Indirect Tax Monthly Updates

15 September 2021

This update covers:

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

1 Goods and Services Tax (GST)

1.1 Telangana High Court: Demand of GST cannot be made unless liability of GST is determined under Section 74 of the CGST Act

The Telangana High Court in ***Deem Distributors Pvt. Ltd. v. UOI*** has directed the tax department to refund the amount collected during the stage of investigation along with interest from the date of payment of the amount till the date of refund.

The tax department alleged that the petitioner had availed Input Tax Credit (**ITC**) on the basis of fake invoices issued by fictitious suppliers. The tax department was still carrying out the investigation during which it issued letters to the petitioner to reverse ITC/pay GST. To buy peace with the tax department, the petitioner had deposited certain amount of money, however the letters issued by the tax department and recovery of tax was challenged by the petitioner before the High Court.

The Court held that without following the process under Section 74 of the Central Goods and Services Tax Act (**CGST Act**), i.e., determination of liability of tax, interest and penalty, there cannot be any demand of tax, interest and penalty. The Court further held that no tax demand can be raised when the investigation is still in progress.

This is an important judgment in the context of the practice of recovery of alleged tax amounts being made by the tax department during the course of investigation itself.

1.2 Delhi High Court: Search and Seizure to be authorised by the proper officer if there is a 'reason to believe' that a person has contravened provisions of GST law

The Delhi High Court in *RJ Trading v. Commissioner of CGST* has declared that search and seizure of documents by the CGST, Delhi Commissionerate was unlawful and directed them to release such documents at the earliest. The decision follows a search and seizure exercise conducted by the CGST, Delhi Commissionerate based on a communication received from CGST officer of a different Commissionerate. While the communication requested the CGST, Delhi Commissionerate to confirm whether the petitioner was an actual entity which existed the CGST, Delhi Commissionerate conducted a search and seizure at the premises of the petitioner.

The High Court held that the CGST officers should bear in mind that the power to conduct search and seizure is an intrusive power, which is ring-fenced with the insertion of a controlling provision, i.e., 'reason to believe'. Therefore, before authorising the search and seizure, the concerned jurisdictional officer should investigate and satisfy itself that there is a 'reason to believe' that a person has contravened provisions of GST law and/or has secreted documents/books etc.

2 Service Tax

2.1 CESTAT, Chennai holds that service tax is not leviable on liquidated damages

The Customs Excise and Service Tax Appellate Tribunal (**CESTAT**), Chennai in *M/s Steel Authority of India Vs. Commissioner of GST & C. Excise* has set aside an appellate order confirming service tax on liquidated damages. The service tax demand was confirmed and upheld against the appellant on the ground that (1) the appellant had agreed to tolerate breach of timelines stipulated in the contract and that (2) the amount imposed as liquidated damages was consideration for the act of tolerating the contractual default and amounted to a declared service under Section 66E of the Finance Act, 1994.

The CESTAT relied upon an earlier decision in M/s South Eastern Coalfields Ltd. vs. Commissioner of Central Excise and Service Tax, Raipur and held that (1) agreements have to be read as a whole so as to gather the intention of the parties and that (2) the recovery of liquidated damages from other party cannot be said to be towards any service per se. The purpose of compensation/liquidated damages is to ensure that the defaulting act is not undertaken or repeated and not for tolerating the default of the party.

3 Customs

3.1 Telangana High Court allows amendment of bill of entry under Section 149 of the Customs Act, 1962 to claim the benefit of exemption notification

The Telangana High Court, in ***M/s Sony India Pvt. Ltd. Vs. UOI & Anr.***, has set aside the order of the Assistant Commissioner of Customs whereby the request of the petitioner to amend the bills of entry was denied on the grounds that the assessment of bills of entry was an appealable order and in the absence of the same being challenged by the petitioner/importer, the same had attained finality.

The petitioner had imported mobile phones in India for trading purposes but had not claimed any exemption from countervailing duty under Notification No.12/2012-CE dated 17 August 2012 (**Exemption Notification**) at the time of import. However, the petitioner sought amendment of the bills of entry under Section 149 of the Customs Act in order to avail the benefit of the Exemption Notification at a later stage, which was rejected by the tax department which led to the writ petition before the Telangana High Court.

The High Court held that the Customs Act, apart from the remedy of appeal under Section 128 against any order, also enables the assessee to seek amendment of bill of entry under Section 149, subject to the condition that such amendment is sought on the basis of documentary evidence which was in existence at the time when the goods were cleared. Further, the High Court held that the Supreme Court in ITC Ltd. vs. Commissioner of Central Excise had nowhere said that such amendment or modification of an assessment order can only be done in an appeal under Section 128 of the Customs Act and in fact, had clearly indicated that the modification of assessment order can be done either under Section 128 or under other relevant provisions of the Customs Act such as Section 149.

4 Central Excise

4.1 CESTAT, New Delhi holds outward freight to be eligible input for availing CENVAT Credit in case of sales being made on FOR destination basis

The Principal Bench of CESTAT, New Delhi in ***M/s Chittor Polyfab Ltd. Vs. CCE***, has set aside the order-in-appeal which denied CENVAT Credit of outward freight services to the appellant.

In the present case, the appellant was clearing goods after receiving purchase orders from customers making the sales on Freight on Road (**FOR**) destination basis. Arranging for freight and engaging the transporter was the responsibility of appellant till the goods were actually delivered to the purchaser. Accordingly, an issue arose as to whether the appellant was entitled to avail the CENVAT Credit of the outward freight services.

The CESTAT observed that the term 'input service' under the CENVAT Credit Rules means any service used by manufacturer in relation to manufacture of final products and clearance thereof up to the 'place of removal'. The CESTAT thereafter examined the definition of the terms 'place of removal' and 'sale' under Central Excise Act, 1944 and the Sale of Goods Act, 1930 to conclude that until and unless the goods are delivered to the buyer and the title of the goods is transferred to the buyer, the sale does not take place and the goods cannot be said to have been sold. In case of FOR destination-based contracts, the possession of the goods remains with the seller during the transit and is transferred to purchaser when the goods reach him.

In the present case, the control and possession of goods remained with the appellant till they reached the place of the buyer. When the appellant had engaged the transporter, the appellant, instead of his buyer, became the service recipient of freight and thus, the same became his input on which he was entitled to avail the CENVAT Credit.

5 State Excise

5.1 Compensation to be paid to Retail Liquor Shops for closure during COVID-19 lock-down

A division bench of Tripura High Court in ***Abhishek Dahiya v. State of Tripura*** has dealt with the issue of payment of compensation to retail liquor shops under the Tripura Excise Act, 1987 (**Act**).

The petitioners were issued licenses for running shops for retail sale of liquor against payment of license fees on quarterly basis. Owing to the declaration of lockdown during the pandemic by the District Magistrate, the shops remained closed from 25 March 2020 to 3 May 2020. Thereafter, the petitioners approached the Court for the adjustment of the license fee already paid during the lockdown.

Examining the scope of Section 24 of the Act, the Court held that the statutory scheme clearly envisages compensating the licensees of the State Government engaged in the business of liquor vending when their shops had to remain closed on account of any of the grounds mentioned in Section 24 of the Act – one such ground being an order passed by the District Magistrate to this effect. The Court, thus, held that when the statute itself provides for such compensation, the respondents cannot refuse to pay the same.

The Court further held that a licensee enters a contractual relationship with the Government for sale of liquor, for which he agrees to pay certain royalty to the government as license fee. On its part, the Government authorizes the licensee to sell liquor for which it collects royalty from the vendor. One of the considerations in the statutory scheme provide that upon closure of liquor shops ordered by the District Magistrate for a period exceeding 6 hours, the licensee would be compensated by waiver of license fee for such period. If this basis of statutory assurance is removed, the very foundation of the agreement between the government and the licensee will become shaky.

Accordingly, the Court ordered that compensation should be paid to the liquor shop owners for the period of closure due to lockdown.

6 Important Notifications and Circulars

6.1 Notification No. 19/ 2015-2020 dated 17 August 2021

The Central Government has made amendments to the Foreign Trade Policy 2015-20 with effect from 17 August 2021 to allow refund of the currently un-refunded duties/ taxes/ levies at the Central, State and Local level borne on exported products. The rebate will not be available in respect of duties and taxes already exempted or remitted or credited and will be subject to receipt of sale proceeds within the time allowed under the Foreign Exchange Management Act, 1999. The amendments will take effect for exports undertaken from 1 January 2021.

6.2 Instruction No. 18/ 2021- Customs dated 17 August 2021

India has entered into Free Trade Agreements (**FTAs**) with various countries for promotion and facilitation of trade. The FTAs are given effect by way of notifications issued under the customs law in India which prescribe preferential tariff rate for import, the criteria to be met by the goods being imported to be eligible for such preferential tariff and operational procedures. In case the customs authorities in India have doubts about the eligibility of a particular product for preferential tariff under a particular FTA, the Certificates of Origin, as issued by the competent issuing authority abroad and produced before the customs authorities in India by the importers, are required to be put to verification.

In this context, the Central Board of Indirect Taxes and Customs (**Board**) has issued instructions in respect of verification of Certificate of Origin certificates issued by competent authorities abroad, on the strength of which the importers claim preferential tariff rate on imported goods in India. The instructions specify that the customs field formations should only forward representative Country of Origin certificates to the Board for verification and if a product has been verified following the due verification process earlier, subsequent consignment of the same product by the same manufacturer may not be considered for verification again, unless there are reasons to believe that the originating criteria is not met.

The instructions further provide that while forwarding the request for verification of the Country of Origin certificates to the Board, the proper officers should clearly indicate the 'reason to believe' why the goods do not meet the origin criteria and also enlist the specific information required from the Verification Authority, i.e., the competent authority abroad which has issued the Country of Origin certificate.

Lastly, the instructions emphasise that in cases where there is a doubt regarding the genuineness of the certificate or when the verification is undertaken randomly, the verification requests to the Board should be communicated immediately, while in cases where there are 'reasons to believe' that the country of origin criteria has not been met, the verification requests should be communicated within 10 days from the date of receipt of requisite information and documents from the importer.
