



The **TAX** POST

A bimonthly bulletin on the world of Indirect Taxes

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PREFACE

“In the middle of every difficulty lies opportunity.”

-Albert Einstein

As we embark on the last month of 2023, Taxpayers, tax consultants and tax authorities are bracing to face the most difficult times of the year comprising of annual GST compliances coupled with stringent timelines for issuance of Show Cause Notices (SCN) for FY 2018-19 and passing of adjudication orders for FY 2017-18.

The issues identified by the tax authorities in the SCN for FY 2017-18 may be considered as an indicator of the challenges that may be posed by tax authorities in the SCNs for FY 2018-19. The ‘Cover Story’ of this edition of the ‘The Tax Post’ deals with the key issues, which may be identified by the tax authorities in respect of SCNs for FY 2018-19 while also providing a guide to address such issues. Further, this section also enlists aspects which need to be addressed while filing the reply to the SCNs.

This edition’s ‘Expert Speak’ explores the recent amendments to the valuation of corporate guarantees given on behalf of related persons. It also highlights some issues, which remain unaddressed in the amendments.

The ‘In Tales’ section of this edition of ‘The Tax Post’ dissects the Infrastructure industry, highlighting the global outlook and India’s position in the infrastructure space. The section also highlights the various challenges faced by the industry including the challenges from the indirect tax perspective.

The ‘Decoded’ segment of this edition dissects a vital judgement of the Hon’ble Allahabad High Court, which reiterates the settled legal principle that a Circular cannot run contrary to the statutory provisions. The Hon’ble High Court has ruled that Input Tax Credit (ITC) shall be allowed on a cumulative basis from February 2020 to August 2020 whereby the entire period would be treated as a single tax period for computation of ITC eligibility in accordance with the provisions of Rule 36(4) of the Central Goods & Services Tax Rules, 2017 (CGST Rules).

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

We wish you an interesting read.



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Partner & Leader
Indirect Tax

COVER STORY

NAVIGATING THE LABYRINTH OF GST: A GUIDE TO MANAGING LITIGATION

INTRODUCTION

As the last month of the year 2023 approaches, the various stakeholders (i.e., the Taxpayers, tax consultants and the tax authorities) are bracing for the most frenetic season of the year concerning annual GST compliances coupled with the stringent timelines for the issue of Show Cause Notices (SCNs) and passing adjudication orders. In this section, we will address the relevant activities, which are due on or before 31 December 2023, general issues raised in the SCNs issued by the tax authorities along with a guide in managing these issues.

TIMELINES FOR ADJUDICATION PERTAINING TO FY 2017-18 AND FY 2018-19

The due date for annual GST filings (i.e., Form GSTR-9/9C) is 31 December 2023. The following timelines about issuing SCNs/adjudication orders for FY 2017-18 and FY 2018-19 are also ending on the same date:

- **Adjudication of SCNs issued for FY 2017-18:**
 - CBIC had issued the notification for extending the time limit for issue of adjudication order under Section 73(10) of the Central Goods & Services Tax Act, 2017 (CGST Act), i.e. pertaining to SCNs not involving fraud, suppression etc., for FY 2017-18, to 31 December 2023. Under section 73(2) of the CGST Act, the tax authorities are required to issue SCNs at least three months prior to the due date of issuing the orders. As a consequence, the Taxpayers saw a barrage of SCNs being issued for the FY 2017-18 around 30 September 2023.
- **Issuance of SCNs for FY 2018-19:**
 - The same notification also extended the due date for issuing adjudication orders under Section 73(10) for FY 2018-19, to 31 March 2024. Consequently, the Taxpayers can also expect a similar barrage of notices for FY 2018-19 around 31 December 2023, i.e., three months before the due date of passing adjudication orders for FY 2018-19, for cases not involving any allegation of fraud, suppression, etc. The tax authorities have to fulfil this task, while simultaneously ensuring that the adjudication process for the SCNs for FY 2017-18 is also ongoing and needs to be concluded on or before 31 December 2023.

In addition to the above, the ongoing GST departmental audits, periodic SCNs concerning scrutiny of GST returns, etc. also need to be dealt within this month.

EXPECTATIONS IN DECEMBER 2023 REGARDING ADJUDICATION FOR FY 2017-18 AND FY 2018-19

For FY 2017-18, as per Section 73(2) of the CGST Act read

with the notification, the due date for issuing SCN for FY 2017-18 was 30 September 2023 which resulted in the Taxpayers witnessing a sudden surge in the number of SCNs issued in the quarter ending on 30 September 2023. Accordingly, in respect of these SCNs, while most Taxpayers would have already furnished their written response, the coming month would see a series of personal hearings, followed by the passing of adjudication orders for the SCNs for the period FY 2017-18.

Similarly, for FY 2018-19, the upcoming month is likely to witness the issuance of a significant number of SCNs where the responses given by the Taxpayer during the investigation/ verification stage are found to be unsatisfactory to the tax authorities.



KEY ISSUES IDENTIFIED BY THE TAX AUTHORITIES

Given that the Taxpayers have already received SCNs for FY 2017-18, the issues identified by the tax authorities could be an indicator and may have a bearing in respect of adjudication for FY 2018-19 as well. Considering the above, it is likely that the Taxpayers may receive SCNs on the very same issues identified by the tax authorities in FY 2017-18, for FY 2018-19 as well. Accordingly, it is pertinent to refer to some of the key issues identified by the tax authorities in the SCNs for FY 2017-18:

- Denial/ reversal of ITC on account of the following:
 - Mismatch between the procurements appearing in Form GSTR-2A vis-à-vis the procurements on which ITC is availed by the Taxpayer in Form GSTR-3B.
 - Non-filing of Form GSTR-3B returns by the supplier resulting in non-payment of tax to the Government and thus, violating the conditions prescribed under Section 16(2)(c) of the CGST Act.
 - Non-payment of consideration within 180 days from the date of issue of invoice.
 - Availment of blocked credits specifically restricted under Section 17(5) of the CGST Act.
 - Failure to reverse ITC as per Rules 42 and 43 of the CGST Rules.
- Non-payment of GST under the Reverse Charge Mechanism (RCM), including on secondment of employees

GUIDE TO MITIGATE ISSUES IDENTIFIED BY THE TAX AUTHORITIES

The issues highlighted above can be responded to based on the following:

| SL NO. | ISSUE | POTENTIAL GROUNDS TO DEFEND SCNS |
|--------|---|--|
| 1. | A mismatch between the procurements appearing in Form GSTR-2A vis-à-vis the procurements on which ITC is availed by the Taxpayer in Form GSTR-3B | <ul style="list-style-type: none"> ▪ Undertake vendor reconciliation and determine whether the Company has availed excess ITC. ▪ If yes, obtain certificates from the vendors in accordance with CBIC Circular no:183/15/2022-GST dated 27 December 2022. ▪ Further, Taxpayers may take various legal arguments such as (a) the legal requirement or lack of it to undertake vendor reconciliation activity, (b) the law cannot compel a Taxpayer to perform an impossible task, (c) GSTR-2A is merely a facilitator, (d) Taxpayer is a bonafide recipient of goods/ services, etc. |
| 2. | Non-filing of Form GSTR-3B returns by the supplier resulting in non-payment of tax to the Government and thus, violating the conditions prescribed under Section 16(2)(c) of the CGST Act | <ul style="list-style-type: none"> ▪ Present factual evidence that the Taxpayer has duly paid consideration to the vendors within 180 days from the date of issue of invoice; and/ or ▪ In case of non-compliance, whether proportionate ITC has been reversed by the Taxpayer (along with corroborative evidence). |
| 3. | Non-payment of consideration within 180 days from the date of issue of invoice | <ul style="list-style-type: none"> ▪ The Taxpayer has not claimed ITC in respect of the procurements alleged in the notice; and/ or ▪ The procurements alleged in the notice are not restricted under Section 17(5) of the CGST Act. |
| 4. | Availment of blocked credits specifically restricted under Section 17(5) of the CGST Act | <ul style="list-style-type: none"> ▪ The Taxpayer has not undertaken supply of exempt goods/ services which attract the provisions of Rules 42 and 43 of the CGST Rules ▪ Bifurcate the ITC availed into the following: <ul style="list-style-type: none"> - Procurements used exclusively for exempt supplies - Procurements used exclusively for taxable supplies - Common procurements for exempt and taxable supplies ▪ Substantiate with factual evidence that ITC is duly reversed <i>qua</i> Common procurements (on a proportionate basis) and procurements exclusively for exempt supplies |
| 5. | Failure to reverse ITC as per Rules 42 and 43 of the CGST Rules | <ul style="list-style-type: none"> ▪ In case of demands relating to the secondment of employees, review the contracts and compare the same with the facts involved in <i>C.C.CE & ST, Bangalore Vs. Northern Operating Systems Pvt. Ltd. [TS-21 6-SC-2022-ST]</i> and determine GST liability. ▪ Substantiate with factual evidence that the entire tax liability under the reverse charge mechanism has been discharged. |
| 6. | GST demand (under RCM), including on secondment of employees | |



STANDARD CHECKLIST/ GROUNDS TO BE ADDRESSED IN THE REPLY TO NOTICES

Just as SCN is the foundation on which a tax authority is required to establish its case, the initial replies to the intimation in Form GSTR DRC-01A and SCN serve a parallel (if not exact) purpose. It is therefore imperative for the Taxpayers to ensure that the preliminary replies address the various nuances and defences supporting the Taxpayer's claim (as per the periodical GST returns). While filing replies to these communications, the following aspects must be properly addressed and contested, wherever possible:

- **Jurisdictional issues:** One must ensure that the notices issued to the Taxpayer do not suffer from the jurisdictional challenges such as notices issued beyond the statutory time limit, beyond jurisdictional powers or without the authority of law, without key contents such as Document Identification Numbers i.e., DIN, etc. In cases where the notices are vague and cryptic, it must be ensured that the replies address these concerns at the preliminary stage itself.
- **Factual issues:** Where the notices are based on an incorrect understanding of the Taxpayer's business or are placed on an incorrect fact, the same must also be highlighted in the preliminary response.
- **Legal issues:** It must be ensured that all legal grounds, including judicial precedents, must be put forth in the reply at the preliminary stage itself. Failure to take vital legal contentions may result in the non-admissibility of these arguments at the appellate stage or higher forums.
- In addition to the above, the following aspects must also be borne in mind while filing replies to the notices:
 - Whether proper allegations have been levelled against the Taxpayer. If not, the same must be brought out in the reply that the allegations have not been framed and hence, the Taxpayer is unable to rebut the allegations levelled in the notice.
 - Whether the documents/ statements/ information relied upon in the notice have been provided. If not, the same must be sought by filing a written response based on which, the allegations qua the said documents must be responded to.
- Lastly, the reply must specifically include the following:
 - A request/ leave to add, alter, amend, delete, or modify any of the grounds mentioned in the reply.
 - Request for a personal hearing before the matter is finally adjudicated/ decided.

CONCLUSION

The Taxpayers and tax consultants must be prepared to face the huge magnitude of challenges. With the looming deadlines for the annual GST compliances, responding to the SCNs and pre-SCN consultation notices, it is crucial for businesses to stay vigilant and well-prepared to address the discrepancies and litigious issues that may arise. Additionally, the aspects highlighted above to mitigate tax disputes must be borne in mind while replying to the notices.

THE EXPERT SPEAK



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CORPORATE GUARANTEE: GST AMENDMENTS LEAVE MORE QUESTIONS THAN ANSWERS

The levy of GST on corporate guarantees, especially between 'related' parties, has been a matter of debate for a very long time now.

The Supreme Court recently settled the dust around this issue under Service Tax by holding that corporate guarantee provided by the holding company to its subsidiary does not qualify as 'service' in the absence of consideration. It is pertinent to note that under service tax law, the levy was on the service provided by one person to another person for consideration. However, under the GST regime, supplies between 'related' persons would qualify as supply even in the absence of consideration owing to the deeming fiction created as per Schedule I of the CGST Act. Therefore, the rationale laid down by the Supreme Court may not come to the rescue of the Taxpayer, under the GST regime.

A corporate guarantee typically refers to an arrangement where a party (Guarantor) assumes the responsibility to absolve the liability of a third person (Principal debtor) in the event of their default, and the person to whom such guarantee is rendered is known as the creditor or the Lender.

The levy of GST on corporate guarantees has been a matter of debate since the introduction of GST. While some Taxpayers adopted a position that GST is applicable, some Taxpayers defended levy on a plank that there is no element of supply involved in the provision of a corporate guarantee by the parent to its subsidiary. The primary argument extended by such Taxpayers is that it is part of the shareholder activity and as such the same cannot be equated to supply.

For Taxpayers who considered this transaction as taxable and paid GST, one key challenge was the value to be adopted for the levy of GST, as determining market value for corporate guarantee wasn't possible. While some of them adopted the rate that would have been charged by banks, few others adopted a fixed percentage, say 0.5% or 0.25% etc. Given that valuation is an integral component of the levy of GST, the lack of explicit guidance has resulted in Taxpayers adopting different values of supply, while simultaneously seeking intervention from the government.

This also led to multiple disputes being raised by the tax authorities on the issue of valuation, due to divergence in value adopted by different Taxpayers.

Based on multiple representations filed before the GST Council, the Council clarified that corporate guarantee between 'related' parties would be taxable. Concerning the value, the Council recommended that the value should be taken as 1% of the amount guaranteed or the actual amount charged, whichever is higher.

The Government, consequent to the 52nd GST Council meeting and in line with the recommendation of the Council, provided a definitive valuation mechanism by introducing a new sub-rule in the existing framework of Rule 28 (which dealt with valuation in case of related party transactions).



Consequent to this, CBIC issued Circular no. 204/16/2023 in October 2023, clarifying certain aspects of this issue, largely confirming that no tax would be payable in case of personal guarantees given, where due to RBI regulations, no fee is allowed to be charged by the Guarantor. On this issue, the industry is still grappling with various issues. This article primarily aims to explore such unresolved issues:

ISSUE -1: DOES THE RULE HAVE PROSPECTIVE OR RETROSPECTIVE APPLICATION?

Following any amendment to the law, more particularly in the tax laws, the inevitable question that comes to the mind of the Taxpayer is regarding its applicability for the past period. Rightfully so, as retrospective application of the provisions would require the Taxpayer to recompute the tax liability and discharge the shortfall along with punitive interest. The inquisitiveness of the Taxpayer is trenchant in case of this newly introduced sub-rule as it commences with a non-obstante clause, effectively superseding other valuation provisions in force. Implementing this change retrospectively would mandate the Taxpayer to reevaluate their tax obligations, rendering the previously determined tax amount obsolete.

However, in this case, the amendment is given effect by the introduction of a new sub-rule, which does not explicitly indicate retrospective applicability. Hence, one may argue that this amendment is likely to be applied only prospectively.

Furthermore, the language used in the corresponding Circular issued by CBIC confirms the prospective nature of this amendment. Due to this, the issues for the past period remain unaddressed and the tax authorities can seek to adopt this value of 1% even for the past periods and demand differential tax, where the Taxpayers had taken the position of nil tax or paid tax on a value less than one per cent. Had the Circular also clarified to accept the practice followed for the past period, similar to clarification on internally generated services, a lot of ongoing litigations could have been concluded, and the Taxpayers would have got certainty for the past period.

ISSUE -2 VALUATION

- While this change was intended to provide a definitive valuation mechanism, it has left another area for further consideration, i.e., should this valuation mechanism be applied independently for each financial year or will it be a one-time levy (and distribute the valuation evenly across the period of guarantee).

In the absence of any specified frequency such as per annum, per quarter, per tax period, etc. and on a plain reading of the amendment, it appears that this is only a one-time levy over the tenure of the guarantee and should not be recurrently applied.

Furthermore, of greater significance is the fact that once the guarantor assumes responsibility and the agreed credit facilities are extended by the creditor or bank to the principal debtor, the only surviving contract is the contract between the guarantor and the creditor. As a result, the service contract between the guarantor and principal debtor ceases to exist once the credit facilities are extended. Therefore, it is evident that even though the period of guarantee may span multiple financial years, the service contract between the guarantor and principal debtor ceases to operate once the credit facilities are

extended. Hence, for subsequent financial years, there is no taxable supply between the principal debtor and the guarantor for the levy of GST, thus substantiating the assertion of a one-time GST levy.

ISSUE-3: VALUATION OF CONTRACTS EXECUTED BEFORE THE INTRODUCTION OF THE AFOREMENTIONED VALUATION MECHANISM BUT STILL IN FORCE

This scenario is likely the most prevalent among Taxpayers who have extended corporate guarantees. The rationale explained in the preceding paragraph also applies in this scenario. As the service contract/ supply expired before the introduction of this sub-rule, the point of taxation in such scenarios has long since passed. Therefore, even in these cases, the new sub-rule holds limited significance and the valuation mechanism already adopted by the entity should be accepted by the tax authorities, as mentioned above.

In conclusion, there are a multitude of areas which warrant further clarifications from the Government. Nevertheless, it is important to note that these are highly subjective areas of the law, so the user should exercise caution before pursuing any course of action.



DECODED

A CIRCULAR CONTRARY TO THE STATUTORY PROVISIONS IS UNENFORCEABLE IN LAW - ALLAHABAD HIGH COURT

INTRODUCTION

In an important judgement, the Hon'ble Allahabad High Court² while upholding the settled legal principle that a Circular cannot run contrary to the statutory provisions, has held that the ITC shall be allowed on a cumulative basis between February 2020 to August 2020 (relevant period) as provided in the first proviso to Rule 36(4) of the CGST Rules (First Proviso). Accordingly, the entire relevant period must be treated as a single tax period for computation of credits under Rule 36(4) of the CGST Rules. In as much as Circular no:123/42/2019-GST dated 11 November 2019 (Impugned Circular) runs contrary to Rule 36(4) of the CGST Rules, the Impugned Circular would remain unenforceable in law.

FACTS OF THE CASE

- M/s. Vivo India Pvt. Ltd. (Taxpayer) is *inter alia* engaged in the manufacture and sale of cellular phones and spare parts and accessories thereof.
- During the relevant period, the Taxpayer purchased various mobile phone components and other related items which were disclosed by its suppliers in their Form GSTR-1.
- During the relevant period, the Taxpayer claimed ITC in accordance with the First Proviso which provides that the condition stipulated under Rule 36(4) shall apply cumulatively for the relevant period and the return in Form GSTR-3B for September 2020 shall be furnished with the cumulative adjustment of ITC for the relevant period.
- In this regard, *vide* Order dated 7 April 2021, the tax authorities sought reversal of ITC amounting to INR 1.10bn (along with equal amount of penalty and applicable interest) on the ground that the Taxpayer had availed excess ITC during the relevant period violating the provisions of Rule 36(4) of the CGST Rules.
- Aggrieved by the above, the Taxpayer filed a Writ Petition before the Hon'ble Allahabad High Court.
- During the pendency of the present Writ Petition, the Taxpayer had *suo motu* deposited 10% of the amount of disputed tax (i.e., INR 0.11bn) under protest.
- Further, since no stay was granted by the Hon'ble High Court in the present Writ Petition, the tax authorities proceeded to recover the entire amount of disputed tax and an equal amount of penalty from the Taxpayer (i.e., INR 2.20bn) without considering the *aforsaid suo motu* payment of tax.
- Pursuant to the above, the Taxpayer filed an application seeking a refund of the aforesaid amount recovered (i.e., INR 2.20bn) and the amount *suo motu* paid during the pendency of the present Writ Petition (i.e., INR 0.11bn) along with interest.

CONTENTIONS BY THE Taxpayer

- The tax authorities have erred in considering a monthly reconciliation for the relevant period instead of treating the same as a single tax period in terms of the First Proviso.
- The aforesaid error is based on misreading the Impugned Circular which is contrary to the provisions of the First Proviso *qua* the relevant period.
- It is not open for the Administrative Authorities to override a part of delegated legislation which mandates monthly reconciliation by interpreting the words 'on the due date of filing of the returns' (used in the Impugned Circular) as the 'date when reconciliation was to be made'.
- Alternatively, the Impugned Circular was issued before the introduction of the First Proviso and hence, it lost its contrary intent and consequentially its enforceability to the binding force of law upon introduction of the First Proviso w.e.f. 3 April 2020.
- Entitlement to ITC is a statutory right accrued under Section 16 of the CGST Act and the same cannot be defeated either by the administrative instructions or by construing the law in any other manner.
- A Circular can neither take away a statutory right or benefit nor it can impose a new condition. Further, the restrictions conjured on the strength of the Impugned Circular would remain confiscatory in the scheme of the CGST Act which is consistent with the provisions of Article 300A of the Constitution of India.
- Reliance was placed on *Union of India Vs. Bharti Airtel Ltd. [(2022) 4 SCC 328]* and *Suncraft Energy Private Limited & Anr. Vs. Assistant Commissioner, State Tax, Ballygunge Charge & Ors. [TS-367-HC(CAL)-2023-GST]* to contend that furnishing details of outward supplies in Form GSTR-1 by a supplier and consequent intimation in Form GSTR-2A to the recipient is only a facilitation and does not impact the Taxpayer's ability to claim ITC on self-assessment which is governed by Section 16 of the CGST Act.
- Given the clear language of Rule 36 of the CGST Rules which must prevail over the Impugned Circular and on the test of the general principles under the GST law, the contention of the tax authorities is wholly unfounded in law.

² Vivo Mobile India Pvt. Ltd. Vs. Union of India, [TS-523-HC(ALL)-2023-GST], dated 16 October 2023

- Further, the tax authorities have disregarded the law and recovered the entire amount despite the matter being contested in the present Writ Petition. This has given rise to the entitlement of full restitution (refund of the amount deposited) along with interest at the market rate.

OBSERVATIONS AND RULING BY THE HON'BLE HIGH COURT

▪ Provisional availment of ITC and applicability of First Proviso:

- On perusal of the various provisions under the GST law, it is unambiguous that the legislature has created a substantive right in favour of the recipient to avail ITC albeit provisionally as under:
 - The claim of ITC is subject to reversal (along with interest) where the due tax remains to be paid by the supplier (Section 41(2) of the CGST Act).
 - The condition to claim ITC regarding payment of tax by the supplier to the Government is subject to Section 41 of the CGST Act (Section 16 of the CGST Act).
- It is equally true that the event of late payment of due tax may be accompanied by a demand of interest and penalty. Yet, prior payment and deposit of tax is not a sine qua non for provisional grant of or utilisation of ITC, by the recipient.
- The stipulations regarding furnishing of returns (together with their timelines), though mandatory, run parallel to the stipulations for claim, grant and availing ITC. Yet the same does not create a pair of inflexible parallel rails of a railroad and they co-exist within the permissible limits of elasticity created by the grant of provisional ITC.
- Though the date of filing of the details by the supplier would remain fixed, at the same time, by way of principle, it is difficult to acknowledge that ITC could be availed only with reference to that event. There is no reason to adopt a view different from the principles laid down in *Bharti Airtel Ltd. (supra)* and *Suncraft Energy Pvt. Ltd. (supra)*.
- By necessary implication, the details of outward supplies furnished by the supplier in Form GSTR-1 are nothing more than a necessary step in the facilitation to avail ITC.
- The Impugned Order is not based on the reasoning of any collusion, misrepresentation, or fraud played by the petitioner in obtaining the tax invoices from its suppliers nor those tax invoices were alleged to be not genuine and the same is merely based on the reading of Rule 36(4) of the CGST Rules.
- The language of the First Proviso only provides an exception to Rule 36(4) of the CGST Rules by contemplating that during the relevant period, the eligible ITC for each month would not exceed 10% of the eligible ITC appearing in Form GSTR-2A on a cumulative basis.

- The First Proviso is not an independent provision of law; rather, it has been incorporated with reference to pre-existing Rule 36(4) of the CGST Rules which provides a benefit to the Taxpayers in addition to what was available otherwise.
- The word 'cumulative' has not been defined in the GST law. However, it conveys an increase or addition to size/ quantum with successive additions without corresponding losses/ deductions.
- Given the above, the condition contained under Rule 36(4) of the CGST Rules qua the relevant period would have to be seen cumulatively i.e., with all additions made, taken together for the relevant period which is specifically mentioned therein.
- The First Proviso has introduced something new and different by allowing cumulative adjustment of ITC for the relevant period and thereby, preserving to them the benefit of the increased figure of ITC as it stood at the time of filing Form GSTR-3B for September 2023, on a cumulative basis.
- The legislature consciously relaxed the condition of monthly reconciliation of eligible ITC availed to a longer fixed period during the relevant period such that the period of 1 month was practically enlarged to 8 months by using the term 'cumulatively' to create a deeming fiction in law.
- Once 'cumulative adjustment' was allowed for a prior period while filing a return for the later period, the date of such cumulative effect would be the date of filing the return for the later period; otherwise, the language used by the legislature would be contradicted.
- Though the Impugned Circular is valid, it cannot be enforced contrary to the First Proviso and has lost its efficacy and force to that extent for a limited period from February 2020 to August 2020.
- **Consideration of pre-deposited tax in the recovery of the disputed amount of tax:**
 - Although the Taxpayer had deposited 10% of the disputed tax amount while filing the Writ Petition, no automatic benefit accrued to the Taxpayer in the absence of the grant of an interim order. However, the recovery of the entire disputed tax leading to a 110% recovery of such tax by the tax authorities is untenable.
 - Given the above, the tax authorities were directed to refund the entire recovered amount of the disputed tax to the Taxpayer along with interest @ 6% on the excess tax recovered in a timely manner.

COMMENTS

This is an important judgement which clarifies the legal background that a law would always prevail over an administrative instruction. Further, it affirmed the legal position adopted by the Taxpayer to avail cumulative ITC for the months during the relevant period.

IN-TALES

INFRASTRUCTURE: PAVING THE WAY FOR A SUSTAINABLE AND EQUITABLE ECONOMIC FUTURE

INTRODUCTION

Infrastructure is a key driver for the overall development of any economy. Infrastructure includes the facilities and systems that support the sustainable functionality of households and firms. The key segments of the infrastructure industry are as under:

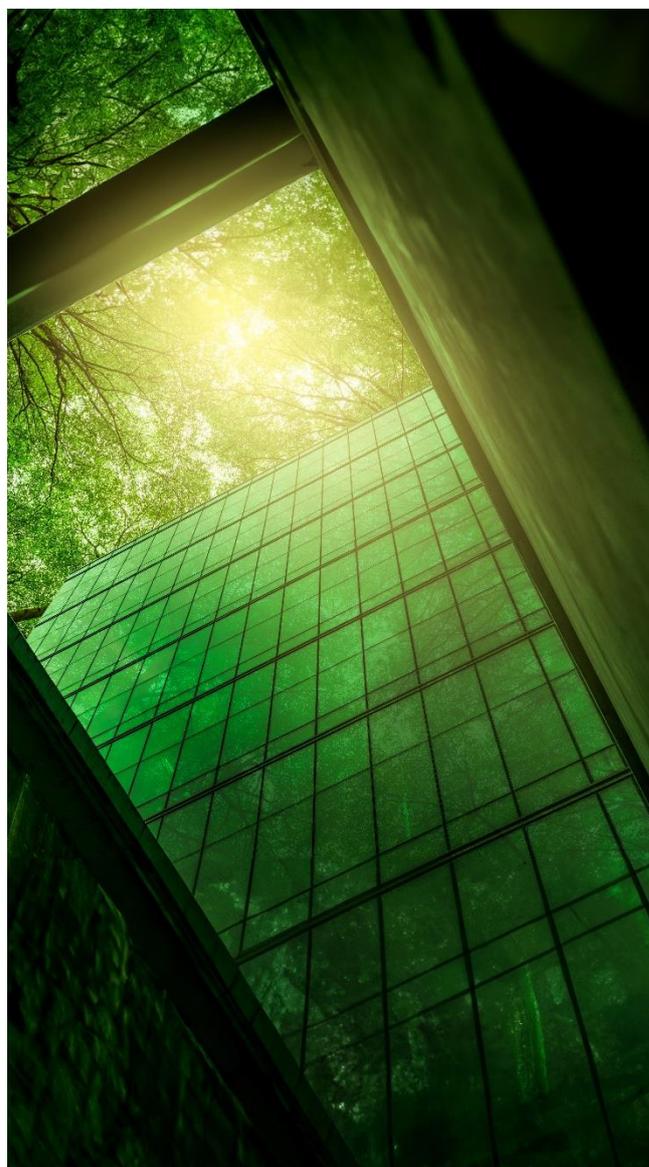
- **Railways:** Railways offer an environment friendly and efficient mode of transportation for both passengers and goods, promoting economic growth while reducing greenhouse gas emissions. It provides a comparatively cleaner and compact means of moving large numbers of people and goods over long distances, making them a key strategy for achieving sustainable transportation goals and building a low-carbon economy.
- **Roadways:** The roadways are an intricate and extensive industry encompassing construction (including repairs, resurfacing and new construction), maintenance, and operation of roads and highways around the world. It serves as a vital backbone of the global economy, enabling the seamless flow of goods, services, and people³.
- **Ports:** Ports serve as vital hubs and nodes for waterborne transportation networks, connecting countries across the globe. They facilitate cost-effective transportation and distribution of goods, extending beyond mere infrastructure to influence freight transport costs and enabling companies to reach international markets.
- **Airports:** Airport infrastructure covers the immediately visible and dominating passenger terminals with security and catering, runways and air traffic control towers, to hidden but vital baggage systems, gate operations, lighting systems, and cargo terminals.

GLOBAL OUTLOOK

The global market of the Infrastructure Industry was valued at an estimated USD 2.57tn in 2023 and is projected to reach USD 3.48tn by 2028 with a CAGR of 6.27%⁴. The global contribution of the key segments of the infrastructure industry is as under:

- **Railways:** The vast global railway network stretches across over 1.3mn route-km. The United States boasts the world's most extensive railway network, followed closely by Russia, China, India, Canada, Germany, and France. In 2019, Japan was recognised as the country with the top-notch railway infrastructure⁵.
- **Roadways:** The global roadways and highways market size is expected to grow from USD 674.98bn (in 2022) to USD 716.74bn (in 2023) and USD 871.36bn (in 2027) at a CAGR of 6.2% and 5%, respectively. In 2022, North America was the largest region in the roads and highways market. However, during the forecast period, Asia-Pacific is expected to be the fastest-growing region⁶.

- **Ports:** The global port infrastructure market is thriving, with an estimated value of USD 151bn in 2022 and a projected growth to USD 249.49bn by 2032, driven by a CAGR of 5.2%⁷. In 2022, over 900 ports were servicing global liner shipping networks, handling 171mn Twenty-foot Equivalent Units (TEU) of containerised trade, and generating over 800 million TEU of world containerised port traffic⁸.
- **Airports:** There are over 41,700 airports around the world, with the United States having the most with over 13,000 airports, followed by Brazil having a little over 4,000 airports⁹.



³ <https://www.thebusinessresearchcompany.com/report/roads-and-highways-global-market-report>

⁴ <https://www.mordorintelligence.com/industry-reports/infrastructure-sector>

⁵ <https://www.statista.com/topics/1088/rail-industry/#topicOverview>

⁶ <https://www.thebusinessresearchcompany.com/report/roads-and-highways-global-market-report>

⁷ <https://www.precedenceresearch.com/port-infrastructure-market>

⁸ <https://unctad.org/publication/global-port-infrastructure-sufficiency-index-results-pilot-phase>

⁹ <https://euflightcompensation.com/how-many-airports-are-there-in-the-world/>

INFRASTRUCTURE INDUSTRY IN INDIA

The contributions of the various segments of the infrastructure industry are as under:

- **Railways:** India has the 4th largest railway system in the world, behind only the US, Russia, and China, and consists of a total track length of 0.13 million km with 7,335 stations. 5,243 km of track length was achieved during FY 2022-23 (as against 2,909 km in FY 2021-22), resulting in the average daily track laying of 14.4 km per day (highest-ever commissioning)¹⁰.
- **Roadways:** Between 2014 and 2023, India's road network grew by 59% to 6.4 million km of total road network, being the second largest in the world after the United States of America. During the aforesaid period, the revenues from tolls increased from INR 47.70bn to INR 413.42bn. India's National Highways network alone stands at 1,45,240 km today compared to 91,287 km in 2013-14¹¹.
- **Ports:** India has a coastline of over 7,500 km, and the country has 13 major ports and around 200 minor ports¹². In FY 2022-23, major ports have collectively handled a record-breaking 795 million tonnes of cargo, registering a 10.4% growth over the previous year, thereby achieving the highest-ever output per day of 17,239 tonnes¹³.
- **Airports:** India's current airport infrastructure consists of 450 airstrips across the country, though only 100 are considered fully operational. By 2024, India has ambitions to add 100 new airports. Projects have been announced in locations such as Amritsar, Varanasi, Bhubaneswar, Indore, Raipur, and Trichy. Though, AAI owns and operates most of the airports in India, through ongoing privatisation efforts, various private business groups have also secured airport projects¹⁴.



CHALLENGES FACED BY THE INDIAN INFRASTRUCTURE INDUSTRY¹⁵

While the infrastructure industry has been witnessing substantial growth and financial push from the government, it faces certain challenges as highlighted below:

- **Land acquisition:** Availability of land and its acquisition is one of the biggest challenges faced by the industry considering that the acquisition of land is usually not welcomed by the locals since it involves re-settlement of the locals and determination of compensation, which is a sensitive subject.
- **Availability of funds:** Large-scale infrastructure projects have significant funding requirements. Usually, the government only funds a part of the project (For example - projects under the Hybrid Annuity Model) as it has limited resources and private players sometimes find it difficult to raise funds from the banks and financial institutions.
- **Lack of technology:** Complex infrastructure projects require technologically advanced machinery and mechanised vehicles which may not be available or may be too costly for the project. Further, the project team may also be lacking the technical expertise to build such projects.
- **Inadequate skilled personnel:** The shortage of skilled workers, engineers, and managers can be a hindrance to the development of infrastructure projects.

KEY OPEN GST ISSUES CONCERNING THE INFRASTRUCTURE INDUSTRY

Various indirect tax issues are faced by the infrastructure Industry in India, some of which have been outlined below:

- **Levy of GST on annuities - Construction Phase:**
 - Services in relation to road infrastructure projects can be bifurcated into Construction Phase (HSN Code 9954) and Operation & Maintenance (O&M) Phase (HSN Code 9967).
 - Generally, the consideration for road construction projects is either received in the form of Tolls or Annuity.
 - **GST on tolls:** Service by way of access to a road or a bridge on payment of toll charges are exempt from the levy of GST (Sl. no: 23 of the Exemption Notification¹⁶) since 1 July 2017.
 - **GST on annuity:** Services by way of access to a road or a bridge on payment of annuity were exempt from the levy of GST during the period 13 October 2017 to 31 December 2022 as per Sl. no: 23A of the Exemption Notification.
 - In this regard, CBIC vide Circular no: 150/06/2021-GST dated 17 June 2021 (Circular) had clarified that sl. no.: 23A of the Exemption Notification would not apply to the Annuity paid for the construction of roads (i.e., during the Construction Phase, classifiable under HSN Code 9954).
- **Relevant judicial precedents:**
 - The Hon'ble Karnataka High Court in *DPJ Bidar - Chincholi (Annuity) Road Project Pvt. Ltd. Vs. Union of India and Ors. [2022 (7) TMI 1314]*

¹⁰ <https://www.investindia.gov.in/sector/railways>

¹¹ <https://www.ndtv.com/india-news/indias-road-network-now-2nd-longest-in-world-grew-59-in-9-years-nitin-gadkari-4156768>

¹² <https://ensureias.com/blog/ports-infrastructure-in-india>

¹³ <https://pib.gov.in/PressReleaseSelfframePage.aspx?PRID=1920518>

¹⁴ <https://www.trade.gov/market-intelligence/india-airports-and-ports-development#:~:text=India's%20current%20airport%20infrastructure%20consists,Indore%2C%20Raipur%2C%20and%20Trichy>

¹⁵ <https://www.drishitias.com/daily-updates/daily-news-editorials/india-s-infrastructure-push>

¹⁶ Notification no: 12/2017-Central Tax (Rate) dated 28 June 2017

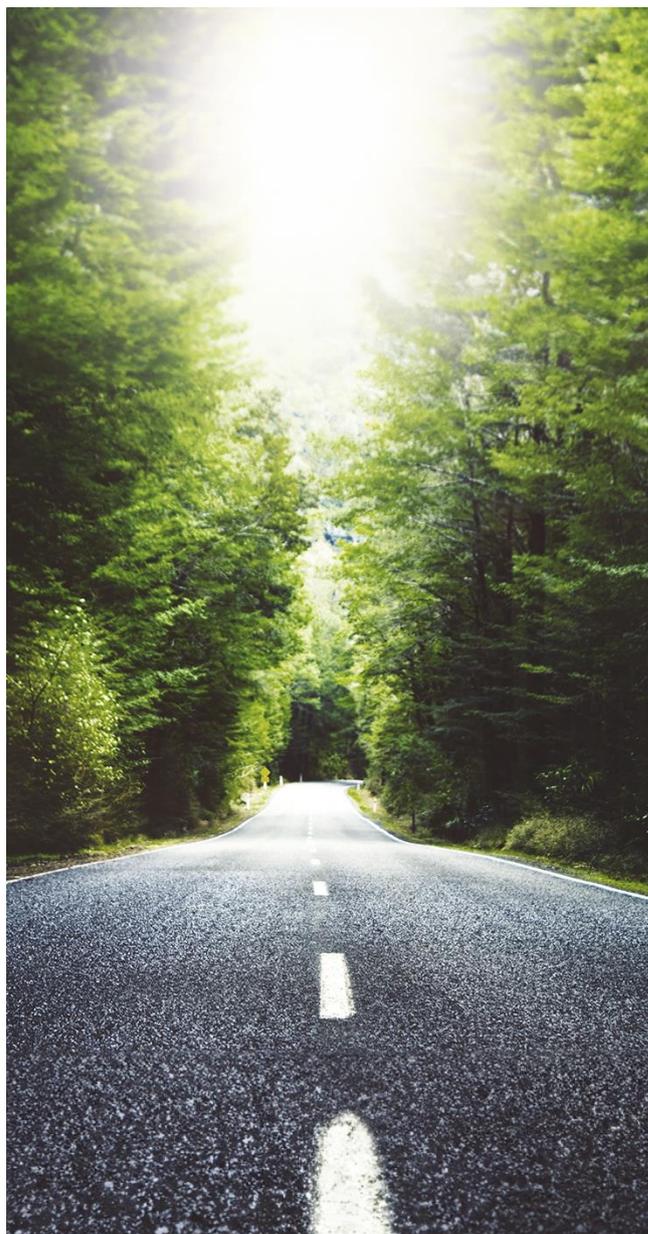
had held that the Circular has the effect of overriding Sl. No. 23A of the Exemption Notification and hence, the same is bad in law.

- **In Re: Nagaur Mukundgarh Highways Pvt. Ltd., Udaipur [2019 (3) TMI 1076 AAAR, Rajasthan]** it was held that "... that whole project can be divided into two parts- one is construction phase and second is O&M phase. The activity of the Appellant (i.e. Concessionaire) having nexus with annuity is classifiable under SAC 9967 and activity of the Appellant having nexus with the Construction payments during construction phase is Works Contract which is taxable under **Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017 under SAC 9954.**"
- **Multi-State Projects (Road and Railways):**
 - Multi-State Projects are projects which require the construction of roads/ railways through more than one State and/ or Union Territory. Such projects pose various challenges to the Taxpayer/ Contractor, some of which are reproduced hereunder:
 - **Multiple GST registrations:** The Taxpayer/ Contractor may be required to obtain GST registration in every State and/ or Union Territory where the construction activity is being undertaken. This results in an enhanced compliance burden on the Taxpayers/ Contractors. This also leads to practical challenges in centralising procurements.
 - **Determination of value of supply attributable to each State and/ or Union Territory:** Although a consolidated agreement is executed, considering the multiplicity of GST registrations, the Taxpayer would be required to attribute the value of supply to each State and/ or Union Territory where the project is situated. In the absence of the agreement stipulating the value of supply in the respective State and/ or Union Territory, the same would be determined as per the principles laid down in Rule 4 of the Integrated Goods & Services Tax Rules, 2017 based on the area of immovable property lying in each State or Union Territory.
 - In addition to the above, the Taxpayers/ Contractors may be required to undertake various other compliances such as maintaining separate books of accounts for each GSTIN, generating invoices through the respective GSTINs, filing GST returns, etc.



- **Movement of goods including capital goods from one GSTIN to another:**
 - Since different GSTINs of a Taxpayer are treated as distinct persons under the GST law, the transactions *inter se* (including for transfer of goods, including capital goods) would be treated as a supply even in the absence of consideration. Accordingly, in such cases, the supplier branch would be liable to discharge applicable GST on the transfer of goods including capital goods.
 - In this regard, the Taxpayers/ Contractors face the following challenges in respect of movement of goods including capital goods from one GSTIN to another:
 - **Applicability of circular no:199/11/2023-GST dated 17 July 2023:** While the Circular was specifically in respect of supplies by Head Office (HO) to its Branch Office (BO), the applicability of the Circular qua movement of goods is an open issue which needs to be tested before the GST authorities. However, the Circular may be construed to have a persuasive value. Accordingly, where the recipient is entitled to claim full ITC, it may be an arguable case to contend that for movement of goods (including capital goods), the value declared in the invoice would be deemed to be Open Market Value (OMV) and that in case where no tax invoice is issued, the OMV shall be deemed to be Nil, in line with the Circular.
 - **Value of supply where the recipient is not entitled to claim full ITC:** In cases where the recipient is not entitled to claim full ITC, the OMV must be determined as per Rule 28 of the CGST Rules.
 - Similarly, in *Sanghvi Movers Ltd. [TS-1224-AAAR(TN)-2019-NT]*, it was held that the movement of capital goods such as cranes, excavators, drills etc. for construction purposes would constitute a supply and would require the head office to cross charge for such movement of goods.
 - Further, in *Sanghvi Movers Ltd. [2018 (10) TMI 1242 - AAR, Maharashtra]*, it was held that the supply of cranes, crane components and trailers on lease/ hire charges by the Head Office to the branches situated in another state constitutes an Inter-state taxable supply of service between two distinct persons, and hence, leviable to IGST.
- **Accumulation of ITC:**
 - Composite supply of works contract services involving predominantly earthwork provided to government or local authority is leviable GST @12%.
 - However, the inward procurements (goods and services) used for making the aforesaid supply are leviable to a higher rate of GST such as 18% (e.g., various input services) and 28% (e.g., cement).
 - This could result in accumulation of ITC in the hands of the Taxpayer/ contractor thereby impacting the overall project efficiency.

- **Denial of ITC on procurement of goods and/ or services used for construction of immovable property:**
 - In terms of Section 17(5)(c) and 17(5)(d) of the CGST Act, ITC is not available on procurement of goods and/ or services (including works contract services) used for construction of an immovable property, subject to certain conditions and exceptions.
 - Where the Taxpayer undertakes the activity in relation to construction of an immovable property/ structure (say construction/ development and supporting infrastructure for ports, airports, etc.) on his own account, ITC in respect of such procurements would not be available even though the said immovable property/ structure is used for making taxable outward supplies.
 - In this regard, the Hon'ble Orissa High Court in **Safari Retreats Pvt. Ltd. [2019 (5) TMI 1278 (Orissa High Court)]** held as follows:
 - Section 17(5)(d) of the CGST Act is to be read down keeping in mind the language used in **Eicher Motors Ltd. [1999 (1) TMI 34 - Supreme Court]** which held that the very purpose of credit is to give benefit to the assessee.
 - If the assessee is required to pay GST on the rental income arising out of the investment on which he/ she has paid GST, it is required to have the input credit on the GST.
 - The tax authorities have filed an SLP against the aforesaid judgement before the Hon'ble Supreme Court. The hearings in respect of the aforesaid matter were concluded on 12 October 2023 and the order in this regard is awaited.
- **Miscellaneous issues:** In addition to the above, the Taxpayers/ contractors face various issues inter alia including the following:
 - ITC on 'Mobilisation Advances' given to the sub-contractors may be claimed only upon actual receipt of services. Accordingly, although applicable GST is already discharged on such advances, eligibility of ITC may need to be deferred till the date of receipt of services.
 - Reversal on account of a delayed payment of consideration on account of amounts retained as per the contractual agreements with the sub-contractors.
 - Denial of ITC due to mismatches (between eligible ITC as per Form GSTR-3B vis-à-vis Form GSTR-2B) and other defaults by the supplier (such as non-filing of return, non-payment of tax, cancellation of GST registration, etc.).
 - In addition to the above, considering that the benefit of reduced rate of GST (12%) or exemption (for specified services) is available in respect of supplies made to specified persons viz., Central Government, State Government, Union Territory or a local authority, the classification of the recipient into the aforesaid persons could be the subject matter of disputes before the GST Authorities.



CONCLUSION

By building sustainable and modern infrastructure that can match with the developed world, particularly through advanced transportation networks, including roads, railways, ports, and airports, India intends to accomplish the overall goal of over 8% growth, in future. The government plans to bring down the cost of logistics in the economy from an estimated 14% to 10% by adopting advanced mobility solutions, mainly to improve the country's competitive edge in global manufacturing and trade, and for a greater role in supply chains¹⁷.

For this, the aforesaid challenges must be duly addressed. Addressing these issues in turn would boost investor confidence and promote the 'Ease of doing business in India' initiative.

GLOBAL TRENDS

VAT/GST NEWS:

INTERNATIONAL



Russia: Russia plans to zero VAT for tour operators, selling tours to Belarus

Russia is planning to introduce a zero value-added tax rate for tour operators selling tours to Belarus soon. During the last year, almost half a million Russian tourists visited Belarus, while in the first half of 2023, there are already more than 0.4 million tourists. The number of trips of Belarusian guests to Russia is also growing and is gradually returning to the pre-pandemic level.

(Source: https://www.tvr.by/eng/news/ekonomika/rossiya_planiruet_obnulit_nds_dlya_turoperatorov_realizuyushchikh_tury_v_bielarus/)



Nigeria: The Nigerian government announces six-month VAT exemption on diesel

To alleviate the consequences of removing the petrol subsidy, the federal government has announced its intention to temporarily exempt diesel from value-added tax for the next six months. In August 2023, consumers were, on average, paying N854.32 per litre, marking a rise from the lower cost of N786.88 per litre recorded in the same month of the preceding year. A sub-committee is to be constituted to work out the details of the implementation of all items for consideration regarding government interventions to cushion the effect of fuel subsidy removal.

(Source: <https://africa.businessinsider.com/local/markets/the-nigerian-government-announces-six-month-vat-exemption-on-diesel/qs2p40v>)

Tax Appeal Tribunal rules rental income from real properties not subject to VAT

The Tax Appeal Tribunal Lagos Zone held that rental income from real properties in Nigeria is not subject to Value Added Tax (VAT). The tribunal agreed that a transaction must qualify as a supply of goods or services to be subject to VAT. Rental income from land and buildings does not constitute a taxable supply of goods. A lease giving possessory rights to a tenant is also not considered a taxable supply of services.

(Source: <https://www.vatupdate.com/2023/10/28/tax-appeal-tribunal-rules-rental-income-from-real-properties-not-subject-to-vat/>)

GST NEWS:

INDIA



Commercial property tenants to pay 18% GST on electricity bills

The Central Board of Indirect Taxes and Customs (CBIC) issued a Circular on the applicability of GST on reimbursement of electricity charges received by real estate companies, malls, and airport operators from their lessees or tenants. It is clarified that whenever electricity is being supplied bundled with renting of immovable property and/ or maintenance of premises, it forms a part of the composite supply and shall be taxed accordingly.

(Source: <https://www.hindustantimes.com/india-news/commercial-property-tenants-to-pay-18-gst-on-electricity-bills-101698864868058.html>)

Online money gaming companies explore various models to offset impact of 28% GST

After a month the 28% goods and services tax (GST) kicked in, online money gaming companies are looking at various models to keep players interested and at how to retain players by offsetting the impact of the tax. According to industry players, some firms have already started offering vouchers or coupons to players while others are rolling out subscription models under which no platform fee will have to be paid by the players.

(Source: <https://www.msn.com/en-in/money/topstories/online-money-gaming-companies-explore-various-models-to-offset-impact-of-28-gst/ar-AA1jwxwP>)

GST amnesty scheme provides relief, appeals to be filed by January 31, 2024

CBIC has announced an amnesty scheme for Taxpayers who were unable to file appeals or had their appeals rejected on grounds of time limitation. The scheme applies to appeals against demand orders issued on or before 31 March 2023. The appeals must be filed by 31 January 2024. The introduction of the amnesty scheme is a welcome move, providing relief to Taxpayers who had exceeded the statutory time limit to file appeals.

(Source: <https://timesofindia.indiatimes.com/business/india-business/gst-amnesty-scheme-provides-relief-appeals-to-be-filed-by-january-31-2024/articleshow/104964350.cms>)

CUSTOMS NEWS

INTERNATIONAL

China: China October soybean imports jump 25% from a year earlier - customs

China imported 5.16 million metric tons of soybeans in October 2023, surging 25% from the previous year on account of cheap and plentiful Brazilian soybeans. Freshly harvested U.S. soybeans usually dominate the global export market from September as the Brazilian export season winds down, but a record crop in the South American country is expected to dominate China's imports in the last three months of the year.

(Source: <https://www.nasdaq.com/articles/china-october-soybean-imports-jump-25-from-a-year-earlier-customs>)

Israel: Israel Eases Import Rules to Expedite Entry of Needed Goods

Israel's Economy Ministry on Friday said dozens of imported products would be exempt from inspection and other approvals to facilitate their entry into Israel and help to prevent shortages during the war with the Palestinian militant group Hamas. However, the exemption from official approval does not exempt the importer from the obligation to comply with the requirements of the standard, but only from the obligation to produce a standard approval upon importation.

(Source: <https://www.usnews.com/news/world/articles/2023-10-13/israel-eases-import-rules-to-expedite-entry-of-needed-goods>)

China: China restricts exports of graphite as it escalates a global tech war

China has unveiled plans to restrict exports of graphite – a mineral crucial to the manufacture of batteries for electric vehicles (EVs) – on national security grounds. China, which dominates the world's production and processing of graphite, says export permits will be needed, starting in December, for synthetic graphite material – including high-purity, high-strength, and high-density versions – as well as for natural flake graphite.

(Source: https://www.kxly.com/news/money/china-restricts-exports-of-graphite-as-it-escalates-a-global-tech-war/article_40a75427-9ac4-524d-b412-702e687a3d54.html)

INDIA

New tax refund scheme for exports faces US, EU action

Indian products are facing anti-subsidy action in the United States of America (USA) and the European Union (EU) due to their use of the new government scheme, Remission of Duties or Taxes on Export Products (RoDTEP). While the Indian Government argues that the RoDTEP Scheme is in line with the WTO rules, the USA and the EU disagree and have imposed anti-subsidy action in the form of imposition of countervailing duties on at least two products.

(Source:

<https://timesofindia.indiatimes.com/city/delhi/new-tax-refund-scheme-for-exports-faces-us-eu-action/articleshow/105196974.cms>)

UK seeks customs duty cut on electric cars in free-trade talks with India

The UK is pushing for a cut in customs duty on electric vehicles in the ongoing negotiations for signing a free-trade deal with India. Presently, Customs duty @ 60% is levied on imported cars priced below USD 0.04mn and @ 100% on those priced above this point. As per sources, India is keen to protect its electric vehicle industry which is just beginning to take off and it is not easy to give any duty concessions to foreign companies.

(Source: <https://www.orissapost.com/uk-seeks-customs-duty-cut-on-electric-cars-in-free-trade-talks-with-india/>)

Govt to increase customs duty on shipping products

In a bid to give push to Aatmanirbhar Bharat in the maritime sector, the Finance Ministry is likely to raise customs duty on fishing vessels, tugs and pusher crafts and light vessels from 5% to 50%. For lifeboats, BCD is likely to be imposed at 50% for the next 10 years and 100% in 10-25 years. BCD is likely to be raised to 50% on barges or pontoons imported along with ships for the next ten years and thereafter increase it to 100% from the years 10-25.

(Source: <https://www.msn.com/en-in/news/India/govt-to-increase-customs-duty-on-shipping-products/ar-AA1jyIOC>)

Looking at liberalising some restrictions on SEZ units, says Piyush Goyal

The Indian government is looking at easing certain restrictions for units in the Special Economic Zones (SEZ) to promote the sector's growth. SEZs in India are treated as foreign territories for trade and customs duties, with restrictions on duty-free domestic sales. Companies in SEZs are urging the government to permit them to sell their products in domestic tariff areas or domestic markets without paying the import duties that currently apply, like duty-free FTA imports.

(Source: https://www.business-standard.com/economy/news/looking-at-liberalising-some-restrictions-on-sez-units-says-piyush-goyal-123110800794_1.html)



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