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INDIRECT TAX

Newsletter - November 2024

Circulars

Clarifications on GST Applicability and Exemptions on various services

Circular No. 234/28/2024-GST dated October 11, 2024

The Central Board of Indirect Taxes and Customs (CBIC) has clarified the following issues:

Applicability of Goods and Services Tax (GST) on affiliation services provided by universities to colleges: Affiliation services provided by universities to colleges are not by way of services related to admission of students to such colleges or the conduct of examination by such colleges. Consequently, the said services are not exempted under the GST Laws and accordingly, GST@18% is applicable to such services.

Applicability of GST on affiliation services provided by Central and State Education Boards or Councils, or other similar bodies, to schools: Affiliation services provided by educational boards/councils/other similar bodies to schools are not by way of services related to admission of students to such schools/colleges or the conduct of examination by such colleges/schools. Consequently, such services were not exempted under the GST laws and accordingly, GST@18% was payable on such services from July 01, 2017, to October 10, 2017 (i.e., till the date when such services were exempted from the levy of GST). Further, the GST liability of such services between the period July 01, 2017, to June 17, 2021 (i.e., when the rate of such services was clarified) has been regularized on an 'as is where is' basis.

Applicability of GST on the Directorate General of Civil Aviation (DGCA) approved flying training courses conducted by Flying Training Organizations (FTOs) approved by the DGCA: The flying training courses conducted by the FTOs approved by the DGCA, whereby the DGCA mandates the requirement of a completion certificate are covered under the relevant exemption notification. Consequently, no GST is leviable on such services.

GST on transport of passengers by helicopter: The payment of GST on transportation of passengers, with or without accompanied baggage, in a helicopter on seat share basis (which has been notified at 5% w.e.f. October 10, 2024) between the period July 01, 2017, to October 09, 2024, have been regularized on 'as is where is' basis. Further, it is clarified that transport of passengers by helicopter on other than seat share basis, i.e., for charter operations, will continue to attract GST @18%.

Whether incidental/ancillary services such as loading/ unloading, packing, unpacking, transshipment, temporary warehousing, etc. provided in relation to transportation of goods by road are to be treated as part of Goods Transport Agency (GTA) services: Ancillary or incidental services provided by GTA in the course of transportation of goods by road, such as loading, unloading, packing/unpacking, transshipment, temporary warehousing etc. will be treated as composite supply of transport of goods and the method of invoicing used by GTAs will not generally alter the nature of the composite supply of service. However, if such services are not provided during the transportation of goods and are invoiced separately, then the afore-mentioned services will not be treated as a composite supply of transport of goods.

GST on import of service by an establishment of a foreign airlines company from a related person or any of its establishments outside India, when made without consideration: The GST liability on import of service by an establishment of a foreign airlines company from a related person or any of its establishment outside India, when made without consideration (which were exempted from the levy of GST w.e.f. October 10, 2024), between the period July 01, 2017, to October 09, 2024, has been regularized on 'as is where is' basis.

Applicability of GST on Preferential Location Charges (PLC) collected along with consideration for sale/transfer of residential/commercial properties: Location charges/PLC is a part of consideration charged for supply of construction services before the issuance of completion certificate. Accordingly, the location charges/PLC paid along with consideration for the construction services of residential/commercial/industrial complex forms part of composite supply where supply construction services are the main service and PLC is naturally bundled with it. Consequently, location charges/PLC attract GST at the same rate as the main supply of construction services.

Regularizing payment of GST on certain support services provided by an electricity transmission or distribution utility: The GST liability on services provided by an electricity transmission or distribution utility which are incidental or ancillary to the supply of transmission and distribution of electricity such as services by way of providing metering equipment on rent, testing for meters/transformers/capacitors etc., releasing electricity connection, shifting of meters/service lines, issuing duplicate bills etc. (which were exempted from the levy of GST w.e.f. October 10, 2024) between the period July 01, 2017, to October 09, 2024, are regularized on 'as is where is' basis.

Regularizing payment of GST on services of film distributors or sub-distributors who act on a principal basis to acquire and distribute films: The payment of GST on transactions between distributors and exhibitors wherein the distributors grant the theatrical rights to the exhibition centers (GST @18% has been clarified w.e.f. October 01, 2021) between the period July 01, 2017, to September 30, 2021 are regularized on 'as is where is' basis.

By explicitly defining the GST treatment for services like university affiliation, flying training courses, passenger transport by helicopters, and various ancillary services by GTA, the circular ensures greater tax compliance and reduced litigation by removing uncertainties. However, qua clarification regarding affiliation services, the Karnataka HC recently held that no service tax is leviable on income accrued to the University on account of granting/renewing affiliation. Since the relevant entry in service tax exemption notification was similarly worded to the entry in the GST exemption notification, the leviability of GST on affiliation services may be litigated.

Clarification on the scope of the phrase "as is where is basis"

Circular No. 236/30/2024- GST dated October 11, 2024

CBIC has clarified that in the context of GST, the phrase "regularized on as is where is basis" means that the payment made at a lower rate or exemption claimed by the taxpayer will be accepted by the Revenue Department while no refund will be granted if tax has been paid at a higher rate. Therefore, where matters are regularized on 'as is' or 'as is, where is' basis in cases of (a) two competing rates and the GST is paid at lower of the two rates or (b) GST is not paid where one of the competing rates was nil under notification entry by some suppliers while other suppliers have paid GST at higher rate, the payment of GST at lower/ nil rate will be treated as tax fully paid for the period that is regularized.

The present clarification provides clear guidance to taxpayers in cases where the tax demand has been regularized on an 'as is where is' basis by CBIC. However, regularization of GST levy or specific tax rate on an 'as is' basis may prejudice the taxpayers who diligently discharged the liability, thus, being amenable to challenge.

Clarification of various doubts related to Section 128A of the CGST Act

Circular No. 238/32/2024-GST dated October 15, 2024

CBIC has inter-alia clarified the following issues with respect to availment of benefit of waiver of interest or penalty or both under Section 128A of the Central Goods and Services Tax Act, 2017 (CGST Act) (which provides for conditional waiver of interest and penalty in respect of demand notices issued under Section 73 of CGST Act, i.e., non-fraud cases for the Financial Years (F.Y.) 2017-18, 2018-19 and 2019-20, except the demand notices in respect of erroneous refund):

(i)Any amount paid towards the demand up to the notified date i.e., March 31, 2025, will be considered as paid towards the amount payable under Section 128A irrespective of the fact whether (a) the said payment has been done before the said section comes into effect or after that or (b) the said payment was made before the issuance of demand notice/order, as long as the said payment was intended to pay towards the demand.

(ii)Any amount recovered by the tax officers as tax due from any other person on behalf of the taxpayer, against a particular demand can be considered as tax paid towards the same for the purpose of Section 128A if such amount is recovered before March 31, 2025.

(iii)Where any amount is recovered by tax officers as interest/penalty or both, such an amount cannot be adjusted against the tax amount payable towards the demand.

(iv)Where the tax due has already been paid and the notice or demand orders under Section 73 of the CGST Act only pertain to the interest and/or penalty involved, the same will be considered for availing the benefit of Section 128A. However, the benefit of waiver of interest and penalty will not be applicable in cases where the interest has been demanded on account of delayed filing of returns, or delayed reporting of any supply in the return, as such interest is related to demand of interest on self-assessed liability and does not pertain to any demand of tax dues.

(v)The benefit under Section 128A is available only when the full amount of tax demanded in the notice/statement/order is paid. Consequently, such a benefit will not be available if the taxpayer makes partial payment of the amount demanded and opts to litigate the remaining issues.

(vi)Where the notice/order involves multiple periods, ranging from the period for which waiver provided in Section 128A is applicable (i.e., F.Y. 2017-18, 2018-19, and 2019-20), and includes some other tax periods for which such waiver is not applicable, the benefit of waiver of interest/penalty or both can be availed for the period covered under the said Section. However, though the amount of tax demanded shall be required to be paid as per the notice/statement/order, as the case may be, for the whole of the period covered under the said notice/statement/order, the waiver of interest or penalty or both under Section 128A will only be applicable for the period specified under the said provision.

(vii)Where the notice/statement/ order issued under Section 73 involves multiple issues and one of them is regarding demand of erroneous refund, the taxpayer can file an application can be filed for a waiver of interest or penalty or both under Section 128A. However, the taxpayer shall be required to pay the full amount of tax demanded in the notice/statement/order, as the case may be, including on account of the demand for erroneous refund, the waiver of interest or penalty, or both under Section 128A will only be available in respect of tax demand other than that pertaining to demand of erroneous refund.

(viii)Even in cases where an order has been issued by the Proper Officer accepting the application filed by the taxpayer, the conclusion of the said proceedings will be subject to the condition that the taxpayer pays the additional tax amount as determined by the Appellate Authority/Appellate Tribunal/Court/Revisional Authority by an order issued in the matter of appeal filed by the Department, within a period of three months from the date of such order enhancing the tax liability.

(ix)In cases where the taxpayer has filed a Special Leave Petition (SLP) and the same is pending before the Supreme Court, the taxpayer is required to withdraw such SLP and submit the proof of such withdrawal along with the application seeking the benefit of Section 128A.

(x)The benefit under Section 128A will also be available for matters involving integrated tax, compensation cess, and transitional credit. However, qua transitional credit, the benefit is available only if the amount of transitional credit has been availed in the period covered under Section 128A and notice for demand of wrongly availed credit is issued under Section 73.

(xi)Section 128A will cover the waiver of any penalties demanded under the

demand notice/statement/order issued under Section 73. However, late fees, redemption fines, etc. are not covered under the said provision.

(xii)The payment of tax for availing the benefit under Section 128A can be made by either debiting the electronic cash ledger (ECL) or electronic credit ledger (ECrL). However, where (a) the demand is in respect of any tax to be paid by the recipient under the Reverse Charge Mechanism (b) by the Electronic Commerce Operator under Section 9(5), or (c) demand of erroneous refund paid in cash, then the said amount shall be required to be paid by debiting the ECL only.

(xiii)The benefit of waiver under Section 128A cannot be availed qua import on which integrated tax (IGST) is payable under the Customs Act, 1962 (Customs Act) since the demand is not issued under Section 73 of the CGST Act.

(xiv)In cases where the taxpayer has paid the required amount through FORM GST DRC-03 pursuant to an order of the Appellate Authority/Tribunal/Revisional Authority, the taxpayer is required to adjust the said amount towards the demand created in the Electronic Liability Register, before filing an application under Section 128A.

The detailed guidance by CBIC helps taxpayers understand eligibility for waiver benefits, thereby reducing ambiguity and aligning with the Government's aim of boosting revenue collection without triggering additional disputes. The taxpayers, in certain situations such as tax demand on account of multiple issues, erroneous refund and demand beyond FY 2017-20, are required to pay the entire tax amount to get the waiver of interest and penalty for FY 2017-20. In such cases, taxpayers may still be required to pay interest and penalties for the period beyond FY 2017-20. Accordingly, it is worthwhile for the taxpayers to evaluate and weigh the benefit of waiver of interest and penalty against any additional tax, interest, and penalty liability that they may have to suffer on account of opting for amnesty scheme under Section 128A.

Judgments

Kerala High Court holds Rule 96(10) of the CGST Rules 'manifestly arbitrary'

Sance Laboratories Pvt. Ltd. vs. Union of India and Ors [Writ Petition(C) No. 17447 of 2023]

The Kerala High Court has held that Rule 96(10) of the Central Goods and Services Tax Rules, 2017 (CGST Rules) (which restricts the refund of IGST paid on exports where the supplier availed benefits under certain relevant notifications provided thereunder) is ultra- vires Section 16 of the Integrated Goods and Services Tax Act, 2017 (IGST Act) (which pertains to zero- rated supply).

The Petitioner-exporters challenged the validity of Rule 96(10) of the CGST Rules primarily on the ground that the said rule is ultra vires the provisions of Section 16 of the IGST Act. The Petitioner contended that the provisions of Rule 89 of the CGST Rules (which inter-alia provides for the procedure of claiming refund of unutilized ITC on zero-rated supply of goods or services under bond or Letter of Undertaking without payment of IGST) do not restrict the right of an exporter to claim a refund, even if certain inputs have been procured after availing the benefits of the notifications referred to in Rule 96(10) of the CGST Rules. This accordingly results in an anomalous situation where an exporter, who is otherwise on the same footing, will get the benefit of refund of taxes paid if he opts for the letter of undertaking/bond route, i.e., without payment of IGST, but will not get such refund when he opts to pay the IGST and seek a refund under Rule 96(10).

The High Court, after examining the provisions of Section 16 of the IGST Act, noted that the said Section itself does not cast any restriction in claiming either a refund of unutilized ITC, where no output IGST is paid, or a refund after payment of IGST on exports.

The High Court observed that it is a well-settled proposition of law that subordinate legislation must be subservient to primary legislation. In the present case, it is evident that the subordinate legislation has traveled beyond the scope of primary legislation and does not answer in any manner primary legislation.

The Court further noted that 'subject to such conditions, safeguards, and procedure as may be prescribed' in Section 16(3)(a) and (b) (which provide for refund of IGST on zero-rated supplies), Section 20 of the IGST Act and Section 54 of the CGST Act (which pertains to refund of tax) does not authorize the imposition of restrictions to completely take away the right granted under Section 16 of the IGST Act.

The High Court, after meticulously analyzing the provisions of Rule 96 vis-à-vis Rule 89 of the CGST Rules, concluded that the working of Rule 96 of the CGST Rules results in hostile discrimination against exporters who opt to apply for a refund upon payment of IGST on exports under Rule 96 vis-à-vis exporters who opt to apply for refund in the manner contemplated under Rule 89 of the CGST Rules, which for refund of unutilized ITC upon exports.

The Court concluded that the working of Rule 96(10) of the CGST Rules created a restriction not contemplated by Section 16 of the IGST Act, on the right to refund. Accordingly, the High Court held that Rule 96(10) is ultra-vires the provisions of Section 16 of the IGST Act and unenforceable on account of being manifestly arbitrary.

Interestingly, on the recommendations of the GST Council in its 54th council meeting, the Government has prospectively omitted Rule 96(10) of the CGST Act recognizing the difficulty being faced by the exporters claiming refund of IGST paid on exports.

States can regulate all aspects related to 'intoxicating liquor', which is not limited to potable alcohol

State of U.P. & Ors. vs. M/s Lalta Prasad Vaish and Sons [Civil Appeal No 151 of 2007]

The Supreme Court, in a majority (8:1) verdict, inter-alia held that "intoxicating liquor" in Entry 8 of List- II of the Seventh Schedule to the

Constitution (List- II/ State List) (which pertains to Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors) includes not only potable alcohol but also covers alcohol that could be used noxiously to the detriment of public health such as rectified spirit, Extra Neutral Alcohol (ENA) and denatured spirit which are used as raw materials in the production of potable alcohol and other products.

The Supreme Court, adjudicating a batch of Petitions consequent to a reference made by a three-judge bench of the Supreme Court, decided inter alia on the following questions of law:

(a) Whether Entry 52 of List- I of the Seventh Schedule to the Constitution (which pertains to Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest) (List-I/Union List') overrides Entry 8 of List-II?

(b) Whether the expression 'intoxicating liquors' in Entry 8 of List II includes alcohol other than potable alcohol?

The majority bench (8 judges) of the Supreme Court, after a threadbare analysis of various provisions of the IRDA, the Constitution of India, and various judicial precedents, held the following:

(i) On the scope of Entry 8 of List- II, the Court noted that the said Entry specifies the scope of the provision by the usage of the phrase "that is to say". The Entry stipulates that it includes everything from production to the sale of intoxicating liquor, with the use of the expressions "production, manufacture, possession, transport, purchase, and sale". The Court, after analyzing various judicial precedents, held that the words that follow the expression "that is to say" are illustrative and explanatory of the scope of the provision and do not limit the scope of the Entry. Thus, the scope of Entry 8 of List II cannot be limited to the "production, manufacture, possession, transport, purchase and sale" of intoxicating liquor.

(ii) On whether Entry 8 of List-II is industry-based or product-based, i.e., whether it covers the consumable end-product (product-based Entry) or covers the production of the product as well (industry-based Entry), the Court held that Entry 8 indicates that the intent is to ensure that it is read as broadly as possible. The Entry covers the 'production, manufacture, possession, transport, purchase and sale' of intoxicating liquors. Consequently, the Entry seeks to regulate everything from the stage of the raw materials to the consumption of 'intoxicating liquor'. Thus, the said Entry includes both the industry and the product of 'intoxicating liquor'.

(iii) On Scope of Entry 52 of List- I, the Court held that the power of Parliament in Entry 52 of List I is defined by the phrase 'control'. The law enacted by Parliament must not be an abstract declaration but must specify the extent of control that is necessary to be taken in the public interest. Consequently, the competence of the State Legislature to legislate on the industry of intoxicating liquor is only denuded to the extent of the 'control' by the Union declared by the law of Parliament to be expedient in the public interest.

(iv) On the question of whether Parliament under Entry 52 of List I takes over the industry of intoxicating liquor covered by Entry 8 of List- II, the Court held that irrespective of whether the term 'industry' is interpreted in a narrow or wide manner, the industry of intoxicating liquor cannot be taken over by Parliament under Entry 52 of List I since it is a general entry dealing with industry and Entry 8 of List II is a special entry dealing with one particular industry. The consequence of interpreting Entry 52 to cover the industry of 'intoxicating liquor' is that the State Legislature loses its exclusive competence to legislate upon the product of the industry, i.e., intoxicating liquor, rendering Entry 8 fully redundant.

(v) On the meaning of 'intoxicating liquor' in Entry 8 of List-II, the Apex Court, on applying the principle of harmonious construction, concluded that the meaning of the phrase 'intoxicating liquor' cannot be restricted to potable alcoholic liquor, i.e., alcohol that is sold as a beverage. The said Entry is based on public interest, and it covers all alcohol that could be 'prone' to noxious use. Thus, while the entry covers ENA and rectified spirit which are used in the preparation of potable alcohol, it also covers variants of alcohol such as denatured alcohol which though not used in the preparation of potable alcohol, are prone to be misused. However, the Court held that the phrase 'intoxicating liquor' cannot be interpreted to mean liquid containing alcohol since it would include liquid products which may be covered by other entries, thereby, causing an overlap of the entries.

The judgment of the Supreme Court in essence holds that the States have the authority to regulate all aspects related to 'intoxicating liquor', which includes not only potable alcohol but also substances like ENA, rectified spirit, and denatured alcohol that could be 'prone' to noxious use by general public. Thus, a wide interpretation has been given by the Supreme Court to uphold the power of the State to legislate on both potable and non-potable alcohol.

Officers of the Directorate of Revenue Intelligence are 'Proper Officers' for issuance of Show Cause Notices demanding customs duty

Commissioner of Customs vs. M/s Canon India Pvt. Ltd. [Review Petition No. 400 of 2021 in Civil Appeal No. 1827 of 2018]

The Supreme Court, in a landmark ruling, adjudicated the following batch of petitions:

(i)The Review Petitions in Canon India wherein the three-judge bench of the Supreme Court decided on (a) whether the officers of the Directorate of Revenue Intelligence (DRI) would be 'Proper Officers' under the Customs Act for the purpose of Section 17 (which provides for assessment of duty) and 28 (which provides for the determination and recovery of duties) of the said Act and (b) whether such officers are empowered to issue show cause notices demanding customs duty.

The Supreme Court, relying upon its earlier decision in Sayed Ali, had held in Canon India that where one officer has exercised his powers of

assessment, the power to order re-assessment, by way of issuance of show cause notice under Section 28, must also be exercised by the same officer or his successor, else it would result in a state of chaos and confusion. It also held that unless it is shown that the officers of DRI are, at first instance, customs officers entrusted with the functions of a 'Proper Officer', they would not be competent to issue show-cause notices. The Supreme Court ultimately held that the relevant notification appointing DRI as proper officer for issuance of show cause notice under Section 28 was invalid, having been issued by the Board which had no power to do so since the relevant section did not confer any such power.

(ii)The Appeal in the case of Mangali Impex Ltd. vs. Union of India wherein Section 28(11) of the Customs Act (which retrospectively empowered all officers of customs appointed under Section 4 before 06.07.2011 to be 'Proper Officers' having power of assessments) was challenged before the Delhi High Court being in contradiction to Explanation 2 of Section 28 (which empowered all officers appointed as officers of customs prior to 06.07.2011 as proper officers for Section 17 and 28).

The High Court had held that Section 28(11) of the Customs Act did not empower DRI to issue show-cause notices prior to 08.04.2011, i.e., the date on which Section 28 of the Customs Act was amended.

(iii) The Petitions challenging the constitutional validity of Section 97 of the Finance Act, 2022 (which validated past actions of DRI Officers consequent to the judgment of Canon India)

The Supreme Court, after a threadbare analysis of the statutory provisions, inter-alia ruled as under:

a)The judgment in Canon India was rendered without looking into relevant circulars and notifications and looking into the statutory scheme for assigning the DRI officers the functions of 'Proper Officers' under Sections 17 and 28 of the Customs Act.

b)The Supreme Court noted that Section 17 of the Customs Act underwent a radical change by virtue of an amendment made by the Finance Act, 2011 by way of which the competence of the Proper Officer to conduct "assessment" was completely taken away by the legislature. However, the assessment orders, in respect of which the show cause notices under challenge in Canon India were issued, were passed under amended Section 17.

c)Reliance placed by the Supreme Court in Canon India on Sayed Ali was misplaced as the said ruling dealt with officers of Customs (Preventive) and did not consider the amendment made in Section 17 of the Customs Act in 2011 which introduced self-assessment.

d)The policy being followed by the Customs Department since 1999 provided for the exclusion of jurisdiction of all other proper officers once a show cause notice by a particular proper officer is issued, which provided a sufficient safeguard against the apprehension of the issuance of multiple show cause notices to the same assessee under Section 28 of the Act, 1962. Further, the apprehensions of misuse were unfounded considering that no substantial empirical evidence had been brought forth to support such a view.

e)There was no inherent contradiction between Section 28(11) and Explanation 2, which operated in two distinct fields. Accordingly, the decision in Mangali Impex was set-aside.

f)Qua the use of the expression "the proper officer" instead of "a/an" in Section 28, there is no statutory linkage between Section 17 and 28 of the Customs Act, and the definite article "the" in Section 28 refers to a "Proper Officer" who has been conferred with the powers to discharge functions under Section 28 by virtue of a Notification issued by the competent authority.

g)The procedure envisaged under Section 28 is a quasi-judicial proceeding with the issuance of the show cause notice by the proper officer followed by adjudication of such notices by the field customs officers.

h)The Court held that the validating provision under Section 97 of the said Act is a mere surplusage and clarificatory in nature.

The present ruling of the Apex Court definitively positions DRI officers as "Proper Officers" under 28 of the Customs Act, empowering them to issue notices and drive forward tax recovery actions. With this clarity, the government can now proceed to act on a substantial volume of pending cases, pending at various judicial and quasi-judicial fora—collectively valued at over INR 20,000 crores—that had been previously kept in abeyance on account of legal uncertainty.

KEY PEOPLE

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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.

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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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