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THE INDIRECT TAX NEWSLETTER

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SOLICITORS AND ADVOCATES

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Recent Case Laws

Goods and Services Tax (GST)

1. *Cases of erroneous refund granted pursuant to adjudication by the authorities may be re-opened under Section 74 of the Goods and Services Tax (GST) Law.*

Ganesh Ores Private Limited v. *State of Odisha & Others* [W.P.(C) No.32488 of 2021 (Orissa High Court), decided on October 21, 2021]

Facts of the case:

(a) The Petitioner had filed a refund application, which was adjudicated and the refund amount was duly allowed and sanctioned. Subsequently, another notice was issued under Section 74(1) of the Orissa Goods and Services Tax Act, 2017 ("**OGST Act"**) seeking to deny the refund already sanctioned and paid.

(b) The Petitioner challenged such notice on the ground that against an order of erroneous refund it was open to the department to have filed an appeal under Section 107(1) of OGST Act but having missed the time limit for doing so, the Department cannot indirectly seek to demand the tax (refund), which has already been granted by resorting to Section 74 of the OGST Act.

Judgment:

(a) The Hon'ble High Court observed that no limitation was placed by the Legislature on the powers exercisable under Section 74(1) of the OGST Act, which states that an order of refund granted after an adjudication cannot be sought to be reopened thereunder. Further, Section 74(1) of the OGST Act does not appear to make any distinction between those refund orders passed without an adjudication and those passed after an adjudication.

(b) There was also no indication that an order that is otherwise appealable under Section 107 of the OGST Act cannot be sought to be revisited under Section 74(1). Accordingly, the Hon'ble High Court upheld the issuance of the notice by the authorities to re-open the refund proceedings and dismissed the petition filed by the Petitioner.

2. *Making old sugar mill rollers reusable by reshelling process is a mere repair activity and does not amount to job work.*

In Re: S. B. Reshellers Private Limited [Order No. GST-ARA-73/2019-20/B-78 (Authority for Advance Ruling, Maharashtra), decided on October 25, 2021].

Facts of the case:

(a) The Applicant receives old sugar mill rollers (worn out due to wear and tear) from its customers, which is made reusable by reshelling process.

(b) The Applicant has sought an advance ruling from the advance ruling authority (**"AAR"**) on the issue whether such activity amounts to job work service under SAC 9988 or a repair/maintenance service under SAC 9987.

Judgment:

(a) The AAR observed that SAC 9988 covers "Manufacturing services on physical inputs owned by others". Under the GST Law, Job work is a process undertaken by a job worker on goods belonging to a principal and may or may not amount to manufacture.

(b) In the subject case, there is no processing of raw material in as much as what comes and goes out is the sugar mill roller itself. Therefore, the conversion of used and worn-out rollers cannot be treated as a manufacturing or jobwork activity.

(c) The AAR further stated that SAC 9987 covers under its ambit "Maintenance, repair and installation (except construction) service". The process undertaken by the Applicant to convert used, worn out and unusable rollers into usable rollers is aptly covered under SAC 9987 as repair services. Hence, the AAR held that the subject activity undertaken by the applicant on old and used sugar mill roller is a repair activity and will attract GST at the rate of 18%.

3. *Tourist vehicles supplied to local authority for carrying COVID 19 patients are not ambulances and will not be eligible for exemption from payment of GST.*

In Re: Messrs Geetee Tours Private Limited [Order No. GST-ARA-55/2020-21/B-82 (Authority for Advance Ruling, Maharashtra), decided on October 25, 2021]

Facts of the case:

(a) The Applicant undertakes business of tours and travels and has entered into a contract with Municipal Corporation of Greater Mumbai ("**MCGM"**) to provide AC SUV and equivalent car services for carrying COVID 19 patients for medical treatment.

(b) The Applicant has sought an advance ruling from the AAR on the issue whether such activity is exempted services and covered under Serial No. 3 of Notification No. 12/2017 – Central Tax (Rate) dated June 28, 2017 (**"Exemption Notification"**), or not.

Judgment:

(a) The Exemption Notification grants exemption *inter-alia* to *"Pure services (excluding works contract service or other composite supplies involving supply of any goods) provided to the Central Government State Government or Union Territory or Local Authority or a Governmental Authority by way of any activity in relation to any function entrusted to a panchayat under article 243G of the constitution or in relation to any function entrusted to a Municipality under article 243W of the constitution".*

(b) In the present case, the activity of renting/leasing of vehicles along with drivers to MCGM would be covered under pure services provided to a "Local authority" under Section 2(69) of the Central Goods and Services Tax Act, 2017 (**"CGST Act"**). The next question for consideration is whether the activity would fall under entry no. 6 of twelfth schedule - Article 243W of the Constitution i.e., "Public health, sanitation conservancy and solid waste management".

(c) The issue pertaining to the present case has also been clarified by Circular No. 51/25/2018-GST dated July 31, 2018, wherein it has been stated that an ambulance service to the government by a private service provider is a function of 'public health' entrusted to Municipalities under Article 243W of the Constitution, and, therefore, eligible for exemption under SI No. 3 or 3A of the Exemption Notification.

(d) In the instant case, it was observed that the Applicant has not converted the vehicles supplied to MCGM as "ambulances" or registered as such, nor submitted proof of having transported only COVID patients for medical treatment. Further, the vehicles were not registered with RTO for the use as an Ambulance and were registered as tourist vehicles. As such, the exemption from payment of GST was denied to the Applicant.

4. *Advance Ruling application by the recipient is unsustainable since the impugned transaction is neither undertaken nor proposed to be undertaken by such recipient.*

In Re: Messrs. Godavari Marathwada Irrigation Development Corporation [Order No. GST-ARA-91/2019-20/B-80 (Authority for Advance Ruling, Maharashtra), decided on October 25, 2021].

Facts of the case:

The Applicant, being a recipient of works contract services has sought an advance ruling from the AAR on the issue as to whether the services relating to Krishna Bhima stabilization project, provided by the supplier is classifiable under sub-clause (vii) of serial No. 3 of Heading 9954 (construction of service) of the Notification 11/2017 - Central Tax (Rate) dated July 28, 2017 as amended or not.

Judgment:

The AAR, without going into the merits of the case dismissed the application on the ground that an advance ruling under Section 95 of the CGST Act, 2017 allows the AAR authority to decide the matter in respect of supply of goods or services or both, undertaken or proposed to be undertaken by the applicant. In the present case, the applicant has not undertaken the supply nor proposes to undertake the same and is merely a recipient. In such a scenario, the AAR held the advance ruling application to be unsustainable.

Service Tax

5. *Revenue sharing arrangement does not amount to provision of service unless the service provider and service recipient relationship is established.*

Inox Leisure Limited v. *Commissioner of Service Tax, Hyderabad* [Final Order No. 30338-30339/2021 (CESTAT, Hyderabad), decided on October 20, 2021].

Facts of the case:

(a) The Appellant is engaged in business of exhibiting cinematographic films across India in theatres owned by the appellant or taken on rent. It acquires the rights/license to exhibit the films at the designated theatres from various film distributors by entering into separate license agreements for each film. The consideration towards such license is paid by the Appellant as per the agreed percentage of box office collection

and such percentage varies from distributor to distributor, movie to movie and week to week, after the release date.

(b) The department raised a dispute that the Appellant was providing services to distributors/producers in the nature of infrastructure support services falling within the definition of Business support service defined under Section 65(104c) of the Finance Act, 1944. Consequently, the entire amount received by the Appellant amounts to "consideration," which was liable to Service tax.

Judgment:

(a) The Customs Excise and Service Tax Appellate Tribunal ("**CESTAT**") observed that in terms of the agreement, the distributor/producer had granted the exhibitor, i.e., the Appellant, a non-exclusive license to exploit the theatrical rights of a motion picture and each party was entitled to conduct its business in its absolute and sole discretion. Such an arrangement between a distributor/producer and an exhibitor of films does not amount to provision of service as it is revenue sharing in nature.

(b) Reliance was placed by the CESTAT on the decision of ***Commissioner v. Mormugao Port Trust*** **[2018 (19) GSTL J 118 (SC)]**, ***PVS Multiplex India Pvt. Ltd. v. Commissioner of Central Excise, Meerut-I*** **[2017 (11) TMI-156- CESTAT Allahabad]** and other decisions wherein it has been held that a revenue sharing arrangement does not necessarily imply provision of services, unless the service provider and service recipient relationship is established. In view thereof, the Hon'ble CESTAT held that no infrastructure support services have been provided by the Appellant and consequently, no Service tax was leviable.

6. *In the absence of proof to substantiate that the assessee was acting as an intermediary, the demand thereon was unsustainable.*

Messers IDP Education India Private Limited v. *Additional Director General of Central Excise Intelligence, New Delhi* [Final Order No. 51901/2021 (CESTAT, New Delhi), decided on October 28,2021].

Facts of the case:

(a) IDP, Australia (Education service providers) is required to recruit students of high quality in terms of its arrangement with the Australian universities. In lieu thereof, the universities pay IDP Australia a percentage of the tuition fee which is received from the students.

(b) In turn, IDP Australia has entered into a "Student Recruitment Services Agreement" with its Indian subsidiary, i.e., the Appellant to help recruit students from India. Under this agreement, the Appellant provides information and advice to students, helps in their application process, assists in pre-departure student activities such as visa, health insurance etc., and would receive a commission amounting to 77% of the application processing fee received by IDP Australia.

(c) Earlier, a show cause notice ("**SCN"**) was issued to the Appellant by the Commissionerate demanding Service tax on the commission received by it, which was subsequently dropped on the ground that the Appellant was undertaking export of services. On the same issue, the DGCEI conducted investigation and concluded that the student recruitment service was misnomer and that the Appellant was, in fact, acting as an "intermediary" between the foreign service providers, viz. IDP Australia

and the students. Accordingly, a demand of Service tax was confirmed against the Appellant.

Judgment:

(a) The CESTAT observed that in terms of the arrangement, IDP Australia is providing services to the foreign universities and is receiving consideration for the same. Insofar as recruitment of students in India is concerned, IDP Australia has created the Appellant as a fully owned subsidiary and has sub-contracted this work thereto. There was nothing on record to show that the Appellant had a direct contract with the foreign universities or that the Appellant was liasioning or acting as intermediary between the foreign universities and IDP Australia. In fact, the Appellant was providing the services which were sub-contracted to it by IDP Australia and receiving commission for the same. Hence, the contention that the Appellant was engaged as an "intermediary" is not established in the present case.

(b) It was further held that on the exact same services, where the matter was settled by the Commissionerate, the DGCEI has adopted a different view and confirmed the demand. If the DGCEI was aggrieved by the earlier order which was passed, it should have filed an appeal to a higher judicial forum. Accordingly, the CESTAT held that a SCN issued on the same issue which has already been settled, simply because DGCEI holds a different view, was not sustainable. The appeal was thereby allowed.

Customs

7. *In case of excess duty paid mistakenly, amendment of Bill of Entry should have been allowed under Section 154 of the Customs Act, 1962.*

Messers Kluber Lubrication India Private Limited v. *Commissioner of Customs (Air Cargo)* [Final Order No. 20797/2021 (CESTAT, Bangalore), decided on October 22, 2021].

Facts of the case:

(a) The Appellant had inadvertently paid excess Customs duty on import of certain goods and filed a claim of refund of such excess amount while also requesting the departmental authorities to issue an amended Bill of Entry along with request for sanctioning the refund.

(b) The request for amendment was denied on the ground that it could not be permitted once the imported goods have been cleared for home consumption or deposited in a warehouse or the goods have been exported. Aggrieved by the same, an appeal was filed before the Ld. Commissioner (Appeals), who rejected the claim of amendment of Bill of Entry and directed the Appellant to follow the refund route.

(c) Subsequently, the refund application was rejected by the departmental authorities on the ground that the same was filed with delay and was accordingly not admissible.

Judgment:

(a) The CESTAT observed that there was no dispute that excess duty was paid mistakenly on account of certain error and the said mistake was rectifiable under Section 154 of the Customs Act, 1962 (**"Customs Act**"). Had the Department

considered the appellant's request for amendment of its Bill of Entry then, perhaps, the alleged delay, etc. would not have arisen at all.

(b) Accordingly, relying upon the decision of the Hon'ble Apex Court in the case of *ITC Ltd.* v. *CCE, Kolkata IV*, 2019 (368) ELT 216 (SC) and Hon'ble Bombay High Court, in the case of *Dimension Data India Pvt. Ltd.* v. *CC and ANR,* 2021-TIOL-224-HC-MUM-CUS, the CESTAT directed the Respondent to consider the prayer for amendment of the Bill of Entry filed by the Appellant and thereafter pass an appropriate order under section 17(4) of the Customs Act after giving due opportunity of hearing thereto.

8. *Hon'ble non-jurisdictional High Court's judgment in favour of the assessee is to be preferred over the Hon'ble non-jurisdictional High Court not favourable to the assessee.*

John Cashew Company v. *Commissioner of Customs, Cochin*, *Kerala* [Final Order No. 20792/2021 (CESTAT, Bangalore), decided on October 18, 2021].

Facts of the case:

(a) The present dispute relates to the question whether the Appellant is eligible for refund of 4% of Special Additional Duty (SAD) in terms of Notification No.102/2007-Cus dt. September 14, 2007 or not, which was rejected on the ground that it is time barred.

Judgment:

(a) The Appellant relied on the favourable judgment by the Hon'ble Delhi High Court in the case of *CC(Import)* v. *Gulati Sales Corporation* [2018(360) ELT 277 (Del.)] on the same issue. However, the departmental authorities argued that there was a jurisdictional High Court judgment on the said issue which was against the Appellant.

(b) In this regard, the CESTAT held that doctrine of precedence only mandates that it is the ratio in the decision of higher courts to be followed, and not conclusions. Hence, when there was a reasonable interpretation of a legal and factual situation, which was favourable to the assessee, such an interpretation was to be adopted.

(c) The CESTAT therefore allowed the refund claim filed by the Appellant and set aside the impugned order.

Central Excise, Sales Tax, VAT

9. *The activity of fixing of prescription lenses in spectacle frames amounts to assembly and not manufacture.*

Titan Company Ltd. & Others v. *CCE Large Tax-Payer Unit, Chennai* [W.P.Nos.37765 of 2016 (Madras High Court), decided on October 21, 2021].

Facts of the case:

The present dispute relates to the question whether Petitioners are liable to remit excise duty on the activity of fixing of prescription lenses in spectacle frames.

Judgment:

(a) The Hon'ble High Court while examining the process in detail, held that the end result of all the processes only results in assembly of the lens with the frame, which does not amount to manufacture. It was further observed that the process of assembly is bound to involve some amount of refining and fine-tuning of the individual components and this, by itself, would not tantamount to manufacture.

(b) It was further held that notwithstanding that a distinct commercial product is obtained upon assembly of a lens with a spectacle frame, this would not result in such assembly being equated to manufacture. Accordingly, the demand of excise duty on the activity of fixing of prescription lenses in spectacle frames was set aside.

10. *Reversal of proportionate credit with interest amounts to non-availment of credit.*

Sanstar Bio Polymers Limited v. *CCE & ST, Rajkot* [Final Order No. A/12475/2021 (CESTAT, Ahmedabad), decided on October 29, 2021].

Facts of the case:

The issue involved in the present case is whether the Appellant is required to pay 5%/10% of the value of exempted goods in terms of Rule 6(3) of CCR, when the Appellant has reversed the proportionate CENVAT credit along with interest for the period post April 1, 2008. The department contended that the retrospective amendment in Rule 6 was effective only up to March 31, 2008, therefore, subsequent to that the Appellant was required to pay 5%/10% in terms of Rule 6(3) of CCR.

Judgment:

The CESTAT held that when the credit availed initially was reversed along with interest, it results in a situation as if the CENVAT credit was not availed right from the taking credit. Reliance was placed on the rulings of inter-alia, *Chandrapur Magnet Wires (P) Ltd.* v. *CCE, Nagpur* [1996 (81) E.L.T. 3 (S.C.)] and *Bombay Minerals Ltd* v. *CCE, Rajkot* [2019 (29) GSTL 361 (Tri.-Ahmd)]. In light of the same, the demand of 5%/10% under Rule 6(3) of CENVAT Credit Rules, 2004 was held to be unsustainable and the appeal was allowed.

11. *The nomenclature that the legislature has ascribed to the tax does not determine either the nature of the levy or its true and essential character. The nature of the levy has to be deduced from the nature of the tax and the provision which specifies the taxing event.*

Jalkal Vibhag Nagar Nigam & Ors. v. Pradeshiya Industrial and Investment Corporation & ANR [Civil Appeal No. 6107 of 2021 (Supreme Court), decided on October 22, 2021].

Facts of the case:

a) The dispute pertains to a challenge to the order of the Hon'ble High Court of Allahabad, which held that the levy of Water tax and Sewerage tax by the Nagar Nigam under the provisions of the Uttar Pradesh (UP) Water Supply and Sewerage Act 1975 was unsustainable and consequently directed the Nagar Nigam to refund the same.

b) The questions for consideration vide the preferred appeal are as follows:

- Whether the demand of water tax and sewerage tax is sustainable under the provisions of the UP Water Supply and Sewerage Act in as much as it does not constitute a tax on 'land and buildings;' and

- Whether the State Legislature has the legislative competence to levy the tax under the provisions of Section 52(1)(a) of such Act in as much as it is in the nature of fee and not a tax.

Judgment:

(a) The Hon'ble Apex Court ruled that in terms of Section 52, the levy of Water tax is squarely on lands and buildings situated within the area of the Jal Sansthan. It does not levy a fee instead of tax. The measure of such tax has been provided under Section 53. A similar provision has been incorporated in regard to the levy of a sewerage tax in Section 52(1)(b) and sub-Sections (2) and (3) provide for the measure and the rate of tax. Further, in terms of Section 56, so long as a provision for water supply or a sewerage is made by the Jal Sansthan in the area covered, the occupier or the owner of the premises is liable to pay the taxes. Hence, the levy under Section 52(1) is tax and not fee, and such tax amount based on the premises is constitutionally valid.

(b) It was further held that the nomenclature that the legislature has ascribed to the tax does not determine either the nature of the levy or its true and essential character. The nature of the levy has to be deduced from the nature of the tax, the provision which specifies the taxing event and, as in the case of Section 52, the unit upon which the levy is to be imposed. In the present case, the tax has been labelled as the water tax or a sewerage tax simply because it is imposed by the Jal Sansthan and that does not alter the nature of the levy which in substance is a tax on lands and buildings within the meaning of Entry 49 of List II of the Seventh Schedule.

Recent Circulars and Notifications

No.	Reference	Particulars
1.	Notification No. 13/2021-Central Tax (Rate) dated October 27, 2021	Seeks to amend the rate of goods as under: i. "Permanent transfer of Intellectual Property (IP) right in respect of goods other than Information Technology software," chargeable to 12% GST has been sought to be omitted from the Entry No. 243 of Notification No. 1/2017- Central Tax (Rate) dated June 28, 2017. ii. Entry 452P of the Notification No. 1/2017-Central Tax (Rate) dated June 28, 2017 has been amended to cover "Permanent transfer of Intellectual Property (IP) right", chargeable to 18% GST. **Argus Comments:** Notification No. 06/2021 – Central Tax (Rate) dated September 30, 2021 had amended Entry 17 of the

		Services Rate Notification, viz. Notification No. 11/2017-Central Tax (Rate) dated June 28, 2017, and increased the tax rate on the temporary or permanent transfer or permitting the use or enjoyment of Intellectual property right from 12% to 18%. However, no change was made correspondingly for Permanent transfer of Intellectual Property (IP) right in respect of goods other than Information Technology software. Vide the aforesaid amendment, parity of rates for permanent transfer of Intellectual property right (other than Information technology software), whether considered as goods or services, has been sought to be maintained, viz. 18% GST.
2.	Notification No. 83/2021 – Customs (N.T.) dated October 27, 2021	Seeks to insert rules in Customs Tariff (Identification, Assessment and Collection of Countervailing Duty on Subsidized Articles and for Determination of Injury) Rules, 1995, relating to anti-absorption of countervailing duty imposed under Section 9 of the Customs Tariff Act, 1975, viz. anti-absorption review, initiation of investigation to determine absorption, determination of absorption.
3.	Notification No. 84/2021 – Customs (N.T.) dated October 27, 2021	Seeks to insert rules in Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995, relating to anti-absorption of countervailing duty imposed under Section 9 of the Customs Tariff Act, 1975, viz. anti-absorption review, initiation of investigation to determine absorption, determination of absorption.
4.	Circular No. 24/2021 – Customs dated October 27, 2021	Various rationalization measures have been proposed with respect to reducing compliance burden regarding registration of authorised couriers. It has been stated that the first of such registrations of the authorised courier under the respective Regulation should be taken as the single registration and the others should be regularised in terms of the intimation procedure under those regulations.
5.	Public Notice No. 32/2015-20 dated October 29, 2021	Existing entry at Para 2.76 of HBP of the FTP 2015-20 has been modified to bring out clarity on export policy of SCOMET items for supplies/exports from DTA to SEZ/EOU and outside the country.
6.	Trade Notice No. 21/2021-22 dated October 18, 2021	Seeks to extend the mandatory electronic filing of Non-Preferential Certificate of Origin through the Common Digital Platform to 31st October 2021.

Contributed by the Indirect Tax team

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