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1. JUDICIAL PRONOUNCEMENTS

a) Condition to deposit Rs. 70 lakhs for bail not sustainable in the absence finally assessed liability

(M/s Subhash Chouhan Vs Union of India, 2023-VIL-06-SC)

Facts:

- The appellant challenged the order passed by the Chhattisgarh High Court wherein one of the conditions was to deposit the sum of Rs. 70 lakhs under protest in favour of the Principal Commissioner, CGST within a period of 45 days.
- In this regard, appellant challenged the conditions to deposit Rs.70 lakhs within 45 days before the Hon'ble SC.

Held:

- In the instant case, the Court accepted the contention raised by the appellant wherein the appellant stated before the Hon'ble SC that to deposit the 70 lakhs within the 45 days from the date of the release as pre-requisite conditions for the bail is not sustainable in as much as the FIR report was in respect of wrongfully availing the ITC of Rs.6,95,32,472/-
- Further, the Court held that conditions directing the appellant to deposit a sum of Rs.70 lakhs is not liable to be sustained and set aside. However, the rest of the conditions in the impugned order are sustained.

b) Manual filing of GSTR-1 allowed to amend the reporting errors in GSTR-1 in order to entitle ITC to the recipient

(M/s Y.B Constructions Pvt Ltd. Vs Union of India and Others, 2023-VIL-138-Ori)

Facts:

- The petitioner filed the writ petition seeking direction to the respondent to permit to rectify the GST return filed for the period 2017-18 and 2018-19 in

Form B2B instead of B2C as was wrongly filed under GSTR-1 in order to get the input tax credit (ITC) benefit by the principal contractor.

- The last date of filing the return was 31st March 2019 and the date by which the rectification should have been carried out was 13th April 2019.
- In the instant case, the error came to be noticed after the principal contractor held up the legitimate running bill amount to the petitioner by informing it about the errors.

Held:

- By permitting the petitioner to rectify the above error, there will no loss whatsoever caused to the opposite parties. It is not as if that there will be any escapement of tax. This is only about the ITC benefit which in any event has to be given to the petitioner.
- Further, the reference is drawn to decision passed by the Hon'ble HC in the case of **M/s Sun Dye Chem Vs. The Assistant Commissioner ST-2020-VIL-523-MAD,** accepted the plea of the petitioner and directed that the petitioner in that case should be permitted to file the corrected form.
- In light of above case law and abovementioned reasons the court permitted the petitioner to correct GSTR-1 for the aforementioned periods.

c) Measures stipulated under the Circular to be followed to reduce the pendency of writ petitions due to non-constitution of GST Tribunal

(M/s Gulf Oil Lubricants India Ltd. Vs Joint Commissioner of State Tax, Appeal-V, Mumbai, 2023-VIL-132-BOM)

Facts:

- The petitioner had received the SCN which were adjudicated and order-in-original was passed. Thereafter, petitioner filed the appeal before the Appellate Authority and the appeals were dismissed.
- Be that as it may, the petitioner filed the writ petitions invoking Article 226 of the Indian Constitution on the ground that though the statute provides an appeal to Appellate Tribunal under section 112 of the State Good and Services

Tax Act, since the Appellate Tribunal is not constituted the petition is being made before the High Court.

Held:

- Reference is made to the **Circular no. JC(HQ)-1/GST/2020/Appeal/ADM-8 dated 26.05.2020** issued by Commissioner of State Tax, Maharashtra giving clarification on non-constitution of Appellate Tribunal wherein stating that prescribed time limit to make application to Appellate Tribunal will be counted from the date on which president or the State president enters office.
- Respondent shall consider two measure to reduce the inflow of writ petitions in this Court due to non-constitution of the GST Tribunals.
- First to incorporate a stipulation contained in clause 4.3 and clause 5 of Trade Circular dated 26.05.2020 in the order passed by the First Appellate Authority, this will put the taxpayer to notice that the time limit for filing the appeal is extended and if declarations is filed within the stipulated period, the protective measure would automatically come into force.
- Second, if recovery is being undertaken in terms of clause 5 for failure to file a declaration within the time limit, by way of indulgence to give 15 days' period to make such declaration.
- These two measures will substantially reduce the litigation which has arisen due to non-constitution of GST Tribunal.

d) Uploading of summary of Show cause notice in form GST-DRC-01 under Rule 142(1) of the GST Act is mandatory

(M/s New Hanumat Marbles Vs State of Punjab and others, 2023-VIL-122-P&H)

Facts:

- Search was conducted in the premises of the petitioner on 03.01.2018 and some documents were seized from his office. Thereafter, he was issued notice and the petitioner submitted his reply and the case was adjourned for 12.07.2018.

- In the order dated 10.03.2021, it is further noticed that on 08.01.2021 the case was allotted to some other officer and that officer issued summons dated 19.02.2021 under section 70 of the Central/ Punjab GST Act,2017.
- The grievance of the petitioner is that before passing final order on assessment, Rule 142(1) of the CGST Act, 2017 is mandatory to be followed and GST DRC-01 has to be uploaded electronically on the website.
- Hence, the petitioner filed the writ petition under Article 226 of the Indian Constitution seeking quashing of order in Form DRC-07 and detailed order passed under section 74(5) of the GST Act/Punjab GST Act,2017.

Held:

- Reference was made to the decision passed by the High court of Madhya Pradesh in the case of **M/s Shri Shyam Baba Edible Oils Vs The chief Commissioner and another-2020-VIL-567-MP,** in which Hon'ble High Court had examined a case where show cause notice was issued to the petitioner on his email address. Reference was made to Rule 142(1) of the CGST Act, and it was observed that the only mode prescribed for communicating to the SCN/order is by way of uploading the same on the website of the revenue.
- Therefore, in the facts of the present case the respondent did not upload the notice on the website of the revenue as per Rule 142(1) of the CGST Act, 2017 before passing final orders.
- Hence, in the present case the orders passed by the respondent are set aside and the matter is remanded back to the Assessing officer to pass fresh order after issuing notice as contemplated under Rule 142(1) of the CGST Act and afford the opportunity of hearing to the petitioner in accordance with law.

e) Authorities cannot deny the opportunity of personal hearing despite assessee has marked 'No' against the option for personal hearing

(M/s Mohan Agencies Vs State of U.P And Ors., 2023-VIL-114-ALH)

Facts:

- The notice in the proceedings was issued to the petitioner seeking his reply within 30 days.
- The Assessing Authority had at that stage chosen to not give any opportunity of hearing to the petitioner by mentioning "NA" against column description "Date of personal hearing".
- Similar endorsements were made against the columns for "Time of personal hearing" and "Venue where personal hearing will be held".
- Be that as it may, revenue authority contended that the petitioner was denied opportunity of hearing because he had tick marked the option 'No' against the option for personal hearing in the reply to the show-cause-notice submitted online .
- Therefore, the petitioner cannot turn around to claim any error in the impugned order passed consequently.
- Therefore, the issue before Hon'ble High Court that whether an assessee can be denied opportunity of personal hearing merely because he had tick marked the option 'No' against the option for personal hearing, in the reply to the show-cause notice, submitted through online mode.

Held:

- Section 75(4) of the CGST Act, states that "An opportunity of hearing shall be granted where a request is received in writing from the person chargeable with tax or penalty, or where any adverse decision is contemplated against such person".
- Further, the court relied upon the decision passed in the case of **Bharat Mint & Allied chemicals Vs Commissioner Commercial Tax & 2 Ors-2022-VIL-189-ALH,** wherein the court held that Assessing Authority is bound to afford opportunity of personal hearing to the petitioner before he may have passed an adverse assessment order.
- Therefore, once it has been laid down by way of a principle of law that assessee is not required to request for "opportunity of personal hearing", it remained mandatory upon the Assessing Authority to afford such opportunity before passing an adverse order.

- The fact that the petitioner may have signified 'No' in the column meant to mark the assessee choice to avail personal hearing, would bear no legal consequence.
- Be that as it may in the context of an assessment order creating heavy civil liability, observing such minimal opportunity of hearing is a must.
- Therefore, not only such opportunity would ensure observance of rules of natural of justice, but it would allow the authority to pass appropriate and reasoned order as may serve the interest of justice.
- Consequently, the Hon'ble High Court allowed the present writ petition and set aside the impugned order.

f) Department cannot go beyond the scope of SCN to create a new ground at the stage of adjudication

(M/s CJ Darcl Logistics Ltd Vs Union of India, 2023-VIL-113-JHR)

Facts:

- The petitioner was engaged in providing *inter alia* goods transportation agency (GTA) services under Reverse charge mechanism (RCM). The petitioner was also registered for the same services under Forward charge mechanism (FCM).
- On account of bonafide mistake petitioner deposited the amounts in electronic cash ledger pertaining to the RCM registration instead of depositing in cash ledger pertaining to FCM registration.
- Further, the petitioner again deposited the same amount in the electronic cash ledger of the FCM registration to file GTSR-3B return.
- As a result, there was a double payment and the amount was lying as excess balance in the electronic cash ledger for which an application for refund in FORM GST RFD-01 was filed.
- The petitioner was proceeded against a show cause on an application for refund in respect of his registration no. Be that as it may, the Form GST-RFD-08 did not disclose any reasons for inadmissibility of refund.
- Petitioner was not granted any personal hearing and his claim was rejected by order.

- On examination of the documents, adjudicating authorities finds that the petitioner has taken two GSTIN numbers in the same place of business, in the same nature of business under the same PAN number and maintaining the same bank account which was not proper in the eyes of law.

Held:

- In the instant case, the Court held that the petitioner refuted the allegations of the department given in the show cause notice *vide* his reply by clarifying among other things that the returns in FORM GSTR-3B and FORM GSTR-1 have been correctly filed.
- The order-in-original passed pursuant to the reply to the show cause notice did not deliberate with the content of reply but Adjudicating Officers had proceeded to pass an order rejecting the refund application on the grounds which were never part of the original show cause notice.
- It is settled principle of law that if an allegation or ground is not made at the time of issuance of show cause notice, the authority cannot go beyond the scope of show cause notice to create new ground at the later stage of adjudication.
- The impugned proceedings are also vitiated for violation of principles of natural justice as neither a proper show cause notice has been issued nor any opportunity of hearing was given to the petitioner.
- It is well settled that before adjudicating any issue which is against the interest of assessee, opportunity of hearing should be granted to him.
- The impugned order of adjudication is bad in law for the reasons that it has been passed beyond the scope of show cause notice.
- Since the show cause notice is vague and cryptic in nature and order in original has been passed beyond the show cause notice, both are liable to be quashed and set aside.
- However, revenue is at liberty to issue a fresh show cause notice and proceed in accordance with law.

g) If services rendered by an assessee are not chargeable to service tax at a given point of time then there is no liability to deposit any service tax for such services

(Principal Commissioner, CGST, Delhi-South Vs M/s EMAAR MGF Land Ltd, 2023-VIL-109-DEL-ST)

Facts:

- The Respondent assessee-M/s Emaar India Ltd. filed an appeal before the learned Tribunal impugning an order-in-original dated 31.01.2017 passed by the Commissioner, Service Tax ordering for the recovery of an amount being inadmissible Cenvat Credit under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 73(2) of the Finance Act, 1994.
- Further, the Order-in-original passed in relation to the SCN dated 17.04.2014 was found to be beyond the period prescribed under Section 73(1) of the Act and the Commissioner had sought to recover the Cenvat Credit claimed by the respondent in respect of service tax liability for July 2008 to January 2009. The ld. Tribunal held that the extended period of limitation of five years was unavailable as there was no suppression of facts or any intention to evade tax.
- Further, the ld. Tribunal rejected the contention of the Revenue that any liability could be imposed under the provisions of Section 73A of the Act, as proceedings under the said Section had been dropped by the Commissioner, and the Revenue had not preferred any appeal against the order-in-original dated 31.01.2017.
- The controversy in the present case, essentially, relates to whether the services rendered by the respondent during the relevant period were taxable under the Act.
- In this regard, the Respondent submits that during the said time, it was engaged in undertaking construction activities for development of residential complexes and flats in southern India an entered into two separate agreements with the purchaser of flat. The first type of agreement was in respect of construction of the flat/unit and the other was an agreement for sale of the land. The first agreement was termed as 'Construction Agreement', whereby the respondent had agreed to design and promote a residential project comprising of apartments of various sizes but of standard specifications and

the second agreement for sale of land was in respect of an undivided share in the land proportionate to the size of the flat/apartment.

- Further, the Respondent claimed that the said activity fell within the scope of taxable service under Section 65(105)(zzzza) of the Act, 'Works Contract' Service, which was taxable under the Act with effect from 01.06.2007 and in this regard the Respondent recovered service tax and deposited a certain amount and discharged the balance liability by utilizing the Cenvat Credit.
- As per the Appellant, the services rendered by the Respondent falls under the definition of Service of 'Construction of Complex' as defined under Section 65(105)(zzzh) of the Act, which was chargeable to tax with effect from 01.07.2010 and the services rendered by the respondent were not taxable at the material time, and it could not claim any Cenvat Credit in respect of input services for discharging its liability. Consequently, the Respondent was required to refund the same along with interest. The Revenue claimed that the respondent could not have collected the service tax in respect of services that were not taxable. Nonetheless, it was obliged under the provisions of Section 73A of the Act to deposit any amount collected as service tax.
- The Appellant projected the following questions for the consideration of this Court:
    - Whether the availment of Cenvat credit and its utilization for payment of service tax on construction of flats for sale to buyers even though the activity to develop residential colonies and commercial properties were exempt from service tax vide Notification No.24/2010 dated 22.06.2010, is in contravention of provisions of Rule 3 read with Rule 2(1) and 2(p) of the Cenvat Credit Rules, 2004?
    - Whether the extended period of limitation is invokable correctly or not.
    - Whether the extended period of limitation is invokable correctly or not especially when admittedly the service tax has been collected on exempted service and not deposited with the government?
    - Whether the extended period of limitation is invokable correctly or not especially when admittedly the service tax has been collected on exempted service and not shown in ST returns?

- Whether the learned CESTAT is correct in ignoring the specific findings in order-in-original that the respondent has collected service tax on exempted service and has not deposited the same in cash?
- Whether the learned CESTAT is correct in ignoring the specific findings in order-in-original that the respondent has collected service tax on exempted service and has not deposited the same in cash?
- Any other question of law.

- It is undisputed, that a person can claim service tax paid on input services in discharge of its liability to pay service tax in respect of output services. Thus, in cases where the output services are not taxable, the question of claiming any Cenvat Credit does not arise.

Held:

- The proceedings under Section 73 of the Act could not be initiated as it was beyond the period of limitation. Further, it has been observed that the question whether the respondent was required to deposit the entire amount collected as service tax with the authorities in cash in terms of Section 73A of the Act, did not arise, as the Commissioner had dropped the proceedings under Section 73A of the Act and had confined the demand under Section 73(1) of the Act for recovery of the Cenvat Credit, which according to the Commissioner had been wrongfully availed.
- In this regard, the Revenue's contention that services rendered by the Respondent were not chargeable to service tax at the material time is accepted and holds no liability to deposit any service tax with the authorities as Section 73 of the Act is applicable only in cases where any service tax had not been levied or paid or had been short paid or erroneously refunded.
- If a person collects any amount representing it as service tax, which is otherwise not collected, he is obliged to deposit that amount and this amount is to be credited to the Consumer Welfare Fund referred to in Section 12C of the Central Excise Act, 1944.
- In the present case, the Ld. Commissioner had dropped the demand under Section 73A of the Act and the Revenue did not file any appeal against the OIO. Thus, no demand can now be raised on the ground that the respondent

had not deposited the entire amount collected from its customers as service tax, under Section 73A(2) of the Act.

- Hence, the question no. (V) and (VI) as projected by the revenue are answered in negative.
- Further, the Ld. Tribunal found that there was no suppression as to the activities being carried out by the Respondent and extended period of limitation cannot be invoked.
- Hence, as per the findings of the Ld. Tribunal, the proviso to Section 73(1) of the Act could not be applied and the Respondent had filed its service tax return on basis that the services were taxable as 'Works Contract' Services. In this regard, the Respondent have availed Cenvat Credit upto a certain amount and paid the balance amount in cash in discharge of the liability, which was computed on the aforesaid basis. There is no allegation that the respondent had concealed that it was carrying on the activity of construction and selling residential flats.
- Therefore, the question nos. (II), (III) and (IV) as projected by the Revenue are answered in the negative; that is, in favour of the respondent and against the Revenue.
- The Appeal is dismissed and no reason to interfere with the impugned order.

h) E-way bill not valid if information in PART-B of FORM GST EWB-01 is not furnished

(M/s Stertile India Pvt Ltd Vs Union of India, 2023-VIL-104-P&H)

Facts:

- The appellant was engaged in the manufacturing of pharmaceuticals. The goods belonging to the petitioner were apprehended while in transit in vehicle No HR-61C-7811 by the Proper Officer.
- Driver produced the documents along with the tax invoices and delivery challans to the Proper Officer.

- On verification, it was found that Part-B of the E-way bill was not entered by the appellant, as contemplated under provisions of Section 20 of the IGST Act, 2017 read with Rule 138 of the CGST/ SGST Rules, 2017.
- Consequently, the conveyance carrying the goods was detained and order of detention was issued and further, notice in Form GST MOV-07 was issued determining tax and penalty.
- Notice served on the authorized representative of petitioner-company, on furnishing of bank guarantee the goods along with conveyance were released.
- After that, none appeared and no reply was received, in consequence of which the Proper Officer passed impugned order. Petitioner challenged the order before the Appellate Authority but the Appellate Authority rejected the appeal.
- The petitioner by way of present writ petition challenged the actions of the authorities on the ground that there was no intention on part of the petitioner to evade tax therefore, penalty should not have levied.

Held:

- In the instant case, the Court held that for purpose of Section 129 of the CGST/SGST Act, 2017 there is no requirement that there should be intention to evade tax. The authorities are not required to establish intention to evade payment of tax.
- Section 129 of the CGST/SGST Act, 2017 has been enacted to check evasion of tax, if the goods are intercepted during transit and documents accompanying the goods are not in compliance with the provisions of the Act, authorities are within their power to detain the goods and demand the payment of tax and 100% penalty under the provisions.
- Therefore, keeping in view the bare provisions of Section 129(5) proceeding in respect to the notice are deemed to have concluded. As sequel discussion held hereinabove, there is no ground to interfere in the impugned order.
- Consequently, the Hon'ble High Court dismissed the writ petition without merits.

i) No requirement under GST law to furnish details of all vehicles and establish their registration with e-Vahan portal for claiming refund of ITC once conditions under section 16 are complied with

(M/s Mahajan Fabrics Pvt Ltd Vs Commissioner, CGST And Ors., 2023-VIL-103-DEL)

Facts:

- The petitioner had filed an application for refund of CGST under Section 54 of the CGST Act read with Rule 89(1) of the CGST Rules, 2017.
- The said application was allowed. However, the said order was reviewed by the Commissioner under Section 107(2) of the CGST Act, 2017. In terms of the said provisions, the Commissioner directed that the appeal be preferred to the Appellate Authority.
- The review order, directing the filing of the appeal, indicates that the decision to appeal the Order-in-Original was premised on a finding that the vehicle numbers mentioned in two invoices out of 126 invoices were not reflected at the e-vahan portal.
- In review proceedings, the Commissioner concluded that in all the remaining invoices, in respect of which the refund was sought and allowed were dubious and the claim for refund of tax was inadmissible.
- Subsequently, an appeal was filed by the Respondent and the Appellate Authority found that the vehicles mentioned in those invoices were, in fact, registered on the e-vahan portal. However, the appeal was allowed on the ground that the Petitioner had not provided details of other vehicles pertaining to the remaining invoices.
- Being aggrieved, the petitioner filed the present writ petition before the Hon'ble High Court.

Held:

- The Hon'ble High Court held that there is no provisions of the CGST Act which required the petitioner to file details of all vehicles and also establish its registration with the e-vahan portal.

- It is clear from the explanation to Section 16(2)(b) of the CGST Act, 2017 that the person would be deemed to have received the goods if the conditions as stated therein, are satisfied.
- In the present case, there is no dispute that the petitioner had filed its return disclosing all necessary details for claiming the refund. Few invoices were picked up for scrutiny and it was found that the vehicles mentioned in two invoices were not registered on the e-vahan portal.
- Having established that the foundation of the Revenue appeal is flawed, the petitioner was not required to do anything more.
- The Appellate Authority did not find any flaw in the details as furnished by the petitioner. There is neither any tangible reason or doubt regarding the particulars stated in the invoices, nor any findings that the same are untrue.
- Therefore, the impugned order is set aside and the respondents are directed to disburse the amount of refund sanctioned by the Assistant Commissioner in terms of the Order-in-Original.

j) Refund of IGST paid on exports cannot be denied due to procedural non-compliance in respect of EWB

(M/s Mobiles Shoppe Vs The Union of India, 2023-VIL-80-GUJ)

Facts:

- The Petitioner was engaged in the export of mobile phones. Petitioner received a purchase order for mobile phones from foreign buyers. Petitioner buys he mobile phones through its sister concerned i.e., Anjali Enterprise, which instructs the vendors to deliver the mobile phones directly to the airports for the purpose of exports by the petitioner.
- Due to the single movements of the goods from the premises of vendor to the airport, only one e-way bill was generated by the vendor wherein delivery address was mentioned as the airport.
- Respondent asked for the second e-way bill in respect of purchase made by petitioner from its sister concern and in absence thereof, same was construed as the deficiency of documents and the refund of IGST was held to be erroneous on the ground of deficiency of documents.

- Petitioner claimed the refund of IGST paid on export of mobile phones stands by the customs authorities in accordance with Rule 96 of the CGST Rules.
- The petitioner contended before the Hon'ble High Court that the proceeding for scrutiny of refund of IGST for the export already initiated by the CGST department even though the proper officer for grant of refund of IGST is the custom authorities, therefore, initiation of the actions on the part of the respondents is bad in law.

Held:

- Custom authority has permitted the goods to be exported and the petitioner having paid the IGST on the export what being provided as Rule 96 of the CGST Rules, 2017 is very clear that the shipping bill of the export needs to be treated as the refund applications.
- The Court held that customs authority is the proper authority for taking up the issue in case of doubt regarding the export of goods.
- Noting the fact that the export cannot be disputed merely for the reason that only one e-way bill is generated by the vendor and if there is any doubt as regard to the export of the goods, it is for the custom authority to take up the issue. However, at this stage the department has not issued the SCN.
- Further, the Court held that when the export has been permitted by all the concerned on the part of the respondent, the petitioner would be entitled to the refund and the same shall be paid with interest to the petitioner.

k) IGST refund claim cannot be withheld when ITC towards purchase from risky supplier has already reversed

(M/s Choksi Exports Vs The Union of India, 2023-VIL-78-GUJ)

Facts:

- The Petitioner was a partnership firm which is engaged in the business of manufacturing and exporting of organic pigments and registered under the GST law.
- Respondent visited the premises of the petitioner and upon the physical verification, the petitioner had been marked as "*risky exporter".* However, the

petitioner submitted all the information as prescribed under Circular No. 131/1/2020-GST vide email.

- The above-mentioned circular prescribes the procedure to be followed by the exporters as risky exporter and as part of that, the petitioner already submitted all the details and documents to the concerned authorities.
- Thereafter, petitioner filed the writ petition under Article 226 of the Indian Constitution seeking direction to release the refund of IGST amount, which is allegedly withheld illegally violating the provisions of section 54(6) of the CGST Act, 2017 read with 91(1) of the CGST Rules.

Held:

- In the instant case, the Court held that supplier's supplier is placed in the list of L2 risky supplier and even then, with a hope to get IGST refund, the petitioner has paid the ITC but refund is not processed.
- Further, respondent ought to have granted the provisional refund to the extent of 90% as provided under section 54(6) of the CGST Act read with rule 91 of the CGST Rules, which the respondent failed to do so.
- In the present case, petitioner is not prosecuted for any offence under the Act or under the existing law and has also reversed the ITC, therefore there is no point for the respondent herein to withhold the refund.
- Considering the judgment passed by the Telangana HC in the case of ***Bhagyanagar Copper Private Limited-2021-VIL-762-TEL***, the Court directed the authorities to grant the amount of IGST refund to the petitioner provided under section 54(6) of the CGST Act r/w 91 of the CGST Rules.

l) Interest on delayed refund not allowed when refund itself was inadmissible but allowed due to technical reasons

(M/s Welcure Drugs & Pharmaceutical Ltd. Vs Commissioner of CE & CGST, Rajasthan, 2023-VIL-159-CESTAT-DEL-CE)

Facts:

- The Appellant was engaged in manufacture of pharmaceutical drugs. However, the Appellant stopped said manufacturing activities and surrendered their Central Excise registration. Further, the balance of credit amounting to Rs. 1,34,45,987/- was lying in their Cenvat credit and service tax register.
- Thereafter, the Appellant applied for refund of said unutilized Cenvat credit and after due process of law the said refund was allowed by Hon'ble High Court, Rajasthan and, accordingly, said refund without interest was sanctioned vide OIO.
- Subsequently, the revenue challenged the order of the Hon'ble High Court before Hon'ble Apex Court, however, the same was dismissed due to low monetary limit.
- Thereafter, the Appellant filed claim for interest on the refund under Section 11BB of the Central Excise Act, 1944. After due process of law, the said claim was rejected vide impugned order on account of being time barred.
- Being aggrieved, the Appellant has filed the present appeal before the Hon'ble CESTAT, Delhi.

Held:

- The Hon'ble CESTAT, Delhi observed that Hon'ble High Court had not granted interest and accordingly, the Appellant ought to have challenged the said order before appropriate forum as the Tribunal has no power to award interest on the amount of refund by exercising inherent power.
- Further, the issue of refund of unutilised Cenvat credit has been settled by the Larger Bench of Hon'ble High Court, Mumbai in the case of ***Gauri Plastics P. Ltd. [2019 (30) GSTL 224]*** wherein it has been held that refund of unutilised Cenvat Credit is not permissible as there is no express provision in the statute providing for it.
- However, judicial discipline requires to follow the law declared by the Larger Bench of the High Court. Accordingly, the Appellant had no right under Section 11BB of Central Excise Act, 1944 to get the refund on account of unutilised Cenvat credit but for the order passed by the Hon'ble High Court, Rajasthan.
- Therefore, the Tribunal rejected the argument that interest is automatic in view of the peculiar facts of the present case and held that appellant is not entitle to interest on delayed refund.

m) Cenvat credit of towers and shelters allowed as they are not immovable properties

(M/s ATC Telecom Infrastructure Pvt. Ltd. Vs Commissioner, Service Tax, Delhi-II, 2023-VIL-152-CESTAT-DEL-ST)

Facts:

- The Appellant was engaged in setting up of passive infrastructure and leasing the same to various telecom companies. The Appellant availed Cenvat credit of excise duty paid in respect of capital goods and inputs used in setting up such passive infrastructure.
- During investigation, it was observed that the Appellant had availed ineligible Cenvat credit. Accordingly, 4 SCNs were issued denying Cenvat credit of inputs and capital goods for different periods.
- After adjudication of the said SCNs, the demand of Cenvat credit availed by the Appellant on towers, shelter and parts thereof, was confirmed vide impugned order on the ground that the subject goods were used for fabrication/erection of towers and shelters, which being attached to earth, were immovable in nature and thus, not used for providing output services in terms of the Circular dated 26.02.2008.
- Being aggrieved, the Appellant has filed the present appeal on following grounds:
  - towers and shelters are not immovable property,
  - towers and shelters would also qualify as "inputs' under Rule 2(k) of the Cenvat Credit Rules, 2004,
  - towers and shelters are 'capital goods' and, therefore, credit was correctly taken as 'capital goods'.

Held:

- The issue involved in this appeal stands decided in favour of the appellant by the Delhi High Court in ***Vodafone Mobile Services Limited vs. CST, Delhi [2018-VIL-506-DEL-CE]***, which decision was affirmed by the Supreme Court

in ***Commissioner of Service Tax Delhi vs. Vodafone Mobile Services Limited [2019-TIOL-309-SC-ST]***.

- The Hon'ble Delhi High Court in the case of ***Vodafone Mobile Services Limited*** examined whether the towers, shelters and accessories used by the appellant were immovable property and held that **the manufacture of the plants in question do not constitute annexation and hence cannot be termed as immovable property for the following reasons**:
  - The plants in question are not per se immovable property.
  - It cannot be said to be "attached to the earth" within the meaning of that expression as defined in Section 3 of the Transfer of Property Act.
  - The fixing of the plants to a foundation is meant only to give stability to the plant and keep its operation vibration free.
  - The setting up of the plant itself is not intended to be permanent at a given place. The plant can be moved and is indeed moved after the road construction or repair project for which it is set up is completed.
- Apart from the above cases, the Hon'ble CESTAT, Delhi relied upon various cases and held that towers and shelters would not be immovable property.
- The Hon'ble Tribunal further held that the appellant was also entitled to take Cenvat credit since the items in dispute are 'capital goods' by relying upon the case of ***Vodafone Mobile Services (supra).***
- The Hon'ble Tribunal further held that in ***Vodafone Mobile Services (supra)*** held that Rule 2(k) of the CCR, 2004 uses the term 'all goods' and therefore, it is wide enough to cover all the goods used for providing output services, except those which are specifically excluded in the said Rule. Further, the towers and prefabricated shelters form an essential in the provision of telecommunication service, the term 'used' should be understood in a wide sense, so as to include passive as well as active use. Accordingly, towers and shelters qualify as 'inputs'.
- Thus, it was held that the Appellant had correctly taken Cenvat credit of towers and shelters and accordingly, appeal was allowed.

n) SCN under Section 28 can be issued without first appealing against the assessment of BOEs

(M/s Midas Fertchem Impex Pvt. Ltd. Vs Principal Commissioner of Customs, New Delhi, 2023-VIL-95-CESTAT-DEL-CU)

Facts:

- The Appellant imported goods described as "0.1 per cent natural brassinolide fertilizer" and classified it as fertilizer under various headings of Chapter 31 of Customs Tariff and accordingly, filed Bill of Entries (BOEs) based on self-assessment.
- The BOEs were assessed and were accepted by the proper officer after examining the technical literature. Thereafter, DRI sent an alert and after investigation it was concluded that natural brassinolide is not a fertilizer but it is a plant growth regulator classifiable under CTH 38 08.
- Accordingly, SCN was issued to the Appellant proposing to re-classify the said goods and recover the differential duty along with interest and penalty. Further, extended period was invoked in case of some of the BOEs on the ground that the Appellant has malafide intention to evade customs duty.
- After due process of law Order-in-Original was passed confirming the demand along with interest and penalties.
- Appellant being aggrieved by the aforesaid order filed an appeal before the Tribunal on a new ground which was not raised earlier before the original authority and therefore, the Tribunal remanded the matter to the original authority.
- The demand along with interest and penalty was again confirmed vide impugned orders.
- Being aggrieved, the Appellant has filed the present appeal.

Held:

Issue	Held
Whether SCN under Section 28 of the Customs Act can be issued after the	• The Tribunal relied upon various SC judgments to hold that once an assessment is made it stands, unless it is reviewed under Section 28 or modified in an appeal. Thus, any assessment

assessment is finalized (either through self-assessment or through assessment by an officer) without first appealing against the assessment.	(including self-assessment) can be modified in two ways; first is through an appeal and other is through a process of review under Section 28. • Rejected the submission of the Appellant that both sides can appeal against self-assessment, it means that no SCN under Section 28 can be issued without first appealing against the assessment as it would render Section 28 itself otiose because there cannot be any SCN and adjudication by an officer to modify the assessment after an order in appeal is passed by the Commissioner (Appeals).
Classification	• The brassinolide is in the form indicated in CTH 3808 by being preparation, it is not excluded by Chapter Note 1(a)(2). Therefore, it falls under CTH 3808.
Whether the impugned order travelled beyond the scope of remand order	• The submission that the scope of the Tribunal's order gets circumscribed by the appellant's submissions during the proceedings cannot be accepted. The Commissioner was correct in examining other issues i.e., whether the goods were preparations and such an examination was within the scope of the remand order.
Extended period of limitation	• Extended period of limitation can be invoked in case of collusion or any willful mis-statement or suppression of facts. • Self-assessment is also a form of assessment but the importer is not an expert in assessment of duty and can make mistakes and it is for this reason, there is a provision for re-assessment of duty by the officer. • As far as the description of the goods, quantity, etc. are concerned, the importer is bound to

	state the truth in the Bill of Entry. Thus, simply claiming a wrong classification or an ineligible exemption notification is not a mis-statement or suppression. • Therefore, extended period cannot be invoked.
Whether penalty under Section 114A of the Customs Act, 1952 can be invoked?	• The ingredients necessary for imposing a penalty under Section 114A are identical to the ingredients necessary to invoke extended period of limitation. • Since extended period cannot be invoked, the penalty under Section 114A also cannot be sustained for the same reason.

o) Excess payment of tax cannot be adjusted under Rule 6(4A) of Service Tax Rules, 1994 after passing of reasonable time

(M/s. MCKINSEY & CO. INC Vs Commissioner CGST & Service Tax, 2023-VIL-126-CESTAT-MUM-ST)

Facts:

- The Appellant is engaged in the business of providing Management Consultant's Services. Further, during the month of June, 2012 they had paid the excess service tax of Rs.25,57, 778/- and adjusted the excess amount after more than two years by disclosing the same in ST-3 return.
- During the Audit, the Department observed the said adjustment and accordingly issued the SCN asking the Appellant to pay the said amount along with interest and penalty and after due process of law, the demand was confirmed *vide* impugned order passed by Commissioner (Appeals).
- The Appellant argued that excess tax was paid in June 2012, and was adjusted in April-June 2014 as there was no contravention of law as 'succeeding month or quarter' cannot be interpreted as immediately succeeding month.

Held:

- Hon'ble CESTAT, Mumbai stated that it is a settled law that a taxing statute has to be strictly construed. Meaning thereby a taxing statute has to be interpreted in the light of what is clearly expressed, it cannot imply anything which is not expressed.
- Accordingly, applying the principles of strict interpretation the Tribunal held that the succeeding month denotes the month, which succeeds the current month, i.e., the next month. Further, the Rule 6(4A) of Service Tax Rules, 1994 did not use the word 'any' before the words 'succeeding month or quarter'. As General Principle of strict construction shall be applied and one has to look merely at what was clearly said.
- Further, if the Appellant had established that they were prevented from adjustment in the succeeding month or quarter then it could be month or quarter thereafter.
- The Appellant prior to adjusting the alleged excess payment, did not inform the Department about the same nor provided any documentary evidence except arithmetical calculation that can conclude that extra-payment had been made by the Appellant.
- Further, the Appellant had already filed the refund in 2011 so it cannot be said that the Appellant was not aware about the filing of refund claim and time limit for filing the refund. As there has to have some reasonable period but not as long as two years. Very carefully the legislature has used the words 'subsequent month or quarter', else it could have also used 'subsequent year' or so.
- So, the Appellant cannot claim/adjust the excess payment of tax after reasonable period was over. Accordingly, upheld the impugned order and dismissed the present appeal filed by the Appellant.

p) Service tax not payable on take-away food and sharing of expenses

(M/s Haldiram Marketing Pvt. Ltd. Vs Commissioner, CGST, GST Delhi East Commissionerate, New Delhi, 2023-VIL-124-CESTAT-DEL-ST)

Facts:

- The Appellant was engaged in running food outlets where customers could purchase packaged food and avail facility of (a) dining & (b) take-away.
- The Appellant had taken a premises on rent from DIAL vide rent agreement to sell its own goods as well as goods of associated enterprise purchased by the Appellant for which it received certain portion of rent from the associated enterprise.
- During audit, the Department observed that the Appellant had not discharged service tax liability on the activity of take-away of food items and share of rent received from associated enterprise.
- Accordingly, a SCN was issued proposing service tax demand of Rs. 23,09,45,317/- along with interest and penalties for the period from April 2014 to June 2017.
- After due process of law, the demand of 20,12,46,762/- was confirmed vide impugned order and demand of Rs. 2,96,98,555/- was dropped on account of cum-tax benefit.
- Being aggrieved, the Appellant has filed the present appeal to the extent of confirmation of demand.

Held:

Taxability of take-away food items:

- The Hon'ble CESTAT, Delhi observed that Circular No. 334/3/2011-TRU dated 28.02.2011 issued w.r.t taxability of restaurant service clarified that the levy was intended to be confined to the composite contract and was not to cover either the meal portion of the composite contract or mere sale of food by way of pickup or home delivery.
- Further, clarification letter dated 13.08.2015 also clarified that in case of transaction involving pickup or home deliveries of the food sold by the restaurant, the dominating nature of the transaction is that of sale and not service, as the food is not served at the restaurant and no other element of service is offered. The said transaction would, therefore, not be leviable to service tax, being in the nature of sale only.
- The Hon'ble CESTAT, Delhi held that take-away food sold by the Appellant over the counter amounts to sale of goods as the intention of the customer is to merely buy such packaged product and not to avail any restaurant services.

- Further, Commissioner (Appeals) in the case of **Anjappar Chettinad [Appeal No. 147/2019-ST dated 25.03.3019]** held that no service tax is leviable on take-away food items and the said order was accepted by the Department on 17.06.2019 and therefore, it is not open to the department to take a contrary stand in this appeal.
- Accordingly, no service tax can be levied on the activity of take-away of food items as it would amount to sale and would not involve any element of service.

Taxability of rent received from associated enterprise:

- The Hon'ble CESTAT, Delhi held that consideration received by the Appellant from the associated enterprise would not be leviable to service tax under the category of "renting of immovable property" as there is no contractual relationship between the associated enterprise either with the Appellant or DIAL.
- Further, the goods of the associated enterprises are also being sold from same premises and certain portion of the rent is received from the associated enterprise. The associated enterprises is benefiting with respect to the space. This arrangement would, therefore, fall under the category of sharing of expense.
- Further as per the decision of the Supreme Court in **Gujarat State Fertilizers & Chemicals Ltd. vs. Commissioner of C. Ex. [2016 (45) S.T.R. 489 (S.C.)]** sharing of expenditure cannot be treated as service rendered by one to another.
- The impugned order was set aside and accordingly, the appeal was allowed.

q) Refund of service tax allowed for cancellation of service agreement in GST regime

(M/s Rawat Infra Construction Company LLP Vs Commissioner, Central Excise & CGST-Jaipur, 2023-VIL-118-CESTAT-DEL-ST)

Facts:

- The Appellant was mainly engaged in construction of residential complex among others.
- The Appellant entered into an agreement of sale of flats during service tax regime and had received advance payment from the proposed buyers.
- However, some of the bookings were cancelled vide Cancellation Agreement dated 30.12.2019. Accordingly, credit note was issued by the Appellant and advance amount along with service tax amount was refunded to the said buyers.
- Further, due to change in regime from Service tax to GST, on the event of cancellation, the Appellant could not take credit of the excess service tax paid in terms of Rule 6(3) of the Service Tax Rules.
- Therefore, the Appellant applied for refund of service tax under Section 142 of the CGST Act, 2017 on 30.09.2020.
- After the due process of law, the said refund was rejected on the ground of limitation and unjust enrichment.
- Being aggrieved, the Appellant has filed the present appeal.

Held:

- The Hon'ble CESTAT, Delhi held that the Appellant is entitled to refund under Section 142(3) of the CGST Act, 2017 as CENVAT credit is no longer available, in spite of it being available in terms of Rule 6(3) of the Service Tax Rules, 1994.
- Further, the Appellant has refunded the booking amount along with service tax to the buyers and therefore has satisfied the bar of unjust enrichment.
- Accordingly, the Department was directed to grant refund along with interest.

r) Refund of unutilised Education Cess and Secondary & Higher Education Cess allowed even post GST

(USV Private Limited V/s. Commissioner of Central Excise & ST, 2023-VIL-110-CESTAT-AHM-CE)

Facts:

- The Appellant applied for refund against the accumulated and unutilized Cenvat credit of Education Cess (EC) and Secondary and Higher Education cess (SHEC).
- Revenue rejected refund on the ground that (a) Cenvat credit of EC and SHEC is not admissible, and (b) the refund was time-barred.

Held:

- It is not disputed that the appellant was not in a position to utilize Cenvat credit of Education Cess and Secondary and Higher Education Cess due to introduction of GST with effect from 01.07.2017.
- As regards the admissibility of Cenvat credit of Education Cess and Secondary and Higher Education Cess, Rule 3 of CENVAT Credit Rules, 2004 clearly provides the Cenvat credit to be allowed in respect of Education Cess and Secondary and Higher Education. Therefore, the appellant was legally entitled for Cenvat of Education Cess and Secondary and Higher Education Cess. Hence, on this count refund could not be denied.
- As regards limitation, the Hon'ble High Court in ***Slovak India Trading Company Private Limited vs. CCE Bangalore - 2006 (205) ELT 956(Tri.Bang) - 2005-VIL-39-CESTAT-BLR-CE*** also considered limitation and held that in case of refund of accumulated unutilized credit, limitation shall not apply. The above decision of Hon'ble Karnataka High Court had been upheld by the Hon'ble Supreme Court reported at ***2008 (223) ELT A170 (SC) – 2007-VIL-43-SC-CE***.
- The impugned order, thus, set-aside and the appeal was allowed.

s) No interest liable to be paid for delayed payment of NCCD due to technical glitches on portal

(M/s. AFT Tobacco Pvt. Ltd. V. Commissioner CGST & CE, 2023-VIL-94-CESTAT-DEL-CE)

Facts:

- The Appellant was engaged in the business of manufacturing tobacco products. As per Section 136(1) of Finance Act, 2001, National Calamity

Contingent Duty (NCCD) was to be charged on manufacturing of tobacco products.

- After the implementation of CGST Act, Central Excise Act was repealed, however, said Section 136(1) was saved being in the union list of the constitution of India. Now the Appellant was liable to pay GST plus NCCD.
- Due to technical glitches on the government portal, the Appellant was not able to deposit NCCD on time. After that, the Appellant regularly filled ER-I return and disclosed the NCCD amount as payable mentioning that unable to deposit the NCCD due to "PV report pending". As the Appellant had no other way to deposit NCCD as the NCCD was to be paid via electronic mode only.
- However, when the issue was partly resolved, the Appellant immediately paid the amount of NCCD and intimated the department regarding payment.
- The Department issued the show cause notice requiring the Appellant to pay interest on the disputed amount alleging fraud, suppression etc. for delay in payment of NCCD.
- The show cause notice was adjudicated and the adjudicating authority observed that the Appellant always wanted to pay NCCD however due to technical problem on portal he was not able to pay the amount. However, when the facility was active on the portal, the Appellant immediately paid the amount. Thus, when there is no breach of provision and there is delayed payment due to reasons beyond the control of Appellant than no liability would be raised.
- The department appealed against the order and the Commissioner (Appeals) allowed the appeal and confirmed the demand of interest and held that there was no clause in the Section for allowing condonation or relief from the interest under any circumstances.
- The Appellant appealed before the Tribunal against the order of the Commissioner (Appeals).

Held:

- It was held that the interest was payable either in case of default in depositing the tax by due date voluntarily or after determination of the amount of duty under section 11A.

- In the instant case, both the conditions were not available with the department i.e., neither there was any determination of duty liability of NCCD nor there was any voluntary default in depositing amount of NCCD.
- Further, the Appellant was prevented from deposit of dues, due to technical glitches which were wholly attributable to the inaction of the department. As the department could not take the advantage of its wrongdoing by levy of interest.
- Hence, the order demanding interest was set aside.

t) Invoices of pre-registration phase shall be considered for availment of CENVAT credit

(M/s Nagano India Private Limited V. Commissioner of CE & CGST, NCRB, Jaipur, 2023-VIL-89-CESTAT-DEL-ST)

Facts:

- The Appellant was engaged in providing consulting service of manpower agency and legal assistance and was liable for service tax under reverse charge mechanism (RCM).
- Thereafter, GST was introduced w.e.f. 01.07.2017 and accordingly, the Appellant carried forward the CENVAT Credit amount of Rs. 7,49,359/- in TRAN-1.
- However, the said transitional credit was denied on account of (a) being availed prior to taking the registration and (b) invoices which were not in the name of registered address.
- Accordingly, SCN was issued invoking extended period and denying aforesaid CENVAT credit alleging violation of Rule 9 of the CENVAT Credit Rules, 2004 (CCR) and Rule 4(8) of the Service Tax Rules, 1994 (Service tax Rules).
- After due procedure of law, the said demand was confirmed by Commissioner (Appeals) vide impugned order. Further, Commissioner (Appeals) also held that CENVAT credit of service tax paid by the Appellant has been claimed on the ineligible import of service.
- Being aggrieved, the Appellant filed the present appeal.

Held:

- The Hon'ble CESTAT, Delhi observed that Rule 9 of the CCR is absolutely silent for the manufacturer or the service provider to mandatorily be the registered entity at the time when the invoices were issued mentioning requisite details. Therefore, invoice is sufficient document to avail CENVAT credit as per Rule 9 of the CCR.
- Further, Rule 4 of the Service tax Rules provides that any person who is liable for paying service tax has to get registration but the proviso thereof talks about the situation where the services can be provided even prior the registration.
- In the present case the Appellant started providing taxable services prior to registration against the invoices which were issued at the address at which the Appellant subsequently took registration.
- Though no CENVAT is allowed if document lacks necessary particulars, the proviso to Rule 9(2) of the CCR states that if the requisite details given in the said proviso are available on record, the CENVAT Credit may be allowed.
- Since the Appellant during the period of providing service in question applied for registration and finally got itself registered with the service tax Commissionerate, the invoices of pre-registration phase shall also be considered for availment of CENVAT credit by the Appellant.
- The Hon'ble CESTAT, Delhi held that there was no intention on the part of the Appellant to evade service tax. Rather the service tax has already been paid by the Appellant and therefore, extended period cannot be invoked.

2. AAAR/AAR

u) Concessional rate of tax at 12% is available if the recipient of assessee fulfills the conditions for being a local authority

(M/s The Indian Hume Pipe Company Ltd, 2022-VIL-12-AAAR)

Facts:

- The Appellant is a Company which is engaged in construction commissioning and maintenance of entire work for water supply projects/sewerage projects/facilities and has been awarded a contract by M/s Bangalore Water Supply & Sewerage Board (hereinafter referred to as 'BWSSB' in short) to execute the work of Rehabilitation/Remodelling/Replacement of 400-100 mm dia sewer line in V-Valley.
- the GST Rate Notification No. 11/2017 CT (Rate) dated 28-06-2017 prescribed a rate of 18% on composite supply of works contract as defined in clause 119 of Section 2 of the CGST Act and an amendment *vide* Notification No. 20/2017 CT (Rate) dated 22-08-2017 wherein Sl. No. 3(iii) was applicable to composite supply of works contract when supplied to the Government, a local authority or a Governmental authority by way of construction, erection, etc. for (i) water supply, (ii) water treatment or (iii) sewerage treatment or disposal and GST rate was at 12%.
- The said Sl. No. 3(iii) of the Notification No.11/2017- Central Tax (Rate)was further amended vide Notification No 31/2017 CT (Rate) dated 13- 10-2017 to include the supplies of works contract to Central Government, Statement, Union territory, a local authority, a Governmental Authority or a Government Entity at the rate of 12%. The said entry was further amended vide Notification No 15/2021 CT (Rate) dated 18-11-2021 (effective from 1st Jan 2022) where the concessional rate of 12% was made applicable only to the supplies made to the Central Government, State Government, Union territory or a local authority. The supplies made to a Governmental Authority and Government Entity were no longer eligible for concessional rate of 12% with effect from 1st January 2022.
- The Appellant approached the Authority for Advance Ruling (AAR) seeking the following questions and the AAR gave a finding that the BWSSB is not a local authority but a Governmental Authority, gave the following ruling in respect of the questions as mentioned in the table below:

S. No.	**Questions**	**Held by AAR**

i.	Whether the supply of services by the applicant to BWSSB is covered by Notification No 15/2021 CT (Rate) dated 18-11-2021 read with Notification No 22/2021 CT (Rate) dated 31-12-2021?	The supply of services by the applicant to BWSSB is covered by Notification No 15/2021 CT (Rate) dated 18-11-2021 read with Notification No 22/2021 CT (Rate) dated 31-12-2021.
ii.	If the supplies as per question 1 are covered by Notification No 15/2021 CT (Rate) dated 18-11-2021 read with Notification No 22/2021 CT (Rate) dated 31-12-2021, then what is the applicable rate of tax on such supplies made w.e.f 1-1-2022?	The applicable rate of tax on the supplies made by the applicant to BWSSB is 18% w.e.f. 1-1-2022 as per entry 3(xii) of Notification No 11/2017 CT (Rate) dated 28-06-2017.
iii.	In case if the supplies as per question 1 are not covered by the Notification supra, then what is the applicable rate of tax on such supplies w.e.f. 1-1- 2022?"	In view of the ruling given at question (i), this question becomes redundant.

- Aggrieved by the AAR the Appellant filed the present appeal before the Appellate Authority for Advance Ruling.

Held:

- It was observed that the BWSSB is an autonomous body formed by the Karnataka State legislature under the BWSSB Act, 1964 and the statements and objects of BWSSB Act, 1964 would show that prior to the enactment of the said Act, the Head-works and the Rising Main of the Water Supply Scheme were under the control of the Government, whereas the distribution was under the control of the Bengaluru Municipal Corporation. In order to improve the

water supply and the drainage system, the BWSSB Board has been constituted under the said Act.

- Further, the State Government appoints chairman and other members and for carrying on its operations under the BWSSB Act, the Board shall levy rates, fees, rentals, prorata charges, deposits, taxes, and other charges and shall vary such rates, fees, rentals and other charges from time to time in order to provide sufficient revenue.
- To be called a "Local Authority", Supreme Court in the case of **Union of India vs R.C Jain** has laid down the following distinctive attributes and characteristics of a 'local authority':
  (i) It must have separate legal existence as a corporate body;
  (ii) it must not be a mere governmental agency but a legally independent entity;
  (iii) it must function in a defined area and must ordinarily be elected wholly or partly, directly or indirectly by the inhabitants of the area;
  (iv) it must enjoy a certain degree of autonomy, which, though not complete, must be appreciable;
  (v) the statute must entrust the authority with such governmental functions and duties as are usually entrusted to a municipal body for providing such amenities, as health and education services, water and sewerage, town planning and development, roads, markets, transportation etc. to the inhabitants;
  (vi) it must have power to raise funds in the furtherance of its activities and the fulfilment of the projects entrusted to it by levying taxes, rates, charges, fees etc. all of which may be in addition to the moneys provided by Government. What is essential is that the control and management of the fund must vest in the authority.
- The BWSSB fulfils the attributes mentioned at (i), (ii) and (v) above. However, the authority fails to satisfy the characteristics listed at (iii) and (iv) above in as much as the members of the BWSSB Board are not elected either wholly or partly, directly or indirectly, by the inhabitants of the area, but are appointed by the State Government. Therefore, the 3rd and 4th attribute of a local authority is not satisfied in this case.

- Further, the emphasis by the Appellant that BWSSB has been registered with the Income Tax Department and the GST Department as a 'local authority'; that when both the departments have acknowledged the status of BWSSB as a local authority and accordingly granted them a PAN and GSTIN, the lower Authority cannot take a u-turn and change the status of BWSSB to a Governmental Authority and not a local authority. Such argument does not impress as much.
- Hence, with effect from 1st January 2022, the Appellant is not eligible for concessional rate of tax of 12% in terms of entry Sl. No. 3(iii) of Notification No 11/2017 CT (Rate) dated 28-06-2017 as amended by Notification No 15/2021 CT (Rate) dated 18-11-2021 on the supplies made to BWSSB. We uphold the order passed by the lower Authority with regard to the rate of applicable tax on the supplies of works contract service made by the Appellant to BWSSB with effect from 1st January 2022 and the advance ruling by the AAR is upheld.

v) Exemption from GST available subject to fulfilment of conditions laid down therein

(M/s CALL ME SERVICES, 2022-VIL-40-AAR)

Facts:

- The Applicant is engaged in Manpower Supply, Contract staffing, Security Guards and Business Auxiliary Services and has been awarded a contract by the Chhattisgarh Housing Board (herein referred to as CGHB) for providing services in relation to maintenance of various colonies developed by Chhattisgarh Housing Board at Atal Nagar, Naya Raipur and not handed over to the local authority for its maintenance.
- As per the Applicant the pure service contracts awarded by the CGHB for providing services in relation to maintenance of various colonies developed by Chhattisgarh Housing Board at Atal Nagar, Naya Raipur comes under Indian Constitution's Article 243W and Twelfth Schedule Services in relation to a function of Municipality. Hence exempt under Sl. No. 3 of Notification No. 12/2017 dated 28/06/2017.

- For availing the benefit of nil tax rate exemption under Sl. No. 3 of Notification No. 12/2017 dated 28/06/2017 its necessary to fulfil the following:
  - the service falling under chapter Heading 99 should be Pure services (excluding works contract service or other composite supplies involving supply of any goods) and
  - the said pure service should be provided to the Central Government, State Government or Union territory or local authority and further,
  - the said pure service should be any activity in relation to any function entrusted to a Panchayat under article 243G of the Constitution or in relation to any function entrusted to a Municipality under article 243W of the Constitution.

Held:

- The activities provided by the Applicant as considered as "pure services" subject to the adherence of the exclusions mentioned therein in the notification viz. the same is not works contract service and other composite supplies involving supply of goods.
- It has been observed that with a view to broaden this category, with effect from 5.1.2018 vide Sr. no. 3A to Notification no. 2/2018-Central Tax (Rate), composite supply of goods and services in which the value of supply of goods constitutes not more than 25 per cent of the value of the said composite supply provided has been included. Thus, from 25.1.2018 composite supply of goods and services has also been included for the said benefit of Nil tax rate with the stipulation that the value of supply of goods constitutes not more than 25 per cent of the total value of the composite supply has been provided with principal supply of services. However, it is unclear about the percentage.
- Further, with respect to the second criterion, it is observed that the said supply of services should be provided to the Central Government, State Government or Union territory or local authority. It would not be out to place to mention here that services provided to Governmental authority, or a Government Entity stands excluded/omitted from Sr. no. 3 (and 3A) of the said Notification no. 12/2017-Central Tax (Rate) dated 28 June 2017 with effect from 1st of January 2022 vide Notification no. 16/2021- Central Tax (Rate) dated 18.11.2021.

- The services of the Applicant in the instant case viz. Chhattisgarh Housing Board (CGHB) does not fall in the specified category of "Government", or "local authority" as defined above. The most important second criterion of the service recipient being "Government" or "Local authority, for availing the benefit stipulated therein as provided under Notification No. 12/2017-Central Tax (Rate) dated 28 June 2017 as amended by Notification No. 16/2021-Central Tax (Rate) dated 17.11.2021 effective from 1.1.2022, stands unfulfilled by the Applicant.
- The provision of services by the applicant to CGHB in relation to maintenance of various colonies of CGHB / provision of security guards etc. do not qualify for be benefit of Nil rate of GST as provided under Sr. no. 3 / (3A) to Notification No. 12/2017- Central Tax (Rate) New Delhi, dated 28th June, 2017 as amended.
- Hence, the services provided by the Applicant in relation to maintenance of various colonies developed by Chhattisgarh Housing Board (CGHB) and not handed over to the local authority by CGHB, is found not eligible for the benefit of Nil rate of GST provided under Sr. no. 3/3A of exemption Notification no. 12/2017-Central Tax (Rate) dated 28.6.2017 as amended by Notification no. 16/2021 -Central Tax (Rate) New Delhi, 18th November, 2021, effective from 1st of January 2022.

w) State Government holding 99.99% equity in a company established for the distribution of electricity does not fall under the definition of "Governmental Authority" due to non-fulfilment of both the conditions specified therein

(M/s Chamundeshwari Electricity Supply Corporation Limited, 2022-VIL-39-AAR)

Facts:

- The Applicant is a Public Limited Company registered under the provisions of Central Goods and Services Tax Act, 2017 and is engaged in the distribution of electricity and sale of energy and the Sale of energy is exempt as per serial number 104 of Notification No. 2/2017-Central Tax (Rate), dated 28-06-2017.

Similarly, transmission and distribution of electricity is exempt as per serial number 25 of Notification No. 12/2017-Central Tax (Rate), dated 28-06-2017.

- Further, the Applicant states that it purchases power from the Central and State generating stations major independent power producers and independent power producers from non-conventional sources like wind, solar and mini hydel, etc. and supplies & distributes the power to various consumers, such as, companies, industries, commercial shops, hospitals, farmers, irrigation pumps, individuals, Government organisations etc in the districts of Mysore, Mandya, Chamarajanagar, Hassan and Kodagu. The retail tariff is determined by the Karnataka Electricity Regulatory Commission (KERC) as per Electricity Act 2003.
- The Applicant sought advance ruling for the following questions:
    - Since the Government of Karnataka holds 99.99% of equity in the Corporation, whether the Corporation is considered as "Governmental Authority" or "Local Authority"?
    - Since the Corporation is fully owned by the Government of Karnataka and audited by the Comptroller and Auditor General of India, whether filing of Annual Return in Form GSTR-9 and Form GSTR-9C is exempt under the Second Proviso to Section 44 of the CGST and KGST Acts?
    - Whether the Corporation is eligible to claim input tax credit on the inward supply of goods and services which are capitalized in the books of accounts?
    - Whether the Corporation is eligible to claim input tax credit on the inward supply of services against output taxable supplies of support and auxiliary services and other supply of taxable goods?
    - Whether the Corporation is eligible to claim input tax credit (on inputs, input services and capital goods) proportionately on the taxable output supply of support services and goods (scrap etc.) as per the provisions of Rule 42 and 43 of the CGST and KGST Rules?
    - Whether the Corporation is eligible to claim taxes paid under RCM, as input tax credit?
    - Whether Additional Surcharge collected from Open Access Consumer as per sub-section (4) of Section 42 of the Electricity Act, 2003, clause 8.5.4 of the Tariff Policy 2016, Clause 5.8.3 of the National Electricity Policy and

Clause 11 (vii) of the KERC (Terms and Conditions for Open Access) Regulations, 2004, is taxable under the GST Acts?

- Whether "Wheeling and Banking Charges" allowed by Commission (KERC) as 5% and 2% of the energy input into the distribution system by Open Access consumer is taxable under the GST Acts?

Held:

- In regard to the first question, to be a Government Authority, two conditions have to be satisfied which are follows:
  a. It must be either set up by an Act of Parliament or a State Legislature or must be established by any Government, with 90 per cent or more participation by way of equity or control
  b. This must be either set up or established to carry out any function entrusted to a Municipality under article 243W of the Constitution or to a Panchayat under article 243G of the Constitution.
- The Applicant stated that the Government of Karnataka holds 99.99% of equity in the applicant company and is established by the Government of Karnataka and hence the first condition is satisfied.
- As per Article 243W of the Constitution and Twelfth Schedule to the Constitution relating to the functions entrusted to a Municipality is verified and found that the supply of electricity is not covered and as per the Article 243G of the Constitution and Eleventh Schedule to the Constitution relating to the functions entrusted to a Panchayat is verified and found that the Rural Electrification including the distribution of electricity is covered. But the applicant company is not set up or established only to provide Rural Electrification and hence the second condition is not satisfied.
- Hence, even for the purposes of Notification No. 12/2017- Central Tax (Rate) dated 28.06.2017, the applicant cannot be covered under the definition of "governmental authority" and hence the same is clarified.
- In regard to the second question, since the Corporation is fully owned by the Government of Karnataka and audited by the Comptroller and Auditor General of India, the second proviso is not applicable to the Applicant.
- In regard to the third question, every registered person is entitled to take credit of input tax credit charged and goods or services procured by the

Applicant and capitalized, if used or intended to be used in the course or furtherance of business, then the Applicant is entitled to take credit of input tax.

- In regard to the further question, the Applicant has been supplying taxable and exempted goods, the eligible input credit claim shall be restricted as per Section 17(2) of the CGST Act as prescribed in Rule 42 and 43 of the CGST Rules and in the present matter, subject to the section 17(2) of the CGST Act read with Rule 42 and 43 of CGST Rules, the applicant is eligible to claim input tax credit on the inward supply of services against output taxable supplies of support and auxiliary services and other supply of taxable goods.
- In regard to the fifth question, the applicant is eligible to claim input tax credit (on inputs, input services and capital goods) proportionately on the taxable output supply of support services and goods (scrap etc.) subject to section 17(2) of the CGST Act read with Rule 42 and 43 of CGST Rules.
- In regard to the sixth question, it is a clear that the tax on inward supply of goods or services or both and would be eligible as input tax credit under Section 16(1) of the CGST Act subject to apportionment of input tax credit in terms of Section 17(2) of the Act, ibid read with Rules 42 and 43 of the Rules, ibid and the tax on a transaction paid under reverse charge basis would still be a tax on inward supply.
- In regard to the seventh question, the additional surcharge collected from Open Access Consumer as per sub- section (4) of Section 42 of the Electricity Act, 2003, clause 8.5.4 of the Tariff Policy 2016, Clause 5.8.3 of the National Electricity Policy and clause 11 (vii) of the KERC (Terms and Conditions for Open Access) Regulations, 2004, is taxable under GST Act.
- In regard to the eight question, the "Wheeling and Banking Charges" collected by the Applicant is exempted from the payment of GST.

3. RECENT UPDATES

Notifications

x) National Testing Agency to be treated as educational institution for conduct of entrance examination

(Notification No. 01/2023 -Central Tax (Rate) dated 28.02.2023)

- The CBIC has issued notification to amend *Notification No. 12/2017- Central Tax (Rate) dated 28.06.2017* by way of inserting clause (iva) in Explanation in Para 3 of the said notification. *Vide* said notification it has been provided that any authority, board or body set up by the Central Government or State Government including National Testing Agency for conduct of entrance examination for admission to educational institutions shall be treated as educational institution for the limited purpose of providing services by way of conduct of entrance examination for admission to educational institutions\
- By way of this amendment, the services provided by way of conduct of entrance examination for admission to educational institutions by National Testing Agency or any other authority/board by set up by the Central Government or State Government shall be exempt under GST. This notification shall come into force ***with effect from 01.03.2023***.

y) Tax to be paid under RCM on services provided by Courts and Tribunals w.e.f. 01.03.2023

(Notification No. 02/2023 -Central Tax (Rate) dated 28.02.2023)

- The CBIC has issued notification to amend *Notification No. 13/2017- Central Tax (Rate) dated 28.06.2017* by amending clause (h) in Explanation to the said notification. *Vide* said notification it has been provided that services provided by Courts and Tribunals shall be covered under RCM and provisions of RCM notification shall apply to Courts and Tribunals as they apply to the Central Government and State Governments. This notification shall come into force ***with effect from 01.03.2023***.

Circular

z) Leviability of Service Tax on the declared service "Agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act" under clause (e) of section 66E of the Finance Act

(Circular No. 214/1/2023-Service Tax dated 28.02.2023)

- A service conceived in an agreement where one person agrees to an obligation to refrain from an act or to tolerate an act or to do an act, would be a 'declared service' under section 66E(e) read with section 65B(44) and would be leviable to service tax.
- Agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act has three limbs: -
  i) Agreeing to the obligation to refrain from an act,
  ii) Agreeing to the obligation to tolerate an act or a situation,
  iii) Agreeing to the obligation to do an act.
- Service of agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act is nothing but a contractual agreement. A contract to do something or to abstain from doing something cannot be said to have taken place unless there are two parties, one of which expressly or impliedly agrees to do or abstain from doing something and the other agrees to pay consideration to the first party for doing or abstaining from such an act. Such contractual arrangement must be an independent arrangement in its own right. There must be a necessary and sufficient nexus between the supply (i.e. agreement to do or to abstain from doing something) and the consideration.
- Further, contents of GST circular i.e., Circular No. 178/10/2022-GST dated 3rd August, 2022, may also be referred to in this regard.

Standard Operating Procedure (SOP)

aa) SOP for cancellation of registration and for repository of non-genuine taxpayers

(Circular bearing F. No. 3(479)/GST/Policy/2023/346 dated 01.03.2023)

1. The Circular enumerates illustrative and non-exhaustive list where fake invoices i.e., issuance of invoice without actual supply of goods or services or both could be misused, and revenue loss is caused to the Government exchequer.

2. The SOP is being issued to streamline the following procedures:

- Investigation/ inspection/ verification for identification of non – genuine/existing taxpayers.
- Creation of a 'Repository' of non – genuine taxpayers
- Use of information and 'evidences' of non-genuine/existing taxpayers in the process of adjudication/ audit / assessment or other legal actions
- 'Exchange' of information of non – genuine taxpayers and evidences thereof with other authorities

3. SOP:

(a) <u>Cancellation of registration by the Proper Officer on his own motion:-</u>

- Listed following risk parameters to identify issuers of fake invoice:
    - Multiple GSTIN registrations for a given address
    - Multiple GSTIN for a given PAN
    - GSTIN using incomplete or wrong addresses
    - Taxpayer using sensitive commodities.
    - Common e-mail, common mobile numbers, common address, common authorized signatories, common promoters for multiple GSTIN.
    - Mismatch between the premises declared and the volume of goods transacted.
    - Mismatch between the quantum or transactions and the e-way bills generated. If there are, no e-way bills or less e-way bills generated compared to the details of transactions as per the GST returns.
    - PAN involved in any "fake invoice" fraud or any other GST frauds appear as either in GSTR 1A or GSTR 2A.
    - Abnormal ITC utilization (for example above 95%).

- Where registration is cancelled based on above grounds, it should be cancelled from the date of registration i.e., *ab-initio*.

(b) Cancellation of registration by the registered taxpayer:-

- Listed various checkpoints like registration profile, scrutiny of returns, status of refunds, any other information/ documents received form internal or external sources, details of authorized signatory/ GSTP/ CA/ Advocate for future correspondence.
- Necessary action to be taken within 30 days of application for cancellation of registration.
- Order passed by Proper Officer to be a speaking order containing details of the case and reasons of rejection of plea taken by the registered taxpayer.
- Cancellation of registration not to affect the liability of the person to pay tax and other dues for any period prior to the date of cancellation of registration.
- The taxpayer whose registration has been cancelled is required to furnish GSTR-10 (Final return) within 3 months of cancellation or date of order of cancellation whichever is later.

4. Checklist issued for the collection of detailed evidence during investigation/ inspection/ verification

5. Detailed instructions issued for preparation of Evidence folders and sharing of folders: Actions to be taken after visits

6. A repository of non-genuine/ non-existent taxpayers to be made

Advisories issued on GST Portal

bb) GSTN launches e-invoice registration services with private IRPs

(Advisory dated 04.03.2023)

- GSTN has launched the e-invoice registration services through multiple private IRPs at the recommendation of the GST Council. Four private companies were empaneled by GSTN for providing these e-invoice registration services to all GST taxpayers of the country.

- The details of the existing and new IPRs is available at ***https://einvoice.gst.gov.in/einvoice/dashboard***. This adds significant capacity and redundancy to the single e-invoice registration portal which existed earlier.

cc) New e-Invoice Portal for comprehensive information on e-invoice compliance

(Advisory dated 25.02.2023)

- The beta launch of a new e-Invoice portal (***www.einvoice.gst.gov.in***), has been done where taxpayers can find comprehensive information on e-invoice compliance in a user-friendly format, such as check your enablement status, self-enable themselves for invoicing, search for IRNs, web links to all IRP portals – all the relevant links/information in one convenient location. Taxpayers can log in to the new e- invoice portal using their GSTN credentials for select services pertaining to their GSTIN profiles.
- **Note**: The portal <***einvoice.gst.gov.in***> is reference site for limited purpose i.e. accessing all masters (data), news and updates, latest releases etc.
- For registering e-invoices and to access APIs, the taxpayers still need to go to <einvoiceX.gst.gov.in> sites. Further, taxpayers can continue to report e-invoices on the NIC IRP portal <einvoice1.gst.gov.in> as previously.

dd) Option for opting for payment of tax under the forward charge mechanism by a Goods Transport Agency (GTA)

(Advisory dated 25.02.2023)

- In compliance with *Notification No.* 03/2022-Central Tax (Rate), dated 13.07.2022, an option is being provided on the portal to all the existing taxpayers providing GTA Services, desirous of opting to pay tax under the forward charge mechanism to exercise their option.
- They can navigate **Services > User Services > Opting Forward Charge Payment by GTA (Annexure V),** after login, to submit their option on the portal till 15.03.2023.

- Option in Annexure V FORM is required to be submitted on the portal by the GTA every year before the commencement of the Financial Year.
- The Option once filed cannot be withdrawn during the year and the cut-off date for filing the Annexure V FORM is 15th March of the preceding financial year.

ee) Geocoding of Address of Principal Place of Business

(Advisory dated 24.02.2023)

- The functionality for geocoding the principal place of business address (i.e. the process of converting an address or description of a location into geographic coordinates) is now available on the GST Portal.
- This feature is introduced to ensure the accuracy of address details in GST records and streamline the address location and verification process.
- The said functionality is available for normal, composition, SEZ units, SEZ developers, ISD, and casual taxpayers who are active, cancelled, and suspended. It will gradually be opened for other types of taxpayers.
- Further, the said functionality is currently being made available for taxpayers registered in Delhi and Haryana only, and it will gradually be opened for taxpayers from other States and UTs.

ff) Reporting of credit note issued by suppliers in form GSTR-3B and introduction of Negative Values in Table 4 of GSTR-3B

(Advisory dated 17.02.2023)

- Currently, in GSTR-3B, credit note (CN) is being auto-populated in Table 4B(2), as an ITC reversal. However, in the table, the net ITC available is required to be reported. Therefore, now in view of the said changes, the impact of credit notes are also to be considered on net off basis in Table 4(A) of GSTR-3B only. Accordingly, the impact of credit note & their amendments will now be auto-populated in Table 4(A) instead of Table 4(B) of GSTR-3B.
- In case the value of credit notes becomes higher than the sum of invoices and debit notes put together, then the net ITC would become negative and the taxpayers will be allowed to report negative values in Table-4A.

- The taxpayers also can now enter negative values in Table 4D(2) of GSTR-3B. Consequent updates/ modifications, without any structural changes in form GSTR-2B summary or tables, have also been done in form GSTR-2B.
- The above changes have been made in the GST Portal from January-2023 period onwards and shall be applicable from the tax period - January 2023' onwards. It is advisable to go through the instructions/help text carefully in GSTR-2B & System Generated GSTR-3B pdf before filing GSTR-3B.

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