January 2025 Edition

Recent Rulings by courts and authorities

Supreme Court

DRI[1] officers are 'proper officers' to issue recovery notices under Section 28 of the Customs Act, 1962

The Supreme Court of India ("**SC**") allowed the review petition in the case of ***Commissioner of Customs vs. Canon India Private Limited***,[2] filed by the Customs Department and held that the DRI, Directorate General of Central Excise Intelligence and Commissionerate of Central Excise (and other similarly situated officers) are proper officers of Customs and are thereby competent to issue Show Cause Notices ("**SCN**").

The issue emanated from an SCN issued by the DRI questioning exemption from customs duty on import of digital still image video cameras. The Respondent in the present Review Petition, appealed before the CESTAT[3], which ruled against the said assessee and denied the exemption of duty. Aggrieved by the ruling of the CESTAT, the assessee approached the SC, wherein the SC quashed the SCN on the ground that DRI officers were not 'proper officers' and did not possess the powers of recovery/re-assessment under Section 28 of the Customs Act, 1962 ("**Customs Act**"). Customs authorities challenged the said order by way of a Review Petition before the SC.

The issues for consideration before the SC were:

1) whether officers of DRI are proper officers under Section 28 of the Customs Act?
2) whether the power under Section 28 of the Customs Act can be exercised only by someone who is empowered to exercise the power under Section 17 of the Customs Act?
3) whether the interpretation of 'proper officer' in *Commissioner of Customs vs. Sayed Ali*[4] is correct?

Analysis

The SC overturned the original decision in Canon India (*supra*) broadly on the following grounds:

1) **Applicability of the decision of Sayed Ali (*supra*)**

[1] Directorate of Revenue Intelligence
[2] Review Petition No. 400 of 2021 in Civil Appeal No. 1827 of 2018
[3] Customs, Central Excise and Service Tax Appellate Tribunal
[5] Central Board of Indirect Taxes and Customs

It was held in the case of Sayed Ali (*supra*), that on a conjoint reading of Sections 2(34) and 28 of the Customs Act, it is clear that only such custom officer who has been assigned the specific function of assessment and re-assessment of duty either by CBIC[5] or by the Commissioner of Customs, is competent to issue a notice under Section 28 of the Customs Act. The said decision was relied upon in the Canon India (*supra*). The SC in the present Review Petition held that the said decision cannot be relied upon as post the said decision, the scheme of assessment under Section 17 of the Customs Act has undergone substantial changes, like introduction of self-assessment, wherein the competence of proper officer to conduct assessment was limited.

2) **'The proper officer' and 'a proper officer'**

The SC in the Review Petition highlighted that the finding in Canon India (*supra*) regarding the need for a link between the powers of assessment under Section 17 and the power to issue notices under Section 28 were incorrect. Proceedings under Section 28 are subsequent to the completion of the process set out in Section 17 of the Customs Act. The nature of review under Section 28 is significantly different from the nature of assessment and reassessment under Section 17. Vesting of the functions of assessment and re-assessment under Section 17 being the threshold, mandatory condition for a proper officer to perform function under Section 28 would be an erroneous interpretation of Section 28.

3) **'Entrustment' of powers under the Customs Act**

In its earlier decision, the SC had observed that Section 6 is the only provision which provides for entrustment of the functions of an ''officer of Customs" on other Central/ State officers. However, no empowering notification under Section 6 was issued. In the Review Petition, the SC held that this view was based on an incomplete understanding, particularly overlooking Circular No. 4/99-Cus dated February 15, 1999 and Notification No. 4/20x11 dated July 6, 2011, that had empowered DRI officers to issue such notices. The Court clarified that the jurisdiction of DRI officers to issue SCNs was valid under the Customs Act, as these officers were assign ed the function of the "proper officer" for the purposes of Section 28, which deals with recovery of duties.

4) **Constitutionality of Section 28(11) of the Customs Act**

The SC also commented on the constitutionality of Section 28(11) of the Customs Act, introduced by the Customs (Amendment and Validation) Act, 2011, to validate past actions by DRI officers in light of *Sayed Ali* (supra). Additionally, SC also examined the constitutional validity of Section 97 of the Finance Act, 2022, which retrospectively validated show cause notices issued by DRI officers.

The SC affirmed the constitutional validity of these provisions, stating that they corrected earlier defects and clarified the competence of DRI officers. The Court concluded that the amendments did not violate constitutional principles, as the DRI officers had been assigned the function of proper officers, making their actions under Section 28 lawful.

Order of the Court

Deciding the Review Petition, the SC has restored the SCNs to the adjudication stage where the notices were directly challenged before the High Courts and has granted a period of 8 (eight) weeks in cases for filing appeals where orders were already issued pursuant to such notices.

Telecommunication towers not an immovable property, hence eligible for credit

SC in ***Bharti Airtel Ltd. vs. The Commissioner of Central Excise, Pune***[6] has ruled on the admissibility of CENVAT Credit on procurement of parts of telecommunication towers and Prefabricated Buildings ("**PFB**"). Considering the contrary rulings of the Bombay High Court (**"Bombay HC"**) and the Delhi High Court (**"Delhi HC"**), the SC upholding

[5] Central Board of Indirect Taxes and Customs
[6] 2024 (11) TMI 1042 – Supreme Court

the view of the Delhi HC held that telecommunication towers and PFBs are not immovable property and would fall within the definition of 'Capital Goods' under the CENVAT Credit Rules, 2004 ("**CENVAT Credit Rules**"), therefore, be eligible for credit.

Background

The dispute with respect to eligibility of CENVAT Credit was before the Bombay HC in ***Bharti Airtel Limited vs. The Commissioner of Central Excise, Pune***[7], wherein various mobile service providers ("**MSP**") were being denied credit of duty paid on procurement of parts of telecommunication towers and PFBs on the premise that the same amount to immovable property and outside the purview of 'inputs' and 'capital goods' defined under the CENVAT Credit Rules. The Bombay HC agreed to the same and held that telecommunication tower and PFBs are immovable property since post erection of parts into towers, it assumes the nature of immovable property, not falling within the definition of 'inputs' and 'capital goods' under Rule 2 of the CENVAT Credit Rules. Hence, the assessee will not be eligible to take credit of excise duty paid on procurement of parts of telecommunication towers and PFBs.

Similar dispute was before the Delhi HC in ***Vodafone Mobile Services Limited vs. Commissioner of Service Tax, Delhi***[8], wherein the Delhi HC took a divergent view and held that telecommunication towers and PFBs would not amount to be immovable property as it does not fulfil the permanency test.

Appeals filed against the orders of the Bombay HC and Delhi HC was considered and disposed by the SC by way of a common order.

Analysis of the Court

The SC referred to the provision under the CENVAT Credit Rules enabling assesses to claim CENVAT credit of tax paid on procurements as also the definition of 'inputs' and 'capital goods' before determining movability of telecommunication towers and PFBs. SC observed that in terms of Rule 3(1) of the CENVAT Credit Rules, a service provider is entitled to CENVAT credit of tax paid on 'inputs' and 'capital goods' used in the provision of output service.

The SC observed that before determining whether the said goods fall within the definition of 'inputs' or 'capital goods', it is essential to determine the movability of the goods thereby determining whether telecommunication towers and PFBs can be considered as 'goods' at all. SC remarked that the key factors for this classification are the item's ability to be relocated, dismantled, and sold in the market without significant loss of functionality or market value. The SC emphasised that attachment to the earth alone does not automatically classify items as immovable. If such attachment serves a temporary purpose or is intended to enhance functionality, without the intention of permanent assimilation into the land, the property should be treated as movable. The SC applied the functionality and marketability test laid down in ***Solid and Correct Engineering***[9] and ***Triveni Engineering***[10].

The SC after reviewing past precedents rendered in the context of what constitutes immovable property, identified 5 (five) fundamental precepts *vis.* nature of annexation, object of annexation, intendment of parties, functionality test and permanency test. The SC employed these 5 (five) precepts to conclude that telecommunication towers and PFBs cannot be said to be immovable property.

After establishing the movability of telecommunication towers and PFBs, the SC analysed whether they fall within the definition of 'input' or 'capital goods'. In terms of definition of 'capital goods' under Rule 2(a)(A) of the CENVAT Credit Rules, what is covered within the definition of 'capital goods' is *inter alia* goods falling under Chapter 82, 84, 85, 90 and Heading 6805 of the Central Excise Tariff Act, 1985 ("**Excise Tariff**"). Further, components, spares and accessories

[7] 2014 (9) TMI 38 – Bombay High Court
[8] 2018 (11) TMI 713 – Delhi High Court
[9] Commissioner of *Central Excise, Ahmedabad vs. Solid and Correct Engineering Works & Ors.* – 2010 (4) TMI 15 - SC
[10] *Triveni Engineering and Indus Ltd. vs. Commissioner of Central Excise* – 2000 (8) TMI 86 - SC

of goods falling under the Tariff Heading mentioned hereinabove will also be covered within the definition of 'capital goods'.

The SC observed that antennas are mounted on the telecommunication towers to provide it with sufficient height to receive and transmit signals and also to provide stability to these antennas and consequently ensures seamless and uninterrupted signal transmission. Similarly, PFBs, house essential equipment like generators and cables to support the functioning of antennas and Base Transceiver System (**"BTS"**). Hence, these structures are accessories to these antennas and BTS. Further, given that antennas and BTS are classifiable under Chapter 85 of the Excise Tariff, they are covered within the meaning of 'capital goods' in terms of Rule 2(a)(A) of the Cenvat Credit Rules and accordingly, would qualify as capital goods, and thereby an assessee would be eligible to claim credit of Excise Duty paid on the same.

Alternatively, the assessees contended that the goods will qualify as 'inputs' as defined under Rule 2(k) of the CENVAT Credit Rules. The SC observed that the said rule provides that 'inputs' means all goods, except light diesel oil, high speed diesel oil, motor spirit, commonly known as petrol and motor vehicles, used for providing any output service. Telecommunication towers and PFBs are 'goods' and not immovable property which is used for providing mobile telephonic services. Therefore, the inescapable conclusion would be that they would also qualify as "inputs" under Rule 2(k) for the purpose of claiming CENVAT Credit.

Order of the Court

Having held that the tower and PFBs are not immovable property covered within the definition of 'capital goods' under Rule 2(a)(A), credit will be available on the duty paid. Alternatively, and since these goods are used for providing mobile telecommunication services, they would also qualify as "inputs" under Rule 2(k) for the purpose of credit benefits under the CENVAT Credit Rules.

High Court

ITC[11] on telecommunication towers not restricted under Section 17(5)(d) of the CGST Act[12]

The Delhi HC in the case of ***Bharti Airtel Limited vs. Commissioner, CGST Appeals-1 Delhi, Union of India and Ors***[13] has ruled on the availability of ITC on telecommunication towers, specifically in light of the restriction as provided under the Explanation appended to Section 17(5) of the CGST Act, which allegedly excludes telecommunication towers from the ambit of plant and machinery and deems the same as an immoveable property on which ITC is restricted in terms of clause (d) of Section 17(5). While rendering its decision, the Delhi HC relied on the decision of the SC in Bharti Airtel (*supra*), wherein it was held that telecommunication towers and PFBs are moveable in nature and consequently, the Delhi HC observed that the contention of the revenue authorities that telecommunication towers are immoveable property was untenable.

The Delhi HC observed that the exclusion of telecommunication towers from the definition of plant and machinery does not automatically/inherently classify such telecommunication towers as immoveable property. In order to be restricted in terms of Section 17(5)(d), any property has to independently qualify as an immoveable property. Given that telecommunication towers are to be treated as moveable in nature, they would not fall under the restriction of Section 17(5)(d).

[11] Input Tax Credit
[12] Central Goods and Services Tax Act, 2017
[13] WP(C) NO. 17447 OF 2023

Rule 96(10) is ultra vires and arbitrary to Section 16 of the CGST Act

The Kerala High Court ("**Kerala HC**) in the matter of ***Sance Laboratories Pvt. Ltd. vs. UOI & Ors***.[14] allowed a batch of writ petitions challenging the validity of Rule 96(10) of the Central Goods and Services Tax Rules, 2017 ("**CGST Rules**"). The Petitioners in the case were exporters claiming refund of Integrated Goods and Services Tax ("**IGST**") paid on exports by virtue of Section 16 of the Integrated Goods and Services Tax Act ("**IGST Act**"). Rule 96(10) of the CGST Rules as made applicable to IGST, restricted the refund of IGST in the case where inputs have been availed after taking the benefit of notifications mentioned therein.

For sake of brevity, Rules 96(10) of the CGST Rules essentially restricted refund in case procurements were made against advance authorisation or concessions available to EOU[15] on procurement of goods were availed. Refund was also restricted where suppliers had availed benefit of exemption available to registered supplier making supplies to registered recipient for export as also where benefit of various other exemptions available under different notifications had been availed.

The Petitioners contended that Rule 96(10) of the CGST Rules as it was worded effectively takes away the right of an exporter to claim refund of tax paid on export, which is a right granted by substantive provisions of the IGST Act. While Rule 89 of the CGST Rules, as made applicable to IGST, does not restrict refund of accumulated Input Tax Credit ("**ITC**") in case of export of goods/services under letter of undertaking/bond, however, Rule 96(10) restricts refund of IGST paid on export in case benefit of certain notifications have been availed. This creates a discrimination between exporters who are otherwise on the same footing. Further, it was contented that the delegated legislation in Rule 96(10) of the CGST Rules has travelled beyond the parent statue. Section 16 of the IGST Act as also Section 54 of the CGST Act do not authorise imposition of a restriction as contemplated by the provisions of Rule 96(10) of the CGST Rules.

The Kerala HC held that the words "*subject to such conditions, safeguards and procedure as may be prescribed*" in Section 16(3)(a) and (b) of the IGST Act and the provisions of Section 54 of the CGST Act do not authorise the imposition of such restriction in such a manner that it would completely take away the right of refund granted under Section 16 of the IGST Act. Therefore, Rule 96(10) of the CGST Rules as presently worded is *ultra vires* the provisions of Section 16 of the IGST Act and it is 'manifestly arbitrary'.

The Kerala HC noted that while the Rule 96(10) of the CGST Rules has been omitted with effect from October 8, 2024, however, the same is with prospective effect. Considering the same, the Kerala HC clarified that for the period from October 23, 2017, to October 8, 2024, no proceedings will be initiated to recover IGST refunds already disbursed to the Petitioners under this provision.'

Extension of limitation to issue adjudication orders for FY 2017-18 to 2019-20 valid

The Patna High Court ("**Patna HC**") in ***Barhonia Engicon vs. The State of Bihar and Ors***.[16] has upheld the validity of extension of time limit to issue notices and adjudication orders for FY 2017-18 to 2019-20. The Petitioners had challenged the validity of various notifications extending time limit on the ground that the said notifications were issued after the pandemic had subsided and there was no *force majeure* situation. Hence, the extension was not justified.

The due date to file annual returns typically falls on December 31, of the following financial year. However, due to the pandemic situation, the SC had suspended limitation periods for judicial and quasi-judicial proceedings between March 15, 2020, and February 28, 2022, effectively extending various filing and assessment deadlines. Section 168A was introduced to the CGST Act, allowing the Government to extend limitation periods for certain actions that were hindered by *force majeure* events. In light of the same, the Government extended the deadlines for issuance of adjudication order for FY 2017-18 to 2019-20 through notifications issued during and after the pandemic. The

[14] WP(C) NO. 17447 OF 2023.
[15] Export Oriented Unit
[16] TS-780-HC(PAT)-2024-GST

Petitioners argued that further extension notifications that continued to extend the limitation were unjustified as by the time the notifications further extending the timelines were issues, the *force majeure* situation had passed, and there was no need to extend the deadlines further. It was also argued that the Government failed in adhering to the procedural requirements while issuing the extension notifications.

Dismissing the contention of the Petitioner, the Patna HC noted that the SC had already excluded the period from March 15, 2020, to February 28, 2022, from the limitation period. Therefore, the Government's decision to extend the time limit for issuing orders was in line with the Supreme Court's directives. The Court also took into account GST[17] Council recommendations on extension of limitation due to disruption caused by the pandemic and therefore the notifications were issued in compliance with the recommendations of the GST Council.

Conclusively, the Patna HC upheld the validity of the GST orders and notices issued in light of the extension notifications and dismissed the challenge to these notifications on the premise that such extension was driven by *force majeure* conditions and was hence justified in accordance with both the Supreme Court's directives and the recommendations of the GST Council.

'Negative Blocking' of ITC under Rule 86A permissible

The Madras High Court ("**Madras HC**") in the case of ***Tvl Skanthaguru Innovations Private Limited vs. Commercial Tax Officer***[18] discussed the issue of blocking of Electronic Credit Ledger ("**ECrL**"), without the availability of any credit in the same.

In the facts of the case, a search was conducted at the Petitioner's premise by the central authorities wherein wrongful availment of ITC was alleged and subsequent actions were taken. Thereafter, 3 (three) orders were passed blocking the ECrL of the Petitioner. Further, an intimation in Form GST ASMT – 10 was issued by the State authorities alleging wrongful availment of ITC. The Petitioner were before the Madras HC challenging the said intimation in Form ASMT – 10 as also the orders blocking the ECrL of the Petitioner on the ground that blocking of ECrL when there is no credit available in the ledger amounts to negative blocking of credit which is not permitted under Rule 86A of the CGST Rules.

It was observed by the Madras HC that the 1st part of Rule 86A states that *"The Commissioner or an officer authorised by him in this behalf, not below the rank of an Assistant Commissioner, having reasons to believe that credit of input tax available in the electronic credit ledger has been fraudulently availed or is ineligible".* Further, 2nd part of Rule 86A states that the Commissioner or Assistant Commissioner "*may, for the reasons to be recorded in writing, not allow debit of an amount equivalent to such credit available in electronic credit ledger for discharge of liabilities under Section 49"*. Which means the officers have to record the reasons in writing not to allow the debit of amount equivalent to such credit for discharge of liabilities under Section 49. The words "*amount equivalent to such credit for discharge of liabilities*" would mean that not only the fraudulently availed ITC amount available in the ECrL, but an amount equivalent to fraudulently availed credit utilised for discharge of liabilities under Section 49.

Thus, a conjoint reading of 1st and 2nd parts of Rule 86A would clearly reveal that the word "available in the ECrL" referred in 1st part would mean that the amount available after the fraudulent availment of credit at any point of time, whether it was available in the ECrL or utilised at the time of passing the blocking orders.

The initiation of proceedings by the department will come into picture only after the fraudulent availment/utilisation in most of the cases and certainly, the fraudulently availed ITC would not be available in the ECrL at the time of blocking. Therefore, the right way of interpretation of Rule 86A of GST Rules is as to whether the fraudulently availed credit was made available for the payment of output tax liabilities at any point of time subsequent to the said fraudulent availment. Thus, the Rule 86A empowers the Commissioner or an officer authorised by him not below the rank of Assistant Commissioner to block the fraudulently availed credit in ECrL, whether it is available at the time of passing the blocking orders or not.

[17] Goods and Services Tax Council
[18] 2024 (12) TMI 143 – Madra High Court

Further, in the provisions of Rule 86A, nowhere it has been stated that the negative blocking is prohibited. When the Statute has not stated anything in the statutory term, it has to be construed that the word 'blocking' includes both positive and negative blocking. If the intention of the legislature is not to allow the negative blocking, they are supposed to have specifically prohibited the same by virtue of proviso or otherwise. For the said reasons, Madras HC held that the negative blocking is well within the scope of provisions of Rule 86A of GST Rules.

Denial of ITC for contravention of Section 16(4) of the CGST Act to be set aside in view of insertion of Section 16(5) to the CGST Act

In the matter of ***Louis Mathew Antony v. State Tax Officer & Ors.***[19], the Kerala HC has set aside an order denying ITC on account of non-compliance with Section 16(4) of the CGST Act for financial year 2019-20.

The Petitioner approached the court on the ground that they are now entitled to claim ITC, which was previously denied, in light of insertion of Section 16(5) to the CGST Act, which extends the time limit to claim ITC for FY 2017-18 to 2019-20.

Considering the same, the Kerala HC set aside an order denying ITC, the Petitioner for the reason of non-compliance with the time limit prescribed under Section 16(4) of the CGST Act. The court observed that on account of Sectio 16(5) being notified[20], the Petitioner is now entitled to claim ITC. The court directed the competent authority to pass fresh orders, considering the provisions of Section 16(5) of the CGST Act.

Similar view has been taken by the Madras HC in *WINET Communications vs. Superintendent, Karur - II*[21]. An assessment order was passed against the Petitioner wherein ITC had been denied on the premise that the claims have been lodged beyond the period prescribed under Section 16(4) of the CGST Act.

The Madras HC set aside the said order in view of insertion of Section 16(5) to the CGST Act. The court directed the adjudicating authority to re-do the assessment by taking into account the said amendment.

Notifications and Circulars

Withdrawal of Excise and Customs exceptions on petroleum crude oil and Aviation Turbine Fuel imports

Notification Nos. 32/2024-Central Excise and 48/2024, issued on December 3, 2024

The CBIC has issued 2 (two) notifications rescinding exemptions formerly provided on the export and import of petroleum products. Both notifications take effect on an immediate basis.

These notifications revoke the earlier exemptions provided under Notification No. 08/2022-Central Excise which had exempted goods such as petrol, diesel, and Aviation Turbine Fuel ("**ATF**") cleared for export from basic excise duty and the Agricultural Infrastructure Development Cess and notification No. 32/2022-Customs which had exempted imports of petroleum crude and ATF from the additional customs duty equivalent to the Special Additional Excise Duty ("**SAED**"). The exemptions were introduced and made effective from July 1, 2022, to boost exports and reduce the burden of import of petroleum products.

Now that these exemptions have been removed, the goods will attract the basic excise duty and the Agricultural Infrastructure Development Cess. Imports of petroleum crude and ATF will be subject to the additional customs duty equivalent to the SAED. The notifications are intended to ensure uniform practice among all entities and all areas involved in the export and import of petroleum products.

[19] TS-764-HC(KER)-2024-GST
[20] Inserted by the Finance (No. 2) Act, 2024, w.r.e.f. July 1, 2017. (However, Notification No. 17/2024(S.O. 4253(E))-Central Tax, dated September 27, 2024, appoints September 27, 2024, as the date of enforcement).
[21] 2024 (11) TMI 520

Recission of notifications relating to SAED

Notification No. 29/2024-Central Excise and Notification No. 30/2024- Central Excise, issued on December 2, 2024

The CBIC has come out with 2 (two) notifications aimed towards rescinding the levy of SAED on petroleum crude, high-speed diesel, petrol, and ATF. Notification No. 29/2024 rescinds 6 (six) notifications dated June 30, 2022 that had established or amended SAED rates and Notification No. 30/2024-Central Excise rescinded 2 (two) notifications (Nos. 10/2022 and 11/2022) related to SAED rates. These amendments have been implemented with immediate effect and do not affect any actions or omissions made under the earlier notifications before the date of enforcement. The recession allows the free movement of excise regulations together with the changing dynamics of the market as well as public interest issues. It shrinks the compliance cost burden of the petroleum group of stakeholders including exporters, refineries, and crude oil producers thus bringing certainty about the legal regime.

Key Recommendations of the 55th GST Council meeting

The 55th GST Council meeting chaired by the Union Minister for Finance and Corporate Affairs, Smt. Nirmala Sitharaman was held on December 21, 2024, at Delhi. The GST Council has recommended various changes in GST rates, measures for facilitation of trade and streamlining GST compliances.

The key recommendations of the GST Council are summarised below.

Key recommendations relating to supply of goods and services

1) **Old and used vehicles:** Increasing the GST rate from 12% to 18 % recommended on sale of all old and used vehicles, including EVs other than those specified at 18%, sale of old and used petrol vehicles of engine capacity of 1200 (twelve hundred)cc or more and of length of 4000 (four thousand) mm or more; diesel vehicles of engine capacity of 1500 (one thousand five hundred) cc or more and of length of 4000 (four thousand) mm and SUVs. It has been clarified that GST is applicable only on the value that represents margin of the supplier i.e., the difference between the purchase price and selling price (depreciated value if depreciation is claimed) and not on the value of the vehicle. Also, that it is not applicable in case of unregistered persons.

2) **Ready to eat popcorn:** The following clarification with respect to rate of GST on ready to eat popcorn has been recommended:

Description	HSN	Clarified Rate
Ready to eat popcorn mixed with salt and spices supplied as other than pre-packaged and labelled	2106 90 99	5%
Ready to eat popcorn mixed with salt and spices supplied as pre-packaged and labelled	2106 90 99	12%
Popcorn mixed with sugar (such as Caramel popcorn)	1704 9090	18%

Further, the Council decided to regularise the issues for the past period on 'as is where is' basis.

3) **Sponsorship services provided to body corporates:** Recommendation to bring supply of sponsorship services provided by the body corporates under Forward Chare Mechanism which is presently covered in the Notification No. 13/2017 – CT (Rate) dated June 26, 2017 i.e., the Reverse Charge Notification.

4) **Accommodation, food and beverage service**: It is recommended that the term 'declared tariff' as defined under the rate Notification No. 11/2017-Central Tax (Rate) dated June 28, 2017 (as amended from time to time) would be omitted.

Accordingly, the term 'specified premises' which is defined currently to mean premises providing hotel accommodation services having declared tariff of any unit of accommodation above INR 7500 (Indian Rupees seven thousand five hundred)per unit per day or equivalent would also be suitably amended.

It is recommended that the GST rate on supply of services of accommodation, food and beverage would be linked with actual value of supply of any unit of accommodation provided by the hotel.

Further, the rate of GST applicable on restaurant services in hotels, for a given financial year, is proposed to be dependent upon the 'value of supply' of units of accommodation made in the preceding financial year, i.e. 18% with ITC if the 'value of supply' exceeded INR 7500 (Indian Rupees seven thousand five hundred)for any unit of accommodation in the preceding financial year, and 5% without ITC otherwise.

Further, it is also recommended that the suppliers will have an option to pay tax on restaurant service in hotels at the rate of 18% with ITC, if the hotel so chooses, by giving a declaration to that effect on or before the beginning of the financial year or on obtaining registration.

5) **Measures for trade facilitation**

a) **Amendment to Schedule III of the CGST Act**

Insertion of clause (aa) in paragraph 8 has been recommended with effect from July 1, 2017, to explicitly provide that supply of goods warehoused in a SEZ[22] or FTWZ[23] to any person before clearance of such goods for exports or to the Domestic Tariff Area, will be treated neither as supply of goods nor as supply of services. This will bring transactions relating to supply of goods warehoused in SEZ/FTWZ at par with the existing provision in GST for transactions in Customs bonded warehouse.

b) **Taxability of vouchers**

To address the long-standing issue of taxability of vouchers under GST, it has been recommended to omit Sections 12(4) and 13(4) from CGST Act i.e., time of supply of vouchers and rule 32(6) from CGST Rules i.e., value of vouchers, to resolve ambiguities in the treatment of vouchers.

Various recommendations have been made to clarify taxability of vouchers in different scenarios.

c) **Clarifications to be issued by way of circulars**

a. Clarification regarding requirement of reversal of Input Tax Credit by Electronic Commerce Operators ("**ECO**") in respect of supplies made under Section 9(5) of CGST Act:

It has been recommended to clarify that no proportional reversal of ITC under Section 17 (1) or Section 17 (2) of CGST Act is required to be made by the ECO in respect of supplies made through the ECO for which they are required to pay tax in terms Section 9(5) of CGST Act.

b. Clarification on availability of ITC as per Section 16(2)(b) of CGST Act in respect of goods which have been delivered by the supplier at his (supplier's) place of business:

The Council has recommended to clarify that in an ex-works contract, where goods are delivered by the supplier to the recipient or a transporter at the supplier's place of business and the property in goods transfers to the recipient at that point, the goods are considered to be received by the recipient under Section 16(2)(b) of CGST Act, 2017 and the recipient may claim ITC on such goods, subject to the conditions outlined in Sections 16 and 17 of the CGST Act.

c. Clarification regarding applicability of late fee for delay in furnishing of FORM GSTR-9C and providing waiver of late fee on delayed furnishing of FORM GSTR-9C for the period from 2017-18 to 2022-23:

[22] Special Economic Zone
[23] Free Trade Warehousing Zone

It has been recommended to clarify that the late fee under Section 47(2) of the CGST Act is leviable for the delay in filing the complete annual return under Section 44 of the CGST Act, which includes both FORM GSTR-9 (Annual Return) and FORM GSTR-9C (Reconciliation Statement), where applicable.

For the annual returns pertaining to the period 2017-18 to 2022-23, the Council also recommended issuance of notification under Section 128 of CGST Act for waiver of the amount of late fee for delayed filing of FORM GSTR-9C, which is in excess of the amount of late fee payable till the date of filing of FORM GSTR-9 for the said financial years, provided the said FORM GSTR-9C is filed on or before March 31, 2025.

The above recommendations of the GST Council as discussed during the meeting held on December 21, 2024, are published by way of a press release. The amendments and clarifications proposed above will be effective only when notified/clarified *vide* notifications and circulars issued by CBIC from time to time.

Circulars issued post recommendations of the 55th GST council meeting

1) **Circular No. 240/34/2024 – GST dated December 31, 2024 - clarification in respect of ITC availed by ECO where services under Section 9(5) of the CGST Act has been supplied are supplied through their platform**

Section 9(5) of the CGST Act provides that for specified category of services, when supplied intra-state through ECO, the ECO will be required to pay tax and all the provisions of the CGST Act will apply to such an ECO as if he is the supplier liable to pay tax in relation to supply of such services.

In this regard, it had been clarified through Circular No. 167/23/2021 – GST dated December 17, 2021, that the ECO shall not be required to reverse ITC on account of restaurant services on which tax is paid under Section 9(5) of the CGST Act. However, the said ITC will not be allowed to be utilised for payment of tax under Section 9(5) of the CGST Act. The said liability will be required to be paid in cash.

Clarification was sought with respect to reversal of ITC on account of other services on which tax is paid under Section 9(5) of the CGST Act. Following the recommendation of the 55th GST Council meeting, it has been clarified that the principle outlined in the circular dated December 17, 2021, will also be applicable in respect of other services specified under Section 9(5) of the CGST Act. ECO will not be required to reverse proportionate ITC in terms of Section 17(1) and 17(2) of the CGST Act. ECO will be required to pay full tax liability on account of supplies under Section 9(5) of the CGST Act only through electronic cash ledger. The credit availed in relation to inputs and input services can used to discharge tax liability in respect of supply of services on his own account.

2) **Circular No. 241/35/2024 – GST dated December 31, 2024 – clarification on availability of ITC in respect of goods which have been delivered by the supplier at his place of business under ex-works contract**

In the automobile sector, generally the contract between the automobile dealers and the Original Equipment Manufacturers ("**OEMs**") is generally an ex-works contract and as per the terms of the contract, the property in goods passes to the dealer at the factory gate of the OEM. The dealers avail ITC on the date the vehicles are billed to them and handed over to the transporter by the OEM at his factory gate. Dispute was being raised with the respect to eligibility of the said ITC. It was being alleged that ITC can be availed by the dealers only after the vehicles are physically received by them at their business premise as Section 16(2)(b) of the CGST Act provides that ITC will not be available unless, the registered person has received the goods or services or both.

In this regard, it has been clarified that there is no reference of any particular place where goods are to be 'received' by the registered person. Further, Explanation to clause (b) of sub-section (2) of section 16 of the CGST Act provides that the goods would be deemed to have been 'received' by the registered person for the purpose of this clause, where:

a) the goods are delivered by the supplier to a recipient or to any other person on the direction of such registered person, whether acting as an agent or otherwise;

b) such direction may be given before or during movement of goods; and

c) the goods may be delivered either by way of transfer of documents of title to goods or otherwise.

Accordingly, in the present case, the property in the said goods can be considered to have been passed on to the dealer by the OEM upon handing over of the said goods to the dealer or a transporter at his factory gate, meaning thereby that the goods can be considered to have been delivered to the dealer, (through the transporter, in case of supply to transporter) by the supplier (the OEM) at his factory gate and the supply of the said goods can be considered to have fructified at the factory gate of the OEM.

The same principle is applicable in respect of supply of other goods also where the contract between the supplier and recipient is an ex-works contract, and as per terms of the contract, the goods are to be delivered by the supplier to the recipient, or to any other person (including a transporter) on behalf of the recipient, at supplier's place of business and the property in the goods stands transferred to the recipient at the time of such handing over.

3) **Circular No. 242/36/2024 – GST dated December 31, 2024 – clarification on place of supply of online services supplied to unregistered recipients**

Section 12(2)(b) provides that in case of supply of services made to unregistered recipient, the place of supply will be the location of the recipient where address on record exists in terms of clause (i) of the said Section and the location of the supplier in other cases, in terms of clause (ii) of the said Section. It was observed that many suppliers were not complying with clause (i) of Section 12(2)(b) resulting in flow of revenue in the wrong State.

In this regard, it has been clarified that A conjoint reading of clause (b) of sub-Section (2) of Section 12 of the IGST Act, sub-Section (2) of Section 31 of the CGST Act and proviso to Rule 46(f) of CGST Rules leads to a conclusion that in respect of supply of services made to unregistered persons, irrespective of the value of the said supply, the supplier is required to mandatorily record the name of the State of the unregistered recipient on the tax invoice, in cases involving supply of online money gaming or supply of taxable services by or through an electronic commerce operator or supply of online information and database access or retrieval (OIDAR) services. Rule 46(f) of CGST Rules shall be applicable in respect of all the online supplies of services supplied to an unregistered recipient, in addition to the supply of online money gaming and OIDAR services. Therefore, the suppliers are mandatorily required to record the name of the State of the recipient on the tax invoice, irrespective of the value of supply of such services, and to declare place of supply of the said services as the location of the recipient (based on the name of State of the recipient) in their details of outward supplies.

If the supplier fails to issue invoice in accordance with the said provisions by not recording correct mandatory particulars, including recording of name of State of unregistered recipient in respect of such supplies, he may be liable to penal action under the provisions of Section 122(3)(e) of CGST Act.

4) **Circular No. 243/37/2024 – GST dated December 31, 2024 – clarification on various issues pertaining to GST treatment of vouchers**

It has been clarified that on combined reading of the definition of 'voucher' as per section 2(118) of the CGST Act, along with definition of 'money' as per section 2(75) of the CGST Act and the description of 'pre-paid instruments' given by RBI, it emerges that where the voucher is covered as a pre-paid instrument recognised by the RBI and is used as a consideration to settle an obligation, then in such cases, the voucher will fall under the definition of 'money' and thus would be considered neither as a supply of goods nor as a supply of services.

In cases, where voucher is not covered as a pre-paid instrument recognised by RBI and hence, cannot be treated as money, the voucher will be in nature of an obligation on the supplier to receive it as consideration or part consideration. In such cases, the voucher can be considered as an 'actionable claim' and as per entry 6 of Schedule III of CGST Act, an activity or transactions of actionable claims, is to be treated neither as a 'supply of goods' nor as a 'supply of services'.

Where vouchers are distributed through the distributors/sub-distributors/dealers on principal-to-principal(P2P) basis, as per Section 9 (1) of CGST Act, pure trading of vouchers in this case would not constitute either supply of goods or supply of services. Accordingly, such trading of vouchers would not be leviable to GST as per Section 9 (1) of CGST Act.

Where vouchers are distributed using distributors/sub-distributors/agents on commission/fee basis, distributors/sub-distributors/agents do not operate autonomously, do not own the vouchers and only act as agent of the voucher issuer. In such cases, GST would be payable by such distributor/sub-distributor/agent, acting as an agent of the voucher issuer, on the commission/fee or any other amount by whatever name called, for such purpose, as a supply of services to the voucher issuer.

Further, there may be cases where additional services such as advertisement, co-branding, customisation services, technology support services, customer support services, etc. are provided to the voucher issuer against any amount, by whatever name called, as per agreement between such service provider and the service recipient (voucher issuer). In such a case, the said amount for supply of such additional services to the voucher issuer as per the terms of agreement, would be liable to GST at the applicable rate.

Moreover, in case of non-redemption of vouchers (breakage), there is no agreement between the issuer of voucher and the procurer for payment of any amount of for non-redemption of the voucher. Therefore, the amount attributable to non-redemption of voucher (breakage) would not constitute as a "*monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person*". Therefore, no GST appears to be payable on such amount attributable to non-redemption of voucher (breakage).

Tax Practice

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