



NAVIGATING GST 2.0

- THOUGHT LEADERSHIP
- CONSUMER PROTECTION ACT, 2019 AND ITS INTERPLAY WITH GST
- FROM THE BENCH-KEY JUDICIAL PRONOUNCEMENTS
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INTRODUCTION

Note from Editor:

The COVID-19 pandemic has worsened the economic slowdown in India, evident from the slide in the GDP growth rate and tumbling tax collections. As if the crisis of the pandemic wasn't enough, tensions brewing with China at the Line of Actual Control (LAC) are adding more fuel to the economic fire. Amidst a faltering economy, GST could not remain insulated! With reform measures being put on hold, the toughest challenge for the Govt. now is to devise ways to compensate the states. The current face-off between the Centre and States over the mechanism to meet the compensation deficit under the GST regime is just a preview of the mammoth challenge that lies ahead!

In this backdrop, we are happy to present to you 8th Edition of our **GST Newsletter**, where we get you everything that you need to know from the world of GST, along with incisive analysis from the ELP team. In the **Thought Leadership** section, ELP Partner **Nishant Shah** explains the mystery around interpretation of taxing provisions. The author dissects various landmark rulings on interpretation of GST law and highlights that, *"it is clear that the constitutional principles have played a major role to benefit tax payers against the interpretation of GST law to a great extent."*

In the **Cover Story section** dealing with Consumer Protection Act, 2019 (CPA) and its interplay with GST, the ELP team highlights that *"GST laws are taxing statutes enacted to 'make a provision for levy and collection of tax', whereas the CPA has been enacted for 'protection of the interests of consumers'". Stemming from this, the underlying rules of interpretation for both the enactments are different.* However, the authors explain that though it may not generally be perceived that GST laws and the CPA impact similar areas, there does exist certain interplay between GST and the recently notified CPA in the context of incorrect

tax determination, recall of goods, issuance of tax invoice & maintenance of records etc. The authors conclude by stating that, *"...thus there is a lot of scope for government agencies and authorities under both legislations to frequently exchange information and collaborate in its efforts."*

The segment **From the Bench - Key Judicial Pronouncements** discusses recent notable judgments, rulings, orders and verdicts of the Apex Court, High Courts, AARs and the Appellate Authorities. The **Expert Speak** section covers an incisive interview with **Mr. Sabyasachi Ray (Executive Director, The Gem & Jewellery Export Promotion Council)**, who discusses the impact of GST on the gems and jewellery industry (GJI). He highlights that while GST has accelerated the process of making India's GJI more organized and transparent, *"The GJI is...grappling with the issue of huge ITC accumulation."*

The section **Legislature at work - Recent Amendments** covers all the amendments, updates, clarifications and legislative modifications, which have been implemented by the Government or authorities and also the revamp measures undertaken in respect of taxation to improve the economy. Finally, the segment titled **Allied Laws** touches upon the export policies on various items such as Personal Protection Equipment, Masks, etc., import restrictions on various items, bilateral agreements on India with other countries, extension of time limits for compliance under Excise & Customs law etc.

We are sure the 8th issue of 'Navigating GST' would be an interesting read and we promise to be back with next edition soon.



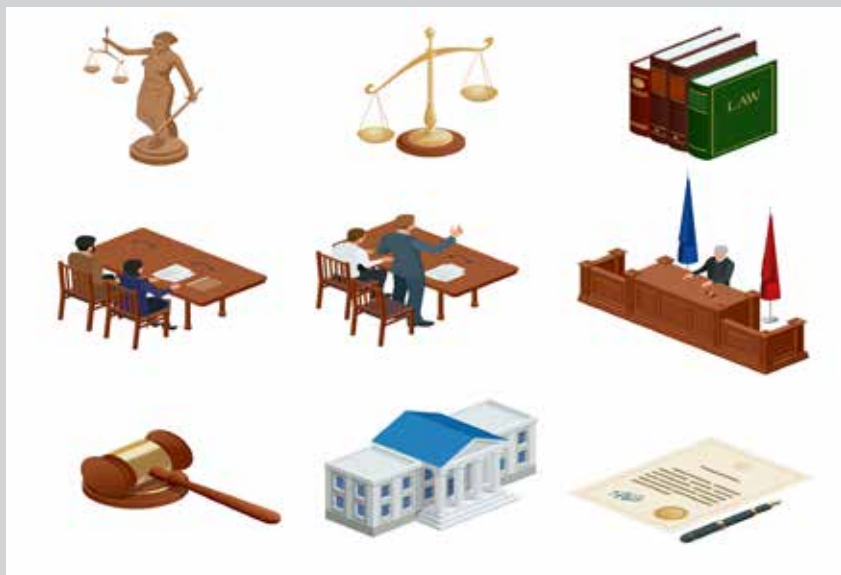


THOUGHT LEADERSHIP

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

GST Law – Saga of interpretation by courts

Perfect Interpretation of every provision in a taxing statute has been and will always be a mystery. While this aspect has at times brought a smile on taxpayer's faces, more often than not such interpretational issues have caused concerns as the mystery unfolds. The uncertainty or ambiguity as to the applicability of tax provision to businesses, has a significant implication on their decision-making capability. Goods and Services Tax (GST) was introduced with an intent to enhance the ease of doing business. Contrary to this intention, the ambiguity and uncertainty brought in by the introduction of GST, therein has led to an adverse and greater negative implication on attracting foreign investments into the country.



As businesses came to terms with the continuously evolving provisions of the GST law prior to its implementation, there was a hope and expectation amongst the industry that certain ambiguous tax positions would be clarified during the course of departmental GST audits. However, with every postponement in the filing of Form GSTR-9/GSTR-9C (relating to GST audit) for businesses, the date of

such departmental audits also got extended, which led to increase in the waiting period for businesses to get a reaffirmation of the tax positions adopted.

Interpretations by Courts

To add to the above, various High Courts have also played an important role by providing interpretations to some of the critical GST provisions applicable to businesses. Some of these decisions have been analyzed for the benefit of the reader.

VKC Footsteps case:

A glaring example of this situation is the ruling of the Ahmedabad High Court in **VKC Footsteps India Pvt. Ltd. v. Union of India & Others [TS-585-HC-2020(GUJ)-NT]**¹. For sometime now, since the introduction of GST, certain industries had been facing the issue of accumulation of credits due to inverted duty structure arising on account of higher rate of input services vis-à-vis GST applicable on their output supplies. To add to the woes of such industries, claiming refund of the unutilized input tax credit (ITC) in terms of Section 54(3) of Central Goods and Services Tax Act, 2017 (CGST Act) did not provide effective relief. This is due to the fact that the formula prescribed under Rule 89(5) of Central Goods and Services Tax Rules, 2017 (CGST Rules) for claiming refund of unutilized ITC on account of inverted duty structure, does not include ITC in relation to input services in the meaning of the term "Net ITC". The meaning of the term "Net ITC" as provided in Explanation

to Rule 89(5) of CGST Rules is as follows:

*"Net ITC shall mean **input tax credit availed on inputs** during the relevant period other than the input tax credit availed for which refund is claimed under sub-rule (4A) or (4B) or both; and"*

To overcome such hindrance of credit accumulation and the consequent blockage

¹ The other cases involving this issue are inter alia Raymond UCO Denim Pvt Ltd v. Union of India [TS-637-HC-2019(BOM)-NT] and Others and Tvl. Transtunnelstroy AFCONS Joint Venture v. Union of India. [TS-800-HC-2020(MAD)-NT]

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of cash, businesses in various industries such as gems and jewellery, textile, e-commerce, etc., realigned their transaction structure to mitigate the concern of credit accumulation. In most, if not all cases, such restructuring was undertaken after the respective industries failed to receive any positive response from the Government to their request for mitigating this issue. The ruling of the Hon'ble Ahmedabad High Court surely brought a smile to these dealers, operating in the industries affected by this issue of credit accumulation. One wonders only how long is the smile going to last, since considering the impact that the ruling is likely to have on the revenue, the department is very likely to challenge the verdict before the Hon'ble Supreme Court. Even worse would be the carrying out of introduction of retrospective amendment to reverse the impact of the decision of the Hon'ble Ahmedabad High Court. This scenario again only leads to uncertainty and ambiguity for businesses, and thereby impacting their ability to take decisions.

Safari Retreats case:

A similar situation was also deliberated upon by the Hon'ble Orissa High Court in ***M/S Safari Retreats Pvt Ltd and Another v. Chief Commissioner of Central Goods and Service Tax and Others*** [TS-350-HC-2019(ORI)-NT]². The issue dealt with herein was the ability of businesses to avail credit of ITC on construction of immovable property, that was used for the purpose of rendering output supplies eligible to GST. The said issue arose, on account of the restriction imposed by Section 17(5)(d) of CGST Act in respect of "goods or services or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account including when such goods or services or both are used in the course or furtherance of business". Here again the industry had cautiously deterred from availing credit in relation to such immovable property. Also, to ensure minimal loss of credit, transaction structures were adopted that would, rightfully under law, reduce negative impact arising on account of ineligibility of credit.

The ruling of the Hon'ble Orissa High Court in the case of ***Safari Retreats (Supra)*** changed the interpretation adopted by the industry of the

relevant provisions, providing them with much needed respite. Here again arises the question as to longevity of the relief, considering that the department has already challenged the ruling of the Orissa High Court before the Hon'ble Supreme Court. More important however, is the ambiguous scenario under which dealers need to carry on their business. The complexity gets multiplied where a dealer provisionally avails the credit but does not pass on the benefit thereof to his customers (on account of uncertainty as to eligibility thereof). Such dealers are subject to the potential threat of facing the wrath of the National Anti-Profiteering Authority (NAA).



Mohit Minerals case³:

Taxation of a cross-border transaction is one of the most complex and disputed areas of litigation. The Hon'ble Gujarat High Court in the case of ***Mohit Minerals Private Limited vs. Union of India and Another***, [TS-29-HC-2020(GUJ)-NT] has struck down two notifications: (i) No. 8/2017-Integrated Tax (Rate) dated 28 June 2017 and (ii) No. 10/2017-Integrated Tax (Rate) dated 28 June 2017 issued by the Central Government under the Integrated Goods and Services Tax Act, 2017 (IGST Act). The aforesaid Notifications inter alia levied IGST on services supplied by a person located in non-taxable territory to a person located in non-taxable territory (i.e. by a foreign shipping line to an exporter located outside India) by way of transportation of goods by a vessel from a place

² Writ Petition challenging the said provisions have also been filed in other Courts. These inter alia are ***Bharti Airtel Ltd. v. Union of India*** [TS-714-HC-2020(DEL)-NT], ***Riveria Commercial Developers v. UOI*** [TS-1014-HC-2019(DEL)-NT], ***Bamboo Hotel & Global Centre (Delhi) Pvt. Ltd. v. UOI*** [TS-963-HC-2019(DEL)-NT], ***Delhi International Airport Ltd. v. UOI and others*** [TS-584-HC-2020(DEL)-NT], ***DLF Cyber City Developers Ltd. v. Union of India and Others*** [TS-1104-HC-2019(P and H)-NT]

³ A similar position has been established in the cases of ***Essar Power Gujarat Ltd. v. Union of India (R/Special Civil Application No. 1417 of 2020)***, ***Gokul Agro Resources Ltd. v. Union of India*** [TS-212-HC-2020(GUJ)-NT]

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outside India up to the customs station of clearance in India. The Notifications were introduced based on representations received from Indian shipping industry to provide a level playing field to Indian shipping lines.

Under Section 9(3) of the CGST Act, only a recipient of service can be vested with the liability to discharge service tax. The term 'recipient' has to be interpreted literally. In case of carriage Contracts, on CIF basis, can the importer of goods into India be said to be recipient of ocean freight services? Especially in cases where, the shipping services have been availed by the exporter (seller outside India) and importer does not have any role to play. The decision analysed and interpreted that the transaction of ocean freight service by foreign shipping line is neither an inter-State nor intra-State supply as per IGST Act.

It is of great essence to understand that Ocean freight has already suffered IGST as a part of value of goods imported. Dual levy of IGST cannot be imposed by now treating it as separate supply of service. The High Court has corrected the anomaly of double taxation in **Mohit Minerals case (supra)** by thereby holding that the Notifications levying GST on ocean freight as a separate supply would be unconstitutional.

From an analysis of the judgments carried out above, it is clear that the constitutional principles have played a major role to benefit tax payers against the interpretation of GST law to a great extent.

Conclusion:

Most businesses in today's competitive world operate on narrow margins where every possible saving opportunities, especially in the nature of effective and efficient availability of ITC is critical to sustain the viability of their operations. Issues discussed above detrimentally impact not only the growth prospects of businesses but also the ongoing sustenance. It is therefore eagerly urged and also the need of the hour is that the government steps in at an early stage to bring about clarity on these issues with a benign perspective towards the businesses. This is very much achievable in the GST regime where the government stands to garner larger revenue with every further value addition in the chain of transactions, and therefore is responsible for granting credit/refund of every kind of input tax borne by businesses. This will go a long way in bringing about positive reinforcements in relation to:

- i. Clarity as to the tax position to be adopted by businesses;
- ii. Instilling of a credit mechanism which reflects the true flow through of credits;
- iii. Facilitate businesses in focusing on the conduct of their operations rather than tax planning and litigation;
- iv. Make India an attractive investment destination.





CONSUMER PROTECTION ACT, 2019 AND ITS INTERPLAY WITH GST

The following chapter has been authored by Stella Joseph (Associate Partner) and Niraj Hande (Associate Manager) - ELP

Consumer Protection Act, 2019 and its interplay with GST

In recent years, one can witness the Indian Government's inclination to imbibe international principles and practices – whether it is the adoption of various recommendations under the BEPS Action Plans of the OECD or the introduction of the Personal Data Protection Bill, 2019 etc. Two prominent examples of such efforts are the introduction of Goods and Services Tax ("GST") w.e.f. 1st July, 2017, resulting in a unified taxation regime in the country, and the recent enactment of the Consumer Protection Act, 2019 ("CPA"), the provision of which became effective from July, 2020.

The enactment of CPA is aimed to replace the more than two decades old Consumer Protection

Act in India, effectuated through the Central Goods and Services Tax Act, 2017, respective State Goods and Services Tax Act, 2017 and the Integrated Goods and Services Tax Act, 2017 (collectively "**GST laws**"), has also been inspired by Value Added Tax / GST structure of some major world economies.

While it may not be generally perceived that GST laws and the CPA impact similar areas, there does exist certain interplay between GST and the recently notified CPA and this article seeks to dwell upon such interplay.

Before discussing such interplay, it is worthwhile to introduce key concepts and changes under the CPA, as compared to its predecessor, the COPRA:

(1) Unfair contract: The concept of 'unfair contract' did not *per se* find mention under the COPRA (though the Hon'ble Supreme Court, in *Pioneer Urban Land & Infrastructure Ltd vs Govindan Raghavan*, had granted relief in case of one-sided contracts - between a builder and flat purchaser in that case). Now, under the CPA, there is an intention to, very clearly, cover such an instance of "unfair contract" and therefore a separate cause of action has been provided for in case of "unfair contract".

(2) Product liability: Through this concept, the liability is cast on the (original) 'product manufacturer', apart from the 'product seller' and 'product service provider', in case of a manufacturing defect/design deficiency etc. Importantly, a strict liability is cast on the 'product manufacturer', 'product seller' and 'service provider', such that he/she will be held liable even if it is proved that there was no negligence or fraudulent action while making express warranty of the product. This concept ultimately furthers the philosophy of *caveat venditor* i.e. "seller beware", rather than *caveat emptor* i.e. "buyer beware" which has ruled the mindset of the judges for several years in the past.



Act, 1986 ("**COPRA**"), in order to update from the perspective of technological advancements and introduce concepts which would provide more ammunition for consumers to bring to task sellers/suppliers in cases where their interests are subverted. In this process, it has also adopted concepts recognised in consumer laws of other countries, such as "product liability".

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(3) Establishment of the Central Consumer Protection Authority ("CCPA"): Under the CPA, a new authority i.e. the CCPA has been established. This authority is to perform multiple roles – it can investigate cases (equipped with its own investigation wing), pass necessary orders against offenders and also advise as regards best practices sub serving the interests of the consumers. It is set up to look into three things specifically – enforcement of "consumer rights" (which is now a separately defined term), "unfair trade practice" (which is an umbrella term, covering wide nature of wrongful actions against the consumer), and "misleading advertisements" (which is discussed below). Importantly, the CCPA can take actions *suo moto* i.e. on its own, without a complaint being filed by any consumer, in case it feels that rights of consumers as a class/public interest is being impacted. Under the COPRA, there was no such regulator/body having the powers to take *suo moto* actions. Individual consumers had to fight their own battles, and many would shy away from incur such additional costs/inconvenience. Now, the CCPA is set to fight battles on behalf of the consumers, and this would give an added reason for business to be cautious and compliant. Further, while dealing with a particular issue, should it deem fit, the CCPA can also notify other regulators who may also be concerned about the relevant issue. The CPA specifically recognises that action under the CPA is additional to actions under other statutes.

(4) Misleading advertisement: Until the CPA came into force, advertisements were monitored by the Advertising Standards Council of India ("ASCI"), which is a self-governing/non statutory body, and which has the authority to stop misleading advertisements. Now, under the CPA, the CCPA has been given the statutory powers to issue specific orders in relation to misleading advertisements. The CPA also casts liabilities on the endorsers of misleading advertisements. For this reason, endorsers may now require back-to-back indemnity from the business/advertisers.

(5) Catch-up with technology: Keeping in mind the changing times, "consumer" is defined to specifically include instances of sale done online, or through direct marketing, tele-shopping etc.

"Advertisement" is defined to include those made on the internet, websites, etc and thus "misleading advertisement" would be understood accordingly. The concept of "unfair trade practice" now also includes sharing of personal data given in confidence by the customer. Critically, the CPA also regulates e-commerce and e-commerce entities. In this regard, the Consumer Protection (E-Commerce) Rules, 2020 have also been notified, which cast specific obligations on the e-commerce entity as well as the suppliers using the service of e-commerce entity, including as regards various disclosures on the platform.

Interplay between CPA and GST

After examining the key concepts introduced under the CPA, we may now dwell upon the interplay between the CPA and the GST legislations:

(A) Subject matter under both legislations:

Both GST laws and the CPA cast statutory obligations on a supplier of goods/services. Section 1 of CPA specifies that the said Act "*applies to all goods and services*" and GST laws also categorise all supplies



as supplies of goods and services, while seeking to tax these. However, it is important to bear in mind that while GST covers all legs of the transaction including, B2B and B2C transactions, the CPA defines a "consumer" as a person who does not use goods/ services for commercial purpose, and thus only governs B2C transactions.

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(B) Impact of incorrect tax determination:

An important factor to be considered from the perspective of GST implications arising from advent of the CPA is whether the consumer will have any say in the tax rate to be charged by the supplier. It has sort of become an industry practice, especially in the B2C segment wherein suppliers usually opt to take a more conservative approach and charge the higher rate of tax (in cases of two or more competing entries under the Rate Notification). In such case, the issue that arises is whether the consumer has any action under the CPA. It requires consideration that the causes of action under the CPA such as "unfair contract" and "unfair trade practice", have been widely defined, and potentially therefore may cover instance of



wrongful determination of the tax element by the supplier. For instance, "unfair contract" is defined as *"contract .. having such terms which cause significant change in the rights of such consumer.."*. Similarly, "unfair trade practice" *inter alia* includes a trade practice, which for the purpose of sale of goods/ provision of service, adopts *"any unfair method or unfair or deceptive practice"*. These terms, if given a wide interpretation may include impact on price due to an incorrect determination of tax by the supplier. In this scenario, going by the past experience of authorities under GST in dealing with such cases (like the National Anti-profiteering Authority ["NAA"]), it will be a prudent approach to err on the side of caution. Hence, to avoid any subsequent issues, it is advisable that in case of two or more competing entries under the Rate Notification, a clarification is obtained from the jurisdictional GST Authority for Advance Rulings ("AAR"), and the rate be determined and charged accordingly.

(C) Issuance of "tax invoice" and maintenance of records:

Under GST, it is mandatory for the supplier to maintain certain documents and records - e.g. tax invoice, debit notes, credit notes and register containing details of purchase and sale etc. Needless to say, it is mandatory for the assessee to maintain such documents and records in a true and accurate manner. Under CPA, there also arises a similar requirement that the representation of the transaction with the customer is true and accurate and not deceiving/misleading. For e.g. 'advertisement' is widely defined to even include an invoice or any such documents. "Misleading advertisement is defined to include an advertisement which *"falsely describes such product or service"* or conveys a representation which would constitute as an 'unfair trade practice' and even an advertisement which *"deliberately conceals important information"*. Further, the inclusive limb of the definition of 'unfair trade practice' includes *"not issuing bill or cash memo or receipt for the goods sold or services rendered in such manner as may be prescribed"*. Even "deficiency" is defined to include *"deliberate withholding of relevant information"* to the consumer. Therefore, non-issue of a tax invoice containing all details prescribed under GST law, may result in violation of both the GST laws as well as the CPA.

(D) Power of CCPA to notify other regulators:

As mentioned above, the CCPA is vested with substantial powers to take actions against sellers found to be violative of the CPA, and a unique aspect in this regard is that where, after preliminary inquiry, the CCPA is of the opinion that the matter is to be dealt with by a Regulator established under any other law, it may refer such matter to the concerned Regulator along with its report. Under GST, the NAA is a body set up to look into the allegations of 'profiteering' by a particular seller. The CCPA, can, in its power, also inform the NAA of any instance of profiteering, which would then result in the NAA leading its own investigations against the seller.

From the perspective of the consumer, this would also mean that ultimately the consumer would have the power to ensure that the supplier complies with all applicable laws. While hitherto also under

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certain statutes, the consumer had powers to approach the regulator with complaints against suppliers, the instances of consumer exercising such powers were fewer, given the time and costs involved in pursuing legal proceedings. However, under the CPA, a consumer will be in a position to have a one stop solution for all his grievances against suppliers, viz. approaching the CCPA. As an illustration, in case a consumer faces a supplier, who as a practice, fails to issue tax invoice for supplies, the consumer may intimate about such practice to the CCPA. The CCPA, after undertaking its investigation into the complaint, in addition to other remedies available, can also approach the GST authorities with this specific complaint. The GST authorities can thereafter take action against the supplier and impose applicable penalty for making supplies without issuance of a tax invoice.

(E) Consequence of “Product liability action”:

As mentioned above, the concept of “product liability” has been newly introduced under the CPA. The term “product” has been defined to include *“any article or goods or substance or raw material or any extended cycle of such product, which may be in gaseous, liquid, or solid state possessing intrinsic value which is capable of delivery either as wholly assembled or as a component part and is produced for introduction to trade or commerce, but does not include human tissues, blood, blood products and organ”*. It therefore includes within its ambit both the finished goods as well as raw materials used during earlier legs of the transaction. Now, the CPA per se governs the last leg of the transaction with the ultimate consumer. However, since the concept of “product liability” been so widely defined, in order to mitigate risks of exposure under the same, it is likely the original manufacturer would re-negotiate the contractual terms with the distributors, specifically providing for indemnification in case where legal consequence under the CPA is cast on the manufacturer on account of an act of the distributor. The receipt of money by the manufacturer from the distributor on account of such indemnification may be liable to GST since it may be understood that the manufacturer was ‘tolerating an act’ of the distributor i.e. the negligent act which resulted in consequences for the manufacturer under CPA. Therefore, while re-negotiating the contractual clauses to cover risks against exposure under CPA, including that of a “product liability action”, one

needs to also be mindful of the exposure under GST in case such indemnification clause is invoked.

(F) Recall of Goods:

Another area of concern which may arise under the GST law on account of the enforcement of CPA is the availability of input tax credit (“ITC”) in respect of goods which are recalled.



In terms of Section 20(a) of the CPA, the CCPA has the powers to order recall of goods or withdrawal of services which are dangerous, hazardous or unsafe and ordering reimbursement of the prices of goods or services so recalled to purchasers of such goods or services. The powers of CCPA are in addition to the powers of the District Commission, State Commission and the National Commission to order such recall of goods.

As per Section 17(5)(h) of the IGST Act, ITC is not available in respect of *“goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples”*. Therefore, in case recall of goods, the issue that arises is whether the GST Department can require the supplier to reverse the applicable ITC availed in respect of inputs/ input services used for manufacture of such goods. It may be argued that even though the final goods are recalled, the inputs in that regard being still used *‘in furtherance of business’*, which is the primary requirement to avail ITC, and thus ITC should not be required to be reversed. However, it is possible that the GST department may take a contrary view on this aspect and require the taxpayers to reverse the applicable ITC availed in respect of goods/ services used for making such supplies.

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(G) Possibility of “class action”:

The CPA specifically recognises the right of the CCPA to initiate a class action, including enforcing recall, refund and return of products when necessary, to prevent detrimental effects to the consumer's interests. Therefore if any practice followed by the supplier of goods/ services qualify as violating consumer rights, or unfair trade practice or misleading advertisement, which in terms of the above analysis could include a violation under GST laws, then one needs to be mindful of the fact that such violation may also result in a class action by the CCPA, if such practice has impacted a section/ class of the consumers.

after applying discount rate has been viewed as 'unfair trade practice'. Therefore, while deciding about depiction of GST on tax invoice and other representation, one needs to ensure compliance of legal requirements, both from the perspective of GST laws as well as the CPA. In cases where GST is to be charged on the discounted value, it is prudent to legibly indicate on the advertisement/ representation that the GST will be charged over and above the discounted rate. Ideally, businesses should review their advertisements and representations, from the perspective of depiction of the GST element vis-a-vis the discounted price to ensure compliance under CPA.

To conclude:

How the above described aspects of interplay between CPA and GST would finally transpire, is something that needs to be seen, and also appreciated in the light of the fundamental divergence between the two legislations. Both the legislations are oriented towards promoting different objectives. GST laws are taxing statutes enacted to “make a provision for levy and collection of tax”, whereas the CPA has been enacted for “protection of the interests of consumers”. Stemming from this, the underlying rules of interpretation for both the enactments are different. The consumer courts, while interpreting the provisions of

the COPRA, have adopted liberal interpretations in a manner so as to further consumer rights and interests - and this approach will likely be adopted even while interpreting provisions of CPA. On the other hand, GST laws, like other taxing statutes, are required to be interpreted strictly and literally, and words are not permitted to be read into, unless the statute expressly provides for the same.

That said, the way the new CPA has been crafted, it certainly allows a lot of interplay (as discussed above) and thus there is a lot of scope for government agencies and authorities under both legislations to frequently exchange information and collaborate in its efforts. This would thus require businesses to make sure that they comply their statutory obligations under both the legislations so that an exposure under one does not result into exposure under the other.



(H) Depiction of GST in case of discounts:

Depiction of the GST element in an erroneous manner on various representations, including on the invoice, advertisements etc in a way which deceives the customer, could raise issues under the CPA. For instance, if the representations depict that a discount of “50% off” is offered, but when finally the customer is charged 50% discounted price plus GST, then such depiction may be understood to be qualifying “unfair trade practice”. Scope of ‘unfair trade practice’ is very wide and *inter alia* covers “publication of any advertisement for sale or supply at a bargain price, of goods or services not intended to be offered for sale or supply at the bargain price” and “misleading public about the price at which goods or services, have been or are, ordinarily sold or provided”. The consumer courts have in the past held that addition of GST separately



FROM THE BENCH - KEY JUDICIAL PRONOUNCEMENTS

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

Spotlight Case Law

1. Gujarat High Court in case of **VKC Footsteps India Private Limited vs Union of India [Special Civil Application No 2792 of 2019]**

Other Cases

2. Hon'ble Chennai Tribunal in case of **Commissioner of Service Tax, Chennai vs M/s Repco Home Finance Ltd. [Service Tax Appeal No 511 of 2011]**
3. Appellate Authority in case of **M/s Stone India**
4. Bombay High court in case of **Sotheby's Art Services (India) Private Limited vs Union of India and Others [Writ Petition No 100 of 2020]**
5. Madras High Court in case of **M/s P R Mani Electronics vs UOI & Ors [TS-531-HC-2020(MAD)-NT]**

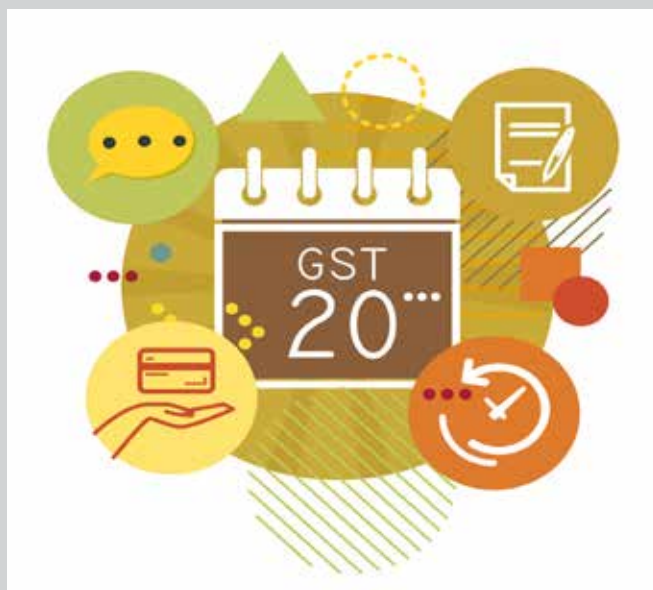
VKC Footsteps India Private Limited vs Union of India [Special Civil Application No 2792 of 2019]

Facts of the Case

- Petitioner is engaged in supply of footwear which attracts GST at the rate of 5%. It procures various inputs and input services, chargeable at 12% or 18%, and avails ITC thereon. Considering that the GST rate on inputs is higher than output, there is accumulation of unutilized ITC in electronic credit ledger of the Petitioner.
- Section 54(3) of the CGST Act provides for refund of 'any unutilized ITC' in such situations, also referred to as inverted duty structure. The term ITC has been defined under Section 2(63) of the Central Goods and Services Tax Act, 2017 ('CGST Act') as credit of input tax, which is defined under Section 2(62) as tax charged on goods or services or both.
- Rule 89(5) of the Central Goods and Services Tax Rules, 2017 ('CGST Rules') provides a formula for determining the refund of unutilized ITC on account of inverted duty structure. Vide Notification No. 21/2018-CT dated April 18, 2018 a revised formula was prescribed, which inter-

alia excluded input services from the scope of 'net ITC' for computation of the refund amount. This amendment was made retrospective w.e.f. July 1, 2017.

- Consequently, the refund on the ITC availed on input services was denied and refund of ITC availed on inputs alone was allowed. Thereafter, Circular No. 79/53/2018-GST dated December 31, 2018 was issued, which clarified that refund of tax paid on input services and capital goods as part of refund of ITC accumulated due to inverted duty structure was not admissible.
- Instant petition was filed to challenge validity of amended Rule 89(5) on the ground that it excludes input services from scope of refund, which is not only violative of Section 54(3) of CGST Act and Article 14 of the Constitution, but also against the basic tenet of GST law of avoiding cascading of taxes.



Ruling

- Hon'ble High Court observed that the formula prescribed in Rule 89(5) of the CGST Rules to exclude input service, is contrary to the provisions of Section 54(3) of the CGST Act, which provides for refund of **any unutilized ITC**.

FROM THE BENCH - KEY JUDICIAL PRONOUNCEMENTS

- Relying on various judicial precedents, Hon'ble High Court held that the Rule which goes beyond statute is *ultra vires* and liable to be struck down.
- Thereby, the High Court read down the Explanation (a) to Rule 89(5) and held that the **Net ITC** as defined therein should mean ITC availed on **inputs** and **input services** as defined under the Act. The Petition was allowed & Respondents were directed to allow the refund accordingly.

ELP COMMENTS

- The judgement is premised on various settled principle, the key ones being (i) Rules are subordinate to the Act; (ii) Equality before law; and (iii) in the event of conflict concerning a beneficial statute, the statute must be read to maximize the benefit so accorded or intended. The thought-provoking question asked, whether the law makers did not know this?
- It is commonly known that various assessees across the country are facing the issue of accumulation of credit on account of inverted duty structure including qua Input services. The refund applications filed by such assessees have been rejected by the Authorities by relying upon the interpretation laid down in Circular No.79/53/2018-GST dated December 31, 2018. The judgment of the Hon'ble Gujarat High Court has far reaching impact in favour of the assessee and would, thus, significantly help in improving the cash flow in the ongoing difficult times of COVID – 19.
- It is also noteworthy that refund of inverted duty structure is also available to service sector engaged in supplying services at a concessional rate of GST.
- Following aspects need further deliberation:
 - a. How do assessee file claims now qua input services credit, for past period, since hurdled by limitation as well as inability to file supplementary claims (if any, as claim may have already been filed previously without considering input services).

The issue of limitation in case of lacunae in law scenario has very limited precedents and hence, that aspect too would be challenged on interpretational grounds.

b. Identical matter is also sub-judice before various other high courts and hence, outcome of those matters needs to be tracked. It is also a key to follow how the tax administration views this development given the materiality of the financial stakes involved.

c. News of retrospective amendments are already on the rise in this connection. While certainly an option with the GST council, it would be interesting to see the shape and form of such amendments, as and when, and also their legal tenability.

- It is recommended that the necessary filings, for refund claims, be done by the assessee sooner than later to minimize the procedural aspects as much as possible

CST Chennai vs M/s Repco Home Finance Limited [Service Tax Appeal No 511 of 2011]

Facts of the Case

- Banks and Non-banking financial companies (NBFCs) provide lending services to borrowers for an agreed period at an agreed rate of interest subject to the terms and conditions contained in the agreement. In a situation, where a borrower decides to close the loan before the stipulated period, the banks and NBFCs collect foreclosure charges, determined as a percentage of the outstanding principal amount, the rate of which may vary on the nature and period of loan cut short.



FROM THE BENCH - KEY JUDICIAL PRONOUNCEMENTS

- The dispute in this case involves levy of Service tax on such foreclosure charges levied by the banks and NBFCs during October 2004 to June 2007 under the head **banking and other financial services (BoFS)**. The issue cropped up in the context of an amendment made to the definition of BoFS on September 10, 2004 whereby the meaning of banking and other financial services was expanded to include 'other services, namely, lending...' vide addition of clause (ix) to the Section 65(12) (a) of the Finance Act.
- Due to the conflicting decisions of the Tribunal in *Small Industries Dev. Bank of India vs. Commissioner (I)* [2011 (23) STR 392 (Tri.-Delhi)] wherein it was held that Service Tax would not be leviable on such charges, followed by *HUDCO vs. Commissioner 2012 (26) STR 531 (Tri.-Ahmd.)* wherein it was held that Service tax would be leviable and again in *M/s Magma Fincorp Limited. vs. Commissioner*, wherein it was held that Service tax would not be leviable, the matter was referred to Larger bench (LB) of the CESTAT, constituted herein.

Ruling

- The Hon'ble CESTAT (**LB**) has held that foreclosure charges for pre-mature termination of loan taken from a bank or NBFC would not be liable to Service tax. While arriving at this conclusion, the LB observed that Service Tax is chargeable on a taxable service based on its value determined under Section 67 of the Finance Act, requiring a 'consideration' for the provision of a service.
- Relying on the definition provided in the Indian Contract Act, 1872, it was held that **consideration** must flow from the service recipient to the service provider and should accrue to the benefit of the service provider and has to necessarily be a consideration for the taxable service provided. Distinguishing between '**condition of a contract**' and **consideration for the contract**, the LB also held that the foreclosure charges are recovered

as **compensation** for loss in interest income or **expectations interest** arising out of disruption of service by the lender and do not represent **consideration**. This results in a unilateral act of the borrower in repudiating the contract and consequently breach of one of the essential terms of the agreement.



- The LB further held that the phrase **in relation to lending** cannot be so stretched to bring within its ambit even activities which terminate the activity. The foreclosure charges received are **damages** that the banks are entitled to when the contract is breached and are consequently, not liable to Service Tax

ELP Comments

- The ruling has elaborately stated the principle that merely because the clause relating to damage is featuring in a contract, it cannot be concluded that the party has been given an option to violate the contract. Thus, it is crucial to note that the event of foreclosure cannot be treated as an optional performance of a service. The principle enunciated vide the judgment may also be useful for the subsequent period covering declared services in the nature of liquidated damages.

FROM THE BENCH - KEY JUDICIAL PRONOUNCEMENTS

M/s Stone India

Facts of the Case

- Appellant filed an application for refund of INR 22,27,497 for the period of October to December-2017 under Section 54 of the CGST Act on account of unutilized ITC on export of goods and services without payment of Integrated Tax. Refund claim was rejected by the adjudicating authority on the ground that as per GSTR-3B, outward zero-rated supplies reflected by appellant was Zero.



- Being aggrieved by the order of the adjudicating authority, an appeal was preferred before the Appellate Authority on the ground that that dispute was only arising due to the fact that the Appellant had shown export sales in column 3.1 (c) other outward supplies (Nil rated, exempted) instead of column 3.1 (b) outward taxable supplies (zero rated). The details in GSTR-1 had been filed correctly.

Ruling

- The Appellate Authority relied upon the Circular No. 7/7/2017-GST, dated September 1, 2017, which has clarified that error committed while filing FORM GSTR-3B may be rectified while filing FORM GSTR-1 and FORM GSTR-2 of the same month. In the present case, the Appellant has committed an error in GSTR 3B by not furnishing the export value/sale figure in proper column

and did not file any corrected/modified GSTR-1 return of subsequent month for which the Appellant was required to do.

- If the Appellant has committed an error while submitting FORM GSTR 3B, the steps should have been taken to rectify the same. The corresponding column in the table thereto provides the step to be followed by the Appellant to rectify this error.
- In view thereof and the legal provisions, the Appellate Authority held that since the Appellant was required to rectify such omission or incorrect particulars in the subsequent return to be furnished for the month or quarter during which such omission has occurred and the same was not performed by the Appellant, the refund of the said amount is inadmissible

ELP Comments

- Considering the confusion during the introduction of GST and multitude of circulars issued to provide procedural clarity, Appellate Authority has indeed taken a strict position. Relief should be available especially in cases which involve minor procedural lapse. High Court, in various similar disputes, have ruled in favour of tax payer.

Sotheby's Art Services (India) Private Limited vs UOI and Others [Writ Petition No 100 of 2020]

Facts of the Case

- Petitioner was duly registered under the erstwhile Finance Act, 1994 for providing taxable services under business auxiliary services in terms of the provisions of the said Act.
- Upon introduction of GST regime, petitioner migrated and obtained registration. The petitioner had CENVAT credit balance of INR 47,96,627 as on June 30, 2017.
- The statutory time limit to file Form GST TRAN-1 was fixed as December 27, 2017 vide order dated November 15, 2017. Having filed the service tax returns and crystallized the amount of eligible CENVAT credit, the petitioner attempted to file Form GST TRAN-1, although belatedly but along with late fees, in order to carry forward and transition its balance CENVAT credit into the GST regime.

FROM THE BENCH - KEY JUDICIAL PRONOUNCEMENTS

- However, the petitioner was unable to file Form GST TRAN-1 on the GST portal. Therefore, according to the petitioner, it was unjustly precluded from filing Form GST TRAN-1 under the GST regime though it fulfilled the conditions prescribed by the proviso to Section 140(1) of the CGST Act read with Rule 117(1) of the CGST Rules.

Ruling

- Hon'ble High Court observed that it is settled law that there cannot be a time limit for transition of eligible CENVAT credit into the GST regime. It was submitted that the right to transition of CENVAT credit into the GST regime is an indefeasible right which cannot be curtailed by providing a time limit in terms of Rule 117(1) of the CGST Rules.
- In view of the legal provisions, the Court observed that on a conjoint reading of Section 140(1) read with Rule 117(1), *prima facie*, it appears that a person is allowed to carry forward CENVAT credit from the erstwhile regime to the GST regime by filing of Form GST TRAN-1.
- The Hon'ble High Court has held that a direction must be issued to the appropriate authority to consider the application filed by the petitioner for seeking to carry forward the accumulated CENVAT credit into the GST regime and acceptance of the petitioner's Form GST TRAN-1 in accordance with law.

ELP Comments

- In a similar petition filed prior to June 30, 2020, the Hon'ble Delhi High Court in **Rehau Polymers Private Limited [Order dated June 30, 2020 in WP(C) No. 3824/2020]** refrained from issuing any directions to the Department and noted that their decision in *Brand Equity Treaties Limited* (allowing filing of GST TRAN-1 till June 30, 2020) has been stayed by the Hon'ble Supreme Court. The Hon'ble Delhi High Court however observed that if the said decision is upheld later, the Hon'ble High Court would not be powerless to direct the Department to accept the Form GST TRAN-1 at such later point of time.

M/s P R Mani Electronics vs UOI & Ors [TS-531-HC-2020(MAD)-NT]

Facts of the Case

- Petitioner failed to carry forward unutilized transitional ITC to GST as its consultant could not upload the Form GST TRAN-1. The evidence thereof cannot be adduced. Thereafter, the Petitioner submitted a hard copy thereof on December 29, 2017. However, the entitlement to such transitional ITC was not affirmed.
- Section 140 of the CGST Act stipulates that the registered person is required to submit a return, within such time, and in such manner as may be prescribed for purposes of availing transitional ITC. The words **within such time** were not originally a part of Section 140(1) of the CGST Act and were introduced by the Finance Act, 2020 with retrospective effect from July 1, 2017. Rule 117 of the CGST Rules, prescribes the procedure and time limit of availing transitional ITC.
 - The Petitioner has challenged the vires of Rule 117 of the CGST Rules on the ground that the time limit prescribed therein is *ultra vires* Section 140 of the CGST Act & infringes Articles 14 and 300A of the Constitution, and also seeks permission to file Form GST TRAN-1 either electronically/manually to claim the transitional ITC.



FROM THE BENCH - KEY JUDICIAL PRONOUNCEMENTS

Ruling

- The Hon'ble High Court observed that Section 164 of CGST Act empowers the Government to make rules and to provide retrospective effect to rules. Consequently, by the amendment vide the Finance Act of 2020, the words **within such time** were introduced in Section 140, with retrospective effect from July 1, 2020, thereby conferring expressly the power to prescribe time limits in Section 140. Hence, Rule 117 of the CGST Rules is intra vires Section 140 of the CGST Act and not ultra vires.
- While arriving at its conclusion, the Hon'ble Court referred to the judgment of *Brand Equity Treaties v. UOI* [TS-256-HC-2020(DEL)-NT] [pending before the Hon'ble Apex Court], wherein the Petitioners have been permitted to file TRAN- 1 on or before June 30, 2020. However, considering that the said judgment was decided prior to the amendment to Section 140 of the CGST Act, the principle laid down was held to be not applicable.
- Accordingly, relying on the judgment of the Hon'ble Supreme Court in *Jayam and Company* [TS-330-SC-2016-VAT], ITC has been construed as a concession and the time limit for transitioning credit has been held to be mandatory and not directory. Consequently, the Petition was dismissed, and the Petitioner was not permitted to file Form GST TRAN-1 and claim the transitional credit, except for any dispensation granted by the authorities themselves.

ELP Comments

- The Hon'ble High Court of Madras has dissented with the views taken by the Delhi High Court in *SKH Sheet Metals Components & Brand Equity Treaties* and has essentially held that transitional credit cannot be availed disregarding the time-limit prescribed under Section 140 of the CGST Act read with Rule 117 of CGST Rules.





EXPERT SPEAK

Interview with Mr. Sabyasachi Ray Executive Director - The Gem & Jewellery Export Promotion Council

Interview conducted by Supreme Kothari (Associate Director) - ELP

- The gems and jewellery industry ('GJI') has always been considered as one of the most sensitive sectors and has often been handled differently and concessionally, while taxing the same. However, under GST, it has largely been treated at par with other sectors. Considering that the sector has had to cover a lot of ground, how difficult and complicated an exercise was this? Has the dust finally settled?

We as a sector are not very amenable to this 'sensitive' tag. Our industry typically comprises of small businesses, artisans, intermediaries, who lack the necessary wherewithal to operate in a complicated tax environment. Also, the products being of very high value in nature, the taxation, in percentage terms, was always on the lower side, for obvious reasons. The onset of GST did create a lot of anxiety in the industry with its rates and paraphernalia of intricate rules. The initial days of GST were certainly challenging for every segment within the GJI, as well as every participant in the value chain. As a Council, since we were inundated with queries from members, we also had to seek professional

help to engage with the Government and the industry at large to address the situation. Three years into GST, we can certainly proclaim with pride that we have been able to tide over and adapt to the situation.

- A key component of the GJI are participants who, while extremely skilled, lack competence to comply with tax laws, and hence have enjoyed exemption under the erstwhile regimes. How has the Council helped them to cope with GST and what has been the progress so far?

Fortunately, we initiated the exercise of helping our members to adapt to GST (and its implications for our sector) well ahead of time. We engaged with professionals prior to introduction of GST, to understand and regularly advise and guide our members. They toured all key regions within the country, interacted with the members (ranging from big firms to the smaller traders), and assisted the GJI in carrying out a comprehensive analysis of the erstwhile tax regime vis-à-vis GST. The above exercise equipped us to pre-empt challenges that would emerge under GST and

thus also customize our GST material, meant for members, and make it more relevant. Post GST, we continued our engagement with the members and grassroots level workers of the Indian gem & jewellery industry by reaching out to participants across the value chain and conducted training sessions/ seminars, workshops, prepared FAQs for members in English as well as in other local languages, operated helpdesks, etc. In a nutshell, we did everything possible, to the best of our abilities, to be of assistance to our members and other stakeholders of the industry, especially those lacking requisite skills, to enable a smooth transition into GST.



EXPERT SPEAK

- **The first major incident of seizure under GST pertained to the GJI. Was it premature and should the industry have been given more time to adapt to the GST environment and documentation thereunder? What were the learnings?**

It's a tricky question. As a reasoned and informed individual, I would say that the specific incident could have been avoided had the basic documentation been followed, by the industry participants, and on that count, there ought not to be any excuses. But as a person who knows and is aware of the pulse of this sector and their tax compliance competencies, I hope that the authorities had given them some warning or a little more time to adapt to the GST environment. However, in hindsight, the said incident also acted as an eye-opener for the sector. We took it up to educate hundreds of operators in the industry with the help of professionals which transformed the level of compliance within the sector once and for all.

- **Which aspects of GST have largely benefited the sector? Will steps towards creating more transparency and formalizing the value chain benefit the sector in the long run, especially by shedding misconceptions around it?**

The focus of GST has been to formalize all transactions in the value chain and create a robust transaction trail. GST has thus accelerated the process of making India's GJI more organized and transparent. To my mind, introduction of GST and coverage of all participants of the GJI sector within its fold would go a long way in according the much-needed credibility to this sector as also reconfirm the sector's commitment to GST compliance.

- **As a Council, you must have had frequent interactions with the administration on sticky industry issues. Has there been a visible shift in the way authorities have approached this, pre and post GST?**

Fortunately for us, so far, the Government has been extremely supportive and has resolved most of our issues promptly. We take this

opportunity to congratulate the Government for being extremely receptive towards the genuine needs/ challenges of our industry whenever the same has been brought to the notice of the Government. Even under the pre-GST regime, we had a good experience in the course of our interaction with the Government authorities and wherever the nature of issues being represented were genuine and practical, the Government had been generous enough to grant an appropriate relief. We are currently working with the authorities on certain issues which are unique to our sector and hopefully the same will be resolved soon.

There is a proposal to bring the products of GJI within the e-way bill net, and the same is under consideration. What are your thoughts on this?

Yes, we are aware that there have been discussions on the proposed implementation of the e-way bill requirements on the GJI as concerns were raised in respect of suspected tax leakages in the revenue accruing to the exchequer. In course of deliberations at the 37th GST Council Meeting held on 20th September 2019; the GST Council constituted a group of ministers to examine the feasibility



EXPERT SPEAK

of extending the e-way bill requirements to the GJI. We strongly espouse that the GJI should not be brought under the ambit of e-way bill compliance as it would go against the very essence of the Lahiri Committee report on excise and its implementation. In our opinion it is not possible to implement e way bill in our sector as it will completely disrupt the free flow of raw materials and finished products within the industry. It also has the potential to give rise to widespread and unnecessary litigation creating disruption in the entire transactional pattern within the industry and put at risk the livelihood of lakhs of daily wage earners, employed with the industry. In this regard, the Council has also made a representation before the relevant authorities.

- **Significant subsisting pain points for the GJI under GST, if any?**

While there certainly are certain subsisting issues, the most significant of them is the issue pertaining to accumulation of input tax credit. Effective 25th January 2018, the rate of GST on cut and polished diamonds and gemstones was reduced from 3% to 0.25%, whereas the GJI continued to incur GST @5%, and now @1.5%,

on job work charges)/18% on other service procurements (including certification charges, bank charges, commission etc.).

This has inevitably led to a situation where there is a huge accumulation of ITC, as regards transactions in the domestic stream. This situation never arose under the pre-GST regime, considering that at various stages of value addition, there was an exemption from the levy of Central taxes or the same were rebatable. As regards the State taxes, uniform rate was applicable on input and output. The benefit of GST refund, owing to inverted duty structure, in terms of Section 54 of the CGST Act, purportedly being restricted only to inputs, does not apply to input services. The GJI is therefore grappling with the issue of huge ITC accumulation. The participants operating in the domestic stream have, in most cases, resisted from passing on the cost thereof in its pricing till date. However, if this issue is not addressed, the ITC cost will be passed on in the pricing. Considering that these domestic transactions are generally undertaken in the export value chain, the burden on pricing would make exports in this sector uncompetitive. We are in discussion with the authorities to get this issue addressed.



LEGISLATURE AT WORK - RECENT AMENDMENTS

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

Recent Amendments

Updates in relation to certain compliances under Goods and Services Tax (GST) law

- Rule 67A of Central Goods and Services Tax Rules, 2017 (CGST Rules) has been amended to enable furnishing of Nil Form GSTR-1 (Nil or no entry in any of the tables) through SMS, w.e.f. 1st July, 2020.⁴
- The due date for furnishing Form GSTR-4 (return to be filed by a person who has opted for composition levy) for FY 2019-20 was extended to 31st August, 2020 from 15th July, 2020.⁵ The CBIC has now extended the due date for the same to 31st October, 2020 from 31st August, 2020.⁶ Additionally, the offline utility to prepare Form GSTR-4⁷ has been introduced by the Goods and Services Tax Network (GSTN) and Frequently Asked Questions and User Manual has also been issued by the GSTN to facilitate preparation of the said return.

- Pursuant to the Removal of Difficulty Order No. 01/2020 – Central Tax dated 25th June, 2020, GSTN has enabled functionality in relation to revocation of cancellation of registration⁸.

- In line with the recommendation made by GST Council during its 39th meeting, an auto-drafted input tax credit (ITC) statement in GSTR-2B⁹ has been introduced with intent to reduce time taken in preparation of return, minimizing errors, assist reconciliation and simplify compliance relating to filing of returns. It will be generated every month for every registered person on the basis of the information furnished by his suppliers in their respective GSTR-1, 5 (non-resident taxable person) and 6 (input service distributor). It will be made available on the 12th day of the succeeding month. The key features of GSTR-2B are as follows:

- It contains information on import of goods from the ICEGATE system including inward supplies of goods received from Special Economic Zones Units / Developers (not available in GSTR-2B of July 2020; will be made available shortly)
- A summary statement which shows all the ITC available and non-available under each section is also present. The advisory given against each section clarifies the action to be taken by the taxpayers in their respective section of GSTR-3B
- Document level details of all invoices, credit notes, debit notes, etc., is also provided, both for viewing and download

GSTR-2B for the month of July 2020 has been made available on the common portal on trial basis.

- Two new tables have been inserted in GSTR-2A for displaying details of import of goods from overseas and inward supplies from SEZ units / SEZ

⁴ Refer Notification No. 58/2020 – Central Tax dated 1st July, 2020.

⁵ Refer Notification No. 59/2020 – Central Tax dated 13th July, 2020.

⁶ Refer Notification No. 64/2020 – Central Tax dated 31st August, 2020.

⁷ <https://www.gst.gov.in/newsandupdates/read/392>

⁸ <https://www.gst.gov.in/newsandupdates/read/390>

⁹ Refer Press Release dated 29th August, 2020 issued by the Ministry of Finance.



LEGISLATURE AT WORK - RECENT AMENDMENTS

developers.¹⁰ In light of the same, the taxpayers will now be able to view data in relation to bill of entries filed by them which is received by GSTN from ICEGATE System (Customs). Currently, the system does not contain import information of bills of entry filed at non-computerized ports (Non-EDI ports) and imports made through courier services/post office. The said data as well as information in relation to amendment made to bill of entries will be provided shortly.

Issuance of clarification on GST rate on alcohol-based hand sanitizers

- Sanitizers are disinfectants like soaps, anti-bacterial liquids, Dettol, etc., which all attract GST at the standard rate of 18%. Accordingly, it has been clarified that hand sanitizers as well as inputs for manufacture thereof, viz. chemicals, packing material and input services attract GST at the rate of 18%.¹¹
- Further, it has been stated that reduction in GST rate on sanitizers and other similar items would lead to an inverted duty structure and help imports become cheaper, which is not in consonance with the nation's policy of 'Atmanirbhar Bharat'.

Announcement of single State Code for merged Union Territory of Dadra and Nagar Haveli and Daman and Diu

- GST Council has decided to assign 26 as State Code to the merged Union Territory of Dadra and Nagar Haveli and Daman and Diu, w.e.f. 1st August, 2020.¹²
- In light of the above change in State Code, all existing taxpayers having GSTIN with UT Code 25 will be provided new GSTIN with UT Code 26 along with log in credentials via email sent to their primary Authorized Signatory.

Amendments in relation to e-invoicing mechanism

- Previously, registered persons whose aggregate turnover in a financial year exceeded INR 100 Crores, were notified as the class of persons required to prepare e-invoices in respect of B2B supply of services or goods, except for the following persons:
 - Insurers, banking companies, financial institutions, including a non-banking financial company



- goods transport agency supplying services in relation to transportation of goods by road in a goods carriage
- Persons providing passenger transportation services
- Persons supplying service by way of admission to exhibition of cinematograph films in multiplex screens

¹⁰ Refer Press Release dated 29th August, 2020 issued by the Ministry of Finance.

¹¹ Refer Press release dated 15th July, 2020.

¹² Refer Trade Notice No. 28/2020 – 21 dated 13th July, 2020 issued by UT Administration of Dadra & Nagar Haveli and Daman & Diu, Finance Department/Commissioner (UTGST), Secretariat, Daman.

LEGISLATURE AT WORK - RECENT AMENDMENTS

- However, vide **Notification No. 61/2020 – Central Tax dated 30th July, 2020**; the previously prescribed threshold limit of INR 100 Crores has been increased to INR 500 Crores. Accordingly, registered persons whose aggregate turnover in a financial year exceeds INR 500 Crores, have now been notified as the class of persons required to issue e-invoices for B2B supplies.
- Further, the exemption from complying with this requirement has now been extended to Special Economic Zone units as well.
- Additionally, CBIC has notified revised Form GST INV-01 which contains the format / scheme for e-invoices.¹³

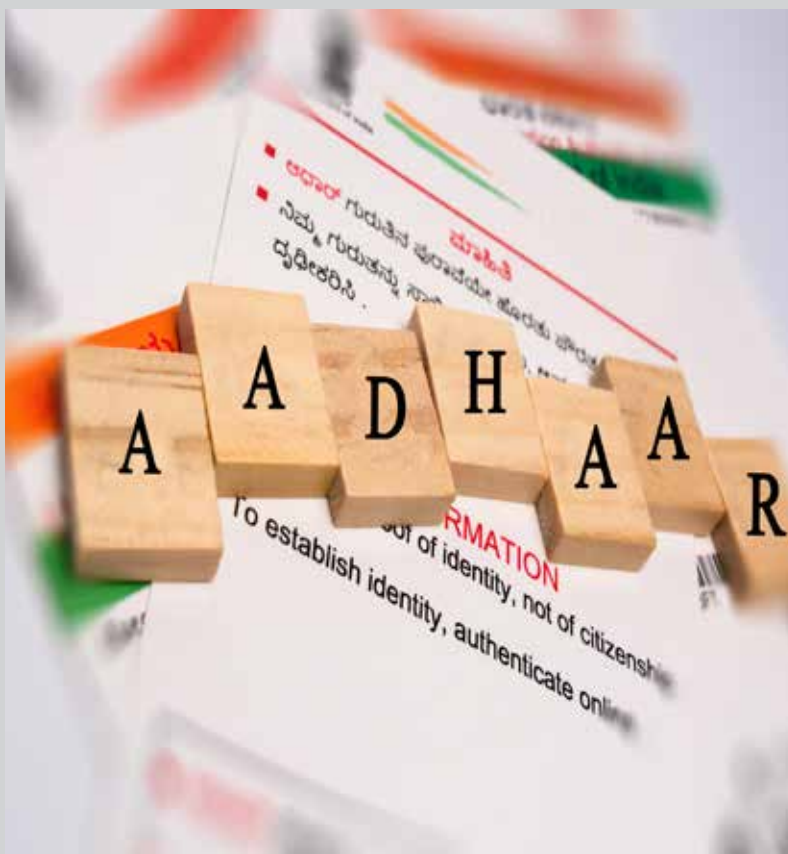
Notification of provisions of authentication of Aadhar number for registration

- CBIC has notified provisions in relation to authentication of Aadhar number by *inter alia* substituting Rule 8(4A) of CGST Rules w.e.f. 1st April, 2020, to provide that where an applicant for registration (other than a person notified under Section 25(6D) of Central Goods and Services Tax Act, 2017 (CGST Act)), opts for authentication of Aadhar number, the applicant will undergo authentication of Aadhar number while submitting the application w.e.f. 21st August, 2020, and the date of submission of the application in such cases shall be the date of authentication of the Aadhaar number, or fifteen days from the submission of the application in Part B of Form GST REG-01 under Rule 8(4) of CGST Rules, whichever is earlier.¹⁴
- Additionally, the proviso to Rule 9(1) of CGST Rules has also been amended w.e.f. 21st August, 2020 to provide that in the event a person (other than a person notified under Section 25(6D) of CGST Act) fails to undergo authentication of Aadhar number or does not opt for the same, the registration will be granted only after physical verification of the place of business in the presence of the said person, in the manner set out in Rule 25 of CGST Rules.

- Further, Rule 9 of CGST Rules has also been amended to expand the scope of instances in which the application for grant of registration will be deemed to be approved.
- The facility for authentication of Aadhar number has been enabled by GSTN.

Notification of date of enforcement of amendment to Section 50 of CGST Act

- Section 50 of CGST Act was amended vide Finance (No.2) Act, 2019 to provide that interest in respect of delayed payment of tax is to be levied on 'net cash liability'.
- The said amendment has been notified to be effective from 1st September, 2020.¹⁵
- In this regard, the CBIC has clarified that while the amendment has been made applicable prospectively, no recoveries will be made by the Central as well as State tax administration for the past period in respect of such interest paid by taxpayers.¹⁶



¹³ Refer Notification No. 60/2020 – Central Tax dated 30th July, 2020.

¹⁴ Refer Notification No. 62/2020 – Central Tax dated 20th August, 2020.

¹⁵ Refer Notification No. 63/2020 – Central Tax dated 25th August, 2020.

¹⁶ Refer Press Release dated 26th August, 2020.

ALLIED LAWS

The following chapter has been authored by Sachin Jain (Senior Associate) & Bhoomi Daffary (Associate) - ELP



Recent Developments

Amendment in Export Policy of Ventilators

- DGFT vide **Notification No. 23/2015-2020** dated 04.08.2020, amends Export Policy of Ventilators to the extent that all ventilators including any artificial respiratory apparatus or oxygen therapy apparatus or any other breathing appliance/ device are made '**Free**' for export.

Extension of date for filing online applications for export quota of August 2020, for PPE medical coverall for Covid-19

- DGFT vide **Trade Notice No. 24/2020-2021** dated 06.08.2020, states that in view of the unavailability of application filling facility during the timeline specified in the Trade Notice No. 18/2020-21 dated 20.07.2020, the time for filing online applications for PPE medical coveralls for the month of **August, 2020** has been extended till **08.08.2020**.

Clarity on Issuance of Advance Authorisations where export item is Gold medallions and coins or Gold Jewellery/ Articles manufactured by fully mechanised process

- DGFT vide **Notification No. 25/2020-2021** dated 10.08.2020, clarifies that Advance Authorisation shall not be issued where item of export is 'Gold Medallions and Coins' or 'Gold jewellery/articles manufactured by fully mechanised process'.

Initiation of Special Drive for disposal of un-claimed/ un-cleared/seized/confiscated goods

- Ministry of Finance (Department of Revenue) vide **Instruction No. 17/2020-Customs** dated 10.08.2020, has initiated Special Drive with effect from 11.08.2020 for complete disposal of all un-claimed/uncleared/seized/confiscated goods due for disposal by 01.08.2020 as per prescribed guidelines. The Special Drive continue till 15.09.2020.

Imposition of provisional Anti-Dumping Duty on imports of 'Black Toner in powder form'

- Ministry of Finance (Department of Revenue) vide **Notification No. 22/2020- Customs (ADD)** dated 10.08.2020, imposes provisional anti-dumping duty on import of "**Black Toner in powdered form**", falling under sub-heading 3707 90 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), originating in or exported from People's Republic Of China, Malaysia and Chinese Taipei for a period of six months.



Amendment in import policy conditions for import of various chemicals falling under Chapters 29, 38 and 39 of ITC (HS), 2017, Schedule - I (Import Policy)

- DGFT vide **Notification No. 26/2015-2020** dated 11.08.2020, amends the policy conditions for imports of various chemicals falling under Chapter 29, 38 and 39 of ITC (HS), 2017, Schedule - I (Import Policy) in the following manner:
 - Importer of Chemicals specified at Sr. nos. 1 to 15 of the Notification, needs to submit a copy of the Bill of Entry within 30 days to the Ozone Cell, Ministry of Environment, Forest and Climate Change, New Delhi.

ALLIED LAWS

- For Sr.no.4 of the Notification, i.e. Dichlorofluoroethanes, Import of HCFC-141b is prohibited except for feedstock application.
- For Sr. nos. 16 to 18 of the Notification, import of pre-blended polyol containing Group VI substances, including HCFC-141B, is not permitted as per Ozone Depleting Substances (Regulation and Control) Amendment Rules, 2014.

Amendment in Import Policy of colour television sets

- DGFT vide **Notification No. 22/2015-2020** dated 11.08.2020, amends the Import policy of colour television sets under HS code 8528 7211 to 8528 7219 from 'Free' to '**Restricted**'.

Extension of levy of Anti-Dumping Duty imposed on 'flax fabrics'

- Ministry of Finance (Department of Revenue) vide **Notification No. 23/2020- Customs (ADD)** dated 11.08.2020, extends the levy of Anti-



Dumping Duty for a further period of three months on import of "**flax fabrics**", falling under Chapter 53 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), originating in, or exported from the People's Republic of China and Hong Kong, imposed vide Notification No. 39/2015-Customs (ADD) dated 12th August, 2015.

- The aforesaid Notification shall hence remain in force up to and inclusive of **11th November, 2020**, unless revoked earlier.

Extension of levy of Anti-Dumping Duty imposed on Diketopyrrolo Pyrrole Pigment Red 254 ('DPP Red 254')

- Ministry of Finance (Department of Revenue) vide **Notification No. 24/2020- Customs** dated 14.08.2020, amends notification No. 41/2015-Customs (ADD) dated 17th August, 2015 to extend the levy of anti-dumping duty on imports of **DPP Red 254** originating in or exported from People's Republic of China for a period of **three months**.

Notification of the "Manufacture and Other Operations in Special Warehouse Regulations, 2020"

- Ministry of Finance (Department of Revenue) vide **Notification No. 75/2020- Customs (N.T.) and Circular No. 36/2020- Customs** both dated 17.08.2020, notifies the **Manufacture and Other Operations in Special Warehouse Regulations, 2020**.
- These regulations shall apply to - (i) the units that operate under section 65 of the Customs Act, 1962 or (ii) the units applying for permission to operate under section 65 of the Act, in a special warehouse licensed under section 58A of the Act.
- The Circular prescribes the procedure to be followed in cases of manufacturing or other operations undertaken in special warehouses under Section 65 of the Customs Act, including application for seeking permission under Section 65, provision of execution of the bond and security by the licensee, receipt, storage and removal of goods, maintenance of accounts, conduct of audit etc.

Amendment in export policy of textile raw material for masks & coveralls

- DGFT vide **Notification No. 28/2015-2020** dated 18.08.2020, amends export policy of textile raw material for masks and coveralls. It modifies the Notification no. 18 dated July 13, 2020 clarifying that only melt blown fabric of any GSM exported against specified HS codes mentioned in the Notification shall continue to remain under prohibition from export
- DGFT allows **free export** of all other non-woven fabrics of any GSM including of GSM 25-70 which were earlier prohibited.

ALLIED LAWS

Extension of Deferred Payment of Customs Import Duty to Authorised Public Undertakings

- Ministry of Finance (Department of Revenue) vide **Notification No. 78/2020-Cus (NT) and Circular No. 37/2020-Customs**, both dated 19.08.2020, prescribes extension of the benefit of deferred payment of Customs duty benefits for Authorized Public Undertakings.
- The facility of deferred payment of Customs import duty shall be governed by the Deferred Payment of Import Duty Rules, 2016, as amended. It is expected that the extension of this facility to the Authorised Public Undertakings shall expedite the Customs clearance of their imported goods at the Ports/Airports/ICDs.
- The Circular further specifies the procedure in detail for availing such facility.

Notification of the "Customs (Administration of Rules of Origin under Trade Agreements) Rules, 2020"

- Ministry of Finance (Department of Revenue) vide **Notification No. 81/2020- Customs (N.T.) and Circular No. 38/2020-Customs**, both dated 21.08.2020, notifies the Customs (Administration of Rules of Origin under Trade Agreements) Rules, 2020 ("CAROTAR") effective from **September 21, 2020**.
- It prescribes the guidelines regarding implementation of Section 28DA of the Customs Act, 1962 and CAROTAR, 2020 in respect of Rules of Origin under Free Trade Agreements and verification of Certificates of Origin.
- It is pertinent to note that CAROTAR 2020 provides a form containing the list of basic information which an importer is required to obtain while importing goods under a claim of preferential rate of duty.
- The Circular also states that in case of any doubt as to the country of origin of the goods, information should first be sought from the importer before initiating verification with the partner country.

Amendment in Export Policy of Personal Protection Equipment / Masks

- DGFT vide **Notification No. 29/2015-2020** dated 25.08.2020, amends Notification No. 21 dated 28.07.2020, to the extent that the export policy



of 2/3 Ply Surgical masks, medical coveralls of all classes and categories (including medical coveralls for COVID-19) is amended from "Restricted" to "**Free**" category and these coveralls (including gowns and aprons of all types) are now freely exportable.

- Medical goggles continue to remain in restricted category with monthly quota of 20 Lakh units and Nitrite/NBR gloves continue to remain prohibited.
- The export policy of N-95/FFP2 masks or its equivalent masks is revised from "Prohibited" to "**Restricted**" category. A monthly export quota of **50 lakh units** has been fixed for N-95/FFP2 masks or its equivalent, for issuing export licenses to eligible applicants as per the criteria, which is yet to be separately issued in a Trade Notice.

Policy on re-validation to export authorizations for Special Chemicals, Organisms, Materials, Equipment and Technologies ("SCOMET") items

- DGFT vide **Trade Notice No. 26/2020-21** dated 31.08.2020, grants extension of **six months**, as a one-time relief for all SCOMET export authorizations involving technology transfer expiring by **September 30, 2020** on submission of prescribed application.

ALLIED LAWS

- It must be noted that going forward, the validity for SCOMET export authorizations for transfer of technology/software under any category of SCOMET will be **24 months** only or the validity period of export authorization allowed in terms of Para 2.16 of HBP of [FTP 2015-20](#).

Issuance of Preferential Certificate of Origin ("COO") for India's exports to Thailand under ASEAN-India FTA

- DGFT vide **Trade Notice No. 23/2020-2021** dated 31.07.2020, informs that w.e.f. **01.08.2020**, the COO applications for exports from India to Thailand under ASEAN-India FTA should be submitted through the e-COO Platform by the exporters to the designated issuing agencies i.e.



EIA, MPEDA and Textile Committee. No physical/manual application for a CoO would need to be submitted from the aforementioned date. However, manual applications submitted prior to the given date may be processed and COOs will be issued by the designated agencies.

Procedure and Criteria for submission and approval of applications for export of 2/3 Ply Surgical masks

- DGFT vide **Trade Notice No. 22/2020-2021** dated 30.07.2020, refers to DGFT Notification No. 21/2015-2020 dated 28.07.2020 restricting the export of 2/3 Ply Surgical Masks and fixing the export quota of **4 Crore 2/3 Ply surgical masks** units per month.

- DGFT further lays down the procedure and criteria for export of 2/3 Ply Surgical Masks in the aforesaid Trade Notice.

Procedure and Criteria for submission and approval of applications for export of Medical Goggles

- DGFT vide **Trade Notice No. 21/2020-2021** dated 30.07.2020, refers to DGFT Notification No. 21/2015-2020 dated 28.07.2020, restricting the export of medical goggles and fixing the export quota of **20 Lakh units of Medical Goggles units per month**.
- DGFT further lays down the procedure and criteria for export of Medical Goggles in the aforesaid Trade Notice.

Procedure and Criteria for submission and approval of applications for export of Diagnostic Kits

- DGFT vide **Trade Notice No. 20/2020-2021** dated 30.07.2020, refers to DGFT Notification No. 09/2015-2020 dated 10.06.2020, restricting the export of Diagnostic Kits/Laboratory Reagents/Diagnostic Apparatus.
- DGFT further lays down the procedure and criteria for export of Diagnostic Kits.

Imposition of provisional Anti-Dumping Duty on imports of "Aniline or Aniline oil"

- Ministry of Finance (Department of Revenue) vide **Notification No. 20/2020- Customs (ADD)** dated 29.07.2020, imposes provisional anti-dumping duty on imports of **"Aniline or Aniline oil"**, falling under tariff item 2921 41 10 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), originating in or exported from China PR for a period of six months.

Imposition of definitive Anti-Dumping Duty on import of "Digital Offset Printing Plates"

- Ministry of Finance (Department of Revenue) vide **Notification No. 21/2020- Customs (ADD)** dated 29.07.2020, imposes definitive Anti-Dumping Duty on import of **"Digital Offset Printing Plates"**, falling under sub-headings 8442 50 and tariff items 3701 30 00, 3704 00 90, 3705 00 00, 7606 11 90, 7606 91 90, 7606 92 90 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), originating in, or exported from People's Republic of China, Japan, Korea RP, Taiwan and Vietnam.

ALLIED LAWS

- The anti-dumping duty imposed under this notification shall be effective for a period of five years (unless revoked, superseded or amended earlier) from the date of imposition of the provisional anti-dumping duty, (i.e. 30th January, 2020) and shall be payable in Indian currency.

Further continuation of levy of Safeguard duty on imports of 'Solar Cells whether or not assembled in modules or panels'

- Ministry of Finance (Department of Revenue) vide **Notification No. 02/2020- Customs (SG)** dated 29.07.2020, seeks to continue the levy of Safeguard duty on imports of '**Solar Cells whether or not assembled in modules or panels**', falling under tariff items 8541 40 11 or 8541 40 12 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), for a period of one year.

Further amendment to export policy of Personal Protection Equipment ("PPE")/Masks

- DGFT vide **Notification No. 21/2015-2020** dated 28.07.2020, further amends the export policy of PPE/Masks. It '**Restricts**' the export of 2/3 Ply Surgical masks, Medical Goggles which were earlier '**Prohibited**', whereas makes export of Face Shields '**Free**'.
- A monthly export quota of 4 crore units per month and 20 lakhs units per month of 2/3 Ply Surgical masks and Medical Goggles respectively has been fixed for issuance of export licenses to the eligible applicants as per the criteria to be separately issued in a Trade Notice.

Mandatory Testing and Certification of Telecommunications Equipment ('MTCTE') regime

- Ministry of Finance (Department of Revenue) vide **Instruction No. 15/2020-Customs** dated 24.07.2020, in continuation to the office notification No. TEC/01/2017-TC dated 04.07.2019, has notified that testing and certification for the following Telecommunications equipment under Phase-II of MTCTE regime as provisioned in Indian Telegraph (Amendment) Rules 2017, shall be mandatory w.e.f. **1st Oct 2020**:

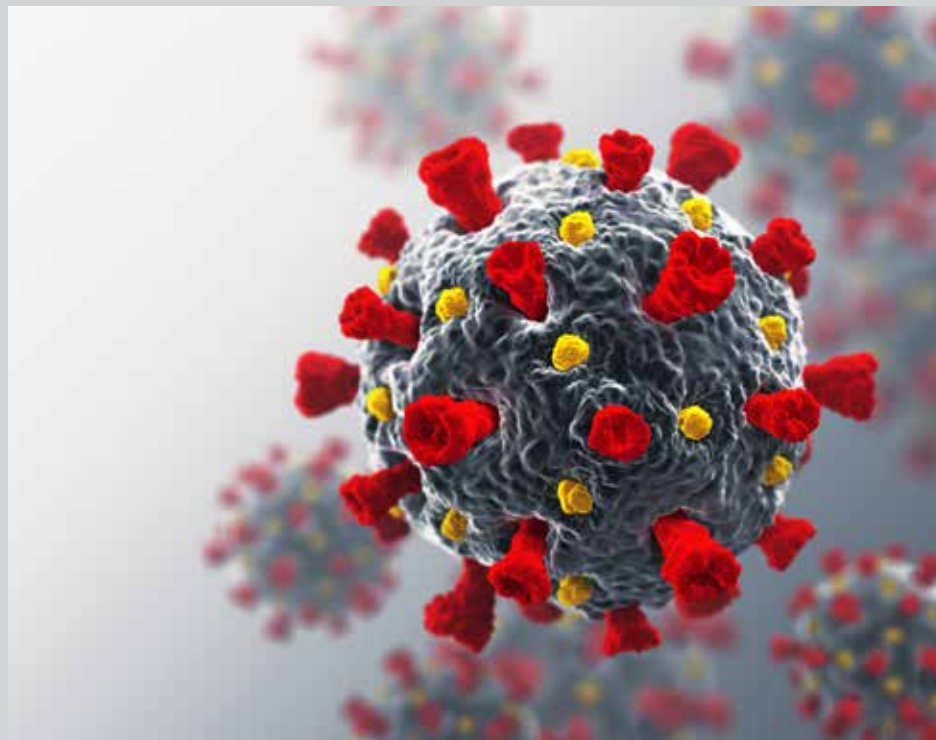


- Transmission Terminal Equipment (SDH Equipment, Multiplexing Equipment)
- PON family of Broadband Equipment (PON ONT, PON ONU and PON OLT)
- Feedback Device
- Applications for testing and certification of telecommunications equipment under phase-II of MTCTE, as mentioned in para I, shall be acceptable on MTCTE portal w.e.f. 25th June 2020.
- However, for sale, import or use of the aforesaid telecom equipment in India, such certification shall become mandatory w.e.f. 1st October 2020.
- It has been clarified that the schedule for mandatory testing and certification of remaining equipment shall be notified subsequently.

Amendment to export policy of PPE/Masks as (part of kits or as individual items)

- DGFT vide **Notification No. 20/2015-20** dated 21.07.2020, notifies amendment to the export policy of Personal Protection Equipment/Masks ("PPE") as (part of kits or as individual items) as "**Prohibited**", thereby modifying Notification no. 14 dated 22.06.2020.
- It clarifies that only surgical drapes, Isolation aprons, surgical wraps and X-Ray gowns are removed from prohibition under the medical coveralls of all classes and categories. It is pertinent to note that rest all other types of medical coveralls of all classes and categories shall remain prohibited.

ALLIED LAWS



- Accordingly, an initiative has been taken to institute a facility at the MyGov Innovate portal (<https://innovate.mygov.in/suggestions-for-review-of-existingcustoms/>) for all the stakeholders/public at large to provide their suggestions online. The last date to submit the suggestions is **21st August, 2020**.

Revised Procedure and Criteria for submission and approval of applications for export of PPE Medical Coveralls for COVID-19

- DGFT vide **Trade Notice No. 18/2020-2021** dated 20.07.2020, lays down comprehensively the revised application procedure and criteria for export of PPE Medical Coveralls for

COVID-19 and invites exporters to file fresh online applications for export of PPE medical Coveralls for COVID-19.

- It limits the export of only **50 Lakh units of 'PPE medical coveralls for Covid-19'** will be allowed every month, and states that the validity of the export license will be **3 months** only.
- An eligibility criterion that shall be applicable for issuance of Export licenses has also been prescribed.

Procedure to implement the restriction imposed on import of Power Tillers

- DGFT vide **Public Notice No. 13/2015-2020** dated 15.07.2020, in exercise of powers conferred under Paragraph 1.03 of the Foreign Trade Policy, 2015-2020 read with Paragraph 2.04 of the Foreign Trade Policy, 2015-2020, notifies the procedure to implement the restriction imposed on **import of Power Tillers (HS code 8432 8020 and 8432 9090)** as per Notification No. 19/2015-2020 dated 15.07.2020.
- It further states that the conditions and modalities for issuance of authorizations for import in detail.

Procedure for export of samples of PPE Medical Coveralls for COVID-19

- DGFT vide **Trade Notice No. 19/2020-2021** dated 21.07.2020, on receipt of several representations from the exporters seeking permission to send samples outside India for testing purpose/potential buyers etc, has decided to allow exporters to apply for export license to send samples of PPE medical coveralls for COVID-19.
- It also lays down the procedure for issuance of export license for sending samples of PPE Medical Coveralls for COVID-19.

Initiative announced to crowd source suggestions for review of existing Customs Duty exemption notifications

- Ministry of Finance (Department of Revenue) vide **Instruction No. 14/2020- Customs** dated 21.07.2020, refers to the Budget 2020-21 Speech of the Hon'ble Finance Minister wherein it was proposed to crowd source suggestions for review of Customs duty exemption notifications. It was also announced that suggestions would be invited in respect of the Customs laws and procedures for aligning them with the needs of changing times and ease of doing business.

ALLIED LAWS

Increment in rate of duty of customs on imports of "Polybutadiene Rubber"

- Ministry of Finance (Department of Revenue) vide **Notification No. 31/2020-Customs** dated 13.07.2020 amends Notification no. 152/2009 dated 31.12.2009, to increase the rate of duty of customs on imports of "**Polybutadiene Rubber**" originating in Korea RP and imported under the India-Korea Comprehensive Economic Partnership Agreement, to the level of Most Favoured Nation duty on the subject goods as on the date of application of the bilateral safeguard measure or Most Favoured Nation duty on the subject goods on the day immediately preceding the date of entry into force of the Trade Agreement, whichever is less, for a period of 200 days.

Amendment in Export Policy of textile raw material for masks and coveralls

- DGFT vide **Notification No. 18/2015-2020** dated 13.07.2020, amends Notification No. 52 dated 19.03.2020, to the extent that only nonwoven fabric of 25 to 70 GSM and melt blown fabric of any GSM exported against the HS codes specified in the notification is prohibited for export. All other non-woven fabrics with GSM other than 25-70 GSM are freely allowed for exports.

Extension of last date for re-import of cut & polished diamonds

- Ministry of Finance (Department of Revenue) vide **Notification No. 30/2020- Customs** dated 10.07.2020, amends the principal Notification No. 09/2012 - Customs dated March 9, 2012, as was last amended vide Notification No. 60/2017-Customs dated the June 30, 2017.
- The last date for re-import of cut and polished diamonds has been extended by three months, for those cases where the last date of such re-import falls between **February 1, 2020 and July 31, 2020**.

Imposition of Anti-Dumping Duty on imports of 'Steel and Fibre Glass Measuring tapes and their parts and components'

- Ministry of Finance (Department of Revenue) vide **Notification No. 17/2020- Customs (ADD)** dated 08.07.2020, levies definitive anti-dumping duty on imports of '**Steel and Fibre Glass Measuring tapes and their parts and components**', originating in or exported from People's Republic of China for a period of five years, payable in Indian currency.

Customs Formations to set-up Turant Suvidha Kendras

- CBIC vide **Circular No. 32/2020-Customs** dated 06.07.2020, with the aim to provide a 'Faceless, Contactless and Paperless' Customs administration, instructs all Principal Chief Commissioners of Customs/Chief Commissioners



of Customs to setup the Turant Suvidha Kendra (TSKs) in all Customs stations by **July 15, 2020**.

- It enables certain functionalities in ICEGATE which would reduce the need for physical interaction between Customs and trade and also speed up the Customs clearance process.
- These include registration of Authorised Dealer Code, Bank Accounts through ICEGATE, Automated debit of bond after Assessment and Simplified Registration of Importers/Exporters in ICEGATE.

ALLIED LAWS

- This step is being taken in the advance of the pan-India rollout Faceless Assessment, which would be done in phases to be announced soon.

Increment in the rate of duty of customs on imports of "Phthalic Anhydride"

- Ministry of Finance (Department of Revenue) vide **Notification No. 29/2020- Customs** dated 06.07.2020, initiated an investigation in terms of the India-Korea Comprehensive Economic Partnership Agreement (Bilateral Safeguard Measures) Rules, 2017 vide initiation notification under F.No.22/8/2019-DGTR, dated the 1st October, 2019 published in the Gazette of India, in order to determine whether the imports of "Phthalic Anhydride" from Korea RP constitute increased imports and whether the increased

imports have caused or are threatening to cause serious injury to the domestic industry.

- In view of the aforesaid investigation, it has recommended imposition of the provisional bilateral safeguard measure of increasing the rate of customs duty on subject goods originating in Korea RP imported under the Comprehensive Economic Partnership Agreement between the Republic of India and the Republic of Korea (hereinafter referred to as the Trade Agreement), to the level of Most Favoured Nation duty on the subject goods as on the date of application of the bilateral safeguard measure or Most Favoured Nation duty on the subject goods on the day immediately preceding the date of entry into force of the Trade Agreement, whichever is less, for a period of 200 days.





LEGAL CLASSICS

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

Commissioner of Service Tax, Chennai vs. M/s Repco Home Finance Ltd. (TS-506-CESTAT-2020-ST)

Introduction:

Taxation on services has undergone a major overhaul in the past few decades, from a few taxable services to the negative list regime under the erstwhile Finance Act, 1994, and presently is governed by Goods and Services Tax (GST). Considering the wide scope of "services" being brought under the ambit of tax, the law on the taxability of services has been ever evolving. One such issue which is yet not settled is whether damages recovered on breach of a contract can be equated with the "consideration" for service and leviable to service tax.

examination of the provisions of the Finance Act, 1994 and the Indian Contract Act, 1872 inter alia held that the foreclosure charges are nothing but damages which the banks are entitled to receive when the contract is broken and the said charges recovered cannot be said to be a consideration for services and accordingly not liable to service tax under the category 'banking and other financial services'.

The tests laid down in the above judgment may be equally relevant in the negative list regime and GST regime as it would aid in interpretation of taxability of penalties/damages received under breach of contract.

Decision in Repco Home Finance Ltd.

The assessee was engaged in the business of providing housing loans to its customers and had collected foreclosure charges from its customers for premature termination of loans. Service tax was not collected and paid by the Respondent on recovery of such foreclosure charges. It was the case of the Department that premature closure is a facility available to a borrower at a price in the same manner as a facility for availing a loan for a price and, therefore the activity would fall within the ambit of 'banking and other financial services' as defined under Section 65(12) of the Finance Act, 1994.

On the said issue divergent views were expressed by the Hon'ble CESTAT, Ahmedabad and Kolkata Bench in the case of Housing & Dev. Corporation Limited (Hudco) vs. Commissioner of Service Tax, Ahmedabad [2012 (26) STR 531 (Tri.-Ahmd.)] and M/s Magma Fincorp Limited. vs. Commissioner of Service Tax, Kolkata [2016 (4) TMI 21-CESTAT KOLKATA] respectively. The Ahmedabad Bench entertained a view that foreclosure charges are leviable to service tax whereas the Kolkata Bench held that foreclosure charges are not exigible to service tax.

Recently the Larger Bench of the Hon'ble CESTAT, Chennai in the case of **Commissioner of Service Tax, Chennai vs. M/s Repco Home Finance Ltd. (TS-506-CESTAT-2020-ST)** examined the issue of chargeability of service tax on foreclosure charges collected by banks and non-banking financial companies collected on premature termination of loan on which there were divergent views expressed by the two Division benches of the Hon'ble CESTAT. The Larger Bench on detailed



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It was inter alia argued by the assessee that foreclosure charges are not towards any 'consideration' for a service provided but to compensate the banks for breach of contract as the borrower seeks to make the payment before the agreed period of time. This premature payment of loan by the borrower is against the interest of the bank since the bank strives on the interest income received in lieu of the loans provided to its borrowers. Therefore, foreclosure charges cannot be deemed to be consideration for banking services. On the other hand, the main argument of the Revenue was that the termination of the loan prior to the agreed term is a facility available to a borrower at a price in the same way as other facilities are available to the borrower at a price. This activity, therefore, would be a service falling within the ambit of 'banking and other financial services' and leviable to service tax.

The Larger Bench of the Hon'ble CESTAT passed a detailed order taking into consideration the submission made by both sides inter alia held as under:

- i. As per Section 2(d) of Contract Act, the consideration should flow at the desire of the promisor. Thus, if the consideration is not at the desire of a promisor, it ceases to be a consideration. As premature termination of a loan results in loss of future interest income, the banks charge an amount for foreclosure of loan to compensate for the loss in interest income. Foreclosure is a unilateral act of the borrower in repudiating the contract and consequently breach of one of the essential terms of the loan agreement and may give rise to a claim for damages.

- ii. Consideration must flow from the service recipient to the service provider and it should accrue to the benefit of the service provider as per the terms agreed by the parties. A service recipient may be required to fulfil certain conditions contained in the contract but that would not necessarily mean that this value would form part of the value of taxable services that are provided.
- iii. Foreclosure charges are recovered as compensation for disruption of service and not towards 'lending' services. Foreclosure is, in fact, an antithesis to lending and therefore cannot be treated as activities 'in relation to lending'.
- iv. Foreclosure charges should not be viewed as 'alternative mode of performance' of the contract because they arise upon repudiation of specified terms of the contract and are intended to compensate the injured party banks and non-banking financial companies.
- v. Merely because the clause relating to damage is featuring in the contract, it would be incorrect to conclude that the party has been given an option to violate the contract. Hence, to treat eventuality of foreclosure as an optional performance is incorrect.

Provisions under the GST law:

Under the GST regime the term "consideration" has been defined under Section 2(31) of the Central Goods and Service Tax Act, 2017 ('CGST Act') as under:

"consideration" in relation to the supply of goods or services or both includes —

- (a) any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government;
- (b) the monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government :

LEGAL CLASSICS

Provided that a deposit given in respect of the supply of goods or services or both shall not be considered as payment made for such supply unless the supplier applies such deposit as consideration for the said supply

On a close reading of the said definition of consideration, it becomes amply clear that the findings given by the Larger Bench would be crucial even while determining the issue of taxability of penalty/damages under a contract in the GST regime.

The issue of chargeability of GST on damages, penalties, liquidated damages has already been raised before the Advance Ruling Authorities and the view expressed by the Authority so far in the facts and circumstances of the said cases

is that GST is chargeable on liquidated damages received under a contract¹⁷. Interestingly the said issue came up before the Hon'ble Bombay High Court in the case of Bai Mamubai Trust vs. Suchitra – 2019 SCC OnLine Bom 1854 wherein the question was whether GST is liable to paid by the Court Receiver in relation to the payments received from the defendant/plaintiff/third party in terms of a court order and the Hon'ble Court held that no GST is payable on the said transaction.

In view the above, the issue of GST required to be paid on foreclosure charges or charges which are in the nature of penalty, liquidated damages is far from resolved and it would be interesting to see how the ratio laid down in the Larger Bench ruling is applied to the cases under GST.



¹⁷i) Northern American Coal Corporation India Pvt. Ltd. - GST- ARA- 07/2018-19/B-63 dated 11.07.2018

ii) Maharashtra State Power Generation Company Ltd. - MAH/AAAR/ SS-RJ/09/2018-19 dated 11.09.2018



QUOTABLE QUOTES

1. "Green Shots visible, India will bounce back", says Niti Aayog CEO Amitabh Kant. (*Free Press Journal, Mumbai*)
2. GST regime may undergo 2 major reforms this year. (*Hindustan Times, Delhi*)
3. "Economy remains resilient even in these testing times" (*Indian Express, Delhi*)
4. "Economy may shrink by 14.2% in June quarter", says the Federation of Indian Chambers of Commerce and Industry (*Mint, Delhi*)
5. "IT consulting services provided to foreign clients liable to GST", states AAR of Tamil Nadu Bench (*Millenium Post, Delhi*)

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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.gststutra.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).

About ELP

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.

A full-service law firm, we actively seek to build, and nurture long-term relationships and our clients value us for providing practical, implementable and enforceable advice. Each project team is helmed by experienced professionals and partners with extensive domain knowledge and expertise, ably supported by some immensely talented and youthful professionals.

ELP has a unique positioning amongst law firms in India from the perspective of offering comprehensive services across the entire spectrum of transactional, advisory, litigation, regulatory, and tax matters. ELP's vision has always been people centric and this is primarily reflected in the firm's focus to develop and nurture long-term relationships with clients.