KPMG

India Tax Konnect

October 2024

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Direct Tax

a. Decisions – International Tax

Foreign tax credit to be granted even if the relevant form claiming FTC is filed belatedly but prior to intimation order: Hyderabad Tribunal[1]

Facts of the Case

The taxpayer, an individual, was an Indian resident. During the year under consideration, he received salary from a US-based company. Such salary was subject to tax in the USA.

In his tax return filed in India, he offered such salary to tax and claimed the foreign tax credit (FTC) of the taxes paid in the USA.

The relevant Form to claim the FTC (i.e., Form 67) was filed after the due date of filing the tax return, but prior to the intimation under section 143(1) of the Income-tax Act, 1961 (the Act).

The tax officer denied the FTC as Form 67 was not filed along with the return of income.

The taxpayer argued that filing Form 67 is directory and not mandatory.[2] The denial of the FTC for belated filing of Form 67 was unjust.

Decision

Although Form 67 was not filed by the due date, it was filed before the tax officer passed the intimation order under section 143(1) of the Act.

Accordingly, the FTC was allowed to be claimed.

[1] *Ramesh babu Jasti Gandipet* v. *ITO* (ITA No. 760 & 761/Hyd/2004)
[2] *Nagababu Kuchibhotla* v. *ITO* (ITA No. 28/Hyd/2024)

b. Decisions – Domestic Tax

Additional claim not available based on time-barred revised tax return: Supreme Court[3]

Facts of the Case

The taxpayer filed its original tax return within the due date as prescribed under the Act.

It revised its tax return after the time limit prescribed for the revision and claimed an additional deduction of deferred revenue expenditure.

The tax officer did not accept the revised tax return as it was barred by the limitation period. The Commissioner of Income-tax (Appeals) dismissed the taxpayer's appeal, citing the same limitation issue.

Subsequently, the Income-tax Appellate Tribunal allowed the appeal in part, remanding the case for consideration of the claim regarding deduction of deferred revenue expenditure.

The Revenue preferred an appeal before the High Court which set aside the Tribunal's order, stating that the claim could not be considered due to the time-barred revised return.

[3] *Shriram Investments* v. *CIT* (CA No. 6274 of 2013). Source: Taxsutra

Taxpayer's contentions

While the Tribunal did not direct consideration of the revised return, it correctly allowed the tax officer to consider claims about the deduction for the deferred revenue expenditure.

Relying on the decision in the case of *Wipro Finance*[4], the taxpayer argued that the claim for a deduction could be made during the assessment proceedings even if such claim is not made in the tax return.

Revenue's contentions

Once the revised return was time-barred, the tax officer does not have the jurisdiction to consider any claims made in that return.[5]

The appellate powers of the Tribunal[6] did not pertain to the powers of the tax officer to consider the claims in the time-barred revised return.

Supreme Court decision

The Supreme Court dismissed the taxpayer's appeal.

In *Wipro Finance* case, the Supreme Court did not consider the question of power of the tax officer to consider a claim made in the time-barred revised return. It merely considered the appellate powers of the Tribunal. Moreover, in that case, the Revenue did not object to the taxpayer making a fresh claim.

On the other hands, in *Goetze* decision, it was held that the tax officer cannot entertain any claim made by the taxpayer otherwise than by following the provisions of the Act.

In the instant case, the Tribunal has not exercised its appellate power under section 254 of the Act to consider the claim. Instead, it directed the tax officer to consider the claim, and the tax officer had no jurisdiction to consider the claim made in the time-barred revised return.

No depreciation allowable on road constructed under BOT basis: Mumbai Tribunal[7]

Facts of the Case

The taxpayer constructed a road expressway and claimed depreciation on the expenditure incurred on the project.

This project was awarded to the taxpayer by the National Highway Authority of India (NHAI) on a Build, Operate, and Transfer (BOT) basis for 18 years.

The issue was whether the taxpayer was entitled to the depreciation under section 32 of the Act.

[4] Wipro Finance Ltd. v. CIT [2022] 443 ITR 250 (SC)
[5] Goetze (India) Ltd. v. CIT [2006] 284 ITR 323 (SC) and PCIT v. Wipro Ltd [2022] 446 ITR 1 (SC)
[6] Under section 254 of the Act

[7] *Hazaribagh Ranch Expressway Ltd* v. *ACIT* (ITA No. 3787/Mum/2023). Source: Taxsutra

Revenue's contentions

The taxpayer is not the owner of the assets as the ownership lies on a lease basis for 18 years, which will eventually transfer to the Government. The toll roads could not be treated as tangible or intangible assets and thus, not eligible for the purposes of the depreciation under the Act.[8]

Taxpayer's contentions

The right to set up an infrastructure facility and collect annuity qualifies as a 'license' or 'business or commercial right', which should be treated as an 'intangible asset' under section 32(1)(ii) of the Act.[9] Alternatively, it should be treated as 'plant and machinery' or 'building' for the purposes of claiming the depreciation.

In the BOT arrangements for the development of roads/highways, as a matter of general practice, the ownership of the land on which the road is constructed remains with the authority granting the development rights. The concessionaire, doing development, enjoys the benefits arising from the use of assets through collection of toll/annuity (right) for a specified period.

Alternatively, if none of the above categories were accepted for depreciation, the entire cost incurred for the construction of the road project should be allowed as revenue expenditure.

Decision

The Mumbai Bench of the Tribunal accepted the Revenue's position. However, the cost was allowed to be amortized evenly over the concession period as per the CBDT Circular No. 9 of 2014.

The Tribunal relied on the jurisdiction Madras High Court in the case of L&T Infrastructure wherein the court interpreted the term 'business or commercial rights of similar nature' by applying the principle of noscitur a sociis[10] instead of applying the principle of ejusdem generis[11] – the former being wider than the latter.

Assessment in the name of amalgamating company valid if its PAN continues to exist for litigation purposes: Hyderabad Tribunal[12]

Facts of the Case

MIPL merged with MTIPL, and the merger was sanctioned with the appointed date as 1 April 2019.

Despite notifications to the tax officer about the merger vide letters in the months of March and April 2021, the assessment orders were passed in the name of the MIPL on 29 July 2022.

The taxpayer challenged the assessment order as it is passed in the name of a non-existent entity (following the merger) and was non-est in the eye of laws.

[8] *North Karnataka Expressway Ltd*. v. *CIT* [2015] 372 ITR 145 (Bom); *CIT* v. *West Gujarat Expressway Ltd.* [2017] 390 ITR 398 (Bom); *L&T Infrastructure Development Projects Ltd.* v. *ACIT* (TCA No. 868 to 870 of 2009)
[9] *CIT* v. *Smifs Securities Ltd* [2012] 348 ITR 302 (SC); *Techno Shares Stocks Ltd*. V. *CIT* [2010] 327 ITR 323 (SC); *DCIT* v. *Progressive Constructions Ltd.* [2018] 63 ITR(T) 516 (Hyd-SB)

[10] When two or more words which are susceptible of analogous meaning are coupled together, they are understood to be used in their cognate sense - associated words take their meaning from another.
[11] When particular words pertaining to a class, category or genus are followed by general words, the general words are construed as limited to things of the same kind as those specified.
[12] *MicroChip Technology (India) Private Ltd* v. *DCIT* (ITA No. 509/Hyd/2022)

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The Revenue argued that the amalgamating company still existed in the records due to unresolved litigations and pending demands, which required the continuation of its PAN. In its statement, the taxpayer itself stated that MIPL's PAN could not be surrendered in view of pending litigation against it and such a surrender will be done only after the litigation is complete and demands against the said PAN are exhausted.

The Revenue also relied on the Supreme Court decision in the case of *Mahagun Realtors (P) Ltd*.[13], wherein it was observed that in the case of amalgamation, unlike the winding up of a corporate entity, the outer shell of the corporate entity is undoubtedly destroyed; it ceases to exist. Yet, in every other sense of the term, the corporate venture continues unfolded within the transferee entity. Therefore, it is essential to look beyond the mere concept of destruction of corporate entity which brings to an end or terminates any assessment proceedings.

The Supreme Court had also held that whether corporate death of an entity upon amalgamation per se invalidates an assessment order ordinarily cannot be determined on a bare application of section 481 of the Companies Act, 1956 but would depend on the terms of the amalgamation and the facts of the case.

Decision

The Hyderabad bench of the Tribunal held that the assessment in the name of the amalgamating entity was valid in the facts of the present case.

In the instant case, where the amalgamated company as well as the amalgamating company continue to be in existence and the PAN of the amalgamating company was necessary for the purposes of concluding the litigations and exhausting the demands against the amalgamating company.

In such a case, it is not open for the taxpayer to argue that the assessment order was passed against a non-existing company. Existence or non-existence do not lie on any continuum. If a company exists for the purpose of some litigation, it exists for the purpose of tax litigation also.

[13] *PCIT* v. *Mahagun Realtors (P) Ltd*. [2022] 137 taxmann.com 91 (SC)

Foreign Exchange Management Act

RBI issues new Directions for Compounding of contraventions under FEMA, 1999

The Ministry of Finance had notified and substituted the Foreign Exchange (Compounding Proceedings) Rules, 2024 on 12 September 2024. In furtherance thereto, new Directions for Compounding have now been issued by Reserve Bank of India ('RBI') vide Circular[14] dated 01 October 2024. The key changes thereunder are as follows :

1. **Online filing of Compounding application :** The Compounding applications can now be filed physically or online through PRAVAAH Portal of RBI.

2. **Compounding application fee** : The compounding application fees stand revised to Rs. 10,000 from Rs. 5,000 plus applicable GST.

3. **Online payment of compounding application fee / amount :** The Compounding application fee or the Compounding amount as per compounding order can now be paid online (NEFT / RTGS/ other permissible modes) apart from a Bank's Demand Draft subject to an intimation as prescribed

4. **Incomplete compounding application :** RBI to return the Compounding application if the application fees are not paid or the application is incomplete or administrative actions are pending. An indicative list of administrative actions is now incorporated in the Directions. In cases of return of the compounding application, the fee paid to RBI will not be refunded. However, if the compounding application is resubmitted then the application fees need not be paid again. The Applicants are now required to intimate any changes in address / contact details to the Compounding Authority.

6 **Revised Computation matrix :** The guidance note on the type of contraventions and formula for computing and levy of compounding fees (known as the compounding matrix) has been revised / updated and increased at certain places. If an applicant does not pay the compounding amount earlier and reapplies for compounding, then the amount payable as per compounding matrix may be enhanced by 50% of the earlier compounded amount but subject to 300% of the sum involved in contravention.

7 **Compounding Hearing :** The Directions now expressly stipulate compounding hearing to be provided by virtual mode as well apart from physical hearing.

8 **Suo-moto compounding :**The Directions explicitly reiterate that the Applicant can opt for compounding either *suo moto* or based on a Memorandum of Contraventions issued by RBI

[14] A.P. (DIR Series) Circular.No.17/2024-25 dated 01 October 2024

Indirect Tax

Notifications

1. **Notification 18/2024–Central Tax dated 30 September 2024** - Principal bench of Appellate Tribunal empowered to examine anti-profiteering cases from 1 October 2024

2. **Notification 19/2024–Central Tax dated 30 September 2024 -** No anti-profiteering cases to be accepted from 1 April 2025

3. **Notification 20/2024–Central Tax dated 8 October 2024 –** The Central Board of Indirect Taxes ('CBIC') issued the Central Goods and Services Tax (Second Amendment) Rules, 2024 through this notification. It amends/inserts a few rules under the CGST Rules 2017. The major impact of such amendments include

   a) Restrictions on IGST refund in specific cases of advance authorization, EOU, etc removed [Rule 96(10)]

   b) Time limit for issuance of self-invoices specified [Rule 47A]

   c) Procedure to be followed for availing the benefit of amnesty scheme introduced through Finance Act 2024 specified [Rule 164]

   d) Restriction of credit not applicable in case of notices issued under section 74A [Rule 36(3)]

   We have covered this notification in detail in our flash news dated 11 October 2024 (Link - KPMG-Flash-News-on-Central-GST-Second-Amendment-Rules-2024.pdf)

4. **Notification 21/2024 – Central Tax dated 8 October 2024**

   - Date notified for amnesty under Section 128A of the CGST Act
   - Effective from 1 November 2024

Cases	Date by which payment to be made
Covered under section 128A(1) of the CGST Act	31 March 2025
Remanded back after rejecting the applicability of section 74 of the CGST Act	Six months from the order redetermining tax under section 73 of the CGST Act

5. **Notification 22/2024 – Central Tax dated 8 October 2024**

   - Procedure for filing application for rectification of orders where demand confirmed for wrong availment of ITC which is now available under section 16(5) and 16(6) of the CGST Act
   - Time period
     a) For filing of application - 6 months from order date
     b) For passing of rectification order – 3 months from application date
   - Mode – electronic, on the common portal, along with Annexure A

Indirect Tax

- Officer to upload summary of rectified order in
  a) GST DRC-08 – for rectification of order issued under section 73/74 of the CGST Act
  b) GST APL-04 – for rectification of order issued under section 107/108 of the CGST Act

6. **Notification 23/2024–Central Tax dated 8 October 2024 –** Late fee for delay in furnishing TDS return (GSTR-7) for the month of June 2021 onwards reduced to INR 25 from earlier INR 100 per day of failure (total late fee for such period capped at INR 1000); no late fee in case of delay in furnishing nil GSTR-7, w.e.f. 1 November 2024

7. **Notification 24/2024 - Central Tax dated 9 October 2024 –** Excludes persons engaged in supply of metal scrap falling under Chapters 72 to 81 from the exemption from registration given by Notification 5/2017-Central tax[15], w.e.f. 10 October 2024

8. **Notification 25/2024-Central Tax dated 9 October 2024 -** TDS of 2% made applicable on B2B supply of metal scrap (applicable even in cases where both the dealers are required to deduct TDS.

9. **Notification 5/2024–Central Tax (Rate) dated 8 October 2024**

   Following tax rates notified w.e.f. 10 October 2024:

   a) Specific cancer drugs– 5%
   b) Extruded or expanded food products, savoury or salted (other than unfried or uncooked) – 12%
   c) Car seats – 28%

10. **Notification 6/2024–Central Tax (Rate) dated 8 October 2024 -** RCM introduced on the supply of metal scrap (covered under chapters 72 to 81) by an unregistered person to a registered person, w.e.f . 10 October 2024

11. **Notification 7/2024–Central Tax (Rate) dated 8 October 2024 -** Transport of passengers by helicopters on seat share basis liable to 5% GST subject to non-availment of ITC on goods used in supplying such service, w.e.f. 10 October 2024

12. **Notification 8/2024–Central Tax (Rate) dated 8 October 2024**

    Following exemptions are applicable w.e.f. 10 October 2024

    a) Services incidental to supply of transmission and distribution of electricity by transmission and distribution utilities to customers when provided as composite supply
    b) R&D services by a Government entity; or a university notified under clause (ii) or (iii) of section 35(1) of Income Tax Act using Govt/private grants

[15] Exempting persons exclusively engaged in supplies liable to reverse charge under section 9(3) of the CGST Act from obtaining registration under GST

c) Affiliation services by State/Central educational boards, educational councils and other similar bodies to Government schools

d) Any services by NSDC[16],NCVET[17], awarding body or assessment agency recognized by NCVET, training body accredited with an awarding body recognized by NCVET in relation to specific programs/courses.

13. **Notification 9/2024–Central Tax (Rate) dated 8 October 2024** – RCM introduced on renting of any immovable property other than residential dwelling by an unregistered person to a registered person, w.e.f . 10 October 2024.

Circulars

1. **Circular 234/28/2024–GST dated 11 October 2024**

Following clarifications have been provided:

a) Affiliation services provided by universities to their constituent colleges are liable to 18% GST.

b) Affiliation services provided by Central or State educational boards or councils to schools are taxable (*Past demands for period between 1 July 2017 to 17 June 2021 regularized on 'as is where is basis')*

c) Approved flying courses by DGCA-approved FTOs[18] are exempt

d) Charter of helicopter liable to 18% GST. Further, past payment of GST on transportation of passengers in helicopter on seat-sharing basis for period between 1 July 2017 to 9 October 2024 regularized on 'as is where is basis'.

e) Ancillary/intermediate services provided by GTA

i. if in the course of transportation of goods (irrespective of the manner of invoicing) –composite supply

ii. if not in the course of transportation of goods and invoiced separately – not a composite supply

f) Past payment of GST on import of services by an establishment of a foreign airline company from a related person/ its establishments outside India without consideration for the period from 1 July 2017 to 9 October 2024 regularized on 'as is where is basis'.

g) PLC[19] charges paid along with consideration for construction services form part of composite supply, with construction services being the principal supply

h) Past payment of GST on services incidental to supply of transmission and distribution of electricity by transmission and distribution utilities to customers for the period from 1 July 2017 to 9 October 2024 regularized on 'as is where is basis'.

i) Past payment of GST on distribution of theatrical rights by distributor to exhibitor for the period from 1 July 2017 to 30 September 2021 regularized on 'as is where is basis'.

[16] National Skill Development Corporation
[17] National Council for Vocational Education and Training
[18] Flying Training Organizations

[19] Preferential Location Charges

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2. Circular 235/29/2024–GST dated 11 October 2024

- GST rate of 18% applicable on extruded or expanded savoury/salted products (except un-fried or un-cooked snack pellets) for period prior to 10 October 2024.
- Un-fried or un-cooked snack pellets continue to attract 5% GST rate.
- Roof Mounting package unit (RMPU) Air conditioning machines for railways liable to 28% GST
- Motorcycle seats liable to 28% GST. Car seats previously attracted an 18% GST rate, revised to 28% from 10 October 2024.

3. Circular 236/30/2024–GST dated 11 October 2024

- Clarified the scope of “as is/as is, where is basis” based on a few illustrations
- Once a particular rate has been finalized in case of a disputed product or service, the tax position prior to the clarification would be regularized in the following manner:
  a) Payment made at lower rate or exemption claimed by the taxpayer to be accepted and no demands to be raised
  b) No refund if tax paid at the higher rate.

4. Circular 237/31/2024–GST dated 15 October 2024

- Clarification on the implementation of section 16(5) and 16(6) of the CGST Act.
- No refund to be granted for any tax paid or ITC reversed because of the retrospective insertion of section 16(5) and 16(6) of the CGST Act

Scenarios	Action to be taken by proper officer
No demand notice issued but investigation/proceedings initiated	Officer to consider Section 16(5) and (6) and take appropriate action
Notice issued but order under Section 73/74 of the CGST Act pending	
Order under Section 73/74of the CGST Act issued but appellate order or revisional order pending	
a) Order under Section 73/74of the CGST Act issued but appeal to appellate authority yet to be filed b) Order under Section 107/108of the CGST Act issued but appeal to Tribunal yet to be filed	Apply for rectification of order according to Notification 22/2024-Central tax

- Proper officer to consider other grounds also, if any, for denial of ITC
- Appeal against the rectified order can be filed under section 107/112 of the CGST Act

5. Circular 238/32/2024–GST dated 15 October 2024

- Clarified various doubts related to amnesty scheme under Section 128A of the CGST Act
- **Amnesty benefit available:**
  a) Even where tax payments made before 1 November 2024 (subject to a few exceptions)

b) Matters involving IGST and compensation cess
c) Matters involving irregularly availed transitional credit demanded under section 73 of the CGST Act
d) Penalties under section 73, 122 and 125 of the CGST Act if demanded through notice/order under section 73 of the CGST Act
e) Matters where SLP filed before Supreme Court *(subject to withdrawal of such SLP before applying for amnesty)*

- **Amnesty benefit not available:**

a) For some of the issues (and not all) in the notice/order
b) Late fee/redemption fee
c) Import IGST payable under the Customs Act, 1962

- **Other clarifications:**

a) Where multiple notices/orders issued for period covered under amnesty, separate applications to be filed for each notice/order
b) Payment to be made through DRC-03 for a notice yet to be adjudicated which is to be covered under amnesty
c) Payment under amnesty can be made through electronic credit ledger

High Court decisions

Clubbing of show cause notices for multiple financial years (where limitation period has expired for either of the years) not permissible[20]

Petitioner received a consolidated show cause notice ('SCN') dated 7 May 2024 under section 73 of the CGST Act for financial years from 2017-18 to FY 2023-24. The petitioner filed a writ petition before the Karnataka High Court against such notice.

The petitioner contended that limitation period of three years applies separately to each assessment year under Section 73 of the CGST Act. Clubbing multiple tax periods in a single notice is impermissible, and separate notices should have been issued for each assessment year. Petitioner relied upon the judgement of M/s Titan Company Limited[21] and Caltex (India) Limited[22].

The Karnataka High Court observed that Section 73(10) of the CGST Act prescribes a specific time limit for issuance of order. The law stipulates that particular actions must be completed within a designated year, and such actions should be executed in accordance with the law's provisions. Thus, the practice of issuing a single, consolidated SCN for multiple assessment years contravenes the provisions of the CGST Act. Accordingly, the High Court allowed the writ and ordered quashing of the SCN.

[20] Bangalore Golf Club [Writ Petition No. 16500 of 2024]
[21] 2024 (15) Centax 118 (Mad.)
[22] 1965 (12) TMI 125 – SC

Indirect Tax

No IGST on ocean freight in case of FOB contracts[23]

The petitioner (BLA Coke Pvt. Ltd) was engaged in the business of imports of coking coal on both CIF and FOB basis. The petitioner filed an intervention application before the Supreme Court in the matter of *Mohit Minerals Pvt. Ltd.* After the pronouncement of the Supreme Court judgment, the petitioner sought a refund of IGST paid on ocean freight, relying on the said judgment. To ensure no double benefit, the petitioner reversed the corresponding amount of input tax credit while claiming the refund.

However, the refund claim was rejected on the grounds that the benefit of the judgment in the Mohit Minerals Pvt. Ltd. case is not applicable to FOB imports. Aggrieved by the rejection, the petitioner filed a petition before the Gujarat High Court.

The petitioner contended that in the *Mohit Minerals* case, the Gujarat HC had struck down Entry no 10 of Notification No. 10/2017-Integrated Tax (Rate) dated 28 June 2017. The court ruled that this levy was not legal for both CIF and FOB transactions, and the decision was upheld by the Supreme Court. The petitioner also placed reliance on the decision of Bombay High Court in case of Agarwal Coal Corporation.

Against this, the revenue argued that the Supreme Court in Mohit Minerals case had considered the validity of Notification No. 10/2017, specifically referring to CIF contracts. The Court did not extend its decision to strike down the levy of IGST on FOB transactions. Therefore, in case of import of goods on FOB value, the petitioner is liable to pay IGST on ocean freight as admittedly, the petitioner has availed the services on payment of freight for importation of the goods.

In this case, the Gujarat High Court held that IGST, as per the proviso to Section 5(1) of the IGST Act, is levied on the value determined under Section 3 of the Customs Tariff Act at the point when customs duties are imposed under Section 12 of the Customs Act, 1962. This value includes the cost, freight, and insurance up to the place of importation. Therefore, IGST is payable on the value of goods, including freight and insurance, regardless of whether the transaction is on a CIF or FOB basis.

Relying on the Supreme Court judgment in the case of *Mohit Minerals* and the Bombay High Court decision in *Agarwal Coal Corporation*, the High Court ruled that when a notification is struck down, the respondent authorities cannot insist on the levy of IGST on the amount of ocean freight in transactions on an FOB basis as well.

Notification extending time limit for order ultra-vires if not recommended by GST council[24]

Petitioner challenged the order [issued under section 73(9) of the CGST Act] on the ground that the following notifications extending the period for passing of the order under Section 73(10) of the CGST Act using powers under Section 168A of the CGST Act are ultra vires the CGST Act:

a) Notification 9/2023-CT dated 31 March 2023 - on the ground of absence of *force majeure*
b) Notification 56/2023-CT dated 28 December 2023 - on the ground of absence of recommendation from GST council to extend the timeline along with absence of *force majeure*.

[23] BLA Coke Private Limited TS-638-HC(GUJ)-2024-GST

[24] Barkataki Print and Media Services [(2024) 22 Centax 479 (Gau.)]

The respondent in first affidavit contended that the time limit for issuance of notice for FY 2018-19 was expiring on 31 December 2023. As no meeting of the GST Council was scheduled, the Central Government had to issue Notification No.56/2023-CT extending the time limit for passing of the order under Section 73(9) of the CGST Act for FY 2018-19 and FY 2019-20.

However, in the second affidavit, the respondent argued that Notification No. 56/2023-CT is valid because the recommendation of the GST Council are persuasive and not binding. The Supreme Court in Mohit Minerals Pvt. Ltd had watered down the effect of the recommendations to be made by the GST Council. Further, on account of the COVID-19 pandemic, there were various delays on account of completing certain assessment, audit etc. and under such circumstances, the existence of force majeure as defined in the Explanations to Section 168A of the CGST Act was there.

Against this, the petitioner's contention was that when Section 168A of the CGST Act categorically mentions 'on the recommendations of the Council', the power to extend can only be on the recommendation of the Council. There cannot be a subsequent ratification by the GST Council. It was not a case of *force majeure* as the COVID pandemic was not affecting the working in 2022 and furthermore there was already an extension granted earlier.

The petitioner further contended that the judgment in case of Mohit Minerals Pvt. Ltd. does not lay a proposition that without recommendations, the Government can exercise the power under the Act. It only states that in certain cases, the recommendation of the GST Council is not binding whereas in respect to secondary legislations, it is binding

In this case, the Gauhati High Court observed that the challenge made to Notification 9/2023-CT is not relevant as the impugned orders were issued within the additional timeline provided by Notification 56/2023-CT.

The Court further observed that the word 'recommendation' is not defined under GST. Thus, reliance was placed on the judgement of the Supreme Court in case of V.M. Kurian Vs State of Kerala[25] where the SC analyzed the meaning of the word 'recommendation' which was not defined in the Kerala Building Rules. It was observed that the meaning of the word "recommendation" has to be understood in the context of the provisions of the Kerala Building Rules and the object behind the Rules. Accordingly, the word "recommend" means "giving of a favourable report opposed to an unfavourable one".

Under GST, for exercising the power under Section 168A of the CGST Act, the existence of the recommendation is a *sine qua non* and without it, the exercise of such power would not be legally sustainable. Further, the word 'recommend' would mean giving of a favourable report opposed to an unfavourable one" by the GST Council for exercising such power.

In the judgement of the Mohit Minerals Pvt. Ltd., the Supreme Court had clearly observed that when the Government is exercising power to notify secondary legislations to give effect to the uniform taxation system, the recommendations are binding. The power under Section 168A is a delegated power on the Government to issue a Notification which can be termed as a delegated legislation or a secondary legislation and not the primary.

[25](2001) 4 SCC 215

legislation. Thus, the recommendations of the GST Council are binding on the Government for exercise of powers under section 168A of the CGST Act.

In the instant case, Notification No.56/2023-CT was issued without the recommendation of the GST Council. Moreover, the Central Government had used the phrase 'on the recommendations of the Council' in such notification, when there was none.

In fact, para 2.8.1 of circular No.FNO.CBIC-20/10/07/2021-GST/516 dated 14 May 2024 categorically mentioned that there was no recommendation prior to issuance of the Notification and the request for recommendation shall be placed before the GST Council for ratification in the subsequent meeting. However, proceedings of four GST Council meetings thereafter did not mention of any recommendation from the GST Council.

Further, as such recommendation was never placed before the GST Council, the GST Council had no occasion to consider existence of *force majeure*.

Thus, Notification No.56/2023-CT is ultra vires the CGST Act. Accordingly, the same is set aside and quashed

Subsequent overruling judgements do not affect decisions that have already attained finality[26]

The Company ('Respondent') is engaged in manufacture of pharmaceutical products. As they were, located in the state of Sikkim, they were entitled to refund of education cess & secondary and higher education cess paid by them under Notification No.20/2007-CE dated 25 April 2007.

The Officer sanctioned refund relying on Supreme Court judgement in the case of SRD Nutrients Private Limited[27]. Thereafter, the judgement in the case of SRD Nutrients Private Limited was overruled by the larger bench of Supreme Court in the case of Unicorn Industries[28]. In view of the latter judgement in the case of M/s. Unicorn Industries, the Department issued notice to the Respondent for recovery of refunds already sanctioned, which were regarded 'erroneous' as per section 11A of the Central Excise Act, 1944 ('the CEA'), which the Respondent challenged before the Kolkata CESTAT.

The CESTAT relying on the judgement of Tripura High Court on the same issue, in the case of *Tripura Ispat*[29], held that refund claims sanctioned by following the ruling of the Supreme Court on the date of sanction was valid in law and any subsequent overruling judgements will not have any impact on the refunds already sanctioned. Aggrieved by the CESTAT's decision, the Department preferred an appeal before the High Court.

The Appellant (Department) contended that the refund was sanctioned based on the Supreme Court's judgement in the case of SRD Nutrients which was subsequently overruled in the case of Unicorn Industries. The concerned authority had the power to invoke the provisions of section 11A of the CEA, for recovery of duty erroneously refunded.

The High Court relying on Supreme Court order in the case of *Saraswati Agro Chemicals Pvt. Ltd*[30], held that judgements rendered based on prevailing law cannot be reopened due to subsequent overruling. If such an action is permitted, it will open a pandora's box and there would be no end to litigation, which is against public policy.

[26] Alkem Laboratories Ltd [2024 (9) TMI 550 - SIKKIM HIGH COURT]

[27] 2017 (11) TMI 655
[28] 2019 (12) TMI 286
[29] 2021 (1) TMI 753
[30] 2023-VIL-66-SC-CE

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Advant Navis Business Park,
Tower-A, Plot# 7, Sector 142,
Expressway Noida,
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1st & 2nd Floor,
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Bengaluru – 560071 Tel: +91 80 6833 5000

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1, 2 & 3 Floor, Harrington Road,
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Sector – V, Salt Lake,
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Lodha Excellus, Apollo Mills Compound, N M
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Opp. Vadodara Central Mall,
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