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GST Compendium

A monthly guide

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Editor's Note

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The online money gaming industry has been in the limelight ever since the GST Council recommended various changes. So far, GST demand notices worth INR 1 lakh crore have been served to Indian online gaming firms by the GST authorities. A significant development to note is that the Bombay High Court (HC) has granted relief to Delta Corp Limited and its subsidiaries and restrained the GST department from passing a final order against the GST demand notices of INR 628 crores. Delta Corp Limited has also challenged the constitutional validity and legality of the GST valuation rules in the case of lottery, betting, gambling, and horse racing before the Sikkim HC, wherein the HC has instructed the department to maintain the status quo.

The GST implications in promotional schemes have been one of the most debatable issues, with various conflicting rulings and interpretations. Considering the upcoming festive season, it might be relevant for businesses to note that the Telangana Authority for Advance Ruling (AAR) has ruled that the supply of gold coins and white goods to the dealers/stockists upon attaining a specified sales target under the sales promotion scheme is taxable as supply of goods. Accordingly, the input tax credit for such promotional material shall be eligible.

On the Customs front, the Supreme Court (SC) has held that the undervaluation needs to be proved based on valid evidence by the Revenue, sans which the declared price would be final. The SC opined that the invoice price could not be rejected without any cogent reason.

Earlier, the government had notified that importing laptops, tablets, all-in-one personal computers, and ultra-small computers shall require a license effective from 1 November 2023. In this regard, the government has clarified that the import restrictions shall not apply to imports by the SEZ/EOUs/EHTP/STPI/BTP for captive consumption. This is a much-awaited clarification and will provide the required clarity to the trade.

In this edition, our experts have shared their views on the recent developments under GST in the online gaming industry.

On the direct tax front, the Central Board of Direct Taxes (CBDT) has amended the valuation rules about equity shares/compulsorily convertible preference shares for expanded angel tax provisions. The CBDT has also issued a clarification regarding the assessment of certain recognised start-ups.

I hope you will find this edition an interesting read.

Greetings for the upcoming festive season!

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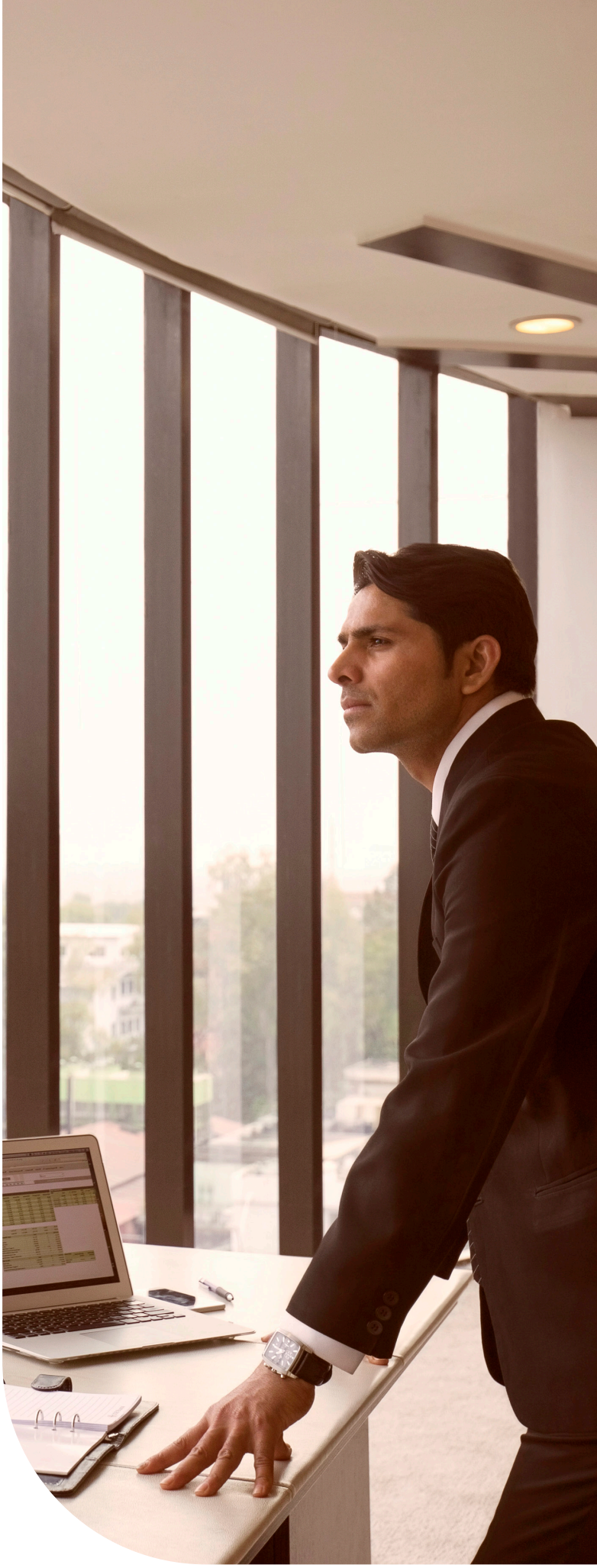

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Important amendments/ updates

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

52nd GST Council Meeting Updates

In furtherance to the recommendations of the 52nd GST Council meeting, the CBIC has issued the following notifications to give effect to the said recommendations. These notifications are effective from 20 October 2023.

*The consequent IGST notifications have also been issued to give similar effect under the IGST Act.

Notification No. & Date	Particulars	Our comments
12/2023-CT(Rate) dated 19 October 2023 *(15/2023-IT(Rate) dated 19 October 2023)	An amendment in the rate notification for services, particularly in case of: • **Passenger transport services (where the cost of fuel is included in the consideration)** – An additional condition has been inserted to restrict the ITC to the tune of 2.5% where the said services are procured from the other provider who is in the same line of business and charges a higher tax rate of 6%. • **Renting of motor vehicle (where the cost of fuel is included in the consideration)** - An additional condition has been inserted to restrict the ITC to the tune of 2.5% where the said services are procured from the other provider in the same line of business and charges a higher tax rate of 6%.	The ITC has been restricted to the tune of 5% when such services are availed by the supplier engaged in the same line of business. It will have an impact on the working capital requirements of the taxpayer.

Notification No. & Date	Particulars	Our comments
13/2023-CT(Rate) dated 19 October 2023 *(16/2023-IT(Rate) dated 19 October 2023)	• The following services provided to a governmental authority has been exempted from GST: – Water supply – Public health – Sanitation conservancy – Solid waste management – Slum improvement and upgradation • Services of/by Indian Railways have been removed from GST exemptions by way of exclusion to bring into the tax net.	These services are part of the functions entrusted to panchayat/ municipalities under Article 243G/ 243W.
14/2023-CT(Rate) dated 19 October 2023 *(17/2023-IT(Rate) dated 19 October 2023)	• An amendment in the RCM notification to exclude the services provided by Indian Railways.	Supply of all goods and services by Indian Railways will now be taxable under the forward charge mechanism. This will enable them to avail ITC.
15/2023-CT(Rate) dated 19 October 2023 *(18/2023-IT(Rate) dated 19 October 2023)	• An amendment in the notification restricting the refund of the unutilised ITC to disallow refund in case of services w.r.t. construction of a complex, building intended for sale either wholly or partly, where the amount charged from the recipient of service includes the value of land or undivided share of land, except where the entire consideration has been received after the issuance of a completion certificate or after its first occupation, whichever is earlier.	The CBIC has now allowed the refund of the accumulated ITC on construction of civil structures, roads, bridges, etc., which are not intended for sale to the buyer by substituting the notification.
16/2023-CT(Rate) dated 19 October 2023 *(19/2023-IT(Rate) dated 19 October 2023)	An amendment in the notification relating to the liability to pay tax in case of supplies through the ECO. • 'Transportation of passengers by an omnibus' – **Supplier of services is a company** The company is liable to pay tax on such supply of services through the ECO. – **Supplier of services is other than a company** The ECO shall be liable to pay GST when such services are provided through the ECO.	The bus operators registered as a company were at a loss of ITC when supplying services through the ECO. With this amendment, liability would arise in the hand of such large bus operators, and consequently, the ITC would be eligible.
17/2023-CT(Rate) dated 19 October 2023 *(20/2023-IT(Rate) dated 19 October 2023)	An amendment in the rate notification to notify the following: • Molasses and food preparation of millet flour, in powder form, containing at least 70% millets by weight, pre-packaged and labelled, shall be taxable @ 2.5%. • The spirits for industrial use shall be taxable @ 9%. New HSN: 2207 10 12	Earlier, molasses were taxed at 28% and millet-based food preparations were under the 18% bracket. The reduction in the rate of tax will aid in promoting their demand. Further, the taxability on ENA for industrial use has been clarified to put to rest a long-pending litigation.
18/2023-CT(Rate) dated 19 October 2023 *(21/2023-IT(Rate) dated 19 October 2023)	• Food preparation of millet flour, in powder form, containing at least 70% millets by weight, other than pre-packaged and labelled, have been exempted from GST.	

Notification No. & Date	Particulars	Our comments
19/2023-CT(Rate) dated 19 October 2023 *(22/2023-IT(Rate) dated 19 October 2023)	• An amendment in the RCM notification with respect to goods to exclude 'used vehicles, seized and confiscated goods, old and used goods, waste and scrap' supplied by Indian Railways under the RCM.	Supply of all goods and services by Indian Railways will now be taxed under the forward charge mechanism. This will enable them to avail the ITC.
20/2023-CT(Rate) dated 19 October 2023 *(23/2023-IT(Rate) dated 19 October 2023)	• The notified refund of unutilised ITC shall not be available for 'imitation zari thread or yarn made out of metallised polyester film/plastic film'.	The rate on zari thread or yarn was reduced from 12% to 5% based on recommendations of the 50th council meeting, resulting in the accumulation of the ITC. By way of notification, refund has been restricted on polyester/plastic film.
60/2023-Customs dated 19 October 2023	• Conditional IGST exemption granted to a foreign-going vessel converted for a coastal run, subject to its reconversion to a foreign-going vessel within six months.	At present, foreign-going vessels are liable to pay 5% IGST on the value of the vessel if it converts to coastal run. This exemption will provide relief to taxpayers and will help in promoting tourism.

The CBIC has notified the Central Goods and Services Tax (Fourth Amendment Rules), 2023. These amended rules will come into effect from the date of their publication in the official gazette.

The amendments introduced have been summarised below for ready reference:

- **Valuation of corporate guarantee:** An amendment in Rule 28 of the CGST Rules to prescribe the value of service by way of corporate guarantee provided to any banking company or financial institution on behalf of the related persons shall be higher of:
  - One percent (1%) of the amount of such corporate guarantee; or
  - Actual consideration

  Our comments: The contentious issue regarding the applicability of GST on corporate guarantees has now been addressed by the GST Council. Consequently, corporate guarantees will be valued at the greater of either 1% of the guarantee amount or the actual consideration received. Although this amendment would be effective prospectively, it will be intriguing to watch out if the taxpayers can benefit from the second proviso to Rule 28 for the past periods, considering the value stated in the invoice as the open market value for valuation purposes.

- **Demand and recovery:** An amendment in Rule 142(3) of the CGST Rules to prescribe that the proper officer shall issue an intimation in FORM GST DRC 05, communicating the conclusion of proceedings where taxpayers voluntary make the requisite payment of tax dues.

  Our comments: This amendment aligns the prescribed Form DRC-05, which states the 'Intimation of conclusion of proceedings' with the rule, removing the inconsistencies

- **Provisional attachment of property:** To introduce a time limit for orders related to the attachment of property. Such orders will automatically cease to be in effect after one year from the date of their issuance. This change is also reflected in the relevant form.

- **Amendments in GST forms:**
  - One Person Company (OPC) has been added as a constitution of business as a registration type in Part B of FORM GST REG 01.
  - The order of cancellation of TDS/TCS registration in FORM REG 08 has been substituted.
  - Statement for TCS in FORM GSTR 8 has been revised.
  - Eligibility criteria for applying for enrolment as GST practitioner has been revised.

    Our comments: These amendments aim to streamline the compliance process.

(Notification no 52/2023 – CT(Rate) dated 26 October 2023)

Refund in case of supplies made to SEZ units/developers with payment of IGST:

- Section 16 of the IGST Act, which deals with the provisions relating to zero-rated supply, was amended with effect from 1 October 2023. Thereafter, the option for making zero-rated supplies with the payment of IGST and claiming refund thereof was restricted only to the notified class of persons or categories of services. The CBIC, vide Notification 01/2023 - Integrated Tax (IT) dated 31 July 2023, notified that all export of goods or services shall be allowed to be made with the payment of tax except pan masala and tobacco products. However, the notification did not explicitly covered supplies made to SEZ units/developers.
- To remove this anomaly and align with the recommendations of the GST Council in its 52nd Council Meeting, the CBIC has now substituted the aforementioned principal notification to allow all suppliers supplying goods or services to a SEZ unit or the developer undertaking the authorised operations to make such supply on the payment of IGST, and subsequently, claim refund of the IGST so paid, except pan masala and tobacco products.
- This amendment shall be deemed to have been in effect from 1 October 2023.

  (Notification no 52/2023 – CT(Rate) dated 26 October 2023)

CBIC issues clarifications pursuant to the 52nd GST council meeting: The CBIC has issued a series of circulars aimed at providing clarity on various tax-related matters.

Circular No.	Issue	Clarifications	Our comments
Circular No. 204/16/2023-GST dated 27 October 2023: Taxability of personal and corporate guarantee	Taxability of personal guarantee by the director of a company to the bank/ financial institutions without any consideration	• Personal guarantees provided by directors constitute as supply of service under GST provisions, even if provided without consideration. The value is determined using Rule 28 of CGST rules, based on OMV, unless specific circumstances apply. • The RBI issued guidelines for obtaining personal guarantee of promoters, directors and other managerial personnel of the borrowing concerns vide Circular No. RBI/2021-22/121 dated 9 November 2021. It mandated that no consideration by way of commission, brokerage fees or any other form, can be paid to the director by the company, directly or indirectly, in lieu of providing personal guarantee to the bank. • Accordingly, such supply/transaction would not have any OMV. Therefore, the OMV of the said transaction/supply may be treated as zero, and therefore, the taxable value of such supply may be treated as zero. **Exception:** • If the director is no longer part of management or if remuneration is provided to the guarantor, in such case the taxable value would be the remuneration or consideration provided by the company, directly or indirectly.	The CBIC has brought closure to the long-standing matter of taxing corporate and personal guarantees. In cases where taxpayers have already settled their tax obligations related to personal guarantees provided by directors, they may explore the possibility of seeking a refund, depending on specific facts. With respect to corporate guarantees, while there will be consistent approach on taxability for the future periods, the disputes concerning the previous periods may still persist until decided by the higher judicial forums.
	Taxability of corporate guarantee by a person on behalf of another related person, or by the holding company to its subsidiary company, to the bank/financial institutions, even when made without any consideration	• Corporate guarantees provided between related companies or by the holding company on behalf of its subsidiary company to a bank or financial institution, even without consideration, constitutes as supply of service between related parties. • The value of such services shall be determined in terms of new sub rule (2) in Rule 28 of the CGST Rules, which prescribe higher of either 1% of the guarantee amount or actual consideration for the purpose of valuation. • The taxable value for services related to corporate guarantees will be determined consistently, regardless of the recipient's ability to claim full ITC or not. • The new rule will not apply to personal guarantees provided by directors to banks or financial institutions.	

Circular No.	Issue	Clarifications	Our comments
Circular No. 203/15/2023-GST dated 27 October 2023 : Determination of POS	POS of supply of service of transportation of goods, including through mail and courier	• It is clarified that the POS of supply of services of transportation of goods where the location of the supplier of services or recipient is outside India will be as per the default rules specified in Section 13(2) of the IGST Act which are as under: – Where the location of the recipient of service is available - location of recipient of service – Where the location of the recipient of service is not available - location of supplier of service	Section 13(9) of the IGST Act, which governed the POS of the supply of service of transportation of goods other than through mail and courier was omitted w.e.f. 1 October 2023. Accordingly, doubts were casted whether the POS of such services would be determined under default provisions under Section 13(2) of the IGST Act or whether it will be determined under Section 13(3) of the IGST Act same as performance-based services. Therefore, this clarification comes as a respite for the taxpayers.
Circular No. 203/15/2023-GST dated 27 October 2023: Determination of POS	POS of supply of services in advertising	The advertising company enters into a different arrangement either for renting of space or a different gamut of activities. The POS in such cases is clarified as below: • The POS of supply (sale) of space/right to use space on the hoarding/structure (immoveable property) by the vendor to the client/advertising company for displaying advertising - location at which the immoveable property is located [Section 12(3)(a) of the IGST Act]. • The POS of supply of services where the vendor is responsible to arrange the hoardings/billboards and display the advertisement of the company, and the company does not occupy the space or structure. • Where the recipient (company) is a registered person - location of recipient (company) • Where the recipient (company) is not a registered person: the location of the recipient (company) where the address on record exists or location of the vendor in other cases [Section 12(2) of the IGST Act].	This issue was also an area of concern, dispute and litigation as there was a prolonged confusion on whether the hoarding/ structure erected on the land should be considered as immovable structure or fixture, as it has been embedded in earth. Accordingly, clarification in this regard was also necessitated.

Circular No.	Issue	Clarifications	Our comments
	POS of supply of co-location services	• Co-location is a data centre facility in which company rents space for its own servers and other computing hardware, along with various other bundled services related to hosting and information technology infrastructure. A. POS where the company avails the all-inclusive co-location services: – Where the recipient is a registered person: location of recipient – Where the recipient is not a registered person: location of recipient where the address on record exists or location of the supplier of services in other cases [Section 12(2) of the IGST Act] B. POS where the agreement between the supplier and recipient is limited to providing physical space on rent, along with basic infrastructure, without components of hosting and information technology (IT) infrastructure provisioning services and the obligation of upkeep, running, monitoring and surveillance, etc., of the servers and related hardware is on the recipient – location at which the immovable property is located [Section 12(3)(a) of the IGST Act]	Co-location services comprises of hosting and IT infrastructure services and the same are not limited to providing the immovable property. Therefore, by way of this clarification, it has been explained that co-location services cannot be considered at par with providing merely immovable property, unless the agreement is limited only to providing such immovable property.
Circular No. 202/14/2023-GST dated 27 October 2023	Export remittances received in special INR Vostro account	• For a service to be qualified as 'export of services', there are prescribed conditions that should be satisfied. One of the conditions specifies that the payment for such service shall be made in convertible foreign exchange or Indian rupees permitted by the RBI. • The RBI had clarified vide the RBI's AP (DIR series) Circular No. 10 dated 11 July 2022, and as also specified in the Foreign Trade Policy 2023, that the export proceeds payable to Indian exporters can be paid through special INR Vostro accounts of the correspondent bank of the partner trading country. • In alignment with the above, it has been clarified that the export proceeds received in INR from the special rupee Vostro account of the correspondent banks of the partner trading country, shall be considered as due fulfilment of the condition, subject to conditions/restrictions mentioned in the FTP or the RBI circulars and in accordance with the requisite permissions/ approvals.	To facilitate cross-border transactions, the special Vostro account allows a foreign bank to maintain an INR account with a corresponding Indian bank for trade settlement. While there were guidelines issued by the RBI, in the absence of explicit clarification, exporters were struggling to get their export refund sanctioned before GST authorities. This clarification will resolve all refund-related disputes and facilitate trade in INR via special Vostro account.

Finance Ministry notifies rules for appointment and conditions of service of president and members in GSTAT

The Ministry of Finance has notified the Goods and Services Tax Appellate Tribunal (Appointment and conditions of service of president and members) Rules, 2023. These rules inter alia prescribe the procedure for the appointment/removal, salary and allowances and powers, and shall apply to the president, judicial member, technical member (Centre) and technical member (state) of the Principal Bench and State Bench of the GSTAT. These rules shall be effective from the date of their publication in the official gazette.

Earlier, the central government, in furtherance of the recommendations of the GST Council, vide its 50th council meeting, had constituted 31 benches of the GST Tribunal for 36 states w.e.f. 14 September 2023.

(Notification No. G.S.R.793(E) dated 25 October 2023)

GSTN issues advisory to facilitate recent amendments made for overseas supplier of 'online money gaming' or OIDAR or both

The CBIC, vide Notification No. 51/2023-Central Tax dated 29 September 2023, mandated the GST registration requirement for the overseas supplier providing online money gaming services in India.

In this regard, GSTN has issued an advisory to give effect to the aforementioned amendment by way of fresh registration/ amendment of the existing registration on the GSTN portal. While GSTN is in process of developing new functionality for the same, a workaround is suggested with respect to registration and return requirements as below:

Registration-related changes (GST REG-10):

- The taxpayer is required to submit additional information with respect to the 'type of supply' by selecting either of following options:

  a. Supply of online money gaming
  b. Supply of OIDAR
  c. Both (a) and (b) above

- Existing OIDAR services providers are also required to amend their registrations by furnishing the aforementioned information.
- Online money gaming suppliers are required to upload additional details, as specified in the form.

Return-related changes (GSTR-5A):

- Online money gaming suppliers are required to furnish the relevant details in Table 5D and 5E. However, the functionality for such tables is still under development.
- As an interim measure, it is advised to furnish such details in existing Table 5 and 5A.

GSTN issues advisory on online compliance pertaining to difference in ITC available in Form GSTR-2B and ITC claimed in Form GSTR-3B/3BQ

Earlier, the CBIC introduced Rule 88B in the CGST Rules, specifying the manner of dealing with the differences in the ITC available in Form GSTR-2B and the ITC availed in Form GSTR-3B, vide Notification No. 38/2023 – Central Tax dated 4 August 2023. In this respect, the GSTN has introduced an online functionality enabling the taxpayers to explain the differences in the ITC.

Below are the key features of the functionality -

- The functionality compares the ITC available in Form GSTR-2B with the ITC claimed as per GSTR-3B/3BQ for each return period.
- If the claimed ITC exceeds the ITC available as per GSTR-2B by predefined limits, the taxpayer will receive an intimation in Part A of Form DRC-01C.
- Upon receipt of the intimation, the taxpayers must file a response in Part B of Form DRC-01C. The taxpayer has the option of providing details of the payment made to resolve the difference using Form DRC-03 or provide an explanation for the difference using the options available, or even a combination of both options and filing it.
- If a taxpayer fails to respond to an intimation for any tax period, it will be unable to file Form GSTR-1/IFF for the subsequent period. Hence, the timely filing of Form DRC-01C Part B is required to avoid interruptions in filing.
- Form DRC-01C is applicable to various taxpayers, including regular taxpayers (including SEZ units and SEZ developers), casual taxpayers, and taxpayers who have opted out of the composition scheme.
- For quarterly filers (QRMP), Form DRC-01C will be generated upon the filing of the quarterly GSTR-3B. On the other hand, monthly filers will receive Form DRC-01C after filing the monthly GSTR-3B. Therefore, depending on the frequency of filing GSTR-3B, Form DRC-01C Part B can be filed.
- The taxpayer can navigate the intimation on the GST portal using the below path - Services > Returns > Return Compliance > ITC Mismatch DRC-01C.
- The GSTN has issued a detailed manual in this regard.

GSTN introduces enrolment facility for unregistered persons supplying goods through ECO

Recently, vide Notification No. 34/2023 dated 31 July 2023, the CBIC exempted the persons supplying goods through the ECO from obtaining mandatory registration, subject to the satisfaction of the prescribed conditions listed below:

a) Such person is engaged in the supply of goods through the ECO and such supplies are made only in one state/UT,
b) Such person does not make any inter-state supply,
c) The said person has a PAN under the IT Act,
d) Such person shall declare his PAN (which shall be validated) on the common portal (i.e., GST portal), along with the address of his place of business and the name of the state/UT or union territory before making such supplies,
e) Such person has been granted an enrolment number on the common portal upon validation of his PAN, before which he shall not make any such supply through any ECO.

In response to the aforementioned requirement, GSTN has developed the functionality for enrolment of unregistered, persons and the same is available on the portal. Such unregistered persons can obtain the enrolment number by following the steps mentioned below:

Visit the GST portal (https://www.gst.gov.in/) > Select 'user services' tab and choose 'Generate User ID for unregistered applicant' > Click 'Yes' on warning window to continue > Check the 'To apply as a supplier to e commerce operator' box > proceed to fill the form > validate PAN and generate enrolment number

E-invoice JSON download functionality live on the GST e-invoice portal

The e-Invoice JSON download functionality is now live on the GST e-invoice portal, which allows to download all e-invoices reported across all six IRPs. The e-Invoice JSON files can be downloaded for up to six months from the date of IRN generation.

The generated and received e-invoices can be downloaded in the JSON format by following the below steps:

Step 1: Log in - Visit the e-invoice portal at https://einvoice.gst.gov.in and log in using the GST portal credentials.

Step 2: Navigate to download e-invoice JSONs section - On the main portal page, find the 'Download E-Invoice JSONs' section. It has two tabs – 'Generated' (for e-invoices generated) and 'Received' (for e-invoices received).

Step 3: Search for e-invoice (By IRN) - A specific e-invoice can be searched by clicking the 'By IRN' tab and enter the IRN or pick the FY, document type, and document number.

Step 4: View and download - The signed e-invoice can be downloaded by clicking 'Download PDF' (available for a single active IRN) or choose 'Download E-Invoice (JSON)' for a JSON format download.

Step 5: Bulk download - To download e-invoices in bulk for a specific period, use the 'For Period' tab, select the FY and month and click 'Download E-Invoice (JSON)' to get all e-invoices in the JSON format for that month.

Step 6: Excel format e-invoice list (by period) - To get an e-invoice list in Excel format for a specific period, visit the 'List of IRNs' tab, select the FY and month, and click 'Donwload E-Invoice (Excel).'

Step 7: Downloading history - The requested e-invoices will remain in downloading history for two days only.

Facility for online application under the Goa Amnesty Scheme

The government of Goa had notified The Goa (Recovery of Arrears of Tax, Interest, Penalty, Other Dues through Settlement) Act, 2023, for settling outstanding tax dues pertaining to the period before the introduction of the GST on 8 September 2023.

The facility for filing an online application in Form I for settlement under the scheme is made active with effect from 8 October 2023 on the notified portal **SETTLEMENT SCHEME 2023 - SETTLEMENT SCHEME 2023 (goagst.gov.in).** The application under the scheme can be filed by the dealer/applicant for settling dues for the period of assessments up to 30 June 2017.

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

DGFT notifies additional changes in import policy for import of computers, laptops, tablets covered under HSN 8471 of the ITC(HS) 2022

With effect from 3 August 2023, the DGFT has amended the import policy relating to Chapter 84 of the Schedule I (Import Policy) of ITC (HS) 2022 by restricting the import of laptops, tablets, all-in-one personal computers, ultra small computers, etc., covered under the specified sub-headings of HSN 8471, i.e., their imports will henceforth require a license. However, based on representation from trade, the applicability of such restriction was extended till 31 October 2023. Accordingly, with effect from 1 November 2023, a valid licence for restricted imports shall be required.

In this regard, the DGFT has now notified additional changes in the import policy conditions for these goods and clarified the implementation of import management system for IT hardware.

Additional changes and clarifications:

- **Import by DTA from SEZ:** IT hardware restricted for import manufactured in a SEZ can be cleared to a DTA without an authorisation on the payment of applicable duties, if any. However, if these goods are subject to activities such as re-packing, labelling, refurbishing, testing and calibration alone in the SEZ, the same will not be considered as manufacturing and will not be exempted from the authorisation requirement for domestic clearance.
- **Exemption in certain cases:** Private entities are exempted from authorisation requirement on the import of the said IT hardware for supply to the CG or agencies, undertakings owned and controlled by the CG, for defence or security purposes, or the state government for security purposes. However, to avail exemption, these entities must furnish an end-use certificate to the customs authorities issued by the concerned government entity placing the order.
- **Exemption to imports for repair, return or replacement:** Import for repair and/or return and/or replacement of IT hardware sold earlier as well as re-import of such items repaired on a self-certification basis shall be exempt from authorisation requirement.
- **Exemption to SEZ/EOUs/EHTP/STPI/BTP:** SEZ units and EOUs/EHTP/STPI/BTP are not required to obtain a 'restricted import authorisation' for the import of IT hardware restricted for captive consumption.
- **No restriction on spares and parts:** No import restrictions on spares, parts, assemblies, sub-assemblies, components, and other inputs necessary for IT hardware devices.
- **Exemption for capital goods:** Notified IT hardware items essential for capital goods are exempt from import licensing requirements. For instance, laptops/tablets accompanying machinery, such as MRI machines, CNC machines, UAVs, etc., are examples of allowed exemptions. However, if servers or laptops, etc., themselves are the primary capital goods, this exemption does not apply.

The importers can apply for multiple authorisations and such authorisations issued shall be valid **up to 30 September 2024.** The quantity mentioned on a valid import authorisation may also be amended at any point, subject to the overall value of the import authorisation remaining unchanged. The application for amendment may be filed online on the DGFT website (https://dgft.gov.in).

Our comments

The additional amendments and clarification were much awaited and will provide required clarity to the trade.

Further, the introduction of the import management system from 1 November 2023 will ensure that the importers will provide the necessary data and information. The decision will help to closely monitor the inflow of such hardware without disrupting the market's supply chain.

(Notification No. 38/2023 dated 19 October 2023 and Circular No. 23/2023-Customs dated 19 October 2023)

CBIC notifies mandatory additional qualifiers in import/export declarations for certain products effective from 15 October 2023

Earlier, the CBIC had notified mandatory additional qualifiers to be mentioned in import/export declarations in respect of certain chemical products effective from 1 July 2023. Later, the effective date for this requirement was extended from 1 July 2023 to 1 October 2023.

In this regard, basis representations received and consultation with the Department of Chemicals and Petrochemicals, the CBIC has notified that for the commodities imported under Chapters 28, 29, 32, Heading 3808 and Chapter 39, the following additional details shall be required mandatorily at the time of filing import declarations:

- For bulk and basic chemicals - CAS number and IUPAC name is mandatory
- For formulations, mixtures and proprietary component, R&D or others - CAS number and IUPAC name of main/active ingredient (at least one) is mandatory.
- In case of the non-availability of information for even one ingredient with the importer since information is not shared by the supplier due to confidentiality, a self-undertaking is to be provided in the BOE.

These additional qualifiers shall be mandatory for imports under the said chapters for all bills of entry filed on or after 15 October 2023.

(Circular No. 23/2023-Customs dated 30 September 2023)

DGFT requests exporters to submit data for review of RoDTEP rates to the RoDTEP Committee by 30 November 2023

The RoDTEP Committee has been constituted for the review of RoDTEP rates. After consultation with the industry, the Drawback Division has finalised the formats for submission of data (letter dated 12 October 2023).

In this regard, the DGFT has issued a trade notice stating that the last date for submission of information to the RoDTEP Committee in the designated formats, as given in Annexure B (Part 1 and Part 2), is **30 November 2023.**

The DGFT has requested the exporters to use this opportunity and submit the required information in Excel on the email id rodtep.dbk@gov.in.

(Trade Notice No. 30/2023-24 dated 19 October 2023)

DGFT discontinues issuance of physical copy of authorisation for restricted imports with effect from 19 October 2023

The DGFT has discontinued the issuance of a physical copy of authorisation for restricted imports with effect from 19 October 2023.

The DGFT has informed that effective from 19 October 2023, all the authorisation for restricted imports shall be issued electronically only for the EDI ports. However, the authorisation for restricted imports issued for any non-EDI port shall continue to be issued on paper.

Further, the amendment or revalidation of any authorisation for restricted imports issued before 19 October 2023 shall be processed in the existing manner wherein the paper copy of the amendment letter shall be issued, and the amendment letter number shall be duly endorsed on the original authorisation. In case of import of restricted items under the EPCG scheme, the authorisation for restricted import number and date is required to be duly endorsed in the condition sheet of the EPCG authorisation.

(Trade Notice 31/2023-24 dated 19 October 2023)

CBIC introduces functionality for implementation of restriction on export of certain goods on payment of IGST

Earlier, the government, vide the Finance Act, 2021, amended provisions related to zero-rated supply, stating that a list of goods or services will be notified, which may be exported on the payment of IGST, and the supplier may claim a refund of taxes so paid. The provision has been made effective from 1 October 2023 vide Notification No. 27/2023 - Central Tax dated 31 July 2023.

In this respect, the CBIC vide Notification No. 01/2023-Integrated Tax dated 31 July 2023, notified all goods or services (except pan masala, unmanufactured tobacco with or without lime tube bearing the brand name, tobacco refuse bearing brand name, related goods, etc.), which may be exported on the payment of IGST, and the supplier may claim the refund of tax so paid.

To implement restrictions imposed on the export of goods or services on the payment of IGST, the Directorate General Systems has developed a backend functionality to restrict the IGST refund route for the goods as specified in the notification wherein the following changes have been introduced:

- Changes in the system of filing of shipping bills and during amendment, with respect to the commodities mentioned in the notification.
- Enabled checks at the shipping bill level, considering IGST refund is paid at shipping bills level.
- In cases where a shipping bill contains single or multiple invoices for which IGST have been paid, and even if one invoice contains restricted items, the shipping bill containing such items will not be allowed to be filed.
- In addition, the CBIC has instructed the concerned officers to not allow the export of such notified goods on the payment of IGST to ensure that no undue benefits are taken, especially for manual shipping bills in non-EDI ports or even at EDI ports, or for export through posts/courier.

(Circular No. 24/2023-Customs dated 30 September 2023)

DGFT announces a two-week EODC camp for expedited disposal under advance authorisations and EPCG

With the aim of expediting the processing of pending applications for EODC for AA and EPCG schemes, the DGFT has organised a two-week EODC camp from **13 November 2023 to 24 November 2023.**

In addition, the DGFT has reiterated the following points to be considered:

- The RA, as well as the exporter, is mandated to ensure that the status of all redeemed AA/EPCG authorisations are duly updated in the DGFT online systems.
- In case of the physical files submitted for redemption/ closure to RA, the RA shall generate the EODC letter online by navigating to the license room, select relevant license number → Click on the 'EODC Status Update' button and generate the EODC letter online.
- Alternatively, the AA/EPCG authorisation holder may also submit EODC status update application by navigating to the DGFT website → Services → AA/EPCG → EODC status update
- The EODC shall not be issued manually or through any legacy IT system(s).

(Trade Notice No. 29/2023-24 dated 13 October 2023)

DGFT introduces facility for automatic system-based issuance of e-SHC

In furtherance of the e-governance initiatives, the DGFT has introduced an automatic system for issuing an e-SHC. This system eliminates the need for exporters to file any applications for obtaining the certificate.

Going forward, the SHC will be electronically generated based on export data available in DGCI&S database. The individual exporters will be divided into five Status categories based on available merchandise export figures from the EDI, non-EDI Ports and SEZ ports as per the eligibility criterion in the FTP 2023. This will eliminate the earlier process of submission of an online application with a supporting export performance certificate from a CA and will also do away with the file examination required at the DGFT regional offices and use existing data elements available within the government for export certification.

The e-SHC will be made available to the exporting entity in their registered email and the customer dashboard on the DGFT portal (https://www.dgft.gov.in/CP/), after necessary IT iterations, by the 15th of August each year. The data set used for the status categorisation will be the merchandise export performance of the preceding 3 FY or the preceding 2 FY (in case of the gems and jewellery sector), plus the three-month export data from April to June of the current FY.

However, it is to be noted that all SHC issued under FTP- 2015-20 will remain valid till 30 September 2023, and any IEC holder willing to avail the SHC under the FTP 2023, and who is not getting covered under the new mechanism of automatic issue, will need to apply online to the concerned jurisdictional RAs of the DGFT.

(Trade Notice No. 28/2023-24 dated 9 October 2023, Press Release dated 9 October 2023, Public Notice No. 32/2023 dated 9 October 2023)

DGFT amends provisions under Handbook of Procedures 2023 to allow ITC of GST paid on imported/ indigenously materials procured against the AA scheme

The DGFT has amended Para 4.10 (i) of the HBP, 2023, to allow utilisation of the ITC of GST paid on materials imported/ indigenously procured against the AA scheme. This change is aimed at facilitating ease of doing business and reducing transaction costs.

Earlier, the relevant para specifically restricted the benefit of the ITC on the transfer of any duty-free material imported or procured under the AA scheme from one unit of a company to another unit for manufacturing purpose. However, the amended para provides that in case of the transfer of duty-free imported or indigenously procured materials, on which GST has been paid, between the units located in same or different states, the availment of the ITC shall be governed as per the provisions of the GST law.

(Public Notice No. 34/2023 dated 13 October 2023)

Advisory regarding check introduced for shipping bill in reference to nature of contract

The Directorate General of Systems and Data Management has issued an advisory regarding the check introduced for the SB in reference to the nature of the contract to ensure that the same nature of contract is declared at the invoice level and item level during export.

Wherever 'Nature of Contract' for invoice is declared as CIF, the FOB value at the item level would be derived by the system after deducting the declared insurance and freight amount proportionately among the items of that invoice. Similarly, if the 'Nature of Contract' is declared as 'CF' or 'CI', the unit value at the item level would be treated as inclusive of freight and inclusive of insurance respectively, and thereafter, the FOB value would be derived by the system.

(Advisory dated 6 October 2023)

Government issues clarification on lease rental services received by SEZ units utilised for employee welfare amenities

The Department of Commerce received representations stating that authorities are restricting zero-rating benefits on lease rental services given by developers to SEZ units on such portion of space that is used to create employee welfare amenities.

In this regard, the government has clarified that the zero-rating benefit continues to be available for lease rental/other charges collected by the developers from SEZ units for the space utilised for the creation of employee welfare facilities exclusively for the SEZ unit's employees.

(Instruction No. K-43013(13)/1/2022-SEZ dated 3 October 2023)

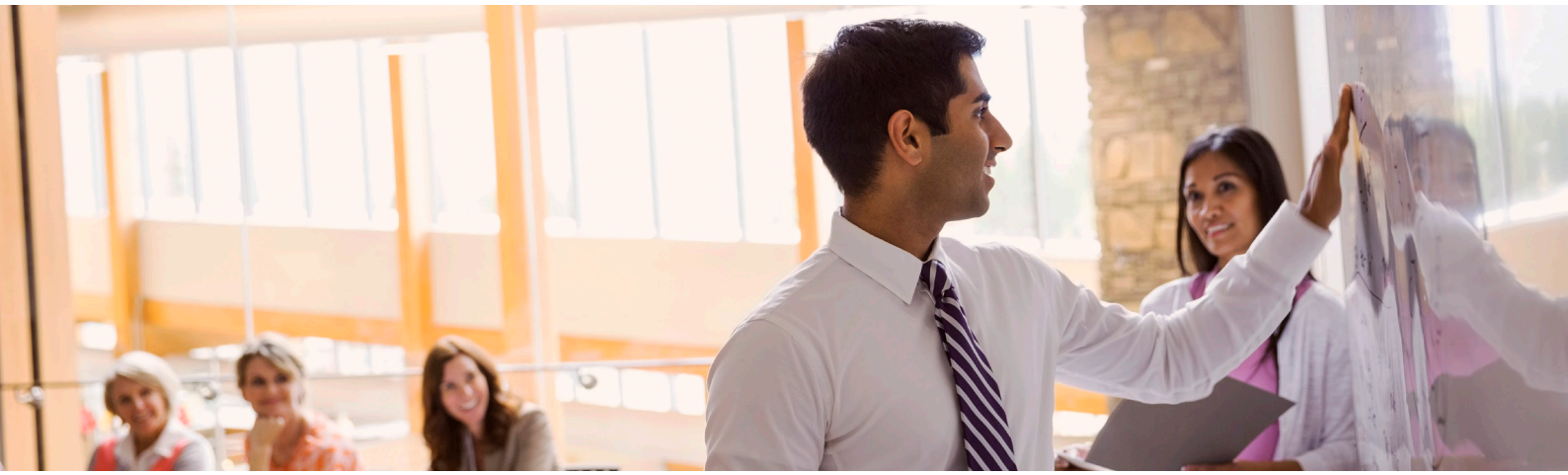
Government notifies changes in Production Linked Incentive scheme for white goods (ACs and LED Lights)

In order to bring manufacturing at the centerstage and emphasise its significance in driving India's growth and creating jobs, the PLI scheme for white goods for manufacture of components and sub-assemblies of ACs and LED Lights was notified by the DPIIT on 16 April 2021. The scheme is to be implemented over a seven-year period, from FY 2021-22 to FY 2028-29, and has an outlay of INR 6,238 crore.

Based on various requests/suggestions received from trade and industry, the government has notified further changes in the scheme guidelines with a view to simplify the operation of the scheme, as well as to improve the ease of doing business. Some of the key changes are:

- Adoption of the cost-plus method in place of the CUP method for the calculation of sales prices in case of captive consumption or supplies to group companies;
- Investments in the tool room for the manufacturing of mould and dies, etc., shall be considered as an eligible investment under capital investment;
- Allowing one more year over and above two years, permitted for informing by beneficiaries about the establishment of an additional manufacturing facility;
- Revision of the last date of submission of filing the claim and refund of excess incentive by the beneficiary on account of discrepancy between the statutory compliance and records provided at the time of filing of claim(s), if any;
- Roll over of bank guarantee.

(Press release dated 11 October 2023, File No. P-29014/101 /2020-LEI dated 9 October 2023)



02

Key judicial pronouncements

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

I. Key rulings under the GST laws

Karnataka HC grants ad-interim stay on adjudication proceedings denying ITC on secondment of employees

Summary

The Karnataka HC has granted an ad-interim stay on the departmental proceedings wherein the ITC of the IGST paid on a reverse charge basis on the payments made to seconded employees/related entities has been denied. The HC observed that the department did not consider the apex court's decision in the case of Northern Operating Systems Private Limited and proceeded to deny the ITC availed by invoking the limitation provisions prescribed under GST law.

Facts of the case

- The SC, in the case of M/s. Northern Operating Systems Private Limited [CA No. 2289-2293/2021], had held that the secondment of employees by the overseas entity qualifies as 'manpower supply services' provided to the Indian entity, and therefore, the salaries and other expenses recovered from the Indian entity would be exigible to service tax.
- In furtherance of the above decision, M/s. Toyota Kirloskar Motor Private Limited (the petitioner) had discharged the IGST liability under the RCM and subsequently availed ITC of the same.
- However, three different authorities had issued SCNs in the quest to deny the ITC availed by invoking the limitation period as prescribed under Section 16(4) of the CGST Act, which restricts ITC availment for a given financial year till 30 November of the subsequent year, or the date of filing an annual return, whichever is earlier.
- The department contended that the prescribed limitation period for availing the ITC shall apply from the date such liability arises, i.e., the time of supply of the underlying transaction.
- On the other hand, the petitioner has contested the applicability of such limitation and asserted that the department has failed to take into consideration the decision of the SC, which has finalised the levy of GST.

Karnataka HC's observations and ad-interim order [WP No. 22952/2023; Order dated 12 October 2023]

The HC observed that the department had not considered the SC's decision in the case of Northern Operating Systems (supra) and granted an interim stay on the adjudication of the SCNs issued by the central and state tax authorities.

The HC also granted liberty to the authorities to seek vacation of such stay.

Our comments

Pursuant to the judgement of Northern Operating Systems, the DGGI initiated inquiries into similar arrangements. To safeguard against potential penal implications, the taxpayers voluntarily paid the GST tax liability under the RCM and availed the ITC for the same. However, the GST department has raised disputes on several occasions regarding these ITC claims.

The taxpayers opine that the ITC under the RCM is eligible on payment basis and from the date of self-invoice in terms of the provisions of GST law. This has become a contentious issue, which requires clarification to prevent any dispute between the taxpayers and the department.

It may be noted that before the decision of the SC, there was no clarity on the taxability on the secondment of employees and the assessees cannot be held liable retrospectively. The department should take into consideration the decision of the SC before proceeding to deny the ITC availed on the transaction. Accordingly, precluding the taxpayers from obtaining the ITC in such cases would be manifestly arbitrary.

Karnataka HC grants ad-interim stay on adjudication proceedings levying IGST on secondment of employees

Summary

The Karnataka HC has granted an ad-interim stay on the adjudication proceedings seeking the levy of IGST on the salaries paid directly to expatriates. The department had issued a SCN in pursuance of the decision of the SC in the case of Northern Operating Systems. The petitioner assailed the proceedings on the grounds that primarily, the NOS decision is distinguishable on facts and cannot be applied to them and that the salary paid to employees is specifically excluded from the ambit of taxable supply of services.

Facts of the case

- M/s. Alstom Transport India Limited (the petitioner) had employed expatriates from an overseas entity and paid salaries to them in INR.
- The petitioner had also paid the social security costs on account of the lien maintained by the employees with the overseas entity.
- The Supreme Court, in the case of M/s. Northern Operating Systems Private Limited [CA No. 2289-2293/2021] (NOS), had held that the secondment of employees by the overseas entity qualifies as 'manpower supply services' provided to the Indian entity, and therefore, the salaries and other expenses recovered from the Indian entity is exigible to service tax on a reverse charge basis.
- In furtherance of the above, the department had issued an SCN seeking to levy IGST on the above transaction.
- The petitioner assailed the SCN and contended that the SC's decision in NOS applied only in the context of the peculiar factual background in that case. The same is distinguishable from their own case and does not apply to them. Further, the salary paid to employees does not fall within the purview of taxable supply of service. Accordingly, the petitioner pleaded for an interim stay on the adjudication proceedings.
- The appellate authority upheld the refund rejection orders because the export turnover was not in accordance with Rule 89(4)(C) of the CGST Rules.
- The petitioner was aggrieved by the impugned orders and preferred the present petition. The petitioner also challenged the constitutional vires of Rule 89(4)(C) of the CGST Rules.
- The department contended that Rule 89(4)(C) of the CGST Rules is a procedural provision to calculate the refund, and therefore, the amended clause is applicable retroactively.

Karnataka HC's observations and adinterim order [WP No. 23915/2023; Order dated 2 November 2023]

- The HC, taking into consideration the petitioner's contentions, stayed the adjudication of the impugned SCN.
- The HC also granted liberty to the authorities to seek vacation of such stay.

Our comments

The taxability of salary paid to seconded employees is an impending issue before the apex court and also in various high courts. The SC, in the case of NOS, had decided that service tax is applicable on the secondment of employees by overseas entities on the grounds inter alia that mere test of control is insufficient to determine the existence of an employer-employee relationship accurately. Therefore, employees working under a secondment arrangement cannot be considered actual employees of the Indian company. However, the factual background remains distinguishable in various cases, and the judgement of the SC cannot be extended or interpreted in the same way in all the scenarios. It is also pertinent to note that on a similar matter, the Division Bench of the SC has issued a notice in the case of M/s Komatsu India Pvt. Ltd, and has tagged the case, along with the case of M/s. Nortel Networks India Pvt. Ltd. The final verdict is awaited

Amended Rule 89(4)(C) capping export turnover cannot be applied retrospectively for computing refund of accumulated ITC – Delhi HC

Summary

The Delhi HC has held that the amended Rule 89(4)(C) of the CGST Rules, which restrict refunds by capping export turnover, will not be applicable prior to 23 March 2020, i.e., the date from which it came into effect. The HC rejected the department's contention that provisions are procedural in nature and have a retrospective application. It was held that the right for a refund of the accumulated ITC arises on the date when the goods are exported, and the 'turnover' refers to the period during which the supplies are made. In view of the above, the HC set aside the refund rejection order of the appellate authority.

Facts of the case

- M/s. Indian Herbal Store Pvt. Limited (the petitioner) had filed refund applications for the period from 1 October 2018 to 30 September 2019. The department rejected the same on two grounds, i.e., non-submission of the FIRC and the computation of the eligible export turnover not complying with Rule 89(4)(C) of the CGST Rules.
- The appellate authority upheld the refund rejection orders because the export turnover was not in accordance with Rule 89(4)(C) of the CGST Rules.
- The petitioner was aggrieved by the impugned orders and preferred the present petition. The petitioner also challenged the constitutional vires of Rule 89(4)(C) of the CGST Rules.
- The department contended that Rule 89(4)(C) of the CGST Rules is a procedural provision to calculate the refund, and therefore, the amended clause is applicable retroactively.

Delhi HC's observations and judgement [W.P.(C) 9908/2021; Order dated 15 September 2023]

- **Amended rule restricts the value of export turnover for calculating refund: T**he HC analysed the rule amended w.e.f. 23 March 2020 and stated that after the amendment, the turnover of the zero-rated supplies would mean the value of the zero-rated supplies actually made during the relevant period without tax payment, or 1.5 times the

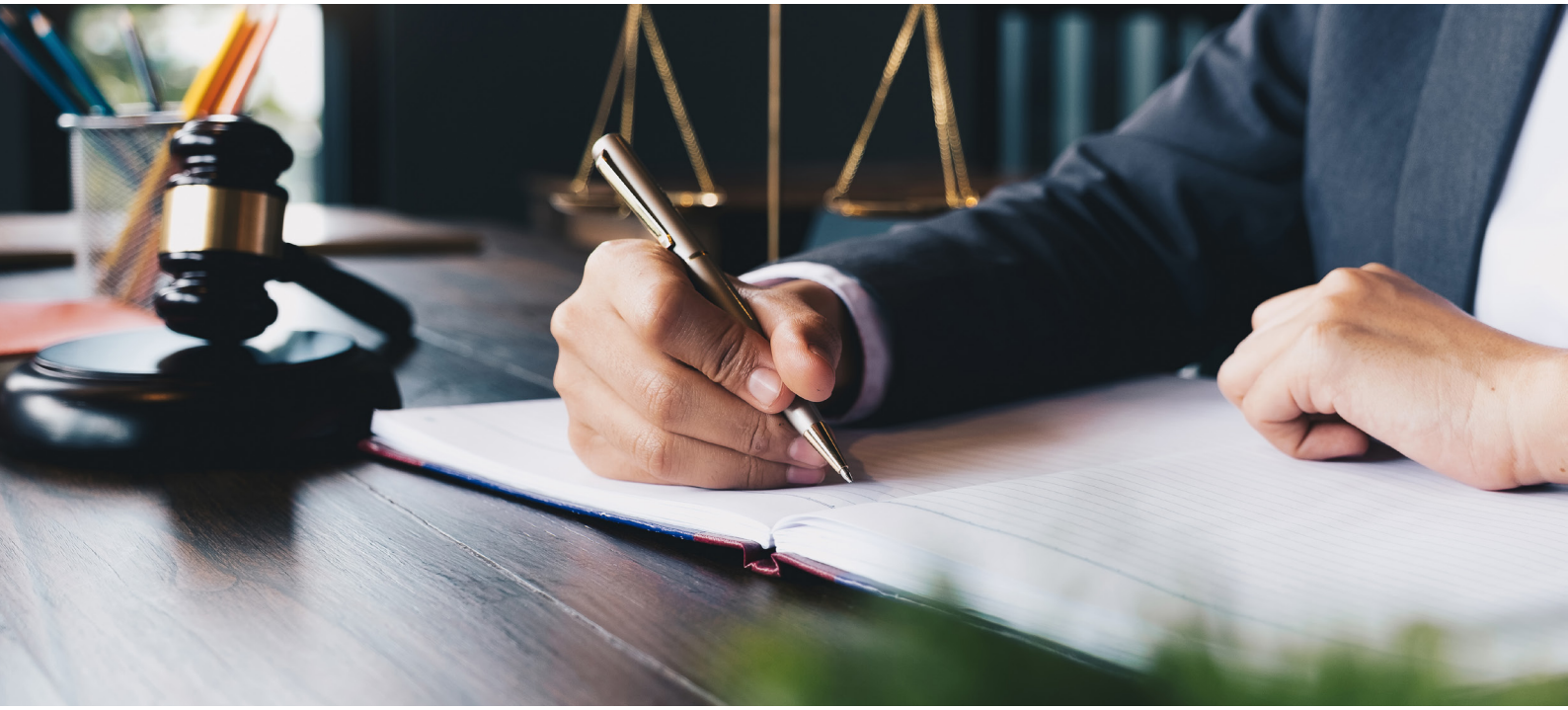
value of similarly placed domestic supplies, whichever is less. Accordingly, even if the value of zero-rated supplies exceeds 1.5 times the value of similarly placed domestic supplies, for the purpose of computation of refund, the export turnover shall necessarily be the value that is 1.5 times the value of similar goods domestically supplied. Accordingly, the refund of the ITC is restricted by capping the value of the export turnover.

- **Amended rule applicable prospectively:** The HC rejected the department's contention that the rule is retroactive. The HC found that the appellate authority erred in applying the amended rule for computing the assessee's export turnover. The HC referred to the refund provisions and held that the right to refund the accumulated ITC is crystalised on the date the subject goods are exported. Further, the HC clarified that the term 'turnover' has to be interpreted in relation to the period it relates to. Therefore, the ITC relating to the turnover of a period must be calculated in accordance with the rules in effect at the time.
- **Amended rule struck down:** The HC stated that the Karnataka HC, in the case of M/s. Tonbo Imaging India Pvt. Ltd., struck down the amended rule. The HC ruled that if a statute or a statutory position is declared ultra vires the Constitution of India, it is retroactive to the date it was issued. Accordingly, at present, the amended provisions are not in existence.

Our comments

Pertinently, Rule 89(4)(C) of the CGST Rules restricts the refund quantum where the exports are made without the payment of IGST under a LUT/bond. This leads to discrimination between the exporters who export goods under the LUT and claim a refund of accumulated ITC vis-a-vis exporting goods with tax payment. Therefore, on this account, the Karnataka HC, in the case of Tonbo Imaging India Private Limited, had invalidated the amended Rule 89(4)(C) of the CGST Rules and declared it to be in violation of Article 14 and Article 19(1)(g) of the Constitution.

The Delhi HC relied upon the above-mentioned ruling and concluded that the amended provisions are nonexistent as of date. This is a favourable judgement for the exporters seeking a refund of accumulated ITC on account of exports and may set precedence in mitigating similar scenarios.



Circular cannot override statutory provisions, cumulative ITC adjustment allowed for the period February - August 2020 – Allahabad HC

Summary

The Allahabad HC has set aside a demand order of approximately INR 235 crores towards excess ITC for the period between February and August 2020. The HC held that the computation of the eligible ITC for the said period shall not be done on a month-to-month basis, rather it will be given effect on a 'cumulative' basis as explicitly prescribed under the first proviso to Rule 36(4) of the CGST Rules. The HC specifically highlighted that when the provision was explicitly prescribed for such computation on a cumulative basis for the said period, the department had erred by making computation on a pre-existing monthly basis as prescribed under the circular. Accordingly, the HC opined that the circular that conflicts with the amended statutory law cannot be enforced.

Facts of the case

- M/s. Vivo Mobile India Private Ltd. (the petitioner) is engaged in the business of manufacture, assembly and wholesale trade of cellular phone devices, and its spare parts and accessories.
- The petitioner had purchased various components of mobile phones from different suppliers against a valid tax invoice and claimed the ITC in respect of such purchases.
- The department demanded the reversal of such ITC on the ground that the petitioner had violated Rule 36(4) of the CGST Rules and availed/utilised excess ITC amounting to INR 110.06 crores for the period February to August 2020. Accordingly, requisite interest and equal amount of penalty was also imposed, with total demand amounting to INR 235.52 crores.
- The petitioner challenged the demand order vide the present writ petition and had initially deposited 10% of the total tax amount as pre-deposit.
- However, owing to the absence of any stay order, the department had recovered INR 220.13 crores towards the entire tax amount, along with an equal amount of penalty.
- Subsequently, the recovery of the balance amount towards interest was stayed. The petitioner sought a refund of the entire amount recovered, along with a pre-deposit with requisite interest on the same.

Petitioner's contentions

- The petitioner stated that the department had mistakenly considered month-to-month reconciliation of the ITC available and utilised in terms of GSTR-3B and GSTR-2A, instead of considering the period from February 2020 to August 2020 cumulatively as a single tax period.
- For the purpose of ITC computation, the petitioner had considered all the tax invoices that were reflected in GSTR-2A at the time of filing GSTR-3B for September 2020. Such eligible ITC was increased by 10% permissible addition in terms of Rule 36(4) of the CGST Rules, and accordingly, such amount was taken as eligible ITC. Accordingly, the petitioner challenged the demand order, as there was no excess utilisation of the ITC.
- The petitioner contended that the department had misread the circular and interpreted the phrase 'on the due date of filing of the returns' to mean a month-to-month reconciliation, whereas the first proviso to Rule 36(4) of the CGST Rules explicitly specifies a 'cumulative period'. Additionally, it was stated that the impugned circular cannot be enforced, as it was issued prior to the introduction of Rule 36(4) of the CGST Rules.
- It was also emphasised that GSTR-2A does not create the 'substantive right' of the ITC, rather it is merely a facilitator that enables the petitioner to take an informed decision for self-assessment.
- The petitioner also asserted that the ITC is a statutory right that cannot be taken away by interpreting the law in a different sense. Further, it was stressed that a circular can neither take away a statutory right or a benefit and nor impose a new condition.

Allahabad HC's observations and judgement [Writ Tax No. 433/2021; Order dated 5 September 2023]

- **ITC is a substantive right that can be availed/utilised provisionally:** The HC examined the ITC provisions and stated that it is a statutory right created by the statute, which can be claimed provisionally without any reconciliation or final payment of tax. However, such provisional ITC is liable to be reversed, along with interest if the tax so collected is not deposited by the supplier in the government treasury. The HC held that prior payment or deposit of tax is not mandatory for provisional availment/utilisation of ITC. However, the supplier is obligated to deposit the tax on a monthly basis by way of filing a monthly return.

- **Availment/utilisation of ITC does not depend on filing of returns:** The HC opined that although the statutory provisions prescribe a specific date for filing of returns by the supplier, the same cannot be associated to availment/ utilisation of the ITC. The HC drew reliance from the decision of the Calcutta HC in the case of Suncraft Energy Private Limited and asserted that furnishing the details of the tax invoice in GSTR-1 by the supplier is a merely a measure of facilitation.
- **Eligible ITC for February to August 2020 shall be computed cumulatively:** The HC examined Rule 36(4) of the CGST Rules and observed that it permitted additional 10% of the eligible ITC in terms of GSTR-2A to be claimed as provisional ITC. Further, in terms of the first proviso to the rule, such eligible ITC shall be computed for the period February to August 2020 on a cumulative basis. The HC affirmed that when the first proviso explicitly prescribed such cumulative computation, adopting a month-to-month computation by relying on the pre-existing circular would be violative of the first proviso. The HC explained that the stipulation of the filing of GSTR-1 by the supplier is merely a measure of facilitation and not for grant of provisional ITC. Alternatively, it was explicated that the intention of the legislature was not merely deferment of date, rather it was precisely to allow 'cumulative adjustment' for the period February to August 2020.
- **Pre-existing circular that conflicts with the amended statutory law is invalid:** The HC held that the first proviso superseded the pre-existing month-to-month reconciliation of the eligible ITC, specifically for the period between February and August 2020. Accordingly, the impugned circular, which prescribed the monthly reconciliation, was in conflict to the amended provision and cannot be enforced for the said period. In view of the above, the HC quashed the demand order

Our comments

This is an important judgement that pertinently clarifies that a circular, being an administrative instruction, loses its enforceability if it runs contrary to the amended statutory law. The impugned circular prescribed that an additional ITC of 10% of eligible ITC, in accordance with Rule 36(4) of the CGST Rules, can only be availed as per the eligible ITC for the 'respective month'. However, the first proviso to Rule 36(4) of the CGST Rules specifically prescribed that such eligible ITC shall be computed cumulatively for the period February to August 2020. Therefore, owing to the conscious departure from the pre-existing position for the said period, the validity of the circular is diluted.

Additionally, it is also apposite to note that the HC deprecated the conduct of the department to recover 100% of the total disputed amount when the assessee had already deposited 10% as pre-deposit, leading to the recovery of 110% of the total amount of demand.

A notice issued after six months from the seizure of goods is valid under GST - Delhi HC

Summary

The Delhi HC has noted that the authorities should have reasons to believe that the goods are subject to confiscation. Further, the provisions allow the relevant authorities to issue an order prohibiting the taxpayer from dealing with the goods in cases where the goods are liable for seizure, but it is impracticable to do so. In this respect, the HC has held that the prohibition order is not a temporary measure that allows the department to decide whether or not to confiscate the goods. Further, the HC has held that the order of prohibition cannot be extended indefinitely. The HC also held that if a notice has not been issued within six months from the seizure of goods, the goods shall be liable to be returned. However, it does not invalidate the notice issued after six months.

Facts of the case

- The proper officer conducted search in the premises of Best Crop Science Pvt. Ltd. (the petitioner) and passed an order of prohibition, and thereafter, passed a seizure order.
- During the course of the proceedings, a demand cum SCN was issued by the authorities. Later on, an order for confiscation of goods was passed, which has been challenged by the petitioner in another petition.
- Aggrieved by the search conducted and SCN issued by the authorities, the petitioner has filed the present petition.

Petitioner's contentions

- The petitioner contended that the search was conducted by the officer without having any reasonable ground to believe that the petitioner had concealed any transaction involving the supplies or stock of goods.
- The impugned SCN was not issued within the mandated period of six months provided under Section 67(7) of the CGST Act and is liable to be quashed on the ground of time barred. Therefore, the goods seized were liable to be returned.
- The petitioner relied on the decision of the Gujarat HC in the case of Devesh Radheshyamji Kabra, wherein it was held that the goods seized are liable to be returned. Further, the petitioner submitted that the language of Section 110 of the Customs Act is similar to the language of Section 67(2) of the CGST Act.

Respondent's contentions:

- The SCN was issued within six months from the date of the seizure of the goods, and hence, the goods were not liable to be returned.
- The provisions of seizure under the CGST Act are substantially different from the provisions under the Customs Act. Therefore, the decision, rendered by courts in respect of the Customs Act, was inapplicable to the proceedings under the CGST Act.
- The respondent submitted that it is open for the authorities to first pass an order of prohibition, and thereafter, take an informed decision whether or not to seize the goods.

Delhi HC's observations and judgement [W.P.(C) 238/2023 & CM APPL. 900/2023, CM APPL. 16376/2023, CM APPL. 16399/2023; Order dated 5 September 2023]

- **The order of prohibition is not a temporary measure:** The HC stated that the action for seizure of the goods must be based on a reasonable ground that the goods are subject to confiscation. This criteria is required to be satisfied before passing any order for restricting the assessee from the dealing of goods. The first proviso to Section 67(2) of the CGST Act allows the relevant authorities to issue an order prohibiting the taxpayer from dealing with the goods in cases where the goods are liable for seizure, but it is impracticable to do so. The prohibition order is not a stopgap measure that allows the department to decide whether or not to confiscate the goods.
- **Order of prohibition cannot continue for indefinite period:** Referring to the relevant provisions, the HC noted that a prohibition order is a seizure order for all intents and purposes. Further, the HC held that the order of prohibition cannot be extended indefinitely since it would contradict the intent of Section 67 of the CGST Act.
- **CGST and Customs Act have similar provisions regarding seizure of goods:** The HC referred to the pre-amended Section 110 of the Customs Act and noted that the language used relating to the seizure of goods under the customs is similar to the CGST Act in material aspects. Therefore, the decision relied upon by the petitioner in the case of Mohd. Salman Khan is relevant.
- **Impugned SCN is valid:** The HC held that as per Section 67(2) of the CGST Act, if no notice is issued within the stipulated period, the goods seized are liable to be returned. However, it does not invalidate the notice issued after six months.

Our comments

As per the GST provisions, the authorities have the power to search and seize the goods if they have reasons to believe that such goods are liable for confiscation. In this respect, the Gujarat HC, in the case of Patran Steel Rolling Mill, had held that these powers should be exercised only after due application of mind to the relevant factors. Further, in case where seizure of goods is not practicably possible, the authorities may pass an order of prohibition to the assessee, restricting him to deal with the goods. However, in case if the notice is not issued within six months from the date of seizure of goods, the goods are liable to be returned. Earlier, the Gujarat HC, in the case of Devesh Radheshyamji Kabra, had held that if a notice is not issued within six months, the goods are liable to be returned.

In the present case, the Delhi HC emphasised that in case the notice is issued after six months from the order of prohibition, such a notice cannot be invalidated. This may result in wider implication of this provision on the taxpayers. However, there may be another interpretation that the notice has to be issued within six months, further extendable by six months only. Therefore, it will be interesting to see further developments in this regard.

Gujarat HC grants interim stay on GST levy on the transfer of leasehold rights

The matter regarding the imposition of GST on the transfer of leasehold rights of GIDC land has been challenged before the Gujarat HC in the case of **Suyog Dye Chemie Private Limited [SCA No. 17792/2023].** The HC has issued a notice in the case, and in the interim, stayed the departmental proceedings.

Background

- The matter pertaining to the transfer of leasehold land rights by the private players, i.e., the original allottee and the related GST implications has been a matter of ongoing dispute, both from the outward and inward perspective. The state GST officers have issued SCNs to multiple MSMEs across the state, seeking explanation as to why GST shall not be recovered, along with requisite interest and penalty on transfer of leasehold rights of the GIDC land by private parties.
- Numerous representations have already been filed by the industry players of the genuine hardship being faced by the MSMEs in this regard.

Petitioner's arguments

- In terms of Schedule III of the CGST Act, the 'sale of land' is neither a supply of goods nor supply of service; therefore, no GST is levied on the same.
- The transfer of leasehold rights is equivalent to the sale of land, and accordingly, falls within the ambit of Schedule III of the CGST Act.
- The 'transfer of leasehold rights' does not qualify as lease, tenancy, easement or licence for land occupancy, which is classified as a supply of service as per Schedule II of the CGST Act.

Our comments

- Presently, the transfer of leasehold rights by State Government Industrial Development Corporation or undertakings or other entity having 50% or more ownership of the central/state government or union territory to the industrial units or the developers is exempt under GST.
- However, the transfer of leasehold rights by other entities (i.e., private parties) is a 'supply of service' and taxable under GST, as also clarified vide Circular No. 44/18/2018-CGST.
- Pertinently, the Bombay HC, in the case of Builder Association of Navi Mumbai [(2018) 92 taxmann.com 134], had held that long-term lease will be liable to GST. In appeal, the SC had also upheld the Bombay HC's judgement.
- In view of the above, in the present scenario, the transfer of leasehold rights by other entities are exigible to GST. However, the Gujarat HC has admitted the petition and stayed the proceedings. It will be interesting to note the further deliberations in this regard.

Telangana HC reserves judgement in the case of Prahitha Construction

The issue of GST levy in case of TDR by landowner under a JDA. The Telangana HC has reserved the judgement in the case of Prahitha Construction Private Limited (WP No. 5493/2020), wherein the petitioner has challenged the notifications that prescribe GST on consideration received by landowners under a JDA, for being ultra vires the Constitution of India. [Notification No. 4/2018-CT(Rate) dated 25 January 2018 and Notification No.4/2018-ST(Rate)]

Below is the summary of the arguments advanced before the HC:

Hearing Day 1 (10 October 2023)

Petitioner's arguments

- A JDA is merely a medium by which a landowner sells/ conveys undivided right, title and interest in land to the developer.
- It merely facilitates the granting of easement right in land for undertaking the development activity.
- Transfer of undivided interest in land to the developer is a consideration for undertaking construction activity.
- Essentially, a JDA results in exchange of land by the developer for works contract services by the developer on the landowner's share of built-up area.
- The power to levy GST cannot be exercised by way of the notification. The notifications do not prescribe any method of valuation of TDR.
- The TDR is equivalent to the 'sale of land' as clarified by the CG under services tax vide Circular No. 151/2/2012-ST dated 10 February 2012.
- The imposition of GST on such transaction adds to the cost.
- There is no reasonable rationale to impose GST on TDR, specifically for commercial developments, when there is no GST on TDR for residential projects.

Hearing Day 2 (17 October 2023)

Revenue's arguments/rebuttal

- TDR under JDA is not equivalent to the sale of land, and accordingly, liable to GST.
- TDR is not specifically covered under Schedule III of the CGST Act, which specifies 'activities/transactions that do not qualify as supply of goods/service', and therefore, qualifies as supply u/s. 7 of the CGST Act.
- Many components of land, such as renting/leasing/license, are liable to GST. Accordingly, TDR cannot be kept outside the taxability when the ultimate objective is the development of land into an IT-enabled complex for sharing common amenities.

TDR is similar to the 'transfer of license to manufacture liquor', which is liable to GST.

Hearing Day 3 (18 October 2023)

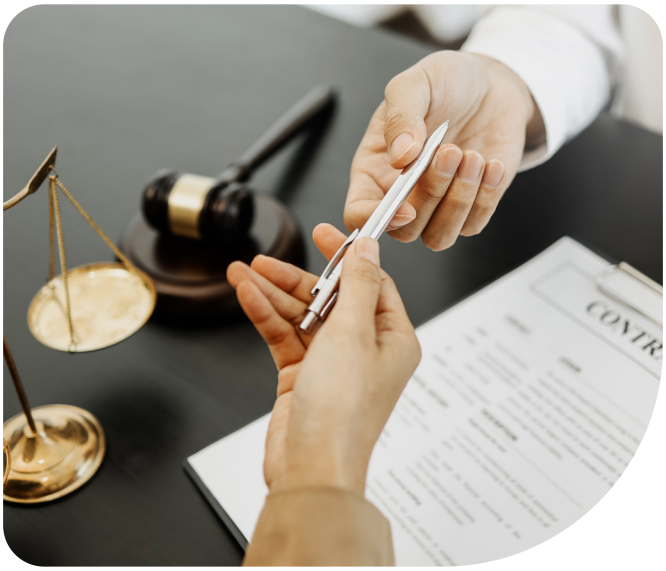
Revenue's arguments/rebuttal (cont.)

- Rights accruing from land, such as tenancy, lease license and license, are liable to GST. TDR is also a right accruing from land.
- Article 246A empowers the levy of GST on the same.

Petitioner's rejoinder

- TDR is a right that is inherent and inseparable from the sale of land. TDR cannot exist without the transfer of land.
- The Income Tax Act cannot be relied upon to determine whether GST shall be levied on TDR.
- TDR does not fall within the purview of 'barter' (as contended by Revenue), as the usage of the term is limited to movable property.
- TDR is in the nature of an 'exchange deed' as contemplated under the Transfer of Property Act, wherein the landowner is transferring land in exchange for building by developer.
- TDR does not qualify as a 'supply of service' and neither qualifies as supply.
- 'Measure of levy' is an important phrase, as what is being transferred is a value of land (reliance placed on the SC's judgement in the case of Orissa Cement)

Note: The HC has reserved the judgement in this case.



Madras HC grants interim stay on advance rulings stating that 'hostels will not fall within the purview of residential dwelling'

The writ petitions filed before the Madras HC w.r.t. the issue whether 'hostels' falls within the ambit of 'residential dwelling'. The aggrieved petitioners filed the writ petitions against the advance rulings* pronounced by the TN AAR, wherein it has been concluded that hostels will not fall within the ambit of residential dwelling.

The petitioner submitted that the Karnataka HC, in the case of Taghar Vasudeva Ambrish, had held that a hostel will fall within the ambit of a residential dwelling. However, the TN AAR has not considered the HC ruling while deciding the advance rulings.

In respect to the writ petitions filed, the Madras HC has granted an interim stay and has listed the matter for next hearing on 30 October 2023.

*Advance rulings
Thai Mookambikaa Ladies Hostel (TS-505-AAR(TN)-2023-GST)
M/s. Tapovan Living solutions (Advance Ruling No.55/AAR/2023 dated 01.09.2023)
Win Residency Ladies Hostel (Advance Ruling No.32/AAR/2023 dated 31.08.2023)
Sri Krishna Ladies Hostel (Advance Ruling No.93/AAR/2023 dated 05.09.2023)
Madhura Hostel (Advance Ruling No.43/AAR/2023 dated 31.08.2023)

Sikkim HC grants stay on GST demand against casino and online gaming company

The constitutional validity and legality of Rule 31A of the CGST Rules, which prescribes the method of valuation of lottery, betting, gambling and horse racing, has been challenged before the Sikkim HC in the case of Delta Corp Limited [WP(C) No. 41/2023]. In addition to it, the petitioner has also challenged the SCN levying demand of INR 628 crores, GST Rate Notification dated 28 June 2017, Circular No. 27/01/2018 dated 4 January 2018, which inter alia clarifies the levy of GST on betting and gambling in casinos, horse racing and related FAQs.

The following arguments were advanced before the court:

Petitioner's arguments

- Rule 31A was inserted back in 2018, while the SCN alleging short payment of GST has been issued only in 2023.
- The petitioner was facing difficulties in determining the value of supply in terms of Rule 31A, which was duly communicated to the department and guidance was sought, but to no avail.

Important note: The HC, in the interim, has directed the respondents to maintain status quo. The matter has been listed on **5 December 2023** for further arguments.

Bombay HC grants relief to Delta Corp and sister companies on GST recovery proceedings

The Bombay HC has restrained the GST department from passing the final order on GST demand notices issued to Delta Corp and its subsidiary companies [WP No. 715-717/2023].

The petitioner has challenged the constitutional validity of Rule 31A of the CGST Rules, which prescribes the method of valuation of lottery, betting, gambling and horse racing, along with its related circulars, rate notifications and clarifications.

The HC, in the interim, has directed the DGGI to not pass final orders without permission of the court on the adjudication of the SCN. The matter has been listed on **5 February 2024** for final arguments and disposal.

It may be noted that earlier, the Sikkim HC had instructed the department to maintain status quo in WP(C)No. 41/2023 filed by Delta Corp Limited, challenging the demand on similar grounds.

II. Key rulings under the erstwhile indirect tax laws

Service tax cannot be levied on takeaway of food items and sharing of expenses for use of space by associated enterprise - SC

Summary

The SC has upheld the decision of the CESTAT Delhi Bench, wherein it was concluded that service tax could not be levied on the activity of takeaway of food items, as it would amount to the sale of goods. The CESTAT had observed that the element of services, such as dining facility, washing area, and clearing of the tables, was not involved in the takeaway activity. The CESTAT referred to the circulars wherein it was clarified that no service tax is to be levied on takeaway food items and emphasised that the department also accepted this position. The CESTAT also held that permitting an associated enterprise to use a part of the premises to sell its products would not amount to sub-letting and would be considered as sharing of expenditure, which cannot be treated as a service.

Facts of the case

- The Haldiram Marketing Private Limited (the appellant) is engaged in the business of running food outlets, and the appellant also provides the facility of the 'takeaway' of food items.
- During an audit, the department noticed that the appellant had not paid service tax on the activity of the takeaway of food items and the share of rent received from the associated enterprise.
- A SCN was issued, alleging that the appellant had failed to pay for the aforementioned services.
- Subsequently, the petitioner submitted its reply, with the authorities claiming that it was not required to pay service tax on the impugned activities, and therefore, the SCN is invalid.
- After that, the commissioner confirmed the demand.
- Aggrieved by the order and the SCN issued by the authorities, the appellant filed an appeal before the CESTAT

Appellant's contentions

- The appellant contended that the takeaway of food items is not exigible for service tax, as it constitutes a pure sale transaction without any service element.
- The appellant relied on the decision of the Madras HC in the case of Anjappar Chettinad, wherein it was held that the provision of food and drink through takeaway would be tantamount to the sale of food and would not attract service tax levy.
- Further, the appellant relied on the circulars issued by the department dated 24 September 1997 and 10 September 2004, which clarified that the delivery of food without dining service and free home delivery by restaurants should not attract a service tax, respectively.
- Also, the appellant placed reliance on a circular dated 28 February 2011, which clarifies that pick-up or delivery of food or goods sold at MRP would be considered a sale and not levied to service tax.
- The payment of VAT and service tax is mutually exclusive.
- The value of pre-packaged goods should not be included in the taxable value, and because machinery provisions with respect to valuation are not present under law, therefore, the activity of takeaway cannot be levied to service tax.
- The service tax cannot be levied on the amount received from the associated enterprise because this is an internal arrangement between the appellant and the associated enterprise for sharing expenses. For this, there is no privity of contract between the appellant and its associated enterprise.
- The extended period of limitation could not have been invoked. Therefore, the demand is time-barred.

Respondent's contentions

- The appellant was providing 'restaurant services', which is a declared service under Section 66E(i) of the Finance Act.
- The activity related to food or any article for human consumption performed in restaurants having air-conditioning facilities would be subject to service tax.
- The activities performed by the appellant involve preparations and supply of food items.
- Therefore, the consideration charged for the takeaway of food items involves the value of goods and materials used by the appellant to prepare food items and the service portion of the preparation, packing, and delivery of food. Thus, this would fall under 'restaurant services'.

Issue before CESTAT

Whether service tax is leviable on the activity of the takeaway of food and sharing of rent expense by the associated enterprise for permitting the use of part of its restaurant space to sell its products?

CESTAT New Delhi's observations and judgement [Order No. - Final Order No. 50122/2023, Order dated 13 February 2023]

- **Selling of packaged food items over the counter amounts to sale:** The CESTAT stated that the appellant meets the criteria for the sale of goods since it sells packaged or food items over the counter. The activities of preparation of food and packing by the appellant are merely conditions of the sale of takeaway food items.
- **Service tax cannot be levied on the activity of takeaway of food items:** The CESTAT relied on the decision of the Madras HC in the case of Anjappar Chettinad (supra). Further, the CESTAT observed that the department also accepted this order and emphasised that it is not open to the department to take a contrary stand in this appeal. Therefore, the CESTAT ruled that no service tax should be levied on the takeaway of food items.
- **Service tax is not leviable on the share of rent received from the associated enterprise:** The CESTAT observed that this is an internal arrangement between the appellant and the associated enterprise for the sharing of expenses, and for this, there is no privity of contract between the appellant and its associated enterprise. The associated enterprise is also not a party to the agreement between the appellant and the lessor for renting out the appellant's premises. The associated enterprises are benefiting with respect to the space. Therefore, this arrangement would fall under the category of sharing of expense and would not be leviable to service tax.

SC's observations and judgement [Civil Appeal No. 6147 of 2023; Order dated 25 September 2023]

The SC found no merit in the Revenue's appeal and, therefore, upheld the CESTAT's order dismissing the present appeal filed by the department.

Our comments

Earlier, the Madras HC, in the case of Anjappar Chettinad, had held that the provision of food and drink to be taken away in parcels by restaurants tantamount to the sale of food and drink and does not attract service tax. A similar view was taken by various tribunals in other cases.

This is a welcome judgement by the SC, which will settle one of the contentious issues on the taxability of takeaway food under the erstwhile service tax regime. It further highlights that the Revenue cannot take a contrary stand to its own clarifications.

With respect to the use of space by the associated enterprise, the SC has observed that there was no contractual relationship between the associated enterprises and the appellant or the lessor of the premises. Therefore, the payment made by the associated enterprise to the appellant was not a consideration for any specific service but a form of cost-sharing between them. This is in line with the SC's decision in the case of Gujarat State Fertilizers & Chemicals Ltd., wherein it was held that the sharing of expenditure cannot be treated as service rendered by one to another.

SC upholds HC's decision that educational institutions are 'governmental authority', eligible for service tax exemption

Summary

The SC has upheld the decisions of the Patna and Orissa HC holding that IIT Patna and the NIT Rourkela are governmental authorities and are eligible for exemption under the erstwhile service tax laws. The SC has interpreted the second clause of the definition of governmental authority, i.e., 'the condition of 90% equity or control to carry out a function entrusted to a municipality under Article 234W of the constitution' and opined that this clause is not applicable to the entire definition. Therefore, the SC held that service tax is not leviable on the services provided to IIT Patna and NIT Rourkela and dismissed the appeals filed by the department.

Facts of the case

- M/s. Shapoorji Pallonji and Company Pvt. Ltd. ('the Respondent/SPCL') are registered under the Central Excise and Service tax and are engaged in the business of construction services.
- They were awarded the contract for construction works from NBCC India Ltd (NBCC), which were appointed as the project management consultant by IIT Patna, and it was agreed that the respondent would be reimbursed for the service tax paid by IIT Patna.
- On a similar term, NIT Rourkela also awarded a works contract for the construction project.
- The respondent discharged the service tax liability for the period of FY 2013 till 2015. However, no service tax was reimbursed by NIT Rourkela.
- Subsequently, the Indian Audit and Account Department carried out an audit and expressed its concern that the service providers engaged in construction activities for educational institutions, which fulfil the criteria of a 'governmental authority', are not leviable to service tax.
- The respondent filed a writ petition before the Patna HC, requesting to refund the amount of service tax paid.
- Aggrieved by the non-reimbursement of taxes by NIT, the respondent filed an appeal before the Orissa HC.
- Aggrieved by the HC's decision, the appellant filed an appeal before the SC requesting to set aside the HC's orders.

HC's observations and judgement

- The Patna and Orissa HC allowed the writ petition and held that IIT Patna and NIT Rourkela are covered within the scope of governmental authority and are not obliged to fulfil the condition of '90% or more participation by way of equity or control'.
- Therefore, the respondent is exempt from the payment of service tax, and the service tax collected by the appellant shall be refunded.

Appellant's contentions

- The appellant submitted that the respondent was not eligible for service tax exemption and emphasised that IIT and NIT are excluded from the definition of governmental authority, as they do not carry any duties as per Schedule XII of the Constitution.
- The requirement of 90% or more government equity or control applies to both types of governmental bodies (statutory or non-statutory).
- The appellant contended that the HC has wrongly interpreted the sub-clauses of the term 'governmental authority' as independent and disjunctive.
- The respondent referred to various decisions and emphasised that 'punctuation marks alone should not dictate the interpretation of a statute, especially when the meaning of the statute is clear without them' and the terms 'or' and 'and' can be interchangeably interpreted to fulfil the legislative intent.
- The appellant placed its reliance on the decision in the case of ITC Limited, wherein it was held that the order of self-assessment being an assessment order under the Customs Act is appealable and a refund claim is not sustainable unless the assessment itself is set aside.
- The appellant submitted that the SPCL has delivered its services to NBCC, not directly to IIT Patna, and NBCC is not a governmental authority. Therefore, these transactions are leviable to service tax.

Respondent's contentions

- The respondent contended that the IIT Patna and NIT Rourkela should be considered as governmental authorities because both are established by the parliament.
- The respondent submitted that the services provided by sub-contractors (works contract) to another contractor that are also providing works contract services are exempted vide Clause 29(h) of the exemption notification.

Issue before SC

Whether the educational institutions can be classified as 'governmental authority' in order to avail exemption from service tax as per the mega exemption notification?

SC's observations and judgement [Civil Appeal No. 3991-3992/2023; Order dated 13 October 2023]

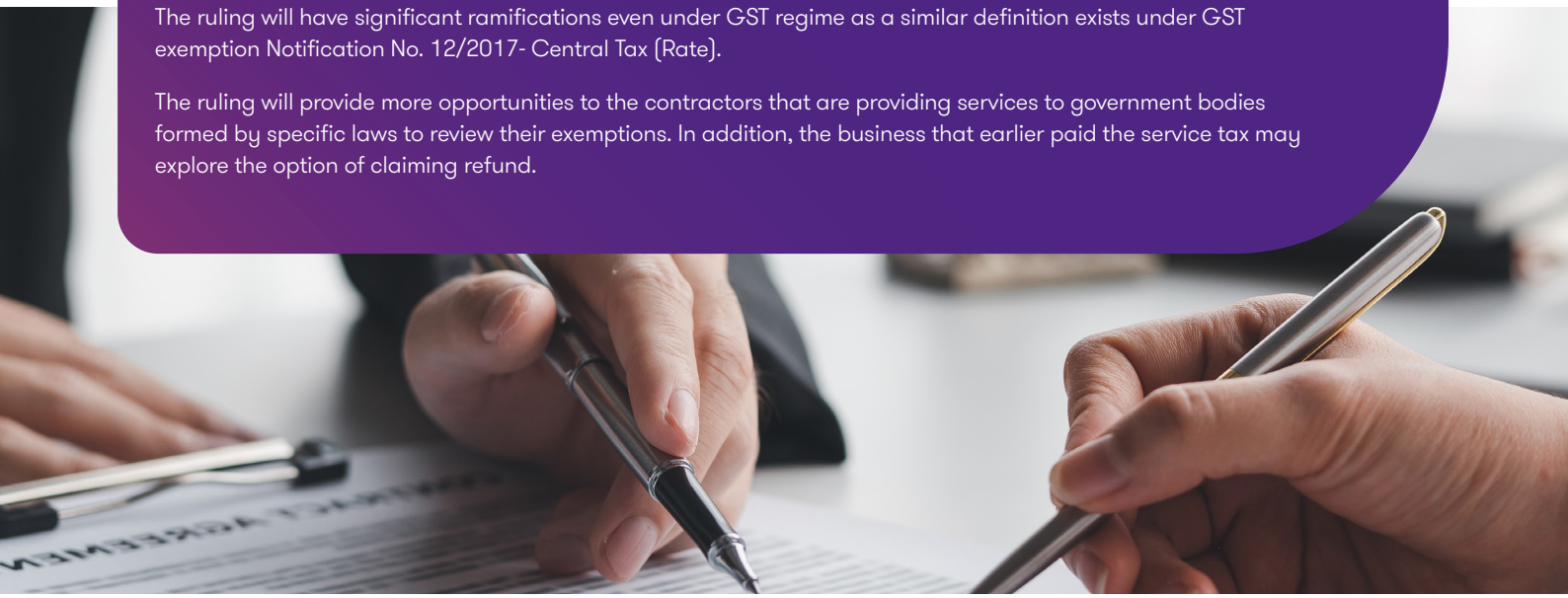
- **Analysis of the exemption notification before amendment:** The SC observed that before the amendment, exemption was extended only to those entities that fulfil three conditions, i.e., if they are established with 90% or more participation by way of equity or control by the government, set up by an act of the parliament or state legislature and were engaged in functions under Article 243W of the Constitution of India.
- **Objective of government to redefine the term 'governmental authority':** The SC opined that the earlier definition of governmental authority was restrictive in nature due to which later, the government widened the scope of exemption and notified that any authority or board or any other body, set up by an act of parliament or state legislature would be eligible for exemption without the condition of having been established with 90% or more participation by way of equity or control by the government to carry out any function entrusted to a municipality under Article 243W of the Constitution.
- **Interpretation of the definition of governmental authority:** The SC noted that the conjunction 'or' between sub-clauses (i) and (ii) divides the two clauses into parts, wherein the first part is independent of the second part; therefore, it is capable of operating independently. It was further noted that the proviso in Clause 2(s) of the Exemption Notification stating that '90% or more participation by way of equity or control, to carry out any function entrusted to a municipality under Article 243W of the Constitution' would be applicable only with respect to sub-clause (ii) of Clause 2(s), i.e., 'governmental authority' that is established by the government.
- **HC's interpretation is valid under law:** The SC relied on its own judgement in the case of Dilip Kumar, wherein it was held that 'the burden of proving applicability of the exemption notification is on the assessee and when there is ambiguity in interpreting an exemption notification, the interpretation that favours the Revenue must be adopted'. The SC held that the above decision is not applicable to the present case because there is no ambiguity present, so the HC's decisions are valid. The SC also observed that the authority has fulfilled its duty by re-defining 'governmental authority', and now courts are responsible to interpret the legislation.
- **HC's orders were upheld, and appeals were dismissed:** The SC observed that the tools of interpretation are intended to make a statute workable, not to achieve a particular outcome. Therefore, the SC upheld the HC's order and dismissed the present appeal.

Our comments

This is a welcome judgement by the SC through which the SC has widened the coverage of the entities that would be covered under the scope of governmental authority under the service tax law.

The ruling will have significant ramifications even under GST regime as a similar definition exists under GST exemption Notification No. 12/2017- Central Tax (Rate).

The ruling will provide more opportunities to the contractors that are providing services to government bodies formed by specific laws to review their exemptions. In addition, the business that earlier paid the service tax may explore the option of claiming refund.



Jharkhand HC held subsequent amendment in the industrial policy curtailing benefits of existing units as unreasonable

Summary

In a significant development, the Jharkhand HC has affirmed the doctrine of the promissory estoppel and held that subsequently amending the state industrial policy to curtail the benefit originally promised to the beneficiaries in the absence of any public interest is unreasonable and violative of Article 14 of the Constitution. The HC further stated that the notification, which has an effect of destroying the accrued and vested right of the petitioner, is without any authority, and is irrational and unreasonable.

Facts of the case

- Atibir Industries Company Ltd (the petitioner) was engaged in the manufacture of iron and steel.
- In 2016, a scheme was introduced, named as 'The Jharkhand Industrial Investment and Promotion Policy, 2016 (policy)' to generate revenue and to create employment in the state of Jharkhand. The scheme provided that new large projects will be provided with the reimbursement of 75% of net VAT p.a. for seven years from the date of production with a ceiling of maximum 100% of total fixed capital investment made and also extended this benefit to the units that will undertake expansion modernisation and diversification.
- Post the introduction of GST, the policy was amended, stating that new large units, including the units having undertaken expansion/modernisation/ diversification, would be given an incentive of 75% reimbursement of 'State GST paid on intra-state sale, subject to actual realisation in the state government treasury' for seven years with a ceiling of 100% of total fixed capital investment made.
- The petitioner expanded its unit of sinter and pig iron production in 2017 and applied for grant of reimbursement of state GST subsidy for the period 2017- 23, of which only part amount was granted.
- The petitioner produced a 'No Dues Certificate' issued by the Commercial Taxes Department, but the amount sanctioned was not being disbursed to it. Aggrieved by the same, the petitioner filed the present writ petition.
- Subsequently, a high-powered committee decided to keep in abeyance the decision of the grant of the SGST subsidy to the petitioner.
- After the implementation of GST, an explanation was inserted vide notification dated 7 March 2019, wherein it was provided that if a subsequent taxable person to whom the supply of goods has been made, claims ITC on the goods supplied, the benefit of the SGST subsidy would not be available to the industry. Resultantly, the tax subsidy granted ceased to continue.

Petitioner's contentions

- Drawing its reference from various SC judgments, the petitioner contended that the action of the department to introduce an 'End user condition within the state' vide notification was not permissible under law.
- The petitioner submitted that the term 'tax actual realisation in the state government treasury' means the net GST payable by an industry, i.e., GST (-) ITC = net GST.
- The petitioner contended that the government cannot deny the incentive by amending the policy retrospectively.
- The subsidy on VAT/GST under the policy was extended to the industries in public interest, and these are the vested rights.
- The respondents are bound by the promissory estoppel and legitimate expectations and, in the absence of any supervening public interest being pleaded, the policy cannot be amended to the detriment of the petitioner.
- The petitioner placed reliance on the decisions in the cases of Birla Corporation Ltd., MRF Ltd. and Pondicherry State Cooperative Consumer Federation Ltd., wherein it was held that 'rigorous burden of proof lies on the state to show the supervening public interest, and mere loss of future revenue cannot be a ground to invoke benefit promised under the policy, on the strength of which, an industrial unit has already established and commenced production'.
- The petitioner submitted that its expanded unit is manufacturing pig iron, which is not a consumable product by the people at large or is not an end user product. As a result, the petitioner would not be eligible to get SGST refund at any cost.

Respondent's contentions

- The respondent relied on the provisions of Section 24 of the General Clauses Act and submitted that the power to enact also includes the power to repeal and/or amend.

Issues before the Jharkhand HC

- Whether a notification issued under Clause 10.7 of policy by the department of industries for giving effect to the provisions of the policy can lay down additional conditions and/or restrictions for the availment of benefit of the incentive that has not been stipulated under the policy?
- Whether the notification is contrary to the principles of the promissory estoppel and whether the same can be sustained in the absence of any supervening public interest being pleaded and/or established by the state of Jharkhand for curtailing the benefits as promised under the policy?

Jharkhand HC's observations and judgement [W.P. (T) No. 3357 of 2023; Order dated 31 August 2023]

- **Restricting benefit of subsidy by issuing a notification is not valid under law:** The HC emphasised that this issue is no longer res integra and has been settled by various decisions of the apex court in the case of Suprabhat Steel Ltd., Tata Sponge Iron Ltd. and Manuelsons Hotels Private Limited, and noted that an additional condition or restriction, which has been imposed by the department, is wholly without jurisdiction and beyond its powers. The HC observed that what has been promised by the state government cannot be taken away by a department of the state government by laying down guidelines for implementation of the policy.
- **Promissory estoppel can be invoked against the legislature in the exercise of its legislative functions:** The HC drew reference from a recent decision of the SC in the case of Brahmaputra Metallics Ltd., wherein the SC upheld the principles of the promissory estoppel and declared the amendment introduced in 2019 as invalid and observed that the state has not offered any justification for the delay in the issuance of the notification, or also not provided reasons for it in public interest. Thus, the SC held that the action of the state is arbitrary and is violative of Article 14.
- **Amendment destroying petitioner's right is not valid under law:** The HC ordered that the notification, which has an effect of destroying the acquired, accrued and vested right of the petitioner, is without any authority, is irrational and unreasonable, and violative of Article 14 of the Constitution of India, and is unsustainable. Thus, the acquired right of the petitioner cannot be curtailed.
- **HC quashed and set aside the decision of the high-powered committee:** The HC observed that to avail the benefit under the policy, the petitioner has maintained the separate records of production, investment, details of VAT/SGST paid/payable for its expanded unit, but the high-powered committee calculated reimbursement on the basis of the entire unit, i.e., the original and expanded unit of the petitioner, which resulted into reduction of the claim of subsidy of the petitioner. Therefore, the HC directed the respondent to calculate the incentive, keeping in view the expanded unit of the petitioner only, as the petitioner is maintaining separate books of account and, consequently, to sanction and disburse the amount claimed by the petitioner. The HC ruled that the amendment is not sustainable, and accordingly, the HC quashed and set aside the decision of the high-powered committee.

Our comments

Earlier, the SC, in the case of Brahamputra Metallics Ltd., had held that the state government, after having promised to grant industrial subsidy/ incentive to industrial units, cannot deny the said incentive by amending the policy.

Even in the case of Tata Sponge Iron Ltd., the SC had upheld the decision of the Orissa HC, which declared the additional condition laid down in operational guidelines/instructions, restricting the benefit of exemption as being without jurisdiction and without the sanction of law.

The present ruling by the Jharkhand HC is a significant development, wherein the principles of the promissory estoppel have been reinforced and emphasised the importance of upholding commitments made by the government through its policies.

The ruling is likely to bring relief to other assesses, considering that similar restrictions were inserted by many other states in their policies (Maharashtra, Rajasthan), which resulted in a huge quantum of incentives being stalled by the state government.

B. Key judicial pronouncements under Customs/FTP/ SEZ laws

Undervaluation needs to be proved basis valid evidence by the Revenue, in the absence of which, invoice price as declared shall be accepted – SC

Summary

The SC has upheld the order of the CESTAT Mumbai bench, wherein it was held that unattested and unverified export declarations were not valid evidence for rejecting invoice value. The SC opined that the invoice price could not be rejected without any cogent reason. The transaction value (the price actually paid or payable for the goods) should be the primary basis for customs valuation, and other valuation methods shall be invoked sequentially only when there is evidence to doubt the correctness of the declared transaction value. The SC further stated that undervaluation needs to be proved by valid evidence by the Revenue, in the absence of which, the benefit of the doubt must be given to the importer, and the invoice price, as declared, shall be accepted.

Facts of the case

- M/s. Ganpati Overseas (the assessee), had imported tuners and saw filters from M/s. Arise Enterprises (the supplier) based in Hong Kong. On the basis of the secret information received, the DRI/department had alleged that such imports were undervalued, leading to the evasion of the Customs Duty.
- The DRI carried out an investigation and scrutinised all the relevant material, along with the export declaration filed by the supplier before the Hong Kong Customs and Excise Department. The DRI stated that the same revealed that the price declared therein was much higher than the invoice price declared before the Indian Customs Authority at the time of import.
- Basis the above, the DRI contended that the value of imported goods should be enhanced and computed on the basis of the export declarations. Accordingly, the DRI issued a SCN and raised a demand for differential duty, along with interest and penalty. Additionally, since the value of imported goods was misdeclared and undervalued, it was stated that they were liable to be confiscated.
- The DRI had also stated that the directors of the supplier and the owner of the assessee had, in their respective statements, admitted that the value as declared in the export declarations was the actual price of the imported goods, and the assessee had deliberately undervalued the imported goods to evade Customs Duty.
- The assessee, in response, had denied the allegations in totality. It was stated that the copies of the export declaration were unattested and should not be relied upon by the department.
- Moreover, the export declarations reflected wrong values due to the inadvertence of the supplier's staff, which was duly rectified by filing fresh ones, along with the payment of the requisite penalty. It was stated that the tuners and saw filters were supplied to the assessee at a lower price because the supplier had initially obtained the same on a stock-clearance basis.
- The assessee further stated that the statements, subsequently retracted, were obtained through coercion and under duress and shall also not be relied upon.
- The Commissioner of Customs (the Adjudicating Authority) did not accept the assessee's response and relied upon the export declarations to confirm the demand.
- The assessee challenged the order before the CESTAT.

CESTAT 's observations and order [Appeal No. C/1347 and 1374/2002; order dated 27 June 2008]

- The CESTAT stated that unattested photocopies of export declarations cannot be considered valid evidence for the enhancement of the value of imports. Additionally, the supplier had duly submitted corrected export declarations, indicating prices that were congruent to the price as declared in the import invoices.
- The CESTAT invoked the trite position that the onus of proving the undervaluation of imports lies on the department. Accordingly, in the absence of incriminating evidence or any contemporary imports of higher value, the transaction value, as declared by the importer, shall be accepted.
- Additionally, the assessee had also submitted invoices of contemporaneous imports, evidencing a similar price as the one declared by them. In view of the above, the CESTAT set aside the impugned demand order of the adjudicating authority.
- The department had challenged the order of the CESTAT before the SC.

SC's observations and judgement [Civil Appeal Nos. 4735- 4736/2009; order dated 06 October 2023]

- **Unattested photocopies of export declarations are not valid evidence:** The SC agreed with the CESTAT's observation that the department and the adjudicating authority had erred by relying upon the unattested photocopies of export declarations. The SC asserted that a relied-upon document has evidentiary value only when the authenticity of the same is proved or verified. The SC also stressed the fact that the corrected export declarations subsequently filed by the supplier and accepted by the Hong Kong Customs Authority eliminate the initially filed export declarations. Therefore, the same cannot be construed as valid evidence for proving undervaluation and tax evasion.
- **Statements recorded under duress or coercion are not admissible as evidence:** The SC observed that the Customs Law empowers customs officers to summon and record statements to determine if there is any violation. Such statements would be admissible as evidence and can be used against such a person. The SC stated that the statements recorded under duress or coercion do not conform to minimum judicial standards and, therefore, would not be admissible as evidence. Accordingly, the SC held that the adjudicating authority was obligated to ensure that the statements of the directors of the supplier and owner of the assessee recorded by the DRI were not under duress and coercion.
- **Invoice price shall be accepted in the absence of contemporaneous imports at higher prices:** The SC stated that the transaction value or the invoice value cannot be rejected arbitrarily without giving any valid reasons. The SC opined that the allegations of undervaluation should be buttressed by valid evidence or the price of contemporaneous imports of comparable goods. In the absence of the above, the benefit of the doubt must be given to the importer and the invoice price as declared shall be accepted. Accordingly, the SC upheld the order of the CESTAT.

Our comments

Recently, the SC, in the case of M/s Aggarwal Industries Ltd., had ruled that the Customs Department cannot reject the authenticity of the invoice produced by the importers of the consignment on the basis of mere suspicion. Any doubt about the value of such an invoice must be based on some material evidence and not on a mere suspicion or speculation of the authorities.

Earlier, the CESTAT Delhi, in Wall Street Impex, had held that in terms of the valuation provisions, the value of imported goods shall be the comparable value of identical goods. If such value is not found, then the comparable value of similar goods will be considered. In the absence of both, the value shall be determined by adopting the deductive method of valuation, i.e., based on the price of similar or identical goods sold domestically. The CESTAT held that in terms of the valuation provisions, the value should be first determined as per the value of contemporaneous imports of identical goods.

Even the CESTAT Chennai, in the case of Kaveri Silks & Jute Private Limited, had accepted the transaction value as declared by the importer assessee when the contemporaneous import value was not conclusive.

The present ruling by the SC is in line with the above and is a welcome ruling, which should set precedence in similar matters. The ruling will provide relief and safeguard taxpayers from undue hardship caused by the authorities in similar cases.

Advance authorisation and duty drawback benefit can be obtained simultaneously in case of AIR, and duty-free inputs are a fraction of the overall inputs – Madras HC

Summary

The Madras HC has held that the benefit of duty drawback need not be reversed on goods manufactured by using both duty-free and dutiable inputs, provided the duty-free inputs are a fraction of the overall inputs utilised. The HC explained that AIR is a consolidated, presumptive industry rate declared by taking into account the composition of goods, including both exempted and dutiable inputs. The HC opined that the benefit of the DD scheme computed on AIR shall be available in full without the requirement to apportion the benefit qua the exempted and dutiable inputs. Accordingly, the HC set aside the demand of reversal of benefit of the DD scheme when surplus duty-free inputs were used to manufacture goods on which the DD scheme benefit was obtained.

Facts of the case

- K.G. Demin Limited (the petitioner) had imported indigo blue as raw material under the AA scheme during the period 2002 to 2004 for manufacturing denim.
- In terms of Notification No. 31/97-Customs dated 1 April 1997, the materials imported duty-free under the AA scheme (exempted materials) should first be utilised for discharging the EO. Accordingly, the exempted materials could be used in any manner after the fulfilment of the prescribed export obligation. The same was also categorically clarified under the FTP 2004-09.
- Therefore, the petitioner utilised the surplus indigo blue left after the fulfilment of the export obligation, for further manufacturing of products and availed the benefit of the DD scheme on such products.
- The department demanded the petitioner to reverse the benefit of the DD scheme on the grounds that the benefit of both the AA scheme and DD scheme cannot be obtained simultaneously on the same raw material. Additionally, requisite interest and penalty was also imposed.
- In appeal, the CESTAT set aside the demand order on the grounds that the petitioner cannot be made to reverse the whole of the DD scheme benefit merely because a negligible amount of indigo blue was utilised for manufacturing the products on which benefit of the DD Scheme was obtained. Additionally, the DD scheme benefit was computed on the basis of AIR, which takes into consideration the composition of goods, including both exempted as well as dutiable inputs.
- The department challenged the impugned order of the CESTAT before the HC.

Madras HC's observations and judgement [CMA (MD) No. 1279/2015; Order dated 28 August 2023]

- **Attributing individual rates to inputs is impossible when DD benefit is computed on AIR:** The HC opined that the bifurcation of the individual rate components or the individual components of duty pertaining to each input is not possible when the benefit of the DD scheme is computed by applying AIR. The HC expounded that the AIR is a consolidated, presumptive industry rate that is declared by taking into account the composition of goods inclusive of both exempted and dutiable materials. The same is different and lesser than the brand rate.
- **AIR duty is to be allowed in full where portion of inputs are exempted materials:** The HC stated that Rule 3 of the Drawback Rules disallowed benefit of the DD scheme on goods manufactured by using duty-free inputs. However, the FTP 2004-09 diluted this absolute position primarily by allowing the DD scheme benefit proportionate to dutiable inputs on goods manufactured using both duty free/ exempted and dutiable inputs. Moreover, it was further clarified by a circular that if the benefit of the DD scheme is computed by applying AIR, it shall be available in full without any need to apportion the benefit qua the dutiable and duty-free inputs. However, the HC pertinently stressed upon the fact that the apportionment shall not be required only in cases where the duty-free inputs are a fraction of the total inputs used, as also clearly stated in the circular. In view of the above, the HC upheld the order of the CESTAT .

Our comments

The HC, in this judgement, has clarified that the AA scheme and duty drawback scheme are not mutually exclusive to each other, i.e., the benefit of both schemes can be obtained simultaneously.

However, the HC has pertinently stressed that such simultaneous benefit will be available only when the inputs imported duty-free are a fraction of the overall inputs used in the manufacture of the product. Apart from the specific caveat, the HC also interpreted the provisions contained under the Drawback Rules and FTP 2004-09 harmoniously to bring respite to the assessee.

Refund of anti-dumping duty paid wrongly cannot be denied – CESTAT

Summary

The CESTAT Ahmedabad bench has held that the refund of anti-dumping duty paid wrongly by the assessee cannot be denied merely on the ground that the anti-dumping duty is dealt with under the CTA, which is different from the Customs Act. The CESTAT further stated that there is no bar on the refund arising otherwise in distinct situations to be allowed. In this case, the refund rose due to a pronouncement by the court of law that anti-dumping duty was not payable by the party, and this is very much governed by the refund provisions under the Customs Act due to same having been borrowed in the CTA. The CESTAT observed that the anti-dumping duty provisions clearly indicate that even the CTA envisages situations where the refund could arise even in anti-dumping duty cases otherwise in listed situations. Accordingly, the CESTAT allowed the appeal and held that the assessee was entitled for claiming refund of the anti-dumping duty paid under the Customs Act.

Facts of the case

- POSCO India Processing Center Private Limited (the appellant/assessee) had wrongly paid the anti-dumping duty. In the appellant's own case, the CESTAT had also upheld the same.
- Accordingly, the appellant sought a refund of the amount deposited, which was denied by the department on the ground that the Customs Act and CTA were different legislations, and anti-dumping law and provisional and final impositions are dealt under the CTA.
- Section 9A(8) of the CTA only envisages refund of anti-dumping duty in enumerated cases as provided under Section 9AA of the CTA.
- The appellant challenged the refund rejection order before the CESTAT.

Issue for consideration before the CESTAT

Whether a refund of the anti-dumping duty wrongly paid by the assessee and upheld as such by this in the appellant's own case could be denied by the department on the ground that the refund sought u/s 27 of the Customs Act cannot be given as the Customs Act and the CTA are different legislations, and anti-dumping law and provisional and final impositions are dealt with under the CTA. Therefore, only the refund, as envisaged u/s 9A(8) of the CTA of anti-dumping duty in enumerated cases, can be granted.

CESTAT Ahmedabad's observations and order [Customs Apeal No. 11453/2018; vide order dated 14 September 2023]

- **Refund of anti-dumping duty other than those enumerated is permitted under the Customs Act:** The CESTAT agreed with the appellant's contention that Section 9A(8) of the CTA, which is a borrowing provision, permits refund in cases other than those enumerated u/s 9AA of the CTA. Pertinently, Section 9A(8) of the CTA explicitly provides that refunds shall be regulated and governed by the Customs Act. Accordingly, since the duty was wrongly paid, the refund application was not only maintainable but also grantable as per Section 27 of the Customs Act.
- **Notified limitation period applies only to enumerated cases:** The CESTAT examined Notification No.05/2021-Cus(NT), which prescribed three months as the time limit for filing refund under Section 9AA of the CTA. The CESTAT opined that the prescribed time limitation shall be confined to refund in the enumerated cases.
- **No bar in refund arising in different situations:** Accordingly, the CESTAT held that there is no bar in the refund arising in distinct situations, which in the present case is due to the pronouncement of the court that anti-dumping duty was not payable. In view of the above, the CESTAT set aside the refund rejection order of the lower authority.

Our comments

This is an important judgement wherein the CESTAT has alleviated the existing dichotomy by harmoniously interpreting Sections 9A(8) and 9AA of the CTA.

The CESTAT has clarified that a legislature does not use words such as 'refund' arbitrarily or without any meaning/significance. Additionally, the CESTAT rejected the department's contention that Section 9A(8) of the CTA only permits refund of anti-dumping duty in enumerated cases, as it results in a scenario whereby a duty that could not have been imposed could nevertheless be allowed to be retained, if already collected. This interpretation is not sustainable, as it violates Article 265 of the Constitution of India.

This is a welcome ruling, which should set precedence in similar matters.

CVD due at the time of debonding of EOU can be paid by utilising CENVAT credit – CESTAT

Summary

The CESTAT Ahmedabad Bench has held that the CVD payable at the time of debonding an EOU can be paid from the accumulated CENVAT credit. The CESTAT drew reliance from the judgement of the Gujarat HC in the case of Dishman Pharmaceuticals and Chemicals Private Limited, wherein the HC had permitted the payment of excise duty foregone from the CENVAT credit account. Further, the CESTAT also observed that the appellant had made a detailed declaration before the proper officer regarding the facts of payment of various kinds of the dues and utilisation of the CENVAT credit and a no-dues certificate. Therefore, an extended period of limitation could not be invoked, as there was no suppression of facts, misdeclaration or any other contravention with an intention to evade duty.

Facts of the case

- Sun Pharmaceuticals Industries Limited (the appellant), a 100% EOU unit, decided to exit from the 100% EOU scheme during the year 2012-13 and applied for de-bonding of the unit.
- The appellant calculated the dues on the stock of finished goods, imported as well as indigenous raw materials, goods under work-in-progress and capital goods, and paid the requisite customs and central excise duties. The details of the same were duly conveyed to the department as well.
- The appellant submitted the no-dues certificate to the Development Commissioner and was permitted to de-bond the unit.
- Subsequently, the department issued a show cause notice by invoking the extended period, alleging that the appellant had wrongly utilised the CENVAT credit of raw materials and input goods imported towards the payment of CVD. The same was confirmed by the order in original.
- The appellant challenged the impugned order.

CESTAT Ahmedabad's observations and order [Customs Appeal No. 10719/2017; Order dated 13 October 2023]

- **CENVAT credit can be utilised for paying CVD at the time of de-bonding:** The CESTAT held that the CVD, which is payable on de-bonding 100% EOU, can be paid by utilising the accumulated CENVAT credit. The CESTAT relied upon the judgement of the Gujarat High Court in the case of Dishman Pharmaceuticals and Chemicals Private Limited, wherein the HC had categorically validated the practice of payment of excise duty foregone by utilising CENVAT credit instead of cash.
- **Extended period cannot be invoked in the absence of suppression of facts, misdeclaration or contravention with intention to evade duty:** The CESTAT pointed out that the appellant had duly communicated the details of the dues and its payment, including the utilisation of CENVAT credit to the proper officer, and the department had upon satisfaction issued a no-dues certificate. Accordingly, there is no suppression of facts, misdeclaration or violation with the intention to evade duty. Therefore, in the CESTAT's opinion, the demand was barred by limitation. In view of the above, the CESTAT set aside the impugned order.

Our comments

Earlier, the Gujarat HC, in the case of Ralli Engine Ltd., had held that the appellant is permitted to pay the excise duty foregone from the legally availed CENVAT credit account. Upon the payment of excise duty through the CENVAT credit account, the HC had directed the department to issue a 'No Dues Certificate' to the appellant for de-bonding out of the 100% EOU scheme.

Considering there is a lack of clarity on whether the ITC of IGST can be utilised for the payment of the IGST foregone, at the time of debonding this ruling, along with the judgement of the Gujarat HC in the case of Dishman Pharmaceuticals, would be relevant precedents in this regard.

03

Decoding advance rulings under GST

Merely connecting auto drivers and passengers through a mobile application does not imply that services are provided through e-commerce operator – Karnataka AAR

Summary

The Karnataka AAR has noted that the applicant is engaged in providing computer application services through the 'Namma Yatri' application for facilitating services provided by registered auto drivers to the recipients. The AAR held that the applicant owns the digital platform 'Namma Yatri' for the supply of services and qualifies as an ECO. The AAR further ruled that the applicant's services are confined to connecting the auto drivers and the passengers and do not include providing operational aspects, such as arranging supplies, collecting consideration, customer care services, etc. Accordingly, the services provided are not 'through' the ECO. Therefore, the supply made by the auto drivers to their customers does not constitute a supply made by the applicant, and hence, the applicant is not liable to collect and pay tax on such supplies.

Facts of the case

- M/s. Juspay Technologies Private Limited (the applicant) is engaged in providing computer application services through the 'Namma Yatri' application for facilitating services connecting through the platform of auto drivers and recipients registered under the application.
- The applicant submitted that it shall charge membership and subscription fee to the person who enrolls for the application services. Further, it is not concerned with collecting the consideration for supply from the clients/ business associates of the subscribed suppliers.
- The applicant has no role in the arrangement between the registered members and their recipients, including in the case of disputes. The applicant is not involved in arranging the supply or collecting any consideration from the buyers to the registered members.
- The applicant is a technology provider to autorickshaw drivers, which differs from a rent-a-cab aggregator. Therefore, it does not fulfill the mandatory requirements for obtaining a rent-a-cab aggregator licence from the RTO.
- The applicant sought clarification on whether it qualifies as an ECO and supply falls within the ambit of the RCM. Further, whether the supply by the autorickshaw driver to the customer would be equivalent to the supply of the applicant, and accordingly, whether the applicant would be liable to collect GST on such supply.

Karnataka AAR's observations and ruling [KAR ADRG 31/2023; Order dated 15 September 2023]

- **Applicant qualifies as ECO:** Referring to the definitions of 'electronic commerce' and ECO, the AAR stated that an ECO is any person who owns, operates or manages a digital or electronic facility or a platform for electronic commerce, i.e., for the supply of goods and/or services, including digital products over a digital or electronic network. The AAR noted

that the applicant owns a digital platform for the supply of services, and hence, qualifies as an ECO.

- **Supply of services not through the applicant:** The AAR noted that in the present case, the passenger transportation services are provided by an auto-rickshaw, which qualifies as a motor cab. As an ECO, the applicant would be liable to pay tax if the supply of intra-state supplies notified by the government is through an ECO. In the instant case, the category of services of intra-state supplies notified by the government covers passenger transportation services by a motor cab. Further, since the applicant merely connects the auto drivers and passengers, and has no control over the actual provision of the service, it can be understood that the services are independent and not provided through an ECO. Hence, the applicant does not meet the conditions of Section 9(5) of the CGST Act.
- **No liability of applicant to pay GST on services provided by auto drivers:** The AAR held that though the applicant meets the criteria of an ECO, it does not fulfil the nature of supply prescribed in Section 9(5) of the CGST Act read with Notification No. 17/2017- Central Tax. Further, the supply made by the auto drivers to their customers does not amount to supply by the applicant. Hence, the applicant is not liable to collect and pay GST on supplies made on the application.

Our comments

Earlier, the Karnataka AAAR, in the case of M/s. Opta Cabs Private Limited, ruled that the passenger transportation services supplied through the appellant's electronic platform and digital network would be subject to tax in the hands of the appellant. The AAAR emphasised that 'booking' a taxi ride using the appellant's app is the first step in providing passenger transportation services, without which no services can be provided. Hence, the services are supplied 'through' the ECO.

However, contrary to the above, the AAR Karnataka, in the case of M/s. Multi-verse Technologies Private Limited, ruled that the word 'through' in the phrase - 'services supplied through ECO' - meant that the services are to be supplied by means of/by the agency of/from beginning to the end/during the entire period by an ECO. The AAR held that although the applicant qualifies the definition of an ECO, it is not the person liable to discharge tax liability under Section 9(5) of the CGST Act. The present ruling is also in line with the above ruling.

Even though the advance rulings are applicable only to the applicant and the jurisdictional officer, they have a persuasive effect and can be inferred in similar cases.

Distribution of gold coins/white good under promotional scheme qualifies as supply - Telangana AAR

The recent decision by the Telangana AAR in the case of Orient Cement Limited [TSAAR Order No. 20/2023 dated 30 September 2023], which held that the supply of gold coins and white goods to the dealers/stockists upon attaining a specified sales target under the sales promotion scheme is taxable as supply of goods, and accordingly eligible for ITC. It also clarified that the transaction would not qualify as permanent transfer or disposal of business assets under Schedule I of the CGST Act.

Interestingly, in the applicant's own case, the Karnataka AAR [2023 (9) TMI 126] had previously ruled that the distribution of gold coins and white goods as incentives for achieving marketing targets amounted to an 'inducement of' the supply of goods, thereby qualifying as a supply. The primary reasoning behind this decision was that the goods were permanently supplied and ITC was availed, thus falling under the category of 'transfer of permanent transfer or disposal of business assets' as outlined in Schedule I of the CGST Act.

Facts of the case

- M/s Haworth India Private Limited (the applicant), a wholly-M/s. Orient Cement Limited ('the applicant') incurs marketing and distribution expenses towards promotion of their brand and to enhance its sales in the course of its business.
- The applicant launched various target/performance-based discount schemes/white goods schemes for its dealers, in order to achieve its sales and marketing objectives.
- The 'Dealer White Goods Scheme' is one such scheme wherein specific slabs have been identified, and upon purchase of the designated quantity of cement, specified

discount per bag is credited. The dealers attaining higher discounts would also be eligible to receive gold coins/ white goods against the total credit point earned at the end of each quarter. Therefore, higher the cement quantity purchased, higher will be the discount earned, and accordingly, higher will be the eligibility of gold coins/white goods.

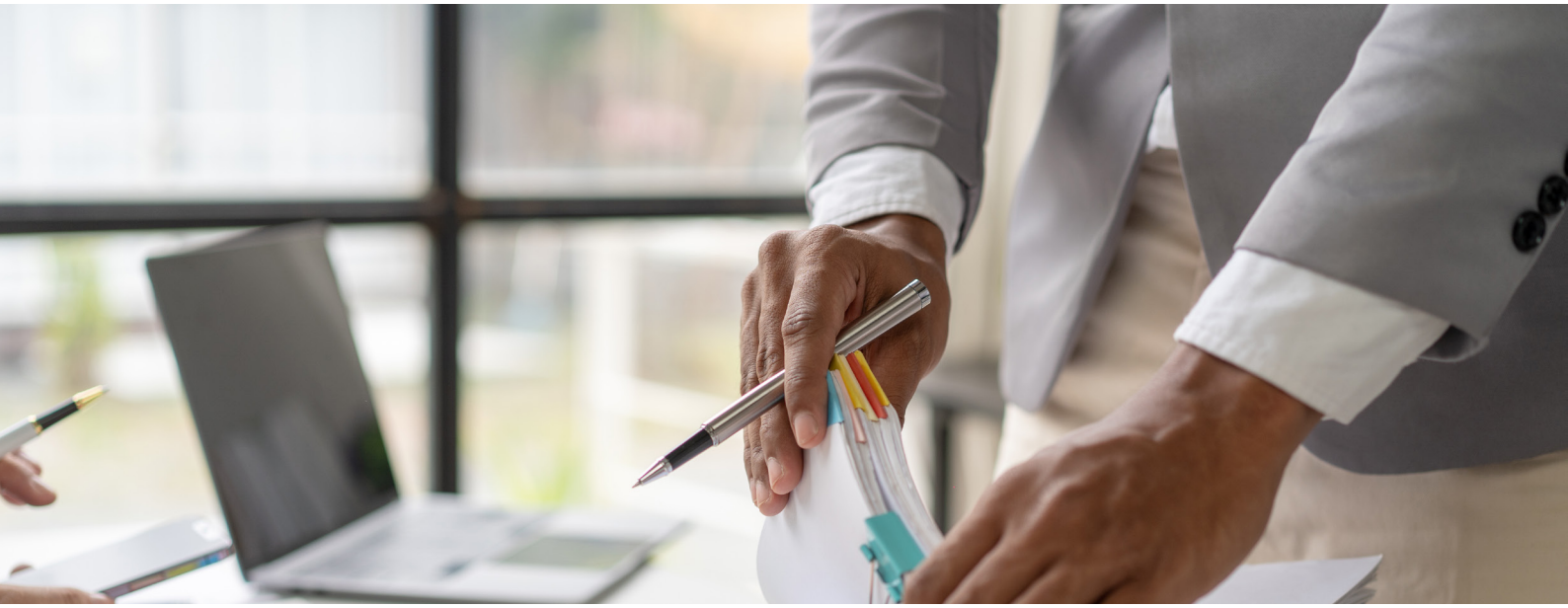
- The applicant purchased and distributed the gold coins/ white goods worth the total discount credited in the dealer accounts. Pertinently, the price of the gold coins/white goods was accounted for in the price of cement. Also, the applicant duly availed the ITC on the gold coins/white goods.
- The applicant sought clarification on whether the gold coins and white goods distributed to the dealers upon achieving the specified target would:
  - Qualify as 'goods disposed by way of gift' and the ITC would stand blocked under Section 17(5)(h) of the CGST Act;
  - Qualify as 'permanent transfer or disposal of business assets where ITC has been availed on such assets' and treated as 'deemed supply' in terms of Schedule I of the CGST Act;
  - Qualify as supply under Section 7 of the CGST Act.

Analysis and ruling of AAR

- The AAR observed that the applicant under the sales promotion scheme gave point-based incentives to its dealers based on growth percentage and net-points achieved by the said dealers on the sale of cement.
- The AAR stated that the supply of white goods/gold coins is against a consideration, which is the monetary value of the 'act' of attaining the sales target/threshold as indicated in the promotional scheme. Accordingly, the transaction would constitute supply under Section 7 of the CGST Act and would be taxable for the applicant. The value of supply shall be determined as per Section 15 of the CGST Act r/w Rule 30 of the CGST Rules.
- The AAR also ruled that such supply would not qualify as 'permanent transfer or disposal of business assets' under Schedule I of the CGST Act.

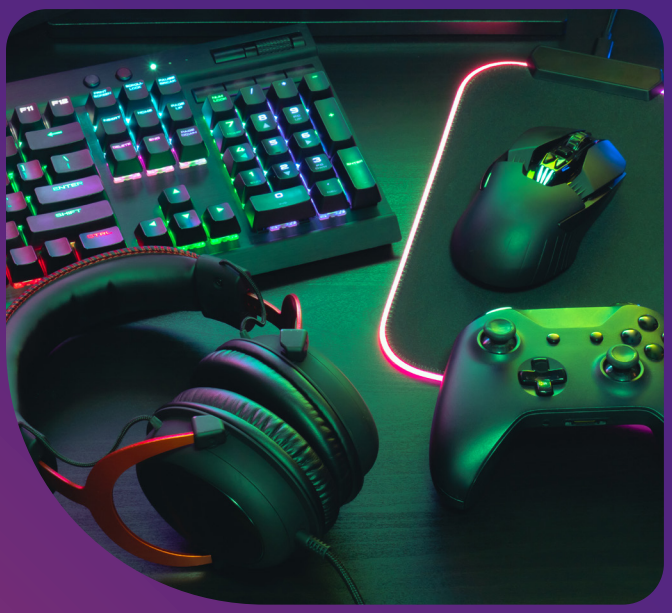
Our comments

The issue surrounding the GST implications of promotional schemes, both from an outward and inward perspective, has been a long-standing source of debate and confusion, with various conflicting rulings and interpretations. Earlier, the TNAAAR ruled in the matter of GRB Dairy Foods Pvt. Ltd. [2022 (3) TMI 1368] that goods distributed as part of a promotional scheme would not qualify as a supply, and as a result, the ITC would not be eligible. This viewpoint was also upheld by the Karnataka AAAR in the case of Page Industries [2021 (4) TMI 839]. However, the recent ruling contradicts these earlier judgements, leading to ambiguity in the interpretation of GST laws.



04

Experts' column



With its recent decision to impose GST @ 28% on full-face value of bets placed, the government has enacted GST Amendment Acts, 2023, and various notifications with effect from 1 October 2023 amid numerous industry representations and ongoing litigations on the issue of overall impact of this tax burden and prior period taxability.

To have a summarised understanding of the subject, we had a dialogue with subject-matter experts **Krishan Arora, Partner & Leader – Indirect Tax, Grant Thornton Bharat,** and **Karan Kakkar, Partner – Indirect Tax, Grant Thornton Bharat.**

Can you provide some insights into the recent GST amendments related to online gaming?

Response by Karan Kakkar:

Certainly, there have been noteworthy amendments introduced pursuant to the recommendations of the GST Council regarding the taxability of online gaming, casinos, and horse racing. In this regard, various amendments (including GST rate and valuation rules) have been notified vide CGST & IGST Amendment Acts, 2023, and other notifications w.e.f. 1 October 2023. Key changes as notified are:

- GST @ 28% to be levied on total amount deposited with the supplier (including advances).
- Amount returned/refunded not to be reduced from the supply value.
- Introduction of new definitions under GST for online gaming, online money gaming and specified actionable claim.
- Amendment in the definition of a supplier to provide deeming fiction in case of the supply of 'specified actionable claim' in specified cases.
- Mandatory registration for offshore online money gaming platforms undertaking supplies in India.
- An amendment in the definition of 'supplier' to provide deeming fiction in case of specified actionable claim transactions.
- The supply of online money gaming to be treated as the supply of goods, and if procured from outside India, shall be subject to IGST. Provisions of customs laws will not be applicable

What could be the significance and rationale behind imposing GST @ 28% on full face value of bets?

Response by Karan Kakkar:

The online gaming industry had long grappled with divergent views w.r.t. classification of games, i.e., a game of skill and a game of chance, the applicable GST rate and supply valuation. With the insertion of specific provisions w.r.t. online gaming including par treatment of game of skill vs game of chance, the government has endeavoured to put the prevailing ambiguities at rest.

Further, referring to the comments from government officials, the decision to categorise online money gaming under the highest GST slab may be attributed to the following rationales:

- Demarcation of the gaming industry with the essential commodities industry.
- Heavy tax on the expanding and growing sector, which is perceived to be addictive for the youth.

How do these developments influence the GST landscape, and what are the major challenges that the gaming industry might encounter?

Response by Krishan Arora:

These recent developments have a significant impact on the GST landscape in the context of online gaming. There are several aspects to be considered and challenges to address:

- Defining online money gaming as a subset of online gaming while classifying the former as goods being specified actionable claim and excluding the same from the OIDAR services, allows for a range of various interpretations.
- The tax incidence on advances against online money gaming activity (i.e., supply of goods) without permitting GST adjustment on return/refunds seems to be in contrast with the conventional practice of allowing such adjustment on returned tangible goods vide credit notes.
- The GST applicability on wallet-to-wallet transfers and transitional wallet balance.
- The prospective or retrospective effect of these amendments. While the notification does not explicitly state the applicability, this determination can have a significant impact on the industry.

Given the global landscape, how do you anticipate the recent GST amendments in online gaming will impact the Indian gaming sector?

Response by Krishan Arora:

It's a pertinent question, and the impact of these recent GST amendments on the Indian gaming sector is indeed a topic of concern. When we look at the global scenario, we see that many countries, such as Australia, Austria, the Czech Republic, Italy, Malaysia, Singapore and the UK have adopted Gross Gaming Revenue (GGR)-based taxing models. Other nations that impose tax on contest entry amounts have subsidised tax rates ranging between 3% to 15%, with a rising tendency towards taxing GGR rather than the full-face value of the bets placed.

Considering these worldwide practices, the Indian government's choice to levy taxes on contest entry fees could profoundly affect the development of the Indian gaming sector. The low profit margins in the gaming industry make this tax structure particularly challenging. Such non-standardisation of tax implications at the global level could potentially lead to a significant shift of consumers towards offshore platforms or even illicit gaming and betting platforms.

These amendments may have overarching effects on employment generation in this fast-growing industry, especially in the start-up space. We could also witness a potential decline in FDIs, as well as reduced focus on research and development in the gaming industry.

What could be the way forward for the industry to adapt to these amendments?

Response by Krishan Arora:

Adapting to these recent amendments will indeed require careful deliberation and strategic planning to alleviate the impact of additional tax burden on gaming players. One of the crucial considerations for gaming platforms will be whether to absorb the entire GST liability or pass on a portion or the entirety of additional burden to gaming players. With the lower GGR and higher tax rate, absorbing the full brunt of additional taxes may prove financially unviable for gaming platforms. On the other hand, passing on the entire burden to players could significantly reduce the prize pool and disincentivise users from participating.

Therefore, striking a balance between the tax burden, global competitiveness, and net winnings for players becomes paramount with focus on scaling up of the user base to mitigate the impact of the increased tax burden. Gaming platforms would also be required to ensure compliance with other legal regulations, including direct tax provisions, and undertake necessary changes in the accounting processes to streamline financial and tax management processes.

Moreover, various GST notices are being issued to many online giant real money gaming (RMG) companies for raising demand for the prior period. In this regard, the companies are suggested to undertake steps to ensure readiness around the anticipated litigation.

05

Issues on your mind

What are the features of the new e-invoice portal?

GSTN has onboarded four new IRPs for reporting e-invoices, in addition to NIC-IRP on a new e-invoice portal (www.einvoice.gst.gov.in). On the new portal, the taxpayers can find comprehensive information and all the relevant links/information in one convenient location on e-invoice compliance in a user-friendly format, such as check your enablement status, self-enable themselves for invoicing, search for IRNs, web links to all IRP portals. Taxpayers can log in to the new e-invoice portal using their GSTN credentials.

This portal is reference site for all masters (data), news and updates, latest releases, etc. For registering e-invoices and to access APIs, the taxpayers still need to go to https://einvoiceX.gst.gov.in.

What other applications/routes are available to download generated/received e-invoice?

The facility to download generated/received e-invoice is also accessible through G2B APIs and can be accessed via the GSP/ASP route. However, in API access, users will need to authenticate their credentials as well. The e-invoice JSON is available for download for 6 months from the date of IRN generation. A taxpayer whose registration is cancelled can also download JSON files only for the period when their registration was active.

What are the features of the new ICEGATE 2.0 portal?

The new registration module of ICEGATE aims at simplifying the overall process of completing registration at ICEGATE for accessing the ICEGATE dashboard and availing the services therein. During the process, few key details, such as GSTIN, PAN, etc., will be validated online and users will be required to provide minimal details for obtaining the registration. Once the process is completed, users are provided with a system generated ICEGATE ID and password for accessing the ICEGATE dashboard. The new ICEGATE 2.0 provides access to two types of users – the external users, i.e., trade users such as customs brokers, shipping lines, etc., including participating government agencies (PGAs) and the internal users of CBIC, i.e., ICEGATE officials.

The existing users of ICEGATE (i.e., the users already registered on ICEGATE 1.0 except simplified registration users) are not required to obtain a fresh registration. The user can directly login by providing their ICEGATE ID and password without having to register again. In such cases, the 'User Type' that needs to be selected shall be the 'ICEGATE User'. The existing simplified registration users of ICEGATE 1.0 need to upgrade their simplified registration to the DSC-based registration on ICEGATE 2.0 to access various services.

What is ECCS under Customs?

ECCS is an application that enables automated clearances in the express mode. ECCS is an automation programme to carry out clearance process under the Courier Imports and

Exports (Electronic Declaration and Processing) Regulations, 2010. This system is currently operational at nine ICT locations, i.e., Bengaluru, Mumbai, Delhi, Ahmedabad, Chennai, Cochin, Jaipur, Kolkata and Hyderabad, and is planned to be rolled out at the remaining locations in a phased manner..

The ECCS can be accessed on: https://eccsmobility.cbic.gov.in/eicimobility/. It provides facilities such as checking of status of import and export shipments, and status of transmission of CBE/CSB to RBI-EDPMS/GSTIN/ICEGATE.

06

Important developments under direct taxes

CBDT notified Form No. 10-IFA for exercising concessional tax rate under Section 115BAE of IT Act by new manufacturing cooperative societies

The Finance Act, 2023, inserted Section 115BAE under the IT Act with effect from **1 April 2024**, to provide for the concessional tax regime for certain new resident manufacturing cooperative societies and tax their income at the rate of 15%. The option under this section needs to be exercised on or before the due date of furnishing the ROI. Further, once this option is exercised for any FY, it will then apply for all subsequent FYs.

In this regard, the CBDT has inserted Rule 21AHA under the IT Rules to provide that the option under Section 115BAE of the IT Act is to be exercised in Form No. 10-IFA.

Further, Pr. DGIT(System) or DGIT(System) will specify the procedure for filing such a form, manner of generation of EVC and will also be responsible for formulating and implementing appropriate security, archival and retrieval policies in relation to this form.

[Notification No. 83 of 2023 dated 29 September 2023]

CBDT issues clarification regarding assessment of recognised start-ups

Earlier, the CBDT had exempted recognised start-ups from angel tax provisions if they received investment from resident investors in excess of the FMV of shares. However, recognised start-ups had to comply with conditions prescribed in Para 4 of Notification No. 13 of 2019 to be eligible for this exemption.

Since the scope of Section 56(2)(viib) of the IT Act was expanded vide the Finance Act, 2023, (i.e., to include investment by non-residents), the CBDT clarified that angel tax provisions would not apply to start-ups even if the investment is received from non-residents, provided they fulfill the conditions specified by the CBDT in its earlier notification.

The CBDT has now issued the following clarifications:

1. **Selection of case for single issue:** If case of such recognised start-ups being selected for scrutiny for applicability angel tax provisions only (single issue), then:
   - No verification on such issue will be done by the AO during the proceedings under Section 143(2)/147 of the IT Act; and
   - Contention of such recognised start-up on the issue will be summarily accepted.
2. **Selection of case for multiple issues:** If the case of such recognised start-up is selected for scrutiny for multiple issues, including the issue of the applicability of angel tax provisions, then:

- The issue of the applicability of angel tax provisions will not be pursued during the assessment proceedings; and
- For the other issues, the requisite procedure needs to be followed.

[Notification No. 13 of 2019 dated 5 March 2019, Notification No. 30 dated 24 May 2023 and F No. 173/149 /2019-ITA-1 dated 10 October 2023]

CBDT notifies amended Rule 11UA of the IT Rules

Pursuant to the amendment to angel tax provisions, the CBDT has notified the amended Rule 11UA of the IT Rules for the valuation of ES and CCPS. Salient features of this rule are as under:

- **Prescribed methods for valuation of ES / CCPS:** The net asset value method (applicable for ES) and discounted cash flow (applicable for ES and CCPS). These methods are prescribed for the valuation of investments by residents and non-residents.
- **Additional methods for valuation:** With effect from 25 September 2023, the following additional methods are prescribed for valuation of investment made by non-residents in ES/CCPS:
  - Comparable company multiple method
  - Probability weighted expected return method
  - Option pricing method
  - Milestone analysis method
  - Replacement cost methods

  The issuer company has an option to select any of the valuation methods prescribed above.

  Further, for the valuation of the FMV in the case of an investment in CCPS, valuation can be as per the value determined for the CCPS or the value specified for ES based on the methods prescribed above, at the option of the issuer company.
- **Price matching applicable for investments made by residents and non-residents:**

  This mechanism is applicable in the following cases:
  - In the case a venture capital undertaking has received consideration from the issue of ES/CCPS to a venture capital fund or venture capital company or any specified fund.
  - If consideration is received by a company from any notified entity.

  Further, price matching is available to the extent the consideration does not exceed the sum received from such venture capital fund/venture capital company/specified fund/notified entity.
  - Provided that the consideration is received within a period of 90 days (before/after) from the date of issue of such ES/CCPS to such venture capital fund/venture capital company/specified fund or notified entity.
- **Validity of the valuation report:** If a valuation report is prepared by a merchant banker within 90 days prior to the date of issue of such shares, such date can be taken to be the valuation date at the option of the taxpayer.
- **Safe harbour:** Safe harbour limit of 10% for the valuation of equity shares and CCPS for both resident and NR investors.
- **Excluded entities:** It prescribes the list of excluded entities to which the provisions of angel tax will not apply.

[Notification No. 81 of 2023 dated 25 September 2023]

CBDT notified Rule 16D of IT Rules and Form No. 56F for furnishing accountant's report under Section 10AA

As per Section 10AA(8) read with Section 10A(5) of the IT Act, deduction under Section 10AA of the IT Act for AY commencing on or after 1 April 2006 would be available if the taxpayer furnishes a report of an accountant certifying the deduction claimed by the taxpayer.

Earlier, the CBDT had, *inter-alia*, omitted certain rules and forms, which included 16D of IT Rule, along with Form 56F. However, no changes/amendments were made in the provisions of Section 10AA of the IT Act. Further, mechanism for the electronic filing of Form No. 56F has also been discontinued for AY 2023-24.

The CBDT has now reinserted Rule 16D under IT Rules to provide that an accountant's report needs to be furnished in Form No. 56F. This rule is applicable retrospectively with effect from 29 July 2021.

Considering the difficulties faced by the taxpayers in furnishing Form 56F for AY 2023-24, the CBDT has now extended the due date for furnishing Form No. 56F for AY 2023-**24 to 31 December 2023.**

[Notification No. 83/2021 dated 29 July 2021, Notification No. 91 of 2023 dated 19 October 2023, Circular No. 18 of 2023 dated 20 October 2023]

Glossary

AA	Advance Authorisation
AAR	Authority for Advance Ruling
AAAR	Appellate Authority for Advance Ruling
AC	Air conditioner
AIR	All Industry Rate
AO	Assessing Officer
API	Application programming interface
ASP	Application Service Providers
AY	Assessment Year
BTP	Bio-Technology Park
BoE	Bill of Entry
CA	Chartered Accountant
CAS	Chemical Abstracts Service
CBIC	Customs Excise and Service Tax Appellate Tribunal
CBDT	Central Board of Direct Taxes
CCPS	Compulsorily Convertible Preference Shares
CENVAT	Central Value Added Tax
CESTAT	The Customs Excise and Service Tax Appellate Tribunal
CG	Central government
CGST	Central Goods and Service Tax
CGST Act	The Central Goods and Services Tax Act, 2017
CGST Rules	The Central Goods and Services Tax Rules, 2017
CIF	Cost, Insurance, and Freight
CNC	Computer numerical control
CTA	The Customs Tariff Act, 1975
CT(Rate)	Central Tax Rate
CUP	Comparable Uncontrolled Price
Customs Act	The Customs Act, 1962
CVD	Countervailing duty
DD Scheme	Duty Drawback Scheme
DGCI&S	The Directorate General of Commercial Intelligence and Statistics
DGFT	Directorate General of Foreign Trade
DGGI	Directorate General of GST Intelligence
DGIT (System)	Director General of Income Tax (System)
DPIIT	Department for Promotion of Industry and Internal Trade
Drawback Rules	Customs and Central Excise Drawback Rules, 1995

DRI	Directorate of Revenue Intelligence
DTA	Domestic Tariff Area
ECCS	Express Cargo Clearance Systems
ECO	E-commerce operators
EDI	Electronic Data Interchange
EHTP	Electronics Hardware Technology Park
EODC	Export Obligation Discharge Certificates
EO	Export obligation
EOU	Export Oriented Unit
EPCG	Export Promotion Capital Goods Scheme
ES	Equity Shares
EVC	Electronic Verification Code
FIRC	Foreign Inwards Remittance Certificates
FMV	Fair Market Value
FOB	Free On Board
FTP	Foreign Trade Policy
FTP 2004-09	Foreign Trade Policy 2004-09
FY	Financial Year
G2B	Government to Business
GST	Goods and Services Tax
GSP	GST Suvidha Provider
GSTAT	Goods and Services Tax Appellate Tribunal
GSTN	Goods and Services Tax Network
GSTR	Goods and Services Tax Return
HBP	Handbook of procedures
HC	High Court
HSN	Harmonized System of Nomenclature
ICEGATE	Indian Customs Electronic Data Interchange Gateway
ICT	Information and Communications Technology
IGST	The Integrated goods and services tax
IGST Act	The Integrated Goods and Services Tax Act, 2017
IFF	Invoice Furnishing Facility
IIT	Indian Institute of Technology, Patna
INR	Indian Rupee
IRN	Invoice Reference Number
RP	IInvoice registration portals
ITC	Input Tax credit
ITC(HS) 2022	Indian Trade Clarification based on Harmonized System

IT Act	Income-tax Act, 1961
IT(Rate)	Integrated Tax Rate
IT Rules	Income-tax Rules, 1962
IUPAC	International Union of Pure and Applied Chemistry
JDA	Joint Development Agreement
JSON	JavaScript Object Notation
LED	Light-emitting diode
MRI	Magnetic Resonance Imaging
MRP	maximum retail price
MSME	Micro Small and Medium Enterprises
NIC-IRP	National Informatics Centre- Invoice registration portals
NIT	National Institute of Technology, Rourkela
NR	Non-Resident
OIDAR	Online information database access and retrieval services
OMV	Open Market Value
PAN	Permanent Account Number
PLI	Production Linked Incentive
POS	Place of Supply
Pr. DGIT (System)	Principal Director General of Income Tax (System)
PY	Previous year

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