Grant Thornton

GST Compendium

A monthly guide

September 2020

Editor's note

The e-invoicing requirement has been made mandatory for businesses with turnover of more than INR 500 crore w.e.f. 1 October 2020. This will help track invoices on real-time basis and ensure better monitoring and put a curb on fake invoices. It is expected that this threshold will gradually be lowered over time. Therefore, businesses which do not fall under the above threshold should also prepare their systems and processes to align with the likely change in future.

On the judicial front, the Gujarat HC has pronounced a welcome ruling, allowing the refund of input tax credit on input services under inverted duty structure. It held that the denial of refund for input services is violative of GST provisions. A similar writ petition was also filed before the Madras HC and final verdict is awaited. It will be interesting to observe the position taken by the government on this subject.

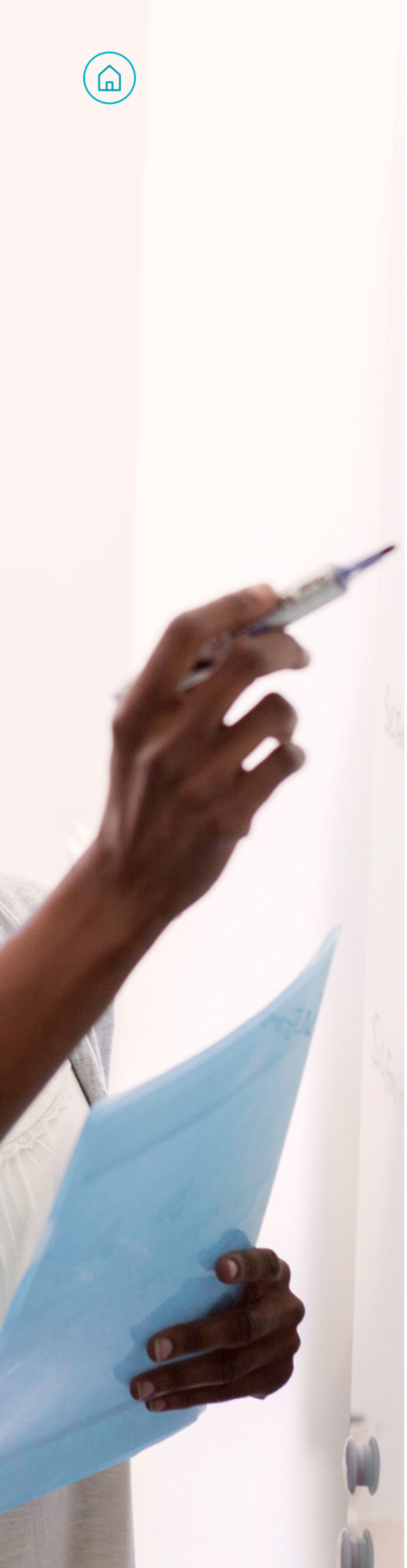
The Delhi HC has taken up a batch of 37 writ petitions collectively on constitutional validity and legality of GST anti-profiteering provisions and has posted the matter for final hearing on 3 November 2020. This is a keenly watched event and will set tone for further course of action for both the taxpayers and tax administration.

Further, NAA has recently set aside penalty proceedings, stating that relevant provisions were inserted subsequently and in absence of any penal provisions during the period of dispute, no penalty can be imposed.

This edition also discusses importance of operationalising GST Appellate Tribunals on priority. At present, taxpayers can file writ petition in HCs against order of appellate authorities. GST being a relatively new law, a robust appellate mechanism is need of the hour.

We hope you will find this issue informative and interesting.

Vikas Vasal
National Managing Partner, Tax



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01 Important amendments/updates

Interest on delay in payment of 'net tax liability' applicable with effect from 1 September 2020

The Finance (No. 2) Act, 2019 had amended the provisions related to computation on interest liability in case of delay in paying GST. The amendment provided that the **interest on tax payable** in respect of:

- supplies made during a tax period; and
- declared in the GST return for the said period furnished after the due date

shall be levied on that **portion of the tax** that is paid by debiting the electronic cash ledger.

The amendment is effective from **1 September 2020**.

Our comments

The GST Council in its 39th meeting had recommended that the interest on delay in payment of 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. It has been clarified that, in accordance with the decision taken by the GST council in its 39th meeting, no recoveries shall be made for past period.

This is a welcome move and will provide much needed relief to the taxpayers.

Government issues advisory on e-invoicing system

The Central Board of Indirect Taxes and Customs (CBIC) recently notified mandatory e-invoicing for businesses having turnover above INR 500 crore with effect from 1 October 2020.

The government has now issued an advisory explaining the e-invoicing system and detailing procedure to be followed by taxpayers for generating the e-invoice. Some of the important aspects are as under:

- **Generate Invoice Reference Number (IRN):** The notified taxpayers are required to generate the IRN for the supplies/sales, i.e., invoices, debit notes and credit notes for the local, interstate and export transactions. The IRN can be generated by a supplier only and not by buyer or transporter.
- **Details to be uploaded for generating IRN:** The taxpayer is required to upload complete invoice details, prepared manually or through internal ERP/accounting system as per the format. After due validations of the data, the system returns the IRN with the signed invoice and QR code to the taxpayer.
- **Details to be mentioned in invoice:** The IRN, acknowledgment number, date and QR code has to be printed on the invoice being issued to the buyer.
- **Verification facility:** One can upload the IRN generated and signed invoice file and get it verified on the portal for the authenticity of the IRN using the 'Verify Signed Invoice' facility under the 'Search' option.
- **Logging on to the e-invoice system:** The taxpayer can use same username and password created on the e-way bill system for logging on to e-invoice system. If a taxpayer is not registered on the e-way bill system, he/she can register for the e-invoice system, which will enable him/her to access the e-way bill system as well.

Government amends export policy relating to PPE kits/masks

Considering the increase in demand for face masks and related personal protection goods due to the COVID-19 crisis, the government had earlier put restriction on export of Personal Protection Equipment (PPE) kits. It has now made changes to the extant export policy.

The Directorate General of Foreign Trade (DGFT) has now removed restriction on export of certain PPE kits. Accordingly, following items are now freely exportable:

- Medical coveralls of all classes/ categories
- All masks (except N95/FFP2 masks or its equivalent)
- Face shields

Further, the following PPEs exported either as part of kits or as individual items have been **shifted from prohibited to restricted** category as under:

Item	Condition
Medical Goggles	Monthly export quota of 20 lakh units
N95/FFP2 masks or its equivalent	Monthly export quota of 50 lakh units

It should be noted here that Nitrile or Nitrile Butadiene Rubber (NBR) gloves shall continue to be prohibited.

DGFT notifies changes in the Merchandise Export from India Scheme

Background

Considering the limitation on fund allocation and to limit the issuance of any more scrips, the online Merchandise Export From India Scheme (MEIS) module was blocked from 23 July 2020. However, realising the difficulties of exporters the ministry of commerce and industry had intimated that they are looking for an early solution to resolve the issue.

Key changes notified in the MEIS

The Directorate General of Foreign Trade (DGFT) has notified following changes in MEIS:

- **Cap on total rewards under the Scheme:** The total reward which may be granted to an Import-Export Code (IEC) holder shall not exceed INR 2 crore per IEC for exports made during the period 1 September 2020 to 31 December 2020.
- **IEC holders who cannot submit any claim:** Following would not be eligible to submit claim under the MEIS:
  - An IEC who has not made any exports for a period of one year preceding 1 September 2020 or
  - New IECs obtained on or after 1 September 2020.
- **MEIS to be discontinued:** The DGFT has given an advance notice informing that the benefits under the MEIS shall not be available for exports made with effect from **1 January 2021**.

Manufacture and Other Operations in Special Warehouse Regulations, 2020 notified

The CBIC notified the Manufacture and Other Operations in Special Warehouse Regulations, 2020 effective from 17 August 2020. Some of the important aspects of the regulations are as under:

- **Units covered:** The regulations shall be applicable to:
  - Units carrying on manufacturing process or other operations in relation to goods in a warehouse or special warehouse; or
  - Units applying for permission to carry on the said process in a warehouse or special warehouse.
- **Eligibility to apply:** The following persons are eligible to apply for operating:
  - A person who applies for licencing of a special warehouse along with permission to undertake manufacturing and other operations in the said warehouse.
  - A person who has been granted licence for warehousing specified goods in accordance with Special Warehouse Licensing Regulations, 2016.
- **Application process:** An application under these regulations shall be made to the Principal Commissioner of Customs (PCC) or the Commissioner of Customs (CC), along with an undertaking to:
  - Maintain accounts of receipt and removal of goods in digital form and digitally furnish the same to the bond officer every month.
  - Provide facilities, equipment and personnel as required by the Regulations.
  - Execute a bond and submit security in such manner and format as may be specified.
  - Inform the original and revised input-output norms, as the case may be, for raw materials and the final products.
  - Pay for the services of supervision of the warehouse by custom officers as determined by PCC or CC.
  - Comply with such other terms and conditions as may be specified by the PCC or CC.
- **Grant of permission:** The PCC or CC, upon due verification of the application and after ensuring that all requirements of regulations have been fulfilled, may grant permission to operate under the provisions of these regulations, along with a licence to operate as a special warehouse where required, subject to such conditions as deemed necessary.
- **Validity of permission**: The permission granted under these regulations shall remain valid unless it is cancelled or surrendered or the licence to operate as a special warehouse is cancelled or surrendered.

Customs (Administration of Rules of Origin under Trade Agreements) Rules, 2020 notified

Summary

The Finance Act, 2020 had inserted Chapter VAA pertaining to administration of rules of origin under trade agreement. The chapter contained provisions relating to procedure for claim of preferential rate of duty.

In this regard, the CBIC have now notified the Customs (Administration of Rules of Origin under Trade Agreements) Rules, 2020. These new rules shall be effective from **21 September 2020** and shall apply to import of goods where the importer makes claim of preferential rate of duty in terms of a trade agreement.

Some of the important aspects of the rules are as under:

Procedure to claim preferential tariff claim

For the purpose of claiming preferential rate of duty under a trade agreement, the importer or his agent shall follow the procedure as under:

Declaration: The importer shall make a declaration in the bill of entry that the goods qualify as originating goods for preferential rate of duty under that agreement.

Mention tariff notification: The importer shall indicate in the bill of entry the respective tariff notification against each item on which preferential rate of duty is claimed.

Certificate of origin: Produce certificate of origin covering each item on which preferential rate of duty is claimed.

Details to be mentioned in bill of entry: Following details should be entered in the bill of entry:

- certificate of origin reference number date of issuance of certificate of origin
- originating criteria
- indicate if accumulation/cumulation is applied
- indicate if the certificate of origin is issued by a third country (back-to-back
- indicate if goods have been transported directly from country of origin

Documents to be retained by the importer

The importer claiming preferential rate of duty shall possess information as indicated in Form I, to demonstrate the manner in which country of origin criteria (including the regional value content) and product specific criteria specified in the Rules of Origin are satisfied. The importer shall submit the same to the proper officer on request.

Further, the importer shall keep all supporting documents related to Form I for at least five years from date of filing of bill of entry and submit the same to the proper officer on request.

Situations when verification request can be made

The proper officer may, during the customs clearance or thereafter, request for verification of certificate of origin from the verification authority. The verification request shall be made in following cases:

- If there is a doubt regarding genuineness or authenticity of the certificate of origin for reasons such as mismatch of signatures or seal when compared with specimens of seals and signatures received from the exporting country in terms of the trade agreement.
- If there is reason to believe that the country of origin criterion stated in the certificate of origin has not been met or the claim of preferential rate of duty made by importer is invalid; or
- If verification is being undertaken on random basis, as a measure of due diligence to verify whether the goods meet the origin criteria as claimed.
- In addition to above, the CBIC has also issued guidelines to provide procedure for sending verification request to the verification authorities in exporting countries and for implementation of the above rules.

CBIC revises guidelines for conducting hearings through videoconferencing

On account of the coronavirus disease (COVID-19) pandemic, the CBIC had decided that personal hearing in respect of any proceedings may be conducted through videoconferencing facility. This was done to ensure social distancing and reduce physical presence through use modern information and communication technology systems. In this regard, it had issued certain guidelines for the conduct of virtual mode of personal hearing.

Pursuant to above, the CBIC has now issued revised guidelines as under:

Key revised guidelines

- **Mandatory conduct of hearing through virtual mode:** The CBIC has instructed that personal hearing in respect of any proceedings before the appellate or adjudicating authority shall be mandatorily conducted through videoconferencing facility. For this purpose, the taxpayer is required to provide the email address for correspondence.
- **Date and time of hearing shall be informed in advance:** The date and time of the hearing along with the link for the videoconference shall be informed in advance through the official e-mail. The e-mail would also give details of the officer-in-charge who would provide assistance to the party for conducting the virtual hearing. It has been stated that the link should not be shared with any other person without the approval of the adjudicating/appellate authority
- **Vakalatnama or authorisation letter:** The taxpayer or the authorised representative appearing in virtual hearing should file their vakalatnama or authorisation letter along with a copy of photo ID and contact details to the adjudicating/appellate authority through official email address.
- **Submissions made during the hearing:** The submissions during the virtual hearing shall be recorded in writing and a statement of the same shall be prepared known as 'record of personal hearing'. A copy of the record shall be mailed to the party in pdf within one day of the hearing.
- **Modification of record of personal hearing:** If the appellant/authorised representative wants to modify the contents of the record of personal hearing, they can do so and sign the modified record. This modified record should be sent to the adjudicating/appellate authority within three days of the receipt of the email record of personal hearing.
- **Additional submissions:** If the appellate/authorised representative prefers to submit any document including additional submissions during the virtual hearing, he may do so by sending self-attest scanned copy of the same to the adjudicating/appellate authority. The additional submissions should be sent immediately after the hearing and in no case after three days of the hearing.

CBIC amends provisions related to GST registration

The CBIC, pursuant to the GST Council's recommendation, made Aadhaar verification mandatory for granting GST registration with effect from 1 April 2020.

In line with the above, the CBIC has now introduced the following changes related to GST registration in the Central Goods and Services Tax Rules, 2017:

Opted for Aadhaar authentication

- **Date of submission of application:** Effective from 21 August 2020, the date of submission of the application in such case shall be earlier of -
  - the date of authentication of the Aadhaar number; or
  - 15 days from the date of submission of the application in Part B of Form GST REG-01.
- **Deemed approval:** If the proper officer fails to take any action within three working days from the date of submission of application, the registration shall be deemed to have been approved.

Failure in Aadhaar authentication or not opting for Aadhaar authentication

- **Mandatory physical verification:** Effective from 21 August 2020, in such case, the registration shall be granted only after physical verification of the place of business in a prescribed manner. Further, notice in Form GST REG-03 may be issued not later than 21 days from the date of submission of the application.
- **Deemed approval:** The registration shall be deemed to have been approved, if the proper officer fails to take any action:
  - **within 21 days** from the date of submission of application or
  - **within seven working days** from the date of the receipt of the clarification.

GSTN issues FAQs and user manual for offline filing Form GSTR-4 by composition dealers

The Goods and Services Tax Network (GSTN) has issued frequently asked questions (FAQs) and user manual for offline filing of annual returns in Form GSTR-4 by composition dealers. It has listed down key features of the form and also provided a detailed procedure for downloading the offline utility, updating and validating business details as well as uploading the file.

Some of the important aspects are as under:

- **Excel-based offline utility:** The offline utility is an excel-based tool to facilitate the preparation of annual return creation.
- **Applicable to all taxpayers under composition scheme:** All taxpayers, who have opted for composition scheme for any period during the financial year, are required to file the said form and furnish details regarding summary of outward supplies, inward supplies, import of services and supplies attracting reverse charge, etc.
- **JSON file to be uploaded on portal:** Once the return is prepared using the offline utility, it is to be uploaded on the GST portal by creating a JavaScript Object Notation (JSON) file and signed through digital signature certificate (DSC) or verified through electronic verification code (EVC).

GSTN launches new functionality in Form GSTR-2A for disclosing imports and SEZ supplies

GSTN has launched a new functionality in Form GSTR-2A (a purchase-related tax return that is automatically generated for each business by the GST portal) for displaying details of import and supplies made from special economic zones (SEZs) units/developers. For this purpose, two new tables have been inserted in Form GSTR-2A.

Following details shall now be disclosed:

- Import of goods from overseas
- Inward supplies made from SEZ units/ SEZ developers

In addition, taxpayers can now also view data related to bill of entries that is received by GSTN from ICEGATE System (customs).

In order to give a feel of the functionality and to gather taxpayer's feedback, currently, data has been uploaded on a trial basis. The taxpayers can share their feedback by raising a ticket on the **self-service portal**.

It has also been clarified that information for bill of entries filled at non-computerised ports (non-EDI ports) and through courier services/ post-service alongwith amendment information made in the details of bill of entries will be made available shortly.

ITC statement in Form GSTR-2B introduced for July 2020 on trial basis

The GST Council in its 39th meeting on 14 March 2020 recommended introduction of an auto-populated input tax credit (ITC) statement. The statement would assist in determining the ITC that is available for taxpayer. Pursuant to the above, the finance ministry has now introduced an auto-populated ITC statement in Form GSTR-2B for July 2020 on trial basis for the purpose of feedback.

It is a static statement and will be made available for each month, on the 12th day of the succeeding month. It is expected that Form GSTR-2B will help in reducing time taken for preparing return, minimising errors, assist reconciliation and simplify compliance relating to filing of returns.

The taxpayers can go through the GSTR-2B for July 2020 by using the following path:

Login to the GST Portal > Returns Dashboard > Select Return period > GSTR-2B

After comparing the statement with the credit availed by them in July 2020, the taxpayer can provide feedback on any aspect of GSTR-2B by raising a ticket on the **self-service portal**.

The government has advised all the taxpayers to go through the **detailed advisory** related to Form GSTR-2B on the common portal before using the statement.

GSTN releases GST system statistics

The GSTN has recently released GST system statistics on the GST portal. The GST system statistics as on 16 August 2020 are as under:

Sr No.	Particulars	Statistics
1	Registered taxpayers	1.25 crore
2	Total returns filed	49.77 crore
3	Total number of payment transactions	14.69 crore
4	Total invoice uploaded	957 crore
5	Payment through the portal (excluding IGST on imports)	25.75 lakh crore
6	E-way bill	133 crore
7	Highest returns transactions in a day	23.86 lakh
8	Highest number of payment transactions in a day	9.55 lakh

Last date for availing Kerala Amnesty Scheme, 2020 extended to 30 September

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.

However, considering the difficulties faced by the taxpayers due to the COVID-19 pandemic, the government has extended the scheme till **30 September 2020**. Further, the last date for payment of the amount determined under the scheme is **31 March 2021**.

Date of completion or compliance of action by authorities under anti-profiteering provisions extended

Due to the COVID-19 pandemic, the Central Board of Indirect Taxes and Customs (CBIC) extended the time limit for completion of compliances under certain indirect tax laws.

The CBIC has now extended time limit for completion or compliance of any action by authorities under the anti-profiteering provisions under the GST law. Accordingly, time limit falling during the period 20 March 2020 to 29 November 2020 has been extended up to **30 November 2020**.

2a Key judicial pronouncements

Gujarat HC allows refund of ITC on input services under inverted duty structure

Summary

The Gujarat High Court (HC), in a recent case, has allowed refund of input tax credit (ITC) in respect of input services under the inverted duty structure (IDS). The HC held that the relevant provisions 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.

Facts of the case

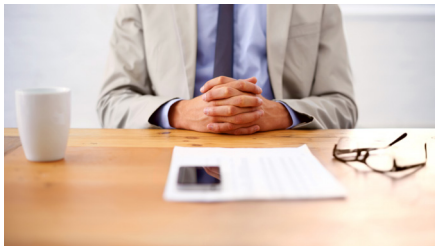
- The petitioner[1] is engaged in the business of manufacture and supply of footwear, which attracts GST at the rate of 5%. Majority of the inputs and input services used by the petitioner attract GST at the rate of 12% or 18%, thereby resulting in accumulation of unutilised credit in electronic credit ledger on account of IDS.
- The tax authorities allowed refund of accumulated ITC of tax paid on inputs however, refund of accumulated ITC of tax paid on procurement of input services was denied.
- The petitioner has therefore challenged validity of the relevant provisions[2] under the GST law to the extent it denies refund of ITC relatable to input services.

Gujarat HC's observations and ruling[3]

- Relevant provision is violative: The HC accepted the petitioner's submission that the relevant provision denying refund of ITC of input services is violative of the refund provision[4], which entitles any registered person to claim refund of 'any' unutilised ITC.
- Refund claim cannot be restricted only to input excluding the input services: The HC observed that the scope of supply[5] includes all forms of supply of goods or services, further, input tax[6] means the tax charged on any supply of goods or services or both made to any registered person. Thus, since input and input service are both part of the input tax and input tax credit, such refund claim cannot be restricted only to input.
- Refund of ITC of input services allowed: The HC stated that keeping in mind

1. M/s VKC Footsteps India Pvt. Ltd.
2. Rule 89(5) of the CGST Rule,2017
3. C/SCA/2792/2019 dated 24 July 2020
4. Section 54 (3) of the CGST Act, 2017
5. Section 7 of the CGST Act, 2017
6. Section 2(62) of the CGST Act, 2017

scheme and object of the GST law, denying a registered person refund of tax paid on input services as part of refund of unutilised ITC[7] cannot be the intent of law. Thus, the HC directs the tax department to allow petitioner's refund claim considering the unutilised ITC of input services as part of the net ITC for the purpose of calculation of refund claim.



Our comments

Refund of accumulated ITC in respect of input services due to the inverted duty structure has been a matter of extensive litigation for businesses into e-commerce, textiles, fabric manufacturers, etc. This is a much-needed decision by the Gujarat HC as the amended provision denying the refund in case of input services was ultra vires to the GST law. Recently, writ petition has also been filed before Madras High Court challenging refund-denial on input services under inverted duty structure and it will be interesting to observe the final verdict of the court.

The government should consider making appropriate amendment in the said provision to avoid any further litigation and settle the long-drawn dispute on this aspect.

Rajasthan HC allows petitioners to make application before the GST Council to avail transitional credit

Background

With a batch of writ petitions, petitioners approached the Rajasthan HC for:

- Allowing them to file Form TRAN-1 thereby enabling them to avail transitional credit; and
- Asking the tax department to allow legitimate tax credit by giving effect to Form TRAN-1 that had been submitted manually.

Further, a few petitioners also challenged the constitutional validity of the transitional credit provisions under the GST law.

The HC order

The HC granted liberty to the petitioners to submit application to the GST Council. The application should seek the Council's recommendation along with requisite particulars, evidence and a certified copy of the order from the GST Council forthwith.

The HC further directed that if the petitioners' assertion is found to be correct, the GST Council shall issue necessary recommendation to the commissioner to enable the them to claim credit within stipulated time.

Our comments

The Delhi HC, in a recent case, held that the time limit prescribed under the GST law for claiming transitional credit is 'directory' in nature. Contrary to this, the Madras HC in another case had held that transitional credit is mandatory and not directory and such credit must be availed within the stipulated time.
The tax department had filed a Special Leave Petition (SLP) against the order of Delhi HC arguing that the time limit prescribed for availing transitional credit is 'mandatory', 'rational' and 'reasonable'. The SC had stayed the operation of the Delhi HC order and the SC's verdict in this regard is awaited.

Gujarat HC upholds constitutionality of provisions relating to place of supply in case of intermediary services

Summary

The Gujarat HC in a recent case held that the relevant provisions under the GST law determining the place of supply in case of intermediary services are constitutional. Further, the HC stated that the services would not qualify to be export of services merely because:

- commission invoices are raised on a person outside India and
- commission is received in foreign exchange in India

Facts of the case

- The petitioner[8] is an association engaged in manufacture of metals and castings for various upstream industries in India.
- The members of the association act as agents to facilitate sale of recycled scrap goods for their foreign principals in India as well as outside India. They have no role in the sale/purchase. The agents receive commission income

7. as interpreted in the Circular No.79/53/2018- GST dated 31.12.2018
8. Material Recycling Association of India

upon receipt of sale proceeds by the foreign principals in foreign exchange.

- The petitioner challenged the constitutional validity of the provisions[9] under the GST law determining the place of supply and prayed to hold the same as ultra vires[10] to the Constitution of India.
- Further, the petitioner prayed that the tax department be directed to allow refund of Integrated Goods and Services Tax (IGST) paid on services provided by the members of the petitioner to their clients located outside India.

Gujarat HC's observations and ruling[11]

- **Mere receipt of commission in foreign exchange does not qualify to be export:** The HC stated that merely because the invoices are raised on the person outside India with regard to the commission and foreign exchange is received in India, it would not qualify to be export of services.
- **Place of supply shall be location of 'intermediary':** There is no deeming provision as tried to be canvassed by the petitioner, but there is legal stipulation to consider the location of the service provider of 'intermediary' to be place of supply. Similar situation was also existing under the service tax regime as well.
- **No double taxation:** The petitioner's contention that said transaction would lead to 'double taxation' stands non-tenable, as intermediary service would not be taxable in the hands of the recipient, however, commission paid by recipient outside India would be deducted from such payment of commission by way of expenses.
- **No unconstitutionality in the provisions:** The HC held that the supply of services by 'intermediaries' to recipients outside India is not export of service and there is no unconstitutionality in the relevant provisions determining the place of supply in case of intermediary services under GST law.
- **Respondents may consider petitioner's grievances:** The HC stated that it would be open for the respondents to consider the representation made by the petitioner to redress its grievance in suitable manner and inconsonance with the GST law.

Our comments

Taxability of 'intermediary services' has been a matter of extensive litigation under the GST regime. Divergent rulings have been pronounced by various advance rulings authorities.

- The West Bengal Appellate Authority for Advance Ruling (AAAR) had held that the marketing and promotion of foreign university's courses and assistance in enrolment/ recruitment of students in India shall be treated as intermediary services. Similar ruling was also given by the Maharashtra AAR, which held that marketing and promotion of Computer Reservation System (CRS) software for foreign clients is intermediary services.
- Contrary to this, the Maharashtra AAR, had held that market research and support services provided by an Indian entity to its overseas parent company and other overseas group companies shall not be classified as intermediary services and shall qualify as 'export of services'.

Even under the service tax regime, the authorities had held that the services of marketing and branding provided by India entity to its parent company in the USA shall be regarded as 'export' as provision of services was on a principal-to-principal basis. The government had also issued a clarification in this regard, which was withdrawn subsequently, and a revised clarification is still awaited.

Though the Gujarat HC has held that the relevant provisions determining the place of supply in case of intermediary services are constitutional, there exists anomaly in the said provisions. For example, in a transaction where both the buyer and seller of the goods is outside India, but the agent is in India receiving commission in foreign exchange, such commission shall be leviable to GST even if there is no movement of goods involved from India. The basic intention of the GST law was to tax goods and services, which are consumed in India. Thus, levying transactions undertaken outside India cannot be the intention of the legislature. Therefore, the government should amend the provisions appropriately to remove the anomaly and avoid future litigation on this account.

It is pertinent to note here that the authorities are misinterpreting the said provisions and as a result genuine exporters, such as Business Process Outsourcing units, other businesses engaged in providing administrative and support services, etc., are being termed as 'intermediary' thereby, effecting their competitiveness. Similar provisions existed under the erstwhile regime and such businesses were treated as exports. The government should accordingly issue a due clarification because levying GST on such services will affect the competitiveness of the Indian exporters.

9. Section 13(8)(b) of the Integrated Goods Service Tax Act, 2017 (IGST Act)
10. under Articles 14, 19, 265 and 286
11. C/SCA/13238/2018 dated 24 July 2020

Delhi HC dismisses PIL seeking classification of masks/sanitisers as 'essential commodity' and GST rate reduction

Background

A Public Interest Litigation (PIL)[12] was filed seeking the following:

- Directions for classifying masks and sanitisers as 'essential commodity' under the Essential Commodity Act, 1955 and fixing the retail prices of the said products[13].
- Directions to reduce the GST rate of 18% on alcohol-based sanitisers to either 5% or 12%.

Delhi HC order

- The Delhi HC dismissed the PIL and held that inclusions of items under the Essential Commodities Act, 1955 as 'essential commodity', is a policy decision of the respondent/ government and, unless the decision can be shown to be manifestly unreasonable or arbitrary, this Court will be extremely slow in interfering with the policy decision of the government.
- In the opinion of the government, masks and sanitisers are now easily available and there is no need to control such commodities or to regulate supply, etc., of these commodities. In the opinion of the government, based upon the facts, there is no need to control the price of the masks and sanitisers[14].
- HC held that the contentions about regulation of quality of these products, as sought to be raised in the petition, are therefore not relevant to the relief sought.
- As regards reduction in GST rates, the HC held that it ought to be kept in mind that the rate of tax cannot be challenged in a court of law unless it is abundantly confiscatory in nature. In the present case, nothing has been argued out about how the present rate of GST is confiscatory in law. Merely, because the petitioner feels that the GST rate applied on masks and sanitisers is excessive, this cannot be a reason for issuing a writ of mandamus and direct the respondents to reduce tax on the said commodities.

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 on timely basis.

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.

Delhi HC hears batch of writ petitions challenging constitutional validity of anti-profiteering provisions

The Delhi HC recently heard a batch of 37 writ petitions filed on the constitutional validity and legality of anti-profiteering provisions under the GST law through videoconferencing.

The HC directed clubbing of all the questions on constitutional validity put forth in the writ petitions and stated that it is agreed between the Counsels that such issues and interpretation of the said provisions be framed by consensus.

It also directed continuation of interim orders and posted the matter for final hearing on 3 November 2020.

12. Gaurav Yadav & ANR
13. By extension of Notifications dated March 12, 2020 and March 21, 2020
14. as per the Office Memorandum dated 1st July, 2020

2b Decoding advance rulings

Supply of food to hospital on outsourcing basis leviable to GST – Telangana AAR

Summary

The Telangana AAR in a recent case held that supply of food to hospital on outsourcing basis is liable to GST. The AAR noted that the exemption under GST law is not applicable to the applicant as it is available only if when the clinical establishment itself provides the service as a part of health care services to the in-patients and not on contractual agreement.

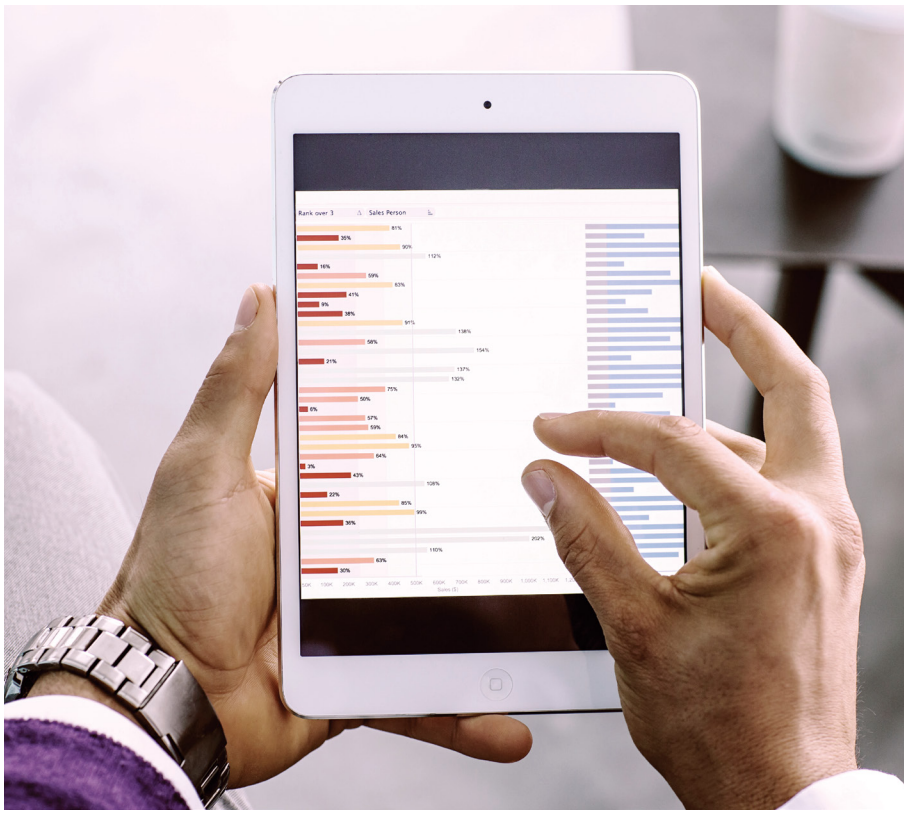
Facts of the case

- The applicant[15] is engaged in supply of food to a hospital through canteen services on outsourcing basis.
- The recipient of the services is the hospital that enters into a contract with the applicant. The charges are received from the hospitals on monthly basis on the coupons collected.
- The applicant sought an advance ruling from the Telangana AAR to understand whether the supply of foods to hospital on outsourcing basis is taxable under GST.

Telangana AAR observations and ruling[16]

- **Exemption unavailable in case of supply of food by person other than clinical establishment:** Under the GST law, exemption is available only when the clinical establishment itself supplies food as a part of health care services to the in-patients. Exemption is not available when such supply of food and beverages is made by a person other than the clinical establishment based on a contractual arrangement with such establishment[17].
- **Supply of food taxable:** Therefore, the Telangana AAR held that GST is payable on supply of the food services by the applicant to hospitals.

15. M/s Navneeth Kumar Talla
16. TSAAR Order No. 07/2020 dated 29 June 2020
17. Entry no. 74 of Notification No. 12/2017 CT (R) dated 28 June 2017 readwith Circular No. 32/06/2018 dated 12 February 2018



Our comments

The Telangana AAR has rightly held that under the GST law exemption is available only when the clinical establishment itself supplies food as a part of health care services to the in-patients. Earlier, the Andhra Pradesh AAR[18] had also held that supply of food supplied to out-patients or attendants or visitors shall be taxable.

However, it is pertinent to note that ultimate objective is to not charge GST on the food being served to the patients. To achieve this objective, the government should consider exempting supply of food by the third party when it is for consumption of the admitted patients.

Even though advance ruling is applicable only to the applicant, the same acts as a guiding tool for other taxpayers with similar issues.

ITC in respect of services received for construction of laboratory unavailable – Telangana AAR

Summary

The Telangana AAR in a recent case held that the applicant is ineligible to avail ITC of GST paid on lease premium charges, annual lease rent and land maintenance charges in respect of land acquired on lease for construction of laboratory. The AAR observed that the 'building' which is to be constructed by applicant falls within the ambit of 'immovable property' and thereby falls under restriction provided under the GST law.

Facts of the case

- The applicant[19] is engaged in providing chromatography services.
- The applicant acquired land on lease for a period of 33 years. As per the terms of the lease, the applicant is required to pay one-time lease premium along with applicable GST at the beginning of the lease.
- In addition, the applicant is also required to pay annual lease rentals at the end of every year to the lessor for 33 years and maintenance charges for the leased premises along with applicable GST.
- The applicant sought an advance ruling from the Telangana AAR to understand the eligibility of ITC in respect of GST to be paid in respect of above charges.

Telangana AAR observations and ruling[20]

- **ITC barred in respect of goods or services used for construction of immovable property:** The AAR observed that under the GST law ITC is barred in respect of goods or services used for construction of immovable property (other than plant or machinery) including when such goods or services are used in the course or furtherance of business[21].
- **Laboratory building falls under the ambit of immovable property:** The 'laboratory building' constructed by the applicant unquestionably falls within the ambit of 'immovable property'[22].
- **Construction of immovable property on own account:** The building after completion of construction would be utilised by the applicant for their own utility to accommodate a laboratory. Thus, it is established that the referred services have been received by the applicant for the purpose of construction of

18. M/s CMC Vellore Association
19. M/s Daicel Chiral Technologies (India) Private Limited
20. TSAAR Order No. 05/2020 dated 24 June 2020
21. Section 17(5)(d) of the CGST Act, 2017
22. As defined under Sec. 3(26) of the General Clauses Act, 1897

immovable property on their own account.

- **Impugned services fall under exclusion:** The services received by the applicant squarely fall under exclusion provided under the GST law.
- **ITC unavailable:** The impugned services referred by the applicant have been received for construction of immovable property on their own account and therefore ITC on these services is barred under the GST law.

Our comments

Availability of ITC in respect of certain services used for construction of immovable property has been a matter of extensive litigation even under the erstwhile regime. The GST law was formulated with the intention of ensuring free flow of credits. However, it provides for certain restrictions in availing ITC in respect of goods or services.

Similar ruling was given by the Tamil Nadu AAR[23] wherein no ITC was allowed against any goods/ services received by applicant for construction of Marriage Hall on own account even if used in course or furtherance of his business of renting the place. The Maharashtra AAR[24] had also denied ITC on input and input services used for construction of commercial immovable property on own account which was subsequently let out. Earlier the West Bengal AAR[25] had also disallowed ITC of lease rent paid during pre-operative period for leasehold land on which resort was being constructed on own account to be used for furtherance of business when the same was being capitalised and treated as capital expenditure. The above ruling was also upheld by the West Bengal AAAR.

It is pertinent to note that such services involve huge amount of expenditure for businesses and such kind of restrictions add to the costs rather than ensuring free flow of credits. At this juncture, it is imperative that a suitable amendment is made in the law to ease the restrictions on availability of ITC in respect of these services.

23. Sree Varalakshmi Mahaal LLP
24. Ashish Arvind Hansoti
25. GGL Hotel and Resort Company Limited

2c Key National Anti-Profiteering Authority orders

NAA sets aside penalty for profiteering as no specific penalty provisions existed prior to 1 January 2020

Summary

The National Anti-Profiteering Authority (NAA), in a recent case, has set aside penalty imposed on the respondent builder who was held guilty for not passing the additional benefit of ITC to buyers of his flats/plots. It held that penalty cannot be imposed in the instant case as no relevant penalty provisions were in existence during the period in which profiteering was committed.

Facts of the case

- The Directorate General of Anti-profiteering (DGAP) had investigated on compliant against the respondent[26] and found that it had not passed on the benefit of additional ITC to its flat/plot buyers in its project[27].
- The DGAP thus concluded that the respondent had denied the benefit of ITC to the said buyers amounting to INR 41.82 lakh pertaining to period **1 July 2017 to 31 August 2018** and accordingly indulged in profiteering[28].
- Therefore, a notice imposing penalty was sent to the respondent[29].

NAA's observations and ruling[30]

- **Violation of anti-profiteering provisions not covered:** The NAA observed that violation of ant-profiteering provisions is not covered under the said penalty provisions. In this regard, it held that-
  - 'profiteered amount' is not a 'tax imposed' under the GST law, and therefore penalty as envisaged under said provision cannot be imposed for violation of anti-profiteering provisions.
  - penalty provision doesn't provide penalty for not passing on the benefits of tax reduction.

26. M/s Eldeco Infrastructure & Properties Ltd.
27. Eldeco County
28. Section 171(1) of the CGST Act, 2017
29. u/s 122(1)(i) of the CGST Act, 2017 r/w Rule 133(3)(d) of the CGST Rules, 2017
30. Order No. 43/2020 dated 14 August 2020

- **Penal provisions non-existent during investigation period:** The NAA observed that the specific penalty provisions for violation of anti-profiteering provisions have been added effective from 1 January 2020[31]. Therefore, the NAA stated that in absence of any penal provisions during the period of dispute, no penalty can be imposed for violation of anti-profiteering provisions.
- **Penalty proceedings dropped:** Accordingly, it directed withdrawal of notice issued for imposition of penalty and dropped the penalty proceedings launched against the Respondent.

Our comments

The relevant penal provisions for imposing penalty in case of violation of the anti-profiteering provisions were inserted recently under the GST law effective from 1 January 2020. The NAA has rightly held that the newly inserted provisions are substantive and cannot have retrospective effect. This is a welcome ruling by the NAA wherein the taxpayer is held not liable to penalty for profiteering done prior to the insertion of specific penalty provisions. The ruling may set a precedent for other similar cases.

31. by inserting Section 171 (3A) of the CGST Act, 2017 vide Finance No.2 Act, 2019 made effective from 1 January 2020 vide Notification No. Notification No. 01/2020 – Central Tax dated 1 January 2020

3 Expert's column

GST Tribunals – when to see the light of sun?

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Many quarter in the industry and those in government felt that a flawed GST is better than a delayed one and perhaps with this thought, the GST was implemented on 1 July 2017. Recently, GST in India completed three years. The journey has been mixed. Several issues remain unresolved, yet the revenue department and the government has been conducive and resolve the issues in a time bound manner.

Considering that GST is fairly a new statute, disputes are bound to take place and it is believed that Tribunal is the forum where majority of the dispute attains finality. As per the Code of Civil Procedure, 1908, the GST Appellate Tribunal holds the same powers as the court and is deemed Civil Court for trying a case.

Constitution of the GST Appellate Tribunal

The GST law recognises that on any given set of facts and laws, there can be different interpretations or viewpoints. GST being a new law, a plethora of litigations have already arisen against rejection of export refund, non-allowing / short allowing of ITC, trade discount, valuation mechanism, place of supply etc. These litigations are handled at first, before the appellate authority, the first level of appellate forum.

GST Tribunal is the second level of the appellate forum, where appeals can be filed against the orders in appeal passed by the appellate authority, or order in revision passed by revisional authority. The law envisages the constitution of two-tier Tribunal[32]:

- National bench/regional benches (for matters related to place of supply)
- State bench/area benches (for matters related to other than place of supply)

32. Section 109 and 110 of the Central Goods and Services Act, 2017

The GSTAT has the following structure:

- **National Appellate Tribunal:** The National Appellate Tribunal is situated in New Delhi, constitutes a National President (Head) along with two technical members (one from centre and state each).
- **Regional Appellate Tribunal:** On the recommendations of the GST Council, the government can constitute (by notification) an 'N' number of regional benches, as required. As of now, there are three regional benches (situated in Mumbai, Kolkata and Hyderabad) in India, wherein each bench constitutes a judicial member and two technical members (for centre and state each).
- **State Appellate Tribunal:** The government, on the recommendations of the GST council has notified the state benches in all states and UTs.

Delay in operational GSTAT

Delay in constitution of the GST Appellate Tribunal (GSTAT) at national, state and regional benches has compelled taxpayers to file writ petitions against appellate orders passed by GST authorities.

The composition of GSTAT is also under consideration after the Madras High Court ruling in the case of Revenue Bar Association Vs. Union of India (2019-TIOL-2188-HC-MAD-GST). The questions before the High Court were:

1. Whether the exclusion of advocates from being considered for appointment as a judicial member in GST Appellate Tribunal, is violative of Article 14 of the Constitution of India.
2. Whether Section 110 (b)(iii) which makes a member of the Indian legal service, eligible to be appointed as a judicial member of the appellate tribunal, contrary to the law laid down by the Supreme Court in Union of India vs. R. Gandhi reported in 2010-TIOL-39-SC-MISC.Whether the composition of the GST Appellate Tribunal, which consists of one judicial member, one technical member (centre) and one technical member (state), by which the administrative members outnumber the judicial member is violative of Articles 14 and 50 of the Constitution of India.

A division bench of the Madras High Court held that composition of GST Appellate Tribunal is unconstitutional. The court held in respect of first challenge that the constitution validity[33] cannot be struck down on the ground on non-inclusion of advocates but recommended that Parliament should consider the eligibility of lawyers to be appointed as judicial members in the Appellate Tribunal.

Further the High Court held that issue of appointment of member of Indian legal service as judicial member is no longer res integra. The issue stands settled in the case of Union of India v. R. Gandhi, (2010). The court also agreed that composition of GSTAT should be on same lines as that of VAT/ CESTAT Tribunals.

Further the court struck down relevant provisions[34] prescribing that the Tribunals that primarily decide the state and citizens cannot be run by a majority consisting of non-judicial members. The High Court held that the Article 50 of the Constitution of India that provides for the separation of the judiciary, must be interpreted in such a way that dominance of departmental member, cannot outweigh the judicial members.

Reverberations of the High Court decision

The order of the first appellate authority is subject to challenge before second appellate authority, i.e., GST Tribunal and appeal to such order is to be filed within the period of three months from the date of communication of order. After the decision of the Madras High Court, the Appellate Tribunals were not constituted and therefore, appeals could not be filed within three months' time-period. In some cases, the appellate authority on the pretext of not having any further remedial option with the appellant has not decided the

33. Section 110 (1) (b) of CGST Act, 2017
34. Section 109(3) and 109(9) of the CGST Act, 2017

cases yet and these are pending since more than one year and in some cases, where order has been passed by the appellate authority but due to non-operationalisation of GST Tribunals the appellant has become remediless.

To overcome these challenges, the CBIC had clarified[35] that prescribed time limit to make application to Appellate Tribunal will be counted from the date on which president or state president enters the office. Accordingly, it was advised to authorities to dispose all pending appeals expeditiously without waiting for the constitution of the Appellate Tribunals.

Conclusion

The saga of litigations appears to be never-ending in the GST law and it will be interesting to see how the GST laws will shape up in this atmosphere of controversial rulings from high courts and how government and judiciary will be able to address this challenges paving the balance of harmony between taxpayers and the tax authorities. A strong and vibrant Tribunal is required in the GST domain, since the law is naïve and prone to various interpretations.

*Sakshi Monga also contributed to this article

35. Circular no. 132/2019 dated 18 March 2020

4 Issues on your mind

What is the mechanism and procedure for e-invoicing system under GST?

The CBIC has notified mandatory e-invoicing for businesses having **turnover above INR 500 crore with effect from 1 October 2020**. The special economic zones are excluded from this requirement. The CBIC has notified the format/schema for e-invoice in **Form GST INV-01**.

Recently, the government has also issued an advisory explaining the e-invoicing system and detailing procedure to be followed by taxpayers for generating the e-invoice. As per the procedure mentioned therein, the taxpayer can use same username and password created on the e-way bill system for logging on to e-invoice system. If a taxpayer is not registered on the e-way bill system, they can register for the e-invoice system, which will enable them to access the e-way bill system as well.

The notified taxpayers are required to generate the IRN for the supplies/sales, i.e., invoices, debit notes and credit notes for the local, interstate and export transactions. The IRN can be generated by a supplier only and not by buyer or transporter. The IRN, acknowledgment number, date and QR code has to be printed on the invoice being issued to the buyer.

What are the key features of customs bonded manufacturing and warehousing scheme?

Under the said scheme, the government **allows import of raw materials and capital goods without payment of duty** for manufacturing and other operations in a bonded manufacturing facility. When the raw materials or capital goods are imported, the import duty on them is deferred. If these imported inputs are utilised for exports, the deferred duty is exempted. In case of domestic consumption, the duty on imported inputs is deferred until the finished goods are cleared to the domestic market.

The CBIC has recently issued detailed regulations, i.e., the manufacture and other operations in Special Warehouse Regulations, 2020, providing the applicability, eligibility and other procedural aspects.

What is Remission of Duties or Taxes on Export Products (RoDTEP) scheme?

The RoDTEP scheme **aims to replace the existing Merchandise Exports from India Scheme (MEIS)**. Under

this new scheme, a mechanism would be created for **re-imbursement of taxes/duties/levies incurred by the exporters**. The rebate would be claimed as a percentage of the freight on board (FOB) value of exports.

The government has also formed a committee to determine ceiling rates under the RoDTEP scheme and to evolve a mechanism for calculations of duties at the central, state and local level that are borne by exporters.

What is the remedy available to taxpayers aggrieved by the order passed by appellate authority in case of non-constitution of Appellate Tribunal?

At present, the only remedy available to the taxpayer is to file **writ petition in the High Court**[36]. However, recently the Allahabad High Court has dismissed a writ on the ground that petitioner can wait and avail the remedy of filing appeal as and when the Tribunal is constituted[37].

36. under Article 226 of the Constitution
37. M/S Air Transport Corporation (Assam) Pvt. Ltd. Versus State Of U.P. And 2 Others

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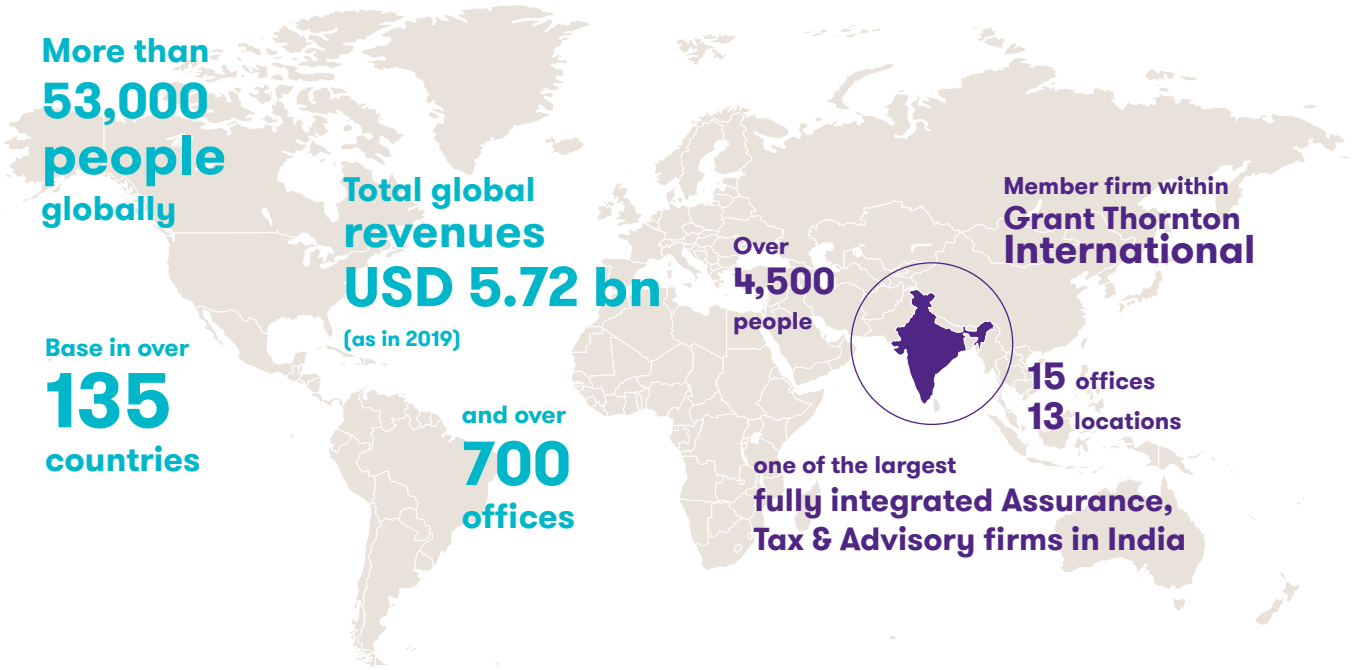

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