

Indirect Tax Monthly Updates

20 October 2021

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1 Goods and Services Tax (GST)

1.1 Gauhati High Court holds that refund of accumulated input tax credit is permissible in cases where the input tax is higher than tax on output supplies with the input and output supplies being the same

This update covers key judicial decisions relating to GST, service tax and customs.

The Gauhati High Court, in *BMG Informatic Pvt Ltd. v Union of India*, held that if the input tax credit has accumulated on account of the rate of tax on input supply being higher than the rate of tax on output supply, the assessee would be entitled to a refund of the unutilised input tax credit even if the input and output supplies are the same.

Regarding the clarification issued by the Central Board of Indirect Taxes and Customs (**Board**) through Circular dated 31 March 2020 that refund of accumulated ITC on account of mere rate differential would not be available in cases where the input and output supplies are the same, the High Court observed that under Section 168(1) of the CGST Act, under which the Circular dated 31 March 2020 was issued, the Board is empowered to issue/orders or instructions, directions to the tax officer on the procedure to be followed for bringing uniformity in the implementation of the CGST Act. The said Section does not give power to the Board to read and give meaning to the provisions of the CGST Act.

The High Court ultimately held that the clarification issued vide Circular dated 31 March 2020 was in conflict with Section 54(3)(ii) of the CGST Act, which provides for refund in case of accumulation of credit on account of the rate of tax on input supply being higher than the rate of tax on output supply and therefore, the Circular needs to be ignored.

This should help businesses in trading sector where supplies of goods are made to government/agencies at a concessional rate.

1.2 Orissa High Court holds that Electronic Credit Ledger cannot be debited to make payment of pre-deposit for filing an appeal

The Orissa High Court in *M/s. Jyoti Construction v Deputy Commissioner of CT & GST, Barbil Circle, Jajpur* has held that Electronic Credit Ledger (ECRL) cannot be debited for making payment of pre-deposit of tax for filing an appeal and instead Electronic Cash Ledger (ECL) has to be debited as per the Orissa Goods and Services Tax Act, 2017 (OGST Act).

The Petitioner while filing appeals before the First Appellate Authority made the mandatory pre-deposit of tax by debiting its ECLR instead of ECL. The First Appellate Authority rejected it on the ground that the appeals were defective and were in contravention of the OGST Act.

The High Court held that output tax cannot be equated to pre-deposit of tax for filing an appeal. The High Court further held that the OGST Act limits the usage to which the ECRL could be utilised.

This decision is going to adversely impact businesses which were utilising credit to make the pre-deposit for filing appeals as they will now be required to make pre-deposit utilising ECL.

2 Service Tax

2.1 Customs, Excise and Service Tax Appellate Tribunal (CESTAT), Chennai holds that service tax is not leviable on Tax Deducted at Source that is borne by the service recipient

The CESTAT, Chennai in *M/s. TVS Motor Company Limited v The Commissioner of Central Excise & Service Tax* has held that service tax is not leviable on the Tax Deducted at Source (TDS) borne by the service recipient while grossing up of the consideration payable to the service provider.

As per the terms of the agreement entered into between the parties, it was agreed that the TDS will not be deducted from the agreed consideration and accordingly, the TDS was to be borne by the Appellant who was the service recipient.

The CESTAT noted that TDS was deposited to the Government by the Appellant as a statutory liability and the amount so deducted cannot be taken as consideration for services rendered. The amount on which the parties had reached a *consensus ad idem* could only be the consideration for the services. It was noted that the Appellant had grossed up the TDS to the actual consideration only for the purpose of discharging its obligation under Income Tax laws and that after the deposit of TDS, the service provider had received only the amount that had been agreed between the parties. Thus, when the TDS amount had been borne by the Appellant and only the consideration for the services as agreed upon by the parties had been paid to the service provider, the TDS amount could not be included in the taxable value for determining the Service Tax liability.

3 Customs

3.1 CESTAT, New Delhi holds that Custodian under the Customs Act, 1962 must be determined in terms of the statute and not the contractual arrangement between the parties

The CESTAT, New Delhi in *Delhi International Airport Pvt. Ltd. v Commissioner of Customs (Appeal)*, has held that the Custodian under the Customs Act, 1962 (**Customs Act**) can only be the person approved by the Principal Commissioner for the custody of the unloaded goods and not the person to whom the task of maintaining and managing cargo terminal has been outsourced.

Delhi International Airport Pvt. Ltd. (**DIAL**) through concessional agreement had appointed and outsourced to a third party - CELEBI its duty to upgrade, modernize, finance, operate, maintain and manage the existing cargo terminal at Delhi Airport. Further, the permission for outsourcing these functions was granted under the provisions of Handling of Cargo in Customs Area Regulation, 2009 (**Regulations**). However, when certain goods imported got removed from the import shed of Air Cargo Complex, IGI Airport, New Delhi without filing the Bill of Entry, a controversy arose regarding the imposition of penalty - whether simultaneous penalty can be imposed on DIAL.

The CESTAT noted that under the Customs Act, only the person who is approved by competent Customs Officer can be the Custodian of goods lying in customs area and who alone is duty bound for handling of cargo in the Customs area till the goods are removed from the Customs area. The CESTAT noted that in the present case, the approval of Principal of Commissioner of Customs was given in favour of DIAL and not CELEBI. Thus, permitting DIAL to enter into concessional agreement cannot be considered as approval under the Customs Act. Furthermore, the custodian bond was of DIAL and was never substituted by CELEBI.

The CESTAT accordingly held that DIAL could not absolve itself from the responsibilities and obligations casted upon it in the manner prescribed under the Customs Act as the Custodian.

3.2 Supreme Court's order lifting extension of limitation period

The Supreme Court in its order dated 23 September 2021 held that in computing the period of limitation for any suit, appeal, application or proceeding the period from 15 March 2020 till 2 October 2021 will be excluded.

The order also stated that in cases where the limitation would have expired during the period between 15 March 2020 till 2 October 2021, notwithstanding the actual balance period of limitation remaining, a limitation period of 90 days will be granted from 3 October 2021. In case the actual balance period of limitation remaining with effect from 3 October is greater than 90 days, that longer period will apply.

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