Dimensions – 20th Edition

Rulings / Judgments under GST era:

1. Western Concessions Pvt. Ltd. - Maharashtra[1]	
Issue for Consideration	Whether input tax credit (ITC) can be availed on the goods and services used for the construction of pipelines for the delivery of the re-gasified Liquified Natural gas (LNG) from Floating Storage Regasification Unit (FSRU) to the national grid?
Discussion & Ruling	**Discussion:** • The Applicant is setting up a LNG re-gassification project at Jaigarh port in Maharashtra. In respect of the same, it would import the FSRU which would be moored to the jetty at the port. • The LNG would be re-gasified in the FSRU and then would be inducted into the national grid (cross country pipeline) from where it would be supplied to the end customers. • The Applicant would procure various goods and services for the laying of the pipeline between the jetty and the national grid, for which it proposes to avail the ITC. • The Applicant has stated that the term 'plant and machinery' as defined under section 17(5) of the Central Goods and Services Tax Act, 2017 (CGST Act) excludes 'pipelines laid outside the factory premises'. Based on dictionary meanings of the words 'factory' and 'premises' and on conjoint reading of the same it means a building located on land. • Accordingly, since FSRU is a floating structure capable of navigating in waters, it cannot be regarded as a factory premises. Therefore, the said exclusion would not be applicable. • Also, it is submitted that pipelines laid outside some premises which are not factory premises will also be covered within the definition of 'plant and machinery'.

[1] Order no. GST-ARA-94/2018-19/B-22 dated February 22, 2019

	• Further, the pipeline being constructed consists of various components, equipments and devices like pipes, isolation valves, metering system, pressure regulating system, etc. which allow to induct, monitor, control the flow of gas. Since the term 'plant and machinery' includes 'apparatus, equipments and machinery', such devices and equipments would fall within the meaning of 'apparatus, equipments and machinery' and qualify as 'plant and machinery' • The Authority observed the following: - As per the Factories Act, 1948, a 'factory' means any premises having workers who are involved in a manufacturing process. FSRU is a place where workers are working, and LNG is converted into a gaseous form. - The manufacturing or processing may not be taking place on land but it is taking place on the ship (FSRU) and the same is to be considered as a factory. - The contention that there should be a building to be regarded as a factory is not convincing since it is the manufacturing/ production of something that makes a factory and not the building. - Further, every pipeline is fitted with various devices and equipments which is also there in the present case. The Applicant has himself regarded the devices and equipments as a 'pipeline,' then it is not justified to bring the said 'pipeline' within the meaning of 'apparatus, equipments and machinery'. **Ruling:** FSRU is a factory and since the pipelines are laid outside the factory, the restriction prescribed under section 17(5)(c) and 17(5)(d) of the CGST Act are applicable and accordingly, the Applicant is not eligible to claim the ITC.
Dhruva Comments:	• The eligibility to claim ITC on pipelines laid by the assessees outside the factory premises or by a service provider for rendering transportation services has been a subject matter of litigation even under pre-GST era. The credits have been contested on various grounds like outside of factory area, nexus with output service, construction / works contract service resulting in immovable property etc. • It will be relevant to see how the Courts would interpret the definition of 'plant and machinery' and in turn its exclusions.

2. Multiples Alternate Asset Management Pvt Ltd. - Maharashtra[2]	
Issues for Consideration	• Whether GST is applicable on Advisory and Management fees ('AMC fees') received in Indian currency from domestic investors? • Whether GST is applicable on AMC fees received in foreign currency from overseas investors?

[2] Order No. GST-ARA-81/2018-19/B-25 dated March 6, 2019

Discussion & Ruling	**Discussion:** • The Applicant is an Asset Management Company ('AMC') which proposes to set up a new investment Vehicle – Alternative Investment Fund ('AIF'), where funds from various investors, both domestic and overseas will be pooled in and invested in various portfolio companies in India in accordance with the applicable AIF Regulations. • The Applicant would be providing Management and Advisory services for which the consideration would be received from the investors. • For the AMC fees received from Indian investors, the Applicant has submitted that such fees should be chargeable to GST @ 18%. • For the AMC fees received from overseas investors, the Applicant submitted that foreign investors should be considered as the service recipients and as the location of service recipients is outside India and the consideration is received in convertible foreign exchange, the services should be treated as export of services and should be treated as zero rated supply as per Section 16 of the Integrated Goods and Services Tax Act, 2017 ('IGST Act'). • The Revenue concurred with the taxability of AMC fees received from Indian investors however for the AMC fees received from foreign investors it was stated that it should not be treated as zero rated supply as the services are supplied in India. It was also contended that such services should be liable to GST under RCM • The Authority for Advance Ruling concurred with the Applicant regarding the taxability of AMC fees received from Indian investors chargeable to GST @ 18%. • With regards to taxability of AMC fees received from foreign investors, it was observed that the service recipient is AIF (not the overseas investors) which is in India and as the service receiver is in India, this service cannot be treated as export of services. The basis for the conclusion is as follows: - The Applicant and the AIF are separate entities and that the services rendered to the investors, if any would be by the AIF. - From the submissions made by the Applicant, the services would be supplied to AIF however the AMC fees would be received from the investors of AIF. - Just because fees will be received from the investors it does not mean that the supply of service is made to the investors. - The facts enumerated by the Applicant clearly shows that their supply of services is to AIF which is a different entity. - The Authority referred to Section 2(93)(a) of the CGST Act, which prescribes that a person who is liable to pay consideration is the recipient of services and usually it is the service consumer who is liable to pay consideration and therefore the ultimate consumer should be treated as the service recipient, which in this case is the AIF. - The Authority further observed that 'Person liable to pay' cannot be equated with 'Person who has paid'. - The receipt of fees by the Applicant from the investors is probably an internal arrangement which cannot be used to say that services have been rendered to the investors.

	Ruling: • In light of the observations and findings, the Authority held that AMC fees received from domestic investors should be exigible to GST at the rate of 18%. • In respect of supply of AMC services to foreign investors, the service recipient would be considered to be AIF which is located in India and thus, chargeable to GST @ 18%.
Dhruva Comments / Observations	• From the viewpoint of indirect tax laws, it is critical to understand the privity of contract between the parties and roles and obligations identified thereunder. It is also relevant to note that a report released by a standing committee 'Alternate Investment Policy Advisory Committee' constituted by SEBI under chairmanship of Shri. N.R. Narayana Murthy has stated that the current framework of GST encourages AIFs (which include foreign investors) to be domiciled offshore since GST becomes an incremental cost for the investors.

3. Mohana Ghosh - West Bengal[3]	
Issue for Consideration	Whether credit of GST paid on the purchase of motor vehicles for supplying them on rental basis could be availed?
Discussion & Ruling	**Discussion:** • The Applicant is supplying cabs on rental basis. The consideration for such service is determined based on the distance travelled. • The Applicant stated that it is providing rent-a-cab service which qualifies as supply of passenger transportation services and therefore, the credit of GST paid on purchase of motor vehicle should be allowed as per Section 17(5)(a)(B) of the CGST Act. • The Revenue stated that before February 1, 2019, the credit of tax paid for purchase of motor vehicle was not allowed due to the restriction placed under Section 17(5)(b)(ii) of the CGST Act, as stood before amendment. • The Revenue further stated that post February 1, 2019, the credit of tax paid for purchase of motor vehicle is eligible as the renting of cab is made for the purpose of transporting passengers in view of Section 17(5)(a)(B) of the CGST Act. • The Authority agreed with the view of the Revenue that for the period prior to February 1, 2019, ITC was not available for the given set of facts. • For period post February 1, 2019, the Authority differentiated rent-a-cab services and service of transportation of passengers based on the following:

[3] Order No. 06/WBAAR/2019-20 dated June 10, 2019

Particulars	Rent-a-cab	Passenger transportation
Transfer of right to use/control	Involved for a specified duration	Varying degree of control
Service recipient	Any person	Passenger
Consideration	For renting of cab and not for the distance travelled	Paid for the distance travelled

- The Authority also observed that the Applicant is providing services to institution like West Bengal Postal Circle who could not travel as passenger, the consideration is received as an agreed upon amount per month, and the distance travelled is taken into consideration to recover the fuel cost.

Ruling:

- Differentiating between both the services on the above grounds, the Authority held that the service provided by the Applicant is in the nature of renting of motor vehicle and not transportation of passenger services and thus, it is not eligible to avail ITC in view of section 17(5)(b)(i) of the CGST Act.

Dhruva Comments / Observations

- It is worth noting that the question by the Applicant and the Authority was from the perspective of Section 17(5)(a)(B) of the CGST Act, however, the ruling has been pronounced by referring to Section 17(5)(b)(i) of the CGST Act.
- Also, this ruling is in direct contradiction to the Advance ruling in the case of **M/s. Narsingh Transport- Madhya Pradesh**[4]. In the said ruling it was held that the Applicant is entitled to avail ITC (pre as well as post February 1, 2019) on cars (passenger vehicles) which are further supplied to customers on lease rent, subject to conditions provided in notification number 11/2017-Central Tax (Rate) dated June 28, 2017.
- In the said ruling, it was observed that ITC on purchase of motor vehicles was allowed if it is used for making further supply of such vehicle and such further supply includes renting/leasing of motor vehicle.

4. Kesoram Industries Ltd Vs Assistant Commissioner of Central GST, Central Excise & Others[5]	
Issue for Consideration	Whether the Petitioner is entitled to file a writ before the High Court against order passed violating the principles of natural justice?
Discussion & Judgment	**Discussion:** • The recovery order passed by the Assistant Commissioner of Central Tax, CE & Service Tax requesting the Petitioner to compute:

[4] Order No. 02/2019 dated February 18, 2019
[5] 2019-VIL-274-TEL – The High Court for the State of Telangana

	- interest payable on the entire amount inclusive of ITC availed; and - penalty payable under section 122(iii) of the 'CGST Act, 2017. • A subsequent order directed the Petitioner to pay the interest, failing which recovery proceedings under section 79 of the CGST Act, 2017 would be initiated. • It was submitted that an opportunity of being heard was not provided in case of the recovery order. Further, the bank account was attached despite the second order being replied by the Petitioner in due time. • The Hon'ble High Court held that the writ petition was highly misplaced because section 107 of the CGST Act provides an effective alternative remedy i.e. approaching the appellate authority. It was also observed that the Petitioner had filed the writ to avoid statutory deposit for filing an appeal before the appellate authority. **Judgment:** • The High Court of Telangana dismissed the writ petition stating that even if the Petitioner is of the opinion that principles of natural justice have been violated, he is free to raise the said plea before the relevant appellate authority. The Court is not inclined to admit the writ jurisdiction.
Dhruva Comments / Observations	• In a similar matter before the Hon'ble High Court of Telangana in the case of *Megha Engineering & Infrastructures Ltd.* v. *The Commissioner of Central Tax and others* [Writ Petition No.44517 of 2018], the writ court admitted the matter challenging imposition of interest on total GST liability including ITC. It was held that ITC is available for utilisation only when the said credit is claimed in the self-assessed return filed and the taxpayer is liable to pay interest and penalty on the entire GST liability including ITC. • However, in a similar case of *Octagon Communications Pvt. Ltd.* v. *Union of India* [TS-399-HC-2019(GUJ)-NT], the High Court of Gujarat by way of an ad-interim relief permitted the taxpayer to file returns manually, noting the submissions made by the assessee that there is no condition for making payment of tax as a pre-condition for filing the return in Form GSTR-3B. Also, if the assessee is not able to file GSTR-3B, it would be deprived of claiming ITC. • It would be interesting to see as to how judiciary would interpret the provisions of law and evolve on this contentious subject. • Also, whether this would have any bearing on admission of writ petitions which are being filed before various High Courts on GST related matters.

5. JSW Energy Limited vs Union of India & Ors[6]	
Issue for Consideration	Whether the principles of natural justice have been violated by the Appellate Authority for Advance Ruling (AAAR) by adverting to new grounds?

[6] 2019-VIL-276-BOM – The High Court of Judicature at Bombay

Discussion & Judgment	**Discussion:** • JSW Energy Ltd. ('JEL'/ 'the Petitioner'), engaged in the business of generation and sale of electricity, proposed to enter into an arrangement with JSW Steel Limited (JSL) involving conversion of coal and other inputs into electricity and electricity into Steel on job work basis. JEL had sought for an advance ruling to determine the applicability of GST on the proposed arrangement. • The AAR ruled that the proposed arrangement doesn't qualify as job work mainly because the same amounted to manufacture as per section 2(72) of the CGST Act, 2017. • Aggrieved by the ruling, JEL appealed against the same before the AAAR. The AAAR upheld the ultimate conclusion of the AAR by relying on following new and distinct grounds: - coal used for the manufacture of electricity and steel thereafter is not covered as an input under the Standard Input Output Norms ('SION') for steel products under the Foreign Trade Policy; - coal would stand consumed and irretrievable in the same form and thus, the proposed arrangement doesn't qualify the condition of bringing back the same inputs as prescribed under section 143 of the CGST Act, 2017. • The Petitioner submitted the following: - the AAAR had exceeded jurisdiction by relying on new grounds which were never raised before AAR by the Revenue; - the AAAR violated the principles of natural justice by not putting the Petitioner to notice regarding the 'new grounds'; - JEL was not offered an opportunity to place documentary evidences with regard to the new grounds. • The Hon'ble High Court stated that they would not examine the orders on merits/ demerits since the statutes do not provide any further appeal against the decision of the AAAR. It was also observed that the validity of the impugned orders would be examined with application of principles of judicial review i.e. examining the decision-making process rather than the decision. • The High Court rejected the contention of JEL that the AAAR should have confined itself to the correctness or otherwise of the primary grounds relied upon by the AAR. It was observed that the AAAR was entitled to uphold the conclusion of the AAR for reasons other than those considered during the original ruling by the AAR. The High Court in this regard stated – *'Ultimately the Appellate Authority is required to give its ruling on the question posed by taking into account the relevant circumstances and eschewing irrelevant ones. Therefore, if the Advance Ruling Authority may have missed a particular point, it is not as if the Appellate Authority is precluded from adverting to such point and basing its ruling on the same.'*

	• The High Court, on the contention of violation of natural justice, observed that AAAR should have provided a notice to JEL for consideration of the new grounds and opportunity to submit agreements and documentary evidences having direct nexus with the said grounds. Further, the failure to follow the correct decision-making process has resulted in violation of principles of natural justice and also caused serious prejudice to the Petitioner. . **Judgment:** • The High Court set aside the order passed by AAAR and remanded the Petitioner's appeal to the AAAR for reconsideration. • The High Court granted liberty to the Petitioner to produce additional material/ evidences having bearing on the new grounds relied upon by the AAAR and requested the AAAR to dispose of the appeal as expeditiously as possible.

Judgment under Pre GST era:

6. Century Metal Recycling Private Limited and Another v. U.O.I. and Ors.[7]	
Issue for Consideration	Whether the proper officer can reject the value declared in the Bill of Entry without observing and following the mandate of Section 14 of the Customs Act, 1962 ("the Act") and rules made thereunder?
Discussion & Judgment	**Discussion:** • The Appellant is *inter alia* engaged in manufacture of aluminium alloys, for which aluminium waste is imported as a raw material for self-consumption purpose. The department rejected the transaction value declared in the Bill of Entry without specifying any reason and compelled them to forgo their right to provisional assessment under Section 18 of the Act. The Appellant under coercion, issued a letter of consent agreeing to the assessment / valuation by the Customs authorities to avoid delay in clearance, levy of demurrage, ground rent and container detention charges etc. • The Appellant filed a Special Leave Petition in the Supreme Court subsequent to rejection of Writ Petition by the High Court of Allahabad. The High Court refrained from exercising extraordinary jurisdiction since the matter pertained to customs valuation. • Given the structure of the Customs Valuation Rules, 2007 ("the Rules"), it was noticed that Rule 4 to Rule 9 of the Rules are subject to the provisions of Rule 3 which in turn gives primacy to Rule 12 of the Rules. Rule 12 which enjoys the primacy and pivotal position applies where the proper officer has a reason to doubt the truth or accuracy of the value declared for the imported goods. Rule 12 also indicates 'certain reasons' basis which the proper officer can raise doubts about the truth and accuracy of the declared value. The said Rule also provides that such reasons (for doubting the truth or accuracy of the value declared) should be communicated to the importer in writing and provide an opportunity of being heard.

[7] [2019] 5 TMI 1152 – Supreme Court

- The authorities despite acknowledging that the aluminium scrap imported is not a homogeneous commodity and therefore, cannot be evaluated on the basis of samples or lab testing, discarded the declared value basis contemporaneous import data available.
- The Supreme Court observed the following in context of the Rules:
  - Before rejecting the value declared in the Bill of Entry, the Proper Officer must have a reasonable doubt and which is based on 'certain reasons' and thereafter Rule 4 to Rule 9 of the Valuation Rules can be used to determine the value of imported goods.
  - To satisfy the requirements of Rule 12 of the Rules, a preliminary enquiry should be conducted by the proper officer where the importer is given an opportunity for clarification of the doubts of the officer by furnishing of documents / evidences as to the truth or accuracy of the value declared.
  - Determination of value in terms of Rule 4 to Rule 9 will come into operation only where the proper officer doubts the truth and accuracy of the value declared after recording 'certain reasons' specified in (a) to (f) or similar grounds in writing.
  - The authorities should make provisional assessment of customs duty under Section 18 of the Act when there is a dispute between the customs authorities and the importer as regards the valuation of the imported goods, which expedites clearance.

Judgment:

- The Hon'ble Supreme Court held that any insistence and compulsion by the authorities that the importer should disclaim and forgo his statutory right under Section 18 of the Act is not correct. It was further held that rejection of the declared value by the proper officer without reasonable doubt for 'certain reasons' is not acceptable.
- The contentions raised by the revenue were rejected that the Appellants did not seek provisional assessment of the bill of entry and paid duty on the valuation done by the customs authorities. This Court also noted that the Appellant had written several letters to the department seeking clearance of the imported goods and that the Appellant was compelled to pay excess duty by waiving of its right to provisional assessment and accepting valuation in terms of Rule 4 to Rule 10.
- The Supreme Court also invoked the doctrine of prospective application to mandate recording of reasons at the second stage of enquiry and with a direction that past cases will be decided on case to case basis, depending on the factual matrix and other conditions.
- It was held that the declared value should not be rejected unless there are contrary details of contemporaneous imports or other material indicating and serving as corroborative evidence of import at or near the time of import which would justify rejection of the declared value and enhancement of the price declared in the bill of entry.
- The Court quashed the order of assessment by issuing writ of certiorari.

Dhruva Comments / Observations	The Supreme Court has reiterated the modus operandi to be adopted by the Custom authorities when evaluating 'transaction value' in terms of the valuation provisions. The directive is clear that the transaction value should not be discarded unless there are contrary evidences. Further, the decision also states that while valuation alerts released by Director General of Valuation could be referred for understanding valuation trends but the same should not interfere with discretion of the assessment authority who is required to pass an assessment order in a given factual matrix.

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