**BOMBAY CHAMBER OF COMMERCE AND INDUSTRY**

**PRE–BUDGET MEMORANDUM 2022-2023 - INDIRECT TAXES**

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**PRE-BUDGET MEMORANDUM 2023-2024**

**GOODS AND SERVICES TAX (GST)**

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| --- | --- | --- | --- |
| **Sl. No.** | **Subject** | **Rationale** | **Recommendation** |
|  | **Rationalization of GST rates to reduce dispute on classification** | * There are seven (7) rates of GST for goods, viz. 0%, 0.25%, 3%, 5%, 12%, 18%, and 28%; for services, there are five (5) rates viz. 0%, 5%, 12%, 18% and 28%. Besides, there is a Compensation Cess on some select supplies.
* Under GST, taxpayers are finding it difficult to pay the proper taxes due to multiple tax rates. If tax is paid at a lesser rate, there will be an upside differential tax along with interest and penalty. On the other hand, if tax is paid at a higher rate, the business may become uncompetitive compared to its peers, who classify the supply at lower rates.
* Industry is approaching AARs to address the rate ambiguity, which involves cost and, at times, is time-consuming. Also, there are instances where AAR of different states has pronounced different rulings for the same supply. This increases confusion among the trade and industry.
 | * The Chamber recommends shifting to a three-tier rate structure of 8 percent (merit rate) – 15 percent (standard rate) and 30 percent (demerit rate) by merging 12 percent and 18 percent into a 15 percent slab and increasing the demerit rate from the current 28 percent to 30 percent.
 |
|  | **ITC eligibility where Place of supply (POS) is in another state** | * Tax collected by the State where the goods or services are consumed is retained by that State only; therefore, an entity registered in another state cannot claim the credit of the same. This applies to all those transactions where the POS is in a different state than the location of the recipient.
* However, in case of an intra-state supply of goods and services, Central Goods and Services Tax (CGST) portion is retained by the Central Government and forms part of the consolidated fund of India. Since Central Government collects taxes, credit of the same could be allowed irrespective of whether the taxpayer is registered in the particular State.

Example: The employees of a company travel across India, and it is not possible to obtain GST registration in each State. Thus, the tax paid on hotel accommodation service becomes cost to the Company. | * The Chamber recommends that a suitable mechanism be introduced to allow ITC of GST (CGST) in such cases to the businesses.
 |
|  | **Transfer of Integrated Goods and Services Tax (IGST)/ CGST/ cess credit balance between registration having same PAN** | * There are many instances where the taxpayer has enough credit balance in one State but needs to discharge tax liability in cash in other states. This negatively impacts the working capital of the business.
* Further, vide Finance Act 2022, provisions related to the transfer of unutilized balance in CGST and IGST cash ledgers have been allowed to transfer between distinct persons with effect from 5 July 2022.
* Also, Rule 10A of CENVAT Credit Rules, 2004 allowed the transfer of CENVAT balance of Special Additional Duty (SAD) lying with any of the registered premises to any other premises of the same manufacturer who have a common PAN.
 | * The Chamber recommends that taxpayers be allowed to transfer the credit balance of IGST, CGST, and compensation cess from one registration to another (i.e., between registrations with same PAN) as allowed under pre-GST era.
* Also, cash balance of the compensation cess should be allowed to be transferred between distinct persons.
 |
|  | **Allowing refund of GST on input services in case of inverted tax structure** | * Section 54(3) of the CGST Act, 2017 states that a registered person may claim refund of any unutilized input tax credit (ITC) only in cases of zero-rated supplies made without payment of tax and supplies involving inverted rate structure.
* Section 54(3) of CGST Act allows refund in case of inverted duty structure where the rate of tax on inputs is higher than the rate of tax on outward supplies. Rule 89(5) of CGST Rules provides that in case of refund on account of inverted duty structure, Net ITC in respect of which refund can be availed shall be restricted to inputs only.
* Further, the Central Government, in "Medium Term Fiscal Policy Cum Fiscal Policy Strategy Statement" of the 2019 budget presented under the Fiscal Responsibility and Budget Management Act, 2003, has indicated in long-term proposals that refund of input services to be allowed as part of refund of ITC accumulated due to inverted duty structure.
* Recently, GST Council has partly addressed the issue by modifying the formula suggested by SC. However, complete relief is likely to be obtained when input service is also considered for refund purposes.
 | * Chamber suggests that Section 54(3) of CGST Act and Rule 89(5) of CGST Rules be amended to allow seamless refunds in case of inverted duty structure for both inputs and input services.

  |
|  | **ITC reversal in case of Mergers and Acquisitions** | * Mergers and Acquisitions (M&A) have increased over the years as companies look at synergizing in a dynamic economic environment.
* Under GST, since services by way of business transfer of a going concern is exempt, ITC is not available in respect of goods and services procured for such business transfer like consultation and legal service, due diligence services, etc.
* Further, there is an ambiguity as to whether the consideration received for business transfer should form part of exempt turnover for calculating ITC reversals. Such inclusion results in an absurd situation where a huge amount of ITC will become a cost for the Company. The intention of the legislature may be different.
 | * Chamber recommends that necessary amendments be made for eligibility of ITC and non-reversal of common credit in case of business transfer arrangement.
 |
|  | **Tax deduction at source (TDS)** | * The GST law requires certain persons, like Government departments, PSU, etc., to deduct tax at source @ 2% (1% CGST and 1% SGST) while paying suppliers. Such a provision was originally inserted to expand the tax base and put a check on tax evasion. However, it led to the blockage of working capital in the hands of the suppliers.
* GST law has evolved, and with data analytics in place. Further, with the introduction of e-invoicing mechanism, proper tracking of transactions is possible. Hence, TDS provision does not serve its intended purpose.
 | * The Chamber recommends that since GST law has enough checks and balances to eliminate tax evasion, the provision of TDS should be omitted.
* For all such contracts which currently attract TDS, a condition should be inserted that only the registered suppliers can bid for the contract. Once the suppliers are registered, they become tax compliant; hence, the need for tax deduction at source will not arise.
 |
|  | **Allow refund of GST claimed on capital goods to exporters supplying under Letter of Undertaking (“LuT”)** | * While exporters can claim refund of accumulated ITC of GST paid on input & input services, GST paid on capital goods is not allowed to be claimed as a refund as per Rule 89(4).
* Further, the exporter who opts for payment of IGST on zero-rated supply can utilize ITC of GST paid on capital goods. This brings disparity between the exporters opting for the LUT scheme and the exporters opting for payment of GST. Service exporters cannot utilize the available ITC on capital goods since most of their output is zero-rated. This impacts the working capital requirements of the exporters.
* Further, GST Council considered the proposal to provide refund of capital goods for exporters with aggregate turnover up to 30 crores in the 39th Meeting held on 14 March 2020. The item was discussed to improve India's ranking in the 'Paying Taxes' category of World Bank's 'Ease of Doing Business index, where India has been scoring 'NIL' without any provision to allow cash refund of ITC on Capital Goods. Then, it was estimated that the said proposal would result in an additional outflow of INR 15,000 Crores for a jump of 7 ranks. Considering the Government's financial situation at that point in time, the said proposal was not agreed.
* Allowing refund of capital goods for exporters under LUT would also improve the World Bank's ease of doing business rankings.
 | * Chamber recommends that GST paid on procurement of capital goods should also be allowed as a refund for export of goods or services under LUT.
 |
|  | **GST ITC eligibility on construction/renovation of immovable property which is used for business purposes** | * As per Section 17(5)(c) and (d) of CGST Act, ITC shall not be available on:
* Works contract services in respect of immovable property except where it is an input service for further supply of works contract service; or
* goods or services used for the construction of an immovable property on his account, including when such goods and services are used in the course of furtherance of business.
* Further, ITC is restricted in case of works contract services only to the extent expenses are capitalized, as per accounting standard renovation of building such as office interior works are capitalized along with the building, and therefore, such credits are disallowed.
* Denial of ITC when used for construction/renovation works of immovable property on own account, although the same is used in the course or furtherance of business, is against the philosophy of the GST law, which is aimed at reducing the cascading effect of taxes.
* Allowing ITC where building is used in the course or furtherance of business (i.e., generating income liable to GST), such as renting, will keep the tax chain intact and serve the purposes of equity.
* Additionally, it is an indisputable fact that immovable properties such as factory sheds, machine foundation, office premises, residential quarters, etc., are an integral part of business and have a direct nexus with the functioning of the business.
* While credit may not be allowable if the immovable properties are intended for personal or non-business purposes, there appears to be no justification for disallowing credit on the construction/renovation of the immovable property exclusively for business purposes.
* Also, there have been advance rulings wherein it has been observed that leasing of land for the construction of an immovable property (such as hotels, commercial establishments, and warehouses) is also regarded as services for construction and restriction under Section 17(5)(c) of CGST Act is made applicable on GST paid on leasing of land.
* Hence, there is a need to omit the provision of Section 17(5)(c) and (d) of CGST Act to allow ITC for construction/renovation of immovable property where such immovable property is intended to be used in the course or furtherance of business.
 | * Chamber recommends that Section 17(5)(c) and (d) of CGST Act should be omitted with retrospective effect.
 |
|  | **GST ITC eligibility on expenses incurred toward Corporate Social Responsibility ('CSR')** **activities** | * As per Section 135 of the Companies Act 2013, a company is required to spend at least 2% of its average net profit for the immediately preceding three financial years on CSR activities subject to its turnover / net worth / net profit crossing prescribed limits.
* Some of the significant expenditures covered under Corporate Social Responsibility activities are:
	+ Providing education
	+ Promoting gender equality
	+ Projects related to rural development
	+ Contribution to PM Cares Fund
	+ Contribution towards the protection of the environment
	+ Promotion of healthcare, preventive healthcare, and sanitation activities related to COVID-19
	+ Events related to disaster management, including relief activities
* Companies incur expenses for procuring goods and services while undertaking CSR activities. Since CSR is a business activity mandated by the Companies Act, ITC of GST paid on supplies procured during the said CSR activities should be allowed.
* Divergent rulings have been pronounced on this topic. Further, rulings against taxpayers are on the ground that CSR activities, as specified in Companies Act, are not in the normal course of business and thus not eligible for ITC under GST.
* Further, Entry 1 of Schedule I treats permanent transfer or disposal of business assets where ITC has been availed on such assets as supply, even if made without consideration.
* In this connection, the goods distributed while undertaking CSR activities should not be considered supply attracting GST in terms of the said entry.
 | * Chamber recommends that suitable clarification be issued to clarify that goods or services which are procured in the course of CSR activities should be considered to have been incurred in the course or furtherance of business or commerce for GST purpose and that restrictions under Section 17(5) of CGST Act should not apply for claiming ITC.
* Also, Chamber recommends that the goods distributed as a part of CSR activities should not be treated as outward supply attracting GST in Entry 1 of Schedule I of the CGST Act.
 |
|  | **Tax Collection at Source** | * E-commerce entities must collect tax at source where the suppliers are making taxable supplies through the portal. Such an amount is credited to the cash ledger of the supplier and can be either utilized for payment of output tax liability or claimed as a refund. The current rate of TCS is 1% (IGST) or CGST and SGST (0.5% each). There is a need to ease the working capital of the industry, which is adversely impacted and trying to recover owing to the recent pandemic.
* Registered suppliers exporting through e-Commerce platforms suffer a TCS of 1 percent since GST law does not exclude zero-rated export supply from the TCS levy. This affects their working capital and adversely impacts their competitiveness.
 | * The Chamber recommends that the rate of TCS should be reduced to 0.1%.
* Further, the Government should make necessary amendments to remove the TCS levy on zero-rated supplies.
 |
|  | **Reverse charge mechanism (RCM) on sponsorship services**  | * Sponsorship Services provided by any person to a body corporate or partnership firm is taxable under RCM. However, the supplier cannot claim credit attributable to such sponsorship services provided, even if such services are liable to GST. This results in a loss of legitimately available ITC.
* Merely changing the person responsible to deposit the GST should not break the otherwise seamless GST ITC chain.
 | * Chamber recommends that the sponsorship services may be taxed under forward charge. This will enable the supplier to claim ITC.
* Further, if the above is not possible, the same should not be considered as an exempt supply in the hands of the supplier for ITC reversal.
* Alternatively, applicability of RCM should be restricted to such services provided only by services providers other than corporates.
 |
|  | **Relaxation in reversal of GST ITC for transactions in securities for life insurance, general insurance, and health insurance companies** | * Life Insurance Companies invest in securities as a statutory obligation to provide life insurance services. In the case of Shriram Life Insurance Company Limited, CESTAT Hyderabad has held that no reversal of CENVAT credit is required for statutory investments mandated under IRDA.
* Explanation to Chapter V of CGST Rules states that for determining the value of exempt supply under section 17(3) of the CGST Act, the value of security shall be taken as 1 percent of the sale value of such security.
 | * The Chamber recommends that the obligation of proportionate reversal of common ITC to the extent they pertain to the transaction in securities in the case of life insurance, general insurance, and health insurance business should be removed.
 |
|  | **Health insurance companies be allowed to avail ITC on the cost of medicine/room rent reimbursed to its policyholders.** | * Cost of medicines is a major component incurred by health insurance companies towards reimbursement of Mediclaim policies. Further, room rent over INR 5,000 per day is subject to GST from 18 July 2022. However, insurance companies cannot avail ITC of medicines and room rent charges as hospitals and pharmacists issue the invoices in the insured person's name, i.e., the patient and not the insurance company.
* Claim towards Health Insurance policies can be done either by cashless or reimbursement model. In both cases, invoices are generated by hospitals and pharmacists in the name of the insured person/patient.
* All the condition to avail ITC under Section 16 of CGST Act is fulfilled by the insurance company's policyholder, i.e., invoice is in the name of the insured person, medicine/room is received, and the insured person makes payment. Before finalizing the claim, the insurance company also ensures that invoices are in the policyholder's name and expenditure is incurred based on doctor advisory and treatment. The only exception is pharmacists and hospitals will raise B2C invoices that will not be reflected in GSTR-2B of the insurance company, thereby denying ITC claim to the health insurance company.

 * Non-availability of ITC of GST paid to Hospitals and pharmacists is adding to the insurance company's cost. However, the same is incurred for providing output service to the policyholders.
 | * The Chamber recommends Health Insurance companies be allowed to avail ITC for claims settled towards the cost of medicines and room rent charges for its policyholders by amending the condition laid down under section 16 of CGST Act.
 |
|  | **Health and fitness companies must be allowed to avail ITC on expenditure incurred for further supply of health and fitness service.** | * Under section 17(5)(b)(ii) of the CGST Act, ITC is not allowed for membership of a club, health, and fitness centre.
* This has impacted fitness companies as they are not eligible to avail ITC of inward supplies although engaged in the further supply of similar services, i.e., health and fitness services to its members.
* Generally, the fitness industry works on membership and subscription model. Members subscribe to fitness company health and wellness schemes.
* Based on subscription, members will have access to reputed fitness centres / gyms across major cities of India with the added advantage of a digital-based wellness app and health experts.
* Fitness companies tie up with health and fitness centres across major cities of India and pay them membership fees and other charges with GST.
* To promote the fitness industry and give importance to health and fitness services Government must allow ITC on such input and input services.

  | * The Chamber recommends amending section 17(5)(b)(ii) of CGST Act to allow Health and fitness Company to claim ITC in respect of inputs and inputs services which is used for further supply of similar services.
 |
|  | **ITC of premium paid by the employer towards group medical and life insurance policies of their employees** | * Under section 17(5)(b)(i), ITC is not allowed in the case of Life Insurance, Health Insurance except where it is obligatory for an employer to provide the same to its employees under any law for the time being in force.
* Covid 19 Pandemic has created an awareness about ensuring life and health of an individual. Also, companies providing insurance coverage to their employees were able to mitigate business risk and give employees a sense of belongingness to the Company.
* It is time Govt. promotes insurance coverage for employees of all sectors by allowing employers to avail ITC of GST paid towards their employees under group insurance policies, considering India has the lowest penetration of insurance coverage.
* The insurance sector plays a crucial role in the development of any economy; the fund generated by the insurance company is invested in infrastructure and development project, thereby generating employment and a better economy.
* Premium paid by the employer for its employees is for business purposes.
 | * The Chamber recommends bringing in an amendment in section 17(5)(b)(i) of CGST Act, allowing ITC of group medical and life insurance policies taken by the employer for their employees irrespective of whether the same is statutorily required or not.
 |
|  | **Allow payment of tax for RCM through ITC** | * As per section 9(3) of CGST Act read with the Notification issued thereunder, recipient of specified services is required to pay GST under RCM. Further, as per section 49(4) of CGST Act read with section 20 of the IGST Act, the amount available in electronic credit ledger is allowed only for payment of output tax, and output tax has been defined u/s. 2(82) specifically to exclude payment under reverse charge. Thus, the service recipient is required to discharge GST liability under reverse charge only through cash.

 * Service exporters cannot utilize the available ITC since most of their output is zero-rated. Moreover, the requirement of payment of cash to discharge such tax liability under "reverse charge" basis inflates the pool of unutilized ITC already available with the exporter. Such tax payment in cash impacts the working capital requirements of the exporters, eventually increasing the export cost.
 | * The Chamber recommends section 49(4) of CGST Act, along with relevant rules to allow payment of RCM through ITC.
 |
|  | **Constitution of GST Appellate Tribunal** | * Constitution of the GST Tribunal is still pending, due to which appeals against the first appeal/revisionary authority order have been pending for a long time.
* In all such cases, assesses would have deposited 10% of the demand amount as pre-deposit as per section 107 of the CGST Act.
* In case unfavorable order is passed against the taxpayer, the same becomes a binding precedent for subsequent periods. Taxpayers are forced to pay an additional amount of pre-deposit for all subsequent periods.
* This causes additional financial & administrative burden on taxpayers until appeals are pending.
* Further, writ petitions were filed by taxpayers against the orders of Appellate Authority / revisionary authority resulting in Courts questioning the Government on non-constitution of the GST Tribunal.
 | * The Chamber recommends that immediate measures be taken to constitute the GST Appellate Tribunal as early as possible.
 |
|  | **Methodology for determining whether benefit of reduction in rate of tax or ITC has been passed on to the recipient – Anti Profiteering Mechanism** | * While it is true that the anti-profiteering law in India has been enacted to safeguard the interests of consumers, it is creating challenges, uncertainty, and undue hardship to businesses due to lack of clearly laid down guidance or rules for compliance with anti-profiteering measures.
* While the word “Commensurate Reduction” is used, its meaning and how such reduction will be operationalized are not provided. There are many unanswered questions raised / challenges faced by the business community, few examples:
* At what level should the anti-profiteering computation be made – at product/ segment / business vertical/company level
* How to change MRPs if products are already at the retail store or with stockist
* How change in prices on account of an increase in the cost of raw materials or due to economic factors (such as transportation, competition pricing, warehousing cost, etc.) should be considered in arriving at anti-profiteering-related calculations
* Difficulty in justifying the regular price increase
* Conflicting with Legal Metrology laws which mandates rounding off MRP
* Further, the absence of a specific time limit for the operation of the anti-profiteering provisions makes it unclear for the industry how long the specified benefits need to be passed on, especially in situations where their overall cost may have increased due to various commercial factors.
* Businesses in various sectors have received notices under anti-profiteering provisions, and numerous investigations are being conducted by National Anti-Profiteering Authority (NAA). Many such investigations/notices have resulted in orders where businesses have been found guilty of not passing benefits to consumers, and the Companies have filed writ petitions against such orders. All these petitions seek to address the constitutional validity of the anti-profiteering law without any methodology to calculate profiteering.
* International experience indicates that lawmakers laid down the guidelines and various communication strategies for proper compliance with anti-profiteering. The guidelines were released before introduction of the GST, which is not the scenario in India where the industry is still waiting for a set of complete guidelines for the proper mechanism in respect of identification of the profiteer & profiteering.
 | * Government should consider issuing a detailed, comprehensive methodology and procedure to compute the commensurate benefits - specific guidelines may be issued dealing with industry-specific concerns. A definite methodology to calculate, considering industry practices, the profiteering is expected to avoid ambiguity and litigation thereafter.
* It is requested to bring a lot more clarity on various related issues, including the ones highlighted, to make compliance with the anti-profiteering provisions smooth, certain, and hassle-free. Volume benefit (grammage increase / increased quantity) offered at the same price, impact of discount or promotional schemes, etc., should also be considered as passing on the benefit instead of only price reduction.
* Further, it is suggested to make relevant changes in the law/rules to the effect that till methodology is formulated to compute profiteering, cases should not be made/adjudicated by NAA.
* It would be prudent to have a time duration specified under law/ guidelines to take corrective actions on account of rate changes. Companies should be allowed a fair duration over which the benefit has to be passed on rather than a specific date.
* One step may be to adopt a soft approach vis-à-vis the businesses where there is no prima facie mala fide intent. This would go a long way in building confidence and trust among businesses.
 |
|  | **Allowing ITC of GST paid on advances for services** | * As per section 13(2) of CGST Act, the liability to pay GST for services is trigged on receipt of advances by the supplier. Further, as per explanation to section 13(2) of CGST Act, supply shall be deemed to have been made to the extent it is covered by the payment, i.e., advance.
* However, as per section 16(2) of CGST Act, one pre-condition for claiming ITC is that the recipient of services should have received services.
* The said restriction read with time restriction placed on taking credit under section 16(4) of CGST Act would cause operational difficulties to capital-intensive businesses due to projects having a long gestation period comprising advance payments. There doesn't seem to be any revenue leakage if ITC is allowed to be claimed on advances for services in the hands of the recipient.
 | * Chamber recommends that section 16(2) of CGST Act be amended to allow service recipients to claim ITC of GST paid on advances.
* The above can be achieved through the insertion of an explanation in section 16(2)(b) of CGST Act to provide that services shall be deemed to have been received to the extent it is covered by advance, similar to section 13(2) of CGST Act.
 |
|  | **Communication of details of inward supplies and ITC** | * As per amended section 38 (effective 1 October 2022), ITC shall be denied to the recipient for various defaults by the supplier. Such defaults include:
* Non-payment of tax by the supplier
* Availment of credit in excess of eligible credit
* Utilization of ITC in excess of the prescribed limit
* Tax payable basis GSTR-1 is more than the tax paid in GSTR-3B
* The recipient is likely to have a nightmare claiming credit if these restrictions are imposed for reasons beyond the recipient's control. These provisions are most likely to be challenged before the Courts.
* The restriction on ITC availment for various defaults by the supplier will result in working capital blockage for recipients. It is not very clear whether the prescribed restrictions are temporary, in the sense that at a later time, on corrective actions undertaken by the supplier, the recipient will be eligible for ITC or not.
* The restrictions somehow dilute the objective of facilitating seamless flow of credit through the implementation of GST.
* There can be genuine cases where credit eligible as per GSTR-2B of a particular month is availed in subsequent months (but within the prescribed time limit). Such deferred availment may cause excess availment in a month compared to GSTR-2B (when matched on a month-to-month basis), a criterion for denial of credit to the recipient. It needs to be seen how the credit matching between GSTR-2B and GSTR-3B is enabled in the GST portal.
* Similarly, there can be instances where a credit note was issued, but there was no sufficient liability in the said month to offset against the credit note. The full value of the credit note is reported in GSTR-1, but in GSTR-3B, the amount of the credit note only to the extent of liability can be disclosed. Accordingly, in the subsequent month, there could be a scenario where liability in GSTR-1 will be more than the liability shown in GSTR-3B on account of the adjustment of the credit note for the balance amount.
* Disallowing credit in such cases basis the system reports without going into actual reasoning can cause undue hardship for genuine recipient.
* This provision could be prone to litigation on the ground that Government should not straightaway burden the recipient with credit denial without first taking steps to recover tax from the supplier.
* Instruction No. 1/2022-GST dated 7 January 2022 stated that where the liability reported in GSTR-1 is more than GSTR-3B, taxpayers will have an opportunity to be heard to explain the differences before initiating recovery proceedings. Similar relaxation is currently absent under section 38.
 | * The Chamber recommends that since the proposed provisions are too onerous, the recipient should not be denied credit due to the supplier's default. Accordingly, it is recommended that notification prescribing restricted suppliers under this section should not be issued.
* Alternatively, the applicability of these provisions should be limited only in case of fraud or collusion.
 |
|  | **Availment of ITC** | * As per provisions of section 41(effective 1 October 2022), a registered person will be entitled to avail credit on a self-assessment basis.
* However, if the supplier has not paid tax for a supply, ITC needs to be reversed by the recipient along with applicable interest. Such ITC can be re-availed when the supplier makes payment of tax.
* Madras HC, in the case of D.Y. Beathel Enterprises, observed that where the sellers have collected tax from buyers, the omission on the part of such sellers to remit tax has to be viewed very seriously, and strict action ought to have been initiated against them. Order denying ITC needs to be quashed due to non-examination of defaulting sellers and non-initiation of recovery action against such sellers in the first place.
* Further, there can be genuine cases where the supplier fails to make payment. Thus, sufficient time should be provided to the supplier to make good the default before the credit is denied to the recipient.
* While there is an express provision to allow re-availment of credit reversed after the supplier has made tax payment, the amendment is silent on re-credit/refund of interest amount in such cases. Hence, the interest element is likely to become a cost.
 | * The Chamber recommends that the credit should not be required to be reversed in the hands of the recipient due to non-payment of tax by the supplier. A suitable amendment should also be made in section 16(2)(c) of CGST Act to remove the condition of payment of tax to Government by the supplier.
* In these cases, the Revenue should recover the tax dues from the supplier. ITC should be denied to the recipient only in the case where fraud or collusion is proved.
* Even in such a scenario, interest should not be levied since the supplier pays interest and a penalty for delayed tax payment. Otherwise, the interest component should be re-credited / refunded in cash once the supplier has paid the tax and interest.

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|  | **Taxation on virtual digital assets (VDA), including cryptocurrency** | * Under income tax, income from the transfer of VDAs such as crypto and NFTs will be taxed at the rate of 30%. TDS provision has also been introduced.
* However, no changes were made to GST law in this regard.
* Officials of the Finance Ministry mentioned that GST would be levied on service fees on cryptocurrency transactions, not on the digital asset's value.
* Providing clarity on taxability would prevent field formations and investigation authorities from adopting divergent tax treatments for different VDAs.
* RBI is also in process of issuing central bank driven digital currency (CBDC). The same is likely to be covered under the term “money” and hence, not taxable under GST.
 | * The Chamber recommends necessary clarity should be provided on taxability of different VDAs to avoid future litigations.

  |
|  | **Tax levy on secondment arrangements** | * It is a common practice in various sectors to provide/ receive employees under secondment programs.
* These arrangements are treated as employment arrangements under Income tax and other allied laws. Further, courts and tribunals under service tax law have also historically affirmed no tax position.

However, a recent Supreme Court, in the case of Northern Operating Systems Private Limited, confirmed the levy of service tax treating the secondment arrangements as the supply of manpower service based on a particular set of facts. * This ruling is likely to have implications under service tax and GST as well as recovery of past period taxes (along with interest and penalty) and could impact various sectors from a tax cost and compliance standpoint.
* There is, therefore, a need for clarifying secondment-related arrangements under service tax and GST standpoint.
 | * The Chamber recommends that an explanation be inserted in Schedule III of CGST Act that the employer-employee relationship shall be determined basis the provisions of the Income Tax Act.
* Alternatively, Government could consider the following:
* Issue a circular clarifying its position and waive all past-period dues.
* Suppose waiver of tax dues is not possible. In that case, clarification should be issued that any GST paid for any past period shall be eligible as credit for utilization or allowed as a refund.
* Further, no interest and penal proceedings shall be pursued in this matter.

 * Also, clarification should be issued that the transaction value for tax payment shall be restricted to the value of actual reimbursements made by the Indian Company to the overseas Company.
* Further, for demands under the service tax regime, Government could consider issuing a Notification under section 83 of the Finance Act, 1994. Read with section 11C of the Central Excise Act,1944.
 |
|  | **Rule 96(10) benefit allowed to importers of capital goods under the Export Promotion Capital Goods (EPCG) scheme should be extended to Export Oriented Unit (EOU)/ Electronic Hardware Technology Park (EHTP)/ Software Technology Park (STPI) scheme**  | * Presently, as per Rule 96(10), if EOU/EHTP/STP units domestically procure/import raw materials and capital goods by availing exemption, then the benefit of export with tax payment is not available.
* However, taxpayers who import/domestically procure capital goods under the EPCG scheme are allowed the benefit of export with payment of tax. The intention of allowing benefit was that it is impossible to have a one-to-one correlation with the outward supplies in case of imports of Capital Goods.
* This has resulted in a disparity between EPCG holders and EOU/STP/EHTP exporters as EOU/STP/EHTP units only procuring capital goods by availing exemption are denied the benefit of export with payment of tax.
* Since one-to-one correlation is possible for inputs, the restriction should be applicable only for inputs procured and not for capital goods. This would ensure EOU/EHTP/STP and all other units procuring only capital goods under the restricted notifications in Rule 96(10) are allowed export with payment of tax.
 | * Chamber recommends that Rule 96(10) be amended retrospectively with effect from 23 October 2017 to restrict the benefit of exports with payment of tax only for inputs procured and not for all goods.
 |
|  | **Change in POS of ‘Intermediary’ services – To treat as ‘Export’** | * Under service tax, before the negative list regime, provision of services by an Indian intermediary to a foreign entity was treated as an export of services. When the domestic supplier of goods utilizes the services of an Indian Intermediary, there is a levy of service tax. This resulted in a tax cost disadvantage for domestic traders vis-à-vis foreign suppliers selling goods in India.
* Post negative list regime, a level playing field was established for the domestic traders since services of Indian intermediary became taxable (as POS was location of supplier) irrespective of whether procured by domestic traders or foreign exporters and resulted in tax cost in both the situations.
* Introduction of GST enabled domestic traders to claim credit of tax charged by the Indian intermediaries, thereby removing the cascading effect, unlike under the earlier regime. Nonetheless, it has become detrimental for foreign exporters as the transaction is exigible to GST. The provisions of the new regime have unintentionally resulted in reversing the level playing field between domestic traders and foreign exporters.
* The levy of GST on Intermediary service provided to foreign entity has been an issue of litigation before various High Courts. While the Division Bench of Gujarat HC in Material Recycling Association of India case upheld the constitutional legality of PoS provisions for intermediary services, the Division Bench of Bombay HC in the case of Dharmendra M. Jani passed dissenting judgment.
 | * To ensure a level playing field and because the need for supplier based PoS lost its relevance with the introduction of GST, Chamber recommends that section 13 of the IGST Act relating to POS for intermediary services be amended to "Location of the Recipient."
 |
|  | **Relief in respect of interest in case of delay in reporting transactions** | * Presently, taxpayers are required to pay interest on net liability basis, i.e., on the amount to be discharged in cash in case returns are filed belatedly, and the filing of returns is not as a consequence of proceedings initiated under section 73/74.
* However, taxpayers are required to pay interest on the gross amount in case of delay in reporting a transaction, i.e., outward supply of October 2022 disclosed in November 2022 return.
* Taxpayers should be granted relief in case of delay in reporting transactions, similar to the relief provided in case of delay in filing returns.
* The objective of the Government to levy interest is that the taxpayer should be made to compensate where there was a loss to the exchequer, i.e., on a net cash basis. However, the levy of interest on a gross basis for delayed reporting goes against the basic principle of the Government to levy interest on a net cash basis.
 | * Chamber recommends that no interest should be levied in cases where a transaction is reported belatedly, to the extent the same is paid using ITC available with the taxpayer.
 |
|  | **ISD vs. Cross Charge** | * The concept of 'distinct person' was introduced under GST to tax the transactions between different offices (separately registered) of the same legal entity. Since the concept is new, there are a lot of deliberations on the taxability of transactions between the head office (HO) and the branch offices (BO)and between different branches.
* In this regard, a draft Circular was discussed in the 35th GST Council meeting to clarify various issues, including distribution of ITC in respect of input services procured by the HO but attributable to various BOs, treatment of services provided by HO such as common administration or common IT maintenance.
* The draft circular clarified that it is mandatory to follow the ISD procedure for distribution of ITC in respect of input services procured by HO from a third party but attributable to both HO and BO or exclusively to one or more BOs. However, the council members noted that CGST Act does not make ISD provisions mandatory. Though the draft circular touched upon the valuation of services provided to a distinct person, it does not specifically comment on whether employee cost should be excluded while computing taxable value.
* During the discussion of this draft circular, it was pointed out that on the issuance of this circular, almost 90 percent of taxpayers may become non-compliant for their past practices. Against this backdrop, the Council agreed to send the matter to the Law committee for further examination. From the 37th GST Council meeting agenda, it is understood that the circular is currently under consideration of the GST Policy wing.
* However, practically authorities are questioning the practice adopted by taxpayers for both ISD and cross-charge.
* Rule 32(7) of GST rules empowers Central Government to issue a Notification for notifying NIL as taxable value for transactions between distinct persons in case of service providers and where ITC is eligible.
* Also, owing to the introduction of GST, seamless ITC of inputs and input services are available. However, the distribution of credit under ISD is restricted only to input services. In this regard, reference can be made to Rule 7A of CENVAT Credit Rules, 2004, where credit for inputs and capital goods was allowed to be distributed by service providers to its other units. A similar concept is absent under GST legislation.
* Allowing the transfer of ITC of inputs and capital goods amongst different units would enable proper allocation of ITC to respective units for which procurements are being done. This can facilitate the functioning of centralized procurement of all goods resulting in commercial advantage.
 | * Chamber recommends that since this matter impacts most of the taxpayers having GST registrations in more than one place, there is an urgent need to clarify that ISD is not mandatory and specify cases where transactions between HO and BO can be treated as supply along with a valuation mechanism.
* Further, Chamber recommends that the following can also be considered:
1. Amend CGST Rules to include all taxable persons under Rule 32(7) irrespective of eligibility to credit or otherwise.
2. Issue Notification under Rule 32(7) to cover all taxable persons for valuation of cross-charge transactions involving cost-sharing arrangements where there is no supply of service.
3. Allow distribution of credit of inputs/capital goods in addition to input service under the ISD model.
 |
|  | **Valuation of land in case of construction service** | * Para 2 of Notification No. 11/2017-Central Tax (Rate) dated 28 June 2017 provides for 1/3rd deduction on land [deemed value] for valuing construction service.
* In the case of Munjaal Manishbhai Bhatt, Gujarat HC held that when the statutory provision requires valuation following the actual price paid and payable for the service and where such price is available, tax has to be imposed on such value. Deeming value can be applied only where actual value is not ascertainable.
* Gujarat HC also noted that when a workable mechanism for the deduction of land was already in force under the service tax regime, the same should have been continued.
* Accordingly, Gujarat HC struck down Para 2 of Notification No. 11/2017-Central Tax (Rate) dated 28 June 2017 as ultra-vires the provisions as well as the scheme of GST law. Further, it held that 1/3rd value, as mentioned above, could be permitted at the option of a taxable person where the value is not ascertainable.
* Further, under the service tax regime, Rule 2A of the Service Tax (Determination of Value) Rules, 2006 was retrospectively amended by the Finance Act 2017 to provide for the deduction of the actual value of land for works contracts if the same was ascertainable and if not, adoption of deemed taxable value.
 | * Chamber recommends a suitable amendment in Para 2 of Notification No. 11/2017-Central Tax (Rate) dated 28 June 2017 to provide that determination of land value in case of construction service should be in line with the provisions under the service tax regime.
 |
|  | **Inbound ocean freight in case of import of goods on CIF imports** | * Hon'ble Supreme Court, in the case of M/s Mohit Minerals Pvt Ltd, has held that no IGST under RCM is applicable on ocean freight in case of CIF imports (where the location of supplier and person paying freight is outside India) since the same violates the principles of composite supply.
* Globally, major maritime jurisdictions, such as Canada, Singapore, Australia, etc., have zero-rated tax treatment for inbound ocean freight.
* Considering the same, it is ideal that inbound ocean freight should be kept outside GST as the services are rendered beyond the territorial jurisdiction of India.
 | * Chamber recommends that inbound ocean freight should be outside the ambit of GST, similar to global practice.
* If the above is not possible, the IGST reverse charge notification entry should be deleted.
* Also, refund of tax paid before the Supreme Court ruling is to be granted to the taxpayer without considering the time limit under section 54.
 |
|  | **Restore GST exemption on outbound freight services provided to Indian** **Customers** | * Services by transportation of goods through a vessel provided by an Indian shipping company to an Indian exporter in case of exports were exempted till 30 September 2022.
* However, the Central Government has not extended the exemption after 30 September 2022. While the freight levy would be creditable and refundable, the same is likely to affect the exporters' working capital.
 | * Chamber recommends that the exemption be restored with retrospective effect from 1 October 2022.
 |
|  | **ITC eligibility on** **demo cars** | * As per GST law, a taxpayer is entitled to ITC on a motor vehicle if the same is manufactured or procured for further supply. The demo cars are displayed for a specified period (say six months) and then supplied at a lower price.
* Thus, the issue arises whether the demo car supplied after a specified period can fall under the clause "further supply of such motor vehicles" to enable the Company to claim ITC.
* Divergent advance rulings are pronounced on the said issue resulting in confusion regarding the availment of ITC on demo cars.
 | * Chamber recommends that suitable clarification should be provided to allow ITC for demo cars.
 |
|  | **Taxpayers’ Charter** | * Government, in August 2020, formally launched the Taxpayers' Charter under Income tax.
* The Taxpayers' Charter lists the Income tax department's commitments to build trust and a harassment-free environment towards the taxpayer and what it expects from them.
* Amongst other commitments, the Charter promises to maintain the privacy and confidentiality of taxpayers and reduce cost of compliance with tax laws. Taxpayers' Charter enshrines in law the rights and duties of taxpayers that can be enforced through Taxpayers' Charter Cell formed in each zone under the Principal Chief Commissioner of Income-tax.
* Under Indirect Taxes, the Director General of Taxpayer Services is supposed to educate taxpayers regarding their rights and obligations in tax compliance as part of its public relations role. Drawing up the formal Bill and constituting a dedicated department will secure taxpayers' rights.
 | * Chamber recommends replicating the Taxpayers' Charter, even under Indirect Taxes, covering GST, with both Central and State level departments.
 |
|  | **Supply of services by office in India to its** **another office outside India** | * Supply of services by office in India to its another office outside India is not treated as exports (since they are treated as the establishment of distinct persons).
* Exemption is available in case POS is outside India; however, ITC becomes cost.
* Since the remittance for such services is also aiding in increasing the forex reserves of India, the said transaction could be treated as export of service.
 | * Chamber recommends granting export benefits for such transactions.
 |
|  | **Taxability of correspondent bank Charges** | * Banks, while providing regular banking services, are inter alia engaged in facilitating the collection of export proceeds for exports made by Indian exporters and making remittances in convertible foreign exchange concerning imports made by Indian importers.
* To facilitate this transaction, a foreign bank is involved, which may either be the bank of the foreign counterparty of the Indian customer or a bank where the Indian bank holds a Nostro account.
* These foreign banks (acting as correspondent banks) charge certain amounts as their fees for facilitation provided. Department had earlier issued Trade notice no. 20/13-14-ST-I dated 10 February 2014, directing banks to pay Service tax under reverse charge mechanism on the foreign bank charges on the premise that the Indian banks are the recipients of these services.
* The banking industry is of the view that the service recipient, in a transaction of the provision of service, has to be treated as the person on whose instructions the service has been provided and who is obliged to make payment for the provision of the service, in this case, the customer.
* The banking industry is involved in a dispute with the authorities on the service tax payable on the correspondent charges levied by foreign banks. Even under GST, this dispute is likely to continue.
 | * Chamber recommends a suitable clarification should be issued for the non-taxability of Correspondent Bank charges in the hands of Indian banks. This will go a long way in resolving the litigation in the matter.
 |
|  | **Amnesty cum settlement** **Scheme** | * "Ease of doing business" has been one of the biggest agenda of the present Government. The uncertainty in the legal processes and the time consumed by the courts and other appellate forums in resolving disputes have been a major challenge to ease of doing business.
* To tackle this, the Central Government announced the Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019, for the erstwhile Service Tax and Excise matters (SVLDRS), which shows the intent of the Government in enabling the resolution of past litigations of the taxpayers in the best possible.
* GST is a new tax regime and a new law incorporating several aspects that do not have any precedents. The law is at a nascent stage and still evolving. The compliance process under GST is materially more onerous compared to the pre-GST era.
* Hence, it is the need of the hour that a similar amnesty cum settlement scheme should be introduced under GST to regularize past transactions on a self-assessment basis with a complete waiver from interest and penalty. Consequently, the tax paid under the scheme should be allowed as a credit in the hands of the recipient.
 | * Chamber recommends Government to consider a one-time amnesty scheme under the GST scheme with a waiver from interest and penalty for past transactions.
 |
|  | **Non-taxability of advances for infrastructure projects** | * As a general practice, to commence/execute work on sites, the contractee pays the contractor 10%-20% of the contract price in the form of mobilization advance to mobilize the resources.
* This advance is paid upon furnishing security such as a bank or corporate guarantee by the contractor. The amount is subsequently adjusted in the running bills.
* Further, the time gap between the receipt of advance and adjustment thereof may take a longer period ranging from 2 to 5 years (project period). Thus, the mobilization advance, though termed as 'Advance,' may not be similar to the normal trade advances.
* Such advance is provided as a loan by the contractee to enhance contractors’ working capital and is akin to a financial transaction (transaction in money).
* Mobilization advance has the following characteristics:
* Security Deposits;
* Obligation of repayment;
* Funding Working Capital Requirements; and
* Not like normal trade advances.
* The contractors are required to pay GST on such advances through cash at the inception stage, reducing the funds available to the contractors. Further, at a later point in time, when the goods are services are procured, ITC accrues, but due to a lower quantum of tax payable (net of advances), the credit cannot be fully utilized and results in accumulation, thereby affecting the working capital of the Company.
* Typically, works contract effectively comprises a supply of goods to almost 70% of the total contract value. However, works contract is deemed service under GST law; the entire advance is being taxed at the time of receipt though nearly 70% of such advances pertain towards supply of goods. It is relevant to note that Notification No. 66/2017 – CT dated 15 November 2017 provides an exemption from payment of GST on advances received for goods.
 | * The Chamber recommends that mobilization advance for infrastructure projects should not be taxed at the time of receipt. GST should be levied at the time of actual invoicing.
* A proviso can be inserted in section 13(2) of CGST Act to provide that time of supply in respect of the works contract shall arise on the date of invoice.
 |
|  | **ITC balance in case of closure of stores** | * Retail companies have stores in multiple States and are registered in the respective States. Retail companies may close down certain stores or open new stores in other States depending on the business requirements from time to time.
* In case closure in particular State results in the surrender of GST registration, ITC balance that State, at the time of surrender of GST registration, is not available as a refund, and the same becomes an additional cost.
 | * Chamber recommends that refund of unutilized ITC under GST should be allowed in case of closure of a Business / Unit.
* Alternatively, ITC balance (CGST, IGST, Compensation Cess) may be allowed to be transferred to other GST registrations of the same Company.
 |
|  | **ITC reversal on destruction of expired goods** | * Currently, ITC on expired goods is required to be reversed on destruction under section 17(5)(h).
* The destruction of expired goods follows the regulatory requirement. Such activity is in regular business and should be considered part of the GST chain. Hence, ITC should be allowed.
 | * Chamber recommends that a suitable amendment be made to section 17(5)(h) of CGST Act to remove the ITC reversal requirement on the destruction of expired goods where such destruction is statutorily required under any law for the time being in force.
 |
|  | **ITC on promotional goods supplied to distributors** | * As per section 17(5) (h), ITC is not allowed on goods disposed of by way of 'gift or free samples.'
* Retail companies provide various goods for business promotion, such as diaries, pens, paperweights, calendars, wall clocks, t-shirts, and other apparel, etc. Such goods are generally provided with the name/ brand of the Company embossed on goods for business promotion.
* Such goods are not free disposals or gifts, as the Company gives such goods in the regular course with the sole objective of promoting its own business.
* However, various AARs have held that promotional items provided in the course of business are restricted under Section 17(5)(h) of CGST Act, thus becoming a cost to the retail companies.
 | * Chamber recommends that a suitable amendment/clarification be issued that ITC is eligible for such promotional goods supplied by retail companies to its customers/distributors.
 |
|  | **GST liability on venture capital fund (VCF) set up as trust by way of contribution from investors** | * The Bangalore CESTAT, in the case of ICICI Econet and Internet Technology Fund vs. Commissioner of Central Tax, has ruled for the Venture Capital Funds ("VCF"), which are set up as trusts, act as a service provider, thereby suggesting that arrangement between the contributor and the trust is that of a receiver and supplier of services liable for payment of service tax, disregarding the principles of mutuality between trust and its members.
* Any start-up needs huge financial support, and presently this is being done by alternative investment funds (AIFs) or venture capital funds (VCFs). These funds are pooled investment vehicles with a certain set of contributors. VCF/AIFs established as a trust with an Indenture of Trust or Trust deed.
* SEBI Regulations in the erstwhile 1996 VC fund regulations or the Alternative Investment Fund 2012 regulations—categorically permit the setting up or establishing these funds in the form of a trust as per the Trust Act of 1882. Most VC funds and AIFs registered with SEBI today are trusts.
* There is no retention of service fee or income by trust as it merely distributes the distributable surplus among various classes of investors, as per the waterfall agreed between the investors after deducting expenses incurred by or on behalf of the trust.
* In distribution of surplus, no discretion is exercised by the VCF trust, and distribution is undertaken based on the agreed terms contained in the Indenture of Trust or Trust Deed and the Private Placement Memorandum or PPM. Thus, trusts typically follow the fund documents such as PPM, Trust Deed and Contribution Agreements.
* The trust model continues to be a preferred mechanism for AIFs/VCF, as, by nature, a trust is understood to be a pass-through with no legal existence of its own.
* The trust appoints an Investment Manager or an Asset Management Company ("AMC") to manage its fund; this ensures the trust receives relevant professional and experienced advice to manage the trust fund and give a good return on the investment made by contributors.
* AMC and other service provider charge fees to trust with GST, the trust book GST as cost as there is no output supply for trust. AMC can also be a contributor to trust and eligible to earn carry income.
* Under that Income Tax Act, any income from the investment under these funds is taxed in the hands of its contributor (section 115U of the Income Tax Act).
 | * The Chamber recommends bringing in suitable clarification on the non-taxability of transactions between trust and its members under the Service tax and GST regime.
 |
|  | **Manner of determination of electronic credit ledger balance i.e. tax head wise or consolidated balance for interest on ineligible ITC under Section 50(3)**  | * Section 50(3) of CGST Act, was retrospectively amended from 01 July 2017 to provide that interest will be applicable only on ineligible ITC when availed and utilized. Rule 88B of CGST Rules has been inserted with effect from 01 July 2017 to prescribe the manner of computation of interest.
* However, a pertinent question is whether the balance should be seen tax head-wise or in a consolidated manner.

 * As per the 45th GST Council meeting, interest liability gets triggered when there is a net cash payment which could happen tax-head wise, whereas, for refund, transfer of credit in case of a merger, etc., the credit is seen on a consolidated basis.
* Further, taxpayers could have availed disputed credit such as IGST and may be mandated under law to utilize the same for tax payments, refunds, etc. Considering head-wise balance may result in a situation where the taxpayer is forced to pay interest despite having sufficient credit balance cumulatively.
 | * Chamber recommends that suitable amendment / clarification be issued for considering consolidated credit balance for interest computation under Rule 88B of CGST Rules.
 |
|  | **Fungibility between CGST and SGST Credit** | * At present, taxpayers are not allowed to utilize CGST credit for discharging SGST liability and vice versa.
* Due to this, the taxpayers, even though having credit of one, need to discharge liability in cash for the other. Allowing cross-utilization between CGST and SGST will likely help businesses effectively manage working capital.
 | * Chamber recommends that fungibility of credit should be allowed to taxpayers considering one nation, one tax. At the backend, states and Centre can settle the amount cross utilized.
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**CENTRAL EXCISE, SERVICE TAX AND CUSTOMS**

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| **Sl. No.** | **Subject** | **Rationale** | **Recommendation** |
|  | **Central Excise and Service tax** |  |  |
|  | **Timely disposal of pending Show Cause Notices under Central Excise and Service Tax** | * Section 11A(11) of the Central Excise Act and section 73(4B) of the Finance Act, 1994 prescribes the period within which adjudicating authority is bound to complete the adjudicating process and determine the duty/ tax payable and issue the demand /adjudication order, if possible.
* Though the limitation period is defined under the law for adjudication, the timelines are not followed in practice due to the discretion available.
* Also, for the show cause notices, which have been issued before the above time limit under the law, no reasonable period is being followed by the authorities to issue the adjudication orders.
* Board instructions F. No. 280/45/2015-CX. 8A, dated 17 September 2015, emphasizes that all adjudicating authorities are directed to pass adjudicating orders within the prescribed time limit.
* However, despite the law and instructions, the timelines are not being followed.

 * This causes undue hardship in arranging age-old documents as the person in-charge may no longer be associated with the organization.
 | * The Chamber recommends that an amendment should be made under the Central Excise Act & Finance Act, 1994, to provide that any show cause notice issued under the Act and pending adjudication on the date of the amendment should be adjudicated within two years, as the case may be (*depending upon whether the extended period has been invoked or not).*
* Any Show Cause Notice (past, present, or future), which does not get adjudicated within the above prescribed time limit, shall be deemed to have been vacated by the department, and no future demand can be raised on the assessee on the same issue.
 |
|  | **Customs** |  |  |
|  | **Classification dispute due to SC decision in case of Westinghouse Saxby** | * Supreme Court (SC), in the case of Westinghouse Saxby, held that the relays are classifiable as part of locomotives under Heading 8607. In so holding, the SC applied the "sole or principal use" test in Note 3 to section XVII to exclude the embargo in Note 2.
* The ratio of this judgment may be summarised as follows:

"if an item is solely or principally used with the articles of Section XVII (which includes railway locomotives, motor vehicles & aircraft), then it is classifiable thereunder, notwithstanding specific exclusions to the contrary in Note 2."* The above judgment is likely to pose the following challenges before the industry as well as the department:
* Mismatch of HSN in case of international trade
* Deviation from the international practice of classification - challenge in claiming FTA benefits
* License requirements for restricted products
* Collection of Statistical Data by Department
* CBIC had issued instructions clarifying its position on the said topic, i.e., classification would be done based on all available material on the subject, the same does not grant full relief as importers could be subject to classification basis this SC ruling as well.
 | * The Chamber recommends that Note 3 to section XVII be suitably amended to clarify that Note 3 is subject to the exclusions given in Note 2 and incorporate the explanation in line with the HSN Explanatory Notes.
 |
|  | **Higher peak rate of customs duty** | * The peak rate of Customs Duty has remained static at 10% since 1 March 2007.
* The peak rate of customs duty on raw materials has increased the cost of manufacture. In certain cases, the impact of inverted duty structure has also made the matter worse for the manufacturing industry in the country.
* Lower rates would encourage manufacturing sector in India and would promote 'Make in India,' "AatmaNirbhar Bharat Abhiyaan’ policy.
 | * The Chamber recommends that the peak rate of customs duty should be reduced to 5% while levying a lower rate of duty on raw materials and inputs required for manufacture.
 |
|  | **CAROTAR 2020** | * Degree of onus on the importers regarding the correctness, and genuineness of information received from the exporter, without having any means to verify it, especially when goods are procured through traders, is a big challenge.
* Due to confidentiality, overseas exporters may be reluctant to share information on costing, value addition, profit, etc.
* The procedure introduced through the Notification is a long-drawn process. It will make the importer to intrude into the foreign buyer's domain and ensure that the COO is issued following the existing rules of the origin and the latest Notification. Since the COO issued is following their Government's directives on the Trade Agreements, save and except, very few unscrupulous importers may misuse these agreement rules and indulge in non-compliance with the COO requirements.
* Major importers [AEO Status holders] source their imports from very reputed and law-compliant suppliers of high repute from overseas [who are also AEO Status holders]. Hence, due diligence regarding the reputation and genuineness of the importer and the supplier is already established. So, there is no reason to doubt their integrity and question the COO unless some discrepancy is noticed.
* The Government has indicated that the procedures introduced will not override the processes and timelines mentioned in the FTA / Trade Agreements. However, the procedures introduced ignore that such preferential rates and treaty benefits have their genesis in the economic integration between nations and form the backbone of multilateral trade across the globe. Introducing such restrictions in the Customs Law will deter importers from availing of such benefits.

 * Hence, in case of any lacuna, left outs, or typographical mistakes, the same may be cleared by accepting either a letter of undertaking or PD Bonds [from AEO Status holders] for faster clearances. There should be a timeframe fixed for the verification process from the cross-border counterparts.
* Further, CBIC vide Circular No. 02/2022 dated 19 January 2022, it has been clarified that bank guarantee relaxations provided to AEO shall not apply for CAROTAR.
 | * The Chamber recommends the following:
* To make suitable changes in the said Rules for the onus of proof of COO on the Importers and trust-based approach to AEO status holders
* Clearance of material on the execution of either letter of undertaking or PD Bond [without any security] pending such verification
* To re-look at the stringent rules and simply so that the genuine importers are not placed in a disadvantageous position, and their legitimate duty benefits are not denied.
* The guidelines may be issued to the field formations to use their powers only when they have strong reasons to believe that the shipment in question needs further verification and not on a routine basis.
 |
|  | **Import of certain goods for petroleum operations (**Notification no. 2/2022 – Customs dated 1 February 2022 read with Notification no. 3/2017 – CT(R) dated 28 June 2017) | * Notification No. 50/2017-Customs granted BCD exemption and concessional IGST rate on certain goods imported for petroleum operations

(List 33 goods).* Vide Notification no. 2/2022-Customs, the list has been pruned, and the concerned HSN codes have been prescribed against the revised description of goods. Also, the requirement to obtain a certificate from the Directorate General of Hydro Carbons (DGH) is done away with.
* At present, petroleum goods are outside the purview of GST. The concessional rate of IGST on procurement of goods was provided since the industry cannot claim credit of GST paid.
* Similar concessional rate of IGST is available under GST rate notification no. 3/2017-CT(R) on procurement of List 33 goods domestically. However, this is subject to the certificate issued by DGH. It is relevant to note that there is no change in the list of goods under provided GST notification.
* This created confusion regarding the rate applicable on the import of goods that are not covered under List 33 (post amendment) but still under GST rate notification.
* Further, there are certain goods which are appearing in Column 3 of List 33. However, the corresponding HSN under which such goods are being imported is missing in Column 2.
 | * Chamber recommends restoration of pre-amended list 33 until petroleum products are included under GST.
* Once the list is restored, the mismatch between HSN and the description of goods will also be resolved.
* Further, in line with Customs amendment, the requirement of a certificate from DGH for claiming concessional rate under GST should be removed.
* Meanwhile, necessary clarification should be issued to clarify the rate applicable on the import of goods that are now outside Customs List 33 but included in the GST rate notification.
 |
|  | **Validation of past actions of officers of DRI, Audit, and Preventive formation**  | * Finance Act provides that the amendments treating officers of DRI, Audit, and Preventive formation as proper officers for Customs shall always be deemed to have effect for all purposes.
* This validates all actions taken by such officers before the amendment.
* Further, it is clarified that the amended provisions will cover pending proceedings on the date of the Finance Act 2022.
 | * The Chamber recommends that past actions of DRI, Audit, and Preventive formation officers should not be validated.
 |
|  | **Binding period of AAR**  | * Section 28J of the Customs Act deals with applicability of advance ruling. Sub-section (2) of the said section has been substituted to state that the advance ruling pronounced will be valid for three years or till there is a change in law or facts based on which the advance ruling was pronounced, whichever is earlier. Earlier, the ruling was binding till there is a change in law or facts.
* The department now has an opportunity to change the position after three years, even if there is no change in law or facts.
* It is to be noted that under GST law, the advance ruling pronounced by the authority shall be binding unless the law, facts, or circumstances supporting the original advance ruling have changed.
 | * The Chamber recommends that the advance ruling be binding until there is a change in law or facts and not for a certain prescribed period.
* In other words, earlier provisions should be re-instated in line with the provisions under GST.
 |
|  | **Clarification on the continuation of BCD exemption for STPI/ EOU units without any sunset clause** | * Proviso to section 25 of the Customs Act, 1962, suggests that any exemption notified without any specified period shall be valid only till 31 March, falling after two years from the grant of such exemption or variation in such exemption. Further, any exemption already in force as of 1 February 2021 (without a specified timeline), then two years sunset date shall be computed from 1 February 2021.
* While customs exemptions arising under the Foreign Trade Policy were not a part of the notifications identified for the application of the sunset clause by the Budget TRU circular, there is significant uncertainty on the fate of BCD exemption for STPI/ EOU units.
* Further, withdrawal of exemption shall render the STPI/ EOU scheme unattractive, including encouraging the exit of units from the scheme.
 | * Chamber recommends that a specific clarification be issued that there is no sunset clause for BCD exemption for STPI units.
 |
|  | **Duty Drawback for Defence Goods** | * Duty Drawback rate for Defence goods is currently NIL. The Government has increased the incentive on various goods by way of higher duty drawbacks to boost exports and ease the liquidity crunch faced by exporters after the rollout of the GST.
* The drawback neutralizes customs duty and GST components on the inputs used for products exported. Duty drawback makes India's exports more competitive in the global economy.
 | * To promote the Defence sector, the exporter should be given a duty drawback incentive.
 |
|  | **Utilization of Remission of Duties and Taxes on Export Products (RoDTEP) and Rebate of State and Central Taxes and Levies (RoSCTL) scrips for payment of GST**  | * As per para 4.56 of the FTP 2015-20, scrips can be utilized to pay Basic Customs Duty.
* However, they cannot be utilized for the payment of IGST & GST Compensation Cess on imports and CGST, SGST/UTGST, IGST & GST Compensation Cess on domestic procurement.
 | * Foreign Trade Policy and Customs law be amended to allow the utilization of scrips towards the payment of GST on imports and domestic procurements.
 |
|  | **RoDTEP Scheme to be extended to exports made by SEZ, EOU & under Advance Authorization** | * The objective of the RoDTEP scheme is to refund taxes not refunded under GST and other statutes. Exporters operating under SEZ, EOU, and Advance Authorization suffer with the taxes in the same manner as any other exporters who do not operate under the said schemes. However, currently, the above exports fall under the ineligible category of the RoDTEP scheme.
 | * Chamber recommends Government to notify the exports made under SEZ, EOU, and Duty Exemption Schemes (Advance Authorisation) under RoDTEP Schemes as an eligible category.
 |
|  | **One-time amnesty-cum-dispute resolution scheme for disputes and litigations under Customs law** | * Government of India has in the past notified “Sabkha Vishwas (Legacy Dispute Resolution) Scheme 2019," covering litigations under the erstwhile Central Excise and Service Tax law. This was a welcome measure as it gave a major relief to Industry from long pending and protracted litigations. In addition, it facilitated the industry to focus on GST compliance. The Government could also sharply allocate the resources involved in litigation to ensure GST compliance and subsequent audits.
* Similarly, customs litigations pending at various forums for a very long time also require time and effort to be spent by both the taxpayer and Government in resolving them.
* A Scheme similar to “Sabkha Vishwas (Legacy Dispute Resolution) Scheme 2019” for customs litigation would go a long way in freeing up time for Industry from such protracted litigations and to focus on business.

  | * Chamber recommends introducing a one-time amnesty-cum-dispute resolution scheme similar to Sabkha Vishwas (Legacy Dispute Resolution) Scheme 2019 to resolve long pending and protracted litigation under the Customs law.
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**COMMON POINTS ACROSS INDIRECT TAX LEGISLATIONS**

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| **Sl. No.** | **Subject** | **Rationale** | **Recommendation** |
|  | **Deferral of appeals by Revenue against the order of lower authority when an identical issue is pending before jurisdictional HC or SC** | * The existing Income Tax law provisions permit the tax authority to defer filing of appeals before the ITAT (subject to consent by the taxpayer) against an order in favor of the taxpayer if an identical issue is pending in appeal before the SC against an order of the HC.
* Finance Act 2022 has extended the benefit of such deferral of appeals (subject to consent by the taxpayer) to the following scenarios as well:
* Where there is an order from ITAT in favor of the same taxpayer, and the appeal is pending with the jurisdictional HC; or against order of HC pending before SC; or
* Where the issue is pending in appeal before the SC or jurisdictional HC against an order of the HC/ ITAT respectively in favor of any other taxpayer.
 | * The Chamber recommends that similar provisions be incorporated under all Indirect tax laws, including GST, Customs, Excise, and Service tax, to reduce the number of litigations and workload of appellate forums.
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|  | **Clarification in accordance with provisions under Insolvency and Bankruptcy (IBC) Code** | * Section 31 of the IBC makes it clear that once the Adjudicating Authority approves the resolution plan, it shall be binding on the corporate debtor and its employees, members, and creditors, including the Central Government, any State Government, or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders.
* Section 238 of the IBC provides that IBC will prevail in case of inconsistency between two laws.
* Field-level officers are continuing the tax proceedings under the respective Indirect tax laws for the period before the transfer of business to the Resolution Applicants (effective date) on the premise that there are no specific provisions in the relevant tax laws for giving effect to the IBC provisions.
* While section 82 of GST law provides that save as otherwise provided under IBC, any tax dues shall be a first charge on the property of the defaulter, there is no specific provision for non-initiation of new tax demand, withdrawal of pending appeals, etc.
* Supreme Court, in the case of Essar Steel, held that the resolution applicant, while taking over the corporate debtor, would intend to have a fresh start on a clean slate. Once a resolution plan has been approved per the provisions of the IBC, the same becomes binding on all stakeholders of the corporate debtor, including guarantors and potential creditors. The Supreme Court went on to bar claimants whose claims have not been admitted by the resolution professional (and therefore are not being paid under the resolution plan) from initiating legal proceedings before any adjudicatory forum to claim these amounts post-completion of the insolvency resolution process under the IBC.
* Finance Act 2022 has inserted a new section under Income Tax Act to enable the tax authorities to modify the demand notice issued u/s 156 in conformity with the resolution plan passed under IBC.
* Further, the Supreme Court, in the case of ABG Shipyard, had held that once a moratorium is imposed in terms of section 14 or 33(5) of the IBC, as the case may be, tax authorities only have a limited jurisdiction to assess/determine the quantum of customs duty and other levies. They do not have the power to initiate the recovery of dues through sale/confiscation, as provided under the Customs Act.
 | * The Chamber recommends that the provisions, similar to the one proposed under Income tax, should be incorporated under all Indirect tax laws, including GST, Customs, Excise, and Service tax, to ringfence potential conflict with IBC.
* Provision should also clarify that the tax officer cannot raise any demand/recovery proceeding of the prior period belatedly in respect of a claim that does not form part of insolvency proceedings.
* Provisions should further stipulate the withdrawal of all past departmental appeals pending disposal and not initiate any fresh litigation once the concerned authority approves the resolution plan.
* In the alternate, suitable clarifications can be issued by CBIC in this regard which shall be binding on the tax department.
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