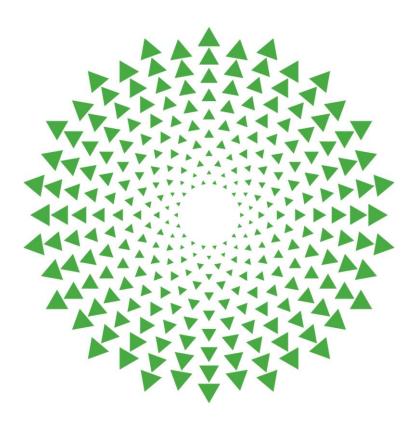
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Indirect Tax Newsletter

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 the public domain from May to June 2023. This issue also covers some updates from the indirect tax perspective.

Goods and Services Tax



Mcdonalds India Pvt. Ltd. vs. Additional Commissioner, CGST 2023-VIL-319-DEL (High Court of Delhi)

The petitioner had entered into a service agreement with its parent company located overseas. Under the agreement, the petitioner was to undertake various activities viz. conduct research on consumer attitudes and demographics, and make periodic visits to existing and prospective suppliers. The petitioner treated the said services provided as export of service.

However, the adjudicating authority denied a refund on the ground that the services provided by the petitioner are in the nature of an 'intermediary' and hence, place of supply of the said services is in India. Accordingly, the subject services do not qualify as export of service. The order-in-original was appealed against by the petitioner before the Commissioner (Appeals) that upheld the order of adjudicating authority. The Commissioner (Appeals) also held that the services included making periodic visits to existing and prospective suppliers on behalf parent company. The services required personal presence of recipient or the person acting on the recipient's behalf and therefore, place of supply of such service is in India.

Aggrieved by the order passed by Commissioner (Appeals), the petitioner filed a writ petition before the Delhi High Court ('HC').

The HC observed that rendering service on behalf of another person does not render the service provider an intermediary. The HC further observed that to ascertain whether the petitioner is working as an intermediary or not, it is essential to identify the principal service, the supplier of such principal service, and its service recipient. The HC noted that the adjudicating authority had no basis for concluding that the petitioner was acting as an intermediary. The HC held that the supply does not require the physical presence of the recipient in India. The matter was remanded back to the adjudicating authority for fresh adjudication.



Gameskraft Technologies Pvt. Ltd. vs. DGGSTI 2023-VIL-291-KAR (High Court of Karnataka)

The assessee operates an online gaming platform that hosts a variety of games. For participating in the game, players need to deposit a 'buy-in amount'. Of such amount, certain portion is retained by the assessee as its 'platform fee' on which GST liability is discharged by the assessee. The balance buy-in amount is held in a designated bank account and given to the game winner. More than 96 percent games played on the platform is 'Rummy'. The department issued a Show Cause Notice ('SCN') seeking to impose GST on the entire buy-in amount received by the assessee as consideration for the supply of actionable claims in the nature of betting and gambling.

The assessee challenged SCN before Karnataka HC. The question before the HC was whether the game of rummy that is mainly/substantially based on skill (and not on chance) can be treated as 'betting and gambling' as contemplated in Schedule III of the CGST Act, 2017 ('CGST Act').

The HC held that Schedule III to the CGST Act, which takes the actionable claims (other than betting and gambling) out of the purview of supply of goods or services, would apply to games of skill and only games of chance such as lottery, betting, and gambling would be taxable. The HC relied upon the earlier Supreme Court's judgements and held that rummy is a game where predominantly skill is exercised to control the outcome of the game. It was also held that the game of skill whether played online or offline, played with or without stakes remains a game of skill and does not become gambling. The HC quashed the SCN issued to the assessee holding that the game of rummy played on assessee's platform is not taxable as betting and gambling.

[Note: In the 50th GST Council Meeting, it has been recommended that online gaming and horse racing would be included as taxable actionable claim items by way of an amendment in schedule III of CGST Act. Furthermore, online gaming, horse races, and casinos would be taxable at 28 percent. GST would be applied on full value of bets placed in case of online gaming and horse racing, and on the face value of chips purchased in case of casinos.]



Best Crop Science Industrial Area vs. Union of India 2023-VIL-325-J&K (High Court of Jammu and Kashmir)

The petitioner was engaged in manufacturing chemical products in Jammu and Kashmir. The goods manufactured by the petitioner were classifiable under HSN code 3808 in respect of which the petitioner was availing area-based exemption under excise. After the introduction of GST, the petitioner started manufacturing new products that were also classifiable under HSN code 3808. However, the eight-digit classification of these new products was different from that of the old products. In respect of new products, the petitioner claimed benefit under the GST budgetary support scheme. The petitioner's claim was rejected by the department on the ground that the goods manufactured by the petitioner under the budgetary support scheme are different from the goods covered under the area-based exemption.

Aggrieved by rejection of its claim, the petitioner preferred a writ petition before Jammu and Kashmir HC.

The HC noted that under the budgetary support scheme, benefit is available with respect to the "specified goods" that were defined to mean goods manufactured by the eligible unit by availing the benefit of excise duty exemption. With respect to new products, no benefit was claimed under excise duty exemption. Hence, such goods cannot be termed as "specified goods" and are not eligible for benefit under the budgetary support scheme.



K.I. International (India) Ltd. vs. State Tax Officer 2023-VIL-267-MAD (High Court of Madras)

The petitioner was engaged in coal trading. For certain months, the petitioner had filed only GSTR-1 and not GSTR-3B. Due to financial constraints, the petitioner made a request for payment of tax in installments. The adjudicating authority rejected the request on the ground that the petitioner has already filed GSTR-1, disclosing the tax liability and installment facility is not available in respect of such admitted tax liability.

Aggrieved by the adjudication order, the petitioner filed a writ petition before Madras HC.

The HC referred the provisions of CGST Act and noted that the installment facility cannot be granted in respect of "amount due per the liability self-assessed in any return". The HC held that GSTR-1 is also a return. Though the petitioner has filed GSTR-1, it has not paid the tax. Hence, it is barred from availing the benefit of payment of tax in installments.



Dharmendra M. Jani vs. Union of India 2023-VIL-346-BOM (High Court of Bombay)

The petitioner was providing marketing and promotion services to its overseas customers that were treated as intermediary services. The petitioner had challenged constitutional validity of Section 13(8)(b) of the IGST Act, 2017 ('IGST Act') before the Bombay HC. The said provision states that in case of intermediary services, place of supply is the "location of supplier of service". The division bench of HC had rendered a split verdict and the matter was referred to the third member. The third member bench upheld the validity of Section 13(8)(b) of the IGST Act and held that the said provision is confined in its operation only to IGST Act and cannot be extended to the CGST and State GST acts.

The reference order of third member bench was placed before the division bench for the final disposal.

The division bench held that the provisions of Section 13(8)(b) of the IGST Act are valid and constitutional.



Gargo Traders vs. Joint Commissioner, Commercial Taxes (State Tax) 2023-VIL-360-CAL (High Court of Calcutta)

The petitioner availed input tax credit on the inward supplies that was disputed by the department. The department alleged that suppliers from whom the petitioner purchased goods were non-existent. It also alleged that the GST registration of the supplier was cancelled with retrospective effect covering the transaction period with the petitioner.

Aggrieved by the order passed by the adjudicating authority, the petitioner filed writ petition before Calcutta HC.

The HC noted that the status of supplier was shown as registered on the GST portal at the time of purchase of goods by the petitioner. It also noted that the purchase amount, along with the tax, was paid by the petitioner through the bank and not in cash. The HC set aside the order-in-original and directed the department to consider the documents relied upon by the petitioner for support of his claim.



Naarjuna Agro Chemicals Pvt Ltd vs. State of UP 2023-VIL-266-ALH (High Court of Allahabad)

The petitioner is an assessee under GST and had submitted GST returns for FY 2017-18. A SCN was issued to the petitioner relating to the classification of goods. The SCN was adjudicated, and demand was raised on the petitioner.

Against the adjudication order, the petitioner filed a writ petition before the Allahabad HC. The petitioner contended that once the returns are submitted, the department should have undertaken scrutiny of the returns and given an opportunity to the petitioner to rectify the discrepancies. The department cannot issue the SCN before undertaking scrutiny of returns.

The HC referred the provisions of CGST Act and noted that scrutiny of returns and issuance of the SCN are two separate and distinct proceedings. The statutory provisions do not envisage mandatory scrutiny of returns before issuance of SCN. The HC dismissed the petition and directed the petitioner to prefer appeal before the appellate authority.



MEK Peripherals India Pvt. Ltd. 2023-VIL-26-AAAR (Maharashtra Appellate Authority for Advance Ruling)

The applicant was engaged in the business of reselling electronic products. The applicant purchased goods from Indian vendors that were authorised distributors of a foreign manufacturer. The applicant entered into a contract with the foreign manufacturer that contemplated payment of incentive amount to the applicant upon the target purchase of goods from Indian authorised distributors.

The applicant filed an application before the Authority for Advance Ruling ('AAR') on the question whether the incentive received by it qualifies as trade discount. The application also covered the question that if the incentive is not considered trade discount, whether it is consideration for any supply and whether such supply can qualify as export of service. The AAR pronounced its ruling against which the applicant filed an appeal before the Appellate Authority for Advance Ruling ('AAAR').

The AAAR observed that the quantum of incentive is not known at the time of removal of goods and that is flowing from the foreign manufacturer rather than the actual supplier (authorised distributor). It held that the incentive received from the foreign manufacturer is not a trade discount. The AAAR also held that the applicant provides marketing and technical support service to the foreign manufacturer in lieu of the incentive. The goods are required to be made physically available to the applicant for provision of service. Hence, the place of supply of such service is the location of supplier i.e., in India. Thus, it was held that the service provided by the applicant to the foreign manufacturer does not qualify as export.



PES Engineers Pvt. Ltd. 2023-VIL-90-AAR (Telangana Authority for Advance Ruling)

The applicant was engaged in construction of power projects and was awarded a turnkey project for the development of certain facilities at a thermal power project. For execution of the project, the applicant entered into two separate contracts with the customer. The first contract was for ex-works supply of goods, whereas the second contract was for inland transportation, inland transit insurance, erection, civil works, testing, commission, and conducting guarantee tests. In terms of the first contract, an advance amount was payable to the applicant.

The applicant sought the advance ruling on the issue whether it is required to pay GST at the time of receipt of advance towards the supply of goods under the first contract.

The AAR determined whether the supply made by the applicant under two agreements are separate supplies or a composite supply. The AAR noted that the first contract is for pure supply of goods and the second contract is a works contract. The AAR also noted that second contract can be executed by the applicant or a third party if the customer awarded such contract to the third party. The AAR also held that since the transfer of property in the goods supplied under first agreement is not taking place during the execution of works contract, its value cannot be included in the works contract service supplied under the second agreement. It was held that the supply made by the applicant is not a composite supply as both the contracts are not naturally bundled together. The AAR held that the applicant is not required to pay GST at the time of receipt of the advance received under the first agreement towards supply of goods.

Service Tax

CGST Delhi vs. Delhi International Airport Ltd. 2023-VIL-58-SC-ST (Supreme Court)

The assessee was an airport licensee and collecting a "User Development Fee" (UDF) from every embarking passenger in terms of the Airports Authority of India Act, 1994 ('AAI Act'). UDF was collected for the purposes specified in the AAI Act viz., for financing the cost of upgrading, expansion or development of the airport at which the fee is collected, or for development of a new airport. The department sought to levy service tax on the UDF collected by the assessee terming it as a consideration for the airport services provided by the latter.

SCN issued to the assessee was adjudicated, against which the assessee filed an appeal before the Commissioner (Appeals). The Order of Commissioner (Appeals) was challenged by the assessee before the CESTAT that ruled in favour of the assessee. Against the CESTAT order, the department filed an appeal before the Supreme Court (SC).

The SC observed that there is no contractual relationship between the assessee and the passenger embarking at the airport with regard to upgrading, expansion, or development of the airport, which is to be funded through UDF. In the absence of such contractual relationship, the liability of the embarking passengers to pay UDF has to be based on a statutory provision. For this reason, a specific provision was made in the AAI Act. The SC held that UDF is in the form of "tax or cess" and it cannot be treated as a consideration for provision of any service. The fact that the amount is not deposited in a government treasury is not relevant. The public nature of these funds does not get undermined merely because they are kept in an escrow account and their use is monitored separately. Accordingly, it was held that no service tax is payable on UDF.

Central Excise

Ingersoll Rand India Ltd. vs. CCE 2023-VIL-511-CESTAT-AHM-CE (CESTAT Ahmedabad)

The assessee was a manufacturer of air compressors, air motors, and its parts. The assessee was selling goods directly to the ultimate customers and distributors who, in turn, were selling the goods to customers. The distributors were given a discount on the price declared in the invoice; however, no such discount was extended in case of sale to the ultimate customers. The department alleged that during the warranty period, it was the responsibility of the distributors to undertake installation and after-sale services. The assessee was passing on expenses incurred on installation and after-sale services in the form of discount to the distributors. Hence, discount should have formed part of the assessable value. Against the adjudication order, the assessee filed an appeal before the Commissioner (Appeals) that upheld the adjudication order. The assessee further filed an appeal before the CESTAT.

The CESTAT held that discount is not being given in the form of reimbursement to the distributors for undertaking installation and after-sale services. As both the activities are beyond the place of removal and post-sale activities, it is not the liability of the manufacturer assessee to undertake such activities. Thus, it cannot be assumed that the distributors are being compensated in the form of discount. Hence, the discount amount is not included in assessable value.

Customs

Union of India vs. Cosmo Films Ltd. 2023-VIL-47-SC (Supreme Court)

With effect from 13 October 2017, it was notified that the goods imported against Advance Authorisation shall be exempt from the levy of IGST and compensation cess, in addition to other prescribed duties. Exemption from IGST and compensation cess was subject to the preimport condition (i.e., goods had to be imported first, and then the final products manufactured with such imported goods were to be exported). Such condition was later on removed with effect from 10 January 2019. For the intervening period, exporters had challenged the pre-import condition before the Gujarat HC as being unconstitutional, arbitrary, and unreasonable. The HC ruled in favour of exporters.

Against the order of HC, an appeal was filed before the SC.

The SC upheld the validity of pre-import condition. It noted that the introduction of pre-import condition may have resulted in hardship to exporters as they may find it difficult to fulfill their contractual obligations. Yet, such hardship cannot be a ground to hold that that the insertion of pre-import condition was arbitrary. It also held that there is no vested or blanket right to claim the exemption, such a relief depends on various factors. The SC held that there is justification for separate treatment of two levies – basic customs duty and IGST. As respondents were not paying tax in view of the interim orders by the Gujarat HC, the revenue was directed to permit them to claim refund or input credit.

VAT

Tata Motors Ltd. vs. Deputy Commissioner of Commercial Taxes 2023-VIL-57-SC (Supreme Court)

The assessee was a dealer of automobile manufacturer. Vehicles were sold by the manufacturer to dealer and then by dealer to the ultimate customer. There existed a separate warranty agreement between the manufacturer and the ultimate customer to whom the vehicles were sold by the dealer. In case of a warranty claim raised by the customer, the dealer replaced the defective part with a new part from his own stock. The defective part was returned to the automobile manufacturer who, in turn, issued a credit note to the dealer for the value of replaced part.

In an earlier case, the SC had held that the dealer has made sale of replaced part on which sales tax is chargeable. Correctness of the said earlier judgement was doubted by a subsequent bench of SC and the matter was referred to the larger bench.

The question referred for consideration by the larger bench was whether a credit note issued by a manufacturer to a dealer in consideration of the replacement of a defective part in the automobile sold pursuant to a warranty agreement is exigible to sales tax. The present judgement is by the larger bench of SC pursuant to the reference made to it.

The SC held that there is transfer of property in the replaced part made by the dealer to the ultimate customer for which the former receives consideration from the manufacturer in the form of a credit note. Accordingly, such transaction was held as sale in the hands of the dealer. The SC also analysed the dictionary meaning of 'credit note' and held that credit note issued by the manufacturer to the dealer is a valuable consideration within the meaning of 'sale' under State VAT Acts. It held that the amount shown in the account of the dealer in the form of a credit note is the price received for the sale of the replaced part by the dealer from his own stock.

Notifications/Circulars/Instructions

Central Board of Indirect Taxes & Customs ('CBIC') issues guidelines for processing of GST registration applications

CBIC has issued guidelines for scrutiny and processing of applications for GST registrations. The guidelines are issued to curb the cases of fake/bogus registrations. The guidelines lay down a detailed procedure to be followed by the tax officers for strengthening the process of verification of registration applications.

(Instruction no. 03/2023-GST dated 14 June 2023)

CBIC has issued circulars and notifications pursuant to GST council meeting

CBIC has issued various circulars and notifications pursuant to the recommendations made by the GST Council in its 50th meeting. Circulars provide clarification on the following issues:

- Charging of interest in case of wrong availment of IGST credit
- Manner of dealing with difference in ITC availed in Form GSTR-3B compared with
 Form GSTR-2A for April 2019 to March 2021
- TCS liability in case of multiple e-commerce operators in one transaction
- ITC on goods and services provided during the warranty period
- Taxability of shares held in subsidiary company by the holding company
- Issues pertaining to e-invoicing
- Refund-related issues
- ISD vs. cross charge

Notifications are issued to extend the time limit of availing the benefit of the amnesty scheme for non-filers of GST returns.

(Circular no. 192/04/2023-GST to Circular no. 199/11/2023-GST dated 17 July 2023. Notification no. 22/2023-Central Tax to Notification no. 26/2023-Central Tax dated 17 July 2023)

CBIC issues Standard Operating Procedure ('SOP') for scrutiny of GST returns for FY 2019-2020

CBIC has issued SOP for scrutiny of GST returns for FY 2019-2020. The selection of returns for scrutiny will be done by the Directorate General of Analytics and Risk Management (DGARM) based on various risk parameters identified by them. SOP prescribes the procedure to be followed by the tax officer for scrutiny of returns, along with the timelines for each step.

(Instruction no. 02/2023-GST dated 26 May 2023)

Reduction in threshold limit for applicability of e-invoicing

With effect from 1 August 2023, e-invoicing is made applicable for taxpayers with aggregate turnover exceeding INR 5 crore.

(Notification 10/2023 – Central Tax dated 10 May 2023)

CBIC issues circular for implementation of Supreme Court's judgement in Cosmo Films

In case of Cosmo Films Ltd., the Supreme Court has upheld the imposition of pre-import condition for claiming exemption from IGST under Advance Authorisation scheme. CBIC has issued a circular prescribing the procedure for payment of IGST by the importer on account of violation of pre-import condition.

(Circular no. 16/2023-Cus dated 7 June 2023)

GSTN issues advisory on e-invoice verifier app

GSTN has issued an advisory regarding the e-invoice verifier app developed by it. The app can be used to verify the e-invoice and other related details by scanning the QR code printed on the e-invoice.

(GSTN advisory dated 8 June 2023)

CBIC issues guidelines for special All-India drive against fake registration

A special All-India drive has been launched to conduct requisite verification for detecting suspicious/fake GST registrations. The drive will be conducted by all central and state tax administrations over a period of two months. Fraudulent/suspected registrations will be identified based on data analytics tool (BIFA, ADVAIT, NIC Prime etc.) and other parameters.

(Instruction no. 01/2023-GST dated 4 May 2023)

Production Linked Incentive Scheme - PLI 2.0 for IT Hardware notified

The Ministry of Electronics and Information Technology has notified PLI 2.0 for IT hardware. The scheme provides financial incentive to domestic manufacturers of the specified goods. The scheme has five target segments viz. laptops, tablets, all-in-one PCs, servers, and ultra small form factor (USFF).

(Notification dated 29 May 2023)

CBIC issues circular regarding electronic repairs services outsourcing

Electronic Repairs Services Outsourcing (ERSO) is an initiative of the Government of India that involves import of defective and damaged electronic goods by designated repair service entities in India, to reliably repair them and re-export the goods. In this regard, a circular has been issued by CBIC to outline various aspects of the customs procedure to be followed for import and re-export of the goods.

(Circular no. 14/2023-Customs dated 3 June 2023)

Introduction of online facility for requesting appointment for virtual/personal hearing

Directorate General of Foreign Trade (DGFT) has introduced an online facility of requesting appointment for virtual meeting/personal hearing to exporters. Through this facility, exporters will be able to request for online personal hearing and the concerned DGFT officer shall provide suitable time and link for the virtual hearing. The facility is introduced with effect from 1 June 2023.

(Trade notice no. 06/2023-24 dated 31 May 2023)

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