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## Indirect Tax Case Law Compendium 2024

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## Supreme Court

### Withdrawal of tax rate concessions by the Government, cannot be subject to judicial scrutiny

The Supreme Court of India ("**Supreme Court**"), in the case of ***Union of India vs. ABP Pvt. Ltd. and Anr.***[1] ruled on the scope of judicial scrutiny in respect of withdrawal of concessional tax rates by the Government of India ("**GoI**"). ABP Pvt. Ltd. ("**Respondent**") was engaged in importing specific printing machines, eligible for concessional rate of customs duty at the rate of 5%[2], which was subsequently withdrawn by the GoI[3]. The Respondent filed the bills of entry for import of printing machines, in accordance with the notification providing concessional rate of customs duty. However, due to the withdrawal of the concessional rate, the Respondent was ineligible for such benefit. Aggrieved by the withdrawal of the concessional rate, the Respondent filed a writ petition before the High Court of Calcutta ("**Calcutta HC**") seeking to declare the withdrawal of the concessional rate of customs duty to be *ultra vires*.

The Calcutta HC set aside the notification (withdrawing concessional rate of duty) on the ground that no intelligible differentia existed for granting concession on one type of machinery and withdrawing concession for other types of machinery, directing the government to allow concessional rate of customs duty to the Respondent. Aggrieved by the ruling of the Calcutta HC, the authorities approached the Supreme Court.

The petitioner contended that there is no vested right in the concession provided to a taxpayer and such concession can be withdrawn at any time, also no time-limit should be insisted upon before it is withdrawn. The Supreme Court agreed with the arguments of the revenue authorities and held that issuance and withdrawal of any fiscal benefit is within the ambit of the executive and such withdrawal cannot be subject to judicial review.

### No service tax payable on user development fee payable at international airport

The Supreme Court in the case of ***Central GST Delhi vs. Delhi International Airport Ltd***[4]***.,*** ruled upon the taxability of user development fee collected by the airport operation and maintenance entities.

[1] 2023 (5) TMI 620
[2] Notification No 86 of 2003 (Cus) Classification, dated May 28, 2003
[3] Notification No 164 of 2003 – Customs, dated November 11, 2003
[4] 2023 (5) TMI 867

Delhi International Airport ("**DIAL**") entered into a joint venture arrangement with the Airports Authority of India ("**AAI"**), whereby DIAL was required to undertake activities, enjoined upon the AAI under the AAI Act[5], for the purpose of operation, management and development of the airports. A demand was raised by the service tax authorities on the ground that development fee collected by DIAL from the passenger will be subject to service tax. The demand was confirmed at the adjudication level, which was challenged by DIAL before the CESTAT[6].

CESTAT Mumbai held that 'user development fee' levied and collected by the airport operation, maintenance, and development entities from passengers was a statutory levy and therefore cannot be subjected to service tax. It was further observed by the CESTAT that such development fee was collected for the purpose of upgradation and renovation of airports and not for providing any services. Revenue authorities challenged the order of the CESTAT before the Supreme Court.

The Supreme Court held that as per the economic policies of GoI, the upgradation and renovation of airports are funded through user development fee, which is a statutory levy. Further, the fact that user development fees are not deposited in a government treasury, per se, does not make it any less a statutory levy or compulsory exaction. The respondent was authorised by notifications issued by the GOI under Section 22A of the AAI Act to collect the 'development fee'. The Supreme Court noted that the fee was collected to bridge the funding gap of project cost for the development of future establishment of the airports. Therefore, it was held that user development fee collected by the respondent is not subject to levy of service tax.

**JSA Comment**: While the ruling is issued in the context of levy of service tax on the user development fee charged by the AAI, the ratio of this judgement could be extended in respect of levy of GST[7] on other statutory levies or licence fees, etc. which is already in dispute in some of the instances.

## Designs imported in paper form are taxable as services and not goods - same activity can be taxed as goods and services

In the case of ***Commissioner of Customs, Central Excise and Service Tax vs. Suzlon Energy Ltd.***[8], the assessee was engaged in manufacturing of Wind Turbine Generators ("**WTG**") and entered into an agreement with its sister concern in Germany for import of engineering, Design & Drawings ("**Designs**") of various models to be used in manufacturing of WTG in India. The assessee imported and cleared the said Designs in a blueprint form on paper and claimed benefit of nil rate of customs duty. Further, the assessee adopted a tax position that the imported Designs were to be included in value of goods, and not to be treated as services, and therefore, there was no requirement of paying service tax on the same.

An audit was conducted by the authorities and an SCN[9] was issued to the assessee, for the period June 2007 to September 2010, demanding service tax on import of the Designs under the category of 'design service' of the erstwhile service tax law[10]. The adjudicating authority confirmed the said demand, along with interest and penalty. Subsequently, the assessee preferred an appeal before the CESTAT, wherein it was held that Designs imported in the form of paper are goods and not services. It was further held that the taxation of goods and services are mutually exclusive, and therefore the same activity cannot be taxed as both goods and services.

Aggrieved by the order of the CESTAT, the authorities preferred an appeal before the Supreme Court. However, the Supreme Court ruled against the assessee and held that the Designs imported from sister companies are classifiable as 'design service' and leviable to service tax, based on the following observations:

1. designs may be shown as goods in a bill of entry under the Customs Act[11]. However, this by itself cannot lead to exclusion of such Designs from the purview of the definition of design service;

[5] Airports Authority of India Act,1994
[6] Central Excise and Service Tax Tribunal
[7] Goods and Services Tax
[8] 2023 (4) TMI 409
[9] Show Cause Notice
[10] Section 65(35b) read with Section 65(105) (zzzzd) of the Finance Act, 1994
[11] Customs Act, 1962

2. there is a distinction between sale of goods and contract of services. Therefore, the intention of the contracting parties must be ascertained as to whether the contracting parties intend to transfer both goods and services, either separately or in an indivisible composite manner; and
3. as per the aspect theory, different aspects of a transaction can be taxed through separate provisions. Therefore, service tax can be levied on the aspect of services, and further the same activity can be taxed both as goods and services, provided the contract is indivisible.

**JSA Comment**: This is an important ruling given the fact that industry has adopted a position that once an activity is taxed as goods, the same cannot be levied to service tax or GST as services due to mutual exclusivity of scheme of taxation for goods and services. This ruling of the Supreme Court could result in past period liability for businesses which needs to be analysed and dealt with.

## Pre-import condition under advance authorisation scheme upheld by Supreme Court

In the case of ***Union of India vs. Cosmos Films Limited***[12], constitutional validity of 'pre-import' condition required to be fulfilled for availing benefit under the Advance Authorisation Scheme ("**AA**"), is upheld by the Supreme Court. The Directorate General of Revenue Intelligence, Kolkata ("**DRI**") initiated an investigation against various manufacturers *vis-a-vis* compliance with the 'pre-import' condition in relation to the exemption claimed of IGST[13] and compensation cess on imports under the AA.

Prior to implementation of GST, unconditional exemption from applicable customs duty was extended on inputs imported under the AA. With the introduction of GST in July 2017, the said exemption was initially limited to BCD[14] and excluded IGST and compensation cess leviable on import of goods. Accordingly. importers were required to pay IGST and seek refund upon export of the resultant goods. However, in October 2017, an amendment was made to include IGST and compensation cess within the purview of exemption, subject to satisfaction of 'pre-import' condition and 'physical exports.' Further, a corresponding amendment to introduce the 'pre-import' condition in the AA was made effective in the Foreign Trade Policy 2015-20 ("**FTP**") as well.

Against this background, exporters continued with their practice of making exports using old stock and importing duty-free inputs, thereby not satisfying the pre-import condition on various occasions. Noticing this, DRI sought to deny the IGST and compensation cess exemption to the businesses. As per the DRI, 'pre-import' condition meant that goods had to be imported first, and then the final products manufactured with such imported goods were to be exported. When it was established that goods imported against a particular AA were used in relation to manufacture of finished goods exported against that specific authorisation, the 'pre-import condition' stood satisfied. Hence, the DRI alleged that the exporters who undertake export and import in a continuous cycle and are unable to establish that their imports are meeting the condition or have exported in anticipation of authorisation are not eligible for the exemption from IGST and compensation under AA. Subsequently, in January 2019, the 'pre-import' condition was removed.

Aggrieved by the interpretation of the DRI, the exporters/assesses approached the Gujarat High Court ("**Gujarat HC**") challenging the 'pre-import condition'. The Gujarat HC held that the exemption of IGST and compensation cess under pre-import condition did not meet the test of reasonableness and is therefore, *ultra vires* the FTP, and extended relief to exporters/assesses. The GOI challenged the decision of the Gujarat HC decision before the Supreme Court.

The Supreme Court has set aside Gujarat HC's order with respect to fulfilment of pre-import condition. The

[12] 2023 (5) TMI 42
[13] Integrated GST
[14] Basic Customs Duty

key findings given by the Supreme Court in this regard are summarised below:

1. it was acknowledged that the introduction of the 'pre-import condition' may have resulted in hardship for the exporters considering that they fulfilled the physical export criteria, however, it was held that this would not make the condition invalid. The Supreme Court relied on various judgements wherein it was held that inconvenience or hardship is not a ground for the court to interpret the plain language of the statute differently, to give relief;
2. it was also observed that in complex economic matters every decision is necessarily empiric and is based on experimentation. The courts while considering the validity of the executive action relating to economic matters grant a certain measure of freedom to the executive and cannot strike down a policy decision taken by the GoI merely because it feels that another policy decision would have been fairer or wiser or more scientific or logical. The court can interfere only if the policy decision is patently arbitrary, discriminatory or mala fide; and
3. further, the argument of the exporters/assessees, that there is no rationale for different treatment of BCD and IGST under AA was held to be without merits. While dismissing the argument, the Supreme Court held that BCD is a customs levy at the point of import. On the other hand, IGST is levied at multiple points (including at the stage of import) and ITC[15] gets into the stream, till the point of end user. As a result, there is a justification for a separate treatment of 2 (two) separate levies. Therefore, the exemption under pre-import condition cannot be faulted with for arbitrariness.

## Dues under Customs Act do not override the rights of secured creditors

In the case of ***Industrial Development Bank of India ("IDBI") vs. Superintendent of Central Excise and Customs & Ors***[16], IDBI was providing financial support to Sri Vishnupriya Industries Limited ("**SVIL**"), for which SVIL *inter alia* hypothecated movable properties as security. This included imported machinery from Italy which was warehoused in a private bonded warehouse. SVIL did not clear the goods for home consumption even after expiry of the period for warehousing and consequently, customs authorities issued a SCN demanding customs duty on the company. However, the company contested the SCN, resulting in the customs authorities confirming the demand of duty in the SCN and auctioning of the warehoused goods.

In the meanwhile, the petition filed by the company for winding up was admitted by the Andhra Pradesh High Court ("**AP HC**"). Subsequently, the official liquidator *vide* application under Section 468 of the companies Act[17] directed the customs authorities to handover possession of the imported goods, which were put up for auction. An application before AP HC in this regard was allowed holding that the official liquidator is a custodian of all the properties of the company and any person making any claim against the company must prove his claim before the official liquidator. Aggrieved by the view of the AP HC, the custom authorities preferred an appeal before the division bench, and it was decided in their favor that the customs authorities have the first right to sell the imported goods under the Customs Act and adjust the sale proceeds towards payment of customs duty. IDBI, as a secured creditor, challenged the said decision of the division bench of AP HC before the Supreme Court.

The Supreme Court perused the provisions of Companies Act and the Customs Act pertaining to preferential claims and held that the provisions in the Customs Act do not override the statutory preference in terms of Section 529A of the Companies Act, which treats the secured creditors and the workmen's dues as overriding preferential creditors. Accordingly, the decision of the AP HC was set aside, and Supreme Court ordered to pay the auction proceeds of the imported goods to the official liquidator, for distribution in accordance with the provisions of the Companies Act.

## Interest and penalty cannot be levied on delayed payment of customs surcharge, CVD[18] and SAD[19] in absence of statutory provisions

[15] Input Tax Credit
[16] 2023 (8) TMI 945 – Supreme Court
[17] Companies Act, 1956
[18] Countervailing Duty
[19] Special Additional Duty

In the case of ***Union of India & Ors. vs. Mahindra and Mahindra Ltd***[20], the assessee engaged in the manufacture of automobiles, filed applications before the Settlement Commission in relation to customs duty demand pertaining to under declaration of value of imported goods. The Settlement Commission confirmed the duty demand along with interest and partial penalty. The assessee approached the High Court of Bombay ("**Bombay HC**") challenging the levy of interest and penalty on additional duties of customs, such as CVD, SAD and surcharge, arguing that there is no enabling provision under the Customs Act and rules issued thereof for imposition of interest and penalty on said duties of customs.

The Bombay HC held that interest and penalty provisions under the Customs Act and rules issued thereof are applicable with respect to short payment of BCD[21] only, and there is no specific provision under Customs Act and rules issued thereof to levy interest or penalty on the additional duties such as CVD, SAD and surcharge. Further, a taxing statute must be construed strictly, and tax can be imposed only when the language of the statute expressly provides for it. Thus, in the absence of any substantive provision under the Customs Act and rules issued thereof the Bombay HC quashed the orders of Settlement Commission and directed refund of interest and penalty.

Against the order of Bombay HC, the tax authorities preferred a SLP[22] before the Supreme Court, which was dismissed and accordingly, the decision of the Bombay HC i.e., interest/penalty cannot be levied on delayed or non-payment of CVD/SAD and surcharge, has attained finality.

**JSA Comment:** This decision has reinforced the well-established principle that no demand can be sustained without necessary statutory provisions. Considering that the Revenue's SLP is dismissed, the taxpayers may consider evaluating the position adopted by them and seek refund of interest and penalty paid on delayed payment of CVD and other levies.

## Failure to avail benefit under amnesty scheme cannot bar restoration of an appeal

In the case of ***P.M. Paul vs. The State Tax Officer and Ors.***[23], P.M. Paul ("**Appellant**"), a dealer registered under the KVAT Act[24], filed an appeal before the Joint Commissioner (Appeals) challenging the assessment order issued by the sales tax officer. During the pendency of the said appeal, the Government of Kerala introduced an Amnesty Scheme[25] to settle disputes under the erstwhile indirect tax laws.

To avail the benefit of the Amnesty Scheme, the Appellant withdrew the appeal filed before the Joint Commissioner (Appeals). However, the Appellant was unable to avail benefits under the Amnesty Scheme. Therefore, the Appellant filed an application for restoration of the appeal (which was withdrawn earlier). The restoration application was dismissed by the Joint Commissioner (Appeals).

The Appellant challenged the rejection order by way of a writ petition before the High Court of Kerala ("**Kerala HC**"). The Single Judge Bench of the Kerala HC observed that the Appellant could not seek restoration of the appeal on the grounds of being unable to avail benefits under the Amnesty Scheme. The said decision of the Single Bench was affirmed by the Division Bench of the Kerala HC. Aggrieved by the decision of the Kerala HC, the Appellant approached the Supreme Court of India.

The Appellant contended that withdrawal of pending appeal(s) was one of the pre-conditions for availing the benefit under the Amnesty Scheme. Therefore, the Appellant was required to withdraw the appeal to avail the benefits available under the Amnesty Scheme. Additionally, the Amnesty Scheme did not bar the restoration of (withdrawn) appeal. The Supreme Court observed that the appeal was neither restored nor heard on merits, resulting in foreclosing of all the remedies available in the law. The Supreme Court therefore set aside the decision of the Kerala HC and directed the appellate authority to restore the appeal.

[20] 2023 (8) TMI 135 – SC Order
[21] Basic Customs Duty
[22] Special Leave Petition
[23] 2023 (9) TMI 448
[24] Kerala Value Added Tax Act, 2003
[25] Amnesty scheme introduced by the Government of Kerala under the provisions of the Kerala Value Added Tax Act, 2003]

## Supreme Court interprets the definition of 'Governmental authority' under service tax


In the case of ***Commissioner, Customs Central Excise and Service Tax, Patna & Ors. vs. Shapoorji Pallonji and Company Private Limited and Anr***[26], Shapoorji Pallonji and Company Private Limited ("**Respondent**") is engaged in the business of providing construction services. The Respondent was awarded a contract for construction works by IIT Patna and NIT Rourkela. The Respondent registered itself under service tax laws[27] and discharged service tax liability for the period from March 2013 to April 2015, on the said contract. While IIT Patna reimbursed the amount of service tax paid by Respondent, NIT Rourkela refused to reimburse the said amount claiming that the work executed is exempt from the payment of service tax.

The Indian Audit and Account Department raised an objection that as per clause 12(c) of Notification No. 25/2012 dated June 20, 2012 ("**Exemption Notification**"), IIT Patna, being a 'governmental authority', is not required to pay service tax. Consequently, directions were issued to undertake action to recover or adjust the service tax reimbursed to the Respondent.

*Clause 12(c) of Exemption Notification exempted levy of service tax on construction services provided to "governmental authority" in specified cases. The term "governmental authority" was defined under clause 2(s) of the Exemption Notification (as amended on January 30, 2014).*

*"Governmental authority" means an authority or a board or any other body;*

*(i) set up by an Act of Parliament or a State legislature; or*

*(ii) established by Government,*

*with 90% or more participation by way of equity or control, to carry out any function entrusted to a municipality under article 243W of the Constitution."*

In view of the above backdrop, writ petitions were filed by the Respondent before High Court of Patna ("**Patna HC**") and Orissa ("**Orissa HC**") respectively to determine whether IIT Patna and NIT Rourkela qualify as 'governmental authority' and whether the exemption from service tax would be available.

Patna HC held that IIT Patna would be covered within the definition of 'governmental authority' stipulated under amended clause 2(s) and hence eligible for aforesaid exemption. It interpreted that the condition of '90% or more participation by way of equity or control, to carry out any function entrusted to a municipality under Article 243W of the Constitution of India ("**Constitution**") is only relevant to sub-clause (ii) of clause 2(s) of the Exemption Notification. The same condition cannot be read with sub-clause (i) as, it separated by 'semicolon' and by a conjunction 'or'. The same view was maintained by Orissa HC for services rendered to NIT Rourkela.

Aggrieved by the Patna HC and Orrisa HC orders, the revenue authorities filed an appeal before the Supreme Court wherein it was held as follows:

1. the scope of term 'governmental authority' was widened to provide exemption even to an authority or a board or any other body, set up by an Act of Parliament or a State Legislature without being subjected to the condition of having been established with 90% or more participation by way of equity or control by the GoI to carry out any function entrusted to a municipality under Article 243W of the Constitution;
2. in this regard, the Supreme Court observed that the use of semicolon followed by the word 'or' in sub-clause (i) and comma in sub-clause (ii) indicates

[26] 2023 (10) TMI 748 - Supreme Court

[27] Chapter V of Finance Act, 1994 read with allied rules, notifications, etc.

that the words stating "*90% or more participation by way of equity or control, to carry out any function entrusted to a municipality under Article 243W of the Constitution*" would be applicable only to sub-clause (ii) of clause 2(s), i.e. 'governmental authority' which is established by the GoI;

3. given that the language and meaning of the above clause in clear and unambiguous, the Supreme Court highlighted that there is no need to resort to rules of interpretation. Harmonious construction is required only when provisions are ambiguous or lack clarity. A statute should be interpreted in a manner to achieve their ordinary, natural and grammatical meaning; and
4. further, one does not read 'or' as 'and' in a statute unless one is obliged to, as 'or' does not generally mean 'and' and 'and' does not generally mean 'or'. Thus, the word 'or' in clause 2(s) between sub-clauses (i) and (ii) indicates the independent and disjunctive nature of sub-clause (i).

Accordingly, the Supreme Court upheld the rulings of Patna HC and Orissa HC to state that IIT, Patna and NIT Rourkela are 'governmental authority' within the meaning of the term as explained under clause 2(s) (*ibid*) and hence, no service tax should apply.

## Corporate guarantees provided to group companies without consideration, not a taxable service

In the case of ***Commissioner of CGST and Central Excise vs. Edelweiss Financial Services Limited***[28], the Supreme Court analysed the taxability of corporate guarantees provided to group companies without consideration under the erstwhile service tax regime.

The respondent (Edelweiss) contended that the issuance of corporate guarantees to a group company without consideration would not fall within the scope of 'banking and other financial services' and therefore, should not be considered as a taxable service.

The tribunal in its order had observed that the criticality of 'consideration' for determination of service, as defined in Section 65B (44) of the service tax laws[29] for the disputed period after introduction of 'negative list' regime of taxation has been rightly construed by the adjudicating authority. Taxability of a service requires 2 (two) elements - a 'provider' and a flow of 'consideration'. In the absence of any of these two elements, taxability under Section 66B of the service tax laws does not arise.

Relying on the above findings of the tribunal, the Supreme Court held that in absence of flow of consideration, no taxable service can be said to be provided.

## In case of mismatch of ITC reported in Form GSTR-3B vs. Form GSTR-2A, GST cannot be collected from the recipient without inquiry into supplier's actions

In the case of ***Suncraft Energy Private Limited vs. Assistant Commissioner of State Tax***[30], Suncraft Energy Private Limited (the Petitioner) approached the Calcutta HC challenging the order [*passed by [mention the appropriate adjudicating authority*] ("**Order**") requiring reversal of ITC on account of non-reflection of supplier invoices in Form GSTR-2A of the Petitioner.

Relying on the press releases dated May 4, 2018, and October 18, 2018, the Calcutta HC observed that furnishing of outward details in Form GSTR-1 filed by the supplier, and those details appearing in Form GSTR-2A of the recipient, is in the nature of facilitation. This process does not impact the ability of the taxpayer to avail ITC on self-assessment basis in accordance with the provisions of Section 16 of the CGST Act[31]. It was also observed that the press releases clarified that there would not be any automatic reversal of ITC by the recipient on non-payment of GST by the supplier. The Calcutta HC set aside the Order and held that demand of GST by way of reversal of ITC is not sustainable without proper inquiry into the supplier's actions and that the proceedings against the recipient can be initiated only in exceptional circumstances such as where supplier is missing, closure of business of supplier, etc.

Aggrieved by the decision of the Calcutta HC, the GST authorities filed SLP, wherein the Supreme Court dismissed the Revenue's plea primarily on pecuniary

[28] Diary No. 5258/2023
[29] Chapter V of Finance Act, 1994 read with allied rules, notifications, etc.
[30] 2023 (8) TMI 174 – Calcutta HC
[31] Central Goods and Services Tax Act, 2017

grounds, without explicitly commenting on the merits of the matter[32], thereby, upholding the decision of the Calcutta HC.

### Supreme Court stays the order of the Himachal Pradesh High Court which declared 'Water Cess' as unconstitutional

In a SLP filed by the National Hydroelectric Power Corporation Ltd., the Supreme Court stayed the operation of the judgment of the Himachal Pradesh High Court ("**Himachal HC**"), which held the imposition of 'Water Cess' under the Himachal Pradesh Water Cess on Hydropower Electricity Generation Act, 2023 ("**Water Cess Act**") as *ultra vires* the Constitution and beyond the legislative competence of the State Government.

The Himachal HC had held that it is a 'misnomer' that 'Water Cess' is not a water tax as tax is levied on water and not generation of electricity. It was also stated that a critical component of taxing statute i.e., measure of tax is absent in the Act. The State's competence to levy tax on water drawn for hydropower generation cannot be traced to Entry 49 of List-II. Consequently, the Supreme Court directed refund of any recovery from assessee under the Act and set aside the notice seeking to recover 'Water Cess'.

## High Court

### GST not payable on exempted activities related to electricity distribution


The Hon'ble High Court of Delhi ("**Delhi HC**") in the case of ***BSES Rajdhani Power Ltd. vs. Union of India***[33], ruled upon the validity of the Circular[34] issued by the CBIC[35], clarifying the applicability of GST on electricity related charges in the nature of metering equipment, testing fee for meter, labour charges for meter shifting, etc.

BSES Rajdhani Power Ltd. ("**Petitioner**"), based on the exemption notification[36] neither collected nor deposited GST with the GoI on intra-State supply of services (transmission or distribution of electricity by an electricity transmission or distribution utility). However, GST was demanded on the services which are ancillary to distribution of electricity.

Aggrieved by the demand, the Petitioner approached the Delhi HC challenging the *vires* of the Circular, which clarified the levy of GST on ancillary services to distribution of electricity. The Petitioner contended that the said services form an integral part of the distribution of electricity, which is exempt from the levy of GST. Further, reliance was placed on the judgement of the Gujarat HC in the case of *Torrent Power Ltd. vs. Union of India*[37], wherein the Gujarat HC had struck down the Circular, being *ultra vires* Section 8 of the CGST Act. The Delhi HC following the judgement of the Gujarat HC, set aside the Circular, thereby, confirming that the said services will not be subject to GST.

*The Petitioner was represented by JSA Team in the matter.*

### Constitutional validity of anti-profiteering provisions under GST upheld

In the case of ***Reckitt Benckiser India Private Limited and Ors. vs. Union of India***[38], the petitioners had challenged the constitutionality of Section 171 of the CGST Act and corresponding rules on the ground that the said provisions are beyond the legislative competence of the Parliament.

The Delhi HC upheld the constitutional validity of provisions in relation to anti-profiteering. The key observations of the HC are as below:

1. there is a presumption in favor that of constitutionality of a statute that unless evidence to the contrary is presented, statutes relating to economic activities should be viewed with greater

[32] Assistant Commissioner of State Tax, Ballygunje and Others vs. Suncraft Energy Private Limited, 2023 (12) TMI 739 - SC Order
[33] 2023 (12) TMI 832
[34] Circular No. 34/08/2018-GST dated March 01, 2018
[35] Central Board of Indirect Taxes and Customs
[36] Notification No. 12/2017, dated June 28, 2017
[37] 2019 (1) TMI 1092 – Gujarat HC
[38] (2024) 14 Centax 374 (Del.)

flexibility due to complexity of transactions governed by such statutes;

2. Article 246A of the Constitution empowers the Parliament and the Legislature to make laws 'with respect to' GST. The expression 'with respect to' is of wide amplitude, encompassing all ancillary, incidental and necessary matters relating to GST including Anti-profiteering measures;
3. Section 171 of the CGST Act is a complete code as it sets out functions, duties, responsibilities and powers of NAA[39] with precision. Therefore, it neither delegates any essential legislative function nor violates Article 14 of the Constitution;
4. the requirement of 'commensurate' reduction in price is essential for passing on the benefit of reduced tax rates and increase in ITC to the end consumers (i.e., ensuring that consequential benefit of tax rate reduction reaches intended recipients);
5. while a supplier has the liberty to set a base price and adjust it as per relevant commercial, economic factors, or applicable laws, such base price adjustment should be justified;
6. Section 171 of the CGST Act is not a price fixing/controlling measure, it is a provision aligned with the objective of consumer welfare. It aims to fulfil primary objective of overcoming cascading effect and reducing burden on final consumer. Therefore, Anti-profiteering provisions are not violative of Article 19(1)(g) and 300A of the Constitution;
7. NAA is empowered to determined methodology on case-to-case basis depending on nature of industry and peculiar facts;
8. there is no requirement of judicial member in NAA as anti-profiteering investigation is a fact-finding process;
9. anti-profiteering provisions to remain effective till such time there exists a direct relationship of price with increase in GST rate/decrease in ITC and therefore, a specific time frame cannot be imposed;
10. Section 171 read with Section 164 of the CGST Act empowers the GoI to prescribe penalty and interest; and
11. In case of instances of arbitrary use of power such as exceeding jurisdiction or overlooking genuine factors (cost escalation offsetting reduction etc.), remedy is to set aside such orders on merits. Such instances do not warrant striking down of provision itself but are cases of incorrect application of power.

The Order of the Delhi HC has been challenged before the Supreme Court by way of SLP.

## Voucher being an actionable claim cannot be subject to tax at the time of issuance

In the case of ***Kalyan Jewelers India Limited vs. Union of India***[40], Kalyan Jewelers India Limited ("**Petitioner**") are engaged in the business of manufacture and sale of ornaments across the country, through its retail outlets. The Petitioner had approached the Tamil Nadu AAAR[41] for determination of taxability of vouchers.

The AAAR ruled that a voucher *per se* is neither supply of goods nor supply of services and is only a means for payment of consideration. Therefore, determination of whether vouchers qualify as actionable claims is not required. Relying on Sections 12(4)(a) and 13(4)(a) of the CGST Act, the AAAR observed that where a voucher identifies goods or services that can be received on redemption, the time of supply of underlying goods or service is at the time of issuance of voucher. Based on the above, AAAR ruled that the gift vouchers can be redeemed for purchase of gold jewelry, at a known rate of GST and therefore, GST will be payable at the time of issuance of voucher.

Aggrieved by the Order of AAAR, the Petitioner filed a writ petition before the Madras High Court ("**Madras HC**"). The Petitioner contended that the gift voucher is an actionable claim falling under Schedule III of the CGST Act and therefore, not subject to GST. Since there is no supply at the time of issuance of voucher, GST is not payable by the Petitioner on the date of issuance as envisaged under Section 12(4)(a) of the CGST Act. Accordingly, GST is payable only at the time of actual supply of the underlying goods/services i.e., at the time of redemption of the gift voucher by the customer.

Relying on the Master Direction dated October 11, 2017, issued by RBI[42], the Madras HC observed that the

[39] National Anti-profiteering Authority
[40] (2024) 14 Centax 146 (Mad.)
[41] Appellate Authority for Advance Ruling
[42] Reserve Bank of India

gift voucher issued by the Petitioner is a prepaid payment instrument . Further, the Madras HC ruled that a gift voucher satisfies all the facets of 'actionable claim' as provided under Section 3 of the Transfer of Property Act, 1882, therefore, no tax is payable on gift voucher in view of Schedule III of the CGST Act. The Madras HC held that since the Gift voucher is not for a specified item of jewelry of specified value, time of supply will get postponed to the actual date of redemption of the voucher.

## Interest not payable when GST paid in ECL[43] before due date of filing Form GSTR-3B

In ***Eicher Motors Limited vs. Superintendent of GST and CEx.***[44], the Madras HC ruled upon the requirement of payment of interest by Eicher Motors Limited ("**Petitioner**"), where GST was paid in the ECL by generating Form GST PMT-06 before the due date, however, monthly return in Form GSTR-3B was filed belatedly, for FY 2017-18.

A demand notice recovering interest was served on the Petitioner due to alleged delay in payment of GST while filing Form GSTR-3B. The recovery notice was issued, without issuance of SCN. Aggrieved by the action of the GST Authorities, the Petitioner filed a writ petition before the Madras HC.

The Petitioner contended that deposit of tax in ECL will amount to payment of tax and will not attract interest liability. The Madras HC agreed with the view adopted by the Petitioner and observed the following:

1. the moment when the amount is deposited by generating Form GST PMT-06, it becomes the money of the exchequer as, the money was collected under the name of the exchequer; and
2. once the amount is paid by way of Form GST PMT-06, the said amount is immediately credited to the account of the GoI and the tax liability of the registered person is discharged to that extent. Thereafter, the said amount is deemed to be credited to the ECL, for accounting purposes[45].

Accordingly, the Madras HC held that no interest is payable if GST is paid in ECL even if the corresponding Form GSTR-3B is filed belatedly.

## Bunched SCNs for different assessment years cannot be issued

In the case of ***Titan Company Limited vs. Joint Commissioner***[46], the petitioner aggrieved by SCNs issued by the respondent for 5 (five) years i.e., FY 2017-18 to FY 2021-22 as a single bunch, has approached the Madras HC on the grounds that bunching of SCNs is against the spirit of the provisions of Section 73 of the CGST Act. The petitioner relied on the ruling of the Constitutional Bench of the Supreme Court in the case of State of *Jammu and Kashmir and Ors vs. Caltex (India) Limited*[47], wherein it was held that each assessment year will have a separate period of limitation and the limitation period will commence independently for each year.

The Madras HC accepted the contentions of the petitioner and held that bunching of SCNs is not permissible and therefore, the same are liable to be quashed. The Madras HC also affirmed that limitation period of 3 (three) years would be separately applicable for each year and would vary from 1 (one) year to another.

## Game of skill, with or without stake, does not amount to betting or gambling

In the case of ***Gameskraft Technologies Private Limited vs. DGGI***[48], the question before the Karnataka High Court ("**Karnataka HC**") was to determine if online games based on skill, whether played with/without stakes amounts to 'gambling' or 'betting'. Gameskraft Technologies Private Limited ("**Petitioner**") was *inter alia* engaged in the business of operating a technology platform on which users can play online games against each other. The petitioner merely hosted such games on the platform. Pursuant to the investigations carried out by DGGI[49], a SCN was issued alleging that the Petitioner is involved in facilitating betting and gambling, which amounts to

[43] Electronic Cash Ledger
[44] 2024 (1) TMI 1111 – Madras High Court
[45] Explanation Clause to Section 49(a) of the Central Goods and Services Tax Act, 2017
[46] (2024) 15 Centax 118 (Mad.)
[47] AIR 1966 SC 1350
[48] 2023 (5) TMI 926
[49] Directorate General of GST Intelligence

supply of 'actionable claims' as per Entry No. 6 of Schedule III of CGST Act, on which GST at the rate of 28% has not been discharged. The SCN seeks to demand GST amounting to INR 21,000 crore (Indian Rupees twenty-one thousand crore). The petitioner filed a writ petition before the Karnataka HC, challenging the validity of the said SCN.

The petitioner relying on several judicial proceedings challenged the jurisdiction of the SCN on the grounds that a game of skill even if played with monetary stakes does not partake the character of 'betting' or 'gambling', as the same continues to be a game of skill. Also, the character of 'rummy' being a 'game of skill' does not change whether played online or offline. The respondents argued that placing stakes on an outcome of a game, irrespective of the game being that of skill or chance, would amount to 'betting' or 'gambling'. The platform of the petitioner allows players to play rummy online, by placing stakes and betting on the outcome thereof. Further, the petitioner is making profits/gains from such game of rummy played on its platform, which amounts to betting/gambling. Both petitioner and respondent relied on the landmark Supreme Court judgments to substantiate their arguments.

The Karnataka HC analysed the judicial precedents relied upon by the petitioners and the respondents and observed that the respondents have relied on selective portions of the decisions, not forming part of the ratio/principle of the rulings. Relying strongly on the principles of the judicial precedents, the Karnataka HC ruled that 'rummy' is substantially and preponderantly a 'game of skill' and not of chance. It was held that rummy, whether played with stakes or without stakes does not amount to gambling and accordingly, the SCN was quashed.

## Central and State GST not applicable on intermediary services provided to an overseas recipient - Validity of intermediary related provisions under the IGST Act[50] upheld

In the case of ***Dharmendra M Jani vs. Union of India***[51], the assessee was engaged in providing marketing and promotion services to foreign principal by way of identifying purchasers for goods in India. The assessee treated the said services as export of services, as the same was consumed outside India and thus outside the purview of the CGST Act, whereas the GST authorities were of the view that such services are intermediary services.

The assessee challenged the provisions related to intermediary services and contended that Section 13(8)(b) of the IGST Act read with Section 2(13) and 2(6) of IGST Act seeks to levy GST on services provided by the petitioners to its overseas customers, which are consumed by such customers/recipients outside India. Therefore, by fiction of law these supplies are being treated as intra-State supply making GST leviable on such export of service, under the CGST Act and MGST Act[52]. These provisions are violative of the provisions of Article 246A read with Articles 269A and 286 of the Constitution since the Constitution grants power to the Parliament to frame laws for inter-State trade or commerce, and not in respect of extra-territorial transactions.

Further, it was contended that Section 13(8)(b) of the IGST Act is *ultra vires* Section 5 of the IGST Act which provides for a levy on all inter-State supplies of goods/services. However, Section 13(8)(b) runs contrary to the scheme of the IGST Act. To this extent, Section 13(8)(b) is *ultra vires* Section 9 of the CGST Act.

The primary issue before the Bombay HC was whether Section 13(8)(b) of the IGST Act is *ultra vires* the Constitution and the provisions of the IGST Act.

In the above backdrop, one of the judges of the division bench of Bombay HC struck down Section 13(8)(b) of IGST Act as *ultra vires* and observed that these provisions are not only against the overall scheme of CGST Act and IGST Act but also offends Articles 245, 246A, 269A and 286(1)(b) of the Constitution. However, the companion judge upheld the validity of the said provisions. In view of such a difference in opinion, the matters were placed before the third judge of the Bombay HC who held as follows:

1. the transactions in question are in fact an export of service, as the recipient of service is the foreign principal and consumption of the services takes place in a foreign land. The test of "export of service" as defined under Section 2(6) of the IGST Act is satisfied;

[50] IGST Act, 2017
[51] 2023 (4) TMI 821
[52] Maharashtra Goods and Services Tax Act, 2017

2. one of the key principles of GST is that the place of taxation of goods and services is to be determined based on the destination. The transaction of export of services (as that of the petitioners) is being treated as inter-State trade or commerce by virtue of Section 7(5) of the IGST Act, whereas the same transaction is treated as an intra-State trade and commerce by virtue of Section 13(8)(b) of the IGST Act. Therefore, due to contradiction between the said provisions, character of export of service is being altered into a transaction of intra-State supply of service and accordingly, the fiction created by Section 13(8)(b) of the IGST Act, would be required to be confined only to the provisions of the IGST Act (i.e., inter-State supply of services);
3. by virtue of Article 286 of the Constitution, the States cannot impose tax in case, the supply takes place outside the State or in case of import or export. Therefore, the transaction of marketing and promotion services being undertaken by the assessee cannot amount to an intra-State trade. Thus, the assessee cannot be taxed under the CGST Act and MGST Act; and
4. the provisions of Section 13(8)(b) and Section 8(2) of the IGST Act are legal, valid and constitutional and, these are confined in their operation to the provisions of the IGST Act only and cannot be made applicable for levy of tax on services under the CGST Act and MGST Act.

## 'Recipient of supply' eligible to file an application for advance ruling

In the case of ***Anmol Industries Ltd and Anr vs. West Bengal Authority for Advance Ruling***[53], the Calcutta HC analysed whether a 'recipient of supply' has the *locus standi* to file an advance ruling application before the Authority for Advance Ruling ("**AAR"**).

The assessee had filed an advance ruling application for determination of GST exemption on lease agreement executed with the supplier of service i.e., a body of the Ministry of Ports, Shipping and Waterways regarding an industrial plot for setting up commercial office complex.

The AAR held that if recipient of supply files an application for advance ruling, the same is binding only on recipient and the supplier may not follow the ruling and in such a scenario, the ruling loses its relevance and applicability. Therefore, the applicant, being recipient of service, has no *locus standi* and application was not maintainable. Aggrieved by the same, the applicant filed the present writ petition before the Calcutta HC.

The Calcutta HC observed that for the purposes of advance ruling, the term 'Applicant' is defined under Section 95(c) of the CGST Act to mean any person registered or desirous of obtaining registration under the CGST Act. Therefore, the said term is defined in the widest possible manner to include any person to that extent. Therefore, in the present case, as the recipient was a registered person under CGST Act, it squarely falls within the meaning of the term 'Applicant' and hence, it will be well within the jurisdiction of the AAR to consider its application on merits rather than rejecting the same on the ground of lack of *locus standi.*

**JSA Comment:** While the ruling may come as a beneficial relief to some of the assesses, who may approach AAR with respect to taxability of supplier received by them, it is interesting to note that Section 95(a) defines an 'advance ruling' to be in relation to the supply of goods or services proposed to be undertaken by an 'Applicant'. Given this it would be relevant to follow the matter closely and keep an eye on the interpretation adopted by other high courts or Supreme Court on the subject.

## Delay of 10 (ten) years in adjudicating assessments proceedings, to be barred by limitation period

The Bombay HC in the case of ***Siemens Ltd. vs. State of Maharashtra and Anr***[54], has ruled on the inordinate delay in concluding adjudication proceedings initiated under Maharashtra Municipal Corporations Act, 1949. Siemens Ltd. ("**Petitioner**") had discharged cess for bringing goods within the limits of Maharashtra Municipal Corporation and filed returns for the same. Pursuant to filing of the return, the Petitioner was issued a notice requiring submission of documents by the authorities. It was contended by the authorities that the Petitioner had failed to produce relevant documents in support of the returns and accordingly, issued a reminder notice after a period of 10 (ten)

[53] TS-153-HC(CAL)-2023-GST

[54] 2023 (5) TMI 181

years. Aggrieved by the reminder notice, the Petitioner approached the Bombay HC.

The Petitioner contended that certain information required by the authorities was submitted. However, the commissioner thereafter did not take any further actions to complete the assessment for a period of more than 10 (ten) years from the date of issuance of notice. It was also contended that in absence of any limitation period prescribed for completion of adjudication proceedings, the same is to be concluded within a reasonable time. The Bombay HC concurred with the arguments of the Petitioner and held that any adjudication proceedings pending for more than 10 (ten) years, should be set aside. However, for proceedings wherein the period of 10 (ten) years had not lapsed, direction was provided to the commissioner to conclude the adjudication proceedings expeditiously.

## Procedural lapses cannot be the ground for denying MEIS[55] benefits

In the case of ***Anupam Port Cranes Corporation Limited vs. Union of India***[56], Anupam Port Cranes Corporation Limited ("**Petitioner**") was involved in the business of manufacturing and supplying cranes. The Petitioner exported 'Steel plates' under MEIS, notified under FTP. At the time of filing the shipping bills, the Petitioner faced technical issues in selecting the option "YES/NO" for availing the benefits. Due to the technical issue, shipping bills were not electronically transmitted to the authorities for processing MEIS scrips and therefore, the Petitioner was not able to claim the benefit. The Petitioner in its email communications requested the authorities to consider the claim for MEIS benefits and not reject the same based on technical issues. In the absence of any response from the authorities, the Petitioner invoked the writ jurisdiction of the Gujarat HC.

The Gujarat HC relied on its decision in the case of *Bombardier Transportation India Private Limited vs. Directorate General of Foreign Trade*[57], wherein it was observed that MEIS (prescribed under the FTP) was a substantive right of a taxpayer, which arises on exportation of the notified goods and the benefits accruing under MEIS cannot be denied on account of procedural lapse. Placing reliance on the aforementioned judgement, the Gujarat HC held that once the Petitioner had fulfilled the conditions provided under MEIS, benefits accruing thereof cannot be denied due to a technical error in the electronic system. Consequently, the Court directed the authorities to grant the benefit of MEIS to the Petitioner within 6 (six) weeks from the date of receipt of the order.

## Time limit prescribed under Section 16(4) of CGST Act to claim ITC held valid


In the case of ***Thirumalakonda Plywoods vs. The Assistant Commissioner – State Tax***[58], the petitioner filed return for March 2020 in November 2020, along with the prescribed late fee. The revenue authorities denied the ITC claimed by the petitioner and imposed interest and penalty for wrongful availment of ITC, as the ITC was claimed beyond the time limit prescribed under Section 16(4) of the CGST Act.

Aggrieved by the same, the petitioner approached the AP HC. The AP HC ruled on the following questions of law:

1. **Issue 1**: Whether time limit prescribed under Section 16(4) of the CGST Act to claim ITC is violative of Article 14, 19(1)(g) and 300A of the Constitution and hence, is liable to be struck down?

   ITC is a mere concession/rebate/benefit but not a statutory or constitutional right and therefore imposing conditions including time limit for availing the said concession are not violative of the Constitution or any statute.

   The operative spheres of Section 16 and constitutional provisions under Articles 14, 19(1)(g) and 300-A of the Constitution are different and hence the question of infringement of the constitutional rights of the petitioner does not arise.

[55] Merchandise Export from India Scheme
[56] 2023 (6) TMI 862
[57] 2021 (3) TMI 9
[58] TS-349-HC(AP)-2023-GST

In order to establish legislative arbitrariness, it must be proved that the action was not reasonable or done capriciously or at pleasure, non-rational, not done or acting according to reason or judgment but depending on the will alone, which was absent in the present case.

2. **Issue 2**: Section 16(2) of the CGST Act prescribes conditions for availing ITC. Section 16(2) of the CGST Act is a *non-obstante* provision in the sense that if the conditions laid down under Section 16(2) of the CGST Act are fulfilled, then whether the time limit prescribed under Section 16(4) of the CGST Act becomes insignificant?

   The AP HC highlighted that it is trite that a *non-obstante* clause is a legislative device used to give overriding effect over contradictory provisions of the same or other statute. While interpreting such clauses, the courts should analyse the intent and scope of that *non-obstante* clause.

   Both Sections 16(2) and 16(4) of the CGST Act are 2 (two) different restrictive provisions, the former providing eligibility conditions to avail ITC and the latter imposing time limit to claim such ITC. Had the legislature not intended to impose time limitation for availing ITC, there would have been no necessity to insert a specific provision under Section 16(4) of the CGST Act and to further intend to override it through Section 16(2) of the CGST Act. Therefore, Section 16(4) of the CGST Act being a non-contradictory provision and capable of clear interpretation, it will not be overridden by Section 16(2) of the CGST Act.

3. **Issue 3**: Whether filing of returns with prescribed late fee can whittle down the conditions to claim ITC?

   The conditions stipulated in Sections 16(2) and 16(4) of the CGST Act are mutually different and both will operate independently. Collection of late fees is only for the purpose of admitting the returns for verification of taxable turnover of the petitioner but not for consideration of ITC. Therefore, mere filing of the return with a late fee will not stifle the statutory conditions contained under Sections 16(2) and 16(4) of the CGST Act.

**JSA Comment:** Validity of the time limit for claiming ITC in terms of Section 16(4) of the CGST Act is challenged in several proceedings before jurisdictional High Courts. Given that there are practical difficulties which often arise for claiming credits before the due date by the assessees, this ruling comes as a set-back, especially in those situations where assesses have complied with other substantive provisions for claiming ITC. It is quite likely that the matter may reach the Supreme Court for a final verdict and till such time the uncertainty may prevail on this issue.

## ITC and GST liability of corporate debtors undergoing CIRP[59] gets lapsed and cannot be transferred to the new company

In the case of ***ESL Steel Limited vs. Principal Commissioner***[60], CIRP proceedings were initiated against the petitioner and were approved by the NCLT[61] on April 17, 2018 ("**NCLT Date**"). Based on the relief granted by the Supreme Court to file revised Form TRAN-1[62], the petitioner revised its Form TRAN-1 on November 30, 2022 to avail unclaimed credits (additional credit of INR 92,13,412 (Indian Rupees ninety-two lakh thirteen thousand four hundred and twelve) was claimed in the revised Form TRAN-1). The additional credit was intended to be claimed after the NCLT Date. The revenue authorities, however, highlighted irregularities in credits claimed in both original and revised Form TRAN-1 and disallowed the total credit therein (including the credits claimed prior to the NCLT Date) *vide* order-in-original dated February 24, 2023 ("**OIO**") and sought to recover the same along with interest and penalty.

Aggrieved by the OIO, the petitioner filed a writ petition before the High Court of Jharkhand ("**Jharkhand HC**"), seeking to quash the OIO and directing revenue authorities to restore its revised Form TRAN-1.

The Jharkhand HC observed that it is established in the matter of ***Ghanshyam Mishra and Sons Private Limited vs. Edelweiss Asset Reconstruction Company Limited***[63] that no recovery and/or proceeding can be continued against a corporate debtor for any alleged

[59] Corporate Insolvency Resolution Process
[60] TS-323-HC(JHAR)-2023-GST
[61] National Company Law Tribunal
[62] Union of India vs. Filco Trade Centre Private Limited – SLP (C) No. 32709-32710/2018
[63] (2021) 9 SCC 657

dues prior to the NCLT Date. It was further observed that where the liability of the earlier management is not shifted to the current management, the credit available to the earlier management will also not be available to the current management as, the current management was not the taxpayer for procurements made by the petitioner prior to the NCLT Date.

Therefore, in view of the decision in the Ghanshyam matter (*supra*), the Jharkhand HC quashed the OIO, to the extent it disallowed credits claimed by the petitioner in original Form TRAN-1, filed prior to the NCLT Date. Further, the Jharkhand HC disallowed unclaimed credits in revised Form TRAN-1, filed after the NCLT Date.

## ITC cannot be denied to recipient for non-reporting by supplier, without conducting proper investigation against supplier

In the matter of ***Suncraft Energy Pvt. Ltd. vs. The Assistant Commissioner, State Tax, Ballygunge Charge***[64], the assessee was availing ITC of GST paid on procurements. However, some of vendors did not report the details of the supplies made in their outward GST returns (GSTR-1) and consequently the details of such supplies did not appear in the assessee's GSTR-2A. The tax authorities conducted scrutiny of the returns filed by the assessee and issued an SCN seeking reversal of ITC to the tune of difference in the amount between Form GSTR-3B *vis-à-vis* Form GSTR-2A. Further, no investigation was conducted on the concerned vendor who did not report the sales made to the assessee. Without appreciating the submissions made by the assessee in relation to the said notice, the GST demand was confirmed by the tax authorities.

Being aggrieved by the above, the assessee approached the Calcutta HC, which ruled in favor of the assessee and made the following observations:

1. In order to avail ITC, the conditions under Section 16(2) of the CGST Act are required to be fulfilled. In the instant case, the fact that the assessee is in possession of a valid tax invoice and has received the services is not in dispute. The payment of tax to the vendors has also been substantiated through the tax invoice and bank statement. Therefore, the tax authorities have blatantly ignored such evidence and denied ITC to the assessee, merely by relying upon the mismatch between Form GSTR-2A and Form GSTR-3B, without investigating the actions of the vendor.
2. There cannot be automatic reversal of ITC from the buyer on non-payment of tax by the supplier. In case of default in payment of tax by the seller, recovery thereof will be made from the seller. However, reversal of ITC availed by the buyer will also be an option available with the tax authorities, to address exceptional situations like collusion between the taxpayer and the supplier, missing dealer, closure of business by supplier or supplier not having adequate assets, etc.
3. Further, furnishing of outward supplies in Form GSTR-1 by the corresponding supplier and the facility to view the same in Form GSTR-2A (of the recipient) is to facilitate the taxpayers and does not impact the taxpayer's ability to claim ITC.

Therefore, the Calcutta HC set aside the impugned demand order, with a direction to revenue authorities for proceeding against the vendor first, and only in exceptional circumstances proceedings against the buyer should be initiated.

## Recipient not entitled to ITC unless tax is deposited by the supplier to the GoI

In contrast to the above decision, the Patna HC in the case of ***Aastha Enterprises vs. The State of Bihar***[65], dismissed the writ petition of an assessee and reinforced the importance of fulfillment of all conditions prescribed under the CGST Act for availing ITC, making the following observations:

[64] 2023 (8) TMI 174 - Calcutta HC

[65] 2023 (8) TMI 1038 - Patna High Court

1. Section 16(2) of the CGST Act provides conditions to claim ITC. These conditions are to be fulfilled cumulatively and not in isolation. If any condition is not fulfilled, then the purchaser is not eligible to claim the ITC. ITC is a benefit or concession and not a vested right and the benefit will be available only if all the conditions for claiming the benefit are complied with;
2. even though the purchaser has produced evidence in the form of invoices, account details showing payment made to the supplier and documents evidencing transportation of goods, the recipient should not be entitled for ITC unless tax is paid by the supplier. The recipient is still required to fulfil the condition provided in Section 16(2)(c) of the CGST Act, which states that credit can be availed by the purchaser only if tax has actually been paid to the GoI; and
3. moreover, the fact that there is a mode of recovery from supplier under the statute would not absolve the ultimate liability of the assessee to pay tax to the GoI. Further, rejecting the double taxation argument of the assessee, the Patna HC stated that taxation is mandatory extraction for public welfare.

**JSA Comment:** The Patna HC judgment has come as a wake-up call. It requires the purchasing dealer to be vigilant not only in connection with its own compliance but also in connection with compliance by the supplier in order to avail itself of the benefit of ITC. While there are judgments such as the order of the Calcutta HC in the matter of *Suncraft Energy Pvt Ltd* (supra), allowing ITC on the ground that the purchasing dealer cannot be held liable for the actions of the supplier, any default by the supplier is likely to result in litigation. Considering divergent decisions on this issue by different High Courts, the matter is likely to be litigated before the Supreme Court.

## Transferring digital work to foreign-recipient not OIDAR[66] merely because of being sent electronically

In the case of ***Globolive 3D Private Limited vs. Union of India***[67], the assessee, entered into a service agreement with Emirates Defence Industries Co. PJSC for supplying satellite derived 3D city models of specific areas in Abu Dhabi. In this regard, assessee imported high-resolution stereo satellite images, processed and digitised such satellite images, and thereafter sent the same to relevant parties *via* file transfer protocol. The assessee adopted the position that the services supplied by them are export of services under GST, and therefore eligible for refund of unutilised ITC under section 54 of CGST Act.

The refund claims of the assessee were initially sanctioned by the revenue authorities, however, subsequently they filed an appeal against such refund order, on the ground that the activity of purchasing the satellite extracted images from unrelated party, processing it as per the customer requirements, and transferring the same through online medium was nothing but OIDAR Services[68]. The appellate authority allowed the appeal considering the submissions of the GST authorities.

Being aggrieved by the said order, the assessee filed a writ petition before the Bombay HC on the ground that the assessee is undoubtedly involved in export of services, since the location of service recipient is outside the Indian territory, and the assessee has complied with the conditions of Section 2(6) of IGST Act[69]. The Bombay HC allowed the writ petition and made the following observations:

1. The service is intended for recipient located outside India, and the place of supply was agreed to be outside India. The payment was received in convertible foreign exchange, confirming compliance with all the conditions for export of services as laid down under Section 2(6) of the IGST Act.
2. The classification of any service as OIDAR Services is not merely on the basis of delivery being mediated by information technology over the internet or through an electronic network. The specialised nature of services provided by the assessee, involving creation of 3D city models are not works which would be freely available on the internet and hence, did not fit the criteria of automated supply with minimal human intervention as specified in the definition of OIDAR Services. Thus, the Court emphasised that such services were not automated and characterised by human involvement, unlike typical OIDAR Services.

[66] Online Information Database Access or Retrieval
[67] **2023 (8) TMI 1264 - Bombay High Court**
[68] Online Information Database Access or Retrieval services
[69] Integrated Goods Services Tax Act, 2017

3. Adopting the revenue's interpretation would lead to an absurd outcome, categorising any form of electronic communication or providing of service through the medium of emails or any electronic transfer of data as OIDAR Services, which contradicted the intended meaning of OIDAR Services under IGST Act.

## State tax officer(s) is not the proper officer(s) for exercising powers of provisional attachment

In the case of ***Saket Agarwal vs. Union of India***[70], State Tax Officer (C-804), Nodal Division-I, Mumbai had issued a communication to the officer-in-charge of the Central Depository Services (India) Ltd., instructing them to attach the demat account of Saket Agarwal ("**Petitioner**"), under Section 83 of the MGST Act. As per Section 83 of the CGST Act, a Commissioner of State Tax ("**Commissioner**") can issue an order for provisional attachment of any property, if it is necessary to do so to protect the interest of the GoI. Aggrieved by the communication issued by the state tax officer, the Petitioner filed a writ petition before the Bombay HC, challenging the *vires* of the communication issued by the state tax officer.

The Bombay HC observed that the state tax officer does not have the jurisdiction under Section 83 of the MGST Act to attach property, as only the Commissioner is authorised to order provisional attachment of any property. Accordingly, the state tax office withdrew the communication, and the Bombay HC directed the sales tax officer to intimate Central Depository Services (India) Ltd. for withdrawal of attachment of demat account of the Petitioner.

## Notification laying down additional conditions beyond the Policy is contrary to the principles of promissory estoppel

In the case of ***Atibir Industries Company Ltd. vs. The State Tax Jharkhand and Ors***,[71] the State of Jharkhand introduced the Jharkhand Industrial Investment and Promotion Policy, 2016 ("**Policy**") on February 16, 2016, offering subsidy on VAT[72] in the form of reimbursement of 75% of the 'Net VAT' paid per annum, for 7 (seven) years for large new projects. Post introduction of GST, the policy was amended offering an incentive of 75% reimbursement of SGST[73] paid. Accordingly, Atibir Industries Company Ltd. ("**Petitioner**") applied for reimbursement of tax under the policy. However, the same was not disbursed due to an explanation added to the policy by notification, dated March 7, 2019, i.e., after the policy was in force, which stated that incentives under the policy will be restricted if ITC on supplies are claimed by the buyer. In the Petitioner's case, its buyers were availing ITC.

Aggrieved by the denial of reimbursement, the Petitioner preferred a writ petition before the Jharkhand High Court ("**Jharkhand HC**") contending that insertion of an additional condition retrospectively into the policy curtails the benefits offered by the policy and is without jurisdiction. The State, being bound by the doctrine of promissory estoppel and legitimate expectation, cannot amend the policy.

In the above backdrop, the Jharkhand HC held as follows:

1. Any notification issued by the State Government, if found to be repugnant to the policy declared in a government resolution, the said notification must be held bad in law, to that extent.
2. An additional condition introduced and laid down in the operational guidelines is *ultra vires* the policy in the absence of public interest. Overriding public interest would prevail over a plea based on promissory estoppel, but in the present case, the State could not prove any overriding public interest or equity.
3. When a right has already accrued and the conditions for availing the benefits have been fulfilled then the amendment cannot affect the already accrued rights. It was observed that the State and its instrumentalities can be made subject to the equitable doctrine of promissory estoppel in cases where because of their representation the party claiming estoppel has changed its position.
4. The notification, which has an effect of destroying the acquired, accrued and vested right of the petitioner, is without any authority, is irrational and unreasonable, and violative of Article 14 of the

[70] 2023 (9) TMI 558
[71] 2023 (9) TMI 1355 – Jharkhand High Court
[72] Value Added Tax
[73] State Goods and Services Tax

Constitution, and is unsustainable. Thus, the acquired right of the Petitioner cannot be curtailed.

5. Therefore, the amendment carried out *vide* the notification dated March 7, 2019, is not legally sustainable and directed the State to release the amount towards reimbursement of SGST subsidy to the Petitioner.

## Amount retained by revenue authorities, voluntarily paid by a taxpayer under protest, liable to be refunded

In the case of ***The Hongkong and Shanghai Banking Corporation Limited vs. Union of India and Ors***[74], Hongkong and Shanghai Banking Corporation Limited ("**Petitioner**"), pursuant to an audit conducted by the revenue authorities of the books of accounts of the Petitioner for period from March 2007 to April 2012, it was observed that the Petitioner had failed to discharge service tax on interchange income earned by the Petitioner from the merchant establishment. Based on the said observation, a final audit report was also issued highlighting the non-payment of service tax on the interchange income. To this effect, the Petitioner deposited the sum under protest.

Considering that no SCN was ever issued by the revenue authorities for a period of 10 (ten) years and that the issue of taxability of 'interchange income' was pending before the larger bench of the Supreme Court, the Petitioner applied for refund of the amount paid under protest. However, the refund applications were rejected by the authorities.

Being aggrieved, the Petitioner moved the Bombay HC seeking refund of amount retained by the authorities without authority of law.

The Bombay HC observed that the Petitioner, time and again, had pointed out to the revenue authorities, that the aforesaid amount was deposited under protest and should not be construed as acceptance of authorities' view regarding levy of service tax on interchange income. It was further observed that the authorities had clearly failed in setting into motion the provisions of law by way of issuing a SCN seeking recovery of service tax on the subject transaction.

In view of the above, the Bombay HC held that the amounts deposited by the Petitioner were retained by the authorities without the authority of law, and hence, the refund claim of the Petitioner could not have been denied. Accordingly, the Bombay HC directed the revenue authorities to refund the amount paid by the Petitioner under protest along with applicable interest.

## Withdrawal of MEIS Scheme[75] applicable prospectively

In the case of ***Indian Flexible Intermediate Bulk Container Association vs. Directorate General of Foreign Trade*** ("**DGFT**")[76], the Indian Flexible Intermediate Bulk Container Association ("**the Petitioner**") is an association comprising of manufacturers and exporters of Flexible Intermediate Bulk Container ("**FIBC**"). The members of the Petitioner ("**Exporters**") were claiming benefits conferred under the MEIS Scheme since its implementation. Leveraging the benefits provided under the MEIS Scheme, the Exporters were rigorously expanding their export operations and were suitably factoring the incentives in their export prices. On January 29, 2020, a notification was issued by DGFT wherein benefits conferred under the MEIS Scheme for export of certain items (including FIBC) was discontinued with effect from March 7, 2019 ("**Impugned Notification**"). The Petitioner filed a Writ Petition before the Delhi HC challenging the Impugned Notification, to the extent it retrospectively revoked the benefits provided under the MEIS Scheme and sought directions against DGFT to ensure that the Impugned Notification is applied prospectively.

The Delhi HC observed that while prospective amendments are within the GOI's purview, retrospective changes that could devastate an entire sector raise serious concerns and may lead to breach of fundamental tenets of natural justice and equity. Relying on the Supreme Court case of *DGFT vs. Kanak Exports*[77], the Delhi HC ruled that Section 5 of the FTDR Act[78] does not permit the GOI to promulgate rules with a retrospective effect. Retrospective application is an exception and can only be permitted if explicitly provided by the parent statute.

[74] 2023 (11) TMI 965
[75] Merchandise Exports from India Scheme
[76] 2023 SCC Online Del 7177
[77] (2016) 2 SCC 226
[78] Foreign Trade (Development and Regulation) Act, 1992

Basis the above, the Delhi HC ruled that the Impugned Notification insofar it withdraws the benefits conferred under the MEIS Scheme on FIBC, is applicable prospectively only and directed DGFT to process the applications in respect of exports made till the date of issuance of the Impugned Notification.

## Rule 89(4)(C) restricting refund by capping value of 'export turnover' applicable prospectively

In the case of ***Indian Herbal Store Private Limited vs. Union of India***[79], Indian Herbal Store Private Limited ("**Petitioner**") filed applications for refund of accumulated unutilised ITC on export of goods made during the period from October 1, 2018 to September 30, 2019 ("**Impugned Period**"). The applications were rejected on the ground that the 'turnover of zero-rated supply of goods' is not in accordance with amended Rule 89(4)(C) of the CGST Rules[80]. Even the Appellate Authority upheld the refund rejection orders on the same grounds ("**Impugned Order**"). Aggrieved by the Impugned Order, the Petitioner filed a writ petition against the Impugned Order challenging the constitutional vires of Rule 89(4)(c) of the CGST Rules.

Rule 89(4)(C) of CGST Rules, introduced *vide* notification no. 16/2020 – Central Tax dated March 23, 2020, defines the term 'turnover of zero-rated supply of goods' to mean the value which is 1.5 (one point five) times the value of like goods domestically supplied by the same or, similarly placed supplier, as declared by the supplier, whichever is less. In a way, the refund of ITC is restricted by keeping the value of the export turnover limited to 1.5 (one point five) times the value of similarly placed goods.

The Delhi HC highlighted that the right for refund of accumulated ITC stands crystallised on the date when the goods are exported. It is also evident from perusal of Section 54 of the CGST Act read with the meaning of the term 'relevant date' contained in the explanation thereto, that the limitation for applying for refund in respect of export of goods/services is reckoned from the date when the goods/services are exported. Therefore, the expression 'turnover' has to be read in reference to the period to which it relates and has to be computed basis the provision as applicable during such period. Rule 89(4)(C) of the CGST Rules was not applicable during the Impugned Period in the present case.

With regard to the constitutionality of amended Rule 89(4)(C) of the CGST Rules, the Delhi HC further observed that the provision has already been struck down by the Karnataka HC in the case of *Tonbo Imaging India Private Limited vs. Union of India*[81], therefore, as on date, the amended provisions are non-existent.

In view of the above, the Delhi HC set aside the Impugned Order and upheld the Petitioner's right to claim refund of the accumulated ITC in respect of exports made prior to March 23, 2020.

## GST Council cannot determine classification of goods


In the matter of ***Parle Agro Private Limited vs. Union of India***[82], Parle Agro Private Limited ("**Petitioner**") challenged the classification of 'flavored milk' under HSN[83] Code 2202 (attracting 12% GST) instead of HS Code 0402 (attracting 5% GST). The Petitioner prayed for the issuance of a writ of *Certiorarified Mandamus* to call the record of 31st GST Council Meeting held on December 22, 2018, regarding the GST Council's decision to classify 'Flavored Milk' under HSN Code 2202 (beverage containing milk) instead of 0402 (dairy based product) and sought to have this decision quashed. The Petitioner argued that the GST Council's role is limited to placing recommendations, and it does not have the authority to conclusively determine classification of goods or services.

Upon perusal of Article 279A (4) of the Constitution, the Madras HC highlighted that the recommendations of the GST Council are recommendatory in nature and are not binding on the government. This interpretation

79 Indian Herbal Store Private Limited vs. Union of India, 2023 (10) TMI 306 – Delhi High Court.
80 Central Goods and Services Tax Rules, 2017
81 2023 (4) TMI 46 – Karnataka High Court
82 TS-577-HC(MAD)-2023-GST
83 Harmonized System of Nomenclature

also finds place in the ruling of the Supreme Court in the case of *Union of India and Mohit Minerals Private Limited*[84], wherein it was held that the recommendations of the GST Council are not binding on the Central and the State Governments on account of reasons below:

1. deletion of Article 279B[85] and inclusion of Article 279(1) by the Constitution Amendment Act, 2016, indicates that Parliament intended for the recommendations of the GST Council to only have a persuasive value;
2. recommendations of the GST Council are the product of a collaborative dialogue involving the Union and the States, and to regard them as binding would disrupt fiscal federalism, where both the Union and the States are conferred equal power to legislate on GST;
3. the GoI, while exercising its rulemaking power under the provisions, is bound by the recommendations of the GST Council. However, that does not mean that all the recommendations of the GST Council made by virtue of the power under Article 279A (4) of the Constitution are binding on the legislature's power to enact primary legislations;

Relying on the above, the Madras HC held that the powers of the GST Council are merely recommendatory and hence, classification decision made by the GST Council cannot be upheld. It is for the government to fix appropriate rates on the goods that are classifiable under the Customs Tariff Act, 1975 ("**Customs Tariff Act**"). As long as the Customs Tariff Act is adopted for the purpose of interpretation of the rate notification issued under the GST regime, classification has to be strictly in accordance with classification prescribed under the said Customs Tariff Act.

With regard to the correct classification of 'Flavored Milk', the Madras HC held that the same will be classified under HSN Code 0402, attracting a lower GST rate of 5% (and not under HSN Code 2202 as was decided by the GST Council).

## Instruction directing customs authorities to review and cancel the licence issued under MOOWR[86] scheme along with consequent SCN quashed

In the matter of ***Jakson Power Private Limited vs. Central Board of Indirect Taxes and Customs and Another***[87] (Petitioner referred to as "**JPPL**"), the Delhi HC delved into the legality of Instruction No. 13/2022-Cus dated July 9, 2022 ("**Impugned Instruction**") issued by CBIC in as much as it dictated the customs officers to review existing licences issued under the MOOWR scheme as well as take necessary follow up action.

JPPL had obtained a license under the MOOWR scheme to set up a solar power generating project in a private bonded warehouse. CBIC issued the Impugned Instruction which stated that MOOWR scheme is inapplicable to solar power generating units. Consequently, the Customs authorities issued SCN to JPPL seeking to cancel MOOWR license granted to JPPL. Aggrieved by the same, JPPL filed a writ petition before the Delhi HC seeking quashing of the Impugned Instruction and the consequent SCN.

The Delhi HC observed and highlighted the below:

1. Impugned Instruction is issued exceeding the scope of Section 151A of the Customs Act and hence, validity of the same cannot be upheld;
2. JPPL had neither contravened any provisions of the Customs Act nor had acted contrary to any of the conditions contained in the MOOWR License since JPPL had already declared in its MOOWR application that the resulting goods would be electrical energy and that the imported capital goods were required to set up a solar power generating plant. Therefore, cancellation of MOOWR licence under Section 58B of the Customs Act is doubtful;

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84 2022 (5) TMI 968 – Supreme Court

85 Article 279B of the Constitution (One Hundred and Fifteenth Amendment) Bill, 2011 proposed that the Parliament may, by law, provide for the establishment of a Goods and Services Tax Dispute Settlement Authority to adjudicate any dispute or complaint referred to it by a State Government or the Government of India arising out of a deviation from any of the recommendations of the Goods and Services Tax Council constituted under Article 279A that results in a loss of revenue to a State Government or the Government of India or affects the harmonised structure of GST. However, the provision was not made part of the Constitution (One Hundred and First Amendment) Act, 2016.

86 Manufacturing and Other Operations in Warehouse Regulations, 2019

87 Writ Petition No. 1507/2023

3. SCN issued by the authorities on the basis of the Impugned Instruction was a mere formality since the Impugned Instruction effectively issued a dictate to decide a particular case in a particular manner;
4. Section 61 read with Section 65 of the Customs Act provide for importing and warehousing all kinds of goods (including capital goods, non-capital goods as well as other goods) for undertaking manufacturing or other operations in a private bonded warehouse. Capital goods, which may not be subsumed in resulting goods and are captively used in undertaking manufacturing or other operations, can be warehoused without payment of duty till these are cleared for home consumption;
5. the expressions "*manufacturing process or other operations*" and "*in relation to*" used in Section 65 of the Customs Act are intended to be expansive and must be given a wider meaning. These cannot be restricted to mean that capital goods must undergo manufacturing process. If capital goods are found to have contributed to or formed part of manufacturing, the qualifying criteria for the applicability of Section 65 of the Customs Act stands fulfilled;
6. Section 65 of the Customs Act neither excludes specific categories of manufacturing activities nor manufacturing of intangible goods, such as electricity. Therefore, the importer is being enabled under Section 61 and 65 of the Customs Act to import capital goods for setting up solar power generating units under the MOOWR Scheme, and the resultant goods alone being subjected to tax;
7. with regard to this, the Delhi HC placed significant reliance on the MOOWR circular, frequently asked questions, declarations of intent appearing on 'Invest India' portal.

The Delhi HC allowed the writ petition and quashed the Impugned Instruction in so far as it mandates review of existing licenses and taking of follow-up action. The consequent SCN was also quashed.

**JSA Comment:** The judgment has come as a significant relief to the solar power generating units already set up under the MOOWR scheme in as much as it upholds the validity of their existing MOOWR licence. However, the judgement has to be tested for new MOOWR applications for setting up solar power generating units under MOOWR scheme.

*JSA (led by Partner, Mr. Manish Mishra) successfully represented and defended JPPL in the matter.*

## Circular clarifying taxability of corporate guarantees stayed

In the matter of ***Acme Cleantech Solutions Private Limited vs. Union of India and Ors***[88], the Petitioner challenged Circular No. 204/16/2023-GST dated October 27, 2023 issued by CBIC ("**Circular**"), which clarified that corporate guarantees provided by a company (including holding company) to bank/financial institutions for providing credit facilities to the other related company (including subsidiary company) is a supply of service between the said related parties under Schedule I of the CGST Act, even if made without any consideration. The value of such supply will be determined basis Rule 28(2) of CGST Rules, i.e., 1% of amount of guarantee offered or actual consideration, whichever is higher.

The Petitioner relied upon the judgement passed by the Supreme Court in the matter of *Union of India vs. Karvy Stock Broking Limited*[89] and contended that the Circular seeks to take away the adjudicatory powers of the assessing authority as well as the Appellate Authority by clarifying provisions in the nature of adjudication.

Considering the above, the Hon'ble High Court of Punjab and Haryana stayed the effect and operation of the Circular to the above extent and directed the appellate authority to decide the case of the Petitioner without being influenced by the Circular.

## 'Covid-19 is force majeure'; notifications extending time limit for passing orders not ultra vires

88 2024 (5) TMI 467 – Punjab and Haryana High Court

89 2015 (8) TMI 159


In the matter of Faizal Traders Pvt. Ltd. vs. Deputy Commissioner, Central Tax & Central Excise, CBIC, New Delhi[90], the Kerala HC upholds the validity of notifications issued for extending the time limit for passing of orders for the period FY 2017-18 and holds that the said notifications are not *ultra vires* the provisions of the CGST Act.

The petitioners had contended that the notifications were issued in terms of Section 168A of the CGST Act, which can only be invoked during events of force majeure (i.e. war, epidemic, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature or otherwise) and given that there was no force majeure event during the time when the said notification was issued, the same is *ultra vires* Section 168A of the CGST Act.

The Kerala HC observed that the said notifications were issued pursuant to the Supreme Court directives in *suo motu* order, whereby a conscious policy decision was taken to extend the limitation for issuance of orders in respect of demand linked with the due date of annual return, in view of impediments caused by Covid-19; Acknowledging that Covid-19 was a force majeure, and that the executive retains the discretion to extend the limitation period considering a force majeure event, the High Court held that the said notifications are rightly issued and not ultra-vires the provisions of the CGST Act.

**JSA Comment:** The Kerala HC has upheld the validity of the extension notifications, however, it is pertinent to note that the validity of the said notifications has been challenged before multiple High Courts, where notices have been issued in the petitions and stay has also been granted. Accordingly, the dispute concerning the validity of the said notification is yet to be settled and likely to be finalised before the Supreme Court.

[90] 2024 (5) TMI 1183 – Kerala High Court

## Madras HC quashes demand of INR 96,00,00,000 (Indian Rupees ninety-six crore) against Chennai Metropolitan Water Supply and remands the matter to decide applicability of exemption on distribution of water

The Madras HC in the case of Chennai Metropolitan Water Supply and Sewerage Board ("**CMWSSB**") vs. the Additional Commissioner[91], a writ petition was filed before the Madras HC. CMWSSB was constituted under the Legislature for provision of water supply and sewerage. A SCN and subsequently an order was passed confirming that GST is leviable on distribution of water as the CMWSSB not only provides water supply and sewerage facilities through pipelines to public but also supplies water including purified water in tankers at commercial and dynamic rates to establishments. Therefore, the petitioner is engaged in composite supply, where purified water is the principal supply (covered under 'Tariff Heading 9969', subject to tax at the rate of 18%.

The said writ petition was filed on the ground that the petitioner's activities were exempted by virtue of exemption notifications. While examining the exemption eligibility, the Madras HC observed that there is a difference between potable water and purified water. Different standards as developed by the Bureau of Indian Standards are required to be conformed with both potable water and purified water. The impugned order has proceeded without considering this difference and has concluded that petitioner was supplying purified water.

Moreover, the court also took into consideration the fact that the impugned order does not contain any details of the value of supply to households through pipelines; value of supplies made through tankers and the value of supplies made through mobile units which are supplied at commercial rates. Without such bifurcation, the adjudicating authority could not have arrived at the conclusion that the principal supply is through mobile units at commercial rates and following the same the order concludes that the supply does not fall within the scope of exemption. Citing the aforementioned reasoning, the High Court set aside the impugned order and concluded that the matter requires re-consideration. CMWSSB has been directed

[91] TS-291-HC(MAD)-2024-GST

to remit INR. 3,00,00,000 (Indian Rupees three crore) as a condition of remanding the matter for reconsideration.

## Rajasthan High Court stays Rajasthan Tax Board's order classifying 'O' Yes Puffs' under Entry 16(vii) of Schedule V

The Jaipur bench of the Rajasthan High Court ("**Rajasthan HC**") issued a notice and granted stay against an order of the Rajasthan Tax Board on the issue of classification of 'O' Yes Puffs' under Rajasthan VAT Act, 2003. The Rajasthan Tax Board in the impugned order had observed that post July 14, 2014, 'puffs' are required to be classified under Entry 16(vii) of Schedule V of the Rajasthan VAT Act, 2003 which includes 'corn flakes, wheat flakes, Kurkure, Popcorn and other similar articles' attracting VAT at the rate of 14/14.5% and not under Entry 131 of Schedule IV of the Rajasthan VAT Act, 2003 which included 'Namkeen' attracting VAT at the rate of 5/5.5%.

It was contended by the petitioner that 'puffs' is essentially Namkeen and would merit classification under the more specific entry, i.e., Entry 131 of Schedule IV and not under Entry 16(vii) of Schedule V of the Rajasthan VAT Act, 2003, which deals with varied products not falling under a particular category. Consequently, a stay has been granted against the impugned order.

*This matter was argued by the JSA Indirect Tax team led by Mr. Manish Mishra.*

## Franchise of a trademark are to be regarded as 'non-exclusive' license and not 'transfer of right to use' subject to VAT

The Allahabad High Court ("**Allahabad HC**") in the case of ***Commissioner Commercial Tax, U.P. vs. Pan Parag India Limited***[92] has ruled on the taxability of trademark franchise and has held that the franchise agreement grants a non-exclusive licence rather than a transfer of the right to use goods, and accordingly the transaction is not susceptible to VAT.

The Allahabad HCobserved that these agreements (i.e. franchise agreements) typically grant non-exclusive rights to use trademarks and business systems and do not constitute the transfer of the right to use goods in a manner that excludes others, which is a critical criterion for considering a transaction as deemed sale. The non-exclusive nature of the rights ensures that the franchisor retains control and can license the same rights to multiple parties (franchisees), reinforcing the licensing framework rather than a full transfer.

In other words, when trademarks are licensed, the licencee's use of the mark is considered as the owners use, thereby maintaining continuity of the trademark. Further, the licensor often imposes conditions for use of trademark to ensure that brand reputation and quality is maintained. Failure to comply with such conditions may result in the revocation of the license. As per all these instances/level of control, it can be observed that there is no transfer (where an owner would have full autonomy over the subject) and accordingly, cannot be subjected to VAT.

## Interest and penalty cannot be levied without there being a substantive provision for levy in the CE Act[93]

The Gauhati High Court in the case of ***Ambe Wire private Limited***[94] has set aside a refund sanctioning order wherein the interest and penalty had been appropriated against delayed payment of duty. A notification issued under Section 5A of CE Act pursuant to the North-East Industrial and Investment Promotion Policy, 2007 granted a 100% excise duty exemption on finished products made in the North Eastern Region for new industrial units and for certain existing units that expanded by at least 25%. The petitioner, based on such policy had set up a unit and claimed refund of excise duty which was sanctioned after appropriating interest and penalty. Justifying the same, the Revenue argued that the same is for delayed payment of duty envisaged in Rule 8(3) and Rule 8(3A) of the CE Act and that in order to claim exemption, it is fundamental to first pay the duty.

The court has disregarded the Revenue's interpretation and has clarified that there is no mandate in the notification for payment of duty within a particular time. Strictly interpreting Section 11AA and 11AC of the CE Act, interest is leviable when a person is liable to pay duty within a specific period and

[92] TS-204-HC-2024 (ALL) - VAT
[93] Central Excise Act, 1944
[94] TS-207-HC-2024 (GAUH)- EXC

not when an assessee is not liable to pay because of the exemption granted to it.

## CESTAT

### Hostel services, if naturally bundled with education services, is exempt from service tax

In the case of ***Mody Education Foundation vs. Commissioner of Central Excise, Jodhpur***[95], Mody Education Foundation ("**Appellant**") was engaged in functioning a boarding school, for which the Appellant received hostel fees from the students (this is in addition to the tuition fee and other charges). On an investigation initiated against the Appellant, the authorities contended that the Appellant had failed to pay service tax in respect of various services provided/received by it. Consequently, a SCN was issued demanding service tax on hostel services provided to the students, subsequently confirmed *vide* an order.

The Appellant approached the CESTAT New Delhi, contending that hostel services are naturally bundled with education services, which are exempt[96] under the service tax regime. Accordingly, the essential character of the transaction is education service which is exempt and therefore, the provision of hostel services is also exempt from levy of service tax. It was further contended that hostel services cannot be provided on a standalone basis, without the provision of education services by a boarding school, there being a clear nexus between the 2 (two) services.

The CESTAT observed that hostel service and education services are naturally bundled in the ordinary course of business, and it is the education service that gives the essential character to such bundle. Given that education services fall under the negative list of services, provided under Section 66D of the erstwhile service tax law hostel services bundled along with the education services will not be subjected to service tax.

### Value of goods adopted by VAT authorities to be accepted by service tax authorities for computing value of services, for levy of service tax on works contract

In the case of ***Schindler India Pvt. Ltd. vs. Comm. Of Service Tax-II, Mumbai***[97]***.*** Schindler India Pvt. Ltd. ("**Appellant**") is engaged in manufacturing of elevators/escalators and provision of installation and commissioning services for the same. The Appellant discharges VAT on supply of the equipment and service tax on the component of installation and commissioning services, covered under a single works contract. The service tax authorities disputed that the Appellant had not paid service tax on the gross amount of the equipment supplied as well as installed at the site of their customers. Aggrieved by the demand of service tax on the gross value of the contract instead of the service component, the Appellant filed an appeal before the CESTAT. The Appellant presented the following arguments:

1. a clear bifurcation of the value of equipment and the value of installation and commission service was provided in the contract;
2. the invoices issued to the end-customer also captured such bifurcation;
3. VAT was discharged on the value of equipment and the VAT authorities accepted the value on which VAT was discharged by the Appellant;
4. service tax was discharged on the service component, value of which was arrived at as per the valuation provisions prescribed under the service tax law[98]; and
5. availment of composition scheme for works contract was optional and at the discretion of the Appellant and not the authorities.

In light of the above arguments, CESTAT set aside the order confirming the demand of service tax and observed the following:

1. given that 1 (one) statutory competent authority has accepted the modus operandi adopted by the Appellant (i.e., value of equipment on which VAT was discharged was accepted by the VAT authorities), for the same set of transaction,

[95] 2023 (5) TMI 609
[96] Sr. No. 9 of Notification No. 25/2012 -ST, dated June 20, 2012
[97] 2023 (5) TMI 391
[98] Section 67 of the Finance Act, 1994 read with Rule 2A of Service Tax (Determination of Value) Rules, 2006

different view cannot be expressed by the service tax authorities;

2. the Appellant had maintained proper and adequate accounting records to demonstrate the segregation of the contract value towards material and installation and commissioning service and therefore, the value declared by the Appellant should be accepted for the purpose of service tax; and
3. the composition scheme is optional and subject to acceptance by the assessee from an accounting point of view.

## Refund of service tax allowed on cancellation of contract

In the case of ***Guardian Landmarks LLP vs. Commissioner of Central Excise and Service Tax, Pune II***[99], Guardian Landmarks LLP ("**Appellant**") constructed a residential complex, wherein 2 (two) customers booked flats and paid part payment along with service tax, as prescribed under the contract. Service tax collected from the customers was duly deposited by the Appellant with the exchequer. Subsequently, both the bookings were cancelled by the customers and the Appellant refunded the consideration to the customers. The Appellant approached the authorities, seeking refund of the service tax deposited as, such service tax collected from the customers was to be paid back on account of cancellation of the booking. Consequently, the authorities issued 2 (two) SCNs to the Appellant, rejecting the refund claims on the ground that the same time barred as per Section 11B of the CE Act, which was upheld by the Commissioner (Appeals). Aggrieved by the rejection order of the Commissioner (Appeals), the Appellant filed an appeal before the CESTAT.

CESTAT observed that service tax has to be paid only on the services which are taxable under the service tax law[100], provided there is a service element. In absence of provision of any service, the assessee cannot be saddled with service tax liability. In such a situation, the amount deposited by the assessee with the exchequer will be considered as 'deposit' for which provision of Section 11B of the CE Act will not be applicable and retaining such amount will be violative of Article 265 of the Constitution. Accordingly, CESTAT held that on cancellation of the bookings, the service contract was terminated, and therefore no service was provided by the Appellant. Accordingly, the amount of service tax deposited by the Appellant was to be refunded.

## Delayed payment charges not a consideration for service

In the case of ***Cholamandalam Investment and Finance Company Limited vs. Commissioner of GST and Central Excise***[101], Cholamandalam Investment and Finance Company Limited ("**Appellant**") was engaged in the business of financing activities such as automobile financing, consumer loan, loans against securities, etc. During the course of the audit, it was noticed that the Appellant had not paid service tax on the 'delayed payment charges' collected from the borrower(s) who had made belated loan repayments. The Principal Commissioner confirmed the demand of service tax on such charges. Aggrieved by such order, the Appellant filed an appeal before the CESTAT.

CESTAT relied on various clauses of the agreement entered between the Appellant and the borrower(s) and observed that strict compliance of the repayment schedule is an essential condition for granting the loan. Delayed payment charges are agreed under the agreement as a safeguard to the commercial interests of the Appellant. Therefore, the delayed payment charges are collected in compliance with a condition to the agreement which cannot be treated as consideration for the service of agreeing to tolerate an act or a situation. Placing reliance on the rulings in the case of *South Eastern Coalfields Limited vs. Commissioner of CGST and Central Excise*[102], *Neyveli Lignite Corporation Limited vs. Commissioner of Customs, Central Excise and Service Tax*[103], CESTAT held that Service tax cannot be levied on 'delayed payment charges' collected by the Appellant.

[99] 2023 (6) TMI 309
[100] Chapter V of Finance Act, 1994
[101] 2023 (6) TMI 501
[102] 2020 (12) TMI 912
[103] 2021 (7) TMI 1090

## Availability of concessional rate of BCD on import of earphones with microphones

In the case of ***Sennheiser Electronics India Pvt. Ltd. vs. Principal Commissioner, Customs (Import)***[104], Sennheiser Electronics India Pvt. Ltd. ("**Appellant**") had imported 2 (two) categories of earphones namely, CX 275s and CX180. While model CX 275 earphones had microphones, model CX180 earphones did not. On importation, the Appellant classified both categories of earphones under customs tariff heading 8518 30 00, attracting BCD of 15%. However, the Appellant claimed the benefit of exemption[105], which exempts all goods falling under customs tariff heading 8518 except "*the following parts of cellular mobile phones, namely, microphone, wired headset, receiver*" in excess of 10%.

During the post audit clearance of goods, the authorities were of the view that such goods 'wired headset' were a part of cellular mobile phones, and therefore not eligible for the exemption. Accordingly, the Principal Commissioner issued an OIO demanding differential duty along with interest on model CX 275s earphones. Aggrieved by the OIO, the Appellant filed an appeal before CESTAT New Delhi.

The Appellant contended that earphones are not considered parts of cellular mobile phones and the expressions 'parts or sub-parts or accessories to cellular mobile phone" provided in the exemption notification should be treated as distinct and in separate categories. It was further contended that model CX 275s earphones have 2 (two) speakers for the ears and an inbuilt microphone, making them compatible with cell phones and various other devices like laptops, iPads, and desktops.

The CESTAT agreed with the contentions of the Appellant and observed that the intent of Entry No. 18 of the exemption notification is to exclude microphones, wired headsets and receivers as are parts of cellular mobile phones. Given that the model CX 275s earphones can be used with variety of devices including cellular mobile, phones and therefore, it cannot be considered as part in any of the devices including cellular mobile. Accordingly, CESTAT set aside the demand raised against the Appellant.

## Independent activity of trading in domestic air tickets not subject to service tax

In the case of ***Hi Tours Mamallapuram Pvt. Ltd. vs. Commissioner of Service Tax***[106], Hi Tours Mamallapuram Pvt. Ltd. ("**Appellant**") was engaged in providing the services of organising tours for customers, which were taxable under Section 65(115) of the service tax law[107]. As part of the tour services, the Appellant raised 2 (two) separate invoices for:

1. booking air tickets (service tax on discharged on margin earned on sale of domestic air tickets); and
2. other services such as accommodation, local transportation, sightseeing trips, visa charges, etc. (service tax was discharged).

SCN was issued to the Appellant seeking to levy service tax on the value of air tickets. The demand was confirmed by the adjudicating authority. Aggrieved by the OIO, the Appellant filed an appeal before the Commissioner (Appeals). The Commissioner (Appeals) held that booking of tickets for outbound tours which was used outside India was exempt from the payment of service tax as, the same constituted export of services. However, the Commissioner (Appeals) partly confirmed the demand (to the extent of mark-up or the margin earned) on sale of tickets for domestic travel. Aggrieved by this, the Appellant approached the CESTAT (Chennai).

The Appellant contended that trading in air tickets, with or without profit, is not within the ambit of tour operator services. The CESTAT observed that a person who is involved in activities like planning, scheduling, organising or arranging tours by any mode of transport, is considered to be covered under tour operator service. Further, the Appellant was not a member or agent of IATA[108] and the Appellant also did not earn any commission from IATA or any other airlines when it sold or traded in air tickets. Accordingly, demand of service tax on the consideration for booking of tickets in respect of domestic travel is not taxable and the order of the Appellate Authority was set aside.

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[104] 2023 (7) TMI 839

[105] Notification No. 57/2017-Cus dated June 30, 2017, as amended by Notification No. 22/2018-Cus dated February 02, 2018 (S. No. 18)

[106] 2023 (9) TMI 78

[107] Chapter V of the Finance Act, 1994

[108] International Air Transport Association

## Mere sole distributorship does not imply 'related persons'; royalty and advertisement expenses not included in the price of imported goods

In the matter of ***Page Industries vs. Commissioner of Customs***[109], the appellant was the sole distributor of Jockey International USA and Speedo International UK ("**Foreign Suppliers**") and was engaged in sole trading of imported goods with exclusive franchise rights. The appellant entered into agreements with the Foreign Suppliers for import and sale of licensed and distributed products and for products manufactured in India. The Adjudicating Authorities alleged that as the appellant was the sole distributor of the Foreign Suppliers, the parties were related persons[110], and hence, the amount of royalty and the cost of advertisement expenditure incurred by the appellant in India will be added to the transaction value of imported goods.

Aggrieved by the above, the appellant appealed before the Tribunal, which observed and highlighted the below:

1. as per agreements executed between the appellant and Foreign Suppliers, royalty was payable only on the sale of the finished products manufactured and sold by the appellant (albeit using imported raw materials). Payment of royalty had nothing to do with the imported raw materials. Merely because imported raw materials were contained in the finished products would not render the payment of royalty as attributable to imported goods;
2. with regard to advertisement expenses, the Tribunal held that marketing and advertisement is a post import activity undertaken by the appellant on its account, and there is no obligation to undertake the said expenditure as a condition of import;
3. relying upon the Supreme Court's judgement in the matter of *Commissioner of Customs (Imports), Mumbai vs. Bayer Corp Science Limited and Ors*[111], the Tribunal highlighted that Explanation-II to Rule 2(2) of the Customs Valuation (Determination of Price of imported Goods) Rules, 2007 would make a sole distributor as a 'related person' only if it falls within the criteria of this sub-rule. Mere sole distributorship is not a conclusive consideration. It has also to be demonstrated that the case falls in one of the clauses mentioned in Rule 2(2). In the present case, other than considering the sole distributorship, there is no admissible evidence to conclude that the appellant and Foreign Suppliers were related persons. In fact, the appellant and the Foreign Suppliers were in no way related parties as their relationship was on a principal-to-principal basis and the fact, the appellant were sole distributors in no way made them related parties.

Considering the above, the tribunal held that the appellant and the Foreign Suppliers were not related persons and that provisions of Rule 10(1)(c) and (e) of the said rules are not attracted to include the amount of royalty and advertisement/marketing expenditure to the price of imported goods.

## Revenue cannot redetermine MRP[112] of imported goods for the purpose of raising differential CVD demand in absence of a methodology under Section 3(2) of the Customs Tariff Act

CESTAT Chennai in the case of ***M/s. Acer India (Pvt.) Ltd. vs. Commissioner of Customs (Audit), Chennai***[113] has held that the tax authorities cannot redetermine MRP of laptops imported by Acer India for the purpose of raising differential CVD demand. The appellant had been importing laptop computers and supplying the same to Electronics Corporation of Tamil Nadu Ltd. ("**ELCOT**") for free distribution to students. The tax authorities alleged that the appellant was suppressing the actual sale price by mis-declaring MRP to evade CVD and that there was a difference in the MRP affixed on the laptops at the time of import and the MRP that was affixed on the laptops along with the carry bag which was to be supplied to ELCOT. Consequently, an order was passed by the Adjudicating Authority

[109] 2024 (3) TMI 870 - CESTAT Bangalore

[110] Explanation II to Rule 2(2) of Customs Valuation (Determination of Price of imported Goods) Rules, 2007 provides that persons who are associated in the business of one another in that one is the sole agent or sole distributor or sole concessionaire, howsoever described, of the other shall be deemed to be related for the purpose of these rules, if they fall within the criteria of this sub-rule.

[111] 2015(9) TMI 1261 - Supreme Court

[112] Maximum retail price

[113] 2024 (5) TMI 478 – CESTAT Chennai

rejecting the MRP declared by the appellant at the time of import and re-determining the MRP.

The appellant approached the CESTAT, contending that MRP of imported laptops cannot be re-determined in the absence of machinery for the same in Section 3(2) of Customs Tariff Act. Provisions relating to re-determination of MRP/ redetermination of sale price ("**RSP**") were introduced through sub-section (4) of Section 4A and the RSP Rules[114] which operationalises sub-section (4) of Section 4A (effective from March 1, 2008). However, RSP Rules have not been made applicable to Section 3(2) of Customs Tariff Act. Section 3 of the Customs Tariff Act is not legislation by reference to Section 4(A) of the Central Excise Act, 1994 but a legislation by incorporation. There is no provision under Section 3 for re-determination of MRP of imported goods and for application of amendments made to Section 4A and RSP Rules to bring in the methodologies for re-determination of CVD payable on imports on MRP basis.

Considering the arguments put forth by the appellant, the Tribunal observed that as per Rule 3 of RSP Rules, the said Rules will be applicable in the case of RSP of excisable goods under sub-section (4) of Section 4A of the Central Excise Act, 1944. There is no mention that it would be applicable to Section 3 of Customs Tariff Act. Section 3 of Customs Tariff Act though it refers to Section 4A, does not adopt it for determining the assessable value. The department has redetermined the RSP of the imported computer alleging misdeclaration of MRP. As there is no methodology for redetermining the MRP, the Tribunal held that such redetermination of MRP is against the provisions of law.

## Appellate Authority for Advance Ruling / Authority for Advance Ruling

### Service supplied by the employees working in a branch office to its head office located in a different State is subject to GST

The applicant, **Profisolutions Private Limited**[115] having its head office at Bangalore, is registered in the State of Karnataka for the purposes of GST laws. The applicant also has its branch office in Chennai, which is registered in the State of Tamil Nadu and provides various support services such as engineering services, designing services, accounting services, etc. to the head office through common employees of the applicant, working for the company (and not employed for head office or branch specifically). In relation to the aforesaid support, no invoice was issued, and no GST was paid by the applicant.

Basis the above, the applicant approached the AAR to determine if provision of service by a branch office in one State to its head office in another state through common employees, constitutes a supply of service.

In the above context, the AAR held as follows:

1. in cases where an employee is deployed in a branch of an entity, the services that are rendered directly to the head office will be in the representative capacity as an employee of the branch. Entry 2 of Schedule I to the CGST Act states that supply of goods and/or services between related persons/distinct persons when made in the course or furtherance of business is to be treated as supply, even if made without consideration;
2. accordingly, the employees deployed at 1 (one) registered place of business, and providing services to another registered place of business of the same person (who are being treated as 'related' under the provisions of CGST Act), would be treated as 'supply' by virtue of Entry 2 of Schedule I to the CGST Act; and
3. accordingly, services, including the services of common employees of a person, provided by the

[114] Central Excise (Determination of Retail Sale Price of Excisable Goods) Rules, 2008

[115] 2023 (4) TMI 541

branch office to its head office and vice versa, each having separate GST registration, will attract GST.

**JSA Comment:** The issue of cross charges of expenses/costs *inter-se* offices within the same legal entity has been a vexed one and remained litigious, for which a clarity is expected to be achieved only at the highest levels of adjudication. There exists a clear argument that the employees' salary should not form a part of the value for such cross charges on which GST is paid, given that the supply of services by employees to an employer are not treated as a supply under the GST laws. Further, it can be argued that an employee is engaged for the entire organisation, irrespective of the location where he is situated.

## Charges inextricably linked to construction taxable as bundled-service

The applicant, *Puranik Builders Limited*[116], is engaged in the business of construction and sale of residential apartments, wherein the applicant discharged GST on residential apartments sold prior to receipt of the occupancy certificate. The business was carried out under an 'agreement for sale' entered between the applicant and the customers, which upon completion of construction is supplemented by a sale deed. As per the agreement for sale, in addition to providing construction services, the applicant was required to provide certain ancillary services. Such services were separately identified and paid for under the agreement. The applicant contended that construction services and the ancillary services were supplied in conjunction with each other, naturally bundled, and supplied in the ordinary course of business, and hence, should be treated as a 'composite supply', of which 'construction services' was a 'principal supply'. Therefore, all the services should be subject to concessional rate of GST at 12% at abated value.

The AAR, however, rejected the applicant's contention and held that the ancillary services were independent supplies and would be taxed separately at 18% at full value of supply. Being aggrieved, the applicant challenged the ruling of the AAR.

The AAAR observed that out of all the ancillary services, services such as water supply connection charges, electric meter installation services, legal charges, infrastructure charges, etc. were inextricably linked to residential apartments. Without these aspects, the property may not be used. Whereas services such as club house maintenance, advance maintenance, share money application, share of municipal taxes after occupancy, and the like were not inextricably linked to the construction services and were independent. It was further observed that:

1. other Services may or may not be advertised as a single package before the customer. Consideration towards Other Services was indicated and received separately, i.e., the customer was not paying a single price for all the services;
2. the test that different elements were integral to one overall supply, even if one or more is removed, the nature of supply would be affected, was not satisfied in the present case; and
3. certain clauses in agreement for sale regarding ancillary services (i.e., open spaces, common areas, road, club house, etc., would remain the property of the promoter) indicated that the property in such ancillary services were not fully transferred to the customers.

In view of the above, it was held that such ancillary services which have an inextricable link to the construction services, the same would be treated as part of 'composite supply', of which construction services would be treated as 'principal supply' and hence, taxable at concessional rate of 12% (at the abated value). However, ancillary services which do not have inextricable link with the construction services would be treated as independent supplies, subject to GST at the rate of 18%.

## Movement of equipment between distinct establishments taxable as 'lease rental service'

In the case of ***CHEP India Private Limited*** [117], CHEP India Private Limited ("**CIPL**") is engaged in the business of leasing pallets, crates, and containers. CIPL proposes to implement the following business model:

1. the ownership of all equipment is proposed to be with CIPL Maharashtra, who would lease the equipment to customers for an agreed consideration;

[116] TS-116-AAAR(MAH)-2023-GST

[117] 2023 (6) TMI 776

2. CIPL Maharashtra may also lease equipment to its distinct establishments (say CIPL Karnataka) under cover of a delivery challan, who may further lease the equipment to its customers; and
3. there may be a situation where a third distinct establishments of CIPL Maharashtra (say CIPL Tamil Nadu) may also require such equipment (which maybe lying with CIPL Karnataka). In such a scenario, CIPL Karnataka will transfer the equipment required by CIPL Tamil Nadu, on instructions of CIPL Maharashtra. CIPL Maharashtra will collect lease charges from CIPL Tamil Nadu and will not charge CIPL Karnataka. CIPL Karnataka will charge CIPL Maharashtra a consideration for facilitation/arrangement of movement of equipment to CIPL Tamil Nadu.

For the aforementioned proposed transaction, the Maharashtra AAR observed that the transaction between CIPL Maharashtra and other distinct establishments qualifies as a supply of leasing service. The AAR further held that the value on which GST is to be charged should be the value which is charged by the recipient distinct establishment to the ultimate customer in the other State. Aggrieved by the ruling of the AAR, the Appellant appealed before Maharashtra AAAR.

**Issue 1**: The first issue of consideration before the AAAR was whether equipment leased by the Appellant located and registered in Maharashtra to CIPL Karnataka would be considered as lease transaction and accordingly, taxable as supply of services? If yes, what is the value on which GST must be charged?

The AAAR ruled that transfer of equipment on lease to the distinct entity, as per the agreement entered into between CIPL Maharashtra and CIPL Karnataka would amount to lease or renting of the goods for a consideration. Accordingly, the said transaction would be treated as supply of services, thereby, being subject to GST.

To ascertain the valuation of such transaction being treated as a supply, AAAR observed that the price actually paid for the lease cannot be treated as value of supply as, the supplies are between related persons/distinct establishments. Therefore, valuation will have to be ascertained in terms of Rule 28 of the CGST Rules. Additionally, CIPL Karnataka (who is recipient of the leasing services) is eligible to full ITC on the transaction between the appellant and the CIPL Karnataka, and therefore, the invoice value would be the value of goods or services or both as per the second proviso to Rule 28 of the CGST Rules.

**Issue 2**: Whether movement of equipment from CIPL Karnataka to CIPL Tamil Nadu on the instruction of CIPL Maharashtra can be said to be mere movement of goods, not amounting to a supply?

For movement of goods from CIPL Karnataka to CIPL Tamil Nadu, at the instruction of CIPL Maharashtra, the AAAR observed that the said transaction is a combination of the following transactions:

1. returning back the goods on lease by CIPL Karnataka to CIPL Maharashtra; and,
2. re-sending the same goods on a new lease contract to CIPL Tamil Nadu.

Accordingly, it cannot be termed as a mere movement without any involvement of supply, thereby, being liable to tax in the hands of CIPL Maharashtra.

## No ITC reversal on commercial/financial credit note towards post sale discount

In the case of ***Vedmutha Electricals India Private Limited***[118]**,** Vedmutha Electricals India Private Limited ("**Applicant**") is engaged in the business of supplying electronic items, which are procured from supplier(s) on payment of consideration, under the cover of a tax invoice. The Applicant receives various incentives in the nature of 'discounts' from the supplier *viz*. turnover discount, quantity discount, cash discount, additional scheme discount, etc., which are in the form of after sales discount. For such discounts provided to the Applicant, the supplier raises financial/commercial notes without GST. Additionally, the supplier does not reduce/adjust its output tax liability in respect of such financial/commercial notes issued, as Section 15 of the CGST Act restricts exclusion of 'post sale discount' from the transaction value. The question before the Andhra Pradesh AAR was whether the Applicant is eligible to claim ITC of GST charged in the tax invoice issued by the supplier.

On examination of transaction between the Applicant and supplier, the AAR noted that the supplier is issuing a tax invoice on the supply of goods to the Applicant

[118] 2023 (6) TMI 1051

and the Applicant is availing ITC on the same. Further, the issuance of financial/commercial notes, without GST, is for accounting purposes only. The AAR observed that for Section 15(3)(b) of the CGST Act, there should exist a prior agreement for the discounts that are to be offered.

In the this case, no such correlation between the financial/commercial notes and invoices is found. In absence of such linkage, the benefit of reducing the transaction value by the amount of discount offered to the Applicant cannot be allowed. Further, the supplier has made no adjustment of price as well as GST in furtherance of issuance of credit notes. Therefore, the corresponding reduction in ITC is also not warranted as there is no corresponding reduction of outward tax liability by the supplier. For the reasons stated above, the AAR held that the Applicant is eligible to take full ITC of charged on the tax invoice issued by the supplier.

## Target incentives received by reseller is consideration for supply and not trade discount

In the case of ***MEK Peripherals (India) Private Limited***[119], the MEK Peripherals (India) Private Limited ("**Applicant**") is engaged in the business of reselling Intel products, which are manufactured by Intel US and received through the distributors. The Applicant has entered into an agreement with Intel US, which entitles the Applicant to earn certain incentives on achieving a specified target.

The Applicant has approached Maharashtra AAR to understand if the incentives received by the Applicant could be considered as 'trade discount'.

The Maharashtra AAR observed that the Applicant had purchased the goods from distributors and that the discount received was not provided by the distributors. Further, there was no transaction of sale of goods or services between the Applicant and Intel US, and therefore, incentives received from Intel US would not be covered under Section 15 (3) of the CGST Act. Therefore, such incentives cannot be said to be in the nature of 'trade discount'. Being aggrieved by the ruling of AAR, the Applicant filed an appeal before AAAR Maharashtra.

The AAAR, by relying on Section 15(3) of the CGST Act, observed that the criteria basis which an amount may be termed as 'trade discount' are as follows:

1. where a discount is mentioned on the face of the invoice, such discount may be reduced from the taxable value of the supply of goods; and
2. where the discount is not mentioned on the face of the invoice, then such discount may be reduced from taxable value only if:
    a) buyer and the supplier have entered into an agreement that includes provision for discount;
    b) discount must be linked to a specific invoice; and
    c) any ITC attributable to the discount must be reversed by the buyer or recipient of the supply.

The AAAR further observed the following:

1. trade discount, being unascertainable at the time of supply, is not mentioned on the face of the invoice;
2. there is no agreement entered between the Applicant and the distributor outlining such incentive;
3. incentive is not linked to the invoices;
4. distributors have not reversed ITC in relation to the goods supplied to the Applicant; and
5. the incentive received from Intel US is separate from the transaction undertaken by the Applicant with the distributors.

Therefore, the AAAR observed that payment of incentives was wholly dependent on the outcome achieved by the Applicant in terms of purchase/sale data. Accordingly, the Applicant is bound by the agreement to perform the tasks as specified and in lieu of the aforesaid services, the incentives are given to the Applicant. Such incentives are in the nature of consideration for supply of marketing and technical support services and not in the nature of trade discount.

## Charging electric batteries of electric vehicles amounts to a taxable supply of service subject to GST at 18%

[119] 2023 (6) TMI 777

In the matter of ***Chamundeswari Electricity Supply Corporation Limited***[120], the AAR ruled on the taxability of the activity of charging electric battery used by Electric Vehicles ("**EVs**"). The applicant proposes to supply electricity to various companies, industries, individuals, hospitals, etc., for setting up Public Charging Stations ("**PCS**") for charging 2 (two) and 4 (four) wheeler EVs. The customers would be charged 'electric vehicle charging fee' consisting of 2 (two) components *viz.* 'energy charges' (refers to number of units of energy consumed) and 'service charges' (refers to services provided by PCS).

The AAR observed that in the present case, the activity of EV charging involves conversion of electric energy to chemical energy at PCS. Electricity, which is a 'moveable' property and classified as goods, is not supplied as such to the EV owner, rather it is converted into chemical energy. The EV owner does not receive electricity as such and receives only chemical energy stored in the battery.

The AAR also placed reliance on the guidelines issued by the Ministry of Power *vide* letter no. 23/08/2018-R&R dated April 13, 2018, which state that charging of an EV battery by a PCS involves utilisation of electrical energy for its conversion to chemical energy, which gets stored in the EV battery. Therefore, the activity involves a service requiring consumption of electricity by PCS and earning revenue from the EV owner for the same. The activity does not involve further distribution or transmission or sale of electricity. A similar analogy was drawn by analysing the provisions of the Electricity Act, 2003.

Based on the above, the AAR held that the activity of charging EV at PCS does not amount to supply of electricity. It amounts to supply of service, i.e., 'Battery charging service' for motor cars, classified under SAC 998714 and is subject to GST at 18%. Further, the entire 'electric vehicle charging fee' consisting of 2 (two) components *viz.* 'energy charges' and 'service charges' will be treated as consideration towards the said supply of service and will be subject to GST.

## Rent paid for accommodation in hostel is not exempted from payment of GST

Karnataka AAR ruled upon the taxability of hostel accommodation in the matter of ***Srisai Luxurious Stay LLP***[121]**.** Srisai Luxurious Stay LLP ("**Applicant**") was engaged in the business of developing, maintaining, renting/sub-letting paying guest accommodations, service apartments and flats to end-customers. Along with the renting/lodging the Applicant also provides ancillary services such as providing meals, washing machine facility, internet facility, etc.

The Applicant contended that the accommodation services provided were falling under the category of residential dwelling, which were covered under entry no. 12 of the Exemption Notification[122], and thereby not being subject to GST. However, the AAR observed that the services provided by the Applicant were in the nature of hotel/guest house. AAR further observed that to be eligible for claiming exemption under entry no. 12 of the Exemption Notification, the accommodation provided must be in nature of a permanent stay and not a temporary stay. Given that the accommodation services provided were temporary in nature, the Applicant cannot be said to have rented residential dwelling, thereby, not being eligible for exemption provided under Entry no. 12 of the Exemption Notification.

For ascertaining the taxability of ancillary services provided along with the accommodation services, the AAR observed that such ancillary services were not naturally bundled with the supply of accommodation services. Therefore, such ancillary services are required to be taxed separately, as per the applicable rate of GST.

Similarly, the Uttar Pradesh AAR in the matter of *V.S Institute and Hostel Pvt. Ltd.*[123], observed that hostels provided for accommodation services typically are maintained for commercial purposes and are accordingly at par with hotel services. Therefore, hostel services cannot be eligible for exemption provided under entry no. 12 of the Exemption Notification.

[120] 2023 (7) TMI 869 - Authority for Advance Rulings, Karnataka

[121] 2023 (7) TMI 870 - Authority for Advance Rulings, Karnataka

[122] Entry No. 12 of Notification No. 12/ 2017-Central Tax (Rate), dated June 28, 2017

[123] TS-327-AAR(UP)-2023-GST

## Recoveries made from employees towards canteen/transport services, not forming part of employment contract, are 'consideration' for supply of services subject to GST

In the case of ***Kothari Sugars and Chemicals Limited***[124]**,** Kothari Sugars and Chemicals Limited ("**Appellant**"), a manufacturer, had set-up a canteen facility (as mandated under the Factories Act, 1948) for the benefit of its employees and workers. For provision of such facility, the appellant used to recover a nominal amount (at subsidised rates) from the employees and pay to the caterer. The question before the Tamil Nadu AAAR was whether recovery of the said nominal amount would attract GST.

The Appellant contended that such nominal amount recovered from the employees would be treated as 'perquisites' forming part of the employment contract, which are excluded from the purview of GST as per Circular No. 172/04/2022 – GST dated July 6, 2022 ("**Circula**r"). Further, such recovery of canteen cost from employees was a mere cost sharing arrangement between the employees and the Appellant, which could not be treated as 'consideration'.

On perusal of the appointment letter issued by the Appellant to its employees, the AAAR observed that the clause states that "*employees will be eligible for only those benefits as applicable to others of the same cadre".* The AAAR ruled that such clause is generic and the same cannot be construed to mean that the supply of food was on account of contractual agreement between the Appellant and its employees. In order to claim the benefit of exemption available under the Circular, the relevant perquisites should be expressly mentioned in terms of the employment agreement. Based on the above, the AAAR held that nominal amount recovered from employees was outside the purview of 'perquisites' and is 'consideration' for supply of food by the Appellant to the employees at subsidised rates. Hence, the transaction will be construed to be supply of services, subject to GST.

Based on the same principle, the Gujarat AAR in the case of *Tata Autocomp Systems Limited*[125]*,* held that if nominal deductions made from employees' salary towards provision of canteen and/or transport services were explicitly mentioned in the Canteen and Transport Policies, such recoveries are outside the purview of GST and hence, do not constitute a supply.

## Independent services provided by auto-driver not a supply through ECO[126]

In the matter of ***Juspay Technologies Pvt. Ltd.***[127], Juspay Technologies Pvt. Ltd. ("**Applicant**") is engaged in the business of providing technology services to vendors by connecting them to their preferred payment aggregators and payment gateways. "Namma Yatri", an online platform launched by the Applicant assists auto-rickshaw drivers to connect with the customers.

Given the above background, the Applicant approached the Karnataka AAR to seek an advance ruling on the following:

1. whether the services provided by the Applicant qualify as a supply; and
2. whether the Applicant qualifies as an e-commerce operator.

The Applicant submitted that a person desirous of availing services of the online platform is required to make an online application in the prescribed form, whereafter such person is bound by the terms and conditions prescribed in the agreement. Further, the role of the Applicant was restricted to providing licence/permission to use the online platform by the subscribers. The ters of the agreement stipulate that business transactions (including quality and price) are entered into by the parties on their own and the Applicant did not have a role in that regard nor was the Applicant involved directly or indiretly in such supply and provision of services.

It may be noted as per Section 9(5) of the CGST Act, ECO is deemed to be the supplier of services if the notified services[128] are provided 'through' him. The AAR observed that the Applicant merely connects the auto driver and passenger, and their role ends on such connection. Additionally, the Applicant is not responsible for collection of consideration and does not have any control over the actual provision of

[124] TS-309-AAAR(TN)-2023-GST

[125] TS-286-AAR(GUJ)-2023-GST

[126] Electronic Commerce Operator

[127] 2023 (9) TMI 1121

[128] List of services notified through Notification No. 17/2017-Central Tax (Rate) dated June 28, 2017

service by the service provider. The Applicant is not aware about the details of the ride and the supply of transportation services happens independently, as the Applicant is involved only in identification of the supplier of services. The responsibility of the operations and completion of the ride is not of the Applicant. Additionally, the AAR relied on the ruling in *Re: Multi-Verse Technologies Private Limited*[129], wherein the AAR (Karnataka) had discussed the services which will be deemed to be provided 'through' the ECO. Given the similarity in facts, the AAR placed reliance on the AAR in the case of Multi-Verse to state that merely connecting the supplier of services and recipient of services will not bring the ECO within the ambit of services notified under Section 9(5) of the CGST Act as such services are not provided 'through' it. Therefore, while the Applicant qualifies as ECO, it is not required to discharge tax under Section 9(5) of the CGST Act.

## ITC reversal required on input/finished goods lost in fire accident

In ***Re: Geekay Wires Ltd***.[130], Geekay Wires Ltd. ("**Applicant**") is engaged in the manufacture of steel nails and other steel products. The Applicant purchases inputs such as polypropylene, copper wire, paper tape, etc., and avails ITC on such inputs. During the manufacturing process, steel scrap is generated which is sold by the Applicant in the market and discharges GST liability thereon.

A fire broke out at the manufacturing facility of the Applicant, destroying finished goods. The Applicant approached Telangana AAR on requirement of reversal of ITC (a) availed on inputs and (b) on finished goods sold as steel scrap in the open market, on which output tax liability was discharged.

The Applicant submitted that Section 17(5)(h) of the CGST Act restricts availment of ITC on goods destroyed/ written off/ disposed. However, in the present case, inputs procured are utilised for manufacture of finished goods and not *per se* destroyed. The fire accident led to the destruction of the finished goods, which could be sold only as scrap (on which GST was discharged).

The AAR relied on ***Union of India vs. Elephintstone Spinning and Weaving Company Limited***[131] and observed that intention of the legislature must be found by reading the statute as a whole and such intention cannot be restricted to a specific cause. AAR observed that ITC can be availed only when taxable supplies are made by a taxable person. Given that (due to the fire) taxable supplies were not made, ITC of goods will not be available, as per Section 17(2) and 17(5)(h) of the CGST Act. If such ITC was utilised, the same should be reversed. Therefore, ITC to the extent of manufactured/ finished goods destroyed or inputs destroyed is not available to the Applicant and the same needs to be reversed.

## Taxpayer entitled to avail ITC on demo-vehicle, when subsequently sold

In the matter of ***Sai Service Pvt. Ltd.***[132], Sai Service Pvt. Ltd. ("**Applicant**") is an authorised car dealer, engaged in supply of 4 (four) wheeler vehicles, spares and servicing of vehicles. As part of its business, the Applicant procures demo vehicles from manufacturers (against a tax invoice) for demonstration purposes in the showroom (which are retained for a period of 2 (two) years or 40,000 kms (forty thousand kilometers), whichever is earlier). The demo vehicles are procured at a discounted price. Further such demo vehicles are capitalised in the books of accounts of the Applicant as fixed assets. Presently, the Applicant does not claim ITC of the tax paid on such vehicles and therefore, claims depreciation on the same as per the provisions of the Income Tax Act, 1961.

The Applicant approached Telangana AAR to ascertain whether ITC of GST paid on procurement of vehicles, which are used for demonstration purpose, in the course of business of supply of motor vehicle can be availed.

The Applicant contended that as per Section 16(1) of the CGST Act, ITC can be availed on procurement of demo vehicles, which are eventually sold, as such vehicles are used in the course or furtherance of business. Further, reliance was also placed on Section 17(5) of the CGST Act, which specifically excludes availment of ITC on motor vehicles, except the following cases:

[129] 2022 (11) TMI 256
[130] 2023 (9) TMI 852
[131] (2001) 4 SCC 139
[132] 2023 (8) TMI 392

1. when used for further supply of such vehicles;
2. transportation of passengers; and
3. imparting training on driving such vehicles.

Accordingly, the AAR observed that the restriction on availment of ITC under Section 17(5) of the CGST Act is not applicable when the demo vehicles are sold after a period stipulated between the parties, thereby, ITC being available.

## Transfer of goods within FTWZ[133] not 'bonded warehouse transaction' under Schedule III of CGST Act[134]

In the matter of ***Haworth India Private Limited***[135], Haworth India Private Limited ("**Applicant**") is engaged in the business of manufacture and sale of office furniture in India. The Applicant also imports certain finished goods from its group entities and sells it to the customers located in India ("**Trading Activity**"). The Applicant proposes to carry out Trading Activity from FTWZ, for operational convenience and expedition of project execution. Under this transaction, the title of goods will be transferred to customers within the FTWZ, until the final customer files bill of entry and clears goods from the FTWZ.

The issue before the Tamil Nadu AAR was whether this transaction of transfer of title of goods within the FTWZ can be classified as 'bonded warehouse transactions' covered under Schedule III of the CGST Act, and accordingly, no GST should be levied on the same.

The Applicant submitted that both customs bonded warehouse (i.e., private warehouses, public warehouses or special warehouses) and FTWZ are required to execute bond with the customs authorities. The rationale for bonding the imported goods under the customs bonded warehouse as well as FTWZ remains the same i.e., to avail duty benefits under the Customs Act. Further, as SEZ[136] is deemed to be a port, inland container depot, land station and land customs station under Section 7 of the Customs Act in terms of Section 53(2) of the SEZ Act[137], the Applicant submitted that FTWZ is in parity with a bonded warehouse under the Customs Act and accordingly any transactions within FTWZ should fall under Schedule III of the CGST Act.

Relying on the relevant provisions of Customs Act, CGST Act and SEZ Act, the AAR observed that the SEZ Act and the SEZ Rules[138] provide the legal framework for approval, licenses and administrative control of FTWZ. Unlike customs bonded warehouses (i.e., private warehouses, public warehouses or special warehouses licensed under the Customs Act), FTWZ is not administered or licensed by the Customs Act. As Schedule III of the CGST Act is specific to only those warehoused goods which are lying in the warehouses licensed under the Customs Act, the same is not applicable to transactions effected within FTWZ. Accordingly, GST will be applicable on such transactions within FTWZ.

## Rectification of mistake application can only be moved to 'rectify any error apparent on the face of the record' and not on a debatable legal point

The Karnataka AAAR in the matter of Assistant Commissioner of Commercial Tax[139] dismissed a Rectification of Mistake ("**ROM**") filed by Revenue against an earlier which set aside a ruling rendered by the AAR. Earlier the AAR, in its ruling had stated that no ruling can be given as the question involves the determination of place of supply. In an appeal against the said order, the AAAR set aside the AAR ruling and remanded the matter to the AAR stating that it was within the AAR's jurisdiction to pass a ruling since the question was linked to determining the taxability to pay tax.

Revenue filed an ROM under Section 102 of the CGST Act against the AAAR ruling citing the reason that if a ruling has already been made by the lower authority, the AAAR may only confirm or modify such ruling, but not remand the same. Relying on the Supreme Court judgment in the case of *Deva Metal Powders Private Limited vs. Commercial Trade Tax, Uttar Pradesh*[140], wherein it was held that a decision on a debatable point

[133] Free Trade Warehousing Zone
[134] Schedule III of CGST Act provides list of activities or transactions which will be treated neither as a supply of goods nor a supply of services.
[135] 2023 (8) TMI 1299 - Authority for Advance Ruling, Tamil Nadu
[136] Special Economic Zone
[137] Special Economic Zone Act, 2005
[138] Special Economic Zone Rules, 2006
[139] TS-302-AAAR(KAR)-2024-GST
[140] 2008 (2) SCC 439

of law or a disputed question of fact is not a mistake apparent from the record, the AAAR dismissed the ROM application stating that the same being related to a debatable legal point is not covered within the ambit of Section 102 of the CGST Act.

## No illegal exercise of power in issuance of notifications extending the timelines for passing of assessment orders for recovery of tax

In the case of ***Graziano Trasmissioni vs. Goods And Services Tax and Ors***[141], the Allahabad HC dismissed a batch of petitions challenging the validity of the Notifications[142] wherein the statutory timelines for issuance of assessment orders and issuance of show cause notices were extended. The petitioners contested the Notifications primarily on the grounds that the provisions of Section 168A of the CGST Act were wrongly invoked and there was no prevailing force majeure event occasioning the extension of time limit as stipulated by the Notifications. The Allahabad HC dismissed the petitions and made the following observations: the powers under Section 168A of the CGST Act (which enables the GOI to extend statutory timelines due to *force majeure*) is a legislative power and not an administrative power, thereby the extension of limitation prescribed was a legislative function.

Upon examining the minutes of the 47th and 49th GST Council meetings and the Supreme Court's directions, wherein the intervening period, from March 2020 to February 2022, which was affected by COVID19, was excluded for computing limitation period[143], the legislative function was exercised by the delegatee, i.e., the Central/State Governments. Accordingly, there existed circumstances for exercise of the power of conditional legislation. Further, the Allahabad HC also noted that the principal legislature has laid down strict conditions for exercise of special powers to extend the limitation.

Regarding the interpretation of a force majeure event and whether its active occurrence triggered the provisions of Section 168A of the CGST Act, it was observed that such an exercise was not within the ambit of judicial review/query.

[141] 2024 (6) TMI 233 – Allahabad High Court

[142] Notification No. 09/2023 - Central Tax dated March 31, 2023, and the corresponding State Notification No. 515/2023 dated April 24, 2023

[143] Suo Moto Writ Petition (C) No. 3 of 2020, in Re: Cognizance for Extension of Limitation

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