GST CASE ABRIDGEMENT

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AMRG & ASSOCIATES
CHARTERED ACCOUNTANTS

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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.

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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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CONTENT

Section 7 of CGST Act -Scope of Supply

Provision of a voucher by an employer to its employees in exchange of them giving up part of their cash remuneration constitutes a supply of services.

AstraZeneca plc is a British-Swedish multinational pharmaceutical and biotechnology company which carries on the business of prescription medicines. Company offers its employees, a remuneration package consisting of a fixed annual remuneration, known as the 'Advantage Fund' (hereinafter referred to as 'the Fund'), which consists of an amount in cash and appropriate benefits that are chosen beforehand by the employees. Each benefit chosen by an employee gives rise to a specific deduction from that employee's Fund. Among those benefits, Astra Zeneca offers its employees retail vouchers to be used in certain shops.

Astra Zeneca completed its VAT returns on the basis that it was not required to charge output VAT on the provision of the vouchers to its employees and that it was not entitled to deduct as input tax the VAT which it had paid in purchasing those vouchers.

However, Astra Zeneca subsequently claimed that, as the cost of acquiring those vouchers was a business overhead, it ought to be entitled to deduct the VAT resulting from that acquisition and not to charge output VAT on the provision of the vouchers issued to its employees, on the ground that they were not provided for consideration.

Consequently, Astra Zeneca made protective claims to the Commissioners for reimbursement of the input VAT which it had incurred in respect of the acquisition of the retail vouchers. However, Commissioners refused to grant Astra Zeneca's application for reimbursement and raised protective tax assessments for the output VAT owed, if the retail vouchers are supplied for consideration by Astra Zeneca to its employees.

Thereafter Astra Zeneca filed this appeal before UKV - Duties Tribunals.

Having regard to the wide scope of VAT, Tribunal held that a company such as Astra Zeneca, in so far as it provides retail vouchers to its employees in exchange for them giving up part of their cash remuneration, carries out an economic activity within the meaning of the Sixth Directive.

Tribunal observed that those vouchers are not a 'supply of goods' within the meaning of Article 5(1) of the Sixth Directive. But would be treated as 'supply of services' within the meaning of Article 6(1) of that directive, as, under Article 6(1), any transaction which does not constitute a supply of goods within the meaning of Article 5 is regarded as a supply of services.

Tribunal further observed that instead of receiving all their remuneration in cash, the Astra Zeneca employees who ave chosen to receive such vouchers must give up part of that remuneration in exchange for those vouchers, that transaction resulting in a specific deduction from their Fund.

Tribunal also observed that when an employee wishes to use such vouchers, he simply has to hand over the vouchers, which include VAT, to the retailer or the provider of the services concerned and receives, in exchange, the goods or services of his choice, the price of those goods or those services, VAT included, was paid by that employee at the time when he chose to receive the retail vouchers concerned in return for giving up part of his remuneration and that it is only when those vouchers are used by that employee that the retailer or service provider will pay the VAT on those goods or services to the tax authorities.

Thus, Tribunal held that the provision of a retail voucher by a company, which acquired that voucher at a price including VAT, to its employees in exchange for their giving up part of their cash remuneration constitutes a supply of services.

[Astra Zeneca UK Ltd. [2021] 127 taxmann.com 130 (UKV - DUTIES TRIBUNALS)]

No GST payable on fees collected from the members of the club.

The applicant is a club and a non-profit organization. It is a members-club as opposed to a proprietary club. The members contribute by way of subscription fees and infrastructure development fund which is used for the purposes of provision of goods and services, reading room, library, chambers for accommodating family and guests, a bar and sports facilities.

Applicant submitted that Supreme Court in State of West Bengal vs Calcutta Club held that doctrine of mutuality applied to these clubs and the levy of admission fee and subscription fee are not eligible to service tax under the Finance Act.

Whether applicant is liable to pay GST on subscription fees and Infrastructure development fund collected from the members?

AAR observed that the Supreme Court judgment in the case of M/s. Calcutta Club Limited is fully applicable on the applicant. AAR observed that Finance Act, 2021 has over ruled what the Courts have held till now and has countered the Principle of Mutuality by way of explanation which states that the members or constituents of the club and the club are two separate entities and persons for the purpose of Section 7 of CGST Act, 2017 which defines Supply.

AAR also noted that by virtue of Section 1 of Finance Act, 2021, the amendment brought in Section 7 of CGST Act, 2017 by way of Section 108 of Finance Act, 2021, will only come into effect on the date when Central Government notifies the same and then the same will be notified with the corresponding amendments passed by the respective States and Union territories in respective SGST/ UTGST Act.

Therefore, AAR concluded that unless the amended Section 7 of CGST Act, 2017 is notified, the applicant is not liable to pay GST on subscription fees and Infrastructure development fund collected from the members as per the Hon'ble Supreme Court judgment in the case of M/s. Calcutta Club Ltd

[Bowring Institute. [2021] 127 taxmann.com 166 (AAR - KARNATAKA)]

Any amount received by the partner from the partnership firm as per the obligation of the partnership deed would not be chargeable to tax.

Appellant was a public limited company engaged in business of manufacturing of pharmaceutical products as well as providing various services. It entered into a partnership agreement with a partnership firm wherein appellant was a partner with 96 per cent share and the remaining 4 percent share was distributed equally between the remaining two partners .

An addendum to the partnership agreement was signed and as per the terms of addendum, the appellant agreed to provide certain services to the partnership firm which related to promotion and marketing of firm's product and other related services.

Said refund claims were rejected by Assistant Commissioner of Service Tax . Commissioner(Appeals) also rejected refund claim of the appellant.

Hence, appellant filed the presentappeals before CESTAT.

CESTAT observed that the activities carried out by the a ppellant for its partnership firm is a part of its duties as a partner.

CESTAT also observed that the remuneration received by the appellant from the partnership firm has been accounted for as —Remuneration received from partnership firm. Any activity can be brought under the Service tax ambit under the Finance Act, the important aspect is that there should be existence of service provider and the service recipient and the service provider and the service recipient should be two different persons. CESTAT further observed that the same persons who are partners of the partnership firm are individually called as partners and the same very persons also called collectively as firm. Therefore, partners and partnership firm cannot be treated as two distinct persons. Further, the service is taxable if it is provided to a distinct person.

In this case, CESTAT observed that the appellant being a partner has discharged its duties pursuant to deed of partnership to a partnership firm M/s Zydus Healthcare. Therefore, there cannot be service provider and a service recipient relationship between partner and partnership firm. Hence, all the activities performed by the appellant in the capacity of partner to the partnership firm is not liable to service tax.

CESTAT also observed that any amount received by the partner from the partnership firm as per the obligation of the partnership deed would be treated as profit share in the partnership business. Applying the same ratio in the present case also, the appellant received remuneration from its partnership firm towards certain activities performance in terms of the partnership deed is nothing but profit in partnership sharing and the same cannot be treated as consideration towards provision of service under Finance Act, 1994.

CESTAT also observed that the appellant are entitled for the refund of the claim made by them. Therefore CESTAT set aside the impugned orders.

[Cadila Healthcare Limited. [2021] 127 taxmann.com 112 (Ahmedabad – CESTAT)

GST leviable on reimbursement, being advance payment and part of software development cost.

Facts of the case

- Appellant is in the business of software development for the infusion systems manufactured by **its overseas holding company.**
- Overseas holding company entered into a Cardholder User agreement with the employees of the Appellant for issuance of Credit Cards. The Credit Cards issued to the employees are meant to be used only for business -related expenses. (Travel, accommodation in the hotel, food expenses, etc.)
- During the course of supplying such software development services, the appellant company incurs expenses (such as travel, accommodation, food, etc.), **which are included in the cost of the services along with a margin. Consideration for these expenses is received from the overseas holding company.**
- Expenses incurred through the credit card are initially settled by the holding company abroad with the card issuing bank.
- The consideration for the development service is agreed to be made on a cost plus margin basis. The expenses incurred by the Appellant through this credit card also forms part of software development cost and subsequently included in invoice raised by the appellant for development of software.
- Appellant filed an application before AAR for clarification related to whether GST is leviable on the reimbursement of the subsidiary company to its ultimate holding company located in a foreign territory outside India.
- AAR Pronounced that the reimbursement is taxable at 18% as “Import of service” under RCM.
- Appellant filed this AAAR, stating that according to them, it is a pure transaction in money, and the same is not to be treated as 'supply'.

AAAR Observation/Judgment

- Appellant Authority said that the entire business of the appellant being with the overseas holding company and the **expenses being part of the software development cost (as admitted by the appellant himself),** it is simple and clear that these expenses (such as travel, accommodation, food, etc.), even when they are paid back (reimbursed) by the appellant to its recipient of services (overseas holding company) and later included in the taxable value in the invoice of the appellant are nothing **but part of the consideration received by the appellant from its recipient.**

- In other words, **the expenses borne by the recipient overseas holding company of the appellant and later reimbursed but again included in the taxable invoice are in the nature of advance consideration paid by the recipient** (i.e. overseas holding company) to the supplier appellant and the time of supply provisions relating to advances received by a supplier of services as per Section 13 of the GST Act will be applicable.

- AAAR also observed that reimbursement does not result in any transaction on its own, as was held by the AAR, but such expenses of employees of appellant, borne at the first instance by the recipient of the supply is nothing but which the supplier (appellant) was liable to pay. Thereby such payment can be treated as an advance received by the supplier.

- **GST is therefore to be paid on such amounts of expenses reimbursed** at the time determined as per Section 13 of the GST Act, as it represents the part of the consideration received in advance by the appellant from its recipient (notwithstanding that the same is later included in tax invoice of the appellant) and to be paid at the time of reimbursement as by then the actual expenses borne by the recipient is known.

- The applicable rate of GST on such expenses incurred by the recipient and reimbursed by the appellant is the same rate at which the appellant charges for the software development service supplied by the appellant to the overseas holding company.

Tamil Nadu AAAR: ICU Medical India LLP dated March 10, 2021 [TS (DB)-GST-AAAR (TN)-2021-201]

Section 9 of CGST Act

Levy of Tax

GST applicable on license fee granted to run parking of vehicles.

These writ petitions were filed questioning the demand made by the Southern Railway to pay 18% of GST in respect of the license fee granted to the Private Contractors to run parking of vehicles.

All the writ petitioners are Contractors, who were granted license to run parking areas for vehicles in the Railway premises by the Southern Railway. All the writ petitioners participated in the tender process and were successful in the tender and entered into an agreement with the Southern Railway, agreeing to certain terms and conditions as stipulated.

Writ petitioners submitted that there is no provision to collect the GST from the contractors on the license fee, therefore the terms and conditions of the agreement are null and void and thus, the conditions imposed in the agreement would not be binding on the contractors. In this regard, the petitioners relied on Section 32 of the CGST Act and sub- section 2 of Section 32 stipulates that "no registered person shall collect tax except in accordance with the provision of this Act or the Rules made thereunder".

Section 7(1-A) Schedule II deals with activities or transactions to be treated as supply of goods or supply of services. Schedule II Sub-clause (2) stipulates

- any lease, tenancy, easement, license to occupy land is a supply of services;
- any lease or letting out of the building including a commercial, industrial or residential complex for business or commerce, either wholly or partly, is a supply of services.

After the perusal of the above mentioned provisions as well as the consequential Board orders and the clarificatory letters issued by the Chief Commissioner of Central Tax and Customs, the Hon'ble HC observed that license, rental, lease amounts to supply and as per Schedule II of the Act, license to occupy the land and renting of an immovable property, are supply of services.

HC also observed that the writ petitioners had agreed for the terms and conditions stipulated in the agreement and as per the said agreement, the licensee shall pay during the continuance of the license all cesses, rates, water charges, taxes and other charges or taxes in respect of the said premises. Thus, they are liable to pay taxes as admissible.

HC further observed that the land belongs to the Southern Railways, the writ petitioners were given license to run vehicle parking and while entering into an agreement of license, the Southern Railways, in clear terms, stated that the contractors are liable to pay taxes as applicable under the CGST Act. Thus, the Railway has to pay tax for the services rendered to the contractors by collecting license fees and the contractors, in turn, have to pay tax for collection of parking fee from the end users.

This being the pattern of liability to pay tax, which is contemplated under the provisions of the Act, there is no question of granting exemption to anyone of the persons, either the Railways or the contractors, who all are licensees and permitted to run the vehicle parking areas and therefore, their liability under the provisions of the Act, is unambiguous.

HC further held that contractors are bound to register their name under the CGST Act, and on such registration, they are bound to pay tax for the parking fee collected from the end users.

[M. Srinivasan v. Union of India. [2021] 127 taxmann.com 175 (Madras)]

Section 17(5) of CGST Act

Input Tax Credit is not available

No ITC available on promotional materials which were distributed to distributors and franchisees free of cost.

Appellant is a manufacturer of knitted and woven garments under the brand name "JOCKEY" and swim wear and swimming equipment under the brand name "SPEEDO". The goods manufactured by the Appellant are sold through their own outlets and also through their distributors and retail dealers.

For the purpose of promoting their brand and products, the Appellant procures various items such as gondola racks, wall shelves and panels, mannequins, storage units, hangers, signages, posters, display stands, etc. which are used in the showrooms for display of their products as well as for advertising their products. Further, the Appellant also procures certain give away items such as carry bags, calendars, dairies, leather bags, pens with their brand name embossed and engraved which are distributed to the showrooms and retailers for giving away to customers who purchase their products.

AAR ruled that the Input Tax Credit on GST paid on the procurement of the "distributable" products which are distributed to the distributors, franchisees is allowed as the said distribution amount to supply to the related parties which is exigible to GST. Further, the said distribution to the retailers for their use cannot be claimed as gifts to the retailers or to their customers free of cost and hence ITC of GST paid on such procurement is not hit by Section 17(5) of the GST Acts.

AAR also ruled that The GST paid on the procurement of "non-distributable" products qualify as capital goods and not as "inputs" and the applicant is eligible to claim input tax credit on their procurement, but in case if they are disposed by writing off or destruction or lost, then the same needs to be reversed under Section 16 of the CGST Act read with Rule 43 of the CGST Rules.

Aggrieved by the ruling given by the AAR, the Appellant filed appeal before AAAR. Whether Promotional Products/Materials & Marketing items used by the Appellant in promoting their brand & marketing their products can be considered as "inputs" and GST paid on the same can be availed as input tax credit or not?

With regard to the promotional items such as gondola racks, wall shelves and panels, POP items such as mannequins and half busts, storage units, hangers, signages, posters, display stands, etc, Authority found from the copies of the agreements furnished by the Appellant that there is a contractual obligation on the part of the Appellant to provide their EBO/franchisees and distributors with promotional materials. The purpose of providing the EBO/franchisees and distributors with these promotional items is to enhance the sales of their products. Thus, authority concluded that these promotional items are indeed used in the course or furtherance of the Appellant's business.

Authority found that the lower Authority has concluded that these promotional items are in the nature of capital goods since the ownership of these goods is retained with the Appellant. It is evident from the agreements that the ownership of the promotional items remains with the Appellant at all times. It is seen from the said agreements that the Appellant Company has undertaken to provide the promotional materials to the EBOs and distributors and the same will continue to be used by the EBO and distributors as long as the agreement is in force. It is also expressly stated in the agreements that on termination of the agreements, it is the responsibility of the EBOs and distributors to return the promotional materials to the Appellant. The Appellant has also urged before authority that these promotional items are not capitalised in their books of accounts but are always treated as revenue expenditure and hence they cannot be considered as 'capital goods'. This is in tune with the normal accounting practices.

Authority observed that the promotional materials are provided to the franchisees and distributors free of charge. In this case, authority found that the franchisees and distributors are independent entities and are not related to the Appellant in any of the ways mentioned in the Explanation to Section 15 of the CGST Act. Thereby it is not Schedule – I transaction.

Therefore, the provision of promotional materials free of charge by the Appellant to the franchisees and distributors is neither covered within the scope of a taxable supply as defined in Section 7 of the CGST Act nor is it a supply covered under the ambit of Schedule I of the said Act. The activity of providing the promotional items can be termed as an 'non-taxable supply' as defined in Section 2(78) of the CGST Act.

Therefore Authority hold that the GST paid on the procurement of promotional items supplied to the EBOs/franchisees and distributors free of charge will not be eligible for input tax credit since the said supply is a non-taxable supply

Carry bags, calendars, diaries, pens

Authority also observed that in the case of the promotional items such as carry bags, calendars, diaries, pens, etc embossed/engraved with the brand name and which are distributed to the EBOs/distributors/ retailers for the purpose of giving away to the customers, there is no contractual obligation on the part of the Appellant to provide these promotional items for distribution. It is voluntarily done by the Appellant with the sole intention of promoting their brand and increasing the sales of their products. These distributable/give away items are supplied at will, free of cost to the EBOs/franchisees, distributors and retailers. While this supply is also a non-taxable supply and ineligible for input tax credit, there is an additional disentitlement in terms of Section 17(5)(h) which provides that goods which are disposed of by way of gift are not eligible for input tax credit.

Therefore, Authority held that input tax credit is not eligible on the promotional items distributed as give away items on the grounds that the same is blocked by virtue of the provisions of Section 17(2) and Section 17(5)(h) of the CGST Act. Accordingly AAAR set aside the ruling passed by the AAR.

[Page Industries Ltd. [2021] 127 taxmann.com 176 (AAAR-KARNATAKA)]

Section 50 of CGST Act

Others

Notice in DRC-01 in relation to payment of interest is not valid

The Appellant filed writ petition before high court challenging the show cause notice issued in Form GST DRC 01 under Rule 142(1) of the CGST Rules, 2017 to point out that the notice has been issued in relation to section 50 of the Act. Reference was made to rule 142 of the Rules to point out that it nowhere contemplates issuance of notice thereunder in respect of section 50 of the Act. Therefore, the impugned show cause notice has been issued without any authority of law.

HC observed that the interest under section 50 of the CGST Act, 2017 can only be levied on the net tax liability and not on the gross tax liability. In such circumstances, the demand raised by the respondent is not in accordance with law.

HC further observed that the Rule 142(1)(a) of CGST Rules, 2017 indicates that Form GST DRC 01 can be served by the proper officer along with the notice issued under section 52 or Section 73 or Section 74 or Section 76 or Section 122 or Section 123 or Section 124 or Section 125 or Section 127 or Section 129 or Section 130 and that too, electronically as a summary of notice.

HC did not find reference of any notice under section 50 so far as Rule 142(1)(a) of the CGST Rules is concerned. In such circumstances, DRC 01 could not have been issued for the purpose of recovery of the amount towards interest on delayed payment of tax.

Section 75(12) of the of CGST Act provides that "notwithstanding anything contained in section 73 or Section 74, if there is any amount of interest payable on tax and which had remained unpaid, the same has to be recovered under the provisions of Section 79. Section 79 is with respect to recovery of tax."

As per Rule 142(5) of CGST Rules, 2017, A summary of the order issued under section 52 or section 62 or section 63 or section 64 or section 73 or section 74 or section 75 or section 76 or section 122 or section 123 or section 124 or section 125 or section 127 or section 129 or section 130 shall be uploaded electronically in FORM GST DRC-07, specifying therein the amount of tax, interest and penalty payable by the person chargeable with tax. Thus, the order referred in sub-rule (5) shall be treated as the notice for recovery.

From the aforesaid, HC had reached to the conclusion that the notice should have been issued in Form GST DRC 07. The Notice should specify the amount of tax, interest and penalty payable by the person chargeable with tax.

Therefore, HC set aside and quashed the impugned order issued in GST DRC 01.

[Rajkamal Builder Infrastructure (P.) Ltd. [2021] 127 taxmann.com 150 (Gujarat)]

Section 83 of CGST Act Provisional Attachment

Impugned attachment of bank account was without jurisdiction and same was to be set aside and quashed.

Petitioner is a businessman having his office in Mumbai. There are various other offices carrying on their business from the said address. Petitioner has rented out commercial premises on lease and license basis receiving license fees from the licensees. Since petitioner is required to pay GST on such license fee, he is duly registered with the GST department and has been submitting GST returns regularly.

Tax department carried out search operations in the office address of the petitioner in respect of other companies having their offices there, namely, Satra Retail Private Limited, Bleu Noir Infrastructures Private Limited, Prarush Impex and Minaxi Satra Ventures whereafter, summons under section 70 of the Maharashtra Goods and Services Tax Act, 2017 were issued. However, no such search was undertaken against the petitioner and petitioner has not received any such summons.

Later, the petitioner came to know that his bank account was provisionally attached. Since the petitioner was not served with a copy of the provisional attachment order, a copy of the same was sought for and obtained by him from the ICICI Bank, which shows that the petitioner's bank account was provisionally attached under section 83 of the MGST Act.

Aggrieved by such provisional attachment of his bank account, petitioner submitted detailed representation before the tax department, requesting the said authority to withdraw the provisional attachment of bank account forthwith. However, there was no response to the said representation.

Aggrieved by the same, the petitioner has filed the present writ petition seeking the relief in this regard.

HC observed that the search and resultant investigation was carried out in respect of M/s. Prarush Impex. Authorization under section 67 was given in respect of M/s. Prarush Impex, that too by an officer of the rank of Deputy Commissioner though as per section 67 such authorization should be by a proper officer not below the rank of Joint Commissioner. There was no proceeding against the petitioner under section 67 of the MGST Act. If that be so, then invocation of power under section 83 of the MGST Act against the petitioner would not be justified. On this ground alone, the impugned provisional attachment of the bank account of the petitioner is liable to be interfered with.

HC also observed that the impugned provisional attachment has been carried out by Joint Commissioner of State Tax. The record does not disclose any authorization by the Commissioner to the Joint Commissioner to carry out provisional attachment. Section 83 does not provide for such delegation or authorization. The opinion contemplated under section 83 of the MGST Act is to protect the interest of government revenue, it is necessary to provisionally attach any property including bank account has to be necessarily that of the Commissioner. No such opinion of the Commissioner is discernible from the record. Attachment of property including bank account of a person even if provisional is a serious intrusion into the private space of a person. Therefore, HC in view that section 83 of the MGST Act has to be strictly interpreted.

In view of above fact, HC set aside and quashed the impugned provisional attachment order and directed respondents to forthwith withdraw the provisional attachment of bank account of the petitioner.

[Praful Nanji Satra [2021] 127 taxmann.com 141 (Bombay)]

Power to order a provisional attachment of property of taxable person including a bank account is draconian in nature.

The appellant manufactures lead according to the specific requirements of its clients.

A 'detection case' was registered against GM Powertech, one of the suppliers of the appellant, through a search and seizure. The partners of GM Powertech were arrested, on the allegation that they had made fraudulent claims of ITC from fake/fictitious firms of Delhi and Kanpur and had issued invoices to various recipients in Himachal Pradesh including the appellant.

Thereafter provisional attachment was ordered against appellant while invoking section 83 of Himachal Pradesh Goods and Service Tax Act, 2017 and rule 159 of the HPGST Rules, 2017.

Appellant instituted Writ Petition under article 226 of Constitution challenging orders of provisional attachment. However, High Court dismissed writ petition on ground that provisional attachment could not be challenged in a petition under article 226 on ground that an 'alternative and efficacious remedy' of an appeal under section 107 was available.

Thereafter appellant filed this appeal before Supreme Court.

SC observed that the order of provisional attachment was passed before the proceedings against the appellant were initiated under Section 74 of the HPGST Act. Section 83 of the Act requires that there must be pendency of proceedings under the relevant provisions mentioned above against the taxable person whose property is sought to be attached.

SC in view that the power to order a provisional attachment of the property of the taxable person including a bank account is draconian in nature and the conditions which are prescribed by the statute for a valid exercise of the power must be strictly fulfilled.

Respondent contended that proceedings were pending/concluded against another taxable entity, that is GM Powertech, the powers of Sections 83 could also be attracted against the appellant.

SC were unable to accept above respondent contention and said this interpretation would be an expansion of a draconian power such as that contained in Section 83, which must necessarily be interpreted restrictively. Given that there were no pending proceedings against the appellant, the mere fact that proceedings under Section 74 had concluded against GM Powertech, would not satisfy the requirements of Section 83. Thus SC concluded that the order of provisional attachment was ultra vires Section 83 of the Act.

SC further observed that an order of provisional attachment was issued by the Joint Commissioner which was withdrawn on 30 January 2019, after considering the representations made by the petitioner. On the very ground, without any material change in circumstances. Another order of provisional attachment came to be issued by another Joint Commissioner. The High Court has not considered this aspect that both the earlier and the subsequent orders of provisional attachment are on the same grounds. Therefore, unless there was a change in the circumstances, it was not open for the Joint Commissioner to pass another order of provisional attachment, after the earlier order of Provisional attachment was withdrawn after considering the representations made by the petitioner.

SC observed that High Court has erred in dismissing writ petition on ground that it was not maintainable.

SC further observed that under the provisions of Rule 159(5), the person whose property is attached is entitled to dual procedural safeguards:

An entitlement to submit objections on the ground that the property was or is not liable to attachment; and An opportunity of being heard;

SC observed that there has been a breach of the mandatory requirement of Rule 159(5) and the Commissioner was clearly misconceived in law in coming into conclusion that he had a discretion on whether or not to grant an opportunity of being heard;

SC in view that the Commissioner is duty bound to deal with the objections to the attachment by passing a reasoned order which must be communicated to the taxable person whose property is attached;

For above reasons, SC allowed appeals and set aside judgment and order of High Court. And the orders of provisional attachment.

[Radha Krishan Industries. [2021] 127 taxmann.com 26 (SC)]

Section 132 of CGST Act

Bail

HC grant bail on executing personal bond and furnishing surety, subject to the conditions.

Petitioner is the Chairman and Managing Director of M/s. Global Space Technologies Limited(GSTL), a concern that was visited for conducting search and seizure. On the same day, summons had been issued to petitioner by Superintendent (Anti Evasion), CGST to appear before him. While, this could not take place as the petitioner was out of town. So, as a substitute of the petitioner, the Accountant of GSTL, attended the office of Superintendent (Anti Evasion). He was interrogated and information was solicited from him about the company, its directors, office locations etc. which he duly provided. Two emails had been issued providing various details viz. tally and ledgers etc. Meanwhile, GSTL deposited a sum of Rs.45 lakhs.

Thereafter, petitioner was summoned on various dates and barring a day while petitioner had undergone angioplasty, he had attended rest of the dates.

When petitioner attended the office of Superintendent (Anti Evasion), he was arrested purportedly in exercise of powers under section 69 of the CGST Act imputing commission of offences under sections 132(1)(a),(c),(d) and (f) punishable under clause (i) of section 132(1). On the next day, he was produced before the Magistrate seeking remand of petitioner in judicial custody.

Petitioner filed appeal before high court challenging validity of section 132(1)(b) and (c) of the CGST Act, 2017 with declaration that the same is unconstitutional and further declaration that exercise of power under Section 69 of the CST Act would be only upon determination of liability and that petitioner's arrest is illegal and in violation of section 69 and seeks his enlargement on bail.

HC observed that in *Daulat Samirmal Mehta Vs. Union of India's* case, HC has analyzed the powers conferred on the Commissioner under section 69. Recording of 'reasons to believe' by the Commissioner that a person has committed offence and is required to be arrested is sine qua non for exercising the powers. It has also been observed that not only recording of reasons would be that a person has committed offence as specified, but also that as to why the person needs to be arrested, the court has highlighted that CGST Act is primarily for collection of revenue and arrest is incidental to achieve said objective and the arrest is subject to provisions of the Code of Criminal Procedure, 1973, containing section 41 and 41A. The court has found that if the amount of tax evaded or ITC wrongly availed or utilized or amount of refund wrongly taken exceeds Rs.5 Crores, then the sentence is imprisonment for a term which may extend to 5 years and all other sentences are below 5 years. While maximum sentence that can be imposed for commission of offence under section 132(1)(b) and (c) is 5 years with fine, Then having regard to the case of Arnesh Kumar Vs. State of Bihar, wherein it has been considered that in case where punishment is 7 years or less and if the person complies with the notice under section 41A of Cr.P.C. and continues to comply with the same, he shall not be arrested unless for reasons to be recorded, the police officer is of the opinion that he ought to be arrested. The court in Daulat Mehta's case (supra) had also taken into account under section 138(1) of CGST Act, any offence is compoundable on payment by accused, and said feature highlights primary concern of the CGST Act is collection of revenue. Further on payment of compounding amount, the proceedings abate.

The court, thus, having regard to factual position that the petitioners therein had responded to the summons and attended the dates, in the circumstances found that there could not have been justification to arrest the petitioner. Apart from that the court also found that there had not been any evidence about petitioner's tampering with the documents or trying to influence the witnesses, observing that mere allegation is not sufficient. The court also went on to consider section 167 and had considered that under said provision a person cannot be kept in detention beyond a total period of 60 days where investigation relates to offence punishable with imprisonment for a term not less than 10 years and that the Magistrate is authorized to detain beyond 15 days period if satisfied that the grounds are made out. However, he would not be able to authorize detention for a total period exceeding 60 days.

In the circumstances, HC directed to respondent to release petitioner on executing personal bond and furnishing surety and subject to the condition that petitioner shall cooperate in the investigation and shall not make any attempt to interfere with the ongoing investigation, shall not tamper with any evidence or try to influence or intimidate any witness.

[Krishna Murari Singh. [2021] 127 taxmann.com 185 (Bombay)]

Section 2(118) of CGST Act 2017

Voucher

Gift vouchers are neither goods nor services, but instruments used as consideration for payment.

The Appellant was in the business of manufacturing and trading of Jewellery Products. As a part of sales promotion the Appellant introduced the facility of different types of Pre-Paid Instruments (PPI's) viz., Closed System PPIs, Semi-closed System PPIs, Open System PPIs through its retail outlets, third party PPI issuers and online portals to their Customers and these are generally called "Gift Vouchers/Gift Cards" in trade practice.

AAR ruled that the Own closed PPIs issued by the Applicant are 'vouchers' as defined under CGST/TNGST Act 2017 and are a supply of goods under CGST/TNGST Act 2017,

Further AAR ruled that the time of supply of such gift vouchers / gift cards by the applicant to the customers shall be the date of issue of vouchers if the vouchers are specific to any particular goods specified against the voucher. If the gift vouchers/gift cards are redeemable against any goods bought, the time of supply is the date of redemption of voucher.

Aggrieved by the above decision, the Appellant has filed the present appeal.

Whether gift vouchers are goods or services, its time of supply?

Authority observed that when a voucher is issued, though it is just a means of advance payment of consideration for a future supply, subsection (4) of section 12 and 13 determine the time of supply of the of the underlying good(s) or service(s). Voucher is neither a goods not a service. It is a means for payment of consideration.

Authority also observed that the the law provides for taxing of the service at the point of time of issue of voucher itself when the supply is clearly known at the time of issue. The supply of underlying goods or service therefore gets taxed only at the time of issue of voucher and not at the time of actual availing of service or time of redeeming the voucher.

Since the gold voucher clearly indicates that the voucher can be redeemed for gold jewellery at a known rate of tax, gold voucher also falls under this category. Therefore, the gold voucher (representing the underlying future supply of gold jewellery) would be taxable at the time of issue of the voucher. This interpretation does not result in double taxation as transfer of gold subsequently will not be subject to tax at the time of redeeming the voucher for gold, as the supply is deemed to have been done at the time of issue of voucher itself (section 12(4)).

Therefore, Authority modified the order of AAR and ruled that the time of supply of the gift vouchers / gift cards by the applicant to the customers shall be the date of issue of such vouchers and the applicable rate of tax is that applicable to that of the goods.

[Kalyan Jewellers India Ltd. [2021] 127 taxmann.com 37 (AAAR - TAMILNADU)]

Section 16(2) of CGST Act 2017

Quashes ITC-reversal orders, raps revenue for inaction against defaulting sellers

- The petitioners are traders in Raw Rubber Sheets. They had purchased goods from one Charles and his wife Shanthi. A substantial portion of the sale consideration was paid only through banking channels.
- The payments made by the petitioners to the said Charles and his wife, included the tax component also.
- Based on the returns filed by the sellers, the petitioners availed input tax credit. Later, during inspection by the respondent, it came to light that Charles and his wife, did not pay any tax to the Government.
- Thereafter without involving the said Charles and his wife Shanthi, the impugned orders came to be passed levying the entire liability on the petitioners.
- Being aggrieved, the Petitioner has filed writ petition against the impugned order.
- HC observed that press release was issued by the Central Board of GST council on 4.5.2018. In the said press release, it has been mentioned that there shall not be any automatic reversal of input tax credit from the buyer on non-payment of tax by the seller. In case of default in payment of tax by the seller, recovery shall be made from the seller. However, reversal of credit from buyer shall also be an option available with the revenue authorities to address exceptional situations like missing dealer, closure of business by the supplier or the supplier not having adequate assets etc.
- HC observed that if the tax had not reached the kitty of the Government, then the liability may have to be eventually borne by one party, either the seller or the buyer. In the case on hand, the respondent does not appear to have taken any recovery action against the seller / Charles and his wife Shanthi, on the present transactions.
- HC in view that when it has come out that the seller has collected tax from the purchasing dealers, the omission on the part of the seller to remit the tax in question must have been viewed very seriously, and strict action ought to have been initiated against him.
- HC also observed that tax department finalised the assessment of the seller by excluding the subject transactions alone and passed an order in their case.
- HC also observed that the impugned order suffers from certain fundamental flaws. It has to be quashed for more reasons than one.

  a) Non-examination of Charles in the enquiry

  b) Non-initiation of recovery action against Charles in the first place
- Therefore, HC quashed the impugned orders and remitted back the matters to the file of the respondent.
- **High court of Madras dated February 24, 2021 D.Y. Beathel Enterprises V. State Tax Officer, Tirunelveli [TS-190-HC (MAD)-2021-GST] [2021] 127 taxmann.com 80 (Madras)**

Section 107 of CGST Act 2017

Appeal to Appellate Authority

Revenue to supply reasoned order to applicant

The petitioner was a private limited company. Revenue had passed an order against applicant without providing any explanation or reasons and demanded payment of tax of huge amount.

Thereafter petitioner filed this appeal before high court seeking relief in this regard.

Petitioner had fairly pointed out the statutory provision of section 107 of CGVAT which provides for the appeal to the Appellate authority, if any person is aggrieved by the decision or order passed under CGST Act or the SGST Act or the UTGST Act by the adjudicating authority, within three months from the date on which the decision of the order is communicated to the person concerned.

Petitioner submitted that absence of detailed order is the hampering ground for the petitioner to move such an appeal and on a query raised by this Court, he has no instructions as to whether the petitioner has sought for the reasoned order from the adjudicating authority in the State.

Therefore, It is deemed appropriate and justifiable to relegate the Petitioner to the appellate authority prescribed under the statute without entering into the merits of the matter. All issues, which have been raised before the Court can be raised before the appellate Authority within the prescribed time of three months on seeking a reasoned order from the concerned authority.

Therefore, HC directed revenue to supply reasoned order to applicant.

[Anish Infracon India (P.) Ltd. [2021] 127 taxmann.com 61 (Gujarat)]

Section 97 of CGST Act

Others

Delay cannot be condoned beyond period of 60 days.

Appellant a company owned and controlled by Government of India was involved in exploration of wide range of minerals including iron ore, copper, lime stone, dolomite etc. Appellant on 27-8-2018 had filed an application in terms of section 97, seeking a ruling on questions in respect of payment of tax on royalty paid in respect of mining lease and contributions made to District Mineral Foundation (DMF) and National Mineral Exploration Trust (NMET) and an order was passed in respect of Advance Ruling on 21-9-2019.

Being aggrieved by order of AAR, appellant company filed an application under section 102 for rectification of advanced ruling and on 23-1-2020 AAR has passed an order holding that they have already passed an order on merits and there is no error/ apparent mistake on face of record for allowing application preferred for rectification of advanced ruling.

Appellant company preferred an appeal before AAAR on 22-6-2020 and AAAR has dismissed appeal as barred by limitation

Thereafter Appellant filed this appeal before high court seeking relief in this regard.

Appellant had argued before this Court that the AAAR has erred in law and facts in dismissing the appeal as not maintainable as it was filed beyond the period of 60 days. He has argued that the order on the issue of advanced ruling was passed on 21.09.2019 and the application for rectification for advanced ruling was rejected on 23.03.2020 and therefore, keeping in view the doctrine of merger, the limitation should have been counted with effect from 23.03.2020. Hence the order passed by the AAR deserves to be quashed.

It had also been argued that even if there is a delay, this court under Article 226 of Constitution of India can exercise extraordinary jurisdiction to condone such delay and the arguments can be canvassed on merits also.

HC observed that statute relating to delay under Income Tax Act and under CGST Act are not at all identical. It is provided categorically under CGST Act that no delay can be condoned after expiry of 30 + 30 days period Provisions under CGST Act, 2017 provides that delay cannot be condoned beyond period of 60 days. AAR was justified in rejecting appeal on ground of limitation as it was not having power to condone delay beyond 30 days. Application for rectification of mistake was dismissed summarily there was no error apparent, hence, doctrine of merger has not taken place. Therefore, HC also did not find reason to condone delay keeping in view statutory provisions.

HC further observed that law of limitation is found upon maxims such as 'Interest Reipublicae Ut Sit Finis Litium' which means that litigation must come to an end in interest of society as a whole, and 'vigilantibus non dormientibus Jura subveniunt' which means that law assists those that are vigilant with their rights, and not those that sleep thereupon. Law of limitation in India identifies need for limiting litigation by striking a balance between interests of state and litigant.

HC observed that statute provided for condonation of delay which is not beyond 60 days. Therefore, question of condoning the delay beyond 30 days does not arise. Resultantly, no reason is found interfere with order passed by AAR as appeal itself was preferred beyond expiry of limitation period. Thus, HC dismissed the writ petition.

[N.M.D.C. v. Authority for Advance Ruling. [2021] 127 taxmann.com 126 (Karnataka)]

Section 16 of CGST Act

Input Tax credit

ITC meant for outward supply of Bullions cannot be used against Castor Oil Seed.

M/s Aristo Bullion Private Limited, plan to engage in two types of business as under:

- To import the bullions on payment of IGST. The Bullion so received will be refined and thereafter the same will be sold in to domestic market to various buyers on payment of GST at applicable rates. Further they may also domestically trade in bullion to take the advantage of price fluctuations.

- Applicant intend to procure Castor oil seeds from agriculturist (not liable to be registered u/s 23 of CGST/SGST Act, 2Ol7), and will be selling in the Domestic Market to the buyer. No ITC will be available on procurement of Castor oil seeds as the same will be procured from the agriculturist. Whereas the sale will attract GST @ 5% on sale.

Whether the applicant can use the Input Tax credit available in the Electronic Credit Ledger earned on inputs /raw-materials/inward supplies (meant for outward supply of Bullions) towards GST liability on 'Castor Oil Seed?

As per Section-16(1) of CGST Act, the registered person shall be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business.

AAR observed that gold inputs i.e. dores or silver dores are not used or intended to be used in the course or furtherance of the business of supply of Castor oil seeds. Therefore even the basic conditions envisaged in the provisions of Section 16(1) have not been fulfilled in the instant case.

Thus, AAR ruled that applicant is not eligible to utilise the input credit available in their Electronic Credit Ledger (earned on the inputs/raw-materials/inward supplies meant for outward supply of Bullions) for payment of GST liability on supply of Castor oil seeds.

[Aristo Bullion (P.) Ltd.. [2021] 127 taxmann.com 42 (AAR - GUJARAT)]

Section 74 of CGST Act
Demand and Recovery
GST collected during Search should be refunded where statement is withdrawn by taxpayer.

An investigation was conducted at premises of assessee company and various documents and registers seized. In course of that investigation, a statement was recorded from Managing Director of assessee that it had not discharged its GST liability correctly. Accordingly, revenue determined tax liability of assessee to be paid in instalments.

Assessee had also deposited two instalments of tax liability. However, later on, assessee retracted its statements and stated that it had no liability to tax and that MD and officials were forced to accept liability to tax and admission was, by no means, voluntary.

Thus, assessee filed an instant writ petition for refund of said tax paid by it under two instalments.

Revenue contended that very fact that assessee had remitted not one but two instalments of tax would reveal that payments were voluntary and if they had been coerced as alleged, payments would have stopped with first instalment.

HC observed that the provisions of subsection (5) and (6) of Section 74 provide an opportunity for the assessee and/or the revenue to ascertain the proper amount of tax, interest and penalty and, even in cases where there might have been a shadow of mis-declaration/short payment of tax or wrongful availment or utilization of ITC, a closure of the proceedings at that stage on the basis of either a self-ascertainment by an assessee and acceptance of the same by the revenue or vice versa. Where there is no such closure, sub-section (7) of Section 74 provides for an avenue to the revenue to continue the proceedings. It states that where the proper officer, on receipt of the self-ascertainment believes that such ascertainment is incorrect and the amount falls short of the amount actually payable, he shall proceed to issue a show cause notice.

HC also observed that section 74(5) is not a statutory sanction for advance tax payment, pending final determination in assessment. Section 74(5) provides is the first opportunity to an assessee to pay tax, interest and penalty liability even prior to the issuance of a show cause notice and such acceptance will have to be in the form of either self-ascertainment or an ascertainment by the proper officer.

HC further observed that the records must contain material to show that the assessee accepts the ascertainment made by it, the revenue has applied its mind and arrived at the position that the self-ascertainment by the assessee is inadequate and an ascertainment by the officer. However, statement recorded at the time of search admitting GST liability and setting the scheme of instalments have been retracted by the petitioner and the petitioner has consistently and vehemently been contested the liability to tax.

HC in view that merely because an assessee has, under the stress of investigation, signed a statement admitting tax liability and has also made a few payments as per the statement, cannot lead to self-assessment or self-ascertainment. The ascertainment contemplated under Section 74(5) is of the nature of self-assessment and amounts to a determination which is unconditional, and not one that is retracted as in the present case.

Therefore HC directed that the amount collected shall be refunded to the assessee.

[Shri Nandhi Dhall Mills India (P.) Ltd. [2021] 127 taxmann.com 31 (Madras)]

NEW DELHI
18A, llnd Floor,
North Avenue Road,
West Punjabi Bagh,
New Delhi - 110026.

Rajat Mohan
Senior Partner
rajat@amrg.in

Priyanka Sachdeva
Partner - GST
priyanka@amrg.in

MUMBAI
Shop No-14, Adarsh
Nagar Building No:4,
Kolbad, Thane West,
Thane-400601

Madhu Mohan
Founding Partner
amrg@amrg.in

Kiran Awasthi Raghavendra
Partner - Assurance and Compliance
amrg@amrg.in

DEHRADUN
Villa No. 12, Upper Crest Avenue,
Jakhan, Rajpur Road, Dehradun,
Uttarakhand, India, 248001

Swati Ghoshal
Partner - Risk Advisory and compliance
swati@amrg.in

GURUGRAM,
204, 2nd Fllor, Time Center, Golf
Course Road, Sector 54, Gurugram,
Haryana 122002

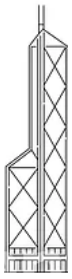
Gaurav Mohan
CEO
gaurav@amrg.in

INTERNATIONAL BRANCH -
AUSTRALIA
Unit 9, 14-15 Junia Avenue,
Toongabbie NSW 2146,
Sydney, Australia

Megha Gandhi
Director- Australia
amrg@amrg.in

INTERNATIONAL DESK - USA
Wiener & Garg LLC,
6000 Executive Boulevard,
Suite 520 | Rockville,
MD 20852T: 301.881.4244
D: 240.833.4002

Subhash Garg
Wiener & Garg LLC
amrg@amrg.in



INTERNATIONAL BRANCH
HONG KONG
Hong Kong Address - Flat B,
Floor 1, Tower - 7, Yee Mei Court,
South Horizons, ap lei chau,
Hongkong

Divya Malhotra
Director - Hong Kong
amrg@amrg.in