Nangia Andersen LLP

Indirect Tax Newsletter

August 2021

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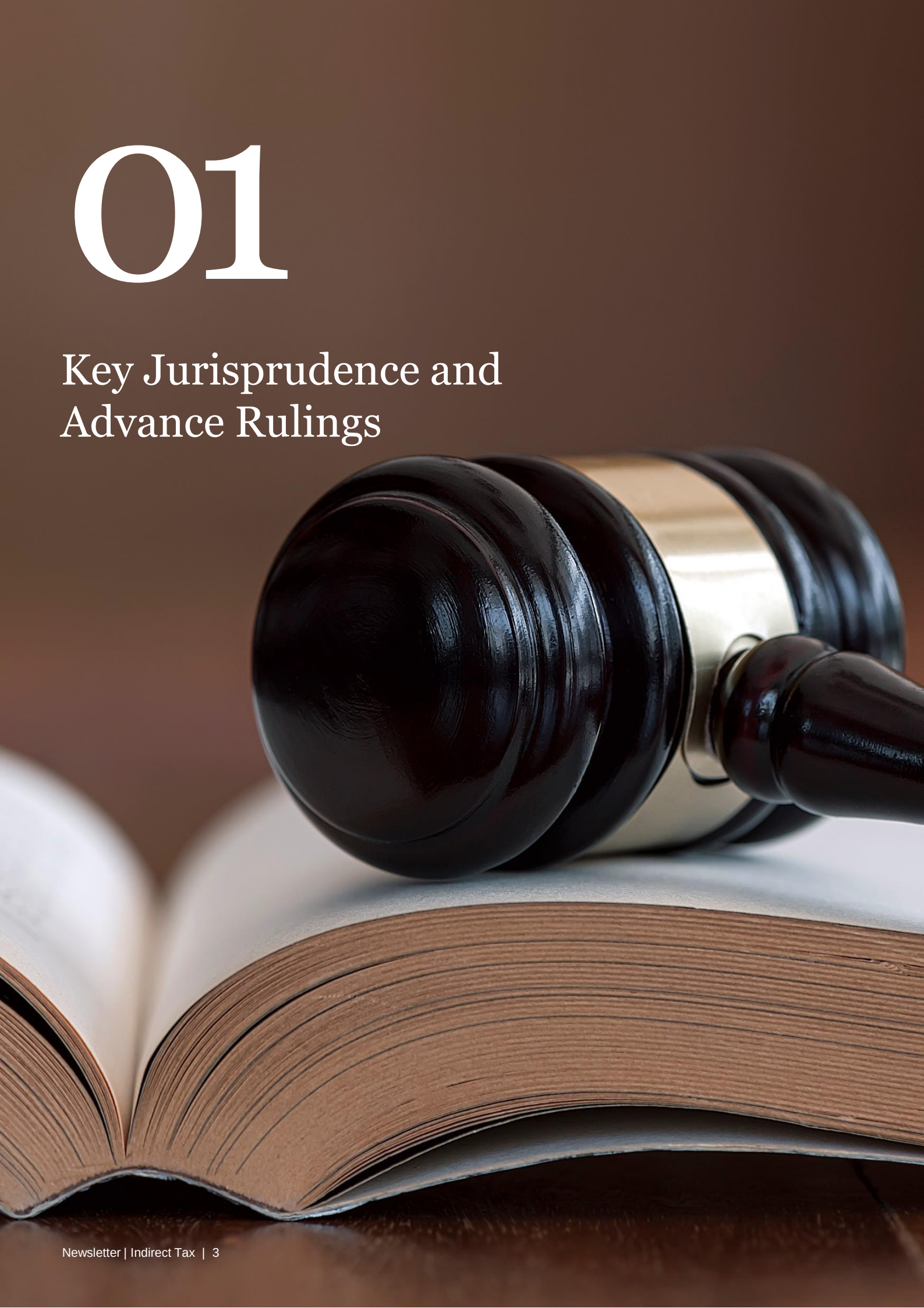
What's Inside?

01

Key Jurisprudence and Advance Rulings



Resident Welfare Associations liable to GST on member's contribution exceeding Rs. 7500

Resident Welfare Associations ('RWA') are common pooling structure where a group of residents come together and contribute towards a common fund and use the funds towards activities of maintenance and upkeep of their residential complexes.

The assessee is a RWA has been collecting and paying GST on the amount in excess of Rs.7,500 as per the exemption notification. In certain cases, contributions from members of RWA were more than Rs.7,500, a question arose that whether in a case where the contribution exceeded the amount of Rs.7,500, the member/ resident in that RWA would lose the entitlement to exemption altogether or whether the exemption would continue to be available up to a sum of Rs.7,500 and only the excess would be liable to tax.

The assessee applied for an advance ruling before the Tamil Nadu Authority for Advance Ruling ('AAR, Tamil Nadu') on this issue and received an adverse ruling that if contribution exceed Rs 7,500, the entire exemption would be disallowed, and GST will be applicable on the entire contribution. Aggrieved by this, the assessee approached the Hon'ble Madras High Court through a writ application.

The Hon'ble High court held that upon a perusal of Entry 77 of Notification No. 12/2017-C.T.(Rate), there is no ambiguity that presents itself on a plain reading of the Entry and the intention is clear, so as to remove from the purview of taxation contribution up to an amount of Rs.7,500. Emphasising on the word 'upto' used in the Entry, Hon'ble High Court noted that the plain words employed in Entry 77 being, 'upto' an amount of Rs.7,500 can thus only be interpreted to state that any contribution in excess of the same would be liable to tax. The court further added that the term 'upto' hardly needs to be defined and connotes an upper limit. It is interchangeable with the term 'till' and means that any amount till the ceiling of Rs.7,500 would be exempt for the purposes of GST.

[Greenwood Owners Association vs. UOI[1]]

Nangia Andersen LLP's Take

The Hon'ble High Court brings much needed respite to this issue. It is interesting to note that the assessee has approached the Hon'ble High Court without filing an appeal before the Appellate Authority for Advance Rulings ('AAAR'). Typically, when alternate remedies are available, the courts reject writ applications and direct to first exhaust appeal remedy.

[1] TS-321-HC(MAD)-2021-GST

No pre-SCN consultation required if assessee has not complied with summons issued by the Department seeking explanation

The Appellant is registered under the provisions of the Central Goods and Services Tax Act, 2017 ('CGST Act') and engaged in providing security services at various Government and Non-Government entities and therefore, was exigible to Service Tax.

An investigation was initiated against the Appellant for failure to pay Service Tax to the Government. Following the investigation, several notices were issued to the Appellant calling upon to produce certain information/documents for verification.

Pursuant to the investigation, a Show Cause Notice ('SCN') was issued which was challenged by the Appellant on the ground that it was in violation of the Central Board of Indirect Taxation and Customs [2] ('CBIC') Master Circular No. 1053/02/2017 dated 10 March 2017 ('Master Circular') which provided for mandatory pre-SCN consultation with the assesses prior to issuance of SCN in cases where the duty demand exceeds INR 50 lac (except for preventive/ offence related to SCNs).

The Appellant contended as follows:

- The Master Circular was binding on the Respondent and had to be followed in letter and spirit by the Respondent.

- The benefit of a pre-SCN consultation should not be denied to the Appellant merely due to the possibility that, at the end of the adjudication process, it may be held that the Appellant had committed an offence. In this regard, the Appellant placed his reliance on the judgment in the case of Amadeus India Pvt. Ltd v. Principal Commissioner, Central Excise, Service Tax and Central Tax Commissionerate.

The Hon'ble High Court ('HC') held that the alleged SCN would be kept in abeyance and granted the Appellant an opportunity of personal hearing to appear before the adjudicating authority. Aggrieved, the Appellant opted to appeal and contended that the SCN issued in the present case should not be characterised as a preventative / offence related SCN and thus, the SCN issued should be quashed.

[2] Earlier known as Central Board of Excise and Customs

The Hon'ble HC held as under:

- Every attempt made by the Respondent to secure documents/ information to investigate the matter was obstructed by the Appellant.
- The impugned SCN was not preventive in nature; an offence case was registered against the Appellant.
- The Appellant is expected to comply with the summons issued by the Respondent and not to seek the benefit of the pre-SCN consultation mandated under the Master Circular.
- The benefit of the Master Circular is not a one-way traffic and cannot be misused by the Appellant.

The Hon'ble High Court dismissed the appeal filed by the Appellant and held that no pre-SCN consultation is required in a scenario where the assessee has not complied with summons already issued by the Department seeking explanation/documents.

[M/s Novel Security Services vs. The Director General Directorate of Goods and Service Tax Intelligence[3]]

Nangia Andersen LLP's Take

The Master Circular endeavours to reduce the litigation by opting for pre-SCN consultation. However, in many cases, it is observed that the Departmental Authorities do not adhere to pre-SCN consultation and directly issue SCN. One can note that non-adoption of pre-SCN consultation may invalidate the proceedings and it is important that the assessee vouches on both the technical and non-technical aspects of SCN prior to responding to the same. However, the said position may not be followed in scenarios discussed in the above-mentioned matter.

[3] Writ Appeal No. 546 of 2021 (T-RES)

The Madras High Court held that ITC should be granted on the original amount of input used notwithstanding that the entire amount of input would not figure in the finished product

The Petitioner was engaged in manufacturing MS Billets and Ingots. Due to the inherent nature of the manufacturing process, a portion of the input was lost during the manufacturing process.

The Respondent reversed the Input Tax Credit ('ITC') corresponding to such lost input in terms of Section 17(5)(h) of the CGST Act on account of goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples. The Petitioner argued that the scenarios given under Section 17(5)(h) of the CGST Act are for such losses which are quantifiable in nature and involve external factors or compulsion. However, loss in the manufacturing process is inherent in nature.

The Hon'ble High Court relied on the case of Rupa & Co. Ltd. V. CESTAT, Chennai [2015 (324) ELT 295] wherein it was held that some amount of consumption of the input was inevitable in the manufacturing process.

The High Court held that ITC should be granted on the original amount of input used notwithstanding that the entire amount of input would not figure in the finished product. Therefore, the loss due to inherent nature of manufacturing process is not covered under Section 17(5)(h) of the CGST Act.

[M/s. ARS Steels & Alloy International Private Limited vs. The State Tax Officer][4]

ICICI Econet and Internet Technology Fund - CESTAT Bangalore - VCF trust is a service provider to its contributors, confirms service tax demand

Brief Facts

The assessee is a Venture Capital Fund ('VCF') established as trust under the Indian Trusts Act, 1882 and registered with the Securities and Exchange Board of India ('SEBI').

It was represented and managed by Trustees. To ensure that the assessee receives relevant professional and experienced advice, the Trustee appointed an Investment Manager/ Asset Management Company (IM/ AMC) to manage the assets of the VCF that charged a fee for its services. The Trustee received trusteeship fee from the VCF for its functions.

The VCF distributed the returns on investment to various classes of contributors, after meeting operational expenses. The service tax authorities contended that the VCF was managing the money of the contributors/ investors/ beneficiaries, which was squarely covered under Banking and Other Financial Services. Further, the deductions in terms of various expenses, carried interest paid to class C unit holders were consideration for providing investment management services to investors, and hence, there was a liability to pay service tax. The assessee claimed that VCFs function as a pooling vehicle, such that several investors combine their investment into one large corpus that invests in many companies. The contributors and VCF are one and the same and that the question of VCF rendering a service to its own contributors does not arise at all, since no person can render service to self. The fact that the contributor is also the beneficiary of VCF proves 'mutuality of interest'.

CESTAT's Ruling

The Hon'ble CESTAT confirmed the levy of service tax on the basis that VCF had independent identity and distinct personality of its own and acted as a commercial concern. It undertook the KYC process for their contributors, thereby, indicating that they were independent of their investors. The Private Placement Memorandum and other scheme documents enabled the VCF to distribute dividends and other amounts to the respective unit holders. The profit motive of the fund was thus evident. The VCF had violated the principle of mutuality by concerning themselves in commercial activities and by using discretionary powers to benefit a certain class of investors / nominees / employees / subsidiaries. They can no longer be treated as trusts for the purposes of taxation statutes at least.

[4] W.P. No. 2885 of 2021 - Madras High Court

The funds had been paying huge amounts to the AMCs in the form of Performance Fee and carry interest to the AMC or their nominees. Thus, as far as the distribution of dividends/ profit is concerned, the Trusts made provisions to act in a manner which is beyond the interest of the Subscribers/ Investors/ Contributors. The carried interest is neither interest nor return on investment, as claimed by the Appellants, but a portion of the consideration retained by the VCFs for the services they rendered to the investors and passed on, in the disguise of return on investments, to class C unit holders, i.e., the IM/ AMC. The assessee devised the structure of the fund in such a manner that the AMC and/ or their nominees would receive huge sums of money in the guise of performance fee, carried interest, with the twin motives of benefitting the IM and/ or their nominees at the expense of the subscribers and avoiding taxes.

Hence, the service tax demand was confirmed, and the matter was remanded back to the adjudicating authorities for recalculation of gross value of taxable services, availability of CENVAT credit and cum duty benefit.

Nangia Andersen LLP's Take

The judgement may have the effect of unsettling the position that a VCF is a pooling vehicle, which does not carry out any activity. It may have a bearing on similar pooling structures as well. Additionally, the Tribunal's comments on the nature of carry interest could spark fresh litigation. and may warrant documentation and review of tax position.

The above ruling will also have impact under GST as similar provisions are incorporated under GST. Section 7 of the CGST Act has been amended retrospectively (not yet made effective) to levy tax on supply of goods/ services by a person to its members/ constituents or vice-versa for a consideration. Also, an explanation is inserted (not yet made effective) to clarify that the person and its members/ constituents shall be deemed to be two separate persons. The definition of 'person' under GST includes Trust.

[M/s. ICICI Econet Internet and Technology Fund Vs. Commissioner Of Central Tax (CESTAT Bangalore][5]

2TS-290-CESTAT-2021-ST

The West Bengal Authority for Advance Ruling held that services by way of arranging sale of goods to the recipient located outside India qualify as intermediary service

Brief Facts

Teretex Trading Private Limited ('the Applicant') is proposed to be engaged in supplying services to various overseas manufacturers/ traders ('service recipients'), by way of arranging the sale of their goods in India/ overseas. The Applicant will identify the prospective overseas/ Indian buyers for the service recipients and would make arrangements for sale of goods. The goods will be delivered directly to the buyers from the service recipient's premise. The Applicant would receive the consideration in the form of commission in convertible foreign exchange from service recipients.

In this backdrop, the Applicant sought ruling if supply of service of arranging or facilitating the sale of goods by the Applicant for the suppliers located outside India would qualify as an 'export of service' in terms of Section 2(6) of the Integrated Goods and Services Tax Act, 2017 ('IGST Act').

CESTAT's Ruling

The Authority for Advance Ruling ('AAR') observed that the nature of activities going to be undertaken by the Applicant towards arranging or facilitating supply of goods envisages the services closely akin to the services provided by an 'intermediary' as defined in Section 2(13) of the IGST Act.

The AAR also finds that the Applicant can neither change the nature and value of supply of goods nor holds the title of the goods at any point of time during the entire transaction. Furthermore, the Applicant has admitted that he is going to undertake the aforesaid business activities without assuming any obligation, either on behalf of the service recipients or on behalf of the buyer of the goods, meaning thereby that he doesn't supply such goods on his own account. It, therefore, appears that the Applicant satisfies all the conditions to be an intermediary as defined in Section 2(13) of the IGST Act.

Pertaining to the place of supply, the AAR held that where the location of the supplier or recipient is outside India, then the place of supply is determined under Section 13 of the IGST Act. In the present case, since the service recipient is located outside India, it attracts the provisions of Section 13 of the IGST Act. As the Applicant is found to be an 'intermediary' as defined in Section 2(13) of the IGST Act, the place of supply shall be determined under Section 13(8) of IGST Act. Therefore, the place of supply shall be the location of the supplier of services i.e., in West Bengal for the present case.

[Teretex Trading Private Limited][6]

[6] Advance Ruling no. 03/WBAAR/2021-22 dated 28 June 2021

The Karnataka AAR held that services rendered by the Applicant to its holding company are considered as intermediary services

Airbus Group India Private Limited ('the Applicant'), a subsidiary of Airbus Invest SAS, France ('holding company') broadly performs Procurement Operations and Procurement Transformation & Central Services for its holding company.

The Applicant approached the Karnataka bench of the AAR seeking a ruling on whether the activities carried out in India by the Applicant would constitute a supply of 'other support services' falling under HSN code 9985 or as 'Intermediary service' classifiable under HSN code 9961/ 9962 or any other classification of services as specified under various Tariff entries of rate notification issued under GST Law, or whether such services will qualify as export of services.

The Karnataka AAR ruled that as per the explanatory notes to the scheme of classification of services, the activities undertaken by the Applicant are classifiable under Heading 998599 and not under Heading 9983. Further, the Authority relied on various judgements passed in case of Verizon India Pvt. Ltd. Vs. Commissioner of Service Tax (TS-594-CESTAT-2019-ST), AMD India Private Limited v. CST, Bangalore, etc.

The AAR further held that that the services of the Applicant are covered under intermediary services as per Section 2(13) of Integrated GST Act, 2017 ('IGST Act') and hence, the place of supply is India in terms of Section 13(8) of the IGST Act. Therefore, the services that are rendered by the Applicant cannot be categorized as export of services and are subject to GST at the rate of 18% in terms of entry no. 23 of Notification no. 11/2017-Central Tax dated 28 June 2017.

[M/s Airbus Group India Private Limited] [7]

Nangia Andersen LLP's Take

The concept of intermediary has been a matter of dispute, both from the levy and determination of place of supply perspective right from the introduction of GST and thus, requires a clarification from the CBIC especially with respect to levy of CGST and SGST or IGST.

Recently, the Hon'ble Bombay High Court has given a split opinion on the constitutionality of Section 13(8)(b) of the IGST Act and now, it would be interesting to observe the final views from Hon'ble Court in coming times to see if the issue gets settled or creates additional confusion amongst the taxpayers.

[7] Advance Ruling No. KAR ADRG 31/ 021 dated 1 July 2021

The Kerala AAAR holds that the reimbursement of additional discount to distributors is taxable under GST Law

M/s. Santosh Distributors ('the Appellant'), an authorized distributor of M/s. Castrol India Limited ('Castrol' or 'the Principal') is engaged in the supply of Castrol brand industrial and automotive lubricants bearing HSN 2710.

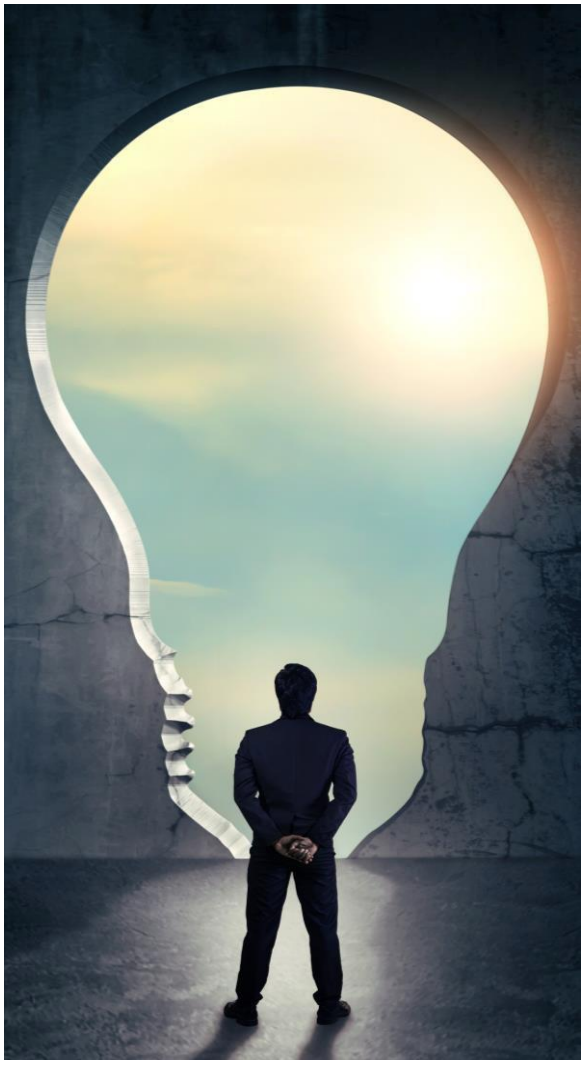
The Appellant is paying tax dues as per the value of the invoice issued and availing the ITC of GST shown in the inward invoice received by them from the Principal or their stockist. The Appellant filed an application with the Kerala Authority for Advance Ruling ('AAR, Kerala') to seek clarifications on the questions viz., a) Whether the discount provided by the Principal to their dealers/ customers through the Appellant attracts GST?; b) Whether the amount shown in the commercial credit note issued to the Appellant by the Principal attracts proportionate reversal of ITC?; and c) Is there any tax liability under the GST Law on the Appellant for the amount received as reimbursement of discount or rebate provided by the Principal as per the written agreement between the Principal and their dealers and also an agreement between the Principal and distributors.

The AAR held that the additional discount reimbursed by the Principal/ supplier of goods to the Appellant/ distributor is liable to be added to the consideration payable by the customer to the Appellant/ distributor to arrive at the value of supply under Section 15 of the CGST/ SGST Act in the hands of the Appellant/ distributor. The Appellant is liable to pay GST at the applicable rate on the amount received as reimbursement of discount from the Principal. Further, the Principal/ supplier of goods issuing the commercial credit notes is not eligible to reduce his original tax liability and hence, the Appellant will not be liable to reverse the ITC attributable to the commercial credit notes received by him.

Aggrieved by the decision of the AAR, the Appellant filed an appeal before the Appellate Authority for Advance Rulings ('AAAR') to seek clarification on the above-mentioned questions.

The AAAR upheld the decision of the AAR on the grounds viz., a) The quantum of post-sale discounts offered by the principal/ supplier had to be pre-determined in terms of the agreement; b) the discounts being re-imbursed by the Principal, after the supply of goods did not meet the requirement of Section 15 of the CGST Act. Hence, the re-imbursement could not be considered as discount for arriving at the transaction value under Section 15 of the CGST Act.; c) the additional discounts given by the Appellant and then re-imbursed by the principal are to be treated as a consideration in terms of Section 2(31) of the CGST Act since it is paid to offer the reduced price and augment the sales.

[Santosh Distributors Kottayam][8]



[8] Order No. AAR/10/20 dated 1 March 2021

02

GST Clarifications and Updates

Clarification regarding extension of time limit in terms of Hon'ble Supreme Court's Order dated 27.04.2021.

The Central Board of Indirect Taxes and Customs ('CBIC') has issued Circular No. 157/13/2021-GST dated 20 July 2021 ('Circular') clarifying the application of Supreme Court order dated 27 April 2021 in Miscellaneous Application No. 665/2021 in SMW(C) No. 3/2020 ('SC order').

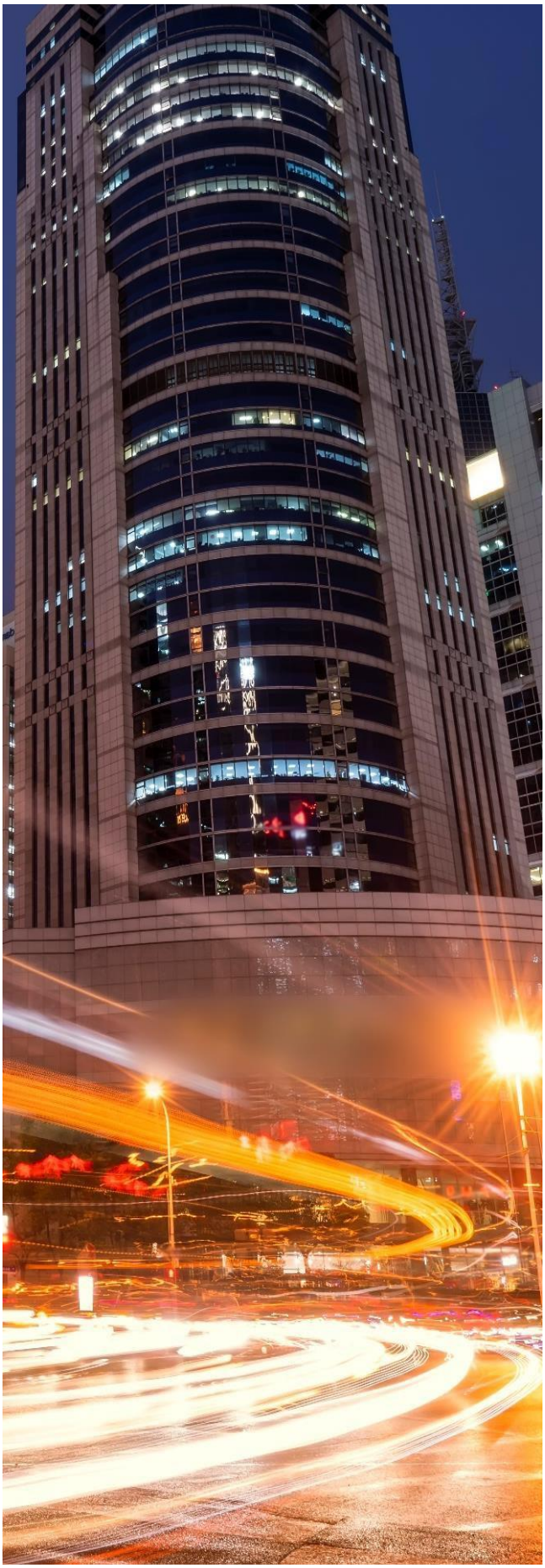
The Supreme Court restored its earlier order dated 23 March 2020 directing that in computing the period of limitation in respect of all judicial or quasi-judicial proceedings irrespective of the limitation prescribed, whether condonable or not, the period from 14 March 2021 to till further order shall also stand excluded. This is in view of hardships faced by litigants due to the alarming Covid-19 situation.

The CBIC clarified those proceedings which need to be initiated or compliances that need to be done by the taxpayers would continue to be governed by the statutory provisions and time limit provided/ extensions granted under the statute itself and SC order will not apply.

It is also clarified that the tax authorities can continue to dispose of Quasi-Judicial proceedings which includes appeals which are filed and are pending, disposal of application for refund, application for revocation of cancellation of registration, adjudication proceedings of demand notices, etc. as given in statute itself and the SC order will not apply.

The extension of timelines granted by SC order is applicable in respect of any appeal which is required to be filed before Joint/ Additional Commissioner (Appeals), Commissioner (Appeals), Appellate Authority for Advance Ruling, Tribunal and various courts against any quasi-judicial order or where proceeding for revision or rectification of any order is required to be undertaken, and is not applicable to any other proceedings under GST Laws.

(Circular No. 157/13/2021-GST dated 20 July 2021)



03

Customs Updates

Improvements in Faceless Assessment

1. Extension in timelines for holding Annual General Meeting ('AGM')

Custom Clearance under Faceless Assessment was rolled out on 31 October 2020. The CBIC has now put forward measures for the scope of improvement in current process:

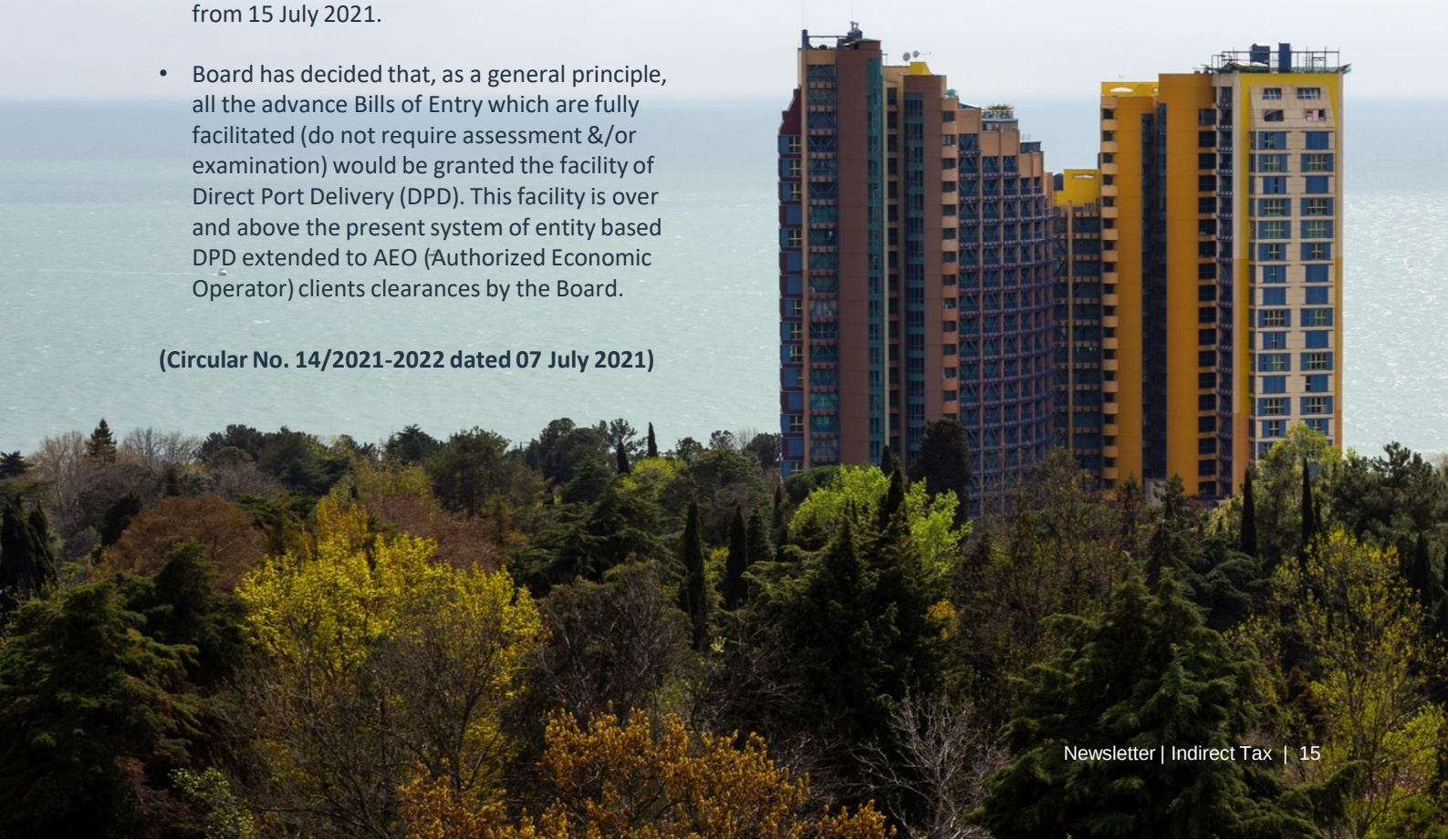
- Facilitation level across all Customs stations would be increased to 90% from 77% relating to risk management division (RMD).
- Working hours of all Faceless Assessment Groups (FAGs) will be from 10 AM till 8 PM on any working day.
- National Academy Customs and jurisdictional Principal Commissioners/ Commissioners of Customs shall administratively monitor that FAGs communicate the 'first decision' on the Bill of Entry within 3 working hours after its allocation.
- One Appraising Officer is given responsibility of not more than 2 FAGs.
- The total number of queries which can be raised by an Appraising Officer in respect of a Bill of Entry would now be restricted to three.
- To promote specialization in assessment, Board has decided to create separate FAGs for certain commodities that would become operational from 15 July 2021.
- Board has decided that, as a general principle, all the advance Bills of Entry which are fully facilitated (do not require assessment &/or examination) would be granted the facility of Direct Port Delivery (DPD). This facility is over and above the present system of entity based DPD extended to AEO (Authorized Economic Operator) clients clearances by the Board.

(Circular No. 14/2021-2022 dated 07 July 2021)

2. Processing of duty drawback claims

- The CBIC had earlier introduced Risk Management Systems (RMS) and decided to implement it in two phases. In the first phase, RMS will process the data and provide output to Indian Customs EDI System ('ICES') up to goods examination stage.
- Now in the second phase, it has been decided to implement RMS for processing of Duty Drawback Claims as well. RMS will process the shipping bill data after the Export General Manifest (EGM) is filled electronically and will provide output to the ICES for processing of Duty Drawback Claims.
- This facility is initiated with effect from 26 July 2021.

(Circular No. 15/2021-Customs dated 15 July 2021)



3. Re-import of goods sent abroad for repairs

- Integrated Goods and Services Tax ('IGST') shall be applicable on the value equal to the repair value, insurance and freight on re-import of goods sent abroad for repairs

- Recently in case of M/s Interglobe Aviation Limited, New Delhi CESTAT interpreted that intention of legislation was only to impose basic customs duty on the fair cost of repair charges, freight and insurance charges on such imports of goods after repair.

- Therefore, the circular is issued to clarify that re-import of goods sent abroad for repair would attract IGST and cess (as applicable) on a value equal to the repair value, insurance and freight.

(Circular No. 16/2021-Customs dated 19 July 2021)

4. Lifetime Validity for License/ Registration

- The CBIC has decided to abolish the requirement of periodic renewal of Licence/ Registration issued to Customs Broker and Authorized Carriers under Custom Broker Licensing Regulation, 2021 and Sea Cargo Manifest and Transhipment Regulations, 2018.

- The Board has incorporated following changes in the Regulations:

    a. Lifetime validity of the licenses/registrations;

    b. Make the licenses/registrations invalid in case licensee/registration holder is inactive for the period exceeding 1 year at a time;

    c. To empower Principal Commissioner or Commissioner of Customs to renew a license/registration which has been invalidated due to inactivity; and

    d. Voluntary surrender of license/registration.

- This would help reduce the compliance burden upon the trade, which had to otherwise make application and submit numerous documents to renew their licenses/registrations.

(Circular No. 17/2021-Customs dated 23 July 2021, Notification No. 61/2021 - Customs (NT) dated 23 July 2021 and Notification No. 62/2021 - Customs (NT) dated 23 July 2021)

04

FTP Updates

Temporary Suspension on issuance of benefits/scrips

- The DGFT issued Trade Notice informing that issuance of benefits/scrips under MEIS, SEIS, ROSL and ROSCTL schemes would be kept on hold for a temporary period due to change in allocation procedure.
- No fresh applications would be allowed to be submitted at the online IT module of DGFT for these schemes during this period.
- All submitted applications pending for issuance of scrips would also be on hold

(Trade Notice No. 08/2021-22 dated 08 July 2021)

04

Compliance Calendar

Indirect Tax

Compliance Category	Compliance Description	Frequency	Due dates falling in the month of August 2021
Form GSTR-1	Details of outward supplies filed by registered person	Monthly	11 August 2021
GST Invoice furnishing facility	Optional facility to furnish the details of outward supplies under QRMP Scheme (Optional)	Monthly	13 August 2021
Form GSTR- 3B (Monthly Return)	Registered person having turnover more than INR 5 crores in the previous FY and registered person having turnover less than INR 5 crores and who have not opted for QRMP Scheme.	Monthly	20 August 2021
Form GST PMT-06 (Monthly payment of tax)	Payment of tax under QRMP Scheme	Monthly	25 August 2021
Form GSTR-6 (Return for Input Service Distributor)	Details of input tax credit received and distributed by input services distributor.	Monthly	13 August 2021
Form GSTR – 7 (Return for TDS Deductor)	For persons who are required to deduct TDS under GST.	Monthly	10 August 2021
Form GSTR – 8 (Return for TCS Collector)	For persons who are required to deduct TDS under GST.	Monthly	10 August 2021

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