Legal Updates

June 2022

Summary of Major Legal Updates

Key Highlights:

1. **Recovery proceedings shall be deemed to be stayed when an order is under appeal and the required pre-deposit amount has been paid.**
2. **Domestic supply of goods attracting NIL rate of Cess are to be reckoned as exempted supplies for the purpose of calculation of refund of ITC of CESS.**
3. **Person who may not be Importer or Exporter, can prefer settlement application if he is served with show cause notice charging him with duty.**
4. **Where it is feasible to allow the assessee to file its revised or re-revised Tran-1 return an attempt for allowing the same by the department should be made**
5. **Bail granted in the matter of Fake ITC citing no criminal history and no link to illicit transactions**

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1. Recovery proceedings shall be deemed to be stayed when an order is under appeal and the required pre-deposit amount has been paid

[M/s Sri Ram Construction, vs The UOI CGST & CEX Ranchi 2022-TIOL-851-HC-Jharkhand-GST]

The petitioner received an order under Sec 79 of the CGST Act, 2017 amounting to Rs 4,28,86,464/- for the period July 2017 to March 2019 which was computed only on the basis of GSTR 1 statement without giving benefit of the input tax credit. Out of the alleged liability, the petitioner has agreed to pay the sum of Rs 1,14,53,646/- and the rest part of Rs 3,04,15,359/- is claimed to be part of ITC which was denied by the authority. Aggrieved by the order, the petitioner has filed two appeals after depositing 10% of the amount of demand under sec 107(6) & (7) of the CGST Act.

The Hon'ble High Court held as follows

a. Once the Petitioner deposits 10% of the demand while filing appeal under sec 107, the recovery proceedings for the balance amount shall be deemed to be stayed. Upon disposal of such appeal, in case adjudication order is upheld or even modified a fresh demand has to be raised in Form GST APL-04.
b. When any appeal is filed against any order and another notice is issued against such petitioner regarding the same case, then such notice shall become pointless and it cannot be given effect to as the same still operating in the appellate stage.

H&A Comments: In the above case we noticed that where recovery of taxes takes place proper adjudication process shall be followed and the authority shall not pass any order without following the process as mentioned in Sec 79 of the CGST Act,2017. Also, when RTP files an appeal then in view of Sec 107 sub-section (6) & (7) of CGST Act,2017 and deposits 10% of the demand then recovery of the balance amount is deemed to have been stayed. The authority shall not issue any Garnishee Order for completion of recovery of taxes when the RTP has already filed an appeal. Even if any demand is confirmed by the appellate authority the same shall communicated to the RTP through GST APL-04. In such cases the authority has to issue fresh order depending upon the outcome of the appeal in the prescribed format. i.e. GST APL-04 and if RTP fails to pay such amount within the stipulated time then special mode of recovery shall be initiated.

2. Domestic supply of goods attracting NIL rate of Cess are to be reckoned as exempted supplies for the purpose of calculation of refund of ITC of CESS.

[Electro Steel Castings Limited Vs The AC, C& CEX, Kolkata North Commissionerate ***2022 (6) TMI 553 - CALCUTTA HIGH COURT****].*

The Petitioner filed a refund application for unutilized ITC of CGST Compensation Cess u/s 54(3) of CGST Act, 2017 read with Rule 89(4) of CGST Rules, 2017 applicable mutatis mutandis to the GST (Compensation to States) Act, 2017. The issue in the instant case is whether the domestic supplies on which the output CESS is not payable, are to be considered as exempt supplies for the purpose of exclusion while calculating "adjusted total turnover" as exempt supplies or not? The assessee filed appeal before the Appellate Authority, which allowed the said refund. However, the refund was not considered by the adjudicating authority. Accordingly, the petitioner filed the instant writ petition.

The Hon'ble High Court held as follows

a. From legislative scheme of the Cess Act it appears that the cess is an impost to counterbalance the loss of revenue of the States on account of subsumption of various taxes commencement of the GST regime. Hence, cess is a levy which partakes the character of all the levies, which now are subsumed in GST. Cess is akin to the components of GST, which is a constitutionally approved amalgam of State taxes, which existed prior to the commencement of the GST regime. The goods and services Tax Compensation Cess Rules, 2017 were also framed and made effective from 1st July, 2017 wherein the Central Goods and Services Tax Rules, 2017 were adapted.
b. Having regard to the conscious use of the expression "mutatis mutandis" in Section 11 of the Cess Act all the provisions of CGST and IGST Acts would be squarely applicable to the levy, collection and refund of the Cess Act. The words tax and cess for the purpose of the Act would have to be used interchangeably.
c. Domestic supply of finished goods which are not liable to Compensation Cess are to be reckoned as exempted supplies for the purpose of calculation of refund in terms of Rule 89 (4) of the CGST Rules.
d. It would be clear that goods which are subject to nil rate of cess would be construed as exempt supplies for purposes of the formula prescribed Rule 89 (4) of the CGST Rules and therefore, deserves to be excluded from the calculation of adjusted total turnover.

e. Respondent CGST authorities concerned are directed to refund the amount as per the aforesaid order of the Appellate authority dated 5th February, 2021, along with applicable interest till the date of such payment, within eight weeks from the date of communication of this order.

H&A Comments: Since the provisions related to refund of unutilized ITC in case of zero-rated supplies are applicable mutatis mutandis to GST (Compensation to States) Act, 2017 and the refund in the instant case is related to unutilized ITC of GST Compensation Cess, the output supplies not attracting GST compensation cess needs to be considered as exempt supply while calculating eligible refund amount.

3. Person who may not be Importer or Exporter, can prefer settlement application if he is served with show cause notice charging him with duty.

[M/s Halliburton Offshore Services Inc. and ors V. The Union of India and ors TS-263-HC-2022(BOM)-CUST]

The Petitioner is a Company incorporated under the laws of Cayman Islands and is operating in India since 1983 for providing lodging and perforating services to the Oil Companies. In 1998, petitioner was awarded a contract for a private oil company, i.e., Hardy Exploration and Production Inc. (for brevity "Hardy"). Petitioner caused Hardy to Import 24 capital equipment without payment of customs duty as per notification that were then in force and on the strength of Essentiality Certificate issued by the Directorate General of Hydrocarbons, subject to re-export condition. On the completion of Contract with Hardy, Petitioner re-exported certain equipment.

Later petitioner realised that what it had re-exported were equipment that were imported for its contract with ONGC not with Hardy. Having realized this error, petitioner decided to pay customs duty and therefore, approached the customs authorities offering to pay the customs duty. Later, show cause notice came to be issued to petitioner. Having received show cause notice, petitioner approached Settlement Commission by way of an application u/s 127-B of the Act. Application of petitioner came to be rejected by respondent not on merits but on eligibility of petitioner to file the application. According to respondent, proviso (a) to Section 127-B of the Act requires applicant to have filed a bill of entry and since applicant had not filed a bill of entry and thus, he is not eligible to file the application. Aggrieved by this order, the Petitioner has filed a Writ Petition before Hon'ble High Court

The Hon'ble High court has held as follows

- Section 127-B of the Customs Act, 1962 provides for any importer, exporter or any other person who has been issued a show cause notice to file application. If the petitioner was not eligible to file application, SCN also could not have been issued to petitioner.
- The term *'any other person'* appearing in the Section has to be interpreted to mean in its literal sense. Any other person would mean any other person to whom SCN has been issued charging him with duty and such any other person can file an application.
- Use of the words filed bill of entry would not mean that a bill of entry has to be necessarily filed by the applicant, provided that the applicant is served with a show cause notice charging him with duty.
- Only requirement is that there must be a case properly relating to applicant with reference to a bill of entry filed. Therefore, a person who may not be an Importer or Exporter, can still file such an application u/s 127-B of the Act before the Settlement Commission if he is served with a SCN. Similar view was taken by a Division Bench of Gujarat High Court in Mahendra Petrochemicals Ltd. Vs. Union of India 2010 (257) E.L.T.412 (Guj).

H&A Comments: The same principal is also in the case of Appeals under GST "where any person aggrieved by any decision or order passed under the GST Act" can Appeal before the Appellate authority. The Court has pronounced the judgement in line with the catena of judicial decisions such as Platinum Holdings Pvt. Ltd. v. Additional Commissioner of GST (Madras High Court) wherein it was held that proviso cannot exclude something which is there in the Section. The intention of the law-making authority is clear. The law-making authority does not intend to deprive any person who is aggrieved to appeal. Where the section in 127(B) itself prescribes that any person can make the application, then the proviso should not restrict it to specified class of person. A proviso has no repercussion on the interpretation of the enacting portion of the section so as to exclude something by implication which is embraced by clear words in the enactment. It was held in case of Dwarka Prasad v. Dwarka Das Saraf, AIR 1975 SC 1758 that "So when on a fair construction the principal provision is clear, a proviso cannot expand or limit it.

4. Where it is feasible to allow the assessee to file its revised or re-revised Tran-1 return an attempt for allowing the same by the department should be made

[Chep India Pvt Ltd. V UOI & Ors. – HC TS-337-HC(BOM)-2022-GST]

The Petitioner had centralized registration under Service Tax regime in the state of Maharashtra. After implementation of GST, the Petitioner instead of filing the FORM TRAN-01 for carry forward of Credit in Mumbai GSTIN mistakenly filed the same in Andhra Pradesh registration. Resultantly, the ITC was not carried forward, neither in Andhra Pradesh, nor in Maharashtra. Being aggrieved, the Petitioner filed the present petition before Hon'ble High Court

The Hon'ble High Court held as follows

a. One thing is certain that petitioner had filed TRAN 1. If it is possible or feasible to open the portal so that the assessee may be able to file its TRAN 1 return or revised return or re-revised return in Maharashtra, an attempt should be made for that and if it is not possible or feasible, the concerned Assistant Commissioner shall communicate the same to petitioner within two weeks of uploading of this order.
b. In such a case, petitioner should be permitted to make unutilized credit in its GST 3B Forms to be filed on the monthly basis. Similar approach has been taken by the Hon'ble High Court at Calcutta in Nodal Officer, Jt. Commissioner, IT Grievance, GST Bhavan Vs. M/s. Das Auto Centre in its judgment pronounced on 14.12.2021. Similar view also has been taken by Panjab & Haryana High Court in the case of Hans Raj Sons Vs. Union of India reported in 2020 (34) G.S.T.L. 58 (P & H).

H&A Comments: The instant judgment, though case specific, has very well considered the substance that the transitional credit could not be carry forwarded due to technical error from the taxpayer end. The issue is just an addition to the list of many issues faced by taxpayers in claiming TRAN – 1.

5. Bail granted in the matter of Fake ITC citing no criminal history and no link to illicit transactions

[Mayank Gautam v UOI, Allahabad High Court TS-321-HC(ALL)-2022-GST]

The Petitioner was arrested by the Revenue authorities for allegedly forming seven fake firms in the name of others along with the principal offender Ashish Rajput for the purpose

of fake Input Tax Credit (ITC). The applicant was in jail since 29.09.2021 and his bail application was once rejected on 19.01.2022 by the Learned Session Judge, Meerut. Thus, the bail application before Hon'ble High Court of Allahabad was filed by the applicant.

The Hon'ble High Court has held that

a. The names and statements of the seven person, in whose name the fake firms have been alleged to be registered, have not been brought to record.

b. The illicit transactions which led to fake Input Tax Credit claims to be processed, have also not been disclosed. The applicant is not a beneficiary of any illicit transaction. The applicant cannot be linked with the aforesaid illicit transactions.

c. The determination of the tax liability of the applicant has not been finalized. The applicant does not have any criminal history apart from this case.

Accordingly, bail has been granted to the applicant on furnishing a personal bond along with two sureties.

H&A Comments: The judgment granting bail in the instant case is well in line with the legal precedents, since neither the details of those persons in whose name the alleged fake firms were registered, nor the details of the illicit transactions were recorded or disclosed. The Hon'ble High Court has very well considered the well accepted principle of law of antecedent and as no past criminal history has been found and no linkage between the illicit transaction and the applicant could be inferred, the bail has been granted.

6. The writ petition cannot be admitted when there is an alternative remedy

[M/s. Progressive Stone Works vs JC, STO, Deputy State Tax Officer (STO), and The STO – Madras High Court 2022 (6) TMI 1077-Madras High Court]

The petitioner was demanded an amount of Rs. 8,21,123/- and Rs. 3,53,519/- for the FY 2017-18 and 2018-19 respectively because of non - reflection of this ITC in GSTR 2A. Being aggrieved by the order, the petitioner filed the petition in the instant case, before Hon'ble HC of Madras.

The Hon'ble High Court has held that the petitioner has alternate remedy available for filing appeal before appellate authority and hence the HC dismissed the appeal without going into the merits and giving liberty to the petitioner to file a statutory appeal before the Appellate Commissioner within a period of thirty days from the date of receipt of copy of this order.

H&A Comments: For FY 2017-18, 2018-19, there was no provision in law mandating reflection of ITC. However, denial of ITC on such grounds is just against the law. Notices denying credit on such basis just creates unnecessary litigation and at higher forum, may not be sustainable. The HC, though has discussed about the submissions of both the sides, have not judged on the merits of the case.

7. The power u/s 129(3) given to the authority to issue the order within seven days of the issuance of the notice should not become a burden to the RTP.

[M/S MBR FLEXIBLES LTD. Vs DEPUTY COMMISSIONER OF STATE TAX (ENFORCEMENT) DIVISION 1 TS-310-HC(GUJ)-2022-GST]

The Petitioner is engaged in business of Flexible Packing materials and have received a notice under Sec 129(3) of the CGST Act, 2017 dated 06/01/2022 and was also asked to appear before the authority on 13/01/2022. The petitioner was not given an opportunity of being heard as the authority passed an order on the same day when the Notice was issued, i.e on 06/01/2022.

The Hon'ble High Court of Gujrat held that the Authority issued an impugned Order without granting an opportunity of being heard. Therefore, the order was set aside and quashed. The petitioner was given three weeks from the date of receipt of this order to appear before the authority and thereafter the authority shall pass order afresh in accordance with law and after examining the material.

H&A Comments: "Audi Alteam Partem" is a well-accepted principle in the Indian Legal System, which means "let the other side be heard as well". In other words, no authority shall pass an order against a person without first giving him / her a sufficient opportunity of being heard. Merely providing the opportunity for the sake of compliance with law is not justice. The same should be provided sufficiently considering the existing conditions and factors. Although Sec 129(3) gives the power to the authority to issue the order within seven days of the issuance of the notice, the same shall be exercised with due care and utmost circumspection. The same should not become a burden to the registered person leading to un-necessary litigation. If the notices and orders are issued in this manner, the taxpayers will unnecessarily be harassed without recourse as it is practically not possible for everyone to file a petition in the High Courts.

8. Exemption is eligible only if the services provided to Governmental Authority etc., are directly in relation to services under Schedule XII of the Constitution.

[Hyderabad Metropolitan Water Supply and Sewerage Board, AAR – Telangana TS-276-AAR(TEL)-2022-GST]

The applicant have paid Medical insurance premium which was taken to provide health Insurance to the employees, pensioners and their family members and Vehicle insurance Policy taken to provide Insurance to the vehicles owned by the Board. In their opinion, they are exempt from paying GST in view of the Entry No. 3 of the Not No 12/2017 - CT (Rate), dated 28.06.2017, wherein it is provided that Pure services (excluding works contract service or other composite supplies involving supply of any goods) provided to the Central Government, State Government or Union territory or local authority or a Governmental authority by way of any activity in relation to any function entrusted to a Panchayat under article 243G of the Constitution or in relation to any function entrusted to a Municipality under article 243W of the Constitution, the rate of GST is NIL. In their opinion being a governmental authority, the above entry No.3 is applicable to them and the services are exempted.

The Advance Ruling Authority held as follows

a. The term *"in relation to"* used in entry 3 of the Notification 12/2017-CT (Rate) to conclude that services received by the Government Authority must be **directly linked** to the services entrusted to Municipality under Schedule XII of Constitution of India. Since, medical insurance is for providing health insurance to employees, pensioners and their family members and not directly linked to services entrusted to Municipality under Schedule XII, the same is not exempt.
b. In respect of Motor Vehicle insurance, the authority ruled that if the vehicles are directly used for to provide services under Schedule XII of the Constitution, the same is exempt but if they are used for transportation of employees/board member/other persons with no direct relationship to functions discharged under Article 243W, the exemption is not available.

H&A Comments: The term "in relation to" has been interpreted in many judgments by various judicial authorities. The instant advance ruling is also on same lines. However, the substance seems to have been ignored as in the instant case, the applicant is the Government

authority providing services entrusted under Schedule XII of Constitution of India and restricting the exemption to those services which are directly related to the services under Schedule XII, the same would defeat the legislature's intention.

9. The power under Rule 86A of CGST Rules, 2017 can be exercised only after recording specific reasons to believe

[Rajnandini Metal Ltd vs UOI – PUNJAB & HARYANA HC 2022 (5) TMI 1361 - JAMMU & KASHMIR HIGH COURT]

The ITC of the petitioner was blocked on the basis of intelligence report received from CIU, CGST-Vadodara Zone, stating that a racket of firms indulging in fake judicial and passing of illicit ITC. Against this blocking of ITC, the Petitioner has filed a Writ Petition before High Court

The High Court of Kashmir held as follows

a. Merely by recording that some investigation is going-on a drastic far-reaching action under Rule 86A of the CGST Rules cannot be sustained. There is no reason recorded by the Authority for exercising power under Rule 86A of the CGST Act, 2017 which would show independent application of mind that can constitute reasons to believe which is sine qua non for exercising power under Rule 86A of the CGST Rules.
b. It is trite law that a speaking order has to be self-sustainable and respondents at this stage cannot be allowed to justify the same by adding reasons to it by filing additional affidavits. From the reading of the order, it is evident that it is bereft (deprived) of any material or 'reason to believe' that the petitioner is guilty of fraudulent transaction or is ineligible under Section 16 of the CGST Act. Thus, the impugned order for blocking of ITC was set aside.

H&A Comments: Provisions of Rule 86A being harsh and draconian, powers by the revenue officers must be exercised diligently and after independent and proper application of mind. Rule 86A is very clear that the proper officer may exercise its power when it has reason to believe that the ITC has been fraudulently availed or is ineligible. However, in many cases, including the instant one, blocking of ITC ledger is done on the basis of external reports and without independent application of mind / opinion of the officer. These kinds of orders are nothing but a booster to litigations and assessee end up knocking the doors of judicial forums for relief.

10. Application for Refund of Service tax paid where there is NIL Liability cannot be rejected under GST law on the ground that it is time-barred under Central Excise Act, 1944.

[M/s. Lifecell International Pvt. Ltd. Vs. Commissioner of GST & Central Excise, CESTAT Chennai 2022 (6) TMI 1134 - CESTAT CHENNAI]

The Appellant is engaged in the business of cord blood banking which was exempted from payment of service tax. The appellant had entered into an agreement with a German company called 'LifeCodexx AG" for technology transfer of non-invasive prenatal diagnostic qPCR test including licensing rights on 20.4.2017. They paid the first instalment of licensing fee amounting to EURO 99,000 (INR Rs.69,64,650) in May 2017. The appellant paid the service tax on this amount under reverse charge mechanism to the tune of Rs.11,60,968/- on 6.6.2017 and filed the returns on 14.8.2017.

Subsequently, the said company annulled the contract on 9.8.2017 and refunded the amount paid by the appellant thereby sought for refund of the service tax paid by them to the tune of Rs.11,60,968/- on the ground that no services were provided by the German company. They sought to consider the payment as deposit and to refund the amount in terms of section 142(3) of CGST Act, 2017. The refund claim was filed on 23.1.2019. After due process of law, the original authority rejected the refund claim as being time-barred. On appeal, the Commissioner (Appeals) upheld the same. Hence this appeal is filed by the Appellant.

The Hon''ble Tribunal held as follows

a. As per Rule 6(3) of Service Tax Rules, 1994, when the service is not provided wholly or partially, the assessee can take recredit of the service tax paid by him. However, the said rule talks about the service provider who has paid service tax and has not provided any service to the service recipient. In the present case, the appellant has paid the service tax under reverse charge mechanism and has to be in the shoes of a service provider.
b. Refund has been rejected on the ground of being filed beyond the period of one year as stipulated in sub-section (1) of section 11B. but the contract having been annulled on 9.8.2018, it cannot be expected of the appellant to file the refund claim within a period of one year from the date (6.6.2017) of payment of service tax. Further, section 142(5) expressly states that the limitation provided in sub-section (1) of section 11B is not applicable. This being the case, the rejection of refund on the ground that it is time-barred cannot be justified.

c. While holding so, the Tribunal has relied on the decisions of Punjab National Bank Vs. Commissioner of Central Tax, Bangalore North reported in 2021 (52) GSTL 421 (Tri. Bang.) and PKF Sridhar & Santhanam LLP Vs. CGST, Chennai North reported in 2022 (58) GSTL 423 (Tri. Chennai)

H&A Comments: Section 142(5) of CGST Act, 2017 provides that the refund claim of service tax paid under the existing law in respect of services not provided shall be disposed of under the existing law and has to be paid in cash. It states that such refund is subject to provisions of sub-section (2) of section 11B of Central Excise Act, 1944 only. On perusal of section 142(5), it is stated that any amount accruing to the assessee has to be paid in cash notwithstanding anything contrary contained other than the provisions of subsection (2) of section 11B of the Central Excise Act, 1944. Therefore, any rejection of refund on the ground that it is time-barred cannot be justified.

OUR PRESENCE

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