



JSA Newsletter Indirect Tax

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Recent Rulings by Courts and Authorities

Supreme Court

Excise duty cannot be levied by State on impure/weak spirit obtained from process of re-distillation

In the case of *State of Orissa vs. Utkal Distilleries*¹, the issue before the Hon'ble Supreme Court was regarding levy of state excise duty on weak spirit generated as a result of the manufacturing process. The appellant granted a license to the respondent for manufacture of IMFL from rectified spirit. The Government allowed 2% process loss while re-distilling the rectified spirit. A demand notice was issued to the respondent in September 1997, seeking excise duty on weak spirit, in excess of the 2% permissible limit for wastage. The respondent filed a writ petition before the High Court challenging the said notice, which was decided in favour of the respondent. However, the State of Orissa challenged the said order before the Hon'ble Supreme Court.

The Supreme Court relied on the cases of *Synthetics and Chemicals Ltd. vs. State of U.P.*² and *State of U.P. vs. Modi Distillery*³, wherein it was held that the State Legislature has no authority to levy duty or tax on industrial alcohol, which is not fit for human consumption, as the same is under the purview of the Central Government. The Hon'ble Supreme Court analysed the relevant entries of Seventh Schedule of the Constitution of India and observed that the power to levy tax on alcoholic liquor is based on the way in which they are used i.e., (a) for human consumption (b) other than for human consumption. Also, the entries are mutually exclusive and therefore, the Supreme Court held that the State has the power to levy excise duty on alcoholic liquor for human consumption and not on wastage of liquor after distillation.

High Court

Refund of pre-deposit in view of CIRP⁴ in case of sick companies

In the case of *Ultratech Nathdwara Cement Limited vs. Assistant Commissioner, Commercial Tax Department*⁵, the High Court dealt with the issue of refund of pre-deposits made under appeal proceedings by Binani Cement Limited ("Binani Cement"), subsequently acquired by the petitioner under IBC⁶.

¹ State of Orissa vs. Utkal Distilleries, 2022 SCC OnLine SC 259

² Synthetics and Chemicals Ltd. vs. State of U.P., (1990) 1 SCC 109

³ State of U.P. vs. Modi Distillery, (1995) 5 SCC 753

⁴ Corporate Insolvency Resolution Process

⁵ Ultratech Nathdwara Cement Limited v. Assistant Commissioner, Commercial Tax Department, 2022 (4) TMI 1250- Rajasthan High Court.

⁶ Insolvency and Bankruptcy Code, 2016

In this case, Binani Cement had filed an appeal before the Rajasthan Tax Board against an order demanding tax and interest, wherein statutory pre-deposit was paid. During the pendency of these appeals, Binani Cement suffered losses and was declared insolvent, and its creditors initiated the insolvency procedure under the IBC. The petitioner's resolution plan for the rehabilitation of the sick industrial unit was admitted by NCLT⁷ as well as NCLAT⁸ and the petitioner acquired Binani Cement. The respondent, being the operational creditors were granted a claim of INR 61.05 crores and all appeals were disposed of as a result of the NCLAT order. The petitioner on disposal of appeals, filed a refund claim for the pre-deposit, which was dismissed by the respondent, on the grounds that such refund is only admissible in the event of appeal being accepted.

The High Court observed that the respondent was provided a claim of INR 61.05 crores and any excess sums cannot be retained by the respondent, as the same would be contrary to the resolution plan approved by NCLAT. Further, the High Court held that all appeals became infructuous and all demands against the petitioner stood extinguished and therefore, once the total tax liability had been quantified by the NCLAT, any amount in excess of such sums is to be reimbursed by the respondent.

CESTAT

Service tax not to be levied on liquidated damages received under any contract

In the case of *Madhya Pradesh Poorva Kshetra Vidyut Vitaran Company Limited vs. Commissioner of CGST and Central Excise, Madhya Pradesh*⁹, the appellant was a public sector undertaking established by the Government of Madhya Pradesh for distribution of electricity. During the course of its business, the appellant was awarded certain works contracts to various contractors, wherein if the contractor failed to meet its obligations under the contract, the appellant had the right to collect liquidated damages.

The CESTAT evaluated the issue of levy of service tax on liquidated damages received by the appellant from the contractors, who failed to perform the terms of the contracts.

The CESTAT placed reliance on the ruling in the case of *Southeastern Coal Fields vs. Commissioner of Central Excise and Service Tax, Raipur*¹⁰, wherein a distinction between a consideration under a contract and the compensation for failure to fulfil the contract was highlighted. While the consideration is paid for performance of an activity by one party at the desire of the other party, compensation or damages are paid when one party fails to perform its obligations under the contract. Consideration is the result of performance of the contract, whereas compensation/ damages are the result of frustration of contract or non-performance of the terms and conditions laid down in the contract.

Further, the CESTAT observed that the nature of liquidated damages is a payment made to the injured party in case of default by the defaulting party. The purpose of liquidated damages in a contract is to dissuade the parties from reneging from the contract, i.e., to strongly dissuade the party from defaulting. Therefore, it was held that service tax cannot be levied on liquidated damages as a declared service under Section 66 E(e) of the Finance Act¹¹.

⁷ National Company Law Tribunal.

⁸ National Company Law Appellate Tribunal.

⁹ *Madhya Pradesh Poorva Kshetra Vidyut Vitaran Company Limited v. Commissioner of CGST and Central Excise, Madhya Pradesh*, 2022 (4) TMI 773 - CESTAT New Delhi.

¹⁰ *M/s. Southeastern Coal Fields v. Commissioner of Central Excise and Service Tax, Raipur*, 2020 (12) TMI 912 - CESTAT New Delhi.

¹¹ Chapter V of the Finance Act, 1994

Appellate Authority for Advance Ruling (“AAAR”) and Authority for Advance Ruling (“AAR”)

No ITC¹² on rewards given to retailers under sales promotion schemes

In the case of *GRB Dairy Foods Pvt Ltd.*¹³, the applicant was engaged in the business of manufacture and supply of ghee, masalas, instant mixes, and sweets. The applicant launched a sales promotional offer (‘Buy n Fly Scheme’) for its retailers, wherein the retailers became entitled to rewards on achieving specified purchase targets (such as trip to Dubai, gold voucher, television, etc.).

The applicant approached the AAR to understand if ITC on GST paid on inputs/ input services procured for the purpose of reward scheme was eligible. The AAR denied ITC of GST paid on such input/ input services. Therefore, aggrieved by the ruling of the AAR, the applicant approached the AAAR.

The applicant contended that the inputs/ input services procured by the applicant had direct nexus with the business and that the rewards were not in the form of ‘gifts’ because these were not given gratuitously but subject to achieving purchase targets by the retailers. Unlike the nature of ‘gifts’, the retailers had the obligation to achieve purchase targets, failing which they would not be entitled to such rewards. The applicant also stated that the restriction with regard to personal consumption under Section 17(5)(g) of the CGST Act was qua the procurer and not the end user. In the present case, as long as the procurer (applicant) used the inputs/ input services for furtherance of business, personal consumption of these inputs/ input services by the retailers would be irrelevant. Hence, ITC should be eligible.

The AAAR observed that Section 17(5)(g) forbids ITC for goods/ services used for personal consumption whether by the appellant or by the retailers. Therefore, as the applicant had not procured goods/ services for further supply but for personal consumption by the retailers, the same is not eligible for ITC. Also, the AAAR observed that the MRP remained the same both pre and post the campaign which indicated that goods/ services granted as rewards were without valuable consideration and hence, were in the nature of ‘gifts’. Therefore, the AAAR concurred with the AAR and held that applicant would not be eligible for ITC.

GST is not leviable on the amount recovered from employees by employer for canteen services

In the case of *Astral Limited*¹⁴, *Cadila Healthcare Limited*¹⁵ and *Intas Pharmaceutical Limited*¹⁶, the applicant facilitated canteen services to its employees at its factory and office premises. A part of the consideration towards canteen services was borne by the applicant (the employers) and a part by the employees of the applicant. The applicant recovered the employee’s share at actuals by way of deduction from the salary and in turn paid it to the canteen service provider (without retaining any margin).

The issue before the AAR was whether GST is applicable on amount collected by the applicant from the employees by way of deduction in salary.

The AAR observed that the applicant did not retain any margins and deducted the amount at actuals. Therefore, the applicant was only facilitating the collection of sums towards canteen services and therefore, the said transaction is not undertaken in the course of business to qualify as supply and hence, is not subject to GST.

¹² Input tax credit

¹³ GRB Dairy Foods Pvt. Ltd., 2022 (3) TMI 1368 - Appellate Authority for Advance Ruling, Tamil Nadu

¹⁴ Astral Limited, 2022 (3) TMI 1147 - Authority for Advance Ruling, Gujarat.

¹⁵ Cadila Healthcare Limited, 2022 (4) TMI 1339 - Authority for Advance Ruling, Gujarat.

¹⁶ Intas Pharmaceutical Limited, 2022 (3) TMI 1082 - Authority for Advance Ruling, Gujarat.

Notifications

Amendments to Foreign Trade Policy 2015-2020

Notification No. 66/2015-20 dated April 1, 2022

Exemption granted under the FTP¹⁷ from IGST and Compensation Cess on import of goods/ capital goods under advance authorization, export promotion capital goods and export oriented units schemes, extended up to June 30, 2022.

Amendments relating to the powers and duties of the Customs officers

Notification No. 21 to 30/2022-Customs (N.T.) and Circular No. 7/2022-Customs dated March 31, 2022

CBIC has notified changes relating to the term proper officer, power for assignment of functions as a proper officer to the Customs officers, clarification on jurisdiction in case of subsequent reassessment, adjudication, etc. arising due to subsequent investigation or inquiry. Some of the key changes brought in the Customs Act are as follows:

1. Section 3 of the Customs Act amended to include officers of DRI, Audit and Preventive formations as officers of customs.
2. Section 5(1A) and 5(1B) have been inserted to empower CBIC, Principal Commissioner and Commissioner of Customs to assign certain functions to the proper officer.
3. Section 110AA inserted to provide that if any audit, investigation is instituted by an officer of customs, such officer is required to transfer documents along with its report to jurisdictional officer who will have the powers to adjudicate the matter.
4. Changes to be applicable for all pending proceedings initiated prior to enactment of Finance Act, 2022.

JSA Comments: The amendments in relation to the power and duties of the customs officers have been made to address the issues faced in the ongoing litigations wherein the powers of DRI officers were challenged¹⁸.

Circulars/ Trade Notice

Re-operationalization of online module of scrip transfer recording

Trade notice No. 01/2022-23 dated April 11, 2022

The DGFT¹⁹ has re-operationalized the online scrip transfer recording module. While the module initially had features of online issuance and transfer of MEIS²⁰/ SEIS²¹ scrips, it is re-operationalized with key additional features such as,

1. Introduction of time-lag (in number of days/ hours, as the case may apply) for transfer of scrip from original scrip owner to another entity, subsequent transfer by said entity to another entity, transfer of scrips subsequent to IEC²² modification;

¹⁷ Foreign Trade Policy, 2015-20.

¹⁸ Canon India Private Limited vs. Commissioner of Customs, TS-75-SC-2021-CUST

¹⁹ Directorate General of Foreign Trade

²⁰ Merchandise Exports from India Scheme

²¹ Service Exports from India Scheme

²² Importer-Exporter Code

2. Introduction of limit on number of scrip transfers which can be initiated for transfer or accepted by each IEC per day;
3. Automatic de-linking of users from IEC every 6 months;
4. Automatic de-linking of digital signature and Aadhaar registration every 90 days, etc.

Extension in the date for mandatory filing of applications for Non-Preferential CoO²³ through the CDP²⁴

Trade Notice No. 4/2022-2023 dated April 27, 2022

The DGFT has extended the date for mandatory filing of applications for Non-Preferential CoO through the CDP from April 1, 2022²⁵ till August 1, 2022. Until such time, manual/ paper-based submissions and issuance of CoO by the issuing agencies through their paper-based systems may continue.

Amendments in EPCG Scheme to reduce compliance burden and enhance ease of doing business

Public notice No. 03/2015-2020 dated April 13, 2022

The DGFT has amended Chapter 5 of the HBP²⁶ to reduce compliance burden and enhance ease of doing business in relation to the EPCG Scheme. The key amendments are as follows:

1. The HBP allowed the filing of application for extension of Export Obligation (“EO”) period for First Block without any period of limitation. However, the same has been amended as follows:

Timelines for extension of First Block	Composition Fee Payable	Late Fee Payable
Within 6 months from the expiry of First Block	2% of duty saved proportionate to unfulfilled portion	-
After 6 months and upto 6 years from the date of authorization		Rs. 10,000 per authorization
After 6 years of date of Authorization for regularization		Rs. 10,000 per authorization, additional Rs. 5000 per year per authorization

In this regard, taxpayer has to pay custom duty along with applicable interest within 6 months of expiry of First Block if the application for extension is not accepted.

2. Time limit for submitting the Annual Report for fulfillment of EO extended from April 30 to June 30 of succeeding financial year.
3. Extension in EO period permitted upto 8 years subject to payment of prescribed late fees.

²³ Certificate of Origin

²⁴ Common Digital Platform

²⁵ Trade Notice No. 32/2021-22 dated January 24, 2022

²⁶ Handbook of Procedures, 2015-20

Free Trade Agreements

Economic Cooperation and Trade Agreement (ECTA) between India and Australia

India has signed the ECTA with Australia which will significantly enhance bilateral trade in goods and services, create new employment opportunities, raise living standards, and improve the general welfare of the peoples of the two countries. The ECTA covers almost all tariff lines dealt by India and Australia, respectively. India will benefit from preferential market access provided by Australia on 100% of its tariff lines, including gems and jewellery, textiles, leather, footwear, furniture, food, and agricultural products, engineering products, medical devices, and automobiles. On the other hand, India will be offering preferential access to Australia on over 70% of its tariff lines, including primarily raw materials and intermediaries such as coal, mineral ores and wines etc. (notifications for the same is awaited).

India-UAE free trade agreement comes into force on May 1, 2022

The Comprehensive Economic Partnership Agreement (CEPA) between India and the United Arab Emirates came into force on May 1, 2022 that would allow 90% of the country's exports a duty-free access to the Emirates. The CBIC has also notified Customs Tariff (Determination of Origin of Goods under the Comprehensive Economic Partnership Agreement between India and the United Arab Emirates) Rules, 2022. The said rules provide for trade in goods, rules of origin, trade in services, technical barriers to trade, sanitary and phytosanitary measures, dispute settlement, movement of natural persons, telecom, pharmaceutical products, Government procurement, intellectual property rights, investment, digital trade, etc.

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