



NAVIGATING GST 2.0

- THOUGHT LEADERSHIP
- ROAD TO GST REFUNDS – TIME TO LEAP OVER IMPEDIMENTS AND CROSS THE FINISHING LINE
- FROM THE BENCH - KEY JUDICIAL PRONOUNCEMENTS
- EXPERT SPEAK
- LEGISLATURE AT WORK – RECENT AMENDMENTS
- ALLIED LAWS
- LEGAL CLASSICS
- QUOTABLE QUOTES

CONTENTS

THOUGHT LEADERSHIP	04
As the Government policies as regards International Trade are dynamic and fluctuating across the world, the author discerns about the Indian Export Incentives Scheme which form a part of the FTP which are aimed at subsidizing exporters and also highlights the global scenario.	
ROAD TO GST REFUNDS – TIME TO LEAP OVER IMPEDIMENTS AND CROSS THE FINISHING LINE	07
GST refunds has been the recurring and most disputed area not only in GST but was rooted in the erstwhile era as well. The authors analyse the refund mechanism and explain the governmental measures as regards maintenance of liquidity in the market.	
FROM THE BENCH - KEY JUDICIAL PRONOUNCEMENTS	14
This chapter pertains to the notable judgments and rulings of the Supreme Court, High Courts, Authority for Advance Ruling and Appellate Authority for Advance Ruling.	
EXPERT SPEAK	20
This Section contains excerpts from the Interview of Mr. Hemant Kadel (Senior President, Grasim Industries Limited)	
LEGISLATURE AT WORK – RECENT AMENDMENTS	23
This division covers all the amendments, clarifications or notifications which have been issued in respect of indirect taxes, government policies and other measures.	
ALLIED LAWS	27
This module involves recent developments in foreign exchange, MEIS, procedure of faceless assessment , restrictions and liberty made in export policies, clearance procedures, tax rates, etc.	
LEGAL CLASSICS	33
Emphasizing on one of the Landmark judgments pronounced in the pre-GST regime, this section shows how inference can be drawn from such a judgment and be co-related to be made applicable to the GST regime.	
QUOTABLE QUOTES	36
Showcases some interesting quotes from the Experts of GST	



INTRODUCTION

While the rock-bottom phase of our economy has begun retreating bit by bit, the Government has pulled up its socks on proposing various policies in public interest, more so, when recovery seems possible only through strategic measures. With the IMF gauging that India shall bounce back with an impressive GDP growth rate in 2021, it remains to be seen which wheels the Govt. would set in motion to bolster the growth rate further.

Given this context, we're glad to present the 9th Edition of our **GST Newsletter** where we outline all the recent developments in the GST and indirect tax world, including changes in policies, landmark judgments, Notifications and so on. In the **Thought Leadership** section, ELP Partner **Nishant Shah** takes us through the International Trade policies adopted by the Governments for amplification of cross border transactions and the export incentive schemes announced by the Indian Government time and again. Emphasizing on the recent Schemes i.e. the Rebate of State & Central Taxes and Levies (RoSCTL) and the Remission of Duties or Taxes on Export Products (RoDTEP), the author explicates that these are aimed at identifying and neutralizing taxes which aren't credited back to the exporters. The section further tabulates the conclusion arrived at by the WTO dispute panel as to how various exemptions/concessions are inconsistent with SCM Agreement.

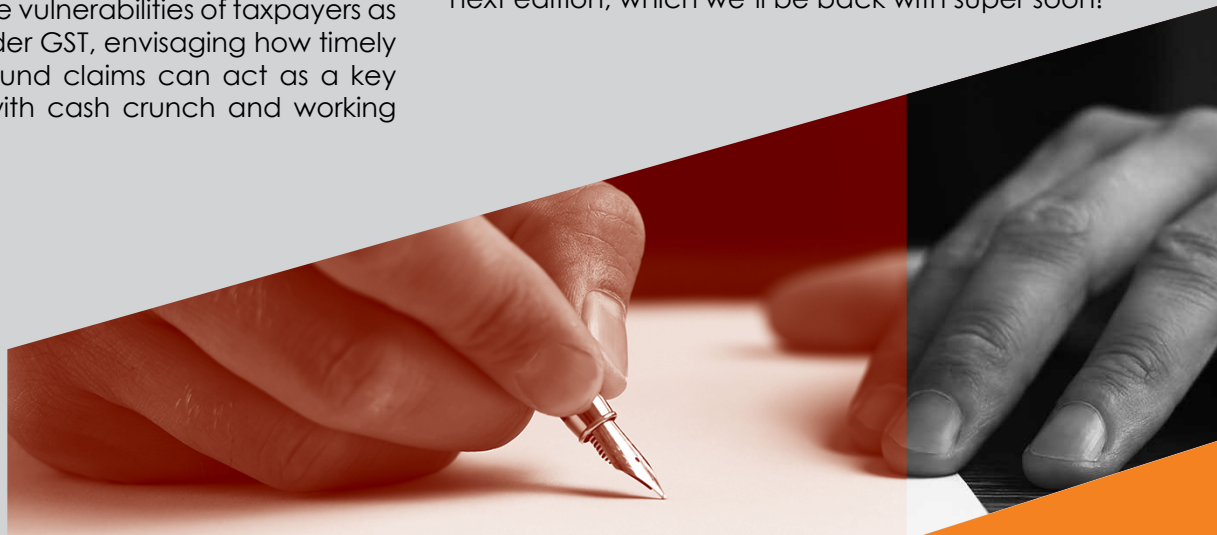
Recently, MNC back offices received a blow when they were denied GST refund on the premise that supplies to an entity's global parent don't amount to exports, this isn't a naïve milieu as refund has created ambivalence. In the **Cover Story** i.e. "Road to GST Refunds – Time to leap over the impediments and cross the finishing line", the ELP team brings forth the vulnerabilities of taxpayers as regards refunds under GST, envisaging how timely sanction of GST refund claims can act as a key measure to deal with cash crunch and working capital issues.

The module **From the Bench-Key Judicial Pronouncements** delineates latest noteworthy verdicts, orders, rulings and judgments of the Apex Court, High Courts, AARs and the Appellate Authorities. The **Expert Speak** section covers an intriguing interview with **Mr. Hemant Kadel (Senior President, Grasim Industries Limited)** who expounds that *"The next round of rationalisation should focus on bringing those sectors/ levies, which are currently outside the ambit of GST, such as petroleum products, electricity and other levies (e.g. stamp duty), within GST. If we want to achieve the 'One Nation, One Tax' concept, there should be no sector/levy, which is left outside the GST ambit"*.

Under the **Legislature at work – Recent Amendments**, the Newsletter covers all the amendments, updates, clarifications and modifications to the indirect tax statutes by the Government. The division titled **Allied Laws** focuses on the export policies and import restrictions on various articles, in addition to the recent developments in MEIS, procedure of faceless assessment, imposition of anti-dumping duty, clearance procedures, implementation of CAROTAR and more.

The section titled **Legal Classics** unravels a landmark judgment from the erstwhile Indirect Tax era which is still relevant in the GST regime for inference on judicial aspects and principles held therein, being a valued and beneficial precedent. And we call it a wrap with **"quotable quotes"** from some GST stalwarts!

We're sure our 9th issue of '**Navigating GST**' would be an enriching read for you. Stay tuned for the next edition, which we'll be back with super soon!





THOUGHT LEADERSHIP

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

International Trade and Export incentives

The last decade or at least the latter half of it has seen a significant reversal of policies adopted by the governments vis-à-vis international co-operation towards enhancement of cross-border trade. But in the era prior to that, with a view to promote exports and to ensure the global economic principle that only goods and services and not taxes are exported, incentive schemes to promote the country's exports were announced and introduced by most international exporting jurisdictions. At this point, it is important to understand and realise the fact that almost 164 countries are today part of the World Trade Organisation (WTO) and subject to various multi-lateral agreements signed by them, there at. These multi-lateral agreements regulate and restrict nations from announcing policies that are derogatory to the principles agreed therein. While prima facie the export incentive, subsidies / exemptions are targeted towards the neutralisation of tax cause, any attempt by nations to breach these limits or grant benefits in the nature of subsidies contingent upon export performance becomes questionable. In fact, The Agreement

on Subsidies and Countervailing Measures ("SCM Agreement") signed by countries at the World Trade Organisation articulates the do's and don'ts for the countries to abide by while announcing and implementing such export incentive schemes.

The Indian scenario

Various export incentive schemes form part of the 5-years-Foreign Trade Policy ("FTP") announced by the government from time-to-time. These schemes while being aimed at subsidizing exporters through neutralisation of tax cost are not necessarily structured to be refunding the exact amount of tax burden borne by the final product to be exported. The primary reason for this has been the multifarious indirect taxes applicable to businesses operating in India, the relevant legislation applicable in implementing these taxes do not necessarily have specific clause providing for a complete refund of taxes on exports. As a result some of these incentive schemes were subject matter of a WTO complaint filed by USA in March 2018. The WTO disputes panel after hearing all the matter has concluded as under:

Sr. No.	Alleged Subsidies challenged by USA	Conclusions of the Dispute Panel
1.	Exemptions from customs duties on importation under the EOU/EHTP/BTP	Inconsistent with SCM Agreement
2.	Exemptions from customs duties on importation under the EPCG Scheme	Inconsistent with SCM Agreement
3.	Exemptions from customs duties on importation and exportation, the exemption from IGST on importation, and the deductions from taxable income the SEZ Scheme	Inconsistent with SCM Agreement
4.	Exemptions from customs duties on importation under DFIS under certain conditions (numbered 10, 21, 36, 60(ii), 61 in Tariff Notification 50/2017 of Indian Customs)	Inconsistent with SCM Agreement
5.	Duty credit scrips awarded under MEIS	Inconsistent with SCM Agreement
6.	Exemption from central excise duty on domestically procured goods under the EOU/EHTP/BTP Schemes	Consistent with SCM Agreement
7.	Exemptions from customs duties on importation under DFIS scheme under certain conditions (numbered 28,32,33,101 in Tariff notification 50/2017 of Indian Customs)	Consistent with SCM Agreement

THOUGHT LEADERSHIP

While the Indian Government has appealed against the decision, actions are being made for amending/ modifying some of the schemes that are considered inconsistent with the SCM agreement.

Possible alternative: It is undoubted that every nation including India wants to enhance exports from its country. It is also undoubtedly clear that every nation should have policies to ensure that exports of goods and services are not burdened with local taxes. Typically, most indirect tax legislations have provisions to ensure re-imbursement / refund of tax burden borne on raw materials, manufacturing activities, rendition of services or other similar processes engaged in by businesses in the conduct of their export activity. Issues however arise when legislations do not clearly provide for such refund or there is lack of fungibility in the chain of transaction culminating in the manufacture of goods/services. The indirect tax legislations in India are currently facing a similar situation. Listed below are few instances of taxes borne but not directly creditable/ refunded to the exporter:

- (a) VAT on fuel used in transportation;
- (b) Local Mandi Tax paid on purchase of agricultural produce;

(c) Electricity duty;

(d) Water Tax;

(e) Coal Cess; etc.

The recent announcements by the Government of India as to The Rebate of State & Central Taxes and Levies ("**RoSCTL**") and the Remission of Duties or Taxes on Export Products ("**RoDTEP**") are the schemes in this direction and are aimed at identifying and neutralizing taxes that are not refunded or credited back to the exporters and the burden of which continues to be borne by the export of goods/services.

The Government is currently working with various sectors to identify such quantum of taxes so as to come-out with the appropriate RoDTEP rate that should be made available as incentives to exporters of various products, thereby replacing the currently prevalent MEIS scheme which has been held inconsistent with the SCM Agreement.

One wonders whether this is an issue unique to India or is also faced by other exporting nations. The genesis of the issue lies at the inability of indirect tax legislations to refund / reimburse taxes borne by exporters in the course of their undertaking exports. A number of developed nations have moved



THOUGHT LEADERSHIP

towards a single unilateral tax thereby making it easier to ensure full availability of credit/ refund of taxes borne in the exports of goods / services. Even after the introduction of GST (which has subsumed a number of erstwhile indirect taxes) in India, there continues to be situations for reasons highlighted hereinabove that do not fully compensate the taxes borne by exporters in the conduct of their operations. This in turn necessitates export incentive schemes to in parallel play the role of neutralisation from such burden.

The global scenario

We have also hereunder as a ready reference analysed similar situations existing in certain other jurisdictions similarly placed as India and how those countries have ensured neutralisation of tax burden borne by exporters while being consistent with the requirement of SCM agreement.

Brazil

Brazil like India has multifarious taxes applicable on domestic transactions of goods/services. Erstwhile

export incentive schemes operating in Brazil have also come under the WTO scanner and have been required to undergo modification. This over time has required the country to have multiple Drawback Schemes ensuring neutralization of tax burden borne under these multiple tax legislations.

South Africa

On the other hand, Export Promotion schemes in South Africa are structured to compensate exporters for the cost of developing these export markets. However, such assistance/compensation is discretionary and awarded by the implementing agency. Tax burden on export goods is dealt with by the relevant legislation.

Vietnam

Vietnam like India has schemes which allow tax free procurement/import of goods/services meant for re-export. However, unlike Brazil, the internal administration and bureaucracy at times leads to obstacles in the enjoyment / availment of benefits under this Scheme.





ROAD TO GST REFUNDS – TIME TO LEAP OVER THE IMPEDIMENTS AND CROSS THE FINISHING LINE

The following chapter has been authored by **Gopal Mundhra (Partner)** and **Ginita Bodani (Senior Associate)** - ELP

It is an incontrovertible fact that the ongoing pandemic and the abrupt nationwide lockdown brought the already slowing Indian economy to a grinding halt and amplified vulnerabilities of businesses which were already facing headwinds



owing to softening of demand in the domestic market and protectionist measures abroad. The increasing number of cases has caused adverse consequences on output, demand, consumer spending, consumption, investments, unemployment and financial stability.

To stimulate the COVID-battered economy, the Government of India announced several measures to boost liquidity for all sectors, more particularly the MSME sector. Furthermore, being wary of the fact that timely refund of taxes is essential to facilitate trade through release of blocked funds for working capital, survival and modernization of existing business, the Government vide press release dated 08.04.2020 had promised to release stuck up tax refund claims of Rs. 18,000 Crores immediately.

A timely sanction of GST refund claims can also act as a key measure to deal with cash crunch and working capital issues, therefore, businesses and taxpayers in India (more particularly in the prevailing conditions) ought to explore every possibility of the refunds that can be claimed by them under the GST law and proactively seek the

same from the Government without any delay. It thereby becomes important to understand and analyse the refund mechanism and relevant provisions contained in the CGST Act, 2017 and the rules made thereunder.

The legal as well as the procedural aspects of claiming refund under GST is embodied in Section 54 of the CGST Act and Rule 89 of the CGST Rules respectively. In terms of the said Section 54 of the CGST Act, refund may be claimed in respect of the following scenarios¹:

1. Refund on taxes paid on zero-rated supply of goods or services or both, which includes:
 - Exports on payment of tax; and
 - Supplies to SEZs units and developers on payment of tax.
2. Refund of accumulated Input tax credit ('ITC') on account of:
 - Export of goods or services or both made without payment of tax;
 - Supply of goods or services or both to SEZs units and developers made without payment of tax; and
 - inverted duty structure, where the ITC has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies.
3. Refund to supplier or recipient of tax paid on deemed export supplies.
4. Refund of taxes on purchase made by UN Organizations or institutions.
5. Refund arising on account of judgment, decree, order or direction of the Appellate Authority, Appellate Tribunal or any court.
6. Refund on account of finalization of provisional assessment.
7. Refund of pre-deposit.

¹ Refunds under GST, GST Flyers published by CBIC, updated as on 01.01.2018 and Circular No. 125/44/2019-GST dated 18.11.2019.

ROAD TO GST REFUNDS – TIME TO LEAP OVER THE IMPEDIMENTS AND CROSS THE FINISHING LINE

8. Refund of excess payment of tax.
9. Refunds to international tourists of GST paid on goods in India and carried abroad at the time of their departure from India.
10. Refund of tax paid on a supply which is not provided, either wholly or partially, and for which invoice has not been issued, or where a refund voucher has been issued.
11. Refund of CGST & SGST paid by treating the supply as intra-State supply which is subsequently held as inter-State supply and vice versa.
12. Refund of excess balance in electronic cash ledger.

Procedure for filing refund claims:

- Every claim of refund must be filed in Form GST RFD 1 along with the supporting documents on the common portal and the same shall be processed electronically except in some specified scenarios such as in case of refund of Integrated tax paid on goods exported out of India, where a shipping bill filed by an exporter is deemed to be an application for refund claim.
- Every application for refund ought to be filed before the expiry of two years from the "relevant date". The explanation to Section 54 of the CGST Act prescribes a distinct "relevant date" for distinct scenarios for claiming refund.
- The refund of accumulated ITC cannot exceed the ITC balance in electronic credit register or the amount as reflected in the Form GSTR-2A of the applicant.
- Barring the cases specified in Section 54(8), refund is subject to the principle of unjust enrichment, i.e., the applicant is entitled to claim refund only if the incidence thereof has not been passed to any other person.

The CGST Act lays down stringent timelines for granting of refund and Section 54(6) of the CGST Act provides that a taxpayer is entitled to provisional refund to the extent of 90 percent of



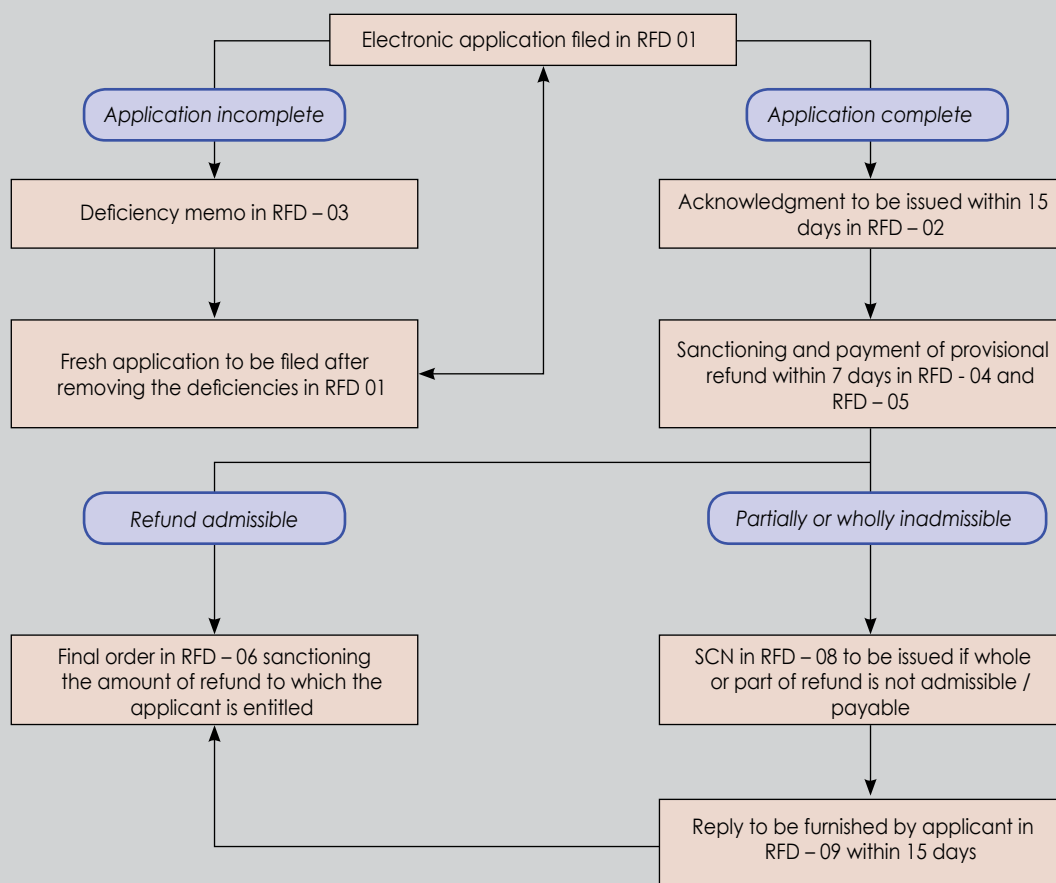
the amount claimed in respect of the zero-rated supplies made by them and that such provisional refund ought to be sanctioned within 7 days from the date of acknowledgement of the claim of refund.

The CGST Act further provides that in all cases, the refund is to be sanctioned to the taxpayer within 60 days from the date of receipt of application, failing which interest at the rate 6 percent / 9 percent would become payable in accordance with Section 56 of the CGST.

It is also pertinent to note that as soon as an applicant applies for refund of ITC lying unutilized in the electronic credit ledger, a debit entry in the electronic credit ledger for such amount claimed is made to restrict utilization of the said amount. However, in case the refund claim is rejected, the rejected amount is re-credited to the electronic credit ledger of the applicant.

The manner of claiming and processing of refund claims under GST has been summarized hereinunder:

ROAD TO GST REFUNDS – TIME TO LEAP OVER THE IMPEDIMENTS AND CROSS THE FINISHING LINE

**Issues faced by registered persons owing to procedural infirmities and lacuna in provision**

Despite the intention of the legislature to employ a refund mechanism that would impart greater efficiency, transparency, and accountability, the refund framework suffers from various infirmities and inherent lacunas which must be done away with by the Government. Some of the crucial aspects are discussed hereunder:

A. Restrictive amendment to the definition of 'turnover of zero-rated supply of goods':

- In terms of Rule 89(4) of the CGST Rules, refund of unutilized Net ITC availed during the period and used for effecting zero rated supplies is computed proportionately i.e. in the ratio of 'turnover of zero-rated supply of goods' to adjusted total turnover.
- In this connection, the Government has amended² the definition of 'turnover of zero-rated supply of goods' under Rule 89(4) to mean the lesser of the following values:

- o value of zero-rated supply of goods made during the relevant period without payment of tax; or
 - o value which is 1.5 times the value of like goods domestically supplied by the same or, similarly placed supplier, as declared by the supplier.
- Accordingly, the refund amount for many suppliers exporting at a higher margin may be significantly reduced.
 - The constitutionality and vires of the aforesaid amendment is amenable to challenge before a Writ Court on the ground that the same does not conform to the statute.

B. Mandating realization of export proceeds by exporters claiming refund of unutilized ITC or IGST paid on exported goods:

- Realization of sale proceeds is not a condition precedent to claiming refund of unutilized ITC and refund of IGST paid on exports of goods.

²Notification No. 16/2020 – Central Tax dated 23.03.2020

ROAD TO GST REFUNDS – TIME TO LEAP OVER THE IMPEDIMENTS AND CROSS THE FINISHING LINE

- However, the Government has introduced Rule 96B of the CGST Rules³ for recovery of refund where any refund of unutilized ITC on account of export of goods or of Integrated tax paid on export of goods has been sanctioned to an applicant but the sale proceeds in respect of such export goods have not been realized by the applicant within the stipulated period.
- In the absence of the condition to recover sale proceeds within stipulated period in the CGST Act, the onerous amendment to introduce Rule 96B could be challenged before a Writ Court.

C. Delayed receipt of consideration for export of services:

- Receipt of payment in convertible foreign exchange or in Indian rupees (wherever permitted by the Reserve Bank of India) is a condition precedent for a service to qualify as an export of service.⁴
- In terms of Rule 96A, payment for services exported under LUT or bond shall be received within a period of one year or such further period as may be allowed by the Commissioner from the date of issue of the invoice for export.
- On failure to receive payment within the specified time, the exporter shall be liable to pay the tax due along with the interest within fifteen days after the expiry of such stipulated or extended period.
- In this connection, the exporters are facing difficulties owing to ambiguity in relation to the following issues:
 - o Whether there is an outer time limit upto which the Commissioner may extend the time period for receipt of sale proceeds by the exporter?
 - o Grant of extension of time being discretionary, what is the recourse available with the assessee in the event the Commissioner does not provide any extension?

- o Whether a refund of the tax and interest so paid by the exporter can be sought in case the export proceeds are realized subsequently?

D. Double reduction in refund of compensation cess:

- Suppliers engaged in making domestic supplies (which are exempt from compensation cess) as well as zero rated supplies are required to reverse ITC of compensation cess to the extent it is attributable to exempt / non zero-rated supplies in terms of Rule 42 of the CGST



Rules.

- In terms of Rule 89(4) of CGST Rules, the refund amount is calculated by multiplying the Net ITC of compensation cess with the export ratio.
- Therefore, while on one hand, the suppliers are entitled to and avail only that amount of compensation cess to the extent they are used in making zero rated supplies, but at the same time, the said credit amount would also suffer the proportionate ratio as laid down under Rule 89(4) of the CGST Rules, thereby, leading to double reduction in the credit of cess.
- Moreover, the export ratio applicable to compensation cess vis-à-vis that applicable to credit of CGST, SGST and IGST would also differ.

³ Notification No. 16/2020 – Central Tax dated 23.03.2020

⁴ Section 2(6) of the IGST Act

ROAD TO GST REFUNDS – TIME TO LEAP OVER THE IMPEDIMENTS AND CROSS THE FINISHING LINE

- To avoid such double whammy, some of the taxpayers are availing the entire eligible credit of compensation cess and instead of showing a reversal entry in GSTR-3B, reversal of the credit under Rule 42 is made through Form DRC – 03. A clarity on the right procedure is overdue.



E. Services provided by a subsidiary in India to its parent entity outside India:

- In terms of Section 2(6) of the IGST Act, services shall not qualify as export of services where supplier of service and the recipient of service are merely establishments of a distinct person in accordance with Explanation 1 in section 8.
- In this connection, the Department has been continuously taking a view that services provided by a subsidiary in India to its parent entity located outside India does not qualify as export of services as the said entities (despite being registered as separate entities) are merely establishments of a distinct person.
- However, such a view is diametrically contrary to the decision of the Hon'ble Gujarat High Court in the case of Linde Engineering India Pvt. Ltd.,⁵ wherein it was held that an overseas company and its wholly owned subsidiary in India have their separate legal identity of their own and shall not be treated as establishments of same distinct person.

F. Refund of unutilized ITC on account of inverted duty structure:

- Section 54(3) of the CGST Act allows refund of unutilized ITC where the credit has accumulated on account of rate of tax on Inputs being higher than the rate of tax on output supplies.
- The formula for computation of such refund has been prescribed under Rule 89(5) of the CGST Rules, which has been amended retrospectively to permit refund of ITC only in respect of Inputs.
- In light of the retrospective amendment to Rule 89(5), the following issue has taken centre stage:
 - o Whether refund of ITC in respect of both Inputs and Input services can be claimed if the rate of Inputs is higher than the rate of output goods or services or both; or
 - o Whether refund of ITC in respect of Input services is not permissible under Section 54(3).
- Recently, the Gujarat High Court in VKC Footsteps⁶ has observed that Section 54(3) of the CGST Act provides for claim of refund of any unutilized ITC and therefore the refund under Section 54(3) ought to be allowed on unutilized credit of 'Inputs' as well as 'Input services'.
- However, the Hon'ble Madras High Court in Transtonnelstroy Afcons Joint Venture⁷ has taken a contrary view by holding that refund of ITC in respect of Input services is not permissible under Section 54(3).
- While the legal battles in Court are set to continue, the aggrieved taxpayers must file refund claims seeking refund of both Inputs and Input services so that their claim is not barred by limitation, in case a positive decision is delivered by the Apex Court.

G. Automatic rejection of refund claims on issuance of deficiency memo:

- In terms of Rule 90(3) of the CGST Rules, a refund application under Section 54 of the CGST Act read with Rule 89 is automatically treated as rejected if the proper officer communicates any deficiencies to the

⁵[TS-587-HC-2020 (GUJ)-ST]

⁶[TS-585-HC-2020(GUJ)-NT]

⁷[TS-800-HC-2020(MAD)-NT]

ROAD TO GST REFUNDS – TIME TO LEAP OVER THE IMPEDIMENTS AND CROSS THE FINISHING LINE

applicant and any rectification of defects is treated as submission of fresh application for the purpose of computing limitation of applying for refund and grant of interest on delayed refund under the Central Goods and Services Tax Act, 2017.

- The automatic rejection of a refund application on issuance of a deficiency memo, without giving any opportunity of hearing to the applicant, is against the principles of natural justice and must therefore be done away with.
- The said Rule 90(3) has been challenged before the Hon'ble Delhi High Court⁸ and is currently pending resolution.

H. Matching of credit declared in Form GSTR – 3B and that reflecting in Form GSTR – 2A:

- The Government has recently clarified⁹ that refund of accumulated ITC is restricted to the ITC as per those invoices, the details of which are uploaded by the supplier in Form GSTR – 1 and are reflected in the Form GSTR – 2A of the taxpayer.
- The GST law nowhere stipulates that refund of ITC not reflecting in Form GSTR – 2A cannot be taken by the applicant.
- Accordingly, the constitutionality of the said clarification is amenable to challenge.

I. Refund of unutilized ITC to SEZs

- In terms of Section 16 of the IGST Act read with Section 54 of the CGST Act and Rule 89 of CGST Rules, suppliers supplying goods or services or both to SEZs are eligible to claim refund of IGST, if they opt to make such supplies on payment of tax.
- Section 54(3) of the CGST Act permits refund of unutilized ITC only in cases where zero rated supplies are made without payment of tax or where credit has accumulated on account of inverted duty structure.

- A bare reading of these provisions gives an impression that only persons supplying goods or services to SEZ would be eligible for refund and not the SEZ itself.
- However, the Hon'ble Gujarat High Court in Britannia Industries Limited¹⁰ has held that a SEZ unit (recipient of supply) is also entitled to claim refund of the IGST lying unutilized in the Electronic Credit Ledger in a case where ITC is distributed by the input service distributor as there is no specific supplier who can claim the refund under the provisions of the CGST Act and the CGST Rules.



- Basis the said decision, SEZ units and developers may apply for refund of IGST lying unutilized in the Electronic Credit Ledger.

J. Recredit of rejected ITC refund

- In terms of Rule 93(2), where any amount claimed as refund is rejected, either fully or partly, the amount debited, to the extent of rejection, shall be re-credited to the electronic credit ledger by an order made in Form GST PMT – 03.
- The mechanism to re-credit the rejected amount through PMT – 03 has been developed and is live w.e.f. 26.09.2019. However, for the period prior to 26.09.2019, there is no mechanism to recredit the rejected amount to the Electronic Credit Ledger of the applicant.

⁸[TS-797-HC-2020(DEL)-NT]

⁹Para 5.2 of Circular No. 125/44/2019-GST dated 18.11.2019 read with Circular no. 135/05/2020-GST dated 31.03.2020

¹⁰[TS-728-HC-2020(GUJ)-NT]

ROAD TO GST REFUNDS – TIME TO LEAP OVER THE IMPEDIMENTS AND CROSS THE FINISHING LINE

- In such a scenario, the Gujarat High Court in *Garden Silk Mills Ltd.*¹¹ has allowed the applicant to claim the recredit manually in case the amount is not recredited through PMT – 03.
- However, Rule 93(2) did not cover a situation where a registered person claimed refund of any amount paid as tax wrongly paid or paid in excess for which debit has been made from the electronic credit ledger. Accordingly, recently sub-Rule (4A) was inserted in Rule 86 to cover the said situation vide Notification No. 16/2020 – Central tax dated 23.03.2020.
- It is pertinent to note that all refund claims filed prior to 23.03.2020, where registered persons have claimed refund of any amount paid as tax wrongly paid or paid in excess for which debit has been made from the electronic credit ledger, are currently stuck owing to unavailability of the relevant process for re-crediting the said amount vide GST PMT-03 prior to 23.03.2020.

K. Cash refund on surrendering or cancellation of registration:

- Cash refund of unutilized credit after closure of a unit or surrendering of the registration has been one of the most contested issues. It was a litigious issue even in the pre-GST regime.
- In the erstwhile regime, the Karnataka High Court in the case of *Slovak India*¹² had held that an applicant is eligible to claim refund of unutilized credit on closure of manufacturing unit or inability to utilize the credit even though there is no express provision under the CENVAT Credit Rules, 2004.
- However, the Larger Bench of the Bombay High Court in *Gauri Plasticulture*¹³ had taken a contrary view by holding that such cash refund is not permissible.
- Considering that the GST law too does not provide any explicit provision to claim refund of unutilized credit when a registration is surrendered by a taxpayer or when a unit is shut down, the taxpayers are set for another round of litigation. In addition to



the above, despite the press release issued by the Government, a lot of exporters have not received their tax refunds and some such exporters are marked as 'risky' and their IGST/ITC refunds are blocked and their duty drawback amount is also blocked until they are declared non-risky. Various representations are made to the CBIC requesting that a show cause notice be issued before any person is declared as "risky exporter" and that the issues related with risky exporters ought to be resolved as early as possible.

It is advisable that assessee revisit their transactions to analyze whether they fall under any of the scenarios mentioned above to be entitled for GST refund claim and should also be aware of the rudiments of the entire refund mechanism and issues at ground level. Needless to say, every penny earned by an entity would help the entity deal with the problems of working capital outflow and cash crunch in the ongoing pandemic situation.

¹¹ [2019-TIOL-859-HC-AHM-GST]

¹² [2006-TIOL-469-HC-KAR-CX]

¹³ [2019-TIOL-1248-HC-MUM-CX-LB]



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. Transtunnelstroy Afcons JV and Ors. vs Union of India and Ors [TS-800-HC-2020(MAD)-NT]

Other Cases

2. Bharat Heavy Electricals Limited vs The Commissioner of CGST, Central Excise and Customs [TS-704-CESTAT-2020(Del)]
3. Ruchi Soya Industries Limited vs UOI [TS-727-HC-2020(Guj)]
4. Britannia Industries Limited vs Union of India [Special Civil Application No. 15473 of 2019]
5. Commissioner of Service Tax, Ahmedabad vs M/s Adani Gas Ltd. [2020-VIL-27-SC-ST]

Transtunnelstroy Afcons JV and Ors. vs Union of India and Ors [TS-800-HC-2020(MAD)-NT]

Facts of the Case

- Petitioners were facing a higher rate of GST on inputs and input services as compared to the rate applicable on output supplies. This resulted in accumulation of input tax credit. It was the view of the Petitioners that refund should be available of the entire unutilized input tax credit, irrespective of whether such credit accumulated on account of inputs or input services.
- Clause (ii) under Proviso to Section 54(3) of the Central Goods and Services Tax Act, 2017 ('CGST Act') provides that refund of unutilized input tax credit shall be allowed only if the credit has accumulated on account of the rate of 'tax on inputs' being higher than the rate of tax on output supplies. Further, Rule 89(5) of the Central Goods and Services Tax Rules, 2017 ('CGST Rules'), which prescribes the formula for calculation of maximum amount of refund, defines 'Net ITC' to be the input tax credit availed on inputs only.
- Petitioners challenged these provisions *inter-alia* on following grounds:

- Object and purpose of GST laws is to consolidate indirect tax legislation and provide a common regime for goods and services. Moreover, preventing cascading of taxes is a primary objective of the laws.
- Section 54(1) does not empower the legislature to frame rules in a manner to create disabilities that are not contemplated in the parent act itself. The language of Section 54(3) is to be interpreted such that refund of any unutilized input tax credit ought to be allowed, as long it falls within the two classes of registered persons entitled to refund, namely those with zero-rated supplies, and those facing an inverted duty structure.



- The word 'inputs' used in common parlance in Proviso (ii) to Section 54(3) ought to mean both 'input goods' and 'input services'. Else, it would amount to a violation of Article 14 of the Constitution as it makes a discrimination amongst contractors who avail input goods but not to those who avail input services.
- One of the Petitioners submitted that the Proviso did not curtail the entitlement to refund of the entire unutilized input tax credit but merely set out an eligibility condition

FROM THE BENCH - KEY JUDICIAL PRONOUNCEMENTS

for claiming refund. That being the case, the amendment made to Rule 89(5), which restricted refund on input services despite crossing the threshold in the second Proviso



to Section 54(3), is thus *ultra vires* Section 54(3). Moreover, there is no such restriction in the case of zero-rated supplies, which shows a clear legislative intent to allow a refund on account of input goods as well as input services.

- Reliance was placed on the decision of the Hon'ble Gujarat High Court in **VKC Footsteps India Private Limited vs Union of India [TS-585-HC-2020(GUJ)-NT]**, wherein the amended Rule 89(5) which only allowed refund of credit accumulated from inputs was held to be *ultra vires* to Section 54(3) which provided refund of 'any unutilized input tax credit'.

Judgement

- The Bench, though cognizant of the decision of the Hon'ble Gujarat High Court in the **VKC Footsteps** decision (cited *supra*), went on to independently analyse the issue to conclude their view. The Hon'ble Court *inter-alia* held that:
 - Section 54(3)(ii) enables claim of refund of unutilized ITC only where such ITC has accumulated on account of the rate of tax on input goods being higher than the rate of tax on output supplies

- Hon'ble Court negated the submission that the word 'inputs' should be read so as to include 'input services' merely because the undefined word 'output supplies' is used in Section 54(3)(ii)
- Refund is a statutory right and imposition of restriction only in respect of unutilized ITC on inputs does not infringe Article 14
- There is a classification of sources of unutilized input tax credit into sources that give rise to a right to refund, i.e. input goods, and those that do not, i.e. input services. This is a valid classification and is a valid exercise of legislative power.
- Section 164 confers power on the Central Government to frame rules for carrying out the provisions of the CGST Act and no fetters are discernible therein except that the rules should be in furtherance of the purposes of the CGST Act.
- Rule 89(5) of the CGST Rules, as amended, is *intra vires* both the general rule making power and Section 54(3) of the CGST Act.

ELP COMMENTS

- The Hon'ble Gujarat High Court in case of **VKC Footsteps** (*supra*) held that Rule 89(5) is *ultra vires* Section 54(3) and that the term 'Net ITC' should mean "input tax credit" on "inputs" and "input services". The Hon'ble Madras High Court has taken a contrasting view. The decision of the Hon'ble Madras High Court is much wider in amplitude as it upholds the constitutional validity of Section 54(3)(ii) in addition to holding that Rule 89(5) is *intra-vires* the CGST Act. As expected, the matter will only attain finality when decided by the Hon'ble Supreme Court.

Bharat Heavy Electricals Limited vs Commissioner of CGST, Central Excise and Customs [TS-704-CESTAT-2020 (Del)]

Facts of the Case

- Appellant had unutilized credit balance of cess (Education cess, Secondary and Higher Education cess and Krishi Kalyan cess) in their Excise returns as on June 30, 2017 i.e. the date on which GST was introduced.

FROM THE BENCH - KEY JUDICIAL PRONOUNCEMENTS

- A major portion of the sales of the Appellant were not liable to Excise duty being supplies made to Mega/ Ultra mega power projects, SEZ, EOU etc. which resulted in accumulation of CENVAT credit. The Appellant did not exercise their right to claim refund under Rule 5 of CENVAT Credit Rules, 2004 on the expectation that they would be able to use the credits available with them on domestic clearances based on their past clearances.
- While the credit balance of service tax and central excise duty was transitioned to GST, the credit balance of cesses remain unutilized inasmuch as these cesses stood abolished under the GST regime.
- The Appellant therefore filed an application claiming refund of such unutilized cess balance. This application was rejected on the basis that there was no provision for refund of unutilized cess balance and thus, such balance would lapse.
- It was argued by the Appellant that ordinarily they were eligible to utilize the cess balance for payment of output duty liability and owing to the introduction of GST, since they were not in a position to utilize the balance, the Appellant deserves refund of such unutilized balance of cess.
- Reliance was placed on a catena of judgements where refund of credit balance was allowed where the accumulated credit became unutilizable due to closure of factory or where the factory was shifted to another area.



there is no such provision in the newly enacted law. Accordingly, it was held that merely by change of legislation, the Appellant would not lose its accrued right.

- It was held that the ratio of the judgements where refund was allowed in case the assessee was unable to utilize the credit due to closure of factory or shifting of factory to a non-dutiable area is squarely applicable in the present facts and the Appellant, is therefore, eligible for cash refund of cesses lying as credit balance as on June 30, 2017.
- Notably, Division Bench of Delhi High Court in case of **Sutherland Global Services (P) Limited [Writ Appeal No 53 OF 2020]** has denied transition and utilization of cess under the GST regime.

Ruchi Soya Industries Limited vs UOI [TS-727-HC-2020 (Guj)]

Judgement

- Hon'ble CESTAT relied on various decisions of the Hon'ble Supreme Court including **Eicher Motors vs UOI [1999 (106) ELT 3 (SC)]**, **Samtel India vs CCE [2003 (155) ELT 14 (SC)]** and held that the credit earned by Appellant was vested right and will therefore, not extinguish with the change in law unless there was a specific provision which debarred such refund. It was observed that

Facts of the Case

- Petitioner purchased crude palm oil of edible grade in bulk (classifiable under tariff heading 1511 1100) on high sea basis vide agreement dated February 8, 2018 and the goods were imported vide five bills of lading dated February 7, 2018. The Petitioner filed three bills of entry dated March 1, 2018 under Section 46 of the Customs Act, 1962 (**Customs Act**) seeking

FROM THE BENCH - KEY JUDICIAL PRONOUNCEMENTS

clearance for home consumption. The goods were assessed by the customs authorities and the Petitioner paid the applicable Customs duties and surcharge along with IGST as applicable on March 1, 2018.



- The Customs department had issued a Notification No. 29 dated March 1, 2018 increasing the customs duty on the said product under Section 25(1) of the Customs Act and this Notification was published in the official gazette on March 6, 2018 at 19:15 hours and was signed digitally. Basis this, the Department insisted on payment of customs duty at an enhanced rate to get release of the subject goods and this amount was recovered by the Department.
- The case arose out of a series of Writ Petitions filed by importers before the Hon'ble High Court facing similar situations where custom duty was sought at enhanced rate despite the Notification being published at a later date.
- Section 25(1) of the Customs Act stipulates that the Central Government may by notification in the Official Gazette exempt notified goods either conditionally or unconditionally from the whole or any part of duty of customs leviable thereon. Section 25(4) of the Customs Act as inserted vide Finance Act, 2016 (w.e.f. May 14, 2016) provides that the Notifications issued, including under Section 25(1), shall come into force on the date of its issue by the Central Government for publication in the Official Gazette.

- Imposition of tax at enhanced rate of Customs Duty vide the Notification which is published at a date later than the date of its issue was challenged on the following grounds:

- Reference was made to Section 15(1)(a) of the Customs Act which *inter alia* stipulates that the rate of duty shall be the rate in force "on the date on which a bill of entry in respect of such goods is presented" in the case of goods entered for home consumption under section 46. Since the goods were presented for clearance for home consumption on March 1, 2018 when the Notification was not published or was not brought to the public domain, the tax liability cannot be determined basis such Notification (which in fact was signed and published at a later date).
- A catena of judgments was relied upon in support of the settled position that for a law to be made binding on the public, it must be published. Natural justice requires that before a law is made operative, it must be promulgated or published.
- Reliance was strongly placed on the decision of the Hon'ble Andhra Pradesh High Court in SCA No. 11063 of 2018 where for the same issue, the Hon'ble High Court ordered to strike down and declare amended Section 25(4) of the Customs Act as arbitrary and contrary to Section 25(1) *ibid*. It was noted and held that Section 25(4) of the Customs Act is an arbitrary exercise of power by the Legislature and it is totally contrary to the purport of Section 25(1) / 25(2A) of the Customs Act which mandates publication of the notification in the official gazette.
- It was further argued that the decision of the Hon'ble Andhra Pradesh High Court striking down the amended Section 25(4) of the Customs Act would apply throughout the country.

Ruling

- The Court concurred with the view taken by the Hon'ble Andhra Pradesh High Court and declared that Section 25(4) of the Customs Act is arbitrary and contrary to Section 25(1) and Section 25(2A) of the Customs Act.

FROM THE BENCH - KEY JUDICIAL PRONOUNCEMENTS

ELP Comments

- The judgment is beneficial and echoes the principle that the subjects of the State must be made aware of the law or there must be some channel by or through which such knowledge can be acquired with the exercise of due or reasonable diligence. It would be interesting to see if the Parliament makes an attempt to amend the provisions of Section 25(1) / 25(2A) to nullify the above decisions

Britannia Industries Limited vs Union of India [Special Civil Application No. 15473 of 2019]

Facts of the Case

- Assessee, situated in Special Economic Zone, had filed a refund application with regard to the credit of IGST distributed by Input Service Distributor ('ISD') for services pertaining to the SEZ unit for the year 2018-2019.
- However, SCN was issued by Revenue for proposal of rejection of refund on the grounds that for supply received from outside SEZ, SEZ unit is not supposed to pay any tax whether under forward charge or reverse charge mechanism and for the supply received from another unit within SEZ, any and all such supplies have no tax treatment.
- Revenue further stated that till date no circular, notification/ relevant guidelines had been issued providing guidelines to process GST refund claim application of units situated in SEZ in respect of tax paid on inward supplies therefore, in absence thereof, refund claim cannot be processed.
- Assessee argued that in the entire scheme of the GST law, no restriction was imposed on distribution of common credit by an ISD to an SEZ unit and on a conjoint reading of section 16 of the IGST Act and section 54 of the CGST Act, it was entitled to get the refund of unutilized ITC lying in the Electronic Credit Ledger.
- Reliance was also placed on this Court's decision in **M/s Amit Cotton Industries vs Principal Commissioner of Customs** wherein in similar facts, claim of Assessee for refund was allowed.

Ruling

- Hon'ble High court held that instead of Rule

96, Rule 89 would be applicable in the present matter which is pertaining to refund of ITC. HC explained that Rule 89 provided for procedure for application for refund of tax, interest, penalty, fees and prescribes that in respect of supplies to a SEZ unit, the application for refund has to be filed by the supplier of goods or services.

- HC held that Assessee was entitled to claim refund of the IGST lying in the Electronic Credit Ledger as there is no specific supplier who can claim the refund under the provisions of the CGST Act and the CGST Rules as input tax credit is distributed by the input service distributor. HC allowed the petition, thereby quashed and set aside the impugned order.

	2018-19	2019-20	2020-21	2021-22
Assets	111,000	111,000	111,000	111,000
Liabilities	111,000	111,000	111,000	111,000
Capital	111,000	111,000	111,000	111,000
Reserves	111,000	111,000	111,000	111,000
Current Liabilities	111,000	111,000	111,000	111,000
Non-Current Liabilities	111,000	111,000	111,000	111,000
Equity	111,000	111,000	111,000	111,000

Commissioner of Service Tax, Ahmedabad vs M/s Adani Gas Limited [2020-VIL-27-SC-ST]

Facts of the Case

- Instant case pertains to appeal by the Revenue against the order of Hon'ble CESTAT, Ahmedabad which set aside the demand for payment of Service tax on the charges collected by the Respondent for equipment installed at customers' premises.
- Respondent is in the business of distributing natural gas to industrial, commercial and domestic consumers through pipes. The

FROM THE BENCH - KEY JUDICIAL PRONOUNCEMENTS

Respondent installs an equipment called 'SKID' at the customers' sites which regulates the supply of piped natural gas being distributed and records the consumption by the customer for billing purposes.



- An audit conducted by the Department revealed that charges were collected for the supply equipment etc. while providing new gas connections to the customers and the ownership of the equipment was retained by the Respondent. A show cause notice was issued seeking to levy Service tax on these charges as the 'supply of tangible goods service' under Section 65(105)(zzzzj) of the Finance Act, 1994. The Respondent replied stating that the equipment was being used by the Respondent for his own purpose and not by the customers. Moreover, right to use, maintain, clean etc. all remained with the Respondent. The amount collected was only in the form of an interest-free security deposit and no Service tax was leviable thereon.
- The matter went up to the Hon'ble CESTAT, where it was *inter-alia* held that the purpose of the equipment is to measure the amount of gas supplied to the customer for purpose of billing by the company and not for use by the consumers. Accordingly, the Hon'ble Tribunal allowed the appeal and ruled in favour of the Respondent.
- The Revenue then filed an appeal against the order of the CESTAT before the Hon'ble Supreme Court of India, and made the following submissions:
 - The equipment is of as much use to the buyer

as it is to the seller. Moreover, the quantum of refund allowed to the buyers has varied in different cases.

- Reference was made to the CBEC circular No. 334/1/2008-TRU dated February 29, 2008 which has clarified that transactions that enable usage of goods without transferring the right to use, are in the nature of a service under Section 65(105)(zzzzj) and not sale under Article 366(29-A)(d) of the Constitution of India. Since the Respondent has not paid VAT for the charges collected on supply of pipelines and the measurement equipment, it was argued that this transaction must be treated as a service.

Ruling

- Hon'ble Apex Court observed that the intention of introducing Section 65(105)(zzzzj) in the Finance Act, 1994 was to tax activities that enable the customer's use of the service provider's goods without transfer of the right of possession and effective control.
- This provision creates an element of taxation over a service, as opposed to a 'deemed sale' under Article 366 (29-A)(d). The Court drew attention to Circular No. 33/1/2008-TRU which also highlighted this distinction.
- The Hon'ble Court went on to discuss the meaning of the term 'use' to determine if the supply of tangible goods was for the use of the purchaser. The Hon'ble Court held that the equipment was of mutual benefit for both the parties and helped to ensure that reciprocal obligations were fulfilled by the seller and buyer properly.
- No deposit receipts for domestic customers were provided and instead, the Respondent relied on the tabulation of the refund of deposit to industrial consumers. The argument of the Respondent that these gas connection charges collected from industrial, commercial and domestic consumers constituted a refundable security deposit was rejected.
- It was held that the supply of measurement equipment (SKID equipment) by the Respondent, was of use to the customers and was taxable under Section 65(105)(zzzzj) of the Finance Act 1994.



EXPERT SPEAK

Interview with Mr. Hemant Kadel (Senior President, Grasim Industries Limited)

Interview conducted by Supreme Kothari (Associate Director) - ELP

1. What relevance does GST hold post three years of its introduction? Has it now settled down to become just another tax law or does it continue to have other ramifications?

We need to revisit the journey of GST and what it has accomplished. Some of the important aspects are:

- It took about 17 years for this law to see the light of the day and the date of implementation was pushed three times for to finally be implemented on 1st July 2017;
- Prior to GST, tax jurisdictions were demarcated between Centre and States without any overlaps. Post GST, a dual GST system has been implemented, wherein both Centre and State levy GST on the same transaction;
- GST subsumed a large number of Central and State taxes or levies, making India a unified market and eliminating cascading effect of various taxes;
- GST has improved the administration for the Government as all interactions with the taxpayers are undertaken through a common GST portal across India, thus increasing automation.

Accordingly, implementation of GST is a landmark reform which has changed the face of the Indirect tax laws in India. At the same time, it continues to remain as relevant since it is in process of being a settled law even after three years of its implementation. Changes are being introduced almost every week to increase automation in tax compliances, curb improper claims of input tax credit and to increase transparency in tax administration. Also, never before has the Government been so actively involved in responding to the grievances of the taxpayer.

2. With regard to your business, what are the major pain points under GST that still survive and how do you see getting them resolved?

Few issues currently being faced by manufacturing companies in general and possible resolutions could be:

a) Transition of Pre-GST Input Tax Credit (ITC)

We believe that as long as the credit claimed in the pre-GST regime was eligible, the same should be allowed to be carried forward in the GST regime without any restriction. The Government had extended the time period for all those taxpayers who had faced



technical issues while transitioning the pre-GST credit, however, this facility was not extended to other taxpayers. Keeping in mind that this is a new law and the nature of complexities involved, a number of taxpayers could not manage to transition their pre-GST credit correctly or completely on account of reasons other than technical issues. The Government may consider opening the

EXPERT SPEAK

GST portal, pertaining to transition credit functionality, for all aggrieved taxpayers, one last time, to put an end to this issue, once and for all.

- b) ITC restriction on lodging accommodation services provided by a Hotel, Inn, Guest House etc. where such premises are located in a state where the recipient of the supply is located in another state

Most of the registered persons under GST need to avail lodging and accommodation services in different parts of India pursuant to their employees travelling for business purposes but might not have any GST registration in that State/location. In such cases, the recipient is unable to avail input tax credit of the CGST and SGST charged on such supply by the supplier (of the state wherein the supplier is located, based on the place of supply provisions). The Government may make necessary amendments to allow input credit.

are procured in course of business operations, ITC of GST charged on such supplies should be allowed. Accordingly, a clarification from the Government ought to be issued in this regard. If required, necessary amendments should also be made to the GST law.

- d) Non availability of credit on CVD and SAD if export obligation is not fulfilled and payment is made after 1st July 2017

CVD and SAD paid on account of non-fulfilment of export obligation towards Advance Authorisations and EPCG Schemes was available as CENVAT Credit under the pre-GST regime. Now post GST, denying ITC on such payments leads to denial of vested right of the taxpayer, since there was no provision in the erstwhile regime restricting credit on such payments when the license holder had taken the license and obligations thereunder were fulfilled. The Government may thus extend ITC of such CVD and SAD paid under the GST regime or the same may be refunded.



- c) Lack of clarity whether ITC is eligible on expenses booked towards CSR activities

As per the Companies Act, 2013, companies are under obligation to spend about 2% of its profits on CSR projects. In that process, Companies incur expenses for procurement of goods and services. Since such supplies

3. Did transition into GST, in the parallel, evolve your business processes and add efficiency to the value chain and thus lead to larger non-tax benefits? Please elaborate.

To a great extent, upon implementation of GST, Indirect tax compliance has become an integral part of the ERP system. Flow of information with all supply chain partners is seamless and at a click of the button. Owing to better communication and use of digital medium, such as e-way bill or e-invoice, transport vehicles are able to cover 10 to 15% more distance during the same time period as compared to the pre-GST regime. This has helped in faster deliveries and reduction of logistics costs.

4. Which attributes or existing scenarios under GST are in direct contradistinction to the philosophy of GST as was originally envisaged?

The idea of GST is based on the philosophy of the 'Input Tax credit'. The recipient of supply can claim the tax paid on supply as ITC where such procurements are used in further supply by the said buyer. Since GST is a destination-based

EXPERT SPEAK

tax, the end customer bears the tax while all value chain partners like retailers, wholesale dealers, get credit of tax paid. Thus, we can say that Input Tax credit is the heart and soul of the whole GST framework and its free utilization is essential for the success of GST. Against this philosophy, currently we are seeing a trend where the Department restricts or reduces the claim of ITC available in the hands of the value chain partners for certain reasons. One such instance being the restriction of claiming ITC on inward supplies, details of which have not been uploaded by the supplier, in terms of the prescribed mechanism. This penalizes the recipient for defaults of the supplier. Such restrictions dilute seamless flow of ITC and need to be rationalized.

5. Undisputedly GST, as introduced, was not an ideal law as it had to balance diverse set of expectations, issues and economic realities. Is the stage set for the next round of rationalisation and what should it focus on?

The next round of rationalisation should focus on bringing those sectors/levies, which are currently outside the ambit of GST, such as petroleum products, electricity and other levies (e.g. stamp duty), within GST. If we want to achieve the "One Nation, One Tax" concept, there should be no sector/levy, which is left outside the GST ambit.

Rationalisation of GST rates should be another focus area wherein the Government should actively consider reducing the number of GST rate slabs.

Simplification of GST returns and reduction of the number of returns required to be filed by a taxpayer can be another focus area.

6. Any other aspect in relation to GST on which you would like to provide your inputs?

Advance ruling is an area which need some more focus. Post implementation of GST, Advance Rulings had become the favourite tool of the taxpayer, which is evident

from the voluminous number of Advance Rulings which were being issued by authorities across India. However, soon it turned out that the same was not a conducive alternative, inter alia for the following reasons:

- Very high percentage of these rulings were in the favour of the revenue;
- In many rulings proper legal basis was not provided;
- As such rulings are binding on the application, the latter either had to abide by it or knock doors of the appellate authority and hence was stuck;
- Divergent views were taken by different Advance Ruling authorities on the same matter which increased the lack of clarity in the minds of the taxpayer.

One more area that needs attention is the IT infrastructure. We have seen that the Government has been taking steps to address IT issues, but the problems still persists.

Note that the views expressed are personal views and not organization's views.



LEGISLATURE AT WORK - RECENT AMENDMENTS

The following chapter has been authored by Vinitt Nagla (Associate Partner) and Snehal Renuke (Intern) - ELP



Recent Amendments

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

CBIC further extends due date of GST compliance to 30.11.2020

- CBIC extends the time limit for completion or compliance of any action prescribed or notified under Section 171 of the CGST Act (relating to anti-profiteering measures) falling between May 20, 2020 to November 29, 2020, to **November 30, 2020**.¹⁴

Time limit for issuing invoices in specified cases extended

- The time limit for issuing invoices in case of goods being sent or taken out of India on approval for sale or return, for the period from March 20, 2020 to October 30, 2020 has been extended to **October 31, 2020**.¹⁵

Waiver / reduction in late fee for not furnishing FORM GSTR-4 for 2017-18 and 2018-19

- The government waives the amount of late fees payable under section 47 of the CGST Act, which is in excess of Rs.250, and fully waives where the total amount of Central Tax payable is nil, for registered persons who fail to furnish FORM GSTR-4 for the quarters July 2017 to March 2020 by the due date, but furnishes the same between 22nd September 2020 and 31st October 2020.¹⁶

Waiver / reduction in late fee for not furnishing FORM GSTR-10

- The government waives the amount of late fees payable under section 47 of the CGST Act, which is in excess of Rs.250 (two hundred and fifty rupees), for registered persons who fail to furnish FORM GSTR-10 by the due date, but furnishes the same between 22nd September 2020 and 31st December 2020.¹⁷

CBIC amends rules related to E-invoice under GST

- Notification No.70/2020** has been issued to amend Notification no.13/2020 – Central Tax by substituting the words and figures “any preceding financial year from 2017-18 onwards” in a place of “a financial year”, for the applicability of e-invoicing and inserting the words “or for exports”, after the words “goods or services or both to a registered person”.¹⁸

Dynamic QR Code for B2C invoices deferred to 01.12.2020



- Vide **Notification No. 71/-Central tax**, the Board substitutes the words and figures “any preceding financial year from 2017-18 onwards” in place of “a financial year”, w.r.t. the eligibility of businesses for generating a dynamic QR Code in B2C invoices; and

Extends the date of implementation of the dynamic QR Code for B2C invoices from 01 October, 2020 to 01 December, 2020. (Refer -The principle notification is notification no 14/2020 dated 21st March, 2020).¹⁹

¹⁴ Refer Notification No. 65/2020 – Central Tax dated 1st September, 2020.

¹⁵ Refer Notification No. 66/2020 – Central Tax dated 21st September, 2020.

¹⁶ Refer Notification No. 67/2020 – Central Tax dated 21st September, 2020.

¹⁷ Refer Notification No. 68/2020 – Central Tax dated 21st September, 2020.

¹⁸ Refer Notification No. 70/2020 – Central Tax dated 30th September, 2020.

¹⁹ Refer Notification No. 71/2020 – Central Tax dated 30th September, 2020.

LEGISLATURE AT WORK - RECENT AMENDMENTS

CBDT amends rules related to IRN & QR code

- Vide **Notification No. 72/2020**, CBIC amended the following rules:

In the Central Goods and Services Tax Rules, 2017 (hereinafter referred to as the said rules), in rule 46, after clause (q), the following clause shall be inserted, namely:-

“(r) Quick Response code, having embedded Invoice Reference Number (IRN) in it, in case invoice has been issued in the manner prescribed under sub-rule (4) of rule 48.”

In the said rules, in rule 48, in sub-rule (4), the following proviso has been inserted:-



The Commissioner may exempt a person or a class of registered persons from issuance of invoice under this sub-rule for a specified period (i.e. till October 1, 2020 which is further extends to **December 31st, 2020**), subject to such conditions and restrictions as may be specified in the said notification.”

- Further, QR code having an embedded IRN may be produced electronically for verification by the proper officer under Rule 138A, in lieu of the physical copy of tax invoice.²⁰

²⁰ Refer Notification No. 72/2020 – Central Tax dated 30th September, 2020.

CBIC notifies special procedure for issuance of GST e- invoices till 31.10.2020.

- Special procedures are notified for relaxation to tax-payers who are unable to comply with e-invoicing requirement to obtain IRN within 30 days of issuance of invoice. Such relaxation is available only for the period from **October 1, 2020 to October 31, 2020**.²¹

CBIC clarifies CGST ITC rules 36(4) for February 2020 to August 2020.

- CBIC issues clarification relating to application of sub-rule (4) of Rule 36 of the CGST Rules, 2017 for the months of February to August, 2020 relating to ITC availment in respect of invoices or debit notes, the details of which have not been uploaded by suppliers;

- Tax-payers should reconcile the ITC availed in FORM GSTR-3B for the period February to August, 2020 with the details of invoices uploaded by their suppliers till the due date of furnishing FORM GSTR-1 for the month of September, 2020;

- The cumulative amount of ITC availed for the said months in FORM GSTR-3B should not exceed 110% of the cumulative value of the eligible credit available in respect of invoices or debit notes the details of which have been uploaded by the suppliers;

- Advises all the taxpayers to ascertain the details of invoices uploaded by their suppliers u/ s 37(1) for the periods

of February, March, April, May, June, July and August, 2020, till the due date of furnishing of the statement in Form GSTR-1 for the month of September, 2020 as reflected in GSTR-2A.

- The excess ITC availed arising out of reconciliation during this period, if any, shall be required to be reversed in Table 4(B)(2) of FORM GSTR-3B, for the month of September, 2020 and failure to do so would be treated as availment of ineligible ITC during the month of September, 2020.²²

²¹ Refer Notification No. 73/2020 – Central Tax dated 1st October, 2020.

²² Refer Circular No. 142/12/2020 – Central Tax dated 9th October, 2020.

LEGISLATURE AT WORK - RECENT AMENDMENTS

CBIC notifies GSTR-1 due date for dealers with turnover up to 1.5cr.

- The time period for filing GSTR-1 for persons having aggregate turnover of up to 1.5 crores in the preceding financial year or the current financial year for the quarter October 2020 to December 2020 is January 13, 2021 and for January 2021 to March 2021 is April 13, 2021.²³

CBIC notifies GSTR-1 due date for dealers with turnover exceeding 1.5cr.

- Due dates of filing of GSTR-1 for the registered persons having aggregate turnover Exceeding Rs. 1.5 crore rupees in the preceding financial year or the current financial year for the period October, 2020 to March, 2021 have been notified vide **Notification No. 75/2020 – Central Tax** dated 15th October, 2020.
- This notification prescribes the due dates for the monthly filing of GSTR-1. GSTR-1 for the months October 2020 to March 2021 is due on the 11th of the month succeeding the return period.²⁴

CBIC notifies GSTR-3B due date for October 2020 to March 2021

- The due date for filing of FORM GSTR-3B for the months of October, 2020 to March, 2021 i.e. for certain prescribed states it should be furnished electronically through common portal, on or before twenty-second day of the month succeeding such month.
- Provided further that, for taxpayers having an aggregate turnover of up to five crore rupees in the previous financial year, whose principle place of business as prescribed in the notification, shall be twenty-fourth day of the month. Further, the mode to discharge tax liability has been prescribed- Every registered person furnishing the return in FORM GSTR-3B of the said rules shall, subject to the provisions of section 49 of the said Act, discharge his liability towards tax by debiting the electronic cash ledger or electronic credit ledger, as the case may be

and his liability towards interest, penalty, fees or any other amount payable under the said Act by debiting the electronic cash ledger, not later than the last date, as specified in the first paragraph, on which he is required to furnish the said return.²⁵

Optional annual GST return filing benefit extended to F.Y. 2019-20

- CBIC extends the benefit of optional filing of annual return for FY 2019-20 to registered persons whose aggregate turnover in a financial year does not exceed Rs 2 crore, for FY 2019-20.²⁶

HSN code mandatory irrespective of Turnover from 1.04.2021

- With effect from 1st April 2021, the dealers registered under GST are required to mention 6 Digit of HSN Code, if the aggregate turnover in the preceding financial year is more than 5 crores. If the aggregate turnover in the preceding financial year is up to 5 crores, the dealers are required to mention 4 digits of HSN Code.²⁷



GST Audit relaxation to SMEs to continue in FY 2019-20

- For the financial year 2018-2019 and 2019-2020, every registered person whose aggregate turnover exceeds five crore rupees shall get his accounts audited as specified under sub-section (5) of section 35 and he shall furnish a copy of

²³ Refer Notification No.74/2020 – Central Tax dated 15th October, 2020.

²⁴ Refer Notification No. 75/2020 – Central Tax dated 15th October, 2020.

²⁵ Refer Notification No. 76/2020 – Central Tax dated 15th October, 2020.

²⁶ Refer Notification No. 77/2020 – Central Tax dated 15th October, 2020.

²⁷ Refer Notification No. 78/2020 – Central Tax dated 15th October, 2020.

LEGISLATURE AT WORK - RECENT AMENDMENTS

audited annual accounts and a reconciliation statement, duly certified, in FORM GSTR-9C for the said financial year, electronically through the common portal either directly or through a Facilitation Centre notified by the Commissioner.²⁸

CBIC notifies extended due date for filing GSTR-9, GSTR-9A & 9C

- Vide **Notification No. 80/2020 dated 28.10.2020**, CBIC extends the due date for filing Annual Return in Form GSTR-9/GSTR-9A and Reconciliation Statement in Form GSTR-9C for Financial Year 2018-19 to 31st December, 2020.²⁹

Standard Operating Procedures (SOP) in respect of Sections 67(1), 67(2), 70 and 71 of APGST Act, 2017-

- CBIC issues Standard Operating Procedures (SOP) to be followed by officers in field formations in the State in respect of Enforcement activities like inspection, search and seizure, summons, access to be business premises under sections 67(1), 67(2), 70 and 71 of APGST Act, 2017.
- Each SOP consists of procedures to be followed while discharging functions of Enforcement activities, draft Panchanama and the Registers to be maintained in the office.³⁰

E-Invoice System has been enabled on Trial sites (for APIs & Offline tools) for taxpayers with PAN based turnover more than Rs. 100 Cr. in a financial year (<https://einv-apisandbox.nic.in>, <https://einvoice1-trial.nic.in>).

Following are the Mechanisms to access E-invoice API

- **For Tax Payers Having Aggregate Turnover of Company more than Rs. 500 Crores-**
- Trial sites for API and Offline tools provide direct Access to API to integrate the ERP system of the registered dealer.
- Trial sites provide GSPs to registered dealer, through which he can generate his own username and password and further, ties up with GSPs to get the access to API using the Client Id and Client Secret of the GSPs.

- The GSTIN (Tax Payer) generates his own username and password and ties up with ERPs to get the access to API using the Client Id and Client Secret of the ERPs.

Tax Payers with Aggregate Turnover of Company less than Rs. 500 Crores

- It has been clarified that if the tax payer has a tie up or is using the ERP of the 'Company which has direct access to API then he/she can use the API through that company.
- The GSTIN (Tax Payer) generates his own username and password and gets the access to API using the Client Id and Client Secret of the Company, which has access. If the tax payer has direct access to E-Way Bill APIs, then he/she can use the same Client Id, Client Secret, username and password to get the access to e-Invoice system.
- The GSTIN (Tax Payer) generates his own username and password and ties up with GSPs to get the access to API using the Client Id and Client Secret of the GSPs. The GSTIN (Tax Payer) generates his own username and password and ties up with ERPs to get access to API using the Client Id and Client Secret of the ERPs.



²⁸ Refer Notification No. 79/2020 – Central Tax dated 15th October, 2020.

²⁹ Refer Notification No. 80/2020 – Central Tax dated 28th October, 2020.

³⁰ Refer Circular ref CCST's Ref. No. ENFT/CEW/E1/150/2020 dated 03rd September, 2020.

ALLIED LAWS

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



Recent Developments

Imposition of ceiling on Merchandise Exports from India Scheme (MEIS) benefits on exports made from 01.09.2020 to 31.12.2020

- DGFT vide **Notification No. 30/2015-2020** dated 01.09.2020, makes the following amendments in the MEIS Scheme:
 - Total benefit which may be granted to an Import Export Code (IEC) holder under the Scheme shall not exceed Rs. 2 Crore per IEC of exports made in the period between 1.09.2020 to 31.12.2020;
 - The above ceiling is subject to further downward revision so that the total limit does not exceed the prescribed allocation of Rs.5,000 crores;
 - Any IEC holder who has not made any export for a period of one year preceding 01.09.2020 or any new IEC obtained on or after 01.09.2020 would not be eligible for submitting any claim under MEIS;
 - In addition, it has been notified that the MEIS Scheme is withdrawn w.e.f. 01.01.2021.

Imposition of Anti-Dumping Duty on imports of "Float Glass"

- Ministry of Finance (Department of Revenue) vide **Notification No. 29/2020- Customs (ADD)** dated 02.09.2020, amends Notification No. 47/2015-Customs (ADD), dated 08.09.2015 to extend the levy of Anti-Dumping Duty on imports of "Float Glass" originating in or exported from China PR, for a period upto **7th December, 2020**.

Extension of the Inland Container Depot (ICD)/ Container Freight Station (CFS) facility for export to more Land Customs Stations (LCSs)

- CBIC vide **Circular No. 39/2020- Customs** dated 04.09.2020, states that in view of the representations received from trade, Board has decided to extend the procedure for export of

cargo in containers and closed bodied trucks from ICD/CFSs through three more LCS namely **Fulbari, Changrabandha and Jaigaon**.

Procedure prescribed to roll out Faceless Assessment at an All India level for all ports/imported goods

- CBIC vide **Circular No. 40/2020- Customs** dated 04.09.2020, decides to roll out the Faceless Assessment at an All India level on all ports of import and for all imported goods by **31st October, 2020**;
- CBIC constitutes 11 National Assessment Centres (NAC) whereby designated Nodal Officers shall be the precursors, explains that NAC shall be organized commodity-wise according to the First Schedule to the Customs Tariff Act, 1975;



- CBIC further lays down responsibilities of NAC for successful implementation of Faceless Assessment in a coordinated manner to ensure assessments are being carried out in a timely manner. It envisages that NAC shall also be in charge of examination of assessment practices of imported goods across Customs stations to bring uniformity and enhanced quality of assessments;

ALLIED LAWS

- CBIC comprehensively lists measures to be undertaken by NAC before the launch of Faceless Assessment to ensure smoothness and unperturbed assessment and clearance of goods;
- The Board notifies that Directorate General of Taxpayer Services (DGTS) in coordination with Customs Policy Wing shall organize extensive outreach via online webinars/ promotional videos etc. for smooth implementation of Faceless Assessment;



Revised leather norms for export of finished leather

- DGFT vide **Public Notice No. 15/2015-2020** dated 04.09.2020, specifies the items which shall constitute "Finished Leather" for the purpose of the entry "**Finished Leather all kinds**" appearing at **Serial No: 176**, Chapter 41, Schedule 2 – Export Policy, of the Foreign Trade Policy 2015-20, and states that the same may be exported without a license but subject to the terms and conditions specified against each item in the table specified under the said Notice.

Facility of Auto Let Export Order (LEO) under the Express Cargo Clearance System (ECCS) permitted

- CBIC vide **Circular No. 41/2020** dated 07.09.2020, allows the facility of LEO under the ECCS developed by the Directorate General of Systems & Data Management;

- In order to reduce the dwell time of clearance of export shipments through courier, it provides that the export goods which are covered under Courier Shipping bills and are facilitated by Risk Management System and are cleared by customs x-ray scanning shall be automatically given LEO by ECCS.

Streamlining of Unit Quantity Codes (UQCs) in DGFT's EDI system and Customs' ICEGATE

- DGFT vide **Trade Notice No. 26/2020-21** dated 14.09.2020, states that various public notices were issued for streamlining usage of UQCs at the time of filing of Shipping Bills and Bills of Entry in ICEGATE. The implementation of the said Notices had resulted in difficulties for complying with the requirement to mention standard UQCs in their old EPCG and Advance authorisations;
- To address this issue, the DGFT has decided: (i) to issue new authorisation mentioning standard UQCs, and (ii) to request Customs to allow exports against old authorisations with non-standard UQCs in ICEGATE till **30.10.2020**;
- Meanwhile, DGFT advises that the authorisation holders should to approach the concerned RA and get non-standard units indicated in their authorisations converted into standard UQCs.

Amendment in Export Policy of Onions

- DGFT vide **Notification No. 31/2015-20** dated 14.09.2020, prohibits the export of onions for the item description at Serial Number 51 and 52 of Chapter 7 of Schedule 2 of ITC (HS) Classification of Export & Import Items.

Insertion of Policy condition in Chapter 85 and 94 of ITC (HS), 2017, Schedule – I (Import Policy)

- DGFT vide **Notification No. 32/2015-2020** dated 17.09.2020, adds a new policy condition in Chapter 85 and 94 of ITC(HS), 2017, Schedule-I (Import Policy) to enable random sampling of LED products and Control Gear for LED products notified under "Electronics and Information Technology Goods (Requirement of Compulsory Registration) Order, 2012".

ALLIED LAWS

Implementation of Customs (Administration of Rules of Origin under Trade Agreements) Rules, 2020 ["CAROTAR"]

- The Ministry of Finance vide **Press Release** dated 18.09.2020, states that CAROTAR 2020 shall come into force with effect from **September 21, 2020** upon completion of the 30-day period given to the importers and other stakeholders to familiarize themselves with new provisions;
- It further clarifies that CAROTAR, 2020 read with CBIC Circular No. 38/2020-Customs, dated 21.08.2020, supplements the existing operational certification procedures prescribed under different trade agreements (FTA/ PTA/ CECA/ CEPA);
- It states that the new Rules will support the importer to correctly ascertain the country of origin, properly claim the concessional rate of duty and assist Customs authorities in smooth clearance of legitimate imports under FTAs;
- It highlights that the importer would now have to do due diligence before importing the goods, provide minimum information and enter certain origin related information in the Bill of Entry as available in the Certificate of Origin; In view of the introduction of new rules, CBIC notifies amendment in (i) Notification No. 40/2012-Cus (N.T.) dated May 2, 2012 & (ii) Bill of Entry (Forms) Regulations, 1976, which shall come into force on September 21, 2020.

Publication of revised ANF 7A of Appendices & ANFs of Handbook of Procedure 2015-20

- DGFT vide **Public Notice No. 18/2015-2020** dated 23.09.2020, notifies the revised ANF-7A of Appendices & ANFs of Handbook of Procedure 2015-20 with immediate effect.

Implementation date for additional HS codes covered under registration under Steel Import Monitoring System (SIMS)

- DGFT vide **Public Notice No. 19/2015-2020** dated 28.09.2020 states that the Implementation date for additional HS codes

covered under registration under SIMS shall be **16th October 2020** i.e. Bill of Entry on or after 16.10.2020 shall require compulsory registration under SIMS.



Amendment in the Import Policy Condition No. 3 of Chapter 71 of ITC (HS)-2017, Schedule- I (Import Policy)

- DGFT vide **Notification No. 34/2015-2020** dated 28.09.2020, amends policy condition no. 3 of Chapter 71 of ITC (HS)- 2017, Schedule- I (Import Policy) by stating that import of rough diamonds shall be permitted only if accompanied by Kimberley Process (KP) Certificate as specified by Gem & Jewellery Export Promotion Council (GJEPC).
- It has been clarified that Endorsement of KP Certificates issued by valid KP Certificate Issuing Authority in the case of errors of minor nature i.e. typographical errors or errors apparent on the face of records will be allowed subject to endorsement by GJEPC as per the Standard Operating Procedure (SOP) which has been annexed to the aforementioned Notification. Further re-export of imported rough diamonds, if so, ordered by Customs Authorities will also be allowed subject to the Technical KP Certificate issued by GJEPC.

ALLIED LAWS

Relaxations granted in the Sea Cargo Manifest and Transshipment Regulations (SCMTR)

- CBIC vide **Notification No.94/2020-Customs (N.T.)** dated 30.09.2020, refers to the disruptions caused due to Covid-19 Pandemic and non-readiness of the stakeholders, considering which the transitional provisions under Regulation 15(2) of the SCMTR have been extended from **1st October, 2020 till 31st March, 2021** to enable submission of manifests under erstwhile regulations. However, as per Regulation 15(1), mandatory filing of different declarations in new format in a phased manner is provided for as per the annexure A to the circular. Different timelines are prescribed so that trade has sufficient time to comply with the new regulations in a phased manner. Further, vide Regulation 15(2), the mandatory compliance requirements for submissions of declarations and manifests under the said regulations shall be applied in full effect from **1st April, 2021**.
- It is also informed that in addition to Authorised Economic Operators (AEOs), 'Customs Brokers' who are already licensed under the Customs Brokers Licensing Regulations, 2018 and authorized to issue delivery orders, are also exempted from the requirement to furnish a fresh bank guarantee or postal security or National Savings Certificate or fixed deposit, under proviso to Regulation 3(1A) of the SCMTR.
- Thereafter, **Circular No. 43/2020- Customs** dated 30.09.2020 has been issued by the Board prescribing comprehensive guidelines w.r.t the implementation of SCMTR.

Extension of Duty Drawback Scheme on supply of steel by steel manufacturers

- DGFT vide **Notification No. 35/2015-20** dated 01.10.2020, enables steel manufacturers to claim Duty Drawback on steel supplied through their Service Centres/ Distributors/ Dealers/ Stock yards.

Additional details prescribed to obtain Advance Release Orders (AROs) by MSME exporters of Engineering Export Promotion Council (EEPC)

- DGFT vide **Public Notice No. 23/2015-2020** dated 01.10.2020 informs that for domestic procurement of steel at export parity price by MSME exporters of EEPC, (as per Ministry

of steel O.M. No. S-21016/3/2020-TRADE-TAX-Part (1) dated 27.05.2020 read with OM dated 24.06.2020 as amended from time to time), the details of Service Centre/Distributor/Dealer/Stockyard of the domestic steel producer from where the steel is being procured, duly countersigned by EEPC, shall also be provided and the same shall be endorsed on the ARO by the Regional Authority at the time of issue.

Extension of The Rebate of State & Central Taxes and Levies (RoSCTL) Scheme validity

- Ministry of Finance (Department of Revenue) vide **Notification No. 36/2020- Customs** dated 05.10.2020 amends Notification No.13/2020-Customs dated 14.02.2020 for extending the RoSCTL scheme validity from 31.03.2020 to **31.03.2021** or until such date the RoSCTL scheme is merged with RoDTEP scheme, whichever is earlier.



Amendment in Export Policy of Personal Protection Equipment/ Masks

- DGFT vide **Notification No. 36/2015-2020** dated 06.10.2020, amends Notification No. 29 dated 25.08.2020 to the extent that the export policy of N-95/FFP-2 masks or its equivalent is amended from "Restricted" to "**Free**" category making all types of masks freely exportable.

Addition of enabling provision related to the issue of scrips under Scheme for Rebate of State Levies (RoSL)

- DGFT vide **Notification No. 37/2015-2020** dated 06.10.2020 inserts a new sub-para in the Foreign

ALLIED LAWS

Trade Policy 2015-20 to give effect to RoSL as notified in para 6.3 of the Ministry of Textiles Notification No. 14/26/2016-IT (Vol-II) dated 07.03.2019, as amended vide Notification No. 12015/11/2020-TTP dated 09.06.2020, which will be implemented by the DGFT in scrip mode, for which procedure will be laid down separately.

Amendment in Foreign Trade Policy (FTP) 2015-2020, related to import under Duty Free Import Authorisation (DFIA) scheme

- DGFT vide **Notification No. 38/2015-2020** dated 06.10.2020 inserts a new sub-para (d) under para 4.25 of FTP 2015-20, for disallowing **import of "tyres"** under DFIA scheme is introduced.



Appointment of a Nodal Directorate for Customs Post Clearance Audit

- CBIC vide **Instruction No. 18/2020- Customs** dated 06.10.2020 informs that the Directorate General of Audit will act as Nodal Directorate for Customs Post Clearance Audit. The scope of the Charter of the Directorate General of Audit has also been expanded to cover the aspects as prescribed in the Instruction.

Notification of procedure for inspection of Inland Container Depots (ICDs) or Container Freight Stations (CFSs)

- CBIC vide **Circular no. 44/2020-Customs** dated 08.10.2020 notifies procedure for inspection of ICDs or CFSs or AFSs in pursuance

of various discrepancies in the Audit Report of 2018 highlighting lack of internal control;

- It also issues directions such as the jurisdictional Commissioner at the beginning of every financial year shall chalk out an action plan to conduct inspection of ICDs/CFSs in their jurisdiction. Further, an inspection report shall be submitted to the jurisdictional Commissioner of Customs and the first inspection wherever required, shall be completed by December 31, 2020;
- The Commissioner upon receipt of the inspection report shall take remedial action wherever deficiencies are noticed including penal action on the defaulting ICDs/CFS;

- It explains that for the ICDs/CPSS, which have not been inspected/audited so far, the initial inspection shall be for the period of last five years or from the date of commencement whichever is earlier and the DGPM shall examine the records relating to inspection of ICDs/ CFSs during inspection of field Commissionerate.

Clarifications issued for Faceless Assessment of Bills of Entry (BoE)

- CBIC vide **Notification No. 96/2020-Customs (N.T.) & Circular no. 45/2020**, both dated 12.10.2020, empowers the customs officers to amend any document to conduct a Faceless Assessment of BoE, before grant of an order for clearance of goods or permitting removal;

- CBIC also issues clarification upon review of implementation of Faceless Assessment, laying down measures for prompt & timely assessment of BoE and clarification on defacement of physical documents to resolve issues impacting the pace of assessment and clearances of consignments;
- It prescribes measures of continuous assessment, raising of queries by Faceless Assessment Group (FAG) officers, resorting to first checks, role of Risk Management Committee (RMCC)/ Local Risk Managers (LRM) in facilitation, re-assessment of BoE, Certificate of Origin (CoO) and Grievance redressal.

ALLIED LAWS

Procedure stated for application and issuance of Scrips under Scheme for Rebate of State Levies (RoSL)

- DGFT vide **Public Notice No. 25/2015-2020** dated 13.10.2020, notifies procedure for applying, recovery mechanism and the new Aayat Niryat Form ANF-4SL under the RoSL scrip mechanism.
- It is also notified that RoSL scrips would be available only for those shipping bills which have been transmitted from the ICEGATE server to DGFT server and for which exporters have not received any RoSL amount.

Electronic filing and Issuance of Preferential Certificate of Origin (CoO) for India's Exports



- DGFT vide **Trade Notice No. 30/2020-21** dated 13.10.2020, informs that the electronic platform for Preferential Certificate of Origin (CoO) is being expanded to India's Exports under Generalized System of Preferences (GSP), Global System of Trade Preferences (GSTP), India-Malaysia Comprehensive Economic Cooperation Agreement (IMCECA), India Singapore Comprehensive Economic Cooperation Agreement (ISCECA) w.e.f. **15th October 2020**.

Extension of Anti-Dumping Duty (ADD) on All Fully Drawn or Fully Oriented Yarn/Spin Draw Yarn/Flat Yarn of Polyester imported from China and Thailand

- Ministry of Finance (Department of Revenue) vide **Notification No. 32/2020- Customs (ADD)**

dated 19.10.2020, amends notification No. 51/2015-Customs (ADD) dated 21st October, 2015 to extend the levy of ADD on All Fully Drawn or Fully Oriented Yarn/Spin Draw Yarn/Flat Yarn of Polyester imported from China and Thailand till **30th November, 2020**.

Exemption from excise duty and duties of customs in respect of goods cleared against duty credit scrip issued under RoSL

- Ministry of Finance (Department of Revenue) vide **Notification No 7/ 2020 - Central Excise & Notification No 38/ 2020- Customs** both dated 21.10.2020 grants exemption from excise duty and duties of customs in respect of goods cleared against duty credit scrip issued under RoSL for garments and made-ups, subject to fulfilment of prescribed conditions.

Amendment in Export Policy of Nitrile/NBR Gloves

- DGFT vide **Notification No. 45/2015-2020** dated 22.10.2020, refers to Notification No. 29 dated 25.08.2020 which is amended to the extent that the export policy of Nitrile/NBR Gloves exported under above mentioned HS Codes or any other HS Code is revised from **"Prohibited"** to **"Restricted"** category.

Linking/Registration of Importer Exporter Code (IECs) in the new revamped DGFT Online environment

- DGFT vide **Trade Notice No. 33/2020-21** dated 28.10.2020, informs that various revamped DGFT services are planned to be introduced into the new DGFT IT platform. The objective of introducing these revamped systems is to provide paperless, digital, efficient and transparent services to the exporters and importers, and to further the overall goal of Trade Facilitation and Digital India. The platform would be accessible through the existing website: <https://dgft.gov.in>
- It further informs that the new online system will have a two-way communication between the DGFT and the exporter/importer and would allow the applicant to apply, monitor the status of the applications, reply to the deficiencies, raise queries etc.



LEGAL CLASSICS

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

Eicher Motors Ltd. & Anr. vs. Union of India & Ors. [(1999) 2 SCC 361]

Introduction:

Taxing statutes keep evolving with the Government amending the law time and again. However, often a debate arises on the applicability of the said amendment being retrospective or prospective in nature. The Courts have had the opportunity to examine such scenarios on various occasions and depending on the facts of each case the issues have been decided either in favour or against the taxpayers.

One fundamental ratio that is laid down by the Courts is that generally any amendment that affects the substantive rights of the assessee is prospective in nature whereas procedural amendments are retrospective in nature.

With the introduction of GST w.e.f. 01.07.2017, the same has been subject to various amendments during the past 3 years of the said law being in force. One such amendment introduced w.e.f. 23.03.2020 had been made to Rule 89(4) of the Central Goods and Services Tax Rules, 2017 ('CGST Rules') and a new Rule 96B was introduced in the CGST Rules with respect to calculation of the refund eligible to the exporters on making 'zero-rated supplies' introduced w.e.f. 23.03.2020. The said amendments curtail the benefit of refund available to the exporters. The said conditions being introduced for the first time, a question arises with regard applicability of the said provisions to the refund applications pending at the time of introduction of the said amendment and to the refund amount already sanctioned prior to introduction of Rule 96B of the CGST Rules.

In this context, it is relevant to refer to the decision of the Hon'ble Supreme Court in the case of **Eicher Motors Ltd. & Anr. vs. Union of India & Ors. [(1999) 2 SCC 361]**, wherein the Hon'ble Apex Court examined the validity and application of the Scheme, as modified by introduction to Rule 57-F of the Central Excise Rules, 1944, under which credit which was lying unutilized on 16.03.1995 with the manufacturers, stood lapsed in the manner

set out therein. The Hon'ble Court after relying on the provisions of the Statute held that the right to the credit has become absolute at any rate when the input is used in the manufacture of the final product. Therefore, the impugned rule cannot be applied to the goods manufactured prior to 16.03.1995 on which duty had been paid and credit facility thereto has been availed of for the purpose of manufacture of further goods.

The ratio laid down by the Hon'ble Supreme Court in the said decision would be relevant to the exporters in interpreting the said amendments to Rule 89(4) and Rule 96B of the CGST Rules.



Decision in Eicher Motors

The Petitioner challenged the validity and application of the Scheme, as modified by introduction to Rule 57F [read as 57F(4A)] of the Central Excise Rules, 1944, under which credit which was lying unutilized on 16.03.1995 with the manufacturers stood lapsed, on the ground that, MODVAT credit lying in balance with the assessee as on 16.03.1995 represents a vested right accrued or acquired by the assessee under the existing law and such right is sought to be taken away by impugned Rule 57F(4A) and the Central

LEGAL CLASSICS

Government has no powers under Section 37 of the Central Excise Act, 1944 or any other provision thereof to frame such a rule.

The Department contended that impugned Rule 57F(4A) is only a part of a scheme providing for giving, concessions under the taxation enactment. The scheme need not be continued for all time to come and could be put to an end at any time and thus all that has happened is that the scheme which was available earlier is no longer available and, therefore, it is not open to contend that the scheme affects any vested right; and, that under the scheme it is only a mode of adjustment of taxes



which were provided and there is no vested right accrued to the assesseees.

The Petitioners argued that they have utilized the facility of paying excise duty on the inputs and carried the credit towards excise duty payable on the finished products. For the purpose of utilization of the credit all vestitive facts or necessary incidents thereto have taken place prior to 16.03.1995 or utilization of the finished products prior to 16.03.1995. Thus, the Petitioners became entitled to take the credit of the input instantaneously once the input is received in the factory on the basis of the existing scheme.

The Hon'ble Supreme Court after considering the facts of the case observed that when on the strength of the rules available certain acts have been done by the parties concerned, incidents following thereto must take place in accordance with the scheme under which the duty had been paid on the manufactured products and if such

a situation is sought to be altered, necessarily it follows that right, which had accrued to a party such as availability of a scheme, is affected and, in particular, it loses sight of the fact that provision for facility of credit is as good as tax paid till tax is adjusted on future goods on the basis of the several commitments which would have been made by the assesseees concerned. Therefore, the scheme sought to be introduced cannot be made applicable to the goods which had already come into existence in respect of which the earlier scheme was applied under which the assesseees had availed of the credit facility for payment of taxes. It is on the basis of the earlier scheme necessarily the taxes have to be adjusted and payment made complete. Any manner or mode of application of the said rule would result in affecting the rights of the assesseees.

In the light of the above observation, the Hon'ble Supreme Court decided the issue in favour of the assessee and held that the rule cannot be applied to the goods manufactured prior to 16.03.1995 on which duty had been paid and credit facility thereto has been availed of for the purpose of manufacture of further goods.

Applicability under GST Laws

Notification 16/2020-Central Tax dated 23.03.2020 lays down the amendment under Rule 89(4) of the CGST Rules and the provisions of new Rule 96B which is reproduced below for ready reference (amendment is highlighted):

*“(C) “Turnover of zero-rated supply of goods” means the value of zero-rated supply of goods made during the relevant period without payment of tax under bond or letter of undertaking **or the value which is 1.5 times the value of like goods domestically supplied by the same or, similarly placed, supplier, as declared by the supplier, whichever is less, other than the turnover of supplies in respect of which refund is claimed under sub-rules (4A) or (4B) or both;**”*

“96B. Recovery of refund of unutilized input tax credit or integrated tax paid on export of goods where export proceeds not realized. –(1) Where any refund of unutilized input tax credit on account of export of goods or of integrated tax paid on export of goods has been paid to an applicant but the sale proceeds in respect of such export goods have not been realized, in full or in part, in

LEGAL CLASSICS

India within the period allowed under the Foreign Exchange Management Act, 1999 (42 of 1999), including any extension of such period, the person to whom the refund has been made shall deposit the amount so refunded, to the extent of non-realization of sale proceeds, along with applicable interest within thirty days of the expiry of the said period or, as the case may be, the extended period, failing which the amount refunded shall be recovered in accordance with the provisions of section 73 or 74 of the Act, as the case may be, as is applicable for recovery of erroneous refund, along with interest under section 50:

Provided that where sale proceeds, or any part thereof, in respect of such export goods are not realized by the applicant within the period allowed under the Foreign Exchange Management Act, 1999 (42 of 1999), but the Reserve Bank of India writes off the requirement of realization of sale proceeds on merits, the refund paid to the applicant shall not be recovered.

(2) Where the sale proceeds are realized by the applicant, in full or part, after the amount of refund has been recovered from him under sub-rule (1) and the applicant produces evidence about such realization within a period of three months from the date of realization of sale proceeds, the amount so recovered shall be refunded by the proper officer, to the applicant to the extent of realization of sale proceeds, provided the sale proceeds have been realized within such extended period as permitted by the Reserve Bank of India."

The amendment under Rule 89(4) of the CGST Rules has the effect of deeming a lower amount than the value which is determined under Section 15 of the Central Goods and Services Tax Act, 2017 (CGST Act) as the amount which would qualify as 'turnover' while calculating refund. Further, newly introduced Rule 96B provides that where any refund of unutilized input tax credit or IGST in respect of export of goods has been paid to an applicant and the sale proceeds in respect of such export goods have not been realized fully or partly in India within the period allowed under the Foreign Exchange Management Act, 1999 (FEMA), the applicant must deposit the amount so refunded to the extent of non-realization of sale proceeds, along with applicable interest within 30 days of the expiry of the period permitted under FEMA.

Thus, to summarize, the amendments have the effect of restricting the refund which an exporter would otherwise have been entitled to and which will be reduced on non-fulfilment of the aforesaid conditions. The said amendment can therefore be said to be oppressive in the nature for the taxpayers and may therefore be interpreted to be applicable only prospectively in view of the settled law in that regard³¹.

In a situation where export has taken place prior to the said amendment and the refund has also been claimed and sanctioned prior to the said amendment, an argument would be available that Rule 96B of the CGST Rules may not be applicable to the said refund sanctioned applying the ratio of decision in the case of Eicher Motors (supra) since the vested right of sanctioned refund becomes the property of the assessee and it cannot be divested of such refund amount by a prospective amendment which introduced further



limitation on the refunds sanctioned. However, in cases where refund application has been made but refund has not been sanctioned prior to the said amendment, a view may be taken by the department that since the refund was sanctioned only after Rule 96B the same ought to be complied with by the taxpayer. Similarly, position would be in respect of amendment carried out to Rule 89(4) on being applicable to exports undertaken prior to 23.03.2020. Further, the possibility of the said amendment in the rules being challenged as ultra vires and contrary to the intention for which GST was introduced being seamless transition of credit cannot be ruled out. It would be interesting to see the view that would be taken by the department on sanctioning of the refunds as the issue opens up a new litigation which would haunt a large number of exporters around the country with the enormous amount of revenue involved.

³¹ i) CCE vs. Mysore Electricals Industries Limited - (2006) 204 ELT 517 (SC)
ii) Suchitra Components Ltd. vs. CCE, Guntur - 2007 (208) ELT 321 (SC)



QUOTABLE QUOTES

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