



ECONOMIC
LAWS
PRACTICE
ADVOCATES & SOLICITORS



INDIRECT TAX NEWSLETTER

September 2023

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CIRCULARS & NOTIFICATIONS

| S. No | Reference | Particulars |
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| Goods and Services Tax (GST) | | |
| 1 | Various notifications related to supply of online gaming and supply of actionable claims in casinos | <p>The GST council, in its 50th meeting held on July 11, 2023, <i>inter alia</i> recommended that the actionable claims supplied in casinos, horse racing and online gaming may be taxed at the rate of 28% on full face value. Pursuant to this, various amendments were made in the Central Goods and Services Tax Act, 2017 (CGST Act) and the Integrated Goods and Services Tax Act, 2017 (IGST Act).</p> <ul style="list-style-type: none"> ▪ The aforesaid amendments have been made effective from October 1, 2023 vide Notification No. 48/2023-Central Tax dated September 29, 2023 and Notification No. 02/2023-Integrated Tax dated September 29, 2023. ▪ Vide Notification No. 03/2023-Integrated Tax dated September 29, 2023, goods/actionable claims involved in online money gaming have been notified as goods on import of which Integrated GST (IGST) shall not be leviable (as per Section 3 of the Customs Tariff Act, 1975). In such cases, IGST shall be liable to be paid by the supplier as per Section 5(1) of the IGST Act. ▪ Vide Notification No. 49/2023-Central Tax dated September 29, 2023, supply of online gaming (including online money gaming) and supply of actionable claims in casinos have been notified under Section 15(5) of the CGST Act. The said Section provides that value of supplies, as notified by the Government, shall be determined in the prescribed manner. ▪ Vide Notification No. 50/2023 – Central Tax dated September 29, 2023, it has been provided that the exemption from payment of GST on advances received for supply of goods shall not apply with respect to specified actionable claims (defined under Section 2(102A) of the CGST Act to include betting, casinos, online money gaming, etc.). ▪ Vide Notification No. 11/2023 – Central Tax (Rate) dated September 29, 2023 and Notification No. 14/2023 – Integrated Tax (Rate) dated September 29, 2023, specified actionable claims (defined under Section 2(102A) of the CGST Act) have been included in Schedule IV of the GST Rate Schedule for goods so as to provide effective 28% rate of GST on the same. ▪ The following key amendments have been made in the Central Goods and Services Tax Rules, 2017 (CGST Rules) vide Notification No. 51/2023-Central Tax dated September 29, 2023: <ul style="list-style-type: none"> – The person supplying online money gaming from a place outside India to a recipient in India shall be required to file the registration application in Form GST REG-10. Such person shall not be required to declare PAN and State/Union Territory in its registration application. Further, the GST returns would be required to be filed in Form GSTR-5A. The relevant amendments have also been made in the aforesaid forms. – In case of supply of online money gaming to an unregistered recipient, the tax invoice issued by the supplier shall <i>inter alia</i> contain name of the recipient's State, irrespective of value of supplies involved. |

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| | | <ul style="list-style-type: none"> – Rules 31B and 31C have been inserted in the CGST Rules which provides for valuation in case of supply of online gaming including online money gaming and supply of actionable claims in casinos as under: <ul style="list-style-type: none"> ○ The value of the said supplies would be the total amount paid or payable or deposited by the player by way of money or money's worth, including virtual digital assets. ○ Any amount returned or refunded to the player for any reasons whatsoever shall not be deductible. ○ Any amount received by the player by winning any game which is used for playing a further game, without withdrawing the said amount, shall not be considered in the value of supply. ▪ Vide Notification No. 04/2023-Integrated Tax dated September 29, 2023, the Principal Commissioner of Central Tax, Bengaluru West and his subordinate officers, have been empowered to grant registration to suppliers of online money gaming located outside India. ▪ All the aforesaid notifications have been made effective from October 1, 2023. |
| 2 | Notification No. S.O. 4073 (E) dated September 14, 2023 issued by Ministry of Finance | <ul style="list-style-type: none"> ▪ Thirty-one State Benches of the Goods and Services Tax Appellate Tribunal have been notified. |
| 3 | Notification no. 47/2023 – Central Tax dated September 25, 2023 | <ul style="list-style-type: none"> ▪ Earlier, Notification no. 30/2023 – Central Tax issued on July 31, 2023 provided for a special procedure to be followed by registered persons engaged in the manufacture of specified goods (pan masala, tobacco products, etc.). With this new notification, it has now been provided that the said requirement would apply with effect from January 01, 2024. |
| 4 | Notification No. 11/2023-IGST (Rate), 12/2023-IGST (Rate) and 13/2023-IGST (Rate), dated September 26, 2023 | <ul style="list-style-type: none"> ▪ Entries providing for, (i) 5% rate of IGST on services by a person located in a non-taxable territory to a person located in another non-taxable territory, by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India and (ii) providing taxability of the above under reverse charge in the hands of importer, have been omitted. ▪ These amendments have been made effective from October 1, 2023. <div style="border: 1px solid black; padding: 5px; margin-top: 10px;"> <div style="background-color: #2c5e8c; color: white; padding: 2px 5px; display: flex; align-items: center;"> ELP Comments </div> <p style="margin-top: 5px;"><i>These amendments have been made to align the law with the Supreme Court's decision in case of UoI vs. Mohit Minerals Pvt. Ltd. [2022 (61) G. S. T. L. 257 (SC)] wherein this levy was found to be unconstitutional.</i></p> </div> |
| 5 | Advisory no. GST/INV/ Provisional Attachment/ | <ul style="list-style-type: none"> ▪ Upon automatic release of a provisionally attached property/bank account (after a period of one year) as per Section 83(2) of the CGST Act, the Commissioner shall be required to issue a communication to the |

| S. No | Reference | Particulars |
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| | Advisory/ 2023-24 dated 02.09.2023 | <p>concerned authority/bank (marking to the concerned person) indicating the release/restoration of the relevant property/bank account.</p> <ul style="list-style-type: none"> This procedure shall be required to be implemented immediately, including for all pending cases. |
| Customs | | |
| 6 | Notification No. 53/2023-Customs dated September 05, 2023 | <ul style="list-style-type: none"> Exemption on import of various food products (lentils, fruits, etc.) and some other items originating from the United States of Americas has been withdrawn. |
| 7 | Notification No. 54/2023-Customs dated September 14, 2023 | <ul style="list-style-type: none"> The last date for project import (HSN 9801) related exemption for certain projects such as coal mining project, power transmission or distribution project, mega Power project etc. has been extended from September 30, 2023 to September 30, 2025. |
| 8 | Notification No. 54/2023-Customs dated September 14, 2023 | <ul style="list-style-type: none"> Certain amendments have been made in Notification nos. 11/2022-Custom and 12/2022-Custom dated February 01, 2022 (providing graded duty structure for wearable and hearable devices and their parts) so as to broaden their scope and include certain other parts. |
| 9 | Circular No. 22/2023-Customs dated September 19, 2023 | <ul style="list-style-type: none"> The format of ex-bond shipping bill, for export of warehoused goods, has now been developed on Indian Customs EDI System (ICES). The design and workflow pertaining to the same have been explained in this Circular. |
| 10 | Circular No. 24/2023-Customs dated September 30, 2023 | <ul style="list-style-type: none"> Notification No. 01/2023- Integrated Tax dated July 31, 2023 notified certain goods for which exports on claim of rebate cannot be made effective from October 01, 2023. The present circular provides that the relevant checks to implement the same have been enabled for exports through EDI as well as non-EDI ports. |
| 11 | Notification No. 72/2023-Customs (N.T.) dated September 30, 2023 | <ul style="list-style-type: none"> Various amendments have been made in the first Schedule to the Customs Tariff Act, 1975 including addition of a supplementary note for "Spirits used for industrial use", inclusion of specified actionable claims as Tariff Heading 9807, etc. These amendments have been made effective from October 01, 2023. Nil rate of BCD has been provided for various newly included Tariff Items of actionable claims for betting, casinos, online money gaming, etc. under the Tariff Heading 9807. |
| 12 | Notification no. 09/2023 – Customs (ADD) dated September 11, 2023 | <ul style="list-style-type: none"> Anti-Dumping Duty on import of "Flat Base Steel Wheels" originating and exported from China has been continued for another period of five (5) years. |
| Directorate General of Foreign Trade (DGFT) | | |
| 13 | Notification No. 33/2023 dated September 26, 2023 | <ul style="list-style-type: none"> The Remission of Duties or Taxes on Export Products Scheme (RoDTEP) has been extended for exports made till June 30, 2024. The existing rates of RoDTEP will continue to remain applicable for such extended period. |
| 14 | Trade Notice No. 27/2023 dated September 25, 2023 | <ul style="list-style-type: none"> As per Trade Notice No. 07/2023-24 dated June 8, 2023, all imports made under Advance Authorization (AA) during the period from October 13, 2017 to January 9, 2019 which could not meet the 'pre-import condition' |

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| | | <p>were required to be regularized by making payment of the prescribed Customs duty amount.</p> <ul style="list-style-type: none"> Vide the present trade notice, the DGFT has clarified that for imports made under AA on or after January 10, 2019, pre-import condition would not apply even if (i) Exports under the AA have been made during the period from October 13, 2017 to January 9, 2019, (ii) AA was issued before January 9, 2019 or (iii) partial imports under the AA were made on or before January 9, 2019. |
| | | <div style="border: 1px solid black; padding: 5px;"> <div style="background-color: #003366; color: white; padding: 2px;"> ELP Comments</div> <p><i>The pre-import condition was inserted vide Notification No.33/2015-2020 dated October 13, 2017 and was effective upto January 9, 2019. The Constitutional validity of this condition has been upheld by the Apex court in case of UoI vs. Cosmos Films Ltd. [2023 (385) E.L.T. 66 (SC)].</i></p> <p><i>This condition was, however, omitted vide Notification No. 53/2015-20 dated January 10, 2019.</i></p> </div> |

RECENT CASE LAWS

Constitutional validity of Section 16(4) of the CGST Act which provides for time limit for availing ITC is upheld

Gobinda Construction Vs UoI 2023-TIOL-1178-HC-PATNA-GST

FACTS OF THE CASE

In a batch of writ applications filed under Article 226 of the Constitution of India, a common challenge was made to the Constitutional validity of Section 16(4) of the CGST Act. The grounds were that the same is violative of Articles 14 and 300A of the Constitution of India. Section 16(4) of the CGST Act provides limitation for availment of Input Tax Credit (ITC) and *inter-alia* restricts availment of ITC in respect of an invoice/debit note after 30th November - following the end of the financial year in which such document was issued.

JUDGMENT

The Patna High Court held that the language of Section 16(4) of the CGST Act is plain and unambiguous and the doctrine of reading down applies only when general words used in a statute or regulation should be construed in a particular manner so as to save its Constitutionality. ITC is not unconditional, and a registered person becomes entitled to ITC only if the requisite conditions stipulated under Section 16 of the CGST Act are fulfilled. The Court opined that in order to invoke Article 300-A of the Constitution, two circumstances must jointly exist: (i) Deprivation of property of a person (ii) Without sanction of law. Section 16(4) is one of the conditions which makes a registered person entitled to take ITC and by no means can this be said to be violative of Article 300-A of the Constitution of India. Accordingly, the Court held that Section 16(4) of the CGST Act is Constitutionally valid and is not violative of Articles 19(1)(g) and Article 300-A of the Constitution of India.

An application for a refund can be rejected as deficient only where any deficiencies are noted. The rejection of the fresh refund application filed thereafter on the ground of limitation is unsustainable.

National Internet Exchange of India vs. UoI [2023 (8) TMI 1211 - DELHI HIGH COURT]

FACTS OF THE CASE

The Petitioner's fresh application for refund of IGST in respect of zero-rated supplies (for the period October 2017) filed pursuant to issuance of a deficiency memo against an earlier application, for the same period, was rejected on the ground of limitation. The Petitioner filed the present Writ Petition to assail rejection of its application on the grounds that its first application seeking refund on 31.10.2019 was filed within the prescribed limitation period of two years. The Petitioner also submitted that the subsequent applications were filed only to clarify the deficiencies and queries raised by the officer concerned and therefore, cannot be considered as a fresh application for the purposes of determining limitation.

JUDGMENT

The Delhi High Court, allowing the Petition, held that the nature of the deficiencies as set out in deficiency memo clearly indicate that the initial application filed by the Petitioner was not incomplete in terms of Rule 89(2) of the CGST Rules. Observing that the documents initially submitted by the Petitioner included various required documents and some of the documents requested by the Department were not even relevant, the High Court held that the first application for refund filed by the Petitioner on 31.10.2019 was in the "form and manner" as prescribed under the CGST Act and the CGST Rules. Thus, in terms of Section 54(1) of the CGST Act, the period of limitation would stop running notwithstanding that the proper officer had required further documents.



ELP Comments

It is pertinent to note that a proviso was inserted in Rule 90(3) w.e.f. 18.05.2021 to provide that time period, from the date of filing of the original refund claim till the date of communication of the deficiencies by the proper officer, shall be excluded for computing limitation period of two years - in respect of subsequent fresh refund claims filed to address deficiencies.

Licensing of rights for theatrical exhibition of films is classifiable under SAC 999614

JB Exhibitors [TS-470-AAR(KAR)-2023-GST]

FACTS OF THE CASE

The Applicant sought advance ruling on the applicable classification (for levy of GST) for the services of licensing of copyrights in films exhibited in cinemas. The Applicant contended that such services are in the nature of "Licensing services for the right to broadcast and show original films, sound recordings, radio and television programme and the like" and are covered under the SAC 997332. Further, SAC 999614 covering "Motion picture, videotape and television programme distribution services" was submitted as a competing classification entry.

JUDGMENT

It was held that the service of licensing of copyrights in films for exhibition in theatres by a distributor is squarely covered under SAC 999614 since SAC 99961 deals with "Audiovisual and related services" and the term audiovisual works would cover films. The Applicant's contention that such services do not fall under the main heading 9996 covering "Recreational, cultural and sporting services" was rejected by relying on the Explanatory Notes to the scheme of classification of services. It was further observed that the term "broadcast" used in the SAC 997332 means to send out something by way of radio or internet for general public reception. Since, the exhibitor would only show the film in a theatre, the same cannot be considered to be in the nature of broadcasting of film and hence, cannot be classified under 997332.



ELP Comments

The Principal Chief Commissioner of Central Tax, Bangalore Zone had issued an internal Alert Circular in October 2020 wherein it was stated that distribution of films by a distributor under revenue sharing, commission basis, etc. appears to be more appropriately classifiable under SAC 999614. The SAC 997332 appears to be only covering transfer or permission to use right in films by original copyright holder (producer) for the purpose of exhibition, satellite broadcasting, etc.

It is pertinent to note that SAC 9973 attracted 12% rate of GST till 30.09.2021. However, this rate was increased to 18% effective from 01.10.2021. The applicable rate of GST for SAC 9996 has been consistent at 18% from July 2017. Considering this rate change, the classification issue in question remains especially critical for transactions for the period from July 2017 to September 2021.

A provisional assessment is provisional for all purposes. At the time of finalization of the assessment, all factors which are necessary for finalization of the assessment must be reckoned

Commissioner of Customs (Port), Kolkata vs. Shyam Metaliks and Energy Limited [2023 (9) TMI 1146 – CESTAT Kolkata]

FACTS OF THE CASE

The importer had imported Low Ash Metallurgical Coke falling under Customs Tariff Heading 2704 and had *inter-alia* self-assessed the amount of Clean Energy Cess on the same. However, provisional assessment was sought due to non-inclusion of ship demurrage charges in the value and the same was granted. The assessment was subsequently finalized upon submission of requisite details of demurrage by the importer. Thereafter, the importer filed an appeal challenging final assessment of such Bills of Entry on the ground that the subject imports did not attract Clean Energy Cess.

JUDGMENT

It was held that once an assessment is provisional, it is provisional for all purposes. The Tribunal also elaborated on this. For instance, if the assessment is left open for questions of valuation, and subsequently it is found that the classification also requires a change or some other licencing requirement has to be examined, all these factors must be examined while finalizing the provisional assessment. It was further held that in light of decision of the Hon'ble Supreme Court in the case of ITC Limited vs. CCE [2019 (368) ELT 216 (SC)], all assessments including self-assessment can be challenged before the appellate authority. With these observations, the matter was decided in favour of the assessee.

Levy of SWS is not attracted in a case where BCD is fully exempted

Tata Motors Limited vs. Commissioner of Customs, Raigad [2023 (9) TMI 463 – CESTAT Mumbai]

FACTS OF THE CASE

The Appellant had filed Bills of Entry by claiming exemption from Customs duty against MEIS scrips. While the Customs authorities provided exemption from Basic Customs Duty (BCD), Social Welfare Surcharge (SWS) was assessed at the rate of 10% on notional BCD amount. The assessments were appealed by the Appellant on the ground that since payment of BCD was exempted under the relevant exemption notification, liability to pay SWS cannot arise. SWS could not be computed as 10% of notional BCD liability as the actual BCD liability was Nil. As per Section 110 of the Finance Act, 2018, imported goods attract SWS and the same is calculated at 10% on the BCD amount.

JUDGMENT

The Tribunal held that since actual BCD in the present case was Nil, there was no question of payment of SWS. The Tribunal also relied on the Circular No. 3/2022 – Customs dated 01.02.2022 wherein it was clarified that calculation of SWS is dependent on levy of Customs duty. The law does not require calculation of SWS on a notional duty calculation in cases where actual aggregate duty payable is Nil. It was further observed that the decision of the Hon'ble Supreme Court in the case of Unicorn Industries vs. Union of India [2019 (370) ELT 3 (SC)] was not relevant in the present case since the issue at hand involved computation of SWS as opposed to determination of any exemption.



ELP Comments

The Hon'ble Supreme Court in the case of Unicorn Industries vs. Union of India [supra] dealt with the issue of applicability Education Cess, NCCD, etc. where levy of Central Excise duty per se was exempted under the area-based exemption notification. Considering that the underlying exemption notification did not refer to exemption from Education Cess, NCCD, etc., the Hon'ble Supreme Court held that such exemption cannot be automatically inferred for other levies.

Service recipient ineligible to seek Advance Ruling, AAAR affirms AAR

Uttar Pradesh Metro Rail Corporation Ltd. [TS-462-AAAR(UP)-2023-GST]

FACTS OF THE CASE

The Appellant had sought a ruling from AAR qua the services supplied by Kanpur Electricity Supply Company Limited (KESCO) to it. The same was however not entertained by AAR on the premise that the recipient of services cannot seek an advance ruling in terms of Section 95(a) of the CGST Act. Aggrieved by the same, the present appeal was filed before the AAAR.

As per Section 95(a) of CGST Act, "Advance Ruling" means a decision provided by the Authority or the Appellate Authority or the National Appellate Authority to an Applicant on matters or on questions specified in sub-section (2) of Section 97 or sub-section (1) of section 100 in relation to the supply of goods or services or both being undertaken or proposed to be undertaken by the Applicant.

As per Section 95(c) "Applicant" means any person registered or desirous of obtaining registration under the act.

JUDGMENT

The AAAR while upholding the AAR held that meaning of the term "Applicant", as defined under Section 95(c) of the CGST Act, should be derived only in consonance with Section 95(a) of the CGST Act which links Advance Ruling to a decision in relation to supply of goods or services by the Applicant. It was observed that as the language of Section 95(c) refers to "supply of goods or services or both" and not "receipt of goods or services or both"; this implies that the Applicants seeking advance ruling should be suppliers of goods/services and not the recipient of goods/services.



ELP Comments

In M/s. Gayatri Projects Limited & vs. Assistant Commissioner of State Tax [2023 (1) TMI 333 - CALCUTTA HIGH COURT] and Anmol Industries Limited vs. The West Bengal Authority for Advance Ruling [2023 (5) TMI 288 - CALCUTTA HIGH COURT], it was held by the High Court that a service recipient, being a registered dealer under the CGST Act, could be an Applicant for advance ruling under Section 95(c) of the CGST Act to determine taxability of a supply proposed to be received by such person.

While the Applicant in the present case had relied upon these decisions before the AAAR, the same were not taken into cognisance by the AAAR on the ground that the Department has not accepted the above referred Orders of Calcutta High Court and is in the process of filing an appeal before the Hon'ble Supreme Court.

Interactive Large Format Displays are classifiable as ADP machine

Lenovo India Private Limited [TS-478-AAR-2023-CUST]

FACTS OF THE CASE

The Applicant proposes to import Interactive Large Format Displays (LFD) with display sizes in the range of 65 to 86 inches. Such interactive LFDs come with large display and 4K resolution, inbuilt CPU, 4 GB RAM, internal storage capacity of 64 GB, Android OS and various ports (such as USB Type C, HDMI, LAN port, etc.). These LFDs come pre-installed with Smart White Board applications which permit users to make notes using fingers / stylus, compare notes, etc. While the Applicant sought to classify the same under CTH 8471 as Automatic Data Processing Machine (ADP), the Department preferred classification thereof under CTH 8528 on the ground that the primary function of such goods is of display.

JUDGMENT

The Customs Advance Ruling Authority ordered that the subject goods merit classification under the Tariff Item 8471 4190 considering that the capabilities of such LFDs meet the requirements of Note 6(A) of Chapter 84 defining ADP. It was observed that while such an item is capable of performing multiple functions, classification of the same needs to be determined with respect to essential function and terms of headings read with Section / Chapter Notes. It was held that the issue of classification in the present case gets settled in terms of Rules 1 and 6 of the General Rules of Interpretation, without inviting reference to Rule 3.

'Independent' service by auto-driver on 'Namma Yatri' App, not supply through 'electronic commerce operator'

Juspay Technologies Pvt Ltd [TS-473-AAR(KAR)-2023-GST]

FACTS OF THE CASE

The Applicant has launched "Namma Yatri" application on ONDC platform and is engaged in the business of providing technology services for merchants to connect to their preferred payment aggregators and payment gateways. "Namma Yatri" is a ride-hailing SaaS platform / Mobility as a service (MaaS) solution offered to the auto-rickshaw community of Bengaluru which includes a driver-side software and customer-side software.

The questions before the AAR *inter-alia* included determination of whether the Applicant qualifies to be an "e-commerce operator" and whether the Applicant is liable to collect and pay GST in respect of services supplied by drivers using their platform in terms of Section 9(5) of the CGST Act.

JUDGEMENT

The AAR held that the Applicant squarely fits into the definition of "electronic commerce operator" since it owns the digital platform in question (i.e., Namma Yatri).

It was observed that the crucial aspect governing liability to collect and pay GST in hands of the Applicant is to determine whether the services in question are supplied *through* the electronic commerce operator or not. It was observed that the Applicant, because of its unique business model, merely connects drivers and passengers and their role ends on such connection in as much as: (i) they do not collect the consideration; (ii) they have no control over actual provision of service by the service provider; (iii) they do not have details of the ride; (iv) they do not have control room/call centre, etc.

It was held that the supply of services in the present case happens independent of the Applicant. While the Applicant is involved in identification of supplier of services, supply of services in question is not through the electronic commerce operator, but an independent supply by drivers. It was therefore held that even as the Applicant qualifies to be an e-commerce operator, it is not liable to collect and pay GST in respect of services of drivers supplied using their platform.

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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