TATTVAM

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Legal Zine

A digest of important judgements and rulings

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JUDICIAL PRONOUNCEMENTS

APRIL 2024

a) Recovery proceedings cannot be initiated against the former director of the Company who was not the director during the relevant period

(M/s Prasanna Karunakar Shetty v. State of Maharashtra, 2024 (4) TMI 779- Bombay High Court)

Facts:

- The Petitioner joined as a Director of the Company. The Company got disqualified under Section 164(2)(a) of the Companies Act, 2013 in November 2017.
- The Petitioner of the Company did not participate in the affairs of the Company after the disqualification. Also, the Petitioner formally resigned as Director of the Company.
- A Show Cause Notice dated 07.08.2020 was issued by the respondent i.e. the department against the Company demanding tax along with interest and penalty for which recovery proceedings were initiated against the petitioner and company.
- The Petitioner's bank account and flat were attached by the department vide the impugned order dated 11.01.2024.
- The main issue which arose was whether recovery proceedings can be initiated against the former director of the Company who is not the director during the concerned period.

Held:

- The Hon'ble Bombay High Court held that as per Section 79 of the CGST Act, the principal liability is not on the petitioner who is not a registered person as per Section 79(1) of the CGST Act.
- Further, it was observed that Section 89 of the CGST Act provides that before taking any action of recovery against the Directors of the Company, the

concerned officer should be satisfied that the person concerned against whom recovery is to be made is the Director of the Company for the relevant period.

- The impugned order against the petitioner was deemed illegal and unsustainable. It violates the rights guaranteed under Article 14 read with Article 300A of the Constitution.

TATTVAM COMMENTS:

- This underscores the necessity of conducting a thorough review of the impugned order to rectify any procedural irregularities and uphold the principles of fairness, transparency and accountability in tax recovery process.
- It highlights the significance of Section 79 and 89 in ensuring due process and fairness in recovery proceedings, emphasizing the need for subjective satisfaction before imposing liability on directors, thereby safeguarding their rights.
- These expresses concern over the breach of legal procedure and constitutional rights evident in the issuance of an illegal order against the petitioner, highlighting the potential ramifications for individual rights and public trust in the tax administration system.

b) Opportunity of personal hearing is a mandatory requirement as per Section 75(4) of the CGST Act

(M/s Meera Glass Industries v. State of UP, 2024 (4) TMI 772- Allahabad High Court)

Facts:

- The impugned order was passed without providing an opportunity for a personal hearing which is mandated by Section 75(4) of CGST Act.

Held:

- The Impugned adjudication order was passed without a personal hearing and it was deemed to be in violation of natural justice and it was held that the

petitioner must be afforded the opportunity of a personal hearing before any order is passed.

- The Hon'ble Allahabad High Court emphasized the significance of the word "or" in Section 75(4) of the CGST Act which indicates the mandatory requirement of a personal hearing.
- Personal hearing is crucial for procedural fairness and natural justice, allowing individuals to present their case, respond to allegations and address concerns directly to the decision-maker.
- Inclusion of "or" in Section 75(4) emphasizes the dual nature of the obligation to provide a personal hearing, accommodating both proactive requests and the reactive responses to adverse orders contemplated by tax authorities.

TATTVAM COMMENTS:

- Personal Hearing acknowledge the complexity of tax and penalty determinations, providing a forum for nuanced discussion and exploration of legal and factual considerations.
- The Court cited case of M/s Shree Sai v. State of UP and Another, 2024 (3) TMI 49- Allahabad High Court, which emphasized the necessity of affording a personal hearing to uphold principles of natural justice and prevent abuse of power.

c) Export refund cannot be denied on account of non-alignment of data on GST Portal with ICEGATE Portal

(M/s Venus Jewel v. Union of India, 2024 (4) TMI 462- Bombay High Court)

Facts:

- The Petitioner is a partnership firm registered under the Partnership Act, 1932 and is a 'registered person' within the meaning of Section 2(94) of the CGST Act. It is engaged in the business of trading and exporting of 'rough diamonds' and 'cut and polished diamonds'.
- The petitioner opted for the export of Consignment basis on subsequent payment of IGST made on confirmed goods. The petitioner had accordingly

exported goods to various foreign consignees and the corresponding shipping bills were raised.

- The petitioner from time to time and regularly declared such confirmation on the 'Common Portal' and paid the proportionate amount of IGST thereon through credit available to the petitioner. Forms GSTR-3B and GSTR-1 which contain details of such confirmed sales were also filled and uploaded on the Common Portal on a regular basis.
- As per the provisions of IGST Act read with Rule 96 and 96A of the CGST Rules, the petitioner was entitled to seek a refund of the IGST paid by the petitioner.
- The petitioner application for refund was rejected by the impugned order on the basis of non-alignment of export data between the ICEGATE Portal maintained by the Customs Department and the Common Portal (GST Portal maintained under Section 146 of CGST Act)
- Further, Petitioner presented shipping bills for confirmed sales, entitling them to IGST refund under zero-rated supplies as per Section 16 of the IGST Act.

Held:

- The Hon'ble Bombay High Court held that the Petitioner's compliance with Rules 96/96A entitled them to IGST refund upon presentation of shipping bills.
- The court further held that Circular dated 18.07.2019 cannot be made applicable to the petitioner or the petitioner cannot be confined to follow the procedure of refund application as per Section 54.
- The confirmation of exports and sales to the foreign parties by the Custom Authorities itself supports the petitioner's entitlement to IGST refund.
- With regards to interest, the Hon'ble Court was of the view that the petitioner would be entitled to interest as the amount has been illegally retained by the department without authority of law.

Tattvam comments:

- This raises concerns regarding the refusal of refund of IGST on exported goods, thereby highlighting the discrepancies in the alignment of export data between different portals maintained by relevant authorities.

- The delay and procedural discrepancies highlighted for the establishment of a special mechanism to streamline refund processes for exports involving IGST payments, emphasizing the need for compatibility between electronic portals and expedited processing of refunds to prevent adverse impacts on trade and commerce.

d) Pre-deposit is to be made only in respect of tax demand and not interest demand

(M/s Evergreen Construction Durgapur Pvt. Ltd v. The Commissioner of Commercial Taxes Govt. of West Bengal, 2024 (4) TMI 526- Calcutta High Court)

Facts:

- The Petitioner earlier in this case challenged the order of the adjudication authority demanding interest on the grounds that they had belatedly filed the returns for the relevant financial year.
- Since, the appellate authority is yet to be constituted, the petitioner had filed the writ petition before the High Court in which the petitioner was directed to deposit 20% of the disputed remaining unpaid interest. Against the said interim order, an intra-court appeal was filed before the Division Bench of the High Court.
- The Petitioner contended that in terms of Section 122 of the GST Act, if the appellants were to approach the Appellate Tribunal the registered taxpayer is required to pre-deposit a sum equal to 20% of the remaining amount of tax in dispute in addition to the amount paid under Section 107(6) arising from the order.
- The Government Counsel contended that pre-deposit is discretionary order and aimed at securing the revenue interests and hence there is no error in the said order.

Held:

- The Hon'ble Court held that the provision for filing an appeal does not specify payment of 20% of the disputed interest, only 20% for the remaining tax amount.
- Further, the Court held that the Legislative intent as per Section 112(8)(b) of the Act, restricts the pre-deposit amount to 20% of the remaining tax in dispute, without mentioning interest.
- The Hon'ble Court has to exercise discretion in line with statutory provisions and the order directing the payment of 20% of the remaining interest is set aside.

Tattvam Comments:

- This decision highlights the court's interpretation of tax appeal provisions, emphasizing the need for adherence to statutory requirements in pre-deposit quantification.
- By directing a stay on recovery proceedings pending the writ petition's resolution, the court demonstrates its commitment to fair adjudication and protection of the petitioner' interest.

e) Late fee leviable for the late filing of GSTR-9 return and not GSTR-9C reconciliation statement

(Anishia Chandrakanth v Superintendent, 2024 (4) TMI 993- Kerala High Court)

Facts:

- The Petitioner filed the annual return in Form GSTR-9 for the financial years 2017-18, 2018-19 and 2019-20 belatedly and paid late fees under Section 47(2) of the CGST Act.
- The Department demanded late fees by stating that the date of filing of reconciliation statement in Form GSTR-9C would be the date of filing of annual return.
- The petitioners argued that GSTR-9C is merely a reconciliation statement and not a return as contemplated under Section 44 of the CGST Act and thus late fees should not apply to it.

- The respondents contended that the Amnesty scheme which waives late fees for non-filers of GSTR-9 if filed after 01.04.2023, does not apply to those who had already filed their returns before this date.

Held:

- The Hon'ble Kerala High Court examined the relevant statutory provisions, including the original and amended versions of Section 44 and Section 35(5) of the CGST Act, and Rule 80 of the CGST Rules. It further noted that the GST portal does not support the payment of late fees for GSTR-9C.
- The Hon'ble Court emphasized that the purpose of the Amnesty Scheme is to provide relief to taxpayers for late filing of returns, and continuing to issue notices for non-payment of late fees for belated GSTR-9C filings before the scheme's commencement contradicts this intent.
- The Hon'ble Court ruled in favour of petitioners holding that the notices demanding late fees for delayed filing of GSTR-9C were unjust and unsustainable.
- The Hon'ble Court further clarified that the Amnesty Scheme's benefit applies retrospectively, including cases where returns were filed before the scheme's implementation. However, the petitioners were not entitled to claim refunds for late fees already paid beyond the Rs. 10,000 waiver limit set by the scheme.

f) Madras High Court directs consideration of appeal on merits without taking into account the period of limitation as demand has already been discharges along with pre-deposit

(M/s. Brithivirajan v. Joint Commissioner (ST), Deputy Commissioner (ST), State Tax Officer, 2024 (4) TMI 618-Madras High Court)

Facts:

- The petitioner filed an appeal before the Second Respondent but the same was beyond 24-days of the condonable period of limitation under Section 107(4) of the CGST Act.

- The Petitioner's tax liability had been recovered on 01.12.2022 and they also paid a sum of Rs. 1,15,372/- on 27.12.2022 as pre-deposit.
- Despite the appeal being filed beyond the limitation period, it was accompanied by the required pre-deposit on 27.12.2022.

Held:

- The Hon'ble Madras High Court held that the petitioner's substantive right to appeal cannot be restricted, especially considering that the tax liability had already been recovered.
- Since the appeal was filed along with the pre-deposit and considering the amount already recovered from the petitioner, the Court directed the second respondent to consider the appeal and dispose it on merits without taking into account the period of limitation.
- Thereby, the petition was allowed by the Court.

TATTVAM COMMENTS:

- This decision highlights the court's recognition of the petitioner's substantive right to seek redress through the appellate process, despite the delay in filing the appeal beyond the condonable period of limitation.
- It reflects the court's pragmatic approach in balancing the procedural requirements with the substantive rights of the petitioner, thereby facilitating a fair and efficient resolution of the dispute.

g) Matter remanded back allowing the assessee to prove the actual movement of goods for alleged wrong ITC claims

(M/s Ravi Chitra Proprietor of Wintech Diamonds Products v. The Assistant Commissioner (ST), The Bank Manager, 2024 (4) TMI 655- Madras High Court)

Facts:

- The Petitioner was denied ITC due to the lack of proof of movement of goods, specifically E-way bills, lorry receipts and weighment slips.

- The Petitioner responded by submitting original tax invoices, ledger accounts, bank statements and relevant GST returns but did not provide documents proving the actual movement of goods.
- The tax proposal was confirmed based on the absence of proof of movements of goods, despite the documents submitted by the petitioner indicating payment made to the supplier and the availability of ITC in the GST return.
- The Petitioner challenged the impugned order dated 30.08.2023 claiming lack of opportunity to contest the tax demand on the merits.

Held:

- The Impugned order was set aside and the matter was remanded for reconsideration on condition that the petitioner remits 20% of the disputed tax demand as agreed to within a period of two weeks from the date of receipt of a copy of the order. Further, the petitioner was permitted to submit additional documents within the same period to establish the actual movement of goods.
- Upon the receipt of additional documents and satisfaction that 20% of the disputed tax demand was received, the 1st respondent was instructed to provide a reasonable opportunity to the petitioner, including a personal hearing and issue a fresh order within two months.
- The Order of attachment was raised as a consequence of setting aside the impugned order.
- Writ petition was disposed of without any order as costs and the connected miscellaneous petitions were closed.

TATTVAM COMMENTS:

- The court's emphasis on procedural fairness is evident in its directive to provide the petitioner with a reasonable opportunity, including a personal hearing before issuing a fresh order on the disputed tax demand, ensuring that the petitioner's rights are upheld throughout the adjudication process.
- The Hon'ble court decision to set aside the impugned order and remand the matter for reconsideration reflects a balanced approach, allowing the

petitioner an opportunity to rectify the deficiencies in documentation and establish the actual movement of goods.

h) Set aside the order confirming GST demand on the basis of financials on PAN India basis

(M/s TMF Business Services Limited, REP. v. UOI, 2024 (4) TMI 733- Madras High Court)

Facts:

- The petitioner is engaged in the provision of non-banking financial services.
- The Petitioner assailed an impugned order confirming the demand of 'sundry creditors' and 'income received' on the basis of financial statement prepared on PAN India basis instead of state level solely on the ground that the petitioner had not provided a trial balance for the State of Tamil Nadu.
- In this regard, the petitioner submitted that Form GSTR-9C to contend that the annual turnover pertaining to Maharashtra GSTIN.
- Further, the Department confirmed demand on respect of 'sundry creditors' by adding trade payable and trade receivable.
- Further, the Department in this case confirmed GST @ 36% on 'Income Received' instead of 18%.

Held:

- The Hon'ble High Court noted that the assessing authority erroneously computed the tax demand by considering the petitioner's 'trade receivables' and 'trade payables', only the 'trade payable' and not 'trade receivable' should have been taken into account.
- The Hon'ble Court observed that the assessing authority erroneously computed the demand towards 'income received' by applying a 36% tax rate on the value derived from the financial statement.
- The HC considered the reconciliation statement submitted by the petitioner to contend the correct figures pertaining to Maharashtra GSTIN and set aside the order and remanded the matter for fresh consideration.

TATTVAM COMMENTS:

- It rightly notes the imbalance in tax liability determination solely based on trade receivables without due consideration of trade payables, highlighting the importance of a comprehensive approach in tax adjudication.
- The court's recognition of the petitioner's submission of the reconciliation statement in GSTR-9C to contest the tax demand underscores the significance of supporting claims with documentary evidence for fair assessment.

i) Writ Petition dismissed on the ground of lack of Locus Standi as no legal injury suffered by Petitioner

(Amit Pandey v. UOI, 2024 (4) TMI 848- Patna High Court)

Facts:

- The Petitioner challenged the constitutional validity of certain sections of the Constitution (101st Amendment) Act, 2016 focusing on the establishment of the GST Council.
- The Petitioner argued that Parliament's reliance on the recommendations of the GST Council amounted to an abdication of legislative functions.
- The Petitioner was not involved in commercial activities and was not even registered under the GST Laws.

Held:

- The Hon'ble Court held that the Petitioner is not engaged in any commercial activity and is not registered under GST enactments and furthermore have not suffered any legal injury due to the 101st Amendment.
- The Court stated that a writ petition under Article 226 is maintainable only to enforce a statutory or legal right or for breach of statutory duty, neither of which applied to the petitioner.
- Furthermore, the court observed no grounds to entertain the petition and dismissed the same.

TATTVAM COMMENTS:

- The judgment relies on the principle established in **Ayaubkhan Noorkhan Pathan v. State of Maharashtra,** emphasizing that only aggrieved parties have standing to challenge legal proceedings.
- The court underscores the limited scope of Article 226 petitions, which are only maintainable for enforcing statutory or legal rights or addressing breaches of statutory duty.

j) No Concessional GST Rate available on Biomass/Agro Boilers and Agro Waste Fluid Thermic Heaters

(M/s Isotex Corporation Pvt. Ltd v. UOI, 2024 (4) TMI 848- Patna High Court)

Facts:

- The Petitioner is engaged in the business of manufacturing of various industrial boilers. It filed an application for advance ruling to determine rate of tax on boilers which would be manufactured by using non-conventional fuel such as municipal wastes/biomass waste and agro waste.
- It was contended that both biomass/agro fired steam boilers as well as agro waste thermic fluid heaters would be classifiable under **Chapter Heading No. 8402 19 90** and eligible for lower rate of 5% or 12% instead of 18%.
- The Authority of Advance Ruling rejected the claim citing the products did not fit specified categories and "Waste to Energy Plant" definition applied only to biogas, bio-CNG, enriched biogas or electricity from waste.

Held:

- The Hon'ble High Court of Patna noted that the petitioner failed to lace on record any documentary evidence to show that products would be using only agro waste to avail benefit of **Entry No.234/201A** of the **Notification No. 01/2017.**
- The court agreed with the Authority of Advance Ruling's interpretation that the term "Power" in the context of waste to energy plants primarily referred to electricity generation and not steam generation.

- The petitioner's product did not fall within the specified categories and did not generate electricity from waste and thereby they were not eligible for the concessional rate of GST as waste to energy plants or devices.

TATTVAM COMMENTS:

- This decision highlights the importance of statutory definitions and government policies in determining eligibility for tax benefits, emphasizing that the classification of waste to energy plants is specific and limited to certain types of products.
- The Hon'ble Court's consideration of previous decisions and interpretations demonstrates a thorough examination of relevant legal precedents to arrive at its conclusion.
- The court's decision underscores the need for businesses to carefully assess their eligibility for tax benefits based on statutory provisions and established interpretations to avoid potential disputes and legal challenges.

k) Pending DRC-01 does not bar cancellation of GST registration

(M/s Chetan Garg v. Avato Ward 105 SGST, 2024 (4) TMI 517- Delhi High Court)

Facts:

- The petitioner sought cancellation of his GST registration citing his intention to discontinue the business operations under the registered GST number.
- The Petitioner, despite filing returns until January 2024 and responding to queries regarding his cancellation application, the petitioner faced rejection twice on 16.02.2024 and subsequently on 17.02.2024.
- The respondents opposed the cancellation primarily due to pending Show Cause Notices/ GST DRC-01 issued against the petitioner for the financial years 2018-2019 to 2023-2024.

Held:

- The Hon'ble Delhi High Court held that the proceedings under DRC-01 are independent of the proceedings for cancellation of GST Registration and can continue despite cancellation of GST Registration.
- The recovery of any amount found due can always be made irrespective of the status of the registration.
- Further, it was held that mere pendency of the DRC-01 cannot be a ground to decline the request of the taxpayer. Thereby, the GST Registration of the Petitioner shall be treated as cancelled.

TATTVAM COMMENTS:

- This case affirms that mere pendency of DRC-01 does not interfere with the process of cancellation of registration.

l) Adherence to Section 29(2) of CGST Act is a must for cancellation of registration retrospectively

(Archit Khandelwal Proprietor M/s Archit Enterprises v. PR. Commissioner of DGST Delhi, 2024 (4) TMI 416- Delhi High Court)

Facts:

- The Petitioner was engaged in the business of trading in metals and sought cancellation of their GST registration citing the closure of business. The Petitioner had submitted an application seeking cancellation of GST Registration on the grounds of closure of business.
- A Show Cause Notice was issued to the Petitioner on the grounds that it issued invoices without supply leading to wrongful availment of ITC. The SCN did not mention retrospective cancellation of registration.
- Pursuant to the impugned SCN, the impugned order was passed. The order stated that the effective date of cancellation of registration was 25.05.2018 i.e. a retrospective date which was under challenge.

Held:

- Section 29(2) of the CGST Act empowers the proper officer to cancel the GST registration from any retrospective date, if the circumstances set out in the said sub section are satisfied.
- Merely, because a taxpayer has not filed the returns for some period does not mean that the taxpayer's registration is required to be cancelled with retrospective date.
- One of the consequences for cancelling a taxpayer's registration effect is that the taxpayer's customers are denied ITC availed in respect of the supplied made by the taxpayer during such period.
- Impugned Order was modified to the extent that registration shall be cancelled with effect from 31.12.2019 i.e. the dated when the petitioner discontinued his business.

TATTVAM COMMENTS:

- This case brings out need to strictly follow Section 29(2) of the CGST Act in cases of retrospective cancellation as arbitrary retrospective cancellation may deprive taxpayer from various benefits like availing ITC etc.
- The court modifying the date of cancellation ensures fair treatment to rights of taxpayer.

m) Application for Revocation of Cancellation of GST Registration can be filed despite expiry of limitation period

(Abdul Satar v. Principal Commissioner, CGST & CX, 2024 (3) TMI 780- Jharkhand High Court)

Facts:

- The Petitioner's firm was duly registered under the CGST Act and the said registration was cancelled on the ground that the firm had failed to furnish the returns for a continuous period of six months.
- Against the order of cancellation, the Petitioner filed an appeal under Section 107 of the CGST Act which was dismissed on the ground that the appeal was barred by limitation.

- The Petitioner could not avail the extension provided vide *Notification No. 03/2023-Central Tax dated 31.03.2023* for filing application for revocation of cancellation due to paucity of time.

Held:

- The Hon'ble Court held that the primary object behind CGST Act is to levy and collection of tax on intra state supply of goods or services and the matters connected therewith or incidental thereto.
- A liberal approach is required to be taken in matters like the present proceeding notwithstanding the period prescribed under Section 30 of the CGST Act (i.e., revocation of cancellation of registration) having been lapsed.
- The Hon'ble Court allowed the petition and held that writ petition succeeded to the extent that the petitioner may file an application under Section 30 of the GST Act within a period of 30 days subject to clearance of dues and other statutory penalty/fine and the period of limitation shall be counted from the date of order.

TATTVAM COMMENTS:

- This is an effective judgment with respect to filing of application for revocation of cancelled GST registration despite expiry of limitation period.

n) IGST is not payable under RCM for freight services in case of goods imported on FOB basis

(M/s Agarwal Coal Corporation Pvt. Ltd. v. Assistant Commissioner of State Tax, 2024 (3) TMI 1265- Bombay High Court)

Facts:

- The Petitioner filed a writ petition against a Show Cause Notice dated 26.09.2023 issued concerning FOB Contract by the department on the ground that the impugned SCN has been issued without any jurisdiction.
- The Petitioner contended that the jurisdiction invoked by the designated officer as per Notification No. 8/2017- Integrated Tax (Rate) dated 28.06.2017 is not

invokable as the Notification dated 28.06.2017 has been struck down by the Division Bench of Gujarat High Court in the case of **Mohit Minerals Pvt. v. Union of India**, 2020 (1) TMI 974- Gujarat High Court which was further affirmed by the Supreme Court.

- The Respondent contended that the decision in Mohit Minerals case is only applicable in the case of CIF contracts only and not FOB contracts.
- The main issue for consideration was whether IGST is payable under RCM for services in Free-on-Board Contract.

Held:

- The Hon'ble Bombay High Court relied upon its own judgment in the case of **Liberty Oil Mills v. Union of India, 2023 (2) TMI 177- Bombay High Court,** wherein the Hon'ble High Court set aside the Show Cause Notice issued by the Department by placing reliance upon the Notification for non-payment of IGST on Ocean Trade Services.
- Further, the Hon'ble Court noted that the contention made by the Respondent that the decision in Mohit Minerals case is only applicable in the case of CIF contracts only and not FOB contract is not tenable as the whole Notification has been held ultra vires.
- Accordingly, the Impugned SCN was rendered without jurisdiction. Reliance was placed upon the judgment of the Hon'ble Supreme Court in the case of **M/s Kusum Ignots & Alloys Ltd. v. Union of India**, wherein it was held that the Notification being ultra vires is not available with the State Authorities and the application of Notification for issuance of Impugned SCN is illegal in nature.
- The petitioner was entitled to refund of the tax amount deposited under protest along with interest after the filing of refund application by the Petitioner.

TATTVAM COMMENTS.

- This is a landmark decision wherein the Bombay High Court has clarified that IGST is not payable under RCM for services provided under Free- on-Board contracts given the invalidity of the Notification No. 08/2017-Integrated Tax (Rate) dated 28.06.2017.

- This ruling aligns with judicial precedents and upholds the principles of legality and jurisdiction in tax enforcements actions.
- The Court's directive for refund underscores the importance of upholding taxpayers' rights in the face of erroneous tax demands.

o) For imposition of penalty under Section 122(1A), 'Person' in said provision should be a taxable person

(Shantanu Sanjay Hundekari v. Union of India, 2024 (3) TMI 1277- Bombay High Court)

Facts:

- The Petitioner was employed as a Taxation manager and aided the Company in tax compliances, including GST, without direct oversight of its daily operations. The Petitioner was in possession of power of attorney for tax representation before the tax authorities.
- The Petitioner and other employees were issued a Show Cause Notice for wrongful utilization and distribution of ITC under Section 74 of the CGST Act and imposed a penalty equivalent to Rs. 3731 Crore as per Section 122(1A) of the CGST Act read with Section 137 of the CGST Act on the ground that the petitioner has aided and abetted the commission of offence on behalf of the Company.
- The main issue involved was whether penalty can be levied from the employees of the Company under Section 122(1A) of the CGST Act who is not directly involved in day-to-day affairs of the company and has not retained the benefit of transaction.

Held:

- The Hon'ble Bombay High Court observed that as per the intention of the legislature, in order for a person would fall within the purview of Section 122(1A), he should necessarily be a 'taxable person' who would be in a legal position to retain the benefit of tax on the transaction covered under clauses (i), (ii), (vii) or clause (ix) of sub section (1) and at whose instance such transaction is conducted.

- The Hon'ble Court noted that the said provisions are not applicable to an individual like the Petitioner and that there was no material that it was at the instance of Petitioner that transactions were conducted so as to make the Petitioner liable to penalty equivalent to the tax alleged to be evaded or ITC availed or passed on by the Company.
- Further, in respect of penalty under Section 137, the Court found that such proceedings would be in the nature of a prosecution necessarily involving the applicability of Section 134.

TATTVAM COMMENTS:

- This ruling offers employees relief who were unjustly accused of tax offences and specifies the extent of penalties under the CGST Act.
- This decision emphasises how crucial it is to follow the law and make sure employees are treated fairly while involved in tax-related proceedings.

p) Interest on delayed refund of ITC is to be paid automatically

(Microsoft Global Services Center (India) Pvt. Ltd. v. State of Telangana, 2024 VIL 312 TEL)

Facts:

- The Petitioner filed a refund claim petition before the department claiming refund of unutilized ITC. The Department issued a deficiency memos to which the petitioners promptly replied.
- Subsequently, Show Cause Notices were also issued which were replied by the petitioner appropriately. Thereafter, Orders were passed rejecting the refund claims and the petitioner was successful in challenging the orders in an appeal and was granted the refund amount.
- The petitioner moved an application with the department for grant of interest on the amount refunded for the period but the same was not granted.
- The main issue involved was whether the interest accrues on delayed refund made by the Department.

Held:

- The Hon'ble Telangana High Court held that interest automatically accrues on the delayed refund made by the Department. The Court in this regard noted that Section 56, the proviso and its explanation provided to the section does not provide for any circumstance or situation under which the delayed refund does not attract interest.
- Further, the Court held that the provision for the grant of interest has to be treated as beneficial legislation and should be enforced non-discriminately.
- The Hon'ble High Court further held that an order by the Appellate Authority, Tribunal or the Court of law as the case may be for the purpose of its enforceability of refund has to be treated as if it is an order under Section 54(5) of the CGST Act and such interest would be calculated immediately after 60 days within which the payment of refund has to be made starts.

TATTVAM COMMENTS:

- The Telangana High Court has clearly provided a guiding light on the recovery of appropriate interest from the department in case of delayed refunds to the taxpayers.

q) In case of refund, the relevant date is the date of payment under correct head where the tax has been paid twice or under the wrong head and then correct head

(M/s DMI Alternatives Private Limited v. Additional Commissioner, 2024 (4) TMI 998- Delhi High Court)

Facts:

- The Petitioner mistakenly paid taxes under the wrong head while filing the monthly statement of outward supply in November 2017. The error led to double deposits of tax once under IGST and then under CGST and SGST. The Petitioner corrected the mistake and filed a refund application on 11.05.2020, but the application was denied due to delay.
- The main crux of the issues lies in determining the relevant date for claiming refunds. The **Circular No. 162/18/2021- GST** clarified that the relevant date is when the tax is paid under the correct head.

Held:

- The Hon'ble Delhi High Court held that refund application filed under Section 54 of the CGST Act on 11.05.2020 is not barred by limitation. The Hon'ble High Court in this regard relied upon **CBIC Circular No. 162/18/2021- GST dated 25.09.2021** which had clarified that the 'Relevant Date' is the date when the tax is paid under the correct head.
- The petitioner refund application filed on 14.07.2022 was also held as not time barred by the Court while it observed that as per the Circular, in cases where the taxpayer had made payment under the correct head before the issuance of Notification No. 35/2021- CT dated 24.09.2021, the refund application could be filed within two years from 24.09.2021.

TATTVAM COMMENTS:

- This ruling underscores the importance adhering to circulars issued by tax authorities and ensuring fair treatment in refund claims.
- This decision serves as a valuable precedent for similar cases and reinforces the principles of fairness and transparency in tax administration.

r) Late fees and interest for delayed filing of return/ payment of tax is payable only in case of failure on part of assessee

(M/s Bhole Baba Milk Food Industries Limited v. Union of India - Allahabad High Court)

Facts:

- The petitioner filed the writ petition before the Hon'ble Court for refund of the amount of interest and penalty for non-filing of return which has been debited from the Electronic Credit Ledger.
- The Petitioner had initiated the payment of tax within the prescribed time period in the manner prescribed for which the amount is debited from the bank account. The Department contended that the amount was received by them at a later stage.

- The main issue involved is whether the interest and penalty leviable when there is no fault of the assessee in depositing GST.

Held:

- The Allahabad High Court held that the levy of fee and interest would arise only in case where the failure is on the part of the assessee to file return and payment of tax due within the prescribed period of time.
- The Hon'ble High Court was also of the view that the errors committed by the bank or GSTN may not involve the assessee.
- The writ petition was disposed of leaving it open to the GSTN and the Bank to devise a better mechanism to ensure prompt credit and debit entries to arise in real time.

TATTVAM COMMENTS:

- The Allahabad High Court's decision underscores that interest and penalty for GST delays should only be imposed when the delay is due to the assessee's fault.
- This judgment provides significant relief to taxpayers ensuring that they are not unfairly penalized for delays beyond their control, thereby promoting fairer tax practices.

s) Issue of levy of GST on residential accommodation should be viewed from the perspective of recipient of service and not from the perspective of service provider

(M/s Thai Mookambikaa Ladies Hostel v. Union of India, 2024 (3) TMI 1271- Madras High Court)

Facts:

- The petitioner was running women hostels by providing hostel accommodation services. It applied the advance ruling to determine the taxability of hostel accommodation services.

- The Authority for Advance Ruling (AAR) held that services by way of providing hostel accommodation supplied by the petitioner would be taxable at the rate of 18%.
- Being aggrieved, the petitioner filed an appeal against the ruling and contended that the services provided by leasing out residential premises as hostels to students and working professionals would be exempted from GST, however the Appellate Authority for Advance Ruling (AAAR) upheld the order of AAR.
- Being aggrieved, the petitioner filed writ petition against the order of AAAR.

Held:

- The Hon'ble Madras High Court noted that the students would use the hostel for the purposes of residence, and the imposition of GST on hostel accommodation should be viewed from the perspective of the recipient of service.
- Further, it was held that since renting out hostel rooms to girl students and working women by petitioners is exclusively for residential purposes, the condition prescribed in the Notification in order to claim exemption, viz., 'residential dwelling for use as a residence' has been fulfilled by petitioners and, thus, said services are covered under Entry Nos.12 and 14 of Notification **No. 12/2017-Central Tax (Rate) dated June 28, 2017.**
- The Hon'ble Court affirmed that the services provided by the petitioner by leasing out residential premises as hostel to students and working professionals would be covered under Entry 13 of Notification No.12/2017 dated 28.09.2017 and exempted from GST.

TATTVAM COMMENTS:

- This is an important judgment with respect to the taxability of hostel accommodation services.
- The Court has clearly laid down the guidelines on which the imposition of GST on hostel accommodation is to be viewed.

t) SEZ unit is not required to pay GST under RCM subject to furnishing of LUT/Bond

(M/s. Waaree Energies Limited, 2024 (4) TMI 845- AAR Gujarat)

Facts:

- The Applicant is an SEZ unit engaged in solar module manufacturing and sought clarification on whether they are obligated to pay GST under RCM for services procured from the Domestic Tariff Area (DTA). The main contention arises from **Notification No. 10/2017- IT (Rate) dated 28.06.2017** which mandates RCM for certain services.
- The Applicant contended that as a SEZ unit, they are exempted from GST under Rule 5(5)(a) of the SEZ Rules, 2006. Additionally, Rule 30 allows DTA suppliers to clear services to SEZ units as zero-rated supplies under Section 16 of the IGST Act.

Held:

- The Gujarat AAR held that a SEZ unit is not required to pay GST under Reverse Charge Mechanism on Goods Transport Agency, legal services from an advocate, security services and services by a way of hiring buses for employees from DTA, in accordance with RCM Notification No. 10/2017- IT (Rate) dated 28.06.2017.
- The AAR further observed that the Legislature's intention is not to tax supplies to a unit in SEZ or to SEZ developer. Accordingly, it was held that a unit in SEZ or SEZ developer can procure services for which IGST is liable to be paid under RCM without the payment of IGST, provided that the SEZ or SEZ developer furnishes a Letter of Undertaking or Bond as specified in condition (i) of Paragraph 1 of Notification No. 37/2017- CT dated 04.10.2017.
- Thereby, considering Notification No. 37/2017-CT dated 04.10.2017, the AAR held that SEZ units are not obligated to pay GST under RCM for specified services, provided they furnish an LUT bond.

TATTVAM COMMENTS:

- This ruling provides clarity on the tax treatment of SEZ units under GST Law.

- The Authority has clearly specified that SEZ units are exempt from GST liability under RCM for specified services subject to compliance with furnishing an LUT or bond.

u) Contribution towards Corpus/ Sinking Fund is 'advance payment' liable to GST at the time of receipt

(M/s Prinsep Association of Apartment Owners, 2024 (4) TMI 409- AAR West Bengal)

Facts:

- The Applicant is an Association of Persons (AOP) and provides maintenance or repair of the common area of the apartments and surrounding which inter alia includes lighting in common area. To provide these services, the Applicant collects monthly subscription as maintenance charges from its members.
- In addition to this, the applicant is engaged in setting up a Corpus Fund to meet future contingencies for which the applicant also collects subscription from its members.
- The Applicant contended that the amount towards the corpus funds is made by the members not in relation to any supply of services, rather the funds are maintained for future contingencies and thereby shall be leviable to GST when the same is supplied as consideration at the time of actual supply of service.

Held:

- The West Bengal AAR held that contribution received by a Resident Welfare Association towards Corpus Fund/ Sinking Fund is taxable and the RWA is liable to pay tax at the time of receipt of such amount in accordance with the provisions of Section 13(2) of the CGST Act.
- The AAR further observed that the contribution is not in the nature of a 'deposit' but an 'advance payment' made by the members of the RWA for receiving a supply of common area maintenance services to be provided RWA in future.

TATTVAM COMMENTS:

- This ruling confirms the GST applicability on corpus funds paid as an advance payment made by members of a Resident Welfare Association.

v) Interest Liability arises on delayed filing of return irrespective of the payment mode

(M/s Sincon Infrastructure Pvt. Ltd. v. Union of India, 2024 (5) TMI 264- Patna High Court)

Facts:

- A demand notice was issued to the petitioner, levying interest on the delay in payment of the tax through Electronic Credit Ledger ('ECRL') to the government due to a delay in furnishing the return.
- The main issue before the Hon'ble Court was whether interest liability arises in case of a delay in furnishing the return where the output tax liability has been discharged by offsetting the balance available in ECRL.
- The Petitioner contended that Section 50(1) stipulates interest liability only when a payment is debited in ECL.
- Further, the Petitioner contended that ITC represents the tax that the recipient pays to the supplier on account of procurement of inward supplies made from such supplier and the said tax amount has already been paid to the Government by the supplier and thereby no interest liability accrues.

Held:

- The Hon'ble High Court stated that the supplier's remittance of tax to the government does not result in automatic credit to the ECRL. The said amount is credited to the ECRL only when the eligible ITC availed in the return is filed by the purchaser.
- The High Court further observed that the set off of ITC against the output tax liability occurs only when such set-off is claimed by way of the furnishing of return and thereby interest shall be payable when there is a delay in furnishing the return, even when the output tax liability has been discharged by way of balance available in the ECRL, as no offset of the ITC has occurred until the return is not furnished.

- In case of ECL also the payment of tax, interest penalty or any other dues is occasioned only when the return is furnished; by reason of which a debit is facilitated from the credit in the ECL which is then transferred to the coffers of the State.
- Hence, whether it be the ECL or ECRL interest is payable on the delay occasioned in payment of tax; which payment is occasioned only on the furnishing of the return and the simultaneous debit made from either of these ledgers. The payment of tax and furnishing of return have to occur simultaneously and none can separate one from the other.
- Thereby, the Hon'ble Court rejected the petitioner's claim that interest t liability shall not occur when the output tax liability has been discharged by way of the balance available in the ECRL.

TATTVAM COMMENTS:

- There are contradictory decisions on this issue. Recently, the Madras High Court in the case of Refex Industries Ltd., (citation) has ruled in favour of the taxpayer that once an amount is deposited in cash ledger, interest is not payable even on delayed filing of return.
- Notably, Notification No. 7/2024 dated 08.04.2024 provides waiver of interest for taxpayers who failed to file return due to portal glitches on the condition that sufficient balance was maintained in cash and credit ledger.

MAY 2024

w) Transfer of Development rights would be considered as service under GST Law.

(M/s Prahitha Construction Pvt. Ltd. v. Union of India, 2024 (5) TMI 1254-SC Order)

Facts:

- In March 2024, the issue of taxability of development rights came before the Hon'ble Telangana High Court for adjudication in ***M/s Prahitha Constructions v. Union of India, Writ Petition No. 5493 of 2020.***
- In this case, it was held that mere transfer of development rights pursuant to a Joint Development Agreement cannot indicate an automatic transfer of ownership or title rights in the land.
- Accordingly, it was held that GST is leviable on transfer of development rights on reverse charge basis and cannot be said to be covered within the purview of Entry 5 of Schedule III of CGST Act.
- Recently, an appeal has been filed before the Hon'ble Supreme Court against the above said decision.

Held:

- The Hon'ble Supreme Court has accepted the Special Leave Petition and accordingly has issued notice to the concerned parties. However, no stay order was issued against the operation of the impugned judgment.
- Further, the Hon'ble Supreme Court has categorically directed the Petitioner to discharge the GST liability on the transfer of development rights.

TATTVAM COMMENTS:

- GST applicability on transfer of development rights is a burning issue and even after various judicial precedents on the same there is no definite answer.
- Binding pronouncements from the Hon'ble Supreme Court will be helpful to lay down proper jurisprudence on the issue.

x) ITC disallowance to recipient invalid without proper inquiry of the Supplier

(M/s Lokenath Construction Pvt. Ltd v. Government of West Bengal, 2024 (5) TMI 362- Calcutta High Court)

Facts:

- The GST Department sought reversal of ITC on the ground that the Appellant has failed to prove that the supplier has paid taxes to the government

exchequer. Accordingly, SCN was issued stating that the Appellant has wrongfully availed ITC in contravention of Section 16(2)(c) of CGST Act.

- The SCN was challenged on the grounds that it has been issued without causing investigation at the end of supplier.
- The Adjudicating Authority passed an order confirming the demand made in the SCN. The said order was challenged in the present case.

Held:

- The Adjudicating Authority admitted that Appellant produced certificates declaring that the suppliers had discharged the liability. However, the ITC was merely rejected due to mismatch in GSTR-2A and GSTR-3B of the Appellant.
- The Adjudicating Authority should have sought further clarifications from the Appellant. However, the Adjudicating Authority proceeded unilaterally.
- Elementary principle adopted in these cases is to cause enquiry with the supplier and without doing so to penalize the appellant would be arbitrary, illegal and without jurisdiction.

TATTVAM COMMENTS:

- This case supports the well settled principle of law that in cases involving non-payment of taxes by the supplier, the liability of recipient is only protective in nature.
- Even after accepting the fact that the recipient has paid the tax to supplier, the departmental authorities issued the SCN to the recipient without investigating the supplier which demonstrates unjustified approach to deny ITC.
- The Hon'ble Court noted that only in exceptional circumstances proceedings can be initiated against recipient in such cases as provided in press release issued by CBIC.

y) Granted stay amid pending High Court matters in respect of extension of time limit to issue SCNs and Orders

(M/s Jahar Sarma v. UOI, 2024 (5) TMI 1139- Gauhati High Court)

Facts:

- The Notifications dated 31.03.2023 and 28.12.2023 extended the time limit specified under Section 73 of CGST Act for recovery of tax not paid for F.Y. 2018-2019 and FY 2019-2020 up to 30.04.2024 and 31.08.2024 respectively.
- SCN was issued to the Petitioner and thereafter an order was passed determining an amount for recovery under Section 73 of the CGST Act.
- In this writ petition, the petitioner has challenged Notification dated 31.03.2023 and 28.12.2023 on grounds that there was no need to extend the time limit after 2022 as there was no Covid-19 pandemic during that time.
- Thus, there was no occasion for the GST council to take resort to the factor of Covid-19 pandemic to recommend the Central Government to extend the time limit under Section 73(10) of the CGST Act.

Held:

- It was noted that the time limit under Section 73(10) of the CGST Act was extended once prior to the Notification dated 31.03.2023.
- Explanation to Section 168A of the CGST Act was refused wherein the expression 'force majeure' is defined to mean a case of war, epidemic, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature or otherwise affecting the implementation of any of the provisions of the Act.
- It was observed that the Hon'ble Allahabad High Court, the Hon'ble Gujarat High Court, the Hon'ble Punjab and Haryana High Court, the Hon'ble Madras High Court and this Court have provided interim reliefs holding that no final order shall be passed ad if final order is passed already, no recovery is to be effected.
- It was held that since similar issues are being examined by different High Courts including this Court, recovery of the amount assessed against the petitioner by the order shall not be enforced till further orders.

TATTVAM COMMENTS:

- By directing a stay on recovery proceedings pending the writ petition's resolution, the court demonstrates its commitment to fair adjudication and protection of the petitioner's interests.

z) The original copies of non-relied upon documents needs to be released in order to ensure fair opportunity of hearing

(M/s Elora Tobacco Company Ltd. v. UOI, 2024 (5) TMI 1091- Madhya Pradesh High Court)

Facts:

- SCN was issued for a total demand of GST and Cess under the pretext of clandestine supply of filter cigarette without cover if invoices and tax payments.
- The Petitioner contended that crucial original copies of non-relied documents seized during the investigations were not provided, which hampered their ability to prepare a defence. Despite multiple requests through letters, the non-relied documents had not been furnished.
- The Petitioner also sought the opportunity to cross-examine witnesses whose evidence was relied upon in the SCNs.
- The petitioner submitted that it was the Respondents' duty to release the non-relied documents within 30 days of issuing the SCN as per Section 67(3) of the CGST Act and Rule 27 of the Central Excise Rules, 2017 (**'Excise rules'**).

Held:

- Section 67(3) of the CGST Act read along with Rule 27 of the Central Excise Rules makes it clear that Respondent should release the non-relied upon documents within a period of 30 days from the issuance of the SCN.
- Petitioner is entitled to receive original copies of non-relied documents to enable him to prepare his reply as fair hearing requires that petitioner is given due opportunity.
- Further, right of fair hearing and personal hearing requires that the Petitioner be given right to cross examine witnesses whose evidence has been relied upon in the SCN.

TATTVAM COMMENTS:

- On multiple occasions, the Adjudicating Authority has denied the opportunity to cross-examine the witness relied upon by it for raising tax demand
- This decision supports the well-settled position of law that the assessee has the right to cross-examine the witness relied upon by the Department to raise tax demand.
- The recognition of right to cross-examine in the tax matters ensures that the assesses are given fair opportunity to defend their case.

aa) Matter remanded as effective opportunity was not provided to the Assessee to make its submissions

(Roshan Sharma v. Assistant Comm. of Revenue, 2024 (5) TMI 513- Calcutta High Court)

Facts:

- SCN was issued to applicant and demand was confirmed via impugned order dated 01.02.2024.
- The statement of the supplier and transporter was relied upon by the department in the SCN.
- The Appellant was neither furnished with copies of the documents relied nor it was afforded an opportunity of cross-examination.
- Therefore, the present writ petition was filled challenging impugned order and for grant of opportunity for cross-examination.

Held:

- The Appellant has an effective alternate remedy by way of an appeal before the Appellate Authority for which the appellant has to pre-deposit 10% of the disputed tax amount.
- However, the Appellant was not given an effective opportunity to rebut the allegations, which have been made against the supplier. Further, the Appellant was not given any opportunity to cross-examine.
- Accordingly, the Court directed the matter to be remanded back to the adjudicating authority for fresh decision after providing proper opportunity of

being heard. Further it was also directed that if the appellant requests for cross examination of the supplier and transporter, the same should be permitted.

TATTVAM COMMENTS:

- Cross-examination is an essential element to ensure fair proceedings but same is mostly denied by appellate authorities.

bb) GST Appellate Authority can condone delay beyond prescribed period

(M/s. Mukul Islam v. Assistant Comm. of Revenue, 2024 (5) TMI 318- Calcutta High Court)

Facts:

- The Petitioner was aggrieved with the order passed under Section 73 of CGST Act. The Petitioner sought an appeal under Section 107 of the CGST Act against the said order.
- The Appeal was filed along with an application under Section 5 of the Limitation Act, 1963 since the appeal was filed beyond the period of limitation.
- The Appellate Authority rejected the said application which was challenged in present writ petition.

Held:

- The Hon'ble Court relied on **S.K. Chakraborty & Sons v. UOI, 2023 (12) TMI 290**, wherein court stated that in absence of specific exclusion of **Section 5 of the Limitation Act, 1963**, it would be improper to read implied exclusion thereof.
- The Appellate Authority has failed to exercise jurisdiction in refusing to consider the application for condonation of delay in its proper perspective.
- The explanation provided by the petitioner in the application under Section 5 of the Limitation Act is satisfactory and delay has been sufficiently explained. Therefore, the Appellate Authority is directed to hear out and dispose of the appeal on merits.

TATTVAM COMMENTS:

- It highlights court's recognition of the petitioner's substantive right to seek redressal of appeal beyond the condonable period of limitation pursuant to Section 5 of Limitation Act.
- This decision reiterates the applicability of Limitation Act in the GST matters.

cc) The period of limitation is computed without taking into account the date on which the order was communicated

(M/s Balaji Coal Traders v. Comm., 2024 (5) TMI 1041-Allahabad High Court)

Facts:

- The Petitioner had filed an appeal under **Section 107 of the CGST Act**.
- The first Appellate Authority vide order dated 24.11.2022 dismissed the said appeal on the premise of being time barred.
- Aggrieved from the impugned order, present writ petition was filed.

Held:

- **Section 9 of the General Clauses Act, 1897** when calculating the limitation period "from" the date of communication of the order, the day on which the order is communicated is excluded.
- When a statute prescribes an action to be taken "within" a certain period, it means that the action can be performed any time from the beginning of the period until the end of the last day of the period.
- Petitioner received the order on 12.07.2022 and filed the appeal on 10.11.2022. Therefore, three months period would have begun on 13.07.2022 and expired on 12.10.2022.
- Extended period would have expired on 12.11.2022. It appears that the calculation done by the authorities was incorrect.

TATTVAM COMMENTS:

- This case reiterates the basic tenet of limitation law that the date on which order has been passed is not included while calculating the period of limitation.

- Writ jurisdiction serves as powerful tool in cases for calculation for limitation and ensures justice, fairness and adherence to rule of law.

dd) Non-submission of summary SCN will not result in any crucial change

(M/s Ashika Business Pvt. Ltd. v. UOI, 2024 (5) TMI 1213- Gauhati High Court)

Facts:

- SCN was issued, however, the summary of the same was not uploaded electronically on the portal in terms of provisions of Rule 142(1)(a) of the CGST Rules.
- Pursuant to the above SCN, order was passed against the Petitioner. The Petitioner duly received the copy of the order but the summary of the same was not uploaded on the portal.
- The issue which came before consideration was whether non-uploading of FORM GST DRC-01 and FORM GST DRC-07 electronically on the common portal vitiates the entire proceedings from the stage of issuance of the SCN till passing of the order.

Held:

- Summary of the SCN will not contain anything more than what is to be found in the SCN issued under Section 73(1) of the CGST Act.
- By not whispering anything in its reply to the SCN, the Petitioner had, by implication, waived the requirement of uploading of the notice electronically on the portal.
- It is not an exceptional situation to entertain the writ petition. Therefore, writ petition is dismissed.

TATTVAM COMMENTS:

- This judgement reaffirms the settled position that mere non-submission of summary would ultimately keep the results unaltered.
- It's different from the case where no SCN is served and prejudice is caused to the taxpayer.

ee) GST Appeal shouldn't be dismissed solely for late certified copy submission

(Enkay Polymers v. State of U.P., 2024 (5) TMI 917-Allahabad High Court)

Facts:

- The appeal filed by the Petitioner was rejected on the grounds that it was time-barred because the self-certified copy of the decision was not made available within time specified under Rule 108 of CGST Rules.
- Aggrieved from the impugned order, present writ petition was filled.

Held:

- Various High Courts have held that when an assesse files a memo of appeal in the GST Portal, non-submission of certified copy would be treated as mere technical defect.
- Mere non-filing of the certified copy of the decision within a period of seven days cannot be a ground to reject the appeal when it has been filed electronically within the time frame prescribed i.e. three months.

TATTVAM COMMENTS:

- The present case has followed the well settled principle as propounded in **Atlas PVC Pipes Ltd. v. State of Odisha, 2022 (7) TMI 130 and PKV Agencies v. Appellate Deputy Commissioner, Vellore, 2023 (2) TMI 932.** In these cases, it has been held that since the petitioner has enclosed the copy of impugned order as made available to it in the GST portal while filing memo of appeal, non-submission of certified copy should not result in dismissal of appeal.
- It highlights court's recognition of the petitioner's substantive right to seek redress through the appellate process, despite some technical errors in filing such appeal.

ff) Search and Seizure proceedings cannot result into penalty under Section 129 of CGST Act

(M/s Gupta Mentha Oil Commission Agent v. State of U.P., 2024 (5) TMI 604- Allahabad High Court)

Facts:

- Penalty proceedings under Section 129(3) of CGST Act was initiated subsequent to search of the business premises of the petitioner.
- An appeal was filed against the penalty order which was also dismissed. Present writ petition was filed against the said appellate order.

Held:

- The court relied on **Mahavir Polyplast Pvt. Ltd. v. State of U.P., 2022 (8) TMI 410**, wherein court held that search and seizure of the godown cannot result in penalty proceedings under Section 129 of the CGST Act.
- Therefore, impugned orders were quashed and set aside.
- This Court directed the respondents to refund the amount of tax and penalty deposited by the petitioner.

TATTVAM COMMENTS:

- This case brings out the need for department to follow justified approach while dealing with penalty matters.

gg) Non-production of hard copy of e-way bill does not mean goods were being transported with the intension to evade tax

(M/s Mid Town Associates v. Additional Commissioner, 2024 (5) TMI 605- Allahabad High Court)

Facts:

- The goods in question were being transferred by the Petitioner which were intercepted and were detained on the ground that the goods loaded on the truck were being transported without E-way bill as the truck driver could not

produce hard copy of the e-way bill. However, the truck driver had produced the soft copy of e-way bill.

- An order of detention under Section 129(1) of the CGST Act was passed by respondent no. 2 on the ground of presumption that the goods were being transported with the intention to evade tax due to the non-production of physical copy of e-way Bill.
- The abovesaid order was appealed and was affirmed. Therefore, present petition was filed.

Held:

- Upon a persual of the E-way Bill downloaded by the petitioner, it is clear that even though the driver could not produce the hard copy of the E-way Bill before respondent No. 2, yet soft copy of e-way bill was downloaded prior to the interception of the vehicle.
- The only violation was a technical one and it was clear that e-way Bill had been downloaded prior to the interception of the vehicle. Accordingly, there was no mens rea for the evasion of tax.

TATTVAM COMMENTS:

- The judgement relies on the principle established in Hindustan Herbal Cosmetics v. State of U.P., 2024 (1) TMI 282, wherein it has been held that presence of mens rea for evasion of tax is a sine qua non for imposition of penalty.
- The court while quashing penalty orders when there was no mens rea to evade tax duty ensure principle of fairness.

hh)IT services provided to foreign clients on principle to principle basis should not always be deemed as 'intermediary services'.

(Re: M/s Center for International Admission and Visas (CIAV)., 2024 (5) TMI 544- Authority for Advance Ruling, Telangana)

Facts:

- Applicant provides referrals of the aspirants/ applicants who wishes to apply and study aboard to the universities/ colleges located outside India. The Applicant is responsible to prepare the case of the aspiring student and refer it to the concerned foreign university or college, as per the requirement of the student and the fitment to the college/ university.
- Applicant is not bound to refer student to a university. Further, the university retains full and complete discretion about whether to accept a student's profile or not.
- Following questions arose before the AAR:
  i. Whether the transaction would qualify as 'intermediary' as defined under **Section 2(13) of the IGST Act, 2017**?
  ii. Whether it would qualify as 'export of services' in terms of **Section 2(6) of the IGST Act, 2017**?

Held:

- Applicant is not an agent of foreign colleges and university.
- Neither the Applicant has any role for services provided by foreign universities to the prospective students nor it can influence in the selection process of prospective students. The Applicant was hired by the foreign colleges/ universities to provide its expertised services of marketing and referral.
- Applicant cannot be considered as 'intermediary' for the purpose of Section 2(13) of IGST Act.
- Services provided will fall under Section 13(2) of the IGST Act. Accordingly, place of supply shall be location of recipient i.e. location of foreign university.
- Activity of the Applicant for foreign college and university should qualify as 'export of service' in terms of Section 2(6) of IGST Act.

TATTVAM COMMENTS:

- Advance Ruling Authority, while passing the order, is throwing light on when certain services will be considered as intermediary services.

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ii) Constitutionality of ITC restrictions in Sections 16(2)(c) and 16(4) upheld; September return deadline set as 30th November for ITC claims post 01.07.2017.

(M/s M. Trade Links v. Union of India, 2024 (6) TMI 288 – Kerala High Court)

Facts:

- Constitutional vires of Section 16(2)(c) and Section 16(4) of the CGST Act was challenged in this case.

Held:

- A taxing statute can be struck down in case where the said statute is infringing upon the fundamental rights of the taxpayers. However, the Hon'ble High Court pointed out that the Government should be allowed some leeway in the enactment of a statute which is basically a fiscal legislation.
- The ITC is merely a concession extended to the recipient of goods or services under the GST law. At best, it can be viewed as an entitlement subject to the satisfaction of the conditions laid down under the GST law for the purpose of availment of the ITC. Accordingly, the Hon'ble High Court held that the ITC is not an absolute right of the recipient of the goods or services.
- The Court observed that the non-obstante clause in Section 16(2) restricts the eligibility under Section 16(1) for entitlement to claim ITC. Section 16(2) is the restriction on eligibility and Section 16(4) is the restriction on the time for availing ITC. It was held that the restriction under Section 16(4) of the Act has to be read independently and the contention of the Petitioner that once the conditions under Section 16 (2) are met, the timeline provided for availing the input tax credit under Section 16 (4) is arbitrary and unsustainable, was not accepted.
- It was also noted that the time limit prescribed under Section 16(4) is not a new condition which has been introduced for the first time in GST law and

different VAT legislations and CENVAT Credit Rules also provided time limits to claim eligible ITC.

- As regards Section 16(2)(c), it was observed that allowing of credit wherein the supplier fails to pay the tax will cause huge losses to the Government and will render the whole scheme of GST law as unworkable. Accordingly, It was held that Section 16(2)(c) cannot be said to be onerous or in violation of the Constitution.
- Thus, both Section 16(2)(c) and Section 16(4) were held to be constitutionally valid.
- Additionally, it was also held that the time limit for furnishing the return for the month of September under Section 16(4) is to be treated as 30th November in each financial year with effect from 01.07.2017, in respect of the taxpayers who had filed their returns for the month of September on or before 30th November, and their claim for ITC should be processed, if they are otherwise eligible for ITC.

TATTVAM COMMENTS:

- This issue is still pending before various other high courts.
- The constitutional validity of both provisions viz. Section 16(2)(c) and Section 16(4) has been upheld by the High Court and it was also highlighted that ITC is in the nature of a concession and the Government can impose restrictions/conditions for the availment of ITC.
- There is need for a balanced approach in implementing the GST provisions and making sure that the genuine taxpayers are not unnecessarily burdened and penalised for the default of others.

jj) Gujarat High Court granted interim relief in the matter of constitutional validity of Section 16(2)(c)

(Pravinbhai Mohanbhai Vadi v. Deputy Commissioner of State Tax, Enforcement Division, 2024 (6) TMI 1092 Gujarat High Court)

Facts:

- Constitutional vires of Section 16(2)(c) was challenged in this case.

Held:

- The court issued an ad-interim relief stating that no coercive steps shall be taken by the respondent authorities against the petitioners during the pendency of these petitions.

TATTVAM COMMENTS:

- This issue a highly contentious issue in view of the fact that the recipient are being denied the benefit of ITC merely on the ground that the supplier has not paid the tax, especially when they have complied with all the conditions which are under their control.
- The constitutionality of Section 16(2)(c) has been upheld in other matters by different High Courts. The same matter will now be decided by the Gujarat High Court.

kk) Court upholds indefeasibility of VAT Credit transitioned to GST despite procedural Lapse.

(TVL Moon Labels v. Government of India, 2024 (6) TMI 1242 - Madras High Court)

Facts:

- Petitioner had accumulated credit in its VAT returns as on 30.06.2017.
- Instead of filing the necessary declaration in Form TRAN – 01, the Petitioner directly reported the unutilized credit in Form GSTR – 3B.
- Petitioner utilized the aforesaid credit to discharge its tax liability under the CGST Act, but the Department denied the same.

Held:

- The Court held that the credit availed under TNVAT Act, 2006 was indefeasible in nature. In this respect, the court relied on the judgment of ***Collector of Central Excise, Pune v. Dai Ichi Karkaria Ltd, 1999 (8) TMI 920 – Supreme Court***.

- The court held that once the credit is validly availed, it is indefeasible unless the same has been provided to lapse under the law.
- Provisions of Section 54 cannot be invoked for seeking refund of the unutilized credit that was not transitioned in GST through Section 140. Nevertheless, the petitioner cannot be made to suffer if the credit was validly availed. The matter was remanded for verification of the credit availed by the petitioner under the TNVAT Act.

TATTVAM COMMENTS:

- The court stressed that credit should not be denied due to procedural errors if entitlement to avail credit is established.
- This case reaffirms the position of law that – (i) taxpayers cannot be denied the benefit to avail the ITC once all the substantive conditions are satisfied for availing the same; and (ii) credit, once availed validly, becomes a vested and indefeasible right of the taxpayer.

II) No interest and penalty for unutilized wrongly availed ITC under the CGST Act

(M/S. Greenstar Fertilizers Limited v. The Joint Commissioner (Appeals), 2024 (6) TMI 667 – Madras High Court)

Facts:

- Petitioner had claimed wrong amount of transitional credit and therefore, the proceedings were initiated under Section 74 of the CGST Act.
- Certain amount of the above credit was reversed prior to issuance of SCN and the remaining amount was reversed after the issuance of SCN.
- Challenge to levy of penalty under Sections 74(1) and 74(5) of the CGST Act for input tax wrongly claimed but not utilized and reversed after the issuance of SCN.

Held:

- Interest and penalty under Section 73 or Section 74 of the CGST are imposable on the wrong availment of credit.
- However, in case where the credit has merely been availed without any utilization of the same for discharging the tax liability, no interest and penalty can be imposed under Section 73 or Section 74.

TATTVAM COMMENTS:

- Reliance was specifically placed on the decision of **M/s. Aathi Hotel v. The Assistant Commissioner (ST) (FAC), Nangapattinam District, 2022 (1) TMI 1213 – Madras High Court** wherein it was held that imposition of interest penalty either under Section 73 or Section 74 is not justified where such credit was not only availed but also utilised for discharging the tax liability. Penalty under Section 122 of the CGST Act can be imposed on wrong availment of ITC.
- In various cases, the Department has issued SCNs demanding penalty in cases involving wrongful availment of ITC wherein the ITC has not been utilized. This judgment can be relied upon by the assessees in such cases.

mm) Deposit in Electronic Cash Ledger is equivalent to tax payment, notices for interest demand quashed

(Arya Cotton Industries v. Union of India, 2024 (7) TMI 239 - Gujarat High Court)

Facts:

- Petitioners were unable to transfer unutilized input tax credit (on account of conversion of Limited Liability Partnership into a Limited Company) due to some technical issues, leading to delays in filing GST returns. They deposited tax in the electronic cash ledger (ECL) to curtail interest liability, but the department demanded interest up to the date of filing the return.
- The respondents issued demand notices and show-cause notices asserting that interest was payable until the date of filing returns, even if the amount in electronic cash ledger was deposited earlier.

Held:

- The Gujarat High Court quashed the demand notices and communications requiring interest for the period after the deposit of tax in the ECL until the filing of returns.
- The court held that the deposit in the ECL is equivalent to payment of tax and once such deposit is made in the ECL, such amount is considered to be credited to the government's account.
- The High Court relied upon the judgment of the Madras High Court in the case of Eicher Motors - 2024 (1) TMI 1111 - Madras High Court and the earlier judgment of Gujarat High Court in the case of Vishnu Aroma Pouching Pvt. Ltd. - 2020 (4) TMI 56 - Gujarat High Court.

TATTVAM COMMENTS:

- In this case, the Gujarat High Court has further reinforced the position of law on the point that the deposit in the ECL is equivalent to payment of tax. The tax is considered paid once it is credited to the government's account.
- W.e.f. 10.07.2024, a proviso has been inserted in Rule 88B of the CGST Rules to provide that the amount credited in the ECL on or before the due date of filing return but debited from ECL after the due date will not be considered for calculating the interest if the said amount is lying in the said ledger from the due date till the date of its debit at the time of filing the return.

nn) High Court admits writ petition involving a question of law at the SCN stage, citing interpretational and jurisdictional issues.

(AKA Logistics Pvt. Ltd. v. UOI, 2024 (6) TMI 1035 - Jharkhand High Court)

Facts:

- SCN was issued against the Petitioner due to the short payment of tax on account of wrong classification of supplies.
- Respondent contended that this is not a case where the writ application should be entertained at this initial stage and the petitioner can very well raise all the

grounds before the assessing officer contending that it is a case of composite/mixed supply.

Held:

- Dispute relates to pure question of law as to whether the impugned supplies fall under the purview of "composite supplies" or "mixed supplies", therefore, the High Court can hear these matters.
- In case where a person has prima facie established that the show cause notice has been issued without jurisdiction and in an abuse of the process of law, the writ court should not hesitate to interfere even at the stage of show cause notice.
- Where case involves interpretation issue, extended period of limitation is not invokable.

TATTVAM COMMENTS:

- In general practice, doors of High Court shall not be knocked at the stage of issuance of SCN. However, this case underlines the peculiar situations in which the High Court can interfere even at the SCN stage.
- This decision highlights the continuous stance of various High Courts that the plea of alternative remedy cannot be entertained when the same would cause palpable injustice to the other party.

oo) High Court stays GST recovery on mining lease payments pending Supreme Court decision

(C. Srinivasa Moorthy v. The Deputy State Tax Officer, Hosur, 2024 (6) TMI 1090 – Madras High Court)

Facts:

- The Petitioner has filed the writ petition challenging an intimation communicating levy of GST on seigniorage fees and mining lease amounts paid by the petitioner to the government.
- The dispute is whether GST should be levied on these payments under the GST law.

Held:

- The High Court disposed of the petition on the basis of a previous Division Bench Judgement in **A. Venkatachalam v Asst. Commissioner (ST), Palladam, 2024 (2) TMI 488 – Madras High Court**.
- The court directed that there shall be no recovery of GST on mining lease until the Nine-Judge Constitution Bench of the Supreme Court decides on the issue.

TATTVAM COMMENTS:

- The court's decision effectively puts a hold on GST recovery on royalties, seigniorage fees, and mining lease amounts paid to the government until the Supreme Court's Nine-Judge Constitution Bench decides on the matter, indicating the complexity and significance of the issue.

pp) Burden of proof on revenue authority of proving product classification under a specific tariff heading

(Harsh Polyfabric Pvt Ltd v. UOI, 2024 (6) TMI 896 - Calcutta High Court)

Facts:

- The petitioner classified Non-woven Fabrics and PPSB Bed Sheet under the **Chapter Headings 5603 and 6304 of the Customs Tariff Act, 1975**, respectively.
- PP Granules which are procured for manufacturing of the above, are classified under HSN 3901 or 3902 on which GST @18% is applicable. However, supplies of Non-woven Fabric are taxable @12% under HSN code 5603, while supplies of PPSB Bed Sheet are taxable @5% under HSN Code 6304.
- The present writ petition has been filled in relation to the Impugned Order wherein PPSB Bed Sheets have been classified under the HSN code 5603 instead of HSN Code 6304, thereby partially denying the refund of accumulated ITC.

Held:

- Onus of proving a product's classification under a specific tariff heading lies with the revenue authority, which must demonstrate that such classification is based on the common parlance test and as such, aligns with the understanding of consumers.
- The Appellate Authority's decision lacks sufficient evidentiary support and proper consideration of pertinent factual and legal principles, necessitating a reassessment of the matter at hand. The impugned order of the Appellate Authority was set aside, and it was directed to conduct de novo reassessment in this matter.

TATTVAM COMMENTS:

- Classification cases should ensure a reasoned decision as to why it should be classified in a particular heading. Proper reasoning is crucial for transparency and determining material factors which can change the classification.

qq) Refund application permissible despite non-registration of petitioner and manual filing; RFD-01 not mandatory

(Amn Life Pvt Ltd v. UOI, 2024 (6) TMI 834 - Himachal Pradesh High Court)

Facts:

- Applications of refund for the FYs 2017-2018, 2018-2019 & 2020-2021 were filed by the petitioner. The petitioner had acquired an entity and had transferred the ITC of that entity by filing ITC-02. The petitioner had filed for refund of ITC for the period prior to the acquisition under 'Inverted Duty Structure'. As the petitioner was not registered during the period for which refund was filed, the refund application was filed manually.
- Applications were denied of the following grounds:
  - **a)** Petitioner was not registered under GST during the relevant period;
  - **b)** Refund application is required to be filed through electronic mode only and manual applications are not allowed; and
  - **c)** RFD-01 had not been filed.

- Aggrieved from the impugned order, present writ has been filed.

Held:

- Section 54(1) permits any person to make an application for refund of tax. Therefore, ground that the petitioner was not "registered" is not maintainable.
- Manual applications can be entertained having regard to Rule 97A of the CGST Rules, which specifically permits such manual filing of applications as opposed to the Circular requiring electric filing.
- Applications for refund cannot be rejected on the ground that a particular form RFD-01 has not been filed.

TATTVAM COMMENTS:

- Court emphasized that the status of registration during the period for which refund is sought, should not hinder the eligibility for seeking a refund.
- Court further emphasized on the well-settled position of law that the departmental circulars cannot override the principal legislation and related rules.

rr) Appeal to be heard on merits; attachment order to be revoked and recovery stay granted under Section107(7)

Manas Banerjee v. The State of West Bengal & Ors, 2024 (6) TMI 1094 – Calcutta High Court)

Facts:

- Under Section 107 of the CGST Act, the petitioner filed an appeal against an order passed under Section 73 of the CGST Act for F.Y. 2017-18.
- The appeal was filed beyond the period of limitation. However, the Petitioner availed the benefit under Notification dated 02.11.2023 which inter alia permitted the disposal of appeals on merits which were filed on or before 31.01.2024, provided the condition pertaining to the additional pre-deposit amount is satisfied.

- Despite complying with all the above conditions, the Petitioner's appeal still remained pending and the attachment order on the petitioner's bank account was not revoked.

Held:

- The High Court held that the order of attachment cannot be permitted to continue and must be revoked.
- The appellate authority was directed to hear and dispose of the appeal on merits within 6 weeks from the date of the order's communication.
- The petitioner was entitled to the benefit of Section 107(7) of the CGST Act, which provides for a stay on recovery proceedings once the conditions under Section 107(6) are met.

TATTVAM COMMENTS:

- The court's decision emphasises the principle that once a taxpayer complies with the statutory requirements for an appeal, including making the required pre-deposit, recovery proceedings should be stayed. This protects the taxpayer's rights during the appeal process.

ss) Orders quashed for violation of natural justice principles; matter remanded for fresh consideration due to lack of access to impounded documents

(Aditya Steel Trading v. Joint Commissioner, Central Goods and Services Tax and Central Excise, 2024 (6) TMI 1324 – Bombay High Court)

FACTS:

- The petitioner challenged the orders on the grounds of violation of the principles of natural justice.
- The petitioner argued that copies of impounded documents were not made available with the SCN. They were only made available on a later date which prevented the petitioner from filing an effective response to the SCN.

Held:

- The Court noted that without the impounded documents, the Petitioner could not effectively respond to the SCN.
- The impugned orders were quashed and set aside. The matter was remanded to Respondent No. 1 for fresh consideration.

TATTVAM COMMENTS:

- The importance of adhering to the principles of natural justice in GST proceedings, particularly the right to access all relevant documents to prepare a proper defense has been highlighted in this judgment.
- The case highlights procedural fairness in GST adjudication, focusing on ensuring that taxpayers have a fair opportunity to respond to SCNs.

tt) Appeal to be decided on merits; dismissal on technical grounds of certified copy filing unjustified.

(Sunder Synthetics Pvt Ltd v. Union of India, 2024 (6) TMI 833 Telangana High Court)

Facts:

- The Petitioner filed an appeal which was admitted by the Appellate Authority on the same day. However, the appeal was dismissed on the grounds that a physically certified copy of the impugned Order was not filed on the same day and was filed at a later point in time.

Held:

- The Appellate Authority had already admitted the appeal and as such, it should have been decided on the merits.
- Instead, the Authority dismissed the appeal on some technicality related to the filing of a certified copy of the impugned Order, which was unjustified on the part of the Appellate Authority.

- In this regard, it was further noted that the production of physical copies cannot be held to be a quintessential requirement, especially when the impugned Order had already been uploaded.

TATTVAM COMMENTS:

- The court relied on similar judgments from various High Courts to support its decision that an admitted appeal should have been decided on the merits of the case and should not have been dismissed just on the basis of hyper-technical grounds.
- The Court's decision to have the appeal heard on merits rather than dismissing it on technical grounds ensures that the petitioner's right to be heard is protected.
- The decisions clarified the meaning of "admission" as admitted for final hearing.

JULY 2024

uu) Prospective application of Section 7(1)(aa) from 01.01.2022, recognizing a club and its members as separate entities under GST

[Indian Medical Association v. Union of India, 2024 (7) TMI 1448 - Kerala High Court]

Facts:

- Petitioner is an association under the provisions of the Travancore – Cochin Literary Scientific & Charitable Societies Registration Act, 1955 and its members were admitted on payment of one-time admission fees.
- Parliament introduced **Section 7(1)(aa)** vide the Finance Act, 2021, with retrospective effect from 01.07.2017, inserting a legal fiction and artificially deeming a club/association and its members to be two separate persons.
- Petitioner argued that **Section 2(17)(e)** and **Section 7(1)(aa) of the CGST Act** are ultra vires to **Article 246A** read with **Article 366(12A)** and are

violative of **Articles 14, 19(1)(g), 265**, and **300A of the Constitution of India**.

Held:

- **Article 246A** grants plenary power to Parliament and State Legislatures to enact laws on GST without any limitation. The Constitution does not put any restriction or limitation from defining a person(s) for the purpose of levy of GST.
- The supply of goods and services may be by club/association to its members and the principle of the mutuality should not come in a way of Parliament or State legislature to enact law for tax on such supply of goods and services. The court concluded that the insertion of Section 7(1)(aa) in CGST Act is within legislative competence and does not violate any fundamental rights.
- The petitioner primarily relied on the principle of mutuality, arguing that clubs and associations are self-serving entities, and transactions between them and their members do not constitute a supply of goods or services. The court referred to judgment of the Supreme Court in ***State of West Bengal v. Calcutta Club***, which upheld the principle of mutuality. However, the court noted that the legislative amendment in Section 7(1)(aa) effectively removed the basis of this principle by deeming clubs and their members as separate entities for GST purposes.
- The court acknowledged that the principle of mutuality was well-established before the amendment, and GST authorities did not demand GST from the petitioner before the amendment. Consequently, the court held that Section 7(1)(aa) should have prospective operation from 01.01.2022, not retrospectively from 01.07.2017.

TATTVAM COMMENTS:

- The Kerala High Court has categorically held that the scope of Article 246A is very wide and it allows the Parliament and State Legislatures to impose tax on supply of goods and services without any limitation. Direct consequence would be that the Parliament and State Legislature is competent enough to bring any transaction under the purview of GST law

considering how widely the terms supply, goods and services have been defined under the GST law.

- Court has held that the principle of mutuality will not come in a way of the Parliament or the State legislature to enact law for tax on supply of goods and services. However, Court has provided some relief to the Petitioner by holding that Section 7(1)(aa) cannot be implemented with retrospective effect as the principle of mutuality was well-recognized prior to the amendment and thus, applying the provision with retrospective effect would create unforeseen burden on the taxpayers.
- This is a High Court decision and therefore, it cannot be said to be a binding precedent on other jurisdictional high courts. As such, the said issue will be settled only at the level of Supreme Court.

vv) Order denying refund solely based on Circular No. 135/15/2020-GST set aside and matter remitted back to Appellate Authority to decide the appeal afresh.

[MO Industries v. UOI, [2024] 165 taxmann.com 10 (Rajasthan)]

Facts:

- Petitioner filed an application seeking refund of ITC accumulated due to Inverted Tax Structure which was allowed on 05.08.2021.
- However, in the appeal filed by the Department, refund order was quashed relying upon **Circular No.135/15/2020-GST dated 31.03.2020** wherein it was clarified that refund of accumulated ITC of **Section 54(3)(ii) of the CGST Act** would not be applicable in cases where the input and the output supplies are the same.
- Present petition is filed on the grounds that the Circular relied upon was held to be repugnant and in conflict with the interpretation of Section 54(3)(ii) of CGST Act in ***Baker Hughes Asia Pacific Limited v. UOI, Civil Writ Petition No. 5714/2021***.

Held:

- Court relied ***on Baker Hughes Asia Pacific Limited v. UOI, Civil Writ Petition No. 5714/2021*** wherein **Circular No. 135/15/2020-GST,** being a subordinate legislation, was held to be in conflict with the parent legislation i.e. **Section 54(3)(ii) of CGST Act** and hence, the same cannot be applied to oust the legitimate claim for accumulated ITC refund.
- Further, it was also considered that claim of refund of ITC was prior to date of issuance of the Circular.
- Appellate Authority has allowed the appeal solely relying upon the **Circular No.135/15/2020-GST.** Consequently, the impugned order is set aside and the matter remitted back to the Appellate Authority to decide the appeal afresh.

TATTVAM COMMENTS:

- The position of law on this issue has been reinforced by the Rajasthan HC which is consistent with the objective sought to be achieved by Section 54(3)(ii) of the CGST Act which is to allow refund accumulated on account of inverted duty structure irrespective of the fact that inputs and output are same.
- The Circular, being a delegated legislation, cannot travel beyond the objective sought to be achieved by the principal statute.

ww) Adjudication invalidated due to non-issuance of mandatory GST ASMT-10 notice post-scrutiny discrepancies

[Mandarina Apartment Owners Welfare Association (MAOWA) v. CTO, 2024-VIL-721-MAD]

Facts:

WP No. 15307 of 2024 & WP No. 15330 of 2024

- The Petitioner challenged the adjudication proceedings initiated through the SCNs issued against him on the ground that the non-issuance of Form GST ASMT-10 notice vitiated the adjudication process.

Held:

- At the outset, it was noted that under **sub-section (1) of Section 61**, the word "may" is used. As such, it was observed that the word "may" is indicative of and raises the presumption that the scrutiny of monthly returns is not mandatory.
- The text of **sub-section (1) of Section 61** indicates clearly that the obligation to issue notice to the registered person is not triggered merely by the selection of the returns of such person for scrutiny, but by the discovery of discrepancies in such returns on scrutiny.
- Upon fulfilment of two conditions, namely, selection of returns for scrutiny and the discovery of discrepancies on such scrutiny, there is an obligation to issue notice. **Rule 99(1)** uses the language "and in case of any discrepancy, he shall issue a notice to the said person in Form GST ASMT-10", thereby raising the presumption that the obligation is mandatory.
- The consequence of not issuing the ASMT-10 notice, in spite of noticing discrepancies after selecting and scrutinizing returns, would be that it vitiates the scrutiny process, including the discrepancies noticed thereby and the quantification, if any, done in course thereof.
- As regards adjudication, the limited impact would be that the scrutiny under Section 61 cannot be relied upon for adjudication.

TATTVAM COMMENTS:

- It was further held that scrutiny of returns and the issuance of notice in Form ASMT-10 under **Section 61 of the CGST Act** is not a mandatory pre-requisite for adjudication under **Section 73 of the CGST Act**.
- However, where the discrepancies are noticed during the scrutiny of returns, notice in Form ASMT – 10 is required to be issued.
- Where such notice is not issued, then the same vitiates the scrutiny process but does not necessarily invalidate the show cause proceedings initiated under Section 73 or 74 of the CGST Act. However, the scrutiny under Section 61 cannot be relied upon during the adjudication proceedings.
- In this case, the court has emphasized on the importance of procedural compliance while also recognizing the need to balance it with substantive justice.

xx) Procedural error in refund claim does not bar legitimate export incentives under Rule 89 of CGST Rules

[Shobikaa Impex Pvt Ltd v. UOI, 2024-VIL-702-MAD]

Facts:

- The petitioner is a 100% Export Oriented Unit (EOU) and had exported goods out of country. By mistake, the petitioner had wrongly claimed refund under **Rule 96 of the CGST Rules, 2017** on the IGST paid by the petitioner on capital goods and inputs utilized for export of goods instead of **Rule 89 of the CGST Rules, 2017.**
- Refund of IGST was availed on such inputs against which benefits under the notifications as specified under **Rule 96(10) of the CGST Rules** were available and as such, the petitioner was not eligible for the refund under **Rule 96 of the CGST Rules**. Petitioner was willing to reverse the same but pointed out there was no machinery to reverse it.
- SCN was issued for ineligible refund of IGST paid on exports availed by petitioner and impugned order was passed confirming the demand which is under challenge.

Held:

- Petitioner was otherwise entitled to refund under **Rule 89 of the CGST Rules, 2017** (other than the ITC availed on capital goods)**.** Therefore, it was held that procedural irregularity committed by petitioner should not come in the legitimate way of grant of export incentives as exports were made and the refund claims were itself based on the shipping bills. Matter was remanded back with instructions to examine eligibility of refund under Rule 89.

TATTVAM COMMENTS:

- The Madras High Court has followed the principle laid down by the Apex Court in ***Commissioner of Sales Tax, Uttar Pradesh Vs. Auriaya Chamber of Commerce, Allahabad, 1986 (3) SCC 50***, wherein it has been held that the rules or procedures are handmaids of justice not its mistress.
- Court has emphasized on allowing substantive benefit of availing export incentives over the denial of the same based on a mere procedural

irregularity so as to ensure that domestic players should not be deprived of necessary benefits necessary for competing in the international market which is the objective of refund mechanism under GST law.

yy) Disallowance of ITC due to cancellation of supplier's registration quashed on the grounds of inadequate evaluation by the Appellate Authority

[Shiva Chemicals v. Assist. Commissioner of Revenue, 2024 (7) TMI 1378 - Calcutta High Court]

Facts:

- The ITC availed by the Petitioner in respect of certain inward supplies was disallowed on the grounds that the registration of the suppliers has been cancelled.
- The Petitioner challenged the impugned Order confirming the demand of ineligible ITC on the above ground.

Held:

- The Court noted that the initial burden of proof has already been discharged by the Petitioner by presenting e-way bills, invoices, bank statements, and GSTR-2A, showing the transaction's authenticity.
- Further, the Court noted that the findings of the Appellate Authority that the Petitioner is not eligible for ITC in absence of transport and other documents, appears to be verbatim reproduction of the observations made by the proper officer.
- Accordingly, it was held that the impugned Order suffers from non-application of mind and is perverse. The appellate authority ought to have indicated and specified as to what other documents the petitioner no.1 was required to be disclosed to establish the genuinity of the transaction.

TATTVAM COMMENTS:

- The impugned Order was passed in contravention of the well-settled principle of law that the order passed under Sections 73 and 74 was a non-speaking

order. The High Court remanded the matter back to the appellate authority to reconsider the matter in light of the observations made by it.

zz) Violation of Natural Justice: Confiscation orders quashed due to lack of proper notice and material disclosure

[Cluster Enterprises v. Deputy Assistant Commissioner, 2024 (7) TMI 1512 - Andhra Pradesh High Court]

Facts:

- Notice in **Form GST MOV-10** was issued to the petitioner to show cause as to why the goods being transported and vehicle in which the goods were transported should not be confiscated.
- Petitioners have filed their objections. After receipt of these objections, respondent passed orders confiscating the goods as well as the vehicle. Aggrieved from impugned orders, present petition was filed.

Held:

- It is a settled principle of law that a SCN would have to set out the entire case against the noticee and noticee should be given an opportunity to rebut the same.
- In that process, the noticee can always ask for the material on the basis of which the SCN has been issued.
- In the present case, the Court noted that the order of confiscation contains various details which were not placed before the petitioners in the SCNs issued against it. The same would amount to violation of principles of natural justice.
- Further, the department did not choose to respond to the request of the petitioners for supply of the material on the basis of which the SCN has been issued and therefore, the same would also amount to further violation of the principles of natural justice.
- The non-mention of DIN on order of confiscation also militates against the validity of the proceedings.

TATTVAM COMMENTS:

- Present case reiterates the well-settled principle of law that the SCN is a genesis of adjudication proceedings and as such, it must contain all the allegations and such allegations should not be vague, unintelligible, or lack details so as to give the noticee a fair opportunity to defend itself. Another facet of principles of natural justice was reiterated which provides that the noticee is entitled to all the relevant documents relied on by the department to issue the SCN.

aaa) Constitutional validity of anti-profiteering provisions challenged and notice was issued to the Central government

[Inox Leisure Ltd. v. UOI, [2024] 164 taxmann.com 713 (SC)]

Facts:

- The constitutional validity of the anti-profiteering provisions under the GST law has been upheld in ***Reckitt Benckiser India (P.) Ltd. v. Union of India [2024] 158 taxmann.com 675.***
- In present SLP, the above order of the High Court has been challenged on the ground that the anti-profiteering provisions i.e., **Section 171 of CGST Act** and **Rules 122, 124, 126, 127, 129, 133 and 134 of CGST Rules,** are not constitutionally valid.

Held:

- Notice was issued to the Central government.
- Further, in the case of ***Excel Rasayan Private Limited v. UOI, SLP (C) No. 3112 Of 2024, the*** constitutional validity of anti-profiteering provisions is also under challenge. Therefore, the present SLP was tagged along with the same.

bbb) SLP admitted and notice issued to Central Government w.r.t. assignment of functions of proper officer to central tax officers including issuance of audit reports and SCNs

[Fomento Resorts & Hotels Ltd. v. UOI, [2024] 164 taxmann.com 612 (SC)]

Facts:

- Bombay High Court in the case of ***Fomento Resorts and Hotels Ltd. v. UOI, 2024 (84) G.S.T.L. 51 (Bom.)*** has upheld the validity of **Circular No. 3/3/2017-GST, Circular No. 31/05/2018-GST**, and **Circular No. 169/01/2022-GST** wherein CBIC had assigned the functions of 'proper officer' to Central Tax Officers, including the issuance of audit reports and show cause notices.
- The Court examined the relevant provisions of the CGST Act, including **Sections 3, 4, and 5 of the CGST Act**, which empower the government and the Board to appoint and authorize officers for the purposes of the Act. The court held that the impugned circulars validly assigned the functions of the proper officer to the central tax officers, including the issuance of audit reports and show cause notices. Petitioner vide the present SLP has challenged the above order of Bombay High Court.

Held:

- SLP has been admitted and notice has been issued to the Government.

ccc) Stay on GST proceedings regarding assignment of long-term leasehold rights on account of pending Gujarat High Court decision

[Mahaveer Warehousing and Logistics v. UOI, 2024 (8) TMI 69 - Gujarat High Court]

Facts:

- Petitioner received notice to show cause as to why GST on transaction of assignment of long-term leasehold right should not be levied as per the provisions of CGST Act.

Held:

- Matter pertaining to taxability of assignment of rights pertaining to long-term lease is already pending before the Gujarat High Court in Special Civil Application No. 113545 of 2023.
- Present matter is to be heard along with the above Special Civil Application No. 11345 of 2023 and other allied matters.

- Further, the department was directed to not continue further proceedings initiated vide the impugned SCN until the final decision.

TATTVAM COMMENTS:

- Interim relief was extended to the petitioner as the department was instructed to not carry out any further proceedings in respect of the SCN.

ddd) GST not applicable on recovery of retention bonuses, work-from-home allowances, and educational assistance from early exiting employees

(In Re: M/s. Fidelity Information Services India Pvt Ltd, 2024-VIL-105-AAR)

Facts:

- Applicant sought advance ruling on the applicability of GST on the following recoveries made by the employer from the employee in the case where the employee exits before the pre-determined period of employment:
    - Retention and joining bonuses to incentivize employees to join and stay with the organization for a pre-defined period;
    - One-time work-from-home setup allowance of INR 22,000 to employees;
    - Financial assistance to employees for further education under TAP.

Held:

- Recovery by applicant is in same lines with that of forfeiture of salary or recovery of bond amount in the event of the employee leaving the employment before the minimum agreed period which is not taxable under GST as per **Circular No. 178/10/2022-GST.**
- The authority also referred to **Circular No. 172/04/2022-GST**, which states that perquisites provided by the employer to employees under a contractual agreement are not subject to GST. Accordingly, the Authority held that these bonuses as well as allowances are also in the nature of perquisites provided by the employer to its employees in terms of contractual agreement entered into

between the employer and employee, therefore, the same shall not be taxable under GST.

TATTVAM COMMENTS:

- This advance ruling has reinforced the well-settled principle of law that these recoveries are not in the nature of agreement for tolerating the non-performance of the terms of a contract. Instead, these recoveries are made to compensate for the breach of contract and as such, these recoveries are in the nature for not tolerating the non-performance of the terms of a contract.

eee) No GST on nominal employee canteen deductions; ITC available for canteen services under mandatory provision to the extent of cost borne

[In Re: M/s. Alleima India (P.) Ltd., 2024 (7) TMI 981 - Authority for Advance Ruling, Gujarat]

Facts:

- Applicant has engaged a canteen service provider ("**CSP**") for preparing and supplying food to their employees and recovers a nominal amount on monthly basis as fees from each employee.
- Applicant has sought advance ruling on the taxability of such recovery of nominal amount from the employees as well as the availability of ITC on the same.

Held:

- The Authority took note of the clarification under **Circular No. 172/04/2022-GST** wherein it is clarified that perquisites provided by the 'employer' to the 'employee' in terms of contractual agreement entered into between the employer and the employee, will not be subjected to GST when the same are provided in terms of the contract between the employer and employee.
- Therefore, deduction of nominal amount made by applicant from salary of employees who are availing facility of food provided in factory premises would not be considered as a 'supply' in terms of Section 7 of CGST Act since the

same is being done pursuant to the contractual arrangement between the employer and employees.

- Further, on the issue of ITC, the Authority noted that **Circular No. 172/4/2022-GST** clarifies that post substitution, proviso to Section 17(5)(iii)(b) is applicable to whole of clause (b) of Section 17(5). As such, it was held that the ITC will be available to the applicant in respect of food and beverages as canteen facility is obligatorily to be provided under the Factories Act, 1948, read with Gujarat Factories Rules, 1963 as far as provision of canteen service employees working at the factory is concerned. However, the ITC on GST charged by the canteen service provider will be restricted to the extent of cost borne by the applicant only.

TATTVAM COMMENTS:

- This ruling is in line with some of the other similar advance rulings issued by the Authority of Advance Ruling, Gujarat such as - ***Tata Motors Limited [GUJ/GAAAR/Appeal/2022/23].***
- Further, there are also advance rulings wherein it has been held that when the companies are not retaining any profit margin while collecting employees' portion of canteen charges, the transaction can be said to be carried out without any consideration and thus, not taxable. [***M/s. Amneal Pharmaceuticals Pvt. Ltd., Gujarat, 2021-VIL-44-AAAR***; ***M/S Dishman Carbogen Amcis Ltd., 2021- VIL334- AAR***; and ***M/S Tata Motors Ltd., 2021-VIL-316-AAR***]
- However, contrary advance rulings also exist wherein it has been held that the food supplied by an employer to the workers at a subsidized rate would be covered within the meaning of the expression 'service' and thus, would be taxable.[***Caltech Polymers Pvt. Ltd.,*** 2018 ***(10) TMI 1313***]

fff) GST exemption on renting of buildings to the government for scheduled tribe welfare hostels

[In Re: M/s. K. A. Sujit Chandan, 2024 (7) TMI 521 - Authority for Advance Rulings, Karnataka]

Facts:

- The applicant has rented out a building to the Department of Social Welfare, Government of Karnataka, and same is used by the Department of Social Welfare to run the boys' hostel.
- Applicant sought advance ruling on whether the services provided to the Department of Social Welfare are exempted as per entry No. 3 of Notification 12/2017-C.T. (Rate) as the same falls under the purview of the functions envisaged under Article 243W of the Constitution of India.

Held:

- It is observed that, in order to claim exemption on supply of services, two conditions should be satisfied:
    - **first**, pure services (excluding works contract service or other composite supplies involving any goods) should be provided to Central Government, State Government or Union territory or local authority; and
    - **second**, such pure services must be related to any function entrusted to a Panchayat under Article 243G or a Municipality under Article 243W.
- The Authority noted that the Applicant has rented out the building to the Department for Scheduled Tribe Welfare which is a Department of Government of Karnataka. Thus, the Applicant is providing services to the State Government and hence, the first condition is satisfied.
- The Applicant has rented out the building to the Department for Scheduled Tribe Welfare to run hostels for boys belonging to Schedule Tribes. This is in relation to the function entrusted to a panchayat under Article 243G of the Constitution (Welfare of the weaker sections, and in particular, of SCs and STs). Thus, the second condition is also satisfied.

TATTVAM COMMENTS:

- Present advance ruling has correctly held that the rental services provided to the Department for Scheduled Tribe is a "pure service", therefore, the

same would be exempt in terms of **Sl. No. 3 of Notification 12/2017 Central Tax (Rate) dated 28.06.2017**.

ggg) ITC available on motor vehicle leasing for mandatory night transportation of women employees

(In Re: CMA CGM Global Business Services (India) Pvt.Ltd., 2024 (7) TMI 1238 – AAR Tamil Nadu)

Facts:

- The Applicant provides for the transportation facilities to its women employees as per the requirement under the Tamil Nadu Shops and Establishments Act, 1947 read with the relevant rules and notifications.
- The Applicant sought advance ruling on the eligibility of ITC on the taxes paid on the leasing of motor vehicles for the above purpose.

Held:

- In this regard, the Authority first noted that CBIC vide Circular No. 172/04/2022 has already clarified that the proviso to Section 17(5)(b)(iii) applies to the entire clause (b) of Section 17(5).
- The said proviso allows for the availment of ITC for restricted goods and services under Section 17(5)(b) where it is obligatory for an employer to provide the same to its employees under any law for the time being in force.
- Accordingly, the Authority opined that since Applicant provides for the transportation facility to ensure safety and security of women employees as mandated under Tamil Nadu Shops and Establishments Act, 1947, ITC shall be available to the Applicant in view of the proviso read with the clarification issued vide the Circular.
- ITC will be available only for services provided to women employees working between 8:00 PM and 6:00 AM, as mandated by the Tamil Nadu Shops and Establishments Act, 1947. The ITC on services for other shifts remains blocked under Section 17(5)(b) of the CGST Act.

TATTVAM COMMENTS:

- This advance ruling is a welcome ruling for the Applicant since it has correctly allowed the benefit of ITC to the Applicant in view of the **proviso under Section 17(5)(b)(iii)** which allows availment of credit even in case of restrictions as laid down under Section 17(5)(b) where the services has to be provided out of a legal mandate under any law.


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