



JSA Newsletter Indirect Tax

April 2023 Edition

Recent Rulings by Courts and Authorities

Supreme Court

Corporate guarantees provided to group companies without consideration, not a taxable service

In the case of *Commissioner of CGST and Central Excise vs. Edelweiss Financial Services Limited*¹, the Hon'ble Supreme Court of India ("Supreme Court") analyzed the taxability of corporate guarantees provided to group companies without consideration under the erstwhile service tax regime.

The assessee contended that the issuance of corporate guarantees to a group company without consideration would not fall within the scope of 'banking and other financial services' and hence, should not be considered as a taxable service.

The Tribunal in its order had observed that the criticality of 'consideration' for determination of service, as defined in section 65B(44) of Chapter V of the Finance Act, 1994 ("**Service Tax Law**") for the disputed period after introduction of 'negative list' regime of taxation has been rightly construed by the adjudicating authority. Any activity, for the purpose of taxability, should not only, reveal a 'provider', but also the flow of 'consideration' for rendering of the service. In the absence of any of these 2 (two) elements, taxability under Section 66B of the Service Tax Law does not arise.

Relying on the above findings of the Tribunal, the Supreme Court held that in absence of flow of consideration, no taxable service can be said to be provided.

JSA Comment

While the judgment is rendered in the context of Service tax regime, the issue remains relevant even under the GST² laws, wherein the supplies between the related parties could be subject to GST even if no consideration is charged towards the same. Given that there could be no like value available towards such guarantees, it may be argued that the same should not be subject to GST. However, the matter remains litigious and needs to be seen as to how courts interpret the same in the context of GST laws.

¹ Diary No. 5258/2023

² Goods and Services Tax

High Court

Refund of unutilized ITC³ can be sanctioned to an SEZ⁴ unit, provided, an undertaking to return such refund is furnished by the unit, if the supplier files a claim for such unutilized ITC

In the case of *SE Forge Limited vs. Union of India*⁵, the petitioner, a SEZ unit, engaged in manufacturing of engineering components and other parts for wind energy and other industrial sectors, exported such goods outside India under cover of a LUT⁶. The petitioner procured goods/ services from a unit located in DTA⁷, on which the supplier discharged IGST⁸. Being unable to utilize the ITC of such IGST, the Petitioner filed a refund claim for the accumulated ITC.

The refund application was rejected on the grounds that supply to SEZ unit is a zero-rated supply, and the SEZ unit is ineligible to claim refund of unutilized ITC as, the provisions for refund allow only a supplier to claim refund.

Aggrieved by the rejection of the refund claim, the petitioner filed a writ petition, contending that GST law does not distinguish between a SEZ unit and other registered persons, so far as eligibility of ITC is concerned. There is no express restriction for claiming refund of output tax or ITC by a SEZ unit under the refund provisions. Emphasis was also placed on the fact that the supplier has also not claimed refund of such GST.

The Hon'ble High Court observed that the situation is squarely covered in the case of *Britannia Industries*⁹ and *IPCA Laboratories*¹⁰, wherein it was held that the SEZ unit would be entitled to seek refund of ITC paid in connection with goods or services supplied to it. Relying on the same, the High Court in the present matter quashed the rejection orders passed by the adjudicating authorities and directed the authorities to grant refund to the Petitioner, provided a specific undertaking is submitted stating that if supplier claims refund at any point in time, the authorities will be empowered to recover the refund sanctioned to the SEZ unit, along with interest.

Restricting refund of unutilized ITC for zero-rated supply of goods to a maximum of 1.5 times of the value of like goods domestically supplied under Rule 89(4)(C) of the CGST Rules¹¹ held *ultra vires*

The Petitioner, in the matter of *Tonbo Imaging India Private Limited vs. Union of India and Others*¹², filed a writ petition before the Hon'ble High Court of Karnataka, challenging the validity of the amendment to Rule 89(4)(c) of the CGST Rules. The amendment restricted the refund of unutilized ITC on account of zero-rated supply, to the extent of 1.5 (one point five) times, of the value of like goods domestically supplied by the same or similarly placed supplier.

The Hon'ble High Court observed the following:

1. There is no rationale in restricting tax-free exports as it defeats the objective of "zero-rating".
2. A rule, being a sub-ordinate legislation, cannot surpass the parent legislation (i.e., Section 16 of the IGST Act¹³) by restricting refunds arising on account of such zero-rated supplies.

³ Input tax credit

⁴ Special economic zone

⁵ TS-67-HC(GUJ)-2023-GST

⁶ Letter of undertaking

⁷ Domestic tariff area

⁸ Integrated goods and services tax

⁹ 2020 (9) TMI 294 - Gujarat High Court

¹⁰ 2022 (2) TMI 947 - Gujarat High Court

¹¹ Central Goods and Services Tax Rules, 2017

¹² TS-108-HC(KAR)-2023-GST

¹³ Integrated Goods and Services Tax Act, 2017

3. Any restriction on the quantum of refund or any arbitrary condition, if permitted, will impede the incentive provided to the exporters, thereby causing grave hardship for the exporters, earning valuable foreign exchange for the country.
4. Phrases such as, 'like goods' and 'similarly placed supplier' suffer from vice of vagueness in as much as both the phrases are completely open-ended and not defined in the GST law.
5. Inequality is created in as much as, the quantum of refund of unutilized ITC is restricted only in cases where export of goods is made without payment of duty under LUT, however, no such restriction is imposed on cases where goods are exported with payment of duty.

In view of the above, the High Court held that the said amendment is ultra-vires the provisions of Section 16 of the IGST Act and Section 54 of the CGST Act¹⁴, and is violative of Articles 14 and 19(1)(g) of the Constitution of India.

Allegation of availment of ITC in respect of fake invoices not a ground to reject refund applications

In the case of *Balaji Exim vs. Comm., CGST*¹⁵, the petitioner, engaged in export of goods, filed applications seeking refund of unutilised ITC on account of export of goods, which was rejected by the Adjudicating Authority, on the pretext that the supplier from whom the petitioner had purchased the goods had allegedly received fake invoices from its suppliers. Aggrieved by the rejection, the petitioner approached the Hon'ble High Court of Delhi ("**Delhi High Court**").

The petitioner contended that the purchases made by it were genuine. Further, the supplier of the Petitioner was being investigated and there was no cogent material to prove that ITC was availed based on fake invoices.

The Delhi High Court observed that the petitioner's refund applications were rejected merely on the basis of suspicion and without any concrete evidence. There was no dispute that goods were exported, the invoices in respect of which the Petitioner claimed the ITC were raised by a registered dealer, and there was no allegation that the Petitioner has not paid consideration towards the invoices, which include GST. Therefore, the applications for refund cannot be denied. The Delhi High Court further observed that *bona fide* taxpayers cannot be penalised basis mere allegations and accordingly, the petitioner was entitled to refund of ITC. However, the Delhi High Court stated that in case there is material to establish the allegations raised against the petitioner, the GST authorities can initiate suitable proceedings against the petitioner.

Professional consultancy services provided to overseas entity do not qualify as 'intermediary services'

In the case of *Ernst and Young ("EY") Limited vs. Additional Commissioner CGST Appeals-II, Delhi and Anr*¹⁶, EY Limited ("**Petitioner**") is an Indian Branch Office of EY Limited, a company incorporated under the laws of United Kingdom, and established pursuant to permission granted by RBI¹⁷. The Petitioner had entered into service agreements for providing professional consultancy services to various offshore group entities ("**EY Entities**"). In lieu of the services, the Petitioner directly raised invoices on EY Entities and received consideration from them directly in convertible foreign exchange. The Petitioner treated the supply of such services as 'export of services' and claimed refund under GST as well as the erstwhile Service tax regime. However, in respect of refund(s) filed under the GST regime, the same were rejected by the adjudicating authorities contending that the Petitioner was engaged in providing 'intermediary services'. The Petitioner challenged the rejection before the Delhi High Court.

The Petitioner contended that it was providing services on a principal basis and was not arranging/ facilitating the supply for any other party. Given that the Petitioner was providing services on its own account, it contended that the

¹⁴ Central Goods and Services Tax Act, 2017

¹⁵ 2023 (3) TMI 529

¹⁶ 2023 (3) TMI 1117

¹⁷ Reserve Bank of India

place of supply for such services should be outside India (as provided under Section 13(2) of the IGST Act). It was also contended that similar refund applications were sanctioned under the erstwhile service tax regime and that there has been no change in the business model.

The Delhi High Court agreed with the Petitioner's view and observed that the Petitioner was not engaged in arranging or facilitating supply and that the Petitioner was supplying the said services on its own account. Accordingly, the services do not qualify as 'intermediary services', and the place of supply of such services will be the location of the recipient of services (i.e., outside India). Therefore, the services qualify as an 'export of services' and the Petitioner is entitled to get the refund of accumulated ITC in respect of such exports.

Appellate Authority for Advance Ruling (AAAR)/ Authority for Advance Ruling (AAR)

Vouchers neither being 'goods' nor 'services', ITC in respect of same is ineligible

The Applicant, *Mynta Designs Private Limited*¹⁸, is engaged in the business of selling fashion and lifestyle products through its e-commerce portal. The Applicant proposes to run a loyalty program where loyalty points will be awarded to the customers based on their purchases made on the platform. Through this program, the Applicant would make electronic vouchers and subscription packages available to the customers, which can be redeemed by the customers on applicable websites/ applications/ platforms. The Applicant will purchase these electronic vouchers and subscription packages in the form of electronic codes from third party vendors, who supply these codes as 'services', and charge GST thereon. The question before the AAAR was, whether the Applicant is eligible to avail ITC of GST paid on the purchase of said electronic vouchers.

The AAR held that the Applicant is ineligible to avail ITC of GST paid on the vouchers as, ITC is blocked in terms of Section 17(5)(h) of the CGST Act, i.e., when goods are disposed of by way of gifts. The Applicant challenged the said ruling before the AAAR and contended that procurement of such vouchers will essentially be in the nature of marketing spend to promote its e-commerce business and will be used in the course or furtherance of business. It was contended that once the voucher has been classified as 'services' at the supplier's end, the same cannot be re-classified as 'goods' at the Applicant's end. Therefore, the restriction under Section 17(5)(h) of the CGST Act, which is applicable only to goods, cannot be invoked in the present case. It was also argued that the vouchers are not in the nature of 'gifts', as these are given to the customers under a contractual obligation and not merely as a voluntary transfer. Therefore, ITC of GST paid on purchase of these vouchers should not be denied.

The Applicant also relied on the recent Karnataka High Court ruling in the case of *Premier Sales Promotion Private Limited v. Union of India and Ors*¹⁹, wherein the Hon'ble Court held that vouchers are neither 'goods' nor 'services' and therefore cannot be taxed. Therefore, Section 17(5)(h) of the CGST Act cannot be invoked for this reason as well.

The AAAR in the present case followed the judgment of the Karnataka High Court and admitted that vouchers are neither 'goods' nor 'services'. With regard to the eligibility of ITC, the AAAR observed that the primary condition for eligibility of ITC is that there should be an inward supply of either goods or services on which GST is charged by the supplier. Given that the vouchers are neither 'goods' nor 'services', the question of eligibility of ITC does not arise.

GST under RCM on renting 'residential-dwelling' used as 'guest-house' for company employees

The Applicant, *Indian Metals and Ferro Alloys Limited*²⁰, rented certain premises to be used as guest house by its employees for official purposes. One of the guest houses was rented from an unregistered person, whereas the other was rented from a registered person. Both the guest houses were located in the residential area and used as residential

¹⁸ 2023 (3) TMI 107

¹⁹ 2023 (2) TMI 130

²⁰ 2023 (3) TMI 622

dwelling. The issue before the AAR was whether renting service received by a registered person, of residential premises used as guest house by the Applicant is subject to GST under forward charge or reverse charge mechanism.

AAR observed that the services received by a registered person, by way of renting of residential dwelling to a registered person are subject to GST under reverse charge mechanism with no other condition. The type or nature/purpose of use of residential dwelling, i.e., for residence or otherwise by the registered recipient (tenant) is not a condition for attracting such levy. Therefore, it was held that irrespective of the nature of use of premises, residential property given on rent to a registered person whether for residential purpose or otherwise will attract GST under reverse charge mechanism, in the hands of such registered person.

Court Updates – Important issues pending before Supreme Court and various High Courts

Bharti Telemedia and Others vs. Union of India²¹

The Delhi High Court is hearing a batch of petitions challenging the *vires* of Section 16(2)(c) read with Section 16(4) of the CGST Act. In its initial observations, the Delhi High Court has noticed that the embargo placed under Section 16(2)(c) with respect to availment of ITC is similar to the condition placed under Section 9(2)(g) of Delhi Value Tax Act, 2004, which was read down to the extent of *bona fide* purchases in the case of Quest Merchandising India Private Limited²². The matter is ongoing and listed to be heard in the coming months.

Esveear Distilleries Private Limited vs. State of Andhra Pradesh²³

The Supreme Court has issued notice on the SLP²⁴ filed, challenging the order of the High Court of Andhra Pradesh ("Andhra High Court") with respect to levy of GST on job-work in relation to manufacture of alcohol. The Andhra High Court held that Notification No. 6/2021-Central Tax(Rate) dated September 30, 2021 prescribes 18% GST on job-work for manufacture of alcohol which will be applicable in the current case. Further, the issue involved in this case is also whether 'alcoholic liquor for human consumption' constitutes food or food products falling within relevant Chapters of the First Schedule of the Customs Tariff Act, 1975.

The Supreme Court has listed the matter in the month of April 2023.

Mytrah Energy India Private limited vs. Union of India²⁵

A writ challenging the '70:30' deemed valuation provision under GST for supply of solar power generating system has been filed before the Andhra High Court. The Andhra High Court has granted an interim relief to the petitioner directing the respondents not to take any coercive action until the next date of hearing.

Prahitha Construction Private Limited vs. Union of India²⁶

Constitutional validity of the levy of GST on 'transfer of land development rights' by landowners to land developers has been challenged before the High Court of Telangana. The petitioner has argued that notifications seeking to impose GST on a transaction which essentially results into sale of undivided share in land by landowners is not subject to GST being covered under entry 5 to Schedule III of the CGST (i.e., 'sale of land' is neither supply of goods nor services).

²¹ W.P.(C) 6293/2019

²² 2017 (10) TMI 1020 – Delhi High Court (affirmed by the Supreme Court)

²³ Special Leave Petition (Civil) Diary No(s). 2805/2023

²⁴ Special Leave Petition

²⁵ W.P. 5670/2023

²⁶ W.P. 5493/2020

The matter was part heard and is listed for final disposal on April 11, 2023.

Notifications/ Instructions/ Circulars/ Trade Notices etc.

Amendments under Finance Act, 2023

Finance Bill has received the assent of the President and has been enacted with effect from April 1, 2023²⁷.

We have covered below the key amendments made to the Finance Bill that was presented during the Budget Speech of the Hon'ble Finance Minister, Mrs. Nirmala Sitharaman on February 1, 2023.

1. Constitution of GST Tribunal ('GSTAT')

Sections 109 and 110 of the CGST Act (dealing with constitution of Appellate Tribunal and Benches under) have been substituted with the amended provisions²⁸. The key aspects of the amendment are as below:

- a) Principal Bench of GSTAT will be located at New Delhi comprising of a President, Judicial Member, Technical Member (Centre) and Technical Member (State). States will have discretion to constitute State Benches which will comprise of 2 (two) judicial members, one technical member (Centre) and one technical member (State).
- b) The jurisdiction for place of supply related issues will lie with the principal bench.

2. Payment of IGST on goods stored in the customs-bonded warehouse under the MOOWR²⁹ Scheme

- a) Section 65 of the Customs Act allowed imported goods to be deposited in warehouses without payment of customs duties (including IGST and compensation cess) for carrying out any manufacturing process or other operations in relation to such goods. Such duties were payable on clearance of goods from the warehouse for home consumption. For warehousing imported goods, importer was required to file into-bond bill of entry, whereas, for clearance of goods for home consumption, importer filed ex-bond bill of entry and discharged applicable customs duties thereon.
- b) Section 65A has been inserted in the Customs Act³⁰, which provides for payment of IGST and compensation cess at the time of depositing goods in the warehouse, for carrying out manufacturing and other operations under Section 65. However, basic customs duty can be paid at the time of clearance of goods for home consumption.
- c) Upon notification of Section 65A, an importer will be required to file a bill of entry for home consumption and pay applicable IGST and compensation cess at the time of depositing the goods in the warehouse. Section 65A will only apply to goods warehoused after the date of notification of this provision and not to goods already warehoused.

Services received from Courts and Tribunals subject to GST under RCM³¹

Notification 02/2023 - Central Tax (Rate) dated February 28, 2023

Courts and Tribunals are considered at par with Central Government and State Governments. Accordingly, services received from Courts and Tribunals will be subject to GST under RCM such as renting of immovable property to a registered person.

²⁷ Lok Sabha passed the Finance Bill, on March 24, 2023, which received the Presential assent on March 31, 2023

²⁸ To be implemented from a date to be notified

²⁹ Manufacturing & Other Operations In Warehouse

³⁰ Pending to be notified

³¹ Reverse Charge Mechanism

Extension of time limit and introduction of one-time amnesty scheme

Notification Nos. 2, 3, 4, 6, 7 and 8/2023-Central Tax, dated March 31, 2023

As per recommendations of the 49th GST Council Meeting held on February 18, 2023, following amendments are notified in the CGST Act regarding extension of time limit and introduction of one-time amnesty scheme in respect of the following:

1. Where, in response to registration cancelled on or before December 31, 2022 for specified defaults³², a registered person failed to apply for revocation of cancellation within the time limit specified in Section 30 of the CGST Act, such person can apply for revocation of cancellation of registration up to June 30, 2023.
2. Waiver of late fee prescribed under Section 47 of CGST Act for failure to file return in FORM GSTR-4 (Composition Dealers) within prescribed due date, in excess of INR 250 and fully waived where total amount of central tax payable is 'nil', for the following periods:
 - a) for quarters July, 2017 to March 2019, or
 - b) for FY 2019-20 to 2021-22.
3. Rule 8(4A) of CGST Rules suitably amended regarding procedure for authentication of Aadhaar number followed by biometric-based Aadhaar authentication.
4. Special procedure for filing return by classes of person who have failed to file valid return within 30 (thirty) days from the service of the assessment order issued on or before February 28, 2023 has been notified. Such persons can file return up to June 30, 2023 accompanied by payment of interest due under Section 50 of the CGST Act and the late fee payable under Section 47 of the CGST Act. The provision is made irrespective of whether or not an appeal has been filed against such assessment order or whether or not the appeal, if any, filed against the said assessment order has been decided.
5. Partial waiver of late fees in respect of delayed filing of annual return for FY 2022-23 onwards is notified. The Notification prescribes waiver of INR 25 (Indian Rupees twenty five) per day for a registered person having aggregate turnover of up to INR 500,00,00,000 (Indian Rupees five hundred crore), and INR 50 (Indian Rupees fifty) per day in cases of turnover of more than INR 500,00,00,000 (Indian Rupees five hundred crore). The amount of said late fee will be subject to a maximum limit of an amount calculated at 0.02 % of turnover in the State or Union territory for both the categories of registered persons.
6. Waiver of amount of late fee which is in excess of INR 500 (Indian Rupees five hundred) for a registered person who failed to furnish return in FORM GSTR-10 (Final Return) by the due date but furnishes the said return between period April 1, 2023 to June 30, 2023.

Service Tax on liquidated damages, compensation and penalty arising out of breach of contract, forfeiture of notice pay, bond, etc.

Circular No. 214/1/2023-Service Tax dated February 28, 2023

CBIC³³ clarified on the levy of service tax on the declared service of "agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act" as provided under clause (e) of section 66E of the Service Tax Law. Relying on Circular No. 178/10/2022-GST dated August 3, 2022, CBIC clarified that activities contemplated under Section 66E(e) of the Service Tax Laws, are activities conceived in an independent contractual agreement which specifically refer to such an activity, where one person agrees to an obligation to refrain from an act or to tolerate an act or to do an act and the other person agrees to pay consideration to the first party for this activity. The Circular also

³² (i) a Composition Dealer who has not furnished the return for a financial year beyond 3 (three) months from the due date of furnishing the said return; or
(ii) any registered person, other than above, who has not furnished returns for such continuous tax period as may be prescribed.

³³ Central Board of Indirect Taxes and Customs

highlights various decisions of CESTAT³⁴ which have not been challenged by the Government. The CBIC has directed field formations to determine taxability basis guidelines laid down above and in Circular No. 178/10/2022-GST dated August 3, 2022.

Phased implementation of electronic cash ledger (ECL) in Customs to be operational with effect from April 1, 2023

Circular No. 09/2023 dated March 30, 2023

In terms of Section 51A of the Customs Act³⁵, an importer, exporter or any other person liable to pay duty, fees, etc. under the Customs Act, is required to make a non-interest-bearing deposit with the Government for the purpose of payment. In this regard, phased implementation of ECL³⁶ has been prescribed.

Extension of date for mandatory electronic filing of Non-Preferential Certificate of Origin (CoO) to December 31, 2023

Trade Notice No. 27/2022-2023 dated March 28, 2023

DGFT³⁷ has further extended the date for mandatory electronic filing of Non-preferential CoO through common digital portal to December 31, 2023. In the interim, the exporters and the Non-preferential CoO issuing agencies have the option to use the online system or process applications in manual/ paper mode form.

GST e-invoicing portal mandates taxpayers to report 6-digit HSN code

In compliance with Notification No. 78/2020 – Central Tax dated October 15, 2020, GST e-invoicing portal requires taxpayers having aggregate annual turnover of more than INR 5,00,00,000 (Indian Rupees five crore) to report 6-digit HSN codes for outward supplies. The system will block 4-digit HSN codes (from a date to be notified).

³⁴ Customs Excise and Service Tax Appellate Tribunal

³⁵ Customs Act, 1962

³⁶ The Customs (Electronic Cash Ledger) Regulations, 2022 (ECLR) notified vide Notification No. 20/2022-Customs (N.T.) dated March 30, 2022 provide the manner of operationalization of ECL and related aspects.

³⁷ Directorate General of Foreign Trade

Tax Practice

JSA offers a broad range of tax services, both direct and indirect, in which it combines insight and innovation with industry knowledge to help businesses remain compliant as well as competitive. The Tax practice offers the entire range of services to multinationals, domestic corporations, and individuals in designing, implementing and defending their overall tax strategy. Direct Tax services include (a) structuring of foreign investment in India, grant of stock options to employees, structuring of domestic and cross-border transactions, advising on off-shore structures for India focused funds and advise on contentious tax issues under domestic tax laws such as succession planning for individuals and family settlements, (b) review of transfer pricing issues in intra-group services and various agreements, risk assessment and mitigation of exposure in existing structures and compliances and review of Advance Pricing Agreements and (c) litigation and representation support before the concerned authorities and before the Income Tax Appellate Tribunal, various High Courts and Supreme Court of India. Under the Indirect Tax, JSA provides services such as (a) advisory services under the Goods and Services Tax laws and other indirect taxes laws (VAT/ CST/ Excise duty etc.), and includes review of the business model and supply chain, providing tax implications on various transactions, determination of tax benefits/exemptions, analysis of applicability of schemes under the Foreign Trade Policy (b) transaction support such as tax diligence (c) assistance in tax proceedings and investigations and (d) litigation and representation support before the concerned authorities, the Appellate Tribunals, various High Courts and Supreme Court of India. The team has the experience in handling multitude of assignments in the manufacturing, pharma, FMCG, e-commerce, banking, construction & engineering, and various other sectors and have dealt with issues pertaining to valuation, GST implementation, technology, processes and related functions, litigation, GST, DRI investigations etc. for large corporates.

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17 Practices and
24 Ranked Lawyers



16 Practices and
11 Ranked Lawyers



7 Practices and
2 Ranked Lawyers



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