The TAX POST

A bimonthly bulletin on the world of Indirect Taxes

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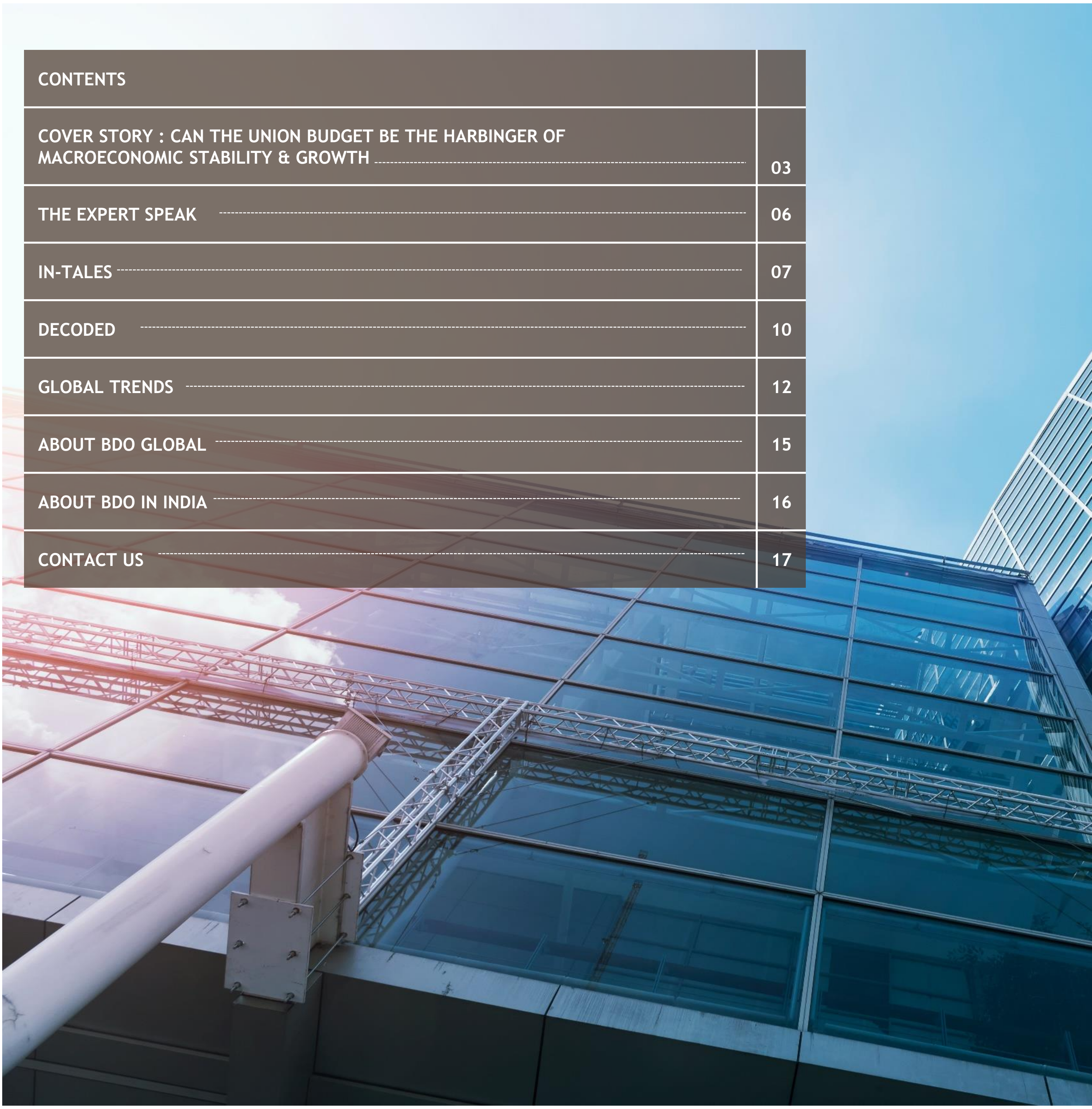

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PREFACE

We wish all our readers a very happy New Year 2023!

As we set sail for the new year, the Indian economy has been showing strong signs of rebound with the worst of the pandemic behind us. However, the global economy continues to navigate an increasingly turbulent and uncertain environment. Despite the current slowdown in global growth, inflation has risen to a multi-decade high in many economies, amid elevated food and energy prices adversely impacted by the Ukraine conflict. The unfavourable developments have prompted IMF to downgrade its outlook for many economies.

As the pandemic fades into the background, India needs to turn its attention towards medium-term challenges, such as securing technology and resources for energy transition and skilling its youth for the 21st-century economy while staying the course on fiscal consolidation. The Union Budget 2023-24 which is the last full budget from the current Government, needs to be viewed against this backdrop. The Cover Story of the current edition of ‘The Tax Post’ provides a macro-economic backdrop and circumstances under which the Budget is presented and key expectations, especially from an Indirect Tax angle.

While many sectors have faced an extended period of pandemic-induced headwinds, the Hospitality sector is one with the worst hit. While relief measures were announced over the past couple of years to address the decline, the ask was more comprehensive and myriad. Recognising the challenges faced by this sector and realising the potential of India as a Travel and Tourism destination, the Government has identified this sector as one of the key pillars of growth. The sections ‘Expert Speak’ and ‘In Tales’ of this edition have turned the focus to this sector.

Another important sector, which has come to be believed as India’s traditional strength, is the ITeS sector. This sector has been facing rough weather of late with increasing international competition and flight of business. The complexity of tax laws, especially indirect tax, has been another area of concern. A recent decision of the Punjab & Haryana High Court could not have come at a better time. This decision has settled a long-contested dispute relating to the recognition of their service as an ‘export’. We have discussed this decision in the section ‘Decoded’.

We continue to bring the latest on indirect tax from across the globe in our feature ‘Global Trends’.

We wish you an interesting read.

GUNJAN PRABHAKARAN
Partner & Leader
Indirect Tax

COVER STORY

CAN THE UNION BUDGET BE THE HARBINGER OF MACROECONOMIC STABILITY AND GROWTH

Budget making in India:

Another season of the Union Budget and a fresh set of expectations! A budget is not merely an exercise in revenue raising and planning expenditure and cannot be relegated to a constitutional ritual; it is a powerful instrument for implementing various economic and social objectives of the Government.

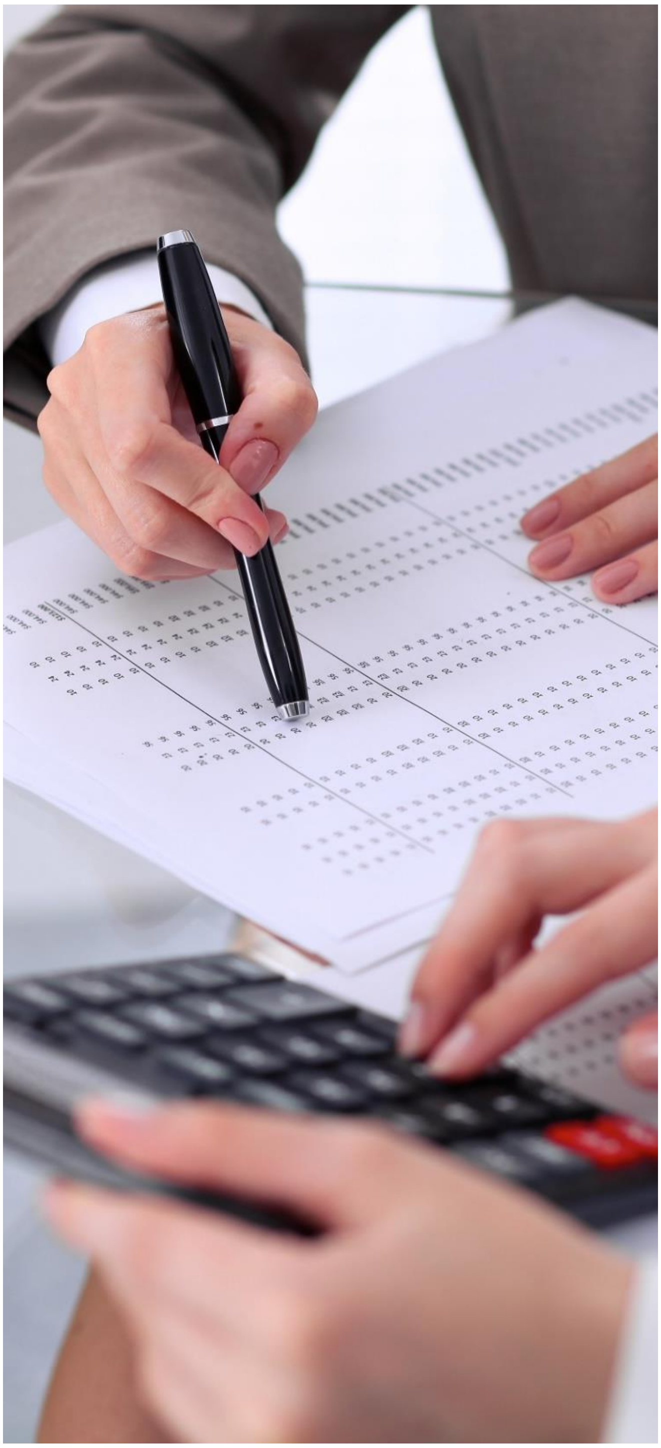
Although the Constitution does not mention the term 'Budget', Article 112 says that the President shall, in respect of every financial year, cause to be laid before both the Houses of Parliament, the House of People (Lok Sabha) and the Council of States (Rajya Sabha), a statement of the estimated receipts and expenditure of the Government for that year. This statement is known as the 'Annual Financial Statement'. Presently, the Union Budget of India is presented each year on the 1st of February or any other suitable date, by the Finance Minister to the Parliament.

The Budget preparation in India is an iterative process between the Ministry of Finance and line Ministries/Departments. The process commences with the Budget Division in the Ministry of Finance issuing the 'Budget Circular' detailing instructions for preparing estimates. The Budget is prepared on a 'Cash' basis - whatever is expected to be actually received or paid under proper sanction during a financial year (including arrears of the past years) should be budgeted in that year.

All unutilised funds within the year lapse at the end of the financial year. It is essential that each demand has realistic estimates which are required for expenditure in that year. The Budget preparation follows a 'gross' and 'net' basis, the latter applies only in case of some grants e.g. Ministry of Railways, Department of Posts, etc. where the departmental receipts are allowed to be utilised. Every Department prepares estimates for receipts and expenditures separately except in case of certain large Departments/Ministries.

Union Budget 2023-24

The Union Budget 2023-24 is on the drawing board at an interesting time in the global arena. The global economy continues to navigate an increasingly turbulent and uncertain environment. Despite the current slowdown in global growth, inflation has risen to a multi-decade high in many economies, amid elevated food and energy prices, adversely impacted by the Ukraine conflict and vagaries of nature. These unfavourable developments have led the IMF to downgrade its outlook on the global economy revising downward its projections of 2023 growth rates for most economies.



India's economy grew faster during the first half of 2022-23 than other economies, driven by strong demand and investment. Inflationary pressures have been moderating since October, with CPI inflation tempering to an 11-month low in November. Furthermore, inflation expectations have also moderated in the November round of the RBI's Households' Inflation Expectations Survey. This bodes well for augmenting consumption in rural and urban regions in the upcoming months.

Improvement in business and consumer sentiment is expected to bolster discretionary spending. The real investment rate during the current fiscal prevailing at a high level of 35% (approx.) demonstrates the Government's continued commitment towards asset creation. The Central Government capital expenditure expanded by 62% (approx.) during the first seven months of 2022-23, reaching INR 4tn, which is 55% of the available budget. Private investment has been gathering pace and is expected to remain upbeat, also apparent in the rising sectoral deployment of bank credit growth[1]. The external front remains resilient, with stable foreign direct investment inflows, resurgent FPI inflows, and adequate foreign exchange reserves providing an import cover of 9 months. As a result, the Indian rupee has performed well compared to many other currencies.

Despite the deterioration in global economic activity, exports have registered positive growth sequentially as well as yearly in Q2 of FY2022-23 as per data released by NSO. Altogether, India's strong economic resilience is also confirmed by the World Bank's recent upgradation of India's growth forecast from 6.5% to 6.9% for 2022-23.

It is reported that India's tax collection will exceed the budget estimate by nearly INR 4,000bn in the current fiscal, on the back of buoyant income tax, Customs duty and GST mop-up[2]. The Direct Tax collections for FY 2022-23 as of 17 December 2022, show that net collections are at INR 11,357bn compared to INR 9,480bn in the corresponding period in FY 2021- 22, representing a smart growth of nearly 20%[3]. The GST collection during the current year too has also recorded an average of INR 1490bn per month, a 20% growth over the previous year.

However, some PMI survey indicators have been signalling a slowdown in economic activity. Since August 2022, the global composite PMI has continued to remain in the contractionary zone, with a major decline in output in the developed market and a mixed trend in emerging markets. During October-November of 2022, PMI Composite indices have indicated contractions in the overall economic activity in the US, UK, China, and Japan owing to a decline in service sector activity and a downturn in manufacturing production.

The impact of slowing global growth has been impacting global trade as well. World merchandise trade volume growth plateaued in the April-June quarter of 2022, with a 4.7% Y-o-Y increase, slightly lower than the 4.8% growth in the previous quarter. The WTO goods trade barometer index stood at 96 in the quarter ending September 2022 (below the baseline value of 100), suggesting cooling business sentiment and weaker global import demand[4]. Further, the PMI Survey also indicated a weakening of international trade, with new export orders contracting for the ninth successive month in November.

Continued commitment to macroeconomic stability will underpin both economic performance and investor interest in India, the latter being very high and currently requiring nurturing. As the pandemic recedes more and more into the background, India needs to turn its attention toward medium-term challenges, such as securing technology and resources for energy transition and skilling its youth for the 21st-century economy while staying the course on fiscal consolidation at the General Government level. The good news is that much hard work has been done in the last several years and a strong platform has been erected on which the superstructure of a middle-income economy can be constructed.

Expectations:

Most industry sectors have high expectations from the upcoming Union Budget 2023–24. One area of focus is likely to be cementing economic growth and development. The upcoming Union Budget will be the last full budget from the current Government, ahead of the Lok Sabha elections due in early 2024. While the salaried and middle class may be expecting tax reliefs, the industry and trade have been awaiting key initiatives and fiscal relief from an indirect tax perspective.

The 'Make in India' programme is expecting to get a shot in the arm by rationalising the Basic Customs duty, especially on finished goods where India has a strong manufacturing set-up. It is also expected that the Budget would focus on a suitable reduction in customs duty on the import of raw materials required for manufacturing to encourage domestic manufacturing. Manufacturing and Other Operation in Warehouse Regulation (MOOWR) had been relaunched, providing ease of compliance as compared to Export Oriented Units (EOUs) which enjoys almost similar benefits. The benefit of depreciation on Capital Goods (CG) while computing duty liability on the removal of CG from MOOWR units, is awaited in the budget announcements.

The misuse of FTAs has been a major cause of concern for domestic industries, and if the trend of the recent budgets

[1] Monthly Economic Review November 2022_1.pdf (dea.gov.in)
[2] https://economictimes.indiatimes.com/markets/stocks/news/tax-collection-to-exceed-budget-estimate-by-rs-4-lakh-crore-says-revenue-secretary/articleshow/95725382.cms
[3] Gross Direct Tax collections for the Financial Year (FY) 2022-23 register a growth of 25.90% (pib.gov.in)
[4] Monthly Economic Review November 2022_1.pdf (dea.gov.in)

is any indication, it is likely that the Government may not deviate from its path of plugging loopholes in the prevention of misuse of FTAs.

The Finance Minister, while presenting the Budget last year, had announced that the SEZ law which has lost its sheen in the recent time, would be recast. While the new legislation is under drafting, it is still not clear when the new law would be introduced and its contours. There is a general expectation that a clear roadmap would be laid out in the current Budget, and it will be expeditiously implemented, after due consultation with the Industry and Trade.

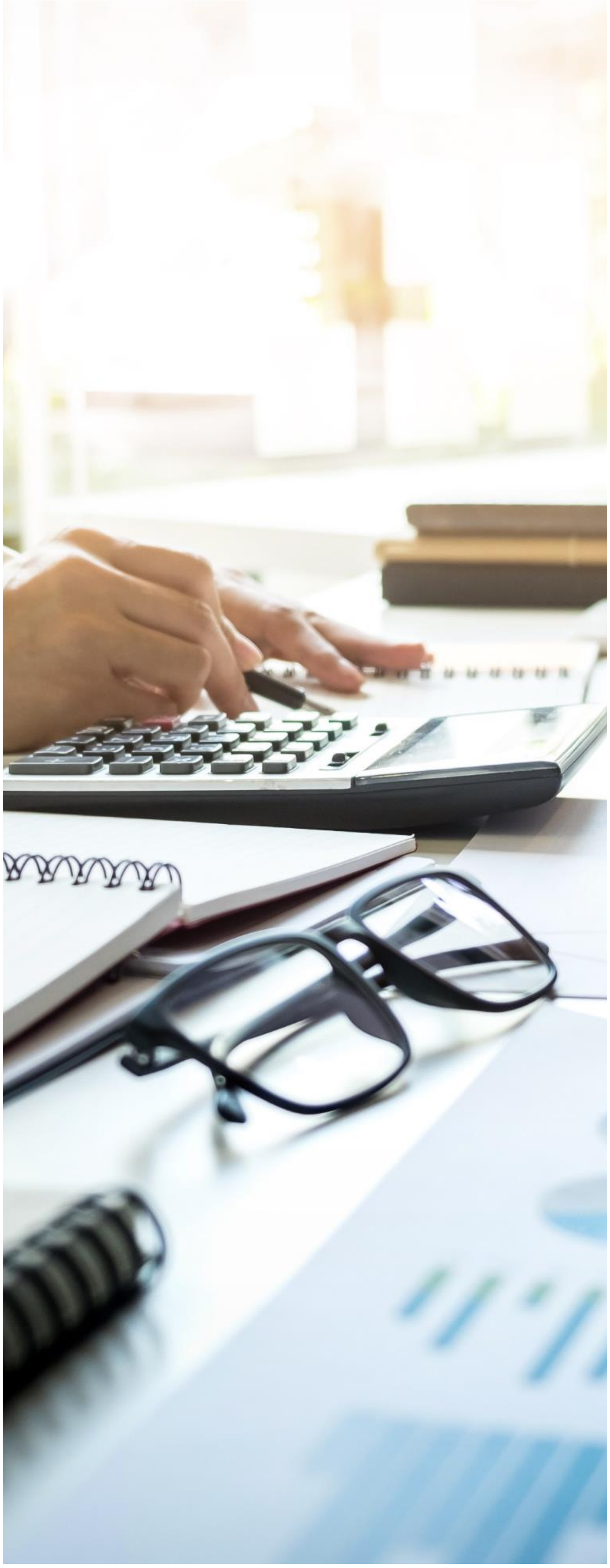
The Industry and Trade which thrive on innovation, research and development in India, await the announcement of some incentives and/or grants for cost-intensive research in the country. For encouraging green investments in the country, PLI schemes could potentially carry additional incentives for investment in green technologies leading to higher utilisation of raw materials and reduction in waste discharged in the manufacturing process.

As far as the Goods and Services Tax (GST) is concerned, the announcements had been subdued in recent times given the role played by the GST council, by periodic issuance of notifications and circulars. While several issues have been addressed, there is still a myriad of issues that need expeditious resolution under GST. One important expectation from this Budget is the expeditious introduction of an Amnesty scheme to settle all procedural disputes from its inception in 2017, especially disputes that have arisen on account of glitches in the GSTN portal and migration to GST law. Another area under the GST law that requires profound consideration is the removal of some of the restrictions on the availment and utilisation of Input tax credits (ITC) under Sections 16 and 17 of the Central Goods and Services Tax Act, 2017 read along with relevant rules.

While it may call for a wide-ranging discussion and buy-in from various stakeholders, including State Governments, Industry and Trade, it is time that the Government kick-starts discussions to broad-base GST to encompass many of the excluded sectors viz. petroleum products, power, real estate transactions, etc. in the ambit of GST. It is also appropriate that a clear road map is laid-out about the plan to prune tax slabs from the current five to two/three and de-population of schedule of goods/services liable to high tax and pruning of exemptions. This could start a progressive movement of GST rates inching closer to a 'Revenue Neutral Rate' to aid the containment of tax evasions.

Conclusion:

It is said that 'more is lost by indecision than wrong decision'. The Government has been proactive and resolute in initiating pathbreaking reforms in the fiscal legislation domain. While there may be a few areas that may require iron-out, it is well within the realm of the determined administration. The Union Budget 2023-24 opens up another opportunity to win a few battles more.



THE EXPERT SPEAK

SMITA ROY
Partner & Leader (North)
Indirect Tax

HOSPITALITY SECTOR – CHALLENGES AND HOPES

The hospitality sector has faced an extended period of pandemic-induced headwinds and is one of the hardest-hit sectors. While policy relief measures were announced over the past couple of years to address the decline, the ask was more comprehensive and myriad. Drivers of the industry include high capital investments, fixed operating costs, high employment and revenue-generating potential and therefore in need of a larger fix.

As tourism is recognised by the Honorable Prime Minister as one of the key pillars of growth and the recovery of this sector is almost at 75% of pre-Covid levels, 2023 is presently being pegged as the year for the revival of this sector. This finds additional comfort from the fact that the Union Budget 2023-24 is the last Budget that will be tabled before the upcoming elections in 2024 and is geared towards providing impetus to the identified significant pillars of revenue and growth.

Reflection of such intent can be gleaned from the extensive consultation session held by the Ministry of Finance with the representatives of the hospitality trade body last November so that due consideration is given to the concerns in the upcoming policy measures. Representations from the trade body are premised on a favourable indirect tax and policy regime, which will maximise the potential, supplemented by requisite measures in place for enabling ease of business.

These recommendations range from lowering the GST rate on hotels and restaurants located in hotels to 12% with full input tax credit, continuity of the Export Promotion Capital Goods Scheme for an extended period, reinstating Service Exports from India Scheme for the hotel sector for a larger period at the prior percentage of incentive, the inclusion of petroleum products under GST amongst others. While the GST Council is a more suitable forum for some of these requests, the larger perspective behind these recommendations is to seek the requisite boost to not only revive the sector but to propel it to the zenith of growth.

Notably, the request for the GST rate reduction of hotel tariffs has been at the forefront of the sector's wish list over the years due to the complex indirect tax rate structure it is currently subjected to. This includes a GST rate of 18% with full ITC for hotels with a tariff greater than INR 7500 and 12% GST with full ITC for hotels with a lower tariff. This is further compounded by the exercise when it comes to determining a suitable rate of GST for transactions such as in-room dining, events organised at the hotel, food and beverage consumption at hotel-based restaurants and utilisation of hotel reward points for transactions amongst others. Moreover, input tax credit restrictions regarding immovable property, standalone restaurants or restaurants located in the hotel with tariffs below INR 7500 further adds to the existing woes.

While the debate around the availability of input tax credit on the construction of immovable property for subsequent rental is expected to be settled once the Supreme Court decides the case of Safari Retreats, careful consideration of the judgment would have to be undertaken to understand the scope of credit restriction in such cases. Lower GST costs for operations would also aid the development of dark kitchen clusters across the country.

An anomaly of continuing with the existing pre-GST tax regime for petroleum products also deserves a relook as its divergent treatment has created a non-recoverable cost for most sectors and is at odds with the stated GST objective of fungibility of taxes and seamless flow of credits. The travel and hospitality sectors go hand-in-hand and therefore, lower tax costs on travel would also aid in boosting the hospitality sector.

The introduction of a new Foreign Trade Policy which addresses the concerns of the industry while incentivising growth and compatibility with WTO guidelines is also keenly awaited to provide the much-needed boost. In recent years, the hospitality sector has been deprived of policy concessions when it comes to such measures and hence, requires redressal.

A simplified tax regime is, therefore, key to regaining the confidence of businesses operating in this segment and achieving the stated vision of revenue and growth.

IN-TALES

RESUSCITATING HOSPITALITY INDUSTRY

Global Outlook

The global hospitality industry enjoyed massive growth over the last decade, since the end of the financial crisis and it was considered a sunrise industry having great potential for manifold growth. However, the ruthless march of the COVID-19 pandemic, which is one of the most catastrophic events in human history affecting the health and livelihoods of millions of people, negatively impacted the Hospitality Industry.

The aviation and hospitality industries were the most affected industries due to the pandemic. The lockdowns and other restrictive measures adopted by the Governments to curb the pandemic have resulted in an unprecedented and far-reaching impact on the sector. The impact was exacerbated further on account of factors such as reverse migration of the workforce and lack of maintenance of properties due to the financial crunch, and in extreme cases, closure of the property. However, like the proverb "Rainbow after the storm", the hospitality industry is now seeing recovery due to the pent-up demand post-pandemic (termed the 'revenge travel').

Statistics reveal the importance of the hospitality industry in the global economy (pre and post-pandemic) as follows[5]:

- International arrivals: International arrivals have increased from 900mn to more than 1.3bn over a span of 10 years. However, the pandemic adversely affected international arrivals, seeing a drop of 73% and 71% in 2020 and 2021 respectively, compared to pre-pandemic levels.
- Global Contribution: The World Travel and Tourism Council has named the hospitality industry as the main driver in global value creation, suggesting a global contribution of USD 8.6tn in 2022, just 6.4% below the pre-pandemic levels.
- Employment creation: The hospitality and travel industry accounts for one out of every ten employment opportunities, providing employment opportunities to 330mn people in 2022, just 1% below the pre-pandemic levels.
- Growth: The global hospitality market is expected to grow from USD 3.95tn in 2021 to USD 4.5tn in 2022, at a CAGR of 15.1%.

In the midst of its recovery from the pandemic, the hospitality industry faced yet another blow in the form of the economic impact of the Russia-Ukraine conflict, which has now disrupted the chances of an immediate recovery. The conflict has witnessed a surge in commodity prices, exchange rate fluctuations, political instability, etc. thereby affecting various economies across the globe, and the sector severely. Despite such challenging circumstances, it is estimated that the hospitality market would grow to USD 6tn in 2026, at a CAGR of 7.4%[6].

The hospitality industry in India[7]:

Of late, India is scaling the charts of popular tourist destinations across the globe with an increase in the number of Foreign Tourist Arrivals (FTAs) from 5.78mn (in 2010) to 10.93mn (in 2019). The hospitality industry is largely dependent on the tourism sector which is driven by Domestic Tourists and inbound FTAs in India for business or leisure trips.

The travel and tourism industry contributed approximately 6.9% to India's GDP and accounted for 40.1mn jobs in 2019. However, in 2020, the contribution of the industry to India's GDP was reduced to 4.7%, employing approximately 31.8mn individuals. This decline was primarily due to COVID-induced lockdowns which had adversely impacted the hospitality and tourism sector.

As per industry estimates, recovering from the impact of COVID-19 by Q3 of FY 2023, the hospitality industry had touched the occupancy of 70%, while the average daily rates had moved up to INR 7,260 as compared to INR 6,540 in the same period in FY 2020. Further, revenue per available room increased from INR 4,499 (in Q3 FY 2020) to INR 5,085 (in Q3 FY 2023)[8]. Whilst 2021 and 2022 saw 'revenge travel', this year is forecasted to show further normalcy in the travel space across the globe. According to the credit rating agency ICRA, the Indian hotel industry is set to regain its lost sheen in 2023[9].

In the hotel and tourism sector, 100% FDI (Foreign Direct Investment) is allowed through the automatic route. A five-year tax holiday has been offered for 2-to-4-star category hotels located around UNESCO World Heritage sites (except Delhi and Mumbai)[10]. While the sector is still struggling to get back to its limb from COVID-induced inflictions,

[5] https://hospitalityinsights.ehl.edu/hospitality-industry
[6] https://www.thebusinessresearchcompany.com/report/hospitality-global-market-report
[7] https://www.ibef.org/blogs/reviving-hotel-industry-in-india
[8] https://economictimes.indiatimes.com/industry/services/hotels-/-restaurants/hospitality-industry-set-for-buoyant-2023/articleshow/96336085.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst
[9] https://bwhotelier.businessworld.in/article/2022-vs-2023-How-were-things-and-the-way-forward-for-the-hotel-industry/21-12-2022-458689/
[10] https://www.ibef.org/states/indian-tourism-and-hospitality-industry-analysis-presentation

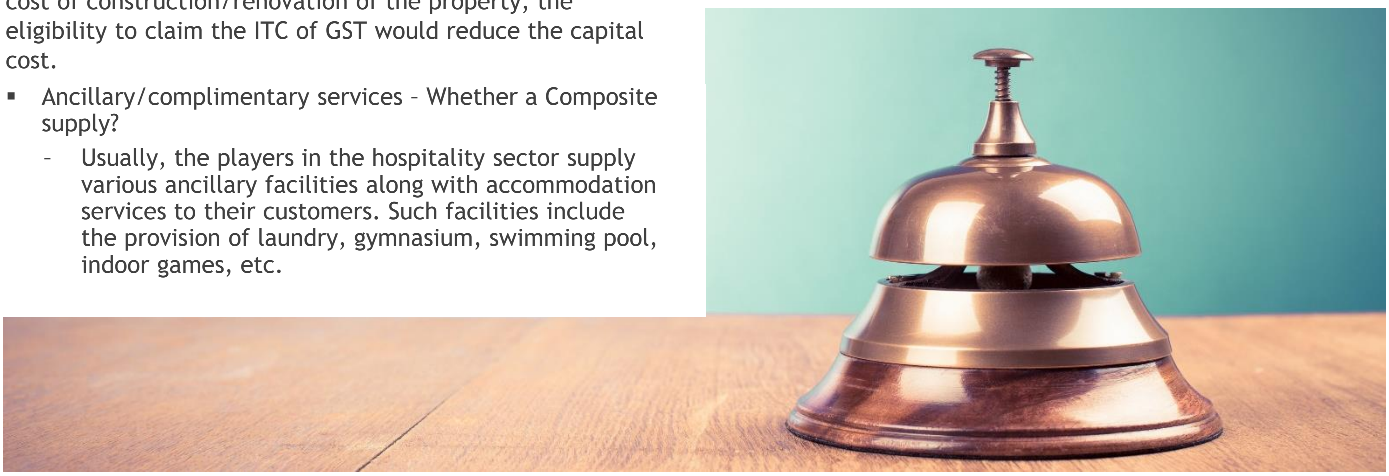
various challenges continue to plague the industry. It is expected that the Union Budget 2023-24 would be a harbinger of better times to come, and the announcements would bring a smile back to the face of the industry and the travellers.

The industry also faces many indirect tax challenges and some of them are captured below:

- Input tax credit (ITC) eligibility on the construction of an immovable property
  - Section 17(5)(c) and (d) of the Central Goods & Services Tax Act, 2017 (CGST Act) restricts ITC on the following procurements:
    - Procurement of goods and services (including works contract services) used for new construction of an immovable property
    - Procurement of goods and services (including works contract services) used for re-construction, renovation, additions, alterations or repairs of an existing immovable property where such costs are capitalised in the books of accounts to the said immovable property
  - After considering the express provision stipulating restriction of ITC on the aforesaid procurements, the Honorable Orissa High Court in Safari Retreats Private Ltd. [2019 (5) TMI 1278 (Orissa High Court)] held as follows:
    - Section 17(5)(d) of the CGST Act is to be read down keeping in mind the language used in Eicher Motors Ltd. [1999 (1) TMI 34 – Supreme Court] which held that the very purpose of credit is to give benefit to the taxpayer.
    - If the taxpayer is required to pay GST on the rental income arising out of the investment on which he has paid GST, it is required to have the input credit on the GST.

Revenue has filed an SLP against the aforesaid judgement before the Honorable Supreme Court where the matter is pending for hearing. However, no stay on the operation of the aforesaid order has been granted (Order dated 8 November 2019). The matter is likely to be heard in February 2023. Since GST forms a significant part of the cost of construction/renovation of the property, the eligibility to claim the ITC of GST would reduce the capital cost.

- Ancillary/complimentary services – Whether a Composite supply?
  - Usually, the players in the hospitality sector supply various ancillary facilities along with accommodation services to their customers. Such facilities include the provision of laundry, gymnasium, swimming pool, indoor games, etc.
  - The issue which requires consideration is whether such ancillary/complimentary facilities could be treated as a composite supply with the accommodation service being the principal supply.
  - Suppliers in the hospitality sector supply all/most of the aforementioned facilities to their customers in the ordinary course of business. Further, these facilities essentially help the customers in better enjoyment of the accommodation services, and hence, improving their stay at the property. Hence, it may be construed that such facilities are naturally bundled and supplied in conjunction with one another. As a result, such facilities may be treated as a composite supply of services. A similar view was taken by the AAR, Karnataka in Srisai Luxurious Stay LLP [2020 (4) TMI 694 (AAR-Kar.)].
  - However, the AAAR, Rajasthan, in Kalani Infrastructure Pvt. Ltd. [2021 (1) TMI 972 (AAAR-Raj.)] had taken a contrary view holding that ancillary facilities such as food, gym, housekeeping, playroom, etc. cannot be said to treated as a naturally bundled service with accommodation services. Hence, the same would not be treated as a composite supply.
  - It may however be noted that the use of the word 'complimentary' or 'free' may lead to disputes and the GST authorities may also contest the eligibility to claim ITC in respect of such supplies in terms of Section 17(5)(h) of the CGST Act.
- Complimentary supplies to the customers
  - Generally, the players in the hospitality industry provide various complimentary items such as toiletries, tea & coffee sachets, bottled drinking water, etc. For providing such goods, no additional consideration is charged to the customers. The issue which must be examined is whether the supplier would be entitled to claim ITC on the aforesaid goods.
  - One may contend that making available such goods to customers would enhance the quality of the accommodation services and that while no consideration is separately charged from the customer in making such supplies, the same is included in the overall consideration of the accommodation services, on which GST is levied.

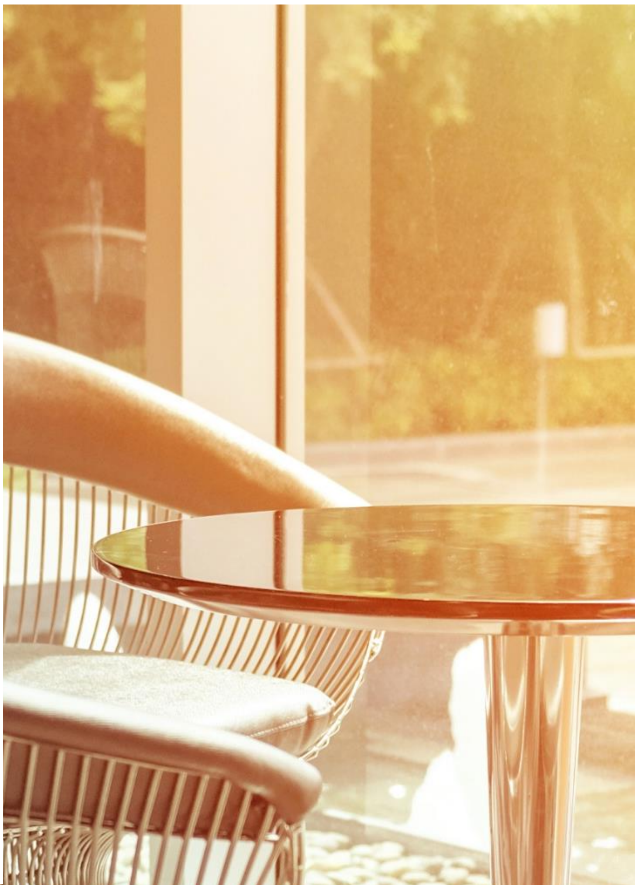


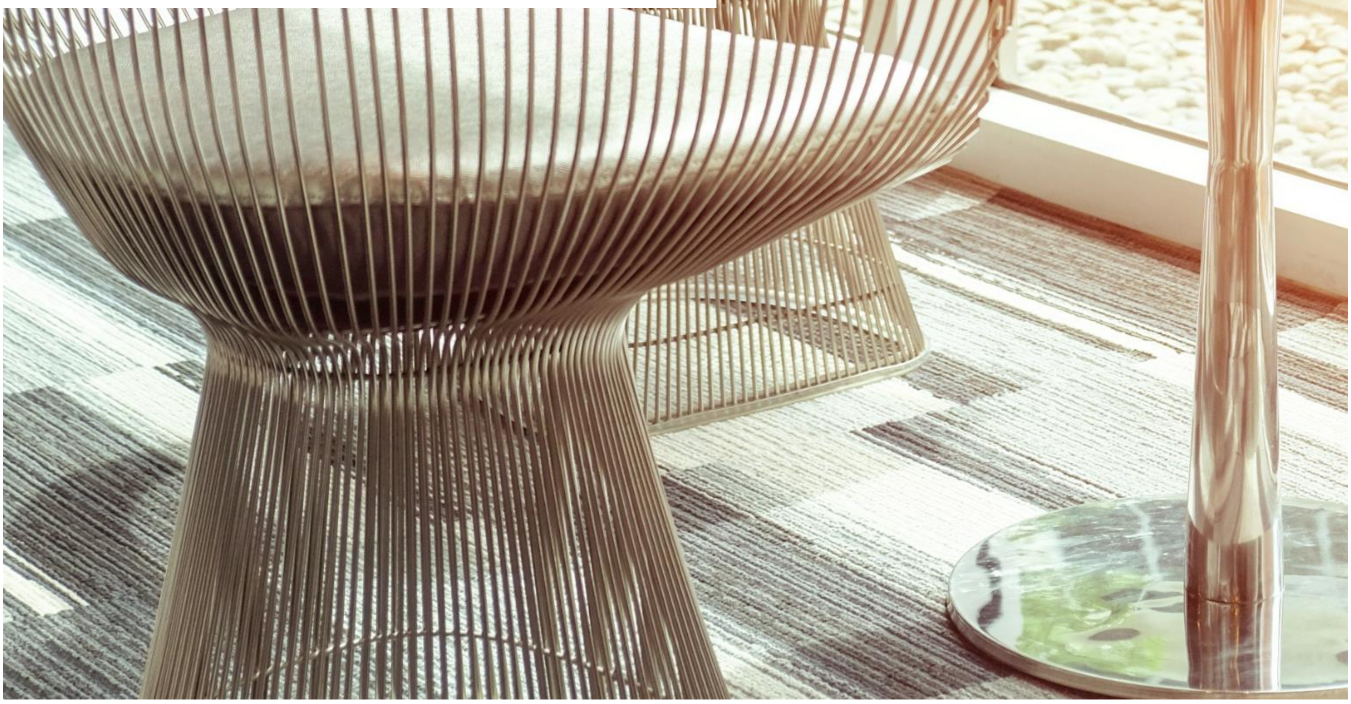
- However, the use of the word ‘complimentary’ or ‘free’ may lead to disputes and the GST authorities may also contest the eligibility to claim ITC in respect of such supplies in terms of Section 17(5)(h) of the CGST Act.

- Restaurants are not given the option of charging normal GST rate with Input Tax Credit; currently, the GST rate is lower at 5%, without ITC leading to significant tax costs on the input side.
- Implementation of GST refunds on purchases made by foreign tourists is delayed.
- Challenges in availing ITC of GST levied on hotel stays outside the home state, as the service recipient is not registered in the destination states, adding to costs.
- The aviation industry is severely impacted by the non-inclusion of ATF under GST purview, leading to VAT/Excise duty suffered on ATF becoming a major cost element. The same goes with VAT/Excise duty suffered Petrol/Diesel which is not available as ITC for tour/cab operators. The growth of the hospitality industry is intricately interwoven with the growth of the travel/aviation sector and high travel costs dissuade tourists.

Way Forward

While the industry is recovering from the pandemic, suitable legislative changes and clarification from the GST Council, as applicable, in respect of the aforesaid issues could bring a sigh of relief, providing the booster dose to the hospitality industry in India.





DECODED

BACK OFFICES ENTITLED TO REFUND OF ACCUMULATED ITC – PUNJAB & HARYANA HIGH COURT

Introduction:

In a judgement favouring the Business Process Outsourcing (BPO) units, also known as 'back offices', the Punjab & Haryana High Court[11] has held that the services provided by BPO cannot be considered as 'intermediary' services and they are eligible to claim a refund of the accumulated input tax credits (ITC) on the services exported by them.

Facts:

Genpact India Private Ltd. (the Taxpayer) is engaged in providing BPO services to clients in India as well as outside India. Some of the services provided by the Taxpayer are:

- Maintenance of vendor/customer data, processing invoices, book-keeping
- Developing and maintaining software as per client needs
- Technical IT support in form of troubleshooting
- Data analysis, etc.

The Taxpayer had entered into a Master Services Sub-Contracting Arrangement (MSA) with Genpact International Incorporated (GI), which is located outside India. As per the terms of the MSA, the services were to be provided by the Taxpayer on a principal-to-principal basis. Further, the Taxpayer is engaged by GI for the actual performance of BPO services to the clients of GI located outside India and the Taxpayer was required to complete the assigned work directly to third parties located outside India.

The Taxpayer had filed a claim for a refund of the accumulated ITC as export of service 'zero rated' supplies of services without payment of IGST, during July 2017 to March 2018. The lower authorities sanctioned the refund, after disallowing part of it on account of ineligible ITC. The Taxpayer filed an appeal against such rejection. During the pendency of the appeal, the Central Board of Indirect Taxes and Customs (CBIC) issued circular no:107 to clarify whether 'intermediary' services to overseas entities qualify as export of services. Meanwhile, the Principal Commissioner of GST reviewed the order sanctioning the refund and ordered to file an appeal on the ground that the services provided by the claimant of refund are in the nature of 'intermediary' services and thus does not qualify as 'export of services' in order to claim the refund.

On the basis of the above, the tax authorities filed an appeal, relying on the above-mentioned circular. During the pendency of the appeals, Circular no:107 was withdrawn. After the withdrawal of the circular, the Appellate Authorities passed an order, holding that the order granting

a refund was erroneous since the services provided by the Taxpayer falls within the ambit of 'intermediary' services thus not qualifying as 'export'. The Taxpayer filed a Writ petition before the High Court and the Court remanded the case back to the Appellate Authorities for a fresh decision.

After hearing the appeal, the Appellate Authorities once again held that the services provided by the Taxpayer fall within the scope of 'intermediary' services and thus are not eligible for refund treating the service as 'export'. In the meanwhile, the CBIC had also issued circular no.159, clarifying the doubts raised on the scope of 'intermediary'. The Petitioner again approached the High Court.

[11] Genpact India Pvt. Ltd. vs Union of India and others [TS-587-HC(P&H)-2022-GST]

Contentions of the Taxpayer:

The Taxpayer relied on the following grounds to challenge the order:

- The conclusion that the Taxpayer is an 'intermediary' is wrong, in so far as the person who provides services on his own account is not an 'intermediary' and the provider of the main services is excluded from the definition of 'intermediary'. There is no evidence on record to conclude that the Taxpayer had not provided the main service.
- The Taxpayer is providing the services on a principal-to-principal basis to GI, as can be seen from the various clauses of the MSA.
- The Taxpayer is not arranging or facilitating the services but is providing the services on his own account and hence, he cannot be treated as an 'intermediary'.
- The Appellate Authority has incorrectly held that the Taxpayer is providing the services on behalf of GI. Further, the finding that the Taxpayer is an agent of GI is contrary to the fact admitted by the Government in its response to the previous Writ petition.
- There is only one supply involved and not two.
- The BPO services rendered by the Taxpayer have been held to be export of services under the erstwhile service tax regime as well.

Contentions of the GST Authorities:

Justifying the order passed to reject the refund, the counsel for Tax authorities argued that –

- On perusal of the MSA, it is clear that two categories of services are involved, one is the main service provided by GI to its customers and another is ancillary and support services provided by the Taxpayer. It is clear that the Taxpayer is acting on behalf of GI and supplies support services.
- Under MSA, GI is required to appoint a dedicated account representative, who would coordinate with the Taxpayer who is responsible to manage and coordinate the delivery of services to GI Customers. Such authority to take decisions for actions taken by the Taxpayer can only be referred to as a principal-agent relationship.
- Res-judicata does not apply in matters pertaining to tax.

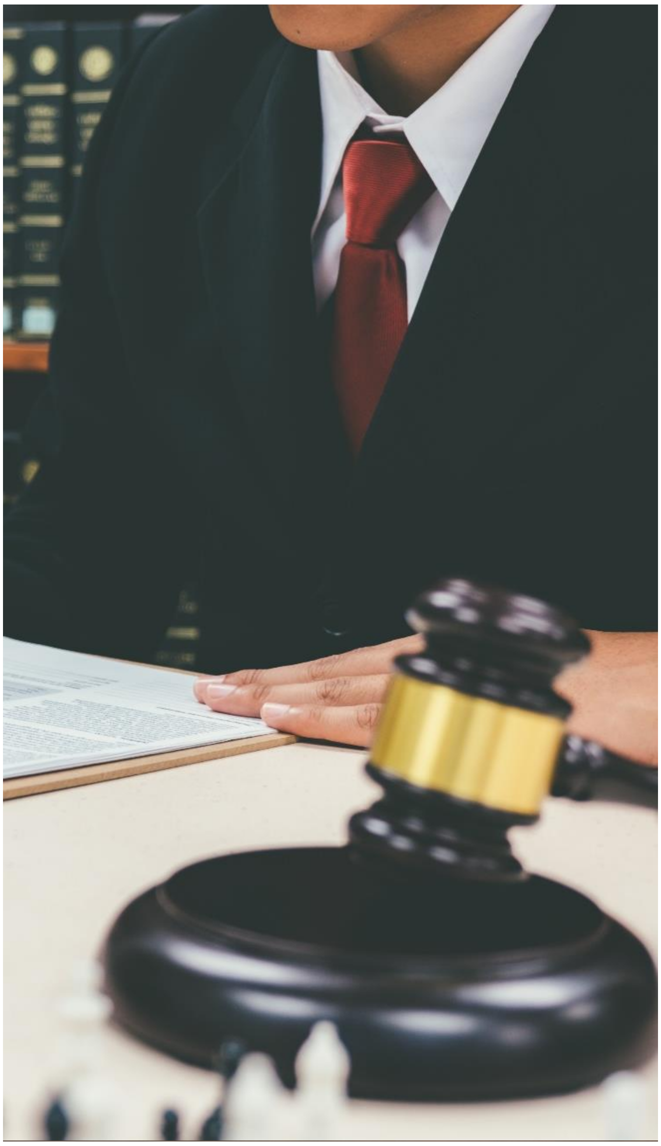
Judgment:

The High Court, referring to the various provisions of law and clauses of MSA, are held as under:

- On perusal of the MSA, it does not appear that the Taxpayer is acting as an 'intermediary'. The clauses cannot be interpreted to conclude that the Taxpayer has merely facilitated the services but are in relation to modalities of how the actual work would be carried out. It doesn't establish that the Taxpayer was required to arrange/facilitate a third party to render the main services, which have actually been rendered by the Taxpayer himself.
- Since there is no change in the scope and ambit of 'intermediary' services under the service tax regime vis-à-vis GST regime and there is no change in facts, the department cannot take a view different from the Service Tax regime, when it was concluded that the service in question was not 'intermediary'.
- The Taxpayer provides services subcontracted to it by GI. It was clarified in circular no:159 dealing with the scope of 'intermediary' that subcontracting for a service is not an 'intermediary' service.

Comments:

This is an important judgment, which can lay to rest the disputes with respect to the denial of the 'zero rating' benefit on services provided by the back offices. While it is important to verify the facts in each case, some of the principles laid down in the above judgment would be commonly applicable and the back offices can place reliance on this judgment to defend the proposal to classify the service as an 'intermediary', on facts. The controversy had its origin in some of the advance rulings under GST, which seemed to persist even after the issuance of circular no:159 clarifying many aspects of the meaning of the term 'intermediary'. With this judgment, the back offices can hope that the controversy is laid to rest and there is ease in the process for the claim for refunds of accumulated ITC.



GLOBAL TRENDS

VAT/GST News:

International:

European Union (EU): Value Added Tax (VAT) implications to customs agents on import

According to Article 201 of EU VAT Directive 2006/112/EC, VAT on import is payable by the person recognised as responsible by the EU member state. To declare import in the EU, the applicant must be established within the EU. However, importation for VAT purposes does not always coincide with importation for customs purposes, and VAT for import is not always due when customs duties become payable.

(Source: Source: https://www.globalvatcompliance.com/globalvatnews/eu-vat-implications/)

Thailand: Royal Decree No.759 - Exemption of data centre businesses from VAT

Royal Decree No.759 was issued in the Official Gazette of Thailand allows data centre operators to claim a VAT exemption for their businesses. Businesses can apply for VAT exemption within a five-year period beginning 9 November 2022 and ending 8 November 2027.

(Source: Source: https://www.globalvatcompliance.com/globalvatnews/thailand-vat-exemption/)

United Arab Emirates: Amendment of the VAT Law - How will it affect businesses?

Federal Decree-Law No.18 of 2022, amending the VAT Law, was released by the UAE's president. The amendment to the VAT Law includes a new article about the Statute of Limitations and revises 25 previously existing articles. The revised provisions took effect from 1 January 2023.

(Source: https://www.globalvatcompliance.com/globalvatnews/uae-amendment-vat-law/)

Greece: Implementation of the proper VAT registration procedures for non-EU taxpayers

To register under the special regime of Article 47c of the VAT code, EU non-residents are required to obtain a VAT number for VAT obligations. A procedure granting VAT registration for a taxable person non-established in an EU Member state was issued by the Greek Office Gazette.

(Source: Source: https://www.globalvatcompliance.com/globalvatnews/greece-vat-registration/)

India

Goods and Services Tax (GST) collection for December'22 and November'22 stands at INR 1.50tn and 1.45tn, respectively

The gross GST revenue for December 2022 and November 2022 accounted for INR 1.50tn and 1.45tn, respectively. The revenue collection has witnessed a surge of 15% and 11%, respectively, over the same month last year.

(Source: https://economictimes.indiatimes.com/small-biz/gst/gst-collection-for-november-stands-at-rs-145867-crore/articleshow/95928376.cms)

(Source: https://www.business-standard.com/article/news-cm/gst-revenue-soars-15-on-year-in-december-2022-123010200342_1.html)

GST amnesty scheme: Why taxpayers need an opportunity to correct inadvertent errors

As per the details available in the public domain, the Indian Government is planning to introduce a scheme and it would only cover matters where the disputes are due to bona fide mistakes. Matters arising out of wilful tax evasion or omissions by repeat offenders would not be covered under the scheme.

(Source: https://economictimes.indiatimes.com/small-biz/gst/gst-amnesty-scheme-why-taxpayers-need-an-opportunity-to-correct-inadvertent-errors/articleshow/96018924.cms)

Exporters may have great festive season amid withdrawal of GST exemption on outbound international freight

There is a lot of hue and cry happening in the exporter circle about the withdrawal of exemption of GST on the international outbound ocean and air freight. Amid the looming threat of the global recession, most of the exporters are in fact assuming further squeeze in the margins, as GST exemption has become a thing of the past now.

(Source: https://economictimes.indiatimes.com/small-biz/gst/exporters-may-have-great-festive-season-amid-withdrawal-of-gst-exemption-on-outbound-international-freight/articleshow/95676877.cms)

GST portal releases Module-wise New functionalities

The GST portal has released a module-wise new functionality deployed on the GST portal for taxpayers in the past few months.

Various new functionalities are implemented on the GST portal, from time to time, for GST stakeholders. These functionalities pertain to different modules such as registration, returns, advance ruling, payment, refund, and other miscellaneous topics.

(Source: https://www.taxscan.in/gst-portal-releases-module-wise-new-functionalities/245360/)

Customs News:

International:

World Customs Organisation (WCO) supports Zambia Revenue Authority (ZRA) in strengthening its integrity enhancement

As part of a multi-year Mercator partnership for effective implementation of the WTO's Trade Facilitation Agreement (TFA), the WCO has supported the ZRA on its strategic objective to further enhance integrity and transparency throughout ZRA's operations and organisation.

(Source: https://www.wcoomd.org/en/media/newsroom/2022/december/wco-supports-zambia-revenue-authority-in-strengthening-its-integrity-enhancement.aspx)

Brexit talks are closing in on a possible customs solution

UK and EU negotiators are closing in on a resolution to end their long-running dispute over post-Brexit trading arrangements in Northern Ireland.

After sealing an agreement last week on real-time trade data, the two sides are also nearing agreement on customs aimed at reducing frictions between Great Britain and Northern Ireland since the UK left the bloc.

(Source: https://www.businesstimes.com.sg/international/brexit-talks-are-closing-possible-customs-solution)

Winds of change: Indonesia targets customs improvements through KITE facilities

The Indonesian Ministry of Finance (MoF) has issued two regulations as part of its Import Facility for Export Purposes (Kemudahan Impor Tujuan Ekspor, or KITE) with the aim of improving customs services.

The regulations are designed to simplify procedures; expand supply chains and export channels; accommodate the development of business process activities; refine policies in the field of import duty facilities on the importation of goods for export purposes; and increase competitiveness, investment, and national exports.

(Source: https://www.internationaltaxreview.com/article/2b1bknvguj17trua7j20w/sponsored/winds-of-change-indonesia-targets-customs-improvements-through-kite-facilities)

Dubai levies new custom duty on international shopping over Dh 300 from 1 Jan 2023

Dubai has introduced new customs duty on goods bought internationally with a value of more than Dh300. This applies under the guidelines of the Dubai Customs, notice no:5 of 2022, which came into effect on 1 January 2023.

Residents shopping internationally over the stipulated value will now have to pay the 5 percent import customs duty and 5 percent VAT on their purchases.

(Source: https://gulfbusiness.com/dubai-levies-new-custom-duty-on-international-shopping-over-dh300-from-jan-1/)

China's trade surplus swells to $877.6B as exports grow

China's trade surplus swelled to a record USD 877.6bn in 2022 as exports rose 7% despite weakening US and European demand and anti-virus controls that temporarily shut down Shanghai and other industrial centres.

Exports increased to USD 3.95tn, decelerating from 2021's explosive 29.9% gain, customs data showed. Imports edged up 1.1% to 2.7tn, cooling from the previous year's 30.1% rise as growth in the world's second-largest economy slowed.

(Source: https://economictimes.indiatimes.com/news/international/business/chinas-trade-surplus-swells-to-877-6b-as-exports-grow/articleshow/96955829.cms)

India

Central Board of Indirect Taxes & Customs (CBIC) notifies the Customs Valuation Rules 2023, effective from 11 February 2023

As per Customs Valuation Rules 2023, the importers will have to furnish additional information at Customs Automated System while filing a bill of entry in case of 'specified goods'. The Central Government has notified the Customs (Assistance in Value Declaration of Identified

Imported Goods) Rules, 2023, aimed at addressing the undervaluation of specified imported goods.

(Source: https://economictimes.indiatimes.com/news/economy/foreign-trade/cbic-to-come-out-with-list-of-identified-goods-to-check-undervaluation-of-imports/articleshow/96918470.cms)

CBIC panel to dispose of pending pre-GST cases

CBIC has constituted Customs, Central Excise and Service Tax Settlement Commission aimed to resolve and settle the show-cause notices issued under the Customs Act, Central Excise Act and Service Tax regime. The move would bring speedy disposal of cases where demand has been raised under the old indirect tax regime.

(Source: https://economictimes.indiatimes.com/news/economy/policy/cbic-panel-to-dispose-of-pending-pre-gst-cases/articleshow/96464742.cms)

Customs dept closely monitoring toy imports, newer modus operandi adopted to circumvent BIS norms: CBIC

The CBIC said the customs department is closely monitoring the import of toys and continuously tackling newer modus operandi adopted to circumvent the quality control and safety norms.

The Government said 18,600 toys have been seized in the last one month from major retail stores, at airports and malls across India for lack of BIS quality marks and use of fake licences.

(Source: https://economictimes.indiatimes.com/news/economy/policy/customs-dept-closely-monitoring-toy-imports-newer-modus-operandi-adopted-to-circumvent-bis-norms-cbic/articleshow/96989719.cms)

New rules to scan items with a history of customs evasion

Importers of items that have a history of customs duty evasion through under-valuation will face higher scrutiny and greater disclosure norms, under a new official framework.

The new rules empower authorities to mandate additional disclosure and certification requirements to be followed by importers of such goods where authorities suspect systematic under-valuation of imports, which robs the government of revenue.

(Source: https://www.livemint.com/news/india/new-rules-to-scan-items-with-a-history-of-customs-evasion-11673542486720.html)

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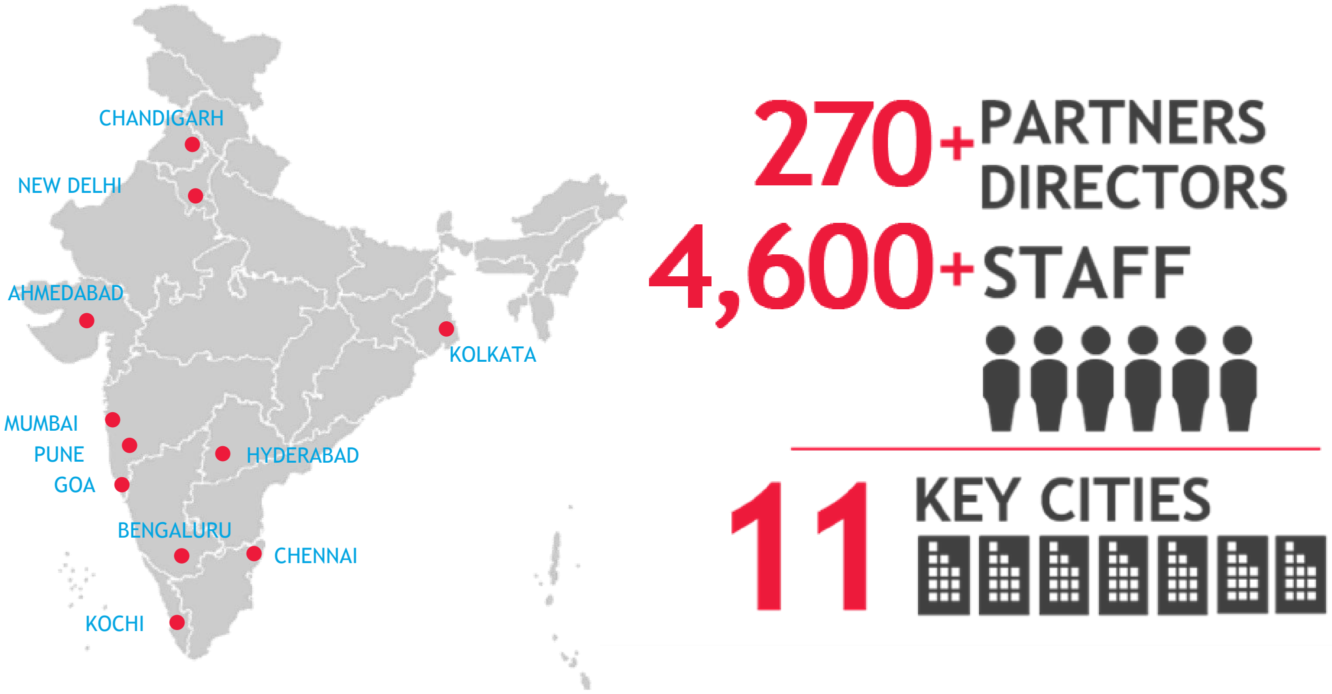

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Contact Us

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
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

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

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

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

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

Goa
701, Kamat Towers
9, EDC Complex, Patto Plaza
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 No. 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