# Tax amicus

OCTOBER – 2023 / Issue 149

An e-newsletter from
**Lakshmikumaran & Sridharan**, India

Lakshmikumaran & Sridharan attorneys

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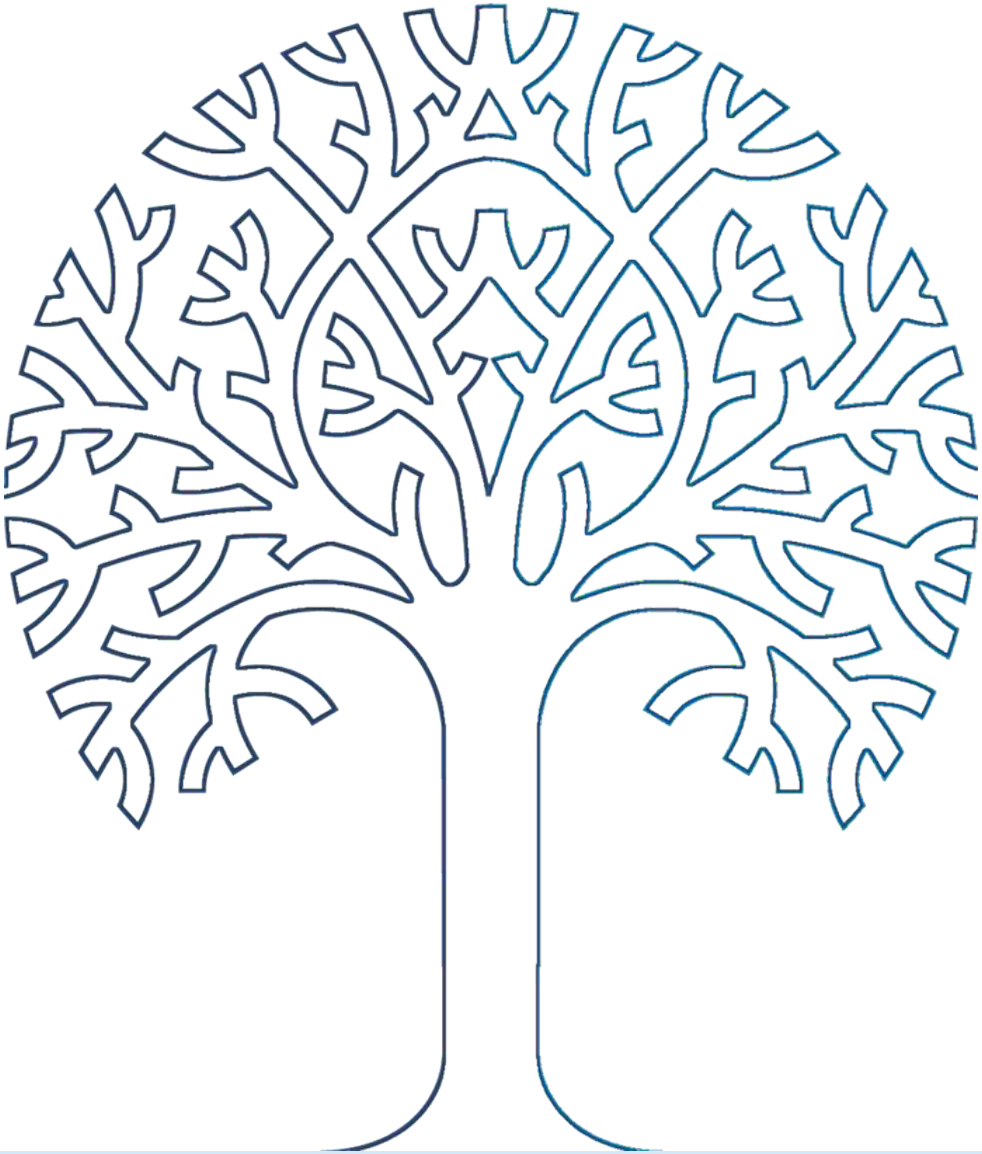

# Article

# Competency and powers for VAT amendments in GST regime

*By Asish Philip and Krina Shah*

The article in this issue of Tax Amicus discusses the recent decision of the Supreme Court wherein the Apex Court has held that the amendments to the Telangana VAT Act, the Gujarat VAT Act and Maharashtra VAT Act, after 1 July 2017, were not correct. According to the Court, amendments to the Telangana VAT Act, and the Gujarat VAT Act after 1 July 2017 were correctly declared void, by the respective High Courts, due to a lack of legislative competence. Further, the Supreme Court set aside the judgment of the Bombay High Court and held that the amendment to the Maharashtra VAT Act, requiring mandatory pre-deposit, was void. The article notes that the impact of the Court's observations on competency of the State legislature for VAT amendments and introduction of VAT Amnesty Schemes by the States, is an interesting academic issue to explore. According to the authors, the observations of the Court will have an impact on levying VAT on Extra Neutral Alcohol (ENA) used for manufacture of alcoholic liquor for human consumption. The 52nd GST Council has ceded the right to tax the ENA to the States. The implementation and legislative changes to give effect to the same will be fraught with challenges.

# Competency and powers for VAT amendments in GST regime

-By *Asish Philip and Krina Shah*

*No power to make amendments to state VAT Acts after GST came into effect: Supreme Court in State of Telangana & Ors.* v. *Tirumala Construction*[1]*. Analysis of the Apex court order and implications on competency / powers of state legislature in GST regime.*

## Background:

The introduction of GST was a landmark achievement in cooperative feudalism envisaged under Constitution of India. The 101st Constitution Amendment Act, 2016 (**'Amendment Act'**) effective from 16 September 2016 introduced new legislative scheme under Article 246A, a stark deviation from separation of taxing powers envisaged under Union and State list of Schedule VII of Constitution. Before the Amendment Act, the States had exclusive rights to tax intra-state 'sale' of goods under VAT legislations introduced under Entry 54 in State List. The Amendment Act redefined India's indirect tax system, paving the way and granting new concurrent taxing powers to the Union Parliament and State Legislative Assemblies under Article 246A to be exercised in terms of GST council recommendations. Article 246A was introduced to pave way for implementing GST and taxing 'supply' and at the same time, Entry 54 of List II was amended to levy VAT on 'sale' only for 5 petroleum-based products and alcoholic liquor for human consumption.

In the above background we will examine the decision of the Apex Court in *Tirumala Construction*

[1] 2023-VIL-93-SC

## Facts: Appeals from divergent views taken by High Courts on powers to amend State laws after 1 July 2017

Batch of appeals in the matter arise from judgments delivered by the Telangana, Gujarat, and Bombay High Court. The concerned states (Telangana and Gujarat) have appealed aggrieved by the High Court judgments. The assessee petitioners are aggrieved by the judgments of Bombay High Court

***Telangana***: The amendment to VAT Act was enacted through an Ordinance effective from 2 December 2017 extending the period of limitation and permitting re-opening of assessments. The said amendment was made after the Amendment Act was already implemented on 1 July 2017 with introduction of GST. However, the High Court in *Sri Sri Engineering Work and Others*[2], invalidated the amendment on grounds, including lack of legislative competence of the State to amend its VAT Act from 1 July 2017 onwards and limited scope to amend in terms of Section 19 of the Amendment Act. It was observed that the State was denuded of legislative competence after 1 July 2017 and hence the ordinance was invalid.

***Gujarat:*** Section 84A was introduced by Gujarat VAT (Amendment) Act, 2018. This amendment allowed for the exclusion of the time spent on litigation when computing the period of limitation for revisions. By giving this provision a retrospective effect, the State legislature aimed to reopen assessments that had already been finalized. However, the Gujarat High Court in *Reliance Industries Ltd*[3]. invalidated the amendment, citing the legislature's lack of competence from 1 July 2017 onwards, and the amendment's being manifestly arbitrary in nature.

***Maharashtra:*** The Maharashtra VAT laws were amended w.e.f. 15 April 2017 to provide a mandatory pre-deposit for filing appeal. The Bombay High Court in the case of *Anshul Impex Pvt. Ltd*[4]. held that the requirement of pre-deposit is based on

[2] 2022-VIL-461-TEL
[3] 2020-VIL-182-GUJ
[4] 2018-VIL-520-BOM

period of dispute. The provision was amended *vide* introduction of Explanation in 2019 to reverse the impact of High Court order. Amendment provided to make pre-deposit mandatory for every appeal, irrespective of the disputed period with retrospective effect. The Bombay High Court in the case of *United Projects*[5] held that powers to make amendment to VAT laws for intra-state 'sale' of goods can be traced to Article 246A.

## Issue:

The validity of various High Court orders is in question basis following queries:

(a) Interpretation of Section 19 of the Amendment Act

(b) Validity of amendments to State VAT Acts made after the Amendment Act or the introduction of GST.

Whether these amendments are valid or void due to a lack of legislative competence.

## Contention of State Governments: Section 19 is empowering

- ***Telangana:*** It argued that ordinances are laws enacted by the legislature. Therefore, amendment brought in by issuance of an ordinance is deemed valid. They asserted that as long as the power to amend existed, both legislatures could not be limited in the exercise of that power which was plenary and sovereign. Further, it mentioned that interpretation placed by the Hon'ble High Courts regarding the word "amend" is erroneous.

- ***Gujarat:*** It argued that insertion of Section 84A is neither arbitrary nor unreasonable as it does not impose new tax or liability, however, is curative in nature against the defects identified for the earlier periods.

[5] 2022-VIL-477-BOM

- ***Maharashtra:*** Existence of a power to legislate is material and not the manner of exercise of that power. Therefore, the power to legislate was in terms of Section19, preserving the existing laws and allowing it's amendment or repeal while they are in operations. The same is supported by judicial precedents. Further, requirement of pre-deposit is a procedural change and is not affecting vested rights of the taxpayer.

## Contention of Taxpayers: Limitation under Section 19

- Section 19 power is limited to harmonizing inconsistent legislation with the Constitution and is not broad for any and every amendment to existing VAT laws. The intent was to let the inconsistent provisions survive temporarily. Section 19 applies to law in force before the Amendment's commencement and where the law is declared as unconstitutional and obliterated from the statute book, such law cannot be treated as a law 'in force'.

- Section 19 aimed to stipulate a timeframe for transitioning from erstwhile tax regime to GST. Further, the provision for reopening of assessments, especially for prior years, appears to be onerous and manifestly arbitrary and violates the Constitution of India. Article 246A requires simultaneous exercise of power by both legislatures and cannot be exercised independently by State as held by Hon'ble Bombay High Court. Lack of legislative competence was focal point of argument.

## Analysis and reasoning by Hon'ble Supreme Court:

- Section 19, along with Article 246A, granted legislative power to both legislatures to amend existing laws for inconsistencies. This power was subject to a time limit of one year or *amended or repealed by a competent Legislature*.

- Claiming legislative competence when the ordinance was issued is invalid because when the ordinance was approved and shaped as an amendment, the State's legislature power ceased as enactments of the State GST and the Central GST Acts had come into force from 1 July 2017.

- The invalidity of the amendment by the state legislature (conforming to the ordinance on 2 December 2017) went to its root of the jurisdiction of those acting under the amended provisions of the State GST, rendering them void and unenforceable. Further, the validity and continuance of any notice, or proceedings, initiated pursuant to the provisions of the ordinance shall be considered invalid and cannot be sustained.

- There is no quarrel with the proposition that a legislative body is competent to enact a retrospective curative law, yet the Gujarat and Maharashtra ceased the authority and power to change the VAT Act, on 1 July 2017 i.e., when GST was implemented. Therefore, due to lack of competence post GST effective date, the amendments to the Maharashtra and Gujarat VAT Act cannot survive.

## Held:

A Supreme Court concluded the following:

(a) Section 19 and Article 246A enacted were transitional arrangement for the limited duration of its operation and had the effect of continuing the operation of inconsistent laws for the specified period(s) which allowed State legislatures and Parliament to amend or repeal existing laws.

(b) Provisions of the said Amendment Act had the effect of deleting heads of legislation, from List I and List II (of the Seventh Schedule to the Constitution of India), both Section 19 and Article 246A reflected the constituent expression that existing laws would continue and could be amended. The sources or fields of legislation, to the extent they were deleted from the two lists, for a brief while, were contained in Section 19. As a result, there were no limitations on the power to amend VAT Acts till the introduction of legislation under Article 246A.

(c) Amendments to the Telangana VAT Act, and the Gujarat VAT Act after 1 July 2017 were correctly declared void due to a lack of legislative competence by the respective High Courts. The judgment of the Bombay High Court was set aside, and the 2019 amendment to the Maharashtra Act requiring pre-deposit was held void.

## Parting Note:

The Supreme Court's decision deems all proceedings initiated and notices issued basis the amendments made to the VAT Acts post 1 July 2017 to be void. This is a favorable judgment and provides relief to taxpayers at large. The Bombay High Court's observation on availability of power to tax intra-state sale of goods with the State legislatures under Article 246A would have created regime for dual taxation and jeopardized the objective of GST – 'One Nation, One Tax'. With the expiry of period provided for compensation from cess collected, State legislatures are looking for avenues to increase revenue base. The impact of the Court observations on competency of the State legislature for VAT and introduction of VAT amnesty schemes by the State is an interesting academic issue to explore. The observations of the Court will have an impact on levying VAT on Extra Neutral Alcohol (ENA) used for manufacture of alcoholic liquor for human consumption. The 52nd GST Council has ceded the right to tax the ENA to the States. The implementation and legislative changes to give effect to the same will be fraught with challenges.

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# Goods & Services Tax (GST)

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# Notifications and Circulars

## Personal guarantee and corporate guarantee – Taxability and valuation clarified

The Central Board of Indirect Taxes and Customs (CBIC) has clarified certain issues with respect to taxability of activity of providing personal bank guarantee by Directors to banks for securing credit facilities for the company, and taxability and valuation of the activity of providing corporate guarantee by a related person to banks/financial institutions for another related person, as well as by a holding company in order to secure credit facilities for its subsidiary company. Circular 204/16/2023-GST, dated 27th October 2023 in this regard clarifies the following.

- Provision of ***personal guarantee*** by a Director of a company, without any consideration, to the bank/financial institutions for sanctioning of credit facilities to the said company is not liable to GST. However, in case of payment of remuneration/ consideration, to erstwhile directors or guarantors by the company, directly or indirectly, taxable value shall be the remuneration/consideration. The Circular relied upon RBI Circular No. RBI/2021-22/121 dated 9th November 2021 for this purpose.
- Provision of ***corporate guarantee*** by a person on behalf of another related person, or by the holding company for sanction of credit facilities to its subsidiary company, to the bank/ financial institutions, even when made without any consideration will be liable to GST. Taking note of the recent amendment in Rule 28 of the Central Goods and Services Tax Rules, 2017, the Circular clarifies that the value of such services will be determined as per Rule 28(2), irrespective of whether full Input Tax Credit is available to the recipient of services or not.

## GST rate changes and changes in RCM as effective from 20 October 2023

The Central Board of Indirect Taxes and Customs (CBIC) has notified nine notifications to amend equal number of rate notifications – both in respect of goods and services. The developments, which are in line with the recent recommendations of the GST Council, are briefly highlighted below. All changes are effective from 20th October 2023.

- Goods and services provided by Indian Railways to any business entity have been excluded from the ambit of Reverse Charge Mechanism. Indian Railways will now also not be eligible for exemption earlier available in respect of services by Central Government, State Government, Union territory or local authority. Further, Indian Railways will be liable in respect of services provided by it to such governments/authorities.
- Passenger transportation service and renting of motor vehicle service – ITC in same line of business will be restricted in certain circumstances.
- Bus operators working as a company/body corporate and providing services through electronic commerce operator would be required to discharge GST under forward charge.
- Services provided to a Governmental Authority by way of water supply, public health, sanitation conservancy, solid waste management and slum improvement and upgradation, have been exempted from GST.
- Construction services – Refund on account of inverted duty structure has been clarified.
- Food preparation of millet flour, in powder form, containing at least 70% millets by weight – Rate of GST has been reduced to 5% (if pre-packaged and labelled) and nil otherwise.
- Molasses – Rate of GST has been reduced to 5%.
- Spirits for industrial use are liable to GST @ 18%.

## Place of supply in certain circumstances clarified

The CBIC has clarified on certain issues with respect to determination of place of supply in case of supply of service of transportation of goods, including through mail and courier; supply of services in respect of advertising sector; and supply of co-location services. According to Circular No. 203/15/2023-GST, dated 27th October 2023,

- Place of supply of services of transportation of goods, other than through mail and courier, in cases where location of supplier of services or location of recipient of services is outside India, will be determined by the default rule under Section 13(2) of the Integrated Goods and Services Tax Act, 2017, with effect from 1st October 2023. Further, service of transportation of goods by mail or courier will continue to be determined by the default Rule.
- Place of supply in two situations pertaining to advertising services - where the vendor is responsible for display of advertisement of the advertisement company at any location, and where there is supply (sale) of space or supply (sale) of rights to use the space on a hoarding

(immovable property), has been clarified. According to CBIC, while location of the hoarding would be the place of supply in the first case, place of supply in the second case should be determined in terms of Section 12(2) [Default Rule] of the IGST Act.

- Observing that Co-location services are in the nature of 'Hosting and information technology (IT) infrastructure provisioning services', the CBIC has clarified that the place of supply of such services should be determined by the default provision under Section 12(2) of the IGST Act. However, the Circular notes that where the agreement between the supplier and the recipient is restricted to providing physical space on rent along with basic infrastructure only, the supply of services shall be considered as supply of renting of immovable property service.

## Online gaming, casinos and horse racing – New regime effective from 1 October 2023

The CBIC has on 29th September 2023 issued number of notifications to bring into effect a new regime for online gaming, casinos and horse racing, etc. While notifications have been issued to notify 1st October 2023 as the date of effect of amendment by the CGST (Amendment) Act, 2023 and IGST (Amendment) Act, 2023 in the CGST Act, 2017 and IGST Act, 2017, Central Goods and Services Tax Rules, 2017 has also been amended for the purpose. Similarly, various other notifications including Notification No. 1/2017-Central Tax (Rate) [Goods exemption notification], have also been amended. ***A detailed analysis of these changes along with the comments from the LKS Indirect Tax Team is available here. Further developments in the online gaming sector in the month of October 2023, including updates from various Courts, are covered here.***

## No IGST on ocean freight in case of CIF imports

The CBIC has notified three notifications effective from 1st October 2023 to the effect that supply of transport services provided for transfer of goods by a person in the non-taxable territory to a person in the non-taxable territory would not fall under the purview of integrated tax (IGST). It may be noted that the changes are in pursuance to the decision rendered by the Supreme Court in the case of *Union of India* v. *Mohit Minerals* [2022 (61) GSTL 257 (SC)], wherein the Court had held that IGST is not payable by the importer on the ocean freight component when goods are being imported on CIF basis. Notifications Nos. 11/2023-Integrated Tax (Rate), 12/2023-Integrated Tax (Rate) and 13/2023-Integrated Tax (Rate), all dated 26 September 2023 have been issued for the purpose.

## Export of services – Receipt of export remittances in Special INR Vostro account, permissible

The CBIC has clarified that receipt of export remittances in case of export of services, in INR from the Special Rupee Vostro Accounts of correspondent bank(s) of the partner trading country, opened by AD banks, shall be considered as fulfilling the conditions of 2(6)(iv) of IGST Act, 2017. Circular No. 202/14/2023-GST, dated 27th October however states that this is subject to the conditions/ restrictions mentioned in Foreign Trade Policy, 2023 & extant RBI Circulars, and without prejudice to the permissions/approvals, if any, required under any other law.

# *Ratio Decidendi*

## Limitation for ITC – Applicability of Section 16(4) to ITC on reverse charge payments – Karnataka High Court stays adjudication of SCNs

The Karnataka High Court has granted stay of adjudication of the show cause notices in DRC-01s issued by the Central tax and State tax authorities for denial of Input Tax Credit (ITC) availed on reverse charge payments, by relying on Section 16(4) of the CGST Act, 2017. After the decision of Supreme Court in the case of *Northern Operating Systems*, the assessee-Petitioner had discharged IGST on the payments made to seconded employees/ related entities and had availed ITC of such IGST paid. The Tax Department sought to deny the ITC by applying the time limit under Section 16(4) of the CGST Act, besides demanding interest and penalty. The Department also sought to demand interest for delayed payment of IGST. The Petitioner *inter alia* had contested the applicability of Section 16(4) to reverse charge payments made by recipient of taxable supply. [*Toyota Kirloskar Motor Pvt. Limited* v. *Commissioner* – Order dated 12 October 2023 in WP 22952/2023, Karnataka High Court]

## Cancelled registration cannot be restored by subsequent payment of tax with interest – CGST Sections 50 and 29 have different scope, purpose and intent

In a case involving cancellation of GST registration for failure to furnish returns, the Kerala High Court has rejected the plea that if the GST amount and the interest is subsequently paid, then the assessee-petitioner cannot be held to be a defaulter for not filing the return. The assessee had pleaded that the proceedings for cancellation of the registration thus become *non est* and hence the registration ought to be restored. The Court noted that the provisions for cancellation of registration and making payment of the tax due with interest are different, having different scope, purpose and intent. The High Court also did not find any contradiction in the provisions of Section 50 or Section 29 of the CGST Act, 2017. It may however be noted that dismissing the writ petition, the Court also stated that if the petitioner

applies for fresh registration, the said application shall be considered in accordance with law, expeditiously. [*Sanscorp India Private Ltd.* v. *Assistant Commissioner* – (2023) 10 Centax 402 (Ker.)]

## 1. Commonality of location of assessee and its parent company is not sufficient to hold that registration obtained by fraud, etc.
## 2. Mere issuance of SCN, devoid of requisite particulars, is not proper compliance

The Andhra Pradesh High Court has held that mere commonality of the location of the assessee-petitioner and its parent company itself is not sufficient to hold that the assessee had committed fraud in obtaining registration and was involved in bill trading, without the scrutiny of the relevant records. The High Court in this regard also was unable to comprehend that even if the place of business of the assessee for argument's sake was not conducive for its business, how the said fact could be treated as sufficient to conclude that it obtained registration by committing fraud or wilful misstatement or suppression of facts. Also, observing that bill trading can only be determined after thorough examination of relevant records, the Court found that the Department did not resort to such verification.

The Court in this regard also observed that the show cause notice which stated that the registration was obtained by means of fraud, wilful misstatement or suppression of facts, was vague and dubious as it did not mention the requisite particulars constituting the alleged fraud, wilful misstatement and suppression of facts, which have to be sufficiently described so as to give an opportunity to the taxpayer to appropriately reply. [*Sakthi Steel Industries India Pvt. Ltd.* v. *Appellate Additional Commissioner* – 2023 VIL 673 AP]

## Detention of goods in transit – Intention to evade is sine quo non for initiation of proceedings under Sections 129 and 130

The Allahabad High Court has held that for invoking the proceeding under Section 129(3) of the CGST Act, Section 130 is also required to be read together, where the intent to evade payment of tax is mandatory. According to the Court, upon a purposive reading of the said sections, it would suffice to state that the legislation has made intent to evade tax a *sine qua non* for initiation of the proceedings under Sections 129 and 130 of the CGST Act. On the facts of the case, observing that once the dealer had intimated the attending and mediating circumstances under which e-way bill of the purchasing dealer was cancelled, and that it was a minor breach, the High Court opined that the Department could have initiated proceedings under Section 122 instead of proceedings under Section 129. [*Shyam Sel and Power Limited* v. *State of Uttar Pradesh* – (2023) 11 Centax 99 (All.)]

## Detention/seizure – Time period for issuance of notice for penalty – Date of detention to be included

The Madras High Court has held that the time period for issuance of notice (under Section 129(3) of the CGST/TNGST Act, 2017) within seven days, has to be calculated from the date on which the detention/seizure is effected, and not from the following date. The Court in this regard observed that the language in Section 129(3) is clear that a notice specifying payment of penalty has to be issued 'within seven days of detention or seizure of goods'. The Court noted that Section 129(3) does not use the expression 'within seven days from the date of detention or seizure'. In a case where the Form GST Mov-02 was issued on 30 August 2023, the last date for issuance of notice under Form GST Mov-07 was held to be 6 September. Impugned notice in said Form, issued beyond the period of limitation, was thus quashed with a direction to the Department to release the goods/conveyances. [*TVL. V.V. Iron and Steels* v. *State Tax Officer* – (2023) 11 Centax 147 (Mad.)]

## Detention of goods on the ground of cancellation of GSTIN when not sustainable

The Allahabad High Court has allowed assessee's petition in a dispute involving grant of two GSTINs to the assessee as the first one was not accessible due to some technical glitch, and the subsequent detention of the goods in December 2018 during transit on the ground that the second GSTIN was cancelled by the Department in November 2018.

Allowing the petition, the Court noted that once the GSTIN registration was allegedly cancelled, the access of the GST portal cannot be made, while the assessee had accessed the portal and downloaded all the relevant forms accompanying the goods in question at the relevant point of time. The Court also noted that the genuineness of the e-way bill as well as tax invoice accompanying with the goods in question were not disputed at any stage. It may be noted the Court also observed that once the fact of opting for composition scheme was not disputed and there could be no availment of input tax credit, intention to evade the payment of tax or wrong availment of ITC does not arise. [*Meera Tent Cloth Supplies* v. *Additional Commissioner* – (2023) 11 Centax 143 (All.)]

## Detention of goods in transit for non-disclosure of transportation route is not permissible

In a case involving detention based on the allegation that the goods along with the truck were not on the route of their destination, the Allahabad High Court has observed that under GST there is no specific provision which bounds the selling dealer to disclose the route to be taken during transportation of goods or while goods are in transit. The Court noted that there was a provision under VAT Act to disclose the route but once the legislature itself in its wisdom has chosen to delete the said provision, the authorities were not correct in passing the seizure order even if the vehicle was not on regular route or on different route. The High Court also observed that the power of detention as well as seizure can be exercised only when the goods were not accompanied with the genuine documents, and that the genuineness of the

documents was not disputed at any stage. [*Om Prakash Kuldeep Kumar* v. *Additional Commissioner* – (2023) 11 Centax 162 (All.)]

## Appeal by transporter against a detention order cannot be refused merely because tax and penalty paid by owner of goods

The Bombay High Court has held that the tax authorities were not justified in rejecting the appeal of the transporter merely because the tax and penalty as per the order of detention passed against the transporter were paid by the owner of the goods and not the transporter-petitioner in this case. The Court noted that Central Goods and Services Tax Act, 2017 does not have any provision providing that the appeal must only be filed by the person who has deposited tax and penalty. The Court further noted that the appeal must be filed by the aggrieved person which in the present case was the transporter against whom the order for tax and penalty was passed and whose account was subsequently debited by the owner of the goods. The issue involved detention of goods due to expiry of validity of E-way Bill. [*Stanship Logistics Pvt. Ltd.* v. *Deputy Commissioner of State Tax (Appeal)* – 2023 VIL 671 BOM]

## Demand notice, devoid of any specific reason, is not sustainable – No provision however for interest on blocked ITC

The Delhi High Court has set aside a show cause notice issued under Section 73 of the CGST Act as the same did not provide for any effective reason for the issuance of the notice. The notice was issued by the Department for a demand identical to the ITC blocked. The Court held the impugned notice to be to be merely mechanical reproduction of Section 73 and unsustainable as the same failed to disclose any reason for proposing the recovery and was incapable of eliciting any meaningful response. The Court noted that the notice can be issued by a proper officer only if there are reasons for raising a demand and that the same must be specifically stated in the notice. The show cause notice was set aside but the Court rejected the prayer for grant of interest for the period for which ITC was blocked. It in this regard noted that there is no such provision for granting such interest. [*Poonawalla Fincorp Limited* v. *Union of India* – 2023 VIL 658 DEL]

## Refund of ITC on exports – Amendment in Rule 89(4)(c) in 2020 is not applicable for exports prior to the amendment even if refund is claimed after the change

The Delhi High Court has rejected the contention of the Department that the amendment to Rule 89(4)(C) of the Central Goods and Services Tax Rules, 2017 in 2020 is merely a procedural amendment and therefore, the new procedure which came into force after the said amendment, i.e. after 23 March 2020, would be applicable in respect of exports for a period prior to the said date, where the refund is applied for after the amendment. The amendment had restricted the refund of ITC by capping the value of the export turnover to 1.5 times the value of similarly placed domestic supplies. Setting aside the refund rejection orders, the Court noted that the right for refund of the accumulated ITC stood crystalised on the date when the subject goods were exported, and that the expression 'turnover' must be read in reference to the

period to which it relates. The Court also noted that the amendment of Rule 89(4)(C) has already been struck down by the Karnataka High Court, and that if a statute is struck down as *ultra vires* the Constitution, it relates back to the date on which it was promulgated. [*Indian Herbal Store Pvt. Ltd.* v. *Union of India* – (2023) 11 Centax 126 (Del.)]

## Refund – Limitation under Section 54 is not applicable for amount deposited under mistake of law

The Delhi High Court has reiterated that the period of limitation for applying for a refund as prescribed under Section 54 of the CGST Act, 2017 would not apply where GST is not chargeable, and it is established an amount has been deposited under a mistake of law. Setting aside the refund rejection order, the Court noted that the Department has not filed any appeal against the decision of the Gujarat High Court in *Cosmol Energy Private Limited* v. *State of Gujarat* [R/Special Civil Application No. 11905/2020, decided on 22 December 2020]. On the facts of the case, the Court noted that GST was not payable by the assessee-petitioner in respect of the service of preparation of detailed project report for a Municipal Corporation, and thus, the amount was deposited on an erroneous belief that payment for services rendered by it were chargeable to tax. [*Delhi Metro Rail Corporation Ltd.* v. *Additional Commissioner* – (2023) 10 Centax 355 (Del.)]

## Investigations – Parallel investigations by different authorities – Section 6(2)(b) does not proscribe transfer/consolidation of investigations/proceedings to a single authority

Observing that the object of Section 6(2)(b) of the CGST Act is to ensure that cross empowerment of officers of central tax and state tax do not result in the taxpayers being subjected to parallel proceedings, the Delhi High Court has reiterated that the provisions of Section 6(2)(b) do not proscribe the transfer of investigations or proceedings or consolidation of investigation or proceedings in a single authority where warranted. The Court in this regard also observed that the Circular D.O.F. No. CBEC/20/43/01/2017-GST (Pt.), dated 5 October 2018 also cannot be read in the negative as proscribing transfer of investigations or consolidation of investigations with one authority merely because the authority that commences the investigations is also empowered to see it through various stages. In a case where parallel investigations were being conducted by the jurisdictional Commissionerate and by the DGGI (though with a different focus), the Court observed that the investigating agencies are not constrained in any straight jacket formula, which would prevent them from completing their investigation, however, the same does not imply that if the course of investigations commenced separately by two authorities coincide at some stage; the authorities cannot consolidate the same. [*Amit Gupta* v. *Union of India* – 2023 VIL 684 DEL]

## Absence of delivery challan – Proceedings to be under CGST Section 122 and not under Section 129 when tax and intention factors absent

In a case involving absence of delivery challan, the Uttarakhand High Court has held that instead of proceeding under Section 129 of the CGST Act, 2017, the Department ought to have proceeded under Section 122. The Court in this regard observed that there was no evasion of tax, no intention to evade, every information was with the Authorities, e-way bill was properly generated, and there was no additional information which could have been provided by production of delivery challan. The Court was also of the view that it was mere non-compliance of the provisions of Section 55(5)(b). It may be noted that the Court also observed that every detention/interception may not invariably proceed under Section 129. [*Presstress Steel LLP* v. *Commissioner* – 2023 (10) TMI 635-Uttarakhand High Court]

## Valuation – Subsidies from Government, not separately recoverable and part of the price, are not to be excluded

The Applicant intended to manufacture and supply plant and machineries to a recipient who is eligible for 90% subsidy grants for the Central and State Government which will be deposited in an Escrow Account and from this account the funds will be transferred to the Applicant. The Karnataka AAR observed that in the present case, the parties are not related, and the price is the sole consideration for the supply. Thus, the transaction value becomes the value of supply. Further, only the subsidies provided by the Central Government and State Government which are directly linked to the price and affect the price of supply are not part of the value of supply. Since, in the present case, the subsidies provided by the Central and the State Government are not separately recoverable by the Applicant and are part of the price payable by the recipient, they cannot be excluded in determining the value of the supply. [In RE: *Hitze Boiler Private Limited* – 2023 VIL 189 AAR]

## Input Tax Credit on central air-conditioning plant, lift, electrical fittings, roof solar plant, fire safety extinguisher, architectural service fees and interior designing fees

Observing that the construction of central air conditioning plant *via* works contract makes it an immovable property, and therefore it ceases to be a plant and machinery, the Gujarat Appellate AAR has held that Input Tax Credit (ITC) will be blocked in terms of Section 17(5)(c) of the CGST Act. It also upheld the decision of the AAR while it held that in terms of the said section, ITC will also be blocked in case of erection, installation and commissioning of lifts *via* works contract which makes it an immovable property. The AAAR was also of the view that electrical fittings after installation and commissioning become part of the building, i.e., an immovable property and thus, here also, ITC will be blocked. Similarly, fire safety extinguishers once fitted are no longer considered as movable property and cease to be a plant and machinery. Hence, ITC will be blocked. It was also of the view that in terms of Section 17(5)(d), ITC with respect to architectural service fees and

interior designing fees will be restricted. However, the AAAR opined that roof solar plant is not an immovable property but a plant and machinery and hence, ITC will be eligible to the assessee-appellant. [In RE: *Varachha Co-op. Bank Ltd.* – 2023 (10) TMI 473-Appellate Authority for Advance Ruling, Gujarat]

## E-commerce operator is not liable under CGST Section 9(5) when service is not supplied 'through' it

In a case where the applicant was involved in merely connecting the auto driver and the passenger and their role ended on such connection, the Karnataka AAR has held that the applicant does not satisfy the conditions of Section 9(5) of the CGST Act, 2017 for discharge of tax liability by electronic commerce operator. The AAR in this regard observed that the supply of services is not 'through' the electronic commerce operator but is independent, as the applicant do not collect the consideration, has no control over actual provision of service, has no details of the ride, and has no control room or call centre, etc. The Authority noted that the word 'through' in the phrase 'services supplied through electronic commerce operator', in Section 9(5), gives the meaning that the services are to be supplied by means of / by the agency / from beginning to the end / during the entire period, by e-commerce operator. [In RE: *Juspay Technologies Pvt. Ltd.* – (2023) 10 Centax 385 (A.A.R. - GST - Kar.)]

## Broken rice – GST rate would be same as for rice

The West Bengal AAR has held that the product 'broken rice' is classifiable under Chapter Heading 1006 and that the applicability of GST rate would be the same as in case of supply of rice. Further, Notification No. 06/2022-Central Tax (Rate) dated 13.07.2022 provides for a tax rate of 5% on 'rice, pre-packaged and labelled' w.e.f. 18 July 2022. However, supply of 'rice, other than pre-packaged and labelled' is exempted from tax liability *vide* Notification No. 07/2022-Central Tax (Rate) dated 13 July 2022 w.e.f. 18 July 2022. Therefore, the tax rate of 5% shall only be applicable on supply of 'broken rice' if the product is supplied as 'pre-packaged and labelled'. Otherwise, such supply shall be exempted from payment of tax. [In RE: *Shri Tamal Kundu*, 2023 (10) TMI 632-Authority for Advance Ruling, West Bengal]

# Customs

**Notifications and Circulars**

- IT hardware (laptops, tablets, personal computers, etc.) – Exemption from import authorisation provided in specific cases
- New All Industry Rates (AIR) of Drawback to be effective from 30 October 2023
- Foreign Going Vessel converted for a coastal run – Additional Customs duty exempted
- Rice, parboiled – Export duty extended till 31 March 2024
- "Spirits for industrial use" and "specified actionable claim" – Tariff entries inserted
- Air freight station in Gujarat notified for export/import of gems and jewellery
- Chemicals – Revision in additional declarations to be made in relation to imports of certain items

Read more

**Ratio decidendi**

- Valuation (Customs) – Unattested copies of export declarations filed by foreign supplier when cannot be basis for enhancement of value – Charge of under valuation need to be supported by evidence – Supreme Court
- Investigation against importer – Detention of goods in hands of third-party purchaser from open market is not permissible – Bombay High Court
- Amendment of document under Customs Section 149 – Department to confine itself to provisions of Customs Act – Bombay High Court
- Export promotion – Exemption notification dealing with export benefit scheme to be liberally construed – CESTAT Ahmedabad
- DFIA – Possibility of use and not actual use important – New technologies to be encouraged – CESTAT Ahmedabad

- Drawback on goods manufactured from inputs imported under Advance Licence when available – Madras High Court
- Amendment of shipping bill – Section 149 not casts any obligation upon exporter to establish ‘intendment’ – Delhi High Court
- Valuation (Customs) – Contemporaneous imports should match in all aspects – CESTAT Ahmedabad
- Cheese Polvaromas is classifiable under Customs Tariff TI 3302 10 90 – CESTAT Chennai

# Notifications and Circulars

## IT hardware (laptops, tablets, personal computers, etc.) – Exemption from import authorisation provided in specific cases

IT hardware manufactured in SEZ and imported in DTA has been exempted from the requirement of import authorisation. Similarly, import of such goods by private entities on behalf of Central and State Government entities, for defence and security purposes will also be exempt from the requirement of import authorisation. Exemption is also available for import for repair and/or return and/or replacement of IT hardware sold earlier as well as reimport of such items repaired abroad on self-certification basis. Notification No. 38/2023, dated 19 October 2023 has been issued for the purpose.

Further, as per Policy Circular No. 6/203-24 of the same date, SEZ units and EOUs/EHTP/STPI/BTP are not required to obtain a 'restricted import authorisation' for import of IT hardware restricted *vide* Notification 23/2023, if the goods are for captive consumption of such units. Policy Circular in this regard also states that there is no import restriction on spares, parts, assemblies, sub-assemblies, components, and other inputs necessary for the IT hardware devices, and that notified IT hardware items essential for capital goods are exempt from the import licensing requirements. Further, the importers are allowed to apply for multiple authorisations which shall be valid up to 30 September 2024.

It may be noted that the regime requiring import authorisation for laptops, tablets, all-in-one personal computers, and ultra small form factor computers and servers, falling under HSN 8471 of the ITC(HS), is effective from 1 November 2023.

## New All Industry Rates (AIR) of Drawback to be effective from 30 October 2023

The Ministry of Finance has on 20 October 2023 notified new All Industry Rates of Drawback which are effective from 30 October 2023. Notification No. 77/2023-Cus. (N.T.) supersedes Notification No. 7/2020-Cus. (N.T.) for this purpose.

## Foreign Going Vessel converted for a coastal run – Additional Customs duty exempted

Additional Customs duty has been removed on foreign going vessels which are converted for a coastal run, provided that such vessels re-convert to a foreign going vessel within six months from the date of initial conversion. Notification No. 60/2023-Cus., dated 19 October 2023 issued for this purpose amends Notification No. 50/2017-Cus. by inserting Sl. No. 551A to the table of the earlier notification.

## Rice, parboiled – Export duty extended till 31 March 2024

The export duty on parboiled rice has been extended till 31 March 2024. Notification No. 59/2023-Cus., dated 13 October 2023 for this purpose amends Notification No. 55/2022-Cus. and revises the date of effect of 'nil' rate of duty to 1 April 2024 instead of 16 October 2023. It may be noted that the export of this product was introduced on 25 August 2023 and was to expire on 15 October 2023.

## "Spirits for industrial use" and "specified actionable claim" – Tariff entries inserted

The First Schedule to the Customs Tariff Act, 1975 has been amended to incorporate specific tariff entries for "spirits of industrial use" under TI 2207 10 12 and various kinds of "actionable claim" under new Heading 9807, w.e.f. 1 October 2023. For this purpose, Supplementary Note 1 to Chapter 22 and Supplementary Note 8 to Chapter 98 have also been inserted to define the scope of such entries. Notification No. 72/2003-Cus (N.T.) dated 30 September 2023 has been issued I this regard.

## Air freight station in Gujarat notified for export/import of gems and jewellery

Village Khajod, Taluka Majura, District Surat in Gujarat has been added to the list of air freight stations for unloading imported goods and loading of export goods. Goods for the purpose of this amendment would mean diamonds, precious and semi-precious stones, pearls, jewellery made of gold or any other precious metal, with or without studding, industrial diamonds including powders, both natural and synthetic and synthetic stones. Notification No. 74/2023-Cus (N.T.) dated 6 October 2023 amends Notification No. 100/2017-Cus. (N.T.), for this purpose.

## Chemicals – Revision in additional declarations to be made in relation to imports of certain items

Circular 15/2023-Cus. required certain additional declarations to be made in respect of import and export under certain items. Circular 23/2023-Cus., dated 30 September 2023 has relatively relaxed the declaration of the IUPAC Name and CAS Codes on constituents of chemicals imported under Chapters 28, 29, 32, 38, and 39. Further, in case of unavailability of information on account of confidentiality, importers are required to submit self-undertaking to this effect. Mandatory declarations on import of such items have become mandatory from 15 October 2023. This Circular does not bring any modification to the declarations requirement on export as laid down under Circular 15/2023-Cus. and effective from 1 October 2023.

# *Ratio decidendi*

## Valuation (Customs) – Unattested copies of export declarations filed by foreign supplier when cannot be basis for enhancement of value – Charge of under valuation need to be supported by evidence

The Supreme Court has affirmed the decision of CESTAT, which had held that unattested copies of export declarations filed by the foreign supplier before the foreign Customs authorities cannot be relied upon for the purpose of enhancement of value of goods imported in India. The Court observed that unattested photocopies of the relied upon documents without anyone proving or owning up the veracity of the same would not have any evidentiary value. The Apex Court also noted that that the very substratum of the documents was subsequently removed when the foreign supplier filed a second set of export declarations before the foreign Customs authority showing price matching the price of the goods as declared in the import invoices. The Court also observed that the second set of declarations were also accepted by foreign Customs, *albeit* after imposing a penalty for misdeclaration.

It may be noted that dismissing the appeal filed by the Revenue department, the Supreme Court, relying upon number of earlier decisions of the Court, also observed that both the department as well as the adjudicating authority were not justified in rejecting the import invoice price of the goods as not correct. The Apex Court reiterated that if the charge of undervaluation cannot be supported either by evidence or information about comparable imports (contemporaneous imports), the benefit of doubt must go to the importer. Enhancement of the price by straightaway invoking Rule 8 of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 by the Department, was also found to be not correct. [*Commissioner* v. *Ganpati Overseas* – Judgement dated 6 October 2023 in Civil Appeal Nos. 4735-4736 of 2009, Supreme Court]

## Investigation against importer – Detention of goods in hands of third-party purchaser from open market is not permissible

In a case involving detention of goods and freezing of bank accounts of the assessee-petitioner, the Bombay High Court has held that where A imports goods and sells them to third parties which are subject to various transactions leading to Z, who is a third party purchaser from the open market, such goods cannot be subject matter of any detention by the Customs Authorities merely because import of goods by A is being investigated. Analysing various provisions of the Customs Act, 1962, the Court observed that once the goods are cleared for home consumption and enter domestic market for sale, such goods cannot be seized from the subsequent purchasers that too when the latter had already sold the goods in open market, more so when there is no demand or pending proceeding against such third person. In the opinion of the Court, the situation would be different if the goods are dealt by the importer in connivance with the third party (petitioner here) or if the petitioner was not a *bona fide* third-party purchaser. Reliance by the Department on Sections 28, 28BA, 110, 111 and 135 of the

Customs Act was also dismissed by the Court. [*Mayur Enterprises* v. *Union of India* – (2023) 9 Centax 410 (Bom.)]

## Amendment of document under Customs Section 149 – Department to confine itself to provisions of Customs Act

In a case where the Department had declined to allow change of GSTIN in the Bill of Entry after relying on Section 25 of the Central Goods and Services Tax Act, 2017, the Bombay High Court has held that the Assistant Commissioner ought to have confined himself to the provisions of Section 149 of the Customs Act, 1962, which provides for amendment of the documents. According to the Court, in exercising his jurisdiction under Section 149, the Assistant Commissioner could not have taken into consideration something which was extraneous to the Customs Act. The Court in this regard also noted that the Assistant Commissioner did not have any jurisdiction as to what the position of the Revenue would be and/or the jurisdiction or the consequences which would fall under the CGST Act, 2017. [*Sinochem India Company Pvt. Ltd.* v. *Assistant Commissioner* – (2023) 11 Centax 232 (Bom.)]

## 1. Export promotion – Exemption notification dealing with export benefit scheme to be liberally construed

## 2. DFIA – Possibility of use and not actual use important – New technologies to be encouraged

The CESTAT Ahmedabad has observed that generally exemption notification is to be construed strictly but exemption notification dealing with export benefit scheme is liable to be liberally construed. The issue before the Tribunal was DFIA benefit to import of lithium ion cells against export of automotive batteries. Allowing the appeal, the Tribunal also noted that if at any stage policy makers want to encourage innovation and advent of new technologies including usage of new materials, then such broad-based imports within an industry and within same SION may be required to be encouraged, rather than persisting with old technologies and materials which can only restrict innovation. According to the Tribunal, to the extent a particular material is capable of use even in any industry due to new patented or innovative technology, the same should be permitted to be imported against export of any specified material. The Tribunal in this regard also stated that while deciding on possibility of use, Department can look into some technical to conclude that with the advent of technology certain items have become capable of use in particular innovative technology even if it was not so earlier. [*KS Enterprises* v. *Commissioner* – 2023 (9) TMI 1264-CESTAT Ahmedabad]

## Drawback on goods manufactured from inputs imported under Advance Licence when available

The Madras High Court has dismissed the appeal filed by the Department against the CESTAT decision which had allowed benefit of duty drawback scheme to export goods manufactured from inputs imported under Advance Licence scheme after fulfilment of Export Obligation under the latter scheme. The Court in this regard noted that the absolute position under the Customs and Central Excise Drawback Rules, 1995, denying the benefit of drawback, stood modified somewhat by clause 4.1.14 of the Foreign Trade Policy 2004-09 and CBEC Circular No. 19/2005-Cus. according to which AIR duty drawback is to be allowed in full in cases where a portion of inputs would qualify to be non-duty paid. It may be observed that the Court in this case noted that the finding of fact by the Tribunal that only a fraction of imported duty-free inputs was used in the export goods claiming duty drawback, was not challenged by the Department. [*Commissioner* v. *K.G. Denim* – 2023 (10) TMI 452-Madras High Court]

## Amendment of shipping bill – Section 149 not casts any obligation upon exporter to establish 'intendment'

In a case where amendment of shipping bill from free to drawback was denied by the Department holding that the importer was unable to satisfy the Deputy Commissioner that it had 'intended' to file the shipping bill under drawback, the Delhi High Court has noted that Section 149 of the Customs Act, 1962 nowhere speaks of an obligation or duty cast upon the exporter to establish intendment. According to the Court, it is not incumbent upon the exporter to prove an 'intention' to claim drawback or other benefit. Allowing the writ petition, the Court also noted that the impugned order denying the benefit, did not rest on any impossibility to scrutinize or dispose of the application for amendment, nor did it allude any other practical difficulty or aspect of impossibility which would have hindered consideration of the request for amendment. [*Sona Printers Pvt. Ltd.* v. *Union of India* – 2023 (10) TMI 12-Delhi High Court]

## Valuation (Customs) – Contemporaneous imports should match in all aspects

The CESTAT Ahmedabad has held that in order to reject the declared value basis the contemporaneous imports, under Rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, it is necessary to match all the relevant details such as quality, quantity, physical characteristics of products, brand, country of origin, time of import, time of placement of order, stock sales, etc. According to the Tribunal, merely giving the details of only Bills of Entry, may be of identical or similar goods, would not be sufficient for legally rejecting the transaction value declared by the importer under Section 14 of the Customs Act, 1962. [*Artex Textile Pvt. Ltd.* v. *Commissioner* – Final Order No. 12108-12151/2023 dated 26 September 2023, CESTAT Ahmedabad]

## Cheese Polvaromas is classifiable under Customs Tariff TI 3302 10 90

The CESTAT Chennai has held that cheese polvaromas (semi-finished) or cheese polvaromas (semi-finished flavour compound) is classifiable under Tariff Item 3302 10 90 of the Customs Tariff Act, 1975 and not under Tariff Item 2106 90 60 as 'food flavouring material'. Dismissing Department's appeal, the Tribunal noted that the goods were imported for use as industrial raw material (as confirmed by Central Food Technology Research Institute) in manufacture of dry seasoning powder and were not meant to be directly used by end users or consumers in any food/food preparation. The Tribunal in this regard also noted that though the subject goods may be were of animal origin, cheese, but had components of synthetic aromatics. [*Commissioner* v. *International Flavours and Fragrances India Pvt. Ltd.* – 2023 VIL 1054 CESTAT CHE CU]

# Central Excise, Service Tax and VAT

**Ratio decidendi**

- Refund of service tax is maintainable even when assessment/self-assessment is not challenged in appeal – CESTAT Larger Bench
- IIT, Patna and NIT, Rourkela covered within definition of 'governmental authority' – SC clarifies on scope of 'governmental authority' in service tax exemption notification – Supreme Court
- Service tax audit for period prior to GST regime – Power to audit saved under CGST Section 174(2)(e) and Chapter XIII of CGST Act to be followed for procedure – Gauhati High Court
- Refund available of SBC and KKC paid on services used for export of goods – CESTAT Kolkata
- Service tax on royalty paid to Government for mining of minerals (Petroleum or Natural Gas) – GST Circular applicable to service tax regime – CESTAT Mumbai
- Service of order-in-original to authorised legal representative is not service to authorised agent – CESTAT Ahmedabad

# *Ratio decidendi*

## Refund of service tax is maintainable even when assessment/self-assessment is not challenged in appeal

The Larger Bench of the CESTAT has held that refund of service tax is maintainable in the absence of any challenge to assessment or self-assessment in appeal under the Finance Act, 1994. It was held that the Supreme Court decision in the case of *ITC Ltd.* v. *Commissioner*, pertaining to refund under Customs Act, 1962 and holding that a claim for refund cannot be entertained unless the order of assessment or self-assessment is modified in accordance with law by taking recourse to the appropriate proceedings, is not applicable to service tax. The LB in this regard noted that provisions regarding assessment, refund and appeals are not *pari-materia* in Customs Act and Finance Act, 1994 (dealing with service tax). It noted that no appeal is contemplated against the self-assessment made by the assessee through the ST-Returns and that the returns filed on self-assessment basis are not assessed/approved/ratified by the Central Excise officer. The Larger Bench was hence of the view that once this exercise is not being done, then the ST-3 returns filed by the assessee as per their own assessment cannot be equated to an 'order of assessment' against which an appeal can be filed.

It may be noted that the Larger bench while holding the issue in favour of the assessee also opined that the Department cannot take a different stand on the issue when it has accepted the same in the case of *Cadila Healthcare*. The Larger Bench was also of the view that the judgement of Rajasthan High Court in *Central Office Mewar Palace Organisation* v. *Union of India* still holds the field even post the Apex Court decision in case of *ITC Limited*. [*Shree Balaji Warehouse* v. *Commissioner* – Order No. Interim/9-12/2023, dated 29 September 2023, CESTAT Larger Bench]

## IIT, Patna and NIT, Rourkela covered within definition of 'governmental authority' – SC clarifies on scope of 'governmental authority' in service tax exemption notification

The Supreme Court has held that Indian Institute of Technology (IIT), Patna and National Institute of Technology (NIT), Rourkela were covered under the definition of 'governmental authority' in Notification No. 25/2012-S.T., and thus were eligible for an exemption from service tax in respect of construction services provided to these educational institutions. The Apex Court in this regard deliberated on the use of word 'or' between the two sub-clauses, and use of a semicolon after sub-clause (i) and a comma after sub-clause (ii). The Court was hence of the view that the long line in clause 2(s) in the notification was not applicable to both the sub-clauses (i) and (ii). The Court therefore rejected the Department's contention that to qualify as 'governmental authority', such authority, board or body must not only be a statutory

authority set up by an Act of Parliament or State Legislature but must also have 90% or more participation of the government by way of equity or control to carry out any like function that a municipality under Article 243W of the Constitution is entrusted to discharge. [*Commissioner* v. *Shapoorji Pallonji and Company Pvt. Ltd.* – Judgement dated 13 October 2023 in Civil Appeals Nos. 3991 and 3992/2023, Supreme Court]

## Service tax audit for period prior to GST regime – Power to audit saved under CGST Section 174(2)(e) and Chapter XIII of CGST Act to be followed for procedure

Observing that as per Section 174(2)(e) of the CGST Act, 2017, not only the power to make recovery is saved, but to carry out investigation, enquiry and verification (including scrutiny and audit) have also been saved, the Gauhati High Court, in a case involving initiation of audit for the period prior to 1 July 2017, after the said date, has rejected the contention of the assessee that there was nothing which could have been saved by Section 174 as there was nothing pending at that point of time. However, noting that the procedure in which the power of audit is to be exercised, which was Section 72(A) of the Finance Act, 1994, was not saved, the Court opined that the procedure to carry on the audit must be as per Chapter XIII of the CGST Act, 2017. The Court hence held that the audit which was carried out by the Department by issuance of the notice on 17 August 2017 cannot be said to be without jurisdiction or authority, and consequently, the issuance of the demand-cum-show cause notice in 2019 was also not without jurisdiction. [*Woodland Works (I) Pvt. Ltd.* v. *Union of India* – 2023 VIL 727 GAU ST]

## Refund available of SBC and KKC paid on services used for export of goods

The CESTAT Kolkata has held that refund of Swatch Bharat Cess (SBC) and Krishi Kalyan Cess (KKC) paid on services used for export of goods is available. The Tribunal noted that Notification No. 41/2012-S.T. granted refund of service tax paid on services used for export of goods and that Section 119 of Finance Act, 2015 (relating to SBC) and Section 161 of the Finance Act, 2016 (relating to KKC) stipulated SBC and KKC as service tax, with all provisions relating to refund of service tax also to be applicable to refund of SBC and KKC. The Tribunal in this regard also observed that if the contention of the Department is accepted, it would lead to denial of refund and export of taxes, which would be against the policy of the Government. Allowing the assessee's appeal, the Tribunal also noted that there was no requirement of any amendment in this regard in Notification No. 41/2012-S.T. to allow refund of SBC and KKC. [*MMTC Ltd.* v. *Commissioner* – 2023 VIL 1047 CESTAT KOL ST]

## Service tax on royalty paid to Government for mining of minerals (Petroleum or Natural Gas) – GST Circular applicable to service tax regime

The CESTAT Mumbai has held that the royalty paid to Government of India on mining services i.e., petroleum and natural gas, is not liable to service tax. The Department had held that the payment of service tax was correct according to Circular No. 179/5/2014-ST which provided that payments made out of cash calls pooled by a Joint Venture towards taxable services received from a member or a third party is liable to

service tax. Observing that the Circular also provided that a detailed scrutiny of terms of Joint Venture maybe required to determine liability under service tax, the Tribunal examined the terms of the Joint Venture and held that the issue has been specifically clarified by CBIC in GST regime *vide* Circular No. 32/06/2018-GST, that payment of royalty for mining of Petroleum and Natural Gas to Government of India is not a consideration and thus not taxable. According to the Tribunal, the GST circular is equally applicable to service tax in pre-GST regime. The Tribunal in this regard also observed that the cost incurred by appellant for conduct of Joint Venture was assessee-appellant's share of capital contribution to Joint Venture and not service to Government of India. The assessee was engaged in business of developing, exploring, and producing crude oil and natural gas by entering into Production Sharing Contract with the Government. [*Reliance Industries Limited* v. *Commissioner* – 2023 VIL 945 CESTAT MUM ST]

## Service of order-in-original to authorised legal representative is not service to authorised agent

Observing that authorised legal representative cannot be equated with an authorised agent of the assessee, the CESTAT Ahmedabad has held that subsequent service of the order copy to the assessee was the date of communication of the order-in-original, and hence there was no delay in filing the appeal. The Tribunal in this regard noted that according to the authority letter, authority was not given to the authorised representative for receiving the order. Further, considering Section 37C of the Central Excise Act, 1944 as applicable to service tax, according to which order could be served only either to the person for whom it was intended or his authorised agent, the Tribunal held that service of the order to authorised representative i.e. Chartered Accountant dealing with the matter before the Adjudicating Authority was not legal and proper. [*Shree Developers* v. *Commissioner* – 2023 TIOL 905 CESTAT AHM]

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