CNK & Associates LLP
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GST Judicial Decisions

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Recovery of tax cannot be made through unilateral recovery from taxpayer's bank account

Pradeep Kumar Siddha [2023] 151 Taxmann.com142 (High Court of Bombay) dated 28-04-2023

In favour of Assessee

Relevant Facts

In the instant case, GST authorities took Rs. 62.32 lakhs from assessee's bank account for recovery of tax. The assessee stated that no instructions had been given by him to the bank to debit the amount from his account and transfer it to the account of GST authorities.

Even after the amount was debited, GST authorities never addressed any communication to the assessee that the amount had been debited from his account. The assessee filed a writ petition against the GST authorities in the High Court of Bombay against such wrongful transfer of amount as recovery of tax.

Held

The Honorable High Court of Bombay questioned the GST authorities to explain under what authority of law they had recovered money from the assessee's bank account and the reason for not informing assessee even after giving instructions to the bank.

The respondent authority in their reply contended that they had relied upon Section 79 of CGST Act which deals with recovery of tax. By this, the authority had proceeded to unilaterally deduct the amount from assessee's bank account by giving instructions to the Bank and transferring it to the electronic cash ledger of the assessee.

The Honorable High Court of Bombay ruled that the provisions of section 79 of CGST Act 2017 was not applicable in the instant case and hence, the authorities are said to have failed to demonstrate the legal basis for such course of action.

The Court ordered the authorities to credit the amount to the bank account of the assessee within a period of 2 weeks.

CNK Comments

A positive decision clarifying that the recovery proceedings cannot be done unilaterally, and that the Department is required to demonstrate legal basis of course of action for recovery of tax from the assessee.

Taxpayer's claim of ITC cannot be rejected on account of fraudulent activity on part of the supplier if the transaction otherwise is genuine and valid

M/s. Gargo Traders [2023]151 Taxmann.com 270 (High Court of Calcutta) dated 12-06-2023

In favour of Assessee

Relevant Facts

The assessee was a registered taxable person and claimed input tax credit **(ITC)** against supplies made from a supplier. The assessee had made payment to the supplier from the assessee's bank account.

The respondent authority claimed that the supplier from whom the assessee claimed to have purchased the goods was all fake and non-existing and the bank account opened by the supplier was based on fake document and the claim of the assessee of ITC was not supported by any relevant document.

Also, the petitioner had not verified the genuineness and identity of the supplier as to whether was a registered taxable person **(RTP)** before entering the transaction with the supplier.

They also claimed that the registration of the supplier in question had already been cancelled with retrospective effect covering the transaction period of the assessee.

Aggrieved by the impugned order issued by the respondent authorities for not allowing the benefit of ITC on purchase from supplier and also being asked

to pay penalty and interest, the assessee filed a writ petition.

Held

The petitioner had filed supplementary affidavit by enclosing tax invoice cum challan, debit note, e-Way bill, transportation bill and statement of bank account showing the transaction made by the petitioner in favour of the supplier.

The assessee contended that the transaction in question is genuine and valid and relying upon all the supporting relevant documents required under law, the assessee with due diligence proved the genuineness and identity of the supplier and the name of the supplier as RTP was available at the government portal showing its registration as valid and existing at the time of transaction.

The Honorable High Court of Calcutta held that without proper verification, it cannot be said that there was failure on the part of the assessee in compliance of any obligation required under the statute before entering the transactions in question.

The authorities only considered the cancellation of registration of the supplier with retrospective effect, and they had rejected the claim of the assessee without even considering the documents relied on by the assessee.

The court ordered to set aside the impugned orders and directed the authorities to consider the documents relied on by the assessee in support of the claim.

CNK Comments

The taxpayers' claim of ITC cannot be denied on the grounds that the supplier's registration was cancelled with retrospective effect covering the period of the taxpayer if the transaction was otherwise genuine and valid. A very welcome ruling particularly in case of retrospective cancellation of registration of the supplier.

Taxpayers are entitled to claim ITC from the date of cancellation till the date of restoration of GST registration

M/s. R.K. Jewelers – Writ Petition No. 4236/2023 (High Court of Rajasthan at Jodhpur) dated 26-04-2023

In favour of Assessee

Relevant Facts

The GST registration of the petitioner firm was cancelled on the ground of non-filing of GST returns.

Impugned by the said order of Appellate Authority, the petitioner filed a writ petition before the High Court of Rajasthan at Jodhpur.

During the pendency of this writ petition, the competent authority under the GST Act, 2017 issued a notification no. 03/2023 dated 31.03.2023 and as per the said notification, on the conditions being fulfilled, the cancellation of registration effected on the ground of non-filing of GST return, could be revoked.

Held

The Honorable High Court believed that the case of the petitioner firm was covered within the notification dated 31.03.2023 and the petitioner firm could move an application before the competent authority with a prayer for restoration of its GST registration subject to fulfillment of the conditions mentioned in the said notification.

Also, when the competent authority considers the issue of revocation of cancellation of petitioner firm's GST registration under the notification dated 31.03.2023, the petitioner-firm, will be entitled to lodge its claim for availment of ITC in respect of the period from the cancellation of the registration till the registration is restored.

CNK Comments

The judgement clears the ambiguities with respect to availment of ITC pertaining to the period from cancellation of the registration till the registration is restored. However, it remains to be seen whether such availment of ITC can be claimed in all cases or is restricted only to the extent of the said notification.

Validity of pre-import condition in Advance Authorisation Scheme upheld by Supreme Court

M/s. Cosmo Films Ltd. – Civil Appeal No. 290 of 2023 (Supreme Court of India) dated 28-04-2023

In favor of Revenue

Relevant Facts

The Advance Authorization **(AA)** scheme exempts import duties on inputs used for manufacturing export products. Prior to GST regime, pre-import condition was applicable only for specific notified goods. On introduction of GST, no exemption was granted for IGST. However, from October 13, 2017, IGST exemption was granted subject to the satisfaction of Pre-import condition.

Exporters community contended that pre-import condition was discriminatory and inconsistent with position prior to introduction of GST wherein exemption was also available on import of inputs post fulfilment of export obligations (except for specified inputs).

Accordingly, writ petitions were filed before various High Courts.

The Madras High Court in the case of **Vedanta Limited v. UOI, 2018-VIL-490-MAD** upheld constitutional validity of pre-import condition. The Court held that not allowing IGST exemption in certain cases, does not alter the benefit of AA Scheme. AA Scheme is a matter of public policy and judiciary cannot interfere in such matters.

On the other hand, in the case of **Maxim Tubes Company v. UOI, 2019-VIL-80-GUJ**, the Gujarat High Court observed that restricting IGST exemption to pre-import cases is not in line with the objective of AA Scheme to boost exports. This will force exporters to choose pre-import option, which may not be possible in all cases. Accordingly, the Court held that this restriction is unreasonable and struck down pre-import condition being *ultra vires* the Foreign Trade Policy.

Subsequently, the Government removed pre-import condition for claiming exemption of IGST effective from January 10,2019. Hence, the issue remained relevant only for disputed period.

Held

The Honorable Supreme Court of India held that pre-import condition was valid during disputed period. The Court over-ruled the judgement of the Gujarat High Court basis for following reasons:

- Director General Foreign Trade **(DGFT)** had authority to impose pre-import condition on imports. Additionally, since pre-import condition was imposed and applicable on certain goods even prior to introduction of GST, all AA holders were never treated equally.
- Hardship or inconvenience caused cannot be ground to determine validity of a provision.
- The right to claim exemption cannot be applied universally and benefit needs to be decided by legislature.

The Supreme Court further directed the revenue to allow respondents to claim refund of ITC by approaching the jurisdictional Commissioner and has instructed the authorities to issue Circular outlining such procedure.

CNK Comments

A remarkable judgement from Honorable Supreme Court of India as DGFT was always empowered to provide exemption only for certain duties subject to certain conditions. Importers who failed to fulfil pre-import condition will now be required to pay IGST along with interest. The eligibility of ITC may be disputable in this case since imports took place long back and the revenue does not practically amend Bills of Entry for payment of differential duty.

However, such ITC may legally be available basis past jurisprudence and on account of fact that no time limit is prescribed for availing ITC on imported goods.

Development fee cannot be linked with future services and hence not liable to service tax

M/s. Delhi International Airport Ltd. – Civil Appeal No. 8996 of 2019 (Supreme Court of India) dated 19-05-2023

In favour of Assessee

Relevant Facts

Delhi International Airport Limited **(DIAL)** entered into an Operation, Management and Development Agreement **(OMDA)** with the Airport Authority of India. Under the OMDA, DIAL had the exclusive right to develop, finance, design, construct, modernize the airport and also to collect and retain appropriate charges from the users of the airport.

Under a notification dated 27 February 2009 pursuant to section 22A of the AAI Act, DIAL was permitted to collect and retain development fee from the embarking passengers from the airport. The said development fee was used for the purposes of *inter alia* upgradation, expansion or development of the airport and other stated purposes. The said fee was however not linked to any of the services provided to the passengers from whom the development Fee is collected.

Show-cause notices were issued to DIAL for multiple assessment years demanding payment of service tax on the development charges collected by DIAL pursuant to section 22A of the AAI Act.

The orders-in-original of the Commissioner of Service Tax were challenged before the Customs Excise & Service Tax Appellate Tribunal **(CESTAT).**

The CESTAT held that the fee collected under section 22A is towards the user fee and was collected only for enhancement of revenue of the airport, and not for any services rendered to outgoing passengers. The CESTAT further held that the development fee is in the nature of cess/tax and therefore, further service tax cannot be levied on the same.

Aggrieved by the order of the CESTAT, the Commissioner of Service Tax filed a Civil Appeal before the Supreme Court.

Held

The Honorable Supreme Court of India dismissed the appeals filed by the Commissioner of Service Tax and *inter-alia* held as under:

- The development fee collected by MIAL is not in consideration of any services provided by MIAL to the embarking passengers upon whom the fee is levied. In absence of any corresponding service, levy of service tax is not attracted on the development fee.
- The development fee is in the nature of tax collected by the airport authorities pursuant to a prior approval granted by the Central Government, which has to be utilized for statutory purposes as specified in section 22A itself. Therefore, the Supreme Court reiterated, levying service tax on the development fee would amount to levy of tax on tax, which has been held to be unconstitutional.
- The development fee is required to be deposited in a separate escrow account which is maintained, controlled and operated under a separate escrow agreement. The ownership of the amounts collected is with the Airport Authority of India and for the said reason too, no service tax can be levied.
- The circular dated 8 July 2011 of the Central Board of Excise Tax cannot be used to contend that service tax is leviable on development fee. In this regard, the Supreme Court reiterated the law settled to the effect that circulars and notifications of revenue departments cannot run contrary to the position of law settled by the Supreme Court.

CNK Comments

In this welcoming judgment, the Supreme Court has reaffirmed the first principles relating to levy of service tax including that no such tax can be levied without there being a corresponding service. The attempt of the department to link the development fee with future services was rightly rejected by the Supreme Court as the nexus between the service and the fee must be in praesenti

and such fee cannot be linked to a later service and be made subject to service tax.

The Supreme Court also rightly upheld the force of precedents over circulars and notifications that run contrary to them.

This judgment will have ramifications under the GST law as well. The findings of the Honorable Supreme Court that the development fee is in the form of tax or cess collected for financing future projects and cannot be held as consideration for services provided to customers, visitors, passengers and vendors should hold good even under GST era.

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