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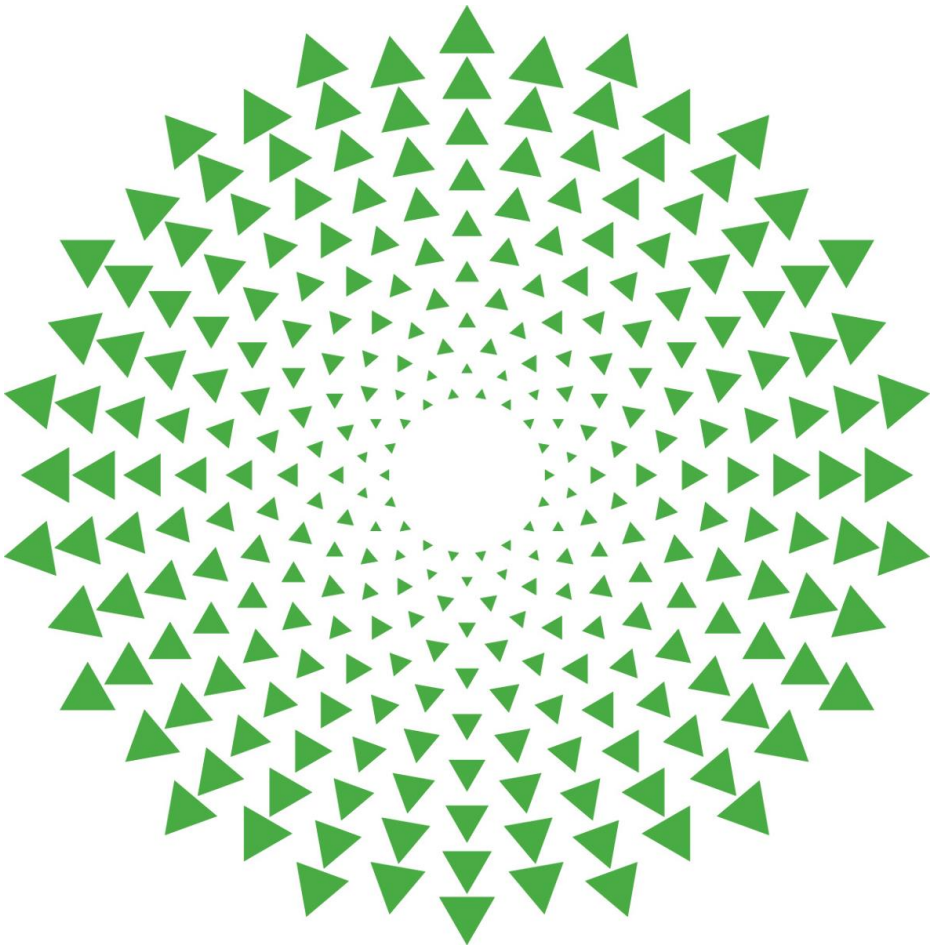

Indirect tax newsletter

Indirect tax updates
February 2024

This newsletter captures a few important judgments/advance rulings passed under Goods and Services Tax (GST), Customs, Central Excise, and Service Tax available in the public domain from November to December 2023. It also covers some of the updates from an indirect tax perspective.

Goods and services tax

M/s Parle Agro Pvt. Ltd. Vs. Union of India and Ors. 2023-VIL-789-Mad (High Court of Madras)

A petitioner filed a writ petition before the Madras High Court (HC) on the decision of the GST Council for classification of "flavoured milk" under HS Code 2202 (taxable at the rate of 12 percent instead of 0402, which is taxable at the rate of 5 percent). The petitioner contended that flavoured milk is classifiable under HS Code 0402 based on the decision of the Hon'ble Supreme Court (SC). The petitioner also prayed to call for the records of the decision of the GST Council with respect to the classification of flavoured milk.

The petitioner argued that the function of the GST Council is not to determine the classification under the provisions of the Customs Tariff Act 1975. According to Article 279-A (4) of the Constitution of India, the role of the GST Council is to recommend the rates of tax on goods and services, which may be notified/implemented by the government.

The HC observed that the GST Council power is recommendatory in nature and that the petitioner's reliance on the SC judgement cannot be accepted. Nevertheless, it stated that flavoured milk merits classification under residuary subheading 0402 99 90 of the Customs Tariff Act. Classification under the GST law needs to be strictly in line with the Customs Tariff Act, 1975. The government is empowered to fix appropriate tax rates on the goods under the GST law. The HC left it to the government to amend the respective entries in the GST rate notification of goods for flavoured milk to tweak the tax rate.

M/s Lenovo (India) Pvt. Ltd. vs. Joint Commissioner of GST (Appeals-1) and Others 2023-VIL-799-Mad (High Court of Madras)

A petitioner, engaged in the manufacturing/importing of computers and supplying them to Special Economic Zone (SEZ) units, filed refund claims on account of zero-rated supplies made to a SEZ unit. The claims were rejected on the grounds that the petitioner did not obtain the endorsement of invoices within 45 days from the date of supply and that the provision of documents was not made at the time of filing the refund application but at the time of filing the reply/personal hearing, and hence the claim was barred by limitation. The appellate authority also upheld the rejection. The petitioner approached the HC on the grounds that provisions of the GST law do not require obtaining endorsement within 45 days from the date of the invoice. Furthermore, as the petitioner is seeking the refund of IGST paid on supplies made to the SEZ unit, the time limit of endorsement will not be applicable.

The HC observed that the adjudication officer had acknowledged the refund application, which indicated that there was no deficiency in the refund application. Once the refund application is acknowledged, it is not open for the Revenue department to contend that the supporting documents were filed with a delay.

The HC, while setting aside the order-in-appeal, observed that once the goods had entered the SEZ, an endorsement to that effect was obtained, and duty was paid by the petitioner, a refund cannot be denied. The refund claim cannot be rejected merely because the authorised officer did not endorse the invoices within 45 days. The HC also observed that the time limit for filing the refund application in the GST law is directory in nature; thus, even if the claim is filed two years later, the legitimate refund claim by the assessee cannot be denied in appropriate cases.

M/s AB Enterprises vs. Commissioner of Delhi Goods and Services Tax
2023-VIL-811-DEL (High Court of Delhi)

A petitioner filed a writ petition against the deficiency memo (Form GST RFD-03) issued by the adjudication officer against an application for refund of unutilised input tax credit (ITC) in respect of zero-rated supplies. The adjudication officer mentioned in the deficiency memo that the supporting documents were incomplete and not attached with the refund application. The petitioner argued that the refund application was filed along with shipping bills, invoice copies, statement 3B, CA certificate, undertaking as required, and bank realisation certificates. As all required documents were submitted along with the refund application, the application cannot be considered deficient. If the officer needs any additional documents to process the claim, he has the liberty to call for them.

The HC, while relying on a judgement with a similar set of facts, observed that the application for refund is complete as it is accompanied with the documents as specified in GST rules and directed the officer to issue the acknowledgement for processing the refund application. The HC further observed that the officer has the liberty to seek further documents or information to process the refund claim of the petitioner.

M/s BBA Infrastructure Limited vs. Senior Joint Commissioner of State Tax and Others
2023-VIL-881-CAL (High Court of Calcutta)

The petitioner was issued a show cause notice (SCN) to explain why ITC for the period of November 2018 to March 2019 should not be denied, as returns for 2018-19 were filed beyond the statutory time limit. An adjudication order was issued confirming the demand on account of tax, interest, and penalty. The petitioner was issued a reminder to pay the demand in pursuance of the said adjudication order, and as the petitioner did not comply with the demand, the department recovered the amount from the electronic cash ledger/electronic credit ledger. The petitioner filed an appeal before the appellate authority, which was rejected on the grounds that the ITC claim is time-barred.

The writ petition filed by the petitioner contained the submission that ITC is not taken through returns but through books of accounts immediately upon receipt of goods/services. The time limit to avail ITC cannot supersede the eligibility conditions for ITC entitlements. The petitioner emphasised that entitlement to a particular right after fulfilling the prescribed conditions results in a right; 'taking' or 'availing' or 'utilising' that right through procedural formalities or furnishing a return by the person who is entitled to that right is a matter of his choice. There is no linkage between the time limit and the entitlement to take ITC.

The HC observed that eligibility conditions must be fulfilled to be entitled to claim ITC. The time limit to claim ITC is also one of the conditions that makes a registered person entitled to claim ITC and, by no means, can be said to be violating Article 300A of the Constitution of India.

M/s Technosys Security System Private Limited vs. Commissioner, Commercial Taxes, Indore & Ors.
2023-VIL-863-MP (High Court of Madhya Pradesh)

A petitioner was issued the SCN, and the final adjudication order determined the tax, interest, and penalty were more than the alleged amount in the SCN. The petitioner, in a writ petition before the HC, contended that the decision-making process adopted by the respondent is contrary to the principles of natural justice and statutory mandate. The petitioner submitted before the HC that providing opportunity of hearing is a mandatory requirement when a specific request is received in writing from a person chargeable to tax 'or' where any adverse decision is contemplated against such person. Therefore, where the adverse decision is contemplated, whether the petitioner specifically opted/demanded a personal hearing or not, a personal hearing ought to have been provided.

The respondent contended that there is a specific provision for the opportunity of hearing. The petitioner was to opt for the personal hearing, and if it is skipped, fault cannot be attributed to the action of the respondent.

The HC held that the language used in the relevant provision providing opportunity of hearing makes it clear that opportunity of hearing is required to be given even in cases where no such request is made but an adverse decision is contemplated against such a person. The HC set aside the proceedings after the stage of replying to the SCN and directed the respondent to provide an opportunity of hearing to the petitioner.

M/s Star Engineers (I) Pvt Ltd vs. Union of India
2023-VIL-874-BOM (High Court of Bombay)

A petitioner filed GSTR 1 for the relevant tax period where, due to an error, the "shipped to" party was reported as a recipient in B2B supplies instead of the "billed to" party. Therefore, the supplies made by the petitioner are reflected in GSTR 2B of the shipped to party instead of the billed to party. The petitioner requested the Deputy Commissioner (DC) to allow the rectification in detail furnished in GSTR 1, which was rejected on the technical ground that the modifications cannot be made after the due date.

The HC conferred that provisions relating to GST returns need to be purposefully interpreted and cannot be read to mean that the assessee would be prevented from placing the correct position, and there would not be any scope for bona fide and inadvertent rectification or correction. The department needs to avoid unwarranted litigation on such issues and make the system more assessee-friendly. A bona fide, inadvertent error in furnishing details in a GST return needs to be recognised and permitted to be corrected when, in such cases, the department is aware that there is no loss of revenue to the government. The HC directed the respondent to permit the petitioner to rectify/amend GSTR 1 either through online or manual means.

Service tax

M/s Cummins Turbo Technology vs. Commissioner of Customs, Central Excise and Central Tax, Indore
2023-VIL-1090-CESTAT-DEL-ST

The appellant has units in SEZ and DTA. The appellant also has a corporate office in DTA that is registered as an Input Service Distributor (ISD). The office received services and distributed the CENVAT credit of service tax paid to its two units (DTA and SEZ) through ISD invoices. Services provided to the SEZ unit were exempted from service tax under the SEZ Act and the service tax law. With respect to credit distributed by the corporate office to the SEZ unit, a refund application for service tax was filed. The officer rejected the refund claim on the grounds that applications were submitted beyond one year from the date on which service tax was paid to the service provider and hence time barred.

The appellant contended that any service supplied to either a developer or a unit in an SEZ is exempted from service tax under the SEZ Act. The said law prevails over any other law for the time being in force. Therefore, the appellant was not required to pay any service tax at all. As service tax was paid on the services received through its corporate office, under the cover of the ISD invoice, the appellant was entitled to the refund, and it cannot be rejected on technicalities. The exemption notification under the service tax law providing for refund of service tax paid is an extra provision, and even in its absence, the appellant was not liable to pay service tax. As the tax has been paid, it is entitled to a refund, and such a refund cannot be denied on the grounds that the time limit of one year to file an application for a refund mentioned in the notification has not been fulfilled. Additionally, as the refunds were sanctioned beyond three months from the date of application, the appellant is entitled to interest on any refunds that may be sanctioned.

The Tribunal held that provisions of the SEZ Act override the charging sections of prescribed tax legislation. Hence, no service tax was payable on the services provided to SEZ units for authorised operations. Thus, where the service tax was not payable because of the overriding effect of the SEZ Act, the question of such services being exempt under tax legislation does not arise. Accordingly, any amount paid as representing service tax in respect of services provided directly/indirectly to SEZ units is merely a deposit and needs to be refunded.

Directions were issued to process refund applications. It was also held that once the SEZ unit is out of the purview of the Finance Act itself, the provisions for payment of interest under it also do not apply to the refunds in question.

Notifications/Instructions

Amnesty scheme for filing GST appeals barred by limitation

- The amnesty scheme for filing GST appeals before the first appellate authority for taxpayers who could not file an appeal against an order issued on or before 31 March 2023, under Section 73/74 of the CGST Act within the prescribed timelines or appeals against said orders rejected on the grounds of the limitation period is to allow such taxpayers to file an appeal on or before 31 January 2024 with an enhanced pre-deposit of 12.5 percent of the amount of tax in dispute instead of 10 percent. (Notification No. 53/2023 – Central Tax Rate, dated 02 November 2023)

Extension of time limit for issuing show cause notices and adjudication orders involving cases of tax not paid or short paid or of input tax credit wrongly availed or utilised for any reason "other than" fraud or any wilful misstatement or suppression of facts

- Additional time has been given to GST authorities to issue SCNs and adjudication orders under Section 73 involving cases of tax not paid or short paid or of input tax credit wrongly availed or utilised for any reason "other than" fraud or any wilful misstatement or suppression of facts for FY 2018-19 and 2019-20 as under:

Year	Extended date to issue SCN	Extended date to issue adjudication order
2018-19	31 January 2024 (Old date–31 December 2023)	30 April 2024 (Old date–31 March 2024)
2019-20	31 May 2024 (Old date–31 March 2024)	31 August 2024 (Old date–30 June 2024)

(Notification no. 56/2023 – Central Tax Rate dated 28 December 2023)

Instructions issued to department officers for service of summary of show cause notice, adjudication order, and not to follow judgement of the Supreme Court on secondment cases as such

- Instructions have been issued to department officers reiterating the requirement to also serve electronically the summary of notices issued under the prescribed provisions of the GST law in Form GST DRC-01 on the portal. Further, it has been reiterated that a summary of orders issued under prescribed provisions should be uploaded electronically in Form GST DRC-07 on the common portal. (Instruction no. 04/2023-GST dated 23 November 2023)

- Instructions were issued to GST officers in relation to the judgement of the SC in case of Northern Operating Systems Private Limited on the issue of secondment of employees of an overseas group company to an Indian entity. Instructions guide the officer to not follow the said ruling of the SC mechanically in all cases but to verify the arrangements in each case.
  Furthermore, officers were directed that the provision of Section 74 needs to be invoked only in cases where there is material evidence of fraud, wilful misstatement, or suppression of fact to evade the tax on the part of taxpayers. (Instruction no. 05/2023-GST dated 13 December 2023)

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