December 2023

Recent Rulings by Courts and Authorities

Supreme Court

Supreme Court interprets the definition of "Governmental authority" under Service tax

In the case of ***Commissioner, Customs Central Excise and Service Tax, Patna & Others v. Shapoorji Pallonji and Company Private Limited & Another***[1], Shapoorji Pallonji and Company Private Limited ("**Respondent**") is engaged in the business of providing construction services. The Respondent was awarded a contract for construction works by IIT Patna and NIT Rourkela. The Respondent registered itself under Service tax laws[2] and discharged Service tax liability for the period from March 2013 to April 2015 on the said contract. While IIT Patna reimbursed the amount of Service tax paid by the Respondent, NIT Rourkela refused to reimburse the said amount claiming that the work executed is exempt from the payment of Service tax.

The Indian Audit and Account Department ("**IAAD**") raised an objection that as per clause 12(c) of Notification No. 25/2012 dated June 20, 2012 ("**Exemption Notification**"), IIT Patna, being a "governmental authority", is not required to pay Service tax. Consequently, directions were issued to undertake action to recover or adjust the Service tax reimbursed to the Respondent.

Clause 12(c) of Exemption Notification exempted levy of service tax on construction services provided to "governmental authority" in specified cases. The term "governmental authority" was defined under clause 2(s) of the Exemption Notification (as amended on January 30, 2014).

"Governmental authority" means an authority or a board or any other body;

(i) set up by an Act of Parliament or a State legislature; or

(ii) established by Government,

with 90% or more participation by way of equity or control, to carry out any function entrusted to a municipality under article 243W of the Constitution."

In view of the above backdrop, writ petitions were filed by the Respondent before High Court of Patna ("**Patna HC**") and Orissa ("**Orissa HC**") respectively to determine whether IIT Patna and NIT Rourkela qualify as "governmental authority" and whether the exemption from Service tax would be available.

Patna HC held that IIT Patna would be covered within the definition of "governmental authority" stipulated under amended clause 2(s) and hence eligible for aforesaid exemption. It interpreted that the condition of "90% or more

1 2023 (10) TMI 748 - Supreme Court
2 Chapter V of Finance Act, 1994 read with allied rules, notifications, etc.

participation by way of equity or control, to carry out any function entrusted to a municipality under Article 243W of the Constitution" is only relevant to sub-clause (ii) of clause 2(s) of the Exemption Notification. The same condition cannot be read with sub-clause (i) as, it separated by "semicolon" and by a conjunction "or". The same view was maintained by Orissa HC for services rendered to NIT Rourkela.

Aggrieved by the Patna HC and Orrisa HC orders, the revenue authorities filed an appeal before the Hon'ble Supreme Court of India ("**Supreme Court**") wherein it was held as follows:

1) The scope of term "governmental authority" was widened to provide exemption even to an authority or a board or any other body, set up by an Act of Parliament or a State Legislature without being subjected to condition of having been established with 90% or more participation by way of equity or control by Government to carry out any function entrusted to a municipality under Article 243W of the Constitution.

2) In this regard, the Supreme Court observed that the use of semicolon followed by the word "or" in sub-clause (i) and comma in sub-clause (ii) indicates that the words stating "90% or more participation by way of equity or control, to carry out any function entrusted to a municipality under Article 243W of the Constitution" would be applicable only to sub-clause (ii) of clause 2(s), i.e. "governmental authority" which is established by Government.

3) Given that the language and meaning of the above clause in clear and unambiguous, the Supreme Court highlighted that there is no need to resort to rules of interpretation. Harmonious construction is required only when provisions are ambiguous or lack clarity. A statute should be interpreted in a manner to achieve their ordinary, natural and grammatical meaning.

4) Further, one does not read "or" as "and" in a statute unless one is obliged to, as "or" does not generally mean "and" and "and" does not generally mean "or". Thus, the word "or" in clause 2(s) between sub-clauses (i) and (ii) indicates the independent and disjunctive nature of sub-clause (i).

5) Accordingly, the Supreme Court upheld the rulings of Patna HC and Orissa HC to state that IIT, Patna and NIT Rourkela are "governmental authority" within the meaning of the term as explained under clause 2(s) (ibid) and hence, no Service tax should apply.

High Courts

Notification laying down additional conditions beyond the Policy is contrary to the principles of promissory estoppel

In the case of ***Atibir Industries Company Ltd. v. The State Tax Jharkhand & Ors***,[3] the State of Jharkhand introduced the Jharkhand Industrial Investment and Promotion Policy, 2016 ("**Policy**") on February 16, 2016, offering subsidy on Value Added Tax ("**VAT**") in the form of reimbursement of 75% of the "Net VAT" paid per annum, for 7 (seven) years for large new projects. Post introduction of GST, the policy was amended offering an incentive of 75% reimbursement of SGST paid. Accordingly, Atibir Industries Company Ltd. ("**Petitioner**") applied for reimbursement of tax under the policy. However, the same was not disbursed due to an explanation added to the policy by notification, dated March 7, 2019, i.e., after the policy was in force, which stated that incentives under the policy will be restricted if Input Tax Credit ("**ITC**") on supplies are claimed by the buyer. In the Petitioner's case, its buyers were availing ITC.

Aggrieved by the denial of reimbursement, the Petitioner preferred a writ petition before the Jharkhand High Court ("**Jharkhand HC**") contending that insertion of an additional condition retrospectively into the policy curtails the benefits offered by the policy and is without jurisdiction. The State being bound by the doctrine of promissory estoppel and legitimate expectation, cannot amend the policy.

In the above backdrop, the Jharkhand HC held as follows:

1) Any notification issued by the State Government, if found to be repugnant to the policy declared in a government resolution, the said notification must be held bad in law, to that extent.

[3] 2023 (9) TMI 1355 – Jharkhand High Court

2) An additional condition introduced and laid down in the operational guidelines is *ultra vires* the policy in the absence of public interest. Overriding public interest would prevail over a plea based on promissory estoppel, but in the present case, the State could not prove any overriding public interest or equity.

3) When a right has already accrued and the conditions for availing the benefits have been fulfilled then the amendment cannot affect the already accrued rights. It was observed that the State and its instrumentalities can be made subject to the equitable doctrine of promissory estoppel in cases where because of their representation the party claiming estoppel has changed its position.

4) The notification, which has an effect of destroying the acquired, accrued and vested right of the petitioner, is without any authority, is irrational and unreasonable, and violative of Article 14 of the Constitution of India, and is unsustainable. Thus, the acquired right of the Petitioner cannot be curtailed.

5) Therefore, the amendment carried out vide the Notification dated March 7, 2019, is not legally sustainable and directed the State to release the amount towards reimbursement of SGST subsidy to the Petitioner.

Amount retained by revenue authorities, voluntarily paid by a taxpayer under protest, liable to be refunded

In the case of ***The Hongkong and Shanghai Banking Corporation Limited v. Union of India and Others***[4], Hongkong and Shanghai Banking Corporation Limited ("**the Petitioner**"), pursuant to an audit conducted by the revenue authorities of the books of accounts of the Petitioner for period March 2007 to April 2012, it was observed that the Petitioner had failed to discharge service tax on interchange income earned by the Petitioner from the merchant establishment. Based on the said observation, a 'final audit report was also issued highlighting the non-payment of service tax on the interchange income. To this effect, the Petitioner deposited the sum under protest.

Considering that no show cause notice ("**SCN**") was ever issued by the revenue authorities for a period of 10 (ten) years and that the issue of taxability of 'interchange income' was pending before the larger bench of the Hon'ble Supreme Court, the Petitioner applied for refund of the amount paid under protest. However, the refund applications were rejected by the authorities.

Being aggrieved, the Petitioner moved the Hon'ble Bombay High Court ("**Bombay HC**") seeking refund of amount retained by the authorities without authority of law.

The Bombay HC observed that the Petitioner, time and again, had pointed out to the revenue authorities, that the aforesaid amount was deposited under protest and should not be construed as acceptance of authorities' view regarding levy of service tax on interchange income. It was further observed that the authorities had clearly failed in setting into motion the provisions of law by way of issuing a SCN seeking recovery of service tax on the subject transaction.

In view of the above, the Bombay HC held that the amounts deposited by the Petitioner were retained by the authorities without the authority of law, and hence, the refund claim of the Petitioner could not have been denied. Accordingly, the Bombay HC directed the revenue authorities to refund the amount paid by the Petitioner under protest along with applicable interest.

Withdrawal of MEIS Scheme[5] applicable prospectively

In the case of ***Indian Flexible Intermediate Bulk Container Association v. Directorate General of Foreign Trade ("DGFT")***[6], the Indian Flexible Intermediate Bulk Container Association ("**the Petitioner**") is an association comprising of manufacturers and exporters of Flexible Intermediate Bulk Container ("**FIBC**"). The members of the Petitioner ("**Exporters**") were claiming benefits conferred under the MEIS Scheme since its implementation.

4 2023 (11) TMI 965
5 Merchandise Exports from India Scheme
6 2023 SCC Online Del 7177

Leveraging the benefits provided under the MEIS Scheme, the Exporters were rigorously expanding their export operations and were suitably factoring the incentives in their export prices. On January 29, 2020, a notification was issued by DGFT wherein benefits conferred under the MEIS Scheme for export of certain items (including FIBC) was discontinued with effect from March 7, 2019 ("**Impugned Notification**"). The Petitioner filed a Writ Petition before the Hon'ble High Court of Delhi ("**Delhi HC**") challenging the Impugned Notification, to the extent it retrospectively revoked the benefits provided under the MEIS Scheme and sought directions against DGFT to ensure that the Impugned Notification is applied prospectively.

The Delhi HC observed that while prospective amendments are within the Central Government's purview, retrospective changes that could devastate an entire sector raise serious concerns and may lead to breach of fundamental tenets of natural justice and equity. Relying on the Supreme Court case of ***DGFT v. Kanak Exports***[7], the Delhi HC ruled that Section 5 of the FTDR Act[8] does not permit the central government to promulgate rules with a retrospective effect. Retrospective application is an exception and can only be permitted if explicitly provided by the parent statute.

Basis the above, the Delhi HC ruled that the Impugned Notification insofar it withdraws the benefits conferred under the MEIS Scheme on FIBC, is applicable prospectively only and directed DGFT to process the applications in respect of exports made till the date of issuance of the Impugned Notification.

Rule 89(4)(C) restricting refund by capping value of 'export turnover' applicable prospectively

In the case of ***Indian Herbal Store Private Limited vs. Union of India***[9], Indian Herbal Store Private Limited ("**the Petitioner**") filed applications for refund of accumulated unutilized ITC on export of goods made during the period from October 1, 2018 to September 30, 2019 ("**Impugned Period**"). The applications were rejected on the ground that the 'turnover of zero-rated supply of goods' is not in accordance with amended Rule 89(4)(C) of the CGST Rules[10]. Even the Appellate Authority upheld the refund rejection orders on the same grounds ("**Impugned Order**"). Aggrieved by the Impugned Order, the Petitioner filed a writ petition against the Impugned Order challenging the constitutional vires of Rule 89(4)(c) of CGST Rules.

Rule 89(4)(C) of CGST Rules, introduced *vide* notification no. 16/2020 – Central Tax dated March 23, 2020, defines the term 'turnover of zero-rated supply of goods' to mean the value which is 1.5 (one point five) times the value of like goods domestically supplied by the same or, similarly placed supplier, as declared by the supplier, whichever is less. In a way, the refund of ITC is restricted by keeping the value of the export turnover limited to 1.5 (one point five) times the value of similarly placed goods.

The Delhi HC highlighted that the right for refund of accumulated ITC stands crystallised on the date when the goods are exported. It is also evident from perusal of Section 54 of the CGST Act[11] read with meaning of the term 'relevant date' contained in the Explanation thereto, that the limitation for applying for refund in respect of export of goods/ services is reckoned from the date when the goods/ services are exported. Therefore, the expression 'turnover' has to be read in reference to the period to which it relates and has to be computed basis the provision as applicable during such period. Rule 89(4)(C) was not applicable during the Impugned Period in the present case.

With regard to the constitutionality of amended Rule 89(4)(C), the Delhi HC further observed that the provision has already been struck down by the Karnataka High Court in the case of *Tonbo Imaging India Private Limited vs. Union of India*[12], therefore, as on date, the amended provisions are non-existent.

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7 Director General of Foreign Trade and Another v. Kanak Exports and Another, (2016) 2 SCC 226
8 Foreign Trade (Development and Regulation) Act, 1992
9 Indian Herbal Store Private Limited vs. Union of India, 2023 (10) TMI 306 – Delhi High Court.
10 Central Goods and Services Tax Rules, 2017
11 Central Goods and Servies Tax Act, 2017
12 2023 (4) TMI 46 – Karnataka High Court

In view of the above, the Delhi HC set aside the Impugned Order and upheld the Petitioner's right to claim refund of the accumulated ITC in respect of exports made prior to March 23, 2020.

GST Council cannot determine classification of goods

In the matter of ***Parle Agro Private Limited v. Union of India***[13], Parle Agro Private Limited ("**Petitioner**") challenged the classification of 'flavored milk' under HSN[14] Code 2202 (attracting 12% GST) instead of HS Code 0402 (attracting 5% GST) and prayed for issuance of a writ of *Certiorarified Mandamus* for calling the record of 31st GST Council Meeting held on December 22, 2018, pertaining to the decision of the GST Council to classify 'Flavored Milk' under HSN Code 2202 (beverage containing milk) instead of 0402 (dairy based product) and quashing the same. The Petitioner argued that the GST Council's role is limited to placing recommendations, and it does not have the authority to conclusively determine classification of goods or services.

Upon perusal of Article 279A (4) of the Constitution of India, the High Court of Madras ("**Madras HC**") highlighted that the recommendations of the GST Council are recommendatory in nature and are not binding on the government. This interpretation also finds place in the ruling of the Supreme Court in the case of *Union of India and Mohit Minerals Private Limited*[15], wherein it was held that the recommendations of the GST Council are not binding on the Central and the State Governments on account of reasons below:

1) Deletion of Article 279B[16] and inclusion of Article 279(1) by the Constitution Amendment Act, 2016, indicates that Parliament intended for the recommendations of the GST Council to only have a persuasive value.
2) Recommendations of the GST Council are the product of a collaborative dialogue involving the Union and the States, and to regard them as binding would disrupt fiscal federalism, where both the Union and the States are conferred equal power to legislate on GST.
3) The government, while exercising its rulemaking power under the provisions, is bound by the recommendations of the GST Council. However, that does not mean that all the recommendations of the GST Council made by virtue of the power under Article 279A (4) of the Constitution of India are binding on the legislature's power to enact primary legislations.

Relying on the above, the Madras HC held in the present case that the powers of the GST Council are merely recommendatory and hence, classification decision made by the GST Council cannot be upheld. It is for the government to fix appropriate rates on the goods that are classifiable under the Customs Tariff Act, 1975 ("**Customs Tariff Act**"). As long as the Customs Tariff Act is adopted for the purpose of interpretation of the rate notification issued under the GST regime, classification has to be strictly in accordance with classification prescribed under the said Act.

With regard to the correct classification of 'Flavored Milk', the Madras HC held that the same will be classified under HSN Code 0402, attracting a lower GST rate of 5% (and not under HSN Code 2202 as was decided by the GST Council).

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13 TS-577-HC(MAD)-2023-GST
14 Harmonized System of Nomenclature
15 2022 (5) TMI 968 – Supreme Court
16 Article 279B of the Constitution (One Hundred and Fifteenth Amendment) Bill, 2011 proposed that the Parliament may, by law, provide for the establishment of a Goods and Services Tax Dispute Settlement Authority to adjudicate any dispute or complaint referred to it by a State Government or the Government of India arising out of a deviation from any of the recommendations of the Goods and Services Tax Council constituted under Article 279A that results in a loss of revenue to a State Government or the Government of India or affects the harmonised structure of GST. However, the provision was not made part of the Constitution (One Hundred and First Amendment) Act, 2016.

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

Transfer of goods within FTWZ[17] not 'bonded warehouse transaction' under Schedule III of CGST Act[18]

In the matter of ***Haworth India Private Limited***[19], Haworth India Private Limited ("**Applicant**") is engaged in the business of manufacture and sale of office furniture in India. The Applicant also imports certain finished goods from its group entities and sell it to the customers located in India ("**Trading Activity**"). The Applicant proposes to carry out Trading Activity from FTWZ, for operational convenience and expedition of project execution. Under this transaction, the title of goods will be transferred to customers within the FTWZ, until the final customer files BoE[20] and clears goods from FTWZ.

The issue before the Tamil Nadu AAR was whether this transaction of transfer of title of goods within a FTWZ can be classified as 'bonded warehouse transactions' under Schedule III of the CGST Act, and accordingly, no GST should be levied on the same.

The Applicant submitted that both customs bonded warehouse (i.e., private warehouses, public warehouses or special warehouses) and FTWZ are required to execute bond with the customs authorities. The rationale for bonding the imported goods under the customs bonded warehouse as well as FTWZ remains the same i.e., to avail duty benefits under the Customs Act[21]. Further, as SEZ is deemed to be a port, inland container depot, land station and land customs station under Section 7 of the Customs Act in terms of Section 53(2) of the SEZ Act[22], the Applicant submitted that FTWZ is in parity with a bonded warehouse under the Customs Act and accordingly any transactions within FTWZ should fall under Schedule III of the CGST Act.

Relying on the relevant provisions of Customs Act, CGST Act and SEZ Act, the AAR observed that the SEZ Act and the SEZ Rules[23] provide the legal framework for approval, licenses and administrative control of FTWZ. Unlike customs bonded warehouses (i.e., private warehouses, public warehouses or special warehouses licensed under the Customs Act), FTWZ is not administered or licensed by the Customs Act. As Schedule III of the CGST Act is specific to only those warehoused goods which are lying in the warehouses licensed under the Customs Act, the same is not applicable to transactions effected within FTWZ. Accordingly, GST will be applicable on such transactions within FTWZ.

Notifications and Circulars

Additional conditions introduced for import of laptops, etc.

Notification No. 38/2023 and Policy Circular No. 6/2023-24 dated October 19, 2023

The DGFT issued Notification No. 23/2023 dated August 3, 2023, amending the import policy for items covered under HSN 8471 of Schedule-I (Import Policy) of ITC (HS), 2022 to restrict import of specified goods (such as laptops, computers, etc.) with effect from November 1, 2023[24]. In this regard, Policy Condition No. 4 was also introduced in Chapter 84 to provide for conditions to be fulfilled for import of said goods, which *inter-alia* included that import is allowed only subject to a valid import license.

DGFT *vide* the said notification has introduced additional conditions as below:

17 Free Trade Warehousing Zone
18 Schedule III of CGST Act provides list of activities or transactions which will be treated neither as a supply of goods nor a supply of services
19 2023 (8) TMI 1299 - Authority for Advance Ruling, Tamil Nadu
20 Bill of Entry
21 Customs Act, 1962
22 Special Economic Zone Act, 2005
23 Special Economic Zone Rules, 2006
24 Notification no. 26/ 2023 dated August 4, 2023

1) No import license will be required where restricted goods manufactured in SEZ[25] are imported in DTA[26]. The said exemption will be subject to payment of applicable duties (if any). Further, the activities of re-packing, labelling, refurbishing, testing, and calibration alone within the SEZ will not be considered as manufactured in SEZ.

2) No import license will be required where restricted goods are imported by private entities for supply to (a) Central Government or agencies, undertakings owned and controlled by the Central Government, for defence or security purposes, (b) State Government for security purposes. These private entities will be required to provide to the customs authorities at the time of import a valid end-user certificate issued by the concerned Government entity.

3) No import license is required for import for repair and/ or return and/ or replacement of restricted goods sold earlier as well as re-import of such items repaired abroad on self-certification basis.

Further, the Policy Circular clarifies the below:

1) SEZ units and EOUs/EHTP/STPI/BTP units are not required to obtain import license for import of restricted goods, provided the goods are used for only captive consumption of the concerned importing unit(s).

2) No import license is required for import of spares, parts, assemblies, sub-assemblies, components, and other inputs necessary for the restricted goods.

3) No import license is required for import of restricted goods forming an essential part of capital goods (such as MRI machines, CNC machines, Unmanned Arial Vehicles (UAVs), etc.). However, if servers or laptops etc. themselves are the primary capital goods, this exemption does not apply.

4) Importers are allowed to apply for multiple import licenses, which will be valid upto September 30, 2024.

Goods and Services Tax Appellate Tribunal (Appointment and Conditions of Service of President and Members) Rules, 2023

Notification No. G.S.R. 793(E) - Central GST dated October 25, 2023

CBIC[27] notified Goods and Services Tax Appellate Tribunal (Appointment and Conditions of Service of President and Members) Rules, 2023 which *inter alia*, provide the manner of selection of President and Members, powers of President and Vice President, salaries and allowances to be received by them, etc.

Taxability and valuation of corporate guarantee and personal guarantee

Notification No. 52/2023 – Central Tax dated October 26, 2023, and Circular No. 204/16/2023-GST, dated October 27, 2023

CBIC has issued Circular No. 204/16/2023-GST dated October 27, 2023 ("**Circular**"), to clarify taxability and valuation of corporate guarantee and personal guarantee under the GST laws.

As per the Circular, the activity of extending corporate guarantee by one company to bank/ financial institutions, for provision of credit facility to the other company, where both the companies are related, or extended by a holding company for its subsidiary company, even if made without consideration, to be treated as supply of service as per Schedule I of CGST Act. The taxable value of extending such corporate guarantee will be determined in terms of newly inserted sub-rule (2) of Rule 28 of CGST Rules only, irrespective of whether full ITC of the GST paid to the supplier, is available to the recipient of services.

Sub-rule (2) of Rule 28 of CGST Rules provide that the value of services involving a corporate guarantee provided by a supplier to any banking company or financial institution on behalf of the related recipient is considered as 1% of the guarantee amount or actual consideration, whichever is higher.

[25] Special Economic Zone
[26] Domestic Tariff Area
[27] Central Board of Indirect Taxes and Customs

Further, the Circular also clarifies on the taxability of the activity of providing personal guarantee by the director of a company to the bank/ financial institutions for sanctioning of credit facilities to the said company without any consideration. As per the Circular, as the director and the company are 'related persons' under the GST laws, the activity of providing personal guarantee would be treated as a supply of service under Schedule I of the CGST Act. The value of said supply will be determined as per Rule 28 of the CGST Rules, per which it will be the open market value. However, since the Reserve Bank of India ("**RBI**") mandates that no consideration can be paid for extending such personal guarantees (except in certain exceptional circumstances), there is no question of said supply having any open market value. Accordingly, the taxable value of said supply can be considered as zero and hence, no GST will be payable on the same.

However, if such personal guarantee has been extended by the director, who is no longer connected with the management of the company, but continuance of his guarantee is considered essential for the company, or where the Directors are paid remuneration/ consideration, directly or indirectly, then the taxable value of said supply of service will be the amount of said remuneration/ consideration. Sub-rule (2) of Rule 28 of CGST Rules will not be applicable in this case.

Supplies to SEZ unit/developer eligible for refund of IGST paid

Notification No. 05/2023 –Integrated Tax dated October 26, 2023

Notification No. 1/2023 -Integrated Tax dated July 31, 2023, notified supplies that can be made on payment of IGST for which refund can be claimed. The said Notification provided benefit only to export of goods or services (except for goods such as tobacco, pan masala, etc.). The same has now been amended to provide that supplies made to SEZ units and developers for authorized operations on payment of IGST, will also be eligible for refund of IGST paid.

Amnesty Scheme for filing appeals before Appellate Authority

Notification No. 53/2023-Central Tax dated November 2, 2023

The Central Government has introduced an amnesty scheme for taxpayers who could not file an appeal against orders passed on or before March 31, 2023, under Section 73 and 74 of the CGST Act in the following circumstances:

1) An appeal was not filed by the taxpayer; and,
2) Appeal was dismissed as being time barred (i.e., beyond 3 (three) months from the date on which the decision or order is communicated to the taxpayer).

The last date for filing appeals in such cases is January 31, 2024. The taxpayers are required to pay in full the amount of admitted tax liability (including interest, penalty, etc.) and/ or 12.5% of the amount of disputed tax, out of which minimum 20% needs to be debited from electronic cash edger.

In the above regard, following points are relevant:

1) If a taxpayer has already filed an appeal and desires, it to be covered by the benefit of the Amnesty Scheme would need to make differential payment as per above.
2) Taxpayers who have previously filed an appeal, but it was rejected as time barred, then the taxpayer would be able to refile the appeal.
3) No refund of amount paid by the taxpayer in excess of above before issuance of this Notification, either voluntarily or pursuant to directions of authority or court, will be granted till the disposal of the appeal.
4) No appeal will be admissible in respect of a demand not involving tax.

Advisory issued by GSTN on November 28, 2023, may be referred to for detailed procedures and other provisions with regard to above.

Rule 43A of SEZ Rules amended to provide for 'Hybrid Working' for employees of an SEZ Unit

Notification F. No. K-43013(12)/1/2021-SEZ dated November 7, 2023

The Ministry of Commerce and Industry has notified Special Economic Zones (Fourth Amendment) Rules, 2023, per which Rule 43A of the SEZ Rules (earlier, work from home provision) has been amended to provide for 'hybrid working' to work from any place outside the SEZ. 'Hybrid working' has been defined to mean a flexible work model whereby an employer may permit its employees to work from the office or from any location outside the employer's office from time to time. Key points of the amended provision are provided below:

1) The following categories of employees can be permitted by their units to work from any place outside the SEZ until **December 31, 2024**:
   a) employees of Information Technology ("**IT**")/ IT enabled services employees;
   b) employees, who are temporarily incapacitated;
   c) employees, who are travelling;
   d) employees, who are working offsite.
2) In case of hybrid working granted to any employee, the same has to be intimated to the Development Commissioner by the Unit on or before the date on which the facility has been permitted.
3) Hybrid work facility will be admissible if the Unit continues to operate from the premises as per their letter of approval.
4) The Unit will have to ensure export revenue of the resultant products or services to be accounted for by the Unit to which the employee is permitted for hybrid work.
5) The Unit may provide to an employee duty-free goods, including laptop, desktop, and other electronic equipment needed by the employee for hybrid work and the same will be allowed to be taken outside the SEZ without payment of duty or IGST, on temporary basis (allowed for a period commensurate with the validity of the facility for hybrid work).

Bio-metric based Aadhar Authentication for GST registration in the State of Andhra Pradesh

Notification No. 54/2023-Central Tax dated November 17, 2023

In terms of Rule 8(4A) read with Rule 8(4B) of the CGST Rules, the State of Andhra Pradesh has been notified for biometric-based Aadhaar authentication and risk-based physical verification along with verification of documents uploaded with application to obtain registration. Notably, the said procedure has already been implemented on pilot test basis in the State of Gujarat and Union Territory of Puducherry.

For all other States/ Union Territories, the existing procedure of processing the registration application would continue to follow.

Clarification on admissibility of export remittances received in Special INR Vostro Account

Circular No. 204/16/2023-GST, dated October 27, 2023

CBIC has clarified that the condition of sub-clause (iv) of Section 2(6) of the IGST Act (i.e., payment for export of service should be in convertible foreign exchange or in Indian rupees wherever permitted by RBI) is considered to be fulfilled when the Indian exporters, undertaking export of services, are paid the export proceeds in INR from the Special Rupee

Vostro Accounts of corresponding banks of the partner trading country, opened by Authorised Dealer banks in India, subject to the conditions/ restrictions mentioned in FTP 2023[28] and extant RBI Circulars.

Clarification on applicability of GST on certain services

Circular No. 206/18/2023-GST dated October 31, 2023

Based on the recommendations of the 52nd GST Council Meeting, following clarifications have been provided with respect to applicability of GST on certain services:

1) Services by way of passenger transportation and renting of motor vehicles with operator, where cost of fuel is included in consideration charged, are exigible to GST at 5%, subject to eligibility of ITC on input services in respect of 'same line of business'. 'Same line of business' means services procured from another supplier of passenger transportation services or renting of motor vehicles services with operator and does not include leasing of motor vehicles without operator (which attracts GST at the same rate as supply of motor vehicles by way of sale).

2) Supply of electricity by real estate companies, malls, airport operators, etc. to lessee/ occupants, as part of bundled supply of service by way of renting of immovable property will be considered as a 'composite supply', wherein principal supply will be renting of immovable property with supply of electricity as ancillary to it. This will apply even when electricity charges are billed separately. Therefore, the rate of GST applicable on principal supply, i.e., renting of immovable property will be applicable to electricity charges recovered from the lessee/ occupants.

   However, if electricity charges is collected by real estate owners or developers, RWAs, on actual basis from the lessee/ occupants (i.e., charging the same amount from lessee/ occupants which is being charged by the State Electricity Boards/ DISCOMs to the real estate owners, etc.), the same will not be added to the value of supply of service by way of renting of immovable property, since the real estate owners will be deemed to be acting as pure agent in such cases.

Clarification on determination of place of supply in various cases

Circular No. 203/15/2023-GST dated October 27,2023

CBIC has clarified on determination of place of supply for co-location services, services in respect of advertising sectors and service of transportation of goods (through mail and courier):

1) **Place of supply of service by way of transportation of goods, including by mail or courier**

   Sub-section (9) of Section 13 of IGST Act provided that where either the supplier or the recipient of services is located outside India, the place of supply of services of transportation of goods, other than by way of mail or courier, will be the place of destination of such goods. The said sub-section has, however, been omitted with effect from October 1, 2023. It is clarified that the place of supply of services of transportation of goods in such cases will be determined by the default rule under Section 13(2) of IGST Act and not as performance based services under Section 13(3) of IGST Act. Accordingly, in cases where location of recipient of services is available, the place of supply of such services will be the location of recipient of services and in cases where location of recipient of services is not available in the ordinary course of business, the place of supply will be the location of supplier of services. The same principle will be applicable for transportation of goods through mail or courier.

2) **Place of supply of services in respect of advertising sector**

   Case 1 – Supply (sale) of space or supply (sale) of rights to use the space on the hoarding/ structure belonging to vendor to the advertising company for display of their advertisement on the said hoarding/ structure

   The hoarding/ structure erected on the land should be considered as an immovable structure or fixture as it has been embedded in the earth. Accordingly, the place of supply of said activity will be governed by Section 12(3)(a)

[28] Foreign Trade Policy 2023

of IGST Act, per which place of supply will be location where such immovable property, i.e., hoarding/structure is located.

Case 2 – Where the advertising company wants to display its advertisement on hoardings/ billboards at a specific location availing the services of a vendor. The vendor is responsible for display of the advertisement of the advertising company at the said location. During this entire time of display of the advertisement, the vendor is in possession of the hoarding/ structure at the said location on which advertisement is displayed and the advertising company is not occupying the space or the structure.

Such services provided by the vendor to advertising company are purely in the nature of advertisement services provided by the vendor to the advertising company, in respect of which place of supply will be determined in terms of Section 12(2) of IGST Act, i.e., (a) location of a registered recipient, or (b) location of unregistered recipient (if unregistered recipient's record exists)/ location of supplier (if unregistered recipient's record does not exist).

3) **Place of supply of services in respect of co-location services**

Co-location is a data center facility in which a business/ company can rent space for its own servers and other computing hardware along with various other bundled services related to "Hosting and information technology (IT) infrastructure provision services". A business/ company who avails the co-location services primarily seek security and upkeep of its servers, storage and network hardware, operating systems, system software and may require interacting with the system through a web-based interface for the hosting of its websites or other applications.

In such cases, supply of co-location services cannot be considered as the supply of services by way of renting of immovable property. Therefore, the place of supply of co-location services will not be determined by the provisions of clause (a) of sub-section (3) of Section 12 of the IGST Act but the same will be determined by the default place of supply provision under sub-section (2) of Section 12 of the IGST Act i.e., (a) location of a registered recipient, or (b) location of unregistered recipient (if unregistered recipient's record exists)/ location of supplier (if unregistered recipient's record does not exist).,

However, if the supplier is merely providing physical space on rent along with basic infrastructure, without components of "Hosting and information technology (IT) infrastructure provision services", then the place of supply will be determined as per clause (a) of sub-section (3) of Section 12 of the IGST Act, i.e., location of the said immovable property.

GSTN[29] introduced 'Enrolment Facility' for supply through ECOs[30] by un-registered suppliers

In furtherance of Notification No. 34/2023 dated July 31, 2023, wherein a person supplying goods through e-commerce operators were exempted from mandatory registration under GST, GSTN now has introduced enrolment facility for supply of goods through e-commerce operators by GST unregistered suppliers.

Himachal Pradesh Government notifies the Himachal Pradesh Sadhbhawana Legacy Cases Resolution Scheme, 2023 (3rd Phase) ("Scheme")

Notification No. EXN-F-(10)-17/2022 dated September 30, 2023

The Government of Himachal Pradesh has notified the Scheme, which will be in effect from October 1, 2023 to December 31, 2023. The key features of the Scheme are highlighted below:

29 Goods and Services Tax Network
30 Electronic commerce operator

1) The Scheme will be applicable on (a) settlement of any additional demand[31] under the subsumed enactment[32] pending for recovery, and (b) settlement of pending assessment[33] and any demand that may accrue as a result of determination of tax liability of such pending assessment under a subsumed enactment.

2) In order to avail the Scheme, the Applicant is required to file a declaration in the prescribed manner along with the proof of payment of settlement fee.

3) A person will not be eligible to make a declaration under the Scheme in the following circumstances:

   a) if the declarant has filed an appeal before the appellate forum and such appeal has not been withdrawn on or before the day of submission of declaration under the Scheme;

   b) if criminal proceedings have been initiated against the person for any reasons including tax fraud;

   c) if a notice has been issued to the person under subsumed enactment for an erroneous refund or refunds;

   d) if all the statutory forms required to be produced for applicability of concessional rate of tax under the subsumed enactment have not been produced either at the time of assessment or have not been filed along with the declaration under the Scheme and the tax due as per returns and settlement fee of the Scheme have not been paid.

4) Calculation of the settlement fee will be as follows:

Scenario	Amount of settlement fee to be paid
I. Where no statutory forms were required to be produced or all the all the statutory forms required to be produced for applicability of concessional rate of were produced	
(i) Periodical returns filed within stipulated time along with payment of tax	No settlement fee
(ii) Periodical returns not filed within stipulated time, but payment of tax due were made as per such return	10% of tax paid after due date of filing the return or payment of tax
(iii) Tax returns not filed and tax due not paid	110% of the tax amount applicable on taxable turnover
II. Where all the statutory forms required to be produced for applicability of concessional rate of tax were not produced and the tax due as per returns has been paid	
Settlement fee will be calculated as below: (i) 100% of the tax paid against the turnover of transactions involved in such statutory forms as if the forms were available; or, (ii) 1% of the value of the turnover of transactions involved in such statutory forms, whichever is higher.	

5) Certain restrictions with regard to payment of settlement fee are also provided such as payment cannot be done through input tax credit, settlement fee will be non-refundable (except paid in excess or application gets rejected) and is not creditable, etc.

6) Settlement fee can be paid by adjustment of pre-deposit paid at any stage of appellate proceedings under the subsumed enactment or deposited voluntarily or as part of recovery proceedings against the additional demand for that financial year or any return period, subject to prescribed conditions.

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31 'Additional demand' means the amount of tax, penalty and interest as assessed by the assessing authority under the subsumed enactment for a financial year or any return period for which declaration under the Scheme has been made.

32 'Subsumed enactment' means any Act repealed under Section 173 of the Himachal Pradesh Goods and Services Tax Act, 2017 and Section 64 of the Himachal Pradesh Value Added Tax Act, 2005.

33 'Pending assessment' means determination of tax liability for a particular financial year or any return period which is pending for determination under the subsumed enactment.

7) A discharge certificate will be issued post which the declarant will not be liable for any further tax, penalty and interest, or for prosecution with respect to the matter and period covered in the declaration. Further, all matters and time period covered by the declaration will not be re-opened in any other proceeding under the subsumed enactment.

Punjab Government notifies the Punjab One Time Settlement Scheme for Recovery of Outstanding Dues, 2023 ("Scheme")

Notification No. G.S.R.85/P.A.8/2005/S.29 A/ CA.74/ 1956/ S5/ PA.8/ 2002/ S.25/P.A.5/2017/S.174Z2023 dated November 9, 2023

The Government of Punjab has notified the Scheme, which will be in effect from November 15, 2023 to March 15, 2024. The key features of the Scheme are highlighted below:

1) The scheme is applicable to cases where assessments under Punjab General Sales Tax Act, 1948, Central Sales Tax Act, 1956, Punjab Infrastructure (Development and Regulation) Act, 2002, and Punjab Value Added Tax Act, 2005, were made until March 31, 2023, with outstanding total demand (includes additional demand of tax, interest, penalty) up to INR 1,00,00,000 (Indian Rupees one crore).

2) Eligible individuals can submit an application in the prescribed form (separate application for each assessment year), accompanied by proof of full payment of self-assessed determined amount. The application undergoes scrutiny, and deficiencies, if any, must be rectified within 15 (fifteen) working days. The settlement order is issued upon satisfactory application review, and rejection occurs if deficiencies persist.

3) Any person, whether or not in appeal before any of the Appellate Authorities i.e., the Deputy Excise and Taxation Commissioner (Appeals) or the Punjab Value Added Tax Tribunal or the Punjab and Haryana High Court or the Supreme Court, will be eligible to apply and avail settlement under this Scheme. Applicants in appeal must declare that they will withdraw the said appeal within 15 (fifteen) working days from the date of communication of order of settlement and will submit the proof thereof.

4) Where the applicant has deposited certain percentage of additional demand as prerequisite for the filing of an appeal under the relevant Acts, the amount so deposited will be adjusted towards the payment of determined amount. No amount will be refunded where the amount already deposited is in excess of the determined amount.

5) No appeal against an order of settlement will lie before any of the Appellate Authorities. Settlement orders can be revoked in case of false information or suppression of facts.

6) The scheme offers waivers based on specified slabs of total demand, including 100% waiver of tax, interest and penalty for total demand up to INR 1,00,000 (Indian Rupees one lakh) and 50% waiver of tax, 100% of interest and penalty, for total demand ranging from INR 1,00,001 (Indian Rupees one lakh one) to INR 1,00,00,000 (Indian Rupees one crore).

Introduction of Automatic System based issuance of Status Holder Certificate ("e-SHC")

Public Notice No. 32/2023 and Trade Notice No. 28/2023-24 dated October 9, 2023

In furtherance of e-Governance initiatives taken by DGFT[34], a new IT module to recognize and certify the export performance of individual companies has been developed. The e-SHC will be electronically generated based on export data available in DGCI&S[35] database. Issuance of e-SHC will eliminate the earlier process of submission of an online application with supporting export performance certificate from a Chartered Accountant and will also do away with the file examination required at the DGFT Regional Offices.

[34] Directorate General of Foreign Trade
[35] Directorate General of Commercial Intelligence and Statistics

Online functionality for dealing with ITC mismatch in Form GSTR-2B vis-à-vis Form GSTR-3B

In accordance with the newly inserted Rule 88D of the CGST Rules, the GSTN[36] has developed a functionality to compare ITC claimed in Form GSTR-3B with ITC available in Form GSTR-2B for each return period. If the claimed ITC in Form GSTR-3B exceeds the available ITC in Form GSTR-2B by a predefined limit or the percentage difference exceeds the configurable threshold, taxpayer will receive an automated intimation in Form DRC-01C. Upon receipt of said intimation, taxpayer will be required to pay to settle the difference through Form DRC-03, or explain the difference within 7 (seven) days. If the taxpayer does not submit its response, then the taxpayer will not be able to file Form GSTR-1 for subsequent period.

Action to be initiated by the tax authorities for non-issuance of e-invoices by notified taxpayers who are mandatorily required to issue e-invoice

Instruction No. CBIC- 20006/15/2023-GST dated October 18, 2023 ("Instruction")

CBIC has issued the Instruction indicating that a list of taxpayers who are mandatorily required to issue e-invoices through electronic invoicing under sub-rule (4) of Rule 48 of the CGST Rules but are not issuing the same will be shared by the GSTN. The Instruction further suggests the actions that can be initiated by the tax authorities against the defaulters.

Other Updates

Validity of deeming-fiction presuming 1/3rd of total amount towards cost of land before Supreme Court

The Supreme Court has listed the SLP[37] filed by Revenue against Gujarat High Court order[38] reading down deeming fiction presuming 1/3rd of total amount charged towards cost of land in construction contracts when land cost is ascertainable, for hearing in January 2024. Notably, the Gujarat High Court had found the deeming fiction to be arbitrary "in as much as the same is uniformly applied irrespective of the size of the plot of land and construction therein".

Supreme Court, Delhi HC, Karnataka High Court and High Court of Punjab and Haryana to examine Service tax/ GST applicability on salary payments to seconded expats

In the case of ***Metal One Corporation India Private Limited v. Union of India***[39], the Delhi HC granted an interim stay over proceedings pursuant to SCN demanding GST on salaries paid to seconded expatriates based on Supreme Court's verdict in *Northern Operating Systems*[40]. Arguing that salaries are not liable to GST, the petitioner seeks to distinguish the instant case with facts involved in the case of Northern Operating. The petitioner submitted that in the Northern Operating case, the salaries were being paid to the seconded employees by the foreign holding company, which were reimbursed by the Indian subsidiary, and it is on these reimbursements that tax was held to be payable, whereas in the present case, salaries are paid to employees by the Indian entity in terms of separate employment contracts entered into between the Indian entity and the employees, on which appropriate TDS is paid under the head 'salaries'. The Delhi HC, in view of the aforesaid, issued notice and listed the matter for hearing on January 10, 2024.

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36 Goods and Services Tax Network
37 Special Leave Petition
38 Munjaal Manishbhai Bhatt v. Union of India, TS-214-HC(GUJ)-2022-GST
39 Writ Petition (C) No. 14945/2023
40 2022(61) GSTL 129 (SC)

Similarly, in the case of ***Alstom Transport India Private Limited v. State of Karnataka***[41], the Revenue issued SCN demanding GST on salary paid to seconded expats based on the Northern Operating judgment. The petitioner argued that the ruling of Northern Operating is fact specific and does not apply in the present case. The Karnataka High Court stayed adjudication of SCN along with liberty to the Revenue to seek vacation of stay. In the case of ***Mitsubishi Electric India v. Union of India***[42], the High Court of Punjab and Haryana granted an ad-interim stay over the SCN proceedings issued on same issue.

In the context of Service tax, the Supreme Court, in the case of ***Renault Nissan Automotive India Private Limited v. The Commissioner of G.S.T and Central Excise***[43], has issued notice in challenge to Service tax demand under RCM against Indian arm (assessee) on deputation of foreign employees/ expatriates i.e., secondees from Nissan Motor Company, Japan. Referring to Northern Operating, CESTAT held that 'recruitment' or 'supply' of manpower is embodied in manpower recruitment or supply agency service (MRS) definition and upheld Service tax demand under RCM on salary payments made to seconded employees. The Supreme Court has listed the matter on January 5, 2024.

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.

41 Writ Petition (C) No. 23915/2023
42 Writ Petition (C) No. 25351/2023
43 Writ Petition (C) No. 38335/2023

This Newsletter has been prepared by:

Manish Mishra
Partner & Head of Practice - Indirect Tax

Shareen Gupta
Partner

Shikha Parmar
Principal Associate

Tanay Vyas
Associate

Chayank Bohra
Associate

Meghna Mittal
Associate

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For more details, please contact km@jsalaw.com

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