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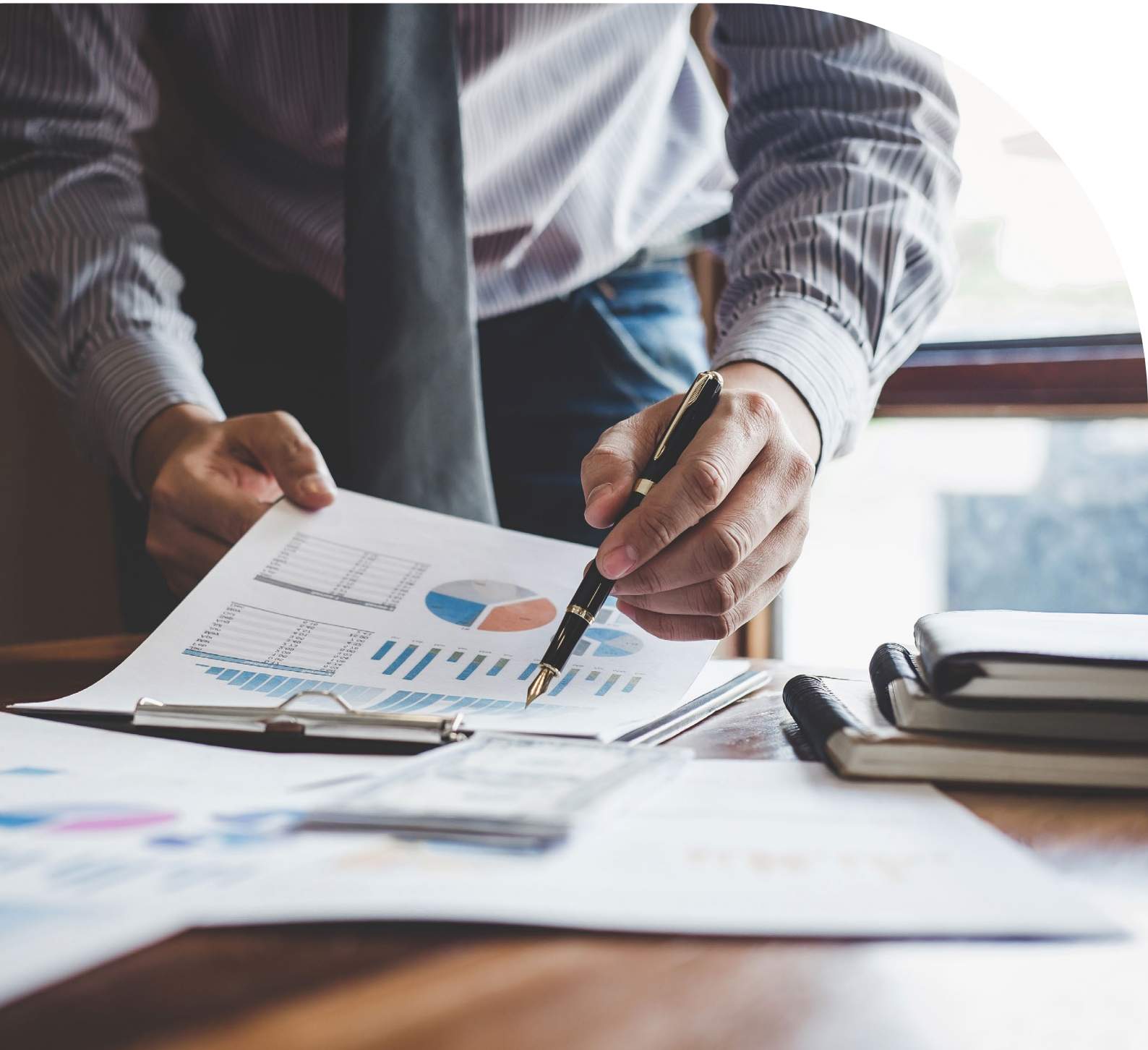
GST Compendium

A monthly guide

September 2023



Editor’s Note

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Off-late seizure of cash and other valuable non-business assets by the tax authorities has become a common practice. In a similar case, the Delhi High Court (HC) has held that the legislative intent to permit the seizure of any books, documents, or things is clear, and it does not allow the seizure of currency or valuable assets simply on the ground that the same may represent unaccounted wealth. The HC also held that the provisions related to the powers of inspection, search, and seizure under the Goods and Services Tax (GST) regime are exceptional and have to be strictly interpreted before application. On a similar issue, the Supreme Court (SC) has upheld the Kerala HC's finding that cash did not constitute part of any business’s stock in trade and could not be seized during an investigation to ascertain possible tax evasion.

In another important ruling, the Patna HC denied the input tax credit to the buyer where the supplier failed to pay tax to the government despite recovering from the buyer. The HC emphasised that mere documentation of tax invoices, bank payments, and proof of goods transportation does not absolve the buyer of the burden of establishing that the tax has been paid to the government. It will be interesting to note if the contrasting deliberations on this issue will finally square up before the SC.

According to the outcome of the 50th and 51st GST Council meetings, necessary amendments have been notified under the GST law that are yet to come into force. These amendments clarify the taxability of online gaming, casinos, and horse racing. Further, the SC has issued ad interim stay on the Karnataka HC judgement in the case of Gameskraft Technologies Private Limited, wherein the HC quashed the show cause notice proposing demand of approx. INR 21,000 crore.

In this edition, we have interviewed our expert regarding the power of big data and digital auditing.

On the direct tax front, the Central Board of Direct Taxes (CBDT) has introduced a new rule for computing taxable income from specific life insurance policies. Also, the CBDT has substituted the rule that prescribes an exchange rate for withholding tax on certain foreign payments.

I hope you will find this edition an interesting read.

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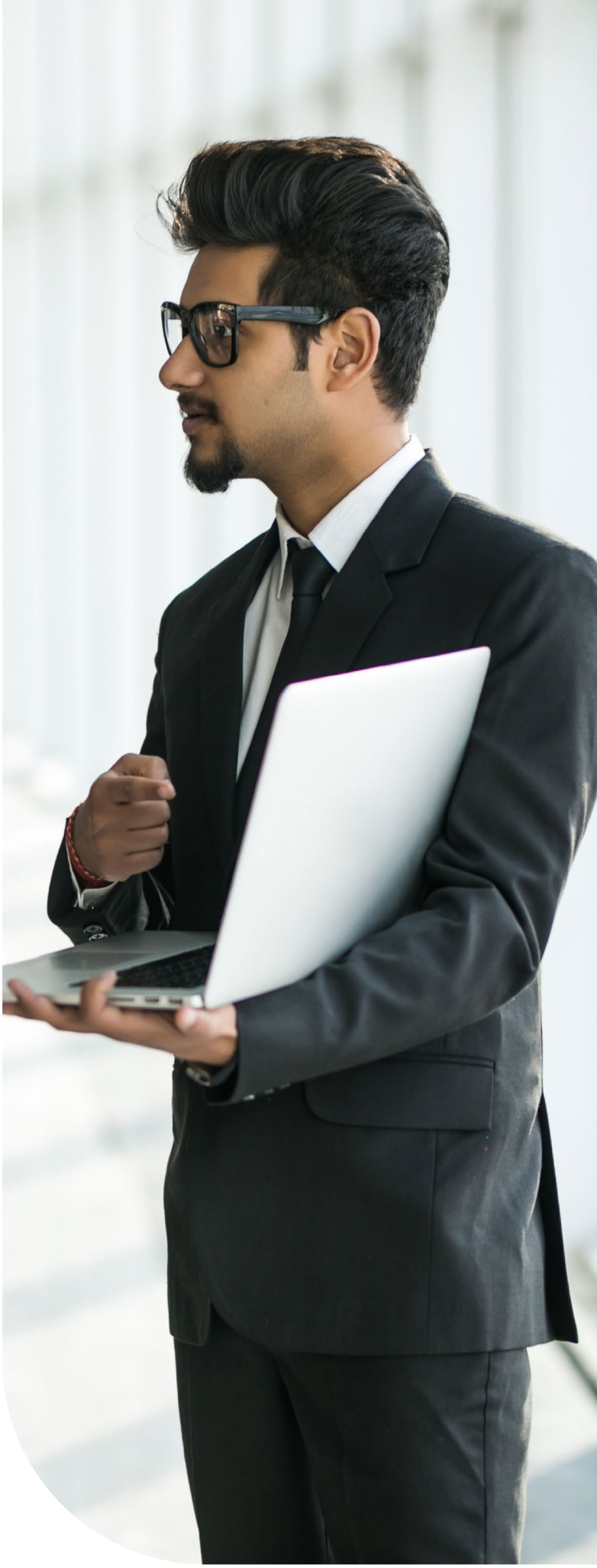


01

Important amendments/ updates

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

Government notifies the CGST (Amendment) Act 2023 and IGST (Amendment) Act 2023 relating to GST on online gaming, horse racing, casinos, lottery, betting, and gambling

Pursuant to recommendations made by the GST Council during its 50th and 51st meetings, the Finance Ministry had introduced the CGST Amendment Bill, 2023, and the IGST Amendment Bill, 2023, in the parliament. The bills proposed various amendments to the GST law to provide clarity on the taxation of supplies in casinos, horse racing, and online gaming, including amendment in the Act for overseas gaming platforms, while also addressing the valuation aspects.

The Lok Sabha passed the CGST Amendment Bill, 2023, and the IGST Amendment Bill, 2023, on 11 August 2023 to amend the respective provisions in the CGST Act and the IGST Act.

Both the bills received the assent of the President on 18 August 2023. The amendments shall come into force on such date as may be appointed by the Central Government by notification in the Official Gazette.

Summary of amendments

- Introduction of the new definition of 'online gaming,' 'online money gaming,' 'specified actionable claim', 'virtual digital asset' [Section 2(80A), (80B), (102A), (117A) of the CGST Act].
- Amendment in the definition of a supplier to provide deeming fiction in case of the supply of 'specified actionable claim' in specified cases [proviso added to Section 2(105) of the CGST Act].
- Amendment in provisions pertaining to obtaining compulsory registration to provide that every person supplying online money gaming, from a place outside India to a person in India, shall be required to get mandatory registration under GST [clause (xia) added to Section 24 of the CGST Act].
- Amendment in Schedule III to the CGST Act to substitute lottery, betting and gambling as 'specified actionable claim'.
- Amendment in provisions related to the place of supply in respect of the supply of goods to unregistered persons [clause (ca) added to Section 10 of the IGST Act].
- A new section has been introduced to prescribe a special provision for specified actionable claims supplied by a person located outside India [Section 14A of the IGST Act].

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

The CBIC has notified new rules for valuation of supply of online gaming and actionable claims in casino. These rules will come into effect on the date to be notified by the Central Government.

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

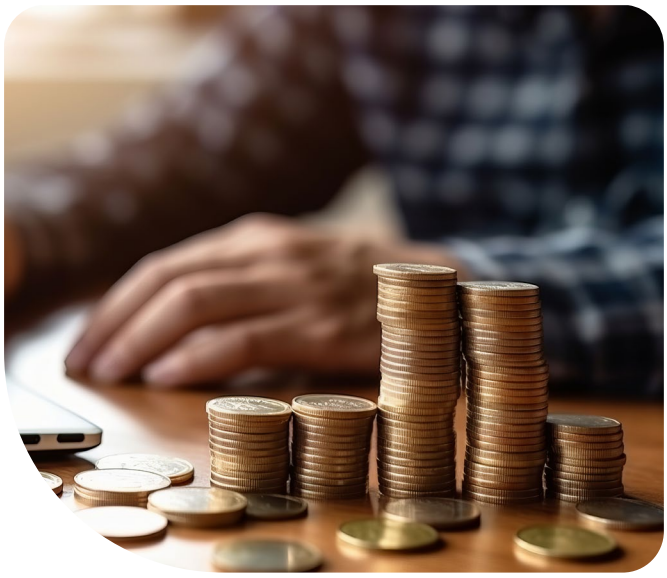
- The value will be the total amount paid/payable to or deposited with the supplier in money or money's worth, by or on behalf of the player.
- The amount returned/refunded by the supplier to the player, including the amount not used by the player, will not be reduced from the value.

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

- In cases where tokens, chips, coins, or tickets are purchased, for use in casino, the value will be the total amount paid/payable by or on behalf of the player to purchase the same.
- Further, 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)



GSTN introduces Electronic Credit Reversal and Reclaimed Statement on the GST portal

Earlier, the CBIC notified the changes in Table 4 of Form GSTR-3B vide Notification No. 14/2022-CT dated 5 July 2022 (read with Circular No. 170/02/2022-GST dated 6 July 2022) to enable taxpayers in the correct reporting of information w.r.t the ITC availed, ITC reversed, ITC re-claimed and ineligible ITC. To facilitate the correct and accurate reporting of ITC reversal and subsequent reclaim thereof, and to avoid clerical mistakes, the GSTN has introduced a new ledger, namely the Electronic Credit Reversal and Reclaimed Statement (ledger).

The features of this ledger are as follows:

- It will start from the **August return** period.
- It will enable the taxpayers to keep track of the ITC reversed in Table 4(B)(2), and subsequently, re-claimed in Table 4(D)(1) and Table 4(A)(5) for each return period.
- It will ensure that the reclaimed ITC in GSTR-3B aligns appropriately with the corresponding reversed ITC.
- For monthly taxpayers, the specified return period would be August 2023. Further, for the quarterly filers, the specified return period corresponds to the second quarter of FY 2023-24 (July 2023 to September 2023).
- The taxpayers will have an option to report their cumulative ITC reversal (i.e., ITC that has been reversed earlier and had not been reclaimed) as opening balance for the ledger. It can be navigated as below:
  - Login > Report ITC Reversal Opening Balance OR Services > Ledger > Electronic Credit Reversal and Re-claimed Statement > Report ITC Reversal Opening Balance
- Monthly filers (taxpayers) shall report an opening balance of ITC reversal done till the return period of July 2023. However, the quarterly filers shall report the opening balance of ITC reversal done till the April-June 2023 return period.
- The taxpayers can declare their opening balance for ITC reversal until **30 November 2023** and shall be provided three amendment opportunities to correct the opening balance. However, it is to be noted that the reporting and amendment facility will be available till **30 November 2023**.
- From **30 November 2023** to **31 December 2023**, only amendments will be permitted. Thereafter, this facility will be discontinued.
- A validation mechanism is also incorporated in Form GSTR-3B. It will trigger a warning message if a taxpayer attempts to reclaim excess ITC in Table 4(D)(1) than the available ITC reversal balance in the ledger, along with the ITC reversal made in the current period in Table 4(B)(2). Although a taxpayer can proceed with the filing, it is advised not to reclaim excess ITC than the closing balance of the ledger, and the taxpayer may report pending reversed ITC, if any, as ITC reversal opening balance.

(www.gst.gov.in/newsandupdates/read/601)

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

DGFT restricts import of laptops, tablets, all-in-one personal computers, ultra small computers with effect from 3 August 2023

With effect from 3 August 2023, the DGFT has amended the import policy relating to Chapter 84 of the Schedule I (Import Policy) of ITC (HS) 2022 by restricting the import of laptops, tablets, all-in-one personal computers, ultra small computers, etc., covered under the specified sub-headings of HSN 8471, i.e., their imports will henceforth require a license.

Key changes

- Import of laptops, tablets, all-in-one personal computers, and ultra-small form factor computers and servers covered under HSN 8471 to be 'Restricted' and import to be allowed against a valid license.
- Restriction not to apply to imports under Baggage Rules, 2016, as applicable.
- Exemption from obtaining import license will be in the following cases:
  - One laptop, tablet, all-in-one personal computer, or ultra-small form factor computer, including those purchased from e-commerce portals, through post or courier. However, these will be subject to payment of the applicable customs duty.
  - Up to 20 such items per consignment for the purpose of R&D, testing, benchmarking and evaluation, repair and re-export and product development purposes. The same will be subject to the condition that these goods are to be used for the stated purposes only and will not be sold. Further, after the intended usage, the goods would either be destroyed beyond use or re-exported.
  - Re-import of goods repaired abroad in terms of repair and return.
  - Laptops, tablets, all-in-one personal computers, and ultra-small form factor computers and servers, which are an essential part of a capital good.

(Notification No. 23/2023 dated 3 August 2023)

Restriction on import of laptops, tablets, all-in-one personal computers, ultra small computers effective from 1 November 2023

The DGFT has notified that liberal transitional arrangements have been provided for the import of laptops, tablets, all-in-one personal computers and ultra small form factor computers, and servers falling under HSN 8471 till **31 October 2023**.

Accordingly, the import of laptops, tablets, all-in-one personal computers and ultra small form factor computers, servers falling under HSN 8471 can be cleared without a license for restricted imports till **31 October 2023**. With effect from **1 November 2023**, a valid license for restricted imports shall be required.

(Notification No. 26/2023 dated 4 August 2023)

02

Key judicial pronouncements

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

I. Key rulings under the GST laws

SC issues ad interim stay on Karnataka HC judgement in the case of Gameskraft Technologies

In May 2023, the Karnataka HC, in the case of an online gaming company Gameskraft Technologies Private Limited, quashed the show cause notice proposing demand of approx. INR 21,000 crore along with interest and penalties. The HC held that a game of chance, whether played with stakes or not, is gambling. However, a game of skill, whether played with or without stakes, is not gambling.

The DGGI, filed an SLP in the SC, challenging the HC ruling.

The issue was taken up by the SC on 6 September 2023.

The SC directed both the parties to file a common compilation of judgements, statutes and rules which would be relied upon during the hearing and the written submissions. Furthermore, the SC issued an ad interim stay on the Karnataka HC judgement. The case has been listed for hearing on **10 October 2023**.

SC upholds Kerala HC's judgement, holding that seizure of cash during investigation was unwarranted

Summary

The SC has upheld the Kerala HC judgement wherein it had been held that cash cannot be seized in an investigation to determine alleged evasion of tax. The HC had opined that even though the provisions pertaining to inspection, search, and seizure permits seizure of cash in appropriate cases, the seizure of cash from the premises of the appellant in the present case was uncalled for and unwarranted. Additionally, the HC had directed the department to release the cash so seized.

Facts of the case

- Shabu George (the petitioner) had ceased to operate his quarrying business years back. The petitioner was not an assessee whose property required to be inspected or seized.
- During the investigation for alleged tax evasion, the petitioner was aggrieved by the seizure of cash from his premises. The petitioner had preferred a writ petition before against the unwarranted seizure of cash and urged for the release of the cash so seized, which was dismissed.
- In an appeal, the division bench of the HC held that seizure of cash from the appellant's premises was completely improper and uncalled for. Hence, the HC directed the department to release the seized cash. Aggrieved by the HC's decision, the department has filed an SLP before the SC.

Kerala HC observations and ruling [Writ Appeal No. 514/2023, Order dated 24 March 2023]

- **Seizure of cash not allowed in investigation for detection of tax evasion:** The HC opined that the power of an authority to seize any 'thing' while functioning under the provisions of a taxing statute must be guided and informed in its exercise by the object of the statute. Accordingly, during a tax evasion investigation, the cash that was not even part of the stock-in-trade cannot be seized. The HC held that even though the provisions for inspection, search, and seizure permits seizure of 'things', including cash in appropriate cases, the present case did not merit such a seizure.
- **Continued retention of cash seized without issuing SCN is unjustified:** The HC condemned the department's action to retain the cash for more than six months without issuing an SCN. Accordingly, the HC directed the department to release the cash immediately.

SC observations and ruling [SLP(C) Diary No. 27670/2023, Order dated 31 July 2023]

- The SC found no merits to interfere with the HC's judgement, and therefore, dismissed the SLP.

Our comments

In a catena of judgements, different HCs favoured the assessees and held that cash cannot be seized during investigation and search proceedings.

The Delhi HC, in the case of Arvind Goyal, has held that the seizure of currency by the GST officers was illegal and without any authority of law. The HC had stressed that the power of seizure is limited to goods that are liable for confiscation or any documents, books or things that may be relevant to any proceedings. Accordingly, 'cash' does not fall within the ambit of goods and cannot be seized.

The Kerala HC, in the case of Dhanya Sreekumari, had also held that cash not being stock-in-trade, cannot be seized, and directed the release of the seized cash. However, the Madhya Pradesh HC, in the case of Kanishka Matta, had broadened the meaning of the word 'things' appearing in Section 67(2) of the CGST Act and permitted that cash would fall within its ambit and can accordingly be seized.

Owing to the contrary view taken by the Madhya Pradesh HC, the issue once again was deliberated upon. The SC has categorically clarified the controversy once and for all.

ITC ineligible if supplier does not pay tax to government despite recovering from recipient – Patna HC

Summary

The Patna HC denied the eligibility of the ITC to the buyer where the supplier fails to remit tax to the government despite recovering from the buyer. The HC emphasised that mere documentation of tax invoices, bank payments, and proof of goods transportation does not absolve the buyer from demonstrating that the tax has actually been paid to the government. Section 16(2)(c) of the CGST Act imposes a mandatory condition, the non-fulfilment of which would render ITC ineligible.

Facts of the case

- M/s. Aastha Enterprises (the petitioner), being the purchasing dealer, fulfilled its tax liability to the selling dealer, who, in turn, had failed to deposit the same to the government.
- The petitioner filed a writ petition to question the eligibility of the ITC, which is evidenced by the invoice and other documentary evidence and insisted on taking action against the selling dealer who defaulted on tax payment in terms of provisions of the GST Act.

Patna HC observations and judgement [Civil Writ Jurisdiction Case No. 10395/2023; Order dated 18 August 2023]

- **Condition for availing ITC must be satisfied in toto:** The HC opined that the registered persons are entitled to avail ITC with respect to goods, services, or both, which are used or intended to be used in the furtherance of business, subject to the fulfilment of specified conditions together and not individually. Therefore, the HC was of the view that the entitlement of the ITC shall be available to the purchasing dealer only upon the payment of tax to the government, along with fulfilment of other conditions, such as the existence of a tax invoice, proof of receipt of goods or services, or both.
- **Burden of proof cast on the purchasing dealer to prove that tax has been deposited to the government:** Drawing reliance from the SC's judgement in the case of M/s Ecom Gill Coffee Trading Private Limited, the HC asserted that the burden of proof of establishing the genuineness of the transaction rests upon the purchasing dealer. Further, merely furnishing the details of the tax invoice would not suffice to claim the ITC. Basis the above, the HC held that merely producing the tax invoices, bank account details, and documents proving transportation of goods does not absolve the purchasing dealer of establishing that tax has been actually paid to the government, which is a mandatory condition under Section 16(2)(c) of the CGST Act for being entitled to the ITC claim.
- **ITC is a benefit or concession conferred only if prescribed conditions are satisfied:** The HC observed that the ITC is a benefit introduced to avoid tax cascading. However, such statutory benefit is available only when the conditions are fulfilled, else no benefit can flow to the claimant. Moreover, the credit of the ITC in the ledger maintained can only arise when the tax is paid to the government. Considering this, the HC asserted that since the tax has not been paid to the government, the tax liability is not satisfied, and the claim of the ITC fails.
- **Existence of recovery provisions does not absolve the purchasing dealer liability:** The HC stated that only because the machinery provisions provide for recovery of the amount from the selling dealer, it does not expunge the tax liability saddled upon the purchasing dealer. Accordingly, the HC denied the entitlement of the ITC to the purchasing dealer in the absence of payment to the government, despite the collection of such tax from such purchasing dealer.

Our comments

This issue was prominently deliberated upon in the erstwhile tax laws and has continued to persist under GST.

Earlier, the Delhi HC, in the case of Quest Merchandising India Private Limited, had read down the provision of the Delhi VAT Act, which precluded the purchasing dealer from availing ITC in the event the selling dealer had failed to deposit the tax despite being paid by the purchasing dealer. In appeal, the SC had affirmed the judgement of the Delhi HC. The apex court had taken a similar position in the case of Arise India Limited. The Madras HC, in the case of Sri Vinayaga Agencies under the Tamil Nadu VAT Act, and in the case of M/s. D.Y. Beathel Enterprises under GST, held a similar stance.

Recently, the Calcutta HC, in the case of Suncraft Energy Private Limited, had overturned the order of the adjudicating authority demanding reversal of excess ITC availed and clarified that the ITC cannot be denied without a thorough investigation of the supplier.

However, the Madras HC, in the case of Pinstar Automotive India Private Limited, had strictly interpreted Section 16(2)(c) of the CGST Act and ruled that the mandate is upon the claimant to ensure compliance with the provision, failing which the purchasing dealer is thwarted from availing the ITC.

The purchasing dealer has been saddled with the impossible burden of proof to ensure that the tax collected is paid to the government, without a mechanism to determine the same. The condition places the purchasing dealer, who has duly paid the tax, at par with the violating supplying dealer, and takes away the genuine claim of the ITC despite availability of the mechanism with the government to recover the tax duly paid or acting upon the defaulter dealer.

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

Advisory services provided to foreign entities on one's own account do not qualify as intermediary service - Delhi HC

Summary

The Delhi HC has held that the advisory services provided on one's own account to foreign entities on a principal-to-principal basis do not qualify as intermediary services. The HC emphasised that the concept of intermediary involves three parties. However, in the present case, the petitioner provided the advisory services as an independent service provider to the service recipient and not as an agent of the recipient, therefore, only two parties were involved. The HC further ruled that merely because the overseas entity may invest in Indian entities based on the advisory services received from the petitioner, it cannot be construed as an intermediary. Additionally, the HC interpreted the place of supply provisions and concluded that the petitioner had not rendered any services in more than one state or union territory, neither were the services supplied to an individual that required the physical presence of the recipient, nor such services were directly related to immoveable property.

Facts of the case

- M/s. Cube Highways and Transportation Assets Advisor Private Limited (the petitioner) provides investment advisory services to non-resident group companies related to investment in transportation sector companies in India.
- The petitioner agreed to provide advisory support services to I Squared Asia Advisors Pte. Ltd., having its principal place of business in Singapore (the recipient) vide an amended support service agreement.
- Under the erstwhile service tax regime, the services provided by the petitioner were recognised as export of services and the accumulated ITC was refunded w.r.t. such services.
- However, under the GST regime, for the FYs 2018-19 to 2020-21, the refund claim of unutilised ITC was rejected on the grounds inter alia that the place of supply of services appeared to be in India; accordingly, the transaction could not be classified as export of services.
- The petitioner filed appeals against the adjudicating authority's rejection orders. However, the appellate authority upheld such orders, asserting that since the petitioner was providing the services to the customers of the recipient, its services qualified as intermediary services. Hence, the place of supply of services would be in India, and they would not be treated as export of services.
- Aggrieved by appellate authority orders, the petitioner filed the present writ petition seeking ITC refund and quashing orders.

Delhi HC observations and judgement [W.P.(C) 14427/2022; Order dated 17 August 2023]

- **Service provided independently on a principal-to-principal basis:** The HC noted that in terms of the agreement, the petitioner provided the advisory services as an independent service provider on a principal-to-principal basis, and not as an agent of the recipient.
- **Adjudicating authority's reasoning is fundamentally flawed:** The HC ruled that solely because the recipient had invested in Indian companies basis the advisory services received from the petitioner, it cannot be construed as an 'intermediary'. Further, in the absence of explicit allegations that the petitioner was an intermediary or a doubt casted upon the nature of services, the adjudicating authority had erred in its order.
- **Advisory services cannot be arbitrarily construed as intermediary services:** The HC explained that the concept of an intermediary involves three parties, i.e., the supplier of principal service, the recipient and an intermediary facilitating or arranging such supply. Further, where a party provides advisory services on its own account rather than merely arranging or facilitating such supply, there are only two entities involved, i.e., the service provider and the service recipient. Additionally, under the erstwhile service tax regime, the advisory services were classified as 'Management and Business Consultant Services' and were eligible for a refund. Accordingly, the HC held that the petitioner, being a service provider, on its own account, provided the advisory services Consequently, the HC held that the petitioner, being a service provider on its own account, provided the advisory services to the service recipient and was not merely facilitating or arranging it. Therefore, the services cannot be considered as intermediary services.
- **Place of supply provisions of advisory services:** The HC interpreted the place of supply provisions and observed that the petitioner had not rendered any services in more than one state or union territory, neither were the services supplied to an individual that required the physical presence of the recipient, nor such services were directly related to any immoveable property. Therefore, the HC quashed the impugned orders and rejected the department's request of remanding the matter for re-adjudication.

Our comments

The interpretation of scope of 'intermediary services' was one of the burning issues under the service tax regime, which persists even under the GST regime. To mitigate the ambiguities and ensure uniformity in the implementation of provisions, the CBIC vide Circular No. 159/15/2021-GST dated 20 September 2021 clarified the doubts in this regard.

The CBIC stated that there is broadly no change in the scope of intermediary services in the service tax regime vis-à-vis the GST regime. Further, the concept of intermediary services requires some basic prerequisites inter alia that it does not include a person who makes supply on his own account. It implies that in cases wherein the person supplies the main supply, either fully or partially, on a principal-to-principal basis, the said supply cannot be covered under the scope of an intermediary.

The Punjab and Haryana HC, in the case of Genpact India Private Limited, held that the services provided on one's own account on a principal-to-principal basis cannot be considered as an intermediary service. Even the Delhi HC, in the case of Ernst & Young Limited, had categorically clarified that the services provided on one's own account cannot be considered as intermediary services. The present ruling passed by the Delhi HC is also on similar lines and shall set precedence in similar matters.

Limitation period for filing an appeal commences from date of service of manual order - Gujarat HC

Summary

The Gujarat HC noted that the GST law requires that an appeal has to be filed electronically. However, it is nowhere stated that it is to be filed only after the impugned order has been uploaded on the GSTN portal. The HC observed that the petitioner agreed that the order was served manually. In this respect, the HC ruled that the limitation period for filing an appeal begins from the date of service of the manual order, even if the order is not uploaded online. Further, only because orders were subsequently uploaded does not render or save the petitioner's appeals having been time barred. Accordingly, the HC rejected the petitioner's claim that they were handicapped in filing an appeal, which can only be filed electronically.

Facts of the case

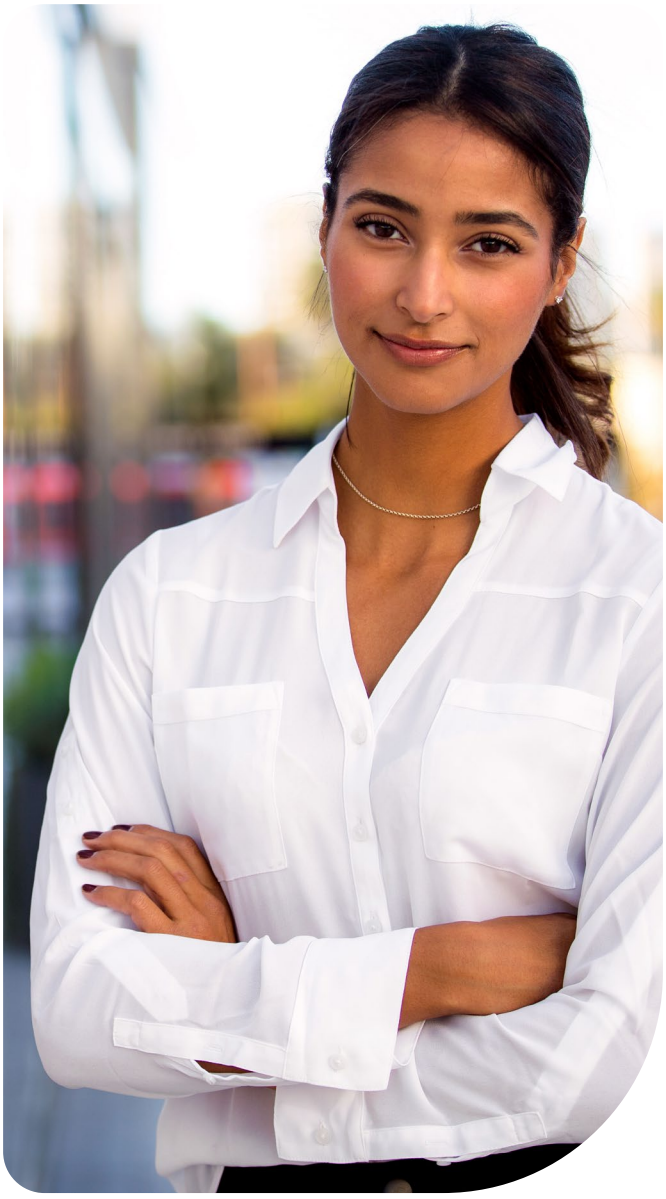
- Britannia Industries Limited (the first petitioner) is engaged in manufacturing food products and exporting goods under the letter of undertaking.
- The petitioner had filed a refund application of accumulated unutilised ITC of IGST distributed by the ISD for services related to the SEZ Unit, which was rejected by the department and served with the OIO manually.
- Thereafter, the petitioner received an SCN as to why a fresh application was filed and the claim was again rejected (second OIO), as it was not maintainable. The petitioner filed an appeal against the second OIO, which was rejected on the ground that there were no powers to review an earlier order.
- The second petitioners are partners in a partnership firm, who were informed by the bank that by virtue of notices, the Assistant Superintendent of CGST had directed the bank to debit-freeze the petitioners' accounts in lieu of tax recoveries from the partnership firm, which were outstanding by virtue of orders dated 31 March 2021 and 29 April 2021.

Petitioners' contentions

- The petitioner contended that he was unable to file an appeal in an electronic mode due to the non-receipt of an electronic copy of the OIO.
- The petitioner could only had filed an appeal electronically, and non-uploading of the OIO must be considered as non-communication of the order. Thus, the subsequent order which observed that since no appeal was filed, the refund issue had become final, was bad and illegal.

Revenue's contentions

- The petitioner had a manual copy of the order, therefore, in accordance with the rule, the form only required details of the number of the OIO on the portal that could have been lodged.
- Non-uploading of the original order had no connection with filing the appeal electronically.
- Uploading of the orders was merely an alternate means of service, and the fact that uploading was necessary under Rule 142(5) of the CGST Rules does not imply that no appeal can be filed until the orders are uploaded. Manual communication of the decision may also make it easier for the assessee to file an electronic appeal, and failing to upload an order does not preclude filing an appeal.



Gujarat HC observations and ruling (R/Special Civil Application No. 14867/4876/5731 of 2022, vide order dated 7 August 2023)

- **Re-credit of the refund amount in the credit ledger is rightly rejected:** The HC referred to the provisions and opined that a refund can only be re-credited to the electronic credit ledger if the claimant provides an undertaking not to file an appeal, or if the appeal filed is rejected. In the present case, the petitioner's appeal was neither rejected nor filed, and he had not made an undertaking for non-filing of an appeal. Hence, the HC opined that the request for re-credit of the refund was rightly denied.
- **Appeal filing period commences from the date of service of manual order:** The HC referred to the Bombay HC's decision in the case of Meritas Hotels Pvt Ltd., wherein it was held that although the GST rules prescribes that an appeal has to be filed electronically, it nowhere prescribes that it is to be filed only after the impugned order has been uploaded on the GSTN portal. Therefore, the date of communication of the order by email was taken as the date of communication of the order for the purposes of limitation. Even in the case of Jose Joseph, the only question that was considered was when the limitation should start. The judgement cannot be read to mean that no appeal can be filed at all unless the order is uploaded.
- **Appeals are time barred:** The HC noted that in the case of Gujarat State Petronet Limited, the authorities were unable to upload the decision due to technical issues. In the present case, the HC opined that the petitioner waived his statutory right to appeal since he requested a copy of the assessment order after the recovery proceedings had begun. Further, merely because the orders were subsequently uploaded will not render or save their appeals from having been time barred, especially when recovery proceedings have already been done and orders to debit-freeze accounts have been made.
- **Liability of the partners:** The HC observed that the orders were served on the partner and an acknowledgement to that effect had also been produced. Therefore, the HC held that the firm and each of its partners shall, jointly and severally, be liable for government dues.

Our comments

An intriguing issue relating to the computation of the limitation period for filing an appeal under the GST laws has been a subject of dispute before various courts. The GST provisions prescribes filing of an appeal before the first appellate authority electronically or otherwise as may be notified within the prescribed period. In the absence of any notification prescribing any other mode for filing, the appeal under the GST laws can only be filed electronically.

In this respect, the Bombay HC, in the case of Meritas Hotels Pvt. Ltd., had held that for the purpose of limitation, the date of communication of the order is to be regarded as the date on which the order was sent by email to the petitioner. Even in the present case, the HC held that merely because the orders were subsequently uploaded will not render or save the petitioners' appeals from having been time barred.

The bonafide assessees are being placed in a precarious situation as a result of the department's decision to either not upload the order or do so after communicating through email or physically, depriving them of timely justice and subjecting them to illegitimate demands.

In this regard, pursuant to the 50th GST Council recommendation dated 11 July 2023, the CBIC, on 4 August 2023, notified that the taxpayers shall now be allowed to file a manual appeal before the first appellate authority in two cases, i.e., if the Commissioner notifies or when the appeal cannot be filed electronically due to the non-availability of the decision on the common portal. The recent amendments allow the manual filing of an appeal in specified circumstances, which shall help the taxpayers in filing appeals in a timely manner to avoid any delay in justice.

Decisions of erstwhile service tax regime clarifying receipt of convertible foreign exchange hold precedential value under GST – Calcutta HC

Summary

The Calcutta HC noted that the adjudicating authority failed to consider pari materia provisions and rulings under the service tax regime. Such provisions and rulings deal with the issue of whether the foreign currency remitted in INR through an exchange house located outside India would qualify as convertible foreign exchange. In the present case, remittance received in USD was converted to INR by an exchange house through its VOSTRO account, which shall be deemed to have been received in foreign currency in accordance with the Foreign Exchange Regulations. Accordingly, the HC set aside the adjudicating authority's refund rejection order and remanded back the matter, directing it to take note of the ratio decidendi that may be drawn from the rulings pronounced under the service tax regime.

Facts of the case

- Bimal Jhunjhunwala (the appellant) had filed a refund claim that was rejected by the adjudicating authority. The authority noted that the remittance was not received in foreign convertible exchange, and therefore, it is violation of the condition prescribed under the definition of export of services under GST.
- Thereafter, the appellant preferred an appeal before the appellate authority, who upheld the rejection order. Aggrieved by the said order, the appellant preferred the present writ petition before the HC.

Calcutta HC observations and order [MAT 1219/2023 with IA No. CAN 1/2023, order dated 18 August 2023]

- **Benefit of export cannot be denied merely because payment was routed through a third party based out of India:** The HC noted the appellant's argument that any INR amount remitted through an exchange house situated outside India shall be deemed to be received in foreign currency. In the present case, remittance received in USD was converted to INR by an exchange house through its VOSTRO account with HDFC Bank, an authorised category-1 dealer, which shall be deemed to have been received in foreign currency in accordance with the Foreign Exchange Regulations. Therefore, the HC set aside the orders of the adjudicating and appellate authorities and remanded back the case to the adjudicating authority.
- **Ratio Decidendi of erstwhile service tax decisions hold precedential value under GST:** The HC found it incorrect that the adjudicating authority did not consider the decisions pronounced under the erstwhile service tax regime. Considering pari materia and statues existing in the service tax regime, the HC directed the adjudicating authority to consider the service tax regime decisions to arrive at a conclusion.

Our comments

As per the condition prescribed for the manner of repatriation under the Foreign Exchange Regulation 2015, a person shall be deemed to have repatriated the realised foreign exchange to India when he receives in India payment in rupees from the account of a bank or an exchange house situated in any country outside India, maintained with an authorised dealer.

In this respect, earlier, the SC, in the case of J.B. Boda V. the CBDT, had held that an exporter cannot be denied the benefit of export of service solely on the ground that the payment has been routed through a third party based out of India. Similarly, the CESTAT Mumbai, in the case of AGM India Advisors Private Limited, under the erstwhile service tax regime, had followed the supra case and had held that even though the appellant received the payment in INR, the same is deemed to be convertible foreign exchange, and the condition prescribed under the definition of export stands complied on the ground that foreign remittance was received in INR.

Since the provisions under the GST and erstwhile service tax laws are pari materia, therefore, the decisions under service tax would hold relevance even under the GST regime.

II. Key rulings under the erstwhile indirect tax laws

Belated hearing of the show cause notice would amount to violation of principles of natural justice - Bombay HC

Summary

The Bombay HC has held that allowing the Revenue to adjudicate an SCN after an unreasonable delay/gap would tantamount to denying fairness, judiciousness, non-arbitrariness and in violation of the principles of natural justice. The HC opined that the adjudication of any SCN shall be strictly done within the prescribed timelines and allowing such proceedings after a long gap without proper explanation is unlawful and arbitrary. Merely because there was shifting of the Commissionerate and re-organisation of its office cannot be reason to turn down and/or not comply with the obligations under the law to promptly and/or expeditiously adjudicate the SCN, to take it to a logical conclusion. Therefore, the HC has allowed the writ, praying not to allow the Revenue to adjudicate a decade-old SCN.

Facts of the case

- Coventry Estates Pvt. Ltd (formerly S and H Services Pvt. Ltd.) (the petitioner) was engaged in the construction of a residential complex.
- The petitioner had entered a contract with Sunny Vista Pvt. Ltd. for undertaking construction of 10 towers and other works in a SEZ.
- The petitioner received a deposit of refundable nature from Sunny Vista Pvt. Ltd. and declared this deposit in service tax return for the period October 2008 to March 2009 as the services provided to the SEZ under the exempt category.
- The department issued summons to the petitioner to furnish balance sheet, receipt ledger, contracts, invoices, agreement, and details of the advance amount received.
- Thereafter, an SCN dated 16 March 2012 was issued, alleging recovery of service tax in respect of an advance received by them to which the petitioner submitted a detailed reply on 24 January 2013.
- The petitioner was subsequently amalgamated as part of a merger plan.
- Several correspondences/notices were issued by the department starting from 29 December 2021, fixing various dates of hearing, to which the petitioner replied vide a letter dated 7 January 2022 and 19 February 2022 requesting for an adjournment and reiterated that the SCN be dropped on the ground of inordinate delay in adjudicating the SCN, respectively. Despite such repeated letters, another communication was issued by the department to the petitioner on 1 March 2022, informing that a hearing on the SCN was fixed on 10 March 2022.
- Aggrieved by the same, the petitioner filed a writ petition before the Bombay HC.

Petitioner's contentions

- The petitioner contended that the adjudication of the SCN after an inordinate delay is severely prejudicial to the rights of the petitioner.
- The petitioner mentioned that the proceedings should be concluded within a period of six months, whereas in the case of fraud, collusion etc., the period prescribed is one year.
- The petitioner referred to the decision of the Bombay HC in the case of ATA Freight Line (I) Private Limited, wherein it was held that the Revenue is not empowered to adjudicate an SCN after an inordinate delay and the Revenue was entirely responsible for the gross delay in adjudicating the SCN also mentioned that any legal actions taken against the assessee must be concluded on time and the Revenue cannot keep such cases pending indefinitely.
- Therefore, the petitioner prayed before the HC to quash the SCN.

Revenue's contentions

- The Revenue submitted that because of genuine reasons on account of shifting of the Commissionerate and re-organisation of the field formations, the proceedings could not be concluded.
- The Revenue contended that the petitioner had acquiesced in accepting belated adjudication by filing a letter requesting adjournment.
- The Revenue referred to the decision in the case of M/s. Swati Menthol and Allied Chemicals Ltd. & Anr., wherein the SC allowed the Revenue to adjudicate a decade-old SCN.

Bombay HC's observations and ruling (Writ Petition No. 4082 of 2022, vide order dated 25 July 2023)

- **Definite purpose and intention of the legislature to prescribe time limits:** The HC referred to the relevant provisions under the service tax law and observed that the statute itself prescribes for such period within which the service tax would be required to be determined. Hence, it is expected that the approach and expectation from the officer adjudicating the SCN would be to strictly adhere to the timelines prescribed, as there is a definite purpose and intention of the legislature to prescribe such time limits.
- **No provision to condone inordinate delay on the part of adjudicating officer:** The HC stated that in the present case, the authority has not considered the requirement to follow the prescribed timelines and obligation mandated by the law has been completely overlooked by the officer responsible for adjudicating the SCN. Furthermore, there is no provision, which in any manner would permit any authority to condone such inordinate delay on the part of the adjudicating officer to adjudicate the SCN.
- **Proceedings pursuant to SCN after a long gap is unlawful and arbitrary:** The HC observed that adjudication of any SCN shall be strictly within the prescribed timelines. The HC also emphasised to the principle of maxim lex dilationes abhorret, i.e., law abhors delay, and opined that a delay in adjudicating an SCN would be tantamount to denying fairness, judiciousness, non-arbitrariness and in violation of the principles of natural justice.
- **If there is violation of a fundamental right, no prejudice, even if required, is to be demonstrated:** The HC referred to its decision in the case of Sushitex Exports (India) Ltd., wherein, the HC allowed a writ petition after a delay of two decades and observed that when a power is conferred to achieve a particular object, such power has to be exercised reasonably, rationally and with objectivity, and if the petitioners had not invoked the writ, the SCN would have continued to gather dust. Therefore, the petitioners cannot possibly be worse off in seeking a constitutional remedy.
- **Re-organisation of the Revenue's office is not an adequate reason to substantiate delay:** The HC held that shifting of the Commissionerate and re-organisation of its office was not a valid reason to abdicate and/or not to comply with the obligations under the Act to promptly and/or expeditiously adjudicate the SCN.

Our comments

It is a well settled principle of law as laid down in the catena of judgements that the period within which adjudication should happen is as mandated by law, and in any case, it needs to be done within a reasonable period from the issuance of the notice.

On a similar issue, in the case of Citedal Fine Pharmaceuticals, the SC held that every authority should exercise the power within a reasonable period. The SC opined that in cases where an inordinate delay in the issuance of a notice or demand for recovery is raised, it would be open to the assessee to contend that it is bad on the ground of delay.

Even recently, in the case of ATA Freight Line (I) Private Limited, the SC upheld the Bombay HC's order disallowing the adjudication of SCNs pending for over 11 years, stating that the Revenue is not empowered to adjudicate an SCN after an inordinate delay.

The present decision by the HC is in line with the decision of the SC and should bring relief to other assessees dealing with a similar situation.

Delayed payment charges, penal interest and cheque bounce charges not leviable to service tax – CESTAT

Summary

The CESTAT Mumbai Bench has held that the charges levied for a delay in the payment of EMIs, including penal interest and cheque bounce charges recovered in the case of the bouncing of repayment/dishonour of a cheque, are not a part of consideration, and therefore, not leviable to service tax. The CESTAT observed that the transaction of levy of additional/ penal interest or penalty imposed for the dishonour of a cheque is not for tolerating the act or situation but is penal in nature, and thus, is not towards consideration for any service. Therefore, the Tribunal allowed the appeal filed and has set aside the order passed by the Commissioner confirming the demand of service tax, along with interest and penalty on the recovery of penal interest and cheque bounce charges.

Facts of the case

- M/s. Bajaj Finance Limited (the appellant) is a NBFC engaged in the business of providing finances to borrowers.
- The appellant had entered into agreements for providing loans and collected various charges, such as processing fees, documentation fees, logging fees, etc., and had paid service tax on such charges.
- The terms and conditions of the agreement provided to collect 'penal interest' as an additional interest in the case of a delay in the payment of dues and 'bounce charges' on account of dishonour of a cheque/ECS or any other electronic or clearing mandate.
- The department conducted an audit and examined the agreements and identified that the 'penal interest' is a part of consideration and is to be treated as a 'service of tolerating the act of delay/default by borrowers'.
- Therefore, an SCN was issued, alleging recovery of service tax on such charges collected, which was confirmed by the commissioner.
- Aggrieved by the same, the appellant had filed an appeal before the Tribunal.

Appellant's contentions

- The appellant submitted that it was under the bonafide belief that the 'penal interest and bounce charges' were additional interest, penalty or liquidated damages or compensation for the breach of the terms and conditions of the agreement, therefore, these were exempt from service tax.
- The petitioner also mentioned that the failure of the payment of dues at the specified time amounts to a breach of the contract and the compensation for the breach is not a consideration for any service.
- The appellant also submitted that there was only one agreement for the disbursal of the loan for which consideration was payable in the form of interest, and this agreement was for the performance of the contract and not for its breach.
- The appellant contended that it is a settled position of law that damages/penalty/compensation for a breach of contract is not consideration for any service, and thus, is not leviable to service tax.
- The appellant referred to the master circular issued by the RBI, wherein, it was stated that interest should be charged on loans and advances. The circular also provides to levy penal interest for default in repayment, and so, there was no extra consideration that flows in such payments made on account of penal interest delayed payment charges.
- The appellant also referred to Notification No.24/ 2012 - S.T. inter alia, which provided that the value of any taxable service does not include interest on delayed payment of any consideration for the provision of services or sale of property, whether 'movable' or 'immovable', and contended that it provides that the government had excluded the interest on delayed payment from the scope of the payment of service tax.

Revenue's contentions

- The department clarified that the penal interest/bounce charges are not part of the EMI of the loan amount or principal loan amount, and these are extra amounts imposed by the appellants as penal interest/bounce charges.
- The department submitted that the following remedies were available with the appellant, either to recall loan or cancellation of agreement, initiation of legal proceedings under the Negotiable Instruments Act, 1881, taking possession of the product, etc., but the appellant did not obtain a recourse to these remedies.
- The department submitted that the intention of both the parties was to avoid litigation by paying a pre-determined sum to the lender on the breach of contract by the borrower.
- Therefore, the department contended that 'penal charges and bounce charges' are in nature of consideration, and such a default/delay/non-payment/dishonour of payment instrument was tolerated by the appellant, and it was a declared service of 'agreeing to tolerate an act or a situation.

CESTAT Mumbai observations and ruling (Service Tax Appeal No. 90043 of 2018, vide order dated 7 August 2023)

- **Penal interest is not chargeable to tax:** The CESTAT referred to a recent circular issued by the board under the GST regime (Circular No. 102/21/2019-GST dated), wherein it has been clarified that the transaction of levy of additional/penal interest does not fall within the ambit of Entry 5(e) of Schedule II of the CGST Act, as this levy of additional/penal interest satisfies the definition of 'interest' as contained in Notification No.12/2017-Central Tax (Rate), and hence, it is exempt from tax.
- **Penal charges are not covered under the ambit of declared services:** The CESTAT referred to the decision in the case of M/s. South-eastern Coalfields Ltd., wherein, it was held that it is not a sustainable view to consider penalty amount, forfeiture of earnest money deposit and liquidated damages as consideration for tolerating an act.
- **Compensation received is not 'synonymous' to 'tolerating of an act':** The CESTAT referred to the decision of the SC, wherein, it was held that in a breach of contract, one party tolerating an act or situation is not correct and also emphasised that any amount charged, which has no nexus with the taxable service and is not a consideration for the service provided, does not become part of the value that is taxable, and there is a marked distinction between 'conditions to a contract' and 'considerations for the contract'.
- **Penalty on dishonour of cheque deters and discourages such actions:** The Tribunal referred to Circular No.178/10/2022 and Circular No.214/1/2023-Service Tax, wherein, it was clarified that a cheque dishonour, fine or penalty is not a consideration for any service, therefore, it is not taxable. The fine or penalty imposed for the dishonour of a cheque is not for tolerating the act or situation, but it is for penalising and thereby deterring and discouraging such an act or situation.

Our comments

The taxability of recovery of penal interest and cheque bounce charges has been one of the contentious issues under the erstwhile service tax laws, as well as GST laws. Considering the contradictory rulings on the issue and concerns raised by the businesses, the board issued a circular categorically clarifying that the fine or penalty that the bank imposes, for delayed payment or dishonour of a cheque, is a penalty imposed not for tolerating the act or situation but for penalising, and thereby deterring and discouraging such an act or situation. Therefore, the recovery of such amounts is not a consideration for the service of agreeing to tolerate an act or a situation. Such transactions of levy of additional/penal interest does not fall within the ambit of Entry 5(e) of Schedule II of the CGST Act.

Even in the appellant's own case, the Maharashtra AAR had held that the amount collected towards cheque bounce charges amounts to the supply of service. However, the AAAR has reversed the AAR's ruling and held that the additional/penal interest recovered by the applicant from its customers against the delayed payment of monthly installments of the load extended to such customers, would be exempt from GST.

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

Intentional and wilful suppression of facts cannot be presumed to invoke extended period of limitation - CESTAT

Summary

In line with the settled legal position, the CESTAT New Delhi has held that the extended period of limitation cannot be invoked unless there is evidence of fraud or collusion or wilful misstatement or suppression of facts or violation of the provisions of an Act or rules with an intent to evade tax. The CESTAT opined that intentional and wilful suppression of facts cannot be presumed merely because the assessee is operating under self-assessment or because the appellant did not agree with the audit and claimed that the CENVAT credit was admissible or because the appellant did not seek any clarification from the Revenue. In the present case, the officer did not conduct a detailed scrutiny of the returns, and the availment of the CENVAT credit, which is alleged to be inadmissible, was discovered only during audit. Therefore, the CESTAT set aside the impugned order to the extent of denial of the CENVAT credit on the architectural services during the period 2011-12 and interest thereon.

Facts of the case

- M/s. G D Goenka Private Limited (the appellant) had built two high quality school buildings and provided high quality school education and provided two other services, viz., franchisee service and renting of immovable property.
- The appellant availed and utilised the CENVAT credit on various input services used in the construction of the school building.
- The Revenue passed the final order, alleging that credit was ineligible and had been wrongly availed because the input services were used in the construction of the school building to provide school education, and that is an exempted service.
- Aggrieved by the same, the appellant had filed an appeal before the CESTAT.

Assessee's contentions

- The appellant submitted that the CENVAT credit was available, and it was correctly taken because the school building and the school were used to provide franchisee services.
- The appellant mentioned that there was a direct nexus between the input services used to construct the school building and the taxable franchisee services provided by the appellant.
- The appellant also submitted that as per the CENVAT Credit Rules, full credit will be available unless such services are exclusively used for providing exempted services.
- The appellant submitted that the extended period of limitation was inadvertently invoked by the Revenue because none of the essential ingredients to invoke it, viz., fraud or collusion or wilful misstatement or suppression of facts or violation of the Act or Rules with an intent to evade payment of service tax, were present in the case.

Revenue's contentions

- The reasons for invoking an extended period of limitation given in the SCN was that the appellant had, during the audit, deposited the allegedly short paid service tax but later disputed it, which showed its intention to evade payment of service tax.
- The Revenue contended that the appellant had wilfully and deliberately suppressed the fact and had availed ineligible CENVAT credit on input services.
- The Revenue submitted that the appellant did not seek clarification from the department regarding the eligibility of the CENVAT credit.
- Considering all these contentions, the Revenue requested to adjudicate the matter afresh.

CESTAT, New Delhi observations and ruling (Final Order NO. 51088 /2023, dated 21 August 2023)

- **Mens rea is essential to prove evasion of tax:** The CESTAT opined that an SCN had to be issued within the normal period of limitation if there is some tax escape assessment. The provision to issue a timely SCN will be rendered otiose if incorrect self-assessment is held as an act of wilful suppression with an intent to evade. The present case is a case of difference of opinion about the eligibility of credit. The appellant had self-assessed duty and paid service tax. Hence, such payment of tax cannot be held as deliberate and wilful suppression of facts.
- **Intent to evade tax is not proved:** The CESTAT held that there is nothing in the law that requires the assessee to accept the views of the audit or of the Revenue during audit or investigation. Sometimes, the assessee deposits some or all the disputed amounts, and later, on consideration or after seeking legal opinion, disputes the liability and seeks a notice or an adjudication order. This does not prove any intent to evade or deliberate or wilful suppression of facts.
- **Returns filed by the assessee in the prescribed format discharges its obligation:** The CESTAT emphasised that the returns are filed online, and it is not possible to provide details related to the invoices or inputs or input services on which credit has been availed. Therefore, the appellant had not provided the details of the credit taken and held that if the format of returns is deficient in design and does not seek the proper details that the assessing officers may require to scrutinise, the appellant cannot be faulted because it neither makes the rules nor designs the format of the returns.

- **No provision in the law nor any obligation on the assessee to seek any clarification:** The CESTAT observed that there is no provision in the Act that contemplates any procedure for seeking clarification from jurisdictional service tax authority. Therefore, the reasoning that the appellant ought to have approached the service tax authority for clarification, is fallacious.
- **Argument that availment of irregular credit would have escaped unless audit was conducted is not valid:** The CESTAT stated that unlike the officers, the assessee is not an expert in taxation and can only be expected to pay service tax and file returns as per its understanding of the law. The remedy against any potential wrong assessment of service tax by the assessee is the scrutiny of the return and best judgement assessment by the Central Excise Officer.
- **Revenue's responsibility to scrutinise the returns on timely basis:** The CESTAT held that if the officer fails to scrutinise the returns and make the best judgement assessment timely and tax escapes assessment is discovered after the normal period of limitation is over, the responsibility for such loss of revenue rests squarely on the shoulders of the officer. It was also clarified vide instructions given by the Board in its manual for scrutiny of returns. Such a loss of revenue is the risk taken by the Board as a matter of policy.
- **Intentional and wilful suppression of facts cannot be presumed:** The CESTAT stated that the intentional and wilful suppression of facts cannot be presumed because the appellant was operating under self-assessment or because the appellant did not agree with the audit and claimed that the CENVAT credit was admissible, or did not seek any clarification from the Revenue. Further, the same cannot be presumed only because the officer did not conduct a detailed scrutiny of the returns and the availment of the CENVAT credit, which is alleged to be inadmissible and was discovered only during audit.

Our comments

Earlier, while dealing with the meaning of the expression 'suppression of facts', the SC, in the case of Pushpam Pharmaceuticals Company, had held that the term must be construed strictly. It does not mean any omission; the act must be deliberate and wilful to evade payment of duty.

Even in the case of Chemphar Drugs & Liniments, the SC had held that something positive other than mere inaction or failure on the part of the manufacturer, producer, or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, beyond the period of six months.

The present ruling is in line with the well settled law that an extended period of limitation cannot be invoked unless there is evidence of fraud or collusion or wilful misstatement or suppression of facts or violation of the provisions of Act or rules with an intent, and is likely to set precedence in similar matters. Further, it categorically highlights that intentional and wilful suppression of facts cannot be presumed merely because the assessee was operating under self-assessment and the irregular availment of CENVAT was discovered only during the audit.

Notice issued based on presumptions without complying with fundamentals of prosecution is unsustainable – CESTAT

Summary

The CESTAT Mumbai Bench has held that the authorities cannot issue an SCN without proper investigation, and accordingly, set aside the impugned SCN. The CESTAT opined that the fundamentals of prosecution, such as framing charges based on admissible evidence, was absent in the present case. The said SCN was issued without examining the activity of the assessee and without examining the reason for difference in the turnover reported in income tax return and ST-3 return. Hence, such SCN issued on presumption is not sustainable.

Facts of the case

- Modern Road Makers Pvt. Ltd. (the assessee) is registered with service tax.
- The Revenue received data about the turnover of the respondent for the year 2013-14 based on income tax return and found that there was a mismatch between the turnover recorded in Form 26AS and the value of the services reflected in ST-3 returns.
- The value of the services reflected in ST-3 returns for the year 2013-14 was nil.
- An SCN was issued alleging recovery of service tax on this difference of turnover of around INR 2,369 crores.
- The respondent submitted their reply to the SCN and submitted that the turnover of about INR 2,295 crores was on account of undertaking works contract for construction, operation, repair and maintenance of national highways and expressways for use by public and the same were exempted from levy of service tax.
- The Commissioner passed the order for dropping the recovery of demands on the account of exemption provided by the government and confirmed the demand of service tax only on the commission received by the respondent.
- Aggrieved by the same, the Revenue had filed an appeal before the Tribunal.

Assessee's contentions

- The assessee filed a cross appeal and submitted its arguments against the grounds of appeal.
- The assessee mentioned that the SCN nowhere explained the reason on account of the difference in turnover.
- The activity of the assessee was also not examined and contended that the difference in turnover could be on account of non-taxable businesses. Therefore, the demand raised in the SCN was not sustainable.
- The assessee also submitted that all the papers related to the contract were provided before the Commissioner.

Revenue's contentions

- The Revenue contended that the Commissioner had not verified any record of the original parent contractor of the NHAI.
- The Revenue submitted that the Commissioner had not recorded any findings to the effect that any verification was carried out to verify the principal genuineness of the contract for operation and maintenance of national highways.
- Therefore, the Revenue requested to adjudicate the matter afresh.

CESTAT Mumbai observations and ruling (Final Order No. 86160/2023, dated 28 July 2023)

- **SCN issued without verification and investigation:** The entire SCN nowhere examines as to on what account the turnover has taken place. The said SCN was issued without examining the activity of the assessee and without examining the reason for the difference in turnover reported in the income tax return and ST-3 return.
- **SCN is totally presumptive in nature:** The Tribunal opined that the fundamentals of prosecution, such as framing charges on the basis of admissible evidence, was absent in the issue of the SCN. It was presumed in the SCN that the entire turnover reported in the income tax return was on account of provision of taxable service, and accordingly, service tax was calculated on such turnover.
- **Basics of proceedings not fulfilled:** The basic of any proceeding is to frame charges based on the assessee's record and establish that the assessee has the short paid calculated and a pre-determined amount of service tax, and then issue them an SCN calling for their explanation as to why the stated amount of service tax should not be recovered from them. Further, the difference in turnover in the ST-3 return and income tax return could be on account of non-taxable businesses. Therefore, unless the Revenue examines the reasons for the difference, it cannot demand service tax blindly based on a difference in the turnover reflected in the two statutory returns.
- **Burden of proof is on the Revenue:** The burden of proof was on the Revenue to establish that the alleged service tax was short paid. Unless such burden of proof was discharged by the Revenue, the SCN cannot be sustainable. The CESTAT observed that the Revenue did not discharge its burden to prove that there was short payment of service tax. Therefore, the impugned SCN cannot be sustained.
- **Impugned SCN is not sustainable:** The Tribunal set aside the SCN and held that it is not sustainable and dismissed the appeal filed by Revenue and allowed the cross appeal filed by the assessee.

Our comments

Several Tribunal benches have previously ruled that it is not possible to demand service tax on a differential amount without first examining the cause of the difference between the turnover reported in ST-3 returns and the Form 26AS statement and without demonstrating that the difference was caused by the provision of taxable services.

Even recently, the Kolkata Bench of Tribunal, in the case of M/s Balajee Machinery, had held that the data appearing on the income tax portal cannot be the basis for levying a penalty on the account of fraud or suppression under the service tax law.

The current judgement is consistent with the precedents set forth above and reiterates that without evidence of a taxpayer default, the Revenue cannot impose demands on taxpayers based solely on information displayed on the income tax portal. This is a positive decision and an analogy can also be drawn under the GST regime in similar matters.

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

Companies Act shall prevail over Customs Act with respect to secured creditors dues vis-à-vis customs dues upon winding up of the company – SC

Summary

The SC has held that the provisions under the Companies Act will prevail over the Customs Act for recovery of dues once the winding up order is passed. The SC opined that the provisions under the Customs Act confers and creates statutory first charge on the customs dues, but these do not incorporate a statutory first charge to override the general law and does not affect the rights of third parties under the Companies Act or rights of the parties as per other applicable laws. Accordingly, the SC has set aside the Andhra Pradesh HC's order which held that the customs authorities have the first right to sell the imported goods under the Customs Act and to adjust the sale proceeds towards the payment of customs duty.

Facts of the case

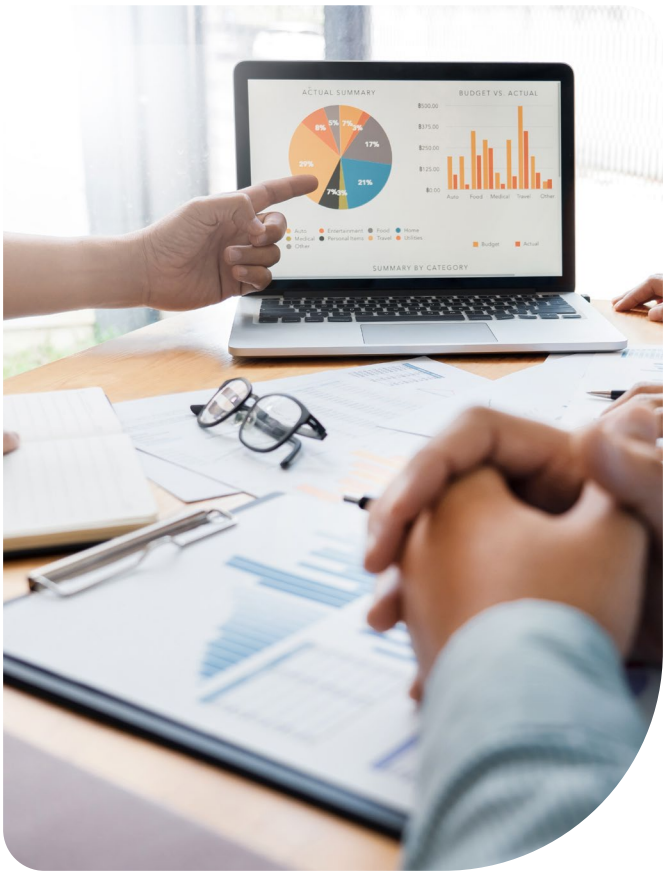
- The Industrial Development Bank of India (the appellant) had granted financial assistance to M/s. Sri Vishnupriya Industries Limited (the company) and created a charge on the movable properties and equitable mortgage of immovable properties.
- The goods imported by the company were not cleared for home consumption. Therefore, SCNs were issued alleging the non-payment of custom duty, which was later confirmed.
- However, on failure to pay the duty, steps were initiated for auctioning the imported goods.
- Simultaneously, the winding up order was passed against the company.
- Further, the official liquidator was to act as the custodian of all the properties of the company, therefore he filed an application for directing the customs authorities to hand over the possession of the imported goods.
- The customs authorities preferred an appeal before the HC. Aggrieved by the same, the appellant, as a secured creditor, had filed the present appeal before the SC.

HC observations and ruling

- The HC referred to the decision in the case of Dytron (India) Ltd and held that the customs authorities had the first right to sell the imported goods under the Customs Act.
- The Companies Act had no application, as it empowers the Company Court to require the 'contributory' to pay, deliver, surrender, or transfer any money, property or books and papers in his custody or control.
- The word 'contributory' does not include the Customs department.

Issue before the SC

Whether the Customs Act creates a first charge for payment of the customs dues, and if so, harmonise and resolve the conflict between the Companies Act and the Customs Act.



SC's observations and ruling (Civil Appeal No. 2568 of 2013, dated 18 August 2023)

- **Winding up provisions under the Companies Act:** The SC referred to the relevant provisions of the Companies Act and opined that the government dues do not create first charge over the appellant properties.
- **Process of liquidation of the company is two-fold:** The SC stated that there are two steps in the company's liquidation procedure. In order to prevent a scramble and the loss of an insolvent company's assets, it is first important to make sure that its assets are gathered and consolidated. Second, in accordance with the waterfall method as per the relevant provisions of the Companies Act, the Company Court/ Tribunal is entrusted with repaying debts from the sale revenues of the assets so assimilated.
- **Relevant date provision under the Companies Act:** The SC stated that the 'relevant date' in the present case of compulsory winding up, would be the date on which the winding up order was passed against the company, which is 1 December 2003.
- **Debt becomes 'due' on the date when the taxing event takes place:** It must not only be a debt 'due', but it must also be a debt 'due and payable' within 12 months next before the relevant date. In the present case, the SC held that the debt had become 'due' when the adjudication orders were passed dated 15 September 2000 and 10 October 2000 and 'payable' immediately. Thus, the customs duty became 'due and payable' before 12 months next to the 'relevant date.'
- **Claim of a secured creditor has precedence over the right of the customs authorities:** The SC opined that the provisions under the Customs Act do not incorporate a statutory first charge to override the general law and does not affect the rights of third parties under the Companies Act or under any other law. Impugned order set aside, the SC ordered in favour of the appellant and set aside the impugned judgement by the Andhra Pradesh HC.

Our comments

Recently, in the case of Sundaresh Bhatt, liquidator of ABG Shipyard, the SC had ruled that the IBC will prevail over the Customs Act for recovery of dues once the moratorium under the IBC is declared. The Customs authority can only determine the quantum of duties and levies but cannot initiate recovery proceedings by means of sale/confiscation under the Customs law. Once the insolvency proceedings are initiated under the IBC, the IRP can immediately secure the goods from the Revenue authorities and take appropriate steps under the IBC. The SC stated that after such assessment, the Customs authorities must submit their claims to the adjudicating authority, for claiming the customs dues as operational debt under the IBC.

This is a significant ruling and in line with the above ruling, wherein the SC has held that once the winding up process has been initiated, the Companies Act shall override any other enactment giving priority to the charges on the property of the assessee.

Though the judgement has been delivered in the context of the Customs Act, it is likely to have an impact under the GST laws as well, as similar provisions exist under the GST laws. Section 82 of the CGST Act, provides that any amount payable by a taxable person or any other person - on account of tax, interest, or penalty that the person is liable to pay to the government - shall be a first charge on the property of such taxable person or such person.

Three judge bench of SC allows Revenue's review petition against SC's decision holding levy of service tax on service provided to DFS as unconstitutional

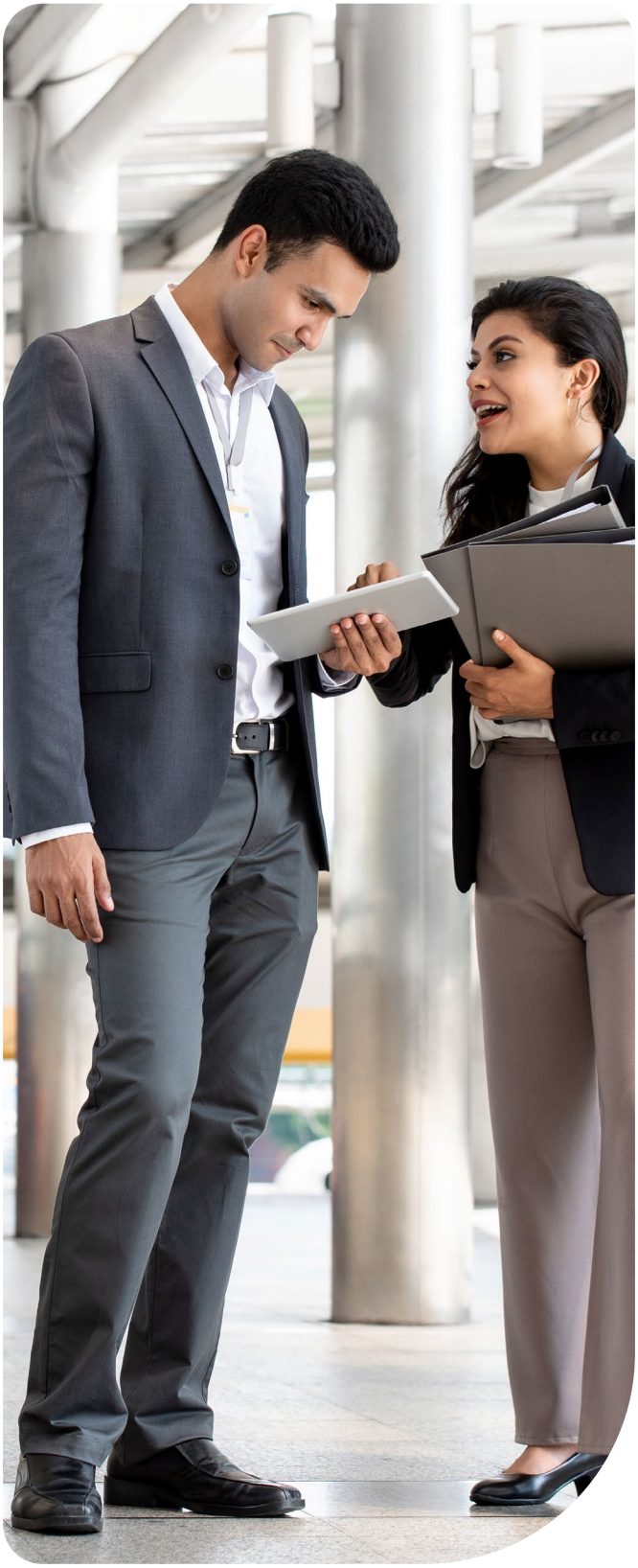
Recently, the SC had dismissed the Revenue's appeal against the CESTAT's order and held that if any tax is levied, the same cannot be retained, and DFS would be entitled for refund of the same without raising any technical objection, including that of limitation. The DFS, whether in the arrival or departure terminals, being outside the customs frontiers of India, cannot be saddled with any indirect tax burden, and any such levy would be unconstitutional. A copy of the judgement has been attached for reference.

This is to update you that the three judge bench of the SC has allowed the review petition filed by the Revenue against the SC's decision holding that DFS cannot be saddled with any indirect tax burden.

Key submissions of Revenue considered by the three judge bench of SC

- The Revenue submitted that the applicable statutory regime regarding goods is distinct from the regime applicable to the services.
- It was also submitted that the decision of the Bombay HC and Kerala HC, in the case of Sandeep Patil and CIAL Duty Free and Retail Services Ltd, respectively, which had been referred by the apex court, pertained to goods and not to the levy of service tax on the renting of immovable property. Therefore, the submission requires substantial consideration.
- Further, it was submitted that none of the submissions of the Union of India had been recorded or considered, and that the judgement only adverted to the submissions of the respondent.

In absence of such a consideration in the judgement under review, and since the issue, which is raised would have large consequential ramifications, the three judge bench of the SC allowed the review petition. It further emphasised that other appeals involving the same issue, which were pending consideration before the SC, shall stand tagged with the above civil appeal and the Registry shall obtain administrative directions, so that all the appeals can be clubbed together and be heard by one bench expeditiously.



03

Decoding advance rulings under GST

Transfer of money to foreign holding company on account of support services is liable to tax under GST – Maharashtra AAAR

Summary

The Maharashtra AAAR upheld the AAR order, wherein it had been held that the support services received by IVL India (appellant) from IVL Sweden qualifies as import of services, subject to IGST under RCM. The AAAR stated that the appellant has been awarded the contract based on the credentials and work experience of IVL Sweden, and hence, the appellant cannot carry out the project management work in India without the support from IVL Sweden. The AAAR further noted that the transfer of money by IVL India to IVL Sweden was on account of the supply of support services.

Facts of the case

- IVL India Environmental R&D Private Limited ('IVL India' or 'the appellant') is a subsidiary incorporated by IVL Swedish Environmental Research Institute Limited (IVL Sweden) to fulfil the tender condition of the contract entered with MCGM. The contract was awarded to IVL Sweden based on the credentials, work experience, and various certifications. Further, for administrative purposes, IVL India was incorporated to act as a conduit between IVL Sweden and MCGM for raising invoices, collecting monies from MCGM, including for the work done by IVL Sweden and later transferring the monies to IVL Sweden for the services provided to MCGM.
- The appellant contended that it has not received any services from IVL Sweden. Further, it relied on the CESTAT ruling in the case of B.G. Exploration & Production India Ltd. to argue that there is no supply of service from IVL Sweden to the appellant. Also, the services provided to MCGM are exempt; therefore, such exemption should be extended to all consultants of the contract.
- The appellant has sought advance ruling to seek clarity on whether mere transfer of monetary proceeds by IVL India to IVL Sweden without the underlying import of service will be liable for payment of the IGST under RCM.

Maharashtra AAR observations and ruling [No. GST-ARA- 50/2020-21/B-108 dated 1 December 2022]

- **IVL India receives support services from IVL Sweden:** The AAR observed that the appellant performed the service at the ground level and the entire support was provided by IVL Sweden based on its own credentials and work experience. Thus, it can be understood that the applicant cannot perform the services without receiving support services from IVL Sweden. Accordingly, the transfer of monetary proceeds by the appellant to IVL Sweden would be subject to the IGST under RCM.

Maharashtra AAAR observations and ruling [MAH/AAAR/DS-RM/03/2023-24 dated 5 June 2023]

- **IVL Sweden had necessary expertise to complete the contract in its own capacity:** The AAAR noted that the appellant carried out the entire project management work with the help of IVL Sweden, which would not have been possible otherwise. The AAAR further noted that all the responsibility of the performance of the work lie with IVL Sweden. Thus, it can be concluded that the appellant has availed support services from IVL Sweden to carry out the PMC work.
- **Upheld the AAR order:** The AAAR analysed the provisions of import of services and held that the support services received by the appellant are within the ambit of import of services, which are subject to the IGST under RCM. Therefore, the AAAR upheld the AAR order.

Our comments

Earlier, the Maharashtra AAR had held that in the instant case, there is a definite service being provided by a foreign holding company that enables the appellant to execute services, hence, the services are taxable in India.

The CESTAT noted in the case of B.G. Exploration & Production India Ltd. that the government of India had entered into a joint venture agreement with RIL and ONGC, whereunder each co-venturer had its own set of obligations and the responsibility discharged by each of the co-venturers towards the venture was not by way of any service rendered to the joint venture, but in their own interest in furtherance of the common objective of the joint venture. There is no contractor-contractee or principal-agent relationship between the co-venturer and the joint-venture, which is a prerequisite for a service to be liable to tax under the Finance Act. Therefore, the CESTAT had held that the appellant was not liable to pay service tax. However, the AAAR found the facts of this case clearly distinguishable from the present case.

Even though the advance rulings are applicable only to the applicant, an inference can be drawn in similar cases.

04

Expert's column

In this edition, **Ajay Kumar**, Chartered Accountant, Gurugram responds to the power of technology and its impact on big data and digital auditing.

Innovating finance: The power of big data and digital auditing

How is big data changing the auditing landscape, and what role does it play in enhancing the audit process?

Big data has fundamentally reshaped auditing practices. Traditionally, auditors relied on sampling techniques to review financial transactions, which had limitations in terms of accuracy and coverage. However, with the advent of big data analytics, auditors can now harness the power of comprehensive datasets. This shift allows us to provide a more thorough and accurate assessment of an organisation's financial health. It not only reduces the risk of errors and fraud but also empowers auditors to identify intricate patterns and anomalies that might have been hidden hitherto.

Can you give us an example of how your firm has used big data analytics to improve the auditing process for a client?

One of our recent success stories involved a client in the entertainment sector with huge data running into terabytes. By harnessing big data analytics, we were able to analyse their data and validate the votes that the client had received from the entire India in a matter of minutes and provided them confirmations almost in near real-time. This allowed us to track unusual vote patterns and identify the votes being cast by robots. This helped protect the client from major brand damage and saved it from an invaluable fraud, which would have been practically impossible using traditional methods. By doing so, we not only improved the accuracy of our reporting but also helped gain a very strong business relationship.

How does it impact the forensic auditing field, and what new opportunities does it present?

Big data has revolutionised forensic auditing in several ways. In the past, forensic auditors often had to sift through mountains of paper documents and financial records, a time-consuming and manual process. Today, they can harness advanced analytics and machine learning algorithms to detect irregularities and potential fraud indicators within massive datasets quickly. This proactive approach to forensic auditing not only enhances efficiency but also enables organisations to respond swiftly to fraud threats, minimising financial losses and reputational damage.

There are concerns about data security and privacy. How does your firm address these issues when handling sensitive financial data?

Data security and privacy are paramount in our line of work. We strictly adhere to data protection regulations and maintain robust cybersecurity measures to safeguard our clients' sensitive information. Additionally, we employ data anonymisation and pseudonymisation techniques whenever possible, ensuring that we maintain the highest data privacy and ethics standards while still deriving valuable insights from the data. Trust is the foundation of our client relationships, and we take these responsibilities very seriously.

Could you share some insights into the emerging trends or technologies that you see shaping the future of digital innovation in finance consulting, particularly in the context of big data?

One emerging trend we are closely monitoring is integrating artificial intelligence (AI) and machine learning (ML) into auditing processes. These technologies have the potential to autonomously analyse vast datasets and identify anomalies or patterns, further enhancing the audit's efficiency and accuracy. Additionally, the adoption of blockchain technology for audit trails and transparency is gaining traction. This innovation not only ensures the integrity of financial data but also offers new possibilities for secure, decentralised financial transactions.

How do you think AI and ML will change the landscape of financial auditing?

AI and ML are poised to profoundly revolutionise the landscape of financial auditing. These technologies offer the potential to enhance the efficiency, accuracy, and scope of audits while also addressing emerging challenges. The current trends and potential future developments in AI and ML in financial auditing could be seen in the following areas:

- **Automation and efficiency:** One of the most immediate impacts of AI and ML in financial auditing is the automation of routine tasks. AI-driven algorithms can scan vast datasets, extract relevant information, and flag anomalies or inconsistencies. This significantly reduces the time and effort required for manual data entry and verification, making audits more efficient.
- **Risk assessment:** AI and ML can improve risk assessment models by analysing historical data and identifying patterns of financial irregularities or fraud. Machine learning algorithms can process massive amounts of transaction data to detect unusual patterns or deviations from the norm, enabling auditors to focus on high-risk areas.
- **Enhanced data analysis:** Auditors can leverage AI-powered analytics tools to perform more profound and more comprehensive data analysis. Natural Language Processing (NLP) can help auditors understand the context of financial documents, contracts, and emails, enabling them to identify potential issues that might have otherwise gone unnoticed.
- **Continuous monitoring:** Traditional audits are typically conducted periodically, leaving room for risks and fraud to persist between audits. AI and ML enable continuous financial data monitoring, allowing auditors to spot anomalies and fraud in real-time or more frequently, reducing the window for financial misconduct.
- **Fraud detection:** ML algorithms can detect patterns associated with fraudulent activities. They can analyse transaction data to identify red flags such as unusual payment patterns, duplicate invoices, or suspicious vendor relationships. Additionally, sentiment analysis can help detect fraud-related communication in emails or messages.
- **Reduced human bias:** Auditors are susceptible to cognitive biases, which can influence their judgement. AI and ML algorithms, when trained on diverse datasets, can make more objective decisions, reducing the impact of human bias on audit outcomes.
- **Audit trail analysis:** AI can be used to create a detailed audit trail, tracking every change and transaction in financial systems. This transparency can enhance trust between auditors and clients and provide an invaluable resource in case of disputes or investigations.

In conclusion, AI and ML are poised to transform financial auditing by automating routine tasks, enhancing data analysis, improving risk assessment, and enabling continuous monitoring. As technology advances, financial auditors must adapt to these changes, developing new skills and embracing innovative tools to provide more accurate, efficient, and valuable audit services.

How does your practice incorporate ethics and sustainability into its digital innovations, aligning with the growing global emphasis on responsible finance?

Responsible finance is a core principle that guides our innovation efforts. We have taken significant steps to incorporate environmental, social, and governance (ESG) factors into our risk assessment models and investment strategies. This ensures that our clients not only achieve their financial goals but also align with global sustainability standards. We firmly believe that responsible finance is not just a trend but a fundamental requirement in today's world, and our commitment to it is unwavering.

05

Issues on your mind

What are the key features of the invoice incentive scheme 'Mera Bill Mera Adhikaar' scheme ('Scheme') under GST?

- The scheme has been launched on 1 September 2023.
- This scheme has been initially launched as a pilot in the states of Assam, Gujarat and Haryana, and the UTs of Puducherry, Dadra Nagar Haveli and Daman & Diu.
- All B2C invoices having value more than INR 200 are eligible for the scheme.
- All residents of India will be eligible to participate in this scheme irrespective of their state/UT.
- To be eligible for the lucky draw, an individual can upload a maximum of 25 invoices on an app/web portal in a month.
- For each uploaded invoice, an ARN will be generated, which will be used for the draw of prizes.
- The monthly draw will include all B2C invoices generated during the prior month that have been uploaded on the application by the fifth day of the subsequent month.
- For bumper prize, a quarterly draw will be conducted for all invoices uploaded in the last three months (till the 5th of the month of the bumper draw) will be considered.
- Duplicate uploads and invoices with inactive or fake GSTIN will be rejected by the system.
- Alert/notification to the winners will be made through SMS/ push notification on the app/web portal only.
- The winning person will be requested to provide some additional information, such as the PAN number, Aadhaar Card, bank account details, etc, through the app/web portal, within a period of 30 days from such date of informing them (date of SMS/app/web portal notification), for enabling the transfer of the winning prize to them through the said bank account.
- This pilot scheme will run for a period of 12 months.

How can I upload the invoices on the mobile application under the scheme?

The invoices can be uploaded by clicking on the 'Upload Invoice' button in either of the three formats:

- **Photo via camera:** By clicking a photo directly from the mobile phone camera;
- **Choose from gallery:** By uploading the image of the invoice from the gallery of the mobile phone;
- **Upload PDF:** By uploading the desired PDF of the invoice from the mobile file manager.

What is Customs Post Clearance Audit (PCA)?

PCA is an initiative aimed at creating an environment of increased compliance while allowing the department the flexibility to enhance the facilitation for importers and exporters. The objective is to ensure collection of the correct amount of duties from importers / exporters and to secure the compliance of applicable laws in a responsive, fair, transparent, and cost-effective manner, thereby inspiring public confidence in tax administration. PCA allows Customs to reduce border controls by shifting compliance checks from the clearance stage to the post clearance stage. PCA enables Customs to apply a risk-based control approach by moving from a transaction-based control environment at the border to a stronger audit-based compliance verification system. PCA is recognised as an effective tool to measure and improve compliance through a structured examination of the business environment and commercial system of the importer/exporter.

Section 99A of the Customs Act provides a statutory framework for the procedure for conducting post clearance audit read with the Customs Audit Regulations, 2018.

Types of post clearance audit in the Indian Customs Administration:

- Transaction based audit (TBA)
- Premises based Audit (PBA)
- Theme based audit (ThBA)

What is IGCR under Customs? What is the procedure for import of goods at a concessional rate?

The IGCR applies to an importer, who intends to avail the benefit of any notification prescribing such rules and such benefit, and is dependent upon the use of the goods imported being covered by that notification for the manufacture of any commodity or provision of output service or being put to a specified end use.

The importer shall provide one-time prior information on the common portal, in **Form IGCR-1**, containing the particulars such as name and address of the importer, nature and description of the goods imported, particulars of notification applicable on such imports, etc.

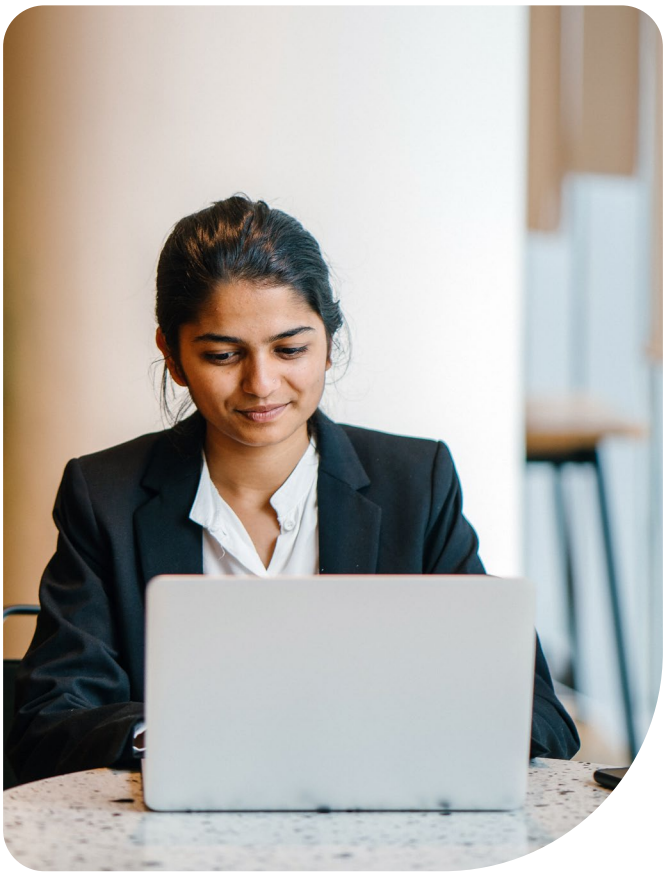
The importer shall submit a monthly statement on the common portal in the **Form IGCR-3** by the 10th day of the following month, provided that the importer may submit details of goods consumed in the **Form IGCR-3A** at any point of time, for immediate re-credit of the bond that shall become a part of the monthly statement of the subsequent month.

What are SEZ WebForms recently launched by ICEGATE and how can they be filed?

The users can now file FTA to SEZ (Z-Type) and SEZ to DTA (T-Type) BoE using WebForms. This form is used by an importer that intends to clear goods for Z and T type BoEs. The importer must specify all the details, such as importer particulars, exchange rate information, invoice particulars, items of imports, etc.

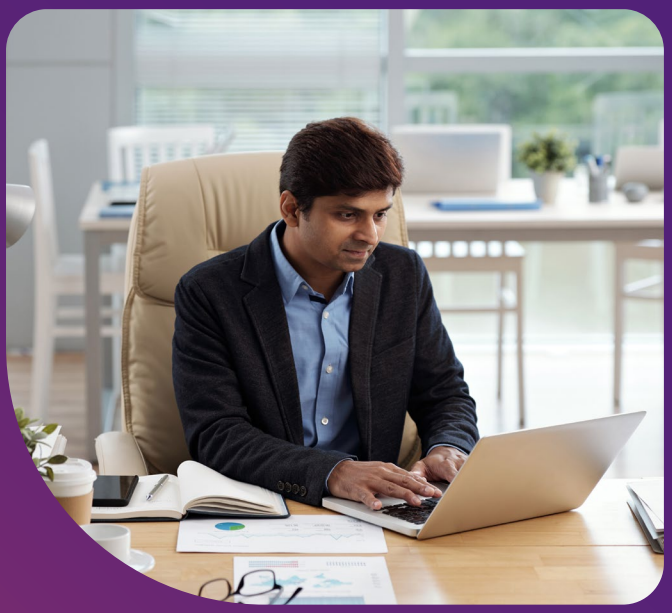
Steps to be followed:

- The user needs to select the type of BE from the below mentioned options from the 'SEZ Bill of Entry',
  - Z type BOE: SEZ BE (FTA-SEZ)
  - T type BOE: SEZ (DTA Sales – Trading)
- On selecting one of the options, the system will display the form. The users need to enter the details and save the draft.
- The user needs to upload all the supporting documents and submit.
- On submission of the form, the system **will generate a Ticket ID Number** and a success message - **"The Form is submitting"** - is displayed.
- After submitting the application form, the users will receive confirmation messages on their registered emails and mobile numbers.



06

Important developments under direct taxes



CBDT exempts rental receipts of ship leasing IFSC units from TDS

The CBDT has notified that tax will not be deducted under Section 194-I of the IT Act on payment on account of lease rent / supplementary lease rent to the IFSC unit (i.e., lessor) for lease of ship, subject to the following conditions:

- Such IFSC unit is required to furnish a statement-cum-declaration in Form No. 1 to the lessee containing details of the PY for which the lessor opts to claim deduction under Section 80LA(1A) or 80LA(2) of the IT Act.
- Such statement must be furnished and verified in the prescribed manner for each PY, for which deduction is claimed by the lessor under the aforesaid section.
- The lessee will not deduct the tax on payment made/ credited to the IFSC unit after the date of receipt of the statement in Form No. 1.
- If the TDS is not deducted pursuant to this notification, details of such payments are required to be furnished in the TDS return of the lessor.

The CBDT also clarified that the lessee would not deduct tax only for those PYs that were declared by the IFSC unit as per Point No. 1 above, and accordingly, would be liable to deduct tax for other PYs.

[Notification no. 57 of 2023 dated 1 August 2023]

CBDT notifies new Rule 6ABBB and Form No. 3AF pursuant to amendment in Section 35D of the IT Act

The Finance Act, 2023, substituted the proviso to Section 35D(2)(a) of the IT Act with effect from 1 April 2024 (AY 2024-25). As per the substituted proviso, an assessee claiming deduction under this section is required to furnish a statement containing particulars of such expenditure in the prescribed form and manner.

In this regard, the CBDT has notified Rule 6ABBB under the IT Rules with effect from 1 April 2024. Rule 6ABBB of the IT Rules provides as under:

- A statement containing the particulars of expenditure covered under Section 35D(2)(a) of the IT Act is to be furnished in Form No. 3AF for each PY.
- Form No. 3AF is to be furnished one month prior to the due date of furnishing the income tax return as per Section 139(1) of the IT Act.
- The aforesaid form is to be furnished to the Pr. DGIT(System) or the DGIT(Systems) or any other authorised person. It is to be furnished electronically using DSC or through an electronic verification code (if the return is not required to be furnished using DSC).
- The authority specified in Point No. 3 above shall forward Form No. 3AF to the concerned assessing officer.

[Notification No. 54 of 2023 dated 1 August 2023]

CBDT introduces new Rule 11UACA for computing taxable income of certain life insurance policies

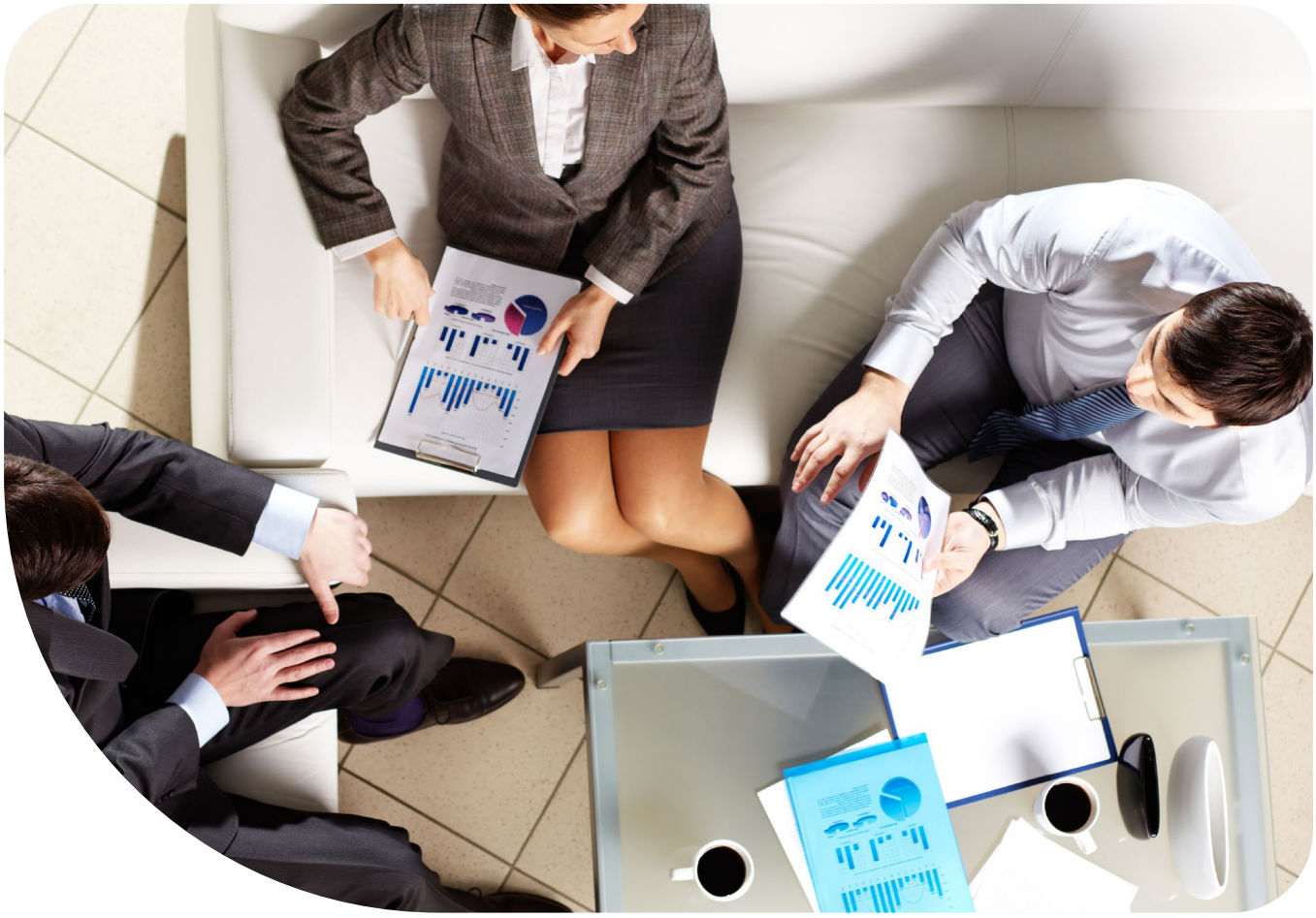
The Finance Act, 2023, had amended Section 56(2) of the IT Act by including a new clause (xiii), which provided that any sum received under a LIP (including the amount allocated by way of bonus) is taxable under the head 'Income from other sources', provided such amount is not exempt under Section 10(10D) of the IT Act.

As per Section 56(2)(xiii) of the IT Act, the taxable amount would be the sum received under LIP after adjusting the aggregate premium paid during the term of such LIP (which is not claimed as a deduction under any other provisions of the IT Act) and computed in the prescribed manner. However, provisions of Section 56(2)(xiii) of the IT Act, do not apply to sum received from a ULIP or a keyman insurance policy.

In this regard, the CBDT has notified Rule 11UACA under the IT Rules, prescribing the following method for computing taxable income under Section 56(2)(xiii) of the IT Act:

- **Sum received for the first time under the LIP:**
  Taxable income will be (A-B), where:
  A = sum or aggregate sum received under the LIP during the first PY.
  B = aggregate premium paid during the term of the LIP till the date of the receipt of such sum in the first PY (provided such premium has not been claimed as a deduction under any other provision of the IT Act).
- **Sum received under the LIP during the PY subsequent to the first PY ('subsequent PY'):**
  Taxable income will be (C-D), where:
  C = sum or aggregate sum received under the LIP during the subsequent PY.
  D = aggregate premium paid during the term of the LIP till the date of the receipt of such sum in the subsequent PY, except the following:
  - Premium for which deduction has been claimed under any other provision of the IT Act; or
  - Premium included in amount 'B' or amount 'D' of this rule in any of the PY(s)

[Notification No. 61 of 2023 dated 16 August 2023]



CBDT issues guidance regarding exemption under Section 10(10D) of the IT Act pursuant to amendment made vide Finance Act, 2023

Pursuant to the amendment made in Section 10(10D) of the IT Act vide Finance Act, 2023, with effect from AY 2024-25, exemption under this section will not be available for any sum received with respect to any LIP (other than a ULIP) issued on or after 1 April 2023, if the premium payable for any PY during the term of the policy exceeds INR 5 lakhs (eligible LIP).

However, if the premium is payable by a person for more than one LIP (other than ULIP), issued on or after 1 April 2023, these provisions shall apply only with respect to those LIPs, where the aggregate amount of premium does not exceed INR 5 lakhs in any of the PY during the term of any of those policies.

In this regard, the CBDT has issued guidance to remove difficulties in implementing the aforesaid amendment. It has also provided certain examples in which the exemption can or cannot be claimed.

The clarification provided by the CBDT is as under:

Scenario 1: No consideration received on eligible LIP (issued on or after 1 April 2023) during any preceding PY or consideration received but not claimed as exempt under Section 10(10D) of the IT Act.

Cases	Received consideration under one eligible LIP or multiple eligible LIP(s)	Aggregate premium payable on all LIP(s) for any of the PYs	Eligible for exemption under Section 10(10D) of the IT Act
Case1	One LIP	< INR 5 lakhs	Yes, but subject to the fulfilment of other conditions
Case 2	One LIP	> INR 5 lakhs	No
Case 3	Multiple LIP(s)	< INR 5 lakhs	Yes, but subject to the fulfilment of other conditions
Case 4	Multiple LIP(s)	> INR 5 lakhs	Only consideration received under such LIP where the aggregate amount of premium is less than INR 5 lakhs for any PY, subject to the fulfilment of other conditions

Scenario 2: Consideration received under eligible LIP(s) [issued on or after 1 April 2023] during any preceding PY and claimed as exempt under Section 10(10D) of the IT Act – referred to as 'old eligible LIP'

Cases	Received consideration under one eligible LIP or multiple eligible LIP(s)	Aggregate premium payable on all LIP(s) (eligible LIP + old eligible LIP) for any of the PY	Eligible for exemption under Section 10(10D) of the IT Act
Case1	One LIP	< INR 5 lakhs	Yes, provided it is not excluded under Section 10(10D) of the IT Act
Case 2	One LIP	> INR 5 lakhs	No
Case 3	Multiple LIP(s)	< INR 5 lakhs	Yes, provided it is not excluded under Section 10(10D) of the IT Act
Case 4	Multiple LIP(s)	> INR 5 lakhs	Only consideration received under such LIP where the aggregate amount of premium is less than INR 5 lakhs for any PY, provided it is exempt under Section 10(10D) of the IT Act

The CBDT has also clarified that while computing the threshold of INR 5 lakhs in respect of the premium payable/aggregate premium payable, the 'GST component' has to be excluded.

Furthermore, the aforesaid amendment will also not apply to a 'term life insurance policy', and hence, any premium paid for such policies will not be considered while computing the threshold of INR 5 lakhs.

[Circular No. 15 of 2023 dated 16 August 2023]

CBDT substitutes Rule 26 of IT Rules that prescribe exchange rate for withholding tax on foreign payments

The CBDT substituted Rule 26 of the IT Rules [with effect from 17 August 2023]. As per this Rule, for the purpose of TDS on 'income payable in foreign currency', the exchange rate for converting foreign currency in INR will be the 'telegraphic transfer buying rate' on the date on which the tax is required to be withheld.

This rule will apply if the income is payable to:

- An assessee outside India;
- A unit located in an IFSC;
- An assessee in India by a unit located in an IFSC.

[Notification No. 64 of 2023 dated 17 August 2023]

Glossary

AAAR	Appellate Authority of Advance Ruling
AAR	Authority of Advance Ruling
AI	Artificial Intelligence
ARN	Acknowledgement Reference Number
AY	Assessment Year
B2C	Business to Consumer
BoE	Bill of Entry
CBDT	Central Board of Direct Taxes
CBIC	Central Board of Indirect Taxes and Customs
CENVAT	Central value added tax
CESTAT	Customs Excise and Service Tax Appellate Tribunal
CGST	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
DFS	Duty Free Shops
DGFT	Directorate General of Foreign Trade
DGGI	Directorate General of Goods and Services Tax Intelligence
DGIT(Systems)	Director General of Income Tax (Systems)
DSC	Digital Signature Certificate
DTA	Domestic Tariff Area
ECS	Electronic Clearing Service
EMI	Equated monthly installments
FTA	Free Trade Agreement
FTP	Foreign Trade Policy
FY	Financial Year
GST	Goods and Service Tax
GSTN	Goods and Service Tax Network
GSTR	Goods and Services Tax Return
HC	High Court
HSN	Harmonized System of Nomenclature
IBC	The Insolvency and Bankruptcy Code, 2016
ICEGATE	Indian Customs Electronic Commerce/ Electronic Data Interchange
ICGR	Customs (Import of Goods at Concessional Rate of Duty or for Specified End Use) Rules, 2022
IFSC	International Financial Service Centre
IGST	Integrated Goods and Services Tax
IGST Act	The Integrated Goods and Services Tax Act, 2017
INR	Indian National Rupees
IRP	Interim Resolution Professional
ISD	Input Service Distributor
IT Act	The Income-tax Act, 1961
IT Rules	The Income-tax Rules, 1962
ITC	Input Tax Credit
ITC (HS)	Indian Trade Clarification based on Harmonized System
LIP	Life Insurance Policy
MCGM	Municipal Corporation of Greater Mumbai
ML	Machine Learning
NBFC	Non- Banking Financial Company
NHAI	National Highway Authority of India
OIO	Order-in-Original
Pr. DGIT(System)	Principle Director General of Income Tax (Systems)
PY	Previous Year
R&D	Research and Development
RCM	Reverse Charge Mechanism
SC	Supreme Court
SCN	Show cause notice
SEZ	Special Economic Zones
SGST	State Goods and Service Tax
SLP	Special Leave Petition
TDS	Tax Deducted at Source
ULIP	Unit Linked Insurance Policies
USD	United States Dollers
VAT	Value Added Tax

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