TRILEGAL

UPDATES

Indirect Tax Monthly Updates

13 August 2021

This update covers:

1 Goods and Services Tax (GST)

1.1 Gujarat High Court: Director General of Goods and Services Tax Intelligence Officer can issue summons under CGST Act

The Gujarat High Court in ***Yasho Industries Ltd. v. UOI*** has upheld the validity of summons issued by Director General of Goods and Services Tax Intelligence Officer (**DGGI Officer**) under the Central Goods and Services Tax Act, 2017 (**CGST Act**).

This update covers key judicial decisions relating to GST, service tax, customs and also some important indirect tax related notifications and circulars.

The key contention of the Petitioner was that the issuance of summons by the DGGI Officer was without jurisdiction, based on the fact that:

- The definition of 'proper officer' under Section 2(91) of the CGST Act does not cover DGGI Officers and therefore DGGI Officers are not empowered to issue summons under CGST Act on behalf of the Central Board of Indirect Taxes and Customs (**CBIC**).
- Section 167 of the CGST Act requires a notification to be issued for delegation of power by the Commissioner and no such notification has been issued by the Commissioner delegating power to DGGI officers.

The Court held that the definition of 'proper officer' in relation to any function to be performed under the CGST Act means, the Commissioner or a Central Tax officer who is assigned that function by the Commissioner. Through a Circular dated 5 July 2017, the CBIC had in fact assigned the functions of proper officers in relation to the various provisions of the CGST Act to Central Tax officers and therefore, as such the DGGI Officer has been assigned the function of 'proper officer'. Noting the distinction between assignment of functions as per section 2(91) and delegation of powers by the Commissioner under Section 167, the Court noted that no particular notification under Section 167 is required to be issued in such a case, as the power exercised by DGGI officer is not a delegated power from the Commissioner.

1.2 Input Tax Credit to be allowed on input inherently lost in manufacturing process

The Madras High Court in a batch of writ petitions titled as ***ARS Steels and Alloy International Pvt. Ltd. v. The State Tax Officer*** dealt with the issue of availability of Input Tax Credit (**ITC**) for a loss of input arising out of a manufacturing process. The tax officials sought a reversal for such ITC arguing that this loss of input attracted the restriction under clause (h) to Section 17(5) of the CGST Act which states that ITC will not be available in respect of *'goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples'*.

The Court held that the loss which is occasioned by the process of manufacture cannot be equated to any of the instances set out in clause (h) to Section 17(5) as such loss is inherent to the process of manufacture itself and the situations in clause (h) indicate loss of inputs that are quantifiable and involve external factors or compulsions.

2 Service Tax

2.1 CESTAT Bangalore upholds service tax demand on performance fee and carried interest paid to AMC by Venture Capital Funds

CESTAT, Bangalore in a batch of appeals titled as ***ICICI Econet Internet and Technology Fund v. Commissioner of Central Tax, Bangalore*** has upheld the demand of service tax on certain expenses incurred and disbursements made by a Venture Capital Fund (**VCF**) incorporated as a Trust.

The Appellant was a Venture Capital Fund (**Fund/Trust**) established as a trust under the Indian Trusts Act, 1882. The Fund was created by way of pooled or collective investments by several investors, who became contributing investors or beneficiaries of the Trust. The returns from such investments made by the Fund were subsequently disbursed among the contributors. ICICI Trusteeship Services Ltd was appointed as the 'Trustee' for the Fund who in turn, appointed ICICI Venture Funds Management Company as the asset management company (**AMC**), for the purpose of managing the Fund and providing professional and experienced advice, in lieu of which a performance fee was paid to the AMC by the Trust. The AMC and its employees/nominees were also entitled to certain 'carried interest' which was in the nature of additional return against their own investment in the Fund.

The service tax demand pertained to expenses which included performance fee paid to the AMC by VCF and disbursement of carried interest to Class B/C unit holders in the Trust as service income earned by the Trust under the category of 'Banking and Other Financial Services' (**'BOFS'**).

The allegation of the Department was that though certain amounts were withheld by the Appellant from the investors and given the colour of 'expenses', in reality, such amounts withheld as expenses constituted 'consideration' towards the BOFS rendered to the investors by the Appellant.

2.2 The CESTAT Order

2.2.1 On the Doctrine of Mutuality

The Appellant argued that there was complete mutuality of interest between the Fund (that was incorporated as a trust) and its contributing investors. They were not distinct from each other and that there could not be service to self in case of a trust.

However, CESTAT held that the Trust had violated the principle of mutuality by engaging in commercial activity and by using their discretionary power to benefit a certain class of investors, i.e., the AMC and its employees or subsidiaries who were paid huge amounts in the form of performance fee and carried interest. Further, the Trust had carried out commercial activities for maximising profits similar to Banks and Financial Institutions.

2.2.2 On provision of taxable service

The Appellants contended that a trust was not recognised as a 'person' under the service tax law prior to 2012. Levy of service tax under the BOFS category is on a banking company, or a financial institution, non-banking financial company or any other body corporate or commercial concern and a trust does not fall under any of these categories.

On this issue, CESTAT held that the concept of trust itself was a 'façade' as the Trust was evidently performing commercial operations. It was managing the amount invested by the contributors and had discretion over the distribution of dividends/ profit to entities other than the investors, such as the AMC and its nominees. The Trust should therefore be regarded as a juridical person rendering services liable to service tax.

2.2.3 On consideration

According to the Appellants, no consideration was received by it from investors. The Appellant had undertaken certain expenses (which included performance fee paid to the AMC) for facilitating investors to earn a profit on their investments and such expenses cannot be construed as consideration. Further, the carried interest that was paid to the AMC and its affiliates was a return on their investment (distinct from performance fee), which was also put to capital gains tax.

CESTAT held that as long as the Trust was performing a taxable service, they were liable to pay service tax thereon. CESTAT concluded that any amount that was retained out of the income distributable to the investors was nothing but a fee for the service rendered and that the Appellant, who ultimately was the principal service provider, was responsible for management of the Fund. Further, the carried interest was not a return on investment of the AMC or its affiliates, but a portion of the consideration retained by the Appellant and passed on to the special class of investors such as the AMC.

2.3 CESTAT Mumbai sets aside service tax demand on expenditure booked towards manpower cost of joint venture operations

CESTAT, Mumbai in *BG Exploration & Production India Ltd v. Commissioner of Service Tax (Audit-I)* has set aside an order of the Commissioner of Service Tax by which demand of service tax was confirmed on the expenditure incurred by the Appellant towards manpower cost for deploying personnel for joint venture operations.

The Appellant was engaged in the exploration, development and production of hydrocarbons under a joint operating agreement. The tax department raised a service tax demand alleging that the recruitment, training and deployment of manpower for the joint venture is a service within the meaning of Section 65B(44) of the Finance Act, 1994 (**Act**).

CESTAT however held that there was no external beneficiary i.e. third-party service recipient, in the arrangement between the parties and therefore, the 'joint operations' did not result in service within the meaning of Section 65B(44). It held that deployment of personnel by the Appellant was pursuant to its obligation under the joint venture. It further held that the activity undertaken by the Appellant, with its cost equivalent recorded in the books, was nothing but capital contribution of the Appellant towards the joint venture. Accordingly, it held that the fulfilment of the obligation to contribute to the capital of the joint venture is beyond the scope of taxation under the Act as it does not amount to consideration.

3 Customs

3.1 Larger Bench of CESTAT sets aside orders for addition of cost of transportation of Aviation Turbine Fuel (ATF) left over in the tank of the aircraft to the price of fuel for discharge of customs duty

The Larger Bench of CESTAT in *Jet Airways (India) Ltd. v. Commissioner of Customs* has answered a reference made to it regarding the addition of the cost of transportation of aviation turbine fuel left over in the tank of the aircraft (**remnant ATF**) to the price of the fuel for determining customs duty under Section 14 of the Customs Act, 1962. At the time of arrival of an international flight into India, airlines are required to discharge customs duty on the remnant ATF. The question before CESTAT was whether the cost of transportation of remnant ATF was to be added to the price of the fuel for determining customs duty payable by the airlines.

The contention of the Department was that since the cost of transportation of the remnant ATF in the tank of the aircraft is not ascertainable, such cost will be 20% of the Free on Board (**FoB**) value and will be added to the fuel price for the payment of customs duty.

CESTAT held that the cost of transportation incurred in respect of imported goods is required to be added to the value of the imported goods only if the same has been incurred. However, where there is no transportation of goods at all, nor any liability to incur the cost of such transportation, the provisions of Section 14 of the Customs Act and Rule 10 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 would not be attracted. In the present case the airline was not transporting the ATF for delivery to India (but filling it into its fuel tank for flying the aircraft), nor was any cost of transportation incurred. Accordingly, it was a consumable for the airline and no amount as 'cost' was payable towards the transportation of remnant ATF.

3.2 Central Government clarifies that re-import of goods sent abroad for repairs attracts IGST

The Central Government through a set of amendments as well as circular has clarified that re-import of goods sent abroad for repairs attracts IGST and cess on a value equal to the repair value, insurance and freight. The amendments nullify the effect of the judgement of the CESTAT, Delhi in a batch of appeals titled ***Interglobe Aviation Ltd. Vs. Commissioner of Customs*** where the CESTAT, Delhi had held that the Appellants were entitled to an exemption from payment of IGST on re-import of the repaired part/ aircrafts into India.

4 Important Notifications and Circulars

4.1 Circular No. 157/13/2021-GST dated 20 July 2021

The circular provides clarification on the extension of limitation under the Goods and Services Tax (**GST**) law in terms of the Order dated 27 April 2021 (**Order**) passed by the Supreme Court directing that the period(s) of limitation, as prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings, whether condonable or not, will be extended till further orders.

The circular clarifies:

a. **Proceedings that need to be initiated or compliances that need to be done by the taxpayers**

It has been clarified that such actions would continue to be governed only by the statutory mechanism and time limit provided/extensions granted under the statute itself. Various Orders of the Supreme Court would not apply to the said proceedings/compliances on part of the taxpayers.

b. **Quasi-Judicial proceedings by tax authorities**

The tax authorities will continue to hear and dispose off proceedings where they are performing the functions as quasi-judicial authority. This includes disposal of application for refund, application for revocation of cancellation of registration, adjudication proceedings of demand notices, etc. Similarly, appeals which are filed and are pending, will continue to be heard and disposed off and the same will be governed by those extensions of time granted by the statutes or notifications, if any.

c. **Appeals by taxpayers/ tax authorities against any quasi-judicial order**

Wherever any appeal is required to filed before Joint/Additional Commissioner (Appeals), Commissioner (Appeals), Appellate Authority for Advance Ruling, Tribunal and various courts against any quasi-judicial order or where a proceeding for revision or rectification of any order is required to be undertaken, the timeline for the same would stand extended as per the Supreme Court's Order.

Therefore, the extension of timelines granted by the Supreme Court vide the said Order is applicable in respect of any appeal which is required to be filed before Joint/Additional Commissioner (Appeals), Commissioner (Appeals), Appellate Authority for Advance Ruling, Tribunal and various courts against any quasi-judicial order or where proceeding for revision or rectification of any order is required to be undertaken, and is not applicable to any other proceedings under GST laws.