

GST Compendium

A monthly guide

January 2023





Editor's note

I wish everyone a happy and prosperous New Year 2023!

The Goods and Services Tax Council (the GST Council) held its 48th meeting on 17 December 2022 and took the following welcoming decisions:

First, decriminalisation of a few offences to support the ease of doing business in India, viz:

- Obstructing/preventing any officer from discharging duties
- Deliberate tempering of material evidence
- Failure to supply information

Second, an increase in the threshold limit, except in the case of fake invoice, for GST evasion from one crore to two crores for launching prosecution.

Third, GST is not payable when a residential property is rented to a person registered under GST if used as the residence by such registered person.

The India-Australia Economic Cooperation and Trade Agreement has come into force from 29 December 2022. This agreement should boost trade and commerce in several sectors — textiles, gems and jewellery, and pharmaceuticals. In this regard, the government has already notified necessary exemption notifications and rules/regulations.

In this edition, we have analysed the Development of Enterprise and Service Hubs (DESH) Bill, which is set to change the Special Economic Zones (SEZ) regime in India and is expected to promote manufacturing and exports.

On the direct tax front, the Central Board of Direct Taxes (CBDT) has issued a circular for tax deduction at source on salary for FY 2022-23. Furthermore, to avoid hardship for non-residents not having a Permanent Account Number, the CBDT has provided certain relaxations regarding the electronic filing of Form No. 10F.

I hope you find this edition an interesting read.

Regards,

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01 Important amendments/updates



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

CBIC notifies amendments and issues clarifications pursuant to the 48th GST council meeting recommendations

Summary

The GST Council, in its 48th meeting, held through a video conference on 17 December 2022, made various significant recommendations relating to changes in GST rates, measures for facilitation of trade and streamlining compliances in GST, issuance of due clarifications. Pursuant to the above, the CBIC has issued various notifications and circulars to give effect to many of the council's decisions.





Key recommendations/decisions

Agenda	Recommendation	Notified changes
Decriminalisation under GST	<ul style="list-style-type: none">• Increase in minimum threshold of tax amount from INR 1 crore to INR 2 crore for launching prosecution• The increased threshold shall not be applicable for offences related to fake invoices• Reduction in the compounding amount range from 50% to 150% of tax amount to 25% to 100%• Decriminalisation of certain offences	<ul style="list-style-type: none">• Yet to be notified
Amendment in rule 37(1) w.r.t. reversal of ITC	<ul style="list-style-type: none">• Amendment in rule retrospectively w.e.f. 1 October 2022 to reverse only the proportionate ITC to the amount not paid to the supplier	<ul style="list-style-type: none">• Retrospective amendment has been made in Rule 37 w.e.f. 1 October 2022 for proportionate reversal of ITC.• If payment is not made to the supplier within 180 days of the invoice date, whether wholly or partially, the recipient shall be liable to pay or reverse the ITC proportionate to the amount not paid to the supplier, along with the interest.• Earlier, there was uncertainty in the industry regarding whether full ITC needed to be reversed in cases of partial payment. This amendment would provide due clarity and relief to the taxpayers in case where a portion of taxable value is withheld due to certain reasons.
Mechanism for ITC reversal in case of non-payment of tax by supplier	<ul style="list-style-type: none">• Proposed to insert Rule 37A to prescribe:<ul style="list-style-type: none">- Mechanism for ITC reversal by the recipient in case of non-payment of GST by the supplier- Mechanism for re-availment of ITC if the supplier pays tax subsequently	<ul style="list-style-type: none">• Mechanism has been prescribed by way of Rule 37A for reversal of ITC in the case of non-payment of tax by the supplier and re-availment thereof.• If a recipient claims ITC in respect of invoice or debit note, which has been reported by the supplier in its GSTR-1/IFF but has not furnished GSTR-3B, the supplier can furnish the same till 30 September following the end of FY in which the ITC has been availed. Otherwise, the recipient shall be liable to reverse such ITC while furnishing its GSTR-3B on or before 30 November following the end of such FY.• If the recipient fails to reverse the ITC before the above said timeline, such amount shall be payable along with interest under Section 50.• However, the ITC may be re-availed after furnishing of GSTR-3B by the supplier.
Clarification on renting of residential dwelling	<ul style="list-style-type: none">• Pursuant to the recommendations of the 47th GST Council meeting, the GST exemption was withdrawn when a residential dwelling was rented out to a registered person• In this respect, it is clarified that GST would not be payable by a registered person if the residential property is rented out to them in their personal capacity and not on account of their business	<ul style="list-style-type: none">• Explanation added under entry 12 of the exemption notification no. 12/2017- Central Tax(Rate) dated 28 June 2017. It states that there shall be no GST if a registered person who is the proprietor of a proprietorship firm rents a residential dwelling in his personal capacity for use as his own residence, on his own account and not that of his proprietorship concern.



Key recommendations/decisions

Agenda	Recommendation	Notified changes
Amendment related to Schedule III	<ul style="list-style-type: none">• Earlier, the below transactions were inserted in Schedule III w.e.f. 1 February 2019:<ul style="list-style-type: none">- Supplies of goods from a place outside the taxable territory to another place outside the taxable territory- High sea sales- Supply of warehoused goods before their home clearance• Above paras shall be effective from 1 July 2017• No refund of GST already paid during the period 1 July 2017 to 31 January 2019	<ul style="list-style-type: none">• Yet to be notified
Facilitate e-commerce for micro enterprises	<ul style="list-style-type: none">• Facility to unregistered suppliers and composition taxpayers to make intra-state supply through ECOs, subject to certain conditions• Implementation of this scheme w.e.f. 1 October 2023	<ul style="list-style-type: none">• Yet to be notified
Amendment in Form GSTR-1	<ul style="list-style-type: none">• Reporting of details of supplies made through ECOs both by the supplier and ECO	<ul style="list-style-type: none">• Amended Form GSTR-1
Registration procedure	<ul style="list-style-type: none">• Amendment in registration rules to avoid fake registrations• Use of PAN-linked mobile number and e-mail address in Form GST REG-01 and OTP-based verification at the time of registration	<ul style="list-style-type: none">• Amendment has been made in registration procedure.• The PAN shall be validated using OTP-based verification on PAN-linked mobile number and email addresses.• In the case where a person who has undergone Aadhaar authentication is identified on the common portal for carrying out physical verification of places of business:<ul style="list-style-type: none">- The registration shall be granted within 30 days of submission of the application after physical verification of the place of business and documents as the PO may deem fit.- In case of any deficiency or clarification required in the application, the notice in Form GST REG-03 may be issued within 30 days from the date of submission of the application• For Gujarat, the registration application will be considered complete only after biometric-based Aadhaar authentication and after taking a photograph of the applicant, as well as the verification of the original copy of the documents uploaded at one of the facilitation centres.



Key recommendations/decisions

Agenda	Recommendation	Notified changes
GST registration	<ul style="list-style-type: none">Facility for cancellation of GST registration to registered taxpayers deducting TDS or collecting TCS on their request	<ul style="list-style-type: none">An amendment has been made in Rule 8. It states that if the PO receives a written request and is satisfied that the registered person is no longer required to withhold TDS under Section 51 or collect TCS under Section 52, the PO may cancel the registration. This cancellation will be communicated to the said person electronically in Form GST REG-08.
GST returns	<ul style="list-style-type: none">Restrict filing of GST returns to a maximum period of three years from the due date	<ul style="list-style-type: none">Yet to be notified
Amendment in definition	<ul style="list-style-type: none">Non-taxable online recipientOIDAR	<ul style="list-style-type: none">Yet to be notified
Intimation of difference in liability reported in Form GSTR-1 and GSTR-3B by the common portal	<ul style="list-style-type: none">Where there is a difference between liability reported in GSTR-1 and 3B beyond a specified amount/percentage, the taxpayer has to either pay the differential duty or explain the differenceRule 88C and Form GST DRC-01B are to be insertedRestrict furnishing of GSTR-1 for a subsequent tax period in case of failure of furnishing reply or depositing amount	<ul style="list-style-type: none">Rule 88C has been added to prescribe the manner of dealing with difference in liability reported in GSTR-1/IFF and GSTR-3B.<ul style="list-style-type: none">When a registered person's tax liability in Form GSTR-1/IFF exceeds the tax liability reported in Form GSTR-3B by the specified amount or percentage, a notice of such difference shall be given to that registered person in Part A of Form GST DRC-01B on the common portal and via email, with instructions to take the following actions within seven days:<ul style="list-style-type: none">Pay the differential tax liability, along with interest, through Form GST DRC-03; orExplain the aforesaid difference in tax payable on the common portalThe registered person shall either pay the differential tax liability along with interest or furnish a reply incorporating reasons of differential unpaid tax in Part B of Form GST DRC-01B electronically within the specified period.Restriction on furnishing of GSTR-1/ IFF<ul style="list-style-type: none">Registered persons to whom the above intimation has been issued shall not be allowed to furnish Form GSTR 1/IFF for a subsequent tax period unless they have either deposited the amount or have furnished a reply explaining the reasons.It seems that the department intends to intervene only where the difference in liability reported in GSTR-1/IFF and GSTR-3B exceeds the specified percentage. Furthermore, this approach will encourage the taxpayers to be more diligent towards proper filing of returns to avoid any restriction of further filing. However, it is important to see whether the Revenue will accept taxpayers' justifications for the discrepancies between GSTR-1/IFF and GSTR-3B, as doing otherwise could open a plethora of new litigations.



Key recommendations/decisions

Agenda	Recommendation	Notified changes
Appeal procedure	<ul style="list-style-type: none">Amendment in appeal provisions to provide clarity on<ul style="list-style-type: none">The requirement of submission of certified copy of the order appealed againstThe issuance of final acknowledgment by the appellate Authority	<ul style="list-style-type: none">Amendment has been made in provisions for filing appeal to the appellate authority.Where the decision or order appealed against is uploaded on the common portal<ul style="list-style-type: none">A final acknowledgement indicating the appeal number shall be issued in FORM GST APL-02The date of issue of the provisional acknowledgement shall be considered as the date of filing of the appealWhere the decision or order appealed against is not uploaded on the common portal<ul style="list-style-type: none">The appellant shall submit a self-certified copy of the order within seven days from the date of filing of Form GST APL-01A final acknowledgement indicating the appeal number shall be issued in Form GST APL-02The date of issue of the provisional acknowledgement shall be considered as the date of filing of the appealIf a self-certified copy is not submitted within seven days, the date of submission of such a copy shall be considered as the date of filing of the appeal. The amended provisions would provide due clarity on requirement of documents to be submitted before the appellate authority which would facilitate the timely processing of appeals and ease the compliance burden for the appellants.
Withdrawal of appeal	<ul style="list-style-type: none">Insertion of rule and form to provide the facility for withdrawal of an appeal application up to certain specified stage	<ul style="list-style-type: none">Rule 109C has been added w.r.t. withdrawal of appeal.Time limit for filing application for withdrawal of appeal -Any time before the issuance of SCN or order, whichever is earlierWhere the final acknowledgement issued<ul style="list-style-type: none">The withdrawal of appeal would be subject to the approval of the appellate authoritySuch withdrawal application shall be decided by the appellate authority within seven daysEarlier, there was no option under the GST law to withdraw an appeal application. Hence, this new provision would help in reducing the litigations both at the level of appellants and the appellate authorities.





Clarifications by way of circulars -

- **Manner of dealing with difference in ITC availed in Form GSTR-3B in comparison to Form GSTR-2A for FY 2017-18 and 2018-19**

There may be a difference in the ITC claimed by the recipient in Form GSTR-3B and that available in Form GSTR-2A due to the non-reflection of supply in Form GSTR-2A of the recipient in the below mentioned scenarios:

- Where the supplier has filed Form GSTR-3B but failed to file Form GSTR-1 for a tax period
- Where the supplier has filed both Form GSTR-1 and GSTR-3B for a tax period but failed to report a particular supply in Form GSTR-1
- Wrong reporting of supply as B2C instead of B2B supply in Form GSTR-1 by the supplier
- Reporting of supply with incorrect GSTIN of the recipient

In respect to the above, the PO shall take the following actions:

- Shall seek details from the recipient regarding all the invoices on which ITC availed in Form GSTR 3B but not reflected in their Form GSTR 2A
- Shall ascertain fulfilment of the specified conditions of Section 16
- Shall check whether ITC reversal is required
- Shall check whether ITC has been availed within the time specified under Section 16(4)
- Shall take verification action to ensure that the supplier on such supply has paid tax

Action by PO in case of difference between the ITC claimed in GSTR-3B and available in GSTR-2A

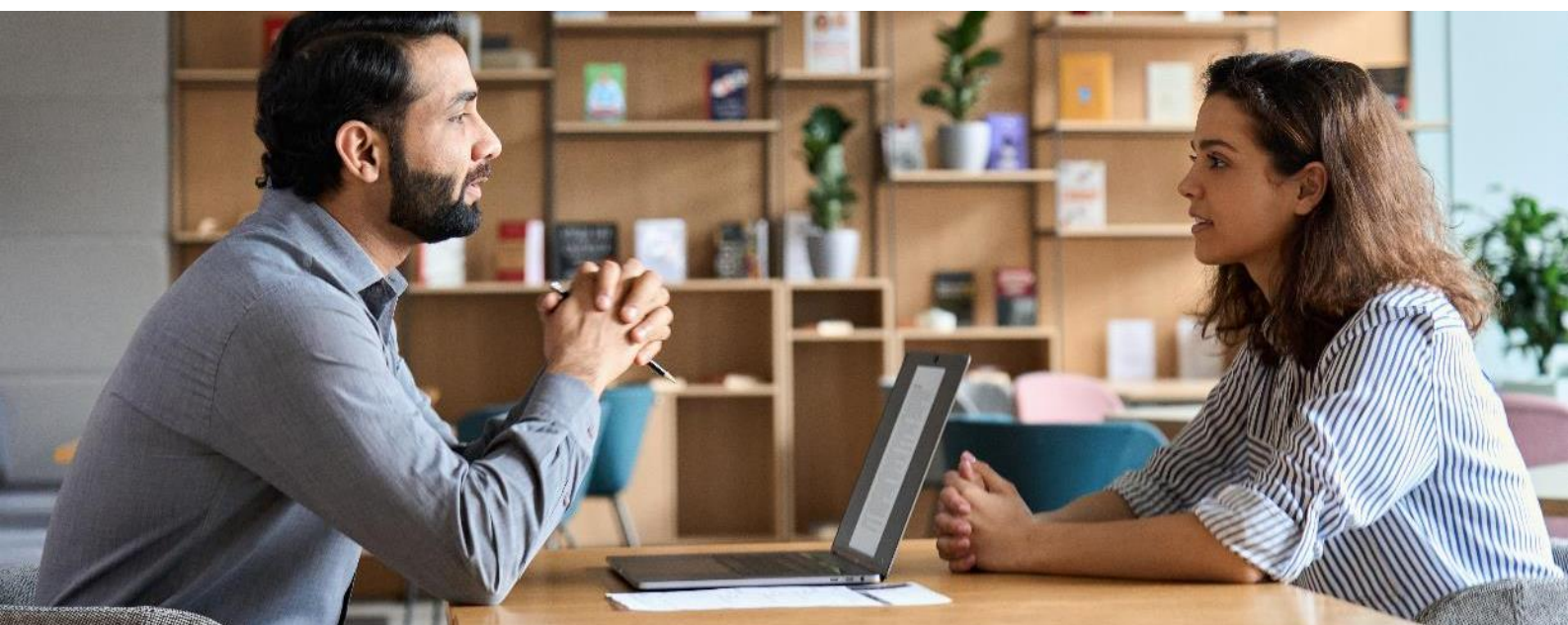
Exceeds INR 5 lakh The PO shall ask the recipient to produce a certificate containing UDIN for the concerned supplier from the CA or the CMA

Up to INR 5 lakh The PO shall ask the recipient to produce a certificate from the concerned supplier

Applicability of instructions

- Applicable to the bonafide errors committed in reporting during FY 2017-18 and 2018-19
- Applicable only to the ongoing proceedings in scrutiny/audit/investigation, etc., for FY 2017-18 and 2018-19 and in those cases where any adjudication or appeal proceedings are still pending

These clarifications would provide relief to the registered persons receiving notices on the ITC mismatch between GSTR-2A and GSTR-3B for FY 2017-18 and 2018-19. Furthermore, the taxpayers whose adjudication or appeal proceedings are still pending or have ongoing proceedings in scrutiny/audit/investigation should also consider the benefit of this circular. However, the circular does not address what should be done in situations that are not specifically addressed by the four scenarios listed therein.





- **Clarification in case of transportation of goods to a place outside India including by mail or courier, to a place outside India, where the supplier and recipient are in India**

Issue	Clarification
PoS	The concerned foreign destination where the goods are being transported would be the PoS
Type of supply	Since the location of the supplier is in India and the PoS is outside India, it would be considered as inter-state supply
Eligibility to avail ITC	The ITC provisions do not restrict credit availing by the recipient located in India if the PoS of the said input service is outside India. Thus, the recipient shall be eligible to avail the ITC, subject to the fulfilment of other conditions
Reporting in GSTR-1	State code as '96-Foreign Country' would be mentioned

- **Applicability of e-invoicing w.r.t. an entity**

Issue	Clarification
Is the exemption from generation of mandatory e-invoice available for the entity as a whole, or only available for certain supplies made by the said entity?	The entity as a whole is exempt from generating e-invoices. It is not restricted by the nature of the supply made by the said entity

- **Clarification on taxability of NCB offered by insurance companies**

- There is no supply provided by the insured to the insurance company in not lodging insurance claim during the previous year(s). Therefore, the NCB cannot be considered as a consideration.
- The NCB is a permissible deduction u/s 15(3) for the purpose of calculating the value of the insurance services supplied by the insurance company to the insured. Where the deduction for the NCB is provided in the invoice issued by the insurer, GST shall be levied on the actual insurance premium amount payable after deducting the NCB.

- **Clarification regarding the treatment of statutory dues under GST law in respect of the taxpayers for whom the proceedings have been finalised under IBC**

It has been clarified that in cases where the demand for recovery has been issued in Form GST DRC 07 / 07A and where proceedings have been finalised against the corporate debtor under IBC, reducing the amount of statutory dues, the jurisdictional commissioner will issue an intimation in Form GST DRC-25, reducing the amount of demand.

- **Manner of filing refund application by URP**

- A new functionality has been made available on the common portal, allowing the URP to take a temporary registration using their PAN and apply for a refund under the category 'Refund for Unregistered Person'.
- The URP shall select the same state or UT where the supplier, for whose invoice the refund is being claimed, is registered.
- In case the supplier is located in different states/UTs, temporary registration is required in each concerned states/UTs.
- The URP would undergo Aadhaar authentication and would enter bank account details that are in their name and has been obtained on their PAN.
- Separate refund applications should be filed in respect of invoices issued by different suppliers.
- For the purpose of a relevant date, the date of issuance of a letter of cancellation of the contract/agreement by the supplier will be considered as the date of receipt of the services by the applicant.
- This is a welcoming circular for the URPs who were earlier unable to claim refund in case of premature cancellation of long-term service contracts or termination of long-term insurance policies.





- **Clarification on applicability of provisions of Section 75(2)**

Issue	Clarification
Time period for re-determination of the amount payable by the noticee	The PO is required to issue the order of redetermination of tax, interest, and penalty payable within two years from the date of communication of the direction from the appellate authority, appellate tribunal or court, as the case may be.
How will the PO recompute/redetermine the amount?	<ul style="list-style-type: none">• In case of bonafide cases (Section 73), the SCN has to be issued within two years and nine months. Therefore, the PO may re-determine for so much amount in respect of which SCN was issued within the specified time limit.• If the SCN under Section 74(1) was issued after more than two years and nine months, and the appellate authority finds that that the notice was invalid and should have been issued u/s 73(1), the entire proceeding shall have to be dropped because of time limitation.• In case of SCN issued for multiple years u/s 74(1), the amount payable u/s 73 will only be recalculated in relation to the FY for which the SCN was issued before expiry of the time period.

(Press release dated 17 December 2022, Notifications no. 26/2022 – Central Tax to 27/2022 – Central Tax dated 26 December 2022 and Circulars No. 183 to 188 - GST dated 27 December 2022)





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

CBIC notifies the Customs Tariff (Determination of Origin of Goods under the India-Australia Economic Cooperation and Trade Agreement) Rules, 2022, effective from 29 December 2022

The CBIC has notified the Customs Tariff (Determination of Origin of Goods under the India-Australia Economic Cooperation and Trade Agreement) Rules, 2022, which have come into force from 29 December 2022.

Key aspects for consideration:

- **Originating goods:** A good shall be regarded as an originating good if it is wholly obtained or produced in the territory of any of the parties to the agreement.
- **CoO:** The exporter shall file an electronic application for issue of CoO, along with appropriate supporting information to the issuing body or authority. A CoO shall be issued bearing an authorised signature and the official seal of the appropriate authority. The CoO shall be issued prior to or within five working days of the date of exportation. It shall be valid for a period of 12 months from the date of issuance. Each of the parties shall inform the other party regarding its issuing body as appropriate authority within a period of 30 days from the date on which the rules come into force. A CoO shall not be required if the importing party has waived the requirement or does not require the importer to present a CoO as per their national laws.
- **Preferential tariff treatment:** The parties shall grant preferential tariff treatment to an originating good on the basis of CoO. The importing party shall provide a declaration that such a good qualifies as an originating good and shall hold a valid CoO. An importer may apply for preferential tariff treatment and claim a refund of any excess duties paid for a good if the importer did not make a claim for preferential tariff treatment at the time of importation.
- **Verification of origin:** For the purpose of determining whether goods imported into the territory of a party from the territory of the other party qualify as originating goods, the customs administration of the importing party may conduct a verification process when required with a written request. During verification, the importing party shall allow the release of the good, subject to payment of any duties or provision of any security as provided for in its laws and regulations. If the verification establishes non-compliance of goods with the rules of origin, duties shall be levied in accordance with the laws and regulations of the importing party.
- **Denial or temporary suspension of preferential treatment:** Any of the parties being an importing party may deny a claim for preferential treatment if it determines that the good does not qualify as originating within the terms of these rules or does not satisfy the requirement(s) of these rules. Such party shall issue a determination to the exporter, which should include the reasons for denial of preferential tariff treatment. In case of persistent failure in complying with the provisions of the rules by any of the parties, the importing party may temporarily suspend the preferential tariff of the originating good.
- **Exporter obligations:** The exporter is required to furnish minimum information and supporting documents for the issuance of CoO. It shall keep such minimum required information for a period of five years from the date of issuance of CoO.

(Notification No. 112/2022-Customs (N.T.) dated 22 December 2022)

CBIC notifies tariff concessions under Ind-Aus ECTA

The CBIC has notified exemptions from payment of BCD and AIDC on certain specified goods when imported from Australia. Furthermore, the tariff concession would be subject to the satisfaction of the Deputy Commissioner or Assistant Commissioner of Customs that the goods in respect of which the exemption is claimed originate from Australia as per the provisions of the Customs (Administration of Rules of Origin under Trade Agreements) Rules, 2020. The exemptions have been made effective from 29 December 2022.

(Notification No. 62 and 64/2022-Customs dated 26 December 2022)





DGFT notifies procedure for allocation of TRQ under the Ind-Aus ECTA

The DGFT has introduced the provisions and procedure for TRQ under the Ind-Aus ECTA. Key aspects to be considered are:

- TRQ certificates shall be issued to the Australian exporters notifying relevant quantities for each TRQ. Such certificates issued by the Australian authority shall be sent over email with the DGFT authorities.
- The Indian importers shall file an application for the TRQ certificate at any time of the year on the DGFT portal by citing the reference of the TRQ issued to the Australian exporter.
- The TRQ issued to the importer shall contain details such as name and address of importer, customs notification number, IEC, quantity and validity of such TRQ.
- A TRQ shall be issued electronically and transmitted to the ICES, and imports shall be allowed only upon debiting electronically in the ICES system.
- The imports under TRQ shall be for the period from 1 January to 31 December.
- The TRQ certificate shall be valid for a maximum period of 12 months or end of the year, whichever is earlier.
- Furthermore, the DGFT authorities have notified certain additional items to be included in the list of import TRQs.

(Public Notice No. 46/2015-20 dated 28 December 2022)

DGFT expands the electronic system for preferential eCoO to include exports under the Ind-Aus ECTA from 29 December 2022

The DGFT has notified the expansion of the electronic platform for CoO to facilitate issuance of preferential certificates of origin for exports to Australia under the Ind-Aus ECTA w.e.f. 29 December 2022.

The Indian exporter shall apply on the eCoO system, and after approval, an electronic certificate shall be issued. Furthermore, the Indian exporter shall consider the following points regarding application on the eCoO system:

- A DSC similar to the one used in DGFT applications would be required for electronic submission. The DSC may be Class III having the IEC of the exporter embedded on it.
- New applicants shall be required to initially register on the portal. However, if an existing IEC holder desires to update its email, it can do so by using the 'IEC Profile Management' service on the DGFT portal. Upon completion of registration, the IEC branch details available in the DGFT system will get auto-populated.

(Trade Notice No. 23/2022-23 dated 22 December 2022)





DGFT notifies amendments in procedure for import of items under TRQ issued under the India-UAE CEPA

The DGFT has notified certain amendments in the procedure for import of items under a TRQ issued under the India-UAE CEPA. Accordingly, the TRQ issued for the 1st, 2nd and 3rd quarters of FY2022-23 shall be revalidated up to **31 March 2023**, and TRQs to be issued under Tariff head 7108 for the 4th quarter shall be valid up to **30 June 2023**. The imports shall be subject to these conditions:

- Importer shall produce a CoO at the time of clearance of the import consignment.
- Applications for the grant of TRQ for imports to be made during the period 1 April 2023 to 31 March 2023 shall be submitted online along with requisite fee till **28 February 2023**.
- Further, certain additional conditions have been notified for applications pertaining to Gold TRQ under tariff head 7108.
- The TRQ issued electronically by the DGFT shall contain details such as name and address of the importer, IEC, customs notification number, tariff item, quantity and validity of the certificate.
- The TRQ shall be transmitted to the ICES system and imports shall be allowed upon debiting electronically in the ICES system.

(Public Notice No. 47/2015-20 dated 29 December 2022)

CBIC expands the powers of POs under the Customs Law

The CBIC vide Notification No. 26/2022-Customs (N.T.) dated 31 March 2022 had assigned the officers mentioned in column two of the table below and the officers ranked higher than the assigned officers, as the POs in relation to various functions under the Customs Act, 1962.

The CBIC has now amended the said notification and expanded the powers of the POs as under:

Designation of officers	Additional powers/functions
i. Deputy Commissioner of Customs or Assistant Commissioner of Customs ii. Deputy Commissioner of Customs (Preventive) or Assistant Commissioner of Customs (Preventive)	Re-assessment of entries relating to postal goods
i. Appraisers or ii. Superintendent Customs (Preventive) or iii. Superintendents of Central Excise Department who are for the time being posted to a customs port, customs airport, land customs station, coastal port, customs preventive post, customs intelligence post or customs warehouse	Assessment and clearance
i. Examiners or ii. Preventive officers or iii. Inspectors of the Central Excise Department who are for the time being posted to a customs port, customs airport, land customs station, coastal port, customs preventive post, customs intelligence post or customs warehouse	Examination

(Notification No. 105/2022-Customs (N.T.) dated 9 December 2022)





List of eligible items under RoDTEP expanded to include additional exports from chemicals, pharmaceuticals and articles of iron and steel sectors

The RoDTEP scheme, which was implemented from 1 January 2021, is based on the global principle that taxes and duties levied on exported products shall either be exempted or remitted to exporters. The rebate under the said scheme is provided by way of a transferable electronic scrip. With a vision to enhance the export competitiveness, the CG has expanded the scope of the RoDTEP scheme by including exports made from uncovered sectors, such as chemicals, pharmaceuticals and articles of iron and steel, under Chapters 28, 29, 30 and 73 of the ITC(HS) schedule of items effective from 15 December 2022.

Accordingly, the Appendix 4R containing the list of export items eligible under the RoDTEP scheme has been revised to include additional exports from the chemicals, pharmaceuticals and articles of iron and steel sectors. The revised Appendix 4R will be applicable for exports made from 15 December 2022 to **30 September 2023**.

The revised Appendix 4R is available at the DGFT portal under the 'Regulatory Updates>RoDTEP'.

(Notification No. 47/2015-2020 dated 7 December 2022)

Permission granted to SEZ units for allowing WFH or work from any place outside the SEZ to be applicable up to 31 December 2023

Recently, the Ministry of Commerce had amended the SEZ Rules, 2006, to prescribe the process, conditions, compliances, etc., to be followed by the SEZ units for availing WFH benefits. In addition, to ensure the harmonised implementation of the WFH rules, the Ministry of Commerce had also notified the SOPs to be followed by the offices of the DCs.

In this regard, the Ministry has notified that the permission to WFH or work from any place outside the SEZ shall be applicable up to **31 December 2023**. Further, a unit permitting WFH shall intimate the same to the DC by email on or before **31 January 2023**.

(Notification No. F. No. K-43013(12)/1/2021-SEZ dated 8 December 2022)

CBIC notifies Postal Export (Electronic Declaration and Processing) Regulations, 2022, for exports through post

To enable the MSMEs to export to global markets using e-commerce or other regular channels, the CBIC, in collaboration with the DoP, has developed a dedicated PBE automated system for postal exports. In this regard, the CBIC has notified the Postal Export (Electronic Declaration and Processing) Regulations, 2022. These regulations are meant to facilitate the processing of commercial postal exports by automating the entire procedure and seamlessly connecting the postal network to the notified FPOs.

These shall be applicable to exports made by a person holding a valid IEC issued by the DGFT effective from 9 December 2022.

Key aspects for consideration:

- **PBE automated system:** The exporter shall register on the PBE automated system in case they wish to export goods through post or their agent. The system, after verifying the registered exporter, may enable them to file declaration and upload supporting documents in this regard.
- **Electronic declaration:** The exporter or their authorised agent shall be required to make an entry in the form of electronic declaration for effecting the export of goods by post. The exporter shall ensure accuracy and completeness of information, authenticity of any supporting document and compliance with any restriction as prescribed.
- **Post offices for booking postal export:** Upon filing of electronic declaration, the exporter shall present the export goods at the booking post office and also at the foreign post office. The export goods shall contain a declaration regarding the contents of the package affixed on the package in the prescribed format.
- **Clearance at foreign post office:** The PO may call for clarification or documents on the PBE automated system, and upon satisfaction of the same, it may grant clearance to export goods.
- **Retention of records:** The exporter shall retain the electronic declaration, along with supporting documents filed on the PBE automated system, for a period of five years from the date of filing of such declaration.
- **Authorised agent:** The exporter may authorise an agent to file declaration on their behalf and assist the exporter in function related to the clearance of export goods. However, the exporter shall be fully responsible for all the actions of the authorised agent and shall be liable for any payment owed to the government.

(Notification No. No. 104/2022-Customs (N.T.) dated 9 December 2022 read with Circular No. 25/2022-Customs dated 9 December 2022)



02 Key judicial pronouncements



SC lists the matter of availability of ITC on construction of malls in the case of M/s Safari Retreats Private Limited in the third week of January 2023

The SC has issued a notice in a matter challenging the decision of the Orissa HC in the case of Safari Retreats Private Limited (the petitioner). Furthermore, the SC has directed the matter to be listed in the third week of January 2023.

The petitioner is engaged in the construction of shopping malls for leasing. The petitioner had contended that it had utilised the ITC paid on the inputs and input services used in construction, against its output liability arising due to rental income. However, the department stated that the ITC on construction material is blocked under Section 17(5)(d) of the CGST Act, 2017, and is therefore not available. The aggrieved petitioner filed a WP before the Orissa HC. The Orissa HC held that the ITC shall be available on inputs and input services used for the construction of a shopping mall to be used for leasing. The Revenue challenged the Orissa HC's decision before the SC.

Mere non-payment to supplier cannot restrict the credit entitlement and cannot be a ground to block credit lying in the electronic credit ledger – Delhi HC

Summary

The Delhi HC dismissed the Revenue's action of blocking ITC available in the ECrL of the petitioner for a period beyond one year. According to the HC, the CGST Act does not forbid the recipient from taking the ITC prior to paying the supplier of such goods or services. However, in accordance with Rule 37, the credit must be reversed along with interest as a component of the recipient's output liability if the payment is not discharged by the recipient within 180 days. The HC found that the respondent's action of proceeding on the premise that a taxpayer cannot claim the ITC unless they pay the supplier was wholly erroneous. The HC further observed that any restriction imposed in accordance with Rule 86A(1) of the CGST Rules, 2017, cannot exceed one year from the date of imposition, and as a result, the HC instructed the Revenue to unblock the ITC available in the ECrL.



Facts of the case

- Sunny Jain (proprietor of Mahavir Impex) (the petitioner) is engaged in the business of supply of mobile phones and their spare parts.
- The ITC in Sunny Jain's ECrL was blocked basis the allegation that he had not paid D.G. Impex's supplies' consideration within 180 days, making him liable for interest under Section 16(2)(d). The Revenue also claimed that it had reason to believe the petitioner's ITC had been wrongly available, and as a result, power under Rule 86A was exercised to block the credit.
- According to the petitioner, the only reason the ITC in his ECrL was blocked was that he was ineligible to avail it under Section 16(2). In addition, the ITC had been blocked for more than 18 months, which is against Rule 86A.
- The petitioner claimed that only in cases where the ITC available in the ECrL has been fraudulently obtained or is ineligible can the restriction be imposed. In addition, there is no allegation of fraudulent availment of ITC lying in the petitioner's ECrL.

Delhi HC observations and ruling [WP(C) 6444/2022, CM Nos. 19502/2022 and 33763/2022]

- **Blocking credit ledger is a harsh measure:** The HC noted that a plain reading of Rule 86A indicates that the restriction can be imposed only where the ITC available in the ECrL has been fraudulently obtained or is ineligible. There is no claim that the petitioner used the ITC lying in the ECrL fraudulently. In addition, blocking the ITC is a drastic action that can only be taken when certain conditions are met.
- **Expression 'in as much as':** The use of the expression 'in as much as' restricts the grounds for ineligibility to the conditions listed in sub-clauses of Rule 86A(1). The restriction under Rule 86A(1) regarding ITC on the grounds that the ITC available in the ECrL is ineligible can only be imposed if any of these conditions are met.
- **No prohibition on ITC availment:** The HC stated that the CGST Act does not prohibit the recipient from claiming the ITC unless they have paid the supplier of such goods or services. However, according to Rule 37, if they fail to discharge the payment within 180 days, the credit must be reversed along with interest as a part of their output liability. The HC found that the respondent's action of proceeding on the premise that a taxpayer cannot claim the ITC unless they pay the supplier, was wholly erroneous.
- **Blocking of ECrL cannot be for more than a year:** According to the HC, the restriction under Rule 86A of the CGST Rules, 2017, cannot extend beyond one year from the date of imposing such restriction. Thus, in the instant case, blocking of ECrL beyond one year is without authority of law. So, the Revenue was directed to unblock the ITC available in ECrL.



Our comments

The GST law was introduced with the intention of facilitating a seamless flow of credit to the taxpayers. However, to curb the growing issues of fake ITC, the government introduced Rule 86A in the CGST Rules, 2017, vide a notification dated 26 December 2019. This provision provides wide powers to the authority to restrict the ITC if it has reasons to believe that the credit available in the ECrL has been fraudulently availed or is ineligible. Furthermore, the ECrL can be blocked for a period of one year, and on expiry of a period of one year, it would automatically get unblocked. As a result, unless a new order is passed, the authority loses its discretion in the matter once the statutory period has expired. However, in the case on hand, even though the period of one year had elapsed, the authority did not unblock the ITC available to the petitioner, which is without the authority of law.

In addition, the use of the expression 'in as much as' restricts the scope of ineligibility to the conditions as set out in sub-clauses of Rule 86A(1) of the CGST Rules, 2017. Thus, the restriction can only be put in place if one of the predetermined requirements is met. However, in this instance, the authority misapplied Rule 86A and blocked ITC on the ground that the petitioner had not paid the supplier within 180 days, which is an invalid justification for blocking ITC under Rule 86A.

Moreover, it is to be noted that blocking a taxpayer's ITC is a drastic measure that should only be used when the prerequisites are met. It is trite law that statutory provisions empowering harsh measures must be strictly construed.



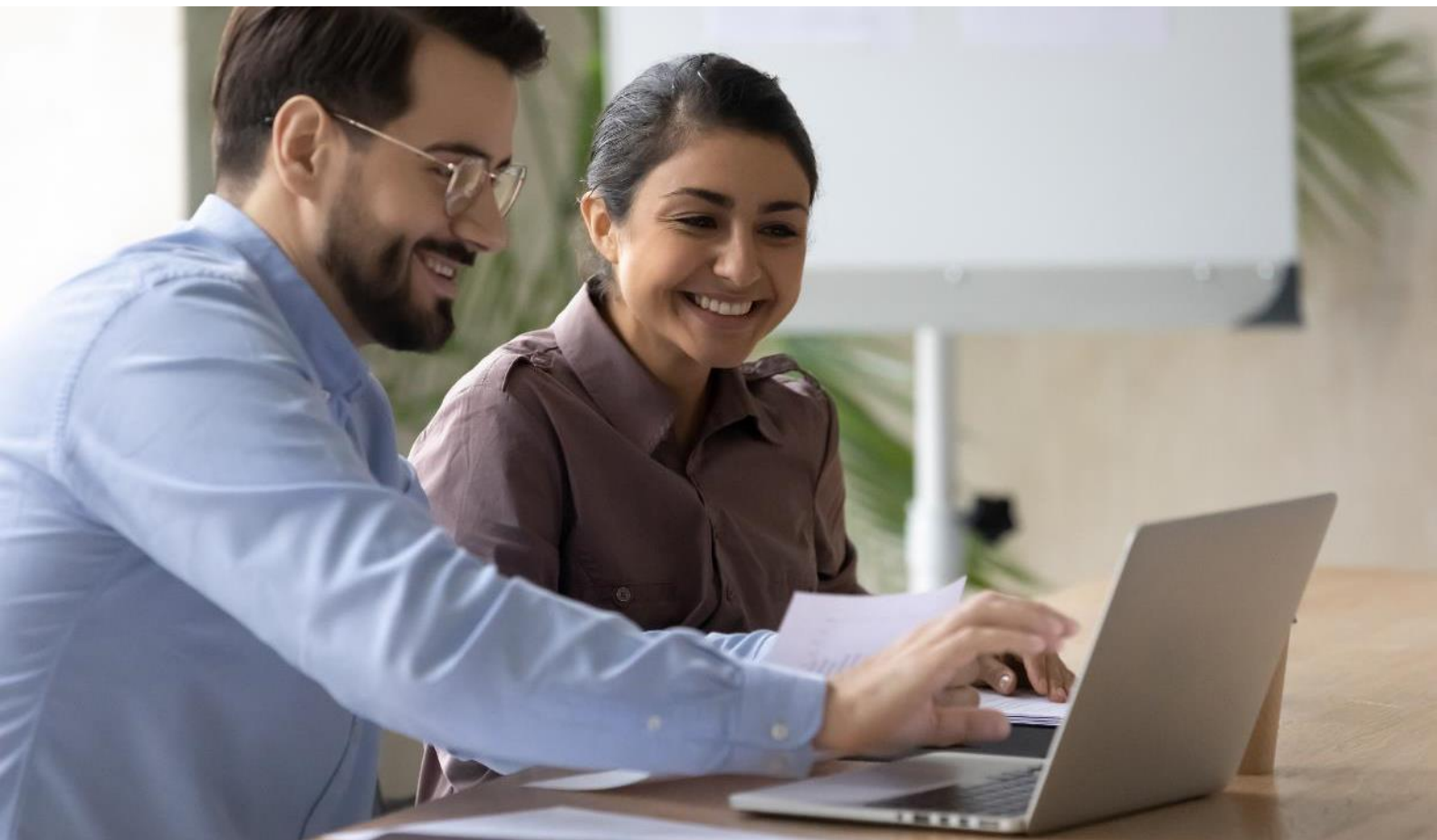
Gujarat HC recommends direct communication of taxpayers with the GST network for grievance redressal to address software limitations in refund processing

Summary

The Gujarat HC noted that the petitioner had filed refund of the IGST paid on the export invoices after validating the SB data available in ICES against the GST returns data transmitted by the GSTN. However, due to a system flaw, refund with respect to one shipping bill out of three was not processed. In this respect, the HC stated that although the automatic system-driven process for initiating IGST refunds is preferred over the officer-driven process, there is a lack of interest on the part of the GSTN to address the limitations of the system. Therefore, the HC recommended to develop a mechanism for grievance redressal in the portal itself, to enable direct communication between the taxpayers and GSTN.

Facts of the case

- Aartos International LLP (formerly known as Azuvi International LLP) (the petitioner) is engaged in the trading of ceramics and tiles.
- The petitioner had changed its name from 8 April 2019, which was intimated to the bank and all the relevant government departments, including GST, Income Tax, ROC and Customs.
- The petitioner had applied for refund of IGST on account of export of goods. However, out of three shipping bills, refund in respect to only two shipping bills was credited to the registered bank account.
- The petitioner contended that as per Section 16 of the IGST Act, 2017 and Section 54 of the CGST Act, 2017, read with Rule 96 of the CGST Rules, 2017, 90% of the refund claimed should be sanctioned by the respondent within seven days from the date the acknowledgment is received.
- The respondent submitted that the ICES has an in-built mechanism to automatically grant refund after validating the shipping bill data against the GST returns data transmitted by the GSTN.
- The respondent further contended that refund of the third shipping bill appears to have not been paid by the bank on account of mismatch in the name of the petitioner's firm. Furthermore, the respondent had generated the PC scroll and the shipping bill was reprocessed as per the ICES advisory. However, the petitioner had still not received the refund.





Gujarat HC observations and ruling [R/Special Civil Application No. 14649 of 2022]

- **Change in name is no reason to miss out on the refund:** The HC noted that the other two refunds had been processed in the same bank account for the exact same time period. The HC could not find an explanation for why this specific refund was missed even when the department was informed of the name change.
- **Shortcomings of GSTN network or software:** The HC acknowledged that in this instance, it appears to be a problem with the GSTN network or a bug in the software itself that needs to be fixed. It is the responsibility of the GSTN to check any issues that may arise during the processing of refund claims or mismatches. Further, the officers rely heavily on the network, so criticising them will not help. The automatic grant of refund that is system-driven rather than officer-driven is beneficial. However, unless the GSTN constantly puts in efforts to address any discrepancies or software flaws, the problems will continue to arise.
- **Direct communication between the GSTN and taxpayers:** The HC recommended developing a feature like 'May I help you?' for redressal grievance, which enables the direct communication of the taxpayer with the GSTN. In essence, this will reduce the workload of the court, as even in the present case, there is nothing for the court to decide other than to draw attention to the department's software limitations.



Our comments

In the electronic age, the system-driven automatic grant of refund is a good step. However, the software's flaws must be addressed proactively for smooth processing.

In this respect, the HC's recommendation to develop a feature such as 'May I Help You' or 'Grievance Redressal Mechanism' on the portal for direct communication of the taxpayers with the GSTN is a welcome move towards redressal of software issues in the processing of refunds.

This will help in achieving the laudable objective of implementing a system-driven process. Furthermore, this will definitely reduce the workload of the courts, as similar issues will not come to them.

No GST applicable on notice pay recovery from employees – Kerala HC

Summary

The Kerala HC noted that the Circular 178/10/2022-GST dated 3 August 2022 specifically clarifies that the amount received by an employer as notice pay from its employees is not a taxable transaction under GST. The HC further held that the petitioner is entitled to the benefit of the circular even if it was issued after the appellate authority's order was issued. The HC also stated that the fact that the period of limitation will start only from the date of the constitution of the appellate tribunal does not provide remedy to the petitioner. Therefore, the petitioner is entitled to file a WP before this court to challenge the impugned orders.

Facts of the case

- M/s Manappuram Finance Limited (the petitioner) is an NBFC registered under the GST regime.
- The petitioner has filed the present WP challenging the order-in-appeal to the extent that the petitioner is liable to pay GST on notice pay recovery from former employees. The appellate authority upheld the order of the original authority, which had rejected the refund claim of GST paid on notice pay recovery.
- The petitioner contended that the CBIC vide circular dated 3 August 2022 has clarified that the petitioner is not required to pay GST on notice pay received from employees. In addition, the said clarification shall be applicable to all past transactions retrospectively.
- Furthermore, the petitioner reiterated the decision of the Madras HC in the case of GE T&D India wherein it was concluded that the notice pay recovered from employees does not constitute a rendition of service under the erstwhile service tax regime.
- The petitioner filed the present writ since the GST appellate tribunal has not been constituted.
- The respondent submitted that the retrospective applicability of the circular is a matter to be decided by the tribunal and the petitioner cannot contend the same before the HC.



Kerala HC observations and ruling [WP(C) No. 27373 of 2022 dated 7 December 2022]

- **Department cannot take a view contrary to the circular:** The HC observed that the transaction involving the notice pay recovered from employees has been explained in the circular. The HC has placed reliance of the decision of the SC in the matter of Navnit Lal wherein it was settled that circulars are binding on the department, and no officer can take a contrary position to that contained in the circular.
- **Retrospective applicability of circular:** The HC noted that even though the circular has been issued after the issuance of the order of the appellate authority, denying benefits of such clarification to the petitioner does not hold good. In addition, the circular only clarifies the existing law. Thus, provisions of such a circular shall be deemed to apply retrospectively.
- **Writ petition is allowed:** The HC held that the petitioner is entitled to exercise the jurisdiction of HC to challenge the orders. The respondent's contention that the period of limitation will be counted from the date of the constitution of the tribunal is no remedy to the petitioner.



Our comments

The levy of service tax or GST on notice pay recovery has always been a subject matter of dispute. In the pre-GST regime, the Madras HC, in the case of GE T&D India Limited, had ruled that the notice pay recovery shall not be liable to service tax. The Bangalore CESTAT had also relied upon the decision of the Madras HC in the case of XL Health Corporation India Pvt Limited and held that the compensation amount received from an employee cannot be covered under the provisions for the purpose of levy of service tax.

Even under GST, the Madhya Pradesh AAR, in the case of M/s. Bharat Oman Refineries Limited, had held that GST is applicable on notice pay recovery from an employee by the employer in lieu of the notice period. However, the AAAR reversed the ruling of the AAR. Similarly, the Maharashtra AAR, in the case of Syngenta India Limited, had also ruled in favour of the taxpayer.

Recently, the CBIC clarified through the circular that the amounts are recovered by the employer not as a consideration for tolerating the act of premature quitting of employment but as penalties for dissuading the non-serious employees from taking up employment. Furthermore, the employee does not get anything in return from the employer against payment of such amounts. Therefore, such amounts recovered by the employer are not taxable as consideration for the service of agreeing to tolerate an act or a situation.

In order to avoid litigation on this matter, many taxpayers had paid tax on notice pay recovery under the GST regime. However, relying on the CBIC circular and the present ruling, such taxpayers may consider filing their refund claims.





The SC directs the CG to expedite steps to ensure filing of appeals and proceedings by the CG before HCs and revenue tribunals in electronic mode and paperless operation in case of the GST Tribunal

- Earlier, the Revenue Department had filed an application before the SC to condone the delay of 536 days in filing the appeal against the order of CESTAT in the case of M/s Bilfinder Neo Structo Constructions Limited.
- The SC observed that the Revenue's appeals in indirect tax matters were not being filed on time. In this respect, the SC directed the constitution of a committee comprising of various stakeholders to adopt ICT initiatives to streamline, monitor and provide seamless integration of all stages in government revenue litigation across the board. The committee invited suggestions from both the CBIC and the CBDT board in this regard.
- Further, the Additional Solicitor General submitted a comprehensive note before the SC, containing an updated status of the initiatives taken by the CG for the incorporation of ICT initiatives in regard to revenue litigation.
- The SC further directed the CG to take expeditious steps to ensure filing of all the appeals and proceedings before the HCs and revenue tribunals, including the ITAT and the CESTAT, in the e-filing mode.
- The high-powered committee shall accordingly proceed to take necessary steps to achieve the above-mentioned goal, so that e-filing can be made universal within a period of three months where the government is in appeal.
- The SC has further instructed the CG to take necessary steps to ensure all filings before the GST Tribunal are in the electronic mode exclusively and the Tribunal is paperless in its operations.
- This matter has been further listed on **6 February 2023**.

Period of limitation prescribed under Section 11B of Central Excise Act, 1944, is applicable to the claim for rebate of excise duty – SC

Summary

The SC has held that the rebate of duty of excise on excisable goods exported out of India would be covered under Section 11B of CEA, and hence, such claims can only be made within the period of limitation. Therefore, the SC has affirmed the decision of the Karnataka HC, thereby rejecting the claim for rebate of duty on the ground of being time barred. The SC has dismissed the appellant's plea and held that rules and notifications, being a subordinate legislation, cannot override the parent statute and have to be read in harmony with the parent statute. The SC further stated that if the appellant's submission is accepted, substantive provision of Section 11B of CEA would become otiose, redundant and/or nugatory and there shall not be any period of limitation for making an application for rebate of duty. Accordingly, the SC ruled that the claim for rebate of duty shall be governed by Section 11B, and since the period of one year as prescribed has lapsed, the claims thus stand rejected.

Facts of the case

- M/s Sansera Engineering Limited (hereinafter referred to as the appellant) manufactures goods that are subject to the levy of excise duty. The appellant had exported goods on payment of excise duty during August 2015 to October 2015 and October 2015 to March 2016 and filed claims for rebate of duty on 10 February 2017 and 14 February 2017, respectively.
- The rebate claims were rejected by the authority because the claims were made beyond the period of one year as prescribed under Section 11B of the CEA.
- The appellant submitted that the rebate of duty paid on excisable goods is provided under Rule 18 of the Central Excise Rules and is different from the refund of duty provided under Section 11B. Thus, there is a vast difference between refund of duty and rebate claim.
- Furthermore, the appellant submitted that the grant of rebate is in the nature of an incentive, and the purpose is to boost exports and earn foreign remittance. Thus, denying the rebate claim despite earning foreign remittance would defeat the said object.
- The Karnataka HC dismissed the appeal preferred by the appellant and confirmed the order rejecting the rebate claim on the ground that such claim is time barred. Therefore, the appellant preferred the appeal before the SC.
- The issue for consideration before the SC was whether the period of limitation prescribed under Section 11B shall be applicable to the claim for rebate of duty provided under Rule 18.



SC observations and ruling (Civil Appeal No. 8717 of 2022 dated 29 November 2022):

- **Section 11B applicable to claim for rebate of duty:** Upon a fair reading of the explanation to Section 11B, it is clear that the refund includes rebate of duty of excise. Therefore, application for rebate of duty shall be governed by Section 11B. Accordingly, any person claiming refund of any duty shall file such refund application to the appropriate authority within one year from the date of payment of duty. Merely because the enabling provision for grant of rebate of duty, i.e., Rule 18, does not contain any reference to Section 11B, it does not mean that the provision contained in the parent statute cannot be applied.
- **Rules and notification being a subordinate legislation cannot override parent statute:** The SC observed that Section 11B is a substantive provision in the parent statute and Rule 18 and notification tantamount to a subordinate legislation. Therefore, a subordinate legislation can only aid a parent statute and can never override such parent statute. Furthermore, as per the submission of the appellant that the limitation prescribed under Section 11B shall not be applicable, there shall be no period of limitation for making application of rebate of duty. Thus, the SC held that when the statute specifically prescribes the period of limitation, it shall be adhered to.
- **Rule cannot be read independent of provision:** The SC has placed reliance on the decision of the Bombay HC in case of Everest Flavours Limited wherein the HC had considered the limitation prescribed under Section 11B with respect to the rebate of excise duty. Therefore, since Section 11B includes the rebate of excise duty, Rule 18 cannot be read independent of the requirement prescribed under the statutory provision.
- **Claims rightly rejected by appropriate authority:** The SC noted that the respective claims for rebate are beyond the period of limitation of one year from the relevant date. Thus, the SC has agreed with the decision of the earlier authority and has affirmed the order passed by the HC. Accordingly, rebate claims are liable to be rejected.



Our comments

On a similar issue earlier, the SC, in the case of Mafatlal Industries Ltd. and Uttam Steel Limited, had held that the rebate of duty of excise on excisable goods exported out of India would be covered under Section 11B of the CEA. Such claims for rebate can only be made under Section 11B within the period of limitation stated thereof.

Even the Bombay HC, in the case of Everest Flavours Ltd., observed that since the statutory provision for refund in Section 11B brings within its purview a rebate of excise duty, Rule 18 cannot be read independent of the requirement of limitation prescribed in Section 11B. Furthermore, the SC completely agreed to the view taken by the Bombay HC.

The SC stated unequivocally that even if the rules or notifications do not specifically mention such a limitation under the CEA, the limitation period prescribed under the act for claims of refund (which includes rebate of duty paid on export of goods) would still apply. The principle that a subordinate law cannot supersede or eliminate an act requirement has been reaffirmed by the court.





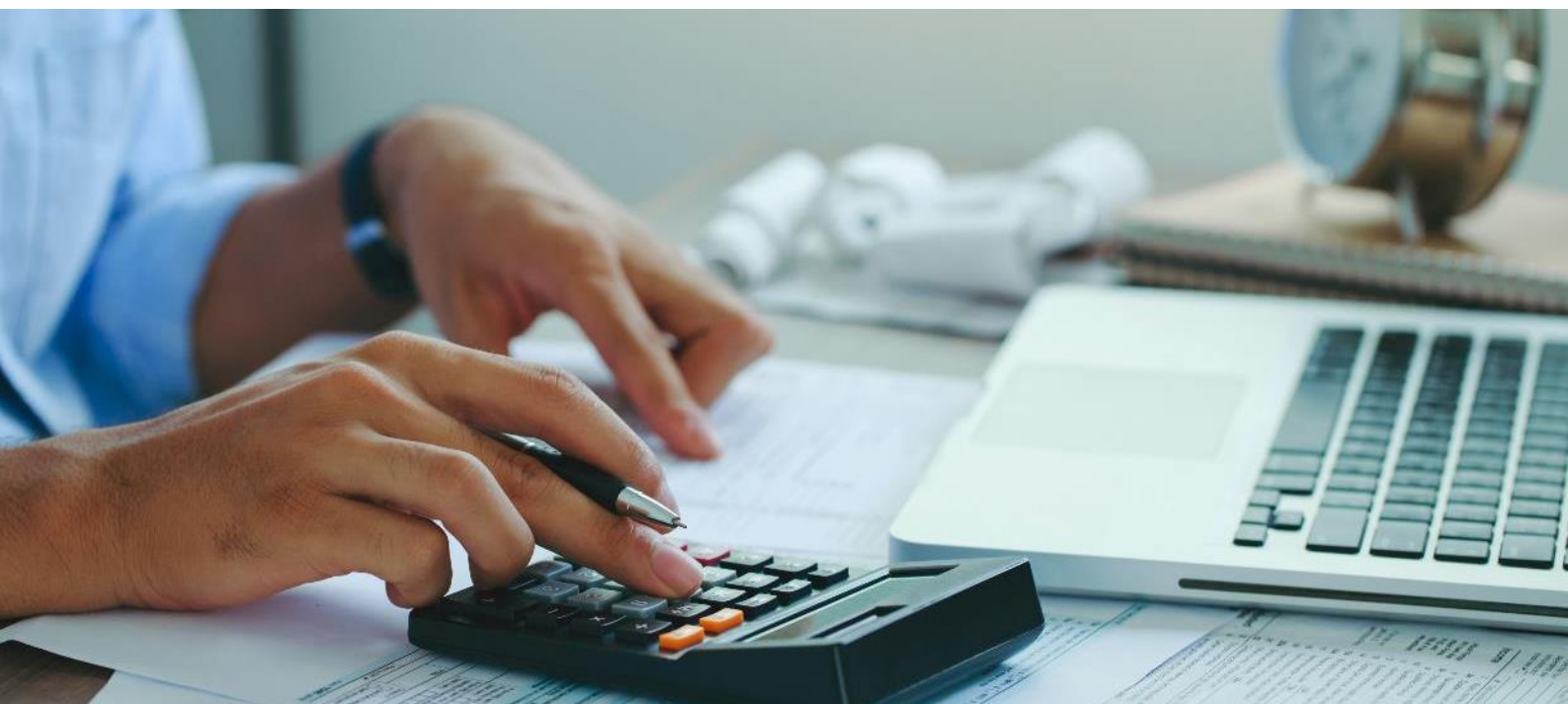
CBEC circular on valuation not violative of central excise laws – SC

Summary

The SC has upheld the validity of the circular regarding valuation of goods sold partly to related persons and partly to independent buyers and held that it is not violative of the CEA and related valuation rules. The SC held that the circular is not contrary to any statutory provisions, but rather it simply mandates the usage of 'reasonable means' to arrive at the correct valuation. In a case where the price itself is the sole consideration to determine the transaction value, the said price can be transposed onto the related-party purchases as well to arrive at the assessable value. Furthermore, the SC has also held that the citation of incorrect provisions does not vitiate the power and the SCN. In conclusion, although the SC has confirmed the demand of excise duty, it has quashed the interest and penalty imposed on the assessee on the ground that the department seems unclear on the valuation method to be adopted.

Facts of the case

- M/s Merino Panel Product Limited (hereinafter referred to as the assessee) manufactures decorative laminates and other similar materials that are subject to the levy of excise duty.
- In an audit conducted on the assessee's operations, it was found that alongside the sale to independent parties, the assessee had affected sales to two related parties, namely, Merino Industries Ltd. (MIL) and Merino Services Ltd. (MSL). The assessee was alleged to have deliberately devalued the sales made to the related parties, which resulted in a short collection of excise duty.
- Consequently, SCN came to be issued upon the assessee wherein the department invoked Rule 11 of CEVR, along with Section 4(1)(a). It was alleged that the transaction value of goods sold to independent parties would be transposed onto the sales made to the related parties in order to determine the appropriate excise duty.
- Further, due to the purported suppression of the differential in the prices, the department invoked an extended period of limitation of 5 years under Section 11A of the CEA.
- The assessee took a view that the valuation method adopted in the SCN for determining the transaction value of the goods sold to the related parties is contrary to the circular dated 01 July 2002. In the circular, the department had clarified that in the case where sales are made to both related and unrelated parties, Rule 11 read with Rule 9 or 10 shall be applied without directly applying Rule 9 since it deals with cases where there are sales to related parties only.
- Eventually, the commissioner confirmed the demand in the impugned SCN, along with interest and penalty. Aggrieved by the order of the commissioner, the assessee preferred an appeal before the CESTAT.
- In its order, the CESTAT allowed the assessee's appeal holding that the methodology to be adopted for valuation of sales made to both related and unrelated parties has been clarified by the CBEC vide circular dated 01 July 2002. Thus, the tribunal held that the valuation adopted by the department by relying on Rule 11, along with Section 4(1)(a), was contrary to the CBEC circular. Accordingly, the circular is defective and unenforceable.
- Therefore, the Revenue filed an appeal before the SC against the order of the CESTAT.





SC observations and ruling (Civil Appeal No. 6891 of 2018 dated 05 December 2022)

- **Invocation of incorrect methodology is immaterial to the validity of notice:** The SC noted that it is only the department whose hands are tied with regard to its circulars, whereas no such prohibition operates on courts and tribunals. Therefore, the department may issue circulars on interpretation or application of different provisions, but courts and tribunals would give effect to decisions of the SC as the law of the land. Furthermore, the SC has ruled that even if the provisions relied upon in the SCN are incorrect, it does not suffice enough to hold the notice as untenable as such defect is curable.
- **Circular is not contrary to any statutory provisions:** The SC observed that the assessable value for related-party sales can be determined by Section 4(1)(a), which is the true meaning and intention in the underlying circular dated 01 July 2002. The circular simply mandates the usage of 'reasonable means', keeping in mind Section 4(1)(a) and Rule 9, and the department shall apply its mind independently in case of sales to both independent and related parties. Thus, the circular is not contrary to any statutory provisions. Also, the view taken by the commissioner is entirely consistent with the intent of the circular.
- **Extension of extended period of limitation:** The SC observed that since the department is unclear regarding the correct methodology to be adopted, it is not appropriate to impose an additional liability upon the assessee other than the excise duty. Therefore, the SC confirmed the demand of duty against the assessee but did not approve of the interest and penalty implications.



Our comments

Earlier, the SC, in the case of Ratan Melting and Wire Industries, had held that when the SC or the HC declares the law on the question arising for consideration, it would not be appropriate for the court to direct that the circular should be given effect to and not the view expressed in a decision of this court or the HC.

Even in the case of Detergents India Ltd., the SC had held that valuation rules should not be invoked if the transaction is done on an arm's length price, even in the case of related parties.

The SC has once again reiterated that only the department is subject to the circulars issued by the board, not the courts or tribunals. Furthermore, there is no conflict between the impugned circular and the excise laws. Therefore, if the price is the only factor used to calculate the transaction value, the price can also be applied to purchases made by related parties to determine the assessable value.



**03**

Decoding advance rulings under GST



Transfer of independent business unit as a going concern is not liable to GST – Karnataka AAR

Summary

The Karnataka AAR noted that the transfer of a mobile application owned and developed by the applicant to a wholly owned subsidiary is a fully functional part of the business. The transferee would take over both the assets and the liabilities. Thus, the AAR held that this transaction amounts to the transfer of the going concern of the said independent part of the business. Accordingly, the activity amounting to 'services by way of transfer of a going concern' is covered under the exemption notification and attracts nil rate of tax without any conditions.





Facts of the case

- M/s Capfront Technologies Private Limited (the applicant) is registered under GST and engaged in providing data analytics, digital marketing services and product development.
- The applicant intends to transfer its self-developed mobile application 'Loan Front' to its wholly owned subsidiary M/s Vaibhav Vyapaar Private Limited (VVPL).
- The applicant submitted that M/s VVPL will receive the rights, obligations, source codes, development requirements and end user manuals of the application. The applicant will be the lead generator and will provide technical assistance. Furthermore, the applicant will earn money through outsourcing agreements.
- The applicant contended that the transfer of the mobile application to M/s VVPL falls under the definition of a going concern, as defined under accounting standards. Thus, the above transaction is exempt under GST as per the Notification No. 12/2017- Central Tax (Rate) dated 28 June 2017.
- The applicant has filed the present advance ruling to seek clarity on the applicability of GST on the transfer of the mobile application as a going concern.

Karnataka AAR observations and ruling [KAR ADRG 47/2022 dated 12 December 2022]

- **Transfer of mobile application as a fully functional independent unit:** The AAR observed that the statement of facts conveys that the mobile application will be sold as a fully functional part of business, where the buyer will have complete control over the assets and liabilities of the business. There will be a continuity of business, which amounts to a transfer of a going concern of an independent part of the business.
- **Transfer of going concern is exempt from GST:** The AAR held that the activity amounting to 'services by way of transfer of a going concern' is covered under the exemption notification and attracts nil rate of tax without any conditions.



Our comments

The phrase 'going concern' is not defined under the GST Act. It is an accounting term referring to a business entity that will continue running its operations in the foreseeable future and will not be liquidated to discontinue operations for any reason. A company is said to be transferred as a 'going concern' when the assets and liabilities being transferred constitute a business activity capable of being carried on independently for an indefinite period in the future.

Earlier, the Andhra Pradesh AAR, in the matter of M/s SCV Sky Vision, had held that even if the company is transferred as a running business, the prerequisites for the transfer of a going concern will not be satisfied if liabilities are excluded. As a result, when the assets and liabilities being transferred constitute a business activity that may be operated independently for the foreseeable future, the company is said to be transferred as a 'going concern'. Therefore, the AAR held that the transfer of the business does not fit into the definition of a 'going concern' in the context of exclusion of liabilities and nil rate of tax is not applicable herein.

Similarly, in the case of Rajashri Foods Private Limited, the Karnataka AAR held that where only a portion of assets is transferred, it constitutes a supply of goods under Schedule II of the CGST Act, 2017. However, when all the company's assets and liabilities are transferred and the business would have continuity, regularity and permanence in operations, it is classified as transfer of a going concern, which is further classified as supply of services.

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





04 Expert's Column



DESH bill: Revolutionary change in existing SEZ law

Contributed by

Praveen Kashyap
Executive Director

The government had proposed to replace the existing law governing SEZs with a new legislation to enable states to become partners in the '**Development of Enterprise and Service Hubs**'. To have a summarised understanding of the subject, we had a dialogue with subject-matter expert Praveen Kashyap, Executive Director.

What is the need of revamping the existing SEZ law with the new legislation?

While the existing SEZ scheme contributed to India's growth story, it had faced numerous challenges since its inception. Certain major issues that resulted in the requirement for revamping the SEZ policy are as follows:

1. The WTO's dispute settlement panel has ruled that India's export-related schemes, including the SEZ scheme, were inconsistent with the WTO's rules since they directly linked tax benefits to exports. Countries are not allowed to directly subsidise exports, as it can distort market prices.
2. The SEZ scheme started to lose its attraction after the introduction of the MAT and Sunset Clause to remove direct tax sops.
3. There was no flexibility to utilise land in SEZs for different sectors.
4. Existing capacity was underutilised.
5. There were barriers in supply to DTA from SEZ units.
6. There was no effective single-window clearance mechanism.



How does DESH plan to change the problems and flaws of the existing SEZ Act?

Unlike in the SEZ ecosystem, the government has proposed to create developmental hubs, where focus is not limited to exports but is also on catering to the domestic market. The DESH Bill is expected to be free from many of the rules that burdened the SEZs in the current scenario and is expected to clarify common issues. For instance, the evaluation of units would not be based on net foreign exchange. The government proposes to measure the performance of the units on aspects such as investment, employment generation, etc.

Clarity is expected around the list of permissible and non-permissible activities that SEZ units can carry to be eligible for various incentives.

Is the DESH Bill a change in name only or is it really going to make a difference?

The budget speech announcement that the existing SEZ Act would be replaced with a new legislation had sparked hopes of disruptive changes. However, the new draft of the DESH Bill, which is set to replace the SEZ Act, adopts a continuity-based approach with two crucial changes: removal of the positive net foreign exchange requirement and ease in access to domestic markets. These changes, which, in principle, are necessary to be WTO-compliant, address long-pending demands of the industry. Yet, it needs to be seen if the new DESH legislation can become a gamechanger.

What suggestions would you like to give to make SEZs in India more effective?

The new DESH policy should ensure that the proposed hubs make India an integral part of the global manufacturing value chain. Tax incentives linked to investment, infrastructure development, research and development spend, employment generation, etc., could also be considered to make this scheme more attractive.

It is important that the DESH policy is implemented with the coordinated efforts of the CG, state governments and other stakeholders for maximum effectiveness.

The DESH policy is expected to make SEZs an engine of economic growth and employment creation besides exports. The proposed DESH policy should act as a booster dose for the Indian economy, specifically in the current global landscape.





05 Issues on your mind



How will the department ensure the correctness of claims made by the exporters under the RoDTEP scheme?

Every exporter would be required to keep records substantiating the claim made under the RoDTEP scheme. A monitoring and audit mechanism with an IT-based RMS would be put in place by the CBIC to physically verify the records of the exporters on a sample basis. Sample cases for physical verification will be drawn objectively by RMS, based on risk and other relevant parameters.

Can benefit under RoDTEP be claimed in case of export of samples from India?

It is pertinent to note that the benefit of the RoDTEP scheme is allowed subject to the receipt of sale proceeds within the time specified under the Foreign Exchange Management Act, 1999, failing which, such rebate shall be deemed never to have been allowed. Since no export proceeds are realised in the convertible foreign exchange in the case of issuance of samples on a FOC basis, the exporter would not be eligible for the RoDTEP benefit in respect of goods issued as free samples.

Is the suo moto registration cancellation request facility available to TDS and TCS registered persons under GST?

Yes, recently vide Notification No. 26/2022 - Central Tax, an amendment has been made in the Rule 8 of the CGST rules, 2017. It states that if the PO receives a written request and is satisfied that the registered person is no longer required to withhold TDS under Section 51 or collect TCS under Section 52, the PO may cancel the registration. This cancellation will be communicated to the said person electronically in Form GST REG-08.



06

Important developments in direct taxes



CBDT issues circular for TDS on salary for FY 2022-23

The CBDT has issued a circular for TDS on salary under Section 192 of the Act during FY 2022-23.

The said circular inter alia contains definition of 'salary', 'perquisite' and 'profit in lieu of salary'. It also specifies the rate of TDS as applicable on salary payments and the manner of computing taxable salary and TDS thereon (along with illustrations).

It further provides the procedure of preparation and furnishing of TDS return for salary.

[Circular No. 24 of 2022 dated 7 December 2022]

Requirement of electronic filing of Form No. 10F relaxed for certain category of taxpayers

As per the provisions of Section 90(5) of the Act read with Rule 21AB of the Rules, in order to claim benefit of the relevant tax treaty, the taxpayer is required to furnish certain prescribed information in Form No. 10F (if such details are not provided in the TRC).

Earlier vide Notification No. 3 of 2022 (dated 16 July 2022), the CBDT inter alia provided that Form No. 10F is to be filed electronically and verified in the prescribed manner.

Considering the practical challenges being faced by non-resident taxpayers not having PAN, the CBDT has provided that such non-residents are not required to obtain PAN and file Form No. 10F electronically till 31 March 2023. However, such non-residents are required to furnish Form No. 10F manually till 31 March 2023.

[F. No. DGIT(S)-ADG(S)-3/e-Filing Notification/Forms/2022/9227 dated 12 December 2022]



07

Glossary

AA	Advance Authorisation	IDS	Inverted Duty Structure
AAR	Authority for Advance Ruling	IEC	Importer-Exporter Code
AAAR	Appellate Authority for Advance Ruling	IFF	Invoice Furnishing Facility
AIDC	Agriculture Infrastructure and Development Cess	IGST	Integrated Goods and Services Tax
BCD	Basic Customs Duty	Ind-Aus ECTA	India-Australia Economic Cooperation and Trade Agreement
CA	Chartered Accountant	INR	Indian Rupee
CBDT	Central Board of Direct Taxes	IT	Information Technology
CBEC	Central Board of Excise and Custom	ITAT	Income Tax Appellate Tribunal
CBIC	Central Board of Indirect Taxes and Customs	ITC	Input Tax Credit
CEA	Central Excise Act, 1944	LLP	Limited Liability Partnership
CENVAT	Central Value Added Tax	MAT	Minimum Alternate Tax
CEPA	Comprehensive Economic Partnership Agreement	MSME	Ministry of Micro, Small & Medium Enterprises
CESTAT	Customs Excise and Service Tax Appellate Tribunal	NBFC	Non-Banking Financial Company
CEVR	Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000	NCB	No Claim Bonus
CG	Central Government	OIDAR	Online Information and Database Access or Retrieval Services
CGST	Central Goods and Service Tax	OTP	One-Time Password
CMA	Cost Accountant	PAN	Permanent Account number
CoO	Certificate of Origin	PBE	Postal Bill of Export
DC	Development Commissioner	PIN	Postal Index Number
DESH	Development of Enterprise and Service Hubs	PO	Proper Officer
DGFT	Directorate General of Foreign Trade	PoS	Place of Supply
DGIT (Systems)	Director General of Income-tax (Systems)	RMS	Risk Management System
DOP	Department of Post	ROC	Registrars of Companies
DSC	Digital Signature Certificate	RoDTEP	Remission of Duties and Taxes on Exported Products
DTA	Domestic Tariff Area	SAD	Special Additional Duty
ECO	Electronic Commerce Operator	SB	Shipping Bill
ECrL	Electronic Credit Ledger	SC	Supreme Court
FOC	Free of Cost	SCN	Show Cause Notice
FPO	Foreign Post Office	SEZ	Special Economic zone
FTP	Foreign Trade Policy	SOP	Standard Operating Procedure
FY	Financial Year	TCS	Tax Collection at Source
GOI	Government of India	TDS	Tax Deduction at Source
GST	Goods and Service Tax	The Act	Income-tax Act, 1961
GSTN	Goods and Service Tax Network	The Rules	Income-Tax Rules, 1962
HC	High Court	TRC	Tax Residency Certificate
IBC	Insolvency and Bankruptcy Code, 2016	TRQ	Tariff Rate Quota
ICES	Indian Customs Electronic Data Interchange System	UAE	United Arab Emirates
ICT	Information and Communication Technology	UDIN	Unique Document Identification Number
		URP	Unregistered Person
		UT	Union Territory
		VVPL	Vaibhav Vyapaar Private Limited
		WFH	Work from Home
		WP	Writ Petition
		WTO	World Trade Organisation



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