

INDIRECT TAX

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GOODS & SERVICES TAX

LEGISLATIVE UPDATES

INSTRUCTIONS

Manner of processing and sanction of IGST refunds, withheld in terms of rule 96(4)(c), transmitted to the jurisdictional GST authorities under rule 96(5A) of the CGST Rules, 2017

- Rule 96 of the Central Goods and Service Tax Rules, 2017 (CGST Rules) was amended retrospectively w.e.f. 01 July 2017 to provide for withholding of IGST refund in cases where the verification of credentials of the exporter, identified on the basis of data analytics including the availment of ITC by the exporter is considered essential before granting of refund.
- Accordingly, the Principal Director General/Director General of DGARM has been authorised to exercise the functions under Rule 96(4)(c) of the CGST Rules.
- Various administrative/procedural directions have been prescribed, inter alia including:
 - DGARM to identify the exporters where verification of credentials of the exporter, including the availment of ITC by the exporter, is considered essential before granting of refund
 - DGARM to then place an all-India alert on such exporters along with reasons for placing such an alert. Subsequently, the IGST refund of such exporters would be withheld and the data in respect of Shipping Bills filed by such exporters, for which IGST scroll could not be generated due to DGARM alert, would be transmitted to GSTN through ICEGATE for generation of refund claims in FORM GST RFD-01.
- Further, in respect of past cases where the exporter was identified as risky and where a refund could not be processed due to pending verification/receipt of the negative report would be transmitted to GSTN through ICEGATE for generation of refund claims in FORM GST RFD-01
- The refund claims are to be made available to the jurisdictional officer on the back-office system under the category 'any other (GST paid on export of goods)' with the remarks 'refund of IGST paid on export of goods (Refund not processed by ICEGATE)'. Further, the risk parameters, on basis of which the exporter has been identified as risky by DGARM, would be shared with the jurisdictional tax officers along with the system-generated refund claim in FORM GST RFD-01.
- Where the verification report qua the exporter is submitted to DGARM by the jurisdictional officer, the same would also be shared with the jurisdictional officer along with the system-generated refund claim in FORM GST RFD-01.
- On receipt of such refunds, the jurisdictional officer to immediately process refund claims in a manner similar to other RFD-01 refunds filed under Rule 89 of the CGST Rules, 2017
- The jurisdictional officer shall ascertain the genuineness of the exporter & verify the correctness

of availment and utilisation of ITC by the exporter and exercise due diligence in processing the said refund claims to safeguard the interest of revenue.

- The proper officer shall pass a detailed speaking order in respect of the refund claim and shall duly upload the same along with the refund sanction order in Form GST RFD-06 on the portal in terms of Instruction no:03/2022-GST dated 14 June 2022. The officer will also follow the timelines for processing of the refund claim in terms of Section 54(7) of the CGST Act, 2017.
- In view of the above, the SOPs dated 23 January 2020 and 20 May 2020 prescribing the procedure to be followed for verification of the risky exporters and their suppliers, are hereby superseded.

[Instruction no:04/2022 dated 28 November 2022]

JUDICIAL UPDATES

ORDERS BY APPELLATE AUTHORITY FOR ADVANCE RULING (AAAR)

AAAR cannot go beyond and decide the point on merits when there has been no ruling by the AAR

Facts of the case

- M/s. Myntra Designs Pvt Ltd (Taxpayer) owns an e-commerce portal www.myntra.com and is a major Indian fashion e-commerce company.
- The Taxpayer entered into an advertising agreement with Lenzing Singapore Pte Ltd, a company registered in Singapore, for providing advertisement space to Lenzing on its e-commerce portal, mobile application, or any other online platform.

Questions before the AAR

- Whether the transaction of providing space on its web portal for advertisements provided to a foreign entity i.e. Lenzing Singapore Pte Ltd for consideration is taxable.
- What will be the correct classification of the services and rate of tax for providing advertisement space to a foreign entity.

Ruling by the by AAR

- The AAR observed that the determination of the taxability of a transaction involves determining the Place of Supply (PoS) which is outside its jurisdiction. Hence, no advance ruling can be given in respect of such an issue.
- The services provided by the Taxpayer are classified under SAC 998365 'sale of internet advertising space (except on commission)' and the same is chargeable to GST at 18% vide entry no:21 of notification no:11/2017-CT(R) dated 28 June 2017.

Contention by the Taxpayer

- Aggrieved by the ruling the Taxpayer approached the AAAR on the limited aspect of the AAR's decision to not to give a ruling on the issue of taxability on the grounds of lack of jurisdiction is incorrect and bad in law.
- It was submitted that the AAR failed to acknowledge that Section 97(2)(e) of the CGST Act, 2017 is wide enough to include a question of whether an activity would amount

to export and consequently, determination of taxability is also covered under the jurisdiction of AAR.

- The Taxpayer relied on the decision of the Honorable Delhi High Court in **CST, New Delhi Vs. Menon Associates [2017 (49) STR 284 (Del)]** wherein it was held that the issue relating to the export of service is covered under the phrase 'determination of the rate of duty/tax/value of goods or services.
- The Taxpayer placed reliance on **Sutherland Mortgage Services INC Vs. Principal Commissioner [2020-VIL-102-KER]** wherein the Honorable Kerala High Court had dealt with Section 97(2)(e) of the CGST Act, 2017 in the context of jurisdiction of AAR to decide whether any transaction amounts to export or not.
- The Taxpayer had also submitted that the conditions of Section 2(6) of the IGST Act, 2017 are satisfied since PoS is outside India.
- The Taxpayer submitted that the term 'modifying' means change, alteration or amendment; that the term modifying has to be construed widely as held by the Supreme Court in **Puranlal Lakhanpal vs President of India and Ors [AIR 1961 SC 1519]**; that the powers of the tax authority to 'modify' the ruling appealed against and pass such orders 'as it thinks fit' is plenary in nature and such power is available to all issues (whether decided or not by the AAR); that the order which fails to decide an issue which ought to have been decided by the AAR can be modified by rendering a finding on that issue.

Observations and Ruling by AAAR

- The issue relating to the determination of POS would come within the ambit of the larger issue of 'determination of liability to pay tax on any goods or services or both' as envisaged in Section 97(2)(e) of the CGST Act, 2017.
- A reading of these provisions makes it abundantly clear that the word 'modifying' used in Section 101(1) of the CGST Act, 2017 implies 'changing' or 'correcting' the decision of the lower tax authority. It would be improper to assume that 'modifying' will also include answering a question that has not been answered by the lower tax authority.
- The phrase 'pass such order as it thinks fit' is followed by a comma and not a full stop as in the case of Section 254 of the Income Tax Act. Therefore, while reading Section 101(1) of the CGST Act, 2017, the phrase 'pass such orders as it thinks fit' must be read in continuity with the rest of the sentence following the comma, and hence, the case is remanded.
- There is no ruling pronounced by the AAR on the question of taxability. In the absence of a ruling, there is nothing for AAAR to confirm or modify.
- The Taxpayer's contention that AAAR has to go beyond and decide the point on merits when there has been no ruling by the AAR was denied.
- The fact that only a ruling pronounced in an order issued under Section 98(4) is appealable before AAAR justifies the stand that 'modifying' does not include answering the unanswered question.

[AAAR-Karnataka, M/s. Myntra Designs Pvt Ltd, ruling no:KAR/AAAR/06/2022, dated 21 November 2022]

EXCISE/SERVICE TAX

Tax authorities cannot assess the admissibility of CENVAT credit under CGST Act, 2017

Facts of the case

- M/s. Usha Martin Ltd. (Taxpayer) is engaged in the business of manufacturing iron and steel products and was registered in the Central Excise Act, 1944 (CEA, 1944) and Finance Act, 1994 (FA, 1994) in the erstwhile tax regime. Post 01 July 2017, the Taxpayer had migrated to the GST regime. The Taxpayer carried forward CENVAT credit under the GST regime by filing GST TRAN-1.
- Subsequently, the Tax authority issued SCN alleging that the Taxpayer could not claim CENVAT credit in lieu of invoices raised by an entity in an erstwhile tax regime as the same was in contravention of the CEA, 1944 and FA, 1994 read with CENVAT Credit Rules, 2004 (CCR) on 30 March 2022. Thereafter, the Tax authority vide Order-In-Original (the Order) 30 March 2022 disallowed the CENVAT credit carried forward by the Taxpayer.
- Aggrieved by the said order, the Taxpayer filed a Writ Petition questioning the jurisdiction of the Tax authorities to examine the correctness of the CENVAT credit.

Issue involved

- Whether Tax authorities can assess the admissibility of CENVAT credit availed under the pre-GST regime

Submission by the taxpayers

- The Taxpayer submitted by referring to Section 73 of the Finance Act, 1994 and Rule 14 of the CCR that any proceeding for wrongful availment of CENVAT credit only could have been initiated under this Section. The Tax authority has wrongly assumed jurisdiction and adjudicated upon the issue of availment of regular CENVAT credit brought forward from the previous years.
- Further, the Taxpayer submitted that Section 73 of the CGST Act, 2017 deals with cases where tax has been short paid or not paid or erroneously refunded or where ITC has been wrongly availed or utilized and that the present dispute relates to alleged wrongful availment of CENVAT credit.
- The Taxpayer has also argued that the Tax authority is only vested with the power of verification of transitional credit and not determine its eligibility or availability. While Rule 117 of the CGST Rules, 2017 deals with procedural aspects of transitional provisions specified in Section 140 of the CGST Act, Rule 117(3) states that amount of credit specified in the relevant form shall be credited to the electronic credit ledger of the Taxpayer. Hence, it has been stated that unless and until the amount specified by the Taxpayer falls under the specified circumstances mentioned under proviso to Section 140, such amount cannot be denied to be transitioned under the GST regime.
- The Taxpayer further stressed that Section 174 of the CGST Act, 2017 reserves the rights accruing under the erstwhile legislation, meaning thereby, any dispute arising out of the erstwhile legislation has to be dealt by the provisions of the said legislation and not under the present GST laws.

Ruling by the Honorable High Court

- The Honorable High Court held that Section 73 of the CGST Act, 2017 makes it clear that a proceeding under this Section can be initiated only for non-payment/short payment of tax or for an erroneous refund of such tax or for wrongly availing the ITC, admissible under the CGST Act, 2017.
- Further, Section 73 of the CGST Act, 2017 does not provide power to adjudicating authority to issue notice pertaining to CENVAT credit. Therefore, the Honorable High Court observed that invoking Section 73 of the CGST Act, 2017 for the present issue was not proper and the initiation of proceedings under Section 73(1) of the CGST Act, 2017 was beyond the Tax Authority's jurisdiction.
- Hence, the Honorable High Court quashed the Order passed by the Tax authority by holding that the same is issued without jurisdiction.

[High Court of Jharkhand - M/s. Usha Martin Limited vs Additional Commissioner, Central GST and Excise, Jamshedpur, Ruling no:W.P.(T) no:3055 of 2022 dated 11 November 2022]

VALUE ADDED TAX

ITC is allowable even if the selling dealer had not declared the output sales and remitted the taxes

Facts of the case

- M/s. Priyanka Products (Taxpayer) is the purchaser of goods and made payments to vendors including the tax portion.
- The vendor has not remitted the tax collected with the Tax authorities.
- The Tax authorities have disallowed the Input Tax Credit (ITC) to the taxpayer on the ground that the seller has not paid the tax.
- The First Appellate Authority dismissed the appeal. KAT (Karnataka Appellate Authority), vide the Impugned Order had allowed the appeal and set aside the order of assessment and the order passed by the First Appellate Authority. Hence, the Tax authority preferred to appeal for consideration of the below-mentioned question of law.

Question before the High Court

- Whether the Tribunal was right in law, in allowing the Taxpayer's appeal and holding that ITC is allowable in the hands of the Taxpayer, even if the selling dealer had not declared the output sales well as remitted the taxes on the said output sales along with the returns filed for said Tax period.

Observations and ruling by the HC

- The Honorable High Court observed that it is the settled law that the ITC claimed by the purchaser cannot be disallowed on the ground that the seller has not made the payment.
- The KAT in paragraphs 7 and 8 of the impugned order has recorded a finding of fact that the entire payment including the tax component was made through account payee cheques, RTGS, NEFT.
- In the State of Karnataka Vs. Sri. Rajesh Jain [2016-VIL-701-KAR], the Honorable High Court has held that once the taxpayer has discharged his burden of proof, the ITC cannot be disallowed. Once the purchaser dealer-satisfactorily demonstrates that while purchasing goods,

he has paid the amount of VAT to the selling dealer, the matter should end so far as the entitlement to the claim input tax credit.

- The Honorable High Court has dismissed the petition in favour of the Taxpayer.

[High Court of Karnataka, The State of Karnataka Vs M/s. Priyanka Products, dated 02 November 2022]

CUSTOMS

NOTIFICATION

Amendment in specific Free Trade Agreements (FTA)/ Preferential Trade Agreements (PTA) notifications

'Flat panel display modules without driver or control circuit for cellular mobile phones' covered under 8524 11 00 or 8524 12 00 or 8524 19 00 has been inserted in the exemption list under the following FTA/PTA notifications:

- Exemption to specified goods of the origin of the Republic of Singapore, when imported into India from the Republic of Singapore - 073/2005 - Customs -Tariff.
- Exemption on goods when imported into India from the Republic of Korea, from the whole of the duty of customs - 151/2009 - Customs -Tariff.
- Duty concessions to Philippines and other ASEAN countries in view of ASEAN-India FTA (AIFTA) - 46/2011- Customs -Tariff.
- Tariff concession to specified goods imported from Malaysia under India-Malaysia CECA - 53/2011-Customs-Tariff.
- Goods imported into India from Japan the duty of customs leviable thereon as is in excess of the amount calculated at the rate specified - notification no:69/2011-Customs (Tariff).

[Notification no:61/2022 dated 25 November 2022]

Extension on exemption on the deposits under Section 51A of the Customs Act, 1962

The exemption that was granted from the deposits pertaining to all classes of persons and all categories of goods, from the provisions of Section 51A (Payment of duty, interest, penalty, etc.) of the Customs Act, 1962 has been extended upto 31 March 2023.

It is also extended the exemption on deposits till 01 April 2023:

- with respect to goods imported or exported in customs stations where customs automated system is not in place.
- with respect to accompanied baggage.
- other than those used for making payments of:
 - any duty of customs, including cesses and surcharges, levied as duties of customs;
 - Integrated Tax;
 - Goods and Service Tax Compensation Cess;
 - interest, penalty, fees or any other amount payable under the said Act, or the Customs Tariff Act, 1975 (51 of 1975).

[Notification no:98 & 99/2022 dated 29 November 2022]

INSTRUCTIONS

Amendment to instruction regarding extension of the requirement of health certificate accompanied with the import of food consignments

- CBIC instruction no:18/2022-Customs dated 12 August 2022 and 26/2022-Customs dated 06 October 2022 issued 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 vide its order dated 27 October 2022, further clarified that the implementation of the order dated 03 August 2022 and its subsequent clarification vide order dated 26 September 2022, has been extended based on the comments received from various stakeholders in respect of the implementation of time. The date of implementation of said orders shall be extended by two months and the order will be now effective from 01 January 2023.

[Instruction no:32/2022 dated 28 November 2022]

FOREIGN TRADE POLICY (FTP)

NOTIFICATION

Incorporation of new policy condition against HS Code 1006 40 00

Export of organic non-basmati rice, including organic non-basmati broken rice, will be governed as per provisions under notification no:03/2015-2020 dated 19 April 2017.

[Notification no:45/2015-20 dated 29 November 2022]

PUBLIC NOTICE

Extension of validity of Pre-shipment Inspection Agencies (PSIAs)

The validity of the Pre-shipment Inspection Agencies (PSIAs) as listed in Appendix 2G of A&ANF, has been extended from 03 December 2022 to 31 December 2022.

[Public notice no:39/2015-20 dated 30 November 2022]

NEWS FLASH

1. “Competition watchdog CCI to handle GST profiteering complaints from next month”
<https://economictimes.indiatimes.com/news/economy/policy/competition-watchdog-to-handle-gst-profiteering-complaints-from-next-month/articleshow/95749512.cms?from=mdr>
[Source: Economic Times, 25 November 2022]
2. “GST Council to meet on December 17 via video link”
<https://economictimes.indiatimes.com/news/economy/policy/gst-council-to-meet-on-december-17-via-video-link/articleshow/95780273.cms>
[Source: Economic Times, 26 November 2022]
3. “GST payment issue paralyses cotton purchase in Khammam”
<https://www.deccanchronicle.com/nation/in-other-news/301122/gst-payment-issue-paralyses-cotton-purchase-in-khammam.html>
[Source: Deccan Chronicle, 01 December 2022]
4. “GST revenues rise 11% to Rs 1.46 lakh crore in November”
<https://indianexpress.com/article/business/economy/india-november-2022-gst-collections-rise-11-per-cent-to-rs-1-46-crore-8300705/>
[Source: Indian Express, 02 December 2022]
5. “City Union Bank authorised to enable GST payments”
<https://www.thehindubusinessline.com/money-and-banking/city-union-bank-authorized-to-enable-gst-payments/article66208748.ece>
[Source: The Hindu Business Line, 01 December 2022]



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