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A VERY HAPPY NEW YEAR TO ALL OUR READERS!

Welcome to yet another edition of the quarterly E-Bulletin brought to you by Khaitan & Co.

The new year carries with it a lot of expectations in terms of getting life back to normal, although the new normal is a far cry from the pre-pandemic days. The Ministry of Finance promises to introduce a robust budget to get the economy back on the growth path. We have also witnessed a healthy GST collection for the last month, although exports still seem to be sluggish.

The last quarter witnessed many significant regulatory announcements, some of which were due to the pandemic, like the extension of certain due dates. A few others were announced keeping in mind the long-term plans of change in GST compliances, like introduction of e-invoicing.

Right at the end of year 2020, the framework of the Remission of Duties and Taxes on Exported Products (RoDTEP) scheme in lieu of the Merchandise Exports from India Scheme (MEIS) was announced for exporters of goods. However, no similar scheme has yet been announced for service exporters, to replace the Service Exports from India Scheme (SEIS).

Yet another set of major decisions were pronounced by the Apex court along with High Courts and tribunals. While the Gujarat High Court upheld the validity of restrictions under Rule 96(10) of the CGST Rules on rebate option, the Madras High Court did not interfere with the restriction on refund of ITC pertaining to input services, in cases of inverted duty structure. Further, applicability of GST on TDR was confirmed by the Appellate AAR in Maharashtra, perhaps paving a role for litigation at higher forums.

Come February and we will witness the much-awaited budget against the global pandemic. Like the rest of the world, even India is hoping to get back on track with increased economic activities. Here's hoping the new year ensures this!

Stay healthy and stay safe!

With regards

Indirect Tax Team
Khaitan & Co

01.

CASE LAW UPDATES

GOODS AND SERVICES TAX

Restriction on refund of ITC pertaining to input services in cases of inverted duty structure, upheld: Madras High Court

In *Tvl Transtonnelstroy Afcons Joint Venture v Union of India*[1], the Madras High Court held that the explanation to rule 89(5) of the Central Goods and Services Tax Rules (CGST Rules) which restricted the definition of "Net ITC" to include Input Tax Credit (ITC) availed on inputs and not input services (in cases of inverted duty structure), was well within the scope of Section 54(3) of the Central Goods and Services Tax Act (CGST Act) and was thus *intra vires*. The High Court held that while Section 54(3)(ii) of the CGST Act enables an assessee to claim refund of any ITC, the proviso thereto qualifies the enabling provision by limiting the source of such refund only to ITC accumulated on inputs, thereby excluding input services. The High Court disagreed with a recent decision of the Gujarat High Court in the case of *VKC Footsteps India Private Limited*[2] (which had read down the aforesaid rule by holding that an assessee was eligible to claim refund of ITC accumulated on input services also) by stating that the Gujarat High Court had failed to notice that the aforesaid proviso did not merely lay down the cases in which refund would be admissible, but also imposed a source-based restriction on entitlement of refund (by confining it to ITC accumulated on inputs).

KCO Comments

The controversy surrounding admissibility of refund of ITC accumulated on input services in cases of inverted duty structure, has already seen two conflicting High Court decisions. The Madras High Court has categorically held that the proviso to Section 54(3) did not merely lay down a *condition precedent* for claiming refund but also restricted the *quantum* of such refund to ITC accumulated on inputs, and on this count differed with the line of reasoning adopted by the Gujarat High Court. While this controversy would now only be settled at the level of Supreme Court, the decision of the Madras High Court comes across as a setback to the trade and somewhat weakens a similar challenge to denial of refund of ITC pertaining to capital goods against exports or cases of inverted duty structure, currently pending before various High Courts. In our view, it is the Gujarat High Court which has laid down the correct position by refusing to distinguish between ITC pertaining to inputs and input services.

Given the above, it would be interesting to see how identical writ petitions currently pending before the High Courts of Bombay, Rajasthan and Patna[3] are dealt with.

Power to arrest can be invoked prior to completion of assessment or adjudication proceedings: Gujarat High Court

In *Vimal Yashwantgiri Goswami v State of Gujarat*[4], the Gujarat High Court affirmed the power of a GST officer to arrest a person on the basis of "reasons to believe", even prior to completion of assessment or adjudication proceedings. The High Court noted that Section 69 of the CGST Act (which confers the power to arrest) referred to Section 132 thereof (which lays down punishment for certain offences) only for the limited purpose of specifying the kinds of offences in respect of which the power to arrest could be exercised, and the two provisions otherwise operated in separate fields. The High Court extensively relied upon the decision of the Telangana High Court in *P V Ramana Reddy*[5] to

1 2020 (9) TMI 931 - Madras High Court

2 2020-TIOL-1273-HC-AHM-GST

3 *Raymond UCO Denim Private Limited* (Bombay High Court, Nagpur bench; WP No 5676/2019), *Voylla Fashions Private Limited* (Rajasthan High Court, Jaipur bench; D.B. Civil Writ Petition No. 24375/2018), *Shree Ram Lime Products Private Limited* (Rajasthan High Court, Jodhpur bench; D.B. Civil Writ Petition No. 11337/2018) and *AFCONS-SIBMOST Joint Venture* (Patna High Court; Civil Writ Jurisdiction Case No. 11470 of 2019)

4 2020-TIOL-1803-HC-AHM-GST

5 2019 (4) TMI 1320 - Telangana and Andhra Pradesh High Court. The Special Leave Petition against this decision was dismissed by

hold that the punishment provided in Section 132 could be inflicted either before or upon completion of adjudication proceedings.

Apart from the above, the High Court also held that (i) "reasons to believe" recorded by the Commissioner should be based on cogent material and credible information, and on intelligence, care and deliberation; (ii) power to arrest, being drastic and far-reaching, should be used sparingly; (iii) provisions of Sections 154 to 157 of the Code of Criminal Procedure, 1973 did not apply to arrests under GST law; (iv) GST officers were not "police officers" and were not required to register an FIR prior to arrest; (v) Section 69 of the CGST Act did not contemplate any interference of a magistrate; and (vi) guidelines specified by the Supreme Court in *D K Basu v State of West Bengal*[6] to safeguard rights granted under articles 21 and 22 of the Constitution had to be followed by officers of the GST department.

KCO Comments

The question as to whether power to arrest can be exercised prior to completion of adjudication proceedings has been extensively litigated under GST, due to increase in cases of fake invoicing and "circular trading" across the country. Under the service tax regime, the Delhi High Court in *Makemytrip (India) Private Limited*[7] (affirmed by the Supreme Court[8]) and *Ebiz.com Private Limited*[9] and the Bombay High Court in *Cleartrip Private Limited*[10] had held that power to arrest could not be exercised by bypassing the adjudication mechanism provided under the erstwhile Finance Act, 1994.

Under the GST regime however, High Court have thus far provided divergent opinions, mostly leaning towards affirmation of power to arrest merely based on "reasons to believe", without completion of adjudication proceedings. The decision of the Gujarat High Court follows this trend, though the issue is far from settled. It may be noted that the Bombay High Court in *Ashok Kumar*[11] has recently also taken a similar view.

Restriction on rebate option as per rule 96(10) of Central Goods and Services Tax Rules, 2017 not discriminatory, but applicable retrospectively from 23 October 2017: Gujarat High Court

In *Cosmo Films Limited v Union of India*[12], the Gujarat High Court affirmed the restriction contained in rule 96(10) of the CGST Rules as introduced by Notification No 54/2018-Central Tax dated 9 October 2018 (Notification 54), whereby persons availing benefit of Integrated Goods and Services Tax (IGST) exemption on import of goods pursuant to an Advance Authorisation license and certain other specified classes of persons, were restricted from undertaking exports upon payment of IGST and claiming rebate of such IGST. The High Court accepted the revenue department's stand that the aforesaid rule was not discriminatory. However, the High Court went one step ahead and held that the restriction would apply retrospectively from 23 October 2017 and directed the exporters who had claimed rebate of IGST prior to issuance of Notification 54 to pay it back with interest and avail ITC of the same.

KCO's indirect tax team represented the petitioner before the Gujarat High Court.

KCO Comments

The decision of the Gujarat High Court, insofar as it deems the restriction contained in rule 96(10) of the CGST Rules to apply retrospectively from 23 October 2017, has given rise to a convoluted scenario potentially affecting a large number of

the Supreme Court in 2019 (5) TMI 1528 - SC, but the question as to the validity of arrest was kept open by the Supreme Court in *Sapna Jain and Others*, 2019 (6) TMI 58 - SC

6 1997 (1) SCC 416

7 2016 (44) S.T.R 481 (Del.)

8 2019 (22) G.S.T.L. J59 (S.C.)

9 2016 (44) S.T.R. 526 (Del.)

10 2016 (42) S.T.R. 948 (Bom.)

11 2020-VIL-387-BOM

12 2020-TIOL-1801-HC-AHM-GST

Advance Authorisation license holders and other specified classes of persons.

The restriction contained in rule 96(10) of the CGST Rules was initially introduced with retrospective effect from 23 October 2017. Subsequently however, by way of Notification 54, the said restriction was made applicable prospectively with effect from October 2018. It may be noted that when Notification 54 itself had removed the retrospective effect of the restriction, the High Court, in our respectful opinion, had no cause to reintroduce the same. In doing so, the High Court has effectively reintroduced the anomaly (of retrospective application) which the government had sought to remove.

It may be noted that the Gujarat High Court itself, in *Zaveri and Co Private Limited*[13] had held the challenge to the previously existing retrospective application of rule 96(10) infructuous, by observing that Notification 54 had made rule 96(10) applicable prospectively. Additionally, the government had issued a Circular[14] clarifying that the restriction shall not apply prior to the date of issuance of Notification 54. In view of the above, the decision of the Gujarat High Court on the retrospective application of Notification 54 deserves to be revisited. A review petition has already been filed in the aforesaid matter.

Separately, insofar as the principal issue involved in the aforesaid matter is concerned *i.e.* the constitutional validity of rule 96(10), the Madras High Court in *Comstar Automotive Technologies Private Limited*[15] has admitted a similar writ petition challenging the said rule.

Education, Higher Education and Krishi Kalyan Cesses cannot be transitioned into GST regime; Single-judge bench order reversed: Madras High Court

In *Assistant Commissioner of CGST and Central Excise v Sutherland Global Services Private Limited*[16], a division bench of the Madras High Court held that carry forward and set off of unutilised balances of Education Cess, Secondary and Higher Education Cess and Krishi Kalyan Cess was not permissible under the GST transitional provisions and in doing so, reversed the order of the single-judge bench which had held otherwise. The High Court laid considerable emphasis on the amendments made to Section 140 of the CGST Act, especially the insertion of explanation 3[17] thereto (which "clarified" that the aforesaid cesses were not eligible to be transitioned) and held that the legislative intent was to apply the explanation

to all modes of ITC transition specified under Section 140, including sub-section (8) thereof under which the case of the Petitioner was apparently covered, despite the explanation ostensibly not referring to the said sub-section.

The High Court also held that (i) post omission of charging provisions of the aforesaid cesses, their unutilised balances represented a "dead claim"; (ii) merely because the petitioner had carried forward the said balances in its returns/books,

13 R/Special Civil Application No 15091 of 2018

14 Para 3.2 of Circular No. 70/44/2018-GST dated 26 October 2018

15 WP/18693/2020

16 2020-TIOL-1739-HC-MAD-GST

17 Inserted by section 28(d) of the Central Goods and Services Tax (Amendment) Act, 2018, effective from 1 February 2019

such cesses would not represent "CENVAT credit" post cessation of their levies so as to enable the petitioner to transition them; (iii) since cross utilisation of such cesses against output central excise or service tax liability was not previously permissible, they could not be used to offset any output GST liability; and (iv) since these cesses were not technically "subsumed" under GST, they could not be transitioned.

KCO Comments

The decision of the division bench comes across as a serious blow to the trade (especially against the backdrop of a favourable single-judge bench decision) and puts a question mark on the fate of identical petitions pending before the Delhi, Gujarat, Jharkhand, Karnataka, Orissa and Telangana High Courts[18].

Although the division bench has provided sound reasons in support of its conclusion, in our opinion, the decision does not take into account factors/contentions such as (i) taxation statutes must be interpreted strictly, leaving no room for intendment; (ii) Section 140(8), which apparently governed the petitioner's case, was differently worded to the rest of the sub-sections; (iii) confiscatory nature and validity of the "clarification" inserted by explanation 3 and other retrospective amendments in Section 140 of the CGST Act; and (iv) the fact that some of the aforesaid amendments had not been made effective till date. These contentions could be used to distinguish the aforesaid decision in other pending petitions.

Importantly, it is interesting to note that the Mumbai bench of the Customs, Excise and Service tax Appellate Tribunal (CESTAT), in *Bharat Heavy Electricals Limited*[19] has held that the unutilised balances of the aforesaid cesses (pursuant to introduction of GST) could be refunded in cash, whereas the Hyderabad bench of the CESTAT, in respect of the same company[20] and also in *M/s Mylan Laboratories Limited*[21], has held that such balances could not be refunded in cash.

Special Economic Zone unit is entitled to claim refund of ITC distributed by an Input Service Distributor: Gujarat High Court

In *Britannia Industries Limited v Union of India*[22], the Gujarat High Court held that a Special Economic Zone (SEZ) unit was entitled to claim refund of ITC distributed by an Input Service Distributor (ISD) lying in its electronic credit ledger, despite their being no formal procedure notified in this regard. While holding so, the High Court dismissed the claim of the revenue department that refund in case of supplies made to an SEZ unit could only be filed by the supplier of goods or services, in terms of proviso to rule 89(1) of the CGST Rules. The High Court, in the present case, observed that since the ITC was distributed by an ISD, there existed no identifiable supplier who could claim the refund, and therefore allowed the petitioner to claim the refund.

KCO Comments

Section 54 of the CGST Act read with Section 16 of the Integrated Goods and Services Tax Act, 2017 (IGST Act), which allow refund of unutilised ITC against export of goods or services, do not prohibit an SEZ unit to file an application for such refund. The decision of the Gujarat High Court is a step in the right direction inasmuch as it plugs an anomaly in the CGST Rules (albeit only in the context of ITC received from an ISD) which ostensibly prohibited SEZ units from claiming refund of unutilised ITC. However, it remains to be seen if GST (erroneously) paid by SEZ units to suppliers located in domestic tariff areas would be allowed to be refunded. Since the text of the CGST Rules does not presently allow for any such claim to be filed by the unit itself (in contrast to the mechanism provided for deemed exports, wherein refund could be claimed either by the supplier or the recipient), the issue cannot not be considered to be settled just yet.

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[18] *Dish TV India Limited* (Delhi High Court; WP(C) No 5735 of 2020); *Grasim Industries Limited* (Gujarat High Court; R/Special Civil Application No 11061 of 2019); *Timken India Limited* (Jharkhand High Court); *HP India Sales Private Limited* (Karnataka High Court); *Hindalco Industries Limited* (Orissa High Court; WP(C) No 3138 of 2019); and *Kesoram Industries Limited* (Telangana High Court)

[19] Excise Appeal No. 50081 of 2019; CESTAT Mumbai

[20] 2020 (1) TMI 188 - CESTAT Hyderabad

[21] 2020 (3) TMI 837 - CESTAT Hyderabad

[22] 2020-TIOL-1495-HC-AHM-GST

Sale of Transferable Development Rights obtained under Development Control Regulations liable to GST: Appellate Authority for Advance Ruling

The Appellate Authority for Advance Ruling (Appellate AAR), Maharashtra in *M/s Vikas Gandhi*[23], affirmed the ruling[24] of the Authority for Advance Ruling (AAR), Maharashtra, and ruled that sale of Transferable Development Rights (TDR) received as consideration from the local municipal authority for surrender of land was liable to GST. The Appellate AAR dismissed the contention of the appellant that TDR was a "benefit arising out of land" and thus covered within the meaning of "immovable property", by observing that schedule III to the CGST Act had kept "land" (and not immovable property, which according to the Appellate AAR was a broader concept) outside the scope of GST. The Appellate AAR further ruled that schedule III was akin to an exemption notification and thus had to be strictly interpreted. Observing that schedule III merely used the term "land" and not "benefits arising out of land", the Appellate AAR finally ruled that sale of TDR was liable to GST at the rate of 18%.

KCO Comments

The issue as to the taxability of transfer of development rights in land, whether through a joint development agreement or development rights certificate, has already proven to be a fiercely contested one, with several AARs unanimously ruling them to be taxable and at least two High Courts[25] being seized of the issue. The ruling delivered by the Appellate AAR is in the context of transfer of development rights through the latter medium. In such cases, the contention that the transfer of development rights is necessarily accompanied by sale of the *underlying* land does not strictly apply, although the primary argument of such transfer being akin to a transfer of land itself, does. With assessees in the real estate sector already facing financial troubles given the prevailing economic circumstances, this issue needs to be settled at the earliest.

Activities undertaken by the Indian liaison office of a foreign company amount to a "supply"; GST registration necessary: Authority for Advance Ruling

The AAR, Karnataka in *Fraunhofer-Gesellschaft zur Förderung der angewandten Forschung e.V., Germany – Liaison Office*[26], ruled that activities carried out by the Indian liaison office of a foreign company constitute "business" within the meaning of Section 2(17) of the CGST Act, despite the prohibition on engaging in any business activities imposed on such liaison office by the Reserve Bank of India (RBI). Observing that the liaison office was *inter alia* engaged in promotion of the foreign company's business in India, the AAR ruled that such activities amounted to a "supply" even if made without consideration. The AAR also held that activities undertaken by the liaison office did not qualify as exports since the liaison office and the foreign company were "establishments of distinct persons".

The AAR further ruled that the liaison office was engaged in providing *inter-state* supply of services and was thus required to obtain a GST registration. However, the AAR declined to rule on whether the liaison office was entitled to avail the benefit of an exemption available to *services provided by any establishment of a person in India to any establishment of such person outside India*[27], citing the question to be outside its jurisdiction.

KCO Comments

The AAR, by holding that activities undertaken by a liaison office constituted a "supply", has upset the settled position that (i) the liaison office and the foreign company were not distinct or related persons as understood under GST law; (ii) the liaison office was merely an extension of the foreign company; and (iii) the activities undertaken by the liaison office did not constitute a supply, previously affirmed by four AARs[28].

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23 Order No MAH/AAAR/RS-SK/25/2020-21 dated 26 August 2020

24 Advance Ruling No GST-ARA-40/2019-20/B-06 dated 15 January 2020

25 *Prahitha Contruction Private Limited* (Telangana High Court; WP No 5493 of 2020), *Nirman Estate Developers Private Limited* (Bombay High Court; WP No 3619 of 2020 - Appellate Side) and *Dadar Matunga Residents Welfare Association* (Bombay High Court; WP No 3528 of 2018). The petitioners in the first two matters are being represented by KCO's indirect tax team.

26 Advance Ruling No KAR ADRG 50/2020 dated 8 October 2020

27 Sl No 10F of Notification No 9/2017-Integrated Tax (Rate) dated 28 June 2017

28 *M/s Takko Holding GmbH* (AAR, Tamil Nadu; Order No 14/AAR/2018 dated 27 September 2018), *M/s Habufa Meubelen BV* (AAR, Rajasthan; Advance Ruling No RAJ/AAR/2018-19/05 dated 16 June 2018), *Hitachi Power Europe GmbH* (AAR, Uttar Pradesh; 2020 (2) TMI 592 – AAR UP) and *M/s Hitachi Power Europe GmbH* (AAR, Maharashtra; No GST-ARA-38/2019-20/B-27 dated 11 March 2020).

Activities undertaken by a liaison office are closely monitored by the RBI, and such offices are prohibited in engaging in any business activity within India. By not reading the aforesaid prohibition into the meaning of "business" under Section 2(17) of the CGST Act, the AAR has thrown into uncertainty the positions adopted by various liaison offices operating in India. Certainty in tax positions is paramount for foreign companies looking to enter India and the aforesaid ruling, in our view, does not lay down the correct position of law.

It may separately be noted that while the AAR ruled that the liaison office was engaged in providing *inter-state supply* of services (a conclusion which necessarily required determination of "place of supply"), the question regarding admissibility of exemption was curiously avoided by stating that the question of "place of supply" was beyond its jurisdiction. Notwithstanding the aforesaid, in our view, even if activities undertaken by the liaison office are viewed as "supply", benefit of the aforesaid exemption should be available.

CUSTOMS / FOREIGN TRADE

Notification increasing import duty would not affect bill of entry presented on the same day, prior to its publication: Supreme Court

In *Union of India v G S Chatha Rice Mills*[29], the Supreme Court held that the rate of import duty and the tariff valuation of imported goods stood crystallised at the point in time the bill of entry was electronically presented. The Court held that a notification increasing import duty published on the same day, but after such bill of entry was presented, would take effect not from the midnight of the day it was published (so as to apply to the said bill of entry), but only from the time of its publication. In this regard, the Court placed reliance on regulation 4(2) of the *Bill of Entry (Electronic Integrated Declaration and Paperless Processing) Regulations 2018*[30] which deems self-assessment of goods to be complete upon filing of the bill of entry. The Court also observed that the Customs Act, 1962 did not authorise the Central Government to increase import duties with retrospective effect and therefore refused to extend the application of the notification to bills of entry filed earlier in time on the same day.

KCO Comments

The Supreme Court has painstakingly traced[31] the scheme of electronic presentation and assessment of bill of entry and analysed it against the backdrop of the Information Technology Act, 2000 and General Clauses Act, 1897, to hold that a notification shall come into force only from the *time* of its publication in the electronic gazette. The Supreme Court, by categorically holding that the rate of duty in force at the *time* of presentation of bill of entry would be considered for assessment, has settled the ambiguity previously surrounding this issue.

Separately, it may be noted that the issue regarding coming into force of a notification having the effect of increasing import duty or amending import policy, and the importance of its "publication" in the official gazette, has previously been litigated before the Delhi, Andhra Pradesh,

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29 2020-TIOL-157-SC-CUS-LB

30 Regulation 4(2) states that *the bill of entry shall be deemed to have been filed and self-assessment completed when after entry of the electronic integrated declaration on the customs automated system or by way of data entry through the service centre, a bill of entry number is generated by the Indian Customs Electronic Data Interchange System for the said declaration and the self-assessed copy of the Bill of Entry may be electronically transmitted to the authorised person or printed out at the service centre.*

31 Judgement authored by Dr D Y Chandrachud, J on behalf of himself and Indu Malhotra, J

Gujarat and Madras High Courts[32] in the context the Customs Act, 1962[33] and the Foreign Trade (Development and Regulation Act, 1992[34]. All four High Courts have unanimously held that the notification shall have effect only upon its publication in the official gazette and not before.

Quantitative restrictions on imports may be imposed by the Central Government under the general regulatory power, without following the procedure provided in Section 9A of the Foreign Trade (Development & Regulation) Act, 1992: Supreme Court

In *Union of India v Agricas LLP and Others*[35], the Supreme Court held that Section 9A of the Foreign Trade (Development & Regulation) Act, 1992 (FTDR Act), which lays down procedural safeguards prior to imposition of quantitative restrictions on imports, did not negate or curtail the general power to prohibit, regulate or restrict imports available to the Central Government under Section 3(2) of the said act. Accordingly, the Court held that notifications imposing quantitative restrictions without conducting an enquiry mandated by Section 9A were valid, since the said Section was merely an enabling provision which did not affect the general regulatory power possessed by the Central Government under Section 3(2) of the FTDR Act.

The Court also held that Article XI of the General Agreement on Tariff and Trade, 1994 (GATT 1994) (which states that member countries shall not impose restrictions on importation or exportation other than duties and taxes) has not undergone an "act of transformation"[36] and thus not been made part of domestic law. Consequently, the notifications in question could not be challenged as being violative of the aforesaid article, in Indian courts.

KCO Comments

The decision of the Supreme Court effectively authorises the Central Government to bypass Section 9A of the FTDR Act and impose quantitative restrictions on imports, and thus leaves several questions unanswered. The Court fails to provide instances wherein such power could be exercised and does not clarify whether such an exercise could be undertaken as a matter of course.

Article XIX of GATT 1994 provides for *Emergency Action on Imports of Particular Products*. This article admittedly has undergone an 'act of transformation' and resulted in enactment of Section 9A of the FTDR Act. However, Section 9A empowers the Central Government to take emergency action and impose quantitative restrictions only by following certain procedural safeguards (such as conduct of enquiry, identification of injury / threat based on notified norms, hearing interested parties, etc), and not otherwise. An unbridled exercise of power without following the prescribed safeguards would make Section 9A redundant.

Finally, while the Court holds that the notifications in question could not be challenged for being violative of Article XI, it fails to convincingly explain how a breach of Article XIX could be justified when the same has been codified in Section 9A and stems from a binding international obligation.

In our view, the judgement needs to be suitably revisited in future to answer these questions.

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[32] *M D Overseas Limited* (Delhi High Court; WP(C) No 7838 of 2017) and *M/s Ruchi Soya Industries Limited* (Andhra Pradesh High Court; WP No 4533 and 4534 of 2019, Gujarat High Court; R/Special Civil Application No 11063 of 2018 and Madras High Court; WP No 21207 of 2018). The Andhra Pradesh High Court, in its judgement, had struck down section 25(4) of the Customs Act, 1962 by holding it to be arbitrary and contrary to sub-sections (1) and (2A) thereof, and the Madras and Gujarat High Courts have followed the aforesaid judgement.

[33] The impugned notification was issued under section 25 (as amended by the Finance Act, 2016) of the Customs Act, 1962

[34] The impugned notification was issued under section 3 of the Foreign Trade (Development and Regulation Act, 1992

[35] 2020 (8) TMI 705 - SUPREME COURT

[36] 'Act of transformation' principle means that an international treaty is not directly applicable in the domestic law system, without being codified into a domestic legislation. In case where an 'act of transformation' is required, international treaties may partially or entirely become part of domestic law. Where a treaty becomes part of domestic law by an 'act of transformation', it becomes invocable and enforceable in municipal courts.

02.

REGULATORY UPDATES

This quarter marked the gradual shift from the firefighting measures that the Government had to resort to in the previous quarters, to rolling out measures which are expected to have a long-term impact. It is clear from the measures implemented that the government has intended to shift gears at the start of the calendar year 2021 with business-friendly measures like rollout of quarterly return monthly payment scheme and revised deadlines for filing returns being made effective along with widening the scope of e-invoicing provisions and a strict clampdown on circular trading by targeting issue of false invoices / irregular availment of ITC and bogus traders. All these moves, if viewed holistically, indicate that the system is moving towards complete digitisation as was envisaged initially and any sort of leniency that was granted during the initial periods, is sought to be brought down. It is a call to the trade and business to be mindful of the subtle changes being made and to have robust systems in place to avoid any lapses / losses. A stock also needs to be taken by the trade on the unintended economic / cash flow impact that any of these measures could result in, so that appropriate representations are made.

GOODS AND SERVICES TAX

Launch of Quarterly Return Monthly Payment (QRMP) Scheme

After the revamp and subsequent withdrawal of the format of FORM GSTR 3B, the Government has rolled out an assessee friendly QRMP Scheme with effect from 1 January 2021 targeted at the small taxpayers to ease procedural difficulties faced.

- *Eligibility:* A registered person, who is required to furnish FORM GSTR-3B and has an aggregate turnover of up to INR 5 crore in the preceding financial year, is eligible for the QRMP Scheme.

- *Exercising the Option:* Option for QRMP Scheme can be exercised throughout the year provided the last return (before the exercise of the option) has been filed. Option need not be renewed every quarter and obligation to file monthly return shall only revert once the option is revised. The facility for opting out of the Scheme for a quarter will be available from first day of second month of preceding quarter to the last day of the first month of the quarter.

- *Default Migration*: For the quarter January 2021 to March 2021, all the registered persons, whose aggregate turnover for the FY 2019-20 is up to INR 5 crore and who have furnished FORM GSTR-3B for the month of October 2020 by 30 November 2020, shall be migrated on the common portal.

  The taxpayers who have not filed their return for October 2020, on or before 30 November 2020 will not be migrated to QRMP Scheme, however they will be able to opt for it once the FORM GSTR-3B as due on the date of exercising option has been filed.

- *Filing of FORM GSTR 1:* The optees under QRMP Scheme will be required to file FORM GSTR 1 on a quarterly basis by the 13th day of the month succeeding the concerned quarter. For the first and second month in a quarter an invoice furnishing facility (IFF) will be granted up to the 13th day of the succeeding month. This will accommodate appropriate population of FORM GSTR 2A / 2B of the recipient. However, the value of outward supplies in each month cannot exceed INR 50 lakhs.

- *Monthly payment of tax:* The GST due in each of the first two months of the quarter will be paid by depositing the due amount in FORM GST PMT-06, by the 25th day of the month succeeding the concerned month. Payments made shall only be utilised to adjust the tax liability for that quarter under the concerned FORM GSTR 3B that is filed.

- Methods to be used:

  – *Self-assessment method:* Only net tax liability has to be paid in cash after you offset the input tax credit against tax

liability payable on account of outward supplies.

– *Pre-filled method:* The optee would be required to deposit either 35% of the GST paid in cash in the previous quarter (when quarterly returns are furnished) or 100% of the GST paid in cash in the previous month (when monthly returns were furnished). No deposit is required if the balance in the electronic cash ledger and/or electronic credit ledger is adequate for the tax due for the 1st month and / or 2nd month or where there is nil tax liability.

- *Quarterly filing of FORM GSTR 3B:* The optee under the QRMP Scheme would be required to furnish FORM GSTR 3B for each quarter on or before 22nd or 24th day of the month succeeding such quarter. Late fee is applicable for delay in furnishing of return / details of outward supply as per the provision of Section 47 of the CGST Act.

- *Late fee and interest:* There is no late fee for delayed payment of GST for the first two months of the quarter. However, delayed filing of Form GSTR 3B would attract late fee at the rate of INR 50 per day subject to a maximum of INR 5000.

  Interest is payable at the rate of 18% on the failure to deposit GST that is due (under either of the methods).

Measures introduced to curb fraudulent issue of invoices / false registrations

- *Tightening of registration process:* The registration process would mandate biometric based Aadhaar verification of individuals / representatives of the application if that mode is opted for. Biometric information, photograph and verification of such other KYC documents, as notified, would be collected even if the Aadhaar verification mode is not opted. This would be followed by physical verification of original copies of documents uploaded at the notified facilitation centres. This change will be made effective from the further date as may be notified.

The registration will be granted in 7 days as opposed to 3 days that was previously specified in the normal course. However, in case the person does not opt for Aadhaar based authentication, the registration shall only be granted within 30 days after physical verification of the premises sought to be registered.

- *Cancellation of registration:* The registration granted can be cancelled if the assessee (i) avails input tax credit in violation of Section 16 of the CGST Act; (ii) declares excess outward supplies in FORM GSTR 1 when compared with FORM GSTR 3B for any corresponding tax period and (iii) violates the newly introduced Rule 86B of the CGST Rules. Further, if irregularities in availment of input tax credit and overstatement of outward supplies is noted in respect of any assessee by analysing the FORM GSTR 1 filed by the suppliers and the FORM GSTR 3B filed by the recipient, then the officers can now suspend the registration without any prior intimation and such assessee will be given 30 days to explain and show cause as to why the registration should not be cancelled. This change has been made effective from 22 December 2020.

- *Restriction on filing FORM GSTR 1:* Assessees will not be allowed to file FORM GSTR 1 for a tax period if the FORM GSTR 3B for the previous
  2 months or previous quarter (as required under the QRMP Scheme) has not been filed. This change has been made effective from 22 December 2020

- *Introduction of restriction on utilisation of input tax credit (Rule 86B of the CGST Rules):* Assessees are restricted from utilising more than

99 percent of their available input tax credit to make payments towards the output tax liability where the taxable supplies for a month exceed INR 50 lakhs. This necessitates mandatory payment of 1 percent of the tax liability for a particular month in cash. However, this restriction shall not apply:

- If the karta, managing director, individual, two or more partners / trustees / directors of the assessee have paid income tax in excess of INR 1,00,000 in the last two financial years for which the due date for filing returns have expired;
- If the assessee has received GST refund of input tax credit in excess of INR 1,00,000 on account of making zero rated supplies or having an inverted duty structure;
- If the assessee has discharged in cash an excess of 1% of the cumulative output tax liability for the previous months;
- If the assessee is a Government undertaking, PSU or a statutory authority;
- If the concerned Commissioner or authorised officer removes such restriction.

Restriction on availment of input tax credit:

- The ceiling of 10 percent (of reconciled / matched credit) up to which unreconciled / unmatched input tax credit under Rule 36(4) of CGST Rules could be availed, has been further reduced to 5%.
- The condition made under sub-rule (4) of rule 36 of the CGST Rules shall apply cumulatively for the tax period February, March, April, May, June 2020 to August 2020 and the return in FORM GSTR-3B for the tax period September 2020 shall be furnished with the cumulative adjustment of input tax credit for the said months.

Extension granted for filing of FORM GSTR 1

With effect from 1 January 2021, registered persons who have to file FORM GSTR 3B on a monthly basis will be required to file FORM GSTR 1 by the 11th day of the succeeding month.

Generation of FORM GSTR 2B

The recipient of supplies will be able to view on the common portal an auto generated FORM GSTR 2B which will contain particulars of eligible input tax credit basis the details uploaded by the suppliers when filing FORM GSTR 1 or through IFF. The statement will be accessible from the day after the due date for furnishing FORM GSTR 1 or uploading details through IFF.

E-invoicing provisions amended

- The e-invoicing provisions which were earlier applicable only for registered persons having turnover of up to INR 500 crores in the preceding financial year have now with effect from 1 January 2021 been made applicable to such registered persons having a turnover of up to INR 100 crores.
- For the month of October 2020, relaxation was granted for such persons who were required to issue e-invoices as per the prescribed format. Any person who did not adhere to the format could obtain the Invoice Reference Number for such invoice by uploading specified particulars in FORM GST INV-01 on the common GST portal, within thirty days from the date of such invoice. If this is not done, the same would not be treated as an invoice.
- The penalty has been waived for the period from 1 December 2020 to 31 March 2021 on non-compliance with the condition of having the dynamic quick response (QR) code on invoices issued by registered persons (who were required to affix) in respect of supplies made to unregistered person. This waiver is subject to the said registered persons complying with the requirements with effect from 1 April 2021.

Relaxation for filing Annual Returns (FORM GSTR 9/ 9C)

- The due date for furnishing of FORM GSTR 9/9C for FY 2018-19 was extended till 30 September 2020 which was further revised to 30 October 2020. A final extension has been provided till 31 December 2020.
- The filing of annual return for FY 2019-20 has been made optional for small taxpayers whose aggregate turnover is less than INR 2 crores in the previous financial year and who have not filed the said return before the due date.

- The due date for furnishing annual return for FY 2019-20 has been extended to 31 March 2021.

One-time extension in respect of goods exported on approval for sale / return

The time limit for completion / compliance of any action by any person in respect of goods being sent or taken out of India on approval for sale or return, which falls during the period from the 20 March 2020 to 30 October 2020 was extended up to the 31 October 2020.

Extension of due date of compliance under anti-profiteering provisions

Time limit for completion or compliance of any action by any authority has been prescribed or notified under Section 171 of the CGST Act, which expires within the period from 20 March 2020 to 30 March 2021 shall be extended up to the 31 March 2021.

Notification of the number of HSN digits required on tax invoice

With effect from the 1 April 2021, the number of digits of Harmonized System of Nomenclature Code (HSN Code) that have to be specified have been set out hereinafter:

Aggregate Turnover in the preceding Financial Year	**Number of digits of HSN Code to be specified**
Up to rupees five crore (when making supplies to registered persons)	4
more than rupees five crore	6

Extension of exemption on services by way of transportation of goods by air or by sea

GST exemption on services by way of transportation of goods by air or by sea from customs station of clearance in India to a place outside India, extended by one year ie up to 30 September 2021.

FOREIGN TRADE POLICY / OTHER REGULATORY UPDATES

Rollout of the Remission of Duties and Taxes on Exported Products (RoDTEP) Scheme

The RoDTEP scheme announced last year is set to replace the existing MEIS with effect from 1 January 2021. This scheme aims to reimburse the taxes and duties incurred by exporters such as local taxes, coal cess, mandi tax, electricity duties and fuel used for transportation, which are not exempted or refunded under any other existing scheme. Although the Government is yet to notify the finer details of rates and process, the key features basis the latest public announcement, have been captured below:

Applicability

- It is applicable to all Export Goods. Since the RoDTEP Scheme comes into effect from 1 January 2021, **the notified rates, irrespective of the date of notification, shall apply with effect from 1 January 2021 to all eligible exports of goods. This necessitates that exporters who expect to avail of the benefit should declare in the shipping bills for exports made on or after 1 January 2021 that they are desirous of availing the benefit under the RODTEP Scheme.**
- The RoDTEP Scheme only contemplates benefits of those Central/State/Local Taxes that were not refunded till now.

Mechanism

- The benefit in the form of refund would be credited in the exporter's ledger account with Customs and the credits used to pay Basic Customs duty on imported goods. The credits can also be transferred to other importers. This Scheme shall be allowed, subject to specified conditions and exclusions (to be notified).
- The rates for all export goods are yet to be notified shortly by the Department of Commerce based on recommendations of Dr G K Pillai Committee. This has caused a stir in the trade considering the lack of clarity on the quantum of benefits available. This is because the declaration on the shipping bill would necessarily block that export from being counted towards any other benefit and if the benefit under RoDTEP is not substantial they would benefit from any other export schemes that are available.

Extension of the Rebate of State and Central Taxes and Levies (RoSCTL) Scheme

The RoSCTL Scheme which expired on 31 March 2020 has now been extended till 31 March 2021 or until such date the RoSCTL scheme is merged with the Remission of Duties and Taxes on Exported Products (RoDTEP) Scheme, whichever is earlier.

Relief for pending claims under Rebate of State Levies (RoSL) Scheme

The RoSL Scheme was launched to mitigate VAT and other state taxes on export of garments and made ups and was replaced by the RoSCTL Scheme on 6 March 2019. For the pending ROSL claims which could not be released due to budgetary limitations, it has been decided that the remaining RoSL rebates were to be granted by DGFT in the form of electronic duty credit scrips which can be used to pay central excise and customs duties (other than integrated tax and compensation cess)

- Exemption has been granted from duties of customs (other than integrated tax and compensation cess) when importing goods against scrips issued under the RoSL scheme for apparel and made-ups sectors
- Exemption has been granted from central excise duty as is applicable under the Fourth Schedule of the Central Excise Act, 1944 at the time of clearance of the specified goods against the RoSL scrips
- RoSL scrips shall be issued against exports of garments and made-ups where the order permitting clearance and loading of goods for exportation under has been made on or after the 20 October 2016 and on or after 23 March 2017 for made-ups, and till 6th March 2019
- The value of RoSL scrips shall be as per the respective rate and cap as notified by the Ministry of Textiles from time to time and in operation at the time of the order permitting clearance for export
- Procedure for application and issuance of scrips under RoSL Scheme has been given on the DGFT website
- The claimant will not be entitled to claim refund / rebate of state levies through any other scheme. However, the claimant shall be entitled to avail drawback / CENVAT credit of additional duties of customs as well as drawback of basic customs duty
- The exports made against advance authorisation licenses cannot be considered towards rebate under RoSL Scheme

The RoSL scrips and goods thereunder are freely transferable

Extension granted for submission of proof for export obligation fulfilment

Wherever export obligation period is expiring/has expired between 1 February 2020 and 31 October 2020, the date of submission of document for export obligation fulfilment has been extended up to 31 December 2020 for all advance authorization.

We hope the e-Bulletin enables you to assess internal practices and procedures in view of recent legal developments and emerging industry trends in the indirect tax landscape.

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For any queries in relation to the E-Bulletin, please email us at idt.bulletin@khaitanco.com.

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