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GST Compendium

A monthly guide

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Editor's Note

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The Finance Ministry has notified the setting up of 31 benches of the Goods and Services Tax Appellate Tribunal (GSTAT) across 28 states and eight union territories, with states such as Uttar Pradesh, Rajasthan, and Karnataka having multiple benches. The establishment of the GSTAT has been a long-awaited milestone announced after a six-year wait. This action will expedite the resolution of tax disputes and provide certainty regarding litigation under GST.

The government has withdrawn the GST levy on ocean freight, which was chargeable on CIF imports under the reverse charge mechanism (RCM). These amendments align with the Supreme Court's (SC's) decision in the case of Mohit Minerals Private Limited, wherein the levy of IGST under the RCM by an importer on ocean freight was overturned.

In another important development, the most debated amendments related to online money gaming have been made effective from 1 October 2023. As per these amendments, all kinds of online money gaming, including betting, casinos, gambling, horse racing, and lottery, are leviable to GST @ 28% on full face value. In some cases, the GST department considers these amendments retrospectively and has also issued notices applying the above provisions for the past period.

On the judicial front, the SC has held that the appellant can seek restoration of the appeal when it is unsuccessful in benefiting from the amnesty scheme. The SC noted that the withdrawal of the appeal was a pre-condition under the amnesty scheme. However, this did not prevent the appellant from pursuing its statutory remedy.

Besides, the Patna High Court (HC) has upheld the constitutional validity of provisions governing the time limit for claiming the input tax credit (ITC). The HC has observed that the ITC is a legislative concession, not a right, and the legislature has the authority to impose conditions, including a time limit for claiming the ITC.

In this edition, we have analysed the concept of input service distributor and cross charge under GST.

On the direct tax front, the Central Board of Direct Taxes (CBDT) has amended the rules for the valuation of the perquisite in case of rent-free accommodation or accommodation at a concessional rate provided by the employer. The CBDT has issued FAQs for audit reports to be filed by charitable institutions/religious trusts and educational/medical institutions and has also extended the timeline of furnishing such audit reports and Form ITR-7. Further, the additional securities (listed on the stock exchange in the International Financial Services Centre) for availing capital gains tax exemption by non-residents have been notified.

I hope you will find this edition an interesting read.

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Important amendments/ updates

A. Key updates under the GST and erstwhile indirect tax laws

52nd GST Council meeting: Key recommendations and decisions

The GST Council held its 52nd meeting on 7 October 2023, wherein the Council inter-alia proposed various recommendations relating to changes in the GST rates on goods and services, clarifications on certain issues, including taxability of personal guarantee and corporate guarantee, an amnesty scheme for filing appeals for time-barred cases, etc.

The recommendations of the GST Council shall be given effect through notifications and/or circulars and/or amendments in the law.

Key recommendations/decisions made by the GST Council:

1. Legislative and clarificatory changes:

Taxability of corporate guarantee provided by the related persons	Amendments proposed in the valuation rules to prescribe the taxable value of supply as one per cent of the guarantee amount offered or the actual consideration, whichever is higher, irrespective of whether the recipient is eligible for full ITC or not.
Personal guarantee	In case the company does not pay any consideration to the director for providing a personal guarantee to the bank/financial institutes, the open market value may be deemed as zero, and hence, no GST would be levied.
Amnesty scheme for filing appeals	• Taxpayers who were unable to file appeals to the Appellate Authority against the demand order issued on or before 31 March 2023 or whose appeals were rejected on the grounds of time barred will be allowed to file appeals up to 31 January 2024 • In these cases, taxpayers will make a pre-deposit of 12.5% of the tax under dispute, subject to a minimum payment of 20% amount through an electronic cash ledger

Export of services	Export remittances received in Special INR Vostro account, approved by the RBI to be admissible as consideration for supply of services to qualify as export of services.
ISD	In line with the 50th council meeting recommendations, necessary amendments proposed in the CGST Act as well as the CGST Rules to make the ISD mechanism mandatory for the distribution of ITC of input services procured by head office on a prospective basis.
Automatic restoration of provisionally attached property	Amendment proposed in the relevant rule and form to specify that the order of provisional attachment be invalid after the expiry of one year from the date of the order.
Amendments in provisions relating to the appointment of President and Members of the GSTAT	• Advocates with ten years of experience, substantially in indirect tax litigations, eligible for appointment as judicial members of the GSTAT • President and Members will have a minimum age of 50 years for appointment and a tenure of up to a maximum age of 70 years and 67 years, respectively.
Supply to SEZ units/developers allowed for authorised operations with payment of IGST	Amendment proposed in the relevant notification to allow the suppliers to make supply of goods and/or services to SEZ units/developers allowed for authorised operations upon payment of IGST.
Place of supply of services	**Clarity to be provided on the place of supply of the below services:** Supply of service of transportation of goods, including by mail or courier, in cases where the location of supplier or the location of the recipient of services is outside India • Supply of advertising services • Supply of the co-location services

2. Changes related to goods and services:

2.1 In respect of goods

ENA	• ENA used for the manufacture of alcoholic liquor for human consumption to be kept outside the GST ambit • A separate entry to be inserted for ENA for industrial use, attracting a GST @ 18% rate
Millet flour	• No GST on food preparation of millet flour in powder form, having at least 70% millets by weight, falling under HSN 1901, in case sold without packaging and labelling • If the above goods are sold in pre-packaged and labelled form, GST @ 5% rate is applicable
Molasses	GST rate reduction on molasses from 28% to 5% to increase liquidity with mills and expedite clearance of dues

2.2 In respect of services

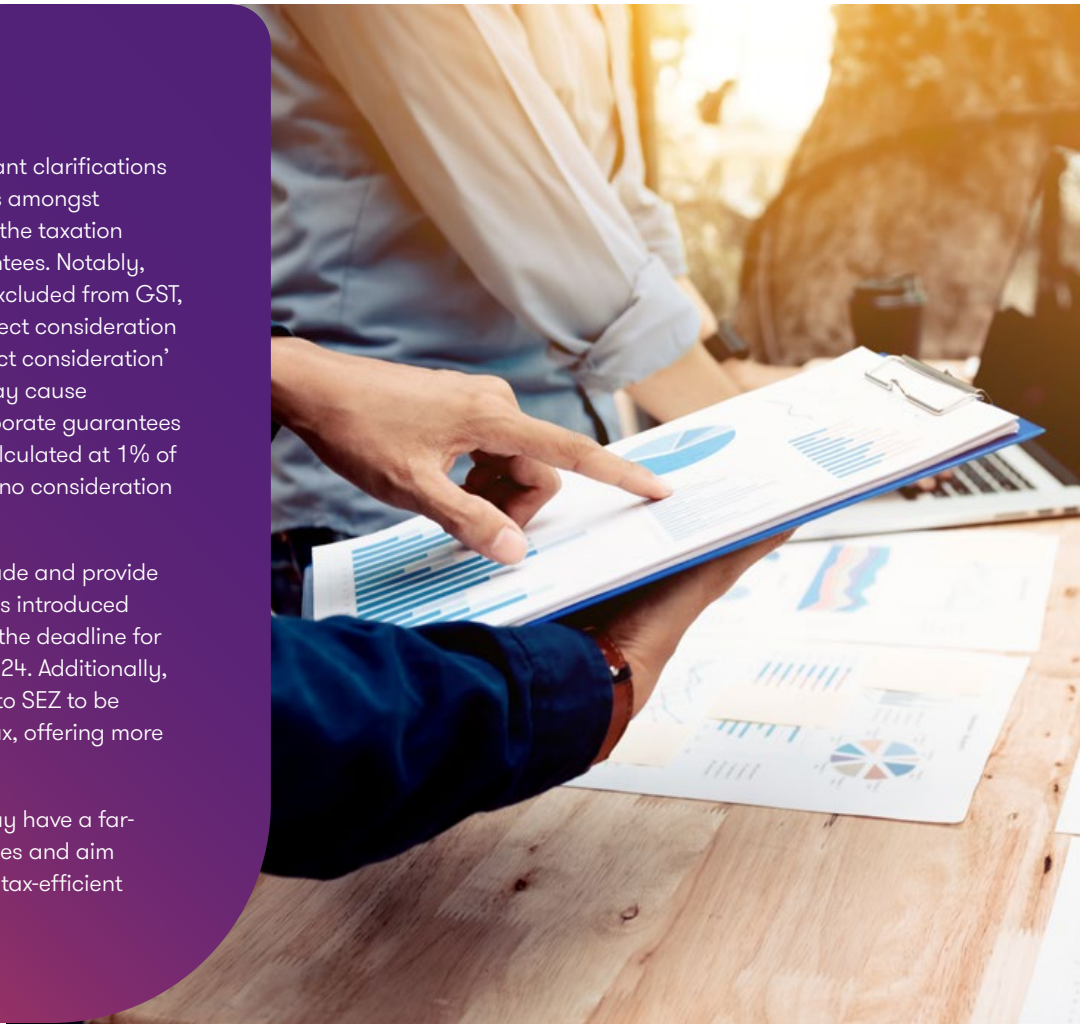
Foreign going vessel	Conditional IGST exemption to be provided to foreign flag foreign going vessel when it converts to coastal run, subject to reconversion to foreign going vessel within six months.
Public services	Exemption on services of water supply, public health, sanitation conservancy, solid waste management and slum improvement and upgradation supplied to the governmental authorities.
Job work services	Job work services for processing of barley into malt leviable to GST @ 5% rate.
GST on bus transportation services	The bus operators organised as companies proposed not to be considered as electronic commerce operators liable to pay GST under section 9(5) of the CGST Act. This would enable them to pay GST on its supplies using ITC.
GST on supply by railways	Supply of all goods and services by Indian Railways to be taxed under forward charge mechanism enabling them to avail ITC.

Our comments

The Council has provided significant clarifications to address longstanding concerns amongst taxpayers, particularly regarding the taxation of corporate and personal guarantees. Notably, personal guarantees have been excluded from GST, provided there is no direct or indirect consideration involved. However, the term 'indirect consideration' is subject to interpretation and may cause litigation. On the other hand, corporate guarantees will now be subject to taxation, calculated at 1% of the guarantee's value, even when no consideration is exchanged.

As part of an effort to facilitate trade and provide relief to taxpayers, the Council has introduced an amnesty scheme that extends the deadline for filing appeals until 31 January 2024. Additionally, the Council has allowed supplies to SEZ to be made with the option of paying tax, offering more flexibility in such transactions.

The Council meeting decisions may have a far-reaching implications on businesses and aim to create a more transparent and tax-efficient environment.



Central government constitutes 31 State Benches of the GST Tribunal

The GST Council, in its 50th meeting, decided to constitute the State Benches of the GST Tribunal in a phase-wise manner. In this respect, the central government has constituted 31 Benches of the GST Tribunal for 36 states, w.e.f. 14 September 2023.

State name	No.	Location
Andhra Pradesh	1	Vishakhapatnam and Vijayawada
Bihar	1	Patna
Chhattisgarh	1	Raipur and Bilaspur
Delhi	1	Delhi
Gujarat	2	Ahmedabad, Surat and Rajkot
Dadra and Nagar Haveli and Daman and Diu		
Haryana	1	Gurugram and Hissar
Himachal Pradesh	1	Shimla
Jammu and Kashmir	2	Jammu and Srinagar
Ladakh		
Jharkhand	1	Ranchi
Karnataka	2	Bengaluru
Kerala	1	Ernakulum and Trivandrum
Lakshadweep		
Madhya Pradesh	1	Bhopal
Goa	3	Mumbai, Pune, Thane, Nagpur, Aurangabad and Panaji
Maharashtra		
Odisha	1	Cuttack
Punjab	1	Chandigarh and Jalandhar
Chandigarh		
Rajasthan	2	Jaipur and Jodhpur
Tamil Nadu	2	Chennai, Madurai, Coimbatore and Puducherry
Puducherry		
Telangana	1	Hyderabad
Uttar Pradesh	3	Lucknow, Varanasi, Ghaziabad, Agra and Prayagraj
Uttrakhand	1	Dehradun
Andaman and Nicobar Islands	2	Kolkata
Sikkim		
West Bengal		
Arunachal Pradesh	1	Guwahati, Aizawl (Circuit), Agartala (Circuit), Kohima (Circuit)
Assam		
Manipur		
Meghalaya		
Mizoram		
Nagaland		
Tripura		

(Notification dated 14 September 2023)

CBIC notifies 28% GST on specified actionable claims, including online gaming, lottery etc., and other provisions effective from 1 October 2023

On 29 September 2023, the CBIC has issued several notifications to prescribe tax rate and give effect to various provisions relating to online gaming, casinos, lottery, betting etc. The notifications are effective from 1 October 2023.

Summary of key amendments:

- The specified actionable claims (i.e., the claims involved in betting, casinos, gambling, horse racing, lottery, or online money gaming) will be taxable @28% under GST.
- The overseas supplier of online money gaming will be required to submit registration application in FORM GST REG – 10. Furthermore, such registered person will be required to file return in FORM GSTR-5A on or before 20th day of the succeeding month.
- Advances received with respect to supply of specified actionable claims will be taxable.
- Supply of online money gaming as goods from outside India will be exigible to IGST as per the GST provisions. The provisions of the customs laws will not be applicable in this case.
- The overseas supplier of online money gaming can obtain a single registration under simplified registration scheme. In this respect, the Principal Commissioner of Central Tax, Bengaluru West and all the officers subordinate to him will be the officers authorised to grant registration.
- In case of supply of online money gaming to unregistered person, the state name of the recipient should be mentioned on the tax invoice, which would be considered as the address on record of the recipient.
- The provisions of the Central Goods and Services Tax (Amendment) Act, 2023 and the Integrated Goods and Services Tax (Amendment) Act, 2023 are effective from 1 October 2023.

(Notification Nos. 11/2023 – Central Tax (Rate), 48/2023- Central Tax to 51/2023- Central Tax, 02/2023 to 04/2023 - Integrated Tax, 14/2023 - Integrated Tax (Rate), dated 29 September 2023)

CBIC notifies rules for valuation of supply of online gaming and actionable claims in casinos

Pursuant to the GST Council recommendations, CGST and IGST Amendment Act, 2023, the CBIC has notified new rules for valuation of supply of online gaming and actionable claims in casinos. These rules have come into effect w.e.f. 1 October 2023.

Rule 31B - Valuation in case of online gaming, including online money gaming

- The value will be the total amount paid/payable to or deposited with the supplier in money or money's worth, by or on behalf of the player.
- The amount returned/refunded by the supplier to the player, including the amount not used by the player, will not be reduced from the value.

Rule 31C - Value of supply of actionable claims in case of casinos

- In cases where tokens, chips, coins, or tickets are purchased, for use in a casino, the value will be the total amount paid/payable by or on behalf of the player to purchase the same.
- Furthermore, where tokens, chips, coins, or tickets are not required, the value will be the total amount paid/payable by or on behalf of the player for participating in any event, in the casino.
- The amount returned/refunded by the casino to the player will not be reduced from the value.

The winnings of the player from any event, which is used for playing in a further event without withdrawing, will not be considered as the amount paid to or deposited with the supplier by or on behalf of the player.

(Notification No. 45/2023- Central Tax dated 6 September 2023)

CBIC notifies 1 January 2024 as the effective date for manufacturers of pan masala and tobacco to follow the special procedure

In accordance with the recommendations of the Group of Ministers on capacity-based taxation and the Special Composition scheme, the GST Council, in its 50th meeting, recommended issuing a notification prescribing a special procedure to be followed by the manufacturers of tobacco, pan masala, etc.

Pursuant to the council meeting recommendation, the CBIC, vide Notification No. 30/2023-Central Tax, dated 31 July 2023, prescribed a special procedure for the manufacturers of specified goods, including pan masala, tobacco, etc., to report the details of packing machines, maintenance of additional records, and the submission of a special monthly statement on the GST portal.

In respect to the above, the CBIC, vide Notification No. 47/2023- Central Tax, dated 25 September 2023, has notified **1 January 2024** as the effective date for manufacturers to follow the special procedure. Further, it shall be deemed to have been inserted w.e.f. 31 July 2023.

(Notification No. 47/2023- Central Tax dated 25 September 2023)

CBIC amends IGST rate notifications to omit provisions related to IGST levy on ocean freight

Earlier, the SC, in the case of Union of India v. Mohit Minerals Private Ltd., struck down the levy of the IGST under the RCM by the importer on ocean freight. It was held that a separate levy on the Indian importer for the supply of services by the shipping line is in violation with the principles of composite supply, as the Indian importer is already liable to pay the IGST on the supply of goods and services, including transportation, insurance, etc., in a CIF contract under composite arrangement.

In order to give effect to the said judgement, the CBIC, vide below notifications, have omitted the provisions related to the taxability of ocean freight w.e.f. 1 October 2023. A summary of said notifications are provided below:

Notification No.	Particulars of the amendment
Notification No. 11/2023-IT(Rate) dated 26 September 2023	Amendment in the rate notification to remove the below mentioned entry for the purpose of taxability: "The services of transport of goods in a vessel by a person located in a non-taxable territory to a person also located in the non-taxable territory from a place outside India up to the customs station of clearance in India has been deleted from the rate notification".
Notification No. 12/2023-IT(Rate) dated 26 September 2023	Amendment in the exemption notification to remove the below mentioned entry: "The services of transport of goods in a vessel by a person located in a non-taxable territory to a person also located in the non-taxable territory from a place outside India up to the customs station of clearance in India has been deleted from the proviso to the exemption notification".
Notification No. 13/2023-IT(Rate) dated 26 September 2023	Omission of entry relating to the reverse charge applicability in case of ocean freight on CIF contracts: "The services of transport of goods in a vessel by a person located in a non-taxable territory to an importer located in the non-taxable territory from a place outside India up to the customs station of clearance in India has been omitted from the RCM notification".

(Notification Nos. 11/2023 - Integrated Tax (Rate) to 13/2023 - Integrated Tax (Rate) dated 26 September 2023)

Time limit of 30 days for reporting of documents on e-invoice portals

The GST authorities have decided to impose a time limit of 30 days from the date of issue for reporting documents on e-invoice portals.

The time limit of reporting will be applicable for taxpayers with an AATO more than or equal to INR 100 crores. Thereafter, the taxpayer will be unable to report documents older than 30 days.

The restriction will apply to all document types for which IRNs are to be generated, including the credit notes and debit notes.

The validation will be effective from **1 November 2023.**

(NIC updated dated 11 September 2023 https://einvoice1.gst.gov.in/)

Active geocoding functionality for additional place of business address

The geocoding functionality for the additional place of business address is now active for all states and union territories. The GSTN has successfully geocoded more than 2.05 crore addresses for both principal and additional places of business. Below are the key features of the functionality:

- The functionality can be navigated to **Services→Registration→ Geocoding Business Addresses** on the portal.
- The system-generated geocoded address will be displayed, which can either be accepted or updated. In case the system-generated geocoded address is unavailable, the geocoded address can be directly updated.
- The saved geocoded address details can be found under **My Profile → Geocoded Places of Business** on the portal.
- Post submission of the geocoding details, the revision in the address will not be allowed.
- Taxpayers who have already geocoded their addresses through the new registration or core amendment will not be required to do this.
- The functionality will not affect the previously saved address record.

(https://www.gst.gov.in/newsandupdates/read/603)

Government of Goa notifies The Goa (Recovery of Arrears of Tax, Interest, Penalty, Other Dues through Settlement) Act, 2023

The government of Goa has notified The Goa (Recovery of Arrears of Tax, Interest, Penalty, Other Dues through Settlement) Act, 2023, for settling outstanding tax dues pertaining to the period before the introduction of the GST, which is effective from 8 September 2023.

Key features of the scheme:

Enactments covered: Expeditious enforcement of payment of arrears of tax, penalty and/or interest in respect of the period of assessment up to 30 June 2017 under the following acts, also known as 'relevant acts':

The Central Sales Tax Act, 1956 Tax Act, 1956	The Goa Entertainment Tax Act, 1964
The Goa Sales Tax Act, 1964	The Goa Tax on Luxuries Act, 1988
The Goa Tax on Entry of Goods Act, 2000	The Goa VAT Act, 2005

- Cases where the appellate or revisional authority, or court, has remanded the case back to the assessing authority for fresh assessment and such assessment has not been completed up to this Act's commencement date.
- Cases, which have been assessed or reassessed u/s 31 or 31A of the Goa VAT Act, 2005 pursuant to action u/s 73 of the Goa VAT Act, 2005 shall not be eligible for the adjustment of arrears.
- A disputed and pending case in appeal shall be eligible for settlement under the category of disputed cases only if such appeal is filed within the prescribed limitation period or an extended limitation period and is accompanied by the pre-deposit.
- Cases that have been settled under the Goa (Recovery of Arrears of Tax through Settlement) Act, 2009, shall not be re-opened, except in the case where the application for settlement has been rejected on merits or for non-payment of the settlement amount in time or for any other reason, and in such case, the applicant shall be eligible to submit a fresh application.

Settlement fee and waiver amount:

Reason of arrears	Waived amount	Settlement fees
Non-submission of declaration form or declaration certificate. Order of assessment and where no review, appeal, or revision is preferred.	100% waiver of interest and/ or penalty imposed.	80% of arrears of tax shall be waived after the adjustment of forms or a declaration certificate submitted till the date of application under the scheme.
Order of assessment is disputed, either in review or appeal or in revision, or in any other suit or writ petition.	100% waiver of interest and/ or penalty imposed.	50% of arrears of tax shall be waived after the adjustment of forms or declaration certificate submitted till the date of application under the scheme.
Order of assessment or reassessment u/s 31 or 31A of the Goa VAT Act, 2005 pursuant to action u/s 73 of the Goa VAT Act, 2005, whether disputed or not.	100% waiver of interest.	100% of the tax arrears and 50% of the penalty imposed.
The arrear of tax is less than INR 10,000/-	100% waiver of tax, interest and/or penalty.	No settlement amount to be paid.
A certificate of settlement is issued.	The entire post-assessment interest shall be waived off.	

- An application shall be made online through an electronic system after one month but before the expiry of six months from this act's commencement date. A separate application is to be made for each year.
- The application shall be accompanied by self-attested challans of pre-deposit at the rate of 10% of the settlement amount or INR 15 lakhs, whichever is lower.
- No application is required to be filed where an amount of tax in arrears for a FY is below INR 10,000.
- The application can be withdrawn within six months from the date of submission of such application or within one month from the date of receipt of the letter of intimation. However, no refund shall be granted for the pre-deposit paid while applying under the scheme.
- Set-off mechanism to be adopted where the applicant whose appeal is pending before the Appellate Authority under the relevant act or before the Tribunal and had paid some amount u/s 35(4) or 36(2) of the Goa VAT Act, 2005.

Amount paid as on filing appeal	Eligible for set-off or not
10% or 50% of the disputed amount of tax.	Yes
10% or 50% of the disputed amount of interest and penalty.	No
10% or 50% of the disputed amount of penalty.	Yes, set-off is allowed for the settlement amount of penalty, but the balance amount should not be refunded.
10% or 50% of the disputed amount of interest.	No, set-off against the settlement amount of tax and shall not be refunded.

- Where 10% or 50% of the disputed amount of tax is paid, along with the appeal, and there is no further amount payable for settlement, then the authority shall issue a certificate of settlement to the applicant, and the applicant shall be discharged from his liability.
- Also, in cases where any appeal or application for review/revision/rectification is not filed under the provisions of the relevant act, the applicant shall not be eligible for a refund of any penalty or interest already paid, either in full or in part.

(Notification No. 7/30/2023-LA dated 8 September 2023)

B. Key updates under the Customs/FTP/SEZ laws

CBIC issues circular implementing Ex-Bond Shipping Bill in ICES

Sections 68 and 69 of the Customs Act deals with the provisions relating to the clearance of warehoused goods for home consumption and for export, respectively. While there has been a BoE format for clearing goods for home consumption, there was no equivalent format available for the export of warehoused goods.

In response to this, the CBIC, vide Circular No. 22/2023 – Customs, dated 19 September 2023, has introduced a new Ex-Bond SB format in ICES 1.5 for the export of warehoused goods from bonded warehouses. The salient aspects have been covered below:

- A single ex-bond SB can be filed against the goods imported under multiple in-bond BoE.
- Separate SB are required in case of for export of goods from multiple warehouses.
- Provisions of automatic quantity debit once the SB is successfully verified.
- Any amendments made in the SB are automatically linked with the ledger quantity.

This type of SB is only applicable for the export of warehoused goods, and not for other goods. There is a specific exclusion in the case of export of goods resulting from manufacturing or other operations under Section 65 in a bonded warehouse. However, if the goods imported in a warehouse, where permission has been granted under Section 65, are exported as such, then the ex-bond SB can be filed.

Further, no incentive such as drawback, RoDTEP/RoSCTL benefit, AA/EPCG, etc., shall be available for such cargo and the SB would be a free SB.

[Circular No. 22/2023-Customs dated 19 September 2023]

DGFT clarifies treatment to be given for various export-import scenarios in respect of AA scheme issued on or after 13 October 2017 till 9 January 2019

Recently, in the case of Cosmos Films Limited, the SC upheld the requirement of the 'pre-import condition' incorporated in the FTP 2015-2020 and HBP 2015-2020 to claim exemption of the IGST and Compensation Cess on inputs imported for the manufacture of export goods, based on the AA scheme. Further, the SC directed the Revenue to permit a claim of refund or input credit (whichever was applicable and/or wherever the customs duty was paid).

Pursuant to the above, the CBIC issued Circular No. 16/2023-Cus, dated 7 June 2023, highlighting the procedures that can be adopted for the imports that could not meet the pre-import condition and are required to pay the IGST and Compensation Cess to that extent at the POI. In addition, the DGFT, vide Trade Notice No. 07/2023-24, dated 8 June 2023, clarified that all the imports made under the AA scheme on or after 13 October 2017 till 9 January 2019 (the relevant period), which could not satisfy the pre-import condition, may be regularised by making payment as prescribed in the circular stated above.

Considering the difficulties faced by the regional authorities, the DGFT, vide Trade Notice No. 27/2023, dated 25 September 2023, has clarified the treatment to be given for various export-import scenarios in respect of the AA scheme issued in the relevant period as under:

Issue	Clarification
Whether a violation of the pre-import condition be considered in the case of the AA under which exports have been made in the relevant period and imports have been made on or after 10 January 2019?	No violation of the pre-import condition.
Will the pre-import condition be applicable in case the AA has been issued on or before 9 January 2019 and the imports made on or after 10 January 2019?	The pre-import condition is not applicable.
Is the pre-import condition applicable to imports made on or after 10 January 2019 in the case of the AA, under which imports partly made up till 9 January 2019 and remaining on or after 10 January 2019?	Imports made on or after 10 January 2019 will not be subject to the pre-import condition.
Will the pre-import condition be applicable if the imports were made under the AA on payment of the IGST and Compensation Cess?	Imports will not be subject to the pre-import condition, irrespective of the date of import.

(Trade Notice No. 27/2023, dated 25 September 2023)

DGFT extends RoDTEP scheme for exports made from 1 October 2023 till 30 June 2024

The RoDTEP scheme has been implemented for exports made w.e.f. 1 January 2021. The scheme rebates various central, state, and local duties/taxes/levies that are not refunded under other duty remission schemes. The rebate under the scheme is provided by way of transferable duty credit electronic scrip (e-scrip).

The list of export items eligible under the scheme is provided under Appendix 4R, along with the rates and per unit value caps applicable for exports made till 30 September 2023.

The DGFT has extended the scheme for exports made from 1 October 2023, and it shall be applicable till **30 June 2024**. Accordingly, the existing rates for all the items covered under the RoDTEP scheme will be applicable for the exports made from 1 October 2023 to **30 June 2024**.

(Notification No. 33/2023, dated 26 September 2023)

02

Key judicial pronouncements

A. Key rulings under the GST and erstwhile indirect tax laws

I. Key rulings under the GST laws

Amendment prescribing comparison between tax invoice and shipping bill for computation of refund has a prospective effect – Jharkhand HC

Summary

The Jharkhand HC has held that a change in policy can only be brought by an amendment in the parent act and shall have a prospective application. The HC adverted to explanation to Rule 89(4) of the CGST Rules, and clarified that the stipulation of comparing value of export with FOB for determining refund, shall have a prospective application. The HC affirmed that the amendment inserted is a substantive change and not clarificatory or declaratory. Further, the amendment is not in line with the comparison of value of export, and the SB, which can either be CIF or FOB values for computing refund, as stipulated by Circular No. 125/44/2019-GST, dated 18 November 2019 (impugned circular).

Facts of the case

- Tata Steel (the petitioner) procures coal from vendors for manufacturing iron and steel upon the payment of requisite GST and Compensation Cess.
- The petitioner undertakes the export of goods under a bond/LUT, i.e., without payment of outward tax, which results in the accumulation of the ITC of the Compensation Cess charged on the supply of coal.
- For the period from January to February 2019 (disputed period), the petitioner could not determine the price of the exported goods with certainty. As a uniform practice, the petitioner furnished the 'cost price' of such goods as 'taxable value', as well the 'invoice value', and declared the same in the GSTR-1 return of the said months.
- Pertinently, the details of SBs were also required to be furnished in GSTR-1. However, in the event of non-availability of such details, it was permitted to update the same by amending Table 9 of the subsequent GSTR-1 return.
- The petitioner, on becoming aware of the final price of goods as reflected in SBs at the time of actual export, updated the details in Table 9A of the GSTR-1 return in September 2019.
- Subsequently, the petitioner applied for refund of the unutilised ITC in respect of the disputed period as per the prescribed formula basis the updated actual value of exports.

- Subsequently, an SCN was issued, indicating that the value of the 'turnover of zero-rated supply of goods' could not be ascertained with certainty.
- However, on the basis of the impugned circular, which stipulates considering the lower of the values indicated in the tax invoice and the SB, the department refunded the partial amount and denied the refund of the balance amount, considering the lower value.
- The subsequent appeal of the petitioner was denied. Therefore, the present writ petition was preferred by the petitioner.

Jharkhand HC's observations and judgement [WP(T) No. 1719/2022; Order dated 21 August 2023]

- **Substantive change in law operates prospectively:** The HC observed that initially Rule 89(4) of the CGST Rules contemplated the actual transaction value for the purpose of calculation of the refund amount. Subsequently, Rule 89(4) was amended by Notification No. 14/2022 dated 5 July 2022 (amendment notification), and an explanation was inserted. The HC opined that since a substantive change was brought in the law, it should have a prospective effect. The HC specifically pointed out that the same can also be inferred from the indication of the date of application provided in the amendment notification.
- **Change in policy cannot be affected by a circular:** The HC opined that merely because the term 'explanation' has been used, it does not indicate that the amendment is clarificatory or declaratory. While the impugned circular contemplated comparison between the value of export in the tax invoice and in the SB, which can either be FOB or CIF value, the amended explanation required the comparison of value in the tax invoice with only the FOB value. Accordingly, the explanation was not on similar lines with the circular. Additionally, the HC adverted that the policy can be changed only by introducing an amendment in the parent Act, and not by a circular.

Our comments

This is a welcome ruling for the exporters claiming refund prior to insertion of the said explanation. This judgement prominently addresses and clarifies the pertinent issue of jurisdiction. By clarifying that policy changes can only be made by way of amendment in the parent act, the HC has restricted the jurisdiction of the department.

It has been affirmed that the department cannot extend its jurisdiction by bringing a policy change by means of a circular. It is trite that a circular must be within the four corners of the parent act. In the present case, the Act or Rules nowhere contemplated the comparison of values of a tax invoice and a SB, and consideration of lower of the two for the purpose of the computation of refund. Accordingly, the amendment, which was brought by the explanation inserted in the Act, shall have a prospective effect.

Further, placing reliance on the celebrated judgement of the SC in the case of Union of India v. Martin Lottery Agencies Ltd., the HC elucidated that merely the usage of an explanation is not indicative of the amendment being clarificatory or declaratory in nature.

Delivery of specialised services via electronic medium does not qualify as OIDAR services – Bombay HC

Summary

The Bombay HC held that merely transferring files via an electronic medium does not qualify these services as OIDAR services. The HC noted that in the present case, services involved specialised work that would not be freely available on the internet. The HC referred to the relevant clauses of the service agreement and ruled that the services qualify as export of services. Further, in light of the principle of substance over form, the HC held that the Appellate Authority had misconstrued the purport and intent of the agreement.

Facts of the case

- Globolive 3D Private Limited (the petitioner) entered into a service agreement with M/s. Emirates Defence Industries Co. PJSC (service recipient) to provide technical services for the production of 3D city models of three cities - Abu Dhabi, AL Ain and Al Dhafra, as per specifications provided by the service recipient.
- The petitioner imported VHR stereo satellite images from M/s. 4 Earth Intelligence Limited (vendor) to provide the services.
- After processing and digitising the satellite images, the petitioner produced satellite models, which were shared online via file transfer protocol.
- The petitioner contended that the transaction amounted to the export of services, and hence, it was entitled to a refund of unutilised ITC, which was initially sanctioned by the department (the respondent). Subsequently, the refund order was reviewed and concluded as not legal and proper.
- The department stated that the services provided by the petitioner qualify as OIDAR services, not as export of services. The Appellate Authority allowed the department's appeal.
- Therefore, the petitioner filed the present writ petition for setting aside the order in appeal and granting a refund of the ITC on account of the export of services.

Bombay HC's observations and judgement [Writ Petition No. 39/2023; order dated 24 August 2023]

- **Services qualify as export of services:** The HC referred to the relevant clauses of the service agreement and observed that the service recipient had engaged the petitioner to provide the said technical services based on experience, skill and knowledge. The HC noted that the recipient of services, not being an establishment of a distinct person, was located outside India, the place of supply was agreed to be outside India, and the payment for the services was in convertible foreign exchange. Accordingly, the petitioner qualified the conditions prescribed for the export of services.
- **Mere delivery of specialised services through electronic medium cannot render the services as OIDAR:** The HC explained the definition of OIDAR and stated that the petitioner's service is not merely a delivery of the nature mediated by information technology over the internet or is a delivery available on an electronic network, and the nature of which would render their supply essentially automated without and/or with minimal human intervention. The HC held that merely transferring the file through an electronic medium did not imply that the services were OIDAR services. Further, the services pertained to specialised work, which would not be freely available on the internet, and hence, do not fall under the preview of OIDAR services.
- **Substance over form would hold importance:** The HC stated the SC's ruling in the case of Bhopal Sugar Industries Ltd., wherein it was held that it is a well-settled principle that while interpreting the terms of the agreement, the court would be required to look at the substance rather than form of the agreement. Accordingly, the HC held that the Appellate Authority had misconstrued the purport and intent of the agreement.

Our comments

The concept of OIDAR services was introduced under the service tax regime, which has been continued even under the GST law.

In the present ruling, the HC interpreted the definition of OIDAR services in detail and ruled that the petitioner's specialised service is not merely a delivery mediated by information technology over the internet or an electronic network characterised essentially by automated supply without/with minimal human intervention.

Further, it is important to note that for the purpose of interpretation of terms of agreement, the principle of substance over form shall prevail. Earlier, the SC, in the case of Bhopal Sugar Industries Ltd, had also held the same.

This is an important ruling and may set precedence in similar matters.

Non- reflection of invoices in FORM GSTR-2A cannot be sufficient ground for denying input tax credit - Kerala HC

Summary

The Kerala HC quashed the assessment order passed by the Appellate Authority rejecting the ITC on the ground of merely non-reflecting invoices in FORM GSTR-2A. The HC held that the petitioner is burdened to prove the authenticity of transactions between it and the supplier using facts and evidence. Further, the HC directed the appellate authority to give the petitioner the opportunity to submit evidence regarding the ITC claimed and ruled that the petitioner should be allowed the ITC if the appellate authority concludes that the claim is bonafide and genuine.

Facts of the case

- Diya Agencies (the petitioner) availed ITC during the FY 2017-18 under the heads 'CGST' and 'SGST'. The department has denied an excess claim of ITC amounting to approximately INR 1 lakh under the 'CGST' and 'SGST' heads on the ground that such credit amount was not reflected in FORM GSTR-2A.
- Aggrieved by the assessment order, the appellant filed a writ petition before the HC.

Petitioners' contentions

- The petitioner contended that it had fulfilled all the conditions for availing of the ITC prescribed u/s 16(2) of the CGST Act. Further, the availability/non-availability of the ITC in FORM GSTR 2A is not in the petitioner's control, and the appellate authority should independently examine the ITC of the assessee irrespective of the amount mentioned in FORM GSTR-2A.
- The petitioner also submitted that in the absence of a deposit of tax by the supplier, the appellate authority cannot ask the petitioner to pay the tax again.
- The petitioner referred to the press release, clarifying that FORM GSTR-2A is in the nature of taxpayer facilitation and should not impact the taxpayer's ability to claim ITC based on self-assessment. Further, it is incorrect to believe that the ITC can be availed based on a reconciliation between FORM GSTR-2B and FORM GSTR-3B before the due date for filing FORM GSTR-3B for a particular month; the same exercise can be done thereafter also.
- The petitioner relied on the HC's decision in the case of Suncraft Energy Private Limited, wherein it was held that the appellate authority should act against the selling dealer if it is found that the dealer had not deposited the tax paid by the assessee. Further, in the SC's decision, in the case of Bharti Airtel Ltd, it was held that FORM GSTR-2A is a facilitator for self-assessment, and it should not impact the ITC availed.

Kerala HC's observations and order (W.P.(C) 29769/2023, order dated 12 September 2023)

- **Burden of proof establishing genuineness of transaction lies with the recipient:** The HC relied upon the SC's decision in the case of Ecom Gill Coffee Trading Private Limited and held that the petitioner has the burden of proving the authenticity of transactions between him and the supplier using facts and evidence. Further, upon perusal of the assessment order, the HC stated that the petitioner cannot be held responsible for the amount not remitted by the supplier.
- **Rejection of ITC merely due to non-appearing in FORM GSTR-2A is not a sufficient ground:** The HC found that the order was not sustainable in terms of denying the ITC. Therefore, the HC directed the appellate authority to give the petitioner an opportunity to submit evidence regarding the ITC claim. The HC further held that the petitioner should be allowed the ITC if the appellate authority concludes that the claim is bonafide and genuine.

Our comments

Earlier, in the pre-GST era, the SC, in the case of Ecom Gill Coffee Trading Private Limited, had stated that the purchasing dealer has to prove beyond doubt the actual transaction by furnishing the details of the selling dealer, details of the vehicle, payment of freight charges, acknowledgment of taking delivery of goods, tax invoices, and payment particulars, etc. Similarly, under the GST regime, taxpayers have the opportunity to prove the genuineness of their ITC claims by providing evidence.

Recently, the Calcutta HC, in the case of Suncraft Energy Private Limited, also held that the recipient cannot be asked to reverse the ITC in case of a mismatch in returns without investigation on the supplier.

The present ruling is a significant development under the GST era, which emphasises that non-reflection of the ITC in FORM GSTR 2A cannot be a sufficient ground for denial. This ruling may provide relief to businesses facing similar issues and shall set precedence.

Indian subsidiary engaged in providing software services to its foreign holding cannot be treated as merely establishment of a 'distinct person' – Delhi HC

Summary

The Delhi HC has held that the services provided by an Indian subsidiary to its parent company qualify as exports, and the subsidiary cannot be treated as the establishment of a 'distinct person.' The HC has cited the CBIC's circular, which clarifies that the supply of services by a subsidiary/sister concern/ group concern of a foreign company incorporated in India to the establishments of the said foreign company located outside India, would not be treated as merely the establishment of distinct persons. Further, the HC has ruled that the respondent's submission that the petitioner acted as an intermediary is invalid since the services provided by the petitioner are on its own account and not facilitated by the provision of services from any third-party services provider.

Facts of the case

- Xilinx India Technology Services Private Limited (the petitioner) is a registered EOU engaged in the export of information technology software services to its holding company. With respect to such services, the petitioner claimed the benefit of the export of services and filed a refund application.
- The department issued an SCN and rejected the refund application on the ground that the petitioner and its holding company are the establishments of a single person, and hence, the services did not constitute as export of services.

Petitioner's contentions:

- The petitioner submitted that it was incorporated as an independent entity in India, and its supplies to its holding companies should be considered export of services.
- The petitioner referred to the CBIC's Circular No.161/17/2021-GST, which clarifies that a subsidiary incorporated in India under the Companies Act 2013 and its holding company incorporated outside India are independent entities. Therefore, they should not be treated as mere establishments of a distinct person.

Respondent's contentions:

- The respondent denied the petitioner's refund request without referring to the circular. Further, the respondent considered the petitioner as an intermediary, and hence, the services provided by the petitioner to its parent company would not qualify as exports.

Delhi HC's observations and order (W.P.(C) 11413/2023, Order dated 1 September 2023)

- **Interpretation of an independent entity:** The HC relied upon the SC's decision in the case of Bacha F. Guzdar, wherein it was held that the identity of an incorporated company is separate from that of its shareholders. Accordingly, the HC held that the petitioner is a distinct and independent legal entity.
- **Service provided by subsidiary company qualifies as export of service:** The HC cited the circular (supra) and held that there is no dispute that the services provided by a subsidiary of a foreign firm to its holding are not covered under Section 2(6)(v) of the IGST Act. Therefore, services provided by the petitioner to its parent company qualify as export of service.
- **Services provided on own account:** The HC noted that the services provided by the petitioner are on its own account and not facilitated by the provision of services from any third-party services provider. Therefore, the respondent's submission that the petitioner acted as an intermediary is invalid, considering the petitioner provided services on a principal-to-principal basis.

Our comments

Under the service tax regime, the Gujarat HC, in the case of Linde Engineering India Pvt. Ltd., held that a company incorporated in India and its holding company incorporated outside India are both distinct persons. Therefore, being distinct artificial juridical persons, they cannot be treated as merely the establishments of the same company, and hence, the benefit of the export of services should be available. Although the decision pertains to the erstwhile regime, an analogy can be drawn under the GST regime, considering similar provisions.

Recently, the Tamil Nadu AAR, in the case of Luksha Consulting Private Limited, also held the same view.

The present ruling is in line with the above and will set precedence in similar matters. In this ruling, the Delhi HC was displeased with the department's manner of passing the impugned order without considering the settled law and further emphasised that these actions by the department not only increased the unnecessary cost of tax litigation but also eroded taxpayers' trust in the tax department. Hence, this ruling may discourage the Revenue authorities from issuing notices without carefully examining the relevant facts and provisions.

Patna HC upholds constitutional validity of Section 16(4) of the CGST Act

Facts of the case

- The assessee filed its monthly returns in Form GSTR-3B for the period February 2019 and March 2019 in October 2019, and November 2019, respectively.
- The Assistant Commissioner issued an SCN u/s 73 of the CGST Act proposing to disallow the ITC on the ground of late filing of Form GSTR 3B.
- The Assistant Commissioner held that the ITC availed was in breach of Section 16(4) of the CGST Act, and therefore, the ITC deserved to be disallowed. Thereafter, the Additional Commissioner upheld the original order confirming demand, along with the interest and penalty.
- Aggrieved by the order, the petitioner filed a writ petition before the Patna HC.

Petitioner's contentions

- The ITC under Section 16(4) of the CGST Act, being in the nature of tax paid at the stage of purchase, is a vested right under Article 300A of the Constitution of India and cannot be taken away on the ground of belated filing of return.
- Section 16(4) of the CGST Act may be read down by this court and it may be held that the embargo in the said provision would apply only to restrict claim of ITC in respect of only such invoices or debit notes received after the end of the FY beyond September of the preceding FY and not such claims in a belated return filed after such date.
- The conditions prescribed in Section 16(4) of the CGST Act are procedural in nature and cannot override the substantive conditions as mandated in Sections 16(1) and 16(2) of the CGST Act.
- This provision imposes unreasonable and disproportionate restriction on right to freedom of trade and profession guaranteed under Article 19(1)(g), and it, therefore, violates Article 300A and is in teeth of Article 13 of the Constitution of India.

Respondent's contentions

- The ITC is a benefit/concession given to a registered person, which can be availed only in accordance with the CGST Act. Further, the statutory scheme under Section 16 of the CGST Act with restriction available under sub-section (4) thereof has uniform application and cannot be said to be either arbitrary or violating any right guaranteed to a registered person under Article 19(1)(g) of the Constitution of India.
- The Respondent cited the SC's decision in the case of ALD Automotive Pvt Ltd, wherein it had been held that the requirement under Section 16(4) of the CGST Act is a condition precedent of mandatory nature for availing the ITC.
- All the provisions under Section 16 of the CGST Act are substantive in nature and do not conflict with any provision under Sections 39, 47 or 49(2) of the CGST Act.

Patna HC's key observations

- The doctrine of reading down applies only when general words used in a statute or regulation should be construed in a particular manner, so as to save its constitutionality.
- The language used in Section 16 of the CGST Act does not suffer from ambiguity and clearly stipulates grant of the ITC subject to the conditions and restrictions.
- The provision under Section 16(4) of the CGST Act is one of the conditions that makes a registered person entitled to take the ITC, and by no means it can be said to be violative of Article 300A of the Constitution of India.
- Fiscal legislation having uniform application to all registered persons cannot be said to be violative of Article 19(1)(g) of the Constitution and the question of such statutory provision being violative of Article 302 of the Constitution and in teeth of Article 13 of the Constitution of India does not arise at all.
- Section 16(4) of the CGST Act is constitutionally valid and is not violative of Articles 19(1)(g) and Article 300A of the Constitution of India. The said provision is not inconsistent with or in derogation of any of the fundamental rights guaranteed under the Constitution.

Rajasthan HC directs Union of India to suggest mechanism for matching exercise under GST

A writ petition was filed by Hindustan Unilever Limited (D.B. Civil Writ Petition No. 13617/2023) before the Rajasthan HC w.r.t. the issue of absence of a proper mechanism of the matching of a credit note of the supplier with the reversal of the ITC by the recipient.

Petitioner's contentions:

- Earlier, there was a provision under Section 43 of the CGST Act obligating the matching exercises to be undertaken by the department. However, this provision has been omitted.
- It is not practically possible for the petitioner to submit a certificate after obtaining the same from the recipient as proof of the reversal of credit.
- The department should undertake the matching exercise, and the claim of reduced liability should not be dependent upon the production of any certificate or proof of the ITC reversal by the recipient.

HC's key observations:

- The HC noted that the petitioner has questioned the validity of the provision more on the grounds of difficulty in collecting such certificate/proof from the recipient.
- In absence of any statutory obligation upon the department to undertake a matching exercise, if the petitioner is willing to claim reduction in tax liability, the proof of reversal by the recipient is to be provided by the supplier.
- The HC has not granted any interim stay but has however directed the department to bring in place an appropriate mechanism before the court.

Calcutta HC disallows clubbing of refund claim of taxpayer with output tax invoice

A writ petition was filed by Abinash Rai (WPA/1906/2023) before the Calcutta HC w.r.t. the issue of clubbing of the refund claim of the taxpayer with the output tax invoice.

Facts of the case

- The petitioner filed a refund application of unutilised ITC on account of zero-rated supply without payment of tax.
- The department issued an SCN to the petitioner, alleging that the petitioner is not entitled to refund, and thereafter, being unsatisfied with the reply furnished by the petitioner, rejected the entire refund claim.
- The aggrieved petitioner filed an appeal, which was disposed of by the appellate authority. However, later, the impugned order was modified by the appellate authority, allowing proportionate refund amount.

Petitioner's contentions

- The clubbing of the refund claim with output tax invoice by the appellate authority is unreasonable and without authority of law.
- There is no provision under the Act that allows the authority to reject a particular claim, and thereafter, club and recover the same from the petitioner.
- After passing of the appellate authority's impugned order, the petitioner has paid INR 4,76,626/- pertaining to the tax invoice.

Calcutta HC's key observations

- The clubbing of the refund claim with the outward supply invoice is without authority of law.
- Even if a partial refund claim was rejected, the simultaneous recovery of such amount is impermissible.
- The HC set aside the impugned order to the extent of rejection of claim on account of a taxable invoice and remanded back the matter to the appellate authority to consider the claim in accordance with law.

II. Key rulings under the erstwhile indirect tax laws

Appeal can be restored if appellant is unsuccessful in availing benefit under Amnesty Scheme - SC

Summary

In a significant ruling, the SC has held that the appellant can seek restoration of the appeal when it is unsuccessful in benefiting from the Amnesty Scheme. The SC noted that the withdrawal of the appeal was a pre-condition under the Amnesty Scheme. However, this did not prevent the appellant from pursuing his statutory remedy. The SC further stated that since the appellant did not avail any benefit under the Amnesty Scheme, he was entitled to be heard in the appeal on merits.

Facts of the case:

- P. M. Paul (the appellant) is a dealer registered under the KVAT Act. The sales tax officer cancelled the appellant's KVAT registration, assuming that he had permanently closed his business since no transactions had occurred and the dealership registration was not renewed.
- The appellant challenged the sales tax officer's order before the Joint Commissioner (Appeals) and contested an assessment order imposing a tax liability.
- While the matters were pending before the appellate authority, the appellant tried to take advantage of an amnesty scheme introduced by the government of Kerala and withdrew the appeal in order to be eligible for the scheme. However, the appellant could not avail any benefit under the Amnesty Scheme, as he failed to pay the required amount.
- Therefore, the appellant sought the restoration of his appeal against the sales tax officer's order, which was dismissed by the appellate authority, stating that there were no valid grounds for seeking restoration.
- Further, the appellant filed a writ petition before the Kerala HC to challenge the order of the dismissal, wherein the HC upheld the appellate authority's order.
- Aggrieved by the decisions, the appellant appealed to the SC.

Issue before the SC:

- Whether the appellant can seek the restoration of his appeal after initially withdrawing it as a pre-condition for availaing benefits under the Amnesty Scheme?

SC's observations and order (SLP 8386/2023, Order dated 1 September 2023)

- **Unsuccessful Amnesty Scheme application:** The SC noted that the appellant had initially withdrawn his appeal as a pre-condition to avail the benefit of the Amnesty Scheme introduced by the government, which required the absence of pending proceedings. However, the appellant's decision to withdraw the appeal did not result in the successful application of the Amnesty Scheme, which became a crucial factor in this case.
- **No legal bar for seeking restoration:** The SC emphasised that no legal bar prevents the appellant from seeking the restoration of his appeal once he was unsuccessful in obtaining the benefits under the Amnesty Scheme. The SC clarified that the withdrawal of the appeal was done to fulfil the prerequisite condition under the Amnesty Scheme. However, this did not permanently preclude the appellant from pursuing his statutory remedy.
- **Right to seek statutory remedy:** The SC recognised that the appeal is a statutory remedy available to the appellant, highlighting that the withdrawal was a procedural step related to the Amnesty Scheme rather than a forfeiture of his legal rights. Additionally, the SC granted the appellant the liberty to seek interim relief before the appellate authority, with the instruction that any such application should be considered expeditiously and in accordance with the law, thereby ensuring the protection of his rights during the appeal process.

Our comments

This is a significant and welcome ruling, wherein the SC has ruled that as the appeal is a statutory remedy, there is no specific restriction on seeking the restoration of the appeal if the assessee is not successful in availing benefit under the Amnesty Scheme.

The SC has also provided liberty to the assessee to seek interim relief before the appellate authority. Thus, the ruling will provide relief and safeguard taxpayers from undue hardship caused by the authorities in similar cases.

Considering that the government has recently introduced various amnesty schemes for clearing pending litigations under erstwhile indirect tax laws, this ruling may be relevant for businesses that have applied for availing benefits under various amnesty schemes but were unsuccessful.

B. Key judicial pronouncements under Customs/FTP/ SEZ laws

Circular prescribing time limit for amendment in SB in the absence of a substantive provision in the law is illegal and without jurisdiction – Bombay HC

Summary

The Bombay HC has held that the impugned circular prescribing a time limit for amendment in the SB in the absence of any substantive provision in the Customs Law is illegal and without jurisdiction. The HC noted that prior to the amendment in Section 149 of the Customs Act, there was no power/ authority vested in the central government to prescribe any time frame. The HC opined that the circular prescribing the time limit was issued during the period wherein there was no substantive power under the Customs Law to prescribe such time period, and therefore, was in violation of the statute. Accordingly, the HC held that the impugned circular, to the extent it incorporates the time limit for amendment in the SB, was ultra vires of Article 14 of the Constitution of India and Section 149 of the Customs Act.

Facts of the case

- Todi Rayons Private Limited (Petitioner No. 2), which is an importer and merchant exporter, had imported goods under the AAS for carrying out the manufacturing process of the final product for the purpose of export. It had sold the goods to Colossustex Private Limited (Petitioner No. 1) and also exported goods vide a Let Export Order to fulfil its EO, so as to avail the benefit of the AA on or before 31 March 2021.
- The DGFT extended the EO period of the specified advance and EPCG authorisations for those advance authorisations where the original or extended EO period expired during the period from 1 August 2020 to 31 July 2021 till 31 December 2021. Therefore, petitioners No. 1 and 2 requested the Revenue to amend the SBs from one scheme to the other as per the provisions of Section 149 of the Customs Act.
- The Assistant Commissioner rejected the request made by the petitioners in light of Circular No.36/2010 Customs dated 23 September 2010 (impugned circular), which provided that the request for conversion of the SBs has to be made within three months from the date of the Let Export Order.
- Aggrieved by such rejection, the petitioners have filed a present writ before the Bombay HC, challenging the legality of the impugned circular.

Bombay HC's observations and ruling [Writ Petition No. 2010 of 2022, Order dated 23 August 2023]

- **No authority/power vested with the central government:** The HC noted that prior to the amendment in Section 149 of the Customs Act, there was no authority and/or any power vested in the central government to prescribe any time frame and/or restrictions and conditions to be imposed on amendment of the documents as stipulated in Section 149 of the Customs Act. The central government could exercise power, provided such power and authority was conferred by Section 149 of the Customs Act, which is the only provision under the Customs Act that provides for amendment to the documents.
- **Not permissible for the central government to issue the impugned circular:** The HC observed that the impugned circular was issued during the period when there was no substantive provision under the Customs Law to prescribe any time frame for amendment. Thus, it was not permissible for the central government to issue the impugned circular, and, more particularly, prescribe the timelines.
- **Impugned circular is illegal and bad, and ultra vires to the Customs Law:** The impugned circular, at the time when it was issued, cannot be traced to any authority, power and jurisdiction vested with the CBEC, considering the provisions of Section 149 of the Customs Act as it stood. Therefore, the impugned circular could not have been issued by the CBEC, prescribing for a three-month time period to make a request for amending the bills as per Section 149 of the Customs Act, when no timeline was prescribed. Thus, the impugned circular, to the extent it prescribes a time limit, was ultra vires of Article 14 of the Constitution of India as well as ultra vires of Section 149 of the Customs Act.

Our comments

On a similar issue earlier, the Gujarat HC, in the case of M/s. Mahalaxmi Rubitech Ltd., had held that the impugned circular, to the extent it prescribes the time limits in Para 3(a), was ultra vires the provisions of Article 14 of the Constitution of India, as well as Section 149 of the Customs Act.

Even the Division Bench of the Bombay HC had pronounced a similar view in the case of Pinnacle Life Science Pvt. Ltd.

The present ruling is in line with the above jurisprudence and shall set precedence in similar matters.

It is pertinent to note that the Board, vide Notification No. 11/2022-Customs (N.T.), dated 22 February 2022, notified the SB (post-export conversion in relation to the instrument-based scheme) Regulations, 2022. The regulations provide that the application for conversion/amendment of the SB, or bill of export, shall be made within a period of one year from the date of the order for the clearance of goods.

SEZ unit can remove capital goods in DTA under EPCG scheme only at the time of exit from SEZ scheme post one-time approval from DC – CESTAT

Summary

The CESTAT Ahmedabad Bench has held that an active SEZ unit cannot remove capital goods under the EPCG scheme. The CESTAT observed that the legislative provisions clearly specified that the EPCG scheme could only be utilised at the time of exit from the SEZ and the same cannot be allowed to be freely availed at any time. The CESTAT further stated that the SEZ unit can remove capital goods only with the one-time approval of the DC once the SEZ ceases to exist. Consequently, the CESTAT dismissed the appeal and upheld the Commissioner's (Appeals) order.

Facts of the case

- ISGEC Heavy Engineering Ltd. (the appellant) is engaged in manufacturing heavy machinery (Chapter 84 of CTA). It filed a BoE for imported capital goods, namely a plate bending machine consisting of three rollers, mobile control panel, air cooler, CNC control unit and all related complete items and accessories for their sister concern, M/s ISGEC Heavy Engineering Ltd, located in DTA under the EPCG scheme, authorised by an EPCG license issued to M/s ISGEC Heavy Engg. Ltd.
- The goods were initially imported into a SEZ unit from Switzerland by another entity. The value of these capital goods was assessed, and accordingly, total duty exemption was granted.

- The clearance of the said capital goods under the EPCG scheme was allowed under provisional assessment as per the provisions of the SEZ Act/Rules. The customs department contended that as the clearance under EPCG was supposed to be allowed only at the time of the SEZ exit since the appellant had not exited from the SEZ and did not have the necessary permission from the DC, they were not eligible to clear the capital goods under the EPCG scheme.
- Consequently, the customs department sought to rework the value of the goods and demanded the payment of applicable customs duties.
- After following due legal procedures, the lower authority finalised the assessment, ordered the payment of the said duties, and appropriated the amount already paid.
- On appeal, the order of specified officer was upheld by the Commissioner (appeals).
- Being aggrieved with the impugned order of the Commissioner (Appeals), the appellant has filed an instant appeal before the CESTAT Ahmedabad Bench.

Issues before CESTAT Ahmedabad:

- Whether the appellant's SEZ unit is legally permitted to sell capital goods to its DTA buyer under an EPCG authorisation without exiting from the SEZ?
- Whether the demand for customs duty and interest by the customs authorities is legally valid?

Appellant's contentions:

- The appellant asserted that their SEZ unit had the legal right to sell the goods to their DTA unit under the EPCG authorisation. They argued that SEZ laws explicitly allow the sale of capital goods from the SEZ units to the DTA, provided applicable duties are paid.
- They relied on legal precedents and customs circulars to support their interpretation of SEZ laws, which allow DTA buyers to avail exemptions when importing goods from SEZs. The appellant contended that SEZ laws should be liberally interpreted to promote economic growth, and no restrictions should be imposed on the benefits provided.
- The appellant argued that Rule 74 of the SEZ Rules did not explicitly limit EPCG benefits to the time of the SEZ unit exit.
- The appellant submitted that DTA buyers can obtain EPCG authorisation for capital goods procurement, and they had not violated the SEZ law in this regard.
- The appellant insisted that the customs duty and interest should not be demanded from either the SEZ unit or the DTA buyer, as the latter has fulfilled its EO and criticised the impugned order for lacking reasoning and violating the principles of natural justice.

CESTAT Ahmedabad's observations and ruling (Custom Appeal No. 12023 of 2018, Order dated 11 September 2023)

- **Interpretation of relevant SEZ provisions:** Rule 74(4) of the SEZ Rules, 2006, provides that capital goods are allowed to be removed in the DTA after use in a SEZ on payment of duty and depreciated value counted from the date of commencement of production. This is a special provision for the exiting units through which the DC has been allowed to permit the unit as a one-time option to exit from the SEZ on payment of duty on capital goods into the prevailing EPCG scheme under the Foreign Trade Policy, subject to the eligibility criteria under the EPCG scheme. Thus, the CESTAT stated that the EPCG scheme is intended to be available only at the time of exit from the SEZ and attempting to utilise the EPCG scheme outside of the exit process goes against the legislative intent.
- **One-time option:** Basis Rule 74(4) of the SEZ Rules, the CESTAT stated that it is clear that the clearance of capital goods under the EPCG scheme is a one-time option given while exiting from the SEZ. When the legislature has made a special provision by mentioning a particular export promotion scheme to be availed only at the time of exit, the same cannot be allowed to be freely availed at any time under a provision in which there is no prescription of capital goods to be cleared under the EPCG scheme.
- **Statutory Interpretation principle:** The CESTAT emphasised on the principle of statutory interpretation, which explained that adherence to a prescribed method or condition in a statute implies the prohibition of alternative methods. It emphasised the strict adherence to explicit legislative mandates when transitioning between different schemes for capital goods and also laid importance on complying with international trade rules and agreements.
- **CESTAT upheld Commissioner's (Appeals) order:** The CESTAT stated that in the present instance, the stipulation of one-time availment of the EPCG scheme at the time of exit cannot be read as permitting availment of the EPCG scheme under Rule 34 of SEZ Rules, particularly under the expression 'on license' appearing in that rule. Further, the EPCG scheme is not available till exit from a SEZ unit and nor has the appellant produced any such mandate or opinion from administrative authorities such as DCs approving such availment by the customs. Therefore, the CESTAT upheld the Commissioner's (Appeals) order.

Our comments

Rule 74 of the SEZ Rules specifically provides that the DC may permit a SEZ unit, as a one-time option, to exit from a special economic zone on the payment of duty on capital goods under the prevailing Export Promotion Capital Goods scheme under the Foreign Trade Policy, subject to the unit satisfying the eligibility criteria under that scheme.

Thus, the CESAT has emphasised on the principle that a specific method prescribed by law prohibits alternative actions, even if not explicitly prohibited, and held that SEZ units can clear capital goods under the EPCG scheme only at the time of exit from a SEZ and cannot be availed normally for clearing capital goods under Rule 34 of the SEZ Rules.

The decision is likely to open a pandora's box for other assessees with similar transactions and are likely to come under the Revenue's scanner.

Duty drawback benefit available on exports regardless of payment of basic customs duty, if additional duty paid during imports – Delhi HC

Summary

The Delhi HC has held that as long as the goods had suffered a 'tax' or 'duty' at the time of import, the drawback claim at the time of export would be available, irrespective whether the BCD has been paid or not. The HC examined the relevant drawback rules and stated that drawback, being a rebate of duty or tax chargeable on the import of goods, the same cannot be denied merely because the BCD was not paid. The HC expounded that the usage of the words 'duty' and 'tax' without confining the same to the customs duty or excise denotes the intention that the drawback of the duty or tax suffered at the import can be claimed in drawback. Accordingly, the HC allowed the petitioner to obtain the drawback benefit, along with interest on the delayed payment.

Facts of the case

- AJ Gold and Silver Refinery (the petitioner) is a metal refining firm, who imported a substantial quantity of gold dore bars, which are unrefined gold bars for further manufacturing and sale.
- In accordance with relevant government regulations and circulars, the petitioner exported a portion (20%) of the imported gold dore bars in the form of gold jewellery.
- During the export process, the petitioner inadvertently submitted free shipping bills instead of the required duty drawback shipping bills, which were necessary to claim drawback benefits in May 2015. However, to rectify, the petitioner requested the authorities to amend the free shipping bills to duty drawback shipping bills, and the same was granted.
- Post the amendment of the shipping bills, the petitioner submitted the relevant documents to claim drawback benefits. However, despite multiple representations and a personal hearing, the authorities did not process the petitioner's drawback claim.
- On 4 November 2019, the authorities issued a memorandum, asserting that the petitioner was not entitled to drawback benefits because they had imported the gold dore bars without paying the BCD and had allegedly violated certain conditions of the drawback notification.
- Hence, the petitioner filed a writ to compel the respondents to process their pending drawback claim, along with applicable interest.

Issue before the Delhi HC:

- Whether the petitioner despite not paying the BCD at the time of import, but paying additional duty under Section 3 of the CTA, was eligible for drawback benefits?

Delhi HC's observations and ruling (W.P.(C) 5986/2023, Order dated 15 September 2023)

- **Interpretation of the term 'duty' mentioned in Section 3 of the CTA:** The HC observed that the duty levied u/s 3 of the CTA, even though distinct from customs duty u/s 12 of the Customs Act, is akin to a customs duty and falls within the category of 'duty'.
- **Definition of drawback and its conditions:** The HC stated that Rule 2(a) of the Drawback Rules defines 'drawback' as the rebate of 'duty' or 'tax' chargeable on imported or excisable materials used in manufacturing goods. The HC noted that the use of the terms 'duty' and 'tax' in the Drawback Rules is not confined to specific acts such as the Customs Act or the Central Excise Act.
- **Drawback cannot be denied if BCD is not paid:** The HC expounded that the usage of the words 'duty' and 'tax' without confining the same to the customs duty or excise denotes the intention that drawback of the duty or tax suffered at the import can be claimed in drawback. The HC examined the relevant Drawback Rules and stated that drawback, being a rebate of duty or tax chargeable on import of goods, the same cannot be denied merely because the BCD was not paid.
- **Imports were not 'duty-free':** The HC pointed out that Condition No. 6 of the drawback notification does not require the petitioner to prove payment of specific customs or central excise duty when an AI rate is applicable, as it implies that the petitioner need not establish actual duty payments to claim drawback benefits. Further, Condition No. 23 of the notification relates to goods exported under specific schemes that provide for 'duty-free import'. The HC emphasised that since the petitioner paid the duties under Section 3 of the CTA, their imports were not 'duty-free', and Condition No. 23 did not apply.
- **Interest on drawback claims:** The HC noted that as per Section 75A of the Customs Act, interest becomes payable after one month from the date of applying for drawback until the actual payment is made. Therefore, the respondents were held liable to pay interest to the petitioner for the delayed disbursement of drawback benefits.

Our comments

The SC, in the case of Hyderabad Industries Ltd., had observed that while Section 3 of the CTA may constitute a charging section distinct and separate from Section 12 of the Customs Act, it continues to remain in the genre of a customs duty. The SC further observed that while the two statutes are independent, merely because the tax under Section 3 of the Tariff Act is imposed on the import of articles into India, it would not mean that the Tariff Act could not provide for a levy of duty independent of customs duty.

Referring to above, the HC, in the present case, has observed that the mere fact that the said additional duty is equated to a duty of excise, which is leviable, does not essentially change the character of that duty as being one other than that which is imposed on the import of articles into India. Accordingly, the additional customs duty is also a duty or tax eligible for drawback benefits.

The present ruling by the Delhi HC is in line with the above and is a welcome ruling, which should set precedence in similar matters.

03

Decoding advance rulings under GST

Incentives distributed to dealers under promotional schemes constitute a supply, eligible for ITC – Karnataka AAR

Summary

The Karnataka AAR has held that the ITC is eligible on the GST paid on promotional goods procured for distribution to dealers upon achieving specified sales targets. The AAR elucidated that these promotional goods are not considered 'gifts' under the GST law since they are pre-agreed upon certain conditions and not voluntary. However, when dealers meet their sales targets, it is regarded as a non-monetary consideration flowing from the particular dealer, constituting it as a supply under GST. Even otherwise, distribution of promotional goods qualifies as permanent transfer or disposal of business assets, which constitute supply even without consideration in terms of Schedule I.

Facts of the case

- M/s. Orient Cement Ltd (the applicant) is engaged in manufacturing cement. To enhance its sales/promote the brand, the applicant launched target or performance-based discount schemes.
- Under these schemes, the benefit amount is credited to the dealer's account based on the quantity and the grade of cement purchased.
- Subsequently, to pass on such benefits, the applicant distributes gold coins and white goods instead of adjusting it against the payment to be received from such dealers.
- The invoice for such goods is in the name of the applicant against which the ITC was availed.
- The applicant approached the Karnataka AAR regarding the admissibility of the GST paid on the procurement of promotional goods and whether it constitutes as supply or qualifies as 'permanent transfer or disposal of business assets' under Schedule I of the CGST Act.

Applicant's contentions:

- The inputs (promotional goods) procured for giving out credit have a direct nexus with the furtherance of business. Incentives are provided to dealers in the furtherance of business to promote and enhance sales.
- The applicant submitted that the object of the scheme is purely to promote the brand and not to offer any gifts voluntarily without conditions/eligibility criteria.
- From a supply perspective, the distribution of rewards cannot be regarded as the permanent transfer or disposal of business assets, as the said restriction is applicable only in respect of those assets that are capitalised in the books of accounts and not to the goods that are in the nature of revenue expenditure.

Karnataka AAR's observations and ruling [Advance Ruling No. KAR ADRG 27/ 2023; Order dated 24 August 2023]

- **Consideration for supply:** The achievement of marketing targets set by the applicant is an inducement from the dealer or can be viewed as a non-monetary consideration paid by the dealers. Since the transfer of goods (gold coins/ white goods) is made for a consideration, it is covered in the definition of 'supply'.

- **Scope of business assets**: The AAR noted that the goods are permanently transferred to the dealers on which the ITC was availed. Accordingly, it tantamounts to the 'permanent transfer or disposal of business assets' in terms of Entry 1 of Schedule I liable to GST. It opined that business assets include the Grant Thornton Bharat Tax Alert inventory, and it does not necessarily be capitalised in the books of accounts.
- **Promotional scheme is in furtherance of business:** In the present case, the goods/services procured as a reward are being supplied by them in the course of their business. Under the scheme, the benefit provided to the dealer is determined based on the amount credited to the dealer account, which is based on the quantity and the grade of cement purchased by such dealer.
- **Goods under the scheme do not qualify as 'gifts':** The AAR opined that in normal parlance, a gift is something that is given without any conditions and stipulations. In the present case, rewards/promotional goods are issued as per the certain conditions mentioned in an agreement. Accordingly, the ITC is not restricted under Section 17(5)(h) of the CGST Act.

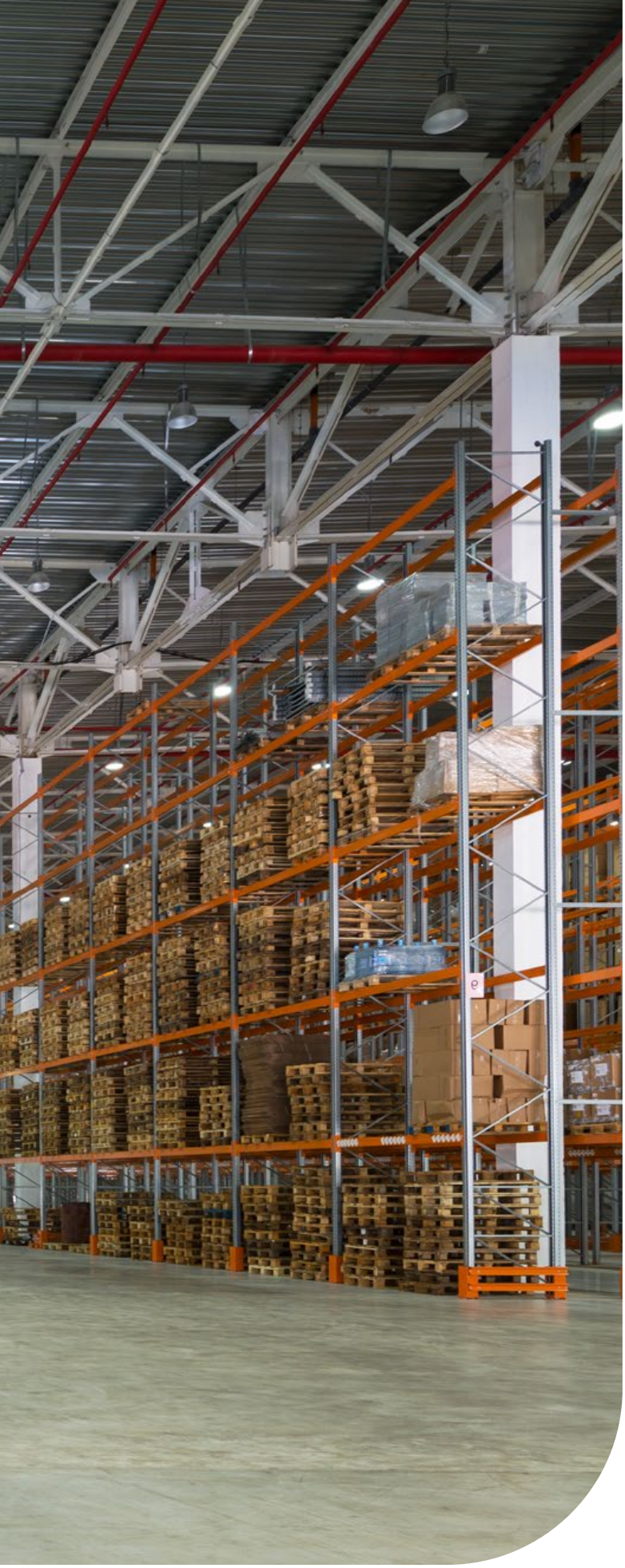
Our comments

The eligibility of the ITC in the distribution of promotional goods has been a subject matter of litigation since the inception of the GST law, with contradictory advance rulings in the past.

In the case of Biostadt India Limited, the Maharashtra AAR held that the ITC would not be available on goods given as 'gifts' when no GST is paid at their disposal. In the case of GRB Dairy Foods Pvt Ltd, the Tamil Nadu AAAR held that giving away goods/services under the promotional scheme is not a supply. Consequently, the ITC is not eligible on the GST paid on the goods/services procured for the scheme. The Karnataka AAAR took a similar stance in the matter of Page Industries Limited.

The present ruling contradicts with previous judgements, creating ambiguity in the interpretation of GST laws. Treating distribution of promotional goods as a supply triggers the valuation implications, given no consideration is involved.

To address this ambiguity and avoid unnecessary litigation, it is advisable for the GST Council to provide further clarification on this matter.



Transfer of title of goods or multiple transfers within FTWZ are not transactions in a bonded warehouse, and hence, not exempt from GST: Tamil Nadu AAR

Summary

The Tamil Nadu AAR has held that the FTWZ falls under the regulatory framework of the SEZ Act and is distinct from warehouses licensed under the Customs Act. Therefore, the transfer of the title of goods or multiple transfers within an FTWZ would not result in transactions in a bonded warehouse and are not exempt from GST.

Facts of the case

- M/s Haworth India Private Limited (the applicant), a wholly-owned subsidiary of Haworth, Inc. United States, is engaged in the manufacture and sale of office furniture under the brand name 'Haworth'.
- To execute its business activities, the applicant procures raw materials indigenously, as well as from its group entities located outside India. It also imports certain finished goods from its group entities.
- The applicant desired to operate its import and re-sale transactions from a FTWZ for operational convenience and expedited project execution.
- The applicant sought clarification on whether the transfer of title of goods to customers or multiple transfers within the FTWZ would result in bonded warehouse transactions covered under Paragraph 8(a) of Schedule III of the CGST Act.
- The applicant has submitted that the FTWZ is a SEZ wherein storage, trading and other ancillary activities are carried out. Further, it is a deemed foreign territory within the boundaries of India where the goods may be landed, handled, manufactured, reconfigured and exported without bearing custom duties on them. Custom duties will only be payable when the goods are cleared from the FTWZ to the consumers for home consumption. Additionally, the SEZ Act and Rules governing the FTWZ permit multiple transfers of ownership without the removal of goods out of the FTWZ, and without payment of indirect taxes or compliances.

Tamil Nadu AAR's observations and ruling (TN/23/AAR/2023; Order dated 20 June 2023)

- **Meaning of the term 'warehouse' used in Para 8(a) of Schedule III:** Expounding the term 'warehouse' referred to in Paragraph 8(a) of Schedule III of the CGST Act, the AAR stated that it covers public warehouses, private warehouses and special warehouses licensed under the Customs Act.
- **FTWZ is distinct from a licensed warehouse:** FTWZ is an SEZ, wherein mainly trading, warehousing and other ancillary activities are undertaken. Notably, the warehousing and clearance of goods for home consumption on payment of requisite custom duties are monitored by customs officials posted in the FTWZ, in consonance with the SEZ Act and the Customs Act. However, the approval, license and administrative control of the FTWZ is carried out as per the SEZ Act and Rules. Accordingly, since Paragraph 8(a) of Schedule III of the CGST Act is specific to warehouses licensed under the Customs Act, a FTWZ, being governed by the SEZ Act and rules, cannot be equated with them.
- **Transfer of the title of goods within FTWZ not exempt from GST:** The transfer of the title of goods or multiple transfers within a FTWZ would not result in a bonded warehouse transaction as contemplated under Paragraph 8(a) of Schedule III of the CGST Act. Therefore, the transfer of the title of goods by the applicant to its customers or multiple transfers within the FTWZ does not come under Schedule III of the CGST Act r/w CGST Amendment Act, 2018. Further, the rescinded Circular No. 3/1/2018–IGST is no longer applicable due to subsequent amendments in the CGST Act. Therefore, the present transaction would not be exempt from GST.

Our comments

Pursuant to the recommendations of the GST Council in its 27th GST Council Meeting, it was clarified that the IGST shall be levied and collected at the time of final clearance of warehoused goods for human consumption. Subsequently, the circular was rescinded and Schedule III of the CGST Act was amended to insert Paragraph 8(a), stating that the 'supply of warehoused goods to any person before clearance for home consumption shall neither be supply of goods nor a supply of service.'

On a similar issue earlier, the Tamil Nadu AAR, in the case of The Bank of Nova Scotia, had held that a FTWZ is a custom bonded warehouse, and removal of goods from the FTWZ to DTA for home consumption is a point of deferred levy/payment of customs duty. Accordingly, the GST shall not be levied when the goods are bonded but rather when the goods are cleared for home consumption. A similar position was taken in the case of Sadesa Commercial Offshore De Macau Limited.

However, the Tamil Nadu AAR, in the present ruling, has taken a contradictory view and held that a FTWZ is not a warehouse licensed under the Customs Act. Accordingly, the transfer of title in goods or multiple transfers within a FTWZ would not be tantamount to transactions in bonded warehouses as covered under Schedule III of the CGST Act and would not be exempt under GST.

It will be interesting to note if the contrasting deliberations on this issue will finally square up before the Appellate Authority.

04

Experts' column

ISD vs cross charge: An analysis without winners or losers

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The concept of the ISD and cross charge under GST has been the most deliberated upon and a burning issue since the inception of the GST law, which had left taxpayers and tax experts in a state of disarray. The GST authorities issued numerous notices to Indian Inc., alleging non-compliance with the ISD distribution mechanism and cross charge of the common expenses incurred at the head office, the nature of expenses that can be considered as common, and ITC distribution.

Though used interchangeably, the ISD and cross charge are different concepts and not analogous or alternates of each other. While the cross charge allocates the cost of goods and services attributable to the beneficiary distinct person, the ISD is a mechanism of distribution of the ITC on procurement from third parties, the beneficiary of which is common. It is defined under Section 2(61) of the IGST Act as under:

> *"Input Service Distributor" means an office of the supplier of goods or services or both which receives tax invoices issued under section 31 towards the receipt of input services and issues a prescribed document for the purposes of distributing the credit of central tax, State tax, integrated tax or Union territory tax paid on the said services to a supplier of taxable goods or services or both having the same Permanent Account Number as that of the said office.*

There have been questions over whether the taxpayers can choose between available options or must abide by any one or both, as both cross-charge and ISD attempt to transfer GST to the separate entity/GSTIN to whom it applies. This also raised a new difficulty about the taxability and valuation of the supply of services between HO and BOs located in different states, being distinct persons.

Advance rulings riddle

The Karnataka AAAR, in the case of Columbia Asia Hospitals Private Limited, had held that services such as accounting, administration, and maintaining information technology services, which are performed by the corporate office employees for branches located in different states, qualify as supply and shall mandatorily be cross-charged. The ruling particularly delineated that such services shall qualify as being in the nature of the employer-employee relationship only for the corporate office and not for other entities. Since the corporate office and other entities are distinct persons, no employer-employee relationship exists between the employees of one distinct entity and another distinct entity, even if they belong to the same legal entity.

Ironically, in the case of Cummins India Limited, the AAAR had affirmed that the activity of availing the ITC of common input supplies from the third-party service vendors on behalf of the BO would qualify as a supply of services, accordingly exigible to GST. However, the cost of such common input services

availed shall be allocated to the BO by the HO by mandatorily registering itself as an ISD. Additionally, since the facilitation of common input services is not affected between employees and the employer but between the HO and BO, which are distinct units, it constitutes a supply and shall be taxable under GST. Hence, the allocation and recovery of the salary of the employees of the HO from the BO will be subject to GST. While determining the value of services provided by the HO to the BO, the value of the tax invoice shall be deemed as open market value in terms of the second proviso to Rule 28(c) of the CGST Rules.

The Haryana AAAR took a similar view in the matter of Tupperware India Private Limited.

The approach adopted by the AAAR puzzled taxpayers and experts alike, leading to a huge uproar demanding government intervention to issue a clarification in this regard.

Clarification and impact analysis

Amidst the hue and cry, the GST Council, in its 50th Council meeting, came to the rescue of the taxpayers and clarified that for the distribution of the ITC of common input services to distinct persons, the ISD is not mandatory. By virtue of Circular No. 199/11/2023-GST dated 17 July 2023, the CBIC has issued clarifications that harmonises the two concepts.

For third-party common services

- Primarily, for the common services procured from third-party vendors, the HO would have a prudent option to distribute or transfer the ITC through ISD or cross-charge. An expected caveat suggests that while opting for any of the options, the ITC could only be distributed or transferred if such services are attributable to the concerned BO.
- The clarification is in harmony with the FAQs issued for the banking sector (Question 17), which clarified that the distribution of the ITC may be appropriately invoiced or routed through the ISD mechanism to the distinct persons who have actually used such services.

For internally generated services

- **Where full ITC is eligible to the recipient:** The value declared on the invoice shall be deemed open market value in terms of Rule 28, irrespective of whether employee costs, etc., have been included.

  Where the HO has issued no tax invoice for any service rendered to the BO, the value of services may be deemed nil.
- **Where full ITC is not eligible:** The value of employee cost, i.e., the salary, shall not be mandatorily included while computing the taxable value of supply.

  The clarification, in principle, negates the advance authority ruling (supra), more particularly inferring that employees are common to the legal entity as a whole.

Open points

Although the circular came as a respite, certain open points remain unaddressed, which could have been clarified to avoid any further litigation -

- **Inclusion of other cost elements:** It is not explicitly clarified whether certain cost elements, such as depreciation, interest, etc., need to be factored into the value of services supplied by the HO when the recipient is not eligible for full ITC.
- **Related party transactions:**
  - It is unclear whether the principles of this circular can be extended to other related party transactions, for instance, with respect to the allocation of the cost of key personnel or employees providing services to both the holding and the subsidiary company.
  - Issues related to the taxability of secondment of employees, use of brand name, etc., undertaken without any consideration but where the taxpayer is eligible for full ITC, whether any value can be construed as the value of supply.
- **Stock transfers of goods:** In cases of stock transfer of goods between two different states of the same PAN, where the taxpayer is engaged in both taxable and exempt supplies, it is not clear whether the cost of labor should be included in the cost of goods to determine the value of goods, similar to the employee cost in the case of services.

Addressing these open points in the circular would have provided much-needed clarity and guidance to the taxpayers in navigating the complexities of GST compliance.

Recently, in the 52nd GST Council meeting held on 7 October 2023, the Council proposed an amendment in the definition of ISD, the manner of distribution of credit via the ISD to make it mandatory prospectively for distribution of the ITC in respect of input services procured by the HO from a third party but attributable to both the HO and the BO. These amendments may be taken up during the budget session of 2024 as part of the Finance Bill.

Concluding remarks

The GST Council is working diligently to alleviate the burden on taxpayers and is consistently offering clarifications when needed. While the process of making the ISD mechanism compulsory has already commenced, it is crucial for the government to provide guidance regarding how to value cross charge, transactions involving related parties, and other cost elements. This guidance will enable taxpayers to operate more effectively within the system. Simultaneously, taxpayers should initiate the transition to the ISD mechanism in order to be adequately prepared for the forthcoming implementation of the amendment.

05

Issues on your mind

Which taxpayers are subject to the mandatory 2-factor authentication for an e-way bill/e-invoice system?

Earlier, the 2-factor authentication for an e-way bill/e-invoice system was made mandatory for taxpayers with the AATO exceeding INR 100 crores w.e.f. 21 August 2023. As per the latest NIC update dated 11 September 2023, the authentication will be mandatory for all taxpayers with the AATO above INR 20 crore w.e.f. **1 November 2023**.

Whether e-invoicing is applicable for supplies made by a registered person, whose turnover exceeds the prescribed threshold for generation of e-invoicing to government departments or establishments registered solely for the purpose of TDS deduction?

The registered person, whose turnover exceeds the prescribed threshold for generation of e-invoicing, is required to issue e-invoices for the supplies made to such government departments or establishments/government agencies/local authorities/public sector undertakings, etc., under rule 48(4) of CGST Rules. The taxpayers notified for generation of e-invoices and supplying goods or services to government departments/ agencies are required to generate B2B e-Invoices with the GSTIN of the government department/agency.

Who can access the geocoding functionality for the additional place of business under GST?

This feature is accessible to normal, composition, SEZ units, SEZ developers, ISD and casual taxpayers whether they are active, cancelled, or suspended.

Which sectors are covered under the the RoDTEP scheme?

The RoDTEP scheme is applicable to all the sectors except apparel and made-ups (Chapter 61, 62 & 63) for which the RoSCTL scheme has been extended, and steel, pharmaceuticals, organic and inorganic chemicals.

What will be the rate of benefit under the RoDTEP scheme?

Rebate would be granted to the eligible exporters at a rate notified in Appendix 4R, as a percentage of the FOB value. For certain export items, a fixed quantum of rebate amount per unit has also been notified. Such rate and quantum have been notified in Appendix 4R at an 8-digit HS code level. The value cap per unit of exported products has also been provided under the notified 8-digit HSN code level in Appendix 4R. The rebate would be capped at such value provided on a per unit basis.

Would RoDTEP scrips be transferable to any other person?

The scrips are transferable to any other person having a valid IEC and valid ICEGATE registration.

06

Important developments under direct taxes

CBDT amends the rule for valuation of perquisites in form of rent-free accommodation

As per the Finance Act, 2023, the perquisite value of RFA or accommodation provided at a concessional rate by the employer to employee is to be computed as per the manner prescribed. In this regard, the CBDT amended the Rule 3(1) of the IT Rules in order to prescribe the manner for computation of RFA. As per the amended rule, the perquisite value would be as under:

Circumstances	Valuation as per erstwhile Rule 3		Valuation as per amended Rule 3	
	Population	Perquisite rates	Population	Perquisite rates
Accommodation is owned by the employer	More than 25 lakhs	15%	More than 40 lakhs	10%
	Between 10 lakh and 25 lakhs	10%	Between 15 lakh and 40 lakhs	7.5%
	Less than 10 lakhs	7.5%	Less than 15 lakhs	5%
Accommodation is taken on lease or rent by the employer	Lower of the following will be reduced from rent paid by the employee: • Actual amount of the lease rental paid or payable by the employer. • 15% of salary.		Lower of the following will be reduced from rent paid by the employee: • Actual amount of lease rental paid or payable by the employer. • 10% of salary.	

The perquisite value computed above would be reduced by the actual rent paid by the employee.

Further, it is to be noted that as per the third proviso to the amended Rule 3(1) of the IT Rules, in case the accommodation is owned/taken on lease or rent by the employer, and such accommodation is continued to be provided to the same employee for more than one PY, there is an indexation benefit provided. Accordingly, the value of the perquisite will be restricted to:

Amount calculated for the first tax year (i.e. FY 2023-24 or the year in which the accommodation is provided, whichever is later) X $\frac{\text{CII for the tax year for which the perquisite is calculated}}{\text{CII for the tax year in which accommodation was initially provided to employee}}$

i.e. the perquisite value for the subsequent years will be the lower of:

- The perquisite value computed as per the rules prescribed for furnished/unfurnished accommodation; or
- The amount computed considering the indexation benefit (as per formula prescribed above)

The value of the perquisite would be nil in case of any accommodation provided to an employee working at a mining site, an on-shore oil exploration site, a project execution site, a dam site, a power generation site, or an off-shore site having plinth area not exceeding 1,000 sq. ft. (earlier, the area was 800 sq. ft.) and not less than eight kms away from the local limits of any municipality, or a cantonment board, or which is located in a remote area.

There is a change in the definition of a remote area, as per which 'remote area' means any area other than the area located within the local limits or located within a distance, measured aerially, of 30 kms (earlier: 40 kms) from the local limits of, any municipality or a cantonment board having a population of 1,00,000 (earlier: 20,000) or more based on the 2011 census (earlier: latest census).

These rules are applicable from 1 September 2023 for the perquisite valuation, for withholding tax purpose.

[Notification No. 65 of 2023 dated 18 August 2023 and Notification No. 72 of 2023 dated 29 August 2023]

CBDT issues FAQs for Form No. 10B/10BB and extended timeline of furnishing these forms and ITR-7

Earlier, the CBDT, in its notification, amended Rules 16CC and 17B of the IT Rules to notify the new Form 10B and 10BB for fund, charitable or religious trusts, education institutions, universities, etc., and also prescribed the conditions for applicability of such forms.

The CBDT has now issued FAQs in relation to Form No. 10B and 10BB. The key clarifications issued through the FAQs are as follows:

- **Applicable AY:** Notified Form 10B and 10BB would apply to AY 2023-24 and onwards applicable.
- **Applicability of old forms:** Old Form No. 10B and 10BB, which were filed prior to the issuance of aforementioned notification, would still be available on the e-filing portal and will be applicable for AY 2022-23 only.
- **Conditions on applicability of new notified forms:** New notified Form 10B would be required to be furnished if any of the conditions are satisfied by the auditee:
  - The total income of auditee (without giving effect to Section 10(23)(iv), 10(23)(v), 10(23)(vi), 10(23)(via), 11 and 12 of the IT Act), would not exceed INR 5 crores during the PY.
  - The auditee has received any foreign contribution during the PY.
  - The auditee has applied any part of its income outside India during the PY.

For all other cases, new Form No. 10BB shall be applicable.

- **Meaning of term 'Auditee':** For the purpose of these forms, 'Auditee' will be any fund or institution or trust or any university or other educational institution or any hospital or other medical institution as referred in Section 10(23)(iv), 10(23)(v), 10(23)(vi), 10(23)(via), 11 and 12 of the IT Act.
- **Due date of filing of such forms:** The due date for filing of Form 10B and 10BB for AY 2023-24 onwards would be one month prior to the due date for furnishing ITR under Section 139(1) of the IT Act, i.e., 30 September. Considering the difficulties faced by the stakeholders, this due date for filing ITR-7 for AY 2023-24 been extended to 30 November 2023, and also, the due date for these forms has now been extended to **31 October 2023**.
- **Completion of filing of forms:** The filing of a form is considered to be completed only when the taxpayer accepts the form submitted by the CA and verifies the same with the active DSC or EVC registered on the e-filing portal.
- **Revision of forms:** Forms 10B and 10BB (AY 2023-24 onwards) can also be revised.
- **Additional documents to be filed along with forms:** Attachments such as balance sheet, the profit and loss statement/income and expenditure account, and the tax audit report, are required to be filed, along with the aforesaid forms. Further, other relevant documents may be attached as 'Miscellaneous attachments'.

[Circular No.16 of 2023 dated 18 September 2023]

CBDT notifies additional securities for availing exemption under Section 47(viiab) of the IT Act

Section 47 (viiab) of the IT Act exempts the transfer of capital assets being bond or GDRs or RDB of an Indian company, or derivative or any other security, as maybe notified by the CG, by a non-resident on a recognised stock exchange located in any IFSC.

In this regard, the CBDT, in its earlier notification (Notification No.16 of 2020 dated 5 March 2020) provided that the transfer of certain additional securities (specified therein) would be exempt under Section 47(viiab) of the IT Act.

The CBDT has now notified that the transfer of the following securities will also be exempt under Section 47(viiab) of the IT Act (with effect from 12 September 2023):

- Unit of investment trust.
- Unit of a scheme.
- Unit of an exchange traded fund launched under the IFSCA (Fund Management) Regulations, 2022.

Furthermore, the meaning of 'Investment trust' and 'Scheme' was also defined in the aforesaid notification.

[Notification No. 71 of 2023 dated 12 September 2023]

Glossary

AA	Advance Authorisation Scheme
AAAR	Appellate Authority for Advance Ruling
AAR	Authority of Advance Ruling
AATO	Aggregate annual turnover
AI Rate	All-India Rate
AY	Assessment year
BCD	Basic Customs Duty
BO	Branch office
BoE	Bill of Entry
CA	Chartered Accountant
CBDT	Central Board of Direct Taxes
CBEC	Central Board of Excise and Customs
CBIC	Central Board of Indirect Taxes and Customs
CESTAT	Customs Excise and Service Tax Appellate Tribunal
CG	Central government
CGST	The Central Goods and Services Tax
CGST Act	The Central Goods and Services Tax Act, 2017
CGST Rules	The Central Goods and Services Tax Rules, 2017
CIF	Cost, insurance, and freight
CII	Cost Inflation Index
Custom Act	The Customs Act, 1962
CTA	The Customs Tarif Act, 1975
DC	Development commissioner
Drawback Rules	The Drawback Rules, 1995
DTA	Domestic tariff area
DGFT	Directorate General of Foreign Trade
DSC	Digital signature certificate
ENA	Extra neutral alcohol
EO	Export obligation
EOU	Export oriented unit
EPCG	Export Promotion Capital Goods Scheme
EVC	Electronic verification code
FAQs	Frequently asked questions
FOB	Free on board
FTWZ	Free Trade Warehousing Zone
FTP	Foreign Trade Policy
FY	Financial year
GDR	Global Depository Receipt
GST	Goods and Service Tax
GSTAT	Goods and Services Tax Appellate Tribunal
GSTIN	Goods and Services Tax Identification Number
GSTN	Goods and Service Tax Network
GSTR	Goods and Services Tax Return
HBP	Handbook of procedures
HC	High court
HO	Head office
ICES	Indian Customs EDI System
ICEGATE	Indian Customs Electronic Data Interchange Gateway
IEC	Importer-Exporter Code
IFSC	International financial service centre
IFSCA	International Financial Service Centre Authority
IGST	The Integrated Goods and Services Tax
IGST Act	The Integrated Goods and Services Tax Act, 2017
INR	Indian national rupee
IRN	Invoice reference number
ISD	Input service distributor
IT Act	The Income Tax Act, 1961
ITC	Input tax credit
ITR	Income tax return
IT (R)	Integrated tax rate
IT Rules	The Income Tax Rules, 1962
LUT	Letter of undertaking
OIDAR	Online information database access and retrieval services
PAN	Permanent Account Number
POI	Port of Import
PY	Previous year
RBI	Reserve Bank of India
RCM	Reverse charge mechanism
RDB	Rupee denominated bond
RFA	Rent free accommodation
RoDTEP	Remission of Duties and Taxes on Exported Products
RoSCTL	Rebate of State and Central Taxes and Levies
SB	Shipping bill
SC	Supreme Court
SEZ	Special economic zone
SEZ Act	The Special Economic Zones Act, 2005
SEZ Rules	The Special Economic Zones Rules, 2006
SLP	Special leave petition
VAT	Value Added Tax

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