

GST Compendium

A monthly guide

October 2020



Editor's note

Due to the ongoing pandemic, the businesses were finding it difficult to complete their annual returns and GST audit for financial year 2018-19 within the due date of 30 September 2020. Various representations were made by trade and industry to extend these timelines. The government has accordingly extended the due date till 31 October 2020.

On the judicial front, the Madras High Court has denied the refund of input tax credit on input services under the inverted duty structure stating it to be intra-vires the Act and a valid exercise of the legislative powers. The judgment is in sharp contrast to the decision of the Gujarat High Court in case of VKC Footsteps India Pvt. Ltd. where it had allowed the refund of input tax credit on input services. The divergent rulings have created dilemma for the industry vis-à-vis the inverted duty structure and is likely to lead to further litigation, unless the department clarifies its position, or the matter is finally decided by the Supreme Court.

In another significant ruling by Haryana Authorities of Advance Ruling, it has been held that the services, such as accounting, marketing support, administrative support, IT support, supplied by head office to its branch offices shall be treated as supplies exigible to GST. Similar ruling was pronounced earlier by the Karnataka AAAR in case of M/s. Columbia Asia Hospitals Pvt. Ltd. There is a need for the authorities to look in this matter and address the concerns of the industry to avoid unnecessary litigation.

This edition also focuses on some of the key issues being faced by the pharma sector under the GST regime. Amidst COVID-19 crisis, there is an urgent need to address these issues and provide necessary relief to this sector.

We hope you will find this edition informative and interesting.

Vikas Vasal

National Managing Partner, Tax





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CBIC issues instructions for recovery of interest on net cash tax liability

The Goods and Services Tax (GST) Council, in its 39th meeting, had recommended that the interest on delay in payment of the GST should be charged on the **net tax liability**. Further, the Council also recommended that the said provision should be made effective retrospectively from 1 July 2017.

Accordingly, the Finance (No. 2) Act, 2019 amended the provisions relating to computation of interest liability in case of

delay in paying the GST. The government recently notified that the said provisions shall be effective prospectively from 1 September 2020.

The government has now issued certain administrative instructions to implement the decision of the GST Council as under:

- **For the period 1 July 2017 to 31 August 2020:** The authorities have been instructed to recover interest only on net cash tax liability (i.e. the

portion of the tax that has been paid by debiting the electronic cash ledger or is payable through cash ledger).

- **Show cause notice (SCN) issued on gross tax payable:** In cases where SCNs have been issued on gross tax payable, the same shall be kept in call book till retrospective amendment in the provision is carried out.

GSTN releases set of FAQs on e-invoicing

The Central Board of Indirect Taxes and Customs (CBIC) recently notified mandatory e-invoicing for businesses having turnover above INR 500 crore from 1 October 2020. In this regard, the government issued an advisory explaining the e-invoicing system and detailing procedure to be followed by taxpayers for generating e-invoice.

In addition to above, the Goods and Services Tax Network (GSTN) has now released a comprehensive set of frequently asked questions (FAQs) consisting of 61 FAQs. Some of the important aspects explained under the FAQs are:

- **Purpose of e-invoice:** E-invoicing facilitates exchange of the invoice document (structured invoice data) between a supplier and a buyer in an integrated electronic format. It does not mean generation of invoice by a government portal.
- **Invoice Reference Number (IRN):** Registered persons will continue to

generate GST invoices on their own accounting/billing/ERP systems. However, a GST invoice will be valid only with a valid IRN generated from the Invoice Registration Portal (IRP).

- **Modes for generation of e-invoice:** Following modes have been provided for taxpayers to generate e-invoice:
 - Application Programming Interface (API) based
 - Mobile app based
 - Offline tool based and
 - GST Suvidha Provider (GSP) based
- **Action point for businesses:** Businesses need to get their ERP/ accounting and billing software updated to incorporate necessary changes for e-invoicing requirement (i.e. to enable reporting of invoices to IRP and obtain IRN).
- **Exemption from e-invoicing:** It has been clarified that following entities are not required to generate e-invoice:

- Special economic zone units
- Insurer or a banking company or a financial institution, including a non-banking financial company
- Goods transport agency supplying services in relation to transportation of goods by road in a goods carriage
- Suppliers of passenger transportation services
- Suppliers of services by way of admission to exhibition of cinematograph films in multiplex screens

- **Resources on e-invoice:** Detailed information on e-invoice can be accessed on the GSTN official website. For videos on e-invoicing, click below:
 - [Everything you may like to know about e-invoicing](#)
 - [E-invoicing: Myths vs Reality](#)
- **Feedback:** Feedback and suggestions on e-invoices can be sent to e-invoice@gstn.org.in.

E-invoicing system available for e-commerce operators

The government has now made the e-invoicing system available for the e-commerce operators (ECO) to report the invoices to the IRP, generated by them on behalf of the suppliers.

Some of the key aspects are:

- **Identification of ECO:** The e-invoicing system identifies the ECO based on the taxpayer type in the GST registration details.

- **Taxpayer enabled for reporting:** The taxpayer having the type as TCS will be enabled for reporting invoices on the e-invoicing system as an ECO.
- **Mandatory ECO GSTN:** E-commerce transactions can be reported by the ECOs with 'EcmGstin' (GSTIN of E-commerce operator) attribute as their GSTINs, i.e., apart from specifying the seller GSTIN in the payload, it is

mandatory to specify the ECO GSTIN in the 'EcmGstin' attribute of the schema by an ECO when they log in using their user credentials.



COVID-19: Supreme Court releases user guide for limited physical hearing

To reduce physical presence and ensure social distancing, the Supreme Court (SC) has issued a user guide for implementing processes relating to limited physical hearing. The user guide contains processes for-

- e-nomination of counsel and clerk;
- e-application for special hearing pass; and
- e-submission of self-declaration.

Some of the key aspects explained in the guide are:

- **Registration of Advocate on Record (AOR):** The businesses need to login to the SC's portal for limited physical hearing and click on the nomination option. The nomination is verified using a one-time password (OTP) received on the mobile number of the counsel/clerk.
- **Case selection:** All the listed cases

of the AOR will be displayed by default. The AOR will have a choice to select the date from the calendar and the cases listed on the selected date will be displayed on the screen.

- **Special hearing entry pass:** Entry pass link permits use of mobile devices, such as smartphones and tablets, besides use of regular desktops/PCs. AOR, arguing counsel or registered clerk may use mobile devices to generate the special hearing entry pass.
- **Self-declaration form:** Any person or advocate seeking to enter/visit the premises of the SC by generating



special hearing entry pass, is mandatorily required to sign in self-declaration form. The self-declaration is to be signed in by entering the OTP sent on the registered mobile number, only on the day of visit.

COVID-19: CBIC notifies further reliefs under GST

Due to the COVID-19 pandemic, the CBIC has announced additional reliefs under GST:

- **Extension of date of completion or compliance for goods sent out of India for sale or return:** The time limit for completion or compliance of any action in respect of goods sent or taken out of India on approval for sale or return during 20 March 2020 to 30 October 2020 has been extended to 31 October 2020.
- **Waiver in late fees for delay in furnishing Form GSTR-4:** Late fees for delay in furnishing Form GSTR-4 (return by composition dealer) for the quarters from July 2017 to March 2019, if return is furnished between 22 September 2020 and 31 October 2020, shall be waived as under:
 - 100% in case there is no tax liability; and
 - Late fees above INR 250 in case there is a tax liability.
- **Waiver in late fees for delay in furnishing Form GSTR-10:** If Form GSTR-10 (a one-time document/statement to be filed by a registered taxpayer at the time of cancellation of GST registration or at the time of closing down of business) is furnished between 22 September 2020 and 31 December 2020, the late filing fees that is in excess of INR 250 shall be waived.

Delinking of credit note/debit note from invoice, while reporting them in Form GSTR 1/GSTR 6 or filing refund

Original invoice number was mandatorily required to be quoted by the taxpayers, while reporting a credit note or debit note in Form GSTR-1 or Form GSTR-6. In this regard, the GSTN has made available new facility to the taxpayers to report credit or debit notes as under:

- **Multiple invoices:** Single credit note or debit note issued in respect of multiple invoices can be reported in Form GSTR-1 or in Form GSTR-6;
- **Supply type:** Option to choose the note supply type as regular, SEZ, DE, export etc., to identify the table to which such credit or debit notes pertain;
- **Place of supply:** Indicate place of supply (POS) against each credit note or debit note, to identify the supply type i.e. intra-state or inter-state;
- **Difference in tax rate:** Debit/credit notes can be declared with tax amount, but without any taxable value, i.e., if a credit note or debit note is issued for difference in tax rate only, then note value can be reported as 'zero'. Only tax amount will have to be entered in such cases.
- **Refund application:** While applying for refund, taxpayers can now report such credit or debit notes in statements (filed during the refund application) without mentioning the related invoice number.



Bihar Amnesty Scheme: Settlement of arrears under indirect tax legislation

Government of Bihar has promulgated the Bihar Settlement of Taxation Disputes Ordinance, 2020 for settling outstanding tax dues pertaining to the period prior to the introduction of the GST to clear the backlog of arrear demands. The scheme shall come into force at a date to be notified by the government.

Key features

Enactments covered under the scheme

The scheme applies to orders passed under following acts:

- The Bihar Finance Act, 1981
- The Bihar Value Added Tax Act,

- The Bihar Tax on Entry of goods into Local Areas for Consumption, use or Sale Therein Act, 1993
- The Bihar Taxation on Luxuries in Hotels Act, 1988
- The Bihar Entertainment Tax Act, 1948
- The Bihar Tax on Advertisement Act, 2007
- The Bihar Electricity Duty Act, 1948
- The Central Sales Tax Act, 1956

Eligibility

Under the scheme an application can be made in respect of **arrear tax, penalty, interest or fine in dispute**, which has

been determined as being payable under any proceeding, by way of an appeal, revision, miscellaneous revision, review, reference or any petition or any order passed under the relevant laws, in respect of any period on or before **30 June 2017**, which is pending as on **31 August 2020**, before any authority or Tribunal appointed under the relevant laws or, as the case maybe, the HC the SC.

Benefits under the scheme

Arrears	Waiver
Failure to furnish or produce any statutory certificate or declaration	Higher of: <ul style="list-style-type: none"> • 100% balance arrears of tax after adjusting certificates/ declarations in possession or • arrears already paid
Other arrears of tax	Higher of: <ul style="list-style-type: none"> • 35% of arrears of tax or • arrears already paid
Penalty, fine or interest	Higher of: <ul style="list-style-type: none"> • 10% of arrears of penalty or fine or interest or • arrears already paid



Our comments

Many states, such as Maharashtra, Gujarat, Himachal Pradesh, Karnataka, Kerala, Uttar Pradesh, Goa, Assam, Meghalaya have recently introduced a one-time tax settlement/amnesty schemes in order to fast-track clearance of pending litigation under the erstwhile indirect tax regime. Such schemes provide a one-time opportunity to the taxpayers to settle their past disputes as also ensure release of blocked revenues for the government.

Thus, the businesses should undertake a due evaluation and make optimum use of this one-time benefit provided by the government.

Government of Kerala issues instructions pertaining to Kerala Amnesty Scheme, 2020

The government of Kerala had introduced an Amnesty Scheme, 2020 for settling outstanding tax dues pertaining to the period prior to the introduction of the GST. The **last date to avail the scheme** electronically was 31 July 2020, which was further extended to 30 September 2020.

In this regard, the government has now issued certain instructions as under:

- **Last date to avail the scheme:** Option to avail the scheme has been further extended till 30 November 2020. The last date for payment of the amount determined under the scheme shall be 31 March 2021.

- **Option to pay arrears in instalments:** If the taxpayer opts to pay arrears under the scheme in instalments, 20% of the arrears shall be paid as first instalment within 30 days of receipt of the intimation. The balance amount can be paid in maximum of four instalments.
- **Unpaid tax can also be settled:** The tax remaining unpaid as on the date of option, pursuant to the payment of compounding fee, can also be settled under this scheme.
- **Extension of time limit for completion of proceeding:** Where any time limit specified or prescribed for-

- completion of any proceeding, or
- passing of any order, or
- issuance of any notice relating to any assessment, proceeding to determine any tax penalty or other amounts,

under the provisions of the relevant acts terminates on 31 March 2020 and where completion or compliance or such action has not been made within such time, then the time limit for completion or compliance of such action stands extended to **31 March 2021**.

Due date for filing annual return in Form 9 and reconciliation statement in Form 9C for FY 2018-19 extended to 31 October 2020

The CBIC had, pursuant to GST Council's recommendation, extended the due date for electronically furnishing annual return for financial year (FY) 2018-19 to 30 September 2020.

The CBIC has now further extended the due date for electronically filing the annual return (in Form 9) and reconciliation statement (in Form 9C) for FY 2018-19 till **31 October 2020**.



CBIC notifies certain changes in applicability of e-invoicing provisions

The CBIC recently notified mandatory e-invoicing for businesses having turnover above INR 500 crore from **1 October 2020**. In this regard, the CBIC has now notified certain changes as under:

Applicability of e-invoicing

It has been prescribed that e-invoice shall be applicable to registered persons whose turnover in any preceding financial year from 2017-18 onwards exceeds INR 500 crore in respect of supply of goods or services or both or for exports.

One time relaxation from implementation of e-invoice

It was observed that some of the taxpayers were still not ready for implementation of the e-invoicing provisions. Accordingly, the CBIC has

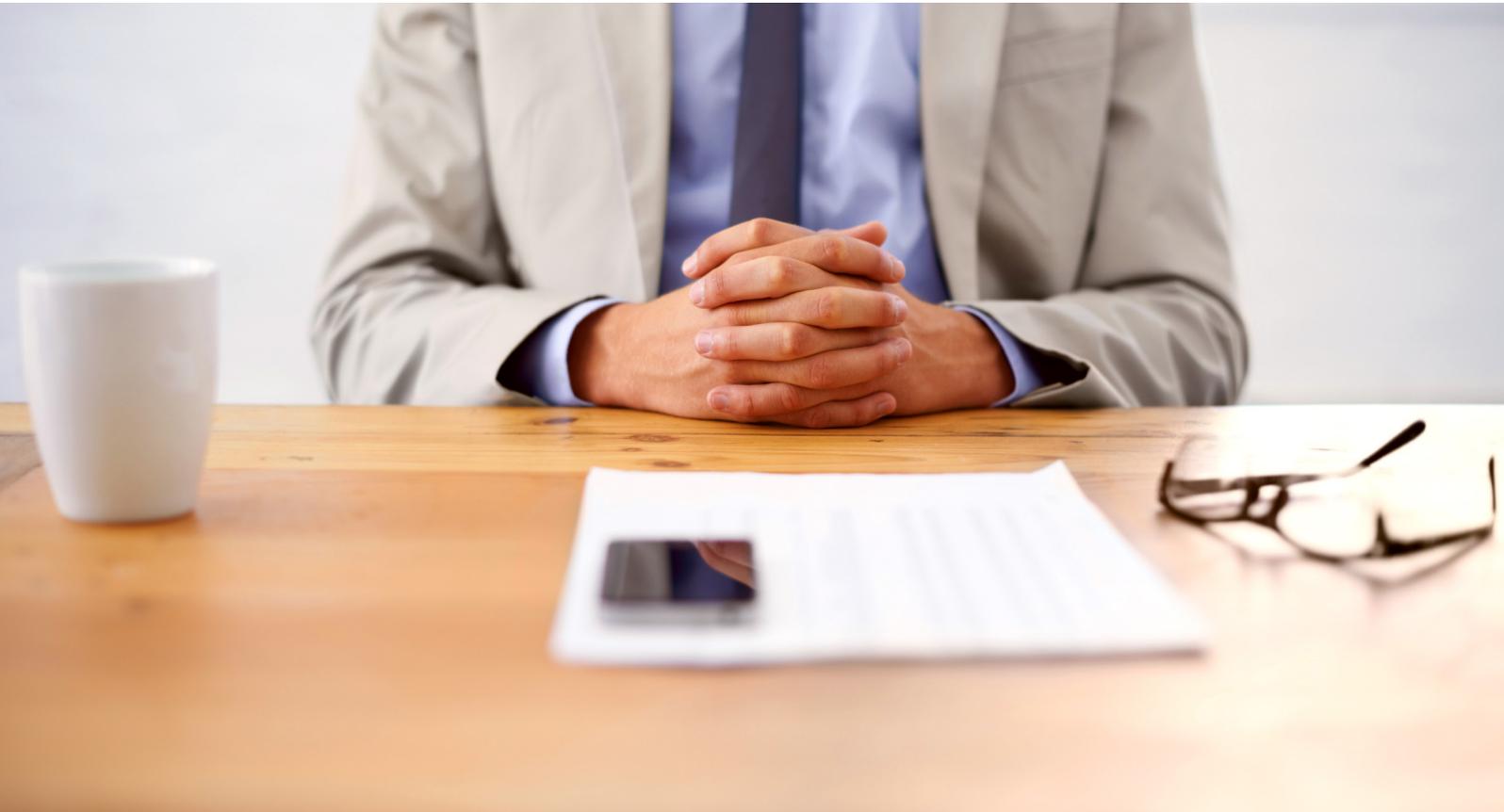
decided to provide relaxation from the e-invoice provisions for the month of October 2020 as under:

- **No requirement to follow e-invoicing provisions:** The invoices issued by such taxpayers during October 2020 without following e-invoice provisions shall be deemed to be valid.
- **Penalty waiver:** The penalty leviable for such non-adherence to provisions shall stand waived if the Invoice Reference Number (IRN) for such invoices is obtained from the Invoice Reference Portal (IRP) within 30 days of date of invoice.
- **No relaxation from 1 November 2020:** No such relaxation would be available for the invoices issued from 1 November 2020 and such invoices

issued in violation of the e-invoicing provisions would not be valid and penalty shall be applicable.

Requirement of QR code deferred

The CBIC had also notified that from 1 October 2020, invoices issued by specified person to an unregistered person (hereinafter referred to as B2C invoice) shall also have a dynamic quick response (QR) code. This requirement of QR code in respect of B2C invoices shall now be applicable from **1 December 2020**.



Gujarat HC allows refund of unutilised ITC distributed by input service distributor to SEZ unit

Summary

The Gujarat High Court (HC), in a recent case, has allowed the petition filed by a special economic zone (SEZ) Unit for claim of refund of input tax credit (ITC) distributed by input service distributor (ISD).

The HC observed that the petitioner, being an SEZ-unit making zero-rated supplies under the GST, was unable to utilise the credit of ITC of Integrated Goods and Service Tax (IGST) received from its ISD. Accordingly, since the credit remained unutilised in the electronic credit ledger (ECL), application for refund claim was made. Thus, the HC concluded that the petitioner is entitled

to refund as the ISD cannot claim the refund.

Facts of the case

- The petitioner¹, an SEZ unit, filed a refund claim about the credit of IGST distributed by its ISD for the services pertaining to the SEZ unit.
- The said claim was rejected on the ground that the refund cannot be processed under any specified category of refund².
- Being aggrieved, the petitioner filed the present writ for refund of unutilised credit lying in ECL and to set aside the impugned order rejecting the refund claim.
- Further, the petitioner prayed that in case there is no provision for obtaining refund by an SEZ, then relevant provisions for granting refund of unutilised IGST credit lying in the ECL be framed to bring parity and to remove financial hardship faced by genuine exporters.

Gujarat HC observations and ruling³

- **ISD cannot file refund claim:** The HC rejected tax department's contention that the petitioner, not being a supplier, would not be entitled to file refund application⁴.
- **No supplier to claim refund:** ISD is an office of the supplier of

1. Britannia Industries Limited

2. under manual refund processing Circular No. 17/17/2017-GST) dated 15.11.2017 and Circular No. 24/24/2017-GST dated 21.12.2017

3. C/SCA/15473/2019 dated 11 March 2020

4. Section 54 of the CGST Act, 2017 read with Rule 89 of the CGST Rules, 2017

goods and services that receives tax invoices issued towards the receipt of input services and issues a prescribed document for the purpose of distributing the credit. Therefore, it is not possible for a supplier of goods and services to file a refund application in the present case.

- **Tax department's stance not tenable:** As per the procedure for application for refund of tax, interest, penalty, fees prescribed under the GST law, in respect of supplies to an SEZ unit, the application for refund has to be filed by the supplier of goods or services. It is not possible for a supplier of goods and services to file a refund application to claim refund of ITC distributed by ISD, therefore, the stance of the department that the petitioner is not entitled to seek the

refund of the ITC paid in connection with goods or services supplied to SEZ unit is not tenable.

- **Refund claim allowed:** Thus, the Gujarat HC allowed the petition for claim of refund of ITC distributed by ISD.



Our comments

Availability of refund to SEZ units with respect to credits distributed by ISD has been a matter of concern due to lack of clarity on refund related provisions under the GST law. This is a welcome judgment by the Gujarat HC and will help to provide required clarity and relief to the SEZ units.

The HC has also made an important observation on the service tax attributable to the services used in

more than one unit. The same shall be distributed on pro-rata basis of the turnover during the relevant period. Similarly, credit of service tax is distributed to all the units by the ISD and therefore, the claim of refund made by the SEZ unit is required to be granted.

The ruling may set a precedent for other similar cases. However, it is likely to be challenged in the apex court.

Madras HC upholds constitutionality of provisions relating to refund in case of inverted duty structure

Summary

- The Madras HC has dismissed a batch of writ petitions challenging the constitutional validity of provisions related to refund in case of inverted duty structure (IDS) under the GST law. The HC held that the relevant refund provisions are clear and limit a registered person to claim refund of unutilised ITC only to the extent that such credit was accumulated on account of the rate of tax on input goods being higher vis-a-vis output supplies. It further stated that the word input encompasses all input goods, other than capital goods and excludes input services.
- The HC also observed that the refund is a statutory right and the extension of benefit of refund only to the unutilised credit on inputs, under IDS by excluding unutilised ITC of input services, is a valid classification and exercise of legislative power. Thus, it held that the amended provision is intra vires to the Statute and does not need to be read down.



Facts of the case

- The petitioner⁵ filed the present writ to pray that it is entitled to refund of the entire unutilised ITC accumulated on account of being subjected to an IDS.
- Further, it challenged the constitutional validity of the relevant refund related

provisions⁶ in case of IDS and that the amended provisions⁷ is ultra vires⁸.

Madras HC's observations and ruling⁹

- **Enabling refund of unutilised ITC in respect of input goods:** The relevant provision qualifies the enacting clause

5. Tvl. Transtonnelstroy AFCONS Joint Venture

6. Section 54(3)(ii) of the CGST Act, 2017

7. Rule 89(5) of the CGST Rules, 2017

8. The Section 54 of the CGST Act, 2017 and Constitution of India

9. W.P No. 8596 of 2019 Batch etc. dated 21 September 2020

by also limiting the source/type and, consequently, quantity of unutilised ITC in respect of which refund is permissible. Hence, it does not merely set out the two cases in which registered persons become eligible for a refund of unutilised ITC. The proviso performs the larger function of also limiting the entitlement of refund to credit that accumulates because the rate of tax on input goods is higher than the rate of tax on output supplies.

- **Inputs encompasses input goods and excludes input services:** Both the statutory definition and the context point in the same direction, namely, that the word inputs encompasses all input goods, other than capital goods and excludes input services.
- **Amended provision is in conformity:** In light of the conclusion that a refund is permitted only in respect of unutilised ITC that accrues or accumulates as a result of the higher rate of tax on input goods vis-à-vis output supplies, the HC held that that

the amended provision is in conformity with the statute.

- **Unable to subscribe to Gujarat HC's view:** The HC expressed its inability to subscribe to the conclusions of the Gujarat HC¹⁰ and stated that it failed to take into consideration the scope function and impact of the relevant refund provisions.
- **Valid classification and exercise of legislative power:** The refund provisions does not infringe the constitution.¹¹ The refund is a statutory right and the extension of its benefit only to the unutilised credit on inputs under IDS, by excluding unutilised ITC that accumulated on account of input services, is a valid classification and exercise of legislative power. Therefore, it is not necessary to interpret the amended provision and the definition of net ITC therein to include the words input services.
- **Petitions dismissed:** The HC dismissed the batch of writ petitions

challenging the constitutional validity of relevant provisions. Further, it concluded that the amended provisions, both the general rule making power and the relevant refund provisions, is intra vires.



Our comments

In a recent ruling, the Gujarat HC had held that the relevant provisions pertaining to the refund in case of IDS under the GST law are contrary and ultra vires and need to be read down to the extent it denies refund of ITC on input services.

Meanwhile, the Madras HC has now held that the relevant provisions are intra vires and do not need to be read down. Considering the contradictory rulings, the matter is likely to reach the apex court. Accordingly, the businesses will have to wait until the matter attains finality.

Refund of service tax on cancellation of flat booking allowed under GST

Summary

The Commissioner of GST and Central Excise (Appeals), Mumbai [Commissioner (A)], has recently allowed refund of service tax paid on cancellation of flat booking under the GST law. The Commissioner (A) observed that in the present case, since the consideration has been returned, no service has been provided to the appellant. Therefore, it held that in such cases, refund becomes admissible under the GST law.

Facts of the case

- The appellant¹² booked a flat in a project and had paid applicable service tax including Swachh Bharat Cess (SBC) on the amounts paid to the builder.
- The appellant cancelled the booking subsequently however, the builder did

not return the service tax paid by the appellant.

- Therefore, the appellant claimed refund of service tax paid¹³.
- The adjudicating authority rejected the refund claim on the ground that it is time-barred and was subject to the doctrine of unjust enrichment.
- The aggrieved appellant filed the present appeal.

Commissioner (A) observations and ruling¹⁴

- **No restriction in law for claiming refund:** The law does not provide that refund can be claimed only in provisional assessment cases or refund cannot be claimed, if assessment is final.
- **No service was provided:** No service has been provided to the appellant

in this case as the consideration for service was returned and the service contract got terminated. Once service is not provided, refund¹⁵ becomes admissible.

- **FAQ by CBIC:** Referring to a recent FAQ issued by the CBIC¹⁶, the Commissioner (A) stated that it has been specifically clarified that any service paid on or before 30 June 2017, for the services to be provided but subsequently not provided, shall be eligible to claim refund. The FAQ recognises that all claims for non-provision of service in respect of which adjustment/credit would have been available under erstwhile laws¹⁷ would merit to be honoured in the GST regime¹⁸ as well. Thus, if a taxpayer is entitled to credit under erstwhile law then refund under GST regime shall be granted.

10. In the case of M/s VKC Footsteps Pvt. Ltd.

11. Article 14 of the Constitution of India

12. Mr. Haresh V Kagrana (HUF)

13. under the provisions of Section 11B of the Central Excise Act, 1944 as applicable to service tax under section 83 of the Finance Act, 1994

14. C/SCA/2792/2019 dated 24 July 2020

15. U/s 142(5) of the CGST Act, 2017

16. FAQs on Insurance and Stockbrokers Updated as on 27 December 2018

17. Rule 6(3) of Service Tax Rules, 1994

18. U/s 142(5) of the CGST Act, 2017

- **Service tax paid in nature of deposit:** No service has been provided to appellant in this case and therefore the provision of relevant date of one year and date of payment¹⁹ cannot be made applicable. The service tax paid by the appellant is deposit and not service tax.
- **Cancellation date shall be relevant date:** Even if payment is in the nature of service tax, the date of cancellation of flat will be considered as the relevant date for calculating the time limit of one year as the event that led to the refund

of taxes is the cancellation by the buyer. If cancellation would not have happened, the refund claim would not have arisen at all.

- **Doctrine of unjust enrichment not applicable:** The appellant has borne the incident of service tax whose refund is being claimed. Therefore, the claim is not hit by the doctrine of unjust enrichment.
- **Appeal allowed:** Therefore, the Commissioner (A) set aside the impugned order and allowed the appeal.



Our comments

Pursuant to the COVID-19 crisis in the country, the demand for face masks and hand sanitisers has seen an increase. To meet the increasing demands in the country, the government has been reviewing the export policy for sanitisers and masks regularly.

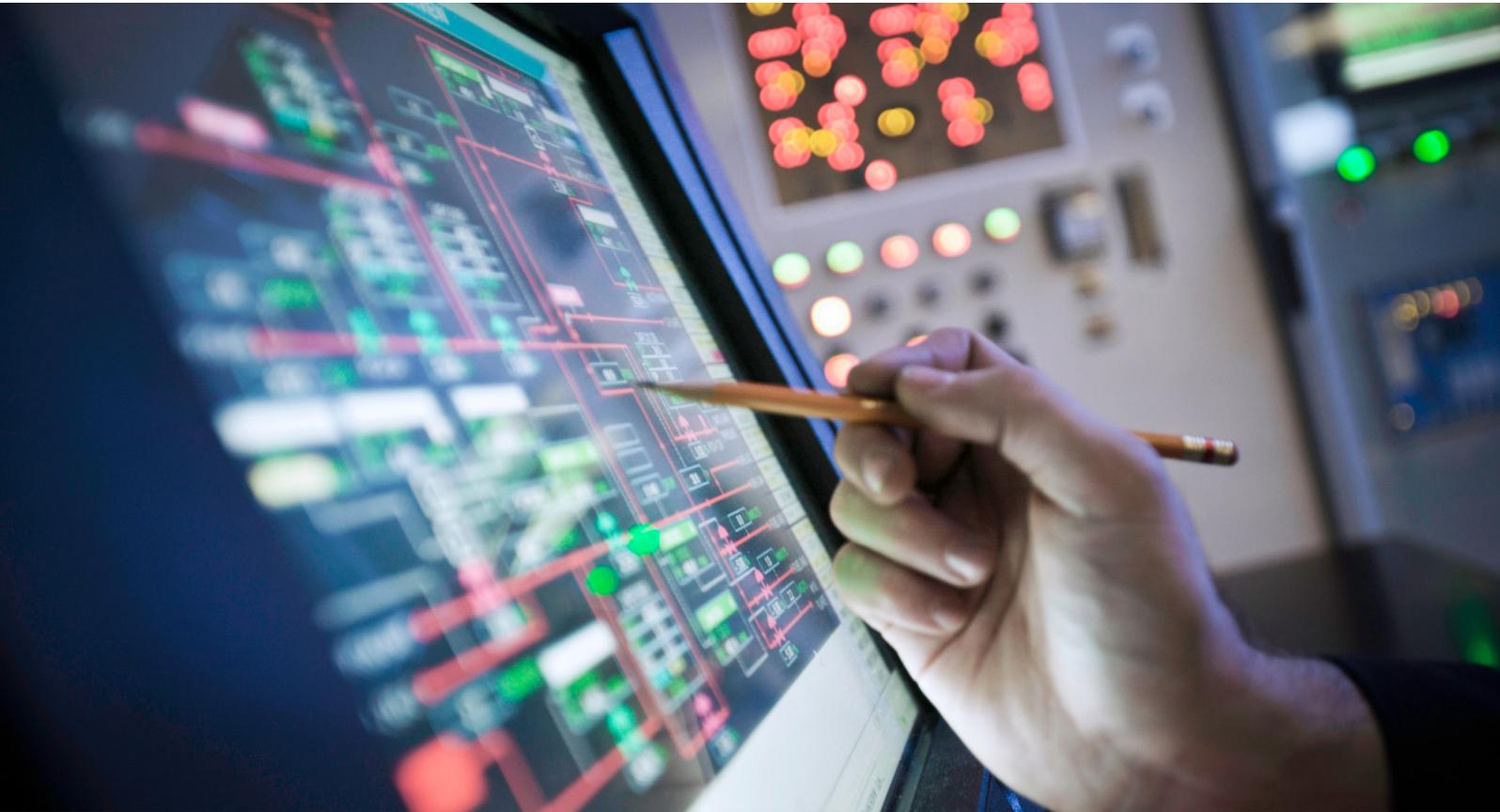
Recently, the Ministry of Finance had also issued clarification on the rate of GST applicable on hand sanitisers, such as soaps and anti-bacterial liquids clarifying that reducing the rate would put domestic manufacturers at a disadvantage vis-a-vis importers as such reduction would lead to inverted duty structure as also will be against the nation's policy of Atmanirbhar Bharat.



19. Section 11B of the Central Excise Act, 1944

2b

Decoding advance rulings



Supply of common administrative/support services by HO to other units leviable to GST – Haryana AAR

Summary

The Haryana Authority for Advance Ruling (AAR), in a recent case, held that the services supplied by Head Office (HO) to its other units/offices by performing activities, such as accounting, marketing support, administrative support, IT support, sales planning, training, policy formation, is leviable to GST.

Facts of the case

- The applicant²⁰ is engaged in manufacturing and trading of plastic houseware products. It has a HO in Gurugram, manufacturing facility in Dehradun and six warehouses in various states in India.
- The HO provides various business support services to these units, such as marketing support, administrative support, accounting, auditing, tax compliance, sales training.
- The above services are included while cross charging the expenses to other units based on sales turnover ratio, number of employees, etc. of these units. The applicant is discharging the applicable tax liability on such services by utilising ITC.
- In addition, certain services are distributed by ISD to the recipient locations/units using prescribed distribution mechanism.
- The applicant sought an advance ruling from the Haryana AAR in respect of the following issues:
 - Whether the activities carried out by the HO for the locations/offices situated in other states, i.e., to the distinct persons would be construed as supply of services between distinct persons and be leviable to GST
 - Whether the HO would be eligible to claim ITC of tax paid on the procurement of goods/services which are used by it during supply of services to the location/offices since goods/services
 - Whether the HO is required to be registered as an ISD for the

20. Tupperware India Pvt. Ltd.

distribution of ITC to recipient locations/offices of the tax paid on input services

- Whether value arrived by the applicant in invoice be deemed open market value.

Haryana AAR observations and ruling²¹

Whether activities carried out by HO for other units would be construed as supply and leviable to GST

The services supplied by HO to units/offices by way of performing activities that benefits other distinct person is chargeable to GST²².

Whether HO would be eligible to claim ITC of tax paid goods/services procured that are used during supply of services to other units

The ITC of GST paid on the receipt of goods or services from a third party can be availed by HO²³.

Whether HO is required to be registered as ISD

In the present case as the applicant intends to distribute common credit received by HO, the applicant must compulsorily obtain separate registration as an ISD²⁴.

Whether value arrived by the applicant in invoice be deemed open market value

The value arrived at by the applicant with respect to provision of such services by the HO on a reasonable basis and declared in the respective invoice would be deemed to be the open market value in respect of each such invoice raised on the units²⁵.



Our comments

Most business organisations with a pan-India presence have similar operating models where the employees at the corporate office or the HO render common group services to other units.

The Karnataka Appellate Authority for Advance Ruling (AAAR), in the case of M/s Columbia Asia Hospitals Pvt. Ltd., held that the corporate office is providing service to its other distinct units by carrying out activities, including accounting and administration work, by using the services of the employees working in the corporate office. This benefits all the other units and therefore, such activity shall be treated as a taxable supply. The Karnataka HC granted a stay on the AAAR's order and the decision is awaited.

While the Karnataka AAAR did not discuss about the valuation of such supply, the Haryana AAR has held that the value arrived at by the applicant with respect to provision of such services by the HO on a reasonable basis and declared in the respective invoice, would be deemed as open market value in respect of each such invoice raised on the units.



21. TSAAR Order No. 07/2020 dated 29 June 2020

22. Section 7(1) of the CGST Act, 2017 readwith Section 25(4) of the CGST Act, 2017 readwith Entry No. 2 of Schedule I of the CGST Act, 2017

23. Section 16(1) of the CGST Act, 2017 readwith Section 2(94) of the CGST Act, 2017

24. Section 2(61) of the CGST Act, 2017

25. Rule 28 of the CGST Rules, 2017

Key National Anti-Profiteering Authority orders



No synchronisation required with turnover for passing ITC benefits

The National Anti-Profiteering Authority (NAA) in a recent case upheld profiteering against the respondent builder and said the benefit has to be computed on the basis of the additional ITC as well as the turnover received by the respondent during the post-GST period. It has no connection with the percentage of work completed or percentage of the amount received, or purchases made by the respondent. Further, it stated the buyers cannot be compelled to wait till the completion of the project to avail benefit of ITC. Therefore, no synchronization is required between the ITC and the turnover while passing on the benefit of ITC.

Facts of the case

- An application against the respondent²⁶ was received by the Directorate General of Anti-Profiteering (DGAP) alleging that it had not passed on the benefit of ITC to the applicant while purchasing apartment in respondent's project, by way of commensurate reduction in price. Thus, the applicant alleged that the respondent had indulged in profiteering.
- The DGAP stated that the respondent has benefited from the additional ITC to the tune of 1.99% of the total turnover during July 2017 to April

2019, which was required to be passed on to the buyers by commensurately reducing the prices of the flats. The respondent has not done the same. Accordingly, the DGAP confirmed profiteering to the extent of INR 9.7 lakh.

- The DGAP also stated that the respondent has profiteering to the tune of INR 3.04 crore in its another project by availing benefit of ITC of 3.62% on the total turnover during the same period.

NAA's observations and ruling²⁷

- **Additional ITC accrued:** the respondent has benefited from the

26. M/s Shapoorji Palonji (Relationship Properties Pvt. Ltd.)
27. Order No. 59/2020 dated 31 August 2020

additional ITC to the tune of 1.99% of the total turnover during July 2017 to April 2019 and to tune of 3.62% during the same period in its another project.

- **No connection with work done:** The benefit has to be computed on the basis of the additional ITC as well as the turnover received by the respondent during the post-GST period. It has no connection with the percentage of work completed or percentage of the amount received, or purchases made by the respondent.
- **No synchronisation required with turnover:** The NAA further stated that the buyers cannot be compelled to wait till the completion of the project to avail the benefit of ITC. Therefore, no synchronisation is required to be done between the ITC and the turnover while passing on the benefit of ITC.
- **Profiteering upheld:** The NAA thus upheld profiteering against the respondent and ordered that the same shall be paid to buyers along with 18% interest from the date of amount collected from them till the date of making payment within a period of three months from the date of the order²⁸. Further, ordered that the respondent shall reduce the prices to be realised from the buyers of the flats of the above projects commensurate with the benefit of ITC received by him²⁹.



Our comments

The GST laws do not prescribe mechanism/methodology to determine the quantum of benefits to be passed on. Non-availability of the prescribed mechanism is one of the major reasons of non-compliance to anti-profiteering provisions.

Various writ petitions have already been filed in the HCs against the orders pronounced by the NAA. The Delhi HC recently heard a batch of 37 writ petitions filed in this regard and directed

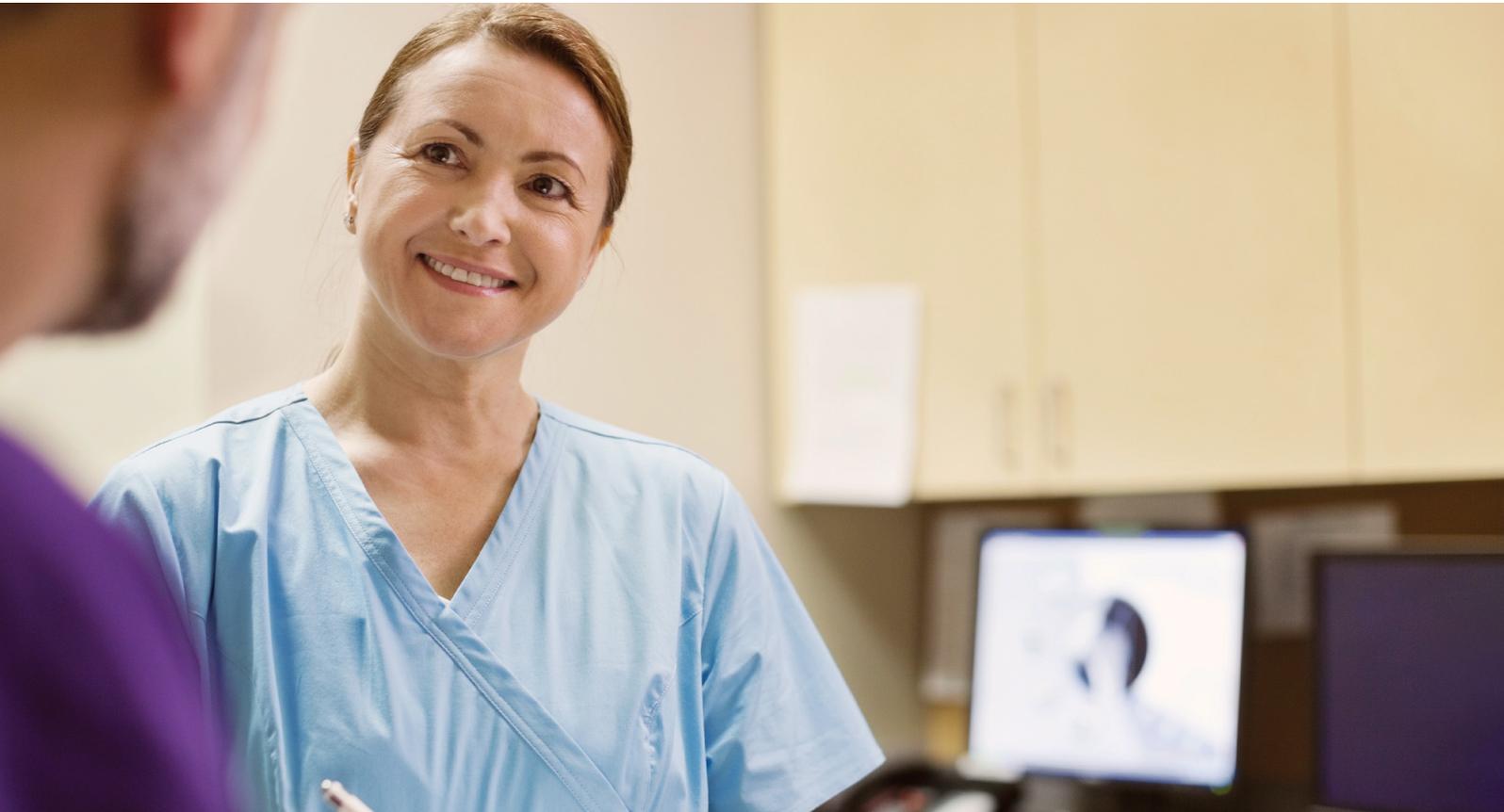
clubbing of all the questions on constitutional validity. It also directed continuation of interim orders and posted the matter for final hearing to 3 November 2020.

In addition, it is pertinent to note that the CBIC has recently extended time limit for completion or compliance of any action by authorities under the anti-profiteering provisions during 20 March 2020 to 29 November 2020, up to 30 November 2020.

28. U/s 171(1) of the CGST Act, 2017 read with Rule 133(3)(c) of the CGST Rules, 2017
29. Rule 133(3)(a) of the CGST Rules, 2017

3

Expert's column



Pharma industry: Looking for a rebound

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The lockdown imposed as a result of COVID-19 pandemic has hit revenue and employment of several businesses and industries. India is currently one of the leading exporters of generic drugs across the world. The demand and supply of pharmaceutical products in India has increased rapidly, given the medical emergency. As demand expands across the globe, Indian pharmaceutical industry aspires to be the largest supplier of drugs by 2030.

However, India is dependent on imports for raw material, especially active

pharmaceutical Ingredients (APIs), 70% of which are imported from China. If the supply disruption continues over the next three to nine months, the pressures on stock supplies could intensify in case of generic drugs, especially anti-infectives, nutritional supplements and chronic care drugs in the future.

Let us consider a few challenges under GST, expectations by the pharmaceutical sector and key measures taken by the government

Key challenges under GST

IDS with API's procurement at higher rate

Afflicted with an IDS, most formulations attract a lower rate on supply of final products while the APIs attract a higher

rate. Under GST inputs and input services including APIs, chemicals, base formulations, loan licensee charges and commission charges are majorly taxable at a rate of 18% vis-à-vis the output supplies of formulations being taxed with GST at 5% and 12%. The primary concern faced by all industry participants is the ineligibility to obtain refund of the input services (consequent to amendment in the GST law in June 2018) which leads to an accumulation of ITC in the books. Such inability to set-off accumulated ITC leads to blockage of the working capital and in turn, leads to rising production costs. Consequently, it increases the prices of the final products. For the pharmaceutical industry, whose objective is to deliver low cost vaccines and drugs, absorbing



the high procurement tax cost becomes cumbersome, particularly for input services.

ITC related challenges

- **Reversal on free samples and expired goods**

ITC is to be reversed in case of supply of free of cost samples for clinical testing, physician samples and product literature provided to doctors. Further, ITC reversal and tax adjustment are a major concern in case of return of expired goods, wherein the average shelf life of medicines/drugs is approximately two-three years from the date of manufacture. Thus, time limit of issuing credit notes by the suppliers not later than September following the end of the financial year to adjust their tax liability becomes a concern.

- **Lack of clarity on research and development (R&D) expenses**

R&D activities are a vital expenditure

for the pharma sector and certain ambiguities exist in relation to the treatment to be adopted for claiming ITC in respect of such expenses. Few companies are claiming full value of ITC in the states where R&D centre is located, while others are distributing such ITC to their manufacturing locations or alternatively to all locations/units claiming that the benefit arising out of such expenditure accrues to the entire company. The GST law provides for the amount of reversals to be computed as pharmaceutical companies have a considerable exemption ratio¹. This would have an indirect exposure on the working capital management for each location and at an organisational level.

- **On stock transfers**

Stock (or branch) transfers are liable to GST and the valuation thereof needs to be typically undertaken at open market value. In cases where full ITC is available to the recipient branch, the law provides

that the value declared in the invoice be considered as open market value. However, in case of pharmaceutical industry, a substantial portion is exempted. In such cases, as ITC is available to recipient branches only in proportion to their taxable supplies, the stock transfer valuation is required to be undertaken at open market value. This results in reversal of proportionate credit by such recipients, consequently, negatively impacting the working capital of pharma entities with presence across states.

Anti-profiteering

Anti-profiteering provisions were put in place so businesses could pass on the benefit of lower taxes and expanded input credit on account of GST. The provision mandates explicitly passing benefit to the recipient, by commensurate reduction of prices. It does not lay down any method or approved formula to calculate the said benefit. Further, it neither specifies if the same is applicable at a product level/ service level/entity level nor defines the applicable circumstances. In terms of Rule 126 of the CGST Rules, 2017, NAA has issued Methodology and Procedure, 2018, containing various clauses dealing with procedural aspects, however, the law has not prescribed any clear machinery or procedure for determining the quantum of profiteering. Several pharmaceutical companies have been under the lens and served notices. There have been instances where the authorities have imposed penalty on some companies for the drugs where prices have been increased in lines with the regulations issued by National Pharmaceutical Pricing Authority (NPPA) and Drug Prices Control Order (DPCO).

Goods sent on job work

Under the job work model, the principal manufacturer sends inputs and capital goods to the job worker without payment of tax. Such goods and capital goods should be received post completion of job work within one

and three years, respectively. Non-compliance of the same would result in such transactions to be considered as a deemed taxable supply by the principal to the job worker on the day when such goods were sent out. Due to the ongoing pandemic, there has been a persistent issue of shortage of labour for which there are no foreseeable solutions. This has led to a slowdown in manufacture and other job work processes. Consequently, it can be envisaged that there could be a delay in receiving the processed goods that would result in deeming the transaction as a taxable supply, leading to generation of tax and interest in the hands of the principal.

Expectations from the government under GST

- To correct IDS, the Gujarat HC recently allowed refund of ITC in respect of input services under the IDS. While this judgment was welcomed by the industry, in a recent case, the Madras HC held that the provision of not allowing refund of input services is *intra vires* the law. With contrary rulings, the controversy around availability of input service refund continues. Thus, the government should bring appropriate amendments to address the rate structure or allow refund of ITC in case of input services under IDS.
- To address issue of ITC reversals, the government should consider increasing the time limit for issuing credit notes to a period of three years compared with the current period available till September of next financial year. This would enable the supplier to adjust tax liability for goods returned due to expiry/spoilage without any need to resort to an alternate method of treating the return of such goods as a fresh supply transaction.
- R&D expenditure partake a significant percentage of a pharmaceutical company's budget. Despite the pandemic, 29% of the healthcare sector is looking at an increase in R&D investments while 39% are expecting to increase investments in technological advancements in the next 12 months, according to IBR H1 2020. It is imperative that the government should release necessary clarifications directing a uniform approach for claiming ITC on these

expenses.

- Valuation in case of stock transfer transaction should be relooked at to ensure there is no additional tax burden for the entity on account of credit reversals.
- In case of job work arrangements, the government should consider providing a relaxation period of additional time (for instance, one year) for both inputs as well as capital goods, thereby minimising the risk of working capital impact arising due to such unforeseen delays, especially during the current pandemic.
- Being an important provision, government should consider making anti-profiteering unambiguous and litigation free. It should consider providing for a proper machinery to compute the profiteering amounts. Separately, under the current

demands. Since the landscape of doing business has changed in the last half year and continues to change today as well, base price comparisons to determine anti-profiteering would be unfair and harsh on suppliers. Authorities should ideally factor the changed business realities before chasing suppliers. While investigating, anti-profiteering authorities would also need to be mindful of COVID-19 factors, such as running costs meter, reduced economies of scale, increased supply chain costs, restriction in cross border movements and other such factors. Thus, in instances of change in law or business structure, prices may eventually be driven-up. However, it would be wrong to compare the base price to a time when the economic conditions were stable, pre-COVID-19. In a free economy, market forces and economic conditions should ideally be the price determinants, with demand and supply conditions contributing to



COVID-19 scenario, the dynamics of determination of drug prices in India needs to be relooked. This will ensure most pharmaceutical companies heavily investing in research activities for developing a vaccine are not burdened with uncalled-for profiteering investigations and consequent

pricing. Alternatively, the government may also look for a temporary suspension of the anti-profiteering provisions till things are normalised.

- Capital goods contribute to huge investment costs, government should consider allowing refund of GST paid

on procurement of capital goods.

- To encourage new set ups/expansion in existing capacities, government should consider removing restriction on availment of ITC on construction of factories and office premises.

Key measures to counter the COVID-19 impact

Various schemes, such as production linked incentive, have been announced that will likely appeal more to the small players. The same would boost domestic manufacturing segment and attract large investments in the pharma sector with the aim to boost manufacture of key starting materials/ drug intermediates, APIs, medical devices with common facilities, such as solvent recovery plant, distillation plant, power and steam units, common effluent treatment plant as well as other infrastructural facilities. Schemes of such nature that have the potential to generate additional employment opportunities, reduce the import burden of medical devices as well as APIs, adopt smart technologies, combined with certain regulatory and tax relaxations would be just the impetus the sector needs during this pandemic.

There has been indirect effect on the continuity of supply of medicines due to lockouts, manpower supply, raw materials supply issue, stoppage of transportation, etc. However, the government under the Department of

Pharmaceuticals has issued instructions for unobstructed movement of pharmaceutical goods. The government has also issued a notification to bring all medical devices and medical equipment sold in India under the existing quality and safety regulatory framework by declaring them as “drugs”. It has exposed all medical devices to India’s Drug Price Control Regulation Order put in place to make drugs affordable and accessible. Since then, all such manufacturers and importers of medical devices and medical equipment sold in India are careful to ensure that the maximum retail price of their products is not increased by more than 10% within a period of 12 months.

To ensure undisrupted supply of essential medical facilities, the government had excluded veterinary hospitals, pharmacies and research labs from the lockdown and also exempted them from the Disaster Management Act, 2005. Further, the Directorate General of Foreign Trade vide various notifications has made “free for export” certain APIs, such as antibiotics, hormones and vitamins, amongst other medicines, subject to certain exceptions.

Conclusion

It is expected that the course of economic recovery in India will be smoother and faster than some other countries. While the government has

taken several safety measures through lockdown and restricted movements, it is time to take calculative stride ahead alongside this pandemic and look to rebound the business growth.

Taking experience from these unprecedented pandemic, pharmaceutical companies must also monitor the evolving situation and ensure enterprises are aware of clauses of their contracts that may become problematic in the longer term.

- Revisit all the ongoing contracts, especially the force majeure clause as any ambiguity may lead to litigation in the future concerning the supply or payment criteria
- Review disaster recovery planning in case of prolonged disruptions, considering their supply chain, APIs, production of medicines, etc. and restructure their contractual clauses, where required
- Realign manpower-related policies especially around compensation for casual laborers in case of temporary layoffs



4

Issues on your mind



What are the GST implications in respect of free supply, promotional activities, etc. Is ITC available in respect of goods and/services used for free supply, promotional activities?

Under the GST law, free supply may not be liable to tax. In this regard, the CBIC had issued a clarification³⁰ in respect of GST implications on various sales promotion activities as under:

- **Free samples and gifts:** Samples provided free of cost do not qualify as 'supply' under GST and are thereby not chargeable to tax (except where the activity falls within the ambit of Schedule-I of the CGST Act, i.e., activities to be treated as supply even if made without consideration). It has been further clarified that the ITC shall not be available to the extent used in relation to such free samples/gifts.

- **Promotional activities such as buy one get one free offer:** Taxability of such supply will depend upon whether the supply is a 'composite supply' or a 'mixed supply' and the rate of tax shall be determined accordingly. It has been further clarified that the ITC shall be available to the supplier for the inputs, input services and capital goods used in relation to supply of goods or services or both as part of such offers.

Is interest in case of delay in payment of GST be paid on gross tax liability or net tax liability, after adjustment of ITC?

The GST Council, in its 39th meeting, recommended that the interest on delay in payment of the GST should be charged on the net tax liability retrospectively from 1 July 2017.

Accordingly, the Finance (No. 2) Act, 2019 amended the provisions relating to computation of interest liability in case of delay in paying the GST. As per the amended provision, interest on delay in payment of GST shall be levied on that portion of the tax that is paid by debiting the ECL, i.e. net tax liability. Further, the said provision has been made effective prospectively from 1 September 2020³¹.

However, as the GST Council had recommended the amendment be made retrospectively, the recently notified provision created confusion amongst the taxpayers. To address the concerns, the CBIC had clarified that no recoveries shall be made for past period and that the law shall be amended suitably in due course to implement the GST Council's decision³².

30. Circular No. 92/11/2019-GST dated 7 March 2019

31. Notification No. No. 63/2020-Central Tax dated 25 August 2020

32. CBIC Press Release dated 26 August 2020

What is the procedure to use the offline tool to match auto-populated ITC in Form GSTR-2B?

The GSTN has now made an offline tool available to the taxpayers to match ITC as auto-populated in their Form GSTR-2B with their purchase register. This tool will help the taxpayer compare their ITC as per their purchase register with the ITC, as shown in their auto-populated Form GSTR-2B and thus help them to claim correct ITC while filing Form GSTR-3B.

To use the matching offline tool, taxpayers need to:

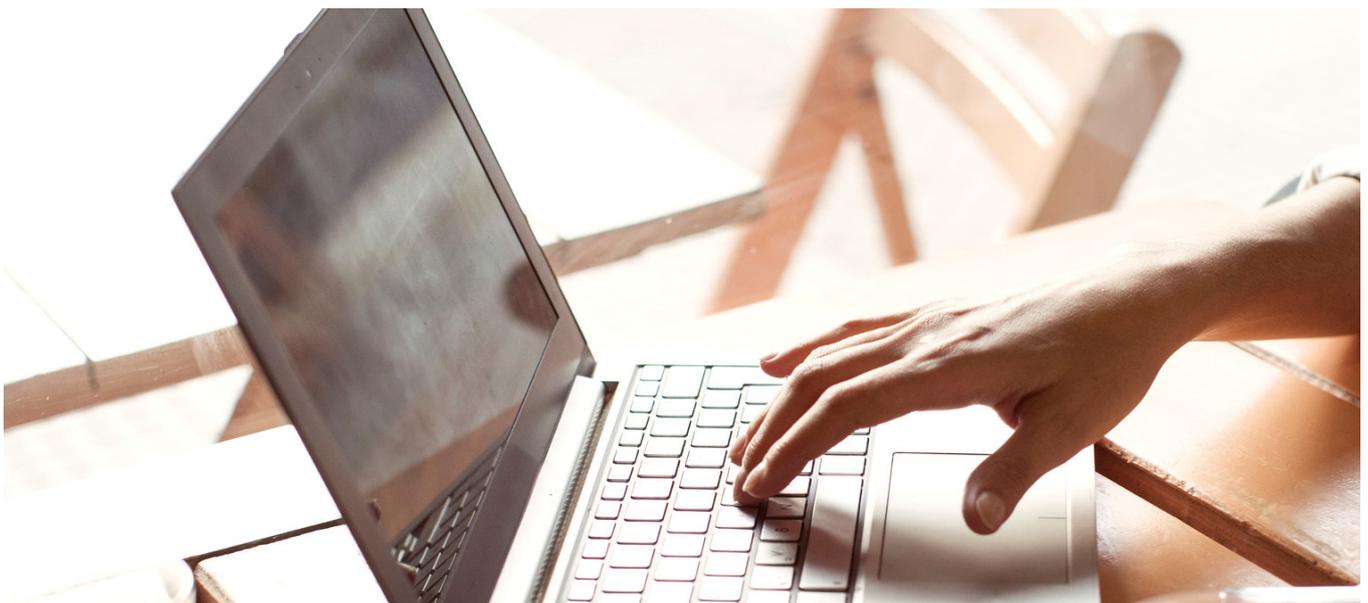
- Download and install the offline tool on their system
- Download the Form GSTR-2B JavaScript Object Notation (JSON) file from the GST portal
- Prepare purchase register in the template provided in the offline tool
- The total number of documents to match should be preferably be less than 3000

Steps to use the utility:

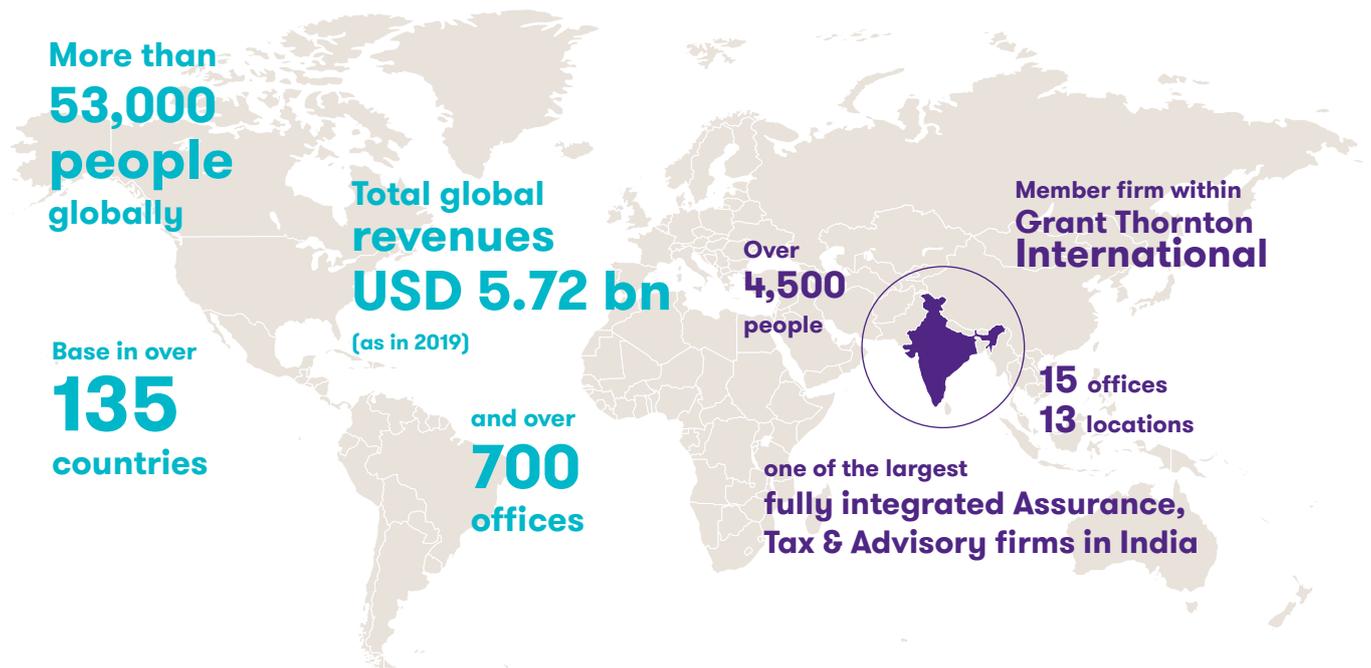
- Download the utility from GST common portal by navigating to Downloads>Offline Tools> Matching Offline Tool
- Following boxes are displayed on offline tool dashboard page:
 - GSTR-2B
 - Import Purchase Register (PR)
 - Matching result
- Import GSTR-2B JSON file, downloaded from GST portal into the tool, by tab 'Open downloaded JSON file' and use it to view the same.
- Import the purchase register data, maintained in the template provided with offline tool, using Excel or CSV format, from Import Purchase Register (PR) tile.
- Click on 'Match' button to match the above two details. The utility will match the table wise details based on the criteria for matching selected. The 'Match' button will be enabled only if purchase register has been

successfully imported into the tool. The matching is done based on GSTIN, document type, document number, document date, taxable value, total tax amount and tax amounts head wise.

- Post matching, user will be navigated to the 'Matching result' page and it will be summarised as exact, partial, or probable match or unmatched.
- Once matching is complete, taxpayer can:
 - Refine matching result
 - View summary of the matching result
 - Export the matching details to CSV file
 - Download the matching result details in excel format from offline utility



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