INDIRECT TAX
Weekly Digest

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GOODS & SERVICES TAX

LEGISLATIVE UPDATES

NOTIFICATION

Competition Commission of India empowered to examine anti-profiteering cases

CBIC has notified that effective from 01 December 2022, the Competition Commission of India (CCI), established under Section 7(1) of the Competition Act, 2002, is empowered to examine whether input tax credits availed by any registered person or the reduction in the tax rate have actually resulted in a commensurate reduction in the price of the goods or services or both supplied by him.

Consequently, CCI would replace the existing National Anti-Profiteering Authority (NAA) with effect from 01 December 2022.

[Notification no:23/2022-Central Tax dated 23 November 2022]

Consequential amendments to the Central Goods & Services Tax Rules, 2017 (CGST Rules) (effective 1 December 2022)

Pursuant to the above, consequential changes were made to the CGST Rules and the following rules have been omitted:

- Rule 122 – Constitution of NAA
- Rule 124 - Appointment, salary, allowances and other terms and conditions of service of the Chairman and Members of NAA
- Rule 125 - Secretary to NAA
- Rule 134 – Decision to be taken by the majority
- Rule 137 – Tenure of NAA

Further, Explanation (a) (after Rule 137 of the CGST Rules) has been amended to stipulate that the authority notified under Section 171(2) of the CGST Act (i.e., CCI) would be treated as the Authority. In addition to the above, in Rule 127 of the CGST Rules, the phrase "It shall be the duty of the Authority" has been replaced by the phrase "The Authority shall discharge the following functions, namely".

[Notification no:24/2022-Central Tax dated 23 November 2022]

BDO COMMENTS

It had already been announced that the CCI would replace the NAA and now the notification is issued to empower CCI to handle the anti-profiteering complaints. While the CGST Rules prescribed a specified tenure for NAA, which was extended from time to time, now the rule laying down the tenure has been removed altogether. This practically results in the anti-profiteering provisions being a permanent provision under the GST laws, as opposed to the initial understanding that the anti-profiteering provisions were meant to be transient. While the constitutionality of the anti-profiteering provisions is being debated before the Courts, the industry would look forward to a uniform methodology being prescribed to determine the profiteering and the quantum of profiteering, if any.

JUDICIAL UPDATES

WRIT PETITION

Deposit in ECL prior to the filing of GSTR-3B returns does not amount to discharge of tax liability, interest liability arises on delayed filing of return

Facts of the case

- M/s. RSB Transmissions India Ltd. (Taxpayer) has filed the GSTR-3B returns beyond the due date for the months of July 2017, October 2017, November 2017 & March 2018
- The taxpayer had deposited the amount in Electronic Cash Ledger (ECL) prior to filing Form GSTR 3B
- The GST authorities requested to pay interest of INR 1.32mn for the delay in payment of tax/filing of return
- The Taxpayer responded to the Tax authorities that the interest could be levied only on the part of the tax debited from ECL after the due date of filing of GSTR 3B
- However, the Tax authorities informed the Taxpayer that deposits stay in ECL until GSTR-3B is filed. Post which, the ECL is debited and the amount will be credited to the Government account as tax
- Hence, the Taxpayer preferred to appeal before the Honorable Jharkhand High Court.

Issues involved

- Whether the amount deposited in ECL prior to the filing of GSTR-3B could be treated as the discharge of GST liability for the period in respect of which the return is being filed on a belated basis?
- Whether interest could be levied on such a deposit in ECL for the delayed filing of GSTR-3B?

Contention by the Taxpayer

- The basic tenet of levy for interest is that interest can be levied if the Government is deprived of tax beyond the due dates. However, interest cannot be levied for delay in filing of GST returns as a late fee for the same has been prescribed
- Thus, interest can be levied only on late payment of tax i.e. where the tax is deposited beyond the return filing date. Upon filing Form GSTR-3B, the amount deposited towards tax and available as a credit in ECL is merely shown as debited from ECL and there is no real movement/transfer of money to the Government exchequer
- Interest cannot be sustained on the amount towards tax which is already lying with the Government exchequer for debit at the time of filing Form GSTR-3B
- ITC being deemed to be good as tax paid, there is no distinction between ECL & Electronic credit Ledger (ECrL) as the amount of tax being in the hands of Government
- The taxpayer relied on Income tax rulings to substantiate that no interest is payable if tax has already been deposited even though returns are filed on a belated basis
- Interest is compensatory and not penal in nature and no deliberate violations of the provisions have been alleged on the part of revenue
- No phrases in the statute should be interpreted in such a manner to render the provisions redundant and hence, the Taxpayer would not be liable to pay interest in the present case.

Contention by the Tax Authority

- Every deposit made by a person toward tax, interest penalty fee or any other amount is credited to the taxpayer's ECL as envisaged in Section 49 of CGST Act, 2017 and rule 87 of CGST Rules, 2017
- ECL is maintained for crediting the amount deposited and debiting the payment towards tax, interest, penalty or any other amount as per rule 87 of CGST Rules, 2017
- As per explanation (a) to Section 49 of CGST Act, 2017, the date of credit to the account of the Government bank shall be deemed to be the date of deposit in ECL;
- The amount available in ECL/ECrL can be used for payment of tax. ITC credited to EcrL shall be debited to the extent of discharge of any liability as per the order of utilisation as per rule 86 of CGST Rules, 2017
- Registered person is required to file the return and pay tax to the Government as per such return but not later than the due date of furnishing the return as per Section 39(7) of CGST Act, 2017
- Thus, only after off-setting the GST liability at the time of filing the return, does the amount gets debited from the ECL of the taxpayer to the Government exchequer
- The taxpayer also failed to inform us about the delay in filing of returns or the reasons thereof. Accordingly, interest is leviable since there is a delay in filing the GST returns resulting in a consequent delay in offsetting the tax liability.

Observations and ruling by the HC

- Every registered person required to furnish a return shall pay the Government tax dues as per such return not later than the last date on which such return is required to be furnished
- A bare reading of Section 49 of the CGST Act, 2017 indicates that any deposit credited to ECL are mere deposits towards tax, interest, and penalty
- Post successful credit of the amount to the Government account, Challan identification number (CIN) is generated, and then, the amount is credited to taxpayers' ECL
- A combined reading of Section 49 of the CGST Act, 2017 read with Rule 87 of the CGST Rules, 2017 shows that deposits does not mean tax is appropriated to the Government exchequer
- Amounts available in the ECL may be used for payment of tax but the deposits in ECL does not amount to payment of tax liability
- Under the GST scheme, tax cannot be paid prior to filing Form GSTR-3B return and the tax liability gets discharged only upon filing the said returns

- Every registered person shall discharge his liability towards tax by debiting ECL/EcrL and include the details of such payment in Form GSTR-3B, and therefore, discharge of the GST liability is simultaneous with the filing of Form GSTR-3B return
- It was also noted that there is no time limit to deposit the amount in ECL and it works as an e-wallet. Further, the GST law also enables a registered person to claim a refund of the amounts deposited in ECL. Consequently, any deposit in ECL prior to the filing of GST returns does not amount to discharge of tax liability
- Based on the above, the Honorable High Court held that interest liability would arise on the delayed filing of the return.

  [High Court of Jharkhand - M/s. RSB Transmissions India Ltd. Vs. Union of India, 2022-TIOL-1426-HC-JHARKHAND-GST, dated 18 October 2022]

BPO services supplied directly to third parties on behalf of the recipient (both located outside India) shall be treated as export of services not as intermediary services

Facts of the case

- M/s. Genpact India Private Limited. (Taxpayer) engaged in the business of providing BPO services to customers located in India as well as outside India. The Taxpayer has entered into a Master Service sub-contracting Agreement (MSA) with Genpact International incorporated and located outside India ('Recipient') for providing BPO services directly to its clients located outside India
- The taxpayer treated the transaction as an Export of service under the GST law and filed an application for claiming refund of unutilised input tax credit (ITC) used in making such supplies
- The Tax Authority rejected the refund application on the ground that the Taxpayer has supplied Intermediary services, and hence, would not be treated as an export of services (since the place of supply of such service is in India)
- Aggrieved by the decisions of lower forums the Taxpayer approached the Honorable High Court.

Questions before the High Court

- Whether the taxpayer would be qualified as 'Intermediary' and services supplied by him directly to the clients of the recipient would be qualified as intermediary services

Contention by the Taxpayer

- The Taxpayer had submitted that the intermediary under Section 2(13) of IGST Act, 2017 inter alia provides that a person who provides services on their own shall not be termed as an intermediary. In the present case, the Taxpayer is providing services on their own to the clients of the recipient and hence, cannot be considered to provide intermediary services
- The taxpayer also submitted that the definition of the intermediary under GST is similar to the definition under the erstwhile Service tax regime, and that, the services provided by the Taxpayer qualified as export of service during the erstwhile Service tax regime. Therefore, the services supplied by him should be considered as an export of services under the GST regime as well.

Submissions by the Tax Authority

- Tax authority submitted that certain clauses of MSA stipulate that the recipient is in authority to take decisions regarding the services provided by the Taxpayer, and hence, such a relationship can be termed a principal-agent relation. Therefore, the Taxpayer is not providing BPO services on their own account but as an agent of the recipient
- In relation to refunds allowed in the pre-GST regime, the Tax Authority submitted that each assessment year should be considered as a separate year and any decision related to such year shall not apply to the different assessment years.

Observations and Ruling by the High court

- A registered person engaged in the export of service without payment of GST is eligible to claim a refund of unutilised ITC
- The Court noted that certain clauses of the agreement state that the Taxpayer is responsible for the risk associated with the services provided by him which would imply that the Taxpayer is providing services on his own account
- On perusal of the definition of 'intermediary', the Honorable High Court observed that there is no change in the legal meaning of 'Intermediary' in the GST regime and the erstwhile Service tax regime. Further, considering that the MSA has not undergone a change, the Tax authority should not take different views in different periods
- Accordingly, the Honorable High Court held that Taxpayer cannot be treated as an intermediary, and hence, would be eligible for a refund of unutilised ITC in respect of such supplies.

  [Punjab and Haryana High court - Genpact India private limited Vs. Union of India and others Case no: CWP-6048-2021 (O&M) dated 11 November 2022]

EXCISE/SERVICE TAX/CUSTOMS

SEZ unit is entitled to import all goods (except prohibited goods) without payment of customs duty for authorised operations

Facts of the case

- M/s. Renaissance Global Limited (Taxpayer) is engaged in the manufacture and export of gold, platinum and silver jewellery. Its unit is located within the Santacruz Electronic Export Processing Zone (SEEPZ), a notified Special Economic Zone (SEZ) under the SEZ Act, 2005 (SEZ Act)
- The Taxpayer imported gold and silver jewellery for remaking by filing a Bill of Entry (BoE) declaring the same as 'Gold and Silver Jewellery'. A declaration was also filed with the BoE which inter-alia declared that the goods covered by the BoE have been imported on an outright purchase/consignment account. The Consignment was intercepted by the Tax Authorities before it reached SEEPZ. The consignment was examined and detained
- The Tax Authorities called for information vide a letter from the Development Commissioner (in charge of SEEPZ) asking whether the Taxpayer's SEZ unit has the approval of the competent authority to import/re-melt and export

the imported finished jewellery. In response, the DC replied that the Taxpayers were eligible to import the goods forming a part of the consignment

- The Tax Authorities, thereafter, issued a Show Cause Notice (SCN) requiring the Taxpayer to show cause as to why the consignment should not be confiscated under Section 111(d) and (m) and penalty under Section 112 and 114A of the Customs Act, 1962 be not imposed followed by an addendum to include Sections 28, 28AB of the Customs Act, 1962
- The Taxpayer filed a Writ petition seeking an order to set aside or quash the SCNs issued by the Tax Authorities
- The Tax Authorities, after considering the replies from the DC and Taxpayer, confirmed the allegations in the SCN, imposed a penalty and issued the order (Impugned order)
- The Writ petition was subsequently modified to challenge to the validity of the impugned order also.

Contention of the Taxpayer

- The unit was governed by the SEZ Act, 2005, and the Tax Authority (an officer under the Customs Act, 1962) has no jurisdiction to issue the SCN
- Section 11 of the Customs Act, 1962, empowers the Central Government to prohibit the importation or exportation of goods. There is no notification issued under Section 11 of the Customs Act, 1962 for prohibiting the import of finished jewellery into an SEZ for the purpose of remaking;
- The DC of SEZ, filed an affidavit stating that the Taxpayer was not wrong and that there was no restriction qua the Taxpayer importing finished jewellery as raw material because even finished jewellery will have to be melted and remade into fresh jewellery. Consequently, there can be no confiscation under Section 111(d) of the Customs Act, 1962.

Contention of the Tax Authorities

- The Tax Authorities placed reliance on the **Union of India Vs. Oswal Agricomm Pvt. Ltd [2011 (268) ELT 21 (Guj.)]**, wherein the Honorable High Court held that the Tax Authorities under the Customs Act, 1962 are empowered to confiscate any goods under Sections 111, 112 and impose a penalty under Sections 113 and 114 of the Customs Act, even with regard to the units situated within the SEZ
- The Taxpayer has an alternative remedy to challenge the order of the Tax Authorities under the Customs Act, 1962. Instead, the Taxpayer has sought to challenge the action of the Tax Authorities in investigating, seizing and issuing SCN as being ex-facie without jurisdiction and without the authority of law after the coming into force of the SEZ Act, 2005
- The Tax Authority has correctly exercised its jurisdiction and powers under the Customs Act, 1962. The Taxpayer failed to submit full self-declaration while filing BoE inter-alia whether the jewellery being imported is 'New or Old' or 'out of fashion/trend' or scrap jewellery or manufactured and exported by it or re-import of self-exported jewellery because of payment issues suffered by Taxpayer. The declaration in the import invoice and the BoE is silent on these aspects
- Further, the Taxpayer, admittedly, resorted to routing the goods through remaking with the full awareness that the self-exported jewellery attracted the provisions of Rule 29(7) to hoodwink the Customs and committed gross willful violations of the SEZ provisions to read with Section 46(4) of the Customs Act, 1962 and Rule 11 of Foreign Trade (Regulation) Rules, 1993.

Observations & ruling by the HC

The Court has made the following observations and ruling:

- The Court opined that the Taxpayer pursued the alternate remedy as per the settled law and that availability of an alternate remedy does not prohibit High Court from considering a writ petition
- The Court noted that Section 111(m) of the Customs Act, 1962 would apply only to goods improperly imported, which means any goods which do not correspond in respect of value or in any other particulars with the declaration made under Section 77 of the Customs Act, 1962
- For invoking Section 111(m) of the Customs Act, 1962, the declaration made in an entry under the Customs Act, 1962, must fail to correspond, in value or any other particular, to the goods actually imported by the
- Taxpayer. It deals with intentional mis-declaration and mismatch between what has been declared in the BoE and what has actually been imported by the Taxpayer. In the instant case, there is no mis-declaration whatsoever and, therefore, the question of Section 111(m) of the Customs Act, 1962 being invoked does not arise
- The Tax Authorities invoked Section 28 by way of a corrigendum to the SCN without even dealing with how the violations (if any) of the provisions of the SEZ Act/SEZ Rules disturb the exemption available to the Taxpayer in terms of Section 26 of the SEZ Act. The customs duty under Section 28 of the Customs Act, 1962 can only be imposed on imports into SEZ if the exemption under Section 26 of the SEZ is withdrawn and since both the SCN and the impugned order are totally silent on any such withdrawal of exemption, the question of levying any duty would not arise
- As per rule 27(1) of the SEZ Rules, an SEZ unit is entitled to import all goods (except prohibited goods) without payment of customs duty for its authorised operations. Therefore, only those goods which are prohibited under a notification (issued under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992) will be treated as 'prohibited goods'
- As per Rule 2(u) read with Rule 27(1) of the SEZ Rules, there is no restriction on the import of jewellery for authorised operations as even previously manufactured items, viz., finished jewellery earlier exported in the present case, can be imported into a SEZ as 'raw material'. The same has been clarified by the Ministry of Commerce vide its instruction no:37 dated 7 September 2009
- There is no misdeclaration between the description and/or value declared in the BoE and the goods actually imported by the Taxpayer, both being diamond-studded gold and silver jewellery. The question of invoking Section 111(d) and 111(m) of the Customs Act, 1962 does not arise
- Only in cases where the conditions of the LOP had been breached or the SEZ permission was cancelled and the area was delicensed by the DC, the exemption will not be available to the Taxpayer

- The Honorable High Court also observed that the SCN did not even propose to impose a penalty under Section 114A of the Customs Act, 1962. However, the Tax Authorities has imposed a penalty under Section 114A of the Customs Act, 1962 in the impugned order. The Court relied upon **Commissioner of Central Excise V/s. Gas Authority of India [2008 (232) ELT 7 (SC)] and Commissioner of Customs V/s. Toyo Engineering [2006 (7) SCC 592]** and set aside the imposition of penalty under section 114A of the Customs Act, 1962
- Based on the above observations Court quashed and set aside the SCNs and addendum thereto as well as the impugned order.

  [Bombay High Court, M/s. Renaissance Global Limited and Ors. Vs Union of India, Dated, 18th November 2022]

CUSTOMS

NOTIFICATION

No Customs Duty on import of motor car for use of Governor of the State

The CBIC has exempted levy of Basic customs duty on the import of motor car for the use of the Governor of the State with effect from 18 November 2022.

[Notification no:57/2022 dated 17 November 2022]

Reduction in iron ore & steel export duties

CBIC has reduced/prescribed nil export duty on certain iron ore & steel products export duties based on the recommendation of the ministry of steel. It includes products covered under chapters 26 and 72.

Nil rate of export duty imposed on the export of stainless-steel items classified under the following HS Code:

- 7201 - Pig iron and spiegeleisen in pigs, blocks or other primary forms
- 7208 - Flat-rolled products of iron or non-alloy steel, hot rolled, not clad, plated or coated
- 7209 - Flat-rolled products of iron or non-alloy steel, cold rolled (cold-reduced), not clad, plated or coated
- 7210 - Flat-rolled products of iron or nonalloy steel, of a width of 600 mm or more, clad, plated or coated
- 7213 - Bars and rods, hot-rolled, in irregularly wound coils, of iron or non-alloy steel
- 7214 - Other bars and rods of iron or non-alloy steel, not further worked than forged, hot-rolled, hot-drawn or hot-extruded, but including those twisted after rolling
- 7219 - Flat-rolled products of stainless steel, of a width of 600 mm or more
- 7222 - Other bars and rods of stainless steel; angles, shapes and sections of stainless steel
- 7227 - Bars and rods, hot-rolled, in irregularly wound coils, of other alloy steel
- 26011210 - Iron ore pellets

Other Amendments made are as follows:

S. No. of notification No. 27/2011-Customs	Chapter or heading or sub-heading or tariff item	Description of goods	Proposed Rate of Duty
20A	2601 11 21, 2601 11 22, 2601 11 41, 2601 11 42	All Goods	Nil
20C	2601 11	All Goods, other than goods mentioned in S.No. 20A	30%
20D	2601 12	All Goods, other than iron ore pellets	30%

This notification shall come into force on 19 November 2022.

[Notification no:58/2022 dated 18 November 2022]

Removal of Customs Duty and Agriculture Infrastructure and Development Cess (AIDC) levy exemption

Earlier, CBIC granted the following exemptions:

- Customs Duty & AIDC on the import of Coking coal and Anthracite/Pulverised Coal Injection
- Customs Duty on coke and semi-coke of coal, of lignite or of peat, whether or not agglomerated and on Ferro-nickel.

The aforesaid exemptions have now been withdrawn effective 19 November 2022.

[Notification no:59/2022 dated 18 November 2022 & Notification no:60/2022 dated 18 November 2022]

FOREIGN TRADE POLICY (FTP)

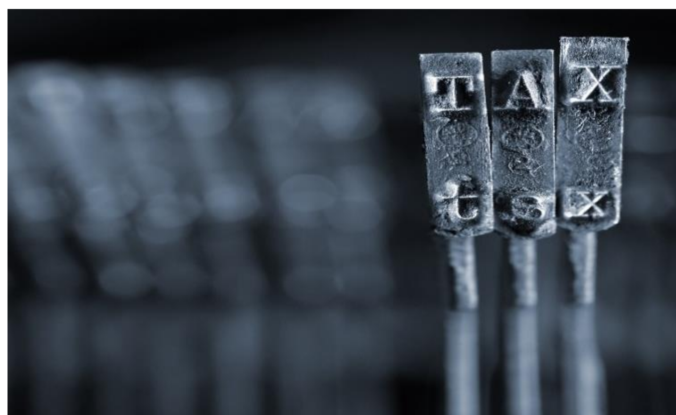
POLICY CIRCULAR

Relief in Average Export Obligation in terms of para 5.19 of Hand Book of Procedures (HBP) of FTP 2015-20

- Para 5.19 of the HBP of the FTP 2015-20 (extended upto 31 March 2023) provides relief to specified class exporters (of those sectors where total exports in that sector/product group have declined by more than 5% as compared to the previous year) to the effect that the average export obligation for the year may be reduced proportionately to the reduction in exports of that particular sector/product group during the relevant year as against the preceding year

- This implies that the sector/product group that witnessed such a decline in 2021-2022 as compared to 2020-2021 would be entitled for such relief. Accordingly, a list is provided in Annexure 1 attached with the circular which specifies such product groups showing the percentage decline in exports during 2021-22 as compared to 2020-21
- Accordingly, the Regional offices are requested to re-fix the annual average export obligation for EPCG authorizations for the year 2021-22. Reduction, if any, in the export obligation should also be endorsed in the licence file of the office of RA as well as in the amendment sheet to be issued to the EPCG authorisation holder
- Regional offices while considering requests of discharge of export obligation has to ensure that in case of shortfall in export obligation fulfilment, policy circulars issued earlier in terms of para 5.11.2 of 2009-14 and para 5.19 of HBP of FTP 2015-20 are also considered before issuance of demand notice, EODC, etc.

[Policy Circular no:44/2015-20 dated 17 November 2022]



NEWS FLASH

1. "Govt may remove penal offences covered under IPC from GST law"
https://economictimes.indiatimes.com/news/economy/policy/govt-may-remove-penal-offences-covered-under-ipc-from-gst-law/articleshow/95638119.cms
[Source: Economic Times, 20 November 2022]

2. "GoM agrees to tax online gaming at par with casinos and horse racing; can attract 28% GST"
https://www.businesstoday.in/latest/economy/story/gom-agrees-to-tax-online-gaming-at-par-with-casinos-and-horse-racing-can-attract-28-gst-353779-2022-11-22
[Source: Business Today, 22 November 2022]

3. "Exporters may have great festive season amid withdrawal of GST exemption on outbound international freight"
https://economictimes.indiatimes.com/small-biz/gst/exporters-may-have-great-festive-season-amid-withdrawal-of-gst-exemption-on-outbound-international-freight/articleshow/95676877.cms
[Source: Economic Times, 22 November 2022]

4. "RBI brings GSTN under account aggregator framework"
https://www.financialexpress.com/economy/rbi-brings-gstn-under-account-aggregator-framework/2889348/
[Source: Financial Express, 24 November 2022]

5. "CCI to pass verdict on GST profiteering complaints from Dec 1; NAA to wind up"
https://economictimes.indiatimes.com/news/economy/policy/cci-to-pass-verdict-on-gst-profiteering-complaints-from-dec-1-naa-to-wind-up/articleshow/95733725.cms
[Source: Economic Times, 24 November 2022]

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