Tax Snippets

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Constitution of GST Appellate Tribunal

The Hon'ble Madras High Court (the Hon'ble "**HC**") in the recent case of ***Madras Revenue Bar Association v. Union of India & Ors. W.P. 21147 of 2018*** struck down the relevant provisions under the Goods and Services Tax ("**GST**") laws providing for the constitution of the GST Appellate Tribunal ("**GSTAT**" / "**Tribunal**"). A brief summary of the findings of the Hon'ble High Court are as follows:

- Post analyzing numerous provisions of the GST laws dealing with the powers and jurisdiction of GSTAT, the Hon'ble HC observed that the some of the orders of the Tribunal are not subject to the jurisdiction of High Court and are therefore similar to the orders passed by Central Administrative Tribunal.
- It was further observed that GSTAT is not just an extension of the mechanism to determine the quantum of tax which is only a subject matter of experts, since the determination of applicable tax requires interpretation of various sections and notifications where GSTAT is also required to scrutinize the decision making process.
- It was thus held that GSTAT while undertaking the activities mentioned above has to keep the judicial principles in mind where any weightage in favour of the service members or expert members and value-discounting the judicial members would render the Tribunal less effective and efficacious than the High Courts.
- It was further stated that since in all GST related issues, the litigation shall be between an assessee and the Government, presence of two members from the Government would create a reasonable apprehension of bias and lead an assessee to believe that perhaps the remedy is non-existent.

In view of the above the Hon'ble High Court struck down Section 109(3) and Section 109(9) of the Central Goods and Services Tax Act, 2017 ("**CGST Act**") providing for the constitution of the GSTAT. The Hon'ble HC further struck down Section 110(1)(b)(iii) of the CGST Act which provided that a member of the Indian Legal Services, having prescribed experience, will be eligible to be appointed as a judicial member in GSTAT.

The Hon'ble HC in its judgment relied on the principles pronounced in numerous case laws (including ***Union of India v. R. Gandhi 2010 (11) SCC 1***) which dealt with the importance of maintaining independence of judiciary in cases where the legislation provided for the establishment of a tribunal to deal with specific disputes under the given legislation.

Implications on other bodies constituted under the GST laws –

It is noteworthy that similar writ petitions are pending across the country including the Hon'ble HC, where the constitution of the Authority for Advance Ruling ("**AAR**"), the Appellate Authority for Advance Ruling ("**AAAR**") and the National Anti-profiteering Authority ("**NAA**") have been challenged.

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In all the pending writ petitions, constitutional *vires* of the AAR, AAAR and NAA have been challenged on the ground of absence of a judicial member (as contemplated under the GST laws) and the resulting apprehension of bias against the assessee.

Therefore, the judgment of the Hon'ble HC in the case of ***Madras Bar Association (supra)*** is likely to have a huge implication on the pending petitions till the time the operation of the said judgment is either stayed or overruled by the Hon'ble Supreme Court.

Furthermore, in case it is held that the constitution of the said authorities is against the settled constitutional principles, it would be interesting to see if the judgment is passed retrospectively or prospectively on account of sheer volume of cases already decided by the said authorities especially the AAR and AAAR.

Recommendations Made by the Goods and Services Tax Council in its 37Th Meeting

The Goods and Services Tax Council ("**GST Council**") recently met for their 37th meeting in Goa, on 20 September 2019. In this regard, a brief summary of the major decisions taken by the GST Council are as follows:

Recommendations in relation to change in law or procedure:

- Simplification of Forms for annual returns along with specific relaxations in filing of annual returns for MSMEs for the FY 2017-18 and FY 2018-19.
- Extension of last date for filing appeals before the GST Appellate Tribunal since they are not yet functional.
- Restriction on availment of input tax credit in cases where the supplier does not furnish details in relation to its outward supplies.
- Due date for rolling out of new returns pushed to April 2020
- In principal approval for the following:
  - Linking of AADHAR with GSTIN; and
  - Reasonable restrictions for passing of credit by 'risky taxpayers' including 'new risky taxpayers'.

Rate change for specific supplies of goods and services:

Industry/Sector (Indicative list)	Movement
Hospitality and Tourism • Hotel Accommodation services • Outdoor catering services	↓
Precious metals • Cut and polished semi-precious stones • Job work services in relation to diamonds	↓
Food industry • Caffeinated beverages	↑

Miscellaneous changes:

- It has been decided to exempt services provided by an intermediary to a supplier of goods or recipient of goods when both the supplier and recipient are located outside the taxable territory.
- 'Aerated drink' manufacturers shall be excluded from the composition scheme.
- Securities lending services have been brought under reverse charge mechanism, attracting IGST at the rate of 18%.
- The following goods and services have been exempted from GST:
  - Services by way of storage or warehousing of cereals, pulses, fruits, nuts and vegetables, spices, copra, sugarcane, jiggery, raw vegetable fibres such as cotton, flax, jute *etc.*, indigo, unmanufactured tobacco, betel leaves, tendu leaves, rice, coffee and tea.
  - Conditional exemption on export freight by air or sea extended till 30 September 2020.
  - Supply of goods and services to Food and Agriculture Organization (FAO) for specified projects in India.

[*Please note that some of the rate changes / exemptions indicated above, have been notified and bought into effect from 1 October 2019.*]

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Due Date for Claiming Transitional Credit Under GST Laws

Recently, a Division Bench of the Hon'ble Gujarat High Court has held that the time limit (of 90 days) for carrying forward Cenvat credit into the GST regime by filing Form GST Tran – 1 is merely procedural in nature and should not be construed as a mandatory provision.

Basis of the judgment

In coming to this conclusion, the Court has opined that input tax credit is a substantive right which cannot be curtailed by the rigors of procedure. Further, once the Cenvat credit is availed of under the erstwhile indirect tax legislations, such Cenvat credit becomes a vested right in the hands of the taxpayer. This right is saved by the savings clause in the GST legislations and creates a legitimate expectation on the taxpayer that the credit would get carried forward in the GST regime and cannot be taken away.

The Court also tested the prescribed time limit on the touchstone of Article 14 of the Constitution and observed that in relation to post-GST purchases, input tax credit can be claimed till the time returns are filed for the month of September following the end of the financial year in relation to such purchases or date of furnishing of the annual return, whichever is earlier. In contrast, restricting the right to claim transitional input tax credit of pre-GST purchases creates an arbitrary, irrational and unreasonable discrimination in terms of the time-limit to allow the availment of input tax credit, which is violative of Article 14 of the Constitution.

Moreover, the court observed that in case such credit is denied, it would lead to a cascading effect of tax, which is against the basic premise of GST. Such credit blockage leads to increased working capital requirements which may diminish continuation of business, thereby being violative of Article 19(1)(g) of the Constitution.

In addition, the court declared that Cenvat credit is in the nature of property for businesses and while the right to property is not a fundamental right, it remains a constitutional right. Such right cannot be taken away merely through rules prescribed by the government. In this regard, it was held that if the time limit for claiming transitional credit was provided for under the CGST Act, the same could have stood the test of constitutionality. However, since such abrogation has been undertaken through the rule making power, the same is violative of Article 300A of the Constitution. The judgment has considered various constitutional aspects before holding that the input tax credit availed under the erstwhile indirect tax regimes cannot be nullified by introducing procedural formalities in the transitional rules framed under the GST laws.

In our view, while the judgment is likely to be challenged by the Revenue before the Hon'ble Supreme Court, it is based on sound legal reasoning and interpretations and comes as a boon to the industry.

Impact on taxpayers

In effect, the judgment vindicates the stand of many taxpayers that even if Form GST Tran – 1 is filed beyond the due date, input tax credit is a vested and indefeasible right which cannot be abrogated. It is also a shot in the arm for all taxpayers who could not file Form GST Tran – 1 due to technical glitches.

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Such taxpayers may approach their jurisdictional tax authorities for filing Form GST Tran – 1 manually or if their manual applications have been rejected, consider approaching the jurisdictional High Courts for seeking necessary directions allowing them to transition their Cenvat credit into the GST regime.

In addition to the above, this judgment substantiates on the point that input tax credit / Cenvat credit availed under the erstwhile tax laws creates a vested and indefeasible right for the taxpayer which cannot be taken away by the Government arbitrarily, through a rule making power on account of procedural rigidities.

It would be interesting to see how the jurisprudence develops in the realm of input tax credit especially in relation to issues pertaining to transitional credit of cesses, such as Education Cess, Krishi Kalyan Cess, *etc.* which are not allowed to be carried forward.

The industry should evaluate on a case to case basis whether there is merit in approaching the courts for seeking relief in relation to denial of transition of eligible tax credits.

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