



Indirect Tax Newsletter

Indirect tax updates

November 2024

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 September to October 2024. This issue also covers some updates from the indirect tax perspective.

Goods and Services Tax



Chief Commissioner of CGST v. M/s Safari Retreats Private Limited and others 2024-VIL-45-SC (Supreme Court of India)

The respondent was engaged in the construction of a shopping mall for the purpose of leasing the premises to tenants.

Since the outward supplies of letting out units in the shopping mall constitute “supply of services” under GST, the respondent was desirous of availing ITC on building materials and input services to set off against the output tax liability. However, departmental authorities denied such availment of ITC, relying on the provisions contained in section 17(5)(d) of the Central Goods and Services Tax Act, 2017 (“CGST Act”) which restricts ITC on goods or services procured for the construction of an immovable property (other than plant or machinery) on his own account, including when such goods or services are used in the course or furtherance of business.

Against such denial, the respondent filed a writ petition before the Orissa High Court seeking a declaration that provisions of section 17(5)(d) of the CGST Act do not apply to inward supplies acquired for construction of immovable property intended for letting out. The High Court allowed availment of such ITC, against which the revenue approached the Supreme Court.

The issues under consideration before the Supreme Court were as follows:

Whether the definition of ‘plant and machinery’ as per the explanation to in section 17 of the CGST Act applies to ‘plant or machinery’ referred to in section 17(5)(d).

In case the definition as per the explanation to in section 17 does not apply, what shall be the meaning of the word ‘plant’ in the expression ‘plant or machinery’?

Are provisions of clauses (c) and (d) of section 17(5) and section 16(4) constitutionally valid?

Are provisions of section 16(4) that provide for ineligibility to avail ITC on invoices or debit notes after 30 November of the financial year following the financial year to which such invoice or debit note pertains constitutionally valid?

The Supreme Court noted that the words used in Section 17(5)(d) are ‘plant or machinery’ whereas Section 17(5)(c) refers to ‘plant and machinery’. The Court held that, it must be inferred that the legislature has intentionally used the expression ‘plant or machinery’ in clause (d). Hence, it is not possible to say that the word “or” in clause (d) should be read as “and”.

The Court also held that, what would constitute as a ‘plant’ is a matter of fact, and each case would be subject to a functionality test, keeping in mind the business of the assessee and the role that building plays in the business.

The Supreme Court observed that construction is said to be on a taxable person's "own account" when it is made for his personal use and not for service or it is to be used by the person constructing as a setting in which business is carried out. However, construction cannot be said to be on a taxable person's "own account" if it is intended to be sold or given on lease or license.

The Court also upheld the constitutional validity of clauses (c) and (d) of section 17(5) and section 16(4).

The Supreme Court remanded the matter back to the High Court to decide whether the shopping mall can be construed as a 'plant' for the purpose of availing ITC.



Metal One Corporation India Pvt. Ltd. v. Union of India and others **2024-VIL-1161-DEL (Delhi High Court)**

The petitioner was issued a show cause notice ("SCN") alleging non-payment of GST under reverse charge mechanism ("RCM") regarding the secondment of employees from an overseas group entity. The respondents relied on the Supreme Court judgement in the case of *Northern Operating Systems (P.) (Ltd.)*, wherein it was held that transactions involving the secondment of employees from a foreign entity to a domestic entity for consideration would qualify as supply under GST.

SCN proposed to demand GST on the amount reimbursed by the Indian entity to an overseas entity (towards payment of salary by the overseas entity) and the amount paid by the Indian entity directly to the expat in India. Agreeing to the fact that the procured services qualify as import attracting GST under RCM, the petitioner contended that the value of supply in such case shall be limited to the value mentioned in the invoice issued by the petitioner to the overseas group entity as per the second proviso to Rule 28 of Central Goods and Services Tax Rules, 2017 ("CGST Rules"). The said proviso states that where the recipient is eligible for full ITC, the value declared in the invoice shall be deemed to be the open market value ("OMV") of the goods or services. However, in the present case, no such invoices were issued by the petitioner.

The court referring to Circular 210/4/2024-GST dated 26 June 2024 observed that the correctness of the position as advocated in terms of that Circular may be questioned on the grounds of whether it would be consistent with the statutory provisions or may be viewed as being contentious or contrary to the intent of the second proviso to Rule 28 of CGST Rules. However, it is not for them to question the wisdom of the CBIC as the Circular, in any case, binds the respondents. In the event of non-issuance of invoice by petitioner to an overseas group entity, the value shall be deemed to be nil irrespective of payments made. Hence, there would not be any tax implications. The impugned SCN was quashed.



**Best Crop Science Pvt. Ltd. v. Principal Commissioner,
CGST Commissionerate, Meerut and others**
2024-VIL-1047-DEL (Delhi High Court)

The petitioner filed a writ petition challenging an order under Rule 86A of the CGST Rules wherein ITC, in excess of the balance available in the electronic credit ledger (“ECL”), was blocked.

An issue for consideration before the High Court was that whether a proper officer can block an assessee’s ECL by an amount exceeding the ITC balance available in the ECL.

The Court opined that, the right to avail ITC is a statutory right which arises as soon as tax is paid by the taxpayer to the Government, subject to the conditions enumerated in section 16 of the CGST Act. It is an invaluable right and an asset for the taxpayer. The Court further opined that a proper officer shall invoke provisions of Rule 86A, which grant a drastic and far-reaching power, only when his opinion regarding wrongful or fraudulent availment of ITC is based on some credible material or information.

The High Court held that the words ‘credit of input tax available in the electronic credit ledger’ plainly refers to the credit, which is at the given point of time available in the taxpayer's ECL. If the same had already been utilised in payment of tax, etc. or has been refunded, the same would not be available in the ECL. It is difficult to accept that the expression “available in the electronic credit ledger” should be read as the ITC that was available in the ECL sometime earlier, prior to the same being used. The Court further held that the expression "amount equivalent to such credit" used in Rule 86A would be subject to the condition referred to in the opening sentence of Rule 86A(1).



M/s Barkataki Print and Media Services v. Union of India and others
2024-VIL-1027-GAU (Gauhati High Court)

The petitioner filed a writ petition before the Guahati High Court challenging adjudication orders passed on the ground that Notification No. 9/2023-CT dated 31 March 2023 and Notification No. 56/2023-CT dated 28 December 2023 are ultra vires the GST Act. These notifications were issued in the exercise of powers under section 168A of the CGST Act for extending the time period for passing the adjudication order. Section 168A of the CGST Act states that the time limits can be extended on the recommendations of the GST Council, in case prescribed actions cannot be completed or complied with due to force majeure i.e., an event of war, epidemic, flood, drought, fire, cyclone, earthquake, or any other calamity caused by nature. The former notification was challenged on the basis of the absence of force majeure whereas the latter was challenged due to the absence of both force majeure and recommendation of the GST Council.

The Court held that, since the orders were passed after the period mentioned in Notification No. 9/2023-CT, the challenge to the said notification and *pari materia* notification issued by the State Government has no relevance.

Regarding Notification No. 56/2023-CT, it was held that the said notification was issued without any recommendation by the GST council to extend the time limit for passing the adjudication order. The Court held that the GST council comprises of members from both Union and State. This has been done with an intention to foster collaborative federalism, and hence, wherever the provisions of the Central Act or the State Act stipulate that an act is required to be done on the recommendation of the GST Council, the act can be done only when there is a recommendation made by the GST Council. Further, the Court held that there was no occasion to consider the existence of force majeure as it was never placed before the GST council for consideration. Therefore, the court quashed Notification No. 56/2023-CT as being ultra-vires and set aside both orders as being passed without jurisdiction.



**K.T. Saidalavi v. The State Tax Officer, SGST Department, Manjeri
2024-VIL-1130-KER (Kerala High Court)**

The Central GST authorities had initiated enquiry against the petitioner regarding non-payment of GST along with a direction to produce certain records. Pursuant to this, summons were issued. In the meanwhile, proceedings under section 74 of the CGST/SGST Acts were initiated by the state GST authorities as well. The petitioner contended that this amounts to parallel proceedings and cannot be sustained in law in light of the provisions of section 6(2) of the CGST/SGST Acts. As per the provisions of the said section, in case one authority has initiated any proceedings on a subject matter, the authority cannot initiate proceedings on the same subject matter.

The court held that the term 'initiation of any proceedings' is no doubt a reference to the issuance of a notice under the provisions of the CGST/SGST Acts and the initiation of an enquiry or the issuance of summons cannot be deemed to be initiation of proceedings for the purpose of Section 6(2)(b) of the CGST/SGST Acts. CBIC Circular dated 5 October 2018 does not appear to be in tune with the clear meaning of the provisions of section 6(2)(b) of the CGST/SGST Acts. Therefore, the writ petitions were dismissed by the court.



M/s Hitesh Gwalani
2024-VIL-36-AAAR (Rajasthan Appellate Authority for Advance Ruling)

The applicant proposed to initiate a business of buying and selling of used iron scrap, used lead batteries, used aluminium, brass and copper goods, used plastic bottles and worn-out tyre tubes. The applicant intended to buy these goods from unregistered sellers and sell them to manufacturers without any further processing. Hence, an advance ruling was sought to ascertain whether such a supply of second-hand goods falls under the margin scheme under Rule 32(5) of the CGST Rules. The margin scheme under the said rule provides that the value of a taxable supply provided by a person engaged in the business of buying and selling second-hand goods shall be the difference of the selling price and purchase price provided. No ITC has been availed on the purchase of such goods. Further, the applicant wanted to ascertain the applicability of the margin scheme on both intra-state and inter-state supplies.

The Authority for Advance Ruling (AAR) held that the benefit of the margin scheme is available with respect to motor vehicles only. It further held that such goods would not fall under the ambit of second-hand goods and rather would be classified as scrap; hence, the valuation mechanism prescribed under Rule 32(5) of the CGST Rules would not be applicable. The applicant filed an appeal before the Appellate Authority of Advance Ruling (AAAR).

The AAAR held that the benefit of the margin scheme is not limited to second-hand motor vehicles but is available to all other goods as well, subject to the condition that these goods qualify as second-hand goods. Mere change of ownership is not sufficient to classify goods as second-hand.

For goods to qualify under this scheme, they must be second-hand, used, or have undergone minor processing that does not change their nature. The scrap requires processing to be useful again, whereas second-hand goods are ready for immediate use by a new owner. The goods supplied by the applicant to the manufacturer provide raw material for the manufacturer and would be further processed by them. They would not be used by them in their original form. Hence, such goods qualify as scrap and not second-hand goods. Therefore, the valuation mechanism prescribed under Rule 32(5) of the CGST Rules would not be applicable to the supplies made by the applicant for both intra-state and inter-state supplies.



Natural Language Technology Research 2024-VIL-154-AAR (West Bengal Authority for Advance Ruling)

The applicant is a research and development organisation, which has developed a website and mobile application (“app”) by the name ‘Yatri Sathi’. The app proposes to connect drivers with potential customers. The app requires the drivers to register on the app and charges a subscription fee from them regardless of the actual fee charged by the driver from the customer. The applicant further submitted that it merely provides a technological infrastructure to the drivers to connect with customers but does not have any control over the prices charged by the driver to the customer and is unaware of the payment method used by the customers to compensate the drivers. Further, the applicant is not in any way liable to the customer in case of any cancellation or refusal of services on the part of the driver. Neither is it responsible for the quality of services provided by the drivers.

The applicant sought an advance ruling to ascertain whether it falls under the definition of an e-commerce operator. Further, it sought a ruling on whether it would be deemed as a service provider under section 9(5) of the CGST Act and whether it would be liable to collect and pay GST on the services supplied by the drivers through the app.

The AAR held that the applicant is the owner of the digital platform which provides the service to the drivers by way of allowing them to use the app for a consideration. Therefore, it qualifies to be an e-commerce operator. The AAR further observed that the role of the applicant is only confined to connecting the drivers with customers. It does not have any control over the actual provision of service and does not collect the consideration. Moreover, it does not raise any invoices for the customers, and it even does not charge any convenience fee from the customers. Hence, it was held that though the applicant qualifies to be an electronic commerce operator, the supply of services is not made through him. Therefore, the applicant does not fall within the ambit of the service provider in terms of section 9(5) of the CGST Act for the services provided by drivers through the app and is not liable to collect and pay GST on the same.

Service Tax

GE Power Systems India Pvt. Ltd. v. CST Service Tax 2024-VIL-1347-CESTAT-AHM-ST

The assessee filed a service tax return for the period April 2017 to June 2017 and carried forward the transitional ITC by filing Form GST Tran-1. Thereafter, the assessee realised that some of the invoices were not included in the service tax return. The assessee filed a revised return to include the omitted invoices and availed CENVAT credit on the same. However, the additional credit availed in the revised return could not be carried forward to GST. The assessee filed a refund claim for the additional amount of CENVAT credit. The refund claim was rejected by the tax authorities and the appeal filed before the Commissioner (Appeals) was rejected.

Being aggrieved, the assessee filed an appeal before CESTAT.

CESTAT noted that there was an inadvertent mistake on the part of the assessee due to which the additional amount of CENVAT credit could not be carried forward to GST. Accordingly, a refund claim cannot be rejected merely on this ground. Towards this, reliance was placed on the decisions in the cases of Gigamon Solutions Pvt. Ltd. and Welsuit Glass & Ceramics Pvt. Ltd. and held that the assessee is entitled to claim the refund.

Notifications/Circulars/Instructions

CBIC issues various circulars

CBIC has issued various circulars in respect of the following matters:

Circular number	Clarification
230/24/2024-GST dated 10 September 2024	Clarification in respect of advertisement services provided by advertisement companies/agencies to foreign clients
231/25/2024-GST dated 10 September 2024	Clarification with respect to availability of input tax credit in respect of demo vehicles
232/26/2024-GST dated 10 September 2024	Clarification on place of supply of data hosting services provided by service providers located in India to cloud computing service providers located outside India
233/27/2024-GST dated 10 September 2024	Clarification regarding regularisation of IGST refund availed in contravention of Rule 96(10) of the CGST Rules, where the exporters imported certain inputs without payment of GST
234/28/2024-GST dated 11 October 2024	Clarification regarding applicability of GST on certain services
235/29/2024-GST dated 11 October 2024	Clarifications regarding rate of tax and classification based on the recommendations of 54th GST council meeting
236/30/2024-GST dated 11 October 2024	Clarification regarding the term 'as is/as is, where is basis' mentioned in GST circulars issued on the basis of recommendations of the GST Council in its meeting
237/31/2024-GST dated 15 October 2024	Clarification on implementation issues of section 16(5) and section 16(6) of the CGST Act
238/32/2024-GST dated 15 October 2024	Clarification of doubts related to section 128A of the CGST Act

Amendments have been made to various rules

The CBIC issued the CGST (Second Amendment) Rules, 2024 to further amend Rule 36, 46, 66, 86, 88B, 88D, 89, 96, 96B, 121, 142, Form GSTR-9, Form GST REG-20, Form GST REG-31, Form GST APL-01, Form GST APL-05, Form GST INS-01 and Form GST DRC-01A and to insert Rule 47A. (Notification No. 20/2024 - Central Tax dated 8 October 2024)

Introduction of rules and forms in relation to GST Amnesty Scheme

The CBIC inserted Rule 164 of the CGST Rules containing procedure and conditions for closure of proceedings under section 128A of the CGST Act. Various forms namely Form GST SPL-01, Form GST SPL-02, Form GST SPL-03, Form GST SPL-04, Form GST SPL-05, Form GST-06, Form GST SPL-07, Form GST SPL-08 related to procedure of the amnesty scheme were also introduced.

(Notification No. 20/2024 - Central Tax dated 8 October 2024)

CBIC notifies due dates for payment of tax under the amnesty scheme

The CBIC issued a notification prescribing the date by which tax needs to be paid in order to qualify for a waiver of interest and penalty under the amnesty scheme contained in the provisions of section 128A of the CGST Act.

(Notification No. 21/2024 - Central Tax dated 8 October 2024)

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