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THE INDIRECT TAX NEWSLETTER

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Recent Case Laws

Goods and Services Tax (GST)

1. ***In case of fraud committed by the seller, there cannot be an automatic cancellation of registration of purchaser, more so when there is no proof to substantiate that the purchaser had deliberately availed the input tax credit.***

   Bright Star Plastic Industries v. *Additional Commissioner of Sales Tax (Appeal) & Others.* [WP(C) No. 15265 of 2021 (Orissa High Court), decided on October 4, 2021]

   Facts of the case:

   The registration of the Petitioner was cancelled by the proper officer on the ground that the Petitioner had claimed input tax credit (**"ITC"**) against fake invoices issued by non-existent supplier, whose registration was cancelled by the authorities. The authorities contended that the registration was cancelled as a preventive measure to prevent future fraud & recurrence for regular claim of ITC, in the interest of Government revenue.

   Judgment:

   The Orissa High Court held that for the fraud committed by the selling dealer, which resulted in cancellation of such selling dealer's registration, there cannot be an automatic cancellation of the registration of the purchasing dealer. Further, the Department has failed to show that the Petitioner as a purchasing dealer deliberately availed the ITC of Goods and Services Tax (**"GST"**) knowing that such an entity was not in existence and that the Petitioner and selling dealer acted in connivance to defraud the revenue. Consequently, the petition was allowed, and the denial of ITC was set aside.

2. ***Pre-deposit of GST Appeals under Section 107(6) of the Orissa Goods and Services Tax Act, 2017 ("OGST Act") is required to be made via the electronic cash ledger.***

   Messrs Jyoti Construction v. *Deputy Commissioner of CT & GST, Barbil Circle, Jaipur,* [W.P.(C) No. 23508 of 2021 (Orissa High Court), decided on October 7, 2021].

   Facts of the case:

   (a) In terms of Section 107(6) of the OGST Act, the Petitioner was required to make payment equivalent to 10% of the disputed amount of tax arising from the order against which the appeal was filed. The Petitioner filed its appeal and made payment of such pre-deposit required by debiting its electronic credit ledger.

   (b) The Appellate Authority dismissed the appeals and held that the appeals filed were defective inasmuch as that the Petitioner had made payment of the pre-deposit from the electronic credit ledger and not from the electronic cash ledger. As per the appellate authority, the payment was required to be made by debiting the electronic cash ledger as provided under Section 49(3) read with Rule 85(4) of the Orissa Goods and Services Tax Rules, 2017 ("**OGST Rules**").

   (c) The Petitioner contended that under Section 49(4) of the OGST Act, the amount available in the electronic credit ledger could be used for making "any payment towards output tax". The definition of "Output Tax" under Section 2(82) of the OGST Act means "tax chargeable under this Act on taxable supply of goods or services or both" made

by the taxable person or his agent but excludes tax payable on reverse charge basis. On this basis, the Petitioner contended that since what in effect the Petitioner was paying was a percentage of the output tax as defined under Section 2(82) of the OGST Act, the amount could well be paid by debiting the electronic credit ledger.

Judgment:

(a) The Orissa High Court held that the plea of the Petitioner that the definition of "Output Tax" could be equated to the pre-deposit required to be made in terms of Section 107(6) of the OGST Act was inadmissible.

(b) Further, the proviso to Section 41(2) of the OGST Act provides that the electronic credit ledger can be utilized for payment of "self-assessed output tax as per the return" and correspondingly limits the usage to which the electronic credit ledger could be utilised. Therefore, it was held that the electronic credit ledger cannot be debited for making payment of pre-deposit at the time of filing of the appeal in terms of Section 107(6) of the OGST Act. The petitions were accordingly dismissed.

Argus Comments:

The interpretation adopted by the Hon'ble Orissa High Court to restrict the utilization of credit while making pre-deposit has laid down a litigious position under the Goods and Services Tax (GST) Laws, which seems to be contrary to the settled legal position. We expect a clarification from the CBIC in this regard.

3. *Damages claimed by the applicant due to the delay in making available possession of site, drawings & other schedules are consideration for tolerating an act or a situation arising out of the contractual obligation and liable to GST.*

In Re: Messrs. Continental Engineering Corporation [A.R.Com/18/2020 TSAAR Order No.13/2021 (Authority for Advance Ruling, Telangana), decided on October 8, 2021].

Facts of the case:

(a) The applicant executed works contract services in the pre-GST era and raised certain claims on the contractee regarding *inter-alia,* compensation for delay in execution of the project which was referred to a dispute resolution board. The applicant then approached the Arbitral Tribunal, which passed an Order directing the party to pay a certain amount to the applicant.

(b) The applicant has sought an advance ruling from the advance ruling authority (**"AAR"**) on the issue as to whether GST is payable on such amount receivable by the applicant, and if yes, what GST rate would be applicable thereon.

Judgment:

The AAR held that the liquidated damages claimed by the applicant due to the delays in making available possession of site, drawings & other schedules beyond the milestones fixed for completion of project was consideration for tolerating an act or a situation arising out of the contractual obligation and liable to 18% GST.

Argus Comments:

The interpretation adopted by the AAR is in contravention with the settled precedents under the Service tax laws, including the decision of M/s. South-Eastern Coalfields Limited vs. Commissioner of CE&ST, Raipur [2020 (12) TMI 912 – CESTAT New Delhi]. It seems to trigger another round of litigation in the GST Regime as well.

Service Tax

1. ***Reimbursement charged to joint account by a co-venturer is for furtherance of the common objective of the Joint venture and not for provision of service.***

B.G. Exploration & Production India Ltd. v. *CCGST & CEX, Navi Mumbai* [Final Order No. A/86962/2021 (CESTAT, Mumbai), decided on October 6, 2021].

Facts of the case:

(a) The Appellant had entered into a Joint Venture ("**JV**") in the form of a public-private partnership with the Government and a Public Sector Undertaking ("**PSU**") for developing, exploring, and producing oil and gas in certain oil fields. Under the said agreement, expenses incurred were required to debited in the joint account and cash calls raised and reimbursement were to be claimed from the Joint Account, basis the participating interest. No profit margin was permissible on the reimbursement charged.

(b) The department raised a dispute pertaining to reimbursement charged to the Joint Account by the Appellant namely, salaries of employees working for the JV and alleged that since the parties are unincorporated association of persons, the Appellant and the JV were distinct persons in terms of the Explanation 3(a) of Section 65B (44) of the Finance Act, 1944. Consequently, the entire cost recovered by the Appellant amounts to "consideration", which was liable to Service tax.

Judgment:

(a) The Customs Excise and Service Tax Appellate Tribunal ("**CESTAT**") held that, in public private partnerships, the public enterprise generally brings in the resource over which it has exclusive rights, while the private party brings in the required capital, either in monetary terms or in kind or by way of equity. Such equity brought in by the co-venturer, by making available manpower, cannot be considered as a service rendered to the unincorporated JV but is a capital contribution.

(b) It was further held that in the said case, there was no contractor-contractee or principal-agent relationship between the co-venturer and the JV, which was a pre-requisite for a service to be liable to tax under the Finance Act. The department had also failed to show that the said flow of money was a consideration for rendition of a service, in which case alone there could be a liability to Service tax. Therefore, each of the co-venturers towards the JV were not rendering any service to the JV but acting in their own interest in furtherance of the common objective of the JV and accordingly, no Service tax was leviable.

2. ***Refund of service tax paid by mistake cannot be barred by limitation.***

Base Educational Services Pvt. Ltd. v. *CCT, Bengaluru* [Final Order No. 20777 - 20780 /2021 (CESTAT, Bangalore), decided on October 7,2021].

Facts of the case:

The Appellant filed refund claim of Service tax *inter-alia* paid twice by mistake. The department denied such refund on the ground of it being barred by limitation under Section 11B of the Central Excise Act, 1944.

Judgment:

The CESTAT observed and relied upon the ruling of the Hon'ble Madras High Court in the *case* of *3E Infotech* v. *CESTAT [2018(18) GSTL 410 (Mad.)]*, wherein it was held that when Service tax is paid by mistake, a claim for refund cannot be barred by limitation, merely because the period of limitation under Section 11B had expired. Accordingly, the CESTAT allowed the appeal and set aside the order rejecting the refund claim.

Customs

1. ***Tariff entry cannot be given a static interpretation ignoring the evolution in technology.***

Reliance Jio Infocomm Ltd. v. *Commissioner of Customs (Import)* [Final Order No. A/86960-86961/2021 (CESTAT, Mumbai), decided on October 6, 2021].

Facts of the case:

The Appellant was issued a show cause notice ("**SCN**") alleging that the base stations of 4G Network technology imported by it had more than basic functionalities as present in 2G and 3G technology and also had additional specifications of Base Transceiver Station and accordingly, were classifiable under Tariff Entry 8517 62 90 ("Other") instead of Tariff Entry 8517 61 00 ("Base Stations") of the Customs Tariff Act, 1975 ("**CTA**"). Consequently, the exemption claimed by the Appellant on such goods under Notification dated 17.03.2016 was not admissible and the Appellant was liable to pay the differential duty, interest, and penalty under the Customs Act 1962 ("**Customs Act**").

Judgment:

(a) The CESTAT while deciding in favour of the appellant, held that the classification of a product has to be determined on the basis of the tariff entries and the Instructions issued by the Board have to also be examined in the light of the tariff entries.

(b) It was further held that in the present case, merely because the base stations of 4G Technology have overcome the drawbacks of 2G & 3G Technology, it cannot be said that such goods are not base stations itself. Hence, since the goods imported satisfy the specific description of a Base Station, it can never be consigned to the said residuary sub-heading CTH 8517 62 90 for "Other". As such, the demand order was set aside by the CESTAT.

2. ***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.***

Messrs Modern Insecticides Limited v. *Commissioner of Customs, Ludhiana*, [Final Order No. 60923/2021 (CESTAT, Chandigarh), decided on October 5, 2021].

Facts of the case:

The present dispute relates to the question whether Additional Director General, DRI, Ludhiana is having jurisdiction to issue SCN under Section 28(4) read with Section 2(34) of Customs Act, 1962 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, Ludhiana 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

1. *CENVAT Credit availed for setting up of coal handling plant, which was used for evacuation of coal by rapid loading process, cannot be denied.*

Bharat Coking Coal Ltd. v. *CCE & ST, Ranchi* [Final Order No. 75645/2021 (CESTAT, Kolkata), decided on October 7, 2021].

Facts of the case:

The Appellant had availed CENVAT credit on its coal handling plant, which was set up for the purposes of evacuation of coal from its mining premises. The department alleged inadmissibility of such credit under the amended definition of "input services" in Rule 2(l) of CENVAT Credit Rules, 2004 (**"CCR"**), which omitted the words "setting up of factory" therefrom.

Judgment:

(a) The CESTAT observed that the definition of input service specifically includes services received by a manufacturer for modernisation of a factory. Without setting up of the factory, there cannot be any manufacture and the mere fact that the words 'setting up of factory" has not been retained in the definition of input services post April 1, 2011, will not mean that the benefit of credit has been taken away by the legislature. Hence, services used for setting up of the factory even after April 1, 2011 would be eligible for credit.

(b) It was further held that, applying the user test principle followed by various High Courts, the services availed for setting up of the coal handling plant with the view to "modernise the coal loading process in the mines", satisfies the definition of input service. Therefore, the order was set aside and the CENVAT credit was allowed.

2. *Amount of compensation received from the buyer on account of loss suffered due to cancellation of the contract was additional consideration flowing indirectly from the buyer and was liable to excise duty.*

Messrs Rajasthan Prime Steel Processing Center Private Limited v. *C.C.E.& CGS.T. Alwar* [Final Order No. 51868/2021 (CESTAT, New Delhi), decided on October 13, 2021].

Facts of the case:

The Appellant received an amount from M/s. Honda Siel Car India Ltd. ("**Honda**"), for loss suffered by the Appellant on account of the cancellation of the contract for supply of auto parts used in the manufacture of vehicles. The said auto parts were then sold as scrap to various scrap dealer. The authorities alleged that the consideration received by the Appellant from Honda under the guise of compensation was liable to be included in the transaction value of goods.

Judgment:

(a) The CESTAT observed that the business arrangement clearly signifies that the Appellant had received a substantial amount from Honda, even though the terms of the contract did not provide for payment of any amount to the Appellant if the contract of supply of auto parts was cancelled by Honda.

(b) It further held that as per the arrangement, the Appellant received some amount from the buyers of scrap and some amount from Honda for the value of the auto parts and there is no good reason as to why this amount received by the Appellant from Honda India should not be included in the transaction value of the goods.

(c) Rule 5 of the Central Excise (Valuation) Rules, 1975 also talks of additional consideration flowing directly or indirectly from the buyer to the assessee. In view of the peculiar nature of the business arrangement between the appellant, Honda, and the buyers of auto parts, it is clear that the amount received by the appellant from Honda India has flown indirectly from the buyers and was liable to be included in the transaction value for the purpose of excise duty. The appeal was therefore dismissed.

3. *Input services used in manufacture of exempted goods and services supplied to SEZ Developers was not required to be reversed under Rule 6 of CCR.*

Vijaya Steels Limited v. *C.C.E – II, Bangalore* [Final Order No. 20772/2021 (CESTAT, Bangalore), decided on October 1, 2021].

Facts of the case:

a) During the period December 28, 2006 to December 30, 2008, the Appellant supplied some goods manufactured by it to Special Economic Zone ("**SEZ**") developers under the provisions of Special Economic Zone Act, 2005 after claiming exemption from payment of excise duty.

b) In case of clearance of exempted goods, Rule 6 of CCR provides for reversal of CENVAT Credit availed thereon. However, Rule 6(6)(i) of the CCR grants indemnity from such reversal, provided such goods were supplied to a SEZ unit. The said entry was amended to exempt the goods supplied to a SEZ developer vide Notification No. 50/2008-CE(NT) dated December 31, 2008.

c) In this background, the department raised a dispute on the ground that the Appellant clearing goods to such SEZ developers and not SEZ units, after claiming exemption from payment of excise duty during the period of dispute, was not eligible for the

indemnity provided and was liable to reverse the credit attributable thereto under Rule 6 of the CCR.

Judgment:

(a) The CESTAT observed that the Notification dated December 31, 2008 granting exemption in case of supplies made to SEZ developers from Rule 6(1),(2),(3)&(4) has retrospective application in terms of the judgment of the Hon'ble High Court in *Commissioner of Central Excise & Service Tax, Bangalore* vs. *Fosroc Chemicals (India) Pvt. Ltd [2015 (318) E.L.T. 240 (Kar.)].*

(b) Hence, the inclusion of SEZ developers under Rule 6(6)(i) of the CCR is clarificatory and applies to the period prior to December 30, 2008 as well. Consequently, the CESTAT held that Appellant was not required to follow Rule 6 of the CCR and was not required to maintain separate accounts or pay an amount equal to 10% of the value of such supplies. The demand was accordingly set aside.

Recent Circulars and Notifications

No.	Reference	Particulars
1.	Circular No. 163/19/2021-GST dated October 6, 2021	Seeks to clarify the issues relating to GST Rates and classification of goods as under: i. <u>Fresh and dried fruits and nuts.</u> Exemption from GST to fresh fruits and nuts covers only such products *which are not frozen or dried in any manner as specified or otherwise processed.* Supply of dried fruits and nuts, falling under Chapter heading 0801 and 0802 attract GST at the rate of 5%/12% as specified in the respective rate Schedules. ii. <u>Tamarind seeds</u> With effect from October 1, 2021, tamarind and other seeds falling under heading 1209, (i.e., including tamarind seeds), if not supplied as seed for sowing, would attract GST at the rate of 5%. iii. <u>Copra</u> Copra, classified under heading 1203, attracts GST rate of 5%, irrespective of use. iv. <u>Pure henna powder and leaves</u>. Pure henna powder and henna leaves, having no additives, is classifiable under Tariff item 1404 90 90 and shall attract GST rate of 5%. The GST rate on mehndi paste in cones falling

			under Chapter heading 1404 and 3305 shall be 5% v. <u>Scented sweet supari and coated ilaichi</u>. Scented sweet supari falls under Tariff item 2106 90 30 as "Betel nut product" known as "Supari" and attracts GST rate of 18%. Flavoured and coated illaichi is a value-added product and falls under sub-heading 2106 and attract GST at the rate of 18%. vi. <u>Brewers' Spent Grain (BSG), Dried Distillers' Grains with Soluble [DDGS] and other such residues</u>. BSG, DDGS and other such residues are classifiable under heading 2303, attracting GST at the rate of 5%. vii. <u>Pharmaceutical goods falling under Chapter heading 3006.</u> All goods falling under heading 3006 attract GST rate of 12%. viii. <u>All laboratory reagents and other goods falling under heading 3822</u> Concessional GST rate of 12% is applicable on all goods falling under heading 3822. ix. <u>Requirement of Original/ import Essentiality certificate, issued by the Directorate General of Hydrocarbons (DGH) on each inter-State stock transfer of goods imported at concessional GST rate for petroleum operations</u> The original/ import Essentiality certificate, issued by the DGH is sufficient and there is no need for taking a certificate every time on inter-state movement of goods within the same company / stock transfer so long as the goods are the same as those imported by the company at concessional rate. x. <u>External batteries sold along with UPS Systems/ Inverter</u> Even if the UPS/inverter and external battery are sold on the same invoice, their price are separately known, and they are two separately identifiable items. Thus, this constitutes supply of two distinctly identifiable items on one

		invoice. In such supplies, UPS/ inverter would attract GST rate of 18% under heading 8504, while external batteries would attract the GST rate as applicable to it under heading 8507 (28% for all batteries except lithium-ion battery). xi. <u>Solar PV Power Projects</u> GST on specified Renewable Energy Projects can be paid in terms of the 70:30 ratio for goods and services, respectively, for the period of July 1, 2017 to December 31, 2018 in the same manner as has been prescribed for the period on or after January 1, 2019. xii. <u>Fibre Drums, whether corrugated or not</u> Supply of Fibre Drums even if made at 12% GST (during the period from 1.7.2017 to 30.9.2021), would be treated as fully GST-paid.
2.	Circular No. 164/20/2021-GST dated October 6, 2021	Seeks to clarify the issues relating to GST Rates and classification of services as under: i. <u>Services rendered by Cloud kitchen or Central Kitchen</u> Service provided by way of cooking and supply of food, by cloud kitchens/central kitchens are covered under 'restaurant service", as defined in Notification No. 11/2017- Central Tax (Rate) will attract 5% GST [without ITC]. ii. <u>Supply of ice cream by ice cream parlours</u> Where ice cream parlours sell already manufactured ice- cream and do not cook/prepare ice-cream for consumption like a restaurant, it is supply of ice cream as goods and not as a service, even if the supply has certain ingredients of service. Accordingly, it is clarified that ice cream sold by a parlour would attract GST at the rate of 18%. iii. <u>GST on overloading charges at toll plaza</u> Overloading charges at toll plazas would get the same treatment as given to toll charges, i.e., exempt from payment of GST. iv. <u>Services by way of grant of mineral exploration and mining rights</u>

			The said service most appropriately falls under service code 997337, i.e., "licensing services for the right to use minerals including its exploration and evaluation" and will be chargeable to GST at the rate of 18%.
		v.	<u>Services supplied by contract manufacturers to brand owners for manufacture of alcoholic liquor for human consumption</u> Services by way of job work in relation to manufacture of alcoholic liquor for human consumption are not eligible for the GST rate of 5% and will be chargeable at 18% GST.

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