

A photograph of a person's hands pointing at a report on a desk. The report is titled "Report Overview" and features a bar chart. The chart has five bars of increasing height, labeled with categories and percentages: "Sales and Marketing (10%)", "Inventory Management (6%)", "Research and Development (5%)", and "Quality Assurance (4%)". A laptop is open on the desk in the background. The image is overlaid with a white diagonal shape that contains the text.

THE TAX POST

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CONTENTS

COVER STORY LEGALITY OF RULE 96(10) OF CGST RULES: A CRITICAL ANALYSIS	03
THE EXPERT SPEAK	05
IN-TALES	08
DECODED	12
GLOBAL TRENDS	15
ABOUT BDO GLOBAL	18
ABOUT BDO IN INDIA	19

PREFACE

“GST has been a game-changer for India, bringing in efficiency, transparency, and ease of doing business.”

- Ratan Tata

Under the GST Law, exporters were entangled in the web of Rule 96(10) of the Central Goods and Services Tax Rules, 2017 (CGST Rules) that restricted the refund of IGST paid on exports, if the benefit of certain notifications (duty exemption schemes like EPCG, EOU/STPI, Merchant Exports, etc.) was availed on its procurements. In this regard, several Writ Petitions were filed before various High Courts *inter alia* challenging the validity of Rule 96(10) of the CGST Rules. Recently, the Kerala High Court rendered a significant ruling, setting aside the validity of the above rule.

The ‘Cover Story’ of this edition of the ‘Tax Post’ delves into the recent Kerala High Court ruling, while also highlighting ongoing cases before various High Courts, the removal of Rule 96(10) of the CGST Rules, and the ambiguity created by its prospective removal.

The ‘Expert Speak’ segment provides an analysis of the recent ruling of the Supreme Court in the case of Safari Retreats wherein it was *inter alia* held that input tax credit can be availed on immovable property being in the nature of ‘Plant or Machinery’ based on the functionality test. This section also highlights what could be the road ahead.

The ‘In Tales’ section dissects the Power sector, highlighting the global outlook and India’s position in the global Power sector. The section also highlights the various challenges faced by the sector including those from the indirect tax perspective.

The ‘Decoded’ segment of this edition dissects a vital judgment upholding the validity of notification no:09/2023-Central Tax dated 31 March 2023 that *inter alia* extended the time limit for issuing an Order under Section 73 of the CGST Act for FY 2017-18 till 31 December 2023 (from 30 September 2023) due to *force majeure*.

We continue to bring the latest news on indirect taxes from across the globe in our feature ‘Global Trends’.

We wish our readers happy reading!



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COVER STORY

LEGALITY OF RULE 96(10) OF CGST RULES: A CRITICAL ANALYSIS

INTRODUCTION

Section 16 of Integrated Goods and Services Tax Act, 2017 (IGST Act) *inter alia* provides that in respect of zero-rated supply (including export) of goods/ services, the supplier would have the following options:

- **Option I:** Undertake zero-rated supply without payment of IGST under Bond / Letter of Undertaking (LUT) and claim refund of unutilised input tax credit (ITC) on inputs/ input services (under Section 54 of the Central Goods and Services Tax Act, 2017 (CGST Act) read with Rule 89 of the Central Goods and Services Tax Rules, 2017 (CGST Rules)); or
- **Option II:** Undertake zero-rated supply on payment of IGST and claim refund of IGST paid on such supplies (under Section 54 of the CGST Act read with Rule 96 of the CGST Rules).

However, Rule 96(10) of the CGST Rules (omitted with effect from 8 October 2024) specifically barred an exporter to claim refund of tax paid on goods/ services exported ‘**on payment of IGST**’ (and consequently claim refund) in case benefit of prescribed notifications (such as under EPCG, as an EOU / STPI, Merchant Exports, etc.) was claimed on its procurements¹. However, Rule 89 of the CGST Rules does not impose a similar restriction (for claiming refund of accumulated ITC).

CHALLENGE TO THE VALIDITY OF RULE 96(10) OF THE CGST RULES

Many exporters have challenged the validity of the aforesaid restriction provided in Rule 96(10) of the CGST Rules before various High Courts, some of which are mentioned below:

- **Punjab & Haryana High Court: *Arjan Impex Ltd. Vs. State of Haryana and Ors.* [CWP 2713-2023 and CWP-566-2022] and *M/s. Glassco Laboratory Equipments Pvt. Ltd. Vs. Union of India* [CWP-3804-2023]** - Interim stay was granted.
- **Bombay High Court: *Prashi Pharma Pvt. Ltd. Vs. Union of India and Ors.* [WP (L) 436 of 2021]** - Interim stay was granted² *vide* order dated 27 January 2021, directing the tax authorities that no recovery of IGST already paid by the petitioner on the goods imported under Advance Authorisation should be made.

- **Madras High Court: *Comstar Automotive Technologies Pvt. Ltd. Vs. Union of India and Ors.* [WP 18693 of 2020]** - While the Writ Petition challenging the validity of Rule 96(10) of the CGST Rules as being *ultra vires* Section 16 of the IGST Act was admitted by the High Court *vide* order dated 15 December 2020, no interim stay was granted by the High Court.
- **Gujarat High Court: *M/s. Mayur Woven Private Limited Vs. Union of India* [2021 (9) TMI 876]** - Interim stay was granted in this matter *vide* order dated 8 September 2021 wherein it was directed that no recovery shall be made in respect of IGST paid on exports that was refunded to the petitioner. The arguments in this matter have been completed and the judgment has been reserved.
- **Kerala High Court: *Sance Laboratories Pvt. Ltd. Vs. Union of India and Ors.* [WP 17447 of 2023]** - Recently, the Kerala High Court, in *Sance Laboratories* [TS-700-HC(KER)-2024-GST] (Kerala High Court Ruling) held that Rule 96(10) of the CGST Rules is *ultra vires* the provisions of the GST law.

Since the Kerala High Court ruling is the first ruling that has rendered Rule 96(10) of the CGST Rules invalid, it is imperative to examine the key observations and ratio of the said ruling.

RATIO LAID DOWN BY THE KERALA HIGH COURT RULING

The key findings of the ratio laid down by the Kerala High Court are summarised below:

- Section 16 of IGST Act (both prior to and from 1 October 2023 onwards) do not restrict an exporter’s right to claim refund of IGST paid on exports or unutilised ITC on inputs/ input services.
- The phrase ‘*subject to such conditions, safeguards and procedures as may be prescribed*’ in Sections 16(3)(a) and 16(3)(b) of IGST Act and Section 54 of CGST Act do not authorise imposition of restrictions in a manner that takes away the right granted under Section 16 of IGST Act.
- Rule 96(10) of CGST Rules restricts the right to claim refund that is not contemplated by Section 16 of IGST Act. Hence, Rule 96(10) of the CGST Rules is *ultra vires* Section 16 of the CGST Act and is manifestly arbitrary. Further, the said provision produces absurd results, not intended by the Legislature.

¹ Vide Notification No. 20/2024-Central Tax dated 8 October 2024, Rule 96(10) has been omitted prospectively i.e., with effect from 8 October 2024. Our alert on the notification can be accessed by clicking [here](#).

² TS-47-HC(BOM)-2021-GST

- In view of the above, Rule 96(10) of CGST Rules was held to be *ultra vires* Section 16 of IGST Act. Consequently, all the pending Show Cause Notices and Orders passed adversely in respect of the Taxpayers were quashed.

WAY FORWARD

After seven years of disputes and interpretational issues, Rule 96(10) of the CGST Rules has finally been deleted from the CGST Rules pursuant to the recommendations of the 54th GST Council meeting albeit with prospective effect from 8 October 2024. While this is a laudatory step, some of the interpretation issues for the past period remain to be resolved. While the Kerala High Court ruling provided relief to the specific petitioners in the case, the impact of this ruling and the availability of such relief on all other exporters who were negatively impacted by the rule is another area that needs to be examined.

Several High Courts are currently considering issues relating to Rule 96(10) of the CGST Rules. While the Kerala High Court's ruling is a significant step forward, the finality of this would depend on the decisions of other High Courts and potential appeals by tax authorities/ Taxpayers, as the case may be.



THE EXPERT SPEAK

SAFARI RETREAT - WHETHER 'PLANT OR MACHINERY' IS DIFFERENT FROM 'PLANT AND MACHINERY'?



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INTRODUCTION

- In the case of *Chief Commissioner of Central Goods and Service Tax Vs. Safari Retreats Private Limited*³, the Taxpayer company has been engaged in the construction of shopping malls for the purpose of letting out the premises in the malls to various tenants. The construction of malls demands large volumes of materials, resources, and services, including cement, sand, steel, aluminium, cables, plywood, paint, elevators, escalators, air conditioning systems, electrical components, building automation systems, etc., and also consultancy services, architectural services, legal and other professional services, engineering services and other services including the services of a team of international designers specialised in the construction of malls. These goods and services used in the construction of malls are taxable under the CGST Act. It was brought to the attention of Taxpayer that the credit of input taxes paid on procurement of these inputs and services is barred, in terms of Section 17(5)(d) of the Central Goods and Services Tax Act, 2017 (CGST Act).
- Section 17(5) of CGST Act *inter alia* provides that notwithstanding anything contained in Section 16(1) of CGST Act, ITC in respect of the following would not be available to a registered person:
 - Works contract services for construction of an immovable property (except plant and machinery) except where it is an input service for further supply of works contract service (Clause (c))
 - Goods or services or both for construction of immovable property (except plant or machinery) on their own account including when such goods or services or both are used in the course or furtherance of business (Clause (d)).

- The term 'plant and machinery' is defined in Explanation to Section 17 to *inter alia* mean apparatus, equipment and machinery fixed to earth by foundation or structural support that are used for making outward supply of goods or services or both and includes such foundation and structural supports but excludes land, buildings or any other civil structures, etc.
- When the tax authorities advised to not claim credit of input tax of the procurements made for construction of the mall, the aggrieved Taxpayer filed a Writ petition before the Orissa High Court⁴. The Orissa High Court had read down the restriction provided under Section 17(5)(d) of CGST Act and held that if the Taxpayer is required to pay output GST on the rental income from the mall, it is entitled to claim ITC for the relevant goods and services used in construction of the mall.
- The tax authorities preferred to file an appeal before the Supreme Court, challenging the Orissa High Court order. Multiple other assesseees had also intervened in the matter.



³ (2024) 23 Centax 62 (S.C.) [03-10-2024]

⁴ 2019 (25) G.S.T.L. 341 (Ori)

ISSUES RAISED BEFORE SUPREME COURT

1. Whether the definition of “plant **and** machinery” in the explanation appended to Section 17 applies to the expression “plant **or** machinery” used in section 17(5)(d)?
2. If it is held that the explanation does not apply to “plant **or** machinery”, what is the meaning of the word “plant”?
3. Whether clauses (c) and (d) of Section 17(5) and Section 16(4) of the CGST Act are unconstitutional?

OBSERVATIONS AND RULING BY THE SUPREME COURT

- The Supreme Court observed that the cases covered by clauses (c) and (d) of Section 17(5) of CGST Act are entirely distinct from other cases. The same is done to ensure the object of not encroaching upon the State’s legislative powers under Entry 49 of List II. Further, in this regard, it was emphasised that ITC is a statutory right, not an inherent one, and the legislature is within its power to create exceptions, especially in tax law. Consequently, it was held that the provisions cannot be said to be arbitrary or discriminatory based on the principle of reasonable classification enshrined under Article 14 of the Constitution of India.
- Section 17(5) of CGST Act carves out certain exceptions to the general rule that a registered person would be entitled to claim ITC after satisfying the conditions specified in Section 16 and Section 18 of CGST Act. Section 17(5)(c) of CGST Act restricts entitlement to ITC on Works Contract services used in the construction of immovable property, subject to certain exceptions. Further, Section 17(5)(d) of CGST Act bars a registered person from claiming ITC of such goods and services which are used in the construction of immovable property on its own account. There are two exceptions in clause (d) to the exclusion from ITC provided in the first part of Clause (d). The first exception is where goods or services or both are received by a taxable person to construct an immovable property consisting of a “plant or machinery”. The second exception is where goods and services or both are received by a taxable person for the construction of an immovable property made not on his own account.
- The Supreme Court noted that the expression “plant **and** machinery” has been used for multiple times in Chapter V related to “Input Tax Credit”, however, the expression “plant **or** machinery” has been used only once in clause (d) of Section 17(5) of CGST Act.
- The Supreme Court provided a detailed interpretation of the phrase “on its own account”. It was observed that in case where the immovable property will be used for personal use and not for providing any services or will be used as a setting for carrying out its business activities, then it can be said that the construction is “on its own account”. However, in this regard, it was further observed that in case where the immovable property is constructed for sale or for leasing/ licence purposes, then it cannot be said to be “on its own account”.
 - The Supreme Court held that whether a building is a plant is a question of fact. Also, the Court held that if it is found on facts that a building has been so planned and constructed as to serve an assessee’s special technical requirements, it will qualify to be treated as a plant for the purposes of investment allowance. The word ‘plant’ used in a bracketed portion of Section 17(5)(d) cannot be given the restricted meaning provided in the definition of “plant **and** machinery”, which excludes land, buildings or any other civil structures. Therefore, in a given case, a building can also be treated as a plant, which is excluded from the purview of the exception carved out by Section 17(5)(d) as it will be covered by the expression “plant **or** machinery”. We have discussed the provisions of the CGST Act earlier. To give a plain interpretation to clause (d) of Section 17(5), the word “plant” will have to be interpreted by taking recourse to the functionality test.
 - The Model GST Law had also used the words ‘Plant and Machinery’ in section 17(5)(d). If it was an error, the tax authorities would have stepped in to correct the mistake, which was not done. Thus, it must be inferred that the legislature has intentionally used the phrase ‘plant or machinery’ (in Section 17(5)(d)) as distinguished from the expression ‘plant and machinery’ (used in other places). Since the legislature had made this distinction consciously, the expressions ‘plant **and** machinery’ and ‘plant **or** machinery’ cannot be given same meaning. Giving same meaning to these terms would be disregard to the words used in the statute.
 - The Supreme Court explained that a building that is constructed to serve as a shelter/ space for conducting business activities would not qualify as a ‘plant’, as it does not serve a direct functional role in the operations themselves.
 - The Supreme Court observed that each mall is distinct, requiring a fact-specific examination to determine if it qualifies as a ‘plant’. Similarly, warehouses and other buildings (except hotels and cinema theatres) must be evaluated individually to determine if they meet the criteria for being classified as a ‘plant.’ Since the HC had not determined whether the mall would satisfy the functionality test to qualify as a ‘plant,’ the SC remanded the case to the HC.
 - Considering the above, the challenge to the constitutional validity of the impugned provisions, along with Section 16(4), was dismissed, while upholding the contention of the Taxpayer with respect to the eligibility to ITC under the GST law, subject to meeting the specified criteria.

AUTHOR'S COMMENTS

- It is to be noted that the Supreme Court in *Safari Retreats* (supra) has not read down clause (c) of Section 17(5) in any manner and as such, the definition of the expression “plant **and** machinery” under Explanation to Section 17(5) would be squarely applicable for the purposes of clause (c) of Section 17(5).
- The Supreme Court has confirmed the applicability of the functionality test to assess the eligibility of input tax credit under section 17(5)(d). This is advantageous for Taxpayers whose business models involve generating revenue from leasing or renting specialised properties, provided they pass through the functionality test.
- The Taxpayers in all instances should now evaluate whether they meet the functionality test based on the current legal precedents and, accordingly, determine their eligibility for input tax credit.
- Interestingly, the Supreme Court, in paragraph 32 of its judgment, has analysed the term 'own account'. The court held that construction is said to be on a taxable person's 'own account' when (i) it is made for his personal use and not for service; or (ii) it is to be used by the person constructing as a setting in which business is carried out. This appears to restrict credit in cases where the constructed building is used by the taxpayer for their own use!
- The SC judgment would now impact various other cases, like in the case of *Western Concessions Pvt. Ltd. Vs. Union of India*⁵ where the orders passed by the Advance Ruling Authority and the Appellate Authority for Advance Ruling holding that the petitioner's pipelines laid outside the factory do not qualify as 'plant or machinery' in terms of Section 17(5) of CGST Act are set aside by the Bombay HC and the matter is remanded back to the Advance Ruling Authority for fresh consideration of the functionality test.

Similarly in case of *M/s. Chirantan Enterprises LLP Vs. Commissioner of CGST and Central Excise*⁶, the petitioner was asked to file an appeal before the Appellate authority by Madhya Pradesh High Court, with all the necessary documents to satisfy the claim that the building in question qualifies for the definition of 'plant' in order to avail ITC and rely on the ratio laid down by the Apex Court in the case of *M/s Safari Retreats Private Ltd.* (supra).

The Taxpayers now need to go back and reevaluate the eligibility to input tax credit on the basis of the judgment.



⁵ 2024-VIL-1145-BOM

⁶ 2024 (10) TMI 1242 - MADHYA PRADESH HIGH COURT

IN-TALES

THE HIDDEN COSTS OF INDIRECT TAXES IN THE POWER INDUSTRY

INTRODUCTION

Power, a cornerstone of modern infrastructure, is indispensable for a nation's economic prosperity and societal well-being. A robust and well-developed power infrastructure is the lifeblood of economic growth, powering businesses and households alike. The availability and reliability of power supply are critical factors influencing a country's economic trajectory. A strong power infrastructure is essential to attract investments, create jobs and improve the overall quality of life for its citizens. Without adequate power, industries may struggle to operate efficiently, leading to lower productivity and reduced economic output.

GLOBAL OUTLOOK

As populations grow and low-income countries move towards urbanisation, the global demand for energy is continuously increasing. Despite a drop in 2020 due to a reduction in economic activities during the COVID-19 pandemic, the global energy production has grown by 60% since the beginning of the century⁷. The global power generation market is expected to be valued at USD 2.10tn in 2024 and is anticipated to reach around USD 4.55tn by 2034, expanding at a CAGR of 8.04% over the forecast period from 2024 to 2034⁸.

During 2024 and 2025, it is anticipated that the global electricity consumption will increase at the fastest pace since the post-COVID rebound. This would be fuelled by robust economic growth, intense heatwaves and continued electrification worldwide. The growth is also driven by strong electricity demand in multiple regions and countries, especially in China, India and the United States⁹.

INDIA OUTLOOK¹⁰

Globally, India is the third-largest producer and consumer of electricity, with an installed power capacity of 446.18 GW as of June 2024. Of this, ~194.99 GW comes from renewable energy sources (Solar energy - 85.47 GW, Wind energy - 46.65 GW, Biomass - 10.35 GW, Hydropower - 51.93 GW and balance 0.59GW from waste). India's power generation witnessed its highest growth rate in over 30 years in FY23, increasing by 8.87% to 1,624.15 billion-kilowatt-hours (b-kWh) in FY23. In FY24, the power generation in India was ~1,739.09 b-kWh. There has been a major policy shift towards generation of power from renewable sources, with the Government aiming to generate/ set up 500 GW of power capacity from renewable sources by 2030.

CHALLENGES FACED BY THE POWER SECTOR IN INDIA¹¹

India's power sector faces significant challenges. A key issue is the need to expand electricity generation to keep up with increasing demand. In June 2024, India was projecting its biggest power shortfall in 14 years of 14GW during nighttime hours¹². Further, Indian transmission infrastructure is plagued with transmission losses and electricity thefts, which also needs to be addressed for effective increase in availability of power for consumption. Additionally, speeding up the process of adding new thermal power plants and securing a reliable supply of equipment is crucial. Improving grid reliability while reducing costs is vital for a stable power supply. Finally, maintaining a stable supply chain and embracing new technology is necessary for the sector's long-term sustainability and efficiency.

CHALLENGES FROM THE INDIRECT TAX PERSPECTIVE

- **Subsuming 'Electricity Duty' under the GST regime**
 - While the power to regulate '*Electricity*' lies with both the Central Government and the State Legislatures as per Entry 38 of List III (Concurrent List) to the Seventh Schedule of the Constitution of India (Constitution), the State Legislatures are exclusively empowered to levy taxes on the consumption or sale of electricity vide Entry 53 of List II (State List) to the Seventh Schedule of the Constitution.
 - When the Goods and Services Tax (GST) was introduced, the power industry advocated for the inclusion of electricity under the GST regime. Despite these requests to both the GST Council and Central and State governments, electricity remains outside the purview of GST. This has negatively impacted entities involved in power generation, transmission, and distribution, leading to a complex tax structure with multiple layers of taxes due to the following reasons:
 - Although the inputs, capital goods and input services used for generation, transmission and distribution of power are leviable to GST, input tax credit (ITC) thereon is not available to these entities. This resulted in an increased cost of generation, transmission and distribution of power and thereby, affecting the consumers at large.

⁷ <https://www.statista.com/topics/6148/global-energy-industry/#topicOverview>

⁸ <https://www.precedenceresearch.com/power-generation-market#:~:text=The%20global%20power%20generation%20market,8.04%25%20between%202024%20and%202034.>

⁹ <https://www.iaea.org/reports/electricity-mid-year-update-july-2024/executive-summary>

¹⁰ IBEF Power Sector Report (Power Sector in India: Trends in Electricity Generation | IBEF)

¹¹ https://economictimes.indiatimes.com/industry/energy/power/budget-2024-graphical-overview-of-power-sectors-challenges-and-wishlist/articleshow/111479476.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

¹² <https://www.reuters.com/business/energy/india-projects-biggest-power-shortfall-14-years-june-2024-05-09/>

- Additionally, coal, which is one of the major raw materials used in thermal power plants is also leviable to GST Compensation Cess.
 - Subsuming Electricity Duty within the GST regime would substantially reduce the costs associated with power generation, transmission, and distribution. This, in turn, would lead to lower electricity prices for consumers and boost profitability, attracting new investments to the sector. It is pertinent to note that subsuming Electricity Duty under the GST regime would necessitate constitutional amendments.
 - On a related note, the inclusion of petroleum products in GST would also be required to provide a seamless tax credit chain, where the petroleum products are used as a fuel for generation of electricity.
- **Whether generation of ‘electricity’ can be covered under the purview of ‘job work’ activity**

- While ‘electricity’ itself is outside the purview of the GST regime, a question had arisen as to whether the process of converting coal / other inputs into electricity could be considered a ‘job work’ activity, which is subject to GST. If the answer to the above is in the affirmative, would the ‘principal’ providing ‘coal’ / other inputs to the job worker be entitled to claim ITC on procurement of ‘coal’ in cases where the electricity (final product) is used by such principal for supplying taxable goods?
- In this regard, it is relevant to refer to the definition of ‘job work’ provided under Section 2(68) of the CGST Act which means ‘*any treatment or process undertaken by a person on goods belonging to another registered person*’.
- In this regard, the Bombay High Court in **Commissioner of C. Ex., Nagpur Vs. Indorama Textiles [2010 (260) ELT 382 (Bom.)]**¹³ had held as under:

“8. The fact of electricity being intermediate goods used in manufacture of final product by Respondent No. 1 is not in dispute before us. It is nowhere contended that M/s. IRSL cannot be a job worker and generation of electricity cannot be outsourced. When it can be outsourced, it also follows that Respondent No. 1 need not have a captive power plant.”

- CBIC vide Circular No. 79/53/2018-GST dated 31 December 2018¹⁴ had *inter alia* clarified that:

“b) Issue: A registered person uses coal for the captive generation of electricity which is further used for the manufacture of goods (say aluminium) which are exported under Bond/Letter of Undertaking without payment of duty. Refund claim is filed for accumulated Input Tax Credit of compensation cess paid on coal. Can the said refund claim be rejected on the ground that coal is used for the generation of electricity which is an intermediate product

and not the final product which is exported and since electricity is exempt from GST, the ITC of the tax paid on coal for generation of electricity is not available?

Clarification: *There is no distinction between intermediate goods or services and final goods or services under GST. Inputs have been clearly defined to include any goods other than capital goods used or intended to be used by a supplier in the course or furtherance of business. Since coal is an input used in the production of aluminium, albeit indirectly through the captive generation of electricity, which is directly connected with the business of the registered person, input tax credit in relation to the same cannot be denied.”*

[Emphasis Supplied]

- Relying on the above, the Maharashtra Appellate Authority for Advance Ruling in **JSW Energy Ltd. [2020 (35) GSTL 456 (App. AAAR- GST - Mah.)]** had *inter alia* held that the arrangement for supply of ‘coal’ or any other inputs by the principal (JSW Steel Limited, in that case) for generation of electricity would be construed as job work and hence, the same would not be leviable to GST.
- Basis the aforesaid ruling, it seems that a principal can supply coal or other inputs to a job worker for electricity generation. In such a scenario, electricity generated by the job worker would be considered as an intermediate product. Depending on the taxability of the final products supplied by the principal, they may be able to claim input tax credit (ITC) on the GST paid for purchasing coal or other inputs, subject to other conditions and restrictions provided under the GST law.



¹³ Against this order, the tax authorities filed a Special Leave Petition before the Supreme Court which was dismissed vide order dated 19 July 2010 [2010 (260) ELT A83 (SC)]

¹⁴ While the Circular was subsequently superseded vide Circular No. 125/44/2019-GST dated 18 November 2019, the clarification extracted in this article has not undergone any change.

- **Whether power generation units can be set-up under Manufacturing and Other Operations in Warehouse (No. 2) Regulations, 2019 (MOOWR Scheme)**
 - The MOOWR Scheme entitles a person to import raw materials and/ or capital goods without payment of duty for undertaking manufacturing and other operations in a bonded warehouse.
 - Electricity is 'goods' and consequently, generation of electricity can be treated as 'manufacture' or 'other operations' on goods. Such generation of electricity can be from various sources (such as thermal, nuclear, solar or hydro) and could fall under the ambit of "manufacturing and other operations". This raises the question of whether capital goods can be procured under the MOOWR scheme for electricity generation.
 - In this regard, CBIC had issued Instruction no:13/2022-Customs dated 9 July 2022 *inter alia* clarifying that solar power generating units fall outside the scope of MOOWR Scheme. Accordingly, the permissions granted to such units under the MOOWR Scheme need to be reviewed by immediately taking necessary follow-up actions and henceforth, no permissions to operate under the MOOWR Scheme should be granted to such units.
 - The aforesaid instruction was challenged before the Delhi High Court wherein in *Acme Heergarh Powertech Pvt. Ltd. and Ors. Vs. Central Board of Indirect Taxes and Customs and Anr. [TS-168-HC2024(DEL)-CUST]*, the Delhi High Court had *inter alia* observed that neither Sections 61 nor 65 of the Customs Act, 1962 (Customs Act) can be construed as incorporating an inherent or implied exclusion for solar power generation. Accordingly, the aforesaid instruction was quashed. The Government has filed an appeal in the Supreme Court against the judgment of Delhi High Court, where it is pending.
 - Subsequently, effective 16 August 2024, Section 65 of the Customs Act has been amended *vide* Section 101 of Finance (No. 2) Act, 2024 by virtue of which, the Central Government has been empowered to issue a notification and specify the manufacturing processes and other operations in relation to a class of goods that shall not be permitted in a warehouse.
 - To date, no notification has been issued regarding the exclusion of 'electricity' under the MOOWR Scheme. Based on this, it may be considered that capital goods procured for electricity generation in MOOWR units could potentially qualify for tax benefits. However, this interpretation may be challenged by tax authorities and applications for the MOOWR Scheme could potentially be decided upon only after the policy decision is taken on this issue.
- **Miscellaneous Issues:** In addition to the above, the power sector is also poised with the following issues from the indirect tax perspective:
 - **Export of electricity:**
 - In respect of export of electricity, since the same is exported on a continuous basis through transmission lines attached to land, generation of a Shipping Bill under the Customs Act becomes challenging. Since electricity is goods, for claiming any refund of accumulated ITC, shipping bill would be required. In this regard, Rule 89(2) of the CGST Rules has been amended and circular no:175/07/2022-GST dated 6 July 2022 has been issued to *inter alia* provide for the procedure for claiming refund of unutilized ITC in respect of export of electricity.
 - Although the aforementioned developments address the issue of refund eligibility, a discrepancy arises between the quantity of electricity exported as stated on invoices and the quantity reported on the Scheduled Energy Statement (Statement) uploaded to the Regional Power Committee website of the Regulatory Electricity Authority (REA). The above circular clarifies that the lower quantity of electricity exported, as indicated either on the Statement or the Export Invoice, will be considered for refund of unutilised ITC.
 - **Turnkey Engineering, Procurement and Commissioning (EPC) contracts for setting-up of renewable energy plants/ devices:**
 - Effective 1 October 2021, turnkey EPC contracts are leviable to GST under the 70-30 scheme where 70% of the consideration would be deemed as the value of goods attracting 12% GST (as per Sl. No. 201A of Schedule II of Notification No. 1/2017-Central Tax (Rate) dated 28 June 2017) and the remaining 30% of the consideration would be deemed as the value of services attracting GST @ 18% (as per Sl. No. 38 of Notification No. 11/2017-Central Tax (Rate) dated 28 June 2017).
 - However, in cases where the EPC contract can be divided into two distinct components - one for supply of goods and the other for supply of services, the question arises whether this division is preferable to the deemed valuation provided under the relevant notifications. While the answer can depend on the contractual terms and the existence of cross-default clauses, even if documentary evidence supports the contract division, tax authorities may still contest this position, where the tax liability is higher under 70:30 scheme and the contractor opts to pay tax under split contract valuation basis.

¹⁵ TOLO was subsequently replaced with Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 (TOLA).

¹⁶ Dated 3 April 2020

¹⁷ Dated 1 May 2021, as amended by Notification No. 24/2021-Central Tax dated 1 June 2021

¹⁸ Dated 5 July 2022

¹⁹ Dated 31 March 2023

²⁰ Dated 28 December 2023

- Another crucial issue pertains to the GST on corporate guarantees. In a typical power generation business, the individual generation assets are held in SPVs for various reasons, including ease in fund raising. For fund raising at SPV level, typically the holding company would guarantee the loans. Now with the requirement to adopt statutorily prescribed valuation norms for GST, the GST cost of the SPVs on guarantee commission would be higher. Given that the recipient would not be eligible for full Input Tax Credit (ITC), the GST paid on such services would lead to the increased cost of power generation, transmission and distribution, ultimately impacting the end-consumer.
- Finally, an issue that requires the GST Council's attention is the taxation of Carbon Credits, including the applicable GST rate and classification.

CONCLUSION

In conclusion, while the GST regime has brought about significant tax reforms in India, the power sector is yet to reap the benefits, due to its non-inclusion in the GST chain. Further, some of the issues related to GST, such as the valuation of corporate guarantees, taxation of Carbon Credits, etc. need to be addressed. Addressing these challenges is crucial to ensure the smooth functioning of the power sector and ultimately benefit consumers.

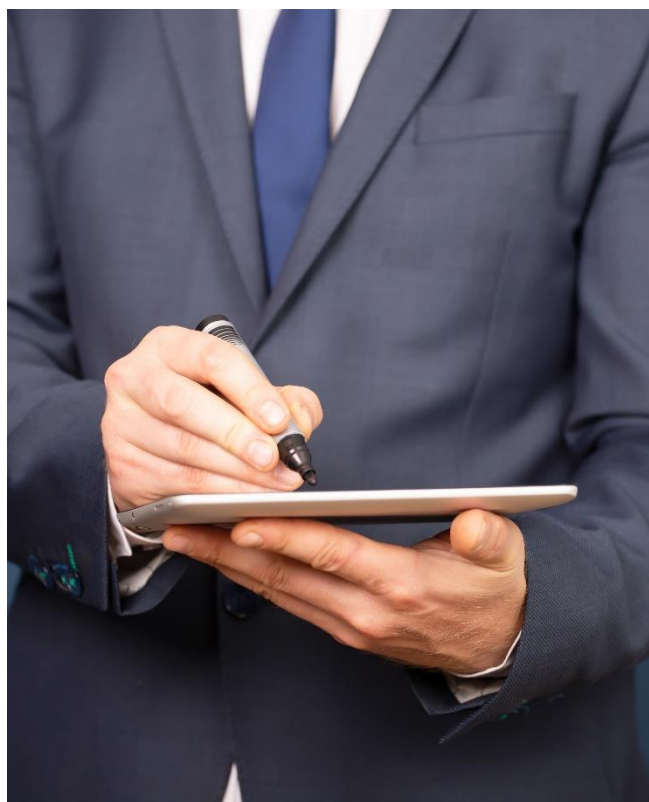


DECODED

THE GREAT GST EXTENSION DEBATE: A COURTROOM SHOWDOWN

INTRODUCTION

- Section 73 of the CGST Act mandates the tax authorities to issue an order within a period of three years from the due date of furnishing of Annual Return, where the Show Cause Notice (SCN) is issued under the said Section i.e., without alleging fraud, etc. Further, the SCN in respect of such orders must be issued at least three months prior to the last date for issuing adjudicating order.
- However, due to COVID-19 pandemic-led lockdown, the Government had promulgated Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020¹⁵ (TOLO) which introduced Section 168A in the CGST Act to *inter alia* provide the following:
 - The Central Government may, on the recommendations of the GST Council, by notification extend the time limit specified in or prescribed or notified under the CGST Act in respect of actions which cannot be completed or complied with due to *force majeure*.
 - The term '*force majeure*' was defined to mean a case of war, epidemic, flood, drought, fire, cyclone, earthquake, or any other calamity caused by nature or otherwise affecting the implementation of any of the provisions of the CGST Act.
- In terms of Section 168A, the following extension notifications were issued by CBIC:
 - **Notification no:35/2020-Central Tax¹⁶:** Time limits for various actions *inter alia* including completion of any proceeding or passing of any order, notice, intimation, etc. that fell between 20 March 2020 and 30 August 2020 were extended until 31 August 2020.
 - **Notification no:14/2021-Central Tax¹⁷:** Similar extension was provided till 30 June 2021 in respect of acts that were required to be performed between 15 April 2021 and 29 June 2021.
 - **Notification no:13/2022-Central Tax¹⁸:** It extended the time limit for issuing order under Section 73 for FY 2017-18 ('relevant period') until 30 September 2023 (as per recommendation made in the 47th GST Council meeting) from earlier due date of 5 or 7 February 2023 (depending on the state).
 - **Notification no:9/2023-Central Tax¹⁹ (NN 9/2023):** Thereafter, basis the recommendations made in the 49th GST Council meeting, notification no:9/2023-Central Tax dated 31 March 2023 (NN 9/2023) was issued, *inter alia* further extending the time limit for issuing order under Section 73 for the relevant period till 31 December 2023 and also extending the time limit for issuing orders under Section 73 for FY 2018-19 and FY 2019-20 to 31 March 2024 and 30 June 2024 respectively (originally 31 December 2023 and 31 March 2024, respectively).
 - **Notification no:56/2023-Central Tax²⁰ (NN 56/2023):** It extended the time limit for issuing order under section 73(10) of the CGST Act for FY 2018-19 and FY 2019-20 to 30 April 2024 and 31 August 2024 respectively from the earlier due date of 31 March 2024 and 30 June 2024.



¹⁵ TOLO was subsequently replaced with Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 (TOLA).

¹⁶ Dated 3 April 2020

¹⁷ Dated 1 May 2021, as amended by Notification No. 24/2021-Central Tax dated 1 June 2021

¹⁸ Dated 5 July 2022

¹⁹ Dated 31 March 2023

²⁰ Dated 28 December 2023

CHALLENGE TO THE VALIDITY OF EXTENSION NOTIFICATIONS (NN 9/2023 AND NN 56/2023)

The constitutional validity of the extension notifications issued by CBIC viz., NN 9/2023 and NN 56/2023 has been challenged by various taxpayers across various High Courts. The gist of the challenges made, and the orders issued by various courts is tabulated hereunder:

SL. NO.	CASE	HIGH COURT	NN CHALLENGED	VALIDITY	RATIO
1.	Faizal Traders Pvt. Ltd. ²¹	Kerala High Court	NN 9/2023	Upheld	<ul style="list-style-type: none"> COVID-19 was <i>force majeure</i>. Impugned Notification was issued on recommendations of GST Council.
2.	Graziano Trasmissioni ²²	Allahabad High Court	NN 9/2023	Upheld	<ul style="list-style-type: none"> Challenge to the Impugned Notification was set aside.
3.	Barkataki Print and Media Services ²³	Gauhati High Court	NN 56/2023	Set Aside/Quashed	<ul style="list-style-type: none"> Powers under Section 168A cannot be exercised without any recommendations. Impugned Notification was issued without any recommendations from the GST Council. Impugned Notification is <i>ultra vires</i> the provisions of CGST Act.

Recently, the Karnataka High Court in *Sahaj Construction*²⁴ (Taxpayer) while examining the validity of NN 9/2023 has upheld the same. In this section, we will dissect the Karnataka High Court ruling.

CONTENTIONS OF THE TAXPAYER

- For the relevant period, the orders under Section 73(10) are required to be passed by 30 September 2023. However, by virtue of NN 9/2023, Section 168A of the CGST Act has been invoked in an arbitrary manner to extend the aforesaid time limit, without any basis.
- Reliance was placed on *Union of India and Another Vs. Mohit Minerals Private Limited [2022 (10) SCC 700]* to contend that the recommendations of the GST Council is not binding on the Union. The Union of India could either accept or reject the recommendations.
- The recommendations made in the 49th GST Council meeting were not unanimous, with some members expressing dissent. They believed that extending the time frame could create a perception of being unsupportive of and against the interests of the Taxpayer.
- In view of the above, the extension given by NN 9/2023 is without any basis and the said notification is required to be quashed and consequently, the proceedings initiated against the Taxpayer are required to be quashed.

CONTENTIONS OF THE TAX AUTHORITY

- NN 9/2023 has been issued on the basis of the recommendations made by GST Council, which was duly accepted by the Government.
- As a result, the Taxpayer cannot contend that the GST Council recommendations are not mandatory. Once the same has been accepted by the Government and a notification has been issued, the same would be binding on all concerned persons.
- There is no requirement for any recommendation of the GST Council to be unanimous. Since the majority has recommended the extension of limitation period and the same has been accepted by the Government, no fault in the issuance of the said notification can be found.

²¹ Faizal Traders Pvt. Ltd. Vs. Central Board of Indirect Taxes and Customs & Ors. [2024-TIOL-736-HC-KERALA-GST]

²² Graziano Trasmissioni Vs. Goods And Services Tax And 5 Ors. [TS-321-HC(ALL)-2024-GST] - Editor's Note: Petitions pertaining to similar notification issued for FY 2018-19 (NN 56/2023) as well as the validity of Section 168A to be heard and decided separately.

²³ Barkataki Print and Media Services Vs. Union of India [TS-588-HC(GAUH)-2024-GST]

²⁴ Sahaj Construction Vs. Union of India and ors. [TS-726-HC(KAR)-2024-GST]

OBSERVATIONS AND RULING OF THE KARNATAKA HIGH COURT

- A perusal of the discussions made in the 49th GST Council meeting indicates that the Law Committee had considered the representation of various tax officers pertaining to -
 - Delays in scrutiny and audit because of COVID-19 pandemic;
 - Increased workload;
 - Inability to conclude proceedings under Section 73(10) of the CGST Act for the relevant period by 30 September 2023.

As a result, an extension of three months was recommended by the Law Committee.

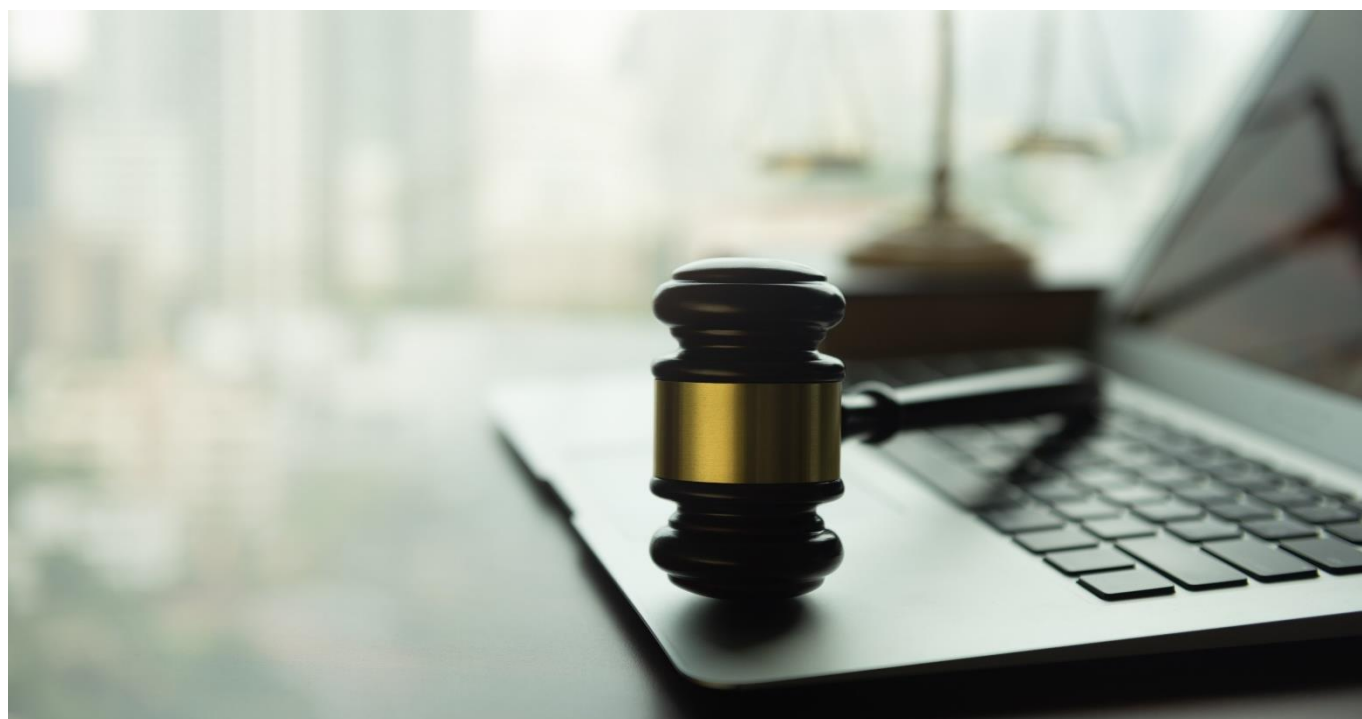
- The recommendation pertaining to extension of three months was made by the GST Council after taking into account the dissenting opinions of certain members of the GST Council. Subsequently, the said recommendation was accepted by the Government by issuing NN 9/2023.
- The reliance placed by the Taxpayer on *Mohit Minerals (supra)* is not applicable in the present case since the acceptance or otherwise of the recommendation is left to the Government and it is for the Government to decide whether to accept the recommendation or not.
- In the present case, the Government having voluntarily accepted the recommendation, it would not be available for the Taxpayer to now contend that the said recommendation is not binding.

- In view of the above, NN 9/2023 cannot be faulted with on the basis of the submissions made by the Taxpayer. The GST Council having considered all material aspects, having recommended the extension of the limitation period from 30 September 2023 to 31 December 2023 and the same having been accepted by the Government, the Taxpayer cannot challenge the same on the submissions made in the present Writ Petition.
- Accordingly, the Writ Petition is dismissed with a liberty to the Taxpayer to file an appeal before the Appellate Authority within 21 days.
- The order is passed in the peculiar facts and circumstances of the case and shall not be treated as a precedent.

CONCLUSION

The aforesaid ruling in *Sahaj Construction (supra)* along with the *Faizal Traders Pvt. Ltd. (supra)* and *Graziano Trasmisioni (supra)* establishes a strong legal precedent supporting the validity of notification no:9/2023. Based on these judgments, it is likely that challenges to the validity of this notification may not be successful.

However, regarding the validity of the subsequent extension notification i.e., NN 56/2023, the Gauhati High Court in *Barkataki Print and Media Services (supra)* has ruled it *ultra vires* the CGST Act. The Allahabad High Court is yet to examine the validity of this extension notification and the constitutionality of Section 168A of the CGST Act. As these matters are currently pending before various High Courts, including the Allahabad and Gujarat High Courts, we will need to await their decisions.



GLOBAL TRENDS

VAT/ GST NEWS

International



E-invoicing in the UAE to enable seamless electronic exchange between suppliers and buyers

The UAE is set to launch a comprehensive e-invoicing system in 2026, as part of its commitment to modernising and digitising the economy. The e-invoicing system aims to deliver multiple benefits, supporting the UAE's goal of a digital, paperless economy. Its key objectives include enabling a modern and digital economy, reducing tax gaps and preventing evasion and creating a balanced business environment for businesses of all sizes, particularly benefiting micro-businesses through access to affordable digital tools.

(Source - <https://www.khaleejtimes.com/business/e-invoicing-in-the-uae-to-enable-seamless-electronic-exchange-between-suppliers-and-buyers>)



Argentina: Why Argentina President Javier Milei dissolved tax agency AFIP | Details

Argentine President Javier Milei announced on Monday the dissolution of the country's tax agency, the Administración Federal de Ingresos Públicos (AFIP), as part of a government effort to reduce inefficiencies. A new entity, the Customs Revenue and Control Agency (ARCA), will be established in its place to streamline operations and reduce bureaucracy. The creation of ARCA aims to reduce the State, eliminate unnecessary positions, professionalise the agency, dismantle corrupt networks, and improve the efficiency of revenue collection and customs control by removing privileges of the past and optimising public management.

(Source - <https://www.timesnownews.com/world/why-argentina-president-javier-milei-dissolved-tax-agency-afip-details-article-114438941>)



The Council of the EU agrees on VAT in the digital age package

The Council of the EU has agreed on new measures to modernise the EU's Value Added Tax (VAT) system. This legislative package includes rules for electronic invoicing, real-time data reporting, and digital platform transactions. It also aims to combat tax fraud, support businesses, and encourage digitalisation. The Council of the EU's agreement includes a directive, a regulation, and an implementing regulation, which collectively update the three aspects of the VAT system namely, digital VAT reporting, VAT for the online platforms, and a one-stop shop for VAT registration.

(Source - <https://www.wired-gov.net/wg/news.nsf/articles/The+Council+of+the+EU+agrees+on+VAT+in+the+digital+age+package+11112024121500?open>)

India



GST, customs, excise case hearings to be virtual by default now: Expert views on pros and cons

The Ministry of Finance has made it mandatory for all Goods and Services Tax (GST), Customs and Central Excise departmental quasi-judicial/ appellate authorities to conduct personal hearings for proceedings under the specified Acts through Video Conferencing (VC) i.e., in Virtual Mode. Exceptions to allow personal hearing in physical mode may be allowed on receipt of specific request from the party concerned and after recording the reasons for the same in writing.

(Source - <https://economictimes.indiatimes.com/wealth/tax/gst-customs-excise-case-hearings-to-be-virtual-by-default-now-expert-views-on-pros-and-cons/articleshow/115082310.cms?from=mdr>)

India's online gaming market grew by 23% in FY24 despite GST burden: Report

India's gaming market grew 23% year-on-year (Y-o-Y) by revenue to USD 3.8bn in financial year 2023-24 (FY24), despite the newly imposed 28% blanket goods and service tax (GST) on online gaming. Regardless, real-money gaming firms added as much as USD 400mn in topline in FY24 by absorbing most of the GST burden coupled with a packed live sports season comprising two world cups and an IPL.

(Source - https://www.business-standard.com/industry/news/gaming-market-to-grow-at-25-to-9-2-bn-by-fy29-despite-gst-burden-report-124111100496_1.html)

New IMS system in GST seen reducing notices, litigation risk

Invoice Management System (IMS) is a fresh integration within the GST portal enabling a recipient to accept, reject, or maintain pending status for the invoices submitted by their suppliers. This functionality is anticipated to reduce notices issued regarding Input Tax Credit discrepancies in returns and bring down litigation. Of the aggregate notices issued by the GST department, approximately 10% stems from ITC-related matters.

(Source - <https://timesofindia.indiatimes.com/city/indore/revolutionary-invoice-management-system-in-gst-set-to-slash-notices-and-litigation-risks/articleshow/115184863.cms>)

CUSTOMS NEWS

INTERNATIONAL



Ukraine and Lithuania reach key milestone in EU4Digital eCustoms pilot

The customs authorities of Ukraine and Lithuania signed a bilateral Memorandum of Understanding (MoU) on 25 October 2024 regarding their mutual e-Customs pilot launched recently under the EU4Digital programme. The MoU lays the foundation to enhance customs procedures and data exchange, facilitating cross-border trade within the Eastern Partnership region. The e-Customs initiative aims to reduce bureaucratic obstacles, enable faster processing times, and enhance transparency ultimately supporting businesses, trade and strengthening overall economic ties between the Ukraine and the EU.

(Source - <https://eunighbourseast.eu/news/latest-news/ukraine-and-lithuania-reach-key-milestone-in-eu4digital-ecustoms-pilot/>)



China adopts measures to promote foreign trade, providing strong support to economy's continuous recovery

A State Council executive meeting deliberated and adopted a raft of policy measures aimed at promoting the steady growth of foreign trade. The meeting called for solid work in promoting the steady growth of foreign trade to provide strong support to the economy's continuous recovery, specifying a slew of work arrangements. These measures include beefing up financial support, fully utilising policy support loans for small and micro-sized businesses and optimising cross-border trade settlements to help enterprises strengthen their capacity in managing exchange rate risks.

(Source - <https://www.globaltimes.cn/page/202409/1319333.shtml>)



Dubai Customs unveils seamless inspections initiative at GITEX Global: A game-changer in Issogistics

At GITEX Global, Dubai Customs introduced its innovative "Seamless Inspections" initiative, marking a significant advancement in how customs inspections are conducted. Designed to streamline the inspection process, the initiative allows on-demand customs checks at logistics service providers' facilities, effectively reducing costs and speeding up clearance times for businesses. The pilot project, launched in partnership with Aramex, is a milestone for both Dubai Customs and the global logistics sector, setting a new benchmark in customs efficiency.

(Source - <https://www.globaltrademag.com/dubai-customs-unveils-seamless-inspections-initiative-at-gitex-global-a-game-changer-in-logistics/>)



India



CBIC reduces compliance burden for customs cargo service providers

The CBIC has reduced compliance burden for Customs Cargo Service Providers (CCSPs) by reducing the number of days for insurance of stored goods and removing the licence renewal process for AEO-compliant entities. These measures aim to reduce logistics costs, improve operational efficiency and enhance India's position as a competitive player in global trade.

(Source - https://www.business-standard.com/industry/news/cbic-reduces-compliance-burden-for-customs-cargo-service-providers-124110801763_1.html)

CBIC asks customs officers to complete inquiry in commercial fraud cases within a year

The Central Board of Indirect Taxes and Customs (CBIC) has issued new guidelines for investigating export/ import fraud cases. To ensure transparency and minimise business disruption, customs officials must now state the specific inquiry in their summons and strive to complete investigations within one year. The CBIC aims to balance efficient fraud detection with a business-friendly environment.

(Source - <https://economictimes.indiatimes.com/news/economy/policy/cbic-asks-customs-officers-to-complete-inquiry-in-commercial-fraud-cases-within-a-year/articleshow/114976771.cms?from=mdr>)

India scraps export tax on parboiled rice to boost exports

India has eliminated the Export Duty on parboiled rice, boosting its position as the world's largest rice exporter. This decision follows last month's reduction of Export Duty from 20% to 10% to enhance exports, along with the resumption of non-basmati white rice exports at a set floor price of USD 490 per metric ton.

(Source - <https://economictimes.indiatimes.com/news/economy/foreign-trade/india-removes-export-tax-on-parboiled-rice-govt-order-shows/articleshow/114474594.cms?from=mdr>)



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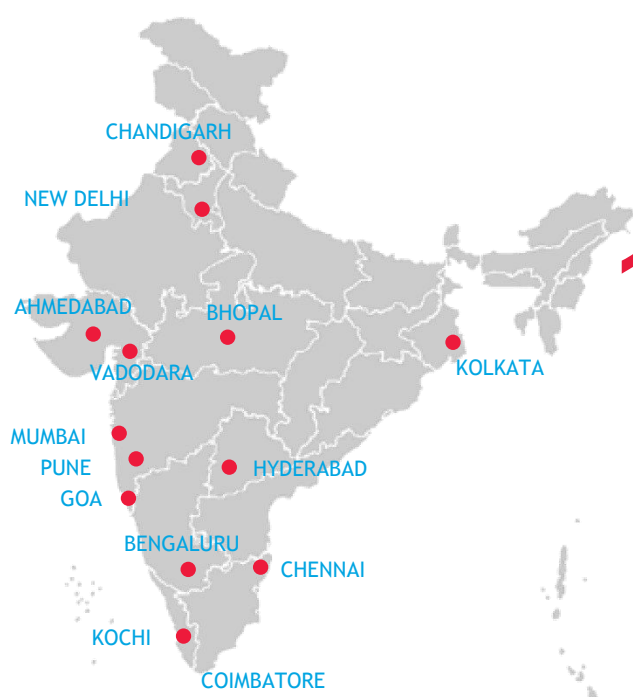
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