LEX TAXIENT
Advisors LLP

TAXIENT INSIGHTS

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TABLE OF CONTENTS

1. WRIT PETITIONS

1.1. Penalty under Section 74 unjustified in cases involving bona fide legal dispute

The Petitioner had expatriate employees seconded from its overseas group company, with salaries paid partly in Indian Rupees and partly in foreign currency. The taxability of such secondment arrangements was previously disputed, with Tribunal rulings favoring the assessee until the Supreme Court, in **CCE and ST., Bangalore v. Northern Operating Systems Private Limited, 2022-VIL-31-SC-ST**, held that these arrangements qualified as taxable 'manpower supply service'. Following this ruling, the Petitioner voluntarily paid the applicable IGST for the relevant period.

The Revenue thereafter issued SCN demanding interest on the delayed payment and imposing penalty under Section 74 of the CGST Act, alleging wilful suppression with intent to evade tax.

The Petitioner contended that this was a bona fide interpretational dispute, with all relevant facts recorded in their books and known to the Revenue, and argued there was no fraud, wilful misstatement, or suppression justifying invocation of Section 74.

The High Court agreed with the Petitioner and held that all transactions and facts were fully disclosed, and the dispute was purely a legal interpretation issue. The Court also acknowledged that the legal position was initially decided in favour of the assessee by Tribunals and later reversed by the Supreme Court. Under such circumstances, the conditions required for applying Section 74 fraud, wilful misstatement, or suppression were absent, rendering the penalty unsustainable. However, the Petitioner remains liable to pay interest from the date of service availment until the tax payment. Additionally, the Petitioner is entitled to avail any applicable amnesty scheme under Section 128A of the CGST Act.

[BSH Household Appliances v. Commissioner of CT, 2025-VIL-831-KAR]

Taxient Comments: This ruling is correct and will provide vital relief to industries facing secondment related tax demands under Section 74. It also confirms the established principle that Section 74 penalties are punitive and require clear proof of fraud, wilful misstatement, or suppression with intent to evade tax. When non-compliance arises from a bona fide legal dispute, especially one initially decided in favour of the taxpayer at lower forums but subsequently reversed by the Supreme Court, such penalties cannot be sustained.

1.2. Interpretation of 'Three Months Prior' under Section 73(2)

The Petitioner challenged the SCN dated November 30, 2024 and the consequent demand order mainly on the ground of limitation. The Petitioner argued that for FY 2020-21, Section 73(10) of the CGST Act required the proper officer to pass the adjudication order within three years from the due date for filing the annual return, which in this case was February 28, 2025. Further, in terms of Section 73(2), the SCN must be issued at least three months prior to this deadline. On this basis, the Petitioner contended that the last permissible date for issuing the SCN was November 28, 2024. As the SCN was actually issued on November 30, 2024, it was claimed to be beyond the prescribed limitation and, therefore, without jurisdiction.

While examining the issue of limitation under Sections 73(2) and 73(10) of the CGST Act, the High Court observed that the expression 'three months' occurring in Section 73(2) is to be construed as three calendar months and not as a fixed number of days. Applying this interpretation, the Court reckoned December 2024, January 2025, and February 2025 as complete calendar months preceding the statutory deadline for passing the order. On such computation, it was held that the SCN issued on November 30, 2024 fell within the prescribed limitation period. Accordingly, the Court held that the SCN was not time-barred.

[Tata Play Ltd. v. Sales Tax Officer Class II / AVATO, 2025-VIL-797-DEL]

Taxient Comments: The Court placed reliance on the Supreme Court's ruling in **State of Himachal Pradesh & Anr. v. Himachal Techno Engineers & Anr., 2010-VIL-107-SC** and on the definition of 'month' under Section 3(35) of the General Clauses Act, 1897. However, while doing so, the Court did not fully address the computation aspect and distinguished the High Court's decision in **M/s Cotton Corporation of India v. AC (ST) (Audit) (FAC), 2025-VIL-124-AP** without adopting its calculation method.

In our view, the correct interpretation of the 'three months prior' requirement under Section 73(2) of the CGST Act should follow the same date correspondence approach. Under this method, the SCN must be issued on or before the same numerical date falling three months before the statutory deadline for passing the order. Applying this principle, where the last date for passing the order is February 28, 2025, the SCN ought to have been issued on or before November 28, 2024 to satisfy the limitation requirement.

The divergence in interpretations generally arises only where the order deadline falls on the last day of a month as in this case with 28th February because month-end dates can produce different results under the calendar-month method versus the same-date method. When the relevant dates fall mid-month, both methods typically yield the same result, and this ambiguity does not arise.

1.3. ITC not allowed on self-generated electricity supplied to employee township

The Petitioner is engaged in aluminium manufacturing. It generated electricity in captive power plants using imported coal on which GST Compensation Cess was paid. Some electricity was supplied to its employee township. One of the main disputes is whether ITC refund of the Cess on the electricity supplied to employee township is allowed. The Revenue claimed the supply to the township was for non-business purposes and not 'in the course or furtherance of business.'

The High Court examined the definitions of business, input, input service, and input tax credit under the GST law. It observed that the supply of electricity to an employees' township does not qualify as being 'in the course or furtherance of business.' Relying on the Supreme Court rulings in **Maruti Suzuki Limited v. Commissioner of CE, Delhi, 2009-VIL-01-SC-CE** and **Commissioner of CE v. Gujarat Narmada Fertilizers Company Limited, 2009-VIL-14-SC-CE**, the Court reiterated that ITC on inputs used for electricity generation is admissible only when such electricity is consumed within the factory for manufacturing purposes. The Court also mentioned that electricity supplied to the township is a welfare activity, not an integral part of the manufacturing process. Accordingly, the Court held that the ITC proportionate to the coal used for generating electricity for the township is ineligible and required to be reversed.

[Bharat Aluminium Company Limited v. JC (Appeals) / AC, State Tax, 2025-VIL-799-CHG]

Taxient Comments: It appears that the High Court's conclusion may not have fully taken into account the broader statutory framework and legislative intent underlying the GST law. The reasoning in the judgment seems to rely substantially on jurisprudence developed under the erstwhile indirect tax regime, particularly in the context of the narrower phrase 'used in or in relation to manufacture'.

In contrast, the GST law employs the distinct and much wider formulation 'in the course or furtherance of business', which, by design, covers a broader range of activities undertaken as part of or to promote the business, whether manufacturing or otherwise. While earlier precedents under the former regime may offer interpretative guidance, their direct application to GST provisions without factoring in this expanded scope may not reflect the legislative intent and could merit reconsideration.

In the present case, given that the employee township maintained by the petitioner is intrinsically linked to the continuity and smooth functioning of operations, it could reasonably be regarded as falling within the ambit of activities carried out 'in the course or furtherance of business.' Accordingly, there is a strong basis to contend that the related ITC should have been allowed.

2. CESTAT RULINGS

2.1. Detection by audit does not, by Itself, establish suppression or mala fide intent

The Appellant availed CENVAT credit on services used for maintenance and construction of foundation and structures for effluent water treatment plants and electrical works. During departmental audit, it was pointed out that such credit was inadmissible. Prior to issuance of SCN, the Appellant voluntarily reversed the said credit without payment of interest.

In adjudication, the Commissioner disallowed the aforesaid credit, appropriated the reversed amount, and imposed equal penalty.

Before the Tribunal, the Appellant contended that the credit was availed under a bona fide belief, reversal was made immediately after audit objection, and there was no suppression of facts. It relied on multiple judicial precedents to contend that no penalty can be imposed when reversal is done voluntarily prior to SCN, particularly where the audit is the sole source of detection. It also agreed to pay interest for the period of utilization until reversal.

The Tribunal observed that recovery of inadmissible credit follows the same principles as tax recovery under Section 73 of the erstwhile Finance Act, 1994. Section 73(3) protected taxpayers from SCN if dues are paid prior to its issuance. The Tribunal held that mere detection in audit does not automatically imply suppression or mala fide intent. Accordingly, the Court set aside the penalty demand.

[CEAT Ltd. v. Commissioner CGST & CE, Navi Mumbai, 2025-VIL-1227-CESTAT-MUM-CE]

Taxient Comments: This ruling confirms that if a taxpayer pays or reverses a tax demand after an audit objection and before an SCN is issued, it cannot be treated as suppression, and no penalty should apply. It also makes it clear that merely finding an issue during an audit is not proof of intent to evade tax. The ruling is equally relevant under the GST law, as the existing provisions are similar to those in the erstwhile regime.

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