

INDIRECT TAX

Weekly Digest

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GOODS & SERVICES TAX

LEGISLATIVE UPDATES

INSTRUCTIONS

Guidelines¹ for arrest and bail for offences punishable under the GST laws

- The Hon'ble Supreme Court in the case of **Siddharth Vs. State of Uttar Pradesh and Ors. [2022 (1) SCC 676]** had made various observations regarding arrest provisions. Considering these observations, the GST Investigation Wing of CBIC has issued the following instructions for exercising the power to arrest:
 - **Condition precedent to arrest:**
 - Section 69(1) of the CGST Act empowers the Commissioner or any other officer authorized by him to arrest a person where he has reasons to believe that the alleged offender has committed any specified offences. It has been expressly provided that such reasons to believe to arrive at a decision to place an alleged offender under arrest must be unambiguous, amply clear and based on credible material
 - The power to arrest must be exercised carefully. Mere fulfilment of the legal conditions provided under Section 69(1) of the CGST Act cannot automatically result in an arrest
 - Even if all the legal conditions to arrest are fulfilled, the Commissioner or the competent authority must determine whether the answer to any or all of the following questions are in the affirmative:
 - Whether the person was concerned in the non-bailable offence or credible information has been received, or a reasonable suspicion exists, of his having been so concerned
 - Whether the arrest is necessary to ensure proper investigation of the offence
 - Whether the person, if not restricted, is likely to tamper with the course of further investigation or is likely to tamper with evidence or intimidate or influence witnesses
 - Whether a person is a mastermind or key operator effecting proxy/benami transaction in the name of dummy GSTIN or non-existent persons, etc. for passing fraudulent input tax credit ('ITC'), etc.
 - Unless such a person is arrested, his presence before investigating officer cannot be ensured
 - In view of the above, the approval to arrest should be granted only where the intent to evade tax or commit acts leading to availment or utilization of wrongful ITC or fraudulent refund of tax or failure to pay the amount collected as tax provided under Section 132(1) of the CGST Act is evident, and the element of men's rea/guilty mind is palpable
 - Thus, the important element to consider before deciding to arrest a person is the need to ensure proper investigation and to prevent the possibility of tampering with evidence or witnesses. The co-operation of the alleged offender in the investigation is also a factor to be considered. It has been specifically clarified that arrest should not be resorted to in cases of technical nature i.e. where the tax demand is based on a difference of opinion regarding the interpretation of the law

¹ Instruction no. 02/2022-23 (GST-Investigation) dated 17 August 2022

▪ Procedure for arrest

- The Principal Commissioner/Commissioner shall record on the file after considering the nature of offence, the role of the person involved and the evidence available, he has reason to believe that the person has committed an offence as mentioned in Section 132 and may authorize an officer of Central Tax to arrest the concerned person(s). An arrest memo must be issued in compliance with the directions of the Hon'ble Supreme Court in **D.K. Basu Vs. State of West Bengal [1997 (1) SCC 416]**. Further, the arrest memo must be issued in the format provided in CBIC Circular no:128/47/2019-GST dated 23 December 2019

- An arrest memo must be separately issued to each individual/arrested person and must indicate the following information:

- Relevant provisions of the CGST Act/other legislations, which have been invoked in respect of the case and the arrested person. Inapplicable provisions, if any, should be struck off from the arrest memo
- The grounds of arrest must be explained to the arrested person and the same must be noted in the arrest memo
- The nominated or authorized person of the arrested person should be informed of, and this fact must be mentioned in the arrest memo
- The date and time of arrest must be mentioned in the arrest memo

A copy of the arrest memo should be given to the arrested person under proper acknowledgment.

- Generation and quoting Document Identification Number ("DIN") is mandatory on communications issued by officers of CBIC to taxpayers and other concerned persons for the purpose of investigations. Any lapse will be viewed seriously

- Key modalities to be complied with at the time of arrest and thereafter:

- A woman should be arrested only by a woman officer (Section 46 of the Code of Criminal Procedure, 1973)
- A medical examination of the arrested person should be conducted by a designated medical officer/registered medical practitioner (as the case may be). In a case where the arrested person is female, the medical examination is to be conducted by a female officer/practitioner
- Reasonable care for the health and safety of the arrested person must be taken by the person having custody of the arrested person
- Arrests should be made with minimal use of force and publicity and without violence. The person arrested should be subjected to reasonable restraint to prevent escape

▪ Post arrest formalities:

- **Offence under Section 132(4) of the CGST Act**

- The Assistant Commissioner or Deputy Commissioner is bound to release the person on bail against a bail bond. The bail conditions should be informed in writing to the arrested person and also on the telephone to the nominated person of the arrested person

- Bail conditions inter alia include execution of a personal bail bond and one surety of like amount given by a local person of repute, appearance before the investigating officer and not leaving the country without informing the officer. It must be ensured that the amount of Bail bond/Surety should not be excessive and should be commensurate with the financial status of the arrested person

- On fulfilment of bail conditions, the arrested person shall be released by the concerned officer on bail. In cases where the bail conditions are not fulfilled, the arrested person shall be produced before the appropriate Magistrate without unnecessary delay and within twenty-four hours of arrest. If necessary, the arrested person may be handed over to the nearest police station for his safe custody, during the night under a challan, before he is produced before the Court

- **Offence under Section 132(5) of the CGST Act**

- The officer authorized to arrest the person shall inform such person of the grounds of arrest and produce him before a Magistrate within twenty-four hours

- If necessary, the arrested person may be handed over to the nearest Police Station for his safe custody under a proper challan and produced before the Magistrate on the next day, and the nominated person of the arrested person may also be informed accordingly. In any case, it must be ensured that the arrested person should be produced before the appropriate Magistrate within twenty-four hours of arrest, exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court

- After the arrest of the accused, efforts should be made to file a prosecution complaint under Section 132 of the CGST Act, before the competent Court at the earliest, preferably within sixty days of arrest, where no bail is granted. In all other cases of arrest also, a prosecution complaint should be filed within a definite time frame

- Every Commissionerate/Directorate should maintain a Bail Register containing the details of the case, arrested person, bail amount, surety amount, etc.

Guidelines on the issuance of summons under Section 70 of the CGST Act

- Another guideline² has been issued for the issuance of summons
- It has been clarified that it needs to be ensured that the exercise of the power to issue summons is done judiciously and with due consideration. The instruction further advises the officers to explore instances when instead of resorting to a summons, a letter for requisition of information may suffice
- CBIC has now issued the guidelines to be followed, which are as under:

- Summons should be issued by Superintendents only after obtaining prior written permission from an officer not below the rank of Deputy/Assistant Commissioner with the reasons for issuance of summons to be recorded in writing
- Where it is not possible to obtain prior written permission, oral/telephonic permission should be obtained, and the same should be reduced to

² Instruction no. 03/2022-23 (GST-Investigation) dated 17 August 2022

writing and intimated to the officer granting permission at the earliest opportunity

- The officer issuing summons should record in a file about appearance/non-appearance of the summoned person and place a copy of the statement recorded in a file
- Summons should indicate the name of the offender against whom the case is being investigated (except where the revelation of the offender's name is detrimental to the cause of investigation) so that the recipient of summons has a prima-facie understanding of whether he has been summoned as an accused, co-accused or as a witness
- Issuance of summons may be avoided to call upon statutory documents which are digitally/online available in the GST portal
- Generally, senior management officials of any company or a PSU should not be issued a summons in the first instance. They should be summoned when there are clear indications in the investigation of their involvement in the decision-making process that led to a loss of revenue
- Generation and quoting DIN is mandatory on communications issued by officers of CBIC to taxpayers and other concerned persons for the purpose of investigations
- The summoning officer must be present at the time and date for which the summons is issued. In case of any exigency, the summoned person must be informed in advance in writing or orally
- All persons summoned are bound to appear before the officers concerned, except women who do not by tradition appear in public or privileged persons
- Issuance of repeated summons without ensuring service of the summons must be avoided. Where the summoned person fails to join the investigation, despite having a reasonable opportunity of being heard (generally three summons at reasonable intervals), a complaint should be filed with the jurisdictional magistrate alleging that the accused has committed an offence under Sections 172 and/or 174 of the Indian Penal Code (45 of 1860). Before filing such a complaint, it must be ensured that a summons has adequately been served upon the intended person as per Section 169 of the CGST Act

Amendment to the guidelines³ for arrest and bail

- The existing nominal monetary limits for arrest and bail matters were provided in circular no:28/2015 dated 23 October 2015. The aforesaid threshold limits for various categories of arrest cases have been revised as under:
 - Cases involving un-authorized importation in baggage/cases under Transfer of Residence Rules, where the market value of the goods involved is INR 5mn or more (erstwhile threshold - INR 2mn)
 - Cases of outright smuggling of high-value goods such as precious metals, restricted items or prohibited items or goods notified under section 123 of the Customs Act or offence involving foreign currency

where the value of offending goods is INR 5mn or more (erstwhile threshold - INR 2mn)

- Cases related to the importation of trade goods (i.e., appraising cases) involving willful misdeclaration in the description of goods/concealment of goods or goods covered under section 123 of Customs Act to import restricted or prohibited items and where the market value of the offending goods is INR 20mn or more (erstwhile threshold - INR 10mn)
 - Cases involving fraudulent evasion or attempt at evasion of duty involving INR 20mn or more (newly inserted)
 - Cases involving fraudulent availment of Drawback or attempt to avail of Drawback or any exemption from duty provided under the Customs Act, in connection with the export of goods, if the Drawback or exemption from duty is INR 20mn or more (erstwhile threshold - INR 10mn)
- Cases related to the exportation of trade goods (i.e. appraising cases) involving (i) willful misdeclaration in value/description (ii) concealment of restricted goods or goods notified under section 11 of the Customs Act, where the market value of the offending goods is INR 20mn or more (erstwhile threshold - INR 10mn)
- Cases involving obtaining an instrument from any authority by fraud, collusion, willful misstatement or suppression of facts and utilisation of such instrument where the duty relatable to such utilisation of the instrument is INR 20mn or more (newly inserted)
 - The aforesaid criteria of value mentioned in sub-para (a) to (f) would not apply in cases involving offences relating to items such as FICN, arms, ammunitions and explosives, antiques and art treasures, wildlife items and endangered species of flora and fauna. In such cases, arrest, if required, based on facts and circumstances of the case, may be considered irrespective of the value of offending goods involved.

Amendment to the guidelines⁴ for launching prosecution

- The existing nominal monetary limits for launching prosecution and related matters were provided in circular no:27/2015 dated 23 October 2015. The aforesaid threshold limits for various categories of cases for launching prosecution have been revised as under:
 - **Baggage and outright smuggling cases:**
 - Cases involving unauthorized importation in baggage/cases under Transfer of Residence Rules, where the market value of the goods involved is INR 5mn or more (erstwhile threshold - INR 2mn)
 - Outright smuggling of high-value goods such as precious metals, restricted items or prohibited items notified under section 11 of the Customs Act or goods notified under section 123 of the Customs Act or foreign currency where the market value of offending goods is INR 5mn or more (erstwhile threshold - INRmn)
 - **Appraising Cases/ Commercial Frauds:**
 - Cases related to the importation of trade goods (i.e. appraising cases) involving willful misdeclaration in value/description or concealment of restricted goods or goods notified under Section 11 of the Customs Act, where the

³ Circular no:38/2013-Customs dated 17 September 2013 amended vide circular no:13/2022-Customs dated 16 August 2022

⁴ Circular no:27/2015-Customs dated 23 October 2015 amended vide circular no:12/2022-Customs dated 16 August 2022

market value of offending goods is INR 20mn or more (erstwhile threshold - INR 10mn)

- Cases related to fraudulent evasion or attempt at evasion of duty under the Customs Act, if the amount of duty evasion is INR 20mn or more (newly inserted)
- Cases related to fraudulent availment of Drawback or attempt to avail of Drawback or any exemption from duty provided under the Customs Act, in connection with the export of goods, if the amount of Drawback or exemption from duty is INR 20mn or more (erstwhile threshold - INR 10mn)
- Cases related to the exportation of trade goods (i.e. appraising cases) involving willful misdeclaration in value/description or concealment of restricted goods or goods notified under Section 11 of the Customs Act, where the market value of offending goods is INR 20mn or more (erstwhile threshold - INR 10mn)
- Obtaining an instrument from any authority by fraud, collusion, willful misstatement or suppression of facts and utilisation of such instrument where the duty relatable to the utilisation of the instrument is INR 20mn or more (newly inserted threshold)
- In respect of cases involving non-declaration of foreign currency by foreign nationals and NRIs (normally visiting India for travel/business trips, etc.) detected at the time of departure from India, exceeding the threshold limit of INR 5mn as prescribed above, if it is claimed that the currency has been legally acquired and brought into India but not declared inadvertently, the prosecution need not be considered as a routine.
- The aforesaid modifications in the threshold limits will apply to all cases where sanction for prosecution is accorded after 16 August 2022. Cases where the prosecution has been sanctioned but no complaint has been filed before the magistrate shall also be reviewed by the prosecution sanctioning authority in light of the provisions of this Circular.

BDO Comments:

The issuance of the above instructions to streamline summons and arrest processes in GST/Customs is a welcome move that clearly spells out the procedural nuances for the summons process, prior to, during and after the arrest. The instruction for summons reiterates the position of not summoning senior functionaries at the first instance and also provides relaxation when documents are available with the tax authorities. The instruction for arrest re-emphasises the important point of not resorting to arrest on issues involving interpretation of the law. The taxpayers may have to look for the on-ground implementation of such instructions and adherence by the Central/State Tax authorities.

The upward revision of monetary for prosecution/arrest under Customs law is welcome.

[Instruction no:02 & 03/2022-23 (GST-Investigation) dated 17 August 2022 Circular no:12 & 13/2022-Customs dated 16 August 2022]

JUDICIAL UPDATES

ORDERS BY AUTHORITY FOR ADVANCE RULING (AAR)

Supply of services by way of cleaning and sweeping of lawns and garden path areas and segregation and transport of the garbage exempted from GST

Facts of the case

- M/s. Indian Security and Personnel Arrangements (Taxpayer) is engaged in providing manpower services. They are proposing to submit a bid in response to the tender floated by the Department of Horticulture, Government of Karnataka for certain services
- The tender floated for the activities of cleaning and sweeping of lawns and garden path areas, segregation and transport of the garbage and supply of manpower for garden maintenance

Questions before the AAR

- Whether the services proposed to be provided by the taxpayer to the department of Horticulture for cleaning and sweeping of lawns and garden path areas and segregation and transport of the garbage liable for GST, and if yes, then at what rate?
- Whether the services proposed to be provided by it to the Department of Horticulture for a supply of manpower for garden maintenance on an outsourcing basis to the Department of Horticulture liable for GST, and if yes, then at what rate?

Observations and Ruling by the AAR

- The taxpayer stated that the services in question, to be provided to the Department of Horticulture, involve essentially the services of sweeping and segregating collected garbage and supply of manpower for garden maintenance. In the case of services of sweeping, and collection of garbage, the requirements stipulated as per the tender documents include workers, auto tippers and a garbage compactor. There is no transfer of property in goods involved in this contract
- The taxpayer added that there is no supply of or transfer of property in goods involved whatsoever in both cases. That being the case, the supply is comprised purely of services and therefore would be a 'pure service'
- Entry no:3 of notification no:12/2017 CT(R) dated 28 June 2017 as amended states that pure services (excluding works contract service or other composite supplies involving supply of any goods) provided to the Government by way of any activity in relation to any function entrusted to a Panchayat under article 243G of the Constitution of India or in relation to any function entrusted to a Municipality under article 243W of the Constitution of India attract nil rate of GST
- The taxpayer submitted that the activity of maintenance of parks and gardens, in respect of which the services are provided to the Department of Horticulture, are therefore within the ambit of "function entrusted to a Municipality under Article 243W of the Constitution"
- The taxpayer further stated that in the advance ruling provided to The Nursery Men Cooperative Society in Advance Ruling no: KAR/ADRG/18/2018 dated 06 August 2017, on a similar factual matrix, the AAR Karnataka has

held that the service of maintenance of parks provided by the taxpayer in that case to the State Government, Central Government or local authority, not involving a transfer of property in goods either as a component of a works contract or a composite supply is covered under entry no:3 of the notification no:12/2017-CT(R) dated 28 Jun 2017 and hence exempt

- The AAR held that the services proposed to be provided by the taxpayer to the Department of Horticulture for cleaning and sweeping of lawns and garden path areas and segregation and transport of the garbage and supply of manpower for garden maintenance are liable for GST at a nil rate as per entry no:3 of notification no:12/2017-CT(R) dated 28 June 2017;

[AAR-Karnataka, M/s. Indian Security and Personnel Arrangements, ruling no: KAR ADRG 22/2022, dated 12 August 2022]

Value of supply to include interest for delayed payment of consideration

- M/s. Andhra Pradesh Industrial Infrastructure Corporation Limited ("Taxpayer") is a state-owned undertaking and is engaged in the business of land allotment to a certain class of persons notified by the State Government
- While 25% of land cost is collected at the time of allotment of land, the balance 75% is collected in 8 equal annual instalments bearing an interest rate of 16% p.a.

Questions before the AAR

Whether the interest amount receivable on the balance land cost to be included in the value of supply?

Submissions by the Taxpayer

- The taxpayer submitted that since interest collectable from the notified persons is not covered under entry 27 to exemption Notification 12/2017-Central Tax (Rate) dated 28 June 2017, the same would be liable to tax @ 18%
- The taxpayer also submitted that since the sale of land does not tantamount to the supply of goods or services, the question of applicability of section 15(2)(d) of the CGST Act will not arise.

Observations and Ruling by the AAR

- The AAR observed that the applicant had given a facility to the notified persons by extending the service of fixation of annual instalments with interest @ 16% p.a. for deferred payment. Hence, the interest charged on such a credit facility is part of the value of taxable supply and hence, would attract GST as per section 15(2)(d) of the CGST Act read with entry 5(e) to Schedule II of the CGST Act)

BDO Comments:

Circular no. 178/10/2022-GST dated 3 August 2022 issued recently clarified the taxability of various transactions covered in terms of Entry 5(e) to Schedule II of the CGST Act. On perusal of the said Circular, it appears that the interest charged for the deferral payment facility provided to the notified persons would be considered as an ancillary supply to the principal supply and the taxability of such ancillary supply would be at the applicable rate of the principal supply. The present AAR decision has not

highlighted/considered the taxability of the principal supply (being the allotment of land which is not leviable to GST) while determining the GST levy on interest recovered from providing the credit facility. It may be possible that this ruling might be further appealed.

[AAR-Andhra Pradesh, M/s Andhra Pradesh Industrial Infrastructure Corporation Limited, Ruling: AAR No 09/AP/GST/2022, dated 30 May 2022]

CUSTOMS

INSTRUCTIONS

Requirement of health certificate accompanied with the import of food consignments

- Reference is invited to F.No. 1829/Health Certificate/FSSAI/Imports/2021 dated 03 August 2022 issued by the Food Safety and Standards Authority of India (FSSAI), on the requirement of a health certificate accompanied with the import of food consignments
- In Vide above communication, FSSAI stated that with effect from 1 November 2022, imported food consignments of the following food categories as specified in FSS (Food Product Standards & Food Additives) shall be accompanied by a health certificate issued by a competent authority of the exporting country in the prescribed format as attached as Annexure-I with the said order. The food categories are as under:
 - Milk and milk products
 - Pork and pork products
 - Fish and fish products
- It is requested that necessary action may be taken to sensitise officers under the respective jurisdiction

[Instruction no:18/2022 dated 12 August 2022]

Application of CAROTAR provisions and maintaining consistency with the provisions of relevant trade agreement or its rules of origin

- Subsequent to the insertion of section 28DA in the Customs Act on 27 March 2020, the CBIC vide notification no:81/2020-Customs (NT) dated 21 August 2020 notified the Customs (Administration of Rules of Origin under Trade Agreements) Rules, 2020
- Further, the operational certification procedures related to the implementation of rules of origin (pertaining to each trade agreement - FTA/ PTA/ CECA/ CECA/ CECPA), stand separately notified under section 5 of the Customs Tariff Act, 1975
- For uniform and judicious application of provisions, CBIC has previously issued circular no:38/2020-Customs dated 21 August 2020, instruction no:20/2020-Customs dated 17 December 2020 & no:18/2021-Customs dated 17 August 2021, and the letter F.No.15021/18/2020(ICD) dated 13 November 2020
- In continuation of the same, field formations are sensitized by drawing attention again to section 28DA of the Customs Act.
 - It has been emphasised that Section 28DA (3) empowers the proper officer to ask the importer to furnish further information, consistent with the trade

agreement, in case the proper officer has reasons to believe that the country-of-origin criteria have not been met

- Similarly, where the importer fails to provide the requisite information for any reason, Section 28DA (4) enables the proper officer, to undertake further verification consistent with the trade agreement
- Moreover, in the Rules, Rule 8(3) states - “In the event of a conflict between a provision of these rules and a provision of the rules of origin, the provision of the rules of origin shall prevail to the extent of the conflict.” Hence, the officers in charge should be sensitive to applying the provisions of CAROTAR and maintain consistency with the provisions of the relevant trade agreement or its rules of origin.

[Instruction no:19/2022 dated 17 August 2022]

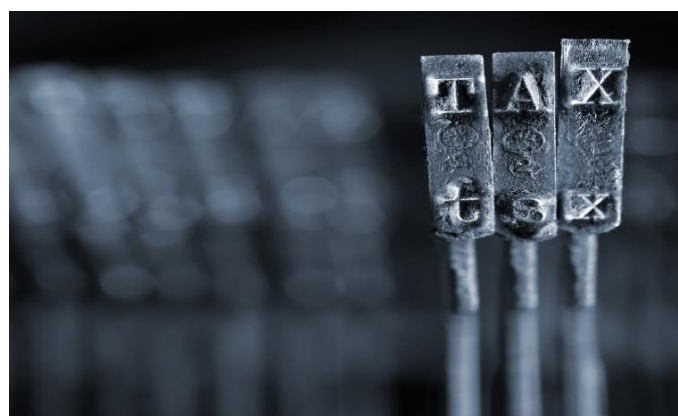
FOREIGN TRADE POLICY (FTP)

NOTIFICATION

Amendment in policy condition on the export of rice (basmati and non-basmati)

Amendment has been made to notification no:61/2015-20 dated 23 March 2022 to the extent that export of rice (basmati and non-basmati) to EU member states and other European countries namely the United Kingdom, Iceland, Liechtenstein, Norway, and Switzerland only will require a certificate of inspection from Export Inspection Agency (EIA)/ Export Inspection Council (EIC). Export to remaining European countries (except the United Kingdom, Iceland, Liechtenstein, Norway, and Switzerland) will require a certificate of inspection by EIC/ EIA for export from 01 January 2023.

[Notification no: 27/2015-20 dated 17 August 2022]



NEWS FLASH

1. “Govt says claim of 18% GST on house rent for tenants is misleading”
<https://economictimes.indiatimes.com/industry/services/property/-cstruction/govt-says-claim-of-18-gst-on-house-rent-for-tenants-is-fake/articleshow/93519950.cms>
 [Source: Economic Times, 12 August 2022]
2. “Centre may release Rs 35,000 Cr to states as June GST compensation”
https://www.business-standard.com/article/economy-policy/centre-may-release-rs-35-000-cr-to-states-as-june-gst-compensation-122081500968_1.html
 [Source: Business Standard, 15 August 2022]
3. “More GST rate changes likely to address inverted duty, exemptions”
<https://economictimes.indiatimes.com/news/economy/policy/more-gst-rate-changes-likely-to-address-inverted-duty-exemptions/articleshow/93579401.cms>
 [Source: Economic Times, 16 August 2022]
4. “GST: From payment for not serving notice period to cheque dishonour, CBIC clears the air”
<https://economictimes.indiatimes.com/small-biz/gst/gst-from-payment-for-not-serving-notice-period-to-cheque-dishonour-cbic-clears-the-air/articleshow/93583074.cms>
 [Source: Economic Times, 18 August 2022]
5. “Indian Medical Association seeks withdrawal of 5% GST on health care sector”
<https://www.thehindu.com/news/national/indian-medical-association-seeks-withdrawal-of-5-percent-gst-on-health-care-sector/article65774969.ece>
 [Source: The Hindu, 18 August 2022]

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