

Recent Rulings by Courts and Authorities

Supreme Court

Dues under Customs Act do not override the rights of secured creditors

In the case of *Industrial Development Bank of India (“IDBI”) v. Superintendent of Central Excise and Customs & Others*¹, IDBI was providing financial support to Sri Vishnupriya Industries Limited (“SVIL”), for which SVIL *inter alia* hypothecated movable properties as security. This included imported machinery from Italy which was warehoused in a private bonded warehouse. SVIL did not clear the goods for home consumption even after expiry of the period for warehousing and consequently, customs authorities issued a SCN² demanding customs duty on the Company. However, the Company contested the SCN, resulting in the customs authorities confirming the demand of duty in the SCN and ordered for auctioning of the warehoused goods.

In the meanwhile, the petition filed by the Company for winding up was admitted by the Andhra Pradesh High Court (“AP High Court”). Thereupon, the official liquidator *vide* application under Section 468 of the Companies Act, 1956 (“Companies Act”) directed the customs authorities to handover possession of the imported goods, which had been put up for auction. An application before AP High Court in this regard was allowed holding that the official liquidator is a custodian of all the properties of the Company and any person making any claim against the Company has to prove his claim before the official liquidator. Aggrieved by the view of the AP High Court, the custom authorities preferred an appeal before the division bench and it was decided in their favor that the customs authorities have the first right to sell the imported goods under the Customs Act and adjust the sale proceeds towards payment of customs duty. IDBI, as a secured creditor, challenged the said decision of the division bench of AP High Court before the Supreme Court.

The Supreme Court perused the provisions of Companies Act and the Customs Act, 1962 (“Customs Act”) pertaining to preferential claims and held that the provisions in the Customs Act do not override the statutory preference in terms of Section 529A of the Companies Act, which treats the secured creditors and the workmen’s dues as overriding preferential creditors. Accordingly, the decision of the AP High Court was set aside, and Supreme Court ordered to pay the auction proceeds of the imported goods to the official liquidator, for distribution in accordance with the provisions of the Companies Act.

¹ 2023 (8) TMI 945 – Supreme Court

² Show Cause Notice

Interest and penalty cannot be levied on delayed payment of customs surcharge, CVD and SAD in absence of statutory provisions

In the case of *Union of India & Ors. v. Mahindra and Mahindra Ltd*³, the assessee engaged in the manufacture of automobiles, filed applications before the Settlement Commission in relation to customs duty demand pertaining to under declaration of value of imported goods. The Settlement Commission confirmed the duty demand along with interest and partial penalty. The assessee approached the High Court of Bombay (“**Bombay High Court**”) challenging the levy of interest and penalty on additional duties of customs, such as CVD⁴, SAD⁵ and surcharge, arguing that there is no enabling provision under the Customs Act and rules issued thereof for imposition of interest and penalty on said duties of customs.

The Bombay High Court held that interest and penalty provisions under the Customs Act and rules issued thereof are applicable with respect to short payment of BCD⁶ only, and there is no specific provision under Customs Act and rules issued thereof to levy interest or penalty on the additional duties such as CVD, SAD and surcharge. Further, a taxing statute must be construed strictly, and tax can be imposed only when the language of the statute expressly provides for it. Thus, in the absence of any substantive provision under the Customs Act and rules issued thereof the Bombay High Court quashed the orders of Settlement Commission and directed refund of interest and penalty.

Against the order of Bombay High Court, the tax authorities preferred a SLP⁷ before the Supreme Court, which was dismissed and accordingly, the decision of the Bombay High Court i.e., interest/ penalty cannot be levied on delayed or non-payment of CVD/SAD and surcharge, has attained finality.

JSA Comment: This decision has reinforced the well-established principle that no demand can be sustained without necessary statutory provisions. Considering that the Department’s SLP is dismissed, the taxpayers may consider evaluating the position adopted by them and seek refund of interest and penalty paid on delayed payment of CVD and other levies.

High Court

ITC⁸ cannot be denied to recipient for non-reporting by supplier, without conducting proper investigation against supplier

In the matter of *Suncraft Energy Pvt. Ltd. v. The Assistant Commissioner, State Tax, Ballygunge Charge*⁹, the assessee was availing ITC of GST¹⁰ paid on procurements. However, some of vendors did not report the details of the supplies made in their outward GST returns (GSTR-1) and consequently the details of such supplies did not appear in the assessee’s GSTR-2A. The tax authorities conducted scrutiny of the returns filed by the assessee and issued an SCN seeking reversal of ITC to the tune of difference in the amount between Form GSTR-3B vis-à-vis Form GSTR-2A. Further, no investigation was conducted on the concerned vendor who did not report the sales made to the assessee. Without appreciating the submissions made by the assessee in relation to the said notice, the GST demand was confirmed by the tax authorities.

Being aggrieved by the above, the assessee approached the Calcutta High Court, which ruled in favor of the assessee and made the following observations:

1. In order to avail ITC, the conditions under Section 16(2) of the CGST Act¹¹ are required to be fulfilled. In the instant case, the fact that the assessee is in possession of a valid tax invoice and has received the services is not in dispute. The payment of tax to the vendors has also been substantiated through the tax invoice and bank statement. Therefore, the tax authorities have blatantly ignored such evidence and denied ITC to the assessee, merely by

³ 2023 (8) TMI 135 – SC Order

⁴ Countervailing Duty

⁵ Special Additional Duty

⁶ Basic Customs Duty

⁷ Special Leave Petition

⁸ Input Tax Credit

⁹ 2023 (8) TMI 174 - Calcutta High Court

¹⁰ Good and Services Tax

¹¹ Central Goods and Services Tax Act, 2017

relying upon the mismatch between Form GSTR-2A and Form GSTR-3B, without investigating the actions of the vendor.

2. There cannot be automatic reversal of ITC from the buyer on non-payment of tax by the supplier. In case of default in payment of tax by the seller, recovery thereof will be made from the seller. However, reversal of ITC availed by the buyer will also be an option available with the tax authorities, to address exceptional situations like collusion between the taxpayer and the supplier, missing dealer, closure of business by supplier or supplier not having adequate assets, etc.
3. Further, furnishing of outward supplies in Form GSTR-1 by the corresponding supplier and the facility to view the same in Form GSTR-2A (of the recipient) is to facilitate the taxpayers and does not impact the taxpayer's ability to claim ITC.

On the basis of the above, the Calcutta High Court set aside the impugned demand order, with a direction to revenue authorities for proceeding against the vendor first, and only in exceptional circumstances proceedings against the buyer should be initiated.

Recipient not entitled to ITC unless tax is deposited by the supplier to Government

In contrast to the above decision, the Patna High Court in the case of *Aastha Enterprises v. The State of Bihar*¹², dismissed the writ petition of an assessee and reinforced the importance of fulfillment of all conditions prescribed under the CGST Act for availing ITC, making the following observations:

1. Section 16(2) of the CGST Act provides conditions to claim ITC. These conditions are to be fulfilled cumulatively and not in isolation. If any condition is not fulfilled, then the purchaser is not eligible to claim the ITC. ITC is a benefit or concession and not a vested right and the benefit will be available only if all the conditions for claiming the benefit are complied with.
2. Even though the purchaser has produced evidence in the form of invoices, account details showing payment made to the supplier and documents evidencing transportation of goods, the recipient should not be entitled for ITC unless tax is paid by the supplier. The recipient is still required to fulfil the condition provided in Section 16(2)(c) of the CGST Act, which states that credit can be availed by the purchaser only if tax has actually been paid to the government.
3. Moreover, the fact that there is a mode of recovery from supplier under the statute would not absolve the ultimate liability of the assessee to pay tax to the government. Further, rejecting the double taxation argument of the assessee, the Patna High Court stated that taxation is mandatory extraction for public welfare.

JSA Comment: The Patna High Court judgment has come as a wake-up call. It requires the purchasing dealer to be vigilant not only in connection with its own compliance but also in connection with compliance by the supplier in order to avail itself of the benefit of ITC. While there are judgments such as the recent order of Calcutta High Court in the matter of *Suncraft Energy Pvt Ltd* (supra), allowing ITC on the ground that the purchasing dealer cannot be held liable for the actions of the supplier, any default by the supplier is likely to result in litigation. Considering divergent decisions on this issue by different high courts, the matter is likely to be litigated before the Supreme Court.

Transferring digital work to foreign-recipient not OIDAR merely because of being sent electronically

In the case of *Globolive 3D Private Limited v. Union of India*¹³, the assessee, entered into a service agreement with Emirates Defence Industries Co. PJSC for supplying satellite derived 3D city models of specific areas in Abu Dhabi. In this regard, assessee imported high-resolution stereo satellite images, processed and digitized such satellite images, and thereafter sent the same to relevant parties *via* file transfer protocol. The assessee adopted the position that the

¹² 2023 (8) TMI 1038 - Patna High Court

¹³ 2023 (8) TMI 1264 - Bombay High Court

services supplied by them are export of services under GST, and therefore eligible for refund of unutilized ITC under section 54 of CGST Act.

The refund claims of the assessee were initially sanctioned by the revenue authorities, however, subsequently they filed an appeal against such refund order, on the ground that the activity of purchasing the satellite extracted images from unrelated party, processing it as per the customer requirements, and transferring the same through online medium was nothing but OIDAR Services¹⁴. The appellate authority allowed the appeal considering the submissions of the GST authorities.

Being aggrieved by the said order, the assessee filed a writ petition before the Bombay High Court on the ground that the assessee is undoubtedly involved in export of services, since the location of service recipient is outside the Indian territory, and the assessee has complied with the conditions of Section 2(6) of IGST Act¹⁵. The Bombay High Court allowed the writ petition and made the following observations:

1. The service is intended for recipient located outside India, and the place of supply was agreed to be outside India. The payment was received in convertible foreign exchange, confirming compliance with all the conditions for export of services as laid down under Section 2(6) of the IGST Act.
2. The classification of any service as OIDAR Services is not merely on the basis of delivery being mediated by information technology over the internet or through an electronic network. The specialized nature of services provided by the assessee, involving creation of 3D city models are not works which would be freely available on the internet and hence, did not fit the criteria of automated supply with minimal human intervention as specified in the definition of OIDAR Services. Thus, the Court emphasized that such services were not automated and characterized by human involvement, unlike typical OIDAR Services.
3. Adopting the revenue's interpretation would lead to an absurd outcome, categorizing any form of electronic communication or providing of service through the medium of emails or any electronic transfer of data as OIDAR Services, which contradicted the intended meaning of OIDAR Services under IGST Act.

Notifications and Circulars

CGST (Second Amendment) Rules, 2023

Notification No. 38/2023 dated August 4, 2023

The Government has notified the following amendments to the CGST Rules¹⁶, which have come into effect from August 4, 2023 (except expressly provided below):

1. **Requirement to furnish details of bank account at the time of registration:** Taxpayers are required to furnish information of bank account on GST portal within 30 (thirty) days from the date of registration or before filing of first GSTR-1, whichever is earlier. Contravention of this provision may lead to suspension of registration.
2. **Extension of period for filing an application for revocation of cancellation of registration:** Taxpayers can file an application for revocation of cancellation of registration within a period of 90 (ninety) days (earlier, the period was 30 (thirty) days), from the date of the service of order of cancellation of registration.
3. **Changes related to Returns:** Rule 88D has been inserted to provide for manner of dealing with difference in ITC availed in GSTR-3B and ITC reflecting in GSTR-2B. As per the said provision, the GST Council will recommend amount and percentage of difference beyond which taxpayer will be intimated in Part A of DRC-01C to pay amount equivalent to excess ITC availed or furnish explanation in respect thereof within 7 (seven) days. If the taxpayer fails to furnish any satisfactory response or pay amount equivalent to differential ITC, proceedings under Section 73 or Section 74 of the CGST Act will be initiated. In furtherance of this, Rule 59 is also amended to bar filing of

¹⁴ Online Information Database Access or Retrieval services

¹⁵ Integrated Goods Services Tax Act, 2017

¹⁶ Central Goods and Services Tax Rules, 2023

GSTR-1 for subsequent tax period where (a) requisite payment or explanation is not furnished, as per Rule 88D; or (b) taxpayer has not furnished details of bank account.

4. **Particular of tax invoices issued by e-commerce operator or supplier of OIDAR services:** Rule 46 is amended to provide that tax invoice for supplies made by e-commerce operator or supplier of OIDAR services to an unregistered person only needs to contain name of State of recipient and same will be deemed as address on record of the recipient.
5. **Value of exempt supply to include supplies from Duty Free Shops to inbound passengers:** Clause (b) of Explanation to Section 17(3) of the CGST Act, allows the Government to prescribe value of such activities or transaction under Para 8(a) of Schedule III of the CGST Act viz. supply of warehoused goods, that would be included in 'value of exempt supply' for reversal of ITC. In furtherance of the same, Explanation is added to Rule 43 of the CGST Rules to provide that value of supply of goods from Duty Free Shops at arrival terminal in international airports to incoming passengers will be included in value of exempt supply. This amendment will be effective from October 1, 2023.
6. **Interest on delayed refund:** Rule 94 is amended to exclude following period for calculating interest on delayed refund under Section 56 of the CGST Act:
 - a) Period beyond 15 (fifteen) days of receipt of notice in RFD-08 taken by taxpayer to furnish reply or for submitting additional documents;
 - b) Period taken by taxpayer to correctly furnish or validate details of bank account.
7. **Manual filing of appeal before the Appellate Authority:** The taxpayer has been given an option of manually filing an appeal to the Appellate authority in FORM GST APL-01 along with relevant documents if;
 - a) The Commissioner has so notified, or,
 - b) The same cannot be filed electronically due to non-availability of the decision or order to be appealed against on the common portal.

In such cases, a provisional acknowledgment will be issued to the appellant immediately.

CBIC exempts LPG¹⁷ imports from AIDC¹⁸

Notification No. 51/2023-Customs dated August 31, 2023

The CBIC has issued a notification to exempt imports of LPG, liquified propane and liquified butane from 15% AIDC with effect from September 1, 2023.

The CGST (Amendment) Act, 2023 and the IGST (Amendment) Act, 2023

Act No. 30/ 2023 and Act No. 31/ 2023 dated August 18, 2023

Pursuant to the recommendations of the GST Council recently, Parliament has passed 2 (two) GST Amendment Bills *inter alia* clarifying the taxation of online gaming, casinos and horse racing, which received assent of the President on August 18, 2023. The date on which respective provisions of these enactments would come into effect would be notified by the Government. The highlights of the key amendments proposed in the above amendment acts are as follows:

¹⁷ Liquefied Petroleum Gas

¹⁸ Agriculture Infrastructure Development Cess

1. Online Gaming:

- a) Section 2 of the CGST Act is amended to define terms 'online gaming', 'online money gaming', 'specified actionable claim' (betting, casinos, gambling, horse racing, lottery and online money gaming) and 'virtual digital asset'.
- b) Definition of 'supplier' under Section 2(105) is expanded to include person who organizes or arranges supply of specified actionable claim.
- c) Definition of OIDAR services is amended to exclude online money gaming from its scope.
- d) Entry 6 of Schedule III is amended to exclude specified actionable claims from scope of no supply transactions.
- e) Section 24 of CGST Act is amended to mandate GST registration for a person located outside India supplying online money gaming services in India.
- f) Section 14A of the IGST Act is inserted to provide for special provisions for registration when online money gaming services are supplied by a person located outside India to a person located in India.

2. Place of Supply:

Section 10 of the IGST Act is amended to provide for place of supply of goods supplied to an unregistered person. In such cases, place of supply will be location of address of recipient as recorded in tax invoice issued by supplier or location of supplier where address is not recorded in tax invoice.

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. Indirect Tax services include 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. 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.

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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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