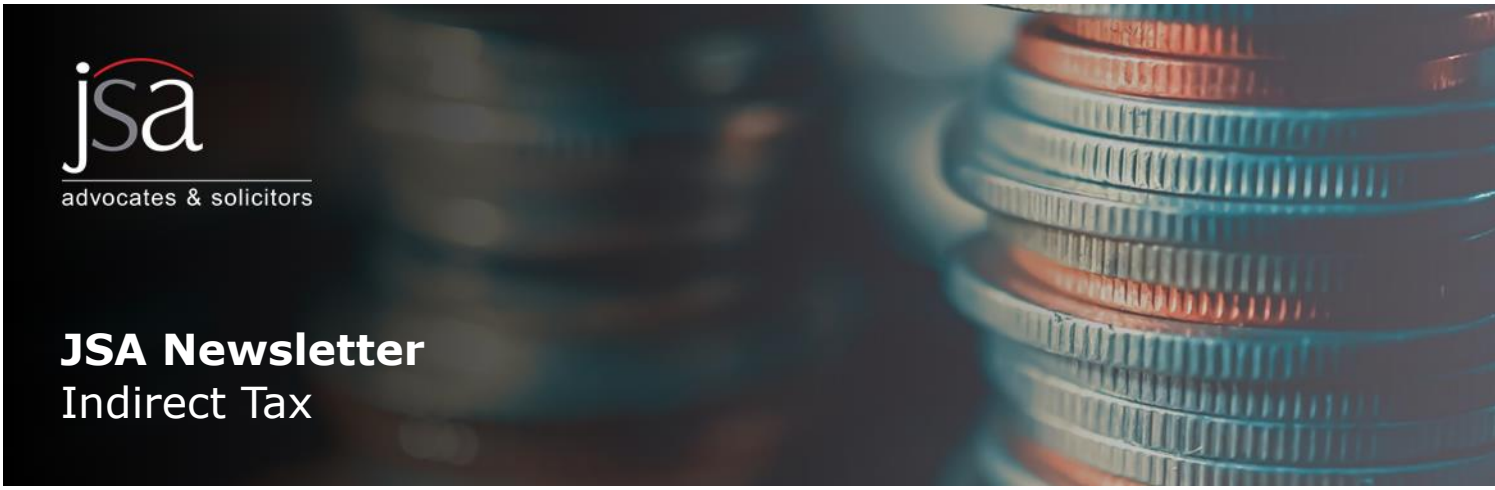

December 2021 Edition

Recent Rulings by Courts and Authorities

Supreme Court Ruling

Input tax credit of outdoor catering services availed for employees, disallowed

In the case of ***Toyota Kirloskar Motor Pvt. Ltd. vs. the Commissioner of Central Tax***[1], the petitioner was engaged in manufacture of motor vehicles and parts/ accessories and registered under the Central Excise Act, 1944. The petitioner procured outdoor catering services for its employees as mandated under Factories Act, 1948 and availed CENVAT credit on such services. The authorities disputed the availment of CENVAT credit on the grounds that the definition of input service specifically excluded outdoor catering services, when used primarily for personal use or consumption of any employee, w.e.f. April 1, 2011.

The petitioner approached the Hon'ble Supreme Court against the order of the Karnataka High Court wherein, CENVAT credit of outdoor catering services was disallowed on account of the amended definition of 'input service' specifically disallowing such credit. The High Court held that the taxing statute is to be strictly construed and what is clearly stipulated by the statutory provisions and therefore, disallowed the CENVAT credit on such services.

The Hon'ble Supreme Court agreed with the observations of the High Court and upheld the disallowance of CENVAT credit.

High Court Ruling

SCN seeking to deny transitional credit issued on erroneous grounds, set aside

In the case of ***Godrej & Boyce Mfg. Co. Ltd. vs. Union of India and Ors***[2], the petitioner is engaged in manufacture and sale of locks, furniture, industrial products, etc. and has availed transitional credit of cess[3] in Form TRAN-1. The GST[4] authorities issued an SCN[5] seeking to deny the credit of cess on the ground that the right for transition of cess balances was taken away by a retrospective amendment vide insertion of Explanation 3 read with Explanations 1 and 2 to Section 140 of the CGST Act[6]. The petitioner challenged the SCN to be issued on an untenable legal premise and without

[1] Toyota Kirloskar Motor Pvt. Ltd. vs. The Commissioner of Central Tax, 2021 (132) taxmann.com 251 (SC)
[2] Godrej & Boyce Mfg. Co. Ltd. vs. Union of India and Ors., 2021 (11) TMI 157 – Bombay High Court
[3] Education Cess, Secondary and Higher Education Cess and Krishi Kalyan Cess
[4] Goods and Services Tax
[5] Show cause notice
[6] Central Goods and Services Tax Act, 2017

jurisdiction as, the said amendments to Explanation 1 and 2 are not effective as on date of issuance of SCN as well as the writ petition.

The Bombay High Court observed that amendments in relation to the applicability of Explanations 1 and 2 to Section 140(1) of the CGST Act are not effective as on date, and the newly inserted Explanation 3 in turn refers to Explanations 1 and 2 (which are not effective). The High Court also observed that Explanation 3 employs the phrase 'eligible duties and taxes' for excluding cess whereas, Section 140(1) deals with transition of credit of 'eligible duties'.

The Hon'ble High Court held that as the law stands now, Explanation 3 to Section 140 of CGST Act does not have any application to Section 140(1) of the CGST Act and hence, cannot be relied on to conclude the coverage or exclusion of cess from Section 140(1) of the CGST Act. Therefore, the SCN suffers from an error pertaining to the want or lack of jurisdiction and accordingly, is liable to be set aside.

CESTAT[7] Rulings

Compensation received as per the order of the Supreme Court in case of coal blocks, not taxable under tolerating a situation

In the case of ***MNH Shakti Ltd. vs. Commissioner, Central Goods and Service Tax and Central Excise, Rourkela***[8], the appellant is a joint venture company engaged in the business of mining and selling coals. Under the directions of the Hon'ble Supreme Court, coal blocks allocated to the appellant were re-allocated to other companies and financial loss suffered by the appellant was compensated by the new allottees.

The service tax authorities issued an SCN to the appellant seeking service tax on the compensation received, being consideration for tolerating the act of cancellation of coal blocks by the Ministry of Coal. The CESTAT outlined that tolerating something and receiving a compensation for such tolerance pre-supposes that:

1. the person had a choice to tolerate or not;
2. the person chooses to tolerate;
3. tolerance was for a consideration as per an agreement (written or otherwise) to tolerate;
4. the tolerance was a taxable service.

The CESTAT noted that none of the above elements were present in the instant case and the appellant had no choice other than tolerating the cancellation. The cancellation was in pursuance of the order of the Supreme Court and not as a result of a contract. The cancellation of the allotted coal blocks as well as the receipt of compensation were by operation of law. Therefore, these cannot be called taxable services of tolerating a situation by any stretch of imagination and hence, there is no levy of service tax.

Retention of money for non-compliance of contract terms not liable to service tax under tolerating an act or situation

In the case of ***Tirupati Balaji Furnaces Pvt. Ltd. vs. Commissioner, CGST***[9], the appellant recorded other income which was retention of income for non-compliance of the conditions of contract of supply of goods. The authorities, during an audit, raised a demand to recover service tax on the amount retained by the appellant under the service category of "*agreeing to the obligation to refrain from an act, or to tolerate an act or a situation or to do an act*".

The CESTAT, New Delhi held that the amounts retained were not received by the appellant in lieu of rendering any service as, the appellant was not carrying on any activity to receive compensation. Also, there cannot be any

[7] Customs, Excise and Service Tax Appellate Tribunal
[8] MNH Shakti Limited vs. Commissioner, 2021-VIL-600-CESTAT-KOL-ST
[9] Tirupati Balaji Furnaces Pvt. Ltd. vs. Commissioner, CGST, [2021] 132 taxmann.com 264 (New Delhi - CESTAT)

presumption for intention of other party to breach or violate the contract and suffer losses. The only purpose for a minimum compensation/ forfeiture of money is to ensure that the parties do not default in undertaking the conditions prescribed in the contract. Therefore, CESTAT held that there is no act of tolerance and the retention of such amount cannot be subject to service tax.

Authority for Advance Ruling ("AAR")

Top up insurance/parental insurance premium recovered from employees does not amount to supply of services

The applicant, ***TATA Power Company Limited***[10], is engaged in the business of generation, transmission and distribution of power to the customers. As part of its employee policies, the applicant provides certain facilities to its employees such as insurance, wherein, a group insurance is provided by the applicant to the employees, by engaging an insurance company. The employees are also provided an option for additional insurance (top-up insurance/ parental insurance) at an additional amount of premium, which is deducted from the employees' salary. The applicant approached the AAR to understand whether recovery of an amount towards top-up and parental insurance premium from the employees, amounts to supply of any services under Section 7 of the CGST Act, 2017.

The AAR observed that for any activity to fall under the ambit of 'supply', such an activity must be in the course of business or for the furtherance of business. In the instant case, the applicant is not primarily engaged in the business of providing health insurance and was merely arranging the same for the benefit of its employees. The applicant pays the insurance premium to the insurance company and recovers the same from its employees. Given that the applicant's business will not be affected by not providing top up/ parental insurance coverage, it can be said that the activity of recovery of the cost of insurance premium cannot be treated as an activity done in the course of business or for the furtherance of business. AAR further observed that the applicant did not avail ITC[11] of the GST paid to the insurance company.

The AAR noted that the activity undertaken by the taxpayer of providing mediclaim policy for the employees and their parents, through the insurance company neither satisfies conditions of supply of insurance services (Section 7 of CGST Act) nor is it covered under the term 'business' [Section 2(17) of CGST Act]. Therefore, the AAR held that the recovery of the top up/ parental insurance premium from employees will not be subject to GST.

GST is exempt on all services covered under Article 243W of the Constitution of India when provided to a government entity

In the case of ***MAHA Mumbai Metro (M3) Operation Corporation Limited***[12] ("**Mumbai Metro**"), the AAR evaluated whether GST is applicable on expenses reimbursed by its parent company, Mumbai Metropolitan Region Development Authority ("**MMRDA**"). MMRDA has engaged Mumbai Metro as an authority for the operation and maintenance of all metro corridors and has agreed to reimburse expenses incurred for performing the said activities.

The AAR observed that the services provided by Mumbai Metro are covered under the ambit of Article 243W read with Twelfth Schedule of the Constitution of India and are exempted[13] under GST, including the consultancy services provided for preparation of transport studies. The AAR also observed that while the reimbursements are not directly related to consultancy services, the same will be treated as consideration for supply of consultancy services. However, the same will be exempt from GST as, Mumbai Metro is providing services to MMRDA, a government entity constituted and established by the State Government of Maharashtra (with 100% participation by way of equity/ control).

[10] TATA Power Company Limited, Advance Ruling No-GST-ARA-99/2019-20/B-92, dated November 10, 2021 (Maharashtra)
[11] Input tax credit
[12] M/s. MAHA Mumbai Metro Operation Corporation Limited, Advance Ruling No-GST-ARA-13/2021-22/B-93, dated November 10, 2021 (Maharashtra)
[13] Notification no. 12/2017-Central Tax (Rate) dated June 28, 2017

Therefore, consultancy services supplied by Mumbai Metro can be covered under the Twelfth Schedule to Article 243W of the Constitution of India and hence, exempt from GST.

Settlement amount paid in lieu of an arbitration proceeding treated as supply of services

In the case of ***GSPC (JPDA) Limited***[14], the applicant carried on petroleum operations within the Joint Development Petroleum Area ("**JPDA**") under a production sharing contract ("**PSC"**) with Autoridade Nacional do Petroleo E Minerals ("**ANP**"). The applicant terminated the PSC in July 2015, whereby ANP issued a notice demanding the cost of exploration, along with damages for breach of the PSC. ANP initiated arbitration proceedings for recovery of the said amount and in July 2020, a settlement was carried out as per the deed of settlement.

The AAR evaluated the taxability of the settlement amount under the provisions of GST Law. The AAR observed that the settlement amount paid by the applicant was not on account of breach of PSC but based on the deed of settlement, which stated that the payment was made for the following purposes:

- Agreeing to release the performance guarantee,
- Toleration of non-payment of damages in pursuance of breach of PSC,
- Agreeing to not pursue any arbitration proceedings against the applicant, subject to the settlement payment.

Based on the above, AAR noted that in terms of clause 5(e) of Schedule II of the CGST Act i.e., "*agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act*", the above activities against the settlement amount will be construed to be supply of service. Given that the deed of settlement and the order of the arbitration proceeding were executed post July 2017, therefore, the said supply falls under the GST regime. Hence, the supply amounts to import of service by the applicant as, the service has been provided by ANP which is located in a non-taxable territory to the applicant located in the taxable territory. Accordingly, the applicant is liable to pay GST under reverse charge mechanism.

JSA Comments: Various courts have evaluated the taxability of liquidated damages and held that damages are paid as a condition to the contract and not as a consideration towards specific services agreed under the contract. However, in this case, the deed of settlement very clearly laid down the clauses which are covered under the service entry of "*agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act*" and hence, is subject to GST, as against liquidated damages. Accordingly, the ruling cannot be applied to all cases of settlement paid under an arbitration order. Taxability of such payments should be evaluated on case to case basis.

Notifications

Amendments in relation to taxability of specific services

Notification No. 15/2021 - Central Tax (Rate) dated November 18, 2021

The rate notification for services[15] is amended to increase the GST rate applicable on supply of following services, w.e.f. January 1, 2022:

Services	Existing GST Rate	New GST Rate
Construction services (composite supply of works contract) provided to Government Entity and Government Authority	12%	18%

[14] GSPC (JPDA) Ltd., Advance Ruling No-GUJ/GAAR/R50/2021, dated September 6, 2021 (Gujarat)
[15] Notification No. 11/2017 – Central Tax (Rate) dated June 28, 2017

Services	Existing GST Rate	New GST Rate
Job work services pertaining to dyeing and printing of textile and textile products	5%	12%

Notification No. 16/2021 – Central Tax (Rate) dated November 18, 2021

Exemptions[16] for the following services have been withdrawn by the Central Government, w.e.f. January 1, 2022:

- Pure services and composite supply of goods and services (where goods constitute not more than 25% value) provided to Government Entity or Government Authority.
- Service of transportation of passenger (with or without accompanied belongings) by non-airconditioned contract/ state carriage or metered cabs or auto/e-rickshaws, if such services are supplied through e-commerce operators.

Notification No. 17/2021 – Central Tax (Rate) dated November 18, 2021

E-commerce Operators are made liable to pay GST[17] under the provisions of Section 9(5) of CGST Act to the following supplies of services, w.e.f. January 1, 2022:

- restaurant services other than the services supplied by restaurant, eating joint, etc.
- services by way of transportation of passengers by omnibus or any other motor vehicle.

Circulars

Clarifications in relation to refund of excess balance in Electronic Cash Ledger

Circular No. 166/22/2021-GST dated 17 November 2021

CBIC has clarified the following in case of refund of excess balance in electronic cash ledger:

- The time period applicable for filing refund application, is not applicable,
- certification/ declaration as required under the CGST Act not required to be furnished,
- any amount, which remains unutilized in electronic cash ledger (including on account of TDS/TCS), can be refunded to the registered person.

Further, the relevant date for purpose of filing the refund claim for deemed export supplies will be the date of filing of return, related to such supplies.

Clarification regarding pre-SCN consultation for cases under Central Excise Act, 1944 or Service Tax Law[18]

Circular no. 1079/03/2021-CX dated 11 November 2021

CBIC has clarified that exclusion from pre-SCN consultation is case specific and not formation specific (i.e., provisions of pre-show cause notice are also applicable to DGGI). Further, pre-SCN consultation for recovery of duties and taxes

[16] Notification No. 12/2017 – Central Tax (Rate) dated June 28, 2017
[17] Notification No. 17/2017 – Central Tax (Rate) dated June 28, 2017
[18] Chapter V of Finance Act 1994

on account of reasons other than by fraud, collusion, wilful misstatement, suppression of facts, etc. for cases under Central Excise Act, 1944 or Service Tax Law is optional.

Guidelines for blocking Electronic Credit Ledger ("ECL")

Instruction No. 20/16/05/2021-GST /1552 dated November 2, 2021

CBIC has issued guidelines for disallowing debit in the ECL as per the provisions of Rule 86A[19] of the CGST Rules[20]. It is clearly stated that the Commissioner or the person authorised by him, should have "reason to believe" that ITC is either ineligible or has been fraudulently availed and the reasons for such belief can be one or more of the following:

1. ITC availed on invoice(s) where supplier is non-existent or not conducting business,
2. ITC availed without receiving goods or services,
3. ITC availed on invoice on which tax has not been paid to Government,
4. Person availing ITC is subsequently found non-existent or is not conducting any business,
5. ITC availed without any invoice or debit note.

These guidelines also prescribe monetary limits and a maximum period of one year for imposing restrictions on the ECL.

For more details, please contact km@jsalaw.com

[19] Conditions of use of amount available in electronic credit ledger
[20] Central Goods and Services Tax Rules, 2017