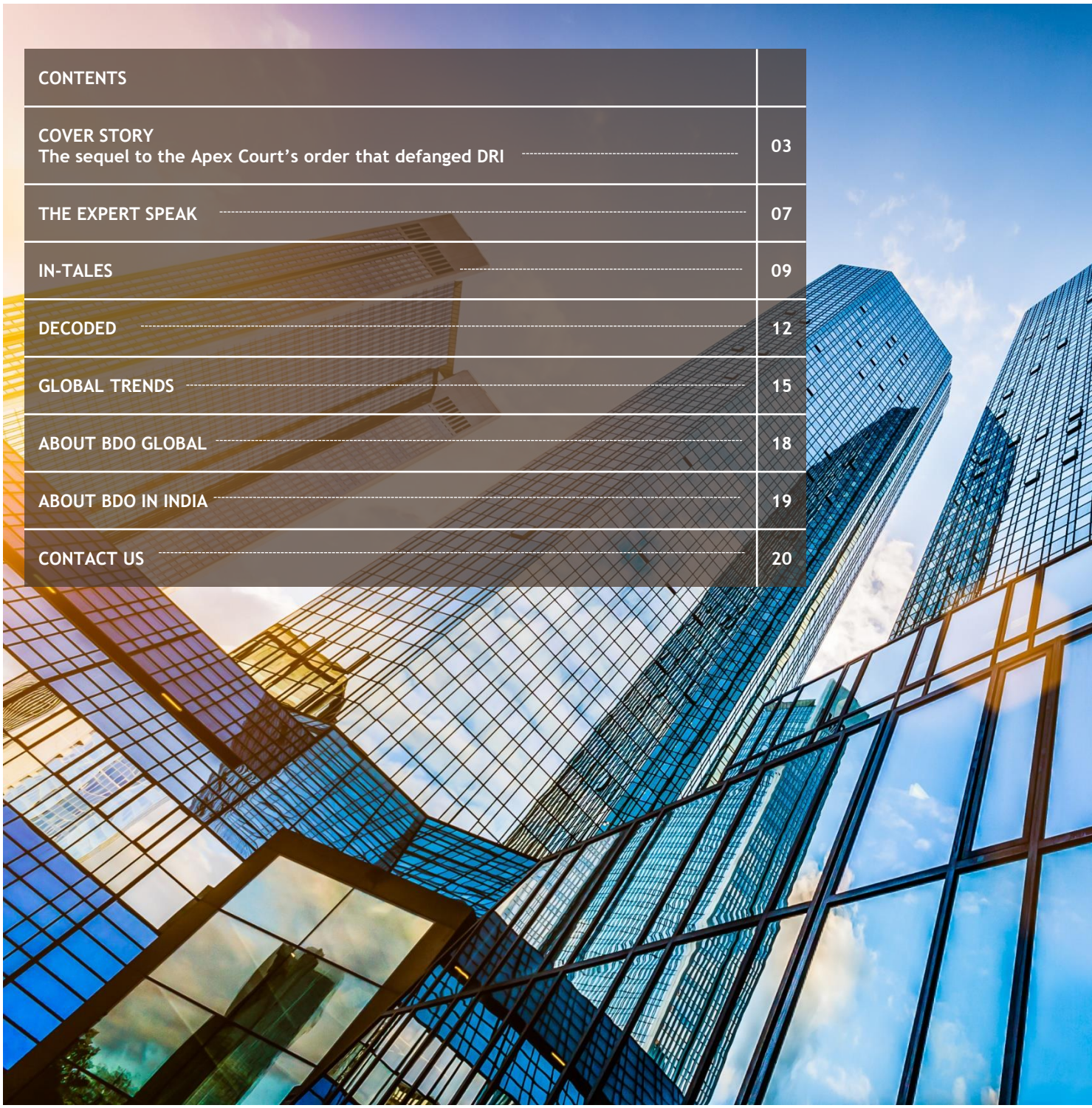
The TAX POST

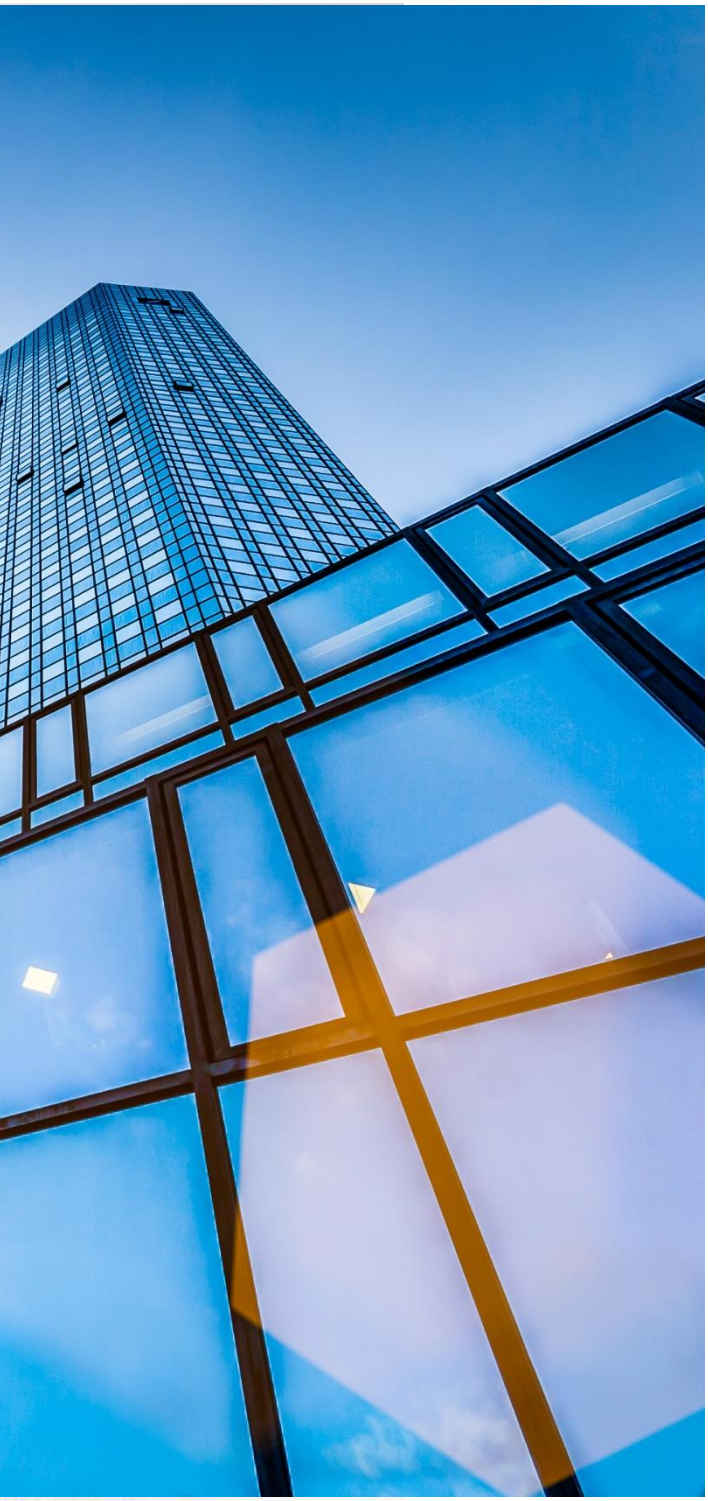
A bimonthly bulletin on the world of Indirect Taxes

Edition 11 - March, 2022

Presented by BDO in India



CONTENTS	
COVER STORY The sequel to the Apex Court's order that defanged DRI	03
THE EXPERT SPEAK	07
IN-TALES	09
DECODED	12
GLOBAL TRENDS	15
ABOUT BDO GLOBAL	18
ABOUT BDO IN INDIA	19
CONTACT US	20



PREFACE

As we come to the end of the fiscal 2021-22, the discussions stand shifted to what FY 2022-23 holds for India and the world at large, as green shoots of the post-vaccination phase appear promising, and conflict between Russia and Ukraine brings a pall of gloom.

The Economic Survey 2021-22 indicated the fiscal headroom the Government of India has in order to ramp-up capital expenditure, which will boost growth. With tax buoyancy (especially GST collection going up from an average monthly of INR 7,190bn (USD 94bn) in 2017-18 to INR 12,238bn (USD 160bn) in FY 2021-22 (up to February 2022) and the fast-paced economic recovery on its side, the government was able to present a transformative and progressive Union Budget 2022-23.

Taking gains from consolidation of a myriad and complex rate structure with multitude of rates, varying with states, local bodies etc., and a huge tax cascading tax to a one, simplified fiscal legislation, the reform process evolved in an inclusive way. Continuous improvements are being made in a responsive manner, with the GST Council responding swiftly, glitches being addressed, and changes implemented without delay.

Continuing the path towards a fully automated and easy to comply tax administration, the Union Budget made few important announcements in the GST and Customs law. Few important and far-reaching amendments are proposed in the field of Input Tax Credit (ITC) compliance mechanism under the GST law, while curative amendments are contemplated in the Customs law to neutralise judgments of the Supreme Court and widen the amplitude of the term ‘proper officer’ to address legislative lacuna. This edition of ‘The Tax Post’ discusses the Customs amendment coming as a sequel to the Apex court judgment and changes in ITC mechanism, in the ‘Cover Story’ and the ‘Expert Speak’, respectively.

Two important but conflicting views expressed by High Courts, would have key bearing on the refund/transition of legacy taxes under the GST law. The discordant notes in these differing views of the High Court would take more time for a clear picture to emerge. The section ‘Decoded’ deals with these interesting orders of the High Court.

This edition of the publication focusses on the key role of the Insurance Industry in the section ‘In Tales’. We continue to bring relevant news from other jurisdictions in the section ‘Global Trends’.

We trust, this edition would be a good read for you.

GUNJAN PRABHAKARAN
Partner & Leader
Indirect Tax

COVER STORY

The sequel to the Apex Court's order that defanged DRI

The Backdrop:

The decision[1] of the Supreme Court which has a colossal ramification, has inflicted a body-blow to effectively defang the Directorate of Revenue Intelligence (DRI), pronouncing officers of DRI as not 'the proper officer' to issue notices for demand of duty[2] under the Custom Act, 1962.

The scope, width, and amplitude of the term 'the proper officer' under the Customs law had been under challenge before the various Courts in India in the past and had a long-winding and checkered history. Repetitive retrospective validations have proved inadequate to counter the legal challenges mounted by taxpayers. The latest decision of the Apex Court has prompted the government to scurry for cover and a 'sequel' was found inevitable in this long controversial saga.

Donald Robert Marquis, a humourist, journalist, and author said that 'a sequel is an admission that you have been reduced to imitating yourselves'. The repetitive amendment clearly indicates to the admission that the various curative amendment incorporated to Section 28 of Customs Act, 1962 (the Act) by insertion of sub-section (11) to section 28 of the Act in 2011 (in the light of the decision in the case of Syed Ali[3], by the Larger Bench of the Supreme Court in 2011) and the subsequent amendments in the year 2015 and 2018 have still fallen short of meeting the legislative purposes and failed to effectively ward-off legal challenges.

The authority of the Preventive Wing of Customs Department was under scrutiny in the case of Sayed Ali referred to above. The Apex Court had concluded that the Collector of Customs (Preventive) not being a 'proper officer' within the meaning of section 2(34) of the Act was found not competent to issue a Show Cause Notices (SCN) under section 28 of the Act. The Court had observed that nothing has been brought on record to show that the said Collector of Customs (Preventive), who issued the SCN, was assigned the functions under section 28 of the Act as 'proper officer'.

This prompted the legislatures to insert sub-section (11) in section 28 to confer power to all persons appointed as officers of Customs under section 4(1) and shall be deemed to have and always had the power to assessment under section 17 and shall be deemed to have been always the proper officers for the purpose of section 28. Explanation-2 was also inserted to declare that any non/short levy or

1 Canon India Private Ltd Vs. CC (2021 (376) E.L.T. 3 SC)
2 https://www.bdo.in/en-gb/insights/newsletters-periodicals-journals/the-tax-post-a-bi-monthly-indirect-tax-bulletin-march-2021
3 CC Vs. Sayed Ali (2011 (265) ELT 17 SC)

erroneous refund before the date on which the Finance bill 2011 receives the assent of the President, shall continue to be governed by the provision of section 28 as it stood immediately before the date on which such assent was received.

The above retrospective amendment was followed by an insertion of Explanation-3 in Section 28 (11) in May 2015, Explanation-4 with effect from March 2018 and another amendment to Explanation-4 (with retrospective effect from March 2018). However, these repetitive curative acts failed to address the legal challenges launched, as it is obvious from the latest decision of the Apex Court, in the case of Canon India P Ltd., *supra*.

Principles laid by Apex Court in Canon:

The Supreme Court had pronounced the judgment to effectively clip the wings of the DRI, fundamentally on three grounds:

- **Scope of the term 'the proper officer':**

  The conferment of power for recovery duty, is only on 'the proper officer' and not on anyone else under the Customs law; use of expression 'the' - a definite article before the term 'proper officer', points and refers to a particular person or thing. Had the Parliament intended that any proper officer could exercise this power, section 28(4) of Customs Act, would have employed an expression 'any' instead of 'the'. It is not an accidental use of definite article 'the'; but with a specific intention to designate 'the' proper officer who had assessed the goods at the time of clearance. Although the proper officer need not be the very same officer who had cleared goods, it may be his successor officer, or any other officer authorised to exercise the powers within the same office.

- **Authority to recover duties:**

  The nature of power to recover the duty not paid, after the goods have been assessed and cleared, is a power to review the earlier assessment. Such power is not inherent in any authority, and it is conferred only through Section 28, which grants such power only to 'the proper officer'. The Court observed that it has not been shown any fiscal statute where the power to re-open an assessment has been conferred to any other officer. When the power is conferred on 'the proper officer', it cannot be exercised by different officers simultaneously. Such overlapping power would lead to an anarchial and unruly operation of the statute.

  If the statute directs something to be done in a certain way, it must be done in that manner alone, especially an administrative review of the assessment and clearance already completed. The re-assessment and recovery of duties contemplated by Section 28(4) of the Act is by the same authority and not by any other superior authority such as Appellate or Revisional authority.

- **Competency of DRI to initiate proceeding under Customs Law:**

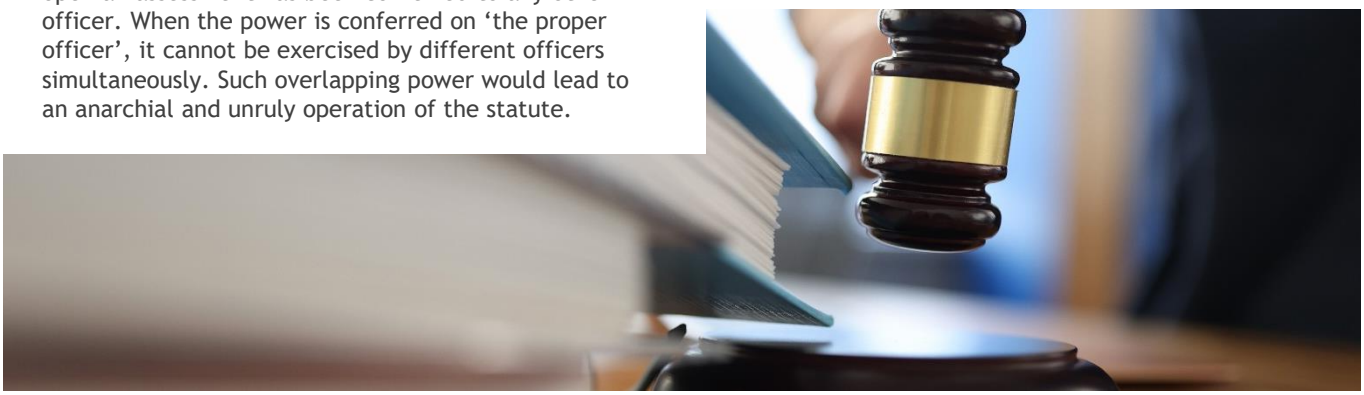
  Officer of DRI (the Addl. Director General (ADG), in this case) can be considered as 'the proper officer' only if it is shown that he is a Customs officer and further he has been entrusted with the power of 'the proper officer' under Section 6 of the Act. The ADG was appointed by the Commissioner of Customs vide notification no:17/2002 dated 7 March 2002; however, entrustment of function is through notification no:40/2012 dated 02 May 2012, which assigned functions under Section 28 of the Act to Dy/Asst Commissioner of Customs; this notification is issued under Section 2(34) of the Act, which does not confer any power on any authority but merely defines who is 'proper officer'.

  Section 6 is the only section which provides entrustment of functions of Customs Officer on other officers of the Central or State Government or Location authority; such entrustment can be made only by the Central Government. If the power was to be conferred on officers of Central/State government or Local authority, the Government would have done so in exercise of powers conferred under Section 6 of the Act. However, in the instant case, a non-existent power under the definition clause has been exercised, which cannot confer power on the DRI.

Sequel to Canon:

- **Retrospective validation:**

  With a sizeable tax revenue locked-up through various proceedings set-in motion through SCN issued by DRI officials, the government has been taken off-guard in this high voltage tax controversy which thrived on technical challenges mounted by the importer, which



apparently was in counter to the principle, object, and purpose of Section 28.

Canon decision has become the principal ground of defence against recovery proceeding initiated by DRI and the high courts have started placing reliance on Canon to thwart revenue's attempt to recover duties not paid or short paid.

Realising the magnitude, within a year of Canon judgment, the Government has proposed retrospective amendment in the Customs Act to cure the defects, as pointed-out by the Apex Court. The Finance Bill 2022

which is awaiting enactment, contains proposals to widen the powers of DRI with retrospective effect to secure revenue.

As per the Finance Bill 2022, while section 2(34) of the Act which defines the term 'proper officer' seeks to give reference to Section 5 (power of Customs officers), Section-3 of the Customs Act, which enumerates the class of Customs Officers, is being amended to specifically bring in its sweep, officers of Preventive wing of Customs department and DRI to counter challenges. Section 5 is proposed to be modified to specifically state that the assignment of functions to an officer of Customs by the Board or the Principal Commissioner or Commissioner of Customs shall be done under the newly inserted sub-section 1A and 1B of Section 5 of the Customs Act.

Further, Section 96 of Finance Bill 2022 proposes to give validation to any action taken or function performed before the enactment of the Finance Bill 2022 and under certain chapters of the Customs Act by any officer of customs as specified in section 3 (as amended) where such action was in pursuance of their appointment and assigning of function by the Central Government or the Board.

These amendments seek to correct the infirmity observed by the Supreme Court.

- **Revision of Canon Judgement:**

  While the retrospective validation proposal is pending before the legislature, the government in a Special Leave Petition filed before the Supreme Court[4], argued that the ADG, DRI, is an officer of Customs. Section 6 of the Act, which has been found to be the repository of power to appoint a person to exercise the power under Section 28, is not relevant insofar as the ADG of DRI is concerned for the reason that he is actually an officer of Customs.

  More importantly, it is pointed out that Section 28(11) would come to the rescue of the government for the reason that the ADG will be treated as a 'proper officer' under the said provision irrespective of the requirement declared in Section 2(34) of the Customs Act. It was also argued that section 28(11) could not be brought to the notice of the Bench when Canon judgment was rendered. The Supreme Court has issued notice and has posted the matter for further hearing.

It thus become clear that the decision of Canon in 2021 is not likely to be the final world on this imbroglio as there are many points which need to be recanvassed before the Supreme Court afresh before the conclusion in this matter.

Potential challenges to Canon:

When the matter is reheard by the Apex Court, some of the potential questions that might find voice are –

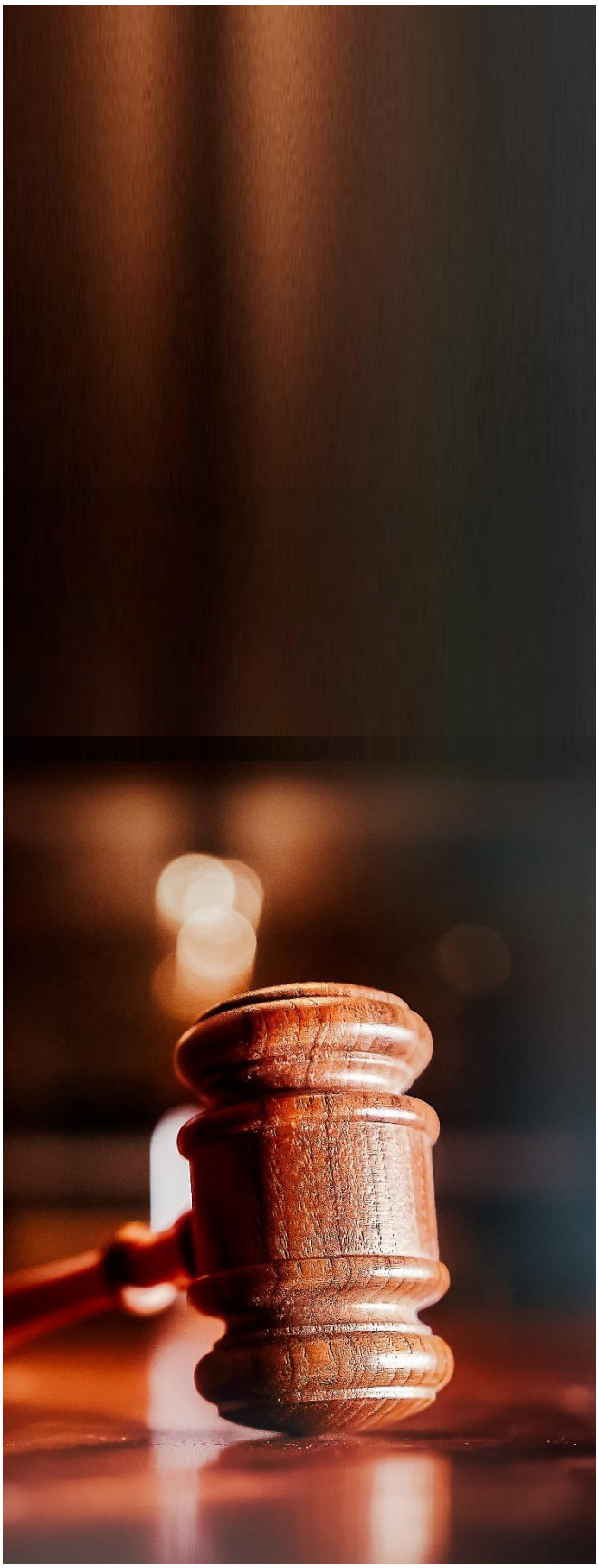
- Canon proceeds on a premise that the source of power to recover duty not paid/short paid is Section 28(4) of the Act, which runs counter to another decision[5] of the Apex Court (larger bench) in which it was held that on a cumulative reading of various provision of the Customs Act, it clearly shows that the jurisdiction of the proper officer to initiate proceedings for recovery which escaped collection, is not traceable to Section 28. Power to recover duty is a concomitant power arising out of the levy of customs duty under section 12 of the Act and same does not arising out of Section 28. The court had also referred to Section 17, which according to the Court contemplates the procedure for making an assessment in regard to duty payable and sub-section (4) makes the provision to empower the proper officer to reassess the imported goods.
- If the observation contained in Canon that only the officer who had initially assessed the duty would be the 'proper officer' is accepted, it would mean even the preventive officers of the customs are not competent to initiate any proceedings by reason of not being a 'proper officer'.
- Section 28(11), which was introduced post Syed Ali, was not cited before the Apex Court, during the Canon hearing. Would section 28(11) tilt the decision in favour of revenue?
- While it may be true that Section 2(34) is interpretation of the term 'proper officer' and not a source of power, it cannot be ignored that Section 6 empowers the government. Need an effort be made to ascertain whether the government otherwise had the power to entrust such powers, especially when it is a settled position of law that mere erroneous reference to the power under which the certain actions are taken would not per se vitiate the action taken if they can be justified lawfully under some other sections?

4 UoI & Anr Vs. Godrej & Boyce Mfg. Co Ltd (2022-TIOL-10-SC-CUS)
5 CC Vs. Virgo Steels (2002 (141) ELT 598 (SC)

- By virtue of notification no:17/2002-Cus (NT) dated 7 March 2002, it is undisputed that the ADG is an officer of Customs, arguably, then section 6 may not have application. While Canon in Para-17 recognises ADG as an officer of Customs, para-21 views that he is an officer of the Government and not a Customs officer.

As Canon was pronounced, there were widespread speculation that this might set in motion another round of retrospective validation. The government has adopted a two-pronged strategy to address Canon judgment by way of Special Leave Petition before the Supreme Court and also amendments to the Act to ward-off any challenges.

While the debate would continue to rage whether this a curative exercise of an unintended error in the drafting or bureaucratic obstinacy, it is loud and clear that the final word on the tax controversy is still not pronounced by judiciary. But the government is determined!



THE EXPERT SPEAK

KARTIK SOLANKI
Partner
Indirect Tax

INPUT TAX CREDIT – PROPOSAL TO TIGHTEN CREDIT MECHANISM THROUGH UNION BUDGET 2022-23

One of the important reasons for the introduction of the GST law was to provide a seamless credit mechanism to the taxpayers. While initially, Input Tax Credit (ITC) was allowed to be claimed by the recipients on the basis of self-declaration, gradually, the Government linked the claim of ITC with the compliances and declarations of the supplier. Presently, the recipient of supply is eligible to claim ITC only on supplies as declared in the statement of outward supplies (Form GSTR 1) filed by the supplier and ITC on the supplies not declared by the suppliers cannot be claimed.

Taking this process further ahead, the Union Budget 2022-23 proposes to introduce[6] an additional condition to claim ITC, that ITC on a supply can be availed only if it has not been restricted in the details of inward supplies and ITC, as communicated to the taxpayer under the amended section 38 of the Central Goods and Services Tax Act (CGST Act). Section 38 is proposed to be substituted to provide that the taxpayer will be provided a statement of inward supplies and ITC on the basis of details of supplies made to such taxpayer as declared by its suppliers and such statement would have two components, (a) supplies eligible for claiming ITC and (b) supplies falling in specified scenarios, on which the ITC is restricted, wholly or partially.

This has further restricted the ITC claim by the recipient on the eligible inward supplies in cases covered in the specified scenarios, despite ITC being otherwise eligible. The scenarios specified in the proposed section follow the attempt of the Government seeking to restrict the claim of ITC by the recipient on account of non-payment or lapse by the supplier. Each of the specified scenarios and its implications, along with some areas requiring clarification are discussed below:

- **Supplies received from a newly registered person:** The ITC on supplies made by persons newly registered with the GST department are sought to be restricted. The period after obtaining registration, for which such restrictions would apply, will be prescribed. While this seems to be aimed at curbing non-genuine persons obtaining registration only to issue tax invoices and vanish without paying tax, while recipients claim ITC basis such invoices, this impacts all the newly registered persons. This restriction potentially also covers the supplies (including intra-entity supplies) made by new entities resulting from restructuring of existing compliant entities and from new registrations obtained by an existing compliant taxpayer, since each of the registrations of a taxpayer are treated as a separate registered person.
- **Supplies by a person, who has defaulted in payment of tax for the period as may be prescribed:** This clause seeks to restrict ITC on supplies by a supplier who hasn't paid tax and such non-payment has continued for a period as may be prescribed. The eligibility of ITC is unclear, in cases, where the applicable taxes for past period are paid by such supplier after the supply in question is made.
- **Supplies by a person whose tax payment is less than the tax liability declared in the statement of outward supplies (in form GSTR 1):** This clause restricts ITC on supplies from a supplier who has declared higher liability in form GSTR 1 (say INR 100) but had paid a lower amount as tax (say INR 80), including payments made by ITC and cash for the same period, subject to period and limits to be prescribed. It is important to note that there can be genuine reasons causing a difference in liability between GSTR 1 and tax payment. There could be multiple reasons for difference. For e.g., value of credit notes for a period exceeding value of supplies in a period and resultant negative liability is adjusted in subsequent period/s in form GSTR 3B, against the liability from supplies as declared in for GSTR 1 for the same subsequent period, human error, etc.
- **Supplies made by a person availing more ITC than eligible:** This clause restricts ITC, if a supplier has claimed more ITC than what is eligible as communicated under section 38[7] for a period and amount as may be prescribed. However, this provision will have some practical challenges such as delayed claim of ITC by supplier for any reason, including delayed receipt of goods, or reclaim of ITC previously reversed, etc.
- **Utilisation of ITC by supplier in excess of specified limit:** This clause restricts ITC, if a supplier has

6 By proposing to introduce section 16(2)(ba) in CGST Act, 2017 (and similar provisions would be introduced in State GST laws as well.
7 Referred above

utilised the ITC to pay its tax liability in excess of the limit specified under the law (per proposed section 49 (12) and existing rule 86B), subject to applicable conditions and restrictions as may be prescribed.

- Any other criteria, which the Government may notify.

Apart from the situation requiring clarification as above, there are other reasons also, which need careful consideration and clarification, as under:

- It is unclear whether the amount of ITC on a supply would be wholly restricted or partially, when any of the restrictions apply.
- The eligibility of the taxpayers to claim the ITC so restricted, after e.g., a default is cured, or appropriate taxes are paid. Presently, the law is silent about claiming such ITC subsequently.
- If the ITC is allowed to be claimed subsequently, applicability of the time limit to claim ITC (30 November of the next financial year, as proposed) is another unclear area. In some cases, there can be a significant gap between date of supply and the supplier curing the issue resulting in the restriction in claiming of ITC by the recipient (e.g. payment of unpaid tax). Provisions of Section 16(4) allowing recredit of ITC reversed due to non-payment to the supplier within 180 days, without any time limit, may be relevant as a guiding principle.

The industry would hope that such ITC is not completely lost and post fulfilment of specified criteria, ITC can be claimed, without any time-limit restriction. The industry would also hope for a consultative process to clarify all the issues, considering the practical challenges which the industry may face, before restrictive provisions are finally implemented. Lastly, it is now becoming even more imperative for the industry to relook at the GST compliance status of vendors and educate and tread carefully in doing of business with non-compliant vendors, due to adverse impacts on ITC and/or working capital blockage.

IN-TALES

The Indian Insurance Industry

The Insurance industry is an important component of the financial system of countries and is needed to drive economic development and industrialisation. Without adequate insurance cover, industrial, economic, and social activities could be hampered, thus highlighting the critical role insurance plays in national development. Hence, the industry deserves much attention from all stakeholders be it government, community, development, and partners of industry in order to enable it to play its naturally ordained role.

In India, insurance has a deep-rooted history. Ancient writings talk in terms of pooling of resources that could be re-distributed in times of calamities such as fire, floods, epidemics, and famines. This was probably a pre-cursor to modern day insurance. Ancient Indian history has preserved the earliest traces of insurance in the form of marine trade loans and carriers' contracts. Insurance in India has evolved over time, heavily drawing from other countries, England in particular.

Insurance contributes to the general economic growth of a society by providing stability to the functioning of processes. The insurance industry develops financial institutions and reduces uncertainties by improving financial resources. Insurance generates funds by way of premiums, which are invested in government securities and stocks.

India's insurance industry has been growing dynamically over the last couple of decades with total insurance premiums increasing rapidly when compared with its global counterparts. Despite the suite of reforms that have been implemented to stoke the sector's growth, it still has a long way to go, as its share in the global insurance market remains abysmally low.

Over the past 7-8 years, the industry has grown significantly, and the total premium (cumulatively for life and non-life) receipt doubled from USD 51bn (INR 3,942bn) (FY 2013-14) to USD 108bn (INR 8,308bn) (FY 2020-21). Insurance penetration, which stood at 3.90% in 2013 stands increased to 4.20% in 2020; insurance density also stands increased from USD 52 in 2013 to USD 78 (in 2019)[8]. The low penetration and density rates reveal the uninsured nature of large sections of the population in India and the presence of an insurance gap. The reasons cited for such minimal levels of penetration rates include tight constraints on the household budget, adverse selection, moral hazard, and affordability issues.

The industry has experienced a sea change in the last few years; the constitution of the Insurance Regulatory and Development Authority (IRDA), opening-up of the sector for both private and foreign players, and increase in the foreign investment cap to 74%. The sector has transitioned from being an exclusive state monopoly to a competitive market.

As of now, the insurance sector of India consists of 57 insurance companies, of which 24 are in the life insurance business and 33 are non-life insurers. The life insurance sector dominates the insurance market in India with a huge share of 76% of the premium[9], whereas non-life insurance accounts for the remaining 24%.

The Indian insurance sector continues to be dominated by public sector insurers with 58% premium share, even though the sector has been opened-up to private and foreign

8 Data as per IDRA handbook of Insurance Statistic 2020-21
9 Data as per IDRA handbook of Insurance Statistic 2020-21

players and the private sector insurers are gradually increasing their presence. From being an exclusive state monopoly and restricted market to a competitive and open one, the insurance sector in India has experienced a paradigm shift in the last couple of years.

Life insurance continues to dominate in market share, the product mix of the sector has changed due to the unveiling of innovative products like unit-linked insurance plans and new distribution channels such as bancassurance. Among the 24 life insurers currently operating in the Indian market, the Life Insurance Corporation (LIC) is the sole public sector company. Motor, health, and crop insurance segments are driving growth in the non-life insurance segment. Among the 33 non-life insurers, four are public sector insurers.

The insurance sector received further impetus with the passing of the Insurance Laws (Amendment) Bill. The passage of the bill paved the way for major reform-related amendments in the Insurance Act, 1938, the General Insurance Business (Nationalisation) Act, 1972, and the Insurance Regulatory and Development Authority (IRDA) Act, 1999. These changes in the regulatory framework helped in raising FDI cap in the sector up to 74%, reinsurance reforms, allowing the PSU general insurers to raise capital without liquidating the government holding to below 51%, strengthening of regulatory institutions, etc. It paved way for new product regulations, emergence of an open architecture for bancassurance and potential for merger of PSU general insurers to create scale and efficiencies.

Going forward, increasing life expectancy, favourable savings and greater employment in the private sector is expected to fuel demand for pension plans. Likewise, strong growth in the automotive industry over the next decade would be the key driver for the motor insurance market. The public and private sectors have been actively working towards crop insurance.

- The union government has been taking proactive and tailored investment promotion policies to identify and attract fresh investments. From FDI to strengthening the country development, investments are required to be targeted at this sector that can generate spill-over for the economy whether in terms of jobs, skills, technology, or access to basic support systems.

The Government of India has undertaken several initiatives in the recent past to provide a boost to the industry, including –

- Union Cabinet approval of investment of USD 8.60bn (INR 60bn) into entities, offering export insurance cover to facilitate additional exports worth USD 75.11bn. over the next 5 years.
- Parliament passed General Insurance Business (Nationalisation) Amendment Bill. The bill aims to allow privatisation of state-run general insurance companies.
- Announcement of an Initial Public Offering (IPO) by LIC as part of the consolidation in the banking and insurance sector
- Announcement to infuse INR 30bn (USD393mn) into the PSU general insurance companies to improve the overall financial health of companies.
- Increased allocation of funds for crop insurance scheme
- Increase of Foreign Direct Investment in Insurance up to 74%

Introduction of Goods & Services Tax (GST) after a prolonged consultative process in the year 2017 is expected to unify the fragmented Indian market and provide a uniform indirect tax code across the country by subsuming many indirect tax laws that existed at the Central and State level. This tax code has helped modify the complex fiscal law environment in India and provide a transparent and certain taxation law environment. The service sector which had to bear various non-creditable taxes such as CST and VAT have breathed a sigh of relief on the introduction of GST.

While these policy changes have significantly helped the industry to position itself better in the market and optimise the tax cost, it is expecting further alignments in the tax laws, especially the indirect tax laws, including:

- Non-availability of centralised registration, return filing and assessment
- Stringent compliance process
- Denial of tax credit for non-compliance by supplier of goods/service
- Glitches in the reporting framework and the GSTN infrastructure
- Increase in the rate of tax under GST law resulting higher incidents of tax, especially policies issued to individual.
- Valuation methodology to exclude investment portion in the premium is complex and often not in sync with actuals
- Denial of ITC of GST levied on life/health insurance policies issued to employees, especially in the pandemic hit world, leading to increase in costs
- Frequent changes in the compliance process and changes necessitated in IT systems

- Restriction in grant of refund of GST paid on input services where output supplies is subjected to 'inverted' tax.
- Inefficient Advance Ruling mechanism that is heavily loaded against taxpayer.
- Delay in constitution of GST Tribunal

A well thought-out and facilitative environment, which can iron-out the remaining gaps in the fiscal policy framework can propel the industry to the next level and realise the potential of this important industry in the overall context of the economy. India's economic growth depends on how shock-absorbent India's economy is. Both financial and climatic shocks (which are on the rise, given climate change) are important for India and having an efficient and stable insurance market in place can dictate India's growth in the short and long terms.

DECODED

No refunds under GST regime, unless protected by legacy law – High Court

Facts:

In an important judgement[10] which is likely to send shockwaves among taxpayers, the Jharkhand High Court have held that taxpayer cannot claim refund of Service tax paid on pre-GST transactions, after the introduction of the GST law on the ground of exhaustion of GST transition deadlines.

In this case, the taxpayer, who was registered under Central Excise Act, 1944, had availed 'Port Service' in April 2017, on which applicable Service tax was charged by the Port. The refund claimant had also taken a registration under Service tax law for the limited purpose of discharging service tax liability under 'Reverse Charge Mechanism' (RCM).

An invoice was raised by the Port for the impugned service in March 2017, which is reported to have been received by the taxpayer in September 2017, post GST introduction.

The taxpayer could not stake claim of CENVAT credit in the Central Excise return for the month of May or June 2017, by which they could have carried forward the credit of Service tax paid on Port service as ITC under GST law. However, realising the non-availment of the credit, the taxpayer availed the credit in their Service tax registration, which was obtained for discharging RCM liability.

Later, in June 2018, the taxpayer filed a claim for refund of the Service tax in Form-R in respect of tax charged on Port Service, under Section 142(3) of CGST Act, 2017. The claim for refund was rejected by the Adjudicating authority and the Appellate authority, aggrieved by which the present Writ Petition was filed before the Jharkhand High Court.

Contentions of Taxpayer:

The claim for refund was made on the following grounds:

- Section 140 of the CGST Act read with Rule-117 of CGST Rules, lays basis for carry forward of CENVAT balance under the legacy laws, by filing a claim in form GST Tran-1
- Section 140(5) of CGST Act does not mandate claim of credit in ER-1 return for the month of June 2017
- Their case is covered by Section 142(3) of the CGST Act, which is a substantive provision that allows refund of CENVAT credit in contingencies like the current as a transitional measure
- Section 142(3) which is residuary provision, inter alia provides for refund of CENVAT credit in cash accruing to the taxpayer under CENVAT Credit Rules. This provision envisages that if carry forward is permissible under CENVAT law, then refund of such credit in cash is also permissible

- Form GSTR-Tran 1 filing date was extended till 31 October 2017, which was further extended till 27 December 2017 in case the claim for credit is disclosed in the ER-1 return, which is not applicable to the taxpayer
- Provisions contained in Section 142(3) was not properly considered by the lower authorities and this provision is a substantive provision, which deals with special situations like the taxpayer's
- The order rejecting refund is violative of Article 14, 19 (1)(g), 265 and 300A of the Constitution of India as the credit of CENVAT of the Service Tax paid on Port Service has become lawfully earned by the taxpayer and it is a substantive benefit conferred and earned under the legacy law

Contentions of the Tax Authority:

Justifying the legality of the orders rejecting claim of refund, the Tax authority argued that –

10 Rungta Mines Ltd. Vs. Commissioner of CGST & Central Excise (2022 (2) TMI 934 (Jharkhand)

- The taxpayer is not entitled to claim of refund under the legacy law nor has transitioned the credit as provided under the GST through Form - GST Tran 1
- Filing of refund claim is a misconceived and without any merit and section 142(3) has no applicability in the current situation. The method for transition of the credit is stipulated in the law, but by way of filing ER-1 return on time and carry forward of the same into the GST regime in terms of Section 140 of CGST Act.
- The taxpayer is not entitled to claim refund of input service credit under the CENVAT law unless they are classified under Rule-5 meant of specific situations like export, which is not relevant in this case
- The taxpayer could not have claimed credit through the Service Tax registration as they are neither a service provider nor use Port service for providing any taxable service.
- There is no legal mechanism available to the taxpayer, other than carrying forward the credit through Form – GST Tran 1, which was not exercised by the taxpayer.

Judgment:

Drawing sustenance from the recent ruling of the Supreme Court, the Jharkhand High Court noted that –

- The Hon'ble Supreme Court crystalised and laid-down the law in connection with refund under taxation; some of the paragraphs of the Supreme Court judgment were also quoted as under:
  - We must be cognizant of the fact that no constitutional right is being asserted to claim a refund, as there cannot be. Refund is a matter of a statutory prescription. Parliament was within its legislative authority in determining whether refunds should be allowed of the unutilised ITC tracing its origin both to input goods and input services or, as it has legislated, input goods alone…. While recognising an entitlement to refund, it is open to the legislature to define the circumstances in which a refund can be claimed.
  - Parliament engrafted a provision for refund in Section 54(3) of CGST Act 2017. In enacting such a provision, Parliament is entitled to make policy choices and adopt appropriate classifications, given the latitude which our constitutional jurisprudence allows it in matters involving tax legislation and to provide for exemptions, concessions and benefits on terms, as it considers appropriate. The consistent line of precedent of this Court emphasises certain basic precepts which govern both judicial review and judicial interpretation of tax legislation.
  - There is no constitutional entitlement to seek a refund. Parliament allowed a refund of the unutilised ITC in the case of zero-rated supplies made without payment of tax. Under clause (ii) of the first proviso, Parliament has envisaged a refund of unutilised ITC, where the credit has accumulated on account of the rate of tax on inputs being higher than the rate of tax on output supplies.
  - When there is neither a constitutional guarantee nor a statutory entitlement to refund, the submission that goods and services must necessarily be treated at par on a matter of a refund of unutilised ITC cannot be accepted.
  - Such an interpretation, if carried to its logical conclusion, would involve unforeseen consequences, circumscribing the legislative discretion of Parliament to fashion the rate of tax, concessions and exemptions. If the judiciary were to do so, it would run the risk of encroaching upon legislative choices, and on policy decisions which are the prerogative of the executive.
- The High Court observed that though in the instant case we are not dealing with section 54 of the CGST Act, we are concerned with transitional provisions dealing with 'refund' under section 142(3) of the CGST Act 2017 'in cash' under certain circumstances in connection with taxes suffered under the previous regime. However, the fundamental concepts and the interpretation of law relating to refund would still be the same and what is to be seen is whether the petitioner qualifies for entitlement of refund under section 142(3) of CGST Act in the light of the facts and circumstance of this case.
- In the instant case the petitioner has failed to follow the prescribed procedure to avail such a credit and consequently having lost such a right, he cannot claim revival of such a right and claim refund of the same by virtue of transitional provisions under Section 140(3) of the CGST Act. The facts involved in the present case would demonstrate that the petitioner had no existing right on the date of coming into force of CGST Act to avail credit of the service tax paid on 'Port services' as CENVAT Credit and accordingly, the provision of Section 140(3) of the CGST Act cannot be construed to have conferred such a right which never existed on the date of coming into force of CGST Act.
- The Petitioner missed to exercise their rights to avail of transitional credit of the service tax paid on 'Port services' through the mechanism prescribed under the CGST Act (Section 140) read with the existing provisions of CENVAT Credit Rules, 2002. It is also important to note that the existing provision did not permit CENVAT Credit of service tax paid on 'Port services' without its inclusion in ER-1 Return and in absence of such inclusion within the prescribed timeline, the claim of credit stood completely lost and could not be claimed in GST TRAN - 1 as transitional credit.
- The Petitioner was having Central Excise Registration for manufacture of sponge iron, billet, and TMT Bar. The petitioner was also registered under Service tax only as a person liable to pay service tax under RCM. Admittedly, the 'Port services' involved in this case is not covered under RCM and therefore the same was not includable in the service tax return filed by the petitioner under ST-3. Accordingly, the Petitioner was not entitled to avail credit of the impugned service tax paid on the 'Port services' in its service tax ST-3 return.

- It is not in dispute that the refunds under the existing law of Service Tax as well as Central Excise Act, 1944 are governed by section 11B of the Central Excise Act, 1944 and sub-section 2 of section 11 B which refers to application for refund made under section 11 B (1) of Central Excise Act, 1944. Further section 11B (3) of Central Excise Act, 1944 clearly provides that all kinds of refunds including those arising out of judgement, decree or orders of Court or Tribunal are to be dealt with in accordance with the provisions of section 11B (2) of Central Excise Act, 1944.
- The entire section 11B of Central Excise Act, 1944, as it stood immediately before the appointed date, does not sanction any refund where the assessee has failed to claim CENVAT Credit as per CENVAT Credit Rules, 2004 and has lost its right to claim such credit by not claiming it within the time prescribed.
- Refund of credit is available to such assesses only who are covered by Rule 5 of CENVAT Credit Rules, 2004 according to which refund of CENVAT Credit of input services is available only to provider of output services or goods which are exported. Thus, the refund application under Section 11 B of Central Excise Act, 1944 read with Rule 5 of Central Excise Rules, 2004 was also not maintainable.
- The provision of section 142(3) does not entitle a person to seek refund who has no such right under the existing law or where the right under the existing law has extinguished or where the right under the new CGST regime with respect to such claim has not been exercised in terms of the provision of CGST, Act and the rules framed, and notifications issued. Thereby, section 142(3) does not confer a new right, which never existed under the old regime except to the manner of giving relief by refund in cash if the person is found entitled under the existing law.
- The argument of the petitioner by referring to second proviso to section 142(3) of CGST Act that it indicates that section 142(3) would apply to the situations where the assessee has failed to take transitional credit under section 140(1), is also devoid of any merits.

The High Court did not find any reason to interfere with the findings and reasons assigned by the adjudicating authority as well as the appellate authority, who rejected the application for refund under section 11B of Central Excise Act read with Section 142(3) and 174 of CGST Act.

Comments:

Although, the decision of the Jharkhand high court is likely to cause a heartburn for taxpayers and the tax authorities are unlikely to take a liberal view in such instances, there have been instances where the authorities and Courts, have been appreciating the genuine difficulties encountered by taxpayers.

Very interestingly, a single member bench of the Madras High Court in a recent judgment[11], allowed Input Tax Credit under the transitional provisions of CGST Act, in respect of Service Tax/Customs duties paid on certain pre-GST transactions, even after the introduction of GST law.

The Madras High Court in this decision had observed that "this Court feels that, insofar as these cases are concerned, since the facts are very peculiar, where, the petitioners availed service prior to 01.04.2017, for which, the amount payable to them have been paid to the service provider, but the tax alone has not been paid i.e., service tax as well as the duty referred to above and this has been paid only after triggering the petitioners by the Revenue, but this payment has been made within the reasonable/permissible period. But, before making these payments since the transitional period has come into effect, the peculiar situation has arisen. Otherwise, had there been no GST regime from 01.07.2017, the petitioners otherwise would have been eligible to claim CENVAT credit of all these amounts paid, for which, the eligibility of the petitioners to claim the credit is not in much dispute…. Merely because, the transitional provision has come into effect from 01.07.2017 and under Section 140(1) of the Act, the persons like the petitioners can make a claim only in respect of the credit which is already accrued as on 30.06.2017 and these credits had come into the account of the petitioners only subsequently, for which, claim under Section 140(1) could not have been made, the chance of making such an application to seek the refund or otherwise of such a credit which has subsequently accrued in the account of the petitioners, cannot be denied. In that view of the matter, this Court feels that, in these kind of special situations, for which, the provision if not Section 142(3), no other eligible provision is available. Therefore, this Court feels that, since it is a dire necessity, as these kind of situation necessarily to be met with by the legislation, for which, these transitional provision has been brought in in the Statute Book, there can be no impediment for invoking Section 142(3) of the Act by invoking the Doctrine of Necessity".

The Jharkhand High Court, having discussed the constitutional framework with a particular reliance on a Supreme Court judgment, appears to have made a compelling case for denial of refund, while the Madras High Court propounded and relied on the 'Doctrine of Necessity'. It is important to keep watch on the trajectory of this controversy, especially with the conflicting views being expressed by the High Courts.

11 Ganges International P Ltd. Vs. Asst. Commissioner of GST & Central Excise (order dated 22-02-2022 in the WP 528 of 2019)

GLOBAL TRENDS

VAT/GST News:

International:

Belgium to cut VAT in response to energy price spike

Belgium will cut VAT on electricity as part of a package to shield consumers from rising energy prices. European gas and power prices have spiked this year as economies recover from the impact of the COVID pandemic, contributing to higher bills and inflating the price of many goods.

(Source : https://www.reuters.com/business/energy/belgium-cut-vat-response-energy-price-spike-2022-02-01/)

European Commission (EC) to regulate the application of VAT on services provided by digital platforms – Madrid VAT Forum 2022

The European Commission will regulate the application of VAT on services provided by digital platforms this year. EC will decide on whether the platforms are only intermediaries or if they are the providers of the service. This has been one of the main aspects of the community legislation on VAT that has been addressed at the Madrid VAT Forum 2022 by advisors and representatives of the EC.

(Source: https://www.globalvatcompliance.com/globalvatnews/ec-application-vat-digital-platforms-madrid-vat-forum-202/)

Turkey: Government cuts VAT on essential food products in response to rising inflation

Turkey has reduced the VAT on staple foods from 8% to 1%. The President Erdogan reiterated the government's intention to tackle rising consumer prices. Businesses that fail to follow the latest tax drop on basic food items will face hefty fines.

The move intends to ease the effects of inflation. The decision entered into force on 14 February 2022.

(Source: https://www.globalvatcompliance.com/globalvatnews/%e2%80%afturkey-government-cuts-vat-on-essential-food-products-in-response-to-rising-inflation/)

The EU to further extend the VAT reverse charge mechanism to combat intra-community fraud in the EU

The European Commission proposed to further extend the VAT reverse charge mechanism to combat intra-community fraud in EU. The proposal involves amendments to the EU VAT legislation that would prolong the application period to 31 December 2025, for:

- The optional VAT reverse charge mechanism applicable to supply of specific goods and services prone to fraud.
- Application of the Quick Reaction Mechanism (QRM) to combat VAT fraud.

(Source: https://www.globalvatcompliance.com/globalvatnews/ec-extends-vat-reverse-charge-mechanism-fraud-combat/)

Dominican Republic: VAT on the transfer of Industrialized Goods and Services (ITBIS) for non-residential digital service providers

The General Directorate of Internal Taxes (DGII) and the legal consultancy of the executive power opened a public consultation on a draft regulation to establish the procedure for the application of VAT on the transfer of ITBIS for digital services provided by foreign suppliers.

(Source: https://www.globalvatcompliance.com/globalvatnews/dominican-republic-draft-regulation-digital-service-providers/)

Poland: VAT-free assistance to Ukraine's crisis victims

According to the order, a 0% VAT rate would be applied to free-of-charge delivery of goods or supply of services targeted at assisting victims of Ukraine's armed conflict made between 24 February 24 to 30 June 2022.

(Source: https://www.globalvatcompliance.com/globalvatnews/poland-vat-free-assistance-to-ukraines-war-victims/)

India

Chandigarh sees 20% growth in GST collection in February

With business activities returning to normal, tax collection has also started picking up in the city. The GST collected in the Union Territory in February stood at INR 1.78bn, 20% higher than the revenue generated in the corresponding period last year.

(Source: https://timesofindia.indiatimes.com/city/chandigarh/ut-sees-20-growth-in-gst-collection-in-february/articleshow/89933577.cms)

GST slashed to 5% on domestic Maintenance, Repair, and Overhaul (MRO) services for aviation sector

The GST has been slashed from 18% to 5% on domestic MRO services for the aviation sector, the government announced on March 14. The reduction in taxation rate is expected to accelerate the pace of setting up of MRO services in India.

(Source: https://www.moneycontrol.com/news/business/gst-slashed-to-5-on-domestic-mro-services-8230621.html)

Goods and Services Tax Network (GSTN) mandates Aadhaar Authentication to claim refunds in GST portal

The GSTN has mandated the Aadhaar authentication to claim refunds in GST Portal. The Central Board of Indirect Taxes and Customs (CBIC) had notified the Central Goods and Services Tax (Eighth Amendment) Rules, 2021 which mandates Aadhaar authentication for refund application.

(Source: https://www.taxscan.in/gstn-mandates-aadhaar-authentication-to-claim-refunds-in-gst-portal/160629/)

GST council to consider input tax credit to hotels, restaurants; may increase GST at 12-18%

The GST council is expected to take a major decision on the issue of GST on hotels and restaurants. The levy could go up from 5% now to 12% or 18%. It could also allow input tax credit to the industry, which is not available till now.

The demand for input tax credit was longstanding from the industry and this could now be considered during the GST council meeting.

(Source: https://www.zeebiz.com/india/news-exclusive-gst-to-consider-input-tax-credit-to-hotels-restaurants-may-increase-gst-to-12-18-180876)

Mandatory GST number bars lakhs of traders & MSMEs from selling products on e-commerce platform

The Confederation of All India Traders (CAIT) has raised an issue that the mandatory requirement of GST number for sellers on e-commerce platform blocks lakhs of traders and MSMEs across the country from using various online platforms to sell their products.

Union Finance Minister Nirmala Sitharaman urged to exempt the mandatory condition of obtaining a GST registration for e-commerce supplies.

(Source: https://knnindia.co.in/news/newsdetails/sectors/mandatory-gst-number-bars-lakhs-of-traders-msmes-from-selling-products-on-e-commerce-platform-says-cait)

Customs News:

International:

Algeria steps up efforts to establish Customs laboratory

Director of taxation and tax bases of the general Directorate of the Algerian Customs confirmed the commitment of the administration in implementing a modern Customs laboratory as another step in the modernisation of the Algerian Customs. It is for the purposes of revenue collection, protection of the society and the environment as well as trade facilitation.

(Source: http://www.wcoomd.org/en/media/newsroom/2022/march/algeria-steps-up-efforts-to-establish-customs-laboratory.aspx)

UK supports the World Customs Organization (WCO) trade facilitation efforts with £ 2.1 Mn

Building on the success of previous years and recognizing the importance of facilitating trade to tackle COVID-19, the United Kingdom (UK) announced a three-year extension of its partnership between Her Majesty's Revenue and Customs (HMRC) with the WCO and UN Conference on Trade and

Development (UNCTAD) on trade facilitation capacity building.

(Source: http://www.wcoomd.org/en/media/newsroom/2022/march/uk-supports-the-wco-trade-facilitation-efforts-with-21-million.aspx)

India

Customs Act clause to criminalise 'illicit' publication of data

The government clarified that the provision proposed in the Customs Act making publication of details of export data a punishable act was aimed at hackers and criminals, and not towards legally published information. CBIC clarified that the proposed clause will only criminalise illicit publication of personalised, transaction-level information by private entities, who compromise data privacy.

(Source: https://economictimes.indiatimes.com/news/economy/policy/customs-act-clause-to-criminalise-illicit-publication-of-data/articleshow/89371980.cms)

Customs duty exemptions on 350 items withdrawn to push 'Make in India'

As many as 350 customs duty exemptions have been withdrawn in the Budget 2022-23 to boost domestic manufacturing. A comprehensive review of customs duty exemption on capital goods and project imports undertaken and more than 40 customs exemptions to be gradually phased out.

(Source: https://economictimes.indiatimes.com/news/economy/policy/customs-duty-exemptions-on-350-items-withdrawn-to-push-make-in-india/articleshow/89294903.cms)

ABOUT BDO GLOBAL

BDO is a leading professional services organisation and are global leaders of the mid-tier, with a presence in 165+ countries and over 97,000 people working out of more than 1,700 offices.We endeavor to deliver an exceptional client experience through a tailored solutions approach, while partnering with our employees and clients globally.

- We offer sensible, actionable advice grounded in local knowledge backed by regional and global experience
- We set high standards and our global systems give our people responsibility for delivering tailored service that is right for clients
- We support our clients every step of the way as they expand abroad

TO BE THE LEADER FOR EXCEPTIONAL CLIENT SERVICE

ANTICIPATING CLIENT NEEDS	CLEAR COMMUNICATION	MEETING OUR COMMITMENTS	ENCOURAGING OUR PEOPLE	DELIVERING VALUE
*anticipating **client needs** and being forthright in our views to ensure the best outcome for them*	*being clear, open & swift in our **communication***	*agreeing to and meeting our **commitments**: we deliver what we promise, everyday, for every client*	*providing the right environment for our **people** and the right people for our clients*	*creating **value** through giving clients up to date ideas and valuable insight and advice that they can trust*

ABOUT BDO IN INDIA

BDO in India offers Assurance, Tax, Advisory, Business Services & Outsourcing and Digital Services for both domestic and international clients across industries.The team at BDO in India consists of over 3500 professionals led by more than 200 partners and directors operating out of 13 offices, across 10 key cities.

200 PARTNERS DIRECTORS

3500 STAFF

10 KEY CITIES

Ahmedabad, Bengaluru, Chennai, Goa
Hyderabad, Kochi, Kolkata, Mumbai
Delhi NCR, Pune

ASSURANCE

- Accounting Advisory Services
- Financial Statement Audit and Attestation Services

BUSINESS SERVICES & OUTSOURCING

- Global Outsourcing
- Shared services & Outsourcing

ADVISORY

- Business Restructuring
- Corporate Finance and Investment Banking
- Due Diligence
- Forensics
- Government Advisory
- M&A Tax and Regulatory
- Resolution Advisory
- Risk Analytics
- Risk and Advisory Services
- Valuations

TAX

- Customs & International Trade
- Direct Tax Services
- Global Employer Services
- Goods & Services Tax (GST)
- Indirect Tax Assessment & Litigation Assistance
- International Tax Services (ITS)
- Representation and Litigation Support
- Tax Technology
- Transfer pricing Services

DIGITAL SERVICES

- Business Analytics
- Business Process Management
- Cyber Security
- Digital Strategy & Transformation
- Technology Solutions

Contact Us

For any content related queries, you may write in to taxadvisory@bdo.in or get in touch with,

GUNJAN PRABHAKARAN
Partner & Leader
Indirect Tax
gunjanprabhakaran@bdo.in

DINESH KUMAR
Associate Partner
Indirect Tax
dineshkumar@bdo.in

For any other queries or feedback, kindly write to us at marketing@bdo.in

BDO in India

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

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