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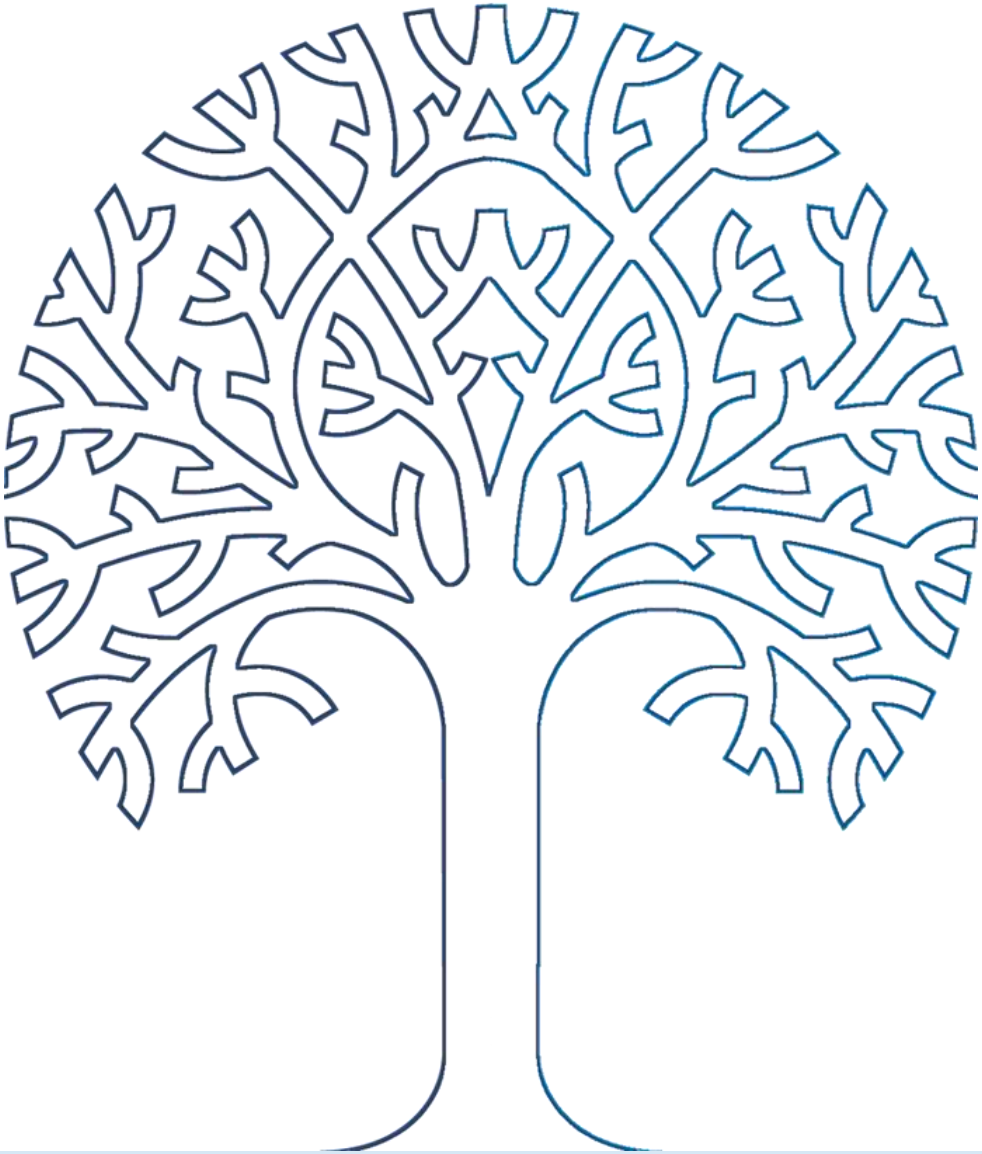

Article

Locking horns over ‘free’ and ‘restricted’

By Nupur Maheshwari, Shambhavi Mishra and Varsha Goel

The concept of ‘restriction’ imposed on export of goods as indicated in the Indian Trade Classification (‘ITC (HS)’) has been the subject matter of judicial interpretation before various forums. The article in this 150th edition of LKS Tax Amicus analyses a recent Gujarat High Court decision in the case of Satyendra Packaging Limited v. Union of India, which has sparked some controversy towards the settled understanding of the issue. The Court has considered the export of restricted item as ‘free’ for determining the eligibility of RoDTEP scheme, once the permission to export the same was granted by the Directorate of Sugar. Deliberating on the legal background and various judicial pronouncements, the authors observe that obtaining an authorisation, does not make restricted goods ‘free’ but, the decision of Gujarat High Court holds to the contrary. According to them, the fulfilment of the conditions prescribed for export of sugar does not ensure automatic revision of the export policy from ‘restricted’ to ‘free’, and that it will be interesting to see if the Hon’ble Supreme Court endorses the view of the Gujarat High Court.

Locking horns over 'free' and 'restricted'

The concept of 'restriction' imposed on export of goods as indicated in the Indian Trade Classification ('**ITC (HS)**') has been the subject matter of judicial interpretation before various forums. The recent decision of the Hon'ble Gujarat High Court in the case of *Satyendra Packaging Limited* v. *Union of India*[1] has sparked some controversy towards the settled understanding of the issue. Through the present article, we intend to analyse the said decision of Gujarat High Court *vis-à-vis* the position established in earlier judicial decisions.

Legal background

To provide a basis for the afore-stated analysis, it is important to discuss the relevant legal provisions. The Central Government has issued the Foreign Trade Policy ('**FTP**') read with the Handbook of Procedures ('**HBP**') that lays down the framework governing the import into and export of goods from India[2]. The import/export policies for all goods are indicated against each item as per its ITC (HS)[3]. Schedule II of ITC (HS) lays down the Export Policy regime[4]. Paragraph 2.01(a) of the FTP, *inter-alia,* provides that the exports shall be 'Free', except when regulated by the ITC(HS). The DGFT may impose 'restriction'/ 'prohibition' on specified goods *inter alia* for the purpose of ensuring availability of essential quantities for the domestic needs, national security, etc.

Notably, 'free'[5] items do not need any authorisation/ license or permission for being imported into the country or exported out as opposed to 'restricted'[6] items, that can be imported into or exported outside the country, only after obtaining an authorisation from DGFT or in accordance with the procedures prescribed in a Notification / Public Notice so issued. It is important to mention that even if such condition to export/import has been fulfilled, the item continues to be a 'restricted' item. In this regard, reference is also made to General Notes on ITC (HS) Schedule relating to Export Policy which provides meaning to expressions 'free' and 'restricted'.

Judicial pronouncements

It should be noted that time and again, different Courts and Tribunals have reiterated the abovementioned understanding of

[1] Civil Application Nos. 3084-5 of 2023 decided on 29 November 2023.

[2] FTP introduced under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 which provides for the regulation of foreign trade by facilitating imports into, and augmenting exports from India. To give effect to the FTDR Act.

[3] Para 2.02(a) of the FTP provides that ITC(HS) is a compilation of codes for all merchandise / goods for export/ import. Goods are classified based on their group or sub-group at 2/4/6/8 digits.

[4] Para 2.02(c) of the FTP.

[5] Para 9.23 of the FTP.

[6] Para 9.47 of the FTP.

'restricted' items under the FTP. In this regard, reference is made to the decision of Hon'ble Supreme Court in the case of *Union of India and others* v. *Agricas LLP and Others*.[7] In *Agricas*, the Apex Court observed that, to comply with the notifications issued by DGFT that brought the specified commodities from 'free' to 'restricted category', imports could only be affected upon obtaining requisite authorisation/license. In other words, satisfying pre-condition of authorisation only allows import of such 'restricted goods'.

Similarly, Hon'ble Kerala High Court in the case of *Jagdev Damodaran* v. *Deputy Commissioner of Customs, ACC, Cochin* [8], relying on the definition of 'prohibited goods' under Section 2(33) of the Customs Act, 1962, held that in case of restricted goods, securing prior permission/license from the relevant authorities is a pre-condition to import such goods.

A perusal of the above judgments clearly establishes that obtaining an authorisation before the import, does not make such restricted goods 'free'. However, the decision of Gujarat High Court holds to the contrary.

Glimpse of the factual background

Since the past year, investigations were initiated by Directorate of Revenue Intelligence against exporters who had exported sugar[9] upon availing the benefit of the Remission of Duties and Taxes on Exported Products ('**RoDTEP**') Scheme. The export policy for sugar had been revised such that it became a 'restricted' goods[10] since 1 June 2022. Thus, for exports of sugar permission was to be taken from the relevant departmental authorities.

The RoDTEP scheme[11] contains a bar for claim of benefits for goods falling under restricted category specified in Schedule 2 of Export Policy of ITC(HS). On this basis, the investigative authorities sought reversal of RoDTEP benefits. Pursuant to the request of the authorities, the exporters (including exporters who had obtained the requisite permissions for export) reversed the amount of duty credit under RoDTEP along with applicable interest.

Decision in Satyendra Packaging Limited v. Union of India

The Hon'ble Gujarat High Court in *Satyendra Packaging* in the afore-stated factual backdrop examined the claim of the petitioner

[7] 2020 (8) TMI 705.

[8] 2017 (352) ELT 5 (Ker.).

[9] Tariff entries 1701 14 90 and 1701 99 90.

[10] Notification No. 10/2015-2020 dated 24 May 2022 ('**NN 10/15-20**') was issued by DGFT to amend the export policy of sugar under Schedule 2 of Export Policy of ITC(HS). As per the notification, from 1 June 2022 till 31 October 2022, the export of the subject product was placed under 'Restricted' category. Accordingly, the export of subject product was allowed on production of specific permission from Directorate of Sugar ('**DoS**'), Department of Food and Public Distribution. Further, by virtue of Notification No. 40/2015-2020 dated 28 October 2022 read with Notification No. 36/2023 dated 18 October 2023, the said restriction has been extended beyond 31 October 2023 till further orders.

[11] In accordance with Para 4.55(iv) of the Foreign Trade Policy read with Sr. No. 1 of Table I of the Notification No. 76/2021-Cus. (N.T.) dated 23 September 2022

to the benefit of rebate under RoDTEP scheme on export of sugar under ITC (HS) Code 1701 14 90 and 1701 99 90 for export made between 1 January 2021 to 13 December 2022. It was noted that in consonance with the condition prescribed in Notification No. 10/2015-2020 dated 24.05.2022, the petitioner had exported sugar with the permission of the DoS and claimed benefit of rebate under RoDTEP scheme on such export.

In the present case, while referring to circular issued by the Department of Food and Distribution ('**DFPD**')[12] permitting export of sugar, Hon'ble High Court noted that the basic objective of the RoDTEP scheme is to grant benefit of rebate to the exporter as an incentive for exporting product. It, *inter-alia*, directed the DGFT to grant benefit of rebate under the RoDTEP scheme to the petitioners who have exported sugar with the permission of DoS.

Remarks

As discussed above, the Gujarat High Court in *Satyendra Packaging* case considered the export of restricted item as 'free' for determining the eligibility of claiming benefit under RoDTEP scheme once the permission to export the same was granted by DoS.

This position signifies a shift in the interpretation of policy conditions mentioned in the ITC(HS). Pertinently as per earlier rulings, the fulfilment of the conditions prescribed for export of sugar by the assessee does not ensure automatic revision of the export policy from 'restricted' to 'free'. It was the prevalent understanding that the restriction is a pre-condition to export goods. Satisfaction of the prescribed condition only ensured that the export of 'restricted' goods is legally complaint. By this standard, it would disentitle the exporter from availing RoDTEP benefits as the goods would continue to belong to the 'restricted' category.

Therefore, the question that arises is whether the above interpretation by the Gujarat High Court is in consonance with the definition of 'restricted goods' as provided in the FTP and the other judicial pronouncements on the issue. In our view, it is contrary to the provisions and the existing jurisprudence which hold the ground in relation to the scope of free and restricted items under FTP.

Exporters who pursuant to investigations had made deposits towards reversal of RoDTEP benefits may explore the option of seeking refunds by placing reliance on the *Satyendra Packaging decision*. In this regard, if the Revenue Department seeks to file an appeal against the judgment, it will be interesting to see if the Hon'ble Supreme Court of India endorses the view of the Gujarat High Court.

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[12] Circular dated 5 November 2022 bearing F. No. 1(1)/2022-Trade, issued by DFPD, Ministry of Consumer Affairs, Foods and Public Distribution; ERO dated 21 October 2022 issued *vide* F. No. 1(1)/(2022)-SP-1 by DFPD, Ministry of Consumer Affairs, Foods and Public Distribution.

Goods & Services Tax (GST)

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& more.....

Notifications and Circulars

Secondment of employees – Applicability of SC decision in *Northern Operating Systems* in GST regime clarified

The Central Board of Indirect Taxes and Customs (CBIC) has issued a clarification in respect of proceedings being initiated by GST authorities under Section 74(1) of the Central Goods and Services Tax Act, 2017 pursuant to the Supreme Court decision in *Northern Operating Systems Pvt. Ltd*. The Supreme Court had held that secondment of employees by the overseas group company to the Indian firm - Northern Operating System, was a taxable service of 'manpower supply' liable to service tax.

As per Instruction No. 05/2023-GST, dated 13 December 2023, the decision should not be applied mechanically in all cases, as investigation in each case requires a careful consideration of its distinct factual matrix, including the terms of contract between overseas company and the Indian entity, to determine taxability or its extent under GST.

Further, it may be noted that the CBIC Instruction also states that extended period of limitation under Section 74(1) cannot be invoked merely on account of non-payment of GST, without specific element of fraud or wilful mis-statement or suppression of facts to evade tax.

Form GSTR-3B – Last date for filing extended for taxpayers in specified districts of Tamil Nadu

The CBIC has extended the last date of filing of Form GSTR-3B for the month of November 2023, for registered persons whose principal place of business is in the districts of Chennai, Tiruvallur, Chengalpattu and Kancheepuram in the state of Tamil Nadu. The last date is now 27 December 2023. Notification No. 55/2023-Central Tax, dated 20 December 2023 has been issued for the purpose

Ratio Decidendi

Refund of ITC due to inverted tax structure is available even if tax rate on main input and output is same – Input and output being same, also immaterial

The Delhi High Court has held that refund of unutilised ITC, accumulated on account of rate of taxes on certain inputs being higher than tax chargeable on the output supply, is available to the assessee notwithstanding the fact that the one of the main input and output are chargeable at the same rate of tax. The assessee was procuring bulk LPG and was producing bottled LPG. Allowing refund under Clause (ii) of the proviso to Section 54(3) of the CGST Act, 2017, the High Court observed that the assessee was using other inputs also where the rate of tax was higher and that the refund is not confined to ITC accumulated on a singular input. The Court also noted that the specified provision does not proscribe the grant of refund where the input and the output are the same and also does not contemplate comparing rate of tax on the principal input with the rate of tax on the principal output supply. CBIC Circular No. 135/5/2020-GST was also distinguished by the Court while it observed that the clarification sought to address an issue where the ITC is accumulated on account of different rates being applicable at different points of time. [*Indian Oil Corporation Ltd.* v. *Commissioner* – 2023 VIL 847 DEL]

Refund of ITC on exports when shipping bills signed by Customs officer who is not a proper officer

The Calcutta High Court has set aside the order of the Appellate Authority which had denied refund of ITC in case of exports where the Shipping Bills were counter signed by Inspector of Customs who was not a Proper Officer, and few Shipping Bills were cleared by the Superintendent of Customs without approval from AC/DC when the value of export goods was more than INR 10 lakh. The High Court in this regard observed that contentions raised by the GST officials were only internal irregularities of the Customs Department which can be verified easily by seeking report from customs, and that for such irregularities the assessee should not be penalised when he has produced documents through online portal as well as physical mode for clearance of goods exported under Section 51 of the Customs Act, 1962. The Court also noted that no such exercise was done by the GST officials, while there was no dispute that the assessee had exported the goods after getting clearance from the customs Department. Department was directed to reconsider the issue after thorough scrutiny of documents and verification of shipping bills. [*Vaishnodevi Advisory Pvt. Ltd.* v. *Deputy Commissioner* – 2023 VIL 827 CAL]

ITC deniable in absence of documentary evidence to support physical movement of goods

Observing that the primary responsibility of claiming the benefit of Input Tax Credit is upon the dealer to prove and establish the actual physical movement of goods, genuineness of transactions, etc., the Allahabad High Court has held that if the dealer fails to prove the actual physical movement of goods, the benefit of ITC cannot be granted. The Court noted that though tax invoice, e-way bill, weighment receipt before & after loading, bilty, etc. were filed by the assessee, on scrutiny, the seller and the person who issued the bilty and weighment slip, were found to be non-existent. [*Shiv Trading* v. *State of U.P.* – 2023 VIL 831 ALH]

Investigation – Section 6(2)(b) does not preclude inspection by Central tax officers when an inspection is already done by State GST authorities

The Delhi High Court has held that the provisions of Section 6(2)(b) of the CGST Act, 2017 do not preclude the central tax officers from conducting an inspection for concluding an ongoing investigation merely because a prior inspection or search had been conducted by the State GST authorities. The case involved inspection by the central officers pursuant to an ongoing investigation in regard to creation of fake firms to fraudulently avail ITC. The assessee-petitioner had contended that the proceedings initiated under Section 67 of the CGST Act were illegal as prior to the said search, the Delhi Goods & Services Tax Authorities had initiated similar proceedings, by conducting a search at the assessee's principal place of business.

Further, it may be noted that though the Court held that the search/inspection was not illegal since there was information which supplied a rational basis for forming a belief that the conditions as stipulated under Section 67(1) were satisfied, the Court directed for refund of the amount involuntarily deposited by the assessee at 9 p.m. while the officers were conducting inspection. The Court in this regard noted that FORM GST DRC-03 was submitted from the laptop carried by the visiting team, and that the assessee had filed the present petition claiming refund of the amount paid, in less than 10 days of inspection. [*Santosh Kumar Gupta* v. *Union of India* – 2023 VIL 852 DEL]

Detention/seizure during transit – No automatic penalty under Section 129 without deciding on defences

The Calcutta High Court has held that the regime of imposition of penalty as envisaged under Section 129 of the CGST Act, 2017 does not automatically result in the penalty for violation of the tax regime stipulated, without the Adjudicating Authority deciding on the defences, if any, set up by passing a reasoned order thereon. The Court in this regard observed that absence of requirement to establish mens rea by the Department cannot be equated with an automatic imposition of penalty under the scheme of Section 129. The dispute involved imposition of penalty in a case where the goods were transferred to a different

vehicle after the breakdown of the vehicle as mentioned in the e-way bill, but the e-way bill was not updated, though the earlier e-way was yet to expire on date of detention of the goods in the new vehicle. The Court observed that the explanation given by the assessee, that the driver of the old vehicle did not know the law and did not inform the assessee, should have been evaluated by the Adjudicating Authority in light of the e-way bill being valid for first vehicle. Orders passed by the Adjudicating Authority and the Appellate Authority were set aside as they had not spoken on the defences taken, and thus violated natural justice. [*Asian Switchgear Private Limited* v. *State Tax Officer* – 2023 VIL 853 CAL]

Audit notice not complying with the time period specified in Section 65(3), and finalisation of findings without considering the reply, are wrong

The Andhra Pradesh High Court has set aside the show cause notice issued under Section 73 of the CGST Act and also the findings of the Audit Officer, after the Court found that the audit notice did not comply with Section 65(3) of the CGST Act/APGST Act. The Court noted that there was no clear 'not less than 15 working days' time prior to conduct of audit. Further, the High Court also noted that the findings were finalised by the Audit Officer without waiting for completion of the statutory notice period and without considering the reply filed consequent to the notice, thus violating Rule 101(4) of the CGST Rules/APGST Rules. It may be noted that the Court though noted that SCN under Section 73 can be issued independent of the provisions of Section 65, it held that the present SCN was not independent of audit report as the SCN referred to the audit report. [*Vardhaman Gold* v. *State of Andhra Pradesh* – 2023 VIL 861 AP]

Personal hearing mandatory before passing assessment order, irrespective of any request for same or even if no reply to SCN is filed

The Madras High Court has held that opportunity of personal hearing is to be provided, where any adverse decision is contemplated against the assessee, irrespective of any request of personal hearing from the assessee. The Department had in the case contended that the reply filed by the petitioner as downloaded from the portal stated 'No' against the column 'option for personal hearing'. The Court however perused the screen shot print out of the portal where the option for personal hearing was mentioned as 'Yes', even though the downloaded print out from the portal, stated 'No'. It also noted that a specific request for personal hearing was made in the reply to the show cause notice, and that the date for personal hearing, as stated in the SCN, was much earlier to the date available with the assessee for filing the reply to the SCN. The Court was of the view that even if no reply is filed, it is mandatory on the part of the Department to provide opportunity to the assessee for personal hearing. Provisions of Section 75(4) of the CGST Act, 2017 was relied upon. [*Gabriel India Limited* v. *State Tax Officer* – 2023 VIL 838 MAD]

'Opportunity of hearing' in Section 75 includes opportunity of personal hearing where adverse decision contemplated against assessee

Considering provisions of Section 75(4) of the CGST Act, 2017, the Madhya Pradesh High Court has held that opportunity of hearing is required to be given even in those cases where no such request is made but adverse decision is contemplated against such person. Further, the Court was unable to persuade itself with the Department's line of argument that 'opportunity of hearing' does not include the opportunity of 'personal hearing' and that the expression 'opportunity of hearing' is fulfilled if reply to show cause notice is received. The Court found substance in the arguments of the assessee that even law makers while prescribing the statutory form have visualized different stages for the purpose of 'personal hearing'- one stage is when the reply is submitted and the other stage is date, venue and time of the personal hearing. [*Technosys Security System Private Limited* v. *Commissioner* – 2023 VIL 863 MP]

Appeal to Appellate Authority – Provisions of Limitation Act, 1963 applicable – Appellate Authority can condone delay beyond 60 days

The Division Bench of the Calcutta High Court has held that since provisions of Section 5 of the Limitation Act, 1963 have not been expressly or impliedly excluded by Section 107 of the CGST Act, 2017 by virtue of Section 29(2) of the Act of 1963, Section 5 of the Act of 1963 would be attracted in the case of filing appeal before the Appellate Authority under Section 107. The Court was hence of the view that the prescribed period of 30 days from the date of communication of the adjudication order and the discretionary period of 30 days thereafter, aggregating to 60 days, is not final and that, in given facts and circumstances of a case, the period for filling the appeal can be extended by the Appellate Authority. The High Court in this regard also noted that Section 107 of the CGST Act does not have a non-obstante clause rendering Section 29(2) of the Limitation Act non-applicable. [*S.K. Chakraborty & Sons* v. *Union of India* – 2023 VIL 855 CAL]

Search – Reasons for authorization to search to precede authorization for search

The Allahabad High Court has quashed and set aside the search and seizure in a case where the authorization for search under the Form GST INS -01 was issued on 31 August 2022, while the reasons for carrying out the search was provided subsequently on 1 September 2022. The Court opined that this was a clear case of putting the cart before the horse, wherein the officer concerned had authorized the search and seizure without even looking into the reasons for the authorization of the same. Perusing Section 67 of the CGST Act, 2017, the Court was of the view that it is only after the reasons are provided to the Joint Commissioner that he can authorize in writing any search and seizure to be carried out. [*Gaurav Saurav Traders and Contractors* v. *State of U.P.* – 2023 VIL 886 ALH]

Demand of bank guarantee when Section 54(11) order directed for solvent security, is wrong

The Rajasthan High Court has allowed a writ petition against the order of the Assistant Commissioner seeking a bank guarantee by way of solvent security. Earlier, the Chief Commissioner had vide its order in terms of Section 54(11) of the CGST Act, 2017, relating to refund, had directed the assessee to provide solvent security. Observing that the solvent security is that of a person who is entitled to/recipient of the amount whereas, the 'bank guarantee' is a guarantee given by the bank on behalf of the applicant to cover the payment obligation to a third party, the High Court held that the demand of bank guarantee could not be equated with providing solvent security as directed under Section 54(11). Allowing the writ, the Court also stated that the Assistant Commissioner, who had passed the original order, which was set aside by the appellate authority and ordered for refund so made, had been trying to somehow block the refund – first by moving an application under Section 54(11) and then asking for a bank guarantee. [*Raj Kamal Cargo Movers* v. *Assistant Commissioner* – 2023 VIL 907 RAJ]

'Delivery note' and 'Delivery challan' are different – No substitute of prescribed Delivery challan

Observing that there is lot of difference between a delivery note and a delivery challan, the Jammu & Kashmir High Court has held that non-possession of prescribed delivery challan at the time of seizure of the goods weakens the case of the assessee. The Court hence held that since the assessee at the time of release of goods did not possess valid document which could have substantiated that the goods were only for approval basis, tax and penalty was rightly imposed. The case involved interception of goods during transit while only a delivery note was accompanying the goods. Taking note of Rule 138(A)(1) of the CGST Rules, 2017 and after observing that a delivery note is a mere document that accompanies a shipment of goods while delivery challan is issued while making a delivery of goods to the buyer and have an impact on the inventory levels, the Court was of the view that there is a lot of difference between delivery note and delivery challan. Dismissing the writ, the Court also noted that CBIC Circular dated 18 October 2017 also indicates that there is no substitute for the prescribed delivery challan. [*K. Anil Jewellers v. UT of J&K* – 2023 VIL 902 J&K]

Exemption to services in relation to 'agricultural produce' – Subsequent processes on the 'agricultural produce' are immaterial

The Madras High Court has held that services of loading, unloading, warehousing, packing etc., rendered in relation to the imported wheat is entitled to exemption in terms of S.No.54(e) of Notification No.12/2017-CT(Rate). Department's contention that the exemption to 'agricultural produce' under the said notification was not available in the present case as the imported wheat was not meant for primary market as such but was

intended to be converted into maida, atta, sooji etc., in the hands of the importer-recipient herein, was thus rejected. The Court was thus of the view that if imported wheat qualifies under the definition of 'agriculture produce' then subsequent processes resulting in conversion of wheat into maida, atta and sooji would not deny exemption to specified services rendered to agriculture produce. The High Court in this regard also held that the Department's view would amount to adding conditions in the exemption notification which is impermissible. Setting aside the AAR order rejecting exemption, the Court also observed that as per the definition of 'agriculture produce', the agriculture produce must be marketable, i.e., capable of being marketed, and is not required to be actually marketed. [*Naga Ltd.* v. *Puducherry Authority for Advance Ruling* – 2023 VIL 833 MAD]

Warehousing of tea exempt under Sl. No. 54 of Notification No. 12/2017-CT(R) – Blending and/or packing of tea does not change is basic character as 'agriculture produce'

Relying upon the Supreme Court decisions in D. S. Bist and Sons and Belsund Sugar Co. Ltd., the Bombay High Court has held that the tea as stored in the assessee's godown, did not change its essential characteristics merely because certain processes were undertaken, so as to reach to a conclusion that tea was an 'agricultural produce'. The dispute involved benefit of Sl. No. 54 of Notification No. 12/2017-Central Tax (Rate) to warehouse services used for packing and storage of tea. Issuing a writ of certiorari in favour of the assessee, the Court observed that merely by blending i.e. mixing or combining different teas and/or packing, would not change the basic character of tea as an 'agricultural produce'. The High Court also held that under the guise of clarification by CBIC Circular dated 15 November 2017, exemption Notification No. 12/2017-CT(R) cannot be taken to be amended so as to delete 'tea' as an agricultural produce from the ambit of exemption. [*Nutan Warehousing Company Pvt. Ltd.* v. *Commissioner* – 2023 VIL 870 BOM]

Correction in GSTR-1 return even after prescribed time period is permissible, when there is no loss of revenue

The Bombay High Court has held that a bonafide, inadvertent error in furnishing details in a GST return needs to be recognized and permitted to be corrected by the department, when in such cases the department is aware that there is no loss of revenue to the Government. The assessee in this case had sought in September 2023 correction in the Form GSTR-1 filed for the months of July 2021, November 2021 and January 2022, on account of human error committed inadvertently, as GSTINs of 'Ship to' parties were reported in the GSTR-1 instead of that of 'Bill to' party. The 'Bill to' was thus unable to take ITC. Allowing the writ, the Court observed that provisions of Section 37(3) read with Section 38 and sub-sections (9) and (10) of Section 39 need to be purposively interpreted. The Court was hence of the opinion that the proviso ought not to defeat the intention of the legislature as borne out on a bare reading of Section 37(3) and Section 39(9) in the category of cases when there is a bona fide

and inadvertent error in filing of returns, when there is no loss of revenue. [*Star Engineers (I) Pvt. Ltd*. v. *Union of India* – 2023 VIL 874 BOM]

No interest for delayed filing of returns due to wrong cancellation of assessee's GSTIN

The Kerala High Court has held that the assessee would not be liable to interest under Section 50 of the CGST Act, 2017 when the GST return was filed with a delay due to unavailability of GSTIN of the assessee. The Court noted that the assessee was not responsible for cancellation of its GSTIN and had infact immediately approached the authorities by way of an e-mail, and on no action by the authorities, had approached the High Court who by an interim order directed the authorities to restore the GSTIN. [*Hilton Garden Inn* v. *Commissioner* – 2023 (12) TMI 69-Kerala High Court]

Clubbing of ITC refund claim with output tax liability is not permissible

The Calcutta High Court has allowed assessee's appeal in a case wherein the assessee had submitted that there is no provision under the CGST Act whereby whilst entertaining an application for refund, the authority could reject a particular claim by the assessee by clubbing the same with some output tax liability and recover the same from the assessee. The assessee had filed for refund of ITC on account of zero-rated supply while the Appellate Authority while partly allowing the appeal against denial of such refund, deducted credit for an amount in respect of output tax pertaining to an invoice, thus clubbing the particular invoice in an application seeking refund. [*Abinash Rai* v. *Assistant Commissioner* – (2023) 12 Centax 286 (Cal.)]

Non-appearance on the stipulated date is not absence of interest in hearing

The Bombay High Court has held that merely because the assessee did not appear on the stipulated date, in the absence of a valid reason, it cannot be presumed by the Department that the assessee was not interested in hearing. The Court in this regard noted that the assessee had sufficiently indicated that it intended that a personal hearing be granted. The dispute was remanded for grant of an opportunity of a personal hearing. [*Cart2india Online Retail Pvt. Ltd.* v. *Union of India* – (2023) 13 Centax 127 (Bom.)]

Amount deposited in Escrow account pending outcome of challenge against Arbitral Award is not liable to GST

The Gujarat AAR has held that the amount deposited by the Applicant in escrow account against bank guarantee pending outcome of challenge against an Arbitral Award or dissatisfaction against Dispute Adjudication Board ('DAB') decision pertaining to a dispute between the parties, would not be liable to GST. According to the Authority, the amount will not be liable to GST since the same is neither a 'consideration' nor a 'supply' till it is

finally decided against the Applicant and accepted by the Applicant. The AAR in this regard noted that the amount is not paid to the contractor [supplier] but is deposited in an escrow account; that it cannot be withdrawn from the account without the explicit approval of the applicant; and that the amount can be withdrawn only subject to the condition that the supplier [contractor] provides a BG for the said amount. [In RE: *Dedicated Freight Corridor Corporation of India Limited* – 2023 VIL 200 AAR GUJARAT]

Hostel services to students and working people is not eligible to exemption available to renting of residential dwelling

The Tamil Nadu AAR has ruled that the services of ladies' residential hostel for college students and working people would not be an exempt supply of service of renting of residential dwelling under Sl. No. 12 of Notification No. 12/2017-CT (Rate). The AAR in this regard noted that the exemption is provided only upon fulfilling the twin conditions i.e. 'renting of residential dwelling' for 'use as residence', wherein the such conditions were not fulfilled in the present case. The Authority was also of the view that hostel accommodation is not equivalent to 'residential accommodation'. The AAR also noted that the assessee had been complying with certain regulatory provisions for running hostels which are not applicable to residential building.

It was also held that such supply of services will fall under Tariff Heading 9963 as 'Accommodation, food and beverage services' and will be taxable @ 18% under Sl. No. 7(vi) of Notification No. 11/2017-CT (Rate). Further, the AAR also held that the activity of providing in-house food to the inmates of the hostel will constitute part of the 'composite supply' with the principal supply being 'accommodation services'. [In RE: 2 *Win Residency Ladies Hostel* – 2023 VIL 204 AAR TAMIL NADU]. See also, In RE: *Deeksha Sanjay* [2023 VIL 209 AAR Karnataka], where such services were held liable to GST @ 12% under Sl. No. 7(i) of Notification No. 11/2017-CT (R).

Lease of residential building for commercial purposes is not covered under RCM

In a case where the land use of the property was for residential purposes while it was to be used for commercial purposes, for establishing the branch/office of the GST-registered Lessee, the Rajasthan AAR has answered in negative the question as to whether the property being leased will be covered in the definition of 'residential dwelling' for the purpose of Notification No. 5/2022-Central Tax (Rate). Sl. No. 5AA of said notification fixes GST liability under RCM on the recipient of service. The AAR in this regard noted that the property was intended to be used for commercial purpose. It also ruled that the important factors that would be relevant to determine if a property would be included in the definition of 'residential dwelling' were the purpose for which the dwelling would be put to use and the length of stay intended by the users. [In RE: *Deepak Jain* – 2023 VIL 205 AAR RAJASTHAN]

Amount paid for termination of lease constitute consideration for the supply of a facility

The Karnataka AAR has ruled that the damages received by the Applicant from the tenant towards the termination of sub-lease before the agreed upon lock-in period as per the sub-lease deed agreements will tantamount to supply as per Section 7 read with clause 5(e) of Schedule II of the CGST Act, 2017, in the nature of 'agreeing to the obligation to refrain from an act or to tolerate an act'. According to the AAR, the amount received towards termination of lease will be construed as 'consideration' for the supply of a facility in the nature of the principal supply being, 'subletting of a commercial property' in this case. The AAR also ruled that the services provided by the Applicant will be classifiable under Tariff Heading 9972 and will be liable to GST at 18% as per Sl. No. 16(iii) of Notification No. 11/2017-CT (Rate). [In RE: *Enzyme Business Center* – 2023 VIL 208 AAR Karnataka]

Customs

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- Data Collection Device, a card reader working in conjunction with server, is classifiable under Heading 8543 – CESTAT Bengaluru
- Wireless Access Product using MIMO technology, and specifically covered under ITA, is not excluded from Notification dated 1 March 2005 – CESTAT New Delhi

Notifications and Circulars

Amnesty Scheme – Clarification in relation to filing of application by 31 December 2023

The DGFT has clarified that the pendency of any application for relaxation/clarification before Policy Relaxation Committee/ EPCG Committee would not form a ground for relief/extension of permissible time period for filing of applications under the Amnesty Scheme for closure of cases of default in the Export Obligation under Advance Authorization and EPCG Scheme, beyond 31 December 2023 as prescribed by Public Notice No. 02/2023 dated 1 April 2023 read with Public Notice No. 20/2023 dated 30 June 2023. Trade Notice No. 35/2023-24, dated 5 December 2023 has been issued for the purpose.

Yellow peas exempted from BCD and AIDC, while import policy also relaxed

The import of yellow peas falling under Tariff Item 0713 10 10 of the Customs Tariff Act, 1975 has been exempted from the payment of customs duty leviable under the First Schedule to the Customs Tariff Act (i.e. BCD) and from Agriculture Infrastructure and Development Cess leviable under Finance Act, 2021. This exemption has been introduced with effect from 8 December 2023 and will remain in force up to and inclusive of 31 March 2024. Notification No. 64/2023-Cus., dated 7 December 2023 has been issued for the purpose.

Further, the import policy of said product, i.e., yellow peas, has been amended from restricted to free. The import of yellow peas is free, subject to registration under the Import Monitoring system with immediate effect for the period up to 31 March 2024. It may be noted that from 1 April 2024 onwards, the import of said product will be subjected to restricted import policy and associated policy condition as existing prior to the instant notification. It may be noted that import of yellow peas was subject to Minimum Import Price and port restrictions till 7 December 2023. DGFT has issued Notification No. 50/2023, dated 8 December 2023 for the purpose. Also, Public Notice No. 35/2023, dated 13 December 2023 has been issued to notify the procedure for registration of imports of the product under Yellow Peas Import Monitoring System.

Lentil (Mosur) – Exemption from AIDC extended till 31 March 2025

The Finance Ministry has extended the exemption from AIDC on import of Lentil (Mosur) falling under TI 0713 40 00 of the Customs Tariff Act, 1975 till 31 March 2025. The exemption was

earlier available only till 31 March 2024. It may be noted that reduced rate of AIDC on other goods namely, crude soyabean oil, crude palm oil and crude sunflower seed oil, as covered by the Notification No. 49/2021-Cus., will however expire from 1 April 2024. Notification No. 65/2023-Cus., dated 21 December 2023 has been issued for the purpose.

De-oiled rice bran – Export prohibition extended till 31 March 2024

The export policy of "*Oil cake and other solid residues, whether or not ground or in the form of pellets, resulting from the extraction of vegetable or microbial fats or oils, other than those of heading 2304 or 2305*" is free. However, the export of de-oiled rice bran falling under ITC (HS) Code 2306 and under any other HS code was amended from free to prohibited till 30 November 2023 *vide* Notification No. 21/2023, dated 28 July 2023. The said prohibition has now been extended till 31 March 2024. Notification No. 51/2023, dated 8 December 2023 has been issued for the purpose.

Onion exports prohibited till 31 March 2024

Export policy of onions falling under ITC (HS) Code 0703 10 19 has been amended from 'free' to 'prohibited' for the period from 8 December 2023 till 31 March 2024. It may be noted that exports of onions were subject to Minimum Export Price of USD 800/MT FOB till 7 December 2023. Notification No. 49/2023, dated 7 December 2023 issued for the purpose also states that the provisions of Para 1.05 of the Foreign Trade Policy relating to transitional arrangement shall not be applicable.

Spices – Minimum value addition under Advance authorisation clarified

The DGFT has clarified that the condition of minimum value addition of 25% in case of import of spices under Advance authorisation for further export, is applicable only where both export as well as import items pertain to Chapter 09 of the ITC (HS) Code. Policy Circular No. 07/2023, dated 21 December 2023 has been issued for the purpose.

Ratio Decidendi

Advance authorisation – Condition X of Notification No. 21/2015-Cus not covers goods manufactured out of imported goods

The CESTAT Ahmedabad has held that Condition X of Notification No. 21/2015-Cus., relating to imports under Advance Authorisation does not cover goods manufactured out of imported goods but applies only to goods imported under the duty exemption notification. The dispute involved alleged violation of the condition which prohibited sale of imported duty-free goods, in a case where the assessee-importer had sold goods manufactured out of imported goods which were left-over after completion of export obligation. Allowing the appeal, the Tribunal observed that the dispute related to taxability of the processed goods left-over after completion of the export obligation was covered by Para 4.16 of the Foreign Trade Policy 2015-20, according to which Authorisation holder had option to dispose of product manufactured out of duty free input once export obligation is completed. CESTAT decision in the case of *PCL Oil & Solvent Ltd.* was followed. [*Larsen and Toubro Limited* v. *Commissioner* – 2023 VIL 1274 CESTAT AHM CU]

EOU – Remission of duty when capital goods destroyed in fire were not insured to cover Customs duty

The CESTAT Bengaluru has allowed remission of duty on capital goods imported by an EOU and subsequently destroyed in fire accident. The Department had denied remission alleging that there was omission on the part of the assessee in not insuring the goods to cover at least the value equal to the Customs duty as per Circular No. 99/1995-Cus., dated 20 September 1995, and that the assessee was bound to take necessary precautions to ensure safety of the goods as per Notification No. 52/2003-Cus. Allowing the appeal, the Tribunal took note of Section 23 of the Customs Act, 1962 according to which when the Assistant/Deputy Commissioner is satisfied that the imported goods have been lost, the question of demanding duty does not arises. The Tribunal in this regard also relied upon jurisdictional High Court decisions in the cases of *Symphony Services Corp*. and *Next Fashion Creators*. [*American Power Conversion (India) Pvt. Ltd.* v. *Commissioner* – 2023 VIL 1285 CESTAT BLR CU]

Echo family devices, having ability to recognize voice commands and interact with AVS, are classifiable under Heading 8517 and not under Heading 8518 or 8528 – Exemption notification is not relevant for classification

The Delhi High Court has that specified 'Echo Family Devices' are classifiable under Heading 8517 of the Customs Tariff Act, 1975

and not under Heading 8518 or 8528 *ibid*. The Court set aside the decision of the AAR which had classified Echo 4th Generation, Echo Dot 4th generation, Echo Dot 4th generation with Clock and Echo Studio Device under Heading 8518 as speakers, and Echo Show 5, Echo Show 8 and Echo Show 10 devices under Heading 8528 as monitors/displays. It was noted that the devices were designed to act as communication devices, were voice enabled and had various functionalities including the capability of controlling compatible smart home appliances, browsing the internet, assisting in online shopping, setting reminders and tasks as well as acting as a calling and messaging platform. The Echo Show range devices could additionally be used for video calling or for streaming video content.

Setting aside the AAR decision, the Court observed that the AAR erred in classifying the goods based on how the products were described or advertised by the assessee, which was against the settled principle that nomenclature alone would not constitute a defining basis for the purposes of answering a question of classification. Further, considering Note 3 to Section XVI of the Customs Tariff, relating to principal function, the Court noted that the soul of the devices was their ability to act as means for transmission and reception of data, when working in a wi-fi environment enabling the user to perform a multitude of tasks, recognition of voice commands and interacting with the AVS in real time. According to the Court, the subject devices were embodiments of 'technological convergence', enabling the holder to replace multiple devices with one gadget for the purposes of communication, information and entertainment, and were not simply speakers or monitors.

The Delhi High Court in this case also held that Ministry's decision to extend exemption to a particular category of products cannot be accepted as being relevant for the purposes of classification. [*Amazon Wholesales India Private Limited* v. *Customs AAR* – TS-634-HC-2023(DEL)-CUST]

Front cover, middle cover and back cover of cellular phones are classifiable under TI 8517 70 90 – Classification cannot be decided by MeITY or Customs exemption notification

The CESTAT New Delhi has held that front cover, middle cover and back covers of cellular phones which house various components of the phone and also provide for dissipation of the heat, are classifiable under Tariff Item 8517 70 90 of the Customs Tariff Act, 1975 and not under TI 3920 99 99. Considering the process of manufacture of the goods in question, the Tribunal was of the view that process of vapour deposition, being lamination, take the goods out of purview of Heading 3920. The Tribunal in this regard also observed that the processes of thermoforming and CNC milling being processes beyond cutting and surface working, take the goods out of the scope of Chapter Note 2(s) to Chapter 39.

Allowing assessee's appeal, the Tribunal also held that classification cannot be decided by the Ministry of Electronics and Information Technology, firstly because MeITY does not have power to assess under Section 17 of the Customs Act, 1962 or to modify assessment, and secondly because their orders, letters, notifications, etc., are executive actions and not quasi-judicial or appealable orders. The Tribunal thus held that any HSN Code indicated against any goods in the policy of MeITY or any other Ministry cannot determine classification of goods under the Customs Tariff. Similarly, the Tribunal also held that exemption notifications issued under Section 25 of the Customs Act are not meant to determine classification of goods.

The Tribunal also held that classification of goods by the importer and claim for the benefit of an exemption notification by the importer, even if it is not in conformity with the reassessment by the proper office or even if it is held to be not correct in any appellate proceeding does not render the goods liable to confiscation and assessee-importer liable to penalty. [*Samsung India Electronics Pvt. Ltd.* v. *Principal Commissioner* – 2023 VIL 1341 CESTAT DEL CU]

Exemption – Delay in issuance of Essentiality Certificate by another Ministry is not fatal

The CESTAT Mumbai has set aside the decision of the Commissioner (A) denying the request for amendment to the Bill of Entry under Section 149 of the Customs Act, 1962 and for remanding the matter for consideration of benefit of Notification No. 84/97-Cus., in a case where the Essentiality Certificate was belatedly issued by another Ministry of the Government of India. The Commissioner (A) had observed that since the Essentiality Certificate was not in existence at the time of clearance of goods, prayer for amendment of B/E cannot be considered. Allowing the appeal, the Tribunal noted that it was not the case of the Department that the goods were not imported for accomplishing the purpose as mentioned in the notification. The Tribunal in this regard also noted that the application for the certificate was filed by the assessee-importer much before the date of filing B/E and it cannot be said that the Department was ignorant about assessee's entitlement. It may be noted that the fact that the certificate was issued by the Competent Authority after subjective analysis that goods were meant for specified use, was also noted by the Tribunal while it held that denial of the benefit of notification was contrary to the legislative intent. [*Delhi Metro Rail Corporation* v. *Commissioner* – 2023 (12) TMI 531-CESTAT Mumbai]

Compounding of offences – CESTAT has jurisdiction to entertain appeal against Chief Commissioner's order

The Telangana High Court has held that the Appellate Tribunal (CESTAT) has the jurisdiction/ authority/ power to entertain an appeal against an order passed under Section 137 of the Customs Act, 1962, which relates to compounding of offences. The Court held that only because sub-clause (a) of Section 129A(1), relating to appeal to Appellate Tribunal, does not reflect the designation of Chief Commissioner (who is the Authority for considering application for compounding of offences), it does not mean the

authority would get automatically excluded from the said provision of law. The High Court in this regard also noted the liberal meaning of the wordings reflected in the said definition of 'adjudicating authority' and the inclusive provision of Section 129(1)(a) which according to the Court must be given a wide interpretation. The Court further for this purpose observed that on an application which stands decided under Section 137(3), the Chief Commissioner becomes the adjudicating authority. The contention that a decision taken by the Chief Commissioner would not be an appealable order with only writ remedy being available, was thus rejected. [*Principal Commissioner* v. *Khan Sadaf* – TS 648 HC 2023 (TEL)-CUST]

Importer is not liable for delay in issuing EODC certificate under EPCG scheme by DGFT

The EPCG License was issued to the importer/appellant on the condition to fulfil export obligation (EO) within the period of eight years. The appellant, after fulfilling the EO, submitted the details of the export to DGFT in 2011, within the said period of eight years for issuance of Export Obligation Discharge Certificate (EODC). After the expiry of eight years (2013), the Customs Department issued the show cause notice for non-fulfilment of EO as the EODC was not issued to the appellant. The Show Cause Notice as well as appeal were adjudicated in favor of the Department. Notably, the EODC was issued by DGFT in 2015. The CESTAT decided the matter in favor of appellant while holding that the delay, if any, in issuance of the EODC was on the part of the DGFT and the assessee-importer cannot be penalized for the same. [*Kabir Oldtex* v. *Commissioner* – 2023 (12) TMI 388-CESTAT New Delhi]

Data Collection Device, a card reader working in conjunction with server, is classifiable under Heading 8543

The CESTAT Bengaluru has held that Data Collection Device which captures the data from the employee's card or the data of the particular employee who key in the PIN into the device is classifiable under Heading 8543 of the Customs Tariff Act, 1975. The Tribunal in this regard noted that the device does not do anything except for collecting the data at the time of entry or exit and transmitted this data to a central server for further processing, like marking the attendance, preparation of payroll, etc. Rejecting classification under Heading 8473, the Tribunal noted that the device was a card reader working in conjunction with the server, and was excluded by Chapter Note 5(e) to Chapter 84. [*Commissioner* v. *Kronos Systems India Pvt. Ltd.* – 2023 VIL 1085 CESTAT BLR CU]

Wireless Access Product using MIMO technology, and specifically covered under ITA, is not excluded from Notification dated 1 March 2005

The CESTAT New Delhi has held that Wireless Access Product (WAP) / MIMO product is not excluded from exemption under

Notification dated 1 March 2005 [Exemption to ITA (WTO's Information Technology Agreement) bound goods] as amended by Notification dated 11 July 2014. The Tribunal in this regard observed that the exclusion clause (iv) under Sl. No. 13 of the notification covering '*Multiple Input/Multiple Output (MIMO) and Long Term Evolution (LTE) products*', does not cover products that have only MIMO technology. Considering that the word 'product' was not used after word 'MIMO' and that the word 'and' was used after MIMO, the Tribunal rejected the contention of the Department that the exclusion clause would cover MIMO product and LTE product. The Tribunal also rejected the plea that MIMO does not by itself mean anything unless it is followed by the expression 'technology' or 'products'. Allowing the exemption, the Tribunal also took note of the Finance Minister's Budget speech for 2014-15 and the TRU Letter clarifying that BCD on specified items not covered under ITA was being increased from Nil to 10%. The Tribunal noted that WAP imported by the assessee was specifically covered under the ITA. [*Commissioner* v. *Redington (India) Ltd.* – 2023 VIL 1135 CESTAT DEL CU]

Central Excise, Service Tax and VAT

Ratio decidendi

- Cenvat credit on GTA services for outward transportation of goods to buyer's premises – CESTAT Larger Bench distinguishes SC decision in Ultratech Cement – CESTAT Larger Bench
- Reference to Larger Bench to be heard at instance of intervener even if appellant settles case under SV(LDR) Scheme – Intervener need not be an aggrieved party – CESTAT Larger Bench
- Refund order passed under CGST Section 142 is appealable before CESTAT – Such appeals not lie before GST Appellate Tribunal – CESTAT Larger Bench
- No service tax on sale of food items in cinema halls when there is no element of service – CESTAT New Delhi
- Packing of rechargeable batteries along with battery charger and labelling same is not 'manufacture' – CESTAT Kolkata
- Relinquishment charges paid for pre-mature termination of access from inter-State transmission system network by power generating companies, is not liable to service tax – CESTAT New Delhi
- Cenvat credit of duty paid on DTA clearance by EOU – Rate of BCD for formula under Cenvat Rule 3(7)(a) – CESTAT Ahmedabad
- Order passed after uploading notice on web portal, without physical service, is wrong – Madras High Court

Ratio decidendi

Cenvat credit on GTA services for outward transportation of goods to buyer's premises – CESTAT Larger Bench distinguishes SC decision in Ultratech Cement

The Larger Bench of the CESTAT has held that for the purpose of eligibility of Cenvat credit on GTA service used for outward transportation, where clearances of goods are against FOR contract basis, the authority needs to ascertain the 'place of removal' by applying the judgments of the Supreme Court in *Emco* and *Roofit Industries*, the Karnataka High Court decision in *Bharat Fritz Werner*, and the CBEC Circular dated 8 June 2018. The Larger Bench in this regard noted that in *Bharat Fritz Werner*, all aspects of the dispute were considered, including the CBEC Circular and the abovementioned judgments of Supreme Court, to conclude that the place of removal was the buyer's premises.

Distinguishing the Supreme Court decision in the case of *Ultratech Cement*, the Larger Bench noted that the Supreme Court, though in paragraph 13 observed that Cenvat credit on GTA service availed for transport of goods from the place of removal to buyers' premises was not admissible, but the principles in ascertaining the place of removal in the context of admissibility of Cenvat credit on GTA Services were not laid down by the Court there.

The issue before the Larger Bench was admissibility of Cenvat credit on the service tax paid on GTA (outward transportation of goods) service for the period after delivery of the judgment of the Supreme Court in *Ultratech Cement Ltd*. and the CBIC Circular dated 8 June 2018. [*Ramco Cements Limited* v. *Commissioner* – Interim Order No. 40020/2023, dated 21 December 2023, CESTAT Larger Bench]

Reference to Larger Bench to be heard at instance of intervener even if appellant settles case under SV(LDR) Scheme – Intervener need not be an aggrieved party

The Larger Bench of the CESTAT has held that the hearing and resolution of the issue referred to the Larger Bench is be continued at the instance of the intervener even if the case of the appellant has been settled under Sabka Vishwas (Legacy Dispute Resolution) Scheme subsequent to the reference to the Larger Bench of the Tribunal. The Bench thus rejected the contention of the Department that the Miscellaneous Application filed by the

intervener was neither maintainable nor entertainable as the intervener was not aggrieved by the decision arising out of the Order-in-Appeal in question. The LB in this regard opined that to be an intervener, on a reference before a Larger Bench, it is not necessary to be an aggrieved party in the appeal from which reference is made. The Tribunal also noted that in the present case the intervener had shown that it was an interested party to the reference, as the appeals involving similar issue are pending before the Principal Bench of the Tribunal at Delhi.

Holding that the hearing is be continued at instance of the intervener and appeal need not be returned to the Referral Bench, the LB noted that the resolution of the reference by the Larger Bench would not be limited to the present appeal but would have implication on all pending appeals involving same issue and awaiting the outcome of the present reference. Further, observing that the issue involved admissibility of Cenvat credit on the service tax paid on GTA (outward transportation of goods) service after delivery of the judgment of the Supreme Court in *Ultra Tech Cement Ltd*. and the CBIC Circular dated 8 June 2018, the Larger Bench held that the reference needs to be answered as the reference involves a substantial question of law having wide implication on the pending cases. Earlier LB decision in the case of *Kafila Hospitality & Travels* was relied upon. [*Ramco Cements Limited* v. *Commissioner* – Interim Order No. 40020/2023, dated 21 December 2023, CESTAT Larger Bench]

Refund order passed under CGST Section 142 is appealable before CESTAT – Such appeals not lie before GST Appellate Tribunal

The Larger Bench of the CESTAT has held that an appeal would lie to the CESTAT and not before the GST Appellate Tribunal, against an order passed under Section 142 of the Central Goods and Services Tax Act, 2017. The 3-Member Bench in this regard observed that as per Section 142(3), every claim for refund after 1 July 2017 must be disposed of in accordance with the provisions of the 'existing law', i.e., Chapter V of the Finance Act, 1994 and the Central Excise Act, 1944, which would mean that the appellate provisions would continue to remain the same. It also noted that Section 142(6)(b) also provides that every proceeding of appeal, review or reference relating to recovery of Cenvat credit initiated whether before, on or after the appointed day under the existing law shall be disposed of in accordance with the provisions of the existing law. Provisions of Section 174(2)(f) were also noted for the purpose.

It may be noted that the Larger Bench also held that against an order passed under Section 142(3) an appeal would not lie before the Appellate Tribunal constituted under the CGST Act. It for this purpose noted that under Section 112 of the CGST Act, an appeal would lie before the Appellate Tribunal constituted under the CGST Act only against an order passed under Section 107 or Section 108 of the CGST Act. [*Bosch Electrical Drive India Private Limited* v. *Commissioner* – Interim Order No. 40021/2023, dated 21 December 2023, CESTAT Larger Bench]

No service tax on sale of food items in cinema halls when there is no element of service

The CESTAT New Delhi has held that service tax is not leviable on the sale of food and beverage items in packed form or by process of reheating in the cinema halls as there is no element of service involved therein for coverage under Restaurant services. Observing that the viewers who come to watch a movie go to the counters during the interval period, stand in queue and buy the food items and bring those items to their respective seats and enjoy it while watching the movie, the Tribunal held that there is no element of service in such transaction.

Allowing the appeal, the Tribunal also noted that the duration of the interval is so short that it is not possible for the viewers to rush outside the cinema complex to buy food and just for making it convenient, the cinema complex provides some food items with limited option. It was also noted that the counters providing food items are not open to the public at large. Further, the Tribunal was also of the view that main service here is to enable the public to view the movie, while the facility of provision of food and drinks is only incidental and hence cannot be treated as a service within the definition of 'service' under the Finance Act, 1994 for charging service tax.

It may be noted that the Tribunal however distinguished the Gold Class category available in multiplexes where apart from special comfortable seats, a staff member of the multiplex / waiter comes to the seats of the viewer and to take order and accordingly provide food and drink on a small table like attachment to the seat. [*PVR Limited* v. *Commissioner* – 2023 (12) TMI 81-CESTAT New Delhi]

Packing of rechargeable batteries along with battery charger and labelling same is not 'manufacture'

The CESTAT Kolkata has held that activity of mere packing of rechargeable batteries along with battery chargers and labelling the same as 'Eveready Rechargeable/Ultima' and 'Uniross/Power Bank' does not amount to manufacture under Section 2(f) of the Central Excise Act, 1944. Supreme Court decision in the case of *Servo-Med Industries Pvt. Ltd.* was relied upon by the Tribunal while it held that no different commercial commodity came into existence, as the goods *viz.* the charger and batteries remain exactly the same even after they were put together in a blister pack. Allowing the appeal, the Tribunal also observed that neither under Section XVI nor under Chapter 85 of the Central Excise Tariff Act, 1985 there were any notes deeming activity of packing or repacking as amounting to manufacture. It also noted that the goods falling under Heading 8504 or 8507, in the present case, were not specified in the 3rd schedule of the Central Excise Act, 1944 to deem processes like packing or repacking, labelling or relabelling as manufacturing processes. [*Eveready Industries India Ltd.* v. *Commissioner* – TS 620 CESTAT 2023 (Kol) EXC]

Relinquishment charges paid for pre-mature termination of access from inter-State transmission system network by power generating companies, is not liable to service tax

The CESTAT New Delhi has held that relinquishment charges collected by the assessee (Central Transmission Utility) on account of pre-mature termination of access by the existing power generating companies from the inter-state transmission system network, are not towards the provision of any service, but are in the nature of compensation and hence not liable to service tax. The Department had demanded tax on the relinquishment charges under Section 66E(e) of the Finance Act, 1994 on the ground that the said charges were consideration received towards a declared service, i.e., tolerating of relinquishing access rights. Relying upon decisions of the Tribunal in the cases of *South Eastern Coalfields Ltd.* and *Northern Coalfields Ltd.*, the Tribunal was of the view that that the amount paid in the nature of compensation/damages on account of breach or non-performance of contract would not be considered in lieu of any service. [*Central Transmission Utility of India Limited* v. *Principal Commissioner* – 2023 VIL 1259 CESTAT DEL ST]

Cenvat credit of duty paid on DTA clearance by EOU – Rate of BCD for formula under Cenvat Rule 3(7)(a)

The CESTAT Ahmedabad has upheld the contention of the assessee, procuring goods from an EOU, that the expression Basic Customs Duty (BCD) in the formula prescribed under Rule 3(7)(a) of the Cenvat Credit Rules, 2004 means normal full rate of customs duty and not 50% BCD as paid by the supplier EOU in terms of Sl. No. 2 of the table in Notification No. 23/2003-C.E. Rejecting the Department's contention that excess Cenvat credit was taken by the DTA recipient, the Tribunal noted that the formula only provided for relevant Basic Customs Duty and not the effective rate of customs duty. Period of demand in this case was from 8 July 2007 till 31 January 2009. [*Birla Cellulostic* v. *Commissioner* – 2023 VIL 1233 CESTAT AHM CE]

Order passed after uploading notice on web portal, without physical service, is wrong

In a case where all the notices were uploaded by the Department in the web portal in the 'View Additional Notices and Order' column and the same were not served physically to the assessee, the Madras High Court has observed that the reasons provided by the assessee for being unaware of the notice appear to be genuine. The High Court set aside the order impugned before it as due to such reasons, no reply was filed by the assessee and no opportunity of personal hearing was provided to him. The Court was of the view that no order can be passed without providing sufficient opportunities to the assessee. [*Jak Communications Private Limited* v. *Deputy Commercial Tax Officer* – 2023 VIL 910 MAD]

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