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Newsletter from Mukesh Manish & Kalpesh, Chartered Accountants

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Decriminalisation of offences – A positive step (Published in TIOL)

In the Union Budget 2023-24, Finance Minister Smt. Nirmala Sitharaman announced the introduction of the Jan Vishwas Bill, aimed at amending42 Central Acts to promote trust-based governance.

The term Jan Vishwas translates to "Public Trust", or "belief upon the individuals". The Jan Vishwas (Amendment of Provisions) Act, 2023 received the assent of the President on 11th August 2023

.While some provisions such as Cinematograph Act, 1952 are effective from 1 st September 2023, some other Acts such as amendments to the Legal Metrology Act are effective from 1 st October 2023. Some other Acts such as the Forest Act, 1927 and the Drugs and Cosmetics Act, 1940 are yet to be notified.

The enactment of this legislation represents a significant stride towards alleviating concerns related to criminal penalties for minor, technical, and procedural lapses in business compliance. The primary aim of the Act, as explicitly articulated in its stated objectives, is to foster 'the ease of doing business in India' by adhering to the principle of 'minimum government, maximum governance.'

The apprehension of incarceration for minor transgressions has significantly impeded the development of the business ecosystem and eroded individual confidence. According to the findings of the report titled 'Jailed for Doing Business,' conducted by the Observer Research Foundation, among the 69,233 distinct regulatory requirements governing business operations in India, a staggering 26,134 stipulate imprisonment as a consequence for non-compliance.[1] In essence, nearly 40% of these regulatory provisions carry the potential to lead entrepreneurs to incarceration.

What the Act seeks to achieve

Under the Act, a total of 183 provisions have been proposed to be decriminalized in 42 Central Acts administered by 19 Ministries/Departments. The Act converts several fines to penalties, eliminating the need for court prosecution to impose punishments. Further, Adjudicating Officers have been appointed across several legislations as primary dispute resolution authorities. As stated supra, the amendments relating to various enactments will come into effect on different dates as notified in the Official Gazette.

Major Enactments amended

The important enactments to be amended and which would directly impact the ease of doing business include the following:

1) The Legal Metrology Act, 2009
2) Information Technology Act, 2000
3) The Indian Forest Act, 1927
4) The Drugs and Cosmetics Act, 1940
5) The Pharmacy Act, 1948
6) Food Safety and Standards Act, 2006

In total, around 42 Acts have been proposed to be amended under the Act.

1. Gautam Chikermane and Rishi Agrawal, Jailed for Doing Business: The 26,134 Imprisonment Clauses in India's Business Laws, February 2022, Observer Research Foundation

Decriminalisation of offences – A positive step [contd.]

Under the Act, several offences with an imprisonment term have been decriminalized by imposing only a monetary penalty. For instance, Section 72A of the Information Technology Act prescribes imprisonment for a period of up to three years and/or a fine of up to Rs. 5,00,000 for disclosing personal information acquired through a contract, without the consent of the concerned person. The amendment substitutes such punishment with just monetary penalty up to Rs. 25,00,000.

In the Indian Forest Act, 1927 the amendment removes imprisonment for trespassing, permitting cattle to trespass, cutting timber etc., in reserved forest. A fine up to Rs 500 and compensation for damage as determined by the Forest Officer is payable instead.

Under the Drugs and Cosmetics Act, 1940, Section 30(2) prescribes for imprisonment of upto two years and/or a fine of upto Rs. 10,000 for repeated offence of using a government analysis or test report for advertising a drug. The amendment now proposes to levy only a fine, but not less than Rs.5,00,000.

Similarly, under the Legal Metrology Act, 2009, imprisonment of up to six months along with fine was prescribed under Section 25 for repeated offence of using non-compliant weights, measures or numeration. The amendment removes imprisonment and provides for Rs. 2,00,000 for the second, and Rs. 5,00,000 for subsequent offences.

Way forward

The objective of the Act carries substantial national importance of leading it towards the goal of making India more competitive in ease of doing businesses. Nonetheless, it is crucial to acknowledge that the legislation may not comprehensively resolve all concerns. While it is theoretically conceivable that streamlining and reducing criminal sanctions could enhance business efficiency and offer various advantages, a more exhaustive scrutiny is imperative to ascertain whether the precise offenses marked for streamlining and decriminalization are sufficient or more provisions must be decriminalized.

Action points

Notably, the amendments to the Cinematograph Act, 1952, Press and Registration of Books Act, 1867, have already been enforced with effect from 1 st September 2023, and Boilers Act, 1923 with effect from 22 nd September 2023. The amendments made to the Legal Metrology Act, 2009, will come into effect on 1 st October 2023. One has to keep a track of the appointment dates of these amendments to ensure compliance with the updated regulations and to adapt any relevant practices accordingly.

A point which comes for interpretation here is whether offences which have been committed prior to the implementation of the Act will also be eligible for the benefits which are flowing under the Act? In other words, are the provisions of the Act retrospectively applicable to existing proceedings is an open query requiring a more detailed scrutiny.

Conclusion

Though at first blush, it may appear that the Government has decriminalized offences under various Statutes, it is also important to note that only some provisions of these statutes have been decriminalized. For example, under the Legal Metrology Act, there are multiple penal provisions which are still providing for prosecution (like Section 36 which is invoked in maximum cases) and have not been included under the Act. Hence, the Assessee must not get coloured by the headlines but read between the provisions to also take into account whether the relaxations provided by the Act will apply to their case.

Key Rulings and Insights

1. M/s J.K. Cement Ltd. (Allahabad HC)

Facts of the case

- **The Question of law is whether penalty under Section 129(3) can be levied merely on the ground that e-way bill has not accompanied the goods in transit?**
- The goods were being transported from Gwalior, Madhya Pradesh to Panna, Madhya Pradesh. The route passes though small portion of the State of Uttar Pradesh – Jhansi.
- While passing through Uttar Pradesh, the goods were intercepted and subsequently, penalty was levied by way of passing an order under section 129(3) on the ground that e-way bill was accompanying the goods.
- Petitioner argued that by virtue of Notification dated 24.4.2018 (issued by the State of Madhya Pradesh), only the 11 items mentioned therein should be accompanied with e-way bill while in transit. As such, the petitioner is not mandated by law to carry e-way bill.
- Department argued that the aforesaid Notification cannot be relied on since the same is not applicable in the State of Uttar Pradesh.
- The Hon'ble Allahabad High Court observed that goods receipt (GR) and tax invoices accompanying the goods are genuine and not disputed by the department.
- The Court further observed that the petitioner was not required to carry e-way bill as per the Notification. Therefore, the Court held that merely because the goods were not accompanying the e-way bill, the seizure ought not to have been made under Section 129.
- It was further held that when there is no discrepancy in the documents accompanying the goods, the penalty cannot be levied for not carrying e-way will. Consequently, the order levying penalty was set aside.

Key insights

- This decision addresses an intriguing issue concerning goods that both originate from and are intended for delivery within a single state but may transiently cross the borders of another state during transit. The key question in such scenarios revolves around whether the exemption granted by one state will still be applicable when the goods temporarily traverse through another state's boundaries.
- Such situations can arise in numerous states and union territories, where the point of origin and the ultimate destination are within the same state, yet the goods may briefly traverse the borders of another state.
- The Hon'ble Allahabad High Court has based its decision on the premise that there was no deliberate tax evasion involved in this matter. Notably, the High Court has also affirmed that the exemption provided through a notification for the E-Way bill will be applicable in such circumstances.
- **Citation:** Writ Tax No. - 44 of 2023

2. M/s Dana Pani (Allahabad HC)

Facts of the case

- **The question of law here is whether the department need not provide 'opportunity of personal hearing' if the assessee chooses in the first place not to avail 'opportunity of personal hearing'.**
- In the present case, Show Cause Notice was issued to the petitioner on 06.04.2021 and thereafter, order was passed on 23.03.2022.
- The department had mentioned 'NA' in the columns providing for date, time and venue of personal hearing in the table appended to the SCN. Therefore, the petitioner challenged the order on the ground that petitioner has not provided 'any opportunity of personal hearing' before passing the order.
- The Allahabad High Court noted that Section 75(4) of CGST Act mandates the department to provide for 'opportunity of hearing' when any adverse order is contemplated.
- The Court further held that even if assessee has signified 'No' in the column meant to mark the assessee's choice to avail personal hearing, the department must provide 'opportunity of hearing'. (Reliance was placed on the SC decision in Bharat Mint & Allied Chemicals Vs. Commissioner Commerical Tax & 2 Ors., (2022) 48 VLJ 325).

Key Insights

- The deadline for issuing Show Cause Notices (SCNs) within the standard limitation period for the year 2017-18 was September 30, 2023, and multiple SCNs have been issued to taxpayers in the past two weeks. It has come to attention that, in many instances, the Department has been unable to provide the opportunity for a hearing due to time constraints.
- The rationale behind this High Court ruling will serve as a valuable resource for such taxpayers, enabling them to argue that the principles of natural justice and the provisions of the Act necessitate the provision of a hearing, even if the taxpayer has not explicitly requested one.
- **Citation:** Writ Tax No. - 1010 of 2023

3. M/s KS Commodities Private Limited (Delhi HC)

Facts of the case

- **The issue here is whether the petitioner is entitled for refund of tax paid on input services received by him in respect of export of sugar.**
- The petitioner was engaged in export of sugar and rice. He has filed an application for refund of ITC availed on input services which are received in respect of export of sugar.
- However, the Adjudicating Authority by way of an order, rejected the refund application on the ground that the petitioner failed to corelate the input supplies and export of commodities i.e., sugar.
- The Appellate Authority by way of order (impugned order), also rejected the refund application. The writ petition is filed against this impugned order.
- The Hon'ble High Court noted various documents submitted by the petitioners to prove that input services received were in respect of export of sugar such as invoices relating to procurement of sugar, invoices relating to sugar brokerage services, invoice relating to transport services and so on.
- The Court observed that neither the Adjudicating Authority nor the Appellate Authority examined these invoices and that also no reasons were provided for not examining these documents. The matter was remanded to the Appellate Authority for reconsideration on merits.

Key insights

- The recent judgment by the Hon'ble Delhi High Court highlights the Department's stringent approach to monitoring and evaluating refund applications.
- It underscores how, even in cases where credit eligibility is evident and a rightful refund is due to the taxpayer, the Department often adopts a narrow perspective, deeming the goods and services ineligible for refund. This ruling will prove beneficial in addressing situations where refunds have been denied despite meeting the criteria.
- **Citation:** W.P.(C) 8221/2023

4. M/s XILINX India Technology Services Pvt (Delhi HC)

Facts of the case

- **The question of law here is whether the petitioner and its holding company in the USA are 'establishments of distinct person' within the meaning of Explanation I to Section 8 of IGST Act.**
- The Petitioner is an EOU, engaged in the export of information technology software services to its holding company located in the USA. The petitioner filed a refund application.
- However, the refund application was rejected on the ground that services supplied to its holding company did not qualify as 'export of services' as clause (v) of Section 2(6) of IGST Act was not satisfied.
- The department argued that the petitioner and its holding company were 'establishments of distinct person' and as such, service supplied to its holding company cannot be regarded as 'export of services'.
- The Hon'ble Delhi High Court referred to circular No. 161/17/2021-GST (issued by CBIC) which clarifies that a company incorporated in India and a body corporate incorporated under the laws of foreign country are separate persons under the CGST Act.
- The Court held that the petitioner and holding company cannot be regarded as 'merely establishments of distinct person' in accordance with Explanation I of Section 8.
- The High Court held services supplied by the petitioner to its holding company in USA falls within 'export of services' under Section 2(6) of IGST Act. Subsequently, the Court directed the department to process refund claim immediately.

Key insights

- The matter of defining 'establishments of distinct persons' for the purpose of determining exports has consistently been a source of contention under the Finance Act. This issue will persist in the context of the GST Act, as the provisions for the export of services remain unchanged.
- In instances where transactions occur between related parties, the tax department typically assumes that these transactions fall under the category of dealings between establishments of distinct persons. However, legal clarity has been achieved through the Board's circular, which stipulates that two separate companies will not be considered as establishments of a 'distinct entity'.
- **Citation:** W.P.(C) 11413/2023

5. M/s Boks Business Services Pvt Ltd (Delhi HC)

Facts of the case

- **The Question of law is whether the petitioner falls under 'Intermediary' within Section 2(13) of the IGST Act when the agreement uses the word 'agent'.**
- The petitioner has filed a refund application for zero-rated supplies under Section 16 of the IGST Act.
- However, the department rejected the application on the ground that services provided by the petitioner to the foreign company falls under 'intermediary services' and as such, the place of supply of services was within India.
- The Hon'ble Court perused the agreement between the petitioner and the foreign company and observed that the petitioner itself is engaged in provision of services such as bookkeeping, payrolls and accounts with cloud technology to the foreign company.
- The Court then held that although the agreement uses the word agent, the agreement clearly provides that the petitioner had been providing the services directly to the foreign company.
- The court further held that petitioner is not an agent for procurement of services for service recipient. As such, the order rejecting the refund was set aside and the department was directed to process the claim expeditiously.

Key insights

- The ruling by the Hon'ble court contributes to the series of High Court judgments addressing the concept of intermediary. In this particular case, the Court underscored the crucial principle of prioritizing substance over form, opting to assess the service's nature based on the actual contract clauses rather than its description in the recital.
- The mere use of the term "agent" for the service provider did not automatically imply that the service qualified as that of an intermediary. This judgment will also hold significance in clarifying the precise scope of the definition of an intermediary within the framework of the GST regime.
- **Citation:** W.P.(C) 1255/2023

6. M/s. Bhavani Industries (Gujarat HC)

Facts of the case

- **The question of law is whether IGST is payable on the ocean freight by the importer where both the service provider and service recipient are outside India?**
- The Petitioner/importer is engaged in the manufacture and outward supply of goods and services pertaining to automobile parts.
- In the audit report issued by the department, the Petitioner was found to have imported certain goods and thereafter, a Show Cause Notice was issued alleging that petitioner is liable to pay tax on ocean freight under reverse charge mechanism (RCM) in accordance with Notification 10/2017-CGST (Notification).
- The department was of the view that since petitioner files the import manifest, he was the service recipient as stipulated in the Notification for the purpose of levying IGST under RCM
- The Hon'ble Gujarat High Court relies on the SC decision in Union of India vs. Mohit Minerals Pvt. Ltd. [22 (61)GSTL 257 (SC) wherein it was held that to a extent tax on the supply of services which has already been included by the legislation as a tax on the composite supply of goods cannot be allowed.
- Since the customs duty is already paid on the CIF contracts which includes ocean freight value, the IGST cannot be levied on the ocean freight because such levy (by way of the Notification) amounts to double taxation. As such, the order proposing to levy IGST was set aside.

Key insights

- The question relating to taxability of ocean freight services have been raised often by the Department and have now been judicially decided in favor of the assessee by the decision of the Hon'ble SC.
- The Gujarat HC has followed the decision of the Hon'ble SC and has also held that once tax under the customs act has been paid on the value of the duty, GST cannot be again demanded for the same transaction as that will lead to double taxation.
- **Citation:** R/Special Civil Application No. 6379 of 2023

7. M/s Diya Agencies (Kerala HC)

Facts of the case

- **The question of law revolves around denial of ITC on the ground that supplier had not paid the tax.**
- ITC was denied to the petitioner on the ground that he had availed ITC in excess of ITC available in GSTR 2A.
- Counsel for the petitioner argued that ITC cannot be denied merely based on GSTR-2A for which petitioner has no control. It was further submitted that petitioner has satisfied all the conditions stipulated under Section 16(2) of CGST Act.
- The Hon'ble Kerala High Court at first noted the decision of the Calcutta HC in Suncraft Energy, wherein it was held that before denying the ITC on the ground that supplier has not deposited tax, Assessing Authority should take action against the selling dealer. Further it was held that ITC cannot be denied if assessee has genuinely paid tax to the selling dealer.
- Then, the Court noted the decision of the SC in M/s. Ecom Gill Coffee Trading Pvt Ltd, wherein while interpreting Section 70 of KVAT Act which is similar to Section 16 of CGST Act, it was held that genuineness of the transaction is to be proved by the purchasing dealer by furnishing address of the selling dealer, tax invoices, details of vehicle delivering the goods and so on.
- The Hon'ble Kerala HC after perusing the above decisions held that if the seller dealer (supplier) has not remitted the said amount paid by the petitioner to him, the petitioner cannot be held responsible.
- As such the matter was remanded to the Assessing Authority, and it was held that if on examination of the evidence submitted by the petitioner, the Assessing Officer is satisfied that ITC claim is bona fide and genuine, the petitioner should be given ITC.

Key insights

- The Hon'ble Kerala HC has once again reiterated the important principle that ITC cannot be denied at the recipient end where there is a failure on the part of the supplier to discharge tax.
- The Department has already issued a circular on matching. Where the ITC remains unmatched and the declaration from vendors are not obtained, will the position relating to eligibility to retain ITC will be a valid position is to be tested before the Higher Forums.
- **Citation:** WP(C) NO. 29769 OF 2023

8. In Re: M/s. EIMCO Elecon India Limited (AAR Gujarat)

Facts of the case

- **The question of law here are twofold:**
  - **Whether the Applicant is liable to pay GST on canteen services provided to its employees and contractual workers?**
  - **Whether Applicant is entitled to ITC on canteen services received from canteen service provider (In short, CSP)?**

- The Applicant is engaged in the manufacture of mining and construction equipment and registered under the Factories Act, 1948.
- They provided the canteen facility to their employees (as mandated under Section 46 of the Factories Act) through CSP. CSP issues tax invoices to the Applicant.
- The Applicant collects 50% of value of food consumed by its employees from the employees by way of deduction and the rest 50% is borne by the company. For contractual workers, the contractor pays the entire amount for canteen services to the Applicant and then Applicant pays to the CSP.
- Circular no. 172/04/2022-GST dated 6.7.2022 clarifies that any perquisites provided by the employer to the employees are merely compensation for the services rendered by the employee in the course of business when such perquisites are provided in accordance with any agreement between employer and employee.
- As such, AAR held that Applicant is not liable to pay GST on the amount representing employees' portion of canteen charges (collected by Applicant and paid to CSP)
- It was further held that Applicant is liable to pay GST on the amount recovered from the contractor for the canteen services since there is no employer-employee relationship and so, canteen services provided to the contractor qualifies as 'outward supply' under Section 2(83) of the CGST Act.
- AAR then held that Applicant is entitled to ITC on the canteen services provided by the Applicant to its direct employees. However, ITC is restricted proportionately to the cost borne by the Applicant for canteen services for its employees. (i.e., 50%).
- Further, it was held that ITC on GST paid on canteen facility is not admissible to the Applicant under Section 17(5)(b) of CGST Act, on the food supplied to contractual worker supplied by labour contractor.

Key insights

- The Hon'ble AAR dwells on the important concept of what qualifies as perquisites for the employee vis a vis the reimbursement. The AAR has held that the proportionate amount of expenses which are borne by the company for the canteen supply to the employee will not be considered as a supply and hence will not be taxable.
- However, the key consideration which remains open are the rate at which the supply will be taxable and if the assessee is discharging tax on the 50% recovery made at 5%, how will the valuation rules apply and can proportionate ITC be availed due to the restriction in the rate entry.
- To the extent of supply made to the contractual worker, the ruling clearly provides that tax will be payable. However, on the question of input tax credit, considering that the supply is used by the company for making a further outward supply, the position of credit is disputable.
- **Citation:** GUJ/GAAR/R/2023/28

9. In Re: M/s. Bayer Vapi P. Ltd (AAR, Gujarat)

Facts of the case

- **The question of law is whether the Applicant is entitled to take ITC for the services received from M/s VEL (supplier of leasehold rights).**
- GIDC had leased its land to VEL for a period of 99 years for them to carry out their business. M/s VEL entered into an MOU with the Applicant to transfer its leasehold rights to them.
- The Applicant intend to expand their manufacturing facility for the purpose of manufacturing chemicals.
- The Applicant was required to make an advance payment to the supplier of 40% of the total consideration along with GST. Can Applicant be allowed to avail ITC on the GST paid?
- AAR noted that Section 17(5)(d) does not allow a taxable person to avail ITC on goods or services received for the purpose of construction of immovable property.
- It was observed that Appellant has acquired the leasehold rights from VEL only with an intention to expand their manufacturing facility. Receiving leasehold rights to land was precursor to the construction on the land for expanding the manufacturing facility.
- As a result, it was held that Appellant was barred by Section 17(5)(d) from availing ITC on the services received from M/s VEL..

Key insights

- The decision of the AAR that leasing of land is barred under Section 17(5) is a highly debatable position. A careful perusal of Section 17(5) highlights that ITC 'for' construction is blocked. Whether, a leasehold right can be construed to be 'for' construction or in relation to construction is a litigious position as the word 'for' can be interpreted to mean a direct nexus/requirement.
- With the negative ruling in place, many assessee who have availed ITC on leasing services are required to carefully re-evaluate the legal position carefully.
- **Citation:** GUJ/GAAR/R/2023/29

10. In Re: M/S. KSH Automotive Pvt Ltd (AAR Andhra Pradesh)

Facts of the case

- **The question of law is whether the applicant is entitled to ITC on the food served by the canteen to the employees of the Applicant.**
- The Applicant is engaged in the manufacturing of automotive parts and registered under the Factories Act, 1948.
- As mandated by Section 46 of Factories Act, Applicant is required to provide canteen facilities to its workers and as a result, they have established canteen by a vendor contractor.
- The Applicant bears the entire cost of the food served to its employees, and vendor raises tax invoices on the Applicant.
- AAR referred to Circular No, 172/04/2022-GST dated 06.07.2022 and observed that second proviso to Section 17(5)(b) is applicable to whole clause (b) of Section 17(5) of CGST Act.
- This implies that ITC is available when services in respect of foods, beverages etc., are provided on account of obligation imposed under any law in force.
- As such, it was held that GST paid on the invoices raised by the vendor can be claimed as credit in terms of second proviso to Section 17(5)(b).

Key insights

- The Hon'ble AAR has given a favorable interpretation on an issue which has now been settled in favor of the assessee through a Board circular. It is hoped that the same is taken note by the Department for all future transactions.
- **Citation**: AAR No. 09/AP/GST/2023

11. M/s. Vishnu Chemicals Limited (AAR, Andhra Pradesh)

Facts of the case

- **The question of law is whether the claim of ITC based on tax invoice dated 1.4.2020 for the supply made in the FY 2018-19 is hit by limitation?**
- The Applicant is engaged in the manufacture of basic chromium sulphate, sodium sulphate and chronic acid. In order to store the raw materials and finished goods, they have entered into a lease agreement with M/s Usha Tubes (lessor) and Pipes Pvt Ltd for leasing of godowns.
- For lease services provided to the Applicant for the period April 2018-March 2019, the lessor has raised tax invoice on 1.04.2020. The issue here is whether Applicant is entitled to ITC in respect of the invoice dated 1.04.2020.
- At the outset, AAR noted that in terms of Section 31(2) read with Rule 47, tax invoice was not issued within the prescribed days. (i.e., 30 days from the provision of service)
- AAR further noted that Section 16(4) provides that ITC in respect of invoice for the supply of goods or services is not admissible after the due date of furnishing of the return under Section 39 for the month of September following the end of the financial year to which that invoice pertains or date of furnishing of the Annual Return whichever is earlier.
- As such, AAR held that ITC in respect of invoice dated 1.04.2020 is not admissible since the invoice does not pertain to the supply made in FY 2020-2021 but pertains to supply made in FY 2018-19.

Key insights

- The issue relating to computation of time limit for availment of ITC to be from 'the date of supply' or 'the date of invoice' is very contentious due to the manner in which the Section is worded. Further, there are no circulars/FAQ issued by the Government on this point. In case of delay in raising the invoices, the law already requires the assessee to pay penalty and interest.
- Hence, barring of the ITC leads to overall harsher implications for the assessee if the position of the AAR is adopted. Hence, this position requires a closer analysis.
- **Citation:** AAR No.21lAP/GST/ 2O21

12. In Re: M/s. Geekay Wires Limited (AAR, Telangana)

Facts of the case

- **The question of law is whether ITC availed/utilized should be reversed when inputs and finished goods were destroyed due to a fire accident.**
- The Applicant is engaged in the manufacturing of steel nails and for that purpose, they procure various raw materials such as steel wire rod, copper wire, paper tape etc.
- Due to fire accident, all the inputs/raw materials and finished goods held in stock were destroyed. ITC on those inputs as well as on input consumed in the finished goods were availed already.
- AAR noted that Section 17(5) does not allow to claim ITC on goods which are destroyed and held that Section 17(5) has to be interpreted in the context of Sections 17(2) and 18(4) in accordance with the principle 'ex-visceribus actus'.
- As such, AAR held that when the taxable supplies are not made, input tax credit is not available under Section 17(2) and17(5)(h). If the input tax credit is already utilized such credit needs to be paid back as given under Section18(4).
- As a result, AAR ruled that the input tax credit to the extent of manufactured goods destroyed or inputs destroyed is not available to the applicant and the same needs to be paid back/reversed.
- Further, when the goods destroyed are sold as scrap and output tax liability is paid, even then ITC, it was held, is not available since scraps are merely destroyed goods. As such, ITC has to be reversed if already availed/utilized.

Key insights

- The position relating to reversal of ITC for goods sold as scrap has been a subject matter of interpretation. While the ruling by the authority is only binding on the applicant, this proposition will be used by the Department to propose to deny ITC for many assessee and hence will be a subject matter of dispute. Assessee who has already availed ITC may review the positions taken in this respect.
- **Citation:** A.R.Com/04/2023 and TSAAR Order No.15/2023

13. In Re: M/s. Orient Cement Limited (AAR, Karnataka)

Facts of the case

- **The question of law here is whether Applicant is entitled to ITC on gold/while goods given to the dealers as an incentive for achieving specific targets.**
- The Applicant is engaged in manufacturing of cement, and they introduced various schemes for their dealers to promote their sales and marketing. They issue gold coins or provide while goods to their dealers upon achieving purchase targets.
- The issue is Applicant's entitlement to the ITC on such gold/white goods. In terms of Section 17(5)(h), ITC is not available on goods which are disposed of by way of gift. One view is that gold issued to dealers is considered as gift and there, ITC is not available on gold/white goods.
- However, AAR held that herein, gold/white goods are not given away as gifts. To qualify as a gift, there must not be any condition or stipulation. AAR observed that herein, gold/white goods are given only when their dealers achieve purchase targets (condition is being imposed here).
- AAR further held that giving away gold/white goods to the dealers would amount to 'permanent transfer or disposal of business assets where ITC has been availed on such asset' covered under Entry 1 of Schedule I to the CGST Act.
- As a result, issuance of gold or giving away white goods would be treated as supply even if made without consideration. As such, Applicant is naturally liable to pay GST on supply of gold or white goods to their dealers.
- Further, Applicant is also held to be entitled to ITC on such goods being covered under Entry 1 to Schedule I to the CGST Act.

Key insights

- While on one hand, the Hon'ble AAR has held that there are no free lunches as such and hence the provisions of Section 17(5) will not get attracted, the AAR has also held that the assessee in any case is required to pay tax on the transaction under Schedule I treating the transaction as a sale of business asset. What constitutes business asset is a subject matter of dispute and one has to take a position on this.
- **Citation:** KAR ADRG 27/2023

14. In Re: M/s. Vinod Kumari Goyal (AAR Karnataka)

Facts of the case

- **The question of law revolves around leviability, rate of tax and eligibility to claim ITC in case of the landowner who has entered into a Joint Development Agreement (JDA) with a developer.**
- The Applicant is a landowner and as per the terms of the JDA, the Applicant and the developer construct and sell apartments to their customers before the issuance of completion certificate.
- Notably, the developer sells his portion of the apartment, and the Applicant sells his portion of the apartment.
- The first issue revolves around the leviability of tax on the sale of apartment made by the Applicant who is merely a landowner and does not involve in the construction (works contract).
- AAR held that developing is providing construction services to the Applicant and the Applicant in turn is providing the same to its prospective customers.
- The sale agreement entered into between the Applicant and the prospective customers indicates that the Applicant is acting as supplier of works contract service even though he is not directly involved in the construction. As such, such transaction qualifies as supply under Section 7.
- AAR further held that Applicant is different from developer and thus, Applicant cannot pay the same rate as the developer. Applicant, it was held, is liable to pay in accordance with entries 3(i) to 3 (id) of the Notification 11/2017 (Rate) depending on the nature of the apartment.
- As regards Applicant's entitlement to ITC on tax charged by the developer, in terms of fourth proviso to entries 3(i) to 3(id) of Notification 11/2017, it was held that Applicant is entitled to ITC subject to two conditions:
    - Applicant should be registered person at the time of supply of construction services by the developer.
    - The tax Applicant pays on the outward supply of apartment, should be more than the tax charged by the developer on supply of construction services.
- Insofar as ITC on other expenses incurred by the Applicant is concerned, it was held that ITC on other expenses is not admissible.

Key insights

- This ruling summarizes the position which the Department has been taking for various real estate transactions and has held that the landowner is Applicant is acting as supplier of works contract service even though he is not directly involved in the construction.
- This position needs to be reviewed on the basis of the agreement which is entered between the real estate developer and the customers.
- **Citation:** KAR ADRG 28/2023

Notifications, Circulars and Other Developments

Provisions of Finance Act, 2023 effective from 1st October 2023

CGST Act

- Section 10 - Registered businesses supplying goods through E-commerce Operators (ECOs) can now choose to pay taxes under the composition scheme.
- Section 16(2) – If the recipient has not paid the value of supply along with tax to the supplier within 180 days and also availed ITC, then the amount equal to ITC availed should be paid by the recipient along with interest.
- Section 17 – Supply of warehoused goods before home consumption to be considered an exempt supply.
- Further, ITC is restricted on goods or services or both for meeting CSR obligations under the Companies Act, 2013.
- Section 23 – Government empowered to specify categories of persons exempted from obtaining registration.
- Section 30 – Any registered person whose registration is cancelled may apply for revocation of cancellation of registration in such manner and within such time as may be prescribed. [Rule 23 – time period to apply is within 90 days from the date of service of order of cancellation.].
- Sections 37, 39, 44 and 52 - Returns in Form GSTR-1, GSTR-3B, GSTR-4, GSTR-5, GSTR-6, GSTR-8, GSTR-9 and GSTR-9C cannot be filed after the expiry of three years from the due date, except when allowed by the Government.

Provisions of Finance Act, 2023 from 1st October 2023 [Contd.]

- Section 54 – Reference to provisional ITC removed as Section 41 was consequentially omitted from CGST Act
- Section 56 - Government to prescribe the mechanism for computation, manner, and restrictions for payment of interest on refunds delayed beyond 60 days.
- Section 62 – registered persons are allowed to file valid return within 60 days (instead of 30 days) from the receipt of the Assessment Order. The period maybe extended to further 60 days upon payment of late fees for each day of delay.
- Sections 122, 132 and 138 – Certain amendments to penal provisions and offences
- Addition of Section 158A - Consent based sharing of information furnished by taxable person on GST portal.
- Schedule III to the CGST Act - Transaction of export from non-taxable territory and high sea sale and supply of Warehoused goods before clearance for home consumptions made applicable with effect from the 1st day of July 2017.

Key Highlights on Specified Actionable Claims including Online Gaming

- The definitions of 'online gaming', 'online money gaming', 'specified actionable claim' and 'virtual digital assets' under Section 2 of CGST Act have been added.
- Last proviso to Section 2(105) has been inserted amending definition of supplier to include person supplying specified actionable claims
- Section 24 (xia) - Persons supplying online money gaming from a place outside India has been mandated to get registered under CGST Act.
- Amendment to Schedule III – now, para 6 reads as 'actionable claims other than 'specified actionable claims'.
- Further, OIDAR provisions amended for Online gaming

Specific provisions for Online Money Gaming

- A special provision has been introduced for taxability of Online Money Gaming. The Section provides that any person supplying online money gaming from **non-taxable territory to a person in taxable territory**, is liable to pay IGST.
- Such supplier should obtain single registration under the simplified registration scheme. Any Indian representative can also pay IGST on behalf of the supplier.
- Non-compliance will lead to blockage for access by public in accordance with Information Technology Act, 2000.

Key Highlights on Specified Actionable Claims including Online Gaming [Contd.]

- Rules amended to provide
  - Supplier need not declare his PAN in Part A of FORM GST REG-01. [Rule 8(1)]
  - Has to apply for registration in FORM GST REG-10. Registration shall be granted in FORM GST REG-06. [Rule 14(1)]
  - In case the supply is made to unregistered person, should issue the tax invoice containing the name of the state of the recipient and the same shall be deemed to be the recipient's address on record. [Rule 46]
  - Has to file return in FORM GSTR-5A. [Rule 64]
- New rules 31B and 31C have been inserted [vide - Notification No. 45/2023 – Central Tax]:
  - Rule 31B – value of supply of online gaming including supply of actionable claim shall be the total amount paid or payable to or deposited with the supplier by or on behalf of the player. The amount can also be in the form of virtual digital assets. Notably, any paid amount even if returned or refunded to the player shall not be deductible from the value of supply.
  - Rule 31C – Value of supply of actionable claims in casino shall be the total amount paid or payable by the player for purchase of the tokens, chips, coins or tickets or by whatever name called, for use in casino. In case such tickets or tokens are not required, value of supply shall be the amount paid for participating in any event including game scheme, competition or any other activity in the casino.
  - Further, any amount paid on such tickets or chips or by whatever name called is being returned or refunded to the player, shall not be deductible from the value of supply of actionable claims.
  - In case, any amount won by the player is being used for playing again without withdrawing shall not be considered as the amount paid or deposited with the supplier.

Other Key Updates on Specified Actionable Claims including Online Gaming [Effective from 1st October 2023]

- Principal Commissioner of Central Tax, Bengaluru West empowered to grant registration to the supplier in case of supply of online money gaming provided by person located in non-taxable territory to a person in India. – [simplified registration scheme for the supplier]

- The entry Sl. No 227A which encompasses Specified Actionable Claims has been inserted in Schedule IV to the Notification 1/2017 - Central Tax (Rate) which makes such intra-state supplies taxable at the rate of 14% of CGST.

- The entry Sl. No. 227A which encompasses 'specified actionable claims' has been inserted in Schedule IV to the Notification 1/2017 – Integrated Tax (Rate), and as such, IGST is charged on the inter-state supply of specified actionable claims at the rate of 28%.

- Where a registered person making supply of specified actionable claim and has not opted for composition levy under Section 10, he is not exempted from paying tax on advances received for the supply of goods. In other words, he has to pay tax on advances received for the supply of goods.

- Supply of 'Online Gaming' notified as import of goods where value will not be determined under proviso to Section 5(1) but under Section 5(1). The effect of this Notification is that the value of such supply shall be determined in accordance with Section 15 of CGST Act (and rules made thereunder).

Other Key Amendments to IGST Act

- Section 5 amended to empower Govt. to notify goods where levy will not be under Proviso to Section 5(1) but under Section 5(1).
- Section 10(1)(cc) of IGST Act – provides that where a supply has been made to a person other than a registered person, the place of supply shall be the location as per the address of the recipient recorded in the invoice.
- If no address is mentioned in the invoice, the place of supply shall be the location of the supplier.
- Section 16 of the IGST Act, 2017 as sought to be amended through Section 123 of the Finance Act, 2021, **to be effective from 1st October 2023**.
    - The terms 'for authorized operations' is inserted in Section 16(b). Consequently, goods or services being supplied to the SEZ will qualify as '"Zero rated supplies" only if the supply is meant for authorized operations.
    - The substituted provision 16(3) of the IGST Act, now provides limited option to exporter to supply goods on payment of tax for notified cases (NO Notification has been issued till date).
    - The Section itself also requires realization of Foreign exchange..

Key Highlights on OIDAR Services

- Section 2(16) – definition of 'non-taxable online recipient' has been amended to mean any unregistered person receiving OIDAR services located in taxable territory. Here, unregistered person also includes a registered person who is required to deduct TDS under Section 51.**[W.E.F., 1st October 2023].**
- With the definition of non-taxable online recipient expanded to include unregistered person, the supplier of OIDAR services from a place outside India to unregistered person in India, are required to comply with GST laws.
- Such foreign suppliers are now required to get GST registration and to file details of their supply of a particular month in GSTR – 5A by the 20th day of the succeeding month. [Rule 64].

Key Amendments to IGST Act pertaining Transportation Services

- Proviso to Section 12(8) has been omitted. As a result, where the service provided by way of transportation of goods to a place outside India, **the place of supply would be the location of the recipient (if recipient is a registered person) rather than the destination of goods.**
- Section 13(9) has been omitted. As a result, in cases where either the location of supplier or recipient is outside India, the place of supply of supply shall be the **location of the recipient**.
    - For instance, if supplier of transportation is outside India and the recipient is in India, then place of supply is India, and the supply qualifies as import of services.
    - Similarly, if recipient of transportation services is outside India and the supplier is in India, then the **supply qualifies as export.**

Key Updates on Treatment of Ocean Freight

- Earlier, service provided by way of transportation of goods by a vessel from a place outside India to the customs station of clearance in India was taxable at 5% and recipient being the importer was liable to pay GST under reverse charge basis.
- Now, for the aforesaid services by way of 'transportation of goods by a vessel from a place outside India to the customs station of clearance', the entries which cast liability for such services have been discarded through three recent notifications.
- As such, import of goods though ocean freight is exempted from GST and this exemption is **made effective from 1st October 2023.**

- Notification 11,12 and 13/2023 – Integrated Tax (Rate)

Constitution of State Benches of Goods and Service Tax Appellate Tribunal

- The state benches of Goods and Service Tax Appellate Tribunal have been recently constituted in the States and Union Territories. Notably, around 31 GSTATs have been constituted across India.
- For Tamil Nadu and Puducherry, two GST Appellate Tribunal have been constituted, and they are located in Chennai, Madurai, Coimbatore and Puducherry.

- Notification No. S.O. 4073(E) – Central Tax

Special Procedures for Manufacturers of Goods

The special procedures laid down in the Notification 30/2023 dated 31.07.2023 for the registered persons engaged in manufacturing of the goods specified (such as pan masala, cut tobacco, snuff and so on) in the schedule appended to the aforesaid notification are to be **made effective from 1st January 2024**

- Notification No. 47/2023- Central Tax

GST PORTAL UPDATES

Advisory on Reporting of Invoices on the IRP Portal

- The Government has imposed 30 days time limit for reporting of old invoices on the e-invoice IRP Portals for the taxpayer with Aggregate Annual Turnoover (AATO) more than Rs. 100 crores.
- This restriction is also applicable to not merely invoices but also to debit note and credit note since these documents requires IRN too.
- Since time is required to comply with requirement, 30 days time limit will be effective from 1st November 2023.
- Further, it is clarified that taxpayers with AATO less than 100 crores is not required to report of invoices.

Advisory on Geo-Coding Functionality for the Additional Place of Business

- Geocoding functionality for 'additional place of business' is now active across all the States and Union Territories.
- Here is brief guide as to how to utilize this functionality:
  - Access: Navigate to Services>>Registration>>Geocoding Business Addresses tab on the FO portal to find this functionality.
  - Usage: The system will display a system-generated geocoded address. You have the option to accept this or modify it as needed. If a system-generated address is not available, you can input the geocoded address directly.
  - Viewing: Saved geocoded address details can be found under the "Geocoded Places of Business" tb. After logging in, go to My Profile >>Geocoded Places of Business.
  - One-time Submission: This is a one-time activity, and post-submission, address revisions are not permitted. Taxpayers who have already geocoded their addresses through new registration or core amendment would not be required to do this as on the GST portal their address will be shown as geocoded.
  - Eligibility: This feature is accessible to normal, composition, SEZ units, SEZ developers, ISD and casual taxpayers whether they are active, canceled, or suspended.

Indirect Tax Compliance Calendar for October 2023

October 2023

Important Due Dates under Indirect Tax

S	M	T	W	T	F	S
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				

Important Due Dates under Indirect Tax

Due Date	Description
10 October 2023	↳ Filing of GSTR-7 - By Tax Deductor for the month of September 2023 ↳ Filing of GSTR-8 - By E-Commerce Operator for the month of September 2023
11 October 2023	↳ Monthly filing of GSTR-1 for the month of September 2023 (Regular taxpayers)
13 October 2023	↳ IFF by Taxpayers under QRMP Scheme for the month of September 2023 ↳ Filing of GSTR-5 - By Non-Resident Taxable Persons for the month of September 2023 ↳ Filing of GSTR-6 - By Input Service Distributor for the month of September 2023
20 October 2023	↳ Filing of GSTR-3B (Regular Taxpayers) for the month of September 2023 ↳ Filing of GSTR-5A by OIDAR Service Providers for the month of September 2023
25 October 2023	↳ GST PMT-06 - Challan for depositing GST for the month of September 2023 by taxpayers who have opted for QRMP Scheme for the quarter July – September 2023.
28 October 2023	↳ Filing of GSTR-11 - Statement of Inward supplies by persons having Unique Identification Number (UIN) for claiming GST refund.

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