Legal Updates

May 2023

Summary of Major Legal Updates

Key Highlights:

- Rectification of FORM GSTR-1 is allowed in cases of inadvertent mistake.
- Taxability of the game of Skill and game of chances.
- Service Tax not leviable on user development fees collected by Airport authority, being a statutory levy
- GST Registration cannot be cancelled with effect from retrospective date.
- Unsigned scanned copy of declaration uploaded with RFD-01 is not an "Illegality".
- Notices u/s 61 not mandatory before initiation of proceedings u/s 74.
- Writ Petition filed before receiving an order is premature.
- Invoice in physical form is necessary along with e-way bill during movement of goods.
- Appeal cannot be dismissed on the ground of not uploading self-Certified copy of Order-in-original.
- Sales tax/VAT is leviable on credit notes issued to the dealers for replacement of the defective parts under warranty.
- GST Registration cannot be cancelled for reasons other than as mentioned u/s 29(2) of the CGST Act
- The pre-import condition for availing exemption benefit under AA scheme is not arbitrary, unreasonable or unconstitutional.
- Waiver of pre-deposit as per Section 129E of the Customs Act, 1962 can be done only in case of the financial hardship

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1. Rectification of FORM GSTR-1 is allowed in cases of inadvertent mistake.

[M/s. Rajendra Agency vs. Union of India, , 2023 (5) TMI 74 - RAJASTHAN HIGH COURT [26-04-2023]

Facts of the Case:

- ✓ The petitioner requested permission to rectify GSTR-1 for the periods 2019-20 and 2020-21, due to the inadvertent error made in the returns. The GST department did not take any action on the request of the petitioner.

Contentions of Petitioner

- ✓ Petitioner contented that in an identical situation, the Calcutta High Court had disposed of the writ petition in favour of the assessee and remanded the case back to the GST department for rectification of the same. Hence it was prayed to consider the request of the petitioner.

Decision Held:

- ✓ Permitting the Petitioner to rectify the error was acceded, as the mistake committed vide filing of the GSTR-1 was inadvertent in nature. Further, there will be no loss whatsoever caused to the Ex-chequer.
- ✓ In similar circumstances, the Calcutta High Court in its order dated 12th July 2022 in Writ Petition No.1611/2022 **(M/s. T.M.C.- HI-Tech v. The Assistant Commissioner State GST)** accepted the plea of the Petitioner and directed that the Petitioner should be permitted to file the corrected form.
- ✓ For the aforementioned reasons, the Court permitted the Petitioner to resubmit the corrected GSTR-1 for the aforementioned periods.

H N A Remarks: This is a welcome judgment, as in the self-assessment regime like GST, providing these types of options, would encourage taxpayers to correct their mistakes and avoids unnecessary litigations in the future.

2. Taxability of the game of Skill and game of chances

[M/s Gameskraft Technologies Private Limited Vs Directorate General of Goods Services Tax Intelligence Writ Petition No. 19570 of 2022 [11.05.2023] [2023 (5) TMI 926-Karnataka High Court]]

Facts of the Case:

- ✓ Petitioner is an Online Intermediary Company, who runs technology platforms that allow users to play skill based online games against each other.
- ✓ The basic construct of an online skill-based game facilitated by the Petitioner is that the Petitioner has no role/ influence insofar as the playing of the games are concerned. The users/players choose the games based on the amount they want to stake to match their skills against other players who want to play for a similar amount.
- ✓ The Petitioner merely hosts the games and the discretion to play a game and the stake for which it is to be played entire lies with the players with no role of the Petitioner.
- ✓ Subsequent to the summons and the documents, evidence collected, the show cause notice had been issued to the petitioner whereby it has been alleged that the Petitioner is involved in 'betting/gambling' and supplies 'actionable claims' and that the petitioner is guilty of evasion of

GST by misclassifying their supply as services under SAC 998439 instead of actionable claims which are goods and mis-declaring their taxable value, though the activities undertaken by the petitioner were in the form of betting/gambling which is an actionable claim and not a service.

Contention of the Petitioner

- ✓ It is an undisputed fact that more than 96% of the game played on the platform of the Petitioner is 'Rummy' which a 'game of skill' and is Constitutionally protected as established by judgments of the Apex Court, this Court and other High Courts and the said position has remained unchanged till today.
- ✓ It is also settled law that the character of rummy being a game of skill does not change when it is played online and consequently, the allegation that the Petitioner is involved in betting/gambling is liable to be rejected.
- ✓ It is well settled that "games of skill" played with monetary stakes does not partake the character of betting and it still remains within the realm of 'games of skill' only. The term 'betting and gambling' cannot be artificially bifurcated by the Respondents to carve out an exception by stating that 'games of skill' played with monetary stakes can also partake the character of betting and hence, be taxable at the rate of 28%.

Decision Held

- ✓ There is a distinct difference between games of skill and games of chance; games such as rummy, etc. whether played online or physical, with or without stakes would be games of skill and test of predominance would apply.
  Taxation of games of skill is outside the scope of the term "supply" in view of Section 7(2) of the CGST Act, 2017 read with Schedule III of the Act.
- ✓ A game of mixed chance and skill is not gambling, if it is substantially and preponderantly a game of skill and not of chance. Rummy is substantially and preponderantly a game of skill and not of chance. Rummy whether played with stakes or without stakes is not gambling.
- ✓ There is no difference between offline/physical Rummy and Online/Electronic/Digital Rummy and both are substantially and preponderantly games of skill and not of chance.
- ✓ Consequently, the impugned Show Cause Notice dated 23.09.2022 issued by the respondents to the petitioners is illegal, arbitrary and without jurisdiction or authority of law and deserves to be quashed

H N A Remarks: Though it was a settled law that "Game of skill" cannot be taxed under GST, the revenue, without looking into settled legal precedent and GST provisions, issuing these types of notices, would cause hardship to the taxpayers. To avoid the hardship, the CBIC should come-up with a circular clarifying the taxability of these types of businesses.

3. Service Tax not leviable on user development fees collected by Airport authority, being a statutory levy.

[CENTRAL GST DELHI - III VERSUS DELHI INTERNATIONAL AIRPORT LTD – 2023 (5) TMI 867 – SUPREME COURT]

Fact of the case:

- ✓ Delhi International Airport Ltd ("the Respondent") had entered into joint venture agreement with the Airports Authority of India, a corporate body created by the Airports Authority of India Act, 1994 ("the AAI Act").
- ✓ The Respondent agreed to undertake some activities enjoined by the AAI Act and were authorised by various notifications issued by the Central Government under Section 22A of the AAI Act to

collect a "development fee" @ Rs. 100/- for every departing domestic passenger and Rs. 600/- for every departing international passenger at the concerned airports for a period of 48 months.

- ✓ The show-cause notices ("the SCN") was issued by the Commissioner of Service Tax, in respect of demanding payment of Service tax on the development fee collected for various periods.
- ✓ The SCN were adjudicated and confirmed. The Revenue Department ("the Appellant") disposed of all show cause notices by confirming demands, and also levying penalties.
- ✓ Aggrieved by the Order of the Revenue department, the Respondent filed an appeal before the Customs Excise & Service Tax Appellate Tribunal ("the CESTAT") allowed the Respondent's appeal, holding that the development fee collected was not liable to service tax levy.

Contentions of the Respondent:

- ✓ The Respondent had contended that the development fees collected by the airport on behalf of airport authority is chargeable to service tax.

Decision Held:

- ✓ The Hon'ble Supreme Court observed that, development fee, collected under Section 22A of the AAI Act are statutory exactions and not fees or tariffs, as was contended by the Union of India and there is a distinction between the charges, fee and rent etc., collected under Section 22 of the AAI Act and the User Development Fee ("UDF") levied and collected under Section 22A of the AAI Act.
- ✓ Noted that, The UDF collected by the Respondent is to bridge the funding gap of project cost for the development of future establishment at the airports, there is nothing on record to show that any additional benefit has accrued to passengers, visitors, traders, airlines, etc., upon levy of the UDF during the period in question.
- ✓ Held that, there is neither any compulsion to levy development fee nor is the collection conditional upon its deposit in the government treasury. However, the absence of these features, in this court opinion, does not render UDF any less a statutory levy.
- ✓ Held no Service tax leviable on the UDF collected by airport authority being a statutory levy.

H N A Remarks: This is a welcome judgement as it once again reconfirms the fact that Service Tax cannot be levied on any statutory fees. The said judgement could also be squarely applied in GST era.

4. GST Registration cannot be cancelled with effect from retrospective date.

[Aditya Polymers vs. Commissioner of Delhi Goods and Services Tax [TS-148-HC(DEL)-2023-GST]

Facts of the Case:

- ✓ The petitioner had discontinued her business in Delhi and shifted to Kanpur. As a result, she did not file GST Returns for a continuous period of six months. Consequently, the GST department had issued SCN on 11.12.2020 proposing to cancel GST Registration.

- ✓ However, the petitioner did not respond to the SCN. As a result, GST Department passed the order dated 15/07/2021 cancelling the GST Registration with effect from the date of registration i.e., 01.07.2017.

- ✓ Aggrieved by the cancellation order, the petitioner filed an appeal but the appeal was rejected on the ground that the same was time-barred. Aggrieved by the retrospective cancellation of GSTIN, the petitioner filed the writ petition in the Delhi High Court.

Contention of the Petitioner

- ✓ It is essential that the exercise of powers to cancel the registration ab initio, must be based on material on record and some rationale.
- ✓ Further, the taxable person must be put to notice of the proposed action to cancel the registration from a retrospective date so as to provide an opportunity to the said person to show cause why such cancellation should not be from a retrospective date .
- ✓ In the present case, the show cause notice issued to the petitioner did not mention that the proper officer proposed to cancel the registration with retrospective effect. Thus, the petitioner had no opportunity to address any proposed action of cancellation of registration ab initio.

Decision Held:

- ✓ The Hon'ble Delhi High Court directed the respondent to cancel the GST Registration with effect from 11.12.2020 i.e., the date of SCN.
- ✓ Also, the respondent was not precluded to initiate any action for recovery of any tax, interest, penalty, if any, in accordance with law.

H N A Remarks: This is a welcome judgement as it ascertains that the power to exercise cancellation of GST Registration from a retrospective date as per Section 29(2) of CGST Act, 2017, must be exercised diligently and should be based on some reasonable grounds or rationale rather than on arbitrary basis.

5. Unsigned scanned copy of declaration uploaded with RFD-01 is not an "Illegality"

[Medicamen Biotech Ltd. vs UOI & ors [TS-199-HC(RAJ)-2023-GST])

Facts of the Case:

- ✓ Refund application was filed by the appellant and the Adjudicating Authority sanctioned the refund of an amount of Rs. 14,30,110/- in Form GST RFD-06 and credited the said amount vide payment advice issued in Form GST RFD-05.
- ✓ The Principal commissioner, in terms of provisions of Section 107(2) of the CGST Act of 2017 reviewed the order of refund, observing that on examination of the records and documents uploaded by the claimant taxpayer, the requisite declarations and undertakings as per Master Circular No. 125/44/2019-GST dated 18.11.2019 was not duly signed, hence, the refund claim processed by the jurisdictional Assistant Commissioner was improper.
- ✓ Pursuant to the same the respondent-department filed appeal under Section 107 of the CGST Act of 2017 on the ground that the Adjudicating Authority has erred in sanctioning refund claim to the petitioner and eventually the Additional Commissioner (Appeals) has held that the said refund order is not legal and proper since the declarations and undertakings uploaded by the claimant taxpayer as per Master Circular No. 125/44/2019-GST was not duly signed.

Contention of the Petitioner

- ✓ The petitioner contended that all the documents including the declarations and the undertakings attached to form GST RFD 01 were digitally signed. It further stated that the requirement to physically sign before scanning and uploading the declaration has been introduced by administrative instructions and there is no such requirement as per the relevant rules.

- ✓ The petitioner also stated that there was no dispute regarding the correctness of the declarations submitted with the refund application. Hence, the contention of the Appellate Authority that the refund claim was illegal & improper is not sustainable in law.

Decision Held:

- ✓ A conjoint reading of the provisions contained in Rule 26 and Rule 89 of the CGST Rules of 2017 leaves no manner of doubt that as far as requirement of law is concerned, it does not mandate that even after having authenticated a document in the manner prescribed under Rule 26 of the CGST Rules of 2017, the said documents are also required to be signed in physical mode before being scanned and uploaded through electronic submission along with the application for refund.

- ✓ It was held that the non-submission of physically signed and scanned declaration may only be an irregularity but not an illegality.

- ✓ The Hon'ble Rajasthan High Court held that the order passed by the Appellate Authority is not sustainable in law. It had also stated that administrative instructions cannot bar claim of refund if the legal requirements as contained in the law are fulfilled.

H N A Remarks: The Court has categorically held that the non-compliance of administrative requirements cannot render the refund claim illegal or improper.

6. Notices u/s 61 not mandatory before initiation of proceedings u/s 74

[Nagarjuna Agro Chemicals Pvt Ltd. vs. State of UP and anr [TS-216-HC(ALL)-2023-GST])

Facts of the Case:

- ✓ Short question which is raised in the present petition is as to whether the department is enjoined to issue a notice under subsection 3 of Section 61 of Central Goods and Service Tax Act, 2017 once returns have been submitted by the assessee before initiating action under Section 74 of the Act or not?

Contentions of Petitioner

- ✓ The petitioner submitted that since returns had been submitted by the petitioner for the period in question, therefore, the appropriate course open for the department was to have pointed out deficiency in the returns submitted by the petitioner so as to give it an opportunity to rectify the return before proceeding under Section 74 of the Act.

Decision Held:

- ✓ It was held by the Hon'ble HC that 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.

- ✓ The petitioner has not availed the right to file appeal against the said order. Therefore, the petitioner was accordingly directed to file an appeal and that the respondent must accept the said appeal without raising any objection regarding period of limitation.

H N A Remarks: This ruling has provided clarity with regard to the procedure adopted under Section 74 of the CGST Act, 2017. There is no precondition of issuance of notice under Section 61 of the Act in case the proper officer deems a case is fit for initiating the proceedings under Section 74 of the Act. However, there are contrary rulings provided by other High Courts. Considering the contrary rulings, it would be ideal if CBIC provides further clarity in this matter.

7. Writ petition filed before receiving order is premature.

[Shalimar Chemical Works (P) Ltd. Vs Commissioner of Commercial Taxes and Goods and Services Tax, Cuttack and another)]

Facts of the Case:

- ✓ The petitioner challenged the audit report issued by the officer u/s 65(6) of OGST Act, 2017 dated 24.03.2023 in which the officer has directed the petitioner to discharge the statutory liabilities as contained in the Audit observations.

Contention of Petitioner:

- ✓ The petitioner contended that he is not liable to discharge certain liabilities mentioned by the officer in the audit report. Therefore, to the extent liability is not payable, the same should not be discharged by the petitioner.

Contention of Respondent:

- ✓ The respondent mentioned that the present writ petition is premature as the notice regarding the same has not been issued yet after which the opportunity of being heard will be provided to the petitioner.

Decision Held:

- ✓ The Hon'ble Orissa High Court held that the present writ petition is premature one and therefore, the same was not entertained. It was held that the petitioner at the stage of adjudication will have sufficient opportunity to contend against the liability alleged as payable by the adjudicating authority.

HNA Remarks: The Writ petition should be filed only in case where there is an adjudged demand in the form of an order. Merely because there is an option to file a writ, the same need not be availed in hurry.

8. Invoice in physical form is necessary along with e-waybill during movement of goods.

[J.K Jain Buildtech India Pvt. Ltd. vs. Assistant Commissioner, Revenue [WPA 3415 of 2022]]

Facts of the Case:

- ✓ The petitioner did not produce physical copy of invoices before the appellate authority, which the person in charge of conveyance is required to produce along with e-waybill during movement of goods.

Contention of the Petitioner:

- ✓ Petitioner contended that production of the relevant invoice in physical form is not required whenever a person-in-charge of the conveyance carries the same, even in an electronic/digital form or in his mobile or in such devices carried by him and the authority should not have asked for production of the invoice in physical form.

- ✓ Further based on Sub Rule 1(b) of the CGST Rules, 2017, he contended that as far as the e-way bill was concerned, the legislature while legislating the rule thought it fit to use the expression "physical form" as a mandatory pre-requisite, whereas in so far as the invoice was concerned, no such expression was used and as such, he submitted that, the invoice was not required to be produced in physical form in the event the same is produced digitally.

Contention of the Revenue:

- ✓ The respondent mentioned that from a reading of the provision laid down under sub-Rule 138A, it is evident that, the Person-In-Charge of the conveyance/ vehicle should carry the invoice also in physical form for verification by the respondent authority, if required. Since in the instant case, the person-in-charge of the concerned conveyance was not carrying the invoice in physical form there is violation of the rules laid down in this behalf.

Decision Held:

- ✓ The Court held that, the expression used in the heading of the Rule 138A is clear that "documents and devices to be carried by a person-in-charge of the conveyance" which included under sub-Rule (1)(a), the invoice.

- ✓ The Court further held that "It is trite that the provision in a taxing statute has to be construed strictly and no benevolent interpretation is available while construing taxing statute. When the said provision specifically provided for those documents and device to be carried by the person-in-charge of a conveyance including the invoice, this clearly means that the invoice has to be carried in physical form and if required shall be produced in its physical form."

HNA Remarks: The CBIC vide Circular No.160/16/2021-GST dated 20.09.2021 had clarified that carrying of physical copy of invoice where the same has been issued under Rule 48(4) of the CGST Rules, 2017 is not mandatory and electronic form would be sufficient. However, the said ruling has not considered the above Circular.

9. Appeal cannot be dismissed on the ground of not-uploading self- Certified copy of Order-in-original

[KPMG India Pvt Ltd Vs Joint Commissioner of State Tax (Appeals) [TS-188-HC(P&H)-2023-GST]]

Facts of the Case:

- ✓ The petitioner filed an appeal which was dismissed on the ground that self- certified copy of Order-in-original had not been filed

Contention of the Petitioner:

- ✓ The petitioner submitted that the appeal was filed along with digitally uploaded order on the common portal. Since the uploaded copy was already part of appeal, it would amount to substantial compliance of Rule 108 of Haryana Goods and Service Tax Rules, 2017.

- ✓ Reference was made to order passed by court in CWP-12128-2020 decided on 26.08.2020 where in similar circumstances writ petition was allowed by setting aside the impugned order and matter was remanded back by giving directions to the Appellate Authority to decide the appeal on its merits. This order is passed on the technical flaw that the certified copy was not filed along with the appeal and only uploaded copy was attached, the appeal cannot be dismissed on this technical ground.

Decision Held:

- ✓ Since the uploaded copy of Order-in-original was already part of the appeal, it would amount to substantial compliance of Rule 108 and the Joint Commissioner would not dismiss the appeal by the impugned order on the ground that the appellant had not submitted the certified copy of the order impugned therein.

HNA Remarks: This judgement provides clarity on the requirement of Rule 108 of the CGST Rules,2017. In lot of cases the appeal was either not getting admitted or was being rejected on such technical ground ignoring the merits of the case.

10. Sales Tax/VAT is leviable on credit notes issued by a manufacturer to the dealer for replacement of the defective parts under Warranty

[Tata Motors Ltd. Vs Deputy Commissioner Of Commercial Taxes (SPL) & Anr.[TS-227-SC-2023-VAT][15.05.2023]]

Question on Hand:

- ✓ The point for consideration is, whether a credit note issued by a manufacturer to a dealer of automobiles in consideration of the replacement of a defective part in the automobile sold pursuant to a warranty agreement being collateral to the sale of the automobile is exigible to sales tax under the sales tax enactments of the respective States.

Decision Held:

- ✓ The Apex Court held that the replacement of such warranted part can be done in three scenarios and the taxability shall be accordingly interpreted as below:
  1. Whereby the dealer may request the manufacturer to provide the spare parts for fulfilling the requirement.
  2. Where the dealer could buy the spare parts in the open market by providing the necessary taxes and replace with the bought ones.
  3. Where the dealer could utilise his own stock for such replacement.

- ✓ In situation (1), since the manufacturer himself has dispatched the spare part to the dealer for the purpose of replacement, there is no investment made by the dealer on the said part. The dealer merely acts on behalf of the manufacturer, pursuant to the warranty.
- ✓ In situations (2) and (3), the dealer would have invested on the spare part either by buying it from the open market or earlier would have purchased the same from the manufacturer of the automobile or from the manufacturer of the particular part by paying the requisite price and taxes.
- ✓ The dealer has every right to sell such a part and seek a return on his investment and possibly a profit also. But when the same is used for the purpose of replacement of a defective part pursuant to a warranty, the dealer does not "sell" the part to the customer who has approached the dealer with the defective part.
- ✓ The dealer does not receive any consideration in the form of a price from the customer but on the basis of the warranty, the dealer is obliged to replace the defective part with a
- ✓ new part. The dealer then sends the defective part to the manufacturer of the automobile, who had given the warranty.
- ✓ The manufacturer, from whom the automobile has been purchased, then issues a credit note which may be equivalent to the value of the spare part used by the dealer. This credit note is in order to recompense the dealer for his investment made on the spare part which was "not sold" by him to the customer so as to earn any return but has been utilised to replace a defective part of the automobile as an obligation under a warranty given at the time of the sale of the automobile on behalf of the manufacturer.
- ✓ The Court held that such recompense would amount to valuable consideration within the meaning of the definition of sale and hence, exigible to sales tax under the respective State enactments of the States under consideration.

H N A Remarks: This ruling had provided the necessary clarity on the taxability of the issuance of credit notes issued by the manufacturer, for replacement of spare parts under warranty, as there was a lot of mixed judgements delivered by various High Courts in this regard. The consequence of this judgement could be very high for the dealers and the impact of such judgment on the GST act needs to be evaluated in detail.

11. GST Registration cannot be cancelled for reasons other than as mentioned u/s 29(2) of the CGST Act.

[M/s. Star Metal Company Vs Additional Commissioner Grade (Allahabad High Court)]

Fact of the case:

- ✓ The petitioner (Star Metal Company) was a proprietorship firm.
- ✓ The petitioner claimed to have filed its returns on time and also deposited due taxes. A survey was conducted at the business place of the petitioner on 27.09.2019 and in the said survey, the business place of the firm was not found as disclosed in the registration certificate.

- ✓ Thereafter, the registration of the petitioner was cancelled vide order dated 01.12.2020. Thereafter, the petitioner moved a revocation application on 28.01.2021, which was rejected vide order dated 19.03.2021.
- ✓ Aggrieved by the said order, the petitioner preferred an appeal, which was also dismissed vide order dated 14.10.2022.

Contentions of the Respondent:

- ✓ The Respondent had contended that the impugned orders have been passed in contravention of the provisions of the GST Act and Rules as opportunity of hearing was not given to the petitioner.
- ✓ Cancellation of registration also suffers from illegality as none of the conditions mentioned in section 29(2) of the UP GST Act are complied with.

Decision Held:

- ✓ The registration once granted could be cancelled only if one of the five statutory conditions was found present. Per se, no registration may be cancelled by merely describing the firm that had obtained it, was "bogus".
- ✓ The word "bogus" has not been used by the statute. The only contingency to which such expression may relate may be one appearing under Clauses (c) and (d) of Section 29(2) of the Act being where a registered firm does not commence its business within six months of its registration.
- ✓ Other than that, the term "bogus" may also refer to a satisfaction contemplated by Section 29(2)(c) of the Act where registration may be cancelled if the registered firm has not furnished its return for continuous period of six months. Those conditions have not been shown to exist in this case.
- ✓ The order was quashed with liberty to the department to issue a fresh notice on any specific ground mentioned under section 29(2) of the GST Act.

H N A Remarks: This Judgement highlights that the officer cannot go beyond the statutory provisions and any act of the officer which contravenes the provisions of Act will be duly revoked.

12. The pre-import condition for availing exemption benefit is not arbitrary, unreasonable or unconstitutional- Advance Authorization Scheme

[UNION OF INDIA & ORS. versus COSMO FILMS LIMITED2023 LiveLaw (SC) 377 Civil Appeal No.290/2023 [28.04.2023]]

Facts of the Case:

- ✓ Upon introduction of GST, the exemption on the IGST on import had not been given for AA scheme, instead the same had to be paid and the refund was claimed for such IGST paid which led to the huge blockage of the working capital. Upon many representations, an exemption notification had been issued whereby two conditions had to be fulfilled for availment of such benefit being:
  A) Pre import condition
  B) The export obligation to be fulfilled only through physical exports.

- ✓ Various investigations had been made by DRI on the Advance Authorisation holders who are manufacturer-exporter as to the issue of "pre-import condition" where they were permitted to

import inputs with exemption on all the applicable duties with the only condition that the inputs shall be used in manufacturing and shall be subsequently exported.

- ✓ The Exemption notification had been challenged before many High Courts and the mixed judgements have been delivered. The Petition filed before the Apex Court pertains to the explanation sought by the Revenue in the **Cosmo Films Ltd Vs Union of India as served by the Gujarat High Court.**

Contentions of the Respondent

- ✓ The Counsel for the Respondent held that the pre-import condition had been inserted through the amended notification for availment of the Exemption of the IGST and GST Compensation cess, whereby there is no necessity for the same as even before the insertion of the condition, the Advance Authorisation holders had been facilitating the smooth flow of operations in this regard.
- ✓ Also, the condition of export orders to the executed within the period of 4-8 weeks after receiving the purchase order was impossible and is arbitrary, unconstitutional.

Decision Held

- ✓ The Apex Court held that the Contention of the Respondent were false and the Gujarat High Court as favoured to the Respondent did not interpret the provisions of the Chapter 4 of FTP and HBP as ought to be interpreted.
- ✓ It was held that the provisions of the pre-import condition cannot be treated as unconstitutional as the Chapter 4 of the FTP had provided a in-built provision for pre-import condition as a part of the claim for the Advance Authorisation.
- ✓ It was also held that the provisions of the FTP and HBP are not contrary to each other, rather they were complimentary and was mutually exclusive.
- ✓ As alleged by the Respondents for treatment of other duties and IGST in similar ways, it was held that the IGST had been implemented new and the tax had implications at various points of time unlike BCD which is levied at the time of import and hence both are separate levies in nature and hence cannot be treated as arbitrary.
- ✓ There is no constitutional compulsion that whilst framing a new law, or policies under a new legislation, particularly when an entirely different set of fiscal norms are created, overhauling the taxation structure, concessions hitherto granted or given should necessarily be continued in the same fashion as they were in the past.
- ✓ When a new set of laws are enacted, the legislature's effort is to on the one hand, assimilate, as far as practicable, the past regime, the exclusion of benefit of imports in anticipation of AAs, and requiring payment of duties, under Sections 3 (7) and (9) of Customs Tariff Act, 1975, with the 'pre-import condition', cannot be characterized as arbitrary or unreasonable.
- ✓ The High Court was persuaded to hold that the subsequent notification of 10.01.2019 withdrew the 'pre-import condition' meant that the Union itself recognized its unworkable and unfeasible nature, and consequently the condition should not be insisted upon for the period it existed, i.e., after 13.10.2017. This court is of the opinion that the reasoning is faulty.
- ✓ It is now settled that the FTPRA contains no power to frame retrospective regulations. Construing the later notification of 10.01.2019 as being effective from 13.10.2017 would be giving effect to it from a date prior to the date of its existence; in other words, the court would impart retrospectivity. To give retrospective effect, to the notification of 10.01.2019 through interpretation, would be to achieve what is impermissible in law. Therefore, the impugned judgment cannot be sustained on this score as well.
- ✓ Hence the Apex court considering all the above points states that, the pre import condition shall be applicable only upto the period of the amended notification and the condition is not arbitrary, unconstitutional in nature.

H N A Remarks: This ruling had been in favour of the revenue, though the relief had also been provided to the exporters. The havoc created with the insertion of the pre import condition comes to

an end with the judgement. Further CBIC has issued a Circular No. 16/2023-Cus dt 07/06/2023, to give effect to the above judgement.

13. Waiver of the Predeposit as per Section 129E of the Customs act,1962 can be done only in case of the financial hardship.

[Mohammed Akmam Uddin Ahmed& ORS. v. Commissioner Appeals Customs And Central Excise & Ors 2023 (5) TMI 23 - DELHI HIGH COURT [28.04.2023]

Facts of the Case:

- ✓ The Petitioners have challenged the Constitutional vires of Section 129E of the Customs Act,1962 which mandates the pre-deposit and seeking a direction to the Customs Authorities to admit the Appeal filed by them without the pre-deposit and the mandatory duty as stipulated in the above - mentioned provisions. The appeal filed before the Adjudicating Authority pertains to the valuation of the Agarwood as traded by the petitioner.

Contentions of Petitioner

- ✓ The Petitioner had submitted the income certificate showing Rs. 1,00,000 as their annual income and had stated that they are engaged in the trade of the Agricultural product Agarwood and its chips. They have relied on the **Supreme Court Judgement Chandra Sekhar Jha V. Union of India & Anr. 2022 SCC OnLine SC 269** contending that the non-payment of the pre deposit and the unconstitutional nature of the same as to the wholesomeness of the provision.
- ✓ Furthermore, they have contended that the valuation for the Agarwood held by the authorities had been made wrong as the quality of the same would differ which was of low quality as being traded by them.

Contentions of the Respondent

- ✓ The Respondent had contended that the requirement of pre-deposit is mandatory as the case shall be dismissible with regard to the same in case of non-fulfilment of the requisite conditions and have relied on the precedents as issued by various courts earlier.
- ✓ Also, Agarwood being the endangered species as referred to in CITES [Convention on International Trade in Endangered Species of Wild Fauna and Flaura] cannot be exported in terms of the DGFT Notification No. 2 (RE-98)/1997-2002 dated 13.04.1998 and hence the same shall be liable for confiscation as corresponding documents were not produced in this regard.

Decision Held:

- ✓ The Hon'ble Court upon consideration of the facts and evidences produced have analysed the cited precedents and held that the Petitioners as contended to be poor and are unable to pay the mandatory pre-deposit had been proved right in accordance with District Magistrate's Report corresponding to the Income Certificate as produced by them.
- ✓ Also, upon considering the Supreme Court in Chadrasekhar Jha judgement, it was held that in rare cases like such where the petitioner or the tax payer is unable to fulfil the requisite mandatory compliance requirements due to the financial conditions, cannot be denied the justice and can be waived off which is constitutional by nature.
- ✓ The appeal shall be allowed by the respective authority in this regard and the matter is remanded back regarding the valuation of the confiscated goods from the petitioner.

H N A Remarks: This is a welcome judgment in the right narrative which would encourage the common man to step to the court of justice even though in case of financial hardships. It proves that the law is people-friendly, and this judgement is a great relief in such issues.

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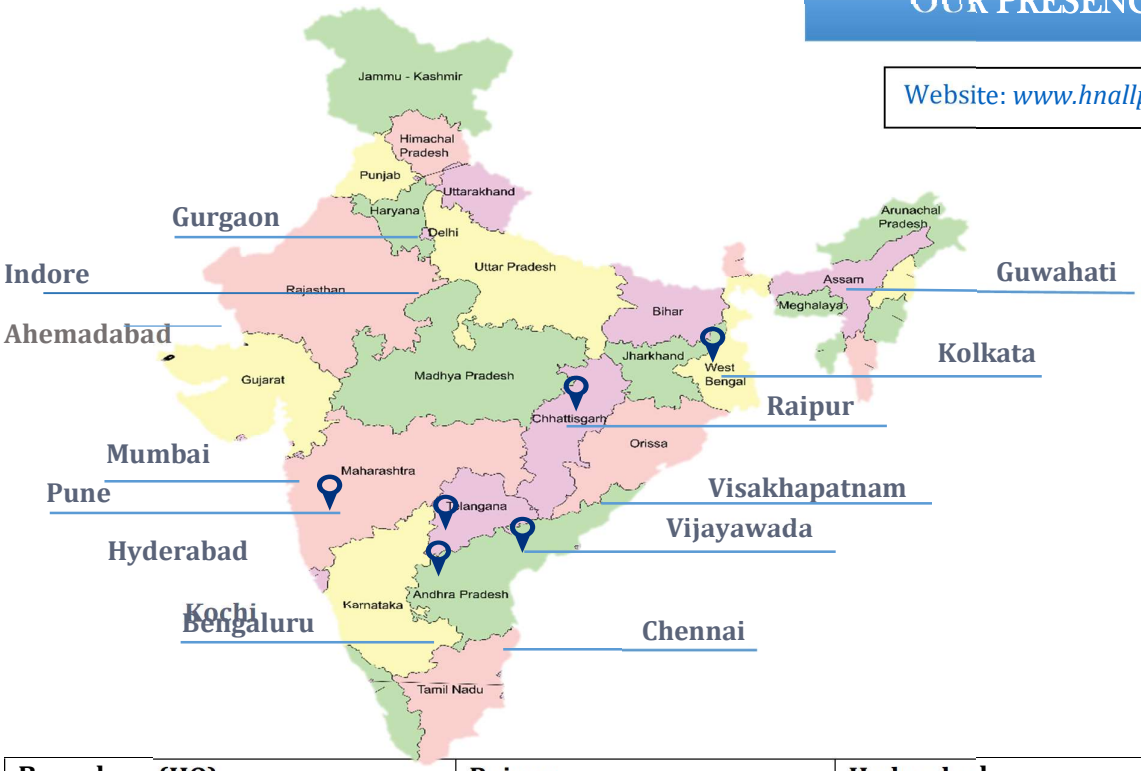

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