



ECONOMIC
LAWS
PRACTICE
ADVOCATES & SOLICITORS

TAX NEWSLETTER

October 2021

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DIRECT TAXATION

RECENT CASE LAWS



Article 8 of India-UAE DTAA covers income from feeder vessels

Avana Global FZCO (ITA No.: 7113/M/2019) (Mumbai ITAT)

- The taxpayer, a company incorporated and fiscally domiciled in the UAE, is engaged in the business of international operation of ships. The taxpayer has received income from freight under charter party arrangement as well as a pooling arrangement. The Tax officer (**TO**) denied the taxpayer's claim for exemption of freight receipts under the India-UAE Double Taxation Avoidance Agreement (**DTAA**). It further held that the assessee had a business connection by way of an exclusive agent and front office in India, which also constituted as a Permanent Establishment (**PE**) in India.
- The income was thus held taxable in India @ 7.5% of the gross receipts and a draft assessment order to the effect was issued to the taxpayer. Aggrieved by such a draft order, the taxpayer filed his objections before the Dispute Resolution Panel (**DRP**).
- **DRP** agreed with the **TO's** view that Article 8 of the India-UAE DTAA only included profits from operations of ships in international traffic and a pooling arrangement was not within the ambit of Article 8.
- On further appeal before Mumbai Bench of Income-tax Appellate Tribunal (**ITAT**), it was observed that the issue was covered in the taxpayer's favor by the Bombay High court (**HC**) ruling in the case of **Balaji Shipping (UK) Ltd. [(2012) 253 CTR 460 (Bom)]** against which a departmental appeal is currently pending in Apex Court. Bombay HC in the case of **Balaji Shipping (UK) Ltd. (supra)** has held that feeder vessels are covered by the term 'pool or slot arrangement' under the India-UK DTAA. **ITAT** remarked that the fact that an appeal against the **Balaji Shipping** judgement is pending before SC does not dilate the binding nature of this precedent.
- Thus, **ITAT** allowed the taxpayer's appeal and held that benefit under Article 8 of the India-UAE DTAA would be applicable to entire freight receipts irrespective of whether the earnings are relating to feeder vessels or ships in international traffic.

ELP Comments:

ITAT highlighted the fact that once the jurisdictional **HC** takes a view, **ITAT** is bound to follow the same in letter and in spirit and an appeal pending before Hon'ble **SC** nowhere dilates the binding nature of this view.

It is also interesting to note that **Ld. Mumbai Bench of ITAT** has, in the case of **Simatech Shipping Forwarding LLC [ITA No. 3819/Mum/2011]** held that the ratio of '**Balaji Shipping**' ruling would not be applicable to the India-UAE tax treaty as Article 8 of Indo-UAE treaty is differently worded from Indo-UK treaty whereas Article 8 of Indo-UAE treaty is more similar to Article 8 of Indo-US treaty.

Supply of design/drawing not characterized as fees for technical services (FTS), absent 'Make available' condition

Buro Happold Limited [ITA no. 1296/Mum./2017]

- The taxpayer, a company which is a tax resident of UK - provided engineering design and consultancy services. The taxpayer had earned income from provision of consulting engineering services to Buro Happold Engineers India Pvt. Ltd. (**BHEI**).
- The TO treated payment received for development and transfer of a technical plan or technical design as FTS as per Article-13(4)(c) of India-UK DTAA, irrespective of the fact that it also 'makes available' technical knowledge, experience, skill, knowhow, etc. The TO's interpretation was that the words 'make available' go with technical knowledge, experience, skill, knowhow, etc. but do not go with the development and transfer of a technical plan or a technical design. Accordingly, the TO brought to tax the amount received as FTS and levied tax @ 15% on the gross amount as per Article-13(2)(a)(ii) of the India-UK DTAA.
- The CIT(A) upheld the order of the TO. Being aggrieved with the order of the CIT(A), the taxpayer preferred an appeal before the ITAT.
- The ITAT observed that the taxpayer was entrusted with the work of providing consulting services for a twin city project by the Pune Municipality as well as other building projects in Mumbai. The ITAT perused sample copies of the agreement and observed that the work of the taxpayer was to provide consultancy services relating to the projects and accordingly, it was a fact on record that the technical designs/drawings/plans supplied by the taxpayer were project specific and could not be used in the future. Accordingly, the ITAT observed that the taxpayer did not 'make available' any technical knowledge, experience, skill, knowhow or processes.
- The ITAT on a careful reading of Article-13(4)(c) of the India-UK DTAA and relying on the rule of ejusdem generis remarked that it becomes clear that the words 'or consists of the development and transfer of a technical plan or technical design', appearing in the second limb has to be read in conjunction with 'make available technical knowledge, experience, skill, knowhow or processes'.
- ITAT placed reliance on the decision of Pune ITAT in case of **Gera Developments Pvt. Ltd. (160 ITD 439 [PUN])**, wherein an identical case of FTS as per Article 12(4)(b) of the India-US DTAA which is identically worded like Article 13(4)(c) of the India-UK DTAA was adjudicated. Here the ITAT had held that unless there is transfer of technical expertise skill or knowledge along with drawings and designs (and the receiver cannot independently use the drawings and designs in any manner for commercial purpose) payment received cannot be treated as FTS.
- In view of the above, the ITAT held that the amount received by the taxpayer be treated as business profit and in the absence of a PE in India, it cannot be brought to tax in India.



Management Support Services do not satisfy the ‘make available’ clause under India-Singapore DTAA and hence not taxable as FTS

Inter Continental Hotels Group (Asia Pacific) Pte. Ltd (ITA 4524/Del/2017)

- The taxpayer, a Company incorporated in Singapore is a part of the InterContinental Hotels Group (**IHG**), is in the hospitality business, operating under different hotel brands in the Asia-Pacific Region. The taxpayer provided operational and accounting support, training, recruitment and manpower services as ‘Management Support Services’ to InterContinental Hotels Group (India) Private Limited (**IHG India**). The TO held that such services provided are in the nature of FTS under the India-Singapore DTAA and accordingly, made an addition. CIT(A) confirmed the addition by holding that it was not merely a service but also was equipped with capacity building in order to manage hotel operations.
- Being aggrieved by the order of CIT(A), the taxpayer filed an appeal with the Delhi Bench of ITAT on the grounds that the services were not made available as they were required by IHG India on an ongoing basis. Also, in case the services conferred any technology, skill set, knowledge etc., there would have been no need of providing the services on an ongoing basis.
- On reviewing the definition of FTS under India-Singapore DTAA, the ITAT observed that ‘make available’ only means that the recipient of the service should be in a position to derive an enduring benefit and be in a position to utilize the knowledge or know-how in future by himself.
- On reviewing the services provided by the taxpayer and applying the ‘make available’ clause ITAT held:
 - the operational support (such as providing advice, information and competitive expertise on the operation of hotels, maintaining the quality, management techniques and coordinating the managerial plan and actions, advising on trends and changes in the hotel business and providing advice on the production of operating and capital budgets) can at best be managerial consultancy service. It is however not services ‘made available’ which the recipient could use or replicate
 - accounting support was in relation to the preparation of balance sheet and modalities and to provide advice on production of reports regarding budgets. These services are rendered repetitively based on the requirements of the clients and hence it cannot be treated as a service which was ‘made available’ to be applied independently
 - With respect to services rendered in connection with training & recruitment and manpower specification, there was neither technology transfer, knowledge transfer nor transfer of any skill or know-how and hence does not fall under the ‘make available’ clause

The ITAT thus held that the provisions of the Article 12(4) could not be applied to the services rendered by the Assessee in the strict sense of the provisions of DTAA and accordingly allowed the taxpayer’s appeal.



HC Orders quashing faceless assessment to be circulated to Revenue Secretary, everybody within Finance Ministry

Mantra Industries Limited (WP. No. 1625/2021) (Bombay HC)

- The taxpayer received a show cause notice (**SCN**) cum draft assessment order dated April 22, 2021 requiring to show-cause as to why the assessment should not be completed in terms of the draft order and to submit a response by 23:59 hours on April 24, 2021 (fourth Saturday). On April 23, 2021, the taxpayer submitted a response seeking a period of twenty days to furnish the requirement as per notice and further also seeking to object to the modifications made along with a request for personal hearing. Further, on April 27, 2021, the taxpayer fulfilled all other requirements for which the SCN was issued. Taxpayer received the final assessment order on June 8, 2021 which was an exact reproduction of the draft order with a remark that the assessee did not give any justification for non-furnishing of quantitative details in Form 3CD, which is challenged by way of this writ petition.
- On filing of the writ petition, Hon'ble Bombay HC observed that the remarks of the TO indicate that the assessment order has been passed without application of mind, and without considering the replies and the request for personal hearing furnished by the taxpayer. HC further found the affidavit in the reply filed by the TO stating that "the noting records show that the submission dated April 23, 2021 and April 27, 2021 both taken on record and considered" and observed that the assessment order did not reflect the said fact.
- Thus, HC held the impugned assessment order to be *non-est* and set aside the order along with consequential notices. Further, HC also directed circulation of its order up to the Revenue Secretary including everybody in the Finance Ministry so as to prevent repetitive breach of the procedure specified under Section 144B of the Income-tax Act, 1961 (**the IT Act**).

ELP Comments:

It is interesting to note that the HC has taken a very stringent stance towards the issue of repetitive non-compliance by the Revenue Authorities with respect to the procedure specified under Section 144B of the IT Act. In order to discourage such breaches in future, the HC remarked that if such orders are continued to be passed the Court will be constrained to impose substantial costs on the concerned TO to be recovered from his/her salary and also direct the department to place such judicial orders in the career records of such TO. Thus, on account of such a stern view taken by the HC, Revenue Authorities are now expected to strictly follow the procedure specified under Section 144B of the IT Act and alleviate the hardships caused to the taxpayers during assessment proceedings.



Section 56(2)(vii) not applicable on proportionate allotment of shares in case of rights issue

Rajeev Ratanlal Tulshyan [I.T.A. No.5748/Mum/2017]

- The taxpayer an individual resident of India was a director and a major shareholder in an entity M/s Kennington Fabrics Private Limited (**KFPL**). During the year, KFPL offered a rights issue, and the taxpayer was allotted 3.95 crores shares at a face value of INR 1 each. However, it was alleged by the TO that the consideration of INR 1 per share was less than the FMV of shares computed in accordance with Section 56(2)(vii)(c)(ii) of the IT Act read with Rule 11U & 11UA of the IT Rules and accordingly, the difference between FMV and consideration paid was charged to tax under Section 56(2)(vii) of the IT Act.

- The TO noticed that the percentage of taxpayer's shareholding in KFPL increased from 90.37% to 96.88% in 1 year and opined that since there was disproportionate allotment of shares, provisions of Section 56(2)(vii) of the IT Act would apply in the taxpayer's case by relying on the decision of Mumbai ITAT in the case of **Sudhir Menon HUF v. ACIT (45 taxmann.com 176)** wherein it was held that in case of disproportionate allotment of shares, provisions of 56(2)(vii)(c) of the IT Act would be applicable.
- The ITAT observed that there is a clear fallacy in the conclusion by lower authorities that allotment was disproportionate and skewed in favor of the taxpayer. The fact was that there were two right offers during the year and the right issue was offered on both occasions to existing shareholders in the ratio of 7:8 on first occasion and 5:8 on the second occasion. The issue was offered to existing shareholders in proportion to their holding at the same price i.e., INR 1 per share and since the taxpayer subscribed his entitlement but other shareholders did not, taxpayer's overall holding increased at year-end and the holding ratio got skewed in his favor.
- The ITAT held that the decision in the case of Sudhir Menon HUF (supra) was applicable in the instant case wherein it was held that as long as there was no disproportionate allotment, there is no scope for any property being received on allotment of shares since there is only an apportionment of the value of the existing holding over a larger number of shares and accordingly, Section 56(2)(vii)(c) would not get attracted. Further, the ITAT also relied on the decision of **ACIT v. Subodh Menon (103 Taxmann.com 15)**, CBDT Circular No.1/2011 dated April 6, 2011 and remarked that provisions of Section 56(2)(vii) of the IT Act do not apply to the bona-fide business transaction.
- The ITAT observed that the provisions of Section 56(2)(vii) of the IT Act were intended as an anti-abusive measure to prevent laundering of unaccounted income. The ITAT held that there was no case of tax evasion/abuse made against taxpayer and accordingly, the ITAT quashed the order of the TO and held that the provisions of Section 56(2)(vii) of the IT Act did not apply to the taxpayer.



Choosing a tax effective and legally permissible option does not mean employing a colorable device and hence must be allowed

Venus Infrastructures & Developers (P) Ltd ITA 1582/Ahd/2019

- The taxpayer's business was construction and development of real estate. The taxpayer was holding shares of Ahmedabad Royal Garden Hotels Limited (**ARGHPL**) which were acquired in Assessment year (**AY**) 2008-09. ARGHPL owned only one immovable property as an asset.
- During the year under consideration, the taxpayer sold the shares of ARGHPL and incurred a long-term capital loss. The TO held that the taxpayer used colorable device by resorting to sale of shares resulting in long term capital loss, instead of sale of property, which would have resulted in short term capital gains and made an addition. CIT(A) confirmed the addition made by TO. Aggrieved by the order, the taxpayer filed an appeal with the Ahmedabad bench of ITAT.
- The ITAT states that the term colorable device means transactions which appear to be authentic on the face but in reality they are false. Further, it relied on Jurisdictional HC ruling in the matter of **Banyan Berry [TS-5770-HC-1995(GUJARAT)-O]** wherein it was held that:
"every Act which results in tax deduction, exemption of tax or not attracting tax authorized by law cannot be treated as a device of tax avoidance and the real question to be asked is whether the act of the assessee falls in the category of a colorable device, a dubious method or subterfuge which the judicial process may

not accord approval”

- On the basis of the above, ITAT observed that the assessee had two options, one to sell the land, which was the only asset and second to transfer the overall control by selling off the shares. The assessee chose one of the two legally permissible options which it deemed to be the most tax effective or viable. Further, the holding period of 34 months for land cannot be a criterion to hold the transaction as a colorable device and the taxpayer could easily have postponed the transaction by two months in order to avoid the possible hassles of the income tax proceedings. It also held that the taxpayer treated the shareholdings as investment in shares and not in land and was also subjected to disallowances under Section 14A for the expenses incurred to earn dividend from such investment. The ITAT held that the principle of consistency should be followed and the TO cannot change its stand as per its will. Accordingly, the taxpayer’s appeal was allowed.

Upholds addition of share application money routed via 6 layers of transactions, complex web of companies

Leena Power Tech Engineers Pvt Ltd (ITA No. 1313/Mum/20) (Mumbai ITAT)

- The taxpayer, a resident company, engaged in carrying out business as an investment company, was subjected to reassessment proceedings, initiated on the basis of information indicating that the taxpayer was in receipt of share application money. The share application money was routed through several layers and had its source in huge cash deposits in 19 different bank accounts, referred to as Layer 1 accounts, from where the funds were transferred to bank accounts of 10 different entities collectively referred to as Layer 2 accounts. Subsequently, these amounts were transferred to other bank accounts referred to as Layer A3/B3 from where the same were finally credited to the accounts of Layer A4/B4 companies and all of which were ultimate beneficiaries including the taxpayer.
- Resultantly, taxpayer was asked to prove the identity and creditworthiness of the investor company and genuineness of the transactions by the TO. The TO issued notice under Section 133(6) of the IT Act to the taxpayer demanding to show cause as to why additions should not be made under Section 68 of the IT Act for AY 2011-12.
- The taxpayer argued that the onus of proving the alleged money laundering racket was on the TO. However, the TO claimed that such an argument would be relevant only when the money laundering racket is being prosecuted. The taxpayer also contended the validity of reopening of assessment under Rule 27 of the IT Rules. On appeal to Ld. CIT(A), the income addition on account of share application money was deleted. However, the TO preferred further appeal before Ld. Mumbai Bench of ITAT.
- On evaluation of the facts involved, the ITAT remarked that the taxpayer is under a legal obligation to prove the receipt of share capital/premium to the satisfaction of the TO, failure of which, would justify addition of the said amount to the income of the taxpayer.
- ITAT relied on the SC ruling in the case of **Durga Prasad More [(1971) 82 ITR 540 (SC)]** wherein it was observed, *“If all that an assessee who wants to evade tax is to have some recitals made in a document either executed by him or executed in his favour then the door will be left wide open to evade tax. A little probing was sufficient in the present case to show that the apparent was not the real. The taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents”*.

- With regards to taxpayer's plea against validity of reopening of assessment, the ITAT relied on the SC ruling in the case of ***Phool Chand Bajrang Lal [(1993) 203 ITR 456 (SC)]*** and remarked that, before approaching the ITAT, the taxpayer can only take up the grounds decided against him by the CIT(A). Thus, ITAT ruled in favor of the TO.

ELP Comments:

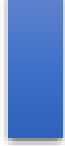
ITAT has highlighted that the decision regarding genuineness of any transaction is not to be taken merely in the light of documents submitted, instead; it should be taken after contextual evaluation of surrounding circumstances including preponderance of human probabilities and ground realities. Thus, this ruling would clearly act as a deterrent to taxpayers who plan to evade tax on the basis of complex or artificial transaction and document trails.



No distinction between listed, unlisted shares w.r.t. holding period for classification as long-term capital asset

Exim Rajathi India Pvt. Ltd (T.C.A.No.78 of 2016) (Madras HC)

- The taxpayer, an exporter of agricultural commodities and a dealer in iron ore, was subjected to assessment for AY 2007-08 which was followed by revision proceedings as the details of taxpayer's transactions in shares were not examined. Subsequently, under the revision proceedings, CIT directed the tax officer to work out the short-term capital gains which was given effect to.
- Aggrieved by the same, the taxpayer preferred an appeal to CIT(A) wherein the taxpayer contended that the TO has made a mistake by treating the shares held for more than twelve months as short-term capital assets as the proviso to Section 2(42A) clearly defines the same as a long-term capital asset and therefore, the gain should be taxed at the special rate of 20%. CIT(A) allowed the taxpayer's appeal and directed the TO to treat the gain as long-term capital gain. Aggrieved by CIT(A)'s order, the TO preferred an appeal before Ld. Chennai Bench of ITAT.
- ITAT considered the definition of "short-term capital asset" under Section 2(42A) of the IT Act and the amendment made by Finance Act, 1994 w.e.f. 1 April 1995, read with relevant extracts of the Explanatory Notes as well as definition of the term "securities" under Section 2(h) of the Securities Contracts (Regulation) Act, 1956. ITAT concluded that there is no distinction between unlisted and listed shares for classifying them as short-term capital asset and further observed that the legislature does not intend to include shares in the term "other security" while making the amendment.
- On further appeal to Hon'ble Madras HC, it was observed that usage of the word "or" in between each of the categories of items mentioned in the first proviso to Section 2(42A) of the IT Act (i.e. shares held in a company or any other security listed on a recognized stock exchange in India or a unit of the Unit Trust of India or a unit of a Mutual Fund or a zero-coupon bond) where the period of holding for construing short-term capital asset is twelve months. HC remarked that as far as shares held in a company are concerned, there is no category mentioned as listed or unlisted shares, albeit the condition for being listed in recognized stock exchange in India is for 'any other security'. The expression listed in a recognized stock exchange in India is only used for category of 'any other security' and not for the category of 'share held in a company'
- HC also referred to the Explanatory Notes to the Provisions of the Finance (No.2) Act, 2014 and observes that it clearly indicates that all shares whether listed or unlisted have enjoyed the benefit of shorter period of holding and any investment in shares of private limited companies enjoyed long-term capital gains on its



transfer after twelve months.

- Thus, Madras HC dismissed TO's appeal and ordered in favor of the taxpayer.

ELP Comments:

Hon'ble Madras HC in the above ruling emphasized on the fact that Section 2(42A) of the IT Act as it stood on the date of the transaction does not distinguish between unlisted and listed shares for extending the benefit of lower holding period (12 months) for classification as short-term capital asset.

However, Finance Act 2016 amended Section 2(42A) of the IT Act to provide that effective April 1, 2017, the holding period for unlisted share of a company to be treated as short term capital asset is 24 months. Thus, the principle laid by the above ruling would hold good upto the period prior to April 1, 2017.

NOTIFICATION/CIRCULARS

S.No.	Reference	Particulars
1.	Notification No. 117/2021	CBDT vide Notification No. 117/2021 dated September 24, 2021 has extended applicability of Safe Harbour Rules under Rule 10TD of the IT Rules to AY 2021-22. The said amendment is deemed to come into force from 1 April 2021.
2.	CBDT vide order dated October 11, 2021	CBDT vide order dated October 11, 2021 has exempted certain classes of non-residents, foreign companies and eligible foreign investors from filing return of income from AY 2021-22 onwards if they satisfy certain conditions.

NEWS

- OECD released Stage 2 peer review monitoring reports of BEPS Action 14, evaluating the progress made by Brazil, Bulgaria, China, Hong Kong (China), Indonesia, Russia and Saudi Arabia in implementing recommendations resulting from their Stage 1 peer review. The reports take into account the Mutual Agreement Procedure (MAP) Statistics, signing and ratification status of MLI as well as status on MAP guidance.
- OECD released fourth annual peer review report of BEPS Action 13 Country-by-Country (CbC) reporting each jurisdiction's domestic legal and administrative framework, exchange of information network and measures to ensure the confidentiality and appropriate use of CbC reports.
- CBDT vide order dated September 30, 2021 has further extended time-limit for processing of returns with refund claims under Section 143(1) for AY 2017-18 in non-scrutiny cases to November 30, 2021. CBDT in July 2021 had earlier extended the time-limit to 30 September 2021.
- CBDT vide order dated September 28, 2021 has authorized CIT (posted as Secretary, ITSC prior to 1 Feb 2021) to admit an application for settlement on behalf of the Interim Board filed after January 31, 2021 and before 30 September 2021.
- Due to technical glitches for the period June 7, 2021, to 30 September 2021, CBDT, in exercise of power under Section 119 of the IT Act allows certain returns under Section 142(1), 148, 153A and 153C to be filed under Electronic Verification Code (EVC) which otherwise required Digital Signature Certificate (DSC). Further, such returns to be immediately brought to the notice of concerned AOs through ITBA by DGIT(Systems) so that they are not treated to be *non-est*.
- CBDT modifies its order dated March 31, 2021, which was partially modified on September 6, 2021, and directs that in addition to the cases in the said order, cases
 - Set aside to be done *de novo*, or
 - To be done under Section 147 of the IT Act
- For which the time limit for completion expires on September 30, 2021 pending with Jurisdiction Assessing Officer and cannot be completed as per procedures laid down under Section 144B due to technical/procedural constraints, shall also be excluded from the purview of Section 144B. This order comes into effect immediately

INDIRECT TAXATION

RECENT CASE LAWS



Pre-deposit cannot be made through debit of Electronic Credit Ledger

Jyoti Construction vs. Deputy Commissioner of CT & GST and Anr. [TS-523-HC(ORI)-2021-GST]

FACTS OF THE CASE

- The Assessee, a partnership firm, engaged in the business of execution of works contracts including civil, electrical and mechanical, had filed an appeal in Form GST APL-01 before the appellate authority under Section 62(1) of the Central Goods and Services Tax Act, 2017 (**CGST Act**) read with Rule 100 (1) of the Central Goods and Services Tax Rules, 2017 (**CGST Rules**) against GST demands confirmed by the Deputy Commissioner of CT & GST for IGST, CGST and SGST.
- In terms of Section 107(6) of the CGST Act, the Assessee was required to make a payment equivalent to 10% of the disputed amount of tax arising from the order against which the appeal was filed (**pre-deposit**). The said pre-deposit payment was made by the Assessee through utilization of input tax credit i.e., debiting the Electronic Credit Ledger (**ECRL**).
- The appellate authority had argued that pre-deposit under Section 107(6) of the CGST Act was required to be discharged only by debiting the Electronic Cash Ledger (**ECL**) and payment through debit of ECRL was in in contravention of the provisions of Section 49(4) of the CGST Act read with Rule 85(4) of the CGST Rules, 2017.

JUDGEMENT

- The Assessee had argued that payment of pre-deposit under Section 107(6) of the CGST Act was in essence payment of a percentage of output tax as defined under Section 2(82) of the CGST Act. As output tax was allowed to be paid through debiting of ECRL basis provisions stipulated in Section 49(4) of the CGST Act read with Rule 85(4) of the CGST Rules, pre-deposit could be paid by debiting the ECRL.
- The Hon'ble High Court upheld that 'Output Tax', as defined under Section 2(82) of the CGST Act could be equated with pre-deposit envisaged under Section 107(6) of the CGST Act. Further, the Court also observed that Section 41(2) of the CGST Act limits the usage of ECRL for payment of self-assessed output tax. The Hon'ble High Court has upheld that as pre-deposit does not construe payment of self-assessed output tax, ECRL cannot be utilized for payment of pre-deposit.
- Further, the Hon'ble High Court while pronouncing the ruling, observed that the judgement of Hon'ble Gujarat High Court in the case of **Vinayak Trexim v. State of Gujarat** which was relied upon by the Assessee, was not applicable to the instant petition, as in the said case, the Hon'ble Gujarat High Court had allowed adjustment of refund payable to the assessee with the pre-deposit payable. The Hon'ble High Court stressed that there was a difference between a refundable amount and debiting of ECRL; specifically in light of the restrictions

prescribed for utilization of ECRL.

ELP Comments:

The said decision of Hon'ble High Court may have wide ramifications on scenarios where the pre-deposit has been paid through utilization of input tax credit.

Further, the interpretation accorded by the Hon'ble High Court may also have potential ramifications on instances where a waiver of pre-deposit is sought, on account of under protest payment of entire output tax liability before filing of appeal.

Payment of tax, even if voluntary, will not be considered to be paid under Section 74(5)

Bundl Technologies Private Limited vs. UOI [TS-546-HC(KAR)-2021 GST]

FACTS OF THE CASE

- Assessee operates an e-commerce platform under the brand name 'Swiggy'. The electronic platform facilitates delivery of food through delivery partners engaged by the Assessee. The Assessee also engages certain GST registered third-party service providers for delivery and supply of food, who issue a tax invoice for the services provided by them and the Assessee claims input tax credit of the GST charged by such third party service providers.
- One of the third-party service providers engaged by the assessee included 'GreenFinch'; whose services were availed by the Assessee and input tax credit was availed on the tax invoices raised by GreenFinch. The Directorate General of Goods and Services Tax Intelligence, Hyderabad Zonal Unit (**DGGI**) had initiated an investigation on the Assessee on the ground that 'GreenFinch' was a non-existent entity and hence corresponding input tax credit availed on tax invoiced raised by them was fraudulent.
- The Assessee had stated that statement of various Directors and employees was recorded during the course of investigation with the assessee having been forced for making a payment of INR 15 crores under the threat of arrest of its Directors. Further, during another course of summons issued to the Directors, the assessee was forced to make another additional payment of ~INR 12.51 crores under the threat of arrest of the Directors including late night continuation of investigation in a locked room of DGGI office. The said payment was made with specific submissions of the payments being made as an extension of the goodwill conduct of the Assessee and for bonafide reasons. The Assessee had also emailed a letter to the DGGI office mentioning the payment of INR 15 crores to be "under protest".
- No Show Cause Notice (**SCN**) was issued by the revenue authorities on the above matters even after about ten months of the initiation of investigation. Given this, the Assessee had sought a refund of the amount already paid by them during the course of investigation i.e., ~ INR 27.51 crores. The refund was initially sought from DGGI and where the same was not entertained, a formal refund application was filed before the jurisdictional GST authorities.
- The revenue authorities asserted that the refund application was premature and there was no question of coercion as the deposit was made by the Assessee as a goodwill gesture and the payments made are to be construed as tax in furtherance of self-ascertained tax u/s 74(5) of the CGST Act.

JUDGEMENT

- The Hon'ble High Court observed that if there is an amount that has been wrongfully withheld, which could be demonstrated to be so, there is no bar for exercising writ jurisdiction to issue appropriate directions directing the respondent to make good the Assessee's claim for refund. [relied upon **Godavari Sugar Mills Ltd. v. State of Maharashtra and Others (2011) 2 SCC 439**].
- The Hon'ble High Court, while discarding the revenue authorities' defence that voluntary payment by assessee as a goodwill gesture is to be construed as tax in furtherance of self-ascertainment u/s 74(5), outlined that the payment of tax even if construed to be voluntary will not by itself in anyway lead to a conclusion that same has been paid under Section 74(5) of the CGST Act; as one under the scheme of self-ascertainment.
- Further, the Court had also observed that the manner in which investigation was carried out, during late hours of the night and early hours of morning with physical gates closed, any person would fear possible arrest, as *'the fear of police powers are such that would shake a man irrespective of their position in society'*.
- The High Court also upheld that not honoring of legitimate claims of refund, on the premise of investigation still continuing, is incorrect and not acceptable. Further, the Court observed that lack of time and lack of conclusion of investigation has only exacerbated the situation conferring upon the Assessee a right to seek for refund.
- It was also asserted that a bona fide tax payer is required to be treated better than a 'detenu and arrestee', adding that no doubt, neither can the power of investigation be interfered with nor can the court direct investigation to be made in a particular manner; however, during all such investigations, it cannot be held that the fundamental rights be kept in abeyance, including the right of a bona fide tax payer to be treated with appropriate dignity as enshrined under Article 21 of the Constitution of India.

ELP Comments:

The said decision will favourably impact/aid numerous taxpayers who would have made payments under protest during the course of investigation on the direction of the authorities and which have been later termed as self-ascertained taxes by the authorities.

Basis the said judgement, the taxpayers may evaluate the option of filing an application for refund in respect of the aforementioned payments.



Show-cause notice found to be non-est in the eyes of law

Godrej & Boyce Mfg. Co. Ltd. Vs. Union Of India And Ors [2021 (11) TMI 157]

FACTS OF THE CASE

- The Assessee, a company is inter alia, engaged in manufacture and sale of multiple products such as locks, furniture, industrial products, etc.
- Vide the writ petition, the Assessee challenged the show cause notice issued by the Joint Commissioner, CGST & C.Ex, Navi Mumbai, wherein it was alleged that transitional credit comprising of Education Cess, Secondary and Higher Education Cess availed by the Assessee was inadmissible and liable to be rejected.
- The show cause notice was essentially based on the premise that the right for transition of cess balances such as Education Cess, Secondary & Higher Education Cess and Krishi Kalyan Cess was taken away by a retrospective amendment under the GST laws vide Explanation 3 to Section 140 of the CGST Act; restricting the transition of

cess balances.

- The Assessee's claim of due transition of cess balances was based on the premise that neither on the date of issuance of show cause notice nor on the date of the presenting of the Writ Petition was the amendment(s) brought vide the CGST Amendment Act, 2018 for transition of cesses made effective. Therefore, the show cause notice has been issued on an untenable legal premise; hence, it is without jurisdiction.

JUDGEMENT

- The transition of cess balances was made under Section 140(1) of the CGST Act. The Hon'ble Bombay High Court observed that Explanation 3 to Section 140 creates an exclusion of cesses from the definition of 'eligible duties and taxes'. The said term 'eligible duties and taxes' appears in sub-section (5) of Section 140, whereas the expression used in subsection (1) thereof is 'of eligible duties'. The contention of the Assessee is right that mere introduction of Explanation 3 to Section 140 of the CGST Act, and making it operational with effect from February 1, 2019, would not clothe the authorities with the power to issue show-cause notice on the premise that Education Cess, Higher Secondary Education Cess and Personal Account Amounts are not included in Explanations 1 and 2 as well.
- The Hon'ble High Court further observed that as the law now stands, Explanation 3 does not have any application to sub-section (1) of Section 140. The authorities while issuing the impugned show cause notice perhaps overlooked this aspect and also that, parts of the amendments in Explanations 1 and 2 to Section 140 of the CGST Act sought to be introduced by sub-clauses (1) each of clauses (b) and (c) of Section 28 of the CGST Amendment Act, are yet to be brought into force.
- It is settled law that the High Court in exercise of its extra-ordinary jurisdiction under Article 226 of the Constitution of India ought not to interfere with a show-cause notice as a matter of routine or for the mere asking. However, it is different for cases where a show cause notice is found to be totally non-est in the eyes of law for absolute want of jurisdiction of the authority issuing the notice. Reliance in this regard was placed on the decision of Supreme Court in **Special Director and Anr. vs. Mohd. Ghulam Ghouse & Anr. (2004) 3 SCC 440**.
- In the current case, it was thus held by the Hon'ble High Court that the impugned show-cause notice suffers from an error pertaining to the want/lack of jurisdiction and is, accordingly, indefensible and liable to be set aside.

ELP Comments:

Transition of cess balances into the GST regime has been under immense dispute and the said ruling may provide much needed relief to the taxpayers where transitioned cess balances are being disputed by the revenue authorities.



Circular No. 26/26/2017 - GST held to be within the authority of law

Union Of India vs. Bharti Airtel Ltd. & Ors.2021 (11) TMI 109- Supreme Court

FACTS OF THE CASE

- The Assessee, being a taxable service provider was required to discharge output tax on the services provided by them. For provision of the said services, the Assessee had received certain inputs/input services, on which input tax credit was claimed by them. Details of output tax and input tax credit was furnished by the Assessee in the monthly GST returns filed by them (including summary return in Form GSTR-3B).
- Notably, returns i.e. Form GSTR-3B to be filed by the Assessee for the period from July 2017 to September 2017 (**relevant period**) was to be filed before 10.01.2018. Significantly, Form GSTR 2A became operational only in September 2018; with Form GSTR-2A being the auto populated return reflecting the input tax available to the Assessee on the procurements made by them. The Assessee had claimed that it was only after operationalization was Form GSTR-2A, that the Assessee realized that it had sufficient amount as input tax credit during the relevant period. Resultantly, the Assessee had discharged its output tax liability through cash even while they had sufficient amount of input tax credit.
- For the reason above, the Assessee wished to rectify the GSTR-3B's filed by them for the relevant period. However, paragraph 4 of Circular No. 26/26/2017 – GST dated December 29, 2017, restricted the Assessee from making the said rectification in GSTR-3B; deterring them from availing input tax credit in the Relevant period and discharging their output tax liability through utilization of input tax credit and obtaining a re-credit of the excess cash paid by them in their electronic cash ledger account.
- Given the said restriction imposed by the Circular, the Assessee had filed a Writ with the Delhi High Court for allowing rectification of the Form GSTR-3B filed by them, so as to avail ITC for the Relevant Period. The High Court of Delhi in W.P. (C) No.6345 of 2018, allowed the writ petition filed by Assessee and read down paragraph 4 of the Impugned Circular issued by the Commissioner (**GST**), to the extent it restricted the rectification of Form GSTR-3B in respect of the period in which the error had occurred. The High Court also allowed the Assessee to rectify Form GSTR-3B for the period in which error had occurred.
- The revenue authorities had assailed the view so taken by the High Court for reasons including the High Court not having territorial jurisdiction to entertain the Writ Petition filed by the Assessee.

JUDGEMENT

- It was observed by the Hon'ble Supreme Court that 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, receipt of goods/services and books of accounts which are maintained by the Assessee manually/electronically.
- The Assessee is obliged to self-assess the taxes payable under the Act and furnish a return for each tax period as specified under Section 39 of the Act.
- It was held by the Hon'ble Supreme Court that a circular is not the direction issued by the Commissioner (**GST**) as such, but it is notifying the decision(s) of the Central Board of Indirect Taxes and Customs (**CBIC**) taken in exercise of its powers conferred under Section 168(1) of the 2017 Act. Even though a circular is issued under the signatures of Commissioner (GST), but in essence, it is notifying the decision(s) of the CBIC, which has the authority and power to issue directions. It was also observed that question of reading down paragraph 4 of the Impugned Circular would have arisen only if the same was to be in conflict with the express provision in the 2017 Act and the Rules framed thereunder.

- Given the above, the argument that the Impugned Circular dated December 29, 2017 had been issued without authority of law, was rejected. It was concluded that the stipulations in the Impugned Circular pertaining to paragraph 4 are consistent with the provisions of the CGST Act and the Rules framed thereunder.
- Further, the Hon'ble Supreme Court also rejected the preliminary objections regarding the maintainability of the writ petition and the jurisdiction of the Delhi High Court.

ELP Comments:

The said ruling is remarkably noteworthy in as much as the Hon'ble Supreme Court has inter alia, held that the common portal is only a facilitator to feed or retrieve information and the obligation of self-assessment is fastened on the shoulders of the taxpayer. The responsibility of taxpayers is not mitigated even on account of system failures or inefficiencies. It may be worthwhile to note that such obligation of self-assessment as well as proper maintenance of accounts and records shall lie with the taxpayers and going forward, the taxpayers may have to substantiate the fulfilment of their obligations before challenging the dependency on the common portal.


CESTAT holds that eNodeB used as Base Transceiver Station (BTS) for 4G LTE Networks classified under CTH 85176100

Reliance Jio Infocomm Ltd. v the Commissioner of Customs (Import)(Vice-Versa)[TS-452-CESTAT-2021-CUST]

FACTS OF THE CASE

- During the period October 2014- May 2017, Reliance Jio Infocomm Ltd (**RJIL**) had imported 'eNodeB' used as 'Base Transceiver Station' (**BTS**) for 4G LTE Networks under various bills of entry. Up to December 2015, it had classified the goods under the residuary Tariff Item 8517 62 90 and claimed benefit of Exemption Notification No. 12/2012 dated 17.03.2012.
- Thereafter, RJIL realized that 'Base Stations' are specifically covered under CTH 8517 61 00 and thus changed its classification from CTH 8517 62 90 to CTH 8517 61 00 w.e.f. January 2016.
- Central Board of Excise and Customs (**CBEC**) issued an instruction dated 07.06.2017 vide which classification of eNodeB was declared to be as CTH 8517 62 90 by stating that it may be commercially referred as 'Base Station' of LTE Network but its functionality is beyond earlier Base Stations of 2G and 3G networks and rightly classifiable at CTH 8517 62 90.
- Pursuant to the same, a show cause notice dated 19.07.2018 was issued to RJIL seeking to classify the said goods under CTH 8517 62 90 instead of CTH 8517 61 00 and proposing to recover differential duty along with interest.
- The proposal to re-classify the eNodeB was confirmed vide the Order-in-Original passed by the Commissioner of Customs (Imports) by holding that on a plain reading of the term 'Base Station', the goods appear to be classifiable under CTH 8517 61 00 which is specific for Base Stations. However, as technology involved in these goods goes beyond the basic functionalities, the goods would more appropriately be classifiable under CTH 8517 62 90.
- However, while confirming the demand, the Adjudicating Authority held that there was no misdeclaration on part of RJIL and accordingly extended period of limitation cannot be invoked. This finding of the Adjudicating

Authority was challenged by the Revenue Department before the Hon'ble CESTAT along with other grounds.

- RJIL challenged the Order-in- Original on merits stating that the said goods are rightly classifiable under CTH 8517 61 00 which entry is specific for 'Base Stations' and not under CTH 8517 62 90, which is a residuary sub-heading under 'Other'.

JUDGEMENT

- The Hon'ble CESTAT allowed the appeal filed by RJIL, dismissed the Revenue's appeal by holding that the eNodeB Base Transceiver Stations would be classifiable under CTH 8517 61 00.
- The Hon'ble CESTAT after going through the technical literature and 'General Rules of Interpretation to the First Schedule of the Customs Tariff Act, 1975' held that the Instructions issued by CBEC have to be examined in the light of the tariff entries and rejected the contention of the Revenue Department that scope of CTH 8517 61 00 must be restricted to only Base Station of earlier 2G and 3G Technologies (digital signals) by holding that base station of 4G technology (digital signals) is at par with Base Station of 1G technology (analog signals) as 'Handover' in both takes place at Base Stations itself and not via a separate controller.
- It also upheld the principle of classification that specific description should prevail over a general description . It also upheld the principle that there is no estoppel in matters relating to classification

ELP Comments:

In this case, the Hon'ble Tribunal impressed upon the fact that the classification of a product has to be determined on basis of the tariff entries and even the Board Instruction is to be examined in the light of these tariff entries. It also emphasized on a cardinal rule of classification that specific tariff entries must be preferred over general ones.



Hon'ble Supreme Court frames guidelines for granting of bail

Satender Kumar Antil v Central Bureau of Investigation & Anr. [TS-448-SC-2021-NT]

FACTS OF THE CASE

- The Hon'ble Supreme Court has laid down guidelines for granting bail to a person not arrested during an investigation and who has cooperated throughout including appearing before Investigating Officer whenever called.
- The Hon'ble Supreme Court also held that considering the said guidelines, the trial Court is not precluded from granting interim bail taking into consideration the conduct of the accused during the investigation which has not warranted arrest.

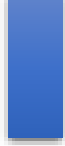
JUDGEMENT

- The following are the categories and guidelines issued by the Hon'ble Supreme Court:

Category A

Offences punishable with imprisonment of 7 years or less not falling in category B & D.

After filing of charge sheet/complaint taking of cognizance
a. Ordinary summons at the 1st instance/including



	<p>permitting appearance through Lawyer.</p> <ul style="list-style-type: none"> b. If such an accused does not appear despite service of summons, then Bailable Warrant for physical appearance may be issued. c. NBW on failure to failure to appear despite issuance of Bailable Warrant. d. NBW may be cancelled or converted into a Bailable Warrant/Summons without insisting physical appearance of accused, if such an application is moved on behalf of the accused before execution of the NBW on an undertaking of the accused to appear physically on the next date/s of hearing. e. Bail applications of such accused on appearance may be decided w/o the accused being taken in physical custody or by granting interim bail till the bail application is decided.
<p>Category B</p> <p>Offences punishable with death, imprisonment for life, or imprisonment for more than 7 years.</p>	<p>On appearance of the accused in Court pursuant to process issued bail application to be decided on merits.</p>
<p>Category C</p> <p>Offences punishable under Special Acts containing stringent provisions for bail like NDPS (S.37), PMLA (S.45), UAPA (S.43D(5), Companies Act, 212(6), etc.</p>	<p>Same as Category B & D with the additional condition of compliance of the provisions of Bail under NDPS S. 37, 45 PMLA, 212(6) Companies Act 43 d(5) of UAPA, POSCO etc.</p>
<p>Category D</p> <p>Economic offences not covered by Special Acts.</p>	<p>Economic offences form a different nature of offences and thus the seriousness of the charge has to be taken into account but simultaneously, the severity of the punishment imposed by the statute would also be a factor.</p>



CESTAT allows refund of service tax paid on ocean freight post April 23, 2017

M/s Panasonic Energy India Co. Ltd. v Commissioner of Customs, Central Excise & Central GST, Indore
[TS-433-CESTAT-2021-ST]

FACTS OF THE CASE

- The Appellant is engaged in manufacturing of dry battery cells. With respect to the Bills of Entry filed between April 23, 2017 to June 30, 2017, the Appellant had belatedly in October 2018, post the advent of GST regime, discharged service tax, Krishi Kalyan Cess and Swachh Bharat Cess along with applicable interest on ocean freight in terms of Notification No. 15/2017 and 16/2017-ST both dated April 13, 2017.
- Although technically the Appellant was eligible to avail Cenvat Credit of the said amount, post the advent of GST regime, it could not do the same. Therefore, it filed a refund in terms of Section 142(3) r/w Section 142 (6)(a) of the Central Goods and Service Tax Act, 2017 (**CGST Act**).
- A show cause notice was issued to the Appellant proposing to reject its refund claim *inter alia* on the ground the Appellant had enough time for payment of service tax on ocean freight of CIF value of the imports and to indicate the same in their ST-3 returns to be filed upto August 31, 2017- which the Appellant had failed to refund/revise. This proposal was confirmed by the Adjudicating Authority as well as the Appellate Authority. The Appellate Authority further held that CGST Acts does not provide for Cenvat credit of Krishi Kalyan Cess (**KKC**) and held no refund was admissible as the said amount was paid by the Appellant voluntarily.
- Against the Order-in-Appeal, Appellant filed an appeal before Hon'ble CESTAT

JUDGEMENT

- The Hon'ble CESTAT relied on the judgement of **Mohit Minerals Pvt. Ltd. v. Union of India and Others**¹ and held that since the notifications under which the payment was made, have as such been struck down, any payment made pursuant thereto no more remains under the scope of the charging section, i.e. it cannot be called as duty and thus, ought to be refunded.
- The Hon'ble CESTAT also observed that as on date the transitional credit of Education Cess, Secondary Higher Education Cess and Krishi Kalyan Cess is eligible under Section 140(1) of the CGST Act as the restrictive amendments have not yet been brought into force at all. It thus held that there is no reason why refund of such tax should not be allowed to the Appellant.
- Dealing with the applicability of Section 142 (c) of the CGST Act, 2017 the Hon'ble CESTAT held that as per the said section every claim of refund filed by a person for refund of CENVAT credit or duty on or after July 1, 2017 ought to be entertained in terms of the provisions of the existing laws and refund if any ought to be granted in cash.

ELP Comments:

This case provides a major relief to all the assesseees who had paid service tax on ocean freight for the period April 23, 2017 – June 30, 2017 and have claimed refund of the same after the judgement of the Hon'ble Gujarat High Court in the case of Mohit Mineral Pvt Ltd. Furthermore, although the Hon'ble CESTAT has held that its discussion with respect to Section 140 of the CGST Act is almost academic as the amount paid is not in the nature of tax, yet this observation could assist the assessee while defending SCN issued under the CGST Act, 2017 alleging irregular transition of Education Cess, Secondary Higher Education Cess and Krishi Kalyan Cess.

¹ 2020 (33) G.S.T.L. 321 (Guj.)



CESTAT set aside proceedings initiated on the basis of SCN issued by DRI

M/s Modern Insecticides Limited v Commissioner of Customs, Ludhiana [TS-456-CESTAT-2021-CUST]

FACTS OF THE CASE

- The Appellant had filed an appeal before the Hon'ble CESTAT against the order passed by Commissioner of Customs, Ludhiana wherein the show cause notice was issued by the Additional Director General, DRI, Ludhiana.
- The Appellant relied on the *Canon India P. Canon India P. Ltd. vs. Commissioner of Customs*², *Commissioner of Customs Kandla vs. M/s. Agarwal Metals & Alloys*³, *Quantum Coal Energy Pvt. Ltd. vs. Commissioner, Office of the Commissioner of Customs*⁴, *Steelman Industries vs. Union of India & Ors*⁵ wherein it was held that Additional Director General (DRI), Ludhiana is not a proper Officer to issue show cause notice under Section 28 (4) read with Section 2 (34) of Customs Act, 1962.
- The Department contended that since a Review Petition has been filed in the Canon India P. Ltd. (Supra), the matter ought to be kept in abeyance.

JUDGEMENT

- The Hon'ble CESTAT took note of the fact that the Revenue has filed a Review Petition in the case of Canon India P. Ltd. (Supra) which is still pending before the Hon'ble Apex Court. However, it also held that the decision of the Hon'ble Apex Court has again in the case of *Commissioner of Customs Kandla vs. M/s. Agarwal Metals & Alloys* (Supra) followed up the decision of *Canon India Pvt. Ltd.* (Supra). Similarly, Madras High Court in the case of *Quantum Coal Energy Pvt. Ltd.* (Supra) and the jurisdictional Hon'ble High Court of Punjab & Haryana in the case of *Steelman Industries vs. Union of India & Ors.* (Supra) have followed the decision in *Canon India Pvt. Ltd.* (Supra).
- Therefore, the Hon'ble CESTAT held that the Additional Director General, DRI, Ludhiana is not a proper Officer to issue show cause notice under Section 28 (4) read with Section 2 (34) of Customs Act, 1962.

² 2021 – TIOL – 123 – SC – CUS – LB.

³ 2021 – TIOL – 233 – SC – CUS – LB.

⁴ 2021 – TIOL – 711 – HC – MAD – CUS

⁵ CWP No.11287 of 2015

ADVANCE RULING



Amount of wages/salaries, EPF/ESI etc., reimbursed by customer liable to tax

Bhagyalakshmi Devamma Vangimallu [TS-534-AAR(TEL)-2021-GST], Telangana

FACTS OF THE CASE

- The Applicant had executed a contract with M/s. Asian Institute of Gastroenterology Private Limited, Somajiguda, Hyderabad (**Customer**) for provision of housekeeping services.
- As per the Memorandum of Understanding so executed, the Applicant would provide housekeepers and supervisors to the Customer for provision of housekeeping services. The Customer pays consideration for the supply of such services to the Applicant and also reimburses EPF, ESI and other statutory payments on actual basis for the housekeepers and supervisors deployed, to the Applicant.
- The Applicant contends that as the salary/wages are fixed by the hospital management and as EPF, ESI are statutory payments, therefore these amounts reimbursed by the hospital management cannot form part of the value of supply and hence, would not be liable to GST.

ADVANCE RULING

- It was held that the Applicant is not a pure agent under GST Law. Further the deductions available under Section 15 of the CGST Act do not include the amounts pertaining to EPF, ESI, salary, or wages. Therefore, the entire amount received from the customer including EPF, ESI, etc. were also exigible to GST.



Re-shelling of old sugar mill rollers services not classified as job work service

In Re: M/s S.B. Reshellers Pvt. Ltd. 2021 (10) TMI 1160

FACTS OF THE CASE

- The Applicant manufactures sugar mill rollers and supplies the same to various customers. Further, it receives old sugar mill rollers (worn out due to wear and tear) from their customers and makes them reusable by re-shelling process. Sometimes the Applicant also receives bare shafts (taken out of the old sugar mill rollers) or new shafts/forged bars from their customers and converts the same into ready to use sugar mill rollers.
- The Applicant was classifying the said as a supply of service under GST and discharging GST @ 18%; as applicable on the services so provided.
- However, after insertion of clause (id) in Sr. No.26 of Notification No. 11/2017-CT(R), dt.28.06.2017 declaring 6% CGST for services by way of job work, there arose an ambiguity on the nature of the said activity being qualifiable as job work service; covered under said newly inserted clause (id) of Sr. No.26 of Notification No. 11/2017-CT(R), dt.28.06.2017. This was also corroborated by the fact that customers of the said services were following the procedure under Rule 55 read with Rule 45 of CGST Rules, 2017 for the said activity and declaring the same in their job work return filed under Rule 45 of the CGST Rules, 2017. It is pertinent to note that where the said services qualify as job work services, GST @ 12% would be payable.
- Accordingly, the Applicant filed an application seeking an advance ruling in respect of the following questions:
 - Whether the activity of re-shelling of old sugar mill rollers qualifies as a job work service under SAC 9988

or is treatable as a repair/maintenance service under SAC 9987?

- Whether the said activity of re-shelling of old sugar mill rollers would qualify for concessional GST at 12% in terms of clause (id) of Sr. No.26 of Notification No.11/2017-CT(R), dt.28.06.2017 or will continue to attract 18% GST?

ADVANCE RULING

- The Authority for Advance Ruling observed that the activity undertaken by the Applicant essentially involves maintenance of used sugar mill rollers; which with maintenance services would be refurbished and brought to a reusable condition. The said activity does not culminate into emergence of any new product. The supply of service in the subject case is nothing but repair done on some old and used product to make it reusable. The identity of the impugned goods remains the same before and after performing the process.
- It was observed that SAC 9988 covers under its ambit 'Manufacturing services on physical inputs owned by others'. The term 'manufacture' has been defined under section 2(72) of the CGST Act to mean processing of raw material or inputs in any manner that results in emergence of a new product having a distinct name, character and use and the term manufacturer shall be construed accordingly. In the subject case, as there is neither processing of any raw material nor emergence of a new product, the said activity does not qualify as manufacturing services.
- The Authority also observed that job work is an activity involving processing or working upon on raw materials or semi-finished goods supplied to the job worker, so as to complete a part or whole of the process resulting in the manufacture or finishing of an article. In other words, the sugar mill rollers are not brought into existence by the applicant in the subject case, rather the said rollers are already in existence, the usage of which has resulted in its wear and tear.
- It was further observed that SAC 9987 covers under its ambit 'Maintenance, repair and installation (except construction) service'. The subject activity of re-shelling old and worn out and unusable sugar mill rollers is an activity of repair and squarely falls under SAC 9987.
- Further, it was observed that since the aforesaid activity of re-shelling of old sugar mill rollers is neither manufacturing nor job work, it will continue to attract 18% GST and not 12% GST in terms of clause (id) of Sr. No.26 of Notification No.11/2017-CT(R), dt.28.06.2017.

NOTIFICATION/CIRCULARS

S.No.	Reference	Particulars
GST		
1.	<p>Notification No. 6/2021 dated September 30, 2021</p> <p>(Amends Notification No. 11/2017 – CT (Rate) dated June 28, 2017)</p>	<p>Clarifies various issues, including the following:</p> <ol style="list-style-type: none"> 1. GST at the rate of 12% will be charged on Works Contract by way of construction, erection, commissioning etc. of a building owned by an entity registered under Section 12AA or Section 12AB of the Income Tax Act, 1961 (43 of 1961), which is used for carrying out the activities of providing centralized cooking or distribution, for mid-day meals under the mid-day meal scheme sponsored the Government. Where entity does not register under Section 12AB of the IT Act, 18% GST will be applicable. 2. Rate on transfer of IPR increased to 18% from 12%. 3. Services by way of job work in relation to alcoholic liquor for human consumption to be taxed at the rate of 18%. 4. Printing services including newspapers, books etc. where content is supplied by publisher but physical inputs including paper for printing belong to printer increased from 12% to 18%. 5. Services by way of admission to entertainment events/amusement facilities except casinos/race clubs/sporting events like IPL to be taxed at 18%. 6. Multimodal transport of goods from a place in India to another place in India to be classified under SAC 996541.
2.	<p>Notification No. 7/2021 dated September 30, 2021</p> <p>(Amends Notification No. 12/2017 – CT (Rate) dated June 28, 2017)</p>	<p>Clarifies various issues, including the following:</p> <ol style="list-style-type: none"> 1. Services by an entity registered under section 12AA or 12AB of Income Tax Act, 1961 will be exempt. Where such a charitable organization does not get itself registered u/s 12AB of Income Tax Act, it will not be eligible for exemption as well as 12% GST rate benefit. 2. Exemption for services provided by and to Asian Football Confederation (AFC) and its subsidiaries directly or indirectly related to any of the events under AFC Women’s Asia Cup 2022 to be hosted in India. 3. Services by way of transportation of goods by an aircraft or vessel from customs station of clearance in India to a place outside India shall be exempted till September 30, 2022. 4. Services of leasing of assets (rolling stock assets including coaches, locos etc.) by the Indian Railways Finance Corporation to Indian railways shall now be taxable from October 1, 2021.

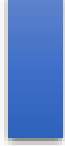
		Services by way of granting national permit to a goods carriage to operate through-out India/contiguous states shall be exempted from October 1, 2021
3.	<p>Notification No. 9/2021 dated September 30, 2021</p> <p>(Amends Notification No. 2/2017 dated June 28, 2021)</p>	1. Only seeds, fruits, and spores ' used for sowing ' will be exempted.
4.	<p>Notification No. 8/2021 dated September 30, 2021</p> <p>(Amends Notification No. 1/2017 dated June 28, 2021)</p>	<p>Clarifies various issues, including the following:</p> <ol style="list-style-type: none"> 1. Tamarind seeds meant for any use, other than sowing shall be taxable at 5% and not be exempted. 2. Iron ores and concentrates, Manganese ores, Copper ores, Nickel ores, Cobalt ores, Aluminum ores, Lead ores, Zinc ores, Tin ores, Chromium ores and their respective concentrates to be taxed at 18%. 3. Biodiesel supplied to Oil Marketing Companies for blending with High Speed Diesel will be taxed at 5% and other Bio-Diesel will be supplied at 12%. 4. Several renewable energy devices & parts for their manufacture shall be taxed at 12%. 5. Cartons, boxes and cases of corrugated paper or paper board will be taxed at 18%. 6. Ball point pens; felt tipped and other porous-tipped pens and markers etc., pen holders, pencil holders and similar holders; parts (including caps and clips) of the foregoing articles, other than those of heading 9609 will be taxed at 18%. 7. Various railway related products to be taxed at 18%. 8. Carbonated beverages of fruit drink or carbonated beverages with fruit juice will be taxed at 28% plus Compensation Cess of 12%.
5.	<p>Notification No. 10/2021 dated September 30, 2021</p> <p>(Amends Notification No. 4/2017 dated June 28, 2017)</p>	<p>Supply of following essential oils other than those of citrus fruit namely: -</p> <ol style="list-style-type: none"> a) Of peppermint; b) Of other mints : Spearmint oil, Water mint-oil, Horsemint oil, Bergament oil <p>from an unregistered person to a registered person shall be taxable under RCM.</p>
6.	<p>Notification No. 12/2021 dated September 30, 2021</p>	On basis of the recommendations of GST Council, exempts certain medicines used in COVID-19 from GST exceeding the rate specified in the notification.

7.	Notification No. 13/2021 dated October 27, 2021	Permanent transfer of Intellectual Property (IP) in respect of goods other than Information Technology Software will be taxable at the rate of 18% instead of 12%.
8.	Circular No. 163/19/2021-GST dated October 6, 2021 (Clarifications issued pursuant to 45th GST Council Meeting)	Clarifies the following: <ol style="list-style-type: none"> 1. If the UPS/inverter and external battery are sold on the same invoice, their price are separately known, and they are two separately identifiable items. Thus, this constitutes supply of two distinctly identifiable items on one invoice. Therefore, it is clarified that in such supplies, UPS/inverter would attract GST rate of 18% under heading 8504, while external batteries would attract the GST rate as applicable to it under heading 8507 (28% for all batteries except lithium-ion battery). 2. All products falling under CTH 3822 would attract GST at the rate of 12%. 3. All products falling under CTH 3006 will be covered under Entry 65 of Sch. II of Not. 1/2017-CT and attract 12% rate. 4. Brewers spent grain, dried distiller's grains with soluble and other residues to be classified under CTH 2303 will attract GST at the rate of 5%. 5. Henna powder and leaves without additives to be classified under CTH 1404 and shall attract GST at the rate of 5%. 6. Exemption available to coconut under Not. 2/2017-CT (Rate) will not be available to copra. 7. Essentiality certificate issued by Directorate General of Hydrocarbons on imports would suffice; no need for taking a certificate every time on inter-state stock transfer.
9.	Circular No. 164/19/2021-GST dated October 6, 2021 (Clarifications issued pursuant to 45th GST Council Meeting)	Vide the said Circular, the following has been clarified: <ol style="list-style-type: none"> 1. Services by cloud kitchen/central kitchens would be covered under 'supply of restaurant service' and would attract GST at the rate of 5%. 2. Supply of already manufactured ice cream at ice cream parlors is not restaurant service and will constitute supply of goods and not supply of service with GST at the rate of 18%. 3. Services provided by any institutions/NGOs under the central scheme of "Scholarships for students with Disabilities" where total expenditure is borne by the Government is covered under Entry 72 of notification No. 12/2017-Central Tax (Rate) dated June 28, 2017 and hence exempted from GST. 4. Satellite Launch Services supplied by M/s New Space India Limited (NSIL), a wholly owned Government of India Company under the administrative control of Department of Space (DoS), to international customers constitutes 'Export of Service'.

		<p>5. Entry 23 of notification No. 12/2017-Central Tax (Rate) dated June 28, 2017, exempts Service by way of access to a road or a bridge on payment of toll charge. It has been clarified that the overloading charges in essence are effectively higher toll charges and hence, treatment given to toll charges would be squarely applicable to overload charges as well.</p> <p>6. The expression “giving on hire” in Sl. No. 22 of the Notification No. 12/2017- Central Tax (Rate) includes renting of vehicles. Accordingly, services where the said vehicles are rented or given on hire to State Transport Undertakings or Local Authorities are eligible for the said exemption.</p>
FTP		
1.	Trade Notice No. 19/2021-2022 dated October 1, 2021	<p>Clarifies the following:</p> <ol style="list-style-type: none"> 1. Extends date of mandatory electronic filing of non-preferential CoO through common digital platform to October 31, 2021. 2. Directs agencies notified under Appendix 2E to complete the process by October 31, 2021, failing which they will be de-notified from Appendix 2E.
Customs		
1.	Notification No. 42/2021-Cus dated September 10, 2021	Amends Notification No. 50/2017-Customs dated June 30, 2017 and Notification No. 11/2021-Customs dated February 1, 2021 to reduce and rationalize the import duties on palm, sunflower and soya-bean oils.
2.	Notification No. 43/2021-Cus dated September 10, 2021	Rescinds Notification No. 34/2021-Customs dated June 29, 2021 which provided rate of customs duty on crude palm oil and other palm oil.
3.	Instruction No. 20/2021-Customs dated September 10, 2021	Announces various measures for easing availability of containers for exporters
1.	Notification No. 73/2021 – Customs (NT) dated September 15, 2021	Amends Notification No. 36/2021 – Customs (NT) dated August 3, 2001 in order to fix the tariff value of edible oils, brass scrap, areca nut, gold and silver.
1.	Notification No. 44/2021-Cus dated September 17, 2021	Amends rate of basic customs duty on lentils (masur) with CTH 0713 40 00 originating in or exported from USA to 20%.

2.	Notification No. 71/2021 – Customs (NT) dated September 20, 2021	Notifies the rate of exchange of conversion of foreign currency for imported and exported goods
1.	Notification No. 75/2021 – Customs (NT) dated September 23, 2021	Notifies the Electronic Duty Credit Ledger Regulations, 2021.
2.	Notification No. 76/2021 – Customs (NT) dated September 23, 2021	Notifies the manner of issue of duty credit for goods exported under the Scheme for Remission of Duties and Taxes on Exported Products (RoDTEP).
3.	Notification No. 77/2021 – Customs (NT) dated September 24, 2021	Notifies the manner of issue of duty credit for goods exported under the continuation of Scheme for Rebate of State and Central Taxes and Levies (RoSCTL).
4.	Notification No. 45/2021-Cus dated September 29, 2021	Grants customs duty exemption for import of COVID-19 vaccines till December 12, 2021
5.	Notification No. 46/2021-Cus dated September 30, 2021	Implements GST Council recommendation and amends Notification No. 50/2017-Customs dated September 30, 2021 in order to exempt BCD and IGST on import of life-saving medicines for treatment of Spinal Muscular Atrophy or Duchenne Muscular Dystrophy
6.	Notification No. 78/2021 – Customs (NT) dated September 30, 2021	Amends Sea Cargo Manifest and Transshipment Regulations, 2018 to extend applicability of transitional provision in Regulation 15(2) till December 31, 2021.
7.	Notification 79/2021 – Customs (NT) dated September 30, 2021	Fixes tariff value of edible oils, brass scrap, areca nut, gold and silver.
8.	Circular No. 23/2021-Customs dated September 30, 2021	Explains various conditions and restrictions regarding scheme for Remission of Duties and Taxes on Exported Products (RoDTEP) issued under Section 51B of the Customs Act including : <ol style="list-style-type: none"> 1. Remission amount may be in form of transferable duty credit maintained in electronic credit ledger 2. The scheme rebates the incidence of duties, taxes and levies which are not exempted, remitted or credited under any other scheme.

		<p>3. Remission under RoDTEP is a percentage of Free on Board (FOB) value of eligible export product along with value caps for certain HS Codes</p> <p>4. E-scrips are freely transferable and valid for a period of one year from date of generation.</p>
9.	Circular No. 22/2021-Customs dated September 30, 2021	<p>Provides various clarifications regarding scheme for Rebate on State and Central Taxes and Levies (RoSCTL) on export of apparel, garments or made ups.</p> <p>1. Remission amount may be in form of transferable duty credit maintained in electronic credit ledger</p> <p>2. Till facility for making claim of RoSCTL on shipping bill/bill of export is operationalized, the scheme will function on the basis of exporter having claimed shipping bill exercising claims for RoDTEP and Duty Drawback.</p> <p>3. E-scrips shall be valid for a period of one year from date of generation.</p>
Anti-Dumping		
1.	Notification 53/2021-Customs (ADD) dated September 29, 2021	Extends levy of anti-dumping duty on 'Color coated/pre-painted flat products of alloy or non-alloy steel' from China PR and EU up to March 31, 2022.
2.	Notification 54/2021-Customs (ADD) dated September 30, 2021	Extends levy of anti-dumping duty on "Glazed/Unglazed Porcelain/Vitrified tiles in polished or unpolished finish with less than 3% water absorption" from China PR upto February 28, 2022.
3.	Notification 55/2021 – Customs (ADD) dated September 30, 2021	Amends Notification No. 54/2018-Customs (ADD) dated October 18, 2018 pertaining to Anti-dumping Duty on Alloy Steel Bars and Rods in Straight Length from China so as to extend the temporary revocation of the operation of the said notification up to January 31, 2022.
4.	Notification 56/2021 – Customs (ADD) dated September 30, 2021	Amends Notification No. 38/2018-Customs (ADD) dated September 25, 2019 pertaining to Anti-dumping Duty on 'Methylene Chloride' from European Union and United State of America so as to extend the temporary revocation of the operation of the said notification up to January 31, 2022.
5.	Notification 57/2021 – Customs (ADD) dated September 30, 2021	Amends Notification No. 16/2020 -Customs (ADD) dated June 23, 2020 pertaining to Anti-dumping Duty on flat rolled product of steel, plated or coated with alloy of Aluminum and Zinc from China PR, Vietnam and Korea RP, so as to extend the temporary revocation of the operation of the said notification up to January 31, 2022.



Countervailing Duty		
1.	Notification 04/2021-Cus (CVD) dated September 24, 2021	Imposes Countervailing duty on "Aluminum Wire in coil form/Wire Rod in coil form having diameter ranging from 9 mm to 13 mm" exported from Malaysia for a period of 5 years.
2.	Notification 05/2021-Cus (CVD) dated September 30, 2021	Amends Notification No. 01/2017 – Customs (CVD) dated September 7, 2017 pertaining to Countervailing duty on the imports of "Certain Hot Rolled and Cold Rolled Stainless Steel Flat Products" from China PR so as to extend the temporary revocation of the operation of the said notification up to January 31, 2022.

NEWS/LEGISLATIVE UPDATES

- GSTN issues advisory on ITC availability in GSTR-2B and GSTR-9 for FY '21
 - GSTN issues advisory in relation to input tax credit (ITC) in respect of records (invoices and debit notes) for supply of goods or services (or both) for Financial Year 2020-21 which have been submitted after the due date of furnishing the return for the month of September 2021.
 - Informs that the records after due date of GSTR-3B of September 2021 will not reflect as “ITC Available” in GSTR-2B of the recipients and will reflect in “ITC Not Available” section of GSTR-2B and such ITC shall in turn not be auto-populated in GSTR-3B.
 - Adds that records will also not reflect as “ITC as per GSTR-2A” in Table-8A of GSTR-9 of the recipients.
 - Thus, taxpayers have to ensure that their records pertaining to Financial Year 2020-21 are reported on or before the due date of their GSTR-3B for the month September 2021, or for the quarter of July to September 2021 in case of quarterly GSTR-3B filers.
- GSTN’s advisory on resumption of blocking of E-way bill generation facility from Aug’ 21
 - The blocking of E way bill generation facility had been temporarily suspended by Government on account of Covid pandemic. In terms of Rule 138 E (a) and (b) of the CGST Rules, 2017, the E Way Bill generation facility of a person is liable to be restricted, in case the person fails to file their return in Form GSTR-3B/outward supplies/statement in CMP-08, for consecutive two tax periods or more, whether Monthly or Quarterly.
 - GSTN issued an advisory on resuming the blocking of EWB generation facility on the EWB portal for all the taxpayers; It Advised taxpayers to file pending GSTR 3B returns/CMP-08 Statement on regular basis.
 - Informs that from the tax period August 2021 the System will periodically check the status of returns filed in Form GSTR-3B or the statements filed in Form GST CMP-08 as per the regular procedure followed before pandemic, and block the generation of EWBs as per Rule 138E (a) and (b) of the CGST Rules.

We hope you have enjoyed reading this update. For further information please write to us at insights@elp-in.com or connect with our authors:

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