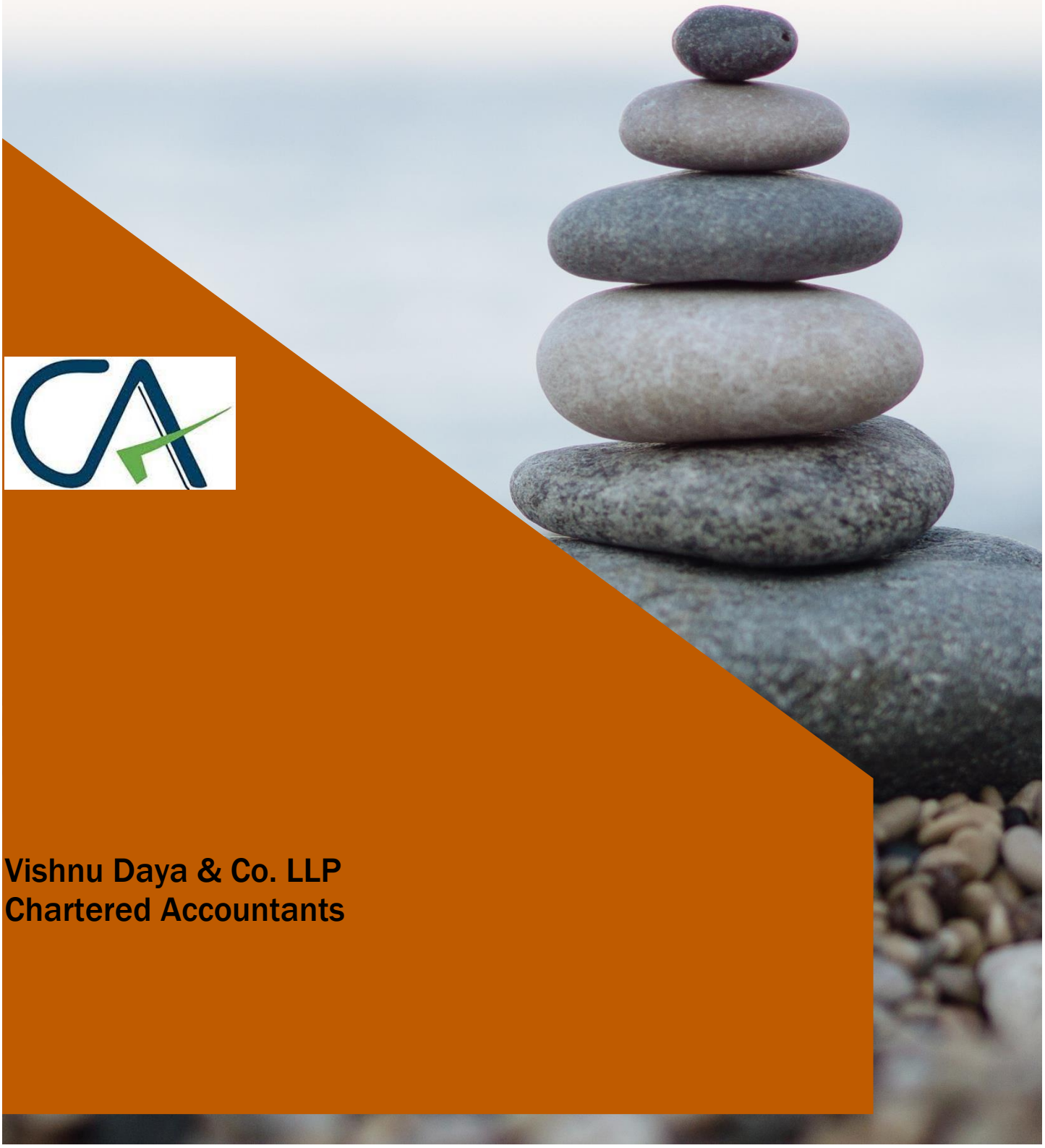
Newsletter November 2021



Vishnu Daya & Co. LLP
Chartered Accountants

Contents

Direct Tax – Circulars & Notifications

Circulars issued by CBDT in the month of October 2021

1. **CBDT issues guidelines on eligibility for exemption u/s 10(23FE) over borrowed sum invested in India.**

   Circular No. 19 / 2021, dated 26th October 2021.

   As per the guidelines, the specified fund shall not be eligible for exemption u/s 10(23FE) if the loans and borrowings have been taken by the fund or any of its group concern specifically for the purposes of making investment by the specified fund in India. Where the loans and borrowings have been taken but not specifically for the purposes of making investment in India, it shall not be presumed that the investment in India has been made out of such loans and borrowings and such specified fund shall be eligible for exemption u/s 10(23FE) subject to the fulfilment of all other conditions under the said clause, provided that the source of the investment in India is not from such loans and borrowing.

   Click here to read / download the copy of the circular.

Notifications issued by CBDT

1. **CBDT extends applicability of Safe Harbour rules to AY 2021-22.**

   Notification no. 117 /2021, dated 24th September 2021.

   CBDT releases Notification No. 117/2021 dated 24th September 2021 to extend applicability of Safe Harbour Rules under Rule 10TD of Income-tax Rules to AY 2021-22. Notifies that sub-rules (1) and (2A) shall now apply to AY 2021-22 also. Amended rules deemed to come into force from April 1, 2021.

   Click here to read / download the copy of the notification.

2. **CBDT notifies Rules to effectuate Taxation Laws (Amendment) Act, 2021.**

   Notification no. 118 /2021, dated 1st October 2021.

   CBDT notifies Income-tax (31st Amendment) Rules, 2021. As per the notified Rules: (i) Rule 11UE provides for the specified conditions for eligibility to claim relief under the Taxation Laws (Amendment) Act, 2021. and (ii) Rule 11UF provides the form and manner of furnishing the undertaking for withdrawal of pending litigation, claiming no cost, damages, etc.

   Click here to read / download the copy of the notification.

3. **CBDT exempts certain non-residents from furnishing return of income from AY 2021-22 onwards.**

   Notification no. 119 /2021, dated 11th October 2021.

   The following class of non-residents shall be exempted from the requirement of filing their return of income, from AY 2021-22 onwards:

   I. Non-resident (not being a company) or a foreign company, subject to fulfilment of the following conditions:
      a. Such non-resident does not earn any income in India, during the previous year, other than income from investment in specified fund referred to in clause (c)(i) of the Explanation to section 10(4D) of the ITA; and

b. The provisions of section 139A of the ITA [relating to Permanent Account Number (PAN)] are not applicable to such non-residents, subject to fulfillment of conditions mentioned in Rule 114AAB(1)3 of the Income-tax Rules, 1962 (Rules).

II. Non-resident, being an eligible foreign investor, subject to fulfillment of the following conditions:
   a. Such non-residents, during the previous year, has made transaction only in capital asset referred to in section 47(viiab) of the ITA, which are listed on a recognised stock exchange located in any International Financial Services Centre (IFSC) and the consideration on transfer of such capital asset is paid or payable in foreign currency;
   b. Such non-residents do not earn any income in India, during the previous year, other than the income from transfer of capital asset referred to in section 47(viiab) of the ITA; and
   c. Provisions of section 139A of the ITA (relating to PAN) are not applicable to such non-residents, subject to fulfillment of the conditions mentioned in Rule 114AAB(2A)5 of the Rules.

Further states that exemption from the requirement of furnishing a return of income shall not be available where a notice under Sections 142(1) or 148 or 153A or 153C has been issued for filing a return of income for the assessment year specified therein.

Click here to read / download the copy of the notification.

4. CBDT extends notified Rules 11UE/11UF to Sec.119 of Finance Act, 2012.

Notification no. 120/2021, dated 13th October 2021.

CBDT notifies Relaxation of Validation (section 119 of the Finance Act, 2012) Rules, 2021. The Rules provide that the form and manner of furnishing undertaking under Explanation to fifth and sixth proviso to Explanation 5 to Section 9(1)(i) as prescribed under Rule 11UE(1)/(3) and Rule 11UF of the Income-tax Rules, 1962, shall mutatis mutandis apply to clauses (i), (ii) and (iii) of the first proviso to Section 119 of the Finance Act, 2012. Also provides that the conditions for the purposes of clause (iv) of the Explanation to fifth and sixth proviso to Explanation 5 to Section 9(1)(i) as prescribed under Rule 11UE(2) shall also mutatis mutandis apply to clause (iv) of the first proviso to Section 119 of the Finance Act, 2012

Click here to read / download the copy of the notification.

5. CBDT prescribes more information to be uploaded by DGIT(Systems) in Form 26AS.

CBDT order, dated 26th October 2021.

CBDT by order u/s 285BB read with Rule 114-I(2) authorizes the Director General of Income-tax (Systems) to upload prescribed information in the Annual Information Statement in Form 26AS in assessee's electronic filing account on the designated portal. The information is required to be uploaded within three months from the end of the month in which the information is received. DGIT(Systems) to also specify the procedures, formats and standards for the purposes of uploading the information. The information prescribed for this purpose is: (i) Foreign remittance information reported in Form 15CC, (ii) Information in Annexure II of the 24Q TDS Statement of the last quarter, (iii) Information in ITR of other taxpayer, (iv) Interest on Income Tax Refund, (v) Information in Form 61/61A where PAN could be populated, (vi) Off Market Transactions Reported by Depository/ Registrar and Transfer Agent (RTA), (vii) Information about dividend of mutual fund reported by RTA, and (viii) Information about purchase of mutual fund reported by RTA.

Click here to read / download the copy of the order.

Direct Tax – Legal Rulings

Domestic and International Tax Rulings in the month of October 2021

1. **ITAT: Classifies Headquarter Services and Technical Consultancy Services as IGS, not stewardship services.**

   Nalco Water India Limited [TS-464-ITAT-2021(PUN)-TP]

   Pune ITAT rejects TPO's classification of support services received from foreign AEs in the field of Headquarter Services and Technical Consultancy Services as 'stewardship services' for AY 2009-10.

   Notes that assessee availed Headquarter Services from Nalco, USA under the Service Agreement while Technical Management Assistance Services from Nalco Pacific Pte Ltd., Singapore under the Technical and Management Assistance Agreement. On perusal of the services received by the assessee from Nalco, USA and Nalco Pacific Pte Ltd, Singapore, ITAT states that "*the services facilitated the carrying on the business operations by the assessee in a more efficient and effective manner by adhering to the international standards in a globally uniform manner*".

   Adjudicating on TPO's classification of said services as stewardship activity instead of intra-group services as claimed by the assessee, ITAT explains the term 'stewardship' (not been defined either in the IT Act, 1961 or in the IT Rules, 1962) in commercial parlance, as activities which are undertaken by an enterprise to protect one's own interest. ITAT opines that "*the services are in the nature of regular business services performed by the group entities with a view to enable the assessee to carry on its business operations, thereby causing effect on it" and hence do not qualify as 'stewardship activities*".

   Click here to read / download the copy of the ruling.

2. **ITAT: Software license-fee not taxable as Royalty, sans PE not taxable as business profits.**

   Husco International Inc. [TS-908-ITAT-2021(PUN)]

   Pune ITAT allows Assessee's appeal, holds that receipts from software license not taxable as royalty and also not taxable as business income due to non-existence of PE in India.

   Assessee-Company (incorporated in the US), engaged in the development and manufacture of hydraulic and electro-hydraulic controls for off-highway and automotive applications, purchased different software products and transferred some of them to the Indian entity at cost, without any markup. Revenue, for AY 2016-17, held the receipts from software to be taxable as Royalty/FTS u/s 9(1)(vi)/9(1)(vii) and the Assessee being a non-resident offered tax under Article 12 of India-USA DTAA at 15%. Before the DRP, the Assessee contended that the rate of 15% was charged erroneously and claimed benefit of lower rate of 10% plus surcharge and cess as per Section 115A.

   DRP rejected Assessee's claim since the Assessee had not filed a revised return with correct tax rate. ITAT relies on SC ruling in *Engineering Analysis* and holds that since the Assessee itself obtained only a limited access to the software products de hors the right to copy the same, the sequitur is that it could not have transferred anything more than that to its entities globally including India. ITAT emphasized that if receipts from the Indian entity is not Royalty, it can be charged to tax as regular business income i.e., Article 7 of the India-USA DTAA for which the *sine qua non* is that the Assessee must have a PE in India. On the issue of rate of tax, ITAT accepts Assessee's contention for lower rate of tax of 10% and concludes that there can be no estoppel against the law and the purpose of an assessment is to determine

the correct amount of income and tax payable thereon.

Click here to read / download the copy of the ruling.

3. **ITAT: Upholds re-classification of pass-through costs as intra-group services. Real-intention of documents submitted relevant.**

Parexel International (India) Private Limited [TS-506-ITAT-2021(Bang)-TP]

Bangalore ITAT restores TP adjustment on location savings and upholds re-classification of pass through cost as intra-group services for assessee for AY 2013-14. As regards to TP adjustment towards location savings, ITAT relies on coordinate bench ruling case of assesee's own case for AYs 2011-12 to 2012-13, where in coordinate bench restored the TP adjustment after stating that the location savings and advantages are relevant but for limited purpose of carrying out exercise of examination and investigation of the transaction and not as a basis for determining the ALP. Following the same, ITAT restores the issue to the file of TPO/AO for fresh adjudication with similar directions as referred in the order of Tribunal.

ITAT opines "*that this is an inter-group services provided by the assessee to its parent company and assessee must charge some fee as it would have, had the services been provided to a third party*". ITAT opines that this intra-group services rendered by the assessee to the parent company cannot be considered as reimbursement of expenses or pass through costs and its separate services in itself for which the assessee needs to determine the ALP. Distinguishing further with assessee's reliance on host of rulings, ITAT upholds TPO's action of charging mark up and subsequently proposing an TP adjustment.

Click here to read / download the copy of the ruling.

4. **ITAT: Allows ESOP expenditure u/s 37(1) to Network 18.**

Network 18 Media & Investment Ltd [TS-918-ITAT-2021(Mum)]

Mumbai ITAT dismisses Revenue's appeal, holds ESOP expenditure is not in the nature of a contingent liability and thus, deductible u/s 37(1).

Assessee-Company claimed deduction of expenditure on ESOP of Rs. 75.53 lakhs for AY 2012-14 which was disallowed by the Revenue on the grounds that the liability did not crystallize and the expenditure was notional. On appeal, CIT(A) allowed the expenditure.

ITAT upholds the CIT(A)'s order. Assessee made suo moto disallowance of Rs. 11.68 Cr u/s 14A having received exempt income in the nature of dividend and long term capital gain. Revenue held the disallowance made by the Assessee was not in accordance with Rule 8D and computed net disallowance of Rs.43.08 Cr. On appeal, CIT(A) deleted the disallowance. ITAT finds the Assessee had sufficient interest free funds at its disposal, and thus disallowance under rule 8D(2)(iii) could be made on the average value of assets yielding exempt income during the year, upholds CIT(A)'s order.

Click here to read / download the copy of the ruling.

5. **ITAT: Rules on Trust's eligibility for exemption u/s 11, interplay of Sec.12A, 10(23C)(iv)**

Association of State Road Transport Undertakings [TS-922-ITAT-2021(DEL)]

Delhi ITAT allows Assessee's appeal, holds utilization period of amount set aside and accumulated in excess of 15% to be examined u/s 11(3) and not u/s 10(23C) for a year when Assessee was not registered u/s 10(23C)(iv), but u/s 12A.

Assessee was registered under section 12A, and vide Notification Order No.1348 dated 31st October, 2007 was also registered u/s

10(23C)(iv) which was valid from AY 2007-08 onwards. Revenue found Assessee had set apart and accumulated surplus of Rs. 4.39 Cr for financial year 2002-03, which was in excess of 15%, and since the amount was not utilized within stipulated period, held the same to be taxable for AY 2009-10 which was confirmed by the CIT(A).

ITAT finds the provision of section 11(3) very clearly stipulated that any amount accumulated for financial year 2003-04 could be utilized up to financial year 2009-10 and if not utilized by then, then it would be taxable in AY 2010-11 (applicable for FY 2009-10), whereas under third proviso to section 10(23C)(iv), surplus of FY 2003-04 in excess of 15% could be accumulated for a period which shall "in no case exceed five years", i.e., the amount accumulated had to be therefore utilized for a period up to five years i.e., FY 2008-09 or AY 2009-10.

ITAT refers to CBDT Circular No. 14/ 2015 which clarified that "*provisions of section 11 and 10(23C) are two parallel regimes and operate independently in their respective realms although some of the compliance criteria may be common to both. Hence obtaining prior registration before granting approval u/s 10(23C) cannot be insisted upon.*", and relies on the Jurisdictional HC ruling in *Venu Charitable Society*.

ITAT finds merits in Assessee's case that for examining utilization period of amount set aside and accumulated in excess of 15% pertaining to FY 2003-04 when it was not registered u/s 10(23C)(iv) will have to be examined only as per provision of section 11(3) and not as per provision of section 10(23C)(iv). Further remarks that legislature has *vide* Finance Act 2020, eliminated the scope of two parallel regimes, and now it is clearly provided that trust can only obtained benefit of under either section 11 or section 10(23C)(iv).

Click here to read / download the copy of the ruling.

6. ITAT: Holds maturity proceeds of fixed deposit as capital receipt not taxable for Trust

Agricultural Produce Marketing Committee [TS-919-ITAT-2021(Bang)]

Bangalore ITAT holds maturity proceeds of FD is "capital receipt" for Assessee and not subject to tax.

Assessee-Trust engaged in marketing activities of agricultural produce declared Nil income in AY 2005-06 and was assessed u/s 143(3) wherein total income of Rs.76.88 lacs was determined. Revenue held that "*Gross receipts excluding corpus donation"* shall constitute income of trust and assessed the maturity proceeds from a fixed deposit of Rs. 50 lakhs as income which was confirmed by CIT(A). Revenue also rejected Form No.10 since the same was not filed within due date of return, but was filed before conclusion of assessment proceedings.

ITAT refers to "income" as defined in Section 2(24)(iia) wherein 'voluntary contributions' received by a charitable trust is brought under the definition of income, even though it may not fall under the category of income under accounting principles. ITAT holds that "total income" has to be computed in the hands of a charitable trust in accordance with the provisions of Sections 11 to 13 along with satisfying definition of "total income" given u/s 2(45) and that maturity proceeds from a FD is in the nature of "capital receipt" to the recipient and not subject to tax. Directs for deletion of Rs. 50 lacs on account of maturity proceeds of FD.

With regards to rejection of Form No. 10, ITAT relies on the Bangalore ITAT ruling in *Ursuline Franciscan Congregation Generalate* and remarks that the debate has been put to rest with the observations that in most cases Form No. 10 can be filed before completion of assessment proceedings and that amendment to Section 11 was only applicable w.e.f. AY 2016-17. Thus, for the year under consideration being AY 2005-06, i.e, prior to AY 2016-17 ITAT holds that Form No.10 already filed should have been

considered by the Revenue and directs Revenue to examine the claim made u/s 11(2).

Click here to read / download the copy of the ruling.

7. ITAT: Subsequent approval by prescribed authority sufficient for claiming deduction u/s 35(2AB)

Titan Laboratories Pvt. Ltd [TS-979-ITAT-2021(Mum)]

Mumbai ITAT allows Assessee's appeal, allows claim for deduction u/s 35(2AB) where approval from the prescribed authority was obtained after the close of the financial year in which deduction was claimed.

Assessee-Company (Titan Laboratories Pvt. Ltd.) engaged in research and development activities claimed weighted deduction u/s 35(2AB) of Rs. 4.98 Cr which was denied by the Revenue holding that Assessee did not fulfil the basic conditions of eligibility u/s 35(2AB) related to approval from prescribed authority which was confirmed by the CIT(A).

ITAT relies on the jurisprudence in the context and remarks merely because approval was received in subsequent year, deduction u/s 35(2AB) could not be denied to the Assessee, further that deduction could not also not be denied on the grounds that application for approval in prescribed form was made after the close of financial year. ITAT, thus sets aside the orders of the lower authorities and allows the deduction.

Click here to read / download the copy of the ruling.

8. ITAT: Expenditure incurred in foreign currency not excludible for computation of 'export turnover' of Infosys BPM u/s 10AA

Infosys BPM Limited [TS-1006-ITAT-2021(Bang)]

Bangalore ITAT holds expenditure incurred in foreign currency not to be excluded from export turnover u/s 10A/10AA as the Assessee was not providing technical services outside India.

Assessee-Company (Infosys BPM Ltd.), providing business process outsourcing services was subjected to scrutiny assessment for AY 2008-09 whereby Revenue found that the deduction computed by the Assessee u/s 10A and 10AA to be flawed since expenditure incurred in foreign currency was not excluded from Export Turnover and expenditure incurred on telecommunication charges was reduced from both Export Turnover and Total turnover as against the requirement to reduce it only from the export turnover.

On appeal, CIT(A) held that the Assessee's case was covered by the jurisdictional HC ruling in *Tata Elxsi* and held that the expenditure incurred in foreign currency and telecommunication charges have to be reduced from both export turnover and total turnover and directed the Revenue to follow the same. ITAT holds that the expenses incurred by the Assessee were not for providing technical services outside India and thus, not contemplated to be excluded from the 'export turnover' u/s 10A/10AA, follows jurisdictional HC ruling in *Mphasis* and directs the Revenue not to exclude the expenditure incurred in foreign currency from export turnover.

Click here to read / download the copy of the ruling.

9. ITAT: Depreciation on assets kept 'ready to use' allowable during temporary suspension of business.

Natural Biochemicals and Foods Ltd [TS-973-ITAT-2021(HYD)]

Hyderabad ITAT allows Assessee's appeal and directs Revenue to allow depreciation on assets unutilized on account of temporary suspension of business.

Assessee-Company (Natural Biochemicals and Foods Ltd.) was subject to scrutiny for AY 2014-15, whereby Revenue found it was a sick company which had suspended its business activities since 2010. Therefore, disallowed

Assessee's claim for depreciation of Rs. 6.13 Cr. which was confirmed by the CIT(A).

ITAT observes that Assessee stopped its business activities since 2010 but was still in existence, and clarifies that a company is an artificial jurisdictional entity, and it maintains its existence unless it gets dissolved under the Companies Act. ITAT also observes that the fixed assets are still lying in Assessee's control and that it was still trying to revive its business and clarifies that use of individual asset for the purpose of business may be examined only in the first year when the asset was purchased and put to use but not in the subsequent years, and that when an asset is included in the block of assets, it remains in the block for its entire life.

ITAT further notes that claim in depreciation was allowed by Revenue in AY 2013-14 in a similar situation, and that the same ought to be allowed considering judicial consistency.

Click here to read / download the copy of the ruling.

10. ITAT: Loss on investment in shares not meant for business expansion, capital in nature

Flight Raja Travels Pvt. Ltd [TS-980-ITAT-2021(Bang)]

Bangalore ITAT holds investment made by Assessee in shares without the purpose of expansion of business to be a capital loss rather than business loss as claimed.

Assessee-Company invested Rs. 5 Cr. in shares of one Blue Ocean Cruises Lines Pvt. Ltd. for the purpose of getting 30% shareholding in a JV to be set up between the Assessee and an individual. Subsequently, the cruise owned by Blue Ocean met with an accident and the company was shutdown, and thus no shares were allotted to Assessee, thus the amount became irrecoverable and was written off in the books of as business loss.

ITAT observes in instant case Assessee made investment not for purpose of business expansion but to create capital asset in the form of holding shares and with a view to creating capital asset in the form of holding shares and follows the jurisdictional HC ruling in *United Breweries* wherein it was held that expenditure incurred for securing shares is a 'capital expenditure' and never 'revenue expenditure' and does not qualify for deduction u/s 36 or 37 and thus holds the loss as capital loss.

Click here to read / download the copy of the ruling.

11. HC: Upholds prosecution for non-filing of return, burden of proof on Assessee.

Raman Krishna Kumar [TS-998-HC-2021(MAD)]

Madras HC dismisses Assessee's petition against criminal complaint for non-filing of return u/s 276CC and wilful attempt at tax evasion u/s 276C, holds burden of proof lies on Assessee as per Sec.278E which can be tested only in the course of trial.

Assessee had not filed the return of income for AY 2013-14 whereas he allegedly had received Rs.68.71 Lacs as salary and also entered into transaction in mutual funds. Assessee submitted that he committed a bona fide mistake by not filing the return and was under an impression that his erstwhile employer would have filed the return and also submitted that there was mistake in Form 26AS regarding his income. Assessee also submitted that he was also issued notice u/s 148 and had paid additional self-assessment tax and had no intention of committing any offence.

Revenue stressed on the mandatory requirement of filing of return u/s 139 and relied on SC ruling in *Sasi Enterprises*. HC notes that the rulings relied upon by the Assessee for quashal of prosecution did not consider SC ruling in *Sasi Enterprises* where it was held that filing the return within the stipulated and mandatory period is a duty cast on any person who has to declare the income and HC also referred to recent SC

ruling in *Neeharika Infrastructure* wherein it was held that quashing of a case should be an exception rather than an ordinary rule. HC observes that the innocence or ignorance cannot be presumed and on the contrary the culpable mental state is presumable u/s 278E which the Assessee has to disprove during the course of trial. Thus, directs the Assessee to cooperate in the trial and directs Additional Chief Metropolitan Magistrate to commence the trial and complete the same on or before Jan 1, 2022.

Click here to read / download the copy of the ruling.

12. HC: Disallows Sec.10B deduction to tea blending company. Remarks, CBDT needs to reconsider low tax-effect Circular

V.N. Enterprises Limited [TS-925-HC-2021(CAL)]

Calcutta HC allows Revenue's appeals, holds Assessee engaged in blending of tea ineligible for deduction u/s 10B since it does not amount to manufacture. Follows earlier SC ruling in *Tara Agencies* where in the context of Section 35B(1A), it was held that blending of tea does not amount to manufacture.

Revenue's appeals pertained to AYs 2002-03 to 2005-06, whereby Assessee-Company (100% EOU), started blending tea in FY 2001-02 with the help of machines and assistance of experts and claimed deduction u/s 10B. Assessee was allowed deduction in the light of the Special Bench ruling whereas on Revenue's appeal, HC notes that Section 10B was substituted by Finance Act, 2000 w.e.f. Apr 1, 2001 and the deduction was allowed to the units already availing the benefit, for the balance period. Further notes, the term 'manufacture' was not defined in the substituted provisions as was available before its substitution to include even the processing.

Notes SC ruling in *Tara Agencies* and holds, "*it is the bounden duty and obligation of the Court to interpret the statute as it is. It is contrary to all rules of construction to read words into a statute, which the legislature in its wisdom has deliberately not incorporated.*" Further holds that, "*The law is now well-settled that in case of ambiguity in an exemption provision the benefit has to go to the revenue*" and answers the substantial question of law - Whether in the facts and circumstances of the case the assessee will be entitled to exemption under Section 10B of the Income Tax Act for business of blending of tea being carried on by it by taking aid from provisions of other statutes and the policies? - in favour of the Revenue.

Click here to read / download the copy of the ruling.

13. ITAT: Upholds arithmetic-mean over weighted-average mean for benchmarking purchase SDT. Highlights proviso to Sec 92C(2)

Ankit Metal & Power Ltd [TS-551-ITAT-2021(Kol)-TP]

Kolkata ITAT upholds assessee's arithmetic mean over Revenue's weighted average mean for benchmarking SDT involving purchase of raw material by assessee from its AE/ sister concern for AY 2013-14.

ITAT notes that assessee has benchmarked the SDT with the 'arithmetical mean rate' at which the related parties sold the same product to independent buyers and that the TPO has benchmarked it by taking the 'lowest/minimum rate' at which the related parties sold the same product to independent buyers, ignoring all other comparable uncontrolled transactions.

ITAT finds that bench marking methodology followed by the TPO is prima facie perverse and against the extant provisions contained in proviso to Section 92C(2) which clearly states that where more than one comparable prices are available, then the arithmetical mean shall be taken as the ALP. Accordingly, ITAT dismisses the Revenue's grounds of appeal.

Click here to read / download the copy of the ruling.

Direct Tax/PF /ESI compliance due dates during the month of November 2021

Due Date	Form	Period	Comments
07.11.2021	Challan ITNS-281	October 2021	Payment of TDS/TCS deducted /collected in October 2021.
14.11.2021	TDS certificate	September 2021	Due date for issue of TDS Certificate for tax deducted under section 194-IA / 194-IB / 194M
15.11.2021	TDS certificate	July 2021 to September 2021	Quarterly TDS certificate in respect of tax deducted for payments other than salary.
15.11.2021	ESI Challan	October 2021	ESI payment.
15.11.2021	E-Challan & Return	October 2021	E-payment of Provident fund
30.11.2021		October 2021	Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194-IA / 194-IA/194M

MCA Updates

1. **MCA extends due date for filing Cost Audit Report with companies, to November 30**

   MCA further extends the last date for Cost Auditors to file the Cost Audit Report with the Board of Directors under Rule 6(5) of the Companies (Cost Records and Audit) Rules, 2014, for FY 2020-21, to November 30, 2021. MCA States that the aforesaid extension has been provided in continuation of its earlier circular extending the last date to October 31, 2021.

2. **No additional fees on FY 2020-21 annual financial statements filing upto December 31**

   MCA relaxes the additional fees for filing of e-forms AOC-4, AOC-4(CFS), AOC-4 XBRL, AOC-4 Non-XBRL and MGT-7/MGT-7A in respect of financial year ended on March 31, 2021, upto December 31, 2021. During the said period, only normal fees shall be payable for the filing of the aforesaid e-forms.

3. **MCA Allows LLPs to file Statement of Account for FY 2020-21, till December 30, 2021**

   MCA allows LLPs to file Form 8 (Statement of Account and Solvency) for FY 2020-2021 without paying additional fees, upto December 30, 2021.

4. **IBBI: Amends CIRP Regulations to restrict number of modifications to EOI, resolution plan**

   IBBI amends Insolvency Resolution Process for Corporate Persons Regulations, 2016 (CIRP Regulations) w.e.f. September 30, 2021, with a view to ensure adherence to timeliness by addressing the delays in CIRP, and to maximize value in corporate insolvency proceedings.

   Inter alia places a cap on the number of times modifications may be made to invitation for expression of interest (EOI), and request for resolution plans, thereby specifying that such modifications shall not be made more than once. Stipulating that the RP may, if envisaged in the request for resolution plan, use a challenge mechanism to enable resolution applicants to improve their plans, IBBI remarks that "*The challenge mechanism can be an additional option available with the stakeholders under the CIRP and will improve transparency and drive maximization of value.*".

   Further provides that the CoC shall not consider any resolution plan received after the time as specified by the committee or received from a person who does not appear in the final list of prospective resolution applicants. Lastly, the Amendment Regulations lay down that the CoC and its members shall discharge functions and exercise powers under the Code and these Regulations in respect of CIRP in compliance with the guidelines as may be issued by the Board.

5. **Due date:**

   Due date to hold Annual General Meeting for the financial year ended March 31, 2021 is November 30, 2021.

   Due date to file Cost Audit report with MCA is November 30, 2021.

Indirect Tax Updates

GST Circulars

1. Clarification on doubts related to scope of "Intermediary"

a. "Intermediary means a broker, an agent or any other person, by whatever name called, who arranges or facilitates the supply of goods or services or both, or securities, between two or more persons, but does not include a person who supplies such goods or services or both or securities on his own account."

b. The concept of intermediary services, as defined above, requires some basic prerequisites, which are discussed below:

i. **Minimum of Three Parties**: By definition, an intermediary is someone who arranges or facilitates the supplies of goods or services or securities between two or more persons. It is thus a natural corollary that the arrangement requires a minimum of three parties, two of them transacting in the supply of goods or services or securities (the main supply) and one arranging or facilitating (the ancillary supply) the said main supply. An activity between only two parties can, therefore, NOT be considered as an intermediary service. An intermediary essentially "arranges or facilitates" another supply (the "main supply") between two or more other persons and, does not himself provide the main supply.

ii. **Two distinct supplies:** As discussed above, there are two distinct supplies in case of provision of intermediary services;

(1) **Main supply**, between the two principals, which can be a supply of goods or services or securities;
(2) **Ancillary supply**, which is the service of facilitating or arranging the main supply between the two principals. This ancillary supply is supply of intermediary service and is clearly identifiable and distinguished from the main supply.

A person involved in supply of main supply on principal-to-principal basis to another person cannot be considered as supplier of intermediary service.

iii. **Intermediary service provider to have the character of an agent, broker or any other similar person:** The definition of "intermediary" itself provides that intermediary service provider means a broker, an agent or any other person, by whatever name called….". This part of the definition is not inclusive but uses the expression "means" and does not expand the definition by any known expression of expansion such as "and includes". The use of the expression "arranges or facilitates" in the definition of "intermediary" suggests a subsidiary role for the intermediary. It must arrange or facilitate some other supply, which is the main supply, and does not himself provides the main supply. Thus, the role of intermediary is only supportive.

iv. **Does not include a person who supplies such goods or services or both or securities on his own account:** The definition of intermediary services specifically mentions that intermediary "does not include a person who

supplies such goods or services or both or
securities on his own account". Use of word "such" in the definition with reference to supply of goods or services refers to the main supply of goods or services or both, or securities, between two or more persons, which are arranged or facilitated by the intermediary. It implies that in cases wherein the person supplies the main supply, either fully or partly, on principal-to-principal basis, the said supply cannot be covered under the scope of "intermediary"

v. **Sub-contracting for a service is not an intermediary service:** An important exclusion from intermediary is sub-contracting. The supplier of main service may decide to outsource the supply of the main service, either fully or partly, to one or more sub-contractors. Such sub-contractor provides the main supply, either fully or a part thereof, and does not merely arrange or facilitate the main supply between the principal supplier and his customers, and therefore, clearly is not an intermediary.

c. The specific provision of place of supply of 'intermediary services' under section 13 of the IGST Act shall be invoked only when either the location of supplier of intermediary services or location of the recipient of intermediary services is outside India.

Click here to read / download Circular No. 159/15/2021-GST dated 20th September 2021.

2. GST department has provided the clarification in respect of following GST related issues:

A. Amendment of Section 16(4) to delink the date of issuance of debit note from the date of issuance of the underlying invoice for purposes of availing input tax credit.

i. Which of the following dates are relevant to determine the 'financial year' for the purpose of section 16(4): (a) date of issuance of debit note, or (b) date of issuance of underlying invoice?

ii. Whether any availment of input tax credit, on or after 01.01.2021, in respect of debit notes issued either prior to or after 01.01.2021, will be governed by the provisions of the amended section 16(4), or the amended provision will be applicable only in respect of the debit notes issued after 01.01.2021?

Clarification:

With effect from 01.01.2021, section 16(4) of the CGST Act, 2017 was amended vide the Finance Act, 2020, so as to delink the date of issuance of debit note from the date of issuance of the underlying invoice for purposes of availing input tax credit.

The amendment made is shown as below:
"A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier."

As can be seen, the words "invoice relating to such" were omitted w.e.f. 01.01.2021.

Accordingly, it is clarified that:

i. w.e.f. 01.01.2021, in case of debit notes, the date of issuance of debit note (not the date of underlying invoice) shall determine the relevant financial year for the purpose of section 16(4) of the CGST Act.

ii. The availment of ITC on debit notes in respect of amended provision

shall be applicable from 01.01.2021. Accordingly, for availment of ITC on or after 01.01.2021, in respect of debit notes issued either prior to or after 01.01.2021, the eligibility for availment of ITC will be governed by the amended provision of section 16(4), whereas any ITC availed prior to 01.01.2021, in respect of debit notes, shall be governed under the provisions of section 16(4), as it existed before the said amendment on 01.01.2021.

B. Whether carrying physical copy of invoice is compulsory during movement of goods in cases where suppliers have issued invoices in the manner prescribed under rule 48 (4) of the CGST Rules, 2017 (i.e. in cases of e-invoice).

It is clarified that there is no need to carry the physical copy of tax invoice in cases where invoice has been generated by the supplier in the manner prescribed under rule 48(4) of the CGST Rules and production of the Quick Response (QR) code having an embedded Invoice Reference Number (IRN) electronically, for verification by the proper officer, would suffice.

C. Whether the first proviso to section 54(3) of CGST / SGST Act, prohibiting refund of unutilized ITC is applicable in case of exports of goods which are having NIL rate of export duty.

It is clarified that only those goods which are actually subjected to export duty i.e., on which some export duty has to be paid at the time of export, will be covered under the restriction imposed under section 54(3) from availment of refund of accumulated ITC. Goods, which are not subject to any export duty and in respect of which either NIL rate is specified in Second Schedule to the Customs Tariff Act, 1975 or which are fully exempted from payment of export duty by virtue of any customs notification or which are not covered under Second Schedule to the Customs Tariff Act, 1975, would not be covered by the restriction imposed under the second proviso to section 54(3) of the CGST Act for the purpose of availment of refund of accumulated ITC.

Click here to read / download Circular No. 160/16/2021-GST dated 20th September 2021

Click here to read / download Corrigendum to Circular No. 160/16/2021-GST

3. Clarification relating to export of services- condition (v) of section 2(6) of the IGST Act 2017.

The board has received various queries related to whether the supply of service by a subsidiary/ sister concern/ group concern, etc. of a foreign company in India, which is incorporated under the laws in India, to the foreign company incorporated under laws of a country outside India, will hit by condition (v) of subsection (6) of section 2 of IGST Act.

Clarification:

Clause (v) of sub-section (6) of section 2 of IGST Act, which defines "export of services", places a condition that the services provided by one establishment of a person to another establishment of the same person, considered as establishments of distinct persons as per Explanation 1 of section 8 of IGST Act, cannot be treated as export. In other words, any supply of services by an establishment of a foreign company in India to any other establishment of the said foreign company outside India will not be covered under definition of export of services.

Further, perusal of the Explanation 2 to section 8 of the IGST Act suggests that if a foreign company is conducting business in India through a branch or an agency or a representational office, then the said branch or agency or representational office of the foreign company, located in India, shall be

treated as establishment of the said foreign company in India. Similarly, if any company incorporated in India, is operating through a branch or an agency or a representational office in any country outside India, then that branch or agency or representational office shall be treated as the establishment of the said company in the said country.

In view of the above, it can be stated that supply of services made by a branch or an agency or representational office of a foreign company, not incorporated in India, to any establishment of the said foreign company outside India, shall be treated as supply between establishments of distinct persons and shall not be considered as "export of services" in view of condition (v) of sub-section (6) of section 2 of IGST Act. Similarly, any supply of service by a company incorporated in India to its branch or agency or representational office, located in any other country and not incorporated under the laws of the said country, shall also be considered as supply between establishments of distinct persons and cannot be treated as export of services.

From the perusal of the definition of "person" under sub-section (84) of section 2 of the CGST Act, 2017 and the definitions of "company" and "foreign company" under Section 2 of the Companies Act, 2013, it is observed that a company incorporated in India and a foreign company incorporated outside India, are separate "person" under the provisions of CGST Act and accordingly, are separate legal entities. Thus, a subsidiary/ sister concern/ group concern of any foreign company which is incorporated in India, then the said company incorporated in India will be considered as a separate "person" under the provisions of CGST Act and accordingly, would be considered as a separate legal entity than the foreign company.

In view of the above, it is clarified that a company incorporated in India and a body corporate incorporated by or under the laws of a country outside India, which is also referred to as foreign company under Companies Act, are separate persons under CGST Act, and thus are separate legal entities. Accordingly, these two separate persons would not be considered as "merely establishments of a distinct person in accordance with Explanation 1 in section 8".

Therefore, supply of services by a subsidiary/ sister concern/ group concern, etc. of a foreign company, which is incorporated in India under the Companies Act, 2013 (and thus qualifies as a 'company' in India as per Companies Act), to the establishments of the said foreign company located outside India (incorporated outside India), would not be barred by the condition (v) of the sub-section (6) of the section 2 of the IGST Act 2017 for being considered as export of services, as it would not be treated as supply between merely establishments of distinct persons under Explanation 1 of section 8 of IGST Act 2017 . Similarly, the supply from a company incorporated in India to its related establishments outside India, which are incorporated under the laws outside India, would not be treated as supply to merely establishments of distinct person under Explanation 1 of section 8 of IGST Act 2017. Such supplies, therefore, would qualify as 'export of services', subject to fulfilment of other conditions as provided under sub-section (6) of section 2 of IGST Act.

Click here to read / download Circular No. 161/17/2021-GST dated 20th September 2021

4. Clarification in respect of refund of tax specified in section 77(1) of the CGST Act and section 19(1) of the IGST Act:

The board provides clarification on the issues in respect of refund of tax wrongfully paid as specified in section 77(1) of the Central Goods and Services Tax Act, 2017 and section 19(1) of the Integrated Goods and Services Tax Act, 2017.

Section 77 of the CGST Act, 2017 reads as follows:

"77. Tax wrongfully collected and paid to Central Government or State Government. (1) A registered person who has paid the Central tax and State tax or, as the case may be, the Central tax and the Union territory tax on a transaction considered by him to be an intra-State supply, but which is subsequently held to be an inter-State supply, shall be refunded the amount of taxes so paid in such manner and subject to such conditions as may be prescribed.

(2) A registered person who has paid integrated tax on a transaction considered by him to be an inter-State supply, but which is subsequently held to be an intra-State supply, shall not be required to pay any interest on the amount of central tax and State tax or, as the case may be, the Central tax and the Union territory tax payable."

Section 19 of the IGST Act, 2017 reads as follows:

"19. Tax wrongfully collected and paid to Central Government or State Government---(1) A registered person who has paid integrated tax on a supply considered by him to be an inter-State supply, but which is subsequently held to be an intra-State supply, shall be granted refund of the amount of integrated tax so paid in such manner and subject to such conditions as may be prescribed.

(2) A registered person who has paid central tax and State tax or Union territory tax, as the case may be, on a transaction considered by him to be an intra-State supply, but which is subsequently held to be an inter-State supply, shall not be required to pay any interest on the amount of integrated tax payable."

Interpretation of the term "subsequently held"

Doubts have been raised regarding the interpretation of the term "subsequently held" in the aforementioned sections, and whether refund claim under the said sections is available only if supply made by a taxpayer as inter-State or intra-State, is subsequently held by tax officers as intra-State and inter-State respectively, either on scrutiny/ assessment/ audit/ investigation, or as a result of any adjudication, appellate or any other proceeding or whether the refund under the said sections is also available when the inter-State or intra-State supply made by a taxpayer, is subsequently found by taxpayer himself as intra-State and inter-State respectively.

In this regard, it is clarified that the term "subsequently held" in section 77 of CGST Act, 2017 or under section 19 of IGST Act, 2017 covers both the cases where the inter-State or intra-State supply made by a taxpayer, is either subsequently found by taxpayer himself as intra-State or inter-State respectively or where the inter-State or intra-State supply made by a taxpayer is subsequently found/ held as intra-State or inter-State respectively by the tax officer in any proceeding. Accordingly, refund claim under the said sections can be claimed by the taxpayer in both the above-mentioned situations, provided the taxpayer pays the required amount of tax in the correct head.

The relevant date for claiming refund under section 77 of the CGST Act/ Section 19 of the IGST Act, 2017:

Section 77 of the CGST Act and Section 19 of the IGST Act, 2017 provide that in case a supply earlier considered by a taxpayer as intra-State or inter-State, is subsequently held as inter-State or intra-State respectively, the amount of central and state tax paid or integrated tax paid, as the case may be, on such supply shall be refunded in such manner and subject to such conditions as may be prescribed. In order to prescribe the manner and conditions for refund under section 77 of the CGST Act and section 19 of the IGST Act, sub-rule (1A) has been inserted after sub-rule (1) of rule 89 of the Central Goods and Services Tax Rules, 2017 vide notification No.

35/2021-Central Tax dated 24.09.2021. The said sub-rule (1A) of rule 89 of CGST Rules, 2017 reads as follows:

"(1A) Any person, claiming refund under section 77 of the Act of any tax paid by him, in respect of a transaction considered by him to be an intra-State supply, which is subsequently held to be an inter-State supply, may, before the expiry of a period of two years from the date of payment of the tax on the inter-State supply, file an application electronically in FORM GST RFD-01 through the common portal, either directly or through a Facilitation Centre notified by the Commissioner:

Provided that the said application may, as regard to any payment of tax on inter-State supply before coming into force of this sub-rule, be filed before the expiry of a period of two years from the date on which this sub-rule comes into force."

The aforementioned amendment in the rule 89 of CGST Rules, 2017 clarifies that the refund under section 77 of CGST Act/ Section 19 of IGST Act, 2017 can be claimed before the expiry of two years from the date of payment of tax under the correct head, i.e. integrated tax paid in respect of subsequently held inter-State supply, or central and state tax in respect of subsequently held intra-State supply, as the case may be. However, in cases, where the taxpayer has made the payment in the correct head before the date of issuance of notification No.35/2021-Central Tax dated 24.09.2021, the refund application under section 77 of the CGST Act/ section 19 of the IGST Act can be filed before the expiry of two years from the date of issuance of the said notification. i.e. from 24.09.2021.

Refund under section 77 of the CGST Act / section 19 of the IGST Act would not be available where the taxpayer has made tax adjustment through issuance of credit note under section 34 of the CGST Act in respect of the said transaction.

Click here to read / download Circular No. 162/18/2021-GST dated 25th September 2021.

GST rates and classification

Click here to read / download Circular No. 163/19/2021-GST regarding the clarification regarding GST rates & classification (goods) based on the recommendations of the GST Council in its 45th meeting held on 17th September, 2021 at Lucknow–reg.

Click here to read / download Circular No. 164 /20 /2021-GST regarding the clarification regarding applicable GST rates & exemptions on certain services–reg.

Indirect Tax Rulings

1. 2021-TIOL-621-CESTAT-DEL

Bhansali Engineering Polymers Ltd Vs CCE & CGST

CX - Appeals relates to rejection of refund claim for unutilised cenvat credit under Rule 5 of Cenvat Credit Rules, 2004 read with Notification No. 27/2012-C.E. (N.T.) - The refund claims were filed prior to 30.07.2017, which were rejected by Adjudicating Authority - Thereafter, Commissioner (Appeals) rejected the same in year 2018 - The appellant instead of filing further appeals before Tribunal, under some erroneous advice, took re-credit of rejected amount of refund and thereafter, again filed the refund claims before Adjudicating Authority, which were again rejected - On appeal, Commissioner (Appeals), held that once the appeals were rejected by Commissioner (Appeals), though the appellant may be entitled to take re-credit under repealed provisions of Notification No. 27/2012-C.E. (N.T.), he is not entitled again to claim the refund amount, as the same has lapsed under the first Proviso to Section 142(3) of CGST Act, 2017 - Appeals are bad under principles of res judicata , as the same issue of refund attained finality on passing of the order by Commissioner (Appeals) in the year 2018 as the appellant chose not to file any further appeal before the higher forum - The subordinate legislation is effective or in force till the date of Parent Act only - As the Parent Act in this case is repealed w.e.f. 1.7.2017, when the CGST provisions, came into force - Accordingly, the appellant have erred in taking re-credit of the rejected refund amount in the year 2018 and thereafter they have again filed claim for the rejected amount of refund - No merit found in appeals and same are rejected: CESTAT

- Appeals dismissed: DELHI CESTAT

2. 2021-TIOL-650-CESTAT-KOL

Shyam Steel Industries Ltd Vs CCGST & Excise

CX - The assessee is engaged in manufacture and sale of TMT Bar, inter alia through dealers - They had processed the discounts (turn-over discount/cash discount) in favour of its dealers through Credit Notes - Only issue that arise for consideration is whether the grant of refund of excess excise duty paid on transaction value without seeking an adjustment for discounts to the appellant shall be hit by principle of unjust enrichment - The law in this regard is well settled by Supreme Court in case of Addison case 2016-TIOL-146-SC-CX-LB that the onus is upon the person claiming refund of excise duty on post clearance discount to establish that the incidence of duty on such discount has not been passed on to any other person - The Supreme Court has held in unequivocal terms that Credit Notes are valid instrument for the purposes of passing post-clearance discounts and that an assessee is entitled for filing the claim for refund on the basis of Credit Notes raised by him towards discount - The CA certificate goes to show that the assessee has not passed on the incidence of duty on discount to its dealers - It is also found from the sample certificates issued by dealers that such dealers were not registered under Central Excise Law for the purposes of availing or passing of Cenvat credit - Therefore, the question of any double benefit in the form of refund of excise duty on component of discount as well as Cenvat credit on said component does not arise - These evidences establish that the duty element on the discount component was borne by assessee himself - The impugned order is therefore, set aside: CESTAT

- Appeal allowed: KOLKATA CESTAT

3. 2021-TIOL-668-CESTAT-AHM

Gujarat Mineral Development Corporation Ltd Vs CCE & ST

CX - The issue arises is that whether the appellant is required to pay an amount as per Rule 6 of CCR, 2004 in respect of exempted product, namely, Silica Sand and Ball Clay when the input service is used for mining of Lignite as well as Silica Sand and Ball Clay - The main contract is for mining of Lignite while doing the excavation to achieve Lignite, the over burden has to be removed and this over burden constitute Silica Sand and Ball Clay, thereafter the Lignite is excavated - Therefore, from the nature of mining of Lignite, it is clear that the Silica Sand and Ball Clay are generated unavoidably which is inevitable - Any input/input services contained in any by-product/waste/refuse, Cenvat Credit cannot be varied or denied - With this logic, demand under Rule 6 in respect of by-product is not applicable - Once it is established that the product in question are by-product then it is settled in respect of by-product demand under Rule 6 will not sustain - Accordingly, Silica Sand and Ball Clay being a by-product, no demand under Rule 6 shall sustain - The impugned orders are set aside: CESTAT

- Appeals allowed: AHMEDABAD CESTAT

4. 2021-TIOL-682-CESTAT-KOL

Bharat Coking Coal Ltd Vs CCE & ST

CX - Assessee is in appeal against impugned order, whereby the Cenvat Credit has been denied on services availed for setting up of Coal Handling Plant (CHP) for the period from June 2013 to November 2015 - The purpose of setting up of CHP is to load the coal into railway wagons in an automated manner after the coal is crushed into the desired size - Services used by appellant is for modernisation of coal loading process - In the case of Pepsico India Holdings (P) Ltd, Tribunal has observed that without setting up of the factory, there cannot be any manufacture and the mere fact that the words "setting up of factory" has not been retained in definition of input services post 01.04.2011, the same will not mean that the benefit of credit has been taken away by the legislature - Thus, services used for setting up of factory even after 01.04.2011 would be eligible for credit - The Commissioner has allowed credit on certain invoices assuming the same to be pure services and disallowed the credit on remaining portion by considering the same to be in the nature of civil portion - In view of the decisions of various High Courts and Tribunal wherein the user test principle has consistently been followed, Cenvat availed by appellant for setting up of CHP, which is used for evacuation of coal by rapid loading process, cannot be legally denied - Since the credit has been allowed by Department on certain invoices raised by Contractor, Department has in-principle found the service to be eligible for credit - The mode of valuation adopted by Contractor to discharge service tax on 40% of contract value is in accordance with law contained in Service Tax Valuation Rules and cannot be disputed while deciding credit eligibility at the appellant's end - When service tax has been levied only on 40% of the total value, it essentially means that service tax has been paid only on the service portion - Impugned demand order cannot be sustained and hence, the same is set aside: CESTAT

- Appeal allowed: KOLKATA CESTAT

5. 2021-TIOL-678-CESTAT-BANG

John's Cashew Company Vs CC

Cus - The issue for consideration in this case is the eligibility of the appellant for refund of 4% of Special Additional Duty (SAD) in terms of Notification No. 102/2007-Cus, dated 14/09/2007 - The appellant made claim for refund and after due adjudication, vide the Order-in-Original dt. 04/08/2018, the Assistant Commissioner rejected 4% SAD as being time barred in terms of the Notification - The Commissioner (Appeals) passed the Order-in-Appeal & upheld the rejection.

Held - There can be no dispute on the proposition that irrespective of whether or not the judgments of non-jurisdictional High Courts are binding, these judgments deserve utmost respect which implies that, at the minimum, these judgments are to be considered reasonable interpretations of the related legal and factual situation - Doctrine of precedence only mandates that it is the ratio in the decision of higher courts to be followed, and not conclusions - Considering legal position and propriety, it is inappropriate to choose views of one of the High Courts based on perceptions about reasonableness of the respective viewpoints, as such an exercise will de facto amount to sitting in judgment over the views of the High Courts - When there is a reasonable interpretation of a legal and factual situation, which is favourable to the assessee, such an interpretation is to be adopted - The Apex Court in CIT v. Vegetable Products Ltd. has laid down that if two reasonable constructions of a taxing provision are possible, that construction which favours the assessee must be adopted - Although this principle so laid down was in the context of penalty, and Their Lordships specifically stated so in so many words, it has been consistently followed for the interpretation about the statutory provisions as well - Hence the denial of refund is bad in law: CESTAT

- Assessee's appeal allowed: BANGALORE CESTAT

6. 2021-TIOL-242-AAR-GST

VL Traders

GST - Advance Ruling cannot be used as a mechanism to nullify and frustrate the inquiry proceedings already initiated vide section 70(1) of CGST Act: AAR

GST - An Admission order no GUJ/GAAR/ADM/2020/112 dated 30-12-2020 was issued earlier, admitting the subject application and it was stated in the Admission order itself that as the applicant has made a declaration that the question raised in the application is not already pending or decided in any proceedings in their case under any of the provisions of the Act and that nothing contrary to this declaration was found by the Authority, the application was, earlier, held as maintainable - However, the applicant has suppressed the material facts that DGGI had initiated inquiry with respect to the same Questions raised in the subject Application and that the proceedings initiated by DGGI vide relevant sections of CGST Act was initiated prior to filing of subject Advance Ruling application - Inasmuch as the applicant had been issued Summons vide Section 70 CGST Act, prior to the filing of subject Application - Authority is of the view that the usage of the words "any proceeding" in the proviso to Section 98(2) of the CGST Act will encompass within its fold the investigation proceedings launched by the DGGI under Section 70 of CGST Act - The applicant has contravened the provision of Section 98(2), CGST Act, in so much that it mis-declared that it had no proceedings pending under any provisions of the Act, with an intention to fraudulently obtain Ruling and frustrate the proceedings initiated by DGGI, for the Question raised in the subject Application dated 5-3-20 and issue for which Investigation was initiated vide Section 70(1) of CGST Act, 2017 by DGGI are the same - Held that investigation initiated against the applicant is a proceeding within the ambit of Section 98 (2) of CGST Act - Application is rejected as non-maintainable and inadmissible: AAR

- Application dismissed: AAR

7. 2021-TIOL-2079-HC-JHARKHAND-GST

Nkas Services Pvt Ltd Vs State of Jharkhand

GST - Show-cause notice issued by the Deputy Commissioner of State Taxes under Section 74 of the JGST Act, 2017 has been challenged by the petitioner along with the consequential challenge to summary of show-cause notice in FORM DRC-01 - Petitioner assails the Show Cause Notice (SCN) dated 7th June 2021 as being vague; without jurisdiction and that the proceeding initiated without service of FORM GST-

ASMT-10 is void ab-initio. Held: [para 14 to 18] + A bare perusal of the impugned show-cause notice creates a clear impression that it is a notice issued in a format without even striking out any irrelevant portions and without stating the contraventions committed by the petitioner i.e. whether its actuated by reason of fraud or any wilful misstatement or suppression of facts in order to evade tax. + Proceedings under Section 74 have a serious connotation as they allege punitive consequences on account of fraud or any wilful misstatement or suppression of facts employed by the person chargeable with tax. In absence of clear charges which the person so alleged is required to answer, the noticee is bound to be denied proper opportunity to defend itself. + This would entail violation of principles of natural justice which is a well-recognized exception for invocation of writ jurisdiction despite availability of alternative remedy. + Apex Court has [in Oryx Fisheries P. Ltd. (2010) 13 SCC 427] held that the concept of reasonable opportunity includes various safeguards and one of them is to afford opportunity to the person to deny his guilt and establish his innocence, which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based. + It is also true that acts of fraud or suppression are to be specifically pleaded so that it is clear and explicit to the noticee to reply thereto effectively. + Impugned notice completely lacks in fulfilling the ingredients of a proper show-cause notice under Section 74 of the Act. A summary of show-cause notice as issued in Form GST DRC-01 in terms of Rule 142(1) of the JGST Rules, 2017 cannot substitute the requirement of a proper show-cause notice. + Court is not inclined to be drawn into the issue whether the requirement of issuance of Form GST ASMT-10 is a condition precedent for invocation of Section 73 or 74 of the JGST Act for the purposes of deciding the instant case. + Court finds that upon perusal of GST DRC-01 issued to the petitioner, although it has been mentioned that there is mismatch between GSTR-3B and 2A, but that is not sufficient as the foundational allegation for issuance of notice under Section 74 is totally missing and the notice continues to be vague. + Impugned notice and the summary of show-cause notice in Form GST DRC-01 are quashed. Respondents are at liberty to initiate fresh proceedings from the same stage in accordance with law within a period of four weeks.

- Petition allowed: JHARKHAND HIGH COURT

8. 2021-TIOL-2082-HC-MAD-CX

Mahanadi Coalfields Ltd Vs CESTAT

CX - PVC impregnated colliery conveyor belting was purchased by the assessee from M/s. Fenner India Limited, Madurai - Said goods were classified by the Department under Sub-Heading 3920.11/3920.12 but the supplier M/s. Fenner India Limited contested the above classification stating that the said goods were classifiable under Sub-Heading 3922.90/3926.90 - Dispute was finally settled by the Supreme Court in favour of the supplier by holding that the said goods were classifiable under Sub-Heading 3922.90/3926.90 - As the assessee had borne the entire duty burden paid by the supplier they filed a claim on 22.7.2003 for refund of central excise duty to the tune of Rs.23,14,715/- - They also stated that they had not passed on the duty liability to its customers, as the goods involved were capital goods and no duty was payable on the final product, for which, such goods were used - Since this claim was rejected by the lower authorities, the assessee is in appeal before the High Court.

Held: Decision in Western Coalfields Ltd. case 2019-TIOL-72-SC-CX and more particularly the conclusion in paragraph 14 is a clear answer to the assessee's case - Indisputably, the application was filed by the appellant as a buyer of the goods from the supplier namely the said M/s. Fenner India Ltd., which paid duty under protest after the period of limitation prescribed in law and, therefore, this would dis-entitle the claim of refund to the assessee as prayed for by applying the law laid down by the Hon'ble Supreme Court in the case of Allied Photographics India Ltd., wherein it was

held that the purchaser of the goods was not entitled to a claim for refund of duty made under protest by the manufacturer without complying with the mandate of Section 11B of the Act - Appellant assessee has not made out any case to interfere with the impugned order passed by the Tribunal - Civil miscellaneous appeal stands dismissed: High Court [para 23 to 25]

- Appeal dismissed: MADRAS HIGH COURT

9. 2021-TIOL-670-CESTAT-BANG

Lekshmi Engineers Vs CCE & CT

ST - The appellant filed a claim for refund of service tax paid on the services provided to Military Engineering Services (MES) - The said services were exempted from payment of service tax vide Notification No. 25/2012-S.T. as amended by Notification No. 09/2016-S.T. - Notification No. 09/2016-S.T. ibid provided for retrospective exemption from service tax on specified services - A SCN was issued proposing to reject the refund claim on the ground of unjust enrichment and the lower authority after due process, rejected the same - This Bench on an earlier occasion, in an almost identical situation, in the case of SN Atiwadkar 2019-TIOL-1560-CESTAT-BANG has considered this very issue and observed that the appellant is claiming the refund as a representative of MES and not on his own account and therefore the principle of unjust enrichment under the provisions of Section 11B of Central Excise Act, 1944 is not applicable - The denial of refund cannot be sustained and hence, the impugned order is set aside: CESTAT

- Appeal allowed: BANGALORE CESTAT

10. 2021-TIOL-240-AAR-GST

Gujarat State Road Development Corporation

GST - Government of Gujarat has established GSRDC as its wholly owned company and entrusted it with the development of roads and bridges, therefore, GSRDC satisfies the definition of Government Entity - GSRDC also constructs roads, sideways, paths on the land which falls under the jurisdiction of Municipality and Panchayat - Roads and bridges are activities entrusted to a municipality under Article 243W of the Constitution and to a Panchayat under Article 243G of the Constitution - Therefore in such specific cases where GSRDC constructs municipal roads/bridges or village roads/bridges, it satisfies the definition of Government Authority - Supply by applicant is exempted vide Sr. No. 3 of Not. No. 12/2017-CT (Rate) : AAR

- Application disposed of: AAR

11. 2021-TIOL-2136-HC-KAR-VAT

IN THE HIGH COURT OF KARNATAKA

AT BENGALURU

STRP No. 296/2018

THE COMMISSIONER OF COMMERCIAL TAXES VANIJYA THERIGE KARYALAYA, GANDHINAGAR BENGALURU-9

Vs

M/s K M S COACH BUILDERS PVT LTD NO. 125-IB, NEAR BMTC DEPOT 12 INDUSTRIAL AREA, KENGERI BENGALURU-560060

S Sujatha & Ravi V Hosmani, JJ

Dated: September 23, 2021

Petitioner Rep by: Sri K Hema Kumar, AGA
Respondent Rep by: Smt Lakshmi Menon, Adv.

Karnataka Value Added Tax Act, 2003 - Writ - Sections 15(1)(b) & 65(1); Rule 3(2)(m)

Keywords - Aggregate turnover - Inter State trade - Total consideration - Vale of contract

The assessee is a dealer registered under the provisions of the KVAT Act and is engaged in the business of bus body building. During the tax periods April 2013 to March 2014, the assessee/respondent had filed returns in Form - VAT 100 claiming deduction of labour and like charges as per the standard rate prescribed under the Rule 3(2)(m) of the Karnataka Value Added Tax Rules, 2003. The AO rejected the deduction claimed and levied interest and penalty under the provisions of the KVAT Act. Aggrieved by the said order, the assessee preferred appeal before the First Appellate Authority. Being unsuccessful, the matter was carried to the Tribunal. The Tribunal has held that the standard rate of deduction on labour and like charges claimed by the assessee is in accordance with law allowing the appeal of the assessee.

In writ, the High Court held that,

Whether meaning assigned to the phrase "value of the contract" that it includes all the amount received whether as taxes or labour, is correct - YES: HC

++ "Total turnover" as defined under Section 2(35) of the KVAT Act means "the aggregate turnover in all goods of a dealer at all places of business in the State, whether or not the whole or any portion of such turnover is liable to tax, including the turnover of purchase or sale in the course of inter-State trade or commerce or in the course of export of the goods out of the territory of India or in the course of import of the goods into the territory of India and the value of goods transferred or despatched outside the State otherwise than by way of sale";

++ Taxable turnover has to be determined under sub-Rule (2) of Rule 3 of the KVAT Rules allowing the deductions specified therein. Clause (h) of Rule 3(2) of the KVAT Rules provides all amounts collected by way of tax under the KVAT Act has to be deducted for determining the taxable turnover from the total turnover. Thus, the total amount paid or payable to the dealer for consideration for transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract including any amount paid as advance to the dealer as a part of such consideration, the entire contract of such value has to be considered as per clause (l) of Rule 3(2);

++ Even the payment of tax under composition scheme under Section 15(1)(b) of the KVAT Act which employs the phrase "total consideration" of contract necessarily is inclusive of tax collected as there is a deduction provided before the taxable value is determined. On the conjoint reading of these provisions, the meaning assigned to the phrase "value of the contract" by the Tribunal that it includes all the amount received whether as taxes or labour cannot be faulted with. We do not see any perversity or illegality in the order.

Revision petition dismissed

JUDGEMENT

Per: S Sujatha:

This revision petition is filed by the State under Section 65(1) of the Karnataka Value Added Tax Act, 2003 ('KVAT Act' for short) assailing the judgment dated 05.01.2018 passed in STA No. 961/2016 by the Karnataka Appellate Tribunal at Bengaluru ('Tribunal' for short), whereby the appeal filed by the assessee has been allowed deleting the tax, interest and penalty levied on the difference of labour charges stated to have been claimed as in excess of eligibility.

2. The revision petition was admitted by this Court to consider the following question of law:-

"Whether the tribunal has erred in holding that the standard rate of deduction in respect of labour and like charges, as prescribed under Rule 3(2)(m) of Karnataka Value Added Tax Rules, is to be applied on the gross turn over of the dealer inclusive of the tax collected from its customers?"

3. The assessee is a dealer registered under the provisions of the KVAT Act and is engaged in the business of bus body building. During the tax periods April 2013 to March 2014, the assessee/respondent had filed returns in Form - VAT 100 claiming deduction of labour and like charges as per

the standard rate prescribed under the Rule 3(2)(m) of the Karnataka Value Added Tax Rules, 2003 ('KVAT Rules' for short). The Assessing Authority rejected the deduction claimed and levied interest and penalty under the provisions of the KVAT Act. Aggrieved by the said order, the assessee preferred appeal before the First Appellate Authority. Being unsuccessful, the matter was carried to the Tribunal. The Tribunal has held that the standard rate of deduction on labour and like charges claimed by the assessee is in accordance with law allowing the appeal of the assessee. Being aggrieved, the State has preferred this revision petition.

4. Learned AGA for the appellant - State would submit that the taxable turnover of a dealer has to be calculated after deducting the amounts specified under Rule 3(2) of the KVAT Rules. It was submitted that rule 3(2) of the KVAT Rules would be applicable in cases where the labour and like charges incurred by a works contractor are not ascertainable from the books of accounts. Since the total turnover of a dealer does not include taxes collected therein, the standard rate of deduction was to be applied only to the sale value of the goods i.e., exclusive of taxes collected by the assessee. The Tribunal erred in holding that the total consideration of contract i.e., inclusive of tax collected, as there is a deduction provided before the taxable value is determined.

5. Learned counsel for the respondent - assessee justifying the impugned judgment submitted that the contract was executed inclusive of taxes as per the understanding between the parties. The assessee had raised invoices for executing the contract showing the element of deduction and the taxes separately. The Table under Rule 3(2)(m) in column (3) contemplates "value of the contract" which is the amount payable to the contractor as per the agreement and would include the tax element. The Tribunal having analyzed the material evidence has rightly allowed the appeal and the same deserves to be confirmed by this Court rejecting the revision petition filed by the appellant - State.

6. We have carefully considered the rival submissions of the learned counsel appearing for the parties and perused the material on record.

7. Rule 3(2)(l) and 3(2)(m) of the KVAT Rules reads thus:-

"3(2). The taxable turnover shall be determined by allowing the following deductions from the total turnover.-

(a) to (k) xxxxxx

(l) All amounts actually expended towards labour charges and other like charges not involving any transfer of property in goods in connection with the execution of works contract including charges incurred for erection, installation, fixing, fitting out or commissioning of the goods used in the execution of a works contract.

(m) Such amounts calculated at the rate specified in column (3) of the Table below towards labour charges and other like charges as incurred in the execution of a works contract when such charges are not ascertainable from the books of accounts maintained by a dealer.

8. The relevant portion of the Table annexed to the said Rule is as under:-

Sl.No.	Type of contract	Labour and like charges as a percentage of the value of the contract
(1)	(2)	(3)

9. Rule 3(1) of the KVAT Rules deals with the determination of turnover.

10. "Total turnover" as defined under Section 2(35) of the KVAT Act means "the aggregate turnover in all goods of a dealer at all places of business in the State, whether or not the whole or any portion of such turnover is liable to tax, including the turnover of purchase or sale in the course of inter-State trade or commerce or in the course of export of the goods out of the territory of India or in the course of import of the goods into the territory of India and the value of goods transferred or despatched outside the State otherwise than by way of sale."

11. Section 2(34) defines "Taxable Turnover" as under:-

"Taxable turnover" means the turnover on which a dealer shall be liable to pay tax as determined

after making such deductions from his total turnover and in such manner as may be prescribed, but shall not include the turnover of purchase or sale in the course of inter-State trade or commerce or in the course of export of the goods out of the territory of India or in the course of import of the goods into the territory of India and the value of goods transferred or despatched outside the State otherwise than by way of sale."

12. Taxable turnover has to be determined under sub-Rule (2) of Rule 3 of the KVAT Rules allowing the deductions specified therein. Clause (h) of Rule 3(2) of the KVAT Rules provides all amounts collected by way of tax under the KVAT Act has to be deducted for determining the taxable turnover from the total turnover.

13. Thus, the total amount paid or payable to the dealer for consideration for transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract including any amount paid as advance to the dealer as a part of such consideration, the entire contract of such value has to be considered as per clause (l) of Rule 3(2).

14. Even the payment of tax under composition scheme under Section 15(1)(b) of the KVAT Act which employs the phrase "total consideration" of contract necessarily is inclusive of tax collected as there is a deduction provided before the taxable value is determined.

15. On the conjoint reading of these provisions, the meaning assigned to the phrase "value of the contract" by the Tribunal that it includes all the amount received whether as taxes or labour cannot be faulted with. We do not see any perversity or illegality in the order impugned.

16. For the reasons aforesaid, we answer the question of law in favour of the assessee and against the revenue.

In the result, the revision petition stands dismissed.

12. 2021-TIOL-247-AAR-GST

TIF Integrated Industrial Parks Pvt Ltd

GST - Applicant is a company formed by industrialists as required by the Telangana State Industrial Infrastructure Corporation Limited (TSIIC) as a special purpose vehicle (SPV) representing the member industrialists with an objective of providing industrial infrastructure by development of land acquired by TSIIC - It is informed by the applicant that a sale deed will be executed with TSIIC upon completion of development of internal infrastructure - Similarly, the applicant is authorised, in turn, to sell to individual industrialists after each of his allottee commences commercial operation by executing individual sale deeds - Applicants seeks to ascertain whether the transaction of sale of developed plot between himself and his member falls within the ambit of GST and whether the infrastructure development undertaken by the applicant qualifies as supply under GST.

Held: Activity undertaken by the applicant for construction of the immovable property would qualify to be a "works contract" if (i) It is executed in pursuance of a contract or agreement; and (ii) There is a transfer of property in goods in execution of works contract from the contractor to the contractee; and (iii) There is a consideration paid by the contractee to the contractor - P erusal of the contract entered by the applicant with the TSIIC Ltd clearly indicates that the property in land will be transferred to the applicant only when the applicant completes the development of infrastructure of schedule land - However, this clause in the agreement appears to have been made to meet the larger objective enumerated in industrial policy of the State - Though there is a contract for development of the land the other two conditions enumerated are not fulfilled i.e., transfer of property in goods from the applicant to the TSIIC Ltd and payment of consideration by TSIIC Ltd to the applicant, hence the activity is not a

Works Contract - If the applicant sells the land after developing by way of erecting a civil structure or a building or a complex, then such supply is liable to tax under CGST/SGST Acts - However, if land is sold without any development involving any civil structure or building or complex, such supply falls under paragraph 5 of schedule III to Section 7(2) of CGST Act, 2017 and hence would be exempt from tax - If the applicant executes works contracts involving transfer of property in goods for a consideration under an agreement of contract, such consideration will be liable to tax - However, if these elements are missing in execution of a construction, it shall not be liable to tax: AAR

- Application disposed of: AAR

13. 2021-TIOL-696-CESTAT-MAD

Terex India Pvt Ltd Vs CGST & CE

ST - The appellant is engaged in manufacture and export of mining machineries - They also provide business support services for which they were paying service tax and they filed ST-3 returns - A spot memo was issued to appellant directing to pay the service tax on Business support services on foreign remittances under RCM - The appellant paid the amount along with interest - Though they were eligible for credit since the time to carry forward the Cenvat Credit to GST regime had expired on 27.12.2017, appellant could not follow the procedure to carry Cenvat Credit to GST regime - They then applied for refund of said credit which has been rejected resorting to Section 142 (8) (a) of GST Act, 2017 - The department views that the payment made by appellant is consequent to an assessment/adjudication proceeding and therefore, when recovered as an arrears of tax, appellant is not eligible for input tax credit under GST Act, 2017 - There is no assessment/adjudication tax as contemplated under provisions of erstwhile law - The appellant has paid the tax when pointed out by Audit Officers - Such payment does not fall under recovery of arrears of tax by an assessment or adjudication proceedings - The sub-section (8) to Section 142 only means that after assessment or adjudication proceedings if an assessee pays the tax so determined, he cannot claim the benefit of availment of credit under the CGST Act, 2017 - The claim is only for refund and not proceedings for assessment or adjudication - In such a scenario, only sub-section (3) of section 142 will be attracted - Rejection of the refund claim by referring to sub-section (8) of Section 142 of CGST Act, 2017 is mis-placed - For these reasons, rejection of refund is unjustified and impugned order is set aside: CESTAT

- Appeal allowed: CHENNAI CESTAT

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In case of any clarification please reach us:

Particulars	Name	Mail ID	Mobile Number
Indirect Taxes	Dayananda K	daya@vishnudaya.com	+91 9845 025 682
Indirect Taxes	Vinayak Hegde	vinayaka@vishnudaya.com	+91 9902 586 492
Direct Taxes	Shankar D	shankar@vishnudaya.com	+91 9880 715 963
Direct Taxes	Anju Eldhose	anju.eldhose@vishnudaya.com	+91 9496 148 918
Direct Taxes	Manjula A	manjula@vishnudaya.com	+91 9740 854 009

Our Offices:

Bangalore	Chennai
GF No. 7 & 3rd Floor, Karuna Complex, No. 337 Sampige Road, Malleshwaram Bangalore – 560 003 Tel +91 80 2331 2779 Fax +91 80 2331 3725	No. 3A, 3rd Floor Amber Crest Apartment (Next to Egmore Ashoka Hotel) Pantheon Road, Egmore Chennai – 600 008 Tel +91 44 2855 4447 Fax +91 44 2855 3521