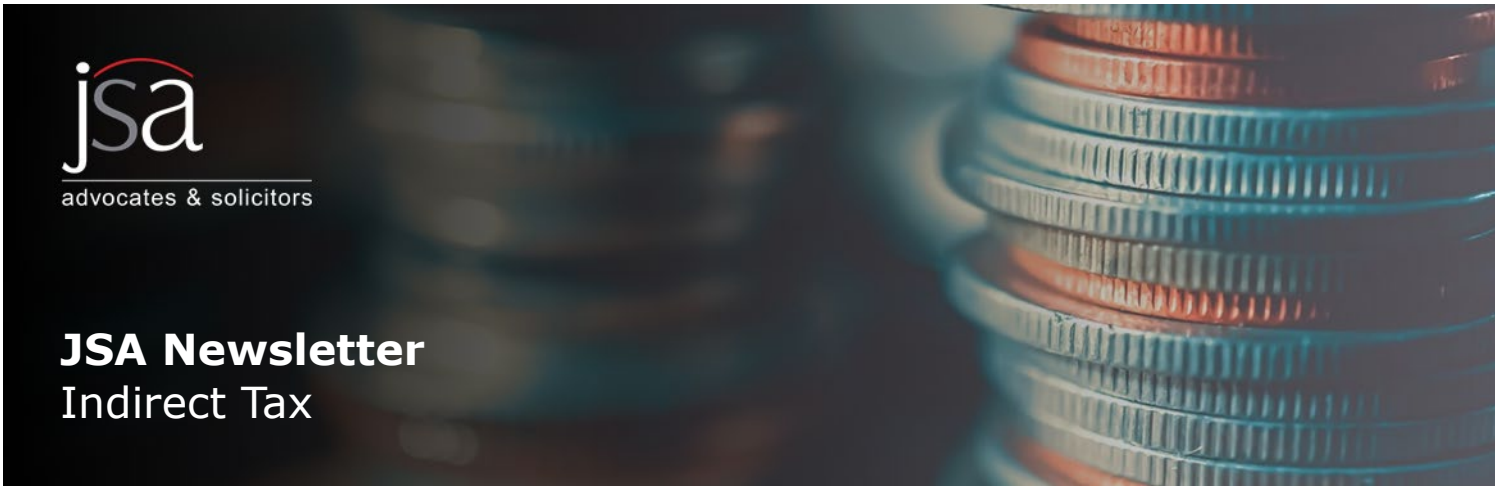

March 2022 Edition

Recent Rulings by Courts and Authorities

Supreme Court

SARFAESI Act[1] has an overriding effect on Central Excise Act[2]

In the case of ***Punjab National Bank vs. Union of India[3],*** the Commissioner of Customs and Central Excise ordered confiscation of assets of Rathi Ispat Limited ("**RIL**"), under Rule 173Q(2) of the Central Excise Rules, 1944. RIL had availed credit facilities with the appellant and mortgaged the assets with the Bank and defaulted in clearing payment of debt. The appellant thereby, issued a notice to RIL under the SARFAESI Act.

The respondent contended that movable and immovable properties of RIL stood confiscated by the orders passed by the Commissioner of Customs and Central Excise and the possession of the assets in question cannot be taken by the appellant bank. The appellant filed a writ petition before the Allahabad High Court, wherein, the writ petition was dismissed on the grounds that the debts cannot be recovered from assets that are confiscated by the Customs and Central Excise Authorities.

The appellant approached the Apex Court to understand whether the dues of the central excise authorities would have priority over the dues of the secured creditors. The Apex Court ruled that,

(i) the dues of a secured creditor, i.e., the appellant bank, will have priority over the dues of the central excise authorities, as, the provisions contained in the SARFAESI Act will have an overriding effect over the provisions of the Central Excise Act; and

(ii) the Court also remarked that the confiscation orders lacked statutory backing, as they were rooted in a provision that stood omitted on the day of the passing of the orders.

In light of the above, it was concluded that where assets are mortgaged/ hypothecated to a secured creditor, having regard to the provisions contained in SARFAESI Act, the secured creditor will have a first charge on such assets.

Agreement has to be read as a whole to determine the nature of services and applicability of tax exemption

In the case of ***Adiraj Manpower Services (P.) Ltd. vs. Commissioner of Central Excise, Pune***[4], the appellant obtained service tax registration under the category of 'Manpower recruitment or supply agency services'. In 2012, the appellant entered into an agreement with a Company ("Sigma") wherein the appellant was required to provide

1 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002
2 Central Excise Act, 1944
3 Punjab National Bank vs. Union of India, 2022 (2) TMI 1171 – Supreme Court
4 Adiraj Manpower Services (P.) Ltd. vs. Commissioner of Central Excise, Pune – II, (2022) 135 taxmann.com 280 (SC)

personnel for activities such as felting, material handling, pouring and supply of material to furnace. SCN[5] was issued to the appellant demanding service tax along with interest and penalty, on the grounds that the appellant failed to pay service tax dues for the years 2012 to 2014.

Based on the investigation, the SCN observed that the appellant collected and paid service tax till the year 2012, on supply of manpower services. However, from year 2012 onwards, the appellant termed the service activity as 'job work' and classified the provision of said services as 'business auxiliary services', thereby, claiming exemption under service tax. SCN stated that the nature of services provided by the appellant before and after year 2012 remained unchanged.

Aggrieved by the orders of the adjudicating authorities and the Tribunal, the appellant approached the Apex Court, and argued the following:

(i) Definition of 'contractor' under the Contract Labour (Regulation and Abolition) Act, 1970 covers job work as well as supply of manpower;

(ii) As per the agreement, the Appellant has to determine the persons to be engaged for performing the contract and the appellant is entrusted with the responsibility for supervision as a contractor. Therefore, there is no supply of manpower to Sigma as, in that case the control over the manpower would have shifted to Sigma;

(iii) The invoices were raised on piece rate basis which indicates that a service charge has been levied on the quantity of work done and not on the quantity of the manpower supplied.

On perusal of the agreements entered into between the appellant and Sigma, the Hon'ble Supreme Court noted that the crucial elements of a job work agreement is nature of process of work to be carried out by the appellant, provisions for maintaining quality of work, nature of facilities utilised, or infrastructure deployed, delivery schedule, specifications in regard to work to be performed and consequences of breach of contractual obligation, which were missing in the agreement with Sigma.

The Supreme Court observed that while the agreement contains a provision for payment on piece rate basis, the agreement has to be read as a whole. On plain reading of the agreement, it is apparent that the contract is a pure and simple contract for provision of contract labour. An attempt has been made to camouflage the contract as a contract for job work to avail the exemption from payment of service tax.

On the basis of the above reasoning, the Supreme Court dismissed the appeal filed against the order of CESTAT and confirmed the demand of service tax, along with interest and penalty.

High Court

Lease of residential premises used as 'hostel' exempted from levy of GST

In the case of ***Taghar Vasudeva Ambrish vs. AAAR***[6], the petitioner, a co-owner of the property leased the premises to a lessee, who in turn leased out said premises as 'hostel' for long term (3-12 months) accommodation to students and working professionals.

The petitioner approached the AAR[7] and subsequently the AAAR[8] seeking clarity on availability of exemption from payment of GST, as renting of residential dwelling for use as residence[9]. It was held by the AAR and AAAR that a hostel is akin to social accommodation rather than residential accommodation. The premises cannot be said to be covered under the term 'residential dwelling' for the purpose of the exemption.

The High Court relied on a number of judgments to explain that residence connotes a place where a person eats, drinks and sleeps and it is not necessary that he should own it. It was observed that hostel is used by students for the purpose

[5] Show Cause Notice
[6] Taghar Vasudeva Ambrish vs. AAAR, Writ Petition No. 14891/2020 dated February 7, 2022 (Karnataka High Court)
[7] Authority for Advance Ruling
[8] Appellate Authority for Advance Ruling
[9] Entry no.13 of notification no. 9/2017-central tax (rate) dated September 28, 2017

of residence i.e., for eating, drinking, and sleeping for a period of 3 to 12 months, which is a longer duration as compared to hotel, guest house, inn, etc.

Further, the High Court observed that (i) the property is being rented as a hostel to the students which falls within the purview of residential dwelling, (ii) the residential dwelling is being used for the purposes of residence, and (iii) there is no condition in the exemption notification which states that the premises should be owned by the same person.

In light of the above, the High Court held that the benefit of exemption notification cannot be denied to the petitioner on the ground that the lessee is not using the premises for its own residential purpose.

JSA Comments: This has been a contentious issue for entities operating in the business of co-living spaces, wherein the premises are leased for use as hostels. This ruling clearly defines the contours of activities that can be treated as leasing for "residential dwelling" by distinguishing between hotel/ guest house/ inn and a hostel/ co-living space, thereby, clarifying the ambit of the exemption provided under the GST Law.

Manual application for claiming refund under GST, permitted

In the case of ***C. P. Ravindranath Menon and another vs. Union of India***[10]**,** the assessee entered into an agreement for sale, with Godrej Redevelopers and paid GST basis a tax invoice. However, the agreement for sale was terminated as, the loan was not sanctioned in favor of the petitioner. Given that the agreement for sale was terminated, the petitioner filed an application in Form GST-RFD-01A for refund of GST paid and enclosed relevant information/ evidence. The petitioner also confirmed that no refund was sought by Godrej Redevelopers in respect of the said transaction. However, the application was rejected on the ground that refund application was not filed electronically and hence, not in compliance with the circular[11] issued for processing of refund claims.

The High Court emphasized on the decision in the case of ***Laxmi Organic Industries Ltd.***[12], which dealt with identical facts. It was observed that the plain and simple construction of Rule 97A of the CGST Rules is that any reference to electronic filing of application on the common portal includes manual filing of the said application(s). A circular cannot control the statutory rule (i.e., Rule 97A of the CGST Rules).

The High Court quashed the refund rejection order and directed the respondent to decide the application of refund within 8 weeks, and thereafter, release the amount of refund within two weeks.

Bombay HC directs the Revenue to issue norms around issuance of summons

In the case of ***Shalaka Infra-Tech India Pvt. Ltd. vs. Union of India***[13]**,** multiple summons were issued by the investigating authorities during the period December 2020 and February 2022, with means of harassing the petitioner, without issuance of SCN. The investigating authority recovered various amounts from the petitioner, during this period when the petitioners appeared and complied with the summons.

Taking cognizance of the grievances of the petitioner, in an interim order, the Bombay High Court issued the following directions to the investigation authorities:

(i) The issue norms around frequency of issuance of summons and the purposes thereof;

(ii) A notice to be given to the petitioner before any coercive actions are undertaken.

JSA Comments: The instructions of the Hon'ble High Court are an encouraging step towards alleviating the investigation proceedings and ensuring that the investigations are undertaken and concluded in a systematic manner.

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10 C. P. Ravindranath Menon and Anr. vs. Union of India, 2022 SCC Online Bom 341
11 Circular No. 125/44/2019-GST dated November 18, 2019
12 Laxmi Organic Limited v. Union of India, Writ Petition No.7861/ 2021dated November 30, 2021 (Bombay High Court.)
13 Shalaka Infra-Tech India Pvt. Ltd. v. Union of India, Writ Petition No. 1745/2022 dated February 21, 2022 (Bombay High Court)

CESTAT

Service Tax not leviable on supply of gensets for short period

In the case of ***Subhash Lighthouse vs. Commissioner, Central Goods and Service Tax***[14], the appellant was engaged in the business of supply of generator sets ('**gensets**') on rental basis to its customers, under the following models:

(i) Fixed ones wherein, the appellant installs the sets in the premises of the customers and the possession of such gensets lies with the customers;

(ii) Mobile ones wherein, the gensets are required for shorter period and are fixed on vehicles. These are supplied with operators who run the gensets as per the instructions of the customers.

Service tax was demanded on the entire consideration received by the appellant during the period FY 2011 – 2016.

The Appellant contended that supply of both kinds of gensets were governed by the provisions of VAT[15] and construed as 'deemed sales' as, the effective control and possession of gensets was with the customers. The Commissioner in respect of the supply of fixed gensets agreed that the transaction was that of deemed sale as, the transaction is not merely of licensing the goods for use. However, the Commissioner observed that the supply of mobile gensets cannot be considered to be a deemed sale as, the effective possession and control of the machine still resides with the appellant. It was held that such activity will be covered under "Supply of tangible goods services" and liable to service tax. Aggrieved by the Commissioner's view, the appellant filed an appeal.

The CESTAT relied on the definition of "supply of tangible goods services" and observed that such services involve transfer of goods without transferring the right of possession or right to use such goods. In the instant case, the appellants transferred the right to use the gensets to its customers along with effective control and possession of the same. The use of gensets was purely at the customers' discretion. Therefore, this arrangement made between the appellant and its customers for supply of mobile gensets would be covered under 'deemed sale' and accordingly, such transaction is subject to VAT and not service tax.

Notifications

CBIC reduces GST e-invoicing turnover limit from INR 50 crores to INR 20 crores with effect from April 1, 2022

Notification No. 1/2022- Central Tax dated February 24, 2022

CBIC[16] has notified the reduction in the applicability of GST e-invoicing threshold from INR 50 crores to INR 20 crores with effect from April 1, 2022. Therefore, every registered person having turnover of more than INR 20 crores is required to generate e-invoices for all B2B supplies.

Circulars/ Trade Notice

Mandatory filing of Registration Cum Membership Certificate/ Registration Certificate through the Common Digital Platform w.e.f. April 1, 2022

Trade Notice No. 35/2021-2022 dated February 24, 2022

DGFT[17] has developed a new online common digital platform for issuance of Registration Cum Membership Certificate (RCMC)/ Registration Certificate (RC). The objective of the platform is to provide an electronic, contact less, single

[14] Subhash Lighthouse vs. Commissioner, Central Goods and Service Tax, Service Tax Appeal No. 50176/2019 dated February 2, 2022 (CESTAT – New Delhi)
[15] Value Added Tax
[16] Central Board of Indirect Taxes and Customs
[17] Directorate General of Foreign Trade

window for the RCMC/RC related processes including application for fresh/amendment/renewal of RCMC/RC. Effective from April 1, 2022, exporters are required to mandatorily file RCMC/RC applications through the common digital portal of e-RCMC platform and the manual procedure will be discontinued from March 31, 2022.

For more details, please contact km@jsalaw.com

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