The TAX POST

A bimonthly bulletin on the world of Indirect Taxes

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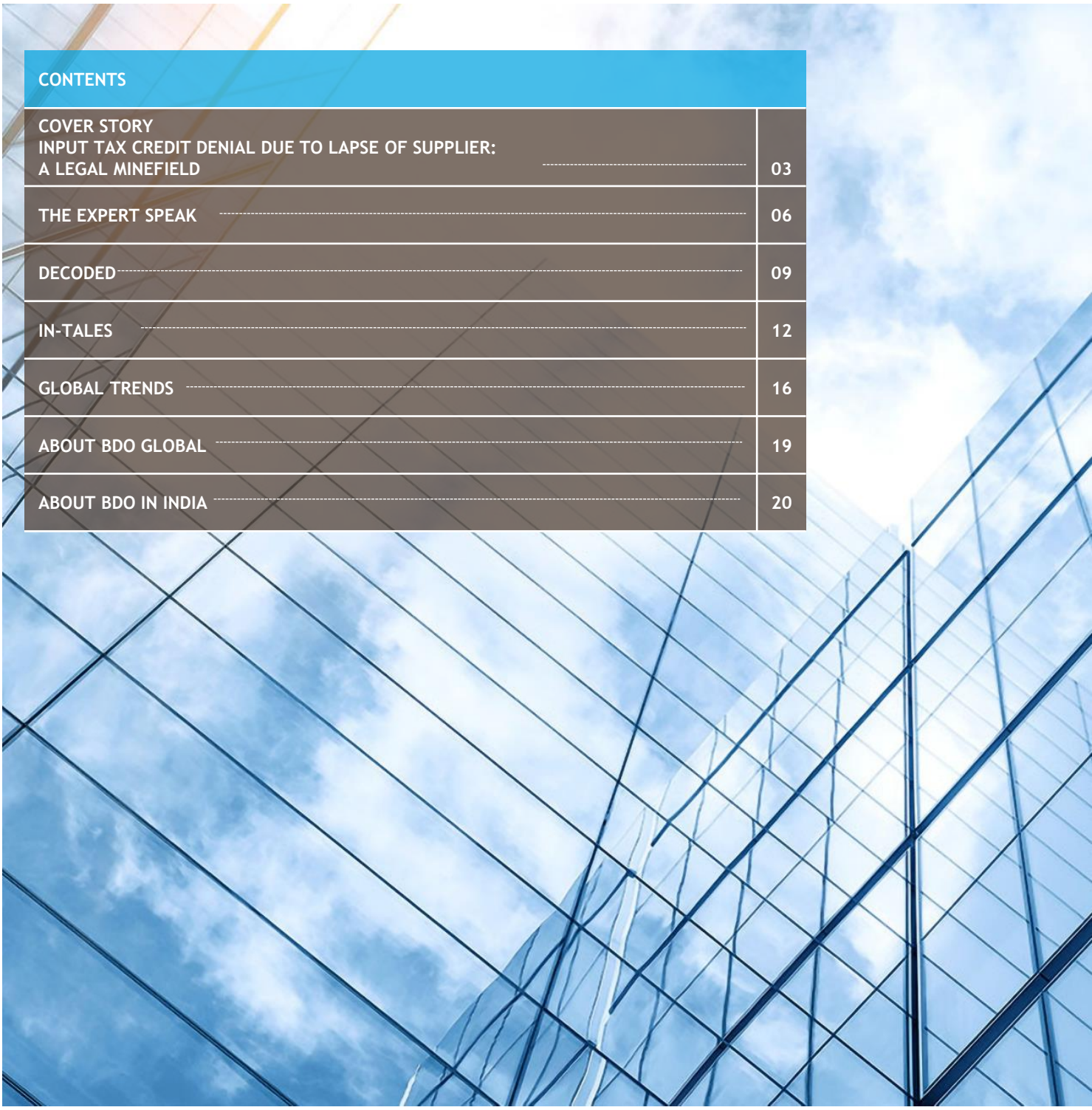

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PREFACE

"The strictest law sometimes becomes the severest injustice."

-Benjamin Franklin, Scientist

The introduction of the Goods and Services Tax (GST) law was India's most significant indirect tax reform, promising to transform the indirect taxation landscape. One of the most important reasons for the introduction of GST was to enable seamless flow of input tax credit (ITC) and elimination of the cascading effect of taxes. Amongst the various conditions and restrictions imposed for availing ITC under the GST law, Section 16(2)(c) of the Central Goods and Services Tax Act, 2017 (CGST Act) which provides a restriction to claim ITC to a recipient of supply in case of default by the supplier to make payment of GST to the Government, is one of the most debated provisions.

The constitutionality of the aforesaid condition for restriction of ITC has been challenged before various High Courts. The 'Cover Story' of this edition of 'The Tax Post' deals with the background and some of the grounds on which the constitutionality of Section 16(2)(c) of the CGST Act has been challenged before various courts.

This edition's 'Expert Speak' explores the concept of shareholders' activity under transfer pricing vis-à-vis cross-charge framework under GST from the perspective of the OECD TP Guidelines, and the GST law in India. The article emphasises the need for alignment of the GST law in India with the OECD TP Guidelines to clarify and resolve the cross-charge related issues on intra-group or intra-company activities.

The 'In Tales' section of this edition of 'The Tax Post' dissects the Information Technology (IT) industry and some of the indirect tax issues faced by the industry.

The 'Decoded' segment of this edition dissects a judgement of the Hon'ble Bombay High Court wherein it was held that if an assessee can establish the bonafides of a mistake leading to excess payment of duty, the limitation provided under the general law of limitation would apply for claiming refund of such excess payment, as per which, the refund can be claimed within three years from the date of discovery/ knowledge of such bonafide mistake. However, if the assessee is unable to establish bonafides of a mistake, the limitation period would be governed by the respective fiscal statute.

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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COVER STORY

INPUT TAX CREDIT DENIAL DUE TO LAPSE OF SUPPLIER: A LEGAL MINEFIELD

INTRODUCTION

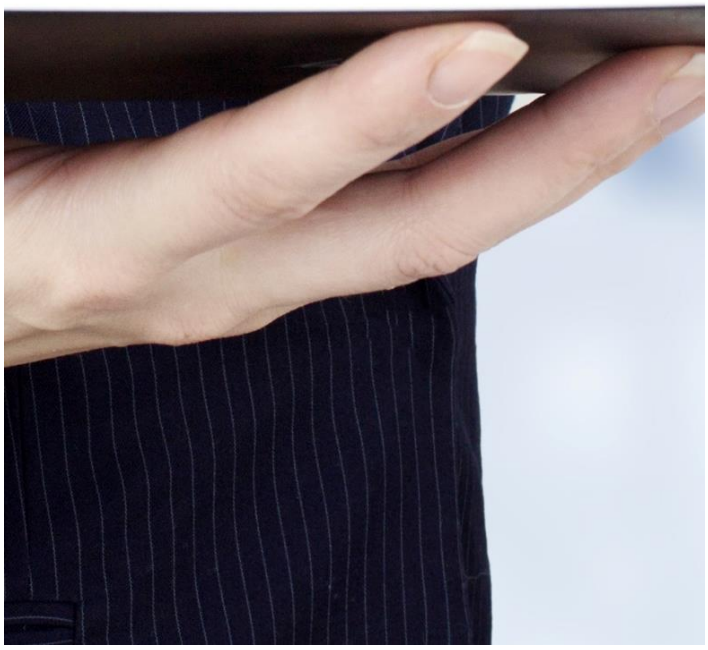
The introduction of the GST law was India's most significant indirect tax reform, promising to transform the indirect taxation landscape. One of the most important reasons for the introduction of GST was to enable a seamless flow of ITC and elimination of the cascading effect of taxes. This was also reflected in the Statement of Objects and Reasons appended to the Constitution (122nd Amendment) Bill, 2014 which inter alia stipulated that *The goods and services tax shall **replace a number of indirect taxes** being levied by the Union and the State Governments **and is intended to remove cascading effect of taxes and provide for a common national market for goods and services**.'*

However, the actual GST law contained arduous conditions and significant restrictions to claim ITC as provided under Sections 16(2), 16(3), 16(4), and 17 of the CGST Act. Amongst the various conditions and restrictions imposed under the GST law is Section 16(2)(c) of the CGST Act, which restricts ITC to a recipient of supply in case of default by the supplier to make payment of GST to the Government (defaulting supplier), which is one of the most debated provisions.

In the initial period of the introduction of GST, a Press Release dated 4 May 2018 (Press Release) had been issued, inter alia, clarifying under:

*iv. **No automatic reversal of credit**: There shall not be any automatic reversal of input tax credit from buyer on non-payment of tax by the seller. In case of default in payment of tax by the seller, recovery shall be made from the seller however reversal of credit from buyer shall also be an option available with the revenue authorities to address exceptional situations like missing dealer, closure of business by supplier or supplier not having adequate assets, etc."*

Despite the above, there have been numerous occasions where the Tax Authorities have sought direct reversal of ITC from the recipient/ purchaser (whether or not covered under the exceptional circumstances mentioned in the Press Release), while parallelly undertaking recovery proceedings from the suppliers causing undue hardships to a purchaser who had acted in a bonafide manner and had procured goods/ services from the defaulting supplier (bonafide purchaser) and in some cases, initiating recovery proceedings only on the bonafide purchaser without even approaching the defaulting supplier. The industry had a valid concern about this condition of claiming ITC being beyond their control and this led to a series of challenges to the constitutionality of Section 16(2)(c) of the CGST Act in various High Courts.



The Hon'ble Calcutta High Court ***in LGW Industries Ltd. [TS-728-HC(CAL)-2021-GST]*** and ***Sanchita Kundu [TS-249-HC(CAL)-2022-GST]***, without examining the constitutional validity of the aforesaid provision, remanded the matter to the Tax Authorities for examining whether the purchases/ transactions were genuine and were supported by valid documents and were undertaken before the cancellation of GST registration of the supplier(s). Pursuant to the above, if the aforesaid questions were determined by the Tax Authorities in favour of the Taxpayer (i.e., recipient), the recipient shall be given the benefit to claim ITC. At the same time, in ***D.Y. Beathel Enterprises Vs. The State Tax Officer [TS-190-HC(MAD)-2021-GST]***, it was held that the demand of ITC reversal without conducting any inquiry or recovery action on the seller was quashed and the matters were remitted back.

The Press Release was also relied upon in ***Suncraft Energy Pvt. Ltd. Vs. The Assistant Commissioner of State Tax [TS-367-HC(CAL)-2023-GST]***, wherein it was held that:

- Before directing a recipient to reverse ITC and remit the same to the Government, the Tax Authorities must act against the defaulting supplier.
- Unless and until the Tax Authorities can bring out the exceptional case as highlighted in the Press Release (viz., there is collusion between the recipient and the supplier or the supplier is missing or the supplier has closed down its business or the supplier does not have any assets or any such other contingencies), the Tax Authorities are not justified to straight-away direct reversal of ITC from the recipient.

However, in ***Jai Balaji Paper Cones Vs. Assistant Commissioner of Sales Tax [TS-358-HC(MAD)-2023-GST]***, it was held that ITC is not available to a bonafide purchaser who procures goods/ services from a supplier whose registration is cancelled before making such supplies.

After all these cases, recently, the Hon'ble Patna High Court in ***Aastha Enterprises Vs. The State of Bihar [TS-407-HC(PAT)-2023-GST]***, took a contrary view & held that:

- When the supplier fails to comply with the statutory requirement of payment of tax to the Government, the recipient cannot claim ITC under the GST law.
- The Tax Authorities can also recover the amounts from the defaulting supplier and if such amounts are recovered, the recipient (who has paid tax to its supplier) could seek a refund.

While the Hon'ble High Court had suggested the possibility of claiming a refund, the mechanism for claiming such a refund was not deliberated upon.

Some of the grounds on which the taxpayers have sought to challenge the validity of section 16(2)(c) are as under:

DOCTRINE OF IMPOSSIBILITY

The doctrine of impossibility which inter alia states that a person cannot be expected to undertake an impossible task is governed by the following Latin maxims:

- ***Lex non-cogit ad impossibilia:*** In simple terms, it means that the law cannot compel a man to do that which cannot possibly be performed.
- ***Impotentia excusat legem:*** This maxim provides a general rule that where the law creates a duty or a charge, and the party is disabled from performing it, without any default by him and has no remedy, the law will in general excuse him from performing such actions.

The Hon'ble Supreme Court and the various High Courts in India have applied the aforesaid doctrine in various cases, inter alia, in Cochin State Power and Light Vs. State of Kerala [1965 AIR 1688 (SC)]. Moreover, in Shiv Enterprises Vs. State of Punjab [2022 (58) GSTL 385 (P&H)], it was observed that a trader cannot ascertain whether or not input tax was paid by his predecessors and hence, it was held that once a person cannot be compelled to do an impossible thing, he cannot be penalised for not doing so.

The aforesaid principles may usefully be made applicable in context of Section 16(2)(c) of CGST Act basis the following:

- Under the GST law, no mechanism has been provided to a recipient to ensure that its supplier has made payment of GST to the Government treasury.
- While Form GSTR-2A contains the filing status of Form GSTR-3B of the supplier, the same cannot be considered conclusive evidence on account of the following factors:
  - The date of filing of Form GSTR-3B is not available in Form GSTR-2A and expecting the recipient to verify the date of filing of Form GSTR-3B for each of its suppliers monthly is against the principle of 'Lex non-cogit ad impossibilia' and hence impermissible.
  - Mere filing of Form GSTR-3B cannot imply that the supplier has made payment of applicable GST to the Government treasury and non-payment of GST by the supplier could arise in case where GST discharged in Form GSTR-3B is less than the liability reported in Form GSTR-1.
- Therefore, in the absence of an appropriate platform or functionality to validate supplier compliances or a definitive mechanism to determine the fulfilment of the condition under Section 16(2)(c) of the CGST Act, the fulfilment of this condition is beyond the control of the recipient and it can be construed that the aforesaid condition compels the recipient to comply with an impossible condition (for availing ITC) which is impermissible in law. Given the above, the compliance of aforesaid condition ought to be excused.
- Reference may usefully be made to various judicial precedents under the erstwhile VAT laws involving identical provisions such as ***Arise India Ltd. Vs. Commissioner of Trade & Taxes [TS-314-HC-2017(Del)-VAT]*** (affirmed by the Hon'ble Supreme Court in ***[TS-2-SC-2018- VAT])*** and ***Gheru Lal Bal Chand Vs. State of Haryana and Ors. [2011 (45) VST 195 (P&H)]***.

SECTION 16(2)(C) OF THE CGST ACT VIOLATES OF ARTICLES 14, 19(1)(G), 265 AND 300A OF THE CONSTITUTION OF INDIA (CONSTITUTION)

- **Article 14 of the Constitution:**
  - As highlighted above, Section 16(2)(c) of the CGST Act applies to all purchasers including bonafide purchasers. Denial of ITC to a bonafide purchaser for the fault of the defaulting supplier (over which the purchaser has no control) is not only arbitrary but also irrational.
  - While interpreting an identical provision under the Delhi Value Added Tax Act, 2004, the Hon'ble Delhi High Court, in Arise India (supra), had held as under:
    - Applying the doctrine of reading down, the condition of payment of tax by the supplier should be interpreted as not applying to a *bonafide* purchaser who:
      - Has entered into purchase transactions with validly registered suppliers;
      - Such suppliers have issued tax invoices to the *bonafide* purchasers; and
      - There is no mismatch in the reporting of such supplies by the suppliers and the purchaser.
    - Unless the provision is read down (as above), the entire provision would be violative of Article 14 of the Constitution.
- Denial of ITC to a *bonafide* purchaser without independently seeking recovery from the defaulting supplier results in undue financial hardship, causing the purchaser to bear the tax cost twice (payment made to the defaulting supplier as well as reversal of ITC). Thus, reversal of ITC qua the *bonafide* purchaser (without initiating recovery from the defaulting supplier) is without the authority of law or without jurisdiction, amounts to double taxation and hence, violates Articles 19(1)(g), 265 and 300A of the Constitution.

RECIPIENT CANNOT BE HELD TO BE VICARIOUSLY LIABLE FOR THE DEFAULTS OF THE SUPPLIER

It is a settled law that no liability can be fastened on a *bonafide* purchaser due to non-payment of tax by the supplier unless the purchaser has acted in a fraudulent manner or in collusion or connivance with the supplier or its predecessors, and the same is established (See ***Arise India (supra)*** and ***Gheru Lal Bal Chand (supra)***).

The aforesaid view is further supported by the Press Release which clarifies that in case of a default in payment of tax by the supplier, the Tax Authorities must recover the tax from the defaulting supplier and that reversal of ITC from the purchaser shall be an option available to the Tax Authorities to address the exceptional circumstances as specified in the Press Release.

CONCLUSION

While the constitutional validity of Section 16(2)(c) of the CGST Act is currently sub judice before various High Courts, there are various aspects for which clarity is awaited from the Tax Authorities. For instance, in a case where the Tax Authorities have sought reversal of ITC from the bonafide purchaser and such bonafide purchaser seeks recovery of the same from the supplier –

- Whether the supplier is absolved from making payment to the recipient if the supplier has paid applicable GST (along with interest) to the Tax Authorities towards his output tax liability.
- If yes, what would be the recourse available to the recipient – Whether the recipient can claim a refund of ITC reversed (along with interest) from the GST authorities considering the fact that the supplier has already discharged output tax liability along with interest or at least claim a recredit.
- If the answer to the above is in the affirmative, in what way can the recipient claim refund/ re-credit of such taxes, especially considering the lack of any mechanism to formally intimate payment of tax by the supplier to the recipient? However, if the answer to the aforesaid question is in the negative, the same would result in another issue concerning *'double jeopardy'* for the recipient and in a way *'unjust enrichment'* by the Government.
- Whether the supplier is absolved from his liability to pay GST along with interest to the Government in cases where the recipient has reversed ITC availed along with interest.

Pending clarification in respect of the aforesaid aspects, it is pertinent to note that over a period of time, considering the various amendments under the GST law, the Tax Authorities are endeavouring to seek recovery from the suppliers first (while retaining their right to deny ITC to a recipient). Some of these provisions are summarised below:

- Restriction on filing Form GSTR-1 if Form GSTR-3B for the preceding month has not been filed by the taxpayer (Rule 59(6) of the CGST Rules).
- Issuance of notice in case where the liability as per Form GSTR-1 exceeds the corresponding liability in Form GSTR-3B by a specified threshold (Rule 88C of the CGST Rules).
- Restriction on filing Form GSTR-1 where the notice under Rule 88C of the CGST Rules has not been responded to or where applicable tax has not been discharged by the Taxpayer (Rule 59(6) of the CGST Rules).

Besides the above, the Government has introduced various validations to ensure that a recipient does not avail excess ITC such as issuance of notice where the ITC in respect of supplies reflected in Form GSTR-2B exceeds the quantum of ITC availed in Form GSTR-3B by a specified threshold (Rule 88D of the CGST Rules) or reversal of ITC in case of non-filing of Form GSTR-3B by the supplier (Rule 37A of the CGST Rules). While these validations are available to the Tax Authorities, it would be noteworthy to see if such restrictions are imposed only in cases other than bonafide purchasers. On such interpretation, the fundamental principle of 'Salus polpuli est suprema lex' (meaning that the welfare of the people is the paramount law) would be achieved, hence promoting the 'Ease of Doing Business' in India.

THE EXPERT SPEAK

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SHAREHOLDERS' ACTIVITY UNDER OECD TRANSFER PRICING GUIDELINES VIS-À-VIS CROSS-CHARGE UNDER GST

A parent company undertakes various functions or activities which may also have an impact on its subsidiaries or group entities based in India. For some of the activities, the parent company or head office may cross-charge certain costs to its Indian group entity or branch office, while some may not lead to any cross-charge.

Under the GST law in India, in the case of related parties, the supply of services without any consideration is also treated as a taxable supply. A similar position applies in the case of the import of services from a related person without consideration. Considering such situations, it is quite challenging to determine whether any activities carried out by the parent could be considered intra-group services. In the absence of specific guidance under GST law on what can constitute the supply of services in cases of benefits received by an Indian entity from activities carried out by a parent, it is worthwhile to consider whether such activities could be classified as intra-group services under the OECD Transfer Pricing Guidelines, which may help to determine the taxability of such transactions under the GST law. Let us now look at some definitions under the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, 2022 (OECD TP Guidelines).

INTRA-GROUP SERVICE

An activity (e.g., administrative, technical, financial, commercial, etc.) for which an independent enterprise would have been willing to pay or perform for itself.

SHAREHOLDER ACTIVITY

An activity which is performed by a member of a Multinational Enterprise (MNE) group (usually the parent company or a regional holding company) solely because of its ownership interest in one or more other group members, i.e., in its capacity as a shareholder.

Accordingly, as per the OECD TP Guidelines, the activity performed by the parent company in the capacity of a shareholder, even though the individual group members may not need the activity (and would not be willing to pay for it if they were independent enterprises), would not be considered as an intra-group service and may be referred to as a 'shareholder activity'.

WHAT IS STEWARDSHIP ACTIVITY?

Various activities undertaken by the parent company for its subsidiary may not be intended to benefit the subsidiary and are solely carried out to protect the interest of the foreign parent company in its capacity as a shareholder. Such activities may be referred to as shareholder activity and cannot be classified as intra-group services requiring a cross-charge. Shareholder activity is distinguishable from the broader term 'stewardship activity'. Stewardship activities also cover a wide range of activities by a shareholder that may include the provision of service to other group companies, for example, services of a coordinating centre. Such non-shareholder activities could include detailed planning services for particular operations, emergency management or technical advice (troubleshooting), or assistance in day-to-day management.

OECD PERSPECTIVES

It is worthwhile to determine whether the services rendered between parent companies and group companies would qualify as intra-group services under the OECD TP guidelines. It is pertinent to note that any activity performed by a parent company for its subsidiaries would be considered a transaction between related parties. There are certain principles laid down in the OECD TP Guidelines to determine intra-group services, which are as under:

- Whether rendering of activities provides an economic or commercial value to enhance the business position of the Indian subsidiary and therefore whether used for commercial or business operations.
- Whether the services are performed to meet the identified need of the specific member of the group or the general need of the entire group.

- Whether the activities are performed relating to the group members even though those group members do not need the activity.
- Whether the objective is to ensure that group policies and standards are adhered to by all the members of the group company.
- Whether the activities undertaken by one group member merely duplicate a service that another group member is performing for itself.
- Whether by the reason of its affiliates, the credit rating is higher than it would have been if it were unaffiliated.

Given the above, the test that the group member should adopt is to apply the 'benefit test', i.e. whether the group member has benefited from or used the services for its business operations. If yes, then it qualifies as a rendition of intra-group services.

The Hon'ble Apex Court of India in the case ***of Director of Income Tax (International Taxation) Vs. Morgan Stanley & Co. [Civil appeal Nos 2914 and 2915 of 2007, dated 9 July 2007]*** has held that stewardship activities in respect of ensuring service output requirements and protecting its interests by ensuring quality and confidentiality would not constitute a service between group companies.

Further, the Hon'ble Tribunal in the case of ***M/s GE Money Financial Services Private Limited Vs. ACIT [ITA No. 5882/Del/2010; ITA No. 5816/Del/2011 and ITA No. 6282/Del/2012]*** has held that generally shareholder services are those services that do not fulfill the need test but are required to maintain and safeguard the shareholder's interest. Such shareholder services do not have a potential and foreseeable benefit which is likely to accrue to the service recipient.

Accordingly, it can be concluded that under the OECD TP guidelines, intra-group services do not take place in the case of shareholder services or stewardship services.

GST PERSPECTIVE

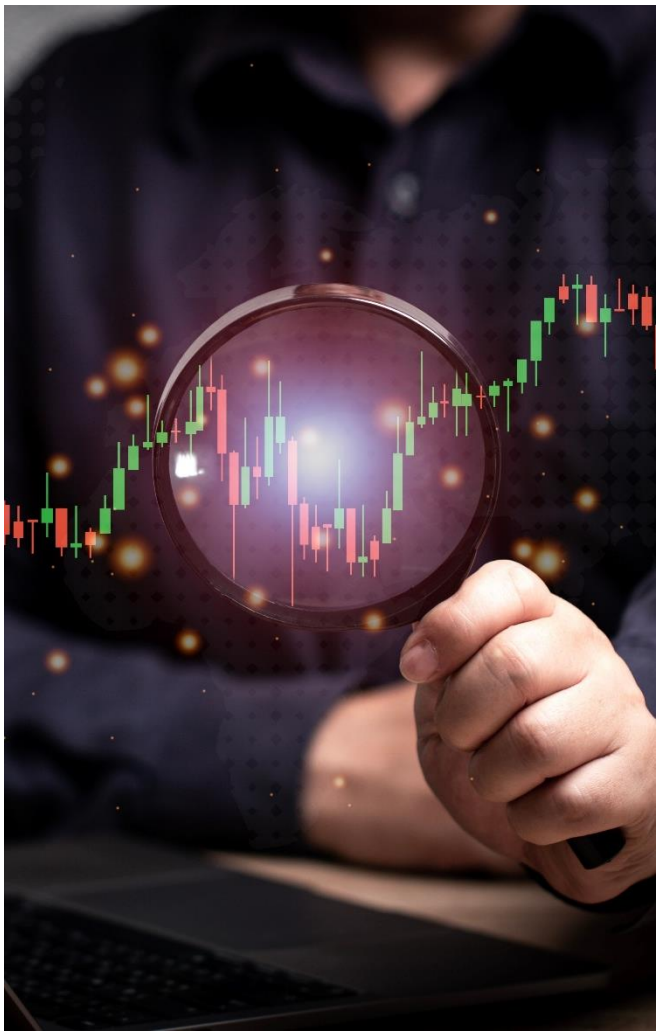
The scope of the term 'Supply' under the GST Law can be understood based on the following parameters:

- Supply of goods or services or both
- For a consideration
- Made in the course or furtherance of business

While the above parameters are generally applied to determine taxability under the GST Law, there are various exceptions to the requirement of supply being made for consideration. Schedule I of the CGST Act seeks to tax those transactions which are undertaken without any consideration. As mentioned in the beginning, such transactions also include the supply of goods or services between related persons.

The Appellate Authority for Advance Ruling in the case of M/s Cummins India Limited has clarified that any facilitation activity provided by the head office by way of procuring common input services on behalf of recipient units would constitute as 'supply' under the GST Law. Further, the FAQs on the Banking, Insurance and Stockbrokers Sector specified that the stewardship activities performed in relation to business operations by the head office to an Indian branch would be considered as 'supply', even in the absence of consideration.

For identifying a transaction of 'service' under GST law, based on the Indian Contract Act, 1872 and the jurisprudence evolved over a period, there should be an existence of an express or implied agreement for the provision of service, apart from other necessary concomitants, i.e. the existence of supplier, recipient and consideration. Agreement implies that the supplier is ready to provide the agreed service and the recipient is desirous of availing the agreed service and in consideration, the recipient should provide something in return to the supplier of such service (not necessarily in money). The same analogy is also derived from circular no:116/35/2019-GST dated 11 October 2019, wherein the department has clarified that there should be an obligation (quid pro quo) on the part of the recipient of donation to do anything (supply a service) for a donation to be a taxable supply. Further, several judicial pronouncements under the erstwhile Service Tax Law also held that there should be an element of quid pro quo in the rendition of any service. The



same principles were adopted in the Service Tax Education Guide 2012. The concept 'activity for a consideration' involves an element of contractual relationship wherein the person doing an activity does so at the desire of the person for whom the activity is done in exchange for a consideration. An activity done without such a relationship, i.e. without the express or implied contractual reciprocity of a consideration, would not be an 'activity for consideration' even though such an activity may lead to accrual of gains to the person carrying out the activity. However, these provisions no longer apply in GST due to specific provisions for the levy of GST even in the absence of consideration, though there still needs to be a supply for the determination of tax liability.

RECENT CIRCULAR REGARDING TAXABILITY OF SERVICES BETWEEN DISTINCT PERSONS

Recently, the Central Board of Indirect Taxes & Customs vide circular no:199/11/2023-GST dated 17 July 2023 has endeavoured to provide clarity regarding the taxability of services provided by an office of an organisation in one State to the office of that organisation in another State, both being distinct persons. Though the circular was particularly issued to clarify the taxability and valuation of common services or internally generated services between distinct persons, it only clarified the valuation methodology to be adopted for cross-charge towards internally generated services. The circular lacks clarity as to what type of activities could be classified as internally generated services, especially CXO function, shareholder activity, etc., and considering the various interpretations possible, the industry was looking forward to clarity on this aspect.

ALIGNMENT OF OECD TP GUIDELINES WITH THE GST LAW

From the above, it could be deciphered that there could be different perspectives to look at the intra-group 'service' under the OECD TP Guidelines and the GST law. While under the OECD TP Guidelines, a cross-charge may not be needed in case of shareholder activities, as they do not result in any intra-group services, the position is not so clear under the GST law (and contrary, if the clarification on the taxability of stewardship activity as per the FAQ document in banking and financial services is considered).

The focus of the transfer pricing provisions and the GST law is to identify the transactions taking place between related parties and to value such transactions at an arm's length price. Accordingly, the principles of transfer pricing provisions and the GST law must be aligned with each other to avoid two different treatments of the same transaction under two different laws. While in strictly legal terms, two different laws can prescribe two different treatments of the same transaction, it would result in avoidable complexities for businesses, reducing 'Ease of Doing Business' and hence, to the extent possible, the industry would always look for aligned tax treatment under all the laws. If the transfer pricing provisions and the GST law are aligned, the OECD guidelines having global acceptability may be adopted for Indian GST law to clarify and resolve the cross-charge related issues on intra-group or intra-company activities. This would lead to a true 'Ease of Doing Business in India' for the industry.

DECODED

ABSENT BONAFIDES, REFUND OF DUTY PAID UNDER 'MISTAKE' IS NOT ADMISSIBLE – BOMBAY HIGH COURT

INTRODUCTION

In an important judgement, the Hon'ble Bombay High Court[1] has held that the admissibility of refund of the amounts paid under mistake is available under Article 265 of the Constitution of India (Constitution) subject to the following conditions:

- The mistake must be a mistake of fact or a mistake of law;
- Such mistake must be a bonafide mistake which must be evinced by the assessee claiming refund;
- If the assessee can establish its bonafides, the limitation provided under the general law of limitation would apply for claiming such refund;
- However, if the assessee is unable to establish its bonafides, the limitation period would be governed by the respective fiscal statute.

Applying the aforesaid principles, the Hon'ble High Court observed that since M/s. Cummins Technologies India Pvt. Ltd. (Taxpayer), in the present case, was unable to establish its *bonafides*, the limitation period provided under Section 27 of the Customs Act, 1962 (Customs Act) would apply instead of the general law of limitation.

FACTS OF THE CASE

- The Taxpayer is inter alia engaged in the manufacture and sales of exhaust after-treatment systems for which it imports various raw materials. In respect of the imports made by the Taxpayer vide 3 Bills of Entry (BoEs), it had paid IGST amounting to INR 3.89mn on 5 July 2017.
- Subsequently, it was noted that the Taxpayer was liable to pay IGST to the tune of INR 4.21mn. Accordingly, on 11 July 2017, the Taxpayer made payment of the entire IGST amount, i.e. INR 4.21mn (instead of the differential IGST amount of INR 320,000). This resulted in excess payment of duty to the tune of INR 3.89mn. However, the Taxpayer did not notice such excess payment of duty.
- Pursuant to the above, on 2 July 2019, during Internal Audit, the Taxpayer's Chartered Accountant noticed the aforesaid mistake and informed the same to the Taxpayer.
- Thereafter, the Taxpayer initiated the discussions with the Tax Authorities. Subsequently, an email was received from the Tax Authorities on 10 July 2019 (Email) informing the Taxpayer that
  - The aforesaid issue was resolved by the rejection of the main challan due to the short payment of IGST. Accordingly, the Taxpayer could initiate full payment of the applicable IGST liability.
  - The refund of previously paid amounts which was rejected can be claimed by the Taxpayer.
- Based on the above, the Taxpayer applied for a refund of double/ excess payment of IGST in the format prescribed under Section 27 of the Customs Act inter alia declaring that the excess duty has not been passed on to any other person.
- The Tax Authorities rejected the refund application (Impugned Order) on 8 November 2019 holding that the same was time barred under Section 27 of the Customs Act because the application was filed beyond the stipulated period of one year from the relevant date (i.e. date of payment of duty).
- Against this, no appeal was filed by the Taxpayer till the expiry of the time limit for filing an appeal under Section 128 of the Customs Act. Subsequently, on 14 September 2020, the Taxpayer filed a Writ Petition before the Hon'ble Bombay High Court.

CONTENTIONS BY THE TAXPAYER

- Section 27 of the Customs Act is inapplicable to the present case as the application for refund of excess amount paid by the Taxpayer under mistake can neither be treated as 'duty' nor as 'interest'.

[1] M/s. Cummins Technologies India Pvt. Ltd. (Taxpayer) Vs. Union of India & Ors., [TS-445-HC(BOM)-2023-CUST], dated 28 August 2023

- Retention of excess amount by the Tax Authorities violates Article 265 of the Constitution of India (Constitution) and it is the fundamental duty of the Tax Authorities to return the same which results in unjust enrichment apart from being illegal retention.
- There is no delay or laches on the part of the Taxpayer in claiming a refund because:
  - The Chartered Accountant had intimated to the Taxpayer about the mistake on 2 July 2019;
  - The Taxpayer received the Email from the Tax Authorities on 10 July 2019; and
  - Taxpayer filed the refund application on 30 July 2019 (i.e., within 20 days)
- The limitation provided under Section 27 of Customs Act is inapplicable to present case, more particularly in the background of the Email. Accordingly, the limitation period would be governed by the provisions of Section 29(2) of the Limitation Act, 1963 (Limitation Act) and the limitation period would begin from the date of knowledge of the mistake and not from the date on which the excess amount was paid.
- The Impugned Order was received by the Taxpayer on 18 November 2019 and thereafter, due to COVID-19, lockdown was imposed from March 2020. Further, the Writ Petition was filed within
  - A period of three years from the date of payment of the excess amount, i.e. 11 July 2017 (in view of the suo motu decision of the Hon'ble Supreme Court providing extension in limitation period); and
  - Within a few months from the date of receipt of the Impugned Order.
- Reliance was placed on Vedanta Ltd. Vs. Commissioner of Customs (Port) & Anr. [(2017) 12 SCC 744] and Salonah Tea Co. Ltd. & Ors. Vs. Superintendent of Taxes, Nowgong and Ors. [(1988) 1 SCC 401].
- The contention of the Tax Authorities that the Taxpayer ought to have challenged/ modified the self-assessment order prior to filing the refund application would not apply to the present case since the refund application was not rejected on the aforesaid ground and there is neither any dispute on the payments made by the Taxpayer nor any dispute pertaining to incorrect assessment of duty.

CONTENTIONS BY THE TAX AUTHORITIES

- The refund application filed by the Taxpayer is not maintainable since the Taxpayer has self-assessed the BoEs and paid the applicable IGST. Accordingly, even the excess IGST paid was out of self-assessment which had attained finality since the same was not challenged by either party.
- Being aggrieved by the self-assessment/ assessment order, the Taxpayer ought to have filed an appeal before the Appellate Authority and only on the setting aside of the aforesaid order, the refund application could be filed. However, the Taxpayer did not challenge the same and hence, the Writ Petition is liable to be dismissed.
- The Tax Authorities were not empowered to sanction refund since they were bound by Section 27 of the Customs Act which stipulates that the refund application must be filed within one year from the date of payment of duty. Since the refund application was filed after a lapse of more than two years, the same was rightly rejected by the Tax Authorities.
- An appeal against Impugned Order can be filed before the Appellate Authority within a maximum period of 90 days (including a 30-day period which can be condoned) from the date of the Impugned Order. Even if the date of receipt of the Impugned Order is considered, the limitation period for filing the appeal had expired on 16 February 2020 which was before 15 March 2020 (being the starting date for the provision of the benefit of suo motu order of the Hon'ble Supreme Court).
- Thus, Impugned Order has attained finality and cannot be reopened. As a result, the Writ Petition filed by the Taxpayer should be dismissed. Reliance was placed on Glaxo Smithkline Consumer Healthcare Ltd. [(2020) 19 SCC 681] and Collector (CE), Chandigarh Vs. Doaba Co-operative Sugar Mills Ltd. [1988 (Supp) SCC 683].

ANALYSIS BY *AMICUS CURIAE*

- In respect of the present matter, the Hon'ble High Court had appointed Amicus Curiae (Friend of the Court) to act as an impartial advisor to the Hon'ble High Court and to provide assistance on the applicability of the statutory limitation for refund applications.
- The Amicus Curiae inter alia referred to the following judicial precedents:
  - ***Hindustan Cocoa Products Ltd Vs. Union of India and Ors. [1994 SCC OnLine Bom 169]***
  - ***Salonah Tea Co. Ltd. & Ors. (supra)***
  - ***DHL Express India Pvt. Ltd. Vs. CST, Bengaluru Service Tax-1 [2021-VIL-305-KAR-CU]***
  - ***UPL Ltd. Vs. Union of India & Ors. [2022 (379) E.L.T. 183 (Guj.)]***
  - ***Vedanta Ltd. (supra)***
  - ***Guru Charan Industrial Works Vs. Union of India & Ors. [(1988) 33 ELT 648]***
  - ***Doaba Co-Operative Sugar Mills Ltd. (supra)***
  - ***Glaxo Smith Kline Consumer Health Care Ltd. (supra)***
  - ***Mafatlal Industries Ltd. & Anr. Vs. Union of India & Ors. [(1997) 5 SCC 536]***
- The Amicus Curie submitted that if the monies, including duty or tax or cess, are paid under a bonafide mistake of law or fact, then the limitation period under Section 11B of the Central Excise Act, 1944 (Excise Act) or Section 27 of the Customs Act would not apply and the claim for refund must be made within the time prescribed under the general law of limitation from the date of discovery/ knowledge of such bonafide mistake.

OBSERVATIONS AND RULING BY THE HON'BLE HIGH COURT

- On a perusal of the decisions referred to by the Amicus Curiae it can be observed that:
  - Initially it was only payments made under mistake of law which were excluded from the purview of Section 11B of the Central Excise Act or Section 27 of the Customs Act (Hindustan Cocoa Products Ltd. (supra)).

  - However, later, a payment made even under a mistake of fact would also be outside the purview of Section 11B of the Central Excise Act or Section 27 of the Customs Act (DHL Express India Pvt. Ltd. (supra)). It was also observed that a mistake of fact does not cease to be a mistake by lapse of time and the claim for refund can be preferred within three years from the date of discovery or knowledge of the mistake and the date of payment was not a relevant consideration.
  - Payment made on account of a bonafide mistake would not be covered by the limitation under Section 27 of the Customs Act (UPL Ltd. (supra)).
- Therefore, any payment made under a bonafide mistake of law or fact would not fall within the provisions of law with respect to refund under Section 11B of the Central Excise Act or Section 27 of the Customs Act. Accordingly, no claim for refund of such amount would be hit by the limitation provided under Section 11B of the Central Excise Act or Section 27 of the Customs Act.
- In the present case, there is no pleading or any material to show or establish or demonstrate that the Taxpayer's mistake was bonafide. To establish bonafides, a corporate of the Taxpayer's stature must demonstrate that due care and diligence were exercised.
- Although the Taxpayer had made excess payment of IGST in July 2017, the said mistake was noticed only in 2019 while conducting internal audit. Further, the Taxpayer initiated discussions with Tax Authorities only after receiving Certificate from the Chartered Accountant.
- The Certificate issued by the Chartered Accountant does not state the circumstances under which the mistake had occurred, or the efforts taken to exercise due care and diligence so that the mistake could be said to be a bonafide mistake. Also, there is no whisper of the time or circumstances under which the said mistake was discovered by the Taxpayer. Thus, it appears that the certificate has been issued at behest of Taxpayer itself.
- The Taxpayer had received the Email in 2019 whereas the excess payment was made in 2017. Further, no explanation has been provided for the two-year delay in filing the refund application. Thus, it appears that the Taxpayer has not approached the Hon'ble High Court with clean hands.
- The present case is nothing but that of 'Taxpayer's negligence' for the following reasons:
  - The Taxpayer and its Chartered Accountants missed out on the glaring financial spectacle of excess payment of IGST.
  - The Taxpayer has not specified the due care and diligence exercised by it or its management.
  - The Taxpayer has not provided any reasons for non-filing of appeal under Section 128 of Customs Act.

As a result, the Taxpayer has not been able to evince that the aforesaid mistake was bonafide and consequently, such lapses cannot be condoned.

- Since it has been concluded that the Taxpayer's mistake was not bonafide, the reliance placed on the following judgments is not applicable to the present case:
  - ***Vedanta Ltd. (supra)***
  - ***Salonah Tea Co. Ltd. & Ors. (supra)***
  - ***Guru Charan Industrial Works (supra)***
  - ***Doaba Co-Operative Sugar Mills Ltd. (supra)***
- To invoke remedy under Article 226 of the Constitution, the Taxpayer must come with clean hands in addition to the mistake being bonafide.
- The Taxpayer's contention that the excess amount paid cannot be treated as 'duty' as provided under Section 27 of the Customs Act or that the Impugned Order is violative of Article 265 of the Constitution is untenable. Even an admission by the Tax Authorities that excess duty has been paid would not make any difference.
- In Mafatlal Industries Ltd. (supra), it was held that an illegal levy is to be refunded subject to an undertaking on unjust enrichment. However, such an undertaking would not be of any assistance in the present case because the requirement that the mistake is bonafide must be brought out upfront by the Taxpayer which has not been satisfied in the present case.
- In view of the above, in the absence of bonafide mistake of law or fact, the limitation period prescribed under Section 27 of Customs Act would be applicable.
- Since time limit for filing an appeal under Section 128 of the Customs Act had expired much before 16 March 2020, the benefit of the suo motu order of the Hon'ble Supreme Court would not be available to the Taxpayer.
- Thus, it is clear that the Taxpayer has been negligent in pursuing its statutory remedies and now is seeking indulgence of this Court through its Writ jurisdiction which cannot be exercised as it has been observed that the Taxpayer was neither able to establish that the mistake was bonafide nor has approached this Court with clean hands.
- The Writ Petition also suffers from delay and laches since the same has been filed after –
  - More than three years after the date of excess payment of duty; and
  - 10 months from the date of rejection order.
- In view of the above, the Writ Petition is dismissed, and the Impugned Order is upheld.

COMMENTS

This is an important judgment which reiterates that the excess payment of duty under a mistake would be covered by the limitation period prescribed under the general law of limitation only when the said mistake is evinced to be bonafide, the burden of which lies on the assessee. Further, it has also ruled that a person invoking the remedy of Writ under Article 226 of the Constitution should approach the Hon'ble High Court with 'clean hands', failing which, the Hon'ble High Court shall not exercise its extra-ordinary jurisdiction.

IN-TALES

INFORMATION TECHNOLOGY (IT) INDUSTRY: A SHINING STAR

INTRODUCTION

The IT industry is one of the fastest-growing sectors in the world. Multiple innovations and inventions have contributed to the growth of this industry. The key segments of the IT sector comprise IT services, Business Process Management (BPM), Software products, Engineering services and Hardware. Each of these segments has been described below:

- **IT services:** IT services refer to the application of business and technical expertise to enable organisations in the creation, management, and optimisation of or access to information and business processes. The IT services market can be further segmented by the type of skills that are employed to deliver the service (viz., design, build and run)[2].
- **BPM:** BPM (Business Process Management) uses various methods to discover, model, analyse, measure, improve and optimise business processes. These processes coordinate with the behaviour of people, systems, information, and things to produce business outcomes, thereby supporting the business strategy. IT Enabled Services (ITES) is a sub-segment of BPM[3].
- **Software products and engineering services:** Software products and engineering services encompass the process of innovating, designing, developing, testing, and maintaining software products. This segment inter alia includes enterprise-level software, packaged software and engineering services covering various activities ranging from designing and coding to maintenance of software products.
- **Hardware:** Hardware, in the context of the IT industry, refers to the physical elements that make up a computer or an electronic system and everything else involved in such system that is physically tangible. Thus, this segment covers the development, manufacture, and sale of hardware such as computers, computer servers, computer/ server peripherals, networking equipment and computer accessories.

GLOBAL OUTLOOK

The global IT industry is a major driver of economic growth, with an estimated market size of USD 8.85tn in 2023 (as against USD 8.18tn in 2022). The industry is also expected to grow at a CAGR of 7.9% from 2023 to 2027, reaching a market size of ~USD 12tn by 2027[4]. The demand for IT in 2023 is expected to be intense as enterprises push forward with digital business initiatives in response to the economic turmoil.

The growth of the IT Industry would primarily be led by the increased adoption of cloud computing, the growth of the Internet of Things (IoT), the increasing demand for data analytics and Artificial Intelligence (AI), automation and cyber-security.

IT INDUSTRY IN INDIA[5]

The IT industry is amongst the vital sectors in the Indian economy contributing ~USD 227bn, i.e. ~7.4% to India's GDP, as of FY22 and is estimated to have touched USD 245bn in FY23. By 2025, it is expected that the contribution of the IT industry to India's GDP will be 10%. The considerable growth of the Indian IT industry is primarily on account of the following:

- **Competitive Advantage:**
  - In FY21, India ranked third with ~0.61mn cloud experts across all verticals.
  - India ranks third among the global start-up ecosystems with more than 5,300 tech startups. FY22 saw the emergence of more than 1,300 new tech startups and 23 new unicorns placing India in the second position in terms of the number of unicorns added in FY22.
- **Global Footprint:** Indian IT firms have delivery centres across the world. Further, the IT & BPM industry is well diversified across various business verticals such as Banking, Financial Service and Insurance (BFSI), telecom and retail, etc.
- **Strong Workforce:** The Indian IT industry had nearly 5mn people employed with almost 4,45,000 net new hires in FY22. India is expected to have 60 to 65mn jobs which require digital skills by 2025-26 (as per the Ministry of Electronics & IT report titled 'India's trillion-dollar digital opportunity').
- **Contribution to Exports**: India's IT export revenue rose by ~11.4% to USD 194bn in FY23. Further, the export from the IT Industry has been the major contributor in India's exports accounting for ~53% of the total services exports in FY23.
- **Innovation:** India's rankings in the Global Innovation Index 2022 improved by six places to the 40th position.

With the new tools for generative AI, such as ChatGPT, Bard, etc. coming into existence, it would be very interesting to see the trajectory of the IT industry, especially for the jobs involving coding and other tasks that can be made more efficient by using generative AI tools.

[2]https://www.gartner.com/en/information-technology/glossary/it-services
[3]https://www.gartner.com/en/information-technology/glossary/business-process-management-bpm
[4]https://www.thebusinessresearchcompany.com/report/information-technology-global-market-report
[5]Source: IBEF report on IT Industry which may be accessed here and Invest India.

ISSUES FACED BY THE IT INDUSTRY

Some of the issues faced by the IT industry in recent years have been outlined as under:

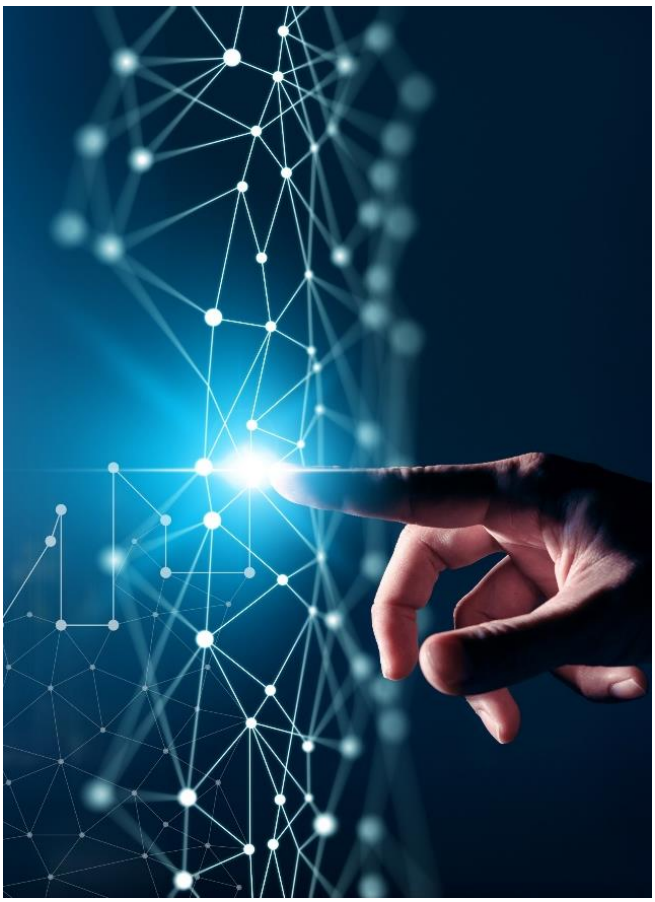
- **Semi-conductor shortage[6]:** A shortage of silicon, a semiconductor used in the manufacture of chips or Integrated Circuits (IC), occurred in late 2021 leading to a shortage of ICs impacting many industries, including the IT Industry.
- **The impact of Generative AI:** Generative AI is likely to affect around one per cent of India's IT employees[7]. Further, IBM's latest research provides that executives estimate that 40% of their workforce will need to re-skill as a result of implementing AI and automation over the next three years[8].

KEY OPEN GST ISSUES CONCERNING THE IT INDUSTRY

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

- **Importing software on a free-of-cost basis from related persons for providing services in relation to such software**
  - To provide services pertaining to the development, upgradation, programming, customisation, adaptation, enhancement or testing of software, the supplier of service situated in India (i.e. Indian entity) is required to obtain original software from its related persons (situated outside India) which is usually downloaded over the internet. However, since the software is provided to the Indian entity for the limited purpose of undertaking the aforementioned scope of work (relating to the software), no consideration is charged by such related person from the Indian entity in respect of such supply.
  - As per Entry 4 to Schedule I to the CGST Act, import of service by a person from a related person situated outside India would be treated as 'supply' even in the absence of consideration. Accordingly, the issue which arises is whether the Indian entity would be required to discharge GST in respect of such supply under the reverse charge mechanism.
  - In this regard, a view may be adopted that since the procurement of the original software is merely to facilitate the supply of service by the Indian entity to the related person, such activity of procurement of software cannot be treated as 'import of service' on account of the following:
    - As per Section 7 of the CGST Act, to classify a transaction as a 'supply', the following are theessential pre-conditions which need to be satisfied:
      - Supply of 'goods' or 'services' or both;
      - Such supply must be made for a 'consideration'; and
      - Such supply must be in the course or furtherance of business.

      While Entry 4 to Schedule I of the CGST Act exempts the pre-condition as regards the existence of 'consideration', the other pre-conditions must be satisfied to classify a transaction with the purview of the term 'supply'.

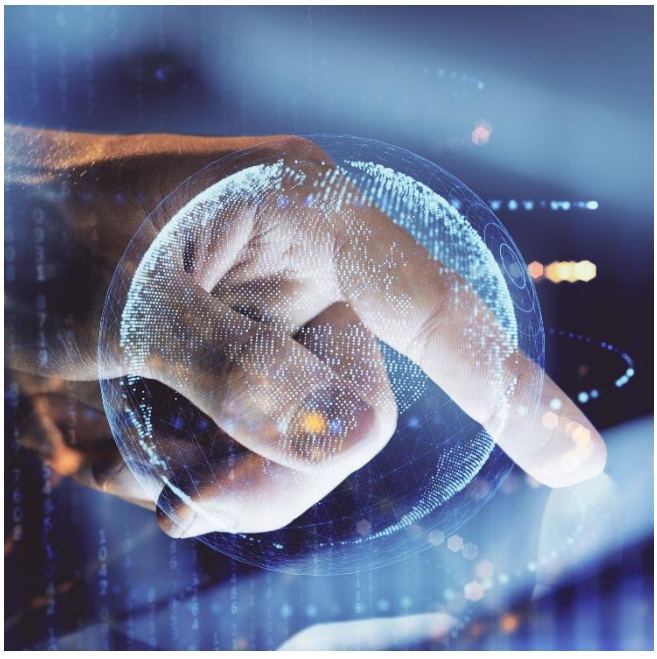


    - Applying the above to the present case, unless there is a supply of 'service' by the related person to the Indian entity, the transaction cannot be considered to be within the purview of 'supply'.
    - To treat the activity of import of software within the purview of 'import of service' there must exist 'consensus ad idem' as to the nature of services supplied by the related person to the Indian entity which is not satisfied in the present case. As a result, the transaction cannot be covered under the purview of 'supply' even after considering the language used in Entry 4 to Schedule I of the CGST Act.
- **Reversal requirements in respect of services supplied to its establishment situated outside India**
  - Usually, Indian IT organisations establish a branch in foreign countries to expand their global reach. Similarly, multi-national IT organisations set up a branch office in India. These branch offices are not incorporated as a separate legal entity. Further, various services are supplied inter se between these branches.
  - Explanation 1 to Section 8 of the IGST Act inter alia provides that where a person has an establishment in India and any other establishment outside India, then such establishments shall be treated as establishments of distinct persons.

[6] https://community.nasscom.in/communities/engineering-research-design/impact-semiconductor-shortage-various-industries
[7] https://www.business-standard.com/technology/tech-news/generative-ai-may-affect-1-of-it-jobs-in-india-add-2-3-billion-revenue-123062100240_1.html
[8] https://www.ibm.com/downloads/cas/NGAWMXAK

- Further, one of the conditions for treating a supply as an 'export of services' under Section 2(6) of the IGST Act is that the supplier and recipient of services are not merely the establishment of distinct persons as per Explanation 1 to Section 8 of the IGST Act.
- Accordingly, the services supplied by an Indian branch to its foreign branch would not be treated as 'export of services'. Instead, the same would be treated as an exempt supply in terms of entry 10F of Notification no: 09/2017 – Integrated Tax (Rate) dated 28 June 2017, subject to the condition that the place of supply of such services is outside India.
- Therefore, in respect of the aforesaid services, the supplier, i.e. the Indian branch would be required to reverse ITC in terms of Section 17(2) of the CGST Act read with Rules 42 and 43 of the CGST Rules.

- **Taxability of composite supplies in respect of Annual Maintenance Contracts (AMC) & other support services**
  - Generally, these services comprise of annual maintenance/ support services pertaining to various hardware such as CCTV, computer servers, laptops, printers, etc. During the course of providing AMC, certain parts of these hardware may also require replacement which is also covered under the purview of AMC. The classification of the aforesaid supplies, i.e. whether it is a composite supply of 'goods' or 'services' or 'independent supplies', is another issue faced by the IT industry.
  - In cases where a composite contract (for a single price) is entered into for the aforesaid supplies involving multiple supplies, then the supply would be treated as a 'composite supply' and the taxability would depend on the 'principal supply'. For example
    - Supply and maintenance of computer servers for a single price would be treated as a composite supply with principal supply being the supply of 'computer servers'.



    - Similarly, AMC of hardware involving the supply of services and use of goods (for repairs) should be treated as a 'composite supply' with the principal supply being 'IT support services'.

- **Supplying services through multiple delivery centres**
  - In the IT industry, it is a common practice that services under a contract with a specific customer can be provided from its various delivery centres (say, Branch X, Branch Y and Branch Z) although the customer enters an agreement only with one of these branches (say, Branch X).
  - In such a scenario, Branch X, i.e. the contracting branch, would raise invoices in respect of the services supplied to the customer. However, as regards the activities undertaken by the other branches (i.e. Branch Y and Branch Z), no invoices are issued by these branches directly to the customer. However, since these branches support Branch X in delivering services to the customer, such activities are deemed to be treated as the supply of services by Branches Y and Z to Branch X. Therefore, in the present case, the transactions involve the following two independent supplies:
    - **Supply 1:** Supply of services by Branch Y and Branch Z to Branch X
    - **Supply 2:** Supply of services by Branch X to the customer
  - With respect to the aforesaid aspect of treating the supplies made by branches Y and Z to branch X, the following are the challenges/ issues faced by the IT industry:
    - Under the GST law, a supplier is required to obtain GST registration in every State/ Union Territory from where the supply takes place. Accordingly, branches Y and Z would be liable to obtain GST registration in the State/ Union Territory in which they are situated. This casts an additional burden of GST compliance on the IT industry.
    - Moreover, the determination of the value of supply with respect to services supplied by these branches to Branch X is another aspect which is a contentious issue.
      - In this regard, circular no:199/11/2023-GST dated 17 July 2023 (Circular) which clarifies GST implications in respect of services supplied by the Head Office to the Branch Office may also be applied in the context of services supplied by the Branch Y and Branch Z to Branch X. For ease, the clarifications provided by the Circular is as under:
        - Where the recipient is entitled to claim full ITC, the value declared in the invoice would be deemed to be the 'Open Market Value' (OMV). Further, in such cases, even when the Head Office has not issued a tax invoice to the Branch Office, the OMV shall be deemed to be Nil.

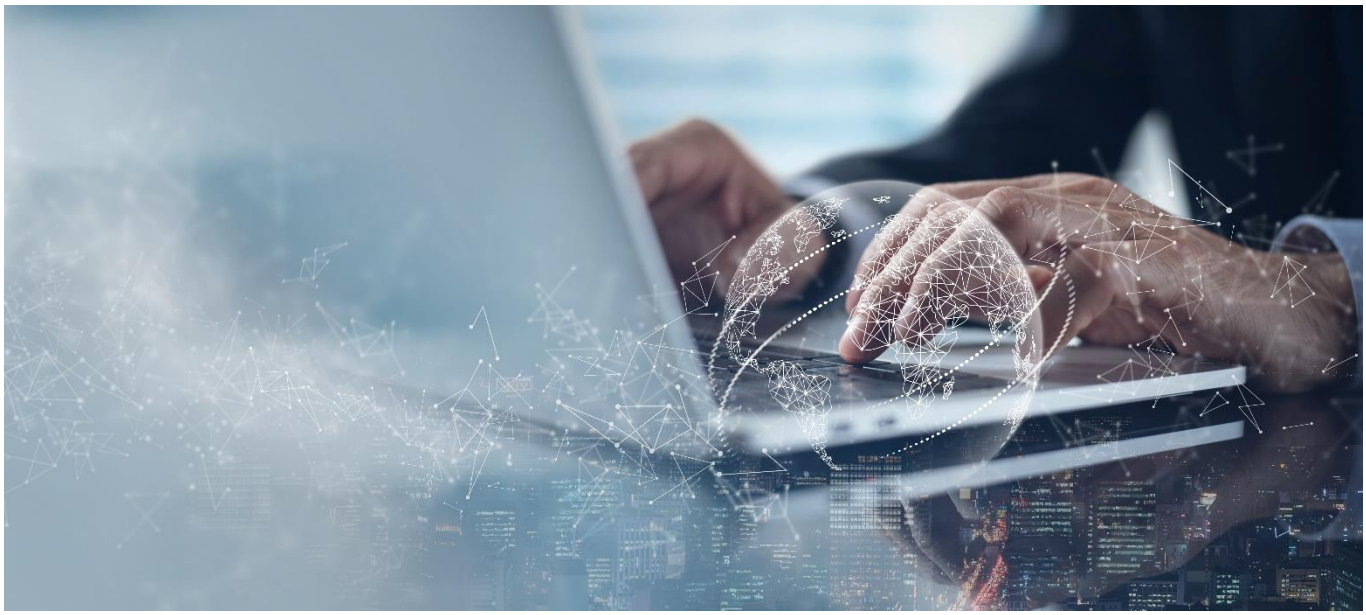
        - Where the recipient is not entitled to claim full ITC, the value of supply may be computed without including the cost of salary of the employees of Head Office.
    - This also results in increased compliance and complex record-keeping process which is another area of concern for the IT industry.
- While the circular provides some clarity in determining the value of supply, the following issues are yet to be clarified by CBIC:
    - Where the recipient (i.e. Branch X) is entitled to claim full ITC and Branch Y and Z are exclusively involved in supporting Branch X, whether the Branch Y and Z can contend that the OMV in respect of services supplied to Branch X is deemed to be Nil.
    - If the answer to the above is in the affirmative, whether these branches can contend that since no GST is payable in respect of the supplies made by such branches, they are not liable to obtain GST registration.
    - If yes, then whether the existing branches providing similar support services can apply for cancellation of GST registration.
    - Will there be any supply of services from branch X to branch Y and branch Z for corporate functions carried out by branch X as a corporate office and corresponding implications on valuation.

- **In addition to the above, there are various other challenges that impact the IT industry, such as:**
    - Delayed GST refund is one of the major areas of concern for the IT industry which not only results in working capital blockage but also hampers the 'Ease of Doing Business in India' initiative. While the Government aims to streamline the refund process, its implementation is far from the expectations. Moreover, the refund process is also complex. This leads to increased working capital blockage for the IT industry.
    - Effective 1 October 2023, Section 16 of the IGST Act has been amended to provide that supplies made to SEZ units/ developers for non-authorised operations would not be covered under the purview of 'zero-rated supply'. As a result, the suppliers would be required to ensure that the services supplied to the SEZ units/ developers are meant for authorised operations, failing which, the benefit of zero-rating would be disallowed to the supplier. This results in an additional compliance burden on the supplier undertaking supplies to the SEZ units/ developers.
    - 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.)

CONCLUSION

Over the past few years, remarkable innovations and developments have taken place in the IT industry. The progress in AI and IoT is creating even more opportunities for the Indian IT industry. The way forward for the industry is to focus on developing these skills and capabilities while also developing new products and services that can meet the needs of businesses in the digital age. With these products and services, the Indian IT industry would contribute ~10% to the nation's GDP by 2025.

It is the need of the hour to facilitate and aid IT companies with a stable taxation policy. Addressing the aforesaid issues faced by the IT industry under the GST regime and providing suitable clarifications would go a long way in the growth path of the industry. Addressing these issues may in turn boost Investor confidence and also promote the 'Ease of Doing Business in India' initiative.



GLOBAL TRENDS

VAT/GST NEWS:

INTERNATIONAL

Portugal: Portugal to extend zero VAT rate on basic food until the end of 2023

The government of Portugal had slashed the VAT rate on a list of 46 basic foods including milk, bread, rice, tomatoes, and some meat and fish from 6% to 0% in April 2023 which was set to expire at the end of October. The aforesaid benefit of zero VAT rate benefit is proposed to be extended till 31 December 2023.

(Source: https://www.reuters.com/world/europe/portugal-extend-zero-vat-rate-basic-food-until-end-2023-2023-09-07/)

Ireland: VAT hike worries hotels, restaurants in Ireland

Ireland has increased the applicable VAT rates for tourism, hospitality, and select other services from 9% to 13.5%, causing concerns to the hospitality industry. The Restaurant Association of Ireland fears that the increase in VAT rate may result in job losses considering that the new VAT rates are the third-highest VAT rates for the hospitality industry in Europe.

(Source: https://www.bignewsnetwork.com/news/273955589/vat-hike-worries-hotels-restaurants-in-ireland)

INDIA

GST: Promotional Schemes are not gifts, tax credit can be claimed, says Karnataka AAR

Recently, the Karnataka Authority for Advance Ruling (KAAR) in Orient Cement Ltd. held that ITC should be allowed for the goods given to the dealers towards incentive/ promotional schemes. The KAAR further held that the distribution of such goods would be treated as 'supply' even in the absence of 'consideration' and hence, such distribution would be leviable to GST. This additional levy of GST is contrary to the other advance rulings as well as the Circular issued by CBIC and hence, experts believe that the CBIC must issue some clarification in this regard.

(Source: https://www.bqprime.com/law-and-policy/gst-promotional-schemes-are-not-gifts-tax-credit-can-be-claimed-says-karnataka-aar)

Taxing GST On Deposits Will Wipe Out 80% Of Online Gaming Industry

The industry players criticised the decision taken by GST Council in its 51st meeting to tax online gaming @ 28% of the gross value collected, saying that levying GST on deposits rather than platform commission charged by the companies will make the unit economics unviable, wiping out 80% of the industry. The Federation of Indian Fantasy Sports and E-Gaming Federation said that the new tax framework while clarifying and resolving uncertainty, will lead to a very burdensome 350% increase in GST and set the Indian online gaming industry back several years.

(Source: https://zeenews.india.com/technology/taxing-gst-on-deposits-will-wipe-out-80-of-online-gaming-industry-2643977.html)

Corporate guarantees given to subsidiaries land many Indian holding companies in a GST pickle

GST Authorities are taking a view that a corporate guarantee given by a holding company to its subsidiary is treated as a 'supply' and hence, leviable to GST. Accordingly, the office of the Directorate General of Goods and Services Tax Intelligence as well as state audit officials are currently probing such cases across sectors.

(Source: https://economictimes.indiatimes.com/news/economy/policy/corporate-guarantees-given-to-subsidiaries-land-many-indian-holding-companies-in-a-gst-pickle/articleshow/102489967.cms?from=mdr)

CUSTOMS NEWS

INTERNATIONAL

Nigeria: Nigeria Customs Service Initiates VAT Implementation on Diesel Imports

The Nigeria Customs Service has implemented the levy of VAT on the import of Automobile Gas Oil, commonly known as diesel, resulting in an increased cost of diesel. The levy stems from the federal government's implementation of the Finance Act in 2020 which stipulated a 7.5% VAT on diesel. This price hike has raised concerns about its impact on the cost of living and production in Nigeria.
(Source:
https://investorsking.com/2023/08/30/nigeria-customs-service-initiates-vat-implementation-on-diesel-imports/)

Ukraine: Rada exempts from VAT number of goods for defence needs

The Verkhovna Rada (i.e. the Parliament) of Ukraine has exempted imports of certain security and defence goods including thermal imaging binoculars, monoculars and binoculars, night vision devices, and rangefinders from the levy of VAT.
(Source:
https://en.interfax.com.ua/news/economic/925618.html)

Bangladesh explores joining RCEP eyeing trade in the Indo-Pacific region

Bangladesh is exploring joining the Regional Comprehensive Economic Partnership (RCEP), eyeing to be part of the trade bloc in the Indo-Pacific region. A study conducted last year by the Bangladesh Trade and Tariff Commission showed Bangladesh's trade with RCEP- member countries mostly concentrated on trade in goods. Bangladesh's exports may grow 17% and gross domestic product (GDP) 0.26% if a free-trade agreement is signed with the bloc members, it mentioned.'
(Source:
https://economictimes.indiatimes.com/news/economy/foreign-trade/bangladesh-explores-to-join-rcep-eyeing-trade-in-indo-pacific-region/articleshow/102411302.cms)

Import of vital medicines from India allowed: Pakistan's drug regulatory authority

The Drug Regulatory Authority of Pakistan has said that hospitals and common citizens can import vital medicines including anti-cancer drugs and vaccines from India for their own use under the Import Policy Order, 2022 after obtaining a No Objection Certificate (NOC). Considering the unavailability of essential medicines in Pakistan, it is directed that common people and hospitals can directly apply for the aforesaid NOC for importing medicines from India.
(Source:
https://economictimes.indiatimes.com/news/economy/foreign-trade/import-of-vital-medicines-from-india-allowed-pakistans-drug-regulatory-authority/articleshow/102642356.cms)

Global reforms needed for speedier Customs clearances: DP World's Sulayem

According to Sultan Ahmed Bin Sulayem (Group Chairman and Chief Executive Officer, DP World), there is an urgent need to reform the Customs clearance framework around the world for better movement of goods with more countries signing agreements to fast-track customs clearances through the Authorised Economic Operator Program of World Customs Organisation.
(Source:
https://economictimes.indiatimes.com/news/economy/foreign-trade/india-needs-to-improve-its-customs-clearance-framework-to-become-export-hub-d-p-world/articleshow/103063191.cms)

INDIA

Modi and Sunak discuss the progress of India-UK FTA negotiations and hope to iron out differences at the earliest

Indian Prime Minister Narendra Modi and British Prime Minister Rishi Sunak have pledged to work towards a Free Trade Agreement (FTA) during their meeting on the sidelines of the G20 Leaders' Summit in New Delhi. They have also discussed cooperation in defence technology, innovation, and consular issues.
(Source: https://economictimes.indiatimes.com/news/economy/foreign-trade/modi-and-sunak-discuss-progress-of-india-uk-fta-negotiations-hope-to-iron-out-differences-at-the-earliest/articleshow/103537738.cms)

Canada-India FTA negotiations stand paused, talks to resume later

The Canada-India FTA negotiations which have been on hold since early August, are likely to resume after the issues on both sides are resolved. The negotiations on the FTA were paused abruptly in August 2023 by Canada due to the development of certain political issues in Canada.
(Source: https://www.indiatvnews.com/news/world/india-canada-free-trade-agreement-fta-which-paused-before-g20-summit-delhi-will-resume-issues-resolved-justin-trudeau-modi-bilateral-khalistan-rally-2023-09-15-892896)

GJEPC facilitates India's first jewellery exports through courier from Mumbai

The Gem and Jewellery Export Promotion Council (GJEPC) said that it has achieved a significant milestone by facilitating India’s first jewellery exports through courier mode from Mumbai. This would result in simplifying international trade which will enhance the industry growth and would also open up new avenues for exports, especially in the e-commerce segment.
(Source: https://economictimes.indiatimes.com/industry/cons-products/fashion-/-cosmetics-/-jewellery/gjepc-facilitates-indias-first-jewellery-exports-through-courier-from-mumbai/articleshow/103480440.cms)

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