ECONOMIC
LAWS
PRACTICE
ADVOCATES & SOLICITORS

INDIRECT TAX NEWSLETTER

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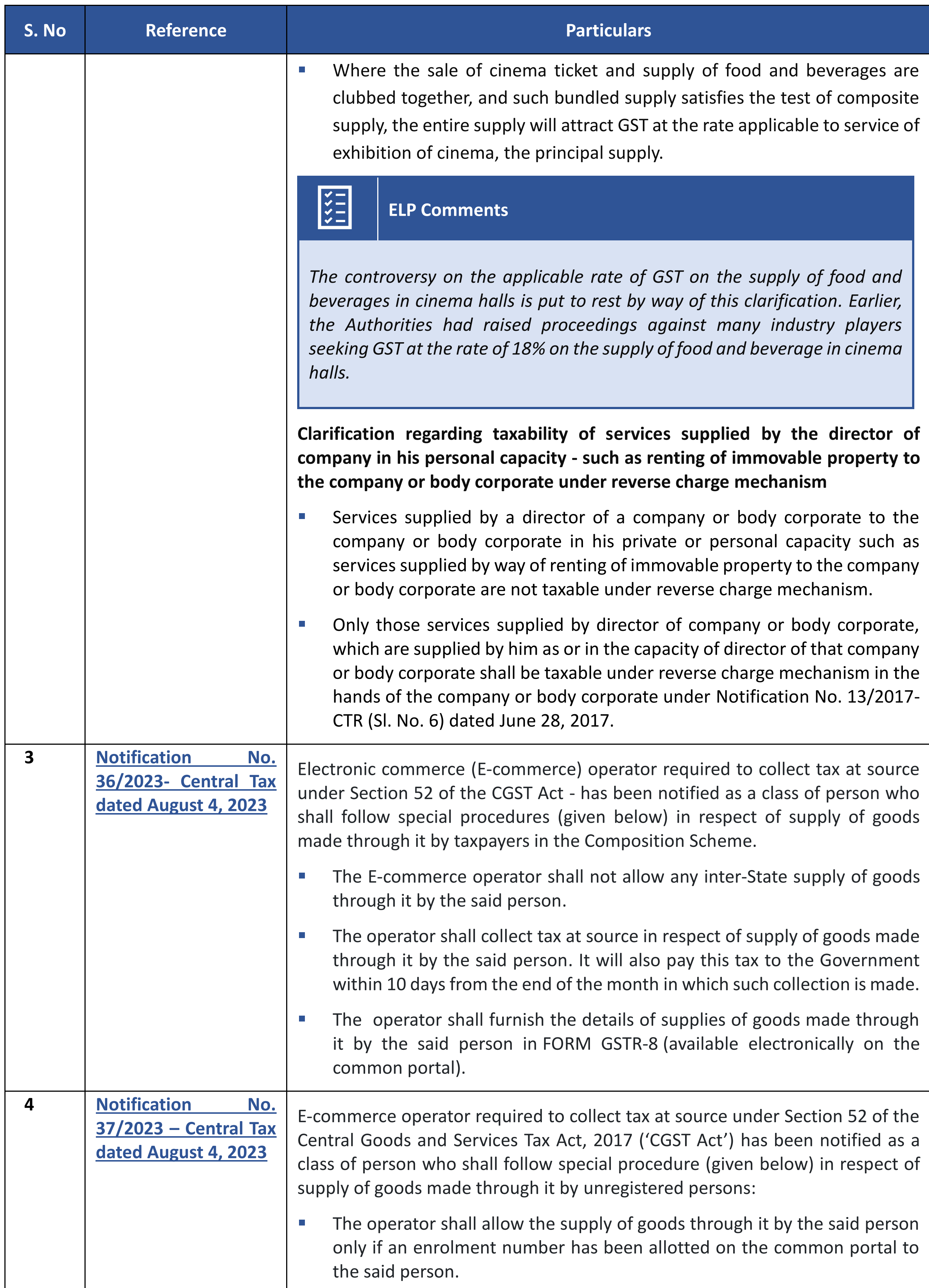
CIRCULARS & NOTIFICATIONS

S. No	Reference	Particulars
		Goods and Services Tax (GST)
1	Circular No. 200/12/2023-GST dated August 1, 2023	**Clarification on classification of specified goods and applicable GST rate based on the recommendations of the GST Council in 50th meeting held on July 11, 2023** ▪ Supply of uncooked/un-fried extruded snack pellets, by whatever name called, falling under CTH 1905, will attract GST rate of 5% with effect from July 27, 2023. ▪ GST on fish soluble paste, falling under CTH 2309, has been reduced to 5%. ▪ Supply of raw cotton, including kala cotton, from agriculturists to cooperatives is a taxable supply and such supply of raw cotton by agriculturist to the cooperatives (being a registered person) would attract 5% GST on reverse charge basis. ▪ GST on imitation zari thread or yarn, known by any name, in trade parlance has been reduced from 12% to 5%. ▪ GST rate on trauma, spine and arthroplasty implants falling under HSN heading 9021 would attract GST rate of 5%. ▪ No refunds will be granted where GST has already been paid in any of the above cases.
2	Circular No. 201/13/2023-GST dated August 1, 2023	**Clarification on taxability of supply of food or beverages in cinema halls. The detailed thinking of authorities provided below:** ▪ As per Explanation (at Para 4 (xxxii) to Notification No. 11/2017-CTR dated June 28, 2017),'Restaurant Service' means supply, by way of or as part of any service, of goods, being food or any other article for human consumption or any drink, provided by a restaurant, eating joint including mess, canteen, whether for consumption - on or away from the premises – where such food or any other article for human consumption or drink is supplied. ▪ Eating joint is a wide term which includes refreshment or eating stalls/kiosks/counters or a restaurant at a cinema also. ▪ The cinema operator may run these refreshment or eating stalls/kiosks/ counters or restaurant themselves or they may give it on contract to a third party. The customer may like to avail the services supplied by these refreshment/snack counters or choose not to avail these services. Further, the cinema operator can also install vending machines, or supply any other recreational service such as through coin-operated machines etc. which a customer may or may not avail. ▪ Supply of food or beverages in a cinema hall is taxable as a 'restaurant service' at the rate of 5% as long as the food or beverages are supplied by way of or as part of a service and supplied independent of the cinema exhibition service.



S. No	Reference	Particulars
		▪ Where the sale of cinema ticket and supply of food and beverages are clubbed together, and such bundled supply satisfies the test of composite supply, the entire supply will attract GST at the rate applicable to service of exhibition of cinema, the principal supply. **ELP Comments** *The controversy on the applicable rate of GST on the supply of food and beverages in cinema halls is put to rest by way of this clarification. Earlier, the Authorities had raised proceedings against many industry players seeking GST at the rate of 18% on the supply of food and beverage in cinema halls.* **Clarification regarding taxability of services supplied by the director of company in his personal capacity - such as renting of immovable property to the company or body corporate under reverse charge mechanism** ▪ Services supplied by a director of a company or body corporate to the company or body corporate in his private or personal capacity such as services supplied by way of renting of immovable property to the company or body corporate are not taxable under reverse charge mechanism. ▪ Only those services supplied by director of company or body corporate, which are supplied by him as or in the capacity of director of that company or body corporate shall be taxable under reverse charge mechanism in the hands of the company or body corporate under Notification No. 13/2017-CTR (Sl. No. 6) dated June 28, 2017.
3	Notification No. 36/2023- Central Tax dated August 4, 2023	Electronic commerce (E-commerce) operator required to collect tax at source under Section 52 of the CGST Act - has been notified as a class of person who shall follow special procedures (given below) in respect of supply of goods made through it by taxpayers in the Composition Scheme. ▪ The E-commerce operator shall not allow any inter-State supply of goods through it by the said person. ▪ The operator shall collect tax at source in respect of supply of goods made through it by the said person. It will also pay this tax to the Government within 10 days from the end of the month in which such collection is made. ▪ The operator shall furnish the details of supplies of goods made through it by the said person in FORM GSTR-8 (available electronically on the common portal).
4	Notification No. 37/2023 – Central Tax dated August 4, 2023	E-commerce operator required to collect tax at source under Section 52 of the Central Goods and Services Tax Act, 2017 ('CGST Act') has been notified as a class of person who shall follow special procedure (given below) in respect of supply of goods made through it by unregistered persons: ▪ The operator shall allow the supply of goods through it by the said person only if an enrolment number has been allotted on the common portal to the said person.

S. No	Reference	Particulars
		▪ The operator shall not allow any inter-State supply of goods through it by the said person. ▪ The operator shall not collect tax at source in respect of supply of goods made through it by the said person. ▪ The operator shall furnish the details of supplies of goods made through it by the said person in the statement in FORM GSTR-8 on the common portal. ▪ Where multiple commerce- commerce- operators are involved in a single supply of goods through the E-commerce platform, "the electronic commerce operator" shall mean the electronic commerce operator who finally releases the payment to the said person for the supply.
5	DGFT Notification No. 23/2023 dated August 3, 2023 and Notification No. 26/2023 dated August 4, 2023	The import policy for Laptops, Tablets, All-in-one Personal Computers, and Ultra small form factor Computers and Servers falling under ITC (HS) Code 8471 has been revised from 'free' to 'restricted'. This implies that import of these products would be allowed basis a valid import license. Import licensing has been exempted in following cases: ▪ Import under Baggage Rules ▪ Import of one Laptop, Tablet, All-in-one Personal Computer, or Ultra Small Form Factor Computer, including those purchased through an E-commerce portal, through post or courier ▪ Import of up to 20 such items per consignment for the purpose of R&D, testing, benchmarking and evaluation, repair and re-export, product development purposes. Certain imports shall be allowed subject to condition that the imported goods shall be used for certain stated purposes only and will not be sold. Further, after the intended purpose, the products would either be destroyed beyond use or re-exported. ▪ Re-import after repair. ▪ Laptops, tablets, all-in-one personal computers, and ultra small form factor computers and servers which are an essential part of a Capital Good. The import consignments can be cleared till October 31, 2023.For clearance of import consignments with effect from November 1, 2023 a valid license for restricted imports will be required. **ELP Comments** *There is an ambiguity on whether all servers or only ultra small form servers would be covered under the scope of restriction. While the plain reading of the notification indicates that only ultra small form factor servers shall be restricted, an express clarification is awaited by the industry. There is an existing facility on DGFT portal to obtain authorization of restricted items. It needs to be seen whether any separate procedure will be prescribed for obtaining the license.*

THE CENTRAL GOODS AND SERVICES TAX (AMENDMENT) ACT, 2023

- The following definitions have been inserted in Section 2 of the CGST Act:
  - **Online gaming:** Offering of a game on the internet or an electronic network and includes online money gaming – [Section 2(80A)]
  - **Online money gaming:** Online gaming in which players pay or deposit money or money's worth, including virtual digital assets, in the expectation of winning money or money's worth, including virtual digital assets, in any event including game, scheme, competition or any other activity or process. This is irrespective of whether or not the outcome or performance is based on skill, chance or both and if the same is permissible or otherwise under any other law for the time being in force – [Section 2(80B)]
  - **Specified actionable claim:** Actionable claim involved in or by way of betting, casinos, gambling, horse racing, lottery or online money gaming – [Section 2(102A)]
  - **Virtual digital asset**: Meaning as assigned to in Section 2(47A) of the Income Tax Act, 1961 [Section 2(117A)]
- A proviso has been inserted in the definition of supplier to provide that - a person who organises or arranges, directly or indirectly, supply of 'specified actionable claims' shall be deemed to be the supplier of such actionable claims. This supplier is liable to pay GST [Proviso to Section 2 (105)].
- Schedule III lists the activities or transactions which shall neither be treated as supply of goods nor supply of services. Para 6 of Schedule III provides for 'Actionable claims, other than lottery, betting and gambling'. The words 'lottery, betting and gambling' in Para 6 of Schedule III of the CGST Act have been substituted with words 'specified actionable claim'.
- A new clause is inserted in Section 24 of the CGST Act to provide for mandatory registration of the person supplying online money gaming, from a place outside India to a person in India.
- The above amendments will come into effect as and when it is notified by the Central Government in the official gazette.

ELP Comments

*The amendments in the CGST Act appear to counter the Karnataka High Court decision in **Gameskraft Technologies Private Limited vs. DGGSTI** wherein it was held that entry which takes actionable claims out of the purview of supply of goods or services (Entry 6 to Schedule III to the CGST Act) would apply to games of skill. However, games of chance such as lottery, betting and gambling would be taxable. These amendments are likely to be challenged in writ courts.*

THE INTEGRATED GOODS AND SERVICES TAX (AMENDMENT) ACT, 2023

- The definition of Online Information Database Access Retrieval ('OIDAR') services under Section 2(17) of the Integrated Goods and Services Tax Act, 2017 ('IGST Act') has been amended to exclude online money gaming as defined under Section 2(80B) of CGST Act.
- The proviso to Section 5, dealing with levy of IGST on import of goods has been amended to exclude certain specified goods on which IGST would not be levied as per the Customs Tariff Act, 1975 ('Customs Tariff Act'). Instead, IGST on such imported goods would be levied and collected as per provisions under IGST Act.
- Sub-clause (ca) is inserted in Section 10 of the IGST Act to provide for place of supply of goods in the case of supplies to registered persons. The place of supply in such cases shall be the location as per the address of the person recorded in the invoice or location of the supplier where the address of unregistered person is not recorded in the invoice. The Explanation to sub-clause (ca) further provides that recording of the name of the State of such person shall be deemed to be the recording of the address of the said person.

- Section 14A has been inserted to provide that a supplier of online money gaming services not located in the taxable territory shall be liable to pay IGST in respect of such services. Such supplier is required to obtain GST registration in accordance with the Simplified Registration Scheme provided in Section 14(2) of the IGST Act.
  - If such supplier does not have a physical presence or does not have a representative for any purpose in the taxable territory, he shall appoint a person in the taxable territory for the purpose of paying integrated tax and such person shall be liable for payment of such tax.
  - In case of failure to comply with the above provisions, any information generated, transmitted, received or hosted in any computer resource used for supply of online money gaming by such supplier shall be liable to be blocked for access by the public.
- The above amendments will come into effect as and when it is notified by the Central Government in the official gazette.

THE CENTRAL GOODS AND SERVICES RULES (SECOND AMENDMENT) RULES, 2023

The key amendments in the CGST Rules notified vide Notification No. 38/2023-Central Tax dated 04.08.2023 have been summarised below:

- Sub-rule (2A) of Rule 21A, which deals with suspension of registration, has been substituted to provide that failure to provide bank account details on the common portal under Rule 10A will also result in suspension of registration.
- Second proviso has been inserted to sub-rule (4) of Rule 21A to revoke suspension of registration under Sub-rule (2A) if the registered person complies with the provision of Rule 10A (furnishes bank account details) and the registration has not already been cancelled.
- Rule 25 has been substituted to allow the proper officer to conduct verification of the premises of a person before grant of registration in the circumstances specified in the proviso to Rule 9(1). This includes the case where proper officer, with prior approval of Commissioner, deems fit to carry out physical verification. Before change in the rule, the proper officer was allowed to conduct verification of the premises before grant of registration only on failure of a person to authenticate Aadhaar or for not opting for Aadhaar authentication.
- Clause (c) in Explanation 1 to Rule 43 has been omitted. As per the said clause, the value of supply of services by way of transportation of goods by a vessel from the customs station of clearance in India to a place outside India was excluded from the aggregate value of exempt supplies for the purpose of reversal of Input tax credit under Rule 42 and 43. Consequently, value of such services would now be included in the aggregate value of exempt supplies for the purpose of reversal of Input tax credit.
- Explanation 3 has been inserted to Rule 43 to provide that the value of supply of goods from Duty Free Shops at arrival terminal in international airports to the incoming passengers shall be included in the value of exempt supplies for the purpose of Rule 42 and 43. *[Effective from October 1, 2023]*
- Rule 59(6) has been amended to prohibit furnishing the details of outward supplies in FORM GSTR-1 or use of the invoice furnishing facility by the following registered persons:
  - who has received an intimation under Rule 88D(1) for availment of excess Input tax credit than what is available in Form GSTR-2B if he has not paid excess credit . It also applies to a person who has not furnished a reply to notice issued under Rule 88D within the prescribed time
  - who has not furnished the details of the bank account as per the provisions of Rule 10A.
- Rule 88D has been inserted to provide a mechanism for system-based intimation in Part A of Form DRC-01C to the taxpayers with respect to the excess availment of Input tax credit in FORM GSTR-3B vis-à-vis FORM GSTR-2B by such amount and percentage as may be recommended by GST Council.
  - The taxpayers need to either reverse the excess Input tax credit availed in Form GSTR-3B along with the interest, through Form DRC-03 or explain the reasons for such differences in Part B of Form DRC-01C, within 7 days.

- In case the taxpayers do not respond or the reasons for difference explained by the taxpayer are not found to be acceptable by the proper officer, recovery proceedings under Section 73 or 74 of the CGST Act shall be initiated.

- Rule 108(1) and 109 have been amended to provide for manual filing of appeals to the Appellate Authority in such situations as may be notified by the Commissioner or where the appeal cannot be filed electronically due to non-availability of the decision or order to be appealed against on the common portal.
- Rule 138F has been inserted to provide for generation of mandatory e-way bill for intra-state movement of gold, precious stones, etc., where the consignment value is two lakhs or more, if the State/ Union Territory GST laws so notifies.
- Sub-rule (3A) has been inserted in Rule 162 to prescribe the below mentioned amounts for compounding of various offences specified under Section 132 of the CGST Act. *[Effective from October 1, 2023]*

S. No.	Offence	Compounding amount where tax evasion exceeds INR 5 crores	Compounding amount where tax evasion exceeds INR 2 crores but does not exceed INR 5 crores
1.	Supplies any goods or services or both without issue of any invoice, in violation of the provisions of CGST Act or the rules made thereunder, with the intention of evading tax	Up to 75% of the amount of tax evaded or the amount of input tax credit wrongly availed or utilized or the amount of refund wrongly taken, subject to minimum of 50% of such amount.	Up to 60% of the amount of tax evaded or the amount of input tax credit wrongly availed or utilized or the amount of refund wrongly taken, subject to minimum of 40% of such amount.
2.	Avails input tax credit using the invoice or bill issued without underlying supply or fraudulently avails input tax credit without any invoice or bill		
3.	Collects any amount as tax but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due		
4.	Evades tax or fraudulently obtains refund and where such offence is not covered under clauses (a) to (d) of Section 132		
5.	Falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information with an intention to evade payment of tax due under this CGST Act	Amount equivalent to 25% of tax evaded.	Amount equivalent to 25% of tax evaded.
6.	Acquires possession of, or in any way concerns himself in		

	transporting, removing, depositing, keeping, concealing, supplying, or purchasing or in any other manner deals with, any goods which he knows or has reasons to believe are liable to confiscation under CGST Act or the rules made thereunder		
7.	Receives or is in any way concerned with the supply of, or in any other manner deals with any supply of services which he knows or has reasons to believe are in contravention of any provisions of CGST Act or the rules made thereunder		
8.	Attempt to commit the offences or abets the commission of offences mentioned in this table above	Amount equivalent to 25% of such amount of tax evaded or the amount of input tax credit wrongly availed or utilized or the amount of refund wrongly taken.	Amount equivalent to 25% of such amount of tax evaded or the amount of input tax credit wrongly availed or utilized or the amount of refund wrongly taken.

- Rule 163 inserted in CGST Rules to provide for manner and conditions of consent-based sharing of information of registered persons available on the common portal with other systems as may be notified by the Government.

RECENT CASE LAWS

Pre-deposit for pursuing an appeal is not a duty or tax and becomes refundable alongwith interest from the date on which the appellate authority allows the appeal

Otis Elevator Company (India) Limited. V. Commissioner Of Value Added Tax, & Ors. W.P.(C) 2859/2022

FACTS OF THE CASE

The petitioner filed an appeal against the Assessment Order issued under the Delhi Sales Tax Act, 1975 ('Delhi Sales Tax Act') before the Appellate Authority on payment of mandatory pre-deposit. The appeal was favourably decided by the Appellate Authority. As a consequence, a request for refund of pre-deposit was made before the Authorities. Aggrieved by the inaction of the Authorities in processing the refund, the assessee filed a writ petition before the Delhi High Court.

While the writ petition was pending, the Authorities passed an order whereby the entire refundable amount was appropriated against the demands raised in other matters which were pending before Appellate Authority, by applying the rigors of refund provisions under the Delhi Sales Tax Act. Further, the request for refund of interest from the date of favourable appellate order was also denied.

JUDGMENT

The Delhi High Court relying on the judgment of MRF Limited[1] held that a pre-deposit cannot partake the character of a tax or duty since, it is only connected with the right of the assessee to pursue an appeal. Referring to Section 30 of the Delhi Sales Tax Act pertaining to refund provisions, the Court explained that the express language as employed in the section itself takes the case of refund of pre-deposit out from the rigors of the procedural formalities which are contemplated therein. It was observed that a pre-deposit would become refundable the moment an Appellate Authority comes to hold in favour of the assessee and demands come to be annulled.

The Court, accordingly, directed refund of the pre-deposit along with interest with effect from the date of order allowing the appeal of the assessee till the date of actual payment.

Reversal of input tax credit on account of mismatch in GSTR-2A and GSTR-3B cannot be sustained in the absence of exceptional circumstances

Suncraft Energy Pvt. Ltd. Vs. The Assistant Commissioner, State Tax [TS-367-HC(CAL)-2023-GST]

FACTS OF THE CASE

The petitioner had availed Input tax credit on the basis of invoices raised by its supplier. However, certain invoices of the supplier were not reflected in the GSTR-2A of the petitioner for FY 2017-18 and consequently, the Input tax credit was denied by the Authorities.

The petitioner filed a writ petition before the Calcutta High Court against the order passed by the Department. The Single Judge Bench dismissed the petition on the ground of availability of alternate remedy of appeal prescribed under the CGST Act. The Petitioner filed an intra-court appeal before the Division Bench of Calcutta High Court against the dismissal order passed by the Single Judge Bench.

JUDGMENT

The Division Bench of the Calcutta High Court observed that recovery of Input tax credit from the recipient cannot be sustained solely on discrepancies in Form GSTR-1 without investigating the supplier first or verifying the evidence provided by the assessee. The Court referred to the Press Release dated 18.10.2018 and the judgments of the Hon'ble Supreme Court in the case of Bharti Airtel[2] and Arise India Ltd.[3], emphasizing that Form GSTR-2A should only serve as a facilitator for self-assessment and not as a conclusive basis for denial of Input tax credit.

The Court further held that before directing the petitioner to reverse the credit, the Authorities ought to have taken action against the supplier. Only in exceptional circumstances, such as collusion between the petitioner and the supplier or the supplier's absence or closure of business, can proceedings be initiated against the recipient.

Intelligence-based enforcement action by DGGI cannot be interdicted on account of an investigation by another authority

Hanuman Enterprises (OPC) Pvt Ltd vs. The Additional Director General DGGI [TS-403-HC(DEL)-2023-GST]

FACTS OF THE CASE

The petitioner, in this case, preferred a writ petition before the Delhi High Court against the investigation initiated by the Directorate General of GST Intelligence ('DGGI'), Jaipur when already an investigation for the same period was initiated by another authority i.e., Delhi State GST Authority.

The petitioner contended that the action of the DGGI was in violation of Section 6(2)(b) of the CGST Act and reliance was placed on CBIC Circular dated 05.10.2018. In this circular it was clarified that the authority, whether central or

[1] MRF Limited vs. The Commissioner of Trade and Taxes & Anr. [2018 SCC OnLine Del 10624].
[2] Union of India vs. Bharti Airtel Ltd. and Ors. (2022) 4 SCC 328
[3] Arise India Limited and Ors. vs. Commissioner of Trade and Taxes, Delhi and Ors. MANU/DE/3361/2017

state, initiating intelligence-based enforcement action, is empowered to carry the same to its logical conclusion. As per Section 6(2)(b) of the CGST Act, where a proper officer under State or Union Territory GST Act has initiated any proceedings on a subject matter, no proceedings shall be initiated by the proper officer under the CGST Act on the same subject matter.

JUDGMENT

The Court held that mere blocking of Input tax credit and provisional attachment of bank account does not necessarily lead to an 'investigation' being conducted by the authority regarding the affairs of the company and therefore, the provisions of Section 6(2)(b) of CGST Act were not attracted. While interpreting Circular dated 05.10.2018, the Court held that the circular merely clarifies that it is not necessary for an agency that has jurisdiction to conduct the investigation, to transfer the same to the authority to whom the taxpayer has been administratively assigned.

It was further held that if any of the authorities finds it necessary to investigate the petitioner based on certain information, the said investigation cannot be stopped on account of investigation being conducted by another authority.

Amendment prescribing a substantive change in provisions must be made applicable prospectively and via an amendment in the parent act and not a circular.

Tata Steel Ltd. Vs. UOI [TS-422-HC(JHAR)-2023-GST]

FACTS OF THE CASE

The petitioner, engaged in the business of manufacturing steel, purchased coal on payment of applicable GST and Compensation Cess. The petitioner availed Input tax credit and undertook export under Bond / Letter of Undertaking without payment of tax, thereby resulting in the accumulation of Input tax credit.

Since the price could not be determined with certainty at the time of clearance from the factory, the petitioner, as was common practice, reflected the 'cost price' of the goods as 'taxable value' as well as the 'invoice value'. During the course of export, the Petitioner raised a commercial invoice at port on the basis of revised upgraded value and then these enhanced values were declared in GSTR-1. The petitioner filed an application for refund of unutilized Input tax credit of Compensation Cess. Refund was claimed as per the formula prescribed in Rule 89(4) of CGST Rules reflecting the actual value of exports. The Department denied the refund relying on para 47 of the Circular No. 125/44/2019-GST dated 18th November, 2019 wherein it was stated that refund is to be processed on lower value of two, tax invoice or the corresponding shipping bill.

Subsequently, Explanation to Rule 89(4) was inserted vide the CGST (Amendment) Rules, 2022 to provide that the value of goods exported out of India shall be taken as lower value of two, tax invoice or FOB value in shipping bill.

JUDGMENT

The Court observed that Explanation inserted by way of amendment in Rule 89(4) of the CGST Rules was not in existence during the period in dispute. It was also observed that Rule 1(2) of CGST (Amendment) Rules, specifically provides that the rules shall come into force on the date of their publication in the Official Gazette, unless otherwise provided.

It was held that the CGST (Amendment) Rules inserted a new stipulation for comparison between two values. Such an exercise was not contemplated prior to the amendment as what was taken into account was the actual transaction value. Therefore, by way of the amendment, a substantive change has been brought about in the law and therefore the amendment ought to operate prospectively.

Further, it was held that mere use of the term 'Explanation' will not be indicative of the fact that the amendment is clarificatory / declaratory.[4] It was held that the Explanation to Rule 89(4) of the CGST Rules was not in similar lines as

[4] Union of India v. Martin Lottery Agencies Ltd. [(2009) 12 SCC 209]

contemplated in the para 47 of Circular . This was due to the fact that the former compares the tax invoice value with the FOB value and the latter compares the tax invoice value with the value in shipping bill (which can be either FOB or CIF).

The Court held that the amendment in Rule 89(4) of CGST Rules is not clarificatory in nature and will operate prospectively and since the period involved is prior to the amendment, rejection of refund claim was set aside.

Revenue sharing agreement not liable to Service tax

M/s. Shree Shubham Logistics Ltd. V. Commissioner of Central Excise, Jodhpur [Service Tax Appeal No. 51136 of 2017]

FACTS OF THE CASE

The appellant entered into a Memorandum of Understanding ('MoU') with Rajasthan State Warehousing Corporation ('RSWC') to jointly develop a warehousing system. The Authorities were of the view that the appellant was providing operational and administrative assistance to RSWC and the consideration so received would be taxable under the category of 'Business Support Service' placing reliance upon Explanation 3 to Section 65B(44) of the Finance Act, 1994 ('Finance Act'). Further, the Authorities believed that the MoU resulted in formation of an unincorporated joint venture placing reliance on the clarification given by the CBIC vide Circulars dated 13.12.2011 and 24.09.2014.

The appellant filed an appeal relating to the demand of Service tax on 'Support services of business or commerce' defined under Section 65(104c) of the Finance Act. Simultaneously, RSWC also preferred an appeal relating to the demand of Service tax on 'Intellectual property services' (for using the logo of RSWC on warehouse receipts owned by the appellant).

JUDGEMENT

The Tribunal analysing the agreement entered into between the appellant and RSWC held that it was a revenue sharing arrangement and such agreement in itself does not necessarily imply the provision of services unless a service provider – service recipient relation is established. It was further held that the issue has already been decided by the Appellate Authority in favour of the assessee and it has attained finality as no appeal was filed by the Authorities. Therefore, once it has been concluded that the arrangement amounts to joint provision of service by the appellant and RSWC to the end customers, it would not be open to the Department to urge that revenue sharing agreement had not been arrived at in terms of MoU.

Refund of VAT cannot be withheld merely on the ground that appeal is pending before Appellate Authority

Flipkart India Private Limited V. Value Added Tax Officer, Ward 300 & Ors. [W.P.(C) 6430/2022]

FACTS OF THE CASE

The petitioner claimed refund on account of excess Input tax credit in its self-assessed return. The Authorities issued notices for default assessment of tax in terms of Section 32 of the Delhi Value Added Tax Act, 2004 ('DVAT Act'). The petitioner filed objections in respect of the aforesaid notices before the Objection Hearing Authority ('Appellate Authority') in terms of Section 74 of the DVAT Act. The Authorities adjusted the refundable amount against the tax demands contested before the Appellate Authority, considering them as due and payable under Section 38(2) of DVAT Act. The petitioner filed writ petition before the Delhi High Court challenging the validity of such order passed by Authorities.

JUDGEMENT

The Delhi High Court held that once a claim for refund stands embodied in the return itself, there is no additional obligation placed upon the assessee to file the refund application. The Court further held that Section 38(2) of the DVAT Act provides for application of refundable tax amount towards 'recovery of any other amount due under this Act'. The Commissioner is entitled to adjust any refundable tax amount only if there exists an enforceable demand against the assessee. On a conjoint reading of Section 35(2) and 38(2) of the DVAT Act, it is evident that, as long as the

objections remain pending with the Appellate Authority, any amount claimed by the Authorities would not answer the description of an amount due or payable as contemplated under Section 38(2) of DVAT Act. The Authorities were consequently directed to refund the amount along with interest from the date it fell due.

Interest cannot be levied upon CVD, SAD, surcharge in the absence of specific provision; Interest cannot be recovered under the garb of recovery of duty

Union of India & Ors. V. Mahindra And Mahindra Ltd. [SPECIAL LEAVE PETITION (CIVIL) Diary No(s). 18824/2023]

FACTS OF THE CASE

The assessee was served with show cause notices on the allegation that the Company did not declare the entire amount payable in connection with the imported goods which amounts to mis-declaration with an intent to evade payment of customs duty. The assessee approached the Settlement Commission for settlement of the show cause notices. The Settlement Commission passed orders confirming the differential Customs duty along with interest and penalty. The Company filed writ petition before the Bombay High Court challenging the said orders insofar as it imposed interest and penalty with respect to duties other than Basic Customs Duty. The Hon'ble Court disposed of the writ petitions and remanded the matters to Settlement Commission for fresh orders after considering the submissions of the assessee. The Settlement Commission confirmed its earlier orders, against which the Company again preferred a Writ Petition before the Bombay High Court.

The Petitioner contended that Section 90 of the Finance Act, 2000 relating to surcharge, Section 3 of the Customs Tariff Act, 1975 relating to additional duty of customs (CVD) and Section 3A of the Customs Tariff Act, 1975 relating to Special Additional Duty of customs (SAD) do not provide for imposition of penalties and interest on the duty chargeable thereunder. Therefore, there was no power under law to impose penalties and interest.

JUDGEMENT

The Bombay High Court relying upon the judgement of the Hon'ble Supreme Court in Hyderabad Industries Ltd. vs. Union of India[5] and various other decisions[6], held that where there is no substantive provision requiring the payment of interest, the Authorities cannot for the purpose of collecting and enforcing payment of tax, charge interest thereon.

It was further observed that mere fact that there is machinery for assessment, collection and enforcement of tax and penalty under the Customs Act, 1962 ('Customs Act') does not mean that the provision for penalty and interest in the Customs Act is treated as applicable for penalty and interest under the Customs Tariff Act. The meaning of penalty or interest under the Customs Tariff Act cannot be enlarged by the provisions of machinery of the Customs Act incorporated for working out the Customs Tariff Act. Accordingly, it was held that interest and penalty are substantive levy and cannot be levied by implication.

The Supreme Court dismissed the SLP filed by the Department before the Supreme Court against the decision of Bombay High Court.

An agreement for transfer of right to use must be looked at in totality to determine effective control and possession

Aurobindo Highway Services V. The State of Maharashtra [MAHARASHTRA VALUE ADDED TAX APPEAL NO.8 OF 2015]

FACTS OF THE CASE

Aurobindo Highway Services ('AHS') runs a petrol pump and also owns tank trucks ('tankers'). AHS renders services to oil companies like Hindustan Petroleum Corporation Limited ('HPCL') by giving on hire these tankers for transportation of bulk petroleum products.

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[5] 1999 (108) ELT 321 (SC)

[6] Jain Brothers V/s. Union of India AIR 1970 SC (778), Collector of Central Excise, Ahmedabad V/s. Orient Fabrics Pvt. Ltd. 2003 (158) E.L.T. 545 (SC), Khemka and Co. (Agencies) Pvt. Ltd. V/s. State of Maharashtra (1975) 2 SCC 22, India Carbon Ltd. & Ors. V/s. State of Assam 1997 (6) SCC 479, .K. Synthetics Ltd. V/s. Commercial Taxes Officer 1994 SCC (4) 276

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AHS was assessed under the Maharashtra Value Added Tax Act, 2002 ('MVAT Act') by the Sales Tax Officer (STO) wherein it was alleged that the receipts (revenue earned) towards oil transportation by use of tankers owned by AHS are towards 'Transfer of Right to use goods' and hence, sale under the MVAT Act.

AHS contended *inter alia* that there was no delivery or transfer of possession of tankers as the effective control was still with AHS, receipts were towards transport services and AHS was not a 'dealer' in view of Exception III in the definition of dealer in Section 2(8) of the MVAT Act. This is because Exception III provides that a transporter holding permit for transport vehicles (including cranes) granted under the Motor Vehicles Act, 1988 which are used or adopted to be used for hire or reward shall not be deemed to be a dealer in respect of sale or purchase of such transport vehicles or parts, components or accessories thereof.

AHS's submissions were rejected and STO levied tax on the receipts. Being aggrieved, the AHS preferred an appeal, which was dismissed and subsequently appeal was filed before Maharashtra Sales Tax Tribunal ('the Tribunal'). The Tribunal confirmed the action of STO and the First Appellate Authority. Hence, the present appeal.

JUDGEMENT

The Bombay High Court extensively analysed the clauses of agreement entered into between AHS and HPCL for transportation of petroleum products using tankers. It was held that the Tribunal failed to appreciate that the possession and effective control was always with the AHS and HPCL had no right to direct AHS for any other work or any other area than agreed.

The agreement demonstrated that the intention of the parties was that AHS would carry the petroleum and petroleum products from one place to another and such carriage would ordinarily be in those vehicles, which had been accepted by HPCL, but, in unavoidable circumstances, AHS may provide for alternative tankers.

Further AHS has to bear the entire operational cost of the vehicle which included salary and other emoluments of the driver and cleaner, cost of fuel and lubricating oil, maintenance of vehicles, payment of road tax, insurance etc. It was also the responsibility of AHS to pay such fines as might be imposed for non-compliance of any of the rules, which might be applicable to the carriage of petroleum and petroleum products by the tankers.

Merely because of the fact that certain clauses were provided in the agreement in view of the nature of the cargo to be carried and to ensure that the transportation of their products do not get disrupted, it did not necessarily mean that the right to use the tankers stood transferred in favour of HPCL by AHS, more so, when the agreement provided for substitution of the vehicles.

The Bombay High Court held that the agreement cannot be read in bits and pieces by referring only select clauses, the agreement should be looked into its entirety to derive the intention of the parties. Thus, it was held that the Tribunal was not justified in holding that the transportation job with the use of tankers as per the agreement with HPCL amounted to transfer of right to use goods and hence, covered by definition of sale under the MVAT Act.

We hope you have enjoyed reading this update. For further information please write to us at insights@elp-in.com or connect with our authors:

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