



NAVIGATING GST 2.0

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- FROM THE BENCH – KEY JUDICIAL PRONOUNCEMENTS
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INTRODUCTION

Note from Editor

In the backdrop of COVID-19, it comes as no surprise that the 6th edition of our GST Newsletter focuses on all the happenings in the GST domain on account of the pandemic. In the **Thought Leadership** Section, ELP Partner **Nishant Shah** enunciates about Force Majeure clause in contracts, explaining the GST impact on restructuring of such contractual obligations. The author remarks that *"All camaraderie, understanding and mutual concern between parties, while arriving at modified contractual terms, could be dampened if the impact of GST is not appropriately thought through in this regard."* Suggesting 7 steps that may be adopted to ensure proper analysis and implementation of a tax efficient contractual modification, the author signs off by expressing that *"This will go a long way in ensuring preservation of business relationships, lesser litigation and a possibility of recouping the lost opportunities once the pandemic is controlled."*

This edition's **Cover Story** Section titled **"Panacea to the Taxing Impediments – Steering Businesses Through GST Roadblocks in times OF COVID – 19"** sees the ELP team discussing the GST considerations on the various actions of corporates like Corporate Social Responsibility (CSR) initiatives, compensation to supply chain participants and insurance claims on inventory losses to combat the COVID scenario. Highlighting the issues on which corporates can opt to make representations to the GST Council and Ministry of Finance, the authors stress that *"On account of the pitfalls caused by this pandemic, where certain transactions do not fall within the ambit of 'supply', for some transactions, certain provisions of the CGST Act relating to admissibility of ITC will have to be relaxed so as to provide relief to the tax paying Companies bearing the brunt of this pandemic."*

The next section **CFO speak** features an interview with **Mr. Gopal Balachandran (CFO, ICICI Lombard General Insurance Company)** who enounces how the GST law has fastened the additional responsibility as a recipient to ensure compliance by the vendors so that input tax credit (ITC) is reflected online on the GSTN portal, before such ITC can be availed by the recipient.

The Newsletter also captures notable judgments and recent rulings from the Supreme Court, High Courts, AARs and Appellate Authorities in the Section titled **"From the Bench- Key Judicial Pronouncements."** Further, the Newsletter covers all the amendments, clarifications, relaxation measures and legislative changes that have been introduced as a part of Government policies as also the relief measures announced for dealing with the pandemic. The Section titled **"Allied Laws"** showcases the export policies on various items and modifications in light of COVID-19 as also extension of facility of accepting undertaking in lieu of bond under the Customs Act, 1962. The Section titled **"Legal Classics"** elucidates on a landmark verdict under the erstwhile Indirect Tax regime, which is still relevant and can serve as a good precedent in the current times as well. We wrap up the Newsletter with some noteworthy quotes from **"Policymakers and Parliamentarians"**.

We hope you enjoy reading the 6th edition of 'Navigating GST'! And we shall be back with the next issue, sooner than you think...





THOUGHT LEADERSHIP

The following chapter has been authored by Nishant Shah (Partner) - ELP

COVID19 Consequences: Force majeure and damages – is it GST insulated?

Almost the entire world, is passing through an unprecedented phase of lockdown due to the pandemic, which is made even worse by the lack of sight as to its end. While dealing with the various issues that this pandemic has raised, one critical question that nations have been required to answer is the value of life v/s worth of economy. It is clear now, and rightly so, that countries have given importance to the value of life at the cost of closing down of economy where required.

The lockdown, and more so due to the uncertainty of its periodicity, is causing a consequential uncertainty in the prospects and operations of businesses. This uncertainty brings with it a desire to abstain from taking decisive, aggressive or even progressive measures. As a result, the current phase is seeing a number of contracts being either annulled or modified to avoid breach. The contract here means every contractual obligation that businesses are required to fulfil. This would range from delivery against a purchase order or payment of salary to employee to undertaking of large-scale capital/infrastructure contracts. The current scenario has spared none, and we see implications arising on every nature of business transaction being carried out. Managements are today spending more time than ever in deciding which part of the business is to be curtailed to reduce the negative impact of the lockdown. The bigger challenge while deciding this is to ensure that the curtailment is carried out in a manner as not to affect relationship with business partners and other stakeholders, as it is these very stakeholders, with whom there will be a re-engagement once normalisation is established. It is therefore, the need of the hour that parties to various contractual arrangements come to an understanding which creates a win-win situation for both in the current circumstances. It is also therefore, the need of the hour that each business and its counterpart understand the situation, the circumstances, and the concerns faced by the other, and agree to arrive at an amicable rather than a litigious position.

Let me not mince my words in saying here that, every business, and that includes your customers as well as your vendors, look to recoup for the time and opportunity lost due to this lockdown once it normalises. We are seeing some phases of this with the Chinese economy. This is going to require every business to get the full support from their business partners (vendors of goods, suppliers of services and customers) to ensure that their business is



conducted more efficiently than ever before, once the lockdown is over. The criticality of appropriately dealing with the variations in current contractual obligations with business partners can therefore, not be undermined.

Under circumstances due to Force Majeure contracting parties can plead impossibility of performance and consequently frustration of a contract on account of a particular event, unforeseen previously and beyond the control of the parties.

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Tax impact on restructuring of contractual obligation

One aspect that could affect the efficiency of a mutually agreed modification of the contractual obligation is the 'tax impact' on such modifications. In this regard, the treatment under the Income-tax Act, 1961 will be determined more on the basis of the nature of the initial contractual understanding. However, the recent amendment by way of insertion of sub-clause (e) to Section 28(ii) of Income-tax Act, 1961, is bound to have implications,

obligation to refrain from an act, or to tolerate an act or a situation, or to do an act', as an aspect of supply. However, the levy can only arise, if it is first established that there is an activity in the nature of 'supply' as set out under section 7 of Central Goods and Services Tax Act, 2017 (CGST Act). While the term supply has a very wide ambit under the CGST Act, an amount in the nature of compensation, damages or remuneration, paid on the restructuring / realignment of the contract, will be liable to GST, only if a supply is constituted. Based on various domestic and international jurisprudence, one may



and it is suggested that businesses consider the impact thereof while analysing the overall tax impact of restructuring the contract. The other and more significant aspect would be to consider, analyse and mitigate (to the extent possible) the impact of GST on realignment / restructuring of such contractual obligations between parties. All camaraderie, understanding and mutual concern between parties, while arriving at modified contractual terms, could be dampened if the impact of GST is not appropriately thought through in this regard.

While GST is applicable on the transaction of supply, the applicable legislation in Schedule II thereof, covers an entry, namely, 'agreeing to the

be able to arrive at a position that, a payment in the nature of damages, compensation etc., arising on account of a transaction with no underlying supply, is unlikely to be categorised as a supply. This creates the potential for a situation where the modification of the contract can be structured such as to segregate the arrangement requiring the payment of a compensation or reduction in price from the underlying original contract. While this may sound simple, there are bound to be other repercussions from the perspective of commercial interests of the parties to the contracts. Such commercial constraints would dissuade the arrangement or re-arrangement of the earlier contractual obligation from being GST efficient. It is therefore, here that the mutual consideration of parties, as to the concerns

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faced by the others play a very important role in arriving at an amicable solution that is a win-win for both. It therefore boils down to the point of having appropriate documentation reflecting restructuring of the contractual arrangement, which can support the position that any monetary implication, as a result of such restructuring, is not subject to GST. Set out below are suggestive steps that may be adopted to ensure proper analysis and implementation of a tax efficient contractual modification:

- i. Study the existing contractual position to understand the tax impact;
- ii. Determine the tax implications of any amendment to the existing contractual position;
- iii. Analyse the variation in the intensity of the tax impact of such amendment due to altering the timing thereof;
- iv. Determine the burden of tax for each party to the contract;
- v. Identify an alternate independent contractual arrangement, ensuring due consideration to the commercial rights of either parties;
- vi. Understand the extent of mitigation to the tax impact through such alternate independent contractual arrangement;
- vii. Execute and ensure appropriate documentation of the preferred contractual arrangement.

While the above steps are not an exact solution to the situations faced, it could rather act as a means to arrive at a preferred solution. Having said so, one obviously needs to resort to these arrangements when the statutory provisions under the GST law fail to provide an efficient solution.

Section 15 or Section 34 could also be an answer

Section 15 of CGST Act permits exclusion of those discounts which were agreed prior to the supply. One may consider the possibility of structuring any reduction in price as discounts on future payments / milestones with corresponding amendments/ addendum to the contractual arrangement.

In cases where, the time of supply has already been triggered, it appears that issuance of a credit

note in terms of Section 34 of CGST Act is the only available option. However, it is necessary to bear in mind that Section 34 contemplates only two situations in relation to services, viz. charging of excess value or deficiency in service. The possibility of covering the transactions under these situations can be determined on a case to case basis. Additionally, statutorily prescribed time limits for issuance of a credit note will also have to be kept in mind, which for FY 19-20 is September of this year. However, in cases where contracts, for which any payment was received in FY 18-19, is cancelled / amended, respite may not be available in terms of Section 34 of CGST Act. Taxpayers may then explore filing of refund claims in such situations, subject to time limit and other statutory conditionalities.

One clearly understands that the current situation is going to require businesses and their managements to delve on and take decisions never taken or even expected to be taken earlier. One only hopes that it is borne in mind that such decisions are likely to impact other stakeholders who are exactly in the same situation, and facing the same concerns. This will go a long way in ensuring preservation of business relationships, lesser litigation and a possibility of recouping the lost opportunities once the pandemic is controlled.

Stay safe.





PANACEA TO THE TAXING IMPEDIMENTS - STEERING BUSINESSES THROUGH GST ROADBLOCKS IN TIME OF COVID-19

The following chapter has been authored by Jignesh Ghelani (Partner), Sanchita Rungta (Senior Associate) and Aswin Ramesh (Associate)

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With the Indian economy at a standstill because of the lockdown, the Government is congregating ideas from the industry for revival. Businesses today are navigating through a broad range of interrelated issues that span from keeping their employees safe to shoring-up cash and liquidity, optimizing cost, shifting focus on priority vendors, sourcing strategies, reorienting operations, implementing a new normal regime and contributing towards humanity. While the



Government is already rolling out revival packages and new policies/ procedures/ relaxation in light of the new/ innovative ways in which business will have to now operate, the Government needs to also give heed to the difficulties faced by businesses on the Indirect taxation front. While steps have been taken including reduction in Customs duty rates, extension of timelines for filing returns, assessments etc, some of the bottlenecks faced by majority of the industries. In the ensuing paragraphs we have highlighted the GST considerations on the various actions of the Company to combat the COVID scenario.

A. Corporate Social Responsibility ('CSR') and the woes of blocked credits

In light of the ongoing COVID-19 pandemic, Companies are becoming more socially responsible and hence, the concept of CSR is gaining a lot of importance. As a mandatory obligation prescribed under Section 135 of the Companies Act, 2013 ('Companies Act'), a Company which fulfils certain criteria have to mandatorily spend in every financial year, at least 2% of its average net profits earned during 3 immediately preceding financial years on CSR activities.

With the advent of the COVID - 19 pandemic, the Ministry of Corporate Affairs ('MCA') vide **General Circular No. 10/2020 dated March 23, 2020** has clarified that certain specified spending of funds for COVID - 19 is an eligible CSR activity. CSR activities that are carried out by the Companies, could be in different forms, including:

- Contribution by way of cash donations such as towards national relief fund for socio-economic development, ex-gratia payment to temporary/ casual/daily wage workers
- Contribution in kind – by way of goods and/or services.
- Undertaking any CSR activity through external agencies.

In light of the current COVID - 19 pandemic, the MCA has vide **General Circular No. 15/2020 dated April 10, 2020** ('Circular') issued a list of frequently asked questions ('FAQs') in relation to CSR expenditure by the Companies to combat COVID - 19 and has *inter alia* provided clarification on the nature of activities which will qualify as CSR expenditure in the hands of the Companies. However, while complying to the mandatory CSR obligation there are certain issues which need to be addressed from Goods and Services Tax ('GST') legislation perspective, as outlined below:

- The first issue which needs to be addressed by the Companies is whether outward supply, in pursuance to CSR mandate will attract GST.

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- Secondly, whether Input Tax ('ITC') will be admissible on corresponding procurements.

MCA has notified that spending of CSR funds for COVID-19 as an eligible CSR activity, thereby issuing FAQs in this regard providing necessary clarification.

Contribution in money and Contribution in kind

The term 'supply' as per Section 7 of the Central Goods and Services Tax Act, 2017 ('CGST Act') as amended, *inter alia* includes all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business, except for supplies covered in Schedule 1 of the Central Goods and Services Tax Act, 2017 ('CGST Act')¹.

Furthermore, money is excluded from the ambit of goods and services. Accordingly, in case of monetary expenses/contributions by Companies, the same will qualify as a transaction in money and therefore will not be liable to GST.

In case of non-monetary expenses/contribution (i.e. free supply of goods or services such as distribution of PPE kits, masks, medicines, food items, clothing, etc), there is no consideration *per-se*. To qualify within the 'scope of supply', there should be a presence of an activity performed by the supplier, which is wanted/desired by the recipient for a consideration. Such a presence can be established by way of a contractual relationship pursuant to which there is a reciprocal obligation between the parties. This implies that an element of '*quid pro quo*' is essential for any activity to qualify as a 'supply' and be liable to tax. It can be said that the non-monetary contributions (made voluntarily or gratuitously, cannot be construed as supply under GST, as it is an activity undertaken

without any consideration and without the element of *quid pro quo* or reciprocity. Reference in this regard is made to the case of **Bai Mamu Bai Trust & Others [Final Order in Commercial Suit (L) No. 236 of 2017]**, wherein the Bombay High Court had *inter alia* held that where a payment lacks the necessary quality of reciprocity to make it a 'supply', no GST is payable. In view of this, it can be said that contributions in kind (giving away goods or providing services) on free of cost basis, made as part of CSR activities or otherwise will not be subjected to GST as there is no consideration *per se* for the 'supply' either monetary or otherwise.

GST won't be leviable on Monetary expenses by Companies and Non-monetary contributions voluntarily made don't possess the element of *quid pro quo* to constitute as a supply to be liable to GST thus, barring its application.

Globally it is observed that there are divergent practices with respect to applicability of tax on such supplies, for instance, in Australia² and



¹ Section 7 read with Schedule I of the Central Goods and Services Tax Act, 2017

² Goods and Services Tax Ruling 2001/6, Available at: <https://www.ato.gov.au/law/view/document?Docid=GST/GSTR20016/NAT/ATO/00001#fpF39>

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United Kingdom³, such supplies are not subject to tax. Whereas, in Croatia⁴ and China⁵, specific tax exemption is granted on supply of goods and services, which are necessary to combat the COVID-19 crisis. Further, Belgium⁶ and Germany⁷ have given tax exemption only on specific supplies such as masks, protective gears, and clothing to hospitals, during such crisis.

CSR through External Agencies

In the case where CSR activities are undertaken through external agencies for a consideration⁸, GST will be applicable, except services which are provided by entities registered under section 12AA of Income Tax Act, 1961, by way of charitable activities⁹.

Input Tax Credit ('ITC') on CSR expenditure

From the procurement side, it is relevant to assess whether ITC of GST paid on such procurements will be admissible to the Companies incurring the CSR expenditure. In this regard, Section 16 of the CGST Act *inter alia* provides that ITC is available if goods and/or services are used or intended to be used in the course or furtherance of business, subject to other prescribed conditions. The term 'business' as defined under Section 2(17) of the CGST Act is very wide to include any trade, commerce, manufacture, profession, whether or not for pecuniary benefit. Further, it also includes any activity or transaction, in connection or incidental or ancillary to such activities.

In the context of the erstwhile CENVAT Credit Rules, 2004 ('CCR Rules'), the Karnataka High Court in **CCE Bangalore v Millipore India Pvt Ltd [2012 (26) STR 514]** while allowing CENVAT Credit on CSR expenditure, held that expenses on CSR represents activities relating to business and thus, the same should fall within the definition of erstwhile 'input service'. In the

case of **Essel Propack v. Commissioner [2018-TIOL-3257-CESTAT-Mumbai]**, the Tribunal noted that CSR is a mandatory requirement and *inter alia* held that CSR expenses should be treated as input service.

Though the aforementioned decisions are in the context of the erstwhile CCR Rules, the ratio of the decisions can be applied in the GST regime. In this regard, it can be said that CSR activities are undertaken for mandatory compliance of provisions of Companies Act, failure of which attract punitive action and amounts to non-compliance of law. Further, compliance of applicable laws and regulations is an obligation of a Company and any expense incurred to meet such obligation should be construed as incurred in the course or furtherance of business. Accordingly, CSR activities undertaken as statutory compliance should technically be considered to be in the course or furtherance of business.

In reference to the same, it is relevant to note that Section 17(5) of the CGST Act, an overriding provision, *inter alia* restricts ITC on goods disposed of by way of gift or free samples as well as on goods and services used for personal consumption. In the case of **Polycab Wires (P) Ltd 2019 [104 taxmann.com 36 (AAR – KERALA)]**, the Kerala Advance Ruling Authority had held that ITC would not be available as per Section 17(5)(h) of the CGST Act to the

³ VAT Supply and Consideration, HMRC Internal Manual, UNITED KINGDOM, Available at: <https://www.gov.uk/hmrc-internal-manuals/vat-supply-and-consideration/vatsc02140>. See also C & E Comms v Telemed Ltd [1992] BVC 3

⁴ OG 43/2020 (4/8/2020) dated 8.4.2020

⁵ INSIGHT: China VAT Incentives to Help Business, Bloomberg Tax, Available at: <https://news.bloombergtax.com/daily-tax-report-international/insight-china-vat-incentives-to-help-business>

⁶ Circular 2020/C/46 dated 24.3.2020

⁷ Federal Ministry of Finance <https://www.bundesfinanzministerium.de/Content/DE/FAQ/2020-03-13-Corona-FAQ.html>

⁸ In Re: Indian Institute of Corporate Affairs, [2019 (8) TMI 29 - AUTHORITY FOR ADVANCE RULINGS, NEW DELHI]

⁹ Notification No. 12/2017- Central Tax (Rate) dated 28.06.2017



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Applicant, against discharge of its CSR obligations, by distributing electrical items on free basis, without collecting any money.

The term 'gift' has not been defined under the CGST Act. In common parlance and by placing reference to dictionary meanings, it can be said that gift means something which is given voluntarily to the recipient without any obligation. Although the ruling pronounced by the Kerala Advance Ruling Authority is negative, an argument may be considered that the CSR expenditure is not in the nature of gift or free samples *per se* since it is solely undertaken under a statutory obligation laid down by the Companies Act which is mandatory in nature. However, in light of the specific restriction and the meaning of gift being very wide, the said position is highly litigious.

As Section 17(5) of the CGST Act bars ITC on gifts, on a strict reading, it can be said that ITC may not be available to the Companies.

Representation for relief

In light of the COVID - 19 pandemic, as a relief measure, the Companies may therefore opt to make a representation to the GST Council and Ministry of Finance, seeking the following:

- Dispense the restriction prescribed for availment of ITC under Section 17(5) (h) of the CGST Act, especially for supplies made in light of the COVID - 19 crisis or
- Provide specific exemption from levy of tax on all the procurements i.e. goods as well as services, in relation to such supplies.

By doing so, the ITC will not result in a tax cost to the Companies.

B. Compensation to supply chain participants

The unprecedented crisis caused due to COVID - 19 has allowed disruptions to be felt in the supply chain including the global supply chain. Whopping losses are being incurred by the supply chain participants due to storage costs, inventory loss, obligation towards salary payments etc. thereby putting their businesses in jeopardy. Thus, it is becoming incumbent upon the Companies to compensate the supply chain participants for such losses. Compensation may be offered by the Companies to the supply chain participants by giving ex-gratia payments (lumpsum payments),

discounts and benefit of price variations. The GST implications (i.e. levability and ITC perspective) under each of the above options are discussed in the ensuing paragraphs.

Ex-gratia payments (lumpsum payments)

Ex-gratia is a payment which is generally made on account of a sense of a moral obligation rather than on account of any legal requirement. GST is levied on supply of goods or services or both. The primary condition for any activity to qualify as a 'supply' is that there should be an activity for consideration. In case of ex-gratia payment, the recipient of such payment is not under any enforceable obligation to carry out an activity. Thus, it can be said that as the payment lacks reciprocity or *quid pro quo* to make it a 'supply', no GST should be payable. This principle has been upheld by the Bombay High Court in **Bai Mumbai Trust vs. Suchitra** as referred above.

The next issue for consideration from taxpayer's perspective is whether commensurate ITC is to be reversed by the recipient of such ex-gratia payments. Section 17(1) and 17(2) of the CGST Act



inter alia places restrictions on availing ITC for non-business purposes and ITC attributable to exempt supplies. The term 'exempt supply' means supply of goods or services which are exempted, or which attract NIL rate of GST and includes non-taxable supply. Non-taxable supply is further defined to mean such supply on which no tax is leviable. Therefore, to constitute an exempt supply/non-taxable supply of goods or services, the prerequisite test of being a supply of either has to be met. In the present case, given that there is no

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supply whatsoever, it *per se* appears that a view may be adopted that there is no requirement of reversal of ITC as the provisions of Section 17 of CGST Act are not attracted. However, at present, there are no such judicial precedents on this issue in the GST regime and therefore the same is an untested proposition.

Offering discounts

Discounts may be given before or at the time of supplies [i.e. discounts on new/future supply] or after the supply has been affected [i.e. discount on past supplies]. In a case where Companies contemplate to offer discount on supplies which are already undertaken, then the following conditions are required to be satisfied to get deduction of discount from the value of supply in terms of Section 15(3)(b) of the CGST Act.

- Such discount is established in terms of an agreement entered into at or before the time of such supply and specifically linked to relevant invoices.
- ITC attributable to the discount on the basis of document issued by the supplier has been reversed by the recipient of the supply.

However, due to the ongoing COVID - 19 pandemic, there may be cases wherein the discount cannot be established in terms of an agreement which is entered into at or before the time of supply. In such circumstances, since the condition prescribed under Section 15(3)(b) is not satisfied, the Company is not eligible to reduce the value of supply, to the extent of discount. However, considering such circumstances, CBIC vide **Circular No. 92/11/2019-GST dated 07.03.2019** has clarified that financial/commercial credit note(s) can be issued by the supplier even if the conditions mentioned in Section 15(3)(b) of the CGST Act are not satisfied. It is also pertinent to note that as the value of supply for the purposes of GST is not reduced, there is no impact on availability of ITC in the hands of the recipient.

It is also pertinent to note that Circular No. 105/24/2019-GST dated 28.06.2019 was issued to clarify various doubts relating to treatment of post-sale discounts under GST. It was *inter alia* clarified that if the additional discount given by the supplier of goods to the dealer is the post-sale incentive requiring the dealer to do some act like undertaking special sales drive, advertisement campaign, exhibition etc., then such transaction would be a separate transaction and the additional discount will be the consideration for undertaking such activity and therefore would be in relation to supply of service by dealer to the supplier of goods. Accordingly, the dealer, being treated as supplier of services, was required to charge applicable GST on such additional discount. *Albeit* the Circular is withdrawn, Department in such post sale discount scenarios may still contend that there is some sort of supply of service by distributor to manufacturer and thereby demand payment of GST by the distributor. Thus, to shield the distributors from such unwanted litigation in this respect, it is essential that the true nature of the transaction is evidenced vide the documentation.



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Price variations

Price variation strategy may be adopted to charge reduced prices to the supply chain participants for the supplies to be undertaken in future. The key considerations will be that the revised price will have to be established in the contractual arrangements/ Purchase Order. Further, the GST invoice will have to be raised as per the revised price. However, it is also pertinent to consider that in a case where the supply chain participant is a related party or distinct person, the specific valuation mechanism prescribed in the CGST Act read with Rules made thereof in this regard will come into play and the same will have to be complied with, so that the Department cannot allege under-valuation of goods.

C. Loss of inventory - Is it on account of force majeure?

One of the immediate impacts of the pandemic situation which is coming to the fore is that of significant inventory losses which have occurred due to supply disruptions and decreased global

to constraints in movement owing to transport restrictions and disturbed supply chain in a lockdown scenario and also theft.

On account of such inventory losses incurred by various Companies, it is relevant to examine issues regarding ITC reversal/ITC claim qua such expired/damaged commodities. On a strict reading of Section 17(5)(h) of the CGST Act ITC on goods lost, stolen, destroyed or written off is disallowed. However, an argument may be adopted that the inventory losses which have occurred due to supply disruptions, did not happen in the course or furtherance of business, but due to an exceptional scenario cause by COVID-19 pandemic on which the businesses have no control whatsoever. Reference in this regard can be made to the Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance 2020 passed by the Government of India vide which Section 168A is inserted in the CGST ACT classifying an epidemic as 'force majeure'¹⁰. Accordingly, restrictions under Section 17(5)(h) of the CGST Act should not be made applicable to the present situation.



as well as local demands in all sectors. Companies are having higher than usual inventory levels due to higher quantum of unsold inventories across the major cities in India. There are inventory losses in respect to commodities which are perishable and having a limited shelf life. In few incidences, inventory losses also cover items expired due

However, an aspect which warrants an observation is that Section 17(5)(h) of the CGST Act does not use the phrase '*used or intended to be used in the course or furtherance of business*'. On the contrary, the definitions of 'input', 'input service' and 'capital goods' use a common phrase '*used or intended to be used in the course or furtherance of business*'. Furthermore, Section 16(1) of the CGST Act also states that ITC shall be availed if goods/services are '*used or intended to be used in the course or furtherance of business*'. Given this, the Company will be required to carry out reversal of ITC on account of inventory loss.

Although, the Government has already taken numerous steps to deal with forthcoming issues, however, in light of the inventory losses being incurred in the pandemic situation, it may be suggested that a representation be made to the GST Council and Ministry of Finance, to provide specific dispensation from Section 17(5)(h) of reversal of ITC on account of inventory losses caused due to pandemic.

¹⁰ Explanation to the Section 168A (2) of the CGST Act.

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D. Insurance claims on inventory losses

As stated above, there can be situations where the goods get damaged, expired, are rendered unusable, or stolen in pandemic times. In this regard, Companies may have taken an insurance policy for such goods and are now entitled to receive an insurance claim on account of damage/expiry/unsuitability etc. of the said goods. An issue that may arise here is whether the receipt of insurance claim by the Companies qualifies as a 'supply'.

In a true sense, an insurance is an activity of investment where, on the occurrence of an unforeseen event for which the insurance cover is taken or on the maturity of an insurance policy, a prescribed sum of money, in the form of an insurance claim is received by the policy holder. In view of this, it can be said that investment in an insurance policy and receiving an insurance claim is akin to a transaction in money and that there is no element of an underlying supply of goods and/or services. Accordingly, receipt of insurance claim by the Companies will not attract GST. Consequently, there being no supply on receipt

of insurance claim, Companies may also not be required to carry out any reversal of corresponding ITC.

CONCLUSION

The ongoing COVID-19 pandemic has led to an uncertainty surrounding its impact in the world of business today, as it has significantly impaired *inter alia*, the production, supply chain and logistics functions of Companies across the globe including India. On account of the pitfalls caused by this pandemic, where certain transactions do not fall within the ambit of 'supply', for some transactions, certain provisions of the CGST Act relating to admissibility of ITC will have to be relaxed so as to provide relief to the tax paying Companies bearing the brunt of this pandemic. Both the Government and Businesses recognise that these are unprecedented times. While the larger issues are being taken care of, these micro issues hurting the industry also need immediate attention and therefore, clarification/ necessary amendments in respect of these need to be issued.





FROM THE BENCH - KEY JUDICIAL PRONOUNCEMENTS

The following chapter has been authored by Adarsh Somani (Director) and Sahil Kothari (Associate Manager) - ELP

Spotlight Case Law

1. Brand Equity Treaties Limited vs Union of India [WP (C) 11040/ 2018]

Other Cases

2. Mahadeo Construction Co vs Union of India [WP(T) No 3517 of 2019]
3. Directorate General of Anti-Profitteering vs Reckitt Benckiser India Pvt Ltd [Case No 20/ 2020]
4. In Re: Clay Craft India Private Limited [RAJ/ AAR/ 2019-20/ 33]
5. In Re: M/s T & D Electricals [KAR/ ADRG / 18/ 2020]

Brand Equity Treaties Limited & others vs Union of India [WP (C) 11040/ 2018]

Facts of the Case

- Petitioners filed instant writ petition to avail input tax credit ('ITC') of the accumulated CENVAT credit as of June 30, 2017. Petitioners failed to file declaration in Form GST TRAN-1 within the timeline prescribed under the Central Goods and Services Tax Rules, 2017 ('CGST Rules').
- Further, such non-compliance was not due to technical difficulty faced on Goods and Services Tax Network ('GSTN'), extended time limit was not applicable to petitioners.
- In the petition, the Petitioners have assailed Rule 117 of the CGST Rules on the ground that it is arbitrary, unconstitutional, and violative of Article 14 of the Constitution of India, to the extent it imposes a time limit for carrying forward the CENVAT credit to the GST regime.

Ruling

- Hon'ble High Court held that CENVAT Credit which stood accrued and vested as on June 30, 2017 is the property of the assessee, and

is a constitutional right under Article 300A of the Constitution. The same cannot be taken away merely by way of delegated legislation by framing rules, without there being any overarching provision in the Central Goods and Services Tax Act, 2017 ('CGST Act').

- Mechanism for availing the ITC under Rule 117 is procedural and directory, and cannot affect the substantive right of the registered taxpayer to avail of the existing / accrued and vested CENVAT credit.
- Thus, Rule 117 should be read down as being directory in nature, insofar as it prescribes the time-limit for transitioning of credit and therefore, the same would not result in the forfeiture of the rights.
- In absence of any specific provisions under the CGST Act, in terms of the residuary provisions of the Limitation Act, the period of *three years* should be the guiding principle maximum period for availing of such credit.



FROM THE BENCH - KEY JUDICIAL PRONOUNCEMENTS

ELP Comments

- The above ruling of High Court is definitely a relief to the petitioners. Further, various observations of the High Court not only acknowledge the deficiencies in the GSTIN, but also ensures that assessee would not be at the receiving end on account of such short-comings.
- Additionally, the ruling also highlights that intention of the law would not be subservient to the procedural conditions prescribed therein. Further, the Courts will give due credence to the intent, notwithstanding lapse in procedural difficulties.
- A limited aspect to be noted that in there are rulings pronounced by the other high courts that may run contrary to conclusions here.

Mahadeo Construction Co vs Union of India [WP(T) No 3517 of 2019]

Facts of the Case

- Basis the information appearing on the GST portal, Petitioner was under belief that due date for filing of Form GSTR 3B Return for the month of February 2018 and March 2018 was March 31, 2019.
- In the said background, Petitioner filed its monthly return for the said months by March 31, 2019.
- Thereafter, petitioner received a letter directing it to make payment of interest. Authorities also initiated garnishee proceeding and issued a notice to Petitioner's bank under Section 79 of the CGST Act.
- Instant writ petition was filed on the ground that demand of interest cannot be made without issuance of a show cause notice under Section 73 or 74 of the CGST Act.

Ruling

- Hon'ble High Court ruled that interest liability under Section 50 of CGST Act cannot be determined without initiating any adjudication process either under Section 73 or under Section 74 of the CGST Act.



- Section 73(1) of the CGST Act requires issuance of notice for non or short payment of tax. This should imply non or short payment of tax by the due date and thus, in case of delayed payment of tax, notice should be issued to seek interest.
- Additionally, Hon'ble High Court also ruled that garnishee proceedings under Section 79 of the CGST Act cannot be initiated for recovery of interest without adjudicating the liability of interest.

ELP Comments

- Similar view was also taken by Division Bench of the Karnataka High Court in case of **Union of India vs. M/S LC Infra Projects Pvt Ltd [Writ Appeal Number 188 of 2020]**.
- This legal position would ensure that quantum of interest is adjudicated by following due process of law, especially in view of controversy relating to levy of interest on net or gross amount.

Directorate General of Anti-Profiteering vs Reckitt Benckiser India Pvt Ltd [Case No 20/ 2020]

Facts of the Case

- Investigation was undertaken in respect of alleged profiteering by the Company in respect of supply of 'Dettol Hand Wash 900 ml'. The rate of GST on the said product had been reduced from 28% to 18% with effect from November 15, 2017 vide Notification No 41/ 2017 – Central Tax (Rate) dated November 15, 2017.

FROM THE BENCH - KEY JUDICIAL PRONOUNCEMENTS

- It was alleged that although Company had reduced the MRP of the said product post rate reduction, base price of the product was effectively increased. Given this, allegations of profiteering culminated into investigation by Directorate General of Anti-Profiteering ('DGAP').
- While defending the argument of no-profiteering, the Company *inter alia* argued that benefit passed on in non-monetary form such as increase in quantity, extension of schemes etc, should also be considered.
- Further, Company also requested that period under consideration should not be extended up to March 31, 2019.
- Additionally, the fact that profiteering on account of subsequent increase in base price of products after 6.5 months of rate revision, on account of market factors, such as increase in cost of raw materials, packing material, inflation, etc, should be excluded.

Ruling

- National Anti-Profiteering Authority ('NAA') observed that since Company had not reduced the prices even till date, there was no reason to restrict investigation up to March 31, 2018
- With respect to argument on increase in costs, NAA held that Company should have increased the costs before November 15, 2017 and it cannot be accepted that on the intervening night of November 14, 2017 when the rate reduction occurred, Company was to increase prices.
- Further, NAA observed that profiteering has to be computed SKU-wise and not invoice-wise or business vertical-wise or State-wise as every buyer has the fundamental right to get the benefit.
- NAA held that benefit of reduction has to necessarily be passed on form of reduction in

price of goods and Company cannot resort to alternate means such as increase in quantity or promotional offer.

- Further, amount of GST collected on such profiteered amount by Company was also ordered to be deposited in the Consumer Welfare Fund.
- Basis the above, NAA upheld the allegation of profiteering and directed the Company to deposit the profiteered amount along with interest to Consumer Welfare Fund.



ELP Comments

- The strict and pro-revenue approach of NAA is known since inception. Such approach, without considering nuances of business and practical challenges, merely increases woes for the industry.
- It needs to be seen how writ court determines the fate of such cases.
- A well-documented methodology for determining profiteering, keeping in mind underlying commercial considerations, is the need of the hour; albeit NAA has consistently held such argument irrelevant.

FROM THE BENCH - KEY JUDICIAL PRONOUNCEMENTS

In Re: Clay Craft India Private Limited [RAJ/ AAR/ 2019-20/ 33]

Facts of the Case

- Board of Directors of the Company comprises of 6 persons, who are also working in the Company at different level of management.
- Directors receive commission from the Company for fulfilling its responsibility as director. On such commission, Company discharges GST under the reverse charge mechanism in terms of Notification No 13/ 2017 – Central Tax (Rate) dated June 28, 2017.
- Further, for working at managerial level, Company pays salary on which requisite tax deducted at source compliance is being undertaken by Company.
- Applicant sought an advance ruling seeking clarification on whether salary payment made to such directors would qualify as supply and attract GST under the reverse charge mechanism in terms of Notification No 13/ 2017 – Central Tax (Rate) dated June 28, 2017 (Notification 13).



Ruling

- The advance ruling authority held that directors are not employees of the Company and benefit of entry 1 of Schedule III should not be available to the Applicant.
- Basis this, Company is liable to discharge GST under the reverse charge mechanism on consideration paid to directors.

ELP Comments

- The above view of advance ruling authority appears not only against the intent of the law, but also lacks consideration of attendant regulations which govern employer employee relationship.
- This is also against the industry practise and it is imperative that Government comes out with a clarification to put the controversy to rest.

In Re: M/s T & D Electricals [KAR/ ADRG / 18/ 2020]

Facts of the Case

- Applicant, having principal place of business in the State of Rajasthan, got a contract from involving complete electrical and instrumentation jobs, installation, testing and commissioning at township in Karnataka.
- Applicant sought clarification on whether registration is required to be obtained in the State of Karnataka and if not, whether ITC would be available in respect of procurement made directly at site location

Ruling

- It was ruled that location of supplied in terms of Section 2(71) of the CGST Act should be the principal place of business of the applicant in the State of Rajasthan, from where supplies are made.
- Thus, there is no requirement to obtained separate registration in the State of Karnataka.
- Further, in case goods are directly shipped by vendor to Karnataka, vendors in Rajasthan should charge CGST and SGST while dealers located in other States should charge IGST under the bill-to-ship-to model of transaction under Section 10(1)(b) of the Integrated Goods and Services Tax Act, 2017.

ELP Comments

- While this is a welcome ruling for works contractors, the authority did not discuss the definition of 'place of business', which includes within its ambit godown or warehouse where goods are stored.
- Expansive definition of place of business may put force in alternate view of requirement to obtain registration.



CFO SPEAK

Interview with Mr. Gopal Balachandran, Chief Financial Officer and Chief Risk Officer at ICICI Lombard General Insurance Company

Interview conducted by Stella Joseph (Associate Partner)

1. **From the erstwhile indirect tax regime of a Centralised registration with common CENVAT Credit, to the extant regime of distinct person and requirement to take registrations across multiple states in the country, how has ICICI Lombard and the insurance industry at large, coped with the introduction of GST, especially from a perspective of (a) ease of doing business and (b) fungibility of input tax credit?**

Earlier, the general insurance industry was covered under the service tax regime and which permitted to apply and obtain centralised registration for service tax. This option is not available to the industry under the present GST provisions. Resultantly, the industry had to move to state level registration, and swiftly configure the consequential changes to its business models. Further, state-wise GST registration has increased the compliance cost along with litigation issues which may be raised and adjudicated by multiple States.

On input side, the GST law has fastened the additional responsibility as a recipient to ensure compliance by the vendors so that input tax credit (ITC) is reflected online on the GSTN portal, before such ITC can be availed by the recipient. The restriction to avail ITC for unmatched invoices results in increased cash flows and accumulation of unutilised credit.

2. **In your opinion, has the GST law appreciated the various nuances associated with the general insurance business and satisfactorily addressed them?**

GST authorities have covered substantial ground in terms of addressing the concerns of the industry following the introduction of the

GST. GST authorities have facilitated the industry from time-to-time by providing necessary clarifications in certain areas, including the following:

- ITC on motor insurance premium:

There was earlier non-clarity on whether ITC of the GST paid on motor insurance premium will be available to the insured or not. The CGST Amendment Act, 2018, clarified this issue and has now set out specified circumstances wherein such ITC will be available to the insured.



- Exemption in respect of reinsurance of weather-based insurance schemes:

Certain weather-based general insurance services are exempt under the GST regime. However, there was no clarity whether such exemption will also apply in respect of reinsurance services procured in relation to general insurance services which are specifically exempted. This issue was finally clarified in January 2018, when specific entries were introduced in the GST exemption notifications to exempt reinsurance services procured in respect of general insurance services which are exempt.

CFO SPEAK

- Corporate Agent:

Prior to January 2018, the GST on services provided by insurance agents (both corporate and individuals) was payable under the reverse charge mechanism by the recipient of service i.e. the insurance companies. The objective of taxation of services under reverse charge mechanism is to tax the economic activity provided by the unorganized sector by way of collecting tax from the organized sector. Therefore, the corporate insurance agents, who operate in a highly organised manner ought to have been excluded from the reverse charge list. This anomaly was rectified w.e.f. January 25, 2018 when the GST liability was fastened on corporate agents under the forward charge mechanism.



- Rate of GST on motor third party premium:

Motor third-party insurance or third-party liability cover, which is sometimes also referred to as the 'act only' cover, is a statutory requirement under the Motor Vehicles Act. While being a statutory requirement, it is understood that the

percentage of uninsured vehicles in certain categories is as high as 60%. This resulted in people not getting third party insurance claims during accidents. Therefore, to make third party insurances more accessible the rate of GST on third party insurance specifically in respect of "goods carriage" was reduced from 18% to 12% w.e.f. January 01, 2019.

While these are some of the clarification issued under GST, the general insurance industry is still awaiting clarifications in respect of certain areas which were issued under the erstwhile Service tax regime.

3. **GST is a tax, intensely driven by its back-end IT systems. In your view, are these IT systems robust enough to cater to the needs of a law as demanding as the GST. Any specific IT system issues faced by insurance business?**

The introduction of GST has resulted in following benefits:

- i. Elimination of cascading effect of tax
- ii. Ease of document management
- iii. Paperless returns
- iv. Regulation of unorganized sector

A major challenge which is currently being faced by the general insurance industry is in relation to the requirement of matching the ITC. Since there are both major and minor business entities in the insurance eco-system, the system should be flexible and simple to suit to the business needs of all such entities.

In addition to this, the GSTN system keeps changing every now and then, which results in turbulence and prevents the taxpayers from smoothly undertaking the prescribed compliances in a time bound manner.

The existing GSTN system is also not addressing certain specific requirements viz.:

- i. Non-reflection of ITC in GSTR-2A towards ISD credit distributed by filing GSTR-6 Return
- ii. Negative amount is not allowed to be captured in GSTR-3B which results in a mismatch between GSTR-1 and GSTR-3B
- iii. List of cancelled and inactive vendors is not available

CFO SPEAK

4. In these times of COVID-19, the Government has introduced various facilitative measures pertaining to GST compliance. Do these measures address the breadth of challenges being faced by the general insurance industry in the present times?

In these turbulent times, Government has done good job by extending timelines for GST compliances to ease burden on the assessee. Further, the Government should also introduce GST rate reduction for essential goods and services impacting public at large as earlier done for Motor Third Party Premium.

In addition to this, businesses should not be penalised for either non-compliance of other persons or some non-compliance resulting from system challenges or capabilities.

Given the difficulties faced by the general insurance industry with this COVID-19 situation, the Government should endeavour to reduce the litigations to a minimum level and legacy issues, if any, should be simplified either through notifications or by way of clarificatory circulars.

5. How much weightage do you give to tax and more so GST considerations, if any, while undertaking business decisions?

GST is an essential factor which one needs to keep in mind at the time of budget estimation. While pricing of the services, industry needs to factor all input service cost for ensuring that products are offered to various categories of customers at optimum level. Reversal of ITC and employee related costs are important factors impacting the overall pricing of policies.

In addition to this, in case of retail policies, credit notes are issued after six months from the end of the financial year, refund of GST in such cases also accounts for additional cost to the company.

6. What in your opinion are the biggest pros and cons of the GST structure adopted in India and are there any specific suggestions to or request from the Government?

One of the biggest pros of the GST structure for the general insurance industry is the fungibility of ITC, time bound compliance, automation, paperless returns, etc.

On the other hand, as cons of the structure, we are still concerned about credit note with GST not being allowed after six months from the end of the financial year and the requirement of ITC reversal on account of transaction in securities.





LEGISLATURE AT WORK - RECENT AMENDMENTS

The following chapter has been authored by **Abhinay Kapoor (Senior Associate)** and **Deepika Menon (Associate)** - ELP

Recent Amendments

Issuance of clarifications in relation to implementation of Goods and Services Tax (GST) law

- Vide **Circular No. 137/07/2020 – GST dated 13th April, 2020**, following clarifications were issued to address some of the challenges faced by registered persons pursuant to the spread of COVID-19:
 - In cases where GST has been discharged on advances by a supplier of service, and the invoice has also been raised prior to supply of service, the supplier will be required to raise a credit note upon cancellation of such contracts and report the same in the relevant return. The tax liability in such scenarios may be adjusted in the return subject to prescribed conditions, and the supplier need not file a separate refund claim. However, in the absence of an output liability against which the credit note can be adjusted, the supplier will have to file a refund claim through Form GST RFD-01 under the category "Excess payment of tax, if any". Similar treatment is to be followed in the event goods that have been supplied under the cover of a tax invoice are returned by the recipient.
 - In cases where GST has been discharged on advances by a supplier of service, and the invoice has not been raised prior to supply of service, the supplier may file a refund claim through Form GST RFD-01 under the category "Excess payment of tax, if any", upon cancellation of such contracts. The supplier will be required to issue a refund voucher in such cases.
 - The time limit for filing Letter of Undertaking for FY 2020-21 by suppliers making zero rated supply is extended to 30th June, 2020. Taxpayer may continue to make zero rated supplies by quoting the reference number of the Letter of Undertaking for FY 2019-20.
 - Due date for furnishing Form GSTR-7 (return to be filed by the persons who is required to deduct TDS under GST) for the months of March 2020 to May 2020 along with deposit of tax deducted for the said period has been extended to 30th June, 2020.
 - The date for filing application for refund which falls during the period March 20, 2020 to June 29, 2020 has been extended to 30th June, 2020



LEGISLATURE AT WORK - RECENT AMENDMENTS

CBIC issues clarifications regarding relaxation measures introduced in light of COVID-19

- Vide **Circular No. 136/06/2020-GST dated 3rd April, 2020**, the method for computing the reduced rate of interest for delayed payment of tax, i.e., 9% p.a., (as notified through **Notification No. 31/2020 – Central Tax dated 3rd April, 2020**) was clarified as follows:

S. No.	Date of filing GSTR-3B	Number of days of delay	Whether condition for reduced interest is fulfilled	Interest
1.	02.05.2020	11	Yes	Zero Interest
2.	20.05.2020	30	Yes	Zero interest for 15 days + interest rate @9% p.a. for 15 days
3.	20.06.2020	61	Yes	Zero interest for 15 days + interest rate @9% p.a. for 46 days
4.	24.06.2020	65	Yes	Zero interest for 15 days + interest rate @9% p.a. for 50 days
5.	30.06.2020	71	No	Interest rate @18% p.a. for 71 days (i.e. no benefit of reduced interest)

- The said Circular further clarified that the condition for availing the benefit of Nil rate of interest is that the registered person must furnish Form GSTR-3B on or before the date mentioned in **Notification No. 31/2020 – Central Tax dated 3rd April, 2020**.
- In the event, Form GSTR-3B is not furnished on or before the prescribed dates, late fees as well as interest at the rate of 18% p.a. shall be payable from the original due date of return, till the date on which the return is filed.

Notification of certain provisions of Central Goods and Services Tax Rules, 2017 (CGST Rules)

- Rule 87(13) of CGST Rules, which provides for the transfer of any tax, interest, penalty, fee or any other amount available in the electronic cash ledger, as well as Form GST PMT-09 through which such transfers are to be done, have been notified to be effective w.e.f. 21st April, 2020.¹¹
- Additionally, the Goods and Services Tax Network has also issued Frequently Asked

Questions (FAQs) in relation to filing and viewing Form GST PMT-09, which *inter alia* provide:

- Form GST PMT-09 can be used to do intra-head and inter-head transfer of amounts available in the electronic cash ledger in the following manner:
 - o To transfer amount from minor head 'Tax' under major head 'Cess' to minor head 'Interest' under major head 'CGST' or;
 - o To transfer amount from minor head 'Interest' under major head 'IGST' to minor head 'Tax' under same major head 'IGST'
- Taxpayers can select more than one major/minor heads while transferring amount from one head to another, one at a time, while filing Form GST PMT-09
- The FAQs also discuss other procedural aspects such as manner of signing Form GST PMT-09, post-filing process, tracking methods, etc.

¹¹ Refer Notification No. 37/2020 – Central Tax dated 28th April, 2020.

LEGISLATURE AT WORK - RECENT AMENDMENTS

GSTN issues alert in relation to fraudulent messages regard processing of refunds

- In light of fraudulent messages being circulated via Whatsapp, email and SMS regarding processing of GST refund, the GSTN has clarified that GST refunds can be claimed only through the GST portal - www.gst.gov.in
- The said alert cautions taxpayers to steer clear of such messages and also prescribes a list of do's and don'ts regarding refund applications, which are as follows:

Do's	Don'ts
Use only GST portal www.gst.gov.in for claiming refunds	Do not reply to any message claiming to process GST refunds
For any information on claiming GST refund, checking status of the refund application read https://www.gst.gov.in/help/refund	Do not open any link or attachment in the message
Remember that GST Network never call detailed personal information and refund details on email, WhatsApp or SMS	Never fill any personal detail and other information on any platform other than GST portal for claiming refunds
Stay updated with News & Update section of www.gst.gov.in for any official and authorized information	Do not call at the number mentioned in the message
In case of any query of confusion, please call GST helpdesk 1800-103-4786.	Do not trust information from any source other than the GST portal which uses similar portal names and interface



ALLIED LAWS

The following chapter has been authored by Vinitt Nagla (Associate Partner) - ELP



Extension of the facility of accepting undertaking in lieu of Bond under Section 143AA of the Customs Act, 1962

- The Central Board of Indirect Taxes and Customs ("CBIC") vide **Circular No. 17/2020- Customs** dated 03.04.2020 and Public Notice No. 41/2020 dated 03.04.2020, in view of difficulty being faced by importers/ exporters and their authorised Customs Brokers, extends the facility of accepting undertaking in lieu of Bond for the period till 15th May, 2020. Consequently, the date of submission of proper bond in lieu of which the undertaking is being accepted is temporarily extended currently till 30th May, 2020;
- Acknowledging the hardship faced in obtaining notarised stamp papers for furnishing bonds required by Customs in certain situations during the assessment and clearance of goods, CBIC directs that Customs field formations may accept request for submission of an undertaking from the importer/exporter in lieu of a bond. The said relaxation is to apply to the specified categories of the importers/exporters, i.e. (a). Government/Public Sector Undertakings (Central/State/UT Govts. or Administrations and their undertakings) (b). Manufacturer/ Actual User importer (c). Authorised Economic Operators (d). Status holder (e). All importers availing warehouse facility in terms of section 59.

Amendment in Export policy of Hydroxychloroquine

- Directorate General of Foreign Trade ("DGFT") vide **Notification No. 01/2015-20** dated 04.04.2020, amended the export policy of hydroxychloroquine, wherein the export of Hydroxychloroquine and formulations made from Hydroxychloroquine falling under any ITCHS Code, including the

ITCHS Codes mentioned in the Notification No. 54 dated 25.3.2020 is no longer allowed from SEZs/EOWs or against Advance Authorisation or under the Para 1.05(b) of Foreign Trade Policy 2015-20 or against full advance payment as specified in Para 2 of the Notification. The export of Hydroxychloroquine and formulations made from Hydroxychloroquine shall remain prohibited, without any exception.

Amendment in Export policy of Diagnostic kits

- DGFT vide Notification **No. 59/2015-20** dated 04.04.2020, amended the export policy of Diagnostic kits from "free" to "restricted". The export of Diagnostic Kits [Diagnostic or laboratory reagents on a backing, preparation diagnostic or laboratory reagents whether or not on a backing, other than those of heading 3002 or 3006; certified reference materials] falling under any ITCHS Code, including the ITCHS Code mentioned above, is restricted from the date of the notification itself, i.e. 04.04.2020.



ALLIED LAWS

Clarifications w.r.t Merchandise Exports from India Scheme ("MEIS")

- DGFT vide **Trade Notice No. 03/2020-2021** dated 15.04.2020, states that with approval of the RoDTEP scheme by Cabinet on 13th March 2020, to replace the ongoing MEIS scheme as publicized vide PIB Press Note dated 13th March 2020, it had been receiving queries from the members of the trade, as to in what manner benefits under MEIS will be available under the FTP beyond 31.03.20, the then envisaged end date of the FTP 2015-20, which has been extended till 31.03.2021.
- It has been clarified that: a) Benefits under MEIS for any item/tariff line /HS Code currently listed in Appendix 3B, Table 2 (MEIS Schedule) will be available only up to 31.12.2020; b) Prior to 31.12.2020, as and when an item/tariff line/HS code is notified to be covered under RoDTEP Scheme, it would at the same time be removed from coverage under MEIS; c) Detailed operational framework for RoDTEP will be notified separately in consultation with Department of Revenue, Ministry of Finance.





LEGAL CLASSICS

The following chapter has been authored by Jitendra Motwani (Partner) and Rinkey Jassuja (Senior Associate) - ELP

Commissioner of Customs (Import), Mumbai vs. Dilip Kumar [2015 (325) ELT (815) (S.C.)]

Introduction:

Correct classification assumes great importance in indirect tax laws to determine the effective rate of duty/tax to be recovered from an assessee. Similarly, classification becomes essential to determine the applicability of exemption notifications whereby exemption is granted to certain specific category of goods subject to fulfillment of conditions.

At various occasions the Courts have been seized of issues for interpretation of exemption notifications which are sometimes ambiguously worded to determine the scope of the notification and a pivotal question that *"where an ambiguity exists, who will get the benefit, the assessee/subject or the revenue?"*

One such issue came up for consideration of the Hon'ble Supreme Court in the case **Commissioner of Customs (Import), Mumbai vs. Dilip Kumar [2015 (325) ELT (815) (S.C.)]**. In the said case, the dispute concerned the classification of goods, namely Vitamin – E50 powder (feed grade) under the Customs Tariff Act, 1975 and consequential eligibility of the product under exemption Notification No. 20/99-Cus dated 28.02.1999. Following the numerous precedents available on the said issue of interpretation of exemption notifications, the Hon'ble Court could have either given a strict or liberal interpretation to the issue and concluded the case; however, the Court felt a stronger judge made law was required and guidelines were needed for interpretation of such notifications. Therefore, the issue was referred to larger bench (five-judge bench) which was decided vide order dated 30.07.2018.

GST laws also provides for classification of the goods under GST tariff and various exemption notifications are also issued under the said law. Accordingly, the

law laid down in the above judgment may act as a guiding factor even under the GST laws in case of issues arising on classification of goods.

Decision in Dilip Kumar

The issue raised in the abovementioned appeal is whether Vitamin E-50 is classifiable under Chapter 2309.00 as "Prawn Feed" and therefore eligible for the benefit of partial exemption from duty under Notification No. 20/99 dated 28.02.1999.

The Respondent imported a consignment of Vitamin E-50 and claimed benefit of concessional rate of duty at 5% under the abovementioned Notification. The importer relied on the judgment of



the Apex Court in *Sun Export Corporation, Bombay v Collector of Customs [(1997) 6 SCC 564]* ("Sun Export Case") wherein it was held that Animal Food Supplement such as Premix of AD3 which are generally added to animal feed are also covered by the generic term 'Animal Feed'. The adjudicating authority rejected the submissions of the importer and confirmed the demand. On appeal to Commissioner (Appeals), the issue was decided in favour of the importer. On appeal by Department against the said order the Tribunal dismissed the appeal relying upon the Sun Export

LEGAL CLASSICS

Case. On further appeal, the Hon'ble Supreme Court expressed serious doubts on the judgment in the case of Sun Export Case and in view of conflicting decisions of the Hon'ble Court in Sun Exports case and Surendra Cotton Oil Mills and Fertilizers Co. and Ors. [2001 (1) SCC 578] referred the matter to larger bench.

The Larger Bench of the Hon'ble Supreme Court took the following view that while deciding the eligibility of a product for an exemption:

- (i) Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption Clause or exemption notification.
- (ii) When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue.

Applicability under GST law

To sum up, the Hon'ble Court has laid down the following rules of interpretation in determining the scope of exemption notification viz. (i) apply strict

construction to determine if the product falls within the four corners of the notification and ii) once it is established that the product qualifies within the exemption notification, if any subsequent procedural issue arises, that must be given a liberal construction.

The said judgment has assimilated the knowledge that was laid down in various judgments of this Hon'ble Court to come down to a determinative test which will have to be applied at all levels of adjudication. The tests laid down above, would be equally vital in interpretation of the GST Tariff as the same has been brought into effect through a notification and not a statute unlike in the erstwhile laws.

Classification issues are cropping up rapidly in the GST regime as well. The rules of interpretation laid down in the above judgment are after considering the age-old views already expressed by the Courts in various cases earlier and it re-emphasizes the said principles. Different schools of thought to determine the classification of the products under the GST tariff and scope of exemption notification may rely upon the guidelines on classification as laid down by the Hon'ble Supreme Court in the said judgment.



QUOTABLE QUOTES



1. "Infosys is "extremely mobilised" on the GST Network enhancement project and work is progressing at "full speed" even as a large segment of its employees are working remotely amid the nationwide lockdown", its CEO Salil Parekh said.
2. Many states are demanding special packages from the Centre and extending such relief will be a challenging task given the fact that economy is likely to contract in the first half of this fiscal year. Economists expect the GDP growth in the first quarter to contract before improving and full-year GDP estimates for 2020-21 range from contraction to a marginal growth of around 1-2 per cent.
3. The proposal to make GSTN a fully government owned company from April 1 was approved in 39th GST council meeting.
4. CBIC clears Rs 10,700 crore GST, customs duty refund in 16 days. In the 'Special Refund and Drawback Disposal Drive', the CBIC officers have cleared over 1.07 lakh Goods and Services Tax and IGST refund claims worth Rs 9,818.12 crore.



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About Taxsutra

Launched in 2011, India based B2B portal Taxsutra.com, <http://www.taxsutra.com> is a trusted online resource for corporate tax directors, policymakers and practitioners. Taxsutra's instant news alerts & incisive analysis on both domestic and international tax, coupled with unique features like tax ring, Taxsutra Insight, Litigation Tracker, Taxsutra TV and blogs make it a "must-have" for every tax professional.

Given the increasing focus of tax administrations on Transfer Pricing, <http://www.tp.taxsutra.com> was launched in October 2011, as India's first exclusive portal on TP. Apart from a comprehensive database of over 6000 Indian TP cases, the portal offers several new editorial features including Case Tracker, International Rulings, APA Space, TP Talk, Expert Corner, TP Personalities and 'Around the World.'

Taxsutra's thought leadership and continuous engagement with tax professionals has been on display through several unique initiatives/ microsites/ special coverage on burning tax issues, controversies and important developments, be it APA, the \$2bn Vodafone tax case, BEPS, our roadblocked coverage of Union Budget and even some light tax banter with our microsite on Soccer World Cup & tax!

Taxsutra has also championed various niche events and workshops.

Taxsutra also runs popular websites on GST (www.gstisutra.com), launched in 2017 with a highly interactive Mobile App as well and portals on indirect taxes (www.idt.taxsutra.com), corporate law (www.lawstreetindia.com) and accounting (www.greentick.taxsutra.com).

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Since its inception 18 years ago, Economic Laws Practice (ELP) has continually evolved to optimally respond to changing market dynamics and emerging client requirements. The firm today boasts a strength of 54 partners and more than 200 professionals (who include chartered accountants, cost accountants, economists and company secretaries other than lawyers), across six (6) offices in the country and has been recognised as one of the fastest growing law firms in the country.

Today, ELP has an extensive client base across multiple industry sectors with clients from Fortune 500 Companies, Public Sector Undertakings, Multi Nationals, Indian Corporate power houses and start-ups. We work closely with leading global law firms in the UK, USA, Middle East and Asia Pacific region, giving us the ability to provide real-time support on cross-border concerns.

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