



## India Tax Update - GST

August 2022

### Goods and Services Tax Alert

#### 1 Summons not to be issued to Managing Director, CEO, CFOs of companies routinely

By the recent Guidelines for issuance of summons under Section 70 of the CGST Act – Instruction 03/2022-23 [GST-Investigation], indiscriminate issuance of summons has been discouraged, and officers have been advised to issue summons judiciously. Other methods such as a letter for requisition of information instead of summons for obtaining information or collecting evidence have been encouraged.

Summons are to be issued only after obtaining prior written approval from an officer not below the rank of Deputy/ Assistant Commissioner, with reasons recorded on the Summons. An understanding is to be given to the recipient of summon, whether he is an accused, co-accused or a witness.

To rule out any harassment to taxpayers, it is advised that issuance of summons may be avoided for statutory documents, which are digitally available on the GST portal. Issuance of summons to Senior management officials such as CMD/MD/CEO/CFO is discouraged, except if there are clear indications of their involvement in the decision making process which led to loss of revenue.

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In cases, where the summons is avoided or not complied with, a complaint may be filed with the jurisdictional magistrate under Section 172 and 174 of the Indian Penal Code Act, 1962.

These instructions have come as a huge relief to the taxpayers, as GST Officials were routinely issuing summons to top management, only to exert pressure for making so called 'voluntary' tax deposits.

## 2 No GST applicable on damages, compensation or penalty – Circular No. 178/10/2022-GST dated August 3, 2022

'Agreeing to the obligation to refrain from an act, or to tolerate an act or situation, or to do an act' is a service under Entry 5(e) of Schedule II of the CGST Act, 2017. This service has been a bone of contention between the GST Department and the taxpayers since long. It has been the Department's position that liquidated damages, compensation and penalties arising out of breach of contracts or other laws are taxable under this entry.

The Board has finally clarified that for the above activity to constitute a taxable supply, there must be two parties, where one of the parties is under a contractual obligation to either (a) refrain from an act, (b) to tolerate an act or (c) to do an act. Further, some consideration must flow from the opposite party with an express or implied agreement for refraining, tolerating or doing such act.

Payments such as liquidated damages recovered for a breach of contract or recovery of notice pay or employment bond are not in the nature of amounts recovered for tolerating an act but rather an amount recovered for not tolerating an act. The object and intention of putting such clauses is to deter the breach, non-performance and are thus mere 'events' in contract. Additionally, payments made are also not 'consideration' because there can never be any contract for such absurd object i.e. (a) for

breach of contract, (b) for leaving the company earlier than minimum period etc. Specific Clarifications are given below:

- **Liquidated damages** are paid only to compensate for the loss or damage suffered due to breach of contract and to restore the aggrieved party from losses suffered, and the payment is a mere flow of money and not a consideration subject to tax.
- Instances of non-taxable payments include **penalty paid by the builder** for delayed construction so as to compensate for the loss suffered, and forfeiture of earnest money etc. to discourage non-serious buyers from bidding.
- It is clarified that since the object of **forfeiture of salary or recovery of bond amount** at the time of leaving by employee without serving notice period is to discourage the non-serious candidates from taking up employment, these recoveries are not taxable.
- A supply contracted for, such as booking of hotel accommodation, an entertainment event or a journey, may be cancelled by a customer or may not proceed as intended.
- **Cancellation fee** is for the cost involved in making arrangements for the intended supply. The facility of cancellation service is part of the main supply, and taxable as Composite Supply.
- **Fine or penalty at the time of dishonor of cheque** is to discourage or deter the situation of non-payment. There is no implied or express willingness from the party receiving the cheque that he would tolerate deposit of an invalid cheque etc. and hence it would not be taxable.
- It is common for customers to sometimes miss the last date of payment of electricity, water, telecommunication services etc., and **late payments with late fine or penalty made**. Facility of accepting late payment with interest or late fee, fine or penalty is a facility granted by the supplier and is naturally bundled with main supply, and taxable as a composite supply.

- **Fine or penalty imposed for violation of laws** cannot be treated as consideration charged by Government or local authority for tolerating violation of laws.
- **Compensation received by previous allottees** pursuant to Supreme Court order is not a consideration received for tolerating the **cancellation of allocation of coal blocks**, and not taxable.
- Payments made under specific contracts for refraining, tolerating, or doing an act, such as where **late fee is required to be paid for delayed payment, payment against early termination of lease contract, pre-payment penalty in case of bank loans**, are for services accepted as a part of the contractual arrangement. They are not mere default clauses for breach of the terms of the main contract, but separate contracts for provision of such supply on which tax is applicable.

### 3 Clarification on GST rates (Circular 177 and Circular 179 both dated August 3, 2022)

- **Preferential Location Charges (PLC)** collected in addition to lease premium, are for allowing choice of location of plot. As the PLC is an integral part of supply of long term lease, it is exempt under Serial No. 41 of Notification No. 12/2017CT(r) dated June 28, 2017.
- **Additional toll Charges** collected from vehicles which do not have valid functional Fastag are in nature of toll charges, and like toll charges exempt from tax.
- **Sale of land after development** such as levelling, laying down of drainage lines, water lines, electricity lines, etc. is to be considered as a sale of land which is exempt from tax. The development services would alone be taxable.
- **Hiring of vehicles for transport of employees** by a body corporate, for a period of time, during which it would determine schedules, routes, etc. would constitute rental service of transport vehicle with operator and taxable under reverse charge.

However, when a body corporate avails passenger transport service for specific journeys or voyages and does not take vehicle on rent for any particular period of time, it would be Passenger Transport Service and tax would be payable.

Hiring of vehicles under non-airconditioned contract carriage to transport employees to and from work on a fixed route is exempt from tax.

- **Supply of Treated sewage water like supply of water** exempt under GST

### 4 Option to Avail Transitional Credits extended to taxpayers by Apex Court

For the smooth transition from the Erstwhile laws to GST, transfer of transitional credits was critical. Taxpayers, however faced several technical glitches leading to missing out of eligible credits and financial loss. The Apex Court in the case of Union of India Vs. M/s Fico Trade Centre Pvt. Ltd has directed the GST Department to re-open the portal and allow transitional credits of 2017. Taxpayers must revisit their records to ascertain whether any transitional credits were left out, which can be availed of now.

The Apex Court has directed the GSTN to open a common portal for all taxpayers to claim transitional credit for 60 days, preferably from September 1, 2022, till October 30, 2022, irrespective of whether or not they filed a writ or initiated any other proceedings. GSTN to make sure no technical glitches occur during the process. The concerned officers would be given 90 days to verify the claim of credit on merits and pass the appropriate order after grant of personal hearing. The credits are to reflect in the Electronic Credit Ledger.

### 5 Guidance on Procedures and Principles applicable to Arrest and Prosecution

The Apex Court in the 2021 decision in the case of Siddharth Vs. State of Uttar Pradesh & Anr ruled that merely because an arrest can be

made, because it is lawful, does not mandate that an arrest must be made. A distinction must be made between the existence of the power to make an arrest and the justification to do so. There should be no compulsion on the officer to arrest the accused, unless there is reason to believe that the accused will disobey summons or has failed to cooperate in the investigations. Arrest should not be a matter of routine.

By Instruction 02/2022-23[GST-Investigation] dated August 17, 2022, the Board has clarified that for making an arrest, the officer must first ensure that he has reason to believe that the ingredients of the offence, as required under the statute are met, based on credible material. Even if the legal requirements for arrest are met, the competent authority must advert to the following aspects:

- Offence is bailable/ non-bailable
- Existence of Credible information or reasonable suspicion of the person having been concerned with the offence
- Necessity of arrest for a proper investigation as well as the possibility of tampering of evidence or influencing witnesses by the person concerned
- Presence of accused can not be ensured without arrest
- Role of the alleged offender including whether he is the mastermind effecting benami / proxy transaction in the name of dummy persons, for passing on fraudulent input tax credit.

As per the guidelines, arrest is to be confined to cases where the intent to evade tax or wrongly avail or utilize credit is established and the mens rea (guilty mind) is evident, and not in cases of

legal interpretation. Other factors influencing the decision for arrest could be cooperation in the investigation, compliance to summons, voluntary payment of tax etc.

The detailed procedure for making arrest has also been specified, including passing of an order on file, recording the reasons for arrest having regard to the nature of offence, role of the person involved, and evidence available etc. An arrest memo containing the relevant provisions and grounds of arrest must be given to the person, and to an authorized or nominated person. The arrest memo should also bear DIN and a separate arrest memo should be issued to each individual being arrested. Other safeguards include, that women should be arrested only by a woman officer, medical examination after the arrest, reasonable care of health and safety of arrested person, arrest to be made with minimal use of force and publicity and without violence, person arrested should be subjected to reasonable restraint to prevent escape.

If the offence is non-cognizable and bailable, the Assistant Commissioner or Deputy Commissioner is bound to release against a bail bond, with bail conditions being informed to the person arrested. If the person arrested fulfills the conditions of the bail, then he shall be released on bail forthwith.

In case where a person is arrested under cognizable and non-bailable offences, the officer authorized to arrest the person shall inform such person regarding grounds of his arrest and produce before the Magistrate within 24 hrs. Efforts are to be made to file a prosecution complaint before the competent court at the earliest after the arrest.



## REENA KHAIR

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Reena is a Senior Partner and Head of the International Trade & Indirect Taxation Practice at the Firm.

She is a lawyer of eminence with more than 25 years of work experience and specialisation in the areas of international trade and indirect taxation. She represents clients regularly before the Customs, Excise, and Service Tax Appellate Tribunal, as well as before various High Courts and the Supreme Court of India. She has extensive court room experience with more than 300 reported cases argued by her.

In the domain of international trade, Reena has represented clients comprising domestic and foreign industries, as well as user industries in India before the Designated Authority, Directorate General of Trade Remedies, and higher forums. She has also successfully argued the highest number of anti-dumping and anti-subsidy cases before the Tribunal. She has also assisted clients in trade remedial investigations in foreign jurisdictions.

She has been regularly providing advisory services and has been involved in dispute resolution for high-profile matters relating to customs, excise, service tax, FEMA, and GST. Critical issues handled by her include classification under the Harmonized System Nomenclature, valuation, export promotion schemes, drawback, EOU, SEZs, inverted duty structure, admissibility of credits, transitional issues in GST, export refunds.

She regularly assists clients in the transition to the GST regime.

She has also conducted Internal Management audits for optimization of tax liability, identifying issues/risks for potential disputes with departmental authorities and restructuring of transactions undertaken for various clients including some of India's major conglomerates and multinational corporations in the oil & gas, specialty materials and chemicals, steel, and manufacturing sector.

### Awards & Recognitions

Recognised among India's 'Top 100 Lawyers' by FORBES Legal Powerlist 2020; felicitated for expertise in Anti-Dumping.



## SHAMPA BHATTACHARYA

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Shampa is a Partner in the Indirect tax practice of the Firm. She has more than 15 years of post-qualification experience in corporate and civil law with exclusive specialisation of more than 11 years in the domain of indirect taxes. She has worked extensively on various indirect taxes including Customs, Goods & Services Tax (GST), erstwhile Service tax, Excise laws, Value Added Taxes, Foreign Trade Policy and other ancillary laws.

Prior to joining Kochhar & Co., Shampa has an enriching extensive experience of having worked with two of the Big 4 international consultancy firms namely Deloitte and Ernst & Young in the indirect tax practice in Delhi and Gurgaon.

She has advised clients and assisted them in litigation matters by way of drafting, pleading and strategizing. Her experience includes advising large MNC and Indian companies on structuring of transactions by devising tax efficient models, identifying potential revenue and tax leakages in existing operations and providing feasible remedies, guiding through assessments, audit and investigations by the revenue authorities and compliance services for clients.

Shampa has advised extensively on revenue investigations by custom authorities, classification of goods as per Harmonized System of Nomenclature ('HSN') including imports under free trade agreements, issues with regard to customs valuation including special valuation bench matters, anti-dumping matters and advising on export benefits and authorisations viz EPCG, SCOMET, AA under the Foreign Trade Policy. She has had the expertise of assisting IT based corporates in setting up special economic zone ('SEZ') units and other export -oriented units. She has been a part of the GST implementation for MNCs and also offers supports for periodical compliances including GST/ VAT/ Service tax audit. Shampa has been actively involved in rendering policy advocacy support as an alternative to tax litigations by reaching out to policy makers / tax authorities to pre-empt any business disruption. She also assists clients in their anti – profiteering matters and conducting detailed diagnostic tax reviews of the existing business operations of clients. Her focus is also on central and state incentives offered in India.

Her area of industry expertise includes automobile, infra and power, pharmaceutical, telecom and information technology services, FMCG, consumer durables, defence, oil & gas and several others.



## KEY PRACTICE AREAS

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**Awards & Recognition:** Conferred with numerous awards including the National Bar Award, International Council of Jurists Award bestowed by the Prime Minister and Rastriya Gaurav Award (National Pride) Award. Recognised among top-tier Indian firms by leading global publications : Forbes Legal Powerlist, Legal 500, Benchmark Litigation and India Business Law Journal.

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