

# TAX FLASH NEWS

22 July 2022



## High Court sets aside circular clarifying that GST is applicable on Annuity payment received for construction of road pursuant to 22<sup>nd</sup> GST Council decision

Central Board of Indirect Taxes and Customs (CBIC) had issued a clarification<sup>1</sup> which stated the annuity (deferred payments) paid for construction of roads is not exempt from GST. This circular was challenged on the grounds that it is contrary to exemption notification and the decision of the 22<sup>nd</sup> GST Council. Karnataka High Court<sup>2</sup> upheld the contentions and set aside all the actions pursuant to the impugned circular.

### Facts of the case

- Petitioners (i.e. concessionaires) are entrusted with the activity of construction of road.
- In certain contracts where construction and maintenance of the roads is outsourced to private persons, Petitioners are permitted to collect 'tolls' from the vehicles plying on the road. The toll charges are towards construction as well as services provided by the concessionaires.
- In certain other contracts, Petitioners are paid consideration termed as 'annuity' for construction of roads in order that they do not charge toll for access to a road or a bridge.
- Collection of toll charges is exempted vide notification no. 12/2017-CT(R) while annuity was taxable.
- In 22<sup>nd</sup> GST Council's meeting held on 6 October 2017 it was decided to treat annuity at par with toll and exempt service by way of access to a road or bridge on payment of annuity. Accordingly,

exemption notification no. 12/2017-CT(R) was amended vide notification no.32/2017-CT(R) dated 13 October 2017.

- Thereafter, circular No. 150/06/2021-GST dated 17 June 2021 was issued (pursuant to 43<sup>rd</sup> GST Council meeting) clarifying that entry 23A of exemption notification no. 12/2017-CT(R) does not exempt GST on the annuity (deferred payments) paid for construction of roads.
- Aggrieved by the circular, Petitioners filed writ petitions.

### Petitioner's contentions

- Annuity (deferred payments) for construction of roads is exempt from GST as per exemption notification and as per clarification issued by GST Council.
- Clarification in circular dated 17 June 2021 is contrary to the exemption notifications and is liable to be set aside.

### Revenue's contentions

- Clarification made by way of a circular dated 17 June 2021 does not contravene the notifications since it only clarifies what is exempted by virtue of the exemption notification.
- Only service by way of access to a road or a bridge on payment of annuity and not annuity (deferred payments) paid for construction of roads is exempted.

<sup>1</sup> Ministry of Finance Circular No. 150/06/2021-GST, dated 17 June 2021

<sup>2</sup> DPJ Bidar - Chincholi (Annuity) Road Project Private Limited & Anr. Vs Union of India & 3 Ors [2022-VIL-500-KAR]

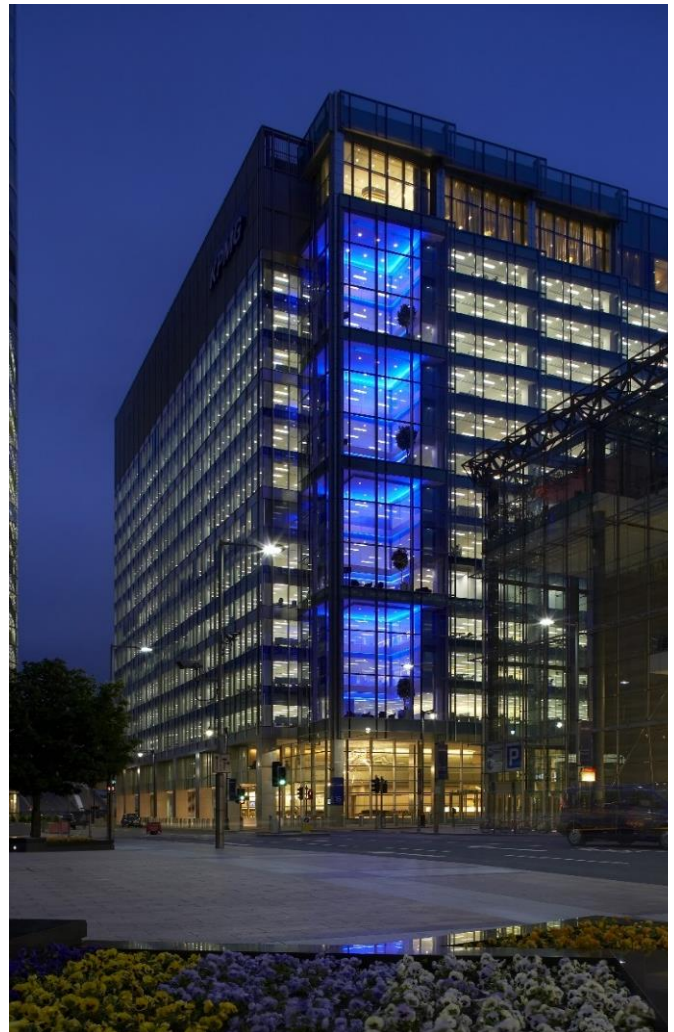
## High Court's decision

Karnataka High Court quashed the impugned circular and set aside all the actions pursuant thereof. It held that:

- It is a settled proposition of law that a circular which clarifies the notification cannot have the effect of overruling the notification.
- Reading of recommendation of the GST Council in its meeting dated 6 October 2017 as well as the notifications issued pursuant thereto clearly exempts the entire annuity being paid to the Petitioners towards construction and maintenance of roads.
- If Government is desirous of altering its stance, it has to issue fresh notifications amending its earlier notifications.

## Our comments

Pursuant to the impugned circular, Ministry of Road Transport and Highways (MoRTH) had issued a circular<sup>3</sup> clarifying applicability of GST on the activity of construction of road where considerations are received in deferred payment HAM (Annuity). This judgement will bring a sigh of relief to concessionaires engaged in construction and maintenance of roads and receives annuity as a consideration. However, complexity will arise on claiming refund of GST if already paid pursuant to the impugned circular. Further, need to wait for next step by Government.



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<sup>3</sup> Ministry of Road Transport & Highways Letter No. NH-24028/22/2020-H dated 27 August 2021

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