Recent Writ Petitions on different litigative issues under GST & Under previous Tax Regime – Relevant for GST

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Working of Common Portal not in accordance with law

M/S P.P. AUTOMOTIVE PVT. LTD VS. UNION OD INDIA (HIGH COURT OF PUNJAB AND HARYANA) CWP-24600-2019

Facts of the case: In the present case, the Petitioner Company by mistake furnished wrong figures in the GSTR-3B returns, and could not rectify the same because of absence of proper mechanism for rectification of Form GSTR-3B. However, when the Petitioner realised its mistake, it tried to submit the rectified copies of the GSTR-3B returns to the authorities stating that it is not able to furnish the correct figures in Form 9 because portal by adopting its own mechanism has auto-populated the figures in table 9 of Form GSTR-9 from Form GSTR-3B furnished electronically. However, no reply in this regard was received by the Petitioner.

In the present case, the mechanism of operation of common portal was challenged on the ground that it has adopted its own mechanism without any authority of law and is functioning in complete contravention of, ultra-vires, and beyond the mandate of the Notification no. 74/2018-Central Tax dated 31.12.2018, and Notification 14/GST-2 dated 11.01.2019 by which the Central Government/Governor of Haryana have substituted Form GSTR-9 under the CGST/HGST Act, in as much as it auto-populates

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the details from Form GSTR-3B and does not allow the petitioner to fill/modify/correct/rectify figures mentioned in table 9 (Part IV) of Form GSTR-9 available on common portal and therefore, does not allow the petitioner to submit correct figures in Form GSTR-9 in relation to ITC utilisation as required under the law. Hence, the said mechanism of operation is unlawful, illegal, without authority of law, unreasonable and violates Article 14 and 19 of the Constitution of India. That the Petitioner has also challenged the inaction on the part of the Respondents as despite various requests made to them seeking solution for rectifications/corrections of Forms GSTR-3B, no solution has been provided yet.

Provisions : The Central Government by issuing Notification no. 39/2018-Central Tax dated 4.09.2018 notified Form GSTR-9/9A under the CGST Act. And also by issuing Notification no. 49/2018-Central Tax dated 13.09.2018 notified form GSTR-9C under Rule 80(3) of the CGST Rules. The Central Government/Governor of Haryana by issuing Notification no. 74/2018-Central Tax dated 31.12.2018 and Notification no. 14/GST-2 dated 11.01.2019 substituted the Form GSTR-9 and Form GSTR-9C. The said notifications nowhere provide auto-population of data in table 9 of Form GSTR-9 from Form GSTR-3B.

Issue - Can the common portal by way of its offline utility adopt its own mechanism for furnishing of annual return electronically, which mechanism is beyond the mandate of the law?

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Ruling - The Hon’ble High Court in the said petition was pleased to issue notice to the Respondents, and has also directed the Respondents to make correction of mechanism of operation of the Common Portal in consonance with Notification no. 74/2018-Central Tax dated 31.12.2018 and Notification 14/GST-2 dated 11.01.2019 by which the Central Government/Governor of Haryana have notified the Form GSTR-9 i.e. an annual return , and also to accept the rectified copies of Form GSTR-3B as submitted by the Company.

Issues relating to refund

HCL INFOSTYSTEMS LTD. VS UNION OF INDIA (DELHI HIGH COURT) W.P.(C) 9314/2019

Facts of the case: Refund claim of the Petitioner on account of supplies to SEZ was rejected on 22.07.2019. No prior hearing was given to the Petitioner before the said rejection and the rejection order itself was not reasoned. Respondents were willing that the order of rejection be set aside, and to grant hearing to the petitioner, and thereafter pass a reasoned order.

Ruling : The Hon'ble Delhi High Court set aside the order dated 22.07.2019 rejecting the refund claim of the Petitioner, since the same was passed without hearing the petitioner and, admittedly, was unreasoned. The court directed the competent officer of the respondent to grant personal hearing to the Petitioner for consideration of the Petitioner's claim. For that purpose, a notice of hearing shall be issued to the Petitioner indicating the deficiencies/objections, if any. The competent authority shall pass a reasoned order on the refund application of the Petitioner within two weeks positively. The court made it clear that they had not examined the merits of the Petitioner's claim for refund, and the competent authority was free to take an independent view, but in accordance with law.

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The court observed that there is a need to deal with refund claims on priority basis since delay in refund of tax beyond the period prescribed in law very severely impedes the generation of business and pace of trade, that itself results in lesser collection of tax which would not be in the interest of Revenue or for the state. Respondent No. 5 who is the Special Commissioner, Delhi GST states that as of now, 593 refund claims are pending in the state of Delhi. He states that about 95 applications are pending for more than 60 days. The court directed him to file an affidavit disclosing the status in this regard within a period of 2 weeks. The affidavit should also indicate the reasons for the cases remaining pending. The affidavit should also disclose the status with regard to provisional refund payable in terms of Rule 91 (2) of the CGST and DGST Rules since it is stated by learned counsel for the Petitioner that provisional refund is not being granted on time.

On the next date the court observed that the petitioner has been granted refund by the Respondent, the claim for interest has been rejected and in this respect, the Respondent have issued a communication dated 14.10.2019. The court permitted the Petitioner to place on record the said communication along with such other documents that the Petitioner wishes to place on record in relation thereto within two weeks.

PITAMBRA BOOKS V. UNION OF INDIA(DELHI HIGH COURT) W.P(C) 627/2020

Facts of the case : The Petitioner, who is a manufacturer and exporter of Books which is a Zero Rated Supply as per Section 16 of the IGST Act, has accumulated unutilized credit in his electronic credit ledger. The Petitioner made purchased of raw materials from November'17 to June'18, and finally exported the goods in June'18, thereafter tried filing the **refund application** on the Common Portal.

The CBIC had earlier issued a **Circular No. 37/11/2018-GST F.No.349/47/2017- GST Dated 15th March, 2018** in pursuant to representations received from the traders regarding the issue being faced by them in claiming refund of exports in cases where refund period has been spread across different months and different financial years. Therefore, considering the issues of the traders the CBIC issued the above mentioned Circular clarifying that the exporter may file refund claim for one calendar month / quarter or by clubbing successive calendar months / quarters. However, the Circular imposed a restriction that "refund period cannot spread across different financial year". The restriction imposed by the Circular has nowhere been provided under the GST Act or Rules. This restriction took away the substantive right of refund which has been provided in CGST Act/ IGST Act and CGST Rules.

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Thereafter, the CBIC again issued Circular No. 125/44/2019-GST Dated 18.11.2019, superseding all the previous circulars which provided for manual filing of refund application as provided under Rule 97A of the CGST Rules, and made full electronic process for filing and processing of refund application w.e.f 26.09.2019. The Circular No. 125 (Supra) also reiterated the Para 11.2 of the Circular No. 37 (Supra) which had imposed the restriction that refund period/claim cannot spread across two financial years. The Circular No. 125 (Supra) also imposed a restriction that for filing refund claim of subsequent period, refund claim for previous period shall be filed .i.e. refund claim has to be filed chronologically.

due to the restriction imposed by the Circular No. 125 (Supra), i.e. the refund claim cannot be spread across two financial years, the petitioner was unable to file the refund application for the period of November'17-June'18. Thereafter, due to the second restriction of filing the refund chronologically, the petitioner was unable to file the refund application for the subsequent months and subsequent years. Thirdly due to the superseding of all the previous Circulars which provided for manual filing of refund application, and despite the Rule 97A providing for manual filing of refund application, Circular No. 125 (Supra), made filing and processing of refund application online mandatory, therefore, the GST Authorities were not ready to accept the manual refund application. This has resulted in the blockage of unutilised input tax credit accumulated in the credit ledger of the Petitioner, which the petitioner was unable to claim refund.

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Therefore, the Petitioner approached the Hon'ble High Court by filing the **Writ Petitioner No. W.P(C) 627/2020** and prayed interim relief for Staying the **Para 8 of the Circular No. 125** (Supra) and for filing of manual refund application for all the periods.

Issue : Can an exporter file refund for which the refund period is spread across two financial years and which does not follow the chronological order?

Ruling : The Hon'ble High Court heard the arguments of Petitioner and passed an order Staying the Para 8 of the Circular No. 125 (Supra) and granted interim relief to the Petitioner to file manual refund application for all the periods starting from November'17. The Hon'ble High Court in the order also directed the Respondents to entertain the manual refund application of the Petitioner.

The impact of the Hon'ble High Court's verdict is that now the restriction that refund period cannot be spread across two financial years and that refund period has to be filed in chronological order, is no more maintainable and therefore assessee can file refund claim which spread across two financial years and for any period.

Is the department correct in levying interest on gross tax liability under Sec 50?

SUNRISE AUTOWORLD PVT. LTD. V. UNION OF INDIA (DELHI HIGH COURT)(W.P (C) NO. 2279 OF 2020)

Facts of the case : Demand Notice was issued to the assessee, for levy of interest under Section 50 on gross tax liability ie liability set off through electronic cash ledger and electronic credit ledger, arising due to belated filing of statement in Form GSTR-3B. The assessee had already paid the interest on payment made through electronic cash ledger. The demand notice issued by the department was challenged. The Department has sought to levy interest even on the input tax credit which stood credited in the electronic credit ledger and hence was already lying with the Government.

Argument advanced - That it is settled principle of law that input tax credit is as good as tax paid, and hence there was no delayed payment of tax in case where the Petitioner had duly adjusted ITC with liability as per GSTR-3B in its books.

Ruling : The Hon'ble Delhi High Court has stayed the operation of said Demand Notice.

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That recently, Madras High Court in the case of ***Refex Industries Ltd. v. ACGST W.P. No. 23360 of 2019*** held that interest under Section 50 is leviable on net cash liability. Further, this Hon'ble Court has, in similar matters, granted interim relief to Petitioner by stay the demand cum recovery of interest on gross tax liability, in the cases of ***Landmark Lifestyle v. Union of India in W.P. (C) No. 6055/2019*** and ***Maple Logistics v. CGST in W.P. (C) 628/2020.***

That the Hon'ble Karnataka High Court in the case of ***LC Infra Projects v. Union of India MANU/KA/5300/2019***, has held that the issuance of Show Cause notice is sine qua non to proceed with the recovery of interest payable thereon under Section 50 of the Act.

On the aspect of providing opportunity to the assessee before quantification of liability has been settled by the Division Bench of the Madras High Court in favour of the Petitioner ***in A.C. v Daejung W.A. No. 2127 of 2019 & CMP No. 14341 of 2019.***

Whether audit can be conducted by the Service Tax Department under Rule 5A of the Service Tax Rules?

GEETANJALI YOG LLP V. UNION OF INDIA(DELHI HIGH COURT) *W.P. (C) 13531/2019*

- **Facts of the Case** : The grievance of the Petitioner arose out of the impugned letter dated 01.11.2019 issued by the Assistant Commissioner, Audit carrying out EA-2000 Audit, demanding documents from the Petitioner LLP and deputing Audit Team comprising of officers in the rank of Superintendent and Inspector.

  The challenge was made on following grounds:

- Rule 5A of the Service Tax Rules travels outside the scope of its parent statute.
- The EA-2000 Audit proposed to be conducted by the Respondents purportedly in exercise of power under Rule 5A (2) of the Service Tax Rules, is liable to be quashed for being carried out without aid of any express statutory provisions.
- Further, the Assistant Commissioner has no power to take any action because of omission of the Chapter V of the Finance Act, 1994, in circumstances whereby Section 174(2) has not saved any power of service tax officer to initiate Audit proceedings.

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Ruling : The Hon’ble Delhi High Court granted stay on audit proceedings initiated by Service Tax Department.The court issued notice and granted interim relief to the Petitioner on their plea that the power of initiating Audit proceedings for verification of documents and records are not provided for in the Finance Act.

The order of the Hon’ble High Court granting interim stay on Service Tax Audits provides a major relief to the taxpayers where such audits have been initiated by the Department without having any express powers in the Law to do so. Thus, it reduces duplicity of work and preserves precious time & effort of the assessee.

CASES RELATED TO ERROR IN FILING GST TRAN-1

Vision Distribution Pvt. Ltd. W.P.(C) 8317/2019- Delhi HC

The Hon'ble Delhi High Court while allowing refund of tax paid in cash on exports due to not availability of option to claim carry forward ITC on 01.07.2017 held that

The business activity in the country could not be expected to come to a standstill, only to await the Respondents making the GST system workable. The failure of the Respondents in first putting a workable system in place, before implementing the GST regime, reflects poorly on the concern that the Respondents have shown to the difficulties that the trade faced throughout the length and breadth of the country. Unfortunately, even after passage of over two years, the Respondents have not remedied their omissions and failures by taking corrective steps. They continue to take shelter of the limitations in, and the inability of their software systems to grant refund, despite the same being justified. The rights of the parties cannot be subjugated to the poor and inefficient software systems adopted by the Respondents. The software systems adopted by the Respondents have to be in tune with the law, and not vice versa. The system limitations cannot be a justification to deny the relief, to which the Petitioner is legally entitled.

[Emphasis Supplied]

SRC AVIATION (P) LTD W.P.(C) 12167/2019- Delhi HC

The Hon'ble Delhi High Court directed the Department to either open online portal to enable the petitioner to file Form TRAN-1 electronically or accept the same manually on or before 31.12.2019 while noting that it is not fair to expect that each person who may not have been able to upload the Form GST TRAN-1 should have preserved some evidence of it such as, by taking a screen shot. Many of the registered dealers/traders come from rural/semiliterate background. They may not have had the presence of mind to create any record of their having tried, and failed, to upload the Form GST TRAN-1. The Hon'ble Court also held credit to be "property" protected by Article 300A. The relevant extracts are reproduced as under:

9. The factual position in the present case is not any different and petitioner is also entitled to similar relief. At this juncture, it may be noted that as per Notification No. 49/2019 dated 09.10.2019 issued by CBIC, the date prescribed for filing of Form GST TRAN-1 under Rule 117 (1A) of the CGST Rules has been extended to 31.12.2019. This itself demonstrates that the Respondents recognise the fact that the registered persons were not able to upload the Form GST TRAN-1 due to the glitches in the system. It is not fair to expect that each person who may not have been able to upload the Form GST TRAN-1 should have preserved some evidence of it – such as, by taking a screen shot. Many of the registered dealers/traders come from rural/semiliterate background. They may not have had the presence of mind to create any record of their having tried, and failed, to upload the Form GST TRAN-1. They cannot be made to suffer in this background, particularly, when the systems of the Repsondents were not efficient.

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From the documents placed on record, it emanates that the Respondents have no cogent ground to deny the benefit of the Notification No. 49/2019 dated 09.10.2019 issued specifically to grant relief to taxpayers who faced difficulty in filing Form GST TRAN-1 due to technical glitches.

10. We may further add that the credit standing in favour of an assessee is "property" and the assessee could not be deprived of the said property save by authority of law in terms of Article 300 (A) of the Constitution of India. There is no law brought to our notice which extinguishes the said right to property of the assessee in the credit standing in their favour.

[Emphasis Supplied]

Hans Raj Sons CWP 36393/2019- P&H HC

The Hon'ble P&H High Court while allowing the petitioner to avail ITC by filing Form TRAN-1 by 31.12.2019 in alternative also allowed the petitioner to avail benefit of unutilized credit in their GSTR-3B for January 2020 if the petitioner is hampered in any way for filing TRAN-1 due to non opening of the Portal by the Department. The relevant extract is reproduced as under:

In view of above, present petition is allowed in terms of the said CWP No.30949 of 2018 decided on 04.11.2019 with permission/modification to file the said Statutory Form TRAN-I by 31.12.2019.

It is clarified that in case the petitioner is hampered in any manner from availing the benefit of aforesaid judgment, due to non opening of the Portal by the Respondents, then the petitioner shall be permitted, in the alternative to claim the benefit of unutilized credit in their GST-3B Forms to be filed for the month of January,2020 either electronically or manually.

[Emphasis Supplied]

THE TYRE PLAZA W.P.(C) 8970/2019- Delhi HC (Argued by ALA Legal)

The Hon'ble High Court observed that the entire GST system is still in a trial and error phase and it will be too much of a burden to place on the Assessees to expect them to comply with the requirement of the law where they are unable to even connect with the system on account of network failures or other failures. Thus, the Hon'ble Court directed the Department to open the Portal to enable the Petitioner to file Tran-1, failing which they shall accept the Form Tran-1 manually filed by the Petitioner. The relevant extracts are reproduced as under:

7. As observed by this Court in several orders i.e. in ***Bhargava Motors v. Union of India 2019 SCC OnLine Del 8474, Kusum Enterprises Pvt. Ltd. v. Union of India [WP(C) 7423/2019] and Sanko Gosei Technology India Pvt. Ltd. v. Union of India & Ors. [WP(C) 7335/2019]****, the entire GST system is still in a trial and error phase and it will be too much of a burden to place on the Assessees to expect them to comply with the requirement of the law where they are unable to even connect with the system on account of network failures or other failures.*

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8. The Court would urge the ITGRC to review the policy it has adopted in such cases, and acknowledge instances like the present one, where the Petitioners are not able to link with the Portal and therefore, the fact of a technical glitch is not able to be accounted for in the system.

9. The Court therefore, directs that the Respondents to either open the Portal to enable the Petitioner to again file the TRAN-1 Form electronically, failing which they will accept the TRAN–1 Form already filed manually by the Petitioner.

[Emphasis Supplied]

Issues related to Sabka Vishwas(Legacy Dispute Resolution) Scheme, 2019

CHAQUE JOUR HR SERVICES PVT. LTD. VERSUS UNION OF INDIA & OTHRS._W.P. (C) NO. 1999 OF 2020

Issue: Declaration filed under the Sabka Vishwas Scheme has been rejected without any notice, opportunity of hearing and without referring to or considering the Petitioner's letter filed in pursuance to the declaration filed.

Facts:

- A Writ Petition has been filed before the Delhi High Court, challenging the impugned rejection order of declaration filed by the Petitioner under the Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019. The rejection has been made by the Designated Committee without any notice, without granting any hearing and without referring to or considering the Petitioner's letter filed in pursuance to the declaration filed.
- The one line ground mentioned in the rejection order is - *"The Concerned investigative authority has informed that amount was neither finally quantified nor communicated to the assessee till 30.06.2019."*

Provisions :

The said rejection is completely contrary to the provisions of the SVLDRS. "Tax dues", which provide for eligibility under the SVLDRS as the amount of duty payable under any of the indirect tax enactments which has been quantified on or before 30th day of June 2019. The SVLDRS has defined the term “quantified” in Section 121(r) as *a written communication of the amount of duty payable under the indirect tax enactment*.

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The said definition has been clarified by the CBIC vide binding Circular No. 1071/4/2019-CX.8 dated 27.08.2019. The para 4(a) of the said Circular provides that the relief is available for cases under investigation and audit where the duty involved is admitted by the assessee / declarant in a statement on or before 30.06.2019. Further the rejection has been made without giving any notice, without affording the opportunity of personal hearing and is hence bad in law for being arbitrary, illegal, unreasonable, violative of the Principal of natural justice and violative of Article 14, Article 19(1)(g) of the Constitution of India.

Ruling:

The Hon'ble Court has set aside the impugned rejection order dated 10.12.2019 passed by Designated Committee with a direction that fresh order be passed after granting reasonable opportunity of hearing and by passing a reasoned order.

Similar issue was there in the case of **Industrial personnel & security services pvt. Ltd. versus commissioner of central goods & services tax delhi south & anr. W.P.(C) 2244/2020.**

Kiran Borewells Vs. Union of India W.P. No. 51299/2019 – Delhi HC

Issue:

- SCN issued on 21.10.2019 and communications made vide letters dated 13.11.2018, 20.01.2019 and other various follow-ups.
- Scheme rejected on the ground that "tax dues were not intimated, therefore, the same was not quantified for the period involved.

Order:

- The impugned order dated 24.10.2019 is the unilateral decision taken by the Respondent without giving an opportunity of hearing to the Petitioner.
- Any order passed by the quasi judicial authority adversely affecting the rights of the parties should be strictly in adherence to the principles of natural justice.
- The petitioner shall appear before the respondent without waiting for any notice and put forth his explanation/submission.
- Designated Committee shall re-consider the matter after providing an opportunity of hearing and take a decision in accordance with law, in an expedite manner.

Nidhi Gupta Vs. Union of India and Anr. W.P.(C) 12917/2019- - Delhi HC

The court held the following:-

9.We expect from the respondents that they shall follow scrupulously the Scheme, 2019 and the provisions of the relevant Act whenever any benefit is to be given for the Central Excise and for the Service Tax. As and when the individual case will come to the Court in detail, the provisions of the Scheme, 2019 and the relevant Act shall be matched with the facts of that individual case. In view of disposal of the main writ petition, this application is dismissed as having become infructuous.

IGST on ocean freight in a CIF transaction

Mohit Minerals Pvt. Ltd. Vs Union of India(Gujarat High Court)

Facts of the case – Mohit Minerals Pvt Ltd. (hereinafter referred to as "importer") imported non-cooking coal from a foreign supplier in the non-taxable territory. The transaction was a CIF transaction i.e. the responsibility of transportation of goods was on the foreign supplier and the importer had to pay one consolidated amount to the supplier which included cost, insurance and freight for the goods imported. The foreign supplier hired a foreign transporter for the purposes of delivering goods to the customs station of clearance in India. The importer paid the custom duty and along with IGST at the time of importation of goods into India on the total CIF value (including the value of ocean freight).

The Central Government vide Notifications 08/2017-IT(R) and 10/2017-IT(R) dated 28.06.2017 made the importer liable to pay IGST on the value of Ocean Freight under the reverse charge mechanism for the transportation services received for the goods imported. Being a third party to the transportation services between the foreign supplier and the foreign transporter, the importer petitioner contended that there was no 'levy' of tax under the IGST Act since both the service provider and the service receiver of the transportation service were outside the territory of India. The transaction being an extra-territorial activity, the importer in the taxable territory was not liable to pay IGST on the said transaction. Another contention of the petitioner was that since the contract was a CIF contract, the importer had no means to determine the actual amount of freight charged by the transporter from the foreign supplier thereby no value for the purposes of levy of tax was available to him. The Central Government by way of a corrigendum to the impugned Notificaton No 08/2017-IT(R) notified that 10% of the CIF value shall be deemed to be the value of ocean freight on which the tax would be chargeable.

Issue : Is the importer liable to pay IGST on ocean freight in a CIF transaction when both the transportation service provider and service receiver are located in the non-taxable territory?

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- Ruling: The importer company shall not be covered under the definition of "recipient" under Section 2(93) of the CGST Act since the importer is not concerned with how the foreign supplier delivers the goods to the Indian Port and such foreign supplier is the one receiving the transportation services from the service provider in the non-taxable territory. The importer has neither availed the services of transportation of goods in a vessel nor is he liable to pay the consideration of such service given that the contract is a CIF contract.
- The court further held that the impugned notifications are ultra vires the act and go beyond the powers conferred by the statutes under the delegated legislation. It was held that Section 5(3) of the IGST Act, from where the Government is supposedly deriving its power to tax the transaction, does not provide that the Government may specify any other person (other than the recipient of supply)to be liable to pay tax.
- Since both the recipient of service and the provider of service are located in the non-taxable territory and the service has been performed outside India, the transaction fails to be covered under the levy of GST being an extra territorial event. This transaction is neither an inter-state supply nor an intra-state supply. Thus no tax can be levied and collected from the importer.
- The value of Ocean Freight is not known to the importer in a CIF transaction. In the absence of any machinery provision in the Act to determine the value on which tax has to be charged, the levy fails. The court quashed the provisions of determination of value in case of such transaction (10% of CIF value as the value of Ocean Freight), given by way of a corrigendum to Notification No. 08/2017-IT(R) as ultra vires and unconstitutional.
- It was also held by the Court that once the freight has already suffered the IGST as a part of the value of the goods being imported, the dual levy of the IGST cannot be imposed on the same freight amount by treating it as a supply of transportation service separately.

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- Hence, it was concluded that

"*no tax is leviable under the Integrated Goods and Services Tax Act, on the ocean freight for the services provided by a person located in a non-taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India and the levy and collection of tax of such ocean freight under the impugned Notifications is not permissible in law.*"

The Notifications were thus declared ultra vires and unconstitutional as they lacked legislative competency.

Issues relating to recovery of tax and interest

M/s Commercial Steel Engineering Corporation Civil Writ Jurisdiction Case No. 2125 of 2019- Patna High Court

Hon'ble Patna High Court has held that words "availed" or "utilized" used in Section 73 each denote a positive act , and when such positive act is substantiated, only then can the dealer concerned be liable for recovery of such amount of tax availed from the input tax credit or utilized by him. However, such credit must have been used by him i.e. the credit balance must have reduced.

The Hon'ble Court further stated that recovery u/s 73(1) can be initiated only where the input tax credit has been availed or utilized to reduce tax liability. Mere reflection of credit in electronic credit ledger would not amount to an act of availment for initiating proceedings u/s 73(1). The relevant extracts of the judgement are reproduced as under:

32. In my opinion, the Assistant Commissioner of State Taxes has somewhere got confused to treat the transitional credit claimed by the dealer as an availment of the said credit when in fact ***an availment of a credit is a positive act and unless carried out for reducing any tax liability by its reflection in the return filed for any financial year, it cannot be a case of either availment or utilization.*** *It is rightly argued by Mr. Kejriwal that* ***even if the respondent No. 3 was of the opinion that the petitioner was not entitled to such transitional credit at best, the claim could be rejected but such rejection of the claim for transitional credit does not bestow any statutory jurisdiction upon the assessing authority to correspondingly create a tax liability especially when neither any such outstanding liability exists nor such credit has been put to use.***

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33. Had it been a case where the credit shown in electronic ledger, was availed or utilized for meeting any tax liability for any year, there would be no error found in the action complained but it would be stretching the term 'availment' beyond prudence to treat the mere reflection of the transitional credit in the electronic credit ledger as an act of availment, for drawing a proceeding under Section 73(1) of 'the BGST Act'. The provisions underlying Section 73 is self eloquent and it is only if such availment is for reducing a tax liability that it vests jurisdiction in the assessing authority to recover such tax together with levy of interest and penalty under Section 50 but until such time that the statutory authority is able to demonstrate that any tax was recoverable from the petitioner, ***a reflection in the electronic credit ledger cannot be treated as an 'availment'.***

[Emphasis Supplied]

Whether the sale of food and drinks by a club to its members is taxable or not?

State of West Bengal v. Calcutta Club Limited (2017) 5 SCC 356.

- **Facts of the case**: The Assistant Commissioner of Commercial Tax officer issued a notice to the Club for failure to make payment of sale tax on sale of food and drinks to the permanent members during the quarter ending 30.06.2002.
- The Tribunal referred to Article 366(29-A) of the Constitution of India and Section 2(30) of the West Bengal Sales Tax Act, 1994, and eventually arrived at the conclusion that, the supplies of food, drinks and refreshments by the Clubs to their permanent members cannot be treated as deemed sales and also there is no exchange of consideration between the member's club and the permanent members of the Club, therefore the member's club are not eligible to tax.
- The Hon'ble Supreme Court then, on 3rd October, 2019, in the appeal decided by the Larger Bench of the Hon'ble Supreme Court arose from its division bench decision on whether the "doctrine of mutuality" survives even after the forty sixth Constitutional Amendment Act, 1982 by virtue of which a new clause (29-A) was inserted in Article 366 of the Constitution of India, 1950.

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The Hon'ble Supreme Court, while deciding the merits of the case, referred to the case of ***Young Men's Indian Association (supra)*** wherein it was categorically discussed and made the following observation:

- A **distinction** was brought out by the Bench between two where the club acts as **an agent of its members** and **when the property in the goods is sold** i.e. the property in food and drinks is passed to the members. The Court held that the club is stated and could only be held as acting as agent of the members and would not be construed as a party which sold the goods. Further, the members are joint owners of all the club property. Where such a club has the characteristics of a member's club i.e. where every member is a shareholder and every shareholder is a member, irrespective of being incorporated. On the other hand, proprietary clubs stand on a different footing altogether, where members are not owners of or interested in the property of the club. Here, some of the shareholders are not members or some members are not shareholders. Therefore, the supply of articles to a member at a fixed price by the club cannot be regarded as "sale". The essential thing was holding of the property by the agent or trustee must be a holding of and on behalf and not a holding antagonistic to members of the club.
- The club is only acting as an agent for its members in the matter of supply of various preparations to them ,**no sale would be involved as the element of transfer would be completely absent**. The members are the joint owners of the general property in all the goods of the club, and the trustees were their agents with respect to the general property in the goods.

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- **THE CONSTITUTION (Forty-sixth Amendment) Act, 1982** inserted in Article 366 of the Constitution of India, clause (29-A) in the Constitution of India.
- *"tax on the sale or purchase of goods" includes-*

(e) ***a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;***

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service is for cash, deferred payment or other valuable consideration,

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;"

Ruling : The Apex Court observed the following:

- The doctrine of mutuality continues to be applicable to members' club even after the 46th Amendment adding Article 366 (29-A) to the Constitution of India
- Young Men's Indian Association case continued to hold the field even after the 46th Amendment.
- Sub-clause (f) of Article 366(29-A) has no application to members' club.

The decision was that clubs are not entitled to charge, collect and pay service tax on any services made to members. The rationale for the decision was that if there are no members, there is no club and vice-versa.

Show Cause Notice is liable to be quashed if it has not been adjudicated within the time limit as prescribed under the Statue or within reasonable period, if no time limit is prescribed.

Sunder System Pvt. Ltd. Union of India and ors., W.P. (C) 8675/2017. Decided on 17.12.2019 by the Hon'ble Delhi High Court.

Facts: In this case, the impugned SCN was issued on 25.11.2011, for which a reply was filed dated 22.02.2012 and for which for which, the hearing was conducted and concluded on 12.02.2015, but no order was communicated to the Petitioner. The Petitioner filed a writ seeking quashing of the adjudication proceeding initiated by the impugned show-cause notice dated 25.11.2011 and the hearing notice dated 09.08.2017 as well as the subsequent corrigendum dated 20.09.2017 primarily on the ground that the adjudication proceeding had become barred by limitation in view of the limitation period of one year for adjudication from the date of the show-cause notice prescribed under Clause (b) of sub-section (4B) of Section 73 of the Finance Act, 1994.

Provisions: As per Section 73(4B)(a)&(b) of the Finance Act, 1994, the Central Excise Officer shall determine the amount of service tax due within 6 months from the date of notice where it is possible to do so, or within one year in respect of SCN issued by invoking the extended period of limitation on the ground of fraud, misrepresentation etc.. Further, the Board had issued a *Circular No. 732/48/2003-CX.: dated 05.08.2003* directing that after the conclusion of personal hearing, it is necessary to communicate the decision immediately or at least one month from the date of the personal hearing. The Board had also issued instructions *F. No. 280/45/2015-CX. 8A, dated 17.09.2015* emphasising that all the adjudicating authorities are directed to pass adjudicating order within the time limit prescribed.

CONT…

Issue: The short question for consideration that aroused before the Hon'ble High Court was the interpretation of Section 73(4B)(a)&(b) of the Finance Act, 1994.

Ruling: The High Court allowed the writ petition and held that a statutory authority has to decide the show-cause notice within the time prescribed wherever it is possible to do so. In the present case, it was certainly possible for the adjudicating authority to adjudicate upon the show-cause notice issued to the petitioner within a period of one year. Since that has not been done, the present writ petition is liable to be allowed on the short ground of limitation alone, and the SCN dated 25.11.2011 is quashed.

Raymond Limited v. Union of India, 2019 (368) E.L.T. 481. Decided on 06.08.2019 by the Hon'ble Bombay High Court

- **Facts:** In this case, the Petitioner challenged the action of the Department in seeking to revive six show cause notices which were issued during the years 2001 to 2004, for which notices for personal hearing in respect thereof were issued in the year 2018 i.e. after a gap 14 to 17 years from the issuance of impugned SCNs', and after 15 years of the last hearing in 2003 in respect of some of the impugned SCNs'.
- **Issue:** The issue before the Hon'ble High Court was whether in the present facts, commencement of adjudication proceedings after a long delay of 14 to 17 years is justified when the party in all these years has not been put to notice that the proceedings were kept in abeyance.
- **Provisions:** The Board had issued a Circular *C.B.E. & C. Circular No. 1053/2/2017-CX., dated 10-3-2017*, wherein it has been directed to the officers of the department to formally communicate to the assessee that the notices which have been issued to them, are being transferred to the call book.

CONT…

- **Ruling:** The Hon'ble High Court allowed the petition and quashed all the impugned SCNs' and hearing notices on the finding that when the notices are being kept in abeyance (by keeping them in the call book as in this case), the Department should keep the assessee informed of the same. This serves two fold purposes - One it puts the assessee to notice that the show cause notice is still alive and is only kept in abeyance. Therefore, the assessee can then safeguard its evidence, till the show cause notice is taken up for adjudication. Secondly, if the notices are being kept in the call book for some reason, the assessee gets an opportunity to point out to the Department that the reasons for keeping it in call book are not correct and the notices could be adjudicated upon immediately. Further, the Court also held that it was reasonable for the Petitioners to proceed on the basis that the department was not interested in prosecuting the show cause notices and had abandoned it. Therefore, even if, notices can be kept in the call book to avoid multiplicity of the proceedings, yet the principle of natural justice would require that before the notices are kept in the call book, or soon after, the petitioners are informed the status of the show cause notices so as to put the assessee to notice that the show cause notices are still pending.

Reliance Industries Limited v. Union of India 2019 (368) E.L.T. 854. Decided on 23.07.2019 by the Hon'ble Bombay High Court

- **Facts:** This petition under Article 226 challenges a notice of hearing dated 21.12.2018 issued by the office of the Commissioner of Customs (Import) seeking to adjudicate show cause notice issued on 28th March, 2002 under Section 28 of the Customs Act, 1962. The basis of the challenge to the notice of hearing, is the long delay in taking up adjudication proceedings.
- **Ruling**: The Hon'ble High Court allowing the Petition, quashed the SCN and held that long delay in taking up the adjudication of a show cause notice (without sufficient cause), would be indicative of the Revenue having abandoned the show cause notice. Further, the Court noted that the delay in adjudication would cause prejudice to the noticee as the men in the knowledge of the facts may not be available or even if available, memories fail. Besides, papers and records which may be an answer to the challenges in the notice may not be traceable. Thus, making it impossible to respond to the notice appropriately.

Kamdhenu Exim Pvt. Ltd. v. Union of India, 2019 (368) E.L.T. 303. Decided on 20.12.2018 by the Hon'ble Gujarat High Court.

- **Facts:** In the present case, though the SCN was issued in the year 2004 and the reply for the same was filed by the year 2005. A notice for personal hearing was issued in the year 2017 after a pretty long gap of 13 years, which was not served on the assessee. The Department passed by the Order in original in pursuance of the SCN issued to the Petitioner.
- **Ruling:** The Hon'ble High Court held that inordinate delay in adjudication proceedings pursuant to the show cause notice for nearly about 14 years is unreasonable, without any explanation, without there being any fault on the part of the Petitioners. Thus, the SCN as well as the Order in original are quashed on this ground.

Premier Limited v. Union of India, 2017 (354) E.L.T. 365. Decided on 13.02.2017 by the Hon'ble Bombay High Court

- **Facts:** In the present case, the SCN issued were not adjudicated for 25 years. The Revenue alleged that the assessee deliberately delayed the matter by seeking frequent adjournments.
- **Ruling:** The Hon'ble High Court held that the the quasi-judicial authorities should realise that they need not be friendly or liberal with the assessee and to such an extent as would give an opportunity to the assessee to complain that the Show Cause Notice having been issued decades back, it cannot be adjudicated. However, rejecting the allegation of the Department that inordinate delay was on the part of the assessee by seeking repeated adjournments, the Court were of the view that it is impossible for the assessee to remember what was the issue and some decades back, what are the records on which it is based and how it is to be presented. In such circumstances, the petitioners should be denied the relief of delay in adjudicating the SCN. Thus, the Hon'ble High Court quashed the impugned SCN and declared that it cannot be adjudicated any longer.
- ***Note: That the above order was challenged by the Department before the Hon'ble Supreme Court which was dismissed by the Apex Court vide its order dated 16.08.2017, thereby restoring the order of the Hon'ble Bombay High Court.***

Lanvin Synthetics Private Limited v. Union of India, 2015 (322) E.L.T. 429. Decided on 15.07.2015 by the Hon'ble Bombay High Court.

- **Facts:** In the present case, the SCN was not adjudicated for 18 years. The Petitioner had paid the entire amount of demand under protest prior to issue of SCN. The Department in explanation for delayed adjudication pleaded that records were not traceable despite best efforts and requested the Petitioner to submit copies of the documents again for adjudication. There was no time limit prescribed under the law for adjudication of the SCN.
- **Ruling:** The Hon'ble High Court noted that no explanation has been given by the Department as to why SCN was not adjudicated for 17 long years. The Court held that if the law postulates early end to such proceedings and there is no period of limitation prescribed, does not mean that the proceedings initiated could be concluded at the sweet will and fancies of the department. The Hon'ble Court even after taking note of the Department's objection that the assessee had approached the Court after a lapse of several years, but that alone cannot refuse any relief to the petitioners of quashing of the proceedings of the show cause notice once the legal principles are well settled. Thus, by allowing the Petition, the Court quashed the SCN and prohibited the Department from passing any adjudication order in furtherance thereof.
- The Hon'ble Court also granted liberty to the Petitioner to institute such proceedings as are permissible in law for recovery of sums deposited with accrued interest.

Issues relating to Liquidated Damages

Issues relating to Liquidated Damages

Background:

- Levy of Service Tax/ GST on amounts received or recovered as Liquidated Damages has been a litigative issue under the erstwhile Service Tax Regime and also under the GST Regime.
- The revenue has been keen to tax such amounts under the category of *agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act* as declared service u/s 66E of the Finance Act, 1994 (Service Tax Law).
- Schedule II of the CGST Act contains an identical entry which classifies as the activity of *agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act* as a Service.

M/s K. N. Food Industries Pvt. Ltd. Service Tax Appeal No.70737 of 2018

The Hon'ble CESTAT Allahabad has held that for invocation of the clause (e) of Section 66(E) i.e. *agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act* to levy Service Tax , there has to be first a concurrence to assume an obligation to refrain from an act or tolerate an act. Payments or recoveries arising from "unintended" events and not emanating from any obligation on the part of any of the parties to an agreement to tolerate an act or a situation cannot be considered to be the payments for any services. The relevant extract of the judgment is reproduced as under:

Contd…

4. …

In the present case apart from manufacturing and receiving the cost of the same, the appellants were also receiving the compensation charges under the head ex-gratia job charges. The same are not covered by any of the Acts as described under Section 66E (e) of the Finance Act, 1994. The said Sub-clause proceeds to state various active and passive actions or reactions which are declared to be a service namely; to refrain from an act, or to tolerate an act or a situation, or to do an act. **As such for invocation of the said clause, there has to be first a concurrence to assume an obligation to refrain from an act or tolerate an act etc. which are clearly absent in the present case.** *In the instant case, if the delivery of project gets delayed, or any other terms of the contract gests breached, which were expected to cause some damage or loss to the appellant, the contract itself provides for compensation to make good the possible damages owning to delay, or breach, as the case may be, by way of payment of liquidated damages by the contractor to the appellant.* ***As such, the contracts provide for an eventuality which was uncertain and also corresponding consequence or remedy if that eventuality occurs****. As such the present ex-gratia charges made by the M/s Parle to the appellant were towards making good the damages, losses or injuries arising from "unintended" events and does not emanate from any obligation on the part of any of the parties to tolerate an act or a situation and cannot be considered to be the payments for any services.*

[Emphasis Supplied]

M/s Amit Metaliks Limited Service Tax Appeal No. 76639 of 2018-[DB]- Liquidated Damages are actionable claims

The Division Bench of Hon'ble CESTAT Kolkata has held that liquidated damages are in the nature of actionable claim and are thus outside the scope of definition of *"service"*. The relevant extract is reproduced as under:

25. We also find a considerable force in the contention raised by the learned Advocate that the compensation received by the Appellant from the cultivators and M/s AML, the debt in present and future, which as per Transfer of Property Act in the category of Actionable Claim placing reliance on the decision of Hon'ble Supreme Court in case of ***Kesoram Industries and Sunrise Association(Supra)***

13. A careful reading of the Settlement Agreement in question clearly show that the land owners have agreed to pay a definite sum, that is, an ascertained amount to the Appellant developer to resolve all claims of settlement.

The settlement agreements have resulted in creation of a debt in favour of the Appellant.

Under the said circumstances a debt is clearly created and the said amount would fall within the scope and ambit of an actionable claim within the meaning of Section 3 of the Transfer of Property Act, 1882 and hence excluded from the definition of ' service' as per Section 65B(44).

14. It is submitted that the amount in question is an ' actionable claim' which is not liable for any service tax under the provisions of the 1994 Act. The meaning, nature and scope of actionable claim has been dealt with in detail by the Constitution Bench of the Hon'ble Supreme Court of India in case ***of Sunrise Association vs. Govt. of NCT of Delhi reported in (2006) 5 SCC 603.***

26. Thus, we held that the entire sum of money would be classified as Actionable Claim which otherwise is beyond the scope of service tax under Section 66B(44) (iii) of the Finance Act. If the transaction of Development Agreement, Settlement Agreement and compensation not fall under 'Service' under the Finance Act there is no application of Section 66 E(e) of the Act ibid.

[Emphasis Supplied]

M/s HCL Learning Ltd. Service Tax Appeal 70580 of 2018- No Service Tax on Notice Pay

The Hon'ble CESTAT Allahabad has held that notice pay recovered from the salary of employees for termination of employment agreement is not covered by the provisions of Service Tax. The relevant extract is reproduced as under:

1…

From the record, we note that the term of contract between the appellant and his employee are that employee shall be paid salary and the term of employment is a fixed term and if the employee leaves the job before the term is over then certain amount already paid as salary is recovered by the appellant from his employee. This part of the recovery is treated by Revenue as consideration for charging service tax.

2. We hold that the said recovery is out of the salary already paid and we also note that salary is not covered by the provisions of service tax. Therefore, we set aside the impugned order and allow the appeal.

[Emphasis Supplied]

M/s Vikhroli Corporate Park v. CST, Mumbai 2016 (12) TMI 484-CESTAT Mumbai

The Hon'ble CESTAT has held that the amount which was forfeited as liquidated damages for not taking the possession of the premises contracted for by the customer is not liable to Service Tax. The Hon'ble CESTAT had also relied upon the judgment of Hon'ble Supreme Court in the matter of ***United Breweries Ltd. v. State of Andhra Pradesh [1997] 105 STC 177 (SC)*** wherein the court has held that security deposit forfeited by the company is in the nature of liquidated damages. The relevant para of the judgment is extracted as under:

*5.3 As regards Service Tax liability on the amount which was forfeited by the Appellant as liquidated damages for rendition of the customer in not taking the possession of the premises contracted for, **we do agree that Service Tax liability on such amount forfeited as liquidated damages does not arises**. Similar issue came up before Hon'ble Apex Court in the case of **United Breweries Ltd**. (supra). In the said case United Breweries Ltd. (supra) the issue was of security deposit of the bottles which was not returned which was forfeited by the said Company. We find the ratio of the judgment can be applicable in the case in hand which is in **paragraph 19** of the judgment which we respectfully reproduce.*

Contd…

“ *We are unable to uphold this contention. Whether the bottles and the crates were sold along with the beer or not will depend upon the intention of the parties. We have set out the terms and conditions under which the beer was sold and it does not appear from these terms and conditions that UB intended to sell crates and bottles to the customers. On contrary it was very anxious to get back these crates and bottles in order to use them again for further supplies. The fact that UB advised customers to charge similar deposits from their consumers and get back the bottles from them goes to show that an out and out sale of the bottles had not taken place. By taking the deposits UB merely ensured the return of the bottles and the crates. A deposit of forty paise per bottle was taken to ensure return of the bottles. In our view, the deposit amount which was liable to be forfeited on failure of the return of bottle was in the nature of liquidated damages recoverable by the supplier under Section 74 of the Contract Act. An overall view has to be taken of the dealings and transactions between the manufacturer of the beer, its customers and the consumers. The intention of UB does not appear to have been to sell the beer bottles. Nor was there any intention of the retailers to sell the bottles to the consumers. On the contrary, by the terms and conditions of the agreement UB was trying to ensure that the bottles in which the beer was supplied to the consumers through their customers were brought back to it so that they could be used again for fresh supply of beer at a cheap rate.”*

Issues relating to Anti-profiteering

M/S SIGNATURE BUILDERS PVT. LTD. VS UNION OF INDIA (DELHI HIGH COURT)W.P (C) 9248/2019

Facts of the case: It was alleged by M/s Signature Builders Pvt. Ltd. that the National Profiteering Authority has shared the business secrets of the Company with a flat buyer in the most illegal manner, in gross breach of provisions of law, in gross violation of their authority and to ensure that the company would be unable to take steps available in law.

In this petition ,the validity of Rule 126 of the CGST Rules, 2017 was challenged, under which the Central Government has further sub-delegated the power to determine the procedure and also methodology to the National Anti-profiteering Authority without providing any guidelines on the same on the ground that the same violates well settled principle *"Delegatapotestas non potestdelegari*" which means no delegated power can be further delegated, and also on the ground that it is against the mandate of parent provision of CGST Act.

Therefore, "Procedure and methodology" issued under Rule 126 of the CGST Rules was challenged for being arbitrary, illegal and violative of Article 14 and 19 of the Constitutions as the same has been framed by virtue of excessive delegated power and against the principles of law.

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That Petitioner is filing this petition to challenge the validity of Rule 126 of the CGST Rules, 2017, under which the Central Government has further sub-delegated the power to determine the procedure and also methodology to the National Anti-profiteering Authority without providing any guidelines on the same on the ground that the same violates well settled principle *"Delegatapotestas non potestdelegari*" which means no delegated power can be further delegated and also it is against the mandate of parent provision of CGST Act. The Petitioner has also challenged "Procedure and methodology" issued under Rule 126 of the CGST Rules for being arbitrary, illegal and violative of Article 14 and 19 of the Constitutions as the same has been framed by virtue of excessive delegated power and against the principles of law.

Issue : Whether sharing of information by the Anti-profiteering Authority with the complainant is warranted or not?

Ruling : The Hon'ble Delhi High Court was pleased to issue notice, and also to direct the Respondents i.e. Anti-profiteering Authority to produce the relevant record, which has been provided to the said flat buyer on 24.09.2019, and also the flat buyer has been directed not to use the information provided by the Anti-profiteering Authority for any purpose other than the purpose of enquiry in relation to anti-profiteering.

RAMPRASTHA PROMOTERS AND DEVELOPERS PVT. LTD. VS. THE UNION OF INDIA(DELHI HIGH COURT) (W P (C) 12847/2019)

Facts of the case : In the matter of M/s Ramprastha Promoters and Developers Pvt. Ltd. A petition was filed against the National Profiteering Authority challenging the order-sheet passed the NAA by which it has directed the Petitioner to produce information/documents in respect of all the projects of the Petitioner Company. That the said order-sheet has been challenged for being beyond the scope of the proceedings pending before the NAA which was initiated on the basis of the complaint of one of the buyers of the one of the projects.

In this petition Section 171 of the CGST Act read with the allied Rules was challenged on various grounds inter alia i.e. for delegating the excessive essential legislative power to the Central Government without providing any guidelines, unconstitutional composition of NAA because it consists of only 4 technical members, and one chairman whose post is equivalent to the secretary of Government of India, for not providing any mechanism/methodology for computation of profiteering etc.

CONT…

Issue : Whether the order sheet passed by the Respondents i.e. Anti-profiteering Authority beyond the scope of its proceedings?

Ruling : The Hon'ble Delhi High Court was pleased to issue notice, and also to direct the Respondents i.e. Anti-profiteering Authority to first consider the fundamental jurisdictional issued raised by the Petitioner and pass a reasoned order on the same. In case the respondent passes a reasoned order holding that they have jurisdiction, it shall be open to respondent to pass an order on merits.

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M/s. Sarvpriya Securities Pvt. Ltd.vs Union of India and Others (Delhi High Court) W.P.(C) 2445/2020

Facts : M/s Sarvpriya Securities Pvt. Limited. (hereinafter referred to as the Petitioner) is engaged in the business of development and sale of residential/commercial properties. The present case relates to development and sale of affordable group housing wherein the sale price is fixed by the Government. The Petitioner has issued covering letter to Pre- intimation-cum-demand letter dated 18.07.2018 to the flat buyers informing them that the Petitioner is giving the benefit of Input Tax Credit (hereinafter referred to as “ITC”) calculated at the rate of 75.75 per sq. ft. under Section 171 of the CGST/ HGST Act.

CONT…

- That on the basis of the report dated 14.06.2019 issued by the DGAP, the NAA issued a **show cause notice dated 02.07.2019** to the Petitioner to show cause as to why the report of DGAP dated 14.06.2019 alleging profiteering of Rs. 5,91,01,833/- should not be accepted and the liability on account of the profiteering should not be determined as against the Petitioner.
- The NAA issued the an **order dated 24.12.2019** and observed the following:
- Petitioner has contravened Section 171 of the CGST Act wherein the profiteered amount is determined as Rs. 9,96,18,637/- which includes GST @12% or 8% along with the interest @18%payable from the date from which the excess amount was collected the Petitioner from the buyer still the date of its payment.
- It is pertinent to note that the amount of profiteering of Rs. 9,96,18,637/- as determined by NAA in its order 24.10.2019 is much more than the profiteering of Rs. 5,91,01,833/- alleged by the NAA in its notice dated 02.07.2019.
- Therefore, the profiteering calculated by the NAA in its impugned order dated 24.10.2019 is beyond the amount of profiteering as alleged in the Show cause notice issued by the NAA, dated 02.07.2019.

CONT…

- The impugned order also mentions that the Petitioner has contravened Section 171(1) of CGST Act, 2017 and has committed and offence under Section 171 (3A) and therefore is liable for imposition of penalty under the above section.

A writ petition was filed before the Delhi High Court to challenge the **order dated 24.12.2019** and **notice dated 02.07.2019** issued by the National Anti-Profiteering Authority. The Petitioner also filed this petition **challenging Section 171 of the CGST Act, 2017 as also Rules 122 to 137 and Rule 21(c) of the CGST Rules for being *ultra vires* Article 14, 19(1)(g) and 246 of the Constitution of India.**

- **Interim Order** : The Hon'ble Delhi High Court vide order dated 03.03.2020 has granted stay in the operation of the order dated 24.12.2019 issued by NAA subject to the petitioner depositing 10% of the amount of profiteering assessed by the NAA i.e. Rs 9,96,18,637/- within 4 weeks of the said order.

Other litigative issues

1. GST is levied at an effective rate of 12 percent **(standard rate of 18 percent less a deduction of 1/3rd of the value of land**) on **sale of under construction property** , where completion certificate has not been issued at the time of sale**.**
2. There is a **fixed rate of 5% without ITC** on restaurant services. But there is no provision to pay a higher rate of tax and avail ITC in case of restaurant services as in cases of goods transport agency or rent-a-cab services**.**
3. The department issuing notices for **non-matching of input tax credit availed in GSTR 3B and amount reflected in 2A.** No provision into effect **till restriction imposed vide Rule 36(4) w.e.f. 09.10.2019**.
4. One of the conditions for availing input tax credit under Section is that the tax charged in respect of supply of goods or services **has been actually paid to the Government**, in respect of the said supply.

THANK YOU

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