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INDIRECT TAX

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INSTRUCTIONS

Directorate General of GST Intelligence Issues Guidelines for Conducting Investigations

Instructions bearing F. No. DGGI/17/2023-INV-O/o Pr DG-DGGI-HQ-DELHI-Part(1) dated February 8, 2024

The Directorate General of GST Intelligence (DGGI), superseding its earlier guidelines, has issued the following consolidated guidelines, approved by Central Board of Indirect Taxes and Customs (CBIC), to DGGI units for conducting investigation in certain cases. The key guidelines are highlighted hereinbelow:

- The DGGI should not take up a role not assigned in the DGGI charter. The Zonal Units (ZU) shall avoid taking up such functions that more appropriately fall in the purview of return scrutiny or audit, etc.
- A ZU shall normally not initiate investigation related to an aspect leading to tax demand notice on a taxpayer located outside jurisdiction allocated to it and rather forward any information or intelligence to the concerned jurisdictional ZU for implementation.
- In situation where a taxpayer has multiple Goods and Services Tax (GST) registrations and a ZU has, on a particular issue, initiated investigation against such taxpayer within its own jurisdiction, the investigation on the same issue with respect to other registrations of the same taxpayer in other State(s) can be conducted without seeking approval for inter-ZU investigation.
- In the case of record-based investigations, only a ZU which has the entity registered in its geographical jurisdiction is to initiate the investigation.

- Investigation is to be initiated after obtaining the prior approval of Principal Additional Director General/Additional Director General of ZU. However, in specific cases such as (i) interpretational issues seeking to levy tax for the first time, (ii) concerning big industrial house/major multinational corporations, (iii) sensitive matters or (iv) matters already before the GST Council, prior written approval of Director General of Sub- National Unit (SNU) will be required for initiation of investigation. Moreover, for cases of the category (iii) or (iv), before any precipitative action is taken in investigation, the respective DG SNU shall necessarily bring the matter to the notice of the Principal Director General.
- In situation where while chasing the Input Tac Credit (ITC) chains, a ZU identifies an entity as being the potential end- availer of ITC in relation to a particular set of fake invoices/supplies, the norm to be followed is that the ZU which identifies such entity shall pass on the relevant intelligence/ information/supporting material to the jurisdictional SNU/ZU of such entity for further necessary action.
- For initiating investigation against listed companies, Public Sector Undertakings (PSUs), Government Agencies/Departments/Authority, official letter should be initially addressed to the officers of such entities and requesting for submission of information within reasonable time rather than issuing summons.
- Vague and cryptic letters/ summons not to be issued for conducting roving inquiry. Moreover, information available on GST Portal may not be called for by way of letters/summons.
- To avoid parallel investigation by multiple investigating office (s), the feasibility of only one of the offices pursuing the investigation must be discussed.
- Investigation must be concluded expeditiously and not more than one year.
- In cases involving interpretational issues where the taxpayer has followed a prevalent trade practice, it has been recommended that the concerned Director General, after consultation with other SNUs and with prior approval of Principal Director General, make a self-contained reference to the relevant policy wing of the CBIC.
- Taxpayers may approach the Additional/ Joint Director (Admn.) of ZU in case of grievance. In case any reasonable persists, the Principal Additional Director General/Additional Director General of ZU may consider meeting with the aggrieved taxpayer.

Recently, the CBIC had issued similar Guidelines to the field formations for conducting investigation and undertaking enforcement activities under the Central Goods and Service Tax Act, 2017 (CGST Act). Notably, the Assam State GST Authorities have also issued advisory on exercising due diligence for issuance of demand notices and timely completion of adjudication thereof. The issuance of the Guidelines by various tax authorities, with grievance redressal mechanism, indicates a positive intent from the Government to streamline investigation procedures, prevent undue harassment to the bona-fide taxpayers, ensure greater transparency and give due consideration of the prevalent trade practices before taking any further action.

JUDGMENTS

Tax claims Extinguished if Not Included in the Resolution Plan

Patna Highway Projects Limited vs. State of Bihar and Ors [Civil Writ Jurisdiction Case No. 14376 of 2023]

The Patna High Court has held against the recovery of tax dues by the tax authorities where such authorities fail to approach the Resolution Professional or the National Company Law Tribunal (NCLT) for inclusion of their demand in the Resolution Plan.

The Petitioner-Company was subject

to Corporate Insolvency Resolution Process (CIRP) under the Insolvency and Bankruptcy Code, 2016 (IBC), consequent to which, a resolution plan was approved by the NCLT. Subsequently, the State Tax authorities issued notices to the Petitioner- Company for assessment of tax and thereafter, the tax demand was confirmed vide assessment orders. Post unsuccessful challenge to the assessment orders before the First Appellate Authority, the Petitioner-Company challenged the demand before the High Court on the ground that State Tax Department having not sought for inclusion of the debts in the resolution plan, the tax dues against the Petitioner stands extinguished.

The High Court noted that unless the resolution plan includes the debts and the demand thereof is a part of the resolution plan, it would stand extinguished even if it is a debt due to the Central or the State Government. The High Court observed that the State or the Central Government or any local authority has the right to approach the Resolution Professional with their claims which the Resolution Professional is obliged to include in the resolution plan. However, in the present case, the High Court held that neither the State approached the Resolution Professional for inclusion of tax dues in the resolution plan, nor the State had challenged the resolution plan by way of appeal/writ. Therefore, following judicial precedents of Supreme Court, the High Court held that the tax demand raised by assessment orders stood extinguished and accordingly, restrained the State from proceeding for recovery under the impugned assessment orders.

The decision of the Patna High Court is consistent with the amendment brought vide the IBC (Amendment) Act, 2019 by way of which the resolution plan was made binding on the Central Government, State Government and local authorities to whom a debt is owed under any law. Furthermore, the judgement has further reaffirmed the position laid down by various tribunals and higher judicial forums including the Supreme Court in Ghanshyam Mishra & Sons Private Ltd., Vs. Edelweiss Asset Reconstruction Company Ltd. [(2021) 9 SCC 657], Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta and Others [(2020) 8 SCC 531] and M/s Ruchi Soya Industries vs. Union of India [(2022) 20 GSTR-OL 59] that claims specified in the resolution plan are final and per contra, any claims which do not form part of the resolution plan, stands extinguished.

Levy of GST under Reverse Charge on Recovery-Agent Services Non-Discriminatory

Pace Setters Business Solutions Pvt. Ltd. vs UOI & Ors. [W.P.(C) 7742/2019]

The Delhi High Court, dismissing the challenge to levy of GST/Service Tax under reverse charge on recovery agent services, held that the denial of ITC to service providers, who are not liable to pay tax on output services is founded on rational basis, has clear nexus with the classification as carved and therefore, is not violative of Article 14 of the Constitution of India.

The Petitioner, who provided recovery agent services to Non-Banking Financial Companies (NBFCs), by way of a writ petition before the Delhi High Court, challenged the levy of GST/ Service Tax under reverse charge on recovery agent services and to that extent, the vires of the relevant Notifications as well as Section 17(3) of the CGST Act, owing to which the Petitioner was unable to avail ITC on input tax paid by it to its sub-contractors.

The High Court observed that there is no vested or inherent right of an assessee to claim credit for an input tax paid on the services availed. The matter relating to whether any such credit is available and to which extent it is available, is a matter of statutory prescription. The right to avail ITC is a statutory right and is available to the extent that the statute permits.

The High Court noted that the Legislature/ Parliament has wide discretion in choosing the persons to be taxed or the objects for taxation. It is not open for the Petitioner to question as to why the Parliament has selected certain set of services for the levy of service tax/ GST while exempting certain other services. Equally, it is not open for the Petitioner to question as to why certain services are selected for being subjected to payment of tax on a reverse charge basis while leaving out other services.

Equally, it is not open for the Petitioner to question as to why certain services are selected for being subjected to payment of tax on a reverse charge basis while leaving out other services.

The High Court held that the legislative scheme for denying ITC in respect of services on which service tax/GST is payable on reverse charge basis is not violative of Article 14 of the Constitution of India. A service provider providing services, which are subject to payment of tax on a reverse charge basis, is not assessed to tax on the output services. Thus, such service providers would constitute a class of their own and the denial of ITC is founded on a rational basis, which has a clear nexus with the classification.

With the current ongoing debate regarding the nature of ITC, i.e., whether it is a vested/ inherent right of the taxpayer or a statutory concession, the decision of the Delhi High Court has wider ramifications insofar as it has held that ITC is not a vested/ inherent right of the taxpayer and is available only if the statute provides for the same and only to the extent that the statute permits. Additionally, the judgement also reaffirms the principle that the legislative has wide discretion in taxation matters and the courts shall not interfere in the discretion exercised as long as such discretion is not exercised in a palpably arbitrary manner. However, the issue with respect to whether ITC is a vested right under GST or not is still pending consideration before various foras.

Interest Liability Automatic on Delay in Filing of GST Returns

Sincon Infrastructure Pvt. Ltd. vs. UOI & Ors. [Civil Writ Jurisdiction Case No. 11621 of 2023]

The Patna High Court has held that interest liability would be automatic on delayed furnishing of returns, regardless of whether the payment be made from the Electronic Credit Ledger (ECrL) or Electronic Cash Ledger (ECL).

The Petitioner had challenged the peremptory recovery against demand of interest on delayed setting off of GST liability through ECrL.

The primary ground for challenge by the Petitioner was that under GST laws, the interest liability accrues only to the extent of tax payment by debit of ECL, given the amount in ECrL is always available with the Government and that the setting off of the output tax liability through ITC in ECrL is only a book adjustment, which ought not entail any interest liability.

The High Court, after thoroughly analyzing the statutory provisions, held that the ITC is availed in the ECrL only when the return is furnished. The setting off of tax liability through ITC is also occasioned only when such setting off is claimed in the return. Thus, in nutshell, the payment of tax and furnishing of return cannot be separated and must occur simultaneously. Hence, the interest is payable on the delay occasioned in payment of tax, which in turn takes place only on the furnishing of the return and the simultaneous debit made from ECL/ECrL.

The High Court further noted that anomaly sought to be rectified by introduction of proviso to Section 50(1) (which mandates the payment of interest only on the portion of delayed payment of tax which is paid by debiting the ECL) was not to prohibit the levy of interest in case of delayed return filed, when the payment of GST due is made from the ECrL. The proviso to Section 50(1) intended dispelling of any notion that the amounts merely deposited in the ECL would amount to payment of tax dues.

Previously, the Madras High Court in M/s. Refex Industries Ltd. vs. The Assistant Commissioner of CGST & Central Excise [W.P. Nos. 23360 and 23361 of 2019] had held against the levy of interest on a belated payment of tax by debit of ECrL. Furthermore, recently the Madras High Court in Eicher Motors Ltd. vs. The Superintendent of GST and Central Excise (W.P.Nos.16866 & 22013 of 2023) had held against the interest liability where GST amount was routinely deposited in the ECL within due date but the assessee defaulted in filing monthly GST return in FORM GSTR- 3B. However, Patna High Court in the present decision has taken a divergent view from both the aforementioned judgements insofar as it holds that the levy of interest is automatic on delayed filing of returns, regardless of whether the payment is made by debiting the ECL or ECrL. With divergent views of different High Courts, the issue is far from being settled.

Notifications Extending the Time Period for Issuance of Orders for Recovery of Tax Upheld

Faizal Traders Pvt. Ltd. vs Deputy Commissioner of Central Tax and Central Excise, Palakkad Division and Anr. [WP(C) No. 24810 OF 2023]

The Kerala High Court has held that the Government was well within the power to extend the limitation for completing the proceedings by way issuing notification in the wake of 'force majeure' of COVID-19 pandemic.

The Petitioner, by way of a writ petition before the Kerala High Court, inter-alia, challenged the Notification No. 13/2022- Central Tax (Rate) dated 05.07.2022 and Notification No. 9/2023- Central Tax (Rate) dated 31.03.2022 (Impugned Notifications) vide which the time limit for Proper Officers to issue orders for recovery of tax, for the financial years 2017-18, 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, was extended. The challenge to the Impugned Notifications was based on the ground that they were *ultra vires* Section 168A of the CGST Act, which enables the Central Government to extend statutory timelines due to *force majeure*.

The High Court noted that COVID-19 was a force majeure event that caused large-scale human tragedy and suffering and paralyzed the world, including economic activities in India. The Impugned Notifications were issued by the Central Government on the recommendations of the GST Council based on the *suo-motu* Order of the Supreme Court [Suo moto Writ Petition (c) No. 3 of 2020 In Re. Cognizance for Extension of limitation] in consideration of the COVID- 19 pandemic.

The High Court held that the time limit up to which the statutory timelines could have been extended considering the COVID-19 pandemic is the discretion of the Executive, which has been taken based on the recommendation of the GST Council. Consequently, the Impugned Notifications are not ultra vires the provisions of Section 168A of the CGST Act.

The exercise of powers conferred under Section 168A of the CGST Act by the Central Government to extend the statutory timelines for issuance of orders (and corresponding de facto extension of time period of issuance of Show Cause Notices), has been an issue of contention between the taxpayers and the Government. With the normal period of limitation for Financial Years 2018-19 and 2019-20 once again extended by the Central Government vide Notification No. 56/2023 – CT dated 28 December 2023 and various other writ petitions challenging the constitutionality of the afore-mentioned Notifications are pending before different High Courts, it would be interesting to see how this issue unfolds and whether is can be said that the force majeure event existed even in December 2023.

Manufacture and Other Operations in Warehouse Regulations Scheme Applicable to Solar Power Generating Units

Acme Heergarh Powertech Private Limited vs Central Board of Indirect Taxes and Customs & Anr. [W.P.(C) 10537/2022]

The Delhi High Court upheld the applicability of the Manufacture and Other Operations in Warehouse Regulations, 2019 (MOOWR), which provide for a duty deferment on the import of capital goods and inputs intended to be used in manufacturing and other operations within a customs bonded warehouse, to solar power generating units.

The Petitioners inter alia challenged Instructions No. 13/2022- Customs dated 9th July 2022 (Impugned Instructions) issued by CBIC vide which the inapplicability of MOOWR was asserted to the warehousing of imported capital goods used in the generation of solar power. The Impugned Instructions were based on the non- fulfillment of the essential

requirement in case of electricity, i.e., the affixation of a one-time-lock on the load compartment of the means of transport in which goods are removed from the warehouse. Since electricity cannot possibly comply with such one-time-lock condition and is not exempt from such condition, it fell outside the scope of the MOOWR.

The High Court, after threadbare analysis of the statutory provisions and the contemporaneous material, held the following:

On validity of Impugned Instructions: The High Court noted that the Impugned Instructions were issued in exercise of the powers conferred upon the Board under Section 151A of the Customs Act, 1962 (Customs Act), which is confined to broad policy directives concerning the working/ implementation of the Customs Act and which alone could form the subject matter of the exercise of power contained therein. The Impugned Instruction travel far beyond the advisory and clarificatory function accorded to the Board under Section 151A of the Customs Act insofar as Impugned Instruction place the licensing authorities under a clear mandate to proceed on the basis that generation of electricity as a subject per se falls outside the ambit of the MOOWR.

The High Court further observed that Impugned Instructions proceeds to hold that all licenses granted as well as applications would be guided by the view expressed by the Board, which has already come to the definitive conclusion that solar power generation is an activity which would fall outside the ambit of MOOWR. Thus, the said Instructions amounts to a dictate binding the licensing authority to cancel all subsisting licenses. Consequently, the High Court quashed the Impugned Instructions, insofar as they mandated review of existing licenses and taking of follow-up action.

On Interplay between Section 61 and 65 of the Customs Act: The High Court, dismissing the principal argument of the Revenue that Section 65 of the Customs Act (which permits the owner of any warehoused goods to carry on any manufacturing process in the warehouse in relation to such goods) was meant to apply only to manufacturing operations being undertaken on the imported capital goods and the applicability MOOWR is limited to the extent where imported capital goods get subsumed in the final product, held that Section 65 of the Customs Act does not use words of qualification or limitation insofar as either the nature of goods or manufacturing activity is concerned. Furthermore, Section 61 of the Customs Act (which provides for the period for which goods may remain warehoused), extends its application to any of the categories of goods (capital goods, non-capital goods as well as other goods) which may be imported and placed in a warehouse pursuant to permissions granted in terms of Section 65. While some categories of goods may get consumed in the manufacturing process, others may not. Therefore, the expanse of Section 61 and 65 cannot be recognized as being either restricted or limited to a particular or compartmentalized genre of goods or type of manufacturing activity.

On 'in relation to' question: Dismissing the contention of the Revenue that the phrase 'in relation to' in Section 65 of the Customs Act is intended to mean that the capital goods themselves must undergo a process of manufacture, the High Court noted that the said expression only suggest a causal link existing between the imported capital goods and the manufacturing activity that may be undertaken in the warehouse. Thus, Section 65 of the Customs Act intended to create a link between the manufacturing process or other operations that may be undertaken with the imported goods. Thus, as long as the imported goods are found to have contributed to or formed part of a process of manufacture, the qualifying criteria for the applicability of Section 65 of the Customs Act would stand fulfilled.

The ruling by the Delhi High Court comes as a major relief to the solar power industry, whose economic viability and interests are pivotal for the success of Government's broad objective for achieving an increased investment and higher share of renewable energy in the energy mix.

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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