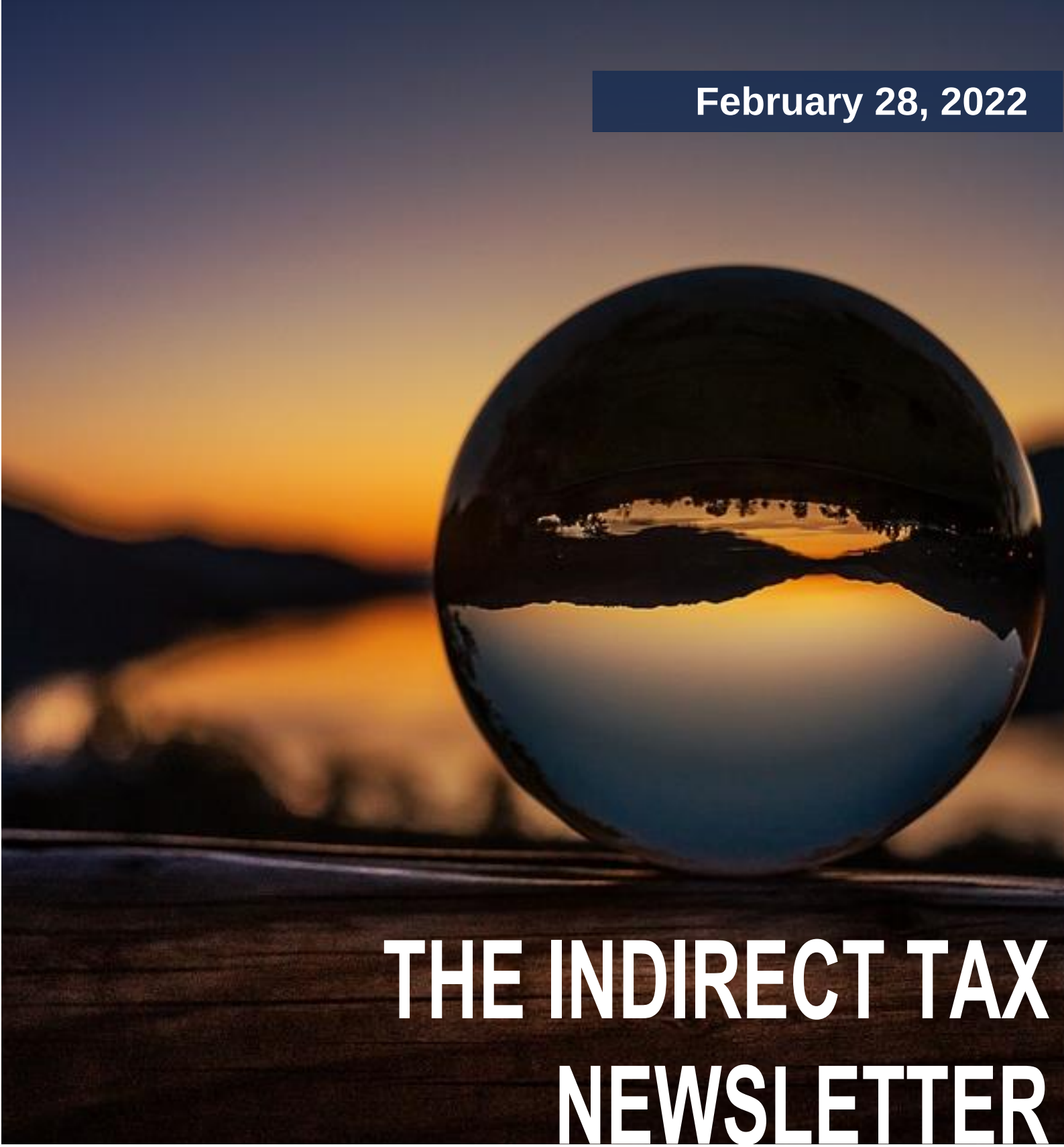

February 28, 2022

THE INDIRECT TAX NEWSLETTER

argus partners
SOLICITORS AND ADVOCATES

MUMBAI I DELHI I BENGALURU I KOLKATA I AHMEDABAD

Index

Recent Case Laws

Goods and Services Tax (GST)

1. ***Suo-moto extension of limitation period has been granted until February 28, 2022.***

   In Re : Cognizance of Extension of Limitation [Miscellaneous Application No. 21/2022 in Miscellaneous Application No. 665/2021 in SMW (C) No. 3/2020, decided on January 10, 2022

   Judgment:

   The Hon'ble Supreme Court in its last suo-moto Order had held that the period between March 15, 2020 and October 2, 2021 will be excluded for the purposes of computation of the limitation period. In light of the rising cases due to third wave of COVID-19, the Hon'ble Supreme Court has again taken suo-moto cognizance of the rising COVID cases and extended the limitation period till February 28, 2022. Therefore, in terms of the said Order, the period between March 15, 2020, to February 28, 2022 will be excluded for computation of limitation period, which is applicable to general as well as special laws and judicial and quasi-judicial proceedings.

2. ***Additional costs imposed on GST officer for unnecessary litigation involving expiry of E-Way bill.***

   Assistant Commissioner (ST) & Others. v. *Messers Satyam Shivam Papers Private Limited & ANR* [Special Leave to Appeal (C) No(s). 21132/2021 (Supreme Court), decided on January 12, 2022].

   Facts of the case:

   Certain goods transported by the Respondent were detained by a GST officer since the E-Way bill expired a day earlier. After detention, the GST officer kept the goods at its relative's premises and not any other designated place for safe custody. Aggrieved by such action of the officer, the Respondent filed a Writ Petition before the Hon'ble High Court, which held that there was no material evidence before the officer to conclude that there was an evasion of tax by the Respondent on lapse of the time mentioned in the E-Way bill. The High Court further held that such action of the officer was a blatant abuse of power and was liable to costs of INR 10,000/-. Aggrieved by the Order of the High Court, the Petitioner filed a petition before the Hon'ble Apex Court.

   Judgment:

   The Hon'ble Supreme Court agreed with the observations of the Hon'ble High Court to the extent that there was no intent on the part of the Respondent to evade tax as the goods in question could not be taken to the destination within time for the reasons beyond the control of the Respondent. However, on account of harassment caused to the Respondent, the Hon'ble Supreme Court imposed a further cost of INR 59,000/- on the Petitioner for unnecessary litigation.

Argus Comments:

The Hon'ble Apex Court has rightly come to the rescue of the bonafide assessees who are made to suffer unnecessary litigation and bear the brunt of harassment at the end of the authorities misusing their powers under the GST Law. One can only hope that such an Order aids in prevention of suffering at the end of the industry and provides a guideline to the officers conducting proceedings under the GST Law.

3. ***Show Cause Notice (SCN) is the foundation of any proceeding and should be a well-reasoned and a speaking document, supported by documentary evidence.***

Vageesh Umesh Jaiswal v. *State of Gujarat* [R/Special Civil Application No. 19176 of 2021(Hon'ble Gujarat High Court), decided on January 6, 2022].

Facts of the case:

Search proceedings were carried out by the Commercial Tax Officer against the Petitioner, during the course of which various documents were seized by the authorities. Thereafter, a SCN was issued proposing to cancel the Petitioner's registration on the ground that they had issued invoices without supply of goods/services and mentioned that "Dealer is engaged in bogus billing". No additional evidence or information was provided and/or relied upon in the SCN and the registration was thereafter cancelled vide the Order issued by the adjudicating authority.

Judgment:

The Hon'ble High Court held that the registration was sought to be cancelled without adducing any evidence or providing any rationale in the SCN/Order issued and therefore, the same was vague and liable to be set aside. While expressing its disappointment on the manner of conducting of proceedings by the authority, the Hon'ble High Court held that the SCN is the foundation on which the adjudicating authority has to build up its case. Hence, the SCN should follow the principles of natural justice and be a speaking and well-reasoned document supported by documentary evidence. In the present case, the absence of any rationale in the SCN or Order shows that the principles of natural justice have not been followed. Therefore, the Order cancelling the registration was set aside.

4. ***Refund claim under GST Laws cannot be rejected for being time barred in view of the Supreme Court order in Re: Cognizance for Extension of Limitation.***

Saiher Supply Chain Consulting Private Limited v. *UOI and Others* [Writ Petition (L) No. 1275 of 2021 (Bombay High Court), decided on January 10, 2022].

Facts of the case:

The Petitioner filed a refund claim for the period July 2018 to September 2018 on September 30, 2020 under the GST Laws, which was rejected on the ground of being filed after the expiry of two years from the relevant date and thereby being time barred in terms of Section 54(1) of the Central Goods and Services Tax Act, 2017 (**"CGST Act"**). The question for consideration in this case was whether the refund claim could be rejected in light of the suo-moto Order of the Hon'ble Supreme Court extending limitation where the period fell between March 15, 2020 and October 2, 2021.

Judgment:

The Hon'ble High Court held that in the present case, the limitation period fell between March 15, 2020 and October 2, 2021, which period was excluded by the Hon'ble Supreme Court in all such proceedings irrespective of the limitation prescribed under the general law or Special Law whether condonable or not. In light of the same, it was held that the period of limitation prescribed in Section 54(1) of the CGST Act also stood excluded and the refund application filed by the Petitioner was within the time limit specified. Therefore, the Hon'ble High Court allowed the refund claim and allowed the appeal.

Argus Comments:

The aforesaid judgment is in line with the earlier judgment passed by the Hon'ble High Madras Court in *Messers GNC Infra LLP* v. *Assistant Commissioner (Circle)* [2021-VIL-856-MAD] wherein the benefit of suo-moto orders of limitation passed by the Hon'ble Supreme Court was extended to matters pertaining to refund under GST Laws and offers a much sought relief to the industry.

5. ***Denial of GST reimbursement by way of retrospective amendment to the Industrial Policy Resolution without any justification is irrational & arbitrary and is applicable only prospectively.***

Messers Ultratech Cement Limited & Another v. *State of Odisha and Others* [Writ Petition (C) No. 29253 of 2020 (Orissa High Court), decided on January 4, 2022].

Facts of the case:

The Petitioner, engaged in manufacturing of cement, was duly claiming the benefits granted under Industrial Policy Resolution 2007 (**"IPR 2007"**), including reimbursement of State Goods and Services Tax (**"SGST"**). However, vide a Government Resolution dated August 18, 2020 issued by the Industries Department, Govt of Odisha, the IPR 2007 was amended to exclude inter-alia, cement manufacturing units, retrospectively with effect from 1st July 2017. The Petitioner has sought to challenge such amendment on the ground that the retrospective application thereof is unconstitutional and without any rational basis.

Judgment:

The Hon'ble High Court observed that the Petitioner had duly fulfilled the "triple objectives" of the IPR 2007 viz, value addition, employment generation and revenue augmentation and was thereby issued the Eligibility certificate for claiming the benefits granted under the policy. It was further observed that the Government Resolution seeking to disentitle the Petitioner from claiming SGST reimbursement was introduced without providing any convincing justification for the same and was also not issued in public interest. Therefore, the Hon'ble High Court held that such retrospective amendment was irrational, arbitrary, and discriminatory and was applicable only prospectively.

Argus Comments:

The aforesaid ruling upholds the principle of promissory estoppel in case of an arbitrary and/or irrational amendment and is based on the lines of equity, which is favourable to the assessees seeking similar relief.

6. ***GST is not applicable on subsidized recoveries from employees for canteen, bus transportation facility and on recoveries made towards notice pay.***

In Re: Messers Emcure Pharmaceuticals Limited [Order No. GST-ARA-119/2019-20/B-03 (Appellate Authority for Advance Ruling, Maharashtra), decided on January 4, 2022]

Facts of the case:

(a) The Applicant makes recovery from its employees at a subsidized rate towards canteen facilities and bus transportation facilities arranged from third party service providers. The Applicant also recovers an amount of notice pay from its employees on account of not serving the full notice period in terms of the employment contract.

(b) In this respect, the Applicant sought an advance ruling from the Advance Ruling Authority (**"AAR"**) as to whether the amount recovered from its employees can be considered towards a supply of service and is therefore liable to GST or not.

Judgment:

(a) The AAR observed that the provision of canteen facility as well as bus transportation services by the Applicant to the employees is a welfare measure and is not connected to the functioning of the Applicant's business. The said services are also not the output services of the Applicant but of the third party vendors and cannot be considered as a "supply" under the relevant provisions of the CGST Act. Therefore, the AAR held that no GST is leviable on the amount recovered from the employees for the aforesaid facilities.

(b) With respect to recovery towards notice pay, the AAR held that the employee opting to resign by paying amount equivalent to month of salary in lieu of notice, has acted in accordance with the contract specifying payment of such notice pay and that there is no breach of contract involved. In the absence of any breach of the contract, the resignation by the employee without serving the notice period cannot be treated as an act of forbearance, which is chargeable under GST laws. Further, in the act of resignation and payment of notice pay amount, there is neither any activity nor any passive role played by the employer. Accordingly, the amount received by the employer does not amount to consideration in terms of Section 2(31) of the CGST Act and is therefore not chargeable to GST.

Service Tax

7. ***Service tax is not leviable on Notice pay recovery from employees.***

Messers Rajasthan Rajya Vidhyut Prasaran Nigam Limited v. *Commissioner of CGST and Central Excise, Jodhpur* [Final Order No. 50047 of 2022 (CESTAT, New Delhi), decided on January 14, 2022].

Facts of the case:

The question for consideration before the Hon'ble Customs Excise and Service Tax Appellate Tribunal ("**CESTAT**") was whether notice pay recovered from its employees by the Company for premature resignations without giving the requisite notice period was exigible to Service tax or not.

Judgment:

(a) The CESTAT observed that the employment contracts between the Company and its employees are not entered into with the intention of removal/resignation of the employee from service. In fact, a notice period on both sides is provided for so that the other party can make arrangements. The clause for the notice period and the compensation towards it are incorporated in the contract itself, but these are not the purpose of the employment contract. Consequently, any compensation paid towards notice pay is not a consideration for the contract.

(b) The CESTAT also noted that the High Court of Madras in *GE T&D India Ltd.* [2019 (12) TMI- 1566- Madras High Court] held that notice pay in lieu of sudden termination, does not give rise to the rendition of service by either party. In view thereof, the CESTAT held that no Service tax was payable on the notice pay received by the Company from its employees.

Argus Comments:

The aforesaid judgment is in line with the myriad of decisions in favour of the assessees on the subject relating to payment of Service tax on Notice pay recovery, including *Intas Pharmaceuticals [2021-TIOL-367-CESTAT-AHM] and State Street Syntel Services Pvt. Ltd. [2021-TIOL-152-CESTAT-MUM]* and provides a much sought relief to the industry even under the GST regime.

8. *No reversal of CENVAT Credit for which no consideration was received and the amount was consequently written off by the assessee.*

SBI Cards and Payments Services Private Limited v. *Commissioner of Service Tax, Delhi* [Final Order No. 60011-60012/2022 (CESTAT, Chandigarh), decided on January 4,2022].

Facts of the case:

The Appellant was engaged in providing banking and other financial services. In certain cases, the Appellant could not recover payments from their customers and had written them off as bad debts in their financial records for the period prior to April 1, 2011. The departmental authority inter-alia raised a demand for reversal of CENVAT credit on the amount written off as bad debts, which has been contested by way of an appeal before the Hon'ble Tribunal.

Judgment:

The CESTAT observed that prior to April 1, 2011, the Appellant was required to pay Service tax only on receipt of consideration for the service provided. However, there was no provision in the CENVAT Credit Rules, 2004 (**"CCR"**) or in the Finance Act, 1994 providing for reversal of CENVAT credit towards services for which no consideration received by an assessee. In the absence of any such provision prior to April 1, 2011, the CESTAT held that the CENVAT credit availed on input services, even when the amount of non-recoverable taxable service has been written off by the Appellant, was duly admissible. Therefore, the appeal was allowed and the demand for reversal was set aside.

Customs

9. *Refund of Terminal Excise Duty (TED) paid on goods supplied to Export Oriented Units (EOUs) is available in terms of the Foreign Trade Policy (FTP).*

Messers Sandoz Private Limited v. *Union of India & Others* [Civil Appeal No. 3358 of 2020 (Hon'ble Supreme Court), decided on January 4, 2022].

Facts of the case:

(a) The issue for consideration before the Hon'ble Apex Court was whether the refund of the amount of TED paid between June 2009 to March 2013 in case of supplies made by DTA to EOU (deemed exports) was available to either of the units or not. If yes, whether such refund was admissible from the authority under the Foreign Trade Policy (**"FTP"**) or under the Central Excise Act, 1944 (**"CEA"**).

(b) The said issue arose due to denial of refund of TED in light of Circular No.16 (RE-2012/2009-14) dated March 15, 2013 issued by the Directorate General of Foreign Trade (**"DGFT"**) which provided that since goods supplied by a DTA unit to a 100% EOU was ab-initio exempt from the payment of excise duty, refund of TED was not admissible.

Judgment:

(a) The Hon'ble Apex Court held that the EOU would be entitled for ab-initio exemption from payment of TED since it is a deemed export. However, in case the EOU had paid such amount of duty to the DTA supplier, which was otherwise ab-initio exempted under the FTP, the refund of TED will be admissible to the EOU, not as an entitlement but as a benefit under the FTP.

(b) It was further held that the amount of such refund would be provided in the same form in which the TED was paid, viz. to the extent of credit utilization, the amount has to be re-claimed in the CENVAT credit account and to the extent of payment in cash, the refund would be provided in cash.

(c) The Apex Court also held that the responsibility of refund of TED in reference to applicable FTP would be that of the Authority responsible to implement the FTP, which had consciously accorded such entitlements/benefits for promoting export and earning foreign exchange.

10. *Proceedings arising out of a SCN which remained dormant for fourteen years cannot be allowed to be carried in the absence of a satisfactory explanation.*

Messers Sushitex Exports (India) Limited v. *Union of India* [Writ Petition (L) No. 9641 of 2020 (Bombay High Court), decided on January 14, 2022].

Facts of the case:

The issue involved was whether the proceedings relating to fraudulent exports arising out of a SCN issued fourteen years before, can be revived after such long period or not.

Judgment:

The Hon'ble High Court observed that the authorities do not have an unfettered right to choose a time for termination and conclusion of proceedings initiated by them as per their convenience. It was further observed that in the present case, the excess delay in the period to undertake adjudication proceedings without an explanation as to what prevented the authorities to conclude the proceedings was unreasonable and such proceedings cannot be allowed to be carried forward. Therefore, the demand was set aside by the Hon'ble High Court.

Central Excise, Sales Tax, VAT

11. *In the absence of any corroborative evidence, third party records cannot be adopted as evidence for arriving at the findings of clandestine removal.*

Alok Ispat Private Limited v. *Commissioner, Central Excise, Raipur* [Final Order No. 52120/2021 (CESTAT New Delhi), decided on January 6, 2022].

Facts of the case:

The departmental authorities confirmed a demand of Excise duty alleging clandestine removal of goods against the Appellant after adopting third party records as evidence. Against such demand, the Appellant preferred an appeal before the CESTAT submitting that no corroborative evidence was produced by the authorities to confirm the demand.

Judgment:

The CESTAT held that it was a settled position of law that third party records cannot be adopted as evidence for arriving at the findings of clandestine removal, in the absence of any corroborative evidence. Reliance was placed on the decision of the Hon'ble High Court of Allahabad in the matter of *Continental Cement Company* v. *Union of India* - 2014 (309) ELT 411 (All.) wherein similar decision was made. In view thereof, the appeal was allowed and the demand was set aside.

Recent Notifications

No.	Reference	Particulars
1.	Notification No. 01/2022 – Central Tax dated February 24, 2022	Seeks to amend Notification No. 13/2020 – Central Tax dated March 21, 2020, so as to notify the turnover limit for issuance of an e-Invoice in terms of Rule 48(4) of the Central Goods and Services Tax Rules, 2017. In terms thereof, specified class of registered person are mandatorily required to issue the e-Invoice, provided their aggregate turnover in any preceding financial year from 2017-18 onwards exceeds INR 20 crores. The said amendment will be applicable with effect from April 1, 2022. **Argus Comments:** The earlier turnover limit of INR 50 Crores for issuance of the E-invoice under Rule 48(4) has been reduced to

		INR 20 Crores, and such taxpayers will be required to comply with the same with effect from April 1, 2022..
2.	Notification No. 11/2022-Customs (NT) dated February 22, 2022	Seeks to notify Shipping Bill (Post export conversion in relation to instrument based scheme) Regulations, 2022. The said regulations will be applicable prospectively w.e.f. February 22, 2022. The salient features thereof are as follows: a. It enables amendment of the declaration made in the shipping bill or bill of export to any other one or more instrument based scheme (such as notified incentive schemes for export under the Foreign Trade Policy 2015-2020 etc.), after the export goods have been exported. b. The application for such amendment shall be filed within one year from the date of order for clearance of goods under Sections 51 or 69 of the Customs Act, 1962. The said period may be extended further by 6 months by the jurisdictional Commissioner of Customs and further 6 months by Chief Commissioner of Customs. c. The amendment may be authorised subject to the conditions and restrictions as prescribed.

Contributed by the Indirect Tax team

You can reach out to our team for any queries

Ajay Sanwaria, Counsel
ajay.sanwaria@argus-p.com

Shreya Mundhra, Senior Associate
shreya.mundhra@argus-p.com

MUMBAI
11, Free Press House
215, Nariman Point
Mumbai 400021
T: +91 22 6736 2222

DELHI
Express Building
9-10, Bahadurshah Zafar Marg
New Delhi 110002
T: +91 11 2370 1284/5/7

BENGALURU
68 Nandidurga Road
Jayamahal Extension
Bengaluru 560046
T: +91 80 46462300

KOLKATA
Binoy Bhavan
3rd Floor, 27B Camac Street
Kolkata 700016
T: +91 33 40650155/56

AHMEDABAD
307, WestFace
Thaltej
Ahmedabad 380054
T: +91 79 29608450

www.argus-p.com I communications@argus-p.com