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SHAPING A VIBRANT INDIA

GST Compendium

A monthly guide

September 2022

Editor’s note

The threshold limit for e-invoicing under GST has been reduced from INR 20 crore to INR 10 crore, effective 1 October 2022. This is in continuation of the steps taken by the government to widen the tax net.

As per the instructions issued by the CBIC, summons should not be issued to the senior management of the company at the first instance unless clear indications are there of their involvement in tax evasion. The CBIC emphasised that the power to arrest must be exercised diligently and not in a routine manner.

On the judicial front, the Apex Court has directed the Union of India/GST Council to instruct states to implement an electronic DIN system to bring transparency and accountability in the indirect tax administration.

In another ruling, the Apex Court has held that the sale/supply of antivirus software in a CD to the end-user by charging a licence fee is a deemed sale, not leviable to service tax. Artificial segregation of the transaction into two parts is not tenable in law, therefore, the transaction cannot be divided into the sale of CD and the supply of updates. Once it is accepted that the software put in the CD is goods, then there cannot be any separate service element in the transaction.

In this edition, we have analysed the RPT governance from the transaction tax perspective.

On the direct tax front, the CBDT has specified more forms that are required to be filed electronically. It has also reduced the time limit for verification of income tax returns and notified the form for claiming a refund of TDS in certain cases.

Hope you will find this edition an interesting read.

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01 Important amendments/updates

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

E-invoicing mandatory for the taxpayers having turnover exceeding INR 10 crore w.e.f. 1 October 2022

The CBIC has made it mandatory for the notified registered persons, having aggregate turnover[1.1] above INR 10 crore[1.2], to issue e-invoices, with effect from **1 October 2022**.

Presently, the limit of aggregate turnover is INR 20 crore.

CBIC clarifies applicability of GST on liquidated damages, compensation received due to breach of contract

To remove the ambiguities and mitigate legal disputes, the CBIC has issued a circular[1.3], wherein it examined the scope of relevant entry[1.4] of Schedule II of the CGST Act, 2017, in respect of the applicability of GST on payments in the nature of liquidated damages, compensation, penalty, cancellation charges, late payment surcharge, etc., arising out of breach of contract. It has been clarified that in the absence of an express or implied promise by the recipient, payment cannot be assumed for doing an act or for refraining from an act, or for tolerating an act. Further, payments such as liquidated damages, forfeiture of salary for premature leaving of the employment, penalty for cheque dishonour, etc., are not a consideration for tolerating an act or situation. Rather, such payments are for preventing breach of contract or non-performance and are, therefore, mere 'events' in a contract.

1.1 in any of the preceding financial year from 2017-18 onwards
1.2 Notification No. 17/2022 – Central Tax dated 1 August 2022
1.3 Circular No. 178/10/2022-GST dated 3 August 2022
1.4 Entry 5(e)

The CBIC has examined the scope of relevant entry of Schedule II, which has below three limbs:

- Agreeing to the obligation to refrain from an act
- Agreeing to the obligation to tolerate an act or a situation
- Agreeing to the obligation to do an act

It is clarified that there must be a necessary and sufficient nexus between the supply and the consideration. Further, the following are the essential characteristics to qualify any activity or transaction under the relevant entry:

- The activities must be under an 'agreement' or a 'contract' (whether express or implied)
- The contract must be for a 'consideration' in return from one party to another
- The contract must be an independent arrangement in its own right. It can take the form of an independent stand-alone contract or may form part of another contract
- A contract cannot be imagined to exist merely because there is a flow of money from one party to another

Further, the CBIC has provided detailed clarifications on specific activities or transactions, which are as below:

Particulars	Clarification	Taxability
Liquidated damages	In case where the amount as 'liquidated damages' is paid only to compensate for injury, loss, or damage suffered by the aggrieved party, without any agreement, such liquidated damages are merely a flow of money from the party who causes breach of the contract. Liquidated damages are not the desired outcome of a contract. Thus, such payment would not be constituted as consideration for supply and, hence, not taxable. However, in case payment constitutes a consideration for a supply, then it is taxable, irrespective of by what name it is called. Hence, it can be concluded that if the payment does not represent the 'object' of the contract, then it cannot be considered as a 'consideration'.	Payments do not constitute consideration for a supply, thereby not exigible to GST.
Compensation for cancellation of coal blocks	The compensation to the prior allottees of mines was paid in terms of order of the SC. However, as such, there was no agreement between such allottees of coal blocks and the government. Therefore, it cannot be said that such prior allottees had supplied a service to the government by way of agreeing to tolerate the cancellation of the allocations. Also, it cannot be said that the compensation paid for cancellation was a consideration for such service.	The compensation paid for the cancellation of coal blocks is not taxable under the provisions of GST law.
Cheque dishonour fine/penalty	These transactions are in the nature of a fine or a penalty, imposed by a supplier or banker for the dishonour of a cheque. The said fine/penalty is not imposed for tolerating the act or situation. Rather, it is imposed for not tolerating, penalising and, thereby, deterring and discouraging such an act or situation.	A cheque dishonour fine or penalty is not a consideration for any service and is not taxable under the GST law.
Penalty imposed for violation of laws	Laws are not framed for tolerating their violation, thus, a penalty imposed for violation of laws is not a consideration for any supply received and is not taxable. Further, as such, there is no agreement between the government and the violator. It is explained in the service tax education guide that there is no service received in lieu of payment of fines and penalties, thus same is not considered. Even the circular[1.5] clarified that the fines and penalty chargeable by the government or a local authority imposed for violation of a statute, bylaws, rules or regulations are not leviable to service tax. An analogy can be drawn under the GST regime also.	Penalties imposed for violation of laws cannot be treated as consideration charged by the government or a local authority for tolerating violation of laws. Hence, the same is not taxable under GST.

1.5 Circular No. 192/02/2016-Service Tax, dated 13 April 2016

Particulars	Clarification	Taxability
Forfeiture of salary or payment of the bond amount in case of premature leaving of employment by the employee	The provision for forfeiture of salary or recovery of the bond amount in case of premature leaving of employment is added to the employment contract in order to discourage non-serious candidates. Further, recovery of such amount by the employer cannot be said as consideration for toleration of the act of such premature leaving, but it is a penalty for discouraging the non-serious employees and to deter such situations. Besides, the employee does not get anything in return for such payment. Therefore, such amounts recovered by the employer are not taxable as consideration.	Amounts recovered by the employer are not a consideration and are not taxable under GST.
Compensation for not collecting toll charges	During the relevant period, NHAI paid compensation to the concessionaires (toll operators) in lieu of free access to toll roads for the users. It has been clarified[1.6] that the toll operators had provided services of access to a road or bridge and toll charges are mere consideration for such service. During the relevant period, the service continued to be provided for which the consideration was paid by NHAI. In this regard, it is, hereby, clarified that it cannot be said that the service has changed merely due to receipt of consideration from another person other than the actual user of the service.	Similar taxability as in case of service by way of access to a road or a bridge on payment of toll charges.
Late payment surcharge or fee	The facility of accepting late payments with interest or late payment fee, fine or penalty is a facility granted by a supplier naturally bundled with the main supply. Even if this service is described as a service of tolerating the act of late payment, it is an ancillary supply naturally bundled and supplied in conjunction with the principal supply. Therefore, it should be assessed at the same rate as the principal supply.	These charges are to be assessed at the same rate as the principal supply, being ancillary to and naturally bundled with the principal supply.
Fixed capacity charges for Power	The price charged for electricity has two components, i.e., minimum fixed charges/ capacity charges and the variable/energy charges per unit charge. The minimum fixed charges need to be paid mandatorily irrespective of the quantity of electricity during a month. However, the variable is charged as per the consumption of the electricity. The minimum fixed charge or part thereof cannot be considered as a charge for tolerating the act of not scheduling or consuming the minimum contracted or available capacity or a minimum threshold. Thus, it is clarified that both components of price are charged for the sale of electricity, which is exempt under GST. Hence, the same is not taxable.	These charges are in respect of the sale of electricity and are not taxable under GST.
Cancellation charges	A cancellation fee is basically the charge for the costs involved in planning for the intended supply and in the cancellation of the supply. The facilitation supply of allowing cancellation against payment of cancellation fee or retention or forfeiture of a part or whole of the consideration or security deposit in such cases should be assessed as the principal supply. The amount forfeited should be assessed at the same rate as applicable to the service contract. Further, it is to be noted that forfeiture of earnest money is agreed as compensation for the losses suffered and as a penalty for discouraging the non-serious buyers or bidders. It cannot be considered as a consideration for tolerating the breach of contract. There is merely a flow of money and the same cannot be said as a consideration for any supply and is not taxable	These charges should be assessed at the same rate applicable to the service contract. Forfeiture of earnest money is not a consideration for any supply and is not taxable.

1.6 Circular No. 212/2/2019-ST dated 21 May 2019

Our comments

The taxability of liquidated damages, notice pay recovery, etc., has been a matter of extensive litigation for a long time.

The present clarifications issued by the CBIC have emphasised that for a taxable supply, there must be an express or implied agreement, which may be oral or written, to do or abstain from doing something against payment of consideration. Further, it cannot be assumed that an agreement exists merely because of the flow of money from one party to another.

Depending on the facts of the case, these clarifications will play a vital role in determining the taxability of the supply of service of agreeing to the obligation to refrain from any act, or to tolerate an act or a situation, to do an act.

Further, this circular is likely to put to rest the controversies and demands raised on taxpayers on the subject matter.

CBIC issues guidelines for arrest and bail in relation to offences punishable under the CGST Act

The CBIC has issued detailed guidelines[1.7] for arrest and bail in relation to offences punishable under the CGST Act, 2017. It has prescribed the conditions to be fulfilled before placing a person under arrest, procedure to be followed for arrest and pursuant to arrest. It has emphasised that the legal requirements must be fulfilled before placing a person under arrest. It has outlined the procedure to be followed in the case when arrest of a person has been made due to cognisable and non-cognisable offences. The CBIC also suggested to maintain an all-India record of arrests made in CGST and accordingly, the authorities shall submit reports to the concerned authorities in a prescribed manner.

The CBIC has examined the judgement[1.8] passed by the Apex Court in criminal appeal[1.9] wherein it was held that a distinction must be made between the existence of the power to arrest and the justification to exercise it. In view of the above judgement, the CBIC has issued guidelines as below:

Particulars	Guidelines
Conditions precedent to arrest	• Before arrest of a person, the legal requirements[1.10] must be fulfilled. The reasons to believe must be explicit and clear and must be based on credible material. • The fulfilment of the legal conditions[1.11] precedent to arrest does not necessitate to make an arrest. The Commissioner or the competent authority also needs to determine if there is affirmative response of the specified questions. • The approval to arrest should be granted only where the intent to do act[1.12] is evident and element of criminal intent is palpable. • It is necessary to ensure proper investigation and prevent the possibility of tampering with evidence or intimidating or influencing witnesses exists. • Arrest should not be done in cases of technical nature[1.13]. Other factors influencing the decision to arrest could be if the alleged offender is co-operating in the investigation, viz. compliance to summons, furnishing of documents called for, not giving evasive replies, voluntary payment of tax, etc.
Procedure for arrest	• After considering the nature of offence, the role of person involved and evidence available, the Principal Commissioner/Commissioner shall record on file that he has reason to believe and may authorise an officer of central tax to arrest the concerned person(s). • The provisions of the Code of Criminal Procedure[1.14] relating to arrest and the procedure thereof, must be followed. Thus, it is the duty of the Principal Commissioner/Commissioner to ensure that all officers are fully familiar with the provisions[1.15]. • The arrest memo must comply with the directions of the Apex Court in the case of D.K Basu[1.16] and the format of arrest memo should be as prescribed in the circular[1.17]. Additionally, following points must be adhered to and must be noted in the arrest memo: – explanation of the grounds of arrest to the arrested person – immediate information to a nominated or authorised person of the arrested person – the date and time of arrest shall be mentioned in the arrest memo • As mandated vide the circular[1.18], DIN needs to be mentioned. • Certain modalities should be complied including the following: – A woman should be arrested only by a woman officer[1.19] – The arrested person shall be examined medically by designated officer[1.20]/registered medical practitioner[1.21]. The person having custody of an arrested person shall take reasonable care of the health and safety of the arrested person.

1.7 vide Instruction No. 02/2022-23 (GST-Investigation) dated 17 August 2022
1.8 dated 16 August 2021
1.9 Appeal No. 838 of 2021, arising out of SLP (Criminal) No. 5442/2021
1.10 Sub-section (1) of Section 132 of CGST Act, 2017 dealing with the punishment for offences and Sub-section (1) of Section 69 giving the power to the Commissioner to arrest a person
1.11 mentioned in Section 132 of the CGST Act, 2017
1.12 evade tax or commit acts leading to availment or utilisation of wrong ITC or fraudulent refund of tax or failure to pay amount collected as tax
1.13 i.e., where the demand of tax is based on a difference of opinion regarding interpretation of Law
1.14 Code of Criminal Procedure, 1973 (2 of 1974) read with section 69(3) of CGST Act
1.15 of the Code of Criminal Procedure, 1973 (2 of 1974)
1.16 in the case of D.K Basu vs State of West Bengal reported in 1997(1) SCC 416 (see paragraph 35)
1.17 under Board's Circular No. 128/47/2019-GST dated 23 December 2019
1.18 Circular No. 122/41/2019-GST dated 5 November 2019
1.19 in accordance with section 46 of Code of Criminal Procedure, 1973
1.20 by a medical officer in the service of Central or State Government
1.21 in case the medical officer is not available

Post arrest formalities: Post arrest, the below procedure shall be followed for different categories of offences:

Type of offence	Procedure
Arrest of person due to non-cognisable and bailable offence	• The AC or DC is bound to release a person on bail against a bail bond. • The bail conditions should be informed in writing to the arrested person and also to the nominated person on telephone. • The amount to be indicated in the personal bail bond and surety will depend upon the facts and circumstances of each case and should be commensurate with the financial status of the arrested person. • Upon fulfilment of the bail conditions by the arrested person, he shall be released by the concerned officer on bail immediately. However, in case of non- fulfilment of the conditions, he shall be produced before the appropriate Magistrate.
Arrest of person due to cognisable and non-bailable offence	• The authorised officer shall inform the grounds of arrest to the person and produce him before a Magistrate within twenty-four hours. However, in case he could not be produced before a Magistrate, then he may be handed over to the nearest police station and produced before the Magistrate on the next day, and the nominated person of the arrested person may also be informed accordingly. • The arrested person must be produced before the appropriate Magistrate within twenty-four hours of arrest, excluding the time necessary for the journey from the place of arrest to the Magistrate's court.

- The formats of the bail bond and the challan for handing over to the police should be followed.
- After the arrest, a prosecution complaint[1.22] should be filed, before the competent court, preferably within sixty days of the arrest, where no bail is granted. In all other cases, it should be filed within a definite time frame.
- A Bail Register[1.23] should be maintained by every Commissionerate/Directorate.
- The money/instruments/documents received as surety should be kept in the safe custody of a single nominated officer.

Reports

- A report shall be sent[1.24] to the Member (Compliance Management) as well as to the Zonal Member within twenty-four hours of the arrest, in specified annexure.
- An all-India record of arrests made in CGST shall be maintained. Thus, from September 2022 onwards, the Principal Chief Commissioner(s)/Chief Commissioner(s) shall send a monthly report of all persons arrested in the Zone to the DGGI[1.25] in the prescribed format, by the 5th of the succeeding month.
- The monthly reports shall be compiled by the DGGI, and a compiled zone-wise report shall be sent to the Commissioner (GST-Investigation), the CBIC by the 10th of every month.
- All reports shall be sent only by e-mail.

Our comments

Earlier, the SC, in case of Dilip K. Basu, had issued the guidelines required to be followed in case of arrest and detention. Further, in case of Siddharth, the Apex Court had held that there should be a proper justification of exercising the power of arrest to avoid incalculable harm to the reputation and self-esteem of a person. The guidelines issued by the GST investigation wing of the CBIC are in line with the above decision of the SC.

These guidelines may safeguard the interest of bonafide taxpayers and reduce the unwarranted hardships faced by the taxpayers. The GST authorities should also follow these instructions to ensure no misuse of arrest provisions.

1.22 under Section 132 of the CGST Act, 2017
1.23 containing the details of the case, arrested person, bail amount, surety amount etc.
1.24 by the Principal Director-General (DGGI)/ Principal Chief Commissioner(s)/Chief Commissioner(s)
1.25 Headquarters, New Delhi

CBIC issues guidelines on issuance of summons under the CGST Act

The CBIC has issued guidelines[1.26] on the issuance of summons under the CGST Act. The GST investigation wing has advised the officers to see the viability of issuing a letter of requisition of information instead of directly resorting to summons. It emphasised that the officers should use the power of issuance of summons diligently. Also, the issuance of a summon should be avoided to call upon the statutory records which are already available on the GST portal. Further, to bring transparency and accountability, the summon should have a DIN.

The CBIC noticed that the field formations/officers have issued summons[1.27] to the top officials of companies in routine matters to call for material evidence/documents. Even the statutory records which are already available online on the GST portal have been sought by issuing summons. In this regard, the CBIC stated that the summon is one of the instruments available with the department to seek information/documents from any person to evaluate tax evasion. However, the power to issue summons must be exercised judiciously and with due consideration. Further, the officers should see the viability of issuing a letter of requisition of information instead of resorting to the summons.

The CBIC has issued fresh guidelines as below, which must be followed in investigation matters under the CGST:

- Summons should be issued by the superintendents after obtaining prior written approval from the officers not below the rank of DC/AC. The reasons for issuance of summons are to be recorded in writing. If it is not possible to obtain prior written permission, oral /telephonic permission must be taken, however, records of the same should be in writing.
- The officer should maintain a record of appearance/non-appearance of the summoned person and place a copy of the statement recorded in a file.
- The name of the offender(s) should be indicated on the summon, to provide understanding to the recipient of summons as to whether he has summoned as an accused, co-accused, or as a witness. However, disclosure of his name should not be detrimental to the cause of the investigation.
- Summons may not be issued to seek the statutory documents which are digitally available on the GST portal.
- The senior management officials[1.28] of any company or a PSU should not generally be issued summons in the first instance. However, they should be summoned if there are clear indications of their involvement in the decision-making process, which can lead to loss of revenue.
- As mandated vide the circular[1.29] issued by the CBIC, DIN must be generated and quoted on all communications issued by the CBIC officers to taxpayers and other concerned persons for the purpose of investigation. Further, the department shall follow the prescribed[1.30] format of summons.
- The summoning officer must be present at the time and date for which the summon is issued. In case of any emergency, the summoned person must be informed in advance in writing or orally.
- All summoned persons are bound to appear before the concerned officers, except the women who do not, by tradition, appear in public or privileged persons.
- Without ensuring service of summons, issuance of repeated summons must be avoided. In case the person does not join the investigation, after giving reasonable opportunity[1.31], a complaint should be filed against him with the jurisdictional magistrate. However, before filing complaints, it must be ensured that the summons have adequately been served upon the intended person[1.32]. Further, it does not bar to issue further summons to the said person[1.33].

Our comments

Earlier, the CBIC stated that the summon is to be issued as a last resort where the assessee is not cooperating, and this section should not be used by the top management. Thus, the summons should not be issued in a casual manner. Further, the language used in summons should not be harsh to cause unnecessary stress and embarrassment to the taxpayer.

However, it has been noticed that the department has caused undue harassment on the honest and bonafide taxpayers. Hence, taxpayers must be aware of their rights to safeguard themselves from unnecessary harassment from the officers.

Now, the GST investigation wing has issued guidelines under the CGST in order to avoid misuse of power by the GST officers. These guidelines may help in reducing the unwarranted hardships faced by the taxpayers. Further, the GST authorities should take these instructions and guidelines into consideration and follow the procedure prescribed therein.

1.26 Instruction No. 03/2022-23 (GST-Investigation) dated 17 August 2022
1.27 Under Section 70 of the CGST Act 2017.
1.28 such as CMD/ MD/ CEO/ CFO/ similar officers
1.29 122/41/2019-GST dated 5 November 2019
1.30 Circular No. 128/47/2019-GST dated 23 December 2019.
1.31 Generally, three summons at reasonable intervals
1.32 in accordance with Section 169 of the CGST Act
1.33 Under Section 70 of the CGST Act

CBIC issues clarification on applicability of GST rates, exemption, and classification concerning various goods and services

To remove ambiguity and mitigate legal disputes on the taxability of various goods and services, pursuant to the recommendations of the GST council in the 47th meeting, the CBIC has issued two circulars to provide clarifications concerning the applicability of GST rates, exemptions on various services, classification of goods.

The CBIC has examined various issues, including applicable GST rate on the supply of ice cream by ice cream parlours, electrically operated vehicles without any battery, taxability of additional toll fees collected from the vehicles not having Fastag, the tax treatment of PLC, etc.

Clarifications[1.34] regarding applicable rate and exemption on certain services:

Issue	Clarification
The applicable rate of GST on the supply of ice cream by ice cream parlours during the period from 1 July 2017 to 5 October 2021	Till 5 October 2021, ice cream parlours have paid GST at the rate 5% without availing ITC and thus, resulted in the loss of benefit of significant ITC. In this respect, it is clarified that to avoid litigation, such cases of GST payment at the rate of 5% without ITC shall be treated as fully GST paid. Further, since the decision is only in order to regularise the past practice, thus GST refund shall not be allowed if tax is already paid at 18%. Besides, w.e.f. 6 October 2021, the ice cream parlours are required to pay GST on such supply at the rate of 18% with ITC benefit.
Applicability of GST on fee charged for entrance or issuance of eligibility certificate for admission or issuance of migration certificate by the educational institutions	The educational services supplied by the educational institutions to their students are exempt from GST[1.35]. The exemption widely covers the amount or fee charged for admission or entrance, the application fee for entrance, or the fee charged from the prospective students for issuance of an eligibility certificate. It also includes the services supplied by way of issuance of migration certificates to the leaving or ex-students. Accordingly, it is clarified that the fee charged from prospective students for entrance or admission, or for issuance of eligibility certificate as well as the fee charged for issuance of migration certificates by the educational institutions to the leaving or ex-students, is covered by the exemption.
Applicability of GST exemption on the service of storage or warehousing of cotton in baled or ginned form	It is clarified that the service by way of storage or warehousing of cotton in ginned and or baled form was covered under the entry 24B of exemption notification[1.36] in raw vegetable fibres, such as cotton. However, this exemption has been withdrawn w.e.f. 18 July 2022.
Applicability of GST exemption on services associated with transit cargo both to and from Nepal and Bhutan	The services associated with the transit cargo to and from Nepal and Bhutan are covered under the exemption notification[1.37], as recommended by the GST Council. Further, it is also clarified that the movement of empty containers from Nepal and Bhutan after delivery of goods is a service associated with the transit cargo to Nepal and Bhutan and is, therefore, covered by the exemption.
Applicability of GST on sanitation and conservancy services supplied to army and other central and state government departments	The exemption[1.38] has been given to pure services and composite supplies procured by the CG, state government, union territories, or local authorities to perform listed functions[1.39]. If such services are procured by the Indian Army or any other government ministry/department that does not perform any listed functions in the prescribed manner, then same are not eligible for such exemption.
The applicable rate of GST on the activity of selling of space for advertisement in souvenirs	The selling of space for advertisement in print media attracts GST at the rate of 5%. The term 'print media'[1.40] means book defined in the Act[1.41], which would cover souvenir books also. Accordingly, it is clarified that the sale of space for advertisement in souvenir books is covered under the relevant entry[1.42] of the notification and attracts GST at the rate of 5%.

1.34 Circular No. 177/09/2022-TRU dated 3 August 2022
1.35 vide entry 66 of the notification No. 12/2017 Central Tax (Rate) dated 28 June 2017
1.36 12/2017- Central Tax (Rate) dated 28 June 2017
1.37 Sl. No. 9B of Notification 12/2017- Central Tax (Rate)
1.38 under entry 3& 3A of notification 12/2017- Central Tax (Rate) dated 28 June 2017
1.39 listed in the 11th and 12th schedule of the constitution
1.40 clause (zt) of notification No.12/2017-Central Tax (Rate) dated 28 June 2017
1.41 Press and Registration of Books Act, 1867
1.42 serial number (i) of entry 21 of notification No. 11/2017-Central Tax (Rate) dated 28 June 2017

Issue	Clarification
Taxability and the applicable rate of GST on the transport of minerals by vehicles deployed with drivers for a specific duration of time	Usually, in these cases, the vehicles are given on hire to the mining lease operator, and the expenses for fuel are generally borne by the recipient of service. Further, the vehicles with a driver are used by the mining lease operator as per his requirement during the specified period. These services are 'rental services of transport vehicles with operator' having HSN 9966 and will attract GST at the rate 18%[1.43]. The person who gives the vehicles cannot be considered as he is supplying the service by way of transport of goods. Thus, it is clarified that such renting of vehicles with driver for a specified period is a service of renting of transport vehicles with operator falling under the Heading 9966. It is not a service of transportation of goods by road, and hence, it is not eligible for exemption[1.44]. Further, in the case where the cost of fuel is included in the consideration charged from the recipient of service of rental services of goods carriages, GST is applicable at the rate of 12%[1.45] w.e.f. 18 July 2022.
Tax treatment of location charges or PLC collected in addition to the lease premium for long-term lease of land or of upfront amount charged for a long-term lease of land	The location charge is nothing, but part of the consideration charged for the long-term lease of the plot. The same is exempt from being charged upfront along with the basic amount for the lease. Accordingly, it is clarified that such an amount paid in addition to the lease premium for the long-term lease of land constitutes part of the upfront amount and is eligible for the same tax treatment, and thus eligible for exemption[1.46].
Applicability of GST on payment of honorarium to the guest anchors	It is clarified that the supply of all goods and services is taxable unless exempt or declared as 'neither a supply of goods nor a supply of service'. The services provided by the guest anchors in lieu of honorarium attract GST liability. However, guest anchors whose aggregate turnover in a financial year does not exceed INR 20 lakh (INR10 lakh in case of special category states) shall not be liable to take registration and pay GST.
Taxability of additional toll fees collected by the concessionaires from the vehicles not having Fastag	The additional amount collected from the users is in the nature of toll charges and should be treated as additional toll charges. It is clarified that such an additional fee is essentially the payment of toll for allowing access to roads or bridges to such vehicles and may be given the same treatment as given to toll charges.
Applicability of GST on services in form of ART/ IVF	The abnormality/disease/ailment of infertility is treated using ART procedures such as IVF. It is clarified that services by way of IVF are also covered under the definition of health care services for the purpose of exemption notification[1.47].
Applicability of GST on sale of land after levelling, laying down of drainage lines, etc.	As per the Schedule III of the CGST Act, 2017, the 'sale of land' is neither a supply of goods nor a supply of services. Therefore, it does not attract GST. Further, land can either be sold as it is or after some development. In this respect, it is clarified that the sale of such developed land is also the sale of land; hence, it is covered under Schedule III[1.48] and, accordingly, does not attract GST. However, any service[1.49] provided for the development of land as may be received by developers shall attract GST at the applicable rate for such services.

1.43 under Sr. No. 10 part (iii) of notification No. 11/2017- Central Tax (Rate) dated 28 June 2017
1.44 under Sl. No. 18 of notification No. 12/2017- Central Tax (Rate) dated 28 June 2017
1.45 reduced from 18%
1.46 under Sl. No. 41 of notification no. 12/2017- Central Tax (Rate) dated 28 June 2017
1.47 Sl. No. 74 of notification No. 12/2017- Central Tax (Rate) dated 28 June 2017
1.48 Sl. No. 5
1.49 like levelling, laying of drainage lines

Issue	Clarification
Liability of corporate recipients to pay GST on renting motor vehicles designed to carry passengers	There exists a clear distinction between the service of transport of passengers and renting a vehicle that is used for transport. Accordingly, it is clarified that when the body corporate hires the motor vehicle for a period of time and has a vehicle at its disposal, the service would fall under Heading 9966, and it shall be liable to pay GST under the RCM. However, if the body corporate avails the passenger transport service for specific journeys or voyages and does not take the vehicle on rent for any particular period of time, the service would fall under Heading 9964 and not liable to pay GST on the same under the RCM.
Will the engagement of non-airconditioned contract carriages by firms for transportation of their employees to and from work be exempt under GST?	It is clarified that 'charter or hire' excluded from the exemption entry is charter or hire of a motor vehicle for a period of time, where the renter defines the operation of vehicles, determining schedules/ routes, etc. Thus, the exemption shall not be applicable where the contract carriage is hired for a period of time, during which the contract carriage is at the disposal of the service recipient.
Applicable GST rate on service of construction, supply, installation, and commissioning of a dairy plant on a turn-key basis.	In this regard, it may be seen that prior to 18 July 2022, the notification[1.50] prescribed GST at the rate of 12 % on the composite supply of works contract by way of construction, erection, commissioning, or installation of original works pertaining to the mechanised food grain handling system, machinery or equipment for units processing agricultural produce as food stuff excluding alcoholic beverages. It is clarified that a contract of the nature described here constitutes the supply of works contract. Further, the dairy plant which comes into existence as a result of such contracts is an immovable property. It is also clarified that such works contract services were eligible for a concessional rate of 12% GST prior to 18 July 2022. However, w.e.f. 18 July 2022, such works contract services would attract GST at the rate of 18%[1.51].

1.50 serial number 3(v)(f) of notification no. 11/2017 Central Tax (Rate) dated 28 June 2017
1.51 Amendment carried out in notification No. 11/2017- Central Tax (Rate) vide notification No. 03/2022- Central

Clarification[1.52] regarding GST rates and classification of goods

Issue	Clarification
The applicable rate of GST on the electrically operated vehicle without any battery fitted to it	As per the explanation[1.53] of 'electrically operated vehicle', it means a vehicle that runs solely on electrical energy derived from an external source or electrical batteries. Therefore, the fitting of batteries cannot be considered a connecting factor for defining a vehicle as an electrically operated electric vehicle. Hence, it is clarified that an electrically operated vehicle is to be classified under the HSN 8703 even if the battery is not fitted to such vehicle at the time of supply and thereby attracts GST at the rate of 5%[1.54].
Applicable GST rates on Napa Stones, which are ready to use and polished in ways other than mirror-polished	Napa Stone is a brittle stone that cannot be subjected to extensive mirror polishing. Currently, as per Schedule I[1.55] , GST at the rate of 5% is applicable for stones[1.56] other than mirror polished stone which is ready to use. Napa Stones are minor polished stones that do not qualify as mirror polished stones. Therefore, it is clarified that the relevant entry of Schedule I[1.57] cover minor polished stones.
Applicable GST rate on different forms of mangoes, including mango pulp	It is clarified that mangoes, fresh falling under the heading 0804 are exempt. Further, mangoes, sliced and dried, falling under 0804 are chargeable to a concessional rate of 5% and all other forms of dried mango, including mango pulp, attract GST at the rate of 12%.
Applicable GST rate on treated sewage water	Water[1.58], with certain specified exclusions, is exempt from GST[1.59]. It includes the supply of treated sewage water. Further, the word 'purified' is omitted from the relevant entry[1.60].
Classification and applicable GST rate on Nicotine Polacrilex gum	Nicotine Polacrilex gum, which is commonly applied orally and is intended to assist tobacco use cessation, is appropriately classifiable under the tariff item 2404 91 00 with an applicable GST rate of 18%[1.61].
Applicable rate on the fly ash bricks and fly ash aggregates	As per the recommendations of the GST Council in the 23rd meeting, the condition of 90% or more fly ash content was applicable only for fly ash aggregate. Therefore, it is clarified that the condition of 90% or more fly ash content is applied only to fly ash aggregates and not to fly ash bricks and fly ash blocks. Further, w.e.f. 18 July 2022, the condition is omitted from the description.
Applicable GST rate on by-products of milling of dal/ pulses such as chilka, khanda and churi	It is clarified that the goods which are used as cattle feed ingredients are classified under the heading 2302 and attract GST at the rate of 5%[1.62]. For the past cases, the matter would be regularised on an as-is basis.

Our comments

The circulars issued by the CBIC should help mitigate disputes across industries/sectors and reduce litigation and tax demands. Depending on the facts of the case, these clarifications will help determine the taxability of the goods or services. It is likely to provide uniformity in the interpretation of the taxpayers and the tax authorities for the transactions.

1.52 Circular No. 179/11/2022-GST dated 3 August 2022
1.53 in entry 242A of Schedule I of notification No. 1/2017-Central Tax (Rate)
1.54 in terms of entry 242A of Schedule I of notification No. 1/2017-Central Tax (Rate).
1.55 Sl. no. 123
1.56 'Ecaussine and other calcareous monumental or building stone;alabaster [other than marble and travertine
1.57 S. No. 123 of the notification No. 1/2017-Central Tax (rate) dated 28 June 2017
1.58 falling under heading 2201
1.59 vide entry at S. No. 99 of notification No. 2/2017-Central Tax (Rate), dated 28 June 2017
1.60 vide notification No. 7/2022-Central Tax (Rate), dated 13 July 2022
1.61 Sl. No. 26B in Schedule III of notification no. 1/2017-Central Tax (Rate), dated 28 June 2017
1.62 vide S. No. 103A of Schedule-I of notification no. 1/2017-Central Tax (Rate), dated 28 June 2017

Impact of GST on unsold stock of pre-packaged commodities

The CG has permitted[1.63] the manufacturers, packers, or importers of pre-packaged commodities to declare the revised retail sale price (MRP) on the unsold stock prior to revision of GST up to earlier of either **31 January 2023** or till the date the stock exhausts. The revised price would be calculated after the inclusion of the applicable/increased amount of tax or after reducing the reduced amount of tax due to GST, if any, in addition to the existing MRP.

The declaration of the changed MRP shall be made by way of stamping or putting sticker or online printing, subject to the following conditions:

- The difference between the original MRP and the revised should not be higher than the extent of the increase in tax and in case of imposition of fresh tax, such tax on account of the implementation of GST act and rules. In case of a decrease in tax, the revised price should not be higher than the extent of price after decrease in tax.
- Display of original MRP would be continued and there should be no overwriting of the revised price on it.
- The manufacturers/packers/importers are required to make at least two advertisements in one or more newspapers. They would also circulate notices to the dealers and the Director of Legal Metrology in the CG and Controllers of Legal Metrology in the states and union territories, indicating the change in the price of such packages.

Further, any packaging material or wrapper left to be exhausted prior to revision of GST, may be used for packing of material up to **31 January 2023** or till the date of exhaustion of the packing material or wrapper, whichever is earlier. It would be used after making necessary corrections in MRP on account of the implementation of GST by way of stamping or putting sticker or online printing as the case may be.

Clarification of applicability of cut-off date on demand of interest under the 'Amnesty Scheme for goods not subsumed under GST'

Recently, the Government of Rajasthan had notified the 'Amnesty Scheme for goods not subsumed under GST' which is valid till 31 August 2022[1.64]. The scheme provides that it shall be applicable to all dealers or persons having outstanding demands or disputed amounts created up to 31 January 2022 under any Act pertaining to the goods included in the Entry 54 of the State List of the Seventh Schedule to the Constitution. The scheme also provides that where the outstanding demand has been deposited and demand for interest pertaining to the same is leviable but not levied, the interest so payable along with interest accrued up to the date of order under this scheme shall be waived.

In this regard, it has been clarified that the cut-off date i.e., 31 January 2022, is not applicable on the order of demand for interest, which is leviable but not levied pertaining to the outstanding demand or any disputed amount which has already been deposited[1.65].

1.63 I-10/14/2020-W&M Section – Government of India dated 1 August 2022
1.64 Notification No. F.12(11)FD/Tax/2022-104 dated 23 February 2022
1.65 Notification No. F.16(752) VAT/Tax/CCT/2022-23/Part-II/588 dated 2 August 2022

B. Key updates under the Customs/FTP/SEZ

Revised threshold limits for arrest and bail in relation to offences punishable under the Customs Act, 1962

The Board had earlier issued guidelines[1.66] for arrest and bail in relation to the offences punishable under the Customs Act, 1962. In this regard, the threshold limits specified in the guidelines therein have been further streamlined as under[1.67]:

Cases	Particulars	Market value of goods/amount of duty evasion/drawback
Baggage and outright smuggling cases	• in cases of unauthorised importation in baggage/cases under Transfer of Residence Rule • precious metal, restricted items or prohibited items[1.68] or foreign currency	**INR 50 lakh or more**
Appraising cases/ commercial frauds	• cases involving wilful mis-declaration in value/description of imported/exported goods • concealment of restricted or notified goods[1.69] • fraudulent evasion or attempt at evasion of duty under the Customs Act 1962 • fraudulent availment of drawback or attempt to avail of drawback or any exemption from duty provided under the Customs Act, 1962 • Obtaining an instrument from any authority by fraud, collusion, wilful misstatement or suppression of facts and utilisation of such instrument	**INR 2 crore or more**
Non-declaration of foreign currency by foreign nationals and NRIs	Non-declaration of foreign currency by foreign nationals and NRIs (normally visiting India for travel/business trips etc.) detected at the time of departure from India. (if it is claimed that the currency has been legally acquired and brought into India but not declared inadvertently, prosecution need not be considered as a routine)	**INR 50 lakh**

It has been further clarified that the above-mentioned criteria would not apply in cases involving offences relating to items i.e., FICN, arms, ammunitions and explosives, antiques, art treasures, wildlife items and endangered species of flora and fauna. Arrest in such cases is required on the basis of facts and circumstances of the case and may be considered irrespective of the value of offending goods involved.

1.66 Circular No. 28/2015-Customs dated 23 October 2015
1.67 Circular No. 13/2022-Customs dated 16 August 2022
1.68 Section 11 and Section 123 of the Customs Act, 1962
1.69 notified under Section 11 of the Customs Act, 1962

Revision of threshold limits for launching of prosecution in relation to offences punishable under the Customs Act, 1962

The CBIC had issued prosecution guidelines[1.70] earlier with respect to launching prosecutions in relation to offences punishable under the Customs Act, 1962. In this regard, the CBIC has now revised the threshold limits specified earlier for launching prosecution for various categories of cases as under[1.71]:

Cases	Particulars	Market value of goods/amount of duty evasion/drawback
Baggage and outright smuggling cases	• in cases of unauthorised importation in baggage/cases under Transfer of Residence Rule • precious metal, restricted items or prohibited items[1.72] or foreign currency	**INR 50 lakh or more**
Appraising Cases/ commercial Frauds	• cases involving wilful mis-declaration in value/description of imported/exported goods • concealment of restricted or notified goods[1.73] • fraudulent evasion or attempt at evasion of duty under the Customs Act, 1962 • fraudulent availment of drawback or attempt to avail of drawback or any exemption from duty provided under the Customs Act, 1962 • Obtaining an instrument from any authority by fraud, collusion, wilful misstatement or suppression of facts and utilisation of such instrument	**INR 2 crore or more**
Non-declaration of foreign currency by foreign nationals and NRIs	Non-declaration of foreign currency by foreign nationals and NRIs (normally visiting India for travel/business trips etc.) detected at the time of departure from India. (if it is claimed that the currency has been legally acquired and brought into India but not declared inadvertently, prosecution need not be considered as a routine)	**INR 50 lakh**

The Board has further clarified that, all cases where sanction for prosecution is accorded after the issuance of this Circular, shall be dealt in accordance with provisions of this Circular irrespective of the date of offense. Further, cases where prosecution has been sanctioned but no complaint has been filed before the magistrate shall also be reviewed by the prosecution sanctioning authority in light of the provisions of this Circular.

SOPs to implement WFH permission under the revised SEZ Rules, 2006

Recently, the Ministry of Commerce had amended the SEZ Rules, 2006 to provide the process, conditions, compliances, etc., to be followed by the SEZ units for availing WFH benefits and certain listed categories, such as employees being temporarily incapacitated, travelling or working offsite.

In this regard, to ensure the harmonised implementation of the WFH rules, the Ministry of Commerce has now notified the SOPs[1.74] to be followed by the offices of the Development Commissioner as under:

1.70 Circular No. 27/2015-Customs dated 23 October 2015
1.71 Circular No. 12/2022-Customs dated 16 August 2022
1.72 Section 11 and Section 123 of the Customs Act, 1962
1.73 notified under section 11 of the Customs Act, 1962
1.74 No. K-43013(12)/1/2021-SEZ dated 12 August 2022, instruction no.110

Application for adoption of WFH scheme:

- SEZ units should adopt a WFH scheme and submit applications to the relevant Development Commissioner notifying the adoption of the WFH scheme, at least 15 days in advance by e-mail to the concerned Development Commissioner office, with a copy to the Specified Officer.
- The application should contain a covering note signed by the authorised signatory of the unit mentioning following details:

Date of application and duration for which permission for WFH is required	Total number of employees including contractual
Whether WFH scheme is for all employees at the unit or for particular categories of employees	In case the WFH scheme intends to cover 50% or any higher percentage, the details of all the employees intended to be covered shall be provided
Undertaking that the unit shall ensure attendance at the unit based on the percentages provided in the scheme and as may be approved	Details of such employees who would be eligible to opt for WFH

- An Excel sheet containing the following details should be submitted along with the application the for WFH scheme:

Name and designation of all employees eligible to opt for WFH scheme along with SEZ/unit ID card number	Validity/expiry date of the SEZ/unit ID card
Details of laptop/other assets assigned to such employees	Duration for which the permission for WFH is required

- For the units already operating under the WFH option covering the existing employees, a period of 90 days for submission of required information would be provided, as a one-time exception.
- In the case of new employees, provisional permission for WFH may be availed on an immediate basis, through an application by e-mail, within 15 days.
- Revised WFH scheme may be submitted at least 15 days in advance from the date of effect of such WFH scheme.

Approval of application by Development Commissioner

- The application for approval of the WFH scheme shall be processed and approved within 15 days.
- In the event, no communication is received by the unit from the Development Commissioner within 15 days from submission of the application, the WFH scheme shall be deemed to have been approved.
- Discretion extended to the Development Commissioner, SEZ to be exercised to enable and allow the seamless implementation of the WFH scheme by the units (as they are currently operating at 90% WFH and need sufficient time to scale down gradually). Approval should not be denied or revoked without extending an opportunity to the unit to be heard and reasons for such denial or revocation are to be provided.
- The requirement of endorsement of certificate by the Specified Officer will be implemented in a manner that avoids any hardships to the employees who are engaged in WFH. In the case where required by the Specified Officer, the units shall get the physical inspection done at a time when the employees come to the unit premises.

Other key aspects

- The WFH facility may be flexibly utilised by units among employees due to day-to-day business requirements subject to the limit of 50% or such percentage of attendance as approved by the Development Commissioner. The units shall self-certify that at any point in time, the approved percentage of the employees are working physically from the premises of the unit at the SEZ.
- The approved percentage of the employees may be calculated based on the monthly employment data of a unit for the previous month and in the case of employees working in shifts, it may be computed based on the shift-wise monthly employee data of a unit for the previous month.

Instruction to maintain consistency with the provisions of relevant trade agreement or its Rules of Origin while applying CAROTAR

The CBIC had earlier notified[1.75] the CAROTAR after insertion of the procedure[1.76] regarding claim of preferential rate of duty under the customs law. Further, the CBIC has also notified[1.77] the operational certification procedures related to the implementation of Rules of Origin (pertaining to each trade agreement - FTA/PTA/CECA/CECA/CECPA) and has also issued circulars/instructions/letters[1.78] for uniform and judicious application of the aforementioned provisions.

In continuation of the above, the CBIC has instructed[1.79] that, if the proper officers have reason to believe that the country-of-origin criteria have not been met then they can ask the importer to furnish further information consistent with the trade agreement. Similarly, if the importer fails to provide the requisite information for any reason, the proper officer can undertake further verification consistent with the trade agreement[1.80].

Further, the rule[1.81] provides that in the event of a conflict between a provision of these rules and a provision of the Rules of Origin, the provision of the Rules of Origin shall prevail to the extent of the conflict. In this regard, the Board has further instructed that to maintain consistency with the provisions of the relevant trade agreement or its Rules of Origin the officers under charge should be sensitive to applying CAROTAR.

CBIC issues clarification regarding customs duty applicable on display assembly of a cellular mobile phone

A concessional BCD of 10% is applicable for display assembly for use in manufacture of a cellular mobile phone and Nil BCD is applicable on inputs or parts for use in the manufacture of a display assembly[1.82].

Instances of mis-declaration of display assembly imported as parts were reported, which were intercepted by the DRI with the issuance of demand notices in few cases. Therefore, representations were made by the industry to the MeitY for intervention in the matter arguing that the investigation is having an adverse effect on the industry.

After the inter-ministerial consultations with MeitY, the CBIC has clarified as under[1.83]:

Display assembly of a cellular mobile phone comes along with a back support frame of metal/plastic without any additional items*	10% (if imported individually, will attract a BCD rate of 15%)
Display assembly comes along with any other item like the sim tray, antenna pin, speaker net, power key, slider switch, battery compartment, FPCs for volume, power, sensors, speakers, fingerprint, etc., with or without a back support frame of metal/plastic, as a whole assembly	15% as general parts of a cellular mobile phone under tariff item 85177990

**since back support frame of metal/plastic does not add any functional part but is only for support of the display assembly*

Ministry of Steel extends the last date for submitting applications under the PLI scheme for specialty steel

The Ministry of Steel had earlier extended the last date for receipt of the application under the PLI scheme for specialty steel till 30 June 2022[1.84].

The last date for receipt of applications under the Scheme for Specialty Steel through the online application window (at https://plimos.meconlimited.co.in/) has been further extended up to **15 September 2022**[1.85].

Extension of last date for furnishing of Non-Preferential Certificate of Origin through common digital platform

The DGFT has further extended the period for mandatory filing of applications for Non-Preferential Certificate of Origin through the Common Digital Platform (e-CoO) till **31 March 2023**[1.86].

The DGFT has also clarified that it is not mandatory to use the online system till **31 March 2023** and the existing systems of processing non-preferential CoO applications in manual/paper mode shall be allowed till **31 March 2023**.

1.75 Notification No. 81/2020-Customs (NT) dated 21 August 2020
1.76 Section 28DA in Customs Act, 1962 dated 27 March 2020
1.77 Section 5 of Customs Tariff Act, 1975
1.78 Circular No.38/2020-Customs dated 21 August 2020, Instruction No.20/2020-Customs dated 17 December 2020 & No.18/2021-Customs dated 17 August 2021, and letter F.No.15021/18/2020(ICD) dated 13 November 2020
1.79 Instruction No. 19/2022-Customs dated 17 August 2022
1.80 Sub-Section (3) & (4) of 28DA of Customs Act, 1962
1.81 Rule 8(3) of CAROTAR Rules, 2020
1.82 S. No. 5D of notification No. 57/2017-Customs dated 30 June 2017
1.83 Circular No. 14/2022-Customs dated 18 August 2022
1.84 No. S 21018/1/2020 TRADE TAX PART(1) dated 30 May 2022
1.85 Vide Press Release dated 18 August 2022
1.86 Trade Notice No. 15/2022-23 dated 1 August 2022

Extension of validity of status certificate issued in Financial Year 2015-16 and 2016-17

The DGFT had earlier extended the validity of status certificates issued under the FTP 2015-2020 for a period of five years till 30 June 2022.

The DGFT has now further extended the said validity from date on which application for recognition was filed till **30 September 2022,** whichever is later[1.87].

Amendment in minimum registration time period for import of Copper and Aluminum under the NFMIMS

Under the existing policy of NFMIMS, the importers were given a window to apply for registration not earlier than the 60th day and not later than the 5th day before the expected date of arrival of consignment of Copper and Aluminum.

Recently, the DGFT[1.88] has made amendment in the requirement of minimum time for advance registration under the NFMIMS. Under the revised policy, the importer shall apply for registration before the arrival of consignment. The importer cannot apply for registration earlier than 60th day before expected date of arrival. Thus, as an effect of aforesaid amendment, there is no requirement of five days advance registration from the expected date of arrival of import consignment under the NFMIMS.

Clarification on the removal of scrap or waste from SEZ units

The DGFT received various letters seeking clarification in respect of applicability of import restriction imposed on gold scrap under CTH 7112 on clearance of dust, sweeping, scrap, etc., from SEZ to DTA.

In this regard, the DGFT has clarified that para 2.33 of the FTP allows removal of scrap/waste including any form of metallic waste and scrap, generated during the manufacturing or processing activity from SEZ to DTA on payment of applicable customs duty without an authorisation[1.89].

CBIC amends rules pertaining to compounding of offences under Customs law for unauthorised publishing of data

The CBIC has amended the Customs (Compounding of Offences) Rules, 2005, to provide for compounding of offence for unauthorised publishing of data under the customs law effective from 22 August 2022[1.90]. Key changes are as under:

- **Compounding of offence for unauthorised publishing of data**[1.91]: INR 1 lakh for the first offence with a 100% increase of this amount for each subsequent offence[1.92].
- **Immunity from prosecution**[1.93]: Immunity from prosecution shall be granted if the offence is punishable only for unauthorised publishing of data.

1.87 Public Notice No. 21/2015-20 dated 5 August 2022
1.88 Notification No. 26/2015-2020 dated 10 August 2022
1.89 Office Memorandum File No. 01/89/180/36/AM-11/PC-2(A)/E-1678/418 dated 12 August 2022
1.90 Notification No. 69/2022-Customs (N. T.) dated 22 August 2022
1.91 Section 135AA of the Customs Act, 1962
1.92 Rule 5 of the Customs (Compounding of Offences) Rules, 2005
1.93 Rule 6 of Customs (Compounding of Offences) Rules, 2005

02 Key judicial pronouncements

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

SC directs the Union of India/GST Council to instruct states on electronic DIN system implementation

Summary

The SC has directed the Union of India/GST Council to issue advisory/instructions to the respective states regarding implementing the electronic generation of a DIN system in the indirect tax administration. Besides, the Apex Court also opined that the concerned states consider implementing the system in order to bring in transparency and accountability in the indirect tax administration at the earliest.

Facts of the case

- The petitioner[2.1], a chartered accountant, has filed a public interest litigation before the SC. It has requested to direct the CG/CBIC/GST Council to issue directions to the concerned states to implement the DIN system in respect of all communications sent by the STO to taxpayers and concerned persons. Further, the GST council should be directed to consider and take a policy decision in respect of the implementation of the DIN system by all the states.
- The petitioner submitted that the system for the electronic generation of a DIN will increase transparency and accountability in the indirect tax administration, which is the objective of the government.

2.1 Pradeep Goyal

SC observations and ruling[2.2]

- **Implementation of a system for the electronic generation of DIN:** The SC stated that the implementation of the DIN system for all the communications sent by the STO would be in interest of the larger public and enhance good governance. Further, it will bring in transparency and accountability in the indirect tax administration. The SC apprised the implementation of this system by the CBDT and further appreciated the implementation of this system by the states of Karnataka and Kerala in the indirect tax administration.
- **GST Council is empowered to make recommendations to the states:** The SC stated that the GST Council is empowered[2.3] to make recommendations to the states on any GST matter. Further, it can also issue advisories to the respective states for implementation of the DIN system to achieve the objective of transparency and accountability. Therefore, the SC directed the Union of India/GST Council to issue advisory/instructions/recommendations to the respective states in this regard. Further, the SC impressed upon the concerned states to consider implementing the system so as to bring in transparency and accountability in the indirect tax administration at the earliest.

Our comments

In the digitisation era, the government is emphasising the digitalisation of communications to the taxpayers and other concerned persons to ensure transparency and accountability. The system is already put in place by the CBDT for direct taxes w.e.f. 1 October 2019.

Similarly, in the indirect tax administration, the CBIC has issued circulars[2.4] to make it mandatory to generate and quote the DIN on all the communications sent to taxpayers and other concerned persons by any office of the CBIC across the country. Further, any document issued without electronically generated DIN shall be treated as invalid and shall be deemed to have never been issued. However, the circulars issued by the CBIC were under the power conferred under the CGST Act, thus, the state GST departments are not covered under said circulars. In this respect, the SC in the present judgement has directed the Union of India/GST Council to issue advisory/instructions/recommendations to the respective states[2.5] regarding the implementation of the system of electronic (digital) generation of a DIN.

This is a welcome move in the indirect tax administration and is likely to result in honest administration and will enable the confirmation of the authenticity of communications issued by the state GST authorities. Further, this decision will bring uniformity under the GST administration as the implementation of the DIN system will be equally mandatory for both the central and state GST authorities.

2.2 Writ Petition (Civil) No. 320 Of 2022, Order dated 18 July 2022
2.3 In view of the implementation of the GST and as per Article 279A of the Constitution of India
2.4 Circular No. 122/41/2019-GST dated 5 November 2019 and Circular No. 128/47/2019-GST dated 23 December 2019
2.5 Already implemented by the states of Karnataka and Kerala

No responsibility of tendering authority to mention HSN code while inviting tenders - SC

Summary

The SC has overruled the order passed by the Allahabad HC wherein the tendering authority (purchaser) was mandated to mention the relevant HSN code in tenders. The SC held that it is the responsibility of the supplier/bidder to find out the relevant HSN code. The Apex court took the relevant provisions of the GST law and clauses of the tender document into consideration and asserted that the appellant had made it clear in the tender that it will have no liability to pay tax if the bidder has wrongly quoted a lower rate. The Apex Court ruled that if order of HC is to be sustained, the appellant would have to resort to the prolonged proceedings of advance ruling, where the appellant had no liability to pay the tax.

Facts of the case

- The appellant[2.6] had published notice for inviting e-tender (NIT) for procurement of turbo wheel impeller balance assembly (the product). The bidders were directed to specify the percentage of local content of the material being offered, in accordance with the 'Make in India' policy. The ranking bidders classified the product[2.7] liable to GST at the rate of 5% whereas the respondent (writ petitioner[2.8]) classified the goods liable to GST at the rate of 18%[2.9].
- The writ petitioner contended that the NIT and the bid documents did not mention the applicable HSN code, which has disrupted the preservation of the level playing field. Further, the appellant should have provided clarity and certainty about the tax rate and the HSN Code, to ensure equal treatment between the tenderers.
- The appellant submitted that the liability to pay the tax is on the successful bidder. Further, the GST Act casts the burden on the bidders to file return and pay tax, then the jurisdictional officer relevant to the supplier can make the proper classification. The appellants, as a purchaser, cannot be expected to find out the HSN Code.
- The respondent had filed the writ petition[2.10] before the Allahabad HC. The HC had held that stating the HSN code in the tender document itself shall resolve all disputes relating to fairness and transparency in the process of selection of bidder. Thus, the HC passed the order in favour of the respondent and directed the appellant to mention the HSN and GST rate in the NIT/ bid document.
- The appellant, aggrieved of the HC order, filed the present appeal before the Apex Court.

2.6 Diesel Locomotive Works
2.7 under CTH 86
2.8 Bharat Forge Ltd and Another
2.9 under CTH 84
2.10 Writ C No. - 17620 of 2019, Order dated 18 December 2020

SC observations and ruling[2.11]

- **Scope of writ of mandamus issued by HC:** A writ of mandamus or a direction in the nature thereof is very wide in scope. It is to be issued wherever there is a public duty and a failure to perform, and the courts will not be bound by the technicalities. Further, there must be a public duty, which may arise from a statute, or it can be imposed by a common charter, common law, custom or even contract. The SC affirmed the view of the HC that the tendering authority ensuring a level playing field in awarding the contract is traceable to the Article 19(1)(g) of the Constitution of India.
- **Responsibility of the supplier to quote correct HSN code and GST rate:** The SC, upon conjoint reading of relevant clauses[2.12] of tender, noted that the liability to make correct classification of HSN and discharge GST is of supplier. The appellant, as a purchaser, made it clear that it will have no liability to shoulder, in case the payment of tax, if it is found that the bidder has wrongly quoted lower tax. The tender provides a clear duty on the bidder to acquaint themselves with all the applicable taxes. Further, the terms of the bid cannot be said to be afflicted with the vice of legal uncertainty.
- **Circular does not mandate the purchaser to mention the correct HSN code:** Upon reading the Railway board's communication[2.13] in holistic manner, the SC viewed that it is the responsibility of the bidder to quote the correct HSN number and the corresponding GST rate. The purchaser may incorporate the HSN in the tender, however it is not mandatory.
- **View taken by the HC creates considerable impediments:** The SC stated that since the appellant was not obliged to find out the correct HSN for the product to be procured, unnecessarily following the cumbersome and elaborated process of the advance ruling by the appellant is impractical. Further, Section 168 provides power to the Board to issue orders/directions/instructions to the officers, however it does not expressly provide for right to any person to seek a direction. This section is essentially meant for officers to seek orders, instructions, or directions besides the Board itself on its own passing orders, in the interest of maintaining uniformity in the implementation of the Act.
- **Make in India policy does not make it mandatory to quote HSN in tender document:** The SC, in view of the Make in India policy, cannot held that there is duty to appellant to declare the HSN code in the tender to make them quote the rate accordingly.

Our comments

Earlier, the Allahabad HC noted that the total price of offer including the GST price is used to determine intense ranking in selection of bidder. Thus, the HC directed the appellant to seek necessary clarification from the GST authorities in relation to the applicable HSN code and further mention it in bid documents to ensure uniformity to all bidders.

However, the Apex Court quashed the decision of the HC and clarified that the appellant/tendering authority has no statutory duty to mention the HSN code on the tender. Rather, it is the responsibility of the supplier/ bidder to mention the correct HSN code and the GST rates. This clarification may help in resolving similar doubts in the tenders/bid process.

There could be a scenario where inadvertently the bidder might quote the lower GST rate while submitting the bid documents, which may impact the selection of bidder if price inclusive of GST is considered as base for selection. However, in light of this ruling, since it is the responsibility of the bidder to identify correct GST rate and the correct HSN code, the bidders need to submit the documents with correct details. This will help the tendering authority in selection of bidder based on lowest price in response to bid invitation.

Supply of antivirus software in a CD amounts to a deemed sale and not leviable to service tax – SC

Summary

The SC has upheld the New Delhi CESTAT's view that the sales/supply of antivirus software in a CD, under the brand name Quick Heal, to the end-users, by charging licence fee is a deemed sale and not leviable to service tax. The SC has held that it is one transaction of software sale put in the CD as 'goods' and thus, the transaction lacks any separate service element. The artificial segregation of the transaction into two parts is not tenable in law and even otherwise, the user is put in possession and full control of the software. The EULA, giving the end customer the licence to use the software, is a transfer of right to use goods (i.e., the antivirus software) and is a 'deemed sale', as per the Article 366 (29A) (d) of the Constitution.

2.11 Civil Appeal No.5294 of 2022, decision dated 16 August 2022
2.12 Clause 2.8.6, 2.7.6, 2.9.2
2.13 Dated 5 September 2017

Facts of the case

- The appellant[2.14] is engaged in the business of research and development of antivirus software under the brand name Quick Heal.
- The appellant contended that the software developed by third parties[2.15] and sold in a ready-to-sell condition is canned software, which is in nature of goods, hence was subjected to sales tax/VAT and no service tax was payable on the same.
- The adjudicating authority[2.16] had issued an SCN to the appellant demanding service tax with an interest and a penalty, alleging that the supply of Quick Heal antivirus software replicated CDs/DVDs in retail packs with key/codes by charging licence fees through dealers/distributors and this amounts to the provision of service. The end-user was provided with a temporary/ non-exclusive right to use the antivirus software, as per the conditions contained in the EULA and would, therefore, not be treated as deemed sale[2.17].
- The Adjudicating Authority passed an order confirming the demand and held that the extended period was correctly invoked. Thus, the aggrieved appellant had filed the present appeal before New Delhi CESTAT, which was thereby allowed.
- The Revenue filed a SLP[2.18] before the SC challenging the Tribunal's order.

CESTAT observations and ruling[2.19]

- **Antivirus software not covered under the definition of IT software[2.20]:** The antivirus software is complete to prevent virus in the computer system. No interactivity takes place nor there is any requirement of giving any command to the software to perform its function of detecting and removing virus from the computer system. Therefore, the antivirus software developed by the appellant is not covered under the definition of IT software, since it lacks the element of interactivity.
- **Supply of software in CD and other mediums is not a service:** The CESTAT relied on the SC judgement in case of Tata Consultancy Service[2.21] and concluded that the sale of canned software or pre-packaged software in CD is in nature of the sale of goods and therefore, no service tax is leviable. However, where there is no transfer of right to use[2.22], it would fall under the scope of service and not deemed sales.
- **Whether the right to use software is transferred to licencee:** The CESTAT, upon perusal of agreement of the appellant, observed that licencee have all the right to use the software from date of activation to expiry subject to terms and conditions. Merely because Quick Heal retains the title and ownership of the software, it does not imply it interferes with the right of the licencee to use the software. Thus, it was concluded, that the right to use the software is given and it would be treated as deemed sales.

SC observations and ruling[2.23]

- **Criteria for transfer of right to use goods:** The levy of tax under the Article 366(29A) (d) is not on the use of goods. It is on the transfer of the right to use goods, which accrues only on account of the transfer of the right. In other words, the right to use goods arises only on the transfer of such right to use goods. The transfer of right is the sine qua non for the right to use any goods and such transfer takes place when the contract is executed, under which the right is vested in the lessee.
- **Canned and un-canned software can be goods:** To determine whether a property is goods, the correct test would be to determine whether the item is capable of abstraction, consumption and use. Also, it is important to determine whether it can be transmitted, transferred, delivered, stored or possessed. Thus, both canned and un-canned software can be goods.
- **Sale of software in CD and sale of updates are not separate transactions:** Relying upon the decision in case of BSNL, the SC stated that the contract cannot be divided into two, i.e., sale of CD and supply of updates. Artificial segregation of the transaction into two parts is not tenable in law. It is, in substance, one transaction of sale of software and once it is accepted that the software put in the CD is goods, then there cannot be any separate service element in the transaction.
- **Deemed sale:** The user is put in possession and full control of the software. Therefore, the sale of software in CD amounts to deemed sales, which could not attract service tax.

Our comments

This is an important ruling by the Apex Court and aligns with its earlier decision in case of Tata Consultancy Services, wherein it had held that canned software supplied in CDs would be 'goods' chargeable to sales tax/VAT and no service tax can be levied.

Even under the Income Tax laws[2.24], in respect of the EULA, the SC had clarified that a non-exclusive, non-transferable licence, merely enabling the use of a copyrighted product, is restrictive in nature. Such licence is an ancillary and cannot be construed as a licence to enjoy all or any of the enumerated rights mentioned in the Copyright Act. The SC concluded that what is 'licenced' and sold to the resident end-user is in fact the sale of a physical object, which contains an embedded computer programme, and is, therefore, a sale of goods.

Under the GST law, the board[2.25] has clarified that supply of pre-designed or pre-developed software, in any medium/storage or made available through use of encryption keys, shall be supply of goods[2.26]. Further, the explanatory notes for the Classification of Services scheme provide that the services of limited end-user licence as part of packaged software are not covered under licensing services for the right to use computer software[2.27].

2.14 Quick Heal Technologies Limited
2.15 M/s Softtalk Technologies Limited, M/s Jupiter International Limited and M/s IP Softcom (India) Private Limited
2.16 Additional Director General
2.17 Under article 366(29A) of Constitution
2.18 S.L.P. (Civil) nos. 67156716 of 2022
2.19 Final Order No. 50022/2020 dated 9 January 2020
2.20 As defined u/s 65(105)(zzzze) of the Finance Act, 1994 prior to 1 July 2012 and u/s 65B(28) of the Finance Act, 1994 after 1 July 2012
2.21 Trade Tax Revision No.1566 of 2006 dated 4th April 2019
2.22 Sub-clause (d) of article 366(29A) of the Constitution
2.23 Civil Appeal Nos. 5168-5169 of 2022 dated 5 August 2022
2.24 Engineering Analysis Centre of Excellence (P) Ltd.
2.25 vide its sectoral FAQ on IT and IT enabled services
2.26 classifiable under heading 8523
2.27 SAC 997331

Circular in contradiction to the notifications is bad in law – Karnataka HC

Summary

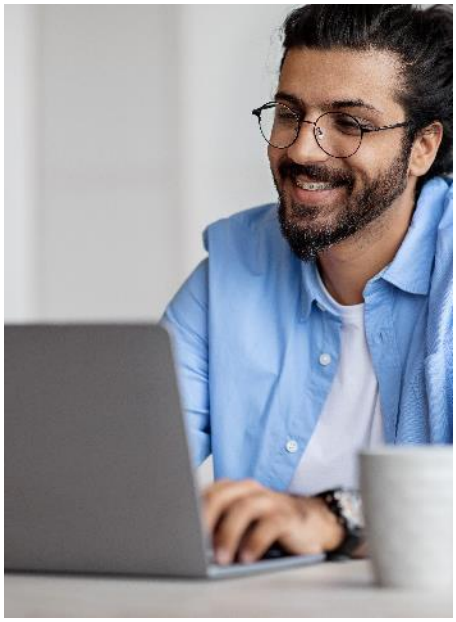
The Karnataka HC observed that the annuity paid to the concessionaires as a consideration for construction of roads is at par with the collection of toll charges and is exempt under GST. The impugned circular issued pursuant to the 43rd GST council meeting has clarified that the exemption notification does not exempt the annuity from GST. In this respect, the court cited that it is a settled proposition of law that a circular which clarifies the notification, cannot have an overriding effect over the notification. The HC stated that in the present case, impugned circular has the effect of overriding the notifications and thus, it has to be held as bad in law. Further, the government can impose GST on annuity paid to the concessionaires, which should be done in a lawful manner.

Facts of the case

- The petitioners[2.28] have been entrusted with the responsibility of construction of a road[2.29]. The consideration for the work is paid in the form of 'annuity' payments. In certain cases, the consideration for construction and maintenance of roads is made by permitting the private parties to collect tolls from the vehicles plying on the road. Such toll has been exempted from the levy of GST[2.30].
- In the 22nd GST Council meeting[2.31], it was proposed to exempt the annuity payments from the levy of GST. Subsequently, the exemption was notified by way of notifications[2.32].
- Thereafter, a circular[2.33] was issued clarifying that GST would not be exempt on the annuity (deferred payments) paid for the construction of the road. The petitioners were aggrieved by the circular and, therefore, filed the present writ petitions.
- The petitioners submitted that GST is exempt on the annuity (deferred payment) for construction of the roads as per the exemption notification and clarification issued by the GST Council.

Karnataka HC observations and ruling[2.34]

- **Circular cannot overrule the notification:** The HC stated that it is a settled proposition of law that a circular clarifying the notification cannot have an overriding effect.
- **Entire annuity is exempt:** The recommendations of the GST Council and the notifications issued pursuant thereto clearly exempts the entire annuity payment made towards construction and maintenance of the roads. Therefore, the impugned circular having an overriding effect over the notifications is held as bad in law. Further, if the government desires to modify the notification, then fresh notifications shall be issued to amend the effect of earlier notifications.



Our comments

In a similar matter[2.35], the Rajasthan AAAR[2.36] had held that the annuity payment received by the concessionaire is exempt under GST[2.37]. The present decision is in line with the well-settled principle that the departmental circular cannot override statutory provisions. The view aligns with the decision of Madras HC in the case of Jenefa India[2.38] wherein the court had held that the clarificatory circular cannot override the exemption notification. A similar view was also taken by the Madras HC in case of Precot Meridian Limited[2.39].

Appeal cannot be dismissed merely due to the procedural requirements- Orrisa HC

Summary

The Orissa HC observed that the GST law[2.40] has not prescribed the condonation of delay in case the petitioner fails to submit a certified copy of the order in the appeal. Further, the law provides only a procedural requirement to furnish a certified copy of the impugned order within seven days of filling the appeal. The HC further stated that if the present case is considered in light of the order of the SC, the petitioner is entitled to the benefit of exclusion of limitation of seven days. The court considered the judgements and instruction/clarification issued during the COVID-19 pandemic and stated that the AA has not exercised its power in a proper manner. Further, the petitioner has pursued the matter diligently, hence it cannot be termed indolent. Therefore, the HC restored the appeal and directed the AA to dispose of the appeal by a reasoned order.

2.28 M/s DPJ Bidar Chincholi (Annuity) Road Project Private Limited & Anr.
2.29 by Karnataka Road Development Corporation Limited (KRDCL)
2.30 Notification No.12/2017 dated 28 June 2017
2.31 Meeting held on 6 October 2017
2.32 Notification No. 32/2017 and Notification No. 33/2017 dated 13 October 2017
2.33 Circular No. 150/06/2021-GST dated 17 June 2021
2.34 Order No. - A/10785-10787/2022 dated 7 July 2022
2.35 Nagaur Mukundgarh Highways Private Limited
2.36 Order No. RAJ/AAAR/06/2018-19 dated 12 Feb 2019 (TS-122-AAAR-2019-NT)
2.37 Entry No. 23A of Notification No. 12/ 2017- Central tax (Rate)
2.38 W.P.(MD)No.16770/2019 and W.M.P.(MD)Nos.13372 to 13376 of 2019
2.39 W.P.(MD)No.20504 of 2019
2.40 Rule 108(3) of CGST Act 2017

Facts of the case

- The petitioner[2.41] is engaged in the supply of pipes. The department had initiated proceedings[2.42] upon the petitioner and thereby issued a demand order for the recovery of tax along with the applicable interest and penalty.
- The aggrieved petitioner filed an appeal in electronic mode and pre-deposited the prescribed amount[2.43]. However, it failed to submit the certified copy of the impugned order along with the appeal memo.
- Thereafter, the petitioner furnished self-attested hard copies of documents including a copy of the impugned order as available on the GST portal. However, regardless of the above submissions, it received a notice after around one year from the date of filing the memo of appeal, from the AA indicating that the petitioner was required to submit a certified copy of the order within seven days of filling of the appeal.
- The petitioner applied for and obtained the certified copy of the order, as per the demand in the notice. However, the AA has denied accepting such an order since it had already passed the order for rejection of appeal which was uploaded online on the GST portal.
- The petitioner submitted that the approach of the AA was hyper-technical. It also could not approach the appellate tribunal since the same had not been constituted.

Orissa HC observations and ruling[2.44]

- **Compliance with rules of natural justice:** There is nothing on record as to whether the AA had ever informed the petitioner about the next date of the proceedings. The HC stated it as an essential condition for compliance with the rules of natural justice.
- **Submission of a certified copy of the order is a procedural requirement:** The HC found that the condonation of delay is not prescribed under the Act in case the petitioner fails to submit the certified copy of the impugned order in the appeal memo. Further, there is no provision restricting application[2.45] in the context of the supply of a certified copy within the stipulated period. Besides, the requirement to furnish a certified copy of the impugned order within seven days of the filing of an appeal is only a procedural requirement and due to default in such compliance, the merit in the appeal could not be sacrificed.
- **Statutorily prescribed period for filing an appeal fell within the extended period:** The HC observed the memo of appeal and stated that the petitioner has filed the appeal one day after passing the order. The statutorily prescribed period for preferring an appeal fell within the extended period in consonance with the Finance Department Notification[2.46] read with the judgement of the SC[2.47].
- **Mere technical defect:** The HC relied on the judgement of the Orissa HC[2.48] wherein it had been held that mere delay in enclosing a certified copy of the order against which an appeal is filed is not a sufficient cause for not considering an appeal. In the present case, the petitioner had already submitted the order copy available on the GST portal, while filling the memo of appeal. Thus, the non-submission of a certified copy is to be treated as a mere technical defect.

Our comments

Earlier, the Orissa HC in the case of Shree Jagannath Traders[2.49] had held that the interests of justice should not be constrained by a hyper-technical view of the requirement that a certified copy of the order appealed against should be submitted within one week of the filing of the appeal.

Similarly, the Orissa HC in the case of Shree Udyog[2.50] had held that the appellate authorities should adopt a liberal approach in matters of condonation of delay considering the restricted functioning of courts and tribunals during the pandemic times.

The present ruling is also in line with the above rulings and shall set precedence in similar matters.

Communication including notice, order issued by the authorities should be signed and the extension of limitation period by the SC applies even to the condonable period- Delhi HC

Summary

The petitioners submitted that the limitation period for filing an appeal was extended by the SC vide the orders passed in *suo motu* petition. The Delhi HC placed reliance on the SC orders and stated that the extension of limitation applies not just to the prescribed period of limitation, but even to the condonable period. Further, in the present case, both the SCN and the order passed by the authorities are unsigned. In this respect, the HC stated that it is not mentioned under the GST provisions[2.51] that signing is not required on any notice, decision, order, summon or any other communication. The HC further held that atleast a digital signature should have been affixed by the revenue on the SCN and the order.

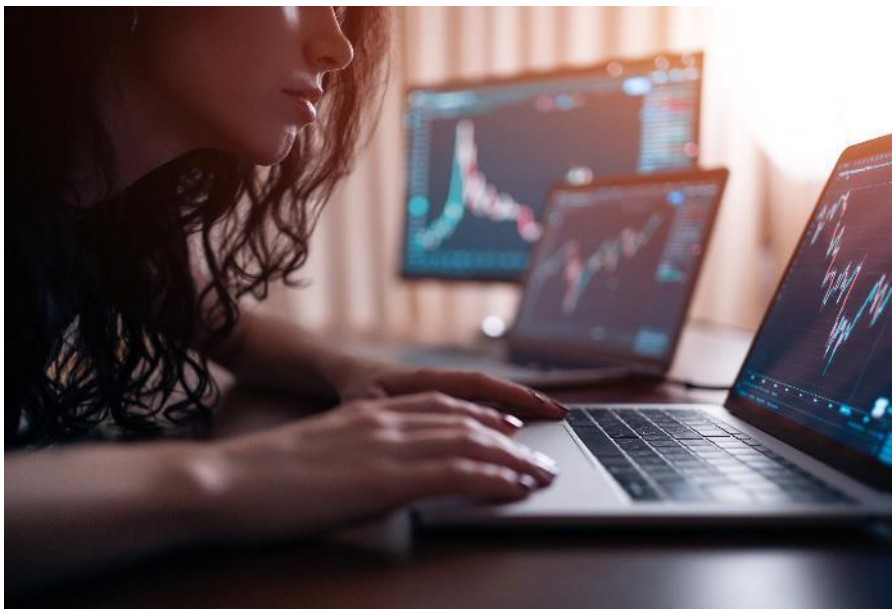
2.41 M/s Atlas PVC Pipes Private Limited
2.42 Section 74 of OGST Act 2017
2.43 Section 107 of CGST Act 2017
2.44 W.P.(C) No. 14163 of 2022
2.45 of Section 5 of the Limitation Act,1963
2.46 13898-FIN-CT1-TAX-0002/2020 [SRO No.129/2021], dated 7 May 2021
2.47 In case of Cognizance for extension of Limitation, SMW(C) No. 3 of 2020
2.48 in case of Shree Udyog W.P.(C) No.14887 of 2021 dated 10 June 2021
2.49 W.P.(C) No.15061 of 2021 dated 7 June 2021
2.50 W.P.(C) No.14887 of 2021 dated 10 June 2021
2.51 Section 169 of the CGST Act, 2017

Facts of the case

- The petitioners[2.52] have disputed the order-in-appeal, the SCN and the order whereby the registration has been cancelled.
- The petitioners submitted that the limitation period has been extended by the SC vide various orders. Further, the petitioners observed that both the SCN and the order for cancellation of registration did not bear the signature of the concerned authority. Also, the detail of the venue for conduct of the proceedings was not prescribed in the SCN.
- The petitioner contended that the provision required the Revenue to issue a notice[2.53] to the petitioners for non-filing of returns for the period in dispute. Therefore, before exercising the powers conferred under the rule 22, the notice should have been issued under the rule 68.
- The petitioner has filed the present writ petition against the appellate order.

Delhi HC observations and ruling[2.54]

- **Extension of limitation applies even to the condonable period:** Placing reliance on various orders[2.55] passed by the SC, the HC stated that extension of limitation applies not just to the prescribed period of limitation[2.56], but even to the condonable period. Therefore, the order-in-appeal is contrary to the directions issued by the SC. Thus, the order stands overruled.
- **Digital signatures on SCN and the order:** The HC stated that the GST provision[2.57] does not suggest that the orders need not be signed. Further, a digital signature should have been affixed by the Revenue on the SCN and the order, considering the grave implications on the assessee.



Our comments

In January 2022, the Apex Court affirmed the order passed by the Madras HC in case of Centaur Pharmaceuticals Private Limited and had held that the HC has not committed any error in extending the limitation period[2.58]. Further, even the limitation period which could have been extended and/or condoned by the Tribunal/Court is excluded and/or extended even up to 7 October 2021.

The CBIC has also clarified[2.59] that in case where any appeal is required to be filed before the concerned authority[2.60], the timeline would stand extended as per the SC order. Thus, the specified period would be excluded while computing the period of limitation for any appeal irrespective of the limitation, whether condonable or not.

Further, the GST provision prescribes the method of service of notice, order, other communication, which does not suggest that signing is not required. Therefore, the communication like notice, order, summon etc. should be properly signed by the authorities, to provide validity.

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Refund can be claimed where tax is paid under the wrong head under GST- Andhra Pradesh HC

Summary

In the present case, the petitioner paid IGST on the transaction considering the location of supplier and the place of supply in two different states. The authorities alleged such transaction as intrastate supply of goods and concluded the assessment accordingly. In this respect, the petitioner admitted the nature of the transaction as intrastate supply and requested the authorities to adjust the amount paid as IGST towards the correct liability of CGST and SGST. However, as mentioned even in the assessment order, the officer cannot adjust the tax paid as IGST towards the tax liability as CGST and SGST. Thus, the Andhra Pradesh HC directed the petitioner to pay correct taxes and thereafter, claim refund of wrong tax paid.

2.52 Railsys Engineers Private Limited & Anr.
2.53 Rule 68 of CGST Rules, 2017
2.54 W.P.(C) 4712/2022 dated 21 July 2022
2.55 Order dated 23 March 2020 in Writ Petition (Civil) No.3/2020, Order dated 08 March 2021 in Writ Petition (Civil) No.3/2020, Order dated 4 April 2022 in SLP(C)No.17298/2021, Order dated 10.01.2022 Writ Petition (Civil) No.3/2020
2.56 Section 107 of the CGST Act, 2017
2.57 Section 169 of CGST Act, 2017
2.58 in filing the written statement and consequently taking on record the written statement filed on behalf of the original defendant
2.59 Circular No. 157/13/2021-GST dated 20 July 2021
2.60 Joint/ Additional Commissioner (Appeals), Commissioner (Appeals), Appellate Authority for Advance Ruling, Tribunal, and various courts against any quasi-judicial order

Facts of the case

- The petitioner[2.61], a works contractor, is engaged in the business of execution of contracts, manufacturing or sale of machinery and general goods and also manufactures industrial products. It is registered under GST in the state of Andhra Pradesh.
- It received a work order[2.62] for execution of aggregation work on defence vessels in line with the technical specifications given by the Department of Defence.
- The petitioner has executed the work/services at the work site, located in Vishakhapatnam and received the payments from the Ministry of Defence, New Delhi based on the stage-wise completion of work. Further, the invoicing is to be done in name of Programme Director, Headquarters ATVP, New Delhi.
- In the present case, the location of the supplier and the place of supply are in two different states. Therefore, the petitioner collected IGST and paid it to the government.
- The petitioner received a SCN alleging the transaction as intrastate transaction. The authorities ignored the submissions made by the petitioner and concluded the assessment considering the transaction as intra-state supply of goods. In this respect, the petitioner requested the authorities to adjust the amount paid under IGST towards the dues payable under both CGST and the SGST, however, the authorities had denied.
- The petitioner filed an appeal in respect to the above order which was dismissed. Hence, the petitioner filed the present writ petition[2.63].

Andhra Pradesh HC observations and ruling[2.64]

- **Adjustment not tenable**: The officer cannot adjust the taxes paid as IGST towards the tax liability as CGST and SGST. The petitioner is allowed to claim refund of wrong taxes paid after making payment of correct taxes. Therefore, the objections raised by the petitioner are not acceptable,
- **Court directed the petitioner to pay correct taxes:** The HC noted that the nature of transaction is not disputed and, therefore, it directed the petitioner to pay correct taxes. Further, the petitioner can claim a refund of wrong taxes paid as IGST.

Our comments

Under the GST law, there is no provision to allow the taxpayer to adjust the tax amount paid under the wrong head with the correct head. However, the provisions[2.65] under the GST law allow the taxpayer to claim refund of the tax paid under the wrong head.

The CBIC has issued a circular[2.66] wherein it was clarified that the term 'subsequently held'[2.67] covers both the cases i.e., mistake observed by the taxpayer himself or by the tax officer in any proceedings. Accordingly, refund can be claimed by the taxpayer in both the abovementioned situations[2.68].

In case of SBI Cards & Payment Services Limited[2.69], the GST department had rejected the refund even after payment of tax made under the correct head, on the ground that the phrase 'subsequently held' could only be applied in a case where an adjudicating authority had held whether a transaction was inter-state or intra-state. In this respect, the Punjab and Haryana HC considered the clarification[2.70] provided in regard of 'subsequently held' and held the case in favour of the petitioner.

2.61 Walchandnagar Industries Limited
2.62 from Ministry of Defence (R&D), Government of India
2.63 Writ Petition No.6307 of 2022
2.64 Dated 21 July 2022
2.65 Section 19 of the IGST Act, 2017 and Section 77 of the CGST and SGST Act, 2017
2.66 Circular No. 162/18/2021-GST dated 25 September 2021
2.67 Referred in Section 19 of the IGST Act, 2017 and Section 77 of the CGST and SGST Act, 2017
2.68 provided the taxpayer pays the required amount of tax in the correct head
2.69 Appeal Number CWP-8108-2021 (O&M) and judgment dated 8 October 2021
2.70 by virtue of circular 162/18/2021-GST

Power to detain or seize the goods and conveyance cannot be invoked for search and seizure of the godown – Allahabad HC

Summary

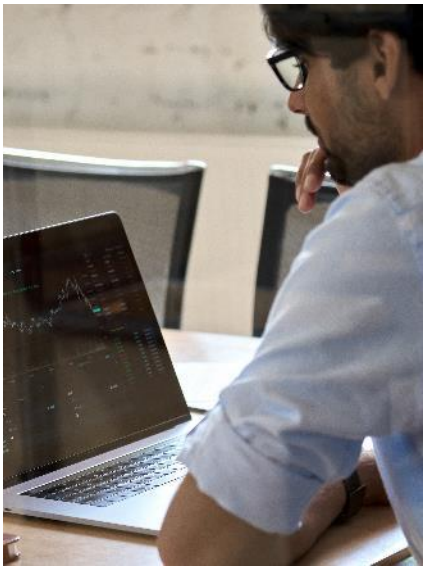
The SIB initiated search and seizure operation in business premises of the assessee[2.71]. In this respect, the Allahabad HC noted that adjudication proceedings were separately initiated, which are pending for consideration in appeal. Further, the assessee received two SCNs from two different authorities. The HC observed that the provision giving the power to detain or seize a vehicle was exercised by such officers to search the godown premise of the assessee. The HC stated that the power for inspection, search and seizure has been given separately under the GST law and in order to exercise such power, the proper officer must have reasons to believe, then he may authorise the officer to inspect any place of business of the concerned person. In this regard, the HC opined that both the officers acted with negligence and deliberately exercised non-existing powers. The HC held both officers accountable for their acts. Further, the HC quashed the entire proceedings initiated without jurisdiction.

Facts of the case

- The assessee, a manufacturer of PVC pipes, has its manufacturing unit in Agra. The assessee stores its raw material and manufactured goods in a godown located at the same premises.
- The SIB initiated a search and seizure operation on the business premises of the assessee. It was alleged that there was a shortage of physical stock in comparison to details recorded in stock registers. The assessee disputed the allegation and contended that the stock reconciliation could be made after considering the stock of raw material and finished goods stored at another godown, which was not subjected to search and seizure.
- The assessee also received two SCNs from two different authorities with respect to the search and seizure of the godown. Thereafter, seizure orders were passed wherein tax and penalty was demanded.
- The appellate authorities dismissed the appeals and therefore, the petitioner has filed the present appeal.

Allahabad HC observations and ruling[2.72]

- **No challenge to search and seizure operation:** The assessee has not challenged the search and seizure operation conducted by the SIB. In this respect, the HC noted that the adjudication proceedings were initiated separately, which are pending for consideration in appeal. Thus, the HC has not passed an order to avoid influencing the outcome of proceedings.
- **Invocation of provisions:** The provision of detention, seizure of goods and conveyance in transit cannot be invoked for search and seizure of the godown merely because it is mandatory to have 'reasons to believe' to invoke Section 67 of the CGST Act. Further, the HC stated that both the officers have exercised non-existing power and even deliberately described the vehicle[2.73], thus it cannot be said that the officers have not directed the subject search at any vehicle.
- **Accountability of the officers:** The HC did not get into detail regarding the intention of the officers in issuing notices and initiating proceedings without jurisdiction[2.74]. However, since the officers are accountable for their acts, the HC communicated the officer[2.75] to look into the matter, call for explanation and take appropriate action to avoid such occurrences in the future.



Our comments

As per the GST provisions, the power to invoke Section 129 is limited to the detention, seizure of goods and vehicles in the case where any person transports goods or stores goods while in transit in contravention of the GST law. Further, the power of inspection, search and seizure is given under Section 67, which can be exercised when the proper officer has reasons to believe that there is suppression of transaction/activities with an intention to evade tax. Therefore, Section 129, which gives the power to detain or seize the goods or vehicles, cannot be invoked to conduct search or seize the godown.

In the present ruling, to control abuse of power, the HC has held the officers accountable due to deliberate exercise of non-existing powers. This is a welcome ruling and shall set precedence in similar matters.

2.71 Mahavir Polyplast Private Limited
2.72 Writ Tax No. 57 of 2020 And 56 of 2020
2.73 being checked as "UPGODOWN02" And "GODOWON"
2.74 since it would require calling of personal affidavits of the officers at the cost of precious time of the Court
2.75 to the Commissioner Commercial Tax UP

B. Key rulings under Customs/FTP/SEZ

IBC overrides the Customs law – SC

Summary

The SC has held that the IBC will prevail over the Customs Act, 1962 for recovery of dues once the moratorium under the IBC is declared. The Customs authority can only determine the quantum of duties and levies but cannot initiate recovery proceedings by means of sale/confiscation under the Customs law. Once the insolvency proceedings are initiated under the IBC, the IRP can immediately secure the goods from the Revenue authorities and take appropriate steps under the IBC. The SC stated that after such assessment, the customs authorities must submit their claims to the adjudicating authority, for claiming the customs dues as operational debt under the IBC.

Facts of the case

- The Corporate Debtor[2.76] was in the business of shipbuilding and imported various materials under the EPCG regularly and stored such imported goods in the Custom Bonded Warehouses.
- The appellant[2.77] was appointed as the IRP by the NCLT to initiate the CIRP against the Corporate Debtor. The appellant informed the Revenue of the initiation of CIRP and sought custody of the warehoused goods and requested the Revenue not to dispose off or auction the same.
- The Revenue demanded custom duties from the Corporate Debtor on non-fulfillment of export obligations under the different EPCG licences.
- After the initiation of the liquidation process, the appellant sought a direction against the Revenue to release the warehoused goods belonging to the Corporate Debtor by filing an appeal before the NCLT[2.78]. The NCLT allowed the appeal and directed Revenue to allow the appellant to remove the goods from the warehouse without any payment of customs duty.
- The Revenue filed an appeal before the NCLAT challenging the order passed by the NCLT.
- The NCLAT allowed the appeal filed by the Revenue and held that the Corporate Debtor had relinquished his title to the imported goods because they were not claimed.
- Being aggrieved, the appellant filed an appeal before the SC challenging the order passed by the NCLAT.

2.76 ABG Shipyard
2.77 Sundaresh Bhatt, Liquidator of ABG Shipyard
2.78 u/s 60(5) of the IBC

SC observations and ruling[2.79]

- **Recovery proceedings under the Customs law:** The proper officer can initiate proceedings under the Customs law only when the importer has not taken sufficient steps for the clearance of goods[2.80]. Further, Revenue has not issued notices against the corporate debtor prior to initiation of the CIRP.
- **Purpose of moratorium under the IBC:** During the insolvency process, the adjudicating authority is required to declare a moratorium on the continuation or initiation of proceedings against the Corporate Debtor. The purpose of the moratorium is to keep the assets of the Corporate Debtor together during the insolvency process and to facilitate orderly completion of the process. Such measures ensure the curtailing of parallel proceedings and reduce the possibility of conflicting outcomes in the process. The moratorium should be continued even when the company goes into liquidation[2.81].
- **IBC overrides other laws:** The provisions of the IBC clearly state that the code overrides the other laws which are inconsistent with IBC provisions[2.82]. Even the Customs law provides that the Customs Authorities would have first charge on the assets of an assessee under the Customs Act except with respect to cases under the IBC[2.83]. Therefore, the IBC clearly overrides the Customs Act.
- **Issuance of demand notices violates the provision of the IBC:** The demand notices are an initiation of legal proceedings against the Corporate Debtor. Therefore, the issuance of demand notices to seek enforcement of the custom dues during the moratorium period violates the provision of the IBC[2.84].
- **Limitation on powers of the Revenue during moratorium:** Revenue can only take steps to determine the tax, interest, fines or any penalty which is due. However, it cannot enforce a claim for the recovery or levy of interest on tax due during the period of moratorium. Therefore, demand notices issued by the Revenue was in clear breach of moratorium.
- **No abandonment of goods:** There was no 'abandonment of goods' which would authorise the Customs Authorities to initiate the adjudicatory process to transfer the title to themselves. No such adjudication or notice has been placed on record to suggest that such abandonment of the warehoused goods had taken place prior to the imposition of the moratorium. Such fact has been ignored by the NCLAT and, therefore, has rendered the moratorium otiose.
- **Appeal allowed:** The SC allowed the appeal to be filed by the appellant and set aside the impugned order of the NCLAT.

Our comments

Earlier, in the case of Gujarat Urja Vikas Nikam Ltd, the SC had held that a harmonious construction of two special laws containing non-obstante clauses can be undertaken by looking at the purpose of both the laws. A special law enacted later prevails over the earlier special law. Therefore, the non-obstante clause under Section 174 of the Electricity Act would be overridden by Section 238 of IBC in case of a conflict of jurisdiction to resolve a dispute.

This is a significant ruling and in line with the above ruling, wherein the SC has held that once insolvency process has been initiated the IBC shall override any other enactment giving priority to the charges on the property of the Corporate Debtor. Post initiation of the insolvency process, the Revenue authorities do not have first right of recovery from assets of the Corporate Debtor under the IBC. It has further reiterated that the customs authorities have the powers to assess the quantum of dues, however, it does not have powers to initiate the recovery of dues under the Customs law.

Petitioner cannot be penalised for the inability of the Settlement Commission - Bombay HC

Summary

In the present case, the petitioner had approached the Bombay HC in respect to the order passed by the Settlement Commission abating the application, since it could not be disposed before the cut-off date. In this respect, the HC stated that the petitioner should be permitted to file a fresh application before the Settlement Commission. Further, the provisions cannot be construed as punishing the petitioner due to failure of the Settlement Commission to dispose the application in prescribed[2.85] time limit, for matters completely beyond his control, where such delay is not attributable to the petitioner. The HC requested the Settlement Commission to dispose the application in the first hearing itself since it had already been admitted.

2.79 Civil Appeal No. 7667 of 2021 dated 26 August 2022
2.80 Section 72 of the Customs Act, 1962
2.81 Section 33(5) of the IBC
2.82 Section 238 of the IBC
2.83 Section 142A of the Customs Act, 1962
2.84 Section 14 or 33(5) of the IBC
2.85 Section 127(c)(6) of Custom Act 2015.

Facts of the case

- The petitioner[2.86] had approached the HC for the order passed by the Settlement Commission. The Settlement Commission concluded the application[2.87] filed by petitioner as abated since it did not get disposed before the cut-off date. The settlement commission gave the liberty to the petitioner to file fresh application.

Bombay HC observations and ruling[2.88]

- **Petitioner cannot be punished due to inability of the Settlement Commission:** The petitioner should be permitted to file a fresh application before the Settlement Commission, which will consider the case on merit in accordance with the law. Further, the provisions cannot be construed as punishing the petitioner for the inability of the Settlement Commission to dispose the application within the specified time.
- **Disposal of application:** The time lost from the date of the impugned order till the filing of application shall be excluded. Further, since the application had already been admitted earlier, hence the HC requested the Settlement Commission to try to dispose the applicant in the first hearing itself.
- The petitioner contended that it had diligently pursued its application, however, the department created an impediment in the progress of the proceedings before the Settlement Commission by challenging the interim order passed.
- The petitioner submitted that the department caused inordinate delay as it created a situation of simultaneously pursuing the case before multiple forums. This caused an obstruction for petitioner's application to be considered by the Settlement Commission.

Our comments

Earlier, the Bombay HC, in case of Star television News Limited, had also held that the petitioner cannot be punished for the inability of the Settlement Commission to dispose the application in prescribed time limit, where such delay is not attributable to the petitioner. This decision was upheld by the Apex Court.

This is a welcome ruling, protecting the right of the taxpayers and will set precedence in similar matters.

Director cannot be penalised when the lapse is on the part of the company – Bombay HC

Summary

The Bombay HC has held that a SCN imposing a penalty cannot be issued against an ex-director due to a lapse on the part of the company. The HC observed that there has to be a specific act attributed to a director or the person allegedly in control of the management of the company, to the effect that such a person was responsible for the acts committed by or on behalf of the company. In the present case, the entire charge undisputedly is levelled against the company for not fulfilling export obligations. Further, in the notice issued to the company, no details about a lapse on the part of the director were specified. Therefore, such proceedings initiated against the ex-director for lapse on the company's part are contrary to the principle of vicarious liability and are *void-ab-initio*.

Facts of the case

- The petitioner[2.89] is the wife of a practising advocate[2.90]. The late advocate was an independent, non-executive director of the company[2.91] and was not involved in the day-to-day affairs of the company. He had subsequently resigned and fulfilled all the statutory compliances[2.92].
- The company defaulted in fulfilling the export obligations as prescribed at the time of issue of Advance Import licences.
- Further, the authorities held that, since the company did not submit the Modified VAT reversal certificate[2.93] no export was made against the licence.
- Therefore, adjudication orders were passed holding the company as a defaulter under the FTDR.
- The order-imposing penalty was addressed to the company and was also forwarded to the ex-director on the ground that, even after his resignation his name was still appearing in the IEC of the company.
- Therefore, the petitioner filed a writ before the Bombay HC challenging the impugned order.

2.86 Gurjeet Singh
2.87 Section 127b of Custom Act 2015.
2.88 Writ Petition No. 563 Of 2009, dated 14 July 2022
2.89 Meena Anand Suryadutt Bhatt
2.90 Late Shri Anand S. Bhatt
2.91 TPI India Ltd
2.92 Under the provisions of the Sick Industrial Companies (Special Provisions Act), 1955 (SICA) by the Board of Industrial and Financial Reconstruction (BIFR), New Delhi.
2.93 As per Circular 108/19/95-Central Excise

Bombay HC observations and ruling[2.94]

- **Lapse on the part of the company for non-fulfilment of obligations:** The company was under an obligation to comply with requirements under the FTDR Act or the Foreign Trade Policy. Hence, it is to be primarily accused of lapse. Further, the order was passed for penal actions against the ex-directors and the company. However, the order did not specify the role of each director contributing to such lapse. Thus, it is a clear contradiction of the principle of vicarious liability.
- **A clear violation of principles of natural justice:** The SCN was issued to the company, and neither of the notices were issued to the director. Further, the director was not given an opportunity of being heard at the time of the impugned order, whereby the aforesaid penalty was imposed on him. Thus, it is a clear violation of the principles of natural justice. Therefore, the proceedings initiated against the ex-director are *void-ab-initio*.
- **The penalty cannot be sustained:** The HC has placed reliance on the decision[2.95] of Gujarat HC, wherein it was held that if no SCN is issued to the directors against the penalty imposed and no opportunity of hearing is granted, then the consequential orders shall be nullified. Accordingly, the HC has passed the present order in line with the decision of the Gujarat HC.

Our comments

The present ruling is welcome and is likely to set precedence in similar matters.

Earlier, the Delhi HC[2.96] had held that the director cannot be held vicariously or jointly liable for service tax dues of a company in the absence of a specific provision and given a company's separate legal personality. The HC had further held that the onus of proof shall remain on the department/respondents to show that a director is personally liable for the dues of the company at the stage of issuing SCN.

However, it is pertinent to note that the GST law[2.97] provides that where any tax, interest or penalty is due from a private company and the same cannot be recovered from the company, then the directors of such company shall be jointly and severally liable for payment of such dues. It further provides that the director shall be liable unless he proves that the non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company.

Thus, the GST laws shifting the onus on the director in such cases is contrary to the settled legal principles and needs a relook.

FTP benefits cannot be denied even if IEC obtained post rendition of services - Bombay HC

Summary

The Bombay HC has held that a service provider is not required to hold a valid IEC at the time of rendering the services, for which benefit under the SEIS is claimed. The condition prescribed as eligibility criteria under the FTP 2015-2020 has imposed additional restrictions of having an IEC number at the time of rendering services, which was not the intent or purport of the statute. The said condition is contrary to the provisions of the FTDR Act, 1992, which provides that in the case of import or export of services, the IEC shall be necessary only when the service provider is taking benefit under the FTP. Therefore, the said condition is against the principal legislation, and consequently, it cannot be termed as of mandatory nature for availing benefits under the scheme.

2.94 Writ Petition No. 325 of 2009 dated 8 July 2022
2.95 Om Vir Singh
2.96 in the case of Sanjiv kumar mittal
2.97 Section 89 of the CGST Act, 2017

Facts of the case

- The petitioner[2.98] is engaged in providing high-quality data services, i.e., market research services. Accordingly, such services fall under the list of services as per Appendix 3D, which are eligible for claiming benefit under the SEIS as introduced under the FTP.
- The petitioner tried to submit SEIS application online, which was not accepted on account of not having a valid IEC. The petitioner filed the application manually, which was not entertained by the DGFT authorities. Therefore, the petitioner dispatched the application along with documents through the post.
- The petitioner had approached the Policy Relaxation Committee of DGFT, which rejected the petitioner's application stating that it should have held a valid IEC number at the time of the rendition of export services.
- The petitioner filed a review application, which was also disposed on similar grounds. Being aggrieved by said rejection, the petitioner has filed present writ[2.99] before the Bombay HC.

Bombay HC observations and ruling[2.100]

- **Requirement of an active IEC for claiming benefit under SEIS:** In terms of eligibility criteria under the FTP[2.101], the condition is of having an active IEC number at the time of rendering services for claiming reward. FTP being delegated legislation should be in conformity with the principal statute. In other words, by way of delegated legislation, additional rights or obligations cannot be imposed.
- **Holding an active IEC number at the time of import of export of services or technology:** As per the provisions of FTDR Act[2.102], it is mandatory to hold an IEC for importing or exporting goods. However, in case of import or export of service or technology, IEC is necessary only while taking benefit under any schemes under the FTP.
- **FTP has imposed additional restrictions for eligibility:** The eligibility criteria of the FTP has imposed additional restrictions on having an IEC number at the time of rendering services, which was not the intent or purport of the statute. Therefore, the said condition is against the principal legislation and, consequently, it cannot be termed of a mandatory nature for availing benefits under the scheme.
- **Petition allowed:** The HC allowed the petition and directed the authorities to consider the petitioner's application without insisting for an active IEC number at the time of rendering services.

Our comments

The SC[2.103] had held that delegated power to legislate by making rules is for carrying out the Act's purposes as a general delegation without laying down any guidelines. It cannot be so exercised as to bring substantive rights or obligations, or disabilities not contemplated by the provisions of the Act itself. In another ruling, the SC[2.104] has held that the rules must be consistent with the parent law under which power has been derived.

The present ruling is in line with the above rulings. It reiterates that condition prescribed should be consistent with the statute and should not exceed the authority under which delegation has been made. This is a welcome ruling and is likely to set precedence in similar matters.

2.98 M/s Smarte Solutions Private Limited.
2.99 Writ Petition No. 503/2021
2.100 Vide order dated 27 July 2022
2.101 Clause 3.08(f) of the FTP
2.102 proviso to section 7 of the Foreign Trade (Development and Regulation) Act, 1992
2.103 Kunj Behair Lal Butail and others
2.104 Supreme Court Employees Welfare Association

Mens rea is an important ingredient for imposing penalty – CESTAT

Summary

The CESTAT Ahmedabad observed that the department had imposed a penalty on the appellant merely on the ground of the statement of parties involved in smuggling gold. The evidence on record was not sufficient to hold that the appellant was involved in the alleged activity of smuggling. It is a well-settled law that the statements of the co-noticee cannot be adopted as a legal evidence to penalise the accused unless the same is corroborated in material particulars by independent evidence. The evidence brought out by the department nowhere suggests that the appellant was aware that the goods in question were smuggled into India. In absence of any finding that the appellant has dealt with the goods physically, a penalty under the customs law for improper importation of goods cannot be imposed on the appellant.

Facts of the case

- The officers of Airport Intelligence Unit found out from the evidence gathered that the appellant[2.105] had financed a smuggling racket, which was involved in smuggling gold into India from Dubai. Based on the evidence, a SCN was issued to the appellant alleging that he was knowingly involved in the smuggling of goods and therefore, imposed penalty[2.106] on the appellant.
- The penalty was confirmed by the adjudicating authority. Therefore, the appellant preferred present appeal before the CESTAT Ahmedabad[2.107].

Ahmedabad CESTAT observations and ruling[2.108]

- **Conditions must be satisfied to impose the penalty:** The CESTAT stated that for imposition of penalty under the customs law[2.109], the person must have acquired possession of the goods and must have a reason to believe or have knowledge that such goods are liable for confiscation[2.110].
- **Statements of co-noticee are not corroborated:** The department did not take any steps to confirm regarding the knowledge and involvement of the appellant with the co-noticee. The evidence on record was not sufficient to hold that the appellant was involved in alleged activity of smuggling gold. It is a well-settled law that the statements of the co-noticee couldn't be adopted as legal evidence to penalise the accused unless the same are corroborated in material particulars by independent evidence. Further, the CESTAT stated that the statements of parties involved in such smuggling remain uncorroborated during the investigation.
- **Without cross-examination evidence cannot be admissible:** The statement of co-accused cannot be relied upon, particularly when the appellant has denied his involvement in respect of the goods in question. For admissibility of evidence of the witness, it should be cross-examined. In the instant case, statements are not cross-examined[2.111].
- **No evidence against the appellant:** The CESTAT stated that during the investigation, the officers did not find any evidence against the appellant to show he had financed the money for the smuggling of gold into India. Also, the Revenue has nowhere ascertained whether the appellant had knowledge or reason to believe that the goods in question were liable for confiscation and hence, the penalty cannot be imposed.
- **For imposing the penalty, *mens rea* is an important ingredient:** For imposing penalty on improper importation of goods under the customs law, *mens rea* is an important ingredient. In the present case, penalty cannot be imposed because the department has failed to prove the knowledge of the appellant in the activities relating to the smuggled gold.
- **For the imposition of penalty, goods must be dealt with physically:** In absence of the finding in the impugned order that the appellant has dealt with the goods physically or any allegation to this effect raised in the proceeding, penalty for improper importation of goods under the customs law cannot be imposed[2.112]. The appellant had never acquired possession or in any way concerned in any of the activities mentioned in the provision or any measure dealing with any goods, which the appellant knew or had reason to believe are liable to confiscation. Therefore, the CESTAT held that the appellant is not liable imposition of penalty.

Our comments

In case of Akbar Badruddin Jiwani, the Apex Court had held that while imposing a penalty, the requisite *mens rea* must be established. In another case, the Apex Court[2.113] had observed that the discretion to impose a penalty must be exercised judicially and after consideration of all the relevant circumstances. Penalty cannot be imposed merely because it is lawful to do so.

On a similar issue, the Apex Court[2.114] had held that in absence of direct/circumstantial evidence to show the role of the appellant as abetting to the activity of smuggling, the appellant is not liable to any penalty in absence of *mens rea* or knowledge of the actual smuggling activity.

The present ruling is in line with the above ruling and has further highlighted that *mens rea* is an important factor for imposing penalty under the customs law.

2.105 Lalit Jain
2.106 Section 112(b)(i) of the Customs Act 1962
2.107 Customs Appeal No. 10061 of 2022
2.108 order dated 12 August 2022
2.109 Section 112 of the Customs Act, 1962
2.110 u/s 111 of Customs Act, 1962
2.111 Section138B of Customs Act
2.112 R.C. Jain, D. Ankneedu Chowdhry, Rakesh Kumar Rajendra Kumar & Co.
2.113 Hindustan Steel Ltd.
2.114 Suresh Rajaram Newagi

03 Decoding advance ruling

Supply by outlet located in SHA of the airport to outbound international passengers is taxable under GST, eligible for refund - Delhi AAAR

Summary

The appellant contended that the sale of goods from outlet located in SHA of the airport should be treated as export of sale and, accordingly, be considered as zero-rated supply. In this respect, the Delhi AAAR stated that the outlet located in SHA cannot be said to be outside India. The AAAR upheld the order passed by the AAR and held that the supply of goods to outbound international traveller qualifies as supply and, therefore, liable to GST. Further, the AAAR stated that the provision of the IGST Act, 2017 is applicable to tourists leaving India and hence, the payment of IGST on such supply shall be refunded in the prescribed manner.

Facts of the case

- The appellant[3.1] is engaged in business of retail sale of sunglasses through various outlets in Delhi including one outlet at Terminal-3.
- The said outlet is permitted to function beyond the Customs Area and within the SHA of the IGI Airport.
- The appellant procures sunglasses from Gurgaon after payment of IGST at the rate of 28%, which are further supplied to the international passengers having a valid international boarding pass. The appellant charges SGST/CGST on the invoices issued to the international passengers. However, the appellant is of a view that such transaction is a zero-rated transaction, being 'export sale'.
- The appellant approached the Delhi AAR to understand implications of GST on its transaction. The AAR passed an order[3.2] that even though the shop is located beyond the Custom Frontiers of India but the same is within the territory of India. Therefore, it shall not be treated as export and applicable GST is to be discharged.
- The appellant placed reliance on the decision of the SC in the case of M/s. Hotel Ashoka (India Tourism Development Corp Limited)[3.3] and contended that when any transaction takes place outside the customs frontiers of India, the transaction would be said to have taken place outside India.
- Thus, the aggrieved appellant filed the present appeal challenging the order passed by the AAR.

AAAR observations and ruling[3.4]

- **Shop located in SHA is in India:** As per the facts on record, the shop of the appellant is in SHA. Further, as per the provisions, the shop located in SHA cannot be said to be outside India. Thus, since the shop of appellant is in SHA, the same shall be considered in India. Therefore, the sales made by the appellant to the outbound international travellers cannot be treated as 'exports of goods[3.5]'.
- **Refund to tourists leaving India:** The provision of the IGST Act, 2017 is applicable to tourists leaving India. Thus, the payment of IGST on the supply of goods taken out of India by him shall be refunded in the prescribed manner.
- **GST is applicable on supply of goods:** The supply of goods to outbound international travellers falls within the definition of 'taxable territory' and forms 'supply'. It will attract the applicable GST on the date of supply of the goods.

Our comments

Earlier, the Delhi AAR in case of M/s ROD Retail Private Limited had held that the goods can be said to be exported only when they cross the territorial waters of India and not merely on crossing the Customs Frontiers of India. The Delhi AAAR has also upheld the above ruling.

However, contrary to this, the HCs in many cases[3.6] had taken a view that the goods supplied by duty-free shops located at the departure area are taken and consumed outside India by the passenger himself, thus, such transaction would qualify as export of goods[3.7] and can be treated as zero-rated supply.

Recently, the CBIC has retrospectively withdrawn Rule 95A w.e.f. 1 July 2019[3.8] which prescribed the manner of refund of taxes to the retail outlets established in the departure area of an international Airport beyond immigration counters making tax-free supply to an outgoing international tourist.

3.1 M/s ROD Retail Private Limited
3.2 AR No. 01/DAAR/2018 (In Application No: 01/DAAR/2017) dated 27 March 2018
3.3 Civil Appeal Nos. 10404-10412 of 2010 dated 3 Feb 2012
3.4 Order No./03/DAAAR/ 2022-23/1999-2004 dated 23 May 2022
3.5 under section 2(5) of the IGST Act,2017 read with section 2(19) of the Customs Act, 1962
3.6 Madras HC (2021)- Flemingo Duty-Free Shops Pvt. Ltd vs UOI , Allahabad HC (2019)- Atin Krishna vs UOI
3.7 as per the IGST Act
3.8 vide notification No. 14/2022-Central Tax dated 5 July 2022

04 Expert's column

Contributed by
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Governance in relation to related party transactions

What is the significance of RPT governance for a business and for protecting stake holder's interest?

RPT governance is one of the most relevant topics in today's world. One cannot overlook the fact that there is continuous synergy between group companies. Organisations often leverage available resources and transact within the group or affiliated entities. This arrangement might lead to potential grey areas of profit transfers, fund siphoning, under/over invoicing, etc.

Governance is built on the four guiding principles of fairness, accountability, transparency and responsibility. Any business that exercises these core values in its conduct exhibits its intent to protect shareholders as well as other stakeholders' interests. Therefore, having a robust governance through the lifecycle of an RPT right from the identification of related parties, transactions, arm's length benchmarking, approvals, documentation and execution, including the use of technology is of utmost importance. A watertight governance framework that ensures clear approval and disclosure norms will help achieve two objectives in the long run. It is likely to help businesses in meeting the enhanced disclosure/reporting requirements brought in by the SEBI LODR, including demonstrating that all their RPT are fair and commercially sound. Additionally, such governance policies will also help in safeguarding the interests of various stakeholders.

What challenges do companies face in ensuring good governance and how can they address them practically?

Each company is different in respect of its nature of business, corporate vision, holding structure, financial stability, etc. Accordingly, the kinds of challenges they face are also very different. For example, start-ups that are in innovative or niche businesses may have unique transactions whose fair market comparison to determine the arm's length may be a potential challenge.

On the other hand, a company that is up and running may have an appropriate RPT policy and implementation mechanism in place. However, a potential challenge in such companies could be that given the consistent nature of such RPTs, which haven't changed over time, the policies governing them haven't been overhauled periodically and may not be compliant with updated governance requirements.

Large established companies may have robust governance frameworks and they may also comply with all the requirements as a result of having independent directors on their board. However, such companies may have complex business structures and integrated transactions which may not have market comparable. For example, a tyre manufacturing company buying a compound from its related parties becomes complex and unique as the product purchased has no internal/external comparison. Further, the effort in developing the compound is closely woven across group entities leading to complex pricing arrangements.

SEBI has laid down regulations for RPT approval process and subsequent disclosure requirements. The new regulation by SEBI has now mandated enhanced three-tier disclosures to the audit committee, shareholders and the stock exchange. It is now the onus of the companies to make transparent disclosures and maintain adequate documentation to support their business rationale for undertaking unique/complex RPT. Accordingly, large business organisations need to create awareness across their teams around these enhanced approval and disclosure requirements and ensure a more conscious effort on their part to fulfill these requirements. Additionally, this could be firmed up by an independent arm's length review and governance framework evaluation on a periodic basis.

What level of supporting documentation can companies consider to be adequate and robust?

Supporting documentation is basically a compilation of what, why and how of a given transaction. This compilation need not be limited to an arm's length exercise but point out the need, benefit, pricing and market comparability of a given RPT.

Such documentation is required to be contemporaneous and clearly details the roles and responsibilities of transacting parties. It is suggested that such a document should be concise across departments and should incorporate any guidance from internal TP relevant to governance should also be included.

There have been no specific requirements prescribed by the Companies Act, 2013 or the SEBI LODR, however, guidance can be taken from the detailed documentation from the Indian Income Tax Act. Furthermore, companies can consider including the below information to be presented before the audit committee and shareholders for obtaining their approval for RPTs as prescribed by SEBI in its circular dated 22 November 2021:

- Type, material terms and particulars
- Name of the related party and its relationship (with listed entity or subsidiary)
- Tenure and value
- % of value of proposed transaction to annual turnover (of listed entity or subsidiary)
- Any loans, inter-corporate deposits, advances or investments by listed entity or subsidiary
- Justification of why the RPTs are in the interest of the listed entity
- Valuation or other external party reports, if any
- % of the value of proposed RPT to counter-party's turnover (voluntarily)
- Any other information

How should companies practically ensure that a governance framework put in place is also followed in spirit?

The culture and the tone at the top are quintessential for ensuring governance. Regular pre-facto/proactive discussion with stakeholders before undertaking a transaction instills confidence and showcases inclusive decision-making of the management. A policy of extra disclosure shows the right intent and develops a culture of integrity. Ultimately, the key to good governance is to go beyond the regulation with an intent to ensure complete transparency with various stakeholders, while safeguarding confidential business information and having clearly defined responsibilities and accountability across the organisation for various processes.

What are the typical roles and responsibilities of upholders of governance framework?

Although governance is to be followed and practiced at all levels across a company, the upholders of governance are the promoters, members of the board, independent directors, audit committee and the secretarial team. SEBI's enhanced regulations of RPT certainly place the onus on listed entities to ensure they have a comprehensive RPT governance framework working meeting the four pillars of governance. With the redefined thresholds of related party relationship and transaction and the burden placed on the management to disclose any transaction which is aimed at directly/indirectly benefitting a related party even though the transacting parties are unrelated, there is an immediate requirement for the upholders to revisit and introspect their preparedness to address any potential governance challenges.

In our experience, very few companies have a robust governance framework and while approvals process is followed the documentation tends to be at a bare minimum. Regular deliberations by companies on the continued importance of not only framework but also diligent implementation is the key focus area to be looked after by the management. This can be effectively achieved through seamless transparency between the various upholders of governance.

How can digitising the entire RPT lifecycle enhance governance by for the companies?

India is increasingly adapting technology in various attributes of business and is conscious of the nexus between technology and growth. Technology has the capability to enable, improve, and transform business operations and mitigate possible errors and omissions.

Drawing inference to the RPTG setup, automating different phases of the RPT lifecycle brings efficiency and adds value to the overall business of a company. The risk of inadvertent noncompliance is mitigated, and real-time comprehensive oversight process is followed. Mapping of related parties as per various definitions and automated mapping of inter-company transaction between identified parties reduces gaps in adhering to approval processes, pricing policies and supporting documentation requirements.

05 Issues on your mind

Who is eligible to file NIL GSTR-1?

The taxpayer can file NIL GSTR-1 return by simply ticking the check box 'File NIL GSTR-1' which is available on the GSTR-1 dashboard. This can be done only if the taxpayers have:

- No outward supplies (including supplies on which tax is to be charged on a reverse charge basis, zero-rated supplies, and deemed exports) during the relevant period[5.1]
- No amendment to be made for any supplies reported earlier
- No credit or debit notes to be declared/amended
- No details of advances received for services to be declared or adjusted.

How many trade names can be entered for a single GSTN registration?

Earlier, only a single trade name was being captured for the normal taxpayers on the GST portal. However, now, a functionality has been made available for the taxpayers wherein the taxpayers have the option to provide up to 9 additional trade names for a single GSTN registration, through core field amendment. The taxpayer can also upload supporting documents[5.2] for trade names.

What is AEM?

The CBIC has enabled an AEM for ICEGATE registered users where they can submit their grievance for delay in BOE clearance under faceless assessment. The grievance would be escalated anonymously to concerned assessment officers at relevant Faceless Assessment Group Port. The Anonymised Escalation facility also enables users to track the status of the grievances submitted by them till the eventual resolution[5.3].

A grievance can be logged for delay in assessment of a bill of entry if the BOE has been pending in assessment for 24 hours or more after filing or the IGM number and date has been mentioned in the BOE, whether at the time of filing, or later.

The ICEGATE users can follow below steps for logging a grievance through AEM on ICEGATE:

- Login through ICEGATE user portal.
- Select 'Taxpayer's Grievance Application' and then click on 'Register BE (BOE) Grievance'.
- Enter Bill of Entry details and click on 'Submit' button to create a grievance.
- If the details match the specified criteria for grievance creation, a new grievance will be created, and a grievance number shall be provided for tracking purposes. Otherwise, an appropriate error message will be generated.

5.1 Month or quarter for which t.e form is being filed for
5.2 of size 5 MB
5.3 Advisory dated 2 August 2022 issued by ICEGATE

06 Important developments in direct taxes

CBDT specifies forms that need to be filed electronically

The CBDT has specified[6.1] the forms that need to be filed electronically. These forms are to be verified in the manner prescribed.

Form no.	Particulars	Form no.	Particulars
3CEF	Annual compliance report on Advance Pricing Agreement	**10FC**	Authorisation for claiming deduction in respect of any payment made to any financial institution located in a notified jurisdictional area
10F	Information for claiming relief under agreement[6.2]	**28A**	Intimation to assessing officer regarding notice of demand[6.3] for payment of advance tax[6.4]
10IA	Certificate of the medical authority for certifying 'person with disability', 'severe disability', 'autism', 'cerebral palsy' and 'multiple disability'[6.5]	**27C**	Declaration[6.6] to be made by a buyer for obtaining goods without collection of tax

6.1 Vide notification No. 3 of 2022 dated 16 July 2022
6.2 As per section 90 / 90A of the Income-tax Act, 1961 (the Act)
6.3 Issued under section 156 of the Act
6.4 Under section 210(3)/210(4) of the Act
6.5 Sections 80DD and 80U of the Act
6.6 Section 206C(1A) of the Act

Form no.	Particulars	Form no.	Particulars
3BB	Monthly statement to be furnished by a stock exchange for transactions in which client codes have been modified after registering in the system for the relevant month	**58C**	Report to be submitted to the National Committee by an approved association or institution under the Act[6.7]
3BC	Monthly statement to be furnished by a recognised association for transactions in which client codes have been modified after registering in the system for the relevant month	**58D**	Report to be submitted by a public sector company, local authority or an approved association or institution to the National Committee on a notified eligible project or scheme[6.8]
10BC	Audit report to be furnished in case of an electoral trust[6.9]	**68**	Application[6.10] for immunity from imposition of penalty/initiation of prosecution

CBDT lays down modalities to condone the delay in filing certain forms

CBDT[6.11] has granted powers to Pr. CCIT/CCIT to condone the delay in filing of Form No. 10BB[6.12], Form No. 9A[6.13] and Form no. 10[6.14], for AY 2018-19 or subsequent years, where there is reasonable cause for the delay in filing such forms and the delay is beyond 365 days but up to three years.

The CBDT has also prescribed the manner of disposal of such applications and the timeline for disposal.

CBDT reduces the time limit for verification of income tax return

CBDT has notified[6.15] that with effect from 1 August 2022, e-verification or submission of ITR-V to CPC should be done within 30 days[6.16] from the date of filing the return of income electronically. It has provided that Form ITR-V should be sent by speed post to CPC Bengaluru and in such cases the date of dispatch will be considered for reckoning the 30 days period.

In case e-verification/ITR-V submission is done after 30 days of filing the return of income, the date of e-verification/ITR-V submission shall be treated as the date of uploading the return of income and all consequences of late filing of return will apply.

Non-applicability of TCS provisions for non-resident buyers not having a PE in India

Tax is to be collected[6.17] on remittances outside India under the RBI's liberalised remittance scheme and on purchase of an overseas tour package. Earlier, CBDT[6.18] had notified that aforesaid TCS provisions will not apply in case of a non-resident individual who is visiting India.

CBDT has now modified the earlier notification[6.19] to provide that the aforesaid TCS provisions would not apply to a non-resident[6.20] buyer who does not have a PE in India.

CBDT notifies the form for claiming refund of TDS

If tax is deductible[6.21] on any income (other than interest) of a non-resident and the same is borne by the payer, the payer can file an application with the assessing officer to claim the refund of such TDS[6.22], if no tax was required to be deducted on such income.

In this regard, the CBDT has inserted a new rule[6.23] and notified the form[6.24] and prescribed the documentation[6.25] requirement for making such application.

6.7 Section 35AC(4)(ii) of the Act
6.8 Section 35AC(5)(ii) of the Act
6.9 Rule 17CA(1) of the Income-tax Rules, 1962 (the Rules)
6.10 Section 270AA(2) of the Act
6.11 Vide Circular no. 15 and 17 of 2022 dated 19 July 2022
6.12 Form 10BB is required to be furnished by any educational or institution, university, hospital, or trust that claims exemption under section 10(23C) of the Act
6.13 Form 9A is required to be filed if a registered charitable or religious trust/institution wants to exercise option under clause 2 of Explanation to Section 11(1) of the Act
6.14 Form No. 10 is required to be filed by a registered charitable or religious trust/institution for claiming exemption for accumulated income
6.15 Notification No. 5 of 2022 dated 29 July 2022
6.16 Earlier time limit of 120 days would continue to apply in respect of returns filed before 1 August 2022
6.17 Section 206C(1G) of the Act
6.18 Notification No 20 of 2022 dated 30 March 2022
6.19 Notification No. 99 of 2022 dated 17 August 2022
6.20 As per section 6 of the Act
6.21 Section 195 of the Act
6.22 Section 239A of the Act
6.23 Rule 40G of the Rules
6.24 Form No. 29D
6.25 Copy of the agreement or other arrangement as referred in section 239A of the Act

07 Glossary

AA	Appellate Authority
AAAR	Appellate Authority of Advance Ruling
AAR	Authority of Advance Ruling
AC	Assistant Commissioner
AEM	Anonymised Escalation Mechanism
ART	Assisted Reproductive Technology
AY	Assessment Year
BCD	Basic Customs Duty
BOE	Bill of Entry
CAROTAR	Customs (Administration of Rules of Origin under Trade Agreements) Rules, 2020
CBDT	Central Board of Direct Taxes
CBIC	Central Board of Indirect Taxes and Customs
CCIT	Chief Commissioner of Income-tax
CD	Compact Disk
CECA	Comprehensive Economic Cooperation Agreement
CECPA	Comprehensive Economic Cooperation and Partnership Agreement
CESTAT	Customs Excise and Service Tax Appellate Tribunal
CG	Central Government
CGST	Central Goods and Service Tax
CIRP	Corporate Insolvency Resolution Process
CPC	Central Processing Centre
CTH	Change of Tariff Heading
DC	Deputy Commissioner
DGFT	Directorate General of Foreign Trade
DGGI	Directorate General of GST Intelligence
DIN	Document Identification Number
DRI	Directorate of Revenue Intelligence
DTA	Domestic Tariff Area
EPCG	Export Promotion Capital Goods Scheme
EULA	End-user Licence Agreement
FICN	Fake Indian Currency Notes Information System
FPCs	Flexible Printed Circuits
FTA	Free Trade Agreement
FTDR Act	Foreign Trade (Development and Regulation) Act
FTP	Foreign Trade Policy
GST	Goods and Service Tax
GSTN	Goods and Services Tax Network
HC	High Court
HSN	Harmonised System of Nomenclature
IBC	Insolvency and Bankruptcy Code, 2016
ICEGATE	Indian Customs Electronic Gateway
IEC	Import Export Code

IGCR	Customs (Import of Goods at Concessional Rate of Duty), Rules 2017
IGST	Integrated Goods and Service Tax
INR	Indian Rupee
IRP	Interim Resolution Professional
IT	Information Technology
ITC	Input Tax Credit
IVF	In-vitro Fertilisation
MeitY	Ministry of Electronics and Information Technology
MRP	Maximum Retail Price
NCLAT	National Company Law Appellate Tribunal
NCLT	National Company Law Tribunal
NFMIMS	Non-Ferrous Metal Import Monitoring System
NHAI	National Highways Authority of India
NRI	Non-resident Indian
OTC	Over the counter
PE	Permanent Establishment
PLC	Preferential Location Charges
PLI	Production Linked Incentive
Pr. CCIT	Principle Chief Commissioner of Income-tax
PSU	Public Sector Undertaking
PTA	Preferential Trade Agreements
RBI	Reserve Bank of India
RCM	Reverse Charge Mechanism
RPT	Related Party Transactions
RPTG	Related Party Transactions Governance
SC	Supreme Court
SCN	Show Cause Notice
SEBI LODR	Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements)
SEIS	Service Exports from India Scheme
SEZ	Special Economic Zone
SGST	State GST
SHA	Security Hold Area
SIB	Special Investigation Branch
SLP	Special Leave Petition
SOPs	Standard Operating Procedures
STO	State Tax Officers
TCS	Tax Collected at Source
TDS	Tax Deducted at Source
TP	Transfer Pricing
VAT	Value Added Tax
WFH	Work From Home

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