SNR & COMPANY
CHARTERED ACCOUNTANTS

GST BULLETIN

APRIL 2024

Delhi, Pune, Bangalore

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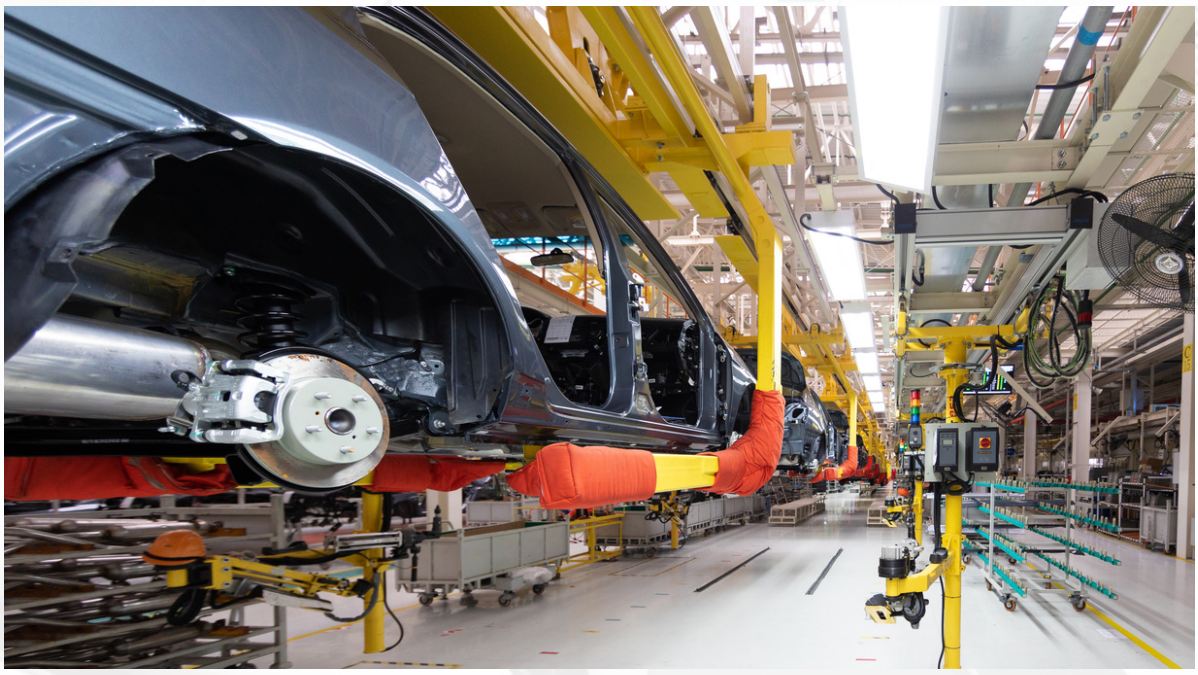
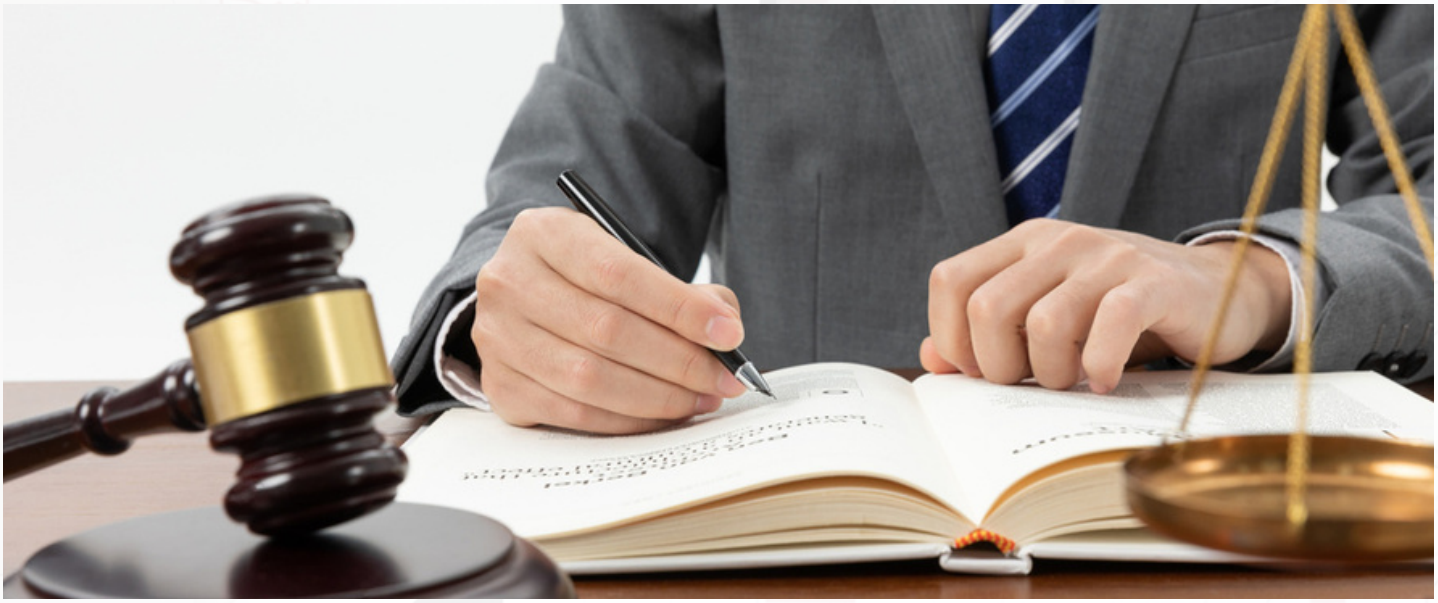
1. SCN can be issued u/s 74 even if the Audit report did not allege fraud or suppression of facts:

Case of : M/s ABT Limited
Decision by : Madras High Court
Date of Ruling : 30th January 2024

- M/s. ABT Limited (Assessee) is engaged in the business of supply of light vehicles, their parts and also servicing of such vehicles. GST Audit Division conducted the audit of the Assessee's books of accounts for FY 2017-18 to 2020-21 and audit report was issued in Form GST ADT-02.
- Thereafter, a show cause notice dated September 13, 2023 ("the Impugned SCN") was issued under Section 73 of the CGST Act in respect of about 11 audit observations and a separate show cause notice under Section 74 of the CGST Act on December 14, 2023 ("the Impugned SCN") in respect of about 5 audit observations.
- Aggrieved by the Impugned SCN under section 74, the assessee filed a Writ Petition before the Madras High Court.
- Assessee contended that the audit report did not record any findings of fraud, wilful misstatement or suppression of facts in respect of any of the observations made therein. Absent such findings, the GST Authorities are not empowered to issue the Impugned SCN under Section 74 of the CGST Act.
- Assessee further contended that the GST Authorities have not issued an intimation in Form GST DRC-01A under Rule 142(1A) of the CGST Rules. The amendment to Rule 142(1A) of the CGST Rules is prospective in nature, and hence, the same would not apply to the present proceedings which relate to the period prior to and after the amendment to Rule 142(1A) of the CGST Rules.
- On the other hand, department argued that as per Section 65 of the CGST Act, SCN u/s 74 can be issued even if the audit report does not contain any findings relating to fraud or suppression of facts. Thus, the SCN was issued is in accordance with law. Department further added that the assessee can furnish their response to the impugned SCN and also raise the objections raised in the present Writ Petition before the Tax Authorities.



- Court observed that section 65(7) of the CGST Act indicates that the audit conducted under Section 65(1) of the CGST Act should result in the detection of tax not paid or short paid or erroneously refunded or that ITC was wrongly availed or utilised. Thus, the obligation with regard to the contents of the audit report appears to have been satisfied in the present case.
- There is nothing in the language of Section 65 of the CGST Act to indicate that the audit report should contain findings of fraud or wilful misstatement or suppression of facts. On the contrary, Section 65(7) of the CGST Act provides that the proper officer may initiate action under Sections 73 or 74 of the CGST Act.
- While Rule 142(1A) of the CGST Rules was amended prospectively, the impugned SCN was issued subsequent to the date of amendment. Therefore, even if the amendment is prospective, the amendment would apply with regard to the Impugned SCN.
- Thus, in view of the above, the High Court dismissed the Writ Petition by allowing liberty to the Assessee to file a reply to the Impugned SCN.



Full Judgement: ABT Limited

SNR's Take

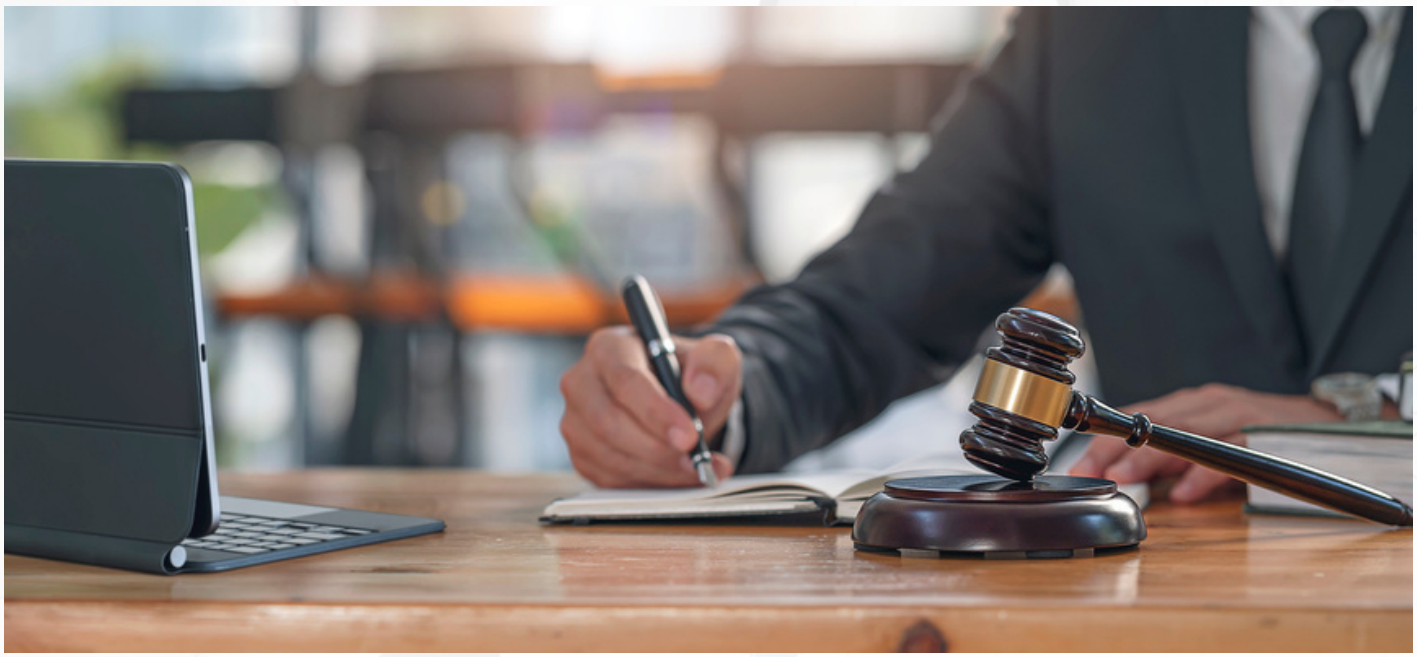
Judgement by High court focuses on the procedural and legal aspects of Departmental audits u/s 65 of the CGST Act. The Madras High Court in this case dismissed the writ petition by holding that during the conduct of GST Audit if it is observed that tax has not been paid or short paid or that ITC was wrongly availed or utilized, then as per section 65(7), the proper officer may initiate the action either u/s 73 or 74 of CGST Act.

2. Mandatory to provide proof of ITC reversal by recipient in case of discounts given by the supplier. Sec 15(3)(b)(ii) does not suffer from 'manifest arbitrariness':

Case of : Hindustan Unilever Ltd
Decision by : Rajasthan High Court
Date of Ruling : 28th February 2024

- Hindustan Unilever Ltd. filed petitions, claiming issues in compliance with Section 15(3)(b)(ii) of the CGST Act, 2017. Under this section, value of supply need not include discount given and accordingly supplier is allowed to reduce his output GST liability when ITC as attributable to the discount has been reversed by the buyer. In the absence of such an IT-enabled platform, for a company like HUL, which has thousands of buyers across the country, such a compliance is a challenge or an impossibility.
- Assessee contended that when the GST Act was enacted, section 43 provided for a suitable mechanism that the matching exercise will have to be undertaken by the Department. That provision, however, was not brought into effect and ultimately omitted w.e.f. October 1, 2022.
- In the absence of any mechanism of matching, the entire burden is now placed on the supplier that post-sales discount can be excluded from taxable value only if ITC attributable to the discount passed on the basis of the credit note is reversed by the recipient and the burden is cast on the supplier to produce proof of such reversal of ITC on the basis of credit note issued by it u/s 34.
- As per the petitioner, it is practically impossible for the assessee to collect certificate/ documents/returns or any kind of evidence to substantiate that on account of post-sale discount, reversal of credit has taken place and therefore, appropriate reduction of tax liability has been made.
- Had the mechanism laid down under the deleted provision of section 43 continued or any other mechanism would have been evolved by the Revenue, being possessed of all the relevant information of the supplier recipient/customer, the present situation would not have arisen. Thus, provision contained in section 15(3)(b)(ii) suffers from manifest arbitrariness.

- Revenue contended that since the assessee had already produced evidence of reversal of ITC in many other transactions, that means there is no impossibility and therefore, the assessee is required to comply with the statutory condition before availing the benefit. Revenue further contended that mere hardship, without anything more, is not sufficient to hold that the provision is suffering from manifest arbitrariness.
- The High Court observed that the challenge rested mainly on the ground that the impugned section is a harsh provision. The court noted that it was assessee's own case that they were able to produce proof in some cases to the satisfaction of the authorities and therefore, the submission of assessee regarding impossibility of production of proof of reversal of ITC on the basis of discount note could not be accepted.
- HC remarked that "Merely because a stringent mechanism is provided under the law, particularly, it being a tax statute, one may not jump to the conclusion that the provision suffers from manifest arbitrariness"



Full Judgement: Hindustan Unilever Ltd

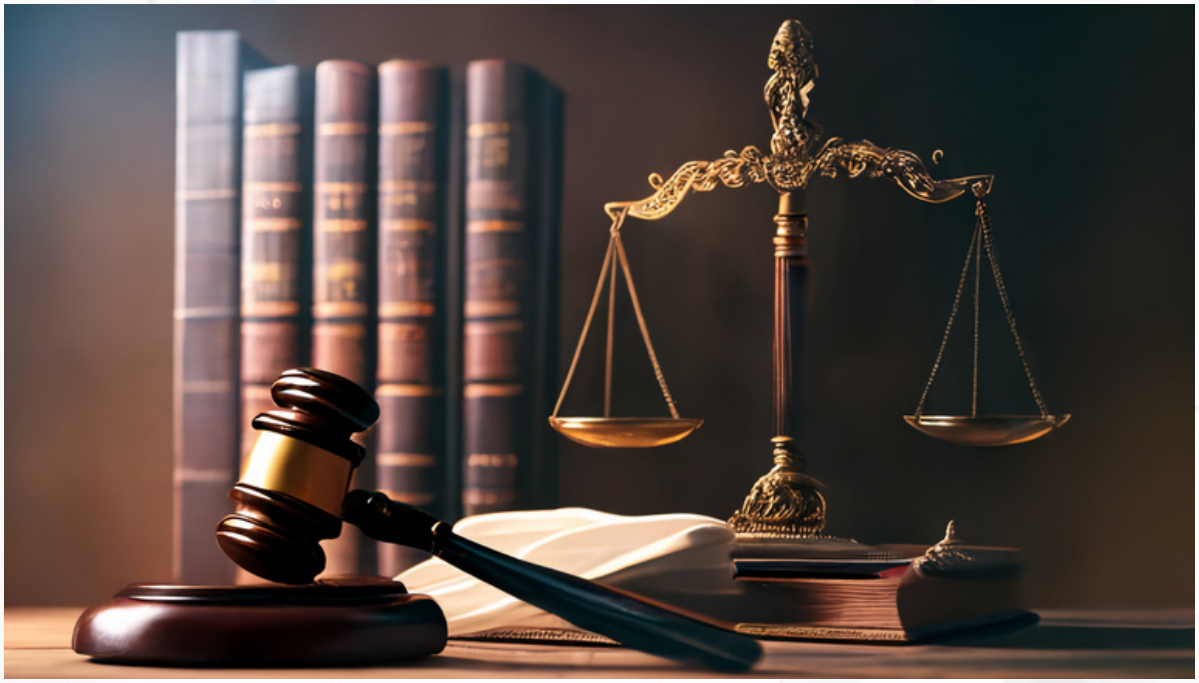
SNR's Take

GST was introduced with 2-way matching mechanism, however, moving forward, some of provisions were deleted. After deletion of some of the provisions related to 2-way mechanism, it has become duty of supplier to provide proof of reversal of ITC by recipient on credit note, if supplier want to reduce the outward liability. This judgement makes it mandatory for supplier to keep proof of reversal of ITC by recipient. This judgement can create lot of hardships for suppliers offering discount or receiving goods back etc. It may also discourage practice of providing post sale discounts by issuing GST Credit notes.

3. GST proceedings deemed to be concluded if tax along with interest has been paid before issue of SCN:

Case of : M/s. Ray Power Infra Pvt. Ltd.
Decision by : Telangana High Court
Date of Ruling : 28th February 2024

- Ray Power Infra Pvt Ltd (Assessee) is engaged in the business of generation of electricity through solar plants and is a registered establishment under GST. Despite entire payment of additional tax as communicated through audit report, SCN was issued u/s 74(1) of the CGST Act and the impugned order imposing demand was passed.
- Assessee referred to the provision of Section 73 of the CGST Act, particularly relying upon Sub-Section (5) and claimed that its case clearly falls within the purview of Section 73(5) and therefore, the entire show-cause proceedings and the final order under challenge in this writ petition deserves to be set aside / quashed.
- Assessee contended that the authorities concerned have wrongly initiated proceedings under Section 74 which otherwise would not be sustainable particularly when the petitioner falls within the purview of Section 73(1) and 73(5) of the CGST Act.
- Revenue in its counter, contended that the case of the Assessee being not a simple wrongful availment of ITC but a deliberate, wilful act on the part of Assessee with an intention to evade tax and therefore, it is a case which would fall squarely within the purview of Section 74(1) where there is an element of misstatement made by the Assessee and also suppression of fact, till it was noticed in the course of audit, which amounts to fraudulent act on the part of the Assessee.
- High court took note of the contents of Section 73 of the CGST Act & observed that the framers of the law were very clear in mind that in the event the taxpayer clears all the tax liability along with interest at any day, prior to the issuance of SCN, they would not be liable for any further additional taxes by way of penalty or interest.
- As regards Revenue's contention that SCN was issued u/s 74(1) and not u/s 73(1), HC firmly stated that Section 74 would get attracted only in the event of there being strong materials available on record to show that the Assessee had played fraud or there was any misstatement made by him and there being any suppression of fact.



- HC explicated that applicability of Section 74 would come into play only if the conditions stipulated in Section 73 has not been met with by the taxpayer i.e. to say in the event if the conditions stipulated in Sub-Section (5) of Section 73 is not honoured by the taxpayer in spite of the tax liability being brought to his knowledge, then in the said circumstances, Section 74 would automatically attract.
- HC ascertained that since the challenge to the impugned order in original and the SCN at the first instance itself is not sustainable in the eye of law in terms of Sub-Sections (5) and (6) of Section 73, the Assessee cannot be forced to undergo the entire process of litigation under the statute once when the issuance of SCN itself was bad.
- HC reiterated that the element of fraud or misstatement or suppression of fact with an intention of evading tax would arise only in the event if the taxpayer fails to meet the provisions of Sub-Section (5) of Section 73.

Full Judgement: M/s. Ray Power Infra Pvt. Ltd.

SNR's Take

In this judgement, High Court emphasised that section 74 proceedings are not sustainable if tax and interest have already been paid and if SCN is not sustainable then assessee cannot be forced to go through entire litigation process. This judgement is aligned with provisions of section 73, which states that if payment of tax along with interest is paid before SCN, then proceeding shall be considered to be concluded.

4. Timeline for issuing registration cancellation order is 'directory' not 'mandatory':

Case of : Fayiz Nangaparambil
Decision by : Delhi High Court
Date of Judgement : 05th March 2024

- Fayiz Nangaparambil (Assessee) is a proprietorship firm. It applied for amendment in registration details through Form REG-14 i.e., for addition of additional place of business in his GST certificate. Assessee received show cause notice whereby GST registration was suspended it was mentioned in notice that 'no business activity found in the premises, no documents and stock was available at business premises at the time of visit on 16.06.2023'.

- Assessee claimed that no order has been passed on the application seeking addition of a place of business and assessee challenged the SCN before High court.

- Revenue contended that a physical verification of the premises of assessee was carried out, and the Field Visit Report which also provided the photographs, show that the registered address of the assessee was a residential premises on the third floor and no business activity was being carried out at the subject property and it was also confirmed by the landlord of the said premises.

- HC examined whether the expression used in Rule 22 (3) of the CGST Rules "shall issue an order within a period of 30 days" was mandatory or directory in nature and noted that there is no consequences provided in the said rule with regard to non-passing of an order within 30 days, which is an indicated factor as to the intention of the Legislature. Further, the HC observed that expression "shall issue an order" used in Rule 22 (3) of the Rules cannot be construed as mandatory for proceedings under Rule 21 and directory for proceedings under Rule 20.

- HC further observed that Rule 22 (3) refers to two separate proceedings:

(i) One initiated by the tax payer by submitting an application seeking cancellation of registration, and

(ii) Other by the proper officer by issuance of show cause notice for cancellation of the registration.

- The court noted that the time line provided for issuance of order was 30 days for both the proceedings. If the intention was that the proper officer would forfeit the right to pass an order, then an anomalous situation would arise with regard to proceedings where the tax payer voluntarily applies for cancellation.
- If the proper officer, qua the said proceedings, also forfeits the right to issue an order, then the application seeking cancellation would be deemed to be rejected and the tax payer would continue to remain registered despite his desire to seek cancellation of registration.
- Besides, juxtaposing Rule 22(3) with Section 75 stipulating time lines for issuance of the order under section 73 and 74 as 3 years or 5 years respectively, observes "There is no such stipulation with regard to the non-compliance of the timeline provided by Rule 22(3) of the Rules. The fact that there is no stipulation of an automatic forfeiture of the right to pass an order implies that the condition is not mandatory but directory.
- HC held that there was no such stipulation with regard to the non-compliance of the timeline provided by Rule 22(3) of the Rules.

Full Judgement: Fayiz Nangaparambil

SNR's Take

In this significant judgement, Rajasthan High court stated that Proper officer can pass order even after time limit of 30 days for passing an order for suspension or cancellation of registration has expired where the taxpayer voluntarily applies for cancellation. This judgement could be helpful to revenue as well as taxpayer in cases where revenue could not pass order within the time limit provided in GST Act.

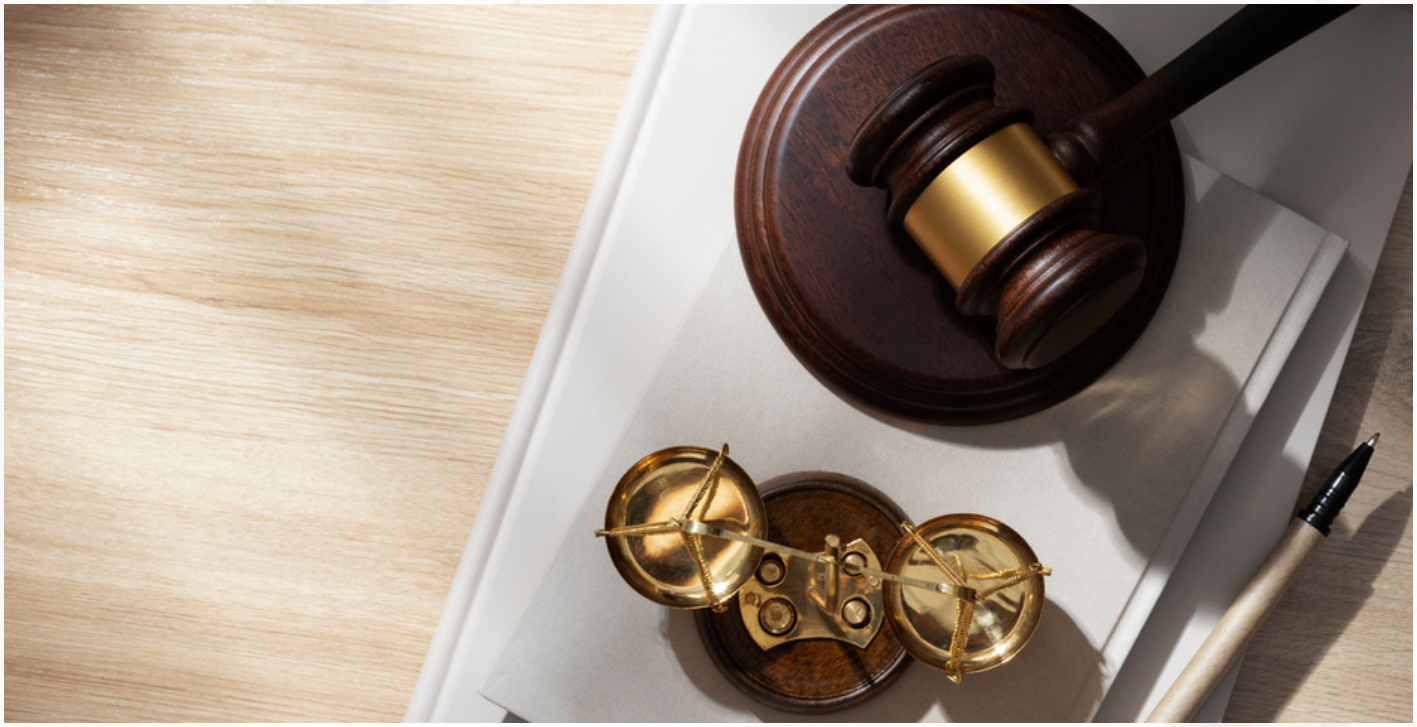
5. Generation and distribution of power from Solar panels to institutional customers using state board infrastructure is exempt from GST

Case of : YIS Power Solutions Pvt Ltd
Decision by : Kerela Authority for Advance Ruling
Date of Ruling : 27th March 2024

- M/s YIS Power Solutions Pvt Ltd (Applicant) is incorporated with an object to produce electricity from solar power panels and sell it to institutional customers through the transmission lines of Kerela electricity Board.
- Applicant sought the advance ruling on the following:

  a) whether GST is payable on the electricity produced from solar panels installed by the applicant when sold to customers?

  b) Whether KSEB (Kerela State Electricity Board) is liable to levy GST on wheeling charges, transmission and distribution charges and carrying charges that will be billed to the applicant by it against providing the infrastructure of KSEB for delivering the electricity produced by applicant to its sellers?
- Assessee contended that he is supplying electricity and supply of electricity is exempt supply under GST. Hence, the activity of generation of electricity from solar panels installed by them and distribution of the same to the end customers through the distribution facilities of KSEB is exempt from GST.
- Assessee further added, that the predominant supply provided by KSEB is transmission and distribution of electricity. In addition to the above services, KSEB also providing usage services of their facilities for which the wheeling and other charges are levied. When predominant element of composite supply is transmission and distribution of electricity which is exempt, then all other charges levied by KSEB is also exempt.



- As per section 2(23) of the Electricity Act, 2003, electricity is electrical energy generated, transmitted, supplied or traded for any purpose or used for any purpose except the transmission of a message. Therefore, electricity and electrical are one and same. The supply of electricity generated from solar panels by the applicant is a supply of goods and supply of electrical energy falling under customs tariff heading 27160000 is exempt from GST as per entry at S.No. 104 of notification No 02/2017.
- Kerala AAR held that supply of electricity generated from solar panels by the Applicant and distributed to end-consumer through the distribution facility of Kerala State Electricity Board (KSEB) is supply of goods falling under CTH 2716 00 00 and is exempted from GST as per Sl. No. 104 of Notification no. 02/2017 dated June 28, 2017

Full Judgement: YIS Power Solutions Pvt Ltd

SNR's Take

The ruling provides essential insights into the tax implications of transaction where solar energy is generated and distributed by private enterprises using the infrastructure provided by state board of electricity. Above judgement is aligned with GST provisions which provides supply of electrical energy as exempt from GST.

Circulars/ Notifications:

1. CBIC issues guidelines for Revenue officials for compliance and maintain ease of doing business while investigation (Instuction No. 1/2023-24-GST (Inv.):

CBIC issues instructions for revenue officials in maintaining ease of doing business while engaging in investigation with regular taxpayers. The detailed guidelines are issued and it mandates taking the approval of Pr. Commissioner before initiating any enquiry. It also mentions that summons issued "should disclose the specific nature of the inquiry being initiated" while avoiding vague expressions and it also states that this might be "useful in promoting uniformity or avoiding litigation if the matter, after being processed, is amongst those that also gets placed before the GST Council.

Full Read: Guidelines for investigation

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