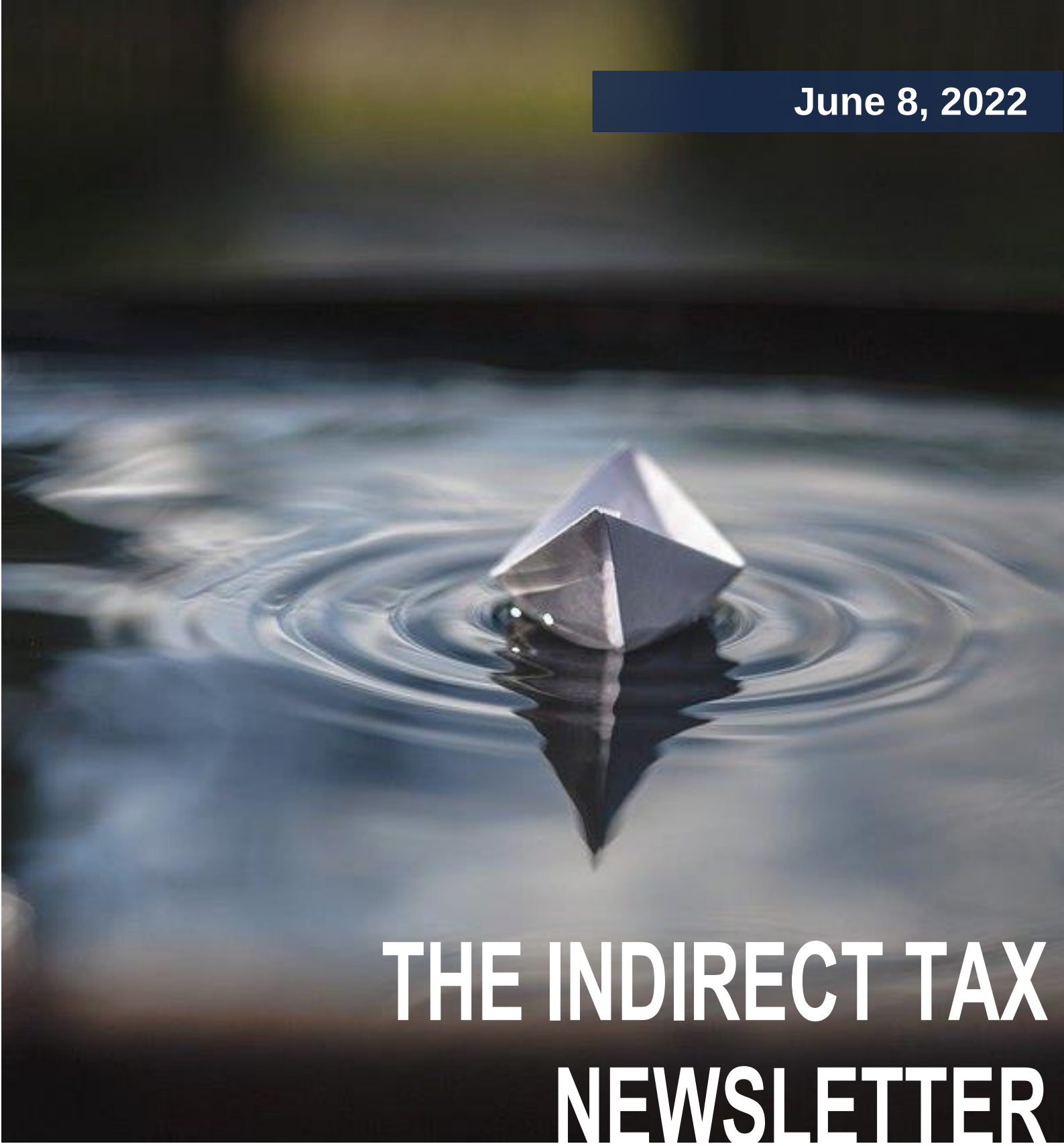

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# THE INDIRECT TAX NEWSLETTER

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# Index

# Recent Case Laws

## Goods and Services Tax (GST)

### 1. *Levy of Integrated GST ("IGST") under reverse charge on ocean freight paid under a Cost-Insurance-Freight ("CIF") contract has been set aside.*

*Union of India & Anr* v. *Messers Mohit Minerals Pvt. Ltd.* [Civil Appeal No. 1390 of 2022 (Hon'ble Supreme Court), decided on May 19, 2022].

Facts of the case:

The issue relates to the question whether an Indian importer undertaking imports on a CIF basis can be subject to the levy of IGST under the IGST Act, 2017 (**"IGST Act"**) on the component of ocean freight paid by the foreign seller to a foreign shipping line, under reverse charge.

Judgment:

The Hon'ble Apex Court while quashing the levy of IGST in such cases has observed that:

(a) The recommendations of the GST Council are not binding on the Union and States for the following reasons:

i. The deletion of Article 279B and the inclusion of Article 279(1) by the Constitution Amendment Act 2016 indicates that the Parliament intended for the recommendations of the GST Council to only have a persuasive value, particularly when interpreted along with the objective of the GST regime to foster cooperative federalism and harmony between the constituent units.

ii. Neither does Article 279A begin with a non-obstante clause nor does Article 246A state that it is subject to the provisions of Article 279A. The Parliament and the State legislatures possess simultaneous power to legislate on GST. Article 246A does not envisage a repugnancy provision to resolve the inconsistencies between the Central and the State laws on GST. The 'recommendations' of the GST Council are the product of a collaborative dialogue involving the Union and States. They are recommendatory in nature. To regard them as binding edicts would disrupt fiscal federalism, where both the Union and the States are conferred equal power to legislate on GST. It is not imperative that one of the federal units must always possess a higher share in the power for the federal units to make decisions. Indian federalism is a dialogue between cooperative and uncooperative federalism where the federal units are at liberty to use different means of persuasion ranging from collaboration to contestation; and

iii. The Government while exercising its rule-making power under the provisions of the Central GST Act, 2017 (**"CGST Act"**) and IGST Act is bound by the recommendations of the GST Council. However, that does not mean that all the recommendations of the GST Council made by virtue of the power Article 279A (4) are binding on the legislature's power to enact primary legislations.

(b) On a conjoint reading of Sections 2(11) and 13(9) of the IGST Act, read with Section 2(93) of the CGST Act, the import of goods by a CIF contract constitutes an "inter-

state" supply which can be subject to IGST where the importer of such goods would be the recipient of shipping service.

(c) The IGST Act and the CGST Act define reverse charge and prescribe the entity that is to be taxed for these purposes. The specification of the recipient – in this case the importer – by Notification 10/2017 – Integrated Tax (Rate) dated June 28, 2017 is only clarificatory. The Government by notification did not specify a taxable person different from the recipient prescribed in Section 5(3) of the IGST Act for the purposes of reverse charge.

(d) Section 5(4) of the IGST Act enables the Central Government to specify a class of registered persons as the recipients, thereby conferring the power of creating a deeming fiction on the delegated legislation.

(e) The impugned levy imposed on the 'service' aspect of the transaction is in violation of the principle of 'composite supply' enshrined under Section 2(30) read with Section 8 of the CGST Act. Since the Indian importer is liable to pay IGST on the 'composite supply', comprising of supply of goods and supply of services of transportation, insurance, etc. in a CIF contract, a separate levy on the Indian importer for the 'supply of services' by the shipping line would be in violation of Section 8 of the CGST Act.

**Argus Comments:**

The aforesaid judgment of the Hon'ble Apex Court grants a sigh of relief to the entire industry of importers suffering from the brunt of IGST under reverse charge in case of ocean freight paid under CIF Contracts.

**2. *In case of multiple proceedings on same subject matter, adjudication is to be done by the authority competent to decide the case involving the highest amount of duty.***

*Union of India & Others* v. *Star Delta Exim (P) Limited* [Civil Appeal No. 22256 of 2019 (Hon'ble Supreme Court), decided on April 19, 2022].

Facts of the case:

(a) The Respondent was issued multiple show cause notices (**"SCNs"**), viz. one dated March 1, 2016 issued by the Directorate General of Central Excise Intelligence, Delhi Zonal Unit (**"DGGI"**) and the subsequent SCN dated October 23, 2017 issued by the Commissioner, Central GST Commissionerate, Alwar on the same subject matter.

(b) Being aggrieved by such action of authorities, the assessee filed a petition before the Hon'ble High Court of Rajasthan. The Hon'ble High Court held that the SCNs shall be adjudicated by the authority competent to decide the case involving the highest amount of duty, viz. the DGGI. Being aggrieved by such action, the Commissioner ("CGST") filed the Writ Petition seeking adequate relief.

Judgment:

The Hon'ble Apex Court observed that since both the SCNs pertained to the same subject matter, such notices were to be adjudicated and heard together by one authority only, viz. the DGGI or its equivalent and directed disposal of such matters within six months. Accordingly, the Petition was dismissed.

**Argus Comments:**

Aside from the aforesaid judgment of the Hon'ble Apex Court, in a recent judgment of the Hon'ble Calcutta High Court [*Ideal Unique Realtors Private Limited* v. *Union of India & Ors.* (FMA No. 297 of 2022 dated April 22, 2022)], where parallel proceedings were initiated by DGGI and Audit authorities on the same issue, the proceedings by the Audit officers was quashed and the DGGI was directed to undertake adjudication.

### 3. *Interest on delay of 94 to 290 days to refund of IGST paid on export of goods capped at 6% and not 9%.*

*Union of India & Others* v. *Messers Willowood Chemicals Private Limited* [Civil Appeal No. 2995-2996 of 2022 (Hon'ble Supreme Court), decided on April 19, 2022].

Facts of the case:

The issue pertains to the rate of interest applicable under Section 56 of the CGST Act on delayed refund of IGST by 94 to 290 days in case of zero-rated supply on export of goods. The Hon'ble Gujarat High Court in the said case held that an interest of 9% per annum is applicable on the delayed payment of such IGST refund. Being aggrieved, the Respondents filed a Petition before the Hon'ble Apex Court and submitted that instead of 9%, net interest of 6% may be given.

Judgment:

(a) The Hon'ble Apex Court observed that the present refund has not arisen from any order of the adjudicating/appellate authority/Appellate Tribunal/Court. Therefore, such case is not covered under the proviso to Section 56 of the CGST Act, providing an interest rate of 9%. Hence, the refund is covered within the principal provision of Section 56 of the CGST Act, which prescribes a rate of interest of 6%.

(b) It was further held that wherever a statute is silent about the rate of interest and there is no express bar for payment of such interest, any delay in paying the compensation or the amounts due, would attract award of interest at a reasonable rate on equitable grounds. Since the delay in the present case was merely in the region of 94 to 290 days and not so inordinate, the Hon'ble Apex Court held that interest would be awarded at the rate of 6% in terms of Section 56 of the CGST Act and not 9%.

### 4. *Refund claim of unutilized ITC of GST paid on supplies received by the recipient, i.e., the Special Economic Zone ("SEZ") unit is admissible thereto.*

*Messers ATC Tyres Pvt. Ltd* v. *Joint Commissioner of GST & Central Excise, Coimbatore* [W.P.MD No. 949 of 2022 (Hon'ble Madras High Court), decided on March 8, 2022].

Facts of the case:

(a) The Petitioner, a SEZ unit undertaking zero-rated supplies had filed refund claims of unutilized ITC of GST distributed by the Input service distributor (**"ISD"**) unit in terms of Section 54 of the CGST Act. Such refund claim was denied to the Petitioner on the ground that in terms of the second proviso to Rule 89 of the CGST Rules, 2017, the refund application can be filed only by a supplier, and in the present case, the Petitioner was the recipient.

(b) Aggrieved by the denial of such refund by the Respondents, the Petitioner filed a petition before the Hon'ble High Court.

Judgment:

(a) The Hon'ble High Court observed that the proviso to Rule 89(1) is only an exception to Rule 89 (1) of the CGST Rules and there is no bar under the said rule for refund of unutilized ITC by the recipient. Further, the Rule is not intended to deny the legitimate benefit available to an exported effecting zero rated supplies.

(b) Hence, the assumption that the application for refund in respect of supplies to a SEZ or a SEZ Developer, can be filed only by a supplier of the goods or services in terms of second proviso to Rule 89(1) of the CGST Rules, 2017 was grossly incorrect. Accordingly, the Hon'ble High Court duly allowed the benefit of the refund claim of unutilized ITC of zero-rated supplies filed by the recipient, i.e., SEZ Unit.

**Argus Comments:**

The decision of the Hon'ble High Court is in line with its earlier decision in Platinum Holdings Private Limited v. Additional Commissioner of GST & Central Excise, Chennai (W.P. No. 13284 of 2020 dated August 11, 2021) wherein refund was allowed to a SEZ developer (recipient) instead of the supplier.

## Service Tax

### 5. *Levy of Service tax on secondment of employees by a foreign group company to an Indian entity has been upheld.*

*Commissioner of Central Excise & Service Tax, Bangalore* v. *Northern Operating Systems Private Limited* [Civil Appeal No. 2289-2293 of 2021 (Hon'ble Supreme Court), decided on May 19, 2022]

Facts of the case:

(a) The Respondent ("**NOS"**) had entered into a service agreement with its foreign counterpart (**"Northern Trust Company"** or **"NTC"**) to undertake incidental back office operations in relation to the activities of the group companies. A markup of 15% on the over-all expenses incurred to provide the service to NTC was to be paid to NOS.

(b) In this respect, NOS also entered into a secondment agreement with an overseas group company viz., Northern Trust Management Services Ltd. or 'NTMS', having a pool of skilled employees. In terms of the secondment agreement, the parties agreed that :

i. NTMS would provide employees having requisite experience for a specified time period to NOS. Such employees would continue to be remunerated through the payroll of NTMS for the purpose of social security, retirement, and health benefits. However, in practicum, NOS shall be the employer. The actual costs incurred by NTMS would be reimbursed by NOS along with the specified administrative costs. During such period, the role of NTMS would be restricted to a payroll services provider.

ii. During the period of secondment, the employees shall act as per the instructions of NOS and would be responsible thereto. NOS shall have the right to approve or reject the employee selected for secondment and request for a replacement. Even the seconded employees retain such right of termination.

(c) The issue which came up for consideration before the Hon'ble Apex Court relates to the question whether secondment of employees by the group companies to the assessee would be chargeable to Service tax or not under the category of "manpower recruitment or supply agency service" *inter-alia* for the negative list period covering July 1, 2012 to September 2014.

Judgment:

(a) The Hon'ble Apex Court applied the test of "substance over form" to analyse the agreements between the parties and made the following observations:

- NOS had operational or functional control over the seconded employees. Further, NOS was potentially liable for the performance of the tasks assigned to the seconded employees. Therefore, for the duration of the secondment, the seconded employees were under the control of NOS and worked under its direction.

- NOS paid (through reimbursement) the amounts equivalent to the salaries of the seconded employees. Yet the fact remains that they are on the pay rolls of the overseas entity under the legal requirement to avail social security benefits in the country of their origin. It is doubtful whether without such assurance such employees would agree to the secondment or not.

- NOS was engaged in providing specialised services to other group companies. As part of this agreement, a secondment contract was entered into, whereby the seconded employees were deployed for the duration the task was estimated to be completed in, and thereafter such employees returned to their original places.

(b) In light of the aforesaid factual position, the Hon'ble Apex Court held that in terms of the overall scheme of things, it is implicit that the quid pro quo for the secondment agreement is that NOS has the benefit of experts for a limited period. Such experts were used to fulfil the conditions under the service agreement between NOS and its other group companies. Hence, the seconded employees do not fall under the exclusion carved out for provision of service by an employee to an employer, and the activity qualifies as a 'service', which is liable to tax under reverse charge in the hands of NOS. Accordingly, the Petition of the revenue was allowed by the Hon'ble Apex Court and the demand of Service tax was confirmed.

(c) However, the Hon'ble Apex Court held that extended period of limitation cannot be invoked in the said case since there was no wilful suppression or deliberate misstatement of facts, and set aside the demand to such extent.

**Argus Comments:**

The aforesaid judgment seems to have opened a pandora's box since the argument that for all practical purposes the seconded employees are essentially the employees of the recipient company has been done away with. It would be interesting to analyse whether the result of the dispute would have been different had no service agreement been involved prior to the secondment agreement, as in the present case. Further, the

ramifications of this judgment under the GST regime also needs to be looked into by the assessees.

### 6. *In case of conflict between statutory provision and delegated legislation, statutory provision would prevail over the delegated legislation.*

*Messers Thankys Exports Private Limited* v. *Union of India* [R/Special Civil Application No. 15275 of 2021 (Hon'ble Gujarat High Court), decided on April 8, 2022].

Facts of the case:

(a) The Petitioner filed a refund claim of Service tax paid on the input services attributable to export of goods under Section 11B of the Central Excise Act, 1994. In terms of the said Section, the refund application is to be filed within one year from the 'relevant date', i.e., the date on which the ship or the aircraft in which the goods are loaded leaves India.

(b) However, the refund claim was denied by the Respondents on the ground that it was time barred in terms of clause 3(g) of Notification No. 41/2021-ST dated June 29, 2012. The said Notification provides that refund claim is to be filed within one year from passing of order permitting clearance and loading of goods for exportation under Section 51 of the Customs Act, 1962. Being aggrieved by such rejection, the Petitioner filed a petition before the Hon'ble High Court.

Judgment:

(a) The Hon'ble High Court observed that Section 11B of the Excise Act has been expressly borrowed for the purpose of the Service tax laws enacted under the Finance Act, 1994. However, as per the Notification, a different timeline has been provided, which is in direct conflict with the statutory provision, i.e., Section 11B of the Excise Act, 1994.

(b) It is a well-established legal position that in case of conflict between the statutory provision and the delegated legislation, the former would prevail. Hence, the impugned clause 3(g) of Notification No.41/2012-ST is ultra vires Section 11B of the Excise Act to such extent. In view of the same, the Hon'ble High Court set aside the impugned order rejecting the refund to the Petitioner and disposed of the petition accordingly.

## Customs

### 7. *Refund under a Scheme granting export benefit cannot be denied on the ground of an inadvertent error.*

*Paramount Textiles Mills Private Limited* v. *Deputy DGFT* [Writ Petition No. 5009 of 2022] (Hon'ble Madras High Court), decided on April 18, 2022].

Facts of the case:

The Petitioner undertook export under Rebate of State and Central Taxes and Levies (ROSCTL) Scheme and made an inadvertent error by selecting 'NO' instead of 'YES' while filing the Shipping Bill. Due to such error, the Respondent rejected the refund

against such Shipping Bill. Aggrieved by such action of the Respondent, the Petitioner filed the present Petition.

Judgment:

(a) The Hon'ble High Court referred to the decision in *K.I. International Limited* v. *Commissioner of Customs* - 2021-VIL-897-MAD-CU wherein despite an inadvertent error under the MEIS Scheme application, the benefit of such scheme was allowed to the assesses. Relying on such decision, the Hon'ble Court observed that even under the ROSCTL Scheme, the Ministry of Textile has decided to rebate embedded State and Central taxes and levies to support exporters from India.

(b) In view of the aforesaid findings, the Hon'ble High Court allowed the appeal and directed the Respondents to grant the benefit of refund to the Petitioner in terms of the Foreign Trade Policy.

## Central Excise, Sales Tax, VAT

### 8. *Welding electrodes are "raw materials" used to manufacture the pre-fabricated structures and are therefore, eligible for ITC.*

*Tiger Steel Engineering India Private Limited* v. *Commissioner, Commercial Tax* [Commercial Tax Revision No. 22 of 2013 (Hon'ble Uttarakhand High Court), decided on April 22, 2022].

Facts of the case:

The Commercial Tax Tribunal has denied the benefit of ITC on welding electrodes consumed by the Petitioner during the manufacture of finished goods, viz. pre-fabricated structures. Such credit was denied on the ground that the welding electrodes were 'consumables' and not 'raw material' and thereby inadmissible to ITC.

Judgment:

The Hon'ble High Court observed that manufacturing pre-fabricated structures involves gas and electric welding. In other words, gas and electric welding are integral parts of the manufacturing process. Further, in the process of welding, welding electrodes are essential to manufacture the pre-fabricated structure even though they lose their character and nature in such end product. The Hon'ble High Court therefore held that welding electrodes are "*raw materials*" as far as manufacturing of the pre-fabricated products are concerned and that the credit thereof is admissible to the Petitioner.

## Recent Notifications and Circulars

| No. | Reference | Particulars |
|---|---|---|
| 1. | Notification No. 05/2022-Central Tax dated May 17, 2022 | Seeks to extend the due date for furnishing the return in FORM GSTR-3B for the month of April, 2022 till the 24th day of May, 2022. |
| 2. | Notification No. 06/2022-Central Tax dated May 17, 2022 | Seeks to extend the due date for depositing the tax due under proviso to sub-section (7) of section 39 of the CGST Act in FORM GST PMT-06 for the month of April, 2022 till the 27th day of May, 2022. |
| 3. | Notification No. 07/2022-Central Tax dated May 26, 2022 | Seeks to waive off late fee under section 47 for the period from 01.05.2022 till 30.06.2022 for delay in filing FORM GSTR-4 for FY 2021-22. |
| 4. | Instruction No. 01/2022-23 (GST Investigation) dated May 25, 2022 | Seeks to clarify the legal position of voluntary payment of taxes through DRC-03 wherein the use of force and coercion by the officers for making 'recovery' has been alleged during the course of search or inspection or investigation.<br><br>It has been clarified that there may not be any circumstance necessitating `recovery' of tax dues during the course of search or inspection or investigation proceedings. However, there is also no bar on the taxpayers for voluntarily making the payments on the basis of ascertainment of their liability on non-payment/ short payment of taxes before or at any stage of such proceedings. However, the tax officer should inform the taxpayers regarding the provisions of voluntary tax payments through DRC-03. |
| 5. | Notification No. 23/2022-Customs dated April 30, 2022 | Seeks to amend various Customs Tariff Notifications in order to align the HS Codes of the said notifications with the Finance Act, 2022.<br><br>The aforesaid amendment has come in force with effect from May 1, 2022. |
| 6. | Notification No. 24/2022-Customs dated April 30, 2022 | Seeks to amend Customs Tariff Notification No. 11/2018-Cus. dated April 30, 2022 in order to align the HS Codes of the said notifications with the Finance Act, 2022.<br><br>The aforesaid amendment has come in force with effect from May 1, 2022. |
| 7. | Instruction No. 04/2022-Customs dated April 27, 2022 | Seeks to issue a clarification in respect of imports of oxygen, oxygen related equipment and COVID-19 vaccines under Notification No. 28/2021-Customs dated April 24, 2021, which exempts customs duty and health cess, subject to the procedure set out in Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017 (**"IGCR"**). |

| | | |
|---|---|---|
| | | The aforesaid instruction clarifies that considering the circumstances of COVID-19 in which such imports were undertaken, the benefit of the exemption notification may not be denied, merely on the issue of not observing the procedure specified in IGCR. However, the goods so imported should have been put to the intended use, i.e., in the manufacture of specified equipment related to the production, transportation, distribution or storage of Oxygen, which if required, is verifiable from invoices and other documents showing supply of such manufactured goods by the importer. |
| 8. | Public Notice No. 03/2015-2020-DGFT dated April 13, 2022 | With a view to enhance ease of doing business and reduce the compliance burden, the following provisions of Chapter 5 related to the Export Promotion Capital Goods (**"EPCG"**) Scheme of the Handbook of Procedures (2015-20) are amended for EPCG authorizations issued under Foreign Trade Policy (2015-20):<br><br>- Block wise fulfilment of Export Obligation<br>- Annual reporting of Export Obligation fulfilment<br>- Automatic Reduction/ Enhancement upto 10% Duty saved amount and pro rata Reduction/ Enhancement in export obligation<br>- Extension in Export Obligation period<br>- Maintenance of Annual Average Export Obligation<br>- Regularization of Bonafide Default and Exit from EPCG Scheme |

***Contributed by the Indirect Tax team***

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