TRILEGAL

UPDATES

Indirect Taxation – Legal Milestones Financial Year 2020-21 and a Look Ahead

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This update covers:

With the onset of the COVID-19 pandemic in 2020 and the consequent lockdowns and disruption to business, indirect tax authorities in India took a proactive approach to address some of the issues faced by tax-payers. Some measures taken included extension of timelines for filing appeals and undertaking Goods and Services Tax (GST)/Customs related compliances.

On the Customs front, a faceless assessment programme was introduced to reduce the time taken for Customs clearance and to address the issues of uniformity in classification and assessment. Further, e-invoicing was introduced under GST, making it mandatory for the specified taxpayers to issue GST invoices with Invoice Reference Number (IRN).

The High Courts also played a major role in granting relief to taxpayers in various writ petitions filed on contentious issues such as transitioning of Cenvat Credit, levy of GST on ocean freight etc.

Further, the Budget 2021 proposes several changes to strengthen the foundation of indirect tax laws such as the introduction of an online customs portal. It also proposes changes to emphasise building production capabilities in India, such as increasing customs duty rates on certain goods. Several proposals have also been made to reduce the compliance burden for

The year 2020 witnessed key changes to the indirect tax regime. Some technology-based changes such as faceless assessment under Customs and e-invoicing and QR code requirements under GST, were also introduced. This update summarises some of the major developments in the past year along with our expectations for the year ahead.

taxpayers under the GST framework such as the removal of requirement of GST audit by a chartered/cost accountant. *Please click here for a more detailed analysis of the Budget 2021.* The Finance Act, 2021 has also now received Presidential assent on 28 March 2021.

1 Faceless assessment of imports introduced

Central Board of Indirect Taxes and Customs (CBIC) notified the roll-out of an all India faceless assessment programme also known as '*Turant Customs*' on 4 September 2020.

Under the faceless assessment, all Customs clearance related processes like filing of bill of entry, submission of documents like certificate of origin, packing list etc. are to be carried out through the e-Sanchit portal. The assessing officer can request for information and return the bill of entry for payment of customs duty through this portal, without having to physically interact with the importer or the customs house agent. Faceless assessment also enables the bill of entry filed at one Customs station to be assessed by an assessment officer physically located at a different Customs station. The assignment of bill of entry will take place through the Customs Automated System.

This new faceless assessment system is likely to bring uniformity and anonymity in Customs assessment process. It is also expected to reduce interface between the businesses/ importers and Customs officers, consequently reducing the time required for Customs clearance.

2 E-invoicing and QR codes introduced for specified persons under GST

In a big step towards the goal of curbing tax evasion and easing compliance under the GST framework, CBIC implemented e-invoicing and QR code for specified persons who met a certain turnover threshold.

Under e-invoicing, the invoices generated by a supplier are authenticated electronically on the GST Network (GSTN). This authentication is carried out by uploading the invoice (either manually or through an ERP software), to the Invoice Registration Portal (IRP) managed by GSTN. Every authenticated invoice carries an IRN which can be used by the authorities to check the authenticity of the invoice.

From 1 April 2021, e-invoicing has been made mandatory for suppliers of goods or services or both having a turnover of more than INR 50 crores (in any financial year from 2017-18) making B2B supplies or export of goods or services or both.

For B2C invoices, suppliers with a turnover of more than INR 500 crores (in any financial year from 2017-18) are mandated to issue e-invoices with QR codes from 1 December 2020.

The QR code contains details of the invoice and payment made. In those cases where the supplier is making the dynamic QR code available to the recipient on a digital display, the QR code is not required on the physical invoice.

3 Time limit for transitioning of Cenvat credit

Section 140 of the Central Goods and Services Act, 2017 (CGST Act) allowed a taxpayer to transition Cenvat Credit from the erstwhile indirect tax regime to the GST regime in the manner prescribed under the Rule 117 of the CGST Rules, 2017. However, nascency of this law and technical issues present in the GST online system precluded taxpayers from affecting the transition smoothly. Additionally, the CGST Act did not empower the legislature to impose a time limit on such transition.

Despite the absence of such power, an initial time limit of 27 December 2017 was prescribed in Rule 117 of the CGST Rules, which was then extended, before finally being fixed to 31 March 2020 for special cases where the taxpayers could not upload the mandated Form GST TRAN-1 (Form) on account of technical issues on the GSTN portal.

This time limit was challenged by taxpayers across the country before various High Courts. Subsequently, the Delhi High Court in *Brand Equities v. Union of India* decided that the time limit prescribed under Rule 117 of the CGST Rules was without authority of law and went beyond the scope of the CGST Act. The Delhi High Court also observed that while the time limit is not mandatory, the right to transition Cenvat Credit could not exist in perpetuity, and thus, will be subject to the residuary limitation period of three years from the date of enforcement of GST.

Accordingly, the Delhi High Court had allowed the transition of Cenvat Credit from erstwhile indirect tax regime to GST regime till 30 June 2020 which came as a great relief to the taxpayers. This extension included not only those who could not file the Form on account of technical glitches, but also those who had filed the Form with incorrect details or could not file the Form at all for other reasons. *click here for a more detailed analysis*.

However, the respite granted by the Delhi High Court was short-lived. The legislature within a few days of the Delhi High Court order, took cognizance of the lacunae in the CGST Act, amending Section 140 with retrospective effect from 1 February 2020 (in the Finance Bill, 2020 subsequently passed as the Finance Act, 2020). *Please click here for a more detailed analysis.*

The retrospective amendment of Section 140 gave the legislature specific powers to prescribe a time limit for transitioning the Cenvat Credit (retrospectively, from the introduction of the GST laws). This ratified the various cut-off dates previously imposed and reinstated 31 March 2020 as the statutory deadline for filing the Form. This cut-off date was only for taxpayers who could not file the Form on GSTN portal on account of technical issues. Consequently, this has left the taxpayers who could not file the Form for any other reasons without any remedy.

4 Applicability of GST on remuneration paid to directors

The long-standing confusion arising from contrary rulings of the Authority for Advance Ruling (AAR) on the issue of applicability of GST on remuneration paid to directors was finally settled in 2020. The CBIC on 10 June 2020, clarified that remuneration paid to a director which is in the nature of salary will not be subject to GST.

The CBIC has clarified that:

a. Remuneration paid to independent directors or other directors, who are not employees of the company, would be subject to GST on a reverse charge basis.

b. Remuneration declared as 'salary' in the books of a company and subject to Tax Deduction at Source (TDS) under Income Tax Act, 1961 would not be subject to GST, being consideration for services by an employee to the employer in the course of or in relation to employment. However, remuneration paid to such 'employee-director', not in the nature of salary would be subject to GST on a reverse charge basis.

The Circular came as a welcome move by CBIC. It brought certainty for all body corporates and eased the burden of paying GST on the remuneration paid to its directors.

Please click here for a more detailed analysis.

5 Refund of Input Tax Credit pertaining to input services under inverted duty structure

One of the major concerns for taxpayers making supplies that are zero-rated (namely, supplies to SEZs and exports) or are under inverted duty structure (GST paid on input goods/services exceeds the GST paid on outward supplies) is the refund of accumulated Input Tax Credit (ITC).

Section 54(3) of the CGST Act allows for refund of unutilised ITC in cases of inverted duty structure and zero-rated supplies. However, Rule 89(5) of the CGST Rules, that prescribes the formula for the refund of ITC on account of inverted duty structure, only allows for the refund of unaccumulated ITC availed in respect of input goods and not input services.

By necessary implication, Rule 89(5) therefore denies the refund of unaccumulated ITC relating to input services. Therefore, while ITC in respect of input goods can be availed as refund in cases of inverted duty structure, the refund of ITC in respect of input services is not refundable.

This provision was therefore challenged by taxpayers before various High Courts, which ruled as follows:

1.1 VKC Footsteps Pvt. Ltd. v. UOI

The Gujarat High Court in this case read down Rule 89 (5) on the ground that it is *ultra vires* and contrary to Section 54(3) of the CGST Act which provides for claim of refund of '*any unutilised input tax credit*' and therefore allows for refund of ITC availed in respect of input services as well. Thus, the court allowed for refund of ITC pertaining to input services, in cases of inverted duty structure.

1.2 Tvl. Transtonnelstroy Afcons Joint Venture v. UOI

Contrary to the Gujarat High Court decision discussed above, the Madras High Court dismissed the writ petitions challenging the restrictions imposed by Rule 89(5) of the CGST Rules on claiming refund of unutilised ITC on input services in cases of inverted duty structure. It held that the right of refund is statutory in nature and can only be availed strictly in accordance with the conditions prescribed under law.

The conflicting judgements of the two High Courts have created an anomaly on the issue and the vires of Rule 89(5) of the CGST Rules will now likely be decided by the Supreme Court.

6 DRI officers do not constitute 'proper officer' under Customs Act; not authorised to issue show cause notices

The power of the Department of Revenue Intelligence (DRI) officers to issue show cause notices under the Customs Act, 1962 had been subject to scrutiny by courts in various instances. In the recent landmark judgment of *Canon India Private Limited v. Commissioner of Customs,* the Supreme Court settled this long-standing dispute and held that the DRI officers have no authority to initiate proceeding/ issue show cause notice to recover duty under Section 28 of the Customs Act. Section 28 provides for recovery of customs duties not levied, not paid or erroneously refunded.

The Supreme Court held that the power to issue show cause notice under Section 28 has been conferred to '*the proper officers*'. '*The proper officers*' for the purpose of Section 28 will be the same officer or his successor who had exercised the power of assessment in that particular case. If such re-assessment under Section 28 is to be carried out by an officer of other department (viz. DRI officer), it would result in an anarchial and unruly operation of statue. The Supreme Court also held that Notification No. 40/2012 dated 2 May 2012 which appoints the DRI officers as 'proper officers' for the purpose of Customs Act to be ill-founded under law.

This judgment is likely to impact all pending proceedings that have been initiated by the DRI officers. The implications of this judgment are also being examined by the CBIC. CBIC has directed that all fresh show cause notices in cases being investigated by DRI will be issued by jurisdictional customs commissionerates from where imports have taken place, instead of DRI.

7 Looking Ahead

Legislative changes are expected in the GST framework to align it with the larger objective of making India an attractive business destination and streamlining compliance related practical issues like filing of returns. Further, given the contradictory rulings of the High Courts on the issue of refund of ITC pertaining to input services under inverted duty structure, we hope that the issue will be finally decided by the Supreme Court in 2021.

For a round -up of some of the key legal developments in the financial year 2020-2021 across other practices and a brief insight on what to expect in the year ahead, please read our practice-wise updates, which can be accessed here.