

# INDIA TRADE BULLETIN

THE MONTHLY JOURNAL ON INTERNATIONAL TRADE AND  
INDIRECT TAXES

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## Salutations Dear Reader!

We are pleased to present this third issue of our monthly journal, "India Trade Bulletin".

In this Issue:

- Snippets on recent changes and updates in GST, Customs and FTP;
- Column on taxability of ocean freight; and
- Sector watch – Pharma

Hope you will enjoy reading this issue!



## SNIPPETS

### Goods & Services Tax

#### Government notifies changes to rules on input tax credit

The government permitted officers at the level of commissioners to bar debit of input tax credit for one year in case of credit being availed fraudulently. The GST Council had approved a proposal in this regard at its meeting on December 18 to check tax evasion and menace of fake invoicing.

Source: The Economic Times dated December 30, 2019 accessed at

[//economictimes.indiatimes.com/articleshow/73003733.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/articleshow/73003733.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

#### GST returns not filed? The taxman can freeze your bank account

The CBIC, in the three-page standard operating procedure issued on Tuesday has decided to go strong against "defaulters". With over 1 crore GST-registered entities failing to file return on time, the new set of rules enable GST-authorities to attach your property and banks accounts if despite repeated reminders you fail to file tax returns.

Source: The Economic Times dated December 27, 2019 accessed at

[//economictimes.indiatimes.com/articleshow/72988396.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/articleshow/72988396.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

#### Niti Aayog member bats for 2 GST slabs, says rates should not be revised frequently

Government think-tank Niti Aayog member Ramesh Chand on Wednesday made a case for only two slabs under the GST regime as against the multiple slabs currently and said rates should be revised annually if required.

The GST, which replaced almost all the indirect taxes, came into force from July 1, 2017, and the rates on goods and services have been revised several times since then.

Currently, there are four GST rate slabs -- 5 per cent, 12, per cent, 18 per cent and 28 per cent. Several items fall in exempt category or nil duty. Besides, cess is also levied on five goods.

Source: The Economic Times Dated December 25, 2019 accessed at

[//economictimes.indiatimes.com/articleshow/72965784.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/articleshow/72965784.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

## Finance Ministry to set up GST grievance redressal panel for taxpayers

The Finance Ministry has decided to set up a Grievance Redressal Committee (GRC) to examine and resolve all issues being faced by the taxpayers, including procedural difficulties and IT-related issues about GST. According to reports, the Finance Ministry has also notified the setting up of a GST Grievance Redressal Committee at zonal and state level following a go-ahead from the GST Council, which met earlier this month.

Source: Zee News dated December 25, 2019 accessed at <https://zeenews.india.com/economy/finance-ministry-to-set-up-gst-grievance-redressal-panel-for-taxpayers-2254442.html>

## Panel of officers on GST for raising rate, curtailing exemption list to increase revenue

The committee of officers from the Centre and states, formed to review the GST, has also recommended selective taxation on education and health, sources said. The committee, which made presentation before the GST Council on December 18, 2019 has also suggested pruning of exempt list for raising resources.

Source: The Economic Times dated December 24, 2019 accessed at [http://economictimes.indiatimes.com/articleshow/72955694.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](http://economictimes.indiatimes.com/articleshow/72955694.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

## Government makes changes to Interest Subvention Scheme for MSMEs

MSME minister Nitin Gadkari has reviewed the scheme, which was launched by Prime Minister Narendra Modi in November 2018. As part of access to credit, the government announced 2% interest subvention for all GST registered MSMEs on fresh or incremental loans.

Source: The Economic Times dated December 16, 2019 accessed at [http://economictimes.indiatimes.com/articleshow/72774377.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](http://economictimes.indiatimes.com/articleshow/72774377.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

## Government may introduce lottery system to incentivise GST filing

On the lines of the Delhi government's scheme for consumers under the VAT regime, the Central Government's lottery system will aim to increase compliance. Requesting a copy of the bill from the seller may turn rewarding, with the government planning a lottery scheme for customers to improve compliance. The measure is being explored by the revenue augmentation officers committee to boost collections and it may be presented before the Goods and Services Tax (GST) Council

Source: Business Standard Dated December 12, 2019 accessed at [http://www.business-standard.com/article/economy-policy/soon-govt-may-introduce-lottery-system-to-incentivise-gst-filing-119121201649\\_1.html](http://www.business-standard.com/article/economy-policy/soon-govt-may-introduce-lottery-system-to-incentivise-gst-filing-119121201649_1.html)

## **GST: Key changes and simplifications of GSTR-9 & GSTR-9C for taxpayers**

The Central Board of Indirect Taxes & Customs (CBIC) has simplified the process of filling the forms GSTR-9 and GSTR-9C by making several fields as optional. Going forward, it is not mandatory for a taxpayer to provide a breakup of the Input Tax Credit (ITC) which is claimed on the services, capital goods and raw materials purchased. Further, the taxpayer is no longer required to provide details of purchases and sales done at an HSN level. This is a much-needed relief to the taxpayer who was groping through some challenges to provide as required for completion of the aforesaid forms.

Source: The Economic Times dated December 10, 2019 accessed at [//economictimes.indiatimes.com/articleshow/72436007.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/articleshow/72436007.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

## SNIPPETS

### CUSTOMS & FTP



#### Telcos ask finance ministry to clarify on import duty for routers

Telcos have asked the finance ministry to clarify whether routers – a critical IT and network communication device – will attract import duty from January 1, 2020, saying such a levy would jack up 4G network expansion costs, hit future 5G deployment and run afoul of India's obligations to the World Trade Organization.

Source: The Economic Times dated December 29, 2019 accessed at [//economictimes.indiatimes.com/articleshow/73022226.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/articleshow/73022226.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

#### Edible oil producers seek lower duty on raw, refined imports

The edible oil producers have asked the government to consider decreasing import duties of crude palm oil (CPO) to 30 percent from 40 percent and refined palm oil to 45 percent from current 50 percent.

Source: The Economic Times dated December 27, 2019 accessed at [//economictimes.indiatimes.com/articleshow/72989296.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/articleshow/72989296.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

#### Reduction of edible oil import duty will harm industry and farmers says SEA

India has seriously compromised its edible oil security which has resulted in dependence on imports growing to almost 70%. The main reason for stagnant oilseed production has been lack of interest among oilseed farmers due to poor returns. We have been advocating keeping high import duties on edible oils being imported in the country, said SEA president.

Source: The Economic Times dated December 27, 2019 accessed at [//economictimes.indiatimes.com/articleshow/72997617.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/articleshow/72997617.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

#### Bangladesh to allow transshipment of Indian goods from January sans custom duties, transit fees

Indian exports transiting through Bangladesh will no longer attract Customs duties and transit fees. The decision, considered a new phase in connectivity between the two countries, was agreed upon when Bangladesh shipping secretary Md. Abdus Samad met his Indian counterpart Gopal Krishna at the shipping secretary-level talks in Dhaka last week.

Source: The Economic Times dated December 19, 2019 accessed at [//economictimes.indiatimes.com/articleshow/72882058.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/articleshow/72882058.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

## Misuse of FTA for gold imports to end as govt tweaks import conditions

Gold and silver in any form, other than monetary gold and silver in any form, has been moved from free to restricted list, a government notification dated December 18 said. The imports under FTA were at a nominal duty against the 12.5% duty on gold and silver.

Source: The Economic Times dated December 18, 2019 accessed at [//economictimes.indiatimes.com/articleshow/72872746.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/articleshow/72872746.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

## Anti-dumping duty on chemical from five nations

Acting on an application filed by Reliance Industries Limited on behalf of domestic players, the government may impose anti-dumping duty on a chemical (Mono Ethylene Glycol) used in polyester fibres and films, imported from five countries — Kuwait, Oman, Saudi Arabia, UAE and Singapore. The government has found that the dumping has impacted domestic industries and has launched a probe into it.

Source: The New Indian Express dated December 13, 2019 accessed at <https://www.newindianexpress.com/business/2019/dec/13/anti-dumping-duty-on-chemical-from-five-nations-2075458.html>

## Secretaries group suggests reduced manmade fibre imports, changes in duty to boost local production

Citing the decision of the GST Council to allow input tax credit at Man-made Fibre (MMF) fabric stage, the Textiles Minister Ms Smriti Irani said that the committee had recommended the ministry to monitor the impact of increasing import duty from 10% to 20% in respect of all MMF items. The group had suggested that there is a need to reduce the dependence of import of the raw material, MMF and filament.

Source: The Economic Times dated December 12, 2019 accessed at [//economictimes.indiatimes.com/articleshow/72491503.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/articleshow/72491503.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

## Additional 2% export benefits to end Dec 31; Government yet to give roadmap for garments, made ups

The additional 2% benefit under MEIS were announced in August to help exporters who had claimed that delayed GST refunds were hurting business. With the additional benefits gone, the original incentive of 2%, 3% and 5% would remain till the time RoDTEP (Remission of Duties or taxes on Export Products) comes in place.

Source: The Economic Times dated December 10, 2019 accessed at: [//economictimes.indiatimes.com/articleshow/72445750.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/articleshow/72445750.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

## Mobile companies seek review of duty on parts as imports from Vietnam soar

India has imported mobile phone components worth more than \$1 billion from Vietnam — with which India has a Free Trade Agreement (FTA) —in the first half of this fiscal alone, compared to \$800 million in the whole of 2018-19 and just over \$600 million in FY18, an industry association of companies making handset in India has informed the government.

Source: The Economic Times dated December 9, 2019 accessed at:

[//economictimes.indiatimes.com/articleshow/72432129.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/articleshow/72432129.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)



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## COLUMN

### Tax on ocean freight - Splitting an Indivisible Contract?

(co-authored by R.G. Muthukumaran & Hemal Makwana)

#### Introduction

Currently, importers in India are forced to face an unpleasant scenario with respect to the levy of Integrated Goods and Services Tax (IGST) on ocean freight under reverse charge<sup>1</sup> in addition to the customs duty and IGST levied on the assessable value i.e. Cost, Insurance and Freight (CIF) of goods at the time of import.

Levy of IGST on ocean freight has been one of the most contentious issues in recent times, and the provisions relating to levy of service tax or IGST on ocean freight payable on import of goods has been challenged before different High courts<sup>2</sup>.

The levy is challenged on various grounds, however, the much discussed and debated ground is whether the said levy would lead to the same transaction being taxed twice.

#### Valuation under Customs Law

In this regard, it is important to refer Rule 10(2) of the Customs Valuation (Determination of value of Import Goods) Rules, 2007 (Customs Valuation Rules) which provides that the value of the imported goods shall include the following:

(a) the cost of transport, loading, unloading and handling charges associated with the delivery of the imported goods to the place of importation

(b) the cost of insurance to the place of importation

Further, the Rule also provides that where the cost of transport is not ascertainable, such cost shall be twenty percent of the free on-board value of the goods.

Thus, it is evident that when the goods are imported into India, the Customs Valuation Rules requires the importer to include the cost of transportation to derive the assessable value of imported goods irrespective whether the goods are purchased on Ex - Factory or Free on Board or Cost Insurance and Freight. The importer pays import duty on such assessable value which includes the cost of transportation up to the place of importation.

It will be appropriate to highlight that the Customs Valuation Rules are framed keeping in view the World Trade Organization (WTO) Agreement on implementation of Article VII of General Agreement on Tariff and Trade (GATT), 1994. The concept of "transaction value" was introduced based on the aforesaid GATT protocol and WTO agreement. This could also be the reason why other WTO member countries such as Singapore and UAE treat ocean freight as a zero-rated supply<sup>3</sup>. It is also noteworthy that such countries do not treat transportation by vessel as an independent transaction than import of goods.

#### Splitting an Indivisible Contract?

While the importer has already suffered customs duty on such imports, is it pertinent to examine the constitutionality of levying GST only on the freight portion in the case of import of goods, particularly in situations where the goods are imported in CIF Terms

<sup>1</sup> Section 5(3) of Integrated Goods and Services Tax Act, 2017 ('IGST Act') read with Notification No.8/2017-Integrated Tax (Rate) and Notification No.10/2017 -Integrated Tax (Rate) both dated 28 June 2017.

<sup>2</sup> Gujarat HC has granted stay on levy of ocean freight in the case of Ganshyamal & Co [TS-345-HC-2019(GUJ)-NT], Bombay High Court Page | 8

has admitted the writ challenging levy of ocean freight in Victory Ventures and others Vs. Union of India [TS-413-HC-2019(BOM)-NT]

<sup>3</sup> UAE: Refer Article 45 of Federal Decree-Law No. (8) of 2017 on Value Added Tax, Singapore: Refer Section 21(3) of Goods and Service Tax Act



where there is no independent contract for transport of goods. In other words, the importer does not enter into a separate contract for supply of goods and supply of services.

The Hon'ble Supreme Court in the case of **Federation of Hotel & Restaurant Association of India v. UOI**<sup>4</sup> has held that subjects which in one aspect and for one purpose fall within the power of a particular legislature may in another aspect and for another purpose fall within the purview of another legislative power. They might be overlapping; but the overlapping must be clearly defined in the law.

Accordingly, the Supreme Court held that the same transaction may involve two or more taxable events in its different aspects. But the fact that there is overlapping does not detract from the distinctiveness of the aspects.

In the case of imported goods supplied under CIF Terms, whether the legislature is right in splitting such contract for sale of goods to identify a taxable event for supply of service is still an open question.

In this regard, a three Judge Bench of the Supreme Court in **Bharat Sanchar Nigam Ltd. v. Union of India(SC)**<sup>5</sup> held that, out of the different kinds of composite transactions, the drafters of the forty-sixth Amendment to the Constitution chose three specific situations, a works contract, a hire-purchase contract and a catering contract to bring them within the fiction of a deemed sale. Of these three, the first and third involve a kind of service and sale at the same time. Apart from these two cases where splitting of the service and supply has been constitutionally permitted in sub-clauses (b) and (f) of clause (29-A) of Article 366, there is no other service which has been permitted to be so split.

The Hon'ble Apex Court further held that an instrument of contract which may be composite in form in any case other than the exceptions in Article 366(29-A), unless the transaction in truth represents two distinct and separate contracts and is discernible as such, then the State would not have the power to separate the agreement to sell from the agreement to render service, and impose tax on the sale<sup>6</sup>.

It is evident from the above judgment that in the absence of an express provision under Article 366(29A), a composite transaction for sale of goods or rendering of service cannot be artificially vivisected and made subject to different levies. Although, the above judgment was delivered in the context of the erstwhile sales tax and service tax legislations, the principles emanating thereon

are still relevant as Article 366 (29A) has not been scrapped.

**Thus, when an indivisible contract cannot be split for the purpose of levy of service tax and sales tax as held in the BSNL case, is the legislature right in splitting an import transaction into a transaction relating to supply of goods and supply of service?**

## Concluding Thoughts

In light of the decision rendered by the Supreme Court in BSNL Case, there is lack of clarity on whether a transaction for import of goods can be dissected for levy of tax on the freight component and whether such levy is constitutional.

It is interesting to note that though the IGST paid on ocean freight is available as input tax credit to the taxpayer, several taxpayers have chosen to challenge the constitutionality or vires of the levy as IGST paid on ocean freight is only resulting in additional cash flow and credit accumulation for the taxpayers. Further, the levy also results in additional cost for the importers involved in supply of exempted goods or services. Since the issue is pending before different High Courts, the issue is likely to be settled by the Apex Court.

Considering the fact that the levy is resulting in credit accumulation or additional cost for importers, it is the imperative of the law makers to engage with the trade bodies and address the concern of the stake holders.

It is also pertinent to note that exemption is provided vide Notification No. 6/2018 (IGST Rate) dated January 25, 2018 from payment of IGST on royalty and license fees as import of service where the same has been included in the transaction value for the purposes of valuation under Customs Law. In this backdrop, industry would welcome if a positive step is taken by the Government in terms of providing similar exemption on ocean freight.

*(The view expressed in the above piece should not be considered as professional advice. Mazars India LLP does not bear any liability to any person acting on the basis of the above view)*

<sup>4</sup> 1989 (3) SCC 634

<sup>5</sup> (2006) 145 STC 91

<sup>6</sup> Para 43, (2006) 145 STC 91



# **SECTOR WATCH:**

## **PHARMA**

## A. Introduction

Healthy population contributes to the healthy economy. Which is why, investment in health is not only desirable but also a priority for most of the countries worldwide.

Globally, the Indian pharmaceutical industry is ranked third largest in volume terms and tenth largest in value terms. As per Indian Brand Equity Foundation ('IBEF') report<sup>7</sup> released during October 2019, Indian pharmaceuticals market stood at approx. ₹ 12,492 Cr. (US\$ 1.79 billion) for the month of September 2019 and sales stood at approx. ₹ 36,725 Cr. (US\$ 5.25 billion) in the three months ended September with a sales growth of 11.5 percent YoY.

The report also highlighted certain key aspects which are mentioned below:

- India's domestic pharmaceutical market turnover reached ₹ 1,29,015 Cr. in 2018, growing 9.4 percent YoY from ₹ 1,16,389 Cr. in 2017.
- The Ayurveda sector in India is expected to reach US\$ 4.4 billion by end of 2018 and will continue to grow at a CAGR of 16 percent till 2025.
- India is the world's largest provider of generic medicines; the country's generic drugs account for 20 percent of the global generic drug exports (in terms of volumes). Indian drugs are exported to more than 200 countries in the world, with the US as the major market along with some of the key markets such as Africa, European Union, United Kingdom and Russia.
- Pharmaceutical exports from India, which include bulk drugs, intermediates, drug formulations, biologicals, Ayush & herbal and surgical products reached US\$ 19.14 billion in Financial Year ('FY') 18-19 and has already reached US\$ 6.7 billion in FY 19-20 (till August 2019). Pharmaceutical exports are expected to reach US\$ 22 billion in FY 19-20.
- The biggest export destination for Indian pharma product is the US. In FY 18-19, 32.1 percent of India's pharma exports were to the North America, followed by 17.96 percent to Africa and 15.70 percent to the European Union.

- Further, investment (as per cent of sales) in Research & Development by Indian pharmaceutical companies increased from 5.3 percent in FY 11-12 to 8.5 percent in FY 17-18 and is estimated to remain at 8.4 percent in FY 19-20.

## B. Government initiatives, interventions and regulations

In April 2017, with a view to provide low cost access to poor people, the PM announced the need for establishment of a legal framework mandating doctors to prescribe medicines by their international non-proprietary name only<sup>8</sup>;

The Union Cabinet permitted Foreign Direct Investment (FDI) up to 100 per cent through the automatic route for the manufacture of drugs and pharmaceuticals; provided the activity does not attract compulsory licensing or involves the use of recombinant DNA technology and specific cell / tissue targeted formulations. This led to cumulative FDI inflows worth US\$ 16.28 billion up to September 2019<sup>9</sup>;

In October 2018, the Uttar Pradesh Government announced that it will set up six pharmaceutical parks in the state and has received investment commitments of more than ₹ 5,000-6,000 crores (US\$ 712-855 million).

The National Health Protection Scheme was the largest government funded healthcare program in the world, which benefited 100 million poor families in the country by providing a cover of up to ₹ 5 lakhs (US\$ 7,723.2) per family per year for secondary and tertiary care hospitalization<sup>10</sup>;

- In March 2018, the Drug Controller General of India (DCGI) announced its plans to start a single-window facility to provide consents, approvals and other information. The move is aimed at giving a push to the Make in India initiative.
- The Government of India is planning to set up an electronic platform to regulate online sale of medicines under a new policy, in order to stop any misuse due to easy availability.
- The Government of India unveiled 'Pharmaceuticals Vision 2020' aimed at making India a global leader in end-to-end drug

<sup>7</sup> IBEF report <https://www.ibef.org/industry/pharmaceutical-india.aspx>

<sup>8</sup> <https://www.fdi.org/2017/10/india-pharmaceutical-legal-regulatory-environment/>

<sup>9</sup> [https://dipp.gov.in/sites/default/files/FDI\\_Factsheet\\_September2019\\_01\\_January2019.pdf](https://dipp.gov.in/sites/default/files/FDI_Factsheet_September2019_01_January2019.pdf)

<sup>10</sup> The program was announced in Union Budget 2018-19.

manufacture. Approval time for new facilities has been reduced to boost investments.

- The government introduced mechanisms such as the Drug Price Control Order and the National Pharmaceutical Pricing Authority (NPPA) to deal with the issue of affordability and availability of medicines.

## C. Recent Indirect Tax amendments vis-à-vis Pharma Sector

### Goods and Services Tax

The place of supply of R & D services related to pharmaceutical sector<sup>11</sup> for the following nature of supply, shall be the location of the recipient of services provided that the service provider is located in the taxable territory, the recipient of service is located in non-taxable territory and place of service is in taxable territory.

- Integrated discovery and development
- Integrated development
- Evaluation of the efficacy of new chemical/ biological entities in animal models of disease
- Evaluation of biological activity of novel chemical/ biological entities in in-vitro assays
- Drug metabolism and pharmacokinetics of new chemical entities
- Safety Assessment/ Toxicology
- Stability Studies
- Bioequivalence, Bio-availability Studies and Bio-analytical studies
- Clinical trail

Circular<sup>12</sup> is issued by the Board to clarify that parts of ophthalmic equipment suitable for use solely or principally with an ophthalmic equipment should be classified with the ophthalmic equipment only and shall attract 12 percent GST. The said clarification has been issued in light of Chapter Note 2(b) of Chapter 90 which states that "parts and accessories, if suitable for use solely or principally with a particular kind of machine, instruments or apparatus, or with a number of machines, instruments or apparatus of the same heading (including a machine, instrument or apparatus of heading 9010, 9013 or 9031) are to be classified with the machines, instruments or apparatus of that kind."

## Customs and International Trade

Advance authorization for penicillin and salts: 6 APA - ITC (HS) Code No. 29411050 is omitted from Appendix 4J of Handbook of Procedure (HBP) and general notes for chemical and allied products of Standard Input Output Norms (SION)<sup>13</sup>.

The date of implementation of track and trace system for export of pharmaceuticals and drug consignment along with maintaining of the parent-child relationship in packaging levels and its uploading on central portal in terms of amended Para 2.90 A (i) and (ii) of the HBP has been extended up to April 1, 2020 for both SSI (small scale industry) and non-SSI manufactured drugs<sup>14</sup>.

"Homopolymer of vinyl chloride monomer (suspension grade)" classified under heading 3904 has been subjected to the levy of Anti-dumping duties when the subject goods are originated from the People Republic of China and United States of America for the period of 30 months w.e.f. August 13, 2019<sup>15</sup> to prevent injury to the domestic manufacturing industry.

## D. Recent decisions in the Pharma/Healthcare sector

### *Chromachemie Laboratory Private Limited (GST AAR Karnataka- Advance Ruling No. KAR ADRG 71/2019)<sup>16</sup>*

Applicant sought the advance ruling on whether import as well as supply of "Prepared Laboratory Reagents" will attract the GST at the rate of 12 percent (as per Schedule II of Notification No. 1/2017 CGST (Rate)- "All diagnostic kits and reagents") or 18 percent (as per Schedule III of Notification No. 1/2017 - Goods which are not specified in Schedule I, II, IV, V or VI will attract tax at the rate of 18 percent).

The applicant argued that 'reagent' in entry 80 of schedule II of Notification No. 1/2017 covers all types of reagents (Laboratory reagents and diagnostic reagents) and specific exclusion or qualification is not ascribed to the word "reagents", hence it should be taxed at the rate of 12 percent.

It was ruled that the entry covers only diagnostic reagents and hence, prepared laboratory reagents

<sup>11</sup> Recommended by GST Council in its 37th meeting. **Notification No. 04/2019- Integrated Tax Dated 30 September 2019.** The notification shall come into force from 1 October 2019.

<http://www.cbic.gov.in/resources/htdocs-cbec/gst/notfctn-4-2019-igst-english.pdf>

<sup>12</sup> <http://www.cbic.gov.in/resources/htdocs-cbec/gst/circular-cgst-113.pdf>

<sup>13</sup> Reference: Public notice no. 54/2015-2020 dated 2 January 2020

Source: [https://dgft.gov.in/sites/default/files/Public\\_per\\_cent20Notice\\_per\\_cent2054\\_per\\_cent20English\\_per\\_cent20pdf.pdf](https://dgft.gov.in/sites/default/files/Public_per_cent20Notice_per_cent2054_per_cent20English_per_cent20pdf.pdf)

<sup>14</sup> Public notice no. 16/2015-2020 dated 4 July 2019

[https://dgft.gov.in/sites/default/files/PN\\_per\\_cent2016\\_per\\_cent20dt\\_per\\_cent204.07.2019\\_per\\_cent20Eng\\_3.pdf](https://dgft.gov.in/sites/default/files/PN_per_cent2016_per_cent20dt_per_cent204.07.2019_per_cent20Eng_3.pdf)

<sup>15</sup> <http://www.cbic.gov.in/resources/htdocs-cbec/customs/cs-act/notifications/notfns-2019/cs-add2019/csadd32-2019.pdf>

<sup>16</sup>Source: <https://gst.kar.nic.in/Documents/General/AAR71chromachemilaboratory.pdf>

are not diagnostic reagents and therefore cannot be covered under the above entry and will attract tax at the rate of 18 percent under the residual entry of Schedule III of Notification No. 1/2017.

***Eskag Pharma Pvt Ltd (GST AAR WEST BENGAL - Advance Ruling No. 46/WBAAR/2018-19 dated 26.03.2019)<sup>17</sup>***

The applicant sought the advance ruling on classification of multiple products as such products cannot be clubbed together into a single category.

In the present case, West Bengal AAR held that dietary/health supplements merits classification under HSN 2106 as per Serial No. 23 of Schedule III and not as medicament under HSN 3004, since the applicant failed to show license for manufacture and sale of products which is required as per Drugs and Cosmetics Act, 1940. Further, even if a product is manufactured using the ingredients and the formula prescribed in the Pharmacopeia, it shall not be classified as a medicament under heading 3004 unless it is meant for therapeutic or prophylactic uses.

***Medivision Scan and Diagnostic Research Centre Pvt. Ltd. (GST AAR Kerala- Advance Ruling No.KER/41/2019)<sup>18</sup>***

The applicant is a clinical establishment which is purely engaged in diagnostic services. It sought ruling as to whether medical diagnostic service activities will be exempt from GST by virtue of Notification No. 12/2017 – Central Tax (Rate) and accordingly not liable to get registered under the GST Act.

Kerala AAR held that diagnostic services in relation to health care provided by clinical establishment/ authorized medical practitioner/ paramedics are exempt from tax as per Sr. No 74 of Notification 12/2017 Central Tax.

Further, clinical laboratory will include microbiological, serological, chemical or other examinations performed of material/ fluids derived from the human body for the purpose of providing information on prevention or treatment of diseases, therefore such types of diagnosis or investigations rightly falls under the category of 'Health care services', eligible for exemption from GST and accordingly is not liable for registration.

Further, it was also held that such persons are liable to obtain registration if they are receiving goods or services liable to be taxed under reverse charge basis.

***CMC Vellore Association (GST AAR Tamil Nadu- Order No. 50/AAR/2019)<sup>19</sup>***

It was held that medicines, drugs, stents, consumables and implants which are used in the course of providing health care services to its in-patients who are admitted in hospital for diagnosis or medical treatment or procedures shall be treated as composite supply of in-patient healthcare service. In terms of Notification No. 12/2017 Central Tax (Rate), in-patient healthcare service supplied by hospitals are exempt from GST.

***Abbott Healthcare Pvt Ltd v The Commissioner of State Tax Kerala and Ors. (W.P(C). No.17012 of 2019(B) dated January 7, 2019) – Kerala High Court***

The petitioner places its diagnostic instruments at the premises of unrelated hospitals, laboratories etc. for their use for a specified period without any consideration. While the supply of instruments is by the petitioner, the supply of reagents, calibrators and disposables are effected by its distributor, who purchases the said products from the petitioner on principal to principal basis and supplies the same to the hospitals/laboratories concerned and the distributor discharges the applicable GST on the price charged for supply of the said reagents etc. In other words, there is no direct sale/supply of the reagents, calibrators and disposables by the petitioner to the hospitals/laboratories.

The petitioner preferred to obtain an Advance Ruling from the AAR which held that the placement of specified medical instruments to unrelated customers like hospitals, laboratories etc., for their use without any consideration, in the backdrop of an agreement containing minimum purchase obligation of products like reagents, calibrators, disposables etc. for a specified period constituted a "composite supply" wherein the principal supply in the said composite supply was of the transfer of right to use goods for any purpose which was liable to GST under Sl.No.17(iii) – Heading 9973 of Notification No.11/2017 Central Tax (Rate) dated June 28, 2017. Accordingly, supply of reagents, calibrators, disposables etc., became taxable at the rate of tax applicable to the instruments, namely, 18 per cent. The appellate authority for Advance Ruling upheld this order, hence the petitioner is before the High Court.

The High Court held as below:

- There was no occasion for the AAR to go into the issue of whether the supply effected was a

<sup>17</sup>Source:[http://wbcomtax.nic.in/GST/GST\\_Advance\\_Ruling\\_AA/08\\_WB\\_AAAR\\_20190723.pdf](http://wbcomtax.nic.in/GST/GST_Advance_Ruling_AA/08_WB_AAAR_20190723.pdf)

<sup>18</sup> Source: <https://keralataxes.gov.in/wp-content/uploads/2019/05/Medivision.pdf>

<sup>19</sup> <http://www.salestaxindia.com/DEMO/TreeMenu.aspx?node=177759>

composite supply or not and, therefore, its findings on the said issue are at any rate legally untenable.

- The concept of enhancement of utility of the instrument through the supply of reagents/calibrators/disposables, while relevant for the purposes of valuation of the supply of instruments, cannot be imported into the concept of composite supply under the GST Act.
- A distinction has to be drawn between the nature of a supply and the valuation thereof. While clubbing of two independent supplies may be resorted to for the purposes of valuation of each of those supplies, there is no scope of clubbing of two independent supplies so as to notionally alter the very nature of each of those supplies as they existed in fact, at the relevant point in time.
- The supplies are made by two different taxable persons; the supply of instrument being by the petitioner and the supply of the reagents, calibrators and disposables being by his distributor, who purchases it from him on principal to principal basis. Although it could be argued that there is a relationship between the said persons that influences the valuation of the supply, the same does not take away from the fact that the supplies are, in reality, made by two different taxable persons.
- The two supplies do not answer to the description of being "naturally bundled and supplied in conjunction with each other in the ordinary course of business".
- Therefore, matter remitted back to the AAR for a fresh decision on the query raised before it by the petitioner company - AAR shall pass fresh orders in the matter, after hearing the petitioner, within a period of six weeks.

***Aurobindo Pharma Ltd v CC (Final Order No. A/31114/2019 dated November 20, 2019 – CESTAT HYD)***

Exemption from customs duties was granted when goods were reimported for 'repair' or 're-conditioning' within three years from the date of exportation. CESTAT held that repacking does not amount to 'repair' or 're-conditioning' and hence, exemption benefit cannot be granted.

## E. Insights

**Inverted tax structure:** The issue of inverted tax structure across various industries has been addressed by the GST Council in several ways from time to time. The issue of input tax credit accumulation, however, is still impacting the pharmaceutical industry.

The Department has in various refund claim proceedings interpreted that, the term "input" is used in the provision and therefore, input services and capital goods are not covered for the purposes of refund. The issue was thereafter referred to the GST Council. As per GST Council's recommendation<sup>20</sup> in its 31st GST meeting, a circular has been issued to state the refund unutilised of input tax is allowed only on inputs and not available on input services and capital goods. The recommendation has been issued on the premise that "Law and the related rules do not allow refund of tax paid on input services and capital goods as part of refund of ITC accumulated on account of inverted duty structure". CGST Rules also have been framed in the same way wherein the formula prescribed, and the forms appended specifies only input tax of inputs but not input services and capital goods. In this background what can industry players do to mitigate credit accumulation? Few of the actions illustrated below, as applicable may be adopted:

- Representation to the Government / GST Council: The interpretation of Section 54 may not have been made appropriately as the same must also be made in light of the Statement of objects and reasons read with Notes appended to CGST Bill, 2017<sup>21</sup>. Accordingly, issue may be referred to GST Council for clarifying the scope of Section 54 to include refund of input services and Capital goods.
- File writ petition in the High Court seeking remedies such as striking down Rule 89 which provides the formula for refund inconsistent with the provision for refund under Section 54, directing the authorities to include input services and capital goods in the online portal functionality.
- Review the correctness of valuation adopted for stock transfers and cross charges / credit transfers through ISD.
- Review if all ineligible credits are reversed in accordance with the law. etc.

<sup>20</sup> Reference: Annexure 4 to the Minute book of 31<sup>st</sup> GST Council meeting. Agenda item No. 7 (xi) (4/4)  
Source: [http://www.gstcouncil.gov.in/sites/default/files/Minutes/Signed\\_per\\_cent20Minutes\\_per\\_cent20- per\\_cent2031st per\\_cent20GST per\\_cent20Council per\\_cent20Meeting.pdf](http://www.gstcouncil.gov.in/sites/default/files/Minutes/Signed_per_cent20Minutes_per_cent20- per_cent2031st per_cent20GST per_cent20Council per_cent20Meeting.pdf)

<sup>21</sup> <https://www.aces.gov.in/Documents/CGST-bill-e.pdf>

**Impact of the WTO ruling on future of SEZs:** In the wake of a ruling by the WTO panel<sup>22</sup> against India that benefits extended under the SEZ scheme are inconsistent with the agreement for subsidies and countervailing measures, it is imperative for pharma companies currently operating as SEZ units to align their business strategies. As per news reports<sup>23</sup> the Commerce Ministry is evaluating the option of revamping SEZ provisions in line with the new Bonded warehouse regulation scheme introduced under the Customs Laws vide Notification 69/2019-Customs (N.T.) dated the 1st October,2019 wherein the tax exemptions are on inputs and not income, which are permissible under the WTO rules. In the meantime, the Companies must closely watch out and evaluate the following:

- What would be the changes to the provisions that would be brought out and its impact on investments, income etc.
- Whether the units have completed tax holiday period or not.
- Conduct cost benefit analysis w.r.t new SEZ scheme (to be announced) versus the bonded warehouse scheme; and
- Arrive at a decision whether or not to continue under the SEZ scheme.



<sup>22</sup> [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds541\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds541_e.htm)

<sup>23</sup> <https://www.thehindubusinessline.com/economy/policy/govt-exploring-alternative-incentivesfor-sezs-to-make-them-wto-compliant/article30396306.ece>

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