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ELP ECONOMIC LAWS PRACTICE
ADVOCATES & SOLICITORS

ISSUE - 13

NAVIGATING GST 2.0

- THOUGHT LEADERSHIP
- LITIGATION ISSUES FACED BY THE BANKING SECTOR
- FROM THE BENCH – KEY JUDICIAL PRONOUNCEMENTS
- EXPERT SPEAKS
- LEGISLATION AT WORK – RECENT AMENDMENTS
- ALLIED LAWS
- LEGAL CLASSICS
- QUOTABLE QUOTES

CONTENTS

THOUGHT LEADERSHIP 04

Taxation reforms endure to attain maximum transparency and therefore, requires details to be filed by a taxpayer in its returns. The author envisages the need to review or audit of such self-assessed returns filed by businesses, that ideally such audit should be undertaken at a time as early as possible post filing of the final return by businesses. This would facilitate businesses to understand divergence, if any, in the tax position adopted, states the author.

LITIGATION ISSUES FACED BY THE BANKING SECTOR 07

In recent years, banks have started operating on the backbone of technology. This has created interesting issues, especially from a tax perspective. Given this backdrop, the authors highlight that even though the IDT regime has modified into a GST regime, some of these issues persist as pending legislation items shown as 'contingent liabilities' in the bank's financial records and the COVID-19 pandemic slowed down the pace at which these issues were being taken up at judicial and quasi-judicial forums.

FROM THE BENCH – KEY JUDICIAL PRONOUNCEMENTS 13

This module lists some of the landmark judgments and rulings of the Hon'ble Supreme Court, High Courts, Authority for Advance Rulings and Appellate Authorities for Advance Rulings.

EXPERT SPEAKS 17

Contains excerpts from the interview of Ms Lata Daswani Chief Executive Officer for Everest Fleet Pvt Ltd.

LEGISLATION AT WORK – RECENT AMENDMENTS 19

The said Chapter enlists all the amendments, modifications, clarifications, and notifications issued in respect of Indirect taxes, GST, Governmental Policies and other initiatives.

ALLIED LAWS 22

This Section stresses on recent developments in foreign exchange policies, exemption provisions under GST, validity of FTP, etc.

LEGAL CLASSICS 30

Emphasizes on a noteworthy judgment of pre-GST era, from which precedence can be drawn and made applicable under the GST regime as well.

QUOTABLE QUOTES 32

Enlists quotes from noteworthy GST experts.

INTRODUCTION

Note from Editor:

Budget 2022 brought in another set of significant modifications be it extending time limit for certain compliances in the GST laws or change of definition of 'Proper Officer' under the Customs Act. It is expected that India's tax policies should align with the long-term goals in the coming time so as to aspire exponential growth which shall lead to gain investors' confidence. India has recorded highest ever GST Collections despite the pandemic, thus, the Country has been on the greener side of development and down the line, we can expect unparalleled development in manifold sectors.

We are ecstatic to share the 13th issue of our GST Newsletter which revolves around the recent developments in the territory of indirect taxation, and deciphers the changes in policy, budget discussions, landmark judgments, Circulars, Notifications and much more. In the **Thought Leadership** chapter, ELP Partner **Nishant Shah** accentuates that GST audit of periodical returns is endeavored to avoid the divergence in tax position and surmises how COVID relaxations granted for filing returns has restricted the authorities from undertaking GST audits. The author recommends "Mutual understanding between the businesses and the GST audit party" hoping that same would address the concern of businesses and tax authorities.

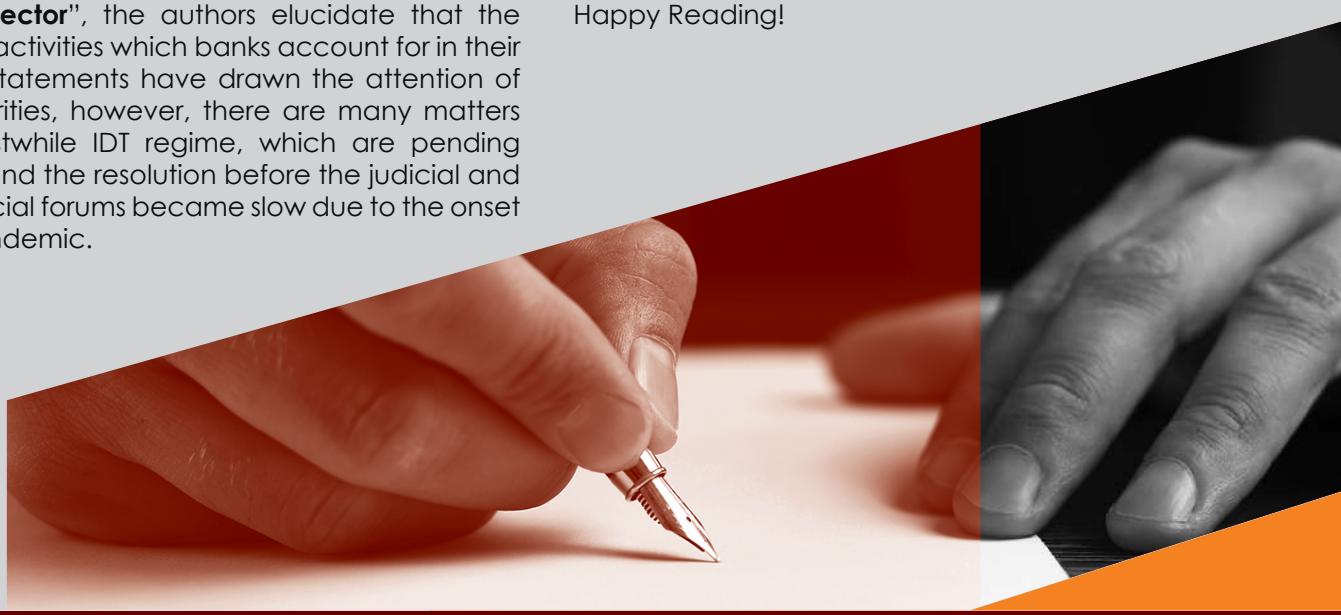
Banking sector is the backbone of any economy, and now with the advent of technology, the said domain has grasped the pace and emerged as one of the most developed sectors. In the **Cover Story** chapter titled "**Litigation issues faced by the Banking Sector**", the authors elucidate that the gamut of activities which banks account for in their financial statements have drawn the attention of tax authorities, however, there are many matters of the erstwhile IDT regime, which are pending litigation and the resolution before the judicial and quasi-judicial forums became slow due to the onset of the pandemic.

The Chapter **From the Bench – Key Judicial Pronouncements** focuses on 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** Segment encompasses the excerpts from the interview of **Ms. Lata Daswani, (Chief Executive Officer for Everest Fleet Pvt Ltd.)** who enlightens that Government should focus on simplifying the law to the extent possible so that there is no ambiguity, also, it will save a lot of time of litigation and time cost on trivial issues. The Expert further cues that, *"reduction in rate of applicable interest on account of wrong availment and utilisation being clarified retrospectively of ITC is a welcome move which set aside the long pending irregularity in the interpretation of law"*.

In the Module **Legislature at work – Recent Amendments**, the Newsletter enumerates all the amendments, updates, clarifications and modifications to the provisions of the indirect tax laws by the Government. Moving ahead, The **Allied Laws** section traverses across the noteworthy Customs Notifications and the Heading **Legal Classics** dwells on a phenomenal judgment of pre-GST era which can be made applicable in the GST regime as well. We wrap up the Newsletter with some noteworthy quotes from GST experts.

We wish to apprise you that, while Taxsutra has been updating the readers with regards to all updates on a real-time basis, going forward we shall put forth a crisp quarterly edition of Newsletter which shall cover critical updates. We hope you have an engrossing read of the 13th issue of **'Navigating GST'**.

Happy Reading!



THOUGHT LEADERSHIP

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

Advent of the GST audit

All taxing statutes carry provisions relating to submission of data, in the form of periodical returns, to the concerned authority, based on which tax is calculated and deposited with the Government treasury. As the world has moved towards trust-based compliances, most of these returns are self-assessed by the tax payer. The tax authority, however, maintains a team of individuals that would on selective basis undertake a review

or audit of such self-assessed returns filed by businesses. Ideally such audit should be undertaken at a time as early as possible post filing of the final return by businesses. This would facilitate businesses to understand divergence, if any, in the tax position adopted by them as against that accepted by the authorities, thereby enabling businesses to decide whether they intend to modify the tax position adopted or litigate the position directed by the authorities.

Post the introduction of GST on 1st July 2017, businesses filed their tax returns on periodic basis, subject to relaxations granted on timelines for filing of initial annual returns to compensate for teething issues. Preferably, audit of GST returns filed by businesses should have been undertaken and carried out immediately post the filing of annual returns for the initial period of July 2017 – March 2018. However, the extended relaxations granted for filing of such annual returns for the initial period followed by the national and global lockdown due to the COVID-19 pandemic, restricted the authorities from undertaking GST audits in the manner as they would have ideally preferred.

Recently, the Hon'ble Chairman – Central Board of Indirect Taxes and Customs (CBIC), Mr. Vivek Johri made a statement in relation to GST Audits, "*Apart from verifying that those who come into the tax base file their returns and pay their taxes, what we need to also look at now—and we have already started because it is very much part of any tax administration—is the* ***need to scrutinize the returns properly to see that the data that has been turned in is valid and compares well with the financials which the business has reported. We will deal with this with scrutiny and audit***". This clearly indicates the Department's intention to pick-up pace and catch-up on the lost time in relation to undertaking audits. This consequently is expected to result in enhanced inquiry and scrutiny being faced by businesses. This clearly indicates the intent of the GST authorities to increase the audit activity and the number of businesses covered under such audits.

The GST legislation under Section 65 of the Central Goods and Services Tax Act, 2017 (**"CGST Act"**) and corresponding provision under the State and Union Territory Acts provides for the rights of GST authorities to undertake audits. Analysed below are some of the practical implications arising from the relevant provisions under the GST law:

1. In terms of Section 65(3) of the CGST Act, if the registered person is not informed by way of a **notice in Form ADT-01 at least 15 days in advance** prior to the conduct of audit, such a non-compliance may be objected by the registered person on the grounds of reasonable opportunity not been provided, for being prepared and submitting relevant information/documents for the purpose of GST audit.

THOUGHT LEADERSHIP

2. While the audit in terms of Section 65(4) of the CGST Act shall be completed within a period of **3 months from the date of commencement of audit**, in terms of the GST audit manual issued to officers by the CBIC, the indicative duration for conduct of GST audit which includes desk review, preparation and approval of audit plan, actual audit and preparation of audit report wherever necessary, is 6-8 working days for large taxpayers, 4-6 working days for medium taxpayers and 2-4 working days for small taxpayers, where the period covered under audit is of 1 financial year. In case the audit coverage is for five years, the number of days may be increased to maximum of 16/12/8 days for large, medium and small taxpayers respectively.

3. While Section 65 of the CGST Act grants enormous power to the GST officers as regards requisitioning for auditing various records, information, documents etc, the exercise thereof must be balanced in line with the instructions provided to GST officers in terms of the GST audit manual. In terms of the GST audit manual, confidentiality of sensitive information/documents furnished to an auditor during the course of audit should be maintained by the GST officers. The GST officer shall not use the information/ documents provided by the registered person for the purposes other than GST audit without the written consent of the registered person. Thus, maintaining confidentiality of the information/documents is necessary to secure co-operation and trust of the registered person for the purpose of GST audit.

4. If the audit proceedings have been initiated under Section 65 or Section 66 of the CGST Act, the GST officer does not have the power [pursuant to Section 83(1) of the CGST Act] to provisionally attach any property of the registered person including the bank account to protect the interest of revenue. Therefore, if any officer threatens/ attempts to provisionally attach any property involving Section 83(1) of the CGST Act, such invocation would be inappropriate and such provisional attachment can be challenged by the registered person.

While every business is unique and has trade specific transaction, issues and modus operandi, there is a single GST law applicable to all such variations, and the same set of GST authorities undertaking audits of varied businesses. This often results in a situation of disconnect between the essence of transaction undertaken by businesses and the understanding thereof by the GST audit authorities. Businesses are therefore alerted to ensure that they spend enough time at the start of such audits explaining and familiarizing the relevant audit authorities with their operations to ensure alignment of understanding as regards the

THOUGHT LEADERSHIP

underlying transactions. During the initial phase of the audit proceedings, audit authorities on their parts also, generally identify and raise issues of generic nature as would be applicable to all businesses but, where the applicable, legislative provisions lack clarity. Some of these are:

i. Treatment adopted by businesses to cross-charge / ISD, etc;

ii. GST treatment meted out in relation to employee payment and receipts;

iii. Treatment to ITC in relation to free supplies, etc;

iv. Credit in relation to plant and machinery installed along with the factory building.

Businesses would be well advised to ensure that they keep necessary data and information available at their end to meet with enquiries on all or any of the above issue, as applicable, since these are expected to be the initial line of queries to be raised by the visiting GST audit party. As the saying goes "Well begun is half done" and therefore effective, conclusive response provided by businesses to initial queries raised by the audit parties would ensure mutual comfort and understanding as also facilitate a smooth and efficient conduct of the audit proceedings.

Businesses in India have come a long way in ensuring due compliance aided by digitization. The GST department has also progressed through digitization and is now well equipped and aided with such specific data that enables them to structure the conduct of their audits efficiently. Mutual understanding between the businesses and the GST audit party along with appropriate prior preparation will go a long way in ensuring that the audit proceedings are neither a concern for businesses nor a reason to doubt for tax authorities.

LITIGATION ISSUES FACED BY THE BANKING SECTOR

The following chapter has been authored by Sweta Rajan (Associate Partner), Rushil Shah (Senior Associate), Samyuktha Srinivasan (Associate) - ELP

LITIGATION ISSUES FACED BY THE BANKING SECTOR

Amongst the various sectors which have seen incredible growth in terms of not just value, but also scope, is the banking sector. Traditionally, banks undertook functions such as accepting deposits, granting loans, advances, cash, credit, overdraft and bill discounting. Over time, they have extended their function to include investment services, insurance covers etc. The idea that banks deal only in transactions in money, falling outside the scope of taxability would be an oversimplified and incorrect statement.

In recent years, banks have started operating on the backbone of technology. This has created interesting issues, especially from a tax perspective. The gamut of activities which banks account for in their financial statements have drawn the attention of tax authorities. Further, given the high volume of transactions undertaken on a daily basis, the cumulative value of money flow is very significant. Tax authorities have therefore been busy identifying various issues on taxability and valuation, relevant to all banking companies, Indian or foreign.

Even though the indirect taxation system has transitioned into the GST regime, some of these issues persist as pending legislation items shown as 'contingent liabilities' in the bank's financial records.

Needless to state, the COVID-19 pandemic slowed down the pace at which these issues were being taken up at judicial and quasi-judicial forums. However, the situation appears to have stabilized and most forums have re-initiated proceedings at full capacity. We can expect that these proceedings will speed up now, and companies should suitably prepare for the same.

This article visits some key issues pending at various forums. These issues are broadly categorized under different areas of the banking business.

Retail Banking:

1. Service tax on Average Minimum Balance charges

Banks, in consonance with RBI Guidelines, specify an Average Minimum Balance ("AMB") that is to be maintained in each customer's bank account on a monthly or quarterly basis in order to avail the benefits of a particular bank account. The AMB is specified as per the type of bank account chosen by the customer, and some bank account types may also not have an AMB requirement. In case a customer fails to maintain AMB, they are liable to make payment of 'Non-Maintenance Charges' ("NMC") to the bank. The NMC is fixed competitively as per the NMC fixed by other banks.

The Department has alleged that service tax is payable on NMC, and that maintaining AMB brings various benefits to the bank such as higher certainty, greater dependability between alternative sources of finance, better guarantee of reducing vulnerability etc. Therefore, NMC is in the nature of consideration for the non-maintenance of AMB; in other words, NMC is in lieu of the non-conferment of the above benefits, and thus is liable to service tax.

LITIGATION ISSUES FACED BY THE BANKING SECTOR

Bank's position: Agreeing to an AMB may mean certain additional features as compared to an account where AMB is not maintained. In other words, it is similar to an entitlement provided to customers without charging any consideration from the perspective of business development, maintaining market etc. The customer voluntarily opts for the AMB obligation in lieu of such other entitlements, and this cannot be treated as indirect or hidden consideration in the hands of the bank. The non-maintenance of AMB does not influence the rendition of services by the bank to its customers. NMC is merely a levy of penalty if the account balance falls below AMB, and there is no service or consideration in the picture. Therefore, no service tax should be on NMC.

This issue persists under the GST regime.

2. Service tax on subvention income received by NBFC from vehicle dealers

Banks run certain specific finance schemes jointly with manufacturers and dealers of automobiles and vehicles ("Partners") wherein banks offer loans / finance at nil or low rate of interest to authorized dealers and customers of the Partners, and the Partners arrange to make available vehicles against loans. The amounts representing interest component that was otherwise recoverable from the customer / borrower availing the loan facility, referred to as subvention, is compensated by the Partners and treated as interest income.

The Department alleged that the subvention received by banks are for promotion of the Partner's products and liable to tax as 'Business Auxiliary Service'.

Bank's position: Banks do not receive any consideration. In fact, banks are obligated to pay an agreed consideration to Partners for being appointed as exclusive financiers for the vehicles. Further, banks voluntarily offer such schemes to only those dealers and customers of the Partners, who are eligible as per independent parameters, and not out of a contractual obligation with the Partners.

This issue persists under the GST regime.

Credit Cards:

3. Service Tax on Interchange Fee; Denial of CENVAT Credit on payment of Interchange Fee

Interchange fee is a fee earned by credit card issuing banks while participating in a credit card transaction. When a card is swiped by a customer on a point-of-sale machine ('POS' machine) at a merchant's establishment, the cardholder obtains credit for a month-end payment based on the available credit on the card, and the merchant establishment acquires business at a nominal processing fee known as Merchant Discount Fee ('MDF') paid to the merchant bank / acquiring bank ("AB"). The AB provides the POS machine to the merchant, and receives MDF, which includes an element of interchange fees. The AB pays service tax on the entire amount of MDF (including interchange fees), and then remits the tax-pad interchange fee to the issuing bank.

The Department alleged that interchange fee is once again taxable in the hands of the issuing bank as Banking and Other Financial Services ("BOFS")

which included 'Credit Card Services' under Section 65(72)(zm) / 65(105)(zm) (for the period prior to 01.05.2006), 'Credit card, debit card, charge card or other payment card service' ('CCS') under Section 65(33a) read with Section 65(105)(zzzw) of the Finance Act, 1994 (for the period prior to the Negative List regime) and Section 65B(44) (under the Negative list regime).

LITIGATION ISSUES FACED BY THE BANKING SECTOR

Bank's position: Interchange fee is not a service recompense, absent any service relationship with the AB or merchant, and hence, cannot suffer service tax. In any case, interchange fee is the issuing bank's share of the tax-paid MDF charged by the acquiring bank to the merchant. The service, if at all, is a composite service provided by the acquiring bank and issuing bank, consideration for which is entirely taxed in the hands of the acquiring bank. Such composite service cannot be artificially dissected for a portion of it to suffer tax again in the hands of the issuing bank, as this would amount to double taxation. This position that taxing the amount of interchange fee (which is included in MDF) in hands of both, the issuing bank and acquiring bank would amount to double taxation has been accepted by the Hon'ble Supreme Court in the decision of Commissioner of GST and Central Excise v. Citibank NA (CA 8229/2019; CA 89/2021) though the Division Bench has given divergent views on certain other aspects.

Presently, the appeals in relation to the position of law for the periods (i) prior to 01.05.2006 (under 'Banking and Financial Services'), (ii) 01.05.2006 to 01.07.2011 (under 'Credit Card Services') and (iii) post negative list are all pending before the Hon'ble Supreme Court. In respect of (ii) and (iii), the Division Bench of the Hon'ble Supreme Court has passed a split verdict and referred the issue to a Larger Bench.

Documents to establish availment of credit: Some banks have paid tax and availed credit on the basis of a Daily Settlement Report (DSR), which contains a sum of all transactions on the acquiring and issuing side for each bank, without any details of who the corresponding acquiring bank or merchant establishment is, either at a transaction level or at a cumulative level. The Department has sought to deny credit on the basis that the DSR is not a valid duty payment document under Rule 9 of the CENVAT Credit Rules, 2004.

This issue does not persist under the GST Regime due to changes made by Card Associations in the structure of the transaction.

Bullion Division

4. E-Invoice whether required for movement of bullion

Certain banks are engaged in the business of supply of bullion through their network of branches for which they store bullion at designated bullion vaults owned by them or third-parties. The Department alleges that e-invoices have not been issued while supplying bullion.

Bank's position: Notification No. 13/2020–Central Tax dated 21.03.2020 ('e-invoice Notification') notifies the class of persons who shall issue e-invoice. Specifically, registered persons referred to in Rule 54(2) of the CGST Rules are specifically excluded from the requirement to issue e-invoice. Rule 54(2) of the CGST Rules refers to registered persons, namely insurer, banking company, and financial institution, including a non-banking financial company who can issue consolidated monthly invoice. Therefore, on a joint reading of the e-invoice Notification and Rule 54(2) of the CGST Rules, banking companies are excluded from the requirement to issue e-invoices. Further, the e-invoice Notification is not specifically restricted only to supply of services made by an insurer, banking company, or financial institution and therefore can be interpreted to be relevant to the supply of bullion as well. Therefore, the

LITIGATION ISSUES FACED BY THE BANKING SECTOR

supply of bullion by a banking company will be covered under the exemption regarding the issue of e-invoice.

Investment Banking

5. Service Tax on delayed payment charges collected by stock brokers

Investment companies, banks and stock brokers charge 'Delayed Payment Charges ("DPC")' from their customers payable where payment obligations are not met by them in a timely manner. The Department has initiated proceedings to recover Service Tax on DPC, as being consideration for tolerating the non-performance by the customer under Section 66E(e) of the Finance Act, 1994.

Bank's / stock broker's position: The transaction is in the nature of a loan/ advance to the customer, wherein DPC is interest charged in lieu of the delayed payment. The activity of extending loans/advance wherein the consideration is received in the form of interest is covered under the Negative List and hence not taxable. This treatment that DPC is interest on loans / advances is specifically clarified under the GST regime in the FAQ on Banking, Insurance and Stock Broker Sector dated 27.12.2018 as well as for the pre-negative list regime vide Circular No. 137/25/2011- S.T. dated August 03, 2011.

This issue persists under the GST regime.

Miscellaneous

6. Demand of Service Tax on Head Office Expenses

Head Offices ("HO") of foreign banks incur certain stewardship, executive and general administration expenditure outside India. These are incurred on their own account and discretion, for the benefit of the bank's business and brand globally. The HO expenses are allocated to its branches globally, in keeping with the international taxation and transfer pricing requirements. The Indian branch claims a deduction of the HO expense in terms of Section 44C of the Income-tax Act, 1961. While some banks remits this portion of the allocated HO expenses to its HO, other banks do not remit any amount to the HO.

The Department has alleged that the HO expenses allocated to the Indian branch is in lieu of 'Business Support Services' received from the HO, and liable to service tax on reverse charge basis.

Bank's position: Expenses remitted to the HO are not specifically requisitioned by the branch. They are incurred by the HO suo moto and allocated to the branches only for corporate taxation and transfer pricing purposes. The remittances pertain to amount transferred between different branches of the same entity, and there is no service relationship inter se. Thus, no support services are provided and the allocated expenses are not in the nature of consideration for service tax purposes.

This issue persists under the GST regime.

7. Issue pertaining to taxability of Joint Promotion Agreements

Banks run joint promotion schemes with merchants, to offer their customers an upfront discount or cash back. The cost of such discount/cashback is usually shared between the bank and the merchant at an agreed proportion. The banks and sellers bear their respective share of the promotion expenses. The Department alleges that such joint promotion schemes, amount to rendition of services by the banks to the merchant and vice versa.

Bank's Position: The promotional activities are performed by the bank for their customers and not for the seller. As there is no consideration attached to such activity, it would be outside the scope of taxable service. In the absence of any express

LITIGATION ISSUES FACED BY THE BANKING SECTOR

agreement between the bank and the merchant, there cannot be any rendition of service by the bank to the merchant. Promotions are carried out to increase their own respective business, which at most is a service to self, not amenable to service tax. Though such promotion may incidentally increase the merchant's business, that alone cannot be said to involve a service by the bank to the merchant.

This issue persists under the GST regime.

8. Denial of CENVAT Credit of service tax on statutory expenses (insurance premium paid to DICGC and brokerage on sale/purchase of government securities)

Banks incur various expenses as statutorily mandated. For instance, as an institution requiring large sums of money, as raw material for carrying out its business, banks are required to: (i) obtain license as Authorised Dealers ("AD") for providing underwriting services to the RBI for which they are required to buy and sell Government securities, and

(ii) insure a specified percentage of their deposits with the Deposit Insurance and Credit Guarantee Corporation (DICGC) and pay premium. These expenses suffer service tax. The Department has alleged that CENVAT Credit on such brokerage and insurance premium are not consideration for 'input services'.

Bank's Position: The money received as deposit from customers is like a raw material for banks to enable them to carry on business. Premium paid towards protecting such money would thus be towards an input service. Brokerage is paid for rendering taxable output services of underwriting. Per settled law , 'input service' is to be given a wide import and credit cannot be denied on input services that have a nexus with the rendition of output services. Further, given that these are expenses that are statutorily mandated, they should be treated as input services.

9. Service tax on activities of Indian branches as 'intermediary services' (ECBs and Correspondent Bank's services)

With the growth of MNC banks having presence across the globe, there are activities performed by the Indian branch as part of its global function. The department in certain cases has sought to treat such activity as 'intermediary service. For instance:

- External Commercial Borrowings (ECB) are foreign currency commercial loans availed by Indian borrowers from "recognized lenders" including offshore branches of international banks. The Indian branch of such MNC bank identifies the foreign branch who can disburse ECB loans. The Indian branch acts as the face of the bank and orchestrates the entire disbursement of the loan. Per RBI guidelines, the actual disbursement of the loan happens from the foreign branch. In this regard, the Indian branch usually enters into an agreement with the disbursing branch to perform key functions in relation to disbursement of ECBs. The Department alleges that services rendered by the Indian branch do not qualify as export of services but are in fact intermediary services, taxable in India.
- Similarly, correspondent bank services are those where the Indian branch acts as the face of an MNC bank which does not have presence in India, for providing services to customers in India. Such activities are carried out by the Indian branch to further its own business and client relationship, and not to promote/ market the services of the foreign

LITIGATION ISSUES FACED BY THE BANKING SECTOR

branch. The MNC bank, as such, is a single legal entity, who along with all its branches functions as a singular unit in respect of its global business/ operations. Department alleges that the correspondent bank's services rendered by the Indian branch are intermediary services, taxable in India.

Bank's Position: These services are almost entirely performed by the Indian branch and the Indian branch cannot be said to have merely facilitated or arranged the lending services but should be construed as the actual provider of services (main service). In fact, it is the foreign branch who facilitates the Indian branch by assisting it with mere disbursal of the loan amount or with granting the Indian bank an opportunity to correspond for it.

From another perspective, the arrangement does not create a service relationship between the banks. It is only a joint exploitation of an opportunity where there is a sharing of revenue earned through such joint activity. The deeming fiction under the definition of service (treating establishments as distinct persons) is not elastic enough to govern the corporate intercourse and commercial indivisibility of a headquarters and its branches. For service tax to apply on inter-branch transactions, there has to be a flow of service from one to the other.

These issues persist under the GST regime.

FROM THE BENCH - KEY JUDICIAL PRONOUNCEMENTS

The following chapter has been authored by Authors: Gopal Mundhra (Partner), Parth Parikh (Principal Associate), Dinesh Rohera (Senior Associate) - ELP

CONTENTS

Litigation Learnings

1. Cummins India Ltd. [TS-747-AAAR(MAH)-2021-GST]

Facts of the case

- The applicant procured common input services at its head office in Maharashtra. The GST paid on such input services was availed as Input tax credit at the head office.
- The costs incurred by head office for procurement of such common input services, is booked by head office in its own books of accounts. Such cost is then allocated, and recovered proportionately from each of the recipient units to determine the office/ plant-wise profitability as part of an internal procedure.
- An application seeking ruling on following questions was filed:
  - Whether availment of input tax credit of tax on common input supplies on behalf of other unit/units registered as distinct person, and further allocation of the cost incurred for same to such other units, qualifies as supply and attracts levy of GST?
  - If GST is leviable, whether assessable value can be determined by arriving at nominal value?
  - Once GST is levied and ITC thereof is availed by recipient unit, whether the Applicant is required to register itself as an Input Service Distributor for distribution of ITC on common input supplies?

Ruling

- The head office is not entitled to avail and utilize the Input tax credit on common input services inasmuch as such services are being consumed by the Branch Offices/Units in the course or furtherance of their businesses, and not by the Head Office. It is mandatory to obtain ISD registration for distribution of credit of GST paid on the common input services.
- Availment of common input services from the third-party service suppliers on behalf of the branch offices/Units would qualify as supply of services between distinct persons in accordance with Section 7(1)(a) of the CGST Act, 2017. The cost of common input services would be excluded from the value of supply of the facilitation services as such costs have been incurred by the head office in the capacity of a pure agent of the Branch Offices/Units.

- The assessable value of the services provided by the head office to the branch offices/ units can be determined as per the second proviso to Rule 28(c) of the CGST Rules, 2017, which provides that value of the tax invoice will be deemed as the open market value of the services.

ELP Comments

The AAAR ruling is questionable on many counts and is clearly passed without proper appreciation of the provisions under GST. There is no explicit provision under GST which makes ISD registration

FROM THE BENCH - KEY JUDICIAL PRONOUNCEMENTS

mandatory. The CBIC FAQs on banking, insurance and stock-brokers sector itself suggest that an office would have the option of both, invoicing under cross charge mechanism or distribution of credit under ISD mechanism. The finding on treatment of head office as pure agent of branch offices is also devoid of any merit whatsoever. While advance rulings are not binding on other assessees, considering the increasing Departmental audits and DGGI enquires, this ruling may have a far-reaching impact on the industry at large.

2. GRB DAIRY FOODS PVT. LTD. (TN/ AAAR/04/2022(AR))

Facts of the case

- With the objective of expanding the market share, the applicant launched a sales promotional scheme named as 'Buy n Fly' scheme to promote second leg sales in supply chain.
- Under the scheme, the retailers were rewarded on fulfilment of the purchase target.
- Different rewards were prescribed for different slabs of purchase targets.
- The applicant filed Advance Ruling application to understand the eligibility of ITC in respect of GST paid on the inputs/ input services procured by the applicant for giving rewards under the sales promotional scheme.

Ruling

- The goods and services distributed under the reward scheme are for personal consumption of the distributors/retailers and are in the nature of gifts.
- The Input tax credit on inputs/input services given as rewards without consideration under sales promotion scheme is not available in terms of restriction under Section 17(5)(g) and (h) of CGST Act.

ELP Comments

The Hon'ble Supreme Court in **Sonia Bhatia v. State of UP [1981 (3) TMI 250 - SC]**, held 'gift' to be a voluntary transfer of property by one to another, without any consideration or compensation thereof. One of the essential attributes of gift is that the same must be given without any obligation. Therefore, one may argue that rewards given to the dealers as incentives on achieving stipulated sales targets and fulfilment of other conditions cannot be treated as 'gifts'.

3. Bombay High Court – Dee Vee Projects Ltd. v. Government of Maharashtra (Writ Petition No. 2693 of 2021)

Facts of the Case

- The Electronic Credit Ledger (ECL) of the petitioner was blocked by the Deputy Commissioner under Rule 86A of CGST Rules. The impugned order only mentioned that ECL has been blocked by relevant DC.
- The petitioner sent representation on 2.7.2021, protesting against the unlawful attachment of its property and blocking of ECL and also sent a reminder on 14.7.2021 with a request to unblock the ECL, however, the same was rejected.
- Aggrieved by this, writ petition was filed *inter alia* contending that:
  - Blocking of ECL amounts to illegal provisional attachment of the property under Section 83 of the CGST Act. This attachment can be done only if any proceedings are pending or initiated under any of sections such as sections 62, 63, 64, 67, 73 and 74 (Assessment, Audit and Demand & Recovery).

FROM THE BENCH - KEY JUDICIAL PRONOUNCEMENTS

- No order of provisional attachment has been passed under Section 83.
- As per Rule 86A, the amount of wrong availment of credit in ECL needs to be quantified and no such quantification was done

Ruling

- The Hon'ble High Court allowed the writ petition and *inter alia* held as follows:
  - Blocking of ECL is quite different from the attachment of property and hence, any order passed under Rule 86A cannot be treated as the order amounting to the provisional attachment of property under section 83.
  - For the purpose of exercise of power under Rule 86A, (i) the Authorities must be satisfied on the basis of material available before them that blocking of ECL for the prescribed reasons is necessary and (ii) an order should be passed in writing, recording the reason for blocking the ECL.
  - In the petitioner's case, no reason for blocking of ECL was shown nor it was recorded / communicated and therefore, both the pre-requisites are not fulfilled.
  - Further, the Input tax credit which was alleged to be fraudulently availed was not specified by the Authorities. The powers under Rule 86A does not allow to put blanket prohibition on ECL.

ELP Comment

This decision signifies the essence of a reasoned order before blocking of ECL and quantification of the amount alleged to be fraudulently availed. The order is in line with the decisions in case of **HEC India [TS-513-HC(MAD)-2021-GST]** and **Aryan Tradelink [TS-1143-HC-2020(KAR)-NT]** wherein it was held that before blocking of credit available in the assessee's credit ledger, the Authorities need to communicate the reasons to enable the assessee to put forth his objections.

4. Karnataka High Court - UOI v. Bundl Technologies Pvt. Ltd. (TS-84-HC(KAR)-2022-GST)

Facts of the case

- The respondent, operating under the brand name of 'Swiggy', engaged Temporary Delivery Executives ('Temp DEs') from third party service providers to cater to sudden spike in food orders.
- Such third-party service providers charged consideration paid to Temp DEs along with mark up and GST thereon. The respondent availed ITC of the GST charged by the third-party service providers.
- The Directorate General of GST Intelligence ('DGGI') initiated investigation with respect to the ITC availed based on the invoices issued by one of such third-party service providers which was alleged to be a non-existent entity.

- During the course of investigation, the respondent made a payment of Rs. 27 crores (approx.) to the Authorities. The respondent intimated the Authorities that it reserves its right to claim refund of such amount and the same should not be treated as admission of its liability.
- Despite a lapse of about 10 months from initiation of investigation, no show cause notice was issued to the respondent. The respondent therefore sought refund of the amount paid during the course of

FROM THE BENCH - KEY JUDICIAL PRONOUNCEMENTS

investigation. However, no action was taken by the Authorities.

- The respondent challenged the inaction of the Authorities in refunding the amount by way of a writ petition. The Single Judge Bench of the Hon'ble High Court allowed the writ petition with directions to the Authorities to process the refund. Aggrieved by the said decision, the Authorities filed appeal before the Division Bench of Hon'ble High Court.

Ruling

- The Hon'ble Court held that payment made without prejudice to and with full reservation of rights and contentions to seek necessary refund at the appropriate time cannot be treated as payment under Section 74(5) of CGST Act towards admission of liability. Hence, the same is liable to be refunded to the respondent.
- Further, it was held that a statutory power has to be exercised within a system of controls and has to be exercised by relevance and reason. It needs reiteration that a statutory power should not be exercised in a manner, so as to instil fear in the mind of a person.

ELP Comments

There are numerous cases where the investigating officers have used coercive measures to recover tax from the assessees during the course of investigation. It must be ensured that if at all any deposit is made during the course of investigation, such deposit should be made alongwith a suitable under protest letter clearly stating that the deposit is not towards assumption of any liability and right to claim refund of such deposit is reserved.

5. Assistant Commissioner (ST) & Ors Vs. Satyam Shivam Papers Pvt. Limited & Anr. [TS-13-SC-2022-GST]

Facts of the case

- The Deputy State Tax Officer stopped and detained the goods as well as the trolley for the reason that the e-way bill had expired a day earlier.
- The respondent (original petitioner) submitted that the delivery was not possible on the

designated day due to CAA and NRC political rallies leading to traffic blockage. However, such explanation was not considered and fine was imposed.

- The respondent filed a writ petition before the Hon'ble Telangana High Court challenging such action of the Authorities. The Hon'ble High Court held that no presumption can be drawn that there was an intention to evade tax on account of non-extension of the validity of the e-way bill by the respondent. Aggrieved by the said decision, the petitioner department filed SLP before Hon'ble Supreme Court.

Ruling

- The Hon'ble Supreme Court held that the consideration of the High court order and the material placed on record leave no doubt that the contentions of the tax Authorities are baseless and even the intent behind the proceedings against the respondent was also questionable.

ELP Comments

It is time and again held that if the e-waybills are expired with justifiable reasons, the same cannot be arbitrarily treated as GST evasion. There have been multiple instances where the assesses have been harassed under the pre-text of expired e-waybills. Heavy traffic and vehicle breakdowns are one of the most common reasons for expiry of e-waybills and considering the same as GST evasion by Authorities is completely unwarranted.

EXPERT SPEAKS

Interview with Ms Lata Daswani (Chief Executive Officer for Everest Fleet Pvt Ltd.)

Interview conducted by Varun Parmar (Associate Partner) - ELP

1. The taxation of car leasing/ renting industry underwent a major rejig under GST. As the industry had to catchup with the new tax regime, how complicated the exercise was? are the issues now ironed out?

Every change in law takes its own time and course to streamline and put the new processes in place. Thankfully for Everest when the change in law happened it was still in nascent stages of growth and the team was able to adopt the new position and work with stakeholders to complete the exercise. However, given the complexity of GST law, its analysis, interpretations and positions are always evolving.

2. Has your company effectively geared up from the perspective of audit enquiries under the Goods and Services Tax ("GST") regime?

With effective streamlining and improvisation of the processes periodically and with the reconciliations undertaken during the filing of form GSTR-9 and GSTR-9C (annual returns and GST Audit) advent of e-invoicing regime, we do not anticipate any significant inquiries under GST audit. We continue to focus our efforts towards simplifying the data capture process as well as automation of the processes to the extent possible

3. How much weightage do you give to tax and more so GST considerations while undertaking business decisions?

Indirect taxes like GST have a bearing on the cost of doing business and therefore GST considerations are given a reasonable weightage in undertaking business decisions. As a fleet service provider working towards generating entrepreneurial and employment opportunities for the unorganised sector in the space of environmentally friendly mobility solutions, we do feel that start ups like ours are given impetus by way of GST concessions and reasonable tax laws.

4. Does the implementation of e-invoice is a step in ease of doing business?

Till now we were not required to register for e-invoicing as our turnover has been below the threshold. But as we move along e-invoicing will be applicable to us and our general understanding is that it will be a good step in automating compliance and help in ease of doing business. However, only after implementation we will be in a position to comment if its easing the process or complicating it. Usually most new regimes take few months or years to give the outcomes they are expected to give

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

In my view these are the few things Government should focus on:

- Simplifying the law to the extent possible so that there is no ambiguity (for instance issues like cross charge of common expenses across distinct person, recovery from employees etc). This will save a lot of litigation and time cost on trivial issues

EXPERT SPEAK

- Training the GST officers and administrators at each level to follow the intent of law in letter and in spirit so that there is no scope for multiple interpretations leading to multiple inquiries.
- Just like there are income tax exemptions and concessions for start ups or for businesses that are creating meaningful impact for the society, Government should consider GST exemptions or better input credit utilisation methods for such start ups/ purpose driven businesses
- Strengthen their technology teams to drive the digital transformation effort

6. How do you see the recent changes brought into effect in terms of the availment of ITC?

I think while the intent of the amendments is to bring more simplicity to the process of input credit claims, service recipients seem to be at a disadvantage as their input credit claims are going to be restricted due to non-compliances of the suppliers. As the benefit of provisional ITC is no longer available this may impact the cash flow of various organizations. Further, the reduction in rate of applicable interest on account of wrong availment and utilisation being clarified retrospectively of ITC is a welcome move which set aside the long pending irregularity in the interpretation of law.

LEGISLATURE AT WORK - RECENT AMENDMENTS

The following chapter has been authored by Sonam Bhandari (Principal Associate); Gaurav Rawat (Senior Associate) - ELP

CONTENTS

LEGISLATIVE UPDATES		
Sr. No	**Reference**	**Particulars**
1	**Press Release dated February 7, 2022**	GST collection for the month of January 2022 crosses INR 1.40 crore. This is the record GST collection and has been highest since the implementation of GST
2	**Notification No 1/ 2022 (Central Tax) dated February 24, 2022**	Vide the said notification, the requirement to generate e-invoice for B2B supplies and exports has been extended to registered persons with aggregate turnover of greater than INR 20Cr in any preceding financial years from FY 2017-18. Prior to issuance of the said Notification, the said requirement was mandatory for those registered persons whose turnover exceeded INR 50 Cr. The exemptions, as were available earlier, continue to apply
3	**Internal Circular No. 02A of 2022 dated February 25, 2022 issued by the Commissioner of State Tax, Mumbai**	*Vide* the said circular, the Maharashtra Commissionerate has prescribed certain guidelines for issues pertaining to return scrutiny by jurisdictional authorities for tax periods FY 2017-18 and FY 2018-19 Summarized below are the issues and clarifications provided by the Maharashtra Commissionerate: • **Issue 1: For scenarios, where certain B2B supplies were inadvertently reported as B2C supplies in Form GSTR-1 at the first place and then rectified, without a corresponding reduction in B2C supplies. This would have entailed a higher turnover being disclosed in GSTR-1 vis-à-vis GSTR-3B** **Clarification:** In such scenarios, it has been directed that the proper officers should obtain transaction wise details of outward supplies and reconcile the same with the supplies declared in Form GSTR 1. Then, proper officer would (a) identify details of supplies declared as supplies made to registered person ('B2B') and supplies made to un-registered person ('B2C'); and (b) figure out details of transactions shifted from B2C to B2B; and (c) take on records details of GSTR 1 where such shifting has been done • **Issue 2: For typographical errors during filing of disclosures in GSTR-1. This would have typically entailed excess tax liability in GSTR-1 vis-à-vis GSTR-3B** **Clarification:** In such scenarios, it has been directed that proper officer should obtain transaction wise details of outward supplies and reconcile the same with the supplies declared in Form GSTR 1. The proper officer should then (a) identify categories of supplies (e.g., B2B or export sales etc.) where there exists a difference; (b) in case of B2B supplies, take undertaking from the recipient that

LEGISLATURE AT WORK - RECENT AMENDMENTS

		he has not availed excess ITC on account of such error; and (c) in case of export, verify it with turnover of export considered while granting refund • **Issue 3:** In case there is a difference in Input Tax Credit ('ITC') claimed in Form GSTR 3B vis-a-vis Form GSTR 2A due to following reason: **a.** Supplier has reported B2B supplies as B2C supplies in Form GSTR 1 and the said has not been amended on account of limitation period for amendment **b.** Suppliers have reported B2B supplies against wrong GSTN i.e., disclosed GSTN of some other registered person **c.** Supplier has missed reporting B2B transactions in Form GSTR 1 **Clarification:** In such scenarios, ITC may be allowed by the proper officer with the following actions: o Where difference in ITC per supplier is 2.5 lakhs or more, the proper officer may ask the claimant to obtain a CA certificate from the said supplier certifying outward transactions and tax paid thereon o Where difference in ITC per supplier is below 2.5 lakhs, the proper officer may ask the claimant to obtain ledger confirmation of the concerned supplier with his / her certification • **Issue 4 & Clarification:** The pre-condition provided under the proviso of Section 16(4) of Central Goods and Services Tax Act 2017 i.e., details of invoices / debit notes should be uploaded by supplier for FY 2017-18 in Form GSTR 1 till the due date of filling GSTR 1 of March 2019 is only applicable to those registered persons who have availed ITC in respect of invoices / debit notes of FY 2017-18 during the extended period (i.e. after the due date of September 2018 return but before the due date of March 2019 return) and not to all other cases. • **Issue 5**: Supplier has mistakenly declared B2B supplies taxable under forward charge as reverse charge transactions in Form GSTR 1 **Clarification:** In such scenarios, proper officer may verify whether due tax has been paid on such transactions by supplier on such transactions which have been wrongly reported as reverse charge transactions in Form GSTR 1 • **Issue 6**: In case where in-eligible credit as pointed out in ASMT-10 is reversed by taxable person in the subsequent returns **Clarification:** In such case, proper officer may obtain the details of reversal in table 4(b)(2) of Form GSTR 3B that specified return period along with transaction list from suppliers and verify the ITC claim & reversal thereof. Alternatively, the said could also be verified through Form DRC-03 filed by tax payer, if any

LEGISLATURE AT WORK - RECENT AMENDMENTS

4	**Notification No 2/2022 – (Central Tax) dated March 11, 2022**	*Vide* the said notification, the Government has empowered Additional Commissioners of Central Tax / Joint Commissioners of Central Tax with All India Jurisdiction for the purpose of adjudication of the Show Cause Notices ('SCN') issued by the officers of the Directorate General of Goods and Services Tax Intelligence

Circular no. 169 / 01 / 2022 - GST dated March 12, 2022

Vide the said circular the Government has amended para 6 & 7 of the Circular 31 / 05 / 2018 - GST dated February 9, 2018 pursuant to Notification No 2/2017 dated March 11, 2022 (supra) to clarify the adjudicating authority for the SCNs issued by Central Tax officers of Audit Commissionerates or Directorate General of Goods and Services Tax Intelligence ('DGGI') which is as under:

Sr No	SCN is issued by	Scenario	Adjudicating Authority
1	Central Tax of officers of Audit Commissionerates or DGGI	SCNs pertain to jurisdiction of one executive Commissionerate of Central Tax only	Competent Central Tax officer of the executive Commissionerate in whose jurisdiction the noticee is registered
2	Officers of DGGI	Where principal place of business of noticees fall under the jurisdiction of multiple Central Tax Commissionerates	Additional / Joint Commissioners of Central Tax who have been empowered with All India jurisdiction *vide* Notification Number 2/2022 – Central Tax
3	Central Tax officers of Audit Commissionerates	Where the principal place of business of noticees fall under the jurisdiction of multiple Central Tax Commissionerates	A proposal for appointment of common adjudicating authority may be sent to the Board.
4	Officers of DGGI prior to issuance of Notification No. 02/2022 – Central Tax	Where principal place of business of noticees fall under the jurisdiction of multiple Central Tax Commissionerates - no adjudicating order has been issued till March 11, 2022	Additional / Joint Commissioners of Central Tax who have been empowered with All India jurisdiction *vide* Notification Number 2/2022 – Central Taxes

	Press Release dated March 1, 2022	GST collection for the month of February 2022 cross INR 1.30 lakh crore. This is for the 5th time GST collection had crossed the INR 1.30 lakh crore mark, which signifies recovery of certain key sectors, especially, automobile sales.

ALLIED LAWS

The following chapter has been authored by Milan Soni (Associate); Palak Naik (Associate) - ELP

Customs Tariff Notifications

Notification no. 1/2022-Customs dt. 18.01.2022 - Seeks to exempt BCD and IGST on goods imported for the purpose of AFC Women's Asian Cup India, 2022.

The Central Board of Indirect Taxes and Customs ('CBIC' or 'Board') vide Notification No. 1/2022 – Customs dated 18.01.2022 provides conditional exemption for certain goods imported into India by All India Football Federation for the purpose of AFC Women's Asian Cup India, 2022 from the Basic Custom Duty (BCD) and IGST.

Items	Conditions
The following goods: • Kelme Referee kits, ball boy uniform and match-day bibs • Competitions goods shipped using Aramex • Molten official match balls • Kelme AFC delegations / volunteer's attire • Country Flags • Sleeves Badges • WAC mini Trophy	a. The importer, at the time of clearance of the goods, produces a certificate to the Assistant Commissioner of Customs or Deputy Commissioner of Customs as the case may be, from the Director or Deputy Secretary (Sports), Department of Sports, the Ministry of Youth Affairs and Sports, Government of India, indicating that the said goods are required in relation to the AFC Women's Asian Cup India, 2022. b. The importer, at the time of clearance of the goods, furnishes an undertaking that: i. all such goods, excluding gift items, souvenirs, mementoes shall be re-exported within three months from the date of conclusion of AFC Women's Asian Cup India, 2022. ii. a utilization certificate for the goods consumed shall be furnished from the Director or Deputy Secretary (Sports), the Department of Sports, the Ministry of Youth Affairs and Sports, Government of India, within three months from the date of conclusion of AFC Women's Asian Cup India, 2022.

Notification no.4/2022-Customs dt. 01.02.2022 - Seeks to rescind notification Nos. 190/1978-Customs and 191/1978-Customs both dated 22th September, 1978 prescribing additional duty of customs on imports of transformer oil equivalent to such portion of the excise duty leviable on the raw material commonly known as transformer oil base stock or transformer oil feedstock.

The Central Board of Indirect Taxes and Customs ('CBIC' or 'Board') vide Notification No. 4/2022 – Customs dated 01.02.2022 rescinds Notification no. 190/1978-Customs dt. 22.09.1978 and Notification no. 191/1978-Customs dt. 22.09.1978 prescribing additional duty of customs on imports of transformer oil.

Notification no. 7/2022-Customs dt. 01.02.2022 - Seeks to further amend Notification No. 82/2017-Customs dated 27.10.2017 to prescribe effective rate on certain Textile items up to 30.04.2022

The Central Board of Indirect Taxes and Customs ('CBIC' or 'Board') vide Notification No. 7/2022 – Customs dated 01.02.2022 seeks to amend Notification no.82/2017-Customs dt. 27.10.2017, (prescribing rate of duty for goods covered under Chapter 50 to 63 i.e., textile products) by way of inserting and substituting certain entries and

ALLIED LAWS

the said notification shall come into effect from 02.02.2022 up to 30.04.2022.

Notification no. 8/2022-Customs dt. 01.02.2022 - Seeks to amend Notification Nos. 104/2010-Customs, 38/96-Customs, 40/2017-Customs, 60/2011-Customs, 148/94-Customs to exempt AIDC/Health cess/RIC on goods imported under the said notifications

The Central Board of Indirect Taxes and Customs ('CBIC' or 'Board') vide Notification No. 8/2022 – Customs dated 01.02.2022 seeks to amend Notification Nos. 104/2010-Customs dated 01.10.2010, 38/96-Customs dated 23.07.1996, 40/2017-Customs dated 30.06.2017, 60/2011-Customs dated 14.07.2011, 148/94-Customs dated 13.07.1994 thereby providing exemption from Agriculture Infrastructure and Development Cess, Health Cess and Road and Infrastructure Cess. The said notification shall come into effect from 02.02.2022.

Notification no. 9/2022-Customs dt. 01.02.2022 - Seeks to amend notification Nos. 146/94-Customs, 147/94-Customs, 39/96-Customs, 50/96-Customs, 30/2004-Customs, 81/2005-Customs, 5/2017-Customs, 16/2017-Customs, 32/2017-Customs to prescribe end-dates as per Section 25(4A) of Customs Act, 1962

The Central Board of Indirect Taxes and Customs ('CBIC' or 'Board') vide Notification No. 9/2022 – Customs dated 01.02.2022 seeks to amend Notification Nos. 146/94-Customs dated 13.07.1994, 147/94- Customs dated 13.07.1994, 39/96-Customs dated 23.07.1996, 50/96-Customs dated 23.07.1996, 30/2004-Customs dated 28.01.2004, 81/2005-Customs dated 08.09.2005, 5/2017-Customs dated 02.02.2017, 16/2017-Customs dated 20.04.2017, 32/2017-Customs dated 30.06.2017. The purpose is to provide extension of the time period for availing conditional exemption granted under the various notifications until 31.03.2023 if not rescinded. This notification shall come into effect from 02.02.2022.

Notification no. 10/2022-Customs dt. 01.02.2022 - Seeks to amend notification No. 27/2011-Customs dated 01.03.2011 to omit redundant entries and reduce export duty raw hides and skins of buffalo

The Central Board of Indirect Taxes and Customs ('CBIC' or 'Board') vide Notification No. 10/2022 – Customs dated 01.02.2022 seeks to amend Notification no. 27/2011-Customs dt. 01.03.2011 omitting redundant entries and inserting new entry "38B" for raw hides and skins of buffalo with export duty of 30% with effect from 02.02.2022.

Notification no. 11/2022-Customs dt. 01.02.2022 - Seeks to implement a graded BCD structure for wearable devices and its parts, sub-parts and sub-assembly.

The Central Board of Indirect Taxes and Customs ('CBIC' or 'Board') vide Notification No. 11/2022 – Customs dated 01.02.2022 seeks to implement a graded structure for levying BCD on wearable devices and its parts, sub-parts and sub-assembly and provides for conditional exemption of customs duty with effect from 02.02.2022.

Notification no. 12/2022-Customs dt. 01.02.2022 - Seeks to implement a graded BCD structure for hearable devices and its parts, sub-parts and sub-assembly.

The Central Board of Indirect Taxes and Customs ('CBIC' or 'Board') vide Notification No. 12/2022 – Customs dated 01.02.2022 seeks to implement a graded structure for levying BCD on hearable devices and its parts, sub-parts and sub-assembly and provides for conditional exemption of customs duty with effect from 02.02.2022.

ALLIED LAWS

Notification no. 13/2022-Customs dt. 01.02.2022 - Seeks to implement a graded BCD structure for smart meters and its parts, sub-parts and sub-assembly.

The Central Board of Indirect Taxes and Customs ('CBIC' or 'Board') vide Notification No. 13/2022 – Customs dated 01.02.2022 seeks to implement a graded structure for levying BCD on smart meters and its parts, sub-parts and sub-assembly and provides for conditional exemption of customs duty with effect from 02.02.2022.

Notification no. 16/2022-Customs dt. 12.02.2022 - Seeks to amend notification No. 48/2021-Customs and No. 49/2021 - Customs, both dated 13.10.2021

The Central Board of Indirect Taxes and Customs ('CBIC' or 'Board') vide Notification No. 16/2022 – Customs dated 12.02.2022 seeks to amend notification no.48/2021 and 49/2021 dt. 13.10.2021 to rationalize the Agriculture Infrastructure and Development cess on crude oil and lentil by extending the validity of extension to 30.09.2022. This notification shall come into effect from 13.02.2022.

Customs Non-Tariff Notifications

Notification no. 07/2022-Customs (N.T.) dated 01.02.2022 - Seeks to further amend Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017 so as to simplify and automate the procedures.

In order to simplify and automate the procedure in relation to import of goods at concessional rate, The Central Board of Indirect Taxes and Customs ('CBIC' or 'Board') vide Notification No. 07/2022 amends the (Import of Goods at concessional rate of Duty) Rules, 2017 (hereinafter referred to as the rules).

(i) Rule 4 of the rules now makes it mandatory for the importer to furnish certain information on common portal in Form IGCR -1 only one time after these rules come into force. After furnishing and acceptance of the details, the importer will receive an Import of Goods at Concessional Rate Identification Number (IIN). The importer shall also submit a continuity bond with surety or security, with an undertaking to pay the differential duty.

(ii) Rule 5 provides for the procedures such as:

- Indicating IIN, continuity bond number and details while filing the Bill of Entry to avail the benefit of an exemption notification based on which the concerned customs officer shall allow the benefit of the exemption notification to the importer.
- Once a Bill of Entry is cleared for home consumption, the bond submitted by the importer gets debited automatically in the customs automated system and the details shall be made available electronically to the Jurisdictional Custom Officer.

(iii) Rule 6 provides that the importer must maintain records of the goods imported/ re-exported and shall produce the same whenever required by the jurisdictional officer. The importer, in case of non-receipt or short receipt of imported goods, must inform the jurisdictional officer through common portal in Form IGCR-2. The importer is also required to submit a monthly statement within 10th day of the following month in IGCR-3.

(iv) Rule 6A and 6B provides for the procedure for allowing imported goods for job work and for unit transfer respectively. These rules provide for maintenance of records

ALLIED LAWS

by the importer in case of imported goods transferred to job worker or unit transfer. The importer shall issue an invoice or an e-way bill mentioning the description and quantity of goods. If the importer is not able to establish that the goods were sent to a job worker or unit transfer the jurisdictional officer shall take necessary actions against the importer.

(v) Rule 7 provides for re-export or clearance of unutilised or defective goods. The importer who has availed the benefits of exemption notification, shall within a period of 6 months from the date of import shall either re-export the same or clear the goods for home consumption. The value of goods during re-export should not be less than the value of goods during import. For consideration of these rules date of import shall mean the date of the order under Section 47 of the Customs Act permitting clearance of such goods.

(vi) Rule 8 provides for the recovery proceedings to be initiated by the jurisdictional officer because of failure on part of the importer to comply with the conditions.

Notification no. 11/2022-Customs (N.T.) dated 22.02.2022

The Central Board of Indirect Taxes and Customs ('CBIC' or 'Board') vide Notification No. 11/2022-Customs (N.T.) dated 22.02.2022 by exercising their power conferred by section 157 and 149 of the Customs Act, has enacted Shipping Bill (Post export conversion in relation to instrument-based scheme) Regulations, 2022.

(i) Regulation 3 provides for post export conversion of Shipping Bills by way of an application within a period of one year from the date of clearance of goods. The jurisdictional Commissioner and the Chief Commissioner may extend the period by a further period of six months respectively. This post export conversion may be ordered by the jurisdictional officer on the basis of documentary evidence, subject to some conditions and restrictions and on a payment of fee.

(ii) As per regulation 4, the conversion of shipping bills will be subject to certain conditions and restrictions as follows:

- fulfilment of all conditions of the instrument-based scheme to which conversion is being sought
- the exporter has not availed benefit of the instrument-based scheme from which conversion is being sought
- no condition, specified in any regulation or notification, relating to presentation of shipping bill or bill of export in the Customs Automated System, has not been complied with
- no contravention has been noticed or investigation initiated against the exporter under the Act or any other law, for the time being in force, in respect of such exports
- the shipping bill or bill of export of which the conversion is sought is one that had been filed in relation to instrument-based scheme.

ALLIED LAWS

Customs Anti-dumping Notifications

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

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

- "1,1,1,2-Tetrafluoroethane or R-134a", originating in or exported from China PR, and imported into India **[Notification No. 1/2022-Customs (ADD) dated 06-01-2022]**
- "Colour coated / pre-painted flat products of alloy or non-alloy steel" originating in or exported from China PR and European Union. **[Notification No. 2/2022-Customs (ADD) dated 13-01-2022]**

- "PVC Flex Films", falling under Chapter 39 of the First Schedule to the said Act, originating in or exported from China PR and imported into India **[Notification No. 3/2022-Customs (ADD) dated 24-01-2022]**
- "Straight Length Bars and Rods of alloy-steel" originating in or exported from China PR vide Notification No. 54/2018-Cus (ADD) dated 18.10.2018. **[Notification No. 5/2022-Customs (ADD) dated 01-02-2022]**
- "High Speed Steel of Non-Cobalt Grade" originating in or exported from Brazil, China PR and Germany vide Notification No. 38/2019-Cus (ADD) dated 25.09.2019. **[Notification No. 6/2022-Customs (ADD) dated 01-02-2022]**
- "Flat rolled product of steel, plated or coated with alloy of Aluminum or Zinc" originating in or exported from China PR, Vietnam and Korea RP vide Notification No. 16/2020-Cus (ADD) dated 23.06.2020. **[Notification No. 7/2022-Customs (ADD) dated 01-02-2022]**

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

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

- 'Axles for Trailers' originating in or exported from the Peoples Republic of China **[Notification No. 4/2022-Customs (ADD) dated 24-01-2022]**
- Glazed/Unglazed Porcelain/Vitrified Tiles in polished or unpolished finish with less than 3% water absorption from China PR for a period of 5 years China **[Notification No. 9/2022-Customs (ADD) dated 24-02-2022]**

Extension of levy of Anti-dumping Duty on various imports

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

- "Aluminium foil of thickness ranging from 5.5 micron to 80 micron" originating in or exported from People's Republic of China, imposed vide Notification No. 23/2017-Customs (ADD), dated 16th May, 2017, till 15th June, 2022. **[Notification No. 08/2022-Customs (ADD) dated 14-02-2022]**
- "Jute products" originating in or exported from Nepal and Bangladesh. **[Notification No. 10/2022-Customs (ADD) dated 24-02-2022]**

Customs Countervailing Duty Notifications

Revoking the levy of Countervailing Duty on various imports:

The Central Government has revoked the levy of Countervailing Duty on imports of:

- "Certain Hot Rolled and Cold Rolled Stainless Steel Flat Products" originating in or exported from China PR vide Notification No. 1/2017-Cus (CVD) dated 07.09.2017. **[Notification No. 1/2022-Customs (CVD) dated 01-02-2022]**

ALLIED LAWS

Customs Circulars

Circular No. 01/2022-Customs dt. 18.01.2022 - Retention of ISO Containers to meet future requirements.

The Central Board of Indirect Taxes and Customs ('CBIC' or 'Board') issued Circular No. 01/2022-Customs dt. 18.01.2022 regarding retention of International Organisation for Standardization ("ISO") Containers to meet future requirements as various representation were received through the Department for Promotion of Industry and Internal Trade (DPIIT), Ministry of Commerce and Industry, for providing relaxations in the re-export of ISO Containers imported temporarily for combating the COVID Pandemic. Such containers have been used for efficient transportation of Liquid Medical Oxygen (by Road/Rail/ Waterways/Airways).

In addition to the Board's instructions dated 24.04.2021, 27.04.2021 and 25.05.2021 relating to relaxation of various procedures relating to facilitation of COVID related consignments, the Board hereby allows extension of time period for re-exports of ISO containers meant for transportation of Liquid Medical Oxygen, if imported under Notification no. 104/1994-Customs dated 16.03.1994. This extension is allowed till 30.09.2022.

The Board further clarifies that if ISO containers are imported on lease by availing IGST exemption, till the time the containers are in India under a valid lease and IGST is paid on such lease, IGST is not required to be paid on the value of ISO containers and the need for re-export would not arise.

Circular 02/2022-Customs dt. 19.01.2022 - Alignment of AEO Circular No. 33/2016 dated 22.07.2016 and 54/2020 dated 15.12.2020 with CAROTAR, 2020 implemented vide dated 21.09.2020

The Central Board of Indirect Taxes and Customs ('CBIC' or 'Board') issued Circular No. 02/2022-Customs dt. 19.01.2022 aligning Authorized Economic Operator ("AEO") Circular No. 33/2016 dated 22.07.2016 and 54/2020 dated 15.12.2020 with Customs Administration of Rules of Origin Under Trade Agreements Rules, 2020 ("CAROTAR 2020") implemented vide dated 01.09.2020.

It is clarified that with the insertion of Section 28DA of Customs Act, 1962 relating to procedure regarding claim of preferential rate of duty, and the issuance of CAROTAR, 2020 (Customs Administration of

Rules of Origin Under Trade Agreements Rules, 2020) vide Notification No. 81/2020-Customs dated 21.08.2020 (effective 21.09.2020), these provisions would prevail over dispensation extended vide para 1.5.1. (v), 1.5.2.(ix), 1.5.3.(iv) of Circular No. 33/2016 - Customs dated 22.07.2016 and para 3(vii) of Circular No. 54/2020- Customs dated 15.12.2020 and the latter stand suitably aligned to the former.

Circular no. 03/2022-Customs dt. 01.02.2022 - Clarification regarding applicability of Social Welfare Surcharge on goods exempted from basic and other customs duties/cesses

The Central Board of Indirect Taxes and Customs ('CBIC' or 'Board') issued Circular No. 03/2022-Customs dt. 01.02.2022 clarified that Social Welfare Surcharge (SWS) is levied at the rate of 10% of the aggregate of customs duty payable and not on the value of imported goods. If aggregate customs duty payable is zero on account of an exemption, the SWS shall be computed as 10% of value equal to 'Nil' (as aggregate amount

ALLIED LAWS

of customs duties payable is zero). Law does not require computation of SWS on a notional customs duty calculated at tariff rate where applicable aggregate of duties of customs is zero.

Thus, it is clarified that the amount of Social Welfare Surcharge payable would be 'Nil' in cases where the aggregate of customs duties (which form the base for computation of SWS) is zero even though SWS has not been exempted.

Circular no. 04/2022-Customs dt. 27.02.2022 - Implementation of automation in the Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017 with effect from 01.03.2022

The Central Board of Indirect Taxes and Customs ('CBIC' or 'Board') vide Circular No. 04/2022-Customs dt. 27.02.2022 seeks simplifying the procedures with a focus on automation and making the entire process contact-less. The Board clarifies certain procedures in relation to:

- One-time prior intimation of intent to avail IGCR Benefit
- Import of goods at concessional rate
- Receipt of goods
- Goods sent for job work from importer's premises:
- Receipt of goods from the job worker:
- Inter-Unit transfer of goods
- Utilization of goods for intended purpose
- Re-Export or clearance for home consumption:
- Monthly statement and maintenance of account
- Transitional measures

NOTIFICATIONS

Notification No. 49/2015-2020 dt. 05.01.2022 – Amendment in import policy conditions of gold under Chapter 71 of Schedule – I (Import Policy) of ITC (HS), 2017

DGFT vide Notification No. 49/2015-2020 has made an amendment under which qualified jewellers as notified by the International Financial Services Centres Authority (IFSCA) will be permitted to import gold under specific ITC (HS) Codes through the India International Bullion Exchange IFSC Ltd along with nominated agencies as notified by the RBI (in the case of banks) and nominated agencies as notified by the DGFT (BX). However, the relevant FTP provisions would continue to apply to import of gold/silver under Advance Authorisation and supply of gold/silver directly by foreign buyers to exporters under paragraph 4.45 of the FTP against export orders.

Notification No. 54/2015-2020 dt. 09.02.2022 – Notification of ITC (HS), 2022 – Schedule – 1 (Import Policy)

DGFT vide Notification No. 54/2015-2020 notifies that Schedule 1 (Import Policy) of the ITC (HS) 2022 is notified in accordance with the Finance Act of 2021.

TRADE NOTICES

Trade Notice No. 30/2021-2022 dt. 13.01.2022 - Guidelines for submission of online application for One time registration for SCOMET license and Post-reporting requirements for Export of chemicals under General authorization for export of Chemicals and related equipment's (GAEC) w.e.f 19.01.2022

The DGFT vide Trade Notice No. 29/2021-2022 has stated that for export of Chemicals and related equipment's (GAEC) under General authorization, one-time registration is necessary for obtaining General SCOMET license from DGFT for each Category/Sub Category (i.e. one general license for each 1C, 1D, 1E, 3D001, and 3D004) falling under this policy. This would grant exporters a five-year unique authorization/license number for chemical exports (under 1C, 1D, 3D001, and

ALLIED LAWS

3D004) to any end user in 42 specified countries, as well as 1E chemicals to Chemical Weapons Convention (CWC) signatory states. With effect from 19.01.2022, all such applications for one-time registration for obtaining a GAEC SCOMET license must be filed and submitted through DGFT's online portal.

Trade Notice No. 31/2021-2022 dt. 14.01.2022 - De-Activation of IECs not updated at DGFT

The DGFT has vide Trade Notice No. 31/2021-2022 has stated that all IECs which have not been updated after 01.07.2020 shall be de-activated with effect from 01.02.2022. In this interim time, until 31.01.2022, the relevant IEC holders are given the option to amend their IEC. IECs that have submitted an online updation application but are awaiting clearance from the DGFT RA will be exempt from the de-activation list. It should also be noted that every IEC that has been de-activated has the option of being automatically re-activated without the need for any manual action or visits to the DGFT RA. It was mandated by DGFT through Notification No. 58/2015-2020 dated 12.02.2021, 11/2015-2020 dated 01.07.2021, 16/2015-2020 dated 09.08.2021 that all IEC holders should ensure that details in their IEC is updated electronically every year during April-June period (No user charges to be borne by IEC holder). The time period for updation was extended upto 31.07.2021 and further to 31.08.2021 for IEC holders who had not updated their IECs.

Trade Notice No. 32/2021-2022 dt. 24.01.2022 - Extension of Date for Mandatory electronic filing of Non-Preferential Certificate of Origin (CoO) through the Common Digital Platform to 31st March 2022

The DGFT vide Trade Notice No. 32/2021-2022 has stated that an electronic platform for Certificate of Origin (CoO) has been implemented to enable electronic filing and issuance of Non-Preferential Certificates of Origin (CoO) besides Preferential CoOs. The intention of this Platform is to provide an electronic, contact-less single window for the CoO related processes. The last date for the transition period for mandatory filing of applications for Non-Preferential Certificate of Origin through the e-CoO Platform has been extended till 31st March 2022.

Trade Notice No. 33/2021-2022 dt. 27.01.2022 - Procedures for application for Tariff Rate Quota (TRQ) under FTA/CECA for FY2022-23

The DGFT vide Trade Notice No. 33/2021-2022 has instructed Importers/Members of Trade and Commerce, all applicants seeking Tariff Rate Quota (TRQ) for imports for the period FY2022-23 should be submitted online using "e-Tariff Rate Quota" system. The last date for e- TRQ applications for FY2022-23 is 28.02.2022. It should also be noted that TRQ applications should not be submitted as 'License for Restricted Imports'.

Trade Notice No. 35/2021-2022 dt. 24.02.2022 - Mandatory filing/issuance of Registration Cum Membership Certificate (RCMC)/ Registration Certificate (RC) through the DGFT common digital platform from 01.04.2022

The DGFT vide Trade Notice No. 35/2021-2022 stated that it mandates exporters to file for Registration Cum Membership Certificate/ Registration Certificate (RC) applications (for issue/ renewal/ amendment) from 1st April 2022.

LEGAL CLASSICS

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

Franco Indian Pharmaceutical (P) Ltd V. Commr. Of S.T., Mumbai 2016 (42) S.T.R. 1057 (Tri. - Mumbai)

In a business environment which is characterized by specialization and efficient utilization of resources, the concept of joint employment and deputation of employees across related companies becomes important. Sharing of human resources across companies allows them to retain specialists and get more bang for their buck. Ever since the introduction of the service tax regime, the consideration which flows from the employer to an employee in course of a contract of employment has been kept outside the purview of tax.

However, when human resources are pooled between companies and cost of such pooling are shared inter se between companies, then such a transaction of deputation/ joint employment has been alleged to be leviable to service tax by the Revenue. The said dispute was conclusively put to rest by the decision of the Hon'ble Customs, Excise and Service Tax Tribunal ("Tribunal") in the case of **Franco Indian Pharmaceutical (P) Ltd V. Commr. Of S.T., Mumbai 2016 (42) S.T.R. 1057 (Tri. - Mumbai) ("Franco Indian Pharmaceutical").** In this case, the moot issue before the Hon'ble Tribunal was whether reimbursement received from group companies for deputation of employees would be leviable to service tax. The Hon'ble Tribunal answered the said question in negative and in favour of the assesee.

While dealing with the aforementioned issue the Hon'ble Tribunal also dealt with the contours of taxation of joint employment and deputation. The principles laid down by the Hon'ble Tribunal in this case, may be relevant under the GST regime as well.

Decision in the case of Franco Indian Pharmaceutical

The Appellant in this case, was engaged in the manufacture of pharmaceuticals and had its own marketing network. It had three related group companies which also manufactured pharmaceutical products; however, these companies did not have their own marketing network. Accordingly, they utilized Appellant's network and reimbursed it for expenses incurred therein. This reimbursement was mainly towards, Employee Cost

In this background, the Revenue took a view that the recovery of expenses by the Appellant was consideration towards Business Auxiliary Services rendered by Appellant to its group companies.

The Hon'ble Tribunal at the very outset held that this decision was covered in Appellant's favor by the decision of the Hon'ble Tribunal in the case of K. Raheja Real Estate Services Pvt. Ltd. reported as - 2013-TIOL-2363-CESTAT-MUM.

Having said the above, the Hon'ble Tribunal compared the present transaction to joint employment. It held that as per the Draft Circular

LEGAL CLASSICS

released by the CBIC dated 27.12.2012, it has been clarified that joint employment, i.e. when an employee enters into a contract of employment with more than one company, is not leviable to tax; even when the salary is paid by one company and is subsequently reimbursed by other employers.

Drawing an analogy from the above, the Hon'ble Tribunal held that merely because there is no contract of joint employment, it would be remiss to hold to that there is a supply of services. It further held that due to various administrative reasons, even in the absence of a contract for joint employment, there may exist a joint employment arrangement which would be apparent from the conduct of the parties. It held that in the Appellant's case the conduct of the employees who have been working with Appellant's group companies for several years knowingly full well that their emoluments were been paid by the Appellant, shows that it was a case of joint employment.

The Hon'ble Tribunal further held that in any case, if the arrangement was not a joint employment arrangement, then the company who hires and keeps the employees on its rolls would have insisted on some mark-up over the actual cost. An absence of the same would indicate that the same is not in nature of consideration for any service rendered but is merely reimbursement of shared costs.

Applicability under the GST regime

As per Section 7(2)(a) of the Central Goods and Services Act, 2017 all the activities and transaction specified under Schedule III shall not be treated as supply of goods or services. Entry 1 of the said Schedule covers services by an employee to the employer in the course of or in relation to the contract of employment. In other words, services by an employee to an employer is not treated as supply and accordingly, is not leviable to GST.

Thus, it could be argued that the treatment of service provided by an employee to an employer during the course of employment, remains unchanged even under the GST regime. In this background, considering the pari materia provisions of GST laws, the ratio of the Hon'ble Tribunal's decision in Franco Indian Pharmaceutical (supra) remains relevant.

However, much like the service tax regime, even under the GST regime, joint employment/ deputation of employees across group companies has still remained controversial. The controversy mainly revolves around that fact that as per Section 25 of the CGST Act, 2017, branch offices of the same company in different states are required to obtain separate registration and are treated as distinct person.

To appreciate the said controversy, it would be relevant to refer to the Advance Rulings issued in the case of **B.G. Shirke Construction Technology Pvt. Ltd** reported as **2021 (55) GSTL 174 and Columbia Asia Hospitals Pvt. Ltd** reported as **2019 (20) GSTL 763 ("AARs").** In both of these AARs, the issue in dispute was whether it could be said that there was supply of services from employees of the head/corporate office to the branch offices. In the said cases, the decision hinged on the fact that as per Entry 2 of Schedule I read with Section 7 (1) (c) of the CGST Act, transaction between related persons or distinct persons specified in Section 25 of the CGST Act, shall be treated as supply, even if made without consideration.

The AAR rulings appear to have not appreciated the fact that Section 7(2) of the CGST Act, 2017 is notwithstanding Section 7(1)(c) of the CGST Act. Therefore, when there is no supply of service the question of applicability of provisions for distinct persons may not arise. It would be interesting to see how the ratio laid down in the case of Franco Indian Pharmaceutical (supra) will be applied by the Courts while deciding upon the taxability of the said transactions in the GST regime.

QUOTABLE QUOTES

Compiled by: Virangana Wadhawan (Principal Associate), Raghav Khandelwal (Advocate) - ELP

"We are very hopeful from the upcoming budget as you know that tourism industry is the most affected sector due to COVID-19 in the past two years. Firstly, we want that the government to give the tourism sector equal status as that of the industrial sector along with equal facilities. Secondly, we request the government to provide low-interest finance to us. There is no GST on hotel rooms below the tariff of rupees one thousand which should be rupees two thousand. So that the tourists' flow will increase and will help to revive the economy." **President of Himachal Federation of Hotels and Restaurants Association, Ashwani Bamba**

"The GST Input Tax Credit (ITC) should be restored. This industry is running on very thin margins and after two years of very tough times, we need support at this juncture. In the absence of ITC, it is difficult for everyone to keep their heads above water. There should also be a mechanism in place to protect the industry from further lockdowns. For instance, why not come up with a furlough scheme, as has been the case in the UK, and perhaps introduce an insurance mechanism. After all, if there is insurance against earthquakes and fires, why not the pandemic?" - **Zorawar Kalra, Founder & MD of Massive Restaurants, with brands such as Masala Library, Farzi Cafe and Pa Pa Ya**

"At the outset the Union Budget 2022 the launch of National Tele Mental Health program will better the access to quality mental health counseling which has accentuated mental health problems in people of all ages. There could have been focus on primary healthcare centres and preventive healthcare diagnostics, which has become a necessity in the wake of the third wave. The Union Budget 2022 seems to have its sights set on the long term with a major push towards Digital Healthcare Ecosystem, and no major announcements or tax breaks that would have worked as an instant relief to the Healthcare sector. The much-anticipated goods and services tax (GST) streamlining and the introduction of input tax credit (ITC), if implemented, would've introduced the liquidity that the industry was hoping for" - Mr. **Arjun Ananth, CEO Medall Healthcare Pvt Ltd**

In my experience with the current regime, policy conversations are not limited to Budget Day but take place through the year. So, we are hoping for discussions on how exports can be further incentivized and policy can be enhanced for design led local manufacturing. From an electronics sector standpoint, we expected reforms in the Union Budget FY 2022 - 23 that would accelerate growth channelized by consumer demand. For instance, rationalizing the GST from 28% to 18% on ACs and large screen size (>105cm) TVs will improve affordability and penetration as these are no longer considered luxury items. We will look forward to hearing from the GST Committee on this. From the individual's perspective, no changes in tax structure can also be a relief as it defines stability in current times. Though more money in the hands of the tax-payers could have helped drive consumption over short term," said **Manish Sharma, CEO, Panasonic India.**

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