AIFTP

INDIRECT TAX & CORPORATE LAWS JOURNAL

ETHICS EDUCATION EXCELLENCE

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All India Federation of Tax Practitioners
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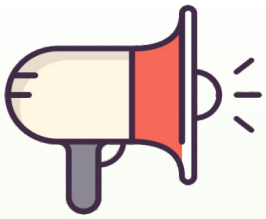

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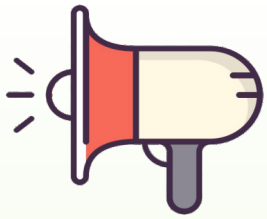

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CONTENTS

SECTION: I

SECTION: II - GOODS & SERVICE TAX

SECTION: III - CORPORATE & OTHER LAWS

SECTION: IV - JUDGMENTS

SECTION: V – MISCELLANEOUS

CHIEF-EDITOR'S COMMUNIQUE

Friends

Major changes have been recommended in the GST Council Meeting held recently. The effect of the changes are far reaching and it will result in more restriction regarding the claim of Input Tax Credit and also the interpretation of other provisions and particularly the tax rates etc. The clarification issued by the GST Council regarding the tax on mining stating that it will be taxable @ 18% since 2017 will have a far reaching effect as the matter is under litigation and writ petitions in different High Courts are pending about the validity of the Tax on Royalty for Mining rights. The matter is also pending before the Hon'ble Supreme Court to the issue whether the royalty is a tax or not. The outcome will be interesting on the issue.

The Second big and important issue is the recent decision of the Hon'ble Apex Court in the case Union of India Vs. VKC Footsteps Pvt. Ltd. wherein the Hon'ble Supreme Court interpreting the provisions of the Rule 89(5) of the CGST Rules, 2017 held that the said Rule is valid and Constitutionally correct and is intra vires to the Constitution of India. It affirmed the judgment of the Hon'ble Madras High Court in the similar matter and reversed the judgement of the Hon'ble Gujarat High Court. In the order the Hon'ble Court stated that there are certain anomalies in the inverted Rate duty structure and refund issue and they observed that GST Council would take note of it. However no relief has been given and it is a big set back for the assessee as after the judgment of Gujarat High Court the assesses were hopeful that the excess input tax credit due to inverted duty structure on services would result in refund and not blockage of capital. After the decision of the Hon'ble Court the excess ITC has become a cost in relation to services refund.

The major issue under GST is also the validity of the provisions of section 16(2)(C) of the CGST Act. In a recent order the Hon'ble Supreme Court in order dated 20.09.2021 has said that the matter may be disposed of by the respective High Courts within a period of two months from the date this order is brought to their notice.

In the recent times we are seen that the litigation has to be taken very cautiously and it can go either way.

Many National Tax Conference and other Seminars of AIFTP are being held in October, November and December. The big Conference at Katra on 2nd and 3rd November, 2021 has seen over 300 Registrations. Next big Conference it at Pune on 11th – 13th November, 2021. We also look forward for the National convention in December, 2021.

We also request the Members to send their articles, judgements or other accomplishments so that the same may be covered in this Journal the same can be made to the undersigned.

Regards,

PANKAJ GHIYA
Chief Editor
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ALL INDIA FEDERATION OF TAX PRACTITIONERS

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Membership of All India Federation of Tax Practitioners as on 18th September, 2021

Life Members

Zone Name	Associate	Individual	Association	Corporate	Total
Central	0	1385	25	0	**1410**
Eastern	6	1988	37	0	**2031**
Northern	0	1585	21	1	**1607**
Southern	1	2150	23	2	**2176**
Western	5	2880	38	3	**2926**
Total	**12**	**9988**	**144**	**6**	**10150**

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President's Message

Dear Colleagues,

I am wishing all the members of the AIFTP on 75th Independence Day 15.08.2021, fortunately the 75th Independence and 45th AIFTP foundation day celebrations on 11.11.2021 are co-incidental. Azadi ka amruth mahostav is going on all over the country I request all the leaders of the federation are requested to conduct the Azadi ka amruth mahostav linked with AIFTP flag hoisting will started today onwards. The vibrant leaders of the federation zonal chairman's, national vice presidents, national joint secretaries, zonal secretaries, NEC members, co-opted members special invites and all committees chairman's and committee members are requested to hoist the flag of AIFTP along with the national flag for motivation and inspiration to rededicated towards over AIFTP as well as the country. In this connection I request each and every member is requested to involve in the activities of the federation and attend the physical and virtual programmes organized jointly with local associations. This same may help us all for enriching the knowledge and updation ourselves from time to time respectively.

Coming to the feature programmes I have personally witnessed Alwar (Rajasthan) residential refreshing course by the central zone of AIFTP was well organized the topics of Income tax and Gst were discussed the eminent paper writers dealt the subjects in very high constructive manner and enriched a good knowledge by the participants more than 80. In the two days programme the visit of tiger forest and Lake Etc. are very well organized by the team of Pankaj Ghiya, Vinay Jolly, Rajesh Mehta, Guptaji and, Khandelwal and other members the reception & hospitality, friendship & fellowship are excellent and commendable bench mark in the cap of central zone of AIFTP, 7th national executive committee of 2021 is also conducted 8th of August 2021. The AIFTP Ho is thanking the organizers for conducting a nice programme. Coming to the feature events there is a virtual national tax conference in southern zone on 28th and 29th of August 2021, residential refreshing course by the north zone AIFTP is also scheduled on 3rd 4th 5th of September 2021 at Amritsar (Punjab) in physical ,Virtual National Moot Court Competitions and research paper in memory of Padma Vibhushan Dr. N A Palkhiwala Senior Advocate conducting by western zone AIFTP and more over there are two more physical NTCs & NECs at Katra Jammu & Kashmir by North zone AIFTP,3rd 4th 5th of October 2021., NTC & NEC foundation day celebrations on 11th 12th 13th of November 2021 at Pune Western Zone AIFTP.

The government of India, Ministry of revenue secretary invited AIFTP in physically to the north block to discuss about the GST relating issues and glitches a team headed by CA H. L. Madan chairman Indirect Taxes Committee AIFTP,

D. K. Gandhi Advocate Deputy President AIFTP, S. S. Satyanarayana Secretary General AIFTP, CA Janak K. Vaghani National Vice President AIFTP Western Zone, K. C. Kaushik Senior Advocate, Chairman, PRO Committee AIFTP are attend on 10th August 2021 at 3 pm in the north block New Delhi and submitted memorandum on behalf of AIFTP to the government of India revenue secretary as well as to the member GST council for earlier disposal and rectifications and ratifications for the GST eco friendly manner for more and more revenue collections.

The Indirect tax and corporate law journal is an extraordinary book as a journal will gain and enrich knowledge in the above respective matters to the AIFTP members the contents of 8th part are also very informative for the regular professional in their day to day transactions of their respective profession in relating to GST matters.

Happy to Read & Learn - Long Live AIFTP

M. Srinivasa Rao
National President, AIFTP

FORTHCOMING PROGRAMMES

Date & Month	Programme	Place
2nd, 3rd October, 2021	National Executive Committee Meeting & National Tax Conference (NZ)	Katra (Jammu)
9th October, 2021	Annual General Meeting & Election (SZ)	Chennai
9th October, 2021	Annual General Meeting & Election (CZ)	Jaipur
16th October, 2021	Annual General Meeting & Election (WZ)	Mumbai
23rd October, 2021	Annual General Meeting & Election (NZ)	Lucknow
27th October, 2021	Annual General Meeting & Election (EZ)	Patna
11th, 12th & 13th November, 2021	Foundation Day Celebration, National Executive Committee Meeting & National Tax Conference (WZ)	Pune
17th - 21st, November, 2021	Padma Vibhushan Late Dr. N. A. Palkhivala, Sr. Advocate Memorial National Tax Moot Court and Research Paper Competition (WZ)	Virtual Platform

RECENT NOTIFICATIONS & CIRCULARS UNDER CGST ACT

Adv. Deepak Garg

NOTIFICATIONS - CENTRAL TAX

DATE	NOTIFICATION NO.	REMARKS
24.09.2021	36/2021-CENTRAL TAX	Seeks to amend Notification No. 03/2021 dated 23.02.2021.
24.09.2021	35/2021-CENTRAL TAX	Seeks to make amendments (Eighth Amendment, 2021) to the CGST Rules, 2017.
29.08.2021	34/2021-CENTRAL TAX	Seeks to extend timelines for filing of application for revocation of cancellation of registration to 30.09.2021, where due date for filing such application falls between 01.03.2020 to 31.08.2021, in cases where registration has been canceled under clause (b) or clause (c) of section 29(2) of the CGST Act.
29.08.2021	33/2021-CENTRAL TAX	Seeks to extend FORM GSTR-3B late fee Amnesty Scheme from 31.08.2021 upto 30.11.2021.
29.08.2021	32/2021-CENTRAL TAX	Seeks to make seventh amendment (2021) to CGST Rules, 2017.
30.07.2021	31/2021-CENTRAL TAX	Seeks to exempt taxpayers having AATO upto Rs. 2 crores from the requirement of furnishing annual return for FY 2020-21.
30.07.2021	30/2021-CENTRAL TAX	Seeks to amend Rule 80 of the CGST Rules, 2017 and notify Form GSTR 9 and 9C for FY 2020-21. Rule 80 provides for exemption from GSTR-9C to taxpayers having AATO upto Rs. 5 crores.
30.07.2021	29/2021-CENTRAL TAX	Seeks to notify section 110 and 111 of the Finance Act, 2021 w.e.f. 01.08.2021.

CIRCULARS - CENTRAL TAX

DATE	CIRCULAR NO.	REMARKS
25.09.2021	162/18/2021/GST	Clarification in respect of refund of tax specified in section 77(1) of the CGST Act and section 19(1) of the IGST Act.
20.09.2021	161/17/2021/GST	Clarification relating to export of services-condition (v) of section 2(6) of the IGST Act 2017
20.09.2021	160/16/2021/GST	Clarification in respect of certain GST related issues
20.09.2021	159/15/2021/GST	Clarification on doubts related to scope of "Intermediary"
06.09.2021	158/14/2021/GST	Clarification regarding extension of time limit to apply for revocation of cancellation of registration in view of Notification No. 34/2021-Central Tax dated 29th August, 2021

*****

TIMELINE - GST

Adv. Abhay Singla

GOODS & SERVICE TAX

Sr. No.	Particulars	Form	Period	Due Date
(i)	Monthly Summery GST Return	GSTR-3B		
	(a) Regular Taxpayers		Sep, 2021	20th Oct 2021
			Oct, 2021	20th Nov 2021
(ii)	Detail of Outward Supplies: -	GSTR-1 (QUARTERLY)	July-Sep, 2021	13th Oct 2021
	(a) QRMP		Oct, 2021 (IFF)	13th Nov 2021
	(b) Monthly Filing	GSTR-1	Sep, 2021	11th Oct2021
			Oct, 2021	11th Nov2021
(iii)	Payment of Tax under QRMP	PMT-06	By 25th of next month	
(iv)	Quarterly return for Composite taxable persons	CMP-08	July-Sep, 2021	18th Oct 2021
(v)	Return for Non-resident taxable person	GSTR-5	Non-resident taxpayers have to file GSTR-5 by 20th of next month.	
(vi)	Details of supplies of OIDAR Services by a person located outside India to Non-taxable person in India	GSTR-5A	Those non-resident taxpayers who provide OIDAR services have to file GSTR-5A by 20th of next month.	
(vii)	Details of ITC received by an Input Service Distributor and distribution of ITC.	GSTR-6	The input service distributors have to file GSTR-6 by 13th of next month.	
(viii)	Return to be filed by the persons who are required to deduct TDS (Tax deducted at source) under GST.	GSTR-7	Sep, 2021	10th Oct 2021
			Oct, 2021	10th Nov 2021
(ix)	Return to be filed by the e-commerce operators who are required to deduct TCS (Tax collected at source) under GST	GSTR-8	Sep, 2021	10th Oct 2021
			Oct, 2021	10th Nov 2021

IMPORTANTADVANCE RULINGS UNDER GST

CA Manoj Nahata

1. Whether educational courses conducted in Indian Institute of Infrastructure and Construction (IIIC) falls under the category of taxable services?

Held: No, Exempt from GST

In case of ***M/s. Uralungal Labour Contract Co-Operative Society Ltd.-AAR Kerala*****,** the applicant is an accredited agency for Govt. of Kerala and engaged in the construction of roads, bridges and other public infrastructure to Govt. and other institutions. It is also affiliated by National Skill Development Corp. (NSDC). It entered into a contract with the Govt. of Kerala for setting up and operation of Indian Institute of Infrastructure and Construction (IIIC). The Govt. of Kerala declared that the IIIC is a government owned institute and the courses offered therein are approved by the Govt. An advance ruling is sought on the taxability of the courses conducted in the IIC.

The Authority observed that claim of the applicant for exemption under GST is based on the two grounds- firstly, it is affiliated by the NSDC and secondly, the courses conducted by IIIC are approved by the Govt. of Kerala. The Authority referred NN.12/2017 dated 28.06.2017 C. T (R) and observed that the applicant is not falling under any of the categories prescribed for exemption under Entry No.69 of the said notification.

Against the second contention of the applicant, the authority observed Entry No.66 and stated that to qualify as an "educational institution", it is to be examined whether the services provided by the applicant is education as a part of curriculum for obtaining a qualification recognized by any law. Observing the Govt. Order reproduced by the applicant, the Authority stated that the govt. declares IIIC to be a govt. owned institute and granted IIIC, the status of an institution providing services by way of education as a part of a curriculum for obtaining a qualification recognized by law. Hence, the courses conducted in the IIIC is exempted from GST.

2. Whether printing of text books for supply by the State Govt. to its

allied educational institutions falls within the ambit of 'supply' under GST?

Held: Yes, supply of services (Exempt)

In case of ***M/s. Kerala Books and Publications Society - AAR Kerala*****,** the applicantis a printing press established by the Govt. of Kerala in order to print and supply textbooks for school children under the syllabus of Kerala state. Its customer for the printed books is solely the state govt. The state govt. does not charge GST on the school textbooks supplied by it to its allied educational institutions. The print content and its features that are to be printed is designed solely by the state govt. The applicant only arranges the paper and then print the said content on paper. The applicant sought an advance ruling on whether the above services of printing falls under 'supply' under GST.

The applicant contended that the said services do not fall under the ambit of supply under GST. In support, it referred sec-7(2)(b) of the CGST Act. It admitted that it may not be classified as Central Govt., State Govt. or a local Authority, but it is a Government Authority as per NN-12/2017 C.T (R) dated 28.06.2017. Additionally, it referred para 2(zf) of NN-12/2017 wherein the term 'Government Authority' is defined.

The Authority referred sec-7 of the CGST Act and stated that any transaction involving goods and/or services made for a consideration in the course or furtherance of business will come under the scope of supply unless it is listed under Sch-III or notified by Govt. on the recommendations of GST council. Hence, the activities of the applicant are covered under the scope of supply and liable to GST unless specifically exempted. Also, as per the circular no.11/11/2017 GST dated 20.10.2017 issued by the CBIC, the activities undertaken by the applicant is 'supply of services'. Additionally, the applicant falls under the definition of 'Government Authority' and the service of printing of textbooks supplied by the applicant to the state govt. is exempted as per entry no. 3 of the NN-12/2017 C.T (R) dated 28.06.2017 being pure services provided to the state govt. by way of an activity in relation to a function entrusted to a Panchayat under Article 243G of the Constitution.

3. Whether lease rent charged by Municipality/ Panchayat for land used for fish farming is exempt from GST?

Held: Yes

In case of***M/s. Chellanam Grama Panchayath – AAR Kerala,*** the applicant is a local self-government institution and is engaged among other activities in leasing of wet land for fish farming. It has allotted some wet land on rent, which is used for fish and crab farming. An advance ruling is sought on the taxability of the rent received by the applicant.

The applicant referred Sl No. 54 of the NN-12/2017-C.T(R) dated 28.06.2017 and contended that the above-mentioned service is exempt from GST.

The Authority stated that on the plain reading of Entry No.54, it is clearly evident that the services relating to cultivation of plants and rearing of all life forms of animals by way of renting or leasing of vacant land with or without structures is exempted under the entry. The applicant is providing water channel, which comes under the category of land.Also, the nature of provision of land comes within the scope of renting of immovable property. Lastly, the vacant wet land is given on rent for rearing of animals. Thus, the activity of the applicant is exempt under GST in terms of the NN-12/2017 C.T (R) dated 28.06.2017.

4. Whethersupply of drinking water to general public in unpacked/ unsealed manner through dispensers/mobile tankers by a charitable organization at a concessional rate is covered under exemption of GST?

Held: No

In case of***M/s. Vijayavahini Charitable Foundation – AAR Kerala,*** the applicant is a Sec. 8 Company registered under theCompanies Act, 2013, which undertakes, encourages, supports and aids charitableactivities in relation to poor in the areas of medical relief, education, health, vocation, livelihood etc. It is also exempted under section 12A of Income Tax Act,1961. VCF has proposed to undertake the activity of providing pure and safe drinking water at an affordable cost for the under privileged people. An advance ruling is sought on the taxability of the above-mentioned services.

The applicant stated that Entry No 99 of notification 12/20t7 ls applicable only if the water is sold inunsealed containers. In the instant case, water is sold in unsealed containers, which is an essential condition for the benefit of exemption. The villagers come and collectthe water from the dispensing units/

Mobile Tankers. Moreover, the beneficiaries are general public. The view is also supported by the CBIC vide Circular No.52/26/2018-GST dated 09.08.2018

The Authority stated that the exemption entry excludes the following categories of aerated, mineral,***purified***, distilled, medicinal, ionic, battery, demineralized, and water sold in sealedcontainer.The supply in the instant case is 'purified water', which is purified throughReverse Osmosis (RO) process in the plants established by the applicant and thus **it is covered under exclusion of the exemption entry** and **is liable to tax.**The assumption of the applicant that the supply made by them attracts exemptionas it is sold in unsealed containers and aimed at public purpose is erroneous. Theabove Circular reiterates the point that exemption is permissible only when the supply does not fall in the exclusion clause to serial no.99 of NN-12/2017- Central Tax (Rate) dated 28.06.2017. Therefore, the purified water supplies made by the applicant are not eligible for exemption either as per Sl.No 99 of Notification No. 02/2077-CentralTax (Rate) dated 28.06.2017.

5. Whether Indian Institute of Management, Tiruchirapalli is a government entity under GST and whether it is liable to discharge GST under RCM on supply of services as per sec-9(3) and 9(4) of the CGST Act?

Held: Govt. entity, no liability under RCM for security services but liable to pay GST under RCM for receipt of legal services.

In the case of ***M/s Indian Institute of Management, Tiruchirapalli- AAR Tamil Nadu,*** the applicant is an educational institution established with the objectives of imparting high quality management education and training, conducting industrial and management research etc.IIMT is a body corporate as per Section 4 of The Indian Institute of Management Act, 2017, directly under the supervision and control of the Ministry of Human Resources Development of India. In the course of discharging the functions as per the IIMT Act 2017, the applicant engages certain suppliers to provide certain services like pure labour services and supply of composite services.It also avails security services and legal services and pays GST on the same. The applicant sought an advance ruling on the matter whether they are govt. entity under GST and whether they are liable to discharge GST under RCM

on the above-mentioned services.

The applicant stated that the initial corpus fund of the institute is provided by the Government of India by way of Grants. Thus, it can be seen 100% of the initial corpus is fully provided by the Government of India. It also submitted relevant extracts of the IIM Act,2017, in view of which, the applicant stated that they are a Government entity as defined under Notification 12/2017 CT (Rate) dated 28.06.2017 and the service received by them by way of pure labour service and composite service shall be covered by Serial No 3 & 3A of Notification 12/2017 and Serial No.3(vi) of Notification no. 11/2017 CT(Rate) dated 28.06.2017.

The Authority stated that term 'government entity' has been defined in NN-32/2017 – Central Tax (Rate) dated 13.10.2017. It stated that the IIM Act 2017 was enacted wherefrom the applicant becomes an entity set up by an Act of Parliament. Further the institute was initially and also after the enactment of the IIM Act, has been receiving funds from the central Government by way of fund which substantiates the requirement of more than 90% financial participation from the central or state Government. Thus the IIMT satisfies the conditions prescribed to be held as 'Government entity' under the CGST. In respect of the taxability of the security services, it stated that the security services provided by any person other than a body corporate, received by a registered person is taxable under RCM. From the invoices submitted by the applicant, it is clear that the service provider is a registered Private Limited company and so the tax liability will vest on the service provider. In respect of the taxability of the legal services, it stated that any business entity is liable to pay tax under RCM on the legal fees paid to any individual advocate or a firm of advocates. Hence, the applicant is liable to pay GST under RCM on receipt of legal services.

6. Whether the activity of tanker body building on the job work basis, on the chassis supplied by the customer, is supply of goods or supply of services?

Held: Supply of Services.

In the case of ***M/s CC Fabs – AAR Kerala,*** the applicant is engaged in tanker body fabrication given by the customer on job work basis. The chassis is purchased by the customers and then handed over to the applicant for

fabricating the tanker body. An advance ruling is sought on the classification of the above-mentioned supply.

The applicant contended that the activity of providing service of tanker building on motor vehicles/ chassis owned by others by fabricating and collecting lump sum charges should be treated as "supply of services" in terms of paragraph-3 of Sch-II of the CGST Act. There is no transfer of ownership of the chassis for providing such services and thus it is supply of service.

The Authority stated that the applicant is collecting the charges for the activity which includes the cost of inputs/ material used by the applicant and the labor charges for fabrication of the body. Thus, it is evident that the applicant is fabricating body on the chassis belonging to the customer. The ownership of the chassis remains with the customer and at no stage of the process of fabrication of the body, the title in the chassis is transferred to the applicant. Therefore, the activity is squarely covered under Para 3 of the Sch-II of the CGST Act as a treatment or process which is applied to another person's goods and accordingly is a supply of services.Also, the activity is liable to tax @ 18% as per entry no.26 of the NN-11/2017 C.T (R) dated 28.06.2017

7. Whether GST is applicable on the cost of diesel incurred for running DG Set in the course of providing DG Rental Service?

Held: Yes

In the case of ***M/s Goodwill Auto's- AAR Karnataka,*** the applicant is a partnership firmand is engaged in the business of leasing of DG Set to customers like LIC of India, Syndicate Bank, and SBI in various districts of Karnataka. Further, it has entered into agreement with Life Insurance Corporation of India (LIC),to install Diesel Generator on hire basis for rentalong with reimbursement of diesel cost on usage of the DG Set. An advance ruling is sought on the taxability of the cost of diesel reimbursed to the applicant.

The applicant referred compliance given by the Service tax authorities during Pre GST period. It contended that the intention is always to include reimbursable expenditure in the value of the taxable service. However, in the case of ***Intercontinental Consultants and Technocrats Private Limited Vs Union of India***, the Court has taken a contrary view, where in, it was held that the reimbursement will not be liable to service tax in the absence of

specific provision for valuation under section 67 of the Act.

The Authority referred sec-15 of the CGST Act and stated that reimbursement of diesel cost incurred for running DG Set by the recipient of service are incidental expenses and is a part of the consideration as per section 2(31) of the CGST/KGST Act. The contract entered between the applicant and the recipient is for the hiring of DG Set and is a comprehensive contract with the consideration having a fixed component and a variable component. The fixed component is the monthly fixed rent charged in the invoice for the DG Set and the variable charge is the charge for the diesel used. Both are part of the same consideration and is for the contract of supplying DG Set on hire. Though it appears that the applicant is receiving the reimbursement of diesel cost, the recipient is not paying for the diesel but for the services of DG Set, which is an integral part of the supply of DG Set rental service. There is no separate contract for supply of diesel and the invoice issued for the reimbursement of diesel cost is nothing but a supplementary invoice issued for the supply of rental service of DG Set. Hence, consideration for reimbursement of expenses as cost of the diesel for running of the DG Set is nothing but the additional consideration for the renting of DG Set and attracts CGST @ 9% and KGST @ 9%.

8. Whether supply of aerated waters and cigarettes by hotels/ restaurants independently and not as composite supply in the restaurant, to walk in customer will be treated as supply of goods or supply of services?

Held: Supply of aerated water is a Composite Supply of service whereas supply of cigarettes is a Mixed Supply.

In the case of ***M/s MFAR Hotels & Resorts Private Limited-AAR Tamil Nadu,*** the applicant owns and manages hotels and resorts and offer variety of services to their customers. They sell tobacco (cigarettes), soft beverages to the guest. They also supply liquor to the guest and provide free supply of food to their employees.However, on certain occasions some of the guest will take only aerated water or cigarette as walk in guest and they will not consume food. An advance ruling is sought on-

i. classification of supply of aerated waterto walk in customers who do not consume any food item and take only aerated water.

ii. classification of supply of cigarettes to walk in customers who do not

consume any food item and take only cigarettes.

The Authority stated that the question involves the supply of soft beverages/ aerated water as a separate supply by the restaurant to a casual guest who do not avail of any other services offered by the applicant other than buying soft beverages/aerated water at the restaurant.The applicant in the menu for restaurant has 'aerated water' and 'soft Beverages' i.e., any guest who comes to the restaurant can have aerated/soft beverages alone also as these are in the menu of the restaurant. When a guest (resident or non-resident) comes to the restaurant and orders from the menu either soft beverages or aerated water, it involves supply of goods (soft beverages/aerated waters) and supply of services by the restaurant. In this case both the supplies are taxable. The serving of any items on the menu involves the supply of the items along with the use of the facilities/staff of the restaurant. These two are naturally bundled and supplied in conjunction each other and hence is a composite supply as per section 2(30) of the Act. Also, Schedule-II of the CGST Act states that the composite supply of goods being food or any other article for human consumption or any drink (other than alcoholic liquor for human consumption), where such supply or service is for cash, deferred payment or other valuable consideration is a supply of service. Hence, in respect of the first question in hand, the supply of aerated water independently to the walk-in customers will be treated as composite supply of services and taxable @ 18% (CGST+SGST).

In respect of the second question, the Authority stated that any guest who comes to the restaurant can have cigarettes alone as these are in the menu of the restaurant. When a guest (resident or non-resident) comes to the restaurant and orders from the menu tobacco products, it involves supply of goods (cigarettes) and supply of services by the restaurant. In this case both the supplies are taxable. The service of any items by a restaurant involves the supply of the items along with the use of the facilities/staff of the restaurant. However, in this case the sale of cigarettes products are not naturally bundled together with the restaurant services as the services of the restaurant involves serving of food and beverages alone in the normal course. Hence, it is not a composite supply as per section 2(30) and falls squarely u/s 8 of the CGST Act as 'Mixed supply' taxable @ 28% (CGST+SGST) along with applicable Cess.

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DIGEST OF ADVANCE RULINGS UNDER GST

S. S. Satyanarayana, Tax Practitioner

1. Construction of Residential Complex :

Facts : The applicants are providers of taxable services of construction of residential complexes. They have averred that they have entered into a supplementary agreement with land owner on 15.05.2017 duly fixing the total number of flats to be shared with the land owner. This was prior to the introduction of GST. They also averred that the construction was expected to be completed by October/November 2018 i.e., after the introduction of GST.

The applicants sought Advance Ruling on the following questions :

a. *Time of supply and point of taxation with respect to flats allotted to land owner by the builder by way of supplementary agreement on 15.05.2017(i.e., before GST regime) where as the construction will be completed during GST regime.*

b. Is this date to be concluded as the date of allotment for payment of service tax in respect of construction services provided to landlord ignoring the fact that the construction was continued subsequently from May, 2017 to November, 2018.

c. Will it be sufficient and adequate compliance, if the appellant complies law and remit entire service tax on the entire area earmarked to landlord.

d. Once the time of supply is clarified and ruled, the appellant will plan for remittance of tax accordingly on hearing from office.

e. In the event the service tax is remitted based on the date of above supplementary agreement, will the appellant not required to comply with GST on the said value of service to land owner.

f. Will this view in transitional period have any impact on the future projects to be explored by the applicant company.

g. What is the 'Constructed complex' referred to in the ***Notification No.4/2018 – Central Tax (Rate) dated 25.01.2018****.*

Observations & Findings : ***The Hon'ble Apex court in the case of Chandavarkar S R Rao Vs Ashalata S Gautam (1986) 4 SCC 477*** held that, when the grammatical construction is clear and manifest without doubt, that construction must prevail unless there are strong and obvious reasons to the contrary.

Further, after the phrase 'Constructed complex' the words building or civil structure is used to convey the intention in the notification i.e., a constructed complex. So this entails application of the principle of *noscitur a sociis*. The Hon'ble Apex Court of India in the case of – ***Godfrey Philips India Vs State of UP AIR 2005 SC 1103*** held that when two or more words are susceptible of analogous meaning are clubbed together, they are understood to be used in their cognate sense. They take, as it were, their colour from and are qualified by each other, the meaning of the general word being restricted to a sense analogous to that of the less general. In this case, it was held that even in case of inclusive definition, principle of *noscitur a sociis* can be applicable. Therefore in light of catena of case laws declared by the Hon'ble Apex Court of India, the phrase 'Constructed complex' is understood in its natural, ordinary and popular sense to mean a building.

Transfer of possession or transfer of right in the constructed building shall be accomplished by a conveyance deed or similar instrument such as allotment letter. As per Notification No.4/2018 the time of supply to determine liability to pay tax on development rights by a land owner to a developer is the date on which the building or the rights in an existing building are handed over to the land owner by way of a conveyance deed or an allotment letter. If the applicant has handed over the building after inception of CGST & SGST, then the liability to pay tax will arise under CGST & SGST.

Ruling :

1. Time of supply and point of taxation with respect to flats allotted to land owner by the builder by way of supplementary agreement on 15.05.2017(i.e., before GST regime) where as the construction will be completed during GST regime.

   Ans : As per Notification No.4/2018 Dt:25.01.2018 the date of transfer of possession of the building or the right in it to the person supplying development rights will be the time of supply and the liability to pay

tax on the said services shall arise on that day. The time of supply shall not be at any other time.

2. Is this date to be concluded as the date of allotment for payment of service tax in respect of construction services provided to landlord ignoring the fact that the construction was continued subsequently from May, 2017 to November, 2018.

   Ans: No, the applicant has to pay tax as per the time of supply indicated at Point 1 above.

3. Will it be sufficient and adequate compliance, if the appellant complies law and remit entire service tax on the entire area earmarked to landlord.

   Ans : No, the applicant has to pay tax as per the time of supply indicated at Point 1 above.

4. Once the time of supply is clarified and ruled, the appellant will plan for remittance of tax accordingly on hearing from office.

   Ans : Not a question.

5. In the event the service tax is remitted based on the date of above supplementary agreement, will the appellant not required to comply with GST on the said value of service to land owner.

   Ans : Does not arise.

6. Will this view in transitional period have any impact on the future projects to be explored by the applicant company.

   Ans : Does not arise.

7. What is the 'Constructed complex' referred to in the notification.

   Ans : 'Constructed complex' refers to a building or a completed structure.

[2021 (7) TMI 928 – AAR, Telangana – Vajra Infracorp India P Ltd.]

2. Taxable Supply :

Facts : The appellant is an institute imparting coaching to the students to facilitate them to obtain qualification such as Chartered Accountant, Cost Accountant. Company Secretary, certified Management Accountant, certified Public accountant, Association of Chartered certified Accountant etc.

On the application for Advance Ruling, the AAR, Kerala in its Ruling KER/76/2019 dated 20/5/2020 has answered the questions raised by the Appellants. The Rulings provided by the Authority are given below:

Questions Nos. 1, 2 and 3 -The appellant is not covered under the definition of 'educational institution' in Para 2(y) of the Notification 10.12/2017 Central Tax (rate) dated 28-06-2017 and hence the services provided by the appellant is not exempted from GST.

Question No.4 - As per the Scheme of Classification of Service5 notified as Annexure to Notification No. 11/2017 Central Tax (Rate) dated 28.06.2017, the education services provided by the appellant come under SAC - 9992 999293 - Commercial training and coaching services. As per Explanatory Notes to the Scheme of Classification of Services the service code - 999293 includes any training or coaching provided by any institute or establishment providing commercial training or coaching for imparting skill or knowledge or lessons on any subject or field other than the sports, with or without issuance of a certificate and includes coaching or tutorial classes.

Question No. 5 – As per Section 15 of the CGST Act, 2017 the entire consideration received by the appellant from the recipient of services is liable to GST. However, if in respect of the amount collected as examination fees/ other fees the conditions prescribed in Rule 33 of the CGST Rules, 2017 are satisfied then such amount can be excluded from the value of taxable supply as expenditure incurred by the appellant as a pure-agent of the recipient of services.

Question No. 6 – The provision of coaching/training provided by the appellant to their students along with hostel facility qualifies as a composite supply as defined in Section 2(30) of the CGST Act, 2017 and the tax liability on the composite supply has to be determined as per provisions of Section 8(a) of the CGST Act, 2017. Therefore the entire supply is to be treated as falling under SAC – 9992- 999293 – Commercial training and coaching services: being the principal supply and will be liable to GST at the rate applicable for the principal supply.

Question No. 7 – As the value of supply of a unit of a accommodation in the hostel facility provided by the appellant to outside students is below one thousand rupees per day, the appellant is eligible for the exemption under Sl. No. 14 of

the Notification No. 12/2017-Central Tax (Rate), dated 28-06-2017 in respect of the supply.

Question No. 8 – The sale of text books to the students will attracts GST as per the schedule of rates notified under Notification No. 01/2017-Central Tax (Rate), dated 28-06-2017.

Aggrieved by the Ruling, the Appellant challenges the legality, correctness and propriety of the impugned order dated 20/05/2026 passed by the Advance Ruling Authority, Kerala.

Observations & Findings : the appellant's institution is not providing any elementary education or pre-school or upto higher secondary level or equivalent, thereby, they would not come under the purview of the 'educational institution' as defined in para 2(y)(i) of the said Notification No. 12/2017-CT. Similarly, the appellant is not engaged in providing Education as a part of an approved vocational education course as envisaged in para 2(y)(iii) of the said notification. It is not the case of the appellant that they are providing any vocational courses. Hence, they cannot be categorized as 'education institution' within the meaning of sub-clauses (i) and (iii) of para 2(y) of the said notification for the purpose of exemption.

The term "Education" is not defined in the CGST/SGST Act but as per ***Apex Court's decision in*** "***Loka Shikshana Trust v. CIT***". Education is process of training and developing knowledge, skill and character of students by normal schooling. The term "educational institution", under sub-clause (ii) ibid, covers institutions providing services by way of education as part of curriculum for obtaining a qualification recognized by any law for the time being in force. In order to be qualified to get included under this sub-clause educational service should be imparted as a part of curriculum and for obtaining a qualification recognized by extant law.

It is important to understand that to be in the negative list (exempted) the service should be delivered as part of curriculum. Conduct of degree courses by Colleges. Universities or Institutions which lead to grant of qualifications recognized by law would be covered, Training given by private coaching institutes would not be covered as such training does not lead to grant of a recognized qualification. This clearly implies that only those institutions whose operations conform to the specifies given in the definition of the term

"Educational Institution", would be treated as one and entitled to avail exemptions provided by the law. It is settled law that the person availing the exemption notification shall satisfy all the conditions prescribed in the notification and failure to do so would disentitle him from the exemption as held by ***the Larger Bench of Hon'ble Supreme Court in the case of Harichand Shri Gopal 2010 (260) ELT 3 (SC),*** In view of above settled position of law in respect of exemption notification, and by applying the settled law of strict interpretation of taxing statute, which are plainly worded, as in the case in hand, the services rendered by the appellant are held to be not a service by way of 'education as a part of curriculum for obtaining a qualification recognized by any law for the time being in force' as envisaged under no 66 of the said notification, for exemption from GST.

As per the provisions of Section 15 of the CGST/SGST Act, 2017 the entire consideration received by the appellant from the recipient of services is taxable under GST. However, if the conditions prescribed in Rule 33 of the CGST Rules, 2017 are satisfied and the appellant acts as a pure agent on behalf of the students enrolled with them, there will be no tax liability for the amount collected as examination fees/other fees. Accordingly, such amount can be excluded from the value of taxable supply as expenditure incurred by the appellant as a pure agent of the recipient of services.

Order :

Issue No. 1 : Whether the education programme and training being offered by the appellant is exempted from GST as imparting of education since the appellant is giving lecture classes and notes including printed books published by Govt. recognized institutes, on the basis of the specific syllabus (curriculum) published by the very same institutes formed under Acts of Parliament and also facilitating the students to appeal for the examinations conducted by the same institutes.

Issue No. 2 : Whether the education programme and training being offered by the appellant is exempted from GST as imparting of education since the appellant is giving lecture classes and notes including printed books published by Government-recognized institutions like Universities and also availed from online facilities of the said institutions on the basis of the specific syllabus (curriculum) published by various Universities including Mahatma Gandhi

University formed under Acts of State Legislature.

Issue No. 3 : Whether the education programme and training being offered by the appellant is exempted from GST as imparting of education since the appellant is giving lecture classes and notes including printed books published by Government-recognized institutions like ACCA, IMA USA, etc. and also availed from online facilities of the said institutions on the basis of the specific syllabus (curriculum) published by international institutions like ACCA, IMA USA, etc. which are approved by Govt. of India.

Decision – Issue Nos. 1, 2 and 3 – As per the provisions contained in Para 2(y) of the Notification No. 12/2017-Central Tax (rate), dated 28-60-2017, the appellant does not qualify to be categorized as "educational institution" and therefore the above stated services provided by the appellant are not exempted from GST as per entry no. 66 of the Notification No. 12/2017-Central Tax (Rate), dated 28-6-2017.

Issue No. 4 : What is the Service Accounting Code (SAC) of the appellant's services under GST laws?

Decision : As per the Scheme of Classification of Services notified as Annexure to Notification No. 11/2017-Central Tax (Rate), dated 28-06-2017, the impugned services provided by the appellant fall under "SAC – 9992-999293 – Commercial training and coaching services".

Issue No. 5 : Is there any tax liability under GST laws on the appellant for collected and transferring fees and other fees of the recognized institutes or universities on behalf of students studying at the appellant institute.

Decision : Section 15 of the CGST/SGST Act, 2017 specifies that the entire consideration received by the supplier from the recipient of services is liable to GST. However, if the conditions prescribed for "Pure Agent" in Rule 33 of the CGST Rules, 2017 are satisfied in respect of the amount collected as examination fees/other fees by the appellant from the students enrolled with them, then such amount can be excluded from the value of taxable supply.

Issue No. 6 : The appellant offers hostel facility to its students at a rate of less than Rs. 200/- per day per person including food and at a monthly rate of maximum Rs. 6000/-. Whether there is any tax liability on such hostel fee?

Decision : The coaching/training provided by the appellant to their students

along with hostel facility qualifies to be categorized as a composite supply as defined in Section 2(30) of the CGST Act, 2017. As per Section 8(a) of the CGST/SGST Act, 2017, the entire supply is to be treated as falling under "SAC-9992-999293 – Commercial training and coaching services" being the principal supply and will be liable to GST at the rate applicable for the principal supply.

Issue No. 7 : Whether there is any tax liability on the appellant for selling text books to its students?

Decision : As held in respect of hostel fees, the sale of text books to the students qualifies to be categorized as a composite supply as defined in Section 2(30) of the CGST Act, 2017. As per Section 8(a) of the CGST/SGST Act, 2017, the entire supply is to be treated as falling under "SAC-9992-999293 – Commercial training and coaching services" being the principal supply and will be liable to GST at the rate applicable for the principal supply.

In nut shell, the Advance Ruling No. KER/76/2019, dated 20/5/2020 of the Advance Ruling Authority, Kerala stands upheld with aforesaid modification and consequently the appeal filed by the appellant is rejected.

[2021 (7) TMI 809 – Appellate AAR, Kerala – Logic Management Training Institutes P Ltd.]

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CASE LAWS AND NOTIFICATIONS/ CIRCULARSON REAL ESTATE (REGULATION AND DEVELOPMENT) ACT, 2016

CA Sanjay Ghiya

CA Ashish Ghiya

COMMENTARY ON SECTION-7

Section 7: Revocation of Registration

(1) The Authority may, on receipt of a complaint or suo motu in this behalf or on the recommendation of the competent authority, revoke the registration granted under section 5, after being satisfied that—

a) the promoter makes default in doing anything required by or under this Act or the rules or the regulations made thereunder;

b) the promoter violates any of the terms or conditions of the approval given by the competent authority;

c) the promoter is involved in any kind of unfair practice or irregularities.

Explanation.—For the purposes of this clause, the term "unfair practice means" a practice which, for the purpose of promoting the sale or development of any real estate project adopts any unfair method or unfair or deceptive practice including any of the following practices, namely:—

(A) The practice of making any statement, whether in writing or by visible representation which,—

i. falsely represents that the services are of a particular standard or grade;

ii. represents that the promoter has approval or affiliation which such promoter does not have;

iii. makes a false or misleading representation concerning the services;

(B) The promoter permits the publication of any advertisement or prospectus whether in any newspaper or otherwise of services that are not intended to be offered;

(d) The promoter indulges in any fraudulent practices

(2) The registration granted to the promoter under section 5 shall not be revoked unless the Authority has given to the promoter not less than thirty days notice, in writing, stating the grounds on which it is proposed to revoke the registration, and has considered any cause shown by the promoter within the period of that notice against the proposed revocation.

(3) The Authority may, instead of revoking the registration under sub-section (1), permit it to remain in force subject to such further terms and conditions as it thinks fit to impose in the interest of the allottees, and any such terms and conditions so imposed shall be binding upon the promoter.

(4) The Authority, upon the revocation of the registration,—

(a) shall debar the promoter from accessing its website in relation to that project and specify his name in the list of defaulters and display his photograph on its website and also inform the other Real Estate Regulatory Authority in other States and Union territories about such revocation or registration;

(b) shall facilitate the remaining development works to be carried out in accordance with the provisions of section 8;

(c) shall direct the bank holding the project back account, specified under subclause (D) of clause (I) of sub-section (2) of section 4, to freeze the account, and thereafter take such further necessary actions, including consequent de-freezing of the said account, towards facilitating the remaining development works in accordance with the provisions of section 8;

(d) may, to protect the interest of allottees or in the public interest, issue such directions as it may deem necessary

COMMENTS

The registration granted under section 5 can be revoked by the authority. This section lays down the circumstances under which the registration granted can be revoked. The authority may, on receipt of a complaint or suo motu in this behalf or on the recommendation of the competent authority revoke the registration granted under section 5, after being satisfied the conditions as stipulated in sub section (1).The registration granted shall not be revoked without giving a Show Cause

Notice to the promoter. The Authority shall give to the promoter a notice in writing for not less than 30 days stating the grounds on which it is proposed to revoke the registration and has considered the reply or defence filed by the promoter within the period of that notice shall be duly considered by the Authority.

However, if the authority deems fit, instead of revoking the registration, permit it to remain in force subject to terms and conditions as authority may think fit to impose in the interest of the allottees.

It is not necessary that in all the cases of non- compliances the authority will revoke the registration. The authority may instead of revocation may impose various terms & conditions on the promoter for completing the project so as to the safeguard the interest of the allottee(s).

CASE LAWS

MAHARASHTRA REAL ESTATE APPELLATE TRIBUNAL

PARESH BHANUSHALI & ORS V/S ZAHEED SHAIKH & ORS

Heard the parties through their learned Counsel on the point of stay to the operation and implementation of the impugned order dated 22.11.2018 passed by the Adjudicating Officer, MahaRERA.

Brief facts of the case are that in the project of appellants, respondents booked two flats vide registered agreements for sale on 18/06/2016. Possession was agreed to be given by June 2017 though extendable subject to certain contingencies/reasons beyond control of Appellants as provided in the agreement. As appellants failed to hand over possession as agreed, respondents approached the Authority seeking withdrawal from the project andrefund of their amounts. On account of an amicable settlement during the complaint proceedings, respondents agreed to continue in the project and accordingly, learned Chairperson passed the order dated 01/03/2018 by directing Appellants to hand over possession by May, 2018 failing which to pay interest at the applicable rate of interest till possession.

Since Appellants failed to hand over possession as directed in the aforesaid order, respondents again approached the Authority to seek withdrawal from the project. After hearing the parties, learned Chairperson transferred the matter to Adjudicating Officer for deciding the complaint filed by Respondents. On transfer, the matter was heard ex-parte as the Appellants remained absent and the impugned order dated 22.11.2018 came to be passed by Adjudicating Officer by allowing

Respondents withdrawal from the project and refund of the amounts with applicable interest in addition to compensation and costs of Rs.20,000/- to be paid within thirty days from the date of order. The directions to execute Deed of Cancellation at the cost of Appellants are also given.

Respondents and Appellants argued that they found on obtaining information under RTI that the Appellants have not made any applications even to obtain necessary permissions so as to hand over the possession. They also agitated that though Appellants knew ofthe order of transferring the complaint to Adjudicating Officer for adjudication, they neither challenged the same nor attended the hearing before Adjudicating Officer despite having notice to appear in the matter. They also submitted that all along so far in this appeal, Appellants never pressed for stay and only after warrants were issued in the execution proceedings that they have started clamoring for stay. They strongly objected to grant of stay and pleaded for rejection thereof.

Considered the rival submissions of the parties. Perused documents such as order dated 01.03.2018, proceedings dated 06.07.2018 for transfer of second complaint to Adjudicating Officer, impugned order etc. on record. Ld tribunal find that the matter has a history of having amicable settlement of the issues between the parties vide order dated 01.03.2018 and then there is a second round of litigation which after transfer of proceedings in the second complaint culminated in passing of the impugned order in the absence of Appellants by the Adjudicating officer. Appellants have raised several contentious issues such as violation of principles of res judicata in the background of consent order dated 01.03.2018, deformities in determining the cost of compensation, denial of natural justice etc. while passing the impugned order. These all issues arising out of the appeal need to be adjudicated after affording sufficient opportunity to the parties. Validity and tenability of the grounds and contentions of the Appellants and counter thereto by Respondents cannot be gone into at threshold in a summary manner. In such circumstances, pending the final hearing of appeal if execution of impugned order is proceeded with, the entire object and purpose of preferring appeal as a statutory right will be rendered infructuous. Moreover, Appellants have already established their bona fides by depositing 40% amount as per impugned order in compliance of proviso to Section 43 (5) of the RERA. To that extent the interests of the Respondents have been protected.

Considering the above aspects, we are inclined to grant stay to the operation and implementation of impugned order pending finalization of appeal. Accordingly, the

following order:-

ORDER

1. The prayer for stay is granted.
2. The operation and implementation of the impugned order dated 22.11.2018 is stayed till final hearing of appeal.

RAJASTHAN REAL ESTATE REGULATORY AUTHORITY

POONAM SINGH RAJPUROHIT V/S PIYUSH COLONISERS LTD

The complainant has filed an application for execution of the Authority's order dated 03.07.2019, whereby directions were given to the non-complainant company for making refund along with interest.

In its reply to the notice issued on 18.12.2019, the non-complainant company has stated that the National Company Law Tribunal (NCLT), New Delhi, Principal Bench has initiated Corporate Insolvency Resolution Process against the non-complainant company 'Piyush Colonisers Ltd' under section 7 of the Insolvency and Bankruptcy Code, 2016 and the Interim Resolution Professional, Shri Umesh Garg, has issued public announcement inviting claims from all creditors of the company. Vide its judgment dated 30.09.2019, the NCLT, New Delhi, Principal Bench has declared moratorium in terms of section 14 of the Insolvency and Bankruptcy Code, 2016, which, inter alia, prohibits "the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority".

In view of the above, the present execution proceedings are stayed until the Corporate Insolvency Resolution Process gets concluded or the aforesaid moratorium is withdrawn. Accordingly, for the present, the matter shall be dropped from the cause list.

Meanwhile, the complainant has the liberty to file his claim with the Interim Resolution Professional.

NOTIFICATION

ODISHA REAL ESTATE REGULATORY AUTHORITY

No.MISC-25/21/ORERA/No-2009 Date: 15/07/2021

SUB- DIRECTION ON REQUIREMENT OF REGISTRATION OF THE

PROJECTS COMING UNDER SECTION 3(2)(a) OF THE REAL ESTATE (REGULATION & DEVELOPMENT) ACT, 2016.

ORDER

A question is raised if registration is necessary for a project where the area of the land proposed to be developed does not exceed 500 square meters or the number of the Apartment proposed to be developed does not exceed 8 inclusive of all phases. There is no ambiguity in the provision that needs a clarification.

A project is exempted from registration within the scope of Section 3(2)(a) of Real Estate (Regulation & Development) Act, 2016 which reads:

"(2) Notwithstanding anything contained in sub-section (1), no registration of the real estate project shall be required-

(a) where the area of land proposed to be developed does not exceed five hundred square meters or the number of apartments proposed to be developed does not exceed eight inclusive of all phases".

Both the clauses are to be read disjunctly and not conjointly.

If the land area does not exceed five hundred Square meters, but the apartment proposed to be developed exceeds eight inclusive of all phases, there is no requirement of registration.

Similarly, if land area is more than five hundred Square Meters, but the apartment proposed to be developed does not exceed eight inclusive of all phases, no registration is required to be taken from this Authority.

The order to the above effect is passed in exercise of power conferred on this Authority U/s 37 of Real Estate (Regulation & Development) Act, 2016.

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PRESUMPTIVE TAXATION PROVISIONS APPLICABLE TO NON RESIDENTS

CA Paresh Shah

CA Mitali Gandhi

1. Introduction

This is the seventh article in the series of taxation of non-residents. In the previous article we have already discussed two provisions pertaining to presumptive Taxation schemes applicable to non-residents. In the current article we will cover the balance provisions dealing with Presumptive Taxation.

As highlighted in the previous articles, we know that a non-resident is liable to tax in India on that income which is chargeable to tax in India. Income of a Non Resident is chargeable to tax in India if–

i. It is received in India; or deemed to have been received in India

ii. It accrues or arises in India or is deemed to accrue or arise in India

In certain cases, it is difficult for the non-resident to maintain India specific books of accounts, which could be due to the nature of the business or other factors. Preparing a statement of taxable income , for complying with the tax laws of India, would require preparation of India specific accounts, and application of various provisions in the income tax act to each such transaction. In order to ease the burden of the non-resident, and provide a simple mechanism to compute the tax liability, the Indian tax laws has certain provisions for non-residents, who are engaged in specific business covered under those regulations, to offer their taxable income as a percentage of the receipts. In such cases, the deduction of Expenditure is generally not allowed.

2. Presumptive Taxation - Explained

As per sections 44AA of the Income-tax Act, 1961, a person engaged in business or profession is required to maintain regular books of account under certain circumstances. Income Tax department has formulated the presumptive tax scheme to help small traders, businessmen and service providers to pay tax on an estimated income.A person adopting the presumptive taxation scheme can declare income at a prescribed rate and, in turn, is relieved from tedious job of maintenance of books of account.

3. Presumptive Taxation Schemes for non-residents

Section	Particulars
44B read with 172	Income from shipping business shall be computed on presumptive basis (Subject to certain conditions).
44BB	Income of a non-resident engaged in the business of providing services or facilities in connection with, or supplying plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils shall be computed on presumptive basis (Subject to certain conditions)
44BBA	Income of a non-resident engaged in the business of operation of aircraft shall be computed on presumptive basis (Subject to certain conditions).
44BBB	Income of a foreign company engaged in the business of civil construction power turnkey or the business of erection of plant or Machinery or testing or commissioning thereof, in connection with projects shall be computed on presumptive basis (Subject to certain conditions)

We have discussed the provisions pertaining to Income from Shipping Business (Sec 44BB) and Income from business of operation of aircraft (Sec 44BBA). In the current article we will discuss on the other 2 sections, i.e. Section 44BB and 44BBB

3.1. Profits and gains in connection with the business of exploration, etc., of mineral oils – Sec 44BB

i. Notwithstanding anything to the contrary contained in sections 28 to 41 and sections 43 and 43A, in the case of an assessee, being a non-resident, is engaged in the following two activities, he can opt for the presumptive tax provisions of Section 44BB of Income Tax Act: –

a) Providing services and facilities, in connection with prospecting for mineral oil , or extraction or production of mineral oil. ;or

b) Supplying plant and machinery on hire , which is used or to be used in prospecting for mineral oil or extraction or production of mineral oil

ii. If the non-resident opts for the presumptive tax provisions of Section 44BB of Income Tax Act, the profits and gains for such activities shall be deemed to be 10% of the following amounts : –

a) Amounts paid or payable to the assessee or to any person on his behalf whether in India or outside India, for services or facilities or supply of plant & machinery for the aforesaid purposes in India; and

b) Amounts received or deemed to be received in India by the assessee or any other person on his behalf, on account of the provision of such services or facilities or supply of plant & machinery for the aforesaid purposes outside India.

iii. It is not mandatory, for a person who is engaged in the specified business discussed above to follow the provisions of Section 44BB of Income Tax Act. Such a person can opt to be governed by the normal provisions of Income Tax Act, and maintain the required books of accounts and other documents as per section 44AA, and get his accounts audited and furnishes a report of such audit as required under section 44AB

iv. Provisions of Section 44BB do not apply to :

- Section 42 - Special provision for deductions in the case of business for prospecting, etc., for mineral oil
- Section 44D - Special provisions for computing income by way of royalties, etc., in the case of foreign companies
- Section 44DA - Special provision for computing income by way of royalties, etc., in case of non-residents
- Section 115A - Tax on dividends, royalty and technical service fees in the case of foreign companies
- Section 293A - Power to make exemption, etc., in relation to participation in the business of prospecting for, extraction, etc., of mineral oil

v. Fees for technical services earned by non-resident shall be taxable only under the provisions of section 44DA or section 115A, irrespective of the business to which it relates. Section 44BB would apply only for

consideration for services and other facilities relating to exploration activity, which are not in the nature of technical services.

vi. Meaning of certain terms for the purposes of this section,—

a) "plant" includes ships, aircraft, vehicles, drilling units, scientific apparatus and equipment, used for the purposes of the said business;

b) "mineral oil" includes petroleum and natural gas.

3.2. Jurisprudence

i. section 44BB does not create any discrimination between the person who actually does the activity of prospecting for or extraction or production, and the person who renders services in connection therewith.It does not distinguish between main contractor and a sub-contractor. Both can be taxed under the provisions of Section 44BB as far as they fulfil the conditions mentioned therein– ITAT in DCIT vs Technip UK Ltd [2019]

ii. Service tax collected by assessee and passed on to Government does not have any element of income and therefore cannot form part of gross receipts for purposes of computing 'presumptive income' of assessee under section 44 BB – High court of Delhi in DIT vs Mitchell Drilling International (P.) Ltd [2015]

iii. Where assessee is imparting services which could be a simple royalty or FTS then the same would be taxed under section 9(1) (vi)/ (vii) read with section 115A, but where assessee is imparting any services in relation to exploration of mineral oil then the royalties/FTS would be taxable under section 44BB; as section 44BB being specific provision in relation to specific services, it would prevail over the other provisions dealing with royalties/FTS. Sections 9, 44BB, 44DA and 115A relating to royalty/FTS operate in different fields.

Section 44DA applies to non-residents only, however it is broader and more general in nature and provides for assessment of income of a non-resident by way of royalty or fees for technical services where such non-resident carries on business in India through a permanent establishment situated therein or performs services from a fixed place of profession situated in India and the right, property or contract in respect of which the royalties or fees for technical services are paid is effectively connected

with the permanent establishment or fixed place of profession. – ITAT bench in DDIT vs RPS Energy Pty Ltd [2018]

iv. High Court by impugned order held that section 44BB is a complete code in itself and amount received by way of reimbursement of actual expenses, was not, in any way, excluded from ambit of section 44BB

v. The Hon'ble Calcutta High Court in the case of Schlumberger Sea Co.Inc.(157 CTR 538) has held that once a non-resident supplier of machinery comes within the purview of section 44BB,then it cannot come again under the purview of the other parts of the Act, dealing with profits and gains of business or profession.

3.3. Special provision for computing profits and gains of foreign companies engaged in the business of civil construction, etc., in certain turnkey power projects – Section 44BBB

i. Notwithstanding anything to the contrary contained in sections 28 to 44AA, in the case of an assessee, being a foreign company, engaged in the following activities approved by the Central Government in this behalf

a) business of civil constructionin connection with a turnkey power project, or

a) the business of erection of plantin connection with a turnkey power project or

b) Testing or commissioning of such plant and machinery in connection with the turnkey project

ii. a sum equal to 10% of the amount paid or payable (whether in or out of India) to the said assessee or to any person on his behalf on account of such civil construction, erection, testing or commissioning shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession

iii. It is not mandatory, for a person who is engaged in the specified business discussed above to follow the provisions of Section 44BBB of Income Tax Act. Such a person can opt to be governed by the normal provisions of Income Tax Act, and maintain the required books of accounts and other documents as per section 44AA, and get his accounts audited and furnishes a report of such audit as required under section 44AB

4. <u>Non Obstante Clause</u>

Section 44BB and 44BBB both the sections begin with "Notwithstanding……"

"A clause beginning with 'notwithstanding anything contained in this Act or in some particular

provision in the Act or in some particular Act or in any law for the time being in force', is

somet³mes appended to a sect³on ³n the beg³nn³ng, w³th a v³ew to g³ve the enact³ng part of the

Sect³on ³n case of confl³ct, an overr³d³ng effect over the prov³s³on or Act ment³oned ³n the non obstante clause.²t ³s equivalent to say³ng that ³n sp³te of the prov³s³on or the Act ment³oned ³n the non-obstanteclause, the enactment follow³ng ³t w³ll have ³ts full operat³on or that the provisions embraced ³nthe non-obstante clause w³ll not be an ³mped³ment for the operation of the enactment. Thus anon-obstante clause may be used as a leg³slat³ve dev³ce to mod³fy the amb³t of the prov³s³on orthe law ment³oned ³n such clause or to override it ³n specified circumstances. - The Hon'ble Supreme Court in Chandavarkar S.R. Rao v. Ashalata S. Guram

The phrase 'notw³thstand³ng anyth³ng ³n' ³s used ³n contrad³st³nct³on to the phrase 'subject to',

the latter convey³ng the ³dea of a prov³s³on y³eld³ng place to another prov³s³on or other

prov³s³ons to wh³ch ³t ³s made subject.

A non-obstante clause must also be d³st³ngu³shed from the phrase 'w³thout prejud³ce'. A

prov³s³on enacted 'w³thout prejud³ce' to another prov³s³on has not the effect of affect³ng the operat³on of the other prov³s³on and any act³on taken under ³t must not be ³ncons³stent w³th such other prov³s³on

The purpose of a non-obstante clause is to give the enacting part of the statute an overriding effect in the case of a conflict with the laws mentioned in the non-obstante clause. This amounts to expressing a legislative intent that in spite of enactment mentioned in the non-obstante clause, the law enacted following it will have full operation and the provisions mentioned in the non-

obstante clause will not be an impediment. - Apex Court in Union of India v. G.M Kokil, reported in AIR 1984 SC 1022).

A non obstante clause is usually used in a provision to indicate that that provision should prevail despite anything to the contrary in the provision mentioned in such non obstante clause. In case there is any inconsistency or a departure between the non obstante clause and another provision one of the objects of such a clause is to indicate that it is the non obstante clause which would prevail over the other clause." To the same effect are the observations in Shree Ganesh Trading Co. v. State of Madhya Pradesh, 1972 MPLJ 864 : (AIR 1973 Madh Pra 26) (Full Bench).

The Honorable High Court of Patna in case of Magadh Stock Exchange vs CIT [2020] stated the as per settled principles of interpretation, a non-obstante clause assumes an overriding character against any other provision of general application. It declares that within the sphere allotted to it by the Parliament, it shall not be controlled or overridden by any other provision unless expressly provided for

4.1 In case of two non obstante clauses

Somet³mes one f³nds two or more enactments operat³ng ³n the same f³eld and each conta³n³ng a non-obstante clause stat³ng that ³ts prov³s³ons w³ll have effect 'notw³thstand³ng anyth³ng ³ncons³stent therew³th conta³ned ³n any other law for the t³me be³ng ³n force'. The confl³ct ³n such cases ³s resolved on cons³derat³on of purpose and pol³cy underly³ng the enactments and the language used there³n. Another test that ³s appl³ed ³s that the later enactment normally preva³ls over the earl³er one. ²t ³s also relevant to cons³der as to whether any of the two enactments can be descr³bed a spec³al one; ³n that case the spec³al one may preva³l over the more general onenotw³thstand³ng that the general one ³s later ³n t³me.

The Supreme Court in Sarwan Singh v. Kasturi Lal, (AIR 1977 SC 265) in the context of the Delhi Rent Control Act and the Slum Areas (Improvement and Clearance) Act where with reference to both the enactments containing non obstante clauses it was observed that "when two or more laws operate in the same filed and each contains a non obstante clause stating that its provisions will override those of any other law, stimulating and incisive problems of interpretation arise. Since statutory interpretation has no conventional protocol,

case of such conflict has to be decided in reference to the object and purpose of the laws under consideration". It was also observed that "one other test may also be applied though the persuasive force of such a test is but one of the factors which combine to give a fair meaning to the language of the law. That test is that the later enactment must prevail over the earlier one".

In Madras Petrochem Ltd. v. BIFR, (2016) 4 SCC 1, this Court had to deal with whether a predecessor statute to the IBC, which has been repealed by the IBC, namely, the Sick Industrial Companies (Special Provisions) Act, 1985, prevails over the SARFAESI Act to the extent of inconsistency therewith. This Court noted that in the case of two statutes which contain non-obstante clauses, the later Act will normally prevail,

5. Conclusion

Depending on the nature and size of the business of the non-resident assesse, he/ she must take a call whether opting for presumptive taxation is more beneficial or not. Presumptive taxation scheme is usually more beneficial for those people who have small businesses and low business expenditures in India and large expenses outside India. Also where provision does not permit employment of normal provisions of the law, one can consider Nondiscrimination Article of the Tax Treaty if beneficial to the Non Resident Tax payer. Normal TDS provisions will apply to thepayer to the Non Resident recipient and that will normally extinguish the Tax liability in India. In most cases Tax return will have to be filed unless exempted.

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HIGH COURT OF TRIPURA

WP(C) No.402/2021

Johal Carriers Private Ltd. ..... *Petitioner(s).*

Vs.

The State of Tripura and Ors. ..... *Respondent(s).*

For Petitioner(s) : Mr. T K Deb, Advocate,
Mr. N Paul, Advocate.

For Respondent(s) : Mr. K De, Addl. Govt. Advocate,
Mr. Tanmay Debbarma, Advocate.

HON'BLE THE CHIEF JUSTICE MR. AKIL KURESHI HON'BLE JUSTICE MR. S G CHATTOPADHYAY

_O_R_D_E_ R_

20/7/2021

(Akil Kureshi, CJ).

Heard learned counsel for the parties for final disposal of the petition.

Petitioner is a transporter. On 13th May 2021, four Ashok Leyland trucks were being brought within the State. These trucks were intercepted by the General Sales Tax(GST) authorities on the ground that the drivers did not possess valid e-way bills for these heavy vehicles. A notice was, therefore, issued to the transporter by the Superintendent of State Taxes, Churaibari Enforcement wing on 15th May 2021 in which it was asserted that the goods were being brought within the State by contravening the provisions of Tripura State General Sales Tax Act, 2017 and there was an attempt to evade tax. The noticee was, therefore, called upon to show cause why the unpaid tax with penalty under State as well as Central GST Acts should not be recovered.

The petitioner replied to the said show cause notice, on 19th May 2021, pointing out that upon arrival the driver had produced the tax invoice, gate passes and e-way bills of the said vehicles. The e-way bills were valid for the period between 3rd May 2021 to 21st May 2021 and that the petitioner having paid full taxes there was no breach or violation of any of the provisions.

On 20th May 2021, Superintendent of State Taxes conveyed to the petitioner that the vehicles which were being brought within the State were new motor vehicles with temporary registration numbers which were affixed in the front of the vehicles and the e-way bills in connection of these vehicles did not display the temporary registration numbers supported by trade certificate issued from the Transport Department of the concerned State. Thus the petitioner had contravened the provisions of Rule 138 of State General Sales Tax Rules, 2017 and therefore, Section 129 of the GST Act was invoked.

On 21st May 2021, the Superintendent of Taxes wrote yet another letter to the petitioner pointing out that the vehicles were detained since the drivers did not carry e-way bills and, therefore, the request for release of the vehicles cannot be considered. These vehicles will be released after completion of all procedures specified in Section 129 of Tripura State GST Act and the Rules made thereunder.

On 29th May 2021, the Superintendent of Taxes issued a demand notice to the respondent No.4 the consignee of the vehicles. In 4 separate demand orders, he had raised the demand for payment of tax with penalty a total of which comes to approximately Rs.31,00,000/-. In this background, the transporter has filed this petition and prayed for quashing the show cause notice dated 15th May 2021 and communication dated 21st May 2021.

Learned counsel for the petitioner submitted that the drivers were carrying all necessary documents along with the vehicles. The GST was fully paid earlier and there was no evasion of the duty in any manner. Only minor technical defect, if at all, was that the e-way bills did not contain the temporary registration of the vehicles in question. This defect was also later on removed by generation of fresh e-way bills in the system and producing before the authorities despite which the vehicles continued to be detained. He submitted that the Superintendent of Taxes has raised a demand on the consignee of the goods without passing the order of assessment which is wholly impermissible.

Learned Additional Government Advocate Mr. Karnajit De for the State submitted that the Superintendent of Taxes was perfectly justified in intercepting the vehicles and raising the tax demand since the drivers did not carry necessary documents at the time of interception of the vehicles. Subsequent generation of e-way bills would not cure the defect.

Learned counsel Mr. Tanmay Debbarma for the respondent No.4 submitted that the said respondent is the consignee of the goods and has nothing to do with the transportation thereof. If there is any defect or non- payment of tax, the respondent No.4 is not liable in any manner.

Whether the defects in the e-way bills were merely technical or substantial inviting fresh collection of tax with or without penalty is a question neither necessary nor possible for us to examine at this stage in this petition. What is of considerable relevance, however, is that the Superintendent of Taxes has adopted a procedure which is wholly irregular. In the show cause notice dated 15th May 2021, he had not elaborated the ground that the e-way bills did not carry the reference to the temporary registration numbers duly certified by the State RTO authorities, a ground which he raised in subsequent communication dated 20th May 2021. The petitioner, therefore, did not have opportunity to meet with these grounds. Further, he has raised a demand for unpaid tax with penalty and sought to recover the same from the consignee. This is wholly irregular. Demand notice must be preceded by an order of assessment, an order which can also be challenged by the person aggrieved before the appellate authority.

In the present case, the Superintendent of Taxes has not passed any order of assessment before raising recovery of the amounts. In any case, he had issued a show cause notice for assessment to the petitioner and the demand notices raised to respondent No.4. Ordinarily, we would have rested at quashing the demand notice*(though not specifically challenged by the petitioner since it was never served to the petitioner).* However, in the present case as noted, the initial show cause notice which the Superintendent of Taxes issued to the petitioner did not contain the grounds which were mentioned in the later communication dated 21st May 2021. The reply that the petitioner therefore filed to the show cause notice, on 19th May 2021, did not cover the grounds and allegations made in the communication dated 20th May 2021.

Under the circumstances, we would though permit the Superintendent of Taxes to carry out proper assessment and pass an order of assessment, the petitioner must be given an additional opportunity to file reply. While this process may go on, the vehicles cannot be detained at the check post for indefinite period. Firstly, according to the petitioner, all taxes were already paid and the defect pointed out

by the Superintendent of Taxes was technical and in any case, later on cured. Secondly, the vehicles have been detained since 13th May 2021, are unattended and lying in uncovered condition. The condition of these vehicles would certainly deteriorate in this ongoing monsoon. On certain conditions, pending further proceedings these vehicles must be released.

The petition is, therefore, disposed of with following directions:

(i) Demand notice dated 29th May 2021 is set aside.

(ii) For the purpose of carrying out assessment, the show cause notice, dated 15th May 2021 read with the communication dated 20th May 2021, from the Superintendent of Taxes to the petitioner shall be treated as a show cause notice.

(iii) The petitioner shall have time up to ***20th August, 2021*** to file further reply, if so desired.

(iv) The Superintendent of Taxes shall consider the reply and give a hearing to the petitioner's representative, if so demanded and thereafter pass an order of assessment in terms of the provisions of GST Act.

(v) The vehicles in question shall be released upon petitioner furnishing unconditional Bank guarantee to the tune of 25% of the total amount and furnishing a bond for remaining amount of 75% indicated in the demand notices dated 29th May 2021.

Pending application(s), if any, also stands disposed of.

(S G CHATTOPADHYAY, J) **(AKIL KURESHI, CJ)**

HIGH COURT OF TRIPURA

WP(C) No.364/2016

Prayas Automation Pvt. Ltd. (an ISO 9001: 2000 Certified Company), 948, South Kumrakhali. Sonarpur Station Road, P.O. Narendrapur, Kolkata-700103. having its principal place of business situated at K. DAS MARKET, Sakuntala Road. Agartala. West Tripura, 799001. A Registered Dealer under section 19 (3) of the Tripura Value Added Tax Act, 2004 as well as under section 7(l)/7(2) of the Central Sales Tax Act, 1956, represented by its Director Shri Ashoke Kumar Das.

.....Petitioner(s)

Versus

1. The State of Tripura, Represented by the Principal Secretary, Revenue Department, Government of Tripura, New Capital Complex, Kunjaban. Agartala-799006.
2. The Principal Secretary, Finance Department, Government of Tripura, New Capital Complex. Kunjaban, Agartala-799006.
3. The Principal Secretary, Power Department, Government of Tripura, New Capital Complex, Kunjaban, Agartala-799006.
4. The Managing Director. Tripura State Electricity Corporation (Ltd.), Bidyut Bhavan, North Banamalipur, Agartala, Tripura, Pin-799001.

.....Respondent(s)

For Petitioner(s) : Mr. T.K. Deb, Advocate.

For Respondent(s) : Mr. A. Nandi. Advocate,
Mr. Biplabendu Roy. Advocate.

HON'BLE THE CHIEF JUSTICE MR. AKIL KURESHI
HON'BLE MR. JUSTICE S.G. CHATTOPADHYAY

Date of hearing and judgment : **22nd March, 2021.**

Whether fit for reporting : **NO.**

JUDGMENT & ORDER (ORAL)

(Akil Kureshi, C.J.)

Petitioner has prayed for a direction to the respondents No.3 and 4 to issue "C" Form for the years 2007-08 to 2010-11 so that the petitioner can avail of the concessional rate of duty on the goods supplied from outside State.

2. Brief facts are as under:

Respondents No. 1 to 3 are State authorities. Respondent No.3 in particular

is a Principal Secretary of Power Department of the Government of Tripura. Respondent No.4 is a Managing Director of Tripura State Electricity Corporation Limited *{hereinafter to be referred to as TSECL).* TSECL had floated a tender for installation and erection of transmission lines. The petitioner which is a Kolkata based company, had participated in this tender process. The tender of the petitioner was accepted and for three different projects work orders were issued in December. 2008 and January & July. 2009. Clause 13 which is common in all agreements pertains to taxes and duties. As per Clause 13.1 the petitioner would pay all the customs duties, excise duties, sales tax etc. However, as per Clause 13.2 TSECL would provide concessional sales tax declaration in prescribed forms which is popularly come to be known as "C" Form. This Clause reads as under:

> **"13.2.** Concessional Sales Tax declaration forms, as admissible, shall be issued to the Contractor, on request, for all items (as indentified in the price schedule of the Bid) to be supplied directly by the Contractor as well as for the items to be supplied by the Sub-suppliers as sale-in-transit."

3. The case of the petitioner is that in the course of execution **of** the work awarded to the petitioner by respondent No.4, the petitioner had supplied materials direct!) to the respondent No.4. Such materials were provided from outside the State and, therefore, would invite concessional rate of duty. To enable the petitioner to claim such concessional rate of duty, the petitioner would require "C" Form that the respondent No.4 would obtain from the respondents No.l and 2 authorities and provide to the petitioner. According to the petitioner a total sum of Rs.40.90.581/- is blocked for the said period between 2007-08 to 2010-11 and the petitioner is unable to claim return as "C" Form has not been issued by the respondent No.4.

4. The respondent No.4 has appeared and filed a reply in which the stand taken is that the petitioner is a registered dealer under the provisions of the Tripura Value Added Tax Act, 2004 and Central Sales Tax Act. 1956 in the State of Tripura and it is a supplier of the materials to the respondent No.4. The petitioner, therefore, cannot claim "C" Form in relation to such transactions. The petitioner can claim "C" Form only from the authority under whose jurisdiction the petitioner is registered. In fact, the respondent No.4 in the affidavit-in-reply has disputed the petitioner's claim for payment of duty at concessional rate.

5. The respondents No. I and 2. i.e. the taxing authorities of the State of Tripura have, however, taken a different stand. The stand taken by the said authorities as emerging from an affidavit-in-reply dated 05.11.2016 is as under:

"9. That, in reply to the averments and/or contentions made in paragraph 5 to 14 of the Writ Petition **I** state that, the Respondents No.4, TSBCL has applied for issuance of 10 (ten) Nos. C-Form on 25.06.2012. out of which 8(eight) Nos. C-Forms were issued to the dealer on 26.06.2012 keeping aside the the remaining 2(two) Nos. C-Forms. Bui. the rest 2(two) Nos. of C Form as per requirement of dealer which are relating to the billing of Prayas Automation Pvt. Ltd. 948, South Kumrakhali. Sonarpur Station Road. P.O. Narendrapur. K.olkata-700103 bearing invoice nos. **II** 0802038 dated 29.02.2008 and TI 0711028 dated 01.11.2007 having value Rs.33,01,750.00 and Rs.43.53.542.00 respectively **were not issued to the dealer** due **to huge value difference coming out from the "utilization** of C **Form to the extent on permits obtained". The dealer was asked to explain in writing with supporting documents/papers why the difference value was occurred. But still the dealer fails to produce any explanation for adjudication of the said issue which appears to be the practice on the part of the dealer.** Otherwise no application was received from the TSECL for issuance of C Form relating to the billing of Prayas Automation Pvt. Ltd. 948. South Kumrakhali. Sonarpur Station Road. P.O. Narendrapur. Kolkata-700103, in respect of Year 2009-10 & 2010-11 as claimed by the Petitioner. **1** also state that in respect of issuance of C-Form of the petitioner respondent No.4 is suppose to apply "Requisition Statement" of required C Form along with copies of permits, invoice etc. to the Superintendent of Taxes Charge-!. Agartala.

A copy of letter dated 25.06.2012 and a Statement of **'C** Form Requisition of TSECL Dated. 26.06.2012 are annexed here with and marked as **Annexure-R/1 & R/2** respectively."

6. Appearing for the petitioner, learned counsel Mr. T.K. Deb pointed out that as per the taxing authorities the reason for not granting *C* Form was the mismatch in the valuation. The respondent No.4 on the other hand has now taken a different stand namely that no such "C" Forms can be issued at all. This according to the counsel is a wholly untenable argument.

7. Learned counsel Mr. A. Nandi appeared for respondents No.l to 3 and submitted that there is no prayer made against the said authorities. In any case, he abides by the affidavit-in-reply filed on behalf of the said respondents. We may recall respondent No.4 in the affidavit-in-reply has cited a reason that the petitioner

being a registered dealer in Tripura. cannot claim "C" Form from the respondent No.4; which itself we find a somewhat of a strange argument. Llowever, learned counsel for the petitioner pointed out that the petitioner had obtained registration in State of Tripura only on 01.10.2011 which was subsequent to the period in question. When confronted with this fact, counsel for the respondent argued that the petitioner ought to have got itself registered earlier and in any case, looking to the nature of the transaction, the petitioner was not eligible to claim concessional rate of duty.

8. The situation that emerges from the record is that the petitioner at the relevant time was a registered dealer in West Bengal. Since the petitioner was awarded a contract for execution of certain work for respondent No.4 in Tripura, the petitioner and respondent No.4 appeared to have entered into an agreement which is manifested in Clause 13.2 that on the goods supplied by the petitioner directly to respondent No.4. the respondent No.4 shall issue certificate of concessional rate of duty. According to the petitioner, the goods supplied were in the course of interstate trade. The objections of the respondent No.4 for issuing "C" Form are completely invalid. As noted in the affidavit-in-reply, the main ground taken was that the petitioner was a registered dealer in the State of Tripura. which itself being somewhat of a strange ground, in any case, in fact the petitioner was not a registered dealer in the State of Tripura at the relevant time. The expansion of the opposition of the respondent No.4 by its advocate through oral arguments, is also wholly unsustainable in law. The respondent No.4 does not hold the authority to decide the taxability of the sale in question. Whether the sale should invite concessional rate of duty or not is to be judged by the taxing authorities. It was perhaps because of this reason that the respondent No.4 itself had also approached the VAT department for issuance of "C"? Forms. From the reply filed by the State authorities, it emerges that such "C" Forms were not issued on account of anomaly in the valuations. As a State authority respondent No.4 ought to have conveyed this reason to the petitioner who could have either pointed out that there is no anomaly or reconcile the figures if it was possible. In the meantime, for want of "C" Forms the petitioner went on suffering duty at the higher rates. The Assessing Officer in West Bengal who had jurisdiction over the petitioner could not postpone the assessments for the fear of the same getting time barred.

9. Be that as it may. in peculiar facts of the case, we propose to issue directions to the respondents No.2 and 4 to point out the difference in the figures which has prevented the respondent No.2 to issue a "C Form to respondent No.4 to be given

to the petitioner. Upon such communication the petitioner would have opportunity to clarify or reconcile the figures. Thereupon, the respondent No.2 shall issue "C" Form to respondent No.4 as may be justified. However, before doing this, one aspect needs to be clarified. We have not commented on the claim of the petitioner for concessional rate of duty on the sales in question. We have devised this methodology in view of the fact that not the respondent No.2 but the respondent No.4 who is not a taxing authority is raising the question of appropriate rate of tax which is not permissible in law.

10. In the result, petition is disposed of with following directions:

(i) The respondent No.2 shall communicate the mismatch in figures which has prevented the said respondent from issuing "C" Form so far to the petitioner as well as respondent No.4 simultaneously within a period of two weeks from today;

(ii) Upon receipt of such communication, the petitioner would have four weeks time thereafter to file a response to explain the discrepancy or to reconcile the figures;

(iii) The respondent No.2 thereupon shall issue "C" Forms in relation to the transactions in question to the extent legally justified. This exercise shall be completed within four months of the date of receipt of the clarification from the petitioner;

(iv) We have not made any observations with respect to the rate of tax that the transaction would attract. It would be the assessing authority of the petitioner to go into that question if the same ever arises or if permissible in law. for the respondent No.2 to take into consideration;

(v) We have also not expressed any opinion on the manner in which the petitioner can take benefit of concessional rate of duty even if "C" Forms were to be eventually issued and leave it to the petitioner to follow the remedies, if any. available in law.

11. Pending application(s), if any, stands disposed of.

(S.G. CHATTOPADHYAY), J **(AKIL KURESHI), CJ**

HIGH COURT OF TRIPURA

Crl. Petn. No.14/2021

Shri Sentu Dey,

Son of Chandradhar Dey, resident of Bairagi Bazar, Jumerdhepa, PS-Melaghar, Sub-Division-Sonamura, District-Sepahijala.

.....Petitioner(s)

Versus

1. The State of Tripura.
2. The Superintendent of Police,
   Sepahijala District, Bishramganj, District-Sepahijala.
3. The Officer-in-Charge,
   Bishalgarh Police Station, PO & Sub-Division - Bishalgarh, District-Sepahijala.
4. Shri Niranjan Ch. Das,
   Superintendent of State Tax, Bishalgarh Charge, Posted at Bishalgarh Office, having its jurisdiction of Sepahijala District.

.....Respondent(s)

For Petitioner(s) : Mr. Sankar Lodh, Advocate.

For Respondent(s) : Mr. Ratan Datta, P.P.

HON'BLE THE CHIEF JUSTICE MR. AKIL KURESHI

Date of hearing : 30.04.2021.

Date of delivery of : 28.05.2021. Judgment & order

Whether fit for reporting : Yes.

JUDGMENT & ORDER

The petitioner has challenged an order dated 02.01.2021 passed by the learned Judicial Magistrate, 1st Class, Bishalgarh under which he has sent a criminal case CR 03 of 2020 for investigation under Section 156(3) of Criminal Procedure Code to the concerned Police Station.

2. This challenge of the petitioner arises in following factual background:

The petitioner is a sole proprietor of one M/S. Sentu Dey, which is registered under Tripura State Goods and Service Tax Act, 2017 (Tripura State GST Act)

(hereinafter to be referred to as the ,,SGST Act) and related statutes. On 27.11.2020, Superintendent of State Taxes, Bishalgarh, filed a complaint before the Sub-Divisional Magistrate, Bishalgarh under Section 190 read with Section 200 of Cr.P.C. In the said complaint, the complainant alleged that the petitioner has under declared the outward taxable turnover and accordingly, paid less tax than he was liable to pay for the period starting from August, 2017 onwards. It is further stated that sizable demand of Rs.19.74 Crores (rounded off) inclusive of tax, interest and penalty has been raised against the petitioner out of which only an amount of Rs.1.18 Crores (rounded off) could be recovered. Remaining amount of Rs.18.55 Crores (rounded off) still remains unpaid. Notices were issued to the purchasing dealers of the petitioner, who conveyed to

the department that they had already paid their taxes to the petitioner for the purchases made by them from the petitioner. The complainant therefore alleged 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 request, therefore, was made to the Magistrate to take cognizance of the said offences.

3. On 24.11.2020, the Sub-Divisional Magistrate, Bishalgarh ordered that the complaint may be registered as a CR Case and be transferred to the Court of JMFC, Bishalgarh. Accordingly, on 27.11.2020, the said complaint was registered as CR 03 of 2020 and was placed before the Judicial Magistrate, 1st Class, Bishalgarh, who passed the following order:

> "Received the case record from the Court of Ld. SDJM Bishalgarh.
>
> Make necessary entry in my T.R.
>
> The instant case is put up today on a petition filed by Ld. Counsel Mr. J.P. Saha.
>
> Ld. APP is present. Perused the case record.
>
> Received some copies of documents by firisti. Keep these along with the case record.
>
> Let the case be fixed for examination U/S 200 Cr.P.C. Fix 02.01.2021 examination U/S 200 Cr.P.C."

4. On 02.01.2021, the learned Magistrate passed the impugned order, which

reads as under:

> "Ld. Spl P.P J.P. Saha is present on behalf of the complainant.
>
> Perused the case record.
>
> Today the case is fixed for order.
>
> This is a complain filed by Mr. N.C. Das, Supdt. of State Taxes, Bishalgarh, Sephaijala, Tripura U/s 132(1) of the Tripura State Goods and Service Tax 2017 read with sections 406/409 of IPC against the accused person namely M/S Sentu Dey having GST-16AJITD6343A2ZT of Bairagi Bazar, Jumedpa, Sephaijala, Tripura.
>
> Along with the petition, complainant submitted some documents with firisti.
>
> Perused the same along with the petition.
>
> After having being heard ld. Spl P.P. Mr. J.P. Saha on behalf of the complainant and after having perused the complainant petition, this court is consider opinion that before taking cognizance the matter be investigated by Police. So, send the original petition along with copy of this order to the OC Bishalgarh P.s for investigation u/s 156(3) of Crpc treating the complaint petition as an FIR and to submit report on the next date.
>
> Office is directed to comply the same immediately. Fix. 2-03-2021 for Report."

5. By the said order thus the learned Magistrate sent the case for investigation after registering the complaint as an FIR and called for a report. It this order the petitioner-original accused has challenged in this petition.

6. Appearing for the petitioner, learned counsel Mr. Sankar Lodh raised following contentions:

(i) On 27.11.2020, when the complaint was placed before the learned Magistrate, he had taken cognizance thereon. It was thereafter not open for him to call for investigation.

(ii) The complainant had not previously approached the police by filing a complaint and that therefore, the Magistrate could not have directly sent the complaint for investigation.

(iii) The order was passed mechanically and without application of mind.

(iv) Counsel submitted 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.

7. In support of his contentions, counsel for the petitioner has relied on following decisions:

In case of ***Mohd. Yousuf vs. Smt. Afaq Jahan & anr***., reported in ***2006 AIR SCW 95***, in order to highlight the difference between investigation that a Magistrate can order under Section 156(3) of Cr.P.C. as compared to one before to under Section 202(1) of Cr.P.C. On the basis of this decision, the counsel argued that once the Magistrate has taken cognizance of the offence alleged in the complaint, he thereafter cannot send the complaint for investigation by the police under Section 156(3) of the Code.

Reliance was placed on the decision in case of ***State of Karnataka & anr. Vs. Pastor P. Raju***, reported in ***2006 AIR SCW 3916***, in which in the context of the question as to when the Magistrate can be said to have taken cognizance, it was observed as under:

> "It is necessary to mention here that taking cognizance of an offence is not the same thing as issuance of process. Cognizance is taken at the initial stage when the Magistrate applies his judicial mind to the facts mentioned in a complaint or to police report or upon information received from any other person that an offence has been committed. The issuance of process is at a subsequent stage when after considering the material placed before it the Court decides to proceed against the offenders against whom a *prima facie* case is made out."

Reliance was placed on the decision in case of ***Mrs. Priyanka Srivastava and another vs. State of U.P. and others***, reported in ***2015 AIR SCW 2075***, in support of the contention that in order to call for investigation under Section 156(3) of Cr.P.C., the Magistrate must apply his judicial mind and such investigation cannot be ordered mechanically.

Reliance was placed on the decision in case of ***Sharat Babu Digumarti vs. Govt. Of NCT of Delhi***, ***AIR 2017 SC 150,*** in which referring to Sections 67, 67A and 67B of Information & Technology Act, it

was observed that the said provisions are complete code relating to the offences

under the IT Act. Section 292 of IPC makes punishable sale of obscene books etc. The IT Act in various provisions deals with obscenity in electronic form and covers the offence under Section 292 of IPC. IT Act is a special enactment and therefore, the provisions made in the IT Act have to be given effect to.

8. On the other hand, learned Public Prosecutor, Mr. Ratan Datta opposed the petition contending that the petitioner is alleged to have committed cognizable offences. The Magistrate had the power to call for police investigation. He had previously not taken cognizance of the offences. He submitted that this petition is not maintainable. In this respect he relied on the decision of Supreme Court in case of ***HDFC Securities Limited vs. State of Maharashtra***, reported in ***(2017) 1 SCC 640***.

9. At the outset, I may dispose of the preliminary objection of the learned Public Prosecutor to the maintainability of this petition. His contention was that the order passed by the Magistrate was not revisable. Under such circumstances, the petition for quashing such an order under Section 482 of Cr.P.C. also cannot be entertained. In my opinion, this objection is not valid. Powers of the High Court under Section 482 of Cr.P.C. read with Articles 226 and 227 of the Constitution are sufficiently wide so as to examine the legality and correctness of an order passed by

the Magistrate which adversely affects the petitioner. Even assuming that a revision petition against the impugned order of the Magistrate is not maintainable, that would not preclude the High Court from examining the legality of the order under Section 482 of Cr.P.C. The reliance on the decision in case of HDFC Securities case (supra) is misplaced. In the said case of the facts were entirely different. It was the case in which the Magistrate had straightway called for investigation under Section 156(3) of Cr.P.C. upon receipt of the complaint upon which an FIR was registered against the accused. The accused approached the High Court even before the stage of issuance of process and challenged the order passed by the Magistrate under Section 156(3) of Cr.P.C. It was in this context observed that the stage of taking cognizance by the Magistrate would arise only after investigation report is filed before the Magistrate concerned. In the present case, the prime contention of the petitioner is that the Magistrate having previously taken cognizance of the offences, cannot revert to calling for police investigation.

10. I may now examine the contentions raised by the counsel for the petitioner in support of the challenge to the impugned order. With respect to the contention of

the complainant not having previously approached the police authorities before filing a written complaint before the Magistrate, I do not find this to be a valid argument in any manner. Section 190 of Cr.P.C. pertains to cognizance of offences by Magistrates and reads as under:

"190. Cognizance of offences by Magistrates.

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub- section (2), may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub- section (1) of such offences as are within his competence to inquire into or try.

11. Under sub-Section(1) of Section 190 thus, a Magistrate is authorized to take cognizance of an offence upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts or upon information received from any other person or upon his own knowledge, that such offence has been committed. This provision thus nowhere requires that before a complaint as referred to in clause (a) of sub-Section

(1) is lodged before the concerned Magistrate, attempt must be first made to file a First Information Report before the police and only when the

police authorities fail to register the same as an FIR, the complainant can approach the Magistrate.

12. The contention of the counsel that since the allegations involved commission of offence under Section 132 of CGST Act, the provisions of IPC cannot be invoked requires a closure examination. Section 132 of CGST Act is a penal provision providing punishment for certain offences. Sub-Section (1) of Section 132 prescribes several acts and omissions which are made punishable with different sentences depending on the nature of the offence. Sub-Section (4) of Section 132 provides that notwithstanding anything contained in the Code of Criminal Procedure, all offences under the said Act, except those referred to in sub-Section (5) shall be

non-cognizable and bailable. However, sub-Section (5) of Section 132 makes certain offences cognizable and non-bailable. Sub-Section (6) of Section 132 provides that a person shall not be prosecuted for any offence under the said Section except with the previous sanction of the Commissioner.

13. As noted, Section 132 of CGST Act provides punishment for certain offences related to the Goods and Service Tax related acts and omissions. However, it is not unknown that a certain act may fall within the said special penal statute at the same time may also have an element of an offence under IPC. The question whether the accused in such a situation

can be made answerable only for the special statue offence or general offence also, has been examined by the Supreme Court earlier.

14. In case of ***Jayant and others vs. State of Madhya Pradesh***, reported in ***(2021) 2 SCC 670***, facts were that on a surprise inspection, the Mining Inspector found that the accused was indulging in illegal mining and transportation of minor minerals. He made a report suggesting that the offences can be compounded. This was accepted by the authorities and the accused also. Subsequently, it was reported that there was large scale illegal excavation and transportation of minerals without payment of royalty. The Magistrate passed and order taking note of such information. He was of the view that offences under the IPC were distinct from those punishable under Mines and Minerals (Development and Regulation) Act. He, therefore, directed registration of a criminal case against the accused and for investigation under Section 156(3) of Cr.P.C. The accused challenged the FIR under Section 482 of Cr.P.C. contending that in view of the bar under Section 22 of MMRD Act, the order passed by the Magistrate was unsustainable. The issue ultimately reached the Supreme Court. One of the questions considered by the Supreme Court was whether in case of illegal mining and transportation of minor minerals action by police for offence of theft under Section 378 of IPC was permissible in view of the provisions contained in MMRD Act. In this respect, it was held that -

> "17.3. Therefore, as in the present case, the Mining Inspectors prepared the cases under Rule 53 of the 1996 Rules and submitted them before the Mining Officers with the proposals of compounding the same for the amount calculated according to the Rules concerned and the Collector approved the said proposal and thereafter the private appellant violators accepted the decision and deposited the amount of penalty determined by the Collector for compounding

the cases in view of sub-section (2) of Section 23-A of the MMDR Act and the 1996 Rules and even the 2006 Rules are framed in exercise of the powers under Section 15 of the MMDR Act, criminal complaints/proceedings for the offences under Sections 4/21 of the MMDR Act are not permissible and are not required to be proceeded further in view of the bar contained in sub-section (2) of Section 23-A of the MMDR Act. At the same time, as observed hereinabove, the criminal complaints/proceedings for the offences under IPC — Sections 379/414 IPC which are held to be distinct and different can be proceeded further, subject to the observations made hereinabove."

15. In case of ***State (NCT of Delhi) vs. Sanjay***, reported in ***(2014) 9 SCC 772***, also similar question came up for consideration. It was held:

"72. From a close reading of the provisions of the MMDR Act and the offence defined under Section 378 IPC, it is manifest that the ingredients constituting the offence are different. The contravention of terms and conditions of mining lease or doing mining activity in violation of Section 4 of the Act is an offence punishable under Section 21 of the MMDR Act, whereas dishonestly removing sand, gravel and other minerals from the river, which is the property of the State, out of the State s possession without the consent, constitute an offence of theft. Hence, merely because initiation of proceeding for commission of an offence under the MMDR Act on the basis of complaint cannot and shall not debar the police from taking action against persons for committing theft of sand and minerals in the manner mentioned above by exercising power under the Code of Criminal Procedure and submit a report before the Magistrate for taking cognizance against such persons. In other words, in a case where there is a theft of sand and gravel from the government land, the police can register a case, investigate the same and submit a final report under Section 173 CrPC before a Magistrate having jurisdiction for the purpose of taking cognizance as provided in Section 190(1)(*d*) of the Code of Criminal Procedure.

73. **After giving our thoughtful consideration in the matter, in the light of the relevant provisions of the Act vis-à-vis the Code of Criminal Procedure and the Penal Code, we are of the definite opinion that the ingredients constituting the offence under the MMDR Act and the ingredients of dishonestly removing sand and gravel from the riverbeds without consent, which is the property of the State, is a**

distinct offence under IPC. Hence, for the commission of offence under Section 378 IPC, on receipt of the police report, the Magistrate having jurisdiction can take cognizance of the said offence without awaiting the receipt of complaint that may be filed by the authorised officer for taking cognizance in respect of violation of various provisions of the MMDR Act. Consequently, the contrary view taken by the different High Courts cannot be sustained in law and, therefore, overruled. Consequently, these criminal appeals are disposed of with a direction to the Magistrates concerned to proceed accordingly." (emphasis supplied)

16. These decisions completely answer the contention of the counsel for the petitioner. In case of ***Sharat Babu Digumarti vs. Govt. Of NCT of Delhi*** (supra), the facts were different. It is the case in which the Magistrate had taken cognizance against the Director of a company for offences punishable under Sections 292 and 294 of IPC and Section 67 of IT Act. It was in such background, the Supreme Court was of the view that Section 67 read with Section 67A and 67B of the IT Act were a complete code and for the same set of allegations, the provisions of Section 292 of IPC cannot be invoked.

17. As noted, Section 132 of SGST Act prescribes punishment for various acts and omissions under the said act such as non-deposit of tax in government revenue after collection from the purchasing dealers. On the other hand, Sections 406 and 409 of IPC deal with offence 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". It can thus be seen that the offences punishable under Section 132 of CGST Act and those under Sections 406 and 409 of IPC operate in different fields. In a given case an act or omission on part of the dealer may form offence only under Section 132 of CGST Act. But in a given case where the ingredients of Section 405 of IPC are satisfied, the action can as well amount to offences punishable under Sections 406 and 409

of IPC. However, a word of caution would not be misplaced. The tax administration of the State should not invoke IPC provisions without application of mind in every case. In the present case, however, no arguments are made on the basis that even if the allegations in the complaint are taken on the face value, offence of criminal breach of trust is not made out.

18. I also do not find that the Magistrate can be said to have passed the order mechanically or without application of mind. He has perused the record, formed an opinion that before issuing process, police investigation is necessary and thereupon passed the order.

19. Coming to the contention regarding the stage at which the Magistrate can call for police report, we may recall, Section 190 of Cr.P.C. pertains to cognizance of offences by Magistrates and authorizes the concerned Magistrate to take cognizance of an offence under certain circumstances referred to in clauses (a) to (c) of sub-Section (1) of Section

190 of Cr.P.C. Section 190 Cr.P.C. falls under Chapter XIV, which pertains to conditions requisite for initiation of proceedings. Section 200, which pertains to examination of complainant falls in Chapter XV pertaining to complaints to Magistrates. Section 200 provides that a Magistrate taking cognizance of an offence on complaint shall examine the complainant on oath and the witnesses present, if any, and the substance of such examination shall be reduced to writing. Under Section 202, the Magistrate may postpone issuance of process to the accused and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit.

20. It is clear through series of judgments of the Supreme Court, reference to some of which would be made shortly, that upon receipt of a complaint under Section 190, the Magistrate may take cognizance thereof himself and thereafter proceed to examine the complainant and other witnesses, if any, as provided under Section 200. In the alternative, the Magistrate may call for an investigation by the police under Section 156(3) of Cr.P.C. before deciding to take cognizance upon receiving the complaint. However, once the Magistrate takes cognizance of the offence, it is not thereafter open for him to call for investigation under Section 156(3) of Cr.P.C.

21. One of the earliest cases of the Supreme Court on this issue is of ***R.R. Chari vs. The State of Uttar Pradesh***, reported in ***1951 SCR 312*** in which the

observations of the Calcutta High Court in case of ***Superintendent and Remembrancer of Legal Affairs, West Bengal v. Abani Kumar Banerjee, AIR 1950 Cal. 437*** were noted with approval as under:

> "9. In *Gopal Marwari* v. *Emperor* it was observed that the word "cognizance" is used in the Code to indicate the point when the Magistrate or a Judge first takes judicial notice of an offence. It is a different thing from the initiation of proceedings. It is the condition precedent to the initiation of proceedings by the Magistrate. The court noticed that the word "cognizance" is a word of somewhat indefinite import and it is perhaps not always used in exactly the same sense.
>
> 10. After referring to the observations in *Emperor* v. *Sourindra Mohan Chuckerbutty* it was stated by Das Gupta, J. in *Superintendent and Remembrancer of Legal Affairs, West Bengal* v. *Abani Kumar Banerjee*[3] as follows: "What is taking cognizance has not been defined in the Criminal Procedure Code and I have no desire to attempt to define it. It seems to me clear however that before it can be said that any Magistrate has taken cognizance of any offence under Section 190(1)(*a*) of the Criminal Procedure Code, he must not only have applied his mind to the contents of the petition but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter—proceeding under Section 200 and thereafter sending it for inquiry and report under Section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind e.g. ordering investigation under Section 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence". In our opinion that is the correct approach to the question before the court."

22. In case of ***Gopal Das Sindhi and others vs. State of Assam and another***, reported in ***AIR 1961 SC 986***, it was observed as under:

> "8. The real question for determination is whether the Additional District Magistrate took cognizance on August 3, 1957, of the offences mentioned in the complaint filed before him. The transfer of a case contemplated under Section 192 is only of cases in which cognizance of an offence has been taken. If the Additional District Magistrate had not taken cognizance of any

offence on August 3, 1957, when the complaint was presented to him, his sending the complaint to Mr Thomas for disposal would not be a transfer of a case under Section 192. We have already quoted the order passed by the Additional District Magistrate on August 3, 1957, on the complaint presented to him. That order, on the face of it, does not show that the Additional District Magistrate had taken cognizance of any offence stated in the complaint. He sent the complaint to Mr Thomas by way of an administrative action presumably because Mr Thomas was the Magistrate before whom ordinarily complaints should be filed.

9. When the complaint was received by Mr Thomas on August 3, 1957, his order, which we have already quoted, clearly indicates that he did not take cognizance of the offences mentioned in the complaint but had sent the complaint under Section 156(3) of the Code to the Officer Incharge of Police Station Gauhati for investigation. Section 156(3) states "Any Magistrate empowered under Section 190 may order such investigation as above-mentioned". Mr Thomas was certainly a Magistrate empowered to take cognizance under Section 190 and he was empowered to take cognizance of an offence upon receiving a complaint. He, however, decided not to take cognizance but to send the complaint to the police for investigation as Sections 147, 342 and 448 were cognizable offences. It was, however, urged that once a complaint was filed the Magistrate was bound to take cognizance and proceed under Chapter XVI of the Code. It is clear, however, that Chapter XVI would come into play only if the Magistrate had taken cognizance of an offence on the complaint filed before him, because Section 200 states that a Magistrate taking cognizance of an offence on complaint shall at once examine the complainant and the witnesses present, if any, upon oath and the substance of the examination shall be reduced to writing and shall be signed by the complainant and the witnesses and also by the Magistrate. If the Magistrate had not taken cognizance of the offence on the complaint filed before him, he was not obliged to examine the complainant on oath and the witnesses present at the time of the filing of the complaint. We cannot read the provisions of Section 190 to mean that once a complaint is filed, a Magistrate is bound to take cognizance if the facts stated in the complaint disclose the commission of any offence. We are unable to construe the word „may in Section 190 to

mean „must . The reason is obvious. A complaint disclosing cognizable offences may well justify a Magistrate in sending the complaint, under Section 156(3) to the police for investigation. There is no reason why the time of the Magistrate should be wasted when primarily the duty to investigate in cases involving cognizable offence is with the police. On the other hand, there may be occasions when the Magistrate may exercise his discretion and take cognizance of a cognizable offence. If he does so, then he would have to proceed in the manner provided by Chapter XVI of the Code. Numerous cases were cited before us in support of the submissions made on behalf of the appellants. Certain submissions were also made as to what is meant by "taking cognizance". It is unnecessary to refer to the cases cited. The following observations of Mr Justice Das Gupta in the case of *Superintendent and Remembrancer of Legal Affairs, West Bengal* v. *Abani Kumar Banerjee AIR 1950 Cal 437*

> "What is taking cognizance has not been defined in the Code of Criminal Procedure and I have no desire to attempt to define it. It seems to me clear, however, that before it can be said that any Magistrate has taken cognizance of any offence under Section 190(1)(*a*) of the Cr PC, he must not only have applied his mind to the contents of the petition but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter — proceeding under Section 200 and thereafter sending it for inquiry and report under Section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, e.g., ordering investigation under Section 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence."

were approved by this Court in *R.R. Chari* v. *State of Uttar Pradesh*[2]. It would be clear from the observations of Mr Justice Das Gupta that when a Magistrate applies his mind not for the purpose of proceeding under the various sections of Chapter XVI but for taking action of some other kind, e.g. ordering investigation under Section 156(3) or issuing a search warrant for the purpose of investigation, he cannot be said to have taken cognizance of any offence. The observations of Mr Justice Das Gupta above-referred to were also

approved by this Court in the case of *Narayandas Bhagwandas Madhavdas* v. *State of West Bengal*[3]. It will be clear, therefore, that in the present case neither the Additional District Magistrate nor Mr Thomas applied his mind to the complaint filed on August 3, 1957, with a view to taking cognizance of an offence. The Additional District Magistrate passed on the complaint to Mr Thomas to deal with it. Mr Thomas seeing that cognizable offences were mentioned in the complaint did not apply his mind to it with a view to taking cognizance of any offence; on the contrary in his opinion it was a matter to be investigated by the police under Section 156(3) of the Code. The action of Mr Thomas comes within the observations of Mr Justice Das Gupta. In the circumstances, we do not think that the first contention on behalf of the appellants has any substance.

23. In case of ***Jamuna Singh and others vs. Bhadai Shah***, reported in ***AIR 1964 SC 1541***, it was observed as under:

"12. Relying on the provisions in Section 190 of the Code that cognizance could be taken by the Magistrate on the report of the police officer the learned counsel for the appellants argued that when the Magistrate made the order on November 22, 1956 his intention was that he would take cognizance only after receipt of the report of the police officer and that cognizance should be held to have been taken only after that report was actually received in the shape of a charge-sheet under Section 173 of the Code, after December 13, 1956. The insuperable difficulty in the way of this argument, however, is the fact that the Magistrate had already examined the complainant under Section 200 of the Code of Criminal Procedure. That examination proceeded on the basis that he had taken cognizance and in the face of this action it is not possible to say that cognizance had not already been taken when he made the order "to Sub-Inspector, Baikunthpur, for instituting a case and report by 12.12.56."

24. This position has been maintained in subsequent decisions of the Supreme Court also. In case of ***Madhao and another vs. State of Maharashtra and another***, reported in ***(2013) 5 SCC 615***, it was observed as under:

"17. In *CREF Finance Ltd.* v. *Shree Shanthi Homes (P) Ltd.*[5] while considering the power of a Magistrate taking cognizance of the offence, this Court held: (SCC p. 471, para 10)

> "*10.* … Cognizance is taken at the initial stage when the Magistrate peruses the complaint with a view to ascertain whether the commission of any offence is disclosed. The issuance of process is at a later stage when after considering the material placed before it, the court decides to proceed against the offenders against whom a prima facie case is made out. It is possible that a complaint may be filed against several persons, but the Magistrate may choose to issue process only against some of the accused. It may also be that after taking cognizance and examining the complainant on oath, the court may come to the conclusion that no case is made out for issuance of process and it may reject the complaint. It may also be that having considered the complaint, the court may consider it appropriate to send the complaint to the police for investigation under Section 156(3) of the Code of Criminal Procedure."

It is clear that any Judicial Magistrate before taking cognizance of the offence can order investigation under Section 156(3) of the Code. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein.

18. When a Magistrate receives a complaint he is not bound to take cognizance if the facts alleged in the complaint disclose the commission of an offence. The Magistrate has discretion in the matter. If on a reading of the complaint, he finds that the allegations therein disclose a cognizable offence and the forwarding of the complaint to the police for investigation under 621Section 156(3) will be conducive to justice and save the valuable time of the Magistrate from being wasted in enquiring into a matter which was primarily the duty of the police to investigate, he will be justified in adopting that course as an alternative to taking cognizance of the offence itself. As said earlier, in the case of a complaint regarding the commission of cognizable offence, the power under Section 156(3) can be invoked by the Magistrate before he takes cognizance of the offence under Section 190(1)(*a*). However, if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to revert back to the pre-cognizance stage and avail of Section 156(3)."

25. The question, however, is what amounts to the Magistrate taking cognizance of an offence for the purpose of Section 190 of Cr.P.C. This expression has not

been defined under the Code of Criminal Procedure and the question whether in a given case the Magistrate can be said to have taken cognizance or not must be judged based on facts of the case. In case of ***Devarapalli Lakshminarayana Reddy and others vs. V. Narayana Reddy and others***, reported in ***(1976) 3 SCC 252***, the Supreme Court has made following observations:

> "14. This raises the incidental question: What is meant by "taking cognizance of an offence" by a Magistrate within the contemplation of Section 190? This expression has not been defined in the Code. But from the scheme of the Code, the content and marginal heading of Section 190 and the caption of Chapter XIV under which Sections 190 to 199 occur, it is clear that a case can be said to be instituted in a court only when the court takes cognizance of the offence alleged therein. The ways in which such cognizance can be taken are set out in clauses (*a*), (*b*) and (*c*) of Section 190(1). Whether the Magistrate has or has not taken cognizance of the offence will depend on the circumstances of the particular case including the mode in which the case is sought to be instituted, and the nature of the preliminary action, if any, taken by the Magistrate**. Broadly speaking, when on receiving a complaint, the Magistrate applies his mind for the purposes of proceeding under Section 200 and the succeeding sections in Chapter XV to the Code of 1973, he is said to have taken cognizance of the offence within the meaning to Section 190(1)(*a*). It, instead of proceeding under Chapter XV, he has, in the judicial exercise of his discretion, taken action of some other kind, such as issuing a search warrant for the purpose of investigation, or ordering investigation by the police under Section 156(3), he cannot be said to have taken cognizance of any offence." (emphasis supplied)**

26. In case of ***Nirmaljit Singh Hoon vs. The State of West Bengal and another***, reported in ***(1973) 3 SCC 753***, it was held that when the Magistrate had applied his mind only for ordering investigation under Section 156(3) or issuing warrant for the purpose of investigation, it cannot be stated that the Magistrate had taken cognizance of the offence. It was further observed that the purpose of examination of the complainant is to find out whether there is the prima facie case against the person accused of the offence in the complaint.

27. As noted, the Calcutta High Court in case of ***Superintendent and***

Remembrancer of Legal Affairs, West Bengal vs. Abani Kumar Banerjee (supra) had observed that before it can be said that any Magistrate has taken cognizance of an offence under Section 190(1)(a) of Cr.P.C., he must not only have applied his mind to the contents of the petition but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter, proceeding under Section 200 and thereafter sending it for inquiry and report under Section 202. These observations of Calcutta High Court were noted with approval by the Supreme Court in case of ***R.R. Chari vs. State of Uttar Pradesh*** (supra).

28. With this legal background, we may revert to the facts of the present case. We may recall that on the first instance when the complaint was placed before the learned Magistrate, on 27.11.2020, he recorded that he had perused the case record, received some of the documents which were ordered to be kept along with the case record. He thereupon stated -

"Let the case be fixed for examination U/S 200 Cr.P.C.

Fix 02.01.2021 examination U/S 200 Cr.P.C."

29. A perusal of this order dated 27.11.2020 would immediately show that the learned Magistrate had decided to examine the complainant or possibly the witnesses, if any, under Section 200 of Cr.P.C. on 02.01.2021. This he had decided after perusal of the case record and receipt of some of the documents, which were kept along with the rest of the record of the case. It is thus clear that the Magistrate had taken cognizance of the offences disclosed in the complaint. His action of perusal of the case record which led to his decision to examine the witnesses under Section 200 of Cr.P.C. at a later date clearly establishes application of mind on his part onthe allegations made in the complaint and which led to his making up his mind about the requirement of carrying out examination under Section 200 of Cr.P.C. Had the Magistrate perused the case records and was of the opinion that before deciding to take cognizance of the offence it was necessary to call for the police investigation, it was open for him to do so. However, in such a case, his decision would have been entirely different. The very fact that after perusal of the case record he was persuaded that there is a requirement of examination under Section 200 of Cr.P.C, would establish that he had already taken cognizance of the offence. It is well settled that the stage of examination of witness under Section 200 of Cr.P.C. would not arise before taking cognizance by the Magistrate. Thus,

these two twin facts namely, the perusal of the case record by the Magistrate and the decision that he arrived on upon perusal

of the case records of examining the witnesses under Section 200 of Cr.P.C. would leave no manner of doubt that on 27.11.2020 itself he had taken cognizance of the offences. It was thereafter not open for him to change the course and revert back to the initial option of requiring police investigation and calling for police report. Unfortunately, on 02.01.2021 this is precisely what he did. In the said order, he has recorded that after hearing the learned P.P. and after perusal of the complaint, he was of the opinion that before taking cognizance, the matter may be investigated by the police. In the process, the learned Magistrate lost sight of the fact that the stage of taking cognizance had already been crossed on 27.11.2020 itself.

30. In the result, the impugned order dated 02.01.2021 is quashed. However, this does not put an end to the complaint lodged before the concerned Magistrate, who shall proceed further in accordance with the law from the stage of taking cognizance of the offences disclosed.

31. Petition allowed in above terms and disposed of accordingly. Pending application(s), if any, also stands disposed of.

(AKIL KURESHI), CJ

THE GAUHATI HIGH COURT

(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/3569/2021

M/S JYOTHY LABS LTD.

(ERSTWHILE JYOTHY LABORATORIES LTD.), A LIMITED LIABILITY COMPANY WITHIN THE MEANING OF THE COMPANIES ACT, 1956 AND HAVING ITS REGD. PLACE OF BUSINESS AT EPIP, AMINGAON, GHY-31, ASSAM, THROUGH ARUNABHA MAJUMDAR, AUTHORISED REPRESENTATIVE OF THE PETITIONER COMPANY

VERSUS

UNION OF INDIA AND 2 ORS.

THROUGH THE FINANCE SECRETARY, MINISTRY OF FINANCE, HAVING HIS OFFICE AT NORTH BLOCK, NEW DELHI- 1100001

2: PRINCIPAL COMMISSIONER CGST COMMISSIONERATE GHY GST BHAWAN 5TH FLOOR KEDAR ROAD MACHKHOWA GHY-01

3: ASSTT. COMMISSIONER OF GST AND CENTRAL EXCISE GUWAHATI-I DIVISION GST BHAWAN KEDAR ROAD GHY-0

Advocate for the Petitioner : MR. S SHARMA

Advocate for the Respondent : ASSTT.S.G.I.

BEFORE

HONOURABLE MR. JUSTICE ACHINTYA MALLA BUJOR BARUA

JUDGMENT & ORDER (ORAL)

Date : 12-08-2021

Heard Mr. Laxmi Kumaran Varadachari, learned senior counsel for the petitioner, Mr. SC Keyal, learned counsel for the respondents in the GST Department and Mr. S Borthakur, learned CGC for the respondent No.1.

2. The petitioner M/s Jyothy Labs Ltd (MAXO Unit) (formally known as Jyothy Laboratories Limited) is a public limited company registered with the Central Excise Department bearing registration No. AAACJ3213BXMO12 and is engaged in the

manufacture of certain excisable products namely mosquito coils falling under HSN 38 08 9191 of the First Schedule to the Central Excise Tariff Act, 1985. The petitioner with the intention to have the benefits under the Northeastern Industrial Policy of 24.12.1997 had established a manufacturing unit within the Northeastern Region. As per the Northeastern Industrial Policy, the petitioner was earlier entitled to an exemption to excise duty to certain extent.

3. By the notifications No.17/2008-CE dated 27.03.2008 and No.31/2008-CE dated 10.06.2008, certain modification was brought in by the respondent authorities to the exemption that was made available to the petitioner under the North Eastern Industrial Policy. The validity and vires of the notifications by which such modification was brought in regarding the entitlement of exemption of excise duties was assailed by the petitioner and some other similarly aggrieved manufacturers by way of WP(C) No.1789/2008 and other writ petitions.

4. One of the ground for assailing the notifications was based on the doctrine of promissory estoppels. WP(C) No.1789/2008 was given a final consideration by the judgment dated 24.06.2009, by which the notifications impugned dated 27.03.2008 and 10.06.2008 were held to be not sustainable in law and were accordingly set aside and quashed. The intra-Court appeal that was carried against the judgment of the learned Single Judge by the respondent authorities which was numbered as WA No. 243/2009, resulted in the judgment dated 20.11.2014, by which the judgment rendered by the learned Single Judge was upheld, meaning thereby that the interference with the notifications impugned was sustained. The respondents in the Union of India carried an appeal before the Supreme Court against the judgment in the writ appeal resulting in SLP No.11878/2015. In the said proceeding, the Supreme Court had passed an interim order dated 07.12.2015, wherein the following as extracted was provided:-

> *"Pending further orders, we direct that subject to the petitioners releasing 50% of the amount due to the respondent in terms of the impugned judgment on the respondents' furnishing solvent surety to the satisfaction of the jurisdictional commissioner, the operation of the impugned judgment shall remain stayed."*

5. In terms of the order dated 07.12.2015 of the Supreme Court, the respondent GST Department was required to release 50% of the amount that was due to the assessee during the pendency of the appeal before the Supreme Court. The said

interim order was passed in an appeal by the Union of India against an assessee namely M/s Kamakhya Cosmetics and Pharmaceuticals and others. The Division Bench of this Court in Raj Coke Industries –vs- Union of India, reported in 2017 (349) ELT 120 (GAU), by a judgment dated 01.12.2016 had provided that the benefit of being paid the 50% of the amount involved as provided by the Supreme Court in its order dated 07.12.2015 would be applicable to all such similarly situated assesses.

6. After the judgment of the Division Bench in Raj Coke Industries (supra), an amount of Rs.8.05 crores and Rs.1.36 crores was refunded to the petitioner on 19.11.2018. In the meantime, the Supreme Court had given its final consideration to the appeal preferred by the respondent Union of India in the GST Department and by the order dated 22.04.2020 in Civil Appeal No.2256-2263 of 2020 arising out of SLP(C) No.28194-28201-2010 and other similar appeals had interfered with the judgment of the Division Bench dated 20.11.2014 in WA No. 243/2009 and other writ appeals and other similar judgments passed by the other High Courts.

7. Consequently, the writ petitions filed by the assesses before the respective High Courts assailing the impugned notifications dated 27.03.2008 and 10.06.2008 stood dismissed. The Supreme Court also clarified that the judgment shall not affect the amount of excise duties already refunded prior to the two impugned notifications providing for modification of excise duty exemption and such refunds are not to be re- opened. It was also provided that the pending refund applications are to be decided as per the impugned notifications bringing in the modification. The implication of the judgment dated 22.04.2020 of the Supreme Court in Civil Appeal No. No.2256-2263 of 2020 arising out of SLP(C) No.28194-28201-2010 and other similar appeals would be that the excise exemption granted under the Northeastern Industrial Policy of 1997 which was earlier available would now be not available to the assessees.

8. In the resultant situation, there is also a requirement under the law for the assessees to refund the 50% amount that as was paid to them pursuant to the interim order dated 07.12.2015 of the Supreme Court.

9. In the aforesaid background, the petitioner relies upon a notification No.32/99-CE dated 18.07.1999, as amended, and notification No. 31/2008-CE dated 10.06.2008 which inter-alia provides that notwithstanding anything contained in paragraph 2A therein providing for the value additions to the manufactured goods,

the manufacturer shall have the option not to avail the rates specified in the table and instead apply to the Commissioner of Central Excise or the Commissioner of Customs and Central Excise, as the case may be, having jurisdiction over the manufacturing unit of the manufacturer, for fixation of a special rate representing the actual value addition in respect of any goods manufactured and cleared under the said notifications.

10. The implication of the said provision would be that irrespective of the rates prescribed in the aforesaid two notifications, the manufacturer is provided a further option not to avail the rate specified in the tables contained in the two notifications, but to apply to the Commissioner of Central Excise or the Commissioner of Customs and Central Excise, as the case may be having jurisdiction over the manufacturing unit of the manufacturer for fixation of a special rate representing the actual value addition. The time provided for filing such application for fixing of the special rate is provided in the notifications itself to be 30th September of that given financial year.

11. In the instant case, the petitioner had submitted an application on 18.05.2020 before the Commissioner of Central Excise and GST, Guwahati making a request for fixation of a special rate for the value addition on the manufactured goods for the financial year 2011-2012 in terms of the notifications No.32-99-CE dated 18.07.1999, as amended and No. 31/2008-CE dated 10.06.2008. Similar applications were also filed for fixation of a special rate in respect of other financial years. As the applications of the petitioner were not entertained and the department invoked the attachment of some properties of the petitioner, the petitioner approached this Court by way of WP(C) No.1644/2021, which was given a final consideration by the order dated 24.03.2021. Paragraphs 7 and 8 of the order dated 24.03.2021 are extracted as below:-

> *"7. This petition is instituted on the grievance that the Notification dated 27.03.2008 having been restored as per the judgment of the Supreme Court, two application dated 20.05.2020 under Clause3(1) of the Notification No.20/2008-Central Excise and Notification No.17/ 2008- Central Excise both dated 27.03.2008 was submitted by the petitioner claiming for a special rate, but the same has not been given its consideration and without giving a due consideration to the claim for special rate made by the petitioners, the respondents now intend to*

attach the bank accounts of the petitioner on the premises that the refund of excise duty would be as per the rates provided in the Notification dated 27.03.2008. As the Notification dated 27.03.2008 provides for a legal right to the assessee to claim for a special rate to be fixed in the event of there being any add-ons to the goods manufactured, we are of the view that without an appropriate decision being taken on such claim for special rate, it would be inappropriate for the department to proceed against the petitioners as per the rates provided in the Notification dated 27.03.2008.

8. In view of the above, as agreed by the learned counsel for the parties, this petition stands disposed of by directing the Principal Commissioner of GST Guwahati to consider the aforesaid application of the petitioner dated 20.05.2020 claiming for a special rate to be fixed on the basis of the add-ons made to the goods manufactured. After arriving at the special rate, if any as per the order to be passed by the Principal Commissioner, GST further process against the petitioner as per law may be initiated. Till such decision is taken, no coercive measure be taken against the petitioner pursuant to the communication impugned dated 18.02.2021."

12. From paragraph 7 of the order dated 24.03.2021, it transpires that the issue involved in the said writ petition was that the respondents intended to attach the bank account of the petitioner on the premises that the refund of the excise duties shall be as per the notification dated 27.03.2008, without considering the legal right of the petitioner assessee for fixation of a special rate for the value addition to the goods manufactured. In the circumstance, it was an agreed order between the petitioner and the respondents in the GST Department requiring the Principal Commissioner of GST, Guwahati to consider the aforesaid application of the petitioner dated 18.05.2020 claiming for a special rate to be fixed on the basis of the value addition made to the goods manufactured.

13. In response to the order dated 24.03.2021 in WP(C) No.1644/2021, the order dated 23.06.2021 was passed by the Principal Commissioner, GST, Guwahati. In the order dated 23.06.2021, the Principal Commissioner, GST, Guwahati came to his conclusion in paragraph 4.11 thereof, which is extracted below:-

"The matter can be viewed from another angle. If it is to be argued that

staying the judgment of Hon'ble Gauhati HC does not mean that the amending Notification became operational, in such a case the assessee and also other similarly placed taxpayers could not have availed exemption during the intervening period i.e. the date on which stay was granted and the date on which the case was finally decided by Hon'ble Supreme Court. Original Notification would not be in operation because of the stay and the amending Notification would also not be in operation. The orders of the Hon'ble Supreme Court and Hon'ble High Court do not have any express or implied intention to stay the operation of the amending Notification all together. In view of the discussions above, I do not go into the merit of the case."

14. A reading of paragraph 4.11 of the order of the Principal Commissioner, GST, Guwahati would go to show that the authorities had arrived at a conclusion that a stay of the judgment of the Division Bench in WA No.243/2009 would not mean that the notifications impugned therein became operational and that the petitioner assesse could have availed the exemption during the intervening period when the appeals were pending before the Supreme Court. The Principal Commissioner was also of the view that the orders of the Supreme Court and the High Court have not provided for any express or implied intention to stay the operation of the amended notification No.32/99-CE dated 19.07.1999.

15. We do not express any view on the said stand taken by the Principal Commissioner as regards the effect of the judgment of the Division Bench in the writ appeal concerned and the stay by the Supreme Court by the order dated 07.12.2015 on the said judgment. The issue before this Court is that whether under the notification No.32/99-CE dated 18.07.1999 as amended and the notification No. 31/2008-CE dated 10.06.2008 the manufacturers are entitled to have an option not to avail the rates specified in the tables contained in the notifications and whether they have a legal right to request the authorities for fixation of a special rate as per the actual value additions to the manufactured goods. Another aspect to look into is whether as per the notifications, such applications requesting for fixation of a special rate are to be made within 30th September of the given financial year for which such claim is made.

16. In the instant case, it is the case of the petitioner that the requirement of requesting for fixation of a special rate in respect of the value addition to the

manufactured goods had arisen only after the final judgment of the Supreme Court on 20.04.2020, inasmuch, as long as the matter was pending before the Supreme Court and the interim order dated 07.12.2015 was in operation requiring a refund of 50% of the amount involved, no occasion had arisen for the assessee to claim for the fixation of a special rate in respect of the value addition to the manufactured goods. The dominant purpose of the two notifications i.e. amended notification No.32/99-CE dated 18.07.1999 and the notification No. 31/2008-CE dated 10.06.2008, is the bestowing of a legal right to the assessee to opt for the fixation of a special rate in respect of the value addition to a manufactured goods. The requirement that such applications are to be made not later than 30th day of September of the given financial year is a provision for streamlining the procedure for making such application and to avoid the situation where the process of making such applications would be a never ending matter.

17. Without going into the aspect whether the requirement to submit such application within 30th September of the given financial year is a mandatory requirement or a directory requirement, what we take note of is that such a provision has been incorporated to streamline the process for submission of the application seeking for the fixation of a special rate to the value addition to manufactured goods.

18. We have to take note of that as long as there was a judgment of the Division Bench in WA No.243/2009 in favour of the petitioner interfering with the modification for exemption of excise duty and the matter thereafter was pending before the Supreme Court on an appeal with an interim order dated 07.12.2015 requiring a refund of the 50% of the amount of excise duty, the occasion had not arisen for the assessee to go further and seek for a fixation of a special rate in respect of the value addition to the manufactured goods and even if there would have been a determination of such special rate, the same would have remained ineffective and un-implementable till the Supreme Court had finally decided the issue which was done as per the judgment dated 20.04.2020 in Civil Appeal No.2256-2263 of 2020, and further the relevance of such determination would again depend on the outcome of the appeal that was pending before the Supreme Court. We have taken note of that immediately after the judgment dated 20.04.2020 in Civil Appeal No.2256-2263 of 2020, when the occasion had again arisen for the petitioner assessee to seek for fixation of a special rate in respect of the value addition to the manufactured goods for the purpose of payment of the excise duty, the application for such

request was made within a period of one month, which is on 18.05.2020. From such point of view, it cannot be wholly said that the petitioner would now be prevented from claiming their legal right for fixation of a

special rate to the value addition to the manufactured goods merely because such application was not made within 30th September of that given financial year to which the claim for fixation of the said rate pertains to.

19. In the peculiar facts and circumstances of the present case, where the necessity for making of a request for fixation of the special rate for the value addition to the manufactured goods may not have occasioned earlier, we deem it appropriate that the Principal Commissioner of GST, Guwahati decides the application of the petitioner dated 18.05.2020 on its own merit as regards the claim for fixation of a special rate to the value addition to the manufactured goods of the given financial year. We also take note of that in the earlier order dated 24.03.2021 in WP(C) No.1644/2021, it was an agreed stand of the respondent GST Department that the application of the petitioner requesting for fixation of a special rate on the value addition to the manufactured goods would be considered and the possibility that the application would be rejected on the ground of it having not been submitted prior to 30th September of that given financial year was not raised when the said order was passed by the Court.

20. If any such apprehension would have been expressed, the matter possibly would have been decided in the earlier writ petition itself. From such point of view also, on the principle of constructive res-judicata, the ground for rejecting such application for the reason that it was not submitted within 30th September of the given financial year would perhaps be not available for the respondent authorities for rejecting the application.

21. In the circumstance, we direct the Principal Commissioner, GST, Guwahati to consider the application of the petitioner dated 18.05.2020 seeking for fixation of a special rate to the value addition to the manufactured goods of the given financial year and decide the same as per law.

22. Writ petition stands allowed in the above terms.

JUDGE

GAUHATI HIGH COURT

(HIGH COURT OF ASSAM, NAG ALAND. MIZORAM & ARUNAC HAL PRADESH)

C EX APP3OK2020

Commissioner of Central Excise and Service Tax, Guwahati, Sethi Trust Building, GS Road, Bhangagarh, Guwahati - 781005, Kamrup (M), Assam.

.....*Appellant*

Versus

Indian Oil Corporation Limited, Finance Manager, Taxation Finance Department, Bongaigaon Refinery, PO: Dhaligaon, Chirang, Assam -783385.

.....*Respondent*

For the Writ Appellant : Mr. S.C. Keyal, Advocate.

For Respondent : Dr. A. Saraf, Senior Advocate.

-BEFORE-

HON'BLE THE CHIEF JUSTICE MR. SUDHANSHU DHULIA
HON'BLE MR. JUSTICE MANASH RANJAN PATHAK

Date of hearing and

Judgment & order : 11th August, 2021.

JUDGMENT & ORDER (ORAL)

(Sudhanshu Dlwlia. CI)

The matter is taken up through video conferencing.

2. Heard Mr, S.C. Keyal, learned counsel for the appellant. Also heard Dr. A. Saraf, learned senior counsel for the respondent.

3. This is an appeal filed by the Revenue under Section 35G of the Central Excise Act, 1944 (for short, "the Act"). The assessee before this Court is the Indian Oil Corporation, which has paid an excise duty on SKO, which is Superior Kerosene Oil, as applicable at the relevant point of time. The Revenue, on the other hand, relied upon a Circular dated 22.04.2002 and its objection was that since SKO is mixed with Motor Spirit (MS) or High Speed Diesel (HSD), it will have to pay the duty, which is applicable on MS and HSD, as stipulated in the Circular dated 22.04.2002. Admittedly, the rate of duty on MS and HSD is higher than what it is on SKO.

4. The argument of the assessee was that the duty has to be paid at the time of removal of the goods from the gate and admittedly at the time when the goods were removed from the gate, even though from the pipeline, it was in the form of SKO and not MS or HSD. This, however, did not find favour of with the authority and thereafter, the matter was later taken to the Tribunal by the assessee, which gave an order in favour of the assessee holding that the duty was liable to be paid only as SKO and not payable as on MS or HSD and as far as the applicability of Circulate was concerned, the Tribunal was of the view that it is the law which would be applicable and the Circular, which is onthe face of it against the law cannot be applied in the present case. Aggrieved by the order of the Tribunal, the Revenue has filed the present appeal under Section 35G of the Act. Sub-section (1) of Section 35G as applicable as of now reads as under:-

> *"35G. Appeal to High Court. -*
>
> *(1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for the purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law."*

5. A preliminary objection has thus been raised by Dr. A. Saraf, learned senior counsel appearing for the assessee who would argued that an appeal shall lie to a High Court from an order of the Appellate Tribunal only if it is an order which is not relating, among other things, "to the determination of any question having a relation to the rate of duty of excise or to the value of goods for the purposes of assessment." In case the dispute relates to rate of duty for the purposes of assessment, then an appeal would lie before the Supreme Court under Section 35L[1] of the Act.

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[1] 35L Appeal to Supreme Court.—

(1) An appeal shall lie to the Supreme Court from -

(a) *** *** ***

(b) any order passed (before the establishment of the National Tax Tribunal) by the Appellate Tribunal relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment.

6. The two decisions primarily relied upon by the learned senior counsel for the assessee are *Sterlite Optical Technologies Limited -Vs- Commissioner of C.Ex, Aurangabad* [2] and *Commissioner of Customs & Central Excise, Jammu -Vs- Bharat Box Factory Limited* [3]. The case which was before the Jammu & Kashmir High Court was an appeal under Section 35 of the Act filed by the Revenue and a similar objection, as has been raised before this Court, was raised on behalf of the assessee regarding maintainability of the appeal in view of the exclusive jurisdiction on these matters of the Hon'ble Apex Court. Relying upon the earlier judgment of the Bombay High Court, which in turn relied upon the judgment of the Supreme Court, the Jammu & Kashmir High Court in Paragraph 5 to 10 gave its detailed findings, which read as under:-

> *"5. M/s. Bharat Box Factory Ltd. is holding Central Excise registration in respect of their units which are engaged in the manufacture of printed corrugated cartons, printed duplex cartons and mosquito repellant coils. These items fall under Tariff Items 4819.12; 4819.19 and 3808.10 of the First Schedule to the Central Excise Tariff Act, 1985. However, the company is also availing the Cen-vat credit facility under Rule 3 of the Cenvat Credit Rules, 2004 on duty paid inputs as well as on capital goods. They are also availing benefits of Notification No. 56/2002-CE., dated November 14, 2002, as amended. In respect of their Unit-I, the respondent-company had filed a refund claim by way of self credit for Rs. 32,00,562/- on account of Central Excise duty and for Rs. 63,936/- on account of Education Cess paid through Permanent Ledger Account for the month of August 2005. Similarly, in respect of their Unit-II, the respondent-company had filed a refund claim for Rs. 40,68,392/- on account of Central Excise duty and for Rs. 81,368/- on account of Education Cess paid through Permanent Ledger Account for the month of August 2005. The Assistant Commissioner, Central Excise, vide his orders dated September 27, 2005 and October 3, 2005, sanctioned the refund claims of Rs. 32,00,562/- and Rs. 40,68,392/- and rejected the*

[2] 2007 SCC Online Bom 1435

[3] 2008 SCC Online J&K 107

refund claims of Rs. 63,936/-and Rs. 81,368/- on account of Education Cess on the reasoning that Education Cess was not exempted under notification dated November 14, 2002. Aggrieved by the same, the respondent filed appeal before the Commissioner (Appeals), Central Excise, Jalandhar. The Commissioner (Appeals), vide his order dated December 7, 2005, upheld the order of the Adjudicating Authority and rejected the respondent's appeal. The respondent then filed appeal before the Appellate Tribunal. The Tribunal vide order dated June 12, 2006 set aside the orders of the Commissioner (Appeals) and allowed the appeals with consequential relief to the respondent holding that Education Cess was also required to be refunded on the reasoning that it was in the nature of piggy back duty on the excise duties under Central Excise Act, 1944, Additional Duties of Excise (Goods of Special Importance) Act, 1957 and Additional Duties of Excise (Textiles and Textiles Articles) Act, 1978 and, therefore, was not at all leviable in view of entitlement to exemption worked out under paragraph 2 of the Notification.

6. From a perusal of the provisions of the aforementioned Acts as well as the claims made by the respondents, it is clear that the orders impugned related to the rate of duty of excise. The Apex Court in Navin Chemicals Mfg & Trading Co. Ltd. v. Collector of Customs (supra) had the occasion to consider the scope of Sections 129C(4), 129D(5), 130(1) and 130E(b) of the Customs Act, 1962 and Sections 35D(3), 35E(5), 35G(1) and 35L(b) of the Central Excises and Salt Act, 1944. The Apex Court examined the scope of words "determination of any question having a relation to the rate of duty of customs to the value of goods for purposes of assessment". The provisions of Section 129C of the Customs Act, 1962 are pari materia with the provisions of Section 35G of the Central Excise Act, 1944. Interpreting this provision, the Apex Court held as follows:

"It will be seen that sub-section (5) uses the said expression determination of any question having a relation to the rate of duty or to the value of goods for the purposes of assessment' and the Explanation thereto provides a definition of it Tor the purposes of this sub-section'. The

Explanation says that the expression includes the determination of a question relating to the rate of duty; to the valuation of goods for purposes of assessment; to the classification of goods under the Tariff and whether or not they are covered by an exemption notification; and whether the value of goods for purposes of assessment should be enhanced or reduced having regard to certain matter that the said Act provides for. Although this Explanation expressly confines the definition of the said expression to sub-section (5) of Section 129D, it is proper that the said expression used in the other parts of the said Act should be interpreted similarly. The statutory definition accords with the meaning we have given to the said expression above. Questions relating to the rate of duty and to the value of goods for purposes of assessment are questions that squarely fail within the meaning of the said expression. A dispute as to the classification of goods and as to whether or not they are covered by an exemption notification relates directly and proximately to the rate of duty applicable thereto for purposes of assessment. Whether the value of goods for purposes of assessment is required to be increased or decreased is a question that relates directly and proximately to the value of goods for purposes of assessment. The statutory definition of the said expression indicates that it has to be read to limit its application to cases where, for the purposes of assessment, questions arise directly and proximately as to the rate of duty or the value of the goods."

7. The aforesaid judgment is followed by Bombay High Court in Commissioner of Customs and C Ex., Goa v. Prime/la Sanitary Products (P) Ltd., 2002 (145) El.T. 515 (Bom.). The Punjab and Haryana High Court has also considered the scope of Section 35L(b) of the Act in Commissioner of Central Excise, Chandigarh v. Suraj Udyog Ltd., 2003 (158) EL. T. 684 (P & H). Reference may also be made to the Rajasthan High Court decision in Laxmi Udyog v. Commissioner of Central Excise, 2002 (142) El.T. 27 (Raj.). The Delhi High Court also had the occasion to consider the scope of Section 35L of the Central Excise Act, 1944 in Perfect Electric Concern Pvt. Ltd. v. Assistant Collector/CCE, 2000 (118) EL.T 578 (Del).

8. The Bombay High Court in. Sterlite Optical Technologies Ltd. v. Commissioner of C Ex., Aurangabad, 2007 (213) EL T. 658 (Bom.) also considered the scope of Section 35G of the Central Excise Act, 1944. Placing reliance on Navin Chemicals Mfg & Trading Co. Ltd. v.

Collector of Customs (supra) the Court observed that the word Assessment is used as meaning sometimes the computation of rate of duty, sometimes the assessable value of goods and sometimes the whole procedure laid down under the Act for imposing duty liability upon the manufacturer or importer. The Court held that the word 'assessment' is, thus, capable of bearing a very comprehensive meaning, in the context, it can comprehend the whole procedure for ascertaining and imposing duty liability.

9. We are inclined to apply the principles laid down in the above decisions of the Apex Court and other High Courts. The question posed would not fall under Section 35G of the Act but under Section 35L. Whether Education Cess levied and collected under Section 91 of the Finance Act, 2004 can be considered as a duty of excise for the grant of refund in the cases or by way of self credit un der notification dated November 14, 2001, is definitely related to rate of duty of excise for the purpose of assessment. We have, therefore, no hesitation to say that the point raised is directly related to the rate of duty of excise and that being so, the only remedy open to the Commissioner is to move the Supreme Court and this Court cannot entertain these applications under Section 35G of the Act, since appeal shall lie to the. High Court only against those orders not being orders related to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment.

10. We, therefore, uphold the preliminary objection raised by the respondents in all these cases and dismiss all these applications."

7. Mr. S.C. Keyal, learned counsel for the Revenue, on the other hand, would argue that the assessee has not paid their liability and the duty was liable to be paid by them on MS and HSD in terms of the Circular dated 22.04.2002.

8. Whichever way we look at this dispute, what goes to the root of the present dispute is as to at what rate the duty was liable to be paid by the assessee, i.e. whether it was a duty liable to be paid on SKO or on MS and HSD. That is the core issue. Sub-Section (1) of Section 35G states that an appeal will not lie before the High Court but before the Supreme Court if "among other things" the matter relates to rate of duty of excise. Therefore, even if one of the many issues relate to the rate of duty, the appeal would still lie before the Hon'ble Apex Court and not before the High Court.

9. The dispute here in any case falls in a very limited area as to the determination of the rate of duty to be paid by the assessee. That being so, this matter lies within the exclusive jurisdiction of the Hon'ble Apex Court under Section 35L of the Act and it is an appeal which cannot be heard by this Court under Section 35G of the Act.

10. In view thereof, we allow the preliminary objections of the assessee and dismiss the appeal as not maintainable.

11. Having made the aforesaid determination, we make it absolutely clear that dismissal of the present appeal will not prejudice the case of the Revenue in case they choose to file an appeal before the proper forum.

JUDGE **CHIEF JUSTICE**

HIGH COURT OF TRIPURA AGARTALA

WP(C) No.399/2021

OPC Assets Solutions Pvt. Ltd., having its Registered Office at Door No. 5, 7th Floor, ALSA Tower, No. 186/187, Poonamallee High Road, Kilpauk, Chennai-600010 & Corporate Office at Unit No. 202, A-Wing, 2nd floor, Natraj by Rustomjee, Sir M.V. Road, Western Express Highway, Andheri (East), Mumbai-400069 and present principal place of business at House No. 324389, Ward No. 32, Holding No. 386 Netaji Subhash Road Near HDFC bank Agartala Branch Post, Agartala-799001, having GSTIN. 16AAAC07555K1Z4, represented by its Authorized Signatory Mr. Rahul Tiwari (Manager-Accounts & Finance), S/o Ramashankar Tiwari, residing at Building No. IB/1-305, Gokuldham Society, Adivali-Dhokali Talav Malang Road, Kalyan East, Near Namaskar Dhaba, Pisawaji (N.V.), Pisavli, Thane, Maharashtra-241306, camped at Room No.304, Hotel Polo Towers Agartala, VIP road, Kunjaban, Agartala, Tripura (W)-799006.

-----Petitioner(s)

Versus

1. THE STATE OF TRIPURA Represented by the Principal Secretary, Finance Department- Government of Tripura, Civil Secretariat, New Capital Complex, P.O. Kunjaban, Agartala, West Tripura, PIN:799010.

2. THE CHIEF COMMISSIONER OF STATE TAX, Tripura Goods & Service Tax Department, O/o The Commissioner of Taxes and Excise, Government of Tripura, 3rd Floor, Khadya Bhavan, Pandit Nehru Complex, Gurkhabasti, Agartala, West Tripura-799006.

3. THE SUPERINTENDENT OF STATE TAX, Sales Tax Officer, Class II, Level-1, Charge-IV, Agartala, Tripura Good and Service Tax Department, Kar Bhavan, Palace Compound, Agartala, West Tripura, PIN-799001.

-----Respondent(s)

For Petitioner(s)	:	Mr. B.L. Narsimhan, Advocate, Mr. T.K. Deb, Advocate, Mr. N. Pal, Advocate, Mr. R. Tangri, Advocate, Mr. V. Jain, Advocate.
For Respondent(s)	:	Mr. Debalay Bhattacharjee, G.A., Mr. K. De, Addl. G.A.

HON'BLE THE CHIEF JUSTICE MR. AKIL KURESHI
HON'BLE MR. JUSTICE S.G. CHATTOPADHYAY

Date of hearing : 17th **August, 2021.**
Date of judgment **: 31st August, 2021.**
Whether fit for reporting : **NO.**

JUDGMENT & ORDER

(Akil Kureshi, C.J.)

The petitioner has challenged 5 summary demand orders produced at Annexure-P/22 collectively passed by the Superintendent of Taxes on 23.04.2021 (which are based on a common assessment order dated 23.4.2021) raising demands of Central as well as GST and IGST from the petitioner with penalty for the tax periods 2017-18 to 2020-21.

2. Brief facts are as under:

Petitioner is a company registered under the Companies Act and is engaged in the business of providing goods on rental basis to its customers across the country including in the State of Tripura. For the purpose of its business the petitioner enters into a rental agreement with the customers and provides capital goods and machinery to such customers on lease. In the State of Tripura the petitioner had provided such goods to M/S Reliance Retail Limited, Tripura (RRL, for short). The petitioner had taken premises on rent from one Rinku Dey under a lease agreement in the year 2018, however, subsequently the petitioner was compelled to obtain another premises on rent for its business purposes. On 06.09.2020 the petitioner received a notice from the Superintendent of Taxes under Section 61 of the CGST Act pointing out certain discrepancies in the returns furnished by the petitioner. The petitioner made a detailed representation in response to the said notice under a communication dated 16.01.2021. In the meantime, the Superintendent of Taxes had issued a notice on 06.12.2020 to the petitioner for cancellation of the registration. This is subject matter of a separate petition being WP(C) No.401 of 2021 and which we will deal with separately.

3. On 10.03.2021 the Superintendent issued a show-cause notice to the petitioner for recovery of unpaid tax and penalty for financial year 2018-19. Along with this the Superintendent also attached an inquiry report essentially conveying that the petitioner had wrongly availed input tax credit in relation to the transactions with RKL by willful misstatement and suppression of facts. The petitioner replied to the show-cause notices resisting the demands and contending that the input tax credit

was correctly availed. On 23.04.2021 the Superintendent of Taxes issued the order of cancellation of registration of the petitioner and also issued separate orders confirming the tax and penalty demands against the petitioner for the tax periods 2017-18 till 2020-21. These five orders are produced by the petitioner at Annexure-P/22 collectively and which are under challenge before us.

4. Appearing for the petitioner learned counsel Mr. B.L. Narsimhan submitted that show-cause notice was issued only for one year whereas the Superintendent of Taxes passed five separate orders for different tax periods which was wholly impermissible. He further submitted that the entire order is passed without following the principles of natural justice. The Superintendent has relied on materials, documents and judgments never discussed with the petitioner. He drew our attention to a rather detailed order passed by the Superintendent of Taxes in which according to the counsel the discussion on merits of the issues was almost non-existent.

5. On the other hand, learned Government Advocate Mr. Debalay Bhattacharjee painstakingly took us through the detailed order passed by the Superintendent of Taxes and contended that this order is sound on merits. It is in any case an appealable order. The petitioner has approached the Court without availing of such appeal. Even on merit no interference is necessary.

6. First and foremost the Superintendent of Taxes has passed five separate orders for different tax periods starting with 2017-18 to 2020-21 raising tax demands with penalty. We have noticed that he had issued show- cause notice for assessment and penalty on 10.03.2021 only for the assessment period 2018-19. Without any further show-cause notice he could not have assessed the petitioner for remaining years and imposed penalties. His stand that once notice is issued for a particular tax period, no notice is necessary for other tax periods stems from utter ignorance of law. This fundamental breach is sufficient to vitiate the orders of assessment barring one for the period in relation to the year 2018-19.

7. Even otherwise the impugned order cannot sustain. The Superintendent of Taxes has passed an order which runs into close to 150 pages in which he has discussed range of issues completely unconnected to the case on hand. He has referred to the requirement for passing Board resolutions and circulations as flowing from the Company Law. He has discussed the issue of authorisation as referred to in the GST regime. He has entered into the arena of what are the requirements of a valid affidavit, who should sign such affidavit, who should notarise it and who should be the witnesses. He has referred to Section 195 of IPC which provides for punishment for false evidence. He has referred to the concepts of power of attorney

and Negotiable Instruments Act. He has discussed a law on Transfer of Property and the essentials of a lease. He has spoken on the remedies available with the lessor. He has also taken note of different kinds of leases. He has reproduced literature from books and presumably from internet. He has extensively reproduced from judgments of various Courts discussing constitutional principles. All these references are without showing relevance to the issues at hand. The ultimate observations and conclusions in the order are hard to find and more difficult to understand. The task of the reader of this order to fish out the reasons in support of the demand is more difficult than finding a needle from a haystack. Howsoever hard we may try, it is difficult to separate the grain from the chaff.

8. The order passed by the Superintendent and the approach that he has adopted is totally unsatisfactory. To begin with, the order reads more like a thesis in several fields of law in which he has tried to exhibit his half-baked, incomplete and internet acquired knowledge, in the process completely losing sight of the focal issue. He has made his order needlessly verbose, in the process not deciding the vital issues at all. More importantly he has referred to materials, documents and judgments and there is no evidence that he ever shared the same with the petitioner before relying upon them. In the age of internet and availability of information through technology, the Superintendent of Taxes was not precluded from doing his own homework and finding out material which was useful for the purpose of the case that he was deciding. However, any use of such material must precede sharing of it with the person likely to be adversely affected by his order. The basic requirement of principle of natural justice for sharing adverse material before utilising the same against a person must be observed with greater rigour in the times of availability of information on internet, all of which need not necessarily be accurate at all times. Accurate or otherwise the noticee must have a chance to meet with such adverse material before it is used against him. For each individual reason namely the order being unintelligible, the action failing the test of principles of natural justice and the Superintendent of Taxes exceeding the show-cause notice, the impugned orders must be set aside. For sheer verbosity the orders must go. The same are accordingly set aside. Nothing stated in this order would prevent the Superintendent of Taxes from proceeding against the petitioner afresh for framing proper assessment if so advised and permitted under law.

9. Petition disposed of accordingly.

Pending application(s), if any, also stands disposed of.

(S.G. CHATTOPADHYAY), J **(AKIL KURESHI), CJ**

HIGH COURT OF TRIPURA AGARTALA

WP(C) No. 139/2021

M/s. Nandini Impex Pvt. Ltd. having its Registered & Head Office at 10, Biplabi Rash Behari Basu Road, Kolkata-700001 and also corporate office at 'White House', 1/18-20, Ground Floor, Rani Jhansi Road, New Delhi-110055 and Branch Office at Master Para, Agartala, P.O. Agartala, P.S West Agartala, District West Tripura, represented by its authorized signatory Mr. Jiban Singh Rana, Deputy Manager (Commercial), 10, Biplabi Rash Behari Basu Road, Kolkata- 700001 camped at Master Para, Agartala.

-----Petitioner(s)

Versus

1. The State of Tripura, represented by the Principal Secretary, Finance Department, Civil Secretariat, **New** capital Complex, P.O. Kunjaban, Agartala, District West Tripura, **799006.**

2. The State of Tripura, represented by the Principal Secretary, Revenue Department, Civil Secretariat, New Capital Complex, P.O. Kunjaban, Agartala, District West Tripura, **799006.**

3. The Commissioner of Taxes, Government of Tripura, Gurkhabasti, P.N Complex, P.S. Capital Complex, District West Tripura, pin **799006.**

4. The Superintendent of Taxes, Charge-V, Palace Compound, P.S. East Agartala, District West Tripura.

-----Respondent(s)

For Petitioner(s)	;	Mr, T.K. Deb, Advocate.
For Respondent(s)	:	Mr. P.K. Dhar, Sr. G.A.,
		Mr. K. De, Addl. G.A.

HON'BLE THE CHIEF JUSTICE MR. AKIL KURESHI
HON'BLE MR. JUSTICE S.G. CHATTOPADHYAY

Date of hearing	**: 17lh August, 2021.**
Date of judgment	**: 31s'August, 2021.**
Whether fit for reporting	**: YES.**

JUDGMENT & ORDER

(Akit Kureshi, C.J.)

The petitioner has challenged an order dated 23.04.2018 as at Annexure-8 to the petition. He has prayed for the grant of refund of a sum of Rs.24,21,007/- which was deducted from the petitioner's bills in course of execution of a work contract for the assessment period 2010 -11 to 2013-14 These prayers arise in following background:

2. Petitioner is a private limited company and is dealing in laying down and installation of pipes in the field of Gas, Electric and Telecom sectors with Trenchless technology called Horizontal Directional Drilling (HDD, for short). The petitioner was awarded a work order for laying/ installation of pipes through HDD technology in the city of Agartala by one Kazstrov Services Infrastructure India Private Limited (KSS, in short) on 21.12.2010. For execution of the said work the petitioner obtained a registration under the then in force Tripura Value Added Tax Act (TVAT Act, for short) in January, 2021. In the course of the execution of the work order the petitioner as a service provider paid service tax to the Central Excise and Service Tax Department, Government of India by depositing or adjusting service tax.

3. In the course of payment of the bills to the petitioner-company KSS had deducted tax of Rs.24,21,007/- during the year 2011-12. It appears that the said action was taken by KSS under the direction of the Superintendent of Taxes. The petitioner, therefore, wrote to the Superintendent of Taxes, Charge-V on 18.08.2011 and explained the detailed mode of thework in order to point out that the petitioner is a service provider and is exigible to service tax. However, in absence of any transfer of material or machinery during the course of execution of the work, no sale takes place as per the provisions of TV AT Act. It was pointed out that there is no transfer of property in goods and, therefore, in this transaction the petitioner has no VAT liability.

4. On 01.09.2011 the Superintendent of Taxes, respondent No.4 herein, wrote to the petitioner stating that in pursuance to the work order in question the petitioner had imported taxable materials and this transaction, therefore, falls within Section 4 of TVAT Act and the purchase of material would invite VAT as per specified rate. It was, therefore, necessary that KSS deducts 4% of the gross amount of bill at the time of payments on provisional basis.

5. According to the petitioner, the case was covered under the service tax regime

and no value added tax was to be paid. Despite this, in response to the notice issued by the respondent No.4 the petitioner also filed the returns under TVAT Act for the assessment period 2010-11 to 2013-14 on 19.09.2014. The company prayed for the refund of amount of Rs.24,21,007/- collected for the period during 2011-12. Since the petitioner did not receive any response to its returns filed and the request for refund of the tax collected in excess, the petitioner wrote to the respondent No.4 on 27.05.2015 and reminded that despite submission of all documents the assessment for the period 2010-11 to 2013-14 is pending and that the Superintendent may fix a date of hearing at the earliest. There was no response to this notice by the respondent No.4. The petitioner, therefore, wrote to the Superintendent on 19.04.2018 and reiterated the request for completion of assessment and refund of amount of Rs.24,21,007/- collected.

6. In response to the said letter, the Superintendent wrote to the petitioner on 23.04.2018 as under:

> "Sir,
>
> With reference to your letter No. Nil, dated 19.04.2018 I would like to inform you that due to provisional Bar under section 33 of the TVAT Act, 2004 it is not possible at this moment to take up the assessment case for the period from 2010-11 to 2012-13. However, in respect of assessment case for the period 2013-14 it is to be mentioned h ere that there is no time bar limit up to the period 31.03.2019. So, the assessment case for the period may be taken up under section 31 of the TV AT Act, 2004.
>
> This is for your information."

7. As per this communication of the Superintendent thus assessment for the period between 2010-11 to 2012-13 had become time barred. However, for the assessment period of 2013-14 time limit was up to 31.03.2019 which had not till then expired.

8. The petitioner thereupon approached the revisional authority under the TVAT Act and sought refund of the tax collected in excess. The revisional authority, i.e. Commissioner of Taxes passed an order on 18.12.2018 in which he came to the conclusion that he cannot take cognizance against the communication sent by the Superintendent of Taxes. The revision petition was dismissed.

9. The petitioner thereafter filed further revision petition before the High Court being CRP No.43 of 2019 and challenged the order passed by the revisional authority on 18.12.2018. This petition was disposed of by an order dated 24.11.2020 observing that the revisional authority was not wrong in holding that the communication issued by the Superintendent was not open to revision. However, it would be open for the petitioner to institute appropriate proceedings as may be advised. Thereupon the present petition has been filed.

10. The case of the petitioner is brief namely that under the Soinsistence of the Superintendent of Taxes from the bills of the petitioner KSS was compelled to deduct provisional tax. According to the petitioner the transaction was not exigible to tax under the TVAT Act since there was no sale of the, goods in course of execution of the work contract. The Superintendent of Taxes ought to have adjudicated on this issue by passing an order of assessment. He cannot retain the provisionally collected tax on the ground that such assessment has now become time barred.

11. On the other hand, the case of the respondents is that the petitioner had appeared before the Superintendent in response to a notice dated 12.02.2014 but had prayed for adjournment. The case of the respondents as emerging from the affidavit-in-reply is as under:

> "That, with regard to the statements made in paragraph No. 14 and 15 of the Writ Petition, I say that, the Works Contract tax deducted by M/S KSS for the bill of the petitioner was provisional. Without making any assessment of the dealer/petitioner the actual amount of tax cannot be ascertained and the claim raised by the petitioner cannot be proved conclusively. **It is further submitted that the dealer is selected for assessment on random basis and after completion of assessment the actual tax liability of the dealer is determined and after assessment if it is found that the dealer is entitled to net the refund the same is done.**
>
> xxx xxx xxx
>
> It is pertinent to mention here that the contention raised by the Petitioner that the assessment was kept pending is not true. **The selection of dealer for assessment is done randomly and in the present case alsojhe the assessment could not be done within time as**

> **the petitioner was not selected for assessment. In the meantime due provisional bar under section 33 of the TVAT Act, the assessment could not be done. Thereafter the Petitioner filed one revision petition before the Revisional Authority with a plea to complete the assessment process for the period 2010-11 to 2013-14. But the Revisional Authority did not take up the matter as it was already time barred.**
>
> xxx xxx xxx
>
> That, with regard to the statements made in para 24 of the Writ Petition, I say that, the Petitioner without appearing for scrutiny of documents including books of accounts, **TPS certificate etc. to the Assessing Authority for reconciliation, had dropped his books of accounts in the central receipt section. Without physical hearing of the petitioner the assessment could not be conducted.'**[1]

12. The record would thus suggest that the petitioner from the beginning objected to any collection of tax from its payment for execution of the work in question. According to the petitioner there was no transfer of property in course of execution of work and, therefore, tax under TVAT Act was not exigible. According to the petitioner, it was liable to pay service tax which it had paid. The Superintendent of Taxes, however, *prima facie* formed a belief that on the imports made by the petitioner for execution of the work value added tax had to be paid. In the present case, we are not concerned with the correctness or validity of the rival stands. What was of importance is that this issue had to be decided by a formal order to be passed by the Superintendent. Since the petitioner had objected to collection of tax from its running bills, the Superintendent had to take into account the petitioner's objection and pass a formal order either accepting or rejecting the objections which can be done only through assessment to be made in case of the petitioner for the period in question. If this assessment was adverse to the petitioner, he had a right of appeal.

13. The Superintendent did not undertake this exercise and allowed the assessments to get time barred. As is well-known, TVAT Act contains limitation provisions under which the assessments of returns filed by the dealers would become time barred. Section 31 of the TVAT Act pertains to Audit assessment. Section 32 pertains to assessment of dealer who fails to get himself registered. Section 33

provides that no assessment under section 31 and 32 shall be made after expiry of five years from the end of the tax period to which the assessment relates. Section 34 which pertains to turnover escaping assessment and permits assessment of such turnover, also contains a similar limitation clause in sub-section (2) which provides that no order of assessment shall be made under sub-section (1) after the expiry of five years from the end of the year in respect of which the tax is assessable. In the present case, the Superintendent himself conveyed to the petitioner under a letter dated 23.04.2018 that the assessment for the period 2010-11 to 2012-13 can no longer be made since the time limit for scrutiny assessment was over. Whatever be the reason which prevented the Superintendent from completing the assessments within the statutory period permitted, once the assessment gets time barred it would no longer be possible for the Superintendent to withhold provisionally collected tax which was disputed by the petitioner at the very outset. As stated by the respondents in the affidavit-in-reply the petitioner in addition to furnishing documents did not appear for physical hearing before the Superintendent. This alleged non-cooperation of the petitioner also did not limit the power of the Superintendent to frame what is popularly referred to as a best judgment assessment. The Superintendent had to take into account whatever the documents the petitioner had placed on record and thereafter ought to have expressed his legal opinion on the disputed issue in form of an order of assessment. The Superintendent having failed to do so, having allowed the assessment to get time barred, now cannot withhold the provisionally collected tax, collection of which was resisted and payability of which was disputed by the petitioner. At the time of filing of the return in response to the notice issued by the Superintendent, the petitioner had claimed refund of the excess tax collected. To deny this refund to the petitioner, the Superintendent had to make an assessment for the period in question and appropriated the provisionally collected amount towards the petitioner's tax liability under the TVAT Act if the Superintendent was finally of the opinion that such tax was payable. Any such decision, as observed earlier, would be open to challenge in the form of appeals and revision. The Superintendent by not passing the assessment order, cannot terminate the petitioner's dispute of taxability of the transaction at his level without any opportunity to file appeal, that too without passing any order of assessment. In plain terms, the Superintendent has not expressed his own legal opinion of the vital question of taxability of the transaction in question. Any appropriation of tax in such a manner

would be without authority of law.

14. Reference in this respect may be made to a decision of the Supreme Court in case of ***Commissioner of Income Tax vs. Shelly Products*** reported in ***229 ITR 383 (SC)*** in which the question of refund of the tax deposited by the assessee by way of advance tax, self assessment tax or tax deducted at source when the assessment had become time barred came up for consideration. It was observed that the Income Tax Act provides for the manner in which advance tax is to be paid and deduction of tax at source is to be made, failure of both of which would result into penalties. It is therefore apparent that the act provides for payment of tax in such manner by the assessee and further enjoins upon the assessee the duty to file a return of income disclosing his true income. On the basis of the income so disclosed, the assessee is required to make a self assessment and to compute tax payable on such income and to pay the same in the manner provided by the act. Thus the filing of the return on payment of tax computed on the basis of the income disclosed amounts to an admission of tax liability by the assessee. Charging of such tax under section 4 of the Income Tax Act is thus not dependent on the assessment being made. However one cannot lose sight of the fact that the failure or inability of the revenue to frame an assessment should not place the assessee in a more disadvantages position then what it would have been an assessment had been made. In a case where an assessee chooses to deposit by way of abundant caution advance tax or self assessment tax which is in excess of his liability on the basis of the return furnished or there is any arithmetical error or inaccuracy, it is open to him to claim refund of the excess tax paid in the course of assessment proceeding. Section 240 of the Act enjoins an obligation on the revenue to refund the amount to the assessee without his having to make any claim in that behalf. In appropriate cases it is open for the assessee to bring facts to the notice of the concerned authority on the base of the return furnished which may have a bearing on the quantum of the refund. The concerned authority for the limited purpose of calculating the amount to be refunded under section 240 may take all such facts into consideration and calculate the amount to be refunded. So viewed, assessee will not be placed in a more disadvantages position then in what he would have been, had an assessment made in accordance with law.

15. In the case before us the assessee had not paid tax voluntarily. From the beginning the assessee had contested any collection of tax from its payments by

KSS. The Superintendent of taxes however insisted that such deduction be made and the amount so deducted be deposited with the government revenue. The assessee had every right to dispute such collection and such dispute when raised in the return filed, had to be adjudicated by the Superintendent. The amount so collected cannot be retained without adjudication. Not framing the assessment till the return gets time barred cannot be the ground for retaining such tax.

16. The Superintendent not having framed assessment, must refund the amount in question to the petitioner with statutory interest. Accordingly.

the respondent No.4 shall refund the said sum of Rs.24,21,007/- to the petitioner with interest as prescribed under the Act. This shall be done within four months from today.

17. Petition disposed of accordingly.

Pending application(s), if any, also stands disposed of.

(S.G. CHATTOPADHYAY), J **(AKIL KURESHI), CJ**

HIGH COURT OF JUDICATURE FOR RAJASTHAN BENCH AT JAIPUR

S.B. Civil Writ Petition No. 6019/2021

M/s Maruti Castings, Proprietor Nand Kumar Sharma, Addressed At A-336, Road No. 17, Vkia, Jaipur, Rajasthan Through Authorised Signatory Rajendra Kumar Sharma S/o Shri Nand Kumar Sharma, Aged About 44 Years, R/o 33, Shalimar Bagh, Near Heerapura, Ajmer Road, Jaipur.

----Petitioner

Versus

1. Union Of India, Through Revenue Secretary, North Block, New Delhi 110001
2. Additional Director General Directorate General Of Goods And Service Tax Intelligence, Jaipur Zonal Unit, C-62, Sarojani Marg, C-Scheme, Jaipur, Raj 302001
3. Commissioner Of CGST, NCRB, Statue Circle, Jaipur
4. Joint Commissioner, CGST, Anti Evasion, NCRB, Statue Circle, Jaipur.
5. Superintendent (Anti Evasion) CGST, NCRB, Statue Circle, Jaipur.

—Respondents

For Petitioner(s)	:	Mr. Sameer Jain.
	:	Mr. Arjun Singh. Mr. Pranav Malik.
For Respondent(s)	:	Mr. Siddharth Ranka.
		Mr. Kinshuk Jain for DGGI.

HON'BLE MR. JUSTICE ARUN BHANSALI

Order

14/09/2021

The matter comes up on an application filed by the respondents No.1, 3, 4 & 5 under Article 226(3) of the Constitution of India seeking vacation of the interim order dated 21/5/2021.

By order dated 21/5/2021, a coordinate bench of this Court passed the following order:

"Learned counsel for the petitioner submits that a sum of Rs.50 lac

has been recovered under duress from the petitioner without even issuing show cause notice treating it as under Section 74 of the CGST Act, 2017. Learned counsel submits that the goods which have been seized are all duly accounted for and the same could not have been seized. The entire seizure is illegal.

Learned counsel submits that he is ready to submit surety bond instead of asking for a Bank guarantee.

Issue notice of the writ petition as well as stay application, returnable within eight weeks.

In the meanwhile, the goods lying with the respondent/s shall be released subject to submitting a surety bond of the equivalent amount of the value of the goods by the petitioner. The petitioner shall not be insisted for submitting the Bank guarantee."

It is submitted by learned counsel for the respondents that the directions of the Court that the petitioner shall not be insisted for submitting the Bank guarantee is contrary to the provisions of Section 67(6) of the Central Goods & Services Tax Act, 2017 ('the Act') read with Rule 140 of the Central Goods & Services Tax Rules, 2017 ('the Rules').

It is submitted that provisions of Section 67 (6) envisage release of goods on provisional basis, upon execution of a bond and furnishing of a security, in such manner and of such quantum, as may be prescribed, and as per Rule 140 of the Rules, the seized goods may be released on a provisional basis upon execution of a bond for the value of the goods and furnishing of a security in the form of a bank guarantee equivalent to the amount of applicable tax, interest & penalty payable.

It is submitted that the petitioner filed an application (Annex.10) seeking release of goods as per the provisions of Section 67(6) of the Act and indicated that it was ready to comply with the procedure. Based on the said application (Annex.10), a communication dated 11/5/2021 (Annex.15) was issued indicating the requirement to furnish a bond of Rs.2,71,07,354/- and a security in the form of a bank guarantee of Rs.1,51,80,118/- as per Section 67(6) of the Act and Rule 140 of the Rules for provisional release of seized goods. It is submitted that the respondents have passed the order in terms of the relevant provisions, which cannot be faulted and, therefore, the direction to release the goods without insisting for submitting the bank guarantee deserves to be vacated.

Reliance was placed on *State of U.P. & Ors. vs. Kay Pan Fragrance Pvt. Ltd. : (2020) 5 SCC 811*, *M/s. Maa Karni Traders & Anr. vs. Union of India & Ors. : I.A.(Civil)/977/2021 in WP (C) 1003/2021* passed by Gauhati High Court on 10/6/2021 and *JVG Super Cargo Service Ltd. vs. State Tax Officer : S.B.Civil Writ Petition No.2540/2020,* decided on 29/6/2020.

Learned counsel for the petitioner made vehement submissions with reference to various provisions of the Act that the petitioner is a registered person under Section 25 of the Act and as such in the circumstances of petitioner's case, issues have to be dealt with under Section 35(6) of the Act read with Section 73 or 74 of the Act. Action of the respondents in resorting to Section 67(2) of the Act in seizing the goods is not valid and consequently provisions of Section 67(6) do not apply and, therefore, as the entire action of the respondents in seizing the goods of the petitioner itself is invalid, the interim order granted by the Court is justified and the same does not call for any vacation/modification.

It was sought to be emphasized by learned counsel that besides the fact that as the petitioner is a registered person, as such provisions of Section 35 (6) read with Sections 73 & 74 of the Act only are applicable, even Section 67(2) has no application inasmuch as Section 67(2) of the Act applies only in cases where the goods or documents or books or things are 'secreted', which is not the case and on that count also as the seizure is illegal and CGST authorities have no jurisdiction, therefore, passing of the interim order is justified and does not call for

It was also emphasized that the present action of the respondents is also contrary to Section 6 of the Act as only the Directorate General of GST Intelligence (DGGI) has the jurisdiction in the matter and as such, the action of the respondents in this regard being without jurisdiction, the interim order granted by the Court does not call for any interference.

Further submissions were made that the judgments cited by the learned counsel for the respondents have no relevance to the case in hand as the said judgments/ order pertain to transporters and not registered persons.

Learned counsel for the respondents reiterated that the action taken by the respondents is in consonance with the statutory provisions, the seizure is valid and CGST authorities have the jurisdiction in terms of Section 6(2)(b) of the Act and as such, the interim order dated 25/5/2021 deserves to be vacated/modified.

I have considered the submissions made by learned counsel for the parties

and have perused the material available on record.

The prayers made in the writ petition read as under:

"It is, therefore, most humbly and respectfully prayed that by suitable writ, order or direction to:

a) Direct the respondents to refund the illegally recovered money during the course of search without any issuance of show cause notice as required under section 73 and 74 of CGST act, 2017 and to declare the same as premature, illegal and arbitrary;

b) Quash and set aside the Seizure of Goods worth Rs.2,71 crores vide order dated 31.03.2021, in terms of INS 02 and INS 03 and the provisional order dated 11.05.2021.

c) Quash and set aside the search warrant and search proceedings carried out without jurisdiction, contrary to the provisions of section 6, by exercising overlapping jurisdiction over DGGI, contrary to the Circular dated 12.06.2017.

d) Quash and set aside the statements recorded by bypassing the provisions of Section 70 and in non compliance with the Hon. Supreme Court directions in the judgment of Paramvir Singh Saini v/s Baljit Singh and others in SLP (Criminal) No. 3543 of 2020.

e) provide such further and other reliefs, costs as this Hon'ble Court may deem fit and proper in the nature and circumstance of the case."

The action of the authorities, apparently, is two fold (i) on account of allegations of one M/s Krishna Enterprises being a bogus firm and supplying fake invoices without supplying the raw material physically and (ii) on account of inspection carried out by the authorities at the principal place of business and additional places of business of the petitioner firm. It is claimed by the respondents, based on the 'Panchnama' dated 31/3/2021 that physical stocks available at the principal place of business/additional places of business did not match with the books of the petitioner during the course of inspection.

Various submissions have been made by learned counsel for the petitioner seeking to explain the circumstances in which there was a mismatch between the two and seeking to emphasize that the provisions of Section 35(6) read with Section 73 or 74 only could have been invoked in the given circumstances.

Having heard the learned counsel for the parties, prima facie it cannot be said that in case of a registered person action only under Section 35(6) read with Section 73 or 74 of the Act can be taken and that Section 67 of the Act cannot be invoked, if the circumstances as indicated therein exist.

The emphasis laid by learned counsel for the petitioner that as the goods liable to be confiscated or documents or books or things were not secreted, the provisions cannot be invoked, is premature at this stage.

The word 'secreted' is not defined under the Act, however, the same can be understood to mean anything which is concealed and in those circumstances even if the documents are not kept at the designated places where the same ought to be kept in terms of the Act and the Rules, and in case circumstances exist where the absence of the documents is with an intention to conceal them from the officers, the same can be termed as secreted, therefore,

as observed hereinbefore, the plea raised in this regard, based on the circumstances which have come on record, is essentially premature.

Consequently, at this stage, prima facie it cannot be said that the seizure is illegal for the purpose of coming to the conclusion that provisions of Section 67 (6) of the Act would have no application.

The plea raised regarding lack of jurisdiction also apparently cannot be countenanced while dealing with the application seeking vacation/modification of the interim order.

The Hon'ble Supreme Court in the case of Kay Pan Fragrance (supra), wherein the High Court had directed the State to release the seized goods subject to deposit of security other than cash or bank guarantee or in the alternative indemnity bond equal to the value of tax and penalty to the satisfaction of assessing authority, *inter alia* quoting the provisions of Section 67 and Rule 140 and 141 observed as under:

> "9. For the sake of consistency, we have no hesitation in observing that the High Court in all such cases ought to have relegated the assessees before the appropriate Authority for complying with the procedure prescribed in Section 67 of the Act read with Rules as applicable for release (including provisional release) of seized goods."
>
> "12. There is no reason why any other indulgence need be shown to

the assessees, who happen to be the owners of the seized goods. They must take recourse to the mechanism already provided for in the Act and the Rules for release, on a provisional basis, upon execution of a bond and furnishing of a security, in such manner and of such quantum (even upto the total value of goods involved), respectively, as may be prescribed or on payment of applicable taxes, interest and penalty payable, as the case may be, as predicated in Section 67(6) of the Act. In the interim orders passed by the High Court which are subject matter of assail before this Court, the High Court has erroneously extricated the assessees concerned from paying the applicable tax amount in cash, which is contrary to the said provision.

13. In our opinion, therefore, the orders passed by the High Court which are contrary to the stated provisions shall not be given effect to by the authorities. Instead, the authorities shall process the claims of the concerned assessee afresh as per the express stipulations in Section 67 of the Act read with the relevant rules in that regard. In terms of this order, the competent authority shall call upon every assessee to complete the formality strictly as per the requirements of the stated provisions disregarding the order passed by the High Court in his case, if the same deviates from the statutory compliances. That be done within four weeks without any exception.

14. We reiterate that any order passed by the High Court which is contrary to the stated provisions need not be given effect to in respect of all the cases referred in the affidavit by the State Government before this Court and fresh cases which may have been filed or likely to be filed before the High Court in connection with the subject matter of these appeals, by all concerned and are deemed to have been set aside/modified in terms of this order. In view of this order, all the Writ Petitions pending before the High Court, list whereof has been furnished in the affidavit are deemed to have been disposed of accordingly. We have passed this common order to cover all cases of seizure during the relevant period, to obviate inconsistency in application of Law and also to do away with multiple appeals required to be filed by the State/ assessee to assail the unstatable orders/directions passed

by the High Court in subject writ petition(s) referred to in the affidavit filed by the State before this Court."

A perusal of the above observations indicate that qua the nature of interim order passed by the High Court therein, the Court required that the assessee must take recourse to the mechanism provided under the Act and the Rules for release on provisional basis upon execution of bond and furnishing of a security in such manner and of such quantum as has been prescribed and it was ordered that the orders passed by the High Court which are contrary to the statutory provisions shall not be given effect to by the authorities.

The order in the case of Kay Pan (supra) has been followed in the case of JVG Super Cargo Service (supra) and Maa Karni Traders (supra).

The attempt made by learned counsel for the petitioner to distinguish the judgment in the case of Kay Pan Fragrance (supra) by indicating that the same pertains to transporters essentially has no substance, as there is apparently no distinction between the case of a transporter and that of a registered person insofar as the applicability of provisions of Section 67 are concerned.

Admittedly, the petitioner himself applied under Section 67(6) of the Act seeking release of the seized goods vide Annex.10, based on which the order dated 11/5/2021 (Annex.15) was issued and as such passing of the order 11/5/2021 by the respondents also cannot be faulted.

In view of the above discussion, the application filed by the respondents under Article 226(3) of the Constitution is allowed. The order dated 21/5/2021 is modified to the extent that besides the surety bond of the equivalent amount of value of goods by the petitioner, it would be required of the petitioner to furnish security in the form of bank guarantee in terms of Section 67 (6) of the Act and Rule 140 of the Rules for release of the seized goods.

It is made clear that the observations made hereinbefore are confined to disposal of the present application and shall not affect the final outcome of the present writ petition.

Stay application stands disposed of.

(ARUN BHANSALI),J

SUPREME COURT OF INDIA

RECORD OF PROCEEDINGS

Transfer Petitions(Civil) Nos.1481-1482/2021

UNION OF INDIA Petitioner(s)

VERSUS

M/S CUMMINS TECHNOLOGIES INDIA PVT LTD. & ORS.ETC.

Respondent(s)

(FOR ADMISSION and IA No.106940/2021-STAY APPLICATION)

Date : 20-09-2021 These petitions were called on for hearing today. CORAM :

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SURYA KANT

HON'BLE MS. JUSTICE HIMA KOHLI

For Petitioner(s)

Mr. Tushar Mehta,

SG Mr. S.V. Raju, ASG

Mr. Zoheb Hossain, Adv.

Ms. Chinmayee Chandra, Adv.

Mr. Kanu Agrawal, Adv.

Mr. Mukesh Kumar Maroria, AOR

For Respondent(s)

Mr. B. Lakshmi Narasimhan, Adv.

Mr. Aditya Bhattacharya, Adv.

Ms. Apeksha Mehta, Adv.

Ms. Charanya Lakshmikumaran, AOR

Mr. Vinay Shraff, Adv.

Mr. Ravi Bharuka, AOR

Mr. Ankit Agarwal, Adv.

UPON hearing the counsel the Court made the following

ORDER

The Court is convened through Video Conferencing.

Heard Mr. Tushar Mehta, learned Solicitor General, Mr. S.V. Raju, learned Additional Solicitor General appearing for the Union of India, learned counsel appearing for Respondent No.1, who is on caveat, and carefully perused the record.

These transfer petitions have been filed by the Union of India under Article

139A read with Article 142 of the Constitution of India seeking transfer of two Writ Petitions to this Court, i.e., (i) Writ Petition No. 9443/2020 titled 'M/s. Cummins Technologies vs Union of India' pending before the High Court of Madhya Pradesh at Indore and (ii) Writ Petition No.7767 /2020 titled 'M/s. SPL Infrastructure Private Limited v. Assistant Commissioner of State Tax, Narasannapeta and Ors.' pending before the High Court of Andhra Prdesh at Amaravati. In both these Writ Petitions, the constitutional validity of Section 16(2)(c) of the Central Goods and Services Tax Act, 2017 has been challenged.

In addition to the aforementioned two Writ Petitions, we are informed that the constitutional validity of Section 16(2)(c) of the CGST Act has been challenged in 34 other writ petitions, which are stated to be pending across nine High Courts in the country.

According to learned Solicitor General, since the issue has implication on a number of matters pending across the country and also ramifications of huge amounts payable under the said Act, it would be appropriate if this Court hears all the matters.

Even though learned Solicitor General insisted for transfer of cases pending before various High Courts to this Court, we are not inclined to entertain these transfer petitions, for the reason that various High Courts are already seized of the matters. In particular, in the matter before the High Court of M.P., Indore Bench, counter affidavit is already stated to have been filed.

In view of the above, we request the High Court of Madhya Pradesh, Indore Bench to dispose of the Writ Petition No.9443/2020, pending adjudication before it, as early as possible and preferably within a period of two months' time from the date of communication of this Order.

Parties are at liberty to advance their respective arguments before the High Court of Madhya Pradesh, Indore Bench.

So far as other Writ Petitions, which are pending before various High Courts, it is open for the parties to bring this Order to the notice of the concerned High Courts and seek expeditious disposal of their cases.

The Transfer Petitions are disposed of in the afore-stated terms.

Pending applications, if any, shall also stand disposed of.

(VISHAL ANAND)
ASTT. REGISTRAR-cum-PS

(R.S. NARAYANAN)
COURT MASTER (NSH)

COMMERCIAL NEWS

CA Deepak Khandelwal

Highlights of the 45th GST Council Meeting held on 17th Sept 2021 at Lucknow

Key matters discussed in the Council meeting, as announced in the FM's press briefing:

1. Expensive life-saving drugs such as Zolgensma and Viltepso used to treat muscular atrophy are exempted from GST. Further, drugs suggested by the Ministry of Health for treating the same, imported for personal use, are exempted from IGST.
2. Concessions on drugs used for COVID-19 treatment which include Amphotericin B (nil rate), Remdesivir (5% rate), Tocilizumab (nil rate) and anti-coagulants like Heparin (5% rate), have been extended until 31st December 2021. The list of drugs has been expanded to include Itolizumab, Posaconazole, Infliximab, Favipiravir, Casirivimab & Imdevimab, 2-Deoxy-D-Glucose, Bamlanivimab and Etesevimab, all now taxed at 5% GST. This extended relief is not granted to equipment.
3. Cancer-related drugs (Keytruda being one of them) are now at a reduced rate of 5% from 12%.
4. The GST rate on retro fitment kits used by disabled persons is now reduced to 5%.
5. The GST rate on fortified rice kernels used for ICDS is reduced from 18% to 5%.
6. GST rate on bio-diesel supplied to oil marketing companies reduced from 12% to 5%.
7. Transport of goods exported by vessels and air exempted from GST until 30th September 2022.
8. The National Permit Fee for granting permits to goods carriages to operate throughout Indian and contiguous states has been exempted from GST.
9. Training programmes for skill development wholly/substantially funded by Central and state governments are exempted from GST. Programmes where the Central Government or state government bear 75% of the cost of such training or higher will get exemption from GST.
10. The import of aircraft and other goods on lease are now exempted from IGST to avoid double taxation. Necessary amendments will be made to customs laws as well. Lessors located in SEZ paying GST under forward charge are also exempted.
11. On the issue of the inverted duty structure, the correction in the footwear and textile sector anomalies will take place from 1st January 2022.
12. With regard to ore concentrates and specified metals, the inverted tax structure due to the royalty used as input services that were being charged at 18% GST is now corrected but without a date decided on its implementation.
13. All kinds of pens and their parts will be taxed at 18% GST. This correction will remove the inverted tax issue.

14. Specified renewable energy devices that are presently at 5% have inputs charged at 18%. Hence, corrections have been made. A GST rate of 12% has been prescribed on those energy devices, thereby helping domestic manufacturing and the Aatmanirbhar Bharat Mission of the government.
15. GST on railway parts and locomotives falling under Chapter 86 increased from 12% to 18% to correct the inverted tax structure.
16. The matter of bringing petrol and diesel under GST was discussed. However, it was decided that this was not the time to bring petrol and diesel under the scope of GST.
17. The revenue-neutral rate at the time of the introduction of GST was 15.5%. The same has been brought down to 11.6%.
18. The compensation cess collection will be extended beyond July 2022. To repay the total amounts borrowed last year and this year to pay the states, the compensation cess will be extended to March 2026.
19. A Group of Ministers (GoM) has been formed to look into e-way bills, compliances, FASTags, use of technology, compensation cess, plugging of loopholes, and other issues.
20. Another GoM has been formed to look into the rate rationalisation of certain goods and services.
21. With regard to food delivery apps, the e-commerce operators will be liable to pay the tax on restaurant services provided through them, with some exceptions.

Recommendations relating to GST law and procedure

1. A measure for trade facilitation includes relaxation in the requirement of filing Form GST ITC-04. Taxpayers whose annual aggregate turnover in the preceding financial year exceeds Rs.5 crore can furnish Form ITC-04 once in six months. Taxpayers whose annual aggregate turnover in the preceding financial year is up to Rs.5 crore can furnish ITC-04 annually.
2. A previous Council decision stated that interest is to be charged only in respect of the net cash liability under GST. Section 50 (3) of the CGST Act to be amended retrospectively, from 1st July 2017, to provide that interest is to be paid by a taxpayer on "ineligible ITC availed and utilised" and not on "ineligible ITC availed". It has also been decided that interest in such cases should be charged on the ineligible ITC availed and utilised at 18% from 1st July 2017.
3. The unutilised balance in the CGST and IGST cash ledgers may be transferred between distinct persons (i.e., entities with the same PAN but registered in different states) without a refund procedure. This is subject to certain safeguards.
4. The following circulars will be issued to remove ambiguity and legal disputes on various issues: Clarification on the scope of "intermediary services"; Clarification relating to the interpretation of the term "merely establishment of distinct person" in condition (v) of Section 2 (6) of the IGST Act 2017 for the export of services; C.Clarification in respect of certain GST related issues.
5. A provision will be incorporated in the CGST Rules for removing ambiguity regarding the procedure and time limit for filing a refund for tax wrongfully paid as specified in Section 77(1) of the CGST and SGST Acts and Section 19(1) of the IGST Act.

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