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TAX NEWSLETTER

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What's Inside

Part I – Direct Tax

- Charitable institutions of the residual 'general public utility' category can engage in trade and commercial activity to attain objectives with a monetary limit provided under section 2(15) of the Act – Supreme Court
- The term 'solel' is not the same as 'predominant/ mainly'. The term 'solely' means to the exclusion of all others – Supreme Court
- Amount credited to partner's capital account on revaluation of assets can be said to be 'transfer', taxable as capital gain under erstwhile section 45(4) of the Act – Supreme Court
- The non-obstante clause under section 43B or anything contained in that provision would not absolve the taxpayer from its liability to deposit the employee's contribution on or before the due date as a condition for deduction – Supreme Court
- Partial relaxation with respect to electronic submission of Form 10F by select categories of taxpayers

Part II – Indirect Tax

- Amendment made to the CGST Rules
- Circulars to clarify various issues under GST
- Customs
- Judicial Updates

THE ASSOCIATED CHAMBERS OF COMMERCE AND INDUSTRY OF INDIA

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PART I – DIRECT TAX

Charitable institutions of the residual 'general public utility' category can engage in trade and commercial activity to attain objectives with a monetary limit provided under section 2(15) of the Act – Supreme Court

In the case of *ACIT (Exemptions)* v. *Ahmedabad Urban Development Authority*,[1] the Supreme Court dealt with the concept of 'advancement of any other object of general public utility' under section 2(15) of Income tax Act, 1961 (the Act).

The Revenue contended that organisations that mask their profit under the garb of charitable purposes have mushroomed. The belief is that 'the mask is charitable but the heart hungers for tax-free profit'. The Revenue further contended that various organisations claiming exemption should be brought to tax as such organisations were carrying out trade or commercial business in the guise of being a charitable entity.

The term 'solely' is not the same as 'predominant / mainly'. The term 'solely' means to the exclusion of all others – Supreme Court

The taxpayer's contention was that receipts from the services have largely been ploughed back in to attain the objectives of general public utility (GPU). Also, the accounts have been audited as stipulated in a timely manner. The taxpayer argued that if the activities involved were mainly charitable and for advancement of public utility, it did not matter even if the organisation carried on some business or trade like activities to generate income.

The Supreme Court held that a taxpayer carrying on commercial activity as part of carrying out objects of GPU would not be entitled to claim the said activity as 'charitable purpose' unless the activities are carried out in the course of advancement of GPU and further the aggregate receipts are within the prescribed limits, i.e., 20% of the total receipts of the previous year with effect from 1 April 2016. Moreover, there is a requirement of maintaining separate books of accounts of such incidental business in line with section 11(4A) of the Act which is to be read harmoniously with section 2(15) of the Act.

The Supreme Court has also clarified that if and when the consideration for such an activity of advancing GPU is on a cost basis or nominally above the cost, such an activity cannot be considered as 'trade, commerce or business' or any services in relation thereto. It is only when the charges are markedly or significantly above the cost, that they would fall within the mischief of 'cess, or fee, or any other consideration' towards 'trade, commerce or business'. Under this circumstance, the limit in the proviso would be invoked. The Supreme Court has applied this core principle broadly across categories of the taxpayers against whom the Revenue was in appeal.

The term 'solel' is not the same as 'predominant/ mainly'. The term 'solely' means to the exclusion of all others – Supreme Court

Section 10(23C)(vi) of the Act *inter alia* provides certain exemption to charitable trusts that 'solely' exist for education purpose and 'not for profit'. Seventh proviso to section 10(23C)(vi) of the Act *inter alia* provides that profits and gains of business earned by such trusts may be exempt, if such business is incidental to the attainment of its objects and separate books of accounts are maintained.

The Supreme Court in *New Noble Educational Society v. CCIT and Anr.*,[2] held that the term 'solely' is to be interpreted as exclusively and not predominantly. Therefore, the trust under section

[1] Civil Appeal No. 21762 of 2017
[2] Civil Appeal No. 3795 of 2014 and others

10(23C)(vi) must solely exist for educational purposes and not for profit. However, as an exception, the seventh proviso permits such trust to earn profits from business, provided such business activities are incidental to the attainment of its objective of providing education and/or connected with the activity of education like sale of textbooks, school bus facility, hostel facilities, etc.

Where institutions provide their infrastructure to other entities for the purpose of conducting seminars, workshops etc., the income derived therefrom cannot be characterised as education or incidental to the imparting of education.

The other observations of the Supreme Court are as follows:

i. All objects of the trust must relate to imparting education or be in relation to educational activities. Objects unrelated to the main object of education would disentitle the trust for exemption under the Act.

ii While considering applications for approval under section 10(23C), the concerned authority may, in addition to examining the objects of the institution/ trust, also examine accounts and other related documents in the case of existing institutions. This would be necessary to ascertain the genuineness of the institution and the manner of its functioning.

iii) Wherever registration of trust is obligatory under state or local laws, the concerned trust seeking approval under section 10(23C) should also comply with provisions of such state laws.

iv) As the present judgment has departed from the previous decisions regarding the meaning of the term 'solely', in order to avoid disruption, and to give time to institutions likely to be affected, to make appropriate changes and adjustments, the law declared in this judgment would operate prospectively.

Amount credited to partner's capital account on revaluation of assets can be said to be 'transfer', taxable as capital gain under erstwhile section 45(4) of the Act – Supreme Court

In *CIT* v. *Mansukh Dyeing and Printing Mills*,[3] the taxpayer was a partnership firm. During the relevant previous year, the assets of the taxpayer were revalued, and the revaluation amount was credited to the accounts of the partners in their profit-sharing ratio. Two of the original partners withdrew some amounts from their capital accounts.

According to the Revenue, credit of the revalued amount to the accounts of the partners was akin to distribution of the assets to the partners. Such distribution should be 'transfer' under section 45(4) of the Act.

The taxpayer, *inter alia*, contended that the provisions of section 45(4) would be attracted only if there is a transfer of a capital asset by way of distribution and such transfer is either on account of dissolution of the partnership firm or otherwise. The taxpayer argued that the surplus on account of revaluation of assets credited to the partner's capital account could not be construed as a transfer or deemed transfer as per section 45(4). It was only a book entry of notional surplus accounted in the books of account.

The Supreme Court held that the credit to the partner's capital account of the revaluation amount can be said in effect to be distribution of assets to the partners. The newly admitted partners were benefitted by the huge credit to their respective accounts, immediately after joining the firm, which was available to the partners for withdrawal. Therefore, revaluation of the asset and the credit into the capital accounts of the respective partners can be said to be 'transfer' which falls in the category of 'otherwise' and therefore, the provision of section 45(4) inserted

[3] Civil Appeal No. 8258 of 2022

by Finance Act, 1987, w.e.f. 1 April 1988 will be applicable.

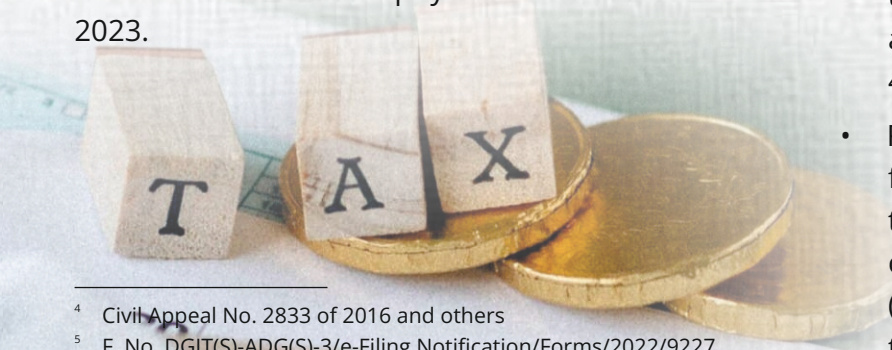
The non-obstante clause under section 43B or anything contained in that provision would not absolve the taxpayer from its liability to deposit the employee's contribution on or before the due date as a condition for deduction – Supreme Court

In the case of *Checkmate Services Pvt. Ltd.* v. *CIT*,[4] the Supreme Court held that deposit of employees' PF and ESI contribution specified under section 36(1)(va) of the Act on or before the due date stipulated in the respective statutes is an essential condition for claiming deduction.

The Supreme Court observed that the leeway granted to taxpayers under section 43B to allow deductions on deposits made beyond the due date, but before the date of filing the return cannot apply in the case of employees' contribution that are held in trust after deducting from employees' income.

Partial relaxation with respect to electronic submission of Form 10F by select categories of taxpayers[5]

The Directorate of Income Tax (Systems), New Delhi, CBDT, in a Notification dated 12 December 2022, has stipulated that non-resident taxpayers who are not having PAN and not required to have PAN under the provisions of the Act read with the Rules, are 'exempted' from electronic filing of Form l0F till 31 March 2023. These non-residents can furnish Form 10F in physical form till 31 March 2023.



[4] Civil Appeal No. 2833 of 2016 and others

[5] F. No. DGIT(S)-ADG(S)-3/e-Filing Notification/Forms/2022/9227 dated 12 December 2022

[6] Notification Nos. 26/2022 & 27/2022-Central Tax dated 26 December 2022

PART II – INDIRECT TAX

The Central Board of Indirect Taxes and Customs (CBIC) issued notifications, making key amendments to the Central Goods and Services Tax Rules, 2017 (CGST Rules), and the statutory forms therein in furtherance of announcements made at the 48th Meeting of Goods and Services Tax (GST) Council.

Amendment made to the CGST Rules[6]

Registration

- Permanent Account Number linked mobile number and email address should be updated on registration application of the applicant.
- Implementation of biometric-based Aadhaar authentication and risk-based physical verification of registration applications of the applicant

Reversal of ITC

- Amendment to Rule 37 of the CGST Rules to provide that Input Tax Credit (ITC) reversal shall be proportionate to the extent of amount not paid to the suppliers.
- Insertion of new Rule 37A to the CGST Rules which provides the mechanism with respect to reversal and re-availment of ITC on an invoice or debit note on which tax is not paid by the supplier.

Outward supplies and invoice related

- Single invoice-cum-bill of supply issued to an unregistered person to contain the particulars as specified in other rules, i.e. Rules 46, 54 and 49 of the CGST Rules as applicable.
- Rule 87 has been amended to provide that on failure by bank to communicate the details of the Challan Identification Number to the common portal, the Electronic Credit Ledger (ECL) will be updated based on the E-scroll of the Reserve Bank of India where such cases are in conformity with details of the challan.
- Issuance of tax invoice containing the name

and address of the recipient along with its State and PIN code by the supplier, supplying taxable service by or through an electronic commerce operator or of an online information and database access or retrieval (OIDAR) services to an un-registered recipient. Such address will be deemed to be the recipient's address on record.

- Through Rule 59 and insertion of new Rule 88C, the following amendments were made-
  - ✓ Difference arising due to excess tax payable as per Form GSTR-1 over tax paid as per Form GSTR-3B for the same tax period to be intimated to the taxpayer electronically through newly introduced Form DRC-01B
  - ✓ Taxpayer to pay the differential tax liability along with interest under section 50 of the Central Goods and Service Tax Act, 2017 ('CGST Act') through Form GST DRC-03 or to furnish a reply electronically on the common portal, incorporating reasons for the non-payment, if any, within a period of seven days.
  - ✓ Failure by the taxpayer to pay the differential amount as intimated or to furnish the reasons for such non-payment will disable the taxpayer from furnishing Form GSTR-1 or the requisite details using the invoice furnishing facility for the subsequent tax period.
  - ✓ Moreover, in case of failure by the taxpayer in paying the differential amount or furnishing the reasons for such non-payment or where the reason provided is not found to be acceptable by the Proper Officer (PO), recovery proceedings will be initiated as per the provisions of section 79 of the CGST Act.

Adjudication appeals, recovery, etc.

- Amendment made to eliminate the requirement for the submission of certified copy of decision or order appealed against in case the same is uploaded on the common portal in which case the date of issue of the provisional acknowledgment will be considered as the date of filing of appeal. Similar facility has also been extended to the application filed by Revenue against the orders of the adjudicating authority.
- Insertion of Rule 109C to the CGST Rules, to provide the facility to withdraw appeals during the pendency of the proceedings before the Appellate Authority.

Changes in rate of tax for goods[7] (changes applicable from 1 January 2023)

Items	Old Rate	Revised Rate	Remarks
Ethyl alcohol supplied to petroleum refineries for blending with motor spirit (petrol)	18%	5%	Earlier, 5% rate was applicable when these goods were supplied to oil marketing companies. Now, 5% rate has been made applicable when goods are supplied to petroleum refineries as well.
Husk of pulse including chilka, concentrates including chuni or churi, khanda used as cattle feed	5%	Nil	These goods are specifically exempted with effect from 1 January 2023. As a relief measure, for the past period, it was stated in the 48th GST Council's Press Release that non-payment of tax by taxpayers on account of confusion or doubts would be regularised.
Fruit pulp or fruit juice-based drinks (except carbonated beverages of fruit drink or carbonated beverages with fruit juice)	12%	12%	Earlier, 'Carbonated beverages of fruit drink or carbonated beverages with fruit juice' (Carbonated Beverages) was specifically listed under the 28% rate schedule. To bring more clarity, carbonated beverages have been excluded from the 12% rate entry.
Pencil sharpeners used as paper-based stationary	12%	18%	

[7] Notification Nos. 12/2022-Central Tax (Rate) and 13/2022-Central Tax (Rate) dated 30 December 2022

Changes in goods covered under reverse charge mechanism[8]

- Supply of 'Mentha arvensis' by unregistered person to registered person with effect from 1 January 2023.

Key Recommendations

The key recommendation made by GST Council in the 48th GST Council meeting for which the notifications to give effect the decisions taken in the meeting under the GST law are yet to be issued, are as below:

- Compensation cess at 22% on motor vehicles which meet the following conditions-
  - ✓ Popularly known as SUV,
  - ✓ Engine capacity of more than 1500 cc,
  - ✓ Length more than 4000 mm, and
  - ✓ Ground clearance equal to or more than 170 mm
- Clarification on non-taxability of incentives paid to banks by the Central Government for promotion of RuPay Debit Cards and BHIM-UPI transactions.
- The maximum period filing of specified returns/ statements proposed to be restricted to three years from the due date of filing of the relevant return/ statement.
- In wake of an amendment[9] made effective retrospectively w.e.f. 1 July 2017, the following supplies were kept outside the purview of GST:
  - ✓ supply of goods from a place outside the taxable territory to another place outside the taxable territory
  - ✓ high sea sales
  - ✓ supply of warehoused goods before their home clearance
- For launching prosecution (except for the offence of issuing invoices without supply) – the threshold limit proposed to be increased to INR20 million (currently it is INR10 million).
- Obstructing or preventing any officer in discharge of his duties, deliberate tampering with material evidence and failure to supply information proposed to be removed from the list of offenses inviting prosecution.
- The compounding amount proposed to be reduced from the present range of 50% to 150% of tax amount to the range of 25% to 100%.

Circulars to clarify various issues under GST

CBIC prescribed mechanism to deal with ITC difference in FORM GSTR-3B and FORM GSTR-2A for FY 2017-18 and 2018-19[10]

- The PO will seek details regarding invoices on which ITC has been availed and not reflected in Form GSTR-2A and ascertain that all condition of section 16 has been fulfilled read with sections 17 and 18 of the CGST Act, including if the ITC has been availed within the allowed timelines.
- Where the difference between ITC claimed in Form GSTR-2A v. Form GSTR-3B exceeds 0.5 million in a financial year, the PO to seek a certificate from Chartered Accountant or the Cost Accountant (to contain UDIN) and where the difference is up to 0.5 million, the PO to seek a certificate from the supplier.

[8] Notification No. 14/2022-Central Tax (Rate) dated 30 December 2022

[9] Inserted vide paras 7, 8(a) and 8(b) in Schedule-III to the CGST Act w.e.f. 1 February 2019 – For the intervening period 1 July 2017 to 31 January 2019

[10] Circular No. 183/15/2022-GST dated 27 December 2022

- The said procedure will apply only to the ongoing proceedings in scrutiny, audit, investigation, etc. or any adjudication or appeal proceedings that are still pending for FY 2017-18 and 2018-19 and not to completed proceedings.

ITC where place of supply is determined in terms of section 12(8) of the IGST Act[11]

- It has been clarified that integrated tax is to be charged if the goods are delivered outside India, but location of the supplier as well as the recipient is in India. The provisions of sections 16 and 17 of the CGST Act do not restrict ITC to the recipient located in India, where the place of supply is outside India. The supplier of such service will report such supply in Form GSTR-1 by selecting the state code as 96 – Foreign Country.

Applicability of section 75(2) and its effect on limitation[12]

- Where the Appellate Authorities did not find the allegations in the show cause notice (SCN) issued under section 74(1) of the CGST Act sustainable due to the absence of any evidence of fraud, suppression etc. against the taxpayer, the PO shall redetermine the tax payable deeming as if the SCN was issued under section 73(1) of the CGST Act.
- Clarifies to provide a fresh time period of two years from the date of communication of the direction by the Appellate Authority or Appellate Tribunal or Appellate Court for re-determination of the tax, interest and penalty payable by the noticee, to the PO to pass an order under Section 73.

'No Claim Bonus' by Insurance Companies and e-invoicing for an Entity[13]

- It has been clarified that there is no supply provided by the insured as the insurer is not under any contractual obligation not to claim insurance during the period covered under the policy. Accordingly, No Claim Bonus shall not be liable to tax as it cannot be considered as a consideration for any supply provided by the insured to the insurance company and is as an admissible deduction for valuation purposes.
- Certain suppliers were exempted from mandatory generation of e-invoices *vide* notification[14] is applicable for the entity as a whole and not restricted by the nature of supply being made by the said entity.

Treatment of statutory dues in respect to proceedings under the Insolvency and Bankruptcy Code, 2016 (IBC)[15]

- The CBIC has clarified on the treatment of statutory dues under GST law in respect of the taxpayers for whom the proceedings have been finalised under the IBC.
- As per section 84 of the CGST Act, if the government dues are reduced as a result of any appeal, revision or other proceedings, then the Commissioner has to provide an intimation of such reduction to the taxpayer as well as to the appropriate authority with whom the recovery proceedings are pending. Recovery proceedings can be continued in relation to such reduced amount of government dues.
- As the proceedings conducted under IBC adjudicate the government dues pending under the CGST Act or under existing laws against corporate debtors, same are to be covered under the term 'other proceedings' in section 84 of the CGST Act. Accordingly, where a confirmed demand for recovery has been issued under GST and where proceedings have been finalised against corporate debtors under the IBC reducing the amount of statutory dues under the CGST Act, the Jurisdictional Commissioner will issue an

[11] Circular No. 184/16/2022-GST dated 27 December 2022
[12] Circular No. 185/17/2022-GST dated 27 December 2022
[13] Circular No. 186/18/2022-GST dated 27 December 2022
[14] Notification No. 13/2020-Central Tax dated 21 March 2020
[15] Circular No. 187/19/2022-GST dated 27 December 2022

intimation in Form GST DRC-25 reducing such demand, to the taxable person or any other person as well as the appropriate authority with whom the recovery proceedings are pending.

Application for refund by unregistered persons (URD)[16]

- The CBIC has prescribed the manner of filing of application for refund by URD in cases where contract has been cancelled or terminated and the period for issuance of credit note by the supplier on account of such cancellation or termination of service has expired.

Recurring SCNs[17]

To bring uniformity in the practice followed by the authorities in case of cross investigations and issuance of recurring SCNs, the Maharashtra State Tax Authority has issued a circular clarifying the following:

- Both State and Central tax authorities, irrespective of their administrative jurisdiction may initiate enforcement action against the taxpayer.
- All consequential actions against the enforcement lies with the same authority, who initiated the same.
- Jurisdictional tax authority is authorised to issue recurring SCNs and grant refund. Recurring SCNs do not require fresh investigation where the grounds remain the same.

Inverted Duty Structure (IDS)

The CBIC vide circular[18] has clarified two important issues relating to ITC refunds vis-à-vis IDS refunds:

- **Effective date for revised formula under rule 89(5) of the CGST Rules**
  - ✓ The formula to claim refund of unutilised ITC was amended by a notification.[19] The CBIC has now clarified that the revised formula would be applicable for all refund applications filed on or after 5 July 2022. The refund applications filed before 5 July 2022 would be dealt as per the formula as it existed before the amendment.
- **Effective date for negative categories for IDS refund[20]**
  - ✓ Referring to another notification that was made effective from 18 July 2022, it was notified that certain goods covered under Chapters 15 and 27 of the Customs Tariff are not eligible for IDS refund. It was clarified that this restriction has a prospective effect, and the restriction will not apply to the refund applications filed before 18 July 2022.

Verification of Transitional credit[21]

Pursuant to the direction by the Supreme Court,[22] the GST Network (GSTN) re-opened the portal permitting aggrieved registered taxpayers (applicants) to file or revise Forms TRAN-1 or 2 for the period between 1 October 2022 to 30 November 2022. Such transitional forms are required to be verified by the jurisdictional tax officers within 90 days, i.e. between 1 December 2022 to 28 February 2023, the CBIC has issued guidelines for verification of the claims and to ensure uniformity in the implementation of the

[16] Circular No.188/20/2022-GST dated 27 December 2022
[17] Trade Circular No. 12T of 2022 date 17 November 2022
[18] Circular No. 181/13/2022 dated 10 November 2022
[19] Notification No. 14/2022-Central Tax dated 5 July 2022
[20] Notification No. 09/2022-Central Tax (Rate) dated 13 July 2022
[21] Circular No. 182/14/2022-GST dated 10 November 2022
[22] 2022-VIL-38-SC and 2022-VIL-63-SC

Supreme Court's directions, which states that Jurisdictional central tax officers have the right to access the filed or revised FORM TRAN-1 or 2 and to verify the applicant whose administrative control are with central tax authorities and vice-versa. The verification process commences earlier of availability of the filed or revised TRAN-1 or 2 Forms or receipt of the self-certified copy from the applicant and to be completed within a period of 90 days from 1 December 2022 upto 28 February 2023. Moreover, where the amount credited to the ECL pursuant to the originally filed TRAN-1 or TRAN-2 Forms exceeds the amount of revised TRAN-1 or TRAN-2 Forms filed, such excess credit should be recovered along with interest and penalty.

Special Economic Zones (SEZ)[23]

After consultation with the stakeholders, Ministry of Commerce has issued revised work from home (WFH) guidelines for employees employed with the IT and ITES SEZ units. The saliant features of guidelines are as follows;

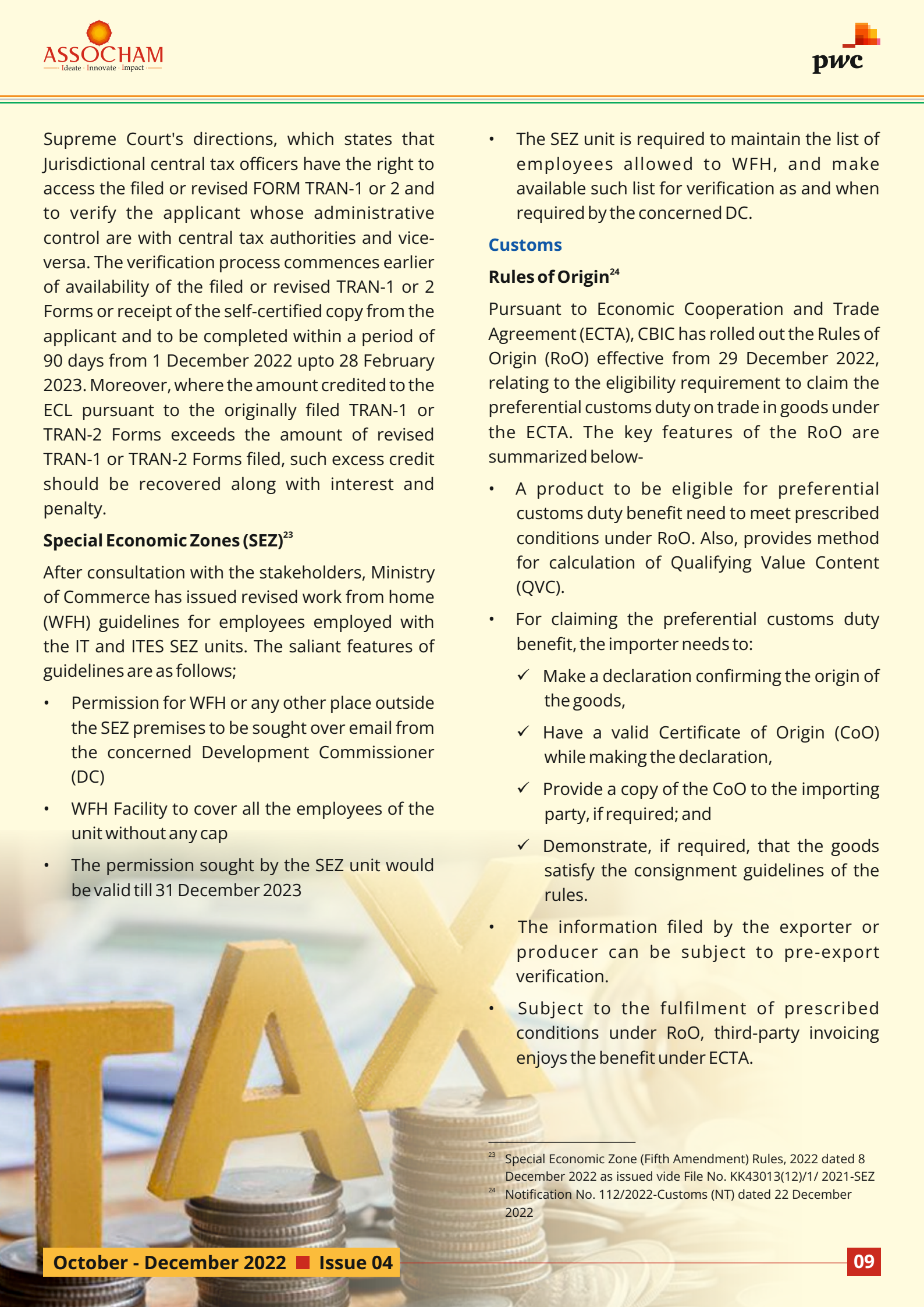
- Permission for WFH or any other place outside the SEZ premises to be sought over email from the concerned Development Commissioner (DC)
- WFH Facility to cover all the employees of the unit without any cap
- The permission sought by the SEZ unit would be valid till 31 December 2023
- The SEZ unit is required to maintain the list of employees allowed to WFH, and make available such list for verification as and when required by the concerned DC.

Customs

Rules of Origin[24]

Pursuant to Economic Cooperation and Trade Agreement (ECTA), CBIC has rolled out the Rules of Origin (RoO) effective from 29 December 2022, relating to the eligibility requirement to claim the preferential customs duty on trade in goods under the ECTA. The key features of the RoO are summarized below-

- A product to be eligible for preferential customs duty benefit need to meet prescribed conditions under RoO. Also, provides method for calculation of Qualifying Value Content (QVC).
- For claiming the preferential customs duty benefit, the importer needs to:
  - ✓ Make a declaration confirming the origin of the goods,
  - ✓ Have a valid Certificate of Origin (CoO) while making the declaration,
  - ✓ Provide a copy of the CoO to the importing party, if required; and
  - ✓ Demonstrate, if required, that the goods satisfy the consignment guidelines of the rules.
- The information filed by the exporter or producer can be subject to pre-export verification.
- Subject to the fulfilment of prescribed conditions under RoO, third-party invoicing enjoys the benefit under ECTA.



[23] Special Economic Zone (Fifth Amendment) Rules, 2022 dated 8 December 2022 as issued vide File No. KK43013(12)/1/ 2021-SEZ

[24] Notification No. 112/2022-Customs (NT) dated 22 December 2022

Judicial Updates

- By a recent order, the Punjab & Haryana High Court sanctioned refund on export of BPO services provided by the taxpayer under a sub-contracting agreement. It was observed by the court that the taxpayer provides the main service, i.e. BPO services, directly to the overseas customers and does not receive any remuneration from such clients. It only receives commission from the main contractor, i.e. the overseas entity. Further, clarification provided by the circular dated 20 September 2021 that sub-contracting of services does not tantamount to 'intermediary services'.[25]
- The Bombay High Court in a recent judgement, held that the pre-deposit required for filing the appeal before the Appellate Authority can be made by debiting the ITC balance in the Electronic Credit Ledger. In holding so, the court distinguished an earlier contrary judgment of the Orissa High Court.[26]
- The Supreme Court in a recent judgement, held that limitation period prescribed under Section 11B of the Central Excise Act, 1944, would apply to the claim of rebate of duty under Rule 218 of the Central Excise Rules, 2002, even if the rules or notification do not specifically refer to such limitation under the Central Excise Act, 1944. This decision also emphasis the need to read the Central Excise Act, 1944, the Central Excise Rules, 2002, and the Notification harmoniously.[27]
- The Supreme Court has clarified that the price charged from independent parties for the sale of excisable goods can be used as a benchmark to determine the excise duty on sales to related parties. However, the tax department cannot mechanically transpose the transaction value by adopting this method. It is also pertinent to note that the Supreme Court has set aside the levy of both interest and penalty when there is lack of clarity in the valuation methodology on the part of the tax department. It also held that the tax department is bound by the circulars that the CBEC has issued, while courts and Appellate Tribunals are not.[28]

[25] 2022-TIOL-1413-HC-P&H-GST
[26] W.P.(ST) No.23507 of 2022
[27] Civil Appeal No. 8717/ 2022
[28] Judgement dated 5 December 2022 in Civil Appeal No. 6891 of 2018

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