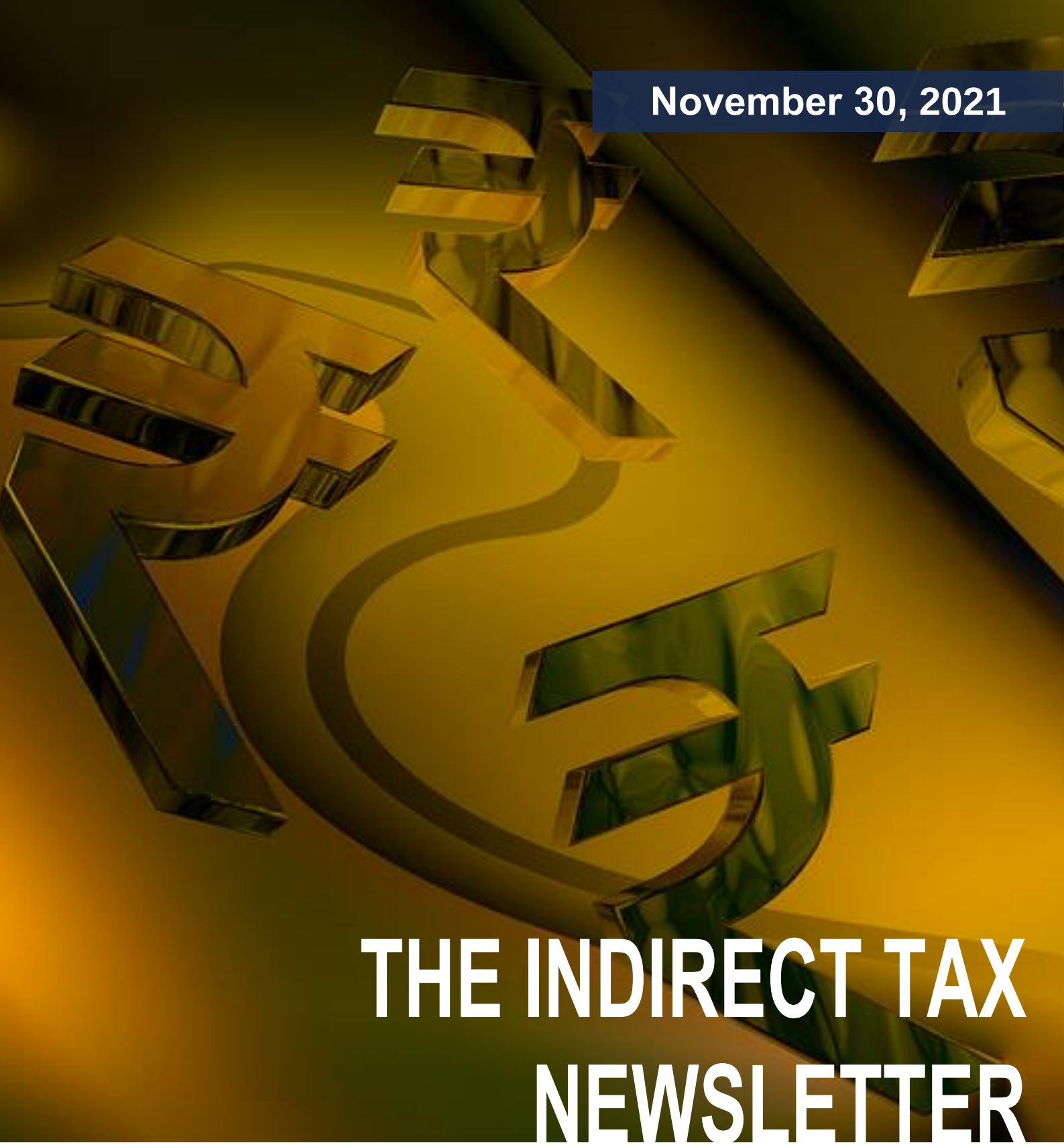

November 30, 2021

THE INDIRECT TAX NEWSLETTER

argus partners
SOLICITORS AND ADVOCATES

MUMBAI I DELHI I BENGALURU I KOLKATA I AHMEDABAD

Index

Recent Case Laws

Goods and Services Tax (GST)

1. ***Cancellation of registration without fixing any date or time for hearing is untenable in the eyes of law.***

Kashish Infra Energy Power Azadpur v. *State of U.P.* [Writ Tax No. - 367 of 2021 (Allahabad High Court), decided on November 9, 2021]

Facts of the case:

(a) The Adjudicating Authority issued a Show Cause Notice (**"SCN"**) seeking to cancel the Goods and Services Tax (**"GST"**) registration of the Petitioner on account of non-commencement of its business within six months from the date of registration. The Petitioner filed an application for revocation of cancellation of the registration, which was rejected on the ground that the Petitioner had not replied to the SCN within the time specified therein.

(b) The Petitioner challenged such notice on the ground that the SCN did not reflect any time or date for personal hearing and in the absence thereof, the rejection Order was liable to be set aside.

Judgment:

The Hon'ble High Court observed that the SCN has neither specified the period to furnish the reply to the SCN nor mentioned the appointed date and time for personal hearing. Accordingly, the mandatory requirement to grant an opportunity of hearing in terms of the proviso to Section 30(2) of the Central Goods and Services Tax Act, 2017 ("**CGST Act**") was not complied with. Therefore, the Order confirming the cancellation of registration was set aside.

2. ***The exercise of power for ordering a provisional attachment must be preceded by an opinion based on tangible material for the purpose of protecting the interest of the government revenue.***

Messers AKS Electricals and Electronic Private Limited v. *Chief Commissioner CGST & Central Excise* [Writ Tax No. 959 of 2021 (Allahabad High Court), decided on November 18, 2021]

Facts of the case:

(a) The Respondent attached the bank account of the Petitioner in exercise of his power conferred under Section 83 of the CGST Act read with Rule 159(1) of the Central Goods and Services Tax Rules, 2017 ("**CGST Rules"**).

(b) The Petitioner challenged such attachment on the ground that other than simple recital of the language of the statute, there was no fact, circumstance or material existing on record to have given rise to the harsh consequence of attachment of the Petitioner's bank account.

Judgment:

(a) The Hon'ble High Court observed that the present issue was squarely covered by the decision of the Hon'ble Supreme Court in the case of *Messers Radha Krishan Industries* v. *State of Himanchal Pradesh and others* [Civil Appeal No.1155 of 2021, decided on April 20, 2021] wherein it was held that "*The exercise of the power for ordering a provisional attachment must be preceded by the formation of an opinion by the Commissioner that it is necessary so to do for the purpose of protecting the interest of the government revenue. Before ordering a provisional attachment, the Commissioner must form an opinion on the basis of tangible material that the assessee is likely to defeat the demand, if any, and that therefore, it is necessary so to do for the purpose of protecting the interest of the government revenue."*

(b) Applying the aforesaid principle, the Hon'ble High Court held that the impugned communication issued under Section 83 of the CGST Act was wholly laconic and inadequate. Accordingly, the communication issued by the department was set aside along with a direction to release the bank account from attachment.

3. ***Merely because criminal proceedings are pending against the Petitioner under Section 132(1)(c) of the CGST Act, the proceedings arising from the same transaction under Section 74 of the CGST Act cannot be quashed.***

Messers Aamir and Sons v. *Commissioner of Commercial Taxes* [Writ Tax No. 910 of 2021 (Allahabad High Court), decided on November 17, 2021]

Facts of the case:

Investigation was carried out against the Petitioner on the basis of certain information received from the Petitioner's bank, resulting in two proceedings - one under Section 74 of the CGST Act and another seeking criminal prosecution, under Section 132(1)(c) of the CGST Act. The Petitioner challenged the same on the ground that once criminal prosecution is pending, parallel proceedings under Section 74 cannot be entertained.

Judgment:

(a) The Hon'ble High Court observed that a single transaction may give rise to both criminal and civil consequences. There is no principle in law to either grant injunction against the pending proceedings under Section 74 of the CGST Act or to quash the same, merely because criminal proceedings are pending against the Petitioner arising from the same transaction under Section 132(1)(c) of the CGST Act.

(b) In view thereof, the Hon'ble High Court held that both proceedings may continue simultaneously such that the rule of evidence applicable to each may be applied independently. While criminal prosecution may conclude applying the rule of strict proof, the civil proceedings may conclude on the rule of balance of probabilities. Also, at the conclusion of a criminal prosecution, punishment may be awarded, whereas at the conclusion of a civil proceeding, only recoveries may be made. Accordingly, the present Petition was dismissed by the Hon'ble High Court with a direction that both proceedings would continue.

4. ***Recovery of Top Up Insurance/Parental Insurance Premium from employees does not amount to "supply of service".***

In Re: Tata Power Company Limited [Order No. GST-ARA-99/2019-20/B-92 (Authority for Advance Ruling, Maharashtra), decided on November 10, 2021]

Facts of the case:

(a) The Applicant has an arrangement with New India Assurance Co. Ltd. (hereinafter referred to as **"insurance company"**), in pursuance to which, the insurance company issues a master insurance policy to the Applicant for providing group insurance to the Applicant's employees.

(b) In furtherance to the insurance cover, the Applicant has formulated an optional Top up insurance over and above the specified limit along with an optional Parental insurance for its employees. To avail the aforesaid additional insurance cover by way of Top-up insurance and Parental Insurance, employees are required to contribute an additional amount as premium which will be recovered by the Applicant from the employees' salary.

(c) The Applicant has sought an advance ruling from the AAR on the issue whether such recovery towards Top-up and parental insurance premium from the employees, amounts to a "supply" of any service under GST Laws or not.

Judgment:

(a) The AAR observed that to attract GST, Section 7 of the CGST Act should be applicable. In the present case, the provision or non-provision of the Top Up Insurance / Parental Insurance will not affect the business of the Applicant in any way. Further, the Applicant is not engaged in providing insurance service. In fact, the service of insurance is actually provided by the Insurance Company for which the Insurance Company is charging GST and the Applicant is just paying the insurance premium amount to the insurance company and recovering the premium amount from its employees.

(b) Therefore, the AAR held that activity of recovery of the cost of insurance premium cannot be treated as an activity done in the course of business or for the furtherance of business. Consequently, the activity does not amount to provision of a "supply" under Section 7 of the CGST Act and will not be chargeable to GST.

5. ***Input tax credit of GST paid on repairs is not admissible to the housing society***

In Re: Messrs. Mahavir Nagar Shiv Srushti Co-operative Housing Society Limited [Order No. GST-ARA-19/2021-22/B-94 (Authority for Advance Ruling, Maharashtra), decided on November 10, 2021].

Facts of the case:

The Applicant, a Housing Society has engaged a contractor to provide works contract services, such as repairs, renovation, and rehabilitation work for its society members. The Applicant has sought an advance ruling from the AAR on the issue as to whether the input tax credit of such services received was admissible in case the activity performed by it for its society members constitutes a "supply" under the GST Act.

Judgment:

(a) The AAR observed that a housing society is a collective body of persons, who stay in a residential society and the collective body, supplies certain services to its members, like collecting statutory dues to be remitted to statutory authorities, or maintenance of the building, etc. In terms of the deeming fiction under Section 2(17) of the CGST Act, the provision of the facilities or benefits by a society to its members is deemed to be a business.

(b) In the present case, even though the said provision of facilities/benefits by the society to its members amounts to business, the Applicant is not providing any works contract services to its members. Further, Section 17(5)(c) of the CGST Act provides that Input tax credit of works contract services is admissible provided it is an input service for further supply of works contract service. In view thereof, the AAR held that since the Applicant is not engaged in provision of works contract services, the Input tax credit is inadmissible thereto in terms of Section 17(5)(c) of the CGST Act.

6. ***Sale of developed plot of land, where development is limited to providing common amenities, does not amount to supply under GST Laws***

In Re: Messrs. Bhopal Smart City Development Corporation Limited [Order No. 16 of 2021 (Authority for Advance Ruling, Madhya Pradesh), decided on November 22, 2021].

Facts of the case:

The Applicant has sought an Advance ruling on the question whether GST is applicable on sale of developed plot of land for which consideration is received before the issuance of completion certificate, under the following facts:-

(a) The plot would be sold after carrying out the development activities or providing amenities such as Drainage line, water line, electricity line, land levelling, and common facilities viz road and street-light which are to be provided by the Applicant; and

(b) The remaining construction activities including civil foundation on the developed plot would be carried out by the buyer on their own account and cost.

Judgment:

(a) The AAR observed that in terms of the provisions of the GST Law, the intention of the legislature is clear regarding exclusion of land from the purview of GST and accordingly, no GST can be levied on the sale of land per-se. Consequently, it is pertinent to examine whether the Applicant is engaged in sale of land or otherwise.

(b) The definition of ‘sale’ under various acts refers to a transfer of ownership, which creates a right in one person’s favour to the exclusion of all others. In the present case, the development work done on the land is for the whole parcel of land and not for a given plot, which is sold to the customers. The title in the common area and amenities does not belong to the owners of the plot but rests with the Urban Local Body as per the applicable laws. Further, there is no collective ownership of the common amenities with the plot owners or any association of such plot owners. Therefore, in the absence of a transfer of ownership, the provision of common amenities to the buyers of the plot of land does not have any bearing on the taxability or otherwise of the “sale” of plot after carrying on the development work for providing the aforesaid amenities.

(c) Further, as per the definition of "land" in various statutes, the developmental work on the plot of land being sold is subsumed in land itself and ceases to have a separate identity. It cannot be bought and sold as something distinct and separate from the plot of land. The AAR also clarified that there is no concept of obtaining completion certificate in case of development of land since development of land is not akin to construction of a building or a complex. Hence, it was held that the sale of land by the Applicant would not amount to "supply" under the GST Laws.

7. ***Activity of a club collecting contributions from its members and spending towards meetings and administrative expenditures amounts to a supply under Section 7 of the CGST Act***

In Re: Messrs. Rotary Club of Bombay Queen City [Order No. GST-ARA-19/2020-21/B-96 (Authority for Advance Ruling, Maharashtra), decided on November 22, 2021].

Facts of the case:

The Applicant, a club, has sought an Advance ruling on the following questions:-

(a) Whether the activity of collecting contributions and spending towards meeting and administrative expenditures only, is 'business' under the CGST Act; and

(b) Whether contributions from its members, recovered for expending the same for the weekly and other meetings and other petty administrative expenses amounts to or results in a "supply" under the GST Laws or not.

Judgment:

The AAR observed that in view of the amended Section 7 of the CGST Act, the Applicant and its members are distinct persons and the fees received by the Applicant therefrom is nothing but consideration received for supply of goods/services as a separate entity and is covered by the scope of the term "business". Hence, the amount collected as membership subscription and admission fees and other contributions received from members is liable to GST as supply of services.

Service Tax

8. ***Compensation received in case of cancellation of coal blocks is not a "service"***

MNH Shakti Limited v. *Commissioner of CGST & Central Excise, Rourkela* [Final Order No. 75689/2021 (CESTAT, Kolkata), decided on November 10, 2021].

Facts of the case:

(a) The Appellant received a compensation in case of cancellation of coal blocks allotted to it by the Government in light of an Order of the Hon'ble Apex Court.

(b) The department raised a dispute that Appellant "tolerated the act of cancellation of coal blocks" and received a compensation in lieu thereof, which amounts to a "service" under Section 65B(44) read with 65B(22) and Section 66E(e) of the Finance Act, 1994 and the amount received is therefore chargeable to Service tax.

Judgment:

(a) The Customs Excise and Service Tax Appellate Tribunal ("**CESTAT**") observed that the question of tolerating something and receiving a compensation for such tolerance pre-supposes that:

i. the person had a choice to tolerate or not;
ii. the person chose to tolerate;
iii. such tolerance was for a consideration as per an agreement (written or otherwise) to tolerate;
iv. the tolerance was a taxable service.

(b) In the present case, the Appellant had no choice of tolerating cancellation. The cancellation was in pursuance to the order of the Hon'ble Supreme Court and not as a result of a contract to tolerate cancellation. There was no consideration for tolerating the cancellation and only a statutory compensation provided for the investment made in the mines by the Appellant.

(c) In view thereof, the Hon'ble CESTAT held that this situation cannot be called tolerating an act and consequently, no Service tax is leviable on such compensation.

9. *Recovery under Rule 6 of the CENVAT Credit Rules, 2004 cannot exceed the amount of CENVAT Credit availed.*

Surya VistaCom Private Limited v. *Commissioner of Service Tax - I, Kolkata* [Final Order No. 75675/2021 (CESTAT, Kolkata), decided on November 9,2021].

Facts of the case:

The issue for consideration was whether the Appellant was required to pay 6% of total sale value of the goods traded by them in terms of Rule 6(3)(i) of the CENVAT Credit Rules, 2004 ("**CCR**") and whether the CENVAT credit availed by the Appellant for its unit engaged in trading of goods qualifies as common CENVAT credit for the purposes of Rule 6 or not.

Judgment:

(a) The CESTAT observed that since the total CENVAT Credit availed during the period of dispute was only INR 41.17 Lakhs, the demand for recovery based on 6% of the total turnover amounting to INR 3.39 Crores was grossly untenable. Reliance in this respect was placed on the ruling of *Mercedes Benz India Private Limited* v. *Commissioner of Central Excise, Pune – I* [2015-TIOL-1550-CESTAT-MUM] wherein it has been held that the recovery cannot exceed the amount of CENVAT credit availed by the Appellant.

(b) It was further held that the calculation of the demand by the department was completely mechanical and therefore the demand of CENVAT Credit was unsustainable. Correspondingly, the demand was set aside by the CESTAT.

10. ***Refund of Service tax paid under protest is not bound by the provisions of the Finance Act, 1994***

Shri Javed Akhtar v. *Commissioner of CGST, Mumbai West* [Final Order No. A/87103 / 2021 (CESTAT, Mumbai), decided on November 9,2021].

Facts of the case:

(a) The question for consideration in the appeal was whether the refund of Service tax paid under protest by the Appellant was bound by the limitation imposed vide Finance Act, 1994 or not.

Judgment:

(a) The CESTAT observed that where there is no levy of Service tax, amount wrongly paid cannot partake the character of 'Service tax'. In the present case, the amount paid by the Appellant under protest cannot be termed as tax, but is merely a deposit.

(b) It was further held that the authority was duty bound to refund such amount as retention thereof would be hit by Article 265 of the Constitution of India which bears the heading "Taxes not to be imposed save by authority of law" and lays down that no tax shall be levied or collected except by authority of law.

(c) Consequently, it was held that when the amount deposited by the Appellant was not a tax and merely a deposit, there was no question of applying the provisions of the Finance Act,1994 for its refund. Accordingly, the appeal was allowed by the CESTAT.

11. *In case where the charges to manufacture goods in the factory of service recipient (manufacturer) by their own manpower are based on the goods per unit, the activity would merit classification as a Job work service and not Manpower recruitment service.*

Jayesh Patel v. *Commissioner of Service Tax - III, Ahmedabad* [Final Order No. A/12552-12553 /2021 (CESTAT, Ahmedabad), decided on November 29,2021].

Facts of the case:

The issue for consideration was whether the activity performed by the Appellant, viz. manufacturing Plastic Jars and Containers in the factory of the service recipient by the help of their own manpower falls under supply of Manpower and Recruitment Service or Job work manufacturing.

Judgment:

The CESTAT observed that the charges for the job was on per container basis and that the Appellant was not collecting the fixed wages or salary against providing the manpower. Therefore, the activity carried out by the appellant was of Job Work manufacturing and not of Manpower Recruitment Service. Correspondingly, the classification by the department was rejected and the demand was set aside by the CESTAT.

12. *Transactions between merged companies during the effective date and the date of order of the competent Court, partake the character of mutuality and hence are no longer taxable by operation of law.*

Commissioner of Central Goods and Services Tax, New Delhi v. *Dalmia Cement (Bharat) Limited* [Final Order No. 52001/2021 (CESTAT, New Delhi), decided on November 17,2021].

Facts of the case:

(a) By virtue of the Order of the NCLT, three companies had merged with the Respondent Company w.e.f. January 1, 2015. The Respondent produced the Order of the NCLT before the adjudicating authority on November 1, 2018 for claiming refund. Subsequently, a refund application dated June 28, 2019 was also filed with all requisite documents seeking refund of the Service tax paid on service transactions between such companies.

(b) Vide the order of the Commissioner (Appeals), the Respondent was granted the refund along with interest for the period starting from the expiry of three months from the date of submission of the NCLT Order. Being aggrieved by the grant of interest on the refund amount from the date of submission of the NCLT Order seeking refund instead of the date of complete refund application filed, the department filed an appeal before the CESTAT.

Judgment:

(a) The CESTAT observed that once the four companies have become one, by merger, under operation of law as per order of the competent Court, the transactions between them during the effective date and the date of order of the competent Court, partake the character of mutuality and are no longer taxable by operation of law.

(b) Therefore, whatever tax is deposited by different companies during the intervening period, ipso facto becomes "Revenue deposit". On such Revenue deposit, interest has to be paid in terms of Section 11BB of the Act, from end of three months from the date of the initial refund claim, i.e., submission of NCLT Order. Accordingly, the appeal of the department was set aside by the CESTAT.

Customs

13. ***Extended period of limitation can be invoked only when the information has not been disclosed deliberately to escape payment of duty.***

Exclusive Motors Private Limited v. *Commissioner of Customs* [Final Order No. 51931/2021 (CESTAT New Delhi), decided on November 11, 2021].

Facts of the case:

The department had invoked extended period of limitation confirming a demand of differential Customs duty along with interest and penalty under the Customs Act, 1962 (**"Customs Act**") on the ground that the Appellant had cleared the said goods without disclosing the retail sale price [RSP] in the Bill of Entry filed under the Customs Act, 1962 with an intent to evade payment of Customs duty on such goods.

Judgment:

(a) The CESTAT observed that the provisions of section 11A of the Central Excise Act relating to invoking of extended period of limitation, which are pari materia to section 28(4) of the Customs Act came up for interpretation before the Hon'ble Supreme Court in *Pushpam Pharmaceuticals Company* v. *Collector of C. Ex., Bombay* [1995 (3) TMI 100 - SC]. In the said decision, it has been held that the suppression of facts should be deliberate and in taxation laws it can have only one meaning, viz. that the correct information was not disclosed deliberately to escape payment of duty.

(b) Applying the aforesaid principle to the facts of the present case, it was held that there was no mis-statement or suppression of facts by the Appellant and the basic ingredients of invoking extended period of limitation are not satisfied. Accordingly, the CESTAT set aside the demand of Service tax.

14. *Rejection of refund on the ground that no appeal was filed against the Bills of Entry, when the said Bills of Entry were re-assessed by way of an amendment under Section 149 of the Customs Act, is not tenable.*

Messers Brightpoint India Private Limited v. *Commissioner of Customs, Mumbai (Air Cargo Import)* [Final Order No. A/87098/2021 (CESTAT, Mumbai), decided on November 9, 2021].

Facts of the case:

The present dispute relates to the question whether the refund can be rejected on the ground that no appeal was filed against the Bills of Entry under Section 128 of the Customs Act, when the said Bills of Entry were re-assessed by way of amendment under Section 149 of the Customs Act.

Judgment:

(a) The Tribunal observed that once the Bills of Entry was reassessed by the Revenue and thereafter if neither side is aggrieved with the said re-assessment, it has attained finality.

(b) Hence, after re-assessment of the Bills of Entry, if the refund is arising out of it, there is nothing against which any appeal needs to be filed. Therefore, the CESTAT held that the contention of the Revenue that Appellant has not filed appeal against the Bills of Entry was absolutely incorrect and consequently, the refund was allowed.

15. *Refund claim is to be filed within one year from the finalization of assessment of bill of entry, irrespective of the date when the goods were provisionally released.*

Maruti Suzuki India Limited v. *Commissioner of Customs, Mumbai* [Final Order No. A/87248/2021 (CESTAT, Mumbai), decided on November 29, 2021].

Facts of the case:

The present dispute relates to the question whether the refund application filed on April 4, 2012 can be rejected on the ground that the goods were provisionally released on March 29, 2011 and accordingly, the refund application should have been filed based on such date. In the said case, however, the bill of entry was not finally assessed till February 27, 2012.

Judgment:

(a) The Tribunal observed that the judgment in the case of *Pioneer India Electronics (P) Ltd* v. *Union of India* [2014 (301) ELT 59 (Del.)] wherein it was held that the question of payment of duty arises only after finalization of assessment of bill of entry, was squarely applicable to the facts of the case.

(b) In view thereof, the refund claim filed by the Appellant on April 4, 2012 was well within one year from February 27, 2012 when the bill of entry was still pending for final assessment and the date of provisional release was not material. Accordingly, the CESTAT held that the refund claim cannot be rejected on the ground of limitation and allowed the appeal of the Appellant.

Argus Comments:

The aforesaid judgment passed by the CESTAT has not considered the ruling in the case of *ITC Limited* v. *CCE, Kolkata-IV* 2019 (368) ELT 216 (SC), and the same may be prone to further litigation.

Central Excise, Sales Tax, VAT

16. ***In case separate books of accounts are not maintained, the department cannot demand the amount of 5% or 10% as per Rule 6(3) of the CCR.***

Texmaco Rail & Engineering Limited v. *CCE, Kolkata North* [Final Order No. 75685-75686/2021 (CESTAT, Kolkata), decided on November 10, 2021].

Facts of the case:

The present dispute relates to the question whether the Appellant is liable to discharge an amount of 5% or 10% as per Rule 6(3) of the CCR where separate books of accounts have not been maintained, but the proportionate credit attributable to the exempted supplies has been reversed.

Judgment:

(a) The CESTAT relied upon the decision in the case of *Tiara Advertising* v. *Union of India 2019 (10) TMI 27* – Telangana High Court wherein it has been held that in case the assessee has not chosen to maintain separate accounts, the CCR does not authorize the departmental authorities to choose one of the options on behalf of the assessee so as to demand the amount of 5% or 10% as per Rule 6(3) of the CCR.

(b) In view thereof, it was held that the demand of the duty amount calculated at the rate of 5% or 10% of the value of clearances cannot be made even though the assessee has not followed the prescribed procedures. Therefore, the demand order was set aside by the CESTAT.

17. ***Aluminium dross and skimming arising unavoidably out of the manufacture of aluminium motor vehicle parts does not amount to manufacture.***

Tata Motors Limited v. *CCE, Pune – I* [Final Order No. A 87108-87109/2021 (CESTAT, Mumbai), decided on November 9, 2021].

Facts of the case:

The issue involved in the present case is whether the aluminium dross and skimming arising unavoidably out of the manufacture of aluminium motor vehicle parts amounts to manufacture and liable to duty or otherwise.

Judgment:

The CESTAT held that the generation of aluminium dross and skimming unavoidably in the manufacture of aluminium castings/parts of motor vehicles does not amount to manufacture. Reliance was placed upon the decision in the case of *Hindalco Industries Limited* v. *Union of India* [2015 (315) ELT 10 (Bom.) as affirmed by Hon'ble Apex Court and reported at 2019 (367) ELT A246. In light of the same, the demand was set aside and the appeal was allowed.

18. ***Rule 7 of the CCR, which deals more with procedural aspects cannot take precedence over Rule 3 of CCR.***

Messers Brakes India Private Limited v. *CCE, Faridabad* [Final Order No. 60962/2021 (CESTAT, Chandigarh), decided on November 29, 2021].

Facts of the case:

The issue involved in the present case is whether the credit of duty paid on inputs received by the Appellant from their sister concern under stock transfer invoices, is admissible under Rule 7(4) of the CCR, 2002 or not, which prior to the amendment vide Notification No. 13/2003-CE(NT) dated March 1, 2003 specified that the inputs should be 'purchased'. The departmental authorities contended that after the amendment, the terminology used in Rule 7(4) was changed to 'procured' instead of 'purchased' and therefore, the credit was admissible subsequently and not for the period prior to the amendment dated March 1, 2003.

Judgment:

(a) The CESTAT observed that Rule 3 of the CCR, which provides for eligibility criteria of CENVAT credit does not discriminate between purchase and procurement. The only pre-condition in Rule 3 of CCR appears to be receipt of input or capital goods in the factory of manufacture.

(b) Further, the Hon'ble Karnataka High Court in the case of *Karnataka Soaps & Detergents Ltd.* v. *Commissioner of Central Excise* - 2010 (2) TMI 524 has upheld the view that Rule 7 which is more towards laying down the procedure cannot take precedence over Rule 3 of CCR.

(c) In view of the aforesaid, the CESTAT held that the demand on the basis of Rule 7 was grossly unsustainable and the order was therefore set aside.

19. ***Tribunal is bound by the earlier Order of the Bench involving the same assessee on identical facts***

Associated Cement Company Limited v. *State of Maharashtra* [STREV No. 29 of 2006 (High Court of Orissa), decided on November 10, 2021].

Facts of the case:

The dispute pertains to challenging the order of the Tribunal which failed to follow its earlier order passed by another Division Bench on identical facts and between the same parties. Consequently, the Petitioner prayed for quashing of the demand Order.

Judgment:

The Hon'ble Orissa High Court observed that a co-ordinate Bench of the same Tribunal had in its earlier order on identical matter concluded that there was no basis for confirming the demand. Further, in terms of the decision of the Supreme Court in *Collector of Central Excise, Kanpur* v. *Matador Foam* (2005) 2 SCC 59, the Tribunal was bound by the earlier order of the co-ordinate Bench involving the very same Assessee. Therefore, following the aforesaid decision, the demand was set aside by the Hon'ble High Court.

Recent Circulars and Notifications

No.	Reference	Particulars
1.	Notification No. 14/2021-Central Tax (Rate) dated November 18, 2021	Seeks to amend the rate of GST on certain Textile and textile products and Garments falling under chapter 50, 51, 52, 53, 54, 55, 56, 58, 59, 60, 63, 64 to 6% CGST w.e.f. January 1, 2022.
2.	Notification No. 15/2021-Central Tax (Rate) dated November 18, 2021	Seeks to amend the rate of GST on certain services w.e.f. January 1, 2022, prescribes *inter-alia:* - Changing the rate of taxes applicable on composite supply of services of works contract supplied to Governmental authority or Government entity to 18%. - Excluding services by way of dyeing or printing of textile and textile products from the service of job work.
3.	Notification No. 16/2021-Central Tax (Rate) dated November 18, 2021	Seeks to *inter-alia* remove the exemption granted to services supplied to Government authority or Government entity and bring the same under the tax net w.e.f. January 1, 2022.
4.	Notification No. 17/2021-Central Tax (Rate) dated November 18, 2021	Seeks to *inter-alia* implement the recommendation made in the 45th GST Council meeting on September 17, 2021 and thereby levy GST on restaurant service supplied through e-commerce operator w.e.f. January 1, 2022. **Argus Comments:** Vide the amendment, the liability to discharge GST in the hands of the restaurant owners (wherever applicable) has been shifted to the hands of the e-commerce operators.

<table>
<tr><td></td><td></td><td></td></tr>
<tr><td>5.</td><td>CBEC-20/16/05/2021-GST/1552 dated November 2, 2021</td><td>Seeks to issue guidelines for disallowing debit of electronic credit ledger under Rule 86A of the CGST Rules, 2017:

i. <u>Grounds for disallowing debit of an amount from electronic credit ledger.</u>

It has been clarified that the power of disallowing debit of amount from electronic credit ledger must not be exercised in a mechanical manner and careful examination of all the facts of the case is important to determine case fit for exercising power under Rule 86A.

It has also been stated that the remedy of disallowing debit of amount from electronic credit ledger being extraordinary, has to be resorted to with utmost circumspection and with maximum care and caution. It contemplates an objective determination based on intelligent care and evaluation as opposed to a purely subjective consideration of suspicion.

The reasons to believe are to be on the basis of material evidence available or gathered in relation to fraudulent availment of input tax credit or ineligible input tax credit availed as per the conditions/ grounds under sub-rule (1) of rule 86A.

ii. <u>Proper authority for the purpose of Rule 86A:</u>

The Commissioner (including Principal Commissioner) is the proper officer for the purpose of exercising powers for disallowing the debit of amount from electronic credit ledger of a registered person under rule 86A.

The Commissioner/Principal Commissioner may authorize exercise of powers under rule 86A based on the following monetary limits as mentioned below:

<table>
<tr><th>Total amount of ineligible or fraudulently availed input tax credit</th><th>Officer to disallow debit of amount from electronic credit ledger under rule 86A</th></tr>
<tr><td>Not exceeding ₹1 crore</td><td>Deputy Commissioner /Assistant Commissioner</td></tr>
<tr><td>Above ₹ 1 crore but not exceeding ₹ 5 crore</td><td>Additional Commissioner / Joint Commissioner</td></tr>
</table>
</td></tr>
</table>

Above ₹ 5 Crore	Principal Commissioner/ Commissioner		

The Additional Director General / Principal Additional Director General of Directorate General of Goods and Services Tax Intelligence (DGGI) can also exercise the powers assigned to the Commissioner under rule 86A.

Where during the course of Audit under section 65 or 66 of CGST Act, 2017 it is noticed that any Input tax credit has been fraudulently availed or is ineligible, which may require disallowing debit of electronic credit ledger under rule 86A, the concerned Commissioner/ Principal Commissioner of CGST Audit Commissionerate may refer the same to the jurisdictional CGST Commissioner for examination of the matter.

iii. Procedure for disallowing debit of electronic credit ledger/blocking credit under Rule 86(A):

The reasons to believe while disallowing the credit should be duly recorded by the specified officer in writing on file.

The amount disallowed for debit should not be more than the amount of input tax credit believed to have been fraudulently availed or is ineligible. Such action to disallow debit is to be informed on the portal to the concerned registered person, along with the details of the officer who has disallowed such debit.

iv. Allowing debit of disallowed/restricted credit under sub-rule (2) of Rule 86A:

The Commissioner or the authorised officer, as the case may be, examine the matter afresh and on being satisfied that the input tax credit is no more ineligible or wrongly availed, either partially or fully, may allow the use of the credit so disallowed or restricted. The reasons for allowing the same shall be duly recorded on file in writing, before allowing such debit.

The restriction shall cease to have effect after the expiry of a period of one year from the date of imposing such restriction.

It should be endeavoured that the investigation and adjudication are completed at the earliest, well within the period of restriction, so that the due

		liability arising out of the same can be recovered from the said taxable person and the purpose of disallowing debit from electronic credit ledger is achieved.
6.	Circular No. 1079/03/2021-CX dated November 11, 2021	Seeks to clarify Master Circular No. 1053/02/2017- CX dated March 10, 2017 and states that pre-show cause notice consultation shall not be mandatory for those cases booked under the Central Excise Act, 1944 or Chapter V of the Finance Act, 1994 for recovery of duties or taxes not levied or paid or short levied or short paid or erroneously refunded by reason of: - (a) fraud: or (b) collusion: or (c) wilful mis-statement: or (d) suppression of facts: or (e) contravention of any of the provision of the Central Excise Act, 1944 or Chapter V of the Finance Act, 1994 or the rules made there under with the intent to evade payment of duties or taxes.
7.	Circular No. 166/22/2021-GST dated November 17, 2021	Seeks to clarify as under, *inter-alia*: i. The provisions of sub-section (1) of section 54 of the CGST Act regarding time period, within which an application for refund can be filed, would not be applicable in cases of refund of excess balance in electronic cash ledger. ii. Furnishing of certification/ declaration under Rule 89(2)(l) or 89(2)(m) of the CGST Rules, 2017 for not passing the incidence of tax to any other person is not required in cases of refund of excess balance in electronic cash ledger. iii. The relevant date for the purpose of filing of refund claim for refund of tax paid on such supplies would be the date of filing of return, related to such supplies, by the supplier.
8.	Circular No. 165/21/2021-GST dated November 17, 2021	Seeks to clarify that wherever an invoice is issued to a recipient located outside India, for supply of services, for which the place of supply is in India, as per the provisions of IGST Act, and the payment is received by the supplier, in convertible foreign exchange or in Indian Rupees wherever permitted by the RBI, such invoice may be issued without having a Dynamic QR Code, as such dynamic QR code cannot be used by the recipient located outside India for making payment to the supplier. Accordingly, the earlier Circular No. 156/12/2021-GST, dated 21.06.2021 on this issue stands modified to this extent.

9.	Trade Notice No. 22/2021-22 dated November 2, 2021	Seeks to clarify that the last date for filing claim at the Online IT module for Scrip based Schemes - MEIS/SEIS/ROSL/ROSCTL is December 31, 2021.

Contributed by the Indirect Tax team

You can reach out to our team for any queries

Ajay Sanwaria, Counsel
ajay.sanwaria@argus-p.com

Shreya Mundhra, Senior Associate
shreya.mundhra@argus-p.com

MUMBAI
11, Free Press House
215, Nariman Point
Mumbai 400021
T: +91 22 6736 2222

DELHI
Express Building
9-10, Bahadurshah Zafar Marg
New Delhi 110002
T: +91 11 2370 1284/5/7

BENGALURU
68 Nandidurga Road
Jayamahal Extension
Bengaluru 560046
T: +91 80 46462300

KOLKATA
Binoy Bhavan
3rd Floor, 27B Camac Street
Kolkata 700016
T: +91 33 40650155/56

AHMEDABAD
307, WestFace
Thaltej
Ahmedabad 380054
T: +91 79 29608450

www.argus-p.com I communications@argus-p.com