



INDIRECT TAX
Newsletter – February 2024

TABLE OF CONTENTS

• Budget Update: Mandatory Applicability of Input Service Distribution Route for Distribution of Credit	2
• Budget Update: Insertion of New Penalty Provision for Non-compliance of Special Procedure Notified for Manufacturers of Tobacco, Pan Masala etc.	2
• Notification No. 04/2024- Central Tax dated January 05, 2024	2
• Judgment: M/s K.P. Mozika vs. Oil and Natural Gas Corporation Ltd. & Ors. (Civil Appeal No. 3548 of 2017)	2
• Judgment: Eicher Motors Ltd. vs. The Superintendent of GST and Central Excise (W.P.Nos.16866 & 22013 of 2023)	2
• Judgment: Tvl. Kalyan Jewellers India Pvt Ltd vs. UOI & Ors. (W.P.No.5130 of 2022)	3
• Judgment: M/s Bosch Electrical Drive India Private Limited Vs. Commissioner of Central tax (Service Tax Appeal No. 40010 of 2020)	3



Budget Update

Mandatory Applicability of Input Service Distribution Route for Distribution of Credit

The Finance Bill 2024 proposes amendment to Section 20 of the Central Goods and Services Tax (CGST) Act, making Input Service Distributor (ISD) registration mandatory for common input services received at head offices, eliminating the option to cross charge. The amendment mandates ISD to distribute Input Tax Credit (ITC) for common input services subject to Reverse Charge Mechanism (RCM) and will resultantly remove the flexibility to adopt any value for cross charging.

Earlier, the GST Council in its 50th Meeting had recommended amendment to GST laws to make ISD mechanism mandatory prospectively for distributing ITC of common input services procured from third parties. Pursuant to such recommendations, the GST Council in its 52nd Meeting recommended the proposed amendments to GST laws to make ISD mechanism mandatory prospectively. Many assesseees, having operations in multiple states, have been opting to cross-charge the ITC. It may be noted that cross-charge mechanism has not been statutorily prescribed for distribution of ITC under the GST laws.

Insertion of New Penalty Provision for Non-compliance of Special Procedure Notified for Manufacturers of Tobacco, Pan Masala etc.

The Central Board of Indirect Taxes and Customs (CBIC) had notified a special procedure for registered manufacturers of specific goods including tobacco, pan masala and other similar products regarding

machine registration and monthly return filing. The Finance Bill 2024, proposes to introduce a new penalty provision, imposing on assessee a penalty of INR 1 lakh per unregistered machine used in the production of such items if he fails to comply with the prescribed procedures and allows for seizure and confiscation of such machines. The machines will not be confiscated if the penalty imposed is paid by the defaulting assessee and the registration is completed within three days of receipt of penalty order.

Notifications

Notification No. 04/2024- Central Tax dated January 05, 2024

The Central Government has notified a special procedure for registered manufacturers of tobacco products (such as pan masala, smoking mixtures, scented tobacco, etc.) for furnishing the details of filling and packing machines being used/ installed at/ disposed off from the registered place of business. A special statement has also been prescribed which is required to be filed by the registered person by 10th of every month.

The notification has been given effect from April 01, 2024.

The proposed amendment and the notification have been issued with a view to curb tax evasion and malpractices in tobacco industry as was deliberated upon and recommended by the GST Council in its 49th Meeting.

Judgments

M/s K.P. Mozika vs. Oil and Natural Gas Corporation Ltd. & Ors. (Civil Appeal No. 3548 of 2017)

The Supreme Court, adjudging a batch of appeals, has held that the hiring motor vehicles such as cranes, trucks, buses, trailers, etc. to be a service, being in the nature of grant of license to use.

The Apex Court, to determine whether the transactions constituted a 'sale' or a 'service', applied the tests laid down by it in the case of *Bharat Sanchar Nigam Limited & Anr. vs Union of India & Ors. (2006) 3 SCC 1*. As per the said ruling, for transfer of

'right to use', a transferee should have a legal 'right to use' the transferred goods and the transferor must hand over substantial control over the goods to the transferee. On the contrary, if the contractor-transferor retains substantial control over the goods, there was no transfer of 'right to use' and consequently, such transaction amounted to a 'service'. In the process, the Hon'ble Court acknowledged the legal distinction between transfer of 'right to use' versus a mere 'license to use' goods.

The Court, after careful evaluation of terms and conditions of the underlying contracts, opined that in all cases, the contractor-transferor retained control over the cranes since the contractor had the option of replacing the vehicles in case of malfunction, he was responsible for the legal consequence of using the vehicles and the vehicles were operated upon by his crew. The Court, therefore, held that the transactions did not constitute 'sale' and accordingly, were not amenable to sales tax or the Value Added Tax (VAT). However, the Court granted liberty to Union of India to initiate proceedings for recovery of service tax.

This decision once again highlights the importance of contractual arrangement between the parties in determining the factum of transfer of effective control and possession and whether a transaction qualifies as 'sale' or 'service'.

Eicher Motors Ltd. vs. The Superintendent of GST and Central Excise (W.P.Nos.16866 & 22013 of 2023)

The Madras High Court has held against the interest liability where GST amount was routinely deposited in the Electronic Cash Ledger (ECL) within due date but the assessee defaulted in filing monthly return in FORM GSTR- 3B.

Owing to technical glitches on the GST portal, the assessee was unable to transition the credit accumulated in the pre- GST regime to the Electronic Credit Ledger (ECrL), which in turn led to non-filing of monthly FORM GSTR-3B for the period between August, 2017 to December, 2017. However, the assessee had been



depositing GST for the said period in its Electronic Cash Ledger (ECL) under the appropriate heads within the due date of tax payment. While the credit was finally transitioned, after a lapse of 6 years, the GST Department initiated interest recovery proceedings for alleged belated payment of GST during the said period.

The High Court, to decide whether the deposit into the ECL constitutes payment of GST, analyzed various provisions under the GST laws. The Court observed that once the FORM GST PMT-06 is generated and if any amount is paid through the said form in the authorized bank, the same stands credited to the account of the Government. It is only then that the said amount is deemed to be credited to the ECL. The Court further observed that filing of FORM GSTR-3B within due date is immaterial for remittance of GST to the account of Government and as long as GST is paid to the Government before the last date for filing FORM GSTR-3B, there is no interest liability.

The Court observed that whenever, the GST has been paid by using FORM GST PMT-06, the tax liability stands discharged to that extent. The filing of FORM GSTR-3B only ensures the complete discharge of GST liability by the registered person through the accounting entries in the respective ledgers. It does not mean that only when the FORM GSTR-3B is filed, the Government can utilise the GST collection made by the registered person. From the moment GST is deposited by generating FORM GST PMT-06, it is the money of the exchequers, since the money was collected only under the name of the exchequer in the form of GST.

The High Court accordingly ruled against the interest liability of the assessee.

This decision of the Madras High Court will greatly benefit those compliant assesseees who, despite having discharged tax liability by depositing GST, may have defaulted in filing return in FORM GSTR-3B owing to genuine reasons.

Tvl. Kalyan Jewellers India Pvt Ltd vs. UOI & Ors. (W.P.No.5130 of 2022)

The Madras High court has held that

Gift Vouchers are 'actionable claims' under the GST laws. However, the underlying transaction is subject to GST.

The Petitioner, as part of its sales promotion strategy issued redeemable Pre-Paid Instruments (PPIs) or Gift Vouchers and had accordingly sought an advance ruling on the taxability thereof from the Authority of Advance Ruling (AAR). While the AAR held that the PPIs issued by the Petitioner are 'vouchers' and constituted supply of goods, in appeal, the Appellate Authority for Advance Ruling (AAAR) held the PPIs/Gift vouchers to be neither a supply of goods nor a supply of services but means of payment for consideration.

However, the High Court opined that the PPIs/gift vouchers issued by the Petitioner constituted 'actionable claim' under the GST laws. The customers had the right to enforce a voucher in case the Petitioner failed to allow redemption thereof and thus, a voucher acknowledged 'debt'. Similarly, if amounts paid were not credited into the account of the customer after the expiry of the period of the vouchers validity, it would give a cause of action to customers to recover the amount as per RBI's Master Direction. The High Court accordingly held that the gift vouchers/ cards were not exigible to GST in terms of the exclusion provided to 'actionable claims' under Section 7(2)(a) of the CGST Act read with Clause 6 of Schedule III.

The Court further held that while the vouchers are not liable to tax by themselves, the underlying transactions are taxable. As a result, where a gift voucher is issued for identifiable goods, the Court held that GST is payable at the time of issuance of the gift voucher and if gift voucher is for unspecified goods to be purchased later, then GST is payable at the time of their redemption.

The question of taxability of vouchers is vexed one and has been subject to matter of litigation previously as well. The Karnataka High Court, in the context of taxability of vouchers held that GST is not leviable thereon as vouchers are mere instruments accepted as consideration for supply of goods or services and do not have any inherent value of their own.

M/s Bosch Electrical Drive India Private Limited Vs. Commissioner of Central tax (Service Tax Appeal No. 40010 of 2020)

The Customs, Excise and Service Tax Appellate Tribunal (CESTAT), Chennai rules that it has the jurisdiction to entertain appeals against refund order passed under Section 142 of the CGST Act.

The Appellant, pursuant to an audit, had deposited the short payment of service tax in respect of import of services post implementation of GST. The Appellant thereafter claimed refund of service tax under Section 142(3) of the CGST Act as he was unable to transfer the credit of service tax in his ECRL (owing to the service tax return been filed before deposit of service tax). The Appellant's refund claim was rejected both at the adjudication and appellate level.

Before the CESTAT, the issue arose as to whether an appeal would lie before it against an order passed under Section 142 of the CGST Act (which pertains to provisions related to transition from pre- GST to GST regime).

The Larger Bench of CESTAT opined that Section 142(3) of the CGST Act mandates that claims for refund of CENVAT credit or any other amount paid under the 'existing law' must be governed by the provisions of the 'existing law', i.e., Chapter V of the Finance Act, 1994 and the Central Excise Act, 1944. Thus, despite the enactment of the CGST Act, the appellate provisions remain the same for refund claims filed under the previous laws. Furthermore, the CESTAT opined that an appeal against an order passed under Section 142 of the CGST Act does not lie before the Appellate Tribunal to be constituted under the CGST Act since such Tribunal can only entertain an appeal against an order passed under Section 107 or 108 of the CGST Act.

By way of the above decision, the CESTAT has ruled in favor of its jurisdiction to entertain appeals against refund orders pertaining service tax arising out of the action of the Department post transitioning into GST.

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.

DISCLAIMER

The information provided in this document does not constitute a legal opinion/advice by DMD Advocates. The information provided through this document is not intended to create any attorney-client relationship between DMD Advocates and the reader and, is not meant for advertising the services of or for soliciting work by DMD Advocates. DMD Advocates does not warrant the accuracy and completeness of this document and readers are requested to seek formal legal advice prior to acting upon any information provided in this document. Further, applicable laws and regulations are dynamic and subject to change, clarification and amendment by the relevant authorities, which may impact the contents of this document. This document is the exclusive copyright of DMD Advocates and may not be circulated, reproduced or otherwise used by the intended recipient without our prior permission.

