



# NAVIGATING GST 2.0

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## INTRODUCTION

### Note from Editor

Compliance under GST has been nerve cracking since its inception. The innumerable amendments have just added fuel to the fire, making it difficult for the Taxpayer to assimilate the sheer volume of provisions. While digitalization has made the provisions accessible at the click of a button, nonetheless, understanding the same is still a colossal task!

With the festive season fast approaching, we are delighted to share the 12th issue of our GST Newsletter which encompasses not only the recent developments on the turf of indirect taxation, but also involves the policy changes, landmark judgments, Circulars, Notifications and more. In the **Thought Leadership** module, ELP Partner **Nishant Shah** elaborates the valuation provisions under GST and the quandary surrounding the issue as it has always generated more legal complications than any other, on account of critical and controversial aspects of valuation parameters.

Digitalization has shifted traders from street corners to computers, to enhance e-commerce in the best possible way, making it super convenient. The **Cover Story** chapter titled "**The Evolving GST Landscape Governing E-Commerce in India**" accentuates how the speed of digitalization has accelerated to another level owing to the pandemic and given a significant rise to e-commerce business models, in particular the aggregator model which provides the Government an important anti-evasive tool facilitating it to collect tax from one source.

The section **From the Bench – Key Judicial Pronouncements** enumerates the recent remarkable verdicts, orders, rulings and decisions of the Hon'ble Supreme Court, High Courts, AARs,

Tribunals and the Appellate Authorities. The **Expert Speak** Module embodies fragments from the interview of **Mr. Sachin Rathod (General Manger Accounts & Finance for A Raymond Fasteners India Pvt Ltd.)** who talks about the key areas which need keen attention from the GST council for effective GST implementation. Mr. Rathod says, "*Vocal for local is the need of the hour to put India in the league of being a manufacturing hub. The rationalization of Customs duty exemption is a welcome move as it would enhance the opportunities for existing / new Indian manufacturers*".

In the chapter **Legislature at work – Recent Amendments**, the Newsletter covers all the amendments, updates, clarifications and modifications to the indirect tax laws by the Government. Under the segment named **Allied Laws**, the Newsletter delves on exemption of customs duty on oxygen and oxygen related equipment import, amendment in export policy of rapid antigen testing kits, extension of levy of Anti-dumping duty on various imports and more.

The section **Legal Classics** emphasizes on a remarkable decision of pre-GST era which has set an example in the taxation arena and on account of principles laid down therein, can be made applicable in the GST regime as well. We wind up the Newsletter with some exceptional quotes from GST experts.

We hope the 12th issue of '**Navigating GST**' proves an intriguing read! We promise to be back with the next edition soon!





## THOUGHT LEADERSHIP

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

### Valuation Under GST – a Conundrum?

Every taxing statutes by their very nature deal with source critical parameters which among others includes incidence, rate of tax, point of levy and most importantly the value on which the levy is to be imposed. While each of these parameters have various critical and controversial aspects from the perspective of interpretation of the applicable provisions, the issues surrounding valuation has always generated more legal complications than any other.

Valuation holds significance from the perspective

of every transaction as the final quantum of levy is a direct outcome of the value on which the levy is applied. In addition to this, while other provisions of a taxing statute may raise controversies from the perspective of interpretation of relevant provisions, the parameter of valuation generally depends on and is corroborated by accounting and other factual records available with the tax payer. Elaborate valuation provisions therefore find their place in most taxing statutes that existed and continue to exist in India. A brief tabulation of these statutes, the applicable provisions and typical controversies have been set out below:

Statute/ Relevant provisions	Major controversies
Central Excise Act. (Section 4, Valuation (determination of the price of excisable goods) Rules)	<ul style="list-style-type: none"> <li>- Whether the tertiary expenses is required to be added to the value on which excise duty is required to be levied?</li> <li>- Whether goods cleared to own units, is required to be valued based on cost of production or on the basis of transaction value?</li> </ul>
Customs Act (Section 14, Customs Valuation (determination of value of imported goods) Rules)	<ul style="list-style-type: none"> <li>- Whether royalty/ licensee fee paid to overseas supplier is includible in assessable value if such royalty is related to post importation and not to imported goods?</li> <li>- Whether the warranty charges/ charges for free replacement is includible in the assessable value or not?</li> </ul>
Maharashtra Value Added Tax (VAT)(Section 2(25))	<ul style="list-style-type: none"> <li>- Whether cost of transport/ freight should be forming part of sale price or not?</li> <li>- Whether excise duty paid is required to be included in the sale price for the purpose of discharging VAT?</li> </ul>
The Maharashtra Stamp Act	<p>The value on which stamp duty is required to be paid in case of unlisted shares is subjective.</p> <p>In case of transfer of immovable property stamp duty is required to be paid on reckoner value or on independent transaction value?</p>
Income Tax Act (Section 92 )	<ul style="list-style-type: none"> <li>- Valuation of import of goods and claiming of such expenditure vis a vis valuation of import of goods for discharging customs duty.</li> <li>- Transfer of intangibles between associated enterprise.</li> <li>- What is the value of corporate guarantee fee/commission to be applied in case of corporate guarantee provided by overseas company to an Indian company.</li> </ul>
Goods and Services Tax (Section 15, Chapter IV of CGST Rules - Determination of Value of Supply)	The same is deliberated in this article at greater length

## THOUGHT LEADERSHIP

### Transactions between related persons

Valuation provisions become further complicated where transactions are between related persons since there is perceived to be an enhanced possibility of tax planning/ avoidance by structuring such transactions. Therefore, specific and elaborate provisions are provided in relation to valuation of related party transactions. This aspect when co-related to the GST legislation becomes more complex on account of the wide variety of transactions that can be classified as between "related persons".

As per explanation to Section 15 of Central Goods and Services Tax Act (CGST Act) related persons have been defined to mean:

"(a) persons shall be deemed to be "related persons" if —

- (i) such persons are officers or directors of one another's businesses;
- (ii) such persons are legally recognised partners in business;
- (iii) such persons are employer and employee;
- (iv) any person directly or indirectly owns, controls or holds twenty-five per cent. or more of the outstanding voting stock or shares of both of them;
- (v) one of them directly or indirectly controls the other;
- (vi) both of them are directly or indirectly controlled by a third person;
- (vii) together they directly or indirectly control a third person; or;
- (viii) they are members of the same family;

(b) the term "person" also includes legal persons;

(c) persons who are associated in the business of one another in that one is the sole agent or sole distributor or sole concessionaire, howsoever described, of the other, shall be deemed to be related."

Further it is pertinent to note that the meaning of distinct person as well as specified in the CGST Act.

In terms of section 25(4) of CGST Act a person who has obtained or is required to obtain more than one registration, whether in one State or Union territory or more than one State or Union territory shall, in respect of each such registration, be treated as distinct persons for the purposes of this Act.



### Key Valuation controversies concerning related party transactions

1. Transaction between related and/ or distinct persons even without consideration is considered as deemed supply as prescribed under entry 2 of schedule 1 to CGST Act. The said provision has caused significant controversies from the perspective of valuation of such supplies. The complexity of the controversies is not due to the deeming fiction causing the levy rather the controversy is on account of lack of detailing in valuation provisions that would address all possible scenarios/transactions. A perusal of the applicable provisions will reveal that there is no specific provision for arriving at value on the basis of a deductive or a computed method. A significant number of intangible transactions such as use of group logo by Group entities, benefit of promoter's credit worthiness to various Group entities, exploitation of systems, goodwill, other similar intangibles developed by a group over the years, benefit of which arises to various entities could all become controversial. On account of these being considered as deemed supply but lacking a method of valuation to discharge GST on the same.

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2. The traditional stock transfers under the sales tax/vat regime have now been termed as supplies between distinct persons and thereby exigible to tax. While valuation methodologies are existing prescribed under provisions, there are still situations where one may conclude that, the valuation provisions are not clear and specific. One instance of such transaction is a situation where taxable goods (which form inputs for manufacture of exempted output by the receiving distinct person) are supplied between distinct persons.
3. Employer and employees have been considered to be related persons under the GST law and therefore any transactions between the two even without consideration shall be deemed to be a supply. This in turn requires the discharge of GST which further requires the determination of the measure or value of such transaction on which GST shall be discharged. While this issue is not new and has been part of a number of advance authority rulings by various states<sup>1</sup> the same has not reached a conclusion to be considered as a precedence.

In addition to above, valuation has become a controversial aspect under the GST law on account of certain specific provisions that create a deeming fiction as to the nature of transaction involved such as in case of a situation that can be clarified as "tolerating an act" or specific transactions relating to immovable property.

In relation to controversies for transaction of the nature set out above while the same have not yet been settled or clarified by the department, one may find precedence under erstwhile legislations which answer such controversies. It would however be critical to ensure that the precedence being relied upon mimics the facts and circumstances to the concern from a GST perspective.

### Conclusion

While GST has been around for more than four years now, in its early days in relation to audit/assessments under GST, it may be prudent to say that a series of tax positions could be challenged no sooner full scale audits are undertaken by relevant authorities from GST department. The belief that a significant proportion of these challenges and more importantly of high value to be those revolving around and arising on account of valuation and especially on transactions between related persons cannot be ruled out.

It is therefore suggested that as the companies prepare for a departmental audit under GST pay a specific focus to such controversial transactions and ensure that an appropriate tax position has been adopted. The lack of relevant provisions may deprive companies from what may be termed as an appropriate tax position in which case necessary supporting documents or recording of the basis for arriving at the view be maintained on record. This in turn would facilitate responding to the GST authorities in the course of audit should complex controversial questions relating to valuations were to arise.

Till then value well and stay safe....



<sup>1</sup> Columbia Asia Hospitals Pvt. Ltd. reported in 2019 (20) G.S.T.L. 763 (App. A.A.R. - GST); Musashi Auto Parts Pvt. Ltd. reported in 2021 (49) G.S.T.L. 185 (A.A.R. - GST - Haryana)



# THE EVOLVING GST LANDSCAPE GOVERNING E-COMMERCE IN INDIA

The following chapter has been authored by Stella Joseph (Partner) and Rushil Shah (Senior Associate) - ELP

## INTRODUCTION

The advent of digital era has witnessed the shift in various business functions from physical to digital, giving rise to use of electronic/digital means to carry on business, better known as electronic commerce ("e-commerce"). The pandemic has further hastened the speed of digitization of businesses by leaps and bounds. The rise of e-commerce business models, in particular the aggregator model, has also provided Government an important anti-evasive tool facilitating it to collect tax from one source i.e. the aggregator as opposed to collection of taxes from numerous suppliers. The increasing usage of such tool by the Government can be witnessed from the recent decision of the GST Council in its 45th meeting. The Council has decided to further add to the list of services on which such e-commerce operator is liable to pay tax on supplies made through it, instead of the supplier making such supplies – with the proposed addition of restaurant services and expansion of transportation of passenger services with effect from 1st January, 2022.

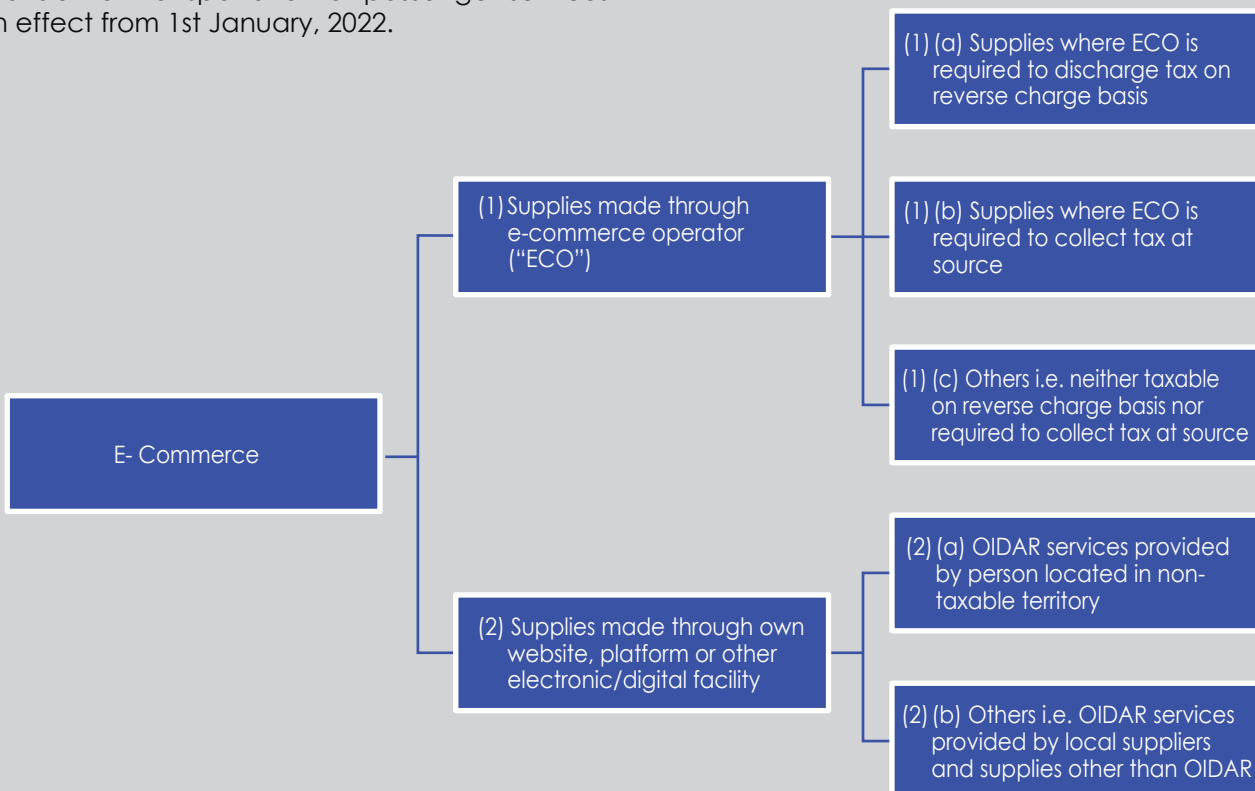
This article seeks to dwell into various nuances of the present GST landscape governing the e-commerce sector in India.

## MEANING OF "E-COMMERCE"

The term "e-commerce" has been widely defined under Section 2(44) of the Central Goods and Services Tax Act ("CGST Act") to mean the "supply of goods or services or both, including digital products over digital or electronic network". Thus, the GST law understands "e-commerce" to cover all kinds of supply of goods or services made through a digital/electronic network, including, for instance sale made through website or a mobile application.

## BROAD LEGAL OVERVIEW

The below diagram depicts the broad categories under which the GST law has divided e-commerce transactions:



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The tax implications with respect to each of the above categories are explained hereunder:

### 1. Supplies made through ECO

Section 2(45) of CGST Act defines electronic commerce operator (ECO) as “any person who owns, operates or manages digital or electronic facility or platform for electronic commerce;”

GST implications for supplies made through ECO can further be divided into the following categories:

#### a. Where ECO is liable to discharge tax on reverse charge basis:

In terms of Section 9(5) of CGST Act<sup>2</sup> ECO is liable to pay tax instead of the supplier, in case of notified services<sup>3</sup> which are supplied through it. It may be noted that the said Section empowers the Government to only notify services and not goods on which the ECO may be liable to pay tax. The notified services include the following :

- i. **Services in relation to transportation of passengers:** by a radio-taxi, motorcab, maxicab and motor-cycle. The GST Council has in its 45<sup>th</sup> Meeting, decided to extend this to cover transportation of passengers by any motor vehicle with effect from 1st January, 2022.
- ii. **Accommodation services:** in hotels, inns, guest houses, clubs, campsites or other commercial places meant for residential or lodging purposes, except where the supplier of service is liable to be registered under section 22(1) of CGST Act.
- iii. **House-keeping services:** such as plumbing, carpentering etc., except where the supplier of service is liable to be registered under section 22(1) of CGST Act.
- iv. **Restaurant services:** The GST Council has in its 45th Meeting decided to include restaurant services with effect from 1st January, 2022.

In terms of the language employed in the relevant notification (notifying the above under Section 9(5)), while services of transportation of passengers in (i) is taxable on reverse charge



basis irrespective of whether the supplier is liable to be registered or not, unlike accommodation and house-keeping services in (ii) and (iii) above, which are to be taxed on reverse charge basis only in cases where the supplier is not liable to register under Section 22(1) of CGST Act i.e. where their aggregate turnover does not exceed the prescribed threshold (generally of INR 20 lakhs).

Further, as opposed to other suppliers making supplies through ECO, supplier of notified services are not liable to obtain a compulsory registration as per Section 24 of CGST Act.

#### b. Where ECO is liable to collect tax at source:

In terms of Section 52 of CGST Act read with Notification No. 52/2018 – Central Tax dated 20.09.2018, ECO is required to collect tax at source at the rate of 1% of the “net value of taxable supplies”<sup>\*</sup> only if:

- i. The supplies are made by the supplier through the ECO
- ii. ECO does not act as an agent of the supplier
- iii. ECO collects the consideration on behalf of the supplier

*Net value of taxable supplies	=	Aggregate value of taxable supplies of goods/services made during the month through ECO (-) value of supplies notified u/s 9(5) of CGST Act (-) aggregate value of taxable supplies returned to the suppliers during the month
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<sup>2</sup> For the sake of brevity, wherever feasible, reference is only made to provisions under the CGST Act even where mirror provisions exist under the State Goods and Services Tax Act

<sup>3</sup> Notified as per Notification No. 17/2017-Central Tax (Rate) dated 28.06.2017 (as amended)



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Tax collected by ECO is required to be deposited with the Government by 10th of the next month along with a statement furnishing details of outward supplies made and returned through it and the details of amount collected by it in Form GSTR-8.

Further, for supplies requiring collection of tax at source, both the supplier making supplies through ECO as also the ECO are required to compulsorily obtain registration in terms of Section 24(ix) and Section 24(x) of CGST Act respectively.



It may be noted that the tax collected by ECO would be available to the supplier as a credit in its Electronic Cash Ledger.

### c. Others

The ECO will not be obligated to either discharge tax on the value of supplies made by the supplier making supplies through it or to collect tax at source if:

- i. the supplies made through ECO are not covered by supplies notified under Section 9(5) of CGST Act, and
- ii. ECO does not collect consideration on behalf of the supplier or acts as an agent of the supplier.

If the above two conditions are satisfied then the ECO would not be obligated to obtain a mandatory registration in terms of Section 24 of CGST Act. ECO would also not be required to comply with the provisions of Section 52 of CGST Act for collecting tax at source.

### 2. Supplies made through own website, platform or digital/electronic facility

#### a. Online information and database access or retrieval ("OIDAR") services provided by a person located in non-taxable territory:

The concept of OIDAR services is inspired by "Electronically Supplied Services" (ESS) existing under the EU VAT regime. In terms of Section 14 of Integrated Goods and Services Tax Act ("IGST Act") where OIDAR services<sup>4</sup> are provided by a person located in non-taxable territory to a non-taxable online recipient ("NTOR")<sup>5</sup>, then such person located in non-taxable territory shall be liable to obtain registration and pay tax on supply of such services. However, if such supplier supplies services through an intermediary located in non-taxable territory, then such intermediary shall be the person liable for obtaining registration and discharging tax.

However, such intermediary shall not be responsible to register and discharge tax if:

- (i) the invoice/bill/receipt issued to the customer clearly identifies the service being provided and the supplier located in non-taxable territory;
- (ii) it does not collect or process the payment nor is responsible for the payment between NTOR and supplier of such services;
- (iii) it does not authorise delivery and
- (iv) general terms and conditions of supply are set by the supplier of services

Further, it may be noted that where OIDAR services are provided by a person located

<sup>4</sup> For definition of OIDAR services refer Section 2(17) of IGST Act

<sup>5</sup> NTOR is defined under Section 2(16) of IGST Act as follows: "non-taxable online recipient" means any Government, local authority, governmental authority, an individual or any other person not registered and receiving online information and database access or retrieval services in relation to any purpose other than commerce, industry or any other business or profession, located in taxable territory.

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in non-taxable territory to a person other than NTOR i.e. a person registered under GST regime or a person receiving services for the purpose of his business, then such supplies would be treated as import of services<sup>6</sup> and the liability to discharge tax thereon would be that of the recipient of such services in India.

**b. Others:** OIDAR services provided by suppliers located in India would be governed by the general provisions, where the supplier of such services would be liable to discharge tax on forward charge basis.

Place of supply for OIDAR services is location of service recipient.

To have a better and practical understanding of the above provisions, the below illustration seeks to analyze its practical application in various scenarios.



### Illustration:

Book Your Homes ("BYH") a company incorporated in Ireland, operates a digital platform which connects the people offering accommodations ("hosts") and people seeking to rent such accommodations ("guests"). While the hosts can list their accommodations on BYH's website/mobile application, the guests can view the available accommodations listed by various hosts and book the accommodation of their choice.

The rent for accommodation is fixed and charged by the host to the guests but collected by BYH through its platform, who after retaining its platform fees transfers the balance amount to the host. BYH charges a flat platform fee at the rate of 5% of the rent from both the host as well as the guest.

In the above set of facts, whether services provided by BYH would qualify as OIDAR services or intermediary services? Whether BYH would require a normal registration in all states from where it conducts business or a simplified registration in one state?

Further, what would be the GST implications with respect to:

- (i) Platform fees charged by BYH to the host
- (ii) Platform fees charged by BYH to the guest
- (iii) Taxability of rent charged by host to the guest, in the hands of BYH
- (iv) Collection of TCS by BYH
- (v) Collection of TCS by BYH, if the rent is directly credited to the hosts bank account
- (vi) Collection of TCS by BYH, if rent is collected by BYH's group company in India who subsequently settles the payment with the host and BYH.

<sup>6</sup> Refer Entry at Sl.No. 1 of the Notification NO. 10/2017 – Integrated Tax (Rate), dated 28.06.2017

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### OIDAR vs. intermediary?

While the IGST Act defines intermediary as a person facilitating supplies between two or more persons other than one who makes such supplies on his own account, OIDAR services are defined as services whose delivery is mediated by information technology over the internet/electronic network, which are essentially automated and involve minimum human intervention and are impossible to render in the absence of information technology.

It may be observed that services provided by BYH fulfill the criteria of both, intermediary as also OIDAR. While BYH facilitates supply between the host and the guest, such services provided over its website/mobile application are automated involving minimal human intervention.

While the place of supply in case of intermediary services where one of the parties is located outside India, is location of supplier of services, the place of supply in case of OIDAR services is location of recipient of services. Therefore, if the services provided by BYH are classified as intermediary services, the place of supply would be outside India and thus no GST would be applicable on platform fees. However, if they are classified as OIDAR services, then depending upon the recipient of such services, either BYH will have to obtain registration and discharge tax on platform fees or the recipient of such services would have to discharge tax on reverse charge basis.

It may be noted that the provisions pertaining to OIDAR services are special provisions for bringing into tax net the services provided by a person located in non-taxable territory to a NTOR. In terms of the principle of interpretation *generalibus specialia derogant* the special provisions on a particular subject matter are to be preferred over the general provisions.

Accordingly, one view may be that, as the provisions pertaining to OIDAR services are special provisions governing taxability of a particular

service provided by a person located in non-taxable territory, they shall prevail over the general provisions pertaining to intermediary services. Therefore, the place of supply pertaining to OIDAR services shall be adopted in the facts of the present case. Thus, BYH will have to obtain registration and discharge tax for services provided to NTOR and in case of services provided to a recipient other than NTOR, the recipient would have to discharge tax on services received by them on reverse charge basis.

### ECO vs OIDAR and the need to register

It may be noted that the definition of ECO is only meant for classifying a particular person as an ECO. On the other hand, the definition of OIDAR services typically covers the type of services that should be classified as OIDAR services. While a



person may be an ECO, he may at the same time be a supplier of OIDAR services. Further, in view of the above discussion the provisions pertaining to OIDAR services are special provisions and shall prevail over the general provisions.

Accordingly, if the services provided by the ECO also classify as OIDAR services then the tax implications thereon would be governed by the provisions applicable to OIDAR services. Thus, BYH may have to obtain registration both as an ECO as well as an OIDAR service provider.

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### Tax implications under GST

It may be noted that the hosts as also the guests using BYH's platform could be registered persons under the GST law or may be unregistered persons using BYH's services for personal use. Accordingly, the GST implications in the hands of BYH, for discharging tax on OIDAR services rendered by it, to pay tax on the rent charged by host and to

comply with TCS provisions, would depend upon the registration status/the use of service by the guest. Further, the registration status/the purpose of receiving services by the guest would also be determinative of whether there is any liability on the guest to discharge tax.

In light of the above discussion, GST implications for supplies made through BYH may be as under:

Scenario	GST Implication
<b>(i) GST on platform fees charged to host</b>	
(a) Where the host is a <u>registered</u> person	The host is not NTOR. It would be liable to pay tax on reverse charge basis as being towards import of services <sup>1</sup> .
(b) Where the host is not a registered person	The host receives services for business purpose, it cannot be a NTOR. Therefore, the host would be liable to pay tax on reverse charge basis
<b>(ii) GST on platform fees charged to guest</b>	
(a) Where guest is a <u>registered</u> person	Same as (i)(a) above
(b) Where guest is <u>not a registered</u> person	If services are received for personal use, the guest would be treated as a NTOR. Accordingly, BYH will have to discharge tax on OIDAR services provided by it. If services are received by the guest in the course of its business, then it would not be a NTOR. In such a scenario the guest would be liable to pay tax on reverse charge basis.
<b>(iii) GST on rent charged by host to the guest, in the hands of BYH</b>	
(a) Aggregate turnover of host is upto Rs. 20,00,000	In terms of Section 9(5) of CGST Act r.w. N.N. 17/2017-CTR, BYH will be liable to pay tax on the amount of rent charged by the host to the guest.
(b) Aggregate turnover of host exceeds Rs. 20,00,000	The supplies made by host in this case would not be covered by N.N. 17/2017-CTR. The liability to pay tax would be that of the host.
<b>(iv) Collection of tax by BYH when rent is first collected by BYH</b>	
(a) Aggregate turnover of host is upto Rs. 20,00,000	In terms of Section 9(5) of CGST Act r.w. N.N. 17/2017-CTR, as BYH is liable to pay tax on the amount of rent charged by the host to the guest, It would not be required to collect tax in such a situation
(b) Aggregate turnover of host exceeds Rs. 20,00,000	BYH would be liable to collect tax at source on the net value of taxable supplies (i.e. rent) made by the hosts.
<b>(v) Collection of tax by BYH when rent directly credited to host's account</b>	
(a) Aggregate turnover of host is upto Rs. 20,00,000	As BYH does not collect the rent (i.e. consideration) for booking made through its website/mobile application, it would not be required to collect tax at source.
(b) Aggregate turnover of host exceeds Rs. 20,00,000	
<b>(vi) Collection of tax by BYH when rent is collected by its group company in India</b>	
Aggregate turnover of host is less than Rs. 20,00,000	As discussed in (iii)(a) and (iv)(a) above TCS provisions will not apply, but BYH would be liable to pay tax in terms of Section 9(5) of CGST Act.
Aggregate turnover of host exceeds Rs. 20,00,000	In the present case the consideration (i.e. rent) is collected by a separate legal entity and not by BYH. Therefore, BYH would not be liable to collect tax in such a situation. It may be argued that if a principal-agent relationship is established between BYH and its group company, the consideration is collected by the group company for and on behalf of BYH and the consideration has in effect been collected by BYH. In such a situation BYH may become liable to collect tax in terms of Section 52 of CGST Act.

In view of the above illustration, it is evident that the tax implications on e-commerce transactions are dependent upon several factors such as, the nature of supplies made, turnover of the supplier/recipient, collection of consideration by ECO etc.



## FROM THE BENCH - KEY JUDICIAL PRONOUNCEMENTS

The following chapter has been authored by Sweta Rajan (Partner), Nischal Agarwal (Principal Associate) and Samyuktha Srinivasan (Associate) - ELP

### SPOTLIGHT CASE:

**High Court of Delhi in RJ Trading Co. v. Commissioner of CGST, Delhi North Commissionerate, TS-356-HCDEL-GST**

#### Facts of the Case:

- The Petitioner was in the business of trading tobacco products.
- Officers of the Directorate General of Goods and Services Tax Intelligence (DGGI) visited the premises of the Petitioner and seized certain documents, including the stock register, details of which were recorded in GST INS-02 as per the procedure prescribed. The officers had found



that the stock of cigarette sticks were duly accounted for. A summons was issued to the Petitioner.

- Thereafter another set of officers from the GST Delhi North Commissionerate visited the premises, conducted a search and seized 190 cartons of cigarettes and certain documents. They recorded that the concerned officer had formed a 'reasonable belief' that the goods were meant for illicit trade / supply. Further, the officers noted that the stock register was not submitted by the Petitioner.

- The Petitioner challenged the action of the GST Commissionerate by way of a writ petition, on the basis that the seizure of goods was not as per the procedure prescribed in Section 67 of the CGST Act.

#### Ruling:

- Section 67 of the CGST Act confers on the proper officer, not below the rank of a Joint Commissioner, the power of inspection, search and seizure. As per Section 67(1) and (2), the expression 'reason to believe' controls the exercise of powers under the said provisions.
- The Hon'ble Court observed that the phrase 'reason to believe' does not carry the same connotation as say 'reason to suspect'. The standard of belief is of a honest and reasonable person and not based on mere conjectures or suspicion. In other words, the belief of the concerned authority should be based on some actionable material / evidence that he has had an opportunity to peruse. Further, such material should have nexus with the formation of the belief.
  - Search and seizure are intrusive powers and need to be wielded with utmost care and caution.
  - In the present case, the search and seizure conducted by the officers of the Delhi North Commissionerate was authorised by the order of the Additional Commissioner, CGST Delhi North Commissioner. However, such an authorisation was found to be on the basis of a document which did not state anything which could have formed a basis for issuing an authorisation for search, seizure etc. Therefore, the very trigger for conducting the search was flawed and unsustainable in law.
- Further, the stock register was not been produced since the same had been seized by the DGGI. In any case, stock registers are not

## FROM THE BENCH - KEY JUDICIAL PRONOUNCEMENTS

primary documents. The Court also noted that other documents seized by the Respondents did not have any connection with the cartons of cigarettes.

- Therefore, it was held that the search and seizure was unlawful and the orders were set aside.

### ELP Comments:

The Hon'ble Court examines and finds that the standard of 'reason to believe' in context of provisions for search and seizure is high, given that these powers are intrusive. Absent a clear correlation between evidence arising from a doubt and an officer's 'reason to believe', the seizure would fail the test of Section 67. This is in line with observations made by various High Courts on this subject.

**In Re. M/s IBM India Private Limited, [TS-420 AAR(KAR)-2021-GST] Aug 18, 2021**

### Facts of the Case:

- The applicant is transferring one of its lines of business (MIS) to another Company ('demerged Company') by way of de-merger
- In terms of Section 18(3) of the CGST Act read with Rule 41(1) of the CGST Rules, the balance of unutilized ITC is allowed to be transferred to the demerged Company in the ratio of value of assets of the demerged Company as per the demerger scheme.
- The term "value of assets" has been defined to mean "*the value of the entire assets of the business, whether or not input tax credit has been availed thereon.*"
- The Applicant has filed the ruling before the Authority on the following issues
  - (a) Whether the following categories of assets will form part of the "value of assets" to determine the ITC balance to be apportioned between the Applicant and the demerged Company?
    - Assets which are outside the purview of GST
    - Assets which are created only to comply with the requirements of the Accounting Standards

- Assets which are not being transferred as part of the de-merger

- (b) If yes, whether the assets which are not attributable to any particular GSTIN should be considered in the GSTIN of the head office of the Company for the purpose of computation of asset ratio?

### Ruling:

- It was noted that "value of assets" as defined under the CGST Rules includes the value of entire assets of the business, and which expression is wide enough to cover all the assets whether or not they are within the purview of GST or not.
- The expression "whether or not ITC has been availed" does not restrict the scope of the assets to assets where ITC is eligible to be taken. ITC, whether availed or not will not preclude the assets from being considered for the purpose of determining the ITC attributable to the demerged entity.
- Further, the expression "entire assets" will also cover such assets which are created to comply with the accounting standards.



- All assets would have to be attributed to one GSTIN or the other. Assets which are transferred to the demerged Company will be considered as part of total assets in that State and accordingly ITC apportionment is to be computed.

## FROM THE BENCH - KEY JUDICIAL PRONOUNCEMENTS

### ELP Comments:

The present ruling provides necessary guidance on the computation of apportionment of balance ITC at the time of demerger. However, a very wide meaning has been assigned to the term “value of assets” and “entire assets” to include intangibles generated for accounting purposes as well. This position is likely to be litigious.

### In Re. Chep India Private Limited, TS-359-AAR(KAR)-2021-GST

#### Facts of the Case:

- The applicant (i.e., CIPL) was engaged in renting of re-usable unit load equipment for shared use by multiple participants in a supply chain under a business model known as ‘pooling’. During all instances of shared use, the ownership of the equipment rested with the Applicant.
- Presently, the equipment is mostly procured or manufactured in Karnataka while some of the procurement is also done from other States.



- The applicant is proposing to change its business model wherein the ownership of all equipment will be consolidated in Karnataka. Thereafter, they would enter into arrangements with other CIPL units in other States (eg. CIPL, Kerala) for leasing the equipment to them at agreed leasing / hiring charges and the equipment will move under the cover of a delivery challan.

- Additionally, in some cases, CIPL Karnataka may instruct CIPL Kerala to transfer the goods to CIPL, Tamil Nadu (say). The Applicant sought a ruling on the GST implications on the transactions under the proposed business model, including:

- Whether the lease of goods from CIPL Karnataka to CIPL Kerala would constitute a supply?
- What would be the valuation of such a supply?
- What are the documents to accompany movement of goods from Karnataka to Kerala?
- Whether movement of goods from CIPL Kerala to CIPL Tamil Nadu would constitute a supply?
- What are the documents to accompany movement of goods from Kerala to Tamil Nadu?

#### Ruling:

##### On taxability:

- Under the CGST Act, 2017, the registration is State specific and thus, inter-State transactions are brought under the purview of the IGST Act. Therefore, all stock transfers from one State to another will be considered to be ‘deemed supplies’ between two deemed distinct persons, in terms of Section 25(4) of the CGST Act. Therefore, any supply of service by CIPL Karnataka to CIPL Kerala will be considered as a taxable supply of service (even without consideration) for the purpose of GST law. The transaction of lease is treated as supply of service in terms of Entry 1 (b) to Schedule II of the CGST Act and will be taxed accordingly.

##### On valuation:

- As regards valuation, as per the second proviso to Rule 28 of the CGST Rules, the open market value of the supply is to be considered if the recipient is entitled to full input tax credit (‘ITC’). In the present facts, since the recipient is entitled for full ITC the invoice value shall be treated as open market value of the supply.

## FROM THE BENCH - KEY JUDICIAL PRONOUNCEMENTS

On documents:

- For the transfer from CIPL Karnataka to CIPL Kerala, CIPL Karnataka will be required to issue (i) tax invoice in terms of Section 31(2) of the CGST Act read with Rule 47 of the CGST Rules, and (ii) delivery challan and e-way bill for movement of goods in terms of Rule 55 and Rule 138 of CGST Rules.
- Where CIPL Kerala is instructed to transfer the goods to CIPL Tamil Nadu, CIPL Kerala acts as a bailee of CIPL Karnataka. CIPL Karnataka would need to enter into a contract of lease with CIPL Tamil Nadu and raise a delivery note and e-way bill for movement from Kerala to Tamil Nadu. This lease transaction between CIPL Karnataka and Tamil Nadu, is once again in the nature of a supply and hence liable to GST.
- However, if it is CIPL Kerala that is sub-leasing the goods to CIPL Tamil Nadu during the pendency of the lease contract with CIPL Karnataka, CIPL Kerala would generate the e-way bill and delivery note for movement to Tamil Nadu, as this transaction is effected by a lease agreement between CIPL Kerala and CIPL Tamil Nadu. CIPL Kerala will have to raise a tax invoice on CIPL Tamil Nadu in such case.

### ELP Comments:

The ruling clarifies various practical nuances (including documentation) as regards leasing transaction undertaken between distinct persons (i.e. branches of the same entity). However, what is relevant is that any movement of goods otherwise than by way of sale / supply between distinct persons can be treated as "lease" even without any explicit arrangement for levy of GST. In several industries including construction, equipments like cranes etc. are purchased at one location and transferred to other locations depending on project requirements. If tax is levied at each such leg, then it will be very cumbersome for a taxpayer to maintain documents.

**In Re. Dharmic Living Private Ltd. [TS-316-AAR(KER)-2021-GST]**

### Facts of the case:

- The applicant is engaged in the development and promotion of gated community villas to prospective buyers in Kerala. All their activities are undertaken after 01.04.2019.
- The applicant identifies locations suitable for gated community villa projects and purchases the land in their name.
- The total land area is divided into various plots and layout approval is taken from the concerned local authority. The exact area of plots as per approved layout for each villa are sold to the villa buyers and there is no undivided share of land involved in the present facts.
- The land is directly registered in the name of the villa buyers and thereafter a construction



agreement is entered into between the applicant and the villa buyers for construction of the villas.

- The applicant also redevelops incomplete projects of other developers.
- They are also engaged in development of plots, which are sold after development to buyers (no development work is undertaken by them for and on behalf of the buyer).



## FROM THE BENCH - KEY JUDICIAL PRONOUNCEMENTS

- An application seeking a ruling on the applicable rate of tax was filed along with the following questions:
  - What is the rate at which GST is leviable on the construction activities of the Applicant?
  - How will the value of the villa be determined for the purpose of payment of GST?
  - Whether no GST is leviable on the sale of developed plots in terms of Schedule III to the CGST Act?

### Ruling:

- From a reading of Notification No. 11/2017-Central Tax (Rate), it was evident that the residential villas constructed by the applicant would fall within the definition of 'residential apartment' and the project was a 'real estate project'. Accordingly, GST is payable at 1.5% for construction of affordable residential apartments and 7.5% for construction of other residential apartments other than affordable residential apartments.
- The applicant will be liable to pay GST on the total value of the villa including land on which one-third deduction shall be available in terms of the Notification.
- In respect of the sale of developed plots, the applicant was not receiving any advance from their customers. Therefore, the transaction is covered by Para 5 of Schedule III of the CGST Act and is not liable to GST.

### **ELP Comments:**

The ruling provides clarity on the applicable rate of GST on construction of residential villas. As regards the value on which GST is liable to be paid on construction services, the taxpayers are compelled to pay GST on the deemed value i.e. total value including land value less abatement of one-third value. There are situations where the construction activities are undertaken especially in urban areas, where the value of land is approximately 40-50% of the total construction value. In such cases also, the taxpayers are liable to pay tax on two-third value of the total

construction value (including land cost) even if the actual cost is available. The said provision basis which the deemed value of land is determined has been challenged before the Hon'ble Gujarat High Court in **Munjaal Manishbhai Bhatt Vs Union of India [C/SCA/1350/2021]**.

### **High Court of Bombay in Fine Exime Private Limited v. Union of India, TS-417-HC(BOM)-2021-GST**

#### Facts of the case:

- The Petitioner was accused of claiming a fraudulent refund under Section 54 of the CGST Act and his bank account was provisionally attached. *The bank was directed to freeze the Petitioner's account. The order-in-original confirmed the refund amount to be payable along with interest and penalty.*
- The Petitioner challenged the provisional attachment on the ground that the same was without jurisdiction as no proceedings were pending under Sections 62, 63, 64, 67, 73 or 74 of the CGST Act, and the condition precedent for provisional attachment itself was non-existent.



#### Judgment:

- The proceedings initiated against the Petitioner under Section 73 of the CGST Act were terminated by the issuance of the order-in-original. Such termination would have the effect of terminating the life of the provisional attachment order.

## FROM THE BENCH - KEY JUDICIAL PRONOUNCEMENTS

- The provisional attachment order also suffers from a jurisdictional error as it was not made during the pendency of any proceedings under Sections 62, 63, 64, 67, 73 or 74, but was made in contemplation of proceedings under Section 73. Therefore, the provisional attachment order was not a valid order right from the date of its issuance.
- For the above reasons, the order of provisional attachment was held to be *void ab-initio*.

### Delhi High Court in Subway Systems India Pvt Ltd vs. UOI & Ors., TS-441-HC(DEL)-2021-GST

#### Facts of the case:

- Subway Systems (the Petitioner) challenging the order of the National Anti-profiteering Authority ("NAPA") wherein it was held that M/s Dough Makers India Pvt. Ltd. ("DMIPL") had profiteered a sum of Rs. 78,41,754/-. The Petitioner, who was the franchisor of DMIPL, was made a party to the NAPA proceedings and was served with a notice seeking proof of payment of alleged profiteering by the franchisee.
- DMIPL raised an objection as to the maintainability of the present writ petition since the Petitioner had neither been held guilty under the CGST Act nor had any adverse inference been drawn against them. DMIPL submitted

that they had no objection from the Petitioner being removed from the array of parties to the matter.

#### Judgment:

- In order to have *locus standi* to invoke Article 226 of the Constitution, the applicant-petitioner should ordinarily be one whose legal rights are infringed or legal interest are prejudiced in some manner.
- Since the Petitioner has not been held guilty of violation of CGST Act and NAPA has no objection if the Petitioner is removed as a party from the anti-profiteering proceedings, the Petitioner has no *locus standi* to maintain the present petition.
- For the above reasons, the Petitioner was dropped from the proceedings against DMIPL and the notice issued to them was withdrawn. This order was stated to be without prejudice to the inferences drawn against DMIPL in the NAPA proceedings.

#### ELP Comments:

This judgement clarifies the position in law as regards *locus standi* (meaning, capacity to bring action) required for a person to be party to a proceedings. The judgements reiterates that on persons who are aggrieved or have some legal interest in the proceedings have *locus standi*.





## EXPERT SPEAKS

**Interview with Mr. Sachin Rathod (General Manger Accounts & Finance for A Raymond Fasteners India Pvt Ltd.)**

Interview conducted by Pranav Pagaria (Associate Director) - ELP

1. What are key focus points as per your experience, that the government/GST Council should target for effective implementation in India?

- In my experience, some critical aspects need keen attention and could be considered by the government / GST council to ensure the effective implementation of GST.
- The backbone of GST is the seamless flow of credit however, the claim of credit is currently being restricted due to mismatch with GST returns of corresponding vendors. I feel that the GST council should consider a revamp around the matching concept so as to penalize the defaulter and not all the assesses on account of credit mismatch. Alternatively, a two-way matching platform could be developed for effective and timely reconciliation of all the credits. This would help minimize the credit blockage.
- Also, currently, the Companies having to comply with E-invoicing provisions have to additionally comply with E-Waybill requirements for transactions involving movement of goods. This causes duplication of process and can be mitigated by removing E-Waybill requirement for Companies issuing E-invoices.
- Lastly, for removal of cascading effect of GST, the government / GST council should now consider inclusion of products currently outside the ambit of GST, such as, petroleum products.

2. Is there a compelling need for Central Bench for Appellate Authority for Advance Ruling ("AAAR") to reconcile the contradictory orders on similar issues passed by AARs in different states?

- The current mechanism of AAR has led to various contradictory judgements on the similar issues and sometimes in case of the same assessee. This raises concern as to the tax position on the specific transactions to be undertaken by the Companies across various states. A Central bench for appellate authority would definitely help resolve this issue and

bring uniformity in the tax positions.

- Also, recently, there have been rounds of discussion(s) suggesting that the Government is contemplating Board for Advance Ruling ('BAR'), which would be a central authority which shall replace the current AARs. This would be a welcome move and will bring necessary relief for tax payer.
3. How do you see the proposed amendment to Section 16 of the CGST Act which mandates 100% matching of GSTR-2A and credit register? Will it result in genuine credit blockages?
- The proposed amendment could have implications on the working capital of the Companies due to mismatch with GSTR-2A. It is important to highlight that the 100% reconciliation of all the transactions is not



possible due to numerous reasons such as delay in receiving invoices, delay in filing of return by vendors, errors while filing GST returns, etc. As a consequence, there is a need for supplier and customer to structure the process so as to ensure timely compliances so that the credits can be utilized efficiently. Also, the government / GST council could assess the possibility of digitizing the entire reconciliation process for better credit availment.

## EXPERT SPEAK

4. The Government has recently taken steps for rationalization of Customs duty exemption on various products to give push to "Make in India" program. Do you see it a step in the right direction?

- Vocal for local is the need of the hour to put India in the league of being a manufacturing hub. The rationalization of Customs duty exemption is a welcome move as it would enhance the opportunities for existing / new Indian manufacturers. Domestic Industry needs to be technically competent and look out for such opportunities to move towards 'Atmanirbhar' Bharat.

5. In your opinion, is there a need to reduce the GST slabs from four to three?

- As we march forward into the GST era, the GST rates would continue to evolve in the upcoming years. I feel, having 4 or 3 GST rates would not necessarily change anything but yes, the rates should be reanalyzed in the long run. This should be done by considering the long-term reforms as well as viewpoint / acceptance of the end consumer. After all, it is the end consumer who ultimately pays GST.

6. Is the e-invoicing really helping the cause of real time recording the GST transactions?

- One cannot simply go-away from digitalization in today's world. The E-invoicing has effectively assisted in better compliance and having real-time record of the outward supplies. I think E-invoicing should be adopted for all B2B transactions as it efficiently ensures timely compliance.

7. What is your take on the recently notified rates for RoDTEP scheme ? Do they meet the industry expectation?

On the RoDTEP rates, what I see is mixed reaction across all players as some industries got satisfactory rates whereas others got lower or were even kept out of the scheme. Speaking of auto industry specifically, the rate notified is 0.5% which is on the lower side in comparison to the erstwhile schemes. Also, the scheme is not an export incentive but it's only remission of taxes / duties where direct credit is not available.





## LEGISLATURE AT WORK - RECENT AMENDMENTS


The following chapter has been authored by Sanchita Rungta (Associate Partner) and Aswin Ramesh (Principal Associate) - ELP

Legislative Updates – August 2021		
S. No.	Reference	Particulars
1	<b>Notification No. 41/2021 – Customs dated 30th August, 2021</b>	<ul style="list-style-type: none"> <li>Vide Notification no. 28/2021-Customs dated April 24, 2021, Government exempted 18 life savings items like Medical Oxygen and COVID-19 vaccine from the whole of the duty of customs and health cess. Further, vide Notification no. 31/2021-Customs dated May 31, 2021, exemption was extended from July 31, 2021, to August 31, 2021.</li> <li>Government extends exemptions granted to Medical Oxygen, Covid vaccines, oxygen and oxygen equipment's etc. from customs duty and health cess from August 31, 2021 to September 30, 2021.</li> </ul>
2	<b>Notification No. 21/2015-2020 dated 31st August, 2021</b>	<ul style="list-style-type: none"> <li>Policy Condition No. 1 of Chapter 88 of ITC (HS) 2017, Schedule I (Import Policy) , is revised in part (e) to allow import of aircrafts by Aircraft Leasing Entities in IFSC (International Financial Services Centres), located in GIFT (Gujarat International Finance Tech City) city, Gandhinagar, Gujarat. Further, part(f) is added to do away with the permission by the Ministry of Civil Aviation, which is as part of measures to reduce transaction cost and for ease of doing business.</li> </ul>
3	<b>Notification No. 33/2021- Central Tax, dated 29<sup>th</sup> August, 2021</b>	<ul style="list-style-type: none"> <li>Vide Notification No. 19/2021- Central Tax, dated 01.06.2021, relief has been provided to the taxpayers by reducing / waiving late fee for non-furnishing FORM GSTR-3B for the tax periods from July, 2017 to April, 2021, if the returns for these tax periods were furnished between 01.06.2021 to 31.08.2021. The last date to avail benefit of the late fee amnesty scheme, has now been extended from existing 31.08.2021 to 30.11.2021.</li> </ul>
4	<b>Notification No. 34/2021- Central Tax, dated 29<sup>th</sup> August, 2021</b>	<ul style="list-style-type: none"> <li>Government has extended timelines for filing of application for revocation of cancellation of registration to 30.09.2021, where the due date of filing of application for revocation of cancellation of registration falls between 01.03.2020 to 31.08.2021. The extension would be applicable only in those cases where registrations have been cancelled under clause (b) or clause (c) of sub-section (2) of section 29 of the CGST Act.</li> </ul>
5	<b>Notification No. 32/2021- Central Tax, dated 29<sup>th</sup> August, 2021</b>	<ul style="list-style-type: none"> <li>The filing of FORM GSTR-3B and FORM GSTR-1/ IFF by companies using electronic verification code (EVC), instead of Digital Signature certificate (DSC) has already been enabled for the period from 27.04.2021 to 31.08.2021. This has been further extended to 31st October, 2021.</li> </ul>

## LEGISLATURE AT WORK - RECENT AMENDMENTS

Legislative Updates – July 2021		
S. No.	Reference	Particulars
6	<b>Notification No. 31/2021 – Central Tax dated 30<sup>th</sup> July, 2021</b>	<ul style="list-style-type: none"> <li>With effect from <b>1<sup>st</sup> August, 2021</b>, a registered person whose aggregate turnover in the financial year 2020-21 is upto two crore rupees, is exempted from filing annual return for the said financial year.</li> </ul>
7	<b>Notification No. 30/2021 – Central Tax dated 30<sup>th</sup> July, 2021</b>	<ul style="list-style-type: none"> <li>With effect from <b>1<sup>st</sup> August, 2021</b>, every registered person, other than those referred to in the second proviso to section 44 of the CGST Act, an Input Service Distributor, a person paying tax under section 51 or section 52 of the CGST Act, a casual taxable person and a non-resident taxable person, whose aggregate turnover during a financial year exceeds <b>five crore rupees</b>, shall also furnish a self-certified reconciliation statement in FORM GSTR-9C along with the annual return, on or before the thirty-first day of December following the end of such financial year.</li> </ul>
8	<b>Notification No. 29/2021 – Central Tax dated 30<sup>th</sup> July, 2021</b>	<ul style="list-style-type: none"> <li>With effect from <b>1<sup>st</sup> August, 2021</b>, the registered person whose aggregate turnover during a financial year exceeds <b>five crore rupees</b> would be able to self-certify the GSTR 9C for FY 2020-21 and onwards, instead of getting it certified by a Chartered Accountant.</li> </ul>
9	<b>Circular No. 157/13/2021 – GST dated 20<sup>th</sup> July, 2021</b>	<ul style="list-style-type: none"> <li>In 2020, the Supreme Court suo-moto took cognizance of the situation arising out of COVID 19 and issued an Order dated March 23, 2020 stating that the period of limitation in filing petitions / applications / suits / appeals and all other proceedings irrespective of the period of limitation prescribed under the general or special laws, shall stand extended with effect from March 15, 2020 till further orders.</li> <li>Due to the second wave of COVID-19, Order dated March 23, 2020 was restored vide Order dated April 27, 2021 which stated that period(s) of limitation, as prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings, whether condonable or not, shall stand extended till further orders.</li> <li>Present circular clarifies that extension granted by Hon'ble Supreme Court Order dated April 27, 2021 applies only to quasi-judicial and judicial matters/proceedings relating to petitions/ applications/suits/appeals before the Appellate Authority, Tribunal, Courts or where proceeding for revision/ rectification of any order is to be undertaken, and does not per se apply to every action or proceeding under the GST laws such as issuance of summons, scrutiny of returns, search, enquiry or investigations and even consequential arrest in accordance with GST law. Further, the Supreme Court Order would also not apply to issuance of show cause notice, granting time for replies and passing orders, even though they are quasi-judicial proceedings, as the same has only been made applicable to matters relating to petitions/ applications/suits, etc.</li> </ul>

## THE EVOLVING GST LANDSCAPE GOVERNING E-COMMERCE IN INDIA

Continued from Page No. 12 

### Some issues for consideration

#### **Relevant for ECO and TCS obligations**

- (1) When should the tax be collected?** – There appears to be a divergence in views in the FAQs issued by the CBIC as regards when should the tax be collected by the ECO. While FAQs on TCS under GST dated 28.09.2018, has in its FAQ No. 13 provided that TCS is to be collected in the month in which the supply has taken place through the ECO, FAQ No. 11 of Sectoral Series: E-commerce FAQ provides that ECO should make the collection during the month in which the consideration is received. Neither of the two clarifications have been withdrawn or superseded and thus, this may lead to ambiguity. Ideally, the payment of TCS should be aligned to when the supplier records the supply in his/her GST return.
- (2) Valuation in case of Section 9(5) supplies when discounts offered by ECO:** In case of Section 9(5) services [where ECO is deemed to be the

itself is deemed to be supplier, it has been held that the ECO would be liable to discharge GST on the net value after deducting the discount offered by the ECO. Another related issue in this case would be the treatment of the 'discount' amount offered by the ECO. The ECO in this case will pay the discount amount to the supplier while recording it as an expense in its own books. In such case, it can be argued that since there is no reciprocal activity done by the Supplier in this case to receive this compensation *qua* discount, there cannot be a supply and thus no liability to discharge GST. However, this issue would have to be tested basis the facts of each case.

- (3) Registration for foreign ECOs in multiple states:** Unlike the Simplified Registration Scheme available for foreign OIDAR service providers, no such option exists for a foreign ECO who also needs to necessarily register in all States where suppliers are located [though it can appoint a representative in States having no physical location]. This makes the process highly cumbersome for foreign ECOs who are otherwise not entrenched in the tax systems of the country.

#### **(4) Deemed supplier status of ECO in case of accommodation and housekeeping services:**

In case of these services, strictly speaking the ECO will be deemed to be the supplier only in cases where the supplier is not liable to obtain registration under Section 22(1). However, even in case where supplier is not liable to obtain GST registration on account of crossing the threshold under Section 22(1), he may still obtain GST registration, say under Section 24 (compulsory registration in certain cases) or Section 25(3) (voluntary registration) of CGST Act. In such a case, one wonders whether a view can be taken that though the supplier is registered, the ECO may still be liable to pay tax on reverse charge basis as there is no obligation on the supplier to register in terms of Section 22(1).

#### **Relevant for OIDAR services**

- (5) Scope of "minimum human intervention":** One of the criteria for qualifying as an OIDAR



supplier] such as transportation service or the recently proposed restaurant services, an issue that arise is the value on which GST is required to be discharged in case the ECO itself offers certain discounts to the customer. This issue was deliberated upon by the Authority for Advance Ruling in the case of **Gensol Ventures Pvt. Ltd.** While relying on sub-sections (1) and (3)(a) of Section 15 and while recognizing that ECO

## THE EVOLVING GST LANDSCAPE GOVERNING E-COMMERCE IN INDIA

service is that the services should involve "minimal human intervention". What would constitute minimal human intervention is unclear as the term is neither defined nor is there any mechanism provided in the GST laws for determining what is 'minimal human intervention'. Accordingly, the classification of any service as an OIDAR service may remain open to interpretation, leading to divergent views among tax payers and the Department. A noteworthy attempt to explain what can be construed as "minimum human intervention" may be found in the Commentary on the recently inserted Article 12B of United Nations Model Double Taxation Convention which deals with tax on "automated digital services" ("ADS") which is also similarly defined and also uses the words "minimum human intervention".

- (6) Compulsory registration/No minimum threshold:** It is important to bear in mind that for OIDAR service providers located outside India, there is

requirement to obtain compulsory registration, without any stipulations as regards minimum threshold. Thus, hypothetically, even an INR 1 transaction with NTOR would trigger the requirement. It thus becomes crucial for non-resident OIDAR service providers to rigorously maintain the GSTIN databank of each of their clients. In the event that such GSTIN cannot be procured from their clients, there arises a requirement to get GST registration in India and discharge GST.

### Conclusion

As e-commerce becomes ubiquitous, so will its taxation. In the backdrop of the global discussions on OECD/G7 Pillar 1 and Pillar 2 proposals and possibility of withdrawal of unilateral measures such as Equalization Levy, the levy of GST on e-commerce transactions will gain further significance and will become an important source of revenue for the government.







## ALLIED LAWS

The following chapter has been authored by Sachin Jain (Principal Associate), Prakhil Mishra (Associate) and Anushree Kothari (Advocate)- ELP

For Month of August 2021

### Circulars/Trade Notices/Notification

**Trade Notice No. 13/2021-2022 – DGFT dated 04.08.2021 – Uploading of e-BRC by 15.09.2021 for shipping bills with LEO upto 31.03.2020 on which RoSCTL scrip has been claimed from DGFT Ras.**

The Directorate General of Foreign Trade ('DGFT') vide Notification No. 13/2021-2022 DGFT dated 04.08.2021 requested all IECs/firms, who have been issued scrips under Rebate of State and Central Levies and Taxes ('RoSCTL') for shipping bills up to 31.03.2020 to get the related e-BRCs uploaded on the DGFT portal by their AD banks



latest by 15.09.2021 failing which action would be initiated by the jurisdictional Ras.

The trade notice was issued observing that for RoSCTL shipping bills with LEO up to 31.03.2020, there are a significant number of cases where corresponding e-BRCs have not been uploaded in the DGFT's online e-BRC repository, as a proof of export proceeds realization.

**Notification No. 16/2015-2020 – DGFT dated 09.08.2021 - Extension in period of modification of IEC till 31.08.2021 and waiver of fees for IEC updation done during August 2021**

The Directorate General of Foreign Trade ('DGFT') vide Notification No. 16/2015-2020 DGFT dated 09.08.2021 had extended the period of modification of IEC for the year 2021-22 till 31.08.2021. Further, no fees shall be charged for modifications carried out in IEC during the period up to 31st August 2021.

**Notification No. 18/2015-2020 DGFT dated 16.08.2021 - Amendment in Export Policy of COVID-19 Rapid Antigen testing kits.**

The Directorate General of Foreign Trade ('DGFT') vide Notification No. 18/2015-2020 DGFT dated 16.08.2021 revised the policy to add the export of COVID-19 Rapid Antigen testing kits under Restricted category, with immediate effect.

**Trade Notice No. 16/2021-22 DGFT dated 17.08.2021 - Procedure and Criteria for submission and approval of applications for export of COVID-19 Rapid Antigen Testing kits**

The Directorate General of Foreign Trade ('DGFT') vide Trade Notice No. 16/2021-2022 DGFT dated 17.08.2021 had fixed the quota for export of COVID-19 Rapid Antigen Testing kits for the month of July, August and September 2021 to 1176 Lakh Kits. Further, it had been clarified that online applications for export of "COVID-19 Rapid Antigen Testing Kits" maybe applied from August 20 to August 30, 2021. The notice also outlined the eligibility criteria for consideration of

applications while requiring self-attestation of all the documents and provided that the validity of the export license shall be for 6 months only.

**Notification No.41/2021 customs dt 30.08.2021 – Amendment of notification No. 28/2021-Customs to extend the exemptions on import of oxygen, oxygen related equipment and COVID-19 vaccines up to 30th September 2021**

The Central Board of Indirect Taxes and Customs ('CBIC' or 'Board') vide Notification No. 28/2021 – Customs dated 24.04.2021 had exempted customs duty and health cess on import of oxygen, oxygen

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related equipment and COVID-19 vaccines, up to 31st July 2021. However, vide Notification No. 41/2021 – Customs dated 30.08.2021, the same is further extended up to 30th September 2021.

### **Circular No.20/2021- Customs dated 16.08.2021 - pending**

In order to address the difficulties being faced by the custodians of Inland Container Depots (ICDs) and Container Freight Stations (CFSs) at the time of winding up of operations in facility and approach Customs formations for de-notification, the CBIC had provided detailed guidance and procedure to be followed for denotification. There can be two situations where de-notification can be initiated namely, (a) on application from the custodian and (b) on the report of the jurisdictional Principal Commissioner/Commissioner of Customs in terms of Circular No. 50/2020-Customs dated 05.11.2020.

In case of application from the custodian a facility will become ripe for de-notification if the following conditions are met, namely,

1. The application for de-notification is complete in all respects.
2. There are no dues, including the duties on the uncleared goods that are eventually sold, pending to be recovered from the custodian.
3. All the uncleared goods lying at the facility have been cleared from the facility by disposal and/or shifting to any other facility in the jurisdiction of the Commissionerate.
4. All the detained/ seized/ confiscated goods lying at the facility are disposed and/or shifted out of the facility to another location for safe custody and
5. All the other items belonging to Customs such as office records, furniture etc. are removed from the facility.

It was also provided that to ensure the custodian intending to get the facility de-notified is not put to hardship, the jurisdictional Principal Commissioner/Commissioner of Customs, shall facilitate the de-notification of a facility within maximum of four months from the date of receipt of application or from the date of de-notification requested by the custodian, whichever is later. Also, it shall be ensured that there shall be no disruption in the Exim

operations, if any, at the facility while the formalities of de-notification are being completed.

The jurisdictional Principal Commissioner/Commissioner of Customs shall, after satisfying herself/himself that the facility is ripe for de-notification shall:

- (i) revoke the approvals granted under Sections 8 and 45 of the said Act;
- (ii) forward a proposal to Director General of Human Resource Development (DGHRD), CBIC so that the sanctioned/regularized posts are surrendered in time; and
- (iii) forward (in the case of ICD and AFS) a proposal to the Board for de-notification of the facility at least two weeks before the expiry of four months from the date of application.



Further, it was provided that the custodian's bond and security, if any, shall be kept live by the Customs till the resolution of disputes, if any, against the custodian. It was also provided that before cancellation of the bond and return of the security, it must be ensured that all the goods for which the custodian has taken responsibility to dispose are duly disposed as per law.

### **Ministry of Commerce & Industry Notification No. 19/2015-20 dated 17.08.2021 - Guidelines and rates for new RoDTEP scheme for exporters**

The Government vide Ministry of Commerce & Industry Notification No. 19/2015-20 dated 17.08.2021 issued guidelines and rates for new Remission of Duties and Taxes on Exported Products

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(RoDTEP) scheme. The notification defined scheme objectives and operating principles being refund of currently un-refunded duties/taxes/levies at Central/State/local level, on goods and services used in the production of exported product and such indirect duties/taxes/levies in respect of distribution of exported product. It stated that no rebate shall be allowed in respect of duties/taxes already exempted/remitted/credited.

The ceiling rates shall be determined by a Committee in the Department of Revenue/Drawback division with suitable representation of the Department of Commerce/DGFT, line ministries and experts. The scheme shall operate in a budgetary framework. The rebate would be granted to eligible exporters at a notified rate as a percentage of FOB value with a cap per unit of exported product wherever required. However, for certain export items, a fixed quantum of rebate amount per unit may also be notified. The Rates of rebate/value cap per unit under RoDTEP will be notified in Appendix 4 R.



The rebate would not be dependent on the realization of export proceeds at the time of issue of rebate but is subject to the receipt of sale proceeds within time allowed under the Foreign Exchange Management Act, 1999 failing which such rebate shall be deemed never to have been allowed. The rebate amount shall be disbursed in the form of a transferable duty credit/electronic scrip (e-scrip) which shall be used only for payment of basic custom duty (BCD).

It was also informed that the said scheme will take effect retrospectively from January 01, 2021, however, the implementation date will be decided later for exports made by certain category of exporters. Further, it provided for Ineligible Supplies/Items/Categories under the Scheme. It stated that a monitoring and audit mechanism with an IT based Risk Management System (RMS) would be put in place by the CBIC, Department of Revenue to physically verify the records of the exporters on sample basis.

### **Ministry of Textiles Notification dated 13.08.2021 - Government extends RoSCTL Scheme for apparel and made-ups sector**

Ministry of Textiles ('MoT') vide Notification dated 13.08.2021 decided to continue the Scheme for Rebate of State and Central Taxes and Levies on Export of Apparel/Garments and Made-ups (RoSCTL) w.e.f. January 01, 2021, till March 31, 2024, for apparel/garments (under Chapter 61 and 62) and Made-ups (under Chapter 63) in exclusion of Remission of Duties and Taxes on Exported Products (RoDTEP) for these Chapters. The rates, as notified by the Ministry of Textiles, shall be subject to periodic review and revision of rates shall be decided separately by MOT and Ministry of Finance.

However, specified that other textiles products (excluding Chapter 61,62 and 63) shall be eligible to avail the benefits, if any, under RoDTEP along with other products, as may be notified. It clarified that Duty Credit Scrip under RoSCTL Scheme shall be issued without insisting on realization of export proceeds. Further, MOT also annexed Guidelines for Continuation of the Scheme.

### **Initiation of levy of Anti-dumping Duty on various imports:**

The Central Government has initiated levy of Anti-Dumping Duty on imports of:

- "Phthalic Anhydride (PAN)" originating in or exported from China PR, Indonesia, Korea RP and Thailand for a period of five years.
- "Natural Mica based Pearl Industrial Pigments excluding cosmetic grade" originating in or exported from China PR for a period of five years.

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### Extension of levy of Anti-dumping Duty on various imports

The Central Government has extended levy of Anti-Dumping Duty on imports of:

- "Wire Rod of Alloy or Non-Alloy Steel" originating in or exported from China PR up to and inclusive of 31st January 2022.
- "Axle for Trailers" originating in or exported from People's Republic of China, till 28th January 2022.
- «Uncoated copier paper" from Indonesia & Singapore up to 28th February 2022.
- "Glass Fibre and Articles thereof" from China PR up to 31st October 2021.

### Revoking the levy of Anti-dumping Duty on various imports:

The Central Government has revoked the levy of Anti-Dumping Duty on imports of:

- "Viscose Staple Fibre (VSF)" originating in or imported from China PR and Indonesia.
- "Barium Carbonate" originating in or imported from China PR.

### Recent Case Laws

#### HC: Mandamus sought for finalising provisional assessment of Bills of Entry achieved. [2021-TIOL-1727-HC-MAD-CUS]

##### **Pavan Enterprises Vs Pr.CC**

The petitioner sought a mandamus directing the respondents (i.e., the Principal/Joint/Assistant Commissioner of Customs) to finalise provisional assessments in respect of certain bills of entry filed by petitioner for clearance of goods imported accepting the classification under CTH 23065020 and returning the bank guarantees furnished at the time of provisional assessment.

The court had on 09.04.2021 recorded the statement of respondents to the effect that the representation of petitioner has been received and that the same

would be disposed prior to 14.06.2021. However, time was sought for finalisation and an extension of four weeks was granted. Further, on 14.07.2021, since the matter was still hanging fire, some more time was granted putting the respondents to terms which was complied with and as regards provisional assessment was finalised in line with classification declared by petitioner in the bills of entry in question.

Thus, the mandamus sought for stands achieved.

#### HC: Writ Petition for not debiting any amount pertaining to MEIS Licence/Scrip towards any payment/deductions including customs duty, excise duty and service tax in view of pending outcome of representation TS-361-HC-2021(MAD)-CUST

##### **Global Leathers Pvt Ltd Vs Chief CC**

The petitioner has sought a mandamus directing respondents 1 to 3 being the Chief Commissioner of Customs, the Additional Commissioner of Customs and the Additional Director General of Foreign Trade to not debit any amount pertaining to MEIS Licence/Scrip towards any payment/deductions including customs duty, excise duty and service tax and a representation dated 29.06.2020 to this effect was also filed.

The petitioner's case was that that the 4th respondent, who was entrusted with the management of the business of exports had



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clandestinely sold the scrip in question to a third party, by name Syed Mohideen Shahul Hameed. A police complaint was filed under which investigation is on-going and the persons under investigation have obtained conditional orders of anticipatory bail.

In the light of the above, following directions were issued:

- i. R5 will complete the on-going investigation within a period of ten weeks;
- ii. The Customs Authorities shall dispose the representation of the petitioner dated 29.06.2020, bearing in mind the enquiry/investigation as well as the conclusion in the on-going investigation arrived at by the police, within a period of two weeks from date of completion of the police enquiry after hearing the petitioner as well any other parties that are necessary and germane to the matter.

Interim order restraining R1 from entertaining any request to debit in respect of MEIS scrip in question was granted on 06.10.2020, extended from time to time and was stated that the said protection will continue for the aforesaid period of twelve (12) weeks and will be subject to the conclusion arrived at by R1 to R3 on the representation of the petitioner.

Thus, the writ petition stands disposed.

**HC: Writ Petition against show cause notice issued by Directorate of Revenue Intelligence ('D.R.I.') and for releasing of bank guarantees furnished for provisional release of goods [2021-TIOL-1609-HC-KOL-CUS]**



### Emami Agrotech Ltd Vs Uoi

The petitioners placed the certificate of origin issued by the Ministry of Foreign Affairs, Government of Bangladesh and submitted that inspite of the certificate, the show cause notices have been issued. Further, submitted that subsequent to the judgement of the Supreme Court in M/s. Canon India Pvt. Ltd. Vs. Commissioner of Customs in Civil Appeal No. 1827 of 2018 [TS-75-SC-2021-CUST], the D.R.I. has lost its authority to issue any show cause notice under Section 28 of the Customs Act, 1962 and prayed that the show cause notice be set aside immediately.

The D.R.I. contended that show cause notice has been issued under Section 124 read with Section 28 and not a SCN simplicitor under Section 28. Therefore, one would have to examine the SCN. Also prayed for affidavits to be filed by him and he be allowed to provide further judgements on the next date of hearing to buttress his argument that the show cause notice is not void ab initio.

The High Court ruled that affidavit-in-opposition be filed within four weeks, reply thereto, if any, two weeks thereafter and the matter appear in the combined monthly list of July 2021.

The petitioners also prayed for release of bank guarantees furnished for provisional release of goods. They submitted that the value of these bank guarantees is totalling to approximately Rupees Forty-two crores and keeping the bank guarantees alive is resulting in blockage of entire amount impacting the business of petitioners. Moreover, the petitioner-company expressed the view to provide an alternative source of security.

The High Court ruled that no alternative security has been shown in the present writ petitions and the petitioners shall be at liberty to make an appropriate application for the same to provide the alternative security, if they so desire.

Thus, the petition was partly allowed.

**HC: Writ Petition against the order rejecting the claim of Interest on excess customs duty paid. [2021-TIOL-1607-HC-MAD-CUS]**

### Vedanta Ltd Vs Asstt.CC

The petitioner had paid excess customs duty to the tune of Rs.35,93,64, 311/-, for which he was

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entitled for refund by the Commissioner (Appeals) vide Order-in-Appeal No.01/2020-TTN (Cus) dated 18.02.2020. Since the refund was not made, the petitioner had filed a writ petition which was allowed with a direction to refund the excess customs duty paid by the petitioner with interest. Subsequently, the first respondent vide order dated 18.11.2020 disbursed excess customs duty paid to the petitioner. However, had not disbursed any interest and moreover vide the impugned letter dated 22.02.2021 rejected the claim of the petitioner stating that the interest will not accrue from three months from the date of filing the refund claim, but from three months from the date of the Commissioner (Appeals) order.

Writ petition was filed *inter alia* seeking a direction to the first respondent to disburse interest on delayed disbursement of refund to the petitioner as computed vide letter in terms of the order dated 01.10.2020 passed by the High Court.

Counsel for the respondents-Revenue fairly stated that since there was no interim order in the appeal filed by the respondents, as per the Circular bearing No.276/186/2015-CX.8A dated 01.06.2015 issued by the Government of India, the petitioner is entitled for the interest.

The High Court stated that with regard to the claim made by the petitioner, earlier a writ petition in W.P(MD)No.12969 of 2020 was filed and this Court vide order dated 01.10.2020, had specifically directed the respondents to disburse the refund due to the petitioner at the applicable rates of interest. Further, stated that there is no interim order in the appeal filed by the respondents and therefore, the petitioner is entitled for the interest as ordered by this Court dated 01.10.2020 in W.P(MD) No.12969 of 2020.

In view of the foregoing reasons, the High Court allowed the writ petition and held that the impugned letters of the first respondent dated 22.02.2021 and dated 13.04.2021 to be set aside directing the respondents to pay the interest due to the petitioner within a period of four weeks.

### For Month of July 2021

#### Circulars/Trade Notices/Notification

#### Circular 13/2021 customs dt 01.07.2021 - Online filing of AEO T2 & T3 application

Authorized Economic Operator ('AEO') certification programme is a programme available to any organization, established in India, which is involved



in global trade such as Importers, Exporters, Warehouse Operators etc. It is an internationally recognised certification programme and offers benefits of reduced time of clearance, lower costs, minimal disruption in cargo flow through customs etc. AEO-T1 status is the basic level of certification given under the programme which enables high level of facilitation at ports along with some other key benefits.

The Central Board of Indirect Taxes and Customs ('CBIC' or 'Board') vide Circular No. 13/2021 – Customs dated 01.07.2021 has launched a new version (V 2.0) for on-boarding of AEO T2 and T3 applications by way of online filing, real-time monitoring, and digital certification. The updated version which will be made accessible for both applicants and the customs officials from 07.07.2021 is designed to ensure continuous real-time, and digital monitoring of physically filed AEO T2 and AEO T3 applications for timely intervention and expedience.

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Under the new version, once the relevant annexures are uploaded by the applicant, the applicant will be able to monitor the processing of their application at each stage on real time basis on their respective dashboard. With effect from 01.08.2021, it will be mandatory for AEO T2 and AEO T3 applicants to register on the portal for AEO certification.

**Circular 18/2021 customs dt 31.07.2021 - Amendment in AEO Programme: Auto-Renewal of AEO-T1 validity for continuous certification based on continuous compliance monitoring**

The CBIC vide Circular No. 18/2021 – Customs dated 31.07.2021 reviewed the AEO programme considering the reported difficulties faced by the AEO-T1 (including MSME AEO-T1) entities in seeking renewal. In the light of difficulties faced and with a view to reduce the compliance burden, CBIC



allowed the facility of continuous AEO certification/ auto renewal for AEO-T1 entities due to which these entities would no longer be required to seek periodic renewal of their AEO-T1 certification every three years.

The facility of continuous AEO certification/ auto renewal for AEO-T1 entities is being made available subject to annual self-declaration submitted by the applicant through the AEO online web portal and review thereof. Such annual self-declaration is to be filed between 1st October to 31st December each year.

The review shall be conducted based on at least two annual self-declarations filed after issuance of AEO T1 certificate or from the date of last auto renewal of certification on account of successful

review, whichever is later. The concerned zone shall approve or revoke, as the case may be, continuous certification of the AEO-T1 entity based on the Comprehensive Compliance Review exercise done and inform the National AEO Programme Manager, Directorate of International Customs. If revoked, a new AEO-T1 certification would be granted through fresh application. The AEO entities certified between 1st January to 31st December of each year shall be exempted from filing the annual declaration for that year i.e., AEO-T1 entities certified on or after 01.01.2021 for the present year will not be required to submit annual self-declaration for the present year.

All AEO-T1 entities certified on or after 01.04.2019 shall stand migrated to the auto renewal process with effect from 01.08.2021.

**Notice No. 12/2021- 2022 dated 28.07.2021 - Foreign Trade Policy 2015-20 - Introduction of online Deemed Exports Application Module**

The Directorate General of Foreign Trade ('DGFT') vide Notice No. 12/2021- 2022 dated 28.07.2021 introduced an online Deemed Exports Module on the DGFT website as a part of IT Revamp for receiving applications under the Chapter 7 – Deemed Exports of FTP 2015-20.

Henceforth, the following applications are required to be submitted online through the importer/exporter's dashboard on the DGFT Website:

- i. Refund of Terminal Excise Duty (TED)
- ii. Grant of Duty Drawback as per AIR and
- iii. Fixation of Brand Rate for Duty Drawback

The members of trade can fill the online form with the payment of requisite fees and track the application using the file number generated while filing the application. The applicants will have to submit the corresponding supporting physical documents as prescribed under ANF-7A to concerned ('Regional Authorities') RAs within 7 days of online submission of such applications for processing of the applications at RAs.

DGFT further stated that old/legacy physical applications submitted earlier manually will continue to be processed manually by concerned RAs.



## LEGAL CLASSICS

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

### **South Eastern Coal Fields Ltd. vs. Commissioner of Central Excise & Service Tax [TS-1120-CESTAT-2020-ST]**

#### **Introduction:**

The taxability of services underwent a major overhaul from specific services being taxed to the negative list regime in 2012 under the erstwhile Finance Act, 1994, and presently is governed by Goods and Services Tax (GST).

For most industries, it is common to have contractual obligations/ clauses in the nature of cancellation charges, foreclosure charges, charges for breach of contract, penal charges for delay or quality issues etc. In the decade gone by, rising litigation is seen on the issue of liability to service tax/GST of the amounts received under contracts viz. in the form of liquidated damages, penalties.

One such issue to determine whether penalty, earnest money deposit forfeiture and liquidated damages under a contract would tantamount to be a consideration "for tolerating an act" in terms of Section 66E(e) of the Finance Act, 1994 came up before the Hon'ble CESTAT, Delhi in the case of **South Eastern Coal Fields Ltd. vs. Commissioner of Central Excise & Service Tax [TS-1120-CESTAT-2020-ST]**. This Ruling by the Tribunal lays down crucial principles, which could be applied to a large spectrum of contractual payments while testing applicability of indirect taxes on same. Further, the tests laid down in the above judgment may be equally relevant in the GST regime considering the said provision of Section 66E(e) from the Finance Act, 1994 is borrowed as is under the GST law.

#### **Decision in South Eastern Coal Fields Ltd.**

The Appellant in the said case was a public sector undertaking and a subsidiary of Coal India Ltd. In commercial contracts entered during the course

of business, certain clauses providing penalty for non-observance/breach of the terms of contract had been stipulated by the company. According to the Appellant, these clauses had been provided to safeguard the interest of the Appellant.

A show cause notice was issued to the Appellant demanding service tax for the period from July 2012 to March 2016 inter alia alleging that the Appellant had collected an amount towards compensation/



penalty from i) the buyers of coal on the short lifted/ un-lifted quantity of coal; ii) contractors engaged for breach of terms and conditions; and collected amount in the name of damages from the suppliers of material for breach of the terms and conditions of the contract which appeared to be taxable as a 'declared service' under Section 66E(e) of the Finance Act, 1994. The Principal Commissioner confirmed the demand made in the show cause notice. Being aggrieved by the said order, the Appellant preferred an appeal before the Hon'ble CESTAT.

The Hon'ble CESTAT after hearing the arguments of both the sides at length passed a detailed order and inter alia held as under:



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- i. The provisions of Section 66E(e) have to be analysed considering the decision of the Larger Bench of the Tribunal in *Bhayana Builders* [TS-140-Tribunal-2013-ST] and the decision of the Hon'ble Supreme Court in *Bhayana Builders* [2018 (2) TMI 1325] and *Intercontinental Consultants* [TS-72-SC-2018-ST]. There is marked distinction between "conditions to a contract" and "considerations for the contract". What flows from the said decisions is that "consideration" must flow from the service recipient to the service provider and should accrue to the benefit of the service provider. Further, the amount charged has necessarily to be a consideration for the taxable service provided under the Finance Act, 1994. Any amount charged which has no nexus with the taxable service and is not a consideration for the service provided does not become part of the value which is taxable.
- iv. The recovery of liquidated damages/penalty from other party cannot be said to be towards any service per se, since neither the Appellant is carrying on any activity to receive compensation nor can there be any intention of the other party to breach or violate the contract and suffer a loss. The purpose of imposing compensation or penalty is to ensure that the defaulting act is not undertaken or repeated and the same cannot be said to be towards toleration of the defaulting party. The expectation of the Appellant is that the other party complies with the terms of the contract and a penalty is imposed only if there is non-compliance.
- v. The reliance placed by the department on the decision of the Hon'ble Supreme Court decision in the case of *Fateh Chand* [AIR 1963 SC 1405] to conclude that compensation received is 'synonymous' with 'tolerating' or that the Supreme Court acknowledged that in a breach of contract, one party tolerates an act or situation is not correct.



### Provisions under the GST law:

Under the GST law, Schedule II of the Central Goods and Service Tax Act, 2017 ('CGST Act') provides for "Activities or transactions to be treated as supply of goods or supply of services". In other words, it provides for transactions deemed to be supply of goods or deemed to be supply of services. Point 5(e) of the said schedule provides for deemed supply of service as "agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act"

- ii. The activities that are contemplated under Section 66E(e), when one party agrees to refrain from an act, or to tolerate an act or a situation, or to do an act, are activities where the agreement specifically refers to such an activity and there is a flow of consideration for this activity.
- iii. In the present case, the agreements do not specify what precise obligation has been cast upon the Appellant to refrain from an act or tolerate an act or a situation.

Further, the term "consideration" has been defined under Section 2(31) of CGST Act as under:

*"consideration" in relation to the supply of goods or services or both includes —*

*(a) any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government;*

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*(b) the monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government :*

*Provided that a deposit given in respect of the supply of goods or services or both shall not be considered as payment made for such supply unless the supplier applies such deposit as consideration for the said supply*

Considering the deeming clause for service is identical as in the service tax regime and under GST, on a close reading of the said deeming clause along with the definition of consideration, it becomes amply clear that the findings given by the Hon'ble Bench would be crucial even while

determining the issue of taxability of penalty/damages under a contract in the GST regime.

Post the introduction of GST, a number of Advance Rulings have been passed on the aforesaid issue, which are in majority against the assessee. However, it may be noted that the same have been passed prior to the decision in the case of South Eastern Coal Fields Ltd. (supra). It would be interesting to see, what persuasive value does the ratio laid down in the aforesaid judgment holds when advance rulings or appeals against the same in future are decided on the similar issue. Having said this, considering the revenue involved in the said disputes and that the said decision has an industry wide impact the chances of department challenging the same before the higher appellate forum cannot be ruled out. It would be interesting to see how the litigation unfolds on this issue.





## QUOTABLE QUOTES

Compiled by: **Virangana Wadhawan (Principal Associate) and Surabhi Prabhudesai (Associate) - ELP**

“The Government has paid all the GST Compensation dues to the States for the financial years 2020-21 and 2021-22” – **Minister of State for Finance Shri Pankaj Chaudhary (Press Release dt. 19.07.2021)**

“Rationalisation of GST rate structure is on the government’s agenda. Three-rate structure is (...) important and even the inverted duty structure (is) also equally important to (...) fix.” – **KV Subramanian, Chief Economic Adviser (CEA) to the Government of India**

“(Inclusion of petroleum products under GST) is possible only when both the Central and State governments come forward and discuss the issue at length” – **President, PHD Chamber of Commerce and Industry**

“GST regime is a ‘monster symbol’ of curtailing the financial autonomy of states in the federal system of governance” – **H. D. Kumaraswamy, Former Chief Minister of Karnataka (News18)**

“High GST collection shows resilience of Indian economy”: **Anurag Thakur (Zee Business)**

“No proposal to reduce excise duty on petroleum products”: **FM Nirmala Sitharaman (The Free Press Journal)**

“Come September 1, non-filers of 2 monthly GST returns to be barred from filing GSTR-1” (**The Hindu**)

“Centre is open to discussing a change in tax rates on automobiles” – **Revenue Secretary Tarun Bajaj (The Hindu)**

“‘T.N. let down by Centre in GST compensation’ – **Tamil Nadu Congress Committee (TNCC) president K.S. Alagiri (The Hindu)**


“Robust GST revenues are likely to continue even in the coming months” – **Union Finance Ministry Statement**

“A technological tool to monitor revenue proceedings and litigation at all levels will ultimately serve the legitimate interests of the government.” – **SC Division Bench comprising of Justices DY Chandrachud and MR Shah**

“GST cess will be used till March 2026 to repay loans”: **Finance minister (Times of India)**



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Continued from Page No. 31 

### **Notice No. 11/2021- 2022 dated 28.07.2021- Issuance of Export Authorisation for SCOMET Items from new online Restricted Exports IT Module w.e.f. 05.08.2021**

The Directorate General of Foreign Trade ('DGFT') vide Notice No. 11/2021- 2022 dated 28.07.2021 introduced a new online module for filing of electronic, paperless applications for Export Authorizations for SCOMET Items with effect from 05.08.2021.

Accordingly, applications for issuance of export authorization of SCOMET items as well as amendment/re-validation thereof shall be submitted online. The SCOMET Cell, DGFT (HQ) will continue to be nodal point for all issues relating to SCOMET. SCOMET authorizations will continue to be issued from DGFT HQ, Udyog Bhawan, New Delhi through the New Online Module w.e.f. 05.08.2021. The DGFT further mentioned that all the existing pending applications as on 05.08.2021 will be automatically migrated to the new system and will be processed at DGFT(HQ).

The following processes will also be made available online as part of the new SCOMET Module:

- i. Authorisation for site visit by the foreign entity(ies) on the premises of the Indian Manufacturer / exporter;
- ii. Type of IEC to check production processes for SCOMET Export Items; and
- iii. Post Reporting of Export of SCOMET Items, Software/Technology for certain cases.

The technical support and guidance on the new process shall be accessed on DGFT website through the Help Manual and FAQ's.

### **Notice No. 17/2015- 2020 dated 27.07.2021 - Introduction of a new proforma (ANF) for filing applications for revalidation of SCOMET export authorisation**

The Director General of Foreign Trade (DGFT) vide Notice No. 17/2015- 2020 dated 27.07.2021 has

notified a new ANF proforma, namely ANF 20(d), for filing application for revalidation of SCOMET export authorisation, as required under para 2.74 (General Criteria for Applications for Authorisation to export items or technology on SCOMET List and end user certificate accompanied with the Application) of the Handbook of Procedures (HBP) of the Foreign Trade Policy (FTP) 2015-20.

### **Notice No. 09/2021- 2022 dated 16.07.2021 - New Foreign Trade Policy (2021-26) - inviting suggestions**

The Director General of Foreign Trade (DGFT) vide Notice No.09/2021- 2022 dated 15.07.2021 had invited suggestions /inputs from various stakeholders in order to prepare a new five-year Foreign Trade Policy.



The link to provide suggestions via google-form was valid up to 31.7.2021. Stakeholders including Export Promotion Councils (EPCs), Trade/Industry Bodies/Associations, Commodity Boards, RAs and members of trade, industry were requested to send their suggestions/inputs only through the Google Form, rather than email or paper-based submissions on or before 31.7.2021.

### **Circular No. 15/2021 customs dt 15.07.2021 - Implementation of RMS for processing of Duty Drawback claims**

The Central Board of Indirect Taxes and Customs ('CBIC' or 'Board') had decided to implement Risk Management System ('RMS') in export in two

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phases. In the first phase of implementation, RMS processed the data and provided output to ICES up to the stage of examination of goods. Export RMS thus allowed low risk consignments to be cleared based on self-assessment of the declarations by exporters.

The CBIC vide Circular No. 15/2021 dated 15.07.2021 implements the second phase where RMS will process the shipping bill data after the Export General Manifest (EGM) is filed electronically and will provide required output to ICES for selection of shipping bills for risk-based processing of duty drawback claims. A phased approach will be adopted for extending the risk-based processing of duty drawback shipping bills. NCTC will monitor and review the facilitation of duty drawback shipping



bills and take required measures to enhance the facilitation levels in due course. The above measure is expected to reduce the processing time taken for drawback claims, enable quick disbursement to exporters and rationalise Customs workload.

The second phase of export RMS also envisages post clearance audit (PCA) of the duty drawback shipping bills for which development of an electronic module for PCA of such shipping bills is underway in the Systems Directorate and till then the current instructions for audit, as stipulated in the Manual for Customs Post Clearance Audit, 2018 shall continue to be followed.

### **Circular No. 14/2021 dt 07.07.2021 - CBIC implements further measures in Customs Faceless Assessment and Clearance Processes**

The CBIC vide Circular No. 14/2021 dated 07.07.2021, issued further measures, for expediting the pace of assessment and customs clearance of imported goods in pursuance to roll out Faceless Assessment (FA) pan India w.e.f. October 31, 2020 and for streamlining processes for its effective implementation.

For enhancement, the facilitation level across all Customs stations would be increased to 90% relating to RMD (Release on Minimum Documentation) w.e.f. 15.07.2021. The working hours of all Faceless Assessment Group (FAGs) shall be uniform from 10 AM till 8 PM on any working day, National Assessment Centres (NAC) and jurisdictional Pr. Commissioners/Commissioners to administratively monitor that FAGs communicate the 'first decision' on BoE within 3 working hours after its allocation for expediting assessment process. Also, the total number of queries to be raised by Appraising Officer in respect of BoE is restricted to 3.

Specialized FAGs for certain commodities to become operational w.e.f. 15.07.2021 and FAGs have been re-organised to optimise their performance. For enhancing Direct Port Delivery (DPD), all advance BoE which are fully facilitated would now also be granted the facility of DPD over and above the present system of entity based DPD extended to AEO clients. Examination orders would now be generated by Automated process, and for addressing trade grievances, DG system shall soon shortly operationalise an Anonymized Escalation Mechanism (AEM) on ICEGATE to empower importers/Customs Brokers to directly register his/her requirement of expeditious clearance of a delayed BoE, which may be pending for assessment or examination.

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### **Finance Ministry press release dated July 15, 2021 - CBIC proactively put in place a COVID Response Plan (CRP) for speedy clearances of COVID-19 vaccines at all major airports**

The CBIC has set up a COVID Response Plan (CRP) for speedy clearances of COVID-19 vaccines at all major airports. CRP comprises of COVID-19 Vaccine Response Team (CVRT) at each Air Cargo/Courier Terminal that will function as a single point of contact, for all clearance related to COVID-19 vaccine shipments, to ensure that vaccines are given instant delivery upon arrival. CVRT will develop an SOP (covering Customs, local PGA and other stakeholders) and sensitize traders on the requirements for instant release of vaccines.

Additionally, CBIC has enabled the import/export of vaccines in relation to COVID -19 through Courier, by issuing the Courier Imports and Exports (Electronic Declaration and Processing) Amendment Regulations, 2020 which allow import and export of COVID vaccines through courier without any value limit. Considering vaccines require special containers equipped with temperature monitoring and tracking devices, provisions have been made for their duty-free temporary admission.

### **Circular No. 17/2021 dt 23.07.2021 - CBIC provides for lifetime validity of licenses/registrations, dispensing 'periodic renewals'**

The CBIC vide Circular No. 17/2021-Customs dated 08.07.2021 has undertaken a series of next generation reforms under the umbrella of 'Turant Customs' initiative to enable Faceless, Paperless and Contactless clearance, leading to enhanced Ease of Doing Business. The period of validity of licenses/registrations under the respective regulations is for a certain period after which such licenses/registrations are required to be renewed which was essentially a ground to review the compliance behavior of the license holder/registration holder which can be confirmed transaction-wise or can also be checked in a systemic manner by DGARM. The renewal exercise is an avoidable interface.

In certain situations, say, when the business is wound up, the licensee may wish to surrender the license/

registration or it may so happen that the person is not active for a long time, which may be misused.

Accordingly, the Board has decided to abolish renewals of Licence/Registration in Customs Brokers Licensing Regulations, 2021 and Sea Cargo Manifest and Transshipment Regulations, 2018 incorporating certain changes such as:

- i. To provide lifetime validity of the licenses/registrations;
- ii. To enable provision for making the licenses/registrations invalid in case the licensee/registration holder is inactive for the period exceeding 1 year at a time;
- iii. To empower Principal Commissioner or Commissioner of Customs to renew a license/registration which has been invalidated due to inactivity; and
- iv. To provide for voluntary surrender of license/registration.



Considering the far implications of these measures, it has been decided that above changes will be reviewed after six months (i.e. January 2022) by the Board for its impact and bring changes, if necessary.

### **Trade Notice No. 08/2021-22 dated 08.07.2021 - Acceptance, Processing, and Issuance of claims under MEIS, SEIS, ROSL, ROSCTL in the DGFT IT Modules**

The Director General of Foreign Trade (DGFT) vide Notice No.08/2021- 2022 dated 08.07.2021 informed that issuance of benefits/scripts under

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MEIS, SEIS, ROSL and ROSCTL schemes shall be kept on hold for a temporary period due to change in allocation procedure and during this period, no fresh applications would be allowed to be submitted at the online IT module of DGFT for these schemes.

The DGFT further informed that all submitted applications pending for issuance of scrips would also be on hold.

**Trade Notice No. 10/2021-22 dated 19.07.2021 - DGFT extends date for mandatory e-filing of non-preferential (CoO) through common-portal till Sep 31**

The Director General of Foreign Trade (DGFT) vide Notice No.10/2021-2022 dated 19.07.2021 [informed](#) that the electronic platform for Certificate of Origin (CoO) which was made live for issuing preferential certificates under different FTAs has now been expanded to facilitate electronic application for Non-Preferential Certificates of Origin as well. The objective is to provide an electronic, contact-less single window for the CoO related processes.

However, the option of submission and issuance of CoO (Non Preferential) by the issuing agencies



through their paper-based systems may continue further up to 30th September 2021. All Agencies as notified under Appendix-2E are required to ensure the on-boarding exercise is completed latest by 30th September 2021.

**Non imposition of Anti-dumping duty on various imports**

The Central Government on the basis of their anti-dumping investigation have decided not to impose the anti-dumping duty on imports of:

- 'Plain Medium Density Fibre Board having thickness less than 6mm' originating in or exported from Vietnam, Malaysia, Thailand and Indonesia, proposed in the said Final Findings;
- 'Acrylonitrile Butadiene Rubber (NBR)' originating in or exported from China PR, European Union (EU), Japan and Russia.

**Initiation of Anti-dumping investigation on various imports**

The Central Government have initiated Anti-Dumping investigations on imports of:

- 'Monoethylene glycol (MEG)' from Saudi Arabia, Kuwait and USA;
- 'Electrogalvanized Steel' from Korea RP, Japan and Singapore
- 'Clear Float Glass' from Bangladesh and Thailand;

**Notification No. 35/2021-Customs dated 12.07.2021**

**Exemption of basic customs duty on imports of specified API/ excipients for Amphotericin B and raw materials for manufacturing COVID test kits**

The Government has exempted various goods from payment of customs duty which are used as raw materials for manufacturing COVID test kits subject to the importer fulfilling the procedure set out in the Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017.

**Recent Case Laws**

**CESTAT: Accepts remittance of differential duty by importer as pre-deposit, allows refund [TS-283-CESTAT-2021-CUST]**

Assessee upon import of capital goods for their chemical plant had been subjected to recovery proceedings for wrongful claim of concessional rate of duty. In addition to the differential duty of Rs. 82,62,000 and penalty of Rs. 10,00,000, he

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was also required to pay fine of Rs. 40,00,000 for redemption of the goods held liable for confiscation by Collector of Customs, Mumbai vide order dated July 02, 1987. An appeal was filed against this order before CESTAT and was decided in favour of the importer upholding their claims. However, on filing refund, the claims were rejected.

CESTAT Mumbai formed a view that payment of differential duty was remittance towards pre-deposit. Held that Revenue erred in discarding the refund claim of importer and allows assessee's appeal. It was noted that entire dispute commencing with the notice to discard concessional duty claim on the goods imported in June/July 1987 and culminating in endorsement of declaration in BoE by Tribunal in October 1998, occurred before provisions of Section 129E of Customs Act, 1962 which were amended on August 6, 2014 to substitute discretion of appellate authority to determine extent of waiver of pre-deposit with mandatory pre-deposit.

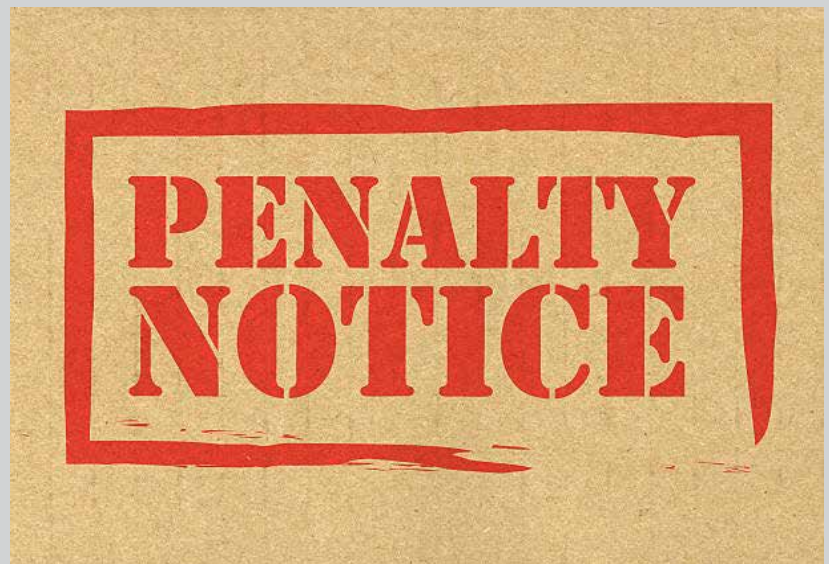
CESTAT acknowledged that at the time of filing of appeal "the bar of 'unjust enrichment' in indirect tax matters was, as yet, unknown to the tax administration as well as the Tribunal and only in the peripheral vision of the constitutional courts with the conceptual simplicity, moral soundness and ethical desirability of the doctrine tugging at the heartstrings." It was after the statutory recognition accorded by amendment of section 27 of Customs Act, 1962, with effect from September 20, 1991 by the Central Excise and Customs Laws (Amendment) Act, 1991, that the authoritative exposition of the doctrine by the Hon'ble Supreme Court in re Mafatlal Industries Ltd as interdict on access to the refund of taxes collected without authority of law offered the wider understanding, and acceptance, that it now has. Assessee accepted the denial of eligibility to the concessional rate of duty is not in doubt; the notice was objected to and the adjudication appealed against.

CESTAT contemplated that the purpose of proviso to section 129E of the Customs Act, 1962 is to "forestall initiation of recovery proceedings during the pendency of appeal and "for 'pre-deposit' to be restricted as designating only those that

are in compliance with such conditions, as may be prescribed for grant of stay, would that be considered inconsistent with the intent". CESTAT held that the position adopted in the impugned order that the original authority was, in discarding the claim of the assessee that the payment of differential duty was pre-deposit, is not incorrect and cannot be affirmed by us as legal and proper.

### **CESTAT: Mere export through third-party exporter does not tantamount to EPCG licence condition violation [TS-310-CESTAT-2021-CUST]**

The assessee is a manufacturer of 'knitted girls pyajama' using 'knitted fabrics'. M/s Rithvikk Garments, a third party exporter purchased the said goods from the assessee who manufactured the said knitted fabrics by using the capital goods imported under EPCG License. CESTAT Chennai set aside the order of confiscation and consequent penalty on the assessee (job worker) who had exported goods through third-party exporter.



CESTAT disregarded Revenue's allegation of violation of conditions of Export Promotion Capital Goods (EPCG) license.

On perusal of EPCG license issued by Directorate General of Foreign Trade (DGFT) in 2015, it was observed that the period for completion of the export obligation is six years. The contention of the assessee that SCN alleging non-fulfilment of export obligation is premature and is without merits.

The CESTAT also observed from the conditions



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of the EPCG license, that the license holder may discharge the export obligation by way of direct exports as well as through third party exports. It was observed that the assessee, who was a job-work manufacturer produced various challans and invoices as proof of supply of yarn by third-party exporter and had read the conditions of EPCG license which stipulated mentioning of name of third-party exporter, EPCG license holder, license number and date on shipping bill.

In view of this, CESTAT concluded that it cannot be said that merely by exporting the goods through third party exporter / Rithvikk Garments, the license holder (assessee) had violated the conditions of the EPCG license and besides, there is no evidence to show that assessee M/s. Rithvikk Garments had intentionally made any false endorsements on the shipping bill. Thereby, CESTAT allowed the appeal.

**Commissioner (Appeal) order requiring total pre-deposit of 17.5% till second appeal stage, unsustainable [TS-319-CESTAT-2021-CUST]**

CESTAT Ahmedabad modifies Commissioner (Appeals) [First Appellate Authority (FAA)] order deeming it to be “not sustainable” requiring assessee to pay a total pre-deposit of 17.5% [i.e., 7.5% at First Appellate stage and 10% at Tribunal stage].

Assessee imported ‘Deodorized Field Condensate Crude Oil’ and ‘Murban Crude Oil’ against which duty demand was raised by Revenue, subsequently, the demand was challenged before the FAA and demand of ‘Murban Crude Oil’ was dropped. Assessee preferred an appeal against the AA order upholding demand and since assessee had deposited 7.5% of duty demand, it sought adjustment of 2.5% of pre-deposit and claimed refund of the balance amounting to Rs. 1.99 cr. After refund was sanctioned, the Revenue went in appeal and adjusted the sanctioned refund amount against pending Duty Drawback

claims, the FAA took a view that as assessee is required to pay 10% separately over and above 7.5% towards pre-deposit in terms of Section 129E of Customs Act, the refund of balance pre-deposit was not due to the Assessee.

In view of Delhi HC decision in case of Santani Sales Organization, CESTAT opines that assessee is required to pay total 10% i.e. 7.5% at first appellate stage and remaining 2.5% at the stage of appeal before the CESTAT. On the issue of whether adjustment of sanctioned refund of Rs 1.99 cr. against the sanction of drawback is correct or otherwise, notes that the amount of drawback sanctioned by the Deputy Commissioner was not disbursed fully but only partial disbursement was made and balance was adjusted against the amount already disbursed, as a result of the sanction of refund of pre-deposit.

Accordingly, to give consequential effect, remanded the matter back to the Adjudicating Authority to decide afresh only on the aspect of adjustment of sanctioned refund against drawback claim.



REFUND

## AUTHORS

Nishant Shah (Partner)  
Stella Joseph (Partner)  
Sweta Rajan (Partner)  
Jitendra Motwani (Partner)  
Sanchita Rungta (Associate Partner)  
Pranav Pagaria (Associate Director)  
Aswin Ramesh (Principal Associate)  
Nischal Agarwal (Principal Associate)  
Rinkey Jassuja (Principal Associate)  
Virangana Wadhawan (Principal Associate)  
Rushil Shah (Senior Associate)  
Surabhi Prabhudesai (Associate)  
Prakhil Mishra (Associate)  
Samyuktha Srinivasan (Associate)  
Anushree Kothari (Advocate)

## KEY CONTACTS

### ROHIT JAIN | PARTNER



T : + 91 22 6636 7000  
M : + 91 90046 04350  
E : [RohitJain@elp-in.com](mailto:RohitJain@elp-in.com)

Tax

### NISHANT SHAH | PARTNER



T : + 91 22 6636 7000  
M : + 91 90046 04323  
E : [NishantShah@elp-in.com](mailto:NishantShah@elp-in.com)

Tax

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