Legal Updates

July 2023

Summary of Major Legal Updates

Key Highlights:

- Whether 16(4) is violative of the CGST/APGST Act r/w Article 14, 19(1)(g) and Section 300A of the Constitution of India
- State Authorities have jurisdiction to retain the refund consequent to Export of Services
- Whether ITC can be denied to the buyer when seller's GST registration is cancelled?
- Whether rejection of refund without giving an opportunity of explanation for mismatch in returns with that of GSTR 2A is correct?
- second refund claim of accumulated ITC for the same period
- Whether challan/debit advise issued by Bank, if co-relatable to Bill of Entry/s indicating payment of tax, can be treated as valid document for the purpose of taking credit under Rule 9(1) of Cenvat Credit Rules, 2004 (In short CCR, 2004)?
- Royalty paid to foreign holding company for providing technology, as percentage of net turnover of manufactured goods, could not be added to assessable value when there was no condition that assessee had to get approval of technology provider either for importing or for procuring components domestically

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1. Whether 16(4) is violative of the CGST/APGST Act r/w Article 14, 19(1)(g) and Section 300A of the Constitution of India

Thirumalakonda Plywoods Vs The Assistant Commissioner – State Tax & Ors.,
(Andhra Pradesh High Court)
[W.P.No.24235 of 2022)

Facts of the Case:

- ✓ The Petitioner is a Sole proprietorship who has commenced his business in hardware and plywood in March 2020 and who has filed his GSTR 3B for the Month of March 2020 on 27.11.2020. After due process of law, the department has issued the order dated 15.03.2022 denying the ITC of Rs.4,78,626/- on the ground of limitation as prescribed under Section 16(4) of the APGST Act, 2017 along with interest and applicable penalty totalling to Rs.11,24,994/-.
- ✓ Aggrieved by the action of State department officer, this Petitioner has moved the Writ Petition before the Hon'ble Andhra Pradesh High Court vide WP No. 24325 of 2022.

Contention of the Petitioner

- ✓ The time limit prescribed under Section 16(4) of CGST/APGST is violative of Article 14, 19(1)(g) and Section 300A of the Indian Constitution.
- ✓ The Non-obstante clause in Section 16(2) of APGST/CGST Act, 2017 would prevail over Section 16(4) of the APGST/CGST Act, 2017.
- ✓ That Notification issued by Andhra Pradesh State Government vide G.O. Ms. No. 264 dated 11.09.2020 provided extension of time for filing returns to Non-resident and not to others such distinguish of other taxpayers is violative of Article 14 of Constitution of India.
- ✓ The acceptance of GSTR 3B returns with a late fee will exonerate the delay in claiming the ITC beyond the period specified in Section 16(4) of the APGST/CGST Act, 2017.
- ✓ That non serving of order dated 15.03.2022 issued in Form DRC 07 is vitiated for non-service of show cause notice in Form GST DRC 01 as per procedure?

- ✓ In view of the above grounds, finally, requested to set aside the impugned order dated 15.03.2022.

Decision Held:

- ✓ The Court held that ITC is mere concession/rebate/benefit and not statutory or Constitutional right, therefore imposition of time limit will not amount to violation of Indian Constitution or any Statute. And held that Section 16(4) is not violative of Article 14, 19(1)(g) and Section 300A of the Indian Constitution. Section 16(2) has no over-riding effect on Section 16(4) of the APGST/CGST Act, 2017 as both operate independently. Mere acceptance of GSTR 3B along with late fee will not exonerate the delay in claiming ITC beyond the period specified in Section 16(4) of the APGST/CGST Act, 2017.
- ✓ With regards to non-service of show cause notice and violative of principles of natural justice it is held that those were already considered by the adjudicating authority.

H N A Comments: The order passed by the Hon'ble High Court is per incuriam because so much of settled legal jurisprudence was not the subject matter of discussion viz., Returns are mere facilitation (Bharti Airtel SC decision), credit taking cannot be determined by act of filing of returns; taking of credit in books is as goods as taking the credit in time; ITC being Vested and Constitutional right (SC 3 judges decisions in Eicher and Dai chi in the year 1999 which hold as such) etc. As such the above decision though did not get any opportunity to address various settled jurisprudence, it is still a law declared by the Constitutional Court which has to be followed unless stayed by the Hon'ble Supreme Court. It is noteworthy that various High Court/s have also admitted the Petitions on the vires of Section 16(4) it would be interesting to hold and watch how the other High Courts take their view.

2. Whether State Authorities have jurisdiction to retain the refund consequent to Export of Services

Media Net Software Services (India) Pvt. Ltd., Vs Union of India

(Bombay High Court)

[W.P.No.749 of 2021 & 4052 of 2022)

Facts of the Case:

- ✓ The Petitioners refund application on account of export of services was rejected by the State tax authorities. Aggrieved by which this Petitioner has moved the Writ Petition No.749 of 2021 and 4052 of 2022 before the Hon'ble Bombay High Court.

Contention of the Petitioner

- ✓ The State tax authorities have no power to levy tax (IGST) on export of services, which would fall within the purview of the IGST Act (Central Tax authorities) and relied on decisions given in Dharmendra M Jani vs. UOI and Ors., and ATE Enterprises Pvt Ltd., vs. UOI and Ors., passed by the same Hon'ble Bombay High Court.

Decision Held:

- ✓ The Hon'ble High Court, relying on the decisions given in the case of Dharmendra M Jani vs. UOI and Ors., and in the case of ATE Enterprises Pvt. Ltd., vs. UOI and Ors., held that jurisdiction of the respective authorities under the IGST Act and CGST/SGST are compartmentalized. Further held that in export of services as per the IGST Act, it is the Central Authorities who have jurisdiction in respect of any transaction in respect of export of services.
- ✓ Accordingly, the retained amount of tax with applicable interest by the State authority has to be transferred to Central authority within two weeks and same shall be decided by Central authorities within a period of six weeks thereafter.

H N A Comments: The order passed by the Hon'ble High Court is an example of Judicial discipline holding certainty in law. The law laid down by the Dharmendra M Jain holds good where for the export activity covered in IGST Act no state authority can retain the benefit or disallow the benefit of exports accrued to the assessee. It is high time that CBIC has to step and issue the clarifications for seeking refund of taxes paid for exports for the assesses who are administratively allocated to State Jurisdiction which will save time and cost of the assessee.

3. Whether ITC can be denied to the buyer when seller's GST registration is cancelled?

Jai Balaji Paper Cones Vs Assistant Commissioner State Tax, Tiruchengode, (Madras High Court) [W.P.No.6780 of 2020)

Facts of the Case:

- ✓ The Petitioner has paid the GST to the tune of Rs.4,14,000/- on three invoices dated 23.11.2018. The inward supplier's registration was cancelled on 31.10.2018 and collected GST was not deposited with ex-chequer by inward supplier.
- ✓ Accordingly, a Writ Petition was moved by the Petitioner having WP No. 6780 of 2020 for issuing mandamus to the department.

Contention of the Petitioner

- ✓ Since the tax is already paid by the Petitioner to his inward supplier, he cannot be asked to pay IGST again.

Decision Held:

- ✓ The Court held that no ITC can be claimed in such situation by referring to Section 16(2)(c) of the CGST/SGST Act, 2017 and held that the tax charged on such inward supply should be paid to the Government exchequer which is absent in this case.
- ✓ Accordingly, court declined to issue mandamus to the department.

H N A Comments: The order passed by the Hon'ble High Court is per incuriam because so much of settled legal jurisprudence was not the subject matter of discussion viz., Doctrine of Impossibility; as there is no mechanism in GST to check the compliance of the inward supplier. Decisions reading down of such compliance conditions in earlier regime viz., VAT/Excise/Service Tax and even in GST regime where ITC was granted. It is pertinent to mention here that vires of Section 16(2)(c) is under challenge before various High Courts including the Hon'ble Supreme Court on the ground of manifest arbitrary, treating both bonafide and non bonafide purchasers at par, etc.

4. Whether rejection of refund without giving an opportunity of explanation for mismatch in returns with that of GSTR 2A is correct?

Shivbhola Filaments Pvt. Ltd., Vs Assistant Commissioner of CGST,

(Delhi High Court)

[W.P.No.9742 of 2023)

Facts of the Case:

- ✓ The Petitioner is engaged in manufacturing of Polypropylene Yarn and Polypropylene narrow woven fabric which are chargeable to GST at 12% and 5% respectively.
- ✓ The Petitioner claimed that the raw materials used for manufacturing of the above products are chargeable to 18%. Thus, the Petitioner had filed around eight refund applications due to inverted tax structure for the period August 2018 to March 2019, which were rejected due to mismatch in returns filed by the Petitioner in Form GSTR 2A. Despite petitioner responding by filing reply and giving reconciliation statement same were rejected with the same reason as that raised initially in refund rejection notice by eight different Orders. After appellate process, those were again rejected vide Common Order in Appeal dated 18.11.2021.
- ✓ Thereafter, aggrieved by the action of Appellate Authority, this Petitioner has moved the Writ Petition before the Hon'ble Delhi High Court vide WP No. 9742 of 2023.

Contention of the Petitioner

- ✓ They were not given opportunity of being heard by the adjudicating authority.
- ✓ Despite giving reconciliation statement refund claims were rejected which is clear violation of Principles of natural justice.

Decision Held:

- ✓ Setting aside the Order in Appeal dated 18.11.2021 the Hon'ble High Court held that thought the appellate authority opined that certain amount of refund is to be rejected there was no exercise conducted to determine the actual extent of refund eligible.
- ✓ Rejection of refund on the ground of mismatch without permitting the Petitioner to reconcile the same and provide necessary explanations is also incorrect and restored the refund applications before the adjudicating authority for determining the amount

of refund payable to Petitioner after giving opportunity of being heard, by giving liberty to the Petitioner to file his submissions.

H N A Comments: The order passed by the Hon'ble High Court is welcome. This gives message to the Appellate Authorities to do their part Holistically and to pass reasoned orders which is an enriched characteristic of Principles of natural justice. Despite Appellate Authority giving finding that Petitioner is eligible to refund did not do enough to provide the same which was corrected by Hon'ble High Court.

5. Whether second refund claim of accumulated ITC for the same period allowed?

Shree Renuka Sugars Ltd Vs. State of Gujrat

(Gujrat High Court)

[S. Civil Application No. 22339 of 2022)

Facts of the Case:

- ✓ The appellant had filed a refund application of accumulated ITC in making zero rated supplies for 11 months in FY 2020-21 to 2021-22. Refund was filed for Rs.1,00,47,38,439/- under the category 'accumulated ITC in respect of export of goods without payment of tax' which was sanctioned to them.
- ✓ Thereafter, on coming to know that there was inadvert arithmetical error done by an employee on calculating the eligible refund. Instead of Rs.1,10,67,67,172/- which they are actually eligible for refund, filed and got refund of Rs.1,00,47,38,439/- only. Thereafter, a supplementary refund application for same period was filed for Rs.10,20,28,733/- under the category 'any other' as portal did not allow to file second refund for same period under the earlier category.
- ✓ Refund was rejected by the department on the ground that as it is filed under wrong category.
- ✓ Aggrieved by which, a Petition/Application was filed before the Hon'ble High Court.

Submissions of the Petitioner/Applicant

- ✓ They are rightly eligible for refund as per Section 54 read with Section 16 of IGST Act and Rule 89 of CGST Rules and mere technical lapse cannot disentitle them from availing the refund.

- ✓ GST portal did not allow them to file the supplementary refund application under the category as that of main refund application.

Ruling given:

- ✓ The Hon'ble High Court had held that when eligibility for refund of accumulated of ITC on account of exports is not in dispute the ground taken by department to deny the refund is incorrect. And noted that the benefit which otherwise a person is entitled to once the substantive conditions are satisfied cannot be denied due to technical error or lacunae in the electronic system.
- ✓ Accordingly, by setting aside the order directed the department to allow the petitioner to file refund application manually which would be decided by the department in six weeks.

H N A Comments: The order passed by the Hon'ble High Court reiterates the settled legal position that substantive benefits cannot be denied on technical/procedural aspects. Whereafter, we hope department in future will follow the same.

6. Whether challan/debit advise issued by Bank, if co-relatable to Bill of Entry/s indicating payment of tax, can be treated as valid document for the purpose of taking credit under Rule 9(1) of Cenvat Credit Rules, 2004 (In short CCR, 2004)?

Ivax Paper Chemicals Ltd., Vs. Commissioner of Central Tax, Visakhapatnam (CESTAT Hyderabad)
[Final Order No. A/30159 of 2023 in Appeal No. E/30364/2022)

Facts of the Case:

- ✓ The appellant located at Hyderabad has also has three other units located at Gumpam, Kathua and Kovai. The Gumpam unit has imported goods and payments were processed from Hyderabad unit which is a liaison office having common bank account. Department denied the credit on the ground that ITC availed by Gumpam unit is incorrect as the payments were done by the Hyderabad unit which is a ISD office. Notice issued by department culminated in Order in Original and thereafter in Order in Appeal following due process of law. Vide above appeal this appellant is before this Hon'ble CESTAT seeking ITC and contesting the notice issued on extended period of limitation.

Contentions of the Appellant

- ✓ That Hyderabad unit is not a head office which is merely having a central bank account, which makes payments for all locations for ease of business. Submitting the Bill of entry/s it was argued that Gumpam unit actually received the imports and on behalf of which Hyderabad unit had made the payment.
- ✓ Hyderabad office is not required to take ISD registration.

Decision held:

- ✓ The Hyderabad office is not required to take ISD registration. The payment advise/challan issued by Bank to Hyderabad office is rightly issued as per Rule 4A of the Service Tax Rules, 1994 which contains details of tax paid, nature of service provided and service tax registration number. From the Bill of Entry/s under which Gumpam unit received the goods and payment advice issued proves that the payments were done with respect to Gumpam unit only on which ITC can be claimed.
- ✓ On the other hand, with respect to issue where Gumpam unit is also clearing their raw materials as such imported by them to other units after taking credit by following procedure under Rule 3(5) of CCR, 2004. It is held that they have to reverse the credit actually availed and clearance of same on payment of duty is incorrect. Finally held that the appellant is eligible to take credit based on invoice/challan issued by bank to the extent the raw material is used in manufacturing process and not covered by stock transfer on which duty was paid instead of credit reversal.
- ✓ Extended period is rightly invoked as appellant has not correctly followed the CCR procedure.

H N A Comments: The order passed by the CESTAT to the extent allowing the credit based on invoice/challan issued by bank holds good. But findings with respect to non-following of procedure prescribed under Rule 3(5) and upholding extended period is erroneous interpretation of law. It is fact on record that the appellant instead of reversing the credit paid the duty which is as good as reversing the credit which is aptly covered under the Principle of Revenue Neutrality. The Hon'ble CESTAT erred in upholding the demand when the situation is Revenue Neutral for department as much as upholding the extended period of limitation which is long being settled jurisprudence.

7. Demand of Service Tax on the basis of TDS /26AS statements/3CD Statements is not sustainable: CESTAT Ahmedabad.

[Shree Kankeshwari Enterprise Vs Commissioner of Central Excise & Service Tax, Bhavnagar (2023) 9 Centax 77 (Tri. - Ahmd)]

Facts of the Case:

- ✓ M/s. Shree Kanakeshwari Enterprise (The 'Appellant') is engaged in providing work contract Services to the State Government, local authority or governmental authority and also to private parties by way of construction of road, bridge, tunnel, ponds or irrigation work, Repairs and Maintenance of civil structure etc.
- ✓ The Appellant has discharged service tax liabilities from time to time, filed all statutory ST-3 Returns.
- ✓ The Central Excise officers at Bhavnagar noticed that the Appellant had short paid Service Tax for the F.Y. 2015-16 to 2016-17. In this respect, the Superintendent of the Central Excise, Bhavnagar requested Appellant to submit the details of the incomes received and service tax paid.
- ✓ Thereafter, a show cause notice was issued demanding total Service Tax of Rs.4,02,21,381/- on the basis of the Form 26AS. Further, the impugned OIO confirmed demand to the extent of Rs. 3,95,32,273 /- with interest and imposed penalties.

Contentions of the Petitioners and Appellant:

- ✓ The Appellant submitted that it is settled principal of law that Service Tax demand cannot be raised on the basis of data of the Income tax Authorities, without conducting any independent enquiry. Appellant submits that the data of Income Tax in 26AS relied upon in SCN/O-I-O does not have its evidentiary value in absence of any independent evidence. Appellant submits that by relying on 26AS data for demand of service tax cannot be made. He has relied upon the following decisions: -
    - Ved Security Vs. CCE, Ranchi -III 2019(6) TMI 383 CESTAT, Kolkata
    - Synergy Audio Visual Workshop Pvt Ltd V/s CST - 2008 (10) S.T.R. 578 (Tri. - Bang.)
    - Calvin Wooding Consulting Ltd. Vs. CCE 2007 (7) S.T.R. 411 (Tri. - Del.)

- CCE Vs. Tahal Consulting Engineers Ltd. – 2016(44) S.T.R. 671 (Tri. Del)
- J.P. ISCON PVT. LTD vsCCE vs 2022 (63) G.S.T.L. 64 (Tri. - Ahmd.)
- Shresth Leasing & Finance Ltd - 2023 (68) GSTL-143(Tri-Ahmd)
- FORWARD RESOURCES PVT. LTD - 2023 (69) G.S.T.L. 76 (Tri. - Ahmd.)
- VATSAL RESOURCES PVT LTD - 2023 (68) GSTL-279(Tri-Ahmd)
- REYNOLDS PETRO CHEM LTD - 2023 (68) GSTL-292(Tri-Ahmd)
- State of Gujarat v/s Novelty Electronics – 2018(16) GSTL- 87(Guj.)

✓ Appellant has provided services related to construction of roads etc to Government authorities/agencies and their activity are covered under the Mega Exemption of Service Tax vide Sr. Nos 12(d), 12(e), 12A(a), 13(a) and 29(h) of Notification No. 25/2012-ST. The Appellant submitted that the impugned show cause notice confirmed the demand and without granting the benefit of the Mega Exemption Notification no. 25/2012-ST. The impugned show cause notice hasn't reasoned for such denial of the benefit of the Notification and the notice has fully relied upon the information as per the Form 26AS.

✓ Further, the Appellant submitted that the following case laws laid down that SCN is foundation in the matter of levy and collection/recovery of duty, penalty and interest. Revenue cannot argue case not made in SCN and that Department cannot travel beyond the show cause notice as settled in the following judgments: -

- 2006 (201) ELT-513(S.C.) - CC v. Toyo Engineering India Ltd.
- 2007 (215) ELT-489(S.C.) - CCE v. Ballarpur Industries Ltd.
- 2008 (232) ELT-7 (S.C.) - CCE v. Gas Authority of India Ltd.
- 2009 (241) ELT-481(S.C.) - CCE v. Champdany Industries Ltd.
- 2016 (334) ELT-577(SC)-Precision Rubber Industries (P) Ltd v/s CCE
- 2018 (10) GSTL- 479 (Tri. - Mumbai) – Swapnil Asnodkar
- 2011 (22) STR- 571 (Tribunal)-United Telecoms Ltd.

Also submitted that aforesaid decisions clearly hold there is no authority in law to improvise any such defective SCN by O-I-O.

- ✓ The Appellant also submitted that the impugned show cause notice considered the gross receipts as consideration of "Taxable Services", which is against the principal of law laid down by the Hon'ble Apex Court in the case of M/s Larsen and Toubro - 2014 (303) ELT 3 (SC).
- ✓ The Appellant submitted that the demand cannot sustain on the ground that the impugned notice hasn't specified the clause under which the activity falls for levy of Service Tax. In absence of exact sub-heading under which service falls, taxability of service cannot be decided. Decisions in United Telecoms Ltd. v. CST – 2011 (22) STR - 571 (TRI), Swapnil Asnodkar-2018 (10) GSTL-479 (Tri-Mumbai), Balaji Enterprises – 2020 (33) GSTL-97 and ITC Ltd. -2014 (33) STR-67 (Tri-Del).
- ✓ The Respondent reiterated the finding of impugned Order and submittted that though SCN was issued only on the basis of 26AS data shared by the Income Tax Authorities, O-I-O has given fairly reasonable findings to confirm the service Tax demand and hence O-I-O may be upheld.

Decision Held:

- ✓ The Tribunal held that Settled law is that the exemption should be interpreted strictly, but, when eligibility criteria of availing exemption is proved, liberal interpretation should be adopted to allow substantive benefit of an exemption for the assessee for whom exemption is intended to be allowed.
- ✓ Eligibility criteria in this case is providing services to Government Authorities in public work on Roads, Bridges etc, which is not denied in this O-I-O. Appellant has given detailed clarification and documents for services and submitted that they are eligible for exemption by clause No. 12(d), 12(e), 12A(a), 13(a) and 29(h) of Notification No. 25/2012-ST which allows the exemption in services provided to the Government, a local authority or a governmental authority.
- ✓ Appellant has also reflected all these transactions in their Books of Account, paid appropriate VAT and Service Tax in respect of sale transactions and Taxable services. Services of Appellant were to Government agencies and even as a sub-contractor were exempted. It is held that Appellant is within four walls for eligibility of the exemption.

- ✓ Show Cause Notice dated19-04-2021 for demand of Service Tax for F.Y. 2015-16 to 2016-17 is issued beyond normal period, considering following decisions relied by Appellant are applicable: -
    - Padmini Products v. CCE -1989 (43) ELT-195(S.C.)
    - CCE v. Chemphar Drugs & Liniments – 1986 (43) ELT-276(S.C.)
    - Gopal Zarda Udyog v. CCE -2005 (188) ELT-251(S.C.)
    - Lubri-Chem Industries Ltd. v. CCE -1994 (73) ELT-257(S.C.)
    - Anand Nishikawa Co. Ltd. v. CCE -2005 (188) ELT-149(S.C.)

  Therefore, the entire demand for FY 2015-16 to 2016-17 raised by the SCN dated 19-04-2021 confirmed by impugned O-I-O against Appellant deserves to be set aside on this ground of limitation.
- ✓ In view of the above findings, demand of the Service Tax confirmed by the adjudicating authority as well as imposition of interest and penalties also deserve to be set aside.

H N A Comments: The Tribunal held that the levy and collection of the Service tax shall be confirmed basing upon the Provisions of Chapter V of the Finance Act, 1994 and not basing upon the Income Tax Returns, Form 26AS and Form 3CD Statements. Both the Acts have separate provisions operating for levy of tax in two different fields and hence both cannot be merged, and notice cannot be issued by taking the basis of other. Objection against any availment of exemption should be done within the normal time limit which seemed to over in current case and department cannot invoke the provisions of suppression of facts & misstatements, fraud etc.

8. Royalty paid to foreign holding company for providing technology, as percentage of net turnover of manufactured goods, could not be added to assessable value when there was no condition that assessee had to get approval of technology provider either for importing or for procuring components domestically.

[Commissioner of Customs (General) Vs Kruger Ventilation Industries (North India) Pvt. Ltd. (2023) 9 Centax 75 (S.C.)]

Facts of the Case:

- ✓ M/s. Kruger Ventilation Industries (North India) Pvt. Ltd. (the 'Respondent') is a private limited company incorporated under the Companies Act, 1956 and is engaged in manufacturing industrial fans. It imported various parts such as side plate, back plate, tube casting, motor base and impeller for use in manufacturing its final products from (i) M/s. Kruger Ventilation Industries Pte. Ltd., Singapore and (ii) M/s. Kruger Ventilation Asia Co. Ltd., Thailand.
- ✓ As the respondent and the foreign suppliers were related persons, the Deputy Commissioner of Customs, SVB, Nhava Sheva referred the matter to SVB New Customs House, Delhi. The respondent submitted documents, requisitioned by the SVB Delhi and also participated in the proceedings before the Deputy Commissioner. The three issues considered and decided by the Deputy Commissioner are as follows:
    - Whether the buyer and seller are related persons in terms of Rule 2(2) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 [Valuation Rules];
    - Whether the transaction between the buyer and seller are influenced by such relationship; and
    - Whether any addition is required to be made to the assessable value of the imported goods under Rule 10 of the Valuation Rules.

  On the first issue, the adjudicating authority found that the importer (respondent herein) and the overseas supplier were related persons. On the second issue, the adjudicating authority decided that there is no evidence on record that can establish that the relationship has influenced the transaction value and, therefore, the transaction value needs to be accepted in terms of Rule 3(3)(a) of the Valuation Rules. On the third question as to whether any additions have to be made under Rule 10 of the Valuation Rules, the adjudicating held that the licence fee paid by the appellant to M/s. Kruger Asia Holding Pte. Ltd., Singapore, its holding company, under the technical aid agreement, needs to be added to the assessable value in terms of Rule 10(1)(c) of Valuation Rules.
- ✓ Aggrieved by decision of the adjudicating authority, both the revenue as well as the respondent has filed appeals to the Commissioner (Appeals). Whereas the

Commissioner (Appeals) allowed the appeal filed by the revenue and rejected the respondent's appeal. Hence the said appeal was filed by the respondent before the CESTAT Delhi.

Contentions of the Respondent:

- ✓ Respondent submitted that he is not liable to include the amount of license fee/royalty paid to the associate company in terms of Rule 10(1)(c) of Valuation Rules since the agreement with M/s. Kruger Asia Holding Pte. Ltd., Singapore for receiving technical assistance is not a condition for sale of the imported goods. The license fee is based on the total net sales made by the respondent.
- ✓ The agreement nowhere states that the appellant cannot import any goods from Kruger, Singapore unless and until the license fee is paid to the holding company in terms of technical agreement. The agreement is neutral about the supply of raw material and does not mandate the appellant to buy the goods from the supplier of technology or any of its associate companies.
- ✓ The license fee is paid on the sales of the goods domestically manufactured and sold in India. No condition has been imposed in the agreement restricting import of goods from any suppliers. It is purely an independent activity and has no relationship to the raw material by the respondent.
- ✓ It is undisputed that there is no influence of the relationship between the appellant and exporter on the transaction value. The Respondent has already included the value of miscellaneous expenses in terms of Rule 10(2) of Valuation Rules as can be seen from the bill of entry and invoices enclosed. Therefore, it is erroneous to say that the accepted price has been taken as the FOB value.

Decision of the CESTAT Delhi Bench:

- ✓ Rule 10(1)(c) of the Valuation Rules reads as follows:

> "(c) royalties and licence fees related to the imported goods that the buyer is required to pay, directly or indirectly, as a condition of the sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable".

As per Rule 10(1) (c) any royalty paid directly or indirectly as a condition for the import is includible in the assessable value of the imported goods.

- ✓ It needs to be seen whether the payment of such royalty is **pre-condition to the sale of the imported goods**. No such condition emerges from the agreement in the present case. The goods were also not imported under the agreement. In view of the above, we find that the royalty cannot be included in the assessable value.

Appeal to Supreme Court:

- ✓ The Revenue aggrieved by the decision of the Hon'ble Delhi CESTAT filed an appeal against the same before the Hon'ble Apex Court. The said appeal was filed with a delay of 343 days.

Decision of the Apex Court:

- ✓ The Apex Court dismissed the appeal both on the grounds of delay as well as on merits as the case was already decided by the judgement of the same court in the case of Matsushita Television and Audio (I)Ltd. v. Commissioner — 2007 (211) E.L.T. 200 (S.C.).

H N A Comments: The Hon'ble Apex Court and the Delhi Tribunal held that only such royalties or license fees which are directly relatable to the imported goods, and which is a condition of sale of such goods alone could be added to the declared price. If the agreement clearly stipulates the difference between the royalty paid and the transaction for import of raw material which are independent of each other, no need to add to the assessable value under Rule 10.

9. Cash seizure limitation - During an Investigation aimed at tax evasion under GST Act, cash cannot be seized especially when cash does not form part of stock-in-trade of business.

[State Tax Officer (IB) Vs Shabu George (2023) 9 Centax 89 (S.C.)]

Facts of the Case:

- ✓ The Revenue filed an appeal before the Hon'ble Apex Court on the decision of the Hon'ble Kerala High Court in the case of Shabu George Vs State Tax Officer (IB) (2023) 9 Centax 28 (Ker.), wherein it allowed the appeal of the Shabu George (the

'Petitioner') and directed the revenue to release the cash seized to the appellant from his premises at the time of investigation.

Decision of the Apex Court:

- ✓ The Hon'ble Apex Court upheld the judgement given by the Kerala High Court stating that "We are not inclined to interfere with the judgment and order impugned in this petition."
- ✓ Relying on the decision of Kerala high court where in it held – "The power of any authority to seize any 'thing' while functioning under the provisions of a taxing statute must be guided and informed in its exercise by the object of the statute concerned. In an investigation aimed at detecting tax evasion under the GST Act, we fail to see how cash can be seized especially when it is the admitted case that the cash did not form part of the stock in trade of the appellant's business."
- ✓ It further held that – "Findings of Intelligence Officer that huge amount of money kept in house of assessee as idle and not deposited at bank or recorded in income tax return made evident that money was from illicit sources, was beyond powers and jurisdiction of authorities under GST Act."

H N A Comments: The Revenue has no authority to seize cash during an investigation initiated under the provisions of the GST Act, especially when such cash does not form part of the stock in trade of the business. It clearly dissects and distinguishes a line of difference between the power & authority of the proper officer under GST Act and under income tax law. Under other law, it may allow for retention/seizure of such amount, but the GST authorities have no power to seize that amount under GST law and hence liable to release the said cash seized at the earliest.

10. Orissa HC stayed rest of demand after deposit of entire tax amount till pendency of writ petition.

[Ajaya Kumar Nayak Vs Joint Commissioner of State Tax (Appeals) (2023) 9 Centax 61 (Ori.)]

Facts of the Case:

- ✓ Mr. Ajaya Kumar Nayak (the 'Petitioner') filed the writ petition before the Hon'ble High Court of Odisha challenging the order passed by the 1st Appellate Authority

(The Joint Commissioner of State Tax (Appeal), Jagatsinghpur Circle, Cuttack-III, Odisha). The said appellate authority has rejected the appeal filed by the petitioner on the grounds of delay beyond the period specified under Section 107 (1) & (4) of the GST Act, 2017.

Contentions of the Petitioner:

- ✓ The Petitioner requested the court to accept the petition on the grounds that the petitioner is not liable to pay the tax and penalty against the 1st Appellate Order. Further, the petitioner has already deposited 10% of the demanded tax amount before the first appellate authority and as there is no second appellate forum, this Court should entertain this writ petition.

Decision Held:

- ✓ The Hon'ble High Court held that the petitioner wants to avail the remedy under the provisions of law by approaching 2nd appellate tribunal, which has not yet been constituted, as an interim measure subject to the Petitioner depositing entire tax demand within a period of fifteen days from today, the rest of the demand shall remain stayed during the pendency of the writ petition.

H N A Comments: Payment of the entire demand as a "DEPOSIT/PAYMENT UNDER PROTEST" can be used as a remedy to stay the entire demand from recovery proceedings until the decision is disposed off by any higher forum or Tribunal, after its constitution. Though there are no similar provisions as compared to earlier law in relation to payment of tax under protest, courts have held that mechanisms still exist and option available with the assessee in case of liability of interest and penalty which can be avoided in future by way of paying under protest.

11. Scrutiny proceedings and proceeding under section 74 are two separate and distinct exigencies.

[Nagarjuna Agro Chemicals Pvt Ltd Vs State of U.P (2023) 9 Centax 13 (All.)]

Facts of the Case:

- ✓ M/s. Nagarjuna Agro Chemicals Pvt Ltd (the 'Petitioner') is registered under the GST Regime and has submitted the returns for the FY 2018-19. The department

has not issued any discrepancy notice nor initiated any proceedings under the provisions of the Section 61 of the GST Act, 2017.

- ✓ Further, the department at a later stage found that there is a short payment of tax for the FY 2018-19 and the demand has been raised for the short fall of the tax by the department.

Contentions of the petitioner:

- ✓ The Petitioner submitted that since the returns were duly filed by the petitioner for the period 2018-19 and the appropriate course of action was defied to point out the difference if any, in the returns by the GST Act under the provisions of Section 61. So, the petitioner should be given an opportunity to rectify the return before initiating the proceedings under Section 74 of the GST Act.

Decision Held:

- ✓ The Hon'ble High Court held that the Section 61 regulates scrutiny of returns. In the process of scrutiny of such returns, the proper officer has been vested the jurisdiction to examine the return and in case any discrepancies therein the proper officer can intimate such discrepancy to the assessee with the object of conferring an opportunity upon the assessee to rectify such discrepancy. The discrepancy may be of different kinds.
- ✓ The proper officer is also vested with jurisdiction under section 61 to proceed with issuance of notice against the assessee where the deficiency pointed out by the department is not rectified and no satisfactory explanation is furnished in that regard. The exigency, which is dealt with under section 61 is therefore, quite distinct and is confined to the scrutiny of returns.
- ✓ The argument of the petitioner that unless deficiency in return is pointed out to the assessee, and an opportunity is given to rectify such deficiency, that the department can proceed under section 74 is not borne out from the statutory scheme and the argument in that regard, therefore, must fail.
- ✓ The scrutiny proceedings of return as well as proceeding under section 74 are two separate and distinct exigencies and issuance of notice under section 61(3),

therefore, cannot be construed as a condition precedent for initiation of action under section 74 of the Act.

H N A Comments: The provisions of scrutiny of the returns under section 61 of the GST Act is a recourse given to the department for issuance of the notice to the assessee for rectification of the discrepancies in its return. However, the department may at its discretion proceed to initiate proceedings under Section 74 in case of discrepancy of short payment of tax by the assessee in its returns. Earlier in case of Vadivel Pyrotech, Madras HC had held that issuance of notice under section 73 should come through scrutiny of returns under section 61, though the facts were different to say that different grounds were adopted in issuance of show cause notice under section 73 & scrutiny of returns under section 61.

12. SCN shouldn't be uploaded merely on portal but also copy to be sent to assessee by e-mail and/or by hand delivery.

[Mayel Steels Pvt. Ltd. Vs UOI (2023) 9 Centax 25 (Bom.)]

Facts of the Case:

- ✓ M/s. Mayel Steels Pvt Ltd (the 'Petitioner') is registered under the provisions of the GST Act, 2017. The Superintendent, Range IV, Division II, CGST & C EX has cancelled the GST Registration and issued a show cause notice dated 01.08.2022, requiring the petitioner to present at the office of the Superintendent at 2.pm on 02.08.2022. Further, such notice was uploaded only on the common web portal of the petitioner.
- ✓ The petitioner after being aware of the said notice, filed a reply to the notice for cancellation of registration vide its reply dated 08.08.2022, which was received by the said authority on 09.08.2022. In the meantime, the Joint Commissioner of State Tax (GST) issued orders under FORM GST DRC-22 for Provisional Attachment of Bank Account/Property under section 83 of the CGST/SGST Act, 2017.

Contentions of the Petitioner:

- ✓ The Petitioner contended that the impugned order was passed in violation of the principles of natural justice. In the case of this violation, the impugned order is

liable to be set aside as the impugned order was passed without granting an opportunity of the being heard to the petitioner.

Decision Held:

- ✓ The High Court held that the petitioner despite being proceeded to file a petition before this court, served to the respondent on 02.12.2022. The Respondent passed an order dated 02.01.2023 cancelling the petitioner's registration, also such impugned order passed takes into consideration of some issues, which does not form part of the show cause notice.
- ✓ Therefore, in above circumstances and in breach of the principles of natural justice, there is no option except to set aside not only the show cause notice but the impugned order dated 02.01.2023 cancelling the Petitioner's registration.
- ✓ It is also observed that whenever an action is intended to be taken by the Respondent in respect of registration of the dealers, it is expected that the show cause notice in that regard is not merely uploaded on the Web-portal but also a copy of the same be forwarded to the dealers by e-mail and/or by hand delivery, **so that the same are effectively replied.**

H N A Comments: No Notice or Order can be issued in violation of principles of natural justice, such Notice or Order shall be liable to be set-aside. Further, the notice or the orders not only be uploaded on the web-portal but also a copy of the same shall be sent to the taxpayers through e-mail and/or by hand delivery for its effective reply.

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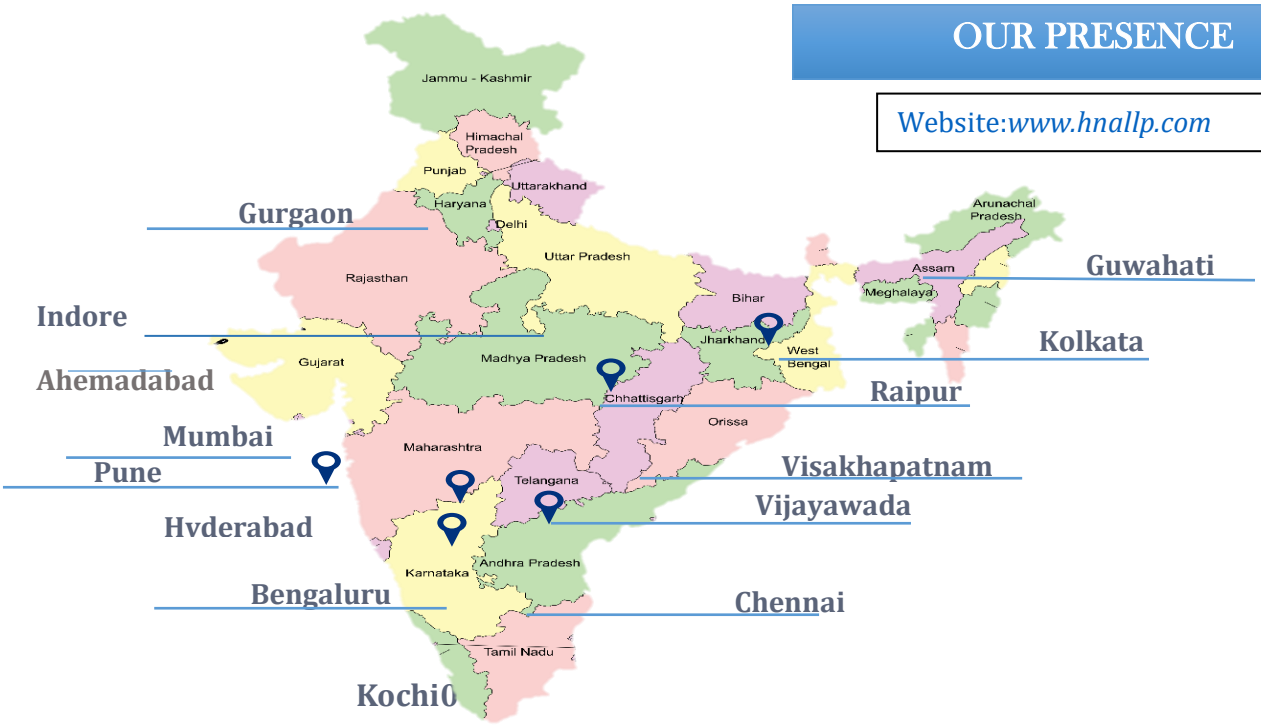

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