ICAI

Significant Judicial and Advance Rulings in GST : A Compilation

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GST & Indirect Taxes Committee

The Institute of Chartered Accountants of India

(Set up by an Act of Parliament)

New Delhi

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Edition	:	December, 2022
Committee/Department	:	GST & Indirect Taxes Committee
E-mail	:	gst@icai.in
Website	:	http://www.icai.org; https://idtc.icai.org/
Price	:	₹ 260/-
ISBN	:	978-93-90668-54-0
Published by	:	The Publication and CDS Directorate on behalf of the Institute of Chartered Accountants of India, ICAI Bhawan, Post Box No. 7100, Indraprastha Marg, New Delhi - 110 002.
Printed by	:	Sahitya Bhawan Publications, Hospital Road, Agra - 282 003.

Foreword

The GST & Indirect Taxes Committee of ICAI has always been proactive in providing the needed support to the members and honing their skills by organising courses, conferences and programmes, live webcasts, e-learning etc. on GST. Further, it has been regularly bringing out useful technical publications on various aspects of GST.

I am happy to note that the GST & Indirect Taxes Committee of ICAI has come out with another useful publication titled, *"Significant Judicial and Advance Rulings in GST : A Compilation"*. The publication would help the readers in understanding the judicial outlook/perspective on various provisions of GST as also on prevalent issues in the GST law. In the publication, the judicial and advance rulings have been discussed in a concise manner to give the readers a brief overview of the cases.

I congratulate CA. Rajendra Kumar P, Chairman, CA. Umesh Sharma, Vice-Chairman, and other members of GST & Indirect Taxes Committee for this initiative and all those who have contributed towards bringing out this publication for the benefit of the members and other stakeholders at large.

I am confident that the members would find this publication very useful in their professional assignments.

Place: New Delhi
Date: 19.01.2023

CA. (Dr.) Debashis Mitra
President, ICAI

Preface

Chartered Accountants have time and again proved their expertise in the domain of indirect taxes. The ICAI and its members played a key role in the GST policy making and implementation. Equipped with the knowledge of GST, the Chartered Accountants helped trade and industry to adopt and adjust to this new tax system, which was radically different from the erstwhile indirect tax regime.

We, at ICAI, take our role of partner in nation building with utmost sincerity and responsibility and thus, do not leave any stone unturned in upskilling our members so that they can perform their duties effectively and efficiently. Being abreast with the latest judicial developments and having the ability to analyse case laws and applying the ratio to the practical situation at hand, is a crucial skill set for tax advisory and compliance functions. Accordingly, the Committee thought it fit to develop a publication dedicated exclusively to case laws, namely, "*Significant Judicial and Advance Rulings in GST : A Compilation*".

The publication includes summaries of landmark rulings of only the Supreme Court and High Courts as the GST Appellate Tribunal is yet to be constituted. Further, some widely discussed advance rulings having significant implications have also been included in the publication. We have taken a conscious decision to include case laws on substantive law and to avoid case laws on procedural issues like working of the GST portal. Further, where the law has been amended, the case laws based on the old position of law have not been included. As far as possible, contrary rulings of High Courts/AAR on an identical issue have been included in the publication at the same place. The rulings have been categorised topic-wise for easy reference.

We are thankful to CA. (Dr.) Debashis Mitra, President, ICAI and CA. Aniket Sunil Talati, Vice-President, ICAI for their constant encouragement and support in all the initiatives of the GST & Indirect Taxes Committee. We express our profound gratitude for the untiring efforts of CA. S Thirumalai, CA. Viral M Khandhar and CA. Aanchal Kapoor in diligently compiling and summarising the case laws for the publication. We are also thankful to CA. Gajendra Maheshwari in meticulously reviewing this publication. We would also like to thank the members of our Committee who have always been a significant part of all our endeavours. Last, but not the least, I commend the efforts made by the Secretary to the Committee, CA. Smita Mishra and her team comprising of CA. Tanya Pandey and CS. Impreet Kaur in providing the requisite technical and

administrative assistance for successfully releasing this publication. We are sure that this publication will be of practical use to all the members of the Institute and other stakeholders.

Though all efforts have been taken to provide correct information in this Handbook, there can be different views/opinions on the various issues addressed in this Handbook. We request the readers to bring to our notice any inadvertent errors or mistakes that may have crept in during the development of this Handbook.

We will be glad to receive your valuable feedback at gst@icai.in. We also request you to visit our website https://idtc.icai.org and share your suggestions and inputs, if any, on indirect taxes.

CA. Rajendra Kumar P
Chairman
GST & Indirect Taxes Committee

CA. Umesh Sharma
Vice-Chairman
GST & Indirect Taxes Committee

Place: New Delhi
Date: 19.01.2023

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- Readers may make note of the following while reading the publication: For the sake of brevity, the terms “Input Tax Credit”, “Goods and Services Tax”, “Central GST”, “State GST”, “Union Territory GST”, “Integrated GST”, “Central Goods and Services Act, 2017”, “Integrated Goods and Services Act, 2017”, “Central GST Rules, 2017”, “Central Board of Excise and Customs”, “Central Board of Indirect Taxes and Customs”, “Reverse Charge Mechanism” , “Central Excise Act, 1944”, “Central Excise Tariff Act, 1985”, “Customs Act, 1962” , “Customs Tariff Act, 1975”, “Code of Criminal Procedure, 1973/ Criminal Procedure Code” , “Union Territory”, “Constitution of India, 1949”, “Input Service Distributor”, “Authority for Advance Ruling”, “Appellate Authority for Advance Ruling”, “Service Accounting Code” and “Harmonized System of Nomenclature”, have been referred to as “ITC”, “GST”, “CGST”, “SGST”, “UTGST”, “IGST”, “the CGST Act”, “the IGST Act”, “CGST Rules”, “CBEC”, “CBIC”, “RCM” , “the Excise Act”, “the CE Tariff Act,”, “ the Customs Act”, “the Tariff Act”, Cr. P.C., “UT”, “the Constitution”, “ISD”, “AAR”, “AAAR”, “SAC” and “HSN” respectively in this publication. The abbreviation NN denotes Notification Number.
- Unless otherwise specified, the section numbers and rules referred to in this publication pertain to CGST Act, 2017 and CGST Rules, 2017 respectively.
- The word ‘Assessee’ has been used instead of the words Petitioner/ Appellant, etc for easy comprehension, wherever possible.

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Constitutional Aspects

1. UNION OF INDIA & ANR. vs. M/S MOHIT MINERALS PVT. LTD. [2022 (5)TMI 968 - SUPREME COURT]

No GST under RCM on ocean freight in case of importation on CIF basis

Background:

- In a cost, insurance and freight (CIF) contract, a freight invoice is issued by a foreign shipping line to a foreign exporter, with no involvement of Indian importer. In terms of *NN 8/2017 Integrated Tax (Rate), dated 28.06.2017* and *NN 10/2017-Integrated Tax (Rate), dated 28.06.2017,* the Indian importer was required to discharge IGST on the aforesaid freight services under RCM.
- Prior to the enforcement of the GST regime, service tax on ocean freight was exempted by Entry 34 of *NN 25/2012-Service Tax, dated 20.06.2012*. This exemption was withdrawn by *NN 01/2017- Service Tax, dated 12.01.2017* which levied service tax on the importer under RCM.
- With the advent of the GST regime, *NN 8/2017- Integrated Tax (Rate) dated 28.06.2016* w.e.f. 01.07.2017 was issued by the Central Government on the advice of the GST Council and by virtue of serial no. 9 of this notification, integrated tax shall be levied at the rate of 5% on the supply of specified services, including transportation of goods, in a vessel from a place outside India upto the customs station of clearance in India. Further, serial no. 10 of *NN 10/2017-Integrated Tax (Rate) dated 28.06.2017* categorized the recipient of services of supply of goods by a person in a non-taxable territory by a vessel to include an importer under section 2(26) of the Customs Act.

Points of Dispute:

- Writ petition was filed before the Hon'ble Gujarat High Court challenging the aforesaid notifications as *ultra vires* the GST Laws.
- The High Court struck down the same, against which the Union of India filed a petition before the Hon’ble Supreme Court.

Submissions by the Revenue:

- The rationale for the aforesaid notifications is to remove the disparity between Indian and foreign shipping lines. Indian shipping lines are unable to claim ITC of GST paid that forms a part of their transportation costs, since supply of goods is hitherto exempt for the purpose of taxation.
- Tax on ocean freight will not add to the cost of the importer as ITC for the GST paid under the reverse charge is available.
- "Co-operative federalism" leads to the binding nature of the recommendations of the GST Council where these have been given effect to.

Submissions by the Assessee:

- Customs duty/IGST under the Customs Act and the Tariff Act respectively at the point of importation of the goods on the component of ocean freight is included for the purposes of arriving at the transaction value. Levying IGST on the freight element in the course of transportation under RCM as aforesaid would amount to double taxation.
- Under the extant maritime laws/taxation regime, in a contract of affreightment/charter party, the importer is distinct entity and is not treated as a recipient of the service.
- In terms of a CIF contract, the supply of service of transport of goods in a vessel is by a foreign shipping line located in a non-taxable territory to an exporter located in a non-taxable territory by a vessel outside the territory of India. The recipient of service is the foreign exporter who is outside India.
- There is no territorial nexus for taxation since the supply of service of transportation of goods is by a person in a non-taxable territory to another person in a non-taxable territory from a place outside India. This is neither an inter-State nor an intra-State supply. The aforesaid notifications are contrary to section 5(3) of the IGST Act as instead of the "recipient" mentioned therein, the "importer" as defined in section 2(26) of the Customs Act, is made liable to pay tax. The so-called recipient of service is the importer and not the exporter and therefore, the reverse charge cannot apply.
- The said section enables the Government to stipulate the categories of supply and not specify a third-party as a recipient of such supply.

- Freight portion is already included in the transaction value for the purpose of customs duties, including IGST under the Tariff Act on the full value. Hence, the importer cannot be again called upon to pay IGST on the freight portion. This is a composite supply as defined under section 2(30) and cannot be split and vivisected for the purpose of taxation as goods and services.
- The GST Council which has been created by Article 279A of the Constitution is a recommendatory body, whose recommendations can be implemented by either amending the CGST Act or the IGST Act or by issuing a notification, but notifications issued cannot be *ultra vires* the parent legislation. Further, this contention was never raised before or in the impugned judgment of the Hon'ble Gujarat High Court.

Legal Principles and Scope of Decision:

- The Hon'ble Supreme Court refused to accept the contention that recommendations of the GST Council are binding on the Parliament and State Legislatures and held that such compulsion shall be against the principle of fiscal federalism. However, the Central and State Governments while exercising their rule-making power under the provisions of the CGST Act and IGST Act are bound by the recommendations of the GST Council.
- The tax sought to be collected on the 'service' aspect of the transaction in terms of the relevant notification under RCM is in violation of the principle of 'composite supply' under section 2(30) read with section 8.
- Supply of a service, which has already been included by the legislation as a tax on the composite supply of goods, cannot be allowed to be taxed once again.
- The impugned notifications are validly issued under section 5(3) and (4) of the IGST Act.
- On a conjoint reading of sections 2(11) and 13(9) of the IGST Act, read with section 2(93) of the CGST Act, the import of goods by a CIF contract constitutes an inter-State supply which can be subjected to IGST where the importer of such goods would be the recipient of shipping service.
- The IGST Act and the CGST Act define 'reverse charge' and prescribe the entity that is to be taxed for these purposes. The specification of

the recipient (in this case the importer) by *NN 10/2017-Integrated Tax (Rate), dated 28.06.2017* is only clarificatory. The Government by notification did not specify a taxable person different from the recipient prescribed in section 5(3) of the IGST Act for the purposes of reverse charge.

- Section 5(4) of the IGST Act enables the Central Government to specify a class of registered persons as the recipients, thereby conferring the power of creating a deeming fiction in the process of delegated legislation.

Conclusion:

- Since, the Indian importer is liable to pay IGST at the point of importation on the 'composite supply', comprising of supply of goods and supply of services of transportation, insurance, etc. in a CIF contract, a separate levy on the Indian importer for the 'supply of services' by the shipping line by vivisecting the CIF contract would be in violation of section 8 of the CGST Act.

2. SKILL LOTTO SOLUTIONS PVT. LTD. vs. UNION OF INDIA [2020 (12) TMI 140 (SUPREME COURT)]

Constitutional validity of levy of GST on prize money of lottery

Background:

- The assessee, an authorized agent, for sale and distribution of lotteries organized by the State of Punjab filed a writ petition before the Hon'ble Supreme Court challenging the definition of 'goods' under section 2(52) and consequential notifications to the extent it levies GST on lotteries.
- The assessee sought declaration that the levy of tax on lottery was discriminatory and violative of Articles 14, 19(1)(g), 301 and 304 of the Constitution of India.

Point of Dispute:

- Taxation of lotteries from the indirect tax perspective has been a subject matter of litigation before the Hon'ble Supreme Court even under the erstwhile Service tax regime. With the advent of GST regime from 01.07.2017, once again the levy of GST on lotteries was questioned on Constitutional grounds before the Hon'ble Supreme Court.

Submissions by the Assessee:

- Lotteries (Regulation) Act, 1998 was enacted for regulating the lotteries and providing for matters connected therewith and incidental thereto. Section 2(b) of this Act defines "lottery" to mean *'a scheme, in whatever form and by whatever name called, for distribution of prizes by lot or chance to those persons participating in the chances of a prize by purchasing tickets'* .
- Lotteries are not goods and therefore, by including actionable claims as goods in terms of the definition under section 2(52) of the CGST Act, the same is opposed to Article 366(12) of the Constitution which provides a definition of 'goods' to include all materials, commodities and articles.
- The definition of 'goods' as occurring in the Sale of Goods Act, 1930 clearly excludes actionable claims from the definition of goods, which definition has been held to be the definition for 'goods' under the Constitution by this Court in *State of Madras vs. Gannon Dunkerley & Co., (Madras) Ltd.[(1959) SCR 329] ("Gannon Dunkerley case")*.
- The attempt of including the actionable claim within the meaning of goods seems to be a deliberate attempt to make the lottery fall within the scope of GST which would render the definition of goods contrary to the meaning ascribed to it by the Constitution of India as held in *Gannon Dunkerley case (supra)*.
- The Constitution Bench of the Hon'ble Supreme Court in *Sunrise Associates vs. Govt. of NCT of Delhi and Ors.[(2006) 5 SCC 603] ("Sunrise Associates case")* has categorically held that lottery is not a good. When the Constitutional Bench has held that lottery is not a good, the provisions of GST Acts treating the lottery as goods is contrary to the judgement of the Constitution Bench in *Sunrise Associates case (supra)*.
- Under entry no. 6 of Schedule III to the CGST Act, *actionable claims, other than lottery, betting and gambling* have been treated neither as supply of goods nor supply of services. There is a clear hostile discrimination in taxing only lottery, betting and gambling whereas all other actionable claims have been left out of the taxing net.
- Further, GST is being levied on the face value of the lottery tickets which is impermissible since the face value of the tickets also includes prize money to be reimbursed to the winners of the lottery tickets.

Submissions by the Revenue:

- The definition of 'goods' given under Article 366(12) of the Constitution is an inclusive definition. Article 366(12A) defines *"goods and services tax" to mean tax on supply of goods, or services or both except taxes on the supply of alcoholic liquor for human consumption*. Lottery having been judicially held to be an actionable claim, is covered within the meaning of the term 'goods' under section 2(52). The Parliament has the competence to levy GST on lotteries under Article 246A of the Constitution.
- The levy on face value is authorized by section 15(1) read with section 15(5) and rule 31A. The levy of 28% tax on face value is neither discriminatory nor beyond the taxing policy/powers of the State.

Legal Principles and Scope of Decision:

- When the Parliament has been conferred the power to make law with respect to goods and services, the legislative power of the Parliament is plenary. The observations of this Court in *Gannon Dunkerley case* are clear pointer that though the State Legislature had no legislative competence to enact the impugned legislation, Parliament on the strength of residual power could have legislated.
- The Constitutional Bench in *Sunrise Associates case (supra)* has categorically held that lottery is actionable claim after due consideration.
- When section 2(52) expanded the definition of goods by including actionable claim also, the said definition in section 2(52) is in line with the Constitution Bench pronouncement in Sunrise Associates case and no exception can be taken to the definition of the 'goods' as occurring in section 2(52).
- Regulation including taxation in one or other form on the activities namely lottery, betting and gambling has been in existence since last several decades. When the Parliament has included the above three for the purpose of imposing GST and not taxed other actionable claims, it cannot be said that there is no rationale or reason for taxing the above three leaving others.
- For determining the value of lottery, statutory provision is contained in section 15 read with rule 31A. The value of taxable supply is a matter of statutory regulation and when the value is to be transaction value

which is to be determined as per section 15, it is not permissible to compute the value of taxable supply by excluding prize which has been contemplated in the statutory scheme.

- When prize paid by the distributor/agent is not contemplated to be excluded from the value of taxable supply, we are not persuaded to accept the submission of the assessee that prize money should be excluded for computing the taxable value of supply.

Conclusion:

- While determining the taxable value of supply, the prize money is not to be excluded for the purpose of levy of GST.

3. MUNJAAL MANISHBHAI BHATT vs. UNION OF INDIA [2022 (5) TMI 397 (GUJARAT HIGH COURT)]

Constitutional validity of adhoc and standard method to value undivided share of land (i.e., deeming fiction of 1/3rd deduction for value of land) involved in under-construction real estate transactions under GST.

Background:

- The assessee entered into an agreement dated 29.09.2020 with Navratna Organisers & Developers Pvt. Ltd. (respondent) in the writ proceeding for the purchase of a plot of land in Ahmedabad.
- The said agreement encompassed construction of bungalow on the said plot of land by the respondent for the assessee. Separate and distinct consideration was agreed upon between the parties to the agreement for (i) the sale of land and (ii) construction of a bungalow on the land. Further, as per the said agreement, the assessee was liable to pay all taxes including GST. The assessee *bona fide* believed that by virtue of such clause, he would be liable to pay tax under the Central/Gujarat Goods and Services Tax Act, 2017 on the consideration payable for construction of bungalow in as much as it would constitute supply of construction services under the GST Acts.
- The respondent, however, relying upon the impugned serial no. 3(if) of the *Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017* [“*NN 11/2017-CT(R) dt. 28.06.2017”*] read with para 2 of the said notification informed the assessee that he would be liable to pay tax at the rate of 9% CGST + 9% SGST on the entire consideration payable

for land as well as construction of bungalow after deducting 1/3rd of the value towards land in accordance with the impugned para 2 of the said notification. The respondent raised an invoice on the assessee to collect such tax.

Points of Dispute:

- The issue under consideration was whether the impugned notification providing for one third deduction with respect to land or undivided share of land in cases of construction contracts involving element of land is *ultra-vires* (i.e., contrary) to the provisions of the GST Acts and/ or violative of Article 14 of the Constitution.
- In other words, the issue involved was whether serial no. 3(if) of *NN 11/2017-CT(R) dt. 28.06.2017* and similar State Tax (Rate) are *ultra vires* section 7(2) read with entry no. 5 of schedule III as well as sections 9(1) and section 15.

Submissions by the Assessee:

- The sale of land is neither supply of goods nor services. The imposition of tax on consideration received towards the sale of land by virtue of delegated legislation is therefore *ultra-vires* sections 7 and 9.
- The agreement in question is clearly severable and the sale of land being made for separate consideration, the entire amount of consideration relating to land is outside the scope and purview of the GST Acts.
- The booking agreement was entered after the land was fully developed and that no further activity was required to be done by the landowner/developer in respect of the land after entering the booking agreement with the assessee.
- The impugned notification under the CGST Act giving only fixed percentage of deduction for land by way of abatement is thus contrary to the judgement of the *Delhi High Court in Suresh Kumar Bansal vs. UOI [(2016) 92 VST 330 (Del)]* wherein it was held that there need to be a specific statutory provision excluding the value of land from the taxable value of the works contract and mere abatement by way of notification is not sufficient.

Submissions by the Revenue:

- Section 15(5) provides that notwithstanding anything contained in sub-section (1) or (4) of the said section, the value of such supplies as may be notified by the Government on the recommendations of the Council shall be determined in such manner as may be prescribed and *NN 03/2019-Central Tax (Rate) dated 29.03.2019* (amending *NN 11*/2017-*CT(R) dt. 28.06.2017*) was issued by the Government on the recommendations of the GST Council. It provided for deemed valuation of the land as provided in the 2nd para of the notification.

- Reference was made to *Narne Construction P. Ltd. and Ors. vs. Union of India (UOI) and Ors. [(2012) 5 SCC 359]*, wherein the basic question to be answered was if the sale of a developed plot is considered to be sale of land, then the said transaction shall be out of scope of the Consumer Protections Act, and the buyer/purchaser shall not be a consumer and consequently will have no relief under the said Act. The Apex court concluded that the buyer/purchaser shall be a consumer and consequently will have relief under the said Act. The Apex Court concluded in the above matter that the sale of a developed plot is not a sale of land only but it is a wider transaction than a mere sale of land.

- Reference was also made to the judgement of the Supreme Court in *Union of India & Ors. vs. VKC Footsteps India Pvt. Ltd. AIR [2021 SC 4407]* wherein it was held that a formula is to be evolved/read down by the Courts only if it leads to absurd results or is unworkable. Merely because some inequities may result from practical effect of the formula cannot be a ground to replace the wisdom of the legislature or its delegate.

- On such basis, it was contended that when a calculation/method/ formula is devised as per the powers granted under an Act, the same cannot be subject to any challenge.

Legal Principles and Scope of Decision:

- Tracing the legislative history, intent is to impose tax on construction activity undertaken by a supplier at the behest of or pursuant to contract with the recipient. There is no intention to impose tax on supply of land in any form and it is for this reason that it is provided in the schedule III to the CGST Act that the supply of land will be neither supply of goods nor supply of services.

- The imposition of tax can only be on the construction activity which is undertaken by the supplier at the behest of the proposed buyer. Thus, if a tripartite agreement is entered into after the land is already developed by the developer, then such development activity was not undertaken for the prospective buyer and therefore, there is no question of imposition of GST on the developed land.
- The only service which is supplied by the supplier to the recipient is the construction undertaken for the buyer and it is such supply alone which can be taxed. Hence, the fact that the land is not a plain parcel of land but a developed land cannot be a ground for imposing tax on the sale of such land.
- Referring to section 15(1) it was held when the statutory provision requires valuation in accordance with the actual price paid and payable for the service and where such actual price is available, then tax has to be imposed on such actual value. Deeming fiction can be applied only where actual value is not ascertainable.
- If the minutes of the 14th GST Council Meeting, which led to the insertion of the impugned notification is perused, it becomes clear that the deduction was contemplated only in the context of flats wherein it was difficult to ascertain the value of the undivided share of land. However, when it came to actual issuance of notification, a standard rate of deduction came to be provided irrespective of the nature of the transaction or whether it is a case involving transfer of land itself or undivided share in land. Moreover, the discussion in the GST Council meeting whose minutes is part of the record would show that there was an apprehension that a standard rate of deduction for land may not withstand judicial scrutiny.

Conclusion:

- Mandatory application of deeming fiction of 1/3rd of total agreement value towards land even though the actual value of land is ascertainable is clearly contrary to the provisions and scheme of the Act and therefore, *ultra-vires* the statutory provisions.
- One of the most glaring features of the impugned deeming fiction is its arbitrariness in as much as the same is uniformly applied irrespective of the size of the plot of land and construction therein.

- The arbitrary deeming fiction by way of delegated legislation has led to a situation whereby the measure of tax imposed has no nexus with the charge of tax which is on supply of construction service.
- Even if it is presumed that the Government had the competence to fix a deemed value for supplies, if the deeming fiction is found to be arbitrary and contrary to the scheme of the statute, then it can be definitely held to be *ultra-vires)*. The judgement of the Supreme Court in *VKC Foot Steps (supra)* will not apply since in the present matter the impugned notification is contrary to the provisions and scheme of the GST Acts as well as arbitrary and violative of Article 14 of the Constitution. Further the judgment in *Narne Construction (supra)* will not apply as that was rendered upon a construction of the provisions of an entirely different statute.
- Impugned para 2 of *NN 11/2017-CT(R) dt. 28.06.2017* and the parallel State tax notification is read down to the effect that the deeming fiction of 1/3rd will not be mandatory in nature. It will only be available at the option of the taxable person in cases where the actual value of land or undivided share in land is not ascertainable.

4. M/S V.S. PRODUCTS vs. UNION OF INDIA [2022 (1) TMI 380 (KARNATAKA HIGH COURT)]

Constitutional validity of levy of NCCD and BED after introduction of GST

Background:

- National calamity contingency duty (NCCD) and basic excise duty ("BED") were continued to be levied by the Central Government on certain products even after the enactment of Article 246A of the Constitution bestowing powers on both the Parliament and the State Legislatures to levy taxes on goods and services.
- The issue under consideration was whether the levies of NCCD and BED under Article 246 could co-exist with GST.

Points of Dispute:

- Whether after coming into force of the Constitution (101st Amendment) Act, with effect from 01.07.2017, the levy of BED and NCCD is constitutionally valid?

- Whether simultaneous levy of GST under Article 246A of the Constitution and levy of BED and NCCD under Article 246 *qua* tobacco and tobacco products is legally permissible?
- Whether such simultaneous levies would be consistent with purposive and harmonious construction of the Constitution?

Submissions by the Assessee:

- Article 246A of the Constitution being a *sui generis* power exhaustive of taxes on all aspect and facets of supply of goods including tobacco and tobacco products, overrides the taxing power of Legislature referable to Article 246 in the light of the non-obstante clause in Article 246A.
- Article 248 which provided for residuary power of legislation including the power to impose a tax not mentioned in the Concurrent or State List stands curtailed, as the same has been amended by the *Constitution (One Hundred and First Amendment) Act and begins with the phrase "subject to Article 246-A, ……." 2016.*
- Once the CE Tariff Act stood repealed by section 174 of the CGST Act, the reference to the CE Tariff Act in the Seventh Schedule of the Finance Act, 2001 is otiose. The Union cannot levy any tax, cess or surcharge in the form of BED or NCCD on a facet of supply (that is manufacture) on tobacco products beyond the GST framework and the scheme envisaged under Article 246A, 269A, 270 and 279A. Tobacco products are subjected to indirect taxes under the pre-GST regime (i.e., under the Excise Act) and GST regime as well. The singling out of tobacco products for such taxation vis-à-vis other goods which are subjected to tax only under GST regime does not have any legal justification for such hostile and discriminatory treatment.

Submissions by the Revenue:

- The Courts while interpreting the GST law have to keep in mind that the Parliament had to make balances to accommodate the interest of the States and that the area of GST law is such that judicial interpretation cannot be ahead of policy making.
- Considering the nature of both, the Federal partners and the complexity involved, certain goods are kept outside the ambit of GST and certain goods such as tobacco, tobacco products and opium are subject to both GST and other taxes.

- The Constitutional competence cannot be questioned as to whether goods are liable to GST and other taxes/levies and such question cannot be raised when there is no express bar. The use of the word "notwithstanding" in Article 246A only enables the Union and the States to impose GST on the notified goods irrespective of any other provision in the Constitution and does not destroy or denude powers otherwise available elsewhere in the Constitution providing for valid imposition of taxes.
- As per the aspect doctrine, the same transaction may involve two or more taxable events in different aspects and accordingly, there is no illegality in the levy of GST as well as excise duty on the same product.

Legal Principles and Scope of Decision:

- The sources of power under Article 246A and 246 are in fact mutually exclusive and could be simultaneously exercised.
- Article 246 continues to be the source of power even post-introduction of Article 246A. The amendment to Entry 84 of List I whereby field of legislation indicating levy of duty of excise on goods manufactured or produced relating to tobacco and tobacco products does indicate the conscious intention to preserve the exercise of power under Article 246 even after introduction of Article 246A.
- In *Indian Oil Corporation Ltd. v. Union of India [(2020) SCC Online All. 1538],* it was held that 'superior kerosene oil' would continue to be governed by the provision of the CE Act even after the advent of GST.
- In *Union of India v. Mohit Mineral (P) Ltd. [(2019) 2 SCC 599],* it was observed , "*When express power is there to make law regarding goods and services tax, we fail to comprehend that how such power shall not include power to levy cess on goods and services tax. True, that the Constitution (One Hundred and First Amendment) Act, 2016 was passed to subsume various taxes, surcharges and cesses into one tax but the constitutional provision does not indicate that henceforth no surcharge or cess shall be levied."*
- It must be noted that taxing statutes are revenue generation statutes and, in that context, levy even if on the same taxable event which may also amount to double taxation is *per se* not prohibited unless the prohibition can be read into on the basis of any other constitutionally

available principle. [*Avinder Singh v. State of Punjab (1979) 1 SCC 137]*.

- Surcharge being imposed by way of the Finance Act has nothing to do with surcharge on GST that may still be levied. As the levy under Article 246 is permissible even after introduction of Article 246A, the levy of surcharge, tracing the power under Article 271 would still subsist even if the goods are subjected to levy of GST under Article 246A. It is a settled principle that the Legislature has a larger discretion in the matter of classification for the purpose of tax. The requirement, however, is that there is a classification and a rational nexus between such classification and the object sought to be achieved.
- Reference was also made to the Apex Court's decision in *Commissioner of Urban Tax vs. Buckingham & Carnatic Company Ltd. [(1969) 2 SCC 65]* in which the settled principle was reiterated that selecting objects to the tax, determining the quantum of tax, legislating conditions for the levy and the socio-economic goals which a tax must achieve, are matters of legislative policy and these matters have been entrusted to the Legislature and not to the Court.

Conclusion:

- Levy of NCCD and ED under Article 246 of the Constitution can co-exist with GST even after the Constitution (101st) Amendment Act, 2016.

5. M/S ABBOTT HEALTHCARE PVT. LTD. vs. THE COMMISSIONER OF STATE TAX [2020 (1) TMI 338 (KERALA HIGH COURT)]

Placing of diagnostic instruments at hospital, labs etc.

Background:

- Abbott placed its own diagnostics instruments at the premises of unrelated hospitals, labs etc. for their uses for a specified period without any consideration.

  To execute the aforesaid placement of instruments, the appellant assessee *inter-alia* entered into Re-Agent Supply and Instrument use Agreement ("the Agreement") with various unrelated hospitals, labs etc. ("the Customers"). The ownership in the instruments continues to be with the assessee and all rights, title and interest in the instruments vested with the assessee at all times during the continuity of the agreement with no consideration charged from the customers. The customers had only a permission to use the instruments provided to the hospitals for a specified period and the instruments were returnable at the end of such specified period or at the earlier termination of the agreement.

- As per the terms of the agreement, the customers were required to purchase re-agents, calibrators, disposables. etc. (hereinafter referred to as the 'products') at the prices specified in the agreement. The products were supplied by the assessee to its distributors on payment of applicable GST. The distributors in turn supplied the same to the hospitals i.e., the customers. The distributors also duly discharged the applicable GST on the price charged for the supply of the said products. There was no direct sale/ supply of the products by the assessee to the hospitals/labs etc.

- The AAR, Kerala held that the placement of specified medical instruments to unrelated customers like hospitals, labs, etc. constituted a 'composite supply', where the principal supply was transfer of right to use the instruments for any purpose and was accordingly liable to GST under serial Entry No. 17(iii) - Heading 9973 of *NN 11/2017-CT(R) dt. 28.06.2017*.

- The assessee filed an appeal before the AAAR against the order of AAR. The AAAR dismissed the appeal. Aggrieved by the dismissal order, the assessee filed a writ petition before the Kerala High Court.

Point of Dispute:

- Whether the provision of specified medical instruments by Abbott (the assessee) to the customers namely unrelated parties like hospital/s Lab/s for use by them without any consideration, constitutes a "supply" or whether it constitutes "movement of goods otherwise than by way of supply" as per the provisions of the GST law?".

Decision of the Court:

- It was open for the AAR to decide whether the supply of instrument was a supply for consideration, but its findings regarding composite supply were wholly without jurisdiction.
- The AAR could not have held that the placement of instrument and the supply of re-agents is a composite supply for the following reasons:
    a) The supply of instrument and the supply of re-agent was by two separate persons, i.e., by the assessee and the distributor of the assessee. Supply by two persons cannot be fused together to make it a composite supply.
    b) For two supplies to be composite supplies they have to be supplied on 'as is where is' basis, i.e., at the same time. Thus, in the present case, continuous supply of service (right to use instrument) and periodic supply of goods/ products cannot be a composite supply.
- The High Court quashed the order of AAAR *and AAR,* respectively and remanded the matter to AAR for fresh determination of the question posed by the assessee.

Remarks:

- After the remand by the High Court, the AAR held that the placement of instrument at the premises of the customers i.e., the hospitals/labs was a supply of service by the assessee as per entry no. 1(b) of schedule II of the Act which provides that any transfer of right in goods without transfer of title is a supply of service. The AAR further held that the obligation of the customers to purchase minimum value of re-agents at the specified price and to forfeit the deficit amount in case

of short purchase was the motivation for the assessee to enter into the contract with the customers and thus, such obligation constituted valid consideration for supply of transfer of right to use the instrument by the assessee. Subsequently, assessee filed an appeal to challenge the order of AAR before the AAAR.

- The AAAR held that on a plain reading of the terms and conditions of the agreement, it is revealed that the primary intention of the assessee was to enter into an agreement to place the instrument only at the premises of those customers who agreed to purchase the products of the agreement in accordance with the terms and conditions specified in the agreement. The minimum purchase obligation of the re-agent and forbearance of the customers from using any other re-agent than that was prescribed by the assessee served as a consideration for the placement of the instrument at the premises of the customers by the assessee.
- The AAAR concluded that the act of assurance from the part of the customers for exclusive usage of re-agents, calibrators and disposable in the instruments according to the approved directions of the assessee and the obligation to purchase minimum assured quantity on the agreed price from the appellant assessee constituted a valid consideration for inducement of the supply of these services against the activity of placement of the instruments by the assessee at the customers' premises.

6. IN RE: M/S CUMMINS INDIA LTD. [TS-747-AAAR (MAH)-2021-GST (AAAR, MAHARASHTRA)]

Allocation of cost by Head Office to its branches

Background:

- The assessee had presence across various States in India through its manufacturing/service/sales units. The assessee procured common input services at its head office (HO) in Maharashtra. The GST paid on such input services was availed as ITC at the HO. The costs incurred by HO for procurement of such common input services, was booked by HO in its own books of accounts. Such cost was then allocated and recovered proportionately from each of the recipient units to determine the office/ plant-wise profitability as part of an internal procedure.

- The assessee sought a ruling on the issue as to whether availment of ITC of common input supplies on behalf of other unit(s) registered as distinct person and further allocation of the cost incurred for the same to other units, qualifies as supply and attracts levy of GST?
- The AAR placed its reliance on section 7 read with entry 2 of schedule I to state that the allocation of cost of HO to its branches is a supply. In case, the open market value or the value of supply of like kind and quality is not available, then the value should be computed based on the cost of provision of service. Further, it was held that ISD registration is mandatory to distribute the credit on common input services.
- Aggrieved by the order, the assessee filed an appeal before the AAAR.

Points of Dispute:

- Whether availment of ITC of tax on common input supplies on behalf of other unit/units registered as distinct person and further allocation of the cost incurred for same to such other units, qualifies as supply and attracts levy of GST? If yes, what is the assessable value?
- Whether the allocation of the cost of the employees' salary by HO to branch offices would attract levy of GST?
- Whether registering under an ISD is an option provided to an assessee or is it a compulsion for the assessee to obtain registration as an ISD for the distribution of ITC?

Submissions by the Assessee:

- Section 24 merely refers to the necessity of an independent registration if a person intends to avail the facility of ISD. The definition does not create any stipulation as to necessity of availing the ISD facility. Further, there exists no other statutory provision which compels a person to act as an ISD. It is the discretion of the assessee to determine if it intends to distribute the ITC of common input services and that, it is required to obtain registration as an ISD only if it intends to distribute ITC of common input service.
- Even though employees of the assessee at one distinct unit provide assistance to other distinct units of the assessee, the employees are essentially performing functions for the same legal entity. It is settled law that legal relationship of employment is between employee and the company as a whole encompassing all its establishments.

Findings of the AAAR:

- The GST law has provided a very wide connotation for services, which will cover any activity other than those which involves goods, money and securities. In view of this wide scope and coverage of the term "services", it is adequately evident that the impugned activities of providing facilitation services to their branch offices/units by way of availment of the common input services by the assessee's HO on behalf of its Branch Offices/Units would be covered under services and hence, supply in terms of section 7(1)(a) as the said services are provided by the assessee HO to its branch offices/units for a consideration in the course of its business.
- All ISDs, whether separately registered or not, are required to be registered compulsorily as ISD. Thus, the law is very clear in this regard that any ISD, which intends to distribute the credit of the tax paid on the common input services received by it on behalf of its branches/ units, has to mandatorily register itself as an ISD and is bound to comply with the provisions and rules made in relation thereto.
- The HO is not entitled to avail and utilize the ITC on common input services in as much as such services are being consumed by the Branch Offices/Units in the course or furtherance of their businesses and not by the HO. It is mandatory to obtain ISD registration for distribution of credit of GST paid on the common input services . The cost of common input services would be excluded from the value of supply of the facilitation services as such costs have been incurred by the HO in the capacity of a pure agent of the Branch Offices/Units.
- The employees of the assessee's HO work on behalf of the HO and not at the behest of the Branch Offices/ Units. Further, the HO uses all its human resources to facilitate the operational requirements of the Branch Offices/ Units by way of procuring common input services on behalf of the Branch Offices/ Units, thereby, providing the impugned facilitation services. Therefore, allocation and recovery of any amount including its employee's salary cost from the Branch Offices/ Units will be subject to GST.

Held:

- The contention put forth by the assessee that GST is inapplicable on the allocation and recovery of salary cost of the HO employee from the branch offices/ units is erroneous in as much as the impugned

transaction of facilitation services are effected between the HO and branch offices/ units, which are distinct units under the CGST Act, and the same is clearly taxable under the GST law in terms of section 7.

- The assessable value of the services provided by the HO to the branch offices/ units can be determined as per the second proviso to rule 28(c), which provides that value of the tax invoice will be deemed as the open market value of the services.

Remarks:

- In a similar ruling by the Karnataka AAAR in the case of *Columbia Asia Hospitals Private Limited [(2019) 20 G.S.T.L. 763 (App. A.A.R. - GST)],* it was held that support functions provided by employees of HO to branches is taxable. Further, it was held that cost of employees working at HO would be an integral part of the cost of services rendered by HO to its other distinct units.
- Even the Haryana AAR, in the case of *Tupperware India Pvt. Ltd. [AAR No. HAR/HAAR/R/2018-19/59 dated 28 August 2020]* had held that the services supplied by HO to its other units by way of performing activities shall be leviable to GST.

7. IN RE: M/S HP INDIA SALES PVT. LTD. [2019 (8) TMI 30 (AAAR, MAHARASHTRA)]

Whether composite or mixed supply?

Background:

- HP India Sales Private Limited (HP India or "assessee") is *inter alia* engaged in supplying HP Indigo printers and the consumables to re-sellers, who in turn supply them to end customers. The details are as under:
  - i. The Indigo press machine is sold upfront to the reseller/end customer as per mutually agreed terms.
  - ii. Electro Ink and consumables required for printing are then supplied to resellers, who supply them to end customers.
  - iii. Spare parts are sold to resellers who consumed such spare parts in the course of providing maintenance services to end customers.
- In other words, assessee provided supplies to be used with HP Indigo printers supplied to customers. Additionally, ancillary material

comprising of oil, binary ink developer, bib, blanket, print imaging plate and other machine products ("consumables") were consumed by the Indigo press machines in the course of effecting prints.

- In this regard, HP India directly supplies ElectroInk along with consumables from its overseas suppliers at the customs port situated in Mumbai wherefrom the said goods are cleared on payment of applicable customs duties along with IGST. The goods were stored at the HP India's warehouse in Maharashtra. HP India also appointed authorized reseller/distributor across India. The terms of the contract were that the supplies would be the property of HP India till such time supplies were utilized by the customer for effecting prints.
- HP India filed an application before AAR seeking an advance ruling on the question of classification of ElectroInk supplied along with consumables under GST. The AAR observed that HP India's supplies consist of two or more than two supplies. Such supplies are made in conjunction with each other for a single price. Each of the supplies can be supplied separately as they are not dependent on each other and one supply of goods does not occasion the supply of other goods. Accordingly, it was held that all the ingredients of 'mixed supply' have been met.
- HP India filed an appeal before the AAAR against the said order.

Point of Dispute :

- Classification of ElectroInk supplied along with consumables - whether it is a composite supply or mixed supply?

Submissions by the Assessee:

- Based on the terms of the agreement, the consumption pattern and printing cycle and the value of supplies constituted in the consideration per click, it is evident that the predominant element in the bundle is ElectroInk. Binary ink developer, photo imaging plait, etc. are mere support elements to ensure movement of ElectroInk from the printer to the substrate in the required manner.
- Supply of ElectroInk with consumables is a composite supply, with ElectoInk being the principal supply.

Findings of the AAAR:

- Composite supply is defined as supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods and

services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is the principal supply.

- In this case, all the products are equally important for printing to happen. It is not that the printing can take place with only ink and that the other products are not necessary.
- Also, in a composite supply, two or more taxable supplies have to be naturally bundled and one of the indicators of a 'naturally bundled' supply is that it should be an industry practice. HP India has not given any evidence that the program is an industry practice. The fact that HP India offers his customers the option of a tier program does not make the same an industry practice.

Held:

- Therefore, it cannot be said that this is a case of composite supply, where the supply of ink is the principal supply.

8. IN RE: M/S CALTECH POLYMERS PVT. LTD. [2018 (10) TMI 1313 (AAAR, KERALA)]

Recovery of food expenses by employer from employees

Background:

- The assessee was engaged in the manufacture and sale of footwear. It provided canteen services exclusively to its employees. It incurred canteen running expenses for a month and recovered the same from its employees without any profit margin on the same.
- The space for the canteen was provided by the assessee inside the factory premises. A cook was employed by the assessee who paid monthly salary. The vegetables and other items required for preparing the food items were purchased by the assessee directly from the suppliers. The number of times, the canteen facility was availed each day by the employees, was tracked on a daily basis.
- Based on the above details, the expenditure incurred by the assessee on the vegetables and other items required for preparation of food was recovered from the employees, as a deduction from their monthly salary, in proportion to the food consumed by them.
- The assessee did not make any profit while recovering the cost of the food items, from the employees. Only the actual cost incurred for the food items was recovered from the employees.

Point of Dispute:

- Whether recovery of food expenses from employees for the canteen services provided by the assessee is covered under the definition of outward supplies and is taxable under the GST law?

Submissions by the Assessee:

- The activity does not fall within the scope of 'supply', as the same is not in the course or furtherance of its business. The assessee only facilitated the supply of food to the employees, which is a statutory requirement, and recovered only the actual expenditure incurred in connection with the food supply, without making any profit.
- The supply of subsidized food was not the business activity of the assessee. Therefore, the supply of subsidized food by the assessee did not constitute 'supply' within the meaning of section 7 and hence, did not attract the levy of GST.

Findings of the AAAR:

- Admittedly, the assessee served food to the employees for cash, though there is no profit involved in the transaction. In spite of the absence of any profit, the activity of supplying food and charging price for the same from the employees would come within the definition of "supply" as provided in section 7(1)(a).
- Consequently, the assessee would come under the definition of "supplier" as provided in section 2(105).
- Moreover, the assessee recovers the cost of food items from their employees and therefore, there is "consideration" as defined in section 2(31).

Held :

- Hence, in the instant case, AAAR held that "*The supply of food items to the employees for consideration in the canteen run by the appellant company would come under the definition of 'supply' and would be taxable under GST*".

Remarks:

- In the case of *IN RE : Amneal Pharmaceuticals Pvt. Ltd [2022 (3) TMI 1143],* the Gujarat AAAR modified the ruling of the AAR to hold that GST is not applicable on the collection of employees' portions of the amount towards foodstuff supplied by the third-party canteen service provider.

- Similarly, in the case of *Cadila Healthcare Ltd, the Gujarat AAR [2022 (4) TMI 1339]* held that GST is not applicable on such transaction. Same conclusion was arrived at in the case of *Cadmach Machinery Pvt. Ltd. [2022 (4) TMI 1337]*

- Also, *in IN RE : Emcure Pharmaceuticals Ltd. [2022 (60) G.S.T.L. 231 (A.A.R. - GST - Mah.)]*, the Maharashtra AAR held that canteen facility to employees is a welfare measure mandated by Factories Act,1948 which is "*not at all connected to the functioning of their business of developing, manufacturing and marketing pharmaceutical products… not a transaction made in the course or furtherance of business… cannot be considered as a "supply" under section 7 of the CGST Act*".

9. IN RE: M/S VIJAY BABURAO SHIRKE [2020 (10) TMI 48 (AAAR, MAHARASHTRA)]

Prize Money from horse racing

Background:

- The assessee undertook the services of providing specialized and trained horses for participation in the horse race. The assessee paid GST on the prize money received in horse racing w.e.f. 01.07.2017. The assessee also availed ITC of the GST paid on various charges incurred by him in relation to the training of the horses or the entry fee paid by him to Royal Western India Turf Club (RWITC). The assessee was of the view that the prize money is an output service. However, certain competitors were not paying GST and to avoid any dispute with the GST authorities in future, the assessee moved an advance ruling application before the Maharashtra AAR.

- The assessee is receiving the prize money from the horse race conducting entities, in the event, the horse owned by the applicant wins the race. Thus, the prize money is nothing but the consideration received by the assessee. The assessee did not pass on the ownership of horses to the race organizer. Therefore, participation of horses for the purpose of events organized by the clubs was a supply of services to the event organizer classifiable under "*Other services and other miscellaneous services including services nowhere else classified".*

- The AAR held that the prize money received in horse races was a 'supply' under section 7 and accordingly would be subject to GST at rate of 18 % (CGST @ 9% + SGST @ 9%).
- The Revenue filed an appeal before the AAAR against the above decision of AAR.

Point of Dispute:

- Whether receipt of prize money from horse race conducting entities, in the event of the horse owned by the assessee wins the race, would amount to 'supply' under section 7 and consequently attract levy of GST?

Submissions by the Assessee:

- The assessee submitted that the order of the advance ruling authority, is correct in law and hence, needs to be upheld. The said order does not suffer from any infirmity or illegality. Therefore, the present appeal filed by the Revenue, being devoid of any merit, is liable to be rejected.

Submissions by the Revenue:

- The assessee's participation in the race is based on its own *suo-moto* decision and that it is not a result of a mutual pre-agreement or a pre-concert between the participants and the race club.
- The assessee participates in race to fulfil his own desire and not to fulfil any obligation towards the RWITC, the race organizer and thus, the participation of assessee is not an activity carried out by a person at the behest of or for another person.
- The prize money/stakes are given only to those owners, whose horse either wins or gets a place in the race. Therefore, the prize money/stakes received by horse owners would not be construed as 'consideration' for participation in the race.
- Therefore, in the present arrangement, there is no *quid pro quo* because the prize money/stakes are not given for the participation in the race, but for the winning or getting a place in the race.
- Receiving prize money/stakes is a consequence of chance, skill and circumstance and therefore, there is no certainty in this regard. Hence, the prize money/stakes should not be treated as 'consideration' against the owners' participation in the race.

- To qualify as "supply", two separate conditions should be satisfied cumulatively, i.e., there should be a "supply" and it should be for a 'consideration'. Given this, the liability to pay GST would arise only where the payment received is linked to a supply. In the case of a race, the award is received for an achievement carried out independently. The payment of prize money is to recognize the achievement. Therefore, it cannot be construed as consideration towards a "supply". Accordingly, GST liability will not arise on the same.

Findings of the AAAR:

- By applying the definition of "supply" to the facts and circumstances of the case at hand, no service was provided by the assessee to the racing clubs for the prize money/ stakes received from such clubs.
- It is not in dispute that not all horse owners, who agree to provide their horses to such race organizing clubs, receive the consideration in the form of the said prize money/ stake from such clubs. Only those horse owners, whose horses win the races organized by such clubs receive such consideration. Thus, there is no direct nexus between the activities carried out by the horse owners, viz. by providing thoroughbred horses to race clubs organizing horse race events, and the prize money received by such horse owners.
- Participation of racehorses in races and passing on of winning by such races are two separate events/ transactions. It is clear from the issue that in the first transaction, i.e., getting the opportunity to participate in such races organized by horse racing clubs against entry fee payable by the horserace owners to such clubs is a supply of service by the race conducting entity to such aspiring racehorse owners.

Held:

- The AAAR set aside the order of the AAR and held that prize money/stakes are not supply and hence, not subject to GST.

10. IN RE: M/S SANTHOSH DISTRIBUTORS [2021 (7) TMI 789 (AAAR, KERALA)]

Reimbursements of Discount

Background:

- The assessee was an authorized distributor of the principal supplier namely Castrol India Ltd. As a distributor, the assessee supplied

goods to dealers at reduced rates pre-fixed by the principal supplier through the latter's billing software and the assessee did not have any control on the price of the goods supplied.

- In the case of sale of goods at discounted/ reduced rates, the principal supplier reimbursed the differential amount of discount to assessee through commercial credit notes.
- The AAR held that the discount given to augment the sales of the supplier did not satisfy the conditions as per section 15(3) of the CGST Act and therefore the discount will form part of consideration flowing from the principal supplier for the supply made by the distributor to the dealer.
- The assessee filed an appeal against the ruling of AAR before the AAAR.

Point of Dispute:

- Whether reimbursement of discounts provided by the principal supplier to the assessee is subject to levy of GST?

Submissions by the Assessee:

- The impugned order is unsustainable for the reason that it seeks to tax an amount which had already been taxed as part of the transaction value of the transaction between the principal supplier and the assessee.
- Under the GST law, the 'consideration' should be in relation to the supply of goods or services or both. In the present case, the discount/scheme/rebate offered by the principal supplier to the assessee was not towards any supply of goods by the assessee to its customers. The scheme/discounts were first circulated and communicated to the assessee by the principal supplier and on the basis of the above schemes etc., the assessee effected the supply of goods to its customers at a lesser price.

Findings of the AAAR:

- The wordings of section 15(3)(b)(i) very clearly state that if the discount is allowed after the supply of goods has taken place, it should be as per the terms of such agreement i.e., it cannot be open ended.
- Thus, the quantum of discount cannot be arrived at without any basis, at the discretion of the supplier. The supplier has to clearly mention the quantum of discount or percentage of discount which is to be

worked out on the basis of certain parameters or certain criteria agreed to between the supplier and the recipient. These criteria should be pre-determined and mentioned in the agreement in respect of supply of the goods.

- Thus, the word 'discount' mentioned in an agreement without there being any parameter or criteria mentioned with it would not fulfil the requirements of section 15(3)(b)(i). If the word 'discount' is left open ended or without any qualifications or criteria attached, there can be any percentage of discount ranging from bare minimum to even 100% as per the discretion of the supplier and certainly such abnormal discounts without any criteria or basis can in no way be considered as fair.
- Hence, the amount paid to the assessee towards "rate difference" and "special discount" as mentioned above, post the activity of supply do not satisfy the requirements of section 15(3)(b)(i). Therefore, such amounts cannot be allowed as discount for the purpose of arriving at the 'transaction value' in terms of section 15.
- Thus, the additional discount given by the principal supplier to the assessee is a consideration to offer reduced price in order to augment the sales. This additional discount squarely falls under the definition of the term "consideration" as specified under section 2(31).

Held:

- The additional discount in the form of reimbursement of discount or rebate, received from principal supplier over and above the invoice value is liable to be added to the consideration payable by the customer to the assessee for the purpose of arriving at the value of supply of the assessee to the customers as per section 15. Accordingly, the ruling of AAR was upheld.

11. IN RE: M/S NORTH AMERICAN COAL CORPORATION INDIA PRIVATE LIMITED [2018 (10) TMI 1339 (AAR, MAHARASHTRA)]

Taxability of Liquidated Damages

Background:

- The assessee carried on the business of providing technical consultancy relating to coal mining and related activities. The assessee entered into an Association Agreement for mine

development and operations in order to provide technical know-how to Sasan Power Limited (SPL) in relation to mine development and operations. The assessee rendered significant services to SPL under the above-mentioned agreements which contributed immensely to the progress of the project in SPL.

- However, SPL curtailed the activities of the assessee and engaged its in-house international consultants. The assessee charged Service Tax on the invoices raised by it for the services rendered under the Association agreement and duly deposited the same with the Government exchequer even for the invoices where the payment was not received from SPL. Despite several written and in person requests from the assessee, SPL did not honour its obligations under the agreement and, therefore, the assessee was constrained to terminate the association agreement with SPL. The termination effected by the assessee under the terms of Association Agreement resulted in the assessee claiming from SPL the past dues of development fee, reimbursement of expenses and liquidated damages.

Point of Dispute:

- Whether liquidated damages that may be awarded to the assessee by the International Chamber of Commerce (ICC) qualify as a 'supply' under the GST law, thereby attracting the levy of GST?

Submissions by the Assessee:

- The claim of liquidated damages does not qualify as a 'service', as it lacks the element of reciprocity which is the *sine qua non* for a transaction to qualify as a service. Therefore, there is no question of the claim of liquidated damages leading to any 'supply of service.'
- Without prejudice to the aforesaid, even if one were to argue that the claim of liquidated damages amounts to a 'service', such claim cannot be regarded as being 'in the course or furtherance of business'. The termination of the Association Agreement puts an end to the business relationship of the assessee with the service recipient. It results in complete and absolute cessation of the business of the assessee and not its furtherance. All the obligations of the assessee *qua* the service recipient under the Association Agreement ceased to exist once the Association Agreement was terminated and the same cannot be said to be in furtherance of the assessee's business.

- The act of termination cannot be considered to be in the course of any business as the usage of the term 'in course' indicates the continuity of an activity. When the assessee terminates the Association Agreement, there would not be continuation of any business of the assessee with the service recipient as all obligations under the Association Agreement would cease to exist.

Findings of the AAR:

- The Association Agreement did not last for the whole period as envisaged therein. The agreement was claimed to be terminated for breaches on the part of the service recipient i.e., SPL by the assessee in view of the existent provisions in the said agreement.
- On a perusal of the terms and conditions of the Association Agreement, there was clearly an agreement between the assessee and SPL to tolerate an act or situation in case such act was done by the other party or such a situation arose because of default on the part of one or the other during the course of the project. In case of default of terms of the agreement by one of the parties, the defaulting party was required to compensate the other party as per the terms and conditions of the agreement. If there was further dispute in respect of the claims to be recovered/ received by one party from the other in view of violations or termination of the agreement then the agreement provided that they could approach the ICC for arbitration and receive suitable amounts as claims cum consideration from the party violating or defaulting on the Association Agreement.

Held:

- Thus, the consideration, if any, receivable by the assessee after arbitration by the ICC would clearly qualify as 'supply' as per entry no. 5(e) of Schedule II and thereby exigible under GST.

Remarks:

- Similar view was taken by the Telangana AAR in the case of *Achampet Solar Private Limited [2022 (2) TMI 715], Continental Engineering Corporation [2021 (10) TMI 635] and Singareni Collieries Company Limited [2022 (6) TMI 419].*
- In the case of *Bajaj Finance Limited, Maharashtra AAR [2018 (11) TMI 884],* it was held that the receipt of cheque bouncing charges would be receipt of amounts for tolerating the act of their customers for having bounced the cheque or any other mode of payment. However, in another application filed by *Bajaj Finance,* the penal interest that was

collected for delay in payment of EMI was held to be exempted from GST by the Maharashtra AAAR, in view of *Circular No. 102/21/2019-GST dated 28.06.2019* issued by the CBIC.

- *Circular No. 178/10/2022-GST dated 03.08.2022* issued by the Central Government may be referred to in relation to the applicability of GST on liquidated damages.

12. IN RE: M/S VOLVO-EICHER COMMERCIAL VEHICLES LTD. [2020 (8) TMI 522 (AAAR, KARNATAKA)]

Warranty Services

Background:

- The assessee carried on the business of selling Volvo branded trucks and buses and thereafter providing after sales support services, including warranty services.
- The vehicles were sold with a warranty of 1 or 2 years. The assessee was responsible for servicing of the warranty claims of its customers and the liability to reimburse such expenses incurred for discharging the warranty obligations was upon Volvo Sweden.
- The customers claiming warranty services approached the assessee in case of any grievance regarding parts of the vehicles. Thereupon, the assessee processed the claim against the documents adduced by the customers and submitted a 'technical failure analysis report to Volvo Sweden. Upon acceptance of the warranty claim, the assessee carried out services and repair work. In cases requiring replacement of parts, the assessee provided free replacement of the defective parts along with services of fitting out of such replaced parts.
- Subsequently, the assessee raised its invoice on Volvo Sweden for claiming the amount spent on discharging such warranty obligations. The reimbursement sought included the cost of replaced products and the services provided. The reimbursement of such claim was made by Volvo Sweden in convertible foreign exchange to the assessee.
- In respect of this transaction, the assessee sought an advance ruling from the AAR.
- The AAR held that the appellant provided composite supply of goods and services to the customers wherein the principal supply was that of

goods or services depending on the nature of individual case. Further, the transaction was not export and a zero-rated supply under the IGST Act.

- Aggrieved by the said ruling, the assessee preferred an appeal before the AAAR.

Points of Dispute:

- Whether the supplies made by the assessee to Volvo Sweden is a supply of services?
- Whether the supplies made by the assessee amounts to export of services to Volvo Sweden and hence zero rated under the GST law?

Submissions by the Assessee:

- The reimbursement to the assessee was made by Volvo Sweden pursuant to the assessee's arrangement with Volvo Sweden. The customer in India had no contractual right to enforce the performance of the warranty obligations by the assessee. Therefore, the finding of AAR that the consideration was being paid by Volvo Sweden for the transaction between the assessee and the customer is factually and legally incorrect.
- The transaction relates to supply of services of warranty from the assessee to Volvo Sweden with the customers located in India who are the beneficiaries. The recipient of the supply in the present transaction is Volvo Sweden and not the customer.
- The transaction is primarily a supply of service or a composite supply of services with the supply of replaced goods being incidental to the primary supply of warranty services. The transaction is a zero-rated supply in as much as all the conditions for a transaction to be an 'export of service' stand satisfied.

Findings of the AAAR:

- A reading of the definitions given in section 2(93) and 2(31), indicates that the person who is required to make a payment for getting a job done is the recipient of service. To illustrate, if a manufacturer A is under obligation to provide free repair service during a specified warranty period to his customers in respect of some goods sold to them and he engages B to provide the services of free repairs during warranty period to his customers C1, C2, C3, and for this he pays to B.

The recipients of the service provided by B would be A and not the customers C1, C2, C3.

- Accordingly, the recipients of the service supplied by the assessee during the warranty period, will be the overseas company as it is at their behest that the assessee has undertaken the activity of repair and/or replacement of parts to the customer during the warranty period. The reimbursement received from overseas company is in the nature of consideration paid by the manufacturer to the distributor. The activity of carrying out the service during the warranty period was part of the obligations of Volvo Sweden.
- The findings of the lower authority that the recipient of service is the customer is incorrect.
- The supply by the assessee to Volvo Sweden is a composite supply of goods and services with the principal supply being supply of service.

Held:

- The activities performed by the assessee with regard to repair and servicing of vehicles for Indian customers on behalf of an overseas company during the warranty period was held to be an activity amounting to a composite supply of goods and service with the principal supply being a supply of service. The recipient of the supply of service was held to be the overseas company.
- Since determination of place of supply is not a question on which an advance ruling can be sought, the question with regard to 'export of service' is not answered on the ground of lack of jurisdiction.

13. SONKA PUBLICATION (INDIA) PVT LTD. vs. UNION OF INDIA & ORS. [(2019) 5 TMI 643 (DELHI HIGH COURT)]

Classification of books- whether the books published and sold by the assessee are 'Printed Books' classifiable under 'HSN4901' or 'Exercise Books' classifiable under 'HSN 4820'?

Background:

- The assessee is a publishing house engaged in the business of publishing and selling of books for students of various classes. The assessee is also publishing books under the name '*Sulekh Sarita Part-A'*, *Sulekh Sarita Part-B'*, '*Sulekh Sarita Part 1-5'*.
- The assessee filed an application for advance ruling seeking a clarification as to whether the books published by the assessee, viz., Sulekh Sarita Parts I to V are 'Printed Books' classifiable under HSN 4901 to 10 or as 'Exercise Books' under HSN 4820.
- The AAR passed an order dated 6-4-2018 holding that the aforementioned books Sulekh Sarita Parts I to V, printed and sold by the assessee, are classifiable as 'Exercise Books' under HSN 4820. In arriving at this conclusion, the AAR opined that only some parts of the said books aimed to test the understanding of the students while major portions were devoted to practice aspects.
- The assessee challenged the said order in the instant petition on the question as to whether the books 'Sulekh Sarita Parts I to V' are 'Printed Books' classifiable under 'HSN 4901' or 'Exercise Books' under 'HSN 4820'.
- In the present case, the point for clarification was whether these are 'work books' or 'practice books' or books aimed to test the child's knowledge, ask questions which the child has to answer, and facilitate evaluating the child's understanding. All 'printed books' have an author, whereas 'exercise books' or 'note books' do not have any author. However, 'exercise books' or 'note books' are merely ruled sheets of paper, bound to make it a 'note book/ exercise book'. The 'printed books' like 'Sulekh Sarita' in the present case have a copyright

of the content and the printed matter contained therein under the Copyright Act, 1957.

Point of Dispute:

- Whether 'Sulekh Sarita Parts I to V' are 'Printed Books' classifiable under 'HSN4901' or 'Exercise Books' under 'HSN 4820'?
- The emphasis was on the 'functional characteristics' of a book. In other words, the Court must ask what purpose will the book serve In this case, the question to be asked was whether the books in question merely help the child in improving the child's handwriting by providing space in a book by copying from a written text or does it pose questions to the child to answer and whether the teacher then can evaluate, on the basis of such answers, the child's ability and understanding?

Submissions by the Assessee:

- The name of the author of the book is prominently printed on the first page as is the ISBN (International Standard Book Number). It has a contents page which explains the broad features of the book. The first part contains practice exercises where the student is expected to copy the printed text in the lines given immediately below. But, that would be a very limited way of looking at the book as a whole. In fact, there are many portions of the book where a student is expected to answer questions. The student is expected to write down the meaning of Hindi words. The student is expected to write a short essay on a given aspect.
- At the end of the course, by using these books, the attempt is to enhance the educational value addition as far as the child is concerned. The attempt is to help the child think on his own and to enable the teacher to evaluate the child's output. By no means can it be said that these books are for enabling a child to merely copy words from a printed text in order to improve his or her own handwriting.

Submissions by the Revenue:

- Heading 49.01 generally covers "textual reading material/books including textbooks, catalogues, prayer books etc. It specifically covers 'educational workbooks or writing books'. Heading 49.03 generally covers 'children's picture, drawing or colouring books wherein pictures form the principal interest in the books'. Heading 48.20 generally

covers ‘stationery books’. Exercise books that contain ‘simple sheets with printed lines or may even have printed examples of handwriting for copying by the students’ also covered Heading 48.20.

- An examination of the books printed and sold by the assessee revealed that only in very few pages, printed exercise or questions are given. Hence, in these books, the primary use is writing and printing is incidental. Further since none of the books contained any pages with ‘children's picture’, drawing or colouring matter’, classification under heading 49.03 is not possible.

  Therefore, the goods were to be correctly classified under HSN 4820.

Legal Principles and Scope of Decision:

- The Delhi High Court, did not concur with the opinion rendered by the AAR of the above book that "only in very few pages, any printed exercise or questions is given." An educational text is like a handholding exercise for a child. While in the first few pages, it may appear that the child is asked to mechanically reproduce from the printed text and as the course progresses, the child is encouraged to think on his or her own. This is what precisely this 'work book', or 'practice book' does.
- At the end of the course, by using these books, the attempt is to enhance the educational value as far as the child is concerned. The attempt is to help the child think on its own and to enable the teacher to evaluate the child's output. By no means can it be said that these books are for enabling a child to merely copy words from a printed text in order to improve his or her own handwriting.
- *Circular No. 1057/06/2017 – CX dated 07.07.2017* has been issued by the CBIC on the same subject wherein it has been clarified that ‘exercise books’ are more akin to handwriting ‘note books’ and are nothing but stationery items having blank pages with lining for writing.
- Hence, these books are not 'exercise books' as understood by the trade. Assessee had produced before the Court samples of such 'exercise books/exercise note books' as understood in trade parlance to contrast the work book printed and published in the instant case It was demonstrated that the former are simply bound volumes of blank pages which may contain lines to facilitate writing. They do nothing more than providing space for writing.

- *Cases Referred- Central Press (P.) Ltd. vs. Union of India* [W.P. (C) No. 7198 of 2016] (para 2) and *Commissioner of Customs (General)* vs. *Gujarat Perstorp Electronics Ltd.* [2005 taxmann.com 1320 (SC)]

Conclusion:

- The Court went held that the books published and sold by the assessee are classifiable under HSN 49.01 and not HSN 48.02. In terms of *Notification No. 2/2017-Central Tax (Rate) dated 28.06.2017* ["*NN 2/2017-CT(R) dt. 28.06.2017" or "Exemption NN 2/2017"]* i.e., serial no.119 thereunder, such goods classifiable under HSN 49.01 i.e., 'printed books, including Braille books' are wholly exempted from tax.

  Note: While in this case the Hon'ble High Court had taken upon itself the issue of classification for purpose of rate of tax to be applied, in subsequent judgment of the *Bombay High Court in Jotun India Pvt Ltd vs Union of India and others [2022-TIOL-1609-HC-Mum-GST],* the Court has declined to interfere with the finding of fact recorded by the AAR/AAAR on the reasoning that the Court cannot take upon the task of an Appellate Court when that is not the legislative mandate.

14. JENEFA INDIA vs. UNION OF INDIA [2021 (11) TMI 227 (MADRAS HIGH COURT)]

Classification of fish meal in powdered form – Whether vested right to enjoy an exemption can be taken away by a clarificatory Circular?

Background:

- The assessee carried out manufacture of fish meal in a powdered form. It would procure fresh fish to be put into the steam cooker in a plant for steam boiling. The steam boiled fish would then be sent to the squeezer. Subsequently, the solid part of the fish would be transferred into a steam drier for removal of excessive moisture. The moisture removed material would be conveyed to the pulverizer and the resultant material would be in powdered form of fish meal which would be packed in sacks for sale.
- HSN 2301 provided GST rate of 5% under serial no. 103 of schedule I of *Notification No. 1/2017-Central Tax (Rate) dated 28.06.2017 NN 1/2017-CT(R) dt. 28.06.2017 which provided as under:*

103.	2301	*Flours, meals and pellets, of meat or meat offal, or fish or of crustaceans, molluscs or other aquatic invertebrates, unfit for human consumption; greaves*

- Similarly, *NN 2/2017-CT(R) dt. 28.06.2017* exempted the below mentioned goods under Entry. no. 102 :

102.	2302 2304 2305 2306 2308 2309	*Aquatic feed including shrimp feed and prawn feed, poultry feed & cattle feed, including grass, hay & straw, supplement & husk of pulses, concentrates & additives, wheat bran & de-oiled cake.*

- In serial no. 102 of *NN 2/2017-CT(R) dt. 28.06.2017,* in column (2)*,* for the entry "2302", *read* "2301, 2302" *vide M.F. (D.R.) Corrigendum F. No. 354/117/2017-TRU, dated 27.07.2017.*
- Subsequently, by *NN. 28/2017–C.T. (R) dated 22.09.2017*, an amendment was made whereby in serial no. 102, for the entries in column (2), the entries "*2301, 2302, 2308, 2309*" were substituted.
- Thus, the six entries which were included in serial no. 102 of *NN 2/2017-CT(R) dt. 28.06.2017 ["NN 2/2017"]*, were substituted by the aforesaid four entries. However, among the four entries, serial nos. 2301 and 2309 continue to form part of serial no. 102 under the amended notification dated 22.09.2017.

Points of Dispute:

- *Circular No. 80/54/2018-GST, dated 31.12.2018* was issued clarifying that "fish meal" and other raw materials used for making cattle/poultry/ aquatic feed cannot be said to be exempted within the meaning of the e*xemption NN 2/2017* under serial no. 102. Thereby, the Circular clarified that only the finished goods are exempted. Consequently, tax became applicable on the raw material at the rate of 5% and accordingly tax was demanded.
- In this context, the assessee challenged the impugned Circular dated 31.12.2018 by way of a writ petition before the Hon'ble Madras High Court.
- The issue under consideration was whether by way of a Circular, can the Government curtail the benefit of an exemption notification.

Submissions by the Assessee:

- The product the assessee manufactured is "fish meal". On the one hand, it is a finished product for feeding in an aqua farm which includes fish farm, but at the same time, it can also be used as one of the inputs or raw materials for making further finished product either in aqua farm or poultry farm or production of animal food.
- Whatever be the usage of the finished product (i.e., fish meal), it is only a finished product and it is covered under the two entries referred to above i.e., 2301 & 2309. Since, both entries find place in serial no. 102 of the exemption NN 2/2017, the said products are exempt.

Submissions by the Revenue:

- The product of the assessee, i.e., fish meal, can also be used as a raw material for the purpose of making cattle/poultry/aquatic feed, which is not exempted. Therefore, tax is leviable on these items at the rate of 5%.

Legal Principles and Scope of Decision:

- On a conjoint reading of the words by using the proper grammatical interpretation, even under entry 2301, fish meal, fish pellet and fish flour can be said to be included.
- Like that, in entry 2309, it is mentioned that preparations of a kind used in animal feeding. Among various goods under sub-heading 2309 90 20 feeds for fish, (prawn etc.). is mentioned. In sub-heading 2309 90 31, prawn and shrimp feed are mentioned. In sub-heading 2309 90 32, fish meal in powdered form is mentioned. It is to be noted that, the all the entries of Heading 2309 are under Nil GST category. The attempt of the Board for separating the fish meals in the case of raw material is impossible because the manufacturer manufactures this fish meal primarily for feeding fish and aqua. But at the same time, incidentally that product is being used as one of the raw materials in some other industries to prepare animal feed or cattle feed or poultry feed, because of which, the very finished product, namely, fish meal would not lose its character and identity.

Conclusion:

- The exemption provided by the Central Government by exercising its powers either under section 11(1) of the CGST Act or under section 6(1) of the IGST Act are substantive right provided to the stakeholders

by giving such exemption. Therefore, such kind of exemptions cannot be taken away or done away by issuing clarificatory Circulars by the Board, in exercise of its powers under section 168 of the CGST Act.

- Therefore, the impugned clarificatory Circular cannot override the exemption provided under notifications referred above.

15. MANIPAL TECHNOLOGIES LTD. vs. STATE OF KARNATAKA [2022 (5) TMI 843 (KARNATAKA HIGH COURT)]

Classification of Pattadar Passbook cum Title Deed – As a Document of Title or as an article of stationery

Background:

- The assessee was engaged in the business of printing books, magazines, calendars, diaries, bank passbooks, bank account opening forms and various other stationery items required for banking industry, educational institutions and various other customers.
- The Government of Telangana through Telangana State Technology Services Limited (hereinafter referred to as TSTS) invited bids for secured printing and delivery of Pattadar Pass Book cum Title Deed to all pattadars and land owners.
- The assessee procured paper and also printed the Pattadar Pass Book cum Title Deed as per the prescribed security features and specifications. The data/content for printing was provided to the assessee in electronic format.
- The assessee obtained an Advance Ruling wherein it was held that the Pattadar Pass Book cum Title Deed is not a document of title and accordingly classifiable under Chapter Heading 4820 of the Tariff Act attracting tax at 18% instead of 12% as being paid by the assessee.
- The AAAR also upheld that the Pattadar Pass Book cum Title Deed is not a document of title and not classifiable under Chapter 49.
- The assessee filed a Writ before the Hon'ble Karnataka High Court seeking directions for quashing the order of the AAAR.
- Relevant HSN entries are reproduced below:

4820	*Registers, account books, note books, order books, receipt books, letter pads, memorandum pads, diaries and similar articles [exercise books], blotting pads, binders (loose-leaf or other), folders, file covers, manifold business forms interleaved carbon sets and other articles of stationery, of paper or paper board; albums for samples or for collections and book covers, of paper or paperboard*
4907	*Unused postage, revenue or similar stamps of current or new issue in the country in which they have, or will have, a recognized face value; stamp-impressed paper; banknote; cheque forms; stock, share or bond certificates and similar documents of title:*

Point of Dispute:

- Whether Pattadar Passbook cum Title Deed is a document to title classifiable under the HSN 4907 or as an article of stationery classifiable under HSN 4820. Consequently, whether GST is leviable at the rate of 12% or 18%?

Submissions by the Assessee:

- The Pattadar Passbook cum Title Deed confers ownership of entitlement to certain financial interests or benefits named in such deed. This Passbook cum Title Deed is issued by Revenue Department and it contains details of landownership, photo and change of ownership.
- The activity undertaken by the assessee is passbook printing keeping in view the security guidelines issued by the Government of Telangana as per the tender document. Without these details, pass books cannot be used for the purpose of recording transactions.
- The Passbook cum Title Deed cannot be reduced to a mere pass book of general use and be classified under HSN 4820. In several civil disputes, Courts have considered Pattadar Passbook cum Title Deed as a document of title.

Submissions by the Revenue:

- The Pattadar Passbook cum Title Deed is not a document of title and it is only a revenue record and the entries made in the revenue records cannot form the basis for declaration of title.
- The decisions relied upon by the Counsel for the assessee are rendered in civil property disputes and they will not help the assessee in contending that the Pattadar Passbook cum Title Deed is a title deed and it comes under the Heading 4907.

Legal Principles and Scope of Decision:

- Pattadar Passbook cum Title Deed is a document in the form of a small bound book containing the details of land owned by a person (Pattadar), photo identity of Pattadar and changes of ownership subsequent to the issue of Pattadar Pass Book cum Title Deed.
- The Pattadar Passbook cum Title Deed is issued by Revenue Department under the law called Record of Rights Act. The Pattadar Passbook is issued to owners, Pattadars and occupants under section 6A of the Telangana Rights in Land and Pattadar Passbook Act, 1971 on an application upon payment of the prescribed fee.
- Reading the various provisions of Telangana Rights in Land and Pattadar Passbook Act, 1971, it can be inferred that transfer of title can be registered only on production of the title deed and passbook by the transferor as well as transferee.
- A registered document or certificate issued from the Mandal Revenue officer after paying registration fee and stamp duty is considered as document of title and on the basis of such document of title, the revenue authority updates the Record of Rights. The updated information in the Record of Rights is entered in the Pattadar Pass Book cum Title Deed. Therefore, the Pattadar Passbook cum Title Deed is not a document of title as claimed by the assessee and is not classifiable under Chapter Heading 4907.
- In the decision of the Andhra Pradesh High Court in the case of *G. Satyanarayana vs. Government of Andhra Pradesh [2014 (4) ALD 358],* it was held that even if the entries in the Record of Rights carry evidentiary value, that itself would not confer any title on the plaintiff on the suit land in question and the plaintiffs have to show, independent of those entries, that the plaintiff's predecessors had title over the property in question and it was that property which they had purchased.

Conclusion:

- The Pattadar Pass book cum Title Deed is not a document of title and is rightly classifiable under HSN 4820. Accordingly, the writ petition was dismissed.

16. GURDEEP SINGH SACHAR vs. UNION OF INDIA [2019 (6) TMI 1008 (BOMBAY HIGH COURT)]

Online fantasy sports/ games – Betting/ Gambling or not?

Background:

- India has seen a surge in the online gaming platforms. In this matter, the Hon'ble Bombay High Court was faced with the issue of deciding whether the online fantasy games are considered as betting/gambling or wagering *inter alia* for the purpose of CGST Act.

Point of Dispute:

- A criminal public interest litigation was filed by Gurdeep Singh Sachar ("the assessee") against Dream11 Fantasy Pvt. Ltd (Dream11) alleging that Dream 11 was conducting illegal operations of gambling/betting/ wagering in the guise of online fantasy sports gaming, which as per the assessee attracted penal provisions of Public Gambling Act, 1867, and secondly there was evasion of GST payable as per the provisions of GST Acts and Rules (rule 31A).

Submissions by the Assessee:

- Fantasy games are such that after some time people tend to pay with their hard-earned money, instead of playing for free. Accordingly, these fantasy games are nothing but means to lure people to spend their money for quick earning by taking a chance and most of them end up losing their money in the process, which is thus gambling/ betting/wagering, being different forms of "gambling". Fantasy game of this nature is merely a game of chance or luck, which is totally dependent upon the luck of a player on a particular day.
- Further, there is evasion of GST since the player receives a tax invoice in which tax is being charged only on the amount received and retained by the respondent towards platform fee say 20%, and not on the entire money which is put at stake by the player. For the balance 80% amount only "acknowledgement" was being given, notwithstanding the fact that the same was only kept in an escrow account.

Submissions by the Revenue:

- The issues involved in the case were decided by the Hon'ble Punjab and Haryana High Court in the case of *Shri Varun Gumber vs.*

U.T. Chandigarh & Ors [2017(4)TMI 1515 (Punjab and Haryana High Court)] wherein it was held that Dream 11 and other fantasy games are exempted from the Public Gambling Act, in view of section 18 of the said Act as playing of fantasy games requires exercise of knowledge, attention and judgment which is a matter of skill and not of mere chance.

- SLP against this judgment of Punjab and Haryana High Court was dismissed by the Hon'ble Supreme Court *vide* Order dated 15.09.2017.
- Online fantasy sports gaming conducted by Dream11 are predominantly game of skill, where users/participants create virtual teams comprising as many players as in real life teams, e.g., in cricket. The user's team has a mix of players from both the competing teams, between whom, the real-life matches are played.
- The users/ participants compete against such virtual teams created by other users / participants. The winners are decided based on points scored, using statistical data generated by the real-life performance of the players on the ground. Further, the deadline to create a team is latest by the official match start time. No changes can be made after the deadline.
- The participants do not bet on the outcome of the match and merely play a role akin to that of selectors in selecting the team.
- The points are scored by the participants for the entire duration of the whole match and not any part of the match.
- Hence, online fantasy sports gaming are "games of skill" and not "games of chance" and therefore outside the purview of Rule 31A(3).

Legal Principles and Scope of Decision:

- Two issues that needs to be addressed are:
  1. Whether the activities of the assessee amount to gambling/betting?
  2. Whether there is any merit in the allegation of violation of rule 31A (3) and erroneous classification?
- The decision of (a) Punjab & Haryana High Court in Dream11's case, (b) Supreme Court in the case of *K. R. Lakshmanan (Dr.) vs. State of*

Tamil Nadu and Anr. [(1996) 2 SCC 226] where the issue was whether horse-racing is a game of chance or a game involving substantial skill; and (c) Bombay High Court in the case *State of Andhra Pradesh vs. K. Satyanarayana & Ors. [(1968) 2 SCR 387]* wherein the issue was whether the game of rummy was a game of mere skill or a game of chance, clearly laid down that:

1. the competitions where success depends on substantial degree of skill are not ₹ gambling'; and
2. despite there being an element of chance if a game is preponderantly a game of skill it would nevertheless be a game of "mere skill". The expression "mere skill" would mean substantial degree or preponderance of skill.

- Considering the practice of playing the online fantasy games, the Court held that the result of the fantasy game contest on the platform of Dream 11, is not at all dependent on winning or losing of any particular team in the real-world game. There is no plausible reason to take a contrary view than the one taken by the Hon'ble Punjab & Haryana Court in Dream11's own case.
- The allegation of evasion of GST by the respondent is directly related to the outcome of the first issue. The amounts collected from the users are pooled in a common escrow account and the same is an actionable claim.
- The activities of Dream11 do not amount to betting/lottery and gambling and hence, it will be excluded from the scope of supply by virtue of entry 6 of schedule III. Therefore, rule 31A (3), will not have any application.

Conclusion:

- The game in question is not a case of betting or gambling. Accordingly, the legal position as of now appears to be that the online fantasy games played on the portal of Dream11 are not in the nature of betting/lottery/gambling and thus, are also not subject to levy of GST.

17. IN RE: M/S TIRUMALA MILK PRODUCTS PVT. LTD. [2021 (4) TMI 1292, (AAAR, ANDHRA PRADESH)]

Classification of flavoured milk – whether as milk or a beverage containing milk?

Background:

- The assessee filed an application before the AAR, Andhra Pradesh, seeking a clarification on the applicable rate and HSN code for flavoured milk.
- The ruling was issued specifying the applicable HSN Code for Flavoured Milk as 2202 9930 and GST rate as 12% (6% CGST and 6% SGST) under entry no. 50 of schedule II of *NN 1/2017-CT(R) dt. 28.06.2017*.
- The ruling was challenged by the Revenue before the AAAR.

Issue before the AAAR:

- Whether Flavoured milk produced by the assessee is to be classified under HSN 0402 99 90 or HSN 2202 90 30?

Submissions by the Assessee:

- The Hon'ble High Court of Allahabad in the case of *Gujarat Milk Marketing Federation Ltd vs State of U.P [2017 (5) GSTL 351 (ALL)]*, held that 'flavoured milk' is a form of milk, as it is neither a derivative of the milk nor a milk product. It is like hot or cold milk which remains milk even if sugar is added to it. It does not lose its basic characters of milk by heating or cooling or addition of sugar or any permitted colour, essence or flavour. The addition of permitted colour does not transform milk into any other thing.
- The 'Flavoured milk' in question is not a water-based drink, whereas Tariff Heading 2202 deals with water-based beverages and other non-alcoholic beverages. Therefore, it could be inferred that the pre-dominant part of the beverages covered under the Heading 2202 is water. The predominant constituent is milk in the product of the assessee and hence 'flavoured milk' in question does not merit classification under Tariff item 2202 99 30. Instead, it should be classified under Chapter 4 and should be taxed at the GST rate of 5%.

- Under schedule II of the Food Safety and Standards Act, 2006 (FSSAI Act), milk includes milk of cow, buffalo, sheep, goat or a mixture thereof either raw or processed in any manner and includes pasteurized, sterilized, recombined flavoured, acidified, skimmed, toned, double-toned, standardized or full cream milk. Therefore, the product should be classified only as milk.
- AAR, Karnataka in the case of *Karnataka Co-operative Milk Producers Federation Ltd [2019 (10) TMI 1016 - AAR, Karnataka]* decided that flavoured milk is covered under 'milk' under HSN 0402.

Findings by the AAAR:

- *Chronology* of the events of how the flavoured milk was classified over the years under different headings and entries:
    - Flavoured milk was initially classified under entry 0401.11 under the 6-digit code system, which prevailed till 27.02.2005.
    - Even under the 8-digit code introduced from 28.02.2005, flavoured milk was categorically placed under Chapter IV Heading No. 0402 9990.
    - The classification of the product in question was changed *vide NN 3/2005--CE dated 24.02.2005.* By this notification, entry no. 11A was inserted from 15.06.2017 and Nil rate of duty was specified for "flavoured milk of animal origin".
- In the agenda of the 31st GST Council Meeting, it was inferred that flavoured milk is classifiable under HSN 2202.
- Chapter 4 deals with "*Goods of dairy produce; birds' eggs; natural honey; edible products of animal origin, not elsewhere specified or included*". The qualifier here that it is "not elsewhere specified or included" carries enormous importance.
- Chapter 22 dealing with goods/ items of "*Beverages, spirits and vinegar"* carries the following entry "*Beverages containing milk"*. The meaning of the word 'beverage' under common parlance means that beverage is *"(chiefly in commercial use) a drink other than water. It is a liquid for drinking especially such liquid other than water (as tea, milk, fruit juice, beer) usually prepared (as by flavouring, heating, admixing) before being consumed".*

- Even though the product in question is a dairy produce and also an edible product of animal origin, the qualifier that it is *"not elsewhere specified or included"* makes it ineligible to be classified under Chapter 4. The product in dispute is specified and included under Chapter 22 dealing with goods/items of "*Beverages, spirits and vinegar*", that makes it ineligible to be classified under Chapter 4.

Held:

- Accordingly, flavoured milk is undoubtedly a beverage containing milk classifiable under HSN 2202 9030.

Remarks:

- Even the AAR, Andhra Pradesh in the case of *Sri Chakra Milk Products LLP [2019 (12) TMI 1577]* held that the commodity 'flavoured milk' merits classification under beverage containing milk under Tariff Heading 2202 90 30. Also, the ruling of the Gujarat Advance Ruling Authority in *Vadilal Industries [2022 (10) TMI 308 AAAR]* as well as *in Gujarat Co-operative Milk Marketing Federation Ltd [2017(5) GSTL 351 (All) dt. 31.05.2017]*, are in line with the above ruling.
- However, the Karnataka AAR has held that flavoured milk is to be classified as milk only which is contradictory to the ruling pronounced by the AARs of other States.
- The HSN code for flavoured milk was initially notified as 2202 90 30 *vide* entry no. 50 of *NN 01/2017-CT (R) dated* 28.06.2017. However, the HSN code was corrected *vide Corrigendum [F. No.354/117/2017-TRU Pt.] dated 12.07.2017* wherein HSN code 2202 99 30 was specified for beverages containing milk.

18. IN RE: M/S RAJ QUARRY WORKS [2021 (9) TMI (1290) (AAAR, GUJARAT)]

Rate of tax applicable on royalty paid to Government for mining

Background:

- The assessee carried out mining activity on a plot of land leased from the Government of Gujarat. In this respect, the assessee entered into quarrying lease/license agreement for 10 years for "Black Trap" material with the Government of Gujarat.

- As per the lease agreement, the assessee was required to pay lease rent of ₹ 2,62,147/- per year or royalty @ ₹ 250/- per metric ton, whichever is higher to the Government of Gujarat.
- The AAR observed that the nature of service received by the assessee is covered under SAC 9973 27 – "*Licensing services for the right to use minerals including its exploration and evaluation*". Thereby, such services would fall under residual entry no. (viii) of serial no. 17 of *NN 11/2017-CT(R) dt. 28.06.2017* and would attract CGST rate of 9% from July, 2017 onwards.
- Aggrieved by the ruling of AAR, the assessee filed an appeal before the AAAR.

Point of Dispute:

- What is the GST rate applicable on the royalty paid for mining rights granted by the Government of Gujarat to the assessee?

Submissions by the Assessee:

- Since Gujarat AAR accepted the assessee's views regarding classification of taxable event – *Licensing service* (by the Government of Gujarat) *for the right to use minerals including its exploration and evaluation* from the lease of land and accepted that the said activity is covered under SAC 997337, all other sub-entries [i.e., sub-entries (i) to (iv)] of entry no. 17 of *NN 11/2017-CT(R) dt. 28.06.2017*] are not applicable.
- The residuary sub-entry (vi) of the said notification, which is a specific entry for the taxable event, should have been applied in the assessee's case.
- The observation of Gujarat AAR that the aforesaid sub-entry (vi), as amended from time to time, is not implementable due to absence of underlying goods is a complete misinterpretation of the intention behind the entry.
- The mineral 'Black Trap' is subject to tax @ 2.5% CGST + 2.5% SGST. Therefore, till *NN 27/2018-CT (R) dated 28.06.2017* changed the rate of tax (9% CGST + 9% SGST), the applicable rate of tax which needed to be held was as per residual entry of entry no. 17 of *NN 11/2017-CT(R) dt. 28.06.2017.*

Findings of the AAAR:

- SAC 999113 specifically covers '*discovery, exploitation, conservation, marketing and other aspects of mineral production etc.*', as against the SAC 997337 which covers *'licensing services for the right to use, mineral exploration and evaluation information*, such as mineral exploration for petroleum, natural gas and non-petroleum deposits.
- '*Exploitation of mineral*' is specifically mentioned in SAC 999113 whereas SAC 997337 does not specifically cover the said activity. The activities of mineral exploration and evaluation mentioned in SAC 997337 are performed prior to actual extraction/mining of minerals and the expression 'right to use' mentioned therein does not specifically refer to extraction of minerals. Thus, the extraction of minerals, i.e., Black Trap, is specifically covered under SAC 999113.
- The Government of Gujarat permits the assessee to extract the mineral (Black Trap) subject to certain conditions and on payment of royalty. This service is definitely a part of '*administrative services of the Government'* and more specifically public administrative service related to the more efficient operation of business. Therefore, the service involved in the present case merits classification under SAC 999113 as "*Public administrative services related to the more efficient operation of business"*.
- "*Public Administration and other services provided to the community as a whole; compulsory social security services*" falling under Heading 9991 of the scheme of classification of services attracts GST rate of 18% (CGST 9% + SGST 9% or IGST 18%) as per entry no. 29 of *NN 11/2017-CT(R) dt. 28.06.2017*, as amended from time to time.

Held:

- Therefore, the service received by the assessee from the Government of Gujarat, whereby the assessee is required to pay royalty to the Government of Gujarat by calculating an amount per metric ton of 'Black Trap' mined or a fixed amount per year, whichever is higher, is chargeable to 18% (CGST 9% + SGST 9%) GST as per entry no. 29 of *NN 11/2017-CT(R) dt. 28.06.2017*, as amended.

Remarks:

- The AAR, Telangana in the case of *The Singareni Collieries Company Limited [2022 (6) TMI 419]*, has ruled that the royalty on mining service

is classifiable under tariff item '997337' i.e., '*licensing services for the right to use minerals including its exploration and evaluation*'.

- However, in the case of *Pioneer Partners [2018 (18) G.S.T.L. 58 (A.A.R. GST)]*, the AAR, Haryana held that the said service is classifiable under SAC 997337 and the rate of tax applicable is on supply of the like goods involving transfer of title in goods. As per *NN 1/2017-CT(R) dt. 28.06.2017* and the corresponding State Tax Notification under Haryana GST Act, 2017, Schedule I, the stone boulders extracted by the applicant attract 5% GST (2.5 % CGST+ 2.5% HGST) as covered under HSN 2516 (at entry no. 124 of the notification).
- The Government *vide Circular No. 164/20/2021-GST dated 06.10.2021* has clarified that the services by way of grant of mineral exploration and mining rights shall attract GST of 18% right from inception (i.e., July 01, 2017) of GST law.
- Under the service tax law also various cases are pending before the Hon'ble Supreme Court on the ground that the grant of mining lease is neither a service nor a declared service being an authorization by the State Government to excavate the mineral or consume or sell the same. Based on this, the Supreme Court and many High Courts have stayed the GST demand on grant of mining lease/royalty.

19. TORRENT POWER LTD. vs. UNION OF INDIA [2019 (1) TMI 1092 (GUJARAT HIGH COURT)]

Exemption to supplies ancillary to transmission and distribution of electricity

Background:

- The issue involved was whether services ancillary to transmission and distribution of electricity by the assessee is exempt under the GST law under entry no. 25 of *Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017* [*"NN 12/2017-CT(R) dated 28.06.2017"]?*

Points of Dispute:

- Whether para 4(1) of *Circular No.34/8/2018-GST dated 01.03.2018* is against the provisions of the GST laws in so far as it provides the ancillary services such as (i) application fee for releasing connection of electricity, (ii) rental charges against metering equipment; (iii) testing fees for meters/transformers, capacitors, etc.; (iv) labour charges collected from customers for shifting of meters or shifting of service lines; and (v) charges for duplicate bill (called "related services") provided by the assessee to its consumers are taxable?
- Whether the ancillary services such as application fee, meter rent, testing fee, etc. collected by the assessee towards activities directly and closely connected with the transmission or distribution for electricity are exempt from tax under entry no. 25 of *NN12/2017 dated 28.06.2017*?

Submissions by the Assessee:

- The Electricity Regulations, under which the assessee is licensed, mandatorily requires the assessee to provide various services required for distribution of electricity and permit the assessee to recover the charges for such activities.
- The CBIC Circular (*supra*) is contrary to law since it provides for levy of GST on ancillary services that are linked to the transmission or distribution of electricity that is otherwise exempt.

Submissions by the Revenue:

- In the GST regime, the ancillary services are not exempted by the notifications issued under section 11 and hence, when on one service GST is leviable and the other service is exempted, section 8 would not apply.
- The ancillary services are not exempted by virtue of any notification under section 11 and that the impugned circular merely clarifies that these services are not exempted.
- Exemption provisions are required to be interpreted strictly and in case of doubt, the provisions should be interpreted in favour of the Revenue.

Legal Principles and Scope of Decision:

- The services which stood included within the ambit of transmission and distribution of electricity during the pre-negative list regime cannot now be sought to be excluded by merely issuing a clarificatory circular, that too, with retrospective effect.
- Given the statutory background**,** under which the licensee utility supplies electricity, services related to transmission and distribution of electricity are naturally bundled in the ordinary course of business of the assessee and are required to be treated as provision of single service of transmission and distribution of electricity which gives the bundle its essential character.
- In terms of the earlier clarification dated 07.12.2010 issued under the service tax regime [*Circular No. 131/13-2010-ST]*, an activity, which is an essential activity having direct and close nexus with transmission and distribution of electricity would be covered by the exemption for transmission and distribution of electricity extended under the relevant notifications. Therefore, the taxability of the ancillary services is required to be given the same treatment as is given to the single service, which gives such bundle its essential character, namely, transmission and distribution of electricity.

Conclusion:

- The Court struck down the Circular dated 01.03.2018 (*supra*) to the extent that it was contrary to section 8 and held that various ancillary services in question related to transmission and distribution of electricity would be exempt from levy of GST.

20. M/S EDUCATIONAL INITIATIVES PVT. LTD. vs. UNION OF INDIA [2022 (4) TMI 49 (GUJARAT HIGH COURT)]

Whether conduct of supplementary exam can come under the ambit of 'Education' for the purpose of exemption under the Act?

Background:

- The assessee entered into contracts with various schools to conduct Assessment of Scholastic Skill through Educational Testing (ASSET) exams.
- The schools made it mandatory for their students to take up the ASSET exams. Marks obtained in ASSET were given due weightage in the examination results of the students.
- The exams were conducted by the schools in their own premises. However, the assessee set and prepared the question papers which were either physical paper or online version. The evaluation of the answers was also done by the assessee.
- The AAAR took a view that the services provided by the assessee in the nature of setting up the question papers, evaluating the performance of students and reporting of the results of such evaluation to the schools will not get covered under the exemption notifications as forming part of "education".

Point of Dispute:

- What is the meaning of the term "education" for the purpose of GST exemption under *NN 12/2017-CT(R) dt. 28.06.2017* as well as equivalent SGST and IGST notifications?
- More specifically whether the activity carried on by assessee would be covered by the words in the exemption notification which reads as: "(*iv) services relating to admission to, or conduct of examination by such institution?*

Submissions by Assessee:

- The interpretation placed by the AAAR in the impugned order completely defeats the intent of the Government to provide exemption to schools providing education up to the higher secondary level. If GST is made applicable, the schools will not be in a position to avail the ITC.

Submissions by Revenue:

- The words "relating to" used in sub-clause (iv) of clause (b) of serial no. 66 of *NN 12/2017-CT(R) dt. 28.06.2017* cannot be interpreted in a manner to enlarge the scope of the said entry to include the ASSET within its scope. Accordingly, the assessee is not entitled to seek the benefit of exemption of the GST under the notifications referred to above.

Legal Principles and Scope of Decision:

- The term 'education' has not been defined under the GST law. The Hon'ble Supreme Court in the case of *Sole Trustee, Loka Shikshana Trust vs. CIT [(1976) 1 SCC 254]* has explained the term 'education' as a process of training and developing knowledge, skill, mind and character of students by formal schooling.
- The word 'education' cannot be given a natural meaning by restricting it to the actual imparting of education to the students but should be given a wider meaning which would take within its sweep all the matters relating to imparting and controlling education.
- Examination is considered as a common tool around which the entire education system revolves as held in *State of Tamil Nadu vs. K. Shyam Sunder [(2011) 8 SCC 737]* by the Hon'ble Supreme Court.
- The assessee has satisfied the twin tests imposed under serial no. 66(b)(iv) of the Notification for claim of exemption which are as follows:

  (i) *The recipient of the services should be 'Educational Institution' as defined under clause (y) of paragraph 2 of the said NN. 12/2017- CT(R).*

  (ii) *The supply of service should be in relation to the examination conducted by the educational institution.*

- It is now well-settled that even in tax statutes, an exemption provision should be liberally construed in accordance with the object sought to be achieved if such provision is to grant incentive for promoting education or otherwise has some beneficial reason behind it. The exemption notification should be given a literal meaning. The recourse to other principles or canons of interpretation of statute should be resorted to only in the event the same give rise to any anomaly or absurdity. The exemption notification must be construed having regard

to the purpose and object it seeks to achieve. The notification should be read as a whole.

Conclusion:

- The view taken by the AAAR was held to be unsustainable and it was decided that the assessee is entitled to the benefit of exemption from GST with respect to the services provided by it to schools.

21. TAGHAR VASUDEVA AMBRISH [2022 (2) TMI 780 (KARNATAKA HIGH COURT)]

Whether 'hostel premises' would be covered under 'residential dwelling' for the purpose of exemption under the Act?

Background:

- The assessee is co-owner of a residential property situated in Bengaluru. The property is a residential property having 42 rooms in all spread out between a stilt floor, ground floor and four floors along with terrace and common areas. The assessee along with other co-owners have executed a lease deed in favour of the lessee.
- The lessee has leased out the residential property as Hostel for providing long term accommodation to students and working professionals with the duration of stay ranging
- The issue was the applicability of exemption to the activity of leasing of hostel premises to students and working professionals as the services by way of renting of such property for use as residence is provided under the exemption notification.

Point of Dispute:

- Whether the benefit of exemption in terms of entry no. 12 of *NN 12/2017-CT(R) dt. 28.06.2017* could be made applicable to the services in question?
- What is the meaning to be ascribed to the expression "residential dwelling" and "residence" that are not defined in the GST law and how should their respective meanings be understood?

Submissions by the Assessee:

- Residential accommodation which is used for long term stay has to be construed as residential dwelling. Zoning regulations of Bengaluru where the property is situated clearly provide that hostels are allowed

to operate in residential category plots. Students use the hostel for residential purposes. Therefore, the hostels should be treated as residential accommodation.

- The principle of purposive interpretation should be applied while interpreting an exemption notification and regard must be had to its purpose and object.
- The exemption notification in question has not laid down that a tenant alone must occupy the building and, therefore, no additional condition can be read into the exemption notification.
- There is a perceptible difference between hotel or lodging house and student hostel and therefore, the benefit of the notification is available to the assessee.

Submissions by the Revenue:

- The expression used in the exemption notification is 'residential dwelling' which cannot be construed as 'residence'. Residential dwelling means an abode or habitat which has an element of permanency.
- The assessee is engaged in a commercial activity. An exemption notification has to be strictly construed and any ambiguity in the exemption notification should be construed in favour of the Revenue.

Legal Principles and Scope of Decision:

- It is a well settled rule of statutory interpretation of fiscal statues that the words used therein if not defined in the statute have to be interpreted in their popular sense.
- In *paragraph 4.13.1 of Taxation of Services: An Education Guide dated 20.06.2012* issued under the erstwhile service tax regime, the expression "residential building" has been defined as any residential accommodation, but does not include hotel, motel, inn, guest house, campsite, lodge, houseboat, or like places meant for temporary stay.
- It is well settled that when the word is not defined in the Act itself, it is permissible to refer to the dictionaries to find out the general sense in which the word is understood in common parlance.
- The expression 'residence' and 'dwelling' have more or less the same connotation in common parlance and, therefore, no different meaning can be assigned to the expression 'residential dwelling' and it cannot

be held that the same does not include hostel which is used for residential purposes by students or working women.

- Hostel of students and working women are classified in residential category in the Revised Master Plan 2015 of Bangalore City.
- The notification does not require the lessee itself to use the premises as residence.

Conclusion:

- The Hon'ble High Court held that the service provided by the assessee, i.e., leasing out of residential premises as hostel to students and working professionals, is covered under entry no. 13 of *NN 9/2017 dated 28.09.2017* namely 'Services by way of renting of residential dwelling for use as residence'.

22. DPJ BIDAR - CHINCHOLI (ANNUITY) ROAD PROJECT PRIVATE LIMITED vs. UNION OF INDIA & ORS. [MANU/KA/3223/2022(KARNATAKA HIGH COURT)]

GST Exemption on Annuity for construction of roads

Background:

- Services by way of access to a road or a bridge on payment of annuity were exempted as per entry no 23A which got inserted in *NN 12/2017-CT(R) dt. 28.06.2017 vide NN 32/2017-CT(R) dated 13.10.2017 ['NN 32/2017-CT(R)]* and entry no. 24A which got inserted in *NN 9/2017-Integrated Tax (Rate), dated 28.06.2017 vide NN 33/2017-Integrated Tax (Rate), dated 13.10.2017('NN 33/2017-IT(R)')* .

  Pursuant to the said notifications, the annuity being paid by the highway authorities to the concessionaires like the assessee towards construction as well as maintenance of the road was exempted from GST.

- Thereafter, a clarification was sought from the GST Council by certain Government authorities as to whether the entire annuity paid to the concessionaires was exempt from GST. The GST Council in its 43rd meeting held on 28.05.2021 clarified that the annuity paid as deferred payment for construction of roads/highways was not exempted from GST.
- *Pursuant to the above, Circular No. 150/06/2021-GST dated 17.06.2021* (the impugned Circular) was issued by way of clarification

that entry 23A of *NN 12/2017-CT(R) dt. 28.06.2017* does not exempt GST on the annuity (deferred payments) paid for construction of roads.

Point of Dispute:

- Whether the impugned Circular goes beyond *NN 32/2017-CT(R)* and *NN 33/2017-IT(R)* both dated 13.10.2017 and is therefore bad in law?

Submissions by the Assessee:

- Annuity (deferred payments) paid for construction of roads was exempt from GST as per *NN 32/2017-CT(R)* and *NN 33/2017-IT(R)* both dated 13.10.2017 and the clarification issued by the GST Council in this regard in its meeting held on 28.05.2021 and the subsequent impugned Circular dated 17.06.2021 issuing clarification regarding the same are contrary to the exemption notifications and were liable to be set aside.

Submissions by the Revenue:

- The clarification made by way of the impugned Circular does not contravene *NN 32/2017-CT(R)* and *NN 33/2017-IT(R)* and it only clarifies what is exempt by virtue of the notifications dated 13.10.2017.

Legal Principles and Scope of Decision:

- The toll charges collected by the concessionaries for construction, maintenance, operation and providing road access to the vehicle which ply on the road are exempted from GST by *NN 12/2017-CT(R) dt. 28.06.2017*. Annuity is paid to the concessionaires in *lieu* of toll charges. GST Council, in its 22nd meeting held on 06.10.2017 took note of the same and as entire toll charges were exempted from GST, it was decided to recommend exemption of annuity as well, which include the consideration received by concessionaires. This is clear from the recordings in the minute book. The said recording makes it clear that the GST Council recommended for treating annuity at par with the toll charges.
- A reading of the recommendation of the GST Council as well as the notifications issued, makes it clear that the Union of India has treated the annuity being paid to the concessionaires at par with toll charges which the concessionaires are permitted to collect from road users and both are exempted from GST.

- Thereafter, for reasons best known to it, GST Council in its 43rd meeting clarified that the annuity paid as deferred payment for construction of roads/ highways was not exempted from GST like the tolls or annuity in *lieu* of tolls. Accordingly, the impugned Circular was issued after the clarification from GST Council.
- In the instant case, Union of India had issued the notifications under section 11 of the CGST Act and section 6 of the IGST Act exempting the consideration received by concessionaires from highway authorities as annuity from GST. If Union of India is desirous of altering the same, it had to issue fresh notifications amending its earlier notifications.

Conclusion:

- A Circular which clarifies the notification, cannot have the effect of exceeding the notification. The Court declared that impugned Circular had the effect of overriding *NN 32/2017-CT(R)* and *NN 33/2017-IT(R)* both dated 13.10.2017. Consequently, it was held that the demands raised on the basis of the circular in respect of annuity being paid by the highway authorities to the concessionaries like the assessee towards construction as well as maintenance of the road was without the authority of law and therefore the impugned circular was quashed.

23. IN RE: M/S KALYAN JEWELLERS INDIA LTD. [2021 (4) TMI 885 (AAAR, TAMIL NADU)]

Time of Supply of issued gift vouchers/ cards

Background:

- The assessee carried on the business of manufacturing and trading of jewellery products. As a part of sales promotion, the assessee introduced different types of pre-paid instruments (PPIs) - generally called "gift vouchers/gift cards" in trade practice. The PPIs were provided through assessee's retail outlets, third party PPI issuers and online portals to their customers. .
- The assessee dealt with the following PPIs both in electronic/digital and paper formats:
    - Closed System PPIs (dealt with by the assessee on its own):

      The assessee issued such PPIs to customers on receiving the face value as per the requirement of the customer. The customer or holder was allowed to redeem these in any outlet of the assessee's stores across the country at the time of purchase of jewellery.
    - Semi Closed PPIs/ Co-branded PPIs (provided through third party PPI issuers):

      The assessee entered into an agreement with a third-party issuer – Quick Silver Solutions Pvt. Ltd. where the third-party issued PPIs at the retail outlet of the assessee. The issuer paid upfront amount to the assessee, called the discounted value (lower than the face value). The third-party issuer sold these PPIs to customers at their face value. The customers or holders of the PPIs were allowed to redeem these PPIs at the outlets of the assessee at their face value against purchase of jewellery. The difference was an incentive for the third-party PPI issuer.
- The assessee sought an advance ruling *inter alia* as to whether the issue of Closed PPIs by the assessee to its customers could be

treated as supply of goods or supply of service? If yes, what is the time of supply of PPIs by the assessee to its customers?

- The AAR rejected the argument of the assessee that PPIs are actionable claim and held that the own closed PPIs issued by the assessee are 'vouchers' as defined under the Act and is a supply of goods. The time of supply of such gift voucher/ gift card by the assessee shall be the date of issue of the vouchers, if the vouchers are specific to any particular goods specified against the voucher. If the gift vouchers/ gift cards are redeemable against any goods bought, the time of supply is the date of redemption of the voucher.
- Aggrieved by the decision of AAR, the assessee filed an appeal before the AAAR.

Point of Dispute:

- Whether the PPIs supplied by the assessee constituted supply of goods or services? If yes, what was the time of supply of such PPIs?

Submissions by the Assessee:

- The voucher or the PPIs only have a redeemable face value and no intrinsic value capable of being considered as marketable for the purpose of levy of GST.
- The PPIs are in the nature of actionable claims and not goods.
- If PPIs are made liable to tax, it would amount to double taxation as GST is levied on the supply of jewellery made by the assessee at the time of redemption of a voucher.

Findings of the AAAR:

- Voucher *per-se* is neither goods nor a service. It is a means for payment of consideration. There is no need to determine whether voucher is an actionable claim to arrive at a conclusion that it is neither goods nor a service.
- When a voucher is issued, though it is just a means of advance payment of consideration for a future supply, sub-section (4) of sections 12 and 13 determine the time of supply of the underlying good(s) or service(s).
- Where a voucher identifies the goods or services that can be received on redeeming it, the supply of the underlying goods or services takes place at the time of issue of the voucher.

- Since the voucher under consideration clearly indicates that the voucher can be redeemed for gold jewellery at a known rate of tax, gold voucher also falls under this category. Therefore, the gold voucher (representing the underlying future supply of gold jewellery) would be taxable at the time of issue of the voucher.
- This interpretation does not result in double taxation as transfer of gold subsequently will not be subject to tax at the time of redeeming the voucher for gold, as the supply is deemed to have been done at the time of issue of voucher itself.

Held:

- The AAAR modified the ruling of AAR by stating that vouchers are only a means of consideration and therefore, are neither goods nor services. It was held that the time of supply of the gift vouchers / gift cards by the assessee to the customers shall be the date of issue of such vouchers and the applicable rate of tax would be the one applicable to the underlying goods (i.e., gold jewellery in the present case).

Remarks:

- Voucher in GST law is recognised as an instrument of consideration for future supply. Regarding classification, since voucher is only an instrument of consideration and not goods or services, the same is not classifiable separately but only the supply associated with the voucher is classifiable according to the nature of the goods or services supplied in exchange of the voucher earlier issued to the customer.
- The assessee further challenged the ruling of AAAR before the Hon'ble Madras High Court. The High Court granted interim stay against the above ruling and the matter is pending for consideration.
- The Karnataka AAAR, in the case of *Premier Sales Promotion Private Limited [2021 (12) TMI 1299]* upheld the ruling of the Karnataka AAR that the supply of vouchers by the applicant was a supply of goods in terms of section 7. It was further held that since the assessee was not the issuer of the voucher, the provisions of time of supply under section 12(4) would not apply and the time of supply would be governed by the provisions of section 12(5).

24. UNION OF INDIA vs. AAP & COMPANY [(2021) 133 TAXMANN.COM 168 (SUPREME COURT)]

Validity of Limitation Period

Background:

- The Gujarat High Court in a writ petition filed by the assessee held that *para 3 of press release dated 18.10.2018*, clarifying that last date for availing ITC relating to invoices issued during July 2017 to March 2018, as last date for filing return in Form GSTR-3B, was illegal and contrary to section 16(4) read with section 39(1) and rule 61.
- The Revenue filed a petition before the Hon'ble Supreme Court against the decision of the High Court.

Points of Dispute:

- Whether *para 3 of press release dated 18-10-2018*, clarifying that last date for availing ITC relating to invoices issued during July 2017 to March 2018, as last date for filing return in Form GSTR-3B, was illegal and contrary to section 16(4) read with section 39(1) and rule 61?
- Whether Form GSTR-3B is a return under the GST Law?

Submissions by the Assessee:

- The clarification provided under the press release is contrary to section 16(4), as the return prescribed under section 39 is a return required to be furnished in Form GSTR-3 and not Form GSTR-3B.

Submissions by the Revenue:

- The judgment of the High Court has been expressly overruled by the three-Judge Bench decision of Hon'ble Supreme Court in Civil Appeal No. 6520 of 2021 titled *Union of India v. Bharti Airtel Ltd. [2021] 131 TAXMANN.COM 319 (SC).*

Legal Principles and Scope of Decision:

- The appeal filed by the Revenue succeeds on the same terms as in *Civil Appeal No. 6520 of 2021 titled Bharti Airtel Ltd.'s* case (supra).

Conclusion:

- The Supreme Court reversed the judgment of the High Court that laid down that Form GSTR-3B is not a return under section 39 and it is only a temporary stop gap arrangement.
- The Supreme Court rejected the plea that the provisions of section 39(9) cannot be applied to the instant facts for the reason that Form GSTR-3B is only a stop-gap arrangement and not a return under section 39 read with rule 61. The Court stated that though Form GSTR-3B is not comparable to Form GSTR-3, nevertheless, Form GSTR-3B is prescribed as a 'return' and by subsequent amendment of rule 61(5), wherein it was clarified that taxpayer need not file GSTR-3. Accordingly, the Court held that efficacy of Form GSTR-3B being a stop gap arrangement for furnishing of return, required under section 39 read with rule 61, would not stand whittled down in any manner. The Supreme Court also stated that it has not subscribed to the view of the Gujarat High Court in the matter of *AAP & Co, Chartered Accountants vs Union of India*, *[(2021) 133 taxmann.com 168,SC]* wherein it was held that Form GSTR-3B was only a stop-gap arrangement.

25. LGW INDUSTRIES LTD. vs. UNION OF INDIA [(2022) 134 TAXMANN.COM 42 (CALCUTTA HIGH COURT)]

Entitlement of ITC to be considered afresh where ITC was denied on the ground that suppliers were non-existent but the transactions were found to be genuine

Background:

- Notices were issued to the assessee denying the benefit of ITC as the vendors were non-existent.
- Against the said notices, a writ petition was filed by the assessee before the Hon'ble Calcutta High Court.

Point of dispute:

- Whether the denial of ITC on the ground that suppliers were non-existent was correct?

Submissions by the Assessee:

- The assessee with its due diligence verified the genuineness and identity of the suppliers in question and the Revenue's portal was showing that their registrations were valid and existing at the time of transactions.
- When the names of the suppliers as a registered taxable person were already available on the Revenue's portal at the relevant period of transaction, the assessee could not be faulted if they were found to be fake subsequently, unless the department/respondents establish, with concrete materials that the transactions in question were the outcome of any collusion between the petitioners/purchasers and the suppliers in question.
- The assessee paid the amount for the purchases in question as well as GST on the same and such payments were made through banking channels.
- The assessee further submitted that all the purchases in question invoices-wise, were available on the GST portal in Form GSTR-2A which are on record.
- All transactions were entered into before the cancellation of the registrations of defaulting suppliers and therefore, impugned transactions were valid.
- The assessee also challenged the Constitutional validity of section 16(2)(c).

Submissions by the Revenue:

- Genuineness of the suppliers was not verified by the assessee before entering into the transactions. GST authorities on an inquiry, came to know that the suppliers from whom the assessee had claimed to have purchased the goods in question were fake and non-existing and the bank accounts opened by those suppliers are on the basis of fake documents and assessee's claim of benefit of ITC are not supported by the relevant documents.

Legal Principles and Scope of Decision:

- The High Court observed that when the names of the suppliers as a registered taxable person were already available with the Government records and in Government portal at the relevant period of transaction,

then assessee could not be faulted if they appeared to be fake later on. Therefore, it cannot be said that there was any failure on the part of the assessee in compliance of any obligation required under the statute before entering the transactions in question or for verification of the genuineness of the suppliers in question.

- The benefit of ITC to be granted if the purchases were genuine and supported by valid documents.

Conclusion:

- Revenue was directed to verify whether payment along with tax was actually made to the suppliers by the assessee and whether the transactions in question were made before cancellation of registration of the defaulting suppliers.
- The matter was remanded to the respondents for re-considering the matter of the assessee on the issue of its entitlement of the benefit of ITC in question in a fresh manner.

26. DY BEATHEL ENTERPRISES vs. THE STATE TAX OFFICER [2021 (3) TMI 1020 (MADRAS HIGH COURT)]

Recovery action first to be initiated towards the defaulting sellers before imposing responsibility on the dealer

Background:

- The assessee purchased goods from certain suppliers on payment of applicable GST. A substantial portion of the sale consideration was paid through banking channels. The payments made by the assessee to the suppliers included the GST component as well. Based on the GST returns filed by the suppliers, the assessee availed ITC of the GST paid by them.
- Later, during an inspection by the GST authorities, it came to light that the suppliers had not deposited GST with the Revenue.
- Based on the inspection, a SCN was issued to the assessee and an order was passed for rejecting the ITC claim.
- The assessee preferred a writ petition against the said order before the Madras High Court.

Point of Dispute:

- Whether the GST Authorities can recover the GST tax liability from the assessee, without involving the defaulting sellers, where the tax was not remitted to the Revenue by the sellers?

Submissions by the Assessee:

- According to a *press release* issued by the Central Board of GST Council on 04.05.2018, there shall not be any automatic reversal of ITC from the buyer on non-payment of tax by the seller. In case of default in payment of tax by the seller, recovery shall be made from the seller. However, reversal of credit from buyer shall also be an option available with the revenue authorities to address exceptional situations like missing dealer, closure of business by the supplier or the supplier not having adequate assets etc.

Submissions by the Revenue:

- The assessee had availed ITC on the premise that tax had already been remitted to the Revenue by the sellers. When it turned out that the sellers did not pay any tax, the Revenue was entirely justified in proceeding to recover the same from the assessee.

Legal Principles and Scope of Decision:

- The assessee must have received the goods and the tax charged in respect of its supply, must have been actually paid to the Revenue either in cash or through utilization of ITC admissible in respect of the said supply.
- Therefore, if the tax had not reached the Revenue's coffers, the liability may have to be eventually borne by one party, either the seller or the buyer. In the instant case, the Revenue does not appear to have taken any recovery action against the sellers with respect to the present transactions.
- When it came to light that the sellers collected the tax from the assessee, the omission on the part of the sellers to remit the tax in question must have been viewed very seriously and strict action ought to have been initiated against them.
- The order passed by the GST authorities reversing the ITC availed by the assessee is quashed since the same suffered from fundamental flaws.

Conclusion:

- It was held that the Revenue should not reverse ITC availed by the assessee for failure of seller to deposit tax on such supply without first examining the defaulting sellers and initiating recovery proceeding against the sellers who did not deposit the tax with the Revenue.
- Accordingly, the matter was remitted to the GST Authorities for conducting fresh enquiry and initiating recovery action first against the defaulting sellers before making any attempt to recover the amount from the assessee.

27. BHAGWATI CONSTRUCTION vs. UNION OF INDIA [2022 (5) TMI 183 (GUJARAT HIGH COURT)]

Refund not to be denied in case payment of tax has been made through electronic credit ledger instead of electronic cash ledger

Background:

- The assessee was awarded a tender by the Railway Board and pursuant to that an agreement was entered into between the assessee and the Railway Board prior to introduction of the GST law.
- As the assessee had opted for lump sum tax scheme under the Madras VAT law, the liability of the assessee thereunder was 0.6% on the entire contract value. Further, service tax was exempt on the entire contract.
- On introduction of the GST law, the assessee filed a representation before the Railway Board for granting of reimbursement on account of additional GST liability arising on the contract value due to introduction of GST law.
- Having regard to the representation made by the contractors, the Western Railways issued a Joint Procedure Order specifying the procedure for grant of reimbursement on account of additional GST to contractors.
- While processing the assessee's claim for reimbursement of additional GST, the Deputy Chief Engineer of Railways wrote a letter to the assessee asking them to clarify as to why ITC was shown to be 'Nil' in the working sheet for the refund of the GST even though the assessee had discharged tax liability in the returns by utilizing the ITC.

- The assessee clarified that the contract in question did not involve use of any goods in respect of which the ITC was admissible. ITC which had been utilized for making the payment of tax in the GST returns was the ITC admissible in respect of other contracts. The assessee had received the letter from the Deputy Engineer informing that they would not be granted reimbursement of the GST amount since only a part amount of the tax was paid through the electronic cash ledger.

Point of Dispute:

- Whether reimbursement of GST paid on contracts that were entered into in pre-GST regime but executed after implementation of GST is permissible?

Submissions by the Assessee:

- It is well established that the ITC is as good as tax paid. ITC is admissible under the Act in respect of tax actually paid on the inward supply, which is legally admissible as credit for the purpose of payment of the output tax.
- There is no distinction between the tax paid through the electronic cash ledger and the tax paid through the electronic credit ledger. Therefore, the refusal to grant refund on the basis that a substantial amount is paid through the electronic credit ledger, is not sustainable.

Submissions by the Revenue:

- The respondents were not averse to granting the GST reimbursement to the assessee. However, the assessee was not able to substantiate its refund claim by showing the actual payment of the GST through the cash ledger and, therefore, the respondents did not release the reimbursement to the assessee.

Legal Principles and Scope of Decision:

- ITC is admissible under section 16(1) in respect of the tax paid on goods and services used in the course of the business. The ITC claimed by a taxable person gets credited into his electronic credit ledger. Such amount is the actual tax that such taxable person pays to his supplier, which is further paid to the Government's treasury.
- Thereafter, while making the payment of the output tax, section 49 entitles a taxable person to utilize the balance available in the electronic credit ledger. Thus, the tax which was already paid by a taxable person is effectively allowed to be set off against the OTL.

- Therefore, the tax payment through the electronic credit ledger is a legally recognized mode of payment under the GST law. In fact, it is a settled legal position that the ITC is 'as good as tax paid' by a taxpayer.
- The denial to release refund/ reimbursement on the ground that only part amount was paid by the assessee through the electronic cash ledger is not legally tenable.
- So far as the utilization of the ITC from the electronic credit ledger is concerned, the same is only a mode of payment of the output tax.

Conclusion:

- The utilization of ITC from the electronic credit ledger was held to be only a mode of payment of the output tax. The Court held that under the facts of the case, the reimbursement of additional GST claim could not have been denied to the assessee on the ground that only a part amount of the tax was paid through the electronic cash ledger by failing to understand the distinction between the availment and the utilization of ITC.
- Accordingly, the impugned communication refusing to release the refund/reimbursement of the GST was quashed and set-aside by the Hon'ble Court. The respondents (i.e., Railway authorities) were directed to forthwith release the refund in respect of which the pay order was generated by them.

28. S.S. INDUSTRIES vs. UNION OF INDIA [(2020) 122 TAXMANN.COM 296 (GUJARAT HIGH COURT)]

Power under rule 86A not to be used as a tool to harass the assessee or adversely affect his business

Background:

- The assessee carried on the business of manufacture of goods like the TMT Bars etc. He received tax invoices from its suppliers and the ITC availed was recorded in the electronic credit ledger maintained by him.
- The GST Authorities received an information that some registered dealers were supplying only the tax invoices to the various manufacturers of steel products located across the Country, and in the course of such inquiry against such registered dealers/supplies, it was revealed that the assessee had purchased inputs from them.

Therefore, the ITC availed by the buyers including the assessee on the basis of such tax invoices of these input suppliers was denied as being inadmissible.

- The assessee alleged that it was pressurized to deposit an amount of ₹ 25 lakh in cash by uploading Form DRC-03. Over and above, the ITC of ₹ 84,34,547 was blocked in exercise of the powers under rule 86A.
- As the Revenue authorities declined to refund the amount of ₹ 25 lakh deposited by the assessee and denied unblocking the ITC, a writ petition was filed by the assessee before the Hon'ble Gujarat High Court.

Point of Dispute:

- Whether the authority concerned was empowered to retain the amount deposited by the assessee during an inquiry or investigation in the absence of any confirmed liability or SCN or assessment/adjudication order imposing any tax liability on the assessee?
- Whether rule 86A contemplates any passing of a specific order with an obligation to communicate the same to the affected person so that such person can take recourse to any legal remedy available to him?

Submissions by the Assessee:

- The unilateral action of blocking the ITC thereby preventing the assessee from utilizing such credit was illegal and unjustified, more particularly, when there was no assessment of any tax liability against the assessee.
- The ITC related transactions were not only recorded in the statutory registers but were also reported to the jurisdictional GST Officers on a monthly basis all throughout the period in question.
- It is a settled principle of law that the credit of tax paid on inputs, input services and capital goods is an indefeasible right of the assessee. Since credit is a vested right of the assessee, the same cannot be extinguished or curtailed in any manner without any genuine reason.
- With the introduction of rule 86A, the aforesaid right to such credit is sought to be curtailed on flimsy grounds though temporarily.
- Drastic powers as conferred under rule 86A could not have been exercised merely on the ground that an inquiry had been initiated and there was a suspicion that the transactions were sham.

Submissions by the Revenue:

- Over a period of time, the Government has unearthed many cases of fake ITC due to issuance of fake invoices without supply and other fraudulent activities which has led to decline in the exchequer's revenue.
- To meet with such situations, the Government introduced the concept of blocking of ITC by way of rule 86A. The object behind the introduction of rule 86A was to curb such fraudulent activities.

Legal Principles and Scope of Decision:

- 'Reason to believe' is necessary to be formed for the purpose of blocking the ITC in cases of inquiry or investigation into fraudulent transactions under rule 86A.
- Any opinion of a GST authority to be formed is not subject to objective test. The language leaves no room for the relevance of an official examination as to the sufficiency of the ground on which the authority may act in forming its opinion. But, at the same time, there must be material, based on which alone, the authority could form its opinion that it has become necessary to block the ITC pending an inquiry or investigation into the fraudulent transactions of fake/bogus invoices. The existence of relevant material is a pre-condition to the formation of the opinion.

Conclusion:

- The Court held that rule 86A casts an obligation upon the GST authorities to form an opinion but is silent with regard to passing of any specific order assigning *prima facie* reasons for invoking rule 86A. To this extent, the Government needs to look into the matter and issue appropriate guidelines and also lay down some procedure to be followed for the exercise of the power under rule 86A.
- Although the writ petition was dismissed, the Court laid down important principles as regards applicability of rule 86A. It was also observed that the power under rule 86A should neither be used as a tool to harass a taxpayer nor should it be used in a manner which may have an irreversible detrimental effect on the business of a taxpayer.

Registration and Returns

29. UNION OF INDIA vs. BHARTI AIRTEL LTD. [(2021) 131 TAXMANN.COM 319 (SUPREME COURT)]

Whether a supplier can take credit for inputs by correcting Form GSTR-3B beyond the prescribed period?

Background

- The matter pertained to the year 2017 when GST had just been introduced and the assessee paid excess cash towards GST to the tune of ₹ 923 crore instead of utilizing the available ITC, as there was no automated reconciliation available at that time.
- The assessee contended that it had paid an excess amount of ₹ 923 crore as tax since Form GSTR-2A was not operational during the interim period and in the absence thereof the assessee was not in a position to verify the same.
- The assessee filed a writ petition before the Delhi High Court claiming refund of excess GST deposited. The High Court allowed the assessee to file revised Form GSTR-3B and directed the Revenue to verify the excess GST claim based on the revised return and refund the amount to the assessee.
- The Revenue challenged the judgment of the High Court before the Hon'ble Supreme Court.

Point of Dispute:

- Whether non-availability of information through the common portal could be cited as the reason for payment of tax liability in cash which is sought to be claimed as a reinstatement of the credit?
- Validity of the *Circular No. 26/26/2017-GST, dated 29.12.2017* issued under section 168.

Submissions by the Revenue:

- The common portal is only a facilitator to feed or retrieve the relevant information and need not be the primary source for doing self-assessment. The primary source is in the form of agreements, invoices/challans, receipts of the goods and services and books of

accounts which are maintained by an assessee either manually or electronically.

- Every assessee is under obligation to self-assess the eligible ITC under section 16(1) and 16(2) and "*credit the same in the electronic credit ledger*" defined in section 2(46) read with section 49(2). Only thereafter, section 59 steps in, whereunder the registered person is obliged to self-assess the taxes payable under the Act and furnish a return for each tax period as specified under section 39.
- Form GSTR-3B is prescribed as a "return" to be furnished by the registered person by the subsequent amendment of rule 61(5) brought into force with effect from 01.07.2017.
- It is a different matter that despite the availability of funds in the electronic credit ledger, the registered person opts to discharge output tax liability (OTL) by paying cash. That is a matter of option exercised by the registered person on which the tax authorities have no control, whatsoever. Further, they don't have any role to play in that regard. Furthermore, there is no express provision permitting swapping of entries effected in the electronic cash ledger *vis-a-vis* the electronic credit ledger or *vice versa*.

Submissions by the Assessee:

- Had Form GSTR-2A been functional, there would have been no need for a registered person to pay the amount in cash but could have utilized the ITC account (electronic credit ledger) for payment of corresponding outward tax liability. For that reason, a registered person should be allowed to rectify Form GSTR-3B, so as to avail ITC for the relevant period.
- In terms of *Circular No. 7/7/2017-GST, dated 01.09.2017*, the amount paid by the taxpayer in cash towards the OTL would get credited to its electronic cash ledger account. Assessee urged that if it was allowed to rectify Form GSTR-3B, so as to avail ITC for the relevant period in terms of Circular dated 01.09.2017, the amount paid by it in cash towards the OTL would get credited to its electronic cash ledger. However, the impugned Circular dated 29.12.2017 comes in the way of doing so
- The assessee realized that huge amounts of excess ITC was available in its books whereas FORM GSTR-2A was made operational in September 2018. Not permitting the assessee to avail of ITC shown in

the electronic credit ledger had resulted in collection of double tax from the assessee and an unfair advantage to the Revenue.

Legal Principles and Scope of Decision:

- The assessee was under a legal obligation to maintain books of accounts and records as per the provisions of the Act and Chapter VII of the Rules regarding the transactions in respect of which the OTL would occur. In the post as well in the pre-GST regime, the assessee had been maintaining such books of accounts and records and submitting returns on its own. No such auto populated electronic data was in vogue. It is the same pattern which had to be followed by the assessee in the post - GST regime as well.
- As per the scheme of the GST law, the assessee was obligated to do a self-assessment of ITC, reckon its eligibility for ITC and of OTL including the balance amount lying in cash or credit ledger primarily on the basis of his office records and books of accounts required to be statutorily preserved and updated from time to time. That the assessee could have done even without the common electronic portal as was being done in the past in the pre-GST regime. As regards liability to pay OTL, that is on the basis of the transactions effected during the relevant period giving rise to taxable event.
- The supply of goods and services becomes taxable in respect of which the assessee was obliged to maintain agreement, invoices/challans and books of accounts, which could have been maintained manually/electronically. The common portal is only a facilitator to feed or retrieve such information and need not be the primary source for doing self-assessment. The primary source is in the form of agreements, invoices/challans, receipts of the goods and services and books of accounts which are maintained by the assessee manually or electronically. For furnishing of returns, preparatory work has to be done by the assessee himself and is not fully or wholly dependent on the common electronic portal for that purpose.
- The express provision in the form of section 39(9) clearly posits that omission or incorrect particulars furnished in the return in FORM GSTR-3B can be corrected in the return to be furnished in the month or quarter during which such omission or incorrect particulars are noticed. This very position has been re-stated in the impugned Circular. It is, therefore, not contrary to the statutory dispensation specified in section 39(9).

- If there is no provision regarding refund of surplus or excess ITC in the electronic credit ledger, it does not follow that the concerned assessee who has discharged OTL by paying cash (which he is free to pay in cash in spite of the surplus or excess electronic credit ledger account), can later on ask for swapping of the entries, so as to show the corresponding OTL amount in the electronic cash ledger from where he can take refund. Payment for discharge of OTL by cash or by way of availing of ITC is a matter of option, which having been exercised by the assessee, cannot be reversed unless the Act and the Rules permit such reversal or swapping of the entries.

Conclusion:

- The judgment of Delhi High Court in favour of the assessee was reversed by the Hon'ble Supreme Court by holding that if there is no provision regarding refund of surplus or excess ITC in the electronic credit ledger, the assessee who discharged OTL by paying cash (which he was free to pay in cash in spite of the surplus or excess electronic credit ledger account), could later on ask for swapping of the entries, so as to show the corresponding OTL amount in the electronic cash ledger from where he could claim a refund.
- Significantly, the registered person is not denied of the opportunity to rectify omission or incorrect particulars, which he could do in the return to be furnished for the month or quarter in which such omission or incorrect particulars are noticed. Thus, it is not a case of denial of availment of ITC as such. If at all, it is only a postponement of availment of ITC. The ITC amount remains intact in the electronic credit ledger, which can be availed in the subsequent returns including the next financial year.
- The Court held that the GST law permits rectification of errors and omissions only at the initial stages but in the manner specified. GST law has a different dispensation than the one prevalent in pre-GST period, which did not have the provision of auto populated records and entries.

30. B.C. MOHANKUMAR vs. SUPERINTENDENT OF CENTRAL GOODS & SERVICE TAX, KRISHNAGIRI [MANU/TN/6079/2022 (MADRAS HIGH COURT)]

Cancellation of Registration based on non-speaking order

Background:

- The assessee filed an application seeking registration in accordance with section 22 read with section 25 and rule 8. The receipt of the application was duly acknowledged and physical verification was also undertaken by the Revenue.
- A notice was issued by the Revenue on the ground that the applicant had not provided the details of principal place of business.
- The assessee replied to the notice by uploading a copy of the rental/lease deed duly registered in the office of the Sub-Registrar, Krishnagiri, as proof of the principal place of its business.
- The impugned order was passed rejecting the application without assigning any reason.

Point of Dispute:

- The impugned order was assailed by the assessee on the ground that the order being cryptic and entirely non-speaking and opposed to the principles of natural justice.

Submissions by the Assessee:

- The assessee duly responded to the notice by uploading a copy of the rental/lease deed duly registered in the office of the Sub-Registrar, Krishnagiri as proof of its principal place of business. Proof of uploading of the aforesaid document was placed on the relevant file.

Submissions by the Revenue:

- The use of the word 'may' in rule 9(4) grants discretion to the authority to assign reasons for rejection of the registration application.

Legal Principles and Scope of Decision:

- Rule 9(4) of the CGST Rules is extracted below:

  (4) Where no reply is furnished by the applicant in response to the notice issued under sub-rule (2) or where the proper officer is not

satisfied with the clarification, information or documents furnished, he [may], for reasons to be recorded in writing, reject such application and inform the applicant electronically in Form GST REG-05.'

- The word 'may' only refer to the discretion to reject and not to blatantly violate the principles of natural justice. If the assessing authority was inclined to reject the application, which he was entitled to, he must assign reasons for such rejection and adhere to proper procedure, including due process.

Conclusion:

- The impugned order was set aside on the ground that proper reasons were not assigned for rejection of the registration application filed by the assessee.

  Note: In case of *DRS Wood Products vs. the State of UP* [*Manu/UP/2132/2022*], the Allahabad High Court held that the tax authority's exercise of power in the cancellation of registration in that case was an arbitrary exercise of power and the same not only adversely affected the assessee but has also adversely affected the revenue that could have flown to the coffers of GST in case the assessee had been permitted to carry out commercial activities.

31. UNION OF INDIA vs. VKC FOOTSTEPS INDIA PVT. LTD. [(2021) 130 TAXMANN.COM 193 (SUPREME COURT)]

Whether rule 89(5) is ultra-vires section 54(3) by not allowing refund of input services?

Background:

- The assessee carried on the business of manufacture and supply of footwear. It procured input services such as job work service, goods transport agency service etc. and inputs such as synthetic leather, PU polyol, etc. for the manufacturing activity.
- GST rate applicable on inputs procured by the assessee was higher than the rate of GST payable on outward supply of footwear by the assessee. Therefore, there was accumulation of unutilized credit in electronic credit ledger of the assessee.
- Accordingly, the assessee filed a claim for refund of the accumulated ITC. However, the refund of accumulated ITC of tax paid on procurement of input services was denied.
- The Hon'ble Gujarat High Court held that the formula prescribed in sub-rule (5) of rule 89 whereby the refund of unutilized ITC on account of input services is restricted, is contrary to the provisions of sub-section (3) of section 54. The Court also struck down the explanation (a) to rule 89(5) being *ultra vires* to the provisions of section 54(3).
- On the other hand, the Madras High Court in the case of *Transtonnelstroy Afcons Joint Venture vs. Union of India [(2020) 119 Taxmann.com 324 / 43 GSTL 433 (Madras)]* upheld the classification contained in rule 89(5) and upheld the restriction of refund of ITC on inputs.
- The assessee challenged the validity of amended rule 89(5) to the extent it denied refund of ITC relatable to input services.
- It was also pleaded that in the light of the definition of ITC given in section 2(62), rule 89(5) which restricts the refund only to input goods is *ultra vires* section 54(3).

- With contradictory judgments coming from Madras and Gujarat High Courts, the matter reached the Supreme Court for finality pertaining the refund of accumulated ITC on account of input services relatable to refund of accumulation of ITC under inverted duty structure.
- The matter was contested before the Hon'ble Supreme Court by the Revenue.

Point of Dispute:

- Whether rule 89(5) which restricts refund of ITC only to input goods is contrary to the provisions of section 54(3) of the CGST Act?
- Accordingly, in the case of inverted rate structure whether an assessee is entitled to claim the refund of ITC accumulated only on account of input goods or the refund can be claimed with respect to both input goods and input services?

Submissions by the Assessee:

- Section 54(3) has been enacted to achieve the objective of removing the cascading effect of unutilized ITC. It provides for refund of "any unutilized ITC" but the refund is available in only two situations namely, (a) zero rated supplies; and (b) inverted duty structure. The quantum of refund is provided by the main part of section 54(3) which stipulates the refund of any unutilized ITC. This includes credit availed on input goods as well as on input services having regard to the definitions contained in sections 2(62) and 2(63).
- There is no difference in the manner of availing or utilizing ITC on goods or services. If the Legislature has not differentiated between the goods and services at the time of availing or utilizing ITC, it could not have been the intention of the Legislature to differentiate between the goods and services at the time of giving refund in the case of inverted duty structure.
- Clause (ii) of first proviso to section 54(3) provides for cases in which the refund under the main provisions of section 54 will be available. Once the requirement of inverted duty structure in second proviso is fulfilled, the entire unutilized ITC has to be refunded. The proviso indicates the 'cases' in which refund will be eligible. The expression 'cases' means situations or circumstances.
- Clause (ii) of the proviso refers to "the credit". The use of definitive article clearly indicates that the reference is to unutilized ITC already

mentioned in the main part of section 54(3). The word 'the' signifies one particular sum or credit and any attempt to bifurcate it into credit on input goods and input services will produce anomalous results.

- Rule 89(5) by confining refund of unutilized ITC on input goods and denying refund of ITC on input services, curtails the ambit of section 54(3). In other words, the formula erroneously assumes that the entire output tax will be paid from ITC availed on input goods and the credit on input services will not be utilized for payment of output tax.
- The formula erroneously assumes that the entire output tax will be paid from ITC availed on input goods and the credit on input services will not be utilized for payment of output tax.
- By introducing an explanation in rule 89(5), the law has unnecessarily narrowed down the refund to only the taxes paid on input goods and excluding the tax paid on input services. Further, by introducing restrictions on a refund claim under rule 89(5), it curtailed the mandate given by section 54(3).
- The challenge to the vires of rule 89(5) is only because of the definition of 'net ITC' in the explanation to the rule. The explanation defines 'net ITC' to mean ITC availed on inputs during relevant period. Section 54(3) allows refund of any unutilized ITC and not only credit on input goods.

Submissions by the Revenue:

- Goods and services are distinct at the Constitutional level as well. Therefore, different treatment can be given to the refund of tax paid on goods and services.
- If the legislature intended to allow refund of unutilized ITC on input services and capital goods, then the same must have been expressly conveyed by the legislature or it would have defined 'refund' in Explanation-I at par with zero rated supplies.
- The provisos under section 54(3) have to be read and interpreted as restrictions and not as qualifications.
- "Unutilized ITC" includes the ITC available on any supply of goods or services or both. The term 'ITC' has been used in section 54(3). The Legislature, in its wisdom, has decided to give a complete refund of taxes paid on input goods and input services on zero-rated supplies. But the Legislature has, in its wisdom, decided not to extend the same benefit in the case of an inverted duty structure.

- The expression used is 'the credit' and the accumulation is restricted only on account of 'inputs'. This cannot be read or interpreted to include 'input services' or 'capital goods'.

Legal Principles and Scope of Decision:

- Refund is not a constitutional right but a statutory right and, therefore, the legislature, in its wisdom, and through statute can decide how the refund is to be granted.
- Sub-section (3) of section 54 stipulates that no refund of unutilized ITC shall be allowed other than in the two specific situations envisaged in clauses (i) and (ii) of the first proviso.
- While the CGST Act defines the expression 'input' in section 2(59) by bracketing it with goods other than capital goods, it is true that the plural expression 'inputs' has not been specifically defined. But there is no reason why the ordinary principle of construing the plural in the same plane as the singular should not be applied.
- Under clause (ii) of the first proviso to section 54(3), the Legislature has used the word "inputs" which, as defined in the Act, means only input goods. Therefore, there is no disharmony between rule 89(5) of the CGST Rules and section 54(3) of the CGST Act.
- If the Legislature had any intention of giving the credit of tax paid on input goods and input services, the Legislature would not have restricted the scope of refund in inverted duty structure to only "inputs".
- Rule 89(5) was framed under section 164 and therefore, rule 89(5) is not without jurisdiction.
- Parliament is entitled to make policy choices and adopt appropriate classifications, given the latitude which constitutional jurisprudence allows in matters involving tax legislation and to provide for exemptions, concessions and benefits on terms, as it considers appropriate.
- An inequitable and discriminatory provision in tax legislation does not make it discriminatory *per se*. Input goods and input services constitute two different classes and, therefore, the argument that equals are being treated unequally does not hold water.

Conclusion:

- The Apex Court laid down that the right to claim refund is a matter of a statutory prescription. It is within the powers of a legislative authority to determine whether or not refunds should be allowed of unutilized ITC.
- With this ruling of the Supreme Court, the anomaly that arose due to contradictory rulings from the Madras and Gujarat High Courts has been put at rest.
- Accordingly, it was held that in the case of inverted rate structure, refund can be confined to the ITC attributable to input goods alone (i.e., keeping the input services as well as capital goods out of the ambit of the refund claim).

32. BAKER HUGHES ASIA PACIFIC LIMITED vs. UNION OF INDIA [MANU/RH/1146/2022 (RAJASTHAN HIGH COURT)]

Refund under inverted duty structure where input and output supplies are same

Background:

- In order to reduce the burden of tax and the cascading effect and to give a boost to the oil and gas industry, the Central Government issued *NN 3/2017-CT(R)dated 28.06.2017 ["NN 3/2017-CT(R)"]* providing for an effective GST rate of 5% on all supplies made for specified operations subject to certain conditions.
- The assessee procured certain goods by paying GST ranging from 5% to 28% and supplied the same to Vedanta at the fixed GST rate of 5% (output tax) under *NN 3/2017-CT(R)* .
- The ITC available to the assessee was much higher than its Output Tax liability ('OTL') and as a consequence, after complete utilization of the credit towards the OTL, a significant percentage of ITC got accumulated in the hands of the assessee. The assessee, thus, claimed that it was entitled to a refund on account of the inverted duty structure as provided under the GST Acts.
- The assessee received a notice requiring it to show cause as to why the refund claim should not be rejected in the light of *Circular No. 135/05/2020-GST, dated 31.03.2020* (impugned circular) issued by the

CBIC which stipulates that refund under the inverted duty structure in terms of section 54(3)(ii) would not be available where the input and output supplies are the same.

Point of Dispute:

- Whether the assessee was entitled to claim refund of accumulated unutilised tax credit under section 54(3)(ii), irrespective of the fact that the input and output supplies are same?

Submissions by the Assessee:

- There was no restriction on claiming refund in cases where the inputs and output supplies were the same as outward supplies and made at concessional GST rates under *Circular No. 125/44/2019-GST, dated 18.11.2019 (Circular 125)* which approves refund in cases where input and output supplies are same and where GST on output supply was fixed at a lower rate.
- Subordinate legislation in the form of a statutory circular cannot supersede or override the parent statute and as such, the impugned Circular, to the extent it disallows ITC under the inverted duty structure where input and output supplies are same, and so also the impugned order were *per se* illegal and hence deserve to be struck down.

Submissions by the Revenue:

- Input and output supplies made by the assessee are same thereby, leading to no value addition on the goods supplied by it and hence, the assessee' s claim for refund was not compliant with the criteria of inverted duty structure prescribed under section 54(3). Therefore, the tax credit would not be available to the assessee. In this reference, reliance had been placed on Para No. 3.2 of the impugned Circular .

Legal Principles and Scope of Decision:

- Section 54(3)(ii) was absolutely unambiguous and does not carve out any exception that ITC under the inverted tax structure would not be applicable where the input and the output goods were the same.
- Para 59 of *Circular 125* makes it clear that the supplier who supplied goods at a concessional rate to companies involved in specified projects is entitled to refund under the inverted tax structure as per clause (ii) of first proviso to sub-section (3) of section 54.

- The assessee' s claim for refund was for a period between September, 2018 to September, 2019 on which date, the clarification dated 18.11.2019 (i.e., *Circular 125*) was in force which clearly stipulates that a registered dealer who supplies goods at concessional rate was eligible for refund under the inverted tax structure. Clause (ii) of sub-section (3) of section 54 does not indicate that ITC would be admissible only if the goods supplied had been subjected to some process.
- The circular dated 31.03.2020, being a subordinate legislation, is repugnant and conflicting to the parent legislation, i.e., section 54(3)(ii) and, hence, the same cannot be applied to oust the legitimate claim for accumulated ITC refund filed by the assessee. Otherwise also, the claim for refund of ITC filed by the assessee was for a period prior to the issuance of the impugned Circular.

Conclusion:

- It was held that the assessee can claim refund of accumulated unutilised tax credit under section 54(3)(ii), irrespective of the fact that the input and output supplies were same. In view of the court's ruling, this position would continue even after the issuance of *Circular No. 135/05/2020-GST, dated 31.03.2020*.

  Note: CBIC vide *Circular No. 173/05/2022-GST* dated 06.07.2022 has clarified that the intent of para 3.2 of *Circular No. 135/05/2020-GST* was not to restrict the refund of unaccumulated ITC where the supplier makes supply of goods under a concessional rate notification on account of which the GST rate applicable on outward supply is less than the rate of inward supply of such goods. Accordingly, para 3.2 of *Circular No. 135/05/2020-GST* has been amended to give effect to the clarification.

33. NUMINOUS IMPEX (I) PVT. LTD. vs. THE COMMISSIONER OF CUSTOMS [2022 (4) TMI 760 (MADRAS HIGH COURT)]

Refund of ITC cannot be denied merely because the assessee has claimed duty drawback under the provisions of Customs Drawback Rules

Background:

- The assessee exported consignments of goods classifiable under Customs Heading No. 8483 4000 of the Tariff Act 1975 and claimed

duty drawback under section 75 of the Customs Act. Additionally, the assessee claimed a refund of the ITC availed on input and input services used in the export goods.

- The Revenue denied the refund of unutilized ITC under section 16(3)(a) of the IGST Act citing the assessee's claim for duty drawback on the same transaction for export.

Point of Dispute:

- Whether the exports made without payment of IGST under bond on which duty drawback was claimed under the provisions of the Customs and Central Excise Duties and Service Tax Drawback Rules, 2017, (formerly 1995) would make the assessee disentitled for the benefit of refund of ITC under sub-rule (3) of rule 16 of the IGST Act 2017 read with section 54 of the CGST Act, 2017 and rules made thereunder?

Submissions by the Assessee:

- Exports effected by the assessee are "zero rated supply" within the meaning of section 16 of the IGST Act and, therefore, the assessee was entitled to refund of unutilized ITC under section16(3)(a) of the IGST Act, 2017.

Legal Principles and Scope of Decision:

- As far as the duty drawback under *NN 131/2016- Cus. (N.T) dated 31.10.2016* is concerned, there are two rates provided for the duty drawback. Column No. 4 in Schedule to the said Notification deals with the situation where the CENVAT facility has not been availed whereas column No. 5 in Schedule to the said Notification deals with the situation where the CENVAT facility has been availed.
- As far as the goods falling under the Tariff Heading 8483 4000 of the Customs Tariff Act 1975 are concerned, the rate of duty for goods both covered under these two columns is 2%. Thus, there is no variation as far as the rate of duty is concerned. In this case, admittedly, the assessee was entitled to duty drawback at 2% irrespective of the fact whether the assessee had availed ITC under the provisions of the GST law or not.
- The expression 'CENVAT facility' in column nos. 4 and 5 of the Schedule to the *NN.131/2016-Cus (N.T.) dated 31.10.2016* is to be read as 'input tax facility' under the respective enactments. Further, as

per the notes and conditions in paragraph no. 7 of *NN. 131/2016-Cus (N.T.) dated 31.10.2016*, if the rates indicated are the same in columns nos.(4) and (6), it shall mean that the same pertains to only the Customs Duty component and is available irrespective of whether the exporter had availed CENVAT facility or not.

- Paragraph No. 2.5 of *Circular No.37/2018-Cus dated 09.10.2018* cannot be pressed into service to deny legitimate export incentive as same was not sanctioned under the law. Only the higher rate of drawback cannot be claimed for exports covered by shipping bills, where for such exports, the refund of IGST is claimed if two rates are there IGST refund is completely system driven and processed in the system and manual intervention by the Departmental Officers to rectify the same is also not possible. However, that would apply only where higher rate of duty drawback was claimed.

Conclusion:

- In this matter, refund of ITC under section 16(3) of IGST Act, 2017 read with section 54 and rules 89 and 96 cannot be denied, merely because the assessee had claimed duty drawback under the provisions of Customs and Central Excise Duties and Service Tax Drawback Rules, 2017. However, the denial is possible only where higher duty drawback was claimed.

34. SHIVACO ASSOCIATES vs. JOINT COMMISSIONER OF STATE TAX [(2022) 137 TAXMANN.COM 213 (CALCUTTA HIGH COURT)]

Whether a Circular can override the provisions in the Act?

Background:

- The assessee carried on the business of purchasing LPG (liquified petroleum gas) in bulk through tanker and thereafter bottling the same in bottles/cylinders of different capacities and sell the same to commercial customers by charging GST at the applicable rate.
- Prior to the month of January, 2018, the rate of GST on the supply of LPG to commercial and domestic consumers was 18%, however, by notification dated 28.06.2018, the rate of GST on the supply of domestic LPG was reduced from 18% to 5%.

- As the rate of tax on inputs as compared to output was higher, the assessee filed a refund claim of unutilized ITC accumulated on account of inverted duty structure for the period commending from October 2018 to December 2018.
- The refund claim of the assessee was rejected by the adjudicating authority by placing reliance on *Circular No. 135/2020-GST dated 31.03.2020* which stated that, 'taxpayers cannot claim refund in terms of clause (ii) of section 54(3) of the CGST Act, in cases where the input and output supplies remain the same'.

Point of Dispute:

- Whether a benefit available under the Act could be taken away and/or restricted by way of a Circular?

Submissions by the Assessee:

- The Circular relied upon by the Revenue is clarificatory in nature, the Revenue cannot take advantage of the said Circular as the Act permits the refund.
- It cannot be said that the input and output supplies were the same as bulk gas purchased was refilled in small containers and then sold to the commercial and domestic consumers.

Submissions by the Revenue:

- The gas purchased and sold by the assessee to the consumers remained the same and the assessee was liable to pay GST at the rate of 18% in the case of both input and output supplies. Thus, the assessee was not entitled to any refund on account of the inverted duty structure.
- It cannot be said that the Legislature was unmindful of the fact, that there may be instances where the input and output supplies are the same. On the contrary, it can be said that the Legislature consciously did not create any distinction for allowing refund in all cases where the input tax is more than the output tax. The said benefit is applicable to all similar cases.

Scope of Decision:

- Circulars are issued for the purpose of bringing uniformity in the implementation of the Act. The intention of the Legislature as expressed in section 54(3) of the Act is clear and unambiguous. The

Act does not restrict refund where input and output supplies are different.

- The 'uniformity in implementation' does not mean curbing benefits available in the Act by introducing new provisions. A circular cannot supplant or implant any provision which is not available in the Act.
- The Legislature did not create any distinction for allowing the refund in all cases where the input tax is more than output tax. Thus, the refund is permissible in all cases where the input tax is more than the output tax.
- The Circular seeks to restrict the refund and trying to create a class inside a class, which is not permissible.

Conclusion:

- Circular No. *135/2020 dated 31.03.2020* which restricted refund in respect of the supplies where input and output were different was held to be overreaching the provisions of the Act.
- The High Court ruled that refund claim of the assessee should not have been rejected by the Revenue by relying on the said circular.

35. M/S ATC TIRES PRIVATE LIMITED vs. JOINT COMMISSIONER OF GST AND CENTRAL EXCISE (APPEALS) – [2022 (4) TMI 1194 (MADRAS HIGH COURT)]

Refund of ITC in case of supplies to SEZ unit

Background:

- The assessee's head office in Mumbai received invoices issued by vendors registered under GST and distributed the proportionate credit as an input service distributor to assessee's SEZ unit. This credit was claimed as refund by the assessee under section 16(3)(i) of the IGST Act.

Point of Dispute:

- Who was entitled to claim the refund of input credit in the case of supplies to SEZ unit i.e., the supplier or the SEZ unit itself?

Submissions by the Assessee:

- Exports made from assessee's SEZ unit are 'zero-rated' supplies within the meaning of section 2(23) of the IGST Act and therefore, the

assessee was entitled for refund of tax paid on input and input services under section 16(3)(i) of the IGST Act.

Submissions by the Revenue:

- With respect to the supply of service directly made to the assessee's SEZ unit, only the supplier was entitled to claim the refund of ITC.

Legal Principles and Scope of Decision:

- On the supply of common service to the assessee's head office, the supplier of such common services could not have claimed any refund under section 16(3)(b) of the IGST Act as such a supply did not qualify as a "zero rated supply" within the meaning of section 2(23) thereof. Therefore, there is no question of the supplier claiming refund under section 16(3)(a) or (b) of the IGST Act. The suppliers of these input service also could not have availed refund under section 54 (3) read with rule 89.
- The purpose of granting refund on zero rated supply is to ensure that the exports are competitive in the international market and such transactions are not burdened with taxes.
- The export by the assessee from its SEZ unit was a zero-rated supply within a meaning of section 2(23) of the IGST Act read with section 16 of the IGST Act. Once, it is concluded that it was a zero-rated supply, refund in terms of section 16(3)(a) of the IGST Act cannot be denied.
- Section 54 allows refund of tax and includes refund in the case of zero-rated supply made without payment of tax. Proviso to section 54(3) allows refund of unutilized ITC of zero-rated supplies made without payment of tax.
- The assessee's export specifically falls under such category under the proviso to section 54(2). Proviso to rule 89(1) is only an exception to rule 89(1). There is no bar under rule 89(1) for refund of unutilized ITC.

Conclusion:

- The benefit of refund of unutilized ITC towards zero-rated supplies effected by an SEZ unit or developer cannot be denied on the assumption that the application for refund could have been filed only by the supplier of the goods or services.
- An SEZ unit or developer is eligible to claim refund of ITC on account of taxable goods or services distributed to it by its head office through ISD registration obtained by the head office.

36. M/S DHARMENDRA M. JANI vs. UNION OF INDIA [2021 (6) TMI 563 (BOMBAY HIGH COURT)]

Constitutional validity of section 13(8)(b) and section 8(2) of the IGST Act

Background:

- The assessee provided marketing and sales promotion services to customers/ principals located outside India who in turn exported goods to importers in India on the basis of agreements.
- In terms of the agreements executed between the assessee and its overseas customers, the assessee solicited purchase orders for its overseas customers by undertaking activities of marketing and promotion of goods belonging to its overseas customers.
- The Indian purchasers, i.e., importers, directly placed purchase orders on the overseas customers of the assessee for supply of goods. The goods were then shipped by the overseas customers to the Indian importers. Such goods were cleared by the Indian importers from the Customs upon payment of applicable Customs duty.
- The overseas customers raised invoice on the Indian importers, who directly remitted the sale proceeds to the overseas customers. Upon receipt of such payment, the overseas customers paid commission to the assessee against invoice raised by the assessee. The consideration for its services was received by the assessee in India in convertible foreign exchange.

Point of Dispute:

- Constitutional validity of the provisions related to 'intermediatory' under the IGST Act.

Submissions by the Assessee:

- GST is a destination-based consumption tax . Therefore, services provided by a service provider in India to a service receiver located outside India which is treated as export of service cannot be taxed.

For taxing a service, it is not the place of performance but the place of consumption which is relevant. Once the services are consumed outside India, the Parliament has no jurisdiction to levy tax on such services consumed outside India.

- Levy of CGST and SGST on the export of service by the assessee to its overseas customers constitute an unreasonable restriction upon the right of the assessee to carry on trade and business under Article 19(1)(g) of the Constitution of India.
- Levy of tax on export of service is *ultra vires* Article 269A of the Constitution.
- Sections 8(2) and 13(8)(b) of the IGST Act are *ultra vires* section 9 of the CGST Act which is the charging section.
- Levy of GST on an intermediary like the assessee providing services to an overseas customer would lead to double taxation on the same service and therefore, the levy of tax on intermediary like the assessee is violative of Article 14 of the Constitution.

Submissions by the Revenue:

- There is legislative competence to enact the statute and the impugned provision is not violative of any of the fundamental rights enshrined in Part III of the Constitution.
- Even the Place of Provision of Service Rules, 2012 under the erstwhile service tax regime, contained a similar provision with effect from 01.10.2014. The Central Government considered several representations and after examining the issue in detail declared that with effect from 01.10.2014 the place of supply for all intermediaries (goods and services) would be the location of the intermediary. This in turn would encourage the "Make in India" program by encouraging the overseas customers to set up units in India thereby increasing foreign investments giving a boost to "Make in India" program. This will also bring about a level playing field in India.
- The Gujarat High Court in *Material Recycling Association of India vs. Union of India [2020-TIOL-1274-HC-AHM-GST]* rejected the identical challenge made to section 13(8)(b) of the IGST Act. The decision of the Gujarat High Court is correct in all respects and therefore, there is no reason as to why a different view should be taken by the Court.

Legal Principles and Scope of Decision:

- The Division Bench of the Bombay High Court reached a split view on the constitutional validity of the provisions relating to 'intermediary' and the said issue will now be decided by a third judge.
- *Justice Abhay Ahuja's opinion (upholding the levy as constitutional):*
    - In terms of Articles 269A and 286 of the Constitution, the Parliament has validly formulated policies regarding place of supply and pertaining to inter-state and intra-state supply under section 13(8)(b), section 7 and section 8 of the IGST Act, respectively.
    - Section 13(8)(b) cannot be said to have extra-territorial implication, as it merely provides the place of supply as the location of the supplier of service who is located in India and does not seek to levy tax on service recipient outside India. In any case, Article 245 is a 'notwithstanding' provision and is subject to other provisions of the Constitution.
- *Justice Ujjal Bhuyan's opinion (Declaring tax on intermediary services as unconstitutional):*
    - Articles 246A and 269A empower the Parliament to lay down principles for determining the place of supply and when such supply takes place in the course of inter-state trade or commerce, but do not empower the Parliament to impose tax on export of services by treating the said supply as a local supply.
    - Article 286(1) places a restriction on the imposition of tax by a State on supplies in the course of import or export. Article 286(2) empowers the Parliament to formulate principles as to when a supply takes place in the course of import or export, but the said empowerment is not for the purpose of thwarting the entire scheme of the restriction imposed under Clause (1)
    - In terms of Article 245 of the Constitution, while a law cannot be held as unconstitutional merely on account of extra-territorial operation, the said law should have some real connection to India, which is not fanciful or illusory.

Conclusion:

- Due to the difference of opinion between the two judges, the matter is still sub-judice. In due course, a third judge will decide the constitutional validity of the provision related to levy of GST on intermediatory services.

Assessment and Audit including Provisional Attachment & Inspection, Search and Seizure

37. M/S RADHA KRISHAN INDUSTRIES vs. STATE OF HIMACHAL PRADESH [(2021) 127 TAXMANN.COM 26 (SUPREME COURT)]

Order of provisional attachment to be preceded by formation of valid opinion

Background:

- The assessee carried on manufacturing operations in its factory at Himachal Pradesh. A detection case was filed and registered against one of the suppliers of the assessee in 2018. As a consequence, the assessee was also issued a notice to appear before the GST authorities and explain the alleged illegal claim of ITC made by it during the financial years 2017-18 and 2018- 19.
- The assessee appeared before the authorities and contended that the ITC claimed by it was valid and all the necessary conditions were fulfilled.
- Subsequently, after almost a year and half, the Joint Commissioner of State Taxes and Excise, provisionally attached the assessee's receivables from its customers on the ground that the assessee was involved in ITC fraud. The Provisional attachment was ordered by invoking section 83.
- The assessee filed a writ petition before the Himachal Pradesh High Court and claimed that such attachment was done without affording an opportunity of being heard.
- The High Court dismissed the assessee's writ petition on the ground that the provisional attachment could not be challenged in a petition under Article 226 of the Constitution of India as an 'alternative and efficacious remedy' of an appeal under section 107 was available to the assessee.

- The assessee challenged the judgment of the High Court by filing a petition before the Hon'ble Supreme Court.

Points of Dispute:

- Whether the orders of provisional attachment issued by the GST authorities against the assessee are in consonance with the conditions stipulated in section 83?
- Whether the High Court was right in concluding that the provisional attachment could not be challenged in a petition under Article 226 of the Constitution of India

Submissions by the Assessee:

- No efficacious alternative remedy is available against the orders of provisional attachment passed under section 83. The jurisdiction to pass an order under section 83 is conferred on the Commissioner. Although the power stands delegated to a subordinate officer, the order is still deemed to be passed by the Commissioner. Under the CGST Act, an appeal against the order of the Commissioner lies before the GST Appellate Tribunal which has not been constituted till date. Thus, the only remedy available to the appellant was filing a writ petition.
- The impugned orders of provisional attachment are in violation of the procedure established under sub-rule (5) of rule 159, which provides that an opportunity of being heard is to be given against the provisional attachment as a mandatory requirement. In this case, the assessee filed objections to the orders of provisional attachment but the objections were rejected by the Commissioner without providing an opportunity of being heard to the assessee.

Submissions by the Revenue:

- There was no violation of the principles of natural justice as an order of provisional attachment does not require a prior notice to be issued to the assessee.
- The provisional attachment is not only for the purpose of recovery but is intended to safeguard the interests of the Revenue while the proceedings are pending.

Legal Principles and Scope of Decision:

- The writ petition before the High Court under Article 226 of the Constitution challenging the order of provisional attachment was maintainable. The High Court erred in dismissing the writ petition on the ground that it was not maintainable.
- The exercise of the power for ordering a provisional attachment must be preceded by the formation of an opinion by the Commissioner that it is necessary so to do for the purpose of protecting the interest of the Government revenue. Before ordering a provisional attachment, the Commissioner must form an opinion on the basis of tangible material that the taxpayer is likely to defeat the demand, if any and therefore, it is necessary so to do for the purpose of protecting the interest of the Government revenue.
- The expression "necessary so to do for protecting the Government revenue" implicates that the interests of the Government revenue cannot be protected without ordering a provisional attachment.
- The Commissioner is duty bound to deal with the objections to the attachment by passing a reasoned order which must be communicated to the taxable person whose property is attached.
- Under the provisions of rule 159(5), the person whose property is attached is entitled to dual procedural safeguards namely:
  - (i) an entitlement to submit objections on the ground that the property was or is not liable to attachment; and
  - (ii) an opportunity of being heard.
- There has been a breach of the mandatory requirement of rule 159(5) and the Commissioner was clearly misconceived in law in coming to the conclusion that he had a discretion as to whether or not to grant an opportunity of being heard.

Conclusion:

- The Supreme Court laid down that the power to order a provisional attachment of the property of a taxable person including a bank account under section 83 of the CGST Act is draconian in nature and the conditions which are prescribed by the statute for a valid exercise of the power and as explained by the court in its judgement must be strictly fulfilled.

38. ASSISTANT COMMISSIONER vs. M/S SATYAM SHIVAM PAPERS PVT. LTD. [(2022) 134 TAXMANN.COM 241 (SUPREME COURT)]

No penalty to be imposed and no tax evasion to be presumed on non-extension of e-way bill due to agitation and blocked traffic

Background:

- Hon'ble Telangana High Court in the assessee's writ petition set aside the order passed by the GST authorities in Form GST MOV-09, imposing tax and penalty on the assessee due to the expiry of the e-way bill. The High Court also deprecated the GST authorities for blatant abuse of power in detaining goods by treating validity of the expiry on the e-way bill as amounting to evasion of tax.
- The Revenue filed a petition before the Hon'ble Supreme Court challenging the judgment of the High Court.

Point of Dispute:

- Expiry of e-way bill due to road blockage, traffic jam or due to any other unprecedented circumstances - whether a fit case for invocation of section 129?

Legal Principles and Scope of Decision:

- The High Court had meticulously examined and correctly found that no fault or intent to evade tax could have been inferred against the assessee.
- The High Court has rightly arrived at the following findings:
    - It was the duty of GST authorities to consider the explanation offered by the assessee as to why the goods could not be delivered during the validity period of the e-way bill
    - The GST authorities could not have drawn an inference that the assessee was evading tax merely because the e-way bill had expired.

Conclusion:

- The Hon'ble Supreme Court of India affirmed the judgment passed by the Telangana High Court and held that, tax evasion cannot be presumed on mere non-extension of validity of e-way bill by the assessee due to traffic blockage and agitation etc.

39. PARESH NATHALAL CHAUHAN vs. STATE OF GUJARAT [(2022) 135 TAXMANN.COM 42 (SUPREME COURT)]

When an investigation is pending, the taxpayer cannot be detained for indefinite period for an alleged tax evasion.

Background:

- The assessee who was in custody for 25 months, filed a petition before the Hon'ble Supreme Court seeking bail for the alleged evasion of tax.

Point of dispute:

- Can the assessee who had been in custody for a period of 25 months for an offence that could lead to imprisonment of 5 years could be granted bail?

Submissions by the Assessee:

- The assessee had been in custody for 25 months out of a total period of 5 years for which he can be sentenced.
- The endeavour of the GST authorities was only to teach the assessee a lesson for having initiated writ proceedings that resulted in adverse order against them.

Submissions by the Revenue:

- The assessee was an habitual offender engaged in violation of law.
- A number of other accused were absconding and only on their being taken into custody, the root of the problem could be detected.

Legal Principles and Scope of Decision:

- The assessee having already undergone a custody of 25 months, whereas the maximum sentence for such offence is of 5 years, implying that almost 50% of the sentence has been completed by the assessee.
- The assessee was granted bail on the observation that he cannot be indefinitely detained in custody in view of the above facts.

Conclusion:

- The Hon'ble Supreme Court in the instant case granted bail to the accused of tax evasion. Held that the assessee cannot be detained for an indefinite period of time when the maximum sentence for such offence is 5 years and investigation w.r.t. the same is still pending.

40. M/S NKAS SERVICES PVT. LTD. vs. STATE OF JHARKHAND [2021 (10) TMI 880 (JHARKHAND HIGH COURT)]

SCN to be clear and unambiguous

Background:

- The assessee challenged the SCN issued under section 74 on the grounds that it was vague and did not disclose the offense and contraventions. Further, the SCN was a mere mechanical reproduction of the provisions of section 74 without striking of the irrelevant portions.

Point of Dispute:

- SCN issued under section 74 without stating whether it was actuated by reason of fraud or any wilful misstatement or suppression of facts in order to evade tax, was to be quashed being in violation of the principles of natural justice and lacking in jurisdictional facts to initiate a proceeding under section 74.

Submissions by the Assessee:

- The impugned SCN was incapable of any reply and did not fulfill the ingredients of a notice in the eyes of law.
- As per the SCN, the assessee would be denied the opportunity to properly defend itself. It is, therefore, in violation of the principles of natural justice.
- The essential requirement of the proper notice is that it should specifically state the charges to which the noticee has to reply.

Submissions by the Revenue:

- The language of sections 73 and 74 does not suggest that a preliminary determination is required to be done prior to issuance of a SCN.
- In case, there is a genuine error in striking out a particular item, the same would not lead to a conclusion that a notice itself is to be quashed.

Legal Principles and Scope of Decision:

- The proceedings under section 74 have a serious connotation as they allege punitive consequences on account of fraud or any wilful

misstatement or suppression of facts employed by the person chargeable to tax. In the absence of clear charges which the notice so alleged is required to answer, the noticee is bound to be denied proper opportunity to defend itself. This would entail violation of the principles of natural justice which is a well-recognized exception for invocation of writ jurisdiction despite availability of alternative remedy.

- The impugned notice completely lacks in fulfilling the ingredients of a proper SCN under section 74. Proceedings under section 74 have to be preceded by a proper show-cause notice. A summary of SCN issued in Form GST DRC-01 in terms of Rule 142(1) cannot substitute the requirement of a proper SCN.

Conclusion:

- The High Court quashed the SCN as it was vague, unclear and lacked details. It was concluded that such notice amounts to violation of the principles of natural justice.

41. VIMAL YASHWANTGIRI GOSWAMI vs. STATE OF GUJARAT [2020 (11) TMI 40 (GUJARAT HIGH COURT)]

Mere suspicion is not sufficient to invoke provision of confiscation

Background:

- The assessee, a proprietary concern, was engaged *inter-alia* in the business of trading and/or supply of stainless steel.
- GST authorities carried out search proceedings at the residence of the assessee and seized purchase and sales files along with mobile and laptop.
- Summons were issued under section 70(1) to the assessee for giving statement before the GST authorities.
- The assessee filed writ petition before the Gujarat High Court contending that that if they approached the Department, he would be arrested under section 69 of the CGST Act.
- In the writ petition, the assessee sought directions on GST authorities not to take any action against him by exercising powers under section 69 without following the due procedure of law for assessment and adjudication of alleged evasion of GST.

Point of Dispute:

- Whether the provisions of sections 154, 155(1), 155(2), 155(3), 157, 172 of the Cr.P.C. are applicable or should be made applicable for the purpose of invoking the power to arrest under section 69 of the CGST Act? In other words, whether the authorised officer can arrest a person alleged to have committed non-cognizable and bailable offences without a warrant of arrest issued by the Magistrate under the provisions of the Cr. P.C.?
- For the purpose of section 69(3), whether the GST authorities could be said to be a "police officer-in-charge of a police station" as defined under section 2(o) of the Cr. P.C.?
- Whether the constitutional safeguards laid out by the Supreme Court in *D.K. Basu vs. State of West Bengal [(1997) 1, SCC 416]* case in the context of the powers of the police officers under the Cr. P.C. and of officers of the Central Excise, Customs and Enforcement Directorate are applicable to the exercise of powers under the provisions of section 69 of the CGST Act in equal measure?

Submissions by the Assessee:

- Section 132 of the CGST Act cannot be invoked merely on the basis of the "reason to believe" that the "specified offence has been committed" in as much as the factum of a person having committed any of the specified offence needs to be established by following the due process of law.
- A conjoint reading of section 69 and section 132 of the CGST Act would lead to a conclusion that unless it is established that the "offence is committed", the provisions of section 132 cannot be invoked and unless section 132 is invoked, the provisions of section 69 cannot be invoked by the respondent authority.

Submissions by the Revenue:

- The provisions of section 69 are neither connected nor dependent upon the provisions of section 132 and hence, it is incorrect to state that the arrest under section 69 cannot be undertaken before the adjudication of the offences referred to in section 132.
- The provisions of section 69(1) can be read along with section 135, which is similar to section 138A of the Customs Act, which enables an authority to presume the culpable mental state on the part of the alleged offender.

- On a bare reading of section 69, it is clearly discernible that the power to arrest vests with the GST authorities and therefore, once the power and jurisdiction of a concerned authority is established, the writ of prohibition ought not to be granted.

Legal Principles and Scope of Decision:

- The order authorising any officer to arrest may be justified if the Commissioner or any other authority empowered in law has reasons to believe that the person concerned has committed the offence under section 132. However, the subjective satisfaction should be based on some credible materials or information and also should be supported by supervening factor. It is not any and every material, howsoever vague and indefinite or distant remote or far fetching, which would warrant the formation of the belief.
- The power conferred upon the GST authorities under section 69 for arrest could be termed as a very drastic and far-reaching power. Such power should be used sparingly and only on substantive weighty grounds and reasons.
- The power under section 69 should neither be used as a tool to harass the assessee nor should it be used in a manner which may have an irreversible detrimental effect on the business of the assessee.
- The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The Commissioner must be able to justify the arrest apart from his power to do so.
- Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for the authority in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and *bona fides* of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter.
- A person is not liable to be arrested merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the authority effecting the arrest that such arrest is necessary and justified.

- The power to arrest as provided under section 69 can be invoked if the Commissioner has reason to believe that the person has committed offences as provided under clauses (a), (b), (c) or (d) of sub-section (1) of section 132, which are punishable under clause (i) or clause (ii) of sub-section (1) or sub-section (2) of section 132 of the CGST Act without there being any adjudication for the assessment as provided under the provisions of the Chapter VIII of the CGST Act. The reference to section 132 in section 69 of the CGST Act is only for the purpose of indicating the nature of the offences on the basis of which a reasonable belief is formed and recorded by the Commissioner for the purpose of passing an order of arrest.
- An authorized officer is a 'proper officer' for the purposes of the CGST Act. As the authorized officers are not police officers, the statements made before them in the course of inquiry are not inadmissible under section 25 of the Indian Evidence Act, 1872. The power to arrest a person by an authorized officer is statutory in character and should not be interfered with. Section 69 of the CGST Act does not contemplate any Magisterial intervention.
- It is significant to note that in *D.K. Basu vs. State of West Bengal [(1997) 1, SCC 416]* case, the Supreme Court did not confine itself to the actions of police officers taken in terms of the powers vested in them under the Code but also of the officers of the Enforcement Directorate including the Directorate of Revenue Intelligence. This included officers exercising powers under the Customs Act, the Excise Act, 1944 and the Foreign Exchange Management Act, 1999 as well.
- There is no doubt that the arrest memo is a key safeguard against illegal arrest and a crucial component of the legal procedure of arrest. Full and consistent compliance is a responsibility of both, the officers of the GST as well as the Magistrate.
- It is high time that the GST department prescribes a standardized format for the arrest memo. The format must contain all the mandatory requirements and necessary additions. The gist of the offence alleged to have been committed must be incorporated in the arrest memo. It would be the duty of the concerned Magistrate to check that an arrest memo has been prepared and duly filled. In a given case, if the Magistrate finds that the arrest memo is absent or improperly filled or bereft of necessary particulars, then the Magistrate should decline the production of the arrested person.

Conclusion:

- Arrest memo is a crucial component of legal procedure of arrest and the powers of arrest under section 69 are to be exercised with considerable care and circumspection. Prosecution should normally be launched only after the adjudication is completed.

42. A.P. REFINERY PVT. LTD. vs. STATE OF UTTARAKHAND, [(2021) 130 TAXMANN.COM 307 (UTTARAKHAND HIGH COURT)]

Mere suspicion is not sufficient to invoke the provision of confiscation

Background:

- The assessee was transporting Rice Bran Oil from its factory located in Punjab to a dealer located in the State of Uttarakhand through three trucks and in order to transport the consignment, assessee raised three e-invoices.
- The assessee generated e-way bills containing cross-references to e-invoices which were to expire within three days. The e-way bills had expired before completion of the transportation. Upon physical verification, description on e-invoices was found to be matching with physical goods verified in vehicle.
- Despite the fact that there was no discrepancy, GST authorities ordered detention of goods and trucks for further proceedings. SCNs were issued ostensibly on the ground that e-way bills had expired.

Points of Dispute:

- Whether before invoking provisions of section 130 for confiscation, there should be a very strong base to proceed for confiscation and the assessee should be given an opportunity of being heard?
- Since, the Revenue had completely failed to show that the assessee was given an opportunity of being heard before passing the impugned orders of confiscation, the said orders were liable to be quashed and set aside.

Submissions by the Assessee:

- Section 129 and Rule 140 are arbitrary, unreasonable and violative of Articles 14, 19(1)(g) and Article 300 A of the Constitution of India.

- The assessee was not given an opportunity of being heard before passing of the orders by the GST authorities under section 130 in Form GST MOV-11.

Submissions by the Revenue:

- Section 129 and rule 140 referred to by the assessee are valid.
- The assessee has alternative remedy of filing an appeal and therefore, the writ petitions were not maintainable.

Legal Principles and Scope of Decision:

- Section 130 talks about confiscation of goods or conveyances and levy of penalty. Before invoking the provisions of section 130 which relates to confiscation, there should be a very strong base to proceed for confiscation. Mere suspicion is not sufficient to invoke the provision of the confiscation.
- Moreover, a taxpayer should be given an opportunity of being heard according to the intent of the Legislature before passing the confiscation order as mentioned in sub-section (4) of section 130.

Conclusion:

- Both the writ petitions are allowed partly. Consequently, impugned orders passed under Section 130 in Form GST MOV-11 were quashed and set aside. It was directed to release the vehicles and upon execution of a bond for the value of the goods in Form GST INS-04 and furnishing of a security in form of a bank guarantee equivalent to the amount of applicable tax, interest and penalty payable, by the petitioner. The release of the vehicles and goods are subject to the final outcome of the confiscation proceedings. Further, it is clarified that after giving an opportunity of being heard to the assessee, revenue may proceed further in accordance with law.

43. AKHIL KRISHAN MAGGU vs. DEPUTY DIRECTOR [(2019) 111 TAXMANN.COM 367 (PUNJAB & HARYANA HIGH COURT)]

Arrest of Chartered Accountants or Advocates

Background:

- Assessee No. 1 (son of assessee No. 2) was a practicing lawyer in the field of taxation.

- Assessee No. 2 was interrogated by DGGI and thereafter handed over to DRI, who arrested him.
- Apprehending coercive action, assessees No. 1 and 2 approached the Punjab and Haryana High Court.
- There is nothing on record showing admission by assessee No. 2 and no further statement has been recorded in jail though he has been in judicial custody.

Points of Dispute:

- Can the persons against whom there is no documentary or otherwise concrete evidence to establish direct involvement in evasion of huge amount of tax, could be arrested prior to determination of liability and imposition of penalty?
- Is it proper to arrest Chartered Accountants or Advocates, merely on basis of statement without any corroborative evidence linking the professional with the alleged offence?

Submissions by the Assessee:

- It was a case of vendetta against the assessees and there was no evidence against them to connect them with the fraud, if any, committed by alleged four dummy exporters.
- The respondents during the course of investigation could not gather any piece of evidence against assessees.

Submissions by the Revenue:

- Assessee No. 1 was neither co-operating nor answering questions asked by the investigating officials. He was involved in the fraud and deserved no sympathy of the Court.
- The exporters are not the real owners of exporting firm and the assessees were in connivance with other persons and had created bogus/ dummy firms and availed refund of IGST.

Legal Principles and Scope of Decision:

- Power of arrest should be used in exceptional circumstances during investigation, which illustratively may be:

  (i) a person is involved in *evasion of huge amount of tax* and is having no permanent place of business;

(ii) a person is not appearing *in spite of repeated summons* and is involved in huge amount of evasion of tax;

(iii) a person is a *habitual offender* and he has been prosecuted or convicted on earlier occasion;

(iv) a person is likely to *flee from country;*

(v) a person is the *originator of fake invoices* i.e., invoices without payment of tax;

(vi) when direct documentary or otherwise concrete evidence is available on file/record of active involvement of a person in tax evasion.

- It is well known that if a top brass of a running concern is arrested, there are all possibilities of closure of unit which results into unemployment and wastage of precious natural resources.
- There is nothing on record showing admission by the assessee No. 2 and no further statement was recorded in jail though he had been in judicial custody. Assessee No. 1 has already put in appearance on various occasions and there is nothing in file to show which indicates that he is connected with the alleged illegal refund sought by exporters.
- Concededly, the assessee No. 1 is neither the proprietor nor partner nor shareholder of any exporter concern/firm/company, who availed refund of IGST. There is no evidence of transfer of funds in the accounts of the assessees or withdrawal of cash by any one of them.
- Assessee No. 1 is in legal profession since 2017 and after introduction of GST, he had not dealt directly or indirectly with export consignments. He has represented appellants as an advocate which buttress the argument of the petitioner that he was in practice and appeared as an advocate on behalf of four exporters who availed the alleged illegal refund of IGST.

Conclusion:

- Power of arrest should not be exercised at the whims and caprices of any officer or for the sake of recovery or terrorizing any businessman or create an atmosphere of fear, it should be exercised in exceptional circumstances during investigation.

- Arrest of Chartered Accountants or Advocates who had filed returns or otherwise assisted in business but are not beneficiary or part of fraud, merely on the basis of the statement without any corroborative evidence linking the professional with an alleged offence, should not be made.
- The persons who are having established manufacturing units and paying good amount of direct or indirect taxes and persons against whom there is no documentary or otherwise concrete evidence to establish direct involvement in the evasion of huge amounts of tax, should not be arrested prior to determination of liability and imposition of penalty.
- However, assessee No. 1 shall appear before Respondent as and when summoned between 10 a.m. to 5 p.m. Further, it was stated that *"we have not expressed any opinion on merits of the controversy and respondents are free to continue with their investigation and thereafter proceed as per law."*

44. MAHENDRA KUMAR INDERMAL vs. DEPUTY ASSTT. COMMISSIONER [(2020) 122 TAXMANN.COM 254 (ANDHRA PRADESH HIGH COURT)]

Jurisdiction of Deputy Assistant Commissioner under section 67(2)

Background:

- Aggrieved by the order of prohibition issued in Form GST INS-03 by the GST authorities, the assessee filed a writ petition before the Andhra Pradesh High Court.

Point of Dispute:

- Whether a Deputy Assistant Commissioner was competent to pass the order of prohibition under section 67(2)?

Submissions by the Assessee:

- Under section 67(2), the authority competent to pass the order should not be below the rank of Joint Commissioner while the order impugned was passed by the Deputy Assistant Commissioner, who was not competent to pass the order of prohibition. Therefore, the order of prohibition so passed confiscating the goods was unsustainable in law.

Submissions by the Revenue:

- The matter should be adjudicated on merits.

Legal Principles and Scope of Decision:

- As per the provisions of section 67(1), the power of inspection is specified to an officer not below the rank of Joint Commissioner. The said officer for the purpose of search as specified in section 67(1)(a) and (b) may authorize in writing any other officer of Central Tax for inspection of any places of business of the taxable person or the persons engaged in the business of transporting goods or the owner or the operator of warehouse or godown, as the case may be. Similar is the provision of section 67(2) of the CGST Act.
- For the purpose of seizure where the authority is having a reason to believe that proceedings of confiscation are required in the matter, to which inspection has been carried out, after recording the said reason, he may exercise such power for seizure by authorizing in writing any of the officers of the Central Tax Department.
- In the present case, Form GST INS-03, which deals with the order of prohibition, under section 67(2) has been issued by Deputy Assistant Commissioner (ST). In the said order of prohibition, nothing is mentioned, *viz*., by which written order he has been authorized by officer so specified in section 67(2) of the CGST Act.
- For the purpose of section 67, in respect of the search including inspection, written authorization is required. It is conspicuously missing in the present case. Therefore, the order of prohibition passed by the Deputy Assistant Commissioner is illegal and without any jurisdiction.

Conclusion:

- In light of the above facts, the Deputy Assistant Commissioner cannot pass an order of prohibition under section 67(2). The authority competent to pass the order under section 67(2) should not be below the rank of Joint Commissioner.

45. UNION OF INDIA vs. BUNDL TECHNOLOGIES PVT. LTD.- [(2022) 136 TAXMANN.COM 112 (KARNATAKA HIGH COURT)]

Refund of amount involuntarily deposited during investigation

Background:

- The assessee operated an e-commerce platform. On the aforesaid platform, consumers could place orders for delivery of food from nearby restaurants, which was made through delivery executives directly engaged by the assessee. However, on account of sudden spike in food orders during holidays, festive season and weekends, the assessee engaged temporary delivery executives (DE's) from third party service providers.
- DE's who were directly engaged by the assessee, did not charge GST as they were below the threshold limit prescribed for obtaining registration under the GST law.
- However, third party service providers charged the assessee, the consideration paid to temporary DEs along with mark-up between 5.5% and 10% along with applicable GST on the entire consideration.
- An investigation was initiated by the GST authorities with regard to services provided to the assessee by third party service providers on the ground that one of the third party service providers was a non-existent entity and accordingly, the ITC availed by the assessee and the GST component paid by it to the third party service provider was fraudulent.
- During the investigation, the GST authorities issued spot summons to the Directors and employees of the assessee and their statements were recorded. On the next day, i.e., 30.11.2019 at about 4.00 a.m., a sum of ₹ 15 crores was deposited by the assessee in their electronic cash ledger.
- Thereafter, the officials of the assessee were summoned by the GST authorities. It was averred that threats of arrest were held out to the officials of the assessee during the summon proceedings and they were not allowed to leave. The officers of the company therefore deposited a further sum of ₹ 12,51,44,157 at about 1:00 a.m. in the morning in order to secure the release of three directors of the assessee.

- The assessee was of the view that in all a sum of ₹ 27,51,44,157 was illegally collected from the assessee during the course of investigation under the threat and coercion without following the procedure prescribed under the CGST Act.
- The assessee filed a writ petition before the Karnataka High Court seeking refund of a sum of ₹ 27.51 crores.
- The Single Judge Bench of the High Court held that the payment made by the assessee was involuntary. Accordingly, the writ petition was disposed of with the direction to the Revenue to consider and pass suitable orders on the applications for refund filed by the assessee within a period of four weeks.
- The judgment of the Single Judge Bench of the High Court was challenged by the Revenue before the Division Bench of the High Court.

Point of Dispute:

- Whether the assessee was entitled to seek refund of amounts involuntarily deposited during the course of investigation?

Submissions by the Revenue:

- The assessee did not come to the Court with clean hands as the amount claimed as refund included certain payments on other account.
- There was no threat or coercion and the assessee has approached the Court after 15 months which itself was the proof of the same.
- The issue of the deposit made would be examined in a proceeding under section 74 after issue of SCN.

Submissions by the Assessee:

- Third party service provider had raised valid tax invoices on the assessee charging applicable GST. Therefore, the allegation that the third-party service provider was a non-existing entity and that the assessee had not received any services from the said service provider was factually incorrect.
- Assessee was compelled to deposit the amount in electronic cash ledger under the apprehension of arrest and imprisonment. The recovery of tax during the investigation was illegal and unconstitutional and therefore, the assessee was entitled to refund of the amount deposited by it under threat and coercion.

Legal Principles and Scope of Decision:

- There is no communication in writing from assessee to the GST authorities about either self-ascertainment or admission of liability by the assessee to infer that such a payment was made under section 74(5) of the CGST Act.
- The assessee intimated the department *vide* its communication that it reserves its right to claim refund of the amount and the same should not be treated as admission of its liability.
- No one in a society governed by rule of law can take resort to a course of action not permissible in law. A statutory power has to be exercised reasonably and in good faith and for the purpose for which it is conferred. The power vested in any authority by law has to be exercised in consonance with the spirit as well as letter of the Act. The broader the ambit of the power, the more caution and circumspection is required while invoking such power. A statutory power has to be exercised within a system of controls and has to be exercised by relevance and reason. It needs reiteration that a statutory power should not be exercised in a manner, so as to instil fear in the mind of a person.

Conclusion:

- The deposit made by the assessee during the course of investigation was held as not collected under section 74(5). Accordingly, the Hon'ble Karnataka High Court concluded that the amount was collected in violation of Articles 265 and 300A of the Constitution of India. The Revenue was directed to refund the amount to the assessee.

46. M/S JAYACHANDRAN ALLOYS PVT. LTD. vs. SUPERINTENDENT OF CENTRAL EXCISE [2019 (5) TMI 895 (MADRAS HIGH COURT)]

Arrest before completion of investigation

Background:

- The Revenue had gathered intelligence against the assessee that it was trading in fake invoices.

  (i) An investigation under section 67 was carried out and several

documents were seized and statements of the concerned personnel of the assessee were recorded.

(ii) The said process was being continued and the provisions relating to "arrest" under section 69 and punishable offences under section 132 were shown to the assessee.

- According to the subsequent retraction letter of the assessee, he was forced to agree and admit certain liabilities.
- While the investigation proceedings were going on, the assessee filed a writ petition before the Hon'ble Madras High Court seeking certain reliefs.

Point of Dispute:

- Whether the assessee was entitled to get copies of the documents seized and also the statements recorded during the process of investigation and if so under what circumstances?
- Whether the assessee was entitled to interim protection from arrest and punishment under section 132 even before conclusion of the assessment process and determination of the demand?

Submissions by the Assessee:

- There has been no proper compliance with the requirements of the statute. The Managing Director of the assessee was threatened that he would be arrested in the light of the provisions of section 69 of the CGST Act and he was coerced into signing statements, admitting various liabilities and providing for a schedule of payments to the Department.
- The powers of arrest and prosecution would arise only if the Department were in possession of evidence to prove that the assessee had indulged in fraud or had intended to defraud the Revenue. The Circulars issued in the previous regime specifically addressed habitual offenders whereas in the present case, the assessee is a sterling taxpayer and had made substantial payments of taxes over the years.

Submissions by the Revenue:

- Incriminating documents and evidence were found during the course of investigation indicating huge additions were liable to be used against the assessee.

- The assessee was indulging in invoice trading activity which is an offence under the GST law.
- Section 67(5) states that, a person from whose custody documents have been seized shall be entitled to receive copies thereof or take extracts only in cases where in the opinion of the proper officer such supply of copies will not prejudicially affect the on-going investigation.

Legal Principles and Scope of Decision:

- An appreciation of the details in the departmental counter, the allegation regarding lack of co-operation and response on the part of the assessee appears contrary to facts.
- If the Department was of the view that documents secured are not liable to be granted for reasons that the documents were sensitive or such production would prejudice its interests, it ought to have said so in the counter. In the absence of any such averment, it must be concluded that there is no such apprehension in the mind of the department and the prayer of the assessee is thus, liable to be accepted.
- As far as statements are concerned, there being no condition imposed/ restriction placed in statute, copies of the same will be furnished to the assessee. Section 132 imposes a punishment upon the assessee who 'commits' an offence. There is no dispute whatsoever that the offences set out under (a) to (l) of the aforesaid section refer to those items, that constitute matters of assessment and would form part of an order of assessment, to be passed after the process of adjudication is complete and taking into account the submissions of the assessee and careful weighing of evidence found and explanations offered by the assessee in regard to the same.
- The use of words 'commits' make it more than amply clear that the act of committal of the offence is to be fixed first before any punishment is imposed.
- Thus, 'determination' of the excess credit by way of the procedure set out in section 73 or 74, as the case may be, is a prerequisite for the recovery thereof. Sections 73 and 74 deal with assessments and as such it is clear and unambiguous that such recovery can only be initiated once the amount of excess credit has been quantified and determined in an assessment. When recovery is made subject to

'determination' in an assessment, the argument of the Department that punishment for the offence alleged can be imposed even prior to such assessment, is clearly incorrect and amounts to putting the cart before the horse. The exceptions to this rule of assessment are only those cases where the taxpayer is a habitual offender that/who has been visited consistently and often with penalties and fines for contraventions of statutory provisions. It is only in such cases that the authorities might be justified in proceedings to pre-empt the assessment and initiate action against the taxpayer in terms of section 132, for reasons to be recorded in writing.

- While the activities of a taxpayer contrary to the scheme of the Act are liable to be addressed swiftly and effectively by the Department, (the statute in question being a revenue statute where strict interpretation is the norm), officials cannot be seen to be acting in excess of the authority vested in them under the statute. The power to punish, set out in section 132 would stand triggered only when it is established that a taxpayer has 'committed' an offence that has to necessarily be post-determination of the demand due from a taxpayer, that itself has to necessarily follow the process of an assessment.

Conclusion:

- The Revenue has to show that the taxpayer is a perpetual defaulter or has evaded tax in the past and there must be reasons recorded before the action by way of arrest and punishment to follow are taken against the taxpayer during the course of investigation.
- Protection from arrest in writ proceeding could be ordered in an appropriate case pending investigation.

47. ARVIND KUMAR MUNKA vs. UNION OF INDIA [2019-TIOL-2948-HC-KOL-GST] ; [2020-TIOL-510-HC-KOL-GST]

Whether statutory bail and detention beyond 60 days in case of arrest and continued arrest sustainable after filing of charge sheet

Background:

- The assessee, a Chartered Accountant claimed that he was falsely arraigned as an accused on the allegation that he connived with other accused persons for issuing fake GST invoices without actual supply of goods to the buyers.

- The assessee's successive bail applications were rejected on considering the nature and magnitude of the alleged unlawful activity and also on the consideration that there were possibilities of attempts to influence witnesses or destroy the evidence or evade further investigation and trial.
- The assessee renewed his prayer after his bail application was rejected *vide* order dated 24.12.2019. In the renewed bail prayer, the assessee submitted that he is in custody since 06.06.2019 and his further detention is not warranted as the charge-sheet has already been submitted for the investigation.

Point of Dispute:

- Whether the detention in custody of an arrested person could be continued in terms of section 167 of the Cr.P.C., even in cases where the challan or charges were not filed within the statutory period of 60 days?
- Whether the continued arrest of the person is sustainable after filing of the charge sheet?

Submissions by the Assessee:

- Detention in custody beyond the 60th day after filing of the challan or charges is not in accordance with section 167 of Cr.P.C.
- The assessee had extended full cooperation. No notice was issued under section 73 and the assessee was falsely implicated in the case by the Revenue.

Submissions by the Revenue:

- The assessee was arrested on 06.06.2019 and on the same date he was produced before the Chief Judicial Magistrate ("CJM"), but after considering the gravity of the case, the assessee was remanded to judicial custody. On 61st day from the date of arrest, a bail application was moved (i.e., on 06.08.2019) and on the very same day, the prosecution filed the charge sheet. Therefore, the CJM by his order dated 06.08.2019 rejected the prayer for bail holding that the case for grant of default bail does not arise.

Legal Principles and Scope of Decision:

- The right to bail accrues to an accused in case such a situation is enforceable, only prior to the filing of the challan and does not

survive or remain enforceable on the challan being filed, if already not availed of.

- Prima facie on the basis of documentary evidence, the assessee along with other persons caused a huge loss to the Government exchequer. So obviously, the Commissioner has reason to believe that the assessee had committed offence under section 132 and as such authorized the concerned officer to arrest the assessee under section 69 thereof.

Conclusion:

- The detention on the basis of reasons recorded by the Commissioner could be extended even beyond 60 days in a case where the Revenue files a challan before grant of the bail to the accused.
- The Court turned down the prayer for release on bail stating that section 41(A)(3) of Cr.P.C. does not provide an absolute irrevocable guarantee against arrest and the continued arrest of a person is sustainable even after filing of the charge sheet.
- However, the Court gave him the liberty to approach the authority for compounding of the offence under section 138 and reiterated that the assessee may be released on bail by the Trial Court if he approached the authority for compounding of the offence under section 138 on deposit of at least 20% of the evaded amount.

48. DHABRIYA POLYWOOD LIMITED vs. UNION OF INDIA [2022 (5) TMI 184 (GUJARAT HIGH COURT)]

Mere wrong mention of vehicle type in the e-way bill cannot be the ground for detention of goods along with the vehicle.

Background:

- Goods of the assessee were being supplied from its factory in Jaipur to a buyer in Bhavnagar (Gujarat) after charging applicable IGST. The goods were being transported through a truck that carried valid documents i.e., invoice, lorry receipt and an e-way bill, which was generated through official GST portal at the time of removal of goods from the factory premises. However, there was a small mistake of selecting wrong [Over Dimensional Cargo (ODC)] type of vehicle in the e-way bill.
- Due to the mistake in the e-way bill, the vehicle was detained by the GST authorities and Form GST MOV-06 and MOV- 07 for the detention of the goods and vehicle was issued with the reason "wrong vehicle type" (ODC).
- The assessee filed a writ petition before the Hon'ble Gujarat High Court seeking release of the goods and the vehicle.

Point of Dispute:

- Whether proceedings under section 129 can be initiated for detention of goods along with the vehicle due to selection of the ODC vehicle type while generating e-way bill?

Legal Principles and Scope of Decision:

- The *C.B.I. & C. Instruction vide F. No. CBEC/20/16/03/2017-GST dated 14.09.2018 (Circular No. 64/38/2018-GST, dated 14.09.2018)* makes it clear that in case a consignment of goods is accompanied with an invoice or any other specified document and also an e-way bill, the proceedings under section 129 may not be ordinarily initiated, more particularly, in the situation, as highlighted in para 5 of the aforesaid Circular (i.e., spelling mistakes, error in pin-code, error in address of the consignee to the extent other requisite particulars are

correct, error in one or two digits of the document, error in 4 or 6 digit level of HSN where the first 2 digits of HSN are correct and the rate of tax mentioned is correct, error in one or two digit/ characters of vehicle number etc.)

- The goods of the assessee fall within para 5 of the Circular referred to above. The manner in which the assessee has proceeded so far and also having regard to the fact that very promptly he brought to the notice of the authority concerned and admitted its mistake, the assessee should be given some benefit of doubt.

Conclusion:

- The Gujarat High Court quashed and set aside the impugned notice issued by the GST authorities in Form GST MOV-07. Consequently, the order of detention passed under section 129(1) in Form GST MOV-06 was also quashed and set aside by the Gujarat High Court.

49. HINDUSTAN STEEL AND CEMENT vs. ASSISTANT STATE TAX OFFICER [2022 SCC ONLINE TS 1527] (KERALA HIGH COURT]

Voluntary payment of demand for release of goods/ conveyance does not take away the right to file appeal

Background:

- Goods/conveyance of the assessee's were the subject matter of detention/seizure under section 129 and the assessee in these cases opted to pay amounts in terms of the pre-amended provisions of section 129(1)(a), to get the goods/conveyance released pending finalisation of proceedings. On payment of the amount, the goods and the conveyance were released as contemplated by section 129(1) by issuing Form GST MOV-05.

- While an order was issued in Form GST MOV-09 [issued under section 129(3)], a corresponding summary of order/demand in Form GST MOV-07 was not issued. As a result, the assessee was not in a position to approach the appellate authority by way of filing an appeal under section 107.

Point of Dispute:

- Whether a person who opts to make payment in terms of clause (a) of sub-section (1) of section 129 to get goods/conveyance/documents

detained or seized in proceedings under section 129 thereof, released, is deprived of his right to file an appeal against the proceedings?

Submissions by the Assessee

- Under GST provisions, the order under section 129(3) issued in Form GST MOV-09 should have been accompanied by a summary of the order in Form GST MOV-07. Without a summary of the order, the assessee was disabled from filing an appeal as the system accepts an appeal only if there is a summary of an order issued in Form GST MOV-07.

Submissions by the Revenue:

- An assessee or a person who is the subject matter of proceedings under section 129, if he opts to make payment of tax and penalty in terms of section 129(1)(a), the proceedings under section 129 come to an end.
- Payments made under section 129(1)(a) are made and accepted in Form GST DRC-03, which is a form for voluntary payment and such payments cannot be the subject matter of any refund or adjudication at a later point of time.
- On payment of the amount under section 129(1)(a), the entire proceedings should be treated as having concluded and the payment represents an acceptance of the fact that the discrepancies noted by the intercepting officer and leading to the initiation of proceedings under section 129 were well founded.
- Once a payment is made under section 129(1)(a), no demand can be raised through Form GST DRC-07.

Legal principles and Scope of Decision:

- Section 107 provides an opportunity to a person aggrieved to challenge any order or any proceedings issued under any provision of the Act and the wording of that section does not really make a distinction between persons who opt to make a payment under section 129(1)(a) and persons who opt to provide security as provided in section 129(1)(c).
- Section 129(3) provides that irrespective whether the person suffering the detention chooses to make payment under section 129(1)(a) or

provide security in terms of section 129(1)(c), the officer detaining or seizing the goods or conveyance has to issue a notice specifying the tax and penalty payable.

- Rule 142(5) provides for a summary of order issued under section 129 to be uploaded electronically in Form GST DRC-07, specifying therein the amount of tax, interest and penalty payable by the person chargeable with tax.
- *Circular No. 41/15/2018-GST dated 13.04.2018* ('the Circular') further clarifies that a summary of every order in Form GST MOV-09 and Form GST MOV-11 shall be uploaded electronically in Form GST-DRC-07 on the common portal.
- The provisions of section 129(5) only contemplate the ending procedure for detention or seizure of goods or documents or conveyances. It is always open to an assessee who suffers proceedings under 129 to challenge those proceedings if he feels that the demand has been illegally raised on him.
- Section 107 is widely worded and provides that any person aggrieved by any decision or order passed under the GST Acts by an adjudicating authority, may appeal to such appellate authority as may be prescribed, within three months, from the date on which such decision or order is communicated to such a person. The person aggrieved by the proceedings under section 129 has the right to challenge those proceedings, culminating in an order under section 129(3), before the duly constituted Appellate Authority under section 107.
- The fact that the system does not generate a demand or that the system had not provided for the filing of an appeal without a demand does not mean that the intention of the legislature was different.

Conclusion:

- It was held that an assessee is entitled to file an appeal even after he chooses to make payment of demand under section 129(1)(a) for release of the seized goods/ conveyance etc.

Applicability of Anticipatory Bail under section 438 of Cr.P.C. in CGST Act Proceeding

50. SRI HANUMANTHAPPA PATHRERA LAKSHMANA vs. STATE [2020-TIOL-1029-HC-KAR-GST]

A person can apply for anticipatory bail under Cr.P.C., where he apprehends arrest under the GST law.

Background:

- The assessee was a dealer in ferrous and non-ferrous scrap and based on summons issued under section 70 apprehended that he would be arrested by the GST authorities in exercise of the powers under section 69.

Point of Dispute:

- Whether anticipatory bail under section 438 of Cr.P.C. could be granted in matters arising under the CGST Act?

Submissions by the Assessee:

- The Revenue had conducted inspection of the premises and recovered documents under *mahazar* and also issued summons under section 70 and, therefore, there was a reasonable apprehension that the assessee would be arrested.

Submissions by the Revenue:

- The assessee was a habitual offender, he might commit the same offence again and he was deliberately avoiding his appearance for the purpose of enquiry proceedings.
- The anticipatory bail was not maintainable, and it was pre-mature. In similar cases, the Telangana High Court had dismissed the petitions (i.e., *P.V. Ramana Reddy vs. Union of India [2019-TIOL-873-HC-Telangana-GST*]

Legal Principles and Scope of Decision:

- The Co-ordinate Bench of Karnataka High Court while granting anticipatory bail considered the provisions of sections 132, 137 and 138 and by considering the principle laid down by the Hon'ble Supreme Court in the case of *Siddharam Satlingappa Mhetre vs. State of Maharashtra [(2011) 1 SCC 694]* granted the relief by imposing conditions.
- The Telangana High Court in *P V Ramana Reddy (supra)* did not hold that under section 438 of Cr.P.C., bail application was not maintainable in case of an offence which is punishable under the CGST Act.
- There is no statutory bar in the CGST Act either expressly or impliedly for entertaining the bail petition under section 438 of Cr.P.C.
- Once a person apprehends his arrest in the hands of the Commissioner under section 69, the person has a statutory right to seek anticipatory bail under section 438 of Cr.P.C.

Conclusion:

- A person can approach the Courts for seeking anticipatory bail under section 438 of Cr.P.C., if arrest is apprehended by such person under the GST law.

ISBN : 978-93-90668-54-0

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