Legal Updates

December 2021

Summary of Major Legal Updates

Key Highlights:

- Tax paid under wrong head can be claimed as refund by tax payer himself on Suo Moto where the inter-State supply was subsequently found as inter-state and vice versa
- Period of limitation for filing appeal under Section 107(1) of the CGST Act to be reckoned from the date of communication of the Order via e-mail
- The benefit of ITC cannot be curtailed against a genuine transaction supported by valid indentures
- Manual Refund Application is valid under CGST Act, 2017
- Challenging the levy of GST on E-Commerce Operators as ultra vires the Constitution of India

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1. *Tax paid under wrong head can be claimed as refund by tax payer himself on Suo Moto where the inter-State supply was subsequently found as inter-state and vice versa*

[M/s Radhemani and Sons Vs. Addl Commr (Appeals) CGST 2021-TIOL-2295-HC-Chhattisgarh-GST]

The Petitioner has filed a refund application under the category 'excess payment of tax' on account of incorrect payment of IGST instead of CGST and SGST. However, the same was rejected by refund sanctioning authority and the appellate authority stating that the Refund under Section 77 would arise only when a supply is considered as an intra-State supply is so held by any authority as inter-State supply or vice versa and would not arise suo-motu. The present petition was filed against such refund rejection order.

The Hon'ble High Court observed that in terms of Section 77 of the CGST Act, 2017 and Section 19 of the IGST Act, 2017 read with the Circular No. 162/18/2021-GST dated 25/09/2021, where the inter-State or intra-State supply made by a taxpayer, is either subsequently found:

- *By taxpayer himself as intra-State or inter-State respectively or*
- *By the tax officer in any proceeding,*

the refund thereof would be admissible, provided the taxpayer pays the required amount of tax in the correct head. Accordingly, the Hon'ble High Court set aside the rejection Order and remanded the matter to the Appellate authority with a direction to decide the refund application in light of the aforesaid finding.

Comments: *This decision provides a great relief to all the taxpayers where the tax was paid under wrong head initially and corrected it subsequently. Once the payment was made under right head, the amount paid under wrong head can be claimed as refund suo-moto without waiting for the officer to pass an order. Further, the Circular dated 25.09.2021 also provides various clarifications including the relevant date for filing the refund application which can referred for better understanding.*

2. *Period of limitation for filing appeal under Section 107(1) of the CGST Act to be reckoned from the date of communication of the Order via e-mail.*

[M/s Meritas Hotels Private Limited Vs. State of Maharashtra and Others 2021-TIOL-2280-HC-MUM-GST]

The issue for consideration is whether the period of limitation for the purpose of filing an appeal under Section 107(1) of the CGST Act would commence from the date when the impugned assessment order is uploaded on the GSTN portal or from the date of service of order by email.

The Hon'ble High Court held that

- *In terms of Section 107(1) of the CGST Act, the appeal to the Appellate authority is to be filed within 3 months from the date of communication of the impugned assessment order passed by the adjudicating authority and an extension of 1 month may be granted under Section 107(4) of the CGST Act.*
- *Rule 108 of the CGST Rules, 2017 provides that the appeal against the Order has to be filed electronically. However, it no where prescribes that the same is to be filed only after impugned assessment order is uploaded on GSTN portal online. On the contrary, at the time of filing the appeal electronically, it is not even required that the certified copy of the order is submitted, as the same can be submitted within seven days of filing the appeal.*
- *Accordingly, the Hon'ble High Court held that the period of limitation for filing the appeal is to be reckoned from the date of communication of the order via the e-mail dated April 20, 2019 and not otherwise.*

Comments: *Hon'ble High Court has missed to consider the consequence of not uploading the order online and has presumed that there is no requirement to upload the order for filing the appeal. This is evident from the findings of the Hon'ble High Court given in the decision. However, the appeal cannot be filed unless the order is uploaded online and the Appellate Authority has not accepted the manual appeal in the instant case. Therefore, the Petitioner would be losing the right to file the appeal due to non-uploading of order by the proper officer within time even though the Petitioner try to file the appeal within time limit. The Petitioner cannot be punished for the default of the officer in uploading the order online.*

It is imperative that the time limit provided under Section 107(1) of CGST Act, 2017 and the procedure provided under Rule 108 of CGST Rules, 2017 should go hand in hand and the same cannot be interpreted independently as made by the Hon'ble High Court.

3. Release of goods are permissible on payment of fine even during pendency of confiscation proceedings

[State Tax Officer Vs. Y. Balakrishnan 2021-TIOL-2230-HC-KERALA-GST (Kerala High Court)]

The issues in the present case are (i) Whether the provisions of Section 130 of the Act contemplate any provisional release of goods? (ii) Whether the amount payable for release of the goods under Section 130 of the Act is fine alone or is it fine, penalty and tax to be paid together for securing release of the goods?

The Hon'ble High Court held that

- *Though Section 130(2) is not a case of provisional release, the sub-clause confers power upon the competent officer to release the goods on payment of fine in lieu of confiscation, while the proceedings for confiscation are continuing and before orders of adjudication are passed.*
- *Absence of the use of the words 'provisional release' or non-reference to Section 67(6) of the Act is not determinative of the intent of the section. Since Section 130 of the Act is a code by itself, the provisions of Section 130 must be viewed independently to understand its scope. None can find fault if the legislature in its wisdom thought it fit to incorporate a provision into Section 130 itself for release of the goods in lieu of confiscation at two stages - during adjudication and after adjudication. When the intention of a Section is manifest from the words employed, it would be insidious to interpret the section differently, by referring to other sections of the same enactment. Absence of the words provisional release or absence of reference to section 67(6) of the Act is not determinative when section 130(2) of the Act itself is manifest of such a release*
- *The two different stages in which the goods can be released - during adjudication and post-adjudication are obviously created with a purpose. The purpose of the two-stage release is that, if the owner of the goods, even before being deprived of his title to the goods or conveyance, is ready to pay the fine stipulated by the officer, then without further wrangles,*

if the goods and or conveyance can be released to the said owner, the same avoids unnecessary procedural formalities. If the fine in lieu of confiscation is paid at the initial stage, no prejudice would be caused to the revenue also, since by virtue of Section 130(7) even after adjudication, an option to pay fine in lieu of confiscation is to be offered peremptorily. Thus, Section 130(2) of the Act applies before the order of confiscation is issued.

- *The words "be liable" in Section 130(3) of the Act only conveys a possibility of attracting the obligation and not an imperative obligation. Court was of the view that when fine in lieu of confiscation is paid by a dealer under Section 130(2) of the Act, the liability for payment of tax, penalty and charges will fall upon the dealer, in addition to the fine and they need be paid only after adjudication. To obtain the release of the goods or conveyances, while the adjudication proceedings are continuing, the taxpayer needs to pay only the fine and not the tax, penalty and charges thereon. The tax, penalty and charges can be paid after adjudication.*
- *The words in a statute often take their meaning from the context of the statute as a whole, as is clear from the legal maxim 'exposition ex visceribus actus'. The words cannot be construed in isolation. The words 'be liable' in the context in which it occurs in Section 130(3) of the Act only imports a possibility of attracting liability. Merely because the owner of goods or conveyance opts to pay fine in lieu of confiscation does not mean that the facts essential for incurring the liability to order confiscation automatically stands proved. That proof has to come out through the process of adjudication, as otherwise, there would be conferment of unbridled powers upon the Proper Officer to coerce every dealer to pay fine, tax, penalty and other charges without even any adjudication. Such a procedure is against fairness and contrary to the principle of rule of law.*

Comments: *This was a very welcoming decision of the Hon'ble High Court wherein the Section 130(3) was interpreted independently and have given relief to the Petitioner by stating that the Petitioner is sufficient to pay only the amount of fine to get the goods released before the order for confiscation is passed. This decision was well reasoned as the Hon'ble High Court has considered various aspects such as absence of words provisional release and non-reference to Section 67(6) for release of the confiscated goods.*

4. Deputy Commissioner is a proper officer under UPGST Act, 2017

[Maa Geeta Traders v. CCT, 2021-VIL-836-ALH (Allahabad High Court)

The Deputy Commissioner passed an Order under Section 74 of the UPGST Act confirming certain demands and the taxpayer challenged the jurisdiction of Deputy Commissioner to pass such an Order in the absence of assignment of such functions by Commissioner of State Tax.

The Hon'ble High Court held that

- *The Uttar Pradesh Goods & Services Tax Act, 2017 ('UPGST Act'), Section 2(91) defines 'Proper Officer' to mean Commissioner or any other Officer of State Tax who is assigned that function by Commissioner of State Tax. Moreover, Section 5 provides for powers of officers and Section 5(3) stipulates that Commissioner may delegate his powers to any other officer who is subordinate to him.*
- *In the present case, the Commissioner under UPGST Act has issued two office orders dated 01.07.2017 and 19.11.2018. These Orders are issued under Section 2(91) read with Section 4(2) of the UPGST Act defining the territorial limits of Class of Officers and delegated its power under Section 2(91) to various Class of Officers.*
- *As per third part of Section 4(2) of UPGST Act, 2017 all other officers i.e., officers subordinate to the rank of Special Commissioner and Additional Commissioner shall have jurisdiction over the whole of the State or over such local area as the Commissioner may by order specify. Thus, so far as the respondent-Deputy Commissioner is concerned, his territorial jurisdiction would arise under the third part of Section 4(2) of the Act, by an order of the Commissioner and subject to conditions as may be specified by the Commissioner.*
- *Prima-facie, Section 4(2) of the Act does not appear to directly deal with function assignment/sub-delegation or creation of subject matter jurisdiction of the Deputy Commissioner or any other authority. That provision speaks of but does not itself provide for or specify/sub-delegate function jurisdiction in favour of any officer under the Act.*
- *On a plain reading of section 5(3) of the Act, it is clear that the Commissioner has been granted a general power to sub-delegate all or any of his powers/functions to any other officer who may be subordinate to him. It would include within its plain ambit, the sub-*

delegation of functional jurisdiction or the power to act as the "proper officer", to adjudicate a dispute under section 74 of the Act.

- *In absence of any other procedure or manner being prescribed under the Act to effectuate or create that sub-delegation or to create that function assignment, and in face of the powers vested in the "Commissioner" under section 4(2) and 5(3) of the Act, we may test the true purport and scope of the Office Orders dated 01.01.2017 and 19.11.2018 to determine if such sub-delegation of power or necessary function assignment had been made, in accordance with law.*
- *From a plain reading of Section 2(91) of the Act, the sub-delegation of functional assignment is to be made by the Commissioner. Here, clearly, the "Commissioner" had himself issued the Office Orders dated 01.07.2017 and 19.11.2018 and the same makes no difference to the validity of the power exercised. Non-recital of section 5(3) of the Act in either of those orders is inconsequential and even extraneous to the valid exercise of power made by the Commissioner. The power was admittedly existing and it is seen to have been exercised. It is not shown to have been exercised in contravention of any statutory provision or principle of law. Hence, the validity of the power exercised would remain by established firm and undoubted.*
- *Section 5(3) of the Act provides the source of power to be exercised by the Commissioner for the purpose of section 4 read with section 2(91) of the Act. As noted above, the power under section 5(3) of the Act is a general power of sub-delegation vested on the Commissioner, by the legislature. Once that power is shown to exist and the same is seen to have been exercised, no fetters may be searched and attached to the exercise of that power and no challenge may arise thereto, de hors the statutory scheme, to defeat that exercise of power.*
- *It is not the requirement of law that the source of power must necessarily be recited in the order passed in exercise of that power to validate the power exercised. It is enough that the source of power existed and it was exercised in the manner prescribed by law. Its recital in the order passed in exercise of that power would not lend or add to the legitimacy of the power exercised. It is not a spell that may cause a magical effect only upon its incantation in a ritualistically correct manner. Accordingly, there is no lack of jurisdiction in the hands*

of Deputy Commissioner. Further, wrong quoting of provision viz., Section 4(2) may not be fatal to the powers in as far as there exists a provision of delegation.

- *The analogy and reasoning of Supreme Court decisions in Syed Ali and Canon India would apply to 'central tax' officers only and the said reasoning would not apply to functioning of "state officers' who may draw functional jurisdiction from sub-delegation under an administrative order issued by Commissioner.*

Comments: *The issue in the present appeal pertains to assignment of function to Proper Officer vis-à-vis delegation of powers by Commissioner as an alternate tool to assign functions. However, the High Court has mixed both the powers and held that the assignment of the powers by the Commissioner amounts to delegation of powers by Commissioner. Further, the High Court had held that it is not the requirement of law that the source of power must necessarily be recited in the order passed in exercise of that power to validate the power exercised but the same appears incorrect in as much as the orders or notifications or circulars issued shall specify the power under which those are issued. Non-mentioning of provision amounts to non-exercise of powers under such Section and the assumption and presumptions cannot be made with respect to powers of proper officers.*

5. Serving of notice of detention of goods and vehicle to the driver of the vehicle is not proper notice

[M/s Tanay Creation Vs. State of Gujarat 2021-TIOL-2225-HC-AHM-GST]

In this case, the responded detained the vehicle carrying goods due to some mismatches in the invoice and e-way bill and the notice was served upon the driver of the truck and not upon the petitioner. Therefore, the petitioner has challenged such notice on account of violation of the principal of natural justice.

The Hon'ble High Court held that:

- *The show cause notice issued under Section 129 and thereafter under Section 130 of the CGST Act, 2017 is only to the truck driver and neither to the truck owner nor to the petitioner in its capacity of the owner of the goods.*
- *In the instant case, there is a complete absence of any notice and gross violation of the principles of natural justice. The petitioner, who is the owner of the goods has not been*

afforded the opportunity as no service of show cause notice is also made to the petitioner and the opportunity was only afforded to the driver. Quashing of the order will sub-serve the purpose and hence the impugned order passed by the authority is quashed with direction to serve reasonable opportunity of hearing to the petitioner.

Comments: *The provisions of both Sections 129 and 130 speaks that the notice of detention or confiscation has to be served on the owner and not on any other person. Hence, the serving of notice on any other person results in the violation of law and principles of natural justice. The same view was taken by various High Courts.*

6. Blocking of ITC ledger by department beyond one year is not valid under Rule 86A

[Advent India PE Advisors Private Limited Vs. UOI 2021-TIOL-2268-HC-MUM-GST)

Petitioner has referred to the provisions of Rule 86A of the Central Goods and Services Tax Rules, 2017 and in particular sub-rule (3) thereof, which provides that restriction imposed under sub-rule (1) would cease to have effect after expiry of one year from the date of imposition thereof. The respondents have placed before the Court letter seeking reconciliation statements for the difference in their GST returns namely GSTR-2A and GSTR-3B is still awaited and instead of furnishing the documents the taxpayer has filed a writ petition.

The Hon'ble High Court held that having regard to the statutory mandate in sub-rule (3) of rule 86A, the petitioner is entitled to claim that the input tax credit ought to have been unblocked immediately after one year of the restriction being imposed under sub-rule (1) of Rule 86A. If indeed the respondents were of the view that the petitioner had not been cooperating with the department, they ought to have proceeded against it in a manner known to law. However, to say that reply is awaited and hence lifting of the restriction has not been resorted to is clearly illegal. Therefore, it is directed to unblock the input tax credit availed by the petitioner in its electronic credit ledger.

Comments: *The proviso to the Rule 86A clearly says that the restriction of blocking of credit shall be lapsed after a period of 1 year. Further, the blocking of ITC shall be invokable only in case of fraudulent ITC and not for any reason being mismatch between GSTR 2A and 3B or*

otherwise. It is seen that the ITC was blocked beyond the period of 1 year in many cases and the decision of HC shall give relief to those taxpayers where the ITC was blocked beyond 1 year.

7. Assessee allowed to adjust the tax dues payable in 24 monthly instalments with ITC against the last instalment

[JUD Cements Ltd. & Anr. Vs. the Commissioner, CGST, Shillong 2021-TIOL-2297-HC-Meghalaya-GST)

The petition was filed by JUD Cements Ltd. for adjustment of ITC with tax dues to be paid in instalments amounting to INR 43,49,50,071/- as per the letter issued by the Revenue Department that has been accepted by the Petitioner subject to the conclusion of the appeals, on account of the appeals pending for the period of 2017-18.

The Hon'ble Meghalaya High Court held as under:

- *The entire amount should be paid off by the Petitioner in 24 equal or nearly equal monthly instalments beginning December 15, 2021 and payable by the 15th day of the 23 succeeding months and the adjustment on account of the orders passed in the pending appeals and on account of ITC, if any, will be only against the last instalment.*
- *Further held that, the balance amount then due will become automatically payable on default of payment of any instalment by the Petitioner within the time permitted, and it will be open to the CGST authorities to proceed for realization in accordance with law.*

Comments: *Section 80 of the CGST Act, 2017 provides that the dues assessed by any order shall be payable in maximum of 24 EMIs and for making such payment, the High Court has allowed the Petitioner to pay their last instalment using the ITC which provides a great relief to the Petitioner as the reason for non-payment of tax itself was poor cash flows.*

8. Form GSTR-3B is a return under the CGST Law

[Union of India & Ors. Vs. AAP and Company2021 (12) TMI 840 -Supreme Court]

The issue before the Hon'ble Supreme Court of India in Bharti Airtel Ltd. & Ors. (ibid) was whether Form GSTR- 3B can be allowed to be rectified or not. Hon'ble Supreme Court of India disallowed the assessee to unilaterally carry out rectification of his returns submitted electronically in Form GSTR-3B, which inevitably would affect the obligations and liabilities of other stakeholders, because of the cascading effect in their electronic records.

The Hon'ble Supreme reversed the judgment of the Hon'ble Gujarat High Court, ruling that FORM GSTR-3B is not a return under Section 39 of the CGST Act. Hon'ble SC noted that the Hon'ble Gujarat High Court in AAP and Co. v. Union of India [R/Special Civil Application No. 18962 of 2018 dated 24.06.2019] had held that, Form GSTR-3B is not a return under Section 39 of the CGST Act and it is only a temporary stop gap arrangement till due date of filing the return in Form GSTR-3 is notified. It further stated that the judgment in AAP and Co. (ibid) has been expressly overruled by a three-Judge Bench by the decision of the Hon'ble Supreme Court of India in Union of India v. Bharti Airtel Ltd. & Ors., [Civil Appeal No.6520 of 2021 dated October 28, 2021].

However, the Supreme Court in Bharti Airtel (supra) noted that the constitutional validity of Rule 61(5) is not questioned.

***Comments:** This decision would be having a far-reaching consequence to many assesses as it would have impact on the ITC availed. Further, the observations made by the Supreme Court in case of Union of India v. Bharti Airtel Ltd. & Ors., [Civil Appeal No.6520 of 2021 dated October 28, 2021 is only an obiter dictum and the same cannot be considered as a 'ratio decidendi'. The decision based on obiter dictum may not hold good and a review petition is the need of the hour. It is also important to mention that the constitutional validity of Rule 61(5) was not questioned in the decision of Bharti Airtel (supra).*

9. The benefit of ITC cannot be curtailed against a genuine transaction supported by valid indentures

[LGW Industries Limited & Ors. Vs. Union of India & Ors 2021 (12) TMI 834 -Calcutta High Court]

The instant case pertains to the petitioners being denied the benefit of input tax credit (ITC) on purchases made from the suppliers who are fake and non-existing and the bank accounts opened by these suppliers were also on the basis of fake documents. The main contention is that the transactions in question are genuine and valid by relying upon all the supporting relevant documents required under the law. Further, the genuineness and identity of the suppliers have been diligently verified in as much as that the Government portal also reflected their registrations as valid registered taxable persons at the time of transactions in question.

The Hon'ble Court observed that the petitioners had not faulted in compliance of any obligation required under the statute before entering the transactions or for verification of the genuineness of the suppliers in question.

On due verification of whether payments on purchases in question along with GST were actually paid or not to the suppliers and whether the transactions and purchases were made before or after the cancellation of registration of the suppliers and also as to the compliance of statutory obligation by the petitioners in the verification of the identity of the suppliers, the petitioners shall be extended the benefit of input tax credit in question.

Comments: *The department's contention of denying the credit is not legal as there is no default in compliance with the law by the petitioner. Once, the recipient establishes the genuineness of the transaction and the eligibility of the ITC, the benefit of the ITC cannot be denied for the reason being that the supplier is involved in the transaction of fake invoices. It is a well-established rule that recipient shall not be held liable for the actions of the supplier.*

10. Manual Refund Application is valid under CGST Act, 2017

[Laxmi Organic Industries Ltd Vs UOI 2021-TIOL-2248-HC-MUM-GST]

The petitioner has filed the refund application manually, however the same were returned without being processed with an instruction that in terms of Circular No. 125/44/2019-GST dated 18/11/2019, a refund application has to be filed in FORM GST RFD 01 on the common portal and the same has to be processed electronically, with effect from 26/09/2019.

The Hon'ble High Court held as follows:

- *Rule 97A contains a non-obstante clause, it is intended to override rules 89 to 97 of the CGST Rules forming part of Chapter X. The plain and simple construction of rule 97A is that despite rule 89 providing for electronic filing of applications for refund on the common portal, in respect of any process or procedure prescribed in Chapter X any reference to electronic filing of an application on the common portal shall, in respect of that process or procedure, include manual filing of the said application. If indeed the argument of Mr. Mishra that no application in any form other than online can be received and processed is accepted, rule 97A would be a dead letter and rendered redundant. Rule 97A cannot be construed in a manner so as to defeat the purpose of legislation. We, therefore, conclude*

that the impugned circular would certainly be applicable to all applications filed electronically on the common portal, but the impugned circular cannot affect or control the statutory rule, i.e., rule 97A of the CGST Rules or derogate from it.

- *There can hardly be any dispute that the said Superintendent was under an obligation to follow the terms of the impugned circular. However, it is axiomatic that the said Superintendent is also equally bound by the CGST Act and the CGST Rules and could not have turned a blind eye to rule 97A of the CGST Rules. In our considered opinion, the said Superintendent failed to appreciate that the impugned circular could not have been ignored on the face of rule 97A, which is equally binding on him in the discharge of his duties.*

Comments: *This decision has rightly stated that even the manual refund application is in accordance with the law and the same shall be processed by the department. In many cases, difficulties have been faced by the unregistered recipient who wanted to claim the refund of excess taxes paid by the suppliers as the department has rejected the refund applications stating that the application was not filed online. Though Section 54 allows refund to such category of persons, the restriction in filing the refund applications online by unregistered persons has made many persons suffer. With this decision, those assessee's who have filed the manual refund applications would get the relief.*

11. Challenging the levy of GST on E-Commerce Operators as ultra vires the Constitution of India

[M/s UBER Systems India Pvt Ltd Vs UOI 2021-TIOL-2301-HC-DEL-GST]

Present writ petition has been filed challenging clause (iv) of the Notification No. 16/2021-Central Tax (Rate) dated 18th November, 2021 and clause 1(i) and clause 2(i) of Notification No. 17/2021 - Central Tax (Rate) dated 18th November, 2021 as ultra vires the Constitution of India being unreasonable, arbitrary and violative of Articles 14, 19(1)(g) and 21 of the Constitution of India on the following grounds

- *Notification No. 16/2021 and Notification No. 17/2021 have made amendments to the parent notifications i.e., Notification No. 12/2017 and Notification No. 17/2017 in order to levy GST on the supply of transportation of passenger service, through an 'electronic commerce operator', and provided by an auto rickshaw. The impugned Notifications will*

come into effect from 1st January, 2022 and if an auto-driver registers itself with an e-commerce operator like the Petitioner and provides transportation of passenger services to passengers identified through such ecommerce platform, GST at 5% or 12% will become applicable on the fare collected on such passenger transport services through auto rickshaws, even though an auto ride through offline modes like street hailing of auto will still be exempt.

- *The impugned notifications are violative of Article 14 of the Constitution of India as they fail to satisfy the test of reasonable classification. No differentiation in tax treatment can be created between passenger transport services rendered by auto drivers facilitated through e-commerce platforms versus passenger transport services rendered by auto drivers offline.*

The Hon'ble High Court has admitted the Writ Petition and issued notice to the respondents and the final hearing is pending.

12. Reversal of CENVAT Credit in books of accounts instead of transfer of the amount to electronic credit ledger is valid.

[Lightspeed India Partners Advisors LLP Vs. CCT (Appeals) 2021-TIOL-850-CESTAT-DEL]

The issue for consideration is whether Appellant, an export of services, who accumulated CENVAT Credit pertaining to pre-GST era and reversed the same in its books of accounts on February 23, 2018, had made a valid reversal or not. If yes, whether the Appellant was eligible for a refund of such CENVAT Credit reversed in its books of accounts or not.

The Hon'ble CESTAT held that

- *The Hon'ble Madras High Court in the case of BNP Paribas Global Securities Operations Pvt Ltd. Vs. The Assistant Commissioner of GST and Central Excise [2021 (4) TMI 783] had held that for the transaction pertaining to the period prior to June 30, 2017, since the assessee could not file the Service tax return post July, 2017, any reversal/ credit shown in his private accounts/ the Books of accounts can be considered as the statutory documents admissible in evidence.*
- *Further, as per Section 142 of the CGST Act, refund of any duty or tax which was paid for the period prior to coming into force of the GST law can be claimed even after the*

appointed date viz., July 1, 2017. Consequently, it was held that the act of the Appellant of reversal of CENVAT Credit of the period pertaining to the existing law in the books of accounts instead of transferring the same to electronic credit ledger was in order. Accordingly, the refund claims were allowed and the order denying the benefit thereof was set aside.

Comments: *This is a very welcoming decision wherein the Hon'ble CESTAT has understood the practical impossibility of reversing the ITC in the GST returns when the credit was not transitioned to GST regime. It would help the similarly placed assesses who is facing the similar difficulties.*

13. Refund of credit received in the pre-GST Regime cannot be denied on account of the procedural requirement to file TRAN-1 by December, 2017

[M/s Bharat Heavy Electricals Limited Vs. Commr of GST 2021-TIOL-827-CESTAT-MAD]

The Appellant has not availed certain CENVAT Credit under the CENVAT Credit Rules, 2004 with an understanding that the credit can be vailed within 1 year. However, Appellant could not avail the credit or reflect the same in its ER-1 for the month of June 2017 or carry forward the same in TRAN-1. Accordingly, refund application was filed claiming refund of the amount of such credit. The present dispute relates to the question whether the Appellant was liable to refund of amount of credit arising out of payment made to vendors in GST Regime for the supplies received in pre-GST regime or not.

The Hon'ble CESTAT held that

- *The CESTAT held that Appellant would be eligible to avail credit but for the introduction of GST law, the said right cannot be frustrated by pressing on the procedural requirement of filing TRAN-1 before December 27, 2017. The accounting practice adopted allows availment of credit only after making payments to the vendors which has made it impossible to carry forward the credit as set out in the GST law. When the credit is eligible, the same cannot be denied by stating procedural requirements.*
- *Reliance was placed by the CESTAT in the case of Pujan Builders, Engineers and Contractors v. CCE & ST, Vadodra 2021-TIOL-101-CESTAT MUM, wherein the Tribunal allowed the refund even though initially the credit was carried forward to TRAN-1 and*

later reversed, after which the claim for refund was filed. In view thereof, the CESTAT held that the rejection of refund claim was unjustified and the appeal was allowed.

Comments: *This is a very welcome judgement as many taxpayers who missed to transition the credit to GST can claim the refund of such CENVAT Credit. In such cases, there is no option left to the taxpayers except to claim such amount as refund. The CESTAT has appraised such difficulty and held that the refund is eligible. The taxpayers who have not filed any claim of refund can go back and check the possibility of claiming the refund based on this decision.*

14. The entitlement to refund of Special Additional duty arises only after the resale of goods and not otherwise

[M/s Tradewell Vs. Commissioner of Customs, Jaipur 2022-TIOL-14-CESTAT-DEL].

The issue involved is whether the refund claim of Special Additional Duty ("SAD"), under Customs Tariff Act, 1975, filed after the period of one year from the date of payment of SAD, have been rightly rejected as time barred or not.

The Hon'ble CESTAT held that

- *The CESTAT observed that when an importer resells the goods, as it is, by way of trade and deposits sales tax, he becomes entitled to refund of the SAD, which had been deposited at the time of import. The procedure for such refund is provided under Notification No. 102/2007-Cus. dated September 14, 2007 as amended, wherein condition (c) specifies that, "the importer shall file a claim for refund of the SAD before the expiry of 'one year' from the date of payment of the said SAD of customs".*
- *In the present case, admittedly, the importer had filed refund claim after more than one year from the date of payment of SAD. However, the right to claim refund arose on when the importer resells its goods and not otherwise. Correspondingly, relying upon the favourable judgment in Sony India Pvt. ltd., v. Commissioner of Customs 2014 (304) ELT 660 (Del.) as maintained by Hon'ble Supreme Court and reported in 2016 (337) ELT A102 (SC), the CESTAT set aside the rejection order of refund and allowed the Appeal.*
- *The findings of the Hon'ble Delhi High Court in above referred decision clearly show understanding of the department with regard to clause of limitation, provided in the Notification. The condition of limitation was not the part of the original notification. It was*

only with the introduction of Circular No. 6/2008-Cus. and Notification No.93/2008, the department started insisting on the limitation period (of one year) prescribed with effect from 1.8.2008, became applicable. The Hon'ble High Court has clearly held that the expression "so far as may be" used in sub-section (6) of Section 3 of CTA, has to be followed to the extent possible. Merely because Section 27 of the Customs Act provides for a period of limitation for filing refund claim, it cannot be held that even for the purposes of claiming refund in terms of the Notification, the same limitation has to be applied.

Comments: *Though the time limit of 1 year has been given for filing the refund application from the date of payment, the eligibility to claim such refund arises only when the assessee resells the goods. This shows that the triggering point for filing the refund application is the resale and the time limit prescribed of 1 year is not applicable for claiming the refund.*