

October 2021



## Key Case Law Alert

### Notifications

**Last date for submission of application for Merchandise Exports from India Scheme ("MEIS"), Service Exports from India Scheme ("SEIS"), Rebate of State and Central Taxes and Levies ("RoSCTL"), Rebate of State Levies ("ROSL") extended upto 31 December 2021**

**Notification No. 26/2015-2020 dated 16 September 2021** has been issued to revise the last date of submission of applications under Scrip Based Schemes such as MEIS, SEIS, ROSCTL, ROSL and 2% ad hoc incentive for export of mobile phones made from January 2020 to March 2020 [as per para 3.25 of Foreign Trade Policy 2015-2020 ("FTP")] to 31 December 2021. The notification also clarifies that any scrip issued on or after 16 September 2021 will be valid for 12 months from the date of issue, in supersession of erstwhile validity provisions as prescribed in the Handbook of Procedures, 2015-20 ("HBP").

**Extension in Export Obligation period of specified Advance Authorization and Export Promotion Capital Goods (EPCG) Authorisations till 31 December 2021**

**Notification No. 28/2015-2020 dated 23 September 2021** has been issued to notify an extension in the export obligation period until 31 December 2021, without payment of composition fees in case of advance authorizations and EPCG authorizations, where such obligations were expiring between 1 August 2020 to 31 July 2021.

Such option has been provided in addition to the export obligation extension facility (upon payment of the composition fees) which was already provided in FTP/HBP. The extension is however available subject to fulfilling 5% additional export obligation (remittance realized in free foreign exchange) on the balance export obligation remaining at the end of the original period.

**Eligible services and rates under SEIS for 2019-20 notified**

**Notification No. 29/2015-2020 dated 23 September 2021** has notified an Appendix 3X to provide a list of eligible services and rates under the SEIS, for services rendered and claims to be made for the period 2019-20. However, the total entitlement under the SEIS scheme for this period has been capped at Rs. 5 crores per IEC. Further, last date for submission of applications under SEIS for the period 2019-20 has been extended up to 31 December 2021 and all such application will be time barred without late cut option after this period.

**DGFT clarifies that Importer-Exporter Codes ("IEC") not updated shall stand deactivated with effect from 06 October 2021.**

**Trade Notice no. 18/2021-2022 dated 20 September 2021** has been issued to circulate to trade that IEC(s) which have not been updated after 1 January 2005 shall be de-activated with effect from 6 October 2021. The IEC holders have been given time till 5 October 2021 to register with the DGFT and update their details. In case

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of de-activation, an automatic process has been mandated where the IEC holder has to re-link their IEC on the DGFT portal and carry out the necessary validations. Post such validation check, the IEC will be re-activated.

## Central Goods and Services Tax ("CGST") (Eighth Amendment) Rules, 2021 have been introduced by the Central Board of Indirect Taxes and Customs ("CBIC").

**Notification No. 35/2021- Central Tax dated 24 September, 2021** notifies the Central Goods and Services Tax (Eighth Amendment) Rules, 2021. The following changes have been brought about by the new Rules:

### Aadhaar authentication made mandatory for filing refund claims and applications for revocation of cancellation of registration

Rule 10B has been inserted in the CGST Rules, requiring a registered person to undergo Aadhaar number authentication of the proprietor, business partner, karta, managing director or any whole-time director, or of any members of the managing committee of a trustee, as the case may be, for the purpose of filing an application of cancellation of registration, filing a refund claim under Rule 89 of the CGST Rules or for applying for a refund of integrated tax paid on goods exported out of India. Further, Rule 96C has been inserted into the CGST Rules, to notify that the bank account for credit of refund shall be the bank account which is in the name of the applicant and should be linked to the Permanent Account Number ("PAN") of such person.

### Furnishing of Bank account on GST portal

A person after the grant of registration and assignment of GSTIN is required to furnish details of bank account which is in the name of the registered person and linked to the PAN of such registered person. Further, such PAN shall also be linked with the Aadhaar number of the proprietor in case of a proprietorship concern. The above details are mandated to be submitted within 45 days of obtaining the GSTIN registration.

### Amendment in Rule 45(3) of CGST Rules for

### providing Relaxation in filing FORM GST ITC-04

The details of challans in respect of goods dispatched to a job worker or received from a job worker or sent from one job worker to another during a specified period shall be required to be included in FORM GST ITC-04 effective 1<sup>st</sup> October 2021 [Job Worker Goods Form]. Further, a refund provision has been prescribed by means of a filing in FORM GST RFD-01 for a person to claim refund of tax wrongfully paid as intra-State supply, which subsequently was realized to be an inter-State supply. Such application can be filed within a period of 2 years from the date of payment of the tax.

### Rule 59(6) regarding Restricting in the filing of Form GSTR-1

Rule 59(6) of CGST Rules has been amended to substitute the words "for preceding two months", with the words "for the preceding month". After the amendment, a Registered Person shall not be allowed to furnish FORM GSTR-1, if he has not furnished the return in FORM GSTR-3B, for the preceding month.

### Specified persons excluded from Aadhaar Authentication

**Notification No 36/2021-Central Tax dated 24 September 2021** seeks to clarify that a person who is not a citizen of India; or a department of the Central or State Government; or a local authority; or a statutory body; or a PSU, or a person applying for registration under section 25(9) of the CGST Act 2017 [UN organizations or specific international organizations] is not required to undergo Aadhaar authentication or furnish proof of possession of Aadhaar number.

### CBIC notifies the Electronic Duty Credit Ledger Regulations 2021

**Notification No. 75/2021 – Customs (N.T.) dated 23 September 2021** notifies the Electronic Duty Credit Ledger Regulations 2021. Key features of the said rules are as follows:

1. Bills of export issued under section 50 of the Customs Act, on or after 1 January 2021, which has a claim of duty credit under the RoDTEP Scheme shall be processed automatically in the customs automated

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system (ICES). A scroll for duty credit will be created displaying all the relevant details with respect to such bill of export, after the claim of duty credit gets allowed in the system without manual intervention.

2. Registration of e-scrip to take place at the customs station for exports automatically in the ICES system and no manual application for registration is now required to be filed.
3. The e-scrip shall be valid for 1 year from the date of its creation in the electronic ledger and any unutilized duty credit shall lapse at the end of the 1-year period.
4. Transfer of duty credit in the e-scrip is possible within the automated system from the ledger of a person to the ledger of another person who holds an IEC number.
5. The duty credit or e-scrip in the ledger may be cancelled or suspended as per procedure notified by the Central Government under section 51B of the Customs Act, in case of violation of provisions with respect to exports, to which the said duty credit corresponds.

## CBIC notifies the manner of issue of duty credit for goods exported under the Refund of Duties and Taxes on Exported Products ("RoDTEP") Scheme

**Customs (N.T.) Notification No. 76/2021 dated 23 September 2021** notifies the manner of issue of duty credit for goods exported under the RoDTEP Scheme. The conditions to which the duty credit is subject are as follows:

1. The duty credit will be issued in lieu for the remission of any tax or duty payable on any material used in the manufacture or processing of goods or for carrying out any operation on such goods in India that are exported, where such duty or tax or levy is not exempted, remitted or credited under any other scheme.
2. The duty credit must be issued against claim made under the Scheme by an exporter by providing the appropriate declaration at the item level in the shipping bill or bill of export in the customs automated system ICES. Such shipping bill or bill of export will be processed electronically on the customs

automated system.

3. The said credit must be issued against the shipping bill or bill of export, presented under section 50 of the Customs Act on or after the 1 January 2021, and where the order permitting clearance and loading of goods for exportation has been made, as per section 51 of Customs Act, on or after such date.
4. The said credit must be issued against export of goods notified in Appendix 4R [RoDTEP] of the FTP.
5. The duty credit is to be issued after the claim is allowed by Customs based on necessary checks, including on the basis of risk evaluation through appropriate selection criteria, and after filing of export manifest or export report.
6. Such duty credit shall be used for payment of the duty of customs on goods when imported into India, as leviable under the First Schedule to the Customs Tariff Act, 1975;
7. The duty credit allowed under the Scheme against export of goods notified in the Appendix 4R shall be subject to realization of sale proceeds in respect of such goods in India within the period allowed under the Foreign Exchange Management Act, 1999, failing which such duty credit shall be deemed to be ineligible.
8. The duty credit under the Scheme for exports made to Nepal, Bhutan and Myanmar shall be allowed only upon realization of sale proceeds against irrevocable letters of credit in freely convertible currency established by importers in Nepal, Bhutan and Myanmar in favour of Indian exporters for the value of such goods.

The said notification also clarifies the procedure of cancellation of duty credit or e-scrip. The Commissioner of Customs has the authority to pass an order cancelling the duty credit or e-scrip if it is found that there has been violation of the provisions of the Customs Act, 1962 or in relation to exports to which the duty credit relates or in relation to the e-scrip. In the case, the e-scrip is cancelled, the duty credit amount in the said e-scrip shall be deemed

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never to have been allowed and the proper officer of Customs shall proceed to recover the duty credit amount used in such e-scrip or transferred from such e-scrip. The manner of recovery of amount of duty credit as well as the procedure of recovery of such amount when export proceeds have not been realised, has been enumerated in this notification.

## CBIC notifies the manner of issue of duty credit for goods exported under the RoSCTL Scheme

**Notification No. 77/2021 - Customs (N.T.) dated 24 September 2021** notifies the manner of issue of duty credit for goods exported under the RoSCTL Scheme. All conditions to which duty credit under the RoSCTL scheme is mandated to be fulfilled are pari materia to the Customs (N.T.) Notification No. 76/2021 dated 23 September 2021 [Main RoDTEP Scheme Notification] except for garments, which requires that the duty credit will be issued against exports of garments and made-ups, as per the respective rate and cap as listed in Schedules 1, 2, 3 and 4 to the Notification No. 14/26/2016-IT (Vol. II), dated 8 March, 2019, of Ministry of Textiles.

## No Customs Duty on import of COVID-19 vaccine till 31st December, 2021

**Notification No. 45/2021 - Custom Tariff dated**

**29 September 2021** has been issued to provide exemption from the levy of Customs Duty on import of COVID-19 vaccine. This notification shall come into force on 1 October 2021. This exemption shall remain available up to and inclusive of the date of 31 December 2021.

## CBIC notifies CGST Rate on various services with effect from 1 October 2021

Notification No. 06/2021- Central Tax (Rate) dated 30 September 2021 amends Notification No. 11/2017- Central Tax (Rate) dated 28 June 2017, providing classification of services, so as to notify CGST rates of various services.

- Temporary or permanent transfer or permitting the use or enjoyment of any Intellectual Property right is now subject to 18% across the board;
- Other rates notified are on services by way of job work in relation to manufacture of alcoholic liquor for human consumption – 18%; Manufacturing services, publishing, printing and reproduction services, material recovery services – 18%;
- Services by way of admission to theme parks, water parks, casino, race clubs etc. as recommended by GST Council in its 45th meeting held on 17 September 2021 with effect from 1 October 2021 is now to be taxed at 28%

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## CBIC has issued certain clarifications as tabled below:

S. No.	Circulars	Explanation
1.	Circular No. 159/15/2021-GST dated 20 September 2021	<p>Circular provides clarification as to the scope of “Intermediary services” under GST laws. The definition of intermediary in the IGST Act 2017 has been borrowed from the Service Tax law and there has been no major change in the said definition except the addition of “supply of securities” in the definition in the IGST Act. The circular lists out the primary pre-requisites for intermediary services which are as follows:</p> <ul style="list-style-type: none"> <li>• The activity of intermediary service requires minimum 3 parties - two of them involved in the transaction of supply of goods or services (the main supply) and the third one facilitating the main supply.</li> <li>• Two separate supplies are involved in the provision of intermediary services namely, a main supply between two principals and an ancillary supply which refers to the service facilitating the main supply.</li> </ul>



		<ul style="list-style-type: none"> <li>The intermediary service provider needs to be an agent, broker or any other similar person. The definition uses the word 'means' which implies that it is not inclusive in nature. The expression "arranges or facilitates" indicates that the intermediary has only a supportive role and does not provide the main supply.</li> <li>Cases wherein the person supplies the main supply either fully or partly on principal-to-principal basis, the said supply cannot be covered within the meaning of "intermediary".</li> <li>Sub-contracting for a service is excluded from the scope of "intermediary".</li> <li>The provision of place of supply of "intermediary services" under section 13 of the IGST Act shall be invoked only when either the location of supplier of intermediary services or location of the recipient of intermediary services is outside India.</li> <li>An important exception has been clarified to hold that BPO services are not to be considered as intermediary services</li> <li>Illustrations have also been provided in the circular along with the clarification that those are only indicative and generic in nature and that whether a service would be an intermediary service or not would be decided on a case-to-case basis.</li> </ul>
2.	Circular No. 160/16/2021-GST dated 20 September 2021	<p>Circular issued to clarify certain issues with respect to GST laws.</p> <ul style="list-style-type: none"> <li>Section 16(4) of the CGST Act 2017 was amended vide Finance Act, 2020 to delink the date of issuance of debit note from the date of issuance of the underlying invoice for purposes of availing ITC. Effective 1 January 2021, in case of debit notes, the date of issuance of debit note (not the date of underlying invoice) shall determine the relevant financial year for the purpose of section 16(4) of CGST Act.</li> <li>The availment of Input Tax Credit ("ITC") on debit notes in respect of amended provision shall be applicable from 01 January 2021. The eligibility for availment of ITC will be governed by the amended provision whereas any ITC availed prior to 1 January 2021, in respect of debit notes, shall be governed under the old provision.</li> <li>The physical copy of tax invoice is not required to be carried in cases where e-invoice has been generated by the supplier. It is clarified that whenever e-invoice has been generated, production of QR code, having an embedded Invoice Reference Number (IRN), for verification by the proper officer may suffice.</li> </ul>

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		<ul style="list-style-type: none"> <li>Only those goods which are actually subjected to export duty i.e., on which some export duty has to be paid at the time of export, will be covered under the restriction imposed under section 54(3) of CGST Act, with respect to availment of refund of accumulated ITC. Goods, which are not subject to any export duty and in respect of which either NIL rate is specified or are fully exempted, would not be covered by the restriction imposed under the first proviso to section 54(3) of CGST Act.</li> </ul>
3.	Circular No. 161/17/2021-GST dated 20 September 2021	Circular provides clarification with respect to condition (v) of section 2(6) of the IGST Act 2017 which defines "export of services". It is clarified vide this circular that a company incorporated in India and a body corporate incorporated by or under the laws of a country outside India, which is also referred to as foreign company under Companies Act, are separate persons under CGST Act, and thus are separate legal entities. Accordingly, these two separate persons would not be considered as mere establishments of a distinct person in accordance with explanation 1 in section 8 of the CGST Act. Therefore, supply of services by a subsidiary/ sister concern/ group concern, etc. of a foreign company, which is incorporated in India under the Companies Act, 2013, to the establishments of the said foreign company located outside India [which are also incorporated in said country] would not be barred by the condition (v) of section 2 (6) for being considered as export of services.

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### In re M/s B.G. Shirke Construction Technology Private Limited (2021 (9) TMI 949 - AUTHORITY FOR ADVANCE RULING, MAHARASHTRA)

The Maharashtra Bench of the Authority of Advance Ruling (AAR) has recently ruled that managerial and leadership services by a corporate office to its group companies/ construction sites registered in different states would attract 18% GST. In the present case, the applicant has construction sites in different states and holds separate GST registration for these sites in such states [distinct persons]. The applicant also has GST registered group companies [related persons] engaged in various activities. The applicant was providing various leadership services from the corporate office to these related persons and distinct persons and was receiving fixed monthly charges for the same. The present ruling was given in the context whether managerial and leadership services by corporate office employees (e.g., C-Suite employees etc.) to its group companies/

construction sites, registered in different states, would attract 18% GST, when a lumpsum consideration was being received for the expenses incurred by the registered/corporate office. Considering the submissions of the applicant, the AAR held that the group companies were related persons, and the site offices were distinct persons, and both were registered independently and separately under GST laws. Hence, there was no employee-employer relationship between such offices. Further, the corporate office employees were employed by the corporate office and not by such related or distinct persons. Hence, the supply of leadership services for a fee was covered under Entry 2 of Schedule I of the CGST Act which provides that – "Supply of goods or services or both between related persons or between distinct persons, as provided in Section 25 [of the CGST Act], when made in the course or furtherance of business will be activities to be treated as supply, even if made without consideration". Consequently, the AAR held that the lump sum payment received by the Applicant was taxable under GST laws.



The AAR further held that where the service recipient was eligible for full input tax credit, any value declared in the GST invoice would be deemed to be the open market value of the services [as there were no comparable services or ascertained open market value], per the valuation rules under Rule 28 of the CGST Rules, 2017 and its associated provisos. This dispute is an industry issue where concurrent appeals challenging the above position are pending in various high courts in the country including the appeal against a decision of the Appellate Authority of Advance Ruling in the Karnataka High Court.

## **Sinochem India Company Private Limited Vs Union of India (Writ Petition (L) No. 13894 of 2021-Bombay High Court)**

The issue in the present case was regarding amendment of Bill of Entry (“BOE”), seeking amendment in GSTIN and the address in the BOE. The Department submitted that once the goods are ‘out of charge’, any application for amendment cannot be entertained in exercise of power conferred by Section 149 of the Customs Act. Section 149 of the Customs Act provides that no amendment in the BOE shall be authorised after imported goods have been cleared for home consumption or deposited in a warehouse, except based on documentary evidence which was in existence at the time when the goods were cleared.

The Bombay High Court relied upon the decision of the Bombay High Court in the case of *Dimension Data India Private Ltd. v. Commissioner of Customs and Anr.* [Writ Petition (L) No. 249 of 2020 dated 18 January 2021] which interpreted Section 149 of the Customs Act and held that amendment to a BOE is clearly permissible even in a situation where the goods are cleared. The court held that as amendment of documents is squarely covered under Section 149 of the Customs Act, any deficiency in the system cannot be used by the department as a shield to deny relief. Further, the High Court held that if the system does not permit such amendment, the deficiency must be covered by a manual filing until improvements are introduced in the system for such amendment.

The petition was allowed and the Petitioner directed to file appropriate amendment application under Section 149 of Customs Act, for consideration.

## **A.P. Refinery Pvt. Ltd Vs State of Uttarakhand and Others (Writ Petition (M/S) No. 1014 of 2021 - Uttarakhand High Court)**

In the present case, the assessee was transporting Rice Bran Oil from its factory located in Punjab to a dealer in Uttarakhand. The assessee was transporting the said consignment of Rice Bran Oil through three trucks and had raised three e-invoices. Thereafter, the assessee generated e-way bills from the e-way bill portal of the department, containing cross-references to the e-Invoices. However, said e-way bills were to expire on 30 March 2021, i.e. few hours before actual delivery of the goods which was delayed in transit.

Since the e-Way bills had expired before delivery, the Assistant Commissioner (GST-State), issued three separate orders for physical verification of the consignment. Upon physical verification, the description on the e-Invoices were found to be matching with the physical goods verified in the vehicle. However, the Revenue still ordered the confiscation of the goods and trucks for further proceedings, and show-cause notices was issued to the assessee for demand of duty

The Uttarakhand High Court held that mere suspicion was not sufficient to invoke the provision of the confiscation, as mentioned in sub-section (4) of Section 130. Further, the assessee must be given an opportunity of being heard, by virtue of the principles of natural justice, before any confiscation order is passed, and such proceedings reduced to writing. The confiscation orders which were passed under Section 130 in Form GST MOV-11, were hence not found to be passed in accordance with law and were quashed summarily.

## **Ravindranatha Bajpe Vs Mangalore Special Economic Zone Ltd. & Others Etc. (Criminal Appeal No. 1047-1048/2021 - Supreme Court)**

The Supreme Court observed that lower courts necessarily had to record sufficient

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documentation for the satisfaction of a *prima facie* case against any accused, who are managing director, the company secretary and the directors of the company, and record the role played by them in their respective capacities in the company. This matter of record is the *sine qua non* for initiating criminal proceedings against them. In this case, the Apex Court found no specific allegations or averments with respect to role played by the chairman, managing director, executive director, deputy general manager and planner & executor of the company and proceedings had been initiated merely because they held such positions in the company.

The Apex Court held that without existence of specific record proving culpability, persons cannot be arraigned as accused, and particularly they cannot be held vicariously liable for the offences committed by the company.

## Agarwal Metals and Alloys (TS-382-Supreme Court-2021)

The Supreme Court has followed its own judgement in Cannon India and quashed a revenue appeal in the present case. The Supreme Court has again held that since the initial show cause notices were issued by the Additional Director General of the DRI, they were invalid *ab initio* as the additional director general was not a 'proper officer' in terms of the Customs Act, 1962. The Supreme Court rejected the stand of the Revenue that the judgement of Cannon India was under review. However, the Supreme Court gave leeway for the proper competent authority as per law to proceed with the matter against the assessee in accordance with the law.

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