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THE INDIRECT TAX NEWSLETTER

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Recent Case Laws

Goods and Services Tax (GST)

1. ***Refund of tax paid is admissible where the inter-State or intra-State supply made by a taxpayer, is subsequently found by taxpayer himself as intra-State and inter-State respectively.***

   Messers Radhemani and Sons v. *Additional Commissioner (Appeals) CGST and Central Excise* [Writ Tax No. – 213 of 2021 (Chhattisgarh High Court), decided on December 7, 2021]

   Facts of the case:

   The departmental authorities rejected the refund application filed by the Petitioner under the Goods and Services Tax (**"GST"**) laws on account of incorrect payment of Integrated Goods and Services Tax (**"IGST"**) instead of Central Goods and Services Tax ("**CGST**") and State Goods and Services Tax ("**SGST"**). The proceedings culminated into an order by the Appellate authority, against which the Petitioner filed the present Writ Petition.

   Judgment:

   The Hon'ble High Court observed that in terms of Section 77 of the Central Goods and Services Tax Act, 2017 ("**CGST Act**") and Section 19 of the Integrated Goods and Services Tax Act, 2017 ("**IGST Act"**) read with the Circular dated September 25, 2021, where the inter-State or intra-State supply made by a taxpayer, is either subsequently found by taxpayer himself as intra-State or inter-State respectively or by the tax officer in any proceeding, the refund thereof would be admissible, provided the taxpayer pays the required amount of tax in the correct head. Accordingly, the Hon'ble High Court set aside the rejection Order and remanded the matter to the Appellate authority with a direction to decide the refund application in light of the aforesaid finding.

2. ***Period of limitation for filing appeal under Section 107(1) of the CGST Act is to be reckoned from the date of communication of the Order via e-mail.***

   Messers Meritas Hotels Private Limited v. *State of Maharashtra and Others* [Writ Petition No. 7793 of 2021 (Bombay High Court), decided on December 3, 2021]

   Facts of the case:

   The issue for consideration in the present Writ Petition is whether the period of limitation for the purpose of filing an appeal under Section 107(1) of the CGST Act would commence from the date when the impugned assessment order is uploaded on the GSTN portal, viz. January 8, 2020 or from the date of service upon the Petitioner of the scanned copy of the impugned assessment order by email, viz. April 20, 2019.

   Judgment:

   (a) The Hon'ble High Court observed that in terms of Section 107(1) of the CGST Act, the appeal to the Appellate authority is to be filed within 3 months from the date of communication of the impugned assessment order passed by the adjudicating

authority and an extension of 1 month may be granted under Section 107(4) of the CGST Act.

(b) It was further observed that Rule 108 of the CGST Rules, 2017 provides that the appeal against the Order has to be filed electronically. However, it nowhere prescribes that the same is to be filed only after impugned assessment order is uploaded on GSTN portal online. On the contrary, at the time of filing the appeal electronically, it is not even required that the certified copy of the order is submitted, as the same can be submitted within seven days of filing the appeal.

(c) Accordingly, the Hon'ble High Court held that the period of limitation for filing the appeal is to be reckoned from the date of communication of the order via the e-mail dated April 20, 2019 and not otherwise.

3. ***Land filling pit for solid waste management is in the nature of a civil structure, which is inadmissible to credit under Section 17(5) of the CGST Act.***

In Re: Messers Mother Earth Environ Tech Private Limited [Order No. KAR/AAAR/10/2021-22 (Appellate Authority for Advance Ruling, Karnataka), decided on December 13, 2021].

Facts of the case:

(a) The Applicant, engaged in the business of solid waste management, collects hazardous waste from various industries across Karnataka and disposes it as per the guidelines of Central Pollution Control Board (CPCB) and Karnataka State Pollution Control Board (KSPCB). For processing and disposal of the solid waste, the Applicant has taken land on lease from the Government and constructed a land filling pit into which the solid waste is filled and closed and sealed for 30 years. The land fill pit has been capitalised in their books of accounts as an asset and the Applicant has claimed depreciation under Income Tax.

(b) The Applicant had sought an advance ruling from the Authority for Advance Ruling (**"AAR"**) on the issue whether the land filling pit can be considered as 'Plant and machinery' and is therefore eligible for input tax credit or whether the landfilling pit is to be considered as 'civil structure' and therefore become ineligible for input tax credit under Section 17(5) of the CGST Act.

(c) The AAR vide its Order held that the land filling pit is not a plant and machinery but a civil structure. Aggrieved by the said Order, the Applicant approached the Hon'ble High Court, which remanded the matter to the AAR, who again passed a negative Order during the de-novo proceedings. Against such de-novo Order passed by the AAR, the Applicant filed an appeal before the Appellate Authority for Advance Ruling (**"AAAR"**).

Judgment:

(a) The AAAR held that as per the provisions of Section 17(5)(d) of the CGST Act, goods and services received by a taxpayer for construction of immovable property on its own account are not eligible for input tax credit. The exception, however, is when the immovable property is in the nature of plant or machinery.

(b) In the present case, the manner of construction of the land filling pit clearly evidences that the land filling pit is an immovable property imbedded to the earth, which has been done by the Appellant on his own account in order to render the service of disposal of

hazardous waste. Basis this, it is pertinent to determine whether the land filling pit (immovable property) falls under the ambit of "plant and machinery" or not.

(c) In terms of the definition of the expression "plant and machinery" as specified in the second Explanation to Section 17(5), the land filling pit has to be either an 'apparatus', 'equipment' or 'machinery' which is fixed to the earth. Foundations and structural supports used to fix such apparatus, equipment and machinery to the earth are also covered within the ambit of the definition of 'plant and machinery.'

(d) However, in the said case, the pit was more in the nature of a structure which was constructed for a specific purpose by applying scientific principles of geotechnical engineering. Such a structure cannot be termed as an apparatus or equipment or machinery in as much as it is a civil structure, which has been excluded from the definition of "plant and machinery." Accordingly, the AAAR held that the credit thereof will not be admissible.

4. ***In the absence of a specific restriction, the activity of construction of road service provided by a sub-contractor to the main contractor will be chargeable to GST at the rate of 12%.***

In Re: Messers Core Construction [Order No. GST-ARA-08/2020-21/B-109 (Authority for Advance Ruling, Maharashtra), decided on December 10, 2021]

Facts of the case:

The Applicant has sought an advance ruling from the AAR on the issue of rate of GST to be charged by the Applicant sub-contractor to its main contractor on Work Contract Services on Construction of Roads, viz. 12% or 18%.

Judgment:

(a) The AAR observed that in terms of Entry No. (iv) of Notification No. 20/2017-Central Tax (Rate) dated August 22, 2017 amending the Rate Notification No. 11/2017-Central Tax (Rate) dated June 26, 2017, supply by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of, "*(a) a road, bridge, tunnel, or terminal for road transportation for use by general public"* is chargeable to GST at the rate of 12%.

(b) The aforesaid entry does not specify that it should be made applicable only to a contractor and not a sub-contractor. In the absence of such specification, the AAR held that the said entry should apply to the services provided by sub-contractor also. Accordingly, the AAR held that the rate of 12% GST would be applicable.

Service Tax

5. ***Split verdict on the contentious issue of Service tax on interchange fees***

Commissioner of CGST & Central Excise v. *Messers Citibank* [Civil Appeal No(S). 8228 of 2019 (Hon'ble Supreme Court), decided on December 9, 2021].

Facts of the case:

The issue for consideration in the present case relates to levy of Service tax on interchange fees collected by the issuing bank from the acquiring bank in case of a credit card service of a purchase transaction, where the acquiring bank has already discharged Service tax on such fees. The transaction is illustrated herein-below in brief for ease of understanding:

(a) A cardholder purchases goods/services from the Merchant Establishment ("**ME"**) worth ₹100 and makes payment by credit/debit card. The ME receives the consideration for the goods/services from the acquiring bank, which deducts their fee (known as the "**Merchant Discount Rate"** or **"MDR"**) and remits the net proceeds to the ME (₹ 94.3).

(b) The issuing bank retains its share of ₹ 2/- MDR (known as "interchange fees") and remits the net proceeds (₹ 98/-) to the acquiring bank through card associations. The acquiring bank in turn receives its share of₹ 3 for goods/services from the issuing bank. The card-holder remits the gross consideration for the services (₹100) to the issuing bank within the agreed grace period days upon receipt of credit card statement.

(c) The Service tax on the entire MDR amount (₹5) signifies ₹ 0.7, which is paid to the tax authorities by the acquiring bank.

Judgment:

(a) The Hon'ble Apex Court (First judge view) held that in the present case, the issuing bank, as part of its agreement with the card association and the acquiring bank, is engaged in the unique activity of being on the electronic platform hosted by the card association and it is only with the approval of the issuing bank that the merchant bank permits the purchase using the card. It is inconceivable that without the role played by the issuing bank, the very credit card transaction would become possible. Hence, the issuing bank is engaged in provision of an activity, which amounts to a service separate to the nature of service provided by the acquiring bank, which is leviable to Service tax under the Finance Act, 1994. The Hon'ble Supreme Court (First judge view) also rejected the contention of the Respondent that the interchange fee charged by the issuing bank is in the nature of interest in as much as there is no creditor-debtor relationship in the transaction. Consequently, it was held (First judge view) that the interchange fees collected by the issuing bank was leviable to Service. The demand for interest and penalty would stand dismissed provided the acquiring bank, indeed, discharged the tax liability on the interchange fee and for such purpose, the matter is remanded to the Customs Excise and Service Tax Appellate Tribunal ("**CESTAT**").

(b) The Hon'ble Apex Court (Second judge view) seconded the first view and held that that the amount received by the issuing bank, as interchange income or fee, is not towards interest. However, it dissented from the first view of the Hon'ble Apex Court in that the issuing bank provides a separate service. According to the second view, the role of the issuing bank in the service provided by the acquiring bank to the merchant establishment is part of a single unified service falling under clause (iii) of Section 65 (33a) of the Finance Act, 1994 and it cannot be broken up into its components and classified as separate services for classification. It held that there is, in reality, one unified service provided by the acquiring bank to the merchant establishment for which gross value of consideration is the merchant discount rate (MDR). This single MDR includes the interchange fee. Therefore, the issuing bank's service is subsumed into the service of the acquiring bank to make it a unified service

to the merchant establishment. Accordingly, as per the second view, the matter need not be remanded to the CESTAT.

Argus Comments:

What needs to be seen after the dissenting judgment on the issue of leviability of Service tax is whether a larger bench will be constituted to provide finality to the issue or not. Presently, the issue remains unsettled and is of academic interest.

6. ***Reversal of CENVAT Credit in books of accounts instead of transfer of the amount to electronic credit ledger is valid.***

Lightspeed India Partners Advisors LLP v. *Commissioner Central Tax (Appeals), Delhi* [Final Order No. 52063/2021 (CESTAT, New Delhi), decided on December 1,2021].

Facts of the case:

The issue for consideration was whether the Appellant, an exporter of services, who accumulated CENVAT Credit pertaining to pre-GST era and reversed the same in its books of accounts on February 23, 2018, had made a valid reversal or not. If yes, whether the Appellant was eligible for a refund of such CENVAT Credit reversed in its books of accounts or not.

Judgment:

(a) The CESTAT observed that Hon'ble Madras High Court in the case of *BNP Paribas Global Securities Operations Pvt Ltd.* v. *The Assistant Commissioner of GST and Central Excise* [2021 (4) TMI 783] had held that for the transaction pertaining to the period prior to June 30, 2017, since the assessee could not file the Service tax return post July, 2017, any reversal/ credit shown in his private accounts/ the Books of accounts can be considered as the statutory documents admissible in evidence.

(b) Further, as per Section 142 of the CGST Act, refund of any duty or tax which was paid for the period prior to coming into force of the GST law can be claimed even after the appointed date viz., July 1, 2017. Consequently, it was held that the act of the Appellant of reversal of CENVAT Credit of the period pertaining to the existing law in the books of accounts instead of transferring the same to electronic credit ledger was in order. Accordingly, the refund claims were allowed and the Order denying the benefit thereof was set aside.

Customs

7. ***The entitlement to refund of Special Additional duty arises only after the resale of goods and not otherwise.***

Messers Tradewell v. *Commissioner of Customs, Jaipur* [Final Order No. 52077/2021 (CESTAT New Delhi), decided on December 7, 2021].

Facts of the case:

The issue involved in this appeal is whether the refund claim of Special Additional Duty ("**SAD**"), under Customs Tariff Act, 1975, which is in lieu of sales tax, filed after the period of one year from the date of payment of SAD, have been rightly rejected as time barred by the Court or not.

Judgment:

(a) The CESTAT observed that when an importer resells the goods, as it is, by way of trade and deposits sales tax, he becomes entitled to refund of the SAD, which had been deposited at the time of import. The procedure for such refund is provided under Notification No. 102/2007-Cus. dated September 14, 2007 as amended, wherein condition (c) specifies that, *"the importer shall file a claim for refund of the SAD before the expiry of 'one year' from the date of payment of the said SAD of customs*".

(b) In the present case, admittedly, the Appellant importer had filed refund claim after more than one year from the date of payment of SAD. However, the right to claim refund arose on when the importer resells its goods and not otherwise. Correspondingly, relying upon the favourable judgment in *Sony India Pvt. ltd.,* v. *Commissioner of Customs* 2014 (304) ELT 660 (Del.) as maintained by Hon'ble Supreme Court and reported in 2016 (337) ELT A102 (SC), the CESTAT set aside the rejection order of refund and allowed the Appeal.

8. *Additional Director General, DRI, is not a proper Officer to issue SCN under Section 28(4) read with Section 2(34) of Customs Act, 1962.*

Messers N.V. Distilleries & Breweries Private Limited v. *Principal Commissioner of Customs, New Delhi* [Final Order No. 52064/2021 (CESTAT, New Delhi), decided on December 6, 2021].

Facts of the case:

The present dispute relates to the question whether Additional Director General, DRI is having jurisdiction to issue Show Cause Notice (**"SCN"**) under Section 28(4) read with Section 2(34) of Customs Act, 1962 (**"Customs Act**") or not.

Judgment:

(a) The Tribunal while relying on the favourable decision of *Canon India Private Ltd.* vs. *Commissioner of Customs* [2021–TIOL–123–SC–CUS–LB] held that even though the review petition against the said decision was pending before the Hon'ble Apex Court, the said decision was followed in *Commissioner of Customs Kandla* vs. *M/s. Agarwal Metals & Alloys* [2021–TIOL– 233–SC–CUS–LB].

(b) Accordingly, it was held that the Additional Director General, DRI was not a proper Officer to issue SCN under Section 28(4) read with Section 2(34) of Customs Act, 1962 and the SCN was set aside.

Central Excise, Sales Tax, VAT

9. ***Refund of credit amount of supplies received in the pre-GST Regime cannot be denied on account of the procedural requirement to file TRAN-1 by December, 2017.***

Messers Bharat Heavy Electricals Limited v. *Commissioner of GST and Central Excise, Chennai* [Final Order No. 42466/2021 (CESTAT, Chennai), decided on December 15, 2021].

Facts of the case:

The Appellant had effected payment of certain supplies received in the pre-GST Regime after introduction of GST. The Appellant could not avail the credit or reflect the same in its ER-1 Returns for the month of June 2017 or carry forward the same in TRAN-1 Return. Accordingly, the Appellant filed a refund application claiming the refund of the amount of such credit. The present dispute relates to the question whether the Appellant was liable to refund of amount of credit arising out of payment made to vendors in GST Regime for the supplies pre-GST regime or not.

Judgment:

(a) The CESTAT held that in the present case, the Appellant would be eligible to avail credit but for the introduction of GST law. The said right cannot be frustrated by pressing on the procedural requirement of filing TRAN-1 before December 27, 2017. The accounting practice adopted by the Appellant allows availment of credit only after making payments to the vendors which has made it impossible to carry forward the credit as set out in the GST law. When the credit is eligible, the same cannot be denied by stating procedural requirements.

(b) Reliance was placed by the CESTAT in the case of *Pujan Builders, Engineers and Contractors* v. *CCE & ST, Vadodra* 2021-TIOL-101-CESTAT MUM, wherein the Tribunal allowed the refund even though initially the credit was carried forward to TRAN-1 and later reversed, after which the claim for refund was filed. In view thereof, the CESTAT held that the rejection of refund claim was unjustified and the appeal was allowed.

10. ***CENVAT Credit cannot be denied on the ground of time limit for invoices issued prior to the amendment in Rule 4(1) of the CENVAT Credit Rules, 2004 specifying a time limit for taking credit.***

NR Agarwal Industries Limited v. *CCE & ST, Vapi* [Final Order No. A/12609/2021(CESTAT, Ahmedabad), decided on December 14, 2021].

Facts of the case:

The issue involved in the present case is whether the CENVAT Credit of invoices availed after one year of its issuance is admissible, where such invoices were issued prior to the amended Rule 4(1) of the CENVAT Credit Rules, 2004 (**"CCR"**) whereby the time limit of six months/ one year form the date of issue of invoices was fixed for availing the CENVAT credit.

Judgment:

The CESTAT relied upon the judgment in the case of *Vijay Kumar Srivastaw* v. *CCE & ST Daman (Final Order No. 11657-11658/2021)* wherein it was held that the assessee was entitled for the CENVAT Credit of all the invoices (on which CENVAT credit was claimed), which were issued prior to September 9, 2014, i.e., prior to the amendment in Rule 4(1) of the CCR. In light of the same, the denial of CENVAT Credit was set aside and the appeal was allowed by the CESTAT.

11. ***Amount deposited under protest prior to order of assessment can be adjusted against the monetary pre-deposit required for filing an appeal under the Maharashtra Value Added Tax Act, 2002.***

VVF (India) Limited v. *State of Maharashtra* [Civil Appeal No 7387 of 2021(Hon'ble Supreme Court), decided on December 3, 2021].

Facts of the case:

The dispute pertains to the question whether the amounts which have been deposited under protest prior to an order of assessment can be adjusted against the mandatory pre-deposit required for filing an appeal under Section 26(6A) of the Maharashtra Value Added Tax Act 2002 (**"MVAT Act"**).

Judgment:

(a) The Hon'ble Apex Court observed that under the provisions of Section 26(6A) of the MVAT Act, "an amount equal to ten per cent of the amount of tax disputed by the appellant" has to be deposited. Accordingly, the entirety of the undisputed amount has to be deposited and 10 per cent of the disputed amount of tax is required to be deposited by the appellant.

(b) In the present case, the Appellant disputes the entirety of the tax demand. Consequently, on the plain language of the statute, 10 per cent of the entire disputed tax liability would have to be deposited in pursuance of Section 26(6A) of the MVAT Act. The amount which has been deposited by the appellant anterior to the order of assessment cannot be excluded from consideration, in the absence of statutory language to that effect. The provisions of a taxing statute have to be construed as they stand, adopting the plain and grammatical meaning of the words used. Therefore, the disputed amount, which was paid under protest was also liable to be considered while making payment of the pre-deposit. The Appeal was consequently disposed of by the Hon'ble Apex Court with such directions to the appellate authority.

Recent Notification

No.	Reference	Particulars
1.	Notification No. 37/2021-Central Tax dated December 1, 2021	Seeks to *inter-alia* amend Rule 137 of the CGST Rules, 2017 to extend the tenure of the Anti-profiteering authority from four years to five years.

Contributed by the Indirect Tax team

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