Indirect Tax Compendio

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Newsletter from Mukesh Manish & Kalpesh, Chartered Accountants

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Key Rulings and Insights

1. M/s. Flipkart Internet Pvt Ltd (Pat HC)

Facts of the case

- The question of law before the Hon'ble Court was whether amount in Electronic Credit Ledger ("ECRL") can be utilized for the pre-deposit (10%) for maintaining appeal under Section 107 (6) of the CGST/BGST Act.
- The Hon'ble High Court examined Section 49(3) and Section 49(4) of the CGST/BGST Act, along with Rule 85(4) and Rule 86 of the CGST/BGST Rules.
- The court noted that in contradistinction to Section 49(3) which provides that "any other amount" can be paid from Electronic Cash Ledger ("ECL"), Section 49(4) limits payment only **"towards output tax"** under the CGST/BGST or under the IGST.
- Reference was also made to CBIC Circular No. 172/04/2022-GST dated 06.07.2022 where it was clarified that the electronic credit ledger was exclusively meant for settling output tax and couldn't be utilized for other liabilities such as interest, penalty, fees, or any other amount payable under GST laws.
- The Hon'ble court noted that Section 49(4) only permits for making payments towards output tax, and scope of utilization of amounts in ECRL cannot be enlarged for making payment for any other purpose since the amount of pre-deposit can't be considered as output tax.
- Held, as per Section 49 of CGST Act, 2017, the amount in ECRL cannot be utilized for purposes of paying the pre-deposit under Section 107(6) of CGST Act, 2017.
- However, the assessee filed Special Leave Petition before the Apex Court against order of High Court. The Special Leave Petition No. 25437/2023 was admitted, and it was held that pending disposal of SLP, the observations of High Court order regarding mode of payment of pre-deposit would remain stayed.

Key insights

- Whether payment of pre-deposits can be made in cash or ITC has been a vexed question of dispute.
- While favorable decisions on this issue has been rendered by the Madras and Allahabad High Court, the decision of the Hon'ble Orissa High Court has again opened up the issue for consideration.
- Practically, the Department in many cases also insist that the pre-deposit is to be made in Electronic cash ledger alone, even in cases where the dispute revolve around.

- **Citation -** CWJC No. 1848 of 2023

2. Indian Oil Corporation Limited (Del HC)

Facts of the case

- The Question of law was whether refund of accumulated input tax credit on account of inverted duty structure can be denied on the ground that input supply and output supply are the same.
- The petitioner was engaged in the business of bottling and distributing LPG. The principal input – bulk LPG, and the output supply – bottled LPG were taxable at 5%. However, the other inputs used for production were taxable at 18%.
- In terms of Clause (ii) of the proviso to Section 54(3) of the CGST Act, refund is admissible, where the credit is accumulated on account of rate of tax on inputs being higher than the rate of tax of output supplies.
- However, the Adjudicating Authority in the present case held that the case was not one of inverted duty structure and that refund shall not be allowed in terms of Section 54(3) of the CGST Act.
- The authority relied on Circular No. 135/5/2020-GST to contend that the refund of accumulated ITC is not available in cases where the input and the output supplies are the same, even if they attract different tax rates at different points in time.
- However, the Hon'ble court noted that the circular does not indicate that refund ought to be rejected in cases where the principal input and the output supply are similar.
- Nevertheless, if the circular is read in a manner that is in conflict with the provisions of Section 54(3) of the CGST Act, it would be liable to be set aside and disregarded.
- The Hon'ble court directed processing of the petitioner's refund, highlighting that the higher tax rates on other crucial inputs were the actual reason for the accumulated ITC.

Key insights

- The decision of the Hon'ble High Court will assist the assessee who are facing inverted duty structure, and the rate of predominant input and output are the same.
- Similar interpretation and relief has been extended by other High courts in the recent past. The sectors where the decision would play a positive factor will be gold and imitation jewellery, fertilizer and footwear.

- **Citation:** W.P.(C) 10222/2023

3. M/s Balaji Exim (Del HC)

Facts of the case

- The question of law was whether refund of ITC can be denied on mere suspicion of issuance of fake invoices by the Supplier.
- The goods in respect of which refund was sought were undisputedly exported and received by the Petitioner and IGST and Cess were also paid for the exported goods.
- However, the refund application was rejected indicating the legitimacy and genuineness of the invoices issued by the supplier.
- On 10.03.2023, the Hon'ble High Court had directed the respondents to process the petitioner's application for refund of the input tax credit including cess.
- It was observed in the judgement that the allegations of any fake credit availed by the supplier cannot be a ground for rejecting the petitioner's refund applications unless it is established that the petitioner has not received the goods or paid for them.
- It was also noted that the petitioner was not required to examine the affairs of its supplying dealers.
- The present application was disposed of stating that the respondents were required to pass an order for sanctioning the refund in accordance with the law and not to re-adjudicate the application once again.

Key insights

- The decision brings out an important principle that the eligibility of input tax credit cannot be determined during the refund proceedings.
- Further, the Department is precluded from denying the refund claims on mere surmises and suspicion. If the ITC is availed improperly, the recourse towards the same would be to initiate separate proceedings
- **Citation:** W.P.(C) 238/2023 & CM APPL. 900/2023

4. Amit B. Wadhwani (CESTAT Mumbai)

Facts of the case

- The question of law was whether the refund claim concerning the amount paid during an investigation was barred by limitation under Section 11B of the Central Excise Act, 1944.
- The Appellant had issued a tax invoice which was subsequently canceled since no service was provided. However, Service Tax was paid on the same during investigation by the Anti-Evasion wing.
- The investigation was concluded in July 2019, and only after that, the refund claim could be filed.
- The Appellant filed a refund claim in November 2019, arguing that what was paid by them was not tax as envisaged under the Finance Act, 1994. Thus, the amount paid was not tax but was simply an amount paid under a mistake of law, and therefore the provisions of Section 11B of the Central Excise Act would not be applicable.
- The Hon'ble Tribunal observed that the limitation prescribed under Section 11B is not applicable to a refund claim in a situation where the concerned tax was never payable by the assessee.
- As already noted in a plethora of judgements, it was reiterated that the authority concerned was duty bound to refund such amount as retention of such amount would be in violation of Article 265 of the Constitution of India which mandates that no tax shall be levied or collected except by authority of law.

Key insights

- The decision of the Hon'ble Tribunal, though in the context of the Central Excise Regime, would apply in equal force to the GST regime as well.
- Any tax which is paid during investigation would be deemed to be payment made under protest and would be refundable on the conclusion of proceedings, even in the absence of a specific provisions.

- **Citation:** Service Tax Appeal No. 86305 of 2020

5. Adani Gangavaram Port Ltd (CESTAT Hyderabad)

Facts of the case

- The primary question revolves around the eligibility of Cenvat credit on certain Mild Steel (MS) items used as inputs or capital goods during the period from May 2007 to September 2008.
- The appellant availed Cenvat credit on MS items such as angles, channels, beams, etc., falling under Chapter 72 & 73 of Central Excise Tariff Act, considering them as eligible capital goods.
- Show Cause Notice was issued, invoking the extended period of limitation, alleging that the appellant wrongly claimed Cenvat credit.
- Relying on the Hon'ble Gujarat High Court case of Mundra Ports and SEZ Ltd., the appellant argued that inputs like cement and steel, when used for construction purposes, were eligible for Cenvat credit.
- The Hon'ble Tribunal concurred with the appellant and emphasized the essential nature of the MS items in the construction process. Further, the case of Mundra Ports and SEZ Ltd was taken note of, and the availment of Cenvat Credit was held to be eligible.
- The other question discussed was the chargeability of interest under Rule 14 of the Cenvat Credit Rules payable on the Cenvat credit availed and subsequently reversed by the appellant.
- The appellant contended that subsequent to amendment to Rule 14, introduced with effect from 17.03.2012, interest is chargeable on Cenvat credit taken and utilized.
- On the contrary, the Revenue argued that interest is payable even when the credit is taken and reversed before the utilization of the same.
- The Revenue relied on the judgment of the Hon'ble Apex Court in Ind-swift Laboratories Ltd [2011 (265) ELT 3 (S.C.)].
- The court, citing the ruling of the Hon'ble Apex Court in Ind-swift Laboratories Ltd, observed that interest is payable even when the credit is taken and reversed prior to the utilization of the same.
- The court reasoned that the period in question fell before the amendment of Rule 14, and there was no specific mention in the amending Act that the amendment benefiting the appellant should apply retrospectively.
- The court ultimately upheld the chargeability of interest in this context.

Key insights

- The decision of the Hon'ble Tribunal, though beneficial on merits, leaves a very interesting open point in respect of interest liability. While the law is divided on the applicability of interest, the Hon'ble Tribunal has held that the strict interpretation is to be provided to Rule 14 in light with the decision of the Hon'ble SC in M/s Ind Swift Laboratories.

- **Citation:** Service Tax Appeal No. 2547 of 2012

6. In Re. M/s. Lion Seat Cushions Private Limited (AAR, TN)

Facts of the case

- The primary question is whether Two-Wheeler seat covers of Foam and Rexine for Bikes and scooters should be classified under HSN code 87149990 (28% GST), or under 94012000 (18% GST) or under 87089900 (5% GST).
- It was observed that the product does not fall under Heading 940120, since the heading covers "Seats for motor vehicles", whereas the Applicant was manufacturing only a seat cover which is fitted over the seat already fitted in a two-wheeler.
- Chapter 87 covers Vehicles other than railway or tramway rolling stock, and Parts and accessories thereof.
- The heading 8708 reads as 'Parts and accessories of Motor vehicles of Heading 8701 to 8705'. CTH 8701 to 8705 covers Motor Vehicles such as Tractors, Motor cars, etc. and not two wheelers.
- Thus, heading 8708 was observed as not applicable to the goods dealt with by the Applicant, as their product is seat covers for Two-Wheeler which are not parts and accessories of Motor Vehicles falling under headings 8701 to 8705, listed supra.
- Finally, it was noted that Motorcycles are classified under CTH 8711 and on the seats of such Motorcycles, the seat covers are fitted.
- Hence, these seat covers are part and accessories of Motorcycles and fall under CTH 8714, and more specifically under CTH 87149990.
- The same was held to be taxable at 28%, vide entry no. 174 of Schedule IV of Notification No. 1/2017-CT(Rate), as amended.

Key insights

- The Ruling of the AAR is very critical as the decision has followed the principles laid out by the Hon'ble SC in the case of M/s Westinghouse Saxby Limited. Though not binding on other assessee, the ruling will have a significant impact of suppliers engaged in the supply of parts to OEM manufacturers and all such parties may re-evaluate their legal position.

- **Citation:** TN/105/AAR/2023

7. In Re: M/s. Vijay Flexi Packaging Industries (AAR, TN)

Facts of the case

- The main question before the AAR was whether the payment of Basic Customs Duty (BCD), Countervailing Duty (CVD), and Special Additional Duty (SAD) made on the non-fulfillment of the EPCG obligation could be claimed as Input Tax Credit (ITC) under the Goods and Services Tax (GST) Act, 2017.
- The applicant had imported machinery under the EPCG Scheme and availed concessional duty benefits. However, they could not fulfill the export obligation under the EPCG scheme.
- Consequently, the applicant paid BCD, CVD, and SAD along with interest for non-fulfillment of export obligation.
- Rule 3 of the Cenvat Credit Rules allowed credit for additional duties of CVD and SAD paid under Section 3 of the Customs Tariff Act, 1975. However, with the introduction of GST laws from July 1, 2017, the levy of CVD and SAD of Customs was subsumed into GST.
- The Authority observed that definition of "input tax" and "input tax credit" under Section 2 of the CGST Act includes only IGST charged on imports of goods.
- There is no provision under the GST Law for availing credit of CVD and SAD, and, only IGST charged on imports is eligible for input tax credit.
- The imports in question were made before July 1, 2017, and the duties were paid as applicable on the date of import.
- Based on these considerations, it was ruled that the payment of BCD, CVD, and SAD made on non-fulfillment of the export obligation under the EPCG scheme cannot be claimed as Input Tax Credit under the GST Act, 2017.

Key insights

- The Ruling of the AAR would impact all cases where the ITC could not have been transitioned due to non-availability of the relevant forms. Though certain High Courts have given relief to the assessee, the AAR has read not extended such relief.
- In our assessment, it is possible to argue that the ITC can availed under the transition provision and vested right cannot be denied.
- **Citation:** TN/106/AAR/2023

8. M/s. Bosch Electrical Drive India Pvt Ltd (CESTAT Chennai)

Facts of the case

- The primary question of law involved in this case is whether the CESTAT has the jurisdiction to hear an appeal against an order passed under section 142 of CGST Act, 2017 (Miscellaneous Transitional Provisions).
- Section 142(6) of the CGST Act provides that every proceeding of appeal, review or reference relating to a claim for CENVAT credit initiated under the existing law shall be disposed of in accordance with the existing laws. However, there was ambiguity as to whether the CESTAT has the jurisdiction to hear such appeals.
- In the facts of the present case, the refund claim filed by the appellant for refund of Service Tax provisions of the CENVAT Credit Rules, 2004 was rejected.
- The Department argued that after the implementation of CGST Act on 01.07.2017, the CENVAT Rules ceased to be in force and the claim under section 142(3) of CGST Act cannot be considered to be under the 'existing law' as the service tax was not paid after the CGST Act had come into force.
- The Hon'ble Tribunal held that even if the service tax had been deposited by the appellant, nonetheless the refund of any amount of the CENVAT credit could be claimed only under Section 142(3) of the CGST Act and against this order an appeal will lie to the Tribunal.
- It was concluded that since an appeal against an order passed under section 142 of the CGST Act would not lie to the Appellate Tribunal constituted under the CGST Act and it would lie before the CESTAT.

Key insights

- The decision of the larger bench is relevant for all pending matters pertaining to refund applications. All such cases where refund applications are rejected under the transition provisions of the GST Act are to be evaluated for the proper jurisdiction of fling of appeal.
- **Citation:** Service Tax Appeal No. 40010 of 2020

9. In Re: M/s. Sundaram Clayton Limited (AAR, TN)

Facts of the case

- The question of law is whether the recovery of subsidized value from employees for providing canteen facility constitutes a 'supply' under GST.
- The Applicant was providing meals/food at concessional rates to their employees as per the statutory obligation under the Factories Act.
- The Applicant had argued that there was no supply between the Applicant and the employees, and the Applicant was not engaged in the business of provision of canteen services.
- The Applicant also contended that the amount received from the employees was in the nature of recovery and not consideration, and that subsidized food was a perquisite to employees forming a part of the wage agreement and HR policy of the Agreement.
- However, the Authority rejected these contentions and held that the supply of food by the employer to their employees is certainly an activity amounting to supply of service and attracts levy of GST on that part of the consideration being charged for such supply.
- The ruling was based on the fact that the supply of food by the employer to their employees is a composite supply of food as per Schedule-II of the GST Act, and the amount collected by the Applicant is a 'Consideration' on which GST is liable to be paid.

Key insights

- The question relating to taxability of canteen supplies remain a vexed question of law even after 6 years of implementation of the GST Law.
- Numerous advance ruling authorities have provided various interpretations on the tax implications of recovery of canteen supplies.
- All assessee are encouraged to pro-actively review the tax treatment to ensure that there present position is aligned to law.

- **Citation:** TN/107/AAR/2023

10. M/s. Pepsico India Holdings Pvt. Ltd. (Gauhati HC)

Facts of the case

- The question of law was on the validity of the Demand-cum-Show Cause Notice issued without issuance of Form GST ASMT-10.
- The Hon'ble court emphasized that the issuance of Form GST ASMT-10 provides the registered person with an opportunity to respond to any discrepancies before the issuance of a formal notice.
- It was noted that absence of issuance of Form GST ASMT-10 deprives the assessees of the chance to accept or dispute the alleged discrepancies and furnish an explanation, as required by Section 61 of the CGST Act, 2017 r/w Rule 99 of the CGST Rules, 2017.
- Consequently, the court stayed the operation of the impugned notice served without issuance of Form GST ASMT-10.

Key insights

- The decision provides welcome relief in cases where the clients are not provided and afforded with any personal hearing opportunity.
- In the present backdrop of multiple SCNs being issued and many of such notices being system driven, it is incumbent on the Department to also seek inputs from the assessee before issuance of the notice to avoid un-warranted disputes.
- **Citation:** WP(C)/6960/2023

11. M/s. Gabriel India Limited (Mad HC)

Facts of the case

- The question of law revolves around denial of a meaningful opportunity for a personal hearing to the petitioner pursuant to issuance of Show Cause Notice.
- Section 75(4) of CGST Act explicitly states that an opportunity of hearing shall be granted when a request is received from the person chargeable with tax, or when any adverse decision is contemplated against such person.
- In the present case, the petitioner had opted "Yes" in the column which provides "option for personal hearing".
- However, the print of the uploaded copy shows as if the petitioner has opted "No" under the "option for personal hearing".
- The Hon'ble court petitioner took note of the petitioner's reply to Show Cause Notice wherein specific request was made for personal hearing in case of any adverse order being passed.
- It was observed that even if no reply is filed, it is mandatory on the part of the authorities to provide opportunity to the petitioner for personal hearing.
- Passing of the adverse order without giving any opportunity of personal hearing was held to be violation of provision specified under Section 75(4) of the Act.

Key insights

- Multiple assessee are facing this challenge where the default option appearing in the portal is a 'no' even when a personal hearing is sought by the assessee.
- This decision clearly provides that the Department are statutorily mandated under law to provide the opportunity of a hearing to the assessee.
- If such opportunity is not extended, the assessee has the right to approach the Hon'ble Courts seeking relief.
- **Citation:** WP No. 33132 of 2023

Notifications, Circulars and Other Developments

GST Notifications

Extension of Time Limit for issuance of Order under Section 79(3) – Notification No 56/2023-C.T. dated 28th December 2023

The amended deadlines relating to issuance of Show Cause Notice and Orders for recovery of tax not paid, short paid, or input tax credit wrongly availed or utilized are presented below:

Particulars	Show Cause Notice	Order
FY 2018-19	31st January 2024	30th April 2024
FY 2019-20	31st May 2024	31st August 2024

Thus, the deadline has been extended by one month for FY 2018-19 and by two months for FY 19-20.

Note: For notices and orders relating to suppression/misrepresentation cases under Section 74, there is additional time period of two years.

Extension for GSTR-3B Filing for November 2023 in specific Districts of Tamil Nadu - Notification No. 55/2023-Central Tax dated 20th December 2023

The due date for furnishing the return in FORM GSTR-3B for the month of November, 2023 was extended till 27th December, 2023, for the registered persons whose principal place of business is in the districts of Chennai, Tiruvallur, Chengalpattu and Kancheepuram in the state of Tamil Nadu.

GST Notifications

1. Extension for reporting opening balance for ITC reversal

- GST portal has introduced a new ledger called 'Electronic credit and Re-claimed Statement' to track the ITC reversals from Table 4B and reclaims from Table 4D (1) and 4A (5) of GSTR-3B. The initial deadline for declaring the opening balance was 30th November 2023.
- Now, the deadline for declaring the opening balance of ITC reversal has been extended till **January 30, 2024**. The advisory also provides a note that the taxpayer shall be provided **three opportunities** to amend the opening balance in case of any errors while reporting.
- The window for amending the declared opening balance for ITC reversal will be open until **February 29, 2024**.

2. Two Factor Authentication for Taxpayers

- GSTN is enhancing login security on the GST portal through two-factor authentication (2FA).
- The pilot rollout in Haryana was successful, and the first phase will cover Punjab, Chandigarh, Uttarakhand, Rajasthan, and Delhi.
- In the 2FA process, after entering user credentials, taxpayers will receive a one-time password (OTP) on their Primary Authorized Signatory's mobile number and email.
- To ensure smooth implementation, taxpayers are urged to update their authorized signatory's email and mobile number on the GST Portal. This security measure will be effective from December 1, 2023, and will only prompt for OTP when there is a change in the system or location.

3. Pilot Project of Biometric-Based Aadhaar Authentication and Document Verification for GST Registration Applicants of Andhra Pradesh

- Rule 8 of the CGST Rules, 2017 was 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 and then in Gujarat.
- 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.
- The functionality has rolled out in Andhra Pradesh on December 4, 2023.

Indirect Tax Compliance Calendar for January 2024

January 2024

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 January 2024	➢ Filing of GSTR-7 - By Tax Deductor for the month of December 2023 ➢ Filing of GSTR-8 - By E-Commerce Operator for the month of December 2023
11 January 2024	➢ Monthly filing of GSTR-1 for the month of December 2023 (Regular taxpayers)
13 January 2024	➢ IFF by Taxpayers under QRMP Scheme for the Quarter October - December 2023 ➢ Filing of GSTR-5 - By Non-Resident Taxable Persons for the month of December 2023 ➢ Filing of GSTR-6 - By Input Service Distributor for the month of December 2023
20 January 2024	➢ Filing of GSTR-3B (Regular Taxpayers) for the month of December 2023 ➢ Filing of GSTR-5A by OIDAR Service Providers for the month of December 2023
22 / 24 January 2024	➢ Filing of GSTR-3B under QRMP Scheme
25 January 2024	➢ GST PMT-06 - Challan for depositing GST for the first month of the quarter by taxpayers who have opted for QRMP Scheme.
28 January 2024	➢ Filing of GSTR-11 - Statement of Inward supplies by persons having Unique Identification Number (UIN) for claiming GST refund.
30 January 2024	➢ Last date to report ITC reversal opening balance

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