Grant Thornton

#GTBharat
SHAPING A VIBRANT INDIA

GST Compendium

A monthly guide

March 2022

Editor’s note

A Comprehensive Economic Partnership Agreement (CEPA) has been signed between India and the United Arab Emirates (UAE), to boost trade and commerce. This should open new avenues for investments and encourage business through reduced tariffs and increased market access.

It is expected that the scope of e-invoicing regime is being enhanced by covering businesses having turnover of more than INR 20 crore effective from 1 April 2022. We have seen the threshold limits being reduced gradually to bring in more and more businesses under the e-invoicing regime.

The Bombay High Court (HC) has held that a clarificatory circular issued by the Directorate General of Foreign Trade (DGFT) cannot retrospectively amend or take away the benefits granted under the Served From India Scheme (SFIS). Earlier, the Apex Court had also held that the power to amend the Foreign Trade Policy (FTP) is exclusively vested in the central government, and it is not given to the DGFT, whereas the power to clarify is with the DGFT. The present decision by the Bombay HC aligns with the Apex Court's ruling and should provide clarity to businesses on this subject.

In another ruling, the Bombay High Court has held that the proceedings initiated against the assessee should be concluded within a reasonable time. The revenue cannot be granted liberty to conclude proceedings pending for 23 years without valid reasons for the delay. This is in line with the Apex Court’s ruling wherein it had also held that the authorities should exercise power within a reasonable period in the absence of any period of limitation.

In this edition, we discuss the issues related to the taxation of electricity under the GST law, which is one of the contentious topics and often subject to disputes and litigation.

On the direct tax front, the Central Board of Direct Taxes (CBDT) has issued clarification on the interpretation of the most favoured nation clause. Further, the methodology for computing the capital gains on the sale of units of a unit-linked insurance plans has also been notified.

We hope that this edition will be an interesting read for you.

Vikas Vasal
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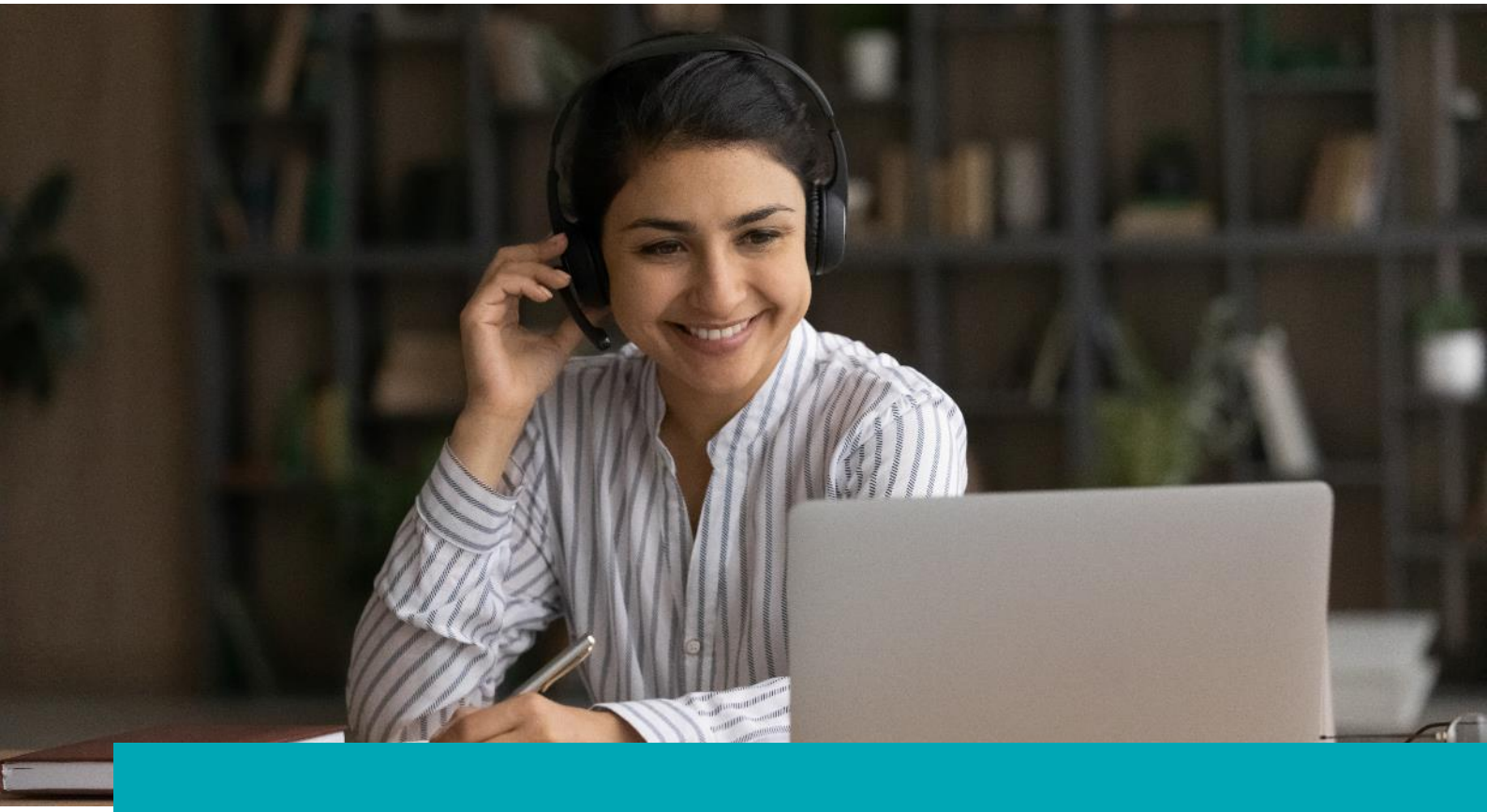


E-invoicing mandatory for taxpayers with turnover above INR 20 crore from 1 April 2022

The Central Board of Indirect Taxes and Customs (CBIC) has notified that the registered businesses having turnover above INR 20 crore will have to mandatorily issue e-invoices for business to business (B2B) transactions with effect from 1 April 2022[1].

Comprehensive Economic Strategic Partnership (CEPA) between India and UAE

A Comprehensive Economic Partnership Agreement (CEPA) has been signed between India and UAE aimed at boosting the merchandise trade between the two countries to USD 100 billion over next five years. The agreement will provide significant benefits to Indian and UAE businesses, including enhanced market access and reduced tariffs[2].

Some of the key features of CEPA are as below:

- The CEPA is a milestone in the relationship between India and UAE and has been built on decades of enterprise and aspires to establish a new era of progress and prosperity for the people of both nations.
- It covers the widest possible array of subjects from free trade, digital economy to government procurement and several other strategic areas of mutual interest.
- The CEPA would generate 10 lakh jobs across multiple labor-intensive sectors like gems and jewellery, textiles, leather, footwear, furniture, agriculture and food products, plastics, engineering goods, pharmaceuticals, medical devices, sports goods etc..

1. Notification No. 1/2022-Central Tax dated 24 February 2022
2. Press release dated 18 February 2022

Guidelines for issuance of Show Cause Notice (SCN) by Department of Trade and Taxes (Delhi)

The Department of Trade and Taxes (Delhi) has noticed certain instances wherein non-speaking and vague SCNs have been issued in violation of the Goods and Services Tax (GST) law. The department stated that proper diligence is to be made before issuance of SCNs by the proper officers. In this regard, the department has now issued indicative guidelines for issuance of SCN[3]. As per the guidelines issued, a SCN should comprise of the following, though it may vary from case to case:

- It should be issued only after proper enquiry/investigation, i.e. after ascertainment of facts and allegations.
- It should be strictly in the prescribed format and manner.
- It should be clear on facts and legal provisions and any alleged violation of provisions and other anomalies should be clearly brought out in SCN.
- It should specifically mention about copies of the documents to be submitted and compliance to be made by notice.
- It should mention that the possibility of additional evidence being needed, or additional anomalies being detected should be kept open during pendency of proceeding.
- The proper officer shall not depend only on drop down menus on GSTIN portal and he should attach the copies containing reasons along with SCN.
- The prima facie amount due should be quantified and specified in the SCN itself. Further, the possibility of raising additional demand shall be kept open and adequately mentioned in notice.
- It should clearly mention that whether the noticee wishes to be heard in person, apart from written representation filed in that matter.
- It should specifically state the authority (along with the ward, designation, e-mail ID, etc.) to which the SCN is answerable.
- All the SCNs should be disposed off within statutory timelines.

Further, the department has also informed that all the proper officers shall adhere to the above guidelines and the Zonal Incharge should ensure and monitor the compliance of these guidelines.

Internal instructions for enabling internal control mechanism for refunds under GST

The Excise and Taxation Department (ETO), Haryana has issued internal instructions[4] for enabling internal control mechanism for refunds under GST. Key instructions are as under:

Processing of refund application of tax amount of more than INR 2 crore:

- In case the refund applications having total tax amount of more than INR 2 crore, the application shall be processed at the ward level by the ETO along with proper officer and tax inspector.
- Before passing of an order in the form of GST RFD-06, ETO and proper officer shall forward the complete case with their recommendations and comments to the Deputy Excise and Taxation Commissioner (DETC).
- The DETC shall examine the case with regard to propriety and legality of the case. Post that, the DETC may give such directions to the ETO cum proper officer to proceed in the case as per the directions/observations of the DETC.
- Tax inspector, ETO cum proper officer and DETC shall ensure adhering of the timelines prescribed.

Processing of refund up to tax amount of INR 2 crore:

- In case of the refund applications having total tax amount upto INR 2 crore, the application shall be finalised by ETO cum proper officer after following due processing at the ward level.
- The DETC shall call for the records pertaining to each ward to check propriety and legality of the orders passed by the ETO cum proper officer. DETC may take up to 5% of such cases in the district in a quarter and ensure that cases from all wards are covered in the scrutiny.
- In case of any deficiency in terms of propriety and legality, the DETC shall recommend proceeding under section 73/74 of the HGST Act, 2017 to be initiated.

3. Letter No. F.No.1(2)/DTT/L&J/Misc./2019-20/77-79 dated 1 February 2022
4. vide Memo No. 193/GST-II dated 15 February 2022

Roles and responsibilities of tax inspector

- All the refund applications shall be scrutinised by tax inspectors for verifying if applications are completed with required documents.
- Where the application is found to be complete, the inspector shall recommend issuance of an acknowledgment in the form of GST RFD-02.He will recommend issuance of GST RFD-03 in all other cases.
- In case of an acknowledgment issued, the ETO cum proper officer shall process the refund application further and may take assistance of the tax inspector wherever required.
- The ETO cum proper officer may, if required, get physical verification of the taxpayer done under Rule 25 of the HGST Rules, 2017.
- The ETO cum proper officer shall also examine the application for the purpose of ensuring the compliance of the applicant, in terms of section 54(10) and section 54(11) of the Goods and Services Act.
- He shall also verify if there are any outstanding arrears pending against the applicant, if he is a return defaulter or any other relevant proceedings pending against the applicant.

In addition, it has been instructed that the refund application under "any other" grounds shall be mandatorily processed after approval with the jurisdictional deputy commissioner of state tax.

DGFT notifies updated ITC (HS) 2022

The Directorate General of Foreign Trade (DGFT) had notified the updated 'Indian Trade Classification (harmonised system) 2022 [ITC(HS)2022] in sync with the Finance Act, 2021 effective from 9 February 2022[5].

Further, the import policy of drones in completely-built-up (CBU), semi-knocked-down (SKD) or completely-knocked-down (CKD) form under HS Code 8806, has been changed to 'prohibited' with exceptions provided for R&D, defence and security purposes. However, import of drone components has been made 'free''.

The updated chapter-wise policy conditions, list of ITC (HS) codes and section notes, chapter-wise main notes, supplementary notes, chapter headings, sub-headings, and description of ITC(HS) codes, have been provided in respective annexures I, II and III of the notification and is available on the DGFT website

Implementation of automation in the Customs (import of goods at concessional rate of duty) Rules, 2017

Certain amendments were notified in the existing Customs (import of goods at concessional rate of duty) Rules, 2017 (IGCR Rules) effective from 1 March 2022[6]. These amendments were aimed at simplifying the procedures, with a focus on automation and making the entire process contactless. In this regard, the CBIC has now issued certain clarifications as under[7]:

- **One-time prior intimation:** An importer who intends to import goods at a concessional rate of duty shall give a one-time prior information in Form IGCR-1 of such goods being imported on the common portal. Upon acceptance of such information on the common portal, a unique IGCR Identification Number (IIN) shall be generated.
- **One time continuity bond:** An importer is required to furnish a one-time continuity bond in a prescribed format[8] which covers all the imports undertaken under this procedure. The bond provides for details such as amount of the bond etc. which shall be filled up by the importer on the common portal in part B of the Form IGCR-1. The physical copy of the bond and bank guarantee, wherever applicable, shall be submitted by the importer to the jurisdictional officer. Upon acceptance, the jurisdictional customs officer shall approve the bond request on the customs automated system. The details of the bond number and bank guarantees will then be available for the importer to view on the common portal. The importer shall also have an option of topping up the amount of the bond and adding the details of the bank guarantee on the common portal and by providing bond addendum to the bond for adding bank guarantee, as per the format given[9].
- **Import of goods at concessional rate:** The importer shall mention the IIN and the continuity bond number and details while filing the bill of entry at the port of import. Based on the same, the deputy commissioner or assistant commissioner of Customs at the port of importation shall allow the benefit of exemption notification. Once a bill of entry is cleared for home consumption, the bond submitted by the importer gets debited automatically in the customs automated system.
- **Receipt of goods:** The requirement of intimating the receipt of the goods has been done away with. However, any non-receipt or short-receipt of the goods shall be intimated by the importer immediately on the common portal through Form IGCR-2.
- **Inter unit transfer of goods:** A separate provision has been included for unit transfer of goods, where goods are sent to a different unit of the same importer. The goods, in such cases shall be sent under an invoice or wherever applicable, e-way bill, mentioning the description and quality of goods.
- **Utilisation of goods for intended purpose:** In case of goods that have not been utilised or defective goods, the importer has an option to either re-export such goods or clear the same for home consumption, within the said period of six months.

5. Notification No. 54/2015-2020 dated 9 February 2022
6. Notification No. 07/2022-Customs (N.T.) dated 01.02.2022
7. Circular No. 04/2022-Customs dated 27 February 2022
8. in Annexure-I to the circular
9. in Annexure-II to the circular

- **Monthly statement:** Instead of the quarterly return prescribed earlier, the importer shall submit a monthly statement by the tenth day of the following month, on the common portal in the Form IGCR-3 prescribed. It is clarified that the first monthly statement under the changed procedures shall be submitted by the importers in the month of April 2022.
- **Transitional measures:** To account for the stock of goods imported under IGCR that are already existing in the premises of the importer or job worker on the date of transition to the new procedure, an option is being provided to the importer to record the details of all such goods, according to the bills of entry, invoice, and item, in the monthly statement by linking their past bills of entry in the common portal. While the system architecture to provide information in the forms prescribed is effective from 1 March 2022, to enable a smooth transition, importers shall have an option to submit procurement certificates for import of goods at the port of import for availing the exemption benefit till 13 March 2022.

Shipping Bill (post export conversion in relation to instrument-based scheme) Regulations, 2022

The CBIC has notified the Shipping Bill (post export conversion in relation to instrument-based scheme) Regulations, 2022. These regulations will be applicable to shipping bills or bills of export filed on or after 22 February 2022[10]. 'Conversion' means amendment of the declaration made in the shipping bill or bill of export to any other one or more instrument-based scheme, after the export goods have been exported.

Subject	Particulars
Procedure for applying for post export conversion of shipping bill	• Application for conversion shall be filed within one year from the date of order for clearance of goods. • Extension of further six months may be granted by jurisdictional Commissioner of Customs, which may be further extended for another six months by jurisdictional Chief Commissioner of Customs. • The period for which stay was granted by an order of court or tribunal shall be excluded for computing the period of one year. • The Jurisdictional Commissioner of Customs may authorise the conversion of shipping bill and decide conversion within a period of thirty days from the filing date subject to the following: – documentary evidence in existence – subject to conditions and restrictions provided – payment of fees
Conditions and restrictions for conversion of shipping bill	• Fulfilment of all conditions of the instrument-based scheme to which conversion is being sought • The exporter has not availed benefit of such instrument-based scheme • Compliance of all conditions relating to presentation of shipping bill or bill of export in customs automated system • No contravention or initiation of investigation against the exporter • Shipping bill or bill of export has been filed in relation to instrument-based scheme

Mandatory filing of Registration Cum Membership Certificate (RCMC)/Registration Certificate through new online platform, effective from 1 April 2022

The DGFT had earlier notified that a new online common digital platform for issuance of RCMC/RC has been developed which would be a single point of access for exporters /importers and issuing agencies[11]. In this regard, the DGFT has now notified that effective from **1 April 2022,** the exporters will have to mandatorily file applications for issue/renew/amendment of RCMC/RC through the common electronic platform. The current procedure of submitting applications directly to registering authority will continue only till **31 March 2022.** The authorities shall ensure onboarding on the e-RCMC portal before 31 March 2022.The registering authorities are advised to conduct outreaches and suitable advisories to members/exporters to use the e-RCMC platform before 31 March 2022[12].

10. Notification No. 11/2022-Customs (N.T.) 22 February 2022
11. Trade Notice No. 27 dated 2021-2022 dated 30 November 2021
12. Trade Notice No. 35/2021-2022 dated 24 February 2022

Introduction of online Export Promotion Division (EPD) portal

The Commissioner of Customs, Chennai-IV (exports) has introduced an online Export Promotion Division (EPD) portal as a one-stop destination for online submission of mandatory compliances such as returns, intimation of import, intimation of goods receipt, B17 bond debit and credit[13].

The portal enables the importers to sign up for an account using their e-mail address. After authentication of email address, the user is required to enter details, such as section (EOU/STPI/EHTP/DTA), importer name, IEC, PAN, etc. along with a suitable password to register. After registration, the details will be forwarded to EPD section, who will activate the ID and an intimation will be sent to registered email address post activation. Some other options, such as bond debit, bond credit, returns filing, intimation of receipt of goods, submit feedback, etc. are also available on the EPD portal.

All the stakeholders are required to use this facility to file the mandatory intimation and returns online through the EPD portal. Any difficulties faced may be brought to the notice of Additional Commissioner of Customs (EPD Section).

Due date for filing annual Kerala Flood Cess return extended

The Government of Kerala had earlier implemented the Kerala Flood Cess with effect from 1 August 2019. Further, it had also notified an annual return and reconciliation statement for Kerala Flood Cess.

The taxpayers were facing technical issues on the electronic system for filing return for the period 2019-20 and 2020-21. Therefore, the Government has extended the due date for filing the annual Kerala Flood Cess return in Form KFC-A1 for the year 2019-20 and 2020-21 to **15 March 2022**[14].

GSTN issues advisory related to upcoming improvements in form GSTR-1

The Goods and Services Tax Network (GSTN) has issued an advisory regarding the upcoming improvements and enhancements in Form GSTR-1/IFF on GST portal. The statement of outward supplies in Form GSTR-1 is to be furnished by all normal taxpayers on a monthly or quarterly basis. The filers of quarterly GSTR-1 were provided with an optional Invoice Furnishing Facility (IFF) for reporting outward supplies to registered persons in first two months of quarter. In the earlier phase, features like the revamped dashboard, enhanced B2B tables and information regarding table/tile documents were added. In the present phase, following changes are being done[15]

- **Removal of 'submit' button before filing**: A simpler single step filing process in the form of 'File Statement' button has been introduced to replace the two-step filing through 'submit' and 'file' buttons. This will provide flexibility to taxpayers to add or modify records before completion of filing.
- **Consolidated summary**: The taxpayers will now have a detailed and table-wise consolidated summary of records before filing GSTR-1/IFF. It will provide complete overview of the records added in GSTR-1/IFF before completion of filing.
- **Recipient-wise summary**: Total value of supplies along with total tax pertaining to each recipient would be provided in the consolidated summary page which will be made available with respect to following tables of return:
  - Table 4A : B2B supplies
  - Table 4B : Supplies attracting reverse charge
  - Table 6B : SEZ supplies
  - Table 6C : Deemed exports
  - Table 9B : Credit/debit notes
- **Summary PDF:** Taxpayers can view and download detailed summary of GSTR-1/IFF containing the total outward supplies liability of taxpayer. The summary can be viewed in new PDF format which has been aligned with notified format of GSTR-1.
- **Steps to file GSTR-1** : The following steps shall be followed for filing GSTR-1 :
  - Click 'generate summary' button to generate the summary,
  - Click 'proceed to file/summary' button to view the final summary before filing and
  - Click 'file statement' button to file GSTR-1/IFF.

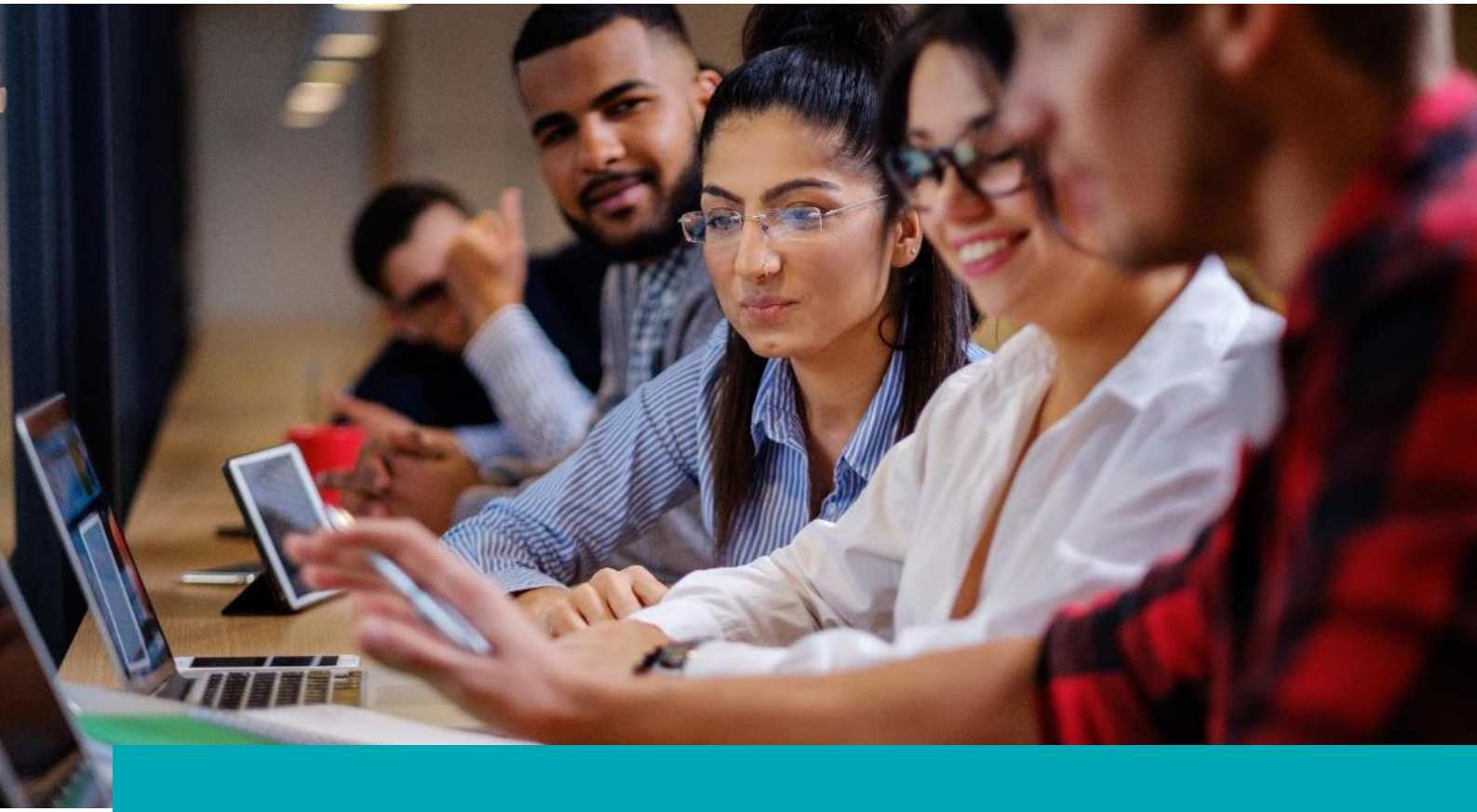
CBIC launches GST refund help desk

The CBIC has setup a 'GST refund help desk' for addressing payment related problems faced by the taxpayers. The taxpayers need to contact the GST refund helpdesk for payment/disbursement related issues in their refund application. The contact details of the help desk are as under[16]:

Name of nodal officer	**Ms Anita Rawat, Accounts Officer**
Toll free helpline number	1800-11-1424
Mail ID	gstrefunds-helpdesk@gov.in

13. Trade Notice No. 04/2022 dated 15 February 2022
14. Notification No. 1/2022-State Tax dated 25 February 2022
15. GSTN advisory dated 23 February 2022
16. GSTN advisory dated 17 February 2022

2a Key judicial pronouncements



Proceedings initiated against the assessee should be concluded within a reasonable time, inordinate delay is not acceptable– Bombay HC

Summary

The Bombay High Court (HC) denied granting liberty to revenue to conclude proceedings pending since last 23 years without satisfactory explanations. The HC stated that such unreasonable delays for termination and conclusion of proceedings are not open for the revenue authorities. The HC held that pendency of logical conclusion of proceedings since over two decades would amount to an arbitrary exercise of power.

Facts of the case

- The petitioner[17] is engaged in the business of exporting fabrics. A show cause notice[18] was issued to the petitioner alleging that the petitioner had indulged in fraudulent export and duty-free import under D.E.E.C. Scheme in contravention of the provisions of the customs law[19].
- The petitioner contended that the show cause notice has not been adjudicated for 23 years and pendency of proceedings for such unreasonably long period cannot be regarded as a reasonable period.
- Therefore, the petitioner filed present writ[20] before the Bombay HC praying to set aside the notice as well as the proceedings and direct revenue to return the amount paid under protest together with accrued interest.

17. Sushitex Exports (India) Ltd.
18. dated 30th April 1997 under section 124 read with section 28 of the Customs Act, 1962
19. Customs Act, 1962
20. Writ Petition (L) No. 9641 of 2020

Bombay HC observations and ruling[21]

- **Proceedings should be concluded within reasonable period:** The words 'reasonable period' needs to be given a flexible rather than a rigid construction. However, the delay of 23 years without sufficient reasons must be seen as unreasonable. When a power is conferred to achieve a particular object, such power must be exercised reasonably, rationally and with objectivity with the object in view. It would amount to an arbitrary exercise of power if proceedings initiated in 1997 are not taken to their logical conclusion for over two decades and then a prayer is made for its early conclusion.
- **Proceedings cannot not be allowed to be carried forward:** The proceedings remained inactive for about 14 years since hearing was given to the petitioners. Thus, carry forward of proceedings should not be allowed further without satisfactory explanation.
- **No liberty to conclude proceedings:** The show cause notice would have continued to gather dust; in case the petitioners had not invoked the writ jurisdiction. Thus, the revenue should not be granted liberty to conclude the proceedings.
- **No prejudice in case of violation of fundamental right:** Article 14[22] is a warning to the State against arbitrary action. Whenever there is violation of a fundamental right, then no prejudice even is required to be demonstrated. Therefore, the HC set aside the show cause notice and all proceedings following the same. Further, the HC directed that the sum of INR 2 crore deposited under protest by the petitioner shall be returned with interest at the rate of 12% per annum.

Our comments

Earlier the Hon'ble Supreme Court[23] had held that every authority should exercise the power within a reasonable period in absence of any period of limitation. The SC opined that in cases where inordinate delay in issuance of notice or demand for recovery is raised, it would be open to the assessee to contend that it is bad on the ground of delay

Similarly, the coordinate bench of the Bombay HC[24] had earlier held that the revenue was not justified in commencing adjudication proceeding 13 years after issuance of the show cause notice and therefore, such adjudication proceeding was held to be invalid.

On the similar lines, the Bombay HC in the present ruling has held that proceedings initiated against the assessee should be concluded within reasonable time. Thus, the HC has refused giving liberty to revenue to conclude proceedings pending in the last 23 years.

Goods cannot be detained for contravention of provisions by other person in supply chain – Punjab and Haryana HC

Summary

The Punjab and Haryana High Court (HC) observed that the goods and conveyance in transit were accompanied with the prescribed documents, i.e. invoice and e-way bill. Further, there was no allegation that the petitioner had contravened any provisions of the GST law with an intent to evade payment of tax. Therefore, the HC held that the action of the revenue initiating detention and seizure proceedings under the GST law cannot be sustained. The HC further stated there must be a direct nexus between intent to evade tax with the activity of the petitioner. Thus, the HC held that the goods cannot be detained without passing appropriate orders in accordance with law and directed to release the goods.

Facts of the case

- The petitioner[25] had sold copper scrap which were detained by the authorities while in transit despite carrying the prescribed documents, i.e. the invoice and the e-way bill.
- The petitioner received a communication from the authorities wherein it was stated that one of the petitioner's suppliers[26] was not having inward supply and was only engaged in outward supply without paying any tax. Therefore, the authorities alleged that petitioner's goods were liable for confiscation and levy of penalty[27].
- The petitioner filed present writ[28] before the HC challenging the detention of goods inspite of availability/production of all the prescribed documents under the law[29]. The petitioner further contended that it cannot be alleged that there was any intention to evade payment of tax, hence proceedings are not sustainable[30].

21. Order dated 14 January 2022
22. of the Constitution of India
23. Citedal Fine Pharmaceuticals Madras
24. Parle International Limited
25. Shiv Enterprises
26. Balbir Enterprises
27. Section 130(1) of the CGST Act, 2017
28. CWP-18392-2021
29. Section 129 of the CGST Act, 2017
30. Section 130 of the CGST Act, 2017

Punjab and Haryana HC observations and ruling[31]

- **No discrepancy found:** In the current case, the goods and conveyance in transit were accompanied with the prescribed documents, i.e. the invoice and the e-way bill[32]. The revenue had not pointed out any discrepancy in the said documents.
- **No intent to evade tax:** There is no allegation that petitioner had contravened any provisions of the law. The allegation of contravention is on the predecessor for not having any inward supply. There is no intention to evade payment of tax on the part of the petitioner.
- **Verification of payment of tax by predecessors:** The trader cannot be accused of having intention to evade payment of tax for act or omission on part of someone not directly linked. It is impossible for trader to ascertain whether input tax has been paid by the predecessors.
- **Proceedings cannot be sustained:** The petitioner can claim input tax credit only if the same has been paid to the government. Therefore, the proceedings under the provisions of the act cannot be sustained and needs to be set aside. In a case where the goods in transit are accompanied with the documents as prescribed, the authorities need not proceed with detention or seizure proceedings. The goods/conveyance cannot be detained without passing appropriate orders in accordance with law.
- **Order for release:** In case, the authorities find that the action of the person falls within the prescribed criteria then the authorities have right to proceed with confiscation proceedings. However, in present case no direct nexus could be found between basis of proceedings and action of the petitioner. Accordingly, the HC directed the revenue to release the conveyance and goods.

Our comments

On a similar issue earlier, the Division Bench of the Punjab and Haryana HC[33] had held that for exercise of power at the check-post to be valid there should be a reasonable nexus with an attempt for evasion.

The present ruling should set precedence in similar cases and act as a barrier for revenue authorities from initiating detention and seizure proceedings in absence of contravention of any provisions by the assessee.

Reasons must be recorded in writing to exercise the power to block electronic credit ledger – Bombay HC

Summary

The Bombay HC has held that while there is discretion provided to authorities for blocking electronic credit ledger (ECL), the satisfaction must be reached based on objective material available before the authority. Further, the ECL can be blocked only to the extent of the amount fraudulently/wrongly availed and the reasons to block ECL must be recorded in writing. The power to block ECL is drastic in nature and hence, the decisions cannot be made on imaginary basis.

Facts of the case

- The petitioner[34] is engaged in infrastructure development. The petitioner noticed that its ECL was not operational and was blocked[35].
- The petitioner contended that blocking of the ECL of the petitioner amounts to illegal provisional attachment[36]. Further, the commissioner is the only authority for making attachment which can be done only if any proceeding is pending or initiated[37].
- The petitioner submitted that the power to attach ECL cannot be exercised without quantifying the credit amount of wrong availment. Further, blocking of ECL could not have been done without an order recording reasons in writing.
- The revenue authorities[38] noticed that the petitioner never existed at the principal place of business. Since the petitioner has availed credit fraudulently, thus it is liable to be recovered[39].
- Therefore, the petitioner filed present writ[40] before the Bombay HC praying to quash the blocking of ECL and issue direction to Union of India to issue guidelines for reasonable exercise of power.

31. Dated 4 February 2022
32. Rule 138A of the GST Rules, 2017
33. Xcell Automation
34. Dee Vee Projects Ltd.
35. by the Deputy Commissioner, State Sales Tax, MIDC, Nagpur
36. under Section 83 of the CGST Act.
37. under any of sections such as sections 62, 63, 64, 67, 73 and 74
38. respondent no. 3-Additional Director, DGGI
39. along with interest and consequential penalties
40. Writ Petition No. 2693 of 2021

Bombay HC observations and ruling[41]

- **Blocking of ECL is different from provisional attachment of property:** In case of attachment of property, the custody of the property is taken over by the department. However, in case of blocking of ECL, the custody remains with the taxpayer. Only a disability is created on the capacity to utilise the unutilised ITC. The power under the relevant provisions pertaining to blocking of credits[42] is quite different from the power of provisional attachment of property as these can be invoked irrespective of any proceedings initiated under the law[43]. Hence, any order passed under the rule cannot be treated as the order amounting to the provisional attachment of property.
- **Provisions permits blocking of the ECL:** The rule permits disallowance of debit of an amount to the ECL and blocking of ECL can be done only to the extent of amount of credit that has been fraudulently or wrongly availed.
- **Order of blocking of ECL is arbitrary and illegal:** The rule prescribes two pre-requisites to be fulfilled to exercise power of blocking of ECL. The first is satisfaction of the authority that blocking is necessary on the basis of material available and second is that recording of the reasons in writing. In absence of the same, the authority cannot block the ECL even to the extent of amount fraudulently or wrongly availed. The order does not give any reasons and does not specify the amount[44]. Hence, the impugned order is arbitrary and illegal.
- **No necessity for examining justification in blocking ECL:** The impugned order itself has been found to be not worthy of upholding. Hence, there arises no necessity for examining justification for issuance of the impugned order.
- **No need to issue directions for exercising the power:** The rule has been adequately framed making authority to take care of any possible misuse of the power. Hence, there is no need to issue any direction to the Union of India for coming out with appropriate guidelines for exercise of the power.

Our comments

The subject matter has been a matter of extensive litigation under GST since inception.

In a similar ruling, even the Madras High Court in case of HEC India LLP[45] had pronounced that before invoking the power of blocking ECL, the authority should have reasons to believe, otherwise, the invocation of power shall be unauthorised and without jurisdiction.

Similarly, even the Allahabad High Court in case of North End Food Marketing Private Limited[46], had held that the power to block ECL should be used sparingly and only on discretionary weighty grounds and reasons. Even the Karnataka HC in case of Aryan Tradelink[47] had directed the revenue to pass a detailed reasoned order to block ECL.

The judgment is in line with the above judicial pronouncements and shall help in curbing the litigations.

Clarificatory circular by DGFT cannot retrospectively amend or take away the benefits granted – Bombay HC

Summary

The Bombay HC has held that a clarificatory circular issued by the Directorate General of Foreign Trade (DGFT) cannot retrospectively amend or take away the benefits granted under the Served from India (SFIS) scheme. The HC stated that the DGFT has powers to issue clarification but cannot retrospectively amend the provisions. The HC further ruled that since the circular does not take away the benefits accrued, it cannot be said to be ultra vires the provisions of the Constitution of India and the Foreign Trade Policy (FTP).

Facts of the case

- The petitioner[48] is engaged in rendering maritime transport services.
- The petitioner has challenged[49] the policy circular[50] issued by the DGFT[51], curtailing the benefits granted to the exporters under the SFIS scheme[52] and has demanded customs duty along with interest on the benefits availed. The petitioner contended that DGFT cannot take away benefits conferred under FTP[53] by way of a circular.
- The petitioner stated that as the maritime transport services were not excluded from the ambit of SFIS scheme, it had been correctly granted SFIS scrips.
- The petitioner submitted that the circular was applicable on pending claims and not on licenses already granted in the past.
- Further, it was also submitted that the DGFT had no powers[54] to recover any customs duty benefits granted to an importer. Thus, the demand notice as well as the reminder issued are without any authority of law and liable to be set aside.

41. Order dated 11 February 2022
42. Rule 86A of the CGST Rules, 2017
43. Chapters XII, XIV and XV of the CGST Act, 2017
44. to the extent to which the ECL has been blocked.
45. WA No. 2341 of 2021
46. Writ Tax No. - 309 of 2021
47. Writ Petition No. 11581/2020 (T/RES)
48. Essar Shipping Limited
49. Writ Petition No. 1335 of 2010
50. Policy Circular No.25 of 2007 dated 1st January 2008
51. Director General of Foreign Trade
52. Served from India Scheme
53. Foreign Trade Policy (FTP) 2004-09
54. Foreign Trade (Development & Regulation) Act, 1992

Bombay HC observations and ruling[55]

- **No suppression of material facts:** The nature of challenge, i.e. non-disclosure of application and/or declaration/undertaking by petitioner does not amount to suppression of material facts. The allegation of authorities is too far-fetched as the benefit was granted but was taken away by way of circular which is under challenge in the present case.
- **Power to clarify and not amend:** The provisions[56] clearly differentiate an amendatory provision and a clarificatory provision. The power to amend the FTP is exclusively vested with the central government, whereas the power to clarify is with DGFT. If there is any doubt or question in respect of interpretation of any provision in the FTP, the DGFT has the authority to interpret the same and provide suitable clarification. Therefore, a purported clarification of SFIS scheme issued upon approval of DGFT is not impermissible. However, whether such clarification really clarifies or brings about an amendment of the terms of the SFIS Scheme needs to be examined.
- **No intention to open settled/closed claims:** Though the circular seems to clarify terms of SFIS scheme, but such circular is intended to be implemented on claims not finalised as on the date of circular. The words 'while finalising the claims' pertains to claims that have not been finalised on date and could not be stretched to take within its coverage the settled and/or closed claims. Hence, the DGFT never intended to reopen settled and/or closed claims.
- **Recovery as per law:** The benefit under SFIS Scheme was settled in favour of the petitioner without raising any question. If a benefit has been erroneously extended, it can be recovered only if law authorises the authorities to do so but not otherwise.
- **Circular does not have retrospective operation:** The circular is clarificatory in nature but does not have any retrospective operation. Accordingly, the demand notice/reminder would not have been issued. The demand notice and reminder being unauthorised, are invalid in law and inoperative and hence, the same to be set aside.

Our comments

Earlier, it had been held by the Apex Court in case of Atul Commodities Private Limited[57] that there is a clear demarcation between an amendatory provision and a clarificatory provision. The power to amend the FTP is exclusively vested in the central government and it is not given to the DGFT, whereas the power to clarify is vested in the DGFT.

Recently, even the Bombay High Court in case of Atlantic Shipping Private Limited[58] had held that the provisions of the FTP cannot be amended by issuing a circular and the amendment in policy decisions have to be carried out only by the central government.

The present decision by the Bombay HC aligns with the above judgment and is a welcoming decision which shall provide due relief to businesses.

Leasing of residential premises as hostel is eligible for GST exemption – Karnataka HC

Summary

The Karnataka HC has held that exemption on residential dwelling under GST will be applicable even if the lessee does not use the premises itself. The HC stated that it is nowhere mentioned in the notification that a lessee needs to occupy the residence itself to avail the exemption. The HC observed that the hostel falls within the purview of residential dwelling, as the same is used for the purposes of residence. Hence, the HC ruled that the petitioner is entitled to avail the benefit under exemption notification. Thus, leasing of residential premises as hostel to students and working professionals will not attract GST.

Facts of the case

- The petitioner[59] is a co-owner of a residential property, who along with other co-owners had executed a lease deed.
- The lessee[60] further leased out the residential property as hostel to provide long term accommodation to students and working professionals.
- The petitioner placed reliance on exemption notification[61], which included renting of residential dwelling for use as residence.
- The petitioner contended that the students use hostel for residential purposes for long-term stay and thus, it has to be treated as residential accommodation.
- The petitioner's application before the Karnataka Authority for Advance Ruling (AAR) and Karnataka Appellate Authority for Advance Ruling (AAAR) was dismissed stating that property rented out by the petitioner cannot be termed as residential dwelling. Further, benefit of exemption notification is available only if the residential dwelling is used as a residence by the person who has taken the same on rent/lease.
- Therefore, the petitioner has preferred present writ[62] before the Karnataka HC.

55. Judgment dated 8 February 2022
56. section 5 and section 6(3) of the FTDR Act read with paragraph 2.3 of the FTP 2004-2009
57. 2009 (2) TMI 18 - SUPREME COURT
58. Writ Petition No.1827 of 2019
59. Taghar Vasudeva Ambrish
60. D Twelve Spaces Private Limited
61. Notification No.9/2017 -Integrated Tax (Rate) dated 28.06.2017
62. W.P. No.14891 of 2020 (T-RES)

Karnataka HC observations and ruling[63]

- **Meaning of residential dwelling:** The terms 'residential dwelling' has not been defined under the GST Act. Under the erstwhile laws[64], residential dwelling was defined to mean any residential accommodation and is different from hotel, motel, etc. which is meant for temporary stay. It has been held by Supreme Court[65] that residence means a place where a person eats, drinks and sleeps and not necessary he owns it. In the hostels, the duration of stay is more as compared to hotel in guest house, club etc.
- **Meaning as per dictionaries:** When the word is not defined in the Act itself, it is permissible to refer to the dictionaries to find out the general sense. Upon referring the meaning of the word 'residence' and 'dwelling' in famous dictionaries[66], it is evident that both these have more or less the same meaning in common parlance. It does not mean that residential dwelling excludes hostels used by students and working women for residential purposes.
- **Eligible for availing benefit under exemption notification:** The hostel rented to students and working professionals for the purposes of residence falls under the purview of residential dwelling. The exemption does not require the lessee itself to use the premises as residence. Therefore, benefit of exemption notification cannot be denied on the ground that lessee is not using the premises. The finding of Karnataka AAAR that the hostel accommodation is more akin to 'sociable accommodation' is unintelligible, irrelevant and liable to be set aside. Therefore, the petitioner is entitled to avail benefit of exemption from GST.

Our comments

The Apex Court in case of Bhagwan Dass[67] had held that the aspect of residence can be determined based on the duration of stay in the premises.

Similar judgment was also pronounced by the Apex Court in case of Jeewanti Pandey v. Kishan Chandra Pandey[68] wherein it was held that residence is more or less of a permanent character, and it means a place where a person permanently resides and not a place where he casually visits. Even the West Bengal AAR in case of Borbheta Estate Private Limited[69] had held that since the dwelling units were being used for residence, irrespective of whether they are let out to individuals or a commercial entity, the service of renting/leasing out the dwelling units for residential purpose is exempt.

In line with the above, in the present case, the HC has held that the hostel falls within the purview of residential dwelling and is being used for the purposes of residence.

Blocking of ECL and insertion of negative balance in ledger when no ITC available is without jurisdiction and illegal – Gujarat HC

Summary

The Gujarat HC has held that the power to block ECL can be exercised only when there is credit available in the ECL. If no credit is available, blocking of ECL would be wholly without jurisdiction and illegal. Accordingly, the Court directed the GST authorities to withdraw the negative block of ECL and allow refund to the petitioner.

Facts of the case

- The petitioner[70] is engaged in manufacturing and sale of MS Billets. The petitioner noticed that portal displayed a message of non-operation due to blocking of ECL despite having nil balance.
- Further, respondent had entered a negative balance in the ECL resulting in paying additional output tax[71].
- The petitioner contended that negative block of ECL with nil balance is without jurisdiction and beyond the scope of rules[72]. There is no power of negative blocking of credit to be availed in future.
- Therefore, the petitioner filed present writ petition requesting unblocking of ECL.

63. Order dated 7 February 2022
64. Education guide issued by Central Board of Indirect Taxes and Customs
65. Kishore Chandra Singh Vs Babu Ganesh Prasad Bhagat AIR 1954 SC 316
66. Concise Oxford English Dictionary 2013 Edition as well as Blacks Law Dictionary 6th Edition
67. 2005 (5) TMI 682 - Supreme Court
68. 1981 (10) TMI 188 - Supreme Court
69. Case Number 21 of 2019 Order No. 13/WBAAR/2019-20
70. Samay Alloys India Pvt. Ltd.
71. to the extent of such negative balance
72. Rule 86A of CGST Rules,2017

Gujarat HC observations and ruling [73]

- **Conditions for invoking power under the rule:** In order to invoke powers under the rule, three conditions should be cumulatively satisfied, i.e. availability of credit in ECL, authorities should have reasons to believe and recording of such reasons must in writing. The rule empowers the authorities to freeze debit of ECL subject to reasons to believe that credit is wrong or fraudulently availed. The credit should be available in ECL before invoking power otherwise blocking of ECL would be wholly without jurisdiction and illegal. Hence, in case credit is not available, power cannot be invoked and therefore, the consequences prescribed becomes ex-facie inapplicable.
- **No power to make debit entries in ECL:** ECL of the petitioner is like a personal bank account. The rule does not entitle the proper officer to make debit entries in the ECL of the registered person. It merely authorises the officer to disallow the registered person to debit from ECL for a limited period of time on provisional basis. This rule is not framed to recover the credit fraudulently availed.
- **Direction to withdraw negative blocking of ECL:** The condition precedent for exercise of power under the rule is availability of credit in ECL, which is ineligible in the present case. The respondents are directed to withdraw negative block of ECL at the earliest. Also, the petitioner is entitled to refund[74] of amount deposited to enable them to file the return.

Our comments

Earlier, the Apex Court in case of Kasturi and Sons Limited[75] had held that there can be no action based on any supposed intendment of the provision.

The judgment of the Gujarat HC in the present case, aligns with the above view wherein, the court has conferred that the input tax credit can be blocked by virtue of Rule 86A only if the credit balance is available in the ECL. Hence, there is no power to negative block the credit to be availed in future.

The decision marks a significant precedent in the context of powers by authorities in case of nil balance in ECL.

Time limitation not applicable on refund of amount paid by mistake – CESTAT

Summary

The Customs, Excise, Service Tax Appellate Tribunal (CESTAT) Delhi has set aside the order rejecting the refund claim of amount mistakenly paid as service tax. Further, the CESTAT stated that the price, as per contract, was firm and independent of any variation, therefore unjust enrichment is not applicable. The CESTAT further held that time limitation will not be applicable as the amount deposited is revenue deposit and not tax as the appellant was not liable to pay tax. Therefore, the CESTAT directed the revenue to grant the refund of amount in cash along with interest at the rate 12% p.a.

Facts of the case

- The appellant[76] is engaged in providing services such as shifting of overhead cables/wires, laying of cables under or alongside road, installation of streetlights, traffic lights, etc. for electricity board/nigam.
- The appellant had filed a refund claim of the amount incorrectly paid on the ground that the work undertaken is not liable to service tax as per circular[77].
- The appellant contended that the limitation period[78] is not applicable in the present case as the amount was mistakenly paid. Further, the principle of unjust enrichment is not applicable as the work order was procured in competition in open bidding. Also, the price is as per open bid and are firm in all respect independent of any variation. The price fixed is not affected due to levy of tax.
- The refund claim was rejected by the assistant commissioner observing that the appellant had issued invoices/bill inclusive of service tax. Out of such payment received they had deposited the service tax portion in the government exchequer. Therefore, the amount deposited was tax amount and not just any amount deposited. Further, it was alleged that the claim has been filed after more than one year from the date of deposit of the tax.
- Aggrieved by the rejection, the appellant preferred appeal before the commissioner appeals who dismissed the same agreeing with the findings of the assistant commissioner.
- Therefore, the appellant filed present appeal[79] before the CESTAT.

74. INR 20 Lakhs
75. Commissioner of Income Tax, Madras vs. Kasturi & Sons Ltd. (1999) 3 SCC 346
76. Ishwar Metal Industries
77. Circular No. 123/5/2010 -TRU dt.24.05.2010
78. limitation u/s 11B of the Central Excise Act, 1944
79. Service Tax Appeal No. 51834 of 2018-SM

CESTAT Delhi observations and ruling [80]

- **Amount to be treated as deposit:** Service tax was not leviable on the services provided by the appellant and tax was paid by mistake. Thus, the amount paid by the appellant will be treated as deposit and shall be entitled for refund. Further, limitation will not be applicable as the amount deposited is not tax but revenue.
- **Unjust enrichment inapplicable:** The work order was issued to the appellant in an open competitive bid. It is clear from the contract that the price was firm in all respect and independent. The appellant did not charge any service tax in the invoices. Accordingly, the principle of unjust enrichment is not applicable.
- **Direction to grant of refund along with interest:** The CESTAT directed to grant refund of the amount in cash within 45 days from receipt of order along with interest at the rate 12% p.a. from the end of three months from the date of refund application by the appellant, till the date of grant of refund.

Our comments

Earlier, the Apex Court[81] had held that the refund claim would not be disallowed solely because it seemed barred by limitation. Similarly, the Madras HC[82] had held that a refund claim cannot be barred by limitation when service tax is paid by mistake, merely because the period of limitation[83] had expired.

In another case, the Karnataka HC[84] had also held that the limitation period is not applicable for refund of service tax wrongly paid on late payment charges. Thus, it is a well settled practice that where amount paid as tax due to mistake of law, then the period of limitation is not applicable for refund. Thus, it seems that the issue is no more res-integra under erstwhile indirect tax regime.

However, unlike erstwhile indirect tax regime, time limit of two years from the relevant date is applicable in case of refund of any tax, interest or any other amount paid under GST. Thus, it appears that in case of wrong tax paid or tax paid by mistake, the assessee is required to file refund application within the time limit prescribed under GST.

80. Final Order No.50064/2022 dated 28 January 2022
81. ITC Ltd. [1993 (7) TMI 75]
82. 3E Infotech [2018 (7) TMI 276]
83. under Section 11B of the Central Excise Act, 1944
84. Way2wealth Brokers Pvt. Ltd.[2021 (10) TMI 488]

Customs duty is not sustainable on raw material when the finished goods have been cleared on payment of excise duty in DTA - CESTAT Ahmedabad

Summary

The CESTAT Ahmedabad held that once the duty-free raw material got consumed in manufacture of final product and the final product is cleared on payment of excise duty, then demanding customs duty on raw material shall amount to double payment of duty. Therefore, no duty of customs can be demanded on such raw material. Demand of customs duty on raw material is not sustainable on merit as well as on limitation.

Facts of the case

- The appellant[85] a 100% EOU was engaged in manufacture of texturised yarn, twisted yarn and knitted fabrics.
- Revenue had confirmed the demand of customs duty on raw material imported duty free[86] on the ground that the appellant has cleared goods in DTA without obtaining permission of Development Commissioner. Therefore, appellant failed to follow the procedure laid down under Exim policy and failed to fulfil the condition of exemption notification.
- Though the appellant had not obtained permission from Development Commissioner for removal of goods in DTA, but they have paid full duty on finished goods wherein, such imported raw material had been consumed.
- Appellant have also raised the ground of limitation, since there is no suppression of fact on the part of appellant as all the information was available to department vide return in the Form ER-2, demand for extended period is not sustainable.

Ahmedabad CESTAT observation and rulings

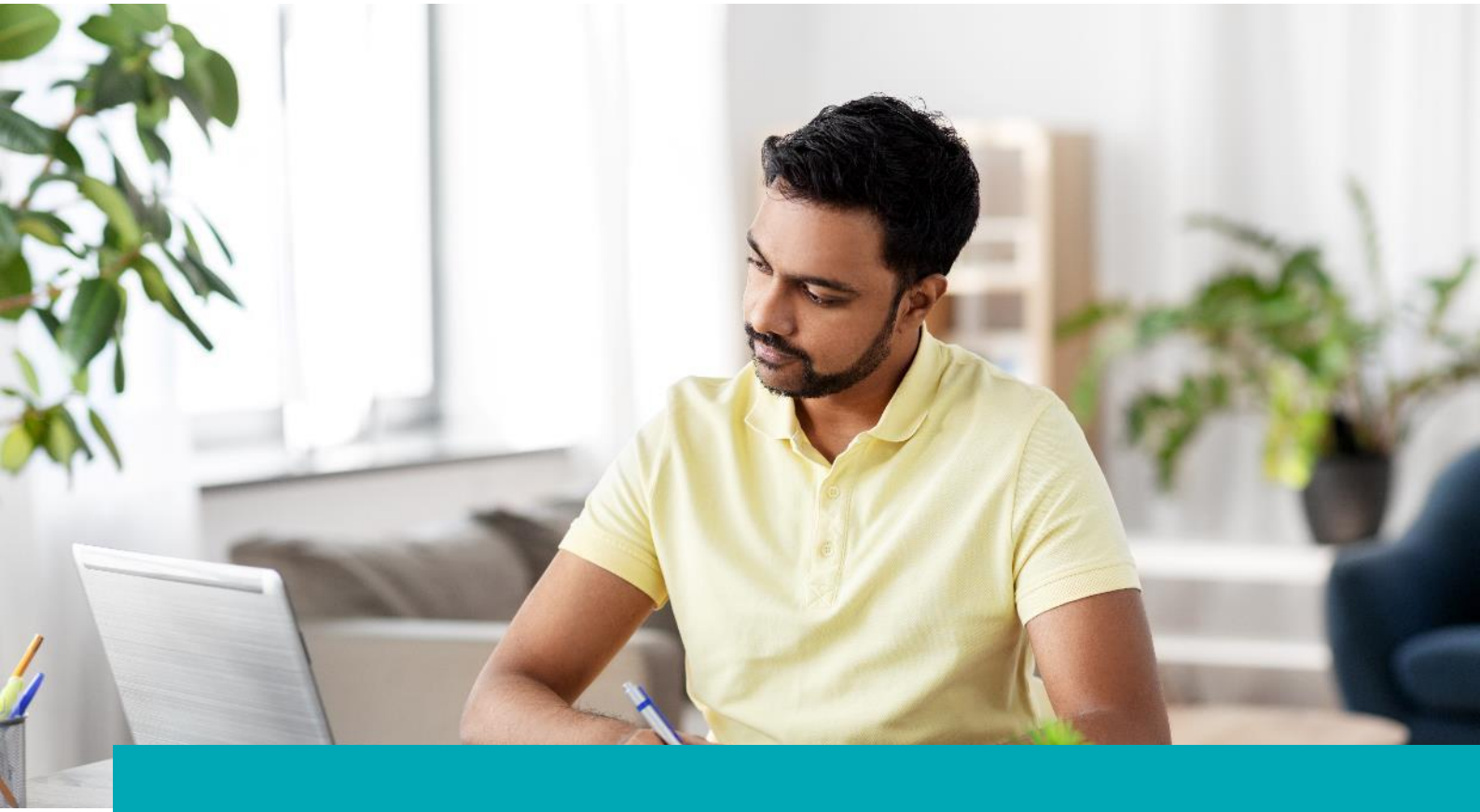
- **Customs duty cannot be demanded on raw material:** Once in the 100% EOU, raw material imported duty free is used in the manufacture of final product and final product is cleared on payment of duty in DTA. For any reason the customs duty on raw material which was used in finished goods cannot be demanded.
- **Customs duty on raw material is subsumed in excise duty:** Where full excise duty is paid on the final product, which is equivalent to the customs duty, the customs duty on raw material gets subsumed in the duty of excise paid on final product cleared in DTA. Hence, the duty of customs on raw material cannot be demanded on said ground.
- **No suppression of facts or misdeclaration:** The appellant has cleared the goods in DTA on payment of full duty and reporting in their monthly ER-2 return. The department was in complete knowledge regarding the clearance of finished goods in DTA and they were not prevented from verifying the fact that whether the appellant have obtained the permission from Development Commissioner or not. Therefore, there is absolutely no suppression of fact or mis-declaration with intend to evade payment of duty on the part of the appellant. Therefore, the extended period of demand cannot be invoked.

Our comments

This is a welcome ruling by the CESTAT and will help provide relief to manufacturing sector. Further, the judgment is also likely to set precedence in similar matters.

85. M/s Kaybee Tex Spin Ltd
86. vide notification No. 52/2003-Customs

2b Decoding advance rulings



Liquidated damages recovered for delay in commissioning of project liable to GST – Telangana AAR

Summary

The Telangana AAR observed that the applicant had recovered compensation on account of the delay in commissioning the project beyond the agreed milestones. The AAR stated that tolerating an act or a situation under an agreement constitutes a "supply of service". Therefore, such toleration's consideration or monetary value is exigible to GST. Accordingly, the AAR held that the liquidated damages recovered for compensation of loss occasioned by non-performance be treated as a supply leviable to GST.

Facts of the case

- The applicant[87] is engaged in producing and distributing electricity obtained from solar energy.
- The applicant had engaged a contractor[88] to construct a solar power project. The agreement had clauses for recovery of liquidated damages due to delay in commissioning of project and postponement of the project.
- Therefore, the applicant filed an advance ruling before the Telangana AAR to understand whether recoverable liquidated would qualify as a supply under GST and know the time of supply triggering GST liability.

87. Achampet Solar Private Limited
88. Belectric India (P) Ltd

Telangana AAR observations and ruling[87]

- **Recovery of compensation for loss due to non-performance:** The Indian Contract Act, 1872 reveals that a failure to perform the contract at the agreed time renders it voidable at the option of the opposite party. Alternatively, the opposing party may compensate for such loss occasioned by non-performance.
- **Consideration for tolerating an act of non-performance:** In the present case, liquidated damages are imposed to cover the loss of revenue and costs borne by the applicant. The applicant in the present case recovered liquidated damages caused due to the delay in commissioning and taking over dates beyond the fixed milestones. Therefore, such recovery is a consideration for tolerating an act or a situation arising out of the contractual obligation[90].
- **Consideration includes a monetary value for the act of forbearance:** Under the GST law, the term consideration consists of the economic value of an act of forbearance[91]. Thus, such toleration of an act or a situation under an agreement constitutes a supply of service, and the consideration or monetary value of such tolerance is exigible to tax[92].
- **Time of supply and taxability under GST:** The clause[93] of the coordination agreement specifies different liquidated damages to be paid for different periods of delay on the commissioning. Hence, the contract itself prescribes the date on which the damage has to be determined and paid. The date on which the liquidated damage is determined[94] shall be the time of supply of service.

Our comments

Taxability of the amounts recovered as compensation due to non-performance of obligations has always been a matter of litigation.

Under the GST law, if there is absence of element of supply of service then Schedule II may not be required to be referred as the primary condition to qualify as supply under Section 7(1) is not getting fulfilled. On similar issue earlier, the Bombay HC in case of Bai Mamubai Trust[95] 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, the Maharashtra AAAR, in the case of Maharashtra State Power Generation Company Limited, had held that the delay in completion of the project stipulated the payment of liquidated damages and did not lead to the termination of the contract. The contracting party had in fact agreed to tolerate an act and hence, any amount paid on account of the same shall be liable to GST.

At this juncture it is imperative to note that similar rulings have also been pronounced by various advance ruling authorities imposing GST on recovery of liquidated damages. Even though advance rulings are applicable only to the applicant, the possibility of litigations cannot be mitigated/neglected. However, it is the need of the hour that the government should clarify the taxability of liquidated damages.

87. Achampet Solar Private Limited
88. Belectric India (P) Ltd
89. A.R.Com/16/2020 TSAAR Order No.07/2022 Order Dated 16 February 2022
90. Entry in 5(e) of Schedule II of the CGST Act, 2017
91. U/s 2(31)(b) of the CGST Act, 2017
92. under the chapter head 9997 at serial no. 35 of Notification No.11/2017- Central Tax (rate) dated 28 June 2017
93. Clause 6
94. as per the formula prescribed in the clause 6
95. Bai Mamubai Trust, Vithaldas Laxmidas Bhatia, Smt. Indu Vithaldas Bhatia vs. Suchitra, 2019 (9) TMI 929 - Bombay High Court

03 Experts' column

Electricity and the shock of GST!

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In today's era and the decade to come, electricity would be as important as food, water and home (roti, kapda aur makan), if not more.

India is the largest generator of electricity and one of the largest electricity consumers in the world, with a consumer base of 1.39 billion people and an industrialised economy.

Electricity is primarily generated by the government/private sector and distributed through the grid and/or authorised private distributors. In many cases, grid/distributors provide single point supply to the resident welfare associations (RWA)/apartment owners associations/group housing societies (GHS)/developers, etc. to make electricity available to the residents/members residing in the colony and for common services/non-domestic loads. Distribution of electricity in such cases is being owned and managed by the GHS/ developer/RWAs.

Taxation of Electricity

As electricity is intangible, the question often appears, if the same is classified as 'goods' or 'services'. Goods generally mean all moveable property. The Supreme Court answered whether electricity is goods or not[96], where it mentioned that reference to "goods" cannot be taken in a narrow sense. Thus, merely because electric energy is not tangible or cannot be moved or touched similar to a piece of wood or a book, it cannot cease to be movable property when it has all the attributes of such property. It was also stated that electricity could be transmitted, transferred, delivered, stored, possessed, etc. in the same way as any other movable property. Thus, the supply of electricity is classified as the sale of goods and not services[97].

96. Commissioner Of Sales Tax Madhya vs Madhya Pradesh Electricity
97. State of A.P. etc. vs. NTPCL & Ors etc. (2002-TIOL-107-SC-CT)

The supply of electricity was subject to separate levies by the state government and was exempted from the levy of regular transaction taxes like central excise or the Value Added Tax. Further, the transmission or distribution of electricity by an electricity transmission or distribution utility was also covered in the negative list under Service Tax laws.

Even under GST[98], "electrical energy" has been classified as goods and specific exemption has been granted from the levy of GST. Further, exemption from GST has been granted to services of "Transmission or distribution of electricity by an electricity transmission or distribution utility"[99].

Issues

A perusal of the above prima facie reveals issues related to taxation of electricity, at least from GST perspective is sorted, and GST is not payable on any transaction related to electricity. But India being a country of intellectuals, have the capabilities to find questions for every answer and even this case is not different.

The first seed of confusion sowed vide a circular[100] clarifying (confusing) that there would be GST on charges related to all incidental charges, for example, releasing connection, rental charges, testing fees, labor charges, fees for duplicate bill, etc.

The second installment of confusion came from the flyer where it was mentioned that charges collected towards the generation and distribution of electricity using Genset would be exigible to GST.

Post that, various advance rulings were deviating from the basic understanding that electricity is the outside purview of the GST levy.

In an interesting case, the Maharashtra Advance Ruling Authority[101] held that the monthly fixed payment of rent is for occupancy. Still, the variable amount of electricity and water charges (at actuals) is for the effective enjoyment of the rented premises, without which the licensee cannot run its business. Therefore, the charges for electricity recovered as reimbursements, even if at actuals, have the nature of incidental expenses in relation to renting of immovable property and are includible in the value of supply for levy of GST. The authority also rejected the plea that the RWA is just acting as an agent between the distributor and the consumer

In the case of Gujarat AAR[102], a similar question was raised by the applicant wherein the applicant makes the payment to the electric company and, in turn, collects such charges from the lessee due to the non-availability of a separate electric meter with the lessee. As per the terms of the agreement, the lessee was required to pay the charges directly to the electricity board; however, to operate practically, the charges are paid by the lessee based on actual readings of the sub-meter. Further, no profit is made by the applicant for the collection of charges. Hence, such charges are qualified as 'Pure Agent.'

In another case, the Karnataka Advance Ruling Authority[103] has held that the electricity charges paid to BESCOM for power consumed towards common facilities and separately recovered from members are liable to GST as consideration received for the supply of maintenance services the members.

98. Notification 2/2017- Central Tax (rate) dated 28 June 2017
99. Notification 12/2017-Central Tax (Rate) dated 28 June 2017
100. Circular No. 34/8/2018-GST dated 1 March 2018
101. Indian Engineering Works (Bombay) pvt. Ltd. [2021 (2) 773]
102. M/s. Gujarat Narmada Valley Fertilizers & Chemicals Ltd., dated 17 September 2020
103. M/s Prestige South Ridge Apartment Owners Association [2019(11) 224]
104. Torrent Power Ltd Vs UOI [2019 (1) 1092]

Our analysis

Now the question that arises is if the sale of electrical energy is exempted, can it be taxable in any manner? To understand this better, let us understand the basic scheme of taxation of electricity in India. Entry 53 List -2 schedule VII of the Constitution of India authorise the states to levy tax on consumption or sale of electricity. This entry is an independent entry, which means that apart from this entry, there is no other entry that authorise the levy of tax on electricity

It is important to note that even after rearrangement by removal or the amendment of entries in the seventh schedule, the entry related to taxation of electricity remains unchanged.

'Expressio unius est exclusio alterius' is a settled legal principle; therefore, electricity having specific entry towards taxation cannot be taxed under any other entry. Since the implementation of GST didn't impact entry related to the taxation of electricity, it is fair to assume that GST has nothing to do with the electricity tax. Notifications exempting electricity and its distribution from the levy of GST strongly support this view.

In line with the above views, Hon'ble Gujarat High Court[104] held the circular as the ultra-virus to the suggesting levy of GST on releasing connection, rental charges, testing fees, labor charges, fees for duplicate bills, etc.

Further, the orders of Maharashtra and Gujarat AAR are contradictory. With an almost similar set of facts, Maharashtra AAR upheld liability of GST on the licensor collecting amount of electricity charges from the tenants on actual basis, refusing to accept them as pure agents. Whereas Gujarat AAR accepted the status of the landlord as a pure agent and held that no GST was payable.

Even if the finding of Maharashtra AAR is accepted, it would mean that the licensee has supplied electricity to the tenant and charged for that. In that case, electricity being goods and outside the purview of GST, the question of levying GST shouldn't arise. It would also counter the logic of electricity being basic amenities in how the restaurants don't charge GST on alcohol even though it is served with the food liable to GST. The same logic that electricity is outside the purview of the GST would counter Karnataka AAR, where electricity charges towards common area have been held to taxable and the flyer by the CBEC holding that electricity generated and supplied by the GHS/ developer/ RWAs would be liable to GST.

From the above discussions, it is almost clear that though contradictory advance rulings and circulars resulted in confusion, the legislature is clear that the supply of electricity, in any manner, is the outside purview of the GST. In such a case, it is high time that the government clarify this once and for all, to avoid any further litigation on this issue

04 Issues on your mind

How to apply for composition scheme if already registered as regular taxpayer?

Any taxpayer who is registered as normal taxpayer under GST needs to file an application to opt for composition levy in Form **GST-CMP-02** at GST Portal prior to the commencement of financial year for which the option to pay tax under the aforesaid scheme is exercised.

Steps to opt for the composition levy on the GST portal:

- Log on to the taxpayers' Interface
- Go to **Services > Registration > Application to opt for composition levy**
- Fill the form as per the form specification rules and submit

The window to opt in for composition scheme for FY 2022-23 is made available at the GST Portal. The eligible taxpayers, who wish to avail the composition scheme may opt in for composition **before 31 March 2022.**

How to file a grievance/compliant related to payments on GST portal?

A grievance can be raised in case of issues such as amount debited from the bank account, however cash ledger has not been updated or NEFT/RTGS related issues. Any registered taxpayer and any user who has been assigned temporary ID can raise grievance for payment related issues.

To file a grievance on the GST portal the taxpayers need to navigate to **Services > User Services > Grievance against Payment (GST PMT 07)** and submit the grievance form. Further, the taxpayers can check the status of the grievance filed by navigating to **Services > User Services > Grievance / Complaints > Grievance against Payment (GST PMT 07) > Enquire Status** and enter the Grievance Number and status will be displayed.

Based on the CPIN and Bank name entered by the taxpayer in the Grievance Form, an on-demand call will be sent to the concerned bank. Based on the response from the bank, the Electronic Cash Ledger will be updated with appropriate comments and the grievance will be closed. If no response is received from the concerned bank or incorrect response is received from the bank, the Grievance ticket will be closed with appropriate remarks. The remarks will be sent on the registered email address and SMS of the authorised signatory. In case of taxpayers who have filed grievance in pre-login mode, the remarks will be sent on the e-mail message and mobile phone number mentioned in the grievance form.

How to transfer eScrip under Rebate of State and Central Taxes and Levies (RoSCTL) / Refund of Duties and Taxes on Exported Products (RoDTEP)?

The users can utilise the eScrip for duty payment or transfer to another IEC user. Any user who has created an eScrip account can transfer a scrip to another user. The user to which the scrip is to be transferred also needs to have a valid eScrip account.

Steps to transfer eScrip:

- Select the “Scrip Transfer” tab from the eScrip home page to transfer a particular scrip to any other user.
- Select the scheme, RoDTEP or RoSCTL under which the scrips are to be transferred. After that, the user can select the appropriate scrip to be transferred from the generated scrips. The list of the generated scrips is available in the drop-down menu under the “Scrip Available” option.
- After appropriate scrip selection, user can view scrip amount and enter IEC of the user to which the scrip is to be transferred in “Transfer To” option. OTP is generated and sent to the user who has initiated the transfer on the registered mobile number and email ID. This OTP is valid for a window of 15 minutes only.
- User who has initiated the transfer scrip request can cancel the request at this stage using the cancel button.
- An approval request is sent to the IEC holder to whom the transfer request has been initiated by the user. This IEC holder will have to create an eScrip account if not already created.
- From the eScrip home page, the user to whom a scrip is transferred can approve/cancel the transfer scrip request by clicking on the “Approve Scrip Transfer” tab. User can cancel the request by clicking on the cancel button, if does not wish to accept the scrip.
- After clicking the Approve button, the transferee is directed to fill OTP. This OTP is generated and sent to the transferee over registered mobile number and email ID and is valid only for 15 minutes. The scrip will be transferred to transferee after successful OTP validation.

What are the features of ICEGATE e-Payment gateway?

The new e-Payment gateway provides facility of payment of multiple challans in single transaction. Any person having net banking facility in the designated bank can proceed for the payment of custom duty. The users can now use internet banking facility of HDFC, Axis, ICICI and Karur Vysya Bank for custom duty payment through ICEGATE e-Payment portal.

05 Important developments in direct taxes

A. Important amendments/updates

CBDT issues clarification on interpretation of most favoured nation (MFN) clause

While determining the taxability and tax rates as per India's tax treaty with a country, the MFN[105] clause enables a taxpayer to import the provisions[106] of India's tax treaty with another country (which is a member of OECD[107]), if the scope is restricted or rate is beneficial.

CBDT has recently issued a circular[108] clarifying various interpretational aspects of the MFN clause in India's tax treaties. As per the clarification provided, MFN clause can be applicable[109] on fulfilment of each of the following conditions:

- India subsequently enters into a tax treaty with a third state, i.e. after the effective date of the relevant tax treaty (i.e. treaty containing MFN clause);
- Third state is a member of the OECD at the time of signing its tax treaty with India;
- The third state's tax treaty provides for a lower rate or restricted scope of taxation; and
- India has issued a notification permitting invocation of MFN clause on account of beneficial treatment accorded in the relevant tax treaty.
- It further clarifies that this Circular will not impact implementation of any decision of the Court which has been decided in favour of such taxpayer on this issue.

105. Most Favoured Nation
106. With respect to certain items of income such as dividend, interest, royalty, fees for technical services etc
107. Organisation for Economic Co-operation and Development
108. Circular No. 3/2022 [F. No. 503/1/2021-FT&TR-I] dated 3 February 2022
109. By applying the MFN clause in the relevant tax treaty, benefit can be taken of a restricted scope or lower rate specified in tax treaty with a third state

CBDT notifies methodology for computing capital gains on ULIPs[110]

Finance Act, 2021 provided that any sum received (including bonus) under a ULIP issued on or after 1 February 2021, would not be eligible for tax exemption if the aggregate annual premium paid exceeded INR 2.5 lakh in any of the financial years[111].

Also, such ULIPs would be treated as a capital asset and the proceeds would be liable to capital gains tax like in case of equity-oriented mutual funds (i.e. ULIPs would qualify as long-term capital asset if it was held for more than 12 months). However, in the event of the death of the policy holder, amount received from ULIP will be exempt from tax[112].

CBDT[113] has now notified[114] the mechanism for computing capital gains in case of such ULIPs which is given in the table below:

Particulars	Amount
Capital gains calculation if consideration received for the first time	
Consideration received during the FY	A
Less: Premium paid till the date of receipt of consideration	B
Capital gains	C
Capital gains calculation for subsequent receipt of consideration	
Consideration received during the FY	D
Less: Premium paid (during the term of ULIP till the date of receipt of such consideration less premium already considered for calculating taxable amount in an earlier FY)	E
Capital gains	F

110.Unit-linked Insurance Plans
111.Financial year
112.Irrespective of the date of policy and the amount of premium paid
113.Vide Notification No. 8/2022 dated 18 January 2022
114.Rule 8AD of the Income-tax Rules, 1962

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