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DA TAX ALERT

INDIRECT TAX

AN E-TAX ALERT FROM

Darda Advisors LLP

December 2022
Issue: 31

GST COMPLIANCE CALENDER

GOODS AND SERVICE TAX

CUSTOMS AND OTHER

DA NEWS

PREFACE

We are pleased to present to you the thirty first 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 November 2022.

During the month of November 2022, there were certain changes under Goods and Service Tax, Customs and other; key judgments and rulings such as Justice oriented approach adopted by Hon HC to restore the GST registration, Cost of the diesel incurred for running DG Set is liable to GST, Penalty paid at check post can be adjusted with pre-deposit for filing appeal and multiple others

In the thirty first 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 November 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

Darda Advisors LLP
Tax and Regulatory Services

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GST COMPLIANCE CALENDAR

DECEMBER 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

- Justice oriented approach adopted by Hon HC to restore the GST registration Issue
- 'Mens rea' needs to be substantiated by adjudicating authority with adequate reasons
- Cost of the diesel incurred for running DG Set is liable to GST - AAR
- Penalty paid at check post can be adjusted with pre-deposit for filing appeal
- Adjudication without issuance of SCN is against the principle of natural justice
- Non-levy of GST on developed plots based on circular issued – HC
- Cryptic one liner order not sustainable and liable to be set aside
- Issuance of order by adjudicating authority pending main appeal at Court is questionable
- Other Notifications/Circulars/Guidelines/Instructions

Justice oriented approach adopted by Hon HC to restore the GST registration Issue

Issue:

The petitioner delayed in filing GST returns and could not make GST payments due to financial constraints and also due to covid-19 pandemic and accordingly SCN issued and the subsequent order for cancellation of GST registration which was appealed before first appellate authority which dismissed the appeal as condonation power not available under section 107 of CGST Act, 2017 beyond the prescribed period and accordingly challenged the order in writ petition.

Legal Provisions:

Section 107 of CGST Act, 2017

Observation and Comments:

The Honorable High Court observed and held that:

In my considered opinion, the explanation offered by the petitioner in not making GST payment and delay in filing returns and preferring an appeal deserves to be accepted and by adopting a justice-oriented approach, I deem it just and appropriate to set aside the impugned orders and direct the 2nd respondent to restore the GST registration of the petitioner, subject to payment of all dues by the petitioner.

DA Insights:

It is an welcome decision where Honorable High Court has taken justice oriented approach to provide relief to taxpayer.

M/S. Nagson And Co. vs JCCT (Appeals-Ii) and other [2022 (11) TMI 1184 - Karnataka High Court]

'Mens rea' needs to be substantiated by adjudicating authority with adequate reasons

Issue:

The case of the appellants is that a single invoice was raised by the appellant to and the goods which were to be supplied was of very huge in size and, therefore, multiple e-weigh bills raised and loaded the goods into three trucks. One of the three trucks had already reached the consignee and the other two trucks could not reach the destination within the validity of the e-weigh bills and accordingly intercepted by the authorities. The appellant had explained that there is absolutely no mens rea on their part and there was no intention to evade payment of tax. Nevertheless, the adjudicating authority had imposed full tax and penalty upon the appellants and further the first appellate authority confirmed the same and being aggrieved by the same, the writ petition is filed.

Legal Provisions:

Section 129 of CGST Act, 2017

Observation and Comments:

The Honorable High Court observed and held that:

- Unfortunately, though the order passed by the Appellate Authority is 22 pages order, there is absolutely no discussion on the question as to whether the mens rea was established.
- It is well settled that by merely using the expression "mens rea", it would not amount to concluding that there was a wilful attempt on the part of the dealer to evade the payment of tax. The concerned authority or the First Appellate Authority, is required to record the reasons in writing as to how and in what manner mens rea was established.
- Since this is lacking in the order passed by the Appellate Authority, we are of the considered view that the matter should be remanded back to the Appellate Authority for fresh consideration to decide this short issue as to whether there is any mens rea on the part of the appellants to evade payment of duty.

DA Insights:

'Mens rea' specially in check post issues are never established by authorities and leading to litigations at higher court level.

Medha Servo Drives Private Limited & Anr. Vs AC & Ors.[2022 (11) TMI 1185 - Calcutta High Court]

Cost of the diesel incurred for running DG Set is liable to GST - AAR

Issue:

The firm has entered into agreement to Install diesel Generator on hire basis for rent with reimbursement of diesel cost on usages of the DG Set and have been discharging the GST on DG Set hiring charges plus on reimbursement of diesel cost incurred for running DG Set. Based on query came from customers, the applicant sought advance ruling from AAR on GST applicability of cost of the diesel incurred for running DG Set in the Course of Providing DG Rental Service.

Legal Provisions:

Section 15 of CGST Act, 2017

Observation and Comments:

The Honorable High Court observed and held that:

- The contract entered between the applicant and the recipient is for the hiring of DG Set and is a comprehensive contract with the consideration having a fixed component and a variable component.
- There isno separate contract for supply of diesel and even single invoice is issued for the supply of rental service of DG Set although both the components are shown separately. Hence, the reimbursement of expenses as cost of the diesel, for running of the DG Set is nothing but the additional consideration for the renting of DG Set and attracts GST @18%.
- We also find that Karnataka Authority for Advance Ruling vide Advance Ruling No. KAR ADRG44/2021 dated 30.07.2021 in the similar case of M/s. Goodwill Autos, Hubbali, Dharwad has held that the cost of the diesel incurred for running DG Set in the course of providing DG Rental Service is nothing but additional consideration for the supply of DG Set on rent as per section 15 of the GST Act and hence attracts GST @ 18%.

DA Insights:

The AAR did not consider that it's a hiring services only where diesel may or may not be an obligation of seller and also such reimbursement can be on 'Pure Agent' basis to be excluded from the valuation.

M/S Tara Genset Engineers (Regd.) [2022 (11) TMI 897 - Authority For Advance Rulings, Uttarakhand]

Penalty paid at check post can be adjusted with pre-deposit for filing appeal

Issue:

The company is engaged in the manufacture of two-wheeler and four-wheeler batteries which are with a fixed period of warranty and under the warranty policy, the defective batteries are replaced free of charge during the warranty period. It is submitted that the goods seized represents replacement for defective batteries, which would be evident from the delivery challan, which says nature of transaction, Warranty FOC. However, by mistake, it is submitted that in the E-way bill, it was indicated as "outward supply". The writ petition is filed challenging the impugned proceedings under Section 129 of the TNGST Act, 2017, whereby, penalty of 200% of the alleged tax due has been imposed.

Legal Provisions:

Section 129 of TNGST Act, 2017

Observation and Comments:

The Honorable High Court observed and held that:

It is submitted that consignment shall be released on payment of penalty of one-time tax i.e., 100% tax and it is open to the Petitioner to agitate the rights finally by way of filing an appeal, if they are so advised. The learned counsel for the Petitioner submitted that they are willing to pay one-time tax for the limited purpose of release of consignment and submit that the payment of 100% of tax as penalty may be adjusted towards 25% pre-deposit for filing an appeal, which was consented to by the learned Government Advocate for the Respondents.

DA Insights:

There is urgent need for detailed instructions from CBIC in check post matters for officers so that undue hardship and business impact can be mitigated.

M/S Amco Batteries Limited vs STO (Intl.) [2022 (11) TMI 786 - Madras High Court]

Adjudication without issuance of SCN is against the principle of natural justice

Issue:

The petitioners in all these writ applications have challenged the respective summary notices in terms of GSTDRC-01 read with Rule 142 of the JGST Rules, and summary orders in Form DRC-07 respective adjudication orders and all consequential orders and also the entire adjudication proceedings and further for a direction upon the respondents to unblocked/re-credit the amount of Input Tax Credit illegally blocked / debited from the Electronic Credit Ledger of the petitioners.

Legal Provisions:

Rules 142 of CGST Rules, 2017

Observation and Comments:

The Honorable High Court observed and held that:

- Thus, it appears that admittedly, the petitioners in the respective applications have been denied of principle of natural justice. In view of the aforesaid discussion, the show cause notices in terms of GST DRC-01 read with Rule 142 of the JGST Rules, summary of orders in Form DRC-07 and respective adjudication orders and all consequential orders, are hereby, quashed and set aside.

DA Insights:

The Honorable High Court has rightfully set aside the proceedings due to absence of principle of natural justice.

M/S. Vinayak Metal And Chemicals, M/S. Shayam Udyog, M/S. Maa Ambica Bhawani Steel, M/S. Balajee Enterprises vs Commissioner [2022 (11) TMI 835 - Jharkhand High Court]

Non-levy of GST on developed plots based on circular issued – HC

Issue:

The petition filed under Article 226 of the Constitution of India is to the land allotment notices by which GST @ 12% has been levied upon the sale consideration for purchase of developed land upon the petitioners who happen to be purchasers of the said land from Bhopal Development Authority.

Legal Provisions:

Sl. No. (5) of Schedule III of the Central Goods and Services Tax Act, 2017 and circular dated 3 August 2022

Observation and Comments:

The Honorable High Court observed and held that:

- In view of the aforesaid clarification issued by the Government of India, it would be appropriate that the Bhopal Development Authority applies its mind again on the question as to whether GST deserves to be levied in given facts and circumstances or not.
- Accordingly, this petition is disposed of with direction to the Bhopal Development Authority to reconsider the question of levy of GST on the sale of developed plots to the petitioners in the light of aforesaid circular dated 03.08.2022 issued by Government of India.

DA Insights:

The recent circulars clarified number of aspects and one of the issue was on GST levy on developed plots which Honorable High Court considered on the said judgment.

Shraddha Tiwari, Surendra Kumar Shukla, Devshree Shukla, Archna Dixit, Deepikashukla vs BDA, Commissioner, Central Goods and Service Tax (CGST) Bhopal, [2022 (11) TMI 1183 - Madhya Pradesh High Court]

Cryptic one liner order not sustainable and liable to be set aside

Issue:

The main ground argued relates to the violation of principles of natural justice. The pre-assessment notice in DRC-01 and the order proceeds on the basis of the petitioner's reply filed in response to a verification of the petitioner's return in Form ASMT – 10. Admittedly, the petitioner has not responded to notice also.

Legal Provisions:

Section 74 of CGST Act, 2017

Observation and Comments:

The Honorable High Court observed and held that:

- Be that as it may, it was incumbent upon the authority under Section 74 of the Goods and Services Tax Act,2017 to have heard the petitioner in person, prior to passing of the impugned order. That apart, the impugned order rejects the explanation tendered by the petitioner vide reply dated 08.02.2022 by way of a cryptic one liner stating 'dealer reply was verified and not accepted so far'.
- The confirmation of proposals in the manner as aforesaid, leaves me in no doubt that the impugned order is liable to be set aside and I do so. Let notice be issued afresh, the petitioner heard and orders passed in accordance with law, within a period of twelve (12) weeks from today.

DA Insights:

The Honorable High Court rightly considered the petition and set aside the impugned order which are issued without any adequate reasons and only with cryptic single line justification.

Vinayaka Steels vs STO [2022 (11) TMI 1122 - Madras High Court]

Issuance of order by adjudicating authority pending main appeal at Court is questionable

Issue:

The applicant challenges the constitutionality, vires and legality of Section 28 of the CGST Act, 2017 and Circular No.87/06/2019–GST dated 02 January 2019 since, it seeks to retrospectively disallowed the transaction and carry forward of credit of Education Cess and Secondary and Higher Education Cess to the GST regime. The jurisdictional authority has issued an Order-in-Original during the pending proceedings although the request was made to keep the said SCN in abeyance. Since the OIO confirms the demand raised in the SCN, the request is made for the stay on the ground that the executive authority cannot start parallel proceedings.

Legal Provisions:

Section 28 of the CGST Act, 2017 and Circular No.87/06/2019–GST dated 02 January 2019

Observation and Comments:

The Honorable High Court observed and held that:

- On our opinion, as the Court is yet to apply its mind to the challenge which has been made before this Court and as the appeal is already statutorily provided, the applicant shall be at liberty to file an appeal and can make a request for stay of appeal.
- Any further proceedings, at the instance of the appellate authority shall be subject to the final outcome of the main matter. If the issue of limitation is the reason for hampering the chance of the applicant in preferring the appeal, let that not be raised against him.
- In the main proceedings, let the pleadings be completed, without fail, within a week's time.

DA Insights:

Since the issue of transition of cess is pending at various courts, the final decision on the same can provide conclusion on long pending issue.

Vodafone Idea Business Services Limited vs UOI [2022 (11) TMI 1267 - Gujarat High Court]

Clarification on formula for grant of GST refund in cases of inverted duty structure

Formula of refund:

Tax payable on such inverted rated supply of goods and services x (Net ITC÷ ITC availed on inputs and input services).

S. No	Issue	Clarification
1	Whether the formula prescribed under sub-rule (5) of rule 89 of the CGST Rules, 2017 for calculation of refund of unutilised input tax credit on account of inverted duty structure, as amended vide Notification No. 14/2022. Central Tax dated 05.07.2022, will apply only to the refund applications filed on or after 05.07.2022, or whether the same will also apply in respect of the refund applications filed before 05.072022 and pending with the proper officer as on 05.07.2022?	Accordingly, it is clarified that the said amended formula under sub-rule (5) of rule 89 of the CGST Rules, 2017 for calculation of refund of input tax credit on account on inverted duty structure would be applicable in respect to refund applications filed on or after 05.07.2022. The refund filed before applications 06.07.2022 will be dealt as per the formula as it before the amendment made vide Notification No. 14/2022- central Tax dated 05.07.2022
2	Whether the restriction placed on refund of unutilised input tax credit on account of inverted duty structure in case of certain goods falling under chapter 15 and 27 vide Notification No. 09/2022- Central Tax (Rate) dated 13.07.2022, which has been made effective from 18.07.2022, would apply to the refund applications pending as on 18.072022 also or whether the same will apply only to the refund applications filed on or after 18.07.2022 or whether the same will be applicable only to refunds pertaining to prospective tax periods?	The first proviso to sub- section (3) of section 54 of the CGST Act, 2017, certain goods falling under chapter 15 and 27 have been specified in respect of which no refund of unutilised input tax credit shall be allowed, where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on the output supplies of such specified goods (other than nil rated or fully exempt supplies). The notification has come into force with effect from 18.07.2022. The restriction imposed vide Notification No. Central Tax (Rate) dated 13.07.2022 on refund of unutilised input tax credit on account of inverted duty structure in case of specified goods falling under chapter 15 and 27 would apply prospectively only. Accordingly, it is clarified that the restriction imposed by the said notification would applicable in respect to all refund applications tiled on or after 18.07.2022, would not apply to the refund applications filed before 18.07.2022.

Circular No 181/13/2022-GST, dated 10th November 2022

Central Goods and Services Tax (Third Amendment) Rules, 2022

Amendment made in GSTR 9 to incorporate the extension of due date of claiming Input Tax Credit to 30th November.

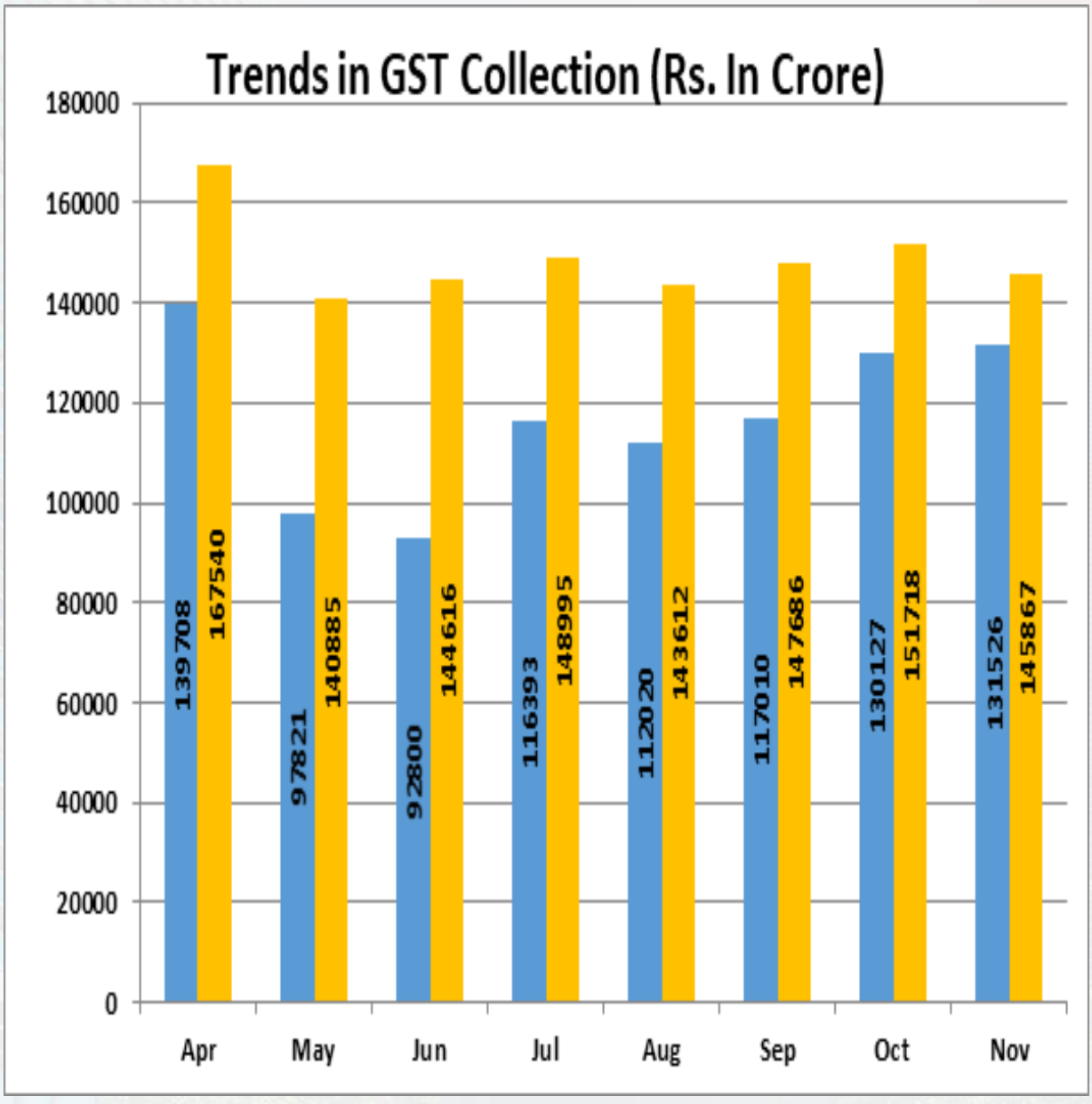
Notification No. 22/2022- Central Tax (Rate), dated 15th November, 2022

Now Competition Commission of India to examine Anti-Profiteering

CBIC notifies Competition Commission of India to examine whether input tax credits availed by any registered person or the reduction in the tax rate have actually resulted in a commensurate reduction in the price of the goods or services or both supplied by him.

Notification No. 23/2022- Central Tax (Rate), dated 23rd November, 2022

GST Revenue Collection in November 2022- Rs. 1,45,867 Cr.



Source: PIB

- Revised rate of duty applies to bills of entry presented after uploading of Notification in e-Gazette form
- Recovery of demand not allowed when appeal has been restored and pending
- Social Welfare Surcharge (SWS) not applicable where BCD is Nil
- Refund allowed on IGST paid on goods imported under EPCG scheme
- Other Notifications/Circulars/Instructions

Revised rate of duty applies to bills of entry presented after uploading of Notification in e-Gazette form

Issue:

The petitioner filed writ petition against the reassessment of bills of entry as it is a non-speaking and unreasoned order coupled with the fact that it is contrary to the provisions of Section 17 (5) of the Customs Act, 1962 and also increased customs duty rate vide notification No.29/2018-CUS dated 01 March 2018 which was published on 6 March 2018 is not applicable for relevant bill of entries as notification is effective when the same is published in e-gazette form.

Legal Provisions:

Section 17 (5) and section 46 of Customs Act, 1962

Observation and Comments:

The Honorable High Court observed and held that:

- What is effective date of Notification is a question no longer res integra. The Apex Court in case of UNIONOF INDIA VS. G.S. CHATHA RICE MILLS, reported in 2020(374) E.L.T. 289 (SC) was to decide whether Notification No.5 of 2019-CUS dated 16.02.2019, which was uploaded on e-Gazette on 16.02.2019 at20:46:58 hours are to be made applicable to the bills of entry presented for home consumption before such Notification was uploaded. The Apex Court held in categorical terms that the revised rate of duty applies to bills of entry presented subsequent to uploading of Notification in e-Gazette form.

- Resultantly, these petitions are allowed quashing and setting aside the orders of re-assessment of the bills of entry and also directed to refund the differential amount being the duty paid by petitioner vide bill of entries within a period of eight weeks from the date of receipt of a copy of this order, with interest at the rate of 6% p.a. from the date of deposit till the date of payment. The order of appeal is also quashed and set aside, and appeal stands disposed in aforesaid terms.

DA Insights:

When the issue is well settled at Apex Court, the same needs to be followed in spirit by adjudicating authorities to avoid undue hardship to assessees.

Adani Wilmar Limited vs UOI [2022 (11) TMI 764 - Gujarat High Court]

Recovery of demand not allowed when appeal has been restored and pending

Issue:

The petitioner applied for refund claim which respondents have allowed on merits. However, instead of disbursing the same to petitioner, respondents have suo-moto adjusted the said refunds against a demand confirmed against petitioner vide Order-in-Original against which the appeal was filed before CESTAT. Since appellant (petitioner) had already paid (well in excess of 7.5% of the total demand imposed vide Order-in-Original) during the investigation proceedings, no separate stay application was filed by petitioner. The balance demand of duty, penalty, and interest stood automatically stayed in terms of Section 129E and the circular dated 16 September 2014.

Legal Provisions:

Section 129E of Customs Act, 1962

Observation and Comments:

The Honorable High Court observed and held that:

- Since the appeal of petitioner has been restored to the CESTAT, no recovery in excess of 7.5% of the duty in dispute can be made by respondents.

- Hence, we quash and set aside the impugned orders in so far as they appropriate the refunds of petitioner against the demand imposed by Order-in-Original. Consequentially, respondents are directed to refund together with applicable interest, within eight weeks from the date of uploading of the order.

DA Insights:

Without considering the legal provisions and clarifications issued, the adjudicating authority adjusted the refund claims of the assessee which is rightly quashed by the Honorable High Court.

Ingram Micro India Private Limited vs UOI And Anr. [2022 (11) TMI 1161 - Bombay High Court]

Social Welfare Surcharge (SWS) not applicable where BCD is Nil

Issue:

The Bill of Entry was assessed with BCD and ACD at zero/nil. However, notionally assessed SWS at 10% of the BCD. The petitioner's case is that if the BCD is Nil whatever may be the percentage of SWS, the amount will also be Nil because anything multiplied by zero is zero which has been confirmed in Circular No.3/2022-Customs dated 1st February 2022.

Legal Provisions:

Notification No. 24/2015-Customs dated 08 April 2015

Observation and Comments:

The Honorable High Court observed and held that:

- It has been clarified in the circular that where the SWS applied is at percentage of the aggregate of customs duty payable on import of goods and not on the value of imported goods, the SWS shall be computed on the percentage of value equal to Nil (as aggregate amount of customs duty payable is zero).
- The fact that the goods imported under the concerned Bill of Entry has been cleared with Nil BCD is not disputed. Therefore, in our view if the SWS is payable at 10% on BCD but where the BCD is Nil, SWS shall also be computed Nil.
- Respondents are directed to re-credit the refund of Notional Social Welfare Surcharge in the duty credit scrips in the goods imported by petitioner within 8 weeks from the date of receipt of copy of this order.

DA Insights:

There are number of instances where SWS was applied even when BCD is Nil and clarification issued in February 2022 and such judgments provide further relief.

La Tim Metal & Industries Limited vs UOI And Ors. [2022 (11) TMI 1099 - Bombay High Court]

Refund allowed on IGST paid on goods imported under EPCG scheme

Issue:

The writ petition filed against the payment of IGST on import of capital goods under EPCG scheme during 1 July 2017 to 12 July 2017 and to declare the provisions of Section 3(7) of the Customs Tariff Act, 1975, Section 5 and Section 7(2) of the IGST Act, 2017 as unconstitutional being violative of Article246/ 246A/269A of the Constitution of India and allow refund of IGST paid.

Legal Provisions:

Section 3(7) of the Customs Tariff Act, 1975, Section 5 and Section 7(2) of the IGST Act, 2017 and Notification No.16/2015-Cus dated 1 April 2015

Observation and Comments:

The Honorable High Court observed and held that:

- Since we have held that the amendment to Notification No.16/2015-Cus dated 1st April 2015 was clarificatory/curative in nature, consequences have to follow inasmuch as Petitioner will be entitled to refund of the IGST paid by Petitioner. The refund shall be processed and paid together with interest, if any, within four weeks of Petitioner reversing the entries of availment of the subject credit and debiting the said amount from the credit ledger.
- We also clarify, should any amendment to the bill of entry is required, Customs Authority shall permit such amendment.

DA Insights:

The initial period during GST implementation had all such issues which is now being addressed at Court levels.

M/S. Sanathan Textile Pvt. Ltd. Vs UOI & Anr [2022 (11) TMI 1046 - Bombay High Court]

Integration of ICEGATE with AQCS-ICS effective 01.12.2022

To further enhance SWIFT, the Digital Import Clearance System of AQCS-ICS has been developed by AQCS for purposes of improved functioning. This would enable migrating from Online NoC through ICES to online message exchange mode, similar to that of FSSAI and PQMS. The AQCS-ICS has been introduced from 01.12.2022.

Circular No. 24/2022-Customs, dated 28th November 2022

Govt permit exports benefits/ fulfilment of Export Obligations for Invoicing, payment and settlement of exports and imports in INR

Export benefits can now be realized both in freely convertible currency and also in Indian Rupees to be eligible for all benefits under various export schemes

Notification No. 43/2015-20- DGFT, dated 9th November, 2022

Amendment in rules of the Work from home of the SEZ units

1. A unit may permit its employees to work from home or from any place outside the Special Economic Zone.
2. The employees covered under this rule include employees of units providing IT and IT enabled services, those temporarily incapacitated, travelling and working offsite.
3. The unit has to intimate the Development Commissioner about the permission for work from home.
4. The unit has to maintain a list of employees permitted to work from home and submit it for verification if required.
5. The work to be performed by the employee must be related to a project of the Unit and export revenue must be accounted for.
6. The unit may provide duty-free goods including laptop, desktop and other electronic equipment needed by the employee.
7. The duty-free goods must be brought back into the Special Economic Zone within the specified period or duty applicable on such goods shall be paid by the Unit.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Goods and Services Tax

- Centre mandates CCI to check GST- related profiteering
- GST on online gaming, casinos, racing: issues in the debate
- Finally, clarity coming soon on GST on crypto
- Big Agenda at 48th GST Council Meeting

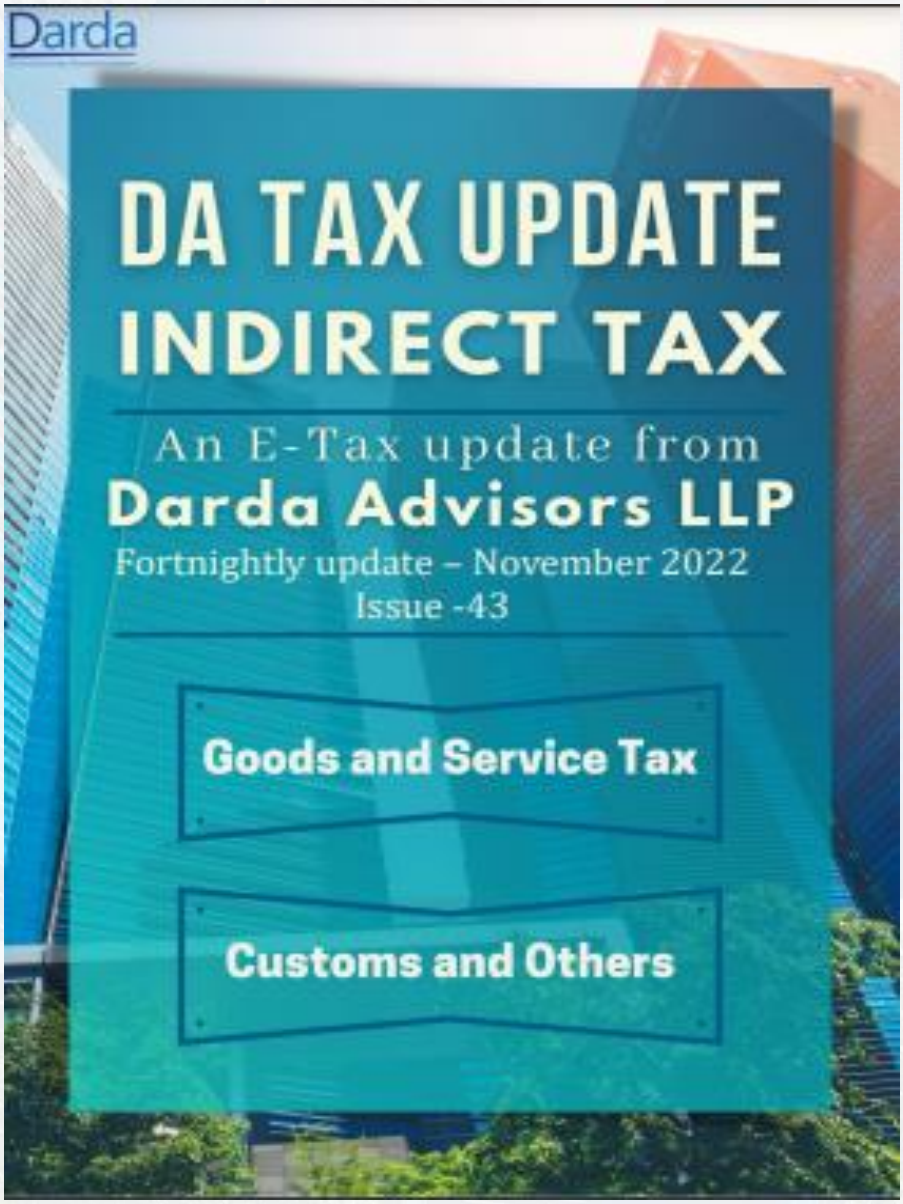
Customs and other

- Web-Based System for Faster Export Consignment Clearance Likely to Roll Out Next Year
- India, Australia free trade agreement to come into force from December 29
- Tax Authority tightens nose on invoicing from Chinese firms
- Seizure activity in full flow at various ports
- Importers waiting for clarity on expanded scope of IGCRS Rules

DA Updates and Articles for the month of November 2022

Indirect Tax Fortnightly Update for the month of November 2022

https://dardaadvisors.com/indirect-tax-alert/da-indirect-tax-fortnightly-update-_-november-2022/



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