



NAVIGATING GST 2.0

- THOUGHT LEADERSHIP
- THE CURIOUS CASE OF CLASSIFICATION UNDER GST
- FROM THE BENCH - KEY JUDICIAL PRONOUNCEMENTS
- EXPERT SPEAKS
- LEGISLATION AT WORK - RECENT AMENDMENTS
- ALLIED LAWS
- LEGAL CLASSICS
- QUOTABLE QUOTES

CONTENTS

THOUGHT LEADERSHIP	04
<p>Constitution of the GST Appellate Tribunal has become more crucial than ever as, in a country like India with high dependency on tax revenue, the number of litigious cases is also likely to be on a higher side. The delay in the constitution of the GSTAT has caused tremendous delay in the carriage of justice in the manner as it should have been. The author hopes for the earliest resolution of various pending issues and effective constitution of the GSTAT Benches along with effective disposal of matters</p>	
THE CURIOUS CASE OF CLASSIFICATION UNDER GST	07
<p>The introduction of GST regime has re-ignited the age-old debate of and disputes pertaining to classification of goods and services, and consequently the GST rate applicable thereon have been reincarnated. Though GST Follows the Harmonized System of Nomenclature (HSN), the constant clarifications and rate changes have given taxpayers a bumpy ride making the implications far-fetched.</p>	
FROM THE BENCH - KEY JUDICIAL PRONOUNCEMENTS	11
<p>This Module focuses on the significant verdicts and rulings of the Hon'ble Supreme Court, High Courts, Authority for Advance Rulings and the Appellate Authorities for Advance Rulings.</p>	
EXPERT SPEAKS	16
<p>Comprises of snippets from the interview of Mr. Sumit Mittal (Chief Operating Officer and Director Finance - GreenCell Mobility Private Limited)</p>	
LEGISLATION AT WORK - RECENT AMENDMENTS	18
<p>This section contains all the amendments, clarifications, notifications, GST collections, etc., w.r.t. Indirect Taxes, Customs Policies and more.</p>	
ALLIED LAWS	23
<p>Encloses the frequent developments notified by CBIC and DGFT vide Notifications in relation to Amendment in the import policy conditions, levy of anti-dumping duty, etc.</p>	
LEGAL CLASSICS	29
<p>Focuses on a remarkable judgment of erstwhile Indirect Tax regime which acts as a paradigm in the GST regime as well</p>	
QUOTABLE QUOTES	31
<p>Contains noteworthy quotes from GST stalwarts</p>	



INTRODUCTION

Note from Editor:

Dear Patrons,

The Constitution of the GST Appellate Tribunal has been the talk of town since the inception of GST. Without the Appellate Tribunal in place for over half a decade the workload of High Courts increased manifold as the aggrieved taxpayers have been compelled to prefer writ petitions. In its recent meeting, the GST Council adopted the report of the Group of Ministers (GoM) of States on GSTAT.

Taxsutra and ELP are elated to present the 16th Edition of our GST Newsletter which encompasses significant events in the domain of indirect taxation. In the **Thought Leadership** module, ELP Partner **Nishant Shah** suggests a few strategic thoughts that may be considered as one approaches to have matters listed and argued before Benches of the GSTAT and hopes that various pending issues shall be resolved at the earliest with the constitution of GSTAT.

The GST regime continues to have age-old dispute on classification over applicability of rates. In the Chapter titled **The Curious Case of Classification Under GST**, the authors envisage that in some cases, circulars issued by the CBIC have settled the issue, however, the divergent views taken by various AARs and the lack of an Appellate Tribunal have only fueled the disputes.

The Section **From the Bench – Key Judicial Pronouncements**, revolves around judgments of

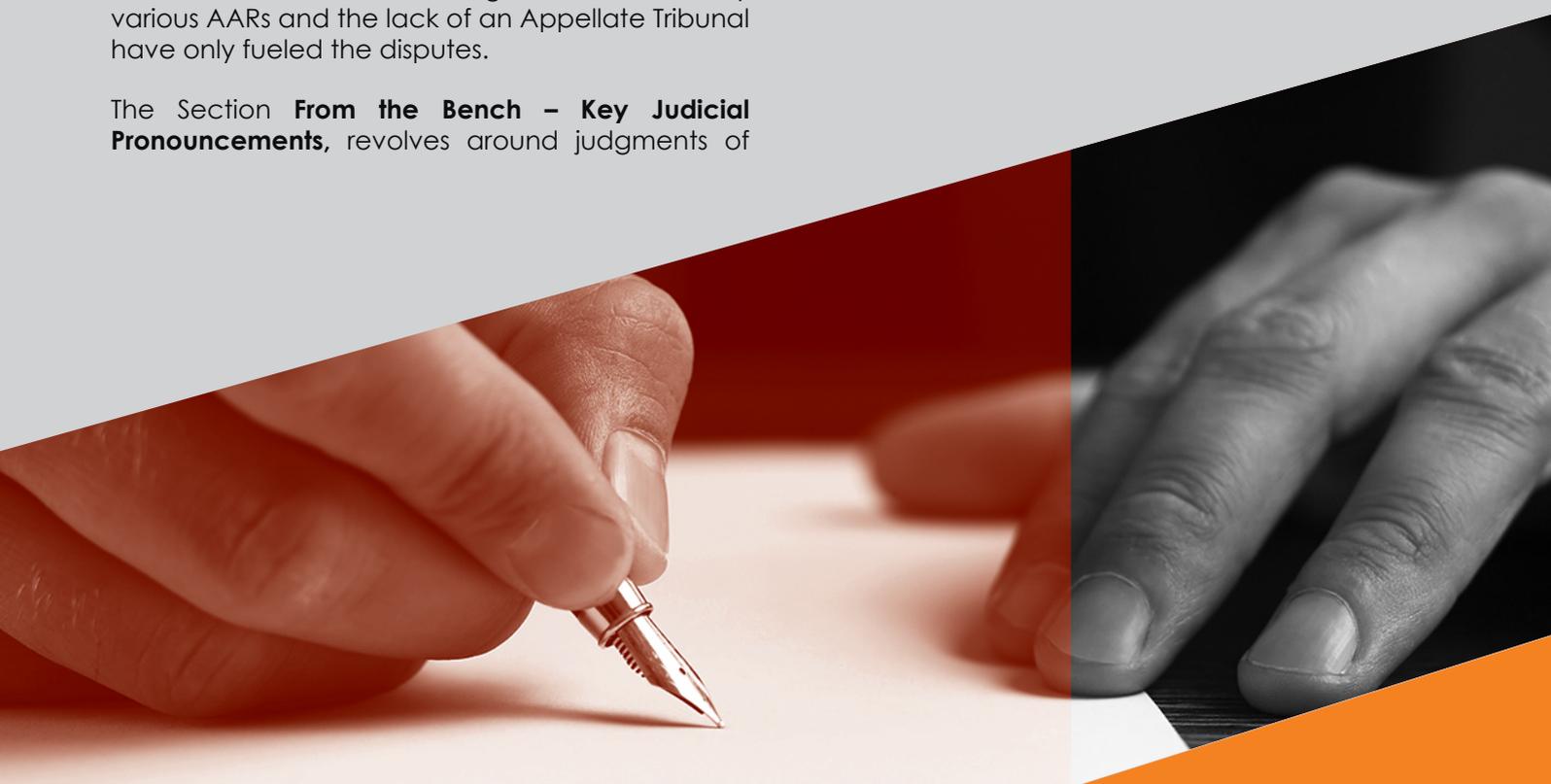
the Hon'ble Supreme Court and High Courts as well as the quasi-judicial authorities. The **Expert Speak** module comprises of snippets from the interview of **Mr. Sumit Mittal (Chief Operating Officer and Director Finance - GreenCell Mobility Private Limited)** who apprises that evolving technology will ensure minimization of ITC leakage and thereby reducing tax cost in any transaction, which shall lead to ease of handling compliance however, certain restrictions act as deterrent to the seamless flow of ITC.

In the segment headed as **Legislature at Work – Recent Amendments**, the Newsletter presents all the amendments, updates, clarifications and modifications pertaining to the indirect tax laws. The Chapter **Allied Laws** encircles important Notifications and Circulars, while **Legal Classics** focuses on a remarkable judgment of erstwhile Indirect Tax regime which acts as a guiding light in the GST regime as well. We wrap up the Newsletter with some interesting quotes from GST experts in **Quotable Quotes**.

We hope you have an engrossing read of the 16th issue of 'Navigating GST'.

Best Regards,

Team Taxsutra.





THOUGHT LEADERSHIP

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

GSTAT: A new reign arrives

Dispute resolution mechanism and provisions relating thereto are a critical component of any taxing statute. The significance thereof is enhanced on account that the opponent is a government authority. In a country like India with high dependency on tax revenue, the number of litigious cases is also likely to be on a higher side. With a view to ensure a full spectrum of judicial proceeding conducted in relation to these matters, Article 323B of the Constitution of India mandates formation of a tribunal under each taxing statute which acts as a quasi-judicial forum before the matter is escalated to the High Court/

Supreme Court. A taxpayer approaches Tribunal after exhausting his appellate remedy before the appellate authority constituted under the legislation and the Tribunal is the final fact-finding authority in the matter.

GST law implemented in the country since July 2017, includes therein the requirement for constituting Tribunals (in terms of Section 109 of CGST Act 2017) known as GST Appellate Tribunals across the country and will have the following Benches and constituents/ members:

Bench	Location	Matters handled	Constitution/Members
National Bench	Delhi		
Regional Bench	Such number of Regional Benches across the country as may be required	National Bench or Regional Bench shall have jurisdiction to take up appeals against the orders passed by the Appellate Authority or the Revisional Authority in the cases where one of the issues involved relates to the place of supply.	Tribunal shall consist of one Judicial Member and one Technical Member (Centre) and one Technical Member (State).
State Bench	The Government shall, by notification, specify for each State or Union territory, a Bench of the Appellate Tribunal for exercising the powers of the Appellate Tribunal within the concerned State or Union territory	Hearing appeals against the orders passed by the Appellate Authority or the Revisional Authority.	
Area Benches	On receipt of a request from any State Government, such number of Area Benches shall be constituted in the State, as may be recommended by the Council	Hearing appeals against the orders passed by the Appellate Authority or the Revisional Authority.	

THOUGHT LEADERSHIP

The Madras High Court in September, 2019 in the matter of **Revenue Bar Association vs Union of India** has struck down Section 109(3) and 109(9) of CGST Act, 2017 which prescribed that the tribunal shall consist of one judicial member, one technical member (centre) and one technical member (state), being ultra-virus on the grounds that the number of expert members cannot exceed the number of judicial members on the Bench.

The Court further struck down Section 110(1)(b) (iii) of CGST Act, 2017 which states that a Member of Indian Legal Services, who held a post not less than Additional Secretary for three years, can be appointed as Judicial Member of GSTAT. It was struck down on the basis that was diluting the qualification of appointment as Judicial Members, and it is a matter of great concern for the independence of the Judiciary.

This, therefore, necessitated change in the applicable provisions to overcome the deficiency highlighted by the Madras High Court. As per the recent press reports, in the recently concluded 49th GST Council meeting, the Council adopted the Group of Minister's report with certain modifications, which was constituted to make suggestions for overcoming this deficiency. The amendment proposes to increase the number of Judicial Member on the Bench from one to two. Proposal for these amendments have been circulated to the State's for their comments. One assumes that such deficiency will be overcome soon and the GSTAT shall see the light of the day and Benches thereof being constituted in various parts of the country as contemplated under the GST law.

Legal strategy

Any litigation before the judicial forum entails not only skilfully presenting the matter before the Bench but also strategy implemented for ensuring an efficient outcome in the matter. Such strategy becomes even more onerous and compelling

especially in cases where there could be more than one relevant jurisdiction and multiplicity of Benches to hear the matter.

Set out hereunder are a few strategic thoughts that may be considered as one approach to have matters listed and argued before Benches of the GSTAT:

1. **Constitutional issues:** The powers granted to tax authorities are varied and wide ranging under the GST law. Situations may arise when powers exercised by the GST authorities may be ultra-virus or could violate fundamental right of the taxpayer. In such scenarios while the taxpayer



can always counter such action by way of adopting the legal remedy provided under the GST law, it can also be open for the taxpayer to approach the Writ Court under Article 226 of the Constitution. In such cases, it is a strategic call to be taken as to whether filing a Writ Petition would provide a quicker and more effective resolution to the issue at hand, subject of course to there being sufficient arguments to protect against the matter being dismissed on grounds of alternate remedy by the relevant High Court.

THOUGHT LEADERSHIP

2. **Selection of the right Bench:** Companies that operate in multiple states across the country are required to undertake registrations for each of their distinct entities. In such cases, for transactions of the nature that have implications in multiple states could result in a situation where issue arising from such transactions can be represented before more than one Bench of the GSTAT. In such situations it will be critical that appropriate Bench of the GSTAT is approached to avoid any dismissal on grounds of the matter being out of jurisdiction. However, where the jurisdiction could if at all, fall before more than one Bench of the GSTAT, it may be a strategic call to identify as to which of the Benches should be approached. Such strategic call may require consideration of multiple aspects including the possibility of similar issue having been dealt with by the said Bench, the nature of orders issued in those cases, etc.

As set out in the table above, under Section 109 of CGST Act, 2017, the National Bench shall have jurisdiction to hear appeals against orders passed by the relevant authority where one of the issues involved relates to the place of supply. This again would entail a strategic call in whether approaching the National Bench for resolution of a matter shall be more effective, in which case, the order of the relevant authority may be appealed in a manner such that can be validly filed before the National Bench.

3. **Early hearing:** The huge pendency of matters before the CESTAT and State VAT Tribunals and the long duration of time before which the matter is heard therein is a known fact. Hopefully, the large number of Benches contemplated to be constituted under the GST regime would overcome such pendency issues. However, the number of controversies currently being revised and the already large quantum of matters which have been filed and pending before the High Court for the want of a GSTAT which could cause large pendency's before GSTAT. In such situations, disposal of GST cases will also become a long-drawn affair. Depending on the nature of issues and quantum involved, strategically grounds may be developed to impress upon the Bench for the matter to be taken up on an expeditious basis to achieve an efficient disposal of the litigation.

4. **Principles established under the erstwhile regime:** The introduction of GST has replaced the erstwhile regime of Excise Duty, Services Tax and VAT laws in the country. While GST is a new law the same being in the genre of the indirect taxes imbibes certain principles as existed in the erstwhile regime. Matters involving concerns or controversies raised relating to such principles already dealt with under the erstwhile regime may be well handled by adopting the past jurisprudence. Here again should there be a situation where Benches are constituted of members who have been actively involved in the erstwhile regime may be well suited for hearing such matters under the GST regime.

The delay in the constitution of the GSTAT has caused tremendous delay in the carriage of justice in the manner as it should have been. One can only hope for the earliest resolution of various pending issues and effective constitution of the GSTAT Benches along with effective disposal of matters in the true spirit in which the GST law has been legislated.





THE CURIOUS CASE OF CLASSIFICATION UNDER GST

The following chapter has been authored by Niraj Hande (Principal Associate) - ELP

The Curious Case of Classification under GST

Classification of goods, and applicability of tax rate thereon, has long been a bone of contention under India's indirect tax regimes. Unlike a few other countries which have a uniform GST rate, the taxing rate under India's regimes have always been dependent upon the tariff entry and the classification of goods thereunder. While most of the classification disputes which arose in the preceding indirect tax regimes have been settled, either by judgments of Hon'ble Courts or through CBIC issued clarifications, the same will likely need to be re-agitated under the GST regime.

By way of being aligned with the Harmonised System of Nomenclature, explanatory notes appended to the HSN and various opinions provided further guidance in respect of classification under the Central Excise and Customs regimes. Further, post 2012, i.e. the introduction of the negative list regime of taxation and the uniform rate of tax applicable on services, classification disputes were rare.

However, the introduction of GST regime has re-ignited this age-old debate and disputes pertaining to classification of goods and services, and consequently the GST rate applicable thereon have been reincarnated. While in some cases, circulars issued by the CBIC have settled the issue, in others they seem to keep festering. Divergent views taken by the various Authorities for Advance Rulings (AAR) and the lack of an Appellate Tribunal have ensured that these classification disputes keep festering.

Rate Changes masquerading as Clarifications and vice versa

The change in the rate structure for GST emerge from the decisions taken by the GST Council, which are based on the recommendations provided by the GST Fitment Committee. As the process goes, suggestions for rate changes are initially tabled before the Fitment Committee.

The Committee after deliberating *inter se* provides its recommendations on whether the rate change is meritorious or not. These recommendations are thereafter tabled before the GST Council, and if accepted, are turned into law. Prior to conversion into law, i.e. issuance of a notification, a press release is usually issued setting out the key decisions taken in the particular meeting, and this is where things become interesting.

Aerated Fruit Beverages

As an illustration, during the 45th GSTC Meeting, a decision was undertaken to change the rate of GST applicable on "carbonated fruit beverages of Fruit Drink" to 28%. To announce this decision, in the press release issued for the said meeting, wherein under the clause for clarifications (para G.) it was **clarified** that "Carbonated Fruit Beverages of Fruit Drink" and "Carbonated Beverages with Fruit Juice" attract GST rate of 28% and Cess of 12%. This is being prescribed specifically in the GST rate schedule".

As a brief background on the position in law which necessitated this change was such that industry members manufacture certain fruit-based beverages, which contain fruit concentrates, but rather than re-constituting the same with still water (as is undertaken by general fruit juices), the industry used carbonated water for the same. This resulted



THE CURIOUS CASE OF CLASSIFICATION UNDER GST

in a product, which while being akin to fruit juices as was generally known, was distinct in a single aspect, i.e. the same was carbonated and not still. The said goods were being classified under entry 28 of Schedule II of Notification no. 1 /2017- Central Tax (Rate) ["**GST Goods Rate Notification**"]. Such classification was being followed on the basis of the order of the CESTAT in the case of Commissioner of C. Ex., Bhopal vs. Parle Agro Pvt. Ltd [2008 (226) E.L.T. 194 (Tri. - Del.)] and maintained by the Supreme Court, wherein it was categorically held that such goods were classifiable under sub-heading 2202 90 20. However, it was a case canvassed by the GST Department that the said goods were taxable as "aerated waters" classifiable under sub-heading 2201 10. Such case being canvassed was in teeth of the settled position that carbonated fruit beverages are classifiable under sub-heading 2201 99, hence, cannot fall for classification under Sl.No. 12.

12B in Schedule IV of the Rate Notification, leading to avoidable litigation.

Reinsurance of notified insurance Schemes

On the flip-side, in certain cases, wherein there has been a clear coverage entry under a particular entry for classification of a supply, the comments of the Fitment Committee coupled with an insertion of a new entry have disturbed this position. An illustration of this can be gleaned from the specific exemption entry introduced for reinsurance of specified general insurance schemes under the GST regime.

Under the Service tax regime, general insurance services provided under certain social sector insurance schemes, such as the Modified National Agricultural Insurance Scheme ("MNAIS") were exempt from the levy of GST under ST Notification 25.2012. The definition of the term "general insurance business" was adopted from the General Insurance Business (Nationalisation) Act, 1972, wherein the same was defined to have then mean "fire, marine or miscellaneous insurance business...". Further, the term "miscellaneous insurance" was defined in the Insurance Act to mean contracts of insurance other than (a) fire, (b) marine or (c) life insurance. Such statutory definitions essentially showcased that the "reinsurance" contracts which are essentially the "insurance of insurance schemes provided under the schemes" fell for classification as reinsurance. Such position was also in sync with the objective, which was sought to be achieved,



While as is evident from the above facts and the text of the press note itself, in order to come to commence taxing carbonated fruit beverages at the rate of 28%, it was necessary that a separate entry be introduced in the Rate Notification. However, the fact that it was modelled as a clarification in the Press Note has provided ammunition to the authorities to seek to tax supplies of such goods at the rate of 28%, even prior to the insertion of Sl.No.

i.e. providing insurance covers under the notified schemes at an affordable price, and being a socially beneficial exemption, the interpretation of such is required to be in a manner which gives full effect to the objective sought to be achieved. Given that general insurance companies are mandated to cede a portion of the premium to reinsurance companies, in case any Service tax was charged on such premium ceded, the same

THE CURIOUS CASE OF CLASSIFICATION UNDER GST

would have a direct impact of the premia charged for such schemes.

Given the above, the industry used to treat "reinsurance" obtained in respect of these schemes as exempt, and accordingly no Service tax was paid on the same. However, show cause notices under the Service tax regime were issued to certain industry constituents in the pre-GST regime alleging that the reinsurance provided under these schemes is not exempt and proposing a demand for the same. However, none of these SCNs have adjudicated as of yet, and thereby there was no distortion on the position that such services were in fact taxable in the previous regime.

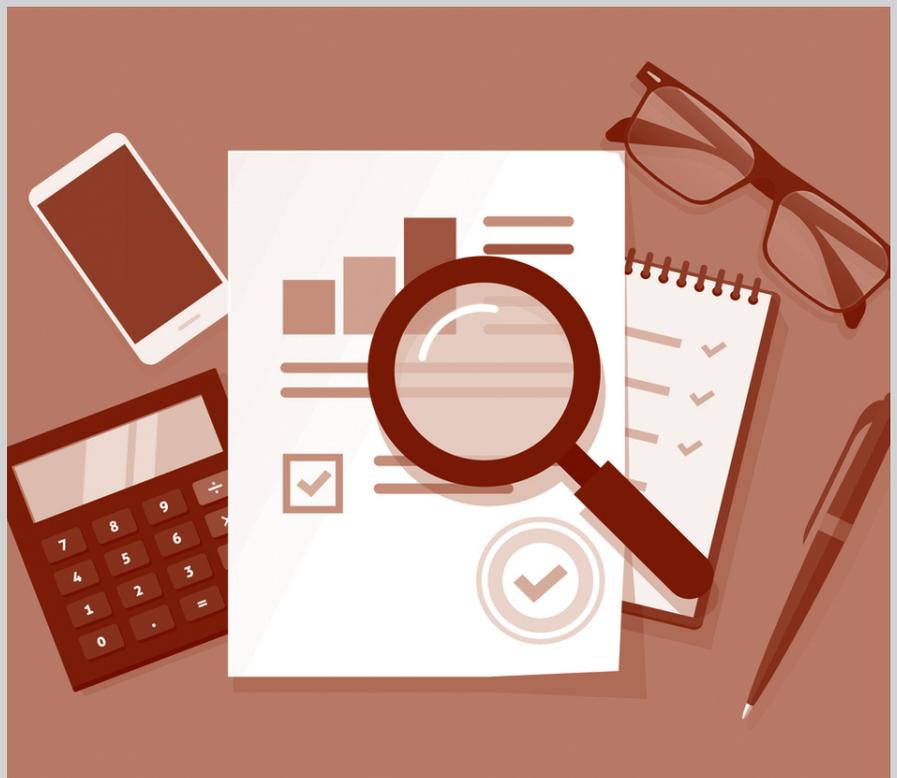
This entry was also grandfathered into the GST regime, and a near identical entry was introduced in GST Exemption Notification. Apprehensive of this issue being raked up again in the GST regime, the industry approached the CBIC to issue a clarification in this regard, stating that the services of reinsurance were covered under the umbrella term of "general insurance" and thereby exempted under the GST regime too. However, rather than acting on such request to issue a clarification in the above regard, the Fitment Committee exceeded its jurisdiction and concluded that the said services were not exempt in the Service tax regime, and consequently issued a separate entry in the GST Exemption Notification exempting reinsurance services obtained in respect of the specified insurance schemes, despite the fact that Sl.No. 35 of the Exemption Notification covered such services under the extant legal provisions.

Such actions of the Fitment Committee, to give its views on taxability under Service tax regime, apart from being uncalled for, has now resulted in a clarification being masqueraded as a new entry. Such insertion of new entry, along with the comments of the Fitment Committee may also have a consequent impact on the SCNs which were issued in the Service tax regime, and in a

manner restricts the adjudicating authority from applying its mind and passing an order in line with the applicable legal provisions.

Applying the jurisprudence developed under the erstwhile laws

The HSN has long been adopted as the bedrock of classification of goods under the Indian indirect tax laws. This has ensured that the classification of goods under the Indian laws is in sync with the global classification followed.



Even under the GST regime, the classification of goods is based on the HSN system. In terms of Explanation (iii) and (iv) of the GST Goods Rate Notification the terms, "Tariff item", "sub-heading", "heading" and "Chapter" are to respectively mean a tariff item, sub-heading, heading and chapter as specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975). Further the rules for the interpretation of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), including the Section and Chapter Notes and the General Explanatory Notes of the First Schedule shall, so far as may be, apply to the interpretation of the GST Rate Notification.

THE CURIOUS CASE OF CLASSIFICATION UNDER GST

The insertion of this explanation, and given that the GST Rate structure based on HSN, would provide an impetus to the belief that the judicial precedents which were passed in the previous regime would equally apply to the present regime. However, the difference in description provided under the GST Rate Notification as compared to that covered under the Customs tariff ensure that this would not be the case. Hence, even for such products for which classification under the Customs / Central Excise tariff was a bone of contention under the previous regime would need to be re-litigated to ensure that certainty in classification.

This issue is further compounded by the fact that the descriptions given under the GST Goods Rate Notification are rather limited in their scope and not all-encompassing. This has led to a situation wherein, two goods having identical characteristics, same coverage under the HSN, are not covered under the same entry on account of omission of the said product from the description. A classic example of this is the classification battle

between parathas and rotis / chapatis, wherein the Gujarat Authority for Advance Ruling held that parathas not being akin to rotis / chapatis, does not merit the concessional GST rate of 5%.

Similarly, the GST Services Rate Notification is based on the Central Product Classification ("CPC") developed by the UN. This system is akin to the HSN System and provides a numerical classification to various services which can be provided. However, as is the case with the HSN classification under the goods notification, the description of services which has been provided under the GST Services Rate Notification is not identical to that used under the CPC (which has been renamed as Scheme of Classification of Services and annexed to the Rate Notification). This, therefore, again makes any explanatory notes to the Scheme of Classification of services barely effective.

Given the above, one can expect long-drawn litigation in the sphere of classification of goods and services under the GST regime.





FROM THE BENCH - KEY JUDICIAL PRONOUNCEMENTS

The following chapter has been authored by Parth Parikh (Associate Partner) & Swati Agrawal (Senior Associate) - ELP

Spotlight Case

1. Usha Martin Ltd. vs Additional Commissioner & Ors [TS-609-HC(JHAR)-2022-GST]

Facts:

- The GST Department passed order under Section 73 of the CGST Act denying CENVAT credit carried forward to the GST regime under Section 140 of the CGST Act on the premise that the petitioner contravened the provisions of CENVAT Credit Rules, 2004 ('the CENVAT Rules') relating to distribution of credits by the Input Service Distributor were contravened by the Petitioner.
- The Petitioner filed a Writ Petition before the Jharkhand High Court *inter alia* challenging the jurisdiction of the GST Authorities to examine the correctness of the CENVAT credit.

Ruling:

- In terms of Section 73 of CGST Act, proceeding can be initiated for wrongfully availing or utilizing Input tax credit which is available under CGST Act.
- The definition of Input tax credit under CGST Act does not cover CENVAT credit within its expression. Thus, the assumption of the jurisdiction to determine whether CENVAT Credit was admissible under erstwhile law by invoking provisions of Section 73 of CGST Act was not proper in the eyes of law.
- Section 174 of the CGST Act saves jurisdiction of the Department to initiate proceedings under the erstwhile laws. Proceedings under CGST Act can be initiated only if conditions of transition provisions are violated which are provided under Section 140 of the CGST Act.

ELP Comments

CBIC vide Circular dated 10.11.2022 has laid down the guidelines for verification of the carried forward transitional credit claimed in Form GST TRAN-1 filed/ revised pursuant to the directions of Hon'ble Supreme Court in UOI vs. Filco Trade Centre Private Limited [TS-369-SC-2022]. The guidelines prescribed by the CBIC do not require the Authorities to get into the verification of eligibility of credit carried forward under the erstwhile laws. However, the Authorities, in the guise of TRAN-1 verification, have often exceeded their jurisdiction and resorted to such verification. This decision aptly restricts the scope of verification of such carried forward transitional credit by the GST Authorities.

2. Hero Motocorp Ltd. vs Union of India and Ors. [TS-519-SC-2022-GST]



Facts:

- The Government of India vide Office Memorandum dated 7 January 2003 (O.M. of 2003) provided various incentives, including the exemption of 100% Excise duty for ten years to new and existing industrial units for their substantial expansion in the States of Uttaranchal and Himachal Pradesh.

FROM THE BENCH - KEY JUDICIAL PRONOUNCEMENTS

- In pursuance of the Office Memorandum and corresponding notifications, the Petitioner set up a new industrial unit and availed the exemption of Excise duty. However, post implementation of GST regime, the tax exemption ceased to continue.
- On the recommendation of the GST council, the Central Government notified the Scheme of Budgetary Support on 05.10.2017 to eligible units located in specified States for residual period. However, the reimbursement of taxes by Central Government was restricted to only 58% of CGST and 29% of IGST.
- The Petitioner aggrieved by the restriction, filed a Writ Petition to provide for 100% reimbursement of CGST for the balance period, on the ground of promissory estoppel.

- Unless the Petitioner show any statutory duty cast upon the Union of India to grant them a 100% refund, a writ of mandamus as sought cannot be issued.
- The Petitioner can make representation to respective State Governments as well as to the GST Council, who should consider such representations in an expeditious manner.

ELP Comments

While the Hon'ble Supreme Court has ruled against the assesseees, the decision acknowledges the merits in the claim of the assesseees based on equity. Therefore, all such similarly placed assesseees may make suitable representations to the respective State Governments and GST Council seeking incentives with proper rationale.

3. RP Buildcon Pvt. Ltd. vs Superintendent, CGST & CX [TS-496-HC (CAL)-2022-GST]

Facts:

- Audit was conducted on the records of assessee under Section 65 of CGST Act for the relevant period. Even before conclusion of the audit proceedings, notices under Section 61 of the CGST Act were also issued by two wings of same department (Anti-Evasion wing and Range Office) asking to produce various relevant documents for the same period.
- Assessee contended that once audit proceedings under Section 65 have already been initiated by the Department for the same tax period, scrutiny of returns under Section 61 cannot be permitted.
- The Single Judge Bench of the High Court upheld the validity of simultaneous proceedings initiated against the assessee, which was challenged before the Division Bench of the High Court.

Ruling:

- Since audit proceedings under Section 65 of the CGST Act have already commenced, it is but appropriate that the proceedings should be taken to the logical end.



Ruling:

- There can be no estoppel against the legislature in exercise of its legislative functions.
- The proviso to clause (c) of sub-section (2) of Section 174 of the CGST Act is clear and specific and accordingly, the benefit granted earlier stands rescinded in view of this proviso also.
- It has been consistently held that where the change of policy is in the larger public interest, the State cannot be prevented from withdrawing an incentive which it had granted through an earlier notification.

FROM THE BENCH - KEY JUDICIAL PRONOUNCEMENTS

- The proceedings initiated by the Anti Evasion and Range Office for the very same period shall not be proceeded with any further.
- However, it is open for the Anti-Evasion Wing and the Range Office to put the assessee on notice if there are any other material required by both wings for a different assessment period than already covered by the Audit proceedings.

ELP Comments

In terms of Section 6(2)(b) of the CGST Act, there is a clear restriction on initiation of parallel proceedings by a proper officer under Central GST where a proper officer under State or Union Territory GST has already initiated proceedings on the subject matter. There are *pari materia* provisions under the respective SGST Act to this effect. While there is no specific restriction with respect to different departments within the Central/State GST Authorities, this decision sets a good precedent even in such cases where audit, enquiry or investigation proceedings are concurrently launched by multiple departments within Central/State GST Authorities the for the same tax period.

4. Sunny Jain vs Union of India and Ors [TS-659-HC(DEL)-2022-GST]

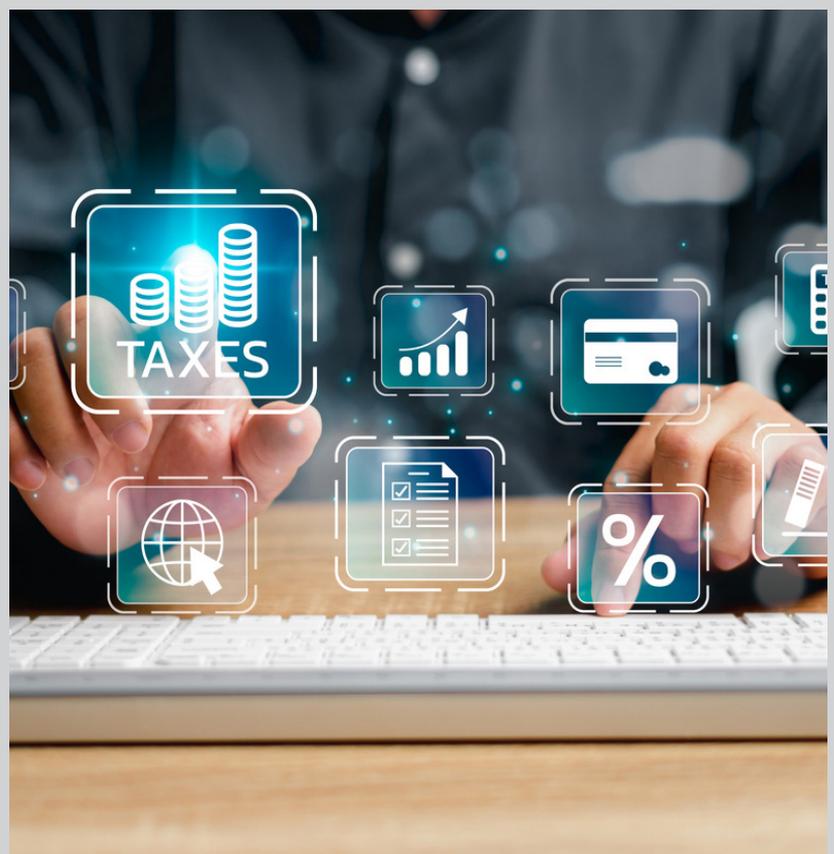
Facts:

- Input tax credit lying in the Electronic Credit Ledger ('ECL') was blocked on the basis of allegation that the Petitioner had not paid the consideration for supplies received from one of its suppliers within the period of 180 days.
- The Department further alleged that they have reason to believe that the ITC available in the ECL of the Petitioner had been wrongly availed and therefore, the same was blocked in exercise of power under Rule 86A of the CGST Act.
- The Petitioner challenged the blocking on the grounds that the only reason for blocking the Input

tax credit is that he is ineligible to avail the same in view of Section 16(2). Moreover, his ITC was blocked for more than 18 months against the provisions of Rule 86A.

Ruling:

- A conjoint reading of Rule 37 of the CGST Rules and the proviso to section 16(2) of the CGST Act leaves no room for doubt that a taxpayer is entitled to avail of ITC in the first instance even though it has not paid the supplier for the goods/services. He has to, however, reverse the same with interest by including the amount of ITC availed as a part of his output liability, if he does not make the payment to the supplier within the stipulated period of 180 days.
- A plain reading of Rule 86A of the CGST Rules indicates that the restriction, as contemplated therein can be imposed only where the ITC available in the ECR has been "fraudulently availed" or is "ineligible". There is no allegation that the petitioner has "fraudulently availed" the ITC.



FROM THE BENCH - KEY JUDICIAL PRONOUNCEMENTS

- The Department has completely misdirected itself in proceeding on the basis that unless a taxpayer pays the supplier, it is ineligible to avail of the ITC lying to its credit in the ECL. The use of the expression 'inasmuch as' limits the scope of restriction under Rule 86A(1) of CGST Rules.
- The restrictions imposed under Rule 86A of the CGST Rules cannot extend beyond the period of one year from the date of imposing such restriction.

ELP Comments

This decision reaffirms the position that the provisions with respect to blocking of ECL should be read strictly and such a drastic measure should be taken in exceptional circumstances as prescribed under Rule 86A of the CGST Rules.

5. In Re: Tata Motors Limited [TS-677-AAAR(GUJ)-2022-GST]

Facts:

- The Applicant is maintaining canteen facility employees at their factory premises to comply with the mandatory requirement of maintaining the canteen as per the Factories Act, 1948 and is recovering a nominal amount from employees towards such canteen facility.
- Ruling was sought on (a) whether ITC is available to the Appellant on GST charged by the service provider on the canteen facility provided to employees working in the factory and (b) if yes, whether it will be restricted to the extent of cost borne by the Appellant.
- The Authority for Advance Ruling held that ITC of GST paid on canteen facility is blocked credit u/s 17(5)(b)(i) of the CGST Act. Further, it was held that GST is not leviable on the amount representing the employee's portion of canteen charges.
- Aggrieved by the said ruling, the Applicant filed an appeal before the Appellate Authority for Advance Ruling.

Ruling:

- CBIC vide Circular No. 172/04/2022-GST dated 06.07.2022 has clarified that vide the CGST (Amendment Act), 2018, clause (b) of Section 17(5) was substituted with effect from 01.02.2019 and accordingly, the proviso after sub-clause (iii) of Section 17(5)(b) of CGST Act, is applicable to whole clause (b) of Section 17(5).
- Input Tax Credit will be available to the Applicant in respect of food and beverages as canteen facility is obligatorily to be provided under the Factories Act, 1948 to its employees working in the factory.
- However, Input Tax Credit will be available in respect of such services provided by canteen facility to its direct employees but not in respect of other type of employees including contract employees/workers, visitors etc.
- ITC of GST charged by the canteen service



provider will be available only to the extent of cost borne by the Applicant, for providing the canteen services only to its direct employees.

ELP Comments

It is interesting to note that the AAR had ruled that the company would not be liable to charge GST on the amount recovered from the employees as part of the canteen charges on the ground that

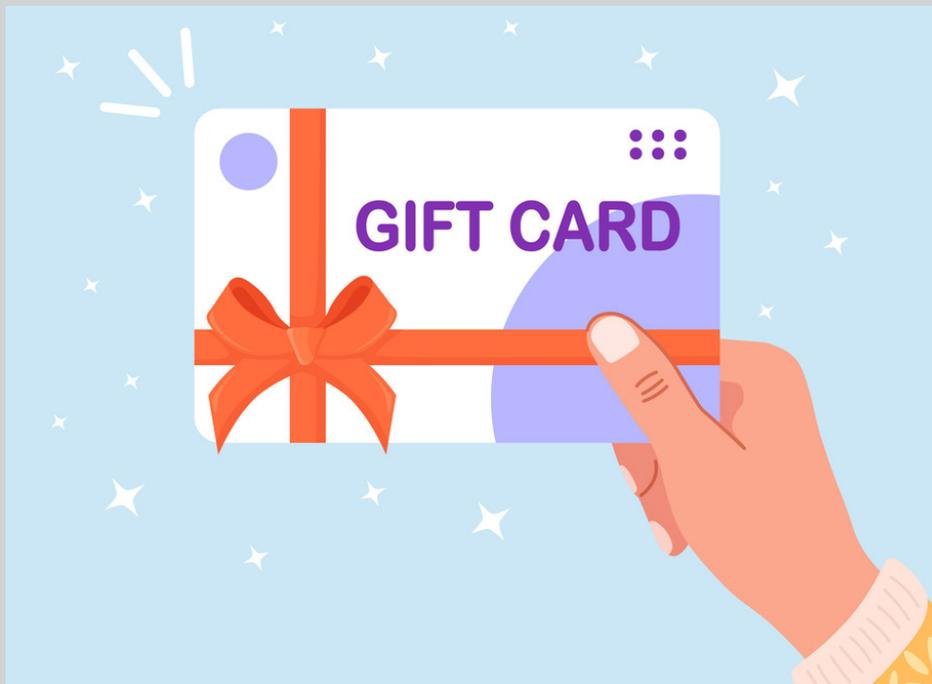
FROM THE BENCH - KEY JUDICIAL PRONOUNCEMENTS

the company does not retain any profit on such amount. The AAR in Tube Investment of India Ltd. (Advance Ruling 12/2022-23) and Federal Mogul Goetze India Ltd. (KAR ADRG 42/2022) have passed contradictory rulings on the said aspect. In order to avoid dispute, one may discharge GST on the amounts recovered from the employees and avail Input tax credit of entire GST charged by the canteen service providers.

6. Premier Sales Promotion Pvt. Ltd. vs Union of India & Others [TS-23-HC(KAR)-2023-GST]

Facts of the case

- The Petitioner procured Pre-paid Payment Instruments ('PPIs') of Gift Vouchers, Cash Back Vouchers and E-Vouchers from the issuers and supplied the same to its clients for specified face



value. These clients ultimately gave vouchers to their employees in the form of incentive or to other beneficiaries under promotional schemes which could be used as consideration for purchase of goods or services, or both as specified on every voucher.

- An application for advance ruling was filed to ascertain the taxability of the PPIs and

vouchers, its classification and the applicable rate of tax before the AAR. The AAR ruled that supply of PPIs and vouchers are taxable supply of goods and exigible to tax at 18% (applicable to goods not specified elsewhere). In appeal against said order before Karnataka Appellate Authority for Advance Ruling ('AAAR'), the AAAR affirmed the order of AAR. Hence, writ petition was filed before Hon'ble Karnataka High Court for quashing the order passed by AAAR.

Ruling

- The term 'money' and 'voucher' are defined under the Central Goods and Services Tax Act, 2017 ('CGST Act'). The vouchers are in the nature of instrument acceptable as consideration and therefore, will qualify as 'money' which is excluded from the definition of the term goods.
- Transaction between the Petitioner and his clients is procurement and supply of printed forms similar to currency. The value printed on the form can be transacted only at the time of redemption of the voucher and not at the time of delivery of vouchers. Therefore, PPIs/ vouchers are merely in the nature of pre-deposit, which is neither a good nor services and accordingly, cannot be taxed.

ELP Comments

This decision is in line with the ruling of Hon'ble Supreme Court in Sodexo SVC India Pvt. Ltd. vs. the State of Maharashtra [2016 (331) ELT 23 (SC)] and the AAAR, Tamil Nadu in Re: Kalyan Jewellers India [AAAR/1/2021 (AR)] wherein it was held that vouchers cannot be treated as 'goods' or 'services' but are only an instrument of consideration for future supply. There have been contrary rulings of AAR on this issue and hence, this decision brings in clarity on the taxability of vouchers under GST.



EXPERT SPEAKS

Mr. Sumit Mittal – Chief Operating Officer and Director Finance - GreenCell Mobility Private Limited

Interview conducted by Varun Parmar (Associate Partner) & Atharva Javalekar (Associate)- ELP

Do you believe that the introduction of GST is making Indian products more competitive in the domestic and international markets owing to the full neutralization of input taxes across the value chain of production?

Ans – As GST has subsumed various indirect taxes, the tax cost and cascading effect has reduced to great level. This makes the products more competitive in the markets. The technology enabled GST (e-invoice, statement of invoices etc.) is ensuring that the appropriate ITC is made available on real time basis, in long term. I apprehend that evolving technology will ensure minimisation of ITC leakage and thereby reducing tax cost in any transaction. This shall result in ease of handling compliance. By widening the tax base and improving the taxpayer compliance, GST should bring buoyancy to the Government Revenue and leading the way to rationalisation of tax slabs. However, seamless flow of input tax credit is restricted in certain areas for instance, input tax credit with regard to renting/hiring of cab or civil work in office should be relooked so long as they are used for the business purpose. Such restrictions act as deterrent to achieving seamless flow credits.

The rate of GST on EV's in India has been rationalized from 12% - 5% in order to promote the EV manufacturing in India. This would have resulted in Inverted Duty Structure in your business. What are your expectations from the GST council meeting?

Ans- Currently, 100% of Lithium- Ion cells are imported which attracts GST rate of 28%. Whereas the rate of final EV product has been reduced to 5%. This leads to accumulation of ITC resulting in blockage of working capital. Especially in EV sector where final product is at 5% and parts of EV used for

manufacturing such as Lithium-Ion battery, motor are taxed at 18/28%. Rationalising the rates for EV parts would help boost EV sector in India and reduce tax cost in the value chain.

Any specific challenge for your new emerging EV passenger transportation sector?

Ans- As India is moving towards digitalisation, the GST legislations are amended commensurately to keep pace with the change in the ecosystem. With effect from January 2022 e-commerce operator



is also liable to pay tax on supply passenger transportation services through buses. Accordingly, the bus operators are not required to discharge GST on the service services supplied. Typically, a bus operator is required to undertake huge CAPEX cost for deploying of EV buses. In the initial years due to heavy investment there is accumulation of input tax credit. The ITC so accumulated cannot be utilised as the outward liability for passenger transportation is shifted on e-commerce operator. Government should consider providing

EXPERT SPEAKS

an exception under section 9(5) of CGST Act for registered passengers transportation operators similar to other services (hotel accommodation and house keeping, plumbing, carpentering) notified under section 9(5) CGST Act.

Recently clarifications have been issued by the CBIC on how to deal with the differences in GSTR-3B vs GSTR-2A, what is your take on it?

Ans – This circular is welcome step to all compliant taxpayer, this will result in concluding many scrutiny's/assessments initiated by the tax authorities. As the circulars are binding on the tax authorities and they have to abide by it Issuance of this circular will prove to be beneficial to a large number of genuine taxpayers who have availed credit in relation to a transaction but the same was disallowed because of misreporting on part of the supplier.

In your view, has the orientation of tax authorities undergone a change with the introduction of GST regime?

Ans - The GST department has established an intelligence wing to reduce revenue leakage and detect frauds. The tax authorities are collating information from multiple sources like Banks, Income tax, stock exchanges, tax payers etc and analysing them. The information is also exchanged across various revenue authorities (income tax, DRI, etc.). Therefore, the functioning of the tax authorities towards business has undergone a major change with the introduction of GST. It is also observed that various revenue departments are issuing notices/ summons sometimes simultaneously. Also, CBIC could consider moving towards faceless assessment similar to Direct Taxes which shall improve the transparency and efficiency along with reduction in duplicity of assessments.





LEGISLATION AT WORK - RECENT AMENDMENTS

The following chapter has been authored by Sahil Kothari (Principal Associate), Pragma Koolwal (Associate) & Kavin Masalia (CA) - ELP



A General Legislative updates from October 2022 to January 2023		
No.	Particulars	Summary
1	Notification No 21/ 2022 dated October 21, 2022	<ul style="list-style-type: none"> The due date of filing Form GSTR-3B for the month of September 2022 has been extended by (1) day to October 21, 2022.
2	Circular No 181/ 13/ 2022 – GST dated November 10, 2022	<p>The said Circular clarifies certain aspects relating to Inverted duty ('ID') refund.</p> <ol style="list-style-type: none"> <u>Applicability of new refund formula</u> <ul style="list-style-type: none"> Amendment to ID refund formula introduced w.e.f. July 5, 2022, is NOT clarificatory in nature. The revised formula would be applicable in respect of refund applications filed on or after July 5, 2022 Refund applications filed prior to such date would be dealt with as per formula prior to such amendment. <u>Restriction to claim ID refund on certain products</u> <ul style="list-style-type: none"> The restriction on claiming ID refund on certain goods, effective from July 18, 2022, should apply prospectively and accordingly be applicable to claims filed on/ or after July 18, 2022, and should not apply to refund claims filed prior to such date.
3	Circular No 182/ 14/ 2022 - GST dated November 10, 2022	<p>Guidelines have been issued for verifying the transitional credit claimed by a taxpayer, pursuant to the ruling of Hon'ble Supreme Court ruling in case of Filco Trade Centre Private Limited [2022-TIOL-57-SC-GST]. Fresh or revised Form GST TRAN-1 can be filed up to November 30, 2022. Adjudicating authority to verify such details and pass an Order within 90 days.</p>
4	Notification No 22/ 2022 - Central Tax dated November 15, 2022	<ul style="list-style-type: none"> The said Notification amends the Central Goods and Services Tax Rules, 2017 ('CGST Rules') and specifically, instructions to Form GSTR-9. Amendment is introduced to align time limit to avail input tax credit ('ITC') or issue Credit Note or rectify returns. Part V of Form GSTR-9 requires furnishing transactions for the FY declared in return for subsequent FY. The instructions for FY 2021-22 have been amended to provide that Part V consists of particulars of transactions for the previous financial year (i.e., FY 21-22) but paid in the FORM GSTR-3B of April 2022 to October 2022, filed up to November 30, 2022. Basis the above amendment, time limit to avail ITC, issue Credit Note and rectify mistake appears to be up to filing of Form GSTR-3B for the month of October. This was also clarified in Press Release dated October 4, 2022.

LEGISLATION AT WORK - RECENT AMENDMENTS

<p>5</p>	<p>Notification No 26/ 2022 - Central Tax dated December 26, 2022</p>	<p>Pursuant to the 48th GST Council Meeting, certain amendments have been introduced in the CGST Rules. These <i>inter alia</i>, include:</p> <ul style="list-style-type: none"> ■ Rule 9 has been amended to provide that the application for registration will be approved only after physical verification of the premises (even after Aadhar authentication), if the said person is identified on the common portal based on data analysis and risk parameters. ■ Rule 12 has been amended to provide that a registered person can <i>suo motu</i> cancel TDS / TCS registration. ■ Rule 37 has been amended to provide that in case of non-payment of consideration to the supplier, the recipient should reverse ITC only proportionate to the amount not paid to the supplier. ■ Rule 37A has been inserted to provide for reversal of ITC by the recipient by November 30, 2022, of the following year if Form GSTR 3B has not been furnished by the supplier by September 30, 2022, of the following year. If ITC is not reversed by November 30, 2022, the amount will be payable along with interest. When the supplier subsequently furnishes Form GSTR 3B, credit may be re-availed. ■ Rule 88C has been inserted to specify the procedure for recovery of tax in case of difference in Form GSTR 1 and Form GSTR 3B, by such amount and such percentage as may be recommended by the GST Council. Where any amount remains unpaid after seven days of intimation or no explanation is furnished, or the explanation is not found to be acceptable, such amount shall be recoverable under Section 79. <p>Rule 59 has been amended to provide that a person to whom an intimation is issued under Rule 88C would be subsequently barred from filing Form GSTR 1 for subsequent periods, unless he has furnished a reply explaining reasons for the difference or deposited the unpaid tax.</p> <ul style="list-style-type: none"> ■ Rule 89 has been amended to specify the procedure for unregistered persons to claim GST refund. ■ Rule 108 has been amended to exclude the requirement of furnishing a certified copy of the Order in case of filing of appeal when the order is uploaded in the GST portal. In case the Order is not uploaded on the GST portal, a self-certified copy of the order may be furnished within a period of 7 days of filing the appeal. ■ Rule 109C has been inserted to permit withdrawal of appeals at any time before issuance of show cause notice by appellate authority or before issuance of Order, whichever is earlier.
<p>6</p>	<p>Notification No 15/ 2022 - Central Tax (Rate) dated December 30, 2022</p>	<ul style="list-style-type: none"> ■ Vide the said Notification, an explanation has been inserted wherein it has been clarified that GST exemption should be available if residential dwelling is rented to a GST-registered person in their 'personal capacity' for their own use as a residence and not for business. ■ Further, GST exemption has been withdrawn in respect of service by way of access to a road or a bridge on payment of annuity.

LEGISLATION AT WORK - RECENT AMENDMENTS

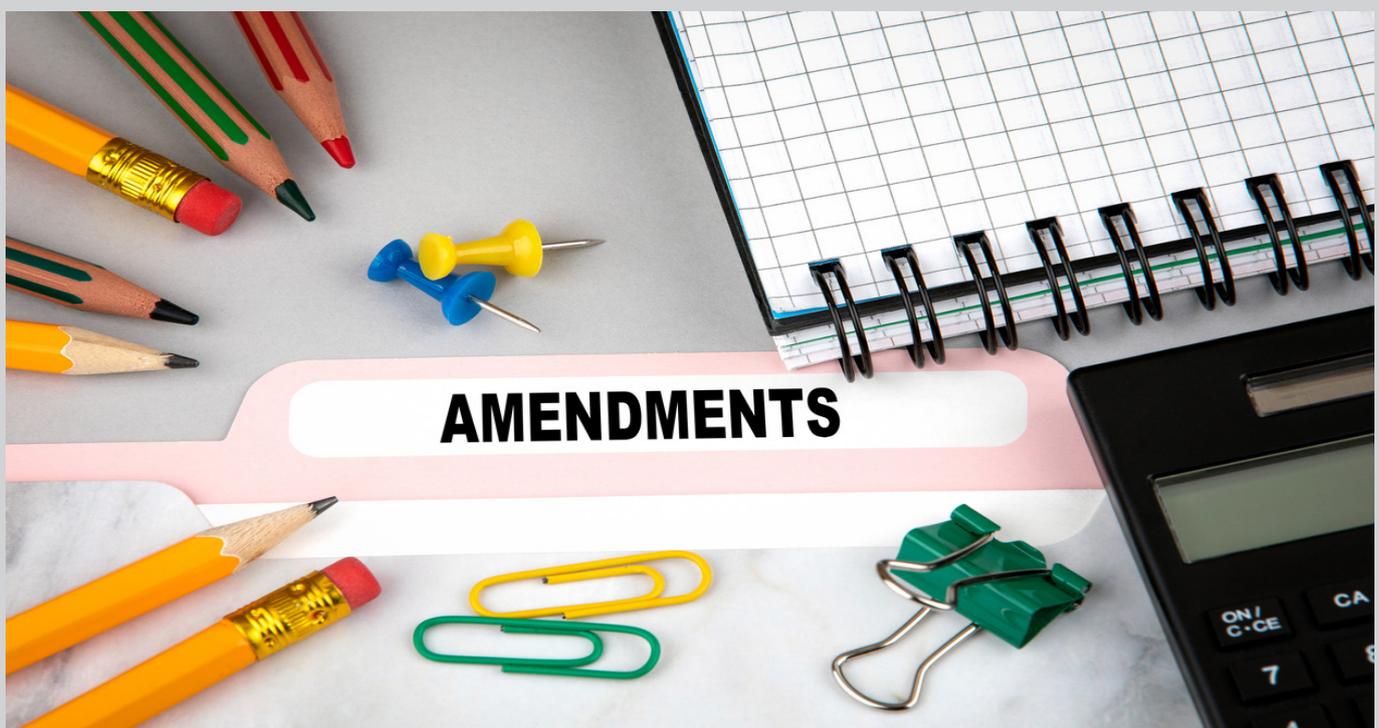
7	<p>Circular No 183/ 15/ 2022 - GST dated December 27,2022</p>	<ul style="list-style-type: none"> ■ Vide the said Circular, CBIC has provided clarification on the procedure to deal with the differences in ITC availed in GSTR 3B vis-à-vis ITC reflected in Form GSTR 2A for FY 2017-18 and 2018-19. ■ This Circular provides the procedure for allowing claim of ITC in case of mismatch and the safeguards to be followed by tax authorities.
8	<p>Circular No 186/ 18/ 2022 - GST dated December 27, 2022</p>	<p>The said Circular inter alia clarifies following aspects with respect to taxability on certain transactions:</p> <ul style="list-style-type: none"> ■ No-claim bonus ('NCB'): <ul style="list-style-type: none"> ○ There is no supply by the insured to the insurance company in not lodging an insurance claim. NCB cannot be treated as consideration for supply provided by the insured to the insurance company. ○ NCB amount is pre-disclosed in the policy document and therefore fulfils the conditions of Section 15(3) of the Central Goods and Service Tax Act, 2017 ('CGST Act'). Thus, it has been clarified that NCB is an admissible deduction under Section 15(3) for the purpose of deduction from the value of insurance services. ■ E-invoicing: It has been clarified that exemption from issuance of e-invoices are applicable for the whole entity and not restricted to the nature of supply. <p><i>For instance:</i> A Banking Company providing banking services, may also be involved in making supply of some goods, including bullion. The said banking company is exempted from mandatory issuance of e-invoice for all supplies of goods and services and thus, will not be required to issue e-invoice with respect to any supply made by it.</p>
9	<p>Notification No. 01/2023 - Central Tax dated January 04, 2023</p>	<ul style="list-style-type: none"> ■ This Notification has amended Notification No.14/2017 – CT dated July 01, 2017, wherein the powers of Superintendent of Central Tax have been assigned to the Additional Assistant Directors in Directorate General of Goods and Services Tax Intelligence, Directorate General of Goods and Services Tax and Directorate General of Audit.
10	<p>Circular No. 189/01/2023-GST dated January 13, 2023</p>	<p>Vide the said Circular, CBIC has clarified the following:</p> <ul style="list-style-type: none"> ■ 'Rab' will be classified under heading 1702 and attract GST rate of 18%. ■ Exemption is provided on by-products of milling of Dal/ Pulses such as Chilka, Khanda and Churi/Chuni w.e.f. January 01, 2023. ■ 'Carbonated Beverages of Fruit Drink' or 'Carbonated Beverages with Fruit Juice' would fall under HSN 2202 99 and will attract 28% GST and Compensation Cess at the rate of 12%. ■ Snack pellets manufactured through extrusion process (such as 'fryums') under HSN 1905 90 30, which <i>inter alia</i>, covers goods with description 'Extruded or expanded products, savoury or salted' will attract GST @ 18%.

LEGISLATION AT WORK - RECENT AMENDMENTS

		<ul style="list-style-type: none"> Benefit of lower rate is extended to goods that attracts IGST at the rate of 12%. Compensation cess ("CC") on Sports Utility Vehicles ("SUVs") at the rate of 22% is made applicable on Motor vehicles falling under Heading 8703 subject to the satisfaction of four specifications i.e., : (a) these are popularly known as SUVs; (b) the engine capacity exceeds 1,500 cc (c) the length exceeds 4,000 mm and (d) the ground clearance is 170 mm and above.
11	Circular No. 190/02/2023 – GST dated January 13, 2023	<ul style="list-style-type: none"> The said Circular has clarified that incentives paid by MeitY to acquiring banks under the Incentive scheme for promotion of RuPay Debit Cards and low value BHIM-UPI transactions are in the nature of subsidy and thus not taxable under GST. This Circular has also clarified that exemption from levy of GST to accommodation services provided by Air Force Mess and other similar messes, such as, Army mess, Navy mess, Paramilitary and Police forces mess to their personnel or any person other than a business entity is available if covered by Sl. No. 6 of Notification No. 12/2017 – Central Tax (Rate) dated June 28, 2017 provided the services supplied by such messes qualify to be considered as services supplied by Central Government, State Government, Union Territory or local authority.
B Legislative updates from Union Budget 2023-24 proposals		
1	Amendment to Section 16 of the CGST Act <i>(to be effective from a date to be notified)</i>	<ul style="list-style-type: none"> Second proviso to Section 16(2) of the CGST Act provides that where a recipient fails to pay the amount towards value and tax to the supplier within a period 180 days from the date of issue of invoice, an amount equal to the ITC availed by the recipient shall be added to his output tax liability, along with interest payable thereon It is proposed that in case of non-payment of consideration to the supplier, the recipient will have to pay the same along with interest under Section 50 of the CGST Act. Further, third proviso to Section 16(2) of the CGST Act provides that the recipient shall be entitled to avail ITC on payment made by him of the amount towards the value of supply of goods or services or both along with tax payable thereon. In this regard, it is proposed that such payment should be made by the recipient to the supplier for availing the ITC.
2	Amendment to Section 17 of the CGST Act <i>(to be effective from a date to be notified)</i>	<ul style="list-style-type: none"> Section 17(3) of the CGST Act provides the value to be considered of exempt supplies for the purpose of reversal of ITC. Explanation to Section 17(3) provides that the value of exempt supply shall not include the value of activities or transactions specified in Schedule III, except those specified in Paragraph 5 of the said schedule. It is proposed to also include transaction covered under Para 8(a) of Schedule III i.e. the value of supply of warehoused goods to any person before clearance for home consumption for the computation of value of exempt supply. Consequently, reversal of ITC under Rule 42 of the CGST Rules will apply.

LEGISLATION AT WORK - RECENT AMENDMENTS

3	<p>Amendment to Section 17 of the CGST Act (to be effective from a date to be notified)</p>	<ul style="list-style-type: none"> ■ A new clause (fa) is proposed to be inserted under Section 17 of the CGST Act to restrict ITC in respect of goods and/ or services received by a taxable person, which are used or intended to be used for activities relating to his obligations under CSR referred to in Section 135 of the Companies Act, 2013.
4	<p>Amendment to Section 23 of the CGST Act (to be effective from a date to be notified)</p>	<ul style="list-style-type: none"> ■ Section 23 of the CGST Act provides for the persons not liable to obtain registration which <i>inter alia</i> includes person engaged exclusively in the business of supplying goods or services or both that are not liable to tax or wholly exempt from tax under CGST Act or IGST Act. Section 23 is proposed to be substituted retrospectively from July 01, 2017, to override Section 22 and Section 24 of the CGST Act.
5	<p>Amendment to Section 2 of the IGST Act (to be effective from a date to be notified)</p>	<ul style="list-style-type: none"> ■ The definition of 'OIDAR' is proposed to be amended to exclude the condition of 'essentially automated and involving minimum human intervention'. ■ Further, the definition of non-taxable online recipient is proposed to be substituted to mean "any unregistered person receiving OIDAR services located in taxable territory". It is also proposed to be clarified that unregistered person shall include persons who are solely registered for the purpose of TDS such as department or establishment of Central Government, State government, local authority, government agencies.
6	<p>Amendment to Section 12 of the IGST Act (to be effective from a date to be notified)</p>	<ul style="list-style-type: none"> ■ Proviso to Section 12(8) of the IGST Act provides that the place of supply in transportation of goods to a place outside India shall be the place of destination of such goods. ■ It is proposed to omit the said proviso.





ALLIED LAWS

The following chapter has been authored by Rushil Shah (Senior Associate), Yash Desai (Senior Associate) & Anushree Kothari (Associate) - ELP

Legislative Updates (Allied Laws)		
Customs Duty		
1.	Notification No. 53/2022-Customs dated 3.10.2022	Amends Notification No. 11/2021 – Customs dated February 01, 2021, to insert a new entry for exempting the levy of Agriculture and Infrastructure Development Cess (“AIDC”) in excess of 1.5% on import of goods covered under HSN 7110, other than: <ul style="list-style-type: none"> i. Platinum and Palladium used in manufacture of specified items, and ii. Rhodium. (Vide Notification 03/2023-Customs dated February 01, 2023, the above exemption is available in respect of AIDC in excess of 5.4%)
2.	Notification No. 54/2022-Customs dated 19.10.2022	Amends Project Imports Regulations, 1986 to provide relaxation to “solar power plants or solar power projects” from submitting a statement indicating the details of the goods imported together with necessary documents as proof regarding the value and quantity of the goods so imported or any other document required for finalisation of the contract. Notification has also included Bhopal Metro Rail Project and Indore Metro Rail Project under <i>all Metro Rail or Monorail projects</i> required to submit the relevant details as per the regulations.
3.	Notification No. 55/2022-Customs dated 1.11.2022	Provides exemption to specified varieties of Rice, exported out of India, from customs duty subject to fulfilment of conditions prescribed therein.
4.	Notification No. 57/2022-Customs dated 17.11.2022	Provides exemption to Motor Car for the use of Governor of the State from levy of customs duty, when imported or purchased out of bond by the Governor of any State on appointment or during their tenure in the office.
5.	Notification No. 58/2022-Customs dated 18.11.2022	Amends Notification No. 27/2011- Customs dated March 01, 2011, to exempt levy of export duty on certain iron ore & steel products.
6.	Notification No. 59/2022-Customs dated 18.11.2022	Withdraws exemption from Basic Customs Duty (“BCD”) in respect of Anthracite and PCI Coal, Coke & Semi coke and ferronickel.
7.	Notification No. 60/2022-Customs dated 18.11.2022	Withdraws exemption of AIDC in respect of Anthracite/Pulverized Coal Injection (PCI) coal and Coking coal.

ALLIED LAWS

8.	Notification No. 61/2022-Customs dated 25.11.2022	<p>Amends various Notifications to insert HSN code “8524 11 00 or 8524 12 00 or 8524 19 00” – “Flat Panel Display Modules without driver or control circuit for cellular mobile phones” as follows:</p> <ol style="list-style-type: none"> 1. Provides exemption to such Flat Panel Displays of the origin of Republic of Singapore, when imported into India from Republic of Singapore. 2. Provides exemption to such Flat Panel Displays when imported into India from the Republic of Korea. 3. Provides exemption to such Flat Panel Displays when imported into India from country specified in Appendix I or II, in accordance with Customs Tariff [Determination of Origin of Goods under the Preferential Trade Agreement between the Governments of Member States of the Association of Southeast Asian Nations (ASEAN) and the Republic of India] Rules, 2009 4. Provides exemption to such Flat Panel Displays when imported into India from Japan.
9.	Notification No. 62/2022-Customs dated 26.12.2022	Effectuates the first tranche of tariff concessions under India Australia Economic Cooperation and Trade Agreement consequently Ministry of Finance grants concession to certain goods imported into India from Australia.
10.	Notification No. 63/2022-Customs dated 27.12.2022	Effectuates the fourteenth and final tranche of tariff concessions under India ASEAN Trade in Goods Agreement which provides deeper tariff concessions in respect of specified goods when imported from ASEAN under the India-ASEAN Free Trade Agreement.
11.	Notification No. 64/2022-Customs dated 29.12.2022	Effectuates the second tranche of tariff concessions under India Australia Economic Cooperation and Trade Agreement providing further concessions to goods imported into India from Australia.
12.	Notification No. 65/2022-Customs dated 29.12.2022	Amends Notification Nos. 48/2021-Customs dated October 13, 2021, and 49/2021-Customs dated October 13, 2021, to extend the existing concessional import duties on specified edible oils and lentils upto March 31, 2024.
13.	Notification No. 01/2023– Customs dated 13.01.2023	Exempts COVID-19 vaccine when imported into India by Central Government or State Governments, from the whole of the Customs duty leviable thereon with effect from January 14, 2023, and remain in force upto and inclusive of the March 31, 2023.
Anti-Dumping Duty		
14.	Notification No. 29/2022-Customs (ADD) dated 19.10.2022	Imposes Anti-Dumping duty on “Electrogalvanized Steel” originating in or exported from Korea RP, Japan and Singapore, for a period of 5 years.

ALLIED LAWS

15.	Notification No. 30/2022-Customs (ADD) dated 28.11.2022	Revised the imposition of Anti-Dumping Duty on imports of Cast Aluminum Alloy Wheels or Alloy Road Wheels (ARW) used in motor vehicles, whether or not attached with their accessories, of a size in diameters ranging from 12 inches to 24 inches originating or exported from China PR, Korea or Thailand.
16.	Notification No. 31/2022-Customs (ADD) dated 20.12.2022	Imposes levy of Anti-Dumping Duty on imports of Stainless-Steel Seamless Tubes and Pipes originating in or exported from China PR for a period of 5 years.
17.	Notification No. 32/2022-Customs (ADD) dated 27.12.2022	Imposes levy of Anti-Dumping Duty on imports of Semi-Finished Ophthalmic Lenses, except as provided, originating in, or exported from China PR and imported into India shall be levied to anti-dumping duty.
18.	Notification No. 33/2022-Customs (ADD) dated 30.12.2022	Imposed levy of Anti-Dumping Duty on imports of on Jute products originating in or exported from Nepal and Bangladesh (SSR) subject to certain conditions for a period of 5 years.
19.	Notification No. 1/2023-Customs (ADD) dated 06.01.2023	Extended the levy of Anti-Dumping Duty on Fishing Net originating in or exported from China PR - 01/2023 till and inclusive of the July 09, 2023.
20.	Notification No. 2/2023-Customs (ADD) dated 25.01.2023	Amended Notification No. 43/2021-Customs (ADD) dated August 09, 2021, levying Anti-Dumping Duty on 'Phthalic Anhydride' originating in, or exported from China PR, Indonesia, Korea RP and Thailand to substitute the name of manufacturer "Aekyung Petrochemical Co., Ltd." to "Aekyung Chemical Co., Ltd."
Countervailing Duty		
21.	Notification No. 4/2022-Customs (CVD) dated 21.10.2022	Levies countervailing duty on imports of 'Saccharine in all its forms' originating in or exported from Thailand, to prevent the circumvention of countervailing duty levied on 'Saccharine in all its forms' originating in or exported from China PR.
22.	Notification No. 5/2022-Customs (CVD) dated 21.12.2022	Amends Notification Nos. 2/2022-Customs (CVD) dated April 28, 2022, to provide for change in name of the producer viz. "M/s Kobelco and Materials Copper Tubes (Thailand) Co Ltd." be amended to "KMCT (THAILAND) CO., LTD" levying countervailing duty.
Customs (Non Tariff)		
23.	Notification No. 98/2022-Customs (N.T.) dated 29.11.2022	Amends Notification No. 47/2022-Customs (N.T.) dated May 31, 2022, to extend the availability of exemption to all classes of persons and all categories of goods from the provisions of Section 51A which <i>inter-alia</i> provides for payments through electronic cash ledger to be effective till March 31, 2023.

ALLIED LAWS

<p>24.</p>	<p>Notification No. 99/2022-Customs (N.T.) dated 29.11.2022</p>	<p>Extends the effective date of Notification No. 19/2022-Customs (N.T.), dated March 30, 2022, to come into effect from April 01, 2023. The said notification provides exemption from provisions of payment through electronic cash ledger in respect of deposits relating to</p> <ul style="list-style-type: none"> ■ importation or exportation in customs stations where customs automated system is not in place, ■ accompanied baggage other than those used for making payment of any duty of customs, including cesses and surcharges levied as duties of customs or integrated tax or Goods and Service Tax Compensation Cess or any interest, penalty, fees or any other amount payable under the said Act, or the Customs Tariff Act, 1975 (51 of 1975), <p>from the provisions of Section 51A which provides for payments through electronic cash ledger.</p>
<p>25.</p>	<p>Notification No. 103/2022-Customs (N.T.) dated 09.12.2022</p>	<p>Effectuates Exports by Post (Amendment) Regulations, 2022 wherein the appended forms Postal Bill of Exports ("PBE") PBE-I and PBE-II were substituted with a new format. The Notification also expanded the scope of the Regulations to e-commerce conducted through various electronic means.</p>
<p>26.</p>	<p>Notification No. 104/2022-Customs (N.T.) dated 09.12.2022</p>	<p>Provides for the Postal Export (Electronic Declaration and Processing) Regulations, 2022 under which any person holding a valid Import-Export Code could export goods in furtherance of business through a foreign post office appointed by the Board under Section 7(1)(e) of the Customs Act, 1962. Further, the Regulations provide for filing of Forms PBE-III and PBE-IV for export of goods through e-commerce.</p>
<p>27.</p>	<p>Notification No. 105/2022-Customs (N.T.) dated 09.12.2022</p>	<p>Amends Notification No. 26/2022 dated March 31,2022, to assign functions to officers and to officers in rank above to them as proper officers as follows:</p> <ul style="list-style-type: none"> ■ In respect of Section 84 (Re-assessment of entries relating to postal goods) an officer of the rank (i) Deputy Commissioner of Customs or Assistant Commissioner of Customs or (ii) Deputy Commissioner of Customs (Preventive) or Assistant Commissioner of Customs (Preventive), in case of exercising jurisdiction relating to Customs Station. ■ In respect of Section 84 (assessment) or (clearance) an officer of the rank (i) Appraisers or (ii) Superintendent Customs (Preventive) or (iii) Superintendents of Central Excise Department who are for the time being posted to a customs port, Customs Airport, Land customs station, Coastal port, customs preventive post, customs intelligence post or a customs warehouse.

ALLIED LAWS

		In respect of Section 84 (examination) an officer of the rank (i) Examiners or (ii) Preventive Officers or (iii) Inspectors of Central Excise Department who are for the time being posted to a customs port, Customs Airport, Land customs station, Coastal port, customs preventive post, customs intelligence post or a customs warehouse.
28.	Notification No. 107/2022-Customs (N.T.) dated 13.12.2022	Amends Notification No. 63/1994-Customs (N.T.), dated November 21, 1994, to denotify Kakrawah as land customs station for the purpose of clearance of baggage, passenger vehicles and tourist vehicles.
29.	Notification No. 108/2022-Customs (N.T.) dated 15.12.2022	Amends Notification No. 36/2001-Customs (N.T.), dated March 03, 2001- to notify Tariff Value of Edible Oils, Brass Scrap, Areca Nut, Gold and Silver.
30.	Notification No. 109/2022-Customs (N.T.) dated 15.12.2022	Supersedes Notification No. 101/2022-Customs (N.T.), dated December 01, 2022 - 109/2022 - Customs - Non-Tariff to notify rate of exchange of one unit of foreign currency equivalent to Indian rupees w.e.f. January 06, 2023.
31.	Notification No. 111/2022-Customs (N.T.) dated 20.12.2022	Amends Notification No. 58/2021-Customs (N.T.), dated July 01, 2021, to notify Agreement or Arrangement on Cooperation and Mutual Administrative Assistance (CMAA) in Customs Matter between India and Japan through an insertion at Sr. No. 9A and between India and Philippines at Sr. No. 19A.
32.	Notification No. 112/2022-Customs (N.T.) dated 22.12.2022	Notified Customs Tariff (Determination of Origin of Goods under the India-Australia Economic Cooperation and Trade Agreement) Rules, 2022 which provides for rules on determination of origination of various types of goods, calculation of qualifying value content etc.
33.	Notification No. 01/2023-Customs (N.T.) dated 04.01.2023	Notifies the state of Tripura - Airport of Agartala as a Customs airport for unloading and loading baggage with effect from January 04, 2023.
34.	Notification No. 03/2023-Customs (N.T.) dated 11.01.2023	Notifies the Customs (Assistance in Value Declaration of Identified Imported Goods) Rules, 2023 for prescribing additional obligations on Importer where the Board has reason to believe that the value of such goods may not be declared truthfully or accurately, having regard to the trend of declared value of such goods or any other relevant criteria.
Circulars		
35.	Circular No. 25/2022-Customs dated 09.12.2022	Clarifies the procedure and implementation of Postal Bill of Exports (PBE) Automated System which contains provisions to facilitate the processing of commercial post exports by automating the entire procedure and seamlessly connecting the postal network to the notified foreign post offices. This enables Micro, Small and Medium Enterprises to export to global markets using e-commerce or other regular channels.

ALLIED LAWS

36.	Instruction No. 34/2022- Customs dated 30.12.2022	Provides for the strict import regulation of certain animal feed additives/ premix/supplements and antibiotics to be used in animal feed. The manufacturer is also required to label the final pack regarding its ingredients and the mandatory requirement of respective withdrawal period, if any, indicated against a particular item.
DGFT		
37.	Notification No. 52/2015- 2020 dated 28.12.2022	DGFT amends Import policy of Urad [Beans of the SPP Vigna Mungo (L.) Hepper] (ITC(HS) 0713 31 10) and Tur/Pigeon Peas (Cajanus Cajan) (ITC(HS) 0713 60 00) to extend free importation till March 31, 2024.
38.	Notification No. 51/2015- 2020 dated 28.12.2022	DGFT amends Import policy of Refined bleached deodorized palm oil (ITC(HS) 15119010 and 15119020) and Others (ITC(HS) 15119090) to extend free importation till further orders.
39.	Notification No. 50/2015- 2020 dated 27.12.2022	DGFT amends Export Policy of Red Sanders wood exclusively sourced from cultivation origin obtained from private land (including Pattaland) to permit export of seized/confiscated red sanders subject to fulfilment of conditions.
40.	Notification No. 48/2015- 2020 dated 8.12.2022	DGFT amends Import Policy Condition of Copra (ITC(HS) 12030000) to allow import through NAFED (instead of MMTC) subject to Para 2.20 of Foreign Trade Policy.
41.	Notification No. 40/2015- 2020 dated 28.11.2022	DGFT Restricts export of Sugar (Raw, Refined and White sugar) till October 31, 2023, or until further orders, whichever is earlier.





LEGAL CLASSICS

The following chapter has been authored by Jitendra Motwani (Partner), Rinkey Jassuja (Associate Partner) & Rizwan Khatri (Senior Associate) - ELP

DLF Commercial Project Corporations vs. Commr. of S. T., Gurugram [2019 (27) G.S.T.L. 712 (Tri. - Chan.)]

Introduction:

Acquisition of long-term leasehold rights over a land for a period of 99 years or even more from authorities of State Government for the purpose of setting up industrial units by the corporates has been a fairly common transaction. A one-time hefty premium is paid by the company to obtain the said lease subject to the conditions to fulfilled as mentioned in the agreement. For various reasons, the companies may not be able to sustain the entire period of lease and accordingly envisaging such situations under the agreement the companies are given an option to assign their rights in the leasehold land for the balance duration of the agreement to another entity by charging a one-time premium which can be retained by the company. Taxability of assignment of rights in long-term leasehold land including other rights associated with land as "service" has been an issue in dispute since long time.

One such issue came up before the Hon'ble CESTAT, Chandigarh in the case of **DLF Commercial Project Corporations vs. Commissioner of S. T., Gurugram [2019 (27) G.S.T.L. 712 (Tri. - Chan.)]**. The dispute in the aforesaid case was whether transfer of development rights in land by an entity to another will be considered as 'service' and consequently liable to service tax. The Hon'ble CESTAT held that such transfer would amount to transfer of 'benefits arising out of land' which is also an "immovable property" in terms of Section 3(26) of the General Clauses Act, 1897 and hence outside the purview of service tax under Section 65B(44) of the Finance Act, 1994.

While the aforesaid decision appears to have not been challenged further by the department, in context of various laws other than tax, the courts have analysed and held that granting of long-term leasehold rights over a land for a fairly long period can be equated to "sale of an immovable



property". Sale of land per se has been outside the purview of indirect tax. However, litigation on liability of tax on transfer of rights in land has continued even post the introduction of GST regime. The ratio of the aforesaid decision may be relevant to understand its taxability of the rights in land under the GST regime as well.

Decision in DLF Commercial Project Corporations:

The Appellant was engaged in the business of developing integrated townships and other services. On examination of various agreements, it was alleged that the appellant has transferred development rights, therefore, they are liable to pay service tax on the said activity. The demand was confirmed against the appellant and penalty was also imposed.

LEGAL CLASSICS

The Hon'ble CESTAT after examining the definition of 'immovable property' under the General Clauses Act, 1897 and following the decision laid down in the case of Chheda Housing Development Corpn. v. Bibijan Shaikh [2007 (2) Bom CR 587] by the Hon'ble Bombay High Court has held that transfer of development rights would be considered as transfer of 'benefits arising out of land' and the moment it is either land or "benefits arise out of land", it goes outside the purview of "Service" as defined in Section 65B(44) of Finance Act, 1994.

In view of the above, the entire demand for service tax on account of transfer of development rights was set aside by the Hon'ble Tribunal on the premise that in terms of the various judgments, transferrable development right is immovable property, therefore, the transfer of development rights in the case in hand is termed as immovable property in terms of Section 3(26) of General Clauses Act, 1897 and no service tax is payable as per the exclusion in terms of Section 65B(44) of the Finance Act, 1994.

Applicability under the GST Law:

The rule laid down by the Hon'ble Courts in the said proposition is that development rights are 'benefits arising out of land' and transfer of such rights may be considered as transfer of immovable property. Applying the aforesaid ratio, rights accruing in a leasehold land may also be considered as benefits arising out of land and hence a view may be taken that assignment of such rights may be considered as "sale of land" and accordingly outside the purview of GST under Entry 5 of Schedule III of the CGST Act.

In a recent judgment in the case of Builders Association of Navi Mumbai vs. Union of India [2018 (12) G.S.T.L. 232 (Bom.)], the Hon'ble Bombay High Court under a writ petition examined the question whether the allotment

of land on a long-term lease of 60 years would be treated as "supply of services" under GST. The Hon'ble Court after analysing the transaction in the context of the definition of "supply" under Section 7 of the Central Goods and Services Tax Act, 2017 held that the lease premium paid for long term lease of land for 60 years would get covered within the scope of "supply". On challenge to the said judgment before the Hon'ble Supreme Court [SLP (C) No. 23068/2018] the order of the Bombay High Court has been upheld however the court has left the question with respect to scope and ambit of the expression in Clause 2 (a) of Schedule-II "licence to occupy land is a supply of services" of the Central Goods and Services Act, 2017 open.

Thus, while a precedent is available in the service tax regime, in view of the aforesaid order, it appears that rights in land have been held liable to tax under the GST regime. Huge liability of GST arises on a company as the premium paid for the leasehold land is a considerable amount and eligibility of Input Tax Credit of the said tax is a parallel litigation which may arise in view of the restriction provided in Section 17(5)(d) of the Central Goods and Services Tax Act, 2017. Considering, the scope of interpretation of clause under GST has been kept open, it would be interesting to see how the courts interpret the said expression in future litigation arising on the said issue.



QUOTABLE QUOTES

Compiled by: **Virangana Wadhawan (Principal Associate) & Raghav Khandelwal (Associate) - ELP**



- **Vinnie Mehta, Director General of Automotive Component Manufacturers Association (ACMA)** said, "The uniform GST rate on the auto component industry, is 28 percent for 40 percent of the items, we want all our items to be taxed at 18 percent as we are an intermediary industry. In the first half, we grew 30 percent over what we were in the previous year. However strong headwinds continue in terms of supply chain and the semiconductor problem is not yet behind us."
- "Among others, we are also looking up to the government to take steps to decrease the input costs such as steel and cement, along with fuel costs. The GST on cement, one of the main consumables, at 28%, accounts for almost one-third of the total cement cost and, therefore, is an area of concern. As far as tax incentives are concerned, the sector is batting for sops to the home buyers, friendly provisions under capital gains tax and increasing tax concessions to home buyers, among others," says **Salil Kumar, Director – Marketing & Business Management, CRC Group.**
- **The Society of Manufacturers of Electric Vehicles (SMEV)** released a statement where it said, "While 5% GST is levied for the vehicle; for spare parts, there is no clarity and the industry end up paying 28% (except for batteries). The request, therefore, is for levying a uniform 5% GST for all EV spare parts,"
- "Until the time petroleum products are brought within GST net, suitable amendment in the excise laws be made to allow credit of GST paid on inputs/input services and capital goods against
- payment of excise duty to the manufacturers of petroleum products," **the Federation of Indian Chambers of Commerce & Industry (FICCI)** said in a pre-budget memorandum.
- **Krishnan Ramachandran, MD and CEO, Niva Bupa Health Insurance** said, "Rising medical inflation has resulted in many insurers increasing the premium on health insurance products this year. To reduce the premium cost and make health insurance purchase more affordable for policy buyers, insurers have been requesting the government to reduce the current 18% GST rate from health insurance products."



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About Taxsutra

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

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

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

Taxsutra has also championed various niche events and workshops.

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

About ELP

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

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

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

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