INDIRECT TAX
Weekly Digest

18 October 2022
www.bdo.in

GOODS & SERVICES TAX

JUDICIAL UPDATES

ORDERS BY AUTHORITY FOR ADVANCE RULING (AAR

Amount deducted by the company from the employees who are availing food in the factory/ corporate office not considered as supply

Facts of the case

- M/s. Zydus Lifesciences Ltd (Taxpayer) is engaged in the manufacture, supply and distribution of various pharmaceutical products and is required to comply with all the obligations and responsibilities cast under the provisions of the Factories Act, 1948 like providing canteen facility to its employees at the factory by appointing a Canteen Service Provider(CSP)
- The Taxpayer has submitted that it is obligated and mandated to provide a canteen facility to its employees at the factory. Since the factory premises of the Taxpayer is located far away from local city limits and considering the time and efforts required for arranging food on daily basis, the Taxpayer decided to provide a canteen facility to its employees at the factory by appointing a CSP to comply with the statutory requirement laid down under the Factories Act, 1948
- CSP has entered into an agreement with the Taxpayer who shall pay the full amount to the service provider for the food served during the prescribed period on behalf of the employees, and, a pre-determined percentage of the amount paid by the Taxpayer is recovered from the employees (without any profit) and the balance amount is borne by the Taxpayer to be treated as staff welfare expense towards subsidized food served to the employees
- The Taxpayer pays the CSP along with GST @ 5% and does not avail of input tax credit (ITC) for such expenses and the Taxpayer is of the opinion that the canteen facility provided to the employees against recovery of a nominal amount, cannot be regarded as supply under the GST law and hence, not leviable to GST

Questions before the AAR

- Whether the subsidized deduction made by the Taxpayer from the employees who are availing food in the factory/corporate office would be considered as a supply by the Taxpayer under the provisions of Section 7 of the Central Goods and Services Tax Act, 2017 (CGST Act, 2017)
- If the answer to the above is in the affirmative, whether GST is applicable to the amount deducted from the salaries of its employees
- If the answer to the above is in the affirmative, whether GST is applicable on which portion i.e. the amount paid by the Taxpayer to the CSP or only on the amount recovered from the employees

Observations and Ruling by the AAR

- The Taxpayer is providing a canteen facility to all its permanent employees (on payroll) as per the contractual agreement between the employer-employee relationship which is run by a CSP. As per their arrangement, a part of the canteen charges is borne by the Taxpayer whereas the remaining part is borne by its employees. The employees' portion of canteen charges are collected by the Taxpayer and paid to the CSP
- The Taxpayer does not retain the employees' portion of canteen charges with itself
- The Taxpayer is providing a canteen facility to its permanent employees (on its payroll) as per a contractual agreement with the employees
- CBIC circular no:172/04/2022-GST dated 06 July 2022 has issued the following clarification on the issue of whether GST is leviable on the benefit provided by the employer to its employees in terms of the contractual agreement entered into between the employer and the employee:
  - Schedule III to the CGST Act provides that "services by an employee to the employer in the course of or in relation to his employment" will not be considered as supply of goods or services and hence GST is not applicable on services rendered by an employee to employer-provided, they are in the course of or in relation to employment
  - The provision of services of transport and canteen facility to its employees is as per the contractual agreement between the employee and the employer in relation to the employment. As cited in the above-referred provisions of scheduled III and the clarification issued vide circular no:172/04/2022-GST dated 06 July 22. Hence, the provision of the services of transportation and canteen facility cannot be considered as a supply of goods or services and cannot be subjected to GST
- The provision of services by way of transportation of employees and providing a canteen facility to the employees are under the contractual agreement between the employee and the employer, in relation to the employment. As cited in the above-referred provisions of Scheduled III and the clarification issued, the provision of the services of transportation and canteen facility cannot be considered as a supply of goods or services, and hence, cannot be subjected to GST
- Based on the above observations subsidized deduction made by the Taxpayer from the employees who are availing food in the factory/corporate office would not be considered a supply under the provisions of Section 7 of the CGST Act, 2017

  [AAR-Gujarat, M/s. Zydus Lifesciences Ltd, ruling no:GUJ/GAAR/R/2022/42, dated 28 September 2022]

Fruit drinks should contain the prescribed volume of alcohol to qualify as non-alcoholic beverages

Facts of the case

- M/s. United Breweries Limited (Taxpayer) located in Karnataka is primarily engaged in manufacturing (brewing), bottling, marketing and sale of alcoholic and non-alcoholic beverages
- Taxpayer launched a non-alcoholic malt drink called 'Kingfisher Radler' (product) in 2018 and classified the said product under HSN 2209 9100, as non-alcoholic beer
- Non-alcoholic malts are agri-based products containing barley malt and substantially lesser sugar. They are manufactured out of 100% natural ingredients of agricultural origin such as barley, hops, etc. along with antioxidants and preservatives. Non-alcoholic malt has 0% alcohol by volume
- Vide and notification no:1/2017-CT(R) as amended by notification no:8/2021-CT(R) dated 30 September 2021, the tax rate had been increased to 28% and compensation cess at 12% has been levied w.e.f. 01 October 2021 on 'carbonated beverages of fruit drink or carbonated beverages with fruit juice' under HSN 2022

Question before the AAR

- Whether the non-alcoholic malt drink 'Kingfisher Radler' is covered under 'carbonated beverages of fruit drink or carbonated beverages with fruit juice' of a chapter heading 2202, under entry no:12B of notification no:1/2017 dated 28 June 2017 (as amended)

Contention by the Taxpayer

- Non-alcoholic malts/beer has a separate and distinct classification entry under the tariff viz. 2202 91 00 and is covered by entry no:24A of Schedule III of notification no:1/2017-CT(R) dated 28 June 2017. The same is chargeable to 18% GST
- As per the explanatory notes to the chapter heading 2202, the non-alcoholic beer includes:
  - Beer made from malt, the alcoholic strength of which by volume has been reduced to 0.5% by volume or less
  - Ginger beer and herb beer, having an alcoholic strength by volume not exceeding 0.5% by volume
  - Mixtures of beer and non-alcoholic beverages (e.g., lemonade), having an alcoholic strength by volume not exceeding 0.5% by volume
- The Taxpayer submitted that non-alcoholic malts have a separate and distinct classification under the HSN 2202 9100 (non-alcoholic beer) liable to GST at 18%
- In common parlance, the product is referred to and consumed as beer without alcohol (non-alcoholic malt), and not as a carbonated fruit drink or carbonated beverage with fruit juice
- 'Fruit drink' is understood as a drink made from fruit. Since the product at hand is made from malt and contains traces of fruit only for flavouring purposes, it cannot be considered a 'carbonated beverage of fruit drink'
- As per the FSSAI Regulations, for a beverage or drink to be known as a carbonated fruit drink, it should be prepared from fruit juice and water or carbonated water whereas this product is essentially prepared from a malt extract and minimal fruit juice
- The product is also marketed as a non-alcoholic drink rather than a fruit-based beverage
- The amended notifications seek to cover beverages falling under tariff item 2202 9920 even if they are carbonated and does not seek to cover novel products like malt-based beverage or non-alcoholic beer
- Therefore, in common parlance and as per the FSSAI (which is the sector regulator) the product is a non-

alcoholic beer, a beverage made from malt rather than a carbonated beverage of fruit drink or carbonated beverages with fruit juice and is not covered under the amendment notifications

Observations & Rulings by the AAR

- The AAR invited reference to the explanatory note 3 to chapter 2202 wherein it is specified that 'for the purposes of heading 2202, the term 'non-alcoholic beverages' means beverages of an alcoholic strength by volume not exceeding 0.5% by volume'
- Further explanatory notes to chapter heading 2202 specify that the said heading covers non-alcoholic beverages. This heading consists of three groups (A, B and C) and group B i.e. 'non-alcoholic beer' includes the following:
  - Beer made from malt, the alcoholic strength of which by volume has been reduced to 0.5% by volume or less
  - Ginger beer and herb beer, having an alcoholic strength by volume not exceeding 0.5% by volume
  - Mixtures of beer and non-alcoholic beverages (e.g., lemonade), having an alcoholic strength by volume not exceeding 0.5% by volume
- It could be inferred from the above that 'non-alcoholic beer' is basically a beer having certain alcoholic strength which is reduced to 0.5% by volume or less. It is an admitted fact in the instant case that the impugned product does not contain any alcoholic strength by volume, as it is not fermented, and hence, the question of reducing the said strength does not arise
- Hence, the impugned product is neither a beer initially nor its alcoholic strength is reduced to 0.5% by volume. Thus, the impugned product does not qualify to be a non-alcoholic beer, but it is a non-alcoholic beverage
- It is evident from the information on the ingredients used in making products that the percentage of barley malt is less than the mixed fruit juice content in all the product variants
- The impugned product is a mixture of barley malt, sugar, mixed fruit juice, hops, lemon extract, carbon dioxide, water, flavor & other additives and black carrot juice, amongst which the predominant is mixed fruit juice
- In view of the above all the variants of 'Kingfisher Radler' merit classification as carbonated beverages or fruit drinks, covered under tariff heading 2202 99 90. Accordingly, the product attracts GST at 28% along with an applicable cess of 12% in terms of entry no:12B of Schedule IV to notification no:1/2017-CT(R) dated 28 June 2017, effective from 01 October 2021

  [AAR-Karnataka, M/s. United Breweries Limited Ruling no:KAR ADRG 32/2022, dated 14 September 2022]

EXCISE/SERVICE TAX

Refund claim of excess Central Excise duty paid by mistake is not hit by a bar of unjust enrichment, as the Taxpayer continues to bear it and has not passed it on to the buyer

Facts of the case

- M/s. Alloys Steel Plant (A unit of Steel Authority of India Limited), West Bengal (Taxpayer) had sold the goods being steel blooms of INR 2.48mn to its customer, Rail Wheel Factory, Bangalore in April 2012, against two invoices dated 28 March 2012
- The Taxpayer erroneously calculated and discharged the liability of Central Excise duty for March 2012 at 10.30% instead of 12.36%
- Subsequently, in April 2012, the Taxpayer realized its bona fide mistake and had issued two supplementary invoices on 30 April 2012 to recover the differential duty of 2.06% (viz.12.36%-10.30%)
- However, again the Taxpayer inadvertently paid the full amount of excise duty for April 2012, calculated at 12.36% by debiting the CENVAT credit register instead of paying a differential duty of 2.06%, which resulted into excess payment of duty of INR 0.50mn
- The Taxpayer filed an application for refund of excess duty paid on 24 April 2013 supported by relevant documentary evidence being copies of the original invoices, supplementary invoices, payment proofs, CENVAT credit register and certificate issued by Deputy Chief Material Manager, Rail Wheel Factory stating that Rail Wheel Factory did not avail MODVAT benefits for the purchase of blooms
- The Range Superintendent verified and confirmed that the Taxpayer had paid excise duty twice, however, the benefit of refund of such erroneously paid duty was denied on the presumption that the incidence of duty had been passed on by the Taxpayer to the customer in terms of Section 12B of Central Excise Act, 1944
- Show Cause Notice (SCN) dated 05 July 2013 was issued alleging that the Taxpayer did not discharge the burden of proving contrary to the presumption under Section 12B of the Central Excise Act, 1944 and such amount was proposed to be credited to the Consumer Welfare Fund (CWF) under Section 11B(2) of the Central Excise Act, 1944
- The Taxpayer supported its reply to SCN with a certificate issued by the Chartered Accountant certifying that the incidence of duty had not been passed on to the buyer and submitted that the refund should be granted to the Taxpayer instead of crediting the amount to the CWF
- The Adjudicating Authority rejected the refund claim of excess excise duty paid of INR 0.50mn vide order-in-original dated 17 January 2014 and such amount is only to be credited to the CWF
- The Commissioner (Appeals) passed the impugned order confirming the denial of refund on the ground that the Taxpayer could not produce any material proof in order to prove that the amount of duty had been borne by the Taxpayer and not passed on to the customer. Aggrieved by such an order, the Taxpayer approached the CESTAT

Contention by the Taxpayer

- The Taxpayer submitted that the refund claim was not hit by the principle of unjust enrichment as the incidence of excess Central Excise duty amounting to INR 0.50mn had not been passed on to the buyers and had been borne by the Taxpayer itself
- The Taxpayer also submitted the supplementary invoices wherein the differential duty component 2.06% (viz. 12.36%-10.30%) had only been collected from Rail Wheel Factory

- In other words, amounts pertaining to the original invoice were not required to be re-paid by the customer
- The refund claim was not hit by the bar of unjust enrichment as the excess duty paid by mistake by the Taxpayer was borne by the Taxpayer itself and had not been passed on to the buyer
- Where there is no case of unjust enrichment, the refund claim ought to be allowed to the Taxpayer;
- The Taxpayer also relied upon the decision of the Tribunal in the case of Mhatre Engineering Pvt. Ltd. Vs. Commissioner of C.Ex., Belapur [2008 (230) E.L.T. 459 (Tri.-Mumbai).

Contention by the Tax authorities

- The Taxpayer could not produce any material proof in order to prove that the amount of duty has been borne by the Taxpayer and not passed on to the customer
- The refund claim was liable to be rejected in terms of Section 12B of the Act and credited to CWF

Observations and Ruling by the CESTAT

- It is undisputed that the Taxpayer had erroneously paid Central Excise duty calculated at 10.30% twice, which amounts to INR 0.50mn
- The contention of the Taxpayer that they had not received the amount from their buyer needs consideration
- The Taxpayer had submitted the Chartered Accountant's certificate before the Tax authorities which certified that the incidence of duty of INR 0.50mn, for which refund had been claimed by the Taxpayer had not been passed on to anybody directly or indirectly and the amount of INR 0.50mn had not been realised from anybody
- From the records, it is evident that the Tax authorities had not controverted the above said certificate issued by the Chartered Accountant
- It is settled law that if the Taxpayer has not received the amount from the customer, it cannot be held that the Taxpayer will be unjustly enriched
- The decision of the Tribunal in the case of Mhatre Engineering Pvt. Ltd. Vs. Commissioner of C.Ex., Belapur (supra) and the judgement of the Honorable High Court of Madras in the case of Commissioner of Central Excise, Pondicherry Vs. Southern Agrifurne Industries Ltd. [2006 (205) ELT 39 (Mad.)] are very much on the point
- In light of the above, it was held that the impugned order is not sustainable. Accordingly, the impugned order is set aside and the appeal is allowed with consequential relief as per law

  [CESTAT-Kolkata, M/s. Steel Authority of India Limited Vs. Commissioner of CGST & CX dated 13 September 2022]

CENTRAL EXCISE/SERVICE TAX

INSTRUCTIONS

Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019

- Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 (SVLDRS), an Amnesty cum dispute settlement scheme, which provided a one-time opportunity for Taxpayers to settle their tax disputes and avail of tax relief
- The issue is whether the cases when the tax dues have been paid in full and are eligible under SVLDRS, 2019 for waiver of interest or not, were brought before the Honorable High Court of Madhya Pradesh in the case of M/s. Sigma Construction Co. Vs. UOI & Ors (W.P. No. 16411/2021). The Honorable High Court vide its final order dated 05 August 2022 directed CBIC to dwell upon the question and issue a clarificatory circular/instruction so that ambiguity prevailing in the field can be removed
- The matter has been examined by CBIC and stated that clause (iii) of para 2 of the circular 1073/06/2019-CX dated 29 October 2019, wherein it has already been clarified that in cases where the assessee has filed an ST-3 return on or before 30 June 2019 and has paid the tax dues in full before filing the application, the declarant is eligible to avail the benefit of the scheme for a waiver of interest. This shall also include the cases where the interest has been demanded by an SCN/O-i-O

  [Instruction no:CBIC-110267/75/2022-CX-VIII section-CBEC dated 06 October 2022]

CUSTOMS

INSTRUCTIONS

Requirement of health certificate to be accompanied with the Import of certain food consignments

- CBIC issued instruction no:18/2022-Customs dated 12 August 2022 relating to the requirement of health certificate to be accompanied with the import of certain food consignments, based on a reference from FSSAI
- In this regard, FSSAI has further clarified vide its order dated 26 September 2022, that an integrated/single certificate, incorporating food safety-related requirements/attestations is also accepted by FSSAI at the time of import clearance. It may be ensured that the integrated certificate shall incorporate all the information as per the format notified vide FSSAI's earlier order dated 03 August 2022

  [Instruction no:26/2022-Customs dated 06 October 2022]

Amendment in import policy condition under ITC(HS) 08028010 of Chapter 08 of ITC(HS) 2022, Schedule-I

- DGFT issued notification no:36/2015-2020 dated 28 September 2022, issued vide S.O. No.4570(E) on the amendment in import policy condition and the related public notice no:25/2015-2020 dated 28 September 2022 issued by DGFT, both of which are self-explanatory
- Considering that the product, fresh (green) areca nut, is a prohibited item in the absence of compliance to the policy conditions stipulated therein, the Kolkata Customs Zone may devise an appropriate mechanism for registration of Registration Certificate (RC), debit/utilisation of the quantity in the RC, monitoring the validity of the RC, and an overall monitoring mechanism for the effective implementation of the revised policy stipulation

  [Instruction no:27/2022-Customs dated 07 October 2022]

FOREIGN TRADE POLICY (FTP)

NOTIFICATION

Export quota of only broken rice (HS Code 10064000) for the year 2022-2023

The quota of 3,97,267 MT of only broken rice under HS code 1006 40 00, applicable only to LCs opened before the notification no:31/2015-2020 dated 08 September 2022 and the message exchange between the Indian and foreign bank/swift date also prior to 08 September 2022, to be exported during the year 2022-23 is notified.

[Notification no:38/2015-20 dated 12 October 2022]

PUBLIC NOTICE

Amendment in para 2.107 (TRQ under FTA/CECA) of Handbook of Procedure 2015-2020

The last date for applications for Tariff Rate Quota (TRQs) under HSN 7108 for the 3rd Quarter of the FY 2022-23 is extended till 10 October 2022.

TRQ issued under tariff head 7108 for the import in the 1st and 2nd Quarter of the FY 2022-2023 shall be revalidated till 30 November 2022.

[Public notice no:28/2015-20 dated 06 October 2022]

Extension of validity regarding the export of raw sugar to the USA under Tariff Rate Quota (TRQ) for the fiscal Year 2022

The validity for the export of raw sugar to the USA under TRQ has been extended from 30 September 2022 to 31 December 2022.

[Public notice no:29/2015-20 dated 12 October 2022]

NEWS FLASH

1. "Run-up to Budget: Monetary threshold for GST offences may rise to Rs 25 cr"
   https://www.business-standard.com/article/economy-policy/monetary-threshold-for-gst-related-offences-may-rise-to-rs-25-crore-122101201151_1.html
   [Source: Business Standard, 12 October 2022]

2. "Packaged parathas, unlike chapatis, to attract 18% GST, says GAAAR"
   https://www.business-standard.com/article/economy-policy/packaged-parathas-unlike-chapatis-to-attract-18-gst-says-gaaar-122101300418_1.html
   [Source: Business Standard, 13 October 2022]

3. "Employers no longer require to deduct GST on subsidised meal cost recovered from employees: AAR"
   https://economictimes.indiatimes.com/news/economy/policy/employers-no-longer-require-to-deduct-gst-on-subsidised-meal-cost-recovered-from-employees-aar/articleshow/94792841.cms
   [Source: The Economic Times, 11 October 2022]

4. "Karnataka edges Gujarat out to take second place in H1 GST collections"
   https://economictimes.indiatimes.com/news/economy/finance/karnataka-edges-gujarat-out-to-take-second-place-in-h1-gst-collections/articleshow/94784164.cms
   [Source: The Economic Times, 11 October 2022]

5. "How consumption is dictating State GST mop-up"
   https://www.thehindubusinessline.com/data-stories/deep-dive/how-consumption-is-dictating-state-gst-mop-up/article65989726.ece
   [Source: The Hindu Business Line, 10 October 2022]

Contact Us

For any content related queries, you may please write to the service line experts at:
taxadvisory@bdo.in

For any other queries, kindly write to:
marketing@bdo.in

BDO Offices

Ahmedabad
The First, Block C - 907
Behind ITC Narmada, Keshavbaug
Vastrapur, Ahmedabad 380015, INDIA

Bengaluru
SV Tower, No. 27, Floor 4
80 Feet Road, 6th Block, Koramangala
Bengaluru 560095, INDIA

Chandigarh
Plot no 55, 5th Floor,
Industrial & Business Park,
Phase 1, Chandigarh 160002, INDIA

Chennai
No. 443 & 445, Floor 5, Main Building
Guna Complex, Mount Road, Teynampet
Chennai 600018, INDIA

Delhi NCR - Office 1
The Palm Springs Plaza
Office No. 1501-10, Sector-54 ,
Golf Course Road, Gurugram 122001, INDIA

Delhi NCR - Office 2
Windsor IT Park, Plot No: A-1
Floor 2, Tower-B, Sector-125
Noida 201301, INDIA

Goa
701, Kamat Towers
9, EDC Complex, Patto
Panaji, Goa 403001, INDIA

Hyderabad
1101/B, Manjeera Trinity Corporate
JNTU-Hitech City Road, Kukatpally
Hyderabad 500072, INDIA

Kochi
XL/215 A, Krishna Kripa
Layam Road, Ernakulam
Kochi 682011, INDIA

Kolkata
Floor 4, Duckback House
41, Shakespeare Sarani
Kolkata 700017, INDIA

Mumbai - Office 1
The Ruby, Level 9, North West Wing
Senapati Bapat Marg, Dadar (W)
Mumbai 400028, INDIA

Mumbai - Office 2
601, Floor 6, Raheja Titanium
Western Express Highway, Geetanjali
Railway Colony, Ram Nagar, Goregaon (E)
Mumbai 400063, INDIA

Pune - Office 1
Floor 6, Building # 1
Cerebrum IT Park, Kalyani Nagar
Pune 411014, INDIA

Pune - Office 2
Floor 2 & 4, Mantri Sterling, Deep Bunglow
Chowk, Model Colony, Shivaji Nagar, Pune
411016, INDIA

Visit us at www.bdo.in