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SHAPING VIBRANT INDIA

GST Compendium

A monthly guide

January 2024

Editor's Note

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Greetings for the New Year!

The taxability of secondment arrangements has been one of the most debated issues after the Apex Court's decision regarding M/s. Northern Operating Systems Private Limited (NOS). A significant development to note is that the Board has clarified via an instruction that the ratio of this decision cannot be implicitly applied to every secondment transaction. The evaluation of the various factual matrices, mainly the terms of the agreement between the foreign entity and the group company, would be the significant factor in determining the taxability of such a transaction.

In a much-awaited move, the SC dismissed the department's appeal and upheld the Calcutta HC decision, affirming that ITC cannot be denied due to the supplier's default to pay tax. The HC had pertinently emphasised the trite principle that the purchasing dealer cannot be made to bear the consequences for default of the selling dealer and permitted the entitlement of ITC to the assessee. This landmark judgment greatly relieves the taxpayers grappling with similar mismatch notices and litigation.

Online gaming companies were served show-cause notices for alleged tax evasions of INR 1 lakh crore last year pursuant to the amendments to GST-related provisions. An interesting development to note is that the SC has issued a notice to the government seeking a response to a plea filed by online gaming companies. In September, the SC stayed a Karnataka HC ruling that quashed GST demand for alleged tax evasion amounting to INR 21,000 crore on Gameskraft Technology.

Besides, the government of Haryana has notified the Haryana One Time Settlement Scheme for Recovery of Outstanding Dues, 2023, for settling outstanding pre-GST tax dues. The scheme is effective from 1 January 2024 and valid till **31 March 2024**.

On the customs front, the Directorate General of Foreign Trade has relaxed the norms for the import of used IT assets (Laptops, desktops, monitors, printers) from SEZ to DTA. This will help in the seamless transfer of second-hand goods from SEZ to DTA and reduce the procedural challenges in satisfaction of the specified conditions.

Our experts have expressed their views regarding the Equivalisation Levy 2.0 in this edition.

On the direct tax front, the Central Board of Direct Taxes has notified ITR-1 and ITR-4 for AY 2024-25, issued directions for extending the timelines for processing of ITR with refund claims for AY 2018-19 to AY 2020-21, and issued guidelines relating to TDS provisions for E-Commerce Operators.

I hope you will find this edition an interesting read.

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Important amendments/ updates

A. Key updates under the GST and erstwhile indirect tax laws

CBIC extends the time limit for issuance of an order u/s 73 of the CGST Act for FY19 and FY20

The CBIC has extended the time limit required by a proper officer to pass an order for the recovery of tax or ineligible ITC under Section 73 for FY 18-19 and FY 19-20.

This extension has consequential effects on the time limit for the issuance of show cause notices for the mentioned period, considering Section 73 of the CGST Act mandates the issuance of an SCN at least 3 months prior to the issuance of the order.

The revised timelines are outlined below:

Financial year	Time limit for issuance of order under Section 73 (10)	Time limit for issuance of SCN under Section73 (2)
FY 18-19	30 April 2024	31 January 2024
FY 19-20	31 August 2024	31 May 2024

Earlier, the CBIC, vide Notification No. 09/2023-CT dated 31 March 2023, had extended the time limit for the issuance of orders on similar lines for the financial years 2017-18, 2018-19, and 2019-20. It is noteworthy to mention that this extension has been challenged before the Allahabad High Court in the case of M/s. Graziano Transmissioni [Writ Tax No. 1256/2023] and the Gujarat High Court in the case of M/s. New India Acid Baroda Pvt Ltd [C/SCA/21165/2023]. The matters are currently listed for hearing.

(Notification No. 56/2023-CT dated 28 December 2023)

CBIC issues instructions emphasising the taxability of secondment of employees on a case-specific basis

The CBIC has issued an instruction clarifying that the decision of the SC in M/s. Northern Operating Systems Private Limited [CA No. 2289-2293/2021] (NOS) cannot be extended to each and every secondment transaction mechanically. The taxability of the transaction would be determined only after evaluating the different factual matrices, specifically the terms of the contract between the overseas company and the group company. The CBIC has further underlined that an extended period of limitation can only be invoked by establishing fraud, wilful misstatement or suppression of facts to evade tax and not solely non-payment of tax.

Background

- The SC, in the NOS decision, had held that the secondment of employees by the overseas entity qualifies as 'manpower supply services' provided to the Indian entity, and therefore, the salaries and other expenses recovered from the Indian entity are exigible to service tax on a reverse charge basis.
- The SC had taken into consideration various factors involved therein, such as the agreement between the Indian entity and the overseas group companies, etc., and taking into account the principle of substance over form, decided on the levy of service tax.
- Therefore, the intent was not to base the taxability upon a 'singular test' but rather assess all the relevant facets involved to correctly determine whether the tax liability would arise on the said transaction.
- Since the question of the taxability of the transaction would arise under the present GST regime as well, the same principles would be applicable.
- Accordingly, the CBIC issued Instruction No. 05/2023-GST dated 13 December 2023 (Instruction), clearing the looming confusion and lack of clarity on the subject matter.

Key points for consideration:

- It has been emphasised that there may be a difference in arrangements with respect to the secondment transaction, resulting in a difference in tax implication. Accordingly, the NOS decision should not be applied mechanically.
- Further, each and every case shall be carefully evaluated, taking into consideration the different factual matrices, especially the contractual terms, in order to determine taxability under GST in consonance with the principles laid down by the SC in the NOS decision.
- Moreover, the extended period of limitation, as prescribed under Section 74 of the CGST Act, cannot be applied in the absence of fraud or wilful misstatement or suppression of facts to evade tax. Accordingly, the evidence for the invocation of the extended period shall form part of the SCN.

Our comments

The SC, in the case of Fiat India (P) Ltd., had categorically underscored the importance of a factual matrix in a case and how even a single significant detail can alter the entire aspect. Taking reference to the same, the CBIC has highlighted that the colour of the NOS decision cannot be applied to other cases without duly examining the factual background of a secondment transaction. These guidelines will aim to ensure fair investigations and issuance of SCNs.

Pursuant to the NOS decision and the DGGI enquiry, the taxpayers have sought recourse before different HCs. Recently, various jurisdictional HCs have granted relief to Indian entities, considering the difference in the factual matrix. The Punjab and Haryana HC, in the case of Kanematsu India Private Limited, have restrained the department from taking any coercive steps considering the difference in terms of employment agreement. Similar interim reliefs have also been granted to BMW India and Mitsubishi Electric by the Punjab and Haryana HC, Metal One Corporation by the Delhi HC and Alstom Transport India by the Karnataka HC.

In the midst of the ambiguity surrounding this issue, the taxpayers are eagerly awaiting the verdict in the case of Komatsu India Private Limited, currently under consideration by the SC.

(Instruction No. 05/2023-GST dated 13 December 2023)

CBIC issues instruction to direct proper officers to comply with the requirement (issuance of the summary notice/orders electronically) as per Rule 142 of the CGST Rules

Rule 142(1) and 142(5) of the CGST Rules provides that the proper officer shall issue an electronic summary of the notices issued u/s 52 or 73 or 74 or 122 or 123 or 124 or 125 or 127 or 129 or 130 of the CGST Act in **Form GST-DRC-01** and upload the electronic summary of the orders issued u/s 52 or 62 or 63 or 64 or 73 or 74 or 75 or 76 or 122 or 123 or 124 or 125 or 127 or 129 or 130 of the CGST Act in **Form GST-DRC-07**, respectively.

It is pertinent to note that the summary of the order uploaded in Form GST-DRC-07 shall be treated as the notice for recovery.

In this regard, the CBIC has issued instructions that provide as under:

- **Impact of non-compliance of aforementioned provisions:** The CBIC has emphasised that non-issuance of the summary of notices/orders electronically on the portal will result into violation of the provisions of the CGST Rules, and this may adversely impact the maintenance of records under GST. Furthermore, this may impact seamless proceedings of appeal and/or recovery on the portal. However, the serving/uploading the summary of notices/orders electronically on the portal will make the notices/orders available electronically to the taxpayers on the portal. Thus, this will help in keeping a track of proceedings and will also help in the respect of recovery, appeal, etc.

Pursuant to the above, the proper officers are directed to ensure compliance of the provisions as provided under Rule 142 of the CGST Rules.

It also provides that the Principal Chief Commissioners/Chief Commissioners of the CGST zones and the Principal Director General of the DGGI may closely supervise the officers under their zones/directorate to ensure strict compliance of the provisions mentioned above.

(Instruction No. 04/2023-GST dated 23 November 2023)

Government notifies CGST (Second Amendment) Act, 2023, to bring into effect provisions relating to GSTAT

The government has now notified the CGST (Second Amendment) Act, 2023, on 28 December 2023, to bring into effect provisions relating to the appointment and qualifications of the 'President and Members of the Goods and Services Tax Appellate Tribunals (GSTAT)'.

Key gist of amendments:

- Amendment in the provisions pertaining to the appointment of judicial members and the President.
- Amendment in the provisions pertaining to the tenure of the members and the President.

GSTN enables online declaration filing for GTA taxpayers

The GSTN has issued an advisory specifying that the online functionalities under Form Annexure V & Annexure VI for Goods Transport Agencies (GTA) taxpayers are now live on the GST portal.

a. **For Existing GTAs:** Earlier, the CBIC vide Notification No. 06/2023-CT(Rate) dated 26 July 2023 had prescribed that the existing GTAs can opt to pay GST under the forward charge mechanism (FCM) or under the reverse charge mechanism (RCM) for the next FY, i.e., 2024-25, by making a prior online declaration in Annexure V or Annexure VI from 1 January to 31 March 2024.

   Forms Annexure V and Annexure VI for the succeeding FY 2024-25 are available now on the portal for the **existing GTAs**, and can be accessed as follows:

   - **Form Annexure V:** Post login - Navigate to Services→User Services→GTA→Opting Forward Charge Payment by GTA (Annexure V)
   - **Form Annexure VI:** Post login - Navigate to Services→User Services→GTA→Opting to Revert under Reverse Charge Payment by GTA (Annexure VI)

b. For newly registered GTAs: Vide Notification No. 05/2023-CT(Rate) dated 9 May 2023, the newly registered GTAs were also given an option to file the declaration for the current FY, within 45 days from applying for the registration or one month from the date of obtaining such registration, whichever is later. The online declaration is available on the portal for the newly registered GTAs and can be accessed as follows:

Post login on the GST portal - Click 'YES' on the pop-up message on post login;
(or)
Navigate to Services→User Services→GTA→Opting Forward Charge Payment by GTA (Annexure V)

Key points for consideration:

- The existing/newly registered GTAs, who had submitted the declaration for the FY 2023-24 manually to the jurisdictional authority, shall manually upload the acknowledged legible copy on the portal for record. If the manual declaration for FY 2023-24 has been filed within the specified time, the GTAs are not required to file the declaration again for any succeeding FYs unless they want to opt out. The manual upload facility can be accessed as:

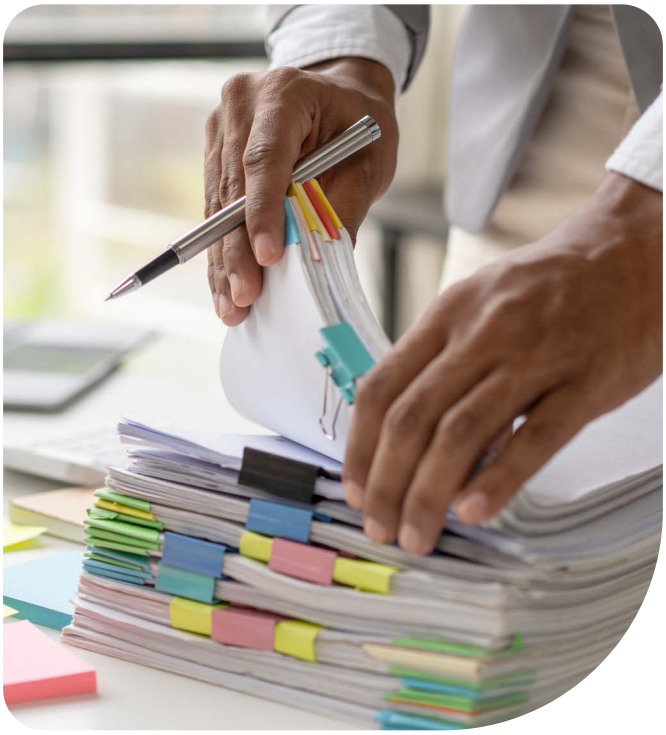
  Post login - Navigate to Services→User Services→GTA→ Upload Manually Filed Annexure V
- The option exercised by the GTA opting to pay tax under the FCM for a FY shall be the default option for the succeeding FYs unless a prior declaration in Annexure VI is filed by the GTA.
- The GTAs who have filed declaration for FY 2024-25 between 27 July 2023 to 22 August 2023 have been considered as filed and valid, and such taxpayers are not required to file the declaration again for subsequent FYs unless they want to opt for the RCM.

GSTN issues advisory extending timeline for reporting opening balance for ITC reversal in e-credit and re-claim statement

The CBIC vide Notification No. 14/2022-CT dated 5 July 2022 (read with Circular No. 170/02/2022-GST dated 6 July 2022), notified the changes in Table 4 of Form GSTR-3B for correct reporting of information w.r.t the ITC availed, ITC reversed, ITC re-claimed and ineligible ITC.

In order to facilitate accurate reporting of ITC reversal and subsequent reclaim thereof, and to avoid clerical mistakes, the Goods and Services Tax Network (GSTN) introduced a new ledger, namely the Electronic Credit Reversal and re-claimed statement (ledger). To comply with this, taxpayers were required to declare the opening balance for ITC reversal till 30 November 2023.

To further facilitate the taxpayers, the GSTN has issued an advisory giving an opportunity to taxpayers to declare opening balance for the ITC reversal till **31 January 2024**. Taxpayers are also provided with an opportunity to make three amendments post such declaration, in order to rectify any error, till **29 February 2024.**



Government of Haryana notifies the Haryana One Time Settlement Scheme for Recovery of Outstanding Dues, 2023

The government of Haryana has notified the Haryana One Time Settlement Scheme for Recovery of Outstanding Dues, 2023, for settling outstanding tax dues under the Haryana Settlement of Outstanding Dues Act, 2017, pertaining to the period before the introduction of the GST.

Key features of the scheme:

- **Validity:** The scheme is effective from 1 January 2024 and valid till **31 March 2024.**
- **Enactments covered:** The scheme shall be applicable to the following acts, namely :-
  - The Haryana Value Added Tax Act, 2003
  - The Central Sales Tax Act, 1956
  - The Haryana Local Area Development Tax Act, 2000
  - The Haryana Tax on Entry of Goods into Local Areas Act, 2008
  - The Haryana Tax on Luxuries Act, 2007
  - The Punjab Entertainment Duty Act, 1955
  - The Haryana General Sales Tax Act, 1973
  - The Haryana Goods and Services Tax Act, 2017 (GST Act)

- **Eligibility criteria:**
  - The applicants whose outstanding dues have been uploaded in Form GST DRC-07A of the Haryana Goods and Services Tax Rules, 2017, for recovery of such dues under the GST Act shall also be eligible to take the benefit of the scheme.
  - The following shall not be eligible to opt for the scheme:
    - Criminal proceedings have been initiated against the applicant for any reason(s) under the acts mentioned above.
    - If the demand is related to erroneous refunds.

- **Settlement of outstanding dues:**

Category	Tax or any other amount payable	Interest associated with tax or any other sum payable	Penalty associated with tax or any other sum payable
Admitted tax	100%	0%	0%
Disputed tax	• 30% in case of tax amount equal to or less than INR 50 lacs • 50% in all other cases	0%	0%
Undisputed tax	• 40% in case of tax amount less than or equal to INR 50 lacs • 60% in all other cases	0%	0%
Differential tax	30%	0%	0%

The applicant may opt to make payment for settlement of his outstanding dues in lumpsum or in instalments as per the option mentioned below:

Settlement amount of tax (in INR)	Amount to be paid at the time of application	Second installment (within 90 days from the date of provisional order of settlement)	Third installment (within 180 days from the date of provisional order of settlement)
Up to 10 lakhs	**Full and final settlement amount to be paid along with Form OTS-1**	**Nil**	**Nil**
10 lakhs to 25 lakhs	**50% of the settlement amount, along with Form OTS-1**	**Balance 50% of the settlement amount, along with intimation in Form OTS-1A**	**Nil**
More than 25 lakhs	**40% of the settlement amount, along with Form OTS-1**	**30% of the settlement amount, along with intimation in Form OTS-1A**	**Balance 30% of the settlement amount, along with intimation in Form OTS-1B**

- The applicant may make the payment for the second installment by the last date of the third installment on the payment of additional interest of 18% p.a. for the period of delay.
- If payment is not made within the specified period, the provisional order of acceptance shall be deemed to be withdrawn.

- **Application procedure:**
  - The applicant shall apply online in Form OTS-1 within 90 days from the appointed day and generate a system generated acknowledgement in Form OTS-2. The applicant shall make a separate application for each assessment year under each relevant Act in Form OTS-1 for which he intends to settle his outstanding dues.
  - Thereafter, the jurisdictional authority shall examine Form OTS-1 within 30 days from the date of acknowledgement.
  - Further, the Deputy Excise and Taxation Commissioner (DETC) will examine the application within 15 days and accordingly issue the provisional settlement (Form OTS 4A) or final settlement (Form OTS 04) or rejection order (Form OTS 3).
  - In case of rejection, the applicant shall submit a reply in Form OTS 3A within 15 days. Thereafter, the above process will be repeated.

- **Terms and conditions:**
  - The applicant shall withdraw any appeal pending before any authority within 180 days from the receipt of Form OTS 4A by filing Form OTS-6.
  - Any proceeding pending before any authority shall be kept in abeyance till the final settlement or rejection order is passed under this scheme.
  - Any amount of tax, interest or penalty or any other sum payable or paid before the appointed day shall not be refunded or adjusted under this scheme.
  - The authority who has passed the final order under this scheme, may rectify any error, either on his own motion or where such error is brought to his notice by the affected person within a period of 30 days from the date of issuance of such order.
  - Any amount paid under this scheme shall neither be paid through input tax nor shall be allowed to be claimed as input tax by any person under the relevant act or any other act.
  - No appeal shall lie before any appellate authority under the relevant act, High Court or Supreme Court against the final orders passed by the jurisdictional authority under this scheme.

B. Key updates under the Customs/FTP/SEZ laws

Government amends SEZ Rules for allowing demarcation of 'non-processing area' from SEZ area for setting up and operation of non-SEZ businesses engaged in IT/ITeS

The Ministry of Commerce and Industry has amended the SEZ Rules for allowing demarcation of non-processing areas in the IT or ITeS SEZs for businesses engaged in IT/ITeS effective 6 December 2023 (New Rule 11B has been inserted). Thus, the government has now permitted the non-SEZ units engaged only in IT/ITeS businesses to operate from the demarcated non-processing areas of IT/ITeS SEZ.

Key aspects for consideration:

- Upon request of a developer of an IT/ITeS SEZ, the BOA may permit the demarcation of a portion of the built-up area of an IT/ITeS SEZ as a non-processing area.
- A non-processing area may be used to set up and operate businesses engaged in IT or ITeS as per conditions specified by the BOA.
- The non-processing area will consist of a complete floor, and part of a floor will not be demarcated as a non-processing area.
- Appropriate access control mechanisms will be provided in the non-processing area of an IT/ITeS SEZ, to ensure adequate screening of movement of persons and goods in and out of the premises.
- The permission for demarcation of a non-processing area in an IT or ITeS SEZ for a business engaged in IT/ITeS will be granted by the BOA only after repayment of tax benefits without interest by the developer as under:
  - Tax benefits attributable to the non-processing area, calculated as the benefits provided for the processing area of the SEZ, in proportion to the built-up area of the non-processing area to the total built up area of the processing area of the IT/ITeS SEZ;
  - Tax benefits already availed for the creation of social or commercial infrastructure and other facilities if proposed to be used by both the IT/ITeS SEZ and business engaged in IT/ITeS in a non-processing area.
  - Amount to be repaid by developer will be based on a certificate issued by a chartered engineer.
- The demarcation of a non-processing area will not be allowed if it results in decreasing the processing area to less than 50% of the total area or less than the area specified.
- The businesses engaged in IT/ITeS in a non-processing area will not avail any rights or facilities available to SEZ units, such as tax benefits on operation and maintenance of common infrastructure and facilities.
- The businesses engaged in IT/ITeS in a non-processing area will be subject to the provisions of all central acts and rules and orders made thereunder, as are applicable to any other entity operating in DTA.

Our comments

Representations were made by the industry and SEZ developers to permit non-SEZ businesses engaged in IT/ITeS to operate from a SEZ area. Thus, this is a much awaited and welcome move from the government and will help increase the occupancy levels of SEZs. It will also provide flexibility as well as access to SEZ's infrastructure to such non-SEZ IT/ITeS businesses.

(Notification G.S.R. 881(E) dated 6 December 2023)

DGFT relaxes norms for import of used IT assets (Laptops, desktops, monitors, printers) from SEZ to DTA

The DGFT has restricted the import of used IT assets (Laptops, desktops, monitors, printers) from SEZ to DTA. However, relaxation from the requirement of obtaining a license for the import of the used IT assets from SEZ to DTA has been granted on satisfaction of the following conditions:

- Minimum usage of two years in the SEZ area, and the goods are not older than five years from the date of manufacturing.
- In case if the SEZ unit is closing its operations and re-locating to the DTA, the goods should not be older than five years from the date of manufacturing. However, IT assets that have entered the SEZ area in secondhand condition and used in the SEZ area for less than two years will not get this benefit.
- The above-mentioned relaxation shall be available only when no exemption was availed from any regulatory requirements (i.e., Compulsory Registration Order (CRO), Restriction of Hazardous Substances (RoHS), and Wireless Planning and Coordination (WPC) import license) at the time of the import of used IT assets into the SEZ.

Our comments

Earlier, the government had restricted the import of laptops, tablets, all-in-one personal computers, ultra small computers, etc., effective from 1 November 2023. However, later it was clarified that SEZ/EOUs/EHTP/STPI/BTP are not required to obtain a 'restricted import authorisation' for the import of IT hardware restricted for captive consumption. In addition, an import management system was introduced effective from 1 November 2023 to ensure that the importers provide the necessary data and information to closely monitor the inflow of such hardware without disrupting the market's supply chain.

In continuation to the above, the government has relaxed the norms for the import of used IT assets from SEZs to DTA. This will help in the seamless transfer of secondhand goods from SEZ to DTA and also reduce the procedural challenges on satisfaction of the specified conditions.

(Notification No. 56/2023 dated 1 January 2024)

CBIC notifies mandatory requirement of BIS registration and random sampling for imported electronic and IT goods

The DGFT had earlier made the requirement of BIS registration for the import of goods and random sampling of LED products and control gear for LED products mandatory vide Notification No. 50/2015-2020 dated 8 January 2019 and Notification No. 32/2015-2020 dated 17 September 2020 for the products notified under the Electronics and IT Goods (Requirement of Compulsory Registration) Order, 2012. Even, the MeitY had authorised the Customs authority/officers at all ports/ICDs for deforming the non-compliant or unregistered goods vide OM No. 37(4)/2018-IPHW dated 11 December 2018.

In respect to the different practices notified/followed, the CBIC has streamlined the above process in the following manner:

- The Customs officer shall check for BIS registration in the system in all cases.
- The risk management system shall randomly select the consignments for sampling and intimate the Customs officer through examination instruction.
- Further, the sample shall be sent to BIS-recognised labs for the testing of limited defined non-destructive safety parameters from the IS standard.
- The OOC shall be given only if the sample has complied with the requirements of the standard.
- If the sample drawn fails to meet the requirements, such consignments may be sent back or be destroyed at the cost of the importer as per extant rules/procedures.
- The updated data for IS wise list of recognised laboratories can be accessed by adding the relevant Indian standard number on www.lims.bis.gov.in.

(Instruction No. 28/2023-Customs dated 12 December 2023)

CBIC launches India-Korea Electronic Origin Data Exchange System for faster clearance of imported goods

The CBIC has recently launched the India-Korea EODES, which is aimed at facilitating the smooth implementation of the India-Korea CEPA by way of electronic exchange of origin information between the two customs administrations in respect of the goods traded under the CEPA. The data fields in a CoO shall be electronically shared by the exporting customs administration with the importing customs as soon as the certificate is issued. This would facilitate faster clearance of imported goods.

The launch shall mark a major milestone in the flourishing bilateral relations between the two countries.

(Press Release dated 8 December 2023)

CBIC launches SAMAY (Systematic Adherence and Management of timelines for Yielding results in litigation) for timely litigation management

The CBIC has rolled out an online portal named SAMAY, for monitoring all the proposals of SLP/CA filling. SAMAY can be accessed through the DLA website: https://dlacbic.gov.in/samay.

Key features of SAMAY are:

- It captures all the orders of the CESTAT as well as HC and decision of the department;
- It shows the pendency of orders that are either under process at various levels or are awaiting processing at the commissionerate level;

All SLP/CA proposals shall be forwarded to the CBIC through an e-office indicating the SAMAY ID. Furthermore, for adding a new order, the jurisdictional commissionerate are required to visit the website of the CESTAT as well as the HC's on a daily basis for downloading orders pertaining to their jurisdiction for entering the same SAMAY application.

(CBIC Instruction dated 13 December 2023)

DGFT further extends transition period for mandatory filing of applications for non-preferential certificate of origin through Electronic Certificate of Origin (e-CoO) Platform

Earlier, vide Trade Notice No. 27/2022-2023 dated 28 March 2023, the DGFT had extended the transition period for mandatory filing of applications for the non-preferential certificate of origin through the Electronic Certificate of Origin (e-CoO) platform till 31 December 2023.

In furtherance to above, the DGFT has further extended the date of e-filing till **31 December 2024**. Further, during this interim period, the DGFT has permitted the existing systems of processing the applications in manual/paper mode and the government has also informed the authorised issuing agencies to sensitise the exporting community and their constituents regarding the online and its registration requirements and has also encouraged the exporters to use this online platform.

(Trade Notice No. 36/2023-24 dated 26 December 2023)

02

Key judicial pronouncements

A. Key rulings under the GST and erstwhile indirect tax laws

I. Key rulings under the GST laws

SC dismisses appeal against the Calcutta HC's order affirming that ITC cannot be denied due to supplier's default to pay tax

Summary

The SC dismissed the department's appeal and upheld the Calcutta HC's decision, which had set aside the demand arising out of the excess ITC availed by the assesee against the invoices that did not reflect in its GSTR 2A, resulting in a difference in GSTR-2A and GSTR-3B. The HC had observed that the assessee had satisfied all the prerequisites of availing ITC, and such entitlement cannot be denied due to non-payment of the tax by the supplier despite collecting the same from the assessee. The HC had pertinently emphasised the trite principle that the purchasing dealer cannot be made to bear the consequences for default of the selling dealer and permitted the entitlement of the ITC to the assesse.

Facts of the case

- Suncraft Energy Private Limited (the assessee) had procured goods and services from its supplier after duly paying the value and applicable tax amount. Accordingly, the assessee had availed the ITC of the same.
- However, the invoices pertaining to the said supply were not reflected in the GSTR-2A of the assessee, resulting in difference with GSTR-3B.
- Because of this difference, the department had initiated the recovery of the excess ITC availed by the recipient, which consequently led to the demand of tax, interest and penalty.

Calcutta HC's observations and order [MAT 1218/2023; Order dated 02 August 2023]

- The HC stated that GSTR 2A does not impact the taxpayer's ability to avail ITC. Rather it only facilitates in taking an informed decision at the time of self-assessment, as also clarified in the CBIC press release dated 18 October 2018.
- Furthermore, the HC relied upon the SC's decision in the case of Bharti Airtel Limited and highlighted that the effect and purport of GSTR 2A is facilitatory in nature.
- Invoking the principle laid down by the Delhi HC in the case

of Arise India Limited that a purchasing dealer cannot be made to bear the consequences for default committed by the selling dealer, the HC had held that when the assessee had fulfilled all the requisite conditions to claim the ITC, i.e., he was in possession of the tax invoice, had received the goods and services and also paid for the same, he is entitled to claim the ITC, and the same cannot be denied.

- The HC had further emphasised that in the absence of any collusion between the purchasing and selling dealer, the department will primarily pursue proceedings against the selling dealer to recover the tax so defaulted.
- Accordingly, the denial of the ITC of the recipient without initiating any action against the defaulting supplier or establishing collusion between the supplier and recipient is arbitrary.

SC's observations and order [SLP(C) No. 27827-27828; Order dated 14 December 2023]

- The SC affirmed the HC's order and dismissed the appeal of the department.

Our comments

This landmark judgement brings considerable relief to the taxpayers grappling with similar mismatch notices and litigation. The matter has been a major source of contention and prolonged litigation, both under the erstwhile regime as well as the GST framework. However, the ongoing litigations under GST have resulted in favourable judgements for the assesses.

Earlier, the Kerala HC, in the case of Diya Agencies, had categorically held that the ITC cannot be denied solely because the transaction is not reflected in GSTR 2A. Underscoring the injustice, the HC had emphasised that if the taxpayer establishes that the tax amount is paid to the seller and the ITC is bonafide, then the same cannot be denied. The SC's decision in the case of Ecom Gill Coffee Trading Private Limited was relied upon wherein it was categorically established that the onus of proving the genuineness of the ITC rests upon the purchasing dealer.

On similar grounds, the Kerala HC, in the case of Henna Medicals, had held that the ITC cannot be denied merely based on a mismatch between GSTR 2A and 3B.

In the wake of affirmation of the SC, it is highly likely that disputes related to the denial of the ITC due to a default by the supplier may find resolution.

SC issues notice against HC's decision on inclusion of diesel supplied FOC basis by recipient in value of supply

Earlier, the Chhattisgarh HC, in the matter of **Shree Jeet Transport [WPT No.117 of 2022]**, had held that the cost of fuel supplied FOC by the service recipient shall be included in the value of services provided by the GTA. The matter has been challenged before the SC in **Special Leave to Appeal (C) No(s). 26867/2023**, wherein the SC has issued a notice on SLP and interim-relief plea by the taxpayer.

Facts of the case

- The petitioner, a GTA, entered into an agreement with one of its customers, wherein it was agreed that the fuel will be provided by the recipient on FOC basis.
- The petitioner had initially sought a clarification from AAR whether the cost of fuel provided on FOC basis by the recipient shall be included in the value of services provided by the GTA, wherein the AAR held that the fuel cost shall be required to be added in the value of services provided by the GTA.
- In an appeal filed before the AAAR, in light of difference of opinion among the central and state member, no ruling was rendered.
- Thereafter, the petitioner filed a writ petition before the Chhattisgarh HC.

HC's observations

- The HC held that the nature of services provided by the GTA is such that the usage of fuel forms a crucial part without which the said services cannot be rendered, i.e., the transportation is inter-dependent on the supply of fuel.
- Section 15(2)(b) of the CGST Act provides inclusion of any amount relating to the supply that the supplier is liable to pay but has been paid by the service recipient. By agreeing that the cost of fuel will be borne by the recipient, one cannot override statutory obligations under Section 15(2)(b) of the CGST Act.
- Accordingly, the HC held that GST liability cannot be evaded by entering into an agreement in such a manner where one of the necessary obligations of the supplier is shifted upon the recipient holding the cost of fuel shall be included in the value of services provided by the GTA.

The SC has issued a notice on the SLP and interim-relief plea against the said judgement. The matter is listed on **9 February 2024** for further hearing.

P&H HC grants interim relief on adjudication proceedings levying GST on salary paid to seconded employees

The matter on the leviability of GST on the salary paid to seconded employees has been extensively deliberated post the decision of the SC in the case of Northern Operating System. The DGGI authorities initiated investigations and issued SCNs to the taxpayers. In response, the taxpayers have been filing writ petitions challenging the GST levy on such payments, obtaining favourable stay orders from various HCs.

Initially, the Karnataka HC, in the case of M/s Alstom Transport India Ltd [WP-23915-2023], granted an ad-interim stay on the adjudication proceedings seeking the levy of IGST on the salaries paid directly to expatriates.

Thereafter, the Punjab and Haryana HC, in the case of M/S Mitsubishi Electric India Pvt. Ltd. [CWP-25351-2023], and Delhi HC, in the case of Metal one corporation [W.P.(C) 14945/2023], also granted interim relief on similar issues.

Moreover, in the case of Renault Nissan Automotive India Pvt. Ltd. [Civil Appeal Diary No(s). 38335/2023], the SC issued a notice to the Revenue in matter challenging the service tax levy on salary, bonus and allowances paid to employees seconded from a foreign entity.

In recent developments, the Punjab and Haryana HC, in the case of M/s. BMW India Pvt. Ltd.[CWP No. 27034 and 27036 -2023], has also granted an ad-interim stay on the recovery proceedings until the final verdict. The petitioner has challenged the tax levy on the amount of salary paid in INR.

Facts of the case

- The petitioner employed expats from its German parent company BMW AG and entered into an agreement.
- In accordance with the agreement, a portion of the salary were to be paid in India, while the remaining portion being paid through the parent company outside India for administrative convenience.
- The petitioner contended that earlier, on a similar issue, the Tribunal had ruled in favour of the petitioner by holding that service tax is not leviable on the amount of salaries paid to expats under manpower recruitment, for the period 2006-07 till September 2011.
- Further, after relying on the SC's decision in the case of M/s. Northern Operating Systems Private Limited [CA No. 2289-2293/2021] (NOS), the department initiated an investigation. In response to it, the petitioner suo moto deposited tax, along with interest.
- Thereafter, a SCN was issued under Section 73(5) of the CGST Act, alleging leviability of tax on the amount of salary paid in INR. Pursuant to it, the petitioner filed a response. Despite that, another SCN was issued under Section 73(1) of the CGST Act.
- The petitioner also relied on the Delhi HC and Punjab and Haryana HC's interim stay order on a similar issue.

The HC has tagged the present case, along with the case of M/S Mitsubishi Electric India Pvt. Ltd., and listed the same for **13 February 2024** for final arguments and disposal.

Rajasthan HC grants relief to online gaming company

The Rajasthan HC, in the case of M/s. Khud Ka Karobar Infotech Private Limited [D.B. Civil Writ Petitioner No. 19668/2023], has granted an ad-interim relief to the petitioner by directing the department to not pass any final order in the adjudication of the SCN, although no stay was granted on the adjudication proceedings of the SCN.

The petitioner, an online gaming company, which hosts the online application, Ludo Sikander, on its platform, challenged the constitutional validity of Section 15(5) of the CGST Act and Rule 31A(3) of the CGST Rules, along with the corresponding provisions under the Rajasthan State GST Act. The impugned provisions relate to the valuation of lottery, betting, gambling and horse racing.

Pertinently, the department, vide the impugned SCN, sought to demand tax, interest penalty amounting to INR 200 crores, contending that the petitioner, through its platform, facilitates the game of 'Ludo', which is a game of chance and amounts to the supply of 'betting and gambling'. On the contrary, the petitioner stated that ludo is a 'game of skill' and merely because it involves 'throw of dice', it cannot be equated to a game of chance.

The matter is listed on 8 January 2024 for further hearing.

Our comments

The ongoing dispute relating to GST taxability for online gaming companies have been pending before different HCs post the amendment in the GST provisions. Various jurisdictional HCs have granted similar relief to numerous gaming companies, and the same have been mentioned below (along with links) for ease of reference:

- **Myteam11 Fantasy Sports Private Limited** [D.B. Civil Writ Petition No. 1100/2023] – Rajasthan HC
- **M/s. Playerzpot Media Private Limited** [W.P.(L) No. 31946/2023] – Bombay HC
- **Sporta Technologies Private Limited** [Writ Petition (L) No. 26588/2023] – Bombay HC (Dream11)
- **Sachar Gaming Private Limited** [W.P.(L) No. 31216/2023] – Bombay HC
- **Delta Corp Limited** [D.B. Civil Writ Petition No. Writ Petition No. 715/2023] – Bombay HC (Goa Bench)
- **Delta Corp Limited** [W.P.(C) No. 41/2023] – Sikkim HC
- **Golden Gaming International Private Limited** [W.P.(C) No. 33/2023] – Sikkim HC
- **Delta tech Gaming Limited** [WPA 26373/2023] – Calcutta HC (subsidiary of Delta Corp)
- **NXGN Sports Interactive Private Limited** [R/SCA/19183/2023] – Gujarat HC
- **Kamal Mishra and Associates** [Writ Tax No. 1257/2023] – Allahabad HC (considering 28% levy on online gaming)

It may be noted that the Karnataka HC's judgement in the case of Gameskraft Technologies Private Limited [WP 18304/2022] had quashed the SCN demanding tax, interest and penalty amounting to INR 21,000 crores. The SC has granted a stay on the judgement of the Karnataka HC.

Kerala HC permits GSTR-3B rectification where ITC was claimed under wrong head

The Kerala HC, in the matter of **Chukkath Krishnan Praveen [WP (C) No. 41219/2023]**, has permitted the assessee's representation for amending its GSTR-3B, wherein it had claimed the ITC under the wrong head.

Facts of the case

- The petitioner had wrongly availed ITC under CGST and SGST instead of IGST in GSTR-3B return, resulting in an assessment order passed against the petitioner.
- Subsequently, the petitioner made a representation before the department, urging rectification of its return, but to no avail.
- The petitioner filed the petition before the HC inter alia praying that the department be directed to permit rectification of the above inadvertence in GST-3B, by treating the representation as a rectification application. Additionally, the petitioner urged that the department be directed to refund the IGST ITC and adjust the same against the CGST and SGST liability.

Observation and judgement

- The HC directed the department to consider the representation filed by the assessee as a rectification application and decide the issue on merits in an expeditious manner in consonance with the provisions.

Our comments

- This is a favourable ruling for the taxpayers who may evaluate the option of seeking rectification of return, on a case-to-case basis.
- Earlier, the Madras HC, in the case of **M/s. Sun Dye Chem [2020 (11) TMI 108]**, wherein the assessee had inadvertently accounted ITC under IGST instead of CGST and SGST, permitted the rectification of the GSTR-3B of the assessee to correct the credit distribution between IGST, CGST and SGST.
- Similar judgements were passed in this context in the following cases:
  - **Shiva Jyoti Constructions [2023 (1) TMI 881]** – Orissa HC
  - **Pentacle Plant Machineries Private Limited [2021 (3) TMI 524]** – Madras HC
  - **Deepa Traders [2023 (3) TMI 628]** – Madras HC

Adjustment of interest against GST refund claim permissible – Delhi HC

Summary

The Delhi HC permitted the adjustment of interest payable by the petitioner on account of the delay in payment of tax liability against its refund claim. The HC observed that the petitioner amended the tax invoices to export under the category 'with payment of IGST', which was initially disclosed as 'supplies under LUT'. Additionally, in order to avoid blockage of working capital, the petitioner had also delayed the payment of the IGST on the import of services. Owing to the above, the petitioner was liable for dual interest liability. Upholding the order of the adjudicating authority, the HC relied on the principle that 'equity is out of place in tax law' and held that GST and interest are statutory levies and cannot be avoided merely because the assessee was entitled to a refund of accumulated ITC resulting in tax neutrality of the import and export of services.

Facts of the case

- Grapes Digital Private Limited (the petitioner) is engaged in the business of providing services of digital media management, online advertisement, management of advertisement projects, the sale and procurement of space and slots for advertisement campaigns and other business support services and provides such services to clients located in India as well as abroad.
- The petitioner imported such services from overseas entities, triggering liability to pay IGST under the RCM.
- The petitioner had opted to export the services without the payment of IGST under LUT. Accordingly, the petitioner would be entitled to avail a refund of the accumulated ITC on account of such exports.
- On account of the immense ambiguity of the refund mechanism and to avoid working capital blockage, the petitioner did not pay the IGST on imports.
- Subsequently, the petitioner amended the export invoices and opted to pay the IGST on the above-mentioned exports. They also paid the impending IGST on imports. Accordingly, the accumulated ITC on account of payment RCM liability on imports was utilised for the payment of IGST on exports.
- The petitioner filed a refund application to obtain a refund of the IGST paid on exports, which was accepted by the adjudicating authority. However, the AA adjusted the interest due on the delayed payment of IGST on imports and exports against the refund claim.

Proceedings in appeal and remand

- The petitioner challenged the adjustment of interest before the appellate authority on the grounds that such an adjustment of interest cannot be made without issuing a SCN.
- The petitioner had contended that the IGST payable on imports would be available as a refund of accumulated ITC on account of exports, making the entire transaction tax-neutral. Since the interest is compensatory in nature, interest liability should not arise.
- The appellate authority rejected the petitioner's contentions, stating that the provisions prescribe the payment of IGST and interest on its own without any requirement of a SCN. It was stated that withholding payment of IGST on imports was in violation of the provisions of GST.
- However, the appellate authority pointed out that the AA had referred to the incorrect provisions for the adjustment of interest. Owing to the said error, the appellate authority remanded the matter back to the AA for reconsideration to afford the petitioner the opportunity to resist the adjustment of interest.
- The AA again confirmed the adjustment of interest under the relevant provisions, which were appealed by the petitioner, reiterating the above contentions.
- On the other hand, the department, on account of the review order, challenged the refund order on the grounds that a refund of IGST cannot be permitted as the petitioner had initially opted to export under the LUT without payment of IGST, and the subsequent amendment to export invoices to change the category of option cannot be permitted.
- The appellate authority, vide a common order, accepted the department's appeal.
- The petitioner has assailed the impugned order of the appellate authority vide the present petition.

Delhi HC's observations and judgement [W.P.(C) No. 2918/2021; Order dated 5 December 2023]

- **Appeal filed against refund order is barred by limitation:** The HC observed that the appeal against the adjudicating authority's order granting a refund was filed subsequent to the review order, which was passed after one year from the date of the adjudicating authority's order. The HC evaluated the appeal provisions and stated that the time period for filing an appeal starts from the date when the original order is communicated and cannot be regarded from the date of communication of the review order. Accordingly, the HC stated that the appeal filed by the department subsequent to receiving the review order was barred by limitation and should have been rejected by the adjudicating authority.

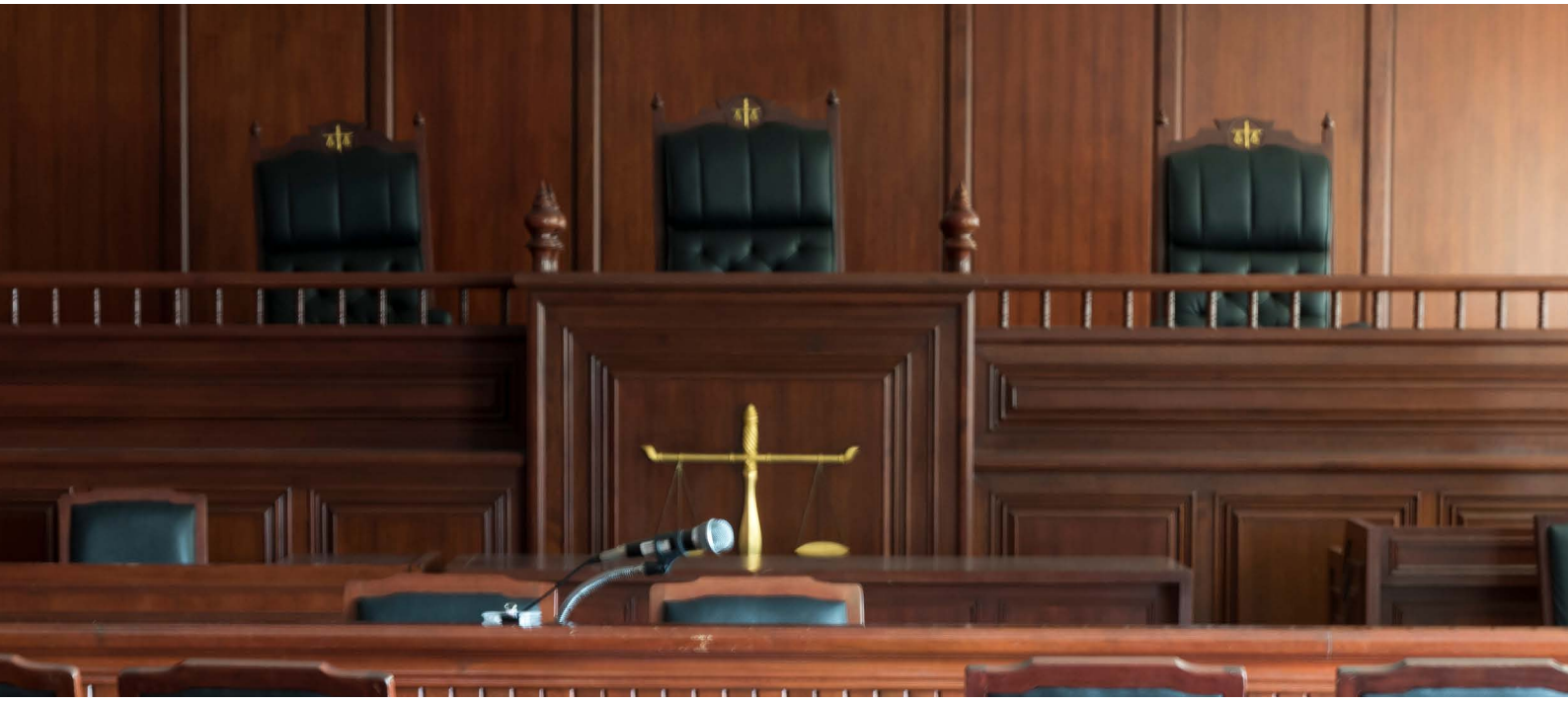
- **Refund permitted by appellate authority cannot be questioned and reconsidered in remand proceedings:** The HC observed that the appellate authority had categorically affirmed the refund entitlement of the petitioner while also upholding the adjustment of interest. The matter was remanded to the AA for the limited purpose of error on account of provisions referred for the adjustment of interest. Accordingly, the original order stood merged with the appellate order, and the refund entitlement could not be questioned in the remand proceedings.
- **Adjustment of interest against admissible refund claim does not warrant issuance of a demand notice:** The HC observed that the interest provisions pertinently prescribe an automatic accrual of interest against any tax that is not paid before the due date. Accordingly, such unpaid interest shall be recoverable as per the recovery provisions. The HC further noted that although the recovery of interest shall be pursuant to a notice, no specific demand notice is required to be issued. The petitioner was given due opportunity to contest the adjustment of interest on the delayed payment; accordingly, there was no requirement for any further notice. In view of the above, the HC upheld the adjustment of interest against the refund.
- **Interest payment cannot be avoided merely on account of tax neutrality:** The HC asserted that GST and interest are 'statutory exactions' and cannot be averted merely because the simultaneous transactions of import and export are tax-neutral. Invoking the principle that 'equity is out of place in tax law,' the HC categorically affirmed that the payment of GST cannot be avoided merely because the same would be available as a consequent refund.

Our comments

Pertinently, the refund provisions categorically permit the deduction of any tax, interest, penalty, fee or any other amount, in the absence of any stay, from the refund due to the assessee.

The HC stated that the assessee who is liable to pay interest should be given an opportunity to contest such levy in consonance with the principles of natural justice. However, it was explicitly clarified that no specific demand notice is required for recovery of such interest, which is an 'automatic accrual' as a consequence of delayed payment.

It is a trite position that when there is a dispute on the quantum of tax or due date of payment of tax that directly affects the interest quantum, the same would be done by issuing a proper notice in terms of Section 73 or 74, as the case may be. In other cases, when the amount is not disputed, the department is entitled to deduct or adjust the amount due from the amount payable to the taxpayer without issuing a notice.



Refund under inverted duty structure cannot be denied merely because tax rate on principal input and output is same – Delhi HC

Summary

The Delhi HC has held that the refund of accumulated ITC, arising out of IDS, cannot be denied merely because the GST rate on principal input and output is the same, without taking into account other inputs. The HC primarily highlighted the trite position that refund under IDS does not depend on the number of inputs and outputs, and accordingly, cannot be restricted on account of the singularity of input. Setting aside the refund rejection order of the AA, the HC stated that the refund provisions do not prescribe comparison between the tax rate of 'principal input' with output to determine refund under IDS.

Facts of the case

- Indian Oil Corporation Limited (the petitioner) is engaged inter alia in bottling and distribution of LPG, both for domestic and industrial use.
- Pertinently, the bulk LPG, which is the principal input for the petitioner, carries a 5% GST rate, same as bottled LPG, which is the consequent output. However, numerous other inputs, including safety accessories, taxed at different GST rates, are also used in the production of bottled LPG.
- The petitioner was denied refund of accumulated ITC on account of IDS, on the ground that the GST rate applicable on the principal input and output was the same. The petitioner's appeal against the rejection order was also rejected.
- Vide the petition, the petitioner assailed the impugned rejection orders contending that the refund of accumulated ITC cannot be denied solely because the GST rate on principal input and output is the same.

Delhi HC's observations and judgement [W.P. (C) 10222/2023; Order dated 05 December 2023]

- **Refund of accumulated ITC under IDS cannot be confined to singular input:** Upon evaluating refund provisions, the HC observed that primarily, the refund of the accumulated ITC on account of IDS does not depend on the number of input or output of the assessee and should be attributable to the accumulation of the ITC on account of higher tax rate on input than output.
  Accordingly, the refund cannot be restricted to singular input or output. The HC observed that various inputs, including safety accessories carrying different GST rates, usually higher than what is applicable on output, are essential for manufacturing bottled LPG.
- **Refund provisions do not prescribe comparison between tax rates of principal input and output to determine refund:** The HC categorically stated that refund is not forbidden in cases where the tax rate on input and output are the same. On the contrary, refund under IDS is permitted only where the ITC has accumulated on account of the GST rate on input being higher than that of the output. The HC pertinently highlighted that the refund provisions do not prescribe comparison between the tax rate applicable to 'principal input' and output for granting refund under IDS. Accordingly, it invalidated the denial of refund merely on account of the same tax applicable to principal input and output, without considering the tax rate on other inputs.
- **Refund under IDS cannot be permitted when input and output are same:** The HC examined the CBIC circular, which clarified that a refund cannot be permitted when the input and output are the same, but the ITC has accumulated due to different tax rates at different points of time. The HC stated that the circular cannot be interpreted to mean that there is a restriction of refund where the tax rate on input and output are the the same and such interpretation is likely to violate the refund provisions, rendering the circular invalid. In view of the above, the HC allowed the refund claim of the petitioner and directed the department to process the same, along with interest.

Our comments

This is a favourable judgement for the taxpayers engaged in taxable supplies wherein the tax rate of input is higher than that of the output, resulting in IDS.

The HC elaborated on the broader interpretation of 'inputs' and held that the circular cannot insert any provision that is not available in the act. However, at the same time, it affirmed that the refund of accumulated ITC cannot be permitted on account of a reduction in the GST rate on the same goods over the period of time, as also clarified by the CBIC circular.

Earlier, the Calcutta HC, on a similar basis, permitted the refund in the case of Shivaco Associates, wherein the refund of accumulated ITC was denied on the ground that the input and output supply were the same though taxed at different rates. The HC observed that by way of the above CBIC circular, the refund benefit was being curtailed, leading to the creation of a class inside a class, which cannot be permitted.

Similar decisions were given by the Rajasthan HC in the case of Baker Hughes Asia Pacific Limited and by the Gauhati HC in BMG informatics (P) Ltd, wherein the courts held that the circular is unsustainable and liable to be ignored.

II. Key rulings under the erstwhile indirect tax laws

Under protest, deposits are not lawful levy; retention thereof by Revenue is without authority of law – Bombay HC

Summary

The Bombay HC has held that the amount deposited under protest by the petitioner would not partake the character of a lawful levy, and thus, retention of such amounts by the department is without authority of law. The HC noted that the department rejected the refund claim on the premise that a similar issue pertaining to the taxability of interchange income was pending before the SC in the case of Citibank. However, the HC stated that this is not a valid reason adopted by the authorities, as such retention is without any authority of law and is violative of the provisions of Article 265 of the Constitution. Accordingly, the HC has set aside the order rejecting the refund, and allowed a refund of the amount deposited under protest by the petitioner, along with interest.

Facts of the case

- An audit was done on Hongkong and Shanghai Banking Corporation Ltd (the petitioner) for the period March 2007 to April 2012, pursuant to which objections were raised for the non-payment of service tax on the interchange income earned during the said period.
- In furtherance to the above, no demand was raised by the department, but the petitioner voluntarily made a deposit of an amount of INR 56,19,84,075/- under protest.
- The final audit report was issued, but a SCN was not issued by the department for a period of about 11 years.
- Accordingly, the petitioner had taken up the issue with the department and had made requests for a refund of the subject amount as deposited. As no action was taken by the department and/or as the department continued to retain the amounts, the petitioner filed an 'application for refund' of the said amount, along with interest.
- Thereafter, an OIO was passed, rejecting the refund application.
- Aggrieved by the same, the petitioner filed an appeal before the appellate authority. The appellate authority set aside the earlier order and remanded the matter back to check the eligibility of the petitioner for a refund.
- Pertinently, during the intervening period, the issue of leviability of service tax on interchange income was under consideration before the SC in the case of Citibank, wherein separate decisions were being given by the different judges. Therefore, the judgement was reserved with a larger bench.
- Considering the above, the Assistant Commissioner passed an impugned order dated 19 June 2023, rejecting the refund claim. Thereafter, the petitioner filed the present writ before the Bombay HC.

Petitioner's contentions

- The petitioner contended that the amount was deposited only in good faith, and it had not accepted the department's view to levy tax on the interchange income in the event of any prospective demand in the future.
- The petitioner also contended that the reliance placed by the department upon the SC's decision in the case of Citibank was not valid in the present case because no SCN was issued by the department.
- Therefore, the petitioner submitted that the retention of the amounts by the department was without any authority of law and retention of the amount under protest leads to a violation of the provisions of Article 265 and Article 14 of the Constitution of India.

Respondent's contentions

- The respondent contended that the right remedy before the petitioner was to file an appeal before the Commissioner (Appeals) against the order passed by the appellate authority.
- The respondent placed its reliance on the judgement of the apex court in the case of Citibank, wherein a split verdict was delivered by the judges on the taxability issue of interchange income. Consequently, the judgement was pending a final verdict with the larger bench.
- Therefore, the department contended that the petitioner's demand for a refund was not sustainable, as a case with a similar matter was pending before the SC.

Bombay HC's observations and judgement [Writ Petition (L) No. 24184 of 2023; Order dated 8 November 2023]

- **Amount deposited under protest cannot partake the nature of tax or duty:** The petitioner had deposited the amount on the basis of the audit objection and on a fortuitous circumstance that the petitioner may face a levy on the interchange income.However, this would not ipso facto mean that any amount deposited under protest would partake the character of a lawful levy, so as to bring about a legal consequence of the appropriation of amounts so deposited as a levy.

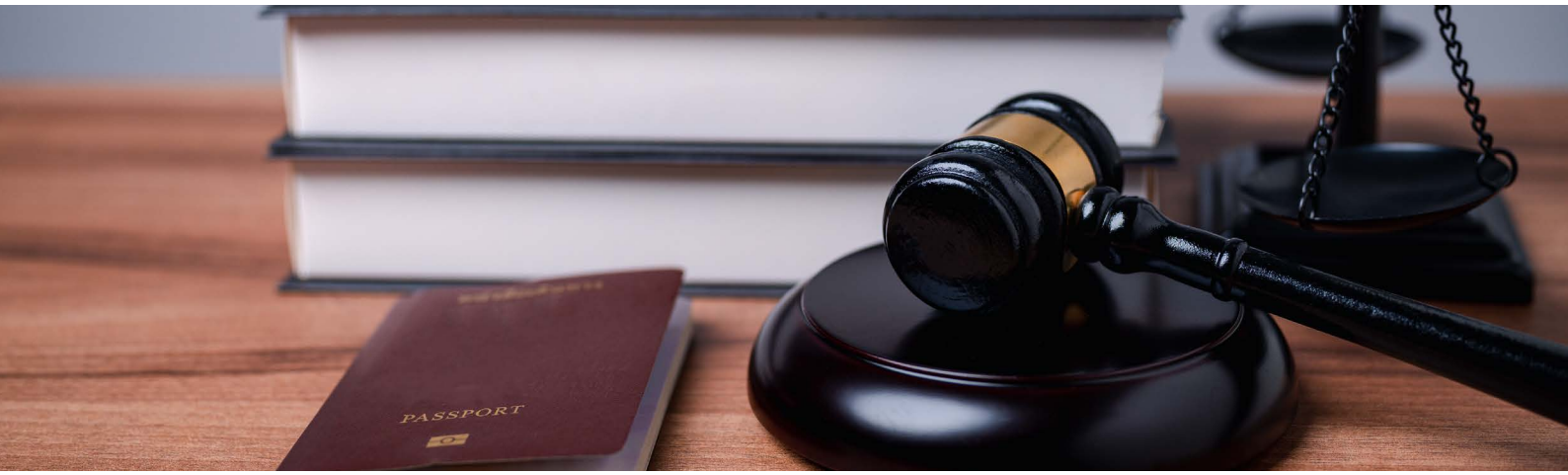
- **Department had no authority in law to retain the amount deposited under protest:** The HC noted that the impugned order was passed based on the premise that a issue similar to the present case pertaining to the taxability of interchange income was reserved by the larger bench of the SC in the case of Citibank. However, this was not a valid reason adopted by the authorities because the judgement of the SC was not applicable due to the difference in the factual background. The present case was of retention without any authority of law, as no SCN was issued, or demand was raised by the department for a period of around 11 years. The department had clearly failed in setting into motion the provisions of law to raise any levy to collect service tax on the transaction in question.
- **Impugned order passed for rejecting the refund claim is violative of Article 265:** The HC emphasised that as per Article 265, no tax shall be levied or collected except by the authority of law and noted that it is the obligation of the department to demonstrate that it had authority in law to withhold the amounts deposited by the petitioner. However, in the present case, the department had not raised any demand. Therefore, the HC held that the order passed was without authority of law and was violative of Article 265 of the Constitution.
- **Settled position under law to allow the refund if the department does not have the authority in law to retain such amount:** The HC relied on the judgement of the Bombay HC in the case of Grasim Industries Ltd., wherein it was held that 'once amounts were deposited by the petitioner and were retained by the department without the authority in law, the claim of the petitioner for a refund could not have been denied.'
- **The impugned order passed was set aside, and a refund was allowed:** The HC also relied on the judgement of the SC in the case of Kanhaiya Lal Makund Lal Saraf, wherein it was held that 'once it was established that the payment of tax has been made by the party under a mistake of law, the party is entitled to recover the same, and the party receiving the same was bound to repay or return it and there was no question of any estoppel being applicable against the party demanding such payment.' Therefore, the HC, in the present case, held that the department had no authority to retain any amount and retaining such amount would lead to an unjust enrichment. Thus, the HC directed a refund of retained amounts, along with interest to the petitioner.

Our comments

It is well settled that when any amount deposited by the assessee was retained by the department without the authority in law, the claim of the assessee for a refund cannot be denied.

A similar decision was made by the Bombay HC in the case of Grasim Industries Ltd. Even recently, the Karnataka HC, in the case of Bundl Technologies Pvt. Ltd., had held that the department could not retain the amount collected during investigations without issuing a SCN, and allowed a refund.

This is a welcome ruling by the Bombay HC and shall set precedence in similar matters. The taxpayers, whose refund applications were initially rejected, may take advantage of the said ruling to demand a refund of the amount paid under protest if it was retained by the department without any authority of law.



Levy of service tax on salary paid to seconded employees – split verdict by CESTAT

Summary

The CESTAT Chennai bench has delivered a split ruling on the issue of whether salary and other allowances paid directly in Indian currency by the appellant to secondees will be liable to service tax. The issue dealt in the present case was limited to the question of valuation and not the taxability of the transaction. The judicial member has held that the allowances paid directly by the appellant to secondees are not includible in the taxable value whereas the technical member has held that such payments are includible in the taxable value. The CESTAT has referred the case to the third member on resolution of the issue raised.

Facts of the case

- An audit was conducted on M/s. Nissan Motors India Private Limited (the appellant), wherein the department noted that the appellant has entered into secondment agreement with its group company located outside India - M/s. Nissan Motor Company Ltd, Japan - to employ expatriates in India.
- Further, the appellant has also entered into a separate agreement with the foreign seconded employees.
- The department relied on Circular F.No.137/35/2011-ST dated 13 July 2011, wherein it was clarified that where one organisation sends its employees to another organisation for a consideration, service tax under the category of manpower supply services would be attracted. Therefore, the department contended that the activity of supplying employees to the appellant unit would fall under manpower services.
- The department noted that part of the salary was paid to the deputed employees directly by the appellant company in INR and part by the associated company outside India. Thereafter, the appellant company had reimbursed the part amount to the foreign company and noted that the appellant did not include the salary portion paid in INR to discharge its service tax liability.
- Therefore, the department invoked an extended period of limitation alleging that the appellant has suppressed facts of payment of part of the salary in INR to the deputed employees, and thus, reduced the taxable value with an intent to evade payment of service tax. Later, the demand was confirmed.
- Therefore, aggrieved by the same, the appellant filed the present appeal before the Tribunal.

Appellant's contentions

- The appellant contended that the service tax is applicable only on those costs that are charged by the service provider.
- The SCN relied upon Rule 5 of the of STDR and Section 67 the FA. However, Rule 5(1) of STDR has been ruled out by the SC in the case of Intercontinental Consultants and Technocrats Private Limited.
- Further, the appellant relied on the decision of the CESTAT in the case of M/s. Neyveli Lignite Corporation Limited, wherein it was held that service tax was not payable on salaries paid directly to the employees.
- The CBEC, vide Circular No. 199/11/2023-GST dated 17 July 2023, clarified that GST is not applicable on the salary component in respect of internally generated services.
- Furthermore, in the case of M/s Boeing India Defence Private Limited, it was held by the CESTAT that perquisites paid to seconded employees are outside the ambit of Section 67.
- The appellant submitted that neither any payment has been made to Nissan, Japan, nor was any debit made in the books of the appellant to Nissan, Japan, being an associate enterprise. Therefore, no point of taxation arises in the present case.
- The demand made on the entire salary portion, including the TDS, is not sustainable.
- The appellant also submitted that Nissan, Japan, qualifies as an intermediary under service tax laws. Therefore, the location of the service provider (Nissan, Japan) would be applicable to demand service tax.

Facts of the case

- Whether the salary, bonus, allowances, and expenses paid by the appellant directly to the secondees in India, is also to be included in the taxable value for the payment of service tax under manpower recruitment services under the RCM.

CESTAT Chennai's observations and judgement [Service Tax Appeal No. 41909 to 41911 OF 2017 dated 11 December 2023]

Arguments of the Judicial Member (Ms. Sulekha Beevi C.S.)

- **Difference in facts vis-à-vis NOS judgement:** The member differentiates the present case from the ruling of the Northern Operating System (NOS) judgement, wherein the seconded employees were entirely remunerated through the payroll of the foreign company. However, in the present case, the appellant reimburses to Nissan, Japan, only a part of the salary that is borne by Nissan Japan.
- **Analysis of the term 'gross amount charged':** Further, the member analysed the term 'gross amount charged' and 'consideration', and noted that the appellant has rightly paid tax only on the amount that has been reimbursed to or charged by the foreign entity because costs that are incurred but not charged do not form part of the consideration; and relied on the decision in the case of M/s. Boeing India Defence Private Limited, wherein it was held that only the gross amount charged must be considered.

- **Earlier jurisprudence:** The member drew reliance from the decision in the case of M/s. Neyveli Lignite Corporation, wherein it was held that if the salary is paid directly and later not reimbursed by the assessee, then that amount would not be leviable under service tax. A similar stance was taken in the case of M/s. Boeing India Defence Pvt Ltd. Contrary to the above, in the case of M/s Renault Nissan Automotive India Pvt Ltd, it was held, relying on the decision of the NOS judgement, that tax would be levied on the part of salary paid directly to an employee and not charged on the foreign company. However, the member held that the above ruling is not applicable because the above ruling was not considered.
- **Amount to be included in taxable value:** Further, relied on the decision of the apex court in the case of M/s Bhayana Builders, wherein it was held that only such amounts that are charged on the service provider need to be included in the taxable value for the purpose of discharging the service tax liability.
- **Extended period not invokable:** The member held that the extended period cannot be invoked because the issue involved was purely interpretational in nature.

Arguments of the technical member (M. Ajit Kumar)

- **Analysis of the term 'consideration':** The member analysed the term 'consideration' under the Indian Contract Act, 1872, and applied the same to the context of the Finance Act and noted that the amount that is payable to the overseas supplier of manpower service, either if paid directly or indirectly to the secondee at the behest of the supplier, i.e., by both the overseas supplier (reimbursable) plus the appellant, it would represent the gross consideration for the service provided or to be provided. This view is substantiated by the SC's decision in the case of M/s. Bhayana Builders Private Limited.
- **Terms of agreement:** As per the secondment agreement, it is clear that the appellant has accepted the group company's promise for services of skilled employees on payment of the gross amount that the group company charges as per certain conditions. Therefore, fulfilment of the agreement's conditions and payment or debit of the books of accounts to pay the secondees their full salary, bonus, and allowances as per the gross amount 'charged' by the group company, would attract service tax. The member held that the cases referred by the appellant on the issue of whether reimbursable charges are to be included in the value on which tax are of limited precedential value.
- **Payments to form part of assessable value:** The member also held that as per the provisions of the RCM, all the payments made by the receiver of service, who is deemed to be the provider of service, towards the salary and advances of the secondee (both in Indian and foreign currency), would form a part of the assessable value on which duty has to be levied.
- **Employer-employee relationship:** Further, the member analysed the concept of employer and employee relationship in the present factual background and opined that the appellant has operational or functional control over the secondee similar to a service recipient of manpower and also as it is clearly mentioned in the agreement that the secondee will continue to be the employee of Nissan (Japan). Therefore, it was concluded that no employer-employee relationship exists. Also, they would not be considered as joint employer.
- **Not an intermediary:** The member held that there is nothing on record to show that the group company is an 'intermediary' employed to perform any act for another.
- **Demand amount incorrect:** The member held that there is no provision under law that specifies to include TDS in the value for purposes of calculating service tax. Therefore, the amount of demand is not correctly calculated. The member held that the invocation of the extended period and imposition of penalty in the present case is not justified.
- **Payments in INR to be included in assessable value:** The member has held that payments made directly to the INR are includible in the taxable value.

Given the difference of opinion between the two members, the matter has been referred for resolution by the third member.

Our comments

The leviability of GST on salary paid to seconded employees has been extensively deliberated post the decision of the SC in the case of Northern Operating System. However, in many cases, a stay has been granted where the GST department issued notices demanding GST on payment of the salary/ reimbursements related to seconded overseas employees.

Even the Board has recently issued an instruction clarifying that the decision of the SC in the case of M/s. Northern Operating Systems Private Limited [CA No. 2289-2293/2021] (NOS) cannot be extended to each and every secondment transaction mechanically. The taxability of the transaction would be determined only after evaluating the different factual matrices, specifically the terms of the contract between the overseas company and the group company. The CBIC has further underlined that an extended period of limitation can only be invoked by establishing fraud, wilful misstatement, or suppression of facts to evade tax and not solely non-payment of tax.

Earlier, the Board, vide Circular No. 199/11/2023-GST dated 17 July 2023, clarified that the cost of the salary of employees of the head office, involved in providing services to the branch office, is not mandatorily required to be included while computing the taxable value of the supply of such services.

While the matter has been referred to the third member, it is relevant to note that similar matters are pending before the SC in the case of M/s Komatsu India Pvt. Ltd and M/s. Nortel Networks India Pvt. Ltd.

B. Key judicial pronouncements under Customs/FTP SEZ laws

RoDTEP benefit available on restricted goods subject to fulfilment of conditions – Gujarat HC

Summary

The Gujarat HC has held that the benefit under the RoDTEP scheme shall be available in case of the export of products that are covered under the 'Restricted' category, provided all the conditions are fulfilled. The HC stated that the basic objective of the RoDTEP scheme is to provide incentives to the exporters on export of products, and when such products are exported after the fulfilment of all conditions, then benefit shall not be denied to the exporters.

Facts of the case

- Satyendra Packaging Limited (the petitioner) is engaged in the export of sugar for which it claims benefit under the RoDTEP scheme as notified by the DGFT by way of Notification No. 19/2015-2020 dated 17 August 2021.
- However, effective from 1 June 2022, the export policy of sugar was amended, and it was put under the 'Restricted' category, wherein it was provided that the exporter shall be required to fulfil certain conditions in terms of obtaining permission from the relevant authorities to become eligible for the export of sugar.
- The petitioner had duly complied with the conditions contained in the amended export policy of sugar and thereafter made an application to the DGFT for claiming benefit under the RoDTEP scheme.
- However, such claim was rejected by the DGFT on the ground that restricted goods are not eligible for RoDTEP benefit.

Issue before Gujarat HC

- Whether the benefit under the RoDTEP scheme shall be available in case of export of restricted goods on fulfilment of conditioned prescribed in the export policy?

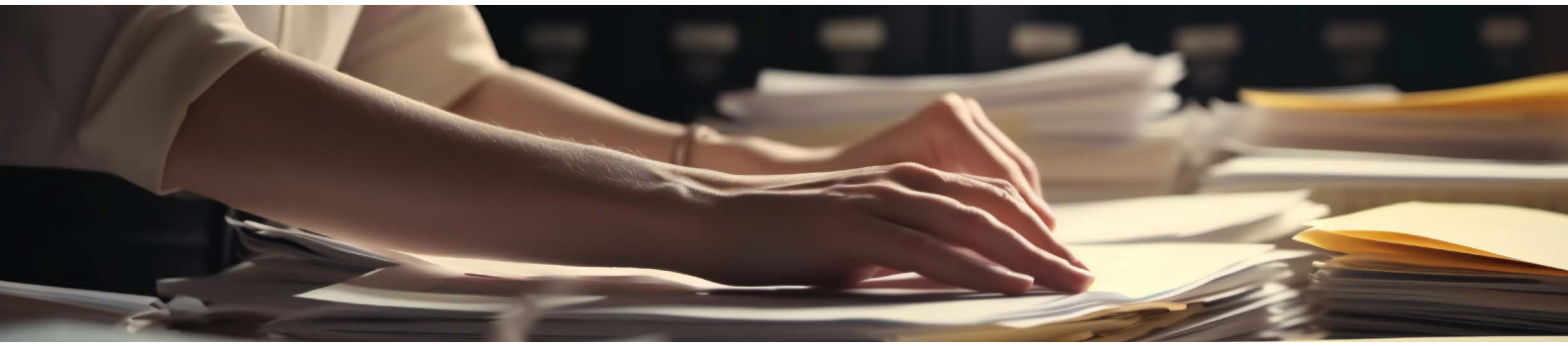
Gujarat HC's observations and judgement [Special Civil Application No. 3084 dated 29 November 2023]

- Objective of RoDTEP scheme is to provide incentives to exporters: The HC observed that the RoDTEP scheme aims to provide incentives to exporters for encouraging the export of products from India, and once all the conditions contained in the export policy are fulfilled by exporters, then export benefits shall not be denied.
- Petition allowed and directions to DGFT to allow RoDTEP benefit to exporter: The HC directed the DGFT to extend the benefit of the RoDTEP scheme to the petitioner on the export of sugar, as it has duly complied with all the conditions of the export policy. Therefore, a petition was allowed by extending the benefit of the RoDTEP scheme to the petitioner.

Our comments

This is a welcome ruling by the Gujarat HC and has provided huge relief to those exporters whose RoDTEP benefit was rejected by the DGFT merely on the ground that the products exported by such exporters are covered under the 'Restricted' category. Thus, exporters who are exporting restricted goods but complying with all the conditions contained in the export policy may take advantage of this judgement of the HC.

The Gujarat HC has also granted similar relief earlier in the case of Shree Renuka Sugars Ltd.



Delhi HC issues notice to Revenue in matter challenging customs duty deferral on capital goods imported under MOOWR

Summary

The Delhi HC has issued a notice to the Revenue in a matter concerning furnishing of a provisional duty bond for clearing capital goods imported by Acme Heergarh Powertech Private Limited (petitioner) [W.P.(C) 12386/2022], under the MOOWR. The petitioner has challenged the Instruction No. 13/2022-Customs dated 9 July 2022 issued by the CBIC.

Facts of the case

- The petitioner had imported goods under the MOOWR scheme. Therefore, the IGST and custom duty on the said imports were deferred.
- The petitioner was advised to submit a provisional duty bond for clearance of capital goods from the warehouse.
- In furtherance to the above notice, the petitioner submitted that 2 bonds have already been filed as per the provisions of Section 59 of the Customs Act. Accordingly, the petitioner contended that an additional bond duty is without authority of law.
- In a hearing held earlier, the HC directed the respondent to not to insist the petitioner on paying an additional bond and directed it to provide a working on the imports made under the MOOWR scheme and the amount of duty payable in order to assess whether the bond amount paid earlier is sufficient even if the revenue contention is right.
- The application was submitted by the petitioner, alleging that the Customs officers are not accepting the regular bond and contented that earlier, the bonds were accepted, and the imported articles were released; therefore, the present action of the officer is not justified.
- Further, the petitioner submitted that the bonds are computed at three times the duty assessed. Therefore, the procedure adopted earlier by the officers should be continued.
- The petitioner submitted that the stay granted earlier via the interim order cannot be continued for an indefinite period. But the HC noted that the interim stay order was not issued for a particular period.
- The HC had a prima facie opinion that if any coercive action is taken against the petitioners with respect to import consignments, it would cause detriment to their interest.
- Further, the HC noted that the proceedings arising out of the SCNs, which subsequently came to be issued, have also been stayed. The HC ordered the applicant to provide the required parent entity's guarantee to uphold any potential obligations that would arise if the writ petitioners eventually fail in claiming benefit under the MOOWR scheme.
- The HC held that the existing process of allowing imports should be followed till the next date of hearing

Key arguments of the Revenue

- Goods imported (solar panels), are not being used in manufacturing the final product, i.e., electricity. Therefore, these goods do not get cover under Section 65 of the Customs Act.
- Further, the exemption under Section 66 of the Customs Act will not be available.
- The assessee's contention that merely because the solar panels used in the generation of electricity are not removed from the warehouse, the levy of import duty becomes indefinitely deferred, is not correct.
- Either the goods imported can be warehoused and then removed or goods can be imported, warehoused and manufacturing can happen and then be removed. As for when the import duty gets levied, Section 68 is important.
- The sunlight/sunrays also fail the test of Section 60 and Section 65 since they can neither be imported goods nor warehoused goods for manufacturing.
- The beneficiary of the PLI scheme cannot simultaneously get exemption from import duty payments and benefits under the scheme.

The HC has listed the following batch for further hearing on **16 January 2024**: W.P.(C) 10537/2022 & CM APPL. 31692/2022 (Amendment);W.P.(C) 10835/2022;W.P.(C) 10836/2022;W.P.(C) 10838/2022;W.P.(C) 10840/2022;W.P.(C) 10844/2022;W.P.(C) 10853/2022;W.P.(C) 1507/2023 & CM APPL. 5656/2023(Interim Stay);W.P.(C) 10837/2022 & W.P.(C) 12386/2022

Customs duty is applicable on goods supplied back as is from SEZ unit to DTA, being a reimport for DTA – CESTAT

Summary

The CESTAT, New Delhi bench, has held that the customs duty is applicable on the goods supplied back from the SEZ unit to a DTA without any manufacturing activity undertaken on such goods in the SEZ. The CESTAT noted that Section 30 of the SEZ Act specifically provides that clearance of goods from a SEZ to a DTA will be on payment of customs and other duties.

Furthermore, the CESTAT stated that Rule 48(3) of the SEZ Rules makes it clear that the goods initially procured from a DTA by a SEZ unit, if cleared back to the DTA without processing, will be treated as reimported goods. It is a reimport for the DTA purchaser who is procuring the goods from the deemed foreign territory of SEZ, and such DTA purchaser is required to file the BoE. The SEZ unit will not become a re-importer, and thereby, be eligible to claim exemption or refund. Accordingly, the CESTAT dismissed the appeal and remanded the matter for examination of exemption pertaining to reimport availed by the appellant.

Facts of the case

- M/s. Lupin Limited (the appellant) is a SEZ unit, which manufactures and exports pharmaceutical products.
- The appellant had imported certain input goods from a DTA unit, which remained unutilised. Thus, the appellant supplied such goods back to the DTA after paying duty.
- The appellant paid the custom duty under protest.
- Therefore, the appellant filed a refund application on the ground that the supply of goods from a SEZ unit to a DTA qualifies as reimport without engaging in any manufacturing activity and will be exempt from custom duties as per Rule 48(3) of the SEZ Rules.
- A SCN was issued and adjudicated, denying the refund, holding that the refund is not admissible under the SEZ Act read with the Customs Act.
- Subsequently, the appellant appealed against the original order, but the Commissioner (Appeals) again rejected the same.
- Therefore, aggrieved by the same, the appellant has filed the present appeal before the CESTAT.
- The appellant also contended that the authorities had not correctly provided the benefit of the exemption under Notification No. 45/2017 - Customs - dated 30 June 2017.

Issue before the Tribunal

- Whether the goods removed from a SEZ to a DTA (initially procured from DTA) are chargeable to customs duties in terms of Section 30 of the SEZ Act read with Rule 47 of the SEZ Rules?

CESTAT New Delhi's observations and judgement [Customs Appeal No. 54694 of 2023-SM dated 29 November 2023]

- **Custom duty is leviable on clearance of goods from SEZ unit to DTA:** The CESTAT observed that Section 30 of the SEZ Act provides that custom duties are leviable on clearance of goods from a SEZ unit to a DTA. The CESTAT also relied on the judgement in the case of Roxul Rockwood Insulation India Pvt. Ltd. and Nokia India Sales Pvt. Ltd., wherein it was held that 'if any goods are to be removed from a SEZ to the DTA, they will be chargeable to the duties of customs, including anti-dumping, countervailing, and safeguard duties.' Therefore, the CESTAT held that the goods cleared from a SEZ unit to a DTA attract custom duties.
- **Settled position under law that rules are being made to supplement the Act and not to supplant the Act:** The CESTAT held that the appellant's argument that the BCD would not be leviable on the reimport of goods is not valid because it is a well-settled position under law that the rules cannot go contrary to the substantive provisions of the Act. Furthermore, to substantiate its view, the CESTAT relied on the judgement of the apex court in the case of J.K. industries Ltd., wherein a similar stance was taken.
- **Settled position under law that, in cases when language is unambiguous and explicit, one cannot resort to a different interpretation:** The CESTAT relied on the judgement of the apex court in the case of Kalyan Roller Flour Mills Private Limited and Shri Vile Parle Kelvani Mandal & Ors. It was clarified that 'once the provisions of an enactment are simple and there is no ambiguity, there is no scope for interpretation.' Therefore, the CESTAT observed that there is no ambiguity under the SEZ laws.
- **Concept of reimportation regarding transfer of goods from SEZ to DTA:** The CESAT opined that the appellant's interpretation of rules was fundamentally incorrect because the appellant ignored the provision of Rule 47 of the SEZ Rules. Rule 48(3) and Rule 47 of the SEZ Rules must be interpreted together and not separately. The CESTAT emphasised that Rule 48(3) of SEZ Rules does not offer blanket exemption from the leviability of tax.

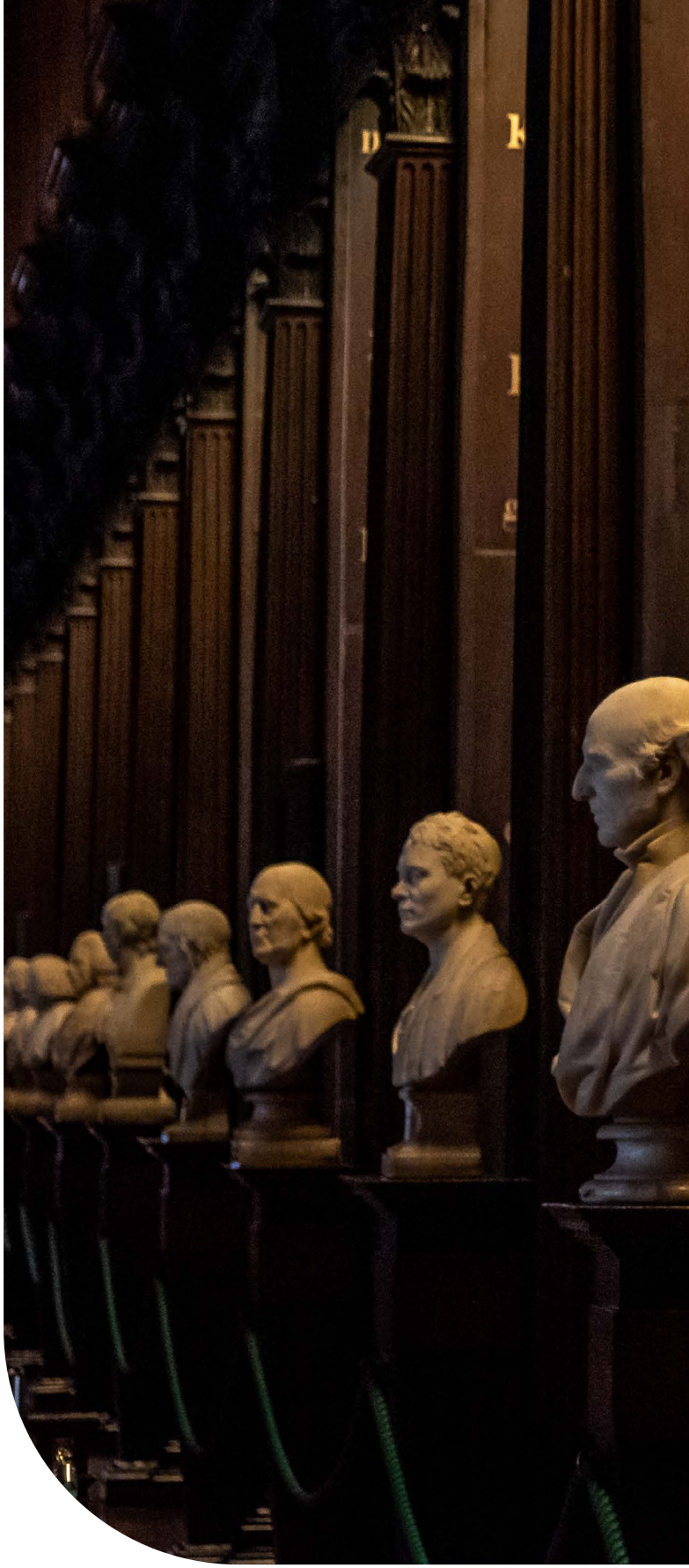
- **Appeal dismissed and issue pertaining to the eligibility of exemption remanded back:** The CESTAT examined the invoices submitted by the appellant and held that the appellate authority has not rightly examined the issue of exemption benefit under the notification(supra). Therefore, the CESTAT dismissed the appeal and remanded the matter for examination of the benefit of exemption.

Our comments

Section 53 declares a SEZ to be a territory outside the customs territory of India for the purpose of undertaking authorised operations. Furthermore, Rule 48 of the SEZ Rules inter-alia states that where goods procured from a DTA by a unit are supplied back to the DTA, as it is or without substantial processing, such goods shall be treated as reimported goods and will be subject to such procedure and conditions as applicable in the case of normal reimport of goods from outside India. Therefore, the CESTAT held that in the present case, custom duty is leviable on the goods reimported from a SEZ unit to a DTA.

The decision is likely to open a pandora's box for other assessees with similar transactions and is expected to come under the Revenue's scanner.

However, it is interesting to note that under the GST law, the Tamil Nadu AAR, in the case of the Bank of Nova Scotia, has held that the applicant is not liable to pay IGST at the time of removal of goods from the FTWZ/SEZ to DTA, in addition to the duties payable under the Customs Tariff Act, on the removal of goods from the FTWZ/SEZ unit.



Custom duty not leviable on defective/obsolete inputs imported without payment of duty at time of destruction; custom duty leviable on scrap value of destroyed goods

Summary

The CESTAT Bangalore bench has held that if an EOU imports raw materials without paying duty, but later the items become obsolete, then the department should allow the assessee to destroy those items without paying duty on the imported value of the goods. The CESTAT observed that in the earlier cases, the department had allowed payment of the duty on the scrap value of the destroyed goods. Therefore, the department, in the present case, should have also allowed the appellant for the destruction of goods without insisting for the payment of custom duty on the original imported value. Therefore, considering the above, the CESTAT allowed the present appeal.

Facts of the case

- M/s. Tyco Electronics Corporation India (P) Limited ('the appellant') is an EOU unit engaged in the manufacturing of connectors.
- In pursuant to the Customs Notification No. 52/2003-Customs dated 31 March 2003 and Notification No. 22/2003-Central Excise dated 31 March 2003, the appellant imported raw materials from a DTA unit without the payment of any duty.
- Due to the rapid technological development, the imported raw material became obsolete and unfit for manufacture. Therefore, the appellant sought permission from the department for destruction of the obsolete goods on payment of duty on the scrap value.
- However, the AA directed to destroy unfit goods after making the payment of duty on the assessable value at the time of import with interest till date of the payment of duty.
- Aggrieved by the same, the appellant has filed the present appeal.

Petitioner's contentions

- The appellant submitted that the impugned order has been issued without considering the provisions of FTP r/w Notification No.53/2003-Cus dated 31 March 2003 further substituted vide Notification No. 34/2015-Cus dated 25 May 2015.
- Further, relied on Board Circular No. 60/1999-Cus dated 10 September1999, wherein it was clarified that 'the supplier of defective goods, does not insist on re-export of such goods, the same may not be re-exported subject to the condition that such goods shall be either destroyed with the permission of the assistant commissioner in charge of the unit or cleared into a DTA on payment of full customs duty'.
- The appellant placed reliance on the judgements of the CESTAT in the case of M/s. Saint Gobin Crystals, M/s Mac Million India Vs CC and M/s. Indian Actuators Pvt Ltd., wherein the above circular was considered, and the department allowed the appellant to pay duty only on the scrap items after destruction.

Issue before the CESTAT

- Whether the raw materials/components procured without payment of duty under Notification 52/2003-cus dated 31 March 2003 can be permitted to be destroyed without the payment of duty when the goods become obsolete and unfit for manufacture?

CESTAT Bangalore's observations and judgement [Final Order No. 21269-21272 of 2023 dated 20 November 2023]

- **All conditions fulfilled:** The CESTAT observed that the appellant had rightly fulfilled the conditions as specified under the FTP and circulars by seeking permission from the department for the destruction of obsolete material. The CESTAT emphasised on the fact that the decision in the case of Santox Pvt Ltd was not correctly relied upon by the department, as in that case also the matter was remanded for the demand of duty only on the value of the deteriorated goods and not on the original imported value.
- **Past judicial precedence:** The CESTAT relied upon the decision of the Punjab and Haryana HC in Pure Rice Ltd. and held that the department cannot insist the payment of customs duty on defective/obsolete goods imported without the payment of duty, which are unfit for export purposes.
- **If imported goods are destroyed, duty is leviable only on the scrap value:** Therefore, the CESTAT held that when imported goods are destroyed, duty is leviable only on the scrap value, and allowed the present appeal.

Our comments

The CESTAT held that in the present case, the duty is leviable only on the scrap value of the destroyed goods even when goods are imported without the payment of any duty on the fulfilment of the condition that permission has been obtained from the department and not on the original imported goods value.

A similar ruling was pronounced in the case of Santox Pvt Ltd.

This is a welcome ruling by the CESTAT and shall set precedence in similar matters. This is expected to provide relief to those importers who had earlier imported goods without the payment of duty but later the goods become obsolete with time and technological changes and are required to destroy the obsolete items.

03

Expert's Column

Equalisation Levy 2.0 and interpretational issues involved

In April 2020, India implemented the Equalisation Levy 2.0 (EL 2.0) through the Finance Act, 2020. This levy is applicable on non-resident e-commerce operators (ECO) for consideration received from the online supply of goods or services (excluding online advertisements covered by EL 1.0 introduced in 2016). The ECOs are obligated to deposit the applicable taxes with the government. EL 2.0 applies to ECO having sales, turnover, or gross receipts amounting to INR 20 million or more in a financial year.

The expansion of EL provisions has given rise to several questions and interpretational challenges. While the Finance Act 2021 has addressed some concerns raised by stakeholders, this edition attempts to highlight some of the unresolved issues that requires clarity.

To have a summarised understanding of the subject, we had a dialogue with Manish Khurana, Chartered Accountant, Gurugram.

What is the interplay between EL 2.0 and royalty/fees for technical services (FTS)

The classification of income as royalty / FTS or business income has been a subject matter of prolonged litigation.

Royalty/FTS are subject to withholding tax on gross basis i.e., on the total amount of royalty / FTS. However, if an enterprise has a permanent establishment (PE) in the other country, then such income is taxable as business income on net basis, i.e., after the claim of allowable expenses.

In a situation where the taxpayer considers a transaction as covered by EL 2.0 provisions, and in the course of assessments the same is characterised as royalty / FTS by the tax authorities or later on during the course of litigation by the courts, the present provisions are silent on the treatment of EL 2.0 liability already deposited by the taxpayer.

Nevertheless, the Delhi Court, in its interim order in the case of Google Asia Pacific Pte Ltd. vs CIT [2022] (137 taxmann.com 486), had permitted tax withholding net of EL Liability (already paid to the government). The said interim order has also been referred by the High Court in its other decision in the case of Amazon Web Services India (P.) Ltd. vs ITO [2023] (154 taxmann.com 230).

However, appropriate guidance concerning the matter is needed to clear the clouds that whether the EL deposited by the ECO shall be allowed as credit against the tax liability arising on account of taxability as royalty / FTS or refunded to the taxpayer.

In case where the income is taxable as fees for technical services under the Act, however, such income is not subjected to tax in India in view of the treaty clause, will EL be applicable in such cases?

The chargeability of the income to tax in India in the hands of a non-resident is governed by the provisions of the act or the treaty, whichever is more beneficial to the non-resident.

The Finance Act, 2021, has clarified that where income by way of royalty/FTS is chargeable to tax under the ITA read with the applicable Double Taxation Avoidance Agreements (DTAA), such income would not be subjected to EL 2.0.

However, if the receipt does not meet the criteria for royalty/FTS under the relevant DTAA, even if it aligns with the definition in the ITA, the amount would not be chargeable to tax in India.

In this scenario, fees for technical services could be subject to EL 2.0, in case the same is received in lieu of rendering services online by an ECO.

Can a non-resident ECO claim any foreign tax credit for EL paid in India?

The availability of foreign tax credit of the EL paid will depend on the local tax laws in the home jurisdiction of the ECO.

It is pertinent to note that the taxes covered under the respective DTAA entered into between India and foreign countries have been specifically defined and generally do not cover the EL. Therefore, it is likely that the tax credit may not be available for the EL paid in India, given that the EL constitutes a distinct chapter in the Finance Act and is not integrated into the ITA.

In the case of countries with which India does not have a DTAA, if the home country's jurisdiction of ECO recognises the EL as a type of direct tax and entitles the ECO to claim FTC, the ECO may be able to claim it.

However, where the EL is not creditable in the home country, it would be a sunk cost in the hands of the non-resident ECO.

Will inter-group transactions and reseller arrangements be covered by the scope of EL provisions? If yes, what type of transactions can get covered, e.g., cross charge of administrative, payroll, finance function charges, software usage, just because a ERP based platform is used by the group?

The EL 2.0 provisions do not provide any exemption for inter-company/intra-group transactions. There are differing viewpoints as to whether inter-group services would fall within the ambit of this levy, particularly in a situation where there is no mark-up.

In the case of rendition of intra-group services by one entity to other group entities/affiliates, it would need to be determined whether the digital facility is maintained by the first entity for commercial purposes, which would be the case where such services are provided on a cost-plus markup basis.

In a situation where services relating to administration, payroll, finance, software usage, are provided to group entities over the digital platform on a cost-plus basis, it would further need to be analysed whether the same would amount to 'online provision of services'.

On the other hand, if one group entity maintains the facility for the various entities in the group and seeks to recover the cost incurred in maintaining such facility from other group entities (without any markup and for purposes of cost efficiencies only), then, it maybe possible to infer that the entity owning, managing and operating such facility is not an e-commerce operator.

Accordingly, such cross charges of inter-company/intra-group support services require careful consideration.

Whether the provisions of EL shall be applicable on transactions conducted over an e-mail/telephone/video conferencing considering the use of terms 'digital or telecommunication facility', or can these modes be said to be only modes of communication and not a platform?

While e-mail and telephone are commonly seen as channels or mediums of communication, the same cannot be universally applied to video conferencing. In the case of video conferencing, if the facility is consistently maintained for commercial purposes specifically, providing services for consideration, then the individual or entity responsible for its upkeep may qualify as an ECO.

For instance, if a video conferencing facility is utilised for hosting online courses with associated fees, it can be considered a digital or electronic platform for transacting business. On the other hand, if the video conferencing facility serves primarily as a means of communication within a user group, the person in charge of it may not be classified as an e-commerce operator.

The distinction lies in the commercial nature and the purpose of the video conferencing facility is in facilitating transactions and services for consideration.

How should one interpret 'digital', 'electronic facility' or 'platform'?

The expressions 'digital', 'electronic facility' or 'platform' have neither been defined by the Finance Act, 2016, nor the Finance Act, 2020, nor by the ITA. As per the Merriam Webster Dictionary, 'digital' means 'composed of data in the form of, especially binary digits.' 'Electronic' means 'of, relating to or being a medium (such as television) by which information is transmitted electronically'. 'Platform' means 'the computer architecture and equipment using a particular operating system'.

OECD BEPS Action Plan 1 observed that "E-commerce platforms typically operate the web stores where products are displayed and purchasers can make their orders..." OECD, in its report 'An Introduction to Online Platforms and their Role in the Digital Transformation' describes an online platform as a "…. digital service that facilitates interactions between two or more distinct but interdependent sets of users (whether firms or individuals) who interact through the service via the Internet".

Having regard to the aforesaid, a view may be possible that the expression 'digital' or 'platform', in the context of EL provisions, refers to a marketplace that facilitates exchange between different types of consumers/service providers who could not otherwise transact with each other. In other words, the facility or platform mediates transactions across different but interdependent user groups subject to network effects.

04

Issues on your mind

What is a Document Identification Number (DIN)/ Reference Number (RFN)? When can a communication be issued without a DIN?

DIN/RFN is an identification number for digitalising all the communications sent by the department to the taxpayers or other concerned persons. A DIN shall be used for search authorisation, summons, arrest memo, inspection notices and letters issued during any enquiry. It would also provide the recipients of such communication a digital facility to ascertain their genuineness.

The situations in which a communication may be issued without the electronically generated DIN/RFN are mentioned below:

i. When there are technical difficulties in generating the electronic DIN/RFN, or

ii. When communication is required to be issued at a short notice and the authorised officer is outside the office in the discharge of his official duties.

iii. When the communication is statutorily issued through the GST backend system by the SGST officers and is intended to be communicated to the taxpayer through the GSTN portal.

What happens when a communication is issued without an auto-generated DIN?

Any communication issued without an electronically generated DIN/RFN in the cases mentioned above shall be regularised within 15 working days of its issuance by:

i. Obtaining the post facto approval of the immediate superior officer as regards the justification of issuing the communication without the electronically generated DIN/RFN.

ii. Mandatorily electronically generating the DIN/RFN after the post facto approval: and

iii. Printing the electronically generated pro-forma bearing the DIN/RFN and filing it in the concerned file.

In any other case the communication shall be treated as invalid and deemed to have never been issued.

What is Direct Port Delivery (DPD)? What were the challenges faced before DPD and how does it help?

DPD is an initiative taken by the CBIC primarily introduced at JNCH to transform the process of cargo clearance. It allows the facilitated consignments to be given 'OOC' directly from the terminal premises, thereby eliminating the requirement of containers being moved to CFSs for completing Customs formalities before the grant of 'OOC'.

Advantages of DPD:

a. Reduced transaction cost

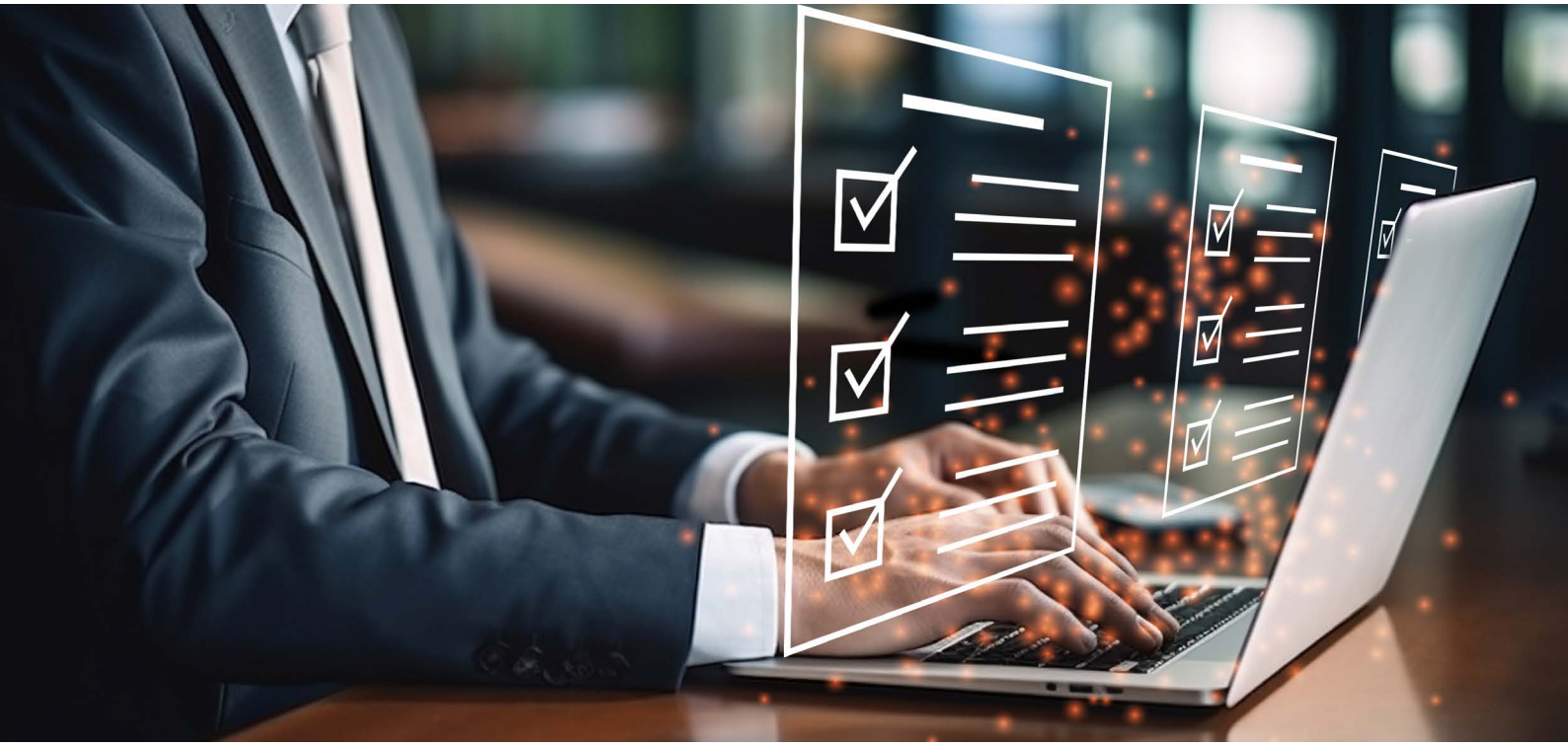
b. Shorter dwell time

c. Exports are made competitive

As per estimates, around INR 8,000/- to INR 10,000/- are being saved as transaction cost per container besides reduction of dwell time to around 1-2 days from the earlier 8-10 days.

What is ICETRACK and what are its benefits?

ICETRACK is a mobile application launched by the CBIC, which will help in live tracking the Custom's documents verification and clearance process. It is a one-stop application for enabling Customs clearances, making the existing shipping bills and bill of entry verification process paperless and contactless. This application allows trade stakeholders to live track the bill of entry/shipping bill status, duty, GSTN enquiry and validate the gate pass/ bill of entry/shipping bill copies with a QR code scanning functionality. This will help to speed up the verification of documents by the Customs officers deployed at ports gates and will also prevent unauthorised transactions.



05

Important development under direct taxes

CBDT notifies ITR forms for AY 2024-25

The CBDT has notified ITR forms (i.e., ITR-1 SAHAG and ITR-4 SUGAM) for AY 2024-25. The applicability of the said forms is as under:

Form No.	Applicability	
	Type of taxpayer	Other conditions
ITR-1 (Sahaj)	**Individuals being a resident (other than not ordinarily resident)**	• Total income up to INR 50 lakh • Income from salaries, one house property, other sources (Interest, etc.) • Agricultural income up to INR 5,000 • Not for an individual who is either director in a company or has invested in unlisted equity shares, or in case where the TDS has been deducted under Section 194N of the Section 194N of the IT Act, or if income tax is deferred on ESOP
ITR-4 (Sugam)	**Resident individuals, HUFs and firms (other than LLP)**	• Total income up to INR 50 lakh • Should have income from business and profession, which is computed under Sections 44AD, 44ADA or 44AE of the IT Act • Not for an individual who is either director in a company or has invested in unlisted equity shares, or if income tax is deferred on ESOP or has agricultural income more than INR 5,000

These forms will come into effect from **1 April 2024**.

[Notification No. 105 of 2023 dated 22 December 2023]

CBDT issues direction for processing of ITR with refund claims for AY 2018-19 to AY 2020-21

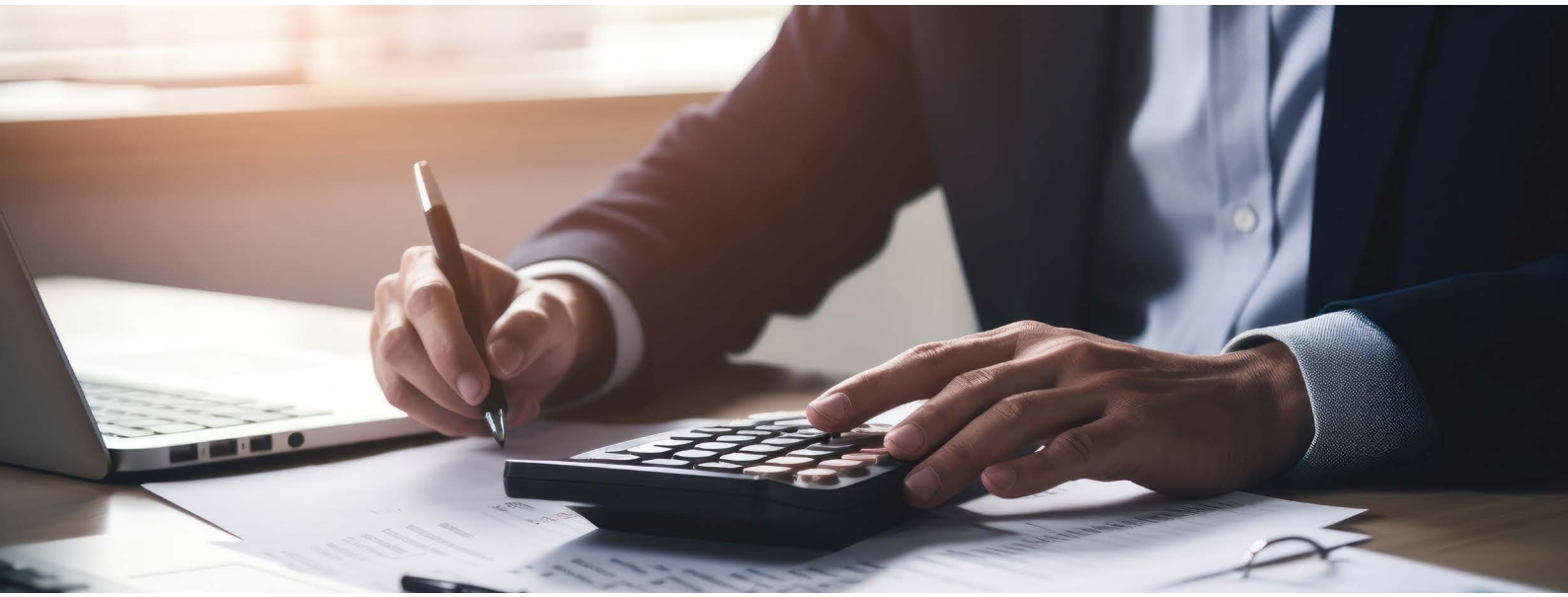
Due to certain technical issues / other reasons not attributable to the taxpayers, several validly filed returns for AYs 2018-19, 2019-20 and 2020-21 could not be processed under Section 143(1) of the IT Act. Accordingly, intimation regarding the processing of such returns could not be sent within the prescribed timelines resulting in cases where taxpayers were unable to get their legitimate refund.

To address this issue, the CBDT has further extended the timeframe for issuing intimation under Section 143(1) of the IT Act. It has directed that all ITRs with refund claims pertaining to **AYs 2018-19 to 2020-21** (wherein the return was validly filed electronically) can be processed with prior approval of PCCIT / CCIT even if the due date for issuing intimation under Section 143(1) of the IT Act has lapsed.

[Order dated 1 December 2023]

In such cases, intimation can be sent to the taxpayer by **31 January 2024**. However, this relaxation **is not applicable** in case the return:

- Is selected for scrutiny.
- Remains unprocessed, i.e., either demand is payable or is likely to arise after processing.
- Remains unprocessed for any reason attributable to the taxpayer



CBDT issues guidelines on Section 194-O of the IT Act

Section 194-O of the IT Act requires an ECO to deduct tax at source at the rate of 1% on the gross amount of sale of goods or provision of service or both, facilitated through its digital or electronic facility or platform. TDS is required to be deducted if the gross amount for sale or services or both exceeds INR 50 lakhs in a FY.

In order to remove practical difficulties in implementing the aforesaid TDS provision, the CBDT has issued the following guidelines:

S. No.	Issue	Clarification
1.	Liability to deduct tax in case multiple ECOs are involved in a single transaction. **Situation 1:** Multiple ECOs are involved in a single transaction and where the seller-side ECO **is not the actual seller** of the goods or services. **Situation 2:** Multiple ECOs are involved in a single transaction and where the seller-side ECO **is the actual seller** of the goods or services.	• Tax is required to be deducted by the **seller-side ECO who finally makes the payment or the deemed payment** to the seller. • Tax is required to be deducted **by such ECO who finally makes the payment or the deemed payment** to the seller.
2.	Whether the gross amount will include charges in relation to convenience fees or commission levied by the ECO and logistics and delivery fees levied by the seller or payment to the platform or network (e.g., ONDC) provider for facilitating the transaction?	• Tax is required to be deducted by the seller-side ECO on the gross amount of sales of goods or provision of services **inclusive of all the charges**. • If tax is deducted under Section 194-O of the IT Act on gross amount, no tax shall be deducted under any other provision. However, if tax is to be deducted under Section 194S of the IT Act, no tax shall be deductible under Section 194O of the IT Act. • Payments made to the platform or network provider (e.g., ONDC) facilitating the transaction would form part of the gross amount, if they are included in the payment for the transaction. However, these payments will not be included if they are being paid on a lump-sum basis and are not linked to a specific transaction.
3.	Whether GST and/or other taxes such as VAT/sales tax/excise duty/ central sales tax will be included in gross amount for TDS?	• **If tax under Section 194-O is deducted at the time of credit and GST component is indicated separately:** GST will not form part of the gross amount for the purposes of TDS under Section 194-O of the IT Act. • **If tax is deducted at the time of payment (i.e., before credit):** GST will be included in the gross amount for the purposes of TDS under Section 194-O of the IT Act.
4.	Adjustment of purchase returns	• **If tax is already deducted before the purchase return, and subsequently, money is refunded:** TDS deducted on the returned goods may be adjusted with the next transaction with the same deductee in the same FY. In case TDS was deposited, it will be allowed as credit to the seller. • No adjustment of TDS is required if the goods are replaced.
5.	Treatment of discounts while computing gross amount for the purpose of TDS	• **Seller discounts:** Seller would reduce the price of the products sold or services provided. • **Discount given by buyer ECO or seller ECO:** In this case, seller receives full consideration, but the discount is given by the buyer / seller ECO. Tax will be deducted by the seller ECO on the **full invoice value (i.e., the sum received by the seller)**.

Circular No. 20 of 2023 dated 28 December 2023

Glossary

AA	Adjudicating Authority
AAR	Authority for Advance Ruling
AAAR	Appellate Authority for Advance Ruling
AY	Assessment Year
BCD	Basic Custom Duty
BOA	Board of Approval
BoE	Bill of Entry
CBDT	Central Board of Direct Taxes
CBEC	Central Board of Excise and Customs
CBIC	Central Board of Indirect Taxes and Customs
CCIT	Chief Commissioner of Income-tax
CA	Civil Appeal
CEPA	Comprehensive Economic Partnership Agreement
CESTAT	The Customs Excise and Service Tax Appellate Tribunal
CFSs	Container Freight Stations
CGST	The Central Goods and Service Tax
CGST Act	The Central Goods and Services Tax Act, 2017
CGST Rules	The Central Goods and Services Tax Rules, 2017
CoO	Certificate of Origin
Customs Tariff Act	Customs Tariff Act, 1975
Customs Act	The Customs Act, 1962
DGFT	Directorate General of Foreign Trade
DGGI	Directorate General of GST Intelligence
DIN	Document Identification Number
DLA	Directorate of Legal Affairs
DPD	Direct Port Delivery
DTA	Domestic Tariff Area
ECO	E-commerce Operator
EODES	Electronic Origin Data Exchange System
EOU	Export Oriented Unit
ESOP	Employee Stock Option Plan
FA	Finance Act,1994
FOC	Free of Cost
FTP	Foreign Trade Policy
FTWZ	Free Trade Warehousing Zone
FY	Financial Year
GST	Goods and Services Tax
GSTAT	Goods and Services Tax Appellate Tribunals
GSTN	Goods and Services Tax Network
GTA	Goods Transport Agency
HC	High Court
ICD	Inland Container Depots
ID	Identification
IDS	Inverted Duty Structure
IEC	Importer Exporter Code
IFSCA	International Financial Services Centres Authority
IGST	The Integrated goods and services tax
IIBX	India International Bullion Exchange
INR	Indian Rupee
IT	Information Technology
IT Act	Income-tax Act, 1961
ITeS	Information Technology Enabled Services
ITC	Input Tax credit
ITR	Income-tax Return
JNCH	Jawaharlal Nehru Custom House
LED	Light Emitting Diode
LPG	Liquified Petroleum Gas
LUT	Letter of Undertaking
MeitY	Ministry of Electronics and Information Technology
MOOWR	Manufacturing and Other Operations in Warehouse Regulations, 2019
OIO	Order-In-Original
OOC	Out of Charge
PCCIT	Principal Chief Commissioner of Income-tax
PLI	Production Linked Incentive
RBI	Reserve Bank of India
RCM	Reverse charge mechanism
RFN	Reference Number
RoDTEP	Remission of Duties and Taxes on Exported Products
SAMAY	Systematic Adherence and Management of timelines for Yielding results in litigation
SC	Supreme Court
SCN	Show cause notice
SEZ	Special Economic Zone
SEZ Act	Special Economic Zone Act, 2005
SEZ Rules 2006	Special Economic Zone Rules, 2006
SGST	The State Goods and Services Tax
SLP	Special Leave Petition

STDR	The Service Tax (Determination of Value) Rules, 2006
TDS	Tax Deducted on Source
TRQ	Tariff rate quotas
UAE	United Arab Emirates
VAT	Value Added Tax

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