

EY Tax Alert

Writ petitions filed before different high courts in the GST regime

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Executive summary

This Tax Alert summarizes various Writ petitions filed before different high courts since the introduction of GST and the outcome of such petitions.

The Key issues raised before the Courts are:

- ▶ Challenging the constitutional validity of levying IGST on the services provided to a head office situated outside India (Delhi HC)
- ▶ Challenging the provisions restricting transitional and deemed input tax credit beyond stipulated period under section 140(3)(iv) of CGST Act, 2017 (Delhi HC)
- ▶ Seeking directions pertaining to utilization of CGST credit and SGST credit for payment of IGST liability (Delhi HC)
- ▶ Challenging the power of state government to detain the goods during the inter-state movement of goods (Kerala HC)
- ▶ Challenging constitutional validity of GST (Compensation to States) Act, 2017 on the ground that same is ultra vires Article 279A of the Constitution of India (Gujarat HC)
- ▶ Questioning the dual levy of IGST on goods stored in bonded warehouse (Delhi HC)
- ▶ Challenging the requirement of registration in every state and union territory for claiming ITC (Delhi HC)



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Writ petition filed before the Delhi High Court (HC), challenging constitutional validity of levying IGST on the services provided to Head Office situated outside India¹

- ▶ A writ petition was filed by a bank challenging the levy of Integrated Goods and Services Tax (IGST) on the services provided to its Head Office situated abroad.
- ▶ By virtue of the provisions of Section 7(5)(a) of IGST Act, 2017, if the supplier is located in India and the place of supply is outside India, it shall be treated as inter-state supply. Hence, IGST was leviable on banking services provided by the bank to its Head Office situated in Singapore.
- ▶ The petitioner contended that there was no levy of service tax on such transactions and the provision under section 7(5)(a) of IGST, which deems such transactions to be an inter-state supply, is violative of Article 14 of the Constitution of India.
- ▶ HC admitted the petition and served notice to the Union of India and the GST Council to address the issue of IGST on services rendered outside India.
- ▶ The matter was listed for hearing on 29 January 2018. However, the outcome of this writ petition is awaited.

Writ petition filed before Delhi HC, challenging provisions restricting transitional and deemed ITC beyond stipulated period under section 140(3)(iv) of CGST Act, 2017²

- ▶ The petitioner challenged the condition contained in section 140(3)(iv) of the Central Goods and Services Tax (CGST) Act, 2017, which provides that no CENVAT credit will be available for the stock lying for more than one year prior to the appointed day.
- ▶ The petitioner also challenged availability of deemed credit scheme for a period of six months from the appointed date in terms of proviso to section 140(3) read with Rule 117(4)(a)(iii) of CGST Rules, 2017.
- ▶ Deemed credit scheme allows credit on the duty paid stock to the registered person in case such person is not in possession of any document evidencing payment of central excise duty/value added tax subject to the prescribed conditions.
- ▶ HC granted interim relief to the petitioner by allowing

¹ *DBS Bank Limited India Branches v. Union of India & Anr*; [W.P.(C) 8732/2017]

² *Hafele India Pvt. Ltd. v. Union of India & ANR*; [W.P. (C) 9572/2017, C.M. Appl. 38984/2017 and *GMMCO Limited v. Union of India & Anr*; [W.P. (C) 9539/2017, C.M. Appl. 38777/2017]

input tax credit on pre-GST stock despite stipulation of time-limit under section 140(3)(iv) of CGST Act, until the finalization of the matter.

- ▶ The matter has been slated for hearing on 20 April 2018.

Writ petition filed before the Delhi HC, seeking directions pertaining to utilization of CGST credit and SGST credit for payment of IGST liability³

- ▶ The petitioner sought directions from the HC on the utilization of credit of CGST and the State Goods and Services Tax (SGST) for payment of IGST in terms of section 49(5) of the CGST Act, 2017.
- ▶ The issue raised by the petitioner was that they were unable to make the payment of IGST partially from the credit of CGST and partially from the credit of SGST due to error on the online portal.
- ▶ The petitioner pointed out that online portal displayed an error stating "Offset the CGST credit completely before cross utilisation of SGST credit against IGST tax liability". In this regard, the petitioner contended that neither section 49(4) nor section 49(5) of CGST Act, 2017 prescribes such restriction on cross-utilisation.
- ▶ The petitioner submitted that system cannot be programmed to deny utilisation of CGST and SGST credit in a manner not envisaged either under the Act or Rules.
- ▶ The matter has been posted for hearing on 12 February 2018.

Writ petition filed before Kerala HC, challenging power of the State Government to detain the goods at the time of inter-state movement of goods⁴

- ▶ The petitioner filed a writ petition for release of its goods detained by the State Government for non-compliance of documents at the time of transportation.
- ▶ The petitioner argued that the State Government does not have competence to detain the goods meant for inter-state supplies.
- ▶ In this regard, HC analysed section 4 and section 20 of IGST Act, 2017 read with Rule 138 of the CGST Rules, 2017 and concluded that the power to prescribe

³ *A&M Design & Print Production v. Union of India & Ors.* [W.P. (C) No. 7977/2017]

⁴ *Asciscs Trading Company v. The Assistant State Tax Officer & Anr*; [W.P. (C) No. 31328/2017]

documents that needs to be accompanied at the time of inter-state transportation of goods rests with the Central Government.

- ▶ Further, the Central Government has not notified the documents that have to be carried by the transporter of the goods in the course of inter-state movement.
- ▶ In view of the above, the court held that detention of goods by the State Government for the sole reason that transportation of goods was not accompanied by the prescribed documents under the IGST Act, CGST Act or the CGST Rules, cannot be legally sustained.
- ▶ Therefore, HC directed the respondent to release the goods of the petitioner.

Writ petition filed before Gujarat HC, challenging constitutional validity of GST (Compensation to States) Act, 2017 on the ground that same is ultra vires Article 279A of the Constitution⁵

- ▶ The petitioner challenged the vires of the GST (Compensation to States) Act, 2017 and the relevant Notifications issued thereunder on the ground that the same is ultra vires Article 279A of the Constitution of India.
- ▶ The petitioner highlighted that they have to pay Compensation cess on the stock purchased prior to 1 July 2017 on which the petitioner has already paid Clean Energy Cess for which no credit was available.
- ▶ In view of the above, validity of Union Legislation is questioned and the court ordered to issue notice to the Learned Attorney General of India.
- ▶ The matter has been listed for hearing on 8 February 2018.

Writ petition filed before Delhi HC, to allow utilization of clean energy cess⁶

- ▶ The petitioner having already paid clean energy cess on the coal purchased was not able to take credit of the same as any credit taken in TRAN-1 was carried forward as either CGST or SGST.
- ▶ Further, the petitioner stated that if it discloses cess in TRAN-1, even then it will not be available for set off against the GST Compensation cess liability. Therefore, the petitioner submitted that despite the order dated 25 August 2017 passed by this court which allowed refund of compensation cess already paid, petitioner was not able to take the credit of the same.

▶ In this regard, petitioner has sought appropriate directions from the Revenue to amend TRAN-1 and simultaneously GSTR -3B and GSTR-1, GSTR-2 and GSTR -3 where utility of cess is to be shown. A column should be inserted in TRAN-1 so that clean energy cess can be carried forward as cess.

▶ The petitioner stated that until an appropriate method is not evolved by the Revenue, the petitioner willing to pay all the taxes as required by law, should be permitted to pay taxes and file the returns manually.

▶ In view of the above, HC directed the petitioner to continue to pay taxes as and when they fall due after availing and utilizing the credit for the cess already paid. However, this will be subject to the final order passed by the Court.

▶ As regards the non-filing of returns by the petitioners on the due dates, HC directed that till the time an appropriate method / system is evolved by Revenue which will facilitate utilization of credit and electronic filing, Revenue will not take any coercive steps against the petitioner for failure to file electronic returns on time.

▶ The matter is pending disposal and shall be heard in due course.

Writ petitions filed before Madras HC, challenging levy of GST at 12% on Works Contract agreement executed prior to July 2017⁷

▶ The petitioner is an association registered under the provisions of the Tamil Nadu Societies Registration Act, 1975.

▶ The Association was formed for the Welfare of the members of the Road Contractors who have been undertaking works for the National Highways and Highways Department and other Governmental Organisation.

▶ The petitioners had paid tax at 2% of the value for the works executed by them towards Works Contract Tax under the Tamil Nadu Value Added Tax, 2006.

▶ Under GST regime w.e.f. 1 July 2017, tax at 12% is leviable on the specified works contract service provided to Government, therefore, the petitioner would be liable to pay tax at 12%.

▶ In this regard, the petitioner contended and filed representations stating that tax at 12% cannot be charged on works contract for the agreements executed prior to 1 July 2017 and the petitioner is liable to pay tax at 2% VAT as applicable under Tamil Nadu Value Added Tax, 2006.

⁵ *Adi Tradelink v. Union of India*; [Special Civil Application No. 20184/2017]

⁶ *Mohit Minerals Pvt. Ltd v. Union of India & Anr*; [W.P.(C)No. 7459/2017]

⁷ *Coimbatore Road Contractors Welfare Association v. State of Tamil Nadu & Ors*; [Contempt Petition Nos. 2107 to 2112/2017]

- ▶ Since the representations were pending before the authority, HC ordered the Commissioner of Commercial Taxes, to pass orders on merits within two weeks from the date of receipt of a copy of this order.
- ▶ Accordingly, the writ petitions are disposed of.

Writ petition filed before Delhi HC, questioning dual levy of IGST on goods stored in bonded warehouse⁸

- ▶ The petitioner filed a writ petition challenging the double taxation on imported goods i.e. (i) at the time of sale (payable by importer-seller), and (ii) ex-bond stage (payable by domestic buyer).
- ▶ Central Board of Excise and Customs (CBEC) had issued a circular⁹ and clarified that inter-state supply of imported goods stored at customs bonded warehouse will attract IGST on its importation from outside India as well as on its further inter-state supply in India.
- ▶ The petitioner contended that this raised fears of government imposing IGST twice on these kind of transaction.
- ▶ Further, petitioner pointed out that they have an apprehension that taxes paid may not be available as input tax credit.
- ▶ The matter has been listed for hearing on 8 March 2018.

Writ petition filed before Delhi HC, challenging the requirement of registration in every state and union territory for claiming ITC¹⁰

- ▶ The petitioner is in the business of booking tours and hotel packages for customers. It charges IGST from customers for bookings in hotels located outside Delhi.
- ▶ The petitioner is unable to avail ITC on the SGST charged by the hotels located outside Delhi as petitioner is not registered in the state in question.
- ▶ In this regard, the petitioner has filed a writ petition challenging the requirement of being a registered person in every state and union territory for availment of ITC in relation to inter-state supply of goods or services as contained in section 2(94) of CGST Act, read with sections 22(1), 24(i) and (vii) and 25 of the CGST Act, as being illegal and unconstitutional.
- ▶ The petitioner contended that they have to compulsory

register themselves in a state or a union territory in order to avail ITC of SGST paid, otherwise the petitioner would be unable to claim credit of SGST paid which will result into double taxation.

- ▶ Further, the petitioner submitted that owing to the absence of availing the facility to claim ITC of SGST of other states without first obtaining registration in those states, the effective rate of tax would go up from 18% to 27% for hotel rooms in the slab of upto INR 7,500/- and from 28% to 42% for hotel rooms falling in the slab of INR 7,500/- and above.
- ▶ In light of the above, HC directed the respondent to examine the matter and also to consider whether the matter should be placed before the GST Council or not.
- ▶ The matter has been listed for hearing on 8 February 2018.

Writ petition filed before the Delhi HC, to allow the import of goods without payment of IGST in case of advance authorization¹¹

- ▶ Imports under the Advance Authorization scheme were earlier exempt from payment of import duty comprising basic customs duty and additional duties of customs. IGST is payable on imports made after 1 July 2017 under GST law. However, outright exemption was not provided to such IGST payable on imports made under Advance Authorization scheme.
- ▶ In this regard, a writ petition was filed before the Delhi HC to allow the petitioner to import goods against advance authorization without payment of IGST, as import by paying IGST was causing blockage of working capital and the resultant burden of the same could not be passed on to the buyer outside India.
- ▶ In view of the above, HC issued interim relief and allowed the petitioner to make imports under the scheme without paying IGST but by furnishing letter of undertaking to the concerned authority.
- ▶ The matter has been slated for hearing on 16 April 2018.
- ▶ In the meanwhile, pursuant to the recommendations of GST Council, the Notification¹² has been issued allowing imports against Advance Authorization, EPCG without payment of IGST as well as Compensation Cess till 31 March 2018.

⁸ *Devashish Polymers Private Limited v. Union of India & Ors; [W.P.(C) 11542/2017]*

⁹ *Circular 46/2017- Customs dated 24 November 2017*

¹⁰ *D Pauls Travel and Tours Ltd v. Union of India & Ors; [W.P.(C) 7320/2017]*

¹¹ *Jindal Dyechem Industries (P) Ltd v. Union of India & Ors; [W.P.(C) 8677/2017]*

¹² *Notification no. 79/2017 - Customs dated 13 October 2017*

Comments

While in most of the writ petitions, high courts have deferred the final disposal of the matter by allowing the interim relief, CBEC has directed its officers to defend matters by filing SLP against all orders whether interim or final, where the levy of GST has been questioned or stayed.

In some cases, notifications / corrigendum have been issued basis recommendations of GST Council, resolving the issue raised by the writ petitions.

Application of the ratio of interim orders of the Court will depend on the facts specific to each matter. In any case, the legal position will not gain certainty till final adjudication.

It is expected that Government will consider addressing some of the issues through appropriate amendments to GST law in the Union Budget.

Our offices

Ahmedabad
2nd floor, Shivalik Ishaan Near C.N.
Vidhyalaya Ambawadi
Ahmedabad - 380 015
Tel: + 91 79 6608 3800
Fax: + 91 79 6608 3900

Bengaluru
6th, 12th & 13th floor "UB City",
Canberra Block No.24 Vittal Mallya
Road Bengaluru - 560 001
Tel: + 91 80 4027 5000
+ 91 80 6727 5000
+ 91 80 2224 0696
Fax: + 91 80 2210 6000

Ground Floor, 'A' wing Divyasree
Chambers
11, O'Shaughnessy Road Langford
Gardens Bengaluru - 560 025
Tel: +91 80 6727 5000
Fax: +91 80 2222 9914

Chandigarh
1st Floor, SCO: 166-167 Sector 9-C,
Madhya Marg Chandigarh - 160 009
Tel: +91 172 331 7800
Fax: +91 172 331 7888

Chennai
Tidel Park, 6th & 7th Floor
A Block (Module 601,701-702) No.4,
Rajiv Gandhi Salai Taramani, Chennai -
600 113
Tel: + 91 44 6654 8100
Fax: + 91 44 2254 0120

Delhi NCR
Golf View Corporate Tower B Sector 42,
Sector Road Gurgaon - 122 002
Tel: + 91 124 464 4000
Fax: + 91 124 464 4050

3rd & 6th Floor, Worldmark-1 IGI Airport
Hospitality District Aerocity, New Delhi -
110 037
Tel: + 91 11 6671 8000
Fax + 91 11 6671 9999

4th & 5th Floor, Plot No 2B
Tower 2, Sector 126
NOIDA - 201 304
Gautam Budh Nagar, U.P.
Tel: + 91 120 671 7000
Fax: + 91 120 671 7171

Hyderabad
Oval Office, 18, iLabs Centre Hitech
City, Madhapur Hyderabad - 500 081
Tel: + 91 40 6736 2000
Fax: + 91 40 6736 2200

Jamshedpur
1st Floor, Shantiniketan Building
Holding No. 1, SB Shop Area Bistupur,
Jamshedpur - 831 001
Tel: +91 657 663 1000
BSNL: +91 657 223 0441

Kochi
9th Floor, ABAD Nucleus
NH-49, Maradu PO
Kochi - 682 304
Tel: + 91 484 304 4000
Fax: + 91 484 270 5393

Kolkata
22 Camac Street 3rd
Floor, Block 'C' Kolkata -
700 016
Tel: + 91 33 6615 3400
Fax: + 91 33 2281 7750

Mumbai
14th Floor, The Ruby
29 Senapati Bapat Marg Dadar
(W), Mumbai - 400 028
Tel: + 91 22 6192 0000
Fax: + 91 22 6192 1000

5th Floor, Block B-2 Nirlon
Knowledge Park
Off. Western Express Highway
Goregaon (E)
Mumbai - 400 063
Tel: + 91 22 6192 0000
Fax: + 91 22 6192 3000

Pune
C-401, 4th floor Panchshil
Tech Park Yerwada
(Near Don Bosco School)
Pune - 411 006
Tel: + 91 20 6603 6000
Fax: + 91 20 6601 5900

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