IDT E-BULLETIN

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Welcome to the third edition of the E-Bulletin (Volume III) brought to you by the Indirect Tax practice group of Khaitan & Co (KCO). This E-Bulletin covers regulatory developments, case law and news updates that would impact businesses from a sector agnostic standpoint.

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Indirect Tax E-Bulletin

Welcome to the third edition of the quarterly E-Bulletin brought to you by Khaitan & Co.

While COVID-19 has considerably slowed down India Inc. and resulted in a dip in the GST collections, there have been significant developments on the indirect tax front in different High Courts and the Supreme Court in the last quarter. On the one hand, important judgements such as *Brand Equity Treaties Limited* (represented by Khaitan & Co) and *Bharti Airtel Limited* (both by Delhi High Court) have liberally interpreted the provisions of GST to provide relief to haggard assesses, whereas on the other hand, the Apex Court has upheld amendments introduced by the Government curtailing benefits previously promised to assessees. In addition, there have been a few conflicting decisions such as those pertaining to recovery of revenue dues not admitted in the resolution plan prepared under IBC and the sanctity of time limit specified for filing Form GST TRAN-1, which are likely to end up before the Supreme Court for final resolution. Once again, the judiciary is seen to be playing a major role in shaping the reforms of the country.

On the regulatory front, given the grim situation, the Central Government has announced a series of measures in the form of relaxation in compliances, expeditious disbursal of refunds and extension of timelines, most of which have been covered.

Technology has also come to the rescue, with people operating from homes and court hearings (although only the urgent ones) being conducted online. Tribunals have issued procedures for conducting hearings online, while the tax authorities have also resorted to tele-conferencing. COVID-19 seems to have pushed the country towards greater adoption of technology, much sooner than anticipated.

Nonetheless, the coming few months, if not years, are going to be tough. We envisage greater scrutiny by the investigating authorities and stronger application of penal provisions in case of tax evasions, once relaxations are lifted. This is therefore a good time for the assesses to have a relook at their business structures and plug all the gaps.

We hope you enjoy this edition and find it useful.

Stay healthy and stay safe!

With regards

Indirect Tax Team
Khaitan & Co

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CASE LAW UPDATES

GOODS AND SERVICES TAX

Insolvency and Bankruptcy Code vis-à-vis Indirect Tax dues: Conflicting decisions

Revenue authorities not entitled to recover dues not admitted in the resolution plan: Rajasthan High Court

In *Ultra Tech Nathdwara Cement Limited, (formerly known as Binani Cements Limited) v Union of India & Ors.*[1], the Rajasthan High Court quashed various demands raised by the revenue authorities upon the Petitioner (an erstwhile corporate debtor) pertaining to the period prior to the taking over of its business by the successful resolution applicant (**pre-CIRP period**) and not admitted in the resolution plan. The High Court held that the resolution plan, under the Insolvency and Bankruptcy Code, 2016 (**Code**), was binding upon all creditors including the Central and State Governments and Courts had been given extremely limited power of judicial review. The High Court relied upon the decision of the Supreme Court in the case of *Committee of Creditors of Essar Steel India Limited*[2], which emphasised on the need for certainty in the insolvency resolution process from the standpoint of the successful resolution applicant, and finally concluded that it was not open for the revenue authorities to recover dues which were not considered by the resolution professional / committee of creditors and admitted in the resolution plan of the corporate debtor, from the Petitioner.

State revenue authorities, who were not involved in the insolvency resolution process, entitled to recover dues not admitted in the resolution plan: Jharkhand High Court

In *Electrosteel Steels Limited v State of Jharkhand and Others*[3], the Jharkhand High Court refused to quash garnishee proceedings initiated by the State revenue authorities towards demands under Jharkhand Value Added Tax Act, 2005 pertaining to the pre-CIRP period and not admitted in the resolution plan. Observing that the dues comprised of taxes already collected by the Petitioner from its customers *on behalf of the State Government*, the High Court stated that the same did not represent a direct debt of the Petitioner and therefore may not be covered within the meaning of the expression "operational debt" under the Code. Despite the resolution plan being approved by the appropriate adjudicating authority under the Code, the High Court observed that the Petitioner had failed to make a proper public announcement within the state of Jharkhand, as required under the Code. The High Court stated that the State revenue authorities had no knowledge of, and were not involved in, the insolvency resolution process and held that the resolution plan was therefore not binding on them.

KCO comments

The aforesaid two cases represent divergent views adopted by two High Courts in the context of indirect tax dues.

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1 D.B. Civil Writ Petition No. 9480 of 2019
2 Civil Appeal No. 8766-67 of 2019
3 W.P. (T) No. 6324 of 2019

On one hand, the Rajasthan High Court, by refusing to look beyond the claims admitted during the insolvency resolution process, has affirmed the supremacy of the resolution plan as approved by the committee of creditors. It may also be noted that a writ petition challenging similar demands raised by income tax authorities upon the same Petitioner is currently pending before the Calcutta High Court[4].

On the other hand, the Jharkhand High Court, by holding that the resolution plan would not bind the State revenue authorities on a seemingly technical ground (*i.e.* existence of a public announcement), has sanctioned recovery of dues outside the resolution plan. Interestingly, the High Court has also cast a doubt upon whether indirect taxes (*i.e.* those which are ultimately borne by the customer) at all could be covered within the meaning of the expression "operational debt".

The object of enacting the Code was *inter alia*, to provide certainty and predictability to the insolvency resolution process and ensure that the successful resolution applicant takes over the business of the corporate debtor with a 'clean slate'. The primacy and all-encompassing nature of the resolution plan is key to achieving this object. Permitting off-resolution plan dues to be recovered from the successful resolution applicant would not only throw into uncertainty amounts payable by such applicant, but also open the doors to unnecessary litigation running contrary to the stated object of the Code.

Validity of time limit prescribed for filing Form GST TRAN-1: Conflicting decisions

Time limit prescribed for claiming transitional credit is only procedural; Credit can be claimed within three years under law of limitation: Delhi High Court

In *Brand Equity Treaties Limited v Union of India and Others*[5], the Delhi High Court read down Rule 117 of the Central Goods and Services Tax Rules, 2017 (**CGST Rules**) insofar as it prescribed a time limit for transitioning past accumulated tax credits into the GST regime by furnishing Form GST TRAN-1. Observing that the Government had extended the time limit for taxpayers who were unable to furnish the said form owing to "technical difficulties" on the online GST portal and as such, had adopted a different yardstick for evaluating its own conduct (failure to maintain an error-free system, inefficient implementation of GST, etc.) and the conduct of taxpayers (failure to file the form within the due date), the High Court held that such an action – being arbitrary, vague and unreasonable – would not pass muster of Article 14 of the Constitution. The High Court further held that the expression "technical difficulties" should be broadly interpreted to cover difficulties faced by the Government as well as the assessees and not read to mean only those cases which are identified based on the system logs.

The High Court held the time limit specified in Rule 117 of the CGST Rules to be procedural in nature and stated that it would not result in forfeiture of the right vested in the assessee by virtue of Section 140(1) of the Central Goods and Services Tax Act, 2017 (**CGST Act**). The High Court, however, also held that absent any time limit provided in the CGST Act, the residuary time limit as provided under the Limitation Act, 1963 would apply and accordingly, a period of three years from the appointed date of 1 July 2017 would be the last date of transitioning past credits into the GST regime. The High Court concluded by

[4] W.P. No. 2036 (W) of 2020
[5] W.P. (C) No. 11040 of 2018

stating that other similarly situated assessees would also be entitled to avail benefit of its decision.

Time limit prescribed for claiming transitional credit not ultra vires the CGST Act; Credit not a right but a concession: Bombay High Court

In *Nelco Limited v Union of India and Others*[6], the Bombay High Court upheld the time limit specified in Rule 117 of the CGST Rules by stating that the same was traceable to the general rule-making power conferred upon the Central Government by the CGST Act and thus was neither *ultra vires* nor unreasonable. Rejecting the argument that past tax credits represented a right accrued in favour of the assessee, the High Court held that Section 140 of the CGST Act allowed transition of past tax credits as a matter of concession (and not as a right) and the same could therefore be regulated by specifying a time limit. Observing that tax credits both in the previous tax regime as also in the GST regime were conditional, the High Court stated that the time limit specified was thus in consonance with the object of the GST law. It was further stated that in cases where economic legislations were questioned, Courts must be slow to strike down a provision and exercise judicial restraint. The High Court extensively relied upon its previous decision in *JCB India Limited*[7] and while observing that other High Courts had granted reliefs on grounds of equity, refused to exercise equity jurisdiction in the absence of any defect perceived by it in the time limit prescribed under the CGST Rules.

KCO Comments

The aforesaid two cases represent divergent views adopted by two High Courts while adjudicating upon the validity of Rule 117 of the CGST Rules.

The decision of the Bombay High Court was a rare occasion where a High Court refused to grant relief to the assessee and upheld the time limit specified in the impugned provision. Despite an overwhelming number of High Courts upholding the assessee's right to transition past tax credits, the Bombay High Court, by consistently holding that past tax credits did not constitute absolute or indefeasible rights, has been hesitant to read down the impugned provision. The decision represents one of the few dissents in a controversy that is preventing a successful transition to the new regime.

On the other hand, the matter in the Delhi High Court was argued by KCO's Indirect Tax team and constitutes a significant development in the controversy surrounding the limitation prescribed, owing to its detailed analysis of the teething problems that confronted the initial months of implementation of GST. While High Courts across the country have undoubtedly granted similar reliefs to assessees, the aforesaid decision goes one step further inasmuch as it holds that the benefit of its judgement ought to be extended to other similarly situated taxpayers (who may not have approached the writ court). To that end, the High Court has directed the Respondents therein to widely publicise its judgement and permit filing of Form GST TRAN-1 until 30 June 2020.

It may be noted that since the Finance Act, 2020 has amended Section 140 of the CGST Act and authorised imposition of a time limit with retrospective effect from 1 July 2017[8], the contention that the time limit specified in the CGST Rules had no statutory backing is likely to be diluted. However, other substantive grounds remain, and the controversy is likely to

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[6] W.P. No. 6998 of 2018
[7] W.P. No. 3142 of 2017
[8] The amendment has come into force with effect from 18 May 2020

be settled only at the level of the Supreme Court, before whom the revenue authorities have already filed a Special Leave Petition[9].

Interest payable on net tax liability; Amendment to Section 50 applicable with retrospective effect: Madras High Court

In *Refex Industries Limited v Assistant Commissioner of CGST & Central Excise, Chennai*[10], the Madras High Court held that interest on delayed payment of GST would apply only to such portion of the liability as is paid by the assessee in cash. Observing that the term "delayed" used in the heading of Section 50 of the CGST Act connoted a state of deprival of funds, the High Court stated that the provision would not apply to cases where the State already possessed funds representing Input Tax Credit (**ITC**) belonging to the assessee. The High Court also took note of the proviso inserted in Section 50(1) by the Finance (No. 2) Act, 2019[11] and finally held that the said proviso should be read to be clarificatory and operate retrospectively.

KCO Comments

At the outset, it must be noted that the proviso inserted in Section 50(1) has not been brought into effect till date (contrary to what has been stated in the judgement). Writ petitions challenging demands of interest have been filed before various High Courts on the ground that interest should be levied only on the liability paid in cash, since that alone represented "delayed payment" on the assessee's part. Though the proviso has ostensibly not been inserted with retrospective effect, the Madras High Court has read it to be clarificatory and hence applicable retrospectively.

Following the footsteps of the Madras High Court, the GST Council has now recommended an amendment in GST law with retrospective effect from 1 July 2017[12], specifying that interest shall be payable only on such liability as is paid in cash.

Interestingly, the Telangana High Court in *Megha Engineering & Infrastructures Limited*[13] (distinguished in the aforesaid decision) has adopted a contrary position and held that interest shall be payable on the liability belatedly paid through cash as well as ITC. The High Court, in the said case, based its reasoning on the proposition that mere availability of ITC with the revenue authorities would not amount to "payment" since the authorities were entitled to appropriate the ITC only once returns were filed by the assessee.

Proceedings for recovery of interest cannot be initiated prior to adjudication: Jharkhand High Court

In *Mahadeo Construction Company v Union of India and Others*[14], the Jharkhand High Court held that if an assessee, following a delay in filing its return, discharges its tax liability but does not discharge its interest liability, the only recourse to the revenue authorities would be to initiate appropriate adjudication proceedings under the CGST Act. Acknowledging that the liability to pay interest was automatic, the High Court held that the same however, was necessarily required to be adjudicated through the mechanism provided in the CGST Act in the event the assessee disputed such liability on account of any reason. The High

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9 SLP (C) No. 7425 of 2020
10 W.P. No. 23360 of 2019
11 The proviso to section 50(1) of the CGST Act inserted by the Finance (No. 2) Act, 2019 specifies that interest on delayed payment of GST (due to delayed filing of returns) shall be levied only on such portion of the liability as is paid in cash
12 See press release issued by the GST Council following its 39th meeting held in New Delhi on 14 March 2020.
13 W.P. No. 44517 of 2018
14 W.P. (T) No. 3517 of 2019

Court further held that absent such adjudication, the interest would not be termed as an "amount payable under the CGST Act" and consequently no proceedings could be initiated for recovery of such amount.

KCO Comments

It is trite law that principles of natural justice must be followed prior to initiating any adverse action against an assessee. However, Section 75(12) of the CGST Act appears to permit a deviation from such practice by authorising the revenue authorities to initiate proceedings for recovery of interest, without resorting to the methods of adjudication provided in Sections 73 and 74 of the CGST Act. The Jharkhand High Court, by holding to the contrary, has accorded primacy to the principles of natural justice in matters pertaining to recovery of interest.

It may be noted that an identical view has been taken by the Karnataka High Court in *M/s LC Infra Projects Private Limited*[15], the Madras High Court in *M/s Daejung Moparts Private Limited*[16] and by the Jharkhand High Court itself in *Godavari Commodities Limited*[17].

Prayer for expansion of budgetary support scheme rejected; Plea of estoppel not to be enforced against a statute: Delhi High Court

In *M/s Hero MotoCorp Limited v Union of India and Others*[18], the Delhi High Court dismissed a challenge to the *Scheme of budgetary support under Goods and Service Tax Regime to the units located in States of Jammu & Kashmir, Uttarakhand, Himachal Pradesh and North East including Sikkim* (**Scheme**) seeking to expand the presently available benefit of partial reimbursement of CGST and Integrated Goods and Services Tax (**IGST**) to complete reimbursement of CGST and IGST – to align the benefits with the pre-GST regime, where exemption from complete Central Excise Duty was available. The High Court noted that the Central Government had formulated the Scheme in recognition of difficulties arising out of withdrawal of previously available exemptions, faced by assessees such as the Petitioners. However, the High Court held that such recognition could not be understood as admission of any right in favour of the Petitioner and it was therefore not open for the Petitioner to insist that the Scheme should provide the entirety of previously promised benefits. The High Court also referred to the proviso to Section 174(2)(c) of the CGST Act, which stated that any tax exemption granted as an incentive would not continue as a privilege upon its rescission post introduction of GST, and held that the doctrine of promissory estoppel could not be enforced against a statute.

KCO Comments

The Delhi High Court, by refusing to enforce estoppel against the Government, has delivered a blow to a large number of assessees who have approached various High Courts seeking identical writs against curtailment of previously promised incentives due to introduction of GST. Considering the need to promote industrial development in backward states and the inherent challenges of setting up factories in such areas, it is unfortunate that the High Court has rejected the Petitioner's contentions.

However, it is worthwhile to note that the Petitioner in the aforesaid case had not challenged the *vires* of the proviso to Section 174(2)(c) of the CGST Act nor the rescinding

[15] Writ Appeal No. 188 of 2020 (T-RES)
[16] W.A. Nos. 2151 and 2171 of 2019
[17] W.P. (T) No. 1786 of 2019
[18] W.P. (C) No. 505 of 2020

notifications themselves. Relying upon a recent decision of the Supreme Court in *M/s Birla Corporation Ltd*[19], an attempt may be made to distinguish the aforesaid decision and argue that the aforesaid proviso and the rescinding notifications themselves are bad in law since the dominant purpose for which the incentive was originally introduced (to promote industrial development in backward states) had not ceased to exist post introduction of GST.

Please also see our coverage of the recent landmark decision of the Supreme Court in the case of M/s V.V.F. Limited, later in this e-bulletin.

Rectification of Form GSTR-3B should be allowed in respect of the period in which error occurred and not the period in which error was noticed: Delhi High Court

In *Bharti Airtel Limited v Union of India and Others*[20], the Delhi High Court held that the self-validation system statutorily envisaged through introduction of Forms GSTR-1, GSTR-2 and GSTR-3, which enabled an assessee to verify, validate, modify or delete the information for each tax period prior to making payment of tax, was critical to ensure successful implementation of GST. The High Court observed that the introduction of Form GSTR-3B (a summary return) as a replacement for Form GSTR-3 was contrary to the statutory provisions inasmuch as it did not permit validation of information prior to uploading/payment of tax. The High Court noted that the Government had failed to operationalise Forms GSTR-2 and GSTR-3 and had thereby deprived the taxpayers of their statutory right to rectify/adjust ITC in the very period to which it relates. Finally, observing that Circular No. 26/26/2017-GST dated 29 December 2017 mandated rectification in Form GSTR-3B in the month in which the error was noticed and thereby restricted rectification in respect of the month in which the error had occurred, the High Court read down the circular to the extent it so mandated.

KCO Comments

By holding that the right to rectify Form GSTR-3B in respect of the period in which the error has occurred, to be a substantive right, the Delhi High Court has come down heavily upon the Government for failing to fully enforce the return filing scheme as envisaged under the GST law and thus depriving the taxpayers of the opportunity to accurately reconcile their ITC in the month of filing. The aforesaid decision may be relied upon by taxpayers who have been issued notices/letters by the revenue authorities seeking reconciliation of ITC for the period prior to September 2018 (*i.e.* prior to availability of Form GSTR-2A). The decision may also be potentially relied upon by taxpayers who had previously paid their liabilities in cash owing to non-availability of Form GSTR-2A (by adopting a conservative approach) and have now been left with a large balance of accumulated ITC, the refund of which is not available except in certain specified situations.

Services provided by whole-time directors taxable on reverse charge basis: Rajasthan AAR

The Authority for Advance Ruling (**AAR**), Rajasthan in *M/s Clay Craft India Private Limited*[21], ruled that whole-time directors were not employees of the company (contrary to the stated facts) and services provided by them were not covered under paragraph 2 of Schedule III

[19] 2019-VIL-38-SC
[20] W.P. (C) No. 6345 of 2018
[21] Advance Ruling No. RAJ/AAR/2019-20/33

to the CGST Act[22]. The AAR observed that Notification No. 13/2017-Central Tax dated 28 June 2017 had given a separate identity to the services provided by directors by including them in the list of services covered under reverse charge mechanism (**RCM**) and ruled that consideration of any kind paid to directors would attract GST.

KCO Comments

The ratio of the aforesaid ruling is identical to that delivered by the AAR, Karnataka in the case of *M/s Alcon Consulting Engineers (India) Private Limited*[23]. Both the aforesaid rulings are surprisingly inadequate in their reasonings since they fail to acknowledge the fundamental principle that a service could be covered under RCM only if it was a "supply" under Section 7(1) of the CGST Act. The AARs have failed to appreciate that Section 7(2) which refers to Schedule III begins with a non-obstante clause that enables it to prevail over the meaning of the expression "supply" provided in sub-Section (1). Accordingly, only such services as are provided by directors who are not employees of the company (such as independent directors, nominee directors, non-executive directors, etc.) or are provided otherwise than in the course of their employment, would be exigible to GST.

The Central Board of Indirect Taxes and Customs (**CBIC**), in a circular issued after pronouncement of the aforesaid rulings (No. 140/10/2020 – GST dated 10 June 2020) has brought in much-needed clarity by correctly appreciating the aforesaid distinction. In light of this circular, the rulings delivered by the aforesaid AARs are likely to be reversed in appeal.

The provisions governing taxability of services provided by directors have been carried forward from the service tax regime. Accordingly, Circular No. 115/09/2009-ST dated 31 July 2009 as well as several decisions of the Customs, Excise and Service Tax Appellate Tribunal (**CESTAT**) such as those in the case of *Allied Blenders and Distillers Private Limited*[24], *Maithan Alloys Limited*[25], *Rent Works India Private Limited*[26] and *PCM Cement Concrete Private Limited*[27] can also be safely relied upon to adopt a position contrary to the aforesaid rulings.

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[22] Activities or transactions which shall be treated neither as a supply of goods nor a supply of services: Services by an employee to the employer in the course of or in relation to his employment

[23] Advance Ruling No. KAR ADRG 83/2019; However, the AAR Karnataka has also adopted a contrary view in Advance Ruling No. KAR ADRG 30/2020 (*M/s Anil Kumar Agrawal*)

[24] 2019 (24) G.S.T.L. 207 (Tri. – Mumbai)

[25] Appeal No. 75277 of 2016 (Kolkata Bench)

[26] 2016 (43) S.T.R. 634 (Tri. – Mumbai)

[27] 2018 (9) G.S.T.L. 391 (Tri. – Kolkata)

SERVICE TAX

Validity of Service Tax audit notice issued after introduction of GST upheld: Delhi High Court

In *Aargus Global Logistics Private Limited v Union of India and Another*[28], the Delhi High Court dismissed a challenge to Rule 5A of the Service Tax Rules, 1994 (**Service Tax Rules**) and letters issued by the revenue authorities seeking information and documents for the purpose of conducting Service Tax audit, post introduction of GST. Rejecting the contention of the Petitioner that Section 174(2) of the CGST Act protected only those proceedings which were initiated prior to enactment of the CGST Act, the High Court observed that clause (e) of the said Section expressly authorised institution of enquiries, investigations and other proceedings even after enactment of the CGST Act and there was nothing to show that the Parliament intended otherwise. The High Court further rejected the contention of the Petitioner that the CGST Act contained no provision to save the Service Tax Rules, by observing that clause (b) of the said Section accorded protection to anything duly done under Chapter V of the Finance Act, 1994 and holding that the Service Tax Rules (framed under the said chapter) had been saved by virtue of the said clause.

KCO Comments

Post introduction of GST, the CBIC has set its sights on completion of audit and investigation exercises pertaining to the erstwhile indirect tax laws for the period up to June 2017. Accordingly, issuance of requisition letters for the purpose of initiating Service Tax / Central Excise audits has become a routine feature. By relying upon the express language of Section 174 of the CGST Act, the Delhi High Court has rightly upheld all such proceedings pertaining to the erstwhile indirect tax laws that have been initiated post introduction of GST.

[28] W.P. (C) No. 2580 of 2020

CENTRAL EXCISE

Subsequent notification restricting previously promised policy benefits valid; Estoppel will not apply: Supreme Court

In *Union of India and Another v M/s V.V.F. Limited and Another*[29], the Supreme Court upheld the validity of certain notifications issued under the Central Excise Act, 1944 (**Amending Notifications**) amending certain exemption notifications previously issued (**Original Notifications**) to give effect to the Industrial Policy of the Central Government for promoting investment in industrially backward areas. The Amending Notifications, which had the effect of restricting the amount of exemption previously promised, were also applicable to entities which had already made investments by relying upon the Original Notifications.

The Supreme Court stated that an exemption granted under Central Excise law was susceptible of being revoked, modified, or subjected to conditions. Observing that the previously promised exemption was misused to a large extent, the Supreme Court held that the Amending Notifications, being clarificatory, merely rationalised the quantum of exemption to align it with the objective of the Industrial Policy. It also observed that the presumption against retrospective operation did not apply to clarificatory legislations.

The Supreme Court finally held that the Amending Notifications were clarificatory in nature and did not take away any vested rights conferred by the Original Notifications. It also held that the Amending Notifications were not hit by the doctrine of promissory estoppel and had to be applied retrospectively.

KCO Comments

The test of supervening public interest is often applied to adjudge whether an executive action falls foul of the doctrine of promissory estoppel. It is also well established that Courts would not act on mere *ipse dixit* of the executive and instead insist on a highly rigorous standard of proof to justify its action on the grounds of supervening public interest.

In the context of taxation statutes, the doctrine is readily invoked whenever an attempt is made by the Government to radically alter or withdraw the scheme of benefits previously promised, in the garb of "public interest". In the aforesaid case, the Union of India's contention that the Amending Notifications were issued merely to rationalise the exemption and prevent its misuse ultimately found favour with the court, which viewed the action to be in public interest.

Considering that the application of doctrine of promissory estoppel is contextual and contingent upon the test of supervening public interest being satisfied, the aforesaid decision may not apply *proprio vigore* to all instances of promised benefits being curtailed. It will be interesting to see how other petitions presently pending before various High Courts, notably challenging revocation of benefits promised under the erstwhile tax regime due to implementation of GST, are dealt with in future.

[29] Civil Appeal Nos. 2256-2263 of 2020

CUSTOMS

Payments for post-importation expenses, not being pursuant to any condition of sale, not includible in the assessable value despite the contract being similar to a turnkey project: Supreme Court

In *Commissioner of Customs (Port), Kolkata v M/s Steel Authority of India Limited*[30], the Supreme Court held that payments towards erection, commissioning, supervision and performance testing of the equipment upon importation in India and towards designs and drawings meant for post-importation activities were not includible in the assessable value in the absence of any specific finding that the said expenses were incurred as a 'condition of sale' of the equipment. The Supreme Court held that merely because the aforesaid payments were made to the same seller and the contract resembled a turnkey project, the existence of a 'condition of sale' could not be presumed to be implicit therein. Observing that there was nothing on record to suggest that the import of equipment had to be supplemented by post-importation activities, the Supreme Court held that the provisions of rule 9(1)(e) of the erstwhile Customs Valuation Rules[31] could not be automatically applied to every instance of import having surface features of a turnkey project.

KCO Comments

The Supreme Court, by refusing to accept the contention that importation of the equipment and payments towards post-importation activities were mutually dependent since the contract was similar to a turnkey project, has affirmed its previous decisions in *Essar Steel Limited*[32] and *Tata Iron and Steel Company Limited*[33] and reiterated that payments towards post-importation activities should not be included in arriving at the assessable value of goods.

Although the principle laid down in the aforesaid decision may well be relied upon by importers pursuing similar litigations, it is important to note that the aforesaid case did not involve a related party transaction. Considering that provisions of rule 10(1)(e) of the Customs Valuation Rules[31] are often invoked by revenue authorities in cases involving related party imports and the fact that such imports are subjected to a greater level of scrutiny, demonstration of an arm's length import price (independent of any other post-importation payment) and absence of any condition linked to the transaction of import would still be critical for acceptance of transaction value.

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[30] Civil Appeal No. 6398 of 2009

[31] Rule 9(1)(e) of the erstwhile Customs Valuation (Determination of Price of Imported goods) Rules, 1988 corresponds to rule 10(1)(e) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and mandates inclusion of all payments actually made or to be made as a condition of sale of the imported goods, by the buyer to the seller, or by the buyer to a third party to satisfy an obligation of the seller to the extent that such payments are not included in the price actually paid or payable – in determining the transaction value of imported goods for the purpose of calculating duties of customs.

[32] 2015 (319) E.L.T. 202 (S.C.)

[33] 2000 (116) E.L.T. 422 (S.C.)

Exemption from payment of IGST and Compensation Cess available to EPCG licence holders from 1 July 2017; Notification granting exemption from a subsequent date clarificatory: Gujarat High Court

In *M/s Prince Spintex Private Limited v Union of India*[34], the Gujarat High Court held that Notification No. 79/2017-Customs dated 13 October 2017 *inter alia* granting exemption from IGST and GST Compensation Cess on import of goods by Export Promotion Capital Goods (**EPCG**) licence holders, was clarificatory or curative in nature and thus retrospectively applicable from 1 July 2017. The High Court also held that Notification No. 26/2017-Customs dated 29 June 2017 which effectively restricted EPCG licence holders from availing the said exemptions was repugnant to the Foreign Trade Policy (**FTP**). The High Court further held the aforesaid notifications were not exemption notifications simpliciter but were issued for implementation of the EPCG scheme. Accordingly, they had to be read in the context of the EPCG scheme keeping in mind the object envisaged by the FTP.

KCO Comments

Curtailment of benefits previously promised under the FTP following the introduction of GST was challenged before various High Courts throughout the country, on the grounds of violation of the doctrine of promissory estoppel and conflict with the stated objective of the FTP. The decision of the Gujarat High Court, though delivered in the context of the EPCG scheme, follows other decisions such as *Narendra Plastic Private Limited*[35] (argued by KCO's Indirect Tax team) and *Jindal Dyechem Industries Private Limited*[36] delivered by the Delhi High Court on the same issue in the context of the Advance Authorisation scheme. It may be noted that the Special Leave Petitions[37] against both the aforesaid decisions have been dismissed by the Supreme Court.

[34] Special Civil Application No. 20756 of 2018
[35] W.P. (C) No. 6534 of 2017
[36] W.P. (C) No. 8677 of 2017
[37] SLP (C) No. 454 - 455 of 2019 and SLP (C) No. 456 of 2019

REGULATORY UPDATES

With a view to facilitate smooth functioning of business activity and provide relief from compliances amidst the COVID-19 outbreak, the Ministry of Finance and Ministry of Commerce and Industry have announced a slew of relaxation measures. In addition to these, few key clarifications have been provided in terms of certain business processes. A broad overview of the key updates in the area of indirect taxes and foreign trade has been set out below:

GOODS AND SERVICES TAX

Interest and late fee waivers on delayed filing of returns (Form GSTR-3B and Form GSTR-1) and payment of Goods and Services Tax (GST) for the tax periods February 2020 to April 2020

- Complete waiver of interest and late fee for taxpayers having an aggregate turnover of up to INR 5 crore;
- For taxpayers having aggregate turnover of more than INR 5 crore, complete waiver of late fee has been granted. However, interest waiver has been granted in the following manner:

First 15 days:	No interest
After 15 days, up to the below mentioned due dates:	9% p.a.

The above concessions are subject to the condition that the returns are filed between 24 June 2020 and 6 July 2020.

Extension of due date for furnishing GST return (Form GSTR-3B) for the tax period of May 2020

Taxpayers having aggregate turnover of more than INR 5 crore:	27 June 2020
Taxpayers having aggregate turnover of up to INR 5 crore:	12 July 2020 or 14 July 2020[#]

([#]depending upon the State)

Facility of verifying Form GSTR-3B through electronic verification code (EVC) / short messaging service (SMS)

Taxpayers, who are registered under the provisions of Companies Act, 2013 have additionally been provided the facility of verifying and filing Form GSTR-3B between 21 April 2020 and 30 June 2020 through an EVC, along with the pre-existing facility of verifying and filing through digital signature certificate. Further, an amendment has been made in the CGST Rules to enable taxpayers who are required to file a Nil return, to do so though SMS, with effect from 8 June 2020.

Extension of due date for furnishing annual return for FY 2018-19

The due date for furnishing annual return for FY 2018-19 has been extended till 30 September 2020.

Extensions in timelines for composition taxable persons

Form	Description	Due date	New due date
GST CMP-02	Intimation to opt for composition levy (FY 2020-21)	31 March 2020	30 June 2020
GST ITC-03	Declaration at the time of opting for compositions levy	30 May 2020	31 July 2020
GST CMP-08	Statement of self-assessed tax (for quarter ended 31 March 2020)	18 April 2020	7 July 2020
GSTR-4	Return for FY 2019-20	30 April 2020	15 July 2020

Availing unmatched ITC

The restriction on availing unmatched ITC (under Rule 36 of CGST Rules) would apply cumulatively for the tax periods from February 2020 to August 2020. Cumulative adjustment of such ITC to be made at the time of filing Form GSTR-3B for September 2020.

Extension of timelines for other compliances

Time limits for completion or compliance of various actions by revenue authorities/taxpayers such as filing of documents, replies, reports, statements, declarations, appeals, returns, etc. (subject to certain exceptions), falling between 20 March 2020 and 29 June 2020 have been extended up to 30 June 2020.

Extension of timeline for furnishing Letter of Undertaking (LUT)

Time limit for furnishing LUT for FY 2020-21 for zero-rating exports and supplies to special economic zone units/developers has also been extended up to 30 June 2020. Taxpayers may continue to make supplies without payment of GST by quoting the LUT reference number allotted for FY 2019-20.

Intra-head and inter-head transfer of cash balances

With effect from 21 April 2020, intra-head (minor heads: tax, interest, penalty, fee, other amount) and inter-head (major heads: central tax, integrated tax, state tax or union territory tax or cess) transfer of balances available in electronic cash ledger has been permitted.

Special procedures notified under GST law for corporate debtors undergoing insolvency resolution

Special procedures have been notified for corporate debtors the management of whose affairs is being undertaken by an RP (other than those who have duly furnished all GST returns prior to the appointment of RP), which are to be followed from the date of the appointment of the RP. A gist of these special procedures is provided below:

Registration

The corporate debtor shall, with effect from the date of appointment of RP, be treated as a *distinct person of the corporate debtor* (**Distinct Person**) and be liable to take a new registration in each of the States or Union Territories in which the corporate debtor was previously registered, within thirty days of the appointment of RP or by 30 June 2020, whichever is later.

First return

The said Distinct Persons shall file their first return declaring *inter alia*, the supplies made or received in the period between the date on which such Distinct Person became liable to registration and the date on which registration was granted.

ITC

- ITC on invoices received since the appointment of RP, but bearing the GST Identification Number (GSTIN) of the erstwhile corporate debtor, shall be available to the said Distinct Person, notwithstanding the time limit specified under the GST law for availing such ITC or the fact that such invoices do not appear in Form GSTR-2A of such person.
- The CBIC has clarified that the aforesaid exception has been carved out only for the first return filed by the Distinct Person.
- Customers of the corporate debtor shall be allowed to avail ITC on invoices issued using the GSTIN of the erstwhile corporate debtor. This shall be applicable for supplies received in the period between the date of appointment of RP and the date of registration of such Distinct Person, notwithstanding the fact that such invoices do not appear in Form GSTR-2A of such customers.
- Any amount deposited in the cash ledger against the GSTIN of the erstwhile corporate debtor, for the period between the date of appointment of RP and the date of registration of the Distinct Person, shall be available for refund. The CBIC has clarified that the above shall apply notwithstanding the fact that the corporate debtor may not have filed the relevant GST returns during the said period.

Clarifications

Additionally, the Government has provided the following clarifications:

- No coercive action should be taken against the corporate debtor with respect to the dues pertaining to the pre-CIRP period. Such pre-CIRP dues shall be considered as 'operational debt' and claims may be filed before the National Company Law Tribunal in accordance with the provisions of IBC.
- The RP is not under an obligation to file returns pertaining to the pre-CIRP period. However, the RP shall be liable to furnish returns, make payment of taxes and comply with all other provisions of the GST laws during the CIRP period.

Refund to be granted in the form of credit

Amendments have been carried out in the CGST Rules to permit grant of refund (other than of IGST paid on zero-rated supplies or deemed exports) proportionately in the original modes of payment of tax *i.e.* in cash or by re-crediting the amount in the assessee's

electronic credit ledger, as applicable. This is to address any pendency which may arise on account of liquidity concerns at the end of the revenue departments.

Recovery of refund granted on account of non-realization of export proceeds

If the export proceeds (or a portion thereof) are not realized within the period specified under the Foreign Exchange Management Act 1999 (**FEMA**) or within such extended period as may be permitted, then the proportionate refund of the IGST paid on the export leg or of unutilized ITC, shall be recovered from the assessee with interest. However, in the event the Reserve Bank of India writes off the requirement of realization of sale proceeds for such assessee, no such recovery shall be made.

Restriction on refund of accumulated ITC against zero-rated supply of goods

Amendments have been made in the CGST Rules having the effect of restricting the refund of unutilized ITC, ordinarily available to an assessee to the extent attributable to its **actual** turnover of zero-rated supplies (covering export of goods/services and supplies to Special Economic Zone unit/developer). The said restriction has been imposed by amending the definition of "*turnover of zero-rated supplies of goods*" to provide that the same shall be **lower** of the following:

- Actual turnover on account of zero-rated supplies of goods (without payment of tax); or
- 1.5 times the value of like goods domestically supplied by the assessee (or by a similarly placed supplier).

The aforesaid restriction, brought in by way of an amendment in the CGST Rules, is bound to be challenged in the Courts as the same is not backed by any provision of the CGST Act.

Rebate option for assessees availing exemption only against Basic Customs Duty

Previously, the option of exporting goods or services on payment of IGST and subsequently claiming a refund thereof (Rebate option) was not available to exporters claiming benefits of certain notifications which allowed for duty-free imports (for example, Advance Authorisation Scheme, Export Oriented Undertaking Scheme, etc.).

With the recent amendment in the CGST Rules, such exporters have been permitted to avail the Rebate option in cases where the duty-free import benefit has been availed only in respect of Basic Customs Duty and not IGST or GST Compensation Cess.

CUSTOMS

Relaxation from submission of bond for importer / exporter

Condition of submitting bond required under the Customs Act, 1962 has been relaxed, subject to compliance of certain prescribed conditions. The importer / exporter may submit an undertaking in lieu of bond. This relaxation would be available up to 15 June 2020 and the importer / exporter availing benefit of the relaxation would be required to submit the bond by 30 June 2020.

Relaxation from submission of Certificate of Origin

Goods imported under free trade agreements have been permitted to be provisionally cleared without submission of physical Certificate of Origin. The importers can submit a digitally signed copy or unsigned copy of the Certificate of Origin at the time of clearance. The final assessment would be done subsequently on submission of the original Certificate of Origin by the importer.

Paperless customs

Several measures have been announced to facilitate & expedite customs clearance in a more automated and paperless manner. Some of the additional measures taken by customs in this direction are:

- Facility of electronically generating out-of-charge copy of bill of entry;
- Facility of electronically generating Gate pass.

These measures have been made effective from 15 April 2020.

E-sealing of goods

Implementation of e-sealing of goods for deposit in and removal of goods from customs bonded warehouses has now been deferred to 1 July 2020.

Facilitation of refunds against export of goods

Export refund process has been fully automated. However, difficulties were faces by certain exporters in claiming refund due to mismatch of invoice number in the Shipping Bill and GST returns (SB005 error). This error was earlier permitted to be rectified through Customs Electronic Data Interchange (EDI) system for shipping bills. This facility has now been extended for shipping bills filed up to 31 December 2019.

E-hearings

Modalities for conducting personal hearings in virtual mode, in respect of various department-level proceedings under the Customs Act, 1962, Central Excise Act, 1944 and Chapter V of Finance Act, 1994 (Service Tax law) have been notified.

FOREIGN TRADE POLICY 2015-20

Foreign Trade Policy 2015-20 extended to 31 March 2021 with the following modifications:

- Eligible categories for Service Exports from India Scheme (SEIS) benefits for FY 2019-20 would be notified separately;
- Decision on continuation of SEIS for services rendered during FY 2020-21 would be notified separately;
- Exemption from IGST and GST Compensation Cess on imports against Advance Authorization / EPCG licenses for physical exports has been extended up to 31 March 2021;
- Validity of all Duty-Free Import Authorizations (DFIA) / EPCG licenses expiring between 1 February 2020 and 31 July 2020 has been extended by six months;
- Exemption from IGST and GST Compensation Cess on import or procurement from bonded warehouse or international exhibition (in India) available to Export Oriented units / Electronic Hardware Technology Park units / Software Technology Park units / Bio-Technology Park units has been extended up to 31 March 2021.

Corresponding notifications under the Customs Act, 1962 have also been issued in respect of the above.

One-time condonation for EPCG

One-time condonation in obtaining block-wise extension of export obligation under EPCG scheme has been granted.

OTHER INDIRECT TAX LAWS

Extension of timelines

Time limits specified or prescribed under the aforesaid laws for completion or compliance of the following actions, falling between 20 March 2020 and 29 June 2020 have been extended up to 30 June 2020:

- Completion of any proceeding or issuance of any order, notice, intimation, notification or sanction or approval, by whatever name called, by any authority, commission, tribunal, by whatever name called; or
- Filing of any appeal, reply or application or furnishing of any report, document, return or statement, by whatever name called.

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NEWS UPDATE

CESTAT procedures amended to facilitate remote hearings

To ensure continuity of work, the CESTAT has notified procedures to facilitate e-hearings, via video conferencing. However, even under the revised procedures, physical copies of appeals / cross-objections / stay applications are still required to be filed, along with soft copies thereof in two pen drives. Additional details like email address and mobile numbers of both, appellants and respondents, are required to be mandatorily supplied in the appeal / cross objection memos. A declaration stating that the soft copies supplied are true copies of the original documents, is further required to be provided at the time of filing.

We hope this E-Bulletin enables you to assess internal practices and procedures in view of recent legal developments and emerging industry trends in the indirect tax landscape.

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