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SHAPING A VIBRANT INDIA

GST Compendium

A monthly guide

June 2022

Editor’s note

The Central Board of Indirect Taxes and Customs (CBIC) has taken note of the fact that its officers were using force or coercion to recover tax liability during search, inspection or investigation, even after the voluntary deposit of GST liability. Therefore, to protect the interest of the taxpayers, the CBIC has instructed the authorities not to make any recovery of GST dues during search, inspection, or investigation proceedings.

The Apex Court has ended the long-drawn litigation by striking down the levy of Integrated Goods and Services Tax (IGST) on ocean freight under the reverse charge mechanism (RCM). The court held that as the Indian importer is liable to pay IGST on the composite supply, therefore, a separate levy on ocean freight is not justified. The ruling provides a big relief to the importers and they should now evaluate their claim for refund of IGST paid earlier where credit was not availed. In addition, the court has reiterated that the GST Council’s decisions are only recommendatory and not binding on the legislature, which only has the power to enact primary legislation.

In another landmark ruling, the Apex Court has held that the secondment of employees by the overseas entity to an Indian entity is in nature of supply of manpower service and thereby liable to service tax. The ruling could have widespread ramification on similar secondment arrangements, even under the GST regime. Therefore, businesses need to examine their agreements and revisit their tax positions.

On the direct tax front, the Central Board of Direct Taxes (CBDT) has issued instructions for implementing the Apex Court’s ruling on the validity of reassessment notices. In addition, it has modified the compliance check functionality for tax deductor/tax collector, in case of non-filers of return of income.

Hope, you will find this edition an interesting reading.

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01 Important amendments/updates

A. Key updates under Goods and Services Tax (GST)

CBIC instructs authorities not to make any recovery of GST dues during search, inspection or investigation

The GST investigation wing observed that some taxpayers have alleged the use of force or coercion by officers for making recovery of tax liability during the course of search, inspection or investigation after voluntary deposit of GST liability. Therefore, in order to protect the interest of the taxpayers and ensure correct application of law in respect of voluntary payment of taxes, the CBIC has issued certain instructions as under[1]:

Option to deposit tax voluntarily

Under the GST law, taxpayers have an option to deposit the tax voluntarily by submitting DRC-03 on the GST portal before issuance of Show Cause Notice (SCN). This helps the taxpayers in discharging their admitted liability without having to bear the burden of interest and save penalty.

No mandatory recovery during proceedings

No recovery can be made unless the amount becomes payable in pursuance of an order passed by the adjudicating authority or otherwise becomes payable under the GST law. Therefore, there may not arise any situation where the recovery of the tax dues has to be made by the tax officer during the course of search or inspection or investigation proceedings. However, there is no bar on the taxpayer to voluntarily make payment of dues on ascertainment of liability by him or by the tax officer in respect of issues identified during the course of such proceedings or subsequently.

Complaint from taxpayer

In case any complaint is received from a taxpayer regarding the use of force or coercion by any of the officers for getting the amount deposited during search or inspection or investigation, the same may be enquired at the earliest. In case of any wrongdoing on the part of any tax officer, strict disciplinary action as per law may be taken against the defaulting officers.

1. Instruction No. 01/2022-23 [GST Investigation] dated 25 May 2022

CBIC waives off late fee payable for delay in furnishing of FORM GSTR-4 for financial year (FY) 2021-22

Based on the recommendations of the GST Council, the CBIC had earlier waived the late fees for delay in furnishing return in Form GSTR-4 in excess of an amount of INR 25 for every day during which such failure continues. The CBIC has now waived off late fee payable for delay in furnishing of FORM GSTR-4 for the FY 2021-22 for the period from the 1 May 2022 to 30 June 2022[2].

CBIC extends the due date for furnishing form GSTR-3B and form GST PMT-06 for April 2022

The CBIC has extended the due date for furnishing various returns under GST for the month of April 2022 as under:

Form	Original due date	Extended due date
Form GSTR-3B	20 May 2022	24 May 2022[3]
Form GST PMT -06	25 May 2022	27 May 2022[4]

Grievance redressal mechanism in case of pending refund under Delhi Value Added Tax (VAT) and GST

The provisions of the Delhi VAT Act[5] and GST Act[6] provide for disposal of refund applications in a time bound manner. The Delhi department observed that plenty of refund cases are still pending despite issuance of circulars from time to time in order to dispose the refund application in a time bound manner. It is obligatory on the part of officers to ensure that the refund applications are disposed strictly in accordance with the statutory timelines. Therefore, the Delhi department has developed a mechanism to streamline the process of disposal of refund applications and to provide a platform for the dealers/taxpayers to register their grievances related to the pending refund applications[7].

The taxpayers may file their grievances by filling a simple Refund Grievances Redressal Form, which shall be handled as follows:

- The dealer shall submit the application in Refund Grievances Form available on the portal
- The Electronic Data Processing (EDP) branch shall forward the details to concerned zonal and ward incharge
- The ward incharge shall dispose the application on merit within 10 working days
- The zonal incharge will supervise the progress of disposal on daily basis and furnish the report to the EDP branch on weekly basis
- The EDP branch shall submit consolidated report to the Special Commissioner on weekly basis who shall further submit the details of pending cases on weekly basis with the Commissioner
- The EDP branch shall inform about this facility to the registered taxpayers by SMS and email

Haryana Revenue Department shares data of commercial rent/lease agreements with the Haryana Excise and Taxation Department to prevent evasion of GST

Under the GST Act, renting of immovable property other than those for residential purpose is chargeable at the rate of 18%. Accordingly, taxpayers having turnover above INR 20 lakh, providing such renting of immovable property for commercial purposes are required to get registration and pay tax. The Haryana Revenue Department has observed that certain individuals providing such renting services are either under reporting or not reporting transactions liable to GST[8].

In order to curb such evasion of taxes, the department has decided the following measures:

- A regular data sharing protocol including details of past registered leases shall be developed between the Revenue department and the Excise and Taxation Department
- System-based checks shall be introduced such as recording details of PAN/GSTIN of the lessor during purchase of e-stamp and property registration
- A special drive may be initiated by the Excise Department against the tax defaulters to recover tax on commercial rentals and leasing

2. Notification No. 07/2022 – Central Tax dated 26 May 2022
3. Notification No. 05/2022 – Central Tax dated 17 May 2022
4. Notification No. 06/2022 – Central Tax dated 17 May 2022
5. Section 38 of the DVAT Act, 2004
6. Section 54 of the Delhi GST Act, 2017
7. Circular No. F.3(433)/GST/Policy/2022/1268-77 dated 13 May 2022
8. Press Release dated 23 May 2022 issued by Excise and Taxation Department Haryana

Telangana government proposes One-Time Settlement Scheme 2022 (OTS Scheme) to settle disputed taxes w.r.t. pre-GST regime

The Commissioner of Commercial Taxes, Telangana has proposed OTS Scheme of tax arrears to settle disputed tax under the Legacy Acts, such as Andhra Pradesh General Sales Tax Act, 1957; the Telangana VAT Act, 2005; the Central Sales Tax Act, 1956 and the Telangana Entry of the Goods into Local Areas Act, 2001 (relevant acts).

Key features of the OTS Scheme

Applicability

- The provisions of the scheme shall apply to all registered and unregistered dealers under the relevant acts
- Each assessment year shall be considered as a distinct unit for settlement of disputes
- 100% of undisputed tax will be payable

Waiver

- The scheme sets out the following rates for disputed tax:

Tax	Collection from dealer	Waiver
Andhra Pradesh General Sales Tax	40% of balance tax	Remaining 60% of demand
VAT and Central Sales Tax	50% of balance tax	Remaining 50% of demand
Entry tax on motor vehicle and goods	60% of balance tax	Remaining 40% of demand

- Interest and penalty shall be waived for persons availing the scheme
- Refunds shall not be given under the scheme

Timeframe for availing the scheme

Particulars	Timeline
Application to avail OTS	16 May 2022 to 30 May 2022
Scrutiny of application for confirming the arrear and intimation	1 July 2022 to 15 July 2022
Submission of settlement letter by taxpayer and payment of agreed amount	16 July 2022 to 15 August 2022

Procedure to apply for the scheme

- The scheme shall be executed through an online module
- The application shall be made online. However, in case dealer is no more in business, then offline application can be filed to the respective Jurisdictional Circle/Service Tax Unit (STU)
- The application shall be scrutinised by a three-member committee consisting of Assistant Commissioner (AC) (Service Tax(ST)) of Circle, Deputy Commissioner(DC)(ST) and Joint Commissioner (JC)(ST) of the division who shall send a confirmation letter by accepting/rejecting/modifying the proposal
- Payment shall be made upon receipt of confirmation letter and submission of such payment details along with relevant documents
- The proceedings for settlement of balance tax, penalty and/or interest will be issued after realisation of the total tax payable and disposal of the case as withdrawn by the respective legal forum. The applicant can pay using instalment facility without interest (up to four equal monthly instalments) in case the amounts payable is higher than INR 25 lakh. In case applicant seeks more instalments, bank interest rates will be applied. The appeal pending before the appellate authority or the tribunal or the court in respect of any order or notice, shall be withdrawn fully and unconditionally by the applicant

Rajasthan government issues guidelines for reimbursement of State Tax deposited by hotels and tour operators

The Rajasthan government[9] has decided to provide reimbursement of State Tax due and deposited by hotel and tour operators (beneficiary), registered under the Rajasthan GST Act, 2017. In this respect, the Rajasthan government has issued guidelines for application and procedure for reimbursement of State Tax due and deposited by hotels and tour-operators in the state.

Entitlement of reimbursement

The registered taxable persons in the categories of hotels, heritage hotels, resorts and tour operators are entitled for reimbursement. It shall not be applicable for stand-alone restaurants and clubs. Any beneficiary found guilty of any tax evasion in preceding financial year shall be ineligible for reimbursement.

Taxes to be reimbursed

The amount of State GST (SGST) paid by the registered person through debit in the electronic cash ledger after complete utilisation of the available credit amount of the state tax and integrated tax shall be the State Tax due and deposited eligible for reimbursement.

Reimbursement of State Tax due and deposited

Period	Percentage of reimbursement of SGST
1 October 2020 to 31 March 2021	50%
1 April 2021 to 30 June 2021	75%
1 January 2022 to 31 March 2022	50%

Reimbursement shall not be available for SGST leviable and paid on rental or leasing services including own or leased non-residential property.

Wrong availment of reimbursement

If the registered taxable person has wrongly availed the reimbursement of state tax, then it shall be recovered as an arrear of state tax along with interest at the rate of 18% and 100% penalty.

Application for reimbursement of State Tax due and deposited:

- The registered person shall sign up on the Rajasthan Tax portal and submit One Time Information for Reimbursement
- Before submitting such application of reimbursement, the registered person shall compulsorily file all the due returns
- The amount of state tax shall be deposited in the state exchequer during the operative period of the order in the prescribed manner
- The registered person may apply for reimbursement for more than one tax period by submitting a single application in Format-I

Procedure for reimbursement of State Tax due and deposited:

- The amount of reimbursement shall first be adjusted against any outstanding tax demand of the registered person
- The reimbursement shall be made only after adjusting amount sanctioned as subsidy under Rajasthan Investment Promotion Scheme (RIPS) 2003, 2010, 2014 and 2019
- The amount of reimbursement due shall not be more than the amount of state tax actually due and deposited by the registered person where any subsidy/reimbursement is granted on basis of deposition of state tax
- The sanction order of reimbursement shall be issued by the proper officer in Format-2. Such order shall be forwarded to Central Subsidy Disbursement Officer (CSDO) for making payment
- The CSDO shall request for budget for reimbursement and shall subsequently pass the payment order

9. Vide order No.F.12(15)FD/Tax/2022 -128 dated 10 May 2022

B. Key updates under Customs/Foreign Trade Policy (FTP)/Special Economic Zone (SEZ):

Ministry of Steel extends last date for submitting applications under Production Linked Incentive (PLI) Scheme for speciality steel

The Ministry of Steel has further extended the timeline for submitting applications under the PLI Scheme for speciality steel till **30 June 2022**[10]. Earlier, the last date was extended till 30 May 2022. The application window shall now be kept open up to **30 June 2022**.

Directorate General of Foreign Trade (DGFT) notifies Remission of Duties and Taxes on Export Products (RoDTEP) schedule

The DGFT has issued amendment in the Foreign Trade Policy 2015-2020(FTP) with respect to the RoDTEP scheme. It has notified RoDTEP schedule as Appendix 4R, which contains the eligible RoDTEP export items, rates and per unit value caps[11].

The RoDTEP schedule has been notified to implement w.e.f. 1 January 2022 after aligning the earlier schedule with the Customs tariff schedule as per the Finance Act, 2021.

DGFT extends the last date for submission of online applications for allocation of Tariff Rate Quota (TRQ) under India–UAE Comprehensive Economic Partnership Agreement (CEPA)

The DGFT has extended the last date for submission of online applications for allocation of TRQ under India–UAE CEPA. The last date for first two quarters of FY 2022-23 (1 May 2022 to 30 September 2022) has been extended till 31 May 2022[12].

DGFT directs uploading of e-BRC for shipping bills on which Rebate of State and Central Levies and Taxes (RoSCTL) scrip has been availed

Under the RoSCTL scheme, the rebate is allowed subject to receipt of export proceeds within time stipulated under the FEMA[13]. Therefore, the DGFT has requested all the exporting firms who have been issued RoSCTL scrips for exports/shipping bills up to 31 December 2020, to get uploaded the relevant e-BRCs by their AD banks by **15 July 2022**[14]. In case of failure, action would be initiated by the jurisdictional Regional Authorities (RAs).

Noida Special Economic Zone (NSEZ) extends Work from Home (WFH) permission to IT/ITES units

As per the communication[15] issued by the Development Commissioner of NSEZ, the WFH facility has been further extended up to **31 December 2022** or until further orders, whichever is earlier.

However, the Development Commissioner has suggested the units to gradually increase the physical presence of their employees in the SEZ premises.

Ministry of Commerce extends validity of Letter of Approval (LOA) of plastic recycling units in SEZs/Export Oriented Units (EOUs)

Earlier the MOC has restricted the renewal of plastic recycling units working under SEZ and EOU Scheme for 18 months as per the communication[16] issued in 2021.

Now after various representations received from the stakeholders for extending the validity of LOA, the MOC has announced vide a recent communication[17] that LOA of the plastic recycling units in SEZs and EOUs may be extended for five years by the Board of Approval (BOA) subject to fulfillment of other conditions/norms.

10. No. S-21018/1/2020- TRADE TAX- PART(1) dated 30 May 2022
11. Notification No: 04/2015-2020 dated 11 May 2022
12. Public Notice No. 08/2015-2020 dated 19 May 2022
13. Foreign Exchange Management Act, 1999
14. Trade Notice no. 12/2022-23 dated 30 May 2022
15. Circular no. 10/311/2010-SEZ/4299 dated 27 May 2022
16. Letter No. K 43014(16)/9/2020-SEZ dated 27 May 2021
17. Letter No. K 43014(16)/9/2020-SEZ dated 05 May 2022

02 Key judicial pronouncements

A. Key rulings under GST

Secondment of employees by overseas entity tantamount to supply of manpower services – Supreme Court (SC)

Summary

The SC held that the assessee (Indian entity) was the recipient of the manpower recruitment service and the supply provided by the overseas entity concerning the employees seconded. The assessee benefited from experts for a limited period and derived economic benefits from such an arrangement. Further, the SC relied on the principle of substance over form and held that the cardinal principles of interpretation of documents implies that the nomenclature of any contract or document is not decisive of its nature, but the court must evaluate overall reading of the documents and its effects. The SC noted that the seconded employees remained on the payroll of the overseas entity. Upon expiration of the secondment term, the employees would return to their overseas employer.

Facts of the case

- The assessee[18] entered into agreements with its group companies located outside India to provide general back office and operational support. To facilitate this, the group entities provided certain technical personnel to the assessee to assist in the business.
- As per the agreement, the seconded employees would continue to be on the payroll of the overseas group entity but shall act under the instructions and directions of the assessee. Accordingly, the seconded employees would receive salary, bonus, social benefits, etc., from overseas group entities and shall be reimbursed from the assessee.
- Proceedings were initiated against the assessee for non-payment of service tax under manpower recruitment or supply agency service regarding the secondment agreements entered with the group companies.

18. Northern Operating Systems Pvt Ltd.

- The assessee submitted that the service received from the group entity did not fall under the manpower recruitment or supply agency service prior to the negative list. Post the negative list, the provision of service by an employee to the employer concerning his employment has been expressly excluded. Thus, the amount paid to the foreign entity as reimbursement of salary cannot be construed as a consideration for the supply of manpower services.
- As a result, the assessee filed an appeal before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) Bangalore, which set aside the demand and passed an order in favour of the assessee.
- Therefore, the Revenue filed appeal against the said order of the CESTAT before the SC.

CESTAT Bangalore observations and ruling[19]

- **The agreement is for providing certain specialised services**: The group companies are not in the business of supplying manpower. The agreement is specifically for provision of certain specialised services. Further, the employees are seconded to the assessee and the payment of salaries to such employees by group companies is only for further disbursement. Hence, an employer-employee relationship exists and does not fall under the taxable service of manpower recruitment or supply agency.
- **Establishment of a distinct employer-employee relationship:** The agreement does not establish a service provider-recipient relationship. Accordingly, there is a distinct employer-employee relationship between the seconded employee and the assessee. Also, disbursement of salary cannot determine the nature of transaction.
- **No supply of manpower service:** The arrangement is of continuous control and direction of the company to the seconded employees. Thus, such an arrangement is out of the ambit to be called as manpower supply service. Accordingly, the demand is to be set aside.

SC observations and ruling[20]

- **Operational or functional control over seconded employees:** The assessee is potentially liable for the performance of tasks assigned to seconded employees. The seconded employees were performing the tasks relating to the assessee's activities and not in relation to the overseas employer. Therefore, the assessee had to reimburse the amounts equivalent to salaries of the seconded employees to the overseas entity as the overseas entity was obliged to maintain such employees on its payroll.
- **Overseas company has a pool of highly skilled employees:** The nature of the overseas entity business appears to be to secure contracts, which can be performed by its highly trained and skilled personnel. The role of the assessee is to optimise the economic edge to perform specific tasks given by the overseas employer. Therefore, the overseas entity's highly skilled employees are seconded to the Indian entity to complete such tasks. Upon cessation of the secondment term, they return to the overseas employer and are further deployed. Thus, it is evident that overseas companies have a highly skilled workforce pool.
- **Terms of employment as per the policy of overseas entity:** While the control over the performance of the seconded employees' work and the right to ask them to return if their functioning is not as it is desired, is with the assessee, the fact remains that their overseas employer in relation to its business deploys them to the assessee on secondment and pays them their salaries. Their terms of employment, even during the secondment, are in accordance with the policy of the overseas entity, who is the employer.
- **Assessee is a service recipient of overseas group company:** The assessee derives economic benefit from the overseas group companies, resulting in its revenues. The assessee has the benefits of experts for limited periods. The seconded employees for the duration of their secondment are under the control of the assessee and work under its direction. Thus, the assessee is held to be the service recipient of the overseas entity, which has provided manpower supply service.
- **Invocation of extended period of limitation is untenable:** In the court's considered view, the revenue's argument that the assessee had indulged in wilful suppression is insubstantial. The revenue had discharged two SCNs to the latter, which evidences that the assessee's view about its liability was neither untenable nor mala fide. Thus, the revenue is not justified in invoking the extended period of limitation to fasten liability on the assessee.
- **Liable to pay service tax for period covered by SCNs:** The SC set aside the order of the tribunal and held that the assessee is liable to pay service tax for the periods mentioned in the SCNs, excluding any liability for the extended period of limitation.

Our comments

This is a landmark ruling wherein the secondment of employees by an overseas entity to an Indian entity has been held to be a supply of manpower service and thereby exigible to service tax based on the principle of substance over form. The SC observed that in return of the secondment arrangement, the assessee has the benefit of experts for limited period and is deriving economic benefit from such arrangement.

The ruling will have widespread ramifications on similar secondment arrangements even under the GST regime. Therefore, the businesses must examine their agreements and revisit their tax positions.

However, it is pertinent to note that the SC has observed that the view held by the assessee about its liability was neither untenable nor mala fide. Therefore, the SC turned down revenue's contention of the wilful suppression of facts and held that the extended limitation period was not invokable.

19. Service Tax Appeal No. 22573 of 2014 order dated 23 December 2020
20. Civil Appeal No. 1390 / 2022, order dated 19 May 2022

Levy of IGST on ocean freight struck down as it violates the principle of composite supply – SC

Summary

The SC has dismissed Revenue's Special Leave Petition (SLP) challenging the Gujarat High Court (HC) decision, which struck down levy of IGST on ocean freight on transportation of goods by vessel. The SC held that the recommendations of the GST Council are not binding on the Union and the State governments. Further, such recommendations are the product of a collaborative dialogue involving the Union and States and binding of such recommendations would disrupt fiscal federalism. The SC further opined that the IGST Act and the CGST Act define reverse charge and prescribe the entity that is to be taxed, hence the specification of the importer as a recipient by the Notification 10/2017 is only clarificatory. The Apex Court also held that the impugned levy imposed on service aspect of the transaction is in violation of the principle of composite supply. Hence, the SC concluded that since the Indian importer is liable to pay IGST on the composite supply, therefore, a separate levy on ocean freight does not hold good.

Facts of the case

- The applicant[21] is an importer of non-coking coal from Indonesia, South Africa and the U.S. by ocean transport on a CIF[22] basis which is supplied to domestic industries.
- The applicant discharges the customs duty on the imported products on value including ocean freight.
- The government issued notification[23] whereby the applicant is required to pay IGST under RCM on the value of goods imported, including ocean freight.
- The applicant preferred the writ before the Gujarat HC challenging the legality and validity of the relevant notifications[24] and to pray to declare that no tax is leviable under the GST laws[25] on ocean freight.
- The Gujarat HC had held that notifications are declared as ultra vires the GST laws as they lack legislative competency and both notifications were declared as unconstitutional.
- The Revenue has approached the SC against the HC order.
- The applicant alleged that the impugned notifications create an element of double taxation as ocean freight is included in the value of goods. However, it does not dispute the liability of integrated tax on supply of service of transportation when it imports goods on an FOB basis.
- Further, the applicant contended that the provisions[26] are merely machinery provisions for collection of tax and not the charging provision. The applicant also submitted that the test of ultimate beneficiary relied upon by the ASG[27] does not have statutory backing since the charging section[28] makes the recipient of the services liable to pay tax. Thus, the applicant submitted that the levy of IGST on ocean freight is extra-territorial and ultra vires the provisions[29].

Gujarat HC observations and ruling[30]

- **Events were outside India:** The HC noted that the entire chain of events took place outside India and mere fact that the transportation of goods terminates in India will not make such supply of transportation of goods as taking place in India.
- **Person liable to pay tax under RCM cannot be other than recipient:** The government is only authorised to specify the categories of supply on which tax is to be paid by recipient of supply under RCM. However, it cannot further specify the person liable to pay tax as other than recipient of supply.
- **Dual taxation:** Once the freight has already suffered the IGST as a part of the value of the goods being imported, the dual levy of the IGST cannot be imposed on the same freight amount by treating it as supply of service. Double taxation, by the way of delegated legislation, when the statute does not expressly provide, is not permissible.
- **Importer not recipient of transportation service:** The HC observed that in case of CIF contract, the contract for transportation is entered into by the seller, i.e., the foreign exporter, and not by the buyer, i.e., the importer and the importer is not the recipient of the service of transportation of the goods. Accordingly, the applicant cannot be made liable to pay tax on some supposed theory that the importer is directly or indirectly recipient of the service.
- **Ultra vires:** Therefore, the HC declared the relevant notifications as ultra vires the GST law as they lack legislative competency and quashed the levy of IGST on ocean freight on transportation of goods by a vessel.

21. M/s Mohit Minerals Private Limited
22. Cost-Insurance-Freight
23. Notification No. 10/2017 – Integrated Tax (Rate) dated 28th June 2017 read with Notification No. 8/2017 – Integrated Tax (Rate) dated 28th June 2017
24. Notification No.8/2017 – Integrated Tax (Rate) dated 28th June 2017 and the Entry 10 of the Notification No.10/2017 –Integrated Tax (Rate) dated 28th June 2017
25. Integrated Goods and Services Tax Act, 2017
26. Sections 5(3) and 5(4) of the IGST Act, 2017
27. Additional Solicitor General of India
28. Section 5 of the IGST Act, 2017
29. Section 1 read with Section 2(22) of the IGST Act, 2017
30. Special Civil Application No. 726 of 2018 dated 23 January 2020

SC observations and ruling[31]

- **No delegation of the essential legislative functions:** The SC noted that the essential legislative functions w.r.t GST law are levy of tax, subject matter of tax, taxable person, rate of tax and taxable value, which have been inculcated in the IGST Act. The Acts[32] clearly define reverse charge, recipient and the taxable persons. Hence, the essential legislative functions and reverse charge have not been delegated. Further, the government by notification did not define a taxable entity different from what has been prescribed under the provisions[33] for the purpose of reverse charge and the stipulation of the recipient is only clarificatory.
- **Notification[34] specifies taxable person envisaged in the statute**: The charging section[35] of IGST Act specifically classifies inter-state supply as a taxable event, taxable person as the person on whom levy is imposed, rate of tax as notified[36] and taxable value as value determined under the CGST Act[37]. Further, Section 5(3) and section 5(4) of the IGST Act are inextricably linked with such charging provision and they must be construed together in determining the vires of the taxation. Further, the notification identifies importer as the recipient liable to pay tax under RCM. The notification clearly specifies a taxable person envisaged in the statute. Thus, the notification cannot be invalidated for an alleged failure to identify a taxable person.
- **Notification[38] cannot be struck down for excessive delegation:** The SC stated that the contention of the applicant that the value of supply is to be specified through rules and not by the notification, is an unduly restrictive interpretation. Further, the Parliament has provided the basic framework and delegated legislation provides necessary supplements to create a workable mechanism. The rule[39] specifically provides for residual power to determine valuation and accordingly, the notification prescribes taxable value[40] for imposing a tax on RCM Thus, the notification cannot be struck down.
- **Supply of transportation service has a nexus to territory of India:** The impugned levy on the supply of transportation service has a two-fold connection. First, the destination of the goods is India and second, the services are rendered for the benefit of the Indian importer. Thus, the transaction does have a clear nexus with the territory of India.
- **Section 5(3)[41] does not confer power to create a deeming fiction:** The provision[42] of the IGST Act does not confer the powers on the Central Government to create a deeming fiction vis-à-vis who constitutes the recipient. However, the provisions[43] inherently create a deeming fiction of the importer to be the recipient of shipping service.
- **Violation of principles of composite supply:** The first leg of transaction in the instant case between the foreign exporter and Indian importer is a composite supply. The other transaction between the foreign exporter and shipping line may be regarded as a standalone transaction. Both of these are independent transactions. In a CIF contract, the transportation service forms part of bundle of supplies between the parties on which IGST is payable. Thus, separately levying tax on service component would contradict the principle and scheme of GST legislation.
- **Recommendations of the GST Council only have a persuasive value:** The Parliament[44] intended for the recommendations of the GST Council to only have a persuasive value, particularly when interpreted along with the objective of the GST regime. Further, the Government while exercising its rule-making power[45] is bound by the recommendations of the GST Council. However, it does not mean that all the recommendations of the GST Council are binding.

Our comments

The levy of IGST on ocean freight has been one of the most contentious matter since inception of GST which has finally come to an end.

The Hon'ble Apex Court in the present case has struck down the levy of IGST on ocean freight and pronounced decision in favour of the importers. Since the Indian importer is liable to pay tax on the composite supply which includes the supply of services also, hence the concept of double taxation does not hold good.

This landmark judgement shall provide a big relief to the importers, which is going to settle down the ongoing litigations on the subject matter. Further, relying on this decision, the importers who had earlier paid taxes under RCM however credit not availed, may apply refund of such taxes paid.

Also, the SC has emphasised that the recommendations of the GST Council are not binding and only persuasive in nature. Thus, it would be interesting to note that the recommendations made earlier by the GST Council can be challenged by the taxpayers which may open up a space for more litigations.

31. Civil Appeal No. 1390 / 2022, order dated 19 May 2022
32. IGST Act and CGST Act
33. Section 5(3) of the IGST Act, 2017
34. Notification No. 10/2017 – Integrated Tax (Rate) dated 28th June 2017
35. Section 5(1) of the IGST Act, 2017
36. by the Union Government on the recommendation of the GST Council capped at forty per cent
37. Section 15 of the CGST Act, 2017
38. Notification No. 8/2017 – Integrated Tax (Rate) dated 28th June 2017
39. Rule 31 of CGST Rules, 2017
40. 10 per cent of CIF value
41. IGST Act, 2017
42. Section 5(3) of IGST Act, 2017
43. Section 13(9) of the IGST Act read with Section 2(93)(c) of the CGST Act
44. deletion of Article 279B and the inclusion of Article 279(1) by the Constitution Amendment Act 2016
45. under the provisions of the CGST Act and IGST Act

Mandatory deduction of one-third value of agreement towards land is not sustainable in case the value of land is clearly ascertainable – Gujarat HC

Summary

The Gujarat HC has held that when the actual value of land is ascertainable, then the mandatory deduction of one-third of total consideration towards land is not enforceable. The HC opined that application of deeming fiction of deduction of one-third value is discriminatory, arbitrary and violative of Article 14 of the Constitution of India as it is applied irrespective of the land plot size and construction therein. The court observed that the minutes of the 14th GST Council meeting clearly contemplate that such deduction was inserted only in the context of flats wherein value of undivided share of land was unascertainable. The HC further stated that wherever a delegated legislation is challenged as being ultra vires, it cannot be defended merely on the ground that the government had the competence to issue such delegated piece of legislation. Accordingly, the HC read down the paragraph of the notification to the effect that the deeming fiction of one-third value of land will not be mandatory. The court also directed the GST authority to refund the excess taxes paid along with interest to the applicant.

Facts of the case

- The applicant[46], a practicing advocate, had entered into an agreement[47] for sale of land and construction of bungalow on the land. As per the agreement, the parties agreed for a separate and distinct consideration for sale of land and construction of a bungalow on the land.
- The respondent raised an invoice on the applicant to pay GST on entire consideration payable for land as well as construction of bungalow after deducting one-third value towards land. The entire consideration towards the sale of land has not been excluded for the purpose of computing tax liability because of the impugned notification[48].
- The applicant submitted that the agreement is severable and the amount of consideration towards sale of land is outside the purview of GST[49].
- The applicant sought an advance ruling w.r.t. the tax liability on supply of developed land, wherein it was held that the deduction for sale of land was admissible only to the extent of one-third of the total consideration on the basis of the impugned notification. The Gujarat Appellate authority for Advance Ruling (AAAR) has affirmed the decision passed by Advance Ruling Authority (AAR).
- Thus, the aggrieved petitioner filed the present petition challenging the validity of the impugned notification and against the ruling passed by the AAAR.
- The applicant placed reliance on the decision[50] of the SC and contended that when actual value can be ascertained, then fictional value cannot be taken into consideration. Accordingly, the notification is contrary and illegal.

46. Munjaal Manishbhai Bhatt
47. with Navratna Organisers & Developers Pvt. Ltd.
48. Para 2 of Notification No. 11/2017-Central Tax (Rate) dated 28th June 2017
49. Sale of land is included in the Entry No. 5 of the Schedule III to the GST Act
50. Larsen and Toubro Ltd.

Gujarat HC observations and ruling[51]

- **Legislative intent is to impose tax on construction activity:** The Apex Court in its decision[52] had held that in a tripartite agreement between the landowner, the developer and the buyer, the construction undertaken after the agreement will be held as works contract. The construction carried out by developer in agreement with the buyer is now taxed under the GST Act along with deduction given for sale of land. The legislative intent is to impose tax on construction activity undertaken by supplier pursuant to a contract with recipient. There is no intent to levy tax on sale of land in any form as it is neither a supply of good nor supply of service.
- **Sale of land covers sale of developed land as well:** The only service provided by supplier is construction undertaken for the buyer. This is the supply alone which can be taxed. The contention of the revenue authorities that sale of land does not include sale of developed land cannot be a ground for imposing tax on sale of land. Moreover, sale of land[53] includes sale of developed land even as per the notification.
- **Deeming fiction can be applied only when actual value not ascertainable:** The agreement specifies consideration for sale of land and for construction of bungalow. Even the revenue authorities have not argued the impossibility of bifurcation. When provisions require valuation in terms of actual price, then tax shall be imposed on actual price. Thus, mandatory application of deeming fiction when the actual value of land is clearly ascertainable is contrary and arbitrary to statutory provisions.
- **Arbitrariness of deeming fiction:** The standard one-third deduction on account of deeming fiction is uniform, irrespective of the size of the plot. Further, there has not been made distinction between a flat and a bungalow. The minutes of the council meeting[54] clearly contemplate that the deduction was notified only in the context of flats wherein value of undivided share of land could not be ascertained. Thus, the deeming fiction leads to arbitrary and discriminatory consequences which are clearly violative of principles of constitution.
- **Provisions cannot be defended on ground of government's competence:** The valuation provisions have to be prescribed by way of rules and not by a notification. Whenever a legislation is challenged for being ultra-vires, then the same cannot be defended on the ground that government had the competence to issue such delegated legislation. Thus, if deeming fiction is found to be arbitrary, then it can be held to be *ultra-vires*.
- **Controversy relates to valuation and not chargeability to tax:** The Schedule II to the GST Act is not meant to define or extend the scope of supply but only clarifies whether a transaction will be supply of goods or services. The impugned schedule is irrelevant in the present case as this has more to do with valuation rather than chargeability of tax.

Our comments

The taxation issues related to real estate industry have been a matter of extensive litigation since pre-GST regime. Under GST laws, service tax and VAT subsumed into a single tax, however, land, not being subjected to GST, has given scope for continuation of earlier disputes. Thus, a mechanism was prescribed under GST by way of a notification[55] to identify the land value as one-third of the total value irrespective of the actual value available/identifiable. However, such notification was challenged on the ground of delegation and arbitrariness and hence, various writ petitions were filed before various HCs.

In the present ruling, the Gujarat HC held that the legislative intent is to impose tax on construction activity undertaken by a supplier at the behest of or pursuant to contract with the recipient. There is no intention to impose tax on supply of land in any form and it is for this reason that it is provided in the Schedule III of the GST laws.

This is a welcome judgement for the entire real estate industry which may bring a boom in this industry which will set precedence in similar matters. Further, taxpayers may consider revisiting their arrangements to have a clause specifying the land value in the arrangement and a refund application may also be filed to claim excess tax paid in the previous years.

However, Revenue may approach filing an appeal before the Apex Court which is a wait-and-see situation.

51. R/Special Civil Application No. 1350 of 2021 with R/Special Civil Application No. 6840 of 2021 with R/Special Civil Application No. 5052 of 2022; Dated 06 May 2022
52. 1st Larsen and Toubro case
53. Under Schedule III to the GST Act
54. 14th GST Council Meeting
55. No.11/2017-CT(R) dated 28.06.2017

Procedural infraction shall not come in way of grant of legitimate refund – Madras HC

Summary

The Madras HC has held that procedures prescribed under the GST rules shall not be applied strictly to deny any legitimate export incentives that are available to the exporters. The HC observed that the refund of tax paid on exports have been incorporated under the GST regime and certain export incentives have been given to encourage the inward remittance of foreign currency. Thus, such incentives entitled to the petitioner cannot be denied for the technicality involved in the system. Accordingly, the HC directed Revenue to verify the data received from the petitioner with counterparts of customs department and proceed to sanction the refund.

Facts of the case

- The petitioner[56] is an exporter and had correctly declared the details regarding exports in its monthly return filed in Form GSTR-1 on payment of tax by debiting the input tax credit.
- The outward supplies, i.e., exports would have qualified as a zero-rated supply and therefore, the petitioner should have filled the details in Form GSTR-3B in column 3.1(b). Instead, the petitioner by mistake has given the details of the export as an outward taxable supply (other than zero rated, nil rated and exempted).
- As a result of such mistake, refund of integrated tax on exports has been denied to the petitioner. The petitioner has placed reliance on a circular[57] issued in context of supplies made to the SEZ Accordingly, the petitioner has contended that the clarification made in the circular would even apply for direct exports by a unit in the domestic tariff area.
- The Revenue submitted that they could not process the refund claims since petitioner's information was not received from GSTN portal to the designated system of customs.
- Therefore, the petitioner filed present writ[58] raying to direct the Revenue to sanction their refund claims within a time frame as may be fixed by the court.

Madras HC observations and ruling[59]

- **Procedure does not intend to defeat legitimate export incentives:** The provisions related to the refund of tax/duty paid on exports have been recognised under erstwhile laws[60]. Further, these have been incorporated under GST, except that most of the proceedings are system driven. The intent of providing export incentives is to increase inward remittance of foreign currency. Thus, procedure prescribed is not intended to defeat legitimate export incentives.
- **Procedures should not be strictly applied:** The Apex Court, in a decision, has held that procedures are nothing but handmaids of justice and not mistress of law. Accordingly, the procedures prescribed under the rules[61] cannot be applied strictly to defeat legitimate incentives, which an exporter otherwise would have been entitled to but for the technicality involved in the system.
- **Writ disposed:** The HC directed the Revenue to take information directly from petitioner and verify the same from counterparts of customs department. If indeed there was an export and a valid debit of tax by the petitioner on the exports made to foreign buyers, the refund shall be granted.

Our comments

The Hon'ble SC, in the case of Auriya Chamber of Commerce[62], had held that procedures are nothing but handmaids of justice and not mistress of law.

In addition, it is pertinent to note that earlier, the Bombay HC in the case of SRC Chemicals Private Limited, had held that non transmission of the data from GSTN to ICEGATE cannot be petitioner's problem. It was the responsibility of the Revenue to ensure that petitioner received its refund on time.

The present ruling is in line with the well settled principle that the substantive benefit of refund claim cannot be denied on technical reasons. The ruling should provide relief to other taxpayers whose refunds have been rejected on similar grounds/issues.

56. Abi Technologies
57. Circular No.45/19/2018-GST dated 30 May 2018
58. W.P(MD).No.4562 of 2022
59. vide order dated 28 April 2022
60. Central Excise Act, 1944 r/w Central Excise Rules, 1944 and later under the provisions of the Central Excise Rules, 2002
61. Rule 96 of CGST Rules,2017
62. Commissioner of Sales Tax, U.P. Vs. Auriya Chamber of Commerce, Allahabad reported in 1986(25) E.L.T.867 (S.C)

Power to levy advertisement fee by the municipal corporation does not conflict with the power to levy GST– Karnataka HC

Summary

The Karnataka HC has held that there is no conflict between the power to levy GST under the GST Act and power of Municipal Corporation to levy advertisement tax under Section 134 of the Karnataka Municipal Corporations Act. The HC observed that post introduction of GST, the authority to collect tax on advertisement hoardings is not exiled under Section 134. The HC further explained that both the transactions are different inasmuch as GST is not charged by HDMC[63] and advertisement fee is not charged by the GST authorities. Therefore, the HC discarded the applicant's contention of double taxation. Hence, the court concluded that the charges levied by the municipal corporation permitting putting up of advertisement is more of a fee than a tax since it is a consideration for permission to put up an advertisement hoarding.

Facts of the case

- The petitioner[64] is a registered association of the advertising agencies and engaged in the business of advertisement on the advertisement hoardings licensed by the HDMC. The petitioner was also registered as dealer under the Karnataka Value Added Tax Act.
- The petitioner was served with a notice to pay advertisement tax on the hoardings used. The petitioner contended that after the enactment of GST Act, the power of respondent to levy and collect advertisement has been divested.
- The petitioner relied on ruling passed by the Allahabad HC[65] wherein it has been held that the power with regard to advertisement tax has been deleted from the UP Municipal Corporations Act. Thus, neither the state government nor the municipal corporation has power to levy tax on advertisement hoardings.
- The respondents on the other hand contended that advertisement tax must be construed as a fee levied for granting license to petitioner. Hence, the fee is charged for display and has nothing to do with GST.

Karnataka HC observations and ruling[66]

- **Two independent and distinct transactions:** The petitioner seeks permission from the authorities to use their hoarding for advertisement and thus, the petitioner pays advertisement fee or tax. Further, the petitioner displays clients' advertisements on the hoardings, this transaction is a supply of service liable to GST. Both the transactions are distinct with different tax implications.
- **No double taxation:** The incidence of both GST and advertisement fee is on two distinct transactions. Both the impugned transactions are independent of each-other. Thus, levy of taxes would not amount to double taxation due to independent incidence of tax. The analogy of the petitioners is completely untenable.
- **No conflict to levy GST and advertisement fee:** The charges levied by the municipal corporation to grant permission regarding use of hoardings is in the nature of a fee[67] rather than a tax. Thus, there is no challenge either to Karnataka Municipal Corporations Act or to the GST Act. The petition for setting aside the demand notice is accordingly dismissed.

Our comments

Earlier the Gujarat HC in case of Selvel Media Services Private Limited[68] had concluded that the charges levied by the Municipal Corporation is more of a fee than a tax.

Similarly, the Karnataka HC in the present case has held that the Municipal Corporation and GST authorities are two different competent authorities having power from different legislatures to levy tax.

An analogy of this ruling can be drawn while dealing with the issues related to double taxation.

Proceedings initiated for overlapping period without any legal bias is misuse of statutory power – Calcutta HC

Summary

The Calcutta HC has held that the SCN cannot be issued on the same ground for part of the relevant period when earlier the proceedings were dropped by the Commissioner after adjudication. The HC ruled that merely stating that the earlier order passed without calling for any conclusive evidence cannot be a ground to ignore the earlier order of adjudication. The Court applied the principles of consistency and opined that the order binds the department as the transaction is identical and there is no fresh material available with the Commissioner justifying the issuance of a second SCN. The HC further stated that the mere use of the words wilfully suppressed, cannot hold the assessee guilty and cannot validate the SCN.

63. Hubballi Dharwad Mahanagara Pallike
64. Hubballi Dharwad Advertisers Association
65. M/s Selvel Media Services Private Limited and Others vs. State of U.P. and Others, Writ Tax No. 354/2018
66. WP No. 104172 of 2021.
67. Division Bench of the Gujarat HC in R/Special Civil Application No.4538/2019
68. R/Special Civil Application No. 4538 of 2019 dated 20 October 2020

Facts of the case

- The assessee[69] is a manufacturer of ball and roller bearings. Upon availing the CENVAT[70] credit of duty paid, the assessee had sent raw materials to job workers for processing. After processing, finished goods were bought back to the factory whereas the scrap and waste were sold directly from the job worker's premises. Accordingly, excise duty was paid on such a sale.
- The Commissioner issued a SCN[71] alleging a short payment of excise duty on account of wilful suppression of facts. The SCN was adjudicated, and the Commissioner dropped the proceedings by passing a speaking order. However, after around three years, the new incumbent. Commissioner issued a SCN with identical allegations and overlapping period.
- The aggrieved assessee filed appeal before the Tribunal. However, the Revenue filed a present appeal challenging the order passed by the Tribunal.

Kolkata HC observations and ruling[72]

- **Transfer of business qualifies as a supply:** On perusal of the provisions[73] of the Act, supply of goods or services between distinct persons made in course or furtherance of business shall be treated as a supply, irrespective of receipt of consideration. Accordingly, the impugned transaction of transfer amounts to supply.
- **Abdication of statutory responsibility:** The SCN[74] with an overlapping period is an exact replica of a SCN[75], except for the period. The Commissioner who had issued SCN was aware of the order in which proceedings were dropped. In the original order, the Commissioner had provided reasons for dropping of proceeding. Thus, a SCN cannot be issued on the same ground for the part of the relevant period when earlier proceedings were dropped by the Commissioner after adjudication.
- **Department cannot take a contra stand in the subsequent case:** The HC placed reliance upon various SC judgements[76] wherein the SC took a view that the department having accepted the principles laid down in the earlier case cannot be permitted to take a contra stand in the subsequent cases.
- **Extended period cannot be invoked:** The HC observed that in the present case, a SCN was issued earlier, whose proceedings had dropped after adjudication. Another SCN was issued on the same subject matter along with overlapping period. The Apex Court relied on a case[77] and stated that the department can never bring the case of the assessee to be a wilful suppression or misstatement. Therefore, an extended period[78] of limitation cannot be invoked.
- **Mere use of wilfully suppressed cannot hold guilty:** The transaction in the instant case is identical and there is no fresh material available with the Commissioner to justify the issuance of the subsequent SCN. Thus, mere use of words wilfully suppressed cannot hold the assessee guilty. Also, these words and expressions cannot validate the SCN. Therefore, initiation of proceedings is bad by law.

Our comments

The Apex Court in case of Nizam Sugar Factory[79] had held that the subsequent SCNs cannot be issued on similar facts as were there in the initial SCN. This cannot be considered as suppression of facts on part of the assessee as all the facts were in knowledge as per the first SCN.

Even, in the case of Birla Corporation Limited[80], the SC had opined that Revenue authorities cannot take a different stand subsequently when initially the question and facts are identical. This will lead to confusion in the law and will place the authorities and taxpayers in quandary.

This is a welcome judgment and an analogy can also be drawn under the GST regime in similar matters.

Notice pay amount received from employee as a compensation cannot be equated as a consideration for any taxable service – CESTAT Bangalore

Summary

The Bangalore Customs, Excise and Service Tax Appellate Tribunal (CESTAT) has held that any compensation in the form of notice pay recovery cannot be considered as a taxable service as neither of the parties have provided any service to each other. The CESTAT further opined that the amount received as compensation cannot be equated with consideration, as the consideration is received for performance under the contract however the compensation is received if the other party fails to perform as per the contractual norms.

69. Tata Steel Ltd
70. Central Value Added Tax
71. Dated 31.03.2004
72. CEXA NO. 25 OF 2021
73. Sr. No. 1 and 2 of Schedule I of CGST Act, 2017
74. Dated 30.04.2007
75. Dated 31.03.2004
76. Jayaswal Neco Limited, Birla Corporation Ltd. and Hindustan Gas and Industries Ltd.
77. Nizam Sugar Factory Versus Collector of Central Excise, A.P. [2006 (197) E.L.T. 465 (S.C.)]
78. Section 11A
79. 2747 of 2001 with 6261 of 03 & 2164 of 06 dated 20.04.2006
80. No.- 5118 of 2003 dated 26.07.2005

Facts of the case

- The appellant[81] has collected certain amount as notice period pay or bond enforcement amount from its employees, who either want to quit job without notice or do not want to serve the notice period.
- During the course of audit, the Department observed that the appellant did not pay service tax on amount of notice pay from employees.
- The Department stated that the activity is a declared service[82] eligible for levy of service tax. Accordingly, a SCN was issued and adjudicated. Subsequently, an order demanding service tax on such notice pay was confirmed along with interest, which was upheld by the Commissioner (appeals). Thus, the aggrieved appellant has filed present appeal before the Tribunal.
- The appellant contended that it is not providing any taxable service to its employees. Thus, mere recovery of notice pay would not subject to levy of any service tax.

Bangalore CESTAT observations and ruling[83]

- **Notice pay cannot be termed as a taxable service:** The CESTAT stated that neither the employer nor the employee has provided any service to each other. The notice pay cannot be termed as a service and more specifically, a taxable service. Thus, consideration of such activity cannot be covered under the provisions for the purpose of levy of service tax. The CESTAT relied on decision of Madras HC[84] in case of GE T&D India Limited and set aside the demand.
- **Compensation cannot be equated with consideration:** The CESTAT held that compensation is received when a party fails to perform contractual norms whereas consideration is received for performance under the contract. Further, the CESTAT in similar cases[85] had held that compensation paid by employee for resigning without giving requisite notice would not be termed as consideration and would not qualify as taxable service.

Our comments

Earlier the Madras HC, in case of GE T&D India Limited, had ruled that the notice pay recovery shall not be liable to service tax. The Bangalore CESTAT has also relied upon the decision of Madras HC in the present ruling and has held that compensation amount received from employee cannot be covered under the provisions for the purpose of levy of service tax.

Though the definition of supply under GST is very wide as compared to the definition of services under service tax law, however, the decision held by the Madras HC shall hold true under both the regimes. As per the GST provisions, merely allowing the early exit to the employee and recovering a compensation for such facilitation does not make the employer a supplier of service as there is no element of supply of service per se.

Compensation received due to operation of law cannot be treated as consideration for tolerance of an act – Kolkata CESTAT

Summary

The Kolkata CESTAT has held that the amount of compensation provided to the appellant cannot be called as a consideration for tolerating the act of cancellation of coal mines. The Tribunal observed that as per the provisions of CMSPA, at the time of re-allocation of coal blocks to successful bidders, prior allottees were to be compensated for the transfer of the right, title and interest in the land and mine infrastructure to the successful bidder. Accordingly, the appellant being a prior allottee, received a compensation in respect of land and mine infrastructure. The Tribunal opined that the appellant had no choice to tolerate such cancellation. Therefore, service tax cannot be levied on the compensation received as both the cancellation of allocation of the blocks and the receipt of compensation are by operation of law.

81. XL Health Corporation India Pvt Ltd
82. Section 66E (e) of the Finance Act, 1994
83. ST/20648/2019, ST/20649/2019, Final Order Nos. 20225-20226/2022 dated 6 May 2022
84. W.P.Nos.35728 to 35734 of 2016 and MP.Nos.30704 to 30710 of 2016 dated 7 November 2019;
85. Intas Pharmaceuticals [ST/12436/2018-DB, Order No.- A/12265/2021 dated 25 June 2021] and Rajasthan Vidhyut Prasaran Nigam Ltd. [Service Tax Appeal No. 53020 of 2018, Final Order No. 50047/2022 dated 14 January 2022]

Facts of the case

- The appellant is engaged in the business of manufacturing steel. The government[86] allocated a coal block to the appellant[87], which was later cancelled by the SC[88].
- Subsequently, as per provisions of CMSPA[89], at the time of re-allocation of coal blocks to successful bidders, prior allottees were to be compensated for the transfer of the right, title and interest in the land and mine infrastructure to the successful bidder. Accordingly, the appellant being a prior allottee, received a compensation in respect of land and mine infrastructure.
- A SCN was issued to the appellant alleging that it had tolerated the act of cancellation of the coal blocks by the Ministry of Commerce, Government of India, in lieu of which it received compensation, on which it was liable to discharge the Service Tax[90].
- The appellant contended that there is no rendition of any service or declared service. Also, the compensation paid was statutorily provided for recouping the investment made in the mines and not as a consideration for tolerating the cancellation of the coal blocks.
- Subsequently, the demand was confirmed. Therefore, the appellant preferred present appeal before the Tribunal.

Kolkata CESTAT observations and ruling[91]

- **Compensation received for investment made in coal mines:** The appellant had already made investment in coal mining from the time such coal mines were allotted to the appellant till the time allotment was cancelled by the SC. Thus, CMSPA was passed which provided for payment of compensation to the old allottees by the new allottees. Accordingly, the appellant received such compensation from the government for the transfer of the right, title and interest in the land and mine infrastructure to the successful bidder.
- **Absence of pre-requisite of tolerance:** The question of tolerance pre-supposes that the person either has a choice to tolerate or not and choses to tolerate or such tolerance is as per some agreement or is a taxable service. In the present case, the appellant neither had a choice nor did it choose to tolerate the cancellation. Rather, the cancellation was in pursuance to the order of the Apex Court. Thus, neither of the conditions are satisfied in the present case.
- **Amounts received are in the nature of compensation:** When one's land is acquired by government in public interest, then the amount so received shall be the compensation. It cannot be thought that landowner has agreed such tolerance. Accordingly, a service tax cannot be levied on the impugned amount of compensation as both the cancellation of the allocation of the blocks and the receipt of compensation are by operation of law.

Our comments

On a similar issue earlier the CESTAT Kolkata in case of MNH Shakti Limited had held that compensation amount received on cancellation of allocation of coal blocks shall not be leviable to service tax. The CESTAT observed that the receipt of compensation is a consequence of the operation of a statute and not the result of any agreement. The appellant had no choice but to accept the cancellation of allocation.

Even under the GST law, it is pertinent to note that, the Bombay HC in the case of Bai Mamubai Trust had held that GST is not payable on damages/compensation paid for a legal injury. The HC observed that such payment does not have the necessary quality of reciprocity to make it a supply and, therefore, GST is not payable on such amount.

CENVAT credit of service tax charged on the amount, including VAT shall be entitled to the appellant – CESTAT Delhi

Summary

The CESTAT Delhi has held that when a service tax has been paid by the contractor and invoice mentioning such service tax amount has been issued to the appellant, then availment of CENVAT credit cannot be denied until excess tax is refunded. The CESTAT observed that the amount of service tax was mentioned on gross value in the invoices and such gross value was inclusive of VAT. The CESTAT opined that the appellant shall be entitled to CENVAT credit of service tax paid irrespective of the fact that it was charged on value including VAT. The CESTAT further ruled that there shall be no recovery of interest on credit availed on excess amount of service tax paid.

86. Ministry of commerce
87. M/s. Jindal Steel & Power Limited
88. Order Dated 24.09.2014
89. Coal Mines (Special Provisions) Act, 2015 (CMSPA)
90. It was alleged that the service rendered by the Appellant was that of 'agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act', which was a declared service under Section 66E(e) of the Finance Act, 1994
91. Service Tax Appeal No.75121 of 2021 dated 4 May 2022

Facts of the case

- The appellant[92] is engaged in providing various services, such as construction service, sponsorship, business auxiliary service, etc. The appellant had entered into an agreement for construction of housing project wherein supply of various building material from the contractor was on free issue basis.
- The audit team has observed that the appellant has wrongly availed CENVAT credit of service tax charged on the invoice for free supply of material.
- A SCN has been served alleging that availment of credit is in violation of Rule 2A[93] and proposed to recover CENVAT credit along with the interest and penalty. The demand was initially confirmed and appeal against the demand order was also rejected. Hence, the aggrieved appellant filed the present appeal.
- The appellant submitted that the amount of VAT was not mentioned in any of the invoices issued by the contractor. Thus, CENVAT credit has been availed on the service tax paid. Further, the order passed by the Commissioner is beyond the scope of SCN.

CESTAT Delhi observations and ruling[94]

- **Entitled to avail CENVAT credit:** The CESTAT observed that the service tax has been paid by the contractor. Also, the invoices mentioning the service tax have been issued to the appellant. Accordingly, the appellant was entitled to have CENVAT credit of the service tax paid.
- **Gross value is inclusive of VAT:** From the perusal of the invoices, it is evident that amount of VAT has been paid with respect to total amount issued to contractor. Therefore, credit has been availed on total amount inclusive of VAT.
- **Credit cannot be denied if excess duty is paid:** The appellant had already paid service tax on gross value inclusive of VAT. Therefore, it appears that the Commissioner has wrongly denied the entitlement of appellant to claim credit. The CESTAT has drawn support from the decision of cases[95] wherein the Punjab and Haryana HC had held that when duty is paid in excess then CENVAT credit cannot be denied unless excess duty paid has been refunded. Hence, the claim of CENVAT credit cannot be denied as the department is not allowed to have duty twice.
- **Recovery of interest and penalty cannot be sustained:** The Karnataka HC[96] had held that the provision[97] for recovery of interest on CENVAT credit availed on excess service tax paid would not be attracted. Thus, recovery of interest and imposition of penalty by the Revenue authorities cannot succeed.

Our comments

Earlier, the Punjab and Haryana HC, in case of VG Steel Industry[98] had held that even if the duty has been paid in excess of the amount finally held to be payable, unless the excess duty paid has been refunded, the assessee could claim CENVAT credit as the department could not get the duty twice. A similar view was taken by the court in case of Ranbaxy Labs Limited[99] and Guwahati Carbons Limited[100] as well.

The CESTAT Delhi in present case has drawn support from the decision held by the Punjab and Haryana HC in above rulings and allowed credit of service tax paid.

This ruling shall be helpful for the taxpayers and shall set precedence in similar matters.

B. Key rulings under Customs/Foreign Trade Policy

Managing directors (MD) of the Company to be summoned only when authorised representatives are not cooperating – Gauhati HC

Summary

The Gauhati HC observed that there was no material available with the Department that the petitioner is not cooperating or that the presence of the Managing Director specifically is required for the investigation for any reason. The HC held that the MD of a company should not be directly summoned by the authorities[101]. Further, the authorised representatives of a Company are to be summoned and MD can only be summoned, if the former is not cooperating or if investigation is to be completed expeditiously. The HC disposed-off the petition by directing the Departmental authorities not to issue summons directly to the MD and to issue it to an authorised representative of the company.

92. M/s Trimurty Landcon
93. Service Tax (Determination of Value) Rules, 2006
94. Service Tax Appeal No. 51786/2021 and Final Order No. 50406 /2022 dated 10 May 2022
95. Ranbaxy Labs Ltd. vs CCE, Chandigarh and V G Steel Industry vs CCE
96. in the case of CCE vs. Pearl Insulation Ltd. [2012 (281) ELT192 (Kar)] and CCE vs Strategic Engineering Pvt. Ltd. [2014 (310) ELT 509 (Mad)]
97. Rule 14 of the CENVAT Credit Rules
98. CEA No. 12 of 2011 dated 23 May 2011
99. 2006 (203) E.L.T. 213 (P & H) dated 24 July 2006
100. 42 of 2010 dated 22 July 2010
101. Section 108 of the Customs Act, 1962

Facts of the case

- The petitioner[102] is an Indian manufacturer, seller and exporter of plywoods, laminates, doors, PVCs, and veneers. The petitioner offers plywood products under the brand name Century Ply and exports its range of products to over 20 countries.
- The aggrieved petitioner filed the petition challenging the Revenue Department for issuance of the summon to the MD of the petitioner by its name, without providing the alternative of it being issued to an authorised representative.
- The petitioner contended that the respondent cannot issue summon directly to the MD of any company for enquiry as per the provisions[103].

Gauhati HC observations and ruling[104]

- **No justification with the Department:** It was observed that it was the practice of the Department not to issue the summons to the MD or the other Directors without any justification. In the instant case, no material was available that there is a reasoned view formed by the Department that the petitioner is not cooperating or that the presence of the MD is specifically required for the investigation for any reason.
- **Directed the Respondent to issue the summons to an authorised representative:** The HC quashed the summon issued to the MD of the petitioner and directed the respondent to issue the summons to an authorised representative of the petitioner as per the Circular.

Our comments

In the present case, the Hon'ble court has held that the MD of a company should not be directly summoned by the Custom authorities. Such an event can take place only if the authorised representatives are not cooperating with the authorities. This decision would act as an indicator of good governance for the authorities as well as responsibility of the authorised representatives, for smooth conduct of proceedings.

Customs authorities (Directorate of Revenue Intelligence (DRI) officials) have no power or jurisdiction to inspect or seize goods in respect of units situated in SEZ area - Andhra Pradesh HC

Summary

The Andhra Pradesh HC has held that the Customs authorities (DRI officials) have no power or jurisdiction to inspect or seize goods in respect of units situated in SEZ area[105]. The court elucidated that the offences under the Customs Act are not yet notified to be investigated by the DRI and any offence in a SEZ unit are to be dealt with only by the Development Commissioner[106].Hence, issuance of a SCN is unconstitutional. The HC further held that the DRI officials have no jurisdiction to issue the impugned SCN and accordingly, the writ petition is allowed.

Facts of the case

- The petitioner[107] is a private limited company, engaged in manufacturing of bio-diesel and glycerine at Visakhapatnam Special Economic Zones (VSEZ). The petitioner has been undertaking authorised operations, i.e., manufacture of bio diesel and export of the same and also trading of the said goods as permitted under the Letters of Approval from its manufacturing premises located within the SEZ area at Visakhapatnam.
- On due investigation, a SCN was issued to the petitioner and the Managing Director of the petitioner proposing penalty[108].
- The petitioner stated that the impugned order came to be passed with many factual errors evidencing the fact that respondent had mechanically passed the order without application of mind.
- The petitioner further contended that DRI officers had no jurisdiction to initiate any action against a unit situated in SEZ as any offence in a SEZ unit are to be dealt with only by the Development Commissioner. Therefore, issuance of a SCN is unlawful.

102. Century Plyboards (India) Ltd.
103. Circular No. F. No. 208/122/89-CX.6 dated 13 October 1989
104. WP(C)/3210/2022, order dated 18 May 2022
105. Section 53 of the Customs Act, 1962
106. Section 22 of the SEZ Act, 2005 (issued a Notification dated 05.08.2016)
107. M/s Divine Chemtee Ltd
108. Section 112(a) and 114 of the Customs Act, 1962

Andhra Pradesh HC observations and rulings[109]

- **Jurisdiction of DRI Officer:** Basis the wordings used[110], it is clear that the SEZ Act[111] prevails over other enactments to the extent of special provisions being made under SEZ Act. Therefore, the SEZ Act would prevail over the Customs Act, 1962 in all aspects in view of the non-obstante clause. It is evident from the perusal of the provisions[112] that the Customs authorities (DRI officials) have no power or jurisdiction to inspect or seize goods in respect of units situated in SEZ area.
- **Availability of alternative remedy:** The HC cited the decision of the SC[113] and ruled that writ petition can be entertained by this Court though an alternate remedy is available when the authority issuing the SCN has no jurisdiction to issue the same. Hence, there is no hesitation to conclude that in the given set of circumstances, a writ petition can be entertained.
- **Goods not seized from SEZ area:** Basis the provisions[114], the Customs authorities have no jurisdiction in respect of units situated in SEZ unit, since the goods were not seized from SEZ area. The petitioner is having license to trade and storage of goods outside the SEZ area namely in a bonded warehouse, it cannot automatically confer power on the DRI Officers to initiate proceedings under the Customs Act. The judgment of the SC[115] squarely applies to the facts in issue.

Our comments

In a landmark judgment by the SC in case of Canon India, it had been held that the DRI officers have no power to issue the SCNs under the customs law. Further, only the proper officer could issue such a notice as the Parliament has employed the article 'the' before the words proper officer not accidentally but with the intention to designate the proper officer who had assessed the goods at the time of clearance.

However, the Finance Bill, 2022 has proposed to widen the scope of the term proper officer, under customs law to include DRI and other officials appointed by the CBIC with retrospective effect.

Interestingly, the Andhra Pradesh HC has emphasised that SEZ law prevails over other laws and hence DRI officials have no power or jurisdiction to inspect or seize goods in respect of units situated in SEZ area. Therefore, it seems that the SC's verdict in the case of Canon India shall remain valid even after widening of the scope of the term proper officer and thus the DRI officers may not be authorised to issue SCNs under the Customs law to units located in SEZs.

SC lists matter challenging validity of amendment made vide Finance Act, 2022 to validate certain actions of DRI officers

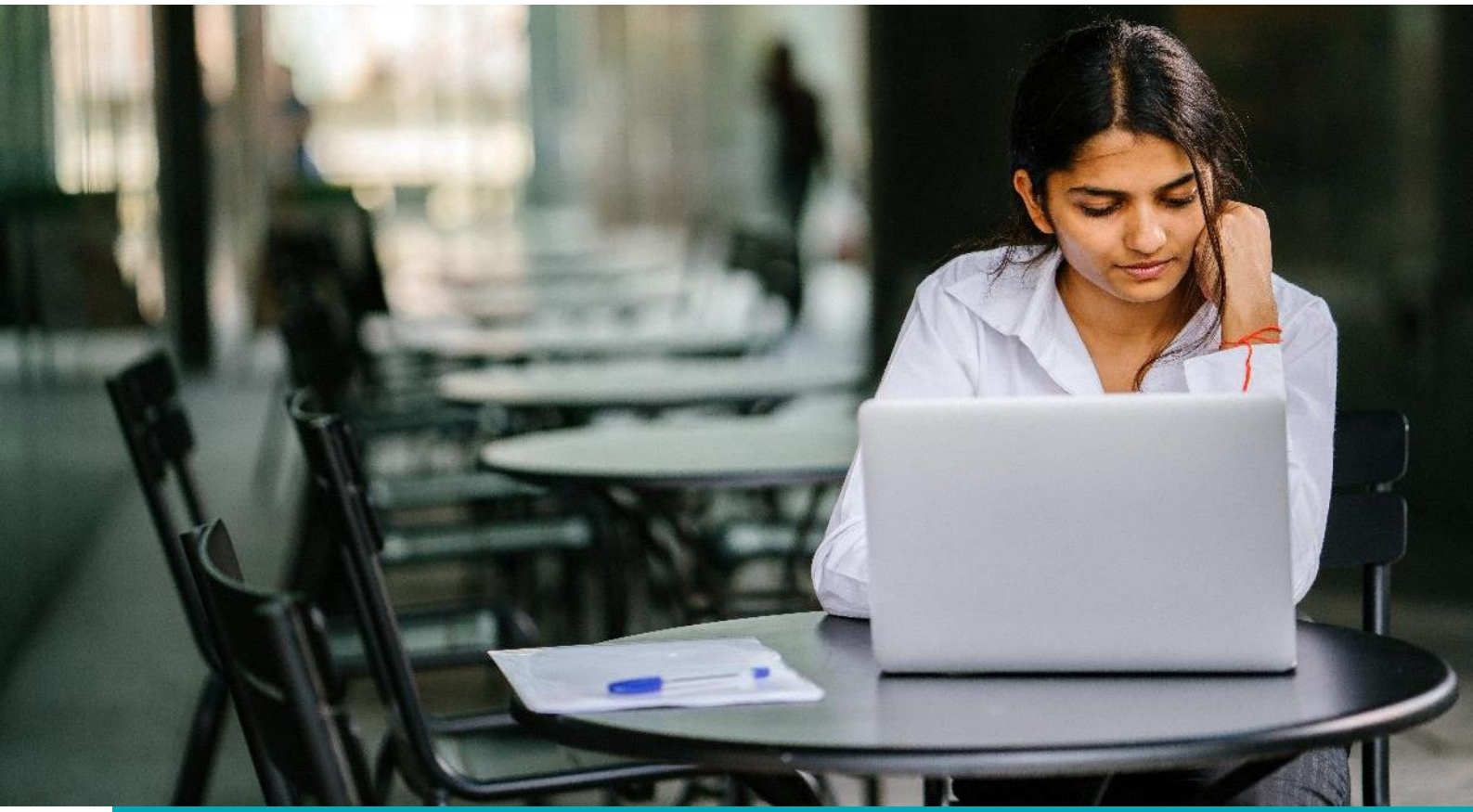
A clause has been inserted in Finance Act, 2022 to retrospectively amend the Customs Act, 1962 to validate certain actions of the officers of DRI.

The Revenue as appellant submitted that clause 96 validates all the previous actions of DRI officers. Thus, the SC advised the assessee to challenge the validity of the amendment and thus, the SC gave time to assessee to file writ petition till 11 July 2022.

Accordingly, the SC has listed the matter[116] on 18 July 2022 for further consideration.

109. Writ Petition No.13794 of 2020, Order dated 5 May 2022
110. Section 51 of the Customs Act, 1962
111. The Special Economic Zone Act, 2005
112. Section 51 and 53 of the Customs Act, 1962
113. M/S Radha Krishan Industries to support its conclusion
114. Section 52 of the Customs Act, 1962
115. M/s. Canon India Private Limited
116. Civil Appeal No(s). 6142/2019

03 Decoding advance ruling



Transfer of business between distinct persons qualifies as supply of goods- Maharashtra Authority of Advance Ruling (AAR)

Summary

The Maharashtra AAR has observed that Schedule I to the CGST Act, 2017 considers the supply of goods or services between distinct persons without consideration as a supply. Hence, transfer of business between two GST registrations having same Permanent Account Number (PAN) would be treated as supply under GST. The AAR further stated that in order to transfer the Input Tax Credit (ITC), there must be a change in the constitution of the registered person. Thus, the AAR held that since there is no change in the constitution in present case, there cannot be any transfer by way of going concern and hence, the supply cannot be treated as supply of services but supply of goods. The advance ruling authority further held that since both units have the same PAN and qualify as distinct persons, this case does not qualify to be a going concern to another person. Therefore, the AAR has ruled that the ITC cannot be transferred between the units.

Facts of the case

- The applicant[117] has two separate registrations in Maharashtra and wished to merge both the registrations by way of transfer of all assets and related liabilities without consideration.
- On the perusal of provisions[118], the applicant submitted that transfer of business by way of merger qualifies as a supply and such transfer will be on a going concern basis.
- Further, the applicant placed reliance on a similar case[119] wherein it was held that transfer of business is an exempt[120] supply and transfer of ITC will be allowed.
- Accordingly, the applicant has approached the Maharashtra AAR regarding the taxability of such transaction of transfer of business in GST law.

Maharashtra AAR observations and ruling[121]

- **Transfer of business qualifies as a supply:** On perusal of the provisions[122] of the Act, the supply of goods or services between distinct persons made in course or furtherance of business shall be treated as a supply irrespective of receipt of consideration. Accordingly, the impugned transaction of transfer amounts to supply.
- **Transfer of unutilised ITC:** The transferor and transferee are distinct persons registered under the same PAN. Hence, the case does not qualify to be the transfer of business undergoing concern. Therefore, the impugned supply shall be treated as supply of goods and not supply of services. Thus, transfer of unutilised ITC cannot be allowed between both the units.

Our comments

Earlier, in case of Shilpa Medicare Limited, the Andhra Pradesh AAR[123] had held that the transfer of business shall be considered as supply of services and shall be exempt under GST. However, the Andhra Pradesh Appellate Authority for Advance Ruling (AAAR)[124] had overruled the decision of AAR and held that the transaction is liable to GST since business was not transferred to another person but to distinct person.

The present ruling pronounced by the Maharashtra AAR is in line with the ruling pronounced by the Andhra Pradesh AAAR.

Basis these rulings, it seems that the taxpayers shall have to bear the burden of tax implications even upon moving of business from one GSTIN to another. It shall create unnecessary complications under GST. Further, even though the AAR's decision is applicable only to the applicant, however the department may also apply this ruling in other cases to create GST liability.

Further, it should be noted that under GST laws, multiple registrations under the same PAN are considered as different taxpayers, hence transfer of business from one GSTIN to another should also be considered as transfer of business undergoing concern.

117. Crystal Crop Protection Limited
118. Section 7(1) of CGST Act
119. Shilpa Medicare Limited [AAR No.05/AP/GST/2020 dated 24 Feb 2020]
120. Under Notification No. 12/2017-CTR dt 28 June 2017
121. GST-ARA-31/2021-22/B-50
122. Sr. No. 1 and 2 of Schedule I of CGST Act, 2017
123. AAR No.05/AP/GST/2020 dated 24 Feb 2020
124. AAAR/AP/07/GST/2020 dated 10 November 2020

GST is applicable on total of the escalated value and the original value of the contract – Maharashtra AAR

Summary

The Maharashtra AAR has observed that there was no supply during the pre-GST period and invoice was also not raised during the said period. The AAR stated that the service was provided entirely during GST regime, therefore, the time of supply is during the GST era. Further, the AAR held that escalated value shall be added to the original value of contract and such value shall be the taxable value for discharging GST liability as per the provisions[125].

Facts of the case

- The applicant[126] was awarded a tender from NHAI[127] for construction of roads in the pre-GST regime. However, the contract was executed after the introduction of GST law. The tender had a clause according to which the contract price could increase or decrease[128] due to which there was an escalation in the contract value.
- The applicant contended that as per provisions[129], the entire value including the escalated value shall be considered to arrive at the taxable value. Further, the service of construction of public road was made in GST regime. Therefore, time of supply shall be determined as per GST provisions[130].
- The applicant approached the Maharashtra AAR to understand the taxability of escalated value of contract under the provisions of GST Act.

Maharashtra AAR observations and ruling[131]

- **Date of occurrence of charging event:** The Maharashtra AAR observed that it is important to know the date of charging event, i.e., the time of supply to calculate and discharge the tax liability. As per the applicant, neither any service nor any invoice was raised during pre-GST period. The entire service was provided during the GST period and the time of supply will be during GST era. Accordingly, GST provisions would be applicable for determining the time of supply.
- **Transaction value includes escalated value:** The value of supply shall be the transaction value which is the price actually paid or payable for a supply. The transaction value shall also include the escalated value. Thus, escalated value recovered from NHAI shall be added to the original value of contract and such value shall be the taxable value for discharging of GST liability.

Our comments

As per valuation provisions under GST[132], the value of supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply. Thus, the Maharashtra AAR in the present case stated that the transaction value will also include the escalated value.

Though the AAR's decision is applicable only to the applicant, however the department may also apply this ruling in other cases as well. Further, it acts as a guiding tool for other taxpayers facing similar issues.

Pre-packaged software supplied to public funded research institutions are eligible for concessional rate of tax at 5% – Karnataka AAR

Summary

The Karnataka AAR has observed that the software supplied is a pre-developed or pre-designed software and made available through the use of encryption keys. Hence, it satisfies all the conditions that are required to be satisfied to cover them under the definition of goods. The goods supplied by the applicant cannot be used without the aid of a computer and hence the goods supplied qualify to be computer software and more specifically covered under application software. The AAR further held that supply of such software licence to public funded research institutions is covered under notification stipulating concessional rate of GST at 5% on scientific and technical equipments.

125. Section 15 of the CGST Act, 2017
126. BP Sangle Constructions Pvt Ltd
127. National Highways Authority of India
128. due to change in rates of labour, steel, cement, etc.
129. Section 15(1) of CGST Act, 2017
130. Section 13(1) of CGST Act, 2017
131. No. GST-ARA-44/2020-21/B-41, Dated 31.03.2022
132. Section 15(1) of the CGST Act, 2017

Facts of the case

- The applicant[133] is a reseller of software products procured from its principal partner[134] in India. However, the applicant does not own the IPRs for the software supplied.
- The applicant is engaged in supply of scientific and technical equipment and time-based and perpetual software license(s) to Public Funded Research Institutions (PFRI), on which GST at 18% has been charged as a supply of service. The applicant contended that the software supplied are embedded in the computer or equipment and require a licence to be activated through a licence key.
- The applicant further submitted that the software licence supplied by them are pre-developed or pre-designed, rather than tailor made and must be loaded in the computer. After activation, the software could be used by the customers in different fields depending on their requirement. Hence, the goods supplied are computer software specifically covered under application software.
- The applicant, placing reliance upon the SC case[135], submitted that such supply is treated as supply of goods and is entitled for concessional rate of GST at 5%, as specified in the notification[136].
- The applicant sought advance ruling on whether the supply of software licence shall be treated as computer software resulting in supply of goods and subsequent benefit of notifications will be allowed.

Karnataka AAR observations and ruling[137]

- **Supply of pre-developed and pre-packaged software is a supply of goods:** The software supplied by the applicant is a pre-developed or pre-designed which must be loaded on a computer. The software becomes useable only after it is activated through licence key. As per the explanatory note[138], services of limited end-user licence as part of packaged software are excluded from the SAC 997331[139]. Thus, supply of software licence by applicant is supply of goods covered under tariff heading 8523.
- **Benefit of concessional rate:** The purpose of the notification is to offer a reduced rate of GST to certain institutions for the purpose of research. Exclusion of computer software on mere technical grounds would defeat such purpose. In the instant case, the applicant is supplying computer software to a PFRI. Further, the said institute has also furnished a certificate as required to fulfil the required condition of the notification. Thus, the benefit of concessional GST rate is applicable to the applicant.

Our comments

In the erstwhile regime, the Apex Court in the case of Tata Consultancy Services[140] had held that canned software, which is sold in packages/CDs/ DVDs/USB drivers, will be classified as goods.

Even, the Karnataka AAR in the case of SPSS South Asia Private Limited[141] had held that the supply of software license made by the applicant is covered under the supply of goods. Further, since the applicant was supplying computer software to National Institute of Science Education and Research, therefore, the notifications prescribing concessional GST rates were made applicable to the applicant.

The Karnataka AAR in the present ruling has primarily focused on two areas. First, that as per the scheme of classification, supply of software with limited end-user license is excluded from SAC 997331 and second, if the software would be supplied on a higher GST rate to the research institution, it would defeat the ultimate objective of providing concession to the research institutions. In our view, just an exclusion from a particular SAC cannot be a criterion to determine whether the underlying supply is of goods or service. Further, as far as second part is concerned, the ground that higher rate on software will defeat the purpose of the notification, does not appear to be convincing, as the exemption notifications cannot determine the type of supply (whether it is goods or a service).

Moreover, this ruling might not be relevant to other taxpayers who are not classified as research institutions in terms of the exemption notification.

133. Keysight Technologies India Pvt. Ltd.
134. Keysight Technologies Inc., USA
135. Tata Consultancy Services Vs. State of Andhra Pradesh [2004 (178) ELT 22 (SC)]
136. Notifications No.45/2017-Central Tax (Rate), Notification (45/2017) No. FD48 CSL 2017, Bengaluru and Notification No.47/2017-IGST (Rate) all dated 14.11.2017
137. KAR ADRG 11/2022 order dated 21.04.2022
138. Explanatory Notes to the Scheme of Classification of Services
139. Licensing services for the right to use computer software and databases
140. Civil Appeal No. 2582 of 1998 with C.A. Nos. 2584-2586 of 1998
141. Advance Ruling No. KAR ADRG 15/2021, Order dated 24 March 2021

Incentive received for achieving sales target cannot be said as a trade discount, it shall be taxable in the hands of reseller as consideration for marketing services – Maharashtra AAR

Summary

The Maharashtra AAR has observed that the applicant has purchased goods from distributors. However, an incentive has been received from the supplier of such distributors (the company). The AAR noted that there is no supply of goods or services, or both, from the company to the applicant. Hence, the incentive received in respect of the goods purchased from the distributor cannot be considered as a trade discount. The AAR opined that the purpose of the incentive was to augment sales/business of the company. Thus, it may be deemed as a consideration received for supply of deemed marketing services. Further, the advance ruling authority observed that the goods in respect of which deemed marketing services was supplied were made available to the applicant at his location. Therefore, the place of supply of such marketing services shall be at the location of the applicant and hence, it cannot be considered as an export of services.

Facts of the case

- The applicant[142] is a reseller of Intel products. The applicant purchases the products from various GST registered distributors who import products from IIUL[143] and further sells the products to various retailers.
- The applicant entered into an agreement with IIUL under IACSP[144] wherein the applicant would earn certain incentive from IIUL on completion of set targets.
- The applicant relied on decision of Mumbai tribunal[145] wherein it was held that incentives received are trade discount and cannot be treated as business auxiliary services. Similarly, the applicant contended that the incentives are trade discount and would not partake the character of consideration for any taxable supply.
- The applicant approached the Maharashtra AAR to understand whether the incentives will be treated as trade discounts or consideration for any supply.

Maharashtra AAR observations and ruling[146]

- **Incentive cannot be treated as trade discount:** In the instant case, there is no supply of goods from IIUL to applicant, but the applicant received incentive from IIUL for achieving certain targets. There is no sale transaction between applicant and IIUL. The supply of goods to applicant has been rendered by distributors and not IIUL. Thus, the incentives cannot be covered under the provisions[147] and in no way, can be treated as trade discounts.
- **Incentive is a deemed marketing service:** The incentive flowing from IIUL to the applicant appears to be consideration for receiving marketing services to augment sales in the country. Therefore, the said amounts cannot be considered as trade discounts received by applicant.
- **Marketing services do not qualify as export of service:** The marketing services are provided by the applicant in respect of goods that are supplied by the IIUL through its distributors. As per the provision[148], the place of rendering of service is the location of supplier. Since the location of applicant is in India, the supply does not qualify as an export of service.

Our comments

As per Section 15(3) of the CGST Act, 2017, value of supply shall not include any discount given after the supply if such discount is established in terms of agreement entered into at or before the time of such supply.

However, in the present case, there is no supply between the company and reseller, hence incentive received by reseller from the company to augment its sales cannot be considered as a trade discount. Further, the Maharashtra AAR has held that such incentive shall be treated as a consideration for marketing services.

Moreover, it seems that this ruling shall not be appreciated by the taxpayers as it is resulting in GST liability on the resellers upon receiving such incentives from the company. Though the AAR's decision is applicable only to the applicant, the department may consider this ruling in other cases as well.

142. M/s. MEK Peripherals India Pvt Ltd
143. Intel Inside US LLC
144. Intel Authorised Components Supplier Program
145. Sharp Motors v Commissioner of Service Tax 2016(43) S.T.R. 158 (Tri. Mumbai)
146. GST-ARA-59/2020-21/B-56 order dated 27.04.2022
147. section 15(3) of CGST Act, 2017
148. Section 13(3)(a) of IGST Act, 2017

04 Experts' column

Levy of IGST on ocean freight – A tale of double taxation

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The levy of IGST on ocean freight on CIF[149] value of imports has been one of the most controversial issues since the inception of GST regime. However, this long-awaited matter was finally settled by the SC on 19 May 2022[150], wherein the levy of IGST was struck down as unconstitutional.

The importers had earlier challenged the constitutional validity of this levy, *inter alia*, before the Gujarat HC wherein the HC held this levy as *ultra vires* to the GST laws.

149. Cost, insurance, and freight
150. in case of Mohit Minerals Pvt. Ltd. and other tagged matters (Civil Appeal No. 1390 of 2022)

However, aggrieved by the decision of the Gujarat HC, the Revenue had filed a batch of SLPs before the Apex Court. The Apex Court has dismissed the SLPs and upheld the decision of the HC. The Apex Court held that a separate tax on the supply of service cannot be allowed when the legislation has already included it as a tax on the composite supply of goods. Hence, it decided the matter in favour of the taxpayers and pronounced that the separate levy of IGST on ocean freight is contrary to the concept of Composite Supply.

Supreme Court's view

Separate levy of IGST violates Section 8 of the CGST Act, 2017

The SC held that although the Union Government has the power to notify an import of goods as an import of services and vice-versa, no such power can be seen w.r.t. interpreting a composite supply of goods and services as two segregable supplies of goods and services.

The SC further remarked that the Court is bound by the confines of the IGST Act and the CGST Act to determine if this is a composite supply. It would not be permissible to ignore the text of Section 8 of the CGST Act and treat the two transactions as standalone agreements. On this ground, the SC ruled that levy of IGST on supply of the service component of the transaction would contradict the principle enshrined in Section 8[151] and violates the scheme of the GST legislation.

Earlier, the Gujarat HC had observed that the difficulty in properly implementing GST is due to the erroneous assumption on the part of the delegated legislation that service tax is an independent levy as it was prior to the GST. It vivisects the supply transaction to levy more taxes on certain components, completely overlooking the basic concept of composite supply introduced under the GST laws. The SC agreed with the view of the HC to the extent that a tax on the supply of a service, which has already been included by the legislation as a tax on the composite supply of goods, cannot be allowed.

Are the recommendations of the GST Council binding or recommendatory?

In response to the argument from ASG[152] regarding binding nature of the recommendations of the GST Council, the Apex Court has carefully gone through the constitutional architecture of the GST law and legislative history of the Constitution Amendment Act, 2016. The SC ruled that the GST Council is a recommendatory body aiding the Government in enacting legislation on GST.

Considering the simultaneous power conferred to both Parliament and State legislatures under Article 246A, the Apex Court has inquisitively ruled that the absence of express provision indicates that the recommendations of the GST Council cannot be transformed into legislation. Further, under Article 279A, only the secondary legislation which is framed based on the Council's recommendations is mandated to be tabled before the Houses of the Parliament. The SC has further opined that merely because a few of the recommendations of the GST Council are binding on the Government[153], it cannot be argued that all the GST Council's recommendations[154] are binding. Thus, the argument of the Union that if the recommendations of the GST Council are not binding, then the entire structure of GST would crumble, does not hold water. The SC also emphasised that the Parliament intended for the recommendations of the GST Council to only have a persuasive value, particularly when interpreted along with the objective of the GST regime to foster cooperative federalism and harmony between the constituent units.

The SC has elucidated the power and authority of the Parliament, the State, and the GST Council in this judgement. It clarified that the GST Council provides recommendations, however, the laws must be legislated by the empowered bodies, i.e., the Parliament and the State legislatures. Basis this ruling, the Court has clearly demarcated roles and powers of the Centre and State legislatures and the persuasive but not binding value of the recommendations of the GST council, in the spirit of cooperative federalism.

Territorial nexus

The Apex Court has relied on the decision in the case of GVK Industries, which clearly recognised the power of Parliament to legislate over events occurring extra-territorially. The only requirement imposed by the Court is that such an event must have a real connection to India. The SC emphasised on the extraterritorial aspect of the transaction and opined that the statute itself is broad enough to cover a taxable event that has extraterritorial aspects, which bears a nexus to India. Even, the supply of transportation service by the shipping line to the foreign exporter has a twofold connection. Thus, the SC ruled that the transaction does have a direct nexus with the territory of India.

Contradictory submissions by the Union Government

The SC noticed that the Union Government is contradicting the main plank of its submission by contending that the two legs of the transaction are separate standalone agreements. On the one hand, the Union Government seeks to levy tax on the Indian importer by going beyond the text of the contract between the foreign shipping line and foreign exporter. However, on the other hand, it urges that the contracts must be viewed as separate transactions, operating in silos.

The SC disagreed with the Union Government and ruled that the Union of India cannot be heard to urge arguments of convenience. Resultantly, the Apex Court concluded that while the impugned notifications are validly issued under Sections 5(3) and 5(4) of the IGST Act, it would be in violation of Section 8 of the CGST Act and the overall scheme of the GST legislation.

151. of the CGST Act, 2017
152. Additional Solicitor General of India
153. under the provisions of the CGST Act, 2017 (CGST Act) and IGST Act, 2017 (IGST Act)
154. made by virtue of the power of Article 279A

Conclusion

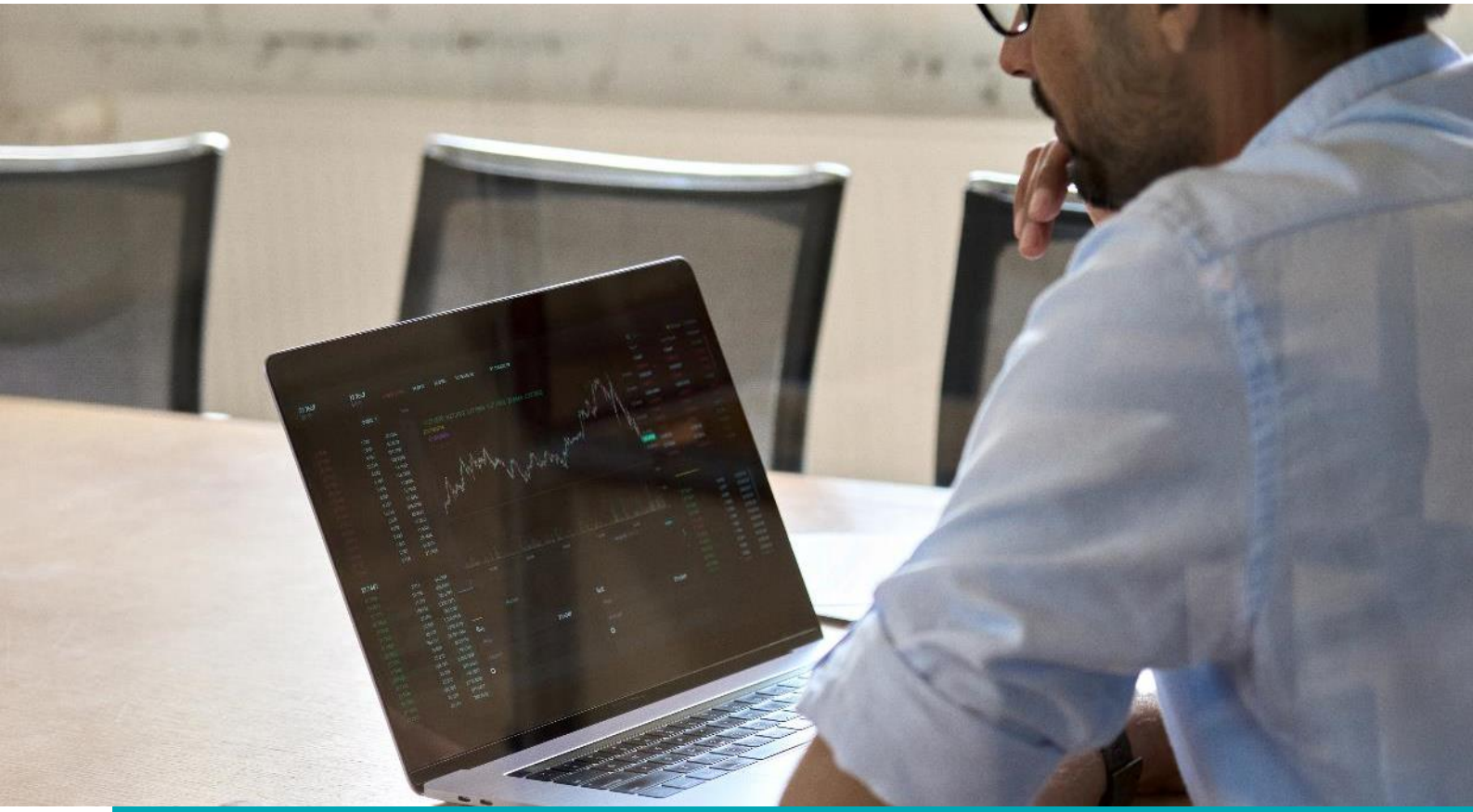
This pathbreaking and landmark judgement brings a big relief for the importers, which is going to settle down the on-going litigations on the subject matter. Now, the importers who had earlier paid taxes under RCM but did not avail credit, may apply refund of such taxes paid. However, it is interesting to note here that the concept of time limitation may be argued since tax collected without authority of law is violative of Article 265 of the Constitution of India.

This is a very significant ruling wherein the Apex Court has clarified that the power of the Parliament and the State Legislature under Article 246A and the power of the GST Council under Article 279A must be balanced and harmonised. The *ratio decidendi* and *obiter dictum* in this ruling are very important and interesting to analyse. In the contrast political environment, there are chances that the States may take a shelter of this judgement and may refuse to make law on specific recommendations passed by the GST Council.

Interestingly, it's a wait and watch situation to see how the government responds on this judgement. As such, till date neither the notifications[155] in questions have been withdrawn nor any circular has been issued to provide any clarification. We hope that the better sense will prevail, and the government will, *suo moto*, withdraw these notifications. Nevertheless, the importers need to be prepared for a long second round of battle in case the government decides to either go for the review against the Apex Court's decision or make retrospective amendment in Section 8 of the CGST Act to nullify the effect of this judgement.

155. Serial No. 9(ii) of N/N 8/2017 read with Para 4 and Serial No. 10 of N/N 9 of 2017-IGST Tax (Rate) dated 28 June 2019

05 Issues on your mind



How can the taxpayers report the goods having rate of 6% on the GST portal?

The GST Network (GSTN) is making changes on the GST portal to include the rate of 6% in form GSTR-1. As a temporary measure, taxpayers may do reporting of goods at this rate by reporting the entries in the 5% heading and then manually increasing the system computed tax amount to 6%. This can be done by entering the value in the Taxable value column and then increase the system computed tax amount to 6% in the Amount of Tax column, under the relevant table. This will ensure that correct tax amount is reported in GSTR-1.

Whether an invoice/Credit Note (CDN)/Debit Note (DBN) (required to be reported to Invoice Registration Portal (IRP) by notified person), valid without Invoice Reference Number (IRN)?

As per Rule 48(4) of CGST Rules, 2017 and the notification issued thereunder, a notified person shall prepare invoice by uploading specified particulars in FORM GST INV-01 on IRP and after obtaining IRN and QR-code.

As per Rule 48(5) CGST Rules, 2017, any invoice issued by a notified person in any manner other than the manner specified in Rule 48(4), the same shall not be treated as an invoice. Therefore, an invoice/CDN/DBN issued by notified person becomes legally valid only with an IRN (QR-code having an embedded IRN).

Whether e-invoicing is applicable for invoices between two different GSTINs[156] under same Permanent Account Number (PAN)?

Yes, e-invoicing is applicable for invoices between two different GSTINs under same PAN. E-invoicing by notified persons is mandated for supplies of goods or services or both to any registered person, including a registered person with the same PAN. As per Section 25(4) of CGST Act, 2017, “a person who has obtained or is required to obtain more than one registration, whether in one State or Union territory or more than one State or Union territory shall, in respect of each such registration, be treated as distinct persons for the purposes of this Act.”

What are the steps required for creation of Escrip Account with ICEGATE?

The importer/exporter may follow the below steps to create an Escrip Account:

Step- 1: The user may select the Escrip account option under Escrip tab on Our Services section available on the **ICEGATE portal**.

Step- 2: The user may login on the portal using valid login credentials. After login, the user would be able to see Escrip option under Financial Services tab on the left panel.

Step- 3: The user can select the scheme name from the drop-down as RoSCTL or RoDTEP and click on Create Escrip Account button.

Step- 4: User will have to enter the new email ID and mobile number. Upon clicking the Update button, user will be directed for OTP authentication.

Step- 5: After creation of Escrip account, the details shall be displayed to the user. User may perform various functions like scrip details, scrip transfer, approve scrip transfer, transaction details, update contact details, add scheme etc.

156. GST Identification Number

06 Important developments in direct taxes

CBDT issues instructions for implementing Apex Court's ruling on validity of reassessment notices

The SC, in a recent case[157] , upheld the validity of reassessment notices issued (under the old reassessment regime) on or after 1 April 2021, subject to compliance with all procedural and other requirements under the new reassessment regime[158]. In order to remove ambiguity and to ensure that consistent approach is followed by tax officers, CBDT has issued instructions regarding implementation of the SC ruling. In this regard, the following guidelines[159] have been issued:

- Reassessment notice issued under the old regime will be deemed to be a SCN[160] and all requirements of the new reassessment regime prior to issuing SCN would be deemed to be complied with.
- Tax officer is required to provide the information and material relied upon for issuing the reassessment notice within 30 days from the date of the SC decision (i.e., till 2 June 2022).
  - Material may not be provided for Assessment Year (AY) 2013-14, AY 2014-15 and AY 2015-16 if the income escaping assessment is less than or likely to be less than INR 50 lakh (separate instructions shall be issued regarding procedure for disposing these cases).
- The taxpayer is required to file a response to the SCN within two weeks from the last date of communication by the tax officer.
  - Taxpayer can request for extended time period to file the response and tax officer shall grant the same based on the merits of the case[161].
- The tax officer is required to pass an order[162] determining whether or not it is a fit case for issuing a notice for reassessment[163]. Such order shall be passed within one month from the date of receiving the taxpayer's response.
  - In case no response is received, the order should be passed within one month from the end of the month in which the time to file the response expires.

157. Union of India & ors. Vs Ashish Agarwal (Civil Appeal No. 3005/2022)
158. As introduced by Finance Act, 2021 with effect from 1 April 2021
159. Instruction No. 1 of 2022 dated 11 May 2022
160. Under section 148A(b) of the Income-tax Act, 1961 (the Act)
161. As per section 148A(b) of the Act
162. Under section 148A(d) and with prior approval of the specified authority
163. Under section 148 of the Act

It has also been clarified that the SC decision applies to all cases irrespective of the fact whether such notices have been challenged or not.

Further, it has been clarified that fresh reassessment notices under section 148 can be issued (with the approval of the specified authority). The condition for issuing such notices would be as under:

AY	Timeline/time period covered
For AY 2013 -14, AY 2014 -15, AY 2015-16	If the prescribed conditions for reopening within 10 years from the end of the relevant AY have been fulfilled[164]
For AY 16-17 and AY 2017 -18	If three years have elapsed from end of the relevant AY[165] and the case is not covered by the 10-year time limit

CBDT modifies compliance check functionality in case of non-fillers of return to deduct higher rate of tax deducted at source (TDS)/tax collected at source(TCS)

A higher rate[166] of TDS/TCS is applicable, in case of specified person, i.e., a person who has not filed tax return in the preceding financial year and the aggregate amount of TDS/TCS exceeds INR 50,000 during such year. In order to ease the compliance burden and considering the amendments made vide Finance Act 2022, CBDT has modified[167] the compliance check functionality[168]. Some of the key aspects of the functionality for FY 2022-23 are as follows:

- No new names would be added during FY 2022-23 in the list containing the names of non-filers for AY 2021-22
  - Deductor/collector may check the PAN of the specified person in the functionality at the beginning of the FY and thereafter is not required to check the PAN of non-specified person during the FY
- In the following situations, name of the non-filers would be removed from the list:
  - The person files a valid return for AY 2021-22
  - The person files a valid return for AY 2022-23
  - Aggregate amount of TDS/TCS for FY 2021-22 is less than INR 50,000
- The functionality does not provide visibility regarding non-resident having a permanent establishment in India and hence, deductors/collectors are required to ensure due diligence to check applicability of the aforesaid provisions in such cases.

CBDT notifies additional conditions for mandatory return filing by a person

A person (other than company or firm) is inter alia and is required to file an Indian income tax return if his/her total income exceeds the maximum amount, which is not chargeable to income tax[169] or if the person fulfills certain prescribed conditions[170]. Recently, CBDT has notified[171] following additional conditions[172] for mandatory filing of income tax return. As per the notification, a person who fulfils following conditions during the year is required to furnish a return of income:

- If total sales, turnover or gross receipts, in business exceeds INR 60 lakhs during the year
- If total gross receipts in profession exceeds INR 10 lakh during the year
- If the aggregate of TDS/TCS during the year is INR 25,000 or more (threshold will be INR 50,000 for resident senior citizens)
- Aggregate amount deposited in one or more savings bank account is INR 50 lakh or more during the year

164. ie. the case falls under section 149(1)(b) of the Act
165. ie. the case falls under section 149(1)(a) of the Act
166. Under section 206AB / 206CCA of the Act
167. Vide Circular No. 10 of 2022 dated 17 May 2022
168. For Financial Year (FY) 2022 -23
169. Section 139(1)(b) of the Act
170. Seventh proviso to section 139(1)(b) of the Act
171. Notification No. 37 of 2022 dated 21 April 2022
172. Vide Rule 12AB by the Income-tax (Ninth Amendment) Rules, 2022

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