Legal Zine Volume –VI (June-2021)

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GST
High Court Decisions

Shri Sentu Dey vs. The State of Tripura 2021-VIL-440-TRI

Certain act may fall within the special penal statute at the same time may also have an element of an offence under IPC

Facts:

The petitioner is a sole proprietor registered under Tripura State GST Act. The Superintendent of State Taxes filed a complaint before the Sub-Divisional Magistrate, alleging that the petitioner though had collected the taxes from the purchasing dealers, had not deposited the same in the Government revenue. The petitioner had thus committed offences punishable under Sections 132 of the SGST Act and 406 and 409 of IPC. Further, the Sub-Divisional Magistrate order that the complaint may be registered as a CR case and be transferred to the Court of JMFC, Bishalgarh. Thereafter, the learned Magistrate passed the impugned order, thereby sent the case for investigation after registering the case as an FIR. Hence, the petitioner by way of present petitioner has challenged the impugned order.

Held:

The Hon'ble High Court, while allowing the petition, held the following:-

- It is not unknown that a certain act may fall within the special penal statute at the same time may also have an element of an offence under IPC.
- In a case where the ingredients of Section 405 of IPC are satisfied, the action can as well amount to offences punishable under Sections 406 and 409 of IPC. However, the Department should not invoke IPC provisions without application of mind in every case.
- These two twin facts namely, the perusal of the case record by the Magistrate and the decision that he arrived on upon perusal of the case records of examining the witnesses under Section 200 of Cr.P.C. would leave no manner of doubt that on 27.11.2020 itself he had taken cognizance of the offences.
- It was thereafter not open for him to change the course and revert back to the initial option of requiring police investigation and calling for police report. hence, the impugned order was quashed and the concerned Magistrate shall proceed further in accordance with law from the stage of taking cognizance of the offences disclosed.

M/s Satyam Shivam Papers Pvt Ltd vs. Asst. Commr. 2021-VIL-448-TEL

A presumption of intention to evade tax cannot be drawn merely on account of non-extension of its validity of ewb

Facts:

The petitioner carries on trading business of all kinds of paper, stated that it made a inter-state supply of paper through a tax invoice and had also generated a e-way bill. Further, during the delivery of paper to the consignee, the goods carrying vehicle got struck in traffic jam due to political rally which caused non-movement of goods within the validity of e-way bill. Thereafter, the vehicle was detained by the Deputy State Tax Officer and a Detention Notice was served alleging that the validity of the e-way bill had expired proposing to impose tax and penalty which was confirmed vide impugned order. Hence, the petitioner through present petition has challenged the impugned order.

Held:

The Hon'ble High Court, while allowing the petition, held the following:-

- There was no material before the respondent to come to the conclusion that there was evasion of tax by the petitioner merely on account of lapsing of time mentioned in the e-way bill
- On account of non-extension of the validity of the e-way bill by petitioner or the driver, no presumption can be drawn that there was an intention to evade tax. It was the duty of the respondent to consider the explanation offered by petitioner as to why the goods could not have been delivered during the validity of the e-way bill
- The Court is unable to understand why the goods were kept for safe keeping at a private premises (in the house of a relative of respondent) and not in any other place designated for such safe keeping by the State. There has been a blatant abuse of power by the respondent in collecting from the petitioner tax and penalty by such conduct

Therefore, the Hon'ble High Court set aside the impugned order and directed the department to refund collected from petitioner within four weeks with interest 6% and also pay cost Rs. 10000/-

M/s Bangalore Turf Club Ltd. vs State of Karnataka 2021-VIL-445-KAR

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Rule 31A of CGST Rules struck down as only commission received by totalisator is the consideration for its services

Facts:

The petitioners are in the business of race club has challenged the constitutional validity of Rule 31A(3) to CGST Rules levying GST on entire bet amount received by totalisator. Petitioners contended that liability to pay GST arise on the commission received against service rendered through totalizator and not on the entire amount passes through the totalisator which is meant for distribution amongst members. While respondent was contending that totalisator indulges in betting, petitioners in regard submitted that betting is neither in their course of business nor in furtherance of business and that the amount received in the totalisator is hold for a brief period in its fiduciary capacity. Once the race is over the money is distributed to the winners of the stake. Further, the petitioners contended that services of a bookmaker and a totalisator can not be held at par as bookmakers indulges in betting by receiving consideration depending on the outcome of race, irrespective of the result while totalisator holds money in trust on behalf of the punter before redistribution to the winner of stake which cannot be construed to be a consideration in terms of Section 2(31) of the Act.

Held: Hon'ble High Court while allowing the petition, held as follows:

- There is no supply of goods/bets by the petitioners as defined under the Act and it is only the commission that qualifies as consideration for the totalisator service provided by the petitioners and rest amount is held only in fiduciary capacity only for a certain period.
- Rule 31A(3) wipes out the distinction between bookmakers and totalisator by making the petitioners liable to pay tax on 100% of the bet value as it's the bookmakers who are indulged in betting and receiving consideration depending on outcome of race.
- Rule 31A(3) travelled beyond the charging section to cover the services of totalisator and hence is ultravires to the provisions of the CGST Act and consequently clarifications issued by Circular No.27/01/2018-GST dated 4.1.2018 also held as quashable.

Dharmendra M. Jani Vs. UOI & Others 2021-VIL-458-BOM & 2021-VIL-472-BOM

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Dissenting views of 2 judges on constitutional validity of section 13(8)(b) and section 8 of IGST Act w.r.t intermediary services

Ujjal Bhuyan J: Section 13(8)(b) is *ultra virus* of IGST Act, 2017 besides being unconstitutional

- The Constitution has only empowered Parliament to frame law for levy and collection of GST in the course of inter-state trade or commerce
- It does not empower imposition of tax on export of services out of the territory of India by treating the same as a local supply
- While import and export of services have been treated as inter-state supplies under section 7 of IGST Act, section 8 treats services as intra-state supply if location of supplier and place of supply are in same state
- Further by artificial creation of a deeming provision in the form of section 13(8)(b) of the IGST Act, where the location of the recipient of service provided by an intermediary is outside India, the place of supply has been treated as the location of the supplier i.e., in India
- This runs contrary to the scheme of the CGST Act as well as the IGST Act besides being beyond the charging sections of both the Acts
- Therefore, Section 13(8)(b) of the Integrated Goods and Services Tax Act, 2017 is ultra vires the IGST Act besides being unconstitutional

Abhay Ahuja J: Section 13(8)(b) as well as Section 8(2) of the IGST Act, 2017 are constitutionally valid

- Once the Parliament has in its wisdom stipulated the place of supply in case of intermediary services to be the location of the supplier of service, no fault can be found with the provision by artificially attempting to link it with another provision to demonstrate constitutional or legislative infraction
- Further, to say that by virtue of section 13(8)(b) read with section 8(2) of the IGST Act, Parliament has sought to impose tax on export of services out of the territory of India by treating the same as local supply in violation of Articles 246A and 269 is completely fallacious and untenable
- Section 13(8)(b) has been enacted pursuant to the authority of law and section 13(8)(b) cannot be linked with section 8(2) of the IGST Act to deem an inter-state supply as an intra-state supply
- Therefore, neither section 13(8)(b) nor section 8(2) of the IGST Act are unconstitutional or *ultra virus* of the IGST Act

M/s Shree Jagannath Traders vs Comm. Of State tax 2021-VIL-454-ORI

Delay in furnishing certified copy of order appealed against due to COVID restriction is condonable

Facts:

The petitioner had filed appeal before appellate authority within prescribed period of 3 months accompanied with downloaded copy of the order appealed against and the certified copy of the order was furnished after 3 months and 21 days of filing appeal due to difficulties faced by litigants in applying for and obtaining certified copies of orders in these COVID times. In terms of Rule 108 (3) of the OGST Rules, 2017, the appeal had to be accompanied by a certified copy of the order appealed against and be submitted within seven days of the filing of the appeal. Therefore, the appeal was rejected on the grounds of time barred contending that the appeal was not presented within time limit.

Held:

The Hon'ble High Court disposed of the matter in below terms:

- Considering that the explanation offered by the petitioner is a plausible and not an unreasonable one, especially in these COVID times, and further considering that a downloaded copy thereof was in fact submitted along with the appeal which was otherwise filed within time, this Court is of the view that the mere delay in enclosing a certified copy of order appealed against along with the appeal should not come in the way of the Petitioner's appeal for being considered on merits by the Appellate Authority
- This is a case of substantial compliance and the interests of justice ought not to be constrained by a hyper technical view of the requirement that a certified copy of the order appealed against should be submitted within one week of the filing of the appeal
- Further, in these COVID times when there is a restricted functioning of Courts and Tribunals in general, a more liberal approach is warranted in matters of condonation of delay, which cannot be said to be extraordinary

M/s Maa Karni Traders and Anr. Vs. UOI & 3 ORS. 2021-VIL-468-GAU

Seized goods shall be released on furnishing bank guarantee for tax and penalty payable on such goods

Facts:

The applicant's goods have been seized under Section 67(2) of CGST Act, 2017. Though the applicant is willing to pay tax on the value of goods but according to applicant, the authorities are putting unnecessary conditions for release of the seized goods by imposing the penalty to release goods. In fact, according to the applicant the goods are properly obtained through legitimate means and not liable to any penalty. The applicant has filed the application to sought whether such penalty shall be imposed or not

Held:

- The imposition of penalty by way of bond with security is in accordance with the specific provisions of Section 67(6) of Central Goods and Services Tax Act 2017
- Section 67(6) provides, that the goods seized under Section 67(2) shall be released on provisional basis, on the execution of bonds and furnishing of a security in such manner and quantum as prescribed, or on the payment of tax, interest and penalty
- In view of the decision by Hon'ble Supreme Court in **State of Uttar Pradesh and others Vs. Kay Pan Fragrance**, the provisions of the statute must be complied with when release of seized goods is ordered, and the conditions imposed by the authorities which was challenged by the applicant is without any basis
- It is the mandate of law that at the time of release, not only the value of the goods but also the penalty as may be payable for which the owner of the goods may have to execute a bond with security

Hence, the Hon'ble Court ordered that the applicants to execute a bond for value of goods and furnish Bank Guarantee for tax and penalty payable, upon which the goods shall immediately be released

Punnimti Usha Rani Vs. The Union of India
2021-VIL-474-AP

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Petition relating to fake invoices and fictitious firms dismissed

Facts:

The petitioner was found engaged in fraudulent passing on of input tax credit by issuing fake tax invoice without actual supply of goods in the name of fictitious/Shell firms. The searches and investigations revealed that no business firms have operated from those premises stated in GST registration and the registration were taken fraudulently in the names of different firms using wrong credentials and addresses. Thereafter, the petitioner got arrested for violation of Section 132(1)(b) and Section 132(1)(c) of the CGST Act,2016 and also his bank account were ordered for provisional attachment. The main contention of the petitioner was that no show cause notice was issued and no opportunity was given to the petitioner to submit their explanation before provisional attachment and accordingly, the principles of natural justice were infringed.

Held:

The Hon'ble High Court while dismissing the writ petition observed that:

- The fictitious firms existed only on paper to issue fake tax invoices in order to pass on ITC without any supply of goods. Such firms generally operated on three levels. The first level firms issues fake tax invoices to second level which further issue GST invoices in the name of third level firms, showing the payment of GST and utilizing irregular ITC and accordingly filing its GSTR-3B
- Documents recovered during search revealed that the petitioner was indulged in the issue of fake GST invoices in the name of more than 70 fictitious/ non –operating companies created by him to facilitate the availment of irregular ITC and therefore, defrauded the government revenue

Hence, it was stated by the High Court that since, the investigation is at crucial stage and the matter is before the special judges for economic offences, the writ petition was dismissed without getting into the merits of the case and the petitioners were directed to approach the court of special Judge for Economic offences for appropriate relief.

M/s Comsol Energy Pvt. Ltd. vs State of Gujarat 2021-VIL-477-GUJ

Statutory limit provided under Act for filing refund shall not apply where tax is collected without authority of law

Facts:

The petitioner filed refund claim of IGST paid on Ocean freight under RCM pursuant to the HC order declaring levy of IGST under RCM on ocean freight as unconstitutional. Department had rejected the claim and issued deficiency memo on premise of being not filed within statutory limit prescribed u/s 54 of CGST Act, 2017. Consequently, present writ has been filed contending that as per Article 265 of the Constitution no tax shall be levied or collected except by way of authority of law and IGST collected by CG is without authority of law, therefore refund should be granted

Held:

The Hon'ble High Court allowed the writ petition and while directing to process the refund claim held that:

- Amount collected by the Revenue without the authority of law is not considered as tax collected by them and, therefore, the provisions of Section 54 is not applicable in such cases
- In such circumstances, Section 17 of the Limitation Act is the appropriate provision for claiming the refund of the amount paid to the Revenue under mistake of law
- Reliance has been placed *inter alia* in the matter of **Binani Cement Ltd.** and **Joshi Technology International**

M/s Benq Catering and Allied Services Pvt. Ltd. vs. Asst. Commrs. 2021-VIL-479-AP

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Issuance of adverse order without giving an opportunity of being heard is bad in law

Facts:

The petitioner, was served with a revised show-cause notice by the authority wherein no opportunity of hearing was given to the petitioner in terms of Section 75(4) of the CGST ACT, 2017 and order was issued. Therefore, the petitioner while relying on a decision of Gujarat High Court in **Alkem Laboratories Ltd. Vs. Union of India MANU/GJ/0223/2021,** contended that the impugned order suffers from breach of principles of natural justice. However, the authorities submitted that opportunity of hearing had been extended to the petitioner upon issuance of the initial show-cause notice

Held:

The Hon'ble High Court while allowing the writ petition held:

- A plain reading of Section 75(4) of CGST Act would leave no doubt that it is incumbent upon the assessing authority to give an opportunity of personal hearing to the assessee when a request in that regard is received in writing from it or where any adverse decision is contemplated against the assesse
- When the procedural breach relates to infraction of a facet of natural justice, that is, an opportunity of hearing and denial thereof prejudices the assessee to effectively respond to intricate issues of fact and law as in the present case, the impugned order is liable to be set aside

Therefore the impugned order is set aside and the matter is remanded back to the assessing authority, who is directed to give an opportunity of personal hearing to the petitioner and pass an appropriate order thereon within two (2) months from the date of communication of this order

Yasho Industries Ltd. Vs. UOI 2021-VIL-483-GUJ

DGGI is a "proper officer" entrusted with the powers to issue summons under Section 70 of the CGST Act, 2017

Facts:

The petitioner is engaged in the business of manufacturing and exporting specialized chemicals. The Directorate of Revenue Intelligence *vide* the communication had initiated an inquiry against the petitioner who had availed the benefits of EOU scheme and availed the benefit of refund of duty paid on the goods exported. Thereafter, the officers of the Directorate General of Goods and Services Tax Intelligence (DGGI) had visited the manufacturing unit of the petitioner and a sum of Rs. 3 cr. was recovered from the petitioner alleging incorrect IGST refund and also issued impugned summons invoking Section 70 of the CGST Act,2017. Thus, the petitioner by way of present petition has challenged the said summons issued under section 70 of the CGST Act and also have sought directions to refund / recredit of Rs. 3 cr paid by the petition under protest and also to quash and set aside the impugned circular dated 5.07.2017 in connection with the assignment of functions to the officers as the 'proper officers'.

Held:

The Hon'ble High Court while dismissing the writ petition, held as follows:

- The respondent is an officer of DGGI holding the designation of Senior Intelligence Officer, who was appointed as the Central Tax Officer with all the powers under the CGST Act and IGST Act and the Rules made thereunder, as are exercisable by the Central Tax Officers of the corresponding rank of Superintendent as specified in the **Notification No.14/2017-CT** dated 1.7.2017. Further, the respondent was also assigned the powers of proper officer by the CBIC *vide* **Circular dated 5.7.2017** issued in exercise of the powers conferred by Section 2(91) of the CGST Act read with Section 20 of the IGST Act
- There is no disagreement with the proposition laid down by the **Hon'ble Supreme Court in case of Cannon India Ltd** that when a statute directs that things to be done in a certain way, it must be done in that way alone. In the present case CBIC in exercise of the powers conferred by Section 2(91) of the CGST Act read with Section 20 of the IGST Act and subject to Section 5(2) of the CGST Act has assigned the officers the functions as that of proper officers in relation to the various sections of the CGST Act and the Rules *vide* the Circular dated 5.7.2017.
- Further, the inquiry by DRI was in connection with the incorrect availment of double benefits while the DGGI issued summon with respect to the refund of ITC under the CGST Act hence not a case of parallel proceedings

M/s ARS Steels & Alloy Int. Vs. The State Tax Officer 2021-VIL-484-MAD

No reversal of ITC required under section 17(5)(h) of the CGST Act in case of loss of input during manufacture process

Facts:

The petitioners are engaged in the manufacture of MS Billets and Ingots. Further, the petitioner suffered a loss of a small portion of inputs, inherent to the manufacturing process. Thereafter, the impugned orders seeks to reverse a portion of the ITC claimed by the petitioners, proportionate to the loss of the input, referring to the provisions of Section 17(5) of the CGST Act, 2017. Thus, the petitioner by way of present petition has challenged the said impugned orders.

Held:

The Hon'ble High Court while allowing the writ petition, held as follows:

- The manufacturing loss that is occasioned by the process of manufacture cannot be equated to any of the instances set out in clause (h) of Section 17(5) of the CGST Act
- The said clause (h) indicates loss of inputs that are quantifiable and involve external factors or compulsions. A loss that is occasioned by consumption in the process of manufacture is one which is inherent to the process of manufacture itself
- The reversal of ITC by invoking Section 17(5)(h) of the CGST Act by the revenue, in cases of loss by consumption of input which is inherent to manufacturing loss is misconceived, as such loss is not contemplated or covered by the situations adumbrated under Section 17(5)(h) of the CGST Act.

Therefore, the Hon'ble High Court set aside the impugned orders and allowed the writ petition.

Rakesh Garg Vs. State of Haryana 2021-VIL-485-P&H

The term 'Prosecution' means the initiation or commencement of the criminal proceedings when formal charge-sheet is presented before a Court of law and it does not amount to Lodging of the FIR

Facts:

The petitioner was the Managing Director of M/s Moksh Alloys Pvt. Ltd. but had submitted his resignation on 05.01.2018. Further, an FIR was logged against the company under Section 132 of the CGST Act,2017 and sections 420, 476, 468 and 471 of the IPC in connection with of bogus input tax credit. The petitioner contended that he had ceased to be a Director of the Company and hence had no role to play in the affairs of the said Company and the Excise taxation Officer went way beyond his jurisdiction he could not have set the criminal law in motion without the prior permission of the Commissioner as provided for under Section 132(6) of the CGST Act. Hence, the petitioner by way of instant petition for quashing of said FIR.

Held: The Hon'ble High Court while dismissing the petition held as follows:

- Since the investigation is still underway and final report under Section 173 Cr.P.C. has not yet been presented by the investigating agency the Court would not be justified in embarking upon the truthfulness or falsehood of the allegations levelled in the complaint
- Section 4(2) Cr.P.C. does stipulate that if a special procedure is prescribed under a special enactment then the procedure would have to be followed as per the enactment and not under the Code
- Section 132(6) of the CGST Act also makes clear that a person under this section can be prosecuted for an offence only with the previous sanction of the Commissioner. However, in the case in hand the 'prosecution' of the petitioner has not even been initiated
- Prosecution means the initiation or commencement of the criminal proceedings when formal charge-sheet is presented before a Court of law. In the instant case investigation is still underway and charge sheet under Section 173 Cr.P.C. has not yet been presented before the Court concerned
- The complaint filed by respondent-ETO cannot be said to be beyond his jurisdiction because the previous sanction of the Commissioner as provided for under Section 132(6) of CGST Act would be required only after the conclusion of the investigation and at the stage of presentation of charge-sheet under Section 173 Cr.P.C. Lodging of the FIR does not amount to prosecution

Syed Asif Ali Vs. State of U.P 2021-VIL-491-ALH

Merely summoning cannot be construed as an intention to arrest on the part of summoning authority

Facts:

The applicant is a director of Roshan Real Estate Pvt. Ltd. which has been purchasing cement from M/s BCC Cement Pvt. Ltd. There has been allegation on M/s BCC Cement Pvt Ltd in regard to defalcation in accounting of input tax credit and it is alleged that M/s BCC Cement Pvt Ltd neither procured any cement nor supplied it but has generated false and fabricated invoices so to take advantage of input credit. Also, the summons were issued to the applicant under Section 70 of the CGST for investigation into alleged generation of false and fabricated invoices by selling company. Hence, the applicant has filed the bail application on the basis of apprehension.

Held:

The Hon'ble High Court held as follows:

- Merely summoning of one of the Directors of the purchaser company cannot be construed to be an intention on the part of the summoning authority to arrest the Director in as much as to arrest or not can be taken only on determination of liability
- At the stage of summon there is no intention to arrest a person so summoned but the intention is to afford an opportunity to person so summoned to give evidence and produce documents so to allay the apprehension of the officers in regard to evasion of duty

Therefore, the Hon'ble High Court held that the application for grant of anticipatory bail application is premature and it is dismissed

TATTVAM ADVISORS

GST
Advance Rulings

M/s Malankara Orthodox Syrian Church Medical Hosp. 2021-VIL-227-AAR

Supply of medicines, implants, and other items for treatment under pre-fixed package is a composite supply with healthcare services being the principal supply

Facts:

The applicant is supplying medicine, implants and other supplies to their patients during the course of treatment who are admitted as inpatient and those who are undergoing treatment in their hospital as outpatients. The patients have option to purchase medicine and other supplies from outside pharmacies and the bill will be prepared accordingly. The applicant is issuing tax invoice as per the GST law for the supply of medicines and other supplies through the pharmacy to both inpatients and outpatients. The applicant has sought advance ruling whether GST is leviable on the value of supply of medicine, implants and other supplies issued to our patients during the course of treatment.

Held:

The advance ruling authority has ruled :

- The supply of medicines, implants, and other items to the inpatients admitted to the hospital for treatment as per the package offered by the applicant is a composite supply where the principal supply is healthcare services falling under SAC 999311 which is exempted as per entry at Sl. No. 74 of Notification No. 12/2017 Central Tax (Rate)
- Similarly, in case of outpatients, the services provided in the course of the treatment to the patients clearly fall within the scope of healthcare services as defined in para 2 (zg) of the Notification No. 12/2017 Central Tax (Rate) and is exempted from GST as per entry at 74 Sl. No. 74 of the said notification
- In the case where applicant supply of medicines, implants and other items separately (whether or not under pre-fixed package) and billing for such supplies, the combination of the goods and/or services included in the supply are not bundled
- Such supplies are made as distinct and clearly identifiable individual supplies and the value of such individual supplies are separately determined according to the choice exercised by the inpatient as made available. Hence, it cannot be considered as composite supply and shall be individually liable to GST at the rate applicable
- The supply of medicines and allied items by the pharmacy run by the hospital can only be treated as an individual supply of medicine and allied items and is liable to GST at the rates applicable for each such item as per the GST Tariff

M/s Ashiana Housing Limited
2021-VIL-232-AAR

Supply of construction service of 'Unit' (other than affordable residential apartments) in the Residential Real Estate Project is a supply of Construction Service classifiable under SAC 9954 and not as "Other services" under SAC 9997

Facts:

The applicant are real estate developer, hold the development rights to develop a residential arrangement in approved residential real estate project (RREP). They entered two agreements with their customers. The First agreement is an Agreement for Sale of undivided share in land ('UDS') to the customer ('UDS Agreement'). The Second agreement is an Agreement for Construction ('Construction Agreement'), whereby the customer appoints the Applicant for construction of units on the said UDS. Such arrangement is under an umbrella 'Indenture of undertaking' ('IOU') recording the understanding of both the UDS Agreement and Construction Agreement. The applicant has sought advance ruling if the activities of construction carried out by the applicant for its customer under the Construction Agreement, being composite supply of works contract are appropriately classifiable under Heading 9997 as "Other services" and chargeable to CGST @9% under S.No.35 of Notification No.11/2017- CT(Rate) dated 28.06.2017.

Held:

The advance ruling authority has ruled :

- Having established that as per the agreements entered into by the applicant with the prospective customer, the obligation is to construct the 'unit' in approved RREP and the construction is undertaken for 'intended sale' before the issue of completion certificate, the activity is a supply taxable under GST
- In the Pre-GST era Works Contracts were subjected to Sales Tax on the value of goods involved in the works and on the labour and service portion of the same contract, service tax was levied. These contracts are treated as supply of service in the GST Era.
- Therefore, the supply of service of construction of a 'Unit' in the RREP based on the 'Construction agreement' entered into by the applicant with the prospective buyer intended for sale to the buyer, is a supply of Construction Service classifiable under SAC 9954 and the Construction of Unit 'other than affordable residential apartments' by Promoter is taxable at 7.5% as per Entry Sl. No. 3(ia) of the Notification 11/2017-Central Tax (Rate) dt.28.06.2017.

M/S M P Enterprises & Associates Limited 2021-VIL-235-AAR

TATTVAM ADVISORS

Services of renting of Motor Vehicle to carry more than twelve passengers chargeable to GST @ 2.5% or 12% GST

Facts:

The applicant entered into an agreement with B.E.S.T (Brihan Mumbai Electric Supply and Transport Undertaking) for operation of stage carriage services for public transport of AC mini buses. Applicant will be paid monthly service charges by BEST on kilometer basis. Thus, in terms of above agreement, applicant classified its services under SAC 9966 and raised invoice for service charges along with GST @12%. The applicant is seeking an advance ruling if the service of operating mini AC buses by the applicant for B.E.S.T would be exempt from payment of GST under Tariff Heading 9966 i.e. 'services by way of giving on hire to a state transport undertaking, a motor vehicle meant to carry more than twelve passengers' in terms of Notification No. 12/2017-CT(R) dated 28.06.2017 or not or would be subject to GST @12% under Tariff Heading 9966 i.e. 'renting of any motor vehicle designed to carry passengers where the cost of fuel is included in the consideration charged from the service recipient' inserted by way of amendment Notification No.31/2017 dated 13.10.2017

Held:

The advance ruling authority has ruled :

- The ownership of the buses lies with the applicant, there is transfer of right to use the buses to BEST by way of effective possession as well as effective control and the consideration for supply of service is charged from BEST and not the passenger. Therefore, the recipient of service is B.E.S.T. Hence, the subject activity amounts to 'renting of motor vehicle' and shall qualify as a taxable activity under the provisions of the GST Laws and the provisions of Notification No. 12/2017-CT (R) dated 28.06.2017 is not applicable
- Since there is a Renting of motor vehicle / transport vehicle which is designed to carry passengers where the cost of fuel is included in the consideration charged from the service recipient i.e. BEST, the applicant will be liable pay GST @ 12%, if credit of input tax charged on goods and services used in supplying the service, other than the input tax credit of input service in the same line of business has not been taken

Teretex Trading Pvt. Ltd.
2021-VIL-239-AAR

Services of arranging or facilitating sales of goods for various overseas suppliers is an “intermediary services” liable to GST

Facts:

The applicant is going to be engaged in supplying services by way of arranging sales of goods for various overseas manufactures/ traders at his own risk and cost without being appointed as an agent by the supplier or by the recipient of goods. The applicant is of the opinion that the services going to be undertaken by him shall be termed as ‘export of services’ as per clause (6) of section of the IGST Act, 2017 and therefore, he has no liability to pay tax on such supply of services. Thus, the applicant has sought advance ruling on the said issue.

Held:

The advance ruling authority has ruled :

- The nature of activities going to be undertaken by the applicant towards arranging or facilitating supply of goods envisages the services closely akin to the services provided by an 'intermediary' as defined in clause (13) of section 2 of the IGST Act, 2017
- The supply of services as provided by the applicant is inextricably linked with the supply of goods made by the overseas supplier and the applicant can neither change the nature and value of supply of goods nor he holds the title of the goods at any point of time during the entire transaction
- The applicant being supplier of services by way of arranging or facilitating sales of goods for various overseas suppliers and the same is not being done on his own account, satisfies all the conditions to be an intermediary service and the place of supply of such services shall be the location of the supplier of services i.e., in India by virtue of section 13(8) of IGST Act, 2017
- As a result, the supply of services by way of arranging sales of goods will not be considered as 'export of service' under section 2(6) of the IGST Act, 2017 and shall be treated as an intra-State supply in terms of sub-section (2) of section 8 of the IGST Act, 2017 leviable to GST

TATTVAM ADVISORS

SERVICE TAX/CUSTOMS

Anjappar Chettinad A/C Restaurant vs. Joint Commr. 2021-VIL-442-MAD-ST

Provision of food and drinks by restaurant as take away in parcels is the sale simplicitor not chargeable to service tax

Facts:

The petitioners, engaged in the business of air-conditioned restaurants hold service tax registration for providing restaurant services, outdoor catering services and mandap keeping services. During the audit undertaken, the department arrived at the conclusion that service tax had not been discharged in relation to 'take/away/ parcel services' for various period upto June, 2017. Thereafter, the petitioners contended that in parcel sales, there could be no artificial splitting of transactions between one of 'service' and one of 'sale' with the attempt to bring the same under the preview of service. However, the department while rejecting the petitioner's contention stated that no mechanism has been provided for bifurcation of sales tax (VAT and Luxuries) and service tax.

Held:

The Hon'ble High Court held as follows:-

- The sale of food and drink simplicitor, services of selection and purchase of ingredients, preparation of ingredients for cooking and the actual preparation of the food and drink would not attract the levy of tax
- In most restaurants, there is separate counter for collection of the take-away parcels. Orders are received either over telephone, by e-mail, online booking or through a food delivery service such as swiggy or zomato. Once processed and readied for delivery, the parcels are brought to a separate counter and are picked up either by the customer or a delivery service. More often than not, the take-away counters are positioned away from the main dining area that may or may not be air-conditioned
- In the said circumstances, the provision of food and drink to be taken-away in parcels by restaurants tantamount to the sale of food and drink and does not attract service tax under the Finance Act

Ace Creative Learning Pvt Ltd vs. Commr. of CT Service Tax Appeal No. 20244 of 2020

Redemption of mutual funds units is not equivalent to trading in securities-No reversal of ITC required

Facts:

The Appellant is engaged in providing taxable service viz. Commercial training and Coaching services and are availing the facility of cenvat credits of inputs, capital goods and input services. During the course of verification of records by Audit wing, the department observed the appellant has declared profit on sale of Mutual fund investments. The department further observed that the appellant is engaged in purchase and redemption of various mutual funds units. Thereafter, the department issued the show-cause notice alleging the appellant is liable to pay is liable to pay an amount as determined in terms of Rule 6(3)(i) i.e. 6%/7% of the value of services contained in the trading activities. After following the due process, the original authority vide Order-in-Original confirmed the demand along with interest and penalty. Hence, the appeal by way of present appeal has challenged the order to the Tribunal.

Held:

The Hon'ble Tribunal while allowing the appeal, held the following:-

- The Appellant is providing Commercial training and Coaching services and they have also invested in mutual fund and have earned profit which they have shown as under the head "other income"
- The Department has wrongly considered the investment in mutual fund as trading in mutual funds and has issued a notice on the presumption that the appellant is providing exempted services which is trading in mutual funds and has not maintained separate records for common input services availed in providing the output services and exempted activity
- The term "trading" has not been defined under the service tax law but in the context of securities, "trading" means an activity where a person is engaged in selling the goods and occupy for the purpose of making profit but certainly trading is different from redemption of mutual fund units
- Hence, the question of invoking Rule 6 does not arise and the department has wrongly invoked provisions of Rule 6(3) demanding the reversal of credit on the exempted services.

M/s Jahanpanah Club vs UOI & ORS 2021-VIL-433-DEL

Transition of CENVAT Credit allowed if it was allowed pursuant to orders passed by authorities after the cut off date

Facts:

The petitioner approached the court seeking a direction to Adjudicating Authority to verify the CENVAT credit claim for the period 2012-13 to 2017-18 which he was entitled to but not claimed due to lack of awareness. Pursuant thereto, CENVAT credit was allowed to the petitioner by the orders of authorities issued in 2018-19. While filing appeal in a matter, it was requested by petitioner to allow adjustment of pre-deposit against the CENVAT credit allowed by virtue of orders passed in 2018-19. Department objected while contending that CENVAT credit was not carried forward from service tax to GST regime through the GST TRAN-1 form. Petitioner submitted that since the CENVAT credit was granted pursuant to the orders issued in 2018-19 which is after the appointed date of 1st July, 2017, the Petitioner should be allowed to file the necessary form for transitioning the accumulated credit. Also, at this stage, petitioner cannot file TRAN-1 form as the last date prescribed under Rule 117 of CGST Rules, 2017 expired on 27.12.2017.

Held:

The Hon'ble High Court while allowing the petition, held as follows:

- Since CENVAT credit has been allowed in favor of the petitioner pursuant to the orders passed by the authorities in 2018-19 i.e., after the cut-off date. In these circumstances, the petitioner may not have genuinely anticipated that he would be required to file TRAN-1 Form particularly since the said amount could not have been reflected in the tax return
- The Petitioner's difficulty in filling up the correct credit amount in the TRAN-1 Form is a genuine one which should not preclude it from having his claim examined by the authorities in accordance with law
- Hence, direction was issued to the Respondents to either open the portal so as to enable the Petitioner to file TRAN-1 Form electronically or to accept a manually filed TRAN-1 Form on or before 30th June, 2021
- Reliance was also placed in case of **Brand Equity Treaties Ltd.** wherein period prescribed under Rule 117 held to be regarded as directory and not mandatory

M/s Schlumberger Asia Services Ltd. vs Comm. of CE & ST 2021-VIL-218-CESTAT-CHD-ST

TATTVAM ADVISORS

Relevant date for refund shall be calculated from the effective date of amendment

Facts:

The appellant took cenvat credit lying unutilized in their cenvat credit account of services, goods, EC, SHEC, KKC to their GST account. Consequent to the introduction of retrospective amendment in Section 140 of CGST Act, 2017 that credit in respect of EC, SHEC, KKC cannot be carried forward, the appellant had immediately reversed the amount of cenvat credit pertaining to EC, SHEC, KKC and filed the refund claim. Department while rejecting the refund claim contended that since cenvat credit has been taken under GST regime on 01.07.2017 therefore, it has become GST credit and refund is required to be filed in terms of the amendment to Section 140 of the CGST Act. Also, that as the cenvat credit lied unutilized on 01.07.2017, refund was required to be filed within one year from the said date and as the same didn't happen, the refund claim filed on 30.08.2019 is barred by limitation.

Held: The Hon'ble CESTAT allowed the refund claim and held that:

- When provisions of law are clear that EC, SHEC, KKC credit cannot be transferred to GST regime, the contention of department that it is a GST credit is not acceptable
- Amendment to Section 140 came after one year of switching to the GST Regime on 30.08.2018 which is applicable retrospectively. In that circumstances how the appellant could have filed the refund claim within one year from 01.07.2017 till 30.08.2018, when no provision of law existed
- Therefore, the relevant date of filing the refund claim shall be 30.08.2018 and the refund claim filed by the appellant within one year of the said date is allowable

Mahanagar Gas Ltd. vs CCGST & CE Mumbai 2021-VIL-227-CESTAT-MUM-ST

Cenvat Credit allowed for services of laying pipeline, feasibility studies, transfer credit from other zone allowed; Cenvat credit of free medical health check up disallowed

Facts:

The SCN has been issued to the appellant, having centralized registration, denying credit on laying of pipeline of inward transmission of CNG, on input service mistakenly taken at zone I which in fact pertained to zone II, on the services of free medical check-up of the drivers for meeting corporate social responsibility, inspection services availed for a site from where compressed natural gas distribution is to be effected which was statutory/ mandatory requirement for them. Such denial is justified by department by stating that definition of CENVAT credit available in Rule 2(l) of CENVAT Credit Rules, 2004 clearly excludes the word "setting up" with effect from 01.04.2014 and since such feasibility report was a part of setting up of gas distribution network, credit is not admissible.

Held: Hon'ble CESTAT had partially allowed the appeal and held that:

- Since, issue of laying pipeline for inward transmission of CNG had been settled in appellant's own matter w.r.t. different period where the benefit has been extended
- Appellant had done the changes that is required for availing credit in the other zone i.e. transfer of such credit in books from one zone to another, therefore credits on input services pertaining to zone II is allowable
- Since, feasibility study and its acceptance is a precondition for getting approval for operation of gas distribution network and is a mandatory requirement stipulated by the PNG Regulatory Board, that cannot be equated with setting up of a factory for initiating manufacturing process since it would be in the nature of a licensing and not of any construction or infrastructure development. Hence, credit is admissible in respect of inspection services
- Since there is nothing available on record to show that such medical health check-up services are freely extended to all CNG Drivers, credit is not admissible

Vigyan Gurukul vs Comm. Of CE & CGST, Jodhpur 2021-VIL-237-CESTAT-DEL-ST

Relevant date for interest on refund is determined with reference to date of receipt of application for refund

Facts:

The appellant has deposited the amount under protest on 09.09.2004 and filed refund claim under section 11BB of Central Excise Act, 1994 ("**CEA**") on 24.06.06. The refund was allowed by CESTAT in 2011 but department had not released the same and adjusted the same against the demand confirmed which was later dropped by High Court. Meanwhile, the appellant had filed refund application in 2013 also. In 2018 department passed the order for release of refund and interest for the partial period was granted. Hence, the present appeal challenges the amount of interest on refund sanctioned by department which was liable to be paid for the period commencing from the date of expiry of three months from the date of receipt of application

Held:

The Hon'ble CESTAT allowed the appeal and held that liability of the revenue to pay interest under Section 11BB of the CEA commences from the date of expiry of three months from the date of receipt of application for refund under section 11B(1) of the Act and not on the expiry of the said period from the date on which order of refund is made

While formulating the above view, reliance has been placed on internal circulars of department and decision of Hon'ble Apex Court in the case of **Ranbaxy vs. Union of India and others** which was also followed by Hon'ble Apex Court itself in the case of **UOI and others vs. Hamdard (Waqf) Laboratories**

M/s Swarna Techno Construction Pvt. Ltd. vs Comm. Of CT&CE 2021-VIL-240-CESTAT-BLR-CE

TATTVAM ADVISORS

Retention of amount paid in excess of mandatory pre-deposit by department is without authority of law

Facts:

The appellant had made a pre-deposit of an amount of 10% of disputed amount at the time of filing appeal before CESTAT pursuant to the copy of Order-In-Appeal (OIA) is received but department had already recovered the whole disputed amount from the bank account (current) of appellant without furnishing copy of OIA. After admission of appeal before CESTAT, appellant filed refund claim of amount recovered by department without serving the copy of OIA. The refund claim has been rejected by the authorities on the ground that claim nowhere relates to Section 35 of Central Excise Act, 1944. Hence the present appeal challenges the refund rejection order on the ground that amount collected by department in excess of pre-deposit is without authority of law and department has no right to retain the amount recovered during the pendency of the appeal as after paying 10% pre-deposit recovery proceeding is automatically stayed

Held:

The Hon'ble CESTAT allowed the appeal while observing that:

- After mandatory pre-deposit of 10%, the department has no right to retain the amount recovered from the bank account and that too without giving copy of the OIA thereby infringing statutory right of appeal before Tribunal
- The retention of the money recovered from the bank account is without authority of law and is hit by Article 265 of the Constitution of India read with Section 35F of the CEA
- Order rejecting refund claim is not sustainable and consequential relief may be allowed to the Appellant

M/s Mammon Concast Pvt Ltd. Vs. Commr. Of CGST, C & CE 2021-VIL-247-CESTAT-DEL-ST

Cenvat credit shall be made available under the scheme of Act if something is missing in the rules and cannot be denied for some gap left in the stataute

Facts:

The Appellant, a manufacturer of M.S Billets, had purchased 'melting iron scrap' on 'high sea sales' from high sea seller. Some of the invoices for port services etc. were in the name of high sea seller on which service tax was paid by the appellant who have filed Bill of Entry for home consumption mentioning the name of the original importer. In the course of audit it appeared to Revenue that the appellant have wrongly taken cenvat credit on the strength of improper document of input service, mainly for the reason that some of the invoices are not issued in their name but are issued in the name of the high sea seller who sold the goods to the appellant on high sea sale basis. Accordingly, Show-cause notice was issued proposing the proposing the recovery of the amount with interest and penalty and the proposed demand was confirmed along with interest and penalty vide order-in-order. Further, the learned Commissioner (Appeals) was also dismissed and being aggrieved, the appellant is before this Tribunal

Held:

- There is no dispute as to the requirements of Rule 4A(1) of Service Tax Rules save and except the invoice not being in the name of the appellant but in the name of the original importer-high sea seller
- Under Rule 9 of Service Tax Rules, there is no specific documents mentioned considering the transaction of subsequent sale on high sea sale basis and the scheme of the Act read with the Rules has to be read harmoniously
- If for something missing in the rules, the cenvat credit is available under the scheme of the Act, r/w Rule 3 r/w Rule 2(l) and (k) of the Cenvat Credit Rules, service tax credit cannot be denied for some gap left in the statute

On the basis of above, the tribunal while allowing the appeal held that the appellant has rightly taken cenvat credit under dispute and the impugned order stands modified and the penalty is also set aside

M/s Chariot International Pvt Ltd. Vs. Commr. Of CT 2021-VIL-255-CESTAT-BLR-ST

Credit reversal in GSTR-3B is equivalent to credit not taken and any delay in such reversal is merely a procedural lapse

Facts:

The Appellant are engaged in the manufacture and export of granite slabs and tiles and are availing the cenvat credit of service tax paid on input services. Further, the appellant had filed three refund applications for refund of cenvat credit under Rule 5 of CCR,2004 read with Notification No. 27/2012-CE(NT). Thereafter the appellant received a show-cause notice proposing to reject the refund claims on the ground that the appellant has not debited the amount in the cenvat register as required under para 2(h) of the Notification No.27/20212. The appellant filed reply to the show-cause notice and submitted that the balance of cenvat credit was carried forward in the TRAN 1 under GST and the amount claimed as refund has been debited in the GSTR-3B. After following due process, the original authority sanctioned the refund. Aggrieved by the sanctioning of the refund, the Department filed three appeals before the Commissioner (Appeals) who passed the impugned order allowing all the three appeals filed by Department against the order sanctioning the refund granted by the original authority. Hence the present appeal

Held:

- The eligibility of the appellant to claim refund is not disputed and it is also not disputed that the appellant has debited the amount claimed in the GSTR 3B
- The Tribunal has consistently held that credit reversed without being utilized is considered as if credit has not been taken and hence the credit reversed in GSTR-3B tantamounts to credit not been taken
- The appellant has reversed the credit in the GSTR-3B; but there was only a delay in debiting the same and this delay is procedural delay and will not disentitle the appellant from claiming the refund

Therefore, the impugned order rejecting the refunds set aside by allowing the appeal

M/s C.C.I Logistics Ltd. Vs. Comm. Of CGST & CX 2021-VIL-260-CESTAT-KOL-ST

Penalty not leviable where tax amount has been deposited along with interest and there is no evidence of fraud or suppression with an intent to evade payment of tax

Facts:

The appellant is engaged in providing various taxable services for which it has obtained service tax registration. In the course of audit undertaken by CERA audit team, a short payment of service tax was ascertained for which spot memo was issued. The demand under the said memo was immediately deposited by the appellant along with applicable interest under intimation to the Departmental authorities. Further, a show-cause notice was issued to raise demand and appropriate the service tax already deposited by the appellant. The show cause notice also proposed imposition of penalty equivalent to service tax amount. In the course of adjudication, the adjudicating authority confirmed the demanded service tax and ordered for appropriation of the amount already deposited, with further imposition of equal penalty u/s 78 of Finance Act,1994. Further, the appeal filed by the appellant against the said adjudication order remained unsuccessful. Hence, the appellant has filed the present appeal before the Tribunal.

Held: The Hon'ble Tribunal while allowing the appeal, held as follows:

- When the tax amount stands already deposited with interest, the show cause notice was not required to be issued
- Merely because the tax amount has been deposited on the basis of ascertainment by the Department, the assessee cannot be deprived of the benefit of provisions of Section 73(3) of the Finance Act, 1994, more so when there was no deliberate short payment of service tax
- Any other interpretation will render the said provision redundant in as much as the very intention of the said provision is to reduce litigation when compliance is made by the assesse
- Since the tax amount along with interest has already been deposited by the assessee, no reason to uphold the penalty amount in absence of evidence of fraud or suppression with an intent to evade payment of tax

M/s Wabco India Ltd. Vs. Commr. Of GST &CE 2021-VIL-263-CESTAT-CHE-ST

TATTVAM ADVISORS

Limitation period not applicable for filing SEZ refund

Facts:

The appellant-Unit is functioning in SEZ area manufacturing brake systems and related parts of motor vehicles. During the impugned period, the appellant received various input services for use in the manufacture of their final product. They discharged service tax on these input services under reverse charge mechanism. Further, they applied for refund claims as per Notification No. 12/2013-St, which was partly allowed by the original authority. Against the order of partial rejection of refund, the appellant filed appeals before the Commissioner. The matter was for re-adjudication by Commissioner (Appeals). In de novo adjudication, the original authority held that the claims are beyond the period of limitation mentioned in the notification and rejected the refund claim which was upheld by the Commissioner vide impugned order. Being aggrieved, the appellant has filed the present appeal before the Tribunal.

Held: The Hon'ble Tribunal while allowing the appeal, held as follows:

- The term 'prescribed' defined under Section 2(w) of the SEZ Act would mean, prescribed by the Rules made by the Central Government under the SEZ Act and from combined reading of Section 26(1)(e) and Rule 22 of the SEZ Rules it becomes clear that there is no limitation period prescribed in the SEZ Act
- Further, in terms of Section 51 of the SEZ Act, the provisions of the SEZ Act shall have overriding effect over the provisions of any other law for the time being in force
- The conditions mentioned in the service tax notification cannot be applied so as to deny the refund when substantial conditions prescribed in the SEZ Act have been fulfilled

Therefore, the Hon'ble Tribunal held that the rejection of refund on the ground of limitation cannot sustain and set aside the impugned orders.

M/s Deep Enterprises Vs. CCE & ST 2021-VIL-270-CESTAT-CHD-ST

TATTVAM ADVISORS

No liability of legal heirs to pay taxes due from the deceased proprietor of firm

Facts:

The appellant has taken over the business, earlier started and owned by Late Shri Kuldeep Singh in October 2009 but unfortunately, he expired on 01.03.2014. Thereafter, a show cause notice was issued to the appellant for the period October 2009 to February 2014 to demand service tax on cable operator. The matter was adjudicated, the demand of service tax was confirmed along with interest and penalty was imposed. The said order was challenged by the appellant firm through his son and the Ld. Commissioner (Appeals) remanded the matter back to determine the liability of service tax payable by the appellant during the impugned period relying on the decision of Blue Star Communication (supra). Against the said order, the present appeal was filed

Held: The Hon'ble CESTAT held as follows:

- Only in case of transfer or otherwise disposal of the business the successor is liable to pay the dues
- There is no provision in law till yet in case of death of the proprietor of the firm who will be liable to pay the dues thereof
- The said issue has been settled by the **Hon'ble Apex Court in the case of Shabina Abraham case** wherein it was held that in case of death of the proprietor of the firm, no liability can be fastened on the legal heir for the period till the lifetime of the proprietor

Therefore, the Hon'ble CESTAT has modified the impugned order that the revenue shall determine the liability of the appellant firm w.e.f. 01.03.2014

M/s TVS Supply Chain solution Ltd. Vs. Commr. of GST&CE 2021-VIL-272-CESTAT-CHE-ST

The matter where GST as well as Service tax has been paid on the same invoice has to be adjudicated by a common adjudicating authority

Facts:

The appellant has taken over the company M/s.TV Sundaram Iyengar & Sons Private Ltd. The said Company had procured services from the service provider for which they paid service tax as per the invoices raised by the service provider. Later when this company was taken over by the appellant., the said service provider insisted on paying GST for which GST invoices were raised against the appellant. The appellant in order to satisfy the customer on his insistence had paid the GST also as per invoices raised. Later, upon understanding that they had paid tax twice on the very same service, they opted for claiming refund of GST in Chennai Commissionerate and also a refund claim of service tax within the Madurai jurisdictional Commisssionerate, since the refund was for transition period to new tax regime of GST.

Held: The Hon'ble CESTAT held that:

- The appellant had paid both service tax as well as GST during the transition period to new tax regime of GST
- The Commissioner (Appeals) in the impugned has also been at confusion to resolve the issue and has remanded the matter to be kept pending till the appeals pending before CESTAT are decided
- Without appointing a common authority for adjudication of these refund claims, the matter cannot be resolved since tax is paid under two different tax laws, i.e. Finance Act, 1994 and GST Act, 2017
- In the interest of justice, the Tribunal directs the Principal Chief Commissioner of GST and Central Excise of Tamil Nadu to nominate a common adjudicating authority for denovo-processing of all these three refund claims

Rayban Sun Optics India Pvt Ltd Vs. Commr. Of CE & CGST 2021-VIL-271-CESTAT-DEL-CE

Time limit of one year for claiming refund under Central Excise Act shall be calculated from the date of final judgment

Facts:

The appellant is engaged in manufacturing of sunglasses and spectacle frames and have been falling facility of Cenvat Credit. A show-cause notice was served on the applicant wherein the demand along with interest and penalty was proposed for violation of Rule 3,4 and 7 of Cenvat Credit Rules which was initially confirmed vide Order-in-Original. Also, the appeal was dismissed vide Order-in-Appeal. The said order was assailed by the Tribunal and vide Final Order, the demand and penalty was set aside. Being aggrieved, the department filed an appeal before the Hon'ble High Court which was dismissed due to monetary limits. Thereafter, the refund claim was filed as was deposited by the appellant which was proposed to be rejected vide show cause notice on the ground that the said refund would have been filed within one year of Final Order of CESTAT and was confirmed initially vide Order-in-Original as being time barred. In appeals, the said findings were upheld. Being aggrieved, the appellants are before this Tribunal.

Held: The Hon'ble CESTAT allowed the refund claim and held that:

- The second proviso of (2) to section 11B of the Central Excise Act,1944 specifically provide that limitation shall not apply where duty has been paid under protest
- In terms of Section 11B of Central Excise Act, 1944 the relevant date to reckon the period of one year is the date of judgement as consequence whereof the amount became refundable and the amount paid by the appellant was made refundable by the final order of the Tribunal but the Department continued the said litigation by filing an appeal before the High Court which finally announced the entitlement of appellant to claim the refund of said amount
- Hence it is the date of High Court judgment which is relevant for calculating the time limit of one year

M/s Nilkamal Ltd. Vs. The Comm. Of GST & CE 2021-VIL-273-CESTAT-CHE-CE

Service tax under RCM on ocean freight forcibly paid for which credit is not available under GST is eligible for refund as tax payer cannot be victim of the change in law

Facts:

The appellant is seeking refund of the service tax and interest paid by it under Reverse Charge Mechanism on freight services received from foreign shipping line during the period from April to June 2017. Despite of the fact that Notifications Nos. 15/2017-ST and 16/2017-ST have been struck down by the Hon'ble High Court of Gujarat in the case of **M/s. Sal Steel Ltd. [2020-TIOL-163-HC-AHM-ST,** for being *ultra vires* of Sections 64, 66B, 67 and 94 of the Finance Act, 1994, the audit officers of the Revenue insisted for the payment of service tax along with interest whereby the appellant was compelled to pay the same. Thereafter, the appellants filed refund claim on the ground that the said payment was under mistake of law and that the levy was itself was *ultra virus*, in response of which a Show cause notice was issued on the ground that the amount was neither covered by Section 142 of the CGST Act, 2017 nor relatable to Section 11B(2) of the Central Excise Act, 1994. Further, *vide* Original-in-Order, the proposal in the Show cause notice came to be confirmed and also the First Appellate Authority upheld the rejection order.

Held: The Hon'ble CESTAT allowed the refund claim and held that:

- The Revenue having collected per force the service tax along with interest, the appellant is pushed into a situation where its refund claim is denied and even the credit of the same is also not allowed to be availed with the introduction of the CGST Act in 2017
- It is the settled position of law that a tax payer cannot be a victim of the change in law
- Service tax paid under mistake of law has to be refunded irrespective of the period covered as refusal thereof would be contrary to the mandate of Article 265 of the Constitution of India

Therefore, the Hon'ble CESTAT held that the denial of refund is contrary to the settled position of law and accordingly, the impugned order and the rejection of refund are set aside

TATTVAM ADVISORS

ABOUT US

- Indirect tax law – Litigation / Advisory / Audits / Compliances
- Founded and led by Partners having experience in leading firms (LKS / Big 4s)
- Team of more than 40 people
- More than 100 Corporates/MNCs across various sectors.
- Knowledge partner of PHD Chamber , Webtel Electrosoft etc

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Thank You