

# INDIRECT TAX DIGEST

16 February 2024

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## GOODS & SERVICES TAX



### LEGISLATIVE UPDATES

#### INSTRUCTION

<p>F. No: 275/31/2023- CX.8A<sup>1</sup></p>	<p>The Central Board of Indirect Taxes and Customs (CBIC) has issued an instruction directing the Tax Authorities that all proposals for filing Special Leave Petitions including those under the GST laws may be forwarded to CBIC after obtaining approval/ concurrence of the jurisdictional Principal Chief Commissioner/ Chief Commissioner/ Principal Director General/ Director General within the prescribed limit along with the copy of the letter/ correspondence/ note-sheet containing such approval.</p>
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#### NOTICE

<p>CBIC Notice<sup>2</sup></p>	<p>The CBIC has extended the last date for submitting feedback in respect of the 6-digit HSN Classification GST rate schedule for services to be introduced (in place of the existing 4-digit classification GST rate schedule) to 16 February 2024.</p>
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### JUDICIAL UPDATES

#### Mindrill Systems & Solutions Pvt. Ltd. [TS-48-AAAR(WB)-2024-GST]

##### Issue

- Whether Input Tax Credit (ITC) in respect of inputs and input services used for the construction of an immovable property is restricted under Section 17(5)(d) of the Central Goods and Services Tax Act, 2017 (CGST Act).

##### Ratio of the AAR, West Bengal

- ITC in respect of expenses for the construction of immovable property is restricted under Section 17(5)(d) of the CGST Act if the construction expenses are capitalised in the books of accounts. However, if such expenses are not capitalised in the books of accounts, the ITC would be available.

##### Ratio of the AAAR, West Bengal

- Explanation to Section 17(5)(d) of the CGST Act is inclusive in nature and provides that the ITC restriction under Section 17(5)(c) and (d) of the CGST Act would apply not only to construction but also re-construction, renovation, additions, alterations or repairs of an immovable property.
- The condition of capitalisation of expenses to the books of accounts as stipulated in the Explanation would only apply in respect of re-construction, renovation, additions, alterations or repairs of an immovable property. The AAR has erred in interpreting the aforesaid Explanation by applying the condition of capitalisation to construction as well.
- Accordingly, since the warehouse constructed by the Taxpayer falls under the purview of 'construction', it will be covered under the restriction provided under Section 17(5)(d) of the CGST Act and not under the above Explanation. Consequently, the ITC in respect of such construction is not available to the Taxpayer.

<sup>1</sup> Dated 12 February 2024

<sup>2</sup> Dated 02 February 2024

## Fena Pvt. Ltd. [2024-VIL-20-AAR]

### Issue

- Whether the transfer of leasehold rights of a leasehold land falls within the ambit of 'supply' under Section 7 of the CGST Act and is leviable to GST.
- If the answer to the above is in affirmative, whether the lessee of the aforesaid transaction would be eligible to avail ITC on such supply.

### Ratio

- Whether the transfer of leasehold rights falls within the ambit of supply and is leviable to GST:**
  - In the present case, the Taxpayer had entered into a lease deed with the Noida Authority for 99 years. Subsequently, the Taxpayer entered into the arrangement with M/s. S. K. Food Equipments Pvt. Ltd. for transferring the lease rights with the approval of the Noida Authority. The moment such a lease right is transferred, the Taxpayer has supplied the service of transferring the leasehold rights and hence, the transaction would be covered by Para 2 of Schedule II to the CGST Act.
  - The Taxpayer's interest in benefits arising from the leasehold land is only limited to sub-leasing, in terms of the Lease Deed. The assignment, therefore, does not amount to the transfer of any benefit other than the leasehold rights for the unexpired period and hence, cannot be treated as transfer of immovable property.
  - The activity of assignment is in the nature of agreeing to transfer one's leasehold rights. It does not amount to further sub-leasing, as the applicant's rights as per the Deed stand extinguished. It does not create a fresh benefit from land other than the leasehold right. It is akin to compensation for agreeing to transfer the applicant's rights in favour of the assignee. It is a service classifiable under Other Miscellaneous Service (SAC 999792) taxable @18% under SI. No. 35 of Notification no:11/2017-CT(Rate) dated 28 June 2017.
- Eligibility of ITC on the transfer of leasehold rights:** The issue concerning the recipient's eligibility to claim ITC was not admitted since it was related to the recipient of service.

## CUSTOMS



## LEGISLATIVE UPDATES

### NOTIFICATION

G.S.R 105(E) (SEZ) <sup>3</sup>	Rule 27(6) of the Special Economic Zones Rules, 2006 is amended to allow a Gem and Jewellery Unit to source gold, silver or platinum on a free-of-charge basis from a foreign buyer for its onward export to the same foreign buyer.
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### CIRCULAR

01/2024 <sup>4</sup>	Authorises 14 more Booking Post offices to accept consignments for export in terms of Postal Export (Electronic Declaration and Processing) Regulations, 2022.
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## JUDICIAL UPDATES

### Jeena & Company Vs. Union of India & Ors. [TS-679-HC-2023(MAD)-CUST]

#### Issue

- The Taxpayer had obtained Duty Credit Scrips from the Directorate General of Foreign Trade (DGFT) which had not initiated any action for cancellation of such scrips. In this regard, whether the Directorate of Revenue Intelligence (DRI) is empowered to issue a Show Cause Notice to recover duties under Section 28AAA of the Customs Act, 1962 (Customs Act) alleging that such scrips were obtained by the Taxpayer through collusion, wilful misstatement or suppression of facts.

<sup>3</sup> Dated 05 February 2024

<sup>4</sup> Dated 01 February 2024

## Ratio

- It is well settled as per the principles laid down by the Supreme Court<sup>5</sup> that if the licensing authority has not taken any steps to cancel the license and where such licensing authority has not alleged misrepresentation, the Customs Authority cannot interfere and allege that there was misrepresentation.
- Therefore, until the DGFT acts for cancellation of scrips, the Customs Authorities cannot assume jurisdiction under Section 28AAA for recovery of customs duty alleging that the scrips were obtained through collusion or wilful misstatement or suppression of facts. Further, the Show Cause Notice issued by the DRI is contrary to Circular no:334/1/2012-TRU dated 1 June 2012.
- The Customs Act cannot assume jurisdiction under Section 28AAA to recover customs duty in cases where the Duty Credit Scrips were obtained by means of collusion, wilful misstatement, or suppression of facts unless the DGFT has initiated action for cancellation of the same. In view of the above, the Show Cause Notice issued by the DRI is liable to be set aside.

## FOREIGN TRADE POLICY



## LEGISLATIVE UPDATES

### NOTIFICATION

59/2023 <sup>6</sup>	Mundra Port and ICD Garhi Harsaru have been added to the existing list 16 ports/ ICDs for importing new vehicles.
60/2023 <sup>7</sup>	Chapters 1 to 39 of Schedule 2 (Export Policy) of ITC (HS) have been notified.

### PUBLIC NOTICE

39/2023 <sup>8</sup>	The date for implementation of the Track & Trace system for the export of drug formulations to maintain Parent-Child relationship in packaging levels and its uploading on Central Portal has been extended to 1 February 2025 (from 1 February 2024) for both SSI and non-SSI manufactured drugs.
40/2023 <sup>9</sup>	Para 4.36 of the Handbook of Procedures 2023 (HBP) is amended to ease the clubbing provisions in respect of Advance Authorisation Scheme to promote Ease of Doing Business.
Corrigendum to Public notice no:28/2023 <sup>10</sup>	Public Notice no:28/2023 dated 18 August 2023 provides the list of banks authorised to import precious metals under Appendix 4B of the HBP. Headings of Table A and Table B in Public Notice no:28/2023 dated 18 August 2023 have been partially amended to make the list of banks authorised to import specified precious metals effective from 1 April 2023.

### TRADE NOTICE

37/2023-24 <sup>11</sup>	Notifies the procedure for making Export Authorisation application for the export of human hair falling under HSN Code 0501 for the Financial Year 2024-25, subject to a Minimum Export Price of USD 55,000/MT. Such applications must be filed between 16 February 2024 and 29 February 2024.
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<sup>5</sup> Titan Medical Systems (P) Ltd. Vs. Collector (Customs), New Delhi [(2003) 9 SCC 133] and Commissioner of Customs, Hyderabad Vs. Pennar Industries Ltd. & Anr. [(2015) 10 SCC 581]

<sup>6</sup> Dated 12 February 2024

<sup>7</sup> Dated 13 February 2024

<sup>8</sup> Dated 02 February 2024

<sup>9</sup> Dated 12 February 2024

<sup>10</sup> Dated 09 February 2024

<sup>11</sup> Dated 02 February 2024

## CENTRAL EXCISE / SERVICE TAX / VALUE ADDED TAX



### LEGISLATIVE UPDATES

#### NOTIFICATION

05/2024 - Central Excise <sup>12</sup>	Effective 3 February 2024, the applicable rate of Special Additional Excise duty on production of Petroleum Crude has been increased from INR 1,700 to INR 3,200 per tonne.
CT/4/2/0001/2 024-Sec-1- 05(CT)(06) (Madhya Pradesh) <sup>13</sup>	<p>Notifies scheme for waiver of pending assessments in respect of specified retail outlets of petrol, diesel and compressed natural gas (petrol pumps) in the State of Madhya Pradesh for the Assessment Years 2021-22 and 2022-23 under the following enactments, subject to certain conditions and restrictions:</p> <ul style="list-style-type: none"> <li>▪ Madhya Pradesh Value Added Tax Act, 2002</li> <li>▪ Central Sales Tax Act, 1956</li> <li>▪ Madhya Pradesh Motor Spirit Upkar Adhiniyam, 2018</li> <li>▪ Madhya Pradesh High Speed Diesel Upkar Adhiniyam, 2018</li> </ul>
F.12(7)FD/Tax/ 2024-72 (Rajasthan) <sup>14</sup>	<p>Notifies the Rajasthan Amnesty Scheme, 2024 (subject to certain conditions and restrictions) for providing rebate of tax and settlement of outstanding demands and disputed amounts under the following enactments, to remain effective till 31 July 2024:</p> <ul style="list-style-type: none"> <li>▪ Rajasthan Sales Tax Act, 1954</li> <li>▪ Rajasthan Sales Tax Act, 1994</li> <li>▪ Central Sales Tax Act, 1956</li> <li>▪ Rajasthan Value Added Tax Act, 2003</li> <li>▪ Rajasthan Tax on Entry of Goods into Local Areas Act, 1999</li> <li>▪ Rajasthan Tax on Entry of Motor Vehicles into Local Areas Act, 1988</li> <li>▪ Rajasthan Entertainments and Advertisements Tax Act, 1957</li> <li>▪ Rajasthan Tax on Luxuries (in Hotels and Lodging Houses) Act, 1990</li> <li>▪ Rajasthan Tax on Luxuries (Tobacco and its Products) Act, 1994</li> </ul>
F 10-40/ 2022/CT/ V(20) (Chhattisgarh) <sup>15</sup>	Extends the last date of submission of application under the Chhattisgarh Settlement of Arrears of Tax, Interest and Penalty Act, 2023 to 31 March 2024 (from 31 January 2024).

### JUDICIAL UPDATES

#### Jubilant Motor Works (South) Pvt. Ltd. Vs. Commissioner of GST & Central Excise [TS-45-CESTAT-2024-ST]

##### Issue

- Whether incentives received by the Taxpayer from its suppliers for achieving sales target are leviable to service tax as Business Auxiliary Service (BAS).
- Whether the Taxpayer is liable to pay service tax on advances forfeited from the customers due to cancellation of booking.
- Whether the Taxpayer is liable to pay an amount (equal to 5%/6%/7% of the value of exempt services (trading)) under Rule 6(3A)(i) of the CENVAT Credit Rules, 2004 (CC Rules) when the Taxpayer has already reversed proportionate credit (under Rule 6(3A)(ii) of the CC Rules) but failed to intimate the same to the Tax Authorities.

<sup>12</sup> Dated 02 February 2024

<sup>13</sup> Dated 07 February 2024

<sup>14</sup> Dated 08 February 2024

<sup>15</sup> Dated 31 January 2024

- Having taken over the business of Jubilant Motor Works Pvt. Ltd. w.e.f. 21 December 2015 (relevant date), whether the Taxpayer is liable to discharge service tax prior to the relevant date.

#### Ratio

- **Taxability of incentives received by the Taxpayer:**
  - The agreements between the Taxpayer and its suppliers stipulate that the relationship *inter se* between them is on a Principal-to-Principal (P2P) basis. Hence, the suppliers cannot be treated as a Taxpayer's client/ customer.
  - The salient features of the P2P transaction involved in the present case are as under:
    - The Taxpayer purchases cars/ products from the suppliers on payment of consideration
    - Since the Taxpayer becomes the owner of such goods, he would be interested to sell more goods to make higher profits.
    - The incentives offered for achieving sales targets cannot be treated as incentives for promoting sale of the suppliers' goods. Instead, the Taxpayer is interested to make higher sales for his own benefit of making more profit.
  - Thus, the incentives given by the suppliers cannot be considered to be paid for promoting the sales of the suppliers. Even if no incentives were payable by the suppliers, the Taxpayer would still be focused to sell more cars. Hence, the incentive is not in the nature of any consideration for providing services to the suppliers. Reliance in this regard was placed on *S. K. Cars India Pvt. Ltd. Vs. Commissioner of GST & CE, Salem [2023-VIL-488-CESTAT-CHE-ST]*.
  - Thus, the incentives offered to the Taxpayer are purely based on sales and not for providing services of promoting the business of the suppliers, and hence, the service tax demand is unsustainable and requires to be set aside.
- **Taxability of forfeited advances on cancellation of booking:**
  - The issue in the present case has already been decided by various judicial precedents<sup>16</sup>. Applying the same to the present case, service tax demand on forfeited advances is unsustainable and hence, set aside.
- **Denial of proportionate reversal of CENVAT Credit on failure to intimate the Tax Authorities:**
  - The requirement to reverse CENVAT Credit under Rule 6(3A)(i) of the CC Rules on failure to intimate the Tax Authorities as to the option of reversing proportionate CENVAT Credit is no longer *res-integra* and is settled by various judicial precedents<sup>17</sup> wherein it is held that the requirement to give an intimation is only procedural in nature and the Tax Authorities cannot deny proportionate reversal of CENVAT Credit for failure to comply with such requirement. Accordingly, the demand pertaining to the reversal of CENVAT Credit under Rule 6(3A)(i) of the CC Rules is unsustainable.
- **Liability to pay service tax for periods prior to incorporation:**
  - The Taxpayer came into existence in December 2015 and hence, would not be liable to pay service tax prior to such date. Further, since on merits, the service tax demand has been held to be unsustainable, no further discussion is required in respect of this issue.

## INDIRECT TAX NEWS FLASH



Outlook India (02 February 2024)	<ul style="list-style-type: none"> <li>▪ <a href="#">Focus on innovation, skill development: What Interim Budget 2024 means for the Edtech sector</a></li> </ul>
Business Standard (12 February 2024)	<ul style="list-style-type: none"> <li>▪ <a href="#">SC issues notice to Central govt on GST anti-profiteering provisions</a></li> </ul>
Money Control (12 February 2024)	<ul style="list-style-type: none"> <li>▪ <a href="#">GST Council likely to discuss coinsurance, reinsurance issues at next meet</a></li> </ul>
CNBC TV18 (09 & 07 February 2024)	<ul style="list-style-type: none"> <li>▪ <a href="#">DGGI recovers ₹2500 crores GST dues not paid on expat salaries from MNCs</a></li> <li>▪ <a href="#">India may soften stance on GST demands on online real money gaming companies: Sources</a></li> </ul>
Economic Times (12 & 9 February 2024)	<ul style="list-style-type: none"> <li>▪ <a href="#">CBIC cautions against fake GST summons; asks taxpayers to check veracity of communications</a></li> <li>▪ <a href="#">Realty redevelopment projects GST ruling likely to hit cost dynamics across markets</a></li> </ul>

<sup>16</sup> Lemon Tree Hotel Vs. Commissioner of GST, CE & Customs, Indore [2020 (34) GSTL 220 (Tri-Delhi)], Bharat Heavy Electricals Ltd. Vs. Commissioner of GST & CE Thiruchirappalli [2023-VIL-359-CESTAT-CHE-ST] and South Eastern Coalfields Ltd. Vs. Commissioner of CE & ST, Raipur [2020 (12) TMI 912 CESTAT, New Delhi]

<sup>17</sup> Mercedes Benz India Pvt. Ltd. Vs. CCE, Pune [2015 (40) STR 381 (Tri-Mum)] and Cranes & Structural Engineers Vs. CCE [2016 (8) TMI 387 - CESTAT, Bangalore]

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