



NAVIGATING GST 2.0

- THOUGHT LEADERSHIP
- COMPENSATION CONUNDRUM AND WHAT IT MEANS FOR THE FUTURE OF GST
- FROM THE BENCH – KEY JUDICIAL PRONOUNCEMENTS
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INTRODUCTION

Note from Editor

The GST regime came as a solo performer in the Indian world of varied range of indirect taxes. While there were a lot of expectations during its implementation, the subject still lacks clarity on certain aspects and calls for frequent amendments. Undoubtedly, the first budget post the COVID-19 pandemic brought in positivity as regards growth and revamping of the economy, however, taxpayers still are in anticipation as to what would be derived from the same, as Customs law brought in a few changes like imposition of Agriculture and Infrastructure Cess, it is also promised to reconsider old provisions.

Given this background, we're more than happy to present the 10th Edition of our **GST Newsletter**, where we take you through the most recent developments in the GST and the Indirect Tax world, including policy changes, landmark judgments, Notifications, Circulars and the list goes on. In the **Thought Leadership** chapter, ELP Partner **Rohit Jain** outlines that even after 3.5 years post its implementation, GST is yet to firmly find its feet and more than anyone else, exporters faced its wrath, being the ones who have had to cope with frequent changes in the GST Export provisions. The author also highlights the positive measure taken by the Government in bringing back the upfront IGST exemption on imports.

Unification of the Central and State/UT Governments was the basic idea of GST, but the same was not roses and petals, and in fact, being a revolutionary move required a lot of cogitation. In the **Cover Story** i.e. "Compensation Conundrum and What it means for the future of GST", the ELP team discerns that even the Centre promised compensation to States/UTs for any revenue shortfall that implementation of GST brought about and hope that better sense and wisdom prevails, and balance is struck so that the long-term benefits of GST are not compromised.

The section **From the Bench- Key Judicial Pronouncements** portrays the current noteworthy verdicts, orders, rulings and the judgments of the Hon'ble Supreme Court, High Courts, AARs, Tribunals and the Appellate Authorities. The **Expert Speak** module covers a riveting interview with **Mr. Khozem Mirza (Joint President, Aditya Birla Group)** and **Ms. Lekha Bapna (Senior Manager - Legal)** who assert that "Compliances have been streamlined vis-a-vis erstwhile state Laws with respect to tangibles. However, for the service industry, a transition from centralized half-yearly compliances to state-wise monthly compliances has been extensive" and also expect clarity on complete roll-out of e-invoicing and integration of GSTN and ICES.

In 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 section named **Allied Laws** focuses on the export policies and import restrictions on various articles, in addition to the recent developments in policy and guidelines for setting up of Inland Container Depots, imposition of Anti-dumping duties on various goods, Preferential Certificates of Origin and more.

Under the head **Legal Classics**, a landmark judgment of the earlier indirect tax regime is laid emphasis on and from which reasoning can be drawn for its applicability in the GST era as well based on the significant judicial precedent it has set and the principles deciphered therein.

We are certain our 10th issue of 'Navigating GST' would be an intriguing read for you, and we promise to bring you the next edition sooner than you think!





THOUGHT LEADERSHIP

The following chapter has been authored by Rohit Jain (Partner) - ELP

CONTINUING CONUNDRUM ON EXPORTS UNDER GST

When the Goods and Services Tax (GST) was implemented, it was hailed as the single largest reform and that pathbreaking tax regime which will be transparent, easy to adhere to and non-adversarial. 3½ years later, GST is yet to firmly find its feet. Amongst the different categories of taxpayers, it is the exporters who have had to cope with frequent changes in the GST export provisions. The Government, in order to arrest any fraud and undue benefit to unscrupulous exporters, has been making regular amendments to key export provisions. Although the intention of the Government is noble, as in the recent past there have been many instances of export frauds, yet these frequent changes/ amendments have made matters difficult for genuine exporters.

The GST law provides for two options to enable zero-rating¹ of exports, viz. (i) Integrated Tax (IGST) can be paid on exports after utilizing available input tax credits, and such IGST will be refunded within a timebound period; or (ii) Export is carried out without payment of tax under bond/ Letter of Undertaking (LuT), and refund of taxes incurred on the input side is claimed. However, both these options have been increasingly fettered through several restrictive amendments aimed at curbing misuse.

The first issue concerns the denial of the upfront IGST exemption on imports made by Advance Authorization (AA) holders. While the exemption for Basic Customs Duty (BCD) continued, the IGST exemption ended upon the transition, even though the IGST levy subsumed the previously exempted levies of Countervailing Duty (CVD) and Special Additional Duty (SAD). For AA holders who had accepted export orders in the legitimate expectation that they would continue to be eligible for duty-free imports of raw materials, this came as an unanticipated cost. Various Writ Petitions were lodged on the issue, wherein the Courts permitted

the duty-free import of raw materials for the fulfillment of export orders taken prior to GST.²

While this dispute was yet ongoing, the Government took the positive step of issuing a notification³ on 13 October 2017 to bring back the upfront IGST exemption on imports. However, its impact was diluted by the fact that it was made subject to a "pre-import condition", a term which is vague and undefined, but has been interpreted to mean that the requisite raw materials should be imported



before finished goods are exported (as opposed to a replenishment model).

Another round of Writ Petitions was filed to test the validity of this pre-import condition – while the Single Bench of the Madras High Court⁴ upheld the said condition, the Division Bench of the Gujarat High Court⁵ struck it down. The Apex Court has since stayed the favorable ruling of the Gujarat High Court, and the final outcome on the issue is awaited. Meantime, the Directorate of Revenue Intelligence (DRI) commenced investigations into AA holders across India, and sought to deny the IGST exemption under any AA license where a replenishment model had been followed, even if in a single instance. Although the pre-import condition

¹ Para 1.9 of International VAT/GST Guidelines 2017 by OECD: "Under the destination principle, exports are not subject to tax with refund of input taxes (that is, "free of VAT" or "zero-rated") and imports are taxed on the same basis and at the same rates as domestic supplies."

² See, for instance, Narendra Plastics Pvt. Ltd. vs. UOI [TS-325- HC-2018(DEL)-NT]

³ Notification No. 79/2017-Customs dated 13.10.2017

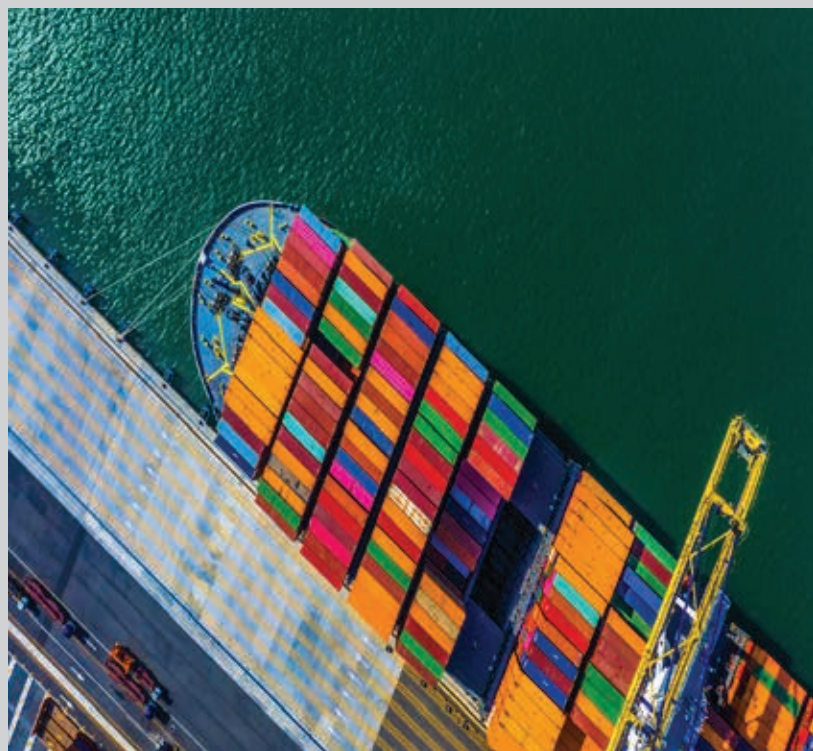
⁴ Vedanta Limited [TS-953-HC-2018(MAD)-NT]

⁵ Maxim Tubes Co. Pvt. Ltd. [TS-79-HC-2019(GUJ)-NT]

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was eventually omitted⁶, this amendment was only prospective (w.e.f. 10 January 2019 onwards), and hence did not address the issue for the period from 13 October 2017 to 9 January 2019.

The real impact for exporters was in fact under Rule 96(10)⁷ of the Central Goods and Services Tax Rules, 2017 (CGST Rules), which underwent multiple amendments to deny refund of tax paid on export



in all cases where the benefit of IGST exemption had been availed on imported procurements (e.g: under AA, Export Promotion Capital Goods (EPCG) Scheme, Export Oriented Unit (EoU) Scheme⁸). Given the language of the provision, a doubt remains as to whether a single availment of an exemption would disqualify an exporter for any refund under Rule 96. It appears that the fear of double benefit being availed is unfounded, as exporters will need both the AA benefit as well as the Rule 96 refund to completely neutralize the incidence of tax on their procurements. Although the Gujarat High Court

upheld the validity of the provision⁹, several other writs¹⁰ are pending before High Courts where the constitutional validity of these amendments has been challenged on various grounds.

Thereafter, upon the onslaught of the pandemic in March 2020, the Government tinkered with the formula under Rule 89(4) of the CGST Rules, which applies to the refund of unutilized input tax credit (ITC) claimed by exporters. Originally, the quantum of refund was arrived at by applying the ratio of actual export turnover to the total turnover. The amendment¹¹, instead of considering the actual value of exports, arbitrarily restricted the export turnover to 1.5 times the value of like goods domestically supplied by the supplier or similarly placed suppliers – a completely notional figure. In a double whammy, while the actual export turnover in the numerator was curtailed, the denominator remains unchanged. Such a skewed ratio significantly constricted the ITC refund claims of exporters. Shortly after, another restriction came in the form of Circular¹² dated 31 March 2020, which also capped the ITC to that reflected in GSTR 2A.

Given the above amendments under the GST law and the continuing pandemic, genuine exporters are the sufferers, viz. whether they opt for paying IGST and claiming refund, or for export without payment of tax and claiming refund of unutilized ITC. Further, the restrictions in relation to schemes such as AA, EPCG, EOUs etc. result in a situation where the various beneficial schemes for exporters offered by the Ministry of Finance and Ministry of Commerce seem to not be completely aligned.

The restrictions for exporters under the GST law were compounded by the parallel developments under the Foreign Trade Policy (FTP). Several months into the pandemic, the Government capped¹³ the benefits under the Merchandise Export from

⁶ Notification No. 01/2019-Customs dated 10.01.2019

⁷ Inserted by Notification No. 3/2018 – Central Tax dated 23.01.2018 and amended by Notification No. 39/2018-Central Tax dated 04.09.2018, Notification No. 53/2018-Central Tax dated 09.10.2018 and Notification No. 54/2018-Central Tax dated 09.10.2018 effective retrospectively from 23.10.2017

⁸ The restriction was also imposed where any procurements were made under the 0.1% scheme (see, for instance, Notification No. 41/2017-I.T. (Rate), dated 23-10-2017).

⁹ Cosmo Films Ltd [TS-925-HC-2020(GUJ)-NT]

¹⁰ Comstar Automotive Technologies Pvt. Ltd. v. UOI before the Madras HC, Watson Pharma Pvt. Ltd. v. UOI before the Bombay HC

¹¹ Vide Notification No. 16/2020 – Central Tax dated 23.03.2020

¹² Para 5 of Circular No. 135/2020 – GST dated 31.03.2020

¹³ Notification No. 30/2015-20 dated 01.09.2020 by the DGFT

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India Scheme (MEIS) at INR 2 crores per exporter for exports made from 1 September 2020 to 31 December 2020. New exporters (obtaining IEC post 1 September 2020) and exporters who had not made any exports for a period of one year preceding 1 September 2020 were altogether disqualified.

1 January 2021. However, a Public Notice¹⁶ was issued the next day, which *inter alia* stated that RoDTEP benefits would not be available to exporters taking the benefit of Advance Authorizations, EoUs, RoSCTL, Jobbing, etc. Lack of clarity persists as to whether the RoDTEP Scheme would be applicable for supplies made to and from SEZs, which may



Given that the Government had indicated that the MEIS Scheme would continue until 31 December 2020, exporters would certainly have factored in the benefit while pricing their exports, and such a cap resulted in additional costs which were unaccounted for. The sudden withdrawal of the MEIS benefits has been challenged before the Gujarat High Court¹⁴, *inter alia* on the basis of the doctrines of promissory estoppel and legitimate expectation¹⁵, as well as on the ground that it discriminates between exporters of different classes by arbitrarily imposing a blanket cap of INR 2 crore. The matter is currently pending hearing.

Meanwhile, the Remission of Duties and Taxes on Exported Products (RoDTEP) Scheme has been under preparation, as the successor to MEIS. As the new year was ushered in, a Press Note issued on 31 December 2020 clarified that the RoDTEP Scheme would be applicable for all export products from

potentially have been intended to be covered by the use of 'etc.'.

As on date, the RoDTEP Scheme has not been introduced under the FTP, and the applicable rates are yet to be notified. It therefore remains to be seen whether the nature of restrictions enacted under the GST will also similarly find place under this much-feted Scheme. Additionally, the fate of service exporters is also uncertain – while the Government had indicated it would take a decision on the continuity of benefits under the Service Exports from India Scheme (SEIS)¹⁷, no such announcement has been made till date.

During these difficult times, it is imperative that the Government adopts a more liberal and benign approach, so as to boost confidence amongst exporters who are the flag-bearers of 'Make in India' and 'Atmanirbhar Bharat'. Such approach will also aid the recovery of the economy.

¹⁴ Man Industries (India) Ltd [TS-1084-HC-2020(GUJ)-FTP]

¹⁵ Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P. [(1979) 2 SCC 409]; State of Punjab vs. Nestle India Ltd. [(2004) 6 SCC 465]; Bannari Amman Sugars Ltd. Vs. Commercial Tax Officer [2005 (1) SCC 625]

¹⁶ Public Notice No. 143/2020-21 dated 01.01.2021

¹⁷ Press Release dated 31.03.2020



COMPENSATION CONUNDRUM AND WHAT IT MEANS FOR THE FUTURE OF GST

The following chapter has been authored by Supreme Kothari (Associate Director), Virangana Wadhawan (Associate Manager) and Surabhi Prabhudesai (Associate) - ELP

Compensation deal that led to GST

The biggest overhaul that GST brought about is not so much in relation to the amalgam of a multitude of past taxes as it has been in unifying the federal structure of the Indian taxation system and bringing both, the Central and the State Governments/ Union Territories within its fold. But achieving this was not a cakewalk, it required a lot of deliberation, not to speak of the amendment to the constitutional framework to dually empower such Governments to levy GST on the same supply transaction. Above all, it also entailed a promise on part of the Central Government to compensate the State Governments for any revenue shortfall that experimenting with GST brought about. Such a framework was also necessitated owing to concerns of the key manufacturing States like Maharashtra, Gujarat, Haryana, etc. driven by the factor that GST was to be a destination-based consumption tax unlike most of the pre-GST taxes which were origin based.

Such promise was even made part of the Constitutional framework whereby, in terms of Section 18 of the Constitution (One Hundred and First Amendment) Act, 2016 ('Amendment Act'), it was specified that 'Parliament shall, by law, on the recommendation of the Goods and Services Tax Council, provide for compensation to the States for loss of revenue arising on account of implementation of the goods and services tax for a period of five years'. Pursuant thereto, the Goods and Services Tax (Compensation to States) Act, 2017 ('Cess Act') was enacted and brought in force 'to provide for compensation to the States for the loss of revenue arising on account of implementation of the goods and services tax in pursuance of' the Amendment Act. The broad methodology laid down is as under-

1. In terms of Section 7 of the Cess Act, compensation shall be payable to the respective State during the transition period, being five years from the date of introduction of GST;
2. The compensation payable to a State, if any, shall be determined by comparing the projected revenue for any year with the actual tax collected under the GST regime. Such projected revenue factors an annual growth of



fourteen percent over the base year revenue of a State (i.e. revenue earned during the period FY 2015-16 by such State);

3. The compensation payable to a State shall be provisionally calculated, in terms of the prescribed mechanism, and released at the end of every two-month period, and shall be finally calculated for every financial year after the receipt of final revenue figures, as audited by the Comptroller and Auditor-General of India;

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4. The levy of Compensation Cess, in terms of Section 8 of the Cess Act, is for the purpose of meeting such compensation. The same is to be levied for a period of five years or for such period as may be prescribed on the recommendations of the GST Council. In terms of Section 10 of the Cess Act, proceeds therefrom shall be credited to a non-lapsable Fund known as the Goods and Services Tax Compensation Fund ('Cess Fund'), which shall form part of the public account of India and shall be utilised for the said purpose. In addition, the Cess Fund could also be credited with 'such other amounts as may be recommended by the Council'.
5. The said Section 10 also prescribes a mechanism of sharing any surplus in the Cess Fund, at the end of the transition period or otherwise (i.e. at any point in time), stipulating that fifty percent of such surplus be credited to the Consolidated Fund of India ('CFI') as share of the Centre and balance be distributed amongst States, in the prescribed manner. At the same time, any shortfall arising with regard to compensation to be released provisionally, on a two-monthly basis, is stipulated to be contributed equally by the Centre and the States, from such surpluses earlier credited.

In a nutshell, the current legal position remains that while the States are entitled to compensation in the manner envisaged, such compensation can be met only out of the Cess Fund, which comprises of Compensation Cess collections alone, along with the possibility of it being credited with any other amount that the GST Council may prescribe. Further, the Cess Act itself does not prescribe any mechanism for meeting any deficit in the Cess Fund. While the Central Government is not objectively required to infuse money into the Cess Fund via the CFI, there remains a possibility of the GST Council extending the levy of Compensation Cess or crediting other amounts in the Cess Fund, to address a deficit situation.



Initial years of glory

Considering the 14% of projected growth, calculated on the basis of 10% of growth plus 4% of inflation, it was a sweet deal for the states, and they conceded. The state of affairs in relation to this arrangement was hunky-dory for the first 2 years, as the Centre paid the compensation amount promised to the respective States. In fact, for the initial 2 years, there was a surplus in the Compensation Fund after disbursing the compensation amount to the States, which was transferred to the CFI by the Centre.

While in the third year i.e. FY 2019-20, there was a shortfall of upto 42% in collections, which led to delay in payment of compensation by the Centre to the States, the last tranche of March 2020 was released in July 2020. The shortfall was made good by the Centre by using balance cess from previous years and an additional transfer from CFI.¹⁸

¹⁸<https://www.thehindu.com/business/gst-cess-falls-42-short-in-fy20/article32206702.ece>

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Skirmish between the Centre and the States for disbursements for FY 2020-21

The Covid-19 induced economic turmoil did have far-reaching implications on the GST revenue collections, enhancing the shortfall as well as capability of meeting such shortfall out of the Cess Fund.



For FY 2020-21, it was initially estimated by the Centre, that the shortfall for the said period would be around Rs. 2.35 lakh crore. Further, relying on the opinion of the ASG, the Centre initially asserted that it was under 'no obligation' to make good any shortfall in GST and it is upto the GST Council to devise a solution. Accordingly, the Centre had proposed that the States should directly borrow from the market, issuing debt under a special window co-ordinated by the Ministry of Finance. The Centre devised two borrowing options in this regard.

Option 1 came with a special borrowing window for States, coordinated by the Finance Ministry, to borrow the projected shortfall of Rs. 97,000 crores only on account of GST implementation and not the balance amount being attributed to the Covid-19 pandemic. The borrowed amount would be fully repaid from the Cess Fund, without being counted as states' debt. Under Option 2, it was proposed that states should borrow the entire

amount of Rs. 2.35 lakh crores and bear the interest burden, although the principal amount would be subsequently repaid from the Cess Fund.

While the sabre-rattling continued for a while, all States thereafter settled for the first option, which has been further sweetened by increasing the borrowing limit to Rs. 1.1 lakh crores and by the Centre agreeing to borrow the amount and thereafter transferring to the states as loans on a back-to-back basis. As of 11th January 2021, the Centre has released the 11th instalment of Rs. 6,000 crores to states as a back-to-back loan to meet the compensation shortfall in collection of goods and services tax, taking the total amount released so far through the special borrowing window to Rs 66,000 crore.

What it means for the future

While the major impasse has been addressed as of now, the other major question is addressing the Rs. 1.25 lakh crore gap in compensation.

As GST revenues increase, this might further narrow down but the issue nevertheless will have to be sorted out. Further, one certainly cannot rule out the possibility of similar issues arising in FY 2021-22, the last of the years for which compensation has been committed. Further, the above situation would certainly also lead to extension/expansion of compensation cess levy. In fact, the GST Council, in its 42nd meeting has agreed to extend the levy of compensation cess beyond January 2022.

The larger takeaway from the current conundrum has to be the uncertainty of how a situation of revenue shortfall would be addressed by the respective Governments beyond the five-year period and whether based on individual positions, the respective Governments would have measures at their disposal to address sluggish revenues.

This takes us to the root of the matter, which is whether with the introduction of the GST, the constitutional objective as set out in Article 1 of the

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Constitution, which declares India as a "Union of States", has been compromised, since, as per the GST, while the State Governments are empowered, in terms of Article 246A(2), to formulate laws for levying SGST on intra-state supplies, such levy, in terms of Section 15 of the respective SGST Acts would be at rates not exceeding twenty percent, as may be notified by the State **on recommendations of the Council**. Thus, tax rates are to be fixed by the GST Council, a body comprised of members from both the Central and the State Governments and chaired by the Union Finance Minister. The States do not seem to be permitted to individually alter the GST rate structure and its design, and the same can be done only in accordance with the decisions of the GST Council. While at first blush this does not seem like a real complication and would suggest that one is making a mountain out of a molehill, the decision-making mechanism would suggest otherwise. While the decisions of the GST Council would be on the basis of a majority, such a majority is defined as three-fourths of those present and voting, with the Union having one-third weightage of all the votes. This effectively gives the Centre a veto over every decision of the GST Council. Also, while it may be argued that prescriptions made by the GST Council are only recommendatory and hence not binding, such an interpretation would be contrary to the envisaged framework of GST. While Article 279A of the Constitution provides for creation of an adjudication mechanism by the GST

Council, to inter alia resolve disputes between the Centre and one or more of the States, there is no move in that direction yet.

Thus, clearly, the financial autonomy of the States seems to have been compromised. The limited flexibility would be with regard to levy of VAT on a limited range of products e.g: alcohol, petrol, diesel, HSD, etc. The recourse to Article 279A(f) of the Constitution, which provides that the GST Council may recommend any special rate(s) for specified period, to raise additional resources during any 'natural calamity' or disaster would be very limited and would also be based on the recommendation of the GST Council.

Conclusion-

At some stage, the possibility of GST going for an overhaul, so as to reinstate the financial autonomy of the States cannot be ruled out. This may materialise by prescription of "floor rates with bands of goods and services tax", in terms of Article 279(4)(e). Alternatively, the taxation structure itself may have to undergo some overhaul to pave way for States' autonomy, which is certainly the cornerstone of a federal economy. One could only hope that better sense and wisdom prevails, and a balance is struck so that long-term benefits of GST are not compromised, while simultaneously ensuring that States are accorded adequate financial autonomy.





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. Madras High Court in ***Sun Dye Chem vs Assistant Commissioner [TS-953-HC-2020(MAD)-NT]***

Other Cases

2. Madras High Court in ***Maansarovar Motors Private Limited vs. The Assistant Commissioner & Ors [TS-945-HC-2020(MAD)-NT]***
3. Madhya Pradesh High Court in ***Shri Shyam Baba Edible Oils vs Chief Commissioner & Anr [TS-1001-HC-2020(MP)-NT]***
4. In Re: ***NCS Pearson Inc [TS-1028-AAAR-2020-NT]***
5. Gujarat High Court in case of ***Super Spintex vs Union of India [Special Civil Application No 20761 of 2018]***

Sun Dye Chem vs Assistant Commissioner of State Tax [TS-953-HC-2020(MAD)-NT]

Facts of the Case

- Petitioner has filed monthly returns in Form GSTR 3B & Form GSTR-1 for the period August 2017 to December 2017. At the time of filling returns, Petitioner inadvertently reported intra-state supplies as inter-state transaction in respect of one customer. Resultantly, customer was not able to avail input tax credit ('ITC') on such transaction.
- Petitioner applied for amendment of Form GSTR 1 on August 12, 2019, However, such request was rejected on the grounds that amendment could be made only up to March 31, 2019.
- Aggrieved by the said order, Petitioner has preferred writ petition

Judgement

- Upon perusal of relevant provision, Hon'ble High Court observed as follows:
 - a. The details of outward supplies need to be declared by registered person in Form GSTR 1, which are then auto populated to recipient in their Form GSTR 2A

- b. Basis the auto-populated Form GSTR 2A, recipient can finalize ITC, by either accepting / rejecting / modifying the data reflected in Form GSTR 2A or by adding the details of inward supplies which are not included by supplier in Form GSTR 1

- c. Details of supplies modified, deleted or included by the recipient would be communicated to supplier by way of Form GSTR 1A

- Admittedly, Form GSTR 2A and Form GSTR 1A are yet to be notified as on date, therefore, statutory procedure contemplated for seamless availment is currently unavailable.
- As on the last date to make amendment, the above forms were not notified. Given this, Hon'ble High Court held that, in absence of enabling mechanism, Petitioner should be allowed to make the amendment in Form GSTR 1.



FROM THE BENCH - KEY JUDICIAL PRONOUNCEMENTS

ELP COMMENTS

This ruling should provide respite to tax-payers served with notices for mismatch of ITC declared in Form GSTR 3B and GSTR 2A.

Maansarovar Motors Private Limited vs Assistant Commissioner [TS-945-HC-2020(MAD)-NT]

Facts of the Case

- A proviso of Section 50 of Central Goods and Services Tax Act, 2017 ('CGST Act') was inserted vide Finance Act, 2019 to impose interest only



on tax liability discharged through cash, in case of delay in filing of GST returns. Thus, no interest would apply on liability discharged through Input Tax Credit ('ITC'). Such amendment was made effective from September 1, 2020.

- However, basis GST Council meeting and consequent press release, it was expected that such proviso will be made effective from July 1, 2017.
- Instant Writ Petition has been filed for retrospective application of said proviso, in view of following grounds:
 - a. Interest should not apply in respect of tax liability discharged through ITC since ITC was available even prior to computation of output tax liability;
 - b. Interest is merely a measure of compensation and since ITC was already available in the

electronic ledger, interest implication should not arise on such component;

- c. Proviso was inserted to rectify an anomaly in law and thus, should have retrospective operation.
- On the contrary, Revenue argued that as per Section 16(2) and Section 41 of CGST Act, ITC is available only upon filing of self-assessed returns.
 - Issue before Hon'ble High Court was whether the proviso would apply prospectively or retrospectively.

Judgement

- Hon'ble High Court referred to 31st GST Council meeting wherein proposal for making an amendment in Section 50 was discussed. GST council had recommended that interest should be paid on net cash liability with effect from July 1, 2017. A press release to this effect was also issued.
- High Court, relying on principle laid down by Hon'ble Supreme Court, remarked that nature and object of a proviso should be considered while deciding its applicability. If proviso was designed to eliminate unintended and prejudicial consequences which would cause hardship to a party, such a proviso should be seen to be remedial in nature and should have retrospective operation.
- Basis the above, it was held that above proviso should have prospective application.

Shri Shyam Baba Edible Oils vs Chief Commissioner [TS-1001-HC-2020(MP)-NT]

Facts of the Case

- In the instant case, Revenue authorities failed to upload copy of the Show Cause Notice ('SCN') on the GST portal. The same was communicated to the Petitioner vide e-mail. Thereafter, a demand order was issued basis the said SCN.
- Petitioner filed a writ arguing that no order can be passed in absence of issuance of a SCN. Further, as per Rule 142 of Central Goods and Services Tax Rules, 2017, revenue authority is obligated to communicate SCN by uploading on GST portal.

FROM THE BENCH - KEY JUDICIAL PRONOUNCEMENTS

Judgement

- Hon'ble High Court observed that the only mode prescribed under the law for communicating SCN is by way of uploading the same on GST portal. It was further observed that when a particular procedure is prescribed to be performed in a particular manner under law, then no other procedure/ mode should be followed other than the one prescribed.
- Basis this, Hon'ble High Court allowed the writ and held that statutory procedure prescribed for serving the SCN was not followed by revenue authorities and thus, demand order was set aside.

In Re: NCS Pearson Inc [TS-1028-AAAR-2020-NT]

Facts of the Case

- Respondent is a foreign company engaged in providing test administration services to students or individuals test takers in India. Respondent has obtained GST registration in India as a supplier of foreign Online Information and Database Access or Retrieval ('OIDAR') services provider.
- Respondent offers following (3) types services to customers in India:
 - Type 1 Test** – Such tests are self-administered by the test taker and can be taken from any location. Test contain MCQs and entire process of test, from profile creation to payment & taking test to scoring is done by internet browser. Result can be seen immediately after the completion of test.
 - Type 2 Test** – This is similar to Type 1, major difference being test taker is required to visit test centre where he is administered by invigilator. Result of the test is obtained immediately after completion of test
 - Type 3 Test** – Difference in this type of test is that it contains MCQs as well as essay-based question. After completion, indicative score can be viewed, which represents only MCQ score. Essay based question are evaluated by human evaluator in the USA and computer-based program. If difference between the two is less than 1 point, then final score would be average of the two. However, if difference

is more than 1 point, essay is sent to expert for evaluation and expert's score would be considered as final. Test taker gets the final score on e-mail after the said process is completed.

- Authority for Advance Ruling ('AAR') held that Type 1 and Type 2 would qualify as OIDAR services and should be taxable in the hands of Respondent. However, Type 3 would not qualify as OIDAR services, in view of human intervention involved, and thus should be exempt from levy of tax.
- Department filed an appeal against the said ruling before the Appellate Authority for Advance Ruling ('AAAR'), on the ground that human intervention is minimal in nature even in Type 3 and thus, qualifies as OIDAR service.

Judgement

- AAAR observed that critical aspect that required evaluation was whether Type 3 involved 'minimal human intervention', so as to qualify as OIDAR service.



- Under the Indian regulations, no guidelines are prescribed to determine what constitutes as minimal human intervention. Reference in this regard was made to definition provided in European Commission VAT Committee Guidelines. The said Guidelines provide that for the notion of minimum human intervention, involvement on the side of supplier is relevant and not recipient.

FROM THE BENCH - KEY JUDICIAL PRONOUNCEMENTS

- In the instant case, evaluation through human examiner is undertaken merely to judge the validity, fairness and reliability of computer-based program. Role of human scorer is a means to ensure reliability of the computer-based program. Further, there is no direct human interaction of individualistic nature between evaluator and the candidate.
- Scoring by human examiner should thus be construed as minimal human intervention and thus, instant service should qualify as OIDAR service.

ELP COMMENTS

An interesting and new principle has been laid down by AAAR to determine extent of human intervention, that it is critical to analyse the involvement and human interaction between supplier and recipient on individualistic basis.

Super Spintex Private Limited vs Union of India [Special Civil Application No 20761 of 2018]

Facts of the Case

- With the introduction of GST regime with effect from July 1, 2017, amendment was made in respect of custom duty exemption available under the Export Promotion Capital Goods Scheme ('EPCG'). As per the said amendment, benefit of exemption was not available on IGST paid on import of capital goods (as per Notification No 26/2017 – Custom dated June 29, 2017).
- On October 13, 2017, Notification No 79/2017 was issued to allow benefit of IGST to IGST paid on import in terms of Section 3(7) of Custom Tariff Act, 1975. Thus, for the intervening period from July 1, 2017 to October 12, 2017, petitioner paid applicable IGST on import of capital goods.
- Instant writ application has been filed to quash Notification number 26/2017 and consequent Trade Notices, to the extent benefit of exemption was disallowed on the IGST component. Petitioner also sought refund of the IGST paid in respect of such imports.
- Petitioner relied on the ruling of Hon'ble Gujarat High Court in case of **Price Spintex Private Limited [SCA No 10756 of 2018]** wherein it was held that benefit of IGST exemption would be available

from July 1, 2017 and refund was allowed to petitioner.

- Further, due to change in order of utilization of ITC operationalized with effect from June 1, 2019, ITC of IGST is required to be first utilized for payment of IGST, CGST and SGST. Owing to this, petitioner had exhausted the ITC balance under the IGST head and had sufficient balance under CGST and SGST head.
- Thus, even if IGST exemption is allowed from July 1, 2017, a practical challenge will be faced by Company to claim refund of IGST in absence of sufficient balance.

Judgement

- Hon'ble High Court, relying on the ruling of Price Spintex Private Limited (*supra*) allowed IGST exemption from July 1, 2017.
- Further, in respect of IGST refund, acknowledged that balance of CGST and SGST got artificially inflated due to change in order of utilization of ITC and allowed refund. Such computation should be undertaken by reversing the entries of ITC utilization to ascertain sufficiency in ITC balance under IGST head.

ELP COMMENTS

The said ruling will provide relief to industry in claiming refund under different categories, especially in scenarios wherein IGST balance has been exhausted due to change in order of utilization.





EXPERT SPEAK

Interview with Khozem Mirza (Joint President) and Lekha Bapna (Senior Manager – Legal) Aditya Birla Group

Interview conducted by Supreme Kothari (Associate Director) - ELP

- 1. Having had the opportunity of dealing with a multitude of sectors, do you think GST has been a uniform law or have there been glaring sector-specific nuances/ challenges. Please elaborate.**



GST, as I see, has subsumed an array of State levies and has been hailed as the biggest tax reform since Indian independence. To your question of uniformity, even post three years of its implementation, there have been glitches- in tech and otherwise. There is no doubt that GST is a framework-based regime, where the charter for applicability of the State and Central Acts has been consistent across sectors. There have been teething issues on applicability of rates and exemptions, heavy compliances for the centralized service industry, E-way bill compliances for movement of goods, applicability of Anti-profiteering provisions and documentation, which have been ironed out gradually. The overall challenges have been more generic in nature. Nevertheless, mobilization of ITC (except in case of inverted duty structure) has been encouraging. Lastly, I believe that minor issues would have been

more easily overcome, if implementation of the law was done in phases, with proper training provided to Departmental officials, as at times, they appeared to be struggling with the transition more than the taxpayers.

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

As mentioned previously, our challenges are more generic than specific and there are still certain grey areas which need to be clarified, some of which include –

- 1) Inverted duty structure – The retrospective restriction on refund of input services has added pressure to the working capital of businesses.
- 2) Taxation of Ocean Freight – A certain percentage of the CIF value is indirectly subject to GST twice. While ITC of the same is available, it is a bigger problem for companies already having an inverted duty structure.
- 3) Denial of transitional pre-GST credits including clean energy cess, collected as additional duties of customs under the pre-GST regime;
- 4) Exclusion of Industrial HSD (among others) from the GST ambit – This is a popular cost absorbed in the Mining and Logistics sector.
- 5) IGST Exemptions – Lack of clarity as to whether the 'pre-import' condition and restriction for deemed exports were applicable during 13th October, 2017 to 9th January, 2019 for relevant import license-holders.
- 6) ITC restrictions on works contracts and motor vehicle expenses are, again, a high cost for businesses.

While preferring a representation before the GST Council is an on-going process, conclusion of various writ petitions, which are pending finality, may provide some resolution.

EXPERT SPEAK

3. Which major attributes of GST, in contradistinction to the erstwhile laws, have made a real contribution in making ease of doing business move north?

- 1) Applicability of E-way bills have definitely been a very positive module leading to reduction in transit time and adequate referencing of RFID with consignments.
- 2) A consolidated centrally-led law, subsuming 17 erstwhile taxes, has provided relief vis-à-vis separate compliances with state-specific VAT Acts and elimination of Entry tax/Octroi.
- 3) Implementation of GST has also increased mobilization of ITC for goods and services alike.
- 4) With creation of a central repository of information under a consolidated law, we hope the necessity of information notices for the authorities would be gradually eliminated.
- 5) Reconciliation of outputs with inputs maintained by business has proved helpful for bookkeeping too.
- 6) Refund provisions, though limited in cases of inverted duty structure, have eased restrictions on cash flow.
- 7) A shift in the taxable event from 'manufacture' to 'supply' of goods has transitioned the levy to a consumption-based tax.

4. Has GST really reduced the compliance burden? Which elements of compliance under GST need to be reformed or done away with?

Compliances have been streamlined vis-a-vis erstwhile state Laws with respect to tangibles. However, for the service industry, a transition from centralized half-yearly compliances to state-wise monthly compliances has been extensive.

Elements of compliance that can be reconsidered are –

- 1) The need for LUT may be done away with.
- 2) The proposed single-page return format may be brought into effect soon.
- 3) E-way Bill for intra-state movement of goods should be restricted to specific goods or with a higher threshold of consignment value.



5. Based on the nature of demands/ queries/ issues being raised by the authorities, what is the likelihood of litigation under GST being restricted to only core issues of interpretation vis-à-vis an otherwise compliant assessee?

The GST Council has been responsive on procedural issues. We expect streamlining of litigation to only core issues. The impact of explainable variances in the GST annual return vis-à-vis books of accounts is yet to be gauged.

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

We are looking forward to clarity on complete roll-out of e-invoicing and integration of GSTN and ICES. Additionally, provision of technological support to MSMEs may be useful to streamline GST pan-India.

LEGISLATURE AT WORK - RECENT AMENDMENTS

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



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

CBIC seeks to notify amendment carried out in sub-section (1), (2) and (7) of section 39 vide Finance (No.2) Act, 2019.

- Central Government hereby appoints the **10th day of November, 2020**, as the date on which the new provisions of **Section 39** of the Central Goods and Services Tax Act, 2017 shall come into force. Section 39 describes the form and manner of furnishing of Returns under GST Law. For simplification of GST and compliances, Government has come up with new scheme of GST Returns and issued certain Notifications for that purpose
- Amendment was carried out by Section 97 of Finance (No. 2) Act, 2019.¹⁹

CBIC issues Notification No. 82/2020-Central Tax [G.S.R. 698(E)] notifying new rules for Inward/Outward Supplies, GST Returns & New form GSTR 2B.

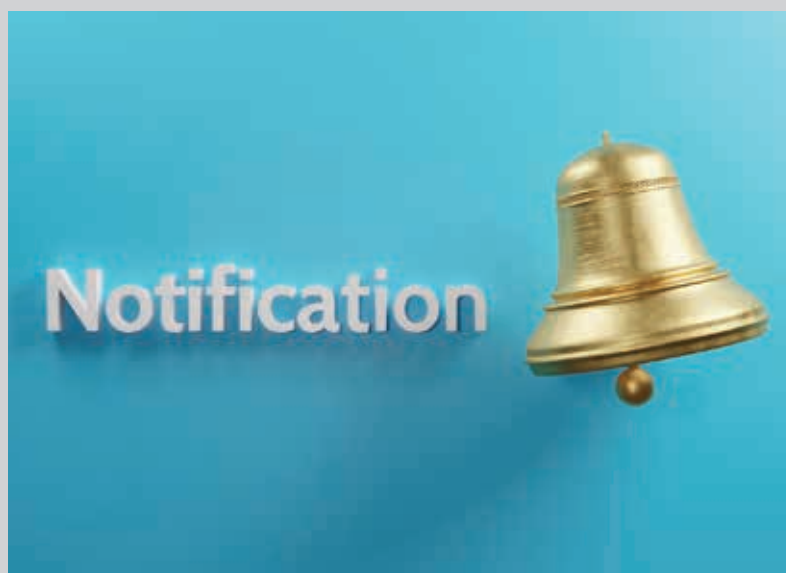
- Notification No. 82/2020** notifies *inter alia* following amendments in the CGST Rules, 2017:
 - A new Invoice Furnishing Facility (IFF) has been introduced for quarterly return filers to furnish their documents for each of the first two month of the quarter, between the **1st and 13th of the succeeding month**.
 - Provisions and Format of the new auto-drafted ITC statement FORM GSTR-2B have been specified.
 - Due dates for furnishing Form GSTR-3B for the period **October 2020 to March 2021** for taxpayers with aggregate turnover up to **Rs.5 crore** have been notified. The due dates have been prescribed based on the principal place of business of such registered persons (i.e. for certain states the due date is prescribed as **22nd day of succeeding quarter** and for the other

states the due date prescribed is **24th day of succeeding quarter**.)

- Provisions for the payment of taxes for quarterly GSTR-3B return filers have been prescribed.
- CBIC has corrected the wrong reference of **notification No. 72/2020-Central Tax, dated the 30th September, 2020** to **notification No. 79/2020-Central Tax, dated the 15th October, 2020**.²⁰

CBIC seeks to extend the due date for FORM GSTR-1

- With effect from 01st January 2021, the due date for **monthly GSTR-1 shall be 11th** of the **succeeding month**, whereas, the due date for **quarterly** filers shall be the **13th of the month succeeding such quarter**.²¹



CBIC Seeks to notify class of persons under proviso to section 39(1).

- Registered Persons having an aggregate turnover of up to Rs.5 crores in the preceding financial year and who have opted for quarterly return filing under Rule 61A as mentioned above can furnish quarterly Form GSTR-3B provided:

¹⁹ Refer Notification No. 81/2020 – Central Tax dated 10th November, 2020.

²⁰ Refer Notification No. 82/2020 – Central Tax dated 10th November, 2020.

²¹ Refer Notification No. 83/2020 – Central Tax dated 10th November, 2020.

LEGISLATURE AT WORK - RECENT AMENDMENTS

1. The return for the preceding month, as due on the date of exercising such option, has been furnished;
 2. Once exercised, such option shall continue unless revised by the registered person.
- Default migration has been prescribed for registered persons who have furnished the return for the tax period October, 2020 on or before 30th November, 2020.
 - However, such default option may be changed from 05th December, 2020 to **31st January, 2021**.²²

Special procedure for making payment of 35% as tax liability in first two month

- **Notification No. 85/2020 -Central tax** dated 10th November 2020 has prescribed a special procedure for quarterly return filers for making payment of tax.
- As per the procedure, the registered person shall in the first month or second month or both of the quarter make payment of tax by way of a deposit of an amount in the electronic cash ledger under either of the following two options prescribed for monthly payment of taxes in case of quarterly return filers:
 - (i) **Fixed Sum Method:-** 35 % of the tax liability paid by debiting the electronic cash ledger in the return for the preceding quarter where the return is furnished quarterly; or
 - (ii) **Self-Assessment Method:-** The tax liability paid by debiting the electronic cash ledger in the return for the last month of the immediately preceding quarter where the return is furnished monthly.
- In case the balance in the electronic cash ledger and/or electronic credit ledger is adequate for the tax due for the first month of the quarter or where there is nil tax liability, the registered person may not deposit any amount for the said month. Similarly, for the second month of the

quarter, in case the balance in the electronic cash ledger and/or electronic credit ledger is adequate for the cumulative tax due for the first and the second month of the quarter or where there is nil tax liability, the registered person may not deposit any amount.

- The Notification prescribes further that registered person shall not be eligible for the said special procedure unless he has furnished the return for a complete tax period preceding such month.
- This notification shall come into force with effect from the **1st day of January, 2021**.²³



CBIC rescinds Notification 76/2020-Central tax dated 15.10.2020.

- CBIC issues **CORRIGENDUM** to **Notification No. 2020/86-Central Tax** [G.S.R. 702(E)] which is related to rescinding of Notification 76/2020 w.r.t due dates of **filing GSTR-3B for October 2020 to March 2021**.
- Vide CORRIGENDUM, CBIC has corrected the use of words to "Central Government" instead of "Commissioner" at one place in Notification No. 86/2020-Central Tax.²⁴

²² Refer Notification No. 84/2020 – Central Tax dated 10th November, 2020.

²³ Refer Notification No. 85/2020 – Central Tax dated 10th November, 2020.

²⁴ Refer Notification No. 86/2020 – Central Tax dated 10th November, 2020.

LEGISLATURE AT WORK - RECENT AMENDMENTS

CBIC extended the due date ITC-04 for period July-September 2020 till 30th November, 2020.

- Vide **Notification 87/2020**, CBIC has extended the time limit for furnishing **Form GST ITC-04**, in respect of goods dispatched to a job worker or received from a job worker, for the period July to September 2020, until **30th November 2020**.²⁵

CBIC notified E-invoicing mandatory for the taxpayers having aggregate turnover exceeding Rs. 100 Cr from 01st Jan 2020.

- The Government, on the recommendations of the Council, made amendments to notification No. 13/2020 – Central Tax, dated the 21st March, 2020.



- With effect from the **1st day of January, 2021**, the provisions of e-invoicing shall be applicable to registered persons having turnover exceeding **100 crore rupees** instead of the current threshold of 500 crore rupees.²⁶

Provisions relating to Quarterly Return Monthly Payment Scheme.

- Vide Notification **81/2020 to 85/2020**, the QRMP – Quarterly Return Monthly Payment Scheme is duly summarized in this circular.

- This circular lays down the provisions of the newly introduced Quarterly Return Filing along with Monthly payment of Taxes (QRMP) scheme for small taxpayers under GST. The circular covers eligibility to opt in to the scheme, furnishing of outward supplies under section 37 of the CGST Act, monthly payments of taxes, applicability of interest and applicability of late fees.²⁷

CBIC seeks to waive penalty payable for noncompliance of QR Code on B2C transactions till 31st March 2021.

- Vide **Notification 89/2020**, seeks to waive the penalty payable by a registered person under section 125 of the CGST Act for non-compliance of the provisions of notification No.14/2020 – Central Tax (i.e. Generating a dynamic QR code for B2C invoices by eligible enterprises), between **1st December 2020 and 31st March 2021**, provided the said person complies with the provisions of the said notification from **1st April 2021**.²⁸

8 digit HSN Code shall be included in GST Invoice for products specified in Notification 90/2020

- CBIC amends **Notification No.12/2017** – Central Tax, dated 28th June 2017, and thereby prescribes the rules for capturing HSN codes on a tax invoice, for a specific class of supplies as listed in the notification.
- Vide **Notification No. 90/2020**, tax Invoice to have 8 digit HSN code on specified products classifying under various tariff items of Chapter 28, 29, 38 & 39 of Customs Tariff Act, 1975 (mainly chemicals and plastic items).²⁹

Due date to comply with Anti-profiteering provisions is extended

- CBIC extends the due date, for compliances and actions in respect of anti-profiteering measures u/s 171 of CGST Act till **31st March 2021**.

²⁵ Refer Notification No. 87/2020 – Central Tax dated 10th November, 2020.

²⁶ Refer Notification No. 88/2020 – Central Tax dated 10th November, 2020.

²⁷ Refer Circular No.143/12/2020 – Central Tax dated 10th November, 2020.

²⁸ Refer Notification No.89/2020 – Central Tax dated 29th November, 2020.

²⁹ Refer Notification No.90/2020 – Central Tax dated 1st December, 2020.

LEGISLATURE AT WORK - RECENT AMENDMENTS

CBIC waives recording of Unique Identification Number (UIN) on invoices pertaining to refund claim from April 2020 to March 2021

- CBIC has waived recording of Unique Identification Number (UIN) on invoices pertaining to refund claim for the period April 2020 to March 2021, subject to the condition that copies of such invoices are attested by the authorized representative of such UIN entity and submitted to the jurisdictional officer.
- This waiver was available till March 2020, however with **Circular 144/14/2020** dated 15th December, 2020 it is further extended to **March 2021**.
- Recording of UIN on invoices does not impact liability of supplier but it enables recipient i.e. Foreign Diplomatic Missions/Consulates/UN Organizations to claim refund of the taxes paid by them.³⁰

Government notifies various Sections of Finance Act, 2020 (12 of 2020) related to GST, to be effective since 01 January, 2021

- Vide **Notification No. 92/2020 dated 22.12.2020**, Central Government has appointed **1st January 2021** as the date on which provisions of Section 119, 120, 121, 122, 123, 124, 126, 127 and 131 of the Finance Act 2020 shall be effective, thereby amending the provisions of CGST Act.³¹

Relaxation given to Union Territory of Ladakh for filing GSTR-4 by composition taxpayers for financial year 2019-20.

- Vide Notification No. 93/2020, the late fee payable for delay in furnishing of FORM GSTR-4 for the Financial Year 2019-20 under section 47 of the said Act, from the **1st day of November, 2020 till the 31st day of December, 2020** shall stand waived for the registered person whose principal place of business is in the Union Territory of Ladakh.³²

Fourteenth amendment (2020) to CGST Rules, 2017 notified which amends provisions qua GST Registration, GST Cancellation, Provisional ITC claim, GSTR 1 blocking and E-way bill validity.

- **Rule 8(4A) Application for registration -Biometric based Aadhaar authentication / verification process for GST registration** (effective from a date to be notified later):-

-Introduced additional requirements for registration

-Biometric based Aadhaar authentication and taking photograph unless specifically exempted, where applicant has opted for authentication of Aadhaar number.

-Taking biometric information, photograph and verification of such other KYC documents, as notified, unless specifically exempted, where



applicant has opted not to get Aadhaar authentication done

The application shall be deemed to be complete only after completion of the process laid down above.

³⁰ Refer Circular No. 144/12/2020 – Central Tax dated 15th December, 2020.

³¹ Refer Notification No. 92/2020 – Central Tax dated 22nd December, 2020.

³² Refer Notification No. 93/2020 – Central Tax dated 22nd December, 2020.

LEGISLATURE AT WORK - RECENT AMENDMENTS

- **Rule 9 amended Verification of the application and approval** (effective from December 22, 2020):-

-Time limit for verification of registration application and issue of notice in Form GST REG-03 is increased from **3 working days to 7 working days**.

-Time limit for grant of registration is increased from **7 to 30 days**, in cases where the applicant does not do Aadhar Authentication or where the Department feels fit to carry out physical verification of business place

- **Rule 21 amended Registration to be cancelled in certain cases-Added new grounds for cancellation of registration** (effective from December 22, 2020) :-

-Where input tax credit ("ITC") is availed in **violation of Section 16** of the **CGST Act, 2017** ("CGST Act") or rules made thereunder;

-Where **outward tax liability declared in GSTR-3B is lesser** than the outward tax liability declared in GSTR1- for one or more tax periods;

-Where there is **violation of newly inserted Rule 86B** of the CGST Rules.

- **Rule 21A - Suspension of registration** (effective from December 22, 2020):-

-**No opportunity of being heard** would be given to the taxpayer for suspension of registration.

-If significant **anomalies** are **found** between Form GSTR3-B and details of outward supplies furnished in Form GSTR1- or inward supplies derived based on the details of outward supplies furnished by his suppliers in their Form GSTR1-, then SCN notice in **Form GST REG 31 (New form introduced)** – Rule 21A(2A) will be served.

-**No refund** u/s 54 of the CGST Act during the period of suspension of registration.

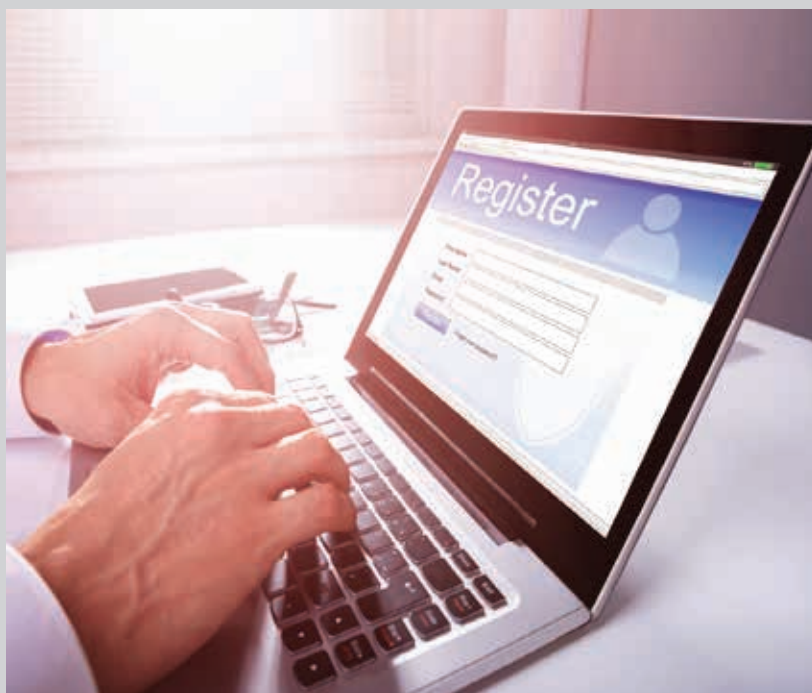
-Allowed proper officer to **revoke suspension of registration anytime** during the pendency of the proceedings for cancellation.

- **Rule 22(3) and (4) amended - Cancellation of registration** (effective from December 22, 2020):

-Registration can be **cancelled within a period of 30 days from the date of reply to SCN** issued under newly inserted sub-rule (2A) of Rule 21A

[i.e., in cases where comparison of the returns (GSTR-3B and GSTR-1) furnished by a registered person shows the significant differences or anomalies].

-**Proceeding of cancellation of registration to be dropped if satisfied by the reply** of SCN issued under Rule 21A (2A) of the CGST Rules and pass order in Form GST REG20-.



- **Rule 36(4) amended - Conditions for claiming ITC** - (effective from January 1, 2021):

Restriction of claim of ITC in respect of invoices/debit notes not furnished by the suppliers has now been **reduced from 10% to 5%** of the credit available in GSTR2-B.

- **Rule 59(5) inserted - Form and manner of furnishing details of outward supplies** (effective from December 22, 2020):

-Non-filing of Form GSTR-3B for preceding two months/ preceding tax period will result in **blocking of Form GSTR-1**.

LEGISLATURE AT WORK - RECENT AMENDMENTS

-Registered person restricted to use ITC to discharge his liability towards tax in excess of 99% of such tax liability as per newly inserted Rule 86B cannot file Form GSTR-1 or use invoice furnishing facility ("IFF"), if he has not filed Form GSTR-3B for the preceding tax period.

▪ **New Rule 86B introduced - Restricting use of ITC amount for discharging output tax liability in GST -** (effective from January 1, 2021):

-Where taxable supply other than exempt supply and export, in a month exceeds INR 50 lakh.

-Taxpayer is not allowed to use ITC in excess of 99% of output tax liability.

-Specified certain exceptions provided to above restrictions.

▪ **Rule 138 amended - Validity of e-way bill narrowed by increasing distance from 100 km. to 200 km. per day** (effective from January 1, 2021):

-E-way bill will now be valid for 1 day for every 200 km of travel, as against 100 km earlier, in cases other than Over Dimensional Cargo or multimodal shipment in which at least one leg involves transport by ship.

-For every 200 km. or part thereof thereafter, one additional day will be allowed.

▪ **Rule 138E amended - Person whose registration has been suspended is now restricted from furnishing PART A of E-Way Bill** - (effective from December 22, 2020):

-Person whose registration has been suspended will not be allowed to furnish the information in PART A of FORM GST EWB01-.

-Registered person other than a person paying tax under composition levy, has not furnished the returns for a consecutive period of **two tax periods**, then he shall not be allowed to furnish the information in PART A of FORM GST EWB-01.³³

The due date to file GSTR-9 & GSTR-9C is extended for FY 2019-20

- CBIC vide **Notification No. 95/2020-** Central Tax dated -30th December 2020, extended the due date for filing of Annual Return in Form GSTR-9 and Annual Reconciliation Statement in Form GSTR- 9C for the financial year 2019-2020 from 31st December 2020 to **28th February, 2021**.³⁴



³³ Refer Notification No. 93/2020 – Central Tax dated 22nd December, 2020.

³⁴ Refer Notification No. 94/2020 – Central Tax dated 30th December, 2020.

ALLIED LAWS

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



Policy and Guidelines for setting up of Inland Container Depots (ICDs), Container Freight Stations (CFSs) and Air Freight Stations (AFSs)

- Ministry of Finance (Department of Revenue) vide **Circular No. 50/2020** dated 05.11.2020, revises the policies and procedure for setting up of new ICDs/CFSs/AFSs. The new policy takes into account the following aspects:
 - The present capacity, future growth potential and regional imbalances and also addresses the need for bringing uniformity, transparency and seamless approval process;
 - Addresses the identified regulatory and logistics concerns associated with the hard and soft infrastructure of ICDs/CFSs/AFSs in India;
 - Establishes a framework of functional requirements pertaining to the design and operation of dry ports, as well as establish certain processes to enable sustainable growth of the sector; and
 - Aims to lay down appropriate institutional, administrative and regulatory frameworks for development and smooth operation of ICDs/ CFSs/AFSs, including procedures for regulatory inspection and the execution of applicable customs control and formalities.

Extension of Anti-Dumping Duty on imports of 'Carbon Black used in rubber applications'

- Ministry of Finance (Department of Revenue) vide **Notification No. 34/2020- Customs (ADD)** dated 09.11.2020, amends Notification No. 54/2015-Customs (ADD), dated 18.11.2015 to extend the levy of Anti-Dumping Duty on imports of "Carbon Black used in rubber applications" originating in or exported from

People's Republic of China and Russia, for a period upto and inclusive of **31st December, 2020**.

Anti-Dumping Duty on imports of 'Acrylic Fibre' revoked

- Ministry of Finance (Department of Revenue) vide **Notification No. 36/2020- Customs (ADD)** dated 11.11.2020, revokes the anti-dumping duty imposed on 'Acrylic Fibre', falling under Chapter 55 of the First Schedule to the said Act, originating in or exported from Thailand,



and imported into India and thereby rescinds Notification No. 27/2015-Customs (ADD) dated 1st June, 2015.

Imposition of definitive Anti-Dumping Duty on imports of 'Clear Float Glass'

- Ministry of Finance (Department of Revenue) vide **Notification No. 37/2020-Customs (ADD)** dated 11.11.2020, imposes definitive anti-dumping duty on imports of 'Clear Float Glass' falling under Chapter 70 of the First Schedule to the Customs Tariff Act, 1975, originating in, or exported from Malaysia and imported into India, produced by the producers as specified

ALLIED LAWS

in the corresponding entry in column (6), an anti-dumping duty at the rate equal to the difference between the landed value of subject goods and the amount indicated in the corresponding entry in column (7), provided that the landed value is less than the amount indicated in column (7), in the currency as specified in the corresponding entry in column (8), and per unit of measurement as specified in the corresponding entry in column (9) of the Notification.

Inviting suggestions regarding the New Foreign Trade Policy

- DGFT vide **Trade Notice No. 34/2020-2021** dated 12.11.2020, in order to prepare a new five-year Foreign Trade Policy, invites suggestions/inputs from various stakeholders. To collate, analyze and for ease of processing



the suggestions/inputs received, a Google Form has been created on the following link: <https://bit.ly/3khHEI2>;

- Stakeholders including Export Promotion Councils (EPCs), Trade/Industry Bodies/Associations, Commodity Boards, Regional Authorities (RAs) and members of trade, industry are requested to send their suggestions/inputs

only through the above-mentioned Google Form, rather than email or paperbased submissions within **fifteen days** from the date of issuance of this Trade Notice.

Clarifications regarding availment of exemption on temporary import of durable Containers

- CBIC vide **Circular No. 51/2020** dated 20.11.2020, refers to **Notification No.104/94-Customs dated 16.03.1994 (as amended)** which grants exemption to import of containers of durable nature, from the whole of the duty of customs and the whole of the integrated tax leviable;
- It clarifies that the exemption is subject to the condition that such containers are re-exported within 6 months from the date of importation and that the importer executes a bond and furnishes documentary evidence to the satisfaction of the Assistant Commissioner/Deputy Commissioner to safeguard the duty in the event of non-compliance;
- It further clarifies that the procedure to be followed for import and re-export of marine containers would continue to be governed by guidelines provided in **Circular No. 31/2005-Customs, dated 25.07.2005**;
- Lastly, w.r.t the eligibility of duty exemption, it refers to the **Circulars No.69/2002-Customs, dated 25.10.2002 and No.73/2002-Customs, dated 07.11.2002**, whereby it reiterated that containers that satisfy following conditions are eligible for duty exemption: a) that are durable, b) capable of being re-used multiple times, c) capable of being identified at the time of re-export viz. a viz. the imported containers, and d) satisfy all the other stipulated conditions in the notification.

Clarifications on export of Gems and Jewellery through Courier mode

- CBIC vide **Circular No. 52/2020-Customs** dated 27.11.2020, refers to the representations that have been received from the Gems and Jewellery Export Promotion Council seeking

ALLIED LAWS

clarification on whether gems and jewellery is allowed to be exported through courier under the Courier Imports and Exports (Electronic Declaration and Processing) Regulations, 2010 and also the Courier Imports and Exports (Clearance) Regulations, 1998;

- It has been clarified by the Board that the aforementioned Regulations place a restriction only on imports of precious and semi-precious stones, gold or silver, in any form, through courier. To this extent, the Board has stated that the Regulations referred above; do **not restrict exports of gems and jewellery through the courier mode.**

Revoked Anti-Dumping Duty on imports of 'Nylon Tyre Cord Fabric' (NTCF)

- Ministry of Finance (Department of Revenue) vide **Notification No. 45/2020- Customs (ADD)** dated 03.12.2020, revokes the anti-dumping duty imposed on Nylon Tyre Cord Fabric (NTCF), falling under chapter 59 of the First Schedule to the said Act, originating in or exported from People's Republic of China, and imported into India and thereby rescinds the Notification No. 30/2015-Customs (ADD) dated the 12th June, 2015.

Third Party Invoicing in case of Preferential Certificates of Origin issued in terms of DFTP for 'wholly obtained goods'

- CBIC vide **Circular No. 53/2020-Customs** dated 08.12.2020, clarifies that Certificate of Origin (CoO) issued in terms of Duty Free Tariff Preference Scheme for least developed countries (LDC) with third party commercial invoice may be accepted where value of goods doesn't have impact on originating status (i.e. the originating criteria is 'wholly obtained');
- The Board further explains that **Notification no. 29/2015- Customs dated 10th March, 2015** is silent upon provisions for third party invoicing i.e. commercial invoice for goods originating in LDC issued in the third country and not by the consignor in the exporting country;

- It states that in some other notified preferential rules of origin where specific provision of third party invoicing is provided, the origin of goods is nonetheless based on the value addition done in the Country of Origin alone, with Free on Board (FoB) in Country of Origin being the base for arriving at the local value content;
- However, it envisages that goods referred in CoO and the invoice must correspond to each other, goods satisfy applicable rules of origin and the normal due diligence to check for authenticity of CoO and correctness of claim should continue to be observed.

Special measures to facilitate Micro, Small & Medium Enterprises (MSMEs) for Authorised Economic Operator (AEO) T1 & T2 accreditation



- CBIC vide **Circular No. 54/2020-Customs** dated 15.12.2020, highlights the difficulties faced by MSMEs while applying for AEO accreditation. Accordingly, the Board has decided to relax the entire gamut of compliance and security requirements for MSMEs;
- The relaxation has been carried out to ensure that the MSMEs are facilitated through rationalized compliance requirements (MSME Annexure 1 & 2) and minimum but effective security requirements (MSME Annexure 3);
- The procedural modifications/relaxations for AEO accreditation of MSMEs are as under:

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- i. The eligibility requirement of handling a minimum of 25 documents during the last financial year has been relaxed to **10 documents**, subject to handling at least 5 documents in each half-year period of the preceding financial year.
- ii. The requirement for the applicant to have "business activities for at least three financial years, preceding the date of application" has been relaxed to **two financial years**.
- iii. The qualifying period for legal and financial compliance has been reduced from 'the last three financial years' to '**the last two financial years**'.
- iv. For AEO T1 and T2 accreditation, the present annexures i.e., Annexure A, B, C, D, E.1-E.4 have been supplanted with **two annexures viz. MSME Annexure 1 and 2**. Similar rationalized annexures 1 and 2 are presently being utilized for AEO T1 accreditation only in accordance with the CBIC Circular No. 26/2018- Customs dated 10.08.2018.
- v. For AEO T2 certification, the present annexures i.e., Annexure E.5.1-E.5.7 for physical verification have been rationalized to a **single annexure viz. MSME Annexure 3**. The rationalization has been carried out to ensure that the security requirements for an MSME are objective and cover the minimum verifiable security criteria.
- vi. The time limit for processing of MSME AEO T1 & AEO T2 application has been reduced to **fifteen working days** (presently one month) and **three months** (presently six months) respectively after the submission of complete documents for priority processing by customs zones.

Instructions for time bound processing of Duty Drawback claims

- CBIC vide **Instruction No. 21/2020-Customs** dated 16.12.2020, issues instructions for time-

bound processing of Duty Drawback claims to reduce pendency and improve rate of disposal of claims;

- It informs that at the 5th meeting of the National Committee on Trade Facilitation (NCTF), it has been decided that at least 90% of Drawback should be credited within a time period of 3 days;
- Further, it instructs that the refund may be deposited into the customer account in T+2 days;
- In supersession of the timeline enumerated in Action Plan of CBIC for 2020-21 through letter dated 4th August, 2020 wherein the target set for disposing drawback claims is 7 days, the Board instructs that the aforementioned time-limit given by NCTF for crediting of duty drawback within a period of 3 days should be strictly complied with.



Amendment in Export Policy of Medical Goggles and Nitrile rubber (NBR) Gloves

- DGFT vide **Notification No. 47/2015-2020** dated 22.12.2020, amends the export policy of Medical Goggles and NBR Gloves from '**Restricted**' to '**Free**' category making all types of Medical Goggles and NBR Gloves freely exportable.

ALLIED LAWS

Amendment in import policy of Coal and incorporation of Policy Condition No. 7 in Chapter 27 of ITC (HS), 2017, Schedule – I (Import Policy)

- DGFT vide **Notification No. 49/2015-2020** dated 22.12.2020, adds a new Policy Condition No. 7 in Chapter-27 of ITC (HS), 2017, Schedule-I (Import Policy) which reads as under:
 - The **Coal Import Monitoring System (CIMS)** shall require importers to submit advance information in an online system for import of items and obtain an automatic Registration Number by paying registration fee of Rs. 1 per thousand, subject to minimum of Rs. 500/- and maximum of Rs. 1 lakh, on CIF value.
 - The importer can apply for registration **not earlier than 60th day and not later than 15th day before the expected date of arrival of import consignment**. The Automatic Registration Number shall remain valid for a period of **75 days**. Importer shall have to enter the Registration Number and expiry date of Registration in the Bill of Entry to enable Customs for clearance of consignment.
- It has been further stated that the CIMS will be **effective from 01.02.2021**, i.e., Bill of Entry on or after 01.02.2021 for items as listed in the Notification shall be governed by CIMS. Additionally, it is pertinent to note that the facility of online Registration will be available with effect from **31.12.2020**.

Extension of deadline to install and operationalise Radiation Portal Monitors and Container Scanners

- Ministry of Commerce & Industry (Department of Commerce) vide **Public Notice No.36/2015-2020** dated 29.12.2020, extends the deadline to install and operationalise Radiation Portal Monitors and Container Scanners in the designated sea ports upto **31.03.2021**.

Import and export of vaccines in relation to COVID-19 through Courier

- CBIC vide **Circular No.56/2020-Customs** dated 30.12.2020, in order to facilitate

the import/ export of vaccines in relation to COVID-19 through courier, at locations where the Express Cargo Clearance System (ECCS) is operational, issues the **Courier Imports and Exports (Electronic Declaration and Processing) Amendment Regulations, 2020** which amend the Courier Imports and Exports (Electronic Declaration and Processing) Regulations, 2010;

- These Regulations, *inter alia*, provide for import and export of COVID-19 vaccines without any value limitation and modify Regulation 6(3) and the declaration in Form H (CSB IV), since the vaccines will be imported in durable containers equipped with the requisite temperature monitoring and tracking devices, to provide for the export of the durable container including accessories thereof;
- It requires Importers to indicate the unique identifier of the container and the accessories during import in the **Courier Bill of Entry (CBE-V)** and also at the time of re-export in the **Courier Shipping Bill (CSB IV)** for facilitating clearance;
- It also calls upon the Commissioners in charge of the International Courier Terminals where ECCS is operational, to immediately form a Task Force headed by an officer of the rank of Joint/ Additional Commissioner of Customs and comprising of officials from relevant PGAs, Authorized Couriers, Custodians, Airlines and other relevant stakeholders, which shall adopt a coordinated approach for efficient clearance of vaccines relating to COVID-19.





LEGAL CLASSICS

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

Ebiz.Com Pvt. Ltd. vs. CCE, Customs & Service Tax [2017 (49) STR 389 (All.)]

Introduction:

Time and again the Apex Court as well as the High Courts in India have recognized the concept of payment of tax under protest and the law in that regard stands settled in the erstwhile indirect tax regime.

With the introduction of GST, surprisingly, as per the law as it stands today an assessee is not given an option to pay the tax under protest which is apparent from the Frequently Asked Questions (FAQs) released at the time of introduction of GST wherein Question 55 reads as *Does GST law recognize the concept of payment of tax under protest?* The answer to the said question is a simple 'No' in the FAQs.

Considering the above a question therefore arises that in the event of an investigation being faced an assessee or during audit of the records if the assessee is made to deposit the tax under coercion or threat, or is willing to make the payment so as to reduce the burden of interest at a later point in time in case the demand is confirmed, there is no procedure prescribed under law to make such payment?

In the aforesaid context, one such judgment of the Hon'ble Allahabad High Court in the case of **Ebiz.Com Pvt. Ltd. vs. CCE, Customs & Service Tax [2017 (49) STR 389 (All.)]** is analyzed herein to understand the view that is taken by the High Courts in the erstwhile regime on the recognition of payment of tax under protest in the erstwhile regime. The Hon'ble High Court in the said judgment held that the amount paid during investigation would be considered an involuntary deposit since no one shall deposit a huge money without creation of liability in law.

The ratio laid down by the Hon'ble Allahabad High Court and other such similar judgments passed by the High Courts may be relevant even under the GST law.

Decision in Ebiz.Com Pvt. Ltd.

The Petitioner had filed a writ petition seeking a writ of mandamus directing respondents to refund

amount of excess paid 'Service Tax', by petitioner, and retained by respondents, unauthorizedly and illegally. On 12.01.2007 an Anti-Evasion Branch of Central Excise Department, Noida headed by Deputy Commissioner (A.E.) conducted search in petitioner's premises and got deposited Service Tax of Rs. 25,55,000/-. Petitioner was also forced to pay interest of Rs. 2,59,000/- on 29.03.2007. Pursuant to issuance of the show cause notice, filing of an appeal consequently the demand was set aside. As show cause notice was issued to the Petitioner for rejection of the refund application filed on the ground that the same is filed after the expiry of one year as prescribed under Section 11B of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994.



The Department in the affidavit filed in the High Court contended that the petitioner paid the service tax voluntarily and not under protest. It was further stated that interest was also deposited by Petitioner on his own since it was his legal obligation. The appeal of the department against the order of Commissioner (Appeals) is pending before the Tribunal. Since petitioner never filed any application for refund in accordance with Section 11B(3) of the Central Excise Act, 1944, hence respondents cannot entertain any claim of refund, and, no refund claim of petitioner, in law, is pending with respondents. No refund is due, automatically.

The Allahabad Court after considering the facts of the case observed that It has been consistent view of various Courts that any amount, deposited during pendency of adjudication proceedings or

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investigation is in the nature of deposit made under protest or pre-deposit and, therefore, principles of unjust enrichment would not be attracted. The deposit paid by the Petitioner during investigation was involuntary since no one shall deposit a huge money without creation of liability in law. Such an amount has been held to be a pre-deposit and principles of unjust enrichment has been held inapplicable in such cases. Reliance was placed on the decisions in the case of *Suvidhe Ltd. v. Union of India* - 1996 (82) E.L.T. 177 (Bom) which was upheld by the Supreme Court. It was further held that the consensus of the authorities of various High Courts as well as Supreme Court is that any amount received by Revenue, as deposit or pre-deposit i.e. unauthorizedly or under mistaken notion, etc., cannot be retained by Revenue since it has no authority in law to retain such amount and it must be refunded with interest.

In the light of the above observation, the Hon'ble Supreme Court directed the Revenue to refund the entire amount refundable to the Petitioner along with interest at the rate of 12% per annum to be computed from the date, after three months of passing of order by Commissioner, till the amount is actually paid.

Applicability under GST Laws

Under the GST law there is no specific provision or rules prescribed for payment of tax under protest. However, for any payment of tax there are various forms prescribed only under which the payment can be made under the Act.

Rule 142 of the Central Goods and Services Tax Rules, 2017 ('CGST Rules') provides for notice and order of demand of amounts payable under the Act. As per sub-rule (2) of Rule 147 of CGST Rules inter alia where any person makes payment of tax, interest, penalty or any other amount due in accordance with the provisions of the Act whether on his own ascertainment or, as communicated by the proper officer he shall inform the proper officer of such payment in FORM GST DRC-03. Therefore, any person if is required to make payment of tax has to file the intimation under Form GST DRC-03. The title of the Form GST DRC-03 reads as "*Intimation of payment made voluntarily or made against the show cause notice (SCN) or statement*". Though the section or the rule nowhere mentions that the payment is to be made voluntarily by the assessee the title of the form mentions the same.

It is seen that the department is raising objections for refund of the amount paid under protest under GST stating that there is no provision under GST law for such payment and accordingly no refund would be entitled to an assessee for any such payment made.

As per the law settled by the Hon'ble Courts as stated above and as held by the Hon'ble Allahabad High Court in the case of **Ebiz.Com Pvt. Ltd. (supra)** payment of such taxes during investigation are nothing but deposits and when the said demand is not payable under law, the department cannot retain the same without the authority of law in view of Article 265 of the Constitution of India³⁵.

It is seen that in various litigations that have arisen with the introduction of GST, few of the High Courts have directed the department to accept the payment of tax under protest from assessee subject to final outcome of the proceedings³⁶.



The stand taken by the department that no payment of tax can be made under protest under GST may open a pandoras box for litigation for the taxpayers to seek refund. It would be interesting to see the view that would be taken by the High Courts on challenge to such actions of the department considering the settled law with regard to payment of tax under protest.

³⁵ i) *Commissioner of Sales Tax, UP vs. Auriaya Chamber of Commerce, Allahabad* - 1986 (25) ELT 867 (SC)

ii) *Salonah Tea Company Ltd. vs. Supdt. of Taxes* - 1988 (33) ELT 249 (SC)

iii) *HMM Ltd. vs. Administrator, Bangalore City Corporation* - 1997(91) ELT 27 (SC)

³⁶ i) *Shreeji Traders vs. UOI* - 2019 (31) GSTL 579 (Guj.)

ii) *Jeeyam Global Foods (P) Ltd. vs. UOI* - 2019 (21) GSTL 465 (Mad.)

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About Taxsutra

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