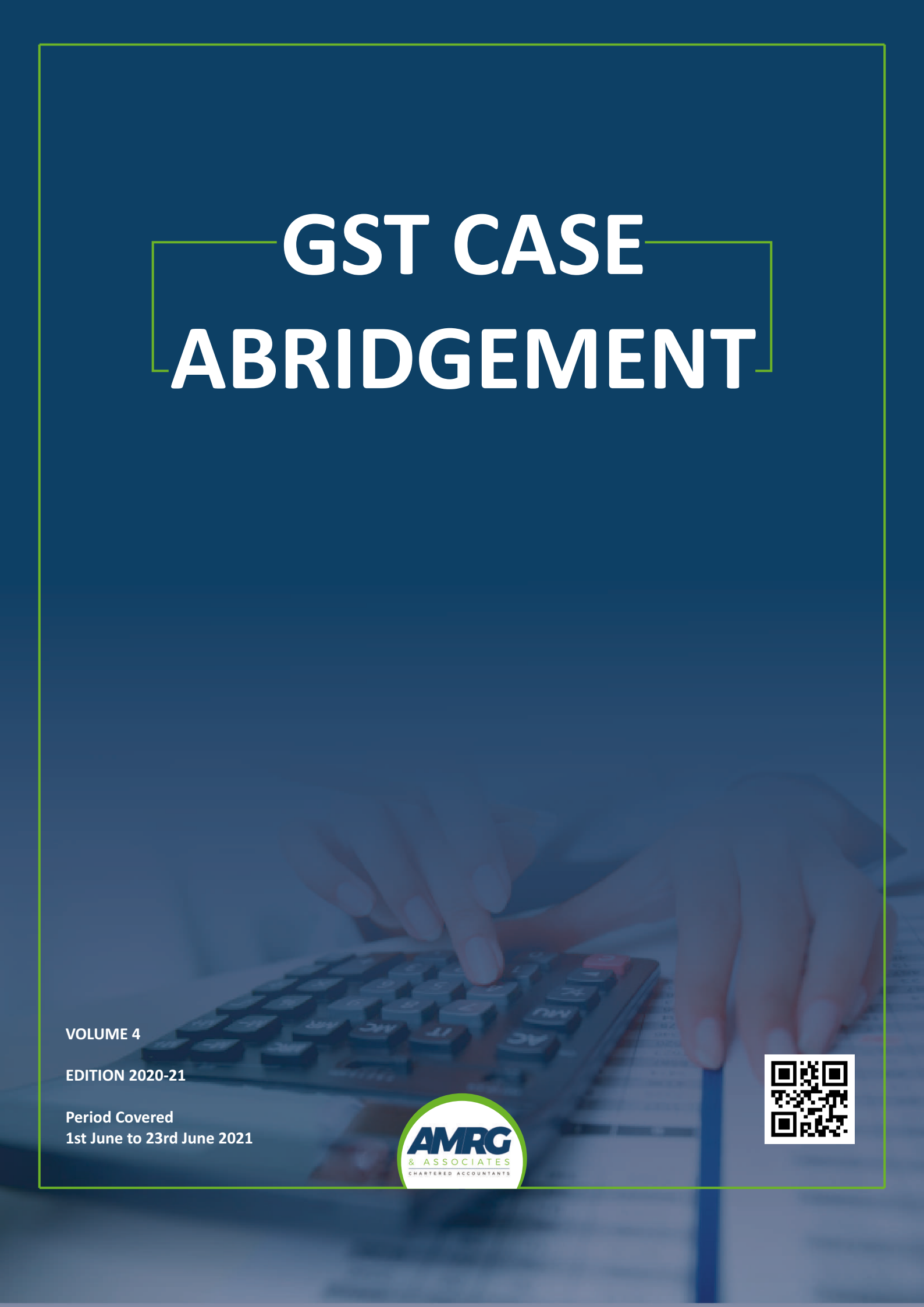
GST CASE ABRIDGEMENT



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AMRG & ASSOCIATES
CHARTERED ACCOUNTANTS

About Amrg

AMRG & Associates Chartered Accountants firm was established in INDIA in 1984 and has currently become one of the leading chartered accountants firms in North India. The firm operates from its offices situated in Delhi, Mumbai, Sydney and various other locations. The firm offers its clients a full range of services including :

- Direct Tax Services
- Audit & Assurance Services
- GST Services
- Other Services

AMRG & Associates has a client base of more than 200 companies & individuals. The firm's approach to service delivery helps to provide value-added services to clients. Our differentiation is derived from a rapid performance based, industry-tailored and technology-enabled business advisory services delivered by talented professionals in the country.

The team consists of distinguished Chartered Accountants, Corporate Financial Advisors, Risk advisors and Tax consultants. The firm represents a combination of specialized skills, which are geared to offer sound financial advice and personalized proactive services.

We crave to build a better working world through our own actions and by engaging with like-minded organizations and individuals. This is our sole purpose of existence as an organization.

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From the Desk of

Rajat Mohan

AMRG & Associates, is a group of professional accountants specialized in providing top notch accounting services across the globe since 1984 .We currently have 200+ client base from various industries enjoying our services . AMRG & Associates is a reputed firm specialized in providing robust services like GST & Indirect Taxation , Statutory & Corporate Audits & Risk Advisory , to name a few.

Here in AMRG , we offer sound financial solutions and expert advices for your modern business queries . We are highy driven team of qualified professionals specializing in different fields of taxation and regulatory matters. We are committed to offer the best of our services to all our esteemed clients. With a holistic perspective in mind , we hope to deliver such dynamic services and grow our clientele with the growth of our clients.

We have been conducting webinars on various topics and also publishing monthly periodical to give our readers a 360 degree view of the changes in Income tax, GST and corporate laws. We are pleased by the overwhelming response that we have received for all our publications and hope to keep doing better and achieving each milestone that that comes our way .

Since 2017 we have been successfully running a GST weekly magazine[1] to get you everything that you need to know from the world of litigation, along with incisive analysis from the AMRG team. Now keeping pace with time, we have now decided to come with "GST case abridgement", which will be shared on a fortightly/monthly basis[2]. GST case abridgement would be much improved version of GST weekly magazine in respected of design, framework, incisive summarizing etc.

This will be the first of its kind digest that will get you key judicial pronouncements from the Supreme Court, various High Courts, AARs and Appellate Authorities emerging in the GST era and the erstwhile VAT, Service tax and Excise regime.

- This document intends to act as a reference tool for businessmen, professionals and tax officers providing them with a common pool of synopsis of important rulings.

- Creative feedback and valuable suggestion from the learned readers, bringing to our notice any discrepancy that may have crept in this book In spite of our best efforts, is most welcome, as it would help us improve the quality of the forthcoming editions, and may be provided at **rajat@amrg.in**

Rajat Mohan

[1] These updates were sent on daily basis till mid of 2019. Then it became weekly eyeing the repetitive nature of case laws.
[2] Depending upon the quality case laws.

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GST Authority was directed to immediately process TRAN-1 Form filed by the taxpayer in accordance with law

Falcon Technologies (P.) Ltd. v. Union of India[2021] 127 taxmann.com 604 (Delhi)

Facts of the Case

- The Petitioner is engaged in trading activity, namely importing and/or domestically procuring various items such as broadcasting/radio equipment and selling the same to All India Radio/Doordarshan/Prasar Bharti and other private broadcasting channels. The Petitioner filed the prescribed TRAN-1 Form well in time before the deadline prescribed under Rule 117 of the CGST Rules, 2017. However, the CENVAT credit has not been transitioned into the GST regime. The Petitioner furnished the screenshot evidencing filing of the TRAN-1 Form and has also raised the issue with the GST Authorities, but the same has not been resolved.

- Petitioner has approached this Court because despite filing the TRAN-1 Form within the prescribed time period, its electronic credit ledger does not reflect the transitional input tax credit balance.

Observation/Judgement

- The Hon'ble High Court observed that the communications were annexed with the petition. Petitioner has been shunted from one office to another, yet regrettably, its grievance has not been addressed. Despite providing copies of proof of having filed the TRAN-1 Form, the Respondents have not taken any action. Emails written by the Petitioner to the help desk of the Respondents and to the Nodal Officer have also not yielded any favorable outcome. There is no counter affidavit filed by the Respondents and therefore we are unable to understand the reason for the denial of the credit to the Petitioner. In this vein, we refer to the judgment of the Madras High Court in The Commissioner of GST & Central Excise, Chennai Outer Commissionerate, and Ors. v. Checkpoint Apparel Labeling Solutions India Pvt. Ltd., wherein the Court deprecated the practice of the Revenue in making the Taxpayer run from pillar to post.

- The case of the Petitioner stands covered by a plethora of judgments of this Court including Aadinath Industries & Ors. v. Union of India and Ors. [2019] 110 taxmann.com 420 (Delhi), Bhargava Motors v. Union of India and Ors. [2019] 102 taxmann.com 127 (Delhi), and The Tyre Plaza v. Union of India [2019] 111 taxmann.com 489 (Delhi).

- Accordingly, the Hon'ble High Court allowed the present petition and direct the Respondents to immediately process the TRAN-1 Form filed by the Petitioner in accordance with law and reflect the credit in the electronic credit ledger under the GST regime. For this purpose, in case the Petitioner is required to file the TRAN-1 Form once again, the Respondents shall open the GST portal to enable the Petitioner to do so or accept the same manually on or before June 30, 2021.

The department should have restrained itself from coercive recovery as soon as it came to know of appeal with mandatory pre-deposit.

J.S. Grover Autos (P.) Ltd. v. Commissioner of Central Goods & Services Tax [2021] 127 taxmann.com 503 (Punjab & Haryana)

Facts of the Case

- The petitioner is a Private Limited Company registered with the Service Tax Department under the categories of "repair, re-conditioning, restoration or decoration or any other similar service of any other motor vehicle". A Show Cause Notice raising demand of service tax along with interest and penalty, amounting to Rs. 30,22,888/- for the periods 2014-15 to 2016-17, was issued on the premise that the commissions received on account of incentive/sale promotion were liable to service tax under the category of Business Auxiliary Services (BAS).

- The aforesaid demand of service tax along with interest and penalty was confirmed vide order dated January 14, 2020.

- The petitioner taking advantage of the extension of the limitation period by Hon'ble Supreme Court vide order dated March 8, 2021 in Suo Motu Writ Petition (Civil) No. 3 of 2020, along with a mandatory pre-deposit of 7.5% of tax liability, preferred an appeal before first Appellate Authority against the assessment order dated January 14, 2020.

- Petitioner contends that as per Para-4.2 of Circular dated September 16, 2014, issued by Central Board of Excise & Customs ('Board'), no coercive step can be initiated if an appeal is filed along with a pre-deposit of 7.5%, thus, recovery proceedings initiated by respondent are bad and contrary to Board Circular which is binding upon the Respondent. He further relied upon the judgment of Bombay High Court in Ramchandra A. Patankar v. UOI, 2019 (31) GSTL 58 (Bom), where a similar question has been answered in favor of the taxpayer.

Observation/Judgment

- As per Para-4.2 of the Circular dated September 16, 2014:-

  "4.2 No coercive measures for the recovery of balance amount i.e. the amount in excess of 7.5% or 10% deposited in terms of Section 35F of Central Excise Act, 1944 or Section 129E of Customs Act, 1962, shall be taken during the pendency of appeal where the party/ taxpayer shows to the jurisdictional authorities:

(I) Proof of payment of the stipulated amount as pre-deposit of 7.5%/10, subject to a limit of Rs. 10 Crore, as the case may be; and

(ii) The copy of the appeal memo filed with the appellate authority. "

- Hon’ble High Court observed in Hon'ble Bombay High Court in Ramchandra' case relying upon Board Circular, set aside attachment of bank account on the ground that Appellant has already filed an appeal before Tribunal along with mandatory pre-deposit.

- The petitioner has already filed an appeal against the assessment order whereby demand was created and tax liability intended to be recovered stands stayed in view of Board Circular and judgment of Hon'ble Bombay High Court. As the liability to be recovered stands stayed, there seems no logic to file an appeal against the recovery proceedings. The respondent-Department should have restrained itself from coercive recovery as soon as came to know of appeal with mandatory pre-deposit. Thus, the contention of the respondent is not sustainable and accordingly rejected.

- In view of the above findings, the present petition deserves to be allowed and accordingly allowed. The impugned order dated March 23, 2021, is hereby set aside and the respondents are directed to permit the petitioner to operate its bank account.

GST Council shall issue a necessary recommendation to Commissioner to enable the taxpayer to get the benefit of Cenvat credit

India Cements Ltd. v. Union of India [2021] 127 taxmann.com 481 (Rajasthan)

Facts of the Case

- Petitioner had submitted the Form GST TRAN-1 under Section 140 of the Central Goods and Service Tax Act, 2017 in order to carry forward the eligible credit on capital goods on December 13, 2017. The petitioner made a mistake in feeding the wrong details of unavailed CENVAT Credit of Rs. 7,89,420.76.
- The petitioner thereafter, filed a writ with the respondents in April, 2019 upon realizing such mistake.

Observation/Judgment

- Hon'ble High Court observed that the petitioner have dealt with two types of defaults:

  Firstly, the registered persons loaded TRAN-1 by December 27, 2017, but there is a mistake and they want to revise the already loaded TRAN-1.

  Secondly, the registered persons, who could not file TRAN-1 by December 27, 2017 and have no evidence of attempt to load TRAN-1.

- Hon'ble High Court finds that the petitioner took all necessary steps of abiding by the law by filling the Form GST TRAN-1 before December 27, 2017 i.e. on December 13, 2017. Hon'ble High Court further finds that the issue is no more res integra as the delay and all other aspects have been dealt with by the Hon'ble Courts one after another, and the propositions of permission to make the necessary amendments in light of the new regime of GST have been affirmed upto the Hon'ble Supreme Court in Adfert Technologies (P.) Ltd. 2020] **115 taxmann.com 29 (SC).**

- Accordingly, the present petition is allowed, and this Court grants liberty to the petitioner to make an application before GST Council for forwarding the same to the GST Council to issue requisite certificate of recommendation alongwith requisite particulars, evidence and a certified copy of the order instantly and such decision be taken forthwith and if the petitioner's assertion is found to be correct, the GST Council shall issue necessary recommendation to the Commissioner to enable the petitioner to get the benefit of CENVAT credit. Such an exercise shall be completed within a period of six months from today, strictly in accordance with law. The stay application and all pending applications stand disposed of accordingly.

Petitioner to approach Competent Authority with a bank guarantee for the release of goods/ vehicle.

Tci Hi Ways (P.) Ltd. v. Assistant State Tax Officer [2021] 127 taxmann.com 479 (Kerala)

Facts of the Case

- The petitioner has approached this Court impugning notices issued under section 129 of the Goods and Services Tax. The petitioner says that even though the proceedings impelled are illegal, unlawful and unjustified, the respondent is refusing to release the consignment along with the vehicle and therefore, that they have been constrained to approach this Court through this writ petition.

- They, however, concede that they are willing to offer a bank guarantee for the amounts and thus pray that the respondent be directed to release the consignment at the earliest, so that they will not be put to further prejudice on account of the fact that the consignor is holding them responsible for each day's delay.

Observation/Judgment

- Hon'ble High Court observed through the judgment of this Court in Podaran Foods India (P.) Ltd. v. State of Kerala [2021] 123 taxmann.com 283, that if the petitioner wants to invoke the remedy of release of the consignment on the strength of a bank guarantee, they will have to approach the respondent itself, so that the said Authority can take a decision thereon, leading to the completion of the adjudication, based on the impugned notices.

- In the aforesaid circumstances, Hon'ble High Court allowed this writ petition to the limited extent of leaving liberty to the petitioner to approach the respondent with a bank guarantee for the amounts covered and if this is done within a period of three days from the date of receipt of a copy of this judgment, the respondent will consider the release of the consignment and vehicle, without any avoidable delay and will, thereupon, complete the adjudication under the provisions of the GST Act after affording necessary opportunity of being heard to the petitioner, as expeditiously as is possible but not later than one month from the date on which the bank guarantee is furnished by the petitioner in terms of this judgment

Petitioner was entitled to a credit but failed to file Form GST TRAN-1 due to technical glitches, department was directed to facilitate uploading of Form TRAN-1

Anand Distributor v. Union of India [2021] 127 taxmann.com 496 (Madras)

Facts of the Case

- The case of the petitioner is that when CGST Act came into force on July 1, 2017, he was entitled to a credit of Rs. 5,03,202/-. The petitioner stated that though he made several attempts to file form GST TRAN-1, he could not do so due to technical glitches. Therefore, the petitioner submitted a representation in this regard to the tax department. The petitioner's request was rejected by the impugned order dated August 28, 2019. The tax department had stated that in the impugned communication, there is no evidence to show that there was a system error in the log.

Observation/Judgment

- Hon'ble High Court observed that there can be no doubt that the petitioner made efforts to upload the details in the web portal. Even according to the respondents, though rule 117 of CGST rules, 2017, originally stipulates that Form TRAN-1 is filed within 90 days, there was a periodical extension and the final extended date was March 31, 2020.

- The respondents are directed to facilitate the uploading of Form TRAN-1 of the petitioner as original prayed for by him. The entire exercise shall be completed within a period of eight weeks from the date of receipt of a copy of this order. No costs.

Competent Authority was to be directed to pass order after compliance with principles of natural justice

Pinax Steel Industries (P.) Ltd. v. State of Bihar [2021] 127 taxmann.com 485 (Patna)

Facts of the Case

- Competent Authority passed demand order under section 73(9) read with section 50 dated November 30, 2019 on taxpayer without affording any adequate opportunity of hearing or assigning any reason and issued summary of order in Form GST DRC-07.
- Taxpayer filed a writ against this case.

Observation/Judgment

- Hon'ble High Court is in view that the impugned order passed by the Respondent, needs to be quashed and set aside as the same has been passed without following the principles of natural justice.

Taxpayer to submit the TRAN-1 before March 15, 2021, when he claimed TRAN credit through GSTR -3B

Neptune Plastics v. Union of India [2021] 127 taxmann.com 587 (Jammu & Kashmir)

Facts of the Case

- The issue in this petition is regarding carrying forward of Rs. 9,96,637/- lying in petitioner's Cenvat account credit on July 8, 2017 when the GST was introduced in the State of Jammu and Kashmir. It appears that the petitioner instead of submitting TRAN-1 form for claiming ITC submitted GSTR-3B. The Assistance Commissioner State Taxes (Technical) Jammu vide letter/order dated March 7, 2019 informed that the reason for non-filing of TRAN-1 was not due to technical glitch in filing TRAN-1, so the case of the petitioner could not be considered.

Observation/Judgment

- Hon'ble High Court observed that the because of the lack of awareness about the procedure to claim the benefit, the petitioner could not submit TRAN-1 within prescribed time but the respondents are denying the same to the petitioner though the petitioner had mentioned about the credit sought to be claimed, in GSTR-3B return submitted by the petitioner within the prescribed period. The respondents have neither disputed that the petitioner is not entitled to carry forward the said credit nor they have disputed the correctness of the amount. Even they have not disputed that the petitioner has not reflected the said credit in GSTR-3B filed within the stipulated time. Only objection that has been raised by the respondents is that TRAN-1 form was required to be submitted within the prescribed period but was not submitted by the petitioner. Learned counsel for the petitioner at this stage informs that the portal for submitting TRAN-1 is lying closed and it is not possible for the petitioner to submit the claim in TRAN-1. Reliance has been upon the decision in the case of Adfert Technologies (P.) Ltd. v. Union of India **[2019] 111 taxmann.com 27 (Punj. & Har.).**

- Hon'ble High Court are of the view that the petitioner cannot be deprived of the benefit of claiming the credit lying in its account on the stipulated date only on the basis of procedural or technical wrangles that one form TRAN-1 was not filled by the petitioner particularly when the petitioner has reflected the said credit in its return GSTR-3B. It would be apt to note the judgment in Adfert Technologies (P.) Ltd's case [2019] 111 taxmann.com 27 (Punj. & Har.)

- In view of what has been stated above, Hon'ble High Court direct the respondents to permit the petitioner to submit the TRAN-1 either electronically or manually on or before March 15, 2021 and the petitioner shall coordinate with the respondents for the submission of TRAN-1 as directed.

The Competent Authority has been directed to release the trucks of the taxpayer until the investigation is completed

Surya Roadways v. Senior Intelligence Officers [2021] 127 taxmann.com 558 (Gujarat)

Facts of the Case

- The writ applicant is a transporter and is carrying on business in the name of M/s. Surya Roadways. In the case on hand, we are concerned with two trucks of the ownership of the writ applicant, which came to be seized by the officers of the GST in the purported exercise of powers under section 129 of the GST Act, 2017. The seizure of the two trucks of the ownership of the writ applicant is on the basis that in the past these two trucks were used for transporting the goods in contravention of the provisions of the Act and the Rules.

- In this regard, an inquiry has been initiated and the same is pending as on date. It appears that a summons under section 70 of the Act was issued to the writ applicant and according to respondent, the writ applicant has not honoured the summons.

Observation/Judgment

- Hon'ble High Court observe that at the end of the inquiry or investigation, if anything incriminating surfaces which may warrant issuance of MOV-10 to the writ applicant under section 130 of the Act, the authority may do so in accordance with law. However, today, for the purpose of such inquiry or investigation, the two trucks may not be kept in the custody of the department.

- Hon'ble High Court held that the inquiry or investigation shall proceed further in accordance with law. We propose to dispose of this writ application with an order of release of the two trucks subject to certain terms and conditions.

- In such circumstances referred to above, Hon'ble High Court direct the competent authority to release both the trucks on the writ applicant furnishing an undertaking in writing on oath before the concerned authority that till the conclusion of the inquiry or investigation, he shall not transfer the two trucks in favour of any other person or shall not part with the possession of the same or create any encumbrance upon the same. It shall be open for the writ applicant to use the two trucks in his normal course of business.

The Appellate Authority does not have the authority to hear an appeal or to condone the delay.

Sujeet Jaiswal v. Union of India [2021] 127 taxmann.com 559 (Chhattisgarh)

Facts of the Case

- Tax department vide his order dated October 15, 2018 has imposed a penalty invoking the provisions of Section 129(1) (b) of the GST Act, 2017. Against the said order, the petitioner preferred an appeal under section 107 of the aforesaid Act of 2017 on May 21, 2019.

Observation/Judgment

- As per section 107 of CGST Act, 2017 –

  (1) Any person aggrieved by any decision or order passed under this Act or the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act by an adjudicating authority may appeal to such Appellate Authority as may be prescribed within three months from the date on which the said decision or order is communicated to such person.

  (2) The Appellate Authority may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of three months or six months, as the case may be, allow it to be presented within a further period of one month.

- Hon'ble High Court observed from the plain reading of the aforesaid provisions, it clearly reflects that the Appellate Authority has been given the power to condone the delay of only one month i.e. 30 days and not beyond that. Thus, from the plain reading of the provisions it clearly establishes the fact that the provisions of Section 5 of the Limitation Act would not be governing the field in view of the specific period of limitation and the period for condonation of delay being provided.

- The original order was dated October 15, 2018. The appeal had to be filed within three months i.e. by January 15, 2019. If for some reason the appeal would not be filed under any circumstances, it ought to have been filed within a further period of 30 days. Having not done so within the said stipulated 30 days period, any subsequent filing of the appeal beyond the extended 30 days period the Appellate Authority would not have the power to condone the delay

- Hon'ble High Court observed that the issue so far as condonation of delay is concerned beyond the limit permissible under the statutes came up for consideration before the Supreme Court recently in the case of N.V. International v. State of Assam [Civil Appeal No. 9244 of 2019, dated December 6, 2019]. In the said judgment, the Hon'ble Supreme Court though under the provisions of Arbitration Act had considered the aspect whether an authority could condone the delay beyond the permissible period provided under the statutes. That disallowing the contention and dismissing the appeal the Supreme Court observed that once when the period is prescribed, beyond the said period the authority does not have the power to entertain the application for condoning the delay or else it will defeat the statutory purpose.

- Hon’ble High Court further observed that the a similar view has further been reiterated by the Supreme Court in the case of Assistant Commissioner (CT) LTU v. Glaxo Smith Kline Consumer Health Care Ltd. [2020] 116 taxmann.com 417. Wherein again, the Hon'ble Supreme Court taking the same stand that beyond the stipulated period, the Appellate Authority could not have condoned the delay even if certain extraordinary situation is given seeking condonation of delay.

- In view of the authoritative decision rendered by the Hon'ble Supreme Court in the aforesaid two judgments, this Court does not find a strong case made out by the counsel for the petitioner in the instant case calling for an interference to the order passed by the Respondent vide his/her order dated January 9, 2020. As a consequence, the writ petition fails and is accordingly, rejected.

- There Hon’ble High Court also held that Appellate Authority in the given circumstances does not have any further powers to entertain an appeal beyond the period of 30 days after the expiry of the original period of limitation, which in other word means that the Appellate Authority becomes functus officio once when the period of 4 months are over.

GST authorities were to be directed to restore taxpayer's registration on GST portal

Vidyut Majdoor Kalyan Samiti v. State of Uttar Pradesh [2021] 127 taxmann.com 578 (Allahabad)

Facts of the Case

- The taxpayer failed to file monthly returns (GSTR-3B) for more than six months, a show cause notice was uploaded on the GST Portal granting seven days' time to the taxpayer to show cause. During this period of seven days, the taxpayer never visited the portal and, therefore, was not able to reply to the show cause notice. As a consequence vide order dated September 2, 2019, the GST registration of the taxpayer was cancelled.

- The order dated September 2, 2019, has been set aside in appeal by the Additional Commissioner. The appellate order restored petitioner's GST registration with effect from September 2, 2019.

- The taxpayer is aggrieved as this order has not been implemented on the GST Portal and the portal insofar as the petitioner is concerned is inactive. The petitioner is seeking reliefs in this regard.

Observation/Judgment

- Hon'ble High Court observed that there is no provision of restoration of a GST registration, once it has been cancelled is absolutely absurd. In case, no provision for its restoration has been made in the software, the same is not the fault of the petitioner and it is for the department and the respondents to make provisions for the same in the software and on the GST Portal. Merely because such provision has not been made, the petitioner cannot be made to suffer and non-compliance of an appellate order, passed by a competent appellate authority cannot be accepted or permitted on the plea raised in the counter affidavit or during the course of arguments.

- Accordingly, the writ petition is liable to be and is hereby, allowed. The authorities are directed to restore taxpayers GST registration on the GST Portal, forthwith not later than ten days from the date a copy of this order is filed before them.

Sending SCN on wrong email is no service.

Ratan Industries Limited v. State of Uttar Pradesh [2021] 127 taxmann.com 576 (Allahabad)

Facts of the Case

- The present petition has been filed by the petitioner challenging the tax and interest leived by tax officer. The appeal filed by the petitioner has been dismissed on the grounds of limitation.

- The petitioner claims to be carrying on the business of manufacture and sale of the auto parts and is duly registered under the GST Act. The petitioner claims that he is purchasing raw material for manufacturing of the goods and are eligible for input tax credit. The petitioner claims to have submitted the details as are required and the amount of tax was paid after deducting the ITC. The petitioner claims that he came to know on December 15, 2019 that some orders have been passed dated January 24, 2019 by the respondent in purported exercise of powers under Rule 142(5) of the GST Rules.

- The main allegation of the petitioner is that prior to passing of the order of demand, no show cause notice was ever served upon the petitioner and in fact no order passed by the respondent was also ever served upon the petitioner, however, against the demand notice the petitioner preferred an appeal and the said appeal was also dismissed as being beyond the prescribed period of limitation under section 107 of the Act.

Observation/Judgment

- Hon'ble high court observes that show cause notice was sent on the wrong E-mail address. Thereby show cause notice was never served upon the petitioner as well as the reasons for quantification of the demand has also never been served upon the petitioner. In view thereof, it is clear that the statutory provisions as well as the principles of natural justice have been clearly violated. Service of the show cause notice at a wrong E-mail address is neither contemplated under the Act nor can it be deemed to be a proper service under the Act. As no show cause notice has ever been served, the petitioner never had any occasion to file its reply and thereafter not serving a copy of the reasoned order quantifying the demand is clearly erroneous

- Hon'ble High Court held that the perusal of the orders passed and the pleadings exchanged, make it clear that the orders passed are wholly arbitrary and contrary to the manner of passing of the order, as prescribed under the Act. There is no hesitation in holding that the orders passed against the petitioner are completely in violation of principles of natural justice.

Order served on driver of the vehicle, is not included in any mode of service to the taxpayer

Suraj Freight Carrier (P.) Ltd. (1) v. State Of Uttar Pradesh [2021] 127 taxmann.com 560 (Allahabad

Facts of the Case

- The present petition has been filed alleging that on 30th August, 2018, the respondent passed a detention order under section 129(1) of the U.P. GST Act. It is stated that on February 4, 2019, respondents had issued a demand notice to the taxpayer. The taxpayer claims that it is on this date that the taxpayer became aware of the said demand and met the respondent requesting him to withdraw the demand notice as no demand exists and the goods have been released in pursuance to the orders passed by the High Court.

- The taxpayer thereafter was informed that an ex-parte order MOV-09 has been passed on September 14, 2018, whereby the demand has been quantified against the taxpayer. As the said order was served upon the driver of the vehicle and not on the taxpayer, the taxpayer was not having any knowledge of the said order.

- The taxpayer claims to have preferred an appeal against the said order dated September 14, 2018 on May 3. 2019. In the said appeal, the order impugned has been passed rejecting the appeal on account of delay alone by recording that it cannot be presumed that the service on the driver was not known to the appellant

Observation/Judgment

- Hon'ble High Court observed that the present writ petition has been filed challenging the said order dated September 23, 2019, as the Tribunal envisaged under the Act has not been constituted and the taxpayer claims that in the absence of such constitution, the taxpayer cannot be left remedy less.

- In view of the above, Hon'ble High Court held that the admitted fact is that the order was served upon the driver of the vehicle, which is not included in any mode of service as prescribed under section 169 of the Act. Consequently, the order dated September 23, 2019 is held to be erroneous and is set aside accordingly. It is directed that the Appellate Authority shall hear the appeal of the taxpayer in accordance with law and on merits, as expeditiously as possible

Applicant is liable to pay GST on delayed payment of charges which are overdue from client towards trading of securities.

SPFL Securities Ltd. [2021] 127 taxmann.com 571 (AAR- UTTAR PRADESH)

Facts of the Case

- The applicant is engaged primarily in the business of providing services of stock broking i.e. purchasing and selling of shares on behalf of the clients on exchange platform by virtue of being a recognized BSE/NSE appointed Stock Broker

Issue Involved

- Taxability on delayed payment charges on reimbursement of amount by client to Applicant, where client failed to pay amount paid to Stock Exchanges for purchase of securities with T+1 (Trading day plus one day) under SEBI regulation .

Observation/Ruling

- AAR observed that delayed payment charges squarely get covered under GST for the purpose of taxation. The applicant is regularly providing services of 'trading of securities on behalf of customers' which is a supply of service on which the applicant is admittedly paying GST. Delayed payment charges are also linked to the above services of 'Trading of securities on behalf of customers' and GST on the same shall be payable in view of section 15(2)(d) of CGST Act, 2017 and the UPGST Act, 2017, which reads as follows:-

  "The Value of supply of goods and services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services or both where the supplier and the recipient of the supply are not related and the price sole consideration for the supply.

  The Value of supply shall include—

  (a) Any taxes, duties, cesses, fees and charges levied under any law.....Act, if charged separately by the supplier;

  (b) Any amount that the supplier is liable to pay.....goods or services or both;

  (c) Incidental expenses, including commission.....supply of services;

  (d) Interest or late fee or penalty for delayed payment of any consideration for any supply;

  (e) Subsidies directly linked.....by the Central Government and State Government."

- AAR held that the Applicant is liable to pay GST on the delayed payment of charges which are overdue from the client towards trading of securities and reimbursed to them.

Best judgment assessment is annulled where principles of natural justice are not followed

Vidyarthi Construction (P.) Ltd. v. State of Bihar [2021] 127 taxmann.com 483 (Patna)

Facts of the Case

- Petitioner has prayed quashing the ex-parte assessment orders passed by the tax department on failure to furnish monthly returns under section 39 of GST Act.
- The tax liability of the petitioner has been determined on the basis of materials available on record in accordance with best judgment assessment.

Observation/Judgment

- Hon'ble High Court Observed that the impugned orders passed by the Respondent in Form ASMT-13 need to be quashed and set aside, for the same to have been passed without following the principles of natural justice. In terms of the impugned order, financial liability stands fastened. Thus, it entails civil consequences, seriously prejudicing the petitioner inasmuch as, without affording any adequate opportunity of hearing or assigning any reason.

Refund claim of cesses lying unutilized on June 30, 2017.

Schlumberger Asia Services Ltd. v. Commissioner of CE & ST [2021] 127 taxmann.com 509 (Chandigarh - CESTAT)

Facts of the Case

- The appellant is providing various services. The cenvat credit of various duties and services paid by them and Education Cess, Secondary & Higher Education Cess, Krishi Kalyan Cess were lying unutilized in their cenvet credit account and the appellant could not utilize the same till June 30, 2017. On July 1, 2017, the GST Regime came in force and the credit lying in the account was allowed to be transferred under GST Regime. The appellant took the cenvat credit lying unutilized in their cenvat credit account of services, goods, Education Cess, Secondary & Higher Education Cess and Krishi Kalyan Cess to their GST account.

- Later on, an amendment came on August 30, 2018 in Section 140 of the CGST Act, 2017 that the taxpayer cannot carry forward the credit lying in their cenvat credit account of Education Cess, Secondary & Higher Education Cess and Krishi Kalyan Cess. Consequent the amendment, the appellant immediately reversed the amount of cenvet credit pertaining to Education Cess, Secondary & Higher Education Cess and Krishi Kalyan Cess and filed the refund claim of the amount lying unutilized as on July 1, 2017 in their cenvat credit account of Education Cess, Secondary & Higher Education Cess and Krishi Kalyan Cess.

- A show cause notice was issued to the appellant that in terms of Section 140 of the CGST Act, 2017 the appellant is not entitled to carry forward the cenvat credit in GST Regime; therefore, the refund claim filed on August 30, 2019 is barred by limitation, therefore, their refund claim has lapsed of credit as Education Cess including Secondary & Higher Education Cess has been abolished from June 1, 2015.The matter was adjudicated and refund claim was rejected. Hence, the appellant is in appeal.

Observation/Judgment

- CESTAT observed that the in the case of M/s Bharat Heavy Electricals Ltd [2020] 120 taxmann.com 363 (New Delhi - CESTAT) this Tribunal laid down in law That Education Cess, Secondary & Higher Education Cess and Krishi Kalyan Cess cannot be transferred to GST account and as they were lying unutilized in their cenvat credit account on June 30, 2017, the assesee is entitled to claim the refund thereof. In other words, if the appellant could have filed the refund claim before June 30, 2017 of Education Cess, Secondary & Higher Education Cess and Krishi Kalyan Cess, the same is admissible to the appellant.

- In view of the above observations, CESTAT held that the appellant is entitled to file the refund claim; accordingly, the impugned order is set aside. The refund claim is allowed which is subject to verification of the records.

No writ where matter is at the stage of show cause notice.

Genus Power Infrastructure Ltd. v. Central Goods and Service Tax [2021] 127 taxmann.com 292 (Rajasthan)

Facts of the Case

- Petitioner filed writ petition for quashing of show cause notice issued by department as same had been issued without providing audit report to petitioner.
- Petitioner further submitted that there is nothing left with the authority to decide in the matter finally, as a bare reading of the show cause notice clearly shows that the Adjudicating Authority has already made up its mind and pre-determined the demand.
- Tax deparment submitted that the matter is at the stage of show cause notice and the petitioner has a right to file reply and the opportunity of personal hearing is also available to the petitioner and thereafter only the matter is to be adjudicated by the Adjudicating Authority.
- Tax deparment further submitted that if the petitioner feels aggrieved by the final order passed by the Adjudicating Authority, the petitioner is having a statutory remedy of filing appeal under section 85 of the Finance Act, 1994 before the Appellate Authority and further against the order of Appellate Authority, the petitioner is having a right to file second appeal as provided under section 86 of the Act before the Appellate Tribunal.

Observation/Judgment

- After considering respondent contention, Hon'ble High Court dismissed writ petition as the matter is at the stage of show cause notice and opportunity of filing reply and personal hearing is still available with the petitioner; secondly the petitioner, if aggrieved by the order of the Adjudicating Authority, has a statutory remedy of filing appeal before the Appellate Authority as provided under section 85 of the Act; thirdly against the order of the Appellate Authority, the petitioner has a right to file second appeal before the Appellate Tribunal as provided under Section 86 of the Act.

Placement of medical instruments without consideration in hospitals is a Supply of Service

Abbott Healthcare (P.) Ltd. [2021] 127 taxmann.com 727 (AAR - KERALA)

Facts of the Case

- The applicant is engaged in the sale of pharmaceutical products, diagnostic kits etc. As part of its business model it places its own diagnostics instruments at the premises of unrelated hospitals, labs etc for their use for a specified period without any consideration. To execute placement of instruments, they enter into the **Reagent Supply & Instrument use agreement** with various hospitals, labs etc.

- Supply of products (reagents, calibrators, disposables etc) as provided in the Agreement. Hospitals/ labs are required to purchase specified quantities of specified product at the prices specified in the Agreement. The products are supplied by them to their distributors on payment of applicable GST. The distributor in turn supplies the same to the hospitals/ labs. The distributors also duly discharge the applicable GST on the price charged for the supply of the said products
- The ownership in the instruments continues to be with them. Instruments are provided to the hospitals for a specified period and are returnable at the end of the specified period or on earlier termination of the Agreement.
- **AAR and AAAR held that placement of medical instruments by the applicant by way of 'Reagents Supply and Instrument Use Agreement' was covered under 'composite supply' and liable to GST.**
- Applicant filed a writ petition before Kerala Hon'ble High Court and quashed Both Rulings and remitted the matter back to AAR for a fresh decision based on observations of the Kerala Hon'ble High Court Judgement as the same was not on the issues enquired.

Issue Involved

- Whether the placement of specified medical instruments to unrelated customers like hospitals, labs, etc., for their use without any consideration for a specific period constitute supply?
- Whether such movement of goods constitutes otherwise than by way of supply under GST?

Observation/Ruling

- It was examined that transaction undertaken by the applicant satisfies the 3 essential ingredients of 'supply', i.e. the activity/transaction (i) involves goods or services, (ii) is in the course or furtherance of business and (iii) is made for a consideration.

- As per the agreement, finds that agreement of the customer to purchase the reagents, calibrators and disposables for use in the instrument exclusively from the applicant for a minimum value every month with an obligation to pay the deficit amount in case the purchase in a month falls short of the minimum agreed value constitutes a valid consideration u/s 2(31)

- Rejecting applicant's contention that consideration in CGST Act, must be in monetary form as it is evident from section 2(31), expounds that "as per clause (b) of the definition every act or abstinence that is a motivation to induce a person is a consideration and there is no requirement that it must be in monetary form.

- Kerala AAR rules that the placement of specified medical instruments by the Applicant to unrelated customers like hospitals, labs etc., for their use without transfer of ownership and consideration, against an agreement containing minimum purchase obligation to purchase products (like reagents, calibrators, disposables), for specified period, **constitutes a 'supply of services' and not movement of goods otherwise than by way of supply.**

Commissioner rejected the appeal filed by the appellant for refund application.

Login Radius LLP v. Assistant Commissioner [2021] 127 taxmann.com 617 (Commissioner Appeals - GST-Rajasthan)

Facts of the Case

- Applicant is engaged in the export of service i.e Software Consultancy Service. They had exported service on payment of IGST and they had discharged the taxability of IGST on export of service.
- Appellant filed refund application in respect refund of IGST paid on export of service. On examination, it was found that the refund claims were liable to be rejected on the various reasons; therefore Show Cause Notices was issued. After considering the submissions made by the appellant, the adjudicating authority vide the impugned order has rejected the refund claim on the ground that the appellant has not submitted the Foreign Inward Remittance Certificates for each transaction, but only submitted e-mail transaction with the bank issued by Standard Chartered Bank Jaipur.
- Being aggrieved with the impugned order, the appellant filed this appeal before Commissioner Appeals.

Observation/Judgment

- Commissioner observed the appellant had exported the service on payment of IGST and claimed the refund of IGST paid on export of services. Rule 89(2) (c) of CGST Rules 2017 stipulates that the refund application shall be accompanied by the following documentary evidences;

  1) a statement containing the number and date of invoices and
  2) the relevant Bank Realisation Certificates
  3) or Foreign Inward Remittance Certificates,

  as the case may be, in a case where the refund is on account of the export of services.

- Commissioner also observed that CBEC vide para no.12 of Circular no. 37/11/2018-GST dated March 15, 18 has also clarified as under

  BRC /FIRC for export of goods: it is clarified that the realization of convertible foreign exchange is one of the conditions for export of services. In case of export of goods, realization of consideration is not a pre-condition. In rule 89 (2) of the CGST Rules, a statement containing the number and date of invoices and the relevant Bank Realisation certificates (BRC) or foreign Inward Remittance Certificates (FIRC) is required in case of export of services whereas, in case of export of goods, a statement containing the number and date of shipping bills or bills of export and the number and the date of the relevant export invoices is required to be submitted along with the claim for refund. It is therefore clarified that insistence on proof of realization of export proceeds for processing of refund claims related to export of goods has not been envisaged in the law and should not be insisted upon.

- From the clarification issued by the CBEC, it is ample clear that a statement containing the number and date of invoices and the relevant Bank Realization Certificates (BRC) or Foreign Inward Remittance Certificates (FIRC) is required in case of export of services. Though the appellant vide their submission dated January 22, 19 has submitted the statement containing the number and date of invoices but they have not submitted the Bank Realization Certificates (BRC) or Foreign Inward Remittance Certificates (FIRC) in this regards.

- The appellant submitted to this office unsigned three inward payment customer advice. On perusal of these advices, Commissioner found that no references in respect of invoice no. are available. Besides it, in all these advices, in the Column of Remittance Amount, USD 100.00 only are mentioned whereas as per statement of invoice submitted by the appellant, invoice amount in USD 23250 is in one invoice and invoice amount USD 31850 is in the another invoice. Therefore, these inward payment customer advice issued by Standard Chartered cannot be accepted as Bank Realisation Certificates (BRC) or Foreign Inward Remittance Certificates (FIRC).

- In view of the above, Commissioner rejected the appeal filed by the appellant.

Conditional Bail granted to the petitioner

Pawan Goel v. Directorate General of Intelligence [2021] 127 taxmann.com 772 (Delhi)

Facts of the Case

- Petitioner filed an application challenging the order passed by the Ld. Patiala House Court, New Delhi by virtue of which anticipatory bail application of the petitioners had been rejected.

- Petitioners submitted that the investigation against the company in which the applicants are directors by GST department started in June 2018 and since then the investigation is still continuing. It is further submitted that the investigation in the present case pertains to availment of wrongful ITC to the tune of Rs. 22.42 Crores on the strength of certain invoices received from various companies which were controlled by brothers Sanjay Dhingra and Gulshan Dhingra.

- Petitioners submitted that they are not the creators of the said alleged documents but are bonafide recipient/purchaser of the said goods as all the payments against the said purchases were made through bank transfers which are duly reflected in the books of accounts. It is further submitted that there is sufficient evidence like Dharamkata slips, stocks in hand of over 7 crores on the business premises of the petitioners which prima facie establishes that during the search of GST department on 28-6-2018 no discrepancy in the stock was found by the officers of GST.

- The petitioners have co-operated in the investigation and even deposited Rs. 2.5 Crore with department but despite that the department is harassing the petitioners with the sole objective of arresting them but no purpose would be served by keeping the petitioners in custody.

- It is further submitted that other co-accused persons who are the creators of the alleged documents namely Sanjay Dhingra and Gulshan Dhingra are on regular bail and now the investigation has been completed and show cause notice have been issued to them, wherein the amount alleged to be wrongly availed by company is already sought to be demanded from the said people. It is further submitted that in the case of petitioners no show cause notice or final assessment has been done which could conclusively determine the liability of the company in which the applicants/petitioners are directors.

- It is further submitted by the petitioners that the company is a 40 years old company which is carrying on its trade business of non-ferrous metals and there has not been any discrepancy in any of their stocks.

- The applicants/petitioners are not habitual offenders and have deep roots in the society and they do not have any other case against them. It is further submitted that it will be unfair to arrest the applicants/ petitioners after three years when show cause notice has already been issued to the main person. It is further submitted that the petitioners were summoned by the investigating officers on several occasions and all the said summonses were duly attended by the petitioners and the petitioners have fully co-operated in the investigation.

Observation/Judgment

- Hon'ble High Court observed that, the Punjab and Haryana High Court, in the case of Akhil Krishan]Maggu ,has given various factors and parameters which should be taken into consideration while deciding the anticipatory bail:

(I) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

(ii) The antecedents of the applicant including the fact as to whether the accused has previously]undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) The possibility of the applicant to flee from justice;

(iv) The possibility of the accused's likelihood to repeat similar or the other offences

(v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

(vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.

(vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(x.) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.

(x.) From the above fact, Hon'ble High Court observed that the investigation relates to the period of 2018 and prior to it, the petitioners have joined the investigation and their statements have already been recorded; the premises of the petitioners have also been searched; the employees of the petitioners have also joined the investigation; the main accused was arrested and granted bail; the petitioners have further joined the investigation at least 4 times after the filing of this bail application; the bank accounts of the petitioners have already been freezed; the petitioners have already deposited Rs. 2.5 crores with the department; there are no allegations of any threat to any of the witnesses or tampering with the evidence and the documents are in the custody of the department; it is not the case of the department that the petitioners are flight risk or there are any chances of their absconding; it is not the case of the department that the petitioners have not co-operated during the period they have joined the investigation on the receipt of the summonses.

Appellant is required to provide compelling documentary evidence for movement of goods even if E-way bill was generated.

Appellant is required to provide compelling documentary evidence for movement of goods even if E-way bill was generated.

Facts of the Case

- The appellant is engaged in carrying on the business of selling and purchasing of Clarified Butter (Ghee), Butter and other milk products under the name of M/s Om Trading Company Gwalior.
- Notice was issued to the appellant in which it was stated that the appellant is carrying on the business only on papers and the e-way bills are downloaded but the concerned vehicles are not transporting any goods in actual.
- The notice was purportedly issued under Rule 21 (b) of the Central Goods and Services Tax Rules 2017, which mandates that the registration granted to the person is liable to be cancelled.

Observation/Judgment

- The appellant contended that the consignment was being transported by the transporter namely M.R. Road Lines through which the material was physically transported to Gwalior through Vehicle No. UP83T0223 and HR63A3341 and the route taken was from Agra to Kheragarh to Rajakheda, then Dholpur to Morena and then Gwalior and in between there was no toll plaza located. all the requisite documents i.e. e-way bill and invoices were available.
- The appellant in support of his contention has placed reliance on the judgment of High Court of Kerala in the case of Kannangayathu Metals v. Asst. State Tax Officer and others reported in (2020) 38 GSTJ 482 (Ker) **[2020] 113 taxmann.com 176 (Kerala)** to contend that as per Section 129 of GST Act, there is no mandate for detaining goods merely because driver took an alternate route to reach the destination, if the goods are covered by valid E-way Bill.
- There are number of toll plaza between Morena to Gwalior and if the goods had been physically transferred, the appellant ought to have possessed the toll plaza receipts. It is also settled practice that the transporters used to choose shortest route available to transport the goods in order to save time and money. In the present case, the route used to transport the goods is not only longer route but also takes more time to reach the destination.
- Hon'ble High Court came to the conclusion that a detailed enquiry was conducted by the Commercial Department Range Agra and that the fact regarding issuance of invoices/e-way bills without any transportation of physical goods came into picture, it was actually found that the goods were not physically transported
- As such finding no error in the judgment rendered by the appellate authority, writ petition wasdismissed

Horse Race clubs not liable to GST on the entire bet amount, but only commission.

Bangalore Turf Club Ltd vs. State of Karnataka [2021] 127 taxmann.com 619 (Karnataka)

Facts of the Case

- The petitioners runs the business of a race club, which includes lay-out and preparing any land for the running of horse races, steeplechases of races of any other kind and for any kind of athletic sports. The petitioners particularly conduct horse racing and facilitate betting by the punters. The petitioners by themselves do not bet, but only facilitate punters in their betting activity. It is the punter who places the bet either with a totalisator run by the petitioners or a book-maker licensed by the petitioners.

If a horse backed by the punter wins, the winning punter is required to surrender the receipt and receive the winning amount. It means, a losing punter's money is used to pay the price money of the winning punter. The price money is distributed by the petitioners to the winning punter and out of the amount, Commission is set apart to be taken by the petitioners. This is the broad modus of functioning of the petitioners.

"Totalisator" is a machine that records bets in this system and works out odds, pays out winnings, etc

Petitioners Contention

- Up to June 30, 2017 the petitioners claim to have discharged payment of service tax on the commission so retained and the betting tax under the provisions of the Mysore Betting Tax Act, 1932. On and from 1st July 2017, the Mysore Betting Tax and the Service Tax provisions stood repealed and the Goods and Services Tax laws were brought into force.

(I) Rule 31A (3) violates Article 246A read with Article 366 (12A) and exceeds the constitutional mandate given to the Parliament and Legislature to levy tax only on the supply of goods and services on the principle that if there is no supply there is no tax.

(ii) Rule 31A (3) in effect imposes tax on the petitioners on the entire bet value without the petitioners supplying any bet, thus violating the constitutional mandate of Article 246A.

(ii) The impugned Rule 31A(3) is ultra vires Section 7 of the CGST Act since the supply of bets is not in the course or furtherance of petitioners' business and is made liable to pay tax. The impugned Rule exceeds the mandate under Section 7 by levying GST on the amount that is not received by the petitioners as consideration

High Court

- The entire case revolves around the fact whether Rule 31A(3) runs counter to the provisions of the Act with particular reference to sub-section (2) of Section 7. Sub-section (2) of Section 7 declares actionable claims to be neither goods nor services except lottery, betting and gambling. Rule 31A(3) which came into effect from January 23, 2018 to depict value of supply in case of lottery, betting, gambling and horse racing. Sub- rule (3) declare the value of supply of actionable claim in the form of chance to win in betting, gambling or horse racing in a race club shall be at 100% face value of the bet or the amount paid into the totalisator.

- Therefore, the act which deals with supply of goods, consideration, business would not apply to the function of the totalisator. Making the entire bet amount that is received by the totalisator liable for payment of GST would take away the principle that a tax can be only on the basis of consideration even under the CGST. The consideration that the petitioners receive is by way of commission for planting a totalisator.

- This can be nothing different from that of a stock broker or a travel agent - both of whom are liable to pay GST only on the income - commission that they earn and not on all the monies that pass through them. Therefore, Rule 31A(3) insofar as it declares that the value of actionable claim in the form of chance to win in a horse race of a race club to be 100% of the face value of the bet is beyond the scope of the Act.

- Hon'ble High Court declare Rule 31A(3) of the Central Goods and Services Tax Rules, 2017 as amended in terms of notification dated January 23, 2018 as ultra vires the provisions of the Central Goods and Services Tax Act, 2017 Act and resultantly, quash the same only insofar as it concerns the petitioners.

AMRG TAKE

The judgment clarified that the clubs providing the similar services in the country are liable for payment of GST on the commission received for the services rendered through the totalisator and not on the total amount collected in the totalisator. This judgment has brought major tax reliefs to the clubs.

Delhi Hon'ble High Court calls upon GST-Council to address divergent rates on job-work of bottling alcoholic beverages.

Confederation of Indian Alcoholic Beverage Companies & Anr. vs. UOI & Ors. [2021] 127 taxmann.com 615 (Delhi)

Facts of the Case

- Petitioner approached the Court and stressed on the minutes of he meetings of the Goods and Services Tax Council held on March 14, 2020 (39th Meeting) and June 12, 2020 (40th Meeting) to state that the sum and substance of these minutes, which concerns the issue at hand, is that, there is no uniformity in the stand taken by the States. These views are variegated. At one end of the spectrum, the view is that there should be a total exemption from imposition of tax while at the other end the view expressed is that tax should be imposed at the highest rate.

- Petitioner contended that some of the states have taken the middle path, which is that the tax according to them should be pegged @ 5% by treating the aforementioned activity as one involving bottling of "food and food products".

Petitioner's contentions

- Petitioner pointed out that the subject issue was pending consideration before the GST Council, even then the Directorate General of Goods & Services Tax Intelligence, had commenced its enquiries by the issuance of summons. Petitioner also contended that some of the summons, unfairly labelled the position taken by it as one involving the "evasion of tax" and despite the pandemic raging in the country, the concerned officers were insisting on personal appearance of the noticee.

High Court

- Noting that the matter in issue is pending consideration before the GST Council and it is also not disputed that the GST Council has indicated that it would take a decision in the matter, Hon'ble High Court issued Notice in the writ.

- Hon'ble High Court clarified that in case the concerned officers wish to continue with the proceedings, they shall do so only via virtual mode, and will not insist upon the personal appearance of the notice, having regard to the fact that, the coronavirus has not abated, as yet, and therefore, the noticee(s) cannot be exposed to the danger connected with it.

- Hon'ble High Court refrained Revenue from taking any coercive measures against the noticee(s) till the next date of hearing. Considering that the matter involved Revenue, **Hon'ble High Court requested the GST Council to take up the matter, at the earliest,** and to reach a decision, one way or the other, on the issue at hand.

AMRG TAKE

With divergent views in the advance ruling regarding taxation of brand fee, bottling fee, and the transfer of super profit, the entire sector faces litigation threats. International brands may worry that these tax litigation forming core of their business activities, would have an adverse impact on overall brand image of the company.

A split verdict by High court on the constitutional validity of Section 13(8)(b) of the IGST Act pertaining to 'Intermediary Service'.

Dharmendra M. Jani vs UOI & Ors [2021] 127 taxmann.com 730 (Bombay)

Facts of the Case

- Petitioner is engaged in providing marketing and promotion services to customers located outside India. These overseas customers are engaged in the manufacture and/or sale of goods. Petitioner solicits purchase orders for its foreign customers.
- The Indian purchaser i.e., the importer directly imports and make payment to the overseas customer of the petitioner. Upon receipt of such payment, the overseas customer pays commission to the petitioner against the invoice issued by the petitioner. **The entire payment is received by the petitioner in India in convertible foreign exchange.**
- Essentially the transaction is one of export of service from India earning valuable convertible foreign exchange for the country. As per section 13(8)(b), the place of supply of the intermediary services shall be the location of the supplier.
- Thus, by way of a deeming fiction, in the case of intermediary services where the location of the recipient is outside India, the place of supply shall be the location of the supplier of services which is in India, thus bringing into the tax net what is basically export of services.
- Petitioner files this writ.

Grounds of Writ

- Levy of tax on export of service is ultra vires Article 269A of the Constitution of India.
- GST is a destination-based tax on consumption. Therefore, services provided by a service provider in India to a service receiver located outside India which is treated as export of service cannot be taxed; for taxing a service it is not the place of performance but the place of consumption which is relevant. Once the services are consumed outside India, Parliament has no jurisdiction to levy tax on such services consumed outside India.

Legal extract of section 13(8)(b) of the IGST Act

13. Place of supply of services where location of supplier or location of recipient is outside India

(8) The place of supply of the following services shall be the location of the supplier of services, namely:—

(a) ……;

(b) intermediary services;

(c) …….

Revenue's Contention

- Till 2014, **for intermediary of services**, place of supply was the **location of service provider** and for **intermediary of goods** place of supply was the **location of the service recipient**

- With effect from October 01, 2014 place of supply for all intermediaries (goods as well as services) was made the location of the intermediary. This was because many a time the same person provided agency services for selling of goods and subsequently selling of annual maintenance contract (AMC). Therefore, making a distinction between intermediaries of goods and services caused hardship.With effect from October 01, 2014 place of supply for all intermediaries (goods as well as services) was made the location of the intermediary. This was because many a time the same person provided agency services for selling of goods and subsequently selling of annual maintenance contract (AMC). Therefore, making a distinction between intermediaries of goods and services caused hardship.

- It is further stated that the issue of the place of supply of intermediaries was discussed during the stage of drafting of GST laws and the above reasoning was adopted by the GST Council. **Taxing such services provided by Indian service providers to foreign companies incentivises the foreign company to start manufacturing in India to offset the liability against the tax on goods cleared domestically in India. Therefore, taxing such services in India is in consonance with the Make in India program.**

High Court

- It is evident that section 13(8)(b) of the IGST Act not only falls foul of the overall scheme of the CGST Act and the IGST Act but also offends Articles 245, 246A, 269A and 286(1) (b) of the Constitution. **The extra-territorial effect given by way of section 13(8)(b) of the IGST Act has no real connection or nexus with the taxing regime in India introduced by the GST system;** rather it runs **completely counter to the very fundamental principle on which GST is based i.e., it is a destination-based consumption** tax as against the principle of origin-based taxation.

- The other submissions made by Mr. Singh that levy of IGST on the supply of services by intermediaries to foreign customers would strengthen the **Make in India** program by **encouraging foreign investment can be no answer to challenge to the constitutionality of a parliamentary statute.** Besides such a statement has been made dehors any supporting statistics and analysis. Therefore, the same cannot be of any assistance to the respondents

- Thus, having regard to the discussions made above and upon thorough consideration, we have no hesitation in holding that **section 13(8)(b) of the Integrated Goods and Services Tax Act, 2017 is ultra vires the said Act besides being unconstitutional.**

- The matter is still to be decided as there was a split verdict by the divisional bench.

Can't presume evasion merely based on e-way bill expiry.

Satyam Shivam Papers Pvt. Ltd. vs. Asst. Commissioner ST & Ors. [2021] 127 taxmann.com 646 (TELANGANA)

Facts of the Case

- Petitioner is the sole distributor of M/s. International Papers Limited, Andhra Pradesh & submits monthly GST returns online and also pays GST payable under the CGST and SGST Act, 2017.
- Petitioner had dispatched goods (paper weighing 4366 kgs) on the auto trolley bearing on January 04, 2020 and the driver of the auto trolley had in his possession tax invoice dt. January 04, 2020 as well as e-way bill dt. January 04, 2020, and that the distance to be traveled by the auto trolley was only 36 kms.
- Petitioner started for delivery January 04, 2020 to the consignee, but on its way there was a political rally opposing CAA and NRC by political parties, the roads were blocked and the traffic could not move. The driver of the said auto trolley waited till 08:30 p.m. on the road; by that time he realized that the shop of the buyer would be closed, the driver of auto trolley took the goods to his residence with a desire to deliver the goods on the next day. Following day January 5, 2020 being a Sunday, the attempt was made by the driver to deliver them to the buyer on January 6, 2020 when it was detained at 12.35 pm by issuing detention notice dt.January 06, 2020

04:33 p.m. -January 4, 2020 (Saturday)	Auto trolley started for delivery of the paper (distance being 36 kms only)
08:30 p.m. -January 4, 2020 (Saturday)	Petitioner waited till 08:30 pm at traffic jam. Shop of the buyer could be closed till 08:30 pm. Driver kept the good at his residence for night.
January 5, 2020 (Sunday)	Delivery was not attempted being a Sunday
12:35 p.m. - January 6, 2020 (Monday)	Goods detained by Deputy State Tax Officer.
Janurary 7, 2020	Petitioner made representation & sought for release of the detained goods by explaining reasons.
Janurary 8, 2020	Enclosing copy of the Rule 138 of the CGST Rules in which the validity period of the e-way bill for more than 20 kms can be extended for one more additional day and also enclosed copy of the decision rendered by the Allahabad High Court n Writ Ta No. 1471 of 2018
January 20, 2020	Petitioner waited for release of goods till 19.01.2020, but goods not released, he made payment fo Rs. 69000 (Tax & Penalty)
January 20, 2020	Deputy State Tax Officer passed order in Form GST MOV-09 ignoring the representation submitted by petitioner.

Facts of the Case

- The taxpayer had dispatched goods in the auto trolley and the driver was in possession of an invoice, as well as a valid e-way bill. Representation was given by the taxpayer explaining about obstruction to the movement of the auto trolley on account of a rally conducted in the city of Hyderabad preventing the vehicle from reaching its destination on that day. Contrary to representations, the order of demand of tax and penalty in From GST MOV-07 was signed by the Senior Assistant attached to the proper officer by wrongly stating therein that taxpayer had no objection to pay proposed tax and penalty.

- Form GST- MOV-07 (notice under Section 129(3) of the CGST Act) to taxpayer mentions on the first page, the name and description of Deputy Commissioner, SGST the as the proper officer who detained the vehicle, but on the last page, thereof the rubber stamp of the Assistant Commissioner Tax Officer is mentioned.

- It was the duty of the proper officer to consider the explanation offered by the taxpayer as to why the goods could not have been delivered during the validity of the e-way bill, and instead, he is harping on the fact that the e-way bill is not extended even four (04) hours before the expiry or four (04) hours after the expiry, which is untenable.

- The Proper officer merely stated in the counter affidavit that there is clear evasion of tax and so he did not consider the said explanations.

- This is plainly arbitrary and illegal and violates Article 14 of the Constitution of India because there is no denial by the proper officer of the traffic blockage preventing the movement of auto trolleys for otherwise the goods would have been delivered on that day itself.

- There was no material before the proper officer to come to the conclusion that there was evasion of tax by the taxpayer merely on account of lapse of time mentioned in the e-way bill because even the 2nd respondent did not say that there was any evidence of an attempt to sell the goods to somebody else.

- On account of the non-extension of the validity of the e-way bill by the taxpayer or the auto trolley driver, no presumption can be drawn that there was an intention to evade tax. There has been a blatant abuse of power by the proper officer in collecting from the taxpayer tax and penalty both under the CGST and SGST and compelling the taxpayer to pay Rs. 69,000

- Hon'ble High Court thus set aside Form GST MOV-09 and deprecated the proper officer's conduct is not even adverting to the response given by the taxpayer to the Form GST MOV-07 in Form GST MOV-09, and his deliberate intention to treat the validity of the expiry on the e-way bill as amounting to evasion of tax without any evidence of such evasion of tax by the taxpayer.

- Hon'ble High Court directed to **refund the said amount collected from the taxpayer within 4 weeks, along with interest. Hon'ble High Court also imposed costs of Rs.10,000 on the proper officer.**

- Thereby, Hon'ble High Court allowed the writ petition

AMRG TAKE

There has been an evident abuse of power by the proper officer by mere possession of the goods in this case, the court shall lay down a codified procedure which needs to be followed by the proper officer considering the principle of natural justice. There was no deliberate intention to treat the validity of expiry on the e-way bill as amounting to evasion of tax without any evidence of such evasion of tax by the petitioner.

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

Shri Sentu Dey vs. The State of Tripura [2021] 127 taxmann.com 628 (TRIPURA)

Facts of the Case

- 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.
- The Magistrate passed the impugned order that after having being heard the complainant and after having perused the complainant petition, the Court was of the opinion that before taking cognizance, the matter be investigated by police. By the said order thus the Magistrate sent the case for investigation after registering the complaint as an FIR and called for a report.

- Petitioner raised that the offence alleged against the petitioner is one punishable under Section 132 of the SGST Act, which is the special statute. The general provisions of IPC in such a case cannot be invoked.

Observation/Judgement

- 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 Section 132 of CGST Act, providing punishment for certain offences related to the Goods and Service Tax related omissions and at the same time may also have an element of an offence under IPC.
- The ingredients of Section 405 of IPC which defines 'criminal breach of trust', Sections 406 and 409 of IPC deal with offences of criminal breach of trust.
- Section 405 of IPC defines the offence of criminal breach of trust by providing that " whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits criminal breach of trust.
- Since in the said case the essentials of Section 405 are satisfied, the action can as well amount to offences punishable under Sections 406 and 409 of IPC.
- However, Hon'ble court also gave a word of caution. The tax administration of the State should not invoke IPC provisions without application of mind in every case.

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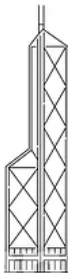

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