S & A Law Offices

INDIRECT TAXES NEWSLETTER

DECEMBER 2022

INDIRECT TAX



IMPORTANT CASE LAWS

- Goods and Services Tax
- Service tax
- Central Excise
- Customs

3-12

INDIA REGULATORY & TRADE HIGHLIGHTS

- Foreign Trade

INDIA CUSTOMS HIGHLIGHTS

13-14

INDIA GST HIGHLIGHTS

15

ARTICLE – FATE OF UNUTILIZED INPUT TAX CREDIT AS ON CLOSURE OF BUSINESS

18-19

GOODS AND SERVICES TAX (GST)

a. The Petitioner is a Business Process Outsourcing (BPO) service provider in India and has entered into a Master Services Sub-Contracting Agreement (MSA) with Genpact International Incorporated (Genpact International) located outside India. In terms of MSA, the Petitioner was required to render BPO services to the clients of Genpact International, located outside India. For rendering such services, Genpact International agreed to pay fees/charges to Genpact India.

The Petitioner filed refund of unutilised Input Tax Credit (ITC) used in making zero rated supplies of services without payment of Integrated Goods and Services Tax (IGST). The refund application was rejected by the Department on the ground that services provided by the Petitioner are not provided on its 'own account' and are in the nature of 'Intermediary Services' and thus, do not qualify as 'Export of Services' under Section 2(6) of the Integrated Goods and Services Tax Act, 2017 (the IGST Act). The Petitioner filed Writ Petition (WP) against order passed by the Department.

The High Court held that pursuant to the MSA, the Petitioner provides the main service directly to the overseas clients of Genpact International but does not get any remuneration from such clients. The Petitioner is responsible for all risk related to performance of services, which would be akin to the services provided on 'its own account'. Further, it has been held that nothing has been brought on record to show that either the Petitioner has a direct contract with customers of Genpact International, or that the Petitioner was liaisoning or acting as an intermediary between Genpact International and its Customers. Therefore, the Department has erred in holding that the Petitioner has principal-agent relationship with Genpact International. Accordingly, it has been held that the Petitioner is not an 'intermediary' and impugned order passed by the Department rejecting refund claim has been set aside.

Takeaway: Services provided by BPO not 'Intermediary Services'

[M/s Genpact India Private Limited Vs. UOI & Others, CWP-6048-2021, Order dated November 11, 2022 (High Court, Punjab & Haryana)]

b. The Petitioner is engaged in export of eggs. While filing refund application, the Petitioner, by mistake, opted for the column 'with payment of tax' instead of 'without payment of tax'. The refund application, when correlated with the return Form GSTR-3B, did not permit the assessee to take a stand contrary to that taken in its GST return, accordingly, the Petitioner was forced to file application under residuary category in column 7(k) [Any other] of Form GST RFD-01 instead of 7(b) [export of services–without payment of tax]. However, the Department rejected refund application on the ground that the Petitioner has applied refund in residuary column. Being aggrieved against refund rejection order, the Petitioner filed WP for allowing refund of accumulated ITC.

The High Court held that error made by the Petitioner is bonafide; and rejecting the refund solely on an inadvertent error that had transpired would be hypothetical. The High Court accordingly set aside the refund rejection order and instructed the Department to issue refund after being satisfied about the quantum of refund.

Takeaway: Refund not liable to be disallowed on solely due to an inadvertent error

[M/s Abi Egg Traders Vs. Assistant Commissioner, WP No. 3773 of 2020, Order dated November 3, 2022 (High Court, Madras)]

c. The Petitioner closed its business and got his registration cancelled vide order dated July 18, 2019. The Petitioner had transitional excise credit available in Form Tran1/ Tran2 but could not claim the same due to cancellation of registration. Thus, the Petitioner filed WP seeking directions for re-opening of the Goods and Services Tax Network (GSTN) portal to enable it to file revised Form GST Tran-1/Tran-2.

The High Court held that the Petitioner is entitled to claim transitional credit as it would be unfair to the Petitioner for having foregone such credit particularly when its liability would continue even after cancellation of registration as per Section 29(3) of the Central Goods and Services Tax Act, 2017 (the CGST Act). Accordingly, the Department was directed to consider application for restoration of registration and ensure that GST portal be opened for the Petitioner for filing Form Tran-1/Tran-2. Further, in case online restoration of registration is not possible, the Department was directed to pass an order manually and Nodal Officer to forward all documents to GSTN to give effect to the order so passed on the GST portal.

Takeaway: Transitional credit can be claimed even after cancellation of GST registration

[M/s Euro Pratik Sales Corporation Vs. UOI & Others, WP No. 3380 of 2022, Order dated November 17, 2022 (High Court, Bombay)]



d. The Petitioner filed Form Tran-1 and owing to some inadvertent mistake, sought permission from the Department to revise the same, which was not allowed. The Department issued summary of Show Cause Notice (SCN) in Form GST DRC-01, informing about initiation of proceedings for utilization of excess ITC (such notice was not made available to Petitioner either electronically or physically). Subsequently, an amount of INR 16,36,000/- was blocked from electronic credit ledger of the Petitioner without any intimation and summary of order in Form GST DRC-07 was issued, without providing the copy of the same to the Petitioner.

   The Petitioner filed WP challenging summary of SCN in Form GST DRC-01 and summary of orders in Form GST DRC-07 and sought directions to the Department to unblock/re-credit the amount of ITC blocked/debited from electronic credit ledger of the Petitioner.

   The High Court has held that no proper SCN has been issued to the Petitioner except a summary of SCN in Form GST DRC-01, which is not in accordance with GST laws. It has been further held that no personal hearing has been granted to the Petitioner, thus, leading to violation of principles of natural justice.

   Accordingly, in view of extension of period for filing Form Tran-1/Tran-2 vide Circular No.182/14/2022-GST dated November 10, 2022, the Department was directed to follow the guidelines and proceed in accordance with law after proper scrutiny of the revised Form Tran-1, if any, filed by the Petitioner. It has been further directed that in case the Petitioner fails to file its revised Form Tran-1 during this window provided, the Department can initiate fresh proceeding after issuance of a proper SCN in accordance with law.

Takeaway: Summary of SCN issued in Form GST DRC-01 is not a proper SCN

[M/s Vinayak Metal and Chemicals Vs. The State of Jharkhand, WP (T) No. 3022 of 2020, Order dated November 14, 2022 (High Court, Jharkhand)]

e. The Applicant filed anticipatory bail application as he was apprehending arrest in connection with summon issued by the Department under Section 70 of the CGST Act.

   The High Court held that it is mandatory for investigating officer to record reasons for arresting or not arresting in respect of cognizable offences punishable with imprisonment for a maximum term of seven years. Section 41(1)(a) of the Code of Criminal Procedure, 1973 (the CrPC) provides that an investigating officer shall not arrest a person accused of such offences in a routine manner and the arrest is to be made only after following the restrictions imposed under Section 41(1)(b) of the CrPC. The statutory protection under Section 41 and Section 41-A of the CrPC is already available, which the authorities are bound to follow. Accordingly, the anticipatory bail application was disposed of directing the Investigating officer to comply with the provisions of the CrPC.

Takeaway: Investigating officer must record reasons before arresting a person

[M/s Prashant Sharma Vs. UOI, Order dated November 1, 2022 (High Court, Allahabad)]



f. The Applicant incurred expenses and donated oxygen plants to AIIMS during Covid pandemic as part of Corporate Social Responsibility (CSR) activities. The Applicant sought advance ruling as to whether ITC is available on CSR expenditure incurred under Section 135 of the Companies Act, 2013 (the Companies Act). The Applicant submitted that it is compulsorily required to undertake CSR activities in order to be in compliance with the law, and run its business, accordingly, it becomes an essential part of its business process as a whole.

The Authority for Advance Ruling (the AAR) held that expenditure made towards CSR under Section 135 of the Companies Act is an expenditure made in furtherance of business. Hence, tax paid on purchase of oxygen plants to meet the obligations under CSR is eligible for ITC under GST laws.

Takeaway: ITC available for expenses incurred for CSR activities

[M/s Bambino Pasta Food Industries Private Limited, TSAAR Order No. 52/2022, Order dated October 20, 2022 (AAR, Telangana)]



g. The Applicant provides computer application services through an app known as MYn (APP) for facilitating business transactions between buyer and sellers. They charge membership and subscription fees from buyers who enrol by furnishing the application in the pre-subscribed form and sign the End User Licence Agreement (EULA).

The Applicant sought advance ruling as to whether (i) the Applicant qualifies as Electronic Commerce Operator (ECO)?; (ii) supply made by a service provider (who has subscribed to the Applicant's APP) to its customers (who have also subscribed to the Applicant's APP) on the Applicant's APP amounts to 'supply' by the Applicant? (iii) the Applicant is liable to collect and pay GST on supply of goods or services supplied by service provider to its customers on the Applicant's computer application?

The AAR held that the Applicant owns digital platform for the supply of goods or services, and accordingly, falls into the definition and qualifies to be an ECO. However, APP merely connects the driver and passenger and its role ends on such connection. Also, the Applicant has not collected the consideration; neither has the details of ride nor has any control over actual provision of service by the service provider. The supply happens independent of the Applicant, it is involved only in the identification of the supplier of services and does not take responsibility for the operation and completion of the ride. Thus, it is observed that supply of services is not through the ECO, but are independent transaction, and hence, the Applicant does not satisfy the conditions of Section 9(5) of the CGST Act for discharge of tax liability by ECO. Further, it has been held that the supply by the service provider (person who has subscribed to the Applicant's APP) to its customers (who have also subscribed to the Applicant's APP) on the Applicant's application does not amount to supply by the Applicant and accordingly, the Applicant is not liable to pay GST on such services.

Takeaway: ECO having no control over actual provision of service shall not be liable to pay and collect GST under Section 9(5) of the CGST Act

[M/s Multi-Verse Technologies Private Limited, Advance Ruling No. KAR/ADRG 36/2022, Order dated October 27, 2022 (AAR, Karnataka)]



h. The Applicant is engaged in the manufacture and supply of exempted goods. The Applicant receives Goods Transport Agency Services (GTA) and Security Services, GST on which is payable by service recipient under reverse charge mechanism (RCM) in terms of Notification No. 13/2017-CT(R) dated June 28, 2017.

The Applicant sought advance ruling as to whether the Applicant, being engaged in supply of exempted goods, would be liable to pay GST under RCM on GTA and Security Services procured by it.

The AAR held that GST is levied on supply of service and liability is fastened independently for each of the supplies. Levy of tax or otherwise on a particular supply does not have a bearing on the taxability of other supplies received or provided by a taxpayer. Thus, the exemption provided to outward supplies of the Applicant does not have a bearing on the GST liabilities under RCM on the supplies received by the Applicant. Accordingly, despite being a manufacturer and supplier of exempted goods, the Applicant is liable to pay GST on RCM basis, on specified services received by it.

Takeaway: A person is liable to pay GST under RCM despite being engaged in supply of exempted goods

[M/s Innovative Nutrichem Private Limited, Advance Ruling No. KAR ADRG 37/2022, Order dated October 27, 2022 (AAR, Karnataka)]



SERVICE TAX

a. The Appellant is engaged in providing advertising agency service wherein they purchase time slots from broadcasters and sell it to their clients for screening advertisement in exchange for agency commission.

The Department issued SCN demanding service tax and interest alleging that the Appellant included gross value of broadcasting services and the service tax charged by the broadcaster in the bills to their clients and did not pay tax on the entire amount. The Appellant contended that being an advertising agency, it only acted as a facilitator between broadcasters and clients and passed on the entire amount to the broadcaster including the amount of service tax, which was deposited by the broadcaster to the Central Government.

The Customs, Excise and Service Tax Appellate Tribunal (CESTAT) has held that that the Broadcaster issues invoice to the Appellant for selling time slots to customers of the Appellant however, the payment of such time slot is routed through the Appellant. Thereafter the customer pays the billed amount including service tax to the Appellant which has been subsequently passed on to the Broadcaster, for discharging service tax liability. It is undisputed that under present facts, it is not case that the Appellant collects an amount as service tax and retains the same by not depositing it with the government exchequer. Once tax has already been paid on the services, the Department cannot demand the same from the Appellant, in respect of the same services.

Takeaway: Tax is not payable twice on same transaction, where service is provided through facilitator

[Triton Communication Pvt. Ltd. Vs. CST, ST Appeal No. 13631 of 2014, Order dated November 1, 2022 (CESTAT, Ahmedabad)]

b. The Appellant, an exporter, filed refund claim of Cenvat credit for the period July to September 2014. The Authorities sanctioned part refund by taking re-credit of the same in the Cenvat credit ledger. Aggrieved by the partial rejection of refund in cash, the Appellant filed appeal before the Appellate Authority, who vide the impugned order upheld the original order. Consequently, the appellant filed present appeal.

The CESTAT relied upon case of ***M/s Veer-o Metals Pvt Ltd.***[1]**,** and held that after introduction of GST, re-crediting the Cenvat credit ledger has become irrelevant for the Appellant. Thus it has been held that the partly rejected amount shall be paid in cash since the Appellant is not able to take re-credit of such amount post introduction of GST.

Takeaway: Refund of Cenvat credit to be allowed in cash since credit cannot be re-availed after the introduction of GST.

[Dhyan Networks and Technologies Pvt. Ltd. Vs. CGST & CE, ST Appeal No. 40813 of 2018, Order dated October 27, 2022 (CESTAT, Chennai)]

[1] 2021-VIL-787-CESTAT-BLR-CE

EXCISE

a. The Appellant is engaged in the manufacture of certain products for Parle as a contract manufacturing unit. Parle is registered as an Input Service Distributor (ISD) and distributes Credit incurred on marketing, market research, advertisement and sales promotion expenditure to the Appellant.

The Department denied Cenvat credit availed by the Appellant from April 1, 2013 onwards on the ground that credit could be distributed by Parle only to its own manufacturing unit and not to Appellant. Subsequently, the Commissioner (Appeals) allowed Cenvat credit only for the period April 1, 2016 onwards based on amendment to the Cenvat Credit Rules, 2004 (the CCR) which allowed credit to an outsourced manufacturing unit.

On appeal, the CESTAT has held that the relevant Rule 7 of the CCR allows distribution of credit by an ISD to its manufacturing units, and it does not use the words its "own" manufacturing units. Thus, it could be safely presumed that "its manufacturing units" should include a contract manufacturer, who manufactures in accordance with the provisions of the Registration Exemption Notification. Accordingly, the Tribunal held that the amendment was made merely to rectify the lacuna in the law and would have effect from the inception of the CCR and that the Commissioner (A) was not justified in denying Cenvat credit prior to April 1, 2016.

Takeaway: ISD credit in respect of service tax paid on input services can be distributed to outsourced contract manufacturing units

[Shahi Food Product Vs. Commissioner of CGST & CE, Excise Appeal No. 51580/2019, Order dated October 25, 2022 (CESTAT, Delhi)]

b. Respondent had set up a Coke Oven Plant (COP) for manufacturing excisable goods and a Captive Power Plant (CPP) for generating power for its own use and sale of power to others. CPP supplied electricity to COP for manufacture of excisable goods. Respondent availed Cenvat credit on capital goods procured by it for use in CPP which was located in factory premises of a different company.

The Department alleged Cenvat credit is not available since the CPP was designed to supply the power to other factories and that the entire power was not used in manufacture of final products of the Respondent.

The Respondent submitted that COP and CPP were in different factories, however both these factories were inter-linked and inseparable. Inputs and capital goods were used in manufacture of excisable final products and not in manufacture of exempted goods. Both the units were inter-dependent both technologically and operationally since power supply from CPP is essential for manufacturing activity.

The High Court has held that since the two portions are integrally connected and inter-linked with the manufacturing process of excisable goods, it can be considered to be part of the same factory premises under the definition of factory under excise laws read with the CBIC manual. The only restriction under the CCR is that capital goods should not be used in the manufacture of exempted goods. Further, power/ electricity is not the final product and is used in manufacture of excisable products, thus Cenvat credit on capital goods was allowed.

Takeaway: Cenvat credit on capital goods used in captive power plant located in a separate location eligible unless such electricity is used in manufacture of exempted goods

[Pr. Commissioner of GST & CE Vs. Neelachal Ispat Nigam Ltd, OTAPL No. 1/2017, Order dated November 22, 2022 (High Court, Orissa)]

CUSTOMS

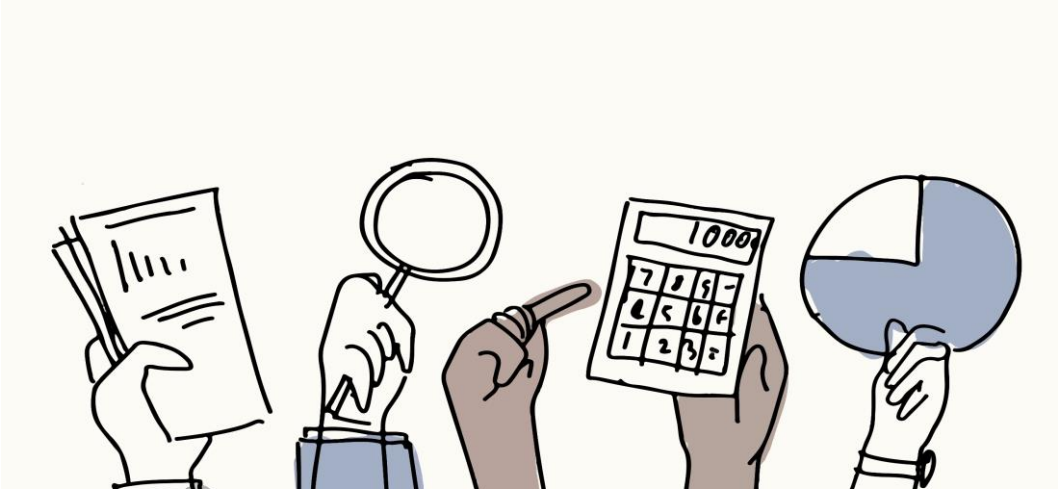
a. The WP pertains to refund of IGST and Compensation Cess paid by the Petitioner on import of capital goods under the Export Promotion Capital Goods Scheme (the EPCG Scheme) for the period July 1, 2017 to October 12, 2017. When GST was introduced, IGST and Compensation Cess was levied on imports, without any specific exemption to imports made under the EPCG Scheme. Thereafter, the Government, vide Notification No. 79/2017-Cus dated October 13, 2017 (the Exemption Notification), exempted IGST and Compensation cess on EPCG imports.

The Petitioner contended that customs duty was always exempted on imports under the EPCG and thus, the Exemption Notification is clarificatory in nature. Accordingly, IGST was never leviable on imports under EPCG Scheme.

The High Court has held that the Exemption Notification is clarificatory and curative in nature as the Central Government always intended to exempt imports of capital goods under the EPCG Scheme from payment of Additional Duty. In case the Exemption Notification is not considered to be clarificatory in nature, it would lead a class of importers bereft of the benefit of imports under the EPCG Scheme at zero customs duty, which is not the intention of Foreign Trade Policy. Accordingly, the Court allowed the Petitioner to claim refund of IGST paid by it on imported capital goods under the EPCG Scheme during intervening period.

Takeaway: Capital goods imported between July 1, 2017 and October 13, 2017 under EPCG Scheme are exempt from levy of IGST

[M/s Sanathan Textile Pvt. Ltd. Vs. UOI, W.P. No. 157 of 2019, Order dated November 11, 2022 (High Court, Bombay)]



b. The Appellant imported certain machines along with the designs. The import was made under the single airway bill however, the Appellant filed two separate Bills of Entry (BoE), one to clear the machines, and second to clear the designs. The Appellant classified the machines and the designs under different Customs Tariff Heading (CTH) and claimed respective exemptions available on import of these items. The Department alleged that the designs imported by the Appellant are integral part of the machines and were imported under one master Airway bill, and so could not be classified separately. Accordingly, the Department added the value of designs in the value of the machines, thereby, enhancing the assessable value of machines, on which duty was demanded. Aggrieved against such addition, Appellant filed the present appeal.

   The CESTAT held that it is immaterial whether the goods were purchased under the same contract or not; and whether they were imported under the same BoE or not. None of these factors should have a bearing on the way the goods are assessed. Barring few exceptions, if the imported goods are classifiable under different CTH; chargeable to different rates of duty and are eligible for various exemption notifications, they should be assessed individually. Accordingly, the impugned order is set aside.

Takeaway: Goods falling under different CTH, chargeable to different rates of Duty to be assessed individually despite being imported under single Airway bill.

[M/s Panacea Biotec Ltd Vs. Commissioner of Customs, C.A. No. 449 of 2001, Order dated October 28, 2022 (CESTAT, New Delhi)]

c. The Appellant imported goods at a certain declared price which was rejected and enhanced by the Department. The Appellant paid the duty under protest and cleared the goods. The orders enhancing the declared value were challenged before the Commissioner (Appeals) and subsequently before the CESTAT. The CESTAT set aside the order enhancing value of goods, based on which the Appellant filed a refund claim with respect to the duty paid under protest. The refund claim was rejected by the Commissioner of Customs for being time-barred, premature (as the same has not attained finality) and non-submission of requisite documents. The rejection of refund claim was upheld by the Commissioner (Appeals), aggrieved by which, the Appellant filed the present appeal.

   The CESTAT has held that Section 27 of the Customs Act, 1962 (the Customs Act), specifically deals with limitation period when duty is paid under protest. Thus, although refund claim is filed pursuant to favourable judgement, the limitation period of one year will not be applicable. It has been further held that the Department's inaction in not filing appeal against the CESTAT's order cannot be a ground to reject the refund claim as being premature. Accordingly, rejection of refund claim was set aside for not being time-barred and pre-mature, and the Department was instructed to complete the re-assessment and process the refund claim after due verification of documents already filed by the Appellant.

Takeaway: Limitation period of one year does not apply when the Duty is paid under protest

[M/s Sai Exports Vs. The Commissioner of Customs, C.A. No.40876 of 2021, Order dated October 10, 2022, (CESTAT, Chennai)]

1.1 Foreign Trade

a. With the implementation of Coal Import Monitoring System, requirement to apply for registration revised from fifteen (15) days to five (5) days before the expected date of arrival of import consignment. [Notification No. 41/2015-2020 dated November 7, 2022].

b. Relief in average export obligation provided to the product groups showing percentage decline in exports during Financial Year (FY) 2021-22 as compared to FY 2020-21 [Policy Circular No. 44/2015-20 dated November 17, 2022].



a. <u>Commodities falling under Chapter 84 (Mechanical Machinery) to be subject to Second Check Examination</u>

- Scope of Second Check Examination widened by covering the commodities falling under Chapter 84 (Mechanical Machinery) w.e.f. November 15, 2022.

[Circular No. 23/2022-Customs dated November 3, 2022]



a. Amendments made in Form GSTR-9 (Annual Return)

- Changes made in Para 7 and Serial No. 10 to Serial No. 13 in instructions of Form GSTR-9, in relation to particulars of transactions for previous Financial Year (FY) but paid in Form GSTR-1/Form GSTR-3B of April 2022 to October 2022.
- Such changes have been made in Form GSTR-9 to give effect to the last date for claiming ITC for FY 2021-22 till November 30, 2022.

[Notification No. 22/2022-CT dated November 15, 2022]

b. Competition Commission of India (CCI) appointed as new Anti-Profiteering Authority

- CCI to examine whether ITC availed by registered person or reduction in the rate of tax have actually resulted in a commensurate reduction in the price of goods or services or both supplied by registered person.

[Notification No. 23/2022-CT dated November 23, 2022]

c. Amendments made in the Central Goods and Services Tax Rules, 2017 (the CGST Rules)

- Various procedural rules in relation to Anti-profiteering such as constitution of national anti-profiteering authority (the Authority), appointment, salary, allowances, terms and conditions of service of chairman and members of the Authority, secretary to the Authority, tenure of the Authority have been withdrawn.

[Notification No. 24/2022-CT dated November 23, 2022]

d. Clarifications on various refund related issues

- Refund of unutilized ITC available on input services on account of inverted duty structure is applicable prospectively w.e.f. July 5, 2022.
- Restriction imposed for claiming refund of unutilized ITC on account of inverted duty structure on goods falling under Chapter 15 (Animal or Vegetable fats and oil, prepared edible fats, animal or vegetable waxes) and Chapter 27 (Mineral fuels, mineral oils and products of their distillation, bituminous substances and mineral waxes) of the Customs Tariff Act, 1975 to be applicable prospectively, i.e. w.e.f. July 18, 2022.

[Circular No. 181/13/2022-GST dated November 10, 2022]

e. Clarification in relation to guidelines issued for verification of transitional credit

- While soft copy of the Tran-1/Tran-2 filed/revised by the Applicant is available with jurisdictional tax officers on their back-office systems, the Applicant to submit a self-certified downloaded copy of Tran-1/Tran-2.

- In case of no change in previously filed Tran-1/ Tran-2, then jurisdictional officer shall pass a reasoned order regarding rejection of transitional claim after providing reasonable opportunity to the Applicant.

- Any pending proceedings related to Form Tran-1/Tran-2 matter against the Applicant would be consider by the jurisdictional tax officer while conducting the verification.

- In case the jurisdictional tax officer finds that the transitional credit claimed by the Applicant is partly or wholly inadmissible, notice seeking explanation as to why the credit claimed should not be denied wholly/partly, as the case might be issued to the Applicant.

- The jurisdictional tax officer to pass a reasoned order specifying the amount of transitional credit allowed preferably within a period of fifteen days from the date of personal hearing and upload a pdf copy of the order on GST portal. Such order required to be passed within a period of 90 days from December 01, 2022 to February 28, 2023.

- In case amount credited to the electronic credit ledger pursuant to the originally filed Form Tran-1/Tran-2 exceeds the amount of credit admissible in terms of the revised Form Tran-1/Tran-2 filed by the Applicant, such excess credit is liable to be demanded and recovered from the Applicant along with interest and penalty under GST laws.

- Taxpayers of Ladakh and Daman and Diu can file/revise Form Tran-1/ Tran-2 only through their newly allotted Goods and Services Tax Identification Number (GSTINs). The jurisdictional tax officers required to take into consideration transitional credit, if any, claimed by such taxpayers under their previous GSTINs.

[Circular No. 182/14/2022-GST dated November 10, 2022]

f. Instruction issued in relation to manner of processing and sanction of refund of IGST of goods or services

- Earlier, Directorate General of Analytics and Risk Management (DGARM) was required to identify the exporters and its suppliers based on risk parameters, approved by the Competent Authority and would forward list of such exporters to Risk Management Centre for Customs (RMCC) for putting alert in system.

- Due to amendment made in Rule 96 of the CGST Rules retrospectively w.e.f. July 1, 2017, guidelines have been issued in relation to manner of processing and sanction of refund of IGST of goods or services. Now, DGARM, based on data analysis and risk parameters, would identify the exporters and their suppliers where verification of credentials of exporter including availment of ITC by exporter is considered before granting refund of IGST.

- DGARM would then place an all India alert on such an exporter.

- Once an alert is placed on an exporter, the IGST refunds of such exporters would be withheld. Details in respect of Shipping bills filed by such exporter would be transmitted to Goods and Services Tax Network (GSTN) though ICEGATE for generation of refund claims in Form GST RFD-01.

- Such refund claims would be available to jurisdictional proper officer.

- The jurisdictional proper officer required to immediately process such claim of refund in a manner similar to other Form GST RFD-01 refund filed under the provisions of Rule 89 of the CGST Rules on receipt of such refunds.

- The proper officer would be required to ascertain the genuineness of the exporter and verify the correctness of availment and utilization of ITC by exporter and exercise due diligence in processing such refund claims to safeguard interest of revenue. The proper officer required to conduct the physical verification of places of business of the exporter.

- The proper officer to provide feedback on GST portal while issuing refund sanction order in Form GST RFD-06 along with recommendation as to whether the alert against taxpayer need to be continued or whether the same can be removed.

- GSTN would transmit the outcome of processing of refund by proper officer along with feedback received from proper officer on requirement of removal or continuation of alert, to DGARM for necessary action for removal or continuation of alert.

[Instruction No. 04/2022-GST dated November 28, 2022]



FATE OF UNUTILIZED INPUT TAX CREDIT AS ON CLOSURE OF BUSINESS

Input Tax Credit (ITC) is in the nature of a benefit, or a concession available to a registered person upon fulfilment of conditions as prescribed under GST law. The IGST Act[2] also provides for refund of unutilized ITC in specific cases like export, inverted duty structure etc. Further, there are situations wherein businesses are in the process of winding up, or discontinuing their operations, and there lies unutilized ITC in the electronic credit ledger (ECL).

It is important to note that there is no provision prescribed under GST law for availing benefit of such ITC to the registered person. Instead, the CGST Act[3] provides for reversal of ITC of inputs and capital goods, available in ECL, in the prescribed manner[4]. However, the law remains silent in relation to ITC balance for input services. Accordingly, it follows that the legislature's intent is clear regarding reversal of ITC for inputs and capital goods; does it mean that the refund of ITC on input services can be claimed?

Under excise/ service tax laws, there was no such provision regarding reversal of closing balance of credit. Also, there was no express prohibition on claiming refund of the same. However, under VAT laws, few states, Karnataka for instance, provided specifically that the closing balance of ITC shall be reversed at the time of discontinuation of business. Further, it is pointed out that, there were various judicial pronouncements under the erstwhile laws wherein refund of unutilized ITC on closure of business was allowed to the assesses. The Courts had consistently held that assessee is entitled to refund in cash if it has gone out of Modvat Scheme or its unit has been closed. Reliance in this regard is placed on the case of **Union of India Vs. Slovak India Trading Co. Pvt. Ltd.**[5], wherein the Hon'ble Division Bench, while allowing refund of closing balance of Cenvat Credit, held that though there may not be a specific provision under the CCR to grant refund when the manufacturing is stopped as a result of the closure of the factory, there is no prohibition either for claiming refund under the CCR.

Coming to the GST regime, amidst the confusion regarding availability of unutilized ITC of input services on closure of business, its refund etc., recently the High Court of Bombay in the case of Euro Pratik Sales Corporation[6] has decided in relation to availability of unutilized transitional credit at the time of surrender of registration. In this case the Petitioner could not carry forward the transitional credit from erstwhile regime to GST regime and had surrendered its GST registration in the meantime. The High Court observed that since the liability to discharge tax or any obligation pertaining to period under registration continues even after surrender of registration, the Petitioner cannot be permitted to forego the credit which can be used to pay off future liabilities. Accordingly, it ordered for restoration of registration of the Petitioner and directed the Department to make procedural arrangements to enable the Petitioner to avail such ITC.

[2] The Integrated Goods and Services Tax Act, 2017
[3] The Central Goods and Services Tax Act, 2017
[4] Section 22(5) of CGST Act
[5] 2006 (201) E.L.T. 559 (Kar.)
[6] 2022-VIL-760-BOM

Now the concern here is the practical modality in applying the judgment of the High Court. Though the Court has allowed carry forward of transitional credit by restoring the GST registration, since the GST laws do not allow refund of ITC in the case of the Petitioner and the same can be set off only against future tax liability, the question that arises is whether the Petitioner is required to continue with the registration and perform the monthly compliances till the time its business is finally assessed and all liabilities are settled? This would lead to an unnecessary delay in cancellation of registration of the Petitioner, which doesn't seem to be the intention of the Petitioner.

Nonetheless, this ruling might be beneficial for those who have an ongoing litigation and are in process of winding up or discontinuing their business, and who can utilize the carried forward transition credit for closing their liabilities.

To sum up, the principle that ITC is a vested right is reiterated and cannot be undermined. Infact, legality of the provision under GST Laws pertaining to reversal of ITC available in ECL can attract litigation any given day. In our view, since there is no specific provision for claiming refund of ITC for input services in event of closure of business, taking cue from previous regime and present ruling of Euro Pratik Sales Corporation, registered persons can explore the option of claiming refund of ITC accumulated at the closure of business and approach Courts, if required, instead of forgoing the same. Alternatively, they can explore ways of monetizing the closing balance of ITC.

******

S&A Law Offices



CONTACT US

GURUGRAM

Plot Number 5, 6, 7, Udyog Vihar
Phase IV, Sector 18
Gurugram, Haryana-122015, INDIA
Phone: 91-124-4666400
Fax: 91-124-4666401

BANGALORE

Awfis, S&A Law Offices
Renaissance Centra, 27 & 27/1
Mission Road, Rama Nagar
Bengaluru, Karnataka-560027, INDIA

NEW DELHI

E-337, East of Kailash
New Delhi-110065, INDIA
Phone: 91-11-46667000
Fax: 91-11-46667001

MUMBAI

Unit No-101,10th Floor
Sakhar Bhawan, Plot No.230
Ram Nath Goenka Marg, Nariman
Point Mumbai-400021, INDIA
Phone:91-22-66025000
Fax:91-22-66025001