

16th Indirect Tax Colloquium



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Agenda of Discussions

Agenda

GST, CUSTOMS, FTP - FORWARD ANALYSIS

Amendments in Finance Bill 2023 passed by Lok Sabha

1. Year End Activities under GST with special focus on Stock in Transit
2. Rectification of GSTR-1 Allowed
3. GSTR-3B Vs GSTR-2B/ GSTR 3B Vs GSTR-1 - Fresh Grounds of Debate
4. Dealing with Interest u/s 50 - Various SCNs still being confirmed
5. Treatment of warranties under GST - Will VAT Dispute go on or clarity in Central Excise prevail!
6. Various SOD Schemes in various states - Last chance to clean up VAT/CST/ET Litigations
7. Refund of Taxes Paid on day of investigation
8. Availing Customs Exemption under N No 50/2017 and Other Notifications - DRI debates on classifications based on Rules of Interpretations
9. Other issues under GST, Customs & DGFT

Finance Bill 2023 passed in Lok Sabha - Amendments

done

1. Expected New Sec. 109 of CGST Act proposes replacing existing Section 109 dealing with Constitution of Appellate Tribunal and Benches thereof;
2. Proposes amendments to provide that the powers of Appellate Tribunal (AT) shall be exercisable by the Principal Bench and States Benches ((earlier National Bench and Benches)
3. Principal Bench of AT shall be situated at New Delhi and be presided over by the President and shall consist of Judicial Member **(Centre/State not specified)**, one Technical Member (Centre) and one Technical Member (State);
4. Government shall, on the recommendations of the Council, by notification, constitute such number of States Benches as may be required which shall consist of 2 Judicial Members **(Centre/State not specified)**, one Technical Member (Centre) and one Technical Member (State);
5. Cases where one of the issues involved relates to the place of supply (PoS) shall be heard **only** by the Principal Bench;

Other cases can be heard by Principal or state benches

6. President shall distribute business of AT and transfer cases from one bench to another

7. Senior most **Judicial member** within the State benches shall act as Vice President for State Benches and shall exercise powers of the President.. **But shall also act as member**

Hence the VP can transfer cases, choose which case to allot to which bench as well as take up matters himself

109(8). Appeals where tax or ITC or penalty, fees, or involved does not exceed Rs. 50 lacs which does not involve question of law may be heard by single member while in all other cases, may be heard by one Judicial member and one Technical member;

Hence “Interest” matters would be heard by ONLY larger bench. Further as all matters will have interest thus this clause becomes almost defunct. It seems that ‘interest’ has been missed.

9. Incase views differ the matter may be transferred to another bench within the state or another state and majority view will be upheld.

10. Centre Members may be transferred by President In different states but state members may not be transferred outside the state.

11. No Act of GSTAT will be void on vacancy or ‘defect’ in formation of GSTAT

GSTAT Update – Sec 110

Seeks to substitute Section 110 which deals with appointment of President and Members of AT, their qualification, appointment, conditions of service, etc; Interalia proposes that, -

A person shall not be qualified for appointment as (i) President, unless he has been a Judge of Supreme Court or is or has been the Chief Justice of a High Court (ii) a Judicial Member, unless he has been a Judge of the High Court or has been a District Judge for 10 years and (iii) Technical Member (Centre) unless he is or has been a member of Indian Revenue (Customs and Central Excise) Service, Group A, and has completed at least 25 years of service in Group A.



... What to do for recoveries post 1st stage rejection?

1. The period till GSTAT will be formed shall not be counted in period of Limitation
2. Admitted tax, interest, penalty, etc is required to be deposited
3. Recoveries of disputed interest, penalty, etc cannot be done
4. Incase recovery of disputed tax is done, the same may be stayed by payment of 20% as predeposit (in addition to 10% paid earlier) - **Surat District Co-operative Milk Producers Union Ltd. V/s. Chief Commissioner of CGST and Central Excise and Ors. (BOM)**

Sec 23 – RCM Taxpayers may require to take registration even if supplying fully exempt goods

Sec 23 - In Finance Bill 2023 Section 23(1) of the CGST Act was being amended, with retrospective effect from 1st July, 2017, to provide that persons for compulsory registration in terms of section 22(1) and Sec 24 of the Act need not register if exempt under section 23(1) (wholly supplying exempt goods)

Now only Section 23(2) of the CGST Act is being amended, to provide that persons requiring compulsory registration in terms of section 22(1) and Sec 24 need not register if notified

Comments - Hence It is understood that there is no intention to provide that taxpayers who are under RCM will not be required to be compulsorily registered even in case wholly supplying exempt goods.

Time period for application of Revocation of Cancellation may be made flexible

Sec 30. (1) Subject to such conditions as may be prescribed, any registered person, whose registration is cancelled by the proper officer on his own motion, may apply to such officer for revocation of cancellation of the registration in ~~[the prescribed manner within thirty days from the date of service of the cancellation order]~~ **[such manner and within such time and such conditions as may be prescribed]**.

~~2[Provided that such period may, on sufficient cause being shown, and for reasons to be recorded in writing, be extended,—~~

~~(a) by the Additional Commissioner or the Joint Commissioner, as the case may be, for a period not exceeding thirty days;~~

~~(b) by the Commissioner, for a further period not exceeding thirty days, beyond the period specified in clause (a).]~~

Comments - All High Courts have held that incase even after 30 days the taxpayer wishes to do business and revive its GSTIN it must be allowed. The process of revocation and time limit for revocation may be prescribed and may be made flexible.

BJ for Assessment of non-filers relaxed

Sec 62 (2) Where the registered person furnishes a valid return within ~~thirty~~ **sixty** days of the **service of the assessment order** under sub-section (1), the said assessment order shall be deemed to have been withdrawn but the liability for payment of interest under sub-section (1) of section 50 or for payment of late fee under section 47 shall continue.

Provided that where RTP files even after 60 days with late fees of Rs.100 per day, the Order will be withdrawn but liability to pay interest u/s 50 or late fees u/s 47

Comment – However this interest u/s 50 will be on the BJ amt or the self assessed amount is not clarified

Sec 13(9) of IGST Act deleted

Sec 13(9) of IGST Act Omitted – “The place of supply of services of transportation of goods, other than by way of mail or courier, shall be the place of destination of such goods.”

Hence place of supply by foreign vessel/aircraft/transporter will not be out of India now but ‘place of recipient’ and hence ITC shall be available after payment under reverse charge

This comes after recommendation of deletion of provisio to Sec 12(8)

What Industry represented but still stays

1. ITC on CSR expenditure shall continue to be blocked u/s 17(5)(fa)
2. Transfer of goods in bond shall be treated as exempted supplies u/s 17(3) and proportionate ITC reversal would be required from 1st July 2017
3. Amendment to Section 194R of IT Act explaining that 194R will also be applicable on 'cash benefits/ perquisites' prevail

Year End Activities under GST with special focus on Stock in Transit

Prepare for 8 Digit HSN Codes incase 6 Digit is not available on IRP - GSTN

1. GSTN: HSN Code Reporting in e-Invoice on IRPs Portal in GST Dear Taxpayers,

1. We would like to bring to your attention notification no. 78/2020 - Central Tax dated 15th October 2020. As per the above-said notification, it is now mandatory for taxpayers to report a minimum of six-digit valid HSN code for their outward supplies having AATO of more than 5 crores in any previous financial year.

2. We would like to inform you that this requirement has already been implemented in the GST system, and we are now in the process of implementing the same at IRPs portal in collaboration with our IRP partners including NIC. It is further suggested that in case wherever valid six digit HSN code is not available, a corresponding valid eight digit HSN code be reported instead of artificially creating six digit HSN code.

3. We understand that this requirement may require changes to your systems as well. We would like to assure you that we intend to provide sufficient time for taxpayers and IRP partners to make the necessary changes to comply with this requirement.

4. We will communicate the exact date of implementation to you shortly

GST Year end Compliances

2. Ensure that you send a **communication to persons who have been issued a GST-CN** so that they reverse the corresponding ITC and take a confirmation from them to this effect. This ensures that you comply with the legal requirements u/s 15(3)

3A. Invoice u/s 31 for goods can be issued '**before**' or '**at the time**' of movement. E-Waybill (Part-B) is required to be generated at the time of movement.

The time before which invoice can be generated is not specified in the GST Law

3B. Incase of Stock-in-Transit, You must show it under temporary reversal under table 4B(2) of GSTR-3B

3C. This would reflect a positive figure in Table 8D of GSTR-9 in this year. However, it would reflect a negative figure in GSTR-9 of next year. Hence, a back up of temporary reversal in Table 4B(2) of GSTR-3B is essential.

4. Incase of ex-works supply, the ownership be transferred on the date of delivery to the recipient or its agent [Sec 16(2)(b)]

5. Filing of LUT for 2023-24 and incase forgotten for 2022-23 also

GST Year end Compliances

6. The last date to opt-in or opt-out from the Composition Scheme is 31st March 2023. Form CMP-02 must be used to opt into the composition scheme (both supplier of goods and service provider).
7. The last date to opt-in or opt-out from the QRMP Scheme is 30th April 2023 for the financial year 2023-24.
8. GST taxpayers should start a new invoice series, unique for the financial year as per the GST advisory released in 2019. **Its best to prepare "State-wise" Series for all documents**
9. This is the 1st Full year of GSTR-2B. Hence taxpayers must ensure –
 - A. All ITC taken match with GSTR-2B
 - B. If ITC do not match with GSTR-2B, then atleast they match with GSTR-2A
 - C. **For all mismatches, interest has to be paid only incase ITC balance has not been available throughout**
 - D. ITC not available in GSTR-2B but in Purchase register is followed up with taxpayers

GST Year end Compliances

10 .Circular 170 of 2022 -

- A. Please ensure that all permanent reversals are checked for unknown ITC and action taken as per Pt 11 below.
- B. Please ensure that all temporary reversals are squared off either during the year or after the year
- C. Please ensure a reconciliations of CNs which are available in GSTR-2B but which are not netted off with ITC or shown as permanent reversals

11. Please ensure that incase of any un-known ITC in GSTR-2B the department and the party are intimated

12. GSTR-1 vs GSTR-3B reconciliation

13. Trial balance Vs GSTR-3B reconciliation

14. Reversal of ITC for sale of Investments incase not made earlier

15. GSTR-2B Vs GSTR-3B Reconciliation

16. GSTR-1 Vs E-Waybill Reconciliation

17. GSTR-2B Vs E-Waybill Reconciliation

GST Year end Compliances

18. Form 26AS Vs GSTR-3B Reconciliation

19. Reverse charge transactions scrutinizing and payments

20. Reconciliation of Ledger balances as per books and GST Portal

21. Requirement of Reversal u/r 37 – Non-payment to suppliers within 180 days

22. Calculation of interest for delayed payment on account of reverse charge provisions

23. Apropos Rule 37A, starting the process of taking ITC even on party not filing GSTR-3B

24. Compliance of GST Cr/Dr Notes linking with Original Invoices

25. Preparing all Commercial CNs with agreement incase not already made

26. Balance Sheet GST Issues-

A. Tax Liability for Advance

B. GST on Sale of Fixed Assets

GST Year end Compliances

27. RC Scrutiny for change in APOB/PPOB or any other changes

28. Rectify transactions wherein Cross charge has been done to route through ISD

29. Start Netting off CNs with 4A(5) in GSTR 3B incase not done from past periods

Rectification of GSTR-1 Allowed

GSTR-1 Can be amended post 30th November

2023-VIL-167-MAD

DEEPA TRADERS Vs PRINCIPAL CHIEF COMMISSIONER OF GST & CENTRAL EXCISE, CHENNAI

GST - Rectification of clerical error in Form GSTR-1 – Petitioner seeking direction to the respondents to enable the petitioner to rectify clerical errors in the details uploaded in Form GSTR-1 for the period 2017-18

– HELD – The errors committed by petitioner are clearly inadvertent and the rectification would enable proper reporting of the turnover and input tax credit to enable claims to be made in an appropriate fashion by the petitioner and connected assesseees - Respondents are directed to do the needful to enable uploading of the rectified GSTR-1 – the writ petition is allowed

GSTR-1 Can be amended post 30th November

Take Aways –

1. For 17-18 & 18-19, now new dispensation under Circular 183 is available and hence no issue is there for rectification
- 2. For other years, this judgement can come handy**
3. In the case of Bharti Airtel the Apex Court decided that GSTR-3B of the period cannot be amended. However this judgement provides relief.

GSTR-3B Vs GSTR-2B/ GSTR 3B Vs GSTR-1/16(2)(c) cases - Fresh Grounds of Debate

Supplier's Invoice can't be called 'fake' without evidence

M/s BALAJI EXIM Vs COMMISSIONER, CGST AND ORS. [2023-VIL-181-DEL]

1. Petitioner's export refund was rejected on allegation of **"it appeared that they are to be part of a supply chain involving fake Input Tax Credit"** of supplier
2. High Court admitted writ 'as tribunal was not formed' even though matter lied in appeals
3. The Appellate Authority concluded that the present case was one of **"goodless supply on the strength of fake invoices"**
4. **There is no allegation that the goods in question were not exported overseas**
- 4A. The invoice was there and was duly paid
5. Allegation was that **"supplier's supplier was involved in issuance of fake invoice"**
6. **Reliance on Arise India/ Quest Merchandising Case wherein the Court held that –**
 - A. Purchasing dealer could not be asked to do the impossible and see whether the selling dealer had paid taxes to the Govt.
 - B. Bonafide Purchasing Dealer had to be distinguished from malafide Purchasing Dealer
7. **Para 26 (Last para is of significance)** - It is clarified that in the event the respondents are able to find material to establish the allegations regarding non-supply of any goods by M/s Shruti Exports to the petitioner, it would be open for the respondents to initiate such action as may be warranted in accordance with law

Proof of delivery of goods mandatory

The Hon'ble Supreme Court in the landmark decision of **Ecom Gill Coffee Trading Private Limited (EGCTPL)** has distinguished its earlier judgement in the case of Arise India Ltd in the matter of laying down the responsibility of the Customer for claiming Input Tax credit (ITC) for goods purchased. Both these decisions, while passed for cases relating to VAT, would be applicable under GST Also. The brief of the judgement are as follows –

1. The earlier Kar VAT Act (now CGST Act) lays burden of proof on the purchasing dealer to substantiate with evidences that it has received the goods to claim ITC.
2. The evidences required for complying with this burden of proof are E-Waybill, consignment note of Vehicle with Vehicle No which carried the goods inwards, Freight charges payment proof and document for acknowledgement of receipt of goods.
3. Just showing invoices and proving that taxes are paid to the supplier would not suffice

Sec 16(2)(c) : Recipient ITC reversal allowed as a 'protective' move and supplier recover a 'substantive' move

2023-VIL-188-MAD

PINSTAR AUTOMOTIVE INDIA PVT LTD Vs ADDITIONAL COMMISSIONER, OFFICE OF THE COMMISSIONER OF GST AND CENTRAL EXCISE, CHENNAI

The provisions of the CGST Act has, assimilating wisdom of experience from the erstwhile tax regimes, gone one step further to ensure that the interests of the revenue are protected by providing for a mandate that the tax liability is defrayed/met either at the hands of the supplier or the purchaser, the petitioner in this case. Thus, no fault can be attributed to the revenue in this regard.

An additional factor is that where the tax liability has been met by way of reversal of ITC and similarly recovery is effected from the supplier as well, this would amount to a double benefit to the revenue.

Thus, while the Department may reverse credit in the hands of the purchaser, this has to be a protective move, to be reversed and credit restored if the liability is made good by the supplier. Thus, the substantive liability falls on the supplier and the protective liability upon the purchaser. A mechanism must be put in place to address this situation.

Key Takeaways

Purchaser now has to ensure the following (**Post 1st Jan 2022**) –

‘Claiming’ stage of ITC –

1. He should have the Invoice – 16(2)(a)
2. The ITC should be available in GSTR-2B 16(2)(a)(a)
3. He should have filed his return 16(2)(d)
4. He should have received the goods/services 16(2)(b). For this, Burden of Proof (u/s 155 of CGST Act) is on purchasing dealer to prove genuineness of transaction i.e. movement has happened with evidences like -

For Goods -

- i. E-Waybill
- ii. CN of Vehicle with Vehicle No
- iii. Freight charges payment
- iv. GRN – acknowledgement of receipt
- v. physical presence of the selling dealer
- vi. “Despatch Address” of the supplier, especially incase of bill-to ship-to transactions
- vii. Are those suppliers who are liable to E-Invoice supplying you Non-E Invoice Bills

Key Takeaways

For Services –

- i. The existence and capability of the service provider**
- ii. The KYC of the service provider (**Identity, creditworthiness & genuineness**)
- iii. The necessity of services
- iv. Proof of delivery of services e.g. Report/opinion/etc
- v. Justification of market value of services
- vi. “Related Party” Status of the service provider

5. The Tax should have been paid to the Govt. 16(2)(c) –

- i. The GSTR 3B Filing Status of the supplier should be up-to-date (Refer GST Portal)
- ii. RC of supplier should not be cancelled before invoice date/receipt of goods/service date – **LGW Industries**
- iii. Value of the ITC and other details of the invoice should be matching with GSTR-2B
- iv. Incase of **Bill-to ship-to** transaction it would be better to get the RC details of the supplier’s supplier and also check the filing status and existence of the same

Hence the genuineness, creditworthiness and identity of the transactions have to be proved

- 6. Supplier’s 3B vs 1 should not be mismatched above a certain amt. - To be notified**

Key Takeaways

However after this is done, then –

1. Section 122(1A) cannot be invoked even incase supplier takes fake ITC (Balaji Exim – Del High Court; Ecom Gill Coffee Trading Private Limited (EGCTPL) - Supreme Court – March 2023).

Incase of bill-to ship-to transactions, dept. alleges that material has moved from somewhere and item has moved from somewhere. Hence, it is a movement of invoice without material movement. This is not sustainable

2. Ab-Initio cancellation will not impact the transaction done pre-cancellation (LGW Industries – Cal HC)

3. Just because Tax has not been paid to the Govt. dept. cannot come to the recipient if supplier is existing (DY Beathel Enterprises – Madras HC)

4. Until supplier is missing/bankrupt/closed down his business, or is untraceable till such time the dept. cannot come to the recipient – Press Release dt'ed 1st May 2018

5. There is no requirement of matching 2A/2B and ITC can be taken on the basis of books of accounts – Pre 1st Jan 2022 – Bharti Airtel Case

Key Takeaways

6. L2 supplier's default cannot effect the ITC of the recipient - (Balaji Exim – Del High Court; Ecom Gill Coffee Trading Private Limited (EGCTPL) – Supreme Court – March 2023; Arise India Ltd – Supreme Court)
7. Even incase of mismatch between 2A/2B, the dept has to go to 'both' recipient and supplier – Sec 42(3) – Pre 1st Jan 2022
8. When "recovery proceedings" are on against the supplier, the recipient cannot be asked to reverse ITC as it would amount to collection of taxes without authority of law – Article 265.
However as a 'protective step' ITC can be asked to be reversed
9. Doctrine of Impossible Performance will apply – Arise India Case (SC). Incase of L2 suppliers, the L2 purchasers cannot be held guilty
10. Court will Distinguishing the 'bonafide' purchaser from 'malafide' purchasers – Arise India Case (SC)
11. Where movement of materials and payment of tax cannot be disputed, then ITC cannot be denied e.g works contract one to one matching of STN items cannot be done

Supplier Due Diligence

1. Declaration of the Supplier for Sec 38 – Creating a Persuasive Evidence
2. Pareto Analysis': Sampling of the Vendors in a way that 80% of the GST-ITC Impact is achieved by a due diligence of 20% or less number of Vendors
3. **Physical Verification of the place of business of the Vendors to check physical existence and Compliances like Rule 18**
4. **Preparing a Suitable Vendor Profile in the format provided by The GST Audit Manual 2019 issued by The CBIC in Annexure 1**
5. Copy of Registration Certificate of the Vendor
6. Copies of All Returns under GST and Challans of payment of taxes
7. Copies of Annual Return and Reconciliation Statement for all years
8. Copies of All Income Tax Returns
9. **Details of Persons Handling Records of the vendor**
10. Details of Accounting System used by the vendor

11. Vendor Due Diligence from the Revenue Authorities as may be deemed fit

12. Checking of whether the Vendor has been filing its GSTR 1 and GSTR 3B or any GST Return as may be required

13. Trend Analysis –

- i. Checking the increase/decrease in the GST Cash Component percentage
- ii. Checking the increase/decrease in the GST ITC Availied percentage
- iii. Checking whether the E-Waybills have been generated as per the GST Law w.r.t. receipts from the Vendors
- iv. Checking whether the correct GST (IGST/CGST-SGST) has been charged and devolved by the Vendors

14. Checking compliances as required under the GST for GST Invoices issued by Vendors like the following

i. Compliance with E-Invoice requirements

- ii. Compliances with the requirements u/r 46 of The CGST Rules and any other Rule for making invoices

iii. Rate of Tax charged

- iv. Other procedural requirements

Dealing with Interest u/s 50 - Various SCNs still being confirmed

Interest under GST – Various Facets

Interest on delayed payment of tax.

50. (1) Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made thereunder, **but fails to pay the tax** or any part thereof to the Government within the period prescribed, shall for the period for which the **tax or any part thereof remains unpaid**, pay, **on his own**, interest at such rate, not exceeding eighteen per cent., as may be notified by the Government on the recommendations of the Council.

2[Provided that the interest on tax payable in respect of **supplies made during a tax period and declared in the return for the said period** furnished after the due date in accordance with the provisions of **section 39, except where such return is furnished after commencement of any proceedings under section 73 or section 74** in respect of the said period, **shall be payable on that portion of the tax which is paid by debiting the electronic cash ledger.**]

Interest under GST – Various Facets

(2) The interest under sub-section (1) shall be calculated, in such manner as may be prescribed, from the day succeeding the day on which such tax was due to be paid.

3[(3) Where the input tax credit has been **wrongly availed and utilised**, the registered person shall pay interest on such input tax credit wrongly availed and utilised, at such rate not exceeding twenty-four per cent. as may be notified by the Government, on the recommendations of the Council, and the interest shall be calculated, in such manner as may be prescribed.]

Interest under GST – Various Facets

1. 50(1) is applicable on only **'tax payment'**
2. No Interest incase of **delayed 3B incase of ITC is available in Credit ledger**
3. 50(1) applicable only **incase supplies shown in last month and 3B filed delayed**
4. **50(1) Not applicable incase supplies shown in subsequent months?**
5. 50(1) not applicable incase payment is made on notice other than SCN u/s 73/74
6. **Interest in RCM Case applicable from date of GSTR-3B subsequent to the 60 days period upto date of filing GSTR-3B**
7. Interest in Rule 37 Case applicable from date of GSTR-3B subsequent to the 180 days period upto date of filing GSTR-3B
8. **Interest on Interest?** DY. COMMISSIONER OF INCOME TAX Vs MSM SATELLITE (SINGAPORE) PTE. LTD. [2022-VIL-707-ITAT-MUM].

Treatment of warranties under GST - Will VAT Dispute go on or clarity in Central Excise prevail!

GST on Warranties in Electronics, Electricals, automobiles, machines and other equipment

Two kinds of warranties are there –

1. Replacement Warranties - A replacement warranty is an assurance provided by the manufacturer supplier at the time of supply to replace the defective product post-supply within a specified time. Sometimes pro-rata costs are recovered from the customers incase the warranty supply is provided after a certain period of time.

2. Warranties for Repair - In such a case, the supplier undertakes to repair the defects found in the product. He may or may not charge additional consideration/ payment.

Doubts –

1. Schedule I of Central GST Act' 2017, "*Permanent transfer or disposal of business assets where input tax credit has been availed on such assets*" shall be considered as a supply made without consideration

2. ITC Reversal on Free of Cost supplies

Considerations for Warranty supplies

1. Section 7(1)(a) and not 7(1)(c) is applicable
2. FAQ's released by the CBIC on 15.12.2018 - For example, consumer buys a television set and he also gets warranty maintenance contract with the TV, this supply is a composite supply. In this example, supply of TV supply is the principal supply, warranty and maintenance service are ancillary."
3. Cost of Warranty supplies are included in 'cost' of original supplies
4. Section 15(2) of CGST Act is in line with Section 4 of Central Excise Act wherein it was settled that 'anything done by supplier before supply' would be included in transaction cost
5. Hence there is no case of output tax or ITC reversal on warranty supplies

Various SOD Schemes in various states - Last chance to clean up VAT/CST/ET Litigations

Various Amnesty Schemes

1. Maharashtra – 20% of Tax
2. WB – 15% of Tax
3. Rajasthan – 10% of Tax
4. Kerela..

Refund of Taxes Paid on day of investigation

Duty paid under protest during investigation – Repayable with Interest

2023-VIL-171-KAR-CU

SURETEX PROPHYLACTICS (INDIA) PRIVATE LIMITED Vs UNION OF INDIA

Q. Validity of recovery of amount in the absence of any adjudication order quantifying the amount of tax or duty payable

- Petitioner seeking refund of amount paid under protest during search at factory premises
- Recovery of Customs duty in respect of the finished goods, raw materials, spares and consumables, plant and machinery, etc. **destroyed in fire (in EOU)**
- **Petitioner contends that respondents visited its factory to search the premises and due to threats of imprisonment and filing of cases under the provisions of the relevant Acts, various documents were seized and after conclusion of search, respondent demanded and collected INR 1.5 crores under coercion and under protest**
- Petitioner case that in the absence of any authority of law, respondents illegally have retained INR 1.5 crores collected by them and the same deserves to be refunded back –

Duty paid under protest during investigation – Repayable with Interest

HELD –

- in view of Board Instruction No. 01/2022-23 (GST-Investigation) dated 25.05.2022 and Circular No. F.No.296/63/2020-CX-9 dated 19.01.2022, **no recovery can be made unless the amount become payable in pursuance of the order passed by the Adjudicating Authority or otherwise become payable under the provisions of the GST Act as well as under the provisions of the Customs Act**
- Also - The Circular dated 19.01.2022 clearly states that **arrears .. arises as result of Order-in-Original –**
- **since the petitioner had made the payment under protest and that the payment was not preceded by any order of adjudication, the respondents did not have any jurisdiction or authority of law to recover the amount, which is clearly violative of Article 265 of the Constitution of India**
- the petitioner would be entitled to refund of the aforesaid amount collected by the respondents without jurisdiction or authority of law
- the contention of the Department that the amount under deposit must be made subject to the outcome of the pending investigation cannot be accepted
- The respondents are directed to refund the aforesaid amount of INR 1.5 crores together with interest @ 6% p.a. from 15.10.2019 till the date of payment – writ petition is allowed

Availing Customs Exemption under N No 50/2017 and Other Notifications - DRI debates on classifications based on Rules of Interpretations

**No Appeal reqd. for claiming Exemption by rectification of BoE u/s 149 – ITC Ltd
Order distinguished**

M/S. STANLEY ENGINEERED FASTENING INDIA PVT LTD., REP. BY ITS COMPANY SECRETARY MR. K. SENTHILKUMAR VERSUS AUTHORISED OFFICER SIPCOT HI-TECH SPECIAL ECONOMIC ZONE, COMMISSIONER OF CUSTOMS (CHENNAI IMPORT)

Refund claim - seeking re-assessment of the Bills of Entry in terms of Section 149 read with Section 154 of the Customs Act, 1962 - duty paid without noticing that the petitioner is eligible for a concessional rate of tax at of 15% vide Notification No.57 of 2018 – Cus dated 07.08.2018 - rejection of request for re-assessment and refund on the ground that the petitioner had not filed statutory appeal with the appropriate authority seeking modification of the self-assessment.

HELD THAT:- Inter-alia the first respondent refers to a Public Notice issued by the Commissioner of Customs / R2 in Public Notice No.88 of 2009 dated 18.10.2019. In this public notice, the authority refers to a judgment of the Hon'ble Supreme Court in the case of *IITC LIMITED VERSUS COMMISSIONER OF CENTRAL EXCISE, KOLKATA -IV* [2019 (9) TMI 802 - SUPREME COURT]. In that judgment, the Hon'ble Supreme Court was concerned with the question as to whether in the absence of any challenge to an order of assessment by way of appeal, a refund application against the assessed duty could be entertained.

No Appeal reqd. for claiming Exemption by rectification of BoE u/s 149 – ITC Ltd
Order distinguished

Public Notice No.88 of 2019 which states that '*no reassessment shall be allowed unless the order of assessment including self assessment is duly modified by way of appeal*' is incorrect as it places a restriction on the mode of re-assessment. **No restrictions was envisaged by the Hon'ble Supreme Court that has made it clear that the modification could be by way of statutory appeal or under relevant provisions of the Act.** To this extent, the stipulation in public notice dated 15.10.2019, does not align with the ratio of the judgment of the Supreme Court.

In light of the categoric pronouncement of Hon'ble Supreme Court as aforesaid, resort to Section 149 of the Customs Act is perfectly in order and thus the application of the petitioner is restored to the file of the first respondent for consideration in line with the conclusion in the case of ITC and observations made herein - **In the present case, the document is a statutory Notification. The authority is directed to hear the petitioner, consider applicability or otherwise of the Exemption Notification to its case and pass orders afresh, all within a period of four weeks from date of receipt of this order.**

Petition allowed

If two notifications are available – Most beneficial to importer can be chosen

CESTAT MUMBAI - M/S. CREATIVE NEWTECH LTD. (FORMERLY KNOWN AS M/S. CREATIVE PERIPHERALS & DISTRIBUTION LTD.) VERSUS COMMISSIONER OF CUSTOMS (IMPORT) , MUMBAI AIR CARGO IMPORT

Classification of GoPro Digital cameras and their accessories - to be classified under tariff heading 85258020, availing exemption under Notification No 50/2017-Cus (SI No 502) or under heading 85258090 (without exemption benefit)?

HELD THAT:-..The findings recorded in the impugned order not agreed upon, to the effect that *the phrases used in the Notification No 50/2017-Cus at SI No 502 has to be interpreted in light of the Explanation which was there in some other Notification at any point of time, the interpretation of the Notification wherein explanation was given defining the phrase "Digital Still Image Video Cameras" need not be examined. The said explanation cannot be used to restrict the phrase used in the notification under consideration. If government intended that the said phrase should have been interpreted according to the explanation contained in the earlier notification then same explanation could have been inserted in the present notification.*

It is settled law that if two notifications are available to the importer at the same time in respect of the imported goods, then it is for importer to choose the exemption which is beneficial to him, revenue cannot force him to chose a particular exemption notification. The argument made by the revenue by the revenue that the exemption notification No 50/2017_Cus was General exemption Notification and Notification No 25/2005-Cus as amended by the Notification No 15/2012 dated 17.03.2012, is more specific for the goods under question, is still in existence and should have been applied, was rejected by the Hon'ble Supreme Court in case of HCL. LIMITED VERSUS COLLECTOR OF CUSTOMS, NEW DELHI [**2001 (3) TMI 971 - SC ORDER**].

Nickel Alloy classified as metal predominant in weight – Specific Notification Notes will apply and not a general notification

2023-VIL-251-CESTAT-AHM-CU (See "Newsletter")

ALLEIMA INDIA PRIVATE LIMITED Vs C.C.-AHMEDABAD

Customs – Classification of imported goods – Appellant imported nickel alloy billets and filed bills of entry seeking classification under Custom Tariff Heading 75051220 as nickel billets and claimed benefit of Notification No.50/2017 exempting all goods of chapter 75 of the Customs Tariff Act, 1975 from Basic Customs Duty

- Deputy Commissioner classified goods under CTH 72189910 as stainless steel
- HELD – Appellant declared imported goods as nickel billets by classified it under CTH 75051220
- As per Note 5 of Section XV, an alloy of a base metal has to be classified as an alloy of metal which by weight predominates over total weight of other elements
- For any material to be classified as nickel alloy, nickel must pre dominate by weight over each of other elements – As per mill test certificate submitted by Appellant, imported item was found to be composed of more than 60% of nickel and rest other alloying elements – Composition of iron is less than 5% and nickel is 62.26%, which means that nickel predominates over content of iron and other elements – Since weight of nickel is in excess of 60%, goods qualify as nickel alloy in terms of Section note 5 of Section XV read with sub-heading note 1(b)(ii) of chapter 75 – Goods in question would be classifiable as nickel alloy under CTH 75051220 – Impugned order classifying goods as steel cannot be sustained and is set aside – assessee appeal is allowed

Other issues under GST, Customs & DGFT

Recovery and cancellation of GST Registration cannot go hand in Hand

2023-VIL-187-ALH

M/s SHYAM SUNDAR SITA RAM TRADERS Vs STATE OF U.P.

GST - Section 29(2) of the CGST Act, 2017 - Cancelling the registration on the ground that the petitioner was non-existent and indulged in availing fake ITC credit from bogus firm – Petitioner challenge rejection of application seeking revocation of cancelling the registration

– HELD – once registration is granted, the same could be cancelled only in terms of the conditions prescribed under Section 29(2) of the CGST Act and allegedly being a bogus firm is not a ground enumerated under Section 29(2)

– while on one hand, the stand of the respondents is that the firm is not existent whereas on the other hand, steps are being taken for recovery of the ITC allegedly wrongly taken under Section 74 of the CGST Act and both of them cannot go simultaneously

- the order rejecting the application for revocation was a wrong exercise of power by the department - The appellate order is equally bad, inasmuch as, no such ground was mentioned before passing the order of cancellation and, thus the impugned orders are set aside - The writ petition is allowed

Takeaways

1. In case of bill-to ship-to transactions, dept. alleges that material has moved from somewhere and item has moved from somewhere. Hence, it is a movement of invoice without material movement. This is not sustainable
2. In case of L2 suppliers, the L2 purchasers cannot be held guilty
3. Where movement of materials and payment of tax cannot be disputed, then ITC cannot be denied e.g works contract one to one matching of STN items cannot be done

THANK YOU



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