Legal Updates

January 2022

Summary of Major Legal Updates

Key Highlights:

- SC order extending period of limitation is applicable to refund application under GST law
- No tax evasion can be presumed on mere non-extension of validity of e-way bill due to traffic blockage and agitation
- The Proper Officer and even the Appellate Authority are not correct in rejecting the application for registration, where all documents as required by the law are submitted.
- The amount paid by the petitioner under coercion shall be treated as an amount paid by the petitioner under protest and will be subject to the final appropriation in the proceedings.
- No GST on recoveries made from employees for canteen, transport, notice pay etc.

1. SC order extending period of limitation applicable to refund application under GST law

[SAIHER SUPPLY CHAIN CONSULTING PVT. LTD 2022 (1) TMI 494 - BOMBAY HIGH COURT]

The refund claim filed by the petitioner under the GST law was rejected on the ground that the same was time-barred as it was filed after the expiry of two years. Therefore, the petitioner filed a writ before Bombay HC for restoration of the said refund application. The petitioner contended that the extension granted as per the SC by exercising powers under Article 142 read with 141 was a binding order within the meaning of Article 141 on all Courts/Tribunals and Authorities. Therefore, the Revenue could not have rejected the refund application on the ground of limitation.

The Hon'ble High Court observed that, the limitation period falling between 15th March 2020 and 2nd October 2021 was excluded by the SC, irrespective of the limitation prescribed under the general law or special law, whether condonable or not. Further it was stated that the Revenue is bound by the order of the SC and is required to exclude the period of limitation falling during the said period. Since the period of limitation for filing the refund application fell between the said period 15th March 2020 and 2nd October 2021, the said period stood excluded. The refund application filed by the petitioner, thus, was within the period of limitation prescribed under the circular No.20/16/04/18- GST dated 18th November 2019. The order of rejection passed by the Revenue is contrary to the order passed by the SC and is accordingly set aside

Comments: This decision being the first by Mumbai HC, it provides a great relief to all the taxpayers where the refund claims have been rejected due to the expiry of the limitation period. However, practically the adjudicating authorities are reluctant to grant the relief in absence of any direct order or clarification from the board.

On a similar issue, the Madras High Court in the case **M/s. GNC INFRA LLP** and **LOGICVALLEY TECHNOLOGIES PRIVATE LIMITED** held that the SC decision extending the limitation period should squarely be applied to refund claim applications under GST law as well. Accordingly, the HC had set aside the refund rejection order and directed the Revenue to examine the refund on its merits.

Recently, due to the surge in covid cases, the SC has again restored its order, dated 23 March 2020 and its subsequent orders, dated 8 March 2021, 27 April 2021, and 23 September 2021. The SC has directed that the period from 15 March 2020 till 28 February 2022 shall stand excluded for limitation, as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings.

2. No tax evasion can be presumed on mere non-extension of validity of e-way bill due to traffic blockage and agitation

[ASSISTANT COMMISSIONER (ST) & ORS. VERSUS M/S. SATYAM SHIVAM PAPERS PVT. LIMITED & ANR. 2022 (1) TMI 954 - SC ORDER]

This petition has been filed by the Revenue Department ("the Petitioner"), being aggrieved of the judgment passed by the Hon'ble Telangana High Court in Satyam Shivam Papers Pvt. Ltd. v. Assistant Commissioner ST & Ors. Wherein, the Court set aside the order passed by the Petitioner in Form GST MOV-09, imposing tax and penalty on Satyam Shivam Papers Pvt. Ltd. ("the Respondent") due to the expiry of the e-way bill and deprecated the Petitioner 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 compelling the Petitioner to pay INR 69,000/- by such conduct. It was held that, no presumption can be drawn that there was an intention to evade tax on account of non-extension of the validity of the e-way bill by the Respondent. Further, directed the Petitioner to refund the amount collected from the respondent with interest @6% p.a. and imposed fine of INR 10,000/- payable to the Respondent.

The Hon'ble Supreme Court of India held as under:

- Noted that, the Hon'ble High Court had meticulously examined and correctly found that no fault or intent to evade tax could have been inferred. Further, the amount of costs as awarded is rather on the lower side, considering the overall conduct of the Petitioner and the harassment faced by the Respondent.
- There was no intent on the part of the Respondent to evade tax and the goods could not be taken to the destination within time, for the reasons beyond the control of the Respondent, including the traffic blockage due to agitation, for which the Petitioner alone is responsible for not providing smooth passage of traffic. Opined that, there is no question of law nor the question of fact involved in the matter and the petition filed by the Respondent has been misconceived.
- Enhanced and imposed the fine with a further sum of INR 59,000/- on the Petitioner the amount toward costs, payable within 4 weeks, over and above the sum of INR 10,000/- already awarded by the Hon'ble Telangana High Court.
- Also clarified that the amount of costs, to be recovered, directly from the person/s responsible for such entirely unnecessary litigation.

Comments: Another incident wherein assessee is being forced to approach court of law for justice, even when the issue is not major, but revenue's stand is catastrophic. The Hon'ble Supreme Court held that, in absence of any evidence, tax evasion cannot be presumed merely on account of non-extension of validity of e-way bill. The concept of e-way bill is introduced to track and punish the tax evaders i.e., involved in the clandestine removal of the goods. The penal provisions extend to 200% of the tax value and in some cases 50% of the value of the goods. Such extreme steps must be invoked only where department proves the fraudulent intentions like, where the e-way bill is not generated or incorrectly generated to make a clandestine removal of the goods, etc. However, if no such fraudulent activity is proved, then the charge of such high penalties would not stand ground. Many High Courts have also held that the vehicle and goods cannot be detained when the mistake is clerical in nature. Considering the difficulties faced by the trade and decision of various High Court, the CBIC has issued Circular No. CBEC/20/16/03/2017-GST dated 14-9-2018, however, the local squad officers are not implementing the same in true spirit which is causing undue hardship to the trade. It is expected that Department should come up with some novel solution or crystal- clear guidelines to avoid such harassing cases against the assessee. In order to emphasizes the gravity of initiation of such unnecessary litigations, Hon'ble Apex court had imposed additional fine of Rs 59,000/- on the petitioner representing revenue.

3. Issuance of summons in casual manner to be avoided

[FSM EDUCATION PVT. LTD. VERSUS UNION OF INDIA, THROUGH THE PRINCIPAL SECRETARY, DEPARTMENT OF REVENUE, MINISTRY OF FINANCE, MUMBAI AND OTHERS 2022 (1) TMI 551 - BOMBAY HIGH COURT]

The Petitioner received a communication dated 2nd December 2021 requesting to submit certain documents. The Petitioner has submitted various documents from time to time to the respondents. Later, respondent issued summons on the Petitioner on 15th December 2021, to remain present before Respondent on 16 December 2021 at 11.20 a.m. The said summons were issued to the Petitioner company without any details of the inquiry. The Petitioner deputed Mr. Piyush Patel, Accounts Manager of the Petitioner for the said hearing. The said Manager, was grilled and interrogated for a period of about five hours from 4.00 p.m. to 9.00 p.m. and was subjected to cross-questioning. The Respondents issued summons on 23 December 2021 to Mrs. Tanuja Gomes, one of the Directors of the Petitioner for producing documents and providing oral evidence also to remain present before his office on 29 December 2021.

In the writ petition filed, the petitioner relied on Question 34 of the FAQs dated 15 December 2018 issued by GST Department and submitted that it is clear beyond reasonable doubt that the assessee can be summoned only as a last resort and as far as practicable, details can be obtained from an assessee by way of an ordinary letter. It is submitted that all the documents are furnished as requisitioned by the Respondents.

The summons cannot be issued to coerce and pressurize the Petitioner or its director. It is submitted by learned Counsel for the Petitioner that a Consultant of the Petitioner would remain present before the Respondents and would provide all details and the particulars as may be further requisitioned by the Respondents.

The Hon'ble High Court passed the below order:

The Respondents are directed to inform the Petitioner the list of further documents required to be produced by the Petitioner and other requisite queries to which, they seek clarifications from the Petitioner within one week.

The Consultants, of the Petitioner would furnish all the documents on behalf of the Petitioner and would furnish such details as per the requisitions as would be made by the Respondents, within the prescribed time or such period as may be extended by the Respondents

It is for the Respondents to decide whether Ms. Tanuja Gomes, director of the Petitioner shall be still called for recording of evidence after furnishing of the documents and information by the Consultant of the Petitioner.

If any summons is issued by the Respondents, the summons shall indicate the purpose of issuing summons to the Petitioner with clear seven days' notice before fixing the date for recording the statement of the said Director Ms. Tanuja Gomes. Ms. Tanuja Gomes shall appear before the Authorities on the appointed date and cooperate with the Respondents in recording her evidence.

The impugned summons dated 23 December 2021 issued to Ms. Tanuja Gomes, Director of the Petitioner company would not survive in view of the undertaking given by the Petitioner and in view of the aforesaid directions issued by this Court. Writ Petition is disposed of accordingly.

Comments:

HC in this judgement did not explicitly mention that summons should be the last resort but the gist of final order hints towards the same. Also, summons without reasonable opportunity to appear cannot withstand legality. Discharge of summons is a genuine recourse to the legal procedure available with the Department. However, discharge of summons in such fashion as in the above case canvases the Revenue's actions as an attempt to exhibit the power of Authorities. Indeed, avoidance of such incident will aid in building healthy litigation process.

4. The Proper Officer and even the Appellate Authority are not correct in rejecting the application for registration, where all documents as required by the law are submitted.

[RANJANA SINGH VERSUS COMMISSIONER OF STATE TAX AND 2 OTHERS 2021 (12) TMI 832 - ALLAHABAD HIGH COURT]

The petitioner is engaged in the business of providing employment through consultancy. Petitioner has applied for grant of GST registration as per the provision of section 25 of the Act, read with rules 8 & 9 furnishing all the requisite documents as prescribed under the Act, i.e., Aadhar Card, PAN card, house tax receipt. Thereafter, on the date of inspection, all the details, as required by the Serving Officer, were provided. Thereafter, a notice was issued requiring the petitioner to submit electricity bill or house tax bill or any other document related to the business. In reply to it, information and documents as required were furnished by the petitioner, but by the impugned order dated 23.09.2021, the same was rejected for non- submission of electricity bill. The said order was assailed before the appellate authority, but the appellate authority too has rejected the appeal confirming the order of rejection. Hence this petition filed. Learned counsel for the petitioner submits that the order passed by the authorities are patently illegal, perverse and against the provisions of law. He submits that the provision of the Act only requires for providing documents, i.e., PAN and Adhar as well as the property tax receipt, which were furnished by the petitioner, but without looking into the same, the impugned orders have been passed. Therefore, he prays for quashing the impugned orders.

Per contra, learned Standing Counsel, at the very outset, submits that under rule 8 of the Rules, forms are prescribed, i.e., form GSTR-1, which have two parts, i.e., Part A and Part B. Part B contains list of documents required for the purpose as mentioned therein and the same was required for submission of electricity bill or property tax receipt. Therefore, the order for non-compliance was passed.

By referring to section 25 read with rules 8 and 9, the Hon'ble High Court observed that:

- In the case in hand, PAN and Aadhar details as well as property receipts were provided as per the provisions of the Act and Rule. On perusal of the show cause notice, rejection order and the appellate order, it appears that firstly, clarification with regard to the possession of business premises was required to be specified and secondly submission of electricity bill / house tax receipt was required. The petitioner has submitted the explanation with regard to the nature or possession of the business premises as the owner and also submitted the house tax receipt in compliance with the show cause notice. But the authorities below without whispering any word or assigning any reason had rejected the application for non-specifying possession of the business premises and insisted for submission of electricity bill

- It is clear from the records that all the documents as required under the Act and law as well as in compliance to the show cause notice were furnished by the petitioner and without pointing out any defect or short coming therein, the application should not have been rejected.
- Before parting with the judgement, the Court is constraint to observe that the two authorities of the State have acted only with a view to harass the petitioner which cannot be accepted at any cost. This attitude of the respondents in this petition cannot be tolerated as the officers are being State functionary has to act fairly and their action must be in consonance with the provisions of the Acts as well as Rules
- In view of the foregoing discussions, the impugned orders dated 23.09.2021 and 28.10.2021 cannot be sustained in the eyes of law. The respondents are directed to pass an appropriate order on the material available on record within a period of seven working days from the date of receipt of a copy of this order.

Comments: Yet another whip by the Hon'ble High Court, on harassment by certain field officer. Recently, Department has become very reluctant and cautious to grant registration, due to fake invoice rackets. However, merely because of some transactions, all assessee cannot be sentenced to undue hardship. Further the officers are empowered to demand for the documents prescribed under law not as per their own will. Officers cannot resort to harsh action of denial of registration merely because the documents asked by them are not supplied by the applicant seeking registration.

5. Whether the period of limitation for filing of an appeal will start on receipt of the order manually even where the same has not been uploaded electronically on GSTN Portal?

[JOSE JOSEPH, VERSUS ASSISTANT COMMISSIONER OF CENTRAL TAX AND CENTRAL EXCISE, ALAPPUZHA, ADDITIONAL COMMISSIONER (APPEALS) , KOCHI, THE UNION OF INDIA 2022 (1) TMI 50 - KERALA HIGH COURT]

The petitioner was manually in receipt of the order of rejection of the refund. The petitioner has filed the appeal manually as no order has been uploaded electronically. The petitioner was in delay of 183 days in filing these appeals. Relying on the judgment of Debabrata Mishra v. Commissioner of Central Tax and GST (Orissa High Court) and Assistant Commissioner (CT), LTU, Kakinada & Ors. v. Glaxo Smith Kline Consumer Health Care Limited (Supreme Court of India) the respondent has rejected the appeals on the ground that the same is time barred Aggrieved by the same, the petitioner has approached the High Court.

The Hon'ble high court observed that:

- Section 107(1) of the Act contemplates the filing of an appeal within three months from the date on which the decision or order is communicated to such person
- While dismissing the appeals as time-barred, the Appellate Authority went in a mechanical manner without appreciating that the orders that were impugned before the Appellate Authority, though required to have been uploaded in the web portal, were never uploaded.
- When the mode of appeal prescribed by Rules is only the electronic mode, the time limit of three months can start only when the assessee had the opportunity to file the appeal in the electronic mode. The assessee cannot be blamed if he waited for the order to be uploaded to the web portal, even if he had in the meantime received the physical copy of the order.
- In this context, it is appropriate to notice that there is no provision for filing an appeal manually. In the absence of such a provision, even though the petitioner has preferred appeals in the manual form subsequently, the same cannot work out as a prejudice to the petitioner to apply the period of limitation from the date of serving of physical copy of the order.
- The petitioner is entitled to have his appeals that were filed manually, to be treated as having been filed within time, in the light of the failure of the department to upload order in the web portal. Therefore, order passed by the respondent in all these writ petitions are set aside and the respondent is directed to treat the appeals as filed within time and thereafter, to pass final orders in the appeals on merits, after affording sufficient opportunity of hearing to the petitioner.

Comments: The provision of GST law nowhere provides for the manual filing of the appeals. The provisions clearly state that the appeal needs to be filed online. In absence of the order being uploaded on the portal, it is not possible to file appeal online. The Hon'ble high Court in the present matter has followed the judgement of the Division Bench of Hon'ble Gujarat High Court in case of *Gujarat State Petronet Limited* and held that the limitation shall commence only after the order in original, to be appealed against, is uploaded on the portal. It is a trite law that when a particular procedure is prescribed then all other procedures/modes are excluded. This principle becomes all the more stringent when statutorily prescribed.

6. Whether the ad-interim relief for non-recovery of tax shall be granted by the High Court where on similar issue the Hon'ble Supreme Court has granted such relief?

[M/S RATAN BLACK STONE, M/S BIHAR BENTONITE SUPPLY CO., M/S BANDANA STONE WORKS, M/S MAA AMBA STONE WORKS, MADAN KANT VERSUS UNION OF INDIA THROUGH PRINCIPAL COMMISSIONER, CENTRAL GST & CENTRAL EXCISE, RANCHI, THE SUPERINTENDENT (PREVENTIVE) , CENTRAL GST & CENTRAL EXCISE, RANCHI, THE SUPERINTENDENT, CENTRAL GST & CENTRAL EXCISE, RANCHI, THE STATE OF JHARKHAND THROUGH ITS SECRETARY, DEPARTMENT OF STATE TAX 2022 (1) TMI 608 - JHARKHAND HIGH COURT]

Petitioner filed this petition seeking declaration that no GST is leviable on the amount of Royalty and District Mineral Fund Contribution paid by him to the State of Jharkhand. Petitioners was in receipt of the notice wherein the respondent has asked the petitioners to pay the tax on Royalty and District Mineral Fund Contribution paid by him to the State of Jharkhand. Petitioners also sought for quashing such notices.

Learned counsel for the petitioners has referred to the order dated 02.03.2021 passed in the batch of writ petitions led by WPT No. 3878/2020. This court upon consideration of the pleadings on record and rival submission of the parties, had stayed the recovery of service tax for grant of mining lease / royalty from the petitioners. It is submitted by the learned counsel for the petitioners that this court had however refused to grant interim protection, so far as levy of CGST and/or JGST is concerned. Learned counsel for the petitioners therein had approached the Hon'ble Supreme Court of India against refusal of interim protection, so far as levy of CGST on the payment of royalty and District Mineral Fund Contribution is concerned. In the referred order dated 04.10.2021, the Hon'ble Apex Court has stayed the payment of GST for grant of mining lease/royalty by the petitioner. Therefore, many petitioners had withdrawn their petition at Hon'ble Supreme Court of India and again approached this Hon'ble Court for such relief.

The Hon'ble high court observed that:

On consideration of the materials on record placed by the parties and in view of interim protection granted by the Apex Court in Writ Petition (Civil) No. 1076/2021 in the referred case, we deem it proper to grant similar interim relief (s) to the petitioners herein. Accordingly, until further orders, payment of GST for grant of mining lease/royalty by the petitioners, shall remain stayed.

Learned counsel for the Respondent CGST and State of Jharkhand are allowed three weeks' time to file counter affidavit in the matter. One week time thereafter is allowed to the learned counsel for the petitioners to file reply, if so advised.

Let these writ petitions be tagged along with W.P. (T) No. 3878/2020 where similar issues are involved and be listed accordingly.

Comments: Since the similar issue is being examined by the Hon'ble Supreme Court and the ad interim relief is granted to the petitioner, similar relief has been extended to the petitioner by the Hon'ble High Court of Jharkhand.

7. No RCM liability will arise on GTA services when no consignment note is issued by vendor.

[M/S. BHARAT SWABHIMAN (NYAS) VERSUS COMMISSIONER CUSTOMS, CENTRAL EXCISE & SERVICE TAX, DEHRADUN 2022 (1) TMI 1127 - CESTAT NEW DELHI]

An enquiry was, conducted in connection with non-payment of service tax under reverse charge on freight charges paid by the appellant. Show cause notice in this regard was issued on the Appellant. the appellant filed detailed reply to the show cause notice. Show cause notice was adjudicated upon by the Commissioner by order dated 13.07.2016. The demand of service tax was confirmed with respect to freight charges paid by the appellant. The appellant has filed this appeal to assail the order passed by the Commissioner confirming the demand of service tax with interest and penalty.

The Hon'ble tribunal has observed that:

Goods transport agency' service has been defined in section 65(26) of the Finance Act to mean any person who provides service in relation to transport of goods by road and issues consignment notes, by whatever name called. In the present case, consignment notes have not been issued and so the activities cannot be said to be covered under 'goods transport agency' services

In this connection it would be useful to refer to the decision of the Tribunal in ***Bhoramdeo Sahakari Shakhar Utpadam Karkhana*** *vs.* ***Commissioner of Customs, Central Excise & Service Tax, Raipur [2019 (10) TMI 1416 - CESTAT, New Delhi]*** wherein it has been held that service tax can be levied only if consignment notes are issued.

Thus, service tax liability could not have been fastened on the appellant under the reserve charge mechanism. The order dated 13.07.2016 passed by the Commissioner, therefore, cannot be sustained. It is, accordingly, set aside and the appeal is allowed.

Comments: Another add on in the pile of favorable judgements on the issue. Several tribunals and courts have frequently held that, RCM applicability arrives only in case of GTA and GTA services arrives only in case consignment note is issued by the service provider. The present judgement is in line with the settled law. In case where the consignment is not issued, then the transporter can be said to be a Goods Transport Operator which is specifically exempted from tax.

8. No GST on recoveries made from employees for canteen, transport, notice pay etc.

[M/S. EMCURE PHARMACEUTICALS LIMITED. 2022 (1) TMI 186 - AUTHORITY FOR ADVANCE RULING, MAHARASHTRA]

Applicant, a pharmaceutical company, provides canteen and bus transportation facility to its employees as a part and parcel of the employment arrangement, which contains the terms & conditions of employment as per its HR Policy.

The Applicant makes recoveries at subsidized rates for providing canteen and bus transportation facility to its employees and has engaged third party service providers to provide the said facilities and the service providers raise invoices with applicable GST. The Applicant recovers a certain portion of the consideration paid to such third-party service providers from its employees

Further there are instances where employees resign and leave the employment without serving the mandated notice period, in part or in full, the Applicant is entitled to monetary compensation, ("**Notice Pay Recovery**"). In such cases, the Applicant deducts salary for the tenure of notice period not served as a compensation for breach of the terms of the Employment Agreement by the employees.

The Advance Ruling Authority has observed that,

On recovery towards canteen and transport facility:

The GST would not be leviable on recoveries made from the employees towards canteen facility and transportation facility as the same does not constitute 'supply' under Section 7 of the Central Goods and Service Tax Act, 2017 ('CGST Act') on account of the following reasons:

- Section 7 of the CGST Act provides that for a transaction to qualify as a "supply" it should essentially be made in course or furtherance of business. However, the provision of canteen facility and transportation facility provided by the Applicant to its employees is a welfare measure and not connected to the functioning of the business of the Applicant
- Provision of said facilities are not the transactions made in the course or furtherance of business. Further, the said facilities are provided by the third-party vendors and not by the Applicant.

On notice pay recovery amount from the employees on account of not serving the full notice period:

The GST would not be leviable on notice pay recovery amount on account of not serving the full notice period as the same does not constitute 'supply' under Section 7 of the CGST Act on account of the following reasons:

- Clause 5(e) of Schedule II of the CGST Act provides that agreeing to the obligation to refrain from an act or tolerate an act or a situation or to do an act is supply of service. However, by virtue of the insertion of Section 7(1A), Schedule II is applicable only if an activity first qualifies as 'supply' under Section 7 (1) of the CGST Act
- In case of notice pay recovery amount, the employee opting to resign by paying an equivalent amount in lieu of waiver of the full notice period has acted in accordance with the contract and therefore no question of forbearance or tolerance arise. There is neither any activity nor any passive role played by the employer
- In absence of any consideration flowing from an act of forbearance in as much as there is no breach of contract. Further relying on the reasoning and decision given by the MPAAAR, mentioned above and the decision of the ***Hon'ble Madras High Court in W.P. Nos 35728 to 35734 of 2016 in the case of GE T&D India Ltd Vs Deputy Commr. of Central Excise, LTU, Chennai - 2020-VIL-39-MAD-ST,*** we hold that, the notice pay recovered by the applicant from its employees is not liable to GST.

Comments:

A favorable AAR is very rare phenomenon. However, the law regarding AAR is amply clear, which states that the ruling shall be binding only on the applicant and that too subject to change of law and facts. However, it does not mean that industry cannot pick the persuasive value from the rulings. In case, the fact of a particular assessee perfectly coincides with the facts in any advance rulings then

although the ruling is not binding as such on the assessee, but it will definitely aid the assessee in building a bona fide stance regarding the tax treatment which can be adopted from the ruling. Therefore, above ruling is welcome ruling clarifying difference in act of toleration and act as per the contractual terms in case of Notice pay and differentiating an act of providing facility from act in furtherance of business.

9. No service tax on flats handed over to existing society members under redevelopment model

[COMMISSIONER OF CGST & C. EX., THANE VERSUS M/S. ETHICS INFRA DEVELOPMENT PVT. LTD. 2022 (1) TMI 1015 - CESTAT MUMBAI]

Appellant is providing the taxable services under the category of "Construction of residential complex" as defined by Section 65(105) (zzzh) of the Finance Act, 1994 as amended. The projects were undertaken for re-development, for which appellant entered into Development Agreements with the existing Societies. It was observed during the course of audit that the appellant did not discharge service tax on the services viz., "construction of residential complex services" rendered by them towards the flats allocated to existing members. Thus, a Show cause cum demand notice was issued to the appellant.

This appeal filed by revenue is directed against the order in original dated 26.11.2019 of the Commissioner. By the impugned order, the Commissioner has dropped the entire demand of service tax made from the appellant as per the Show Cause Notice dated 09.10.2018.

The Hon'ble tribunal has observed that:

In the present case the respondent has discharged the complete service tax liability on the gross amount received by him for providing the taxable services. Once he has discharged the tax liability on the gross consideration received by him by the sale of flats to new buyers, the demand of service tax for the flats handed over to the existing members of the societies without any consideration cannot be sustained. We also find that in case of *Vasantha Green Projects [2019 (20) GSTL 568 (T- Hyd)] Hyderabad Bench* has observed as follows:

*"**10**. The adjudicating authority, in the impugned order, had relied upon Board Circular No. 151/2/2012-S.T., dated 10-2- 2012 to arrive at the value in the case of flats given to landowners to be determined based upon the value of the villas sold to prospective customers seems*

to be inappropriate reasoning and when the cost for acquisition of land has already been considered for discharge of service tax *of an amount received from prospective customers, taxing the same under the laws of service tax liability for the consideration received for the services to land owners, seems to be incorrect, as also on the case of LCS City Makers Pvt. Ltd. [2013 (30) S.T.R. 33 (Tri.-Chennai)].*

11. *We find that C.B.E. & C. vide circular dated 16-2-2006 in respect of collection of service tax under construction of complex services had issued instructions under Section 57B of Central Excise Act, 1944 which are made applicable to service tax under Section 83 of Finance Act, 1994, in Para No. 8 of the said instructions stated as under:*

"8. It is noticed that in the construction business different practices and financial arrangements concerning (a) promoters, developers & builders, (b) landowners (c) contractors and (d) buyers exist. These practices influence the 'taxable value' under the construction of complex services. In all such situations, the taxable value under section 67 shall be the gross amount charged by the service provider (builder in this case) for such services provided or to be provided by him. This read with notification No. 18/2005-S.T., dated 7-6-2005 entitles a builder/contractor an abetment of 67% on the gross amount charged, which shall include the value of goods and material supplied. Further, there is no deductions/exemptions provided for computation of such taxable value in the composite contract."

12. It can be seen from the abovesaid instructions, the gross amount charged by the builder is liable to tax. The said instructions are in force till today and has not been withdrawn by the Board. As already detailed herein above, the appellant has discharged the service tax liability on the gross amount charged i.e., consideration received from land owners in the form of kind other than cash (value of the land/development rights) + consideration received from prospective buyers in cash by way of financial arrangements on the construction services undertaken by the appellant on joint development basis. We also note that appellant had declared the same in the books of account like IT returns and ST-3 returns which has been certified by Chartered

Accountant wherein it is stated that service tax compliance is towards the payment of gross amount of the construction undertaken on joint development basis and received from the customers has been made. This leads to conclusion that it is evident that appellant has complied with the service tax liability on the construction undertaken on joint development basis on the value of construction which is mandated in Section 67 of Finance Act, 1994, read with rules made thereunder. In our view, if once the service tax liability has been discharged on the gross amount, demand of service tax on the same amount again would amount to double taxation.

13. *The reliance placed by Ld. DR on the case of LCS City Makers Pvt. Ltd. will also not carry the case of Revenue any further, as in that case Bench upheld the contention of the Revenue on a recording that "the facts and circumstances of the case do not warrant assessment of a different value, for services in respect of flats sold to individual buyers as compared to flat handed over to the land owners"; and recorded that the flats which were allotted to land owners were sold by land owners. In the case in hand, the facts are different.*

In respect of the arguments put forth on limitation, we do find that in the situation wherein the interpretation of the provisions of Section 67 and the rules were involved and there could be different interpretation. It is undisputed that appellant had declared the value received from prospective customers in their returns and discharged the service tax liability thereon, which include the value of consideration paid in kind towards the land, there cannot be any allegation that there was a deliberate intention on the part of the appellant as to non-payment of differential service tax liability. In our view, in the peculiar facts and circumstances of this case, it cannot be held that there was a mala fide intention on the part of the appellant to suppress any facts or make misstatements, with an intention to evade service tax liability. Accordingly, we hold that demands are also hit by limitation and extended period cannot be invoked for the demands received."

In view of discussions as above we do not find any merits in the appeal filed by the revenue and dismiss the same.

Comments:

One of the most intricate issues in GST and for that matter indirect taxation as a whole, is taxation of redevelopment projects. Each case in real estate is unique with its own factual matrix. It won't be appropriate to apply the ratio of above judgement in a blanket manner to all other cases. However, the gist of above judgement is very much material and can be guiding yardstick to other cases. The present favorable judgement has not considered the ratio in case of LCS City Makers Pvt. Ltd. which is against the assessee and relied on the judgement in case of Vasanta Green Projects which is again in favor of the assessee. Therefore, there is no concrete conclusion to derive from the varying judgements and fate of the complex issue of applicability of service tax/GST on new flats to existing owners in redevelopment project is still dangling around. A clarification in this regard with GST perspective would offer a great relief to the real estate industry.

10. The amount paid by the petitioner under coercion shall be treated as an amount paid by the petitioner under protest and will be subject to the final appropriation in the proceedings.

[M/S. ADITYA ENERGY HOLDINGS VERSUS DIRECTORATE GENERAL OF GST INTELLIGENCE DGGI, CHENNAI 2021 (12) TMI 1223 - MADRAS HIGH COURT]

The petitioner has filed this Writ Petition seeking for a Mandamus to direct the respondent to pay a sum of ₹ 17,27,790/- and ₹ 12,60,472/- which was paid by the petitioner during the course when the officers of the respondent visited the premises of the petitioner and investigated regarding the alleged wrong availment of Input Tax Credit. It is the case of the petitioner that the aforesaid amount was paid under coercion and therefore, the amount should be paid back to the petitioner

The Hon'ble high Court observed that:

The amount paid by the petitioner are only deposits pending proper adjudication under section 73/74 of the CGST Act, 2017. The amount paid by the petitioner shall be treated as amount paid by the petitioner "under protest" and will be subject to the final appropriation in the proceedings to be initiated under Sections 73/74 of CGST Act, 2017. The respondents perhaps are investigating and therefore, seized the documents from the petitioner. Considering the same, I am inclined to dispose the Writ Petition by directing the respondent or the proper officers concerned to complete the investigation and proceed to issue appropriate show cause notice to the petitioner within a period of six months from the date of receipt of a copy of this order

The respondent is also directed to return the photocopies of the seized documents to the petitioner if they have not been already returned to the petitioner. In any event, in the show cause notice under Sections 73/74 of CGST Act, 2017, the respondent shall clearly spell out the reasons and give details of the Relied Upon Documents based on which the demand is proposed to be made against the petitioner and why the amount already paid by the petitioner should not be appropriated. The entire exercise may be completed by the respondent preferably within a period of twelve months from the date of receipt of a copy of this order, i.e., show cause notice should be issued within six months from the date of receipt of a copy of this order together with all Relied Upon Documents. The respondent shall also return the originals of all the documents which are not required for the investigation. The petitioner shall cooperate with the respondent and file a reply within a period of thirty days from the date of issuance of show cause notice. The respondent shall pass appropriate orders within a period of twelve months as stipulated above. In case, there is no case made out in the show cause proceedings, the respondent shall refund the amount to the petitioner, in accordance with law.

Comments:

It is settled law that any amount paid during the investigation should be treated as deposit or amount paid under protest. The fate of any such amount paid will depend upon the outcome of the assessment proceedings and due procedure of issuance of SCN and passing order has to be followed in case the said amount is to appropriated. In case, during the proceeding it is concluded that no amount is payable by the assessee, then the amount cannot be withheld by revenue. As there are not many precedents specifically in GST, present judgement can be applied directly in other GST specific cases.

11. ITC Utilization cannot be denied merely on the ground that the inputs have no nexus with outward supply.

[IN RE: M/S. ARISTO BULLION PVT. LTD. [2022 (1) TMI 1056 - AAAR, GUJARAT]]

Appellant is a company engaged in the business of manufacturing and importing Gold & Silver Bullion including coins etc. Further, Appellant is also engaged in the trading of the Castor Oil Seeds.

The Appellant intended to pay GST by utilizing the ITC lying on the ECL taken on inward supply of Gold & Silver Dore / articles, for the payment of outward supply of Castor Oil Seeds.

This appeal has been filed against the order passed by the AAR, Gujarat in In Re: M/s. Aristo Bullion Pvt. Ltd. - 2021 (4) TMI 561 - AAR, GUJARAT , wherein it was held that, ITC balance available in the ECL legitimately earned on the inputs/raw-materials/inward supplies meant for outward supply of Bullions, cannot be used towards the GST liability on 'Castor Oil Seed' procured from agriculturists and subsequently meant for onward supply, as there is no nexus/connection between the inputs and final product since the inputs

are not used or intended to be used in the course or furtherance of the business of supply of 'Castor Oil Seeds.

Held - Section 16(1) of the CGST Act, 2017 nowhere mandates to prove one-to-one correlations of particular inputs of the particular outward supply and it only states the eligibility and conditions for taking ITC and does not impose any restriction on utilization of the legitimately earned ITC. Further, it does not prescribe that ITC available in ECL to be utilized only for the specific outward supply, on whose inputs such ITC was availed.

Once a taxpayer validly takes ITC on inputs, it merges into common pool of ITC under the ECL, which is not being maintained commodity wise. After merging of ITC in the common pool, it would not be always possible to identify that ITC taken on which particular input has been utilized. Thus, once the ITC is taken it can be used for payment of output tax on any taxable or zero-rated outward supply of the Appellant.

Therefore, it was held that, that payment of output tax on Castor Oil Seeds through utilization of ITC taken on Gold & Silver Dore Bars etc. cannot be denied merely on the ground that the inputs have no nexus with outward supply.

Comments:

Though this AAR is favorable for assessee but advance rulings are applicable on the applicants only. However, it would have a persuasive value to be considered as a precedent. If attention is paid to the value given by this ruling, it can be seen that this advance ruling has emphasized on the issue that once ITC on inputs is validly taken it becomes part of the common pool where it is not necessary to identify ITC taken on a particular input and its utilization and it is not important to have nexus between inputs and outward supply provided the ITC is correctly availed.

12. An error arising out of lapse and where parties seek to have the same rectified, the system must accommodate necessary procedure to rectify it.

[M/s BIOCON LTD- (2) TMI 23 - KARNATAKA HIGH COURT]

Petitioner is an exporter and had inadvertently selected 'No' in the rewards column in the shipping bills. Therefore, petitioner has sought for relaxation of the procedural requirements under the MEIS of selecting 'Yes' in the rewards column in the shipping bills.

The petitioner had approached the Policy Relaxation Committee (PRC), The Committee also accepts the factual assertion though concludes that in light of the automated system and noticing the mistake of the petitioner question of allowing rectification of the shipping bill did not arise. Therefore, petitioner has approached the court to quash the order passed by the committee.

It must be noted that "to err is human" and where ever such bonafide mistakes have happened procedures should be available to rectify such bonafide mistakes.

An error arising out of lapse and where parties seek to have the same rectified, the system must accommodate necessary procedure to rectify it.

Comments:

This is a welcome move by the court which has emphasized that substantive rights to the petitioner cannot be denied on technical grounds. This case law can also be used whenever any benefit is denied under GST on account of technical lapses. Courts have repeatedly taken this stand in various judgements such as ***Indian Metals and Ferro Alloys Limited*** and ***Anu Cashews and Mangalath Cashews***.