

**Latest Judicial  
Pronouncements under  
Indirect Taxes**

**CA Bhavesh Mittal**



# Refund of RCM paid on Ocean Freight

## **Comsol Energy Pvt Ltd (Guj HC) - 2021-TIOL-1334-HC-AHM-GST**

**Facts:** Appellant filed refund claim of IGST paid on Ocean Freight consequent to order of HC in own's case of which was connected to the case of Mohit Minerals. Department denied the refund claim citing the time limit.

### **Held: Refund allowed**

- Entry in the Notification to levy GST has been held unconstitutional. Sec 54 does not provide for the time limit for claiming refund in case of amount collected without authority of law.
- Limitation Act to apply and refund granted.

### **Action points:**

- ✓ Matter to be finally heard by honourable SC on 12<sup>th</sup> August.
- ✓ Wherever ITC not claimed, file the refund claim in the meanwhile based on the judgment of HC so that it is well within Limitation Act.

## Continued - Unconstitutionality of Levy – Ultra vires

### ***Mohit Minerals Pvt Ltd vs UOI (2020 (33) G.S.T.L. 321 (Guj.)***

- Liability can be shifted on recipient of service. Importer is not recipient of service hence entry 10 of Notification No. 10/2017 is ultra virus the Act. Beneficiary of services cannot be said recipient of service.
- Time of supply in case of RCM (import of service) cannot be determined by the importer of goods as he is not privy to the transaction with foreign shipping line.
- Importer of goods is not recipient of service and not entitled to claim ITC. Thus, the claim that it is revenue neutral on account of ITC eligibility is not valid as he cannot avail ITC (being not recipient).
- Article 265 does not entitle delegated legislation to impose the tax in the absence of express legislative provision. Thus, it is unconstitutional.

# Refund of Cess Balances (EC, SHEC, KKC)

## Schlumberger Asia Services Ltd (CHD- CESTAT) 2021-TIOL-313-CESTAT-CHD

**Facts:** Appellant carried forward Cess credit in GST regime and reversed the credit under abandoned caution on amendment proposed in 30.8.2018.

- Then it filed the refund claim; denied by dept – refund for “GST credit” needs to be filed as per GST law.

### **Held: Refund allowed**

- Once held in amendment that credit cannot be taken in GST regime, it is not GST credit.
- Refund filed within one year from amendment, within the time limit and refund should be allowed.

### **Action points:**

- ✓ No specific provision for lapsing of CC. Similar, no specific provision for restricting or allowing CC.  
Different HCs have taken different view and matter may go upto SC.

## **Tower material received in completely knocked down condition is not immovable property**

### **Bharti Hexacom Limited - 2021-TIOL-305-CESTAT-DEL**

**Facts:** Appellant procured Tower Material in CKD condition and installed later on. Department denied the credit on the ground that it is for immovable property.

**Held: Cenvat Credit allowed.**

- Tower material received in CKD condition and installed later on cannot be said immovable property.
- Condition of cenvat credit to be seen at the time of receipt of goods, not subsequently.
- In case of divergent views of different HC, jurisdictional HC view to be followed. Immovable property meaning tested

**Action points:**

- ✓ Immovable property ineligible for ITC under GST. Apply test to evaluate if ITC can be enabled.
- ✓ Vodafone Mobile Services Limited (Del HC) V. Airtel (Bom HC)

# Cenvat credit reversal not required on MF unit sale

## ACE Creative Learning Pvt Ltd - 2021-TIOL-241-CESTAT-BANG

**Facts:** Rule 6 required CC reversal on trading of security. Assessee did not reverse credit pertaining to sale of units in MF on the ground that it does not amount to trading in security.

**Held: Cenvat Credit reversal not required.**

- Redemption of mutual fund units may not be said to be trading in securities as the appellant is not permitted by SEBI to sale MF units in the market. No need of reversal of Cenvat Credit.

### **Action points:**

- ✓ There is ITC reversal requirement under GST on sale of securities under Rule 42.
- ✓ All investment in financial instruments and its disposal may not fall within “sale” or “securities” or “trading”. ITC reversal to be done by strict interpretation of the language of the Rule.

# Arbitrary Assessment not permitted

## Golden Mesh Industries – Telangana HC

**Facts:** Appellant failed to file Return within 15 days. Department proceeded for best judgment assessment by taking turnover 3 times of the monthly average.

### **Held: Assessment order set aside**

- No principle followed by department in passing order. Completely arbitrary and contrary to provisions of the law.

### **Action points:**

- ✓ Many E-way bill, ASMT, assessment order etc are arbitrary and contrary to provision of the law.
- ✓ Evaluate such cases and apply for HC writ for striking down.
- ✓ Further, vide [Circular No. 129/48/2019-GST, dated 24-12-2019], it has been clarified that the PO has to consider the below materials:
  - GSTR-1, 2A, E way bills
  - Other available information including from inspection u/s 71.
  - Reminders – before 3 days, on the due date, after 5 days – to furnish within 15 days – if not BJA.

# No liability on discount received

## **T.V.Sundram Iyengar & Sons Pvt. Ltd - TS-165-HC-2021(MAD)-ST**

**Facts:** Appellant recd discount from the OEM by way of credit note on P2P basis. Dept demanded ST by treating such CN as services provided under declared service entry.

### **Held: No ST liability on discount received**

- Merely because the petitioner is called upon to conduct his business in a certain ambience would not by itself amount to rendering of service to the manufacturers.
- Discount received on P2P basis cannot be said to be provision of services and not liable to ST

### **Action Points**

- ✓ Ratio applicable under GST also. All receipt not liable to GST. Differentiate between provision of services and discount received.
- ✓ Accounting treatment not conclusive but suggested to be cautious to avoid frivolous dispute.



**Procedural delay would not disentitle the appellant from claiming the refund.**

### **Chariot International Pvt Ltd Vs Commissioner of Central Tax -2021-TIOL-346-CESTAT-Bang**

**Facts:** Appellant had filed refund applications for refund of Cenvat credit under Rule 5 of CCR, 2004 read with Notification No. 27/2012-C.E. (N.T.) dt. 18/06/2012. Thereafter the appellant received a SCN proposing to reject the refund claims on the ground that the appellant had debited in GSTR3B instead of debiting in cenvat register, as the said credit stood transferred into GST regime through TRAN 1. The case of Department is that credit reversal in GSTR-3B pertains to GST credit and not cenvat credit.

**Held:**

- The CESTAT has highlighted the settled principle that, procedural lapses will not deprive the assessee from the substantive right. In yet another judgement of Tribunal (Schlumberger Asia Services(supra)) revenue's stand that reversal of credit in GSTR 3B is of GST and not of CENVAT, was rejected.

# Tax evasion can't be presumed merely on expiry of e-way bill

## **M/S Satyam Shivam Paper Pvt Ltd -2021-TIOL-1338-HC-TELANGANA-ST**

**Facts:** Petitioner made an intra state supply of paper through a tax invoice dated 04.01.2020 and had also generated an e-way bill. Due to traffic blockage due to agitation goods could not be delivered till 06.01.2020. After the expiry of e-way bill, they were detained by the Deputy State Tax Officer. As the e way bill had expired. penalty was imposed along with tax.

### **Held:**

- Without any evidence, the conclusion drawn by the STO that evasion of tax by the petitioner merely on expiry of e-way bill is not correct. On account of non extension of the validity of the e-way bill, no presumption can be drawn that there was an intention to evade tax
- There has been a blatant abuse of power by the STO in collecting from the petitioner, tax and penalty both under the CGST and SGST

## ITC not to be reversed in relation to loss arising from manufacturing process

### **M/S. ARS Steels & Alloy International Pvt. Ltd. Vs The STO -2021-TIOL-1393-HC-MAD-GST**

**Facts:** For manufacturing Billets, MS Scrap was the input and MS Billet was the input to manufacture the TMT/CMD Bars. Department asked the petitioner to reverse a portion of the ITC claimed, proportionate to the loss of the input

**Held:**

- Loss occasioned by the process of manufacture cannot be equated to any of the instances set out in Sec17(5)(h)
- HC in the case of **Rupa & Co. Ltd. - 2015-TIOL-2125-HC-MADCX** , held that CENVAT credit should be granted on the original amount of input used notwithstanding that the entire amount of input would not figure in the finished product.
- The reversals under Section 17(5)(h) as alleged by the revenue, in cases of loss by consumption of input which is inherent to manufacturing loss is misconceived, as such loss is not contemplated or covered by the situations adumbrated under Section 17(5)(h). The impugned orders to the above extent were set aside.
- Loss V, Lost

# Portal glitches not to deny legitimate benefit under law

## **HUL vs UOI - 2021 (4) TMI 265 - MADRAS HIGH COURT**

**Facts:** GSTIN of other State reported in SB resulting mismatch for denial of refund. Application filed u/s 149 to amend the shipping bill but denied on the ground that ICES system has been designed in such a way that GST ID cannot be amended.

### **Held: Shipping bill amendment allowed**

- Section 149 permits amendment on the basis of documentary evidence available on the date of clearing the goods.
- Portal/technical glitches in the network shall not go beyond the law.
- The shipping bills needs to be amended to allow replacement of GSTIN given wrongly.

## No recovery proceedings against service receiver without enquiring the provider

### **M/s. D.Y. Beathel Enterprises W.P.(MD)Nos.2127 of 2021 (Madras HC)**

**Facts:** Traders in raw rubber sheets purchase goods from the seller Charles & his wife Shanti. Purchasers pay for the goods along with the tax whereas Charles and Shanti did not pay any tax to the Government. This necessitated initiation of the proceedings and issuance of show cause notices against the purchasers.

#### **Held:**

- Hon'ble Madras High Court quashed the order passed by the officer levying the entire tax liability on the purchasing dealer without involving the seller, where the payment of tax has been made by the purchasing dealer, but the same has not been remitted to the Government by the Seller.
- It was held that, the omission on the part of the Seller to remit the tax should have been viewed very seriously and strict action ought to have been initiated against the seller.

# Claiming of depreciation and cenvat credit both on CG

## **Surya Alumex Vs. Comm. CGST Alwar - 2021-TIOL-319-CESTAT-DEL**

**Facts:** Department alleged that the appellant has taken the Cenvat credit on the capital goods which were capitalised in the balance sheet at full invoice value and also claimed depreciation thereupon. Accordingly, the Cenvat credit was proposed to be disallowed and to be recovered.

### **Held:**

- Though the assessee has initially claimed the depreciation as well as benefit of CENVAT Credit on capital goods but later surrendered the benefit of Income Tax Act in subsequent financial year
- The adjustment in subsequent FY cannot be considered as reversion of the depreciation claimed in the balance sheet of the PY
- Corrective measures taken in subsequent FY does not make good irregular availment of CENVAT Credit during the PY. No doubt the objective /idea of the Rule 4(4) of CENVAT Credit Rules, 2004 is to prevent the double benefit but appellant has failed to produce any evidence that double benefit which was claimed by him, as to actually been reversed for the relevant FY

# Split Judgment on constitutional validity of levying GST on cross border intermediary services

**Dharmendra M Jani Vs UOI and Others (Writ Petition No 2031 of 2018)  
[2021-TIOL-1297-HC-MUM-GST ] and [2021-TIOL-1326-HC-MUM-GST ]**

**Question:** Constitutional validity of the section 13(8)(b) and 8(2) of IGST Act, 2017 which as alleged artificially brings the export of service into the ambit of taxation by treating the same as intra state supply of service as against export of service

**Held: In favor of Assessee**

- Constitution does not empower imposition of tax on export of services out of the territory of India by treating the same as a local supply
- Section 13(8)(b) of the Integrated Goods and Services Tax Act, 2017 is ultra vires the IGST Act besides being unconstitutional.

**Held: In favor of Revenue**

- by virtue of Section 13(8)(b) read with Section 8(2) of the IGST Act, Parliament has sought to impose tax on export of services out of the territory of India by treating the same as local supply in violation of Articles 246A and 269 is completely fallacious and untenable and the argument deserves to be rejected.
- Neither Section 13(8)(b) nor Section 8 (2) of the IGST Act are unconstitutional or ultra vires the IGST Act - Section 13 (8) (b) is also not ultra vires Section 9 of the CGST Act, 2017

# Beneficial Exemption: To Be Given Full Effect

## Government of Kerala v. Mother Superior Adoration Convent [2021-TIOL-156-SC-MISC]

### Facts:

- Section 3(1)(b) of the Kerala Building Tax Act, 1975 granted exemption to buildings that are used principally for religious, charitable or educational purposes or as factories or workshops.
- The question arise whether residential accommodation for nuns and students' hostels attached to educational institutions are eligible for the exemption from building tax under Section 3(1)(b) of Kerala Building Tax Act, 1975 or not

### Held:

- Analyzing Section 3(1)(b), the object for exempting buildings used principally for religious, charitable or educational purposes would be for core religious, charitable or educational activity as well as purposes directly connected with religious activity
- Concluded that “it is obvious that the beneficial purpose of the exemption contained in Section 3(1)(b) must be given full effect to the line of authority being applicable to the facts of these cases being the line of authority which deals with beneficial exemptions as opposed to exemptions generally in tax statutes” – Differed – **Dilip Kumar & Co (SC)**
- The SC ruled in favour of assessee and held that “the beneficial purpose of the exemption benefit must be given full effect. Such statute must be construed in accordance with the object sought to be achieved. And on the assumption that any ambiguity arises in such construction, such ambiguity must be in favor of that which is exempted.”



## **DRI is not the proper Authority to issue SCN under sub-section (4) of section 28 of the Customs Act**

**M/S Canon India Private Limited Versus Commissioner Of Customs 2021 [TIOL-123-SC-CUS-LB]**

### **Facts:**

Appellant raised a question that whether the Directorate of Revenue Intelligence (DRI) had authority in law to issue a show cause notice under Section 28(4) of the Act for recovery of duties allegedly not levied or paid when the goods had been cleared for import by a Deputy Commissioner of Customs who had decided that the goods are exempted.

### **Held:**

- Section 28(4) empowers the recovery of duty not paid, part paid or erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts and confers the power of recovery on “the proper officer”.
- The obvious intention is to confer the power to recover such duties not on any officer but only on “the proper officer”.
- Focus laid on the word “the” and “a” (or an). They may could use the word “any”
- Where the statute confers the same power to perform an act on different officers, as in this case, the two officers, especially when they belong to different departments, cannot exercise their powers in the same case.

# Consideration...

**M/ Shirdiri Sainath Industries [2020-TIOL-2052-HC-AP-GST] - Reiterated the following principles laid down by Hon'ble Apex court in the matter of Food Corporation of India vs. State of A.P [1997 SCC Online AP 1143]**

- (i) When the terms are entered in the form of a written agreement, the same are sacrosanct and shall be looked into know the purpose for which by-products were given to the miller and not by adducing oral evidence.*
- (ii) When the terms only specify a certain amount as remuneration and nothing else is indicated towards remuneration, no further condition can be regarded as remuneration.*

**Held – Parties if want By – products to be added, would have mentioned clearly. The by-products form part of compensation but not consideration.**

*\*Bhayana Builders Private Limited [2018 (10) GSTL 118 S.C.], Intercontinental Consultants and Technocrats Pvt Ltd [2018 (10) GSTL 0401 S.C.] – held similarly.*

*Any Queries???*

*For any clarification*

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**THANK YOU!**