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DA TAX ALERT
INDIRECT TAX

AN E-TAX ALERT FROM

Darda Advisors LLP

September 2022
Issue: 28

GST COMPLIANCE CALENDER

GOODS AND SERVICE TAX

CUSTOMS AND OTHER

DA NEWS

PREFACE

We are pleased to present to you the twenty-seventh edition of DA Tax Alert, our monthly update on recent developments in the field of Indirect tax laws. This issue covers updates for the month of August 2022.

During the month of August 2022, there were certain changes under Goods and Service Tax, Customs and other; key judgments and rulings such as public tenders not obliged to indicate HSN & GST Rate, summary of SCN cannot be a substitute of proper SCN along with other circulars and notifications.

In the twenty-eighth edition of our DA Tax Alert-Indirect Tax, we look at the tumultuous and dynamic aspects under indirect tax laws and analyze the multiple changes in the indirect tax regime introduced during the month of August 2022.

The endeavor is to collate and share relevant amendments, updates, articles, and case laws under indirect tax laws with all the Corporate stakeholders.

We hope you will find it interesting, informative, and insightful. Please help us grow and learn by sharing your valuable feedback and comments for improvement.

We trust this edition of our monthly publication would be an interesting read.

Regards

Vineet Suman Darda
Co-founder and Managing Partner

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Tax and Regulatory Services

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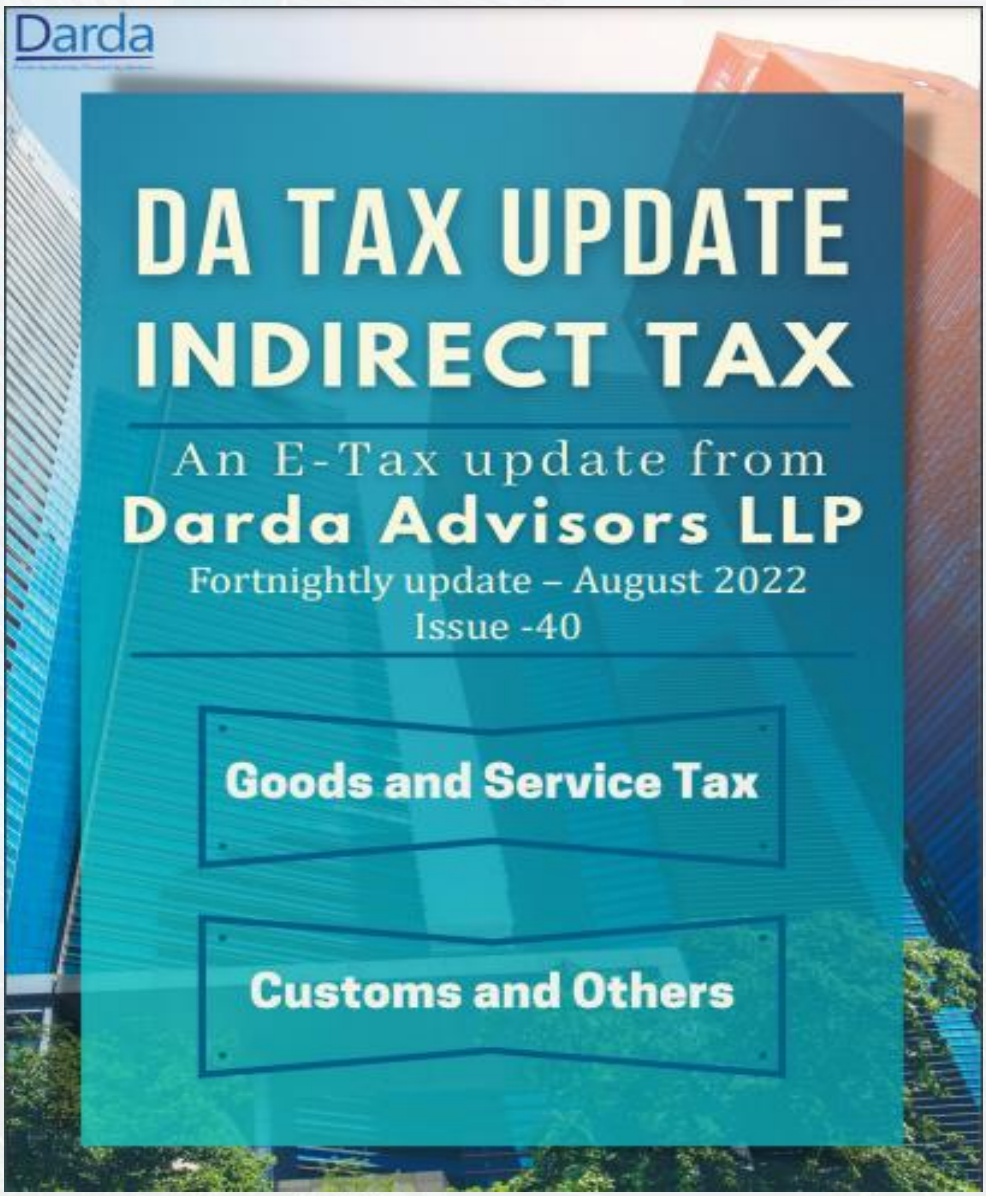
DA Updates and Articles for the month of August 2022

Indirect Tax Fortnightly Update for the month of August 2022

https://dardaadvisors.com/indirect-tax-alert/da-indirect-tax-fortnightly-update_-august-2022/



GST COMPLIANCE CALENDAR

SEPTEMBER 2022

10
GSTR-7
TDS Deductor

10
GSTR-8
TCS
Deductor

11
GSTR-1
Normal Taxpayer

13
GSTR-6
Input Service
Distributor

20
GSTR-5A
OIDAR Service Provider

20
GSTR-3B
Normal Taxpayer

20
GSTR-5
Non-Resident Taxable
Person

- Public tenders not obliged to indicate HSN code & GST rates
- Summary of SCN in DRC-01 cannot substitute proper issuance of SCN
- Ex-Parte Order suffer from procedural infirmities and lack of proper opportunity and thus not sustainable
- GST rate determined based on nature of activity performed and not on form of agreement
- Recovery Without Issue Of SCN – HC Directs Dept To Issue SCN
- Refiling of appeal allowed which was dismissed for non filing of certified copy of order
- Dismissing appeal with single line order for delay in submission is invalid
- Introducing Single Click Nil Filing of GSTR-1

Public tenders not obliged to indicate HSN code & GST rates

Issue:

A global tender was published by the third appellant (Diesel Locomotive Work through its Manager, Varanasi). E-tenders were invited for procurement of turbo wheel impeller balance assembly. The writ petitioner was one of the tenderers. So were among others Respondents 6 to 8 in the Writ Petition.

Further, the case of the writ petitioner is that neither the NIT(Notice inviting Tender)nor the bid documents, mention the relevant HSN (Harmonised System of Nomenclature) Code applicable to the product.

The respondent filed a writ petition seeking the Tendering Authority to clarify the Procurement Product must be taxed at 18% under the Relevant HSN Code, to ensure Uniform Bidding from the parties, so as to ensure a level playing field for all Bidders or suppliers. The High Court disposed of the writ petition stating that "We, therefore, find it expedient to Issue a direction to respondent no.2 namely, the General Manager, Diesel Locomotive Works, Varanasi that if the GST value is to be added in the base price to arrive at the total price of offer for the procurement of products in a tender and is used to determine Interse ranking in the selection process, he would be required to clarify the Issue.

The UOI filed the appeal to Honorable Supreme Court against the order of Honorable High Court.

Legal Provisions:

Tender Document related

Observation and Comments:

The Honorable Supreme Court observed and held that:

- We are of the view that in the facts of the case, the High Court has erred.

- It is clear that the Clauses read together will yield the following result, bearing in mind also the GST regime. When the purchaser happens to be the State, it would be not fair or reasonable to not expect it to accept the bid of the lowest bidder unless it decides to not accept the bid of the lowest bidder for reasons which are fair and legal. No doubt, it is not the law that the Government is bound to accept the lowest bid. It is always open to the Government for relevant, valid and fair reasons, to not accept even the lowest bid.

Public tenders not obliged to indicate HSN code & GST rates

- The terms of the bid cannot be said to be afflicted with the vice of legal uncertainty. This is not a case where the principle as enunciated in Reliance Energy (supra) would be apposite. It is elementary that principles enunciated in the facts of a case are not be likened to Euclid's Theorem, having an inexorable operation divorced from the facts which arise for consideration. In this case, the interplay of the three Clauses, which we have referred to, and its conjoint operation, could not have left the bidders or the purchasers (appellants) in any uncertainty.

- The appellants would stand in the shoes of a purchaser. The appellants cannot therefore be expected to find out the HSN Code and announce it so as to bind the tenderers or fetter the power of jurisdictional officer of the supplier.

- It was further found that the clause properly read could not support the case of the respondent.

- We are of the view that when read in a holistic manner, the purport of the Railway Board is that it is the responsibility of the bidder to quote the correct HSN Number and the corresponding GST rate. We have already unravelled the true scope of the relevant Clauses and wide range of results that would follow on its true construction. It may be true that the circular permits the purchaser to indicate the HSN Number. The purchaser may indicate it. That is a far cry from holding that the communication enshrines a public duty which can be enforced by way of Mandamus. While it is true that in a given case, when a Public Authority is vested with a discretionary power under a Statute, it can be directed to exercise a discretion, it may not be legal to direct even a statutory functionary to exercise the discretion in a particular manner. The very idea of a discretionary power would suffer annihilation, if it ceases to be discretionary in the hands of a Court ordering a Mandamus.

- It is difficult to accept the case of the writ petitioner that appellants must seek the 'clarification' contemplated in the impugned Judgment by resorting to Section 168 of the Central Act or the State Act. Section 168 does not expressly provide for right to any person to seek a direction as contemplated therein. Further, we may notice that there is an express power provided in the provisions relating to advance ruling. There is an elaborate procedure to be followed and even right of appeal. At any rate, power under Section 168 is essentially meant for officers to seek orders, instructions or directions besides the Board itself on its own passing orders, in the interest of maintaining uniformity in the implementation of the Act.

Public tenders not obliged to indicate HSN code & GST rates

- The appeal is allowed, impugned judgment is set aside and we further direct that the appellants will comply with the directions given in paragraph-61 of this Judgment. There is no order as to costs.

DA Comments:

By reversing the judgment of Honorable High Court, the major relief for PSU is not to share the RFQ and other tender documents with GST authority.

Union of India & Others Vs Bharat Forge Ltd. (Supreme Court) [SLP(C) No. 4960 of 2021]

Summary of SCN in DRC-01 cannot substitute proper issuance of SCN – High Court

Issue:

he petitioner has sought quashing of the SCN issued under Section 73 of the JGST Act, 2017 and also laid challenge to the summary of SCN issued in Form GST DRC-01 and also challenged the summary of the order issued in Form GST DRC-07.

Legal Provisions:

Section 73 (1) of CGST Act, 2017

Observation and Comments:

The Honorable High Court observed and held that:

- We may straightaway point out that notices under section 73(1) of the Act of 2017 at Annexure-1 of the respective writ petition is in the standard format and neither any particulars have been struck off, nor specific contravention has been indicated to enable the petitioner to furnish a proper reply to defend itself. The showcause notices can therefore, be termed as vague. This Court has, in the case of M/s NKAS SERVICES PRIVATE LIMITED (Supra) categorically held that summary of show cause notice in Form GST DRC-01 cannot substitute the requirement of a proper show cause notice under section 73(1) of the Act of 2017. It seems that the authorities have, after issuance of show-cause notice dated 28.08.2020 (Annexure-1) and Summary of show cause notices contained in GST DRC-01 (Annexure-2) of the same date, proceeded to issue Summary of the Order dated 12.12.2020 (Annexure-3). Respondents have also not brought on record any adjudication order.

- We are thus of the considered view that the impugned show cause notice as contained in Annexure-1 does not fulfill the ingredients of a proper show cause notice and amounts to violation of principles of natural justice. The challenge is entertainable in exercise of writ jurisdiction of this Court on the specified grounds as clearly held by the decision of the Apex Court in the case of Magadh Sugar & Energy Ltd. Vrs. State of Bihar & others reported in 2021 SCC Online SC 801, para 24 and 25. Accordingly, the impugned notice at annexure-1 and the summary of show cause notice at annexure-2 in Form GST DRC-01 is quashed. This Court, however is not inclined to be drawn into the issue whether the requirement of issuance of Form GST ASMT-10 is a condition precedent for invocation of Section 73 or 74 of the JGST Act for the purposes of deciding the instant case. Since the Court has not gone into the merits of the challenge, respondents are at liberty to initiate fresh proceedings from the same stage in accordance with law within a period of four weeks from today"

Summary of SCN in DRC-01 cannot substitute proper issuance of SCN – High Court

- Levy of penalty of 100% of tax dues reflected in the Summary of the Order contained in Form GST DRC-07 vide Annexure-34 in the writ petition is also in the teeth of the provisions of Section 73(9) of the Act of 2017, wherein while passing an adjudication order, the Proper Officer can levy penalty up to 10% of tax dues only. The above infirmity clearly shows non-application of mind on the part of the Deputy Commissioner, State Tax, Godda Circle, Godda. Proceedings also suffer from violation of principles of natural justice and the procedure prescribed under section 73 of the Act and are in teeth of the judgment rendered by this Court in the case M/s NKAS SERVICES PRIVATE LIMITED (Supra).

DA Comments:

The Honorable High Court rightly held that SCN does not fulfill the ingredients of a proper show cause notice and amounts to violation of principles of natural justice.

Roushan Kumar Chouhan Vs Commissioner of State Tax (Jharkhand High Court) [W.P.(T) No. 1849 of 2022]

Ex-Parte Order suffer from procedural infirmities and lack of proper opportunity and thus not sustainable

Issue:

On the alleged violation of Section 129 of CGST Act, 2017 read with Rule 68 of CGST Rules, 2017 as E-Way bill had expired, the vehicle intercepted and the entire proceedings starting from detention of the vehicle by issuance of Form GST MOV-06, show-cause notice in GST Form MOV-07 and the adjudication order in Form GST MOV-09 were passed on the same date. The petitioner went in appeal but lost there also and deposited the entire tax amount with interest and got the vehicle released on. Being aggrieved, writ petitioner has approached this Court.

Legal Provisions:

Section 129 of CGST Act, 2017 read with Rule 68 of CGST Rules, 2017

Observation and Comments:

The Honorable High Court observed and held that:

- A bare perusal of the provisions of Section 129 shows that no goods or conveyance shall be detained or seized without serving an order of detention or seizure on the person transporting the goods on the allegation of making transit in contravention of the provisions of the Act or Rule made thereunder.
- Apparently, the proceedings have been initiated on the same date and concluded also on the same date. Though, learned counsel for the respondent has stated that the proceedings were expedited at the instance of the tax payer on the same date, but there is nothing to substantiate such contention. The impugned adjudication order and the appellate order therefore both suffer from procedural infirmities and lack of proper opportunity to the petitioner or the person transporting to defend himself.
- As such, the impugned order and the appellate order are set aside. However, the respondents are at liberty to take a fresh decision after due opportunity to the petitioner as provided under the Act.

DA Comments:

IThe objective of introducing GST is not met when such issues still prevail and taxpayer need to go through painful legal process at check post, first appellate level and then till at Courts.

M/s. AMI Enterprises Pvt. Ltd vs UOI and others [W.P. (T) No. 2312 of 2022 at Honorable High Court of Uttarakhand). Similar judgment in the case of G. Power Solution Vs State of Bihar (Patna High Court) [Civil Writ Jurisdiction Case No.11384 of 2022 dated August 17, 2022]

GST rate determined based on nature of activity performed and not on form of agreement – AAR

Issue:

The applicant is a foreign company incorporated in South Korea and is predominantly engaged in manufacture, supply, testing, commissioning and training in respect of rolling stock. The applicant was a successful bidder to the tender invited by Delhi Metro Rail Corporation Limited ('DMRC'J for design, manufacture, supply, testing, commissioning and training of 504 Standard Gauge Cars (passenger rolling stock) including training of operation & maintenance personnel and supply of spares & manuals. The applicant entered into a contract with DMRC, vide contract No.RS-10 dated 24.05.2013, for the purpose of execution of the contract awarded.

The applicant, to undertake the scope of work as agreed in the contract, is required to supply various goods and services to DMRC in a phased manner. The detailed instructions with respect to obligations of the applicant under the contract are specified through various Cost Centres under tender documents which form part of the Contract.

In view of the above, the applicant has sought advance ruling in respect of the following questions:

- Whether the supplies made under Cost Centres D, G and H (to the extent of training services) of Contract 'RS-10' to DMRC are to be considered as independent supplies of goods and services and GST rate applicable depending upon the nature of activity performed under such cost centres?

- Whether the supplies made by all the Cost Centres of RS-10 contract of DMRC are to be considered as 'composite supply' as defined under Section 2(30) of the CGST Act, 2017 read with Section 8(1) of the CGST Act, thereby considering the supply of rolling stock undertaken under Cost Centre B and C as the principal supply and levying GST at 5% (upto 30 Sep 2019), 12% (from 1 oct 2019 till 30 Sep 2021) and 18% (with effect from 1 Oct 2021) of the entire contract value.

Legal Provisions:

Section 2(30) read with Section 8(1) of the CGST Act, 2017

GST rate determined based on nature of activity performed and not on form of agreement – AAR

Observation and Comments:

The AAR observed and held that:

- We find that the facts and circumstances brought out in the application are similar to those on which advance ruling was sought by M/s BEML, (AAR ruling KAR/ADRG 20/2020 dated 6-4-2021) Bengaluru. M/s BEML had a similar contract with M/s BMRCL. It is observed that the contracts in both the cases are for supply of rolling stock, its installation/integration and testing, training the staff etc., and the cost centres in both the cases have similar schedule of activities. The Advance Ruling Authority, Karnataka had ruled that the supplies made by the applicant under cost centres form a composite supply, wherein the principal supply is the supply of intermediate cars.

- Aggrieved by the said ruling the Asst. Commissioner of Central Tax filed appeal against the said order of the Authority for Advance Ruling, Karnataka before the Appellate Authority for Advance Ruling, Karnataka. The Appellate Authority vide order No. KAR/AAAR-08/2021 dated 03.09.2021 has set aside the ruling passed by lower authority and allowed the appeal by concluding that supplies made under cost centres C, D, E and G are to be considered as independent supplies of goods and services.

- It is learnt that M/s BMRCL, being the aggrieved party, filed an appeal against the ruling of AAAR, Karnataka, before the Hon'ble High Court of Karnataka and no Stay has not been granted. Since stay has not been granted in the said case, we are inclined to follow the observations drawn by the AAAR, Karnataka as the facts and circumstances are similar. 13. The Applicant has also relied on the said ruling of the Appellate Authority in the case of M/s BEML, also requested for the ruling in terms of the aforesaid ruling of the AAAR, Karnataka, stating that their case is also very much similar and the cost centers in both the cases have similar schedule of activities.

DA Comments:

The stay petition pending at Honorable High Court in the case of M/s BEML will further impact on the said Ruling.

In re Hyundai Rotem Company (GST AAR Karnataka)

Recovery Without Issue Of SCN – HC Directs Dept To Issue SCN

Issue:

The appellant is aggrieved by the action of the respondents in allegedly recovering tax without issuance of any order under Section 74(9) of the CGST Act, 2017. The appellant would further contend that without intimating the appellant the reason, the ITC ledger has been blocked. Therefore, it is submitted that the action initiated by the respondent department is arbitrary, unreasonable and against the provisions of the Act.

Legal Provisions:

Section 74(9) of CGST Act, 2017

Observation and Comments:

The Hon'ble High Court observed and held that:

- The respondent / department is directed to issue show cause notice to the appellant within 15 days from the date of receipt of the server copy of this order granting not less than 10 days from the date of receipt of the show cause notice to submit a reply by the appellant. It is thereafter the show cause notice shall be adjudicated and a speaking order be passed on merits and in accordance with law.

- Till the aforementioned exercise is completed, the respondent / department is directed not to initiate any coercive action against the appellant.

- With regard to the submission that the appellant's input tax credit ledger has been blocked, the same is an independent issue and cannot be considered in this writ petition. However, liberty is granted to the appellant to work out his remedies in accordance with law on the said issue.

DA Comments:

In this case, by giving instruction to issue SCN and not setting aside the proceedings by the Honorable High Court would lead to similar proceedings where the procedural infirmities will prevail.

Prasanna Kumar Thakkar Vs DGGSTI (Calcutta High Court)

Refiling of appeal allowed which was dismissed for non filing of certified copy of order – HC

Issue:

By this writ petition, the petitioner has challenged the impugned order of the appellate authority under WBGST Act dismissing the appeal of the petitioner on the ground of non-receipt of certified copy of the order which was challenged before the Appellate Authority. The petitioner submits that such dismissal is purely on technical ground and petitioner submits that down loaded copy of the order from the official website of the Authority was filed by the petitioner before the Appellate Authority, which was not accepted and petitioner being a lay person was not aware that the down loaded copy of the order is not acceptable and petitioner will have to file certified copy of the order. Petitioner submits that now the petitioner has obtained the certified copy of the order in question though Mr. Ghosh, learned Advocate appearing for the State respondents submits that the application for obtaining the certified copy of the order was made belatedly.

Legal Provisions:

Section 107 of CGST Act, 2017

Observation and Comments:

The Hon'ble High Court observed and held that:

- Considering the submission of the parties and for the ends of justice, the impugned order dated 27th April, 2022 passed by the Appellate Authority dismissing the appeal of the petitioner on technical ground is set aside and for the ends of justice petitioner is granted liberty to file fresh appeal along with the certified copy of the original adjudication order within seven days from date and if such appeal is filed by the petitioner within the time stipulated herein and after observing all statutory formalities, the same shall be considered and disposed of by the Appellate Authority on merits and without raising the point of limitation.

- With this observation and direction, this writ petition being WPA 17055 of 2022 is disposed of.

DA Comments:

The Honorable High Court rightly held that any appeal cannot be dismissed for procedural lapse and should be decided on merits of the case.

Debabrata Santra Vs Assistant Commissioner of Revenue (Calcutta High Court) [WPA 17055 of 2022]

Dismissing appeal with single line order for delay in submission is invalid

Issue:

The petitioner has challenged the impugned order passed by the revenue department on the ground that the adjudication summary does not contain any reason and specific allegation and no full text of the order along with summary order was furnished to the Petitioner at any point of time and also the Impugned order of the Respondent is a one-line order dismissing the appeal of the Petitioner on the ground of delay in submission of the appeal in question.

Legal Provisions:

Section 107 of CGST Act, 2017

Observation and Comments:

The Hon'ble High Court observed and held that:

- Considering the submission of the parties and facts as appears from record that the summary order is one line order without containing any detailed supporting reason and that the order of the appellate authority is also one line order dismissing the appeal of the petitioner on the ground of delay in filing the appeal without going into the merit of the appeal, I am inclined to dispose of this writ petition being WPA 17530 of 2022 by setting aside the impugned order of the appellate authority and remanding the matter back to the appellate authority concerned to pass a fresh speaking order in accordance with law on merit of the said appeal without insisting on the issue of limitation, within a period of eight weeks from the date of communication of this order without granting any unnecessary adjournment to the petitioner.
- It is needless to mention that at the time of disposal of the appeal in question petitioner or its authorized representative shall be given opportunity of personal hearing.
- Petitioner is further granted liberty to make appropriate application in accordance with law for refund of the amount which has been collected in excess of the pre-deposit, before the authority concerned which shall be considered by them in accordance with law.

DA Comments:

The Honourable High Court rightly held that any appeal cannot be dismissed for procedural lapse and should be decided on merits of the case.

Usha Gupta Vs Assistant Commissioner of State Tax (Calcutta High Court) [WPA 17530 OF 2022]

Introducing Single Click Nil Filing of GSTR-1

Single click Nil filing of GSTR-1 has been introduced on the GSTN portal to improve the user experience and performance of GSTR-1/IFF filing. Taxpayers can now file NIL GSTR-1 return by simply ticking the checkbox File NIL GSTR-1 available at GSTR-1 dashboard.

Eligibility to file NIL GSTR-1:

Taxpayers may file NIL GSTR-1 if they have:

a. No Outward Supplies (including supplies on which tax is to be charged on reverse charge basis, zero rated supplies and deemed exports) during the month or quarter for which the form is being filed for, or

b. No Amendments to be made to any of the supplies declared in an earlier form,

c. No Credit or Debit Notes to be declared / amended,

d. No details of advances received for services is to be declared or adjusted

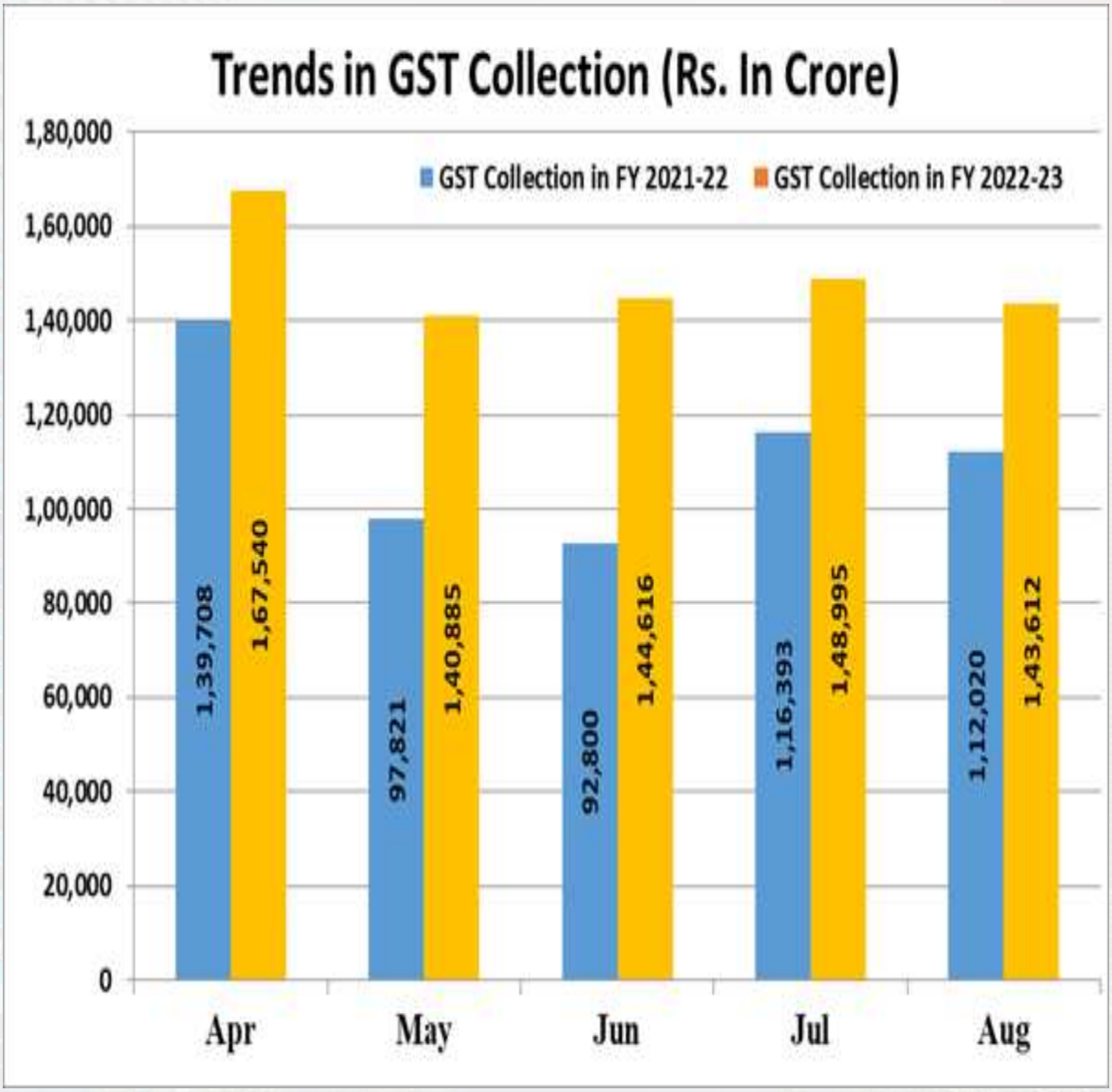
Steps to file NIL GSTR-1:

1. Select File NIL GSTR-1 checkbox:
    - In the GSTR-1 dashboard, a File NIL GSTR-1 checkbox shall be available at the top. If the taxpayer is eligible to file NIL GSTR-1, they can select the File NIL GSTR-1 checkbox. On click of the checkbox, system will show a note related to NIL filing and all the tiles/tables shall be hidden.

    - Nil filing of GSTR-1 will not be allowed in case there is already saved records in GSTR-1. The taxpayers are advised to delete already saved records or reset GSTR-1 data by clicking RESET button available on GSTR-1 dashboard before filing NIL GSTR-1.

2. File Statement: To file Nil GSTR-1, taxpayer need to click File Statement button, which shall be available at the bottom of the GSTR-1 dashboard page. On clicking of 'File Statement' button, taxpayers will be navigated to the filing page to file GSTR1/IFF using DSC/EVC.

GST Revenue Collection in July 2022- Rs. 1,43,612 Cr.



Source: PIB

- Refund of EDD should be automatic under Customs law
- Delayed Proceeding makes entire proceeding vitiated
- EPCG Scheme - Refractory bricks used for re-lining of furnace are eligible
- VAT law cannot be amended after introduction of GST regime
- Revised BCD rate not applicable to BOE presented before issuance of notification
- Concessional BCD rate available On Import Of Power Tillers – CESTAT
- Other Notifications/Circulars/Instructions

Refund of EDD should be automatic under Customs law

Issue:

The appeal has been filed against denial of refund of Extra Duty Deposit paid by them in terms of CBEC Circular No.11/2001-Cus dated 23 February 2001 relating to cases handled by Special Valuation Branch of the customs house.

Legal Provisions:

CBEC Circular No.11/2001-Cus dated 23 February 2001

Observation and Comments:

The Hon'ble CESTAT observed and held that:

- We find that the decision of Hon'ble High Court of Bombay in the case of BUSSA OVERSEAS AND PROPERTIES PVT. LTD (supra) was passed in significantly different set of facts. It is noticed that in the case of COMMISSIONER OF CUSTOMS (EXPORT) CHENNAI V/s. SAYONARA EXPORTS-2015 (321) ELT 583 (Mad.) was examining the following substantial questions of law:-
- (i) Whether the Tribunal was right in holding that the 1st respondent is entitled for automatic refund of the Extra Duty Deposit made pending finalisation of the provision assessment without filing an application for refund under Section 27 of the Customs Act, 1962?
- (ii) Whether the Tribunal is right in not considering the legal issue that there cannot be an order of refund without application and that the application should be within the time stipulated in the statute?
- (iii) Whether the extra duty deposit made by the 1st respondent partakes the character of customs duty so as to attract the provisions of Section 27 of the Customs Act?
- (iv) Whether the claim of the respondent for refund would be contrary to the decision of the Supreme Court in the case of Mafatlal Industries v. Union of India [1997 (98) E.L.T. 247 (S.C.)]?
- After examining these issues, hon'ble High Court of Madras answered the question (i),(ii) & (iv) in favor of the assessee and did not consider it necessary to answer question (iii). In terms of the decision of the Hon'ble High Court of Madras, the appellants would be entitle to automatic refund of EDD without filing of application for refund under Section 27 of the Customs Act, 1962. The Hon'ble High Court held that there is no need to file any refund application and the order for refund can be made suo moto. Hon'ble High Court also held that this issue is in conformity with the decision of Hon'ble Apex Court in the case of MAFATLAL INDUSTRIES- 1997 (98) ELT 247 (S.C.). 4.1

Refund of EDD should be automatic under Customs law

- In view of the above, the appellant was not even required to file refund claim and EDD should have been refunded without filing of refund claim. In this circumstances, if and when the refund claim was filed by the appellant cannot be treated as barred by limitation. Relying on the aforesaid decision of High Court of Madras, the appeal is allowed.

DA Comments:

The said principle of automatic refund of EDD is not followed in spirit by the adjudicating authority and leads to inordinate delay for EDD refunds.

China Steel Corporation India Pvt Ltd Vs C.C. (CESTAT Ahmedabad) [Customs Appeal No.10164 of 2019]

Delayed Proceeding makes entire proceeding vitiated

Issue:

The instant appeal challenges OIO, whereby the respondent has confirmed a demand of Customs Duty with interest thereon under Section 28(8) and 28AB of the Customs Act, 1962 upon the appellant. The respondent has also imposed a penalty of the self-same amount by virtue of the impugned order under Section 114A of the said Act on the appellant.

Legal Provisions:

Section 28(8) and 28AB of the Customs Act, 1962

Observation and Comments:

The Hon'ble CESTAT observed and held that:

Having heard the parties and having perused the record, the following issues fall for consideration and decision:

1. Whether there was an inordinate delay in completion of proceedings by the respondent and the passing of the impugned order.

2. Whether there actually was a transshipment of the imported material to the Appellant's factory in Jaipur.

3. Whether the Appellant had received the imported material and utilized the same for manufacturing export goods. Alternatively, whether there was diversion of the imported goods.

4. Whether the Appellant had disclosed the second factory to the D.R.I. where it claimed to have received the imported material and whether the A.P.E.C. registration certificate in respect of the second factory was issued after the initiation of the investigation by the D.R.I. V. Whether the impugned order deserves to be set aside.

5. Whether the impugned order deserves to be set aside.

On first and fifth issue, the Honorable CESTAT held that:

- Inordinate delay in taking the proceedings relating to a show-cause notice to its final conclusion has been held by the Bombay High Court in The Bombay Dyeing & Manufacturing Co. Ltd. v. D.C., C.G.S.T. & C.X., Mum., 2022 (2) TMI 783 at paragraph 9 to be violative of natural justice. Further, the Gujarat High Court in Sunrise Remedies Pvt. Ltd. v. U.o.I, (2019) 366 E.L.T. 994 (Guj.) has remarked at paragraph 6 that proceedings cannot be a hanging sword on an assessee without justifiable cause.
- If proceedings do not culminate within a reasonable period of time then they stand vitiated. Following these decisions, the answer to issue I should conclusively answer issue V and suffice for the admission of this appeal. The delay of over a decade here, especially when genuine efforts have been made by the Appellant to participate in them, truly violates the Appellant's right to natural justice and vitiates the entire proceeding.

Delayed Proceeding makes entire proceeding vitiated

- Thus, with all other issues answered in favour of the Appellant and with the reasons given above, the appeal is allowed with consequential relief. The impugned order is set aside

DA Comments:

The delay of over a decade truly violates the Appellant's right to natural justice and vitiates the entire proceeding.

Namdev Exports Vs Commissioner of Customs (Port) (CESTAT Kolkata) [Customs Appeal No. 78534 of 2018]

EPCG Scheme - Refractory bricks used for re-lining of furnace are eligible

Issue:

The appellant is, engaged in the manufacture of iron and steel items and uses refractory bricks/materials for lining the furnaces. A refractory brick is designed mainly to withstand high heat, but also has a low thermal conductivity to save energy.

During the disputed period, the appellant imported several sets of refractory materials/bricks for relining and also for maintenance purposes for the ARC furnace and the 60MT ladle furnace. The refractory materials were imported under the EPCG scheme covered by Chapter 5 of the Foreign Trade Policy (FTP) read with notification no. 102/2009- Cus dated 11.09.2009 and 103/2009-Cus also dated 11-09- 2009 which is related to imports at zero rate of duty under the EPCG scheme whereas 103/2009-Cus also dated 11-09-2009 relates to imports at 3% rate of duty under the EPCG scheme. Under the aforesaid two notifications the said goods were allowed to be imported at concessional rate. This is an Appeal filed against OIO passed by the Commissioner of Customs (Port), Customs House, Kolkata.

Legal Provisions:

Chapter 5 of Foreign Trade Policy

Observation and Comments:

The Hon'ble CESTAT observed and held that:

- We agree with the submission of the Ld. Advocate for the Appellants that the refractories imported by the appellants are covered by the definition of 'accessory' and, hence, included in the definition of 'capital goods'. Thus, the definition of 'capital goods' not only includes refractories for initial charge but also those imported as replacement for the purpose of re-lining or maintenance of the furnaces. The Appellants have, therefore, correctly availed the benefit of the above two exemption notifications.

- The first part of the definition of capital goods uses the term 'means'. The term 'means' is exhaustive in nature and is meant to cover all the items mentioned therein, namely, plant, machinery, equipment or accessories , as ordinarily understood, required for the manufacture or production, either directly or indirectly of goods. Refractory bricks are clearly accessories required for lining of the furnace, and hence indirectly used for manufacture of finished goods by the appellants. The use of the expression ' refractories for initial lining' in the inclusive part of the definition of capital goods does not in any way restrict the meaning of the terms used in the 'means' part of the definition.

EPCG Scheme - Refractory bricks used for re-lining of furnace are eligible

- Therefore, we hold that refractories meant for re-lining of furnaces, i.e., for replacement, are covered by the ' means' part of the definition of 'capital goods' and this interpretation cannot in anyway be restricted or controlled by the use of the expression 'refractories for initial lining' used in the inclusive part of the definition of 'capital goods'.

- In view of the above, the Appeal is allowed both on merits as well as on limitation.

DA Comments:

The coverage of EPCG scheme cannot be restricted based on assumed interpretation by adjudicating authority which is also rightly held by Honorable CESTAT.

Jai Balaji Industries Limited Vs Commissioner of Customs (Port) (CESTAT Kolkata) [Customs Appeal No.76284 of 2018]

VAT law cannot be amended after introduction of GST regime

Issue:

The writ petitioners/respondents herein have disputed the assessment notices/orders issued U/s. 25(1) of the Kerala Value Added Tax Act given for the assessment years 2010-11 and 2011-12 as without jurisdiction and competence of the Assessing Officers. The said challenge examined the competence of the Assessing Officer under amended Section 25(1) of the KVAT Act through Kerala State Finance Act Nos.11/2017 and 5/2018.

Legal Provisions:

CAA read with GST law

Observation and Comments:

The Hon'ble High Court observed and held that:

- We have taken note of the applicable amendments introduced by CAA to the Constitution of India, corresponding changes in the schedules, and taken note of the repeal of the KVAT Act and the extent of operation of Section 174 of Kerala Goods and Services Taxes Act. The legislative competence to amend KVAT Act through Finance Act 5/2018 is not established. In our view, and from the scope and scheme of powers enjoyed by the Centre and the State as regards the supply of goods and services, power to amend the KVAT Act is unavailable. The principle laid down in the A Hajee Abdul Shukoor and Company case is also applied by the Gujarat and Telangana High Courts.
- The amendment to KVAT Act by Finance Act 5/2018 is without competence. We are in complete agreement with the view taken in the judgment under appeal i.e., Baiju A A case. The two points on which the appeals are maintained are rejected.
- For the above reasons and discussions, the appeals fail and hence are dismissed accordingly.

State Tax Officer & Anr Vs. Baiju A.A (Kerala High Court) [WA NO. 48 of 2020]

Revised BCD rate not applicable to BOE presented before issuance of notification

Issue:

This Writ Petition has been filed by the petitioner being aggrieved by the action of the respondents customs authorities concerned charging enhanced rate of duty on the consignments in question on the basis of the impugned notification No. 103/2020-Customs (N.T.) dated 29th October, 2020 effective and operational from 23:18:25 hrs of 2020 by applying the same retrospectively and making prayer for quashing the impugned reassessment of bills of entry in question on the basis of which petitioner was asked to pay duty of higher tariff value for clearance of the goods in question.

Legal Provisions:

Notification No. 103/2020-Customs (N.T.) dated 29th October, 2020

Observation and Comments:

The Hon'ble High Court observed and held that:

- As per Section 15 of the Customs Act, 1962, for determination of the rate of duty and valuation of imported goods, in the case of goods in question which entered for home consumption under Section 46 of the Customs Act, not only the date on which the bills of entry in respect of the goods is presented is the only criteria rather the time of presenting the bill of entry on the said date is also an essential criteria for determination of rate of duty on the goods in question.
- Action of the respondents customs authority concerned charging at the enhanced rate of duty on the goods in question on the basis of the impugned notification no. 103/2020-Customs (N.T.) dated 29.10.2020 which was e-gazetted and digitally signed on 29.10.2020 at 23:18:25 hrs whereby Tariff Value of the subject goods was enhanced from USD 755MT to USD 782 MT is not justifiable in law since it is an admitted position substantiated by record that bills of entry relating to goods in question were already self assessed on 23.10.2020 and 26.10.2020 at the prevailing rate of duty and Entry inward was granted to the vessel in question carrying the subject goods on 29.10.2020 at 11:00 hrs which is the time prior to the time of coming into effect the aforesaid E-Gazetted Notification dated 29.10.2020 at 23:18:25 hrs.

Revised BCD rate not applicable to BOE presented before issuance of notification

- On the facts and in the circumstances of the case and in view of Section 15 read with Section 46 of the Customs Act, 1962 and in view of the law laid down by the Hon'ble Supreme Court in the case of Union of India & Ors. –Vs- G.S. Chatha Rice Mills & Anr. reported in 2020 SCC OnLine SC 770, action of the respondents customs authority charging at enhanced rate of duty on the goods in question on the basis of the aforesaid E-Gazette Notification dated 29.10.2020 by giving retrospective effect to it, is arbitrary, illegal and not sustainable in law.

DA Comments:

The Honorable High Court rightly held that the date on which the bills of entry in respect of the goods is presented is the only criteria rather the time of presenting the bill of entry on the said date is also an essential criteria for determination of rate of duty on the goods.

Ruchi Soya Industries Ltd Vs Union of India (Calcutta High Court) [WPA No. 1354 of 2021]

Concessional BCD rate available On Import Of Power Tillers - CESTAT

Issue:

The two separate appeals in two cases related to not giving concessional rate benefit of BCD (Basic Customs Duty) to power tillers:

- The first appeal is filed by BTL against the OIA passed by the Commissioner of Customs (Appeals), Kolkata, upholding assessment orders passed by the Assistant Commissioner of Customs, denying the benefit of customs duty at the concessional rate of 2.5% in terms of notification no. 12/2012- Customs dated 17.03.2012 [Sl. No. 399(X)] in respect of consignments of power tillers imported under 31 (thirty one).

- The Revenue, being aggrieved by the OIA passed by the Commissioner of Customs (Appeals), Kolkata, allowing the appeals filed by Chirag Corporation against assessments on two Bills of Entry filed for import of power tillers denying the benefit of the said notification. The Commissioner (Appeals), however, while allowing the appeal, extended the benefit under the said notification.

Legal Provisions:

Notification no. 12/2012- Customs dated 17.03.2012 [Sl. No. 399(X)]

Observation and Comments:

The Hon'ble CESTAT observed and held that:

- CTH 8432 classifies agricultural, horticultural or forestry machinery for soil preparation or cultivation, lawn or sports ground rollers. CTH 8432 8020 refers to 'rotary tiller' under the sub-heading "other machinery" (8432 80). There is no separate tariff sub-heading for 'power tiller' in the Customs Tariff. It is the contention of the importers that power tiller is nothing but a rotary tiller classifiable under CTH 8432 80. Further, explaining the changes made by the Finance Bill 2002 the clarification provided by the Central Government, under the head ' Machinery Falling Under Chapters 84 and 85 of the Customs Tariff (Other Than Electronics/IT)' clarified the changes effected by the Finance Bill.

- It has thus been made clear that power tillers are also to be classified under CTH 84.32. It has also been made clear that Circular No. 45/2001 dated 07.08.2001 had been withdrawn. Circular No. 45/2001 dated 07.08.2001, which has been relied upon on behalf of the Revenue, had clarified that "pedestrian tractors"/ "power tillers" were classifiable under CTH 87.01, whereas "rotary tillers" were classifiable under CTH 84.32. In view of the above clarification this circular no longer survives.

Concessional BCD rate available On Import Of Power Tillers - CESTAT

- We find that even the DGFT authorities have recognised that power tillers come under HS Code 8432 8020 (CTH 8432 8020). This appears from Notification No. 19/2015-2020 dated July 15, 2020 issued by the DGFT.

- Further, the coordinate Bench of the Tribunal (South Zonal Bench of the Tribunal, Bangalore), in the case of VST Tillers & Tractors Ltd. Vs. Commissioner of Central Excise (supra) has also held that Power Tillers are classifiable under CTH 84.32 of the Central Excise Tariff (which is pari materia to CTH 84.32 of the Customs Tariff). Dealing with the similar issue of classification of power tillers under the Central Excise Tariff, the Bench embarked on a comparison between tractors and power tillers as also rotary tiller and power tiller and thereafter, relying upon the decision of the Hon'ble Supreme Court in O.K. Play (India) Ltd. Vs. CCE, 2005 (180) ELT 300.

- We are in agreement with the reasonings and findings of the said decision of the coordinate Bench of this Tribunal in VST Tillers & Tractors Ltd. Vs. Commissioner of Central Excise (supra) on the clarification in respect of power tillers and rotary tillers.

- To similar effect is the declaration dated December 16, 2019 of the Chinese manufacturer of the power tillers imported by BTL. The said declaration clarifies that the primary function of a power tiller is nothing but a modified rotary tiller, inbuilt with an engine as source of power.

- From the import documents, along with declaration given by the manufacturer, it is evident that the consignments of power tillers imported by the two importers are self propelled rotary tillers where the tractive unit and the tiller make up one integral part. Thus the contention that power tillers are different from rotary tillers are based on erroneous premises and thus unsustainable. Power Tillers imported by the importers herein are therefore entitled to the benefit of concessional rate of basic customs duty of 2.5% in terms of the said notification, as per Sl. No. 399(x) of the 'Table' thereof.

DA Comments:

From the import documents, along with declaration given by the manufacturer, it is evident that the consignments of power tillers imported by the two importers are self-propelled rotary tillers where the tractive unit and the tiller make up one integral part. Thus, the contention that power tillers are different from rotary tillers are based on erroneous premises and thus unsustainable.

BTL EPC Limited Vs Commissioner of Customs (CESTAT Kolkata) [Appeal No. C/76152/2015]

Extension uploading of e-BRC for shipping bills on which RoSCTL scrip availed.

The last date for uploading of all such e-brcs, where RoSCTL scrips have been issued for shipping bills up to 31.12.2020 has been further extended till 30.09.2022.

After 30.09.2022, no further extension would be granted and action under FT (D&R) Act, 1992 may be taken by the Regional Authorities.

Trade Notice No. 16/2022-23, dated 06 September, 2022

Extension of validity of Status Certificates issued in FY 2015-16 and 2016-17

Holder Certificates issued in the FY 2015-16 and 2016-17 under the provisions of FTP 2015-20 has been extended up to 30.09.2022.

Amended para 3.20 (a) of HBP:

Validity of status certificate (a) Status Certificates issued under this FTP shall be valid for a period of 5 years from the date on which application for recognition was filed or 30.09.2022 only whichever is later.

Public Notice No. 21/2015-20, dated 05 August, 2022

Extension of date for mandatory electronic filing of Non-Preferential Certificate of Origin

The transition period for mandatory filing of applications for Non-Preferential Certificate of Origin through the e-CoO Platform has been further extended till 31st March 2023.

While the exporters and NP CoO Issuing Agencies would have the option to use the online system, the same shall not be mandatory till 31st March 2023. The existing systems of processing non-preferential CoO applications in manual/paper mode are being allowed.

Trade Notice No. 15/2022-23, dated 01 August 2022

Simplification for procedure for compounding of offenses under Customs Act, 1962

The salient features of the amendment are as follows:

i. Satisfaction of compounding authority has been limited only to verify and be satisfied that the full and true disclosure of facts has been made by the applicant;

ii. The offense under section 135AA of the Customs Act has also been made compoundable. Further, the competent authority has been mandated to grant immunity when offense is only of this type.

Circular No. 15/2022-Customs, dated 23 August 2022

Customs (Compounding of Offences) Amendment Rules, 2022

The Central Government hereby makes the following rules further to amend the Customs (Compounding of Offences) Rules, 2005, called the Customs (Compounding of Offences) Amendment Rules, 2022.

It shall come into force on the date of their publication in the Official Gazette.

Notification No. 69/2022 – customs (N.T), dated 22 August 2022

Revised Guidelines for Arrest and Bail in relation to offences punishable under Customs Act, 1962

The threshold limit (s) specified in the guidelines therein has been further streamlined in accordance revision of threshold limits for launching of prosecution in relation to offences punishable under Customs Act.

The Act does not specify any value limits for exercising the powers of arrest, it is clarified that arrest in respect of an offence, should be effected only in exceptional situations.

Circular No. 13/2022-Customs, dated 16 August 2022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- More GST rate changes likely to address inverted duty, exemptions
- Report 6-digit HSN code in GSTR-1 filed on or after 1st August 2022
- GST on Rent: Who Needs to Pay 18% GST? Govt Clears Doubts on New Rule

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