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SHAPING A VIBRANT INDIA

GST Compendium

A monthly guide

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Editor’s note

The government has recently announced the rates of tax refund under the Remission of Duties and Taxes on Exported Products (RoDTEP) scheme for multiple products. The scheme provides to compensate central, state, and local duties borne on the goods exported from India. The incentives range between 0.01% to 4.3% for identified export sectors and shall be applicable on exports made from 1 January 2021.

On the judicial front, the Delhi High Court (HC) has held that the search and seizure power is an ‘intrusive power’ that needs to be wielded with utmost care and caution. Further, the HC observed that unless the basic jurisdictional facts exist in a case, the power of search and seizure cannot be exercised. In another case, the Telangana HC held that no tax demand can be raised when the investigation is still in progress and that the revenue cannot collect any tax, interest, or penalty before determination of liability in an inquiry.

In this edition, our experts' corner focuses on the availability of GST refund to the SEZ units/developers.

On the direct tax front, the Central Board of Direct Taxes (CBDT) has extended the time limit for filing various electronic forms considering the difficulties faced by the taxpayers in filling these forms. In an important development, Centre has withdrawn retrospective applicability of provisions on indirect transfer of shares. This should help address some of the key concerns of the foreign investors.

Hope you will find this edition an interesting reading.

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01 Important amendments/updates

Government notifies guidelines and rates for the RoDTEP scheme

The Remission of Duties and Taxes on Exported Products (RoDTEP) scheme was announced by the Government of India with an aim to boost exports and competitiveness in the global markets. The scheme shall provide refund of central, state and local duties/taxes/levies borne on the exported product.

The scheme has been made effective **for exports made from 1 January 2021.**

The government has now notified the RoDTEP rates along with necessary guidelines of the scheme[1].

Sectors covered under the Scheme

Textiles	Agriculture	Leather
Jewellery	Electronics	Marine
Automobiles	Plastics	Machinery

Benefits

- The incentives under the scheme ranges between 0.01% to 4.3% for identified export sectors and covers 8555 tariff items.
- Rebate would be granted to eligible exporters at a notified rate as a percentage of the Freight on Board (FOB) value with a value cap per unit of the exported product.
- Rebate will be issued in the form of a transferable duty credit/electronic scrip (e-scrip) which will be maintained in an electronic ledger by the Central Board of Indirect Taxes & Customs (CBIC).
- The e-scrips would be used only for payment of duty of basic customs duty[2].

1. Notification No. 19/2015-2020 dated 17 August 2021
2. Leviable under the First Schedule to the Customs Tariff Act, 1975

Ineligible exports under the scheme

Goods imported for export (without any value addition)	Export through transhipment
Prohibited/restricted products under Schedule 2 of the export policy in ITC (HS)	Export products subject to minimum export price or export duty
Deemed exports	Products manufactured by domestic tariff area (DTA) units supplied to special economic zone (SEZ)/Free Trade Warehousing Zone (FTWZ) units
Products manufactured in Hardware Technology Park (EHTP) and Bio-Technology Parks (BTP).	Goods which have been taken in to use after manufacture
Exports not having electronic documentation/Exports from non-electronic data interchange (EDI) ports	Products manufactured or exported by 100% Export Oriented Unit (EOU)
Products manufactured or exported by units situated in Free Trade Zones (FTZ) or Export Processing Zones (EPZ) or SEZ	Goods imported for execution of an export order placed on the importer by the supplier of goods for jobbing
Products manufactured or exported in discharge of export obligation against advance authorisation or Duty-free import authorisation, or special advance authorisation issued	

The rebate under the scheme shall not be available in respect of duties and taxes already exempted or remitted or credited. The scheme has been made effective

Ministry of Textiles issues revised guidelines for continuation and implementation of the RoSCTL Scheme

The Union Cabinet had approved the continuation of Rebate of State and Central Taxes and Levies (RoSCTL) scheme till **31 March 2024** vide press release dated 14 July 2021. The scheme shall continue with the same rates on exports of apparel/garments (Chapters-61 and 62) and made-ups (Chapter-63) in exclusion from Remission of Duties and Taxes on Exported Products (RoDTEP) scheme for these chapters. The other textiles products (excluding Chapters-61, 62 and 63), which are not covered under the RoSCTL, shall be eligible to avail the benefits, under the RoDTEP, along with other products.

In this regard, the Ministry of Textiles has now issued revised guidelines for continuation and implementation of the RoSCTL scheme[3].

Key guidelines

- **Nature of rebate:** The rebate under the scheme shall be in the form of duty credit scrips. The scrips shall be issued electronically on the Customs system. The duty credit scrips shall be used for payment of Basic Customs Duty on import of goods. These scrips shall be freely transferable.
- **Claim for rebate:** An exporter opting for this scheme shall make claim for rebate on exports at item-level, in accordance with the guidelines as may be issued by the Department of Revenue, for operationalising the scheme on the Customs system. Electronic duty credit ledger will be created by the Customs authority and the exporter may generate electronic Duty Credit Scrip for value, lying in his/her ledger.
- **Mechanism for rebate:** Duty Credit Scrip under RoSCTL scheme shall be issued without insisting on realisation of export proceeds. However, adequate safeguard mechanism shall be put in place for effective monitoring of realisation of export proceeds. The rebate allowed is subject to the receipt of sale proceeds within time allowed under the Foreign Exchange Management Act, 1999 (FEMA) failing which such rebate shall be deemed to have never been allowed.
- **Procedure for recovery for excess claim:** The exporter is required to return any over-payment of rebate issued through the scrips arising from miscalculation. Where there is repayment, recovery or return, interest shall also be paid by the exporter at the rate of 15% per annum calculated from the date of debit of the scrip till the date of repayment, recovery or return along with penalty, if imposed under an adjudication order. Exporter may have option to surrender unutilised scrip obtained under RoSCTL without payment of interest, however, a penalty may be imposed in case such Duty Credit Scrip is obtained by misdeclaration and fraudulent practice, under the provisions of Customs Act.

3. Notification No. 13 August 2021

Haryana government announces scheme for grant of 'Investment subsidy in lieu of net SGST'

With a vision to make Haryana a pre-eminent investment destination and facilitate balanced regional and sustainable development, the Government of Haryana has formulated a scheme for grant of investment subsidy in lieu of Net SGST. The scheme has been made effective from 1 January 2021. The subsidy is admissible for units which have gone into production on or after 1 January 2021 or which have taken effective steps for establishment of Industrial unit before 31 December 2025[4].

Key features of the scheme

- **Duration of the scheme:** The scheme shall commence with effect from 1 January 2021. The investment subsidy in lieu of net SGST shall be admissible for units, which started production on or after 1 January 2021 or those that have taken effective steps for the establishment of industrial unit before 31 December 2025.
- **Quantum of investment subsidy:**

Category	Quantum of investment subsidy			
	Years	D block	C block	B block
Ultra-mega projects	Shall be decided by Haryana Enterprises Promotion Board			
Mega projects*	First five years	75% of Net SGST	50% of Net SGST	30% of Net SGST
	Next three year	35% with cap of 125% of FCI	25% for next 3 years with cap of 100% of FCI	15% with cap of 100% of new Fixed Capital Investment
Large units	First seven years	75% of Net SGST	50% of Net SGST for first 5 years	30% of Net SGST for first 5 years
	Next three years	35% for next 3 years with up to 125% of FCI	25% with up to 100% of FCI	15% with cap of 100% of new FCI
Micro, Small and Medium Enterprises (MSME)	First 10	75% of Net SGST	75% of Net SGST for first 7 years	50% of Net for first 5 years
	Next three years	35% with up to 150% of FCI	35% with up to 125% of FCI	25% with cap of 100% of new FCI for new enterprises
Mega, Large and MSMEs (thrust sector)	75% of Net SGST for first seven years, 35% for next three years in 'B', 'C' and 'D' category blocks from the date of commencement of commercial production with cap of 150% of new Fixed Capital Investment for woman/SC/ST led new micro enterprises			
Start-ups	100% of Net SGST for seven years with cap of 100% of FCI from the date of commencement of commercial production			
Service enterprises	50% of Net SGST paid for first five years in 'B','C' and 'D' category blocks with cap of 100% of new FCI			
Essential sector enterprises of all categories	75% of Net SGST for first 10 years, 35% for next three years in 'D' category blocks with up to 150% of new FCI			

*In case of mega projects having inverted duties, the investment subsidy up to 5% of FCI will be given for a period of eight years in equal annual instalments subject to annual ceiling of INR 5 crore per mega project. In case, where Net SGST deposited under cash ledger is less than 5% of the FCI in a year, the Investment Subsidy up to 5% of FCI will be given for a period of eight years in equal annual instalments subject to annual ceiling of INR 5 crore per mega project.

4. Notification No. 25/05/2020

- **Key eligibility conditions:** Amongst many other conditions, the industrial units must comply with following key conditions to become eligible under the scheme:

Ultra, mega and large units shall file IEM with Department for Promotion of Industry and Internal Trade	MSME shall file Udyam Registration Certificate (URC) and Haryana Udhyam Memorandum (HUM)
Obtain GST registration	Unit should be in commercial production
Unit should be in regular production at the time of disbursement of subsidy	In case of expansion/diversification units shall obtain separate GST TIN No. for maintaining separate accounts pertaining to manufacturing and sale of products.
Should be placed in restrictive list notified by state government	Obtained NOC/CLU from competent authority (if applicable)

- Incentive excludes any refunds on account of exports or deemed exports
- Incentive shall not apply to tax paid due to any show-cause notice issued by department
- Incentive shall not be given in respect of failed tax credits
- Benefit shall be restricted to manufacture of eligible products under the unit availing the scheme

- **Other key aspects:**
  - The application in the prescribed form along with listed documents shall be submitted on the web portal within three months of closing of financial year or date of notification of scheme, whichever is earlier. The unit shall be inspected by competent authorities for ascertaining new investment.
  - The unit shall forfeit its entitlement if it does not submit its claim within three months of closing FY for which incentive is being claimed or date of notification, whichever is later.
  - In case the scheme has been availed on the basis of any false information or wherein inter-state supplies have been shown as intra-state supplies through any middleman, assistance shall be refunded with interest @12% p.a. and shall be recoverable as arrears of land revenue.
- **Service delivery timeline:**

Tasks	Timeline (working days)
Letter of approval	30 days
Letter of sanction	7 days
Disbursement	7 days

GSTN issues advisory on implementation of restriction in filing return in Form GSTR-1 in certain cases

The GST rules were amended[5] to provide for restriction in filing of return in Form GSTR-1 if a registered person has not furnished the return in Form GSTR-3B for preceding two months and for preceding tax period.

The Goods and Services Tax Network (GSTN) has implemented the said rule on the GST portal effective from 1 September 2021. Thus, the system will now check whether before the filing of the GSTR-1/IFF of a tax period, the following has been filed or not:

- GSTR-3B for the previous two monthly tax-periods (for monthly filers), or
- GSTR-3B for the previous quarterly tax period (for quarterly filers), as the case may be.

The system will restrict filing of Form GSTR-1/IFF till the pending returns as mentioned above have been filed by the taxpayers.

5. New Rule-59(6) of CGST Rules, 2017 was inserted vide Notification No. 1/2021 dated 1 January 2021
6. GSTN advisory dated 26 August 2021

CBIC issues clarification on issuance of instructions relating to classification and levy of duty

The CBIC has clarified that it alone can issue instructions/directions[7] with respect to classification of goods, levy of duty thereon, for the implementation of any other provision of the Customs Act or of any other existing law, in so far as they relate to any prohibition, restriction or procedure for import or export of goods[8].

The CBIC has further directed the directorates/commissionerates/audit to not issue any circulars/reports/alerts etc., in matters covered u/s 151A of the Customs Act as such matters require a holistic analysis, wide ranging consultations involving multiple stakeholders, ministries and also international organisations.

Export of COVID-19 rapid antigen testing kits restricted with immediate effect

The Director General of Foreign Trade (DGFT) has made amendment in the Schedule – 2 of ITC (HS) Export Policy related to export of COVID-19 rapid antigen testing kits[9]. Accordingly, the export of COVID-19 rapid antigen testing kits falling under the ITC HS Code Ex 3822 and 3002 has been put under the Restricted category from free category with immediate effect.

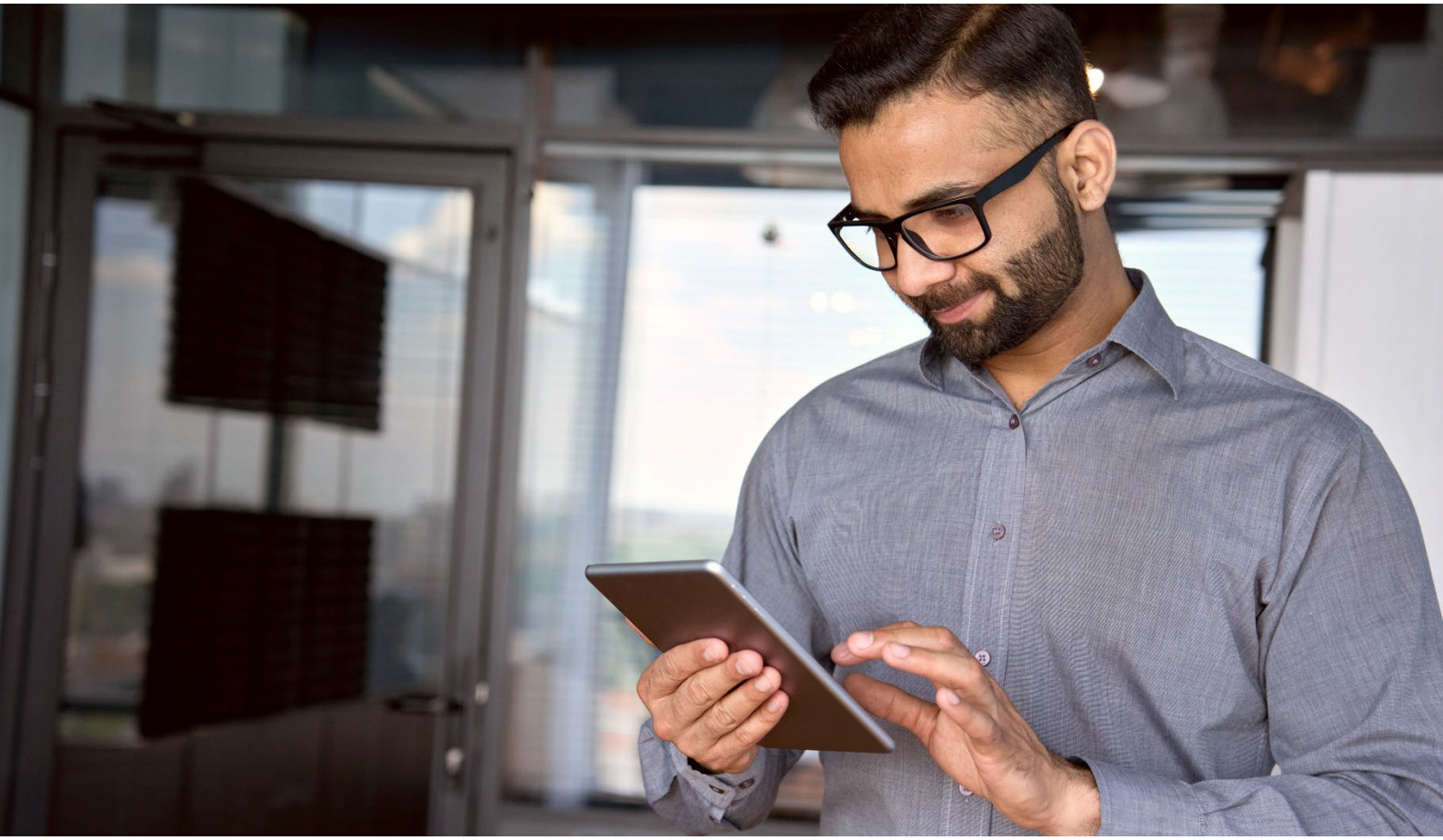
DGFT revises 'restrictions'/'prohibitions' policy on import/export

The DGFT has amended the principles of prohibition and restrictions to be in line with international agreements[10]. As per the revised principles the DGFT may through a notification import 'Prohibition'/'Restriction' as under:

- On export of certain items such as foodstuffs or essential products for preventing/relieving critical shortages,
- On imports and exports necessary for application of standards or regulations for classification, grading or marketing of commodities in international trade
- On imports of fisheries products, imported in any form, for enforcement of government measures to restrict production of the domestic product or for certain other purposes,
- On imports to safeguard country's external financial position and ensure a level of reserves,
- On imports to promote establishment of particular industry,
- For preventing sudden increases in imports from causing serious injury to domestic producers or to relieve products who have suffered injury,
- For protection of public morals or to maintain public order,
- For protection of human, animal or plant life or health,
- Relating to the importations or exportations of gold or silver,
- Necessary to secure compliance with laws and regulations including those relating to the protection of patents, trademarks and copyrights and the prevention of deceptive practices,
- Relating to the products of prison labour,
- For the protection of national treasures of artistic, historic, or archaeological value,
- For conservation of exhaustible natural resources,
- for ensuring essential quantities for the domestic processing industry,
- Essential to the acquisition or distribution of products in general or local short supply,
- For the protection of country's essential security interests:
  - Relating to fissionable material or the materials from which they are derived
  - Relating to the traffic in arms, ammunition and implements of war
  - Taken in time of war or other emergency in international relations, or
- In pursuance to country's obligation under the United Nations Charter for the maintenance of international peace and security.

7. Section 151 A of the Customs Act, 1962
8. Instruction No. 19/2021-Customs dated 17 August 2021
9. Notification No. 18/2015-2020 dated 16 August 2021
10. Notification No. 17/2015-2020 dated 10 August 2021 (amendment in para 2.07 of FTP 2015-20)

2a Key judicial pronouncements



Search and seizure flawed and unlawful in absence of valid reasons to belief - Delhi High Court (HC)

Summary

The Delhi HC observed that the search authorisation issued gave no clue that any goods were liable for confiscation or any documents, or books or things had been secreted to any place. Therefore, the HC held that the authorisation issued by the Joint Director, Directorate General of Goods and Services Tax Intelligence (DGGI) was flawed and unsustainable in law. Accordingly, the search and seizure conducted by the concerned officer was declared unlawful and the orders of seizure and prohibition were set aside.

Facts of the case

- The petitioner[11] was a wholesaler in the business of purchasing and selling cigarettes.
- A search was conducted at the petitioner's premises by the officers of the DGGI backed by an authorisation issued by the Joint Director, DGGI[12].
- A stock register which ought to have been maintained by the petitioner at the premises was not provided. Therefore, a prohibition order was issued, and the goods were detained on reasonable belief that the goods were meant for 'illicit trade/supply'.
- Aggrieved the petitioner filed writ[13] before the Delhi HC praying to set aside the order of prohibition and release the goods.

11. M/s R. J. Trading Co.
12. U/s 67(2) of the CGST Act, 2017
13. W.P.(C) 4847/2021

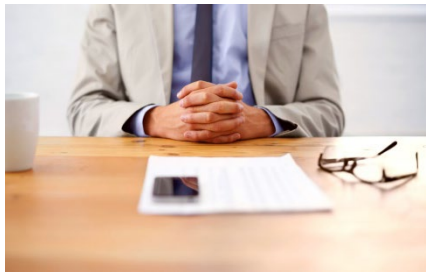
Delhi HC observations and ruling[14]

- **'Reason to believe' controls the exercise of powers:** The expression 'reasons to believe' controls the exercise of powers under the said provisions under the GST law. Therefore, unless the basic jurisdictional facts exist, in a case, the power of search and seizure conferred cannot be exercised.
- **Prima facie view can be formed based on evidence:** It is open to the concerned authority to form a prima facie view based on evidence that may be direct or circumstantial. In other words, the belief of the concerned authority should be based on some actionable material that he has had an opportunity to peruse.
- **No inspection was conducted:** In the present case, the search and seizure was not conducted pursuant to an inspection. The conduct of search and seizure, in this case, appears to have been carried out under the cover of the omnibus term 'otherwise'.
- **No clue for forming 'reasons to belief':** The authorisation issued gave no clue that 'any' goods were liable for confiscation or 'any' documents, or books or things which would be useful for or relevant for proceedings under the CGST Act had been secreted to any place.
- **Order of search and seizure flawed and unsustainable:** Both the order of seizure of documents and the order of prohibition, simply replicate the language of the provisions. Thus, according to us, the very trigger for conducting the search i.e., the authorisation issued by the additional commissioner was flawed and unsustainable in law.
- **Search conducted was unlawful:** The officer should bear that the search and seizure power is an intrusive power that needs to be wielded with utmost care and caution. Accordingly, the search and seizure conducted by CGST North Delhi Commissionerate was declared unlawful and the orders of seizure and prohibition were set aside. The goods and documents seized were allowed to be released.

Our comments

In a similar matter, the Allahabad High Court[15] had held that it is essential that the officer authorising the search should have 'reasons to believe' based on reasonable material and should not be fanciful or arbitrary. It had further highlighted that it is also well established that the reasons may or may not be communicated to the assessee but the same should exist on record.

This is a welcome decision by the Delhi HC and shall provide relief to the businesses as also will set a precedence in similar cases.



Tax demand cannot be issued or raised when investigation is still in progress – Telangana High Court

Summary

The Telangana HC observed that the revenue had drawn conclusion based on incomplete investigation alleging that the petitioner had availed input tax credit (ITC) on fake invoices issued by fictitious firms without actual receipt of goods. The HC opined that no tax demand can be issued or raised when the investigation is in progress and the revenue cannot collect any tax, interest, or penalty before determination of liability in an enquiry. Therefore, the HC allowed the petition and held that the action of revenue is wholly arbitrary and without jurisdiction.

Facts of the case

- The petitioner[16] is engaged in the business of ferrous waste and scrap, re-melting scrap ingots of iron or steel, flat rolled products of iron or non-alloy steel, etc.
- A letter was issued by the revenue to the petitioner alleging that the investigations conducted by the departmental officials reveal that the petitioner had availed ITC based on invoices issued by suppliers/firms which are fictitious. Therefore, the petitioner was requested to reverse the ITC availed on such invoices immediately.
- The petitioner filed a writ[17] before the Telangana HC assailing the conduct of the revenue in directing it to remit the amount availed as ITC at the stage of summons itself without following due procedure prescribed under the GST law[18].

14. dated 20 July 2021
15. Rimjhim Ispat Limited
16. M/s Deem Distributors Pvt. Ltd.
17. WP 7063/2021
18. U/s 74 of the CGST Act, 2017

Telangana HC observations and ruling[19]

- **Notice by proper officer:** As per the relevant provisions under the GST law[20], a notice may be issued by the proper officer if he is of the opinion that the ITC has been wrongly availed or utilised by reason of fraud, or any wilful misstatement or suppression of facts, to the person who has wrongly availed or utilised ITC. Such notice may require the person to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon and a penalty equivalent to the tax specified in the notice.
- **Conclusion drawn on basis of incomplete investigation:** The HC observed that a conclusion appears to have been drawn based on the incomplete investigation already done that petitioner had availed ITC on invoices raised by certain fictitious suppliers without actual receipt of goods. However, without there being a determination of liability of the petitioner in any enquiry conducted under the Act, a demand for reversal of ITC or payment of tax with interest or penalty, cannot be raised by the revenue.
- **Choice to the taxpayer:** The HC opined that the relevant provision[21] gives a choice to the taxpayer to make any payment, if he is so chooses, but it does not confer any power on the revenue to make a demand as if there has been a determination of liability and demand tax along with interest and penalty.
- **No tax demand when investigation is in progress**: Before ascertainment of liability, the revenue could not have issued the letter to the petitioner asking him immediately to reverse the ITC allegedly availed. Therefore, no tax demand can be issued or raised when investigation is still in progress.
- **Revenue's demand is arbitrary and without jurisdiction**: The revenue cannot collect any tax, interest, or penalty before they determine, in an enquiry, after putting the petitioner/assessee of notice. Therefore, the revenue's action is wholly arbitrary and without jurisdiction.
- **Petition allowed:** Therefore, the HC allowed the writ and restrained the revenue from coercing the petitioner to make any payment without issuing notice and following the prescribed procedure. Further, directed to refund the amount paid by the petitioner along with interest.

Our comments

On a similar issue, the Madras HC[22] had directed the Revenue not to demand any amount from the assessee except by following the due process of law and to refund the amount collected at the time of investigation. In another case, the Madras HC[23] had held that the procedure adopted by authorities in trying to collect the amount pending investigation is improper and illegal, without the authority of law and contrary to the constitutional mandate.

Input tax credit cannot be denied merely by issuing a cursory order - Madras HC

Summary

The Madras HC observed that the impugned order rejecting the petitioner's claim of input tax credit (ITC) has been passed by way of a cursory order and hardly meets the standards to be followed in framing of an assessment. The claim has been rejected by simply stating that the taxpayer has claimed ITC using fake invoices and hence, the corresponding ITC is disallowed. Therefore, the HC directed the revenue to consider the documents submitted by the petitioner in deciding as to whether the petitioner is entitled to claim the ITC and accordingly pass a reasoned order.

Facts of the case

- The petitioner[24] is a registered dealer seeking a direction to unblock the ITC available in the electronic credit ledger.
- It contended that all the material necessary to substantiate its request for unblocking have been supplied to the revenue.
- The revenue submits that the claim of ITC is bogus insofar as there was no actual movement of goods. Therefore, a show cause notice was issued to the petitioner granting an opportunity of hearing but the same was not availed by the petitioner citing lockdown on account of on-going pandemic.
- Thereafter, impugned order dated was passed rejecting the claim for ITC by simply stating that the taxpayer has claimed ITC using fake invoices. Thus, the corresponding ITC was disallowed. Aggrieved the petitioner filed the present writ before the Madras HC challenging the impugned order.

19. Order dated 3 August 2021
20. Section 74(1) of the CGST Act, 2017
21. Section 74(5) of CGST Act, 2017
22. Shri Nandhi Dhall Mills India Pvt. Ltd.
23. Sanmar Foundaries Limited
24. M/s Shree Rajendra Steels

Madras HC observations and ruling[25]

- **Claim cannot be denied by issuing a cursory order:** The claim of ITC has to be decided on the basis of the documents supplied by the petitioner as well as the material available with the assessing officer and not by the way of a cursory order. Hence, the order rejecting the claim of ITC by simply stating that taxpayer has claimed ITC using fake invoices and hence ITC shall be disallowed is liable to be set aside.
- **Submissions of petitioner to be considered:** The documents enclosed by the petitioner must be considered for arriving at a decision as to whether he is entitled to claim the ITC or not and the same has to be done by way of a reasoned order.
- **Impugned order does not meet the standards:** The impugned order passed for rejecting the claim of ITC hardly meets the standards to be followed in the framing of an assessment. Hence, the HC held that it is liable to be set aside.
- **Revenue to pass speaking order:** The HC directed the revenue that after hearing the petitioner and considering the reply as well as the documents filed/to be filed, the authority shall decide the claim of ITC by way of a speaking order, in accordance with law.

Our comments

Earlier, the Madras HC[26] had pronounced a similar ruling wherein it had held that rejection of refund claim of ITC through non-speaking order is bad in law. The HC had observed that it is a settled proposition of law that whenever an application of this nature is made, the statutory authority is bound to consider the claim made and pass a reasoned order.

In another case, the Bombay HC[27] had held that, the adjudication order must be a speaking order. A speaking order is an order that speaks for itself. A good adjudication order is expected to stand the test of legality, fairness, and reasons at higher appellate forums. Such order should contain all the details of the issue, clear findings, and a reasoned order. The Himachal Pradesh HC[28] in another case had observed that, speaking orders does not ipso facto mean that they must be lengthy order. If the order spells out the reasons as to why it has been passed, then it is a speaking order and it is not necessary that only lengthy order can be said to be a speaking order.

Thus, this is a welcome ruling by the Madras HC and shall provide relief to the taxpayers in similar matter.

Service tax not applicable on liquidated damages – CESTAT

Summary

The Customs, Excise and Service Tax Appellate Tribunal (CESTAT), Chennai observed that the recovery of liquidated damages/penalty from other party cannot be said to be towards any service per se. Further, observed that neither the appellant is carrying on any activity to receive compensation, nor can there be any intention of the other party to breach or violate the contract and suffer a loss. Therefore, the CESTAT held that service tax could not be levied on the liquidated damages collected by the appellant.

25. Order dated 4 August 2021
26. Jay Jay Mills (India) Pvt. Ltd.
27. Supreme Industries Ltd.
28. Hemant Kumar

Facts of the case

- The appellant[29] is engaged in the manufacture of carbon steel, carbon steel sheet, coin blanks and alloy steel.
- As the time limits mentioned in the contract were not adhered to, the appellant recovered liquidated damages as per the clauses of the contract.
- The Revenue contended that the appellant had agreed to tolerate breach of timelines stipulated in the contract. Therefore, the amount imposed as liquidated damages are consideration for the act of 'agreeing to the obligation to refrain from an act, or to tolerate an act or a situation or to do an act'[30] and therefore, liable to pay service tax.
- The demand of service tax by, interest and penalty were confirmed by invoking the extended period of limitation[31]. Therefore, the appellant preferred an appeal before the CESTAT for quashing the said order.

CESTAT Chennai observations and ruling[32]

- **No intention to breach the contract and suffer a loss:** In another case[33], the Tribunal had observed that the intention of the parties certainly was not for flouting the terms of the agreement so that the penal clauses get attracted. It is not the intention of the appellant to impose any penalty upon the other party nor is it the intention of the other party to get penalised.
- **Purpose is to safeguard the commercial interest of appellant:** The purpose of imposing compensation or penalty is to provide a safeguard to the commercial interest of the appellant and ensure that the defaulting act is not undertaken or repeated. The expectation from the other party is that it complies with the terms of contract.
- **Recovery not towards any service per se:** The recovery of liquidated damages/penalty from other party cannot be said to be towards any service per se, since neither the appellant is carrying on any activity to receive compensation, nor can there be any intention of the other party to breach or violate the contract and suffer a loss.
- **No levy of service tax:** It was held that leviability of service tax on liquidated damages could not be sustained on the ground that the appellant agreed to tolerate the act of non-completion against liquidated damages. Therefore, the Tribunal held that service tax could not be levied on the liquidated damages collected by the appellant.

Our comments

Taxability of liquidated damages has been a litigative issue under the erstwhile indirect tax regime as well as under GST.

On a similar matter, the Bombay HC[34] had held that GST is not payable on damages/compensation paid for a legal injury. The HC observed that such payment does not have the necessary quality of reciprocity to make it a 'supply' and, therefore, GST is not payable on such amount. On the contrary, various advance ruling authorities have held that recovery of liquidated damages shall be considered as supply[35].

It is pertinent to note that, post the amendment in the definition of supply[36], an activity or transaction has to first qualify as a 'supply' before being treated either as supply of goods or supply of services as referred to in Schedule II. Thus, the activity of recovery of liquidated damages may not satisfy the essentials elements of supply. A due clarification from government will help to curb the unwarranted litigations on this matter.

29. Steel Authority of India Ltd
30. Section 66E(e) of the Finance Act, 1994
31. U/s 73(1) of the Finance Act, 1994
32. Final Order No. 41707 / 2021 dated 26 July 2021
33. South Eastern Coalfields Ltd.
34. Bai Mamubai Trust, Vithaldas Laxmidas Bhatia, Smt. Indu Vithaldas Bhatia vs. Suchitra
35. M/s Maharashtra State Power Generation Co. Ltd.(Maharashtra AAR), Rashtriya Ispat Nigam Ltd (Andhra Pradesh AAR), M/s Dholera Industrial City Development Project Ltd. (Gujarat AAR)
36. The Central Goods and Services Tax (Amendment) Act, 2018 effective from 1 February 2019

2b Decoding advance rulings

Part payment of consideration by employer for food expenses of employees does not amount to supply – Karnataka AAR

Summary

The Karnataka Authority for Advance Ruling (AAR) observed that the applicant merely pays part consideration towards the cost of the lunch and refreshments to their employees through contractors and held that the said activity does not amount to 'supply' in terms of the relevant provisions[37] under the GST Act.

37. Section 7(i)(c) of the CGST Act

Facts of the case

- The applicant[38] is engaged in processing of milk and milk products.
- The applicant provides canteen facilities within the factory premises to its employees.
- The contractor sells all meals and eatables at the rate specified by the applicant. The applicant collects part amount from the employees and part amount is paid by the applicant to the contractor. The canteen contractor charges GST @ 5% on the total bill amount under the HSN code 9963.
- Besides the classification issues, the applicant also sought clarification from the Karnataka AAR as to whether the provision of subsidised lunch and refreshments to employees through contractors is to be treated as supply. Further, if the answer is affirmative, then under which tariff classification it has to be classified.

Karnataka AAR observations and ruling[39]

- **Part payment by the employer for canteen expenses:** The applicant merely pays part of the value of the canteen bill on behalf of the employees to the contractor. The applicant is not involved in provision of any supply to the contractor.
- **Does not amount to supply:** Therefore, the instant activity of the applicant of paying the part amount on behalf of its employees to the contractor does not amount to supply[40].

Our comments

In the recent past, there have been many rulings wherein such part payment of the consideration by the employer has been regarded as 'supply' under GST. Since, the subject matter has always been an area of litigation, many companies were discharging the tax liability on a conservative basis to avoid any future disputes/penalties.

The GST law was amended[41] to allow input tax credit in cases where provision of canteen facility by the employer is obligatory/mandatory under any statue. However, where such facility is considered as 'supply', the input tax credit is not allowed due to specific restrictions under the law. A due clarification from the government on this issue will surely be helpful to resolve this anomaly and to mitigate future litigations.

Post-sale additional discount qualifies as consideration liable to GST – Kerala AAAR

Summary

The Kerala Appellate Authority for Advance Ruling (AAAR) observed that the additional discounts offered by the appellant to its customers were as per the instructions of the principal company. The appellant had no control on the quantum of scheme discounts to be offered to its customers/dealers. Such additional discount was given by the principal company to the appellant to augment the sales. Therefore, the AAAR held that the additional discount reimbursed by the principal company is liable to be added to the value of supply payable by the customers or dealers to the appellant and the appellant is liable to pay GST on the same.

Facts of the case

- The appellant[42] is an authorised distributor of M/s. Castrol India Ltd. (principal company) for the supply of Castrol brand Industrial and automotive lubricants.
- The appellant has entered into a distribution agreement with authorised dealers/stockists for supply of goods on a principal-to-principal basis. The prices of the goods supplied by the appellant is determined by the principal company and the appellant has no control over the prices.
- The principal company issues commercial credit notes for reimbursement of the reduced price provided by the appellant to the customer as per its instructions.
- The appellant had sought an advance ruling before the Kerala Advance Ruling Authority (AAR) wherein the Kerala AAR[43] had held that the additional discount reimbursed by the principal company to the appellant is liable to be added to the consideration payable by the customer to the appellant to arrive at the value of supply[44] at the hands of the appellant. Further, the principal company issuing the commercial credit note is not eligible to reduce his original tax liability and hence the appellant will not be liable to reverse the ITC attributable to the commercial credit notes received by him from the principal company.

38. M/s Dakshina Kannada Co-op. Milk Producers Union Ltd.
39. KAR ADRG 39/2021 dated 30 July 2021
40. Section 7(1) of the CGST Act 2017
41. Effective from 1 February 2019
42. Santhosh Distributors
43. Vide order No. KER 60/2019 dated 16 September 2019
44. U/s 15 of the CGST Act, 2017

Kerala AAAR observations and ruling[45]

- **Post-sale discounts leviable to GST:** Two types of discounts are being offered by principal company/appellant. In both these post sale discounts; discounts are extended through credit notes. The said post sale discounts are not known or at least not quantified at or before the time of supply or not predetermined in the agreement concerned. Therefore, these post sale discounts are subjected to GST at the time of supply.
- **Non fulfilment of prescribed criteria:** The bare word 'discount' mentioned in agreement without there being any parameters or criteria mentioned with it would not fulfil the requirement of relevant provisions under GST law[46]. Thus, the amount paid to the appellant towards 'rate difference' and 'special discount', post the activity of supply are not complying with the requirements of GST law and therefore cannot be considered and allowed as discount for the purpose of arriving at the 'transaction value'.
- **Additional discount is in the nature of consideration:** The additional discount/scheme discount is given by the appellant to the customers/dealers as directed by the supplier of goods/principal company and is intended to augment the sales volume by the offer of special discounted price. This shows that the appellant has no control on the quantum of scheme discounts to be offered. Thus, the additional discount given by to the appellant is a consideration to offer the reduced price to augment the sales. This additional discount squarely falls under the definition of the term consideration[47].
- **Additional discount to be added to value of supply:** Thereby additional discount in the form of reimbursement of discount or rebate, received from principal company over and above the invoice value is liable to be added to the consideration payable by the customer to the appellant for the purpose of arriving at the value of supply of the appellant to the customer. Further, the customer, if registered, would only be eligible to claim ITC of the tax charged by the appellant only to the extent of the tax paid by the said customer to the appellant.

Our comments

On the subject matter, the CBIC[48] had also issued a clarification stating that if the additional discount is given by the supplier of goods to offer a special reduced price by the dealer to the customer to augment the sales volume, then such additional discount would represent the consideration flowing from the supplier to the dealer for the supply made by the dealer to the customer. This additional discount as consideration, payable by any person would be liable to be added to the consideration payable by the customer, for the purpose of arriving at the value of supply, in the hands of the dealer. However, subsequently the circular was withdrawn, and revised circular is still awaited.

This judgment is likely to create confusion among the businesses and lead to further litigation. Therefore, a due clarification from the government will help provide required clarity and curb unnecessary litigation.

45. Order No. AAR/10/2020 dated 1 March 2021
46. Section 15(3)(b)(i) of the CGST Act, 2017
47. U/s 2(31) of the CGST Act, 2017
48. Circular No. 105/24/2019-GST dated 28 June 2019

03 Experts' column

Claim of GST refund by SEZ units/developers - a matter of concern

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India recognised the effectiveness of the export processing zone (EPZ) model in promoting exports by setting up Asia's first EPZ in Kandla in 1965.

To overcome shortcomings arising out of multiple controls and clearances, and with a view to attract larger foreign investments in India, the Special Economic Zone Act, 2005, was enacted along with the Special Economic Zone Rules, 2006, on 10 February 2006.

A special economic zone (SEZ) is a specifically demarcated duty-free enclave, which is deemed to be a foreign territory for the purposes of trade and levy of duties and taxes. The basic objective behind the SEZ scheme is to establish hassle-free environment for exports.

Despite the government providing tax benefits to SEZ units/developers through the GST law, there are certain questions about the eligibility of GST refunds to SEZ units/developers on zero-rated supply of goods/services. This article discusses this vexed issue of eligibility of refunds under GST to SEZ units/developers.

Prevailing issue: Restricting GST refund claim by SEZ units/developers

As per Section 16 of the IGST Act, 2017, supplies made to the SEZ units or developers are treated as zero-rated supplies and are either made under cover of letter of undertaking (LUT) or with payment of the IGST, followed by refund of unutilised ITC or IGST paid.

Refund mechanism in case of such supplies has been provided under the Section 54 of CGST Act, 2017, read with Rule 89 of CGST Rules, 2017. The relevant extract of Rule 89 has been reproduced hereunder:

"Provided further that in respect of supplies to a SEZ unit or a developer, the application for refund shall be filed by the –

- supplier of goods after such goods have been admitted in full in the SEZ for authorised operations, as endorsed by the specified officer of the Zone;
- supplier of services along with such evidence regarding receipt of services for authorised operations as endorsed by the specified officer of the Zone."

From the above provision, one can infer that the option of claiming a refund for supplies effected to SEZ unit/developer can be exercised only by the suppliers and not by the SEZ unit/developer (i.e., the recipient of such supplies).

Reference can also be drawn from ruling by the Appellate Authority, GST, Andhra Pradesh, in 'Re: Vaachi International Pvt. Ltd. [Order No. 4990 of 2020 dated 10 February 2020]' wherein it was held that the SEZ unit/developer shall not claim any refund against ITC involved in supplies received from non-SEZ suppliers as the GST law provides mechanism for refund claim by suppliers. Practically, the GST authorities are rejecting refund applications of SEZ units/developers based on the aforesaid ruling.

Points to ponder considering the above laid restriction

- Under the erstwhile regime, SEZ units/developers were granted exemption from payment of service tax on services received from non-SEZ suppliers, which were used for the authorised operations. The units/developers had an option not to pay service tax ab initio when the services were used exclusively for authorised operations. Further, provision for claiming refund of service tax was also provided to units/developers, subject to specified procedures and conditions on services, which were not exclusively used for authorised operations or on which ab initio exemption was not availed. Under both options, the units/developers were granted relaxation from service tax and were not required to bear burden of the same.
- Small vendors supplying goods or services to SEZ units/developers are charging GST on tax invoices and collecting the same from recipients since such vendors deem refund mechanism as cumbersome. These tax payments to such vendors multiply to a huge amount of unutilised ITC for the SEZ units/developers.
- Rule 89 of the CGST Rules, 2017, states refund shall be only provided when supplies made to SEZ units are for authorised operations. Insertion of words "for authorised operation" under definition of zero-rated supplies, through The Finance Act 2021, is merely to harmonise the provisions. Post effecting said amendment, only supplies made to SEZ units/developers would qualify as zero-rated supplies. Thus, going forward, supplies not associated with authorised operations, would attract applicable IGST to be borne by SEZ units/developers, in turn forming part of unutilised ITC for such units/developers.
- Section 54(1) of the CGST Act, 2017, states the phrase "any person claiming refund", through which it implies that intention of the law is to provide benefit of refund to all registered persons and not categorically rule out SEZ units from such benefit.
- Section 54(3) of the CGST Act, 2017, allows a registered person to claim refund of any unutilised ITC in case of provision of zero-rated supplies without payment of tax (i.e. under LUT) and inverted duty structure (i.e., where rate of tax on inputs is higher than rate of tax on outward supplies). No specific exclusion has been provided to SEZ units under this provision as well, which implies that the SEZ units are at par with any other registered person under GST for claiming refund of unutilised ITC on making outward zero-rated supplies without payment of tax.

- Rule 96 of the CGST Rules, 2017, provides the mechanism for claiming refund of IGST paid on goods or services exported out of India, by an exporter. There is no exception mentioned from the said mechanism for SEZ units/developers, which implies that the SEZ units/developers would be allowed to claim refund of the IGST paid on their outward export supplies.

- The suppliers making supplies to the SEZ units/developers, on which tax has been collected, would not be allowed to claim refund of tax paid on such zero-rated supplies, since incidence of tax has been borne by the recipient i.e., the SEZ units/developers. Claim of GST refund by the supplier in such a case would certainly lead to unjust enrichment wherein the supplier would receive double benefit by way of collection of tax from recipients and refund of tax paid to the government. Said unjust enrichment is restricted by provisions of GST law and thus neither the supplier nor the SEZ unit/developer would be entitled to refund in such a case. This clearly is not in accordance with the intention with which the SEZ laws were enacted.

Conclusion

It appears that the restriction to claim refund by the SEZ units/developers is not flowing from the provisions of the Act but from Rule 89 that prescribes a mechanism allowing only suppliers to claim refund in case of supplies made to the SEZ units/developers and specifically debars the recipient the SEZ units/developers from claiming refund. However, Rule 96 allows all exporters to claim refund of IGST paid on export of goods or services.

It is imperative to note that in many cases, the SEZ units/developers are actually bearing the burden of GST either by way of GST charged by suppliers, which forms part of their cost due to non-utilisation of ITC and non-availability of GST refund of ITC, or non-availability of refund of tax paid on outward zero-rated supplies.

It has not been the intent of laws governing SEZs in India to hinder units/developers from a benefit due to certain procedural mechanisms and impact their working capital. Being a registered person under GST engaged in making zero rated supplies, the SEZ units/developers need to be considered eligible to undertake refund option provided under the GST Act, like other registered persons. Keeping in mind the above discussion, the SEZ units/developers would be in a strong position to contest their claim in higher forums for being eligible to apply for a refund under GST laws and a clarification from CBIC would be a welcome step to address the ambiguity in this matter.

04 Issues on your mind

What is the mechanism for issuance of rebate under the RoDTEP Scheme?

The scheme would be implemented through end-to-end digitisation of issuance of rebate amount in the form of a transferable duty credit/electronic scrip (e-scrip) which will be maintained in an electronic ledger by the CBIC.

What is the recourse available to the taxpayers if HSN used by them for reporting in Form GSTR-1 is not available in the Table 12 HSN drop-down?

The Goods and Services Tax Network (GSTN) has recently issued an advisory addressing various issued faced by the taxpayers while reporting HSN codes in Form GSTR-1.

With respect to the HSN related issues leading to error messages – 'Processed with error', 'In progress', 'Received but pending' the GSTN has advised as under:

- The taxpayers are advised to download the latest version of Offline Tool (version 3.0.4) provided on the GST portal, instead of any older version.
- In case the taxpayer is using any third party GSTR-1 offline tool, then the service provider of the third-party offline tool should be contacted and requested that the tool be updated.

What is the recourse available to the taxpayers if the HSN of any goods/service is otherwise valid but not accepted on GST Portal/ e-invoice Portal / e-way Bill portal?

In cases where HSN of any goods/service is otherwise valid but not accepted on GST portal/ e-invoice portal/e-way bill portal, the GSTN has advised the taxpayers to raise a ticket on the GST self-service portal as under:

Goods and Services Tax > Report Issue > Type 'HSN' in 'Type of Issue/Concern' search box > Select relevant sub-category, e.g., 'e-Invoice – IRP – HSN Code related'

05 Important developments in direct taxes

Important amendments/updates

Government extends timelines for filling of various electronic forms

CBDT has extended the timelines for electronic filing of the following forms:

Particulars	Existing due date	New due date
Equalisation levy statement[49] for FY[50] 2020-21	31 August 2021[51]	31 December 2021[52]
Statement[53] to be furnished by authorised dealer in respect of remittances made for		
First quarter of FY 2021-22	31 August 2021[51]	30 November 2021[52]
Second quarter of FY 2021-22	15 October 2021	31 December 2021[52]
Application[54] for provisional registration/approval/ intimation by charitable trust, research institutes, etc.[55]	31 August 2021[56]	31 March 2022[52]
Application[57] for registration/ approval by charitable trusts, research institutes, etc.[58]	28 February 2022	31 March 2022[52]

49. Form No. 1
50. Financial Year
51. Vide Circular No. 15/2021 dated 3 August 2021
52. Vide Circular No. 16/2021 dated 29 August 2021
53. Form No 15CC
54. Form No. 10A
55. Under section 10(23C), 12A, 35(1)(ii)/(iia)/(iii) or 80G of the Act
56. Circular no.12/2021 dated 25 June 2021
57. Form No. 10AB
58. Section 10(23C), 12A or 80G of the Act

Particulars	Existing due date	New due date
Filing of the declarations[59] for non-deduction of tax during		
First quarter of FY 2021-22	31 August 2021[56]	30 November 2021[52]
Second quarter of FY 2021-22	15 October 2021	31 December 2021[52]
Intimation[60] by resident constituent entity (whose parent entity is not resident in India) of an international group	30 November 2021	31 December 2021[52]
Country-by-country report[61] by parent entity or alternate reporting entity or any other constituent entity	30 November 2021	31 December 2021[52]
Intimation[62] of designated constituent entity for furnishing CbCR on behalf of an international group	30 November 2021	31 December 2021[52]
Statement of income distributed by an investment fund to the unit holders[51]		
To be provided to unit holder[63]	31 July 2021	30 September 2021
To be furnished to Principal Commissioner or Commissioner of Income Tax[64]	15 July 2021	15 September 2021
Intimation[65] of investment[66] by Pension Fund in India for		
First quarter of FY 2021-22	30 September 2021[51]	30 November 2021[52]
Second quarter of FY 2021-22	31 October 2021	31 December 2021[52]
Intimation[67] of investment by Sovereign Wealth Fund in India for		
First quarter of FY 2021-22	30 September 2021[51]	30 November 2021[52]
Second quarter of FY 2021-22	31 October 2021	31 December 2021[52]

CBDT notifies[68] rules for computing relief from additional MAT liability resulting from secondary adjustments and APA.

CBDT has notified rules[69] to provide the method of computing relief on the incremental component of the MAT liability on account of timing difference of recording past income (i.e., the amount of secondary/APA adjustment) in the current year.

As per the said rules, the amount of relief is the difference between (i) incremental MAT liability arising in current year on account of including past income and (ii) incremental MAT liability of the year(s) to which the income pertains, if such income had been included in the book profits of such year(s).

Further, application[70] needs to filed by the taxpayer with the assessing officer to claim the aforementioned relief.

59. Form No. 15G/15H
60. Form no. 3CEAC under Rule 10 DB of the Income Tax Rules, 1962 (the Rules)
61. CbCR in Form no. 3CEAD under Rule 10DB of the Rules
62. Form no. 3CEAE under Rule 10DB of the Rules
63. Form No. 64C
64. Form No. 64D
65. Form 10BBB
66. Investment specified under section 10(23FE) of the Act
67. Form II
68. Vide Notification No. 92/2021 dated 10 August 2021
69. Rule 10RB of the Rules
70. Form No. 3CEEA

Government withdraws retrospective taxation of indirect transfer of shares

The Finance Act, 2012 amended deeming provisions[71] for taxation of indirect transfer of shares. This amendment was applicable retrospectively with effect from 1 April 1962.

The Taxation Laws (Amendment) Act, 2021[72], has withdrawn the retrospective applicability of the indirect transfer provisions on transfers made before 28 May 2012[73]. As per the aforesaid Amendment Act:

- No tax demand shall be raised in future on transaction entered before 28 May 2012.
- Demand raised for indirect transfers made before 28 May 2012 shall be nullified on fulfilment of specified conditions and amount paid by taxpayers (if any) shall be refunded without interest. The conditions specified are as follows:
  - Taxpayer shall withdraw or furnish an undertaking for withdrawal of any appeal[74] before an appellate forum or a court.
  - The taxpayer shall withdraw or furnish an undertaking to withdraw any proceeding for arbitration, conciliation or mediation[75].
  - The taxpayer shall furnish an undertaking waiving his right, whether direct or indirect, to seek or pursue any remedy or any claim[76] in relation to the said income.
  - Taxpayer shall fulfil such other conditions as may be prescribed.

CBDT has issued draft rules[77] which specify the conditions to be fulfilled and the process to be followed to give effect to these amendments. CBDT has also invited suggestions / comments on the draft rules by 4 September 2021[78].

CBDT notifies[79] establishment of Interim Boards of Settlement

Finance Act, 2021 provided that with effect from 1 February 2021, no application shall be made before the Income Tax Settlement Commission and it would be replaced by one or more Interim Boards (which would be constituted by the Central Government[80]).

CBDT has notified establishment of 7 Interim Boards for Settlement which would have headquarters in Delhi, Kolkata, Mumbai and Chennai.

CBDT extends last date for payment of amount under Vivad se Vishwas Act, 2020[81]

CBDT has extended the last date for making payment of the amount (without any additional amount) by the declarant under Vivad se Vishwas Act from 31 August 2021 to 30 September 2021. It is to be noted that last date for payment of the amount (with additional amount) of 31 October 2021 remains unchanged.

71. Section 9 of the Income tax Act,1961 (Act)
72. Enacted on 11 August 2021
73. Date on which the Finance Bill, 2012 received President's assent
74. In manner to be prescribed
75. Arbitration, conciliation or mediation under any law for the time being in force or under any agreement entered into by India with any other country or territory outside India, whether for protection of investment or otherwise, in manner to be prescribed.
76. Remedy or claim which may be otherwise available under any other law for the time being in force for protection of investment or otherwise
77. Rule 11UE along with Forms 1 to 4
78. Suggestions to be submitted on ustp11@nic.in
79. Vide Notification No 91 of 2021 dated 10 August 2021
80. As per provisions of Section 245AA(1) of the Act
81. Vide Press release dated 29 August 2021

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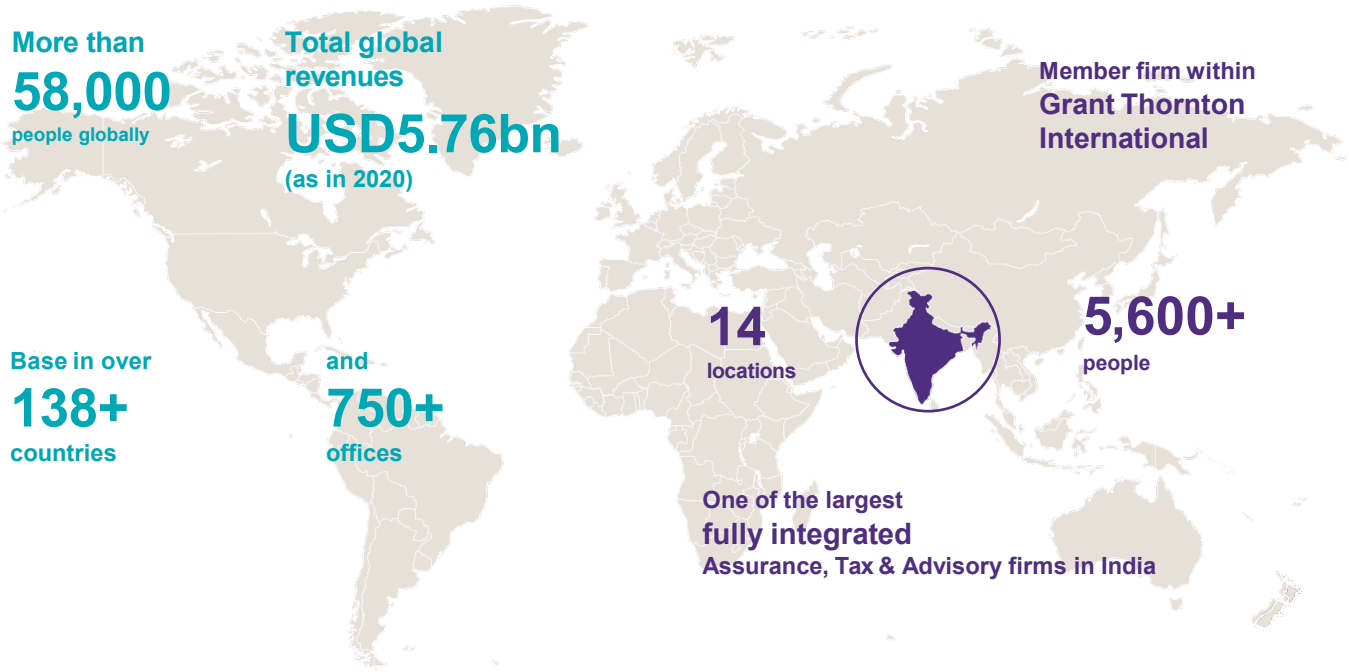

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