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INDIRECT TAX

Newsletter - January 2024

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TABLE OF CONTENTS

Notification

Notification No. 56/2023 – CT– December 28, 2023

Extension of normal period of limitation period under Section 73 of the CGST Act for Financial Years 2018-19 and 2019-20, for issuance of order

The Central Government has notified the extension of time for proper officers to issue orders for recovery of tax, for the financial years 2018-19 and 2019-20, in cases where the short payment/non-payment is on account of reasons other than fraud, wilful-misstatement or suppression of facts by the taxpayer.

As of result of such extension, the limitation period for the issuance of show cause notices for recovery of tax has de facto been extended since under the Goods and Services Tax (GST) laws, the proper officer is required to issue a Show Cause Notice (SCN) at least three months before the issuance of order.

The Central Government has, once again, exercised its powers conferred under Section 168A of the CGST Act which enables the central government to extend statutory timelines due to force majure. Earlier, the statutory timelines for issuance of orders for the financial years 2017-18, 2018-19 and 2019-20, was extended by the Central Government vide Notification No. 09/2023-CT dated 31.03.2023 which was challenged before several High Courts.

Notification No. F. No. A-50050/99/2018-Ad.CCESTAT(Pt.)-S.O. 1(E)- Central GST (CGST)- December 29, 2023

Constitution of Principal Bench of GST Appellate Tribunal

The Central Government, acting on the recommendations made by the GST Council, has notified the constitution of the Principal Bench of GST Appellate Tribunal (GSTAT)at New Delhi.

Earlier, the provisions under Central Goods and Services Tax Act, 2017 (CGST Act) relating to constitution of GST Appellate Tribunal and benches thereof, and qualifications and appointment of the members, were subject to judicial challenge. Accordingly, Section 109 and 110 of the CGST Act had been amended in 2023 to pave way for the constitution of the GSTAT.

The development is extremely crucial as even after nearly seven years of introduction of GST, the GSTAT had not been constituted. As a result, in the absence of efficacious remedy, the taxpayers aggrieved by the orders of the First Appellate Authority, had been approaching the High Courts, thereby increasing their work load.

Instructions

Instruction No. 05/2023-GST- December 13, 2023

Instructions to Department for investigation of secondment arrangements

The Central Board of Indirect Taxes & Customs (CBIC) has instructed the field formations not to mechanically apply the Supreme Court's ruling in the Northern Operating Systems judgment (NOS Ruling) while investigating secondment arrangements. The CBIC has instructed that investigation in each case requires a careful consideration of its distinct factual matrix, including the terms of contract between overseas company and Indian entity, to determine taxability or its extent under GST and applicability of the principles laid down by the Supreme Court's judgement in NOS Ruling.

The CBIC has further instructed that Section 74(1) of the CGST Act for sending SCNs should only be invoked in cases of genuine fraud or evasion of taxes.

Previously, the Supreme Court, in the peculiar facts of NOS Ruling, had held that the secondment of employees by the overseas group company to NOS was a service of 'manpower supply' and Service Tax was leviable on the same. Since secondment as a practice is not restricted to service tax regime, the issue of taxability on secondment under GST also arose. The GST Department accordingly initiated investigation in respect of secondment arrangements of various multi- national corporations and issued SCNs upon mechanical application of the NOS Ruling, even where the factual matrix and underlying secondment arrangements were distinguishable from the NOS Ruling.

Judgments

M/s Jaiprakash Associates Ltd & Ors. v. State of H.P & Ors. (CWP No. 4599 of 2013 and connected matters)

Himachal Pradesh High Court holds that the tax incentives to industrial units under the State Industrial Policy cannot be withdrawn during the promised period

The Himachal Pradesh Government had notified the Industrial Policy, 2004 with the objective of incentivizing entrepreneurs to set up industrial units in backward areas of the State. Pursuant thereto, industrial units were set-up in the tax-free zones notified under the Policy. However, in 2013, the State Government issued a Notification, whereby the areas/ panchayats where the industrial units had been set up were de-notified as backward areas and consequently, tax demands were raised. Notification was accordingly challenged.

The High Court, on application of the principle of promissory estoppel, held that the action of the State in withdrawing tax concessions granted to the industrial units was not in consonance with law. The industrial units had acted upon the promise made by the State for investing in backward panchayats of the State categorized as tax free zone. The promise was regarding the exemption from payment of Value Added Tax (VAT)/ Central Sales Tax (CST) for a period of ten years from the date of commencement of commercial production or from the date of exemption notification, whichever was later.

The High Court observed that the Doctrine of Promissory Estoppel can certainly be invoked by the industrial units under such circumstances to compel the State to adhere to its side of the bargain promised under the Industrial Policy, 2004 and the Rules framed. The State cannot assert its entitlement to withdraw tax concessions and instruct industrial units to pay VAT/CST solely because, in subsequent years, the Panchayats where the industrial units had been established were de-notified, losing their backward status.

Additionally, the High Court held that the notification withdrawing the backward area status will only apply prospectively to industries established or expanded after the withdrawal notification's date and not retrospectively to the industrial units which had already come into production by the time backward area status was withdrawn. The Panchayats must be considered as backward areas/tax-free zones for granting tax incentives to the industrial units, aligning with the State's promise for a specific period.

This is welcome decision as the High Court has once again endorsed the application of promissory estoppel in cases where the Government, having promised tax exemption to industries for development of backward areas, subsequently withdraws the same. Earlier, the Supreme Court in VVF Limited had ruled against the application of doctrine of promissory estoppel owing to fraud and evasion in cases involving area- based exemptions.

Indian Oil Corporation Ltd. v. Commissioner of CGST & Ors. (W.P(C)10222/23 & CMNo.39561/2023)

Delhi High Court allows refund of accumulated Input Tax Credit on account of inverted duty structure where the principal input & output have same GST rate but other inputs have higher rates

The Petitioner had applied for refund of Input Tax Credit (ITC), which had accumulated on account of Inverted Duty Structure (IDS). While the principal input and output supply of the Petitioner were chargeable to GST at the same rate, there were certain other input which were chargeable to higher GST rate.

However, the Department had rejected the refund of accumulated Input Tax Credit (ITC) by relying on CBIC Circular No.135/5/2020-GST dated March 31, 2020 (said Circular). The said Circular provided that in cases where the input and output were same, though attracting different tax rates at different points in time, were not eligible for refund of accumulated ITC.

Upon challenge to the rejection of refund, the High Court noted the bulk LPG, used as principal input, and bottled LPG supplied by the Petitioner, both were chargeable to GST at 5%. Further, various items were used for production of bottled LPG (i.e. the output supply) including accessories required for safety purposes. Such items and accessories were essential for production of the bottled LPG and were chargeable to GST at 18%.

The High Court, upon examination of the statutory provisions, observed that the use of 'inputs' under Section 54(3)(ii), in the plural sense, clearly shows that the refund of accumulated ITC is not limited to ITC accumulated on a single input. Thus, there may be multiple inputs that may be used or consumed for effecting the output supplies. The use of the words output 'supplies' also indicates that the taxpayer's output supply may not be singular. In such circumstances, it would be necessary to determine whether the accumulation of any unutilised ITC is on account of the rate of tax on inputs exceeding the rate of tax on the output or for any other reason.

The Court thus held that in case where the accumulation of ITC is attributable solely to the rate of tax on inputs exceeding the rate of tax on output supplies, the taxpayer's claim for refund on accumulated unutilised ITC will squarely fall under Section 54(3)(ii) of the CGST Act (which provides for refund of accumulated ITC in case of IDS). The Court further held that the said Circular did not proscribe grant of refund in cases where the principal input and the output supply are similar.

The High Court accordingly directed the Department to process the Petitioner's refund claim.

Grapes Digital Pvt. Ltd. v. Principal Commissioner & Another (W.P.(C) No.2918/2021)

Delhi High Court upholds Department's adjustment of interest liability against refund claimed

The Petitioner, an exporter of services, had also been importing certain services which were leviable to IGST under reverse charge. During the initial phase of GST implementation, since certain issues were being faced in respect of refund of GST, in order to avoid blocking of funds by payment of IGST on imports, the Petitioner delayed the payment of tax (both on imports as well as exports) and amended its returns subsequently to include the details of tax payment.

The Petitioner thereafter had filed its refund claim which was allowed after adjusting interest liability on (a) delayed payment of tax on input supplies under RCM and (b) delayed payment of tax on zero- rated supplies.

The question that arose before the Delhi High Court was whether such adjustment of interest amount is permissible and whether the interest liability at all arose.

The Delhi High Court observed that in cases where there is no dispute as regards the tax liability and date of payment of tax, interest liability is only a matter of computation. In the present case, while adjudicating the refund claim, the Department had determined the interest liability and therefore, the principles of natural justice were satisfied and there was no requirement for a further notice under Section 73.

The High Court further held that interest on delayed payment of tax being a statutory levy, cannot be avoided on the ground that the ITC will be available to the assessee at a later stage. An assessee is not absolved from the statutory levy of tax if the supply imported is required to be exported. The Court held that the levy of GST and interest payable thereon is a statutory exaction and if the same is not discharged within the

prescribed period, the interest liability arises.

Qua interest liability on delayed payment of tax on zero- rated supplies, the Delhi High observed that while the Petitioner during the material time had made exports without payment of IGST, at a subsequent stage, the Petitioner had amended its return/ invoices to reflect the supplies were exported with payment of IGST. The Court held that since the Petitioner had elected to amend the export invoices to reflect exports after payment of IGST, the logical consequence was that the Petitioner would be liable to pay interest on delayed payment of IGST. The Court held that such interest liability was the statutory consequence of amending invoices reflecting the exports made without payment of IGST as exports made after payment of IGST.

This is an important decision as regards the challenge by the assessees against determination of interest liability under GST. The High Court has given primacy to the application of statutory provisions over principle of revenue neutrality while adjudicating the assessee's interest liability.

M/S Satyendra Packing Limited v. Union of India (R/SCA/3084/2023)

The Department cannot deny the benefit of rebate under the RoDTEP Scheme even though the goods fall in the restricted category but exports were made by the permission of the designated authority

The Remission of Duties and Taxes on Exported Products (RoDTEP) Scheme, introduced by way of amendment to the Foreign Trade Policy (FTP), aimed to provide a duty credit mechanism for incentivizing the exporters. The benefit under RoDTEP was also available on export of sugar.

While the assessee was claiming the benefit of rebate under the RoDTEP scheme on export of sugar, owing to subsequent developments, export of sugar was put under 'restricted' category and was permitted to be exported with specific permission from the Directorate of Sugar (DoS). The assessee claimed to have fulfilled conditions for sugar export, adhering to guidelines from the DoS, but the Department denied the benefit of the RoDTEP scheme on the ground that export made by the assessee falls under the restricted category.

The High Court noted that since the assessee had exported sugar after fulfilling all the conditions prescribed by the DoS, the assessee was eligible to the benefit under RoDTEP. The Court directed the Department to grant the benefit of rebate to the assessee who exported sugar with specific permission under the specific condition prescribed by the DoS.

Nutan Warehousing Company Pvt. Ltd. v. Commissioner, Central Tax (WP 12775 of 2019)

Bombay High Court allows GST exemption to warehousing of tea by interpreting agriculture produce to include 'tea'

The Bombay High Court holds 'tea' stored in warehouses to be an agricultural produce, and thus, exempting the same from GST in light of the specific exemption available to services of warehousing of agricultural produce.

The assessee had let out its warehouse, where the licensee undertook the activity of blending and packing of tea. The High Court, upon analysing various past rulings, observed that the process of blending does not alter the essential characteristic of tea to be an agricultural produce. Further, the Court observed that while the Department had issued a Circular clarifying that tea does not amount to an agricultural produce, such a circular cannot amend a statutory notification or whittle down the exemption provided thereunder.

S.K. Chakraborty & Sons vs. Union of India & Ors. (S.K. Chakraborty & Sons vs. Union of India & Ors. (M.A.T. 81 of 2022)

Prescribed period of limitation, along with discretionary condonation of delay, for filing of the Appeal before the first appellate authority under GST can be extended by the first Appellate Authority

The assessee, a partnership firm, had received show cause notice alleging suppression of sales. Subsequently, an assessment order was passed, against which the assessee preferred an appeal before the Appellate Authority. However, the said appeal was beyond the limitation period prescribed under Section 107 of the West Bengal Goods and Service Tax Act (WBGST Act).

The Appellate Authority accordingly rejected the appeal for not having any power to condone the delay beyond the prescribed period.

In this backdrop, the High Court noted that in the case of *Superintending Engineer/Dehar Power House Circle Bhakra Beas Management Board (PW) Slapper and Another, 2020 (17) SCC 692*, the Apex Court had observed that the key principle for determining the applicability of provisions of Limitation Act, 1963 to a special law is to consider the scheme of such special law so as to determine whether there is any express or implied exclusion of the provisions of the Limitation Act.

In the present case, the High Court observed that Section 107 of the Act of 2017 does not exclude, expressly or impliedly, the applicability of the Limitation Act of 1963. Thus, in the absence of specific exclusion of the Section 5 of the Limitation Act,1963, which provides for extension of prescribed period if the applicant satisfies the court of sufficient cause for not preferring the application in the prescribed period, it would be improper to read an implied exclusion thereof. The Appellate Authority, thus, was directed to consider and decide the application for condonation of delay filed by the appellant on merits.

Badha Ram vs Intelligence Officer, Kerala State GST Department (Bail Appl. No. 10492 of 2023)

Completion of assessment proceedings not essential for arrest or prosecution of offence under GST

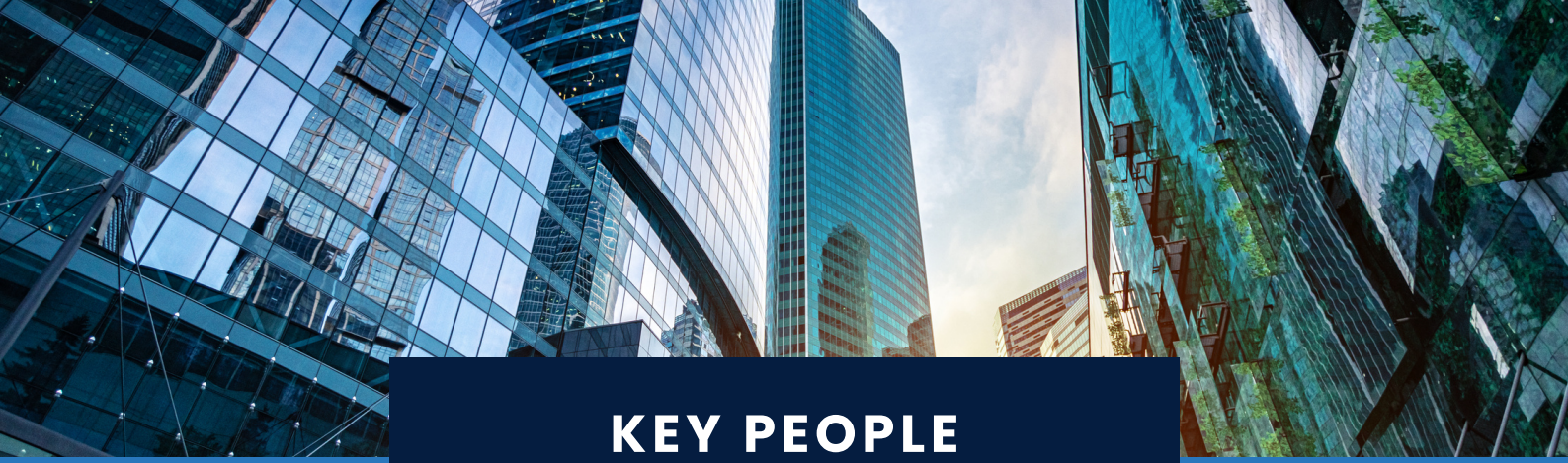
The Petitioner, a wholesale distributor of mobile accessories and electronic items, was accused by the GST authorities of supplying goods without issuing invoices to his customers, resulting in GST evasion of

INR 6.14 Crores. A raid was conducted at the Petitioner's office and he was arrested on the allegation that he committed cognizable and non-bailable offence under Section 132(1)(a) of the CGST Act.

In the bail application, the Petitioner contested that the prosecution for arrest can take place only after the completion of assessment proceedings.

The High Court rejected the contention holding that the prosecution of offences under Section 132 of the CGST Act has no co-relation with the assessment proceedings. The Court further held that the power to arrest under the CGST Act can be exercised where the Commissioner has the reason to believe that the person has committed offences enlisted under Section 132(1) of the CGST Act.

The High Court however, opined that power to arrest cannot be exercised routinely in a mechanical manner. Furthermore, in cases of technical nature where demand is based on difference of opinion involving interpretation of law, the power to arrest must be exercised with utmost caution having regard to Section 41 of the Code of Criminal Procedure which stipulates situations requiring an arrest.



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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