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INDIRECT TAX

Newsletter - December 2023

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Notification

Notification No. 53/2023 - CT: New GST Amnesty Scheme for Filing of Appeals Against Orders passed on or before March 31, 2023 – November 2, 2023

The Central Government has notified the Amnesty Scheme for filing appeals against (a) tax determination orders passed on or before March 31, 2023, under the Central Goods and Services Tax Act, 2017 (CGST Act) and (b) where on an earlier occasion, the appeal of the taxpayer against an order was rejected on the grounds of limitation. In terms of the Amnesty Scheme, an appeal can be filed on or before January 31, 2024, upon payment of pre-deposit amount equivalent to 12.5% of the disputed amount.

The Amnesty Scheme was announced on the 52nd GST Council Meeting as a measure for facilitation of trade and to enable a large number of taxpayers, who could not file appeal in the past within the specified time period.

To access the notification, click here.

Circular

Circular No. 206/18/2023 - GST: Clarifications on reimbursement of electricity charges received by real estate companies, malls, airport operators etc. from their lessees/occupants - October 31, 2023

The Central Board of Indirect Taxes and Customs (CBIC) has clarified that in cases where electricity is supplied bundled with renting of immovable property and/or maintenance of premises, it forms a part of composite supply and will be taxed accordingly. In such cases, the principal supply is

renting of immovable property and/or maintenance of premise, and the supply of electricity is only an ancillary supply. Thus, even if electricity is billed separately, the supplies will constitute a composite supply, and therefore, the rate of the principal supply i.e., GST rate on renting of immovable property and/or maintenance of premise would be applicable.

However, where the electricity is supplied by the Real Estate Owners, Resident Welfare Associations (RWAs), Real Estate Developers etc., as a pure agent, it will not form part of value of their supply. Further, where they charge for electricity on actual basis that is, they charge the same amount for electricity from their lessees or occupants as charged by the State Electricity Boards or DISCOMs from them, they will be deemed to be acting as pure agent for this supply.

While the Circular attempts to clarify the 'taxability' of the supply of electricity along with renting of immovable property, it does not clarify as to when the two services can be said to be 'bundled'. The circular, thus, raises more questions than providing answers.

To access the circular, click here.

Circular No. 204/16/2023 - GST read with insertion of Rule 28(2) vide Notification No. 53/2003- CT: Clarification on taxability of personal guarantee and corporate guarantee in GST – October 27, 2023

The CBIC has issued clarification on taxability of personal guarantee and corporate guarantee in GST. In the backdrop of insertion of Rule 28(2) to the Central Goods and Services Tax Rules, 2017 (CGST Rules), the Circular clarifies as under:

(a) where personal guarantee by the Director of a company is provided to the bank/ financial institutions for sanctioning of credit facilities to the said company without any consideration, no GST is payable; and

(b) where corporate guarantee is offered to the bank/ financial institutions by the holding company for sanction of credit facilities to its subsidiary company, even when made without any consideration, the taxable value will be determined in terms of Rule 28(2) of the CGST Rules, which will be equivalent to 1% of the amount guaranteed or the actual consideration, whichever is higher.

The issue of taxability of corporate guarantee was litigated upon even under the service tax regime. Recently, the Supreme Court had ruled against applicability of service tax on corporate guarantee where no consideration was charged. However, under GST, the supply between related persons even without consideration is taxable. Thus, the insertion of Rule 28(2) and the ensuing clarification now provides greater certainty on the taxability as well as valuation of inter-corporate guarantees.

To access the circular, click here.

Circular No. 202/14/2023 - GST: Clarification relating to export of services where export proceeds are received in INR in the designated Special Vostro Account - October 27, 2023

Export of services has been defined under clause (6) of section 2 of IGST Act. As per the said definition, any supply of services needs to fulfil five conditions for it to qualify as export of services. One of the conditions to qualify a transaction as export of service is that the payments has been received in convertible foreign exchange or in INR wherever permitted by Reserve Bank of India (RBI).

The Circular accordingly clarifies that export remittances received in Special INR Vostro account, as permitted by RBI, for the purpose of consideration of supply of services will qualify as export of services as per the provisions of section 2(6) of the IGST Act, 2017.

Therefore, when Indian service exporters are paid export proceeds in INR from balances in Special Rupee Vostro account, the condition for export of service will be considered fulfilled. This is in line with the RBI policy to promote the growth of global trade with the emphasis on exports from India and to support the increasing interest of global trading

community in INR, though with RBI approval.

To access the circular, click here.

Circular No. 203/15/2023 - GST: Clarification regarding determination of place of supply in various cases – October 27, 2023

The CBIC has provided clarification in relation to the determination of the place of supply in the following scenarios:

Issue A: Supply of services for the transportation of goods, including through mail and courier, in cases where location of supplier of services or location of recipient of services is outside India.

The requirement of clarification arose due to the omission of Section 13(9) of the IGST Act w.e.f. October 1, 2023.

Clarification: The place of supply will be:

(a)the location of recipient of services, in cases where location of recipient of services is available; and

(b)the location of supplier of services, in cases where location of recipient of services is not available in the ordinary course of business.

The determination of place of supply will be made as per section 13(2) of the IGST Act i.e. the default rule.

Issue B: Supply of services in the advertising sector:

(i) where supply (sale) of space or supply (sale) of rights to use the space on the hoarding/structure (immovable property) belonging to vendor to the client/advertising company for display of their advertisement on the said hoarding/ structure; and

(ii) where responsibility of arranging the hoardings/billboards lies with the vendor who may himself own such structure or may be taking it on rent or rights to use basis from another person.

Clarification: In case (i), the place of supply of service provided by way of supply of sale of space on hoarding/ structure for advertising or for grant of rights to use the hoarding/ structure for advertising, in this case would be the location where such hoarding/structure is located.

In case (ii), the services provided by the Vendor to advertising company are purely in the nature of advertisement services and thus the place of supply shall4 be the location of the recipient of services.

Issue C: Supply of co-location services whereby security and upkeep of a business' server/s, storage and network hardware is provided

Clarification: The supply of colocation services cannot be considered as the services of supply of renting of immovable property. Thus, the place of supply in case of co-location services is the location of recipient of co-location service.

However, in cases where the agreement between the supplier and the recipient is restricted to providing physical space on rent along with basic infrastructure, without components of Hosting and Information Technology (IT) Infrastructure Provisioning services and the further responsibility of upkeep, running, monitoring and surveillance, etc., then the said supply of services shall be considered as the supply of the service of renting of immovable property. Accordingly, the place of supply the location where the immovable property is located.

The purpose of this clarification is to ensure consistency and uniformity in the application of the law across field formations.

To access the circular, click here.

Judgments

Supreme Court holds amendments to State Value Added Tax Acts after introduction of GST to be void

M/s Tirumala Constructions Versus the State of Telangana - Civil Appeal No(s). 1628 of 2023 – October 20, 2023

The Supreme Court, in appeals arising from the rulings delivered by the Telangana, Gujarat, and Bombay High Courts, has held the amendments made to the respective Value Added Tax (VAT) Acts after July 1, 2017, i.e., the introduction of GST, to be void.

Section 19 of the Constitution (101st Amendment) Act, 2016 (Constitutional Amendment Act) provided that any provision inconsistent with State laws on goods and services will continue to be in force until their amendment or repeal or until expiration of one year from commencement of the Constitutional Amendment Act, whichever being earlier. Vide the Constitutional Amendment Act, amendments were made to the Constitution of India for introduction of GST.

While the Telangana High Court and Gujarat High Court had struck down the amendments to the state VAT Acts in the backdrop of Section 19 of the Constitutional Amendment Act and on the ground of lack of legislative competence after July 1, 2017, the Bombay High Court had dismissed the writ petitions challenging the Maharashtra VAT Amendment Act.

The Supreme Court observed that Section 19 was not a mere legislative device but was adopted as part of the Constitutional Amendment Act for the limited duration it operated and was effective. By virtue of its operation, Section 19 allowed the state legislatures to amend or repeal existing tax laws during the transitional period. However, this power ceased to exist once the GST regime was implemented on July 1, 2017. Thus, the state legislatures did not have the legislative competence to enact amendments to state VAT Acts. The Court further held that after the coming into force of the GST laws on July 1, 2017, retrospective effect given to amendments to state VAT Acts were void.

GST Council cannot determine classification of goods

M/s.Parle Agro Pvt. Ltd. Versus Union of India 2023-VIL-789-MAD – October 31, 2023

M/s Parle Agro Pvt. Ltd. (Petitioner) preferred writ petition before the Madras High Court challenging the decision of the GST Council to classify 'flavoured milk' under Tariff Heading

2202 instead of Tariff Heading 0402.

While Tariff Heading 0402 pertained to '*Milk and cream, concentrated or containing added sugar or other sweetening matter*' chargeable to GST at 5%, Tariff Heading 2202 9930 pertained to 'Beverage Containing Milk' and was chargeable to GST at 12%.

The Madras High Court held that the GST Council cannot impose a classification in respect of a product, which must be independently determined by a Tax Officer.

The Court, thereafter, upon examination of the Chapter Notes of the relevant Chapter in the Customs Tariff Act, 1975, on application of principle of Nosciter a sociss and placing reliance on Food Safety & Standards (Food Products Standards & Food Additives) Regulations, 2011, concluded that 'Flavoured Milk' should be classified only under Heading 0402 and not under Heading 2202.

This is an important jurisprudential development in the interpretation of GST laws inasmuch as it has been held that the GST Council cannot determine classification.

Refund of service tax on account of export of services not to be denied in absence of challenge to self-assessed returns by the Department

BT India Private Limited Versus Union of India, 2023 SCC Online Del 7143 – November 6, 2023

BT India Pvt. Ltd. (Petitioner) was engaged in the export of information management systems and business support services to companies located outside India. The Petitioner had filed its service tax returns under self- assessment, which had not been disputed by the Department.

The Petitioner filed for refund of the CENVAT credit, i.e., the taxes paid on inputs and input services for rendering the export of services. Thereafter, the Department issued deficiency memos, which were responded to by the Petitioner. However, without the issuance of any show cause notice, the Department passed an order rejecting the refund applications. The primary ground for rejection were that (i) the Petitioner did not submit the necessary documents and (ii) the Petitioner acted as an 'intermediary' and hence, its services did not qualify as 'exports'. The rejection order was thereafter challenged before the Delhi High Court.

The Delhi High Court, reiterating the ratio of the judgement passed by the Supreme Court in *ITC Limited v. Commissioner of Central Excise Bombay, (2019) 17 SCC 46*, held that refund proceedings are akin to execution proceedings. The High Court thus held that the refund claim for CENVAT credit could not have been negated in the absence of self-assessed return being questioned, reviewed, or reassessed. The High Court further observed that a deficiency memo does not serve the purpose of a Show Cause Notice.

Roaming services provided by Indian Telecom Operators to Foreign Telecom Operators qualify as export of services and eligible for refund of tax

Vodafone Idea Limited Versus Union of India & Ors. (Delhi High Court) – October 9, 2023

Vodafone Idea Limited (Petitioner) was providing telecommunication services including services in the nature of International Inbound Roaming (IIR) and International Long Distance (ILD) services to inbound subscribers of Foreign Telecommunication Operators (FTOs). The Petitioner entered into various service agreements, i.e., International Roaming Agreements, with FTOs for providing IIR and ILD services. Further, the consideration for providing IIR and ILD services to subscribers of FTOs during their visit to India, was paid by FTOs to the Petitioner.

The Petitioner accordingly filed refund of Integrated Goods and Services Tax (IGST) towards export of the aforementioned services, which was rejected. Upon subsequent dismissal of its appeal against the refund rejection order, the Petitioner preferred the writ petition before the Delhi High Court.

The Delhi High Court observed that the Petitioner's services were to be treated as export of services as (a) the provider of service, i.e., the Petitioner, was located in the taxable territory, (b) the recipients of the service i.e., FTOs, were located outside India, and (c) the place of provision of the service was outside India. The Court further observed that the date on which payments had been received from FTOs was the relevant date for the purpose of computation of limitation period for refund under Section 54(1) of the CGST Act.

Export turnover capping under Rule 89(4)(C) to apply prospectively

Indian Herbal Store Pvt. Ltd. Versus Union of India & Ors. (Delhi High Court) – September 15, 2023

M/s. Indian Herbal Store Pvt. Ltd. (Petitioner), an exporter of herbal goods, had claimed refund of unutilized Input Tax Credit (ITC), which was rejected in appellate proceedings on the ground of non-fulfilment of conditions under Rule 89(4)(C) of the Central Goods and Services Tax Rules, 2017 (CGST Rules).

Rule 89(4)(C), vide Notification dated March 23, 2020, had been substituted to restrict the refund of ITC by capping the value of the export turnover to 1.5 times the value of similarly placed domestic supplies.

The Delhi High Court, upon examination of the statutory provisions, observed that the right for refund of the accumulated ITC stands crystalised on the date when the subject goods are exported. The Delhi High Court further held that the Rule 89(4)(C) of CGST Rules will not have any retrospective application. The Delhi High Court also observed that the Karnataka High Court in M/s. Tonbo Imaging India Pvt. Ltd. vs. Union of India and Others [W.P.(C) No. 13185/2020 dated February 16, 2023] has already struck down the substitution made in Rule 89(4)(C), being arbitrary and ultra vires in nature and contrary to provisions of Section 54 of the CGST Act. Accordingly, the High Court directed the Department to process the claim for refund of unutilized ITC.

KEY PEOPLE

Shashank Shekhar
Partner

Shashank Shekhar is a Partner in the Indirect Tax Practice at DMD Advocates, bringing over two decades of experience to the role. He has extensive court-room experience while representing clients at various fora including Supreme Court of India, High Courts and Tribunals and has obtained favourable judgments and orders for the clients from Courts and Tribunals.

Tushar Joshi
Principal Associate

Tushar Joshi is a Principal Associate with 10 years of experience in indirect tax litigation and advisory. He handles a wide range of matters related to GST, Customs, Service Tax, SEZ, Foreign Trade Policy, etc., and has represented clients at the adjudication and appellate stages, as well as before Tribunals, High Courts, and the Supreme Court.

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