Critical Issues Emerging from Recent Important Judicial Pronouncements under GST

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- *The views expressed during the presentation are the personal views of the author/speaker and are based on the law as existing on 14.09.2022.*
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Payment of GST under the wrong head

Ola Fleet Technologies Pvt Ltd

Vs

The Union Of India

2022-VIL-434-TEL

Facts of the case

- Ola Fleet Technologies Private Limited ("Ola Fleet") is engaged in providing passenger transport motor vehicles on a rental basis to various individuals for commercial usage.

- Ola Fleet leases vehicles to various drivers located in different states. Ola Fleet is registered under GST in the state of Telangana. If the driver is located in Telangana, Ola Fleet charges CGST and SGST, and if the driver is located in another State, IGST is charged.

- Ola Fleet was subjected to an audit by the GST department under section 65 of the CGST Act, 2017, for FY 2018-19. During the audit, the authorities noticed that the transactions related to the state of Telangana were mapped to Andhra Pradesh, resulting in payment of IGST of Rs. 6 crores instead of CGST and SGST of Rs. 3 crores each.

- It was found that this error was due to incorrect mapping of the Place of supply in the accounting system of Ola Fleet.

- Show cause notice was issued to Ola Fleet demanding payment of CGST and SGST.

- Ola Fleet challenged the same in the Telangana High Court by filing a writ petition and relying on the judgement of the **Kerala High Court** in the case of **Saji S.** reported at **2018 (19) GSTL 385 (Kerala)**. In that case, Kerala High Court had allowed adjustment of refund under one head against demand under another head in terms of proviso to Rule 4(1) of CGST Rules, 2017.

Court’s comment and observations

- The Telangana High Court dismissed the petition and ordered the assessee to pay CGST and SGST in terms of Section 19 of the IGST Act, 2017 relying upon the judgement of **Jharkhand High Court** in the case of **Shree Nanak Fero Alloys Private Limited** reported at **2020 (35) GSTL 393 (Jhar.)**

- The Telangana High Court observed that allowing adjustment of IGST paid by the Ola Fleet with CGST and SGST would amount to adopting a procedure that is not provided under the relevant statute. It would be going beyond the statute.

- However, the Telangana High Court gave liberty to Ola Fleet to file a refund of wrongly paid IGST and ordered the revenue to process the said refund application within two months of receipt of refund application, provided Ola Fleet complies with the demand in Show Cause Notice.

Issues arising from the Judgement

A. **Is the reasoning given by Telangana High Court while passing the order correct?**

B. Now, what are remedies available with Ola Fleet?

C. If Ola Fleet has made a similar mistake in FY 2020-21 wherein CGST and SGST of Rs. 3 crores each were paid instead of IGST of Rs. 6 crores, whether it can adjust the excess payment of CGST / SGST in FY 2020-21 against the CGST / SGST demand of FY 2018-19?

D. In FY 2020-21, Ola Fleet made a similar mistake in making payment of GST under the reverse charge mechanism on legal services received from an Advocate in Mumbai, Maharashtra. Here, instead of making payment of IGST on the legal services, it has paid CGST and SGST. Since the place of supply is not reported in GST returns, will an adjustment be allowed?

Relevant Provisions

- **Section 19 of the IGST Act, 2017 - Tax wrongfully collected and paid to Central Government or State Government**

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

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

Relevant Provisions

- **Section 77 of the CGST Act, 2017 - Tax wrongfully collected and paid to Central Government or State Government**

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

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

Relevant Provisions

- **Section 54 of the CGST Act, 2017 - Refund of tax**

(10) Where any refund is due to a registered person who has defaulted in furnishing any return or who is required to pay any tax, interest or penalty, which has not been stayed by any court, Tribunal or Appellate Authority by the specified date, the proper officer may-

(a) withhold payment of refund due until the said person has furnished the return or paid the tax, interest or penalty, as the case may be;

(b) deduct from the refund due, any tax, interest, penalty, fee or any other amount which the taxable person is liable to pay but which remains unpaid under this Act or under the existing law.

Relevant Provisions

- **Rule 92 of the CGST Rules, 2017 - Order sanctioning refund**

(1) Where, upon examination of the application, the proper officer is satisfied that a refund under sub-section (5) of section 54 is due and payable to the applicant, he shall make an order in FORM GST RFD-06 sanctioning the amount of refund to which the applicant is entitled, mentioning therein the amount, if any, refunded to him on a provisional basis under sub-section (6) of section 54, amount adjusted against any outstanding demand under the Act or under any existing law and the balance amount refundable

~~Provided that in cases where the amount of refund is completely adjusted against any outstanding demand under the Act or under any existing law, an order giving details of the adjustment shall be issued in Part A of FORM GST RFD-07.~~ **[Omitted vide Notification No. 15/2021-Central Tax, dated 18.05.2021]**

Relevant Provisions

- **Rule 92 of the CGST Rules, 2017 - Order sanctioning refund**

(1A) Where, upon examination of the application of refund of any amount paid as tax other than the refund of tax paid on zero-rated supplies or deemed export, the proper officer is satisfied that a refund under sub-section (5) of section 54 of the Act is due and payable to the applicant, he shall make an order in FORM RFD-06 sanctioning the amount of refund to be paid, in cash, proportionate to the amount debited in cash against the total amount paid for discharging tax liability for the relevant period, mentioning therein the amount adjusted against any outstanding demand under the Act or under any existing law and the balance amount refundable and for the remaining amount which has been debited from the electronic credit ledger for making payment of such tax, the proper officer shall issue FORM GST PMT-03 re-crediting the said amount as Input Tax Credit in electronic credit ledger

(2) Where the proper officer or the Commissioner is of the opinion that the amount of refund is liable to be withheld under the provisions of sub-section (10) or, as the case may be, sub-section (11) of section 54, he shall pass an order in [Part A] of FORM GST RFD-07 informing him the reasons for withholding of such refund.

Provided that where the proper officer or the Commissioner is satisfied that the refund is no longer liable to be withheld, he may pass an order for release of withheld refund in Part B of FORM GST RFD-07.

Relevant Case Laws

- **Shree Nanak Ferro Alloys Pvt Ltd Vs the Union of India through the Commissioner, Central Goods and Service Tax and Central Excise, Ranchi and other - 2020-VIL-30-JHR**

"14. Coming to the facts of the present case, we find that admittedly, the petitioner Company had discharged their tax liability under the IGST head, but inadvertently or otherwise, the petitioner deposited the amount under the CGST head. It is not the case that the petitioner Company has concealed the transaction or has committed any fraud in discharging its tax liability. It is a plain case in which the tax has been paid by the petitioner to the Central Government, but not under the IGST head, rather under the CGST head. The contention of learned counsel for the CGST is that there was some ulterior motive behind the deposit of tax under the CGST head, which is evident from the fact that the petitioner had filed its GSTR-1 in which the tax liability was correctly shown, showing the supply to be the inter-State supply, but the stand was changed in the form GSTR-3B. From the letter dated 05.04.2019, issued by the respondent No.2 as contained in Annexure-6 to the writ application, it is apparent that for discharging his liability of tax, the petitioner had deposited cash in its electronic cash ledger, as admitted in the letter itself. Had there been otherwise intention on the part of the petitioner, the same cash could have been deposited by the petitioner in the electronic cash ledger used to deposit the tax under the IGST head, but it is the claim of the petitioner that inadvertently due to the fact that it was the initial stages of the GST regime, the cash was deposited in the electronic cash ledger of CGST head. There appears to be substance in the submission of learned counsel for the petitioner, inasmuch as, by deliberately depositing the cash in the electronic cash ledger for the CGST head, at the place of IGST head, possibly no benefit was going to be derived by the petitioner Company.

Relevant Case Laws

In that view of the matter, we are not in a position to doubt the bona fides of the petitioner Company, that due to the initial stage of the CGST regime, there might be some confusion, and the cash was wrongly deposited in the wrong electronic cash ledger."

15. That being the position, though we find from the plain reading of Section 49 (3) and (4) of the CGST Act, that learned counsel for the CGST may be right in his contention that under Section 49 (3) of the CGST Act, the 'electronic cash ledger' may be used for making the payment of the tax and the other liabilities under this Act only, i.e., CGST Act, and there is no provision of cross utilization of the fund as in case of 'electronic credit ledger' under Section 49 (4) of the CGST Act, but Section 77(1) of the CGST Act, read with Section 19(2) of the IGST Act, clearly lay down that a registered person who has paid the Central tax, treating the transaction to be intra-State supply, as in the case of the petitioner, but which turns out to be inter-State supply, is entitled to the refund of the amount of tax so paid, under Section 77 (1) of the CGST Act, and at the same time such person cannot be saddled with the liability of interest in view of the provision of Section 19 (2) of the IGST Act. The contention of the learned counsel for the CGST that these provisions are for the persons acting bona fide, may also be accepted, but there is nothing on the record of this case to show that the petitioner Company had not acted bona fidely, particularly in view of the fact that the transaction relates to the early stages in which the GST regime had been implemented, and there might be some confusion prevailing at that initial stage. In that view of the matter, we do not find any plausible reason whatsoever, to deny the petitioner Company the benefit of the provisions of Section 77 (1) of the CGST Act, read with Section 19(2) of the IGST Act."

Relevant Case Laws

- **Saji S. Proprietor vs The Commissioner, State GST Department, Thiruvananthapuram and others - 2018 (19) G.S.T.L. 385 (Ker.)**

"9. As seen, Section 77 provides for the refund of the tax paid mistakenly under one head instead of another. But Rule 4 speaks of adjustment. Where the amount of refund is completely adjusted against any outstanding demand under the Act, an order giving details of the adjustment is to be issued in Part A of FORM GST RFD-07. The petitioner's counsel lays stress on this process of adjustment and asserts that the amount remitted under one head can be adjusted under another head, for the demand can be any amount under the Act.

10. Under these circumstances, I find no difficulty for the respondent officials to allow the petitioner's request and get the amount transferred from the head 'SGST' to 'IGST'. It may, as the Government Pleader has contended, take some time, but it is inequitable for the authorities to let the petitioner suffer on that count."

Issues arising from the Judgement

A. Is the reasoning given by Telangana High Court while passing the order correct?

B. Now, what are remedies available with Ola Fleet?

C. If Ola Fleet has made a similar mistake in FY 2020-21 wherein CGST and SGST of Rs. 3 crores each were paid instead of IGST of Rs. 6 crores, whether it can adjust the excess payment of CGST / SGST in FY 2020-21 against the CGST / SGST demand of FY 2018-19?

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Relevant Provisions

- **Section 17 of the IGST Act, 2017 - Apportionment of tax and settlement of funds**

17. (1) Out of the integrated tax paid to the Central Government,--

(a) in respect of inter-State supply of goods or services or both to an unregistered person or to a registered person paying tax under section 10 of the Central Goods and Services Tax Act;

(b) in respect of inter-State supply of goods or services or both where the registered person is not eligible for input tax credit;

(c) in respect of inter-State supply of goods or services or both made in a financial year to a registered person, where he does not avail of the input tax credit within the specified period and thus remains in the integrated tax account after expiry of the due date for furnishing of annual return for such year in which the supply was made;

(d) in respect of import of goods or services or both by an unregistered person or by a registered person paying tax under section 10 of the Central Goods and Services Tax Act;

(e) in respect of import of goods or services or both where the registered person is not eligible for input tax credit;

Relevant Provisions

(f) in respect of import of goods or services or both made in a financial year by a registered person, where he does not avail of the said credit within the specified period and thus remains in the integrated tax account after expiry of the due date for furnishing of annual return for such year in which the supply was received,

the amount of tax calculated at the rate equivalent to the central tax on similar intra-State supply shall be apportioned to the Central Government.

(2) The balance amount of integrated tax remaining in the integrated tax account in respect of the supply for which an apportionment to the Central Government has been done under sub-section (1) shall be apportioned to the,--

(a) State where such supply takes place; and

(b) Central Government where such supply takes place in a Union territory:

Provided that where the place of such supply made by any taxable person cannot be determined separately, the said balance amount shall be apportioned to,--

(a) each of the States; and

(b) Central Government in relation to Union territories,

Relevant Provisions

in proportion to the total supplies made by such taxable person to each of such States or Union territories, as the case may be, in a financial year:

Provided further that where the taxable person making such supplies is not identifiable, the said balance amount shall be apportioned to all States and the Central Government in proportion to the amount collected as State tax or, as the case may be, Union territory tax, by the respective State or, as the case may be, by the Central Government during the immediately preceding financial year.

(2A) The amount not apportioned under sub-section (1) and sub-section (2) may, for the time being, on the recommendations of the Council, be apportioned at the rate of fifty per cent. to the Central Government and fifty per cent. to the State Governments or the Union territories, as the case may be, on ad hoc basis and shall be adjusted against the amount apportioned under the said sub-sections

Renting of Residential Premises

Taghar Vasudeva Ambrish

vs.

Appellate Authority for Advance Ruling Karnataka, Bengaluru and others

2022-VIL-110-KAR

Facts of the case

- Shri Taghar Vasudev Amrish and four others collectively let out a Residential complex to DTwelve Spaces Pvt. Ltd under a single agreement.
- The leased premises comprised 42 rooms and the 2400 sq. ft. of terrace area. The consideration, i.e., lease rental, was payable to the bank accounts of each lessor at a fixed percentage of monthly rent.
- DTwelve Spaces Pvt. Ltd ("lessee" or "company") was engaged in the business of providing affordable residential accommodation to students on a long-term basis (starting from 3 to 11 months).
- Along with such accommodation, the company also offered a host of other services, such as maintenance, food, Wi-Fi, etc., as a part of a package generally called Paying Guest Accommodation.
- The company had entered into a lease agreement with students. It was not charging GST on the rentals considering it as an exempt supply in terms of Entry No. 13 of Notification No. 9/2017-I.T. (Rate) – 'Services by way of renting of residential dwelling for use as a residence.'
- The company believed that lessors also should not charge GST on the lease rental.

Facts of the case

- Advance Ruling was sought by the lessors wherein Authority Ruling Authority, Karnataka held that leasing services in question were not covered under Entry no. 13 because -
  - The property so let out by lessor does not fit into the meaning of residential dwelling, and they are like hotel rooms.
  - Lessee is not using the premises as a residence.
  - That even if it is considered that the property is let out for residential purposes, the services provided by Lessee are not for use as a residence.
  - Service of Lessee and ultimate use of the property is similar to that of hotel, inn, guest house, club site, etc., covered under different entry.

- An appeal was filed before Appellate Authority for Advance Ruling, Karnataka, against the above order. However, the said appeal was dismissed on the ground that –
  - Property rented out by the petitioner is a hostel building more akin to sociable accommodation rather than what is commonly understood as residential accommodation. Therefore, the property rented out by the petitioner cannot be termed a residential dwelling.
  - Benefit of exemption notification is available only if the residential dwelling is used as a residence by the person who has taken the same on rent/lease.

  - Aggrieved by the same, the lessors filed a writ petition before the High Court of Karnataka.

Submission of Petitioner

6…principle of purposive interpretation has to be applied while interpreting an exemption notification and the regard must be had to its purpose and object."

7… It is argued that the activity carried out by the petitioner is not a business activity and the premises are used for residential purposes. It is contended that there is a perceptible difference between hotel or lodging house and student hostel.

Reliance has been placed on the following Judgements:

- *'State of Kerala Vs. Mother Superior Adoration Convent' (2021) 5 SCC 602 - 2021-VIL-43-SC*
- *'Bandu Ravji Nikam Vs. Acharyaratna Deshbhushan Shikshan Prasara Mandal' (2003) 3 Mhlj 470.*
- *Borbheta Estate (P) Ltd., In Re (2019) 106 Taxmann.Com 386 (Aar - West Bengal) - 2019-VIL-181-AAR.*

Court’s comment and observations

- The court held premise in question is a residential dwelling, and leasing of such premises is exempt from GST. The court held as under –

  - Accommodation, used as a hostel for students and working women, is classified in the residential category in the Revised Master Plan 2015 of Bangalore City.

- *“12. In the backdrop of aforesaid well settled legal principles, we may advert to the facts of the case in hand. Entry 13 contained in the exemption notification is unambiguous and is clear. It provides for exemption from payment of Integrated Goods and Service Tax in respect of 'services by way of renting of residential dwelling by way of use as residence'. The burden is of course on the petitioner to show that his case comes within the parameters of the exemption notification. The expression 'residential dwelling' has not been defined. It is pertinent to note that under the erstwhile service tax law, the expression 'residential dwelling' was defined in paragraph 4.13.1 of Taxation of Services: An Education Guide dated 20.06.2012 which was issued by Central Board of Indirect taxes and Customs which is reproduced below for the facility of reference:*

  4.13.1 What is a 'residential dwelling’?
  The phrase 'residential dwelling' has not been defined in the Act. It has therefore to be interpreted in terms of the normal trade parlance as per which it is any residential accommodation, but does not include hotel, motel, inn, guest house, camp - site, lodge, house boat, or like places meant for temporary stay.

Court's comment and observations

Thus, in the aforesaid education guide issued by Central Board of Indirect Taxes and Customs which contains clarifications, it is provided that in normal trade parlance residential dwelling means any residential accommodation and is different from hotel, motel, inn, guest house etc. which is meant for temporary stay. The aforesaid clarification which is issued by the Board, in the absence of anything to the contrary in the Act, binds the Respondent.

14…Therefore, we may also refer to the meaning of the expression 'residence' and 'dwelling' as defined in Concise Oxford English Dictionary 2013 Edition as well as BLACKS LAW DICTIONARY 6th Edition to ascertain its meaning in common parlance and in popular sense which read as under:

- ***The Concise Oxford Dictionary:***

  - *Domicile:*
    1. the country in which a person has permanent residence.
    2. the place at which a company or other body is registered.

  - *Residence:*
    1. the fact of residing somewhere.
    2. a person's home.
    3. the official house of a government minister or other official figure.

Court’s comment and observations

- ***Blacks Law Dictionary:***

  - *Residence- Place where one actually lives or has his home; a person's dwelling place or place of habitation; an abode; house where one' home is; a dwelling house.*

  - *Dwelling- The house or other structure in which a person or persons live; a residence; abode; habitation; the apartment or building , or a group of buildings, occupied by a family as a place of residence. Structure used a place of habitation.*

Thus, it evident that the expression 'residence' and 'dwelling' have more or less the connotation in common parlance and therefore, no different meaning can be assigned to the expression 'residential dwelling' and it cannot be held that the same does not include hostel which used for residential purposes by students or working women.

Court’s comment and observations

- “13. It is noteworthy that the accommodation which is used for the purposes of the hostel of students and working women is classified in residential category in the Revised Master Plan 2015 of Bangalore City. The Supreme Court in KISHORE CHANDRA SINGH VS BABU GANESH PRASAD BHAGAT AIR 1954 SC 316 has held that expression residence only connotes that a person eats, drinks and sleeps at that place and it is not necessary that he should own it. The aforesaid decision was referred to by Bombay High Court in BANDU RAVJI NIKAM SUPRA. The hostel is used by the students for the purposes of residence. The students use the hostel for sleeping, eating and for the purpose of studies for a period ranging between 3 months to 12 months. In the hostels, the duration of stay is more as compared to hotel in guest house, club etc.”

- Notification does not require the lessee itself to use the premises as a residence.

- Fact that Lessor is registered as a commercial establishment under the Karnataka Shops and Commercial Establishment Act 1961 or that BBMP has issued a trade license is irrelevant.

Issues arising from the Judgement

A. **If Taghar Vasudev Amrish had charged GST on lease rental in the past, whether ITC claimed by them for discharging output GST liability will be denied considering the same as towards exempt supply?**

B. Will this judgement apply to student hostels run by the charitable trusts which were claiming exemption under entry 12 of the Notification No. 12/2017 – Central Rate?

C. Whether GST will apply to other services like housekeeping, food, Wi-Fi, etc. if such services are optional or separately charged?

D. If GST is payable, how must the invoice be issued since there is a single agreement? Options -

   I. Each lessor to issue an invoice for their share, i.e., proportionate basis
   II. One lessor issues an invoice for the total amount, and then the others raise an invoice on the primary lessor. GST Implications on transactions between the group?
   III. Form AOP and then issue an invoice

Relevant Provisions

- **Section 5B of The Central Excise Act, 1944 - Non-reversal of CENVAT credit**

  Where an assessee has paid duty of excise on a final products and has been allowed credit of the duty or tax or cess paid on inputs, capital goods and input services used in making of the said product, the subsequently the process of making the said product is held by the court as not chargeable to excise duty, the Central Government may, by notification, order for non-reversal of such credit allowed to the assessee subject to such conditions as may be specified in the said notification.

  Provided that the order for non-reversal of credit shall not apply where an assessee has preferred a claim for refund of excise duty paid by him;

  Provided further that the Central Government may also specify in the notification referred to above for non-reversal of credit, if any, taken by the buyer of the said product

- No such provision under GST Law

Issues arising from the Judgement

A. If Taghar Vasudev Amrish had charged GST on lease rental in the past, whether ITC claimed by them for discharging output GST liability will be denied considering the same as towards exempt supply?

B. **Will this judgement apply to student hostels run by the charitable trusts which were claiming exemption under entry 14 of the Notification No. 12/2017 – Central Rate?**

C. Whether GST will apply to other services like housekeeping, food, Wi-Fi, etc. if such services are optional or separately charged?

D. If GST is payable, how must the invoice be issued since there is a single agreement? Options -

   I. Each lessor to issue an invoice for their share, i.e., proportionate basis
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Relevant Notification

- **Notification No. 12/2017 – Central Tax (Rate)**

Sl. No.	Chapter, Section, Heading, Group or Service Code (Tariff)	Description of Services	Rate (per cent.)	Condition
~~14~~	~~Heading 9963~~	~~Services by a hotel, inn, guest house, club or campsite, by whatever name called, for residential or lodging purposes, having [value of supply] of a unit of accommodation below [or equal to] one thousand rupees per day or equivalent.~~	~~Nil~~	~~Nil~~

** Omitted vide Notification No. 04/2022 - Central Tax (Rate), dated 13.07.2022, w.e.f. 18.07.2022.*

Relevant Notification

- **Notification No. 12/2017 – Central Tax (Rate)**

Sl. No.	Chapter, Section, Heading, Group or Service Code (Tariff)	Description of Services	Rate (per cent.)	Condition
12	Heading 9963 or Heading 9972	Services by way of renting of residential dwelling for use as residence ***[except where the residential dwelling is rented to a registered person]**.	Nil	Nil

** Inserted vide Notification No. 04/2022 - Central Tax (Rate), dated 13.07.2022, w.e.f. 18.07.2022*

Advance Rulings coverage under Entry No. 14 of Notification No. 12/2017– CT (Rate)

- Students' Welfare Association reported at 2019-VIL-93-AAR (Maharashtra AAR – order dated 29.12.2018)
- Ghodawat Eduserve LLP reported at 2021-VIL-343-AAR (Maharashtra AAR – order dated 27.08.2021)
- Ramnath Bhimsen Charitable Trust reported at 2019-VIL-124-AAR (Chhatisgarh AAR – order dated 02.03.2019)
- Mody Education Foundation reported at 2022 VIL-166-AAR (Rajasthan AAR – order dated 19.05.2022)
- Healersark Resources Private Limited reported at 2022-VIL-160-AAR (Telangana AAR – order dated 03.06.2022)

Relevant Case Law

- **Sneh Girls Hostel Vs Commissioner of CGST & Central Excise, Pune I - 2022 (58) G.S.T.L. 431 (Tri. - Mumbai)**

4.3 The terms "Hostel" is not used in entry at S. No. 18 of the Notification No. 25/2012-S.T., dated 20-6-2012 as amended. However to understand the meaning and scope of the said entry we refer to the dictionary meaning of the various terms used in the said entry :

(A) Dictionary meanings referred to by the appellant

(i) Oxford English Dictionary - Hostel : Noun - An Establishment which provides inexpensive food and lodging for a specific group of people, such as students, workers, or travellers.

(ii) Merriam Webster Dictionary : Definition of HOSTEL
: INN
: an inexpensive lodging facility for usually young travellers that typically has dormitory-style sleeping arrangements and sometimes offers meals and planned activities - called also youth hostel 3 chiefly

British : a supervised institutional residence or shelter (as for homeless).

Relevant Case Law

(iii) Wikipedia Dictionary :

Hostels provide budget-oriented, sociable accommodation where guests can rent a bed, usually a bunk bed, in a dormitory and share a bathroom, lounge and sometimes a kitchen. Rooms can be mixed or single-sex, and private rooms may also be available.

Hostels are often cheaper for both the operator and occupants; many hostels have long-term residents who they employ as desk agents or housekeeping staff in exchange for experience or discounted accommodation.

In a few countries, such as the UK, Ireland, Nepal, India and Australia, the word hostel sometimes also refers to establishments providing longer-term accommodation. In India, Pakistan and South Africa, hostel also refers to boarding schools or student dormitories in resident colleges and universities. In other parts of the world, the word hostel mainly refers to properties offering shared accommodation to travellers or backpackers

(iv) Cambridge Dictionary Inn : noun [C]
IN UK : a pub where you can stay for the night, usually in the countryside
In US a small hotel, usually in the countryside
Inn used in the names of some hotels and restaurants : example "the Holiday Inn"

Relevant Case Law

(v) Dictionary.com

Inn : noun

(i) a commercial establishment that provides lodging, food, etc., for the public, especially travellers; small hotel.

(ii) a tavern.

(iii) British : any of several buildings in London formerly used as places of residence for students, especially law students. Compare Inns of Court.

(iv) a legal society occupying such a building.

(v) Oxford Web Dictionary : Hotel : NOUN

An establishment providing accommodation, meals, and other services for travellers and Tourists

(vi) Merriam Webster dictionary HOTEL :

an establishment that provides lodging and usually meals, entertainment, and various personal services for the public : INN

(vii) Wikipedia web dictionary : A guest house (also guesthouse) is a kind of lodging. In some parts of the world (such as for example the Caribbean), guest houses are a type of inexpensive hotel-like lodging. In still others, it is a private home which has been converted for the exclusive use of guest accommodation.

(viii) Merriam Webster Dictionary : GUESTHOUSE : a building used for guests (as on an estate); especially : a house run as a boarding house or bed-and breakfast"

Relevant Case Law

4.4 By referring to the above dictionaries we can conclude with certainty that the phrase "hotel, inn, guest house, club or campsite, by whatever name called, for residential or lodging purposes," used at Sl. No. 18 in the Notification No. 25/2012-S.T., dated 20-6-2012, is wide enough to bring in its ambit the word "Hostel" as commonly understood. In view of this we do not see any reason for denying the benefit of the exemption under this entry.

Issues arising from the Judgement

A. If Taghar Vasudev Amrish had charged GST on lease rental in the past, whether ITC claimed by them for discharging output GST liability will be denied considering the same as towards exempt supply?

B. Will this judgement apply to student hostels run by the charitable trusts which were claiming exemption under entry 14 of the Notification No. 12/2017 – Central Rate?

C. **Whether GST will apply to other services like housekeeping, food, Wi-Fi, etc. if such services are optional or separately charged?**

D. If GST is payable, how must the invoice be issued since there is a single agreement? Options -

   I. Each lessor to issue an invoice for their share, i.e., proportionate basis
   II. One lessor issues an invoice for the total amount, and then the others raise an invoice on the primary lessor. GST Implications on transactions between the group?
   III. Form AOP and then issue an invoice

Relevant Provisions

- **Section 2 of the CGST Act, 2017 – Definitions**
  - **Composite Supply**

    (30) "composite supply" means a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply;

  - **Mixed supply**

    (74) "mixed supply" means two or more individual supplies of goods or services, or any combination thereof, made in conjunction with each other by a taxable person for a single price where such supply does not constitute a composite supply.

Relevant Provisions

- **Section 8 of the CGST Act, 2017 - Tax liability on composite and mixed supplies**

8. The tax liability on a composite or a mixed supply shall be determined in the following manner, namely:-

(a) a composite supply comprising two or more supplies, one of which is a principal supply, shall be treated as a supply of such principal supply; and

(b) a mixed supply comprising two or more supplies shall be treated as a supply of that particular supply which attracts the highest rate of tax.

CBIC Flyer – Composition Supply & Mixed Supply

- Whether services are bundled in the ordinary course of business would depend upon the normal or frequent practices followed in the area of business to which services relate. Such normal and frequent practices adopted in a business can be ascertained from several indicators some of which are listed below –

  - The perception of the consumer or the service receiver. If large number of service receivers of such bundle of services reasonably expect such services to be provided as a package, then such a package could be treated as naturally bundled in the ordinary course of business.

  - Majority of service providers in a particular area of business provide similar bundle of services. For example, bundle of catering on board and transport by air is a bundle offered by a majority of airlines.

  - The nature of the various services in a bundle of services will also help in determining whether the services are bundled in the ordinary course of business. If the nature of services is such that one of the services is the main service and the other services combined with such service are in the nature of incidental or ancillary services which help in better enjoyment of a main service. For example, service of stay in a hotel is often combined with a service or laundering of 3-4 items of clothing free of cost per day. Such service is an ancillary service to the provision of hotel accommodation and the resultant package would be treated as services naturally bundled in the ordinary course of business.

CBIC Flyer – Composition Supply & Mixed Supply

- Other illustrative indicators, not determinative but indicative of bundling of services in ordinary course of business are –

  - There is a single price or the customer pays the same amount, no matter how much of the package they actually receive or use.
  - The elements are normally advertised as a package.
  - The different elements are not available separately.
  - The different elements are integral to one overall supply – if one or more is removed, the nature of the supply would be affected.

"No straight jacket formula can be laid down to determine whether a service is naturally bundled in the ordinary course of business. Each case has to be individually examined in the backdrop of several factors some of which are outlined above."

Issues arising from the Judgement

A. If Taghar Vasudev Amrish had charged GST on lease rental in the past, whether ITC claimed by them for discharging output GST liability will be denied considering the same as towards exempt supply?

B. Will this judgement apply to student hostels run by the charitable trusts which were claiming exemption under entry 14 of the Notification No. 12/2017 – Central Rate?

C. Whether GST will apply to other services like housekeeping, food, Wi-Fi, etc. if such services are optional or separately charged?

D. If GST is payable, how must the invoice be issued since there is a single agreement? Options -

I. **Each lessor to issue an invoice for their share, i.e., proportionate basis**
II. **One lessor issues an invoice for the total amount, and then the others raise an invoice on the primary lessor. GST Implications on transactions between the group?**
III. **Form AOP and then issue an invoice**

Place of supply – Location of recipient or ultimate beneficiary

Vodafone Idea Limited

Vs

The Union Of India

2022-VIL-486-BOM

Facts of the case

- Vodafone Idea Limited ("VIL") provides telecom services under the telecommunication license received from the Government of India. VIL is registered under GST in the state of Maharashtra.
- VIL is also supplying services in the nature of International Inbound Roaming Services (IIR) and International Long Distance (ILD) Services to Foreign Telecom Operators (FTOs).
- By the IIR and ILD services, a person traveling to a country outside of his usual place of residence (where he is a regular subscriber of a telecom service provider) can use telecom services from the same service providers (who usually provide services to that person in their usual place of residence) with the same contact number, so that their connection with the outside world was not interrupted.
- VIL has entered into an agreement with FTO to provide telecom services to customers of FTOs when they travel to India.
- Similar services are provided by the FTO to customers of VIL when they travel outside India.
- According to the agreement, VIL is contractually obligated only to the Foreign Telecom Operators (FTOs) for the services under the contract.

Facts of the case

- The consideration is payable to VIL by the FTOs, and the consideration is payable in convertible foreign exchange.
- VIL treated such as exports, and refund claims were filed accordingly.
- The said refund was rejected on the ground that the place of supply of these services is in Maharashtra; therefore, the transaction does not qualify as exports.

Court’s comment and observations

- In this regard, the Court held that the provision of services by VIL to the FTOs qualifies as exports. The Court based its decision mainly on the following grounds:

  - In terms of the agreement, VIL is rendering services to FTO and receiving consideration from FTOs. As per the definition of the recipient under GST laws, any person who pays consideration is the recipient, and thus, there is no doubt that FTO is the recipient of service

  - Further, VIL has no idea of the subscribers of FTO and no contract with them either, and the invoice for services is also being issued to FTO only

  - Further, since the said services were supplied to FTO and not to an individual, the provision of section 13(3)(b) is not applicable as it starts with the words "service supplied to an individual.” Therefore, section 13(2) will apply.

Court’s comment and observations

- Customer of VIL is the FTO, and the subscribers of FTO are the customers of FTO. Therefore, subscribers of FTO will not be the customers of VIL.

  “21. We would agree with the concept that customer's customer cannot be your customer. In the case at hand customer of Vodafone Idea Limited is the FTO and the subscribers of FTO are the customers of FTO. When a service is rendered to a third party customer of FTO your customer, the service recipient is your customer and not the third party customer of FTO. These issues have been considered by the Central Excise and Service Tax Appellate Tribunal (CESTAT Act), West Zonal Branch, Mumbai and one of Banglore Tribunal. We accept the views expressed and law laid down by the Tribunals. The relevant portion reads as under :-

  - *Vodafone Essar Cellular Ltd. V. CCE - (2013) (31)STR 738 (TriMum) - 2013-VIL-36-CESTAT-MUM-ST*
  - *CST v Bayer Material Science - (2015) 38 STR 1206 (Tri-Mumbai) - 2018-VIL-1354-CESTAT-ALH-ST*
  - *ABS India Ltd. v CST - (2009) 13 STR 65 (Tri Bang) - 2008-VIL-100- CESTAT-BLR-ST (para 4)”*

Issues arising from the Judgement

A. **Impact of ongoing litigation related to service tax on business support services, market research, marketing, and sales promotion services provided by Indian entities to foreign entities in respect of activities in India.**

B. GST Implications in the following scenarios -

- Income tax return filing services provided by an Indian CA firm to a USA CPA firm for their client in India.
- Representation services provided by an Indian law firm to a foreign law firm in respect of their client in India.
- Stock audit service provided by an Indian CA firm to a company/investor located outside in respect of the acquisition of an Indian company.

Relevant Provisions

- **Section 2(6) of the IGST Act, 2017 – Definitions**

(6) "export of services" means the supply of any service when, -

(i) the supplier of service is located in India;

(ii) the recipient of service is located outside India;

(iii) the place of supply of service is outside India;

(iv) the payment for such service has been received by the supplier of service in convertible foreign exchange 1[or in Indian rupees wherever permitted by the Reserve Bank of India]; and

(v) the supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with Explanation 1 in section 8;

Relevant Provisions

- **Section 2(93) of the CGST Act, 2017 – Definitions**

(93) "recipient" of supply of goods or services or both, means-

(a) where a consideration is payable for the supply of goods or services or both, the person who is liable to pay that consideration;

(b) where no consideration is payable for the supply of goods, the person to whom the goods are delivered or made available, or to whom possession or use of the goods is given or made available; and

(c) where no consideration is payable for the supply of a service, the person to whom the service is rendered,

Relevant Provisions

- **Section 13 of the IGST Act, 2017 – Place of supply of services where location of supplier or location of recipient is outside India**

…

(2) The place of supply of services except the services specified in sub-sections (3) to (13) shall be the location of the recipient of services:

Provided that where the location of the recipient of services is not available in the ordinary course of business, the place of supply shall be the location of the supplier of services.

(3) The place of supply of the following services shall be the location where the services are actually performed, namely:-

(a) services supplied in respect of goods which are required to be made physically available by the recipient of services to the supplier of services, or to a person acting on behalf of the supplier of services in order to provide the services:

Provided that when such services are provided from a remote location by way of electronic means, the place of supply shall be the location where goods are situated at the time of supply of services:

Relevant Provisions

Provided further that nothing contained in this clause shall apply in the case of services supplied in respect of goods which are temporarily imported into India for repairs or for any other treatment or process and are exported after such repairs or treatment or process without being put to any use in India, other than that which is required for such repairs or treatment or process;

(b) services supplied to an individual, represented either as the recipient of services or a person acting on behalf of the recipient, which require the physical presence of the recipient or the person acting on his behalf, with the supplier for the supply of services.

Relevant Provisions

- **Section 2(13) of the IGST Act, 2017 – Definitions**

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

Clarification in the scope of the term ‘Intermediary’ - Circular No. 159/15/2021-GST

- CBIC has clarified that to fall within the definition of intermediary services the key requirements are as under:

  a. There should be a minimum of 3 parties. Two of them transact in the main supply and one arranges or facilitates the said main supply

  b. There should be two distinct supplies:
     - The main supply of goods or services or securities between two principals and
     - Ancillary supply of facilitating or arranging the main supply between the two principals i.e., intermediary service

  c. An intermediary should have the character of an agent, broker, or any other similar person

  d. An intermediary must arrange or facilitate the main supply and does not himself provide the main supply

  e. Sub-contracting for a service is not an intermediary service

- The specific provision for place of supply of ‘intermediary services’ under section 13 of the IGST Act, 2017 shall be invoked only when either the location of the supplier or the location of the recipient of intermediary services is outside India.

Issues arising from the Judgement

A. Impact of ongoing litigation related to service tax on business support services, market research, marketing, and sales promotion services provided by Indian entities to foreign entities in respect of activities in India.

B. GST Implications in the following scenarios -

- **Income tax return filing services provided by an Indian CA firm to a USA CPA firm for their client in India.**
- **Representation services provided by an Indian law firm to a foreign law firm in respect of their client in India.**
- **Stock audit service provided by an Indian CA firm to a company/investor located outside in respect of the acquisition of an Indian company.**

Relevant Provisions

- **Section 13 of the IGST Act, 2017 – Place of supply of services where location of supplier or location of recipient is outside India**

…

(2) The place of supply of services except the services specified in sub-sections (3) to (13) shall be the location of the recipient of services:

Provided that where the location of the recipient of services is not available in the ordinary course of business, the place of supply shall be the location of the supplier of services.

(3) The place of supply of the following services shall be the location where the services are actually performed, namely:-

(a) services supplied in respect of goods which are required to be made physically available by the recipient of services to the supplier of services, or to a person acting on behalf of the supplier of services in order to provide the services:

Provided that when such services are provided from a remote location by way of electronic means, the place of supply shall be the location where goods are situated at the time of supply of services:

Relevant Provisions

Provided further that nothing contained in this clause shall apply in the case of services supplied in respect of goods which are temporarily imported into India for repairs or for any other treatment or process and are exported after such repairs or treatment or process without being put to any use in India, other than that which is required for such repairs or treatment or process;

(b) services supplied to an individual, represented either as the recipient of services or a person acting on behalf of the recipient, which require the physical presence of the recipient or the person acting on his behalf, with the supplier for the supply of services.

GST on Ocean Freight

Union of India

Vs

Mohit Minerals Pvt. Ltd

2022 (61) G.S.T.L. 257 (S.C.)

Facts of the case

- Mohit Minerals Private Limited (MMPL) imported non-cooking coal from Indonesia, South Africa, and the U.S. by ocean transport on a CIF basis.
- MMPL paid customs duties on the import of coal, which included the value of ocean freight. Since it was a CIF contract, the ocean freight was paid by the foreign exporter against the invoice raised by the foreign shipping line without any involvement of MMPL.
- GST was again demanded on the ocean freight component from MMPL under the reverse charge mechanism in terms of Notification No. 10/2017-IGST(Rate), which deemed the importer of goods to be the recipient of transportation services under the CIF contract.
- Gujarat High Court passed the order in favor of MMPL and stated that concerned entries of the above notifications were ultra vires the provisions of the IGST Act, 2017.
- The Government of India challenged this decision in the Apex court.

Court’s comment and observations

- The court held that MMPL could not be subjected to the levy of IGST under reverse charge on ocean freight component paid by the foreign seller to a foreign shipping line. The court held as under -
  - CIF contracts for the supply of goods reflect a composite supply under the CGST Act, where the principal supply is the supply of goods.
  - Section 8 of the CGST Act contemplates that the tax liability on a composite supply would be only levied on the 'principal supply.’
  - Though Union Government has the power to notify an 'import of goods' as an 'import of services’ under Section 7(3) of the CGST Act, it cannot interpret a composite supply of goods and services to mean a segregable supply of goods and supply of services.
  - Since the Indian importer was liable to pay IGST on the 'composite supply,’ comprising of supply of goods and supply of services of transportation, insurance, etc. in a CIF contract, a separate levy on the Indian importer for the ‘supply of service’ by the shipping line would violate Section 8 of the CGST Act.
- Notably, the Supreme Court has also observed that the recommendations of the GST Council are not binding on the Government and have only persuasive value.

Issues arising from the Judgement

A. **Whether the ratio laid down by Apex Court in deciding the case that Import of Goods under CIF contract is composite supply is correct? Is it a single supply?**

B. Can a refund be claimed if GST on ocean Freight is already paid and the protest is not registered? Whether the principle of unjust enrichment will apply in such cases?

C. What about any interest and penalty already paid under proceedings initiated by the department? Whether refund can be claimed for the same?

D. If GST is already paid and availed as ITC, can the department disallow such claims?

E. If Government does a retrospective amendment in the law to reverse the Supreme Court decision, whether interest will be attracted?

F. Implications of the Supreme Court observation on the binding nature of recommendations made by the GST council.

Relevant Provisions

- **Section 5 of the IGST Act, 2017 - Levy and collection**

(3) The Government may, on the recommendations of the Council, by notification, specify categories of supply of goods or services or both, the tax on which shall be paid on reverse charge basis by the **recipient** of such goods or services or both and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both.

- **Reverse Charge Notification No. 10/2017 – Integrated Tax (Rate)**

S No	Category of Supply of Service	Supplier of Service	Recipient of Service
10	Services supplied by a person located in 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.	A person located in non-taxable territory	Importer, as defined in clause (26) of section 2 of the Customs Act, 1962(52 of 1962), located in the taxable territory.

Relevant Provisions

- **Section 2(93) of the CGST Act, 2017 – Definitions**

(93) "recipient" of supply of goods or services or both, means-

(a) where a consideration is payable for the supply of goods or services or both, the person who is liable to pay that consideration;

(b) where no consideration is payable for the supply of goods, the person to whom the goods are delivered or made available, or to whom possession or use of the goods is given or made available; and

(c) where no consideration is payable for the supply of a service, the person to whom the service is rendered,

Relevant Provisions

- **Section 2 of the CGST Act, 2017 – Definitions**

  - **Composite Supply**

    (30) "composite supply" means a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply;

    Illustration. - Where goods are packed and transported with insurance, the supply of goods, packing materials, transport and insurance is a composite supply and supply of goods is a principal supply;

  - **Mixed supply**

    (74) "mixed supply" means two or more individual supplies of goods or services, or any combination thereof, made in conjunction with each other by a taxable person for a single price where such supply does not constitute a composite supply.

    Illustration. - A supply of a package consisting of canned foods, sweets, chocolates, cakes, dry fruits, aerated drinks and fruit juices when supplied for a single price is a mixed supply. Each of these items can be supplied separately and is not dependent on any other. It shall not be a mixed supply if these items are supplied separately;

Relevant Provisions

- **Section 8 of the CGST Act, 2017 - Tax liability on composite and mixed supplies**

8. The tax liability on a composite or a mixed supply shall be determined in the following manner, namely:-

(a) a composite supply comprising two or more supplies, one of which is a principal supply, shall be treated as a supply of such principal supply; and

(b) a mixed supply comprising two or more supplies shall be treated as a supply of that particular supply which attracts the highest rate of tax.

Relevant Provisions

- **Section 5 of the IGST Act, 2017 - Levy and collection**

5. (1) Subject to the provisions of sub-section (2), there shall be levied a tax called the integrated goods and services tax on all inter-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption, on the value determined under section 15 of the Central Goods and Services Tax Act and at such rates, not exceeding forty per cent., as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person:

Provided that the integrated tax on goods imported into India shall be levied and collected in accordance with the provisions of section 3 of the Customs Tariff Act, 1975 (51 of 1975) on the value as determined under the said Act at the point when duties of customs are levied on the said goods under section 12 of the Customs Act, 1962 (52 of 1962).

Food for Thought - Single Supply vs. Composite Supply

- Whether two separate supplies in question can be composite supply

  - supply of goods by foreign exporter to Indian importer
  - supply of goods transportation service by foreign shipping line to foreign exporter

since provided by separate persons to separate recipients which can never be in conjunction?

Issues arising from the Judgement

A. Whether the ratio laid down by Apex Court in deciding the case that Import of Goods under CIF contract is composite supply is correct? Is it a single supply?

B. Can a refund be claimed if GST on ocean Freight is already paid and the protest is not registered? Whether the principle of unjust enrichment will apply in such cases?

C. What about any interest and penalty already paid under proceedings initiated by the department? Whether refund can be claimed for the same?

D. If GST is already paid and availed as ITC, can the department disallow such claims?

E. If Government does a retrospective amendment in the law to reverse the Supreme Court decision, whether interest will be attracted?

F. Implications of the Supreme Court observation on the binding nature of recommendations made by the GST council.

GST Refund on Tax wrongfully paid under incorrect head – Circular No. 162/18/2021

- Rule 89(1A) of CGST Rules, 2017 has been inserted vide Notification No. 35/2021-Central Tax dated 24.09.2021 to prescribe a time limit of two years from the date of payment of GST under the correct head for claiming refund under section 77(1) of the CGST Act/ Section 19(1) of the IGST Act of the GST paid under the wrong head.

- In this regard, CBIC has clarified that:

  - The time limit of two years for claiming the refund of the GST paid under the wrong head is applicable from the date of payment of GST under the correct head.

  - However, in cases, where the taxpayer has already made the payment of GST under the correct head before the date of the issuance of Notification No. 35/2021-Central Tax dated 24.09.2021, the refund application can be filed before the expiry of two years from 24.09.2021.

  - Refund of GST paid under the wrong head would not be available if the taxpayer had rectified the same through the issuance of the credit note.

Issues arising from the Judgement

A. Whether the ratio laid down by Apex Court in deciding the case that Import of Goods under CIF contract is composite supply is correct? Is it a single supply?

B. Can a refund be claimed if GST on ocean Freight is already paid and the protest is not registered? Whether the principle of unjust enrichment will apply in such cases?

C. What about any interest and penalty already paid under proceedings initiated by the department? Whether refund can be claimed for the same?

D. If GST is already paid and availed as ITC, can the department disallow such claims?

E. If Government does a retrospective amendment in the law to reverse the Supreme Court decision, whether interest will be attracted?

F. Implications of the Supreme Court observation on the binding nature of recommendations made by the GST council.

Issues arising from the Judgement

A. Whether the ratio laid down by Apex Court in deciding the case that Import of Goods under CIF contract is composite supply is correct? Is it a single supply?

B. Can a refund be claimed if GST on ocean Freight is already paid and the protest is not registered? Whether the principle of unjust enrichment will apply in such cases?

C. What about any interest and penalty already paid under proceedings initiated by the department? Whether refund can be claimed for the same?

D. If GST is already paid and availed as ITC, can the department disallow such claims?

E. If Government does a retrospective amendment in the law to reverse the Supreme Court decision, whether interest will be attracted?

F. Implications of the Supreme Court observation on the binding nature of recommendations made by the GST council.

Relevant Provisions

- **Section 5B of The Central Excise Act, 1944 - Non-reversal of CENVAT credit**

  Where an assessee has paid duty of excise on a final products and has been allowed credit of the duty or tax or cess paid on inputs, capital goods and input services used in making of the said product, the subsequently the process of making the said product is held by the court as not chargeable to excise duty, the Central Government may, by notification, order for non-reversal of such credit allowed to the assessee subject to such conditions as may be specified in the said notification.

  Provided that the order for non-reversal of credit shall not apply where an assessee has preferred a claim for refund of excise duty paid by him;

  Provided further that the Central Government may also specify in the notification referred to above for non-reversal of credit, if any, taken by the buyer of the said product

- No such provision under GST Law

- **Bajaj Allianz General Insurance Company Limited v. CCE, Pune-III - 2015 (37) S.T.R. 316 (Tri. - Mumbai) -** Availing CENVAT credit of wrongly paid service tax is equivalent to refund of such wrongly paid tax.

Issues arising from the Judgement

A. Whether the ratio laid down by Apex Court in deciding the case that Import of Goods under CIF contract is composite supply is correct? Is it a single supply?

B. Can a refund be claimed if GST on ocean Freight is already paid and the protest is not registered? Whether the principle of unjust enrichment will apply in such cases?

C. What about any interest and penalty already paid under proceedings initiated by the department? Whether refund can be claimed for the same?

D. If GST is already paid and availed as ITC, can the department disallow such claims?

E. If Government does a retrospective amendment in the law to reverse the Supreme Court decision, whether interest will be attracted?

F. Implications of the Supreme Court observation on the binding nature of recommendations made by the GST council.

Relevant Case Laws

- **Star India Pvt. Ltd. vs Commissioner of Central Excise, Mumbai and Goa - 2006(1) STR 73 (SC)**

"7. In any event, it is clear from the language of the validation clause, as quoted by us earlier, that the liability was extended not by way of clarification but by way of amendment to the Finance Act with retrospective effect. ***It is well established that while it is permissible for the legislature to retrospectively legislate, such retrospectivity is normally not permissible to create an offence retrospectively.*** There were clearly judgments, decrees or orders of courts and Tribunals or other authorities, which required to be neutralised by the Validation Clause. We can only assume that the judgments, decree or orders etc. had, in fact, held that persons situate like the appellants were not liable as service providers. This is also clear from the Explanation to the Validation Section which says that no act or acts on the part of any person shall be punishable as an offence which would have been so punishable if the Section had not come into force.

8. The liability to pay interest would only arise on default and is really in the nature of a quasi-punishment. Such liability although created retrospectively could not entail the punishment of payment of interest with retrospective effect"

Issues arising from the Judgement

A. Whether the ratio laid down by Apex Court in deciding the case that Import of Goods under CIF contract is composite supply is correct? Is it a single supply?

B. Can a refund be claimed if GST on ocean Freight is already paid and the protest is not registered? Whether the principle of unjust enrichment will apply in such cases?

C. What about any interest and penalty already paid under proceedings initiated by the department? Whether refund can be claimed for the same?

D. If GST is already paid and availed as ITC, can the department disallow such claims?

E. If Government does a retrospective amendment in the law to reverse the Supreme Court decision, whether interest will be attracted?

F. **Implications of the Supreme Court observation on the binding nature of recommendations made by the GST council.**

Reply from Centre to Rajya Sabha

- The Minister of State for Finance Pankaj Chaudhary has informed Rajya Sabha that the recommendations of the GST council regarding the rates of Goods and Services Tax are binding on the Centre and the States and that the Supreme Court' judgment in Union of India & Anr. v. M/s Mohit Minerals Pvt. Ltd does not alter this position.

- The written reply stated :

  "The Constitution has vested upon the GST Council the responsibility to make recommendations of various aspects of GST. The recommendations pertaining to GST laws are implemented through normal legislative process and to that extent the recommendations have a persuasive value. ***However, the State and Central Acts provide that rates, exemptions and rules etc. would be prescribed only on the recommendations of the GST council and, therefore, the recommendations of the GST Council with respect to subordinate legislations, e.g., those pertaining to rules, notifications and rates are binding on States and Centre****."*

Relevant Provisions

“Section 279A. Goods and Services Tax Council

*(4) The Goods and Services Tax Council **shall make recommendations** to the Union and the States on -*

(a) the taxes, cesses and surcharges levied by the Union, the States and the local bodies which may be subsumed in the goods and services tax;
(b) the goods and services that may be subjected to, or exempted from the goods and services tax;
(c) model Goods and Services Tax Laws, principles of levy, apportionment of Goods and Services Tax levied on supplies in the course of inter-State trade or commerce under article 269A and the principles that govern the place of supply;
(d) the threshold limit of turnover below which goods and services may be exempted from goods and services tax;
(e) the rates including floor rates with bands of goods and services tax;
(f) any special rate or rates for a specified period, to raise additional resources during any natural calamity or disaster;
(g) special provision with respect to the States of Arunachal Pradesh, Assam, Jammu and Kashmir, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura, Himachal Pradesh and Uttarakhand; and
(h) any other matter relating to the goods and services tax, as the Council may decide.”

Employee Secondment

C.C., C.E. & S.T., Bangalore (Adjudication)

Vs

Northern Operating Systems Pvt. Ltd.

2022 (61) G.S.T.L. 129 (S.C.)

Facts of the case

- Northern Operating Systems Private Limited (NOSPL) contracted with overseas group entities to render back-office and information technology support services.
- NOSPL had a secondment agreement with an overseas company whereby it deputed its employees in India. The Seconded Employees were required to act under the directions and control of the NOSPL.
- However, the salary, bonus/incentives, social security, and welfare benefits of the Seconded Employees were paid to them by the overseas group entity.
- The Seconded Employees continued to be on the foreign entity's payroll.
- NOSPL subsequently reimbursed such expenses to its overseas entity.
- The service tax authorities had demanded service tax on such reimbursement under the reverse charge mechanism considering it as an import of service.

Court's comment and observations

- The Supreme Court held that the secondment of employees by the foreign entity qualifies as manpower supply service and thus leviable to service tax under reverse charge in the hands of NOSPL.

- The court ruled as under -

  - While the Indian Company exercised operational and functional control over the seconded employees for the secondment period, such control was necessary to ensure their performance. However, it was merely facial since the employee continued to be on the payroll of the foreign entity. Thus, the secondment arrangement was a "contract for service" and not a "contract of service."

  - Employer-employee relationship does not exist between the Indian entity and seconded employees.

  - Seconded Employees were seconded to the Indian Company to use their specific skills.

  - Letter of understanding between the Indian Company and the Seconded Employees nowhere stated that the Seconded Employees would be treated as employees of the Indian Company after the period of secondment. Further, the Indian Company could not terminate the employment of Seconded Employees on cessation of the secondment period; the Seconded Employees had to be repatriated to their overseas employer and could be sent elsewhere on secondment.

Issues arising from the Judgement

A. **Impact on all existing litigations under service tax - Whether revenue neutrality ground can be taken where full ITC is available?**

B. Implications under Income Tax from TDS perspective since such payments are towards service and not reimbursement of expenses.

Relevant Case Laws

- 59. As regards the question of revenue neutrality is concerned, the assessee's principal contention was that assuming it is liable, on reverse charge basis, nevertheless, it would be entitled to refund; it is noticeable that the two orders relied on by it (in *SRF* and *Coca Cola*) by this Court, merely affirmed the rulings of the CESTAT, without any independent reasoning. Their precedential value is of a limited nature. This Court has been, in the present case, called upon to adjudicate about the nature of the transaction, and whether the incidence of service tax arises by virtue of provision of secondment services. That a particular rate of tax - or no tax, is payable, or that if and when liability arises, the assessee, can through a certain existing arrangement, claim the whole or part of the duty as refund, is an irrelevant detail. The incidence of taxation, is entirely removed from whether, when and to what extent, Parliament chooses to recover the amount.

- Duty demand is not sustainable when the consequences of the demand are revenue neutral.

  - CCE Vs. Textile Corporation reported at 2008 (231) E.L.T. 195 (SC)
  - Hindustan Zinc Ltd vs. CCE reported at 2008 (232) E.L.T. 687 (Tri. - Delhi)
  - CCE vs. Special Steel Limited reported at 2015 (329) E.L.T. 449 (Tri. - Mumbai)

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Reopening of TRAN-1/TRAN-2

Union of India & Anr.

Vs

Filco Trade Centre Pvt. Ltd. & Anr.

2022-VIL-38-SC

2022-VIL-63-SC

Court’s comment and observations

- Supreme court has directed the Goods and Service Tax Network (GSTN) to open the common portal for filing concerned forms for availing Transitional Credit through TRAN-1 and TRAN-2 for two months, i.e., w.e.f. 01.10.2022 to 30.11.2022.

- Any aggrieved registered assessee is directed to file the relevant form or revise the already filed form irrespective of whether the taxpayer has filed a writ petition before the High Court or whether the case of the taxpayer has been decided by the Information Technology Grievance Redressal Committee (ITGRC)

- The concerned officers are given 90 days to verify the veracity of the claim/transitional credit and pass appropriate orders on merits after granting the appropriate reasonable opportunity to the parties concerned.

Issues arising from the Judgement

A. Whether revised TRAN-1 can be filed for any missed-out transition credits?

B. If part of the claim made in TRAN-1 is under dispute i.e., pending adjudication or in appeal, whether revised TRAN-1 can be filed for missed-out transition credits?

C. If the department has rejected part of the claim made in TRAN-1 and the assessee has accepted it by paying interest and penalty, whether revised TRAN-1 can be filed for missed-out transition credits?

D. Whether TRAN-1 can be filed for a claim for transitional credit in respect of such C-Forms, F-Forms, and H/I-Forms which have been issued after the due date prescribed for submitting the declaration in FORM GST TRAN-1 i.e., after 27.12.2017?

Guidelines for filing or revising TRAN-1 or TRAN-2

Circular No. 180/12/2022-GST

- The applicant may file declaration in FORM GST TRAN-1/TRAN-2 or revise earlier filed TRAN-1/TRAN-2 duly signed or verified through electronic verification code on the common portal.

- In cases where the applicant is filing a revised TRAN-1/TRAN-2, a facility for downloading the TRAN-1/TRAN-2 furnished earlier by him will be made available on the common portal.

- In cases where the credit availed by the registered person on the basis of FORM GST TRAN-1/TRAN-2 filed earlier, has either wholly or partly been rejected by the proper officer, the appropriate remedy in such cases is to prefer an appeal against the said order or to pursue alternative remedies available as per law. Where the adjudication/ appeal proceeding in such cases is pending, the appropriate course would be to pursue the said adjudication/ appeal. In such cases, filing a fresh declaration in FORM GST TRAN-1/TRAN-2, pursuant to the special dispensation being provided vide this circular, is not the appropriate course of action.

- No claim for transitional credit shall be filed in table 5(b) & 5(c) of FORM GST TRAN-1 in respect of C-Forms, F-Forms and H/I-Forms which have been issued after the due date prescribed for submitting the declaration in FORM GST TRAN-1 i.e. after 27.12.2017.

Any Questions?

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THANK YOU