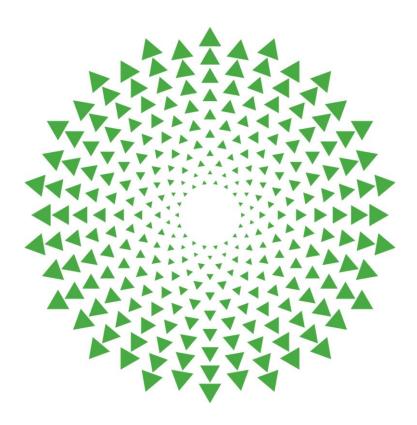
Deloitte.



Indirect Tax Newsletter

Indirect tax updates

We are delighted to share a few important judgments/advance rulings passed under the Goods and Services Tax (GST), Customs, Central Excise, and Service Tax available in public domain from March to April 2023. This issue also covers some of the updates from an indirect tax perspective.

Goods and Services Tax



Uber India Systems Pvt. Ltd. vs. Union of India & Anr. 2023-VIL-228-DEL (High Court of Delhi)

The petitioner is an e-commerce operator ('ECO') which provides an online platform to riders and drivers for provision of passenger transportation services. Till 01 January 2022, passenger transportation service by stage carriage (other than AC carriage) and by auto-rickshaws was exempt from GST. With effect from 01 January 2022, the exemption was removed in respect of passenger transportation services supplied through an ECO.

The petitioner filed a writ petition before the Delhi High Court ('HC') challenging the removal of exemption in case of passenger transportation services provided through an ECO. It was contended that different tax treatment is given to auto-rickshaw drivers providing transportation service through an ECO as compared to street hailing auto-rickshaw drivers. It was further contended that the underlying nature of service remains the same and difference is only with respect to 'mode of booking'. It was further contended that ECO supplying the transportation of passenger service by a non-air-conditioned stage carriage is at par with the individual bus operator. Such differential tax treatment violates Article 14 of the Constitution, as it treats equally placed service providers in an unequal manner.

Referring to the provisions of GST law, the HC rejected the contentions raised by the petitioner and upheld the validity of the challenged provisions and noted that GST law recognizes ECOs as a "class separate" from individual service providers.

It was also observed that while booking a ride through an e-commerce platform, a bunch of other services are also provided by an ECO, such as facility of doorstep pick-up, live tracking of ride, supervisory role etc. Therefore, the consumer who uses an App to an auto rickshaw ride and the consumer who uses a street hailed auto rickshaw fall under a different category. The HC further held that the impugned Notifications do not create an unreasonable classification on the basis of the 'mode of booking' availed by the consumers.

The HC held that there can be no vested right in claiming exemption from payment of tax. The HC further added that there is admittedly no constitutional guarantee to exemption and held that the impugned provisions are constitutionally valid.



M/s Ohmi Industries Asia Pvt. Ltd. vs. AC, CGST 2023-VIL-224-DEL (High Court of Delhi)

The petitioner is engaged in providing market research services (MRS) to its overseas affiliated entity. The petitioner filed application seeking refund of IGST paid on the zero-rated supply. The adjudicating officer did not issue any show cause notice (SCN) and passed the order-in-original (OIO) rejecting the refund claim on the ground that the petitioner is "providing support to customer directly", holding that the services provided are in the nature of "intermediary services" and does not qualify as "export of service".

The petitioner challenged the denial of refund of IGST on amount received from providing MRS before the Commissioner (Appeals) which rejected the petitioner's appeal and confirmed the OIO. Aggrieved by the order passed by Commissioner (Appeals), the petitioner preferred writ petition before Delhi HC.

The HC observed that the petitioner is rendering the MRS directly to its overseas affiliated entity "on its own account" and had not arranged supply of such services from a third party.

Therefore, the HC referring to the Circular issued by CBIC re-iterated that the concept of intermediary services requires minimum of three parties and ruled in favor of the petitioner that the services provided by the petitioner are not in the nature of intermediary services.



Bharat Sanchar Nigam Limited vs. Union of India 2023-VIL-229-DEL (High Court of Delhi)

The petitioner is engaged in providing telecommunication services. It raised an invoice for carrying out a project for Department of Telecom (DOT) involving laying of alternate communication network for defence services on which applicable GST was deposited. DOT clarified that the amount remitted to the petitioner was inclusive of tax. Resultantly, the petitioner re-computed its tax liability and observed that excess GST has been paid.

To claim refund of such excess tax paid, the petitioner filed a refund application against which a deficiency memo (DM) was issued to the petitioner for furnishing certain documents. In response to the DM, the petitioner submitted the requisite documents, however, the acknowledgment indicated it as "fresh application".

The adjudicating authority rejected the refund claim of the petitioner on the ground that the same was beyond the period of limitation. Against this rejection, an appeal was filed by the petitioner before the Commissioner (Appeals), which upheld the original rejection order. Aggrieved by the order of Commissioner (Appeals) rejecting its refund claim, the petitioner preferred a writ petition before Delhi HC.

The HC held that the first refund application was filed within the prescribed time limit and hence, the refund claim cannot be treated as time barred. The Court also noted the provisions of CGST Rules which states that where any deficiencies are noticed, the proper officer shall communicate the deficiencies to the applicant electronically, requiring taxpayer to file a fresh refund application after rectification of such deficiencies. The HC opined that if the application is not deficient in material particulars and is accompanied with documentary evidence, limitation would stop on filing the said application.



Anmol Industries Limited vs. West Bengal Authority for Advance Ruling 2023-VIL-251-CAL (High Court of Calcutta)

The applicant had entered into a leasing agreement with a port authority, as per which the applicant was required to pay upfront lease premium along with applicable GST. The applicant was of the view that the upfront lease premium is exempt from payment of GST, accordingly, it sought an advance ruling to determine applicability of exemption. The application was rejected by Authority of Advance Ruling (AAR) on the ground that the petitioner, being a "recipient of service", is not an 'applicant' as per GST law and hence, it cannot file application for advance ruling.

Against the rejection order of AAR, the applicant preferred a writ petition before Calcutta HC contending that it was eligible to file the application to seek advance ruling.

Referring to the definition of 'applicant' as given under CGST Act, the HC observed that the definition is wide enough to cover "any person registered" or "desirous of obtaining registration" under the CGST Act. As the petitioner is registered under the CGST Act, the HC set aside the rejection order passed by AAR and held that the application before AAR has to be decided on merits.



Dharmendra M. Jani vs. Union of India 2023-VIL-240-BOM (High Court of Bombay)

The petitioner was providing marketing and promotion services to its overseas customers which were treated as intermediary service. The petitioner was of the view that the services provided by it qualify as "export of service".

The petitioner filed a writ petition before the HC challenging the constitutional validity of section 13(8)(b) of the IGST Act, 2017 ('IGST Act'). In terms of the said section, place of supply in case of intermediary service is the "location of provider/supplier of service". The petitioner contended that by way of deeming fiction under Section 13(8)(b), the place of supply is treated as the "location of provider/supplier of service" which, in the present case, is in India. Such deeming fiction seeks to bring "export of services" into tax net. Division bench of HC had earlier rendered split verdict and the matter was referred to the third member and the present judgement is the verdict rendered by the third member.

The HC did not read down the provisions of section 13(8)(b) of IGST Act and section 8(2) of IGST Act nor held them to be unconstitutional. It held that section 13(8)(b) is constitutional however, the fiction created by this provision is confined in its operation only to IGST Act and cannot be extended to CGST or State GST Acts. Further, provisions of Section 13(8)(b) of the IGST Act cannot be read into the provisions of CGST and State GST Acts so as to levy GST on "export of service" as intra-State supply. The HC held that the Constitution would not permit taxing of an export of service under these enactments. The HC thus held that the services provided by the petitioner qualify to be "export of service".



Tonbo Imaging India Pvt. Ltd. vs. Union of India 2023-VIL-198-KAR (High court of Karnataka)

The petitioner is engaged in designing and developing advanced imaging and sensor systems. The petitioner exports the goods under bond/Letter of undertaking (LUT) and claims the refund of unutilized input tax credit (ITC) as per applicable provisions under CGST Rules². As per the said Rule, for the purpose of calculation of refund amount in case of export of goods under LUT/bond 'turnover of zero-rated supply of goods' meant "the value of zero-rated supply of goods made during the relevant period without payment of tax under bond or letter of undertaking".

With effect from 23 March 2020, the said provision was amended to provide that the "value of export goods" shall be restricted to 1.5 times of value of like goods domestically supplied by the same or similarly placed supplier. The proper officer rejected the refund claim of the petitioner on the grounds that it has not submitted the documents required as per the applicable Rule.

Aggrieved by the rejection order the petitioner preferred a writ petition before the Karnataka HC challenging the validity of the said CGST Rule.

The HC observed that the CGST or IGST Act does not stipulate any such restriction and hence, the Rule cannot override the provisions of the Act. It also observed that the restriction is placed only for the goods which are exported under bond/LUT, on the other hand in case of goods exported on "payment of tax", no such restriction exists. The HC observed that said Rule suffers from the vice of vagueness as it has neither clearly defined the terms 'like goods' or 'similarly placed supplier', nor does it specify as to what would be the consequences if there are no goods supplied in the domestic market and value of like goods provided by other suppliers is not available.

The HC held that including domestic turnover in the definition of zero rated supply which is meant to cover only exports is clearly arbitrary and unreasonable. The HC held the said Rule to be arbitrary and unreasonable, in as much as the possibility of taking undue benefit by inflating the value of the zero-rated supply of goods, cannot be a ground to amend the Rule. Accordingly, the HC held that the impugned provision violates Articles 14 and 19 of the Constitution and is ultra-vires the provisions of CGST Act and IGST Act.

² Rule 89(4)(c) of CGST Rules



Balaji Exim vs. Commissioner CGST 2023-VIL-181-DEL (High Court of Delhi)

The petitioner was undertaking export of goods under bond/LUT and filed an application seeking refund of unutilised input tax credit in respect of such export of goods. The refund claim was rejected by the proper officer on the ground that the petitioner had purchased the goods on the basis of fake invoices from its suppliers. The petitioner filed an appeal before the Commissioner (Appeals) against such impugned rejection order. The Commissioner (Appeals) upheld the impugned order on the ground that merely because the petitioner was in possession of the tax invoices, it could not be said that the petitioner had received the goods.

Against the order of Commissioner (Appeals), the petitioner preferred a writ petition before the Delhi HC contending that the petitioner was not concerned with any allegation against its supplier as the purchases made by it were genuine.

The HC noted that the petitioner's refund applications were rejected on a mere apprehension that its supplier had issued fake invoices. The HC observed that there was no dispute that goods have been exported; the invoices in respect of which the petitioner has claimed the ITC were raised by a registered dealer and that there is no conclusive finding that the invoices issued by the supplier to the petitioner are fake invoices. The HC held that the petitioner is not required to examine the affairs of its supplying dealers. Further, allegations of any fake credit availed by the supplying dealer cannot be a ground for rejecting the petitioner's refund applications unless it is established that the petitioner has not received the goods or paid for them.



Myntra Designs Pvt. Ltd. 2023-VIL-13-AAAR (Karnataka Appellate Authority for Advance Ruling)

The appellant is an e-commerce operator and is engaged in the business of selling of fashion and lifestyle products through its online portal. To enhance their business, the appellant runs a loyalty programme where loyalty points are awarded to customers based on the purchases made by them. Against redemption of loyalty points, the appellant provides vouchers and subscription packages to the customers. Such vouchers and subscription packages were procured by the appellant from its vendors who had treated it as "supply of service".

The Appellant had filed an application before AAR to seek clarification as to whether it can claim the ITC on the vouchers and subscription packages procured by it from its vendors. AAR had held that the ITC is not available in respect of vouchers and subscription packages as these are "goods" which are provided to the customers on free of cost basis.

The appellant filed an appeal before the Appellate Authority for Advance Ruling ('AAAR') challenging the order of AAR.

The AAAR relied upon the decision of Karnataka High Court3 holding that the vouchers and subscription packages procured are neither "goods nor services" and stated that as per GST law, ITC is available only on the supply of goods and services received by the registered person. AAAR held that the appellant is not eligible to avail the ITC as the vouchers and subscription packages procured by the appellant are neither "goods nor services".



M/s Indian Metals and Ferro Alloys Limited 2023-VIL-44-AAR (Odisha Authority for Advance Ruling)

The Applicant had taken two premises on rent to be used as guest house for accommodation of its employees. The Applicant sought an advance ruling as to whether the tax on "renting of residential premises" services received, is payable under forward charge or reverse charge. The Applicant submitted that the meaning of 'residential dwelling' as given in Education Guide issued under service tax regime excludes guest house from its purview.

The AAR referred to the reverse charge notification4 which provides that in respect of 'service by way of renting of residential dwelling to a registered person', GST is payable under reverse charge mechanism. The AAR opined that that type or nature of use of residential dwelling is not a "condition" for applicability of reverse charge mechanism and held that as long as residential dwelling is rented to a registered person, GST will be discharged under reverse charge "irrespective of nature of use".

³ Premiere Sales Promotions Pvt. Ltd. (2023-VIL-67-KAR)

⁴ Notification no. 13/2017-Central Tax (Rate) dated 28 June 2017

Service Tax

Commissioner of CGST & Central Excise vs. Edelweiss Financial Services Ltd. 2023-VIL-34-SC-ST (Supreme Court)

The petitioner is engaged in providing banking and financial services to its customers. The petitioner had extended corporate guarantees to its group companies based in India. However, no consideration was charged for providing such guarantee. A SCN was issued to the petitioner alleging that the petitioner company is providing a "service" to its group companies by way of provision of corporate guarantee on which service tax is payable. However, the adjudicating authority held that for levy of service tax, presence of consideration is a pre-requisite, therefore, provision of corporate guarantee to group companies without consideration cannot be subject to service tax.

Against the adjudication order, tax department filed an appeal before the CESTAT which also ruled in favor of the petitioner. The order of CESTAT was challenged by the tax department before Supreme Court ('SC').

The SC dismissed the appeal filed by the tax department on the ground that the petitioner had not received any consideration in exchange of providing corporate guarantee and that the tax department did not demonstrate that there was any "taxable service" which was provided by the petitioner. The SC affirmed the position that issuance of corporate guarantee is not a "taxable service" under the Finance Act when there is "no consideration" received in lieu of such corporate guarantee.

Central Excise

CCE vs. Morarjee Gokuldas SPG. & WVG. Co. Ltd. 2023-VIL-31-SC-CE (Supreme Court)

The respondent was a manufacturer of cotton yarn which it consumed captively for weaving of fabric. It paid excess excise duty on such captively consumed yarn, towards which it filed an application to claim refund of such excess duty paid. The original adjudicating authority passed the OIO granting the refund against which tax department undertook review⁵ and filed an appeal before Commissioner (Appeals) for recovery of refund. Commissioner (Appeals) allowed the appeal filed by the tax department and held that the refund is recoverable from the respondent.

Against Commissioner (Appeals) order, the respondent filed an appeal before Appellate Tribunal contending that in the present case, the proceedings were initiated for recovery of refund pursuant to the review of OIO undertaken by the department, however, no Show Cause Notice (SCN) was issued ahead of initiating such recovery. The Appellate Tribunal held in favour of respondent that issuance of SCN under Section 11A of the Central Excise Act (CEA) is necessary in case of "erroneous refund of the duty". Bombay HC dismissed the appeal preferred by the tax department and affirmed the order passed by the Appellate Tribunal.

Against the Bombay HC's order, an appeal was filed before the SC by the tax department, raising a question as to "whether a SCN under CEA is necessary for recovery of the refund when the refund granted is under review".

The SC noted that once the OIO sanctioning the refund was set aside in a review proceeding as per CEA's provision and if such proceeding were initiated within the prescribed time limit, no further SCN is required to be issued. The SC relying upon its earlier decision⁶ held that even if time limit provided under Section 11A of CEA has expired, recovery of erroneously granted refund can be made pursuant to appeal filed after invoking provisions of Section 35E of CEA.

Notifications/ Circulars/ Instructions

Central Board of Indirect Taxes and Customs (CBIC) issues notification to extend time limit for issuance of show cause notice as per CGST Act

CBIC has extended the time limit for issuance of order under Section 73(9) of the CGST Act (which relates to issuance of order by the proper officer for determining the tax not paid/short paid or erroneously refunded or input tax credit wrongly availed or utilized for reasons other than fraud, wilful-misstatement or suppression of facts) as follows:

- I. for the financial year 2017-18, up to 31 December 2023;
- II. for the financial year 2018-19, up to 31 March 2024;
- III. for the financial year 2019-20, up to 30 June 2024.

(Notification no. 09/2023-Central Tax (Rate) dated 31.03.2023)

⁶ Asian Paints (India) Ltd. [2002-VIL-04-SC-CE]

Scope of Notification on payment of GST under reverse charges mechanism (RCM) extended to services provided by Courts and Tribunal

RCM notification (no. 13/2017-Central Tax (Rate) dated 28 June 2017) has been amended to provide that the provisions of the notification, in so far as they apply to the Central Government and State

Governments, shall also apply to Courts and Tribunal. As a result, in respect of specified services (eg. Renting of immovable property etc.) provided by Courts and Tribunal, GST shall be payable under RCM in the hands of recipient. The amendment comes into force with effect from 01 March 2023.

(Notification no.02/2023-Central Tax (Rate) dated 28.02.2023)

Model "All India GST Audit Manual 2023" released

A "Model All India GST Audit Manual 2023" prepared by the Committee of Officers on GST Audit has been released to provide guidelines to the audit officers for carrying out audit in an effective, uniform and comprehensive manner by adopting the best of the States, Centre and international practices.

The Commerce ministry releases new Foreign Trade Policy (FTP) 2023

Upon the expiration of FTP 2015-20 on 31 March 2023, the Commerce ministry has released FTP 2023 and it shall be effective from 01 April 2023. For detailed analysis please refer to our alert.

CBIC issues customs notifications in pursuance of new FTP 2023

CBIC has issued the customs notifications for implementation of Advance Authorization scheme, Export Promotion Capital Goods scheme and Duty Free Import Authorization scheme etc. in pursuance of new FTP 2023.

(Notifications no. 21/2023 to 27/2023 – Customs dated 01 April 2023)

Amnesty scheme announced by Maharashtra

Government of Maharashtra has introduced an amnesty scheme titled 'Maharashtra Settlement of Arrears of Tax, Interest, Penalty or Late Fee Act, 2023'. The scheme will cover disputes pending under CST Act, 1956, Bombay Sales Tax Act, 1959 and Maharashtra VAT Act, 2002 etc for any period ending on or before 30 June 2017. This amnesty scheme will come into force with effect from 01 May 2023 and cover disputes for any period ending on or before 30 June 2017.

For more information, please connect with:

Mahesh Jaising

Deloitte Touche Tohmatsu India LLP mjaising@deloitte.com

Saloni Roy

Deloitte Touche Tohmatsu India LLP saloniroy@deloitte.com



Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee ("DTTL"), its network of member firms, and their related entities. DTTL and each of its member firms are legally separate and independent entities. DTTL (also referred to as "Deloitte Global") does not provide services to clients. Please see www.deloitte.com/about for a more detailed description of DTTL and its member firms.

This material is prepared by Deloitte Touche Tohmatsu India LLP (DTTILLP). This material (including any information contained in it) is intended to provide general information on a particular subject(s) and is not an exhaustive treatment of such subject(s) or a substitute to obtaining professional services or advice. This material may contain information sourced from publicly available information or other third party sources.

DTTILLP does not independently verify any such sources and is not responsible for any loss whatsoever caused due to reliance placed on information sourced from such sources. None of DTTILLP, Deloitte Touche Tohmatsu Limited, its member firms, or their related entities (collectively, the "Deloitte Network") is, by means of this material, rendering any kind of investment, legal or other professional advice or services. You should seek specific advice of the relevant professional(s) for these kind of services. This material or information is not intended to be relied upon as the sole basis for any decision which may affect you or your business. Before making any decision or taking any action that might affect your personal finances or business, you should consult a qualified professional adviser.

No entity in the Deloitte Network shall be responsible for any loss whatsoever sustained by any person or entity by reason of access to, use of or reliance on, this material. By using this material or any information contained in it, the user accepts this entire notice and terms of use.

©2023 Deloitte Touche Tohmatsu India LLP. Member of Deloitte Touche Tohmatsu Limited