



The **TAX** POST

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PREFACE

Despite the COVID-19 pandemic aftermath and the ongoing Ukraine conflict, the Indian economy is growing significantly. In this edition of the Tax Post, we are spotlighting India's growth story and its strategic plan to achieve an export target of USD 2tn by 2030.

To aid in reaching this goal, the Central Government recently announced a new Foreign Trade Policy (FTP) that took effect from 1 April 2023. The new policy represents a shift from previous FTPs in terms of validity. Unlike previous FTPs, which were valid for five years, unless extended, the new FTP has been issued without an end date, with a continuous process of making amendments in the policy by the Government to address the requirements of the industry. The new FTP will accommodate the emerging needs of the Indian economy and promote grassroots exports while simplifying the export process for businesses.

The 'Cover Story' of this edition broadly focuses on the latest benefits to the exporters under the aforesaid pillars.

The Fast Moving Consumer Goods (FMCG) sector is the fourth-largest sector contributing to the Indian economy. FMCG refers to products that sell quickly at a relatively low cost. It is anticipated that the FMCG sector would rapidly grow due to rising incomes, urbanisation and a growing middle class along with a reach to customers aided by the e-commerce sector. 'In Tales' discusses the sector, including some issues from an indirect tax perspective.

Economic growth and development generate economic power and such power is associated with responsibilities. As responsible entities, businesses are obligated to ensure that they fulfil their responsibilities towards the society that supported their development. The responsibility of businesses towards Environmental, Social and Governance (ESG) norms has gained importance in recent times and continues to be an important consideration for businesses and investors. Taxes, being an important element of ESG, can have a significant impact on a company's financial performance and reputation. Tax transparency reporting and carbon taxes form key elements of the interplay of tax and ESG. The 'Expert Speak' segment of this edition deals with the recent developments in this area on the Indian and global stage.

The 'Decoded' segment of this edition dissects an important judgment of the Hon'ble Supreme Court which has reiterated the cardinal rule of literal interpretation that a statute is to be read in its plain meaning if the language of the statute is unambiguous. The Hon'ble Supreme Court also clarified the position of law as regards imposing a civil liability and the requirement of mens rea while imposing the penalties.

We continue to bring the latest news on indirect tax from across the globe in our feature 'Global Trends'. We wish you an interesting read.

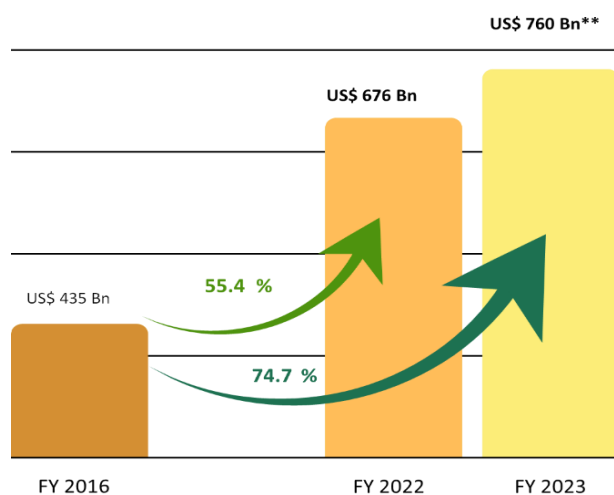


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COVER STORY

THE NEW FOREIGN TRADE POLICY

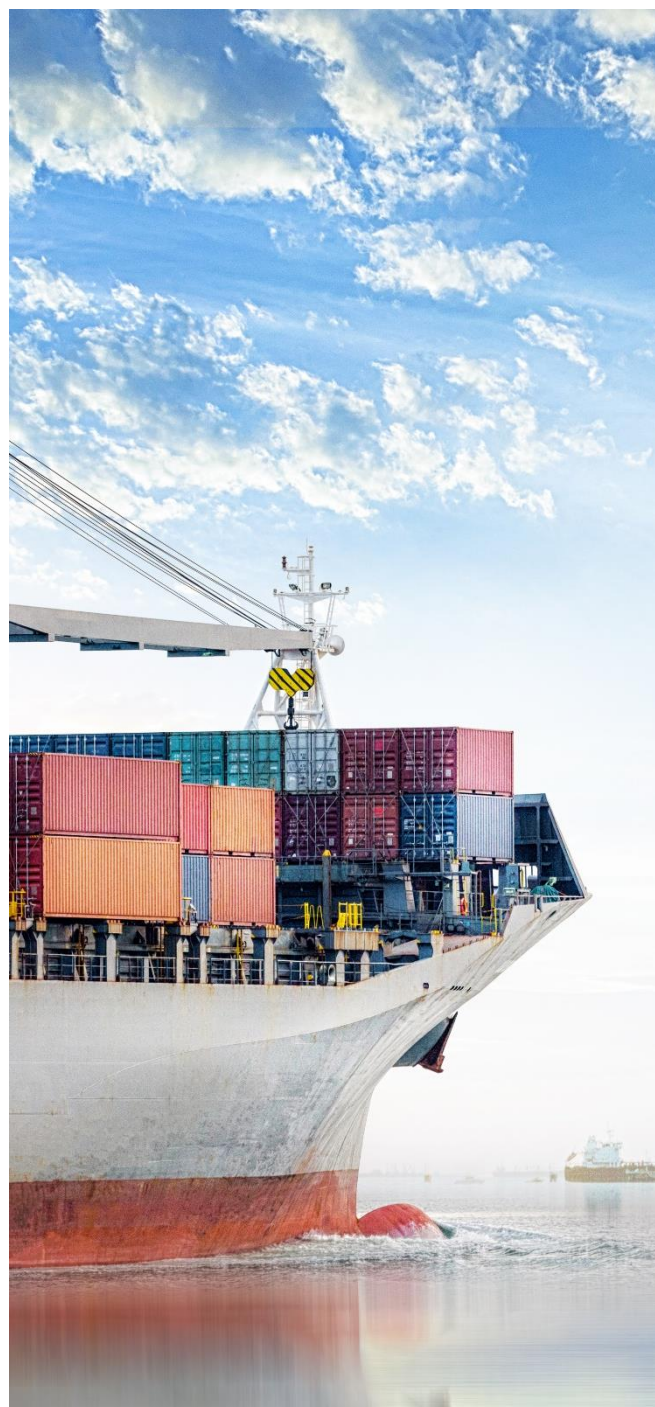
India is one of the fastest-growing major economies. While there is a huge domestic market for goods and services, the growth in the economy is also aided by the improvement in export performance. India has reached a record high export performance in both Merchandise and Services Exports and was estimated to have crossed USD 770bn in FY 2022-23¹. Such formidable growth in exports has been achieved despite the turbulences witnessed by the global economy on account of the COVID-19 pandemic and the Ukraine conflict. The following chart reflects the journey of Export from India (based on the estimated figures for FY 2022-23):



Source: Key Highlights of the Foreign Trade Policy released by DGFT on 31 March 2023

FOREIGN TRADE POLICY

The Foreign Trade Policy lays down the regulations relating to import and export and also provides for various duty-remission schemes. Until now, all the FTPs were issued for five years, with annual revisions on a need basis. The last FTP issued was FTP 2015-20, which was initially valid until 31 March 2020. However, the validity of the said policy was extended multiple times and eventually, it came to an end on 31 March 2023. These extensions were due to various global developments such as the COVID-19 pandemic, FTA negotiations, the Ukraine conflict, etc. Another important consideration while updating the FTP was the ruling by the World Trade Organisation (WTO), holding some of the export promotion schemes under the FTP as violative of the WTO norms, which is appealed against by India.



¹ Source: PIB press release dated 13 April 2023 (<https://pib.gov.in/PressReleasePage.aspx?PRID=1916220>)

Effective 1 April 2023, the Central Government has announced a new Foreign Trade Policy - (FTP 2023). Unlike the previous FTPs, the Government kept the FTP 2023 open-ended without an end date. It was mentioned that revisions to the FTP 2023 shall be done as and when required, after incorporating feedback from Trade and Industry to streamline processes. The Government is aiming to take India's exports to USD 2tn by 2030 with the FTP 2023 playing a role in facilitating an increase in exports from the present number of USD 770bn.

Let us now look at the important aspects of the FTP 2023.

DUTY REMISSION/ EXEMPTION SCHEMES

- The FTP 2023 has not introduced any new scheme for duty remission or incentivising exports. However, the existing schemes have undergone some amendments, some of which are mentioned below:
 - Battery Electric Vehicles of all types, vertical farming equipment, wastewater treatment and recycling, rainwater harvesting system and rainwater filters, and green hydrogen are now included in the list of Green Technology products and will be eligible for reduced Export Obligation requirements under Export Promotion Capital Goods (EPCG) Scheme
 - The Common Service Providers in a Prime Minister Mega Integrated Textile Region and Apparel (PM MITRA) Parks are now eligible to claim benefits under the EPCG Scheme
 - To boost technological development, the dairy sector has been exempted from maintaining Average Export Obligations under the EPCG scheme
 - The specific clause permitting the import of capital goods for project imports notified by CBIC under the EPCG scheme is removed
 - The provisions to issue Post-Export EPCG scrips have been removed
 - For obtaining an export obligation discharge certificate under the EPCG scheme, the previous provisions requiring the authorities to point out shortcomings in one go have been relaxed
 - Special Advance Authorisation (AA) Scheme is extended to the export of the Apparel and Clothing sector on a self-declaration basis, where ad hoc norms would be fixed within 90 days.

SPECIFIC FOCUS ON THE DEVELOPMENT OF DISTRICTS AS EXPORT HUBS AND THE PROMOTION OF CROSS-BORDER TRADE IN THE DIGITAL ECONOMY

The FTP 2023 has focused on the development of areas which have the potential for export growth at an accelerated pace.

Continuing the focus on the identification of local products and supporting the export of such products, a specific chapter on the development of districts as export hubs has

been introduced in the FTP 2023. Under this chapter, a district-level export action plan is envisaged to be prepared where the Government functionaries would work along with the industry to provide support and address bottlenecks for export growth in the districts.

Similarly, a new chapter has been introduced to promote cross-border trade in the digital economy. This chapter provides a framework for the cross-border trade of goods and services from India in the digital economy and the promotion of e-commerce and other emerging channels of exports from India. Some of the proposals include setting up e-commerce export hubs where the infrastructure and facilities for cross-border e-commerce activities can be developed, either through a private initiative or through a public-private partnership mode.

Other measures

In addition to the above, the FTP 2023 has taken various other measures to promote international trade from India. Some of the important measures are:

- Increased use of technology for various processes
- Reduction in threshold limit for exports for recognition as two-star to five-star export houses
- Setting up an inter-ministerial committee to examine MSME Trade-related grievances having policy ramifications, which can expedite decision-making with a whole-of-government approach
- Merchanting trade involving a shipment of goods from one foreign country to another foreign country without touching Indian ports, involving an Indian intermediary, is allowed, subject to compliance with RBI guidelines, except for goods/ items in the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and Special Chemicals, Organisms, Materials, Equipment and Technologies (SCOMET) list
- A specific chapter is now introduced in the FTP, dealing with the import and exports of items included in the SCOMET list, instead of such provisions being part of other chapters. This highlights the focus of the Government to clearly regulate the trade in the items covered under the SCOMET list.

Amnesty scheme for the past defaults of export obligations

Along with the FTP 2023, the Government also announced an amnesty scheme to regularise defaults in the fulfilment of export obligations. While the amnesty scheme does not form a part of the FTP 2023, it needs to be specifically mentioned, considering that it has been a long-standing demand of the industry.

Under the amnesty scheme, the importers, holding AA or EPCG authorisation, which were issued under the FTP 2004-09 and before (where the export obligation period was valid beyond 12 August 2013) and under the FTP 2009-14 (issued until 31 March 2015) are covered. Where the export

obligation under the scheme has not been fulfilled, the importer can pay the applicable customs duties in proportion to the unfulfilled export obligation along with interest (interest is capped at 100% of the amount of duty paid). Further, no interest is payable on the portion of duty representing additional customs duty and special additional customs duty.

The importer is required to register themselves on the DGFT website on or before 30 June 2023 for claiming benefit under the amnesty scheme and pay the customs duty along with interest by 30 September 2023 and intimate the jurisdictional DGFT who will examine the matter and grant Export Obligation Discharge Certificate. It is also clarified that cases under investigation or cases adjudicated for/ involving fraud, misdeclaration or unauthorised diversion of material/ capital goods will be excluded from the coverage. Also, neither CENVAT Credit nor Refund, under any provision of law, of any amount shall be allowed on duties paid under this scheme.

Way Forward

The announcement of the FTP 2023 is a welcome move by the Government which is expected to boost exports and promote economic growth. The focus of the FTP 2023 is clearly on trade facilitation measures instead of grants of incentives, which is evident from the introduction of the new chapters on the Development of Districts as Trade Hubs and promoting Cross Border Trade in the digital economy (which largely focuses on E-commerce). This shows the intent of the Government. The introduction of a specific chapter on SCOMET products is also a welcome move, as it brings focus on an important subject. Measures announced in the FTP 2023 will make it easier for businesses to export and will enable exporters to supply goods/ services at competitive prices and help in India's march to achieve a target of USD 2tn of exports by 2030.



THE EXPERT SPEAK



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INTERPLAY BETWEEN TAX AND ESG: KEY FACETS AND THE ROAD AHEAD

Environmental, Social and Governance (ESG) factors are increasingly becoming important considerations for investors and businesses. As the world grapples with issues such as climate change and inequality, stakeholders are demanding greater transparency and accountability from companies on their ESG performance. Tax is an important element of ESG as it can have a significant impact on a company's financial performance and reputation. Tax transparency reporting and carbon taxes form key elements of the interplay of tax and ESG. Both these aspects have been evolving globally over the past few years and governments are keen to adopt and expand their scope.

TAX TRANSPARENCY - EMERGING TRENDS

Tax transparency enables stakeholders to assess a company's tax risks and impacts. Countries are increasingly adopting policies that require companies to disclose their tax practices and strategies, including their tax payments, incentives and structures. These policies are aimed at promoting transparency, fairness and accountability in the tax system and at reducing tax avoidance, evasion and aggressive tax planning.

Total tax contribution (TTC) filings have been introduced in several countries. TTC filings are designed to provide greater transparency and accountability around a company's tax practices and to enable stakeholders to better understand the company's contribution to public finances. Several countries require TTC filings, including the United Kingdom, Australia, Canada and South Africa. These requirements typically apply to large corporates and in some jurisdictions, companies are required to publish their TTC report as part of their annual reporting requirements. TTC filings typically require companies to report on a range of tax-related information, including their total tax payments, tax obligations, tax incentives and tax disputes. Some countries also require companies to report on their tax strategy and the tax risks that they face. These requirements aim to promote greater transparency and

accountability around tax practices and to enable stakeholders to better understand the company's contribution to public finances.

Countries that recently adopted the implementation of TTC requirements include France and Italy. The implementation of TTC filings is part of a broader trend towards greater transparency and accountability around tax practices. As public concern around corporate tax avoidance grows, governments and regulators are introducing new requirements aimed at promoting greater transparency and accountability. More countries are likely to introduce such filings which would require companies to disclose a range of tax-related information, including their total tax payments, tax obligations, tax incentives and tax disputes.



CARBON TAX FRAMEWORKS - IMPACT ON GLOBAL SUPPLY CHAINS

While green taxes or carbon taxes have been in play for several years, new mechanisms are being introduced to make their levy more robust and expansive. These policies are aimed at addressing the environmental impact of imports and exports and at promoting more sustainable production and consumption patterns. The interplay between tax and ESG is also evident in new policies like the Carbon Border Adjustment Mechanism (CBAM) and other carbon taxes that can significantly impact global supply chains. The CBAM, which is being introduced by the EU, will require importers of certain goods, such as steel, cement and electricity to purchase carbon credits to offset the emissions generated by the production of these goods. This will effectively put a price on carbon for imported goods and will create a level playing field for domestic producers who are already subject to the EU Emissions Trading System (ETS). Other countries are also considering similar policies. For example, the United States has proposed a Carbon Border Adjustment Tax (CBAT) as part of its climate agenda. The CBAT would be a tax on imports of certain goods based on the carbon emissions associated with their production. This would help to level the playing field for domestic producers who are subject to carbon regulations.

These policies can have significant implications for global supply chains. Companies that import goods from countries with weaker climate policies or carbon pricing regimes may face higher costs and increased compliance risks. Such companies may also need to rethink their supply chains and consider sourcing goods from countries with more sustainable production practices and lower carbon emissions.



DEVELOPMENTS IN INDIA

In India, tax transparency reporting is a relatively new and voluntary disclosure. Hence, the level of detail and scope of these disclosures varies widely between companies, with some providing comprehensive information and others providing only basic information. The Indian Government has signalled its commitment to promoting tax transparency and there is growing pressure from stakeholders, including investors and customers, on companies to disclose more information about their tax practices. In the coming years, requirements for companies to make such filings could be broad-based and possibly linked to audited financial statements of the companies.

In so far as carbon taxes are concerned in India, the applicability is scattered across legislations and their scope is limited to a few instances such as new vehicles, petroleum products, coal, etc. The Indian government needs to design a comprehensive green/ carbon tax policy and make sure that the funds generated from the collection of such tax are used for the introduction of greener technologies in the country. Furthermore, since India aspires to be a global export hub, the government needs to ensure that the manufacturing processes are sustainable and that carbon taxes on imports by other countries do not make Indian exports commercially non-competitive.

The Securities and Exchange Board of India (SEBI) has recently mandated that the top 1000 companies listed on the stock exchanges must file a Business Responsibility and Sustainability Report (BRSR) as part of their annual reports. The BRSR is aimed at promoting better corporate governance and transparency and at enabling investors to make more informed decisions. The BRSR requires companies to disclose information on their ESG performance, including their policies and practices on issues such as climate change, labour standards, human rights and anti-corruption. While the BRSR filing requirements have been put in place, these requirements will mature and broaden the base over the next few years to comprehensively address tax transparency and carbon tax disclosure requirements.

In conclusion, the interplay between tax and ESG is becoming increasingly important for companies and investors. Policies around tax transparency and carbon pricing are key elements of ESG and companies that embrace these policies can enhance their financial and reputational health along with their ESG performance.

IN-TALES

FMCG INDUSTRY: CHALLENGES AND OPPORTUNITIES

INTRODUCTION

Fast Moving Consumer Goods (FMCG) refer to products that sell quickly at a relatively low cost. These products are also known as consumer-packaged goods which can be broadly categorised into the following two segments:

- **Food and Beverages (F&B):** This segment includes products that are consumed for sustenance, such as packaged foods, dairy products, bakery items, snacks, soft drinks and other beverages.
- **Household & personal care:** This segment comprises products that are used for household cleaning and maintenance purposes (such as detergents, dishwashing liquids, air fresheners and insecticides); personal hygiene and grooming purposes (such as soaps, shampoos, skin care products, deodorants and oral care products); and some vitamins and supplements, etc.

GLOBAL OUTLOOK²

In 2021, the global FMCG market was valued at USD 11,490.90bn. It is expected to grow at a CAGR of 5.1% and reach USD 18,939.4bn by 2031. The growth of the FMCG industry is attributed to increased urbanisation and premiumisation of FMCG products. According to un.org, the percentage of the global population residing in urban areas was 55% in 2021 and is expected to increase to 68% by 2050, with 90% of this expansion occurring in Asia and Africa.

The shift in economic capacity to developing countries like India and China is expected to create new business industries and a new generation of international-minded firms. Consequently, it is projected that India and China will grow as economic giants in the coming decade.

The FMCG sector in these emerging markets is expected to experience rapid growth due to rising incomes, urbanisation and a growing middle class. However, companies operating in these markets may face challenges such as supply chain and infrastructure issues and the need to adapt to local consumer preferences and cultural norms.

FMCG SECTOR IN INDIA³

In 2020, the FMCG sector in India generated total revenue of USD 110bn. It is projected to grow at a CAGR of 27.9% and reach USD 615.87bn by 2027. As of December 2022, the FMCG sector had contributed revenue of USD 56.8bn, with F&B accounting for 19% and household & personal care accounting for the balance 81%.

The FMCG industry employs around three million people, which accounts for ~5% of the total factory employment in India. It is the fourth-largest industry in India and has been expanding rapidly due to the following factors:

- **Growth of the E-commerce sector:** FMCG revenues are also boosted by the growth of e-commerce in India. An increase in the number of online users has bolstered the growth of the e-commerce sector which translated into the corresponding growth in the FMCG sector. The growth of the e-commerce sector has also resulted in various direct-to-customer (D2C) brands being launched, leveraging the distribution networks of e-commerce platforms.
- **Government initiatives:** The government has launched various initiatives and policies inter alia including the Production Linked Incentive (PLI) Scheme for the food processing industry with a financial outlay of USD 1.3bn over five years. The PLI Scheme is likely to increase sales and exports of food products.
- **Foreign Direct Investments (FDI):** Presently, 100% FDI is allowed in food processing and single-brand retail whereas in respect of multi-brand retail, the permissible FDI is 51%. The Government's initiatives coupled with the FDI have helped the FMCG sector strengthen employment, establish a more robust supply chain and capture high visibility for FMCG brands across established retail markets.
- **Miscellaneous factors:** Apart from the above, factors such as the growth of the rural market and youth population, introduction of new branded products and rising disposable incomes, aided by growth in the organised retail sector, have resulted in the growth of the FMCG sector.



² <https://timesofindia.indiatimes.com/blogs/voices/the-current-scenario-and-future-outlook-of-the-global-fm-cg-sector/>

³ <https://www.ibef.org/industry/fm-cg>

KEY GST ISSUES RELATED TO THE FMCG INDUSTRY

The key issues faced by the FMCG Sector under the GST law are summarised hereunder:

▪ Free Samples & Gifts:

- As a common practice, the FMCG industry provides various goods to its stockists, distributors, retailers, end-users, etc. (unrelated persons) as a gift or by way of free samples, for promoting sales and building the brand of the goods supplied, which are accounted as a sales promotion activity.
- In terms of Section 17(5)(h) of the CGST Act, ITC on 'goods disposed of by way of gifts or free samples' is specifically restricted.
- Disposal of such goods would lead to ITC reversal under Section 17(5)(h) of the CGST Act. Thus, despite the goods having been used in the sales promotion activity which is in the course or furtherance of business, ITC on such goods would not be available to the supplier.

▪ Sales promotion schemes:

- FMCG companies provide various sales promotion schemes such as 'Buy 1 Get 1 Free', 'Buy More, Save More', 'Secondary Discounts - Volume Discounts', etc. There were initially divergent views about whether the discounts are available as a deduction from the transaction value, when the additional quantity is given or credit notes for entitlement of a customer under the scheme are given, or whether such benefits are hit by provisions of section 17(5)(h) and require ITC reversal by treating the additional quantity, etc. given under sales promotion scheme as a gift given to the customer. There were also different views regarding the availability of deduction from transaction value when the benefits under sales promotion schemes are subsequently granted by way of a credit note (e.g., secondary discounts) or a potential addition to the transaction value of the customer when he/she sells such goods at a discounted price, which is reimbursed by the manufacturer.
- In the context of sales promotion schemes, CBIC had issued Circular no:92/11/2019-GST dated 7 March 2019 examining GST implications (including ITC eligibility) on the aforesaid discount schemes wherein it was inter alia stipulated as under:
 - **Buy 1 Get 1 Free scheme:** The entire package could be treated as a composite or a mixed

supply on which applicable tax liability would be discharged. Further, the FMCG company would not be liable to reverse ITC under Section 17(5)(h) of the CGST Act.

- **Buy More, Save More:** Discounts offered under this scheme would be excluded from the value of supply under Section 15(3) of the CGST Act. Further, the supplier would be entitled to claim ITC on inputs, input services and capital goods used in making such supplies.
- **Secondary Discounts:** Secondary discounts which are not known at the time of supply shall not be excluded from the value of supply since the conditions under Section 15(3) of the CGST Act are not satisfied.
- While the circular clarified various specific issues, the dynamic nature of the sales promotion schemes makes it difficult for the tax treatment of all the possible schemes to be clarified, resulting in divergent views adopted by the industry and tax authorities, leading to disputes.
- **Return & destruction of expired goods:**
 - The products supplied by the FMCG industry, by and large, have a specific period beyond which they cannot be used. Post the expiry date of such goods, when they remain unsold, they are returned to the companies supplying such goods, who in turn destroy them by following the applicable guidelines. Section 17(5)(h) of the CGST Act restricts the ITC on the goods destroyed. This causes various practical issues on ITC flows and the reversal of ITC on such destroyed goods.
 - In the context of destruction of expired medicines by pharmaceutical companies as an example, CBIC has issued Circular no:72/46/2018-GST dated 26 October 2018 wherein it was clarified that the return of expired goods may be treated as under:
 - **Option I - Return of goods by treating it as an independent supply:** Here, the distributor/retailer/stockists would treat the sales return as an independent supply on which applicable GST would be discharged by the supplier. Subsequently, when the manufacturer undertakes destruction of such expired goods, the ITC availed in respect of GST charged by the supplier would be required to be reversed under Section 17(5)(h) of the CGST Act.

- **Option II - Return of goods by issuing Credit Note**
Note: Under this option, the manufacturer would issue a Credit Note and claim the benefit of reduction of output GST liability, subject to adherence with the time limit provided under Section 34 of the CGST Act. Moreover, to undertake movement of goods, the distributor/ retailer/ stockists would be required to issue a delivery challan and also generate an E-way bill (wherever applicable). At the time of destruction of expired goods, the manufacturer would be liable to reverse ITC availed on such goods under Section 17(5)(h) of the CGST Act.

- The aforesaid Circular can be applied in the context of the return and destruction of expired goods for the FMCG industry as well. However, it is imperative to ensure that suitable documentary evidence and ITC reversal workings (wherever applicable) are maintained by the FMCG companies to substantiate the same before the GST authorities.

- **Classification of goods:**

- While the classification of FMCG products is by and large a settled issue, there are still some disputes relating to the classification of a particular product as a medicament or a cosmetic. Quite recently, the Supreme Court in two cases⁴ had the occasion to decide the issue, where in one case, it allowed the claim of a hair oil maker to classify the hair oil as a medicament while rejecting the claim of a talcum powder manufacturer to classify the talcum powder as a medicine. While these judgments must be considered in light of the contents and usage of the products, etc. vis-à-vis the language in the legislation, this indicates that the issue is still ongoing and with the various innovative products being launched, may continue to exist.

- In addition to the above, there are various other issues plaguing the industry as a whole, such as cross charges relating to common costs, anti-profiteering investigations, denial of ITC due to mismatches and defaults by the buyer, etc., and the FMCG industry is also impacted by it.

Conclusion

Over the past two decades, India's FMCG sector has undergone a remarkable transformation, driven by rising income levels, urbanisation and changing consumer behaviour. Despite challenges faced post-demonetisation and the rollout of the GST law, the sentiment of the FMCG industry has remained positive and optimistic and it would remain one of the drivers of growth, by creating more jobs.



DECODED

LEVY OF INTEREST/ PENALTY AUTOMATIC EVEN IF NO MENS REA - SUPREME COURT

INTRODUCTION

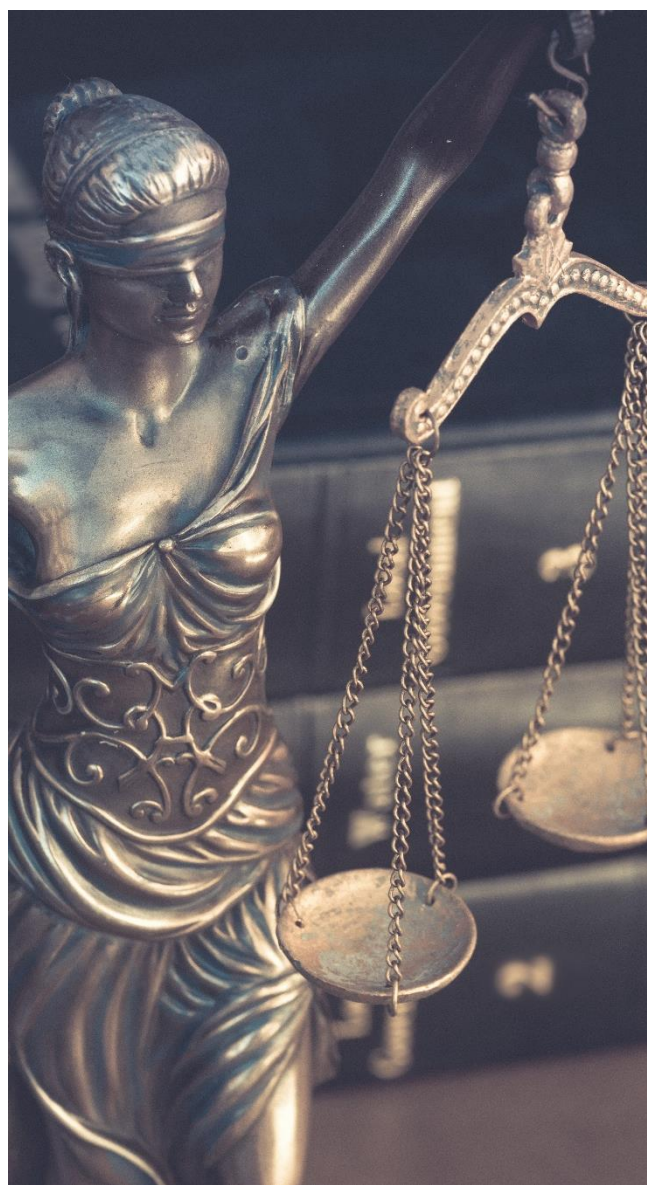
In an important judgement, the Hon'ble Supreme Court reiterated the following cardinal rule of literal interpretation:

- The intention of the legislature is primarily to be gathered from the language used in the statute
- Attention should be paid to 'What has been said' as well as 'What has not been said'
- The Courts cannot aid the legislatures' defective phrasing of an Act i.e., they cannot add or mend and by construction make up deficiencies which are left there.

Applying the aforesaid principle to the provisions of Section 45(6) and 47(4A) of the Gujarat Sales Tax Act, 1969 (Gujarat ST Act), the Hon'ble Supreme Court concluded that there is no requirement of 'mens rea' on the assessee's part for imposition of interest (under Section 47(4A)) and penalty (under Section 45(6)).

Facts of the case

- M/s. Saw Pipes Ltd (Taxpayer), engaged in the business of executing indivisible works contract for coal tar and enamel coating on pipes, had opted for payment of sales tax on a lump-sum basis under Section 55A of the Gujarat ST Act
- Accordingly, the Taxpayer had deposited sales tax @ 2% on the sales turnover involved in the execution of the works contract as per Entry 1 of the Notification dated 18 October 1993
- Subsequently, the Tax Authorities passed an order (assessment order) holding that the aforesaid transaction is not a 'works contract' and hence, the same would fall under the Residuary Entry 8 of the aforesaid notification attracting sales tax @ 12%
- Consequently, a demand for the differential tax was raised by the Tax Authorities. Apart from levying interest under section 47(4A) of the Gujarat ST Act, since the amount of differential tax was more than 25% of the tax paid by the Taxpayer, the Tax Authorities had also imposed penalty under Section 45(6) of the Gujarat ST Act
- Against the assessment order, the Taxpayer filed an appeal before the First Appellate Authority and subsequently, before the Gujarat VAT Tribunal, both of which, had upheld the assessment order



- Aggrieved by the above, the Taxpayer filed an appeal before the Hon'ble Gujarat High Court. However, during the course of the hearing, the Senior Counsel appearing on behalf of the Taxpayer had conceded the issue concerning the Taxpayer's liability to pay sales tax @ 12% and hence, the arguments before the Hon'ble High Court were restricted to imposition of interest and penalty.

OBSERVATIONS AND RULING BY THE HON'BLE HIGH COURT

- The Hon'ble High Court held that -
 - The Taxpayer was under a bona fide belief and following the expert advice, it had discharged sales tax @ 2%.
 - Since the differential tax as imposed in the assessment order has already been paid, imposition of penalty and interest is unsustainable.
 - Accordingly, the Hon'ble High Court allowed the appeal, setting aside the assessment order and the orders passed by the First Appellate Authority and the Gujarat VAT Tribunal.
- Aggrieved by the above, the Tax Authorities filed an appeal before the Hon'ble Supreme Court.

Contentions by the Tax Authorities

- The Hon'ble High Court failed to appreciate that penalty leviable under Section 45(6) of the Gujarat ST Act, is a statutory penalty and hence, compulsorily leviable. As a result, there is no discretion vested with the Tax Authorities to levy or not to levy the penalty where the Taxpayer is deemed to have failed to pay the sales tax under Section 45(5) of the Gujarat ST Act.
- Reliance was placed on *Union of India and Ors. Vs Dharamendra Textile Processors and Ors. [2008 (13) SCC 369]*, wherein it was held that when the term "shall be leviable" is used, the Tax Authorities will have no discretion. Applying the aforesaid ruling, it was contended that the legislature has consciously used the word "shall" under Sections 45(6) (for penalty) and 47(4A) (for interest) of the Gujarat ST Act. Hence, the Taxpayer would be statutorily liable to pay interest and penalty.
- As per the settled principle, when non-compliance or violation of a provision is met with a consequence, the language of the provision is deemed to be mandatory in nature. Hence, imposition of the statutory penalty under Section 45(6) of the Gujarat ST Act cannot be done away with.
- Relying on *Chairman, SEBI Vs Shriram Mutual Fund and Another [(2006) 5 SCC 361]*, the Tax Authorities contended that in case of a statutory penalty, there is no requirement to prove 'mens rea' or consider the aspect of bona fide belief of the Taxpayer. 'Mens rea' can only be expressly included in the legislature and the Courts cannot fill in the gaps and require an intention of guilty mind of the Taxpayer before levying penalty and interest in cases when such requirement has not been prescribed by the legislature.

- Further, reliance placed by the Taxpayer on the judicial precedents was refuted by Tax Authorities as follows:

- **Hindustan Steel Ltd. Vs State of Orissa [1969 (2) SCC 627]**: It was submitted that this ruling will not apply to the present case as there is no evidence to prove the fact that there is a bona fide belief on the part of the Taxpayer (as upheld by the Gujarat VAT Tribunal).
- **CCE, Chandigarh Vs. Pepsi Foods Ltd. [2011 (1) SCC 601]**: It was contended that the present judgment was in respect of interpretation of Section 11AC of the Central Excise Act, 1944 which is contrary to the language used under Sections 45(6) and 47(4A) of the Gujarat ST Act.
- **Jyoti Overseas P. Ltd. Vs State of Gujarat [2017 SCC OnLine Guj 2511]**: It was submitted that the Hon'ble High Court, in the said case was dealing with Section 34(7) of the Gujarat Value Added Tax Act, 2003 under which the Tax Authorities were provided with a discretionary power for imposition of penalty and that under the said provision, a penalty was leviable only in cases involving an intention to 'evade or avoid payment of tax'. However, unlike the provisions under consideration before the Hon'ble High Court in that case, the language used under Sections 45(6) of the Gujarat ST Act does not provide any reference to the requirement of 'mens rea' and hence, the ruling relied upon by the Taxpayer will not apply to the facts of the present case.

Contentions by the Taxpayer

- **Alternate methodology for payment of tax:**
 - It was submitted that the Taxpayer had paid a sales tax of 2% whereas the Tax Authorities had sought to demand a sales Tax of 12%. However, the assessment order and the subsequent orders (in an appeal) failed to appreciate that in case the Taxpayer's claim (of 2% liability) was rejected, the Taxpayer was also entitled to discharge sales tax on the actual value of goods involved in the execution of 'works contract'.
 - Applying the aforesaid valuation mechanism, the differential tax would be less than 25% of the tax paid by the Taxpayer. Consequently, imposition of penalty was not sustainable.
 - It was also submitted that since imposition of interest and penalty was proposed to be waived by the Hon'ble High Court (by following the decision in the case of *Brooke Bond India Ltd. Vs. State of*

Gujarat [1998 JX (Guj.) 128], the Senior Counsel appearing on behalf of the Taxpayer had conceded the issues concerning the Taxpayer's liability to pay sales tax @ 12%. However, in case the decision of the Hon'ble High Court is proposed to be reversed and penalty and interest would be imposed, it would be imperative to also adjudicate the conceded issue on merits.

- It was also contended that the actions of the Senior Counsel appearing on behalf of the Taxpayer in conceding the aforesaid issue before the Hon'ble High Court, cannot bind the Taxpayer. In this regard, reference was made to **Director of Elementary Education Vs Pramod Kumar Sahoo [(2019) 10 SCC 674]**, wherein it was held that any concession in law made by either counsel does not bind the parties, as it is legally settled that advocates cannot throw away legal rights or enter arrangements contrary to law.
- Without prejudice to the legal submission concerning imposition of penalty, it was also submitted that the Taxpayer is within its legal rights to contend that the quantum of differential tax is not correct, even when the same was not pressed before the Hon'ble High Court.
- **Section 45(5) of the Gujarat ST Act creates a presumption which is rebuttable in nature:**
 - Reliance was placed on **Nandlal Wasudeo Badwaik Vs Lata Nandlal Badwaik [2014 (2) SCC 576]**, wherein it was held that there is a clear distinction in law between a legal fiction and a presumption. Legal fiction assumes the existence of a fact that may not really exist whereas the presumption of a fact depends on satisfaction of certain circumstances.
 - Section 45(5) of the Gujarat ST Act creates a presumption against the Taxpayer which is rebuttable in nature. This is because Section 45(6) of the Gujarat ST Act grants a discretionary power to the Tax Authorities to impose a penalty and in cases where the presumption is rebutted by the Taxpayer, the Tax Authorities will not impose penalty by exercising its discretionary power. In such a scenario, the existence of 'mens rea' becomes a relevant factor. Reliance in this regard was placed on **Jyoti Overseas Pvt. Ltd. (supra)**.
- It was also submitted that for imposing penalty under Section 45(6) of the Gujarat ST Act, mens rea, fraud, suppression, etc. (either one or more of them) must be proved. Reliance was also placed on Hindustan Steel Ltd. (supra) and Pepsi Foods Ltd. (supra) wherein the existence of 'mens rea' was emphasised while levying penalty.
- Section 45(6) of the Gujarat ST Act provides for imposition of a penalty not exceeding one and one-half times the differential tax. Thus, the aforesaid provision provides an upper limit for imposition of penalty. However, no minimum penalty has been prescribed indicating that in appropriate cases where 'mens rea' is absent, the Tax Authorities have discretion to impose no penalty.
- On similar grounds, it was also contended that no interest would be payable under Section 47(4A) of the Gujarat ST Act.

OBSERVATIONS AND RULING OF THE HON'BLE SUPREME COURT

- **Whether consideration of 'mens rea' on the part of the Taxpayer is required?**
The Hon'ble Supreme Court perused the provisions of Sections 45 and 47 of the Gujarat ST Act and observed that:
 - Interest and penalty under Section 47(4A) and 45(6) of the Gujarat ST Act respectively are statutory in nature and hence, no discretion is granted to the Tax Authorities.
 - Once it is found that the Taxpayer is deemed to have failed to pay tax as per Section 45(5) of the Gujarat ST Act, the levy of penalty is automatic.
 - Similar view was also taken in **Riddhi Siddhi Gluco Biols Ltd. Vs. State of Gujarat [2017 (100) VST 305 (Guj.)]**, **State of Gujarat Vs. Oil and Natural Gas Corporation Ltd. [2017 (97) VST 506]** and **State of Gujarat Vs. Arcelor Mittal Nippon Steel India Limited [2022 (6) SCC 459]**.
 - Thus, there is no question of considering 'mens rea' on the part of the Taxpayer.
- **Whether the presence of 'mens rea' is essential for imposition of civil liability?**
 - Relying on **Shriram Mutual Fund and Another (supra)**, it was observed that breach of a civil obligation immediately attracts penalty under the provisions of the Act and the Regulations irrespective of whether or not the contravention was made by the defaulter with guilty intention.
- **Literal interpretation**
 - Reiterating the following principles of literal interpretation, it was observed that:

- The Court cannot read anything into a statutory provision which is plain and unambiguous.
 - The intention of the legislature is primarily to be gathered from the language used in a statute, which means that attention should be paid to what has been said as also to what has not been said.
 - The Courts cannot aid the legislatures' defective phrasing of an Act; they cannot add or mend and by construction make up deficiencies which are left there.
- Applying the above and considering that the words used under Section 45(6) of the Gujarat ST Act are 'shall be levied', it was held that the decisions relied upon by the Taxpayer would not apply to the present case as the language of the provisions therein is altogether different from the language of the provisions under consideration.
- **Concession given by the Senior Counsel before the Hon'ble High Court**
 - It was held that Senior Counsel appearing on behalf of the Taxpayer had taken a conscious decision of not pressing the issue concerning the liability to pay sales tax @ 12%. Thus, the decision relied upon by the Taxpayer would not be applicable to the present case.
 - Given the above, the appeal filed by the Tax Authorities is allowed and the order passed by the Hon'ble High Court was set aside. Accordingly, the assessment order as confirmed by the First Appellate Authority and the Gujarat VAT Tribunal was restored.

Comments

This is an important judgement reiterating the well-established principles that the literal rule, which states that the intention of the legislature is primarily to be gathered from the language used. Also, it has been held that the presence of 'mens rea' is not required in enforcing civil liabilities if the statute does not have such requirements. However, this judgment underscores the requirement for carefully considering the language employed in the penal provisions, to determine its applicability. Consequently, the observations made in the judgment may not be used as a benchmark but would need to be applied depending on the language used in the relevant provisions.

[State of Gujarat and Another Vs M/s. Saw Pipes Ltd., [Civil Appeal 3481 of 2022], dated 17 April 2023]



GLOBAL TRENDS

VAT/GST News:

International



UK: 50 years on, VAT continues to create confusion for UK businesses

VAT is one of the top sources of government revenue and 1 April 2023 marks 50 years since its introduction in the UK. It was supposed to be 'a simple tax', but that is not the case.

(Source:

<https://www.avalara.com/blog/en/europe/2023/03/50-years-vat-continues-to-confuse-uk-businesses.html>)



Hungary: EU Council authorized to increase VAT exemption threshold

The European Union Council has approved Hungary's request to raise its VAT exemption threshold to EUR 71,500 from the current EUR 48,000 until the end of 2024.

(Source:

<https://www.globalvatcompliance.com/globalvatnews/hungary-vat-threshold/>)



Indonesia: Indonesia lowers VAT on electric vehicles to 1%

Indonesia has lowered its value-add tax on battery-based electric vehicle sales to 1% from 11% to encourage the adoption of EVs, a government ministry said amid efforts to attract investment into domestic production.

(Source:

<https://www.reuters.com/article/idUSKBN2W007G>)



Portugal: Scrapping food VAT not enough to tackle cost of living crisis, Portuguese say

As prices soar in one of Western Europe's poorest nations, the Portuguese government is brushing off a new measure

to scrap Value Added Tax (VAT) on basic food products which appears to be insignificant.

(Source:

<https://www.reuters.com/markets/europe/scrapping-food-vat-not-enough-tackle-cost-living-crisis-portuguese-say-2023-03-29/>)



Colombia: Update - Tax authorities impose e-invoicing on marketplaces

Columbia's Ministry of Finance and Public Credit has issued several modifications to the CUFE e-invoice rules. This includes an obligation for digital platforms to offer an e-invoicing facility to charge their own customers. It also added clarifications to the definition of 'electronic equivalent documents' and the dates for invoices where an e-invoice is not obligatory.

(Source: <https://www.vatcalc.com/colombia/colombia-cufe-vat-e-invoicing/>)



India

GST Network improved over last 5 years: Report

A report by the Economic Advisory Council to the PM (EAC-PM) has said that the performance of the GST Network, the IT backbone for the indirect tax regime, has improved over the last five years. It suggested that ChatGPT-type language-capable software could be deployed to make chatbot GITA improve responses. The report by EAC-PM members at Government e-Marketplace (GeM) has looked at multiple parameters, including compliance by assesseees, to conclude that GSTN is more robust now.

(Source:

<https://timesofindia.indiatimes.com/business/india-business/gst-network-improved-over-last-5-years-report/articleshow/99653276.cms>)

Centre gets post-GST tax buoyancy boost but states yet to improve: NIPFP

The tax buoyancy in the Goods and Services Tax (GST) regime has improved for the Union Government but the same has not improved for states yet, as per the working

paper released by the National Institute of Public Finance and Policy (NIPFP).

(Source:

<https://www.moneycontrol.com/news/business/economy/c-entre-gets-post-gst-tax-buoyancy-boost-but-states-yet-to-improve-nipfp-10401131.html>)

Constitution of GST Tribunal goes against several rulings of Supreme Court

The historic introduction of a unified, One-Nation-One-Tax at midnight session of Parliament was through a complex web of Central and State laws. The Central Goods and Services Tax Act, 2017 also created a GST Appellate Tribunal. It was unfortunate that the composition and structure of this Tribunal were contrary to settled principles laid down by several Supreme Court decisions. Further, the constitution of the Tribunal in terms of the amended provisions is also unconstitutional and goes to the teeth of the settled principle laid down by the Supreme Court.

(Source:

<https://indianexpress.com/article/opinion/columns/constitution-of-gst-tribunal-goes-against-several-rulings-of-supreme-court-8549359/>)

MSMEs selling online need simpler GST rules

The GST Council during its 47th general meeting, brought both offline and online sellers on the same footing with respect to the threshold for obtaining mandatory registration of GST. Earlier, online sellers selling through e-commerce had to mandatorily register for GST irrespective of their annual revenue, whereas, for offline sellers, there was an exemption of up to INR 4mn annual revenue (INR 2mn in some States). This created an imbalance between online and offline selling and acted as a barrier for the sellers to sell online.

(Source:

<https://www.thehindubusinessline.com/opinion/msmes-selling-online-need-simpler-gst-rules/article66721675.ece>)

Customs News

International

Global: WCO Working Group on Performance Measurement delivers the first version of the WCO Performance Measurement Mechanism

During its 7th Meeting, the WCO Working Group on Performance Measurement (WGPM) accomplished its mandate to establish the WCO Performance Measurement

Mechanism (WCO PMM) thanks to the steady commitment and collective actions of its members.

(Source:

<https://www.wcoomd.org/en/media/newsroom/2023/april/wco-working-group-on-performance-measurement-delivers-the-first-version.aspx>)



Nepal: WCO Support Nepal Customs on Customs Valuation

The World Customs Organisation organised a national training workshop on Customs valuation from 17 to 21 April 2023 for the benefit of the Customs Administration of Nepal with the support of the Customs Cooperation Fund of China.

(Source:

<https://www.wcoomd.org/en/media/newsroom/2023/april/wco-support-nepal-customs-on-customs-valuation.aspx>)



Burkina Faso: Strengthening the organizational culture of Burkina Faso Customs: a decisive vector in the fight against corruption and promotion of integrity

From 24 to 26 April 2023, WCO experts from the WCO Anti-Corruption and Integrity Promotion (A-CIP) Programme facilitated, at the request of Burkina Faso Customs, a workshop dedicated to strengthening their organisational culture.

(Source:

<https://www.wcoomd.org/en/media/newsroom/2023/may/strengthening-the-organizational-culture-of-burkina-faso-customs.aspx>)



Ethiopia: WCO supported Ethiopian Customs Commission in building capacity on the Harmonized System

From 25 to 28 April 2023, the Ethiopian Customs Commission (ECC) hosted a National Advanced Workshop on the Harmonized System in Addis Ababa, Ethiopia. The Workshop was delivered by two experts from the WCO within the framework of the EU-WCO Programme for the Harmonized System in Africa (HS-Africa Programme), funded by the European Union, as part of the comprehensive package of assistance to support ECC's work on building capacity for Harmonized System classification.

(Source:

<https://www.wcoomd.org/en/media/newsroom/2023/may/wco-supported-ethiopian-customs-commission-in-building-capacity-on-the-harmonized-system.aspx>)



India

Customs at core of India's high logistics performance. Key to its role in global value chains

Indian customs must focus on communication tech to improve capability. The focus should be on blockchain and distributed ledger technologies, IoT and machine learning.

(Source: <https://theprint.in/opinion/customs-at-core-of-indias-high-logistics-performance-key-to-its-role-in-global-value-chains/1552689/>)

Clarity on customs duty may boost local telecom gear manufacturing.

The government expects a boost to domestic manufacturing of telecom equipment after a clarification around customs duty on various products, with companies likely getting a 25% fillip to make the products in the country instead of importing.

(Source: <https://economictimes.indiatimes.com/industry/telecom/telecom-news/clarity-on-customs-duty-may-boost-local-telecom-gear-manufacturing/articleshow/99649379.cms>)

New customs interface "moving towards normalcy", claims CBIC

The Central Board of Indirect Taxes and Customs (CBIC) has claimed that the new customs duty payment system, riddled with technical glitches since its introduction on April 1, 'is moving towards normalcy' with more than 27% of duty payments done through the platform even as users continue to flag its erratic functioning.

(Source: <https://www.thehindu.com/business/new-customs-interface-moving-towards-normalcy-claims-cbic/article66764968.ece>)

Customs waives demurrage, interest as technical glitch leads to clearance delays

With importers continuing to face challenges and glitches in navigating the new 'upgraded and modern' Customs duty payment system introduced on 1 April 2023, the Finance Ministry decided to waive demurrage as well as penal interest charges on delayed customs payments.

(Source: <https://www.thehindu.com/business/customs-waives-demurrage-interest-as-technical-glitch-leads-to-clearance-delays/article66707609.ece>)





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