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SHAPING A VIBRANT INDIA

# GST Compendium

## A monthly guide

June 2023

# Editor's Note

Continuing with its push on digital economy, the Central Board of Indirect Taxes and Customs (CBIC) has made issuing e-invoices mandatory for the notified registered persons with an aggregate turnover above INR 5 crore in any preceding financial year (FY) from FY 2017-18 onwards. This change will be effective 1 August 2023. Currently, the limit of the aggregate turnover is INR 10 crore.

The government has notified the Production-Linked Incentive Scheme 2.0 for Information Technology Hardware effective from 1 July 2023 for six years. This should further boost domestic manufacturing in this sector.

On the judicial front, the Supreme Court (SC) has upheld the requirement of fulfilling the 'pre-import condition' incorporated in the Foreign Trade Policy 2015-2020, to claim exemption of the Integrated Goods and Services Tax and Compensation Cess on inputs imported for the manufacture of export goods, based on advance authorisation. The SC stated that the inconvenience caused to exporters by paying two duties and claiming a refund could not be a ground to hold the 'pre-import' condition as arbitrary.

In another important ruling, the Karnataka High Court (HC) has held that games such as rummy, whether played online or physically, with or without stakes, are 'games of skill' and subject to the test of predominance. The HC differentiated that a game of chance, whether played with or without stakes, is gambling. However, a game of skill, whether played with or without stakes, is not gambling. Therefore, taxing games of skill such as rummy is outside the scope of supply. This is an interesting space to watch out as the law develops further with legislative changes and court rulings.

In this edition, we have analysed the taxability of land transfer on a long-term lease basis.

On the direct tax front, the Ministry of Finance has clarified the applicability of tax collected at source provisions on remittances under the Liberalised Remittance Scheme and notified the India-Chile Double Taxation Avoidance Agreement.

I hope you will find this edition an interesting read.


## Vikas Vasal

Partner, Tax
Grant Thornton Bharat

# Contents

# 01 Important amendments/updates

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

### E-invoicing mandatory for taxpayers having aggregate turnover exceeding INR 5 crore w.e.f. 1 August 2023

- W.e.f. **1 August 2023**, the CBIC has made issuing e-invoices mandatory for the notified registered persons having an aggregate turnover above INR 5 crore in any preceding FY from FY 2017-18 onwards.
- Presently, the limit of the aggregate turnover is INR 10 crore.

(Notification No. 10/2023 – Central Tax dated 10 May 2023)

### GSTN enables Aadhaar authentication status in its portal

- The GSTN has added a new functionality in its portal to view Aadhaar authentication status for proprietors / partners or promoters. The new feature also enables downloading e-KYC documents for new registration applications and uploading e-KYC documents of registered persons in the provisional verification report, which can be used by tax officers.
- The move will speed up the process of GST registration, reduce paperwork and the time taken for physical verification. It is in line with the government objective of ease of doing business and simplifying the procedural requirements.

(Registration Advisory No. 23/2023 dated 15 May 2023)

### CBIC rolls out automated return scrutiny module for GST returns in ACES-GST backend application for Central Tax officers

- In response to the directives issued by the Union Minister for Finance and Corporate Affairs, the CBIC has introduced an automated return scrutiny module for GST returns in the ACES-GST backend application. This non-intrusive compliance verification module will allow the Central Tax officers to scrutinise GST returns of central administered taxpayers.
- In this module, the discrepancies on account of the risk associated with a return are displayed on the officer's dashboard, which could be communicated through the GSTN portal to the respective taxpayer in Form ASMT-10. The taxpayer would submit a reply in Form ASMT-11, which would either be approved and result in the issuance of an order of acceptance reply in Form ASMT-12 or would result in the issuance of a SCN or initiation of an audit/investigation.
- The implementation of the module has commenced with the scrutiny of GST returns for FY 2019-20, and the necessary data has been made available on the officer's dashboard.

(Press Release dated 11 May 2023)

# CBIC issues SOP for scrutiny of returns for FY 2019-20 onwards

The DG Systems has developed the functionality 'Scrutiny of Returns', which includes an online process for return scrutiny in the CBIC ACES-GST application. The DG Systems has additionally released Advisory No. 22/2023- Returns dated 16 May 2023, along with a user manual outlining the detailed workflow of the said functionality. The GSTINs selected for scrutiny for FY 2019-20 have also been made available on the ACES-GST application's scrutiny dashboard for the POs.

The functionality includes a detailed workflow for communicating discrepancies noticed by the PO in relation to the details furnished in the returns to the registered person in Form GST ASMT-10, receipt of reply from the registered person in Form GST ASMT-11, issuing an order in Form GST ASMT-12, or taking further action for the issuance of a SCN under Section 73 or 74 of the CGST Act or referring the matter for audit or investigation.

Accordingly, the SOP for scrutiny of returns provided in Instruction No. 02/2022- GST dated 22 March 2022 has been modified to the following extent for scrutiny of returns for FY 2019-20 onwards:

- **Selection of returns for scrutiny and communication of the same to the field formations:**
  - The DGARM will select returns for scrutiny depending on specified risk factors. Based on established risk indicators, the DGARM will choose GSTINs registered with the Central Tax authorities whose returns are to be scrutinised for the FY. The DGARM will make available the details of selected GSTINs through DG Systems on the scrutiny dashboard of the concerned PO of Central Tax on the ACES-GST application.
  - The details of the risk parameters, in respect of which risk has been identified for a specific GSTIN, and the amount of tax/discrepancy involved in respect of the concerned risk parameters (i.e., likely revenue implication), will also be displayed on the PO's scrutiny dashboard.
  - Since the data on the dashboard has been generated at a specific point of time for the calculation of risk parameters and may change during the scrutiny of returns due to subsequent compliances carried out by the taxpayer or by the taxpayer's suppliers, the PO must rely on the latest available data.
- **Scrutiny schedule:**
  - The PO shall finalise a scrutiny schedule in the specified format, with the approval of the divisional assistant/ Deputy Commissioner, which will specify the month-wise schedule for all the GSTINs selected for scrutiny. The GSTINs that appear to be riskier - based on the likely higher revenue implication indicated on the dashboard - may be prioritised. The Principal Commissioner/ Commissioner of the concerned commissionerate would monitor and ensure that the scrutiny schedule is followed by the officers under his jurisdiction.
  - The PO shall conduct the scrutiny of all returns pertaining to a FY for a minimum of four GSTINs per month.


- **Process of scrutiny by the PO:**
  - The PO shall scrutinise the returns and details furnished by the registered persons to verify accuracy. In this respect, information accessible with the PO on the system in the form of various returns and statements furnished by the registered persons, as well as details made available through various sources such as DGARM, ADVAIT, GSTN, E-Way Bill portal, etc., may be relied on.
  - The DGARM will make available to field formations the information of all risk parameters considered by them in the selection of GSTINs for the scrutiny of returns. Additionally, the PO may evaluate any other relevant parameter for the purpose of examination.
  - The PO is expected to rely on the information available on records at this stage. There should be minimal interface between the PO and the registered person and, there should normally not be any need for seeking documents/ records from the registered persons before the issuance of Form GST ASMT-10.
  - The PO shall issue a notice through the scrutiny functionality to the registered person informing him of the discrepancies and seeking an explanation thereto. There will be no need to send a manual communication of notice to the registered person separately. The PO should quantify the amount payable and needs to ensure that the discrepancies should be specific and not vague or general. The PO shall mention the parameter-wise details of the discrepancies noticed by him and shall also upload the worksheets and supporting document(s)/ annexures, if any.

- The PO is required to scrutinise all returns pertaining to the relevant FY for each GSTIN selected for scrutiny, and a single compiled notice in Form GST ASMT-10 may be issued to the registered person for that FY.
- On receipt of such notice on the common portal, the registered person may accept the discrepancy, pay the amount payable, and notify the same, or furnish an explanation for the discrepancy in Form GST ASMT-11, through the common portal. The reply will be made available to the appropriate officer on the ACES-GST application's scrutiny dashboard. If the explanation or information provided in relation of acceptance of discrepancy and payment of dues is found to be acceptable, the PO shall conclude the proceedings by informing the registered person in Form GST ASMT-12 through the scrutiny functionality on the ACES-GST application.
- In case the registered person does not furnish a satisfactory explanation within the permitted time or after accepting the discrepancies, fails to pay the tax, interest and any other amount arising from such discrepancies, the PO may proceed to determine the tax and other dues under Section 73 or Section 74 of the CGST Act. In this respect, specified monetary limits shall be adhered to.
- However, if the PO believes that the matter should be pursued further through audit or investigation, he may seek approval from the jurisdictional Principal Commissioner / Commissioner through the divisional assistant/ Deputy Commissioner through e-file or any other suitable mode, for referring the matter to the Audit Commissionerate or the Commissionerate's anti-evasion wing. The copy of the approval needs to be uploaded when referring the matter to the relevant formation through the scrutiny functionality.

- **Timelines for scrutiny of returns:**

| S.no | Process/event | Timeline/frequency |
|---|---|---|
| i | Communication of GSTINs selected for scrutiny by the DGARM on the ACES GST application for a FY. | From time to time. |
| ii | Finalisation of the scrutiny schedule with the approval of the concerned assistant/ Deputy Commissioner. | Within seven working days of receipt of the details of the concerned GSTINs on the ACESGST application. |
| iii | Issuance of notice in Form GST ASMT-10 for intimating discrepancies. | Within the month, as mentioned in the scrutiny schedule for scrutiny for the said GSTIN. |
| iv | Reply by the registered person in Form GST ASMT-11. | Within a period of 30 days of being informed by the PO in Form GST ASMT-10 or such further permitted period. |
| v | Issuance of order in Form GST ASMT-12. | Within 30 days from the receipt of reply in Form GST ASMT-11. |
| vi | Initiation of appropriate action for determination of the tax and other dues under Section 73 or Section 74, in cases where no reply is furnished by the registered person. | Within a period of 15 days after the completion of the period of 30 days of the issuance of the notice in Form GST ASMT-10 or such further permitted period. |
| vii | Initiation of appropriate action for determination of the tax and other dues under Section 73 or Section 74, in cases where the reply is furnished by the registered person, but the same is not found acceptable by the PO. | Within 30 days from the receipt of reply from the registered person in Form GST ASMT-11. |
| viii | Reference, if any, to the Audit Commissionerate or the anti-evasion wing of the Commissionerate for action. | Within 30 days from the receipt of reply from the registered person in Form GST ASMT-11 or within a period of 45 days of the issuance of Form GST ASMT-10, in case no explanation is furnished by the registered person. |

- **Reporting and monitoring:**
  - The details of action taken by the PO in respect of GSTINs allocated will be available in the form of two MIS reports in the scrutiny dashboard on the ACES-GST application.
  - The MIS report - 'Monthly Scrutiny Progress Report' - displays summary information of the status of scrutiny of returns for the selected month of a FY.
  - Besides, the GSTIN-wise details of action taken in respect of the scrutiny of returns in respect of allotted GSTINs is made available in the MIS report 'Scrutiny Register' on the scrutiny dashboard.

(Instruction No. 02/2023-GST dated 26 May 2023)

## CBIC issues guidelines for special all-India drive against fake registrations under GST

During the national coordination meeting of the state and central GST officers, the issue of fraudulent GST registrations and the misuse of identities was discussed. Fake registrations and the issuance of fraudulent invoices for the purpose of passing on a fake ITC have become severe problems, resulting in revenue loss for the government. To solve this issue, the officers agreed that concerted and coordinated action on a mission mode is required to combat this menace in a more systematic manner. Therefore, the officers launched a special drive on an all-India basis from **16 May 2023 to 15 July 2023** to detect such suspicious/fake registrations and to conduct requisite verification for timely remedial action to prevent any further revenue loss to the government. In respect to the same, the following guidelines have been issued:

- **Identification of fraudulent GSTINs** - Based on detailed data analytics and risk parameters, the GSTN will identify fraudulent GSTINs and share jurisdiction-specific details with the concerned officers for initiating verification and action.
- **Information sharing mechanism -** Each CGST and state zone shall immediately appoint a nodal officer to ensure seamless flow of data and coordination with GSTN/ DGARM and other tax administrations, and to make data available to the concerned jurisdictional formations within two days.
- **Action to be taken by field formations -** Upon verification by the concerned JTO, if the taxpayer is found to be non-existent and fictitious, the concerned JTO may immediately initiate the following actions:
  - Suspension and cancellation of the registration.
  - Blocking of ITC in ECrL as per CGST rules.
  - Identification of details of recipients, through Form GSTR-1, who have received ITC from non-existing taxpayers.
  - If the recipient is in the same tax jurisdiction, the demand and recovery of wrongly availed ITC may be initiated.
  - If the recipient is in a different tax jurisdiction, details of the case must be sent to the concerned tax authority.
  - Investigation to identify masterminds/beneficiaries behind fake GSTINs.
  - Recovery of government dues and/or provisional attachment of property/ bank accounts.
  - Similar action on linked suspicious GSTINs.
- **Feedback and reporting mechanism -** The CGST and state zone shall provide an action report to the GST Council Secretariat, which may include a novel modus operandi. Upon conclusion of the drive, the field officers shall provide a GSTIN-wise verification result to GSTN/DGARM.
- **National Coordination Committee -** This committee shall monitor the progress of this special drive.

(Instruction No. 01/2023-GST dated 4 May 2023)

## CBIC allows filing of declaration by GTA opting to pay tax under forward charge mechanism

- The CBIC has provided that a GTA who commences a new business or crosses the registration threshold during any FY may exercise the option to pay GST on the services supplied by it during that FY by making a declaration in Annexure V before the expiry of 45 days from the date of applying for GST registration or one month from the date of obtaining registration, whichever is later.
- In this respect, the GSTN has issued an advisory that the GTAs, who commence business or cross registration threshold on or after 1 April 2023 and wish to opt for payment of tax under the forward charge mechanism, are required to file their declaration in Annexure V for the FY 2023-24 physically before the concerned jurisdictional authority.

Notification No. 05/2023- Central Tax (Rate) dated 9 May 2023 and https://www.gst.gov.in/newsandupdates/read/587

## Delhi GST department issues circular w.r.t. time limit for scrutinising GST returns of taxpayers for FYs 2017-18, 2018-19 and 2019-20

- Earlier, the CBIC, vide Notification No. 9/2023 Central Tax dated 31 March 2023, extended the time limit for the issuance of orders for the recovery of unpaid or underpaid tax or wrongly claimed ITC, excluding cases involving fraud, willful misstatement, or suppression of facts to evade tax.
- The extended due dates are as follows:

| Tax period | Due date for issuing orders order u/s 73 |
|---|---|
| **FY 2017-18** | 31 December 2023 |
| **FY 2018-19** | 31 March 2024 |
| **FY 2019-20** | 30 June 2024 |

- In respect to the above, considering that the whole scrutiny process takes about 5-6 months, the Delhi GST department has advised all the ward incharges / POs to ensure the timely issuance of the order for scrutiny of returns for the aforesaid tax periods.

(Circular No. F.3/432/GST/Policy/2022/582-89 dated 8 May 2023)

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

## Ministry of Electronics and Information Technology notifies PLI Scheme 2.0 for IT Hardware

With the objective to provide a financial incentive to boost domestic manufacturing and attract large investments in the value chain, the Union Cabinet, chaired by Prime Minister Shri Narendra Modi, had given approval to introduce the PLI Scheme 2.0 for IT Hardware for Enhancing India's Manufacturing Capabilities and Enhancing Exports – *Atmanirbhar Bharat* – on 17 May 2023.

Pursuant to the above, the Ministry of Electronics and Information Technology notified the PLI Scheme 2.0 for IT Hardware on 29 May 2023. The window of applications under the PLI Scheme 2.0 for IT Hardware has opened from **1 June 2023.**

**Key features of the scheme:**

**Target segment:** The target segment under the PLI 2.0 Scheme shall include:

- Laptops
- Tablets
- All-in-one PCs
- Servers
- USFF

**Eligibility:**

- The eligibility of applicants under the hybrid (global/domestic) category shall be decided based on the type of company, i.e., domestic or global. A combined ranking of the applicants shall be maintained based on the eligibility criteria laid down in the scheme guidelines. Thereafter, the selection of applicants under each category, i.e., global, hybrid and domestic shall be done on the basis of ranking of the applicants and their overall PLI projection, subject to the availability of budget.
- The applicants of the existing PLI Scheme, who have not claimed any incentive, will be allowed to participate in the PLI 2.0 Scheme as new entrants, provided they are selected.

**Tenure:**

- Support under the PLI 2.0 Scheme shall be provided for a period of six years starting from **1 July 2023**.
- The scheme shall be open for applications for a period of 45 days initially, which may be extended.
- For applications received post the initial application period, the applicants shall be eligible for incentives only for the remainder of the scheme's tenure, which will end on **31 March 2031.**

**Base year:** The FY 2022-23 shall be treated as the base year for the computation of net incremental sales of manufactured goods.

**Quantum of incentive:**

- The scheme shall extend an average incentive of around 5% for localisation of items given in Annexure-B, such as laptop / tablets/ AIOs, server/USFF, PCBA, display panels, power adapter, battery cabinets/chassis/enclosures.
- The incentives shall be applicable from 1 July 2023 or 1 April 2024 or 1 April 2025 for six years depending upon the applicants' choice to commit incremental investment and incremental sales under the PLI 2.0 Scheme.
- For the first year of the incentive, eligible sales will be considered for nine months starting from 1 July 2023 for which the incentive is being claimed. The baseline sales will be considered for the corresponding period of FY 2022-23. In case the applicants choose to start manufacturing from 1 April 2024 / 1 April 2025, the baseline sales will be computed accordingly.
- The incentive per company shall be applicable on the net incremental sales of manufactured goods (covered under the target segment) over the base year, subject to a ceiling of INR 4,500 crore for global companies, INR 2,250 crore for hybrid (global/domestic) companies and INR 500 crore for domestic companies.
- There will be a provision for penalty of 5% from the payable PLI amount if the actual PLI amount for a year is less by 25%-50% and a penalty of 10% if the shortfall is more than 50% from the estimated PLI amount given by the applicant at the time of application.

(Ministry Of Electronics And Information Technology (IPHW Division) Notification dated 29 May 2023)

## Government launches Vivad se Vishwas scheme for MSMEs as announced in Union Budget

The Department of Expenditure, Ministry of Finance, has launched the scheme – 'Vivad se Vishwas I – Relief to MSMEs' – for providing relief to MSMEs for the COVID-19 period. The scheme was announced in the Union Budget 2023-24 by Union Finance Minister Nirmala Sitharaman.

The Department of Expenditure, Ministry of Finance, had issued an order on 6 February 2023, indicating the broad structure of the scheme. The final instruction in this regard, extending the relief to cover more cases and relaxing the limits of refunds, was issued on 11 April 2023. The scheme has commenced from 17 April 2023 and the last date for the submission of the claims is **30 June 2023.**

Under the scheme, the ministries have been asked to refund 95% of performance security, bid security, liquidated damages forfeited/deducted and 95% of the risk purchase amount realised during the COVID-19 pandemic. In case any firm has been debarred only due to a default in the execution of such contracts, such debarment shall also be revoked by issuing an appropriate order by the procuring entity. However, in case a firm has been ignored for the placement of any contract due to debarment in the interim period (i.e., the date of debarment and the date of revocation under this order), no claim shall be entertained. Further, no interest shall be paid on such refunded amount.

Relief will be provided in all contracts for the procurement of goods and services entered into by any ministry/ department/ attached or subordinate office/ autonomous body/ CPSE/ central public sector banks/financial institution, etc., with MSMEs, which meet the following criteria:

- Registered as a medium, small or micro enterprise as per the relevant scheme of the Ministry of MSME on the date of claim by the supplier/ contractor. MSME could be registered for any category of goods and services.
- The original delivery period/ completion period stipulated in contract was between 19 February 2020 and 31 March 2022 (both dates are inclusive).

(Press release dated 2 May 2023)

## CBIC issues clarification on amnesty scheme for one-time settlement of default in EO by advance and EPCG authorisation holders

Pursuant to an announcement made by the government, the DGFT had notified the amnesty scheme for one-time settlement of default in the EO under the advance authorisation and EPCG scheme.

In this regard, the DGFT has issued a circular clarifying certain aspects as under:

- While the interest payable is capped at 100% max of customs duties exempted on which interest is payable, no interest is payable on additional customs duty and special additional customs duty;
- The authorisation holders are required to complete the process of payment on or before **30 September 2023** in order to avail the benefit. Further, they shall not avail the CENVAT credit or refund of any amount on duties paid under the said scheme;
- Cases, which are under investigation involving fraud, mis-declaration, unauthorised diversion of material and/or capital goods, are not covered under the scheme;
- The Principal Commissioners/Commissioners shall ensure that the exporters who are paying the duty are registered with the DGFT and shall put in place a mechanism to monitor cases under the scheme for expeditious closure of bona fide EO default in a seamless manner.

(Circular No. 11/2023-Customs dated 17 May 2023)

## CBIC issues clarifications on certain aspects of FTP and HBP 2023

The government notified the new FTP and HBP effective from 1 April 2023. Pursuant to this, the Customs notifications were issued for purposes of implementation of the schemes mentioned in the FTP chapters on duty remission/exemption. In this regard, the CBIC has clarified as under:

- The SAAS in Para 4.04 of FTP for the import of a specialised fabric meant for garment export may also be issued on a self-declaration basis, subject to the finalisation of norms within 90 days.
- The eligibility of applying under the Self Ratification Scheme for the purposes of advance authorisation under Para 4.06 has been extended to a manufacturer cum actual user who holds a valid 2 star or above status under Para 1.25, subject to obtaining AEO certification within 120 days;
- The facility of exemption from furnishing bank guarantees shall not be available to certain units that have been issued a confirmed demand under GST law. Further, the facility of exemption from furnishing a bank guarantee at the time of import or going for job work in DTA to EOU/EHTP/STP/BTP has been extended to units having AEO certification, subject to certain conditions.
- The EOUs for setting up operations or maintenance of wind and solar captive power plants would not get tax/duty benefits as per Para 6.04(b)(i).
- The conversion to EOU from a DTA unit having the EPCG license would be permitted only in two scenarios, i.e., if (a) the DTA unit has fulfilled the stipulated export obligation and obtained EODC, or (b) the DTA unit has made the payment of applicable duties, taxes, compensation cess on capital goods imported under the EPCG scheme.

(Circular No. 12/2023 -Cus dated 24 May 2023)

## DGFT proposes realignment of RoDTEP Schedule w.e.f. 1 May 2023, as per amended Finance Bill 2023

Consequent to the enactment of the Finance Bill 2023, the DGFT has notified certain changes to realign the RoDTEP schedule effective from 1 May 2023 with the first schedule of the CTA. Accordingly, the following amendments have been made in Appendix 4R effective from 1 May 2023:

- 149 tariff lines at 8-digit level are added in the RoDTEP schedule,
- 52 tariff lines are deleted from the RoDTEP schedule.

Further, it has been stated that the details of the HS codes, along with RoDTEP rates/value caps, are available at the DGFT portal under the link 'Regulatory Updates > RoDTEP'.

(Notification No. 4/2023 dated 1 May 2023)

## DGFT notifies amendment under Interest Equalisation scheme

Earlier, the RBI had notified an extension of the IES up to **31 March 2024.** In order to rationalise the scheme, the DGFT has notified that the annual net subvention amount would be capped at INR 10 crore per IEC in a given FY. All disbursements made from 1 April 2023 shall be counted for an IEC for the current FY.

(Trade Notice No. 5/2023 dated 25 May 2023)

## DGFT introduces online facility for requesting appointment for virtual meeting/personal hearing for exporters

With the objective of trade facilitation and to extend proactive hand-holding and support to the exporting community, the DGFT has introduced an online facility of requesting an appointment for a virtual meeting/personal hearing to the exporters w.e.f. 1 June 2023.

Through this facility, the exporters will be able to request for online personal hearing, and the concerned officers at RAS of the DGFT shall provide a suitable time period as well as a link for the virtual hearing through the online facility.

The exporters may apply for VC facility for their online hearing on the DGFT website using the following steps – Navigate to the DGFT website (https://dgft.gov.in) → **Services** → **Request for video conference.**

(Trade Notice No. 06/2023-24 dated 31 May 2023)

# 02 Key judicial pronouncements

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

### Key rulings under the erstwhile indirect tax laws:

### Credit note issued by manufacturer to dealer in consideration of completion of warranty obligation exigible to sales tax - SC

#### Summary

In a landmark ruling, the SC has held that the credit note issued by the manufacturer (the assessee) to the dealer, in consideration of replacement of a defective part to complete the warranty obligation of manufacturer, is exigible to sales tax. The dealer is acting on behalf of the manufacturer or as an intermediary between the manufacturer and the customer of the automobile and discharging his obligation under a collateral contract. The manufacturer compensates the dealer by the issuance of a credit note. Hence, the credit note issued by a manufacturer in favour of a dealer is a valuable consideration within the meaning of the definition of 'sale'.

#### Facts of the case

- Tata Motors (the appellant/manufacturer) sells vehicles and spare parts to Marudhara Motors (the dealer) by charging the CST Act. The dealer sells these goods to customers through invoices collecting local sales tax.
- Under the dealership agreement, the dealer would provide the replacement of warranty goods sold to the customer. There exists a separate warranty agreement between the manufacturer and the ultimate customer to whom such vehicles are sold by the dealer.
- The dealer collects defective components from the customers and replaces them with the stock purchased from the manufacturer, and then returns them to the manufacturer. Then, the manufacturer issues credit notes to the dealer for the components after satisfying itself that the components were defective.
- Pursuant to the SC's decision in the case of Mohd. Ekram Khan, the AA initiated assessment proceedings and held that the dealer had supplied the parts and received the price. The Deputy Commissioner (Appeals) upheld the levy of tax and set aside the order to levy tax and interest.
- The RTB issued a common judgement for all the appeals filed, set aside the Deputy Commissioner's (Appeals) order and stated that the transaction of replacing the defective parts did not fall within the definition of 'sale'.
- The Revenue filed revision petitions before the Rajasthan HC, which dismissed these petitions and affirmed the decision passed by the RTB, stating that the facts of the present case differ from Mohd. Ekram Khan's case by underlining three distinguishing factors.
- Firstly, the relationship between the manufacturer and dealer reflected a principal-to-principal relationship; secondly the transaction between the manufacturer and the dealer is independent of the transaction between the manufacturer and the customer, and thirdly, the warranty obligation was being discharged free of cost.

#### Issues before SC:

- Whether a credit note issued by a manufacturer to a dealer of automobiles, in consideration of the replacement of a defective part in the automobile sold pursuant to a warranty agreement being collateral to the sale of the automobile, is exigible to sales tax under the sales tax enactments of the respective states?
- Whether its judgement in the case of Mohd. Ekram Khan calls for reconsideration in terms of the reference order dated 5 December 2019?
- In other words, whether the aforesaid case has been correctly decided or not?

#### SC observations and ruling [CIVIL APPEAL No.1822/2007, order dated 15 May 2023]

- **There should be an agreement:** It was observed in the decision of Gannon Dunkerley and Co. that there should be an agreement between the parties for the purpose of transferring title in the goods, which presupposes capacity to contract that should be supported by money consideration, and property must be transferred.
- **Dealer acting as an intermediary between manufacturer and customer:** The dealer is acting on behalf of the manufacturer or as an intermediary between the manufacturer and the customer of the automobile and discharging his obligation under a collateral contract. Hence, it is a warranty given by the manufacturer through the dealer to the customer during the period of warranty.

- **No warranty unless there is sale of goods:** The dealer discharges his warranty obligation pursuant to the earlier sale of the automobile made by him to the customer, where the transaction of sale is accompanied by a collateral contract in the form of a warranty. There cannot be a warranty unless there is a sale of goods in the first place. That is why a warranty is termed as a contract collateral to the main contract of sale.
- **Sale between a dealer and manufacturer of the automobile of the spare parts:** On the one hand, there is the transfer of property between the dealer and the customer/purchaser of the automobile, and on the other hand the receipt of a valuable consideration by the dealer for the same from the manufacturer in the form of a credit note. Therefore, whether the transaction, resulting in payment by way of a credit note to a dealer is a sale within the definition of sale, has to be considered.
- **Credit note is exigible to sale tax as it is a valuable consideration:** 'Price' is the amount of consideration that a seller charges the buyer for parting with the title to the goods. The valuable consideration has a wider connotation but must be read *ejusdem generis* to cash and deferred payment. The nature of consideration in the form of a credit note is monetary in nature. The manufacturer compensates the dealer by issuance of a credit note. Hence, the credit note issued by a manufacturer in the favour of a dealer is a valuable consideration within the meaning of the definition of 'sale' under the CST Act.
- **Decision given in the case of Mohd. Ekram Khan is not erroneous:** The SC held that the judgement in the case of Mohd. Ekram Khan is applicable to a situation where a manufacturer issues a credit note to a dealer acting under a warranty given by the manufacturer pursuant to a sale of an automobile where the dealer replaces a defective part of the automobile by a spare part maintained in the stock of the dealer or when the same is purchased by the dealer from the open market.
- **SC allowed the appeal filed by the Revenue:** The appeals filed by the dealers are dismissed. The appeals filed by the Revenue are allowed.

## Our comments

Earlier, the SC, in the case of Mohd. Ekram Khan, had held that that when a dealer receives a credit note from the manufacturer while discharging his obligation under a warranty clause and uses a spare part from his own stock to replace a defective part, the transaction between the manufacturer and the dealer constitute sale on which the dealer was liable to pay sales tax. In this regard, the SC has clarified that the above-mentioned judgement does not call for any interference.

However, where the dealer received a spare part from the manufacturer of the automobile to replace a defective part under a warranty collateral to the sale of the automobile, principles of this ruling will not apply.

This is a significant ruling and will have widespread ramifications under GST as well, especially for automobiles, electronic appliances, plant and machinery manufactures, etc., where manufacturers issue credit notes to the dealer for replacement or reimbursement of the defective parts.

# *Mens rea* is not an essential condition for imposing interest and penalty, considering the language of the provisions – SC

## Summary

The SC has allowed the Revenue's appeal and held that *mens rea* is not necessary for levying interest and penalty. The SC stated that the penalty and interest leviable under Section 45 and Section 47(4A) of the Gujarat ST Act are statutory and mandatory in nature since the provisions use the world 'shall'. Therefore, no discretion is vested with the authority as to decide whether the penalty and interest are to be levied under the said provisions or not. The SC also stated that in the instant matter, the relevant sections do not prescribe words such as *mens rea*/or satisfaction of AO and/or other words such as those used in Section 11 AC of the CEA. Accordingly, the absence of guilty intention does not hold significance here where the penalty is automatic.

## Facts of the case

- M/s Saw Pipes Limited (the assessee) is engaged in the business of executing indivisible works contracts involving coal tar and enamel coating on pipes.
- The assessee had opted for the payment of lumpsum tax as provided under Section 55A of the Gujarat ST Act and deposited @2% tax on works contract sales vide Entry-1 of the relevant notification.
- The AO, while passing the assessment order, raised tax demand, along with interest and penalty under Section 45(6) and Section 47 (4A) of the Gujarat ST Act, stating that the assessee is not covered under the Entry-1 of the relevant notification and tax shall be paid under residuary entry @12%.
- The Commissioner dismissed the appeal filed by the assessee. Aggrieved by the order of the Commissioner, the respondent filed an appeal before the Tribunal, wherein the Tribunal confirmed the tax demand, along with interest and penalty.
- The HC has set aside the interest and penalty demand, stating that the assessee has acted under bonafide belief.
- Aggrieved by the HC's order, the Revenue has appealed before the SC.
- The issue before the SC is whether while imposing/levying penalty and interest under Section 45(6) and Section 47(4A) of the Gujarat ST Act, *mens rea* on part of the assessee is required to be considered.

## SC observations and ruling [Civil Appeal No. 3481 OF 2022, order dated 17 April 2023]:

- **No concealment or inaccurate details:** The SC observed that the assessee had not concealed any particulars or deliberately furnished inaccurate particulars of any transaction liable to tax as contemplated under Section 45(2) of the Gujarat ST Act. However, Section 45(5) of the Gujarat ST Act provides that in case the differential tax is more than 25%, the dealer will be deemed to have failed to pay the tax to the extent of the difference.
- **Penalty and interest under Section 45(6) and Section 47(4A) of the Gujarat ST Act is statutory in nature:** The SC observed that the impugned sections use the phrase 'shall be levied'. Accordingly, the SC concluded that the interest and penalty leviable under the impugned sections is a statutory and mandatory penalty, and there is no discretion vested with the Commission as to whether to levy the penalty leviable or not.
- **Penalty is automatic:** Penalty is an integral part of assessment, and the levy of penalty is automatic. Since the phrase used in Section 45(6) of the Gujarat ST Act is 'shall be levied', the moment it is found that the dealer is deemed to have failed to pay the tax, penalty will be applicable.
- ***Mens rea* is not an essential ingredient for contravention of provisions of a civil act:** The SC held that in the instant matter, the intention of legislation is unambiguous and specifically prescribe levy of penalty u/s 45(6) of Gujarat ST Act once any eventuality as mentioned in Section 45 (5) occurs. The impugned sections do not use other words such as *mens rea* and/or satisfaction of the AO and/or other language as used in Section 11AC of the CEA.
- **Penalty and interest is statutory and mandatory:** Based on the aforesaid provisions for the levy of penalty and interest, and the language used therein, on strict interpretation, the SC held that the levy of penalty and interest is statutory and mandatory, and allowed the Revenue's appeal.

## Our comments

Contrary to the present ruling, in the case of Hindustan Steels Limited, the SC had held that *mens rea* is an important element in any penal proceedings. The SC had observed that the discretion to impose a penalty must be exercised judicially and after the consideration of all the relevant circumstances. The penalty cannot be imposed merely because it is lawful to do so. Even in the case of Akbar Badruddin Jiwani, the SC had held that the requisite *mens rea* must be established while imposing a penalty.

However, in the case of Dharamendra Textile, the SC had held that when the phrase 'shall be leviable' has been used, the adjudicating authority will have no discretion. This is a statutory penalty and there is no discretion whether to levy a penalty or not or to levy any penalty lesser than what is prescribed.

The Revenue authorities may attempt to use this decision as justification for pursuing penalty proceedings, but it is important to consider the decision's implications, considering the precise language used in the interest and penalty provisions under the applicable legislation.

# User development fee collected by an international airport a statutory levy, not liable to service tax – SC

## Summary

The SC has ruled that the UDF levied and collected by the airport operation, maintenance and development entities from departing passengers is a statutory levy and, thus, it is not subjected to the ST under the provisions of the Finance Act. The SC held that the UDF is in nature of tax or cess and cannot be construed as a consideration against the provision of any service.

## Facts of the case

- The Delhi International Airport Private Limited, Mumbai International Airport Private Limited and the Hyderabad International Airport Private Limited (Assessees) had entered into an agreement/arrangement for OMD of the respective airports with the AAI. The assessees were authorised to collect a UDF or a development fee from the departing passengers.
- Subsequently, various SCNs were issued demanding payment of ST on the UDF so collected, along with penalty.
- Orders issued by the original authority were challenged before the CESTAT, which allowed the assessees to appeal and held that the UDF should not be exigible to ST.
- Against this, the department filed an appeal before the SC.

## SC observations and order [CIVIL APPEAL NO. 8996/2019 dated 19 May 2023]:

- **UDF is a statutory exaction and cannot be equated with fees or tariffs:** The SC opined that the UDF collected does not qualify as charges or any consideration for services for the facilities provided by the AAI. The SC drew reliance from its judgement in the Consumer Online Foundation, wherein the SC categorically differentiated between the charges, fees and rent and DF. It was noted that charges, fees and rent were collected for providing services under a contractual relationship, whereas the DF collected from passengers was in the nature of a statutory obligation.
- **No element of rendering taxable service to levy ST:** To attract a levy of ST, a taxable service has to be provided by a service provider to the recipient for a consideration. In the absence of any nexus to any service rendered, an amount charged would not be a taxing incident. The UDF is collected and kept in a separate escrow account, and the AAI is empowered to monitor and regulate its receipts and utilisation.
- **Development fee is in the nature of tax:** The SC observed that unlike fees, rent, charges, etc., the development fee could only be utilised for a specific purpose, but such utilisation was subject to approval. Furthermore, no additional benefit accrued to the passengers against payment of the UDF. The SC opined that the UDF was a form of 'tax or cess' collected for the purpose of bridging the funding gap of the project cost for the development of airports in the future.
- **ST cannot be levied on other taxes:** The SC invoked the CBEC circular and affirmed that the ST should not be levied on the collection of amounts in the nature of taxes, sovereign or statutory dues. Drawing reference from its judgement in the Krishi Upaj Samiti case, the SC observed that the UDF was a statutory levy irrespective of the fact that it was not a compulsory levy nor was its collection conditional upon its deposit in the government treasury.

## Our comments

This is a significant judgement, which not only clarifies the age-old dispute on UDF taxability to the airport operator, but also provides guidance in navigating issues pertaining to the inclusion/exclusion of statutory levies for the determination of tax.

Though this ruling pertains to the ST regime, observations and principles of this judgement will trickle down and will have a far-reaching impact under the regime as well.

Contrastingly, under GST, the CBIC had clarified by way of a circular that services provided by an airport operator to passengers against consideration in the form of PSF and UDF are leviable to GST. It would be interesting to watch out for further developments under GST in this regard.

# HP General Sales Tax Act provisions creating tax as first charge over property not *ultra vires* to any law or Constitution - SC

## Summary

The SC has ruled that Section 16B of the HPGST Act is not *ultra vires* to any provision of law. The SC set aside the judgement of the Himachal Pradesh HC wherein it had held that Section 16B of the HPGST Act was inconsistent with Section 35 of the SARFAESI Act and was *ultra vires* to the Constitution. The SC held that Section 16B would be attracted only after the determination of the liability and upon any sum becoming due and payable under the Act, and it is only thereafter that the state's charge on the property, if any, would operate.

## Facts of the case

- M/s A.J. Infrastructures (Pvt.) Ltd. (first respondent) had purchased the property in an auction conducted by the State Bank of Patiala. The said property was taken over by the bank from the M/s Eastman Rubber (the owner) because of the default committed by it in liquidating its dues. The sale deed was executed, registered and then it applied for mutation in its name, but the same was rejected as the owner of the property had liability against government dues by passing an ex-parte assessment order.
- Thereafter, the first respondent filed a writ petition before the HC against the rejection order, and later, the HC in its judgement, stated that if there is proper adjudication of the amount due under the Tax Act, then only the state has a first charge on the property, and if it is not followed, then it cannot be said that tax is due. The HC also held that Section 35 of the SARFAESI Act would have an overriding effect over all inconsistent provisions contained in any other law. The petition was allowed by the HC to mutate the property in its name and to delete the red entries.
- Aggrieved by the HC's order, the official respondents then applied to the HC for a review, but it was dismissed on the ground of delay.

## SC observations and ruling [CIVIL APPEAL NO. 8980-8981/2012 and CIVIL APPEAL NO. 9212-9213/2012, order dated 28 April 2023]:

- **Section 16B would be attracted only after determination of the liability:** Section 16B of the HPGST Act provides that notwithstanding anything to the contrary contained in any law for the time being in force, any amount of tax and penalty, including interest, if any, payable by a dealer or any other person under the HPGST Act, shall be a first charge on the property of the dealer or such other person. It was held by the SC that the charge would be operated only after the determination of liability. Therefore, no red entry marks could have been inserted in the revenue records and the HC was right in holding that the state ought not to have refused mutation.
- **The decision on an infructuous writ petition is inconsequential and can never be of any effect:** The SC observed that the SLP filed by the state was rendered infructuous, partly because the bank, which was a contesting respondent before the court, had already recovered its dues and had released the property from its hypothecation during the pendency of the writ petition before the HC.

The SC also stated that a decision on the constitutional validity of a provision should be invited not in vacuum but when the justice of the case demands such a decision.

- **Non-obstante clauses contained in Section 35 of the SARFAESI Act cannot be read as creating first charge in favour of banks:** The SC relied on its judgement in the case of the Central Bank of India wherein it had held that the Parliament did not intend to give priority to the dues of private creditors over sovereign debt of the state. Furthermore, the SC stated that the non-obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the SARFAESI Act cannot be read as creating first charge in favour of banks, etc.
- **Section 16B of the HPGST Act was inconsistent with Section 35 of the SARFAESI Act:** Section 35 of the SARFAESI Act could not have been construed as conferring any right on a secured creditor to claim priority over dues of the state in the absence of a provision in that behalf, which presently can now be claimed, subject to other conditions being fulfilled, in view of Section 26E of the SARFAESI Act.
- **State cannot recover sales tax dues as arrears of land revenue by creating charge on mortgage property:** The SC further opined that the state cannot resort to the provisions of the HPLR Act, for recovering sales tax dues as arrears of land revenue by creating a charge on the mortgaged property under Section 16B of the HPGST Act, when proceedings under the HPLR Act were not initiated upon notice to the defaulters and the sum owed to the department had not been finally determined.
- **Section 16B of the HPGST Act is a perfectly valid piece of legislation:** The SC held that Section 16B of the HPGST Act is a perfectly valid piece of legislation and is not *ultra vires* to the Constitution and/or the Banking Companies Act. Accordingly, the SC set aside the HC judgement to the extent that it held Section 16B to be *ultra vires* to other provisions, and the appeal was partly allowed in the state's favour.

## Our comments

Earlier, the SC, in the case of the Central Bank of India, had held that the Parliament did not intend to priortise the dues of private creditors over the sovereign debt of the state. However, if the Parliament intended to create a first charge in the favour of banks, financial institutions, or other secured creditors on the property of the borrower, then it would have incorporated a provision to give effect for the same as is provided under the Companies Act, i.e., Section 529-A of the Companies Act to that effect.

Though the judgement has been delivered in the context of the General Sales Tax laws, it is likely to have an impact under the GST laws as well, as similar provisions exist under the GST laws. Section 82 of the CGST Act provides that any amount payable by a taxable person or any other person on account of tax, interest or penalty that the person is liable to pay to the government shall be a first charge on the property of such taxable person or such person.

## Key rulings under the GST law:

# Games like rummy, whether played online or physical, with or without stakes, are 'games of skill' and subject to test of predominance – Karnataka HC

### Summary

According to the Karnataka HC, rummy is a game where predominantly skill is exercised to control the outcome of the game and not one where the outcome is predicted. The HC noted that there is a clear distinction between games of skill and games of chance, and therefore, games like rummy, whether played online or physically, with or without stakes, are games of skill and subject to a test of dominance. The HC referred to the concept of *res extra commercium* and held that there is sufficient jurisprudence to demonstrate that lottery, betting, and gambling will be perceived as noxious and, per se, classified *res extra commercium* as beyond commerce.

In addition, the HC observed that the terms 'betting' and 'gambling' in Entry 6 of Schedule III of the CGST Act do not and cannot include games of skill within its ambit. Further, such an entry excludes actionable claims from the purview of supply, which would clearly apply to games of skill, and only games of chance, such as lottery, betting, and gambling, would be taxable. Therefore, taxing games of skill like rummy is outside the scope of supply.

The HC differentiated that a game of chance, whether played with stakes, is gambling. However, a game of skill, whether played with or without stakes, is not gambling. As a result, the HC quashed the impugned SCN demanding INR 21,000 crore, considering it illegal, arbitrary, and without jurisdiction or authority of law.

### Facts of the case

- M/s Gameskraft Technologies Private Limited (the petitioner/GTPL) is an online intermediary company that operates technology platforms that allow users to play skill-based online games.
- The Revenue conducted search and seizure operations at GTPL's premises and passed provisional attachment orders attaching GTPL's bank accounts, which was subsequently confirmed.
- The petitioner filed a writ petition challenging the attachment order before the Karnataka HC. The HC, vide the interim order, permitted the petitioner to operate the bank accounts for the delineated limited purposes.
- Subsequently, the petitioner received an intimation notice under Section 74(5) of the CGST Act, requiring depositing a sum of INR 2,09,89,31,31,501 (around INR 21,000 crores) with interest and penalty. The HC granted an interim stay against the said notice. Without affording any time, the respondents issued a SCN to the petitioner and its founders, CEO, and CFO (collectively 'Petitioners').
- The petitioners, vide writ petitions, challenged the SCN. The main issues raised in these petitions were whether offline/online games such as rummy, which are mainly based on skill rather than on chance, whether played with/without stakes, constitute 'gambling or betting' as contemplated in Entry 6 of Schedule III of the CGST Act.

### Submissions of petitioners

- The SCN was illegal, arbitrary, untenable, and without jurisdiction or authority of law.
- The SCN wrongly alleged that the petitioner is involved in betting/gambling and is guilty of GST evasion by misclassifying their supply as services instead of actionable claims, which are goods.
- There is a distinction between 'games of skill' and 'games of choice', which is discernible by applying the 'predominance' test. Moreover, whether a game of skill is performed physically or online, the same 'predominance' test applies to determine the true character of the game, as had been held in multiple judicial precedents.
- The petitioner's arguments are entirely covered by the apex court's judgements in the State of Bombay v. RMD Chamarbaugwala (RMDC-1), RMD Chamarbaugwalla v. Union of India (RMDC-2), Satyanarayana, Sivani, Lakshmanan, and the Karnataka HC's judgements in the case of All India Gaming Federation, Junglee Games India Private Limited (Madras), Head Digital Works Private Limited (Kerala), etc.
- Games of skill played with monetary stakes do not partake in the character of betting and remain within the realm of games of skill only. Further, the petitioner has no right, lien, or interest over the prize pool, which is merely held in trust by the petitioner.

### Karnataka HC observations and order [Writ petition Nos. 19570 of 2022 C/W 22010 of 2021, 18304 of 2022, 19561 of 2022, 20119 of 2022 and 20120 of 2022 (T-res), order dated 11 May 2023]:

- **Res extra commercium:** The HC referred to the concept of *res extra commercium*, which means 'things outside commerce'. This doctrine limits the scope by excluding certain 'immoral' or 'noxious' trade activities from the scope of Article 19(1)(g) and depriving them of constitutional protection. Relying on various SC decisions, the HC held that the doctrine of *res extra commercium* could be applied to regard the obnoxious nature of trade. Further, gambling activities are extra-commercium and not entitled to protection under Article 19(1)(g) of the Constitution. Thus, the HC held that there is sufficient jurisprudence to show that lottery, betting, and gambling will be seen as noxious and per se classified *res extra commercium* as beyond commerce.
- **Definition of business to include lottery, betting, and gambling:** The HC analysed the concept of supply under GST, the definition of a business to include betting, gambling, lottery, the meaning of wager or any other similar activity, an actionable claim under Schedule III of the CGST Act and the law elaborating 'game of skill' vs. 'game of chance'. The HC noted that games of skill and games of chance had been differentiated by various courts wherein it had been held that protection under Article 19(1)(g) is not available for lottery, betting, and gambling, which does not amount to a business. Further, the HC noted that Schedule III clearly mentions and excepts lottery, betting, and gambling from the generic term of actionable claims to ensure that it could be taxed.

- **Applicability of RMDC-1 and RMDC-2 cases:** The HC noted that in RMDC-1, the SC had held that any game/competition that relies substantially upon the exercise of skill could not be classified as 'gambling'. The HC stressed upon the 'test of predominance' and noted that despite the element of chance that persisted in each game, it is the element of skill that must prevail in a game of skill. Going by that principle, any competition wherein success depends on correctly forecasting the future result or past result, which has not been ascertained, is not necessarily a game of chance. Further, in the RMDC-2 case, the SC, while interpreting Entry 34 of List II, had held that the phrase 'betting and gambling' does not include games of skill. Therefore, the HC held that a close examination of the ratios established in RMDC-1 and RMDC-2 demonstrates that they totally support the case of the petitioners and intervenors.
- **Rummy is a game of skill:** The HC drew reference from the Madras HC's decision in Junglee Games India Private Limited wherein it had been held that games like rummy and poker are based on skill because they involved considerable memory, working out percentages, the ability to follow the cards on the table and constantly adjusting to the changing possibilities of the unseen cards. The HC noted that merely because a game is played online does not make it a game of chance, as had been held by the SC in the cases of M.J. Sivani and All India Gaming Federation.
- **Principle of *Nomen Juris*:** The HC emphasised the *nomen juris* principle, which stipulates that words should be interpreted in their legal sense rather than their common usage. The HC relied on this principle to assert that the terms 'gambling' and 'game of chance' had been held to involve chance predominantly, whereas in games of skill, the predominant skill controls chance. Therefore, the terms 'betting' and 'gambling' do not include games of skill.
- **Interpretation of betting and gambling under GST:** The terms 'gambling' and 'betting' in Entry 6 of Schedule III of the CGST Act must be interpreted in accordance with Entry 34 of List II of the Seventh Schedule to the Constitution and the Public Gambling Act of 1867, as well as the courts' interpretations. As a result, games of skill are not and cannot be included in the definition of 'betting' and 'gambling' in Entry 6 of Schedule III of the CGST Act.
- **Taxation of games of skill outside scope of supply:** The HC stated that though wagering contracts are included in the term 'business', this would not imply that lottery, betting, and gambling are equivalent to games of skill. Further, Entry 6, which excludes actionable claims from the purview of supply, would clearly apply to games of skill, and only games of chance, such as lottery, betting, and gambling, would be taxable. Therefore, the taxation of games of skill is outside the scope of supply.
- **Rummy is not gambling:** The HC held that rummy is substantially and preponderantly a game of skill and not of chance. Further, there is no difference between physical rummy and online/electronic/digital rummy. Therefore, online games, which are substantial games of skills, whether played with or without stakes, are not gambling.

## Our comments

The GST implications on the online gaming industry has been a long pending matter before the GST Council. The issue that whether a game is of 'chance' or 'skill' is to be decided on a case-to-case basis. Further, from the taxation perspective, it is important to understand the applicable legal provisions in respect of a game of chance and a game of skill. Under GST, games of skills are covered in Entry 6 of Schedule III of the CGST Act, and hence, not taxable. However, games of chance are taxable @28% under GST.

The main question in the present case was to decide whether offline/online games such as rummy, which are mainly based on skill rather than on chance, whether played with/without stakes, constitute 'gambling or betting' as contemplated in Entry 6 of Schedule III. In this respect, the apex court had earlier declared rummy as a game of skill in various judgements, including the State of Andhra Pradesh vs. K. Satyanarayana, K.R. Lakshmanan v State of Tamil Nadu. In the case of K. Satyanarayana, the SC specifically tested the game of rummy on the principle of 'skill versus chance' and held that rummy is not a game entirely based on 'chance' like the 'three-card' game.

Relying upon various historic judgements, the Karnataka HC finally concluded that rummy is substantially a game of skill and not of chance. Therefore, the games of skills, including rummy, are outside the scope of supply, and only games of chance such as lottery, betting and gambling would be taxable under GST. This is a welcoming ruling for India's entire online gaming industry, although the possibility of the tax authorities turning to the apex court is intriguing.

# Deeming fiction of 70:30 for determining the value of land, not applicable to all development projects – Madras HC

## Summary

The Madras HC held that the 70:30 formula set out under Notification No. 11/2017-Central Tax (Rate) is applicable only when the bifurcation of construction is not available. Further, the HC stated that the Revenue is required to verify the correctness of the value of construction service adopted based on the data submitted by the taxpayer and should not assume that the formula as per the deeming fiction is the only method of assessment.

## Facts of the case

- M/s Avigna Properties Pvt. Ltd. (the petitioner), engaged in the business of construction and works contract services relating to immovable property, had initiated a residential township project called Avigna Properties.
- The petitioner had discharged GST on the value of construction services as per the construction agreement entered with the buyer.
- The Revenue issued a SCN, alleging short payment of output tax qua supply of construction service.
- The petitioner submitted that the sale of land and the supply of construction services should be regarded as separate but interconnected parts of a single transaction involving the provision of residential housing units.
- The Revenue contended that the alleged notification does not allow any flexibility in the determination of the value of land and mandates a fixed proportion, i.e., one-third of the total amount charged for the applicability of GST. The payment of stamp duty is irrelevant in this context.
- Aggrieved by the order of the Revenue, the petitioner filed a writ petition before the HC to determine whether the valuation prescribed under the notification is applicable to all the property development cases.

## Madras HC observations and ruling [Writ Petition No. WP.No.6431 of 2020 dated 24 April 2023]:

- **Non-applicability of deeming fiction in specific cases:** The HC observed that the methodology set out under the notification, as relatable to construction services, is for the bifurcation of the total consideration by way of deeming fiction to arrive at the deemed amount attributable to construction services and land costs. The HC further categorically stated that the deeming fiction does not apply if the assessee is able to provide the actual amount of consideration received for both construction services and land cost.
- **Revenue is required to verify the correctness of the value of construction services:** The HC opined that instead of assuming the applicability of the notification (supra) to all property development cases, the Revenue should have requested specific particulars. The HC further stated that if the AO believes that the attribution made by the assessee lacks supporting evidence or the provided documents are insufficient to establish an appropriate attribution based on business practices and costs in the relevant area, then the officer has the right to seek additional details or utilise the deeming fiction as prescribed in the notification. The HC emphasised that the officer should not proceed on the assumption that the formula provided by the deeming fiction is the exclusive method of assessment in such cases.

## Our comments

Earlier, the Gujarat HC, in the case of Munjaal Manishbhai Bhatt, had held that deeming fiction to allocate the total value of land to be one-third of the total project cost will not be applicable where taxpayer is in a position to provide bifurcation, along with details of actual consideration towards construction services and land cost.

On similar lines, the Delhi HC and the Andhra Pradesh HC has granted interim relief to petitioners holding mandatory deeming fiction to be ultra vires the provisions of the GST Act.

It would be interesting to watch out for further developments as revenue authorities would knock the doors of the apex court, given favourable judgements under different states' HCs.

# Amount deposited during search operations is admissible for refund along with interest – Punjab and Haryana HC

## Summary

The Punjab and Haryana HC noted that the deposit made by the assessee during the Revenue's search operations was recovered forcibly. The HC rejected the Revenue's submission that the deposit was made voluntarily, and proper procedure was followed, by taking a reference to the Delhi HC's decision in Vallabh Textiles and Bundl Technologies Pvt. Ltd., where the matter was decided against the Revenue. The HC ruled that tax collected without authority of law would amount to depriving a person of his property and would infringe his right under Article 300A of the Constitution. The HC noted that in the present case, the PO did not issue a receipt after accepting the amount paid during search proceedings. Therefore, the HC directed the refund of tax deposited under protest during search, along with interest @6%.

## Facts of the case

- Diwakar Enterprises Private Limited (the petitioner) is a manufacturer of lead and lead related products. The Revenue Officer 1 has blocked the petitioner's ITC lying in the ECrL basis the illegal purchases made from certain vendors.
- The Revenue Officer 2 conducted a search operation in the petitioner's premises and the director of the company was forcibly detained and pressurised to make a voluntary deposit.
- The petitioner lodged a protest against the deposit. However, thereafter, the Revenue Officer 2 contended further search and got deposited the additional deposit forcibly.
- Consequently, the petitioner received a SCN to which he filed a reply, and thereafter, the Revenue confirmed the demand of around INR 2.34 crores.
- The aggrieved petitioner filed the present writ petition before the Delhi HC, seeking a refund of the amount deposited along with interest.

## Punjab and Haryana HC observations and ruling [W.P.(C) 23788/2021, Order dated 14 March 2023]:

- **Violation of rights provided under Article 265 and 300A of the Constitution:** The HC noted that as per the department, the petitioner has made a voluntary deposit and the proper procedure has been followed. In view of the judgements in the case of Vallabh Textiles, Bundl Technologies Private Limited, the HC ruled that as per Article 265 of the Constitution, if tax is collected without authority of law, it would amount to depriving a person of his property and would infringe his right under Article 300A. The HC noted that in the present case, although the payment has been made through Form GST DRC-03, the PO has not given any receipt after accepting the impugned amount. Therefore, the HC held that the amount deposited by the petitioner under protest has to be refunded since he has been deprived of his rights.

## Our comments

Recovery of taxes during search and investigation proceedings has been a problem faced by the taxpayers wherein the tax authorities force the taxpayers to accept GST liability and discharge the same.

Earlier, the Gujarat HC, in the case of Bhumi Associate, had directed the CBIC to issue the guidelines by way of suitable circular/instructions in relation to the recovery of tax dues during investigations. In light of this decision, the CBIC issued an instruction, clarifying that there may not be any circumstances necessitating the recovery of dues during the search/inspection/investigation proceedings. Further, there is no bar on the taxpayers for voluntary payment before or at any stage of such proceedings.

Despite instructions issued by the tax administration for the recovery of taxes, the tax authorities have yet to follow the same practically while conducting search/ inspection/ investigation proceedings.

Even in the case of Vallabh Textiles, the Delhi HC had directed the Revenue to return the deposit made by the assessee during search proceedings, along with interest for failure to adhere to Rule 142(1A) r/w Sections 73 and 74 and directions of the Gujarat HC in the case of Bhumi Associate. Further, the Karnataka HC, in the case of M/s Bundl Technologies Private Limited, had held that the assessee's payment made as a goodwill gesture during investigation cannot be considered as self-ascertained tax.

The present ruling is in congruence with the above rulings and allows the assessee to seek refund where amounts are recovered forcibly during search operations by officials without providing any acknowledgement.

# Recipient of service qualifies as 'applicant' and can apply for advance ruling under GST – Calcutta HC

## Summary

The Calcutta HC set aside the ruling passed by the WB AAR and held that the term 'applicant' has a wide definition to include any person registered or desirous of obtaining a registration under the Act. The HC opined that the recipient of goods or services is registered, and hence, clearly falls within the definition of an 'applicant'. However, the WB AAR had earlier held that the service recipient did not have any locus standi to apply for an advance ruling.

## Facts of the case

- M/s. Anmol Industries Ltd. (the Applicant/ Service Recipient) had entered into a leasing agreement with Shyama Prasad Mookerjee Port, Kolkata (supplier of services), for an industrial plot for setting up a commercial office complex against an upfront lease premium.
- The applicant filed an application before the WB AAR, seeking clarification on whether such leasing of land is an exempted service under GST.
- The applicant contended that the application for advance ruling can be filed by any person registered or desirous of obtaining registration, rather than a 'supplier' of goods or service. Further, advance ruling can be sought both for outward and inward supply, which entitles the applicant even as a 'service recipient' to file the application.
- The WB AAR had held that if the recipient of supply files an application for advance ruling, the same is binding only on the recipient, and the supplier may not follow the ruling. In such a scenario, the ruling loses its relevance and applicability. Therefore, the AAR held that the applicant cannot seek an advance ruling in relation to the supply where he is a recipient of services.
- The applicant, challenging the AAR, filed the present writ petition before the HC.

## WBAAR observations and ruling [Order No. 26/WBAAR/2022-23]

- **Recipient of service cannot seek advance ruling:** The AAR ruled that an advance ruling is solely binding on the applicant and the concerned officer or the jurisdictional officer. In the present case, the ruling shall not be binding on the supplier. The AAR further stated that any interpretation that defeats the purpose and objective of law cannot be accepted. Therefore, the AAR refused to entertain the application of the applicant being a recipient of services.

## Calcutta HC observations and order [MAT 630/2023 with I.A. No. CAN 1/2023, Order dated 21 April 2023]:

- **'Service recipient' covered within the definition of 'Applicant':** The HC noted that under GST, the term 'Applicant' has been defined in the widest possible manner to include within its purview any person registered or desirous of obtaining registration under the Act. Accordingly, the recipient, being duly registered under GST, clearly falls within the definition of an 'applicant'. Previously, the HC, in the case of M/s. Gayatri Projects Limited, had noted that the appellants being registered under GST qualified as 'applicant' despite the appellants not being parties to the AAR proceedings. Accordingly, the HC remanded the matter back to the WB AAR, directing it to consider the application on merits.
- **Consider the application on merits:** The HC noted that the application would fall under clause (b) of Section 97(2) in terms of applicability of an exemption notification no. 12/2017- CGST (Rate) dated 28 June 2017. The HC therefore held that if that is the case, it will be well within the AAR jurisdiction to consider the application on merits rather than rejecting the same on the ground of lack of l ocus standi.

## Our comments

Earlier, many AARs had held that an advance ruling application can only be filed by the supplier of goods or services or both, and therefore, the recipient of goods or services or both cannot seek advance ruling for its inward supply.

The Chhattisgarh AAR, in the case of M/s. State Water and Sanitation Mission, the Maharashtra AAR, in the case of Romell Real Estate Private Limited and the Tamil Nadu AAAR, in the case of Erode Infrastructure Private Limited held on similar lines invoking constructive and harmonious principles of interpretation and clarified that an interpretation should not defeat the very purpose of the provision as such is improper and bad in law.

Contrary to the above, the HC order extends the scope of the term 'applicant', in view of its wide definition which is a welcome move. The HC highlights that a service recipient, being registered under GST, qualifies as an 'applicant'. However, the HC does not touch upon the germane issue that such ruling shall not be binding on the supplier of such recipient. Moreover, as is trite, the HC order is applicable only within its territorial jurisdiction, and not binding all over the country. It will be interesting to see whether the decision of other HCs align or differ with the view of the Calcutta HC.

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

## SC upholds the validity of mandatory fulfilment of pre-import condition for imports under advance authorisations


**Summary**

The SC has upheld the requirement of the 'pre-import condition' incorporated in the FTP and HBP (of 2015-2020) to claim exemption of IGST and Compensation Cess on inputs imported for the manufacture of export goods, on the basis of the Advance Authorisation scheme. The SC noted that the inconvenience caused to exporters by paying two duties and claiming refund could not be a ground to hold the 'pre-import' condition as arbitrary. Further, the SC observed that the FTP itself empowered the DGFT to impose 'pre-import conditions' on articles other than those specified that the Gujarat HC had failed to consider and had erroneously proceeded on the assumption that only the goods specified were subject to the 'pre-import condition'. Therefore, the SC has set aside the Gujarat HC judgement and held that the pre-import condition under the Advance Authorisation scheme for availing benefit of exemption is not arbitrary or unreasonable. However, the SC has directed the Revenue to permit the exporters who were enjoying interim orders till the impugned judgements were delivered, to claim refund or ITC, and they shall approach the Jurisdictional Commissioner and apply with documentary evidence within six weeks from the date of the judgement.


**Facts of the case**

- The Gujarat HC had struck down the 'pre-import condition' under the Advance Authorisation scheme in the FTP for being unconstitutional, arbitrary and unreasonable.
- Initially, the payment of BCD, CVD and SAD, Safeguard Duty and Anti-Dumping Duty on inputs imported against the Advance Authorisation, was exempted. After the introduction of GST, the CVD and SAD were subsumed, while the IGST and Compensation Cess were introduced. However, the same benefit of exemption was not extended to the IGST and Compensation Cess, leading to the exporters having to avail subsequent ITC or take refund of such duties. This further led to the concomitant blocking of working capital. The DGFT extended the benefit of exemption to the IGST and Compensation Cess from 13 October 2017, subject to conditions, namely the 'pre-import condition' and 'physical exports.'
- The petitioner (Cosmos Films Limited) herein claimed that they were unaware about this condition, and continued exports in anticipation of the grant of the Advance Authorisation scheme, and consequently expected exemption from all custom duty levies, including the IGST and Compensation Cess.
- The HC noted that the department had interpreted 'pre-import condition' to mean that 'goods had to be imported first, and then the final product manufactured with such imported goods were to be exported'. The condition stood satisfied when inputs imported against a particular Advance Authorisation scheme license were used to manufacture finished goods exported for the fulfilment of export obligation of that specific Advance Authorisation scheme license. The HC stated that such interpretation is unfeasible and leads to impossibility.
- The HC noted that the department denied exemption by treating the permissible imports as 'replenishment imports.' Merely because the exports were carried out first, followed by duty-free imports against authorisation, exemption cannot be denied. Such 'sudden treatment' of inputs when the HBP permitted exports in anticipation of authorisation was held to be incomprehensible and unreasonable. The HC further emphasised that the condition was subsequently withdrawn w.e.f. 10.01.2019 Para. 4.13 of the FTP Para 4.27(a) of the HBP.

**SC observations and judgement [CA No. 290 of 2023 order dated 28 April 2023]:**

- **Inconvenience or hardship cannot be a ground to interpret plain language of statute differently:** The SC noted that the amendment brought inconvenience to exporters who first paid the import duties and subsequently claimed refunds, subject to fulfilment of the condition. However, such hardship cannot be grounds to implicate that the pre-import condition was arbitrary. The SC expounded that 'hardship is not relevant in pronouncing on the constitutional validity of a fiscal statute or economic law'.
- **All Advance Authorisation holders were never treated alike:** Drawing reference from Para. 4.13(i) of the FTP, it observed that the DGFT retained power to impose pre-import condition on articles other than those mentioned in Appendix-4J and rebuffed the interpretation that only articles mentioned in Appendix-4J could be subjected to the pre-import condition. The existence of this discretion means that there is flexibility in regard to the nature of policies to be adopted, having regard to the state of export trade, and concessions to be extended in the trade and tax regime. The SC opined that all Advance Authorisation holders were never treated alike.
- **No blanket right to claim exemption:** There cannot be a blanket right to claim exemption, and that such a relief is dependent on the assessment of the state and tax administrators, and mechanism for its administration. The exemption from the requirement of pre-import conditions continues in respect of the old levies, which are, even as on date, not part of the GST regime. That clearly sets them apart from the new levies, the payment of which is insisted (after which refund can be sought) as a part of a unified system of levy, assessment, collection, payment, and refund.
- **Doctrine of classification cannot be applied strictly on new legislation:** When reform by way of a new legislation is introduced, the doctrine of classification cannot be applied strictly, and some allowance for experimentation, to observe the effect of the law, is available to the executive or legislature.

- **No constitutional compulsion to continue concessions granted in past:** There is no constitutional compulsion that while framing a new law, or policies under a new legislation – particularly when an entirely different set of fiscal norms are created, overhauling the taxation structure, concessions hitherto granted or given – should necessarily be continued in the same fashion as they were in the past.
- **Pre-import condition cannot be arbitrary or unreasonable:** The object of the new law is the creation of new rights and obligations, with new attendant conditions. This process is bound to lead to some disruption. In this case, the disruption is in the form of a requirement to pay the two duties and claim refunds. Therefore, the exclusion of benefit of imports in anticipation of Advance Authorisation scheme(s) and requiring payment of duties with the 'pre-import condition', cannot be characterised as arbitrary or unreasonable.
- **HC judgement not sustainable:** Construing the later notification of 10 January 2019 as being effective from 13 October 2017 would be giving effect to it from a date prior to the date of its existence. In other words, the court would impart retrospectivity. To give a retrospective effect to the said notification through interpretation would be to achieve what is impermissible in law. What applies to refunds (the right to which can be curtailed legitimately), applies equally to exemptions. Therefore, the impugned judgement of the Gujarat HC need to be set aside.

## Our comments

Contrary to the Gujarat HC's decisions, earlier, the Madras HC, in the Vedanta Limited case, had also upheld the validity of the pre-import condition. The HC observed that the import is in the nature of the replenishment of inputs used in already exported goods.

The SC has struck down the Gujarat HC's ruling, and thus, the exemption from levy of the IGST under Section 3 (7) and Compensation Cess leviable under Section 3 (9) of Customs Tariff Act, shall be subject to the conditions that the export obligation shall be fulfilled by physical exports only and the 'pre-import condition' during the period 13 October 2017 till 10 January 2019.

The ruling will impact the working capital of the exporters, as they will be required to pay duty, along with interest, for the disputed period.

# SC affirms Telangana HC's order that there is no time limit to amend the BoE

## Summary

In an important decision, the SC has upheld the decision of the Telangana HC that there is no time limit for amendment in the BoE. The Telangana HC had held that to claim a refund of customs duties wrongly paid, there is an additional remedy of amendment of the BoE apart from the remedy of appeal against the assessment order. The HC had further held that the petitioner could not be penalised due to incorrect determination of duty by the AA and allowed the petitioner to amend the BoE u/s 149 of the Customs Act.

## Facts of the case

- Sony India Private Limited (petitioner) is engaged in the manufacture and marketing of different types of electronic goods and consumer electronics, including mobile phones.
- The petitioner had imported mobile phones for trading purposes after paying CVD at the rate of 6%. The petitioner did not claim exemption, which permitted a concessional rate of CVD on mobile phones at the rate of 1%, subject to the condition that no credit was availed on the inputs or capital goods used to manufacture such mobile phones.
- Subsequently, the SC, in the M/s. SRF Limited v. Commissioner of Customs case, had clarified that the condition of non-availment of credit attached to the concessional rate shall be deemed to be fulfilled for an importer.
- Basis the SC order, the petitioner applied for an amendment in the BoE to avail the concessional rate. However, the Revenue rejected the application on the ground that in the absence of an appeal, the assessment order is final.
- The petitioner challenged the order of the adjudicating authority before the HC. The HC set aside the impugned order and allowed the amendment. Therefore, the Revenue filed an appeal before the SC.

## HC observations and order (Writ Petition No. 4793/2021, order dated 12 August 2021):

- **Amendment of BoE an additional remedy:** The HC noted that apart from the remedy of appeal against the assessment order, there is an additional remedy of amending the BoE. However, such amendment is subject to the condition that it is sought on the basis of documentary evidence that existed at the time of clearing, deposit or export of goods. Notably, the Customs Act does not prescribe any time limit to file such an amendment application.
- **The Revenue's stand that only reassessment u/s 128 is a remedy available is untenable:** Referring to the its decision in the case of ITC Ltd., the SC stated that the Revenue's stand - that only reassessment u/s 128 is the remedy available to the petitioner and Section 149 cannot be invoked - is not tenable. It also rejected the Revenue's stand that there is no possibility of getting an order of assessment modified under any other relevant provision and that the petitioner was trying to overcome the limitations stipulated in Section 128.
- **Judgement of the SC is the law of the land:** The HC rejected the contention of the Revenue that the judgement, which entitled the petitioner to avail the concessional rate, had a prospective application. The HC clarified that the SC's judgement could not be treated as 'documentary evidence,' which shall exist at the time of clearing, deposit or the export of goods. Conclusively, a denial of benefit, despite admitting the entitlement of the petitioner, was untenable in law.
- **Impugned order of the respondents violates Articles 14, 19(1)(g), 365 and 300A of the Constitution:** The HC set aside the order of the Revenue on the ground that it had failed in its obligation to determine the duty correctly and caused further injustice by refusing an amendment in the BoE. Opining that the petitioner cannot be penalised for the oversight of the Revenue, the HC allowed the amendment.

## SC observations and Order (SLP(C) No. 2319/2023, Order dated 17 April 2023):

- **Revenue's SLP dismissed:** The SC refused to interfere with the order of the HC and dismissed the appeal.

## Our comments

This is a significant ruling by the SC, wherein it highlights that there is no time limit prescribed u/s 149 of the Customs Act for amendment of the BoE.

On a similar issue earlier, the SC, in the case of Flock (India) Private Limited, had held that it is mandatory to appeal the assessment order before filing a refund claim. This view was also upheld by the SC in the Priya Blue Industries Limited case. Even in the ITC Limited case, the SC had further clarified that a refund claim should be preceded by an amendment or modification in the BoE.

The Bombay HC, in the Dimension Data India Private Limited case, had concluded that it was mandatory on the part of the adjudicating authorities to ascertain the refund claim basis the amendment of the BoE.

# 03 Decoding advance rulings under GST

## Independent contracts do not constitute composite supply – Telangana AAR

**Summary**

The Telangana AAR ruled that the supply of goods and services executed via two separate contracts and invoicing cannot be construed as composite supply in the absence of being 'naturally bundled'. The AAR noted that in the present case, the scope of works undertaken by the applicant under the individual contracts are entirely independent and specific to that contract, and are not associated with another contract. The AAR held that the mere fact that different tasks, i.e., two contracts for which separate invoices were issued by him to his recipient, have been entrusted to the applicant through a single contract agreement, would not make it a 'composite supply' under the CGST Act. .

**Facts of the case**

- PES Engineers Private Limited (the applicant), engaged in the construction of power projects, entered into an agreement with Singarenni Collieries Company Limited (SSCL) for the design, manufacture, testing, delivery, installation and commission of facilities.
- For this purpose, two separate contracts were executed, one for the sale of goods and another one for transportation, transit insurance, unloading, storage, erection, civil works, safety compliance, and other related services that qualify to be works contract services.
- The applicant received a certain advance against the supply of goods under the first contract.
- The applicant contended there are there are two different and divisible contracts within the same contract agreement.
- The issue before the AAR is whether the entire supply involving two separate contracts should be treated as a 'composite supply', with the second contract as the principal supply, i.e., 'works contract', or as separate transactions.

**Telangana AAR observations and ruling [TSAAR Order No.09/2023 dated 13 April 2023]:**

- **Both the contracts are separate and divisible:** The AAR ruled that the two contracts in this case are separate and cannot be clubbed together. The bid/tender is only an offer to the prospective contractors, and the contract is an agreement between two parties. The scope of works/supply undertaken under the individual contracts are entirely independent and specific to that contract and are not associated with any other contract. The contract document itself puts a condition that there are two separate contracts that need to be entered into, one for the supply of service and the other for the supply/sale of goods. Therefore, the AAR concluded that both the contracts are separate and cannot be clubbed together.
- **Supply of goods in first contract is independent of supply in second contract:** The AAR noted that the title of the goods passes on to SCCL when the appellant raises a tax invoice and endorses the dispatch documents, and the title of goods. The AAR further observed that there is evident distinction between the transfer of the property of goods, which is transferred prior to the execution of works contract service under the second contract. Since the supply undertaken under the first contract terminates with making goods available ex-works, accordingly, the supply of goods under the first contract is independent of the supply of services under the second contract.
- **Intention of parties decides the nature of supply**: Referring to the CBIC Circular No. 47/21/2018-GST dated 8 June 2018, the AAR held that the taxability of a supply is to be determined on a case-by-case basis, taking into account the facts and circumstances of each case. The context of supply, the intent of service provider and recipient, method of invoicing, and payment terms are crucial factors while deciding the taxability.
- **The contracts do not constitute composite supply:** The AAR held that for a supply to be considered as a composite supply, its constituent supplies should be integrated with each other that one cannot be supplied in the ordinary course of business without or independent of the other, i.e., 'naturally bundled'. In the present case, the two contracts can be executed independently, as the second contract can be executed by the applicant or any other third party if the recipient desires to. Therefore, both the contracts are not naturally bundled together and hence do not constitute composite supply. Accordingly, the AAR ruled that the applicant is eligible to pay GST liability in respective of the advance received on the supply of goods as per the time of supply, i.e., the date of issue of the invoice.

## Our comments

The apex court, in its landmark judgement, in the case of the State of Madras Vs. Gannon Dunkerley & Company ruled that parties may enter into distinct and separate contracts for the transfer of materials and others for the payment for service. Even though agreements are embodied in a single instrument, the state government has the power to separate them and impose a tax on each of them.

A similar decision was taken in the matter of the State of Karnataka Vs. Pro. Lab by the SC.

The present ruling is in congruence with the above-mentioned rulings and confirms that there can be separate tax liabilities for the sale of goods and rendering of services.

# ITC on sale of motor vehicles modified into 'Ambulance' is not blocked credit – Telangana AAR

### Summary

The Telangana AAR has ruled that the supply of motor vehicles modified into ambulances outside the state shall be an inter-state supply liable to IGST @ 28%. Concurring with the applicant's submission, the Telangana AAR stated that the ITC on the supply of modified vehicles as ambulance shall be eligible since the applicant is in the business of 'further supply of motor vehicles.'

### Facts of the case

- M/s. Raminfo Limited (the applicant) received a work order from the government of Tripura for the supply of 'Mobile common service centres' (Ambulances) for providing health services.
- For executing the work order, the applicant intends to procure Maruti Suzuki EECO vehicles (7-seater) and do necessary modifications to enable vehicle use for the intended purpose, which in turn will be supplied to customers.
- The applicant sought clarification as to classification and the applicable rate of tax and to determine the ITC eligibility on the same.

### Telangana Advance Ruling observations and ruling (Order No. 02/2023 dated 3 April 2023):

- **Supply to Tripura government is an inter-state supply:** The Telangana AAR ruled that the supply of ambulances to the Tripura government will qualify as an inter-state supply and shall be liable to IGST. Moreover, such supply of ambulances would fall under HSN 8703, and accordingly, the rate of tax shall be 28%.
- **Further supply of motor vehicles is not blocked credit:** The AAR held that the applicant is engaged in the business of further supply of motor vehicles, which he purchased from a third party since the 'supply' of motor vehicles under GST includes sale, transfer, exchange, renting or disposal of such vehicles.
- **ITC shall be available:** The Telangana AAR asserted that the credit of such vehicles modified into ambulances shall be allowed, subject to the conditions of availing ITC being fulfilled. Drawing reference from Section 17(5)(a) of the CGST Act, which deals with blocked credit, the Telangana AAR explained that the ITC on the purchase of vehicles meant for further supply shall not be blocked. Accordingly, the ITC shall be available.

## Our comments

The ruling is in line with the Karnataka AAR in the case of M/s. Sai Motors, wherein a similar issue on the classification and eligibility of ITC on modified vehicles is allowed when used for further supply of such motor vehicles.

Although advance ruling is applicable to the applicant and its jurisdictional officer, the principles discussed in the AAR are in line with GST provisions, which can benefit taxpayers who deal in a similar business.

# 04 Expert's column

## Unraveling GST implications on a long-term lease of land

### Introduction

In real estate, the transfer of leasehold rights takes on a captivating significance, nurturing the growth of infrastructure, which stands as one of the fundamental pillars of the Make in India initiative. State development authorities in most states grant long-term lease rights, generally ranging from 30 to 99 years, to developers or industrial undertakings aiming to strengthen the infrastructure for the overall development of business activity in the particular state.

These agreements involve licensing and lease deeds, paving the way for occupiers to enter the land, set up units, and contribute to overall infrastructure growth. The lease deed also permits the lessee to assign his right in the given plot to any other person subject to the prior approval of the state industrial development corporation.

Recently, there has been a significant rise in the assignment of leasehold rights by the occupier or original lessee to the third party for industrial plots owned by state industrial development corporations. Consequently, several notices have been issued levying GST on the consideration received for further transfer of leasehold rights. This article delves into the intriguing facets surrounding GST implications, exploring the provisions, precedents, and issues that emerge when leasehold rights are further assigned.

a. **Initial transfer of leasehold rights by state industrial development corporation:** GST is leviable on the supply[1] of goods or services, encompassing leasing or disposal made or agreed to be made for a consideration in the course or furtherance of business. While the land is explicitly covered outside the GST levy, any license to occupy land or lease out of the building, including the industrial complex, is treated as a supply of service[2].

   Notably, the exemption[3] is granted on the upfront amount payable while granting long-term leases of industrial or infrastructure development plots by the state government industrial development corporations or undertakings or any other entity having 20% or more ownership of the central government, state government, or union territory, subject to the actual user condition. Accordingly, no GST implications would arise at the time of the initial transfer by the state development authorities.


**Contributed by**

**Manoj Mishra**
Partner, Tax
Grant Thornton Bharat LLP

**Shilpa Verma**
Manager, Tax
Grant Thornton Bharat LLP


b. **Subsequent assignment or transfer of leasehold rights by original lessee to third party:** This issue had gained nationwide attention, with GST authorities issuing summons, holding investigations, and pronouncing negative advance rulings on the transfer of leasehold rights. Key developments in this area have caught the spotlight, which are highlighted for ease of understanding:

- **Exemption notification not applicable:** The benefit of exemption is available only in the cases explained above. However, as per the department, subsequent assignments of leasehold rights by other lessees would not be entitled to such exemption and liable to GST. The department heavily relied upon the Tamil Nadu Advance Authority in the matter of M/s India Pistons Limited[4] where the authority held that the activity of parting with the interests in the leasehold rights in favour of someone else for a consideration is taxable under GST. The authority further held that since the applicant does not have absolute authority to transfer leasehold rights to another person subject to approval of SIPCOT, the said activity is not the transfer of leasehold rights.
- **Apart from its taxability, it has also been held that the input tax credit on such transfer is a blocked credit:** The Tamil Nadu AAR[5] and Gujarat AAR[6], while dealing with the aspect of eligibility of ITC in the hands of a third party, held such ITC to be blocked[7], qualifying under the category of the 'construction of immovable property', as without leasehold land rights, the construction of a manufacturing plant cannot come into existence, and these are capitalised in the books of accounts.

1. Section 7 of the CGST Act, 2017
2. Schedule II of CGST Act
3. Sr. No 41 of Notification no. 12/2017 – CT(Rate) dated 28.06.2017
4. 2021 (8) TMI 731 - Authority For Advance Ruling, Tamilnadu
5. 2022 (1) Tmi 749 - Appellate Authority For Advance Ruling, Tamilnadu
6. 2021 (12) Tmi 36 - Authority For Advance Ruling, Gujarat
7. Section 17(5) of CGST Act

However, the authorities have failed to consider the fact that in essence, a transaction between the original lessee and the third party cannot come into effect without the prior approval of the state industrial development authority. The exemption is primarily based on the use of land for its allotted purpose. The development undertakings, instead of an outright sale of land, grants a long-term lease to ensure that the land is used for infrastructure development.

Modification of the original lease deed executed by the state development undertaking is mandatory to ensure that the land is used for the allotted purpose, and in case of any non-compliance, all the parties would be jointly and severally liable to pay GST dues. Accordingly, a view may be taken that since the transfer of the leasehold right requires updating or change in the records of the state development authority, exemption will squarely be applicable in case of subsequent transfers as well.

Moreover, the transfer of leasehold rights, which are subject to certain conditions and approval of the state industrial development undertaking, cannot be construed as an obligation to do an act.

Various representations have been filed before the authorities to reconsider the taxability and disallowance of credit that are pending with the GST Council for consideration.

Apart from the above, it is relevant to mention that taxation related to land is still a state subject[8] and outside the purview of the GST.

The issue that the long-term lease akin to sale is no longer *res no integra*. Based on various decisions from various judicial forums, it is a straightforward legal position that a long-term lease of land is in the nature of a capital transaction qualifying as good as a sale. Reliance can be placed on the following decisions:

- Madras HC in RE: Archaka Sundara Raju Dikshatulu[9] v. Archaka Seshadri Dikshatulu had held that the lease for 99 years, or for a long-term period in consideration of a premium paid down, is as much an alienation as a sale or mortgage. It was further observed that the mere use of the word 'lease' or the fact that a long-term period is fixed would not by itself make the document in lease.
- In a similar matter in RE: In the case of Rama Varma Tambaran v. Raman Nayar[10], it was held that there was no real distinction between mischief of such a transfer in perpetuity and a transfer for the long period of 96 years. Thus, this court took the view that a permanent lease is as much an alienation as a sale.

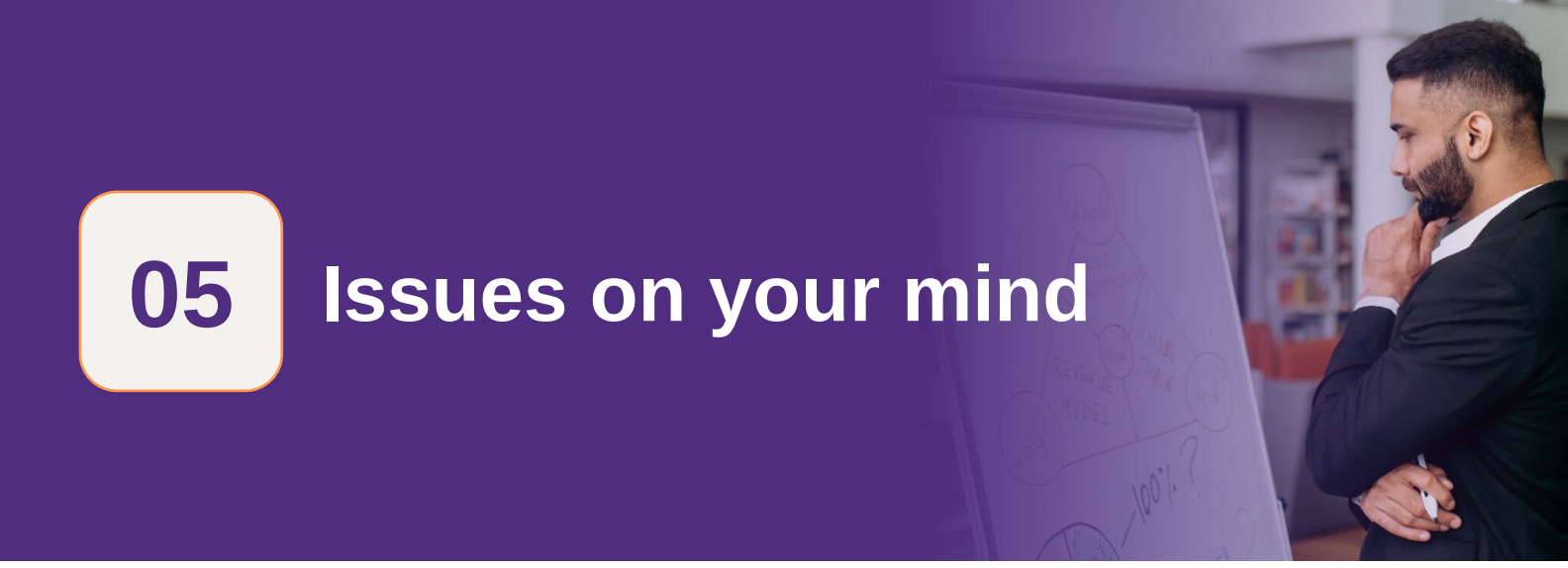
Alternatively, a view taken by the taxpayers is that leasehold rights amount to a benefit arising out of land, and the assignment of leasehold rights is the transfer of immovable property. The term benefit arising out of immovable property is nowhere defined under GST law. However, taking reference from the General Clause Act, 1897, the term 'immovable property' was defined to include land, benefits to arise out of land and things attached to earth or permanently fastened to anything attached to earth. At this juncture, it is pertinent to note that the transfer of the title in an immovable property was specifically excluded from the service definition under the erstwhile service tax regime.

Separately, it is contended that the industry players already comply with stamp duty and direct tax provisions applicable to the transfer of immovable property in such cases, ensuring adherence to relevant tax obligations.

### Concluding remarks

The assignment of leasehold rights sparks contrasting perspectives between the taxpayers and GST authorities. Given the challenges and hardships faced by industry players, particularly MSME, there is an urgent demand by the taxpayers to consider granting exemptions, aligning subsequent assignments of the leasehold right at par with the original allotment. Moreover, denying input tax credit only adds to the overall tax burden, if GST applies to such transactions. Considering the substantial quantum of GST and subsequent input tax credits involved, the GST Council should address these issues suitably, keeping in mind the overall intent and objectives of the law. However, based on the current interpretation of the law, as exemptions are not explicitly granted, taxpayers must carefully evaluate their tax positions.

8. Schedule VII, State List Entry 18
9. (1928) 54 MLJ 76
10. (1882) ILR 5 M 89



# 05 Issues on your mind

## Can the ECL users transfer amounts from a PAN-based wallet to the associated IEC ICEGATE ID-based wallet?

Account merger functionality has been made live at ICEGATE if the duty payment was initiated using PAN, and due to any reason, payment integration failed, and the amount transmitted to a PAN-based wallet. The ECL users can now request to transfer amounts from a PAN-based wallet to the associated IEC ICEGATE ID-based wallet. The procedure is as follows:

- Log on to www.icegate.gov.in and click on the old website.
- Click on 'User Login/SignUp' box under 'Our Services' on the homepage.
- Fill the login details and click on 'Submit'. Once login is successful, the user will be directed to the 'Welcome to ICEGATE' page.
- After clicking on 'Financial Services', the ECL option will be available. Once user clicks on 'ECL', the user will be navigated to the e-cash ledger dashboard where the 'Wallet Merger' button will be available on screen.
- Click on 'Wallet Merger' and fill the details – the PAN Number from which the amount will be transferred to the current account, confirm the PAN number and the amount to be transferred.
- The user needs to accept the declaration by selecting the checkbox mentioned in the form.
- Once the form is submitted successfully, the request number will be generated.
- The amount will be transferred within 24 hours from the PAN-based source wallet to ICEGATE ID/IEC-based destination wallet.

## What is the procedure for SEZ registration on ICEGATE?

Registration facility for SEZ units has been provisioned on the ICEGATE portal in order to support the migration of custom processes in SEZ to the CBIC. Through this facility, SEZ units can submit the registration request on the ICEGATE portal after providing the required details. After approval of SEZ officers on the ICEGATE portal and system validation, SEZ units shall receive ICEGATE user ID/password, warehouse code and bond number. However, currently SEZ registration on ICEGATE has been enabled for GIFT City SEZ units only.

**Steps for registration are as under**:

- Visit the ICEGATE portal - https://old.icegate.gov.in/ - and scroll down to 'Our Services' and click on the link for 'SEZ Unit Registration' provided under 'Our Services'.
- The SEZ unit will be redirected to a new page, where they need to enter IEC and GSTIN and click on 'View Email ID/ Mobile number'.
- Once the SEZ unit enters valid and correct IEC and GSTIN, the email ID and mobile number of the user registered at the DGFT and GSTN shall be displayed to the SEZ unit.
- The SEZ unit needs to select one record for the purpose of OTP-based validation on email and mobile number, and click on 'Generate OTP'.
- The SEZ unit shall enter the OTPs sent on both email IDs and mobile number for verification and click on 'Verify OTP'.
- If the OTP is verified successfully, the SEZ unit shall be asked to complete the registration. The SEZ unit shall then click on 'Proceed to Registration'.
- The SEZ unit will be redirected to the SEZ registration form. The entity name, entity PAN, mobile number, Email ID and GSTIN number are pre-populated and non-editable fields. The remaining fields are to be filled by the SEZ unit.
- Once all details are filled, the SEZ user shall click on the 'Submit' button. Registration request will be submitted for the approval of the aligned SEZ officer at the port and subsequent system validation of provided details at the Customs end. A reference number is generated, which is displayed on the screen, and also shared with the SEZ unit on email.
- When the request is approved by the SEZ officer and system validation is done at the Customs end, the SEZ unit shall be notified of the successful registration through email and SMS.
- If the SEZ registration request is rejected by the SEZ officer or system validation fails for the provided details, SEZ units shall be notified of the rejection. In this case, a fresh registration shall be done by the SEZ units.

## How can validity of an IRN generated by the new IRP be checked?

The validity of an IRN can be confirmed by utilising the 'Search IRN' function available on the new e-Invoice FO portal at: https://einvoice.gst.gov.in.

## Is it permissible to register an invoice through more than one IRPs?

Taxpayers have the flexibility to register on any of the six IRPs, as they might find convenient. However, they should report an invoice for IRN generation through another IRP only if they do not get the IRN number through the IRP through whom they report for the first time.

## What steps should be followed to onboard a new IRP?

To begin the process of onboarding a new IRP for e-Invoice, it is necessary to register and establish an individual account with the desired IRP. The registration process includes the verification of your mobile number and email ID via OTP. The process is free of any charges.

# 06 Important developments under direct taxes


## MoF notifies India-Chile DTAA and protocol

The MoF has notified DTAA and protocol between India and the Republic of Chile for elimination of double taxation, prevention of fiscal evasion and tax avoidance.

The India-Chile DTAA and protocol were signed on 9 May 2020, with the date of entry into force being 19 October 2022.

As per Paragraph 2(a) of Article 30 of the India-Chile DTAA, this DTAA would be applicable in India for the income derived in FY 2023-24 and subsequent FYs.

[Notification No. 24 of 2023 dated 3 May 2023]

## CBDT notifies threshold for interest on Mahila Samman Savings Certificate, 2023

While presenting the Finance Budget 2023, the Finance Minister had announced a one-time small savings scheme for women. Subsequently, the CG notified the Mahila Samman Savings Certificate, 2023, in March 2023.

Under this scheme, a maximum amount of INR 2 lakhs can be deposited for a tenor of 2 years and interest at the rate of 7.5% p.a would be provided with partial withdrawal option.

The CBDT has now notified that tax would be deducted under Section 194A of the IT Act on interest paid / payable to a resident under this scheme, if the interest exceeds INR 40,000 in a FY.

[Notification No. G.S.R. 237(E) dated 31 March 2023, Notification No. 27 of 2023 dated 16 May 2023]

## TCS on remittances under LRS

In order to bring spends on international debit / credit cards outside India within the ambit of LRS, the MoF omitted Rule 7 of the Foreign Exchange Management (Current Account Transactions) Rules, 2000. Hence, such transactions will be subject to TCS and the overall cap of USD 2,50,000 under LRS.

Further, the MoF has released FAQs regarding TCS on foreign remittance through the LRS. However, the MoF has clarified that payments made by individuals using their international debit / credit cards up to INR 7 lakhs per FY will be excluded from LRS limits. Accordingly, TCS would not apply on such transactions. It also clarified that with respect to TCS, the beneficial treatment for education and health payments will continue to apply.

[Notification No G.S.R. 369(E) dated 16 May 2023, FAQs dated 18 May 2023 and MoF clarification dated 19 May 2023]

# 07 Glossary

| | |
|---|---|
| **AA** | Assessing Authority |
| **AAI** | Airports Authority of India |
| **AAR** | Authority for Advance Ruling |
| **AATO** | Aggregate Annual Turnover |
| **AEO** | Authorised Economic Operator |
| **AO** | Assessing officer |
| **API** | Application Programming Interface |
| **BCD** | Basic Customs Duty |
| **BoE** | Bill of Entry |
| **BTP** | Biotechnology Parks |
| **CBDT** | Central Board of Direct Taxes |
| **CBEC** | Central Board of Excise and Customs |
| **CBIC** | Central Board of Indirect Taxes and Customs |
| **CEA** | The Central Excise Act, 1956 |
| **CEO** | Chief Executive Officer |
| **CESTAT** | Customs, Excise and Service Tax Appellate Tribunal |
| **CFO** | Chief Financial Officer |
| **CG** | Central Government |
| **CGST** | Central Goods and Services Tax |
| **CGST Act** | The Central Goods and Services Tax Act, 2017 |
| **CGST Rules** | The Central Goods and Services Tax Rules, 2017 |
| **Constitution** | The Constitution of India |
| **CPSE** | Central Public Sector Enterprise |
| **CST Act** | The Central Sales Tax Act, 1956 |
| **Customs Tariff Act** | The Customs Tariff Act, 1975 |
| **Customs Act** | The Customs Act, 1962 |
| **CVD** | Countervailing Duty |
| **DG** | Directorate General of Systems & Data Management |
| **DGARM** | Directorate General of Analytics and Risk Management |
| **DGFT** | Directorate General of Foreign Trade |
| **DRT Act** | The Recovery of Debts due to Banks and Financial Institutions Act, 1993 |
| **DTA** | Domestic Tariff Area |
| **DTAA** | Double Taxation of Avoidance Agreement |
| **ECL** | Electronic Cash Ledger |
| **ECRL** | Electronic Credit Ledger |
| **EHTP** | Electronics Hardware Technology Park |
| **EO** | Export Obligation |

| | |
|---|---|
| **EODC** | Export Obligation Discharge Certificate |
| **EOU** | Export Oriented Unit |
| **EPCG** | Export Promotion Capital Goods Scheme |
| **FAQs** | Frequently Asked Questions |
| **Finance Act** | The Finance Act, 1994 |
| **FTP** | Foreign Trade Policy 2023 |
| **FY** | Financial Year |
| **GIFT City** | Gujarat International Finance Tec-City |
| **GST** | Goods and Services Tax |
| **GSTIN** | Goods and Services Tax Network |
| **GTA** | Goods Transport Agency |
| **Gujarat ST Act** | The Gujarat Sales Tax Act, 1969 |
| **HBP** | Handbook of Procedures 2023 |
| **HC** | High Court |
| **HPGST Act** | The Himachal Pradesh General Sales Tax Act, 1968 |
| **HPLR Act** | The Himachal Pradesh Land Revenue Act, 1954 |
| **HSN** | Harmonised System of Nomenclature |
| **ICEGATE** | Indian Customs Electronic Data Interchange Gateway |
| **IEC** | Import Export Code |
| **IES** | Interest Equalisation Scheme |
| **IGST Act** | The Integrated Goods and Services Tax Act, 2017 |
| **IGST** | Integrated Goods and Services Tax |
| **INR** | Indian Rupee |
| **IRN** | Invoice Reference Number |
| **IRP** | Invoice Registration Portal |
| **IT Act** | The Income tax Act, 1961 |
| **ITC** | Input tax credit |
| **JTO** | jurisdictional tax officer |
| **KYC** | Know your customer |
| **LRS** | Liberalised Remittance Scheme |
| **MIS** | Management Information Systems |
| **MoF** | Ministry of Finance |
| **MSME** | Micro, Small and Medium Enterprises |
| **OMD** | Operation, Maintenance and Development |
| **OTP** | One Time Password |
| **PLI** | Performance Linked Incentive |
| **PO** | Proper Officer |
| **PSF** | Passenger Service Fee |

| | |
|---|---|
| **RAS** | Regional Authorities |
| **RBI** | Reserve Bank of India |
| **RoDTEP** | Remission of Duties and Taxes in Exported Products Scheme |
| **RTB** | Rajasthan Tax Board |
| **SAAS** | Special Advance Authorization Scheme |
| **SAD** | Special Additional Duty |
| **SARFAESI Act** | The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 |
| **SC** | Supreme Court |
| **SCN** | Show cause notice |
| **SEZ** | Special Economic Zone |
| **SOP** | Standard Operating Procedure |
| **ST** | Service Tax |
| **STP** | Software Technology Park |
| **TCS** | Tax Collected at Source |
| **TDS** | Tax Deducted at Source |
| **UDF** | User Development Fee |
| **USFF** | Ultra-Small Form Factor |
| **VC** | Video Conference |
| **WB** | West Bengal |

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