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GST Compendium

A monthly guide

January 2022

Editor’s note

Wishing you all a very happy and healthy new year!

The scope of supply under the GST has been widened by including activities/transactions between clubs/association and its members. Further, a matching concept has been introduced in the provisions pertaining to the availment of input tax credit. Apart from this, the due date for furnishing the annual returns for FY 2020-21 has also been extended until 28 February 2022.

On the judicial front, the Supreme Court has held that the amount of tax paid under protest can be adjusted against the mandatory pre-deposit required for filing an appeal under the erstwhile Value Added Tax (VAT) law. This is a landmark judgement and shall provide relief to the taxpayers dealing with similar issue.

The Maharashtra Authority for Advance ruling (AAR) has held that electricity and water charges reimbursed by a licencee to a licensor shall be liable to GST. It is pertinent to note that electricity has been kept outside the purview of GST by way of exemption. Therefore, though the present ruling is likely to impact the real estate sector and the Resident Welfare Associations (RWA), it could lead to litigation on this subject.

On the direct tax front, the Central Board of Direct Taxes (CBDT) has issued clarifications in respect of tax deducted at source (TDS) and tax collected at source (TCS) provisions. Further, the CBDT has partially modified the list of cases which are not covered under the Faceless Assessment regime.

With the advancement of technology, various substitutes for computers have emerged, such as iPads, tablets, or smart phones. In this edition, we have discussed various issues under taxation in respect of iPads.

Hope you will find this edition to be an interesting read.

Vikas Vasal
National Managing Partner, Tax

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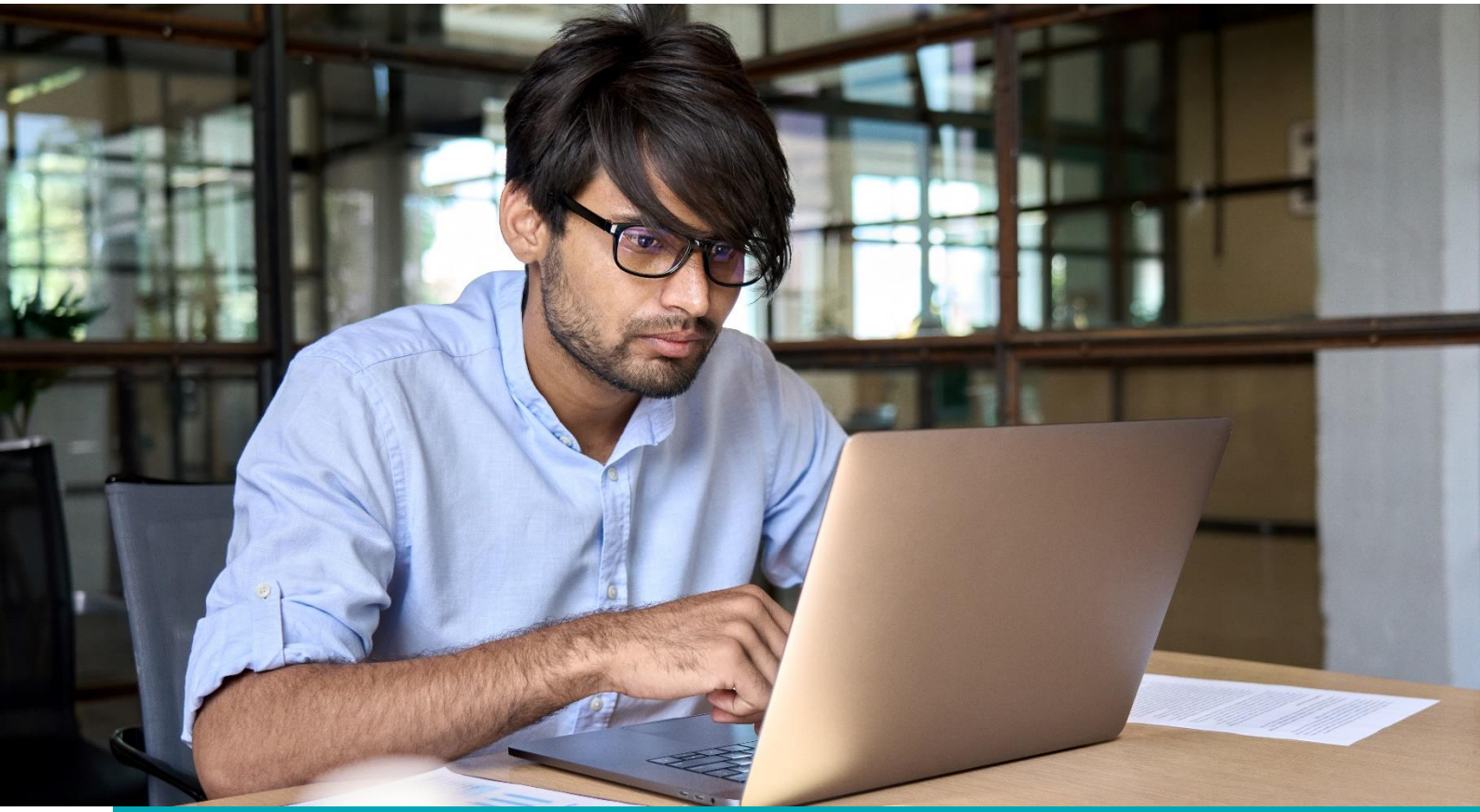
01 Important amendments/updates



Due date for furnishing annual return and reconciliation statement for FY 2020-21 extended

The Central Board of Indirect Taxes and Customs (CBIC) has notified certain amendments in the Central Goods and Services Tax Rules, 2017 (CGST Rules)[1]. Some of the key amendments are as under:

Key amendments

- **Extension of due date for filing annual return:** The due date for furnishing annual return in Form GSTR-9 and self-certified reconciliation statement in Form GSTR-9C for financial year 2020-21 has been extended from 31 December 2021 to **28 February 2022.**
- **Amendment in input tax credit (ITC) related rules:** Effective from 1 January 2022, Rule 36(4) of CGST Rules has been amended to allow availment of ITC only to the extent of invoices or debit notes which have been furnished by the supplier in GSTR-1 or using invoice furnishing facility (IFF) and such details have been communicated to the recipient in GSTR-2B.
- **Amendment in refund provisions:** With retrospective effect from 1 April 2021, Rule 95(3)(c) has been amended to provide that in cases where the Unique Identification Number (UIN) is not mentioned in a tax invoice, duly attested copy of such invoice is required to be submitted along with the refund application in Form GST RFD-01.
- **Recovery of penalty by sale of goods or conveyance detained or seized:** Effective from 1 January 2022, Rule 144A has been inserted to provide mechanism for recovery of penalty under section 129 of Central Goods and Services Tax Act, 2017 by way sale of goods or conveyance detained or seized in transit.

1. Notification No.40/2021-Central Tax dated 29 December 2021

CBIC notifies effective date for mandatory Aadhaar authentication and certain provisions of Finance Act, 2021

The Finance Act, 2021 had introduced certain amendments under the GST law inter alia including amendment in scope of supply, input tax credit provisions, etc[2]. In this regard, the CBIC has notified 1 January 2022 as the effective date of certain provisions[3].

Further, the CBIC had also notified amendments to GST rules to provide for mandatory Aadhaar authentication of registration for being eligible for filing refund claim and application for revocation of cancellation of registration[4]. In this regard, the CBIC has notified 1 January 2022 as the effective date for said amendments in GST Rules relating to Aadhar based authentication for filing application for revocation of cancellation of register and filing of the refund claims[5].

Changes in GST law effective from 1 January 2022

- **Amendment in scope of supply[6]:** Activities or transactions between a person (other than an individual) and its members or constituents for cash, deferred payment or other valuable consideration will be treated as supply retrospectively from 1 July 2017.
- **Amendment in provisions pertaining to availment of ITC[7]:** ITC, in respect of invoices and debit notes, shall be available only to the extent they are furnished in GSTR-1 by the vendors and thus appearing in GSTR-2B of the recipient.
- **Recovery proceedings in case of detention, seizure or confiscation of goods[8]:** Detention, seizure and confiscation of goods or conveyances shall have separate proceedings for recovery of tax and penalty. Therefore, even if the recovery proceedings u/s 73 or 74 are completed, recovery proceedings u/s 129 or 130 can still be initiated by the authorities.
- **Self-assessed tax shall include tax payable in respect of outward supply[9]:** Explanation has been inserted to clarify that 'self-assessed tax' shall include only the amount of tax payable in respect of details of outward supplies furnished in GSTR-1, but not included in GSTR-3B.
- **Extension in powers of provisional attachment[10]:** Powers of provisional attachment of commissioner for attachment of property, including bank account belonging to taxable person or person who has retained benefits for specified offences, have been extended. Thus, the commissioner can exercise this power during pendency of proceedings in case of assessment, inspection, search, seizure and arrest and recovery proceedings.
- **Amendment in provisions pertaining to filing of appeals to appellate authority[11]:** An appeal against an order of detention or seizure of goods or conveyance can be filed only after 25% of the amount of penalty has been paid.
- **Amendment in provisions pertaining to detention, seizure and release of goods and confiscation and levy of penalty[12]:**
  - **In cases where the owner of goods comes forward for payment of such penalty:** Penalty equal to 200% of the tax payable on such goods and, in case of exempted goods, on payment of an amount equal to 2% of the value of goods or INR 25,000, whichever is less.
  - **Where the owner of goods does not come forward for payment of such penalty:** Penalty equal to 50% of the value of goods or 200% of the tax payable on such goods, whichever is higher, and in case of exempted goods, on payment of an amount equal to 5% of the value of goods or INR 25,000, whichever is less.
  - The proper officer detaining or seizing goods or conveyance shall issue a notice within seven days of such detention or seizure, specifying the penalty payable, and thereafter, pass an order within a period of seven days from the date of service of such notice, for payment of penalty.
- **Power to call for information[13]:** The power of the Commissioner has been extended to call for any information relating to any matter dealt with in connection with the GST law.
- **Bar on disclosure of information[14]:** Section 152 has been amended to prevent use of any information obtained under Section 150 and 151 for the purpose of proceedings under the Act without giving the concerned person an opportunity of being heard.
- **Mandatory Aadhaar authentication:** Effective from 1 January 2022, Aadhaar authentication at the time of registration shall be mandatory for being eligible to file refund claim and application for revocation of cancellation of registration.

Our comments

To help curb the fraudulent availment of ITC and check fake billing, the provisions pertaining to availment of ITC have been amended effective from 1 January 2022 to provide that only ITC reflected in GSTR-2B can be taken. Therefore, it is likely that the authorities may initiate recovery proceedings in cases where the tax liability declared in GSTR-1 is more than actual tax payable in GSTR-3B.

2. Vide Section 108, 109 and 113 to 122 of the Finance Act, 2021
3. Vide Notification No. 39/2021-Central Tax dated 21 December 2021
4. Vide Notification No.35/2021-Central Tax dated 24 September 2021
5. Vide Notification No. 38/2021-Central Tax dated 21 December 2021
6. Section 7 of the CGST Act, 2017 readwith Schedule II to the CGST Act, 2017
7. Section 16 of the CGST Act, 2017
8. Section 74 of the CGST Act, 2017
9. Section 75 of the CGST Act, 2017
10. Section 83 of the CGST Act, 2017
11. Section 107 of the CGST Act, 2017
12. Section 129 and Section 130 of the CGST Act, 2017
13. Section 151 of the CGST Act, 2017
14. Section 152 of the CGST Act, 2017

CBIC issues instructions to address divergent practices adopted in 'auto-parts' classification/assessment

The Supreme Court (SC) in the case of M/s Westinghouse Saxby Farmer Ltd. had held that 'relays' are classifiable as parts of 'railway signalling equipment' under Heading 8608. The SC noted that those parts which are suitable for use solely or principally with an article in Chapter 86 cannot be taken to a different chapter as the same would negate the very object of group classification. Therefore, parts suitable for use solely or primarily with an article in Chapter 86 cannot be classified under a different heading.

In this regard, various representations were received by the CBIC pointing out difficulties owing to the divergent practices arisen in assessment of 'automobile parts'. The CBIC has clarified that the judgement in case of M/s. Westinghouse Saxby has decided the classification of the commodity 'relays' used in railway signalling equipment of Chapter 86 and not parts of goods falling under Chapter 87. The judgement itself does not refer to its wider applicability to any other case or issue of a similar nature. Also, this judgement pertains to a matter under the Central Excise Tariff Act in the year 1994, when the Central Excise Tariff and the Customs Tariff were not aligned. Moreover, the SC has acknowledged the complexity of the issue and has pointed to the undesirability of generalising the decisions of one case to others.

Therefore, the CBIC has instructed that the classification of various parts of Section XVII is to be decided considering all facts, details of individual cases, all the decisions on the subject, and arrive at the appropriate classification. The CBIC has also informed that the Department has filed a review petition against the said HC judgement in case of M/s Westinghouse Saxby. Further based on opinion obtained from Ld. Additional Solicitor General, the CBIC has advised that, all relevant aspects, including HS Explanatory Notes, the relevant section and chapter notes and the various decisions of the Supreme Court, such as those illustrated above, should be considered while undertaking assessment of such parts or any change in it[15].

Extension of last date for submitting applications under scrip-based schemes

The government had earlier notified the last date for submitting online applications for various scrip-based schemes under the Foreign Trade Policy 2015-20 as 31 December 2021[16]. The government has further extended the last date for submitting applications to **31 January 2022**[17]. Further, the revised late cut provisions for the applications submitted up to 31 January 2022 have also been notified as follows:

Scheme	Coverage	Late cut applicable as % of entitlement under the scheme	
Merchandise Exports from India Scheme (MEIS)	Goods export made in period from 1 July 2018 to 31 December 2020	FY 2018-19 (1 July 2018 to 31 March 2019)	10%
		FY 2019-20 and FY 2020-21 up to 31 December 2020	Nil
Services Exported from India Scheme (SEIS)	Service exports rendered in FY 2018-19 and 2019-20	FY 2018-19	5%
		FY 2019-20	Nil
Rebate of State and Central Taxes and Levies (RoSCTL) scheme	Exports made from 7 March 2019 to 31 December 2020	7 March 2019 to 31 December 2020	Nil
Rebate of State Levies on Export of Garments (RoSL) scheme	Exports made up to 6 March 2019 for which claims have not been disbursed under scrip mechanism	Upto 6 March 2019	Nil
2% additional adhoc incentive	Exports made in the period 1 January 2020 to 31 March 2020		NA

Further, no applications shall be allowed to be submitted after 31 January 2022. Applications submitted after the last date would become time-barred and late-cut provisions shall also not be available.

15. Customs Instruction No. 1/2022-Customs dated 5 January 2022
16. Notification No. 26/2015-2020 dated 16 September 2021
17. Notification No.48/2015-2020 dated 31 December 2021

CBIC issues clarifications in respect of supply of restaurant service through e-commerce operators (ECO)

Pursuant to the recommendation of the 45th GST Council meeting, the CBIC had notified that tax on supplies of restaurant service supplied through e-commerce operators (ECO) shall be paid by the e-commerce operator[18]. In this regard, the CBIC has issued certain clarifications regarding the modalities of compliance to the GST laws in respect of supply of restaurant service through ECO[19].

Key clarifications

- **Liability to collect tax collected at source (TCS)[20]:** ECOs will not be required to collect TCS and file GSTR 8 in respect of restaurant services on which it is liable to pay tax[20]. However, ECOs will be required to pay TCS on other goods or services supplied through ECO.
- **No separate registration required:** As ECOs are already registered under GST as a supplier of their own goods or services, there would be no mandatory requirement of taking separate registration by ECOs for payment of tax on restaurant service.
- **Liability to pay in case of unregistered entities:** ECOs will be liable to pay GST on any restaurant service supplied through them, including service supplied by an unregistered person.
- **Computation of aggregate turnover:** The aggregate turnover of person supplying restaurant service through ECOs shall include the aggregate value of supplies made by the restaurant through ECOs[22]. For threshold consideration or any other purpose, the person providing restaurant service through ECO shall account such services in his/her aggregate turnover.
- **No requirement to report inward supply:** ECOs are not the recipient of restaurant service supplied through them. Since these are not input services to ECO, these are not to be reported as inward supply (liable to reverse charge).
- **Utilisation and reversal of input tax credit (ITC):** ECO shall not be required to reverse ITC on account of restaurant services on which it pays GST. ECO shall pay the entire GST liability in cash and no ITC could be utilised for payment of GST on restaurant service supplied through ECO.
- **Liability in case of other services supplied through ECO:** In respect of supply other than restaurant service by a person through ECO, the liability to pay GST continues on such supplier and ECO shall continue to pay TCS on such supplies.
- **Separate invoice to be raised:** It is advisable that ECO raises separate bill on restaurant service in cases where ECO provides other supplies to a customer under the same order.
- **Liability to raise invoice:** In case of supply of restaurant service through ECO, the ECO shall be required to raise invoice.
- **Furnishing of returns:** In case of services notified including restaurant service provided through ECO, the ECO may continue to pay GST by furnishing the details in GSTR 3B and reporting them as outward taxable supplies for the time being. The ECOs may furnish the details of such supplies of restaurant services in Table 7A(1) or Table 4A of GSTR-1, as the case maybe, for accounting purpose. Registered persons supplying restaurant services through ECOs will report such supplies of restaurant services made through ECOs in Table of GSTR-1 and Table 3.1 (c) of GSTR-3B, for the time being.

New online platform for issuance of Registration Cum Membership Certificate (RCMC)/Registration Certificate (RC)

The Directorate General of Foreign Trade (DGFT) has notified that a new online common digital platform for issuance of RCMC/RC has been developed which would be a single point of access for exporters/importers and issuing agencies effective from 6 December 2021[23]. The platform can be accessed at **http://dgt.gov.in.**

The objective of the platform is to provide an electronic, contact-less single window for the RCMC/RC related processes including application for fresh/amendment/renewal of RCMC/RC. Submitting applications on this online platform shall not be mandatory as of now and there shall be a transition period for issuing agencies as well as exporters to on board on this common digital platform. Submission and issuance of RCMC/RC by the issuing agencies through their system may continue up to **28 February 2022** or until further orders.

Digital Signature Certificate (DSC)/Aadhaar would be required for the purpose of electronic submission of applications. Further, no separate registration is required for availing the RCMC/RC service on the portal and exporters/importers can avail the service using existing logins.

18. Vide Notification No. 17/2021 dated 18.11.2021
19. Circular No. 167 / 23 /2021 – GST dated 17 December 2021
20. u/s 52 of the CGST Act, 2017
21. u/s 9(5) of the CGST Act, 2017
22. u/s 2(6) of the CGST Act, 2017
23. Trade Notice No. 27/2021-22 dated 30 November 2021

Madhya Pradesh government extends applicability of e-way bill for intra state movement to 41 goods

The Madhya Pradesh Government had earlier mandated the requirement of e-way bill in case of intra-state movement of 11 goods[24]. The government has now extended this requirement to 41 goods effective from 2 December 2021[25].

The additional goods on which e-way bill has now been mandated include all type of fabrics, scraps, utensils, stone, crockery, cosmetics and toilet articles, packing materials; articles of apparel and clothing accessories, motor vehicles and accessories, rubber and articles thereof; cement, copper, brass, aluminium, nickel and their products; non-alcoholic beverage, fireworks and explosives, sanitary goods, hardware goods, pesticides, coal, bitumen, diesel, dry fruits, kirana goods, oil seeds, paints, molasses, betel nut product, mouth freshener, mineral water and aerated water, chocolate etc.

CBIC revamps Tax Information Portal

The CBIC has announced the launch of a revamped tax information portal, through which all indirect tax legislations, rules, regulations, and forms will be available for ease of reference of the taxpayers. The portal can be accessed at **https://taxinformation.cbic.gov.in/.**

The content on this portal is being continuously updated and expanded in a phased manner. Eventually, information under all categories in Customs, GST, Central Excise and erstwhile Service Tax will be available. In case, any user comes across any anomaly or error in content, it is requested to please notify CBIC on **feedback.taxinfo@icegate.gov.in.**

24. Notification No. F-A-3-08-2018-1-V(43), Bhopal dated 24 April 2018
25. Notification No. 474 dated 2 December 2021

2a Key judicial pronouncements

Supreme Court (SC) delivers split verdict on applicability of service tax on credit card interchange fees

Summary

The Division Bench of the Supreme Court has delivered a divergent view on the issue of applicability of service tax on interchange fee for credit card transaction charged by the card-issuing bank. Justice Joseph opined that the interchange fee is received for the service rendered by the card-issuing bank, hence shall be liable to service tax, while Justice Bhat opined that the services rendered by the issuing bank and the acquiring bank cannot be segregated and needs to be considered as a single unified service to the merchant establishment. The service element provided by the issuing bank in the credit card transaction at the merchant establishment is, therefore, not subject to service tax as it is incorporated in the service by the acquiring bank as one service provided to the merchant establishment.

Facts of the case

- The assessee[26] is a bank registered under service tax for providing services under the category of banking and other financial services, business auxiliary services, charge card and other card payment services, manpower recruitment or supply services, among other services.
- A Show Cause Notice was issued, proposing to levy service tax on interchange fee charged by the assessee to its credit card customers in gross billed amount, along with interest and penalty.
- The assessee contended that it is not performing any service to render it exigible to service tax on the interchange service. Further, the interchange fee has already been subjected to service tax in the hands of the acquiring bank.

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26. M/s Citibank N.A.

- The matter was adjudicated, and the demand of service tax was confirmed against the assessee, along with interest and various penalties. Against the said order, the assessee filed appeal before the Tribunal. The Tribunal set aside the Final Orders, by which the Principal Commissioner Service Tax, Chennai, found the assessee liable to pay service tax, penalty and interest on the amount of the interchange fee received by it.
- The Revenue filed a Special Leave Petition before the SC against the said order of the Tribunal.

SC observations and ruling[27]

Observations and opinion of Justice Joseph:

- The credit card system is fundamentally based on the issuing bank undertaking a risk. Essentially, the funds of the issuing bank are used to affect the payment. Though the cardholder pays the money to the bank, the issuing bank undertakes certain risk to settle the amount. In the whole credit card transaction mechanism, the issuing bank, indeed, performs services in relation to the settlement of the amount transacted through the card[28].
- The term service provider includes both the issuing bank and the acquiring bank, then the gross amount to be charged would be on separate services provided by each. Therefore, there could not be a gross amount by adding the value of two distinct services by two different service providers.
- The assessee, as an issuing bank, provided service for which it got paid an interchange fee. Therefore, such fee is eligible for levy of service tax.
- There was no creditor debtor relationship between the assessee (issuing bank) and the card associations or, the acquiring bank or merchant. Therefore, the interchange fee cannot be described as compensation fixed by the parties for use or forbearance of the borrowed money and cannot be in nature of interest.
- The role of the issuing bank is indispensable in the credit card transaction. The active role that it plays and the risk that it takes in settling the amount constitutes rendering service and not merely transaction in money.
- The appeal by the Revenue is allowed and the matter shall be remanded back to the Tribunal.

Observations and opinion of Justice Bhat:

- The role of the issuing bank in the service provided by the acquiring bank to the merchant establishment is part of a single unified service and cannot be broken up into its components and classified as separate services for classification.
- The issuing bank's role is subsumed into the service of the acquiring bank for which the gross consideration is received from the merchant establishment. The service element provided by the issuing bank in the credit card transaction at the merchant establishment is, therefore, not subject to service tax as it is incorporated in the service by the acquiring bank as one service provided to the merchant establishment.
- The amount received by the issuing bank as interchange income or fee is not towards interest.
- Credit card transactions cannot be considered as transactions in money and be excluded from the definition of service.
- When the service is characterised to be a single unified service, wherein service tax is collected from/remitted by the acquiring bank on the Merchant Discount Rate (MDR), which includes the interchange fee that is retained by the issuing bank) taxable for the single service rendered by both the acquiring and issuing bank, the assessee cannot be called upon to pay the service tax again as this would result in double taxation.
- With regards to the Revenue's allegation of willful suppression, there was no merit given that this was not the allegation or scope of the notice issued.
- The present case does not warrant remand to the Tribunal and this dispute should stand finally concluded at this stage. Therefore, appeal by the Revenue ought to be dismissed.

Our comments

Considering the divergence in the opinion of the Division Bench, the matter is likely to attain finality only at the larger bench of the Apex Court. Accordingly, it will be interesting to wait and watch the verdict of the larger bench. Thus, the taxpayers will have to wait until the matter attains finality.

Interestingly, under the GST regime, on a similar issue, the Maharashtra Authority for Advance Ruling (AAR)[29] had pronounced that interchange fee earned by the issuing bank forms an integral part of supply of service of acquiring bank to the merchant establishment, and, therefore, should not be taxed again with GST.

27. Order dated 9 December 2021
28. In terms of Section 65(33a)(iv) of the Finance Act, 1994
29. The Mobile Wallet Pvt. Ltd.

Amount paid under protest prior to assessment can be adjusted against pre-deposit for filing an appeal – SC

Summary

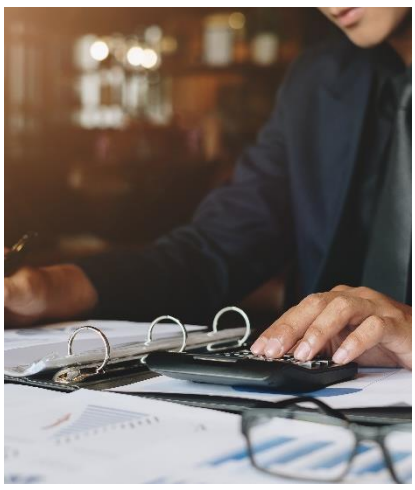
The Supreme Court (SC) has held that the amount of tax paid under protest can be adjusted against the mandatory pre-deposit required for filing an appeal under the erstwhile VAT law. The SC stated that the provisions of a taxing statute must be construed as they stand, adopting the plain and grammatical meaning of the words used. In the absence of express restriction under the statute, the amount paid under protest cannot be excluded for the purpose of computing mandatory pre-deposit payable.

Facts of the case

- The petitioner[30] is engaged in the manufacture and sale of oleo-chemicals and personal care products. Investigation was conducted at premises of appellant and a notice imposing tax, interest and penalty was issued. The petitioner had paid tax and interest under protest for assessment year 2013-14.
- An order of assessment was passed under the Maharashtra Tax on the Entry of Goods into Local Areas Act 2002. An appeal was filed against the order of assessment after adjustment of the amounts paid under protest by the appellant. The appeal was rejected by the appellate authority on the ground that the payments which were made under protest could not be considered towards pre-deposit[31].
- A petition was instituted to challenge the said rejection before the Bombay High Court (HC). The Division bench of the HC dismissed the petition stating that once an order of assessment has been passed, any amounts which have been paid though under protest, would have to be adjusted against the total tax liability and the demand to follow. Hence, the view of the High Court was that the appellant was duty bound to deposit 10 per cent of the total tax demand after adjusting the amount which had already been paid under protest, prior to the order of assessment.
- Therefore, the petitioner filed present Special Leave Petition (SLP) before the SC[32].

SC observations and ruling[33]

- **Taxing statute to be construed strictly and literally:** As per the relevant provision, whole undisputed amount and 10% of disputed amount of tax is required to be deposited by the appellant, along with the proof of payment. There is no express restriction under the law providing that amount paid under protest cannot be considered while computing pre-deposit payable. In absence of statutory language to that effect, the amount deposited by the appellant prior to order of assessment cannot be excluded from consideration.
- **Provisions duly complied by appellant:** The provisions of a taxing statute must be construed as they stand, adopting the plain and grammatical meaning of the words used. The appellant was required to pay 10% of amount of tax disputed and there is no reason why amount paid under protest should not be taken into consideration. Therefore, as the provisions were duly complied with by the appellant, rejection of appeal by the Bombay HC was not in order.
- **Appeal allowed:** The SC held that the rejection of the appeal was not in order and needs to be restored subject to verification of deposit of 10 per cent of disputed tax. Accordingly, the appeal filed by the petitioner was allowed and the order of the Bombay HC was set aside.



Our comments

The Bombay HC had earlier held that when the appeal is against a tax liability, the petitioner cannot contend that because a part amount was deposited under protest that should be adjusted against the pre-deposit. Such adjustment shall mean that the appeal would be entertained even if there was no proof of payment of pre-deposit.

The Apex Court has set aside the order of the Bombay HC and held that the amount deposited under protest can be adjusted against the amount of mandatory pre-deposit under the erstwhile VAT law. Thus, this is a landmark judgement and shall provide required relief to the taxpayers on similar issues. Further, an analogy can also be drawn under the GST regime, since similar provisions exist even under the GST law.

30. VVF (INDIA) LIMITED
31. U/s 26(6A) of the Maharashtra Value Added Tax Act, 2002
32. SLP(C) No 28607 of 2019
33. Order dated 3 December 2021

Concealment of facts is enough to deny any relief in exercise of extraordinary discretionary jurisdiction – Delhi HC

Summary

The Delhi High Court (HC) observed that the petitioner did not disclose the letter through which it had sought release of seized cash from residential premises of its director. The letter clearly stated that petitioner has discharged the tax liability voluntarily and has requested the respondents to not issue any show cause notice in relation to search and seizure. Therefore, the HC stated that the case of coercion being set up by petitioner is an afterthought. No plea of coercion was raised before filing of present petition. Therefore, the HC held that there is concealment of facts and the same is enough to deny any relief to petitioner in exercise of the extra-ordinary discretionary jurisdiction of this Court under Article 226 of Constitution of India.

Facts of the case

- The petitioner[34] had challenged the seizure of cash from the residential premises of its Director. The petitioner further challenged the letter issued by the Revenue, whereby the bank was directed to release the said amount, however, only for payment of Government dues[35].
- The petitioner claimed that a sum of INR 94.65 lakh deposited with the Revenue has been erroneously recovered from the petitioner without proper adjudication.
- The petitioner further prayed for a direction to the Revenue to determine the tax, interest, or penalty due from the petitioner and appropriate the said amount of INR 94.65 lakh paid by the petitioner against the amount so found due.

Delhi HC observations and ruling[36]

- **Concealment of facts:** The petitioner has apparently set up a false case of panchnama not being served. The copy of panchnama produced clearly bears the acknowledgement of the Director of the petitioner company and his wife. Therefore, there is concealment of facts and the same is enough to deny any relief to petitioner in exercise of the extra-ordinary discretionary jurisdiction of this Court under Article 226 of the Constitution of India.
- **Issues of academic importance:** The power to seize cash may not be adjudicated in the present case because the amount seized was released in favour of the petitioner. For condition of release of amount, it has been observed that petitioner had deposited INR 60.66 lakh with respondent towards its balance tax, interest and penalty outstanding. The issue is, therefore, only of academic importance.
- **Case of coercion is an afterthought:** The letter clearly states that the petitioner has discharged the tax liability voluntarily and has requested the respondents to not issue any show cause notice in relation to search and seizure. Therefore, the case of coercion being set up by the petitioner is an afterthought. No plea of coercion was raised before filing of the present petition.
- **Benefit of restriction of penalty availed:** As per the provisions[37], the petitioner can, upon making voluntary deposit of tax, interest and penalty, avail the benefit of reduction of penalty to only 15% of the tax. The petitioner had availed such remedy and, accordingly, search and seizure activities were closed. The petitioner cannot turn around and challenge the said proceedings.

Our comments

The Apex Court[38] had earlier held that the jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution is extraordinary, equitable and discretionary. It is, therefore, of utmost necessity that the petitioner approaching the Writ Court must come with clean hands, put forward all the facts before the Court without concealing or suppressing anything and seek an appropriate relief. If there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the Court, his petition may be dismissed at the threshold without considering the merits of the claim.

The Karnataka HC[39] had also held that suppression of material and vital facts serves to be a legitimate ground to dismiss a writ petition under Article 226 of the Constitution of India, as no discretion can be exercised in favour of a petitioner who has concealed substantial facts from the Court.

Thus, it is imperative that due caution is exercised by the taxpayers before approaching the writ courts to avoid dismissal of the writs and enhance the chances of the case being considered on merits.

34. Vijay Steelcon Pvt Ltd
35. WP(C) 13034/2021
36. dated 18 November 2021
37. Section 74(5) of CGST Act
38. K.D. Sharma v. SAIL
39. Sri Ananthaswamy v. State of Karnataka

Goods can be released on payment of fine in lieu of confiscation when adjudication is in process – Kerala HC

Summary

The Kerala High Court (HC) observed that under the GST law, goods can be released on payment of fine in lieu of confiscation while the adjudication is still in process. When fine in lieu of confiscation is paid by a dealer, the liability for payment of tax, penalty and charges will fall upon the dealer, in addition to the fine only after adjudication. To obtain the release of the goods or conveyances, while the adjudication proceedings are in process, the taxpayer needs to pay only the fine and not the tax, penalty and charges thereon. Therefore, the HC dismissed the review petition filed by the Revenue against the interim order of HC granting release of goods.

Facts of the case

- An inspection was conducted in the godown of the respondent[40] by the officers during which beedis were seized[41].
- When the petitioner attempted to obtain release of seized beedis, the officer issued show cause notices proposing to confiscate the goods and the conveyances and levied penalty[42]. The notices specified, apart from tax and penalty, the quantum to be paid as fine in lieu of confiscation of the goods.
- The dealer filed a writ alleging that goods were not liable for confiscation and perishable goods cannot be detained indefinitely. The dealer also claimed that goods could be released on provisional basis upon execution of bond or bank guarantee. The respondent submitted that fine in lieu of confiscation alone needs to be paid to get release of goods.
- The Kerala HC, vide interim order, had directed the officers to release the goods in favour of the dealer, on payment of the amounts contemplated after adverting to the plea of the dealer that, the officer is refusing to abide by the mandate of the Statute, despite the dealer offering to pay the amounts in lieu of confiscation .
- The officers have preferred the present review petition, seeking to review the interim order.

Kerala HC observations and ruling[43]

- **Release of goods prior to adjudication:** The GST law provides for release of the goods or conveyance contemplated at a stage prior to the final order of confiscation. It is not a post adjudicatory release that is contemplated, it is a release during adjudication[44].
- **Release on payment of fine in lieu of confiscation:** The purpose of the two-stage release is that, if the owner of the goods, even before being deprived of his title to the goods or conveyance, is ready to pay the fine stipulated by the officer, the goods and or conveyance can be released to the said owner and the same avoids unnecessary procedural formalities.
- **Not provisional release:** It is not a case of provisional release, but a power has been conferred upon the competent officer to release the goods on payment of fine in lieu of confiscation, while the proceedings for confiscation are continuing and before orders of adjudication are passed.
- **Liability to pay tax arises after completion of adjudication:** When fine, in lieu of confiscation is paid by a dealer, the liability for payment of tax, penalty and charges will fall upon the dealer, in addition to the fine and they need be paid only after adjudication. To obtain the release of the goods or conveyances, while the adjudication proceedings are continuing, the taxpayer needs to pay only the fine. The tax, penalty and charges can be paid after adjudication.
- **Fine to be paid based on market value:** The basis for calculating the fine in lieu of confiscation is only the market value and not the maximum retail price. If the taxpayer has a dispute on the value fixed tentatively by the Proper Officer, he can dispute the same and during adjudication, get a determination of the market value also.

Our comments

In the present ruling, the Kerala HC has observed that the GST law provides for release of goods on payment of fine in lieu of confiscation at two stages viz. during the process of adjudication and post-adjudication. Therefore, in the present case, it has held that the goods can be released on payment of fine in lieu of confiscation when the adjudication is in process.

Further, the HC has distinguished the Karnataka HC ruling in the case of M/s Meghdoot Logistics, wherein the Karnataka HC had observed that there is no provision for a provisional release of the seized goods under Section 130 o the Act.

Thus, this is an important judgement by the Kerala HC and is likely to set precedence in similar cases. However, it will be interesting to observe the stance of the Revenue on the same.

40. Y BALAKRISHNAN
41. as per Rule 139(2) of the Central Goods and Services Tax Rules, 2017
42. u/s 130 of the CGST Act, 2017
43. RP No. 630 of 2021 in WP(C) No. 18169 of 2021
44. Section 130(2) of the CGST Act, 2017

Conditions prescribed for exercise of power of provisional attachment must be strictly fulfilled – Gujarat HC

Summary

The Gujarat HC observed that the power to order a provisional attachment must be preceded by the formation of an opinion by the Commissioner that it is necessary to do so for the purpose of protecting the interest of the Revenue. The opinion needs to be formed based on tangible material that the assessee is likely to defeat the demand, if any. In the present case, the HC noticed that the Revenue has collected the material from the business premise during the investigation and alleged wrongful availment of ITC by the petitioner. However, such allegation of wrongful availment by the petitioner and attachment order is without any credible material on record. Therefore, the HC disposed-off the petition without entering merits and ordered that the investigation shall be completed within eight weeks.

Facts of the case

- The petitioner[45] is engaged in the business of copper products and is a leading manufacturer of products like copper wire, copper rod, etc.
- A notice was issued, asking the petitioner to pay the input tax credit (ITC) claimed on purchases made from certain suppliers who had defaulted in payment of GST.
- Thereafter a search was conducted at the premises of petitioner and various purchase files were seized. Pursuant to the said search and seizure, the Revenue issued FORM GST DRC-01A[46] directing the petitioner to deposit the total tax of INR 10.43 crore[47] on the ground that the ITC was not allowable and the same was required to be recovered[48].
- Since another search was carried pending the adjudication of the show cause notice and several documents were seized, the petitioner is before the HC challenging the provisional attachment orders passed by the authorities without there being any pending proceedings[49].

45. Madhav Copper Ltd
46. under Rule 142(1A) of the CGST Rules, 2017
47. under Section 74(5) of the GGST Act, 2017
48. under Section 74 of the CGST Act, 2017
49. Vide R/Special Civil Application No. 15201 of 2021

Gujarat HC observations and ruling[50]

- **Power to levy provisional attachment is draconian:** The power to order a provisional attachment of the property of the taxable person, including a bank account is draconian in nature and the conditions which are prescribed by the statute for a valid exercise of the power must be strictly fulfilled. Such powers when exercised, must need to be preceded by the formation of an opinion by the Commissioner that it is necessary to so do it for the purpose of protecting the interest of the Government Revenue. The opinion needs to be formed on the basis of tangible material that the assessee is likely to defeat the demand, if any, and that, therefore, it is necessary to do so for the purpose of protecting the interest of the Government Revenue.
- **Insistence on formation of opinion:** Considering the draconian nature of the power and the serious consequences, the legislature insists on formation of opinion before exercising the powers. A provisional attachment contemplates during the pendency of certain proceedings, which means that a final demand or liability is yet to be crystallised. The anticipatory attachment of this nature must strictly conform to the requirements prescribed under the statute.
- **Pendency of proceedings required:** It is observed that pendency of proceedings, under various provisions of GST law, is ordinarily required for the commissioner to form an opinion to order provisional attachment of any property including the bank account belonging to the taxable person. In absence of any kind of pendency of proceedings, it is not permissible for the respondent authority to invoke powers for the purpose of provisional attachment[51].
- **Contention of absence of proceedings unsustainable:** The HC observed that the proceedings had been initiated on 7 July 2021, the order of attachment of bank account in FORM GST DRC 22, the attachment of immovable properties, the vehicles, movable properties and the personal properties of the Directors and directions to the debtors not to make the payments were on different dates starting from 8 July 2021 to 27 July 2021. Therefore, the contention of the petitioner that the invocation was made by the Revenue in absence of any kind of proceedings was not found to be sustainable.
- **Allegation without any credible material:** The HC observed that the allegations were made by the respondents based on the material collected from the business premise during the investigation and such allegation of wrongful availment by the petitioner and attachment order is without any credible material on record. Therefore, the HC disposed off the petition without entering merits and ordered that the investigation shall be completed within eight weeks and the petitioner shall cooperate without fail. With respect to the operating of the current account, the credit of the ITC worth INR 3 crore and unlocking of the same, the HC held that no order is presently needed to be passed and the same shall be considered by the authority concerned at the time of adjudication.

Our comments

Earlier, the Apex Court[52] had observed that the power to order a provisional attachment of the property of the taxable person including a bank account is draconian in nature and the conditions which are prescribed by the statute for a valid exercise of the power must be strictly fulfilled. In the said case, there was a clear non-application of mind by the Joint Commissioner to the provisions and, therefore, the provisional attachment was held to be illegal.

On similar issue, the Gujarat HC[53] had earlier held that in the absence of pendency of any proceedings under the GST law, the Revenue could not have invoked the powers ordering provisional attachment. The HC further stated even if something is noticed during any inquiry or investigation against the petitioner, the same by itself will not confer jurisdiction to the Revenue to invoke the Section 83 of the Act. In another case, the HC[54] had held that the Court can determine whether the opinion is arbitrary, capricious, or whimsical. An order of provisional attachment cannot be as a matter of course and it must record and indicate that it was necessary to take a drastic action.

The present ruling by the Gujarat HC is in line with the apex court and its previous rulings. Further, the ruling shall provide required relief to the businesses and will set precedence in similar matters.

50. Dated 23 November 2021
51. under Section 83 of the CGST Act, 2017
52. in the case of M/s Radha Krishan Industries Ltd.
53. Bhavesh Kiritbhai Kalani
54. Vinodkumar Murlidhar Chechani

Sludge manufactured unintentionally cannot be treated as an 'exempted goods' – CESTAT

Summary

The Customs, Excise, Service Tax Appellate Tribunal (CESTAT), Chennai observed that the sludge emerging from effluent treatment plant is a waste and cannot be considered as a manufactured product. The appellant needs to comply with the pollution control requirements and, therefore, maintain the effluent treatment plant and remove the waste as per the effluent norms. The CESTAT observed that no manufacturer would consciously manufacture waste rather they would be happy in case where less waste or no waste is generated to reduce the burden of maintaining the effluent treatment plant and transportation of the sludge. Therefore, the CESTAT held that it cannot be said that the waste/sludge is an 'exempted goods' manufactured by the appellant.

Further, the CESTAT set aside the demand of 10%/5% on value of sludge removed as required under Rule 6(3) of the CENVAT Credit Rules, 2004.

Facts of the case

- The appellant[55] is engaged in manufacture of Gelatine, Phosphoryl (A), Phosphoryl (B) in their unit situated at Ooty.
- During the manufacturing activity, waste arising from such manufacture is drained into Effluent Treatment Plant. The solid waste removed from the Effluent Treatment plant is 'sludge' and it is removed daily to their dumping yard, wherein it gets naturally dried for a few months. The dried sludge is crushed and packed in small bags and sent to fertiliser The department alleged that the appellant is also manufacturing exempted product, namely 'sludge'. Therefore, since the appellants have used common inputs for manufacture of dutiable product (gelatine) and exempted product (sludge) and did not maintain separate accounts as required[56], they are liable to pay an amount equal to 10%/5% of the total value of the exempted sludge cleared by them, along with interest and penalty.
- The demand for the period prior to 10 May 2008 was set aside by the Commissioner (Appeals) and the demand, interest and penalty for the subsequent period was upheld. Aggrieved by such order, the appellants filed present appeal before the Tribunal[57].

CESTAT Chennai observations and ruling[58]

- **Waste is not consciously manufactured:** During manufacture, the waste that arises is drained into the Effluent Treatment Plant. The sludge is dried and, thereafter, sold to fertiliser manufacturers. The appellant needs to comply with the pollution control requirements and, therefore, maintain the Effluent Treatment Plant and remove the waste as per the effluent norms. Therefore, such waste arises during the manufacturing activity and is not manufactured consciously.
- **Sludge is not an exempted good:** A manufacturer would be happy in a situation where there is less waste as it leads to minimal maintenance of effluent treatment plant. No manufacturer would consciously manufacture waste and thus, it cannot be said that sludge is an exempted good manufactured by the appellant.
- **Demand on value of sludge cannot sustain:** Sludge emerging from effluent treatment plant is a waste and cannot be considered as manufactured product. Therefore, demand of 10%/5% of value of sludge cannot sustain.

Our comments

The Apex Court in the case of Hindustan Zinc Limited had held that when a by-product emerges as a technical necessity, it cannot be said that any inputs have been used for the manufacturer of the by-product. Therefore, the SC had held that there was no need to maintain separate accounts or payment of 8% under Rule 6 of the CENVAT Credit Rules, 2004. Further, similar ruling was pronounced by the Mumbai Tribunal in the case of M/s JSW Steel Ltd. wherein it had observed that credit of that quantity of raw materials shall be allowed, which is required for manufacture of the intended quantity of final products, irrespective of the fact that certain by-products emerge as technical necessity. Thus, the Tribunal had held that the demand of reversal of ITC on inputs used in manufacture of by-product or waste under Rule 6(3) of the CENVAT Credit Rules, 2004 is not sustainable.

This is a welcome ruling by the CESTAT and shall provide required relief to the manufacturing sector and will set precedence in similar matters. Further, an analogy can also be drawn under the GST regime since similar provisions exist even under the GST law.

55. Sterling Biotech Ltd
56. under Rule 6 (3) of CENVAT Credit Rules, 2004
57. EXCISE APPEAL No. 41097 of 2013
58. FINAL ORDER No. 42452 / 2021 dated 25 November 2021

2b Decoding advance rulings

Electricity and water charges reimbursed by licencee liable to GST – Maharashtra AAR

Summary

The Maharashtra Authority for Advance Ruling (AAR) in a recent ruling has held that the electricity and water charges reimbursed by the licencee to the applicant (licencor) at actuals is liable to GST. The AAR observed that without provision of such services the licencee cannot run its business. Therefore, the amounts reimbursed towards electricity and water charges to the licencor, along with the rent shall be a part of consideration towards renting services.

Facts of the case

- The applicant[59] has entered into a Leave and Licence Agreements with the licencee for licencing space for use and occupation for an agreed licencee fee.
- The monthly electricity charges for use and consumption of electricity by the licencee are paid by the applicant. The applicant raises debit notes on the licencee for reimbursement of electricity charges so paid by the licencor at actuals.
- The applicant has also installed water meter for supply of water to all licencees and pays water bills and apportions the charges at actual by raising bill of supply on licencees for reimbursement based on floor space occupied.
- The applicant sought an advance ruling before the Maharashtra AAR to understand whether the electricity charges and water charges paid by the applicant as per meter reading and collected from the recipients at actual on reimbursement basis is liable to GST and whether the applicant shall be considered as a pure agent.

59. M/s Indiana Engineering Works (Bombay) Pvt. Ltd.

Maharashtra AAR observations and ruling[60]

- **Mandatory provision of essential services:** The variable amount of electricity and water charges (at actuals), paid by the licencee is for effective enjoyment of the rented premises without which the occupation of the premises could not be possible. Thus, the provision of essential services is mandatory on the licencor.
- **Amounts reimbursed are part of consideration:** Without provision of such utility services, such as water and electricity, the licencee cannot run its business. Therefore, amounts towards electricity/water charges reimbursed by licencee to licencor shall be a part of consideration received in relation to renting of immovable property services by the licencor.
- **Value of supply to include incidental expenses:** The electricity and water charges recovered as reimbursements, even if at actuals have the nature of incidental expenses in relation to renting of immovable property service. Therefore, such charges are includible in the value of supply and shall be considered as transaction value for the purpose of levy of tax.
- **Conditions of being pure agent not fulfilled:** As the electricity meter and water meter are in the applicant's name, therefore, these supplies are on applicant's own account and is for effective enjoyment of premises. Making payment for such supplies is the responsibility of the applicant and it is not paying on behalf of the licencee. Further, there is no authorisation obtained by the applicant from the licencee to act as a pure agent and to make payment to third parties on its behalf. Thus, the applicant does not act as a pure agent of the licencee in this respect.

Our comments

On a similar issue, earlier, the Gujarat AAR[61] had held that landlord does not have to pay GST on electricity or incidental charges recovered from tenants, in addition to rent as per lease agreement for renting of immovable property since the said amount would not be includible in the value of supply.

It is pertinent to note that electricity has been kept outside the purview of GST by way of exemption[62]. Further, the Gujarat High Court[63] had quashed the levy of GST on ancillary services provided by electricity distribution companies to consumers[64] as being ultra vires to the provisions of GST law. Therefore, though the present ruling by the Maharashtra AAR is likely to impact the real estate sector and the Resident Welfare Associations (RWA), we may see rise in litigation on the subject matter and it is likely to be challenged further.

60. Maharashtra AAR order No. GST-ARA-120/2019-20/B-114 dated 16 December 2021
61. Gujarat Narmada Valley Fertilizers & Chemicals Ltd.
62. Notification no. 02/2017 –Central Tax (Rate) dated 28.06.2017 and Notification no. 12/2017-CT(Rate) dated 28.06.2017
63. in the case of Torrent Power Ltd.
64. vide Circular No. 34/8/2018-GST dated 1 March 2018

SEZ unit liable to pay IGST under reverse charge on renting services procured from SEEPZ – Maharashtra AAR

Summary

The Maharashtra Authority for Advance Ruling (AAR) in a recent ruling has held that the applicant a Special Economic Zone (SEZ) unit is liable to pay GST under reverse charge on renting services procured from the SEEPZ. With respect to the clarification issued by the Tax Research Unit (TRU) on the issue, the AAR stated that the said clarification has been issued in respect of receipt of services from DTA while in the subject case the receipt of input service is from a SEZ Developer. Therefore, the issues in both cases cannot be considered as same. It further stated that the clarification issued by TRU is not a circular and, hence, cannot be treated as a binding clarification issued by the Board.

Facts of the case

- The applicant[65] is a SEZ unit engaged in manufacture of customized motors in India.
- It procures renting of immovable property services from SEEPZ SEZ authority.
- The applicant sought an advance ruling before the Maharashtra AAR to understand whether the applicant is liable to pay GST under reverse charge mechanism (RCM) on procurement of renting services from SEEPZ SEZ authority[66].

Maharashtra AAR observations and ruling[67]

- **Liable to pay tax under RCM:** In case of supply of renting of immovable property services by a local authority to a registered person, the recipient registered person is liable to pay GST under RCM. In the present case, the applicant a registered SEZ unit is receiving renting services from a local authority, i.e., SEEPZ SEZ. As the applicant is satisfying the prescribed criteria under the said notification, it is liable to discharge tax liability under RCM[68].
- **SEZ liable to pay IGST as a recipient of service:** Referring to the clarifications issued vide the Frequently Asked Questions (FAQ)[69], the AAR stated, in case of supply to SEZ, it is considered as zero-rated. However, in case of services notified under reverse charge, the supplier is not liable to pay, and the recipient is considered as a deemed supplier. Therefore, in such cases, the SEZ is liable to pay GST under RCM.
- **Not an import of service:** The applicant in an SEZ unit is situated in an Exclusive Economic Zone. The definition of term in India, under the GST law, includes an exclusive economic zone. Therefore, in the subject case, both the recipient and the supplier of services are situated in India. Hence, the notification[70] providing exemption from IGST in case of import of services is not applicable in the present case.
- **Provision of SEZ Act not aligned with GST Act:** The provisions under the SEZ law providing exemption to SEZ units from levy of various taxes do not mention exemption regarding tax under the GST law. Therefore, the AAR observed that the said provision has not yet been aligned with the GST law.
- **TRU clarification not applicable:** With respect to the reference to the clarification issued by the TRU, the AAR stated that the said clarification has been issued in respect receipt of services from Domestic Tariff Area (DTA), while in the subject case, the receipt of input service is from a SEZ developer. Therefore, the issues in both cases cannot be considered as same. Further the said TRU is not a circular and, hence, cannot be made applicable in the present case as it cannot be treated as a binding clarification issued by the Board.

Our comments

Renting of immovable property services have been specifically covered under the Uniform List of Services (UOC), which are required by the SEZ units for its authorised operations issued by the Ministry of Commerce (SEZ Unit). Further, it is a well-settled principle that a clarification issued by the TRU of the Board shall be binding rather than a FAQ. Therefore, though the present ruling by the Maharashtra AAR is likely to impact the SEZs, it is likely to be challenged further.

65. M/s Portescap India Pvt. Ltd.
66. In accordance with Notification No. 13/2017-CT (Rate) and 03/2018-CT (Rate) dated 25 January 2018
67. Maharashtra AAR order No. GST-ARA-93/2019-20/B-110 dated 10 December 2021
68. As per Sr No. 6A of the Notification No. 10/2017-IT(Rate) dated 28 June 2017
69. Q No. 41 of FAQ dated 15-12-18
70. Notification No. 18/2017-IT(Rate) dated 5 July 2017

03 Experts' column

Claiming higher rate of depreciation for iPads

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With the advancement of technology, various devices, such as iPads, tablets or even different varieties of smart phones are emerging as substitutes for computers. In many businesses, the work being done by a computer can now easily be done by an iPad.

However, these technological changes and the emergence of these hybrid gadgets, which can do both computing and communicating, has also given rise to new issues from a taxation perspective.

The key issue being the correct classification of such gadgets for the purpose of claiming depreciation under the Income-tax Act, 1961 (the Act). In other words, whether such devices would be regarded as a 'computer' or 'plant and machinery'. It is pertinent to note that the Act does not define the term 'computer'. Further, while the rate of depreciation in case of computers is 40% (60% up to AY 2017-18), it is 15% in case of plant and machinery.

Recently, the Amritsar Tribunal[71] deliberated on this issue, i.e., allowability of depreciation @ 60% on iPads. The Tribunal held that iPad will be considered as a communicating device and not a computing device. Therefore, it will not qualify as a 'computer' for the purposes of claiming higher depreciation.

71. Kohinoor Indian Private Ltd [TS-806-Tribunal-2021(ASR)] (Amritsar Tribunal)

Factual backdrop

Taxpayer in this case, claimed depreciation at the rate of 60% on Apple iPad for AY 2012-13 and AY 2013-14. The assessing officer (AO) held that iPad is a phone and not a computer. He restricted the depreciation rate to 15% (which is applicable for plant and machinery).

The rationale cited was:

- Apple has two other variants, i.e., iPhone and Macbook and comparison of technical specifications would indicate that the iPad has more similarities with the iPhone. It has the same operating system as an iPhone.
- iPad and iPhone contains an inbuilt 2G/3G/4G connectivity and GPS. This is primarily an inherent mobile phone feature, which is not there in a Macbook. Also, like an iPhone, there is an inbuilt option of a sim card and connecting to a mobile network, which is not there in a Macbook.
- Aggrieved by the order of the AO, the taxpayer filed an appeal before the Commissioner of Income -tax (Appeals) (CIT(A)). The CIT(A) upheld the order of AO on the premise that iPad neither had a USB port nor had a CD drive and it was not compatible with Windows, the single most popular operating system.

Tribunal's verdict

The Tribunal noted that though iPads are akin to computers, as defined in the Information Technology Act, 2000 (IT Act), the definition of computer given under the IT Act cannot be utilised for the purpose of claiming higher depreciation applicable for computers under the Act. Both these statutes are not pari materia. There is significant difference in their scope, purpose and substance.

The Tribunal placed reliance on Mumbai Tribunal's (SB) decision in the case of Datacraft India Ltd[72] which held that meaning assigned to a particular word in one statute cannot be imported in another statue. At the same time, if a particular word is not defined in a Central Statue, then meaning to such expression in common parlance and commercial parlance should be adopted. In order to determine whether a particular machine can be classified as a computer or not, the predominant function, usage and common parlance understanding would have to be taken into account. The meaning of computer cannot be extended to a device which is meant to perform some independent function(s) even though in achieving such desired independent function(s), some sort of 'computer functions' are also involved. In other words, in order to be called as computer, it is important that the principal output/object/function of such machine should be achievable only through 'computer functions'.

Basis the above decision, the Tribunal observed that the predominant purpose of the iPad is communication and not a computing device. Its main features are e-mail, WhatsApp, Facetime calls, calls, music, films, etc. The Tribunal noted that iPad is not a substitute for a computer/ laptop, though some functions of iPad maybe be akin to computers. In common parlance also, the iPad is considered as a communicating device with some additional features of computer and not a computing device.

The Tribunal noted that the Apple store does not sell iPad as a computer device rather it is sells it as a communicating/entertainment device. Another reason based on which the iPad was held as a communication device was that it has an IMEI number.

The Tribunal further held that the onus was on the taxpayer to prove that it was entitled for a higher rate of depreciation. Accordingly, Tribunal concluded that the iPad cannot be regarded a 'computer' for the purpose of claiming higher depreciation.

Evolving judicial guidance

Some related issues and gadgets have also been examined by courts in past. Karnataka High Court, in the case of NCR Corporation P. Ltd[73], held that ATM machine is a computer entitled to a higher rate of depreciation. Mumbai Tribunal in case of Hindustan Field Services P. Ltd[74] considered the functional test and allowed depreciation on mobile phones and tablets at the rate of 60%. Similarly, Delhi Tribunal judgement in the case of Falcon Business Resources Pvt. Ltd observed that smart phones which do functions equivalent to computers or much more than a computer, and the phone's functionality is shown to be more than a communication equipment, it may qualify as a computer.

Also, it has been held in several judicial precedents[75] that printers and routers are part of computer system since they are connected with the computer. In view of this, an argument can be taken that just like computers even iPad's on being connected to printers and routers can function as a complete computer system and hence iPad is akin and can be used as replacement to a computer in a computer system.

72. (40 SOT 295) (Mumbai Tribunal) (SB)
73. (117 taxmann.com 252) (Karnataka High Court)
74. (ITA No. 4472/Mum/2016) (Mumbai Tribunal)
75. Ushodaya Enterprises Ltd. (41 taxmann.com 304) (Hyderabad Tribunal); Mphasis Ltd (128 taxmann.com 138) (Karnataka High Court); Samiran Majumdar (98 ITD 119) (Kolkata Tribunal); BSES Yamuna Powers Ltd (40 taxmann.com 108) (Delhi High Court)

Points to ponder

It can be argued that iPads can easily perform functions of a computer viz, word processing, preparing Excel sheet, PPT, etc. Their use is not confined to merely sending/receiving emails. It may not be incorrect to say that an iPad is basically a tablet computer. Merely because a computer is small, it should not be treated otherwise. With advancement in technology, the size of computers has shrunk from being big, bulky devices occupying lot of space to laptops and palmtops.

Also, it needs to be debated that whether making calls can be a determinative factor to conclude if a device is to be treated as a computer or as a phone. It is important to note that calls can be made using Skype or other such applications, even from desktop computers. Also, for the purpose of the aforesaid classification, how much importance should be given to screen size, IMEI number, USB port, CD drive slot, etc. Today, there are several other modes of storage and transfer of data, apart from USB port and CD drive.

Another key aspect which needs consideration is whether one should give maximum weightage to the functional test and whether iPad was being used as a computer by the entity.

The indirect tax angle

One may note that from an indirect tax perspective, there is no dispute for classification of iPad as it is classified under HSN 8471[76]. Such classification is separate from the mobile phone and similar to computers. The Customs adapt the Harmonised System of Nomenclature code (HSN system), which is used and accepted worldwide. Since the Income tax authorities do not have such clear clarity on the classification, it must follow and rely upon the principles developed from the indirect tax. Such application of established practices and clear classification under indirect taxes, would provide larger lucidity and avoid future litigation under income tax.

Way forward

With advancement in technology, it would become increasingly difficult to categorise which gadget should be considered as a ‘communication device’ and which should be regarded as a ‘computing device’. Taxpayers may need to track further judicial developments on this issue to evaluate any exposure on account of such hybrid devices, which borders between being communicating and computing devices.

76. automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included

04 Issues on your mind

Can amendments be made in invoices for which Invoice Reference Number (IRN) has been generated?

The Invoice Reporting Portal (IRP) does not allow amendments to be made to already generated invoice. Any changes in the invoice details reported to IRP can be carried out while filing GSTR-1. In case GSTR1 has already been filed, then the amendment can be done as per mechanism provided under the GST law. However, these changes will be flagged to proper officer for information.

Can an IRN/invoice reported to IRP be cancelled?

The cancellation request can be triggered through 'Cancel API' within 24 hours from the time of reporting invoice to IRP. However, if the connected e-way bill is active or verified by officer during transit, cancellation of IRN will not be permitted. In case of cancellation of IRN, GSTR-1 shall be updated with such 'cancelled' status.

How to search the details of BoE (Bill of Entry) on the GST portal?

To view the details of BoE on the GST portal, the taxpayers need to follow the below mentioned steps:

- Access **www.gst.gov.in** Click the **Services > User Services > Search BoE option.**
- Enter the Port Code, Bill of Entry Number, Bill of Entry Date and Reference Date. Click the **SEARCH** button. Reference date is the date when the goods have been cleared from Customs (passed out of Customs charge). The reference date will either be out of charge date, duty payment date, or amendment date - whichever is later.
- Click on **QUERY ICEGATE** button to initiate on demand fetching of latest BoE record from ICEGATE, in case, most recent record is not available with GST portal. Click **RESET** button to reset the data entered in the fields.
- History of fetched BOE details from ICEGATE, along with status of the query, can be seen using **HISTORY OF ICEGATE** option.

What is custodian registration facility on the ICEGATE portal?

The ICEGATE has rolled out a functionality for Parent Custodians to add GSTIN against their Custodian Code and both ICEGATE ID and GSTIN for each of their Child Custodians. The details can be added post login on the ICEGATE portal. Considering the need of catering the issues being faced by trade in day-to-day data exchange, this functionality has been developed.

Custodian Registration through ICEGATE now facilitate custodian users to give 10-character custodian code and GSTIN at the time of registration. This will help custodian to maintain uniqueness with each port mapping. A 'custodian reconciliation' facility has also been provided to parent custodian post login so that they can integrate 10-character custodian code and GSTIN for themselves and their child custodian members registered on ICEGATE.

05 Important developments in direct taxes

Important amendments/updates

Clarifications issued in respect of TDS and TCS provisions

CBDT[77] has issued clarification/guidance[78], to remove difficulties being faced by the taxpayers in respect of certain TDS and TCS provisions[79].

Tax is not required to be deducted in the following cases:

- E-auction services services carried out through electronic portal, subject to certain conditions.[80]
- On purchase of goods not covered under the purview of GST[81], buyer is not required to deduct TDS[82] on the tax component[83], which is indicated separately in the invoice at the time of credit of amount in account of the seller.
  - Sales return: TDS may be adjusted against the subsequent purchase from the same seller
  - Replacement of goods: No adjustment required
  - Tax is deducted on payment basis: To be deducted on the whole amount (including tax component)
- On purchase of goods[80] by a department of the government, which is not carrying out any business or commercial activity. No tax is to be deducted[81] by the buyer on purchase of goods from any department of central/state government.[84]

Tax is not required to be collected at source [85] in respect of certain goods, if the buyer furnishes a declaration that such goods are to be utilised for the purposes of manufacturing, processing or producing articles or things or for the purposes of generation of power and not for trading purposes. However, TDS[86] will have to be deducted by the buyer in such cases.

77. The Central Board of Direct Taxes
78. Circular No. 20/2021 dated 25 November 2021
79. TDS under Section 194-O (Payment of certain sums by e-commerce operator to e-commerce participant), Section 194Q (Deduction of tax at source on payment of certain sum for purchase of goods) and Section 206C(1H) [TCS provision on sale of goods for a consideration exceeding INR 5 million] of the Income-tax Act, 1961 (the Act)
80. Section 194-O of the Act
81. Such as petroleum products
82. Section 194Q of the Act
83. Value Added Tax/ Sales tax / Excise Duty / Central Sales Tax
84. However, provisions of section 194Q would apply to any other person such as public sector undertaking or corporation established under Central or State Act, or any other such body, authority or entity
85. Section 206C(1A) of the Act
86. Section 194Q of the Act

Delhi High Court has quashed reassessment notices issued under the old regime post 31 March 2021

On account of the difficulties faced due to the COVID-19 pandemic, CBDT extended the timelines[87] for issuance of reassessment notices[88] by way of notifications[89] till 30 June 2021. Finance Act, 2021[90] revamped the entire reassessment proceedings[91] with effect from 1 April 2021. However, tax officers continued to issue reassessment notices under the erstwhile regime (i.e., without complying with the procedure specified by the Finance Act, 2021).

The Delhi High Court has, in a batch of 1,346 writ petitions[92], quashed the reassessment notices issued under the old regime post 31 March 2021, on account of non-compliance with the new reassessment procedure enacted by the Finance Act, 2021.

CBDT partially modifies list of cases which are not covered under the Faceless Assessment regime

CBDT has partially modified its earlier order[93] regarding cases which are not covered under the Faceless Assessment regime. In addition to the exceptions provided earlier, CBDT[94] has now excluded from the purview of the Faceless Assessment regime, cases where assessment proceedings are pending/initiated pursuant to survey[95] or where survey is conducted in ongoing assessment proceedings.

Further, it has directed that all such cases (except international taxation) shall be transferred to the central charges, which will complete the assessment, irrespective of the presence/absence of impounded material in the cases.

87. Section 149 of the Act (Time limit for issuing notice under section 148 of the Act)
88. Section 148 of the Act (Issue of notice where income has escaped assessment)
89. Notification No. 20 dated 31 March 2021 and Notification No. 38 dated 27 April 2021
90. Enacted on 28 March 2021
91. As per section 148A of the Act (Conducting inquiry, providing opportunity before issue of notice under section 148 of the Act)
92. Mon Mohan Kohli vs ACIT W.P.(C) 6176/2021 (TS-1110-HC-2021DEL)
93. Order dated 6 September 2021 and 22 September 2021 (F.no. 187/3/2020-ITA-I)
94. Vide Order dated 16 December 2021
95. Section 133A of the Act

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