# Newsletter
# November 2022

**Vishnu Daya & Co. LLP**
**Chartered Accountants**

# Contents




 

# Direct Tax – Circulars & Notifications

## A. Circular issued by CBDT in the month of October 2022

### 1. CBDT extends due date for filing TDS Statement in Form 26Q for second quarter of FY 2022-23 to Nov 30, 2022.

**Circular no. 21 / 2022, dated 27th October 2022**

On consideration of difficulties arising in timely filing of TDS statement in Form 26Q on account of revision of its format and consequent updation required for its filing, CBDT extends the due date of filing of Form 26Q for the second quarter of the Financial Year 2022-23 from 31st October, 2022 to 30th November, 2022.

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


## B. Notifications issued by CBDT in the month of October 2022

### 1. CBDT amends definition of 'non-reporting financial institution' for Sec.285BA compliance.

**Notification no. 112 / 2022, dated 7th October 2022**

CBDT amends Rule 114F(5) i.e. definition of 'non-reporting financial institution'. The amendment specifies that: (i) a financial institution with a local client base, (ii) a local bank, and (iii) a financial institution with only low-value accounts qualify as a non-reporting financial institution, if there is any U.S. reportable account. The Notification also amends the definition of a Treaty Qualified Retirement Fund to mean "a fund established in India, provided that the fund is entitled to benefits under an agreement between India and the United States of America on income that it derives from sources within the United States of America (or would be entitled to such benefits if it derived any such income) as a resident of India that satisfies any applicable limitation on benefits requirement, and is operated principally to administer or provide pension or retirement benefits"

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

### 2. Memo from the Finance Ministry Official

A senior finance ministry official has urged the taxpayers to check their Annual Information Statement (AIS) every quarter and intimate any discrepancies to help curb instances of wrongful data uploaded in the Income Tax database.

The income tax department had in November 2021 rolled out a new AIS on its portal that provides a comprehensive view of taxpayer information and an option to submit feedback. It includes additional information related to interest, dividend, securities transactions, mutual fund transactions and foreign remittance information.

 

# Direct Tax – Legal Rulings

1. **SC: Employees' PF, ESI contribution has to be deposited within the stipulated time in their respective statutes for claiming deduction.**

   **Checkmate Services P. Ltd [TS-791-SC-2022]**

   SC dismisses Assessees' appeals, holds that deposit of employees' PF and ESI contribution specified under Section 36(1)(va) on or before the due date stipulated in the respective statutes to be an essential condition for claiming deduction.

   Lead Assessee's appeal was dismissed by the ITAT and also by Gujarat HC. SC opines that the leeway granted to Assessees to allow deductions on deposits made beyond the due date, but before the date of filing the return cannot apply in the case of amounts which are held in trust, as it is in the case of employees' contributions- which are deducted from their income.

   Holds that employees' contribution "are others' income, monies, only deemed to be income, with the object of ensuring that they are paid within the due date specified in terms of such welfare enactments.

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

2. **ITAT: Upholds Sec.68 addition for credit purchases. Rejects Assessee's self-serving, unverified statements**

   **Solid Machinery Co Pvt Ltd [TS-815-ITAT-2022(Mum)]**

   Mumbai ITAT allows Revenue's appeal, upholds the addition made under Section 68 of Rs. 19.22 Cr relating to unexplained creditors. Sets aside CIT(A)'s order, holds that Section 68 is applicable to amounts outstanding on credit purchases by rejecting Assessee's '*self-serving statements, based on sweeping generalizations, unverified statements, and without any supporting evidence*' as unacceptable.

   During the assessment proceedings for AY 2009-10, Revenue observed that Assessee-Company made purchase of fabrics worth Rs.19.22 Cr from various entities and sold the same to three entities for Rs. 19.25 Cr however there was neither proof of delivery of fabric nor any transport cost debited in the P&L account. Further Revenue noted that barring confirmation from 4 related parties, all the notices served to the purported sellers of fabrics came back unserved. Accordingly, Revenue added the entire Rs.19.22 Cr as unexplained credits under Section 68, whereas CIT(A) held that Section 68 pertains to cash credits and as such purchases on credit cannot be brought under the ambit of Section 68 and deleted the additions.

   Points out that in the present case, there is not even a whisper of evidence to prove or even prima facie indicate that such vendors exist. States that the law is simple and unambiguous, elucidates that when an Assessee purchases something from a vendor, the account of such a vendor is credited and the purchases are debited and, therefore, when the Assessee does not have a reasonable explanation about the credit appearing in the account of the vendor as in this case, the Revenue is perfectly justified in making the addition under section 68.

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


 

3. **ITAT: Sales & marketing services rendered to Indian-entity by US-subsidiary in American markets, not FTS/FIS**

**Manthan System Inc [TS-777-ITAT-2022 (Bang)]**

Bangalore ITAT allows Assessee's appeal, holds that the sales and marketing services rendered by the Assessee to Indian entity does not fall within the ambit of FTS as defined under Section 9(1)(vii) or FIS under Article 12 of India-US DTAA, since the said services are not of technical managerial or consultancy in nature and does not fulfil the 'make available' condition.

ITAT, based on the sale and marketing agreement entered into between the Assessee and Manthan Software Services Private Limited (MSSPL), observes that Assessee is not providing any technical, managerial or consultancy services but has been engaged to act as authorized business partner to market and promote the products or services of MSSPL. Observes that the decision regarding what products/services to be developed or provided, the price to be charged to the customer etc. are solely taken by MSSPL and Assessee does not play any role in the decision-making process. Further observes that once Assessee procured the orders, it was at the discretion of MSSPL whether to sell the product or render services to identified customers.

Observes that the said receipts on account of sales and marketing services will not qualify as FTS under Article 12(4) of India-USA DTAA as it is not ancillary to application or enjoyment of any right and the services provided are not of technical or consultancy in nature, which make available knowledge, experience, skill, know-how, or processes or consist of the development and transfer of a technical plan or technical design.

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

4. **FC: New Zealand SC upholds GAAR for restricting interest deduction on loan 'arrangement'**

**Frucor Suntory New Zealand Limited [TS-787-FC-2022 (NZLD)]**

New Zealand Supreme Court upholds Court of Appeal's judgment that restricted interest deduction to $11 million as against $66 million claimed by the Assessee-Company (Frucor), confirms invocation of General Anti-Avoidance Rule (GAAR) provisions.

Opines that "*The effect of the arrangement was that DHNZ sought to obtain deductions in relation to $55 million in principal repayments. These are provided for in the Act to meet financing expenses and not repayments of principal. DHNZ was thus claiming deductions for expenses which, in economic substance, it had not incurred.*". Holds that "*Since the purpose and effect of the tax avoidance arrangements were to provide deductibility for what in economic substance were repayments of principal, the Commissioner correctly applied s GB 1(1) to adjust the taxable income of DHNZ to disallow the deductions illegitimately claimed.*"

Justice Glazebrook delivers a dissenting judgment by holding that the use of the interest deductibility provisions does not frustrate the underlying rationale of the provisions and thus could not be termed as a 'tax avoidance' arrangement for invocation of GAAR. The Court of Appeal held that tax avoidance was its principal purpose or effect or, at least, tax avoidance was not merely an incidental purpose or effect of the arrangement and thus upheld Revenue's action of restricting the interest deduction.

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


 

5. **HC: Upholds SMC ruling on disallowance of interest on partner's capital, mandatory nature of depreciation.**

**Arthi Nursing Home [TS-776-HC-2022(AP)]**

Andhra Pradesh HC holds that the Revenue is well within its right to adopt proper computation method to determine true income that affects the amount apportioned to the partner's capital accounts. ITAT held that the book profits of the partnership firm arrived at without providing for mandatory depreciation as per Section 32 did not reflect true and correct state of affairs for accretion on partner's capital. Thus, ITAT held Revenue to be justified in correcting the error by disallowing the interest on partner's capital under Section 40(b).

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

6. **SC: Lays down law on charitable trusts' exemption. Interprets 'General Public Utility', discards 'predominant object' test.**

**Ahmedabad Urban Development Authority [TS-814-SC-2022]**

The Supreme Court rules that the necessary implication which arises is that income (received as fee, cess, or any other consideration) derived from 'prohibited activities' is necessarily motivated by profit. Observing that the term "Fee, cess and any other consideration" ought to receive a 'purposive interpretation', SC holds that if fee or cess or such consideration is collected for the purpose of an activity, by a state department or entity, which is set up by statute, its mandate to collect such amounts cannot be treated as consideration towards trade or business. Therefore, regulatory activity, necessitating fee or cess collection in terms of enacted law, or collection of amounts in furtherance of activities such as education, regulation of profession, etc., are per se not business or commercial in nature. Decisively discarding the 'predominant object' test, SC goes on to infer that the proper way of reading reference to the term "incidental" in Section 11(4A) is to interpret that the activity in the nature of business, trade, commerce or service in relation to such activities should be conducted actually in the course of achieving the General Public Utility object and the income, profit or surplus or gains can then, be logically incidental.

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

7. **HC: Lifts Educational Institutions' 'corporate veil' over 'involuntary' capitation fee. Orders Sec.12A registration cancellation.**

**MAC Public Charitable Trust [TS-837-HC-2022(MAD)]**

Madras HC allows Revenue's appeals against various educational institutions concerning exemption under Section 11. Directs the Revenue to proceed further on the basis of assessment orders and also cancel the registration certificate issued to the various Trusts under Section 12A and not to treat them as charitable. HC also directs the Revenue to proceed to reopen the previous assessments, if permissible by law, based on tangible materials relating to collection of capitation fee.

HC holds that the amounts collected in quid pro quo for allotment of seat in deviation of the Tamil Nadu Educational Institutions (Prohibition of Collection of Capitation Fee) Act, 1992 as capitation fee. On voluntary contribution, HC holds that unless a contribution is made gratuitously and without consideration, it cannot be treated as "voluntary contributions" for the purpose of exemption of tax under Sections 11 and 12.

HC takes into account Revenue's finding that "capitation fee" was in fact collected, therefore, rejects the findings of CIT(A) and

 

ITAT that the Assessees are entitled to collect donations and as long as the donations are applied as per the objects, they are to be treated as voluntary. HC categorically holds that the amounts collected are neither a voluntary contribution nor applied for charitable purpose, thus, holds the impugned orders to be absolutely perverse.

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

8. **ITAT: Letting out space for commercial exhibitions, business in nature, falls foul of Sec. 2(15)**

**All India Granites & Stone Association [TS-774-ITAT-2022(Bang)]**

Bangalore ITAT dismissed Assessee's appeal and upholds CIT(A) order rejecting the exemption under Section 11 on stall rental receipts, sponsorship receipts, advertisement charges, subscription fees etc.. Holds such activities to be in the nature of trade, commerce or business and not for 'charitable purpose' under Section 2(15). Further holds that the rental receipts of Rs. 12.17 Cr from stalls cannot be assessed as income from house property by holding that letting out space for industries for organizing the exhibitions and related events on license fee/rental basis in a systematic and organized manner is nothing but an adventure in the nature of trade that is taxable as business activity only.

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


9. **SC: Dismisses Wipro's review petition against denial to opt out of Sec.10B**

**Wipro Limited [TS-812-SC-2022]**

SC dismisses Wipro's review petition against the judgment denying to opt out of exemption under Sec.10B due to non-fulfilment of mandatory twin conditions. SC rejects the application for listing of review petition in open court and further observes that there is no error apparent on the face of the record, warranting reconsideration of the order impugned.

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

10. **SC: Dismisses Special Leave Petition by Big 4's US arm against reassessment proceedings in new regime**

**Ernst And Young U. S. LLP [TS-806-SC-2022]**

SC dismisses the Special Leave Petition preferred by Ernst and Young US LLP against Delhi HC judgment upholding the reassessment proceedings under the new regime. In the impugned judgment, Delhi HC followed the SC ruling in *Rajesh Jhaveri* to uphold Section 148A(d) order and reiterated that it was not necessary for the Revenue to have some fresh tangible material to form a belief that income had escaped assessment where the Assessee's return was only processed under Section 143(1). HC also held that the Assessee could not demonstrate that the services of Rs.1.92Cr. rendered to Batliboi & Associates LLP during the relevant AY i.e., AY 2018-19 were similar/identical to the services rendered in the AY 2019-20, thus, denied the benefit of Article 15 of the India-US DTAA which was granted for AY 2019-20.

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

 

**C. Direct Tax/ PF / ESI Compliance due dates during the month of November 2022**

| Due Date | Form | Period | Comments |
|---|---|---|---|
| 07.11.2022 | Challan ITNS-281 | October 2022 | Payment of TDS/TCS deducted /collected in October 2022. |
| 07.11.2022 | Challan no. 285 | October 2022 | Payment of equalization levy |
| 07.11.2022 | ITR | AY 2022-23 | Due date for filing of return of income if the assessee (not having any international or specified domestic transaction) is (a) corporate-assessee or (b) non-corporate assessee (whose books of account are required to be audited) or (c)partner of a firm whose accounts are required to be audited or the spouse of such partner if the provisions of section 5A applies<br>The due date for furnishing return of income has been extended from October 31, 2022 to November 07, 2022 vide Circular no. 20/2022, dated 26-10-2022 |
| 14.11.2022 | TDS certificate | September 2022 | Due date for issue of TDS Certificate for tax deducted under section 194-IA / 194-IB / 194M |
| 15.11.2022 | TDS certificate | July 2021 to September 2022 | Quarterly TDS certificate in respect of tax deducted for payments other than salary. |
| 15.11.2022 | ESI Challan | October 2022 | ESI payment. |
| 15.11.2022 | E-Challan & Return | October 2022 | E-payment of Provident fund |
| 30.11.2022 | Challan-cum-statement | October 2022 | Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194-IA / 194-IA/194M |
| 30.11.2022 | ITR | AY 2022-23 | Return of income for the assessment year 2022-23 in the case of an assessee if he/it is |

 

| | | | |
|---|---|---|---|
| | | | required to submit a report under section 92E pertaining to international or specified domestic transaction(s) |
| 30.11.2022 | Form No. 3CEAA | Accounting Year 2021-22 | Report in Form No. 3CEAA by a constituent entity of an international group for the accounting year 2021-22 |
| 30.11.2022 | Form 9A | Accounting Year 2021-22 | Application in Form 9A for exercising the option available under Explanation to section 11(1) to apply income of previous year in the next year or in future (if the assessee is required to submit return of income on November 30, 2022). |
| 30.11.2022 | Form 10 | Accounting Year 2021-22 | Statement in Form no. 10 to be furnished to accumulate income for future application under section 10(21) or section 11(1) (if the assessee is required to submit return of income on November 30, 2022). |
| 30.11.2022 | Form 26Q | July to September 2022 | Quarterly statement of TDS deposited for the quarter ending September, 2022<br><br>The due date for furnishing of TDS statement for the quarter ending September, 2022 has been extended from October 31, 2022 to November 30, 2022 vide Circular no. 21/2022, dated 27-10-2022 |

 

# FEMA

**A. Late Submission Fee for reporting delays under Foreign Exchange Management Act, 1999 (FEMA)**

The Late Submission Fee (LSF) was introduced for reporting delays in Foreign Investment (FI), External Commercial Borrowings (ECBs) and Overseas Investment related transactions with effect from November 07, 2017, January 16, 2019 and August 22, 2022 respectively. It has now been decided to bring uniformity in imposition of LSF across functions. The following matrix shall be used henceforth for calculation of LSF, wherever applicable:

| Sl. No. | Type of Reporting delays | LSF Amount (INR) |
|---|---|---|
| 1 | Form ODI Part-II/ APR, FCGPR (B), FLA Returns, Form OPI, evidence of investment or any other return which does not capture flows or any other periodical reporting. | 7500 |
| 2 | FC-GPR, FCTRS, Form ESOP, Form LLP(I), Form LLP(II), Form CN, Form DI, Form InVi, Form ODI-Part I, Form ODI-Part III, Form FC, Form ECB, Form ECB-2, Revised Form ECB or any other return which captures flows or returns which capture reporting of non-fund transactions or any other transactional reporting. | [7500 + (0.025% × A × n)] |

Notes:

a) "n" is the number of years of delay in submission rounded-upwards to the nearest month and expressed up to 2 decimal points.

b) "A" is the amount involved in the delayed reporting.

c) LSF amount is per return. However, for any number of Form ECB-2 returns, delayed submission for each LRN will be treated as one instance for the fixed component. Further, 'A' for any ECB-2 return will be the gross inflow or outflow (including interest and other charges), whichever is more.

d) Maximum LSF amount will be limited to 100 per cent of 'A' and will be rounded upwards to the nearest hundred.

e) Where an advice has been issued for payment of LSF and such LSF is not paid within 30 days, such advice shall be considered as null and void and any LSF received beyond this period shall not be accepted. If the applicant subsequently approaches for payment of LSF for the same delayed reporting, the date of receipt of such application shall be treated as the reference date for the purpose of calculation of "n".

f) The facility for opting for LSF shall be available up to three years from the due date of reporting/ submission. The option of LSF shall also be available for delayed reporting/submissions under the Notification No. FEMA 120/2004-RB and earlier corresponding regulations, up to three years from the date of notification of Foreign Exchange Management (Overseas Investment) Regulations, 2022.

g) In case a person responsible for any submission or filing under the provisions of FEMA, neither makes such submission/filing within the specified time nor makes such

 

submission/filing along with LSF, such person shall be liable for penal action under the provisions of FEMA, 1999.

**B. Multiple NBFCs in a Group: Classification in Middle Layer**

1. As per para 16 of the Master Direction – Non-Banking Financial Company-Systemically Important Non-Deposit taking Company and Deposit taking Company (Reserve Bank) Directions 2016, applicable NBFCs that are part of a common Group or are floated by a common set of promoters shall not be viewed on a standalone basis. In line with the existing policy on consolidation of assets of the NBFCs in a Group, the total assets of all the NBFCs in a Group shall be consolidated to determine the threshold for their classification in the Middle Layer.
2. If the consolidated asset (consolidation as per para 2 above) size of the Group is ₹1000 crore and above, then each Investment and Credit Company (NBFC-ICC), Micro Finance Institution (NBFC-MFI), NBFC-Factor and Mortgage Guarantee Company (NBFC-MGC) lying in the Group shall be classified as an NBFC in the Middle Layer and consequently, regulations as applicable to the Middle Layer shall be applicable to them.
3. Statutory Auditors are required to certify the asset size (as on March 31) of all the NBFCs in the Group every year. The certificate shall be furnished to the Department of Supervision of the Reserve Bank under whose jurisdiction the NBFCs are registered.
4. These guidelines shall be effective from October 01, 2022.
5. Provisions contained in this circular will not be applicable for classifying an NBFC in the Upper Layer.


 

**C. Reserve Bank of India (Financial Statements - Presentation and Disclosures) Directions, 2021 - Disclosure of Divergence in Asset Classification and Provisioning**

1. In terms of paragraph C.4(e) of Annexure III to the Reserve Bank of India (Financial Statements-Presentation and Disclosures) Directions, 2021, commercial banks (excluding Regional Rural Banks (RRBs)) are required to disclose details of divergence in asset classification and provisioning where such divergence assessed by the Reserve Bank of India (RBI) exceeds certain specified thresholds. In order to strengthen compliance with income recognition, asset classification and provisioning norms, it has now been decided to introduce similar disclosure requirements for Primary (Urban) Co-operative Banks (UCBs) and revise the specified thresholds for commercial banks.

2. Accordingly, for the financial statements for the year ending March 31, 2023, banks shall make suitable disclosures in the manner specified in paragraph C.4(e) of Annex III to the afore-mentioned Directions, if either or both of the following conditions are satisfied:

   a. the additional provisioning for non-performing assets (NPAs) assessed by the RBI exceeds 10 per cent of the reported profit before provisions and contingencies[1] for the reference period; and

   b. the additional Gross NPAs identified by the RBI exceed 10 per cent of the reported incremental Gross NPAs for the reference period.

   Provided further that in the case of UCBs the threshold for reported incremental Gross NPAs specified in paragraph 2(b) above shall be 15 per cent, which shall be reduced progressively in a phased manner, after review.

3. The thresholds specified in paragraph (2) above shall be revised for disclosures in annual financial statements for the year ending March 31, 2024, and onwards, as under:

| Ref | Threshold linked to: | Commercial Banks (%) | UCBs (%) |
|---|---|---|---|
| 2(a) | Reported profit before provisions and contingencies | **5** | **5** |
| 2(b) | Reported incremental Gross NPA | **5** | **15** |


 

# Indirect Tax Updates

## Customs Updates

1. CBIC has further amended the Project Imports Regulations, 1986, which has been mentioned below:

   a. These amended regulations shall come into force on the 20th day of October 2022

   b. In the Project Imports Regulations, 1986, in the Table, -

      i. against Sr. No. 2, in column 2, for the words "All Power Plants and Transmission Projects", the words "All Power Plants and Transmission Projects, other than solar power plants or solar power projects," shall be substituted;

      ii. against Sr. No. 3, in column 2, for the words, figures and symbols "Power Plants & Transmission Projects other than those mentioned at Sl. No. 2 above.", the words, figures and symbols "Power Plants and Transmission Projects, other than solar power plants or solar power projects and other than those mentioned at Sr. No. 2 above." shall be substituted;

      iii. against Sr. No. 3FF, in columns 2 and 3, after item (xi) and the entries relating thereto, the following items and entries shall be inserted, namely: -

| 2. | 3. |
|---|---|
| "(xii) Bhopal Metro Rail Project | Managing Director, Madhya Pradesh Metro Rail Corporation Limited (MPMRCL) |
| (xiii) Indore Metro Rail Project | Managing Director, Madhya Pradesh Metro Rail Corporation Limited (MPMRCL)". |

***Click here to read / download Notification No. 54/2022-Customs dated 19th October 2022***

2. Requirement of Health certificate to be accompanied with the import of certain food consignments – Modification of Board Instruction No. 18/2022 – Customs – reg.

   In this regard FSSAI has further clarified its order dated 26-09-2022 that an integrated/single certificate, incorporating food safety requirements/ attestations is also accepted by FSSAI at the time of import clearance. It may be ensured that integrated certificate shall incorporate all the information as per format notified vide FSSAI's earlier order dated 03-08-2022, enclosed with board's instruction dated 12-08-2022.

   ***Click here to read/ download Instruction No. 26/2022 – Customs dated 06th October 2022***

3. Acceptance of Electronic Certificate of Origin (e-CoO) issued under India-UAE CEPA:

   In this regard, CBIC has clarified that an e-CoO, issued electronically by the Issuing Authority of UAE, is a valid document for the purpose of claiming preferential benefit under India-UAE CEPA, provided that the e-CoO has been issued in the prescribed format, bears electronically printed seal and signatures of the authorized signatory of the Issuing Authority, and fulfills all other requirements stated in notification No. 39/2022-Customs (N.T.) dated 30.04.2022.

 

The specimen seals and signatures, circulated in advance, shall continue to be used to verify the genuineness/ authenticity of e-CoO. In case of doubt, the matter shall be referred to the FTA Cell (under the Directorate of International Customs) for initiating verification process with the issuing authority of exporting country.

The e-CoO shall be mandatorily uploaded on e-Sanchit by the importer/Customs Broker for availing preferential benefit, and the e-CoO particulars such as unique reference number and date, originating criteria etc. shall be carefully entered while filing the bill of entry.

For defacement of CoO during Out of Charge, a printed copy of e-CoO shall be presented to the Customs officer, who shall cross-check the unique reference number and other particulars entered in the bill of entry with the printed copy of e-CoO. This will be in lieu of defacing the original hard copy of a certificate of origin. In this regard, it may be recalled that a check has already been introduced in the System to disallow use of same CoO reference number in more than one bill of entry.

***Click here to read/ download Instruction No. 28/2022- Customs dated 27th October 2022***

4. Central Board of Indirect Tax and Customs has released an instruction dated 28th October 2022.

***Click here to read/ download Instruction 28th October 2022***


 

# Indirect Tax Rulings

1. **2022-TIOL-971-CESTAT-MUM**

**CC Vs Aiges India Marketing Pvt Ltd**

Cus - The only grievance for which Revenue has come in appeal is that since the provisions of Section 114A of Customs Act, 1962 are special and provisions of Section 112 are general, order of adjudicating authority that, no penalty is levied on importer firm under section 114A as he has already penalized under section 112(a), is not legal and proper - As per proviso, penalty could not be imposed under this section if same has been imposed under Section 112(a) - Since in his order, Commissioner has held the goods liable for confiscation under Section 111(d) and (o) of Customs Act, 1962 and confiscated them and allowed them to be released on redemption fine, Commissioner perfectly justified in imposing penalty under Section 112(a) on respondent - Once he has imposed penalty under Section 112(a), in view of proviso, penalty under Section 114A cannot be imposed - No merits found in this appeal, appeal filed by Revenue is dismissed: CESTAT

- Appeal dismissed: MUMBAI CESTAT

2. **2022-TIOL-969-CESTAT-MAD**

**V V Titanium Pigments Pvt Ltd Vs CGST & CE**

ST - The issue that requires to be analysed is, whether the date of one year has to be computed from date of resubmission of refund claim or date of original submission of claim - Date of original submission has to be taken for computing the period of one year as it is the date on which appellant has filed the claim initially - Claim has been returned and not processed and rejected by department - When the claim is returned for resubmission, appellant is allowed to make the required rectification - On such score, rejection of refund claim on the ground that same is time-barred when computed from date of resubmission of refund claim is erroneous and requires to be set aside - Impugned orders are set aside: CESTAT

- Appeals allowed: CHENNAI CESTAT

3. **2022-TIOL-963-CESTAT-AHM**

**Rama Cylinders Pvt Ltd Vs CCE & ST**

ST - Issue involved is, whether the appellant is liable to pay service tax in respect of exhibition service provided by foreign service provider in respect of exhibition in abroad on behalf of appellant for period 2006-07, 2007-08 and 2009-10 - The service provided by overseas service provider is Business Exhibition Service - The service provider i.e. organiser of exhibitions are located in countries such as Pakistan, Egypt, Bangkok and Ukraine and no any part of service was provided in India - Entire service was provided outside India only, therefore, locations of service is outside India - In such case, service tax cannot be levied in India - Even as per sub-rule (II) of Rule 3 of Taxation of Service (Provided from Outside India and Received in India) Rules, 2006, a service can be taxable in hand of recipient of service in India only when the part of service is performed in India - Admittedly whole of the service was provided outside India and received outside India, therefore, even in terms of said rule, the service tax is not leviable on Business Exhibition Service received by appellant which was performed outside India hence not taxable in the hands of appellant - Accordingly, impugned order is set aside: CESTAT

 

- Appeal allowed: AHMEDABAD CESTAT

4. **2022-TIOL-1359-HC-MAD-GST**

**C Manogaran Vs Commissioner/Additional Chief Secretary**

GST - Petitioner participated in the tender process called by the District Collector under the Tamil Nadu Minor and Mineral Concession Rules for grant of lease for carrying out quarry operations of rough stone for a period of five years - Petitioner was declared as successful bidder and lease was granted by the District Collector - Now the respondents are insisting and compelling the petitioner to register the quarry operations under the GST Act, 2017 and to pay the GST on the seigniorage fee paid by the petitioner to the Geology and Mining department - Petitioner submits that the said act of levying GST has already been challenged before the Honourable Apex Court in W.P(Civil) No.1076 of 2021 in the case of Lakhwinder Singh Vs. Union of India and others, dated 04.10.2021 - 2021-TIOL-266-SC-GST as well as before various other high Courts; that the issue with regard to royalty collected for the transport of minerals has been considered as tax or profit pentra; is pending before the Honourable 9 Judges Constitution Bench of the Honourable Supreme Court; that further, the Apex Court has granted stay for payment of GST for grant of mining lease/royalty by the petitioner, which has been followed by the various Courts including this Court; therefore, the issuance of the impugned notice is improper.

Held: It is seen that the Apex Court in the case of Lakhwinder Singh Vs. Union of India and others , had granted stay for payment of GST for grant of mining lease/royalty by the petitioner - Further, it has been followed consistently by various Courts including this Court - It is further seen that the impugned order is only a notice - The petitioner is directed to appear before the respondents and make his objections with necessary documents - second respondent is directed to consider the petitioner's objections and dispose the same in accordance with law following the judgment of the Apex Court - Till such time, status quo to be maintained by the respondents - Writ petition is disposed of: High Court [para 5]

- Petition disposed of: MADRAS HIGH COURT

5. **2022-TIOL-948-CESTAT-DEL**

**Indian Food Tech Ltd Vs CCGST**

CX - SCN was issued invoking extended period of limitation, inter alia alleging that appellant have not paid duty for the period April, 2016 to February, 2017 through account current / cash and same is recoverable under Section 11A of Central Excise Act, 1944 read with Rule 8 of CER, 2002 - Further, penalty was also proposed under Section 11AC ibid r/w Rule 25 of Central Excise Rules - Limitation under Section 11A(1)(a) ibid was one year, which was substituted for two years w.e.f. 14.05.2016 - Appellant have filed their returns (form ER-1) from time to time and have made proper disclosure of their clearances and mode of payment of duty - Admittedly appellant have not taken cenvat credit on inputs utilised for clearance of finished product under Notification No. 1/2011-C.E. - As GST regime have been implemented w.e.f. 01.07.2017, accumulated cenvat credit with appellant was available for transmission to GST regime a s on 30.06.2017 - Duty have been demanded vide SCN dated 01.05.2018 i.e. after implementation of GST regime - Thus, there is only a venial breach of law by utilisation of cenvat credit for payment of duty for goods cleared under concessional rate during period under dispute - Situation is Revenue neutral as on payment of duty again in cash as demanded by impugned order, appellant shall be entitled to refund of equal amount being the duty discharged earlier through cenvat credit - Thus, appellant have not contravened the provisions of law or rules made thereunder with intent to evade payment of duty - Impugned order is set aside: CESTAT

- Appeal allowed: DELHI CESTAT

 

6. **2022-TIOL-1319-HC-MUM-CUS**

**Mahindra And Mahindra Ltd Vs UoI**

Cus - Imposing interest and penalty on the portion of demand pertaining to surcharge or additional duty of customs or special additional duty of customs is incorrect and without jurisdiction - In the absence of specific provision relating to levy of interest in the respective legislation, interest cannot be recovered by taking recourse to machinery relating to recovery of duty - The provisions relating to interest contained in Section 28AB of the Customs Act, 1962 are not borrowed in the legislation imposing levy of surcharge or CVD or SAD - Deriving financial benefits itself cannot be a ground to order payment of interest in the absence of any statutory provisions for payment of interest - Order of the Settlement Commission to the extent of requiring petitioner's to pay interest at the rate of 10% against the four show cause notices and penalty is quashed and set aside - Respondents to refund the amount of Rs.16,0 0,000/- being penalty deposited by petitioner together with interest, if any, within four weeks - Bank guarantee furnished to be cancelled and returned to petitioner by Registry - Petition disposed of: High Court [para 37, 38, 39, 40, 42]

- Petition disposed of: BOMBAY HIGH COURT

7. **2022-TIOL-1305-HC-KOL-GST**

**R P Buildcon Pvt Ltd Vs Supdt. of CGST & CX**

GST - Petition was inter alia filed for issuance of a writ of mandamus to declare that the scrutiny of returns under Section 61 of the CGST Act, 2017 cannot be done once an audit under Section 65 of the CGST Act, 2017 has been conducted by the department for the same tax period - Single Bench by the impugned order had dismissed the writ petition on the ground that the proceedings are in the nature of show cause notice - Aggrieved, the present appeal is filed.

Held: Bench is of the view that since the audit proceedings under Section 65 of the Act has already commenced, it is but appropriate that the proceedings should be taken to the logical end - The proceedings initiated by the Anti Evasion and Range Office for the very same period shall not be proceeded with any further - Appeal allowed by setting aside the order of the Single Judge - Bench directs the first and fourth respondents to issue show cause notice to the appellants within a period of six weeks - Second and third respondents are restrained from proceeding further against the appellants in respect of the very same period for which action has already been initiated by the first and fourth respondents, i.e. for the financial years 2017- 2018, 2018-2019 and 2019-2020: High Court [para 7 to 9]

- Appeal allowed: CALCUTTA HIGH COURT

8. **2022-TIOL-934-CESTAT-MAD**

**Rane Brake Lining Ltd Vs CGST & CE**CX - Rejection of refund claim has been made only on the ground that appellant's claim was time-barred - Orders-in-Original came to be passed on 30.11.2019 and 30.12.2019, consequent to which application for refund was filed by appellant on 31.03.2021 - Appellant in response to SCN has taken support from order of Apex Court whereby, taking judicial notice of steep rise in COVID-19 Virus cases, Apex Court has directed that the period(s) of limitation as prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings, whether condonable or not, shall stand extended till further orders - Appellant had also relied on jurisdictional Madras High Court decision in case of M/s. GNC Infra LLP 2022-TIOL-55-HC-MAD-GST wherein, the High court after considering the order of Apex Court, has set aside the similar rejection order of refund passed by lower authorities and has further directed the adjudicating authority to examine refund application de novo and to make order afresh in accordance with relevant Act and Rules - In view of order of Apex Court and also clear directions of jurisdictional High court, order of Larger Bench in case of Veer Overseas

 

Limited 2018-TIOL-1432-CESTAT-CHD-LB, relied upon by first Appellate Authority for denying refund does not survive - Matter remanded to the file of the adjudicating authority, who shall pass a de novo order, without going in to question of limitation: CESTAT- Matter remanded: CHENNAI CESTAT

9. **2022-TIOL-925-CESTAT-DEL**

**Anjani Technoplast Ltd Vs CC**

Cus - s.129E of the Customs Act, 1962 - What was sought to be contended by the appellant before the Tribunal when the matter came up before it on 07.07.2015 was that the provision of section 129E of the Customs Act, as it stood prior to 06.08.2014, would be applicable and so the Tribunal would have the power to waive the requirement of pre-deposit subject to such conditions as it thought fit - Inasmuch as though the order was passed by the adjudicating authority on 10.10.2014, but the show cause notice was issued prior to 06.08.2014 on 10.06.2014 - Tribunal did not accept this submission citing the decision of the Allahabad High Court in Ganesh Yadav = 2015-TIOL-1490-HC-ALL-ST and accordingly dismissed the appeal - Therefore, the appellant has filed an application on 31.05.2022 under rule 20 of the Customs, Excise and Service Tax Appellate Tribunal Rules, 1982 [The 1982 Rules] for restoration of the appeal.

Held : It is true that no time limit is prescribed for filing an application for restoration of appeal, but nevertheless the applicant has to be the vigilant and the application should be filed at the earliest opportunity after explaining the cause for non-appearance of the applicant on the date when the matter was called out - In the present case, appellant had appeared on the date fixed and made submissions - It is on a consideration of the submission advanced that that the appeal was dismissed for non-compliance of the statutory requirement - Rule 20 of the 1982 Rules, in such circumstances, would not be applicable - Moreover, Application was filed by the appellant for recall of the order dated 07.07.2015 only on 31.05.2022 - The appellant had throughout contested before the Delhi High Court and the Supreme Court that it should not be required to deposit the amount because the un-amended provisions of Section 35 of the Customs Act would be applicable - Even after the dismissal of the Civil Appeal by the Supreme Court on 23.01.2017, the appellant took more than five years to file the application for recall of the order - No satisfactory explanation has been given by the applicant for this enormous delay - In fact, only a casual statement has been made that earlier the financial capacity of the appellant was bad and it took some time to recover, whereafter the amount was deposited in September 2020 - This application was filed after two years of the deposit, therefore, it deserves to be rejected for this reason also - Application rejected: CESTAT [para 13, 21, 22]

- Application rejected: DELHI CESTAT

10. **2022-TIOL-1287-HC-MUM-GST**

**Oasis Realty Vs UoI**

GST - Issue is whether an Appellant, to comply with the requirements of Sub-section 6 of Section 107, can pay the amount [of 10% of the amount of Tax in dispute] utilising the credit available in the Electronic Credit Ledger - It is the Revenue contention that Appellant can utilise the credit available only in the Electronic Cash Ledger? Held: Clause (b) of Sub-section (6) of Section 107 provides a precondition [for filing appeal], "unless the appellant has paid" (not deposited) a sum equal to 10% of remaining amount of Tax in dispute - It says 10% of Tax has to be paid as a precondition - That Tax can be Integrated Tax or Central Tax or the State Tax as in the case at hand, or Union Territory Tax - The amount of ITC available in the Electronic Credit Ledger can be utilised towards payment of Integrated Tax or Central Tax or State Tax or Union Territory Tax -Therefore, Petitioner having to pay 10% of the Tax in dis pute under clause (b) of Sub-section (6) of Section 107, can certainly utilise the amount of ITC available in the Electronic Credit Ledger - Bench hastens to add that in view of provisions of Sub-section

 

(3) of Section 49, the party may also pay this 10% of the Tax in dispute by utilising the amount available in the cash ledger - Output tax in relation to a taxable person is defined in Clause (82) of Section 2 of MGST Act as the tax chargeable on taxable supply of goods or services or both but excludes tax payable on reverse charge mechanism - Therefore, any payment towards output tax, whether self-assessed in the return or payable as a consequence of any proceeding instituted under the MGST Act can be made by utilisation of the amount available in the Electronic Credit Ledger - Hence, a party can pay 10% of the disputed Tax either using the amount available in the Electronic Cash Ledger or the amount available in the Electronic Credit Ledger - CBIT&C has [in its circular F. No. CBIC-20001/2/2022-GST dated 6th July 2022] itself clarified that any amount towards output tax payable, as a consequence of any proceeding instituted under the provisions of GST Laws, can be paid by utilisation of the amount available in the Electronic Credit Ledger of a registered person - Appeal is restored to file on the undertaking of Petitioner that it shall debit the Electronic Credit Ledger within one week towards this 10% payable under Section 107(6)(b) - Petitions disposed of: High Court [para 9, 10, 11, 14]

- Petitions disposed of: BOMBAY HIGH COURT

**11. 2022-TIOL-1280-HC-MAD-GST**

**Trans India Cargo Carriers Vs Asstt. Commissioner**

GST - Petitioners have challenged orders passed cancelling their registrations - Some of the petitioners have missed the bus regarding several opportunities that were extended by way of Amnesty schemes - Act, 2017 contains two modes to enable revocation of cancellation or restoration of registration viz. remedy u/s 30 which none of the petitioners have exercised and second remedy is filing of appeal which some of them have. Held: High Court has had an occasion to consider identical issue in a batch of writ petitions and has passed an order dated 17.08.2022 - 2022-TIOL-1238-HC-MAD-GST and whe rein the directions contained in the order dated 31.01.2022- 2022-TIOL-261-HC-MAD-GST are also made applicable to the said cases - Inasmuch as the petitioners are permitted to file returns for the period prior to the cancellation of registration, if not already filed, together with tax defaulted along with interest for such belated payment of tax and fine and fee fixed for belated filing of returns; respondents to take suitable steps by instructing GSTN to make suitable changes in the architecture of the GST web portal to allow these petitioners to file returns and pay tax/penalty/fine; above exercise to be carried wit hin a period of 45 days - Above order is applicable on all fours to the present petitions - Petitions allowed: High Court [para 1, 2, 4]

- Petitions allowed: MADRAS HIGH COURT

**12. S A Domadia Vs CCE & ST**

ST - Assessee is in appeal against confirmation of demand of service tax, interest and penalty - It is not in dispute how many services like construction of roads, laying down of pipelines etc were provided within confines of GIDC - All the services provided by appellant within confines of GIDC directly, GIDC would be covered under Sr. No. 12 (a) of Notfn 25/2012- ST only if these said civil structure or any other original work meant predominantly for use other than for commerce, industry or other business and it cannot be said that GIDC are not meant for promotion of industry or commerce - It cannot be said that Sr. No. 12(a) of Notfn 25/2012 provides any exemption to work done by appellant - Since GIDC are open to general public also apart from various industry and trade, it can be said that said services bridges, tunnels in GIDC are open for to general public in that sense benefit of Sr. No. 13 (a) of Notfn 25/2 012- ST can be extended to roads, bridges, tunnels for goods transporting within GIDC - Appellant has also claimed the benefit where he has provided service as sub contractor to main contractor in shape of works contract and where main contractors

 

are exempted from service tax - Appellant has claimed the benefit of Sr. no 29(h) of Notfn 25/2012- ST - They had not specified specific details of all the work done by main contractor and therefore, has not substantiated the claim by main appellant - Appellant is not entitled for any benefit of Sr. No. 12 (a) of Notfn 25/2012 - They cannot claim the benefit of Sr. No. 13(a) of Notfn 25/2012 in respect of roads constructed by them in GIDC - Appellant can claim the benefit of Sr. No. 29 (h) in respect of service of works contract provided as sub contractor to main contractor wherever appellant is able to establish that main contractor was exempted from service tax in respect of works contract - No evidence supports the same has been produce d and no bifurcation has been give - Matter remanded to original adjudicating authority to decide a fresh by examining each case and testing the same on parameters prescribed: CESTAT

- Matter remanded: Ahmedabad CESTAT

**13. 2022-TIOL-1277-HC-MP-GST**

**Wipro GE Healthcare Pvt Ltd Vs Assistant Commissioner of State Tax**

GST - Petitioner submits that the impugned order was passed on 17.06.2022 and is appealable within a period of 90 days and the delay is also condonable - Further, that a reading of sub-section 6 and 7 of s.107 makes it clear that if the appellant deposits a sum equal to 10% of the remaining amount of tax in dispute arising out of the impugned order, the balance amount shall be deemed to be stayed - Petitioner, therefore, submits that out of the total tax amount of Rs.1,88,16,111/- respondent has already recovered Rs.49,28,604/- on 19.06.2022 and which is more than 10%; that the respondent ought to have waited for the statutory period within which the petitioner could have filed the appeal; that the order passed is appealable u/s 107 of the Act, 2017.

Held: Since the respondent has already recovered more than 10% of the amount of tax confirmed, the petition is disposed of by reserving liberty to petitioner to file appeal and the appellate authority shall consider the same and pass speaking order by following the principles of natural justice - Petition disposed of: High Court

- Petition disposed of: MADHYA PRADESH HIGH COURT

**14. 2022-TIOL-1275-HC-KOL-GST**

**Mriganka Sarkar Vs UoI**

GST - Petitioner's prayer for refund of tax paid for the second time and penalty amount has been rejected by the lower authorities, hence the petition - Petitioner's vehicle was intercepted and penalty was imposed on account of transporting timber without valid e-way bill - Goods were confiscated and the petitioner had to pay penalty as well as taxes for purpose of release of the goods - A further e-way bill was generated and the same goods were transported to Raiganj - Petitioner prays for refund of the amount paid on account of taxes for the second time and the penalty amount on the ground that respondents cannot impose double taxation in respect of the self-same goods.

Held: As there was discrepancy in the document from where the goods were dispatched, the authorities intercepted and confiscated the same - The petitioner was directed to pay the tax as well as penalty - Thereafter, it appears that a fresh e-Way Bill was generated immediately after interception - The description of the goods in the second e-Way Bill remains the same - It is only that the place of dispatch was rectified - The petitioner had to pay tax for the second time and penalty for not carrying the proper e-Way Bill at the very first instance - From the conduct of the petitioner, it does not appear that there was an intention to evade tax - The respondent authorities ought not to collect tax for second time in respect of the self-same goods that were transported by the petitioner - Law doesn't require payment of tax to be made more than once in respect of the self-same goods - The petitioner is entitl ed to the refund as prayed for - Orders of lower authorities are set aside and the Directorate of Commercial Taxes is directed to refund the amount

 

collected on account of tax for the second time and the penalty paid by him within a period of four months - Petition is disposed of: High Court [para 10, 11, 13, 15]

- Petition disposed of: CALCUTTA HIGH COURT

**15. 2022-TIOL-1274-HC-TRIPURA-GST**

**Satguru Impex Vs State of Tripura**

GST - Vehicle containing 130 drums of bitumen seized on account of vehicle not having an appropriate e-way bill - Petitioner submits that the tax invoice and E-way bill erroneously mixed up the name of the seller and the buyer - Further submitted that after the petitioner learnt of the apparent mistake in the original e-way bill, the said mistake was duly corrected and a fresh e-way bill was generated on 08.05.2022 but even then the vehicle was not permitted to proceed and remains stranded at the Churaibari check post and a SCN dt. 08.05.2022 came to be issued - Petitioner challenges the said SCN and seeks release of the vehicle along with the goods consigned therein.

Held: While there appears to be an apparent mistake in the original e-way bill i.e. the name of the seller and the buyer had been erroneously swapped, therefore, Revenue was justified in not allowing the vehicle to enter into the State and seize the same, yet Bench finds that once the corrected e-way bill was produced, there was no justification to either initiate the present proceedings or continue with the seizure of the vehicle along with the goods - R ole of the State Revenue authorities is highly essential and imperative for the economic growth of the State - In the case at hand, there is no dispute that the parties are genuine, nor is there any dispute that the original E-way bill contained an error - However, where the error is rectified and a corrected E-way bill is produced, it would be appropriate for the Revenue authorities to act sensibly in the manner a nd proceed - Causing unnecessary impediment to the free flow of goods and vehicles does cause an unnecessary hindrance to the economy of the State - Wherever cases are found where people are using fake E-way bills and/or trying to evade tax, adequate power is vested in the Revenue to take suitable action in such matters - But in the present case, the said situation does not arise - Bench hopes and trusts that the officers working for the Revenue authority take up such matters with due seriousness that it deserves - SCN dated 08.05.2022 is quashed and the authorities are directed to release the vehicle and goods forthwith: High Court [para 6, 7, 9]

- Petition allowed: TRIPURA HIGH COURT

**16. 2022-TIOL-1266-HC-KAR-GST**

**G G Agencies Vs State of Karnataka**

GST - Petitioner has sought for quashing of order dated 19.02.2022 as being illegal and untenable in law; refund the taxes and penalty already paid - Petitioner further submits that aggrieved by the order dated 02.02.2019 passed by respondent no.3, they preferred an appeal on 30.03.2019 within the prescribed period as provided u/s 107 of the Act, 2017; that though the said appeal had been electronically filed, the respondent has proceeded to dismiss the appeal on the main ground that the appeal was barred by limitation by assigning wholly invalid reasons and also without providing an opportunity of being heard.

Held: The order impugned has been passed without considering or appreciating the aspects narrated and proceeds on the erroneous premise that the appeal was filed beyond the period of limitation which is factually incorrect and contrary to the material on record warranting interference and particularly when neither sufficient nor reasonable opportunity was provided by respondent before passing impugned order - So long as the appeal was preferred electronically within the prescribed period, merely because the certified copy was subsequently filed physically, the said circumstance cannot be made the basis to come to the conclusion that the appeal was filed beyond the prescribed period - Findings recorded by respondent/appellate authority

 

is set aside and matter is remitted back for reconsideration afresh: High Court [para 5, 6]

- Matter remanded: Karnataka High Court

**17. 2022-TIOL-1258-HC-AP-GST**

**Sembcorp Energy India Ltd Vs State of Andhra Pradesh**

GST - The petitioner participated in the tender process floated by the Bangladesh Power Development Board [BPDB] and was awarded contract by BPDB, pursuant to which, a Letter of Intent for purchase of 250 MW electricity power, was issued on 07.08.2018 - Thereafter, the petitioner entered into a Power Purchase Agreements (PPAs) with BPDB and started supplying electricity/electrical energy - Since export of electrical energy is treated as Zero rated supply under Section 16 of IGST Act, 2017, the petitioner applied for refund of unutilized Input Tax Credit through a refund claim by filing application under Form GST RFD-01A in terms of Section 54 of CGST Act, 2017 read with Section 16(3) of IGST Act, 2017 - SCN was served on the petitioner rejecting the claim for refund to an extent of Rs.5,67,94,499/- on the ground that since the petitioner failed to submit shipping bill and e xport general manifest (EGM) along with refund application, evidencing delivery of electricity at Bohrompur station, the same cannot be termed as 'export of goods' - Refund was accordingly rejected by lower authorities - Petitioner further submits that in the subsequent notices for the months of June 2019 to September 2019, the department realised their mistake and dropped the issue of filing of proof in respect of export of electricity - Petitioner submits that the amendment made to rule 89(2) of Rules, 2017 by notification 14/2022-CT dated 05.07.2022 should be given retrospective effect as it is beneficial legislation.

Held: Maintainability - The existence of an alternate remedy is not an absolute bar to the maintainability of the writ petitions - Coming to present case, as Tribunal is not yet constituted by the GST Council and as there is no efficacious remedy available to the Petitioner, except approaching this court, Bench is of the view that the writ petitions can be entertained - Moreover, the respondents' contention that the petitioner has to approach Tribunal under section 112 of CGST Act, when and where it is constituted, cannot be accepted as it may cause irreparable loss to the petitioner. [para 17]

Export of electricity - filing of shipping bill

+ Provision of s.54 of the Act, 2017 nowhere refers to furnishing of shipping bill for claim of refund, which aspect is not disputed - However, the authorities only refer to Rule 89(2)(b) of CGST Rules, 2017, for production of shipping bills, so as to accept the claim made - A situation of this nature would not have been contemplated, at the time when Rule 89 of CGST Rules was framed and incorporated in the statute book - The transmission of electricity across the border is a phenomena that has come into existence from the recent past i.e. after incorporation of Rule 89, and as such, suitable amendments ought to have been made at the time when permissions are granted for transmission of electricity to other countries - It is also not in dispute that the petitioner has generated electrical energy and transmitted through transmission lines of Power Corporation of India and the same reached Bohrompur sub-station and transmission to Bangladesh would be under the supervision of Central Electricity Authority, which is a Government of India undertaking. [para 20, 21]

+ Rule 89 of CGST Rules, 2017, deals with a procedure for claiming refund - But, requiring petitioners to produce shipping bills, as proof of export cannot be made applicable to electricity, as it is impossible to produce shipping bill for export of electricity, since the Custom Law does not refer to electricity and shipping bill is a Customs document - Export of electricity can only be through transmission line, but not through rail, road or water, for which, necessary documents can be made available. [para 26]

+ Pursuant to repeated representations by Generators of Electrical Energy, and their negotiations with the Central Authorities from the year 2020, fructified into a notification, which came to be issued in the

 

month of July, 2022, amending Rule 89 - A reading of the amendment, inter alia, makes it clear that the petitioner herein can now prove the quantity of electricity transmitted basing on the statement of scheduled energy for export of electricity issued by Regional Power Committee [RPC] Secretariat, as a part of Regional Energy Account [REA] under clause (nnn) of Sub-Regulation (1) of Regulation (2) of Central Electricity Regulatory Commission. [para 27, 28]

+ Situation reminds of an age old maxim Lex Non Cogit ad impossibilia meaning that the law does not compel a man to do things which he cannot possibly perform - Bench holds that Rule 89 of CGST Rules, 2017 and the amendment made thereto cannot curtail the benefit of Input Tax Credit - The petitioner was justified in not producing shipping bills to prove the quantity of energy units transmitted and that the reports of REA filed by the petitioner, could be made the basis to deal with the claim for refund of Input Tax Credit. [para 30, 34]

+ Circular 175/07/2022 - GST dated 06.07.2022 clearly establishes that amendment to Rule 89 of CGST (Amendment) Rules, 2022 was carried out to cure the defect in Rule 89 of CGST Rules, 2017, because of the problem faced by power generating units in filing refund claims of un-utilised Input Tax Credit on export of electricity - This clarification came to be made since the situation namely transmission of energy could not have been visualized when Rule 89(2) was incorporated in the Statute book - Production of shipping bills will not prove or establish by any means the quantity of energy transmitted - Hence, by no stretch of imagination, the amendment can be said to be declaratory in nature, but it can only be a one, which would be curing the defect by issuing necessary clarification as to how transmission of electrical energy can be proved - Therefore, Rule 89 of CGST (Amendment) Rules, 2022 is only clarificatory in nature - It is very clear that any benefit that gets accrued by way of legislation cannot be denied/curtailed, more so, when it is clarificatory in nature like the present one and as such it has to be made retrospective in operation. [para 38, 39, 40, 46]

+ Writ petitions are allowed and the orders under challenge are set aside and the W.P.Nos.11194, 11206 & 11263 of 2021 are remanded back to Additional Commissioner [GST Appeals] and the W.P.Nos.11198, 17275, 28836 & 30292 of 2021 are remanded back to the Deputy Commissioner of Central Tax to deal with the claim of refund in terms of this common order. [para 49]

- Petitions allowed: Andhra Pradesh HC

**18. [TS-493-HC(BOM)-2022-GST]**

Bombay HC allows utilisation of amount available in Electronic Credit Ledger (ECrL) to pay the 10% of tax in dispute in terms of clause (b) of sub-section (6) of Section 107 of MGST Act (which mandates payment before filing appeal). Dismisses Revenue's averment that sub-section (4) of Section 49 restricts the usage of the amount available in ECrL only for payment of output tax or under MGST or under IGST and that Assessee can only utilise the credit available in Electronic Cash Ledger (ECL) for such purpose. HC remarks that "a party can pay 10% of the disputed Tax either using the amount available in" ECL or ECrL. Accentuating on the precondition "unless the appellant has paid" appearing in said sub-section, HC envisages that, expression used is "paid" and not "deposited" and "This would be material while considering the provisions of Sub-section (3), Subsection (4) and Sub-section (5) of Section 49". HC adds that "'Tax' can be Integrated Tax or Central Tax or the State Tax as in the case at hand, or Union Territory Tax" and "amount of ITC available in the ECL can be utilised towards payment of Integrated Tax or Central Tax or State Tax or Union Territory Tax". HC relies upon the CBIC Circular No. 20001/2/2022-GST dated July 6, 2022. As against Revenue's reliance upon an order of Orissa HC in Jyoti Construction, HC opines that, in view of subsequent CBIC clarification "it will not be necessary to discuss the said order". Therefore, HC disposes writ and quashes order-in-appeal and restores the same to file on the undertaking that Petitioner shall debit ECrL within one week of this order getting uploaded.

 

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