

September 6, 2022



THE INDIRECT TAX NEWSLETTER

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Recent Case Laws

Goods and Services Tax (GST)

1. ***The liability to specify the HSN Code and the applicable GST Rate during the public tendering process is on the bidder/supplier and not on the issuer of the tender.***

Union of India & Others v. Bharat Forge Limited & Another [Civil Appeal No. 5294/2022 (Hon'ble Supreme Court), decided on August 16, 2022].

Facts of the case:

- (a) The Petitioner floated a tender seeking to procure certain products for use in the course of its business. In terms of the tender, the tenderers/suppliers were to declare the tax rates applicable on the products to be supplied to the Petitioner. In case such information was not provided, the bid would be considered inclusive of tax and any liability on account of such tax would be payable by the concerned bidder. The tender also specified that the Petitioner would not be responsible for payment of taxes and duties paid by the bidder on a misclassification or misapprehension of law.
- (b) The question which came for consideration before the Hon'ble Apex Court was whether the Petitioner floating the tender was required to indicate the HSN Code of the product to be procured and mention the same in the tender/ bid document or not. The Hon'ble High Court had ruled against the Petitioner and held that the Petitioner was required to provide the applicable HSN code and rate, so as to ensure uniform bidding and to provide all bidders a 'Level Playing Field'. The Hon'ble High Court further held that the issue was to be clarified with the GST Authorities by the Petitioner. Aggrieved against the Order of the Hon'ble High Court, a special leave petition was filed before the Hon'ble Apex Court.

Judgment:

- (a) The Hon'ble Apex Court held that in terms of the provisions of the GST Laws, it is the liability of the supplier to pay tax, unless the case falls under reverse charge under Section 9(3) of the Central Goods and Services Tax Act, 2017 ("**CGST Act**"¹). Hence, it is the responsibility of the bidder to quote the correct HSN Code and the corresponding GST rate. In the name of providing a level playing field, when the State decides to award a contract, it would not be obliged to undertake the ordeal of finding out the correct HSN Code and the tax applicable for the product, which they wish to procure.
- (b) It was further observed that the Hon'ble High Court has erred in providing an impractical decision to get clarification on the applicable rate of taxes from the GST Authorities in as much as the same can be done only by approaching the advance ruling authorities, which is a tedious and cumbersome process for each supply undertaken by the Petitioner. The Hon'ble Apex Court held that the liability to quote the HSN Code and rate would lie on the tenderer/supplier and not on the Petitioner. Accordingly, the appeal of the Petitioner was allowed.

¹ The provisions of the CGST Act are pari-materia to the State Goods and Services Tax Laws, unless otherwise specified

2. *The Hon'ble Supreme Court affirms that 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.*

The Assistant Commissioner of CGST & CE v. Saiher Supply Chain Consulting Private Limited [Petition for Special Leave to Appeal (C) No(s). 12404/2022 (Hon'ble Supreme Court), decided on July 29, 2022].

Facts of the case:

- (a) The assessee filed a refund claim on September 30, 2020 under the GST Laws, which was rejected on the ground that it was filed after the expiry of two years from the relevant date and was therefore time barred in terms of Section 54(1) of the CGST Act.
- (b) 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 February 28, 2022. The Hon'ble High Court had ruled in favour of the assessee relying upon the suo-moto Order and held that the refund application filed by the assessee was within the specified time period. Aggrieved against the Order of the Hon'ble High Court, a special leave petition was filed before the Hon'ble Apex Court.

Judgment:

Considering the facts and legal position involving its own suo-moto Order, the Hon'ble Supreme Court affirmed the Order of the Hon'ble High Court which had held that the extended period of limitation was applicable to refund processing authorities. Consequently, the Hon'ble Apex Court held that the refund application was not time barred and would be considered on merits in accordance with law.

3. *States to consider implementation of a system for electronic (digital) generation of a Document Identification Number ("DIN") for all communications sent by the State Tax Officers to taxpayers and other concerned persons so as to bring in transparency and accountability in the indirect tax administration.*

Pradeep Goyal v. Union of India [Writ Petition (Civil) No. 320 of 2022 (Hon'ble Supreme Court), decided on July 18, 2022].

Judgment:

In the Public Litigation Petition filed by the assessee praying for generation of DIN for all communications sent by the State Tax Officers to taxpayers and other concerned persons, the Hon'ble Supreme Court observed and held that:

- (a) The implementation of the system for electronic generation of DIN would be in the larger public interest and enhance good governance. It will bring in transparency and accountability in the indirect tax administration, which are vital to efficient governance.
- (b) The said system has also been implemented by the Central Government in Central Board of Direct Taxes ("**CBDT**") from October 1, 2019. However, as of today, only two States, namely, the States of Karnataka & Kerala have implemented the said system.

- (c) In view of the implementation of the GST and as per Article 279A of the Constitution of India, the GST Council is empowered to make recommendations to the States on any matter relating to GST.

The petition has been disposed of by directing the Union of India / GST Council to issue advisory / instructions / recommendations to the respective States regarding implementation of the system of electronic generation of a DIN in the indirect tax administration in order to bring in transparency and accountability therein.

4. *The culmination of proceedings in respect of a person who makes payment of tax and penalty under Section 129(1)(a) of CGST Act, cannot result in the deprivation of the right of the person to file an appeal under Section 107 of the CGST Act.*

Hindustan Steel and Cement v. Assistant State Tax Officer [Writ Petition (C) No. 17463/2022 (Hon'ble Kerala High Court), decided on July 20, 2022].

Facts of the case:

- (a) The goods/conveyance of the Petitioner was detained/seized under Section 129 of the CGST Act. The Petitioner opted to pay amounts in terms of the pre-amended provisions of Section 129(1)(a) of the CGST Act, to get the goods/conveyance released pending finalisation of proceedings. On payment of the amount, the goods and the conveyance were released after issuance of Form MOV-05. While an order was issued in Form MOV-09, a corresponding summary of order/demand in form MOV-07 was not issued. As a result, the Petitioner could not approach the appellate authority by filing an appeal under Section 107 of the CGST Act.
- (b) Aggrieved by the same, the Petitioner filed a petition before the Hon'ble High Court. In response thereto, the respondents contended that in terms of Section 129(5) of the CGST Act, once the amount has been paid under Section 129(1), all proceedings which are the subject matter of a notice under Section 129(3) shall be deemed to be concluded and the payments made cannot be a subject matter of refund or adjudication at a later point of time.

Judgment:

- (a) The Hon'ble High Court observed that on a combined reading of the pre-amended Section 129 of the CGST Act with the relevant circulars and rules, it can be inferred that whether or not a person opts to make payment under Section 129(1)(a) or provide security under Section 129(1)(c), the responsibility of the officer to pass an order in Form MOV-07 continues. Further, Section 129(5) only contemplates that once the payment is done, the procedure for detention on seizure of goods or documents or conveyances comes to an end. However, it is always open to the person who suffers proceedings under Section 129 of the CGST Act to challenge those proceedings if he feels that the demand has been illegally raised on him.
- (b) It was also observed that the lack of generation of the demand by the system or lack of provision in the system to file an appeal without a demand does not mean that the intention of the legislature was to deprive the person from filing an appeal under Section 107 of the CGST Act. In view of the aforesaid, the Petition was allowed.

5. Investigation initiated post filing of advance ruling application would not debar the applicant from seeking advance ruling.

Messers Srico Projects Private Limited v. Telangana State Authority for Advance Ruling [Writ Petition No. 26145/2022 (Hon'ble Telangana High Court), decided on August 17, 2022].

Facts of the case:

- (a) The Petitioner filed an advance ruling application on May 11, 2019 on determining the rate of tax on works contract service rendered to the Central Government Employees Welfare Housing Organisation. However, there was inordinate delay in obtaining such ruling. Meanwhile, the authorities issued a letter dated February 15, 2021 alleging short payment of GST. Subsequently, the Advance ruling authority vide its Order dated June 3, 2022 rejected the application on the ground that an inquiry had already been initiated against the Petitioner on the said issue.
- (b) Aggrieved by the same, the Petitioner filed a petition before the Hon'ble High Court.

Judgment:

- (a) The Hon'ble High Court observed that on reading of relevant provision of GST Laws dealing with the advance ruling application, it is seen that the Authority shall not admit an application for advance ruling where the question raised in the application is already pending or decided in any 'proceedings' in the case of an applicant under any of the provisions of the CGST Act. Though the word 'proceedings' has not been defined under the CGST Act, if the said word is understood in the context in which it is being applied, namely, any proceedings pending or decided in the case of an applicant under the provisions of the CGST Act, it would mean proceedings where the question raised in the application for advance ruling has already been decided or is pending decision. Therefore, the inquiry or investigation initiated after filing of the advance ruling application would not come within the ambit of the word "proceedings".
- (b) In view of the aforesaid, it was held that the rejection of the advance ruling application was not tenable, and the Petition was allowed with a direction to the advance ruling authority to pass an appropriate order under the CGST Act.

Service Tax

6. Service tax is not applicable on sale of canned software with updates

Commissioner of Service Tax, Delhi v. Quick Heal Technologies Limited [Civil Appeal No. 5167 of 2022 (Hon'ble Supreme Court of India), decided on August 5, 2022]

Facts of the case:

The assessee was engaged in the development of Quick Heal brand Antivirus Software which was supplied along with the license code/product code either online or on the replicated CDs/DVDs to the end-customers and updated from time to time. The departmental authorities sought to demand Service tax on the consideration received for the supply of the license codes/keys of Antivirus Software during the period between March 2011 to March 2014. The Hon'ble CESTAT held that no Service tax was leviable

and allowed the appeal. Aggrieved by such Order, an appeal was filed before the Hon'ble Apex Court on the question of law as to whether the right to use the software amounts to deemed sale or not.

Judgment:

- (a) The Hon'ble Apex Court observed that the sum and substance of the ratio in the case of *Bharat Sanchar Nigam Ltd. v. Union of India, (2006) 3 SCC 1*, is that the contract cannot be vivisected or split into two. Once a lumpsum has been charged for the sale of CD, as in the case on hand, and Sales tax has been paid thereon, the revenue thereafter cannot levy Service tax on the entire sale consideration once again on the ground that the updates are being provided.
- (b) Applying the aforesaid principle, the Hon'ble Supreme Court held that the artificial segregation of the transaction into two parts is not tenable in law. The transaction in substance is of sale of software, and once it is accepted that the software put in the CD is "goods", then there cannot be any separate service element in the transaction. Even otherwise, since the user is put in possession and full control of the software, the subject transaction amounts to "deemed sale" which would not attract Service tax. Accordingly, the Hon'ble Apex Court upheld the Order of the CESTAT and set aside the departmental appeal.

Customs

7. Issuance of Corrigendum after six years from the original Show Cause Notice materially altering such notice is not tenable.

Messers Hope Cardamom Estate Limited v. Commissioner [CUSREF No. 01/2002 (Hon'ble Orissa High Court), decided on August 16, 2022].

Facts of the case:

On March 11, 1993, the Customs Department issued a SCN proposing to levy customs duty amounting to Rs.28,192/- and a reply thereto was filed on January 5, 1994. Surprisingly, after six years a 'corrigendum' SCN dated January 19, 2000 was issued whereby the amount of demand was enhanced from Rs.28,192/- to Rs.1,15,655/-. Further, the so called 'corrigendum' adverted to matters not mentioned in the original SCN. The proceedings culminated into an appeal before the Hon'ble High Court.

Judgment:

The Hon'ble High Court held that the so-called corrigendum is in fact a fresh SCN since it materially alters the original SCN both in terms of the demand raised as well as the grounds on which the demand was raised. Accordingly, the Hon'ble High Court set aside the order confirming the demand basis the corrigendum and disposed of the petition.

Central Excise, Sales Tax, VAT

8. *Cylinder Holding Charges (CHC) collected from customers delaying in returning the cylinder is in the nature of penalty and is not includible in the transaction value.*

Linde India Limited v. Commissioner of Central Excise, Alwar [Excise Appeal No. 50183/2020 (Hon'ble CESTAT, New Delhi), decided on July 13, 2022].

Facts of the case:

The Appellant manufactures and sells various types of gases in cylinders and paid duty on the sale price of the gas. In addition, the Appellant also collects some charges in the name of the CHC from its customers, if the customers do not return the re-usable cylinders within a specified period. The Appellant had not included CHC in the value for calculating the Central Excise duty. The revenue contended that such CHC charges are includible in the transaction value in terms of Section 4 of the Central Excise Act, 1944. The proceedings culminated into an appeal before the CESTAT.

Judgment:

- (a) The Hon'ble CESTAT observed that in the facts of the present case, the Appellant was not charging CHC as a condition for sale of its gases. In fact, any customer can buy the gas without paying the CHC and return the cylinder within the time and in such a case no CHC will be payable by the customer to the Appellant. If the customer delays returning the cylinder, the Appellant recovers CHC from the customer in the form of a penalty for delayed return of the cylinder. Therefore, the CHC cannot be called an additional consideration for sale but can only be a penalty for not returning the cylinder within time after the sale is completed.
- (b) In view of the aforesaid, the CESTAT held that CHC was not includible in the assessable value. The appeal was therefore allowed, and the order was set aside.

Recent Notifications and Circulars

No.	Reference	Particulars
1.	Notification No. 17/2022-Central Tax dated August 1, 2022	Seeks to amend Notification No. 13/2020-Central Tax, dated March 21, 2020 to implement e-invoicing for the taxpayers having aggregate turnover exceeding Rupees 10 Crore from October 1, 2022.
2.	Instruction No. 03/2022-23 (Investigation) dated August 17, 2022	Seeks to provide guidelines on issuance of summons under Section 70 of the CGST Act. A summary thereof is provided herein-below: <ul style="list-style-type: none"> - Summons by Superintendents should be issued after obtaining prior written permission from an officer not below the rank of Deputy/ Assistant Commissioner with the reasons for issuance of summons to be recorded in writing. - Where for operational reasons it is not possible to obtain such prior written permission, oral/telephonic permission from such officer must be obtained and the same should

		<p>be reduced to writing and intimated to the officer granting such permission at the earliest opportunity.</p> <ul style="list-style-type: none"> - In all cases, where summons are issued, the officer issuing summons should record in file about appearance/non-appearance of the summoned person and place a copy of statement recorded in file. - Summons should normally indicate the name of the offender(s) against whom the case is being investigated unless revelation of the name of the offender is detrimental to the cause of investigation, so that the recipient of summons has prima-facie understanding as whether he has been summoned as an accused, co-accused or as witness. - Issuance of summons may be avoided to call upon statutory documents which are digitally/ online available in the GST portal. - Senior management officials such as CMD/ MD/ CEO/ CFO/ similar officers of any company or a PSU should not generally be issued summons in the first instance. They should be summoned when there are clear indications in the investigation of their involvement in the decision-making process which led to loss of revenue. - Generation and quoting of Document Identification Number (DIN) is mandatory on communication issued by officers of CBIC to taxpayers and other concerned persons for the purpose of investigation. - The summoning officer must be present at the time and date for which summons is issued. In case of any exigency, the summoned person must be informed in advance in writing or orally. - All persons summoned are bound to appear before the officers concerned, the only exception being women who do not by tradition appear in public or privileged persons. The exemption so available to these persons under Section 132 and 133 of CPC, may be kept in consideration while investigating the case. - Issuance of repeated summons without ensuring service of the summons must be avoided. Sometimes it may so happen that summoned person does not join investigations even after being repeatedly summoned. In such cases, after giving reasonable opportunity, generally three summons at reasonable intervals, a complaint should be filed with the jurisdictional magistrate alleging that the accused has committed offence under Sections 172 of Indian Penal Code (absconding to avoid service of summons or other proceedings) and/or 174 of Indian
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		<p>Penal Code (non-attendance in obedience to an order from public servant), as inquiry under Section 70 of CGST Act has been deemed to be a "judicial proceedings" within the meaning of Section 193 and Section 228 of the Indian Penal Code. Before filing such complaints, it must be ensured that summons have adequately been served upon the intended person in accordance with Section 169 of the CGST Act. However, this does bar issuance of further summons to the said person under Section 70 of the Act.</p>
3.	<p>Instruction No. 02/2022-23 (Investigation) dated August 17, 2022</p>	<p>Seeks to provide guidelines for arrest and bail in relation to offences punishable under the CGST Act. Amongst others, conditions precedent to arrest, procedure for arrest, post arrest formalities, and reports to be sent have been specified therein.</p>
4.	<p>Notification No.69/2022 Customs (N.T.) dated August 28, 2022</p>	<p>Seeks to bring certain changes in the Customs (Compounding of Offenses) Rules, 2005. The salient features of the amendment are as follows:</p> <ul style="list-style-type: none"> - Satisfaction of compounding authority has been limited only to verify and be satisfied that the full and true disclosure of facts has been made by the applicant; - The offence under Section 135AA of the Customs Act, which deals with protection of data, has also been made compoundable. Further, the competent authority has been mandated to grant immunity when offense is only of this type.
5.	<p>Circular No. 14/2022- Customs dated August 18, 2022</p>	<p>Seeks to issue clarification with respect to payment of Customs Duty on Display Assembly of Cellular Mobile Phone. The issue stems from the fact that the DRI had intercepted certain cases where imports of assemblies consisting of display assembly and other parts of mobiles like mechanics etc. had been made by mis-declaring such an assembly as display assembly and claiming the concessional Basic Customs Duty (BCD) rate of 10% as provided vide Sl. No. 5D of Notification No. 57/2017-Customs dated June 30, 2017.</p> <p>In this regard, it has been clarified that:</p> <ul style="list-style-type: none"> - Display Assembly of a cellular mobile phone may be imported with or without the back support frame of metal/plastic fitted in the assembly. Although, back support frame of metal/plastic has no essential function in display and only provides strength, protection and structural stability, the mere attachment of back support frame of metal/plastic on the display assembly does not alter the essential characteristic of display in any manner, and the assembly would continue to be treated as a Display Assembly of a cellular mobile phone.

		<ul style="list-style-type: none"> - Therefore, if display assembly of mobile phone is imported with merely a back support frame of metal/plastic attached to it, the assembly continues to be Display Assembly of a cellular mobile phone and a BCD rate of 10% shall be applied on such assembly consisting of Display Assembly and only the back support frame of metal/plastic in addition [though Back support frame of metal/plastic, if imported individually, will attract a BCD rate of 15%]. - However, if any other item like the sim tray, antenna pin, speaker net, power key, slider switch, battery compartment, Flexible Printed Circuits (FPCs) for volume, power, sensors, speakers, fingerprint etc., come fitted along with a Display Assembly with or without a back support frame of metal/plastic, then the whole assembly attracts a BCD rate of 15%. Such assembly [consisting of a Display Assembly of a cellular mobile phone with or without back support frame, plus any other parts as mentioned herein] is not eligible for the benefit of concessional rate of 10% BCD.
6.	Circular No. 13/2022- Customs dated August 16, 2022	<p>Seeks to issue revised guidelines for Arrest and Bail in relation to offences punishable under Customs Act. Amongst others, it has been clarified that arrest in respect of an offence, should be made only in exceptional situations which may include:</p> <ul style="list-style-type: none"> - Cases involving unauthorised importation in baggage/ cases under Transfer of Residence Rules, where the market value of the goods involved is Rs. 50,00,000/- or more; - Cases of outright smuggling of high value goods such as precious metal, restricted items or prohibited items or goods notified under Section 123 or offence involving foreign currency where the value of offending goods is Rs. 50,00,000/- or more; - Cases related to importation of trade goods (i.e. appraising cases) involving wilful mis-declaration in description of goods/concealment of goods/goods covered under Section 123 with a view to import restricted or prohibited items and where the market value of the offending goods is Rs. 2,00,00,000/- or more; - Cases involving fraudulent evasion or attempt at evasion of duty involving Rs 2,00,00,000/- or more; - Cases involving fraudulent availment of drawback or attempt to avail of drawback or any exemption from duty provided under the Customs Act, in connection with export of goods, if the amount of drawback or exemption from duty is Rs. 2,00,00,000/- or more. In cases related to exportation of trade goods (i.e. appraising cases) involving

		<p>(i) wilful mis-declaration in value / description; (ii) concealment of restricted goods or goods notified under Section 11 of the Customs Act, where market value of the offending goods is Rs. 2,00,00,000/- or more;</p> <p>- Cases involving obtaining an instrument from any authority by fraud, collusion, wilful misstatement or suppression of facts and utilisation of such instrument where the duty relatable to such utilisation of the instrument is Rs 2,00,00,000/- or more;</p> <p>The aforesaid value criteria would not apply in cases involving offences relating to items i.e., arms, ammunitions and explosives, antiques, art treasures, wildlife items and endangered species of flora and fauna. In such cases, arrest, if required, on the basis of facts and circumstances of the case, may be considered irrespective of value of offending goods involved.</p>
7.	Circular No. 12/2022- Customs dated August 16, 2022	Seeks to issue guidelines for launching of Prosecution in relation to offences punishable under the Customs Act, 1962.
8.	Instruction No. 110 dated August 12, 2022	Seeks to provide guidelines providing standard operating procedure for Work from Home (WFH) permission for implementation of Rule 43A of the Special Economic Zones (Third amendment) Rules, 2022.
9.	Public Notice No. 21/2015-20 dated August 5, 2022	Seeks to extend validity of Status Holder Certificates issued in the FY 2015-16 and 2016-17 under the provisions of FTP 2015-20 upto September 30, 2022.
10.	Trade Notice No. 15/2022-23 dated August 1, 2022	Seeks to extend the date for Mandatory electronic filing of Non-Preferential Certificate of Origin through the Common Digital Platform to March 31, 2023.

Contributed by the Indirect Tax team

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