# Indirect Tax Compendio

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Newsletter from Mukesh Manish & Kalpesh, Chartered Accountants

# Contents


| | |
|---|---|
| Article | 3 |
| Key Rulings and Insights | 12 |
| Notifications, Circulars & Other Developments | 21 |
| Compliance Calendar – Nov ’23 | 25 |

# Articles

# What's on Your Takeaway Bill – A culinary delight!

**ONE** sunny Sunday, recharged after a well-deserved nap, I embarked on a culinary adventure. A local pizza joint had unveiled an array of tantalizing pizza flavors, sparking my curiosity. As I received the bill, my inner tax aficionado kicked into gear, and I found myself pondering the GST classification.

*"Why is the restaurant treating the sale of pizza in a takeaway outlet as a service when I never had received any service from the restaurant in first place"?*

This enigma led me to unravel the intricate world of taxation when indulging in takeaway delights from establishments like Domino's.

While the question may sound like a minor dining dilemma, it has indeed been a subject of debate and litigation for some time.

Haldiram's, a renowned name in the world of Indian snacks and sweets, was at the epicenter of the debate that questioned the imposition of service tax on the seemingly straightforward act of purchasing food for takeaway.

Recently, the Hon'ble Supreme Court delivered a verdict in this case[1] [by observing that there is no merit in the appeal and dismissing the Civil Appeal filed by Commissioner], bringing a much-needed clarity to the treatment of service tax on takeaways.

**Background: The Evolution of Service Tax on Restaurants**

The issue of taxability concerning foods and services supplied by hotels and restaurants came to the forefront in the case of "***Associated Hotels of India***[2]". In this Landmark case, the Supreme Court examined the nature of services provided in hotels. It was established that the essence of the transaction was providing a service, and food was served as part of, and incidental to that service. As a result, food served as part of a stay package was classified as a service, and no sales tax was applicable.

However, the scenario changed with the pivotal "***Northern India Caterers***"[3] case. The Supreme Court held that the service of meals, whether in a hotel or a restaurant, does not constitute a sale of food for the purpose of sales tax. Instead, it should be regarded as the rendering of a service to satisfy a human need. This decision opened a new avenue for taxation, shifting the focus from sales tax to service tax.

The post-judgment situation created a significant debate and confusion regarding the taxability of food in restaurants. Addressing this, the Hon'ble Andhra High Court in the case of "*Durga Bhavan and Others v. The Deputy Commercial Tax*" 1981 47 STC 104 AP emphasized that the taxation would depend on the **dominant intent** of the transaction. If there was no right to carry away the food, there would be no sale; if the transaction was essentially service with food as an incidental part, it wouldn't be liable for sales tax.

**The Constitutional Amendment**

To overcome the confusion and enable the levy of sales tax on the sale of food in restaurants, a constitutional amendment was introduced through the 46th Constitutional Amendment Act. This amendment expanded the scope of the definition of "tax on the sale or purchase of goods" under Article 366(29A)(f) 4 to include a tax on the supply of food as part of any service. This allowed States to levy Sales Tax on the supply of food and drink. Several states, including Tamil Nadu, amended their sales tax Acts accordingly.

Following this, in the case of "*Damodarasamy Naidu and Bros. v. The State of Tamil Nadu*" 2000 (1) SCC 521, the Hon'ble Supreme Court emphasized that the price paid for the supply of food in a restaurant cannot be split between charges for services and charges for the food. The case made it clear that the tax applies to the entire price paid for the supply of food, even if additional services are provided by the restaurant, such as elegant decor, uniformed waiters, and other amenities.

However, in 2011, significant changes occurred with the introduction of service tax on air-conditioned restaurants serving food. The taxation situation was that non-AC restaurants were liable for VAT (Sales Tax) at an average rate of 14.5%, while AC restaurants incurred VAT at a similar rate and an additional service tax. This dual taxation created confusion and controversy since VAT traditionally applied to goods, while service tax was meant for services.

The situation further evolved in 2012 with the introduction of declared services, where the service portion in the supply of food was specifically classified as a declared service.

Notably, popular restaurant chains, including Anjappar, Thalappakatti and Sangeetha Hotels , challenged the notices issued by the Tax Authorities demanding service tax for takeaway orders.

**Is service involved in sale of packaged food items?**

In the case of *Anjappar Chettinad and Ors* W.P. No. 13469 of 2020 decided on 20.05.2021 (Madras High Court) - 2021-TIOL-1270-HC-MAD-ST, the Hon'ble Madras High Court answered the interesting question as to the liability to service tax under the Finance Act, 1994, on food that is 'taken away' or collected from restaurants or eateries, in parcels.

It was held that the transaction involving supply of goods on take-away basis is a pure sale transaction and does not entail any service element rendered to customers. The transaction was held to be excluded from the definition of "service" under section 65B(44) of the Finance Act.

**The Haldiram's case**

The crux of the legal battle between Haldiram's and the tax authorities revolved around the fundamental question: **Is packing food for takeout, a service or merely an incidental act in the process of selling food**?

Haldiram's argued that their primary activity was the sale of food items, and the act of packing the food for takeaway was a secondary, ancillary service to facilitate the convenience of their customers.

They emphasized that customers visited their establishments with the primary intention of purchasing food, either for immediate consumption or takeout. Therefore, they contended that the essential nature of their transactions was the transfer of ownership of food items to the customers, a characteristic that traditionally aligns with the concept of the sale of goods.

They drew a parallel with the practice of providing carry bags in retail stores. Their contention was that these ancillary services were intended to facilitate the primary transaction—the sale of food—and did not fundamentally transform the nature of the transaction into a service.

The tax authorities maintained that the process of packing food for takeout was inherently a service. They asserted that this service added value to the customer's experience and convenience, thus qualifying as a service subject to service tax.

The Hon'ble Supreme Court, upholding the decision of the Hon'ble CESTAT Delhi [ FINAL ORDER NO. 50122/2023 dated 13 February 2023 ], observed that no Service Tax can be levied on the activity of take-away of food items as it would amount to sale of goods.

**GST Parallels**

Under the GST Act, it was presumed that the deeming fictions of Schedule II would bury the ghosts of the past. Supply of goods, being food or any other article for human consumption or any drink , **by way of or as part of any service or in any other manner** , where such supply or service is for cash, deferred payment or other valuable consideration has been deemed to a service.

However, it still seems that litigation is not ruled out. In case of packed food and takeaways, can it be argued that there is no service during supply of goods. Further, does the use of phrase 'in any other manner' cover supply of goods (being food) in takeaways. The matter is far from over and requires a deeper examination.

Perhaps, the CBIC is gearing up to serve us a culinary delight!

**Endnotes:**

*1 Commissioner of CGST, CST Delhi East Versus M/S. Haldiram Marketing Pvt. Ltd, Civil Appeal No. 6147 OF 2023*

*2 State of Himachal Pradesh v. M/s Associated Hotels of India Limited, A.I.R. 1972 S.C. 1131 - 2002-TIOL-65-SC-CT-CB*

*3 Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi, AIR 1980 SC 674*

*4 "f) a tax on the supply, by way of or, as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration"*

# Electricity reimbursement - Circular opens up more queries than clarifications?

Recently, vide Circular 206/18/2023 dated 31.10.2023, the Board had come out with clarifications relating to applicability of GST on certain services. The issues which were addressed in the Circular on taxability of electricity reimbursements relate to the GST applicability on electricity supplied by entities like real estate companies, malls, and airport operators to their lessees or occupants.

The Circular clarified that when electricity is supplied along with renting of immovable property or maintenance of premises, it constitutes a composite supply and is taxed accordingly. The principal supply in such cases is considered as renting of immovable property or maintenance of premises, and the supply of electricity is treated as an ancillary supply.

**Even if electricity is billed separately, these supplies are deemed as a composite supply, and the GST rate applicable to the principal supply(renting of immovable property or maintenance of premises) will be applicable.**

However, if the electricity is supplied by Real Estate Owners, Resident Welfare Associations (RWAs), or Real Estate Developers as a pure agent, it does not contribute to the value of their supply. In cases where these entities charge for electricity based on the actual amount charged by State Electricity Boards or DISCOMs, they are deemed to be acting as pure agents for this supply.

The circular is very important as most of the recipients both under real estate and RWA are not taking ITC of the GST charged. Thus, if tax is not levied on the electricity charges, it will be a major cost saving for the recipients.

**Deeming fictions and implications**

The Circular has provided two deeming fictions which are otherwise not clearly prescribed under the law.

**Bundling - Different circulars providing different views**

Firstly, the Circular has deemed that the principle of composite supply will apply even if the charges for electricity are billed separately.

In this regard, if one carefully analyses the previous Circular No. 47/21/2018-GST, dated 8-6-2018 issued by the Board in the context of vehicle repair, it was clarified by the Board that when separate invoices are raised for the activities, the transactions will be taxable at merit rates. The relevant portion of the circularis extracted below:

| | | |
|---|---|---|
| 2. | How is servicing of cars involving both supply of goods(spare parts) and services (labour), where the value of goods and services are shown separately, to be treated under GST? | 2.1 The taxability of supply would have to be determined on a case-to-case basis looking at the facts and circumstances of each case.<br><br>2.2 Where a supply involves supply of both goods and services and the value of such goods and services supplied are shown separately, the goods and services would be liable to tax at the rates as applicable to such goods and services separately |

This present circular now leads to an interpretation that the concept of bundling will always get triggered even in cases where separate invoicing is carried out.

Hence, as such, the question relating to the principle of bundling, especially incases where separate invoices are raised will be a subject matter of dispute due to contrary circulars of the Board.

**2nd Deeming fiction for reimbursement**

The Circular also states that the reimbursements will not be taxable if the Real Estate/ RWAs only collect the actual charges which are charged by the State Electricity Board or DISCOMs. The circular further categorically states that it will be deemed that the conditions of Pure Agency will be satisfied.

**Issues and uncertainties**

The first issue which arises is identification of actual amount. Suppose a mall owner 'X' has 200 commercial establishments. As per the contract, the mall owner recovers electricity on the basis of the square feet of the shops let out and not on the basis of the actual consumption of electricity. But the sum total of recovery is equal to the amount charged by the DISCOM/electricity Board. In such cases, whether the benefit of the circular can be extended is a question left unanswered. Further, in many cases, the malls and commercial premises use a DG set (Diesel Generator) for back up/additional power and the recovery from the recipients are for both the DISCOM bills and the DG set cost. In such case, can the benefit of the circular be taken for the DISCOM bills. These are questions which will require deeper evaluation.

Also, the need for the deeming fiction actually arises as the onerous conditions which has been prescribed under law for the pure agency are otherwise difficult to satisfy, especially in respect of these conditions

- enters into a contractual agreement with the recipient of supply to act as his pure agent to incur expenditure or costs in the course of supply of goods or services or both;

- neither intends to hold nor holds any title to the goods or services or both so procured or supplied as pure agent of the recipient of supply;

In most cases of RWAs/Malls, the electricity connection will always be in the name of the association/mall owner. Thus, on a strict reading of the law, the condition of agency will never get satisfied.

The Circular thus essentially relaxes the application of these conditions by deeming that the transaction will qualify as a pure agency if no mark up is applied to the amount collected.

Whether a circular can relax conditions which are mandated under the law is a matter of debate. As such, considering the circulars are binding on the Department[1], the assessee can rely on the circular to claim the benefit.

Further, the other natural question which arises for consideration is whether this rationale can be extended to all transactions involving reimbursements of actual amounts.

**What position must be taken for existing transactions?**

All existing assesses engaged in the provision and receipt of services where electricity charges are also a major component can re-evaluate their present positions in light of the circular. Apart from malls and RWA's, even commercial and residential renting may have cases where electricity is commonly consumed and thereafter segregated amongst various recipients.

In cases involving a markup, where tax has not been charged on the electricity supplies taking the position that supply of electricity is a sale of goods and is exempted, the clarification given under the circular's will be at divergence. In such a case, the position of the law would require to be re-evaluated.

Tax paid on past transactions and refund thereof

In cases where tax has already been paid and the transaction under the clarification fits the position of pure agency, the question which comes up for consideration is whether tax paid in respect of past transactions can be held to be not payable.

It can be contended, in the author's view, that the Circular is only clarifying the position without amendment to the law. Hence, it can be argued that the clarification laid out vide the circular can also be extended for past transactions and tax was never payable in case where there was no mark up involved in recovering the electricity charges.

The concomitant query which now arises is whether refund of tax paid can besought and if so, whether the refund will be governed by the provisions of Section 54. In other words, whether the conditions relating to limitation will apply for such refunds.

In the author's view, the payment of tax cannot be termed as an 'unconstitutional levy' and will qualify as a payment made due to interpretation of law.

The other query which comes up for consideration is whether the recipient of the services can opt for a refund of the taxes discharged.

In this regards, reliance is placed on the landmark decision of the Hon'ble Supreme Court in the case of M/s Mafatlal Industries[2] wherein the Hon'ble Court held that refund can be claimed by the buyer/recipient. Further, a recent circular of the Board in the context of cancellation of flats had clarified[3] that even an unregistered recipient can claim a refund.

In the given transactions, most of the RWA members may be un-registered. In such a case, the modus operandi laid out in the circular can be adopted for claiming refund of the past transactions.

**Endnotes:**

*1. Collector of C. Ex., Vadodara v/s Dhiren Chemical Industries [2001-VIL-03-SC-CE].*
*2. 1996-VIL-01-SC-CE*
*3. C.B.I. & C. Circular No. 188/20/2022-GST, dated 27-12-2022*

# Key Rulings and Insights

# 1. M/s. Parle Agro (P.) Ltd. (Mad HC)

**Facts of the case**

- **The question of law which was challenged before the Hon'ble High Court was whether the GST Council's minutes meeting classifying "flavoured milk" under HSN 2202 instead of HSN 0402 was being contrary to the decision of the Hon'ble Supreme Court in Commissioner versus Amrit Food.**
- In other words, the issue was whether flavoured milk should be classified under HS code 0402 (Entry 8 of Schedule I - 2.5% CGST) or HS code 2202 (Entry 50 of Schedule II - 6% CGST) of the Customs Tariff Act, 1975.
- The writ petitions had been filed against the GST Council's decision in its 31st GST Council Minutes of meeting which classified flavoured milk under the HS code 2202 which was also affirmed by the ruling of the Appellate Authority for Advance Ruling in the case of In Re: Britannia Industries Ltd. 2020 (36) GSTL 582 (AAAR-GST-T.N.).
- The AAAR had held that wherein it was reasoned that Flavoured Milk is marketed as a beverage and since there exists a specific classification of "Beverages containing milk" under HS Code 2202, flavoured milk has to be classified only under heading 2202.
- However, by applying the principle of 'Nosciter – a sociss', the Hon'ble Court clarified that the expression 'Beverage containing milk' in subheading 2202 90 30 can only include beverages containing plant or seed-based milk.
- The court held that flavoured Milk must be classified under HS Code 0402 of the Customs Tariff Act and the petitioner is only liable to pay 2.5% of CGST as provided in Schedule I - Entry 8 of the Goods Rate Notification.
- The Court further observed that the GST council's recommendation of classifying flavoured milk under HS Code 2202 was not proper. The court also affirmed that the power to determine the classification of goods is not provided to the GST Council.

**Key Insights**

- The decision sets precedent on one of the most contested and disputed matters relating to classification of flavored milk which was a point of dispute for the entire Industry, with investigations being conducted to most of the assessee in the sector.
- The decision of the Hon'ble High Court is a landmark decision which clearly establishes that the GST Council's role is only recommendatory and not mandatory.
- The Council can only give recommendations, and these are not construed to be as the law.
- Further, the decision of the Court is a good authority on the manner in which classification of goods is to be carried out.
- **Citation**: W.P. Nos. 16608 & 16613 of 2020 and W.M.P. Nos. 20602 & 20604 of 2020

# 2. M/s. Nahar Industrial Enterprises Ltd (Raj HC)

**Facts of the case**

- **The question of law before the Hon'ble High Court was whether the rejection of refund under claim for inverted duty structure was proper when pre-dominant inputs and outputs were taxable at 5%.**
- The petitioner-company manufactured cotton and polyester or viscose (blended) yarn for which GST on output supplies varies from 0.1%, 5%, and 12%.
- The GST on raw material used as inputs for the manufacturing process ranged from 5% (substantial inputs), 12% (Packing material), 18% (stores and spares) and 28% (other inputs).
- Two writ petitions were filed on account of rejection of claim for refund of unutilized ITC on the basis that petitioner's case did not fall in the category of inverted duty structure as per Section 54(3) of the CGST Act, 2017.
- The Hon'ble Court applied the literal rule of construction and strict interpretation and held that statutory scheme of refund of unutilized ITC is applicable despite there being multiple inputs and output supplies.
- The Court observed that under the provisions of Section 54, the only precursor mandated under the law was that the accumulation of unutilized ITC is on account of the rate of tax on inputs exceeding the rate of tax on output supplies.
- Therefore, the Court held that the ground of rejection of claim of refund is unsustainable in the eyes of law and merely because the present cases at hand involve multiple inputs and multiple output supplies, the scheme of refund based on inverted duty structure cannot be held to be inapplicable.
- The Court also had discussed the application of the decision of M/s VKC Footsteps and the circular 79/53/2018-GST dated 31.12.2018 and held that the Circular did not clarify the scope of the position where multiple inputs existed.

**Key Insights**

- The rationale of the High Court decision holding that the refund under inverted duty structure cannot be barred because the substantial input and output supplies are at the same rate is well reasoned. The Scheme of the section never veers into the aspect of pre-dominant or substantial input theory.
- This decision will be used for many litigations where the Department has denied refund claims under inverted duty structure citing the circular 79/53/2018.
- The decision of the Hon'ble Rajasthan High Court will assist various sectors facing the challenges of inverted duty structure including textiles, fertilizer and gold.
- **Citation**: 2023 (11) TMI 209

# 3. M/s BT (India) Pvt. Ltd. (Del HC)

**Facts of the case**

- **The question of law before the Hon'ble Court was whether the Department can conduct assessment of the tax liability in the course of examination of the claim for refund of tax.**
- In other words, whether the Department can concurrently verify the taxability of the transaction while examining the refund claim without a separate proceeding.
- Petitioners were involved in export of information management systems and business support services to companies located outside India.
- A refund claim under Rule 5 was filed seeking refund of input services attributed to export.
- The Department rejected the refund applications on the ground that the services did not qualify as export.
- The order was challenged in the Delhi HC on the grounds that the returns filed by the assessee were deemed to be the assessment of the liability and these were never questioned.
- Reliance in this regard was placed on the landmark decision of the Hon'ble SC in the case of M/s ITC Limited and Flock India.
- The Court held that the denial of the claim for a refund of CENVAT credit by the department was legally unfounded as there was no inquiry, review, or reassessment of the self-assessed return.
- The Department were only authorized to assess compliance with Rule 5 and the stipulations outlined in the notification dated 18 June 2012 and were precluded from casting doubt, raising questions, or conducting a substantive review of the self-assessed return during this stage of the proceedings.
- It was held that self-assessed returns under Section 70 of the Finance Act also are considered as 'assessment' and can only be challenged by way of filing appeal under Section 73 of the said Act.

**Key Insights**

- The decision of the Hon'ble High Court is a landmark decision as the rationale of the decision of M/s ITC Limited in the context of assessment of Bill of Entry has been mutatis mutandis made applicable to the Finance Act. The High Court has equated the service tax returns to the BoE.
- The judgement reinforces the position that a refund-related proceeding is merely executionary and that if self-assessed returns are not questioned beforehand, the same cannot be questioned in a refund proceeding at a later point of time. Further, the undisputed self-assessed returns cannot be questioned in refund proceedings.
- The decision will also be relevant to the GST context as it would be possible to extend this argument even under the GST regime and GSTR 3B returns will be deemed to be the assessment.
- **Citation**: W.P.(C) 13968/2021

# 4. M/s. Association of Technical Textiles Manufacturers and Processors (Del HC)

**Facts of the case**

- **The question of law before the Court was seeking to quash 4 paragraphs (Para 7.1 to 7.4) from the clarification issued by the Tax Research Unit (TRU) upon the dispute as to whether polypropylene woven and non-woven bags should be classified under tariff heading 3923 or 5603.**
- The petitioner also contended that the TRU of the Ministry of Finance does not have the authority or jurisdiction to independently issue clarification upon the classification of goods.
- Section 168 of the CGST Act provides that only CBIC has been vested with the power to issue orders, instructions, or directions to the Central Tax Officers.
- Relying upon Section 168 and precedents, the court has allowed the writ petition while also affirming that the circular has failed to advert to the Notes placed in Chapter 39 which excludes textiles from the ambit of plastics and articles thereof.
- The court further examined the issue of classification as to whether polypropylene woven and non-woven bags including those laminated with Biaxially Oriented Polypropylene would be classifiable as plastic bags under Chapter 39 or it should be classified under chapter 56.
- The Court observed that the issue of classification should be left open for the consideration of the competent authority in appropriate proceedings due to the industry wide ramifications and limited material on record to provide a definitive opinion.

**Key Insights**

- The decision of the Hon'ble Court provides lays out a very important proposition relating to the powers of the Board provided under Section 168 of the CGST Act, 2017.
- Various circulars have been issued by the TRU under the GST Act and the vires of such circulars is now under consideration.
- **Citation**: W.P.(C) No. 5933 of 2019

# 5. M/s Care College of Nursing v. Kaloji Narayana Rao University of Health Sciences (Telangana HC)

**Facts of the case**

- **The question of law before Hon'ble HC was whether charges collected for provision of 'affiliation' and 'inspection' by the university are liable to GST.**
- Brief facts are that the respondent was a university under a law for the time being in force. The colleges intending to get affiliation with the university were required to undergo inspection. Post the same, the University levied inspection and affiliation fees from the respective colleges.
- The Department contended that the charges will be leviable to GST whereas the assessee argued that the activities were in relating to education and hence will be exempted.
- The Court held that 'affiliation' and 'inspection' are services rendered by the university to the educational institutions even before the commencement of admission process, so it will not fall under the relaxations specified in the said notification. Hon'ble Court affirmed the position enumerated in Clause 4(iii) of the Circular dated 17.06.2021.
- The Court also applied the rationale of the Constitution Bench judgment in Commissioner of Customs (Import), Mumbai v. M/s Dilip Kumar & Co., (2018) 9 S.C.C. 1 (F.B.) (S.C.), and held that a person claiming exemption must relieve the burden of liability of tax must establish the same clearly, as it will be construed against them in case of ambiguity.

**Key Insights**

- This decision emphasizes is crucial for the entire education sector as in many cases, the institutions take positions that all activities relating to the educational institutions are exempt.
- However, under the GST Act, only specified activities relating to admission are exempt and other incomes earned by educational institutions are taxable. Hence, a thorough review of all activities and nature of incomes earned by universities must be undertaken to validate the position adopted by the institutions.
- **Citation**: 2023 (11) TMI 49

# 6. M/s. Bansal International (Del HC)

**Facts of the case**

- **The question of law is whether an applicant is entitled to interest for the period immediately after the expiry of 60 days from the date of the first application for a refund or only after sixty days from the application filed after succeeding in his claim for refund before the Appellate Authority.**
- A major part of the petitioner's application for refund was rejected. In appeal, the order was set aside, and the petitioner was directed to file a fresh application for refund. Now, the Adjudicating Authority sanctioned the refund of the remaining amount but the interest on the said amount was denied.
- The petitioner argued that mere reading of the provisions of Section 56 of the Delhi GST Act, along with Sections 54(7) and 54(8) makes it clear that interest on the said amount cannot be denied pertaining to the Proper Officer passing an incorrect order which was subsequently rectified in the Appellate Proceedings.
- The Tax authorities contended that Rule 89(2)(a) of the Rules makes it clear that a separate application is required to be filed in case the claim of refund was allowed by the Appellate Authority, Appellate Tribunal, or the court and thus interest should run pertaining only to the second application.
- The Court held that the applications for refund filed pursuant to orders passed by the Appellate Authority do not invite any fresh adjudication but only implement the orders already passed, and thus allowed the petition.
- The court also observed that 6% interest should be paid for the period between the date immediately after the expiry of sixty days from the first application till the filing of the second application pursuant to the appellate orders.

**Key Insights**

- The decision of the Hon'ble Court lays out a very important principle relating to what would be construed as the effective date for the purpose of claiming interest in refund applications. Practically, the refunds are sanctioned for many assessee with sizable delays and multiple documentation requirements.
- This decision of the Hon'ble Court will assist such claimants to claim refund along with the interest from the date on which the claim was first filed.
- **Citation**: 2023 (11) TMI 49

# 7. M/s. Lenovo (India) Pvt. Ltd (Del HC)

**Facts of the case**

- **The main question of law is whether the refund claimed by the petitioner is liable to be rejected on the ground that supporting documents were not submitted at the time of filing application.**
- The petitioner-company is engaged in manufacture/ import of computers and supplies the said goods and related services in SEZ Units (Zero rated supplies).
- The IGST refund claimed by the petitioner for the months of December 2019, January 2020 and February 2020 were rejected by the Department.
- One of the major reasons was that the supporting documents were not made at the time of filing applications, but at the time of filing reply/ personal hearing. The refund claim was rejected as being barred by limitation under Section 54(1) of CGST Act.
- The Hon'ble High Court noted that the Petitioner had filed the application within the period of limitation, and that the delay in filing the supporting documents at the time of filing of reply/ personal hearing would only extend the time limit to pass an order under Section 54(7) of the CGST Act.
- Reference was made to Rule 90(2) and 90(3) of the CGST Rules, to highlight the role of the department in scrutinizing the refund application in fifteen days.
- Further perusing the CBDT Circular No. 14/1955 dated 11.09.1955, it was noted that even fresh applications can be permitted to be filed in appropriate cases, even beyond the limitation period.
- It was also noted that the Department ought to have issued a deficiency memo pointing out deficiencies, if any and not issue a SCN directly to reject the refund.
- It was also noted that the time-period of 2 years prescribed under Section 54(1) of the CGST is directory, and not mandatory in nature.
- The Court held that the petitioner's claim cannot be rejected on the ground of limitation. As a result, the petitioner's application for refund was allowed.

**Key Insights**

- In this significant decision, the Hon'ble Court has granted relief to the taxpayer, emphasizing that two-year time limit prescribed under Section 54 (1) of CGST Act is only for filing the refund application, and that the delay in filing the supporting documents would not be fatal to the claim for refund.
- The decision puts forth that the department may facilitate legitimate claims, even if there are discrepancies in the application.
- **Citation**: W.P. Nos. 23604, 23605 and 23607 of 2022

# 8. M/s The Chennai Silks (Mad HC)

**Facts of the case**

- **The question of law was whether the Department was correct in passing an order without considering the reply filed by the Assessee.**
- The assessing officer had failed to consider the reply/ objections and passed a non-speaking order.
- Held, once the assessee files reply / objection pursuant to show cause notice, it is bounden duty of the Assessing Officer to pass a speaking order, providing reasons for rejection of the reply / objection raised by the assessee.
- Further, the Assessing Officer, while issuing show cause notice shall provide sufficient time for the assessee to file their reply / objection, minimum of 21 days, unless and otherwise any specific time limit is fixed under the provisions of the Act; thereafter, shall afford an opportunity of personal hearing.
- A cryptic order passed without touching upon the queries/contentions of the assessee would be fatal to the assessee and merits to be set aside.

**Key Insights**

- This decision is relevant in light of the numerous notices being issued by the tax authorities without providing sufficient reasons in the notice, and subsequently in the order.
- The Hon'ble court has rightly highlighted that failure on the part of the Assessing Officer to consider the reply filed by the taxpayers while passing the impugned order will deprive the taxpayers' right to defend before the Assessing Authority.
- **Citation**: (W.P. No. 29095 of 2023)

# Notifications, Circulars and Other Developments

# Notifications

## Biometric-based Aadhaar authentication u/r 8(4A) mandated for Andhra Pradesh – Notification No. 54/2023 – CT, dated November 17, 2023.

- The newly introduced rule 8(4A) applicable mandates biometric-based Aadhaar authentication and additional procedures for taking GST registration. These stringent processes would be applicable only in 'risky' cases.
- This Notification has extended the additional process of authentication to the State of Andhra Pradesh also.

## The Amnesty scheme- Notification No. 53/2023 – CT, dated November 02, 2023.

- The amnesty scheme proposed by the GST council for filing of appeals is announced. Accordingly, all orders passed until 31st March 2023 where the Assessee has not filed any appeal, can now file the appeal under the scheme. Salient features of the amnesty scheme:
    - The scheme will be open until January 31, 2024.
    - Appeal is to be filed by paying higher pre-deposit of 12.5%.
    - Part of (20%) of the pre-deposit is to be paid through Electronic Cash Ledger
    - No refund shall be granted on account of the notification till the disposal of the appeal, in respect of any amount paid by the appellant, either on their own or on the directions of any authority (or) court
    - The scheme will not apply to the following cases
        i. Where the order has been passed on or after March 31, 2023
        ii. An order where there is no demand of tax involved.
        iii. An order only for a penalty.
        iv. An order only for interest.
        v. An order for rejection of refund.
        vi. Cases of cancellation of registration.

# GST Advisories – Portal updates

## 1. Advisory for provisions relating to the amnesty for taxpayers who missed the deadline to file appeals for the orders passed on or before March 31, 2023

- The amnesty scheme recommended in the 52nd GST Council meeting as per Notification No. 53/2023 dated 02.11.23 is applicable to the taxpayers who could not file an appeal or had filed an appeal under Section 107 of the CGST Act against the demand order under Section 73 and 74 of the said Act but were rejected on the ground of limitation period on or before 31.03.23.
- Taxpayers can now file an appeal in FORM GST APL-01 on the GST portal on or before January 31, 2024, for the order passed by the proper officer on or before March 31, 2023.
- Taxpayers who have previously filed an appeal, but it was rejected as time barred in APL-02 by the Appellate authority, then the taxpayer would be able to refile the appeal.
- Furthermore, if the Appellate authority has issued a rejection order in APL-04 due to the appeal application being time-barred, then the taxpayer has to approach the respective authority and after checking the eligibility of the taxpayer for the amnesty scheme, it will forward the case to GSTN through the State Nodal officer.

## 2. Advisory for Pilot Project of Biometric-Based Aadhaar Authentication and Document Verification for GST Registration Applicants of Gujarat and Puducherry

- Rule 8 of the CGST Rules, 2017 is amended to allow applicant identification on the common portal through Biometric-based Aadhaar Authentication and photograph, along with document verification.
- The GSTN has developed functionality for this purpose, launched initially in Puducherry on August 30, 2023, and scheduled for rollout in Gujarat on November 7, 2023.
- The new functionality includes document verification and appointment booking after application in Form GST REG-01.
- Applicants receive links for either OTP-based Aadhaar Authentication or booking an appointment at a GST Suvidha Kendra (GSK) for Biometric-based Aadhaar Authentication and document verification.
- If an appointment is booked, the applicant must visit the designated GSK with specified documents, Aadhaar number, and appointment confirmation details for biometric authentication and document verification.
- ARNs will be generated upon completion of the Biometric-based Aadhaar Authentication and document verification.
- Currently available for Gujarat applicants; extension to other States/UTs is planned.
- GSK operation days and hours will follow state administration guidelines.

# GST Advisories – Portal updates

**3. ITC Reversal on Account of Rule 37(A)**

- As per Rule 37A of CGST Rules, 2017, taxpayers must reverse Input Tax Credit (ITC) availed on invoices or debit notes if their supplier has furnished details in GSTR-1/IFF but has not filed the return in FORM GSTR-3B by the 30th day of September following the end of the financial year.
- Taxpayers are obligated to reverse the ITC amount when filing the return in FORM GSTR-3B on or before the 30th day of November following the end of the financial year.
- For the FY 2022-23, the system has computed the ITC amount to be reversed under Rule 37A, and this information were communicated to the concerned recipients via email on their registered email IDs.
- Taxpayers are required to acknowledge this communication and ensure that the ITC, if availed, is reversed in Table 4(B)(2) of GSTR-3B before November 30, 2023, in compliance with Rule 37A of CGST Rules.

**4. Advisory for Online Compliance Pertaining to ITC mismatch – GST DRC-01C**

- GSTN has introduced a new functionality on the GST portal, allowing the automated generation of intimation in Form GST DRC-01C.
- This functionality enables taxpayers to explain differences between Input Tax Credit (ITC) available in GSTR-2B statement and ITC claimed in GSTR-3B return, as directed by the GST Council.
- The functionality compares ITC declared in GSTR-3B/3BQ with ITC available in GSTR-2B/2BQ for each return period.
- If claimed ITC in GSTR-3B exceeds the available ITC in GSTR-2B by a predefined limit or the percentage difference exceeds the configurable threshold, taxpayers will receive an intimation in the form of DRC-01C.
- Upon receiving an intimation, taxpayers must file a response using Form DRC-01C Part B.
- Taxpayers have the option to provide details of the payment made to settle the difference using Form DRC-03 or provide an explanation for the difference, or a combination of both options.
- If impacted taxpayers do not file a response in Form DRC-01C Part B, they will not be able to file their subsequent period GSTR-1/IFF.

**5. Comprehensive Guide and Instructions for Direct API Integration with Any of the 6 IRPs for E-Invoice Reporting**

- The GSTN has issued Comprehensive guidelines and instructions for API Integration with 6 IRPs for reporting of E-Invoice. The same shall be viewed from the link below: https://tutorial.gst.gov.in/downloads/news/e-invoice_api_integration_guide_irps.pdf

# Indirect Tax Compliance Calendar for December 2023

# December 2023

## Important Due Dates under Indirect Tax

| S | M | T | W | T | F | S |
|---|---|---|---|---|---|---|
| 31 | | | | | 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 |

# Important Due Dates under Indirect Tax

| Due Date | Description |
|---|---|
| 10 December 2023 | ↳ Filing of GSTR-7 - By Tax Deductor for the month of November 2023<br><br>↳ Filing of GSTR-8 - By E-Commerce Operator for the month of November 2023 |
| 11 December 2023 | ↳ Monthly filing of GSTR-1 for the month of October 2023 (Regular taxpayers) |
| 13 December 2023 | ↳ IFF by Taxpayers under QRMP Scheme for the month of November 2023<br><br>↳ Filing of GSTR-5 - By Non-Resident Taxable Persons for the month of November 2023<br><br>↳ Filing of GSTR-6 - By Input Service Distributor for the month of November 2023 |
| 20 December 2023 | ↳ Filing of GSTR-3B (Regular Taxpayers) for the month of November 2023<br><br>↳ Filing of GSTR-5A by OIDAR Service Providers for the month of November 2023 |
| 22 / 24 December 2023 | ↳ Filing of GSTR-3B under QRMP Scheme |
| 25 December 2023 | ↳ GST PMT-06 - Challan for depositing GST for the month of November 2023 by taxpayers who have opted for QRMP Scheme for the quarter October – December 2023. |
| 28 December 2023 | ↳ Filing of GSTR-11 - Statement of Inward supplies by persons having Unique Identification Number (UIN) for claiming GST refund. |
| 31 December 2023 | ↳ Filing of Annual Return (GSTR-9) and Reconciliation Statement (GSTR-9C) for the FY 2022-23 by applicable taxpayers. |

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