EY Tax and Regulatory Alert

May 2023

Prepared for ACMA

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2.	**M/s Naarjuna Agro Chemicals Pvt Ltd v. State of U.P. And Another (2023-VIL-266-ALH)**	**M/s Naarjuna Agro Chemicals Pvt Ltd v. State of U.P. And Another (2023-VIL-266-ALH)** Scrutiny proceedings of return as well as proceeding under Section 74 are two separate and distinct exigencies and issuance of notice under Section 61(3), therefore, cannot be construed as a condition precedent for initiation of action under Section 74 of the Act
3.	**M/s Profisolutions Private Limited (Advance Ruling No. 07/ARA/2023 dated 31 March 2023- Authority for Advance Ruling ('AAR')- Tamil Nadu)**	**M/s Profisolutions Private Limited (Advance Ruling No. 07/ARA/2023 dated 31 March 2023- Authority for Advance Ruling ('AAR')- Tamil Nadu)** Held that rendering of service through common employees by Branch Office (BO) in one State to Head Office (HO) in another State constitutes a 'Supply' as per Section 7 of CGST Act and liable to GST

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INDIRECT TAX

Part A - Key Indirect Tax updates

Goods and Services Tax

This section summarizes the regulatory updates under GST for the month of May 2023

- **Notification No. 10/2023-Central Tax Dated: 10.05.2023** was issued by the CBIC wherein earlier registered person whose turnover exceeds Rs. 10 crore is required to comply with e-invoice provision which means he must generate e-invoice against each tax invoice, debit note, credit note issued to registered person.

- Now on 10th May'2023 Ministry of Finance by Notification No. 10/2023 central tax has notified that person registered under GST and having turnover more than Rs. 5 Crore in any financial year from 2017-18 is required to comply with the e-invoice provisions w.e.f. 01st August 2023.

- The registered person mentioned above will be required to generate IRN/e-invoice against followings:

  1. Each tax invoice, debit note & credit note issued to registered person.

  2. Export Transactions

- Above e-invoice applicable on supply of goods as well as supply of service and this is in addition to the generation of e-way bill.

- However, e-invoice shall not be applicable on following types of registered person as notified by CBIC by Notification no. 13/2020 – Central tax amended time to time:

  1. Insurance Company
  2. Banking Company or a financial Institutions
  3. SEZ Units
  4. Government Department and Local Authorities
  5.GoodsTransportAgency.

- **Notification No. 05/2023- Integrated Tax (Rate) Dated: 09.05.2023** was issued by CBIC wherein CBIC extends time limit for filing Annexure-V to opt for Forward Charge Mechanism (FCM) for Transporters for the FY 2023-24 to 31st May 2023.

- **Internal Circular No. 4A** of 2023 was issue wherein A special procedure is notified through which a registered person, whose registration has been cancelled under clause (b) or (c) of sub-section (2) of section 29 of the MGST Act on or before 31st day of December, 2022, and who has failed to apply for revocation of cancellation of such registration within the time period specified in section 30 of the MGST Act, can apply for revocation up to 30/06/2023. It also covers the cases wherein appeals are filed and pending or rejected.

- Applications covered under the scope of the said notification.

- This special procedure will be applicable to the cases wherein the application for the purpose of revocation of cancellation of registration is being filed during the period from 1st April 2023 to 30th June 2023. But, limited to where registration which has been cancelled under clause (b) or clause (c) of sub-section (2) of section 29 on or before 31st day of December, 2022, and who has failed to apply for revocation of cancellation of such registration within the time period specified in section 30 of the MGST Act, irrespective of the status of such applications.

- The benefit of this special procedure would be applicable to the cases wherein the application for revocation of cancellation of registration is either pending with the proper officer or has already been rejected by the proper officer. It is further clarified that it would also be available in those cases which are either pending with the appellate authority or rejected by the appellate authority.

- As explained in this para, the special procedure would be applicable in the following manner:

Sr No.	Eventualities	Clarification
1	The application for revocation of cancellation of registration has not been filed by the taxpayer	Taxpayer can file an online application for revocation before the proper officer during the period as provided vide the said notification and proper officer shall process such application.
2	The application for revocation of cancellation of registration has already been filed and which are pending with the proper officer.	In such cases, the proper officer shall process the application for revocation considering the timelines as provided vide the said notification.
3	The application for revocation of cancellation of registration was filed, but was rejected by the proper officer and taxpayer has not filed any appeal against the rejection.	Taxpayer can file a fresh application for revocation and the proper officer shall process the application for revocation considering the timelines as provided vide the said notification.
4	The application for revocation of cancellation of registration was filed, the proper officer rejected the application and appeal against the rejection order is pending before appellate authority.	Taxpayer can file fresh application for revocation and the proper officer shall process it. Simultaneously, taxpayer shall withdraw the appeal or appeal officer shall dispose off the appeal
5	The application for revocation of cancellation of registration was filed, the proper officer rejected the application and the appeal has been decided against the taxpayer	Taxpayer may file fresh application for revocation and the officer shall process the application for revocation.

There is no separate facility for application under this special procedure. The online applications would be received by proper officer as usual. Therefore, the revocation applications received on or after 01st April, 2023 and covered under this special procedure shall be processed accordingly.

- Application for revocation shall be filed only after furnishing of all the returns due up to the effective date of cancellation of registration, and after payment of any amount due as tax, in terms of such returns, along with any amount payable towards interest, penalty and late fee in respect of the said returns. Hence, the proper officer, before effecting revocation, shall ensure that all the returns due up to the effective date of cancellation of registration are filed, and payment of any amount due as tax, in terms of such returns, along with any amount payable towards interest, penalty and late fee in respect of the said returns is made.

- **No. 7451/CT&GST, Dated 02.05.2023** was issued wherein that Hon'ble Supreme Court of India in their order in the W. P. (C) No. No. 320 of 2022 (in case of Pradeep Goyal yrs. Union of India and Others) have directed to implement a system of electronic generation of a DIN (Document Identification Number) for all communications sent by State Tax Officers to taxpayers and other concerned persons so as to bring in transparency and accountability in the indirect tax administration.

- A new facility for generation of a document Reference Number (RFN) has been developed by GSTN in the GST Back office for the tax officers and in the GST Common Portal for verification of such RFNs by the taxpayers. The facility is now available both in GST Back office and the GST Common Portal. The RFNs generated can also be verified by the taxpayers and other concerned persons in the GST Common Portal with login and without login as well.

- The documents, notices, orders, intimations etc. generated by the Tax Officers in the GST Back Office (i.e. system generated) using their Digital Signature Certificates or otherwise are generated with a unique reference number or ARN, which is also printed and communicated on such documents. The same can also be seen by the taxpayer in the GST Common Portal in their dashboards. In those types of communications, the RFNs need not be generated again.

- In all other types of communications between the Tax Officer(s) and the taxpayers and other concerned persons relating to administration of GST, the RFN must be generated and mentioned on the document(s). An advisory for generation of such RFN by the Tax Officers in GST Back Office application and search and verification of the same by the taxpayers in GST Common Portal is enclosed for kind reference.

- It is hereby instructed to all concerned that all offline communications with taxpayers and other concerned persons relating to administration of GST, (i.e. communications which are not generated in the GST Back Office (BO) and communicated to the taxpayers/ concerned persons through GST Common Portal) must be superscribed with the RFN generated from the GST Back Office in the process enumerated in the advisory enclosed.

- **Trade Circular 10T of 2023 dated 03.05.2023:** wherein the tax officer has to generate a RFN for communication/document to be sent to taxpayer or other concerned persons. It also enables taxpayer or that concerned person to verify the authenticity of that document.

- The tax officers have been directed that communications to be made/documents to be sent by tax offices to taxpayers and other concerned persons namely search authorization (INS-01) and inspection notices in the course of any enquiry/investigation proceeding shall use RFN.

- The taxpayers can verify the authenticity and genuineness of search and inspection document by verifying document RFN on the GST portal e. services.gst.gov.in. It can be verified, both pre- and post-login, by navigating to Services > User Services > Verify RFN option.

- If taxpayer notices or has faced an action of inspection and search on the basis of search authorization (INS-01) or inspection notices, which is without valid RFN; he/she may bring it to the notice of Department. Such taxpayers or concerned persons may inform this either on mail DC liViirnahagstgov.in or may contact on telephone 02223760081.

Customs and Foreign Trade Policy (FTP)

This section summarizes the regulatory updates under Customs and FTP for the month of May 2023

- **Circular No.11/2023-Customs | Dated : 17.05.2023** was issued by the CBIC to implement the Public Notice No. 02 dated 01.04.2023 notified by DGFT that has provided a procedure, under category of regularization of bona fide defaults, in which all pending cases of the default in meeting export obligation (EO) may be regularized by the authorization holder on payment of applicable Customs duty, corresponding to the shortfall in EO. Interest payable is capped at maximum of 100% of such duties exempted on which interest is payable as specified in the said Public Notice dated the 01.04.2023. However, no interest is payable on the portion of Additional Customs Duty and Special Additional Customs Duty. The authorization holder choosing to avail this procedure must complete the process of payment on or before 30.09.2023.

- The amendments made by the Notification No.32/2023-Customs provide that in a case of default in export obligation, when the duty on the goods is paid to regularize the default in term of Public Notice No. 02/2023 dated 01.04.2023 notified by DGFT, the amount of interest to be paid by the importer shall be payable as specified in the said Public Notice dated 01.04.2023. No other change is involved.

- It may be noted that the cases under any investigation or adjudicated for involving fraud, mis-declaration or un-authorised diversion of material and/or capital goods are not covered in the scheme. Authorization holder shall not claim CENVAT Credit or Refund, under any provision of law, of any amount on duties paid under this scheme. However, there may be cases of calculation mistakes which are to be dealt on merits. Also, the DGFT PN No. 02/2023 dated 01.04.2023 specifies the necessary procedures which would be required to be followed.

- The Principal Commissioners / Commissioners are to ensure that the exporters approaching for paying the duty, etc. are registered with the DGFT in terms of the Public Notice dated 02.04.2023 ibid. These cases under the scheme be monitored and tracked so that there is efficient handling and expeditious closure of these old cases of bona fide EO default in a seamless manner. Suitable mechanism for this should be put in place and closely supervised by the Principal Commissioners / Commissioners.

- **Notification No. 04/2023-DGFT Dated: 01.05.2023** was issued by the DGFT that in exercise of the powers conferred by Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 read with Para 1.02 of the Foreign Trade Policy 2023, the Central Government hereby makes the following additions/amendments in Appendix 4R w.e.f 01.05.2023:

- 149 tariff lines at 8 Digit level are added in the RoDTEP schedule

- 52 tariff lines at 8 Digit level are deleted from the RoDTEP Schedule

- The details of HS codes as in Para above along with RoDTEP rates/value caps are available at the DGFT portal www.dgft.gov.in under the link 'Regulatory Updates >RoDTEP'.

- **Public Notice No. 12/2023-DGFT Dated: 28.04.2023**: the Directorate General of Foreign Trade hereby amends the procedures for application for TRQ under tariff head 7108 under India-UAE CEPA for FY 2023-24 as under:
- New applications for TRQ under tariff head 7108 for FY 2023-24 are invited from the date of this Public Notice and up to 7th May 2023.

- Applications for TRQ under India-UAE CEPA for the tariff head 7108 for FY 2023-24 are invited online through the DGFT website (https://dgft.gov.in) –> Import Management System –>Tariff Rate Quota (TRQ).

  All applications for TRQ under tariff head 7108 for FY 2023-24 shall be considered as per the guidelines notified vide Public Notice 06/2023 dated 17.04.2023. New applications that may be received pursuant to this Public Notice shall be considered together with the earlier applications already received for TRQ allocation of a total of 140 MTs under tariff head 7108 for FY 2023-24.

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Foreign Exchange Management Act

This section summarizes the regulatory updates for the month of May 2023

1. **Reserve Bank of India ('RBI') amends the condition for remittances to International Financial Services Centres ('IFSCs') under Liberalised Remittance Scheme ('LRS')**

RBI has provided changes that have been implemented with respect to the remittances to IFSC under LRS through Foreign Currency Account (FCA).

The key highlights are summarized as below:

- Condition for repatriation of funds lying idle in the FCA of resident individuals in IFSCs upto 15 days from the date of its receipt is withdrawn with immediate effect.

- Instead, the same will now be governed by the repatriation provisions of the LRS scheme which is 180 days.

RBI notified amendment to the Foreign Exchange Management (Current Account Transactions) Rules, 2000 ('CA Rules')

RBI has amended the CA Rules with respect to the provision of International Credit Card (ICC).

The amendment is summarized as below:

- The CA Rules have been amended to omit Rule 7 which earlier exempted applicability of LRS limit on payments made through ICC.

- As per the amended provision, the payment from ICC has been brought under the ambit of LRS.

Clarification regarding applicability of Tax Collection at Source ('TCS') to small Debit/ Credit transactions under LRS

The key highlights of the clarification are summarized as below:

- The Union Budget 2023 increased the TCS to 20% (as against 5%) on all remittances under LRS (including overseas tour packages) other than for medical and education purposes with effect from 01 July 2023.

- In light of the concerns raised on payments through ICC being brought under the purview of LRS limits and applicability of TCS on such payments, a clarification was issued by the Ministry.

- According to the clarification, payments made through international Debit or Credit cards up to Rs. 7 lakhs per financial year will be excluded from the LRS limits and hence, not attract any TCS.

- The existing beneficial TCS treatment for education and health payments will also continue.

- Further, the necessary changes to the CA Rules will be issued separately in this regard.

Direct Tax

This section summarizes the regulatory updates under DT for the month of May 2023

1. CBDT proposes relief from angel tax pursuant to Budget 2023 amendment expanding scope to non-resident investment

Background

- Section 56(2)(viib) of the Income Tax Act (popularly known as the "angel tax" provision) is an anti-abuse provision which applies when a Closely Held Company (CHC) issues shares (including preference shares) at a premium and receives consideration which is in excess of the fair market value (FMV) of the shares. The excess amount so received is deemed as income from other sources in the hands of the CHC in the year of issue of the shares. However, investments by venture capital funds (VCFs) are exempted from angel tax.

- Rule 11UA of the Income Tax Rules prescribes the valuation methodology for determining the FMV of various types of assets (including unquoted equity shares), not only for the purposes of the angel tax provision but also for other anti abuse provisions involving transfer of assets without consideration or at a value less than the FMV.

- The FMV of unquoted equity shares for the purpose of the angel tax provision, read with existing Rule 11UA, is the higher of the following:

  - Net asset value as reflected in the audited balance sheet of the CHC (NAV method); or

  - The Discounted Cash Flow (DCF) value as determined by a Category-I merchant banker (DCF method); or

  - The value that the company is able to substantiate to the satisfaction of the tax authority, basis the holding of various intellectual property rights (IPRs) like goodwill, know-how, patents, copyrights etc.

- Prior to amendment by the Finance Act 2023 (FA 2023), the angel tax applied only to shares issued to a resident. FA 2023 amended the angel-tax provisions, with effect from tax year 2023-24, to extend it to issue of shares by a CHC to non-resident (NR) investors. FA 2023 also extended the exemption from angel tax to investments in CHC by VCFs set up in IFSC (specified funds).

- Stakeholders made various representations to the Government on challenges arising from expansion of angel tax to investments by NR investors.

Press release dated 19 May 2023:

- Pursuant to interactions with stakeholders, the Central Board of Direct Taxes (CBDT) has issued a press release on 19 May 2023 announcing a slew of relief on aspects of angel tax. While some are applicable exclusively to investment by NRs, some are applicable to investment by both residents and NRs. The press release explains the proposed changes which will be carried out through amendment to Rule 11UA and issue of notifications.

- ***Five new valuation methods for NR investment:***

  - The existing Rule 11UA prescribes two methods (viz. NAV or DCF) for determining FMV of shares issued to investors. CBDT proposes to include five more valuation methods for NR investors.

- ***Price matching facility for both resident and NR investment:***

  - Also, the price at which equity shares are issued by CHC to the notified NR entity shall be adopted as FMV for the purposes of benchmarking equity investments by both resident and NR investors, subject to compliance of the following conditions:

    - The consideration received from other investors at such FMV does not exceed

the aggregate consideration received from notified NR entity; and

- Consideration is received by CHC from notified NR entity within a period of 90 days of the date of issue of shares which are the subject matter of valuation.

- Similar price matching facility shall also be available with respect to investment made by VCF and specified funds.

- ***90-day window period for merchant banker valuation***

  - Existing Rule 11UA requires merchant banker DCF valuation report as on the date of issue of shares.

  - As per the press release, valuation report by the merchant banker of a date not more than 90 days prior to the date of issue of shares shall be accepted. While it is not expressly mentioned, it appears to apply to investment by both residents and NRs.

Safe harbor valuation tolerance limit of 10%

- Existing angel tax provision and Rule 11UA does not provide for any safe harbor valuation tolerance limit.

- As per the press release, a tolerance limit of 10% shall be introduced to factor in variations due to forex fluctuations, bidding processes and other economic indicators, etc. which may affect the valuation of the unquoted equity shares during multiple rounds of investment. While it is not expressly mentioned, it appears to apply to investment by both residents and NRs.

- ***Draft amended Rule 11UA to be published for public comments –*** CBDT shall publish the draft amended Rule 11UA incorporating the above referred changes for public comments for a short period of 10 days, after which they will be notified.

- ***Proposal to exclude certain NR investors from angel tax provision:***

  - CBDT shall notify following classes of NR investors who shall be excluded from the ambit of angel tax provisions:

    - Government and Government related investors such as central banks, sovereign wealth funds, international or multilateral organizations or agencies including entities controlled by the Government or where direct or indirect ownership of the Government is 75% or more.

    - Banks or regulated entities involved in insurance business.

  - Any of the following entities, which is a resident of certain countries or specified territories having robust regulatory framework:

    - Entities registered with Securities and Exchange Board of India as Category-I Foreign Portfolio Investors (Category 1 FPI).

    - Endowment Funds associated with a university, hospitals or charities,

    - Pension funds created or established under the law of the foreign country or specified territory,

    - Broad Based Pooled Investment Vehicle or Fund where the number of investors in such a vehicle or fund is more than 50 and such fund is not a hedge fund or a fund which employs diverse or complex trading strategies.

  - ***Relief to DPIIT recognized start-ups:*** CBDT shall amend its earlier notification dated 5 March 2019 to extend non-applicability of angel tax provisions to consideration received by start-up recognized by DPIIT and fulfilling certain conditions from any person (i.e., not restricted to residents).

2. CBDT notifies specified class of investors and start-up companies exempt from angel tax provisions

Background

- Section 56(2)(viib) of the ITL (popularly known as the "angel tax" provisions) is an anti-abuse provision which applies when a CHC issues shares (including preference shares) at a premium and receives consideration which is in excess of the fair market value (FMV) of the shares. The excess amount so received is deemed as income from other sources in the hands of the CHC in the year of issue of the shares.

- Rule 11UA of the Income Tax Rules prescribes the valuation methodology for determining the FMV of various types of assets (including unquoted equity shares), not only for the purposes of the angel tax provision, but also for other anti-abuse provisions involving transfer of assets without consideration or at a value less than the FMV.

- The FMV of unquoted equity shares for the purpose of the angel tax provision read with existing Rule 11UA is the higher of the following:

  - Net asset value as reflected in the audited balance sheet of the CHC (NAV method); or

  - The Discounted Cash Flow (DCF) value as determined by a Category-I Merchant banker (DCF method); or

  - The value that the company is able to substantiate to the satisfaction of the tax authority, basis the holding of various intellectual property rights (IPRs) like goodwill, know-how, patents, copyrights, etc.

- The angel tax provisions empower the Central Government to notify certain class or classes of investors investing in CHC which are exempt from the rigors of angel tax. Pursuant to exercise of this power, in the past, CBDT had issued Notification No. 1131(E) dated 5 March 2019 notifying exemption to start-up companies registered with Department for Promotion of Industry and Internal Trade (DPIIT) which fulfil conditions specified in para 4 of Notification No. G.S.R 127(E) dated 19 February 2019 and file self-declaration to that effect, in respect of shares issued at premium to resident investors.

- Prior to the amendment by the Finance Act 2023 (FA 2023), the angel tax applied only to shares issued to a resident. FA 2023 amended the angel tax provisions, with effect from tax year 2023-24, to extend it to issue of shares by a CHC to non-resident (NR) investor. FA 2023 also extended the exemption from angel tax to investments in CHC by venture capital funds set up in IFSC (specified funds).

- The expansion of angel tax provisions gave rise to concerns regarding trigger of angel tax in investments made by genuine and regulated NR investors in Indian companies (including start-ups registered with DPIIT).

- In order to address the concerns, post stakeholder consultation, CBDT issued a Press Release on 19 May 2023 (Press Release) announcing that CBDT shall, inter alia, issue notification that certain class of NR investors shall be excluded from the ambit of angel tax provisions. It also clarified that earlier Notification No. 1131(E) dated 5 March 2019 shall be amended to cover investment in start-ups by any person (not merely residents).

CBDT Notification No. 29/2023 (Notification 1): Exclusion of specified class of investors

- CBDT has notified the following classes of persons who shall be excluded from the ambit of angel tax provisions:

  - **Government category:**
    - Government and
    - Government related investors such as: central banks, sovereign wealth funds, international or multilateral organizations or agencies or
    - Entities controlled by the Government or

- Entities where direct or indirect ownership of the Government is 75% or more

- **Banking and insurance category:**
  - Banks or
  - Entities involved in insurance business where such entity is subject to applicable regulations in the country where it is established or incorporated or is a resident

- **Entities from specified jurisdictions:**
  - Any of the following entities which is a resident of any country or specified territory listed at Annexure to the Notification 1 and such entity is subject to applicable regulations in the country where it is established or incorporated as a resident:
    - Entities registered with SEBI as Category-I foreign portfolio investors
    - Endowment funds associated with a university, hospitals or charities
    - Pension funds created or established under the law of the foreign country or specified territory
    - Broad-based pooled investment vehicle or fund where the number of investors in such vehicle or fund is more than 50 and such fund is not a hedge fund or a fund which employs diverse or complex trading strategies.
  - The Annexure to the Notification 1 lists 21 countries viz. Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Iceland, Israel, Italy, Japan, Korea, New Zealand, Norway, Russia, Spain, Sweden, the UK and the US.
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- The effective date is not mentioned in the Notification. As a general principle, a notification is effective from the date of its publication in Official Gazette. Hence, this Notification may be considered as effective from 24 May 2023 onwards.

CBDT Notification 30/2023 (Notification 2): Relaxation to start-up companies

- Earlier, CBDT Notification No. 13 of 2019 dated 5 March 2019 granted exemption to start-ups from angel tax provision if the start-up company complies with the conditions specified by the DPIIT at para 4 of DPIIT Notification No. S.O. 1131 (E) dated 5 March 2019. In order to claim exemption, the start-up company which fulfils the modified conditions has to file a self-declaration stating that the eligible start-up has not invested in non-qualifying assets. The self-declaration shall be transmitted by the DPIIT to the CBDT.

- Since the angel tax provisions were earlier applicable to shares issued to residents, the CBDT Notification No. 13/2019 granted exemption where start-ups issued shares to resident investors at a premium.

- As a consequential modification pursuant to expansion of scope of angel tax to NR investors, CBDT has issued Notification No. 30/2023 dated 24 May 2023 to grant exemption to start-up companies on shares issued to any person (which includes both resident and NR investors) on same conditions as was applicable earlier in respect of resident investors.

- The Notification No. 30/2023 comes into force retroactively from 1 April 2023. Thus, it covers any investment made by NR investor in DPIIT registered start-up company from 1 April 2023 till 23 May 2023 which fulfils the requisite conditions.

Part B- Case Laws

Goods and Service Tax

1. Union of India & ORS. v. Cosmo Films Limited (2023-VIL-47-SC)

Subject Matter: The Hon'ble Supreme Court (SC) has sat aside Gujarat High Court (HC) judgement that struck down pre- import condition under Advance Authorisation (AA)

Background and Facts of the case

- Writ petition was filed before the Hon'ble Gujarat HC regarding the implementation of the pre-import condition from 13-10-2017 to 09-01-2019, basis unjustified discrimination between exporters who meet their export obligations prior to importing goods (i.e., importing for stock replenishment) and other taxpayers.

- It was observed by Gujarat HC that the process of export in anticipation of advance authorisation under para 4.27 of the Handbook of Procedures (HBP); pre-import condition stipulated in para 4.14 of the FTP and customs notification no. 79/2017-Cus dated 13.10.2017 cannot coexist. The court also determined that the "pre-import condition" and para 4.14 of the FTP were unreasonable and inconsistent with the design of the advance authorisation scheme.

- HC invalidated pre-import condition and construed as ultra vires, as it caused unjustifiable difficulties for exporters who had chosen the advance authorisation scheme, contradicting the scheme's fundamental objective.

- Consequently, High Court's order was challenged before the Apex Court, arguing that paragraph 4.03 of the FTP required the physical incorporation of imported materials into exported goods, which could only occur if imports were made before exports. As a result, these authorisations inherently had a "pre-import condition" that had to be satisfied.

Revenue's Contentions

- Para 4.03 of FTP specifically required physical incorporation of imported materials in exported goods which was possible only if imports were made prior to export. The said para had an inbuilt pre-imported condition which had to be followed.

- Para 4.27 allowed exports in anticipation of an authorization. This was an exception to meet requirement in case of exigencies. Exporters were availing the benefit of this provision without exception. Further, para 4.27(d) of the HBP barred benefit of export in anticipation of authorization for inputs where pre-import condition was imposed

- There is no conflict between para 4.03 of FTP and that of 4.27(a) of the HBP. The scope and field of operation of individual para were completely different.

- Further, para 4.13 of FTP gives powers to the policy makers to impose pre import condition on any inputs imported under this chapter

- The taxpayer has only argued that the pre import condition was burdensome and not challenged the power to impose the levies. The condition and the manner in which

such levies are collected is within the domain of the legislature if the power to levy was undisputed.

Taxpayer's Contentions

- There is no rationale or justification in imposing the "pre-import condition" only for a limited period from 13 October 2017 to 9 January 2019, to a scheme operating successfully without any such condition.
- Further, there is no reason or justification for subjecting only IGST and compensation cess to the 'pre-import condition' and not imposing the said condition to other import duties.
- It would be impossible for a manufacturer exporter to execute export orders within a short period of time if the pre-import condition is satisfied.
- Regular exporters import raw materials against several authorizations and utilize such goods for manufacturing final products for exports with reference to those authorization. Consequently, there could be no 'one to one' correlation between import of a consignment of inputs against one particular authorization and utilization of such inputs for manufacturing final products for export against those particular authorizations.
- When the levy of IGST on imported goods was treated like the levy of BCD, there was no reason why the unconditional exemption of BCD granted under the scheme could not be extended to IGST exemption. There was no intelligible difference between the two. Thus, Article 14 of the Constitution was violated as there was no rationale behind different classification of IGST and BCD exemption. Reliance was placed on various SC rulings in this regard.
- Further, Article 19(1) g of the Constitution was also violated as the pre import condition had no nexus with the object sought to be achieved by the AA scheme.

Discussion and Findings of the Case

- The exporters were made aware of the changes brought due to the introduction of GST through a trade notice. The notice clearly mentioned that AA and its utilization would not continue in the same manner as the AA scheme was operating earlier.
- Para 4.27 of HBP was amended to include 4.27(d) which stated that duty free authorization for inputs subject to pre-import condition could not be issued.
- Para 4.13 of FTP gave powers to the DGFT to impose pre-import condition for any inputs under this chapter. HC is wrong in assuming that only specified goods were subject to pre-import condition.
- Introduction of pre-import condition may have resulted in hardship to the exporters and would have forced the exporters to discontinue with their former business practices. However, this cannot be a ground to hold the insertion of pre-import condition as arbitrary.
- In case of Mysore SEB vs. Bangalore Woolen Cotton & Silk Mills Ltd. a Constitution Bench of SC held that inconvenience is not a decisive factor to be considered while interpreting the statute.
- The allegation of discrimination is without merit as para 4.13 itself empowered the DGFT to impose pre-import condition on any inputs which are not specifically included in Appendix -4J. The existence of this discretion meant there is flexibility to the policymakers to treat different AA holders differently.

- Further, there could not be a blanket right to claim exemption and such exemption is dependent on the assessment of the state, tax administrators and the economy. The old levies are completely different from the new levies as in case of new levies, payment is insisted as a part of unified system of levy, assessment, collection, payment and refund.

- When a reform of new legislation is introduced, the doctrine of classification cannot be applied strictly. The same was emphasized in case of State of Gujrat vs. Shri Ambica Mills and Ajoy Kumar Banerjee vs. Union of India.

- There is no constitutional compulsion that whilst framing a new law, or policies under a new legislation particularly with a different set of fiscal norms which overhauls the taxation structure, concessions granted or given earlier should continue in the same fashion as they were in the past. The object of the new law was to create a new rights and obligation with new attendant conditions

- The argument that there is no rationale for differential treatment of BCD and IGST under AA scheme is without merit. There is a justification for separate treatment of the two levies as IGST is levied at multiple points and input tax credit is available till the point of end user. BCD is a custom levy at the point of import and there is no question of credit.

- The taxpayer's contention that subsequent withdrawal of pre-import condition meant that the Union itself recognized its unworkable and unfeasible nature and consequently the condition should not be insisted upon for the period it existed, is faulty.

- The Foreign Trade (Development and Regulation) Act, 1992 has no powers to frame retrospective regulations. To give retrospective effect, to the notification of 10 January 2019 through interpretation, would be to achieve what is impermissible in law.

- Various commentators and economist have spoken about how introduction of GST was one of the most significant tax reforms undertaken by India. Inevitably, this transformation is bound to lead to some disruption. In the present case, the disruption is in the form of exporters needing to import inputs, pay the two duties, and claim refunds. These inconveniences are insufficient to conclude that such change is unreasonable and arbitrary.

Judgement

- Accordingly, SC set aside the judgment passed by HC. However, since the taxpayers were enjoying interim orders, till the impugned judgments were delivered, the Revenue is directed to permit them to claim refund or input credit (whichever applicable and/or wherever customs duty was paid).

- For doing so, the taxpayers shall approach the jurisdictional commissioner and apply with documentary evidence within six weeks from the date of this judgment. The claim for refund/credit, shall be examined on their merits, on a case-by-case basis. For the sake of convenience, the revenue shall direct the appropriate procedure to be followed, conveniently, through a circular, in this regard.

2. M/s Naarjuna Agro Chemicals Pvt Ltd v. State of U.P. And Another (2023-VIL-266-ALH)

Subject Matter: Scrutiny proceedings of return as well as proceeding under Section 74 are two separate and distinct exigencies and issuance of notice under Section 61(3), therefore, cannot be construed as a condition precedent for initiation of action under Section 74 of the Act.

Background

- M/s Naarjuna Agro chemicals private Limited ('Petitioner') is an assessee under the GST regime and has submitted returns for the assessment year 2017-18

- The Department observed certain discrepancy in GST Return relating to incorrect classification and consequential tax payable thereon; however did not initiate any action referable to Section 61 of the Act which deals with scrutiny of Returns. Rather, proceedings were initiated under Section 74 wherein the demand of GST was finalized.

Discussions and findings of the case

- HC observed that it no discrepancy under Section 61 was noticed by the Department in the Returns nor any such deficiency was pointed out to the assessee for it to be rectified. The returns, therefore, remain intact.

- Rather, it is later at the stage of consideration of the Return, the department has found that proper tax has not been deposited and consequently proceedings under Section 74 has been initiated and concluded against the petitioner. In the statutory scheme, the course followed by the department would clearly be permissible in law.

Judgement

- In light of the above, it was held that merely because no notices were issued under Section 61 would not mean that issues of classification or short payment of tax cannot be dealt with under Section 74.

- Therefore, the scrutiny proceedings of return as well as proceeding under Section 74 are two separate and distinct exigencies and issuance of notice under Section 61(3), therefore, cannot be construed as a condition precedent for initiation of action under Section 74 of the Act.

3. M/s Profisolutions Private Limited (Advance Ruling No. 07/ARA/2023 dated 31 March 2023- Authority for Advance Ruling ('AAR')- Tamil Nadu)

Subject Matter: Held that rendering of service through common employees by Branch Office (BO) in one State to Head Office (HO) in another State constitutes a 'Supply' as per Section 7 of CGST Act and liable to GST

Background and Facts of the case

- M/s Profisolutions Private Limited hereinafter referred as 'the Applicant' or 'the Company'. The Applicant's Head Office ('HO') is located in Karnataka and is engaged in provision of engineering services for industrial and manufacturing projects. The branch office ('BO') of the applicant is providing various support services namely engineering, design and accounting services to the head office located at Karnataka.

- In this regard, the Applicant sought advance ruling on the following questions:
  - Whether provision of service by BO in one State to HO in another State through employees who are common to the Company constitutes as supply as per Section 7 of CGST Act, 2017?
  - If answer to question (a) is affirmative, whether such services would attract GST liability?

Applicant's Contentions

- Employees are appointed and working for the Company as whole and not employed for head office or branch specifically, which is a distinct person under GST.

- Salary and benefits paid to employees are in relation to employment, which is neither a supply of goods nor services

under Para 1 of Schedule 3 of CGST Act, 2017 which reads as 'Service by an Employee to Employer in the course of or in relation to his employment'.

Ruling

- The AAR observed that as long as the employee is deployed in a branch of an entity, services rendered by him directly to head office will be in his representative capacity as an employee of the Branch.

- The services of employees deployed in a registered place of business to another registered premises of the same person will attract the provisions of Section 25(4), Section 7 read with Schedule I (2) and Section 15 of CGST Act, 2017 since the employees are treated as related persons in terms of explanation to Section 15; and thus, treated as supply for the purpose of levy of GST.

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