THE TAX POST

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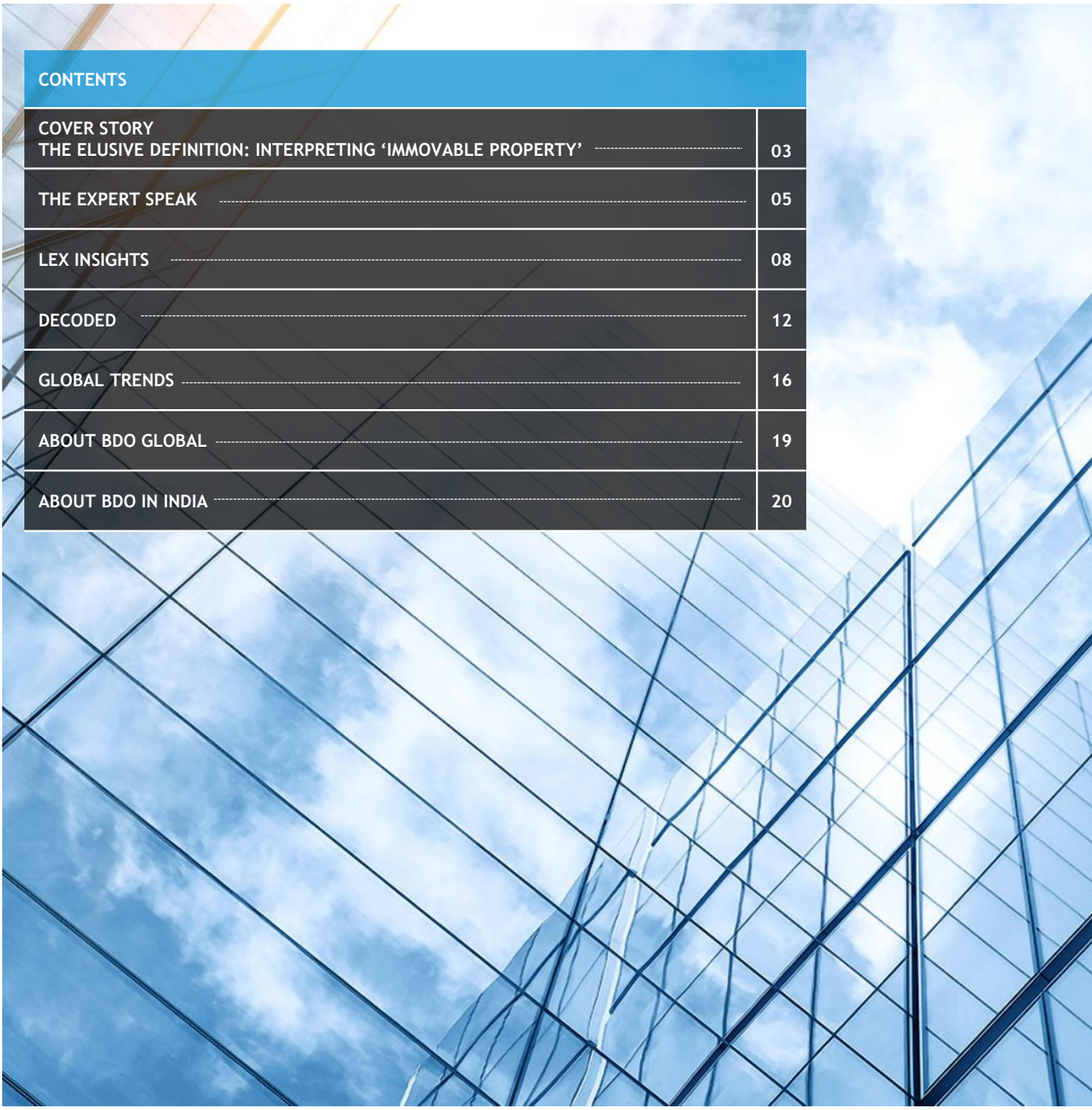

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PREFACE

"The art of taxation consists of plucking the goose so as to obtain the most feathers with the least hissing."

- Jean-Baptiste Colbert

Section 17(5)(c) of Central Goods and Services Tax Act, 2017 (CGST Act) stipulates that input tax credit (ITC) shall not be available on Works contract services supplied for construction of immovable property (other than **plant and machinery**) except where it is an input service for further supply of Works contract services. Additionally, Section 17(5)(d) of CGST Act restricts ITC on goods or services or both received for the construction of immovable property (other than **plant or machinery**) on his own account including when such goods or services or both are used in the course or furtherance of business. While the term 'construction' is defined in Explanation to Section 17(5)(d) of the CGST Act, the phrase 'immovable property' is not defined under the GST law. The 'Cover Story' section in this edition of the 'Tax Post' delves into the meaning and scope of the term 'immovable property' while also setting out the tests for classifying a property as 'immovable'.

In this edition's 'Expert Speak' segment, we provide an in-depth analysis of the Authorised Economic Operator programme, which forms the core of Customs-to-Business Partnership. This programme aims to foster stronger collaboration between key stakeholders in the international supply chain, including importers, exporters, logistics providers, custodians or terminal operators, custom brokers, and warehouse operators.

The 'Lex Insights' segment explores the legislature's authority to enact retroactive tax amendments, particularly examining their implications in light of the 55th GST Council's recommendation to amend Section 17(5)(d) of the CGST Act with retrospective effect which seeks to overturn the Supreme Court's judgment in ***Safari Retreats Pvt. Ltd.***[1]

In the 'Decoded' segment, we analyse a vital judgement reiterating the well-established legal principle that an unreasonable delay in adjudication of show cause notices is impermissible and unsustainable in law, especially when the tax authorities fail to establish the existence of an insurmountable constraint impeding their power to conclude adjudication proceedings within a reasonable period.

Lastly, we continue to bring the latest updates on indirect taxes from across the globe in our 'Global Trends' feature.

We wish our readers happy reading!

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[1] Chief Commissioner of CGST and Ors. Vs. M/s. Safari Retreats Pvt. Ltd. and Ors. [TS-622-SC-2024-GST]

COVER STORY

The Elusive Definition: Interpreting 'Immovable Property'

INTRODUCTION

Section 16(1) of the Central Goods and Services Tax Act, 2017 (CGST Act) enables a registered person to claim input tax credit (ITC) of GST charged on procurement of goods or services or both which are used or intended to be used by such registered person in the course or furtherance of business. The eligibility to claim ITC is subject to various conditions and restrictions including those provided under Section 17 of the CGST Act.

Of immediate relevance is Section 17(5)(c) and (d) of the CGST Act, which provides that ITC shall not be available on:

- Works contract services supplied for construction of immovable property (other than plant and machinery) except where it is an input service for further supply of works contract service; and
- Goods or services or both received for construction of immovable property (other than plant or machinery) on his own account including when such goods or services or both are used in the course or furtherance of business.

Thus, the aforesaid restriction to claim ITC would be triggered only in cases where the goods or services (including works contract services) are used for construction of immovable property. While the term 'construction' is defined in Explanation to Section 17(5)(d) of the CGST Act, the phrase 'immovable property' is not defined anywhere under the GST law.

DEFINITION OF 'IMMOVABLE PROPERTY'

Given that the term 'immovable property' is not defined under the CGST Act, reference may be made to its definition provided under the General Clauses Act, 1897 (GC Act). As per Section 3(26) of the GC Act, the term 'immovable property' is defined to include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.

Further, Section 3 of Transfer of Property Act, 1882 (TOPA) defines the phrase 'attached to the earth' to *inter alia* mean attached to what is embedded (in the earth) for the permanent beneficial enjoyment of that to which it is so attached.

TESTS TO QUALIFY AS AN IMMOVABLE PROPERTY: PRINCIPLES UNDER ERSTWHILE CENTRAL EXCISE LAW

The issue as to whether a particular item would be considered as an immovable property or a movable property, which would be leviable to Central Excise Duty, has been laid down by the Supreme Court in various judicial precedents.[2] The gist of the principles laid down by the Supreme Court as affirmed by CBIC *vide* order no:58/1/2002-CX dated 15 January 2002 are as under:

- Turnkey projects like steel plants, cement plants, and power plants that involve the supply of a large number of components such as machinery, equipment, pipes, tubes, etc. for their assembly/ installation/ erection/ integration/ inter-connectivity on foundation/ civil structure, etc. at site, will not be considered as movable goods and hence, are not leviable to Excise Duty.
- Huge metal tanks for storing petroleum products are constructed at refineries and other facilities. These tanks are not buried underground but instead built on-site in stages. After completion, they cannot be moved as a whole. When sold or disposed of, they must be dismantled into metal sheets/ scrap. Since these tanks cannot be reassembled and moved, they are not movable goods.
- Refrigeration and air conditioning systems are not standalone machines. They are created by combining multiple components like compressors, ducts, pipes, insulation, and sometimes cooling towers. Even though each of these components is taxable, the assembled system as a whole is not considered a movable good.

The aforesaid principles were reiterated in ***Bharti Airtel Ltd.***[3] (Supreme Court ruling) wherein the following principles for determining whether an item would be a movable or an immovable property were laid down by the Supreme Court:

- **Nature of Annexation**: If a property is so attached that it cannot be removed/ relocated without causing damage to it, it is an indication that it is an immovable property.
- **Object of Annexation**: If the attachment is for permanent beneficial enjoyment of the land (as against facilitating the use of item itself), the property will be an immovable property.

[2] CCE, Ahmedabad Vs. Solid & Correct Engineering Works & Ors. [2010 (252) ELT 481 (SC)], Quality Steel Tubes Pvt. Ltd. Vs. CCE [1995 (75) ELT 17 (SC)], Mittal Engineering Works Pvt. Ltd. Vs. CCE, Meerut [1996 (88) ELT 622 (SC)], Sirpur Paper Mills Ltd. Vs. CCE, Hyderabad [1998 (97) ELT 3 (SC)], Triveni Engineering and Indus. Ltd. Vs. CCE [2000 (120) ELT 273 (SC)] and Commissioner Vs. Silican Metallurgic Ltd. [1999 (108) ELT A58 (SC)]

[3] Bharti Airtel Ltd. Vs. The Commissioner of Central Excise, Pune [TS-551-SC-2024-NT]

- **Intendment of the Parties**: The intention behind attachment, express or implied, can be determinative of the nature of the property.
- **Functionality Test**: If an article is fixed to the ground to enhance operational efficiency of the article and for making it stable/ wobble-free, it is an indication that such fixation is for the benefit of the article and hence, movable property.
- **Permanency Test**: If the property can be dismantled and relocated without any damage, then the said property can be considered as movable.
- **Marketability Test**: If the property, even if attached to earth or to an immovable property, can be removed and sold in the market, it can be said to be a movable property.

TESTS TO QUALIFY AS AN IMMOVABLE PROPERTY: PRINCIPLES UNDER GST LAW

As highlighted above, Sections 17(5)(c) and (d) of CGST Act specifically restrict ITC eligibility on procurements used for construction of immovable property. This restriction mandates a thorough understanding and interpretation of the term 'immovable property'. Given that the term 'immovable property' is not defined under the CGST Act, reference may be made to the aforesaid principles prevailing under the erstwhile Central Excise law. Recently, these principles have been increasingly applied by various High Courts in examining the scope of 'immovable property'. Some of these rulings are as under:

- In ***Bharti Airtel Ltd.***[4], the Delhi High Court had ruled that telecommunication towers would not qualify the five fundamental precepts which define an immovable property and hence, they would neither qualify the 'permanency test' nor can they be said to be 'attached to the earth'. As a result, telecommunication towers cannot be considered as an 'immovable property'. As a result, the alleged restriction to claim ITC under Section 17(5) would not apply *qua* telecommunication towers.
- The Andhra Pradesh High Court in ***Sterling and Wilson Pvt. Ltd.***[5] had relied on ***Solid & Correct Engineering (supra)*** to hold that solar modules and Solar Power Generating Systems (SPGS) are not attached to the civil structure for better enjoyment or beneficial enjoyment of the civil foundation. Instead, the civil foundation is embedded to the earth for better permanent and beneficial enjoyment of SPGS. Hence, SPGS cannot be covered under the purview of 'immovable property'.

CONCLUSION

In conclusion, the recent judicial pronouncements by the Supreme Court in ***Bharti Airtel (supra)*** and the Delhi High Court's in ***Bharti Airtel (supra)*** as well as the Andhra Pradesh High Court in ***Sterling and Wilson Pvt. Ltd. (supra)*** have clarified the scope of 'immovable property' and 'plant and machinery' under the CGST Act to conclude that telecom towers and SPGS would not be covered under the purview of 'immovable property', by applying the various tests as laid down in the past judgments of the Courts. Moreover, the Delhi High Court ruling proceeds further to hold that the restriction to claim ITC under Section 17(5)(d) of CGST Act would not apply to telecom towers. By leveraging the principles established in these precedents and applying the same to the facts of each case, taxpayers can effectively determine whether the procurements under consideration can be covered under the purview of the phrase 'immovable property' and if the answer to the same is in negative, the taxpayer can also contest against the applicability of Section 17(5)(c) and (d) of the CGST Act, which seeks to restrict ITC on goods or services used in construction of immovable property.

[4] Bharti Airtel Ltd. Vs. Commissioner, CGST Appeals-I, Delhi [TS-839-HC(DEL)-2024-GST]
[5] Sterling and Wilson Pvt. Ltd. Vs. the Joint Commissioner & Ors. [2025 (1) TMI 663 – Andhra Pradesh High Court]

THE EXPERT SPEAK

Authorised Economic Operator Programme

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BACKGROUND

The genesis of the **Authorised Economic Operator (AEO)** programme dates back to the terrorist events of 11 September 2001 in the United States. The event led Governments worldwide to realize that the supply chain was susceptible to terrorist activities and there was an urgent need to bolster security through an international supply chain. Globally, on one hand, the Customs administration faced a tough task of enhancing cargo security, and on the other hand, there was a need to streamline cargo movement. This was possible through close co-operation with the principal stakeholders of the international supply chain viz., importers, exporters, logistics providers, custodians or terminal operators, custom brokers, and warehouse operators.

The US started the Customs Trade – Partnership Against Terrorism (CT-PAT) programme in November 2001. The WCO then adopted the SAFE Framework of Standards in 2005 to secure and facilitate trade. The SAFE framework has three pillars:

(i) Customs-to-Customs partnership;

(ii) Customs-to-business partnership; and

(iii)Customs-to-other-government stakeholders.

The AEO programme forms the core of the second pillar. India's AEO programme, which started in 2011, has come a long way to align with the features of WCO SAFE Framework and the provisions of WTO Trade Facilitation Agreement. The current AEO programme is governed by Master Circular No:33/2016-Customs dated 22 July 2016 as amended from time to time.

STRUCTURE OF AEO PROGRAMME

The Indian AEO programme is structured as a three-tier system for importers and exporters, consisting of AEO-T1, AEO-T2, and AEO-T3, with each tier offering increasing level of facilitations/ benefits and compliance requirements. AEO-T3 is the highest level of accreditation requiring adherence to stringent security measures, security policies, and record maintenance. Additionally, a single-tier AEO programme exists for logistics providers, custodians, terminal operators, customs brokers, and warehouse operators, granting them the AEO-LO certificate.

BENEFITS OF AEO CERTIFICATION

Key tier-wise benefits available to AEOs are tabulated below:

BENEFIT	AEO-T1	AEO-T2	AEO-T3
Facility of Direct Port Delivery (DPD) and Direct Port Entry (DPE)	Yes	Yes	Yes
Reduction in Bank Guarantee	50% of value (25% for MSME)	25% of value (10% for MSME)	Exempt
Reduction in the time period for investigation and dispute resolution	Yes	Yes	Yes
Reduction in Post Clearance Audit	Once in two years	Once in three years	On request
Waiver in seal verification and scrutiny of documents	No	Yes	Yes
Benefit of Deferred Duty Payment	No	Yes	Yes
Appointment of Client Relationship Manager (CRM)	No	Yes	Yes
Prompt processing of refund/ rebate	No	45 days	30 days
Trade facilitation by a foreign Customs administration as per Mutual Recognition Agreement (MRA)	No	Yes	Yes

AEO-LO certificate holders have the following benefits from obtaining AEO certification[6]:

ENTITY	BENEFIT
Logistic Service Provider	▪ Waiver of Bank Guarantee in case of trans-shipment of goods ▪ Facility of Execution of running bond ▪ Exemption from permission on case-to-case basis in case of transit of goods
Custodian or Terminal Operators	▪ Waiver of Bank Guarantee under Handling of Cargo in Customs Area Regulations, 2009 ▪ Extension of approval for custodians under Regulation 10(2) of the Handling of Cargo in Customs Area Regulation, 2009, for a period of 10 years
Customs Brokers	▪ Waiver of Bank Guarantee ▪ Extended validity (till validity of AEO status) of licenses granted ▪ Waiver from fee for renewal of license
Warehouse Operators	▪ Faster approval for new warehouses within seven days of submission of complete documents ▪ Waiver of antecedent verification envisaged for grant of license for warehouse ▪ Waiver of solvency certificate requirement ▪ Waiver of security for obtaining extension in warehousing period ▪ Waiver of security required for warehousing of sensitive goods

ELIGIBILITY CONDITIONS FOR AEO CERTIFICATION

The decision to participate in the AEO programme is completely optional and driven by business entities' international trade operations as well as their commitment to comply with the programme's criteria and requirements. Eligibility conditions for the scheme are as follows:

- Applicant should be involved in the international supply chain that undertakes Customs related activity in India.
- Applicant must be established in India.
- Applicant should have business activities for at least three financial years preceding the date of application. However, in exceptional cases, on the basis of physical verification of internal controls of a newly established business entity, the AEO Programme Manager may consider it for certification. In order to facilitate MSME, CBIC has provided relaxation and reduced the criteria to have business activities for two financial years.
- Applicant should have handled at least 25 Shipping Bills or bills of entry during last financial year. Relaxation has been provided to MSME who have handled at least 10 Shipping Bills or Bills of Entry.

[6] Circular No. 33/2016-Customs dated 22 July 2017

PRACTICAL ASPECTS OF AEO CERTIFICATION

While the above eligibility criterions appear minimal, there are a few key practical aspects which need to be ensured before an entity contemplates applying for the programme. Following are a few such aspects which need attention:

- The scheme requires business operations in the previous three years. However, there is also an added requirement of 'Positive Net Worth' in those three fiscal years. This requirement becomes a deterrent in making the application. Even a single year of 'Negative Net Worth' due to exceptional circumstances is viewed adversely for AEO certification, despite compliance with all other conditions, measures, and security standards.
- No Show Cause Notice should have been issued during the last three financial years involving serious offenses such as fraud, forgery, smuggling, clandestine removal of excisable goods, or failure to deposit Service Tax collected from customers. Further, no prosecution should have been initiated or contemplated against the applicant or its senior management. Complying with these requirements becomes onerous, especially with the implementation of the GST law where the applicants are inundated with notices issued by the tax authorities. Additionally, issues which involve interpretation and are pending with higher courts also pose hurdles in obtaining the certificate, despite being a pure case of interpretation of the law, involving no fraudulent intent of the applicant.
- If during the last three financial years, the ratio of disputed duty or drawback demanded to the total duty paid and drawback claimed exceeds ten percent, the tax authorities dive deeper to review the application from an operational perspective.
- The applicant must have appropriate internal controls and measures in place, to ensure safety and security of business and its supply chain, in addition to any specific legal requirements that may be applicable to the business. The applicant is required to ensure a security plan detailing its written and verifiable policies, procedures, etc. in respect of the following parameters:
  - Procedural security;
  - Premise security;
  - Cargo security;
  - Conveyances security;
  - Personnel security;
  - Business partners security; and
  - Training and threat awareness.

  It is observed in many cases that an applicant usually follows the above security parameters, but to maintain these as a written and verifiable policy document occasionally poses a challenge, especially in smaller organisations who are still developing their Standard Operating Procedures (SOPs).
- While the AEO-T2 and T3 certificates are valid for three years and five years respectively, the status holder has to apply for renewal before 60 days (for AEO-T2) and 90 days (for AEO-T3). While the tax authorities endeavour to grant renewal before the expiry, sometimes, the process gets delayed due to unforeseen challenges leading to temporary suspension of benefits. This has a two-fold impact:
  - Firstly, the impact of delay in cargo movement at the port; and
  - Secondly, the impact on cash flows on account of denial of deferred duty payment.
- One of the requirements of obtaining AEO-T3 certification is holding a valid AEO-T2 certificate for the preceding two years. Large industrial companies view this as a dampener in an otherwise appealing scheme. These players typically fulfil the financial conditions as well as all the stringent security parameters of the scheme and therefore, aim to avail the highest level of certificate at the very outset, if not for this stringent requirement.
- The intent of the Government to digitise the application process is very noble, with facilities being provided for online applications. Despite this, there is an administrative burden on the applicants to submit these documents physically as well. Additionally, if the financial year changes, during the application process while the application is still pending for review by the jurisdictional AEO officer, then a fresh set of documents must be submitted again for the immediately past three financial years, leading to duplication of efforts.
- AEO-T2 and AEO-T3 holders are entitled to the benefit of deferred duty payment. Procedurally, this benefit should be activated automatically on receipt of AEO status. However, successful applicants sometimes encounter difficulty activating this facility, leading to multiple rounds of follow-ups with the tax authorities.
- Maintenance of the AEO status also involves a degree of attention since the certificate holder has to intimate any significant business change to the AEO officer with 14 business days. This means that status holder has to be mindful of intimating the AEO officer of any operational changes in business impacting the AEO status. For instance, if there is an additional place of business added in the GST certificate, the same has to be intimated to the AEO officer as well to comply with the requirement.

CONCLUSION

India has collaborated with several foreign customs administrations to align with their AEO Programmes, which effectively allows India to adopt the core principles of the program and provide benefits to Indian trade at the international level. AEO programme has emerged as a vital initiative for streamlining trade and strengthening India's position in global trade. While it has benefitted many businesses by enhancing supply chain security, fostering greater inclusivity and simplifying application processes can drive broader participation which would help India's trade and infrastructure align with global best practices.

LEX INSIGHTS

'Plant or Machinery' – A Drafting Error or a Tax Trap? Examining the Validity of the Retrospective Amendments

INTRODUCTION

Section 17(5) of the Central Goods and Services Tax Act, 2017 (CGST Act) *inter alia* provides that notwithstanding anything contained in Section 16(1) of CGST Act, input tax credit (ITC) in respect of the following would not be available:

- Works contract services (WCS) for construction of immovable property (other than **plant and machinery**) except where it is an input service for further supply of WCS (Section 17(5)(c));
- Goods or services or both for construction of immovable property (other than **plant or machinery**) on his own account (Section 17(5)(d)).

The term '**plant and machinery**' is defined in Explanation to Section 17 of CGST Act (Explanation) to *inter alia* mean apparatus, equipment and machinery fixed to earth by foundation or structural support but excludes land, buildings or any other civil structures.

The Supreme Court in ***Safari Retreats Pvt. Ltd.***[7] (SC ruling) had *inter alia* examined the scope of restrictions under Section 17(5)(d) of the CGST Act and observed that –

- While the term '**plant and machinery**' is defined in the Explanation, the term '**plant or machinery**' (referred to in Section 17(5)(d)) is not specifically defined under the CGST Act.
- When the legislature uses the phrase '**plant and machinery**', only a plant will not be covered by the definition unless there is an element of machinery or *vice versa*. However, the term '**plant or machinery**' has a different connotation – it can either be a plant or a machinery. Since the term 'plant' is not defined under the GST law, its ordinary meaning in commercial terms will have to be attached to it (by applying the Functionality Test).
- The tax authorities' contention that use of phrase '**plant or machinery**' in Section 17(5)(d), being a drafting error, should be read as '**plant and machinery**' was not accepted by Supreme Court.
- In view of the above, the expression '**plant or machinery**' used in Section 17(5)(d) cannot be given the same meaning as the term '**plant and machinery**' defined in the Explanation.

Recently, in 55th GST Council meeting (held on 21 December 2024), it was recommended that Section 17(5)(d) will be amended **with retrospective effect from 1 July 2017** to replace the phrase '**plant or machinery**' with '**plant and machinery**'. This recommendation, in essence, seeks to nullify the effect of the SC ruling. In this regard, it is a good time to look at the legal principles relating to retrospective amendment of statutes.

GENERAL PRINCIPLES – RETROSPECTIVE AMENDMENT OF STATUTES

It is a settled law that the Government possesses an inherent authority to amend laws to address evolving needs and circumstances. The legal principles/ judicial pronouncements **establishing a strong presumption against retrospective operation of statutes, particularly those impacting existing rights or creating new liabilities** on a taxpayer are set out hereunder:

- As per the Latin maxim '***nova constitutio futuris formam imponere debet, non praeteritis***', a new law ought to regulate what is to follow, not the past. A new law must be construed in such a way that it interferes as little as possible with the vested rights[8].
- All statutes other than those which are merely declaratory or which relate only to matters of procedure or of evidence are *prima facie* prospective[9].
- In ***Govind Das***[10], it was held that unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose a new liability (Exception: Amendments pertaining to procedural matters[11])[12].
- If a statute is curative or merely declaratory of the previous law, retrospective operation is generally intended. An amending Act may be purely declaratory to clear the meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect[13].

JUDICIAL TESTS TO UPHOLD THE VALIDITY OF A RETROSPECTIVE STATUTE

While prospective amendments are generally the norm, retrospective amendments are not entirely precluded. The Supreme Court decision in ***R. C. Tobacco Pvt. Ltd.***[14] had laid down the following broad **legal principles for testing the validity of a retrospective amendment**:

[7] Chief Commissioner of CGST and Ors. Vs. M/s. Safari Retreats Pvt. Ltd. and Ors. [TS-622-SC-2024-GST]
[8] S.L. Srinivasa Jute Twine Mills Pvt. Ltd. Vs. Union of India and Anr. [2006 (2) SCC 740] and Principles of Statutory Interpretation by GP Singh referred to by the Supreme Court in Zile Singh Vs. State of Haryana and Ors. [2004 (8) SCC 1]
[9] Halsbury's Laws of England (Volume 36) as referred to in Govind Das and Ors. Vs. The Income Tax Officer and Ors. [1976 (1) SCC 906]
[10] Govind Das Vs. The Income Tax Officer [1976 (1) SCC 906]
[11] In Otsuka Pharmaceutical India Pvt. Ltd. Vs. Union of India & Ors. [2024 (4) TMI 282 (Guj.)] and Hitachi Energy India Ltd. Vs. State of Karnataka & Ors. [2024 (7) TMI 53 (Kar.)], it was held that amendment to Rule 108(3) of Central Goods and Services Tax Rules, 2017 ('CGST Rules') pertaining to the requirement of filing of certified / self-certified copies of the order appealed against before the First Appellate Authority would have retrospective operation since the same is clarificatory in nature.
[12] Similar view was held in Hitendra Vishnu Thakur Vs. The State of Maharashtra [1994 (4) SCC 602] and Commissioner of Income Tax (Central) – I, New Delhi Vs. Vatika Township Pvt. Ltd. [2015 (1) SCC 1]
[13] Union of India Vs. V.V.F. Ltd. [2020 (372) ELT 495 (SC)]
[14] R. C. Tobacco Pvt. Ltd. Vs. Union of India [2005 (7) SCC 725]

- **Unreasonability**:
  - A law cannot be held to be unreasonable merely because it operates retrospectively. The unreasonability must lie on some other factors.
  - The retrospective operation of a statute would have to be found to be unduly oppressive and confiscatory before it can be held to be unreasonable so as to violate constitutional norms.
- **Discriminatory**: Where the taxing statute is plainly discriminatory or provides no procedural machinery for assessment and levy of the tax, courts would be justified in striking down the Impugned Statute as unconstitutional.
- **Other factors**: Other factors that can be considered for testing the validity of the statute:
  - The context in which retrospectivity was contemplated;
  - The period of such retrospective amendment; and
  - The degree of any unforeseen or unforeseeable financial burden imposed for the past period.

DOCTRINE OF 'SMALL REPAIRS'

It is possible that a Court may conclude that the levy of tax is not valid because the legal provision enacted for the purpose of imposition of tax may have some defect in phraseology or other infirmity. In such a scenario, the legislature generally passes an amending and validating Act in order to remove and rectify the defect in phraseology or lacuna of other nature and also to validate the proceedings, including realisation of tax, which may have taken place in pursuance of the earlier enactment. Such an amending and validating Act has retrospective operation in the very nature of things. Its aim is to effectuate and carry out the object for which the earlier legislation/ provision was enacted. Such an amending and validating Act to make 'small repairs' is a permissible mode of legislation and is frequently resorted to in fiscal enactments.

The Supreme Court in ***Empire Industries Ltd.***[15] quoted the following excerpts of the 73rd Volume of Harvard Law Review (p.692 at p.795) to hold that 'small repairs' to a provision is a permissible mode of legislation:

"It is necessary that the legislature should be able to cure inadvertent defects in statutes or their administration by making what has been aptly called 'small repairs'. Moreover, the individual who claims that a vested right has arisen from the defect is seeking a windfall since had the legislature's or administrator's action had the effect it was intended to and could have had, no such right would have arisen. Thus, the interest in the retroactive curing of such a defect in the administration of the Government outweighs the individual's interest in benefiting from the defect…"

At this juncture, it is also noteworthy to refer to the principles laid down by the Supreme Court in ***Shri Prithvi Cotton Mills Ltd.***[16] in respect of the legislative amendments introduced to overrule a Court's ruling. The key principles are set out hereunder:

- When the legislature sets out to validate a tax declared by a Court to be illegally collected under an ineffective or an invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively. It is not sufficient for the legislature to merely declare that the Court's decision is not binding as that would lead to reversing the decision in the exercise of judicial power which is impermissible. A Court's decision must always bind the legislature unless the conditions on which it is based are so fundamentally altered that the said decision could not be given in the altered circumstances.
- Validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed, and the tax thus made legal by either of the following modes:
  - Providing for jurisdiction where jurisdiction had not been properly invested before.
  - Re-enacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the re-enacted law.
  - Giving its own meaning and interpretation of the law under which the tax was collected and by legislative fiat makes the new meaning binding upon courts.

The Gujarat High Court[17] applied the aforesaid doctrine in respect of the amendment to Rule 89(5) of the CGST Rules proposed *vide n*otification no:14/2022-Central Tax dated 5 July 2022 *inter alia* amending the formula for calculation of refund of unutilised ITC on account of inverted duty structure. In this regard, the Gujarat High Court has held that the amendment to Rule 89(5) of CGST Rules is curative and clarificatory in nature and hence, the same would apply retrospectively to the refund or rectification applications filed within the period prescribed under Section 54 of CGST Act.

One may contend that the retrospective application of Rule 89(5) of CGST Rules, as held by the Gujarat High Court, cannot be readily extended to support the retrospective amendment to Section 17(5)(d) of the CGST Act. This is because the Rule 89(5) amendment was beneficial to taxpayers, whereas the proposed Section 17(5)(d) amendment would be in detriment to taxpayer, imposing a restriction in the claim of ITC on procurements and may also lead to liability to reverse ITC.

However, the Government may contend the doctrine of 'small repairs' justifies the retrospective amendment of Section 17(5)(d) of CGST Act which permits retrospective amendments to correct a clerical or drafting error. This argument is further supported by the explicit acknowledgment of the tax authorities before the Supreme Court, as evidenced in the SC Ruling, that the phrase '**plant or machinery**' in the said provision was indeed a drafting error and should be read as '**plant and machinery**'.

[15] Empire Industries Ltd. Vs. Union of India [1985 (20) ELT 179 (SC)]
[16] Shri Prithvi Cotton Mills Ltd. Vs. Broach Borough Municipality and Ors. [1969 (2) SCC 283]
[17] Ascent Meditech Ltd. Vs. Union of India and Ors. [TS-750-HC(GUJ)-2024-GST] and Tirth Agro Technology Pvt. Ltd. and Anr. vs. Union of India and Ors. [TS-883-HC(GUJ)-2024-GST]

RETROSPECTIVE AMENDMENT ALONG WITH VALIDATION: AN ILLUSTRATION

Having discussed the principles concerning the introduction of retrospective amendments as well as validation acts, as an illustration, let us consider the retrospective amendment made to the definition of 'renting of immovable property' under Section 65(105)(zzzz) of the Finance Act, 1994 (Finance Act). The gist of the provision (prior to the amendment), judicial development and the subsequent retrospective amendments are set out hereunder:

- Initially, the term 'taxable service' under Section 65(105)(zzzz) of Finance Act defined taxable service as any service provided or to be provided to any person, by any other person **in relation to renting of immovable property** for use in the course or furtherance of business or commerce.
- Subsequently, the aforesaid entry was examined by the Delhi High Court in ***Home Solution Retail India Ltd.***[18] wherein it was *inter alia* held that "*Section 65(105)(zzzz) does not in terms entail that the renting out of immovable property for use in the course or furtherance of business of commerce would by itself constitute a taxable service and be eligible to service tax*".
- Pursuant to the above, *vide* Section 76(A)(6)(h) of Finance Act, 2010 (FA 2010), Section 65(105)(zzzz) was amended with retrospective effect from 1 June 2007 to provide that the term taxable service means any service provided or to be provided to any person by any other person, **by renting of immovable property or any other service in relation to such renting**, for use in the course of or, for furtherance of, business or commerce. Further, a validation provision was introduced *vide* Section 77 of FA 2010 so as to validate certain action taken under Section 65(105)(zzzz) of the Finance Act regarding the taxable service of renting of immovable property.
- Upon challenge to the constitutional validity of the above amendments, the Delhi High Court, in ***Home Solutions Retail (India) Ltd.***[19] had upheld the validity of the amendments by placing reliance on the common parlance/ understanding of term 'renting'[20]. Against this, the SLP is filed by the taxpayer before the Supreme Court and the same is pending. The SLP is tagged along with SLP filed by taxpayers against the orders passed by the Bombay High Court, Punjab & Haryana High Court, and Orissa High Court.

MISCELLANEOUS OBJECTIONS CONCERNING THE VALIDITY OF THE RETROSPECTIVE AMENDMENT

- A significant concern arising from this proposed retrospective amendment to Section 17(5)(d) of CGST Act is the **inordinate delay** by the Government in rectifying the acknowledged clerical or drafting error. The introduction of the GST regime occurred over seven and a half years ago, raising questions about the justification for this belated corrective action. In this regard, reference may usefully be made to the Supreme Court ruling in ***Rai Ramkrishna***[21] wherein it was held that:

  "18. …*The earlier Act was passed in 1950 and came into force on the 1st of April, 1950, and the tax imposed by it was being collected until an order of injunction was passed in the two suits to which we have already referred. The said suits were dismissed on the 8th May 1952, but the appeals preferred by the appellants were pending in this court until the 12th December 1960.* ***In other words, between 1950 and 1960 proceedings were pending in court in which this validity of the Act was being examined, and if a validating Act had to be passed, the legislature cannot be blamed for having awaited the final decision of this court in the said proceedings. Thus, the period covered between the institution of the said two suits and their final disposal by this court cannot be pressed into service for challenging the reasonableness of the retrospective operation of the Act.***"

  The ratio laid down in the aforesaid ruling can be applied to the present case in as much as one may contend that the Government was awaiting the outcome of the matter which was pending before the Supreme Court.
- Another key argument against the validity of the retrospective amendment to Section 17(5)(d) of the CGST Act centers on the potential for **undue financial hardship and cost**. The taxpayers who had previously claimed Input Tax Credit (ITC) on eligible procurements would be compelled to reverse such ITC, along with applicable interest. Moreover, they may face significant difficulties in passing on the resultant tax burden to their customers. However, this contention could be unsustainable by placing reliance on ***J.K. Jute Mills Co.***[22] wherein it was *inter alia* held as under:

  "*… But it is not an essential characteristic of a sales tax that the seller must have the right to pass it on to the consumer, nor is the power of the Legislature to impose a tax on sales conditional on its making a provision for sellers to collect the tax from the purchasers. Whether a law should be enacted, imposing a sales tax, or validating the imposition of sales tax, when the seller is not in a position to pass it on to the consumer, is a matter of policy and does not affect the competence of the Legislature.*"

[18] Home Solution Retail India Ltd. Vs. Union of India [2009 (237) ELT 209 (Del.)]
[19] Home Solutions Retail (India) Ltd. Vs. Union of India [2011 (24) STR 129 (Del.)]
[20] Similar views were also upheld in Shubh Timb Steels Ltd. Vs. Union of India [2010 (20) STR 737 (P&H)], Utkal Builders Ltd. Vs. Union of India [2011 (22) STR 257 (Ori.)] and Retailers Association of India Vs. Union of India [2011 (23) STR 561 (Bom.)].
[21] Rai Ramkrishna and Ors. Vs. State of Bihar [1963 SCC OnLine 31]
[22] J.K. Jute Mills Co. Vs. State of Uttar Pradesh [1961 SCC OnLine 37]

Based on the observations in the aforesaid ruling, it may not be possible to contend that the retrospective amendment would lead to financial hardship and cost due to recovery of ITC claimed earlier (that was availed in accordance with provisions in force at the time of its claim) and consequently, would jeopardise the taxpayer's right to free trade and profession guaranteed under Article 19(1)(g) of the Constitution.

- Another aspect that needs consideration is whether the denial of ITC with retrospective effect could trigger interest liability on the taxpayers who have availed and utilised ITC. In this regard, reference can be made to the Supreme Court ruling in ***Star India Pvt. Ltd.***[23] wherein it was held as under:

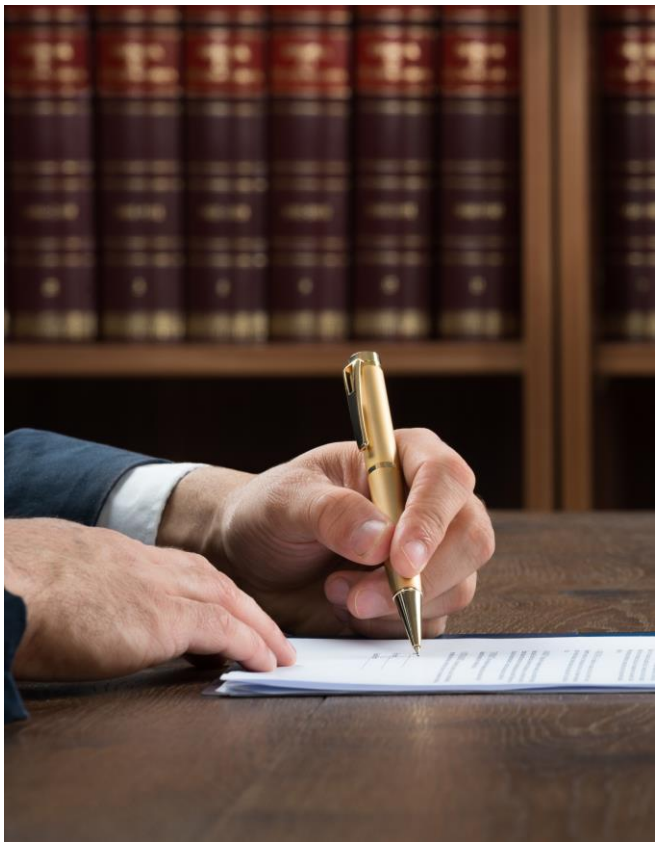
  "7. In any event, it is clear from the language of the validation clause, as quoted by us earlier, that the liability was extended not by way of clarification but by way of amendment to the Finance Act with retrospective effect. It is well established that while it is permissible for the legislature to retrospectively legislate, such retrospectivity is normally not permissible to create an offence retrospectively. There were clearly judgments, decrees, or orders of courts and Tribunals or other authorities, which required to be neutralised by the Validation Clause. We can only assume that the judgments, decree, or orders had, in fact, held that persons situated like the appellants were not liable as service providers. This is also clear from the Explanation to the Validation Section which says that no act or acts on the part of any person shall be punishable as an offence which would have been so punishable if the Section had not come into force.

  8. The liability to pay interest would only arise on default and is really in the nature of a quasi-punishment. Such liability although created retrospectively could not entail the punishment of payment of interest with retrospective effect."

  Considering the above, although an argument could be made that a retrospective amendment culminating in reversal of ITC may not inherently lead to interest liability, the precise impact would depend entirely on the specific wording of the amendment or validation provision. This would necessitate a reassessment of relevant judicial precedents to determine the applicability of interest liability in light of the amended legislation, once enacted.

CONCLUSION

Ultimately, the retrospective amendment to Section 17(5)(d) of the CGST Act, while seemingly aimed at rectifying a drafting error, raises significant concerns. The delay in addressing this issue and the potential for undue financial hardship for taxpayers who had relied on the existing interpretation of law creates a strong case for careful judicial scrutiny. The doctrine of "small repairs", while potentially applicable, must be weighed against the principles of fairness, reasonableness, and the potential for undue burden on the taxpayers and also against the specific findings of the Supreme Court about this not being a drafting error. Accordingly, it is likely that the Courts will need to determine whether this amendment constitutes a permissible correction of a drafting error or an impermissible attempt to retroactively impose unforeseen tax liabilities, transforming a drafting ambiguity into a tax cost for businesses.



[23] Star India Pvt. Ltd. Vs. Commissioner of Central Excise, Mumbai & Goa [2006 (1) STR 73 (SC)]

DECODED

The Consequences of Delayed Adjudication in Indirect Tax: A Closer Look

INTRODUCTION

Recently, the Delhi High Court in ***VOS Technologies India Pvt. Ltd.***[24] had *inter alia* reiterated the established legal principle that unreasonable delays in adjudication of show cause notices (SCNs) is impermissible and unsustainable in law, particularly when the tax authorities have failed to establish the existence of insurmountable constraint impeding their power to conclude adjudication proceedings. The above ruling was in the context of the SCNs issued to various assessees under Section 28 of the Customs Act, 1962 (Customs Act)/ Section 73 of the Finance Act, 1994 (Finance Act).

LEGISLATIVE BACKGROUND

- The gist of the relevant provisions of Section 28 of Customs Act *inter alia* prescribing the time limit for determining the amount of duty or interest (i.e., adjudication of SCNs) is as follows:
  - Prior to Finance Act, 2018 (FA 2018), Section 28(9) of Customs Act prescribed the time limit for adjudication of SCNs[25]. However, the said time limit was qualified by the use of phrase '***where it is possible to do so***'.
  - *Vide* FA 2018, Section 28 of the Customs Act was amended as under:
    - The phrase 'where it is possible to do so' referred to in Section 28(9) was deleted.
    - **Insertion of first and second *provisos***: The time limit prescribed in Section 28(9) can be extended in specified circumstances. Further, if the tax authorities fail to adjudicate within such extended period, the proceeding shall be deemed to be concluded.
    - **Insertion of Section 28(9A)**: If the proper officer is unable to adjudicate the SCN within the time limit provided in Section 28(9) on account of specified circumstances, reason thereof should be intimated by the tax authorities to the assessee and the time limit for adjudicating SCNs would commence from the date when such reason ceases to exist.
- Similarly, Section 73(4B) of Finance Act employs similar provisions pertaining to the time limit for adjudication of SCNs as provided under Section 28(9) of Customs Act. However, unlike Section 28(9) of Customs Act wherein the phrase '***where it is possible to do so***' was deleted *vide* the FA 2018, Section 73(4B) of Finance Act, continues to use the said phrase till date.

JUDICIAL DEVELOPMENTS QUA VALIDITY OF SCNS ISSUED BY DIRECTORATE OF REVENUE INTELLIGENCE (DRI)[26]

- In ***Sayed Ali***[27] it was held that Commissioner of Customs (Preventive) (CCP) is not a 'proper officer' under Section 2(34) and hence, not empowered to issue a SCN. Against this, the tax authorities filed a review petition which was dismissed on the ground of delay in filing the review.
- **Subsequent developments pursuant to the Sayed Ali (supra) ruling**:
  - **Amendment to Sections 17 and 28 *vide* Finance Act, 2011 (FA 2011) w.e.f. 8 April 2011**:
    - While Section 17 amendment altered the method of assessment of Bills of Entry and Shipping Bills, Section 28 was revamped.
    - Explanation 2 to Section 28 was introduced *inter alia* stipulating that any non-levy or short-levy or erroneous refund before the date of Presidential assent to Finance Bill, 2011 (8 April 2011) shall be governed by Section 28 as it stood prior to the amendment.
  - The Central Board of Indirect taxes and Customs (CBIC)[28] issued notification no:44/2011-Cus. (NT) dated 6 July 2011 **prospectively** assigning functions of 'proper officer' to CCP and DRI.
  - **For the past periods**, Section 28(11) was introduced *vide* Customs (Amendment and Validation) Act, 2011 (Validation Act) as per which, all persons appointed as Customs officers under Section 4(1) (prior to 6 July 2011) were deemed to have and always had the power of assessment and were deemed to be and always have been 'proper officers'.

[24] VOS Technologies India Pvt. Ltd. and Ors. Vs. The Principal Additional Director General and Anr. [TS-620-HC-2024(DEL)-NT]
[25] 6 months (in case of non-fraud cases i.e., SCNs not alleging fraud, wilful misstatement, suppression of facts, etc.) and 1 Year (in other cases)
[26] Editor's Note: While this section is not particularly covered in the judgement, for better appreciation of the facts involved and the observations made by the Court, we have summarized the historical background concerning validity of SCNs issued by DRI
[27] Commissioner of Customs Vs. Sayed Ali and Anr. [2011 SCC 537]
[28] Formerly known as the Central Board of Excise and Customs

- The constitutional validity of Section 28(11) of Customs Act was challenged in ***Mangali Impex Ltd.***[29] wherein the Delhi High Court held that Section 28(11) would not empower DRI to either adjudicate SCNs already issued by them for the period prior to 8 April 2011 or to issue fresh SCNs for the said period. Against this, tax authorities filed an appeal before Supreme Court wherein the operation of the aforesaid ruling was stayed *vide* order dated 1 August 2016.
- On 9 March 2021, the Supreme Court in ***Canon Indi***[30] (Canon I) *inter alia* held that unless it is shown that DRI officers are customs officers and are entrusted with the functions of a proper officer under Section 6, they would not be competent to issue SCNs. Since no such entrustment was made, DRI officers could not be assigned as 'proper officers'. Against this, the tax authorities preferred a Review Petition before the Supreme Court.
- Pending decision on the Review Petition, various amendments were made by the Finance Act, 2022 (FA 2022) to Sections 2, 3 and 5 of the Customs Act. Further, Section 110AA of the Customs Act was also introduced to *inter alia* provide that a SCN under Section 28 can only be issued by that 'proper officer' who has been conferred with the jurisdiction, by an assignment of functions under Section 5, to conduct assessment under Section 17 in respect of such duty. Further, Section 97 of the Finance Act, 2022 *inter alia* provided for validation of certain actions. The constitutional validity of these amendments was challenged before Supreme Court[31].
- The Supreme Court in review petition in ***Canon India***[32] (Canon II) *inter alia* upheld the constitutional validity of Section 28(11) of Customs Act while also observing that the application of the said provision is not limited to the period between 8 April 2011 and 16 September 2011. Further, the Supreme Court also held that DRI officers are 'proper officers' for issuing SCNs.

FACTS OF THE CASE

- Considering the multiplicity of Writ Petitions filed by various assessees (hereinafter referred to as the 'Taxpayers') before the Delhi High Court, the facts pertaining to each assessees have not been summarised for the sake of brevity.
- However, to set the contextual framework, the facts pertaining to Writ Petitions filed by City Paper, VOS Technologies India Pvt. Ltd. and Syona Spa are summarised in the ensuing paragraphs.
- **Writ Petition filed by City Paper:**
  - **First transfer to call book**: Although the SCN was issued to the Taxpayer on 22 December 2006, the proceedings were transferred to the call book on 29 June 2016 (i.e., after the lapse of almost 10 years) basis the directions issued by CBIC following the decision in ***Mangali Impex (supra)***. Subsequently, on 3 January 2017, the SCN was taken out of the call book basis the Instructions issued by CBIC.
  - **Second transfer to call book**: The SCN was again transferred back to the call book on 3 November 2017 and later, the same was retrieved therefrom on 3 May 2019.
  - **Third transfer to call book**: Later, on 17 March 2021, the SCN was again transferred to call book for the third time and subsequently, was taken out of call book on 9 April 2022 after coming into effect the FA 2022.
  - Aggrieved by the inordinate delay on the part of the tax authorities to adjudicate the matter as well frequent posting of the SCN in call book and retrieval thereof, the Taxpayer has filed a Writ Petition challenging the validity of the adjudication of SCNs.
- **Writ Petition filed by VOS Technologies India Pvt. Ltd.:**
  - The SCN was issued on 29 November 2019. Later, SCNs for the subsequent period were issued on 20 April 2020 and 18 September 2020.
  - It is undisputed that since the SCNs were issued pursuant to the amendment of Section 28 vide the FA 2018, the adjudication of the SCNs were kept in abeyance basis the provisions of Section 28(9A) of Customs Act. Accordingly, the matter was transferred to the call book on 1 April 2021 basis the Instruction issued by CBIC on 17 March 2021.
  - Further, the inaction to adjudicate the SCNs was sought to be justified by the tax authorities on the ground of the Suo Moto extension of limitation issued by the Supreme Court In Re: Cognizance for Extension of Limitation vide order dated 8 March 2021.
  - Aggrieved by the aforesaid inaction to adjudicate the SCNs, the Taxpayer filed a Writ Petition before the High Court *inter alia* challenging the validity and the subsequent adjudication of the SCNs.
- **Writ Petition filed by Syona Spa:**
  - Although a SCN was issued on 20 March 2020 under the Finance Act, a final order was passed only on 16 January 2024. Between 2020 and 2024, the proceedings pertaining to the Taxpayer's case were never placed in the call book.
  - The tax authorities had asserted that delay in adjudication of the SCN was due to COVID-19 pandemic and that Section 73(4B) of the Finance Act, that uses the phrase '***where it is possible to do so***', makes the time limit for adjudication directory.
  - Aggrieved by the above order, the Taxpayer filed a Writ Petition before the High Court.

[29] Mangali Impex Vs. Union of India [2016 SCC OnLine Del 2597]
[30] Canon India Pvt. Ltd. Vs. Commissioner of Customs [2021 AIR 1699]
[31] Daikin Air Conditioning India Pvt. Ltd. Vs. Union of India [WP (C) 526 of 2022] and Dish TV India Ltd. Vs. Union of India [WP (C) 520 of 2022]
[32] Commissioner of Customs Vs. M/s. Canon India Pvt. Ltd. [TS-515-SC-2024-CUST]

CONTENTIONS OF THE TAXPAYERS

- The issues pertaining to the validity of delayed adjudication of SCNs have been examined time and again by various High Courts, some of which are as follows:
  - In ***Parle International Ltd.***[33] it was held that after a lapse of a reasonable period of time from the date of issue of SCN, it is impermissible for the tax authorities to revive the adjudication proceedings.
  - In ***Nanu Ram Goyal***[34] had *inter alia* held that where the statute fails to provide or stipulate a particular period/ time limit, the principles of reasonable time would apply.
  - In ***Gautam Spinners***[35] it was observed that the instructions issued by CBIC under Section 28(9A) of Customs Act cannot justify delayed adjudication of SCNs. While the tax authorities in that case had contended that delay in adjudication was attributed to flux in legal position pertaining to legislative competence of the DRI to issue SCN, this contention was rejected on the ground that in that case, the SCN was issued by the competent jurisdictional Commissionerates and not DRI.

CONTENTIONS OF THE TAX AUTHORITIES

- Reference was made to the individual facts prevailing in each of the Writ Petitions filed by the Taxpayers so as to provide reasons for the delay in adjudication of SCN. In most cases, the delay was on account of the Taxpayer's non-cooperation in the adjudication proceedings. Such delays cannot be attributed to the tax authorities.
- The CBIC had *inter alia* issued directives/ instructions[36] from time to time to keep the matters pending for adjudication in abeyance and the same was binding on the tax authorities. These instructions were based on the legislative updates pertaining to whether the DRI was empowered to issue SCN under Section 28 of Customs Act.
- The rulings in ***Sayed Ali (supra)***, ***Mangali Impex (supra)*** and ***Canon I (supra)*** had cast a cloud on the rights of the tax authorities to pursue adjudication proceedings and hence, impeded their right to conclude proceedings with expedition.
- Reliance in this regard was also placed on ***M/s. Bhagsons Paint Industry (India)***[37] to contend that delay in itself will not be a sufficient ground to annul or interdict adjudication proceedings. Further, notwithstanding the assertion of an inordinate delay, the Court would be justified in remitting the matter to the adjudicating authorities with appropriate directions for expeditious closure.

OBSERVATIONS AND RULING OF THE DELHI HIGH COURT

- **Whether delay in adjudication, owing to the unsettled legal position, can be justified?**
  - Although the competence of the DRI was the subject matter of tax litigation, not all the SCNs that are subject matter of dispute were issued by DRI. Although the proceedings were initiated by DRI and assuming that tax authorities were compelled to stay the same due to ***Sayed Ali (supra)***, there did not exist any factor preventing or restraining the tax authorities from initiating proceedings by transferring pending matters to the Customs officer.
  - The underlying intent behind introducing the amendments by FA 2011 and the Validation Act was to overcome the decision in ***Sayed Ali (supra)***. Thus, despite the statute having duly empowered the tax authorities to continue the proceedings and specifically validating all actions initiated prior to 6 July 2011, the tax authorities failed to act in terms of the legislative command.
  - Although the validity of FA 2011 and the Validation Act was questioned in ***Mangali Impex (supra)***, the same was ultimately stayed by the Supreme Court on 1 August 2016. Further, the Government intervened and amended Section 28 *vide* the FA 2018. Basis such amendments, it can be construed that the tax authorities, while dealing with all proceedings initiated prior to 29 March 2018, were required to adhere to the precept of reasonable period. Further, the Legislature had introduced appropriate curial provisions so as to enable and empower the tax authorities to conclude pending proceedings.
  - Although ***Canon I*** doubted the authorisation made in favor of DRI, the decision neither struck down nor adversely commented on scope and underlying intent of Section 28(11) of Customs Act. In any event, the Legislature intervened yet again and made amendments *vide* FA 2022.
  - Despite the legislative interventions made by the Government from time to time, the tax authorities continued to abstain from taking proactive steps to conclude the proceedings that had been initiated as far back as 2006.
  - The tax authorities have failed to establish the existence of an insurmountable constraint and which could be acknowledged in law as impeding their power to conclude pending adjudications.

[33] Parle International Ltd. Vs. Union of India [2020 SCC OnLine Bom 8678]. Reliance was also placed on Tata Steel Ltd. Vs. Union of India & Ors. [WP(T) 826 of 2023 (Jhar.)], Swatch Group India Pvt. Ltd. Vs. Union of India [2023 SCC OnLine Del 4938]
[34] Nanu Ram Goyal Vs. Commissioner of Central Excise & GST [2023 SCC OnLine Del 2188]. Affirmed by the Supreme Court in Review Petition No. 330/2023 vide order dated 16 February 2024
[35] Gautam Spinners Vs. Commissioner of Customs [2023 SCC OnLine Del 4041]
[36] Instructions dated 29 June 2016, 3 January 2017, 3 November 2017 and 17 March 2021
[37] Commissioner of Central Excise Vs. M/s. Bhagsons Paint Industry (India) [2003 (158) ELT 129 (SC)]

- **Impact of Delay in Adjudication of SCNs:**
  - The meaning ascribed to the phrase '***where it is possible to do so***' was explained in ***Swatch Group (supra)*** to provide that while the expression did allow a degree of flexibility, it would have to be understood as being concerned with situations where the proper officer may have found it impracticable or impossible to conclude proceedings. Thus, the aforesaid expression applies only where the proper officer was faced with '***insurmountable exigencies***' and further recourse being rendered '***impracticable or not possible***'.
  - The leeway provided by the statute by using the phrase '*where it is possible to do so*' cannot be equated with lethargy or an abject failure to act despite there being no insurmountable factor operating as a fetter upon the power of proper officer to proceed with adjudication.
- **Principles Pertaining to Placing Matters in Call Book**
  - The conceded position of the tax authorities have failed to adhere to the procedure contemplated in first proviso to Section 28(9) of Customs Act. If the tax authorities were to resort to Section 28(9A), they were statutorily obliged to inform the Taxpayer of the reasons on account of which they were unable to conclude the adjudication. Upon such information and notice, the provisions of Section 28(9) would have ceased to apply.
  - The disclosures made by tax authorities establishes that they have adopted a repetitive exercise of placing the matters in call book, retrieval therefrom followed by transferring the matters yet again. These actions were taken mechanically, casually and solely based on instructions issued by CBIC without application of mind to the facts prevailing in individual cases or forming a requisite opinion as contemplated in Section 28(9A) of Customs Act.
  - The tax authorities failed to undertake periodic review of pending proceedings or even make a feeble attempt to accord closure to the proceedings that have been pending for decades.
  - Reliance in this regard was placed on the CBIC Circular as well as various judicial precedents that have underscored the requirement of intimating noticees' regarding the placement of matter in call book and undertaking a periodic review of the matters kept in abeyance.
  - The frequent placement of matters in call book, retrieval thereof and transfer all over again not only defies logic but is also demonstrative of non-application of mind. They have failed to abide by CBIC Circulars pertaining to placing of matters in the call book that had *inter alia* contemplated the affected parties to be placed on notice and a periodic review of such matters.
  - In the present case, the proceedings have lingered unnecessarily with no plausible explanation. The inaction and the state of inertia which prevailed leads to an inevitable conclusion that the tax authorities have clearly failed to discharge their obligation within a reasonable time. Further, the tax authorities failed to act as per the legislative interventions intended to empower them to take the adjudication process to its logical conclusion.
- In view of the above, the writ petitions were allowed with directions to quash all the SCNs as well as any final orders that may have come to be passed and were impugned in the present writ petitions.

CONCLUSION

In conclusion, the Delhi High Court ruling underscored the imperative of expeditious adjudication of SCNs. The Court further held that unreasonable delays in adjudication are impermissible and unsustainable, particularly when the tax authorities fail to demonstrate insurmountable constraints hindering their ability to conclude proceedings. This ruling serves as a crucial reminder to tax authorities of their obligation to adhere to the principles of natural justice and conclude adjudication proceedings within a reasonable time, thereby ensuring fairness and efficiency in tax administration. Recently, CESTAT in ***Kopertek Metals Pvt. Ltd.***[38] had held that the tax authorities cannot endlessly drag a matter and must adjudicate the same within a reasonable time so as to strike between the principles of natural justice and the limitation provided in the statute.

[38] Kopertek Metals Pvt. Ltd. Vs. Commissioner of CGST (West) [TS-594-CESTAT-2024-EXC]

GLOBAL TRENDS

VAT/ GST NEWS

International

Italy: 2025 Tough VAT Requirements for Non-EU Taxpayers with VAT Fiscal Representatives

Italy has published two new stringent regulations affecting Non-EU resident entities engaging in VAT activities through an Italian VAT representative. These changes imposed additional compliance requirements to ensure greater transparency and adherence to the VAT regulations. Italian VAT representatives are now *inter alia* required to meet rigorous ethical and professional standards and are also provide a financial guarantee for a period of minimum 48 months. These new regulations underscore Italy's commitment to maintaining high standards of tax compliance and preventing VAT fraud.
(Source – https://www.vatcalc.com/italy/italy-non-resident-vat-representative-changes/)

Egypt: Tax Authority Withdraws VAT on Export Services The Egyptian Tax Authority (ETA) has reformed its approach to Value Added Tax (VAT) on exported services by cancelling two controversial Circulars issued in 2019. These Circulars mandated the levy of VAT on services such as marketing, promotion, warranty, and agency services provided to foreign entities if the beneficiary was in Egypt. The new instruction restores 0% VAT rate on exported services.
(Source - https://www.vatcalc.com/egypt/egypt-export-services-vat-reform/)

European Union: 2025 SME Special Scheme Introduces Pan-EU €EUR 100,000 VAT Registration Threshold to Reduce Foreign Compliance Burden for EU Businesses

From 1 January 2025, there is a new, optional **€EUR 100,000** EU VAT registration threshold, enabling EU-resident businesses to sell in other EU states, declaring such sales as exempt using a new type of 'EX' VAT registration. This will eliminate the need to register for small levels of sales in other EU states. The updated SME Special Scheme has introduced two thresholds: domestic (similar to current regime) for the country of establishment (maximum EUR 85,000); and cross-border **EUR 100,000** for exempt selling in other EU states.
(Source - https://www.vatcalc.com/eu/eu-2025-vat-registration-thresholds-equivalence-for-foreign-businesses/)

India

55th GST Council Meet Decisions: What you Need to Know

The 55th GST Council meeting introduced a series of recommendations concerning the reduction of GST rate and clarifications on taxability of certain transactions. The key clarifications recommended by the GST Council *inter alia* include non-levy of GST on 'penal charges' levied and collected by banks and NBFCs from borrowers for non-compliance with loan terms. Further, the provisions relating to taxability of vouchers are also recommended to be simplified so as to provide that GST would not apply on transaction of vouchers.
(Source - https://www.ibtimes.co.in/55th-gst-council-meet-decisions-what-you-need-know-876870)

GST Council Bid to Overturn SC Order in Safari Retreats Case, Construction Industry to be Hit

The GST Council has proposed a retrospective amendment to a law to effectively overturn a recent Supreme Court decision that allowed businesses to claim tax credits on construction costs for rental properties. The amendment, retroactive from July 1 2017, aims to rectify what the government has termed a 'drafting error' in the CGST Act and seeks to replace the phrase 'plant or machinery' with 'plant and machinery', aligning it with the terminology used elsewhere in the GST law.
(Source - https://www.telegraphindia.com/business/gst-council-bid-to-overturn-supreme-court-order-in-safari-retreats-case-construction-industry-to-be-hit/cid/2072726)

Government Scraps Windfall Profit Tax on Domestic Crude Oil, Export of Fuels

Effective 2 December 2024, the Government has scrapped the 30-month-old windfall profit tax (i.e., Special Additional Excise Duty) on domestically-produced crude oil and on export of Aviation Turbine Fuel, diesel, and petrol.
(Source - https://www.thehindu.com/business/Economy/govt-scraps-windfall-profit-tax-on-domestic-crude-oil-export-of-fuels/article68937820.ece)

CUSTOMS NEWS

INTERNATIONAL

United Kingdom: UK and US Sign Customs Agreement to Ensure Continued Smooth Trade

The bilateral Customs Assistance Agreement between the UK and the USA was signed on 16 December 2020 at a signing ceremony at the US embassy in London. The agreement will allow customs authorities to continue to cooperate, including sharing data, to tackle customs fraud, maintaining the current strong relationship between the US and the UK Customs authorities. It will also provide the legal basis for the Authorised Economic Operator Mutual Recognition Arrangement, which will ensure that people and businesses will continue to benefit at their respective borders.

(Source - https://www.gov.uk/government/news/uk-and-us-sign-customs-agreement-to-ensure-continued-smooth-trade)

USA: China Hits Dozens of U.S. Companies with Trade Controls

China's Ministry of Commerce had added 28 companies to an export control list to 'safeguard national security and interests'. It had also banned the export of so-called dual-use items, which have both civilian and military applications, to such companies and also placed 10 companies on an 'unreliable entities list' related to sale of arms to Taiwan, preventing them from doing any business in China and prohibiting their executives from entering or living in the country.

(Source - https://www.nytimes.com/2025/01/02/business/china-us-companies-entity-list.html)

Mexico: Mexico Issues 35% Tariff on Textile Imports to Protect Industry

Mexico announced a 35% tariff on textile imports from countries without free trade agreements, aiming to safeguard its local fashion industry. The tariff will primarily affect imports from Asian countries, which have grown significantly in recent years. Imports from the United States will remain exempt, reflecting the importance of the bilateral trade relationship. Mexico will temporarily impose a 35% tariff that already applies to some textile imports to 138 additional 'made' or finished textile products in order to protect the Mexican textile/ clothing industry. The temporary tariffs will remain in effect until 22 April 2026.

(Source - https://mexicobusiness.news/ecommerce/news/mexico-issues-35-tariff-textile-imports-protect-industry)

India

No More Duty-Free Import of Solar Power Items: CBIC

CBIC has announced that effective 17 December 2024, goods imported for solar power generation will no longer be permitted to be imported under the MOOWR scheme, a facility which allows for imported items to be stored without payment of customs duties, on an immediate basis. The CBIC notification overturns a Delhi High Court ruling which had quashed several show cause notices issued by the Customs Department requiring solar power companies to pay Basic Customs Duty on imports, based on an earlier CBIC instruction holding that such companies were not eligible under the MOOWR scheme.

(Source - https://www.financialexpress.com/business/industry-no-more-duty-free-import-of-solar-power-items-cbic-3693918/)

DGFT Expands Global Trade Inspection Framework with Addition of Nine New PSIAs

The DGFT has taken a major step to streamline and strengthen India's international trade operations by enlisting nine new Pre-Shipment Inspection Agencies (PSIAs) and expanding the operational areas for the existing six agencies. The new initiative will benefit exporters, including pharmaceutical exporters. This addition brings specialised services to regions including Southeast Asia, Russia, and Latin America. These agencies will play a pivotal role in certifying the quality and compliance of goods destined for international markets.

(Source - https://www.pharmabiz.com/NewsDetails.aspx?aid=174460&sid=1)

Government Makes Stakeholder Consultation Mandatory While Formulating FTP

The Directorate General of Foreign Trade has made amendments to the Foreign Trade Policy (FTP) to mandate consultations with stakeholders for their views on draft policies. These changes also provide the mechanism to inform reasons for not accepting views, suggestions, comments, or feedback concerning the formulation or amendment of the FTP. The key objective of the amendments is to encourage the participation of all stakeholders in the decision-making process before introducing or changing policy and procedures affecting the importation, exportation and transit of goods, along with a reasonable opportunity to comment and contribute to the process.

(Source - https://www.business-standard.com/industry/news/govt-makes-stakeholder-consultation-mandatory-while-formulating-ftp-125010300981_1.html)

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