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GST Compendium

A monthly guide

November 2021

Editor’s note

Pursuant to the recommendations of 45th GST Council meeting, the Central Board of Indirect Taxes and Customs (CBIC) has clarified applicable tax rates on certain services such as cloud kitchen services, supply of ice-cream by ice cream parlours, admission to amusement parks, etc. It is pertinent to note that these rates are based on certain presumptions and hence, there could be a conflict between these rates and the rates determined by various advance ruling authorities for the same.

On the judicial front, the Apex Court has reversed the relief provided by the Delhi High Court which permitted refund to a telecom major by way of rectifying its GST return for the error period. The honourable court observed that despite an express mechanism provided under the GST law, it was not open for the High Court to proceed on the assumption that the only remedy available was to rectify the return. The Apex Court also stated that any indulgence shown contrary to the statutory requirement would lead to a chaotic situation.

Recently, the Madras High Court has held that the statutory scheme for refund under GST shall be applicable to any person who claims such refund including the Special Economic Zone (SEZ). Further, it has been held that the restriction which has been read into the provision by the revenue authorities that only supplier is eligible to claim refund is not correct.

On the direct tax front, rules providing conditions and the procedure to be followed to claim relief from retrospective taxation of indirect transfers have been notified. OECD has published another statement highlighting further progress in this direction and providing a detailed implementation plan for the two-pillar solution.

In this edition, we have discussed key takeaways from the Apex Court decision on taxation of software payments to non-residents.

Hope you will find this edition to be an interesting read.

Vikas Vasal

National Managing Partner, Tax

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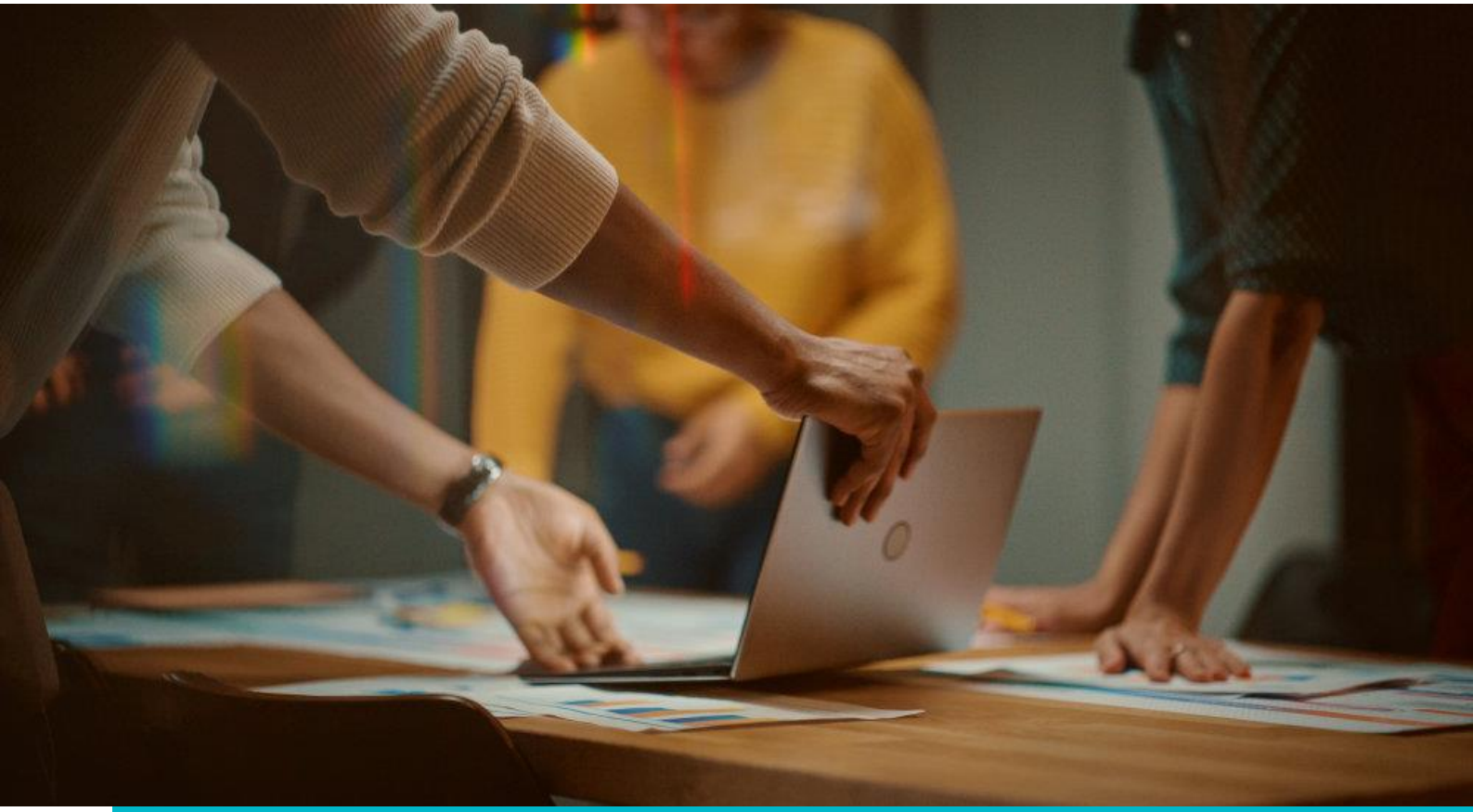
01 Important amendments/updates



CBIC issues clarifications on certain services pursuant to recommendations of the 45th GST Council meeting

Pursuant to the recommendations of GST Council in its 45th meeting, Central Board of Indirect Taxes and Customs (CBIC) has provided clarifications on various issues as follows:

Key issues clarified by CBIC

Services	Interpretation/analysis	Clarification
Services by cloud kitchens/central kitchens	Restaurant services include takeaway services and door delivery of food. Service by an entity even if it is exclusively by way of takeaway or door delivery or through or from any restaurant would be covered by restaurant service. This would thus cover services provided by cloud kitchens/central kitchens.	Service provided by way of cooking and supply of food by cloud kitchens/central kitchens are covered under restaurant service and **attracts 5% GST.**

Services	Interpretation/analysis	Clarification
Supply of ice cream by ice cream parlours	Ice-cream parlours do not engage in any form of cooking at any stage. Their activity entails supply of ice cream as goods (a manufactured item) and not as a service, even if certain ingredients of service are present.	Where ice cream parlours sell already manufactured ice- cream, it is supply of ice cream as goods and not as a service, even if the supply has certain ingredients of service. Hence, ice cream sold by a parlour, or any similar outlet would attract **GST at the rate of 18%.**
GST on overloading charges at toll plaza	Overloaded vehicles were allowed to ply on the national highways after payment of fees basis the base rate. In essence overloading fees are effectively higher toll charges.	Overloading charges at toll plazas would get the same treatment as given to toll charges.
Renting of vehicles to state transport undertakings and local authorities	Services where the vehicles are rented or given on hire to state transport undertakings or local authorities are eligible for the said exemption irrespective of whether such vehicles are run on routes, timings as decided by the state transport undertakings or local authorities and under effective control of state transport undertakings or local authorities which determines the rules of operation or plying of vehicles.	Services of renting of vehicles to state transport undertakings and local authorities are eligible for the said exemption.
Services by way of grant of mineral exploration and mining rights	The expression 'the same rate of tax as applicable on supply of like goods involving transfer of title in goods' applies in case of leasing or renting of goods. In case of grant of mining rights, there is no leasing or renting of goods. Hence, the said entry does not extend to grant of mining rights which is an entirely different activity.	Even if the rate schedule did not specifically mention the service by way of grant of mining rights, during the period 1 July 2017 to 31 December 2018, it was **taxable at 18%.**
Admission to indoor amusement parks having rides etc.	Clarification regarding applicable rate of GST on services provided by indoor amusement parks/family entertainment centres, and scope of the word 'amusement park' under Entry 34(iii) of Notification No. 11/2017-CTR	It has been clarified that the admission to a place having casino or race club even if it provides certain other activities or admission to a sporting event like IPL **attracts GST at 28%.** All other cases of admission to amusement parks, or theme park, etc., or any place having joy rides, merry-go rounds, go-carting, etc., whether indoor or outdoor, so long as no access is provided to a casino or race club **attracts GST at 18%.**
Services supplied by contract manufacturers to brand owners for manufacture of alcoholic liquor for human consumption	The expression 'food and food products' excludes alcoholic beverages for human consumption. In common parlance, even alcoholic liquor is also not considered as food.	Services by way of job work in relation to manufacture of alcoholic liquor for human consumption are not eligible for the GST rate of 5% prescribed under the said entry. Such job work would attract **GST at the rate of 18%.**

Last date for submitting online applications for scrip-based schemes under the Foreign Trade Policy 2015-20 is 31 December 2021

The government had notified the last date for submitting online applications for scrip-based schemes under the Foreign Trade Policy 2015-20 such as Merchandise Exports from India Scheme (MEIS), Services Exports from India Scheme (SEIS), Rebate of State and Central Taxes and Levies (RoSCTL) scheme and Rebate of State Levies on Export of Garments (RoSL) Scheme as 31 December 2021. It was also notified that the facility for filing applications, with a late cut provision would also not be available and all applications will get time barred after 31 December 2021.

In this regard, the Directorate General of Foreign Trade (DGFT) has instructed that after 31 December 2021, the online IT systems will not be operational and no applications/ claims under the above-mentioned schemes can be submitted thereafter. Trade and industry is requested to take note and ensure that applications/claims are submitted online within the stipulated timeline of 31 December 2021 for timely release/issue of scrips by the Regional Authority (RA)[1].

CBIC directs GST officials to issue SCNs due to difference in ITR-TDS data and service tax returns post verification

Pursuant to various representations regarding the instances of indiscriminate issuance of demand notices based on the income tax return (ITR)-TDS data, the CBIC has directed the authorities to issue notices based on the difference in ITR-TDS data and service tax returns only after proper verification9 and after obtaining reconciliation statement for the difference.

Thus, before issuance of any SCN for difference in income, the authorities will have to ask for a reconciliation statement from the taxpayers and cannot issue SCNs without proper verification of the returns and reconciliation statement.

Government invites suggestions from trade and industry for formulation of Union Budget 2022-23

The Ministry of Finance has invited suggestions and views from trade and industry regarding changes in direct and indirect taxes for formulating the proposals for the Union Budget of 2022-23. The Ministry has informed that GST related requests are not examined as a part of annual budget. Therefore, only suggestions related to customs and central excise may be forwarded as per the format provided.

The suggestion and views may be emailed in word document in separate attachments in respect of customs and central excise (for commodities outside of GST) to budget-cbec@nic.in and direct taxes to ustpl3@nic.in by 15 November 2021[2].

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GSTN issues advisory on availability of input tax credit (ITC) for FY 2020-21

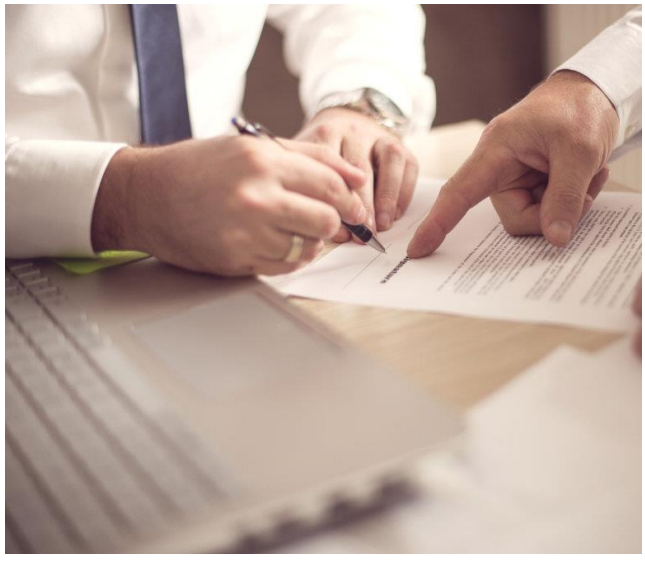
The Goods and Services Tax Network (GSTN) has issued an advisory in relation to availability of ITC for FY 2020-21[3].

Key points for consideration:

- **Invoice or debit notes pertaining to FY 2020-21 reported in Form GSTR-1 after due date of Form GSTR-3B of September 2021:** Such records (invoice or debit notes) will not reflect as 'ITC Available' in Form GSTR-2B of the recipients. Such records will reflect in 'ITC Not Available' section of Form GSTR-2B and shall not be auto-populated in Form GSTR-3B. Further, such records will also not reflect as 'ITC as per GSTR-2A' in Table-8A of Form GSTR-9 of the recipients.
- **Timely filling of returns in Form GSTR-3B:** The taxpayers may take note of the above and ensure that their records pertaining to FY 2020-21 are reported on or before the due date of their GSTR-3B for the month September 2021, or for the quarter of July to September 2021 in case of quarterly GSTR-3B filers.

Government constitutes RoDTEP committee

The government has constituted a committee for determination of rates under the Remission of Duties and Taxes on Exported Products (RoDTEP) Scheme rates for exporters availing benefit under the Advance Authorisation (AA), Export Oriented Unit (EOU) and SEZ[2]. The committee shall give a supplementary report/recommendations on issues or representations if any relating to errors or anomalies pointed out arising from the report of the erstwhile RoDTEP Committee as well as report of the incumbent RoDTEP Committee. The committee will submit its report to the government within a total period of eight months.



1. Trade Notice No. 22/2021-22 dated 2 November 2021
2. Circular No. F.No.334/2/2021-TRU dated 1 November 2021
3. GSTN advisory dated 17 October 2021

Exemption from IGST on import of certain life-saving drugs for personal use

Pursuant to the recommendation of the 45th GST Council meeting, the CBIC has notified exemption from levy of Integrated Goods and Services Tax (IGST) applicable on imports of certain life-saving drugs or medicines such as diagnostic test kits and medicines for treatment of Spinal Muscular Atrophy or Duchenne Muscular Dystrophy [i.e. Zolgensma (Onasemnogene Abeparv ovec), Viltepso (Viltolarsen) and any other medicine for treatment of the said diseases] subject to the following conditions[4]:

- The goods are imported for personal use,
- Import is certified in prescribed manner by the Director-General or Deputy Director-General or Assistant Director-General, Health Services, New Delhi, Director of Health Services of the State Government, or the District Medical Officer/Civil Surgeon of the district, in each individual case,
- Said certificate is produced before the concerned custom officers or an undertaking is given in lieu of such that said certificate would be furnished in specified period, at the time of clearance.

The above exemption shall be applicable from **1 October 2021.**

CBIC issues clarification in respect of Rebate of State and Central Taxes and Levies (RoSCTL) Scheme on export of apparel/garments/made-ups

The Rebate of State and Central Taxes and Levies (RoSCTL) Scheme provides for remission amount in the form of transferable duty credit issued to a person and maintained in the electronic duty credit ledger in the customs automated system for exports made effective from 1 January 2021.

In this regard, the CBIC has clarified as under:

- The exporter shall not be required to amend an existing shipping bill or file a separate claim for RoSCTL benefits. The shipping bill already filed from 1 January 2021 onwards under the RoDTEP and Duty Drawback scheme would suffice[8].
- Once facility for making claim of RoSCTL on shipping bill is operationalised and procedure specified by the systems directorate, the exporter will be required to make a claim of RoSCTL by way of a declaration in shipping bill at item level (along with duty drawback claim).
- Further, the exporter shall make declaration that it would abide by the scheme provisions, not claim rebate/remission with respect to any duties/taxes/levies already exempted or for which remission is provided under other schemes and that it shall preserve documents for audit, etc.
- The shipping bill and the RoSCTL claim shall be processed by the customs including based on risk evaluation.

4. NotificationNo.46/2021-Customs dated 30 September,2021

Amendment in provision relating to supply of SCOMET items from DTA to SEZ/EOU and outside the country

The Directorate General of Foreign Trade (DGFT) has amended the provisions pertaining to supply of Special Chemicals, Organisms, Materials, Equipment and Technologies (SCOMET) items from Domestic Tariff Area (DTA) to Special Economic Zone (SEZ)/Export Oriented Unit(EOU)[11].

Key changes notified:

- No export authorisation is required for supply of SCOMET items from DTA to SEZ/EOU.
- Export authorisation is required if the SCOMET items are to be physically exported outside the country from SEZ/EOU i.e., to another country.
- All supplies of SCOMET items from DTA to SEZ/EOU will be reported to the Development Commissioner (DC) of the respective SEZ/EOU by the supplier in the prescribed proforma within one week of the supplies getting effected.
- An annual report of such supplies from DTA to SEZ/EOU shall be reported to SCOMET section by the DC of the respective SEZ/EOU in the prescribed proforma by 15th May of every financial year, in respect of supplies effected from DTA to SEZ/EOU during the preceding financial year.

11. Circular No. 22/2021-Customs dated the 30 September, 2021
12. Instruction No. 26 October 2021

2a Key judicial pronouncements

Supreme Court disallows GST refund to telecom major claimed on rectification of GST return

Summary

The Supreme Court (SC) has set aside the order of the Delhi High Court which had allowed the petitioner to rectify the return submitted in Form GSTR 3B for the relevant period in which the error had occurred. Further, the SC has disallowed refund of INR 923 crore as tax paid by the petitioner in cash instead of utilising input tax credit (ITC) due to failure to operationalise the Form GSTR-2A (auto populating facility reflecting ITC). The SC observed that the discharge of output tax liability by cash is a matter of option exercised by the petitioner and cannot be reversed unless the law permits such reversal or swapping of the entries. Therefore, the SC held that the petitioner cannot be permitted to unilaterally carry out rectification of return submitted electronically in Form GSTR-3B, which inevitably would affect the obligations and liabilities of other stakeholders, because of the cascading effect in their electronic records.

Facts of the case

- The grievance of the petitioner[13] was that due to failure to operationalise Form GSTR-2A at the relevant time (July to September 2017), it was unable to access the information about its electronic credit ledger account. Consequently, as the petitioner was not able to access the information pertaining to available ITC for the relevant period it had to discharge the output tax liability (OTL) in cash. Thus, this had resulted in payment of double tax and unfair advantage to the tax authorities.
- The petitioner was allowed by the Delhi high court to rectify Form GSTR-3B for the period in which error had occurred.
- The petitioner had appealed to rectify GSTR-3B so that it could avail ITC[14] and the cash deposited against OTL could be credited to electronic cash ledger.

13. 1 Bharti Airtel Ltd
14. 2 Section 49 of the CGST Act, 2017

SC observations and ruling[15]

- **Obliged to do self-assessment of ITC:** Under the law, the registered person is obliged to do self-assessment of ITC[16] based on primary material, reckon its eligibility to ITC and of OTL based on his office record and books of accounts. The common portal is only facilitator and not the primary source for doing self assessment.
- **Express provision for rectification of errors:** On perusal of the provisions[17] it was clear that omission or incorrect particulars furnished in the return in Form GSTR-3B can be corrected in the return to be furnished in the month or quarter during which such omission or incorrect particulars are noticed. The same has been restated in the impugned circular[18]. Therefore, the said circular is not contrary to the statutory dispensation specified under the law.
- **Payment of OTL by cash or ITC is optional matter:** Despite the availability of funds in the electronic credit ledger, the petitioner opted to discharge OTL by cash. Discharge of OTL by cash or by way of availing of ITC, is a matter of option, which having been exercised by the petitioner, cannot be reversed unless the law permits such reversal or swapping of the entries.
- **Ground of non-operability of Form GSTR-2A is not acceptable:** The argument of non-performance or non-operability of Form GSTR-2A will be of no avail to the petitioner because the dispensation stipulated at the relevant time obliged the registered person to submit returns based on such self-assessment in Form GSTR-3B manually on electronic platform.
- **Incorrect assumption by HC:** Despite such an express mechanism provided under the GST law,[16] it was not open to the HC to proceed on the assumption that the only remedy that can enable the assessee to enjoy the benefit of the seamless utilisation of the ITC is by way of rectification of its return for the relevant period in which error had occurred.
- **Rectification not permitted:** Therefore, the petitioner cannot be permitted to unilaterally carry out rectification of his returns submitted electronically in Form GSTR-3B, which inevitably would affect

Our comments

The Apex Court has reversed the grant of relief provided by the Delhi High Court to Bharti Airtel stating that despite an express mechanism provided under the GST law, it was not open for the High Court to proceed on the assumption that the only remedy available was to rectify the return and correct the error to enjoy seamless utilisation of ITC. Further, the court also agreed with the tax department that any indulgence shown contrary to statutory requirement would lead to a chaotic situation. The ruling will have a widespread ramification and will have a substantial impact on all the pending cases at various levels in similar matters.

SEZ unit entitled to claim refund under GST – Madras HC

Summary

The Madras High Court (HC) observed that the petitioner had remitted GST as levied in the invoices erroneously. Further, the refund provisions under the GST law apply to any person who claims such refund and who makes an application for the grant of the same. The language of the provision is clear and does not contain or admit of any restriction in its operation. The statutory scheme for refund admits applications to be filed by any entity that believes that it is so entitled including the petitioner SEZ. Thus, it held that the restriction which has been read into the provision by the Revenue that only supplier is eligible to claim refund is misplaced. Therefore, the HC allowed the writ and held that the petitioner SEZ unit is entitled to claim refund of tax paid on purchases.

Facts of the case

- The petitioner[20] is a Special Economic Zone (SEZ) and has effected purchases from several suppliers/vendors for the development of the SEZ.
- Despite the petitioner not being liable to pay taxes, the invoices have been settled in full and tax has been paid on all the zero-rated supplies[21].
- Therefore, the petitioner had filed applications for refund of the taxes erroneously remitted on various dates.
- However, the same were rejected on the ground that that the petitioner was not entitled to the refund on the ground that only a supplier of services would be entitled to claim refund and not the SEZ itself[22].
- Aggrieved the petitioner filed present writ[23] before the Madras HC.

15. CIVIL APPEAL NO. OF 2021 ARISING OUT OF S.L.P. (C) NO. 8654 OF 2020
16. Under Section 16(1) and 16(2) of the CGST Act, 2017
17. Section 39(9) of the CGST Act, 2017
18. Circular No. 26/26/2017-GST dated 29.12.2017
19. By Section 39(9) of the CGST Act, 2017 read with Rule 61 of the CGST Rules, 2017
20. M/s Platinum Holdings Pvt. Ltd.
21. Section 16 of the IGST Act, 2017
22. As per Section 54 of the CGST Act, 201723511, 23513, 23514 and 23521 of 2021
23. WP No. 13284, 13286, 13287, 13289, 13291 & 13292 of 2020

Madras HC observations and ruling[24]

- **Petitioner paid tax despite being a zero-rated entity:** In this case there is no dispute on the position that the supplies effected to the petitioner SEZ, are indeed zero rated. Though zero-rated supplies are not subject to the levy of taxes, the petitioner, in this case has remitted the same as raised in the invoice, albeit erroneously.
- **No restrictions under refund provisions:** The refund provisions[25] providing for a refund, apply to any person who claims such refund and who makes an application for the grant of the same. The language of the provision is clear and does not contain or admit of any restriction in its operation.
- **Any person can claim refund:** The statutory scheme for refund permits any entity to seek a refund of taxes or other amounts paid under the provisions of the Act, subject to satisfaction that is it so entitled, and that there is no double claim as against the same amount. Thus, the statutory scheme for refund admits applications to be filed by any entity that believes that it is so entitled, including the petitioner SEZ.
- **Restriction misplaced by revenue:** According to the revenue an application for refund can be only by a supplier[26]. However, the court did not find any reason to agree as the said provision does not envisage any such restriction. Though the provision refers to a supplier of an SEZ, which is only one kind of entity that may make an application this is not to say that the reference to a supplier, will exclude, by virtue of such reference, other applicants.
- **SEZ entitled to claim refund:** It is a settled position that there can be no insertion of a word or phrase in a statutory provision or in a Rule which must be read and applied, as framed. No restrictions or amplifications of the Rule are permissible by interpretation. Therefore, the HC allowed the writ and held that petitioner SEZ is entitled to claim refund.

Our comments

This is a welcome judgment and is likely to set precedence in similar matters as it also helps clear pendency of refund claims for other businesses. It will be interesting to observe the stance of the revenue on the same.

It is imperative to note that earlier the Appellate Authority (GST) Andhra Pradesh in case of M/s Vaachi International India Private Limited had denied the refund claim filed by the SEZ unit on the ground that only supplier can claim refund of tax on supply to SEZ units/developer.

Pre-deposit cannot be paid by debiting electronic credit ledger – Orissa HC

Summary

The Orissa High Court (HC) observed that output tax could not be equated to the pre-deposit required to be made for filing an appeal. The HC further observed that the GST law specifically limits the usage to which the Electronic Credit Ledger (ECRL) could be utilised. The HC opined that there is world of difference between an amount which is refundable and an amount which is liable to be paid as output tax. Therefore, the HC held that the ECRL cannot be debited for making payment of pre-deposit at the time of filing appeal.

Facts of the case

- The petitioner[27] is a partnership firm engaged in the business of execution of works contract including civil, electrical and mechanical.
- The petitioner was required to pay 10% of the disputed amount of tax arising from the order against which the appeal is filed as pre-deposit[28]. Such payment was required to be made by debiting its Electronic Cash Ledger (ECL)[29]. However, the petitioner had made payment of pre-deposit by debiting the ECRL.
- Considering this to be defective, the appeal filed by the petitioner was rejected. Aggrieved the petitioner filed writ[30] before the Orissa HC.
- The petitioner contended that Section 107(6) is merely a machinery provision and it must be interpreted purposively to subserve the purpose of collecting the pre-deposit amount which could be done even by debiting the ECRL.

24. Order dated 11 August 2021
25. Section 54 of the CGST Act, 2017 read with Rule 89 of the CGST Rules, 2017
26. Rule 89(1) of the CGST Rules, 2017
27. M/s Jyoti Construction
28. Section 107 (6) of the CGST Act, 2017
29. Section 49(3) read with Rule 85 (4) of the CGST Rules
30. W.P.(C) Nos.23508, 23511, 23513, 23514 and 23521 of 2021

Orissa HC observations and ruling[31]

- **Pre deposit cannot be equated with output tax:** It is not possible to accept the plea that the relevant provision[32] is merely a 'machinery provision' and as such output tax could not be equated to pre-deposit.
- **Limited usage of ECRL:** The GST law[30\3] limits the usage to which the ECRL could be utilised. In no other cases, ITC can be utilised to discharge any liability. It cannot be debited for making payment of pre-deposit at the time of filing of the appeal[34].
- **Judgement referred is not helpful:** The judgement[35] referred by petitioner did not prove to be helpful as it is not possible in the present case to equate output tax payable to amount of pre-deposit to be made. There is difference between an amount that is refundable and an amount which is liable to be paid as output tax. In the present case there is no amount refundable to petitioner which could be used.
- **No error in appellate authority's order:** No defect could be found in appellate authority's action of rejecting the petitioner's contention that the ECRL could be debited for the purposes of making the payment of pre-deposit. Further, the making of the pre-deposit by the petitioner is not contingent upon the above reversal of the debit entry in the ECRL.

Our comments

This matter has been examined in several decisions[36] by various High Courts and Larger Bench of the Tribunal under erstwhile regime. In case of Dell International Services India Pvt Ltd vs Commissioner of Central Tax also, the Hon'ble CESTAT accepted pre-deposit made from CGST credit for service tax appeal.

However, in the present case, the Orissa HC has held that it is not possible to equate the output tax payable to the amount of pre-deposit required to be made and it is incorrect to state the subject GST provisions as merely a "machinery provision".

Once order for refund attains finality, revenue cannot escape its liability – Allahabad HC

Summary

The Allahabad High Court (HC) held that once the application for refund has been processed and an order is passed that attained finality, the revenue cannot escape from its effect. Also, the revenue cannot escape from the liability to pay interest that arose on non-compliance of the order. The HC further observed that when law did not contemplate the refund applications and orders to be passed in online mode, rule was introduced to include manual filing of application. It viewed that a circular cannot take away the plain effect of rule but can only provide a directory or optional mode. Therefore, it opined that though revenue acted in best interest of the state, it gave no relief to the misery of applicant and directed revenue to refund the entire amount along with interest at 6%.

Facts of the case

- The applicant[37] had filed a petition[38] seeking refund in respect of export of services for the period July 2019 that became due to it under order dated 6 October 2020.
- Since the refund was not made, the petitioner filed manual application seeking refund on 27 September 2019.
- Applicant has submitted that a refund application should have been processed and necessary order passed within a period of sixty days[39], but as it was passed beyond the period of sixty days. Therefore, interest at 6% from expiry of sixty days till actual date of payment also became due[40].
- Applicant submitted that neither the amount of refund or interest has been paid up till date nor any affidavit has been filed explaining their conduct.

31. Order dated 7 October 2021
32. Section 107 (6) of the OGST Act
33. Section 41 (2) of the CGST Act, 2017
34. in terms of Section 107 (6) of the CGST Act, 2017
35. Vinayak Trexim v. State of Gujarat [2020] 79 GSTR 118 (Guj)
36. E.g. Cadila Health Care Pvt Ltd – 2018 (18) GSTL 30 (Guj), Birla Yamaha Ltd – 1996 (83) ELT 396 (T-LB)
37. Savista Global Solutions Private Limited (formerly known as Nthrive Global Solutions Private Limited)
38. Writ Tax No. - 113 of 2021
39. Section 54(7) of the CGST Act, 2017
40. Section 56 of the CGST Act, 2017

Allahabad HC observations and ruling[41]

- **No requirement of online mode:** The law did contemplate such applications to be made and orders to be passed and also refund to be made through online mode, at the same time, new rule[42] was introduced. This rule specifically provided that in respect of any process or procedure prescribed herein, any reference to electronic filing of an application on the common portal shall include manual filing of the same.
- **Circular cannot override or negate the effect of law:** Subsequently a circular[43] was issued prescribing online mode for such refund applications. It is of no benefit to the revenue, as in the first place, the said circular did not, and it could not override or negate the effect of law arising from the new rule. If the new rule remains on the rule book, the circular cannot take away the plain effect of the said rule. Therefore, the circular could only provide a directory or an optional mode, to process a refund claim.
- **Revenue cannot escape liability:** The revenue had itself processed the refund application and had passed an order directing for refund. Therefore, once the order attains finality, revenue cannot escape the liability of interest that arose on non-compliance of the order passed.
- **Applicant was made to wait for a long time:** Although the revenue acted in the best interest of the state, it gave no relief to the misery of applicant who had been made to wait for refund for a very long period of almost two years. Therefore, revenue is directed to refund the entire amount along with interest at 6%[44] till date of issuance of demand draft.

Our comments

Even under the erstwhile regime, the Apex Court[45] had held that interest becomes payable when the order of refund has been made but the amount claimed is still not paid within a period of three months from the date of receipt of application.

Recently, the Bombay HC[46] had also held that interest on delayed refund becomes obligatory once there is a delay beyond prescribed period. The HC had opined that non-granting of interest would amount to failure to discharge statutory duty/obligation by the refund sanctioning authority.

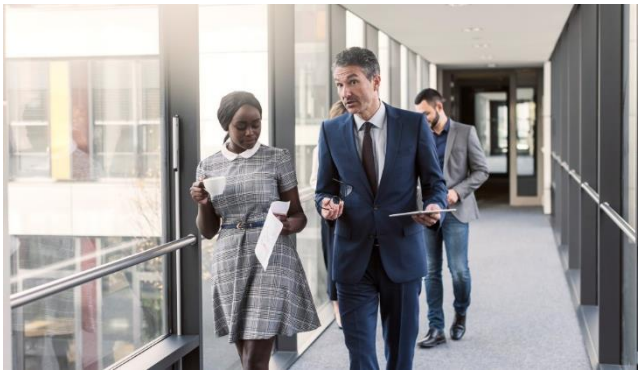
Not following prescribed procedure before passing the order results in violation of assessee's rights – Madras HC

Summary

The petitioner challenged the order of lower authority before the Madras High Court (HC) on the ground that no personal hearing was granted, and the procedure prescribed for making the impugned order has not been followed. The HC observed that non-adherence to the prescribed procedure under the relevant provisions under the GST law had caused prejudice to the petitioner qua the impugned order. The court observed that it was not mere procedural requirement but on facts and circumstances of case, it became clear that it tantamount to violation of petitioner's rights. Therefore, the HC set aside the impugned order and directed the respondents to commence fresh proceedings.

Facts of the case

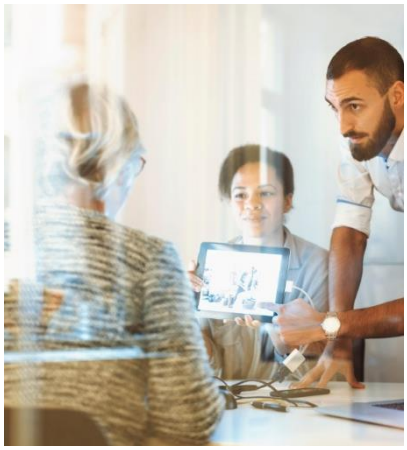
- The petitioner[43] had filed a writ[47] on the ground that no personal hearing was granted, and the procedure prescribed for making impugned order had not been followed[49].
- The petitioner is of the view that order was not followed by the required forms[50].
- The revenue submitted that personal hearing had been held but couldn't demonstrate the procedure proceeding the impugned order for incorrect availment of ITC[51].



41. Order dated 6 October 2021
42. Rule 97A of the CGST Rules, 2017 vide CGST (Twelfth Amendment) Rules, 2017
43. Circular No.125/44/2019-GST
44. from the date against 27 Nov 2019
45. Ranbaxy Laboratories Ltd.
46. Qualcomm India Private Limited
47. Shri Tyres
48. W.P.No.19756 of 2021
49. Rule 142 of the CG&ST Rules, 2017
50. FORM GST DRC-01 and FORM GST DRC-01A
51. Input Tax Credit

Madras HC observations and ruling[52]

- **Procedure prescribed under GST law:** The GST law provides that the proper officer shall before/along with the issue of notice, communicate the details of tax, interest and penalty or a summary thereof in respective form[53]. Further, the proper officer shall serve notice to the person chargeable to tax requiring him to show cause as to why he should not pay the amount specified along with interest and penalty.
- **Non-adherence to the prescribed procedures:** On perusal of the provisions[54] it was clear that non-adherence to the prescribed procedure had caused prejudice to the petitioner. Accordingly, serving of forms is not merely a procedural requirement but non-fulfilment of the same tantamount to violation of petitioner's rights.
- **Fresh proceedings to be commenced:** The impugned order is set aside solely on the ground of non-adherence the procedural requirements. Further, the HC directed the respondents to commence proceedings afresh and adhere to the requirements under the law.



Our comments

Similar judgment was also pronounced by the Madhya Pradesh HC in the case of Ram Prasad Sharma vs the Chief commissioner and another, wherein it was being held that it is trite principle of law that when a particular procedure is prescribed to perform a particular act then all other procedures/modes except the one prescribed are excluded. This principle becomes even more stringent when it is statutorily prescribed similar to the case in hand.

This is a welcome ruling by the Madras HC and shall provide required relief to the businesses and will set precedence in similar matters.

Non transmission of refund data from GSTN to ICEGATE cannot be petitioner's problem – Bombay HC

Summary

The Bombay High Court observed that the petitioner is entitled to refund but it has been made to face hardship only because data is not transmitted from GSTN to ICEGATE. It further stated that non transmission of the data from GSTN to ICEGATE cannot be petitioner's problem. It was the responsibility of the revenue to ensure that petitioner received its refund on time. The revenue had enough time to take appropriate action but unfortunately, it is more than 4½ years since the amount has not been refunded.

Facts of the case

- The petitioner[55] had exported certain goods on 28 June 2017. The shipping bill which should have got printed on 28 June 2017 got printed on 1 July 2017 with petitioner GST Identification Number (GSTIN) and levy of Integrated Goods and Services Tax (IGST) with the date of 29 June 2017.
- As the supplies of goods and services for export have been categorised as 'Zero Rated Supply' the petitioner chose to pay IGST amounting to INR 22,92,587 and claimed refund.
- The petitioner was informed that unless the export data was transmitted from GSTN (GST Network) to ICEGATE (Indian Customs Electronic Gateway), the Customs office would not be in a position to process the refund claim.
- The petitioner had also filed a refund claim on the GST portal in Form GST RFD-01A on 5 March 2019 which was rejected by the authorities. Therefore, the petitioner preferred an appeal before the Commissioner of Central Tax (Appeals-II) Pune which upheld the order passed by the revenue and rejected the appeal on the ground that the jurisdiction of refund of the IGST paid on exported goods was with the Customs Department.
- Therefore, the petitioner filed present writ praying to direct the authorities to refund IGST paid by it.

52. Order dated 21 September 2021
53. Form GST DRC-01 and FORM GST DRC-01A
54. Section 73 of the CGST Act, 2017 in conjunction with Rule 142 of the CGST Rules, 2017
55. SRC Chemicals Pvt. Ltd.

Bombay HC observations and ruling[56]

- **Revenue had enough time to take appropriate action:** The Bombay HC observed that the revenue had sufficient time to take appropriate decision on the communication placed on record. However, no reply was filed and none of directions of this court have been complied with by the revenue.
- **Petitioner despite being entitled to refund was made to suffer:** The communication dated 10 February 2020 indicates that the petitioner is entitled to refund but it has been made to suffer only because data of IGST refund is not transmitted from GSTN to ICEGATE.
- **Non transmission of the data cannot be petitioner's problem:** Non transmission of the data from GSTN to ICEGATE cannot be petitioner's problem. It was the responsibility of the revenue to ensure that petitioner received its refund. Unfortunately, it is more than 4½ years since the amount has not been refunded.
- **Writ allowed:** As the revenue never attempted to resolve the problem of the petitioner and no reply has been filed and directions of this court have not been complied, the HC allowed the writ. Further, it directed the revenue to ensure refund is paid to the petitioner within 4 weeks along with interest thereon at 9% p.a. from the filing date of the petition i.e., 28 April 2021 together with costs in the sum of INR 25,000.

Our comments

Issues in transmission of data from GSTN to ICEGATE systems on timely basis have been a major reason due to which huge refunds have been pending for processing for many taxpayers. Thus, this is a welcome judgement by the Bombay HC and will help provide relief to businesses at large, which are awaiting huge refunds. Further, the judgment is also likely to set precedence in similar matters.

Compensation received on cancellation of contract to be included in transaction value for levying excise duty – CESTAT

Summary

The Customs Excise and Services Tax Appellate Tribunal (CESTAT) Delhi observed that the appellant received a substantial amount from the buyer even though the terms of the contract did not provide for payment of any amount. Both the lower authorities have recorded a categorical finding that the appellant, buyer and scrap buyers were in a business arrangement to evade excise duty payment on the amount called as ‘compensation’. Therefore, the CESTAT held that the compensation amount received should be included in the transaction value since the amount received was for those auto parts which were to be sold to the buyer but were ultimately sold to the scrap buyers. Thus, the CESTAT affirmed the excise duty liability on the amount of compensation received from buyer for the losses suffered on account of the cancellation of contract for supply of auto parts.

Facts of the case

- The appellant[57] is engaged in manufacture of auto parts. It had entered a contract of supply of auto parts and other products used in the manufacture of motor vehicles with the buyer[58].
- The buyer cancelled the purchase order, and the appellant was left with surplus of finished goods which had to be sold as scrap resulting into loss. Therefore, the appellant raised two debit notes on the buyer to recover the loss due to cancellation of the order.
- The revenue alleged that the consideration received by appellant from the buyer under the guise of compensation was liable to be included in the transaction value of goods and confirmed demand along with interest and equal penalty.
- The Commissioner (A) partially allowed the appeal by confirming the proposed demand and directed the Adjudicating Authority to quantify the amount of duty recoverable.
- Aggrieved the appellant filed appeal[59] before the CESTAT.

56. Order dated 12 October 2021
57. Rajasthan Prime Steel Processing Center Pvt. Ltd.
58. M/s. Honda Siel Car India Ltd.
59. EXCISE APPEAL NO. 50371 OF 2019

CESTAT observations and ruling[60]

- **Compensation not covered under contract:** It clearly transpires from the business arrangement that the appellant had received a substantial amount from the buyer, even though the terms of the contract did not provide for payment of any amount to the appellant if the contract of supply of auto parts was cancelled.
- **Compensation received to make up the loss:** For the subsequent year the appellant also claimed that it had to sell the auto parts as scrap since the contract was cancelled. The amount received from the buyer was obviously to make up for the reduced price which the appellant received from the sale of auto parts manufactured.
- **Business arrangement to evade duty:** This was a business arrangement between the appellant, the buyer and the buyers of scrap to evade payment of excise duty on the amount called as 'compensation.' In fact, the buyer paid some amount to the appellant for the goods sold to the scrap buyers.
- **No reason to exclude the amount received by appellant:** It transpires from the business arrangement that the appellant received some amount from the buyers of scrap and some amount from the main buyer for the value of the auto parts. Thus, there is no reason as to why this amount received by the appellant should not be included in the transaction value of the goods.
- **Amount has flown indirectly from the buyers:** The contention of the appellant that the amount cannot be included in the transaction value since the consideration must flow only from the buyer to the seller of goods, in view of the business arrangement arrived at in the present case, cannot be accepted. In view of the peculiar nature of the business arrangement it is clear that the amount received by the appellant has flown indirectly from the buyers.
- **Liability affirmed:** There is no error in the order passed by the Commissioner Appeals. Therefore, the CESTAT upheld the duty demand and dismissed the appeal filed by the appellant.

Our comments

Recently, the CESTAT Delhi in the case of Mahatma Gandhi University of Medical Sciences and Technology had held that it is the burden of the Revenue to prove whether the assessee had intended to conduct evasion.

In the present case, the authorities have observed that the business arrangement has been made in order to escape the duty liability on the amount received by the appellant from the buyer. Therefore, the duty demand has been upheld by the CESTAT.

Employees deputed by parent company to Indian subsidiary cannot be termed as manpower supply – CESTAT

Summary

The Customs, Excise and Service Tax Appellate Tribunal (CESTAT) Chennai observed that the parent company had deputed its employees to work in the appellant's factory. The payment made by the appellant to the parent company was a part of the salary of such deputed employees. There was no consideration towards rendering of Manpower Recruitment or Supply Agency Service. The appellant company and the parent company being of same group, the secondment employees cannot be said to have been recruited by the parent company to the appellant company. The CESTAT further opined that since the essential character of the agreement is marketing and sales promotion, such services are classifiable under Business Auxiliary Services (BAS) and not under Management, Maintenance and Repair Service. Further, such BAS services would qualify as export of service. Therefore, the CESTAT set aside the service tax demand under the category of Manpower Recruitment or Supply Agency Service and Management, maintenance, or repair services.

Facts of the case

- The appellant[61] was a manufacturer of Dump Trucks and a wholly owned subsidiary of Komatsu Asia Pacific Limited, Singapore (KAP).
- It had entered into a Secondment Agreement with its parent company under which employees of the parent company were deputed to work in the appellant's factory in India. The appellant entered into individual employment contracts with such employees. A part of salary was directly paid to such employees in India in Indian currency by the appellant and remaining part of salary was paid by the appellant to the parent company in foreign currency.
- The revenue alleged that such payment made by appellant to the parent companies would come within the purview of 'Manpower Recruitment or Supply agency Service'[62].
- The appellant was also engaged in marketing, sales promotion and products support services including after sales services. The revenue alleged that such services shall fall under management, maintenance, and repair services and confirmed the demand of service tax along with interest and penalty.
- Aggrieved the appellant filed appeal before the CESTAT Chennai.

60. Order 51868/2021 dated 13 October 2021
61. M/s Komatsu India (P) Limited
62. As defined u/s 65(105)(k) read with Section 65(68) of the Finance Act, 1994

CESTAT observations and ruling[63]

- **Observations with respect to Manpower Recruitment and Supply Agency Services:**
  - **Agreement is for deputation of employees:** On perusal of the agreement, the CESTAT observed that the parent company had deputed its employees to work in the appellant's factory for doing after sales work and other related work. The payment made by the appellant to the parent company is nothing but part of the salary of such deputed employees.
  - **No consideration towards supply of manpower:** There was no consideration towards rendering of Manpower Recruitment or Supply Agency Service. The appellant company and the parent company being of same group, the secondment employees cannot be said to have been recruited by the parent company to the appellant company.
- **Observations with respect to management, maintenance, or repair services:**
  - **Agreement is for marketing and sales promotion:** The agreement is entered for marketing, sales promotion and products support service activities for construction and mining equipment sold in Indian market by the foreign company. The main purpose is for marketing and sales promotion. They have appointed another entity to carry out warranty repair and maintenance for the products sold in India.
  - **Services classifiable under Business Auxiliary Service:** The appellant is doing promotion of the sales and marketing the products manufactured by the foreign company. There is major element of promotion of sales and marketing involved. Therefore, as the essential character of the agreement is marketing and sales promotion such services are classifiable under Business Auxiliary Services and not under management, maintenance and repair service. Further, such BAS services would qualify as export of service[64].
- **Demand of service tax and penalties cannot sustain**: Therefore, the demand of service tax under the manpower services and repair and maintenance services was set aside. Further, the CESTAT held that as the appellant had paid service tax along with interest it is also eligible to take credit of the tax paid. Therefore, as the situation is revenue neutral the penalties levied cannot sustain and were set aside.

Our comments

Under pre-GST era, it has been held in various rulings[65] that payments made by Indian Companies to its parent companies for secondment of employee is not taxable under Service Tax. This is a welcome ruling by the CESTAT and will bring required relief for the MNCs operating under similar model and thereby help to curb litigation on this account.

Under GST regime, the Tamil Nadu Authority for Advance Ruling (AAR) had held[66] that when service of employees in role of the applicant are utilised by other entity for which consideration is being charged, the said activity is a supply of service and GST is applicable on such transaction.

63. Final Order no. 42400/2021 dated 20 October 2021
64. In terms of Rule 3(1)(ii) of the Export of Service Rules, 2005
65. Volkswagen India Private Limited Versus CCE, Pune – I [2014 (34) 5TR-135 (Tri – Mumbai)], Nortel Networks (I) Pvt. Ltd. Vs CST New Delhi-2017 (52)STR- 489 (Tri. - Del),Ivanhoe Cambridge Investment Advisory India (P) Ltd. Vs C.S.T., Delhi [2019 (21) GSTL 553 (Tri-Del.)]
66. Section 16(1) of the CGST Act, 2017

2b Decoding advance rulings

ITC ineligible on CSR activities - Gujarat AAR

Summary

The Gujarat Authority for Advance Ruling (AAR), in the present case, has held that the ITC is available only on supply of goods or services which are used or intended to be used in the course or furtherance of business. Since, the corporate social responsibility (CSR) does not include activities undertaken in pursuance of normal course of business of the company, the applicant is not eligible for input tax credit (ITC) as per the GST law.

Facts of the case and applicant's contention[67]

- The applicant[68] supplies insecticides, fungicides and herbicides. It has been spending the mandatory amount on CSR activities such as donation to government relief funds/educational societies, civil works in school or hospitals, distribution of food kits, etc.
- The applicant sought advance ruling as to whether the inputs and input services procured in order to undertake mandatory CSR activities qualify as being in the course or furtherance of business and whether will it be considered as eligible ITC in terms of Section 16 of the CGST Act.
- The applicant placed reliance on certain judgements[69] wherein it was held that CSR activities are mandatory and essential for smooth business operations of a company. It submitted that CSR expenses are incurred in course and furtherance of the business and 1. Section 16(1) of the CGST Act, 2017, 2. M/s. Adama India private limited, 3. Essel Propack vs. Commissioner of CGST, Bhiwandi [2018(362) ELT 833 (Tri-Mum)] Commr. Of CEX, Bangalore, vs. Millipore India pvt.ltd. 2012[26]STR.514(Kar.), 4. GUJ/GAAR/R/44/2021 the ITC pertaining to such expenses must be allowed as per the GST Act.
- The applicant contended that ITC on inputs procured for the purpose of donating must constitute as eligible ITC so that company will have more funds at its' disposal enabling it to contribute more towards the social cause.

Gujarat AAR observations and ruling[70]

- **CSR activities not in course or furtherance of business:** The provisions of the rules state that CSR activities are undertaken in pursuance of its statutory obligation and does not include those undertaken in normal course of business. The CSR activities performed by applicant are not undertaken in pursuance of applicant's normal course of business.
- **CSR activities barred from input/input service:** The provisions of the GST Act state that a person is entitled to claim ITC on supply of goods or services or both that are used or intended to be used in the course or furtherance of business. Thus, as the CSR activities are not in normal course of business, accordingly it will not be eligible to claim ITC.
- **Cases cited are irrelevant:** The case laws cited by applicant pertain to pre-GST era and are not pertaining to GST scheme of law. It is held that decision of Uttar Pradesh AAR shall be binding only on the applicant who had sought and the concerned officer or the jurisdictional officer in respect of the applicant.

Our comments

The present ruling is in sharp contrast to the ruling pronounced by the Uttar Pradesh AAR[71] wherein the authorities had allowed the ITC on expenses incurred to comply with the requirements of CSR under the Companies Act, 2013.

At this juncture, it is imperative to note that similar to Gujarat AAR, even the Kerala AAR had disallowed the ITC on CSR expenditure. This is another classic case of deviating interpretations on the same matter by two different advance ruling authorities. Such divergent view may create ambiguity and unwarranted litigations.

Goods supplied under promotional scheme at nominal price qualifies as individual supply – West Bengal AAR

Summary

The West Bengal Authority for Advance Ruling (AAR) observed that the promotional scheme proposed to be floated by the applicant is aimed and intended to boost the sale of its hosiery goods. The supply of hosiery items and promotional items shall be made for different prices and therefore, it cannot be regarded as a mixed supply. Also, such supply cannot be considered as naturally bundled and supplied in conjunction with each other in the ordinary course of business. Therefore, the AAR held that the supply of hosiery goods and goods under promotional scheme are separate supply and tax on the supply shall be levied at the rate of each such item as notified by the Government.

The AAR further observed that the applicant intends to provide the said goods to the retailers at a certain consideration, though at a very nominal price and that too upon fulfilment of the criteria as specified in the scheme circular. Hence, it cannot be said that the said goods are being given as gift. Therefore, credit of the input tax paid on the items being sold at nominal prices under the promotional scheme would be available to the applicant.

67. Section 16(1) of the CGST Act, 2017
68. M/s. Adama India private limited
69. Essel Propack vs. Commissioner of CGST, Bhiwandi [2018(362) ELT 833 (Tri-Mum)] Commr. Of CEX, Bangalore, vs. Millipore India pvt.ltd. 2012[26]STR.514(Kar.)
70. GUJ/GAAR/R/44/2021
71. in the matter of Dwarikesh Sugar Industries Limited

Facts of the case

- The applicant[72] intends to manufacture and supply hosiery goods such as vests, briefs, etc.
- The applicant further proposes to implement a promotional scheme to incentivise its sale of hosiery goods amongst retailers. Under the scheme, it would offer various unconnected products like gold coins, refrigerators, ACs, coolers, mixer grinders, etc. at discounted prices to retailers who purchase specified units of hosiery goods.
- Applicant submits that the supply of hosiery and goods under promotional scheme will be at different prices and it will raise separate invoices.
- The applicant sought an advance ruling before the West Bengal AAR to understand whether the supply of promotional goods at nominal price to retailers against purchase of specified units of hosiery goods pursuant to a promotional scheme would qualify as individual supplies taxable at the rates applicable to each of such goods[73] or a mixed supply taxable at the highest GST rate[74]. The applicant also wanted to understand whether credit of the input tax paid on the items being sold at nominal prices would be available to the applicant.

West Bengal AAR observations and ruling[75]

- **Supply does not qualify as mixed supply:** Under the promotional scheme, the hosiery goods would be sold first on a separate invoice and once the retailer would meet the eligibility criteria, the promotional goods would be supplied vide a separate invoice. As the supply of the aforesaid two items shall be made for different prices, it does not satisfy the condition of being 'made for a single price' and therefore, cannot be regarded as a 'mixed supply'.
- **Not a composite supply:** The supply of hosiery goods and goods under promotional scheme cannot be considered as naturally bundled and supplied in conjunction with each other in the ordinary course of business. Therefore, the supply shall not fall under the category of 'composite supply'.
- **Individual supply leviable to tax as per rates specified for each item:** Supply of goods at nominal price to retailers against purchase of specified units of hosiery goods pursuant to a promotional scheme would qualify as individual supplies. Further, such supply shall be taxable at the rates applicable to each of such goods.
- **Activity undertaken in course or furtherance of business:** The retail scheme circular which is proposed to be floated by the applicant is aimed and intended to boost the sale of its hosiery goods. So, the provision of providing said goods under the retail scheme circular would undoubtedly qualify as an activity undertaken in the course or furtherance of business.
- **ITC of tax paid on promotional goods available:** The applicant intends to provide the said goods to the retailers at a certain consideration, though at a very nominal price and that too upon fulfilment of the criteria as specified in the scheme circular. Hence, it cannot be said that the said goods are being given as 'gift'. Therefore, the restriction on availment of ITC[76] shall not be applicable in respect of the said goods.

Our comments

The issue has been a matter of exhaustive litigation since implementation of GST.

In the present ruling, the AAR has held that since the promotional items shall be supplied at a nominal amount they cannot be considered as gifts and therefore, input tax credit would be available. In this regard, it is pertinent that the Karnataka Appellate Authority for Advance Ruling (AAAR)[77] had held that the promotional products/materials and marketing items used by/for brand promotion and marketing can be considered as 'inputs', however, the GST paid on the same cannot be availed as input tax credit[78]. Further, on a similar issue the Members of the Maharashtra AAAR[79] had differed in their decision and hence, it was deemed that no advance ruling can be issued in respect of the question under appeal. The AAR has established differentiation regarding ITC in case when there is any consideration involved or not for the promotional goods.

72. Kanahiya Realty Pvt. Ltd.
73. as per section 9 of the CGST Act, 2017
74. as per Section 2(74) read with section 8 (b) of the CGST Act, 2017
75. Advance ruling order no. 11/WBAAR/2021-22 dated 30/09/2021
76. Section 17(5)(h) of the CGST Act, 2017
77. Page Industries Ltd
78. in view of the provisions of Section 17(2) and Section 17(5)(h) of the CGST Act, 2017
79. Sanofi India Ltd.

Reimbursement of EPF, ESI, salaries, wages etc., by hospital liable to GST – Telangana AAR

Summary

The Telangana Authority for Advance Ruling (AAR) observed that the deductions from taxable value available under the GST law do not include the amounts pertaining to EPF, ESI, salary, or wages. Further, the AAR observed that the applicant is not a pure agent. Therefore, the AAR held that the applicant shall be liable to pay GST on the entire amount of wages/salaries, EPF/ESI, etc., reimbursed to it by the hospital.

Facts of the case

- The applicant[80] proposes to enter into a contract with a hospital for providing housekeeping services. The applicant will provide housekeepers and supervisors to maintain and assist the medical team of the hospital in maintaining cleanliness, covering 24 hours service on shift basis.
- The applicant contended that as the salary/wages are fixed by the hospital management and as EPF, ESI are statutory payments, therefore, these amounts reimbursed by the hospital cannot form value of supply.
- Therefore, the applicant sought advance ruling from the Telangana AAR to understand whether the applicant is liable to pay GST on the entire amount of wages/salaries, EPF/ ESI, etc., reimbursed by the hospital.

Telangana AAR observations and ruling[81]

- **No general principles for determining value of supply:** The applicant relied upon the judgement of Delhi High Court and the Supreme Court[82] and stated that in the pre-GST period reimbursable expenses have been held not to form gross value of service provided by the service provider and hence not assessable to tax[83]. However, no general principles have been laid down in determining value of supply of service that travel beyond the interpretation of rule and related sections pertaining to the pre-GST service tax.
- **Entire amount received is exigible to GST:** The AAR observed that the applicant is not a pure agent under GST law. Further, the deductions available under the GST law[84] do not include the amounts pertaining to EPF, ESI, salary, or wages. Therefore, the entire amount received from the hospital are exigible to GST.

Our comments

Recently, the West Bengal AAR[85] on the similar matter had outlined that GST provisions[86] evidently specifies the elements that will form a part of value of supply and excludes the elements that are not to be included in the value of supply. The AAR had stated that under the GST law, there is no room to deduct any amount like management fee, employer portion of EPF and ESI for the purpose of determination of value of supply and hence, GST is leviable on the entire amount.

Earlier, even the Karnataka AAR[87] had held that the value of taxable supply of manpower services is the transaction value equivalent to the bill amount which is inclusive of actual wages of the manpower supplied and the additional amount paid to the applicant.

80. Smt. Bhagyalakhsmi Devamma Vangimallu (Trade name M/s. Versatile Resource Solutions)
81. TSAAR Order No.14/2021 dated 8 October 2021
82. M/s Intercontinental Consultants
83. Rule 5 of Service Tax Rules and Sections 66 and 67 of Finance Act of India
84. Under Section 15 of the CGST Act, 2017
85. M/s Exservicemen Resettlement Society
86. Section 15(2) read with Section 15(3) of CGST Act
87. KSF-9 Corporate Services Private Limited

03 Experts' column

Taxation of software payments to non-residents

Author

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In March 2021, the Supreme Court (SC) of India, settled a two-decade old issue relating to taxation of payments for software to non-residents. This decision is a landmark judgment as it puts to rest the controversy on the issue of characterisation of software payments, by ruling in favour of the taxpayers.

The debate

The question for consideration before the court was, whether the payment by Indian resident end-user or distributor to a non-resident software manufacturer or supplier as consideration for the purpose of use/re-sale of off-the-shelf software is payment in the nature of 'copyright' or 'copyrighted article'? Accordingly, whether the income earned by the non-resident should be characterised as royalty or business income?

The tax department argued that the sale of software should be construed as transfer of interest in the copyright embedded in the software. Therefore, such payments should be classified as royalty. Resultantly, there should be a withholding tax obligation on the Indian payer.

However, the taxpayers contended that the end-user was only allowed to use the software product. The transaction did not entail transfer of interest in the copyright of the software. The essence of the transaction is that of 'sale of copyrighted article' and not 'copyright' per se. Since the non-resident has earned 'business income', if it does not have a permanent establishment in India, no withholding tax obligations could be fastened on the payer.

The Apex Court, in its detailed ruling held that software payments by an Indian entity to a non-resident for the purchase of off-the-shelf software does not qualify as royalty under the relevant tax treaties. Accordingly, there is no withholding tax obligation on the Indian payer.

Key principles

The key principles laid down by the Apex Court are:

Importance of Indian Copyright Act, 1957

The SC went through relevant provisions of the Indian Copyright Act and noted that a computer programme should be classified as a 'literary work'.

In the context of the term 'copyright', it noted that even though the term has not been defined but it appears to mean 'exclusive right' to do or authorise the doing of certain acts 'in respect of a work'. The right to copyright includes the right to reproduce the work in any material form, issue copies of the work to the public, perform the work in public, or make translations or adaptations of the work. It then held that the right to reproduce a computer programme and exploit the reproduction by way of sale, transfer, license, etc., is at the heart of the said exclusive right.

It further observed that:

- The ownership of copyright in a work is different from the ownership of the physical material in which the copyright is embedded. A purchaser of a book or a CD/DVD, who becomes the owner of the physical product does not automatically become the owner of the copyright in the product. The copyright remains exclusively with the owner.
- If the core transaction is to authorise the end-user to have access to and make use of the "licensed" computer software product, over which the licensee has no exclusive rights, no copyright is parted with.
- Right to reproduce and the right to use computer software are distinct and separate rights. While the former amounts to parting with the copyright, the latter in view of non-exclusive arrangements does not qualify as copyright. The making of copies to utilise the computer programme for the purpose for which it was supplied or as a temporary protection against loss, does not constitute an act of infringement of copyright.

The SC discussed and deliberated on four categories of transactions, covering a batch of appeals involving over 80 taxpayers. These categories were:

- **Category 1:** Direct purchase of computer software by an end-user resident in India from foreign non-resident supplier/manufacturer.
- **Category 2:** Purchase of computer software by resident Indian distributors/resellers from foreign non-resident supplier/manufacturer to resell the same to resident Indian end-users.
- **Category 3:** Purchase of computer software by foreign non-resident vendor from a foreign non-resident seller to resell the same to Indian distributor or end-users.
- **Category 4:** Cases where the computer software is affixed into hardware and is sold as an integrated unit by foreign non-resident suppliers to resident Indian distributors or end-users.

The SC reviewed various agreements relating to these categories of cases. In relation to the distributors, it noted that they do not get the right to use the product at all. The distributor is granted a non-exclusive, non-transferable license to resell the software in India.

In the case of end-user consumers in India, the agreements stipulate that the license granted was without any other rights to sub-license or transfer, reverse engineer, modify the software programme with only permission to use the software. The license granted by copyright owner that does not confer any proprietary interest to the payer does involve parting of any copyright and the same always remained with the non-resident.

The court noted that the real nature of transaction and not the nomenclature of the agreement should be considered to evaluate an arrangement.

The SC finally concluded that what is licensed to the distributor is only for the purpose of onward sale or to the end-user for a consideration, and the same does not qualify as 'license' as per the domestic copyright law. The same is in fact sale of goods. The court also concluded that a payer is required to withheld tax only if the sum paid is chargeable to tax. In the instant case as the income was not chargeable to tax under the relevant tax treaty, therefore, there was no requirement to withhold tax.

Tax treaties vs domestic law

The SC reiterated the principle that in case of a transaction where the tax treaty applies, the provisions of the Income Tax Act (Act) apply only if they are beneficial to the taxpayer and not otherwise. The SC noted that the definition of the term 'royalty' is comparatively wider in the India's domestic tax laws as compared to the tax treaties under consideration. Further, the definition under the domestic tax laws has been expanded by retrospective amendments.

Law does not demand the impossible

The SC reiterated that withholding tax liability does not arise when the income of recipient is not liable to tax in India. Taxpayer cannot be subjected to penal provisions because of retrospective amendments as law does not demand the impossible.

It also disproved the tax department's contention that treaty benefits should not be evaluated at withholding stage. It stated that if the contention that the treaty benefits should not be evaluated at withholding stage is accepted, there will arise a situation that the taxes are withheld, even if the sums are not chargeable to tax in India, which is absurd.

Persuasive value of OECD commentary

The SC also dealt with the applicability of OECD commentary and observed that the definition of the term 'royalties' in the tax treaties under consideration is identical or similar to that under the OECD model. Therefore, OECD commentary becomes relevant and carries persuasive value for the purpose of interpretation.

Path ahead

This decision finally provides much needed clarity of this much litigated issue. Accordingly, software payments for off-the-shelf software will now be out of the purview of taxation under these tax treaties. It may also be possible to contend that these principles will hold good in cases where software is downloadable and do not come in physical CDs/hard drives.

However, the taxpayers would need to evaluate the applicability of equalisation levy provisions in these cases. Furthermore, it may be worthwhile to evaluate if the principles laid down in this ruling can be applied in other cases relating to taxation of databases, transponder charges or telecommunication charges and SAAS.

04 Issues on your mind

Whether taxpayer is eligible to take credit/ITC on all the supplies auto-drafted in Form GSTR-2B? What are the different scenarios where ITC is not available?

Taxpayers would be eligible to avail ITC based on the ITC indicated in Form GSTR-2B, as per availability/eligibility of ITC. However, there may be other scenarios for which ITC may not be available to the taxpayers and the same has not been generated by the system in Form GSTR-2B. Taxpayers, are advised to self-assess and reverse or take such credit in their Form GSTR-3B.

ITC availability is shown as 'No' in Form GSTR-2B in case of following scenarios:

- Invoice or debit note for supply of goods or services or both where the recipient is not entitled to ITC.
- Invoice or debit note where the supplier (GSTIN) and place of supply are in the same state, while recipient is in another State.

How to know the enablement of e-invoicing system for my company?

There is an option in the https://einvoice1.gst.gov.in portal under search menu as **'Status of Tax Payer'**. The taxpayers need to select and enter the GSTIN and see the enablement status for the entered taxpayer.

Whether the taxpayers registered on GST portal are again required to register on the e-invoice system portal?

All the registered users under GST who wish to generate IRN need to registered on e-invoice system separately using their GSTIN. Once GSTIN is entered, the system sends an OTP to the mobile number registered with GST portal and after authenticating the same, the system enables the taxpayer to generate username and password for the e-invoice system. After generation of username and password, the taxpayer may proceed to make entries to generate IRN.

05 Important developments in direct taxes

Important amendments/updates

CBDT[88] notifies the rules for withdrawal of retrospective taxation of indirect transfers

The Taxation Laws (Amendment) Act, 2021[89] had withdrawn the retrospective applicability of the indirect transfer provisions[90]. Consequently, such provisions are not applicable to indirect transfers made before 28 May 2012.

In this regard, CBDT has notified[91] rules[92] for effective implementation of these changes which provides for specific conditions and the procedure to be followed to claim relief. These rules will be applicable from 1 October 2021.

Specific conditions to claim relief from retrospective taxation of indirect transfers are as follows-

- The declarant[93] and all other interested parties are required to irrevocably withdraw, terminate or discontinue all the proceedings[94] against the relevant order(s).
- They will refrain from facilitating, procuring, encouraging or assisting any person from bringing any proceedings or claims related to a relevant order(s) and will notify by a public notice or press release, that no claims or related award subsist against the relevant order(s).

88. Central Board of Direct Taxes
89. Enacted on 13 August 2021
90. Section 9 which provides that gains arising from sale of shares of a foreign company would be taxable in India, if such shares, directly or indirectly, derive their value substantially from the assets located in India
91. Vide Notification No. 118/2021 dated 1 October 2021
92. Rule 11UE and Rule 11UF of Income-tax Rules, 1962 ("the Rules")
93. The person in whose case a specified order has been passed
94. Appeals, applications or petitions, proceedings for arbitration, conciliation or mediation, proceedings to enforce or pursue attachments in respect of any award

CBDT exempts certain class of non-residents from furnishing return of income

CBDT has exempted[95] certain class of non-residents from the requirement of furnishing a return of income from AY[96] 2021-22 onwards, subject to the conditions prescribed:

- **A non-resident (not being a company) or a foreign company, provided that:**
  - It does not earn any income in India during the previous year, other than income from investment in Category III Alternative Investment Fund[97] set-up in an IFSC[98] ; and
  - It is not required to obtain a PAN[99] in India subject to fulfilment of prescribed conditions[100].
- **A non-resident, being an eligible foreign investor, provided that:**
  - It has made transactions only in specified capital assets[101] which are listed on a recognised stock exchange located in any IFSC.
  - It does not earn any other income other than income from transfer of such capital asset; and
  - It is not required to obtain a PAN in India subject to fulfilment of prescribed conditions[102].

However, exemption shall not be available where a notice has been issued for filing a return of income for the AY specified.

OECD[103]/G20 Inclusive Framework makes further headway in the two-pillar solution on international tax reforms

To address the issue concerning BEPS[104] and to lay down the foundation of international tax rules, OECD had released a statement on 1 July 2021 which provided a broad framework for the two-pillar solution along with key components of each pillar.

OECD has issued another statement on 8 October 2021 indicating further developments in this direction and providing a detailed implementation plan of the two-pillar framework. Some key takeaways from the statement are as follows:

- Pillar 1 now provides that for in-scope MNEs[105], 25% of residual profit[106] will be re-allocated to market jurisdictions, using a revenue-based allocation key. MLC[107] in this regard, will require inclusive framework members to remove all Digital Services Taxes and other relevant similar measures and to commit not to introduce such measures in the future.
- Under Pillar 2, the global minimum tax rate will be 15%.

95. Vide notification 119 of 2021 dated 11 October 2021
96. Assessment Year
97. Where all units other than units held by sponsor or manager are held by non-residents
98. International Financial Service Centre
99. Permanent Account Number
100. Rule 114AAB(1) of the Rules
101. Bond or Global Depositary Receipt, Rupee Denominated Bond of an Indian company or derivative or foreign currency denominated bond, unit of a mutual fund, unit of business trust, foreign currency denominated equity shares of a company, units of an AIF or such other notified securities
102. Rule 114AAB(2A) of the Rules
103. Organisation for Economic Co-operation and Development
104. Base erosion and profit shifting
105. Multinational Enterprises
106. in excess of 10% of revenue
107. Multilateral Convention

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