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Semi-Annual Indirect Tax Case Law Compendium 2024

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Indirect Tax Case Law Semi -Annual Compendium 2024

This Compendium consolidates the key decisions passed by the Supreme Court of India, different High Courts and the Customs, Excise and Service Tax Tribunal regarding indirect tax laws, which were circulated as a part of the JSA Prisms and Newsletters during the calendar period from July 2024 till December 2024.

Supreme Court of India

Royalty not in nature of tax but consideration for enjoyment of mineral rights

A 9 (nine) judges Constitution Bench of the Hon'ble Supreme Court of India ("**Supreme Court**") in the case of ***Mineral Area Development Authority and Anr. vs. Steel Authority of India and Anr.***[1] held that royalty is not in the nature of tax and therefore, States have the authority to impose taxes on mineral rights. The dispute stems from the fact that several States sought to impose taxes on mineral bearing land in pursuance of Entry 49 of List II of the Constitution of India by applying mineral value or royalty as the measure of tax. The Special Leave Petition ("**SLP**") was filed in the Supreme Court on the primary ground that levy of royalty on mineral rights was beyond legislative competence of State Legislatures.

The Supreme Court observed that royalty cannot be equated to a tax, as royalty is consideration paid by a mining lessee to the lessor for enjoyment of mineral rights and to compensate for the loss of value of minerals suffered by the owner of the minerals. The liability to pay royalty arises out of the contractual conditions of the mining lease. The failure of the lessee to pay royalty is considered to be a breach of the terms of the contract, allowing the lessor to determine the lease and initiate proceedings for recovery against the lessee. Further, Section 9 of MMDR Act[2] statutorily regulates the right of a lessor to receive consideration in the form of royalty from the lessee for removing or carrying away minerals from the leased area. Further, while royalty is a consideration towards value of minerals, tax is an imposition of a sovereign. It was also observed that royalty is paid in consideration of doing a particular action, that is, extracting minerals from the soil, while tax is generally levied with respect to a taxable event determined by law.

The Supreme Court also emphasised on the fact that the levy of royalty is contractual in nature and flows from the agreement executed between the parties for

[1] 2024 (8) TMI 956

[2] Mines and Minerals (Development and Regulation) Act, 1957

extraction of minerals whereas tax is imposed by the Government on an event determined by law. Accordingly, royalty would not be comprehended within the meaning of the expression 'taxes on mineral rights'.

The Supreme Court concluded that the States have the legislative power to tax mineral rights and therefore, upheld the levy of tax on royalty paid for enjoying mineral rights.

Directorate of Revenue Intelligence officers are 'proper officers' to issue recovery notices under Section 28 of the Customs Act, 1962

The Supreme Court allowed the review petition in the case of ***Commissioner of Customs vs. Canon India Private Limited***,[3] filed by the Customs Department and held that the Directorate of Revenue Intelligence ("**DRI**"), Directorate General of Central Excise Intelligence and Commissionerate of Central Excise (and other similarly situated officers) are proper officers of Customs and are thereby competent to issue Show Cause Notices ("**SCN**").

The issue emanated from an SCN issued by the DRI questioning exemption from customs duty on import of digital still image video cameras. The Respondent in the present review petition, appealed before the Customs, Excise and Service Tax Appellate Tribunal ("**CESTAT**"), which ruled against the said assessee and denied the exemption of duty. Aggrieved by the ruling of the CESTAT, the assessee approached the Supreme Court, wherein the Supreme Court quashed the SCN on the ground that DRI officers were not 'proper officers' and did not possess the powers of recovery/re-assessment under Section 28 of the Customs Act, 1962 ("**Customs Act**"). Customs authorities challenged the said order by way of a review petition before the Supreme Court.

The issues for consideration before the Supreme Court were:

1. whether officers of DRI are proper officers under Section 28 of the Customs Act?
2. whether the power under Section 28 of the Customs Act can be exercised only by someone who is empowered to exercise the power under Section 17 of the Customs Act?
3. whether the interpretation of 'proper officer' in Commissioner of Customs vs. Sayed Ali[4] is correct?

Analysis

The Supreme Court overturned the original decision in Canon India (*supra*) broadly on the following grounds:

1. **Applicability of the decision of Sayed *Ali (supra)***

   It was held in the case of Sayed Ali (*supra*), that on a conjoint reading of Sections 2(34) and 28 of the Customs Act, it is clear that only such custom officer who has been assigned the specific function of assessment and re-assessment of duty either by Central Board of Indirect Taxes and Customs ("**CBIC**") or by the Commissioner of Customs, is competent to issue a notice under Section 28 of the Customs Act. The said decision was relied upon in the Canon India (*supra*). The Supreme Court in the present review petition held that the said decision cannot be relied upon as post the said decision, the scheme of assessment under Section 17 of the Customs Act has undergone substantial changes, like introduction of self-assessment, wherein the competence of proper officer to conduct assessment was limited.

2. **'The proper officer' and 'a proper officer'**

   The Supreme Court in the review petition highlighted that the finding in Canon India (*supra*) regarding the need for a link between the powers of assessment under Section 17 and the power to

[3] Review Petition No. 400 of 2021 in Civil Appeal No. 1827 of 2018

[4] (2011) SCC 537

issue notices under Section 28 were incorrect. Proceedings under Section 28 are subsequent to the completion of the process set out in Section 17. The nature of review under Section 28 is significantly different from the nature of assessment and reassessment under Section 17. Vesting of the functions of assessment and re-assessment under Section 17 being the threshold, mandatory condition for a proper officer to perform function under Section 28 would be an erroneous interpretation of Section 28.

3. **'Entrustment' of powers under the Customs Act**

   In its earlier decision, the Supreme Court had observed that Section 6 is the only provision which provides for entrustment of the functions of an ''officer of Customs" on other Central/ State officers. However, no empowering notification under Section 6 was issued. In the review petition, the Supreme Court held that this view was based on an incomplete understanding, particularly overlooking Circular No. 4/99-Cus dated February 15, 1999 and Notification No. 4/20x11 dated July 6, 2011, that had empowered DRI officers to issue such notices. The Supreme Court clarified that the jurisdiction of DRI officers to issue SCNs was valid under the Customs Act, as these officers were assign ed the function of the "proper officer" for the purposes of Section 28, which deals with recovery of duties.

4. **Constitutionality of Section 28(11) of the Customs Act**

   The Supreme Court also commented on the constitutionality of Section 28(11) of the Customs Act, introduced by the Customs (Amendment and Validation) Act, 2011, to validate past actions by DRI officers in light of Sayed Ali (*supra*). Additionally, Supreme Court also examined the constitutional validity of Section 97 of the Finance Act, 2022, which retrospectively validated SCNs issued by DRI officers.

   The Supreme Court affirmed the constitutional validity of these provisions, stating that they corrected earlier defects and clarified the competence of DRI officers. It concluded that the amendments did not violate constitutional principles, as the DRI officers had been assigned the function of proper officers, making their actions under Section 28 lawful.

Order

Deciding the review petition, the Supreme Court has restored the SCNs to the adjudication stage where the notices were directly challenged before the High Courts and has granted a period of 8 (eight) weeks in cases for filing appeals where orders were already issued pursuant to such notices.

Telecommunication towers not an immovable property, hence eligible for credit

The Supreme Court in ***Bharti Airtel Limited vs. The Commissioner of Central Excise, Pune,***[5] has ruled on the admissibility of Central Value Added Tax ("**CENVAT**") credit on procurement of parts of telecommunication towers and Prefabricated Buildings ("**PFB**"). Considering the contrary rulings of the Bombay High Court (**"Bombay HC"**) and the Delhi High Court (**"Delhi HC"**), the Supreme Court upholding the view of the Delhi HC held that telecommunication towers and PFBs are not immovable property and would fall within the definition of 'Capital Goods' under the CENVAT Credit Rules, 2004 ("**CENVAT Credit Rules**"), therefore, be eligible for credit.

Background

The dispute with respect to eligibility of CENVAT credit was before the Bombay HC in ***Bharti Airtel Limited vs. The Commissioner of Central Excise, Pune***[6], wherein various Mobile Service Providers ("**MSP**") were being denied credit of duty paid on procurement of parts of

[5] 2024 (11) TMI 1042 – Supreme Court

[6] 2014 (9) TMI 38 – Bombay HC

telecommunication towers and PFBs on the premise that the same amount to immovable property and outside the purview of 'inputs' and 'capital goods' defined under the CENVAT Credit Rules. The Bombay HC agreed to the same and held that telecommunication tower and PFBs are immovable property since post erection of parts into towers, it assumes the nature of immovable property, not falling within the definition of 'inputs' and 'capital goods' under Rule 2 of the CENVAT Credit Rules. Hence, the assessee will not be eligible to take credit of excise duty paid on procurement of parts of telecommunication towers and PFBs.

Similar dispute was before the Delhi HC in ***Vodafone Mobile Services Limited vs. Commissioner of Service Tax, Delhi***[7], wherein the Delhi HC took a divergent view and held that telecommunication towers and PFBs would not amount to be immovable property as it does not fulfil the permanency test.

Appeals filed against the orders of the Bombay HC and Delhi HC were considered and disposed by the Supreme Court by way of a common order.

Analysis

The Supreme Court referred to the provision under the CENVAT Credit Rules enabling assesses to claim CENVAT Credit of tax paid on procurements as also the definition of 'inputs' and 'capital goods' before determining movability of telecommunication towers and PFBs. It observed that in terms of Rule 3(1) of the CENVAT Credit Rules, a service provider is entitled to CENVAT credit of tax paid on 'inputs' and 'capital goods' used in the provision of output service.

The Supreme Court observed that before determining whether the said goods fall within the definition of 'inputs' or 'capital goods', it is essential to determine the movability of the goods thereby determining whether telecommunication towers and PFBs can be considered as 'goods' at all. The Supreme Court remarked that the key factors for this classification are the item's ability to be relocated, dismantled, and sold in the market without significant loss of functionality or market value. It emphasised that attachment to the earth alone does not automatically classify items as immovable. If such attachment serves a temporary purpose or is intended to enhance functionality, without the intention of permanent assimilation into the land, the property should be treated as movable. The Supreme Court applied the functionality and marketability test laid down in ***Solid and Correct Engineering***[8] and ***Triveni Engineering***[9].

The Supreme Court after reviewing past precedents rendered in the context of what constitutes immovable property, identified 5 (five) fundamental precepts *vis.* nature of annexation, object of annexation, intendment of parties, functionality test and permanency test. The Supreme Court employed these 5 (five) precepts to conclude that telecommunication towers and PFBs cannot be said to be immovable property.

After establishing the movability of telecommunication towers and PFBs, the Supreme Court analysed whether they fall within the definition of 'input' or 'capital goods'. In terms of definition of 'capital goods' under Rule 2(a)(A) of the CENVAT Credit Rules, what is covered within the definition of 'capital goods' is *inter alia* goods falling under Chapter 82, 84, 85, 90 and Heading 6805 of the Central Excise Tariff Act, 1985 ("**Excise Tariff**"). Further, components, spares and accessories of goods falling under the Tariff Heading mentioned hereinabove will also be covered within the definition of 'capital goods'.

The Supreme Court observed that antennas are mounted on the telecommunication towers to provide it with sufficient height to receive and transmit signals and also to provide stability to these antennas and consequently ensures seamless and uninterrupted signal transmission. Similarly, PFBs, house essential equipment like generators and cables to support the functioning of antennas and Base Transceiver System (**"BTS"**). Hence, these structures are accessories to these antennas and BTS. Further, given that antennas and BTS are classifiable under Chapter 85 of the Excise Tariff, they are covered within the meaning of 'capital goods' in terms of Rule 2(a)(A) of the Cenvat Credit Rules and accordingly, would qualify as capital goods, and thereby an assessee would be eligible to claim credit of excise duty paid on the same.

Alternatively, the assessees contended that the goods will qualify as 'inputs' as defined under Rule 2(k) of the CENVAT Credit Rules. The Supreme Court observed that the said rule provides that 'inputs' means all

[7] 2018 (11) TMI 713 – Delhi HC

[8] Commissioner of *Central Excise, Ahmedabad vs. Solid and Correct Engineering Works & Ors.* – 2010 (4) TMI 15 - SC

[9] *Triveni Engineering and Indus Ltd. vs. Commissioner of Central Excise* – 2000 (8) TMI 86 - SC

goods, except light diesel oil, high speed diesel oil, motor spirit, commonly known as petrol and motor vehicles, used for providing any output service. Telecommunication towers and PFBs are 'goods' and not immovable property which is used for providing mobile telephonic services. Therefore, the inescapable conclusion would be that they would also qualify as "inputs" under Rule 2(k) for the purpose of claiming CENVAT credit.

Order

Having held that the tower and PFBs are not immovable property covered within the definition of 'capital goods' under Rule 2(a)(A), credit will be available on the duty paid. Alternatively, and since these goods are used for providing mobile telecommunication services, they would also qualify as "inputs" under Rule 2(k) for the purpose of credit benefits under the CENVAT Credit Rules.

Constitutional validity of Section 17(5)(c) and (d) of Central Goods and Services Tax Act, 2017 upheld

The Supreme Court in an important judgement in the matter of ***Chief Commissioner of CGST and Ors. vs. Safari Retreats Private Limited and Ors.,***[10] has ruled on the eligibility of the taxpayers to avail Input Tax Credit ("**ITC**") of Goods and Services Tax ("**GST**") paid on procurement of works contract services and other goods and services received for construction of immovable property, with reference to specific restrictions contained in Sections 17(5)(c) and 17(5)(d) of the Central Goods and Services Tax Act, 2017 ("**CGST Act**") in this regard.

Background

The issue stems from the interpretation of Sections 17(5)(c) and 17(5)(d) of the CGST Act, which restricts availment of ITC on: (a) works contracts services; and (b) goods and/or services, availed for construction of immovable property, as below:

1. Section 17(5)(c) of the CGST Act: Works contract services when supplied for construction of an immovable property (other than plant and machinery) except where it is an input service for further supply of works contract service.
2. Section 17(5)(d) of the CGST Act: Goods or services or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account including when such goods or services or both are used in the course or furtherance of business.

Therefore, the statutory provisions outlined above draw a difference in the exceptions, as Section 17(5)(c) of the CGST Act uses the term 'plant and machinery' whereas Section 17(5)(d) of the CGST Act uses the term 'plant or machinery'. The explanation clause of Section 17 of the CGST Act defines the term 'plant and machinery' used in Section 17(5)(c) of the CGST Act but does not define the term 'plant or machinery' used in Section 17(5)(d) of the CGST Act.

Additionally, Section 17(5)(d) of the CGST Act restricts availment of ITC of GST paid on procurement of goods and services received for construction of immovable property for own account, which is not provided under Section 17(5)(c) of the CGST Act.

The dispute arose when the ITC of GST paid on inputs (goods) and/or services was denied to Safari Retreats Private Limited ("**Respondent**"), for construction of immovable property, even if goods and/or services were covered under the exceptions outlined above. Aggrieved by the denial, the Respondent filed a writ petition before the Hon'ble High Court of Orissa[11] ("**Orissa HC**").

The Orissa HC held that ITC of GST paid on procurement of goods and/or services used in

[10] Civil Appeal No. 2948 of 2023

[11] Safari Retreats Private Limited vs. Chief Commissioner of Central Goods and Services Tax, Orissa (2019 (5) TMI 1278)

construction cannot be denied under Section 17(5)(d) of the CGST Act if the immovable property is not used for own purposes and is used for fresh stream of GST revenue in the form of rental income. It further held that a narrow interpretation of Section 17(5)(d) of the CGST Act will frustrate the very intention of the CGST Act which is to avoid the cascading effect of multistage taxation.

By reading down the provision of Section 17(5)(d) of the CGST Act, the Orissa HC allowed claim of ITC accumulated on construction of an immoveable property provided that said immoveable property was used in the course or furtherance of business. Aggrieved by the decision of the Orissa HC, the revenue authorities challenged the same by way of an appeal before the Supreme Court.

Key contentions of the taxpayers/assessees

Before the Supreme Court, the taxpayers/assessees contended the following:

1. Section 17(5)(d) of the CGST Act is violative of Article 14 of the Constitution of India as it classifies taxpayers/assessees engaged in the business of constructing immovable properties and then renting/leasing/letting out etc. premises within the said immovable properties on the same footing as taxpayers engaged in the business of constructing immovable properties and then selling the immovable properties or premises within the said immovable properties;
2. parties involved in provision of leasing/renting services are subject to output GST. Thus, denying ITC in such scenarios disrupts the credit flow, thereby defying the entire intent of GST law. Additionally, taxpayers providing leasing/renting services cannot be equated with taxpayers that are engaged in the sale of immovable property;
3. the terms 'plant or machinery' appearing in Section 17(5)(d) of the CGST Act and the term 'plant and machinery' appearing in Section 17(5)(c) of the CGST Act indicate deliberate different legislative treatment, which should be read strictly; and
4. vagueness in Section 17(5)(d) of the CGST Act, on account of non-defined terms such as 'on its own account' leads to arbitrary interpretations thereof, thereby rendering it to be unconstitutional.

Key contentions of the revenue department

The contentions of the revenue department are summarised below:

1. Section 17(5)(d) is constitutionally valid as the principle of equality permits the legislature to create different categories for tax legislations;
2. the term 'or' appearing in phrase 'plant or machinery' used in Section 17(5)(d) of the CGST Act should be interpreted as 'and'. The use of the word 'or' thereunder is a mistake of the legislature; and
3. ITC is not a fundamental right, but a statutory right. Accordingly, denial of ITC on construction-related activities is reasonable and in line with the statutory scheme of Section 17(5)(d) of the CGST Act.

Issues

Based on the arguments advanced by both the parties, the Supreme Court formulated 3 (three) broad issues for consideration, namely:

1. whether the definition of 'plant and machinery' as appended to explanation clause to Section 17 of the CGST Act applies to the expression 'plant or machinery' appearing in Section 17(5)(d)?
2. if the definition of 'plant and machinery' does not apply to the term 'plant or machinery', what is the meaning of the term 'plant'? and
3. whether clauses (c) and (d) of Section 17(5) are constitutionally valid?

Analysis and findings

Based on the arguments advanced by the parties, the Supreme Court analysed clauses (c) and (d) of Section 17(5) of the CGST Act as follows:

1. Section 17(5)(c) of the CGST Act restricts the benefit of ITC in cases of works contract services when supplied for the construction of an immoveable property, unless the goods or services are used in the construction of an immoveable property in the nature of 'plant and machinery' as defined in Section 17(5) of the CGST Act, or where the works contract service supplied for the

construction of an immoveable property is for further supply of the works contract;

2. Section 17(5)(d) restricts the benefit of ITC in cases where goods or services are used to construct an immoveable property, on its own account, unless such goods or services are used in the construction of an immoveable property in the nature of 'plant or machinery' or where such goods or services are used for constructing an immoveable property to be used not on its own account;
3. while explanation clause to Section 17 of the CGST Act defines the term 'plant and machinery', the same cannot be equated with the expression 'plant or machinery' appearing in Section 17(5)(d). Accordingly, plain interpretation should be accorded to Section 17(5)(d) of the CGST Act;
4. the use of the term 'plant or machinery' is used only in Section 17(5)(d), as opposed to use of term 'plant or machinery' in Section 17(5)(c), indicates the intent of the legislature to use different terms. Accordingly, 'plant and machinery' and 'plant or machinery' cannot be read to entail a same meaning. Since 'plant' isn't defined in the CGST Act, it should be understood in its common commercial meaning;
5. the term 'plant' used in Section 17(5)(d) cannot be given a restrictive meaning as per the definition (in the explanation) appended to Section 17(5). Accordingly, to understand the term 'plant' functionality test is to be applied to determine whether an immoveable property can be considered a 'plant'. This determination of whether an immoveable property qualifies as 'plant' is of a factual nature and is required to be tested on merits on a case-by-case basis;
6. the term construction for 'own account' (an exception to Section 17(5)(d) of the CGST Act) will mean:
    a) when made for personal use and not for service; or
    b) it is to be used by the person constructing as a setting, in which the business is carried out.
5. it is clarified that construction cannot be said to be on a taxable person's own account, if the same is intended to be sold or given on lease or licence.

Based on the aforementioned reasonings, the Supreme Court observed that if the construction of a building is essential for carrying out the activity of supplying output services, such as renting or giving on lease or other transactions in respect of the building or a part thereof, the building can be held to be a plant and ITC of GST paid on procurement of goods and/or services thereof can be availed, subject to satisfaction of conditions prescribed under the CGST Act. However, in the facts of the case, given that the Orissa HC had not evaluated if the mall (immoveable property under the original dispute) constructed by the Respondent qualifies as a 'plant', the Supreme Court has remanded the matter to the Orissa HC.

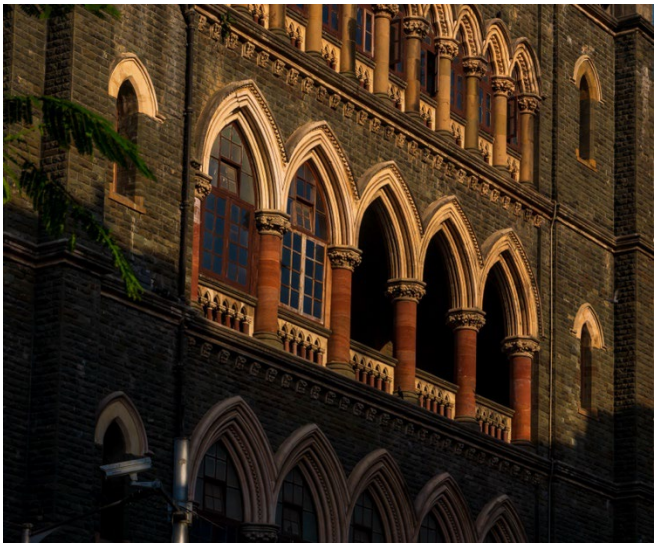
In terms of the challenge to constitutional validity of clauses (c) and (d) of Section 17(5), the Supreme Court upheld the validity thereof and observed the following:

1. immoveable property and immoveable goods constitute a class by themselves. Clauses (c) and (d) of Section 17(5) apply to the said class only; and
2. in terms of clauses (c) and (d) of Section 17(5), unequal's are not treated equally therefore not being discriminatory in nature.

Conclusion

1. While the Supreme Court has ruled to apply the functionality test to determine whether an immoveable property qualifies as 'plant' and consequently ITC to be available on the same, the same will have to be tested on a case-to-case basis.
2. Further, even though the Supreme Court has held that a taxpayer can avail ITC of GST paid on procurement of goods and/or services for construction of immovable property, if it qualifies as a 'plant', it is likely that the revenue authorities will dispute such determination of the taxpayers and a dispute as to what ultimately constitutes a 'plant' is likely to come up.
3. For the past periods, taxpayers will have to evaluate their position whether to take benefit of this decision and avail ITC, as per the statutory timeframe provided under Section 16(4) of the CGST Act. It is apposite to mention that such claim of ITC will be subject to all conditions and restrictions of availment as prescribed under the CGST Act.

4. Additionally, a view may be adopted by the taxpayers that the ambiguity in Section 17(5)(d) of the CGST Act has been clarified by the Supreme Court and any consequent limitation is to be computed from the date of the order of the Supreme Court. However, the present argument will have to be tested in a court of law.



High Courts

ITC denied for breakwater construction

The Bombay HC in the case of ***Konkan LNG Limited vs. The Commissioner of State Tax and Ors.***, evaluated the availability of ITC with respect to construction of breakwater by Konkan LNG Limited ("**Petitioner**").

The Petitioner imports Liquified Natural Gas ("**LNG**") from various countries using vessels equipped with large cryogenic tanks, for its regassification facility. Tugs tow the carriers to the captive jetty, from where the LNG is transferred to cryogenic storage tanks in the regassification plant through insulated pipelines. Due to the rough weather during monsoons, the Petitioner reconstructed an existing breakwater (a protective wall) near the jetty. The Petitioner filed a writ petition before the Bombay HC challenging the denial of ITC for the construction of breakwater adjacent to the jetty near the LNG regasification facility.

The Bombay HC dismissed the writ and upheld the rulings of the lower authorities, concluding that the breakwater does not qualify as 'plant and machinery' under Section 17(5)(d) of the CGST Act. The decision of the Bombay HC was based on the following:

1. the breakwater, while essential for protecting vessels during LNG unloading, is not directly used for making outward supplies of goods or services. The breakwater's primary function is to protect ships and enable safe berthing, rather than participating in the actual regasification process or supply of services; and
2. the breakwater is a civil structure and not an apparatus or equipment.

JSA Comment: The ruling emphasises that term 'plant and machinery' for ITC purposes, should only include structures which are directly involved in the production or supply process, even if such structures are crucial for the overall operations. The ruling has significant implications for businesses in the infrastructure and energy sectors, particularly those with auxiliary structures that support their main operations.

SCN liable to be quashed where adjudication proceedings faced inordinate and unexplained delay

The Bombay HC in the case of ***Paresh Mehta vs. Union of India,***[12] ruled upon the validity of SCN pending adjudication for the last 15 (fifteen) years. Paresh Mehta ("**Petitioner**") was issued a SCN in the year 2008 seeking to impose penalty under Section 112(a) of the Customs Act. In response thereof, the Petitioner filed a detailed response. After a lapse of around 9 (nine) years from the date of issuance of SCN a notice of personal hearing was issued in the year 2017, wherein the Petitioner appeared for the hearing. However, the same was an ineffective hearing. Pursuant to it, another personal hearing was scheduled in the year 2021 (13 (thirteen) years after the issuance of SCN) wherein the Petitioner requested for a virtual hearing. However, no link was provided to the Petitioner. Aggrieved by the pendency of SCN on account of inordinate delay, the Petitioner approached the Bombay HC, seeking quashing of SCN.

The Petitioner contended that when faced with such inordinate and unexplained delay, the SCN must be quashed and cannot be allowed to be adjudicated. Placing reliance on the decisions of the Bombay HC wherein the court had set aside SCNs which involved

[12] 2024 (10) TMI 1412

inordinate and unexplained delay[13], the Bombay HC set aside the SCN in the current case as the same had unjustifiable and inordinate delay in conducting the adjudication proceedings.

ITC cannot be denied to *bona fide* recipients

The Hon'ble High Court of Gauhati ("**Gauhati HC**") in the case of ***National Plasto Moulding vs. State of Assam,***[14] ruled upon the requirement of reversal of ITC availed by *bona fide* recipient, in case of default by the supplier. As per Section 16(2)(c) of the CGST Act, tax in respect of which ITC is availed, is required to be paid to the Government of India by the supplier of goods/services. The GST authorities issued a SCN to National Plasto Moulding ("**Petitioner**"), seeking to reverse ITC on account of violation of conditions prescribed under Section 16(2)(c) of the CGST Act. The Petitioner filed a writ petition before the Gauhati HC challenging the SCN on the ground that he was a *bona fide* purchaser, who had fulfilled all the conditions for availment of ITC which were in his reasonable control.

The Petitioner relied on the judgement of the Delhi HC[15], wherein it was observed that purchasing dealer cannot be punished for the act of the selling dealer, in case the selling dealer had failed to deposit the tax collected by it (under the erstwhile value added tax law). Given that the provisions of the Delhi Value Added Tax Act, 2004 are analogous to the provisions of Sections 16(2)(c) of CGST Act, the Gauhati HC relied on the judgement and set aside the SCN issued to the Petitioner.

Notification extending time limit to issue orders for financial year 2018-19 and 2019-20, quashed

The time limit to pass an order under Section 73(10) of CGST Act for Financial Year ("**FY**") 2018-19 and 2019-20 was extended by way of Notification No. 56/2023 – CT dated December 28, 2023, ("**Notification**"). The Notification was challenged in ***Barkataki Print and Media Services vs. Union of India,***[16] wherein the petitioner challenged orders passed under Section 73(10) of the CGST Act, on the ground that the Notification is *ultra vires* the CGST Act. The petitioner contended that the condition precedent for issuance of Notification in exercise of the powers under Section 168A of the CGST Act were not fulfilled as there were neither recommendations of the GST Council nor any *force majeure* event.

Considering the petitioner's submissions, the Gauhati HC held the Notification to be *ultra vires* Section 168A of the CGST Act. The Gauhati HC observed that as mandated under Section 168A of the CGST Act, the Notification was issued without the recommendations of the GST Council ("**GST Council**"). The Notification had a false statement claiming that a recommendation was made where, in fact no such recommendation existed prior to issuance of the Notification. In such circumstances, there is a colourable exercise of power by the Government in issuing the Notification.

The Gauhati HC further observed that there is a difference between 'no recommendation made' and 'effectiveness of the recommendation'. The fact that it is not binding does not mean the Government can act without a recommendation of the GST Council. Moreover, Section 168A of the CGST Act empowers the Government to extend time limit in case of *force majeure*. The Gauhati HC observed that the GST Council had no occasion to consider existence of *force majeure*, therefore the Notification would also be seen as being issued without the *force majeure* condition. Hence, neither conditions prescribed under Section 168A of the CGST Act were fulfilled for issuance of the Notification, thereby holding the Notification to be invalid.

Notification extending period of limitation for passing order under Section 73(10) of the CGST Act held *ultra vires*

In the case of ***Barkataki Print and Media Services vs. Union of India,***[17] the Gauhati HC decided on the vires of Notification[18] dated December 28, 2023 ("**Impugned Notification**"), which extended the time

[13] Coventry *Estates Pvt. Ltd. vs. The Joint Commissioner CGST and Central Excise & Anr. [2023 (10) Centax 38 (Bom)] and Eastern Agencies Aromatics (Pvt.) Ltd. vs. Union of India & Ors. 2022 (12) TMI 323 (Bom).*

[14] TS-469-HC(GAUH)-2024-GST

[15] Quest Merchandising India Private Limited -Vs- Government of NCT of Delhi & Ors [2017 SCC OnLine Del 11286]

[16] TS-588-HC(GAUH)-2024-GST

[17] W.P. (C) No. 3585 of 2024

[18] No. 56/2023-CT

limit to pass an order under Section 73(10) of the CGST Act.

The Gauhati HC observed and held as under:

1. Section 168A of the CGST Act was introduced to address the difficulties faced by the assessees and GST authorities due to COVID-19 pandemic. Section 168A of the CGST Act empowers the Government to extend time limit in special circumstances, such as force majeure. However, Section 168A of the CGST Act unequivocally states that the time limits can be extended only after the recommendation of the GST Council;
2. with respect to the extension of time for issuance of order under Section 73(10) of the CGST Act, for FY 2017-18, 2018-19 and 2019-20, the GST Council in its 49th meeting recommended that the time limit will be extended by 3 (three) months. Further, it was specifically recorded that no further extension must be granted beyond 3 (three) months;
3. prior to the expiry of the additional 3 (three) months provided by the GST Council for FY 2018-19, the Central Government issued the Impugned Notification thereby further extending the time limit for FY 2018-19 upto April 30, 2024, and for FY 2019-20 upto August 31, 2024;
4. while the Impugned Notification states that the said notification is issued at the behest of the 'recommendation of the GST Council', it is undisputed that there was no GST Council recommendation on record, recommending that time limits be further extended for FY 2018-19 and FY 2019-20;
5. The Gauhati HC held that Section 168A of the CGST Act provides that a notification can be issued only after a recommendation of the GST Council. It is not open to the Government to set aside such a requirement. A 'recommendation' by the GST council has to be a favourable report to enable the Government to exercise its power under Section 168A. Such a recommendation is a *sine qua non* for a notification under Section 168A of the CGST Act. The fact that a recommendation may not be binding on the Government cannot be construed to mean that the Government can act without a recommendation.; and
6. Accordingly, in absence of a force majeure situation to be considered by the GST Council as required under Section 168A of the CGST Act, the Impugned Notification is *ultra vires* Section 168A of the CGST Act and thereby unsustainable.

Based on the judgement of the Gauhati HC, the Hon'ble Calcutta High Court in *Shiv Murat Seth vs. Joint Commissioner of State Tax*[19], and the Karnataka High Court ("**Karnataka HC**")in *DC Rajanna Contractor vs. Assistant Commissioner*[20] stayed the adjudication proceedings and order respectively, which were initiated/issued invoking the extended period of limitation. It was contended that the Impugned Notification extending the time limit for issuance of adjudication order for FY 2019-20 is bad in law and without the authority of law as the same was issued without the recommendation of GST Council, which is a prerequisite for issuance of Notification under Section 168A of the CGST Act.

Conclusion: While the Gauhati HC has set aside the notifications extending the time limit for issuance of adjudication orders for period FY 2018-19 and FY 2019-20, the Hon'ble Allahabad High Court in the case of *Graziano Trasmissoni vs. GST Council*[21] has upheld the validity of the said extension notifications. Accordingly, given that contrary views have been adopted by High Court(s), the department is likely to file an appeal before the Supreme Court against the judgement of the Gauhati HC.

Principles of natural justice must be followed when blocking ITC under Rule 86A of the Central Goods and Services Tax Rules, 2017

The High Court of Telangana ("**Telangana HC**"), in the case of ***Bhavani Oxides and Ors. vs. The State of Telangana and Ors.,***[22] clarified the applicability of principles of natural justice *vis-à-vis* Rule 86A of the Central Goods and Services Tax Rules, 2017 (**"CGST Rules"**), which allows tax authorities to block ITC in a taxpayer's Electronic Credit Ledger ("**ECrL**"). The Telangana HC held that while Rule 86A of the CGST Rules neither expressly nor by necessary implication

[19] WPA No. 20964/2024
[20] W.P. No. 26065/2024
[21] 2024 (86) G.S.T.L. 4 (All.)
[22] WP Nos.10390, 10425, 10459 AND 12733 of 2024

excludes the principles of natural justice, the principles of natural justice should be read into the provision.

The Court's reasoning hinged on the need for consistency within the GST framework. It pointed out that Section 74 of the CGST Act, which deals with similar circumstances of tax recovery and ITC denial, explicitly mandates following principles of natural justice. The Telangana HC argued that interpreting Rule 86A to allow ITC blocking without these safeguards would create an inconsistency with the parent statute. Furthermore, Telangana HC emphasised that this interpretation is crucial to prevent hardship, injustice, and friction in the GST system's operation.

JSA Comment: The ruling is a sign of relief for taxpayers as, it deters the GST authorities from invoking Rule 86A (i.e., blocking ITC in the ECrL) of the CGST Rules without providing the taxpayers an opportunity to be heard. This decision strikes a balance between the need for effective tax administration and the protection of taxpayers' rights, ensuring that the principles of natural justice are upheld in the application of CGST Rules.

No GST leviable on personal guarantees extended by managing director

In the case of ***Manappuram Finance Limited vs. Union of India and Ors.,***[23] SCN was issued to Manappuram Finance Limited ("**Petitioner**") seeking to demand (a) GST under reverse charge mechanism on supply of services by the Managing Director (MD) of the Petitioner by way of providing personal guarantee on loans taken by the Petitioner and (b) GST on supply of services of extending loans by the Petitioner to its subsidiary company. Aggrieved by the issuance of SCN, the Petitioner filed a writ petition before the Hon'ble High Court of Kerala ("**Kerala HC**").

The Petitioner contended that the matter was squarely covered by the clarifications issued by the CBIC *vide* Circular No.204/16/2023-GST dated October 27, 2023, and Circular No.218/12/2024-GST dated June 26, 2024. The Petitioner placed reliance on the said circulars, to argue the following:

1. GST cannot be demanded on personal guarantee provided by the director; and
2. in absence of a procedural requirement for processing the loan, the loan provided by the Petitioner to its subsidiary cannot be equated to loans provide by banks or independent lenders.

Considering the aforesaid arguments, the Kerala HC allowed writ petition by setting aside the SCN.

Rule 96(10) of the CGST Rules is ultra vires and arbitrary to Section 16 of the CGST Act

The Kerala HC in the matter of ***Sance Laboratories Private Limited vs. Union of India & Ors.***,[24] allowed a batch of writ petitions challenging the validity of Rule 96(10) of the CGST Rules. The Petitioners in the case were exporters claiming refund of Integrated Goods and Services Tax ("**IGST**") paid on exports by virtue of Section 16 of the Integrated Goods and Services Tax Act, 2017 ("**IGST Act**"). Rule 96(10) of the CGST Rules as made applicable to IGST, restricted the refund of IGST in the case where inputs have been availed after taking the benefit of notifications mentioned therein.

For sake of brevity, Rules 96(10) of the CGST Rules essentially restricted refund in case procurements were made against advance authorisation or concessions available to Export Oriented Unit ("**EOU**") on procurement of goods were availed. Refund was also restricted where suppliers had availed benefit of exemption available to registered supplier making supplies to registered recipient for export as also where benefit of various other exemptions available under different notifications had been availed.

The Petitioners contended that Rule 96(10) of the CGST Rules as it was worded effectively takes away the right of an exporter to claim refund of tax paid on export, which is a right granted by substantive provisions of the IGST Act. While Rule 89 of the CGST Rules, as made applicable to IGST, does not restrict

[23] TS-451-HC(KER)-2024-GST

[24] WP(C) NO. 17447 OF 2023

refund of accumulated ITC in case of export of goods/services under letter of undertaking/bond, however, Rule 96(10) restricts refund of IGST paid on export in case benefit of certain notifications have been availed. This creates a discrimination between exporters who are otherwise on the same footing. Further, it was contented that the delegated legislation in Rule 96(10) of the CGST Rules has travelled beyond the parent statue. Section 16 of the IGST Act as also Section 54 of the CGST Act do not authorise imposition of a restriction as contemplated by the provisions of Rule 96(10) of the CGST Rules.

The Kerala HC held that the words "*subject to such conditions, safeguards and procedure as may be prescribed*" in Section 16(3)(a) and (b) of the IGST Act and the provisions of Section 54 of the CGST Act do not authorise the imposition of such restriction in such a manner that it would completely take away the right of refund granted under Section 16 of the IGST Act. Therefore, Rule 96(10) of the CGST Rules as presently worded is *ultra vires* the provisions of Section 16 of the IGST Act and it is 'manifestly arbitrary'.

The Kerala HC noted that while the Rule 96(10) of the CGST Rules has been omitted with effect from October 8, 2024, however, the same is with prospective effect. Considering the same, the Kerala HC clarified that for the period from October 23, 2017, to October 8, 2024, no proceedings will be initiated to recover IGST refunds already disbursed to the Petitioners under this provision.'

Denial of ITC for contravention of Section 16(4) of the CGST Act to be set aside in view of insertion of Section 16(5) to the CGST Act

In the matter of ***Louis Mathew Antony v. State Tax Officer & Ors.,***[25] the Kerala HC has set aside an order denying ITC on account of non-compliance with Section 16(4) of the CGST Act for FY 2019-20.

The Petitioner approached the court on the ground that they are now entitled to claim ITC, which was previously denied, in light of insertion of Section 16(5) to the CGST Act, which extends the time limit to claim ITC for FY 2017-18 to FY 2019-20.

Considering the same, the Kerala HC set aside an order denying ITC, the Petitioner for the reason of non-compliance with the time limit prescribed under Section 16(4) of the CGST Act. The Court observed that on account of Sectio 16(5) being notified[26], the Petitioner is now entitled to claim ITC. The Court directed the competent authority to pass fresh orders, considering the provisions of Section 16(5) of the CGST Act.

Similar view has been taken by the Madras High Court ("**Madras HC**") in *WINET Communications vs. Superintendent, Karur - II*[27]. An assessment order was passed against the Petitioner wherein ITC had been denied on the premise that the claims have been lodged beyond the period prescribed under Section 16(4) of the CGST Act.

The Madras HC set aside the said order in view of insertion of Section 16(5) to the CGST Act. The Court directed the adjudicating authority to re-do the assessment by taking into account the said amendment.

Payment during search considered involuntary payment, due to lack of Form GST DRC-04 issued by the authorities

In the case of ***ATR Malleable Casting Private Limited vs. The Inspector of Central Taxes,***[28] ATR Malleable Casting Private Limited ("**Petitioner**") paid a sum of INR 30,00,000 (Indian Rupees thirty lakh) during a search by tax authorities and consequently sought a refund thereof, claiming that such payment was made under the threat of arrest, coercion, and undue

[25] TS-764-HC(KER)-2024-GST
[26] Inserted by the Finance (No. 2) Act, 2024, w.r.e.f. July 1, 2017. (However, Notification No. 17/2024(S.O. 4253(E))-Central Tax, dated September 27, 2024, appoints September 27, 2024, as the date of enforcement).
[27] 2024 (11) TMI 520
[28] 2024 (6) TMI 1258 – Calcutta High Court

influence. The GST authorities denied the claims on the grounds that the payment was voluntary.

However, the Madras HC noted the absence of Form GST DRC-04 which is a receipt confirming payment of GST under Form GST DRC-03, which is mandatory for voluntary payments under Rule 142(2) of the CGST Rules (this observation has been observed under several judicial precedents). Further, Madras HC observed the discrepancy between the timing of conclusion of the search and the actual payment indicating that the payment could not have been voluntary. The facts suggested that the payment was made under coercion and not voluntarily, as it was recorded after the search concluded. Basis the above, the Madras HC directed the GST authorities to refund the said sum.

JSA Comment: Previously the Delhi HC in the case of *Vallabh Textiles vs. Senior Intelligence Officer*[29] had held where payment was made during a search proceeding for which acknowledgment was not issued in Form GST DRC-04, the same was not voluntary and had directed the Department to refund such payment along with interest. The High Court had heavily relied on CBIC *Instruction No. 01/2022-23 [GST – Investigation] dated May 25, 2022*, which clarified the position of making payment during a search, seizure and investigation proceeding.

Issuance of Form ASMT-10 not a pre-requisite for adjudication

In the case of ***Mandarina Apartment Owners Welfare Association and Gani Fashion vs. State Tax Authorities,***[30] the Madras HC ruled on the validity of the GST adjudication proceedings where scrutiny proceedings were issued under Section 61 of the CGST Act read with Rule 99 of the CGST Rules, without issuance of notice in Form GST ASMT-10.

The Madras HC observed that Section 61 of the CGST Act indicates clearly that the obligation to issue notice arises upon fulfilment of following 2 (two) conditions:

1. selection of returns for scrutiny; and
2. discovery of discrepancies on such scrutiny.

Based on the above, it was concluded that issuance of Form ASMT-10 is mandatory only if the aforesaid conditions are satisfied.

The Madras HC further observed that as per Sections 61 and 73 of the CGST Act, there is no indication that scrutiny of returns and issuance of notice in Form ASMT-10 constitute a mandatory pre-requisite for adjudication even in cases where returns were scrutinised.

In the present facts, given that the petitioner was not provided the opportunity to be heard, the petitioner was given an opportunity to file a reply to SCN only on the grounds of principles of natural justice.

'Negative Blocking' of ITC under Rule 86A of the CGST Rules permissible

The Madras HC in the case of ***Tvl Skanthaguru Innovations Private Limited vs. Commercial Tax Officer,***[31] discussed the issue of blocking of ECrL, without the availability of any credit in the same.

In the facts of the case, a search was conducted at the Petitioner's premise by the Central authorities wherein wrongful availment of ITC was alleged and subsequent actions were taken. Thereafter, 3 (three) orders were passed blocking the ECrL of the Petitioner. Further, an intimation in Form GST ASMT – 10 was issued by the State authorities alleging wrongful availment of ITC. The Petitioner were before the Madras HC challenging the said intimation in Form ASMT – 10 as also the orders blocking the ECrL of the Petitioner on the ground that blocking of ECrL when there is no credit available in the ledger amounts to negative blocking of credit which is not permitted under Rule 86A of the CGST Rules.

[29] 2023 (70) G. S. T. L. 3 (Del.)
[30] 2024 (7) TMI 1158 – Madras HC
[31] 2024 (12) TMI 143 – Madra HC

It was observed by the Madras HC that the 1st part of Rule 86A states that *"The Commissioner or an officer authorised by him in this behalf, not below the rank of an Assistant Commissioner, having reasons to believe that credit of input tax available in the electronic credit ledger has been fraudulently availed or is ineligible".* Further, 2nd part of Rule 86A states that the Commissioner or Assistant Commissioner "*may, for the reasons to be recorded in writing, not allow debit of an amount equivalent to such credit available in electronic credit ledger for discharge of liabilities under Section 49"*. Which means the officers have to record the reasons in writing not to allow the debit of amount equivalent to such credit for discharge of liabilities under Section 49. The words "*amount equivalent to such credit for discharge of liabilities*" would mean that not only the fraudulently availed ITC amount available in the ECrL, but an amount equivalent to fraudulently availed credit utilised for discharge of liabilities under Section 49.

Thus, a conjoint reading of 1st and 2nd parts of Rule 86A would clearly reveal that the word "available in the ECrL" referred in 1st part would mean that the amount available after the fraudulent availment of credit at any point of time, whether it was available in the ECrL or utilised at the time of passing the blocking orders.

The initiation of proceedings by the department will come into picture only after the fraudulent availment/utilisation in most of the cases and certainly, the fraudulently availed ITC would not be available in the ECrL at the time of blocking. Therefore, the right way of interpretation of Rule 86A of GST Rules is as to whether the fraudulently availed credit was made available for the payment of output tax liabilities at any point of time subsequent to the said fraudulent availment. Thus, the Rule 86A empowers the Commissioner or an officer authorised by him not below the rank of Assistant Commissioner to block the fraudulently availed credit in ECrL, whether it is available at the time of passing the blocking orders or not.

Further, in the provisions of Rule 86A, nowhere it has been stated that the negative blocking is prohibited. When the Statute has not stated anything in the statutory term, it has to be construed that the word 'blocking' includes both positive and negative blocking. If the intention of the legislature is not to allow the negative blocking, they are supposed to have specifically prohibited the same by virtue of proviso or otherwise. For the said reasons, Madras HC held that the negative blocking is well within the scope of provisions of Rule 86A of GST Rules.

Expression 'as is where is' basis means that status of payment of GST adopted by the assessee will prevail

In ***J.K. Papad Industries and Anr. vs. Union of India and Ors.***[32], the company was engaged in manufacturing and sale of unfried fryums. Considering that fryums were nothing but papad of different shapes and sizes, the company classified unfried fryums under Tariff Heading 1905, attracting nil rate of GST under Entry No. 96 of the exemption notification[33]. The company also obtained an advance ruling from Appellate Authority for Advance Ruling which upheld the classification adopted by the company.

Subsequently, CBIC, *vide* circular dated January 13, 2023, clarified that snack pellets such as fryums will be classified under Tariff Heading 19059030 and attract GST at 18%. Subsequently, CBIC issued another circular which clarified that the rate of GST on un-cooked/un-fried extruded snack pellets falling under Tariff Heading 1905 was reduced from 18% to 5% with effect from July 27, 2023. It was further clarified that issues pertaining to past period will be regularised on 'as is where is' basis.

The revenue authorities, however, interpreted 'as is where is' basis, to be read in the context of classification which ought to be ascribed to it under the law and accordingly issued an SCN to the company proposing to levy GST at 18% for the period before July 27, 2023.

[32] TS-568-HC(GUJ)-2024-GST

[33] Notification No. 2/2017-CGST Rate dated June 28, 2017

The Hon'ble High Court of Gujarat ("**Gujarat HC**") held that the revenue authorities have misinterpreted the expression 'as is where is' basis. 'As is where is' basis means that whatever status of payment of GST had been adopted by the assessee for the past period will continue to prevail. If the assessee had claimed their product to be exempt from GST, they cannot be subjected to levy of GST in order to regularise their past returns. Basis this, Gujarat HC quashed the SCN issued to the company.

Common SCN issued for multiple tax periods 'fundamentally flawed' and contravenes CGST Act

In the matter of ***Veremax Technologie Services Limited vs. The Assistant Commissioner of Central Tax,***[34] a common SCN was issued to the petitioner under Section 73 of the CGST Act for multiple tax periods 2017-18, 2018-19, 2019-20 and 2020-21. Aggrieved, the petitioner filed a writ petition before the Karnataka HC contending that the adjudicating authority cannot issue a common SCN by grouping the tax periods. It further asserted that under Section 73 of the CGST Act, a specific action must be completed within the relevant year, and the limitation period of 3 (three) years applies separately to each assessment year. Consequently, clubbing multiple tax periods in a single notice is impermissible.

The Karnataka HC highlighted that Section 73(10) of the CGST Act mandates a specific time limit from the due date for furnishing the annual return for the FY to which the tax dues relate. The law stipulates that particular actions must be completed within a designated year, and such actions should be executed in accordance with the provisions of the law. The ratio laid down by the Supreme Court in the matter of *State of Jammu and Kashmir and Ors. vs. Caltex (India) Limited*[35], where an assessment encompasses different assessment years, each assessment order can be distinctly separated and must be treated independently, is squarely applicable in the present case.

Basis the above, the Karnataka HC held that the SCN issued by the adjudicating authority is fundamentally flawed. The practice of issuing a single, consolidated SCN for multiple assessment years contravenes the provisions of the CGST Act and thereby, quashed the SCN.

Authorities cannot prosecute GST offenses under Indian Penal Code, 1860 without invoking penal provisions of GST Act

The Madhya Pradesh High Court ("**Madhya Pradesh HC**") has ruled on the power of the authorities to prosecute GST offenses under the Indian Penal Code, 1860 ("**IPC**") without invoking penal provisions under CGST Act. In the matter of ***Deepak Singhal vs. Union of India and Ors.,***[36] the petitioner was a proprietor firm engaged in trading of soya bean seeds and soya de-oiled cakes. The petitioner was summoned under Section 70 of the CGST Act and statements of the petitioner was recorded. Subsequently, the GST authorities conducted search and seizure on the petitioner's premises under Section 67(2) of CGST Act. An inspection report was prepared wherein it was alleged that the firm was a bogus firm and fraudulently registered and issued invoices/bills without supply of goods/services, thereby leading to wrongful availment or utilisation of ITC/refund of tax. One office of the revenue authorities issued a complaint to another office, basis which an FIR under the provisions of IPC was registered against the proprietor of the said firm. The assessee had approached the Madhya Pradesh HC challenging the same.

The petitioner submitted that CGST Act is a complete code which provides procedure to be adopted by GST authorities, penalties in case of breach and punishment for offences committed under GST Act. In the present case, search and seizure operations conducted by GST authorities revealed commission of offence punishable under Section 132 of GST Act. GST being a special statute, for any offence which is squarely covered by

[34] TS-602-HC(KAR)-2024-GST
[35] AIR 1966 SC 1350
[36] 2024 (9) TMI 828

the CGST Act, provisions of IPC could not have been invoked without first invoking the provisions of CGST Act. It was further submitted that Section 132(6) of the CGST Act requires previous sanction of the Commissioner before a person can be prosecuted for offences committed under Section 132 of GST Act, which has not been followed in the present case. Accordingly, registration of FIR at the instance of GST authorities under provisions of IPC without invoking penal provisions under GST Act is bad in law and the FIR and hence consequential proceedings are liable to be quashed.

Considering the petitioner's submissions, Madhya Pradesh HC held that for offences covered under Section 132 of the CGST Act, the GST authorities cannot be permitted to bypass procedure and penal provisions under GST Act for launching prosecution against the assessee by invoking IPC provisions. Letting GST authorities adopt such course of action would amount to abuse of process of law which cannot be permitted.

SCN seeking to levy GST on expat salary quashed

The Delhi HC in the case of ***Metal One Corporation India Private Limited vs. Union of India,***[37] ruled on the liability to pay GST on salary paid to seconded employees by an Indian entity, in view of the recent CBIC circular[38] dated June 26, 2024 ("**Circular**"). Metal One Corporation India Private Limited ("**Petitioner**") entered into employment agreements with the employees of Metal One Corporation Japan, its parent entity. As per the employment agreement, employees of the foreign parent entity were deployed with the Petitioner. SCN was issued to the Petitioner seeking to levy GST on placement of foreign expatriates with the Petitioner. Aggrieved by the SCN, the Petitioner invoked the writ jurisdiction of the Delhi HC.

The Petitioner contended before the Delhi HC that while the Supreme Court in the case of *CCE & Service Tax vs. Northern Operating Systems Private Limited*[39] had held that salary of seconded employees to India will be taxable and the same will have to be evaluated basis fact pattern of each case. Further, *vide* the Circular, CBIC has clarified that where no invoice (self-invoice) is raised by domestic entity in respect of services rendered by its foreign affiliate, the value of such services will be 'deemed' to have been declared as 'Nil' and that 'Nil' value will be treated as the market value for the purposes of the second proviso to Rule 28 of the CGST Rules. Given that the foreign parent entity of the Petitioner had not raised any invoice for secondment of employees to the Petitioner, the value of such services will be deemed to be 'Nil' and accordingly, no GST can be levied thereon.

Relying on the Circular, the Delhi HC quashed the SCN seeking to levy GST on placement of foreign expatriates in India.

ITC on telecommunication towers not restricted under Section 17(5)(d) of the CGST Act

The Delhi HC in the case of ***Bharti Airtel Limited vs. Commissioner, CGST Appeals-1 Delhi, Union of India and Ors.,***[40] has ruled on the availability of ITC on telecommunication towers, specifically in light of the restriction as provided under the Explanation appended to Section 17(5) of the CGST Act, which allegedly excludes telecommunication towers from the ambit of plant and machinery and deems the same as an immoveable property on which ITC is restricted in terms of clause (d) of Section 17(5). While rendering its decision, the Delhi HC relied on the decision of the Supreme Court in Bharti Airtel (*supra*), wherein it was held that telecommunication towers and PFBs are moveable in nature and consequently, the Delhi HC observed that the contention of the revenue authorities that telecommunication towers are immoveable property was untenable.

The Delhi HC observed that the exclusion of telecommunication towers from the definition of plant

[37] 2024 (10) TMI 1534
[38] Circular No. 210/4/2024-GST
[39] 2022 (5) TMI 967
[40] WP(C) NO. 17447 OF 2023

and machinery does not automatically/inherently classify such telecommunication towers as immoveable property. In order to be restricted in terms of Section 17(5)(d), any property has to independently qualify as an immoveable property. Given that telecommunication towers are to be treated as moveable in nature, they would not fall under the restriction of Section 17(5)(d).

No bar on issuance of SCN under Section 74 of the CGST Act after conclusion of the adjudication proceedings under Section 73 of the CGST Act

The Hon'ble Punjab and Haryana High Court ("**P&H HC**") in ***Group M Media Private Limited vs. Union of India,***[41] ruled on the legality of initiating proceedings under Section 74 of the CGST Act after dropping proceedings initiated under Section 73 of the CGST Act.

SCN under Section 73 of the CGST Act was issued to Group M Media Private Limited ("**Petitioner**") which was dropped after taking into consideration the reply submitted by the Petitioner. Subsequently, another SCN under Section 74 of the CGST Act was issued alleging excess availment of ITC by the Petitioner. In addition to the SCN under Section 74 of the CGST Act, the DGGI[42] had also issued enquiry notices to the Petitioner, to which the Petitioner had submitted its reply. Aggrieved by the multiple issuances of notices, the Petitioner approached the P&H HC in writ jurisdiction.

The Petitioner contended the following:

1. SCN under Section 74 of the CGST Act did not outline incriminating allegations against the Petitioner for any wilful misstatement or suppression of facts to evade tax; and
2. given that the DGGI had already initiated an enquiry, the SCN under Section 74 of the CGST Act cannot be issued as the same will amount to parallel proceedings.

The P&H High Court observed that issuance of SCN under Section 73 of the CGST Act and dropping the same would not prevent the authorities from independently initiating proceedings under Section 74 of the CGST Act. Further, in relation to parallel proceedings being conducted, the P&H HC observed that the DGGI had only issued notice seeking certain clarifications/information and no adjudication proceedings were initiated. Accordingly, no parallel proceedings were initiated. Considering the above, the P&H HC did not allow the writ petition filed by the Petitioner.

Extension of limitation to issue adjudication orders for FY 2017-18 to 2019-20 valid

The Patna High Court ("**Patna HC**") in ***Barhonia Engicon vs. The State of Bihar and Ors.,***[43] has upheld the validity of extension of time limit to issue notices and adjudication orders for FY 2017-18 to 2019-20. The Petitioners had challenged the validity of various notifications extending time limit on the ground that the said notifications were issued after the pandemic had subsided and there was no *force majeure* situation. Hence, the extension was not justified.

The due date to file annual returns typically falls on December 31, of the following FY. However, due to the pandemic situation, the Supreme Court had suspended limitation periods for judicial and quasi-judicial proceedings between March 15, 2020, and February 28, 2022, effectively extending various filing and assessment deadlines. Section 168A was introduced to the CGST Act, allowing the Government to extend limitation periods for certain actions that were hindered by *force majeure* events. In light of the same, the Government extended the deadlines for issuance of adjudication order for FY 2017-18 to 2019-20 through notifications issued during and after the pandemic. The Petitioners argued that further extension notifications that continued to extend the limitation were unjustified as by the time the notifications further extending the timelines were issues, the *force majeure* situation had passed, and there was no need to extend the deadlines further. It was also argued that the Government failed in adhering to the procedural requirements while issuing the extension notifications.

Dismissing the contention of the Petitioner, the Patna HC noted that the Supreme Court had already excluded the period from March 15, 2020, to February 28, 2022, from the limitation period. Therefore, the

[41] 2024 (10) TMI 1611
[42] Directorate General of GST Intelligence
[43] TS-780-HC(PAT)-2024-GST

Government's decision to extend the time limit for issuing orders was in line with the Supreme Court's directives. The Court also took into account GST Council recommendations on extension of limitation due to disruption caused by the pandemic and therefore the notifications were issued in compliance with the recommendations of the GST Council.

Conclusively, the Patna HC upheld the validity of the GST orders and notices issued in light of the extension notifications and dismissed the challenge to these notifications on the premise that such extension was driven by *force majeure* conditions and was hence justified in accordance with both the Supreme Court's directives and the recommendations of the GST Council.

Customs, Excise and Service Tax Appellate Tribunal

HDPE poly packs sold to distributors are wholesale packages, not subject to Section 4A of the Central Excise Act

In the case of ***Commissioner of Central Excise vs. Miraj Products Private Limited,***[44] an appeal was filed by the Commissioner of Central Excise ("**Commissioner**"), contesting the decision of CESTAT on whether the goods sold by Miraj Products Private Limited ("**Respondent**") in HDPE poly packs to distributors should be classified under Section 4 or Section 4A of the Central Excise Act, 1944 ("**Central Excise Act**"). The dispute originated from SCNs issued to the Respondent for the period April 2003 to December 2003. These SCNs alleged that the Respondent was not complying with the valuation norms required under the Central Excise Act and was accused of improperly packaging 33 (thirty-three) pouches of chewing tobacco (of 6 (six) grams each) and one pouch of 15 (fifteen) grams into larger HDPE poly packs, with the allegation that these larger packs were intended for retail sale.

The Commissioner, in an order dated July 19, 2005, upheld the SCNs and concluded that the larger poly packs were group packages intended for retail sale. The Respondent's argument that these were wholesale packages, was disregarded and the Commissioner determined that the inclusion of maximum retail price on the poly packs indicated an intent for retail sale, thereby, necessitating compliance with Section 4A of the Central Excise Act. The CESTAT, however, reversed this decision, ruling that the poly packs, which were packed in HDPE bags and sold to distributors qualified as wholesale packages.

The Supreme Court upheld the decision of the CESTAT and noted that the smaller packs were indeed bundled into HDPE bags and sold to intermediaries and not directly to consumers. Relying on the Standards of Weights and Measures (Packaged Commodities) Rules, 1977, the CESTAT held that HDPE bags qualify as wholesale packages, which are exempt from the retail price declaration requirements of Section 4A of the Central Excise Act.

Excess reversal of CENVAT credit eligible for cash refund under GST regime

The Hon'ble CESTAT Mumbai analysed whether the appellant (a manufacturer and trader of motor vehicles) could claim refund of excess CENVAT credit reversed towards provision of exempt goods/services during April to June 2017 under Rule 6(3A) of CENVAT Credit Rules.

In ***Mercedes Benz India Private Limited vs. Principal Commissioner of Central Tax,***[45] the adjudicating authority and the Commissioner (Appeals) rejected the refund of the appellant on the ground that there exists no provision under Rule 5 and/or 7 of the CENVAT Credit Rules, for cash refund of excess CENVAT credit reversed and therefore no refund will be permissible under clause (c) of proviso to Section 11B(2) of the Central Excise Act.

The CESTAT observed and highlighted the below:

1. given that GST was introduced with the intention of eliminating cascading on taxes and taxing only at the consumption stage, it would be least expected that the legislation intended that input credit which was validly available through erstwhile laws

[44] 2024 (7) TMI 476 – Supreme Court

[45] TS-385-CESTAT-2024-EXC

of Central Excise Act and Chapter V of the Finance Act, 1994 would have to be foregone by not allowing the taxpayers such validly earned credit. Accordingly, the transitional provisions under Section 142 of the CGST Act, providing refund of CENVAT credit in accordance with provisions of existing law, cannot be interpreted narrowly to mean that cash refund of CENVAT credit is not permissible because CENVAT Credit Rules provided only for refund in specified situations as stated in Rule 5 of CENVAT Credit Rules;

2. Section 142(3) of the CGST Act specifically provides that refund of any amount of CENVAT credit, duty, tax, interest or any other amount paid under the existing laws will be paid in cash. It is only such amount of CENVAT credit which is rejected, as ineligible, that alone will lapse;
3. Section 142(3) of the CGST Act is a transitional arrangement wherein it has been specifically provided that the said provision apply as a non-obstante clause and thus will have an overriding effect to the provisions of the Central Excise Act, except for Section 11B(2) of the CGST Act; and
4. the phrase 'duty of excise' used in Section 11B(2)(d) of the Central Excise Act refers to duties of excise leviable and also includes CENVAT credit, which is nothing, but duty of excise paid on inputs, which has been allowed for taking credit in terms of Rules 3 of CENVAT Credit Rules.

In light of the above, the CESTAT granted cash refund of CENVAT credit excessively reversed during the erstwhile regime.

Courtroom updates

Supreme Court admits SLP challenging levy of interest in revenue neutral transaction

In the matter of ***Grapes Digital Private Limited v. Principal Commissioner, CGST,***[46] the Supreme Court grants leave and admits SLP challenging judgement of Delhi HC involving the main issue of whether the revenue authorities could have levied and adjusted interest on the tax amount paid by the Petitioner which had already been sanctioned for refund by the revenue authorities, in a revenue neutral situation. The Delhi HC had earlier rejected the Petitioner's stance that transaction of imports and exports is revenue neutral and held that levy of GST is a statutory exaction. Interest on delayed payment of tax being a statutory levy cannot be avoided on the ground that the Petitioner at a subsequent stage is entitled to a refund of the ITC. Accordingly, the Delhi HC passed an order upholding levy of interest on delayed payment of IGST under Reverse Charge Mechanism ("**RCM**") as also delayed payment of IGST on output supply (export) for which ITC of IGST paid under RCM was utilised.

The Petitioner contends that although, the Petitioner was liable to pay IGST on import of services, it is entitled to refund of the same on export of services. It is also entitled to a refund of any IGST paid on output supplies, therefore, the delay in payment of IGST, input or on output supplies did not prejudice the revenue in any manner. The levy of interest is compensatory in nature, thus, if the Petitioner is entitled to refund on payment, the revenue cannot claim any interest on account of any delay as in any event it could not retain any amount of IGST so paid. Relying on the judgement of the Supreme Court in the matter of ***Pratibha Processors v. Union of India,***[47] the Petition highlights that interest is a mere accessory to the principal amount of tax and if the tax itself is not recoverable, no interest can be charged. It is further submitted that the intent of the State exchequer is to make exports tax free and competitive. Levy of interest in a revenue neutral situation has the potential of making exports costly.

[46] SLP (Civil) Diary No. 35601/2024

[47] (1996) 11 SCC 101

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