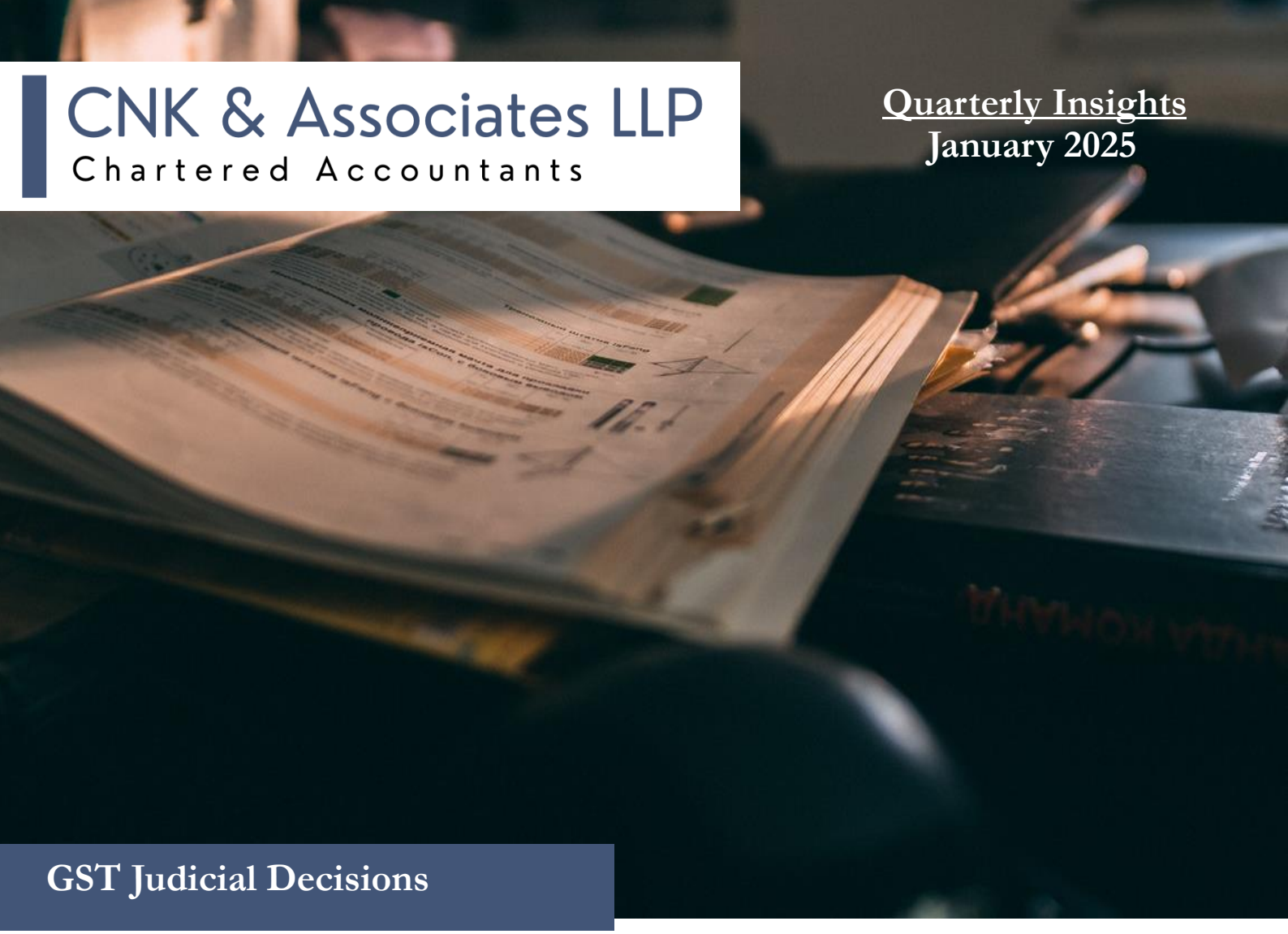

CNK & Associates LLP
Chartered Accountants

Quarterly Insights
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GST Judicial Decisions

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GST Judicial Decisions

Show cause notice demanding GST on expat salary

Metal One Corporation India Private Limited versus Union of India & Ors [TS-697-HC(DEL)-2024-GST]

In favour of taxpayer

Relevant facts

The taxpayer, an Indian subsidiary had engaged seconded employees from its overseas parent company on a certain project. The issue before the Hon'ble Delhi High Court was whether the secondment of employees from its overseas affiliates constitutes a taxable supply of services and if yes, then, the valuation of these services under Rule 28 of the CGST Rules.

Relying on the decision of the Hon'ble Supreme Court in the case of CCE & Service Tax versus Northern Operating Systems Pvt. Ltd.[1], the Revenue contended that the taxpayer was liable to pay tax under the reverse charge mechanism for these services since the salary of the seconded employees was paid by the overseas affiliate and reimbursed by the Indian entity. The Revenue contended that the consideration given to the employee shall be construed to be the value of the secondment services.

On the other hand, the taxpayer argued that the secondment arrangement should not attract GST liability, especially in light of the clarification provided in Circular No. 210/4/2024-GST dated 26th June 2024 issued by the Central Board of Indirect Taxes and Customs (CBIC). The Circular clarified that where full input tax credit is available to the recipient and the related domestic entity (the Indian subsidiary) does not issue an invoice for services received from its foreign affiliate, the value of such services would be deemed "Nil".

Decision of the Hon'ble Delhi High Court

The Hon'ble Delhi High Court observed that since the employees were deputed for a short span of time and were subsequently repatriated to the overseas group company, there was no employer-employee relationship established with the Indian entity. Hence, the secondment services would fall within the definition of supply liable to GST. However, as per paragraph 3.7 of the aforementioned CBIC Circular where no invoice is raised by the related domestic entity in respect of services rendered by its foreign affiliate, the value of such services would be "deemed" to have been declared as "Nil" and that "Nil" value is to be treated as the market value for the purposes of the second proviso to Rule 28 of the CGST Rules.

The Hon'ble Delhi High Court set aside the demand raised in the show cause notice (SCN) solely by placing reliance on the CBIC Circular.

CNK comments

Interestingly, the Hon'ble Delhi High Court made the following observations about the correctness of the position advocated by the CBIC Circular:

"While the correctness of the position as advocated in terms of that Circular may be questioned on the ground of whether it would be consistent with the statutory provisions or may be viewed as being contentious or contrary to the intent of the Second Proviso to Rule 28 itself, we are today constrained to proceed further on the basis thereof."

The Hon'ble Delhi High Court raised the question but did not delve into whether or not the CBIC Circular was aligned with the second proviso to Rule 28 of the CGST rules and simply accepted the circular as is, since the Revenue is bound by the said Circular.

[1] (2022) 17 SCC 90

Appeal rejection on grounds of limitation set aside – online filing date to be considered as filing date

Hitachi Energy India Limited versus State of Karnataka

[2024] 105 GST 489/164 taxmann.com 152 (Karnataka)

In favour of taxpayer

Relevant facts

The taxpayer filed an appeal on the GST portal within 3 months from the date of communication of the order. However, the physical copy of the appeal was filed after the prescribed time limit. The Appellate Authority rejected the appeal on the grounds that the physical filing of the appeal was beyond the limitation and condonable period. Aggrieved by the rejection, the taxpayer approached the Hon'ble Karnataka High Court seeking the issuance of a writ of certiorari to set aside the impugned order.

The Revenue contended that Rule 108(3) of the CGST Rules, as it existed prior to the date of filing the appeal, prescribed that the physical copy of the certified copy of the impugned order should be filed within 7 days of filing the online appeal. Since the date of the physical filing of the appeal fell beyond the prescribed time limit, the appeal was barred by limitation. Further, the date of the physical filing was also beyond the condonable period under Section 107(4) of the CGST Act. Accordingly, the appeal was rejected on grounds of limitation.

Decision of the Hon'ble Karnataka High Court

The Hon'ble Karnataka High Court took note of the amendment to Section 108(3) effective 26th December 2022 as per which, in case the order which is appealed against is uploaded online along with the appeal in GST-APL-01, there is no need to physically submit a certified copy of the order within 7 days of filing the appeal online. Hence, in such cases, the date of filing the appeal online was to be considered as the filing date.

The Hon'ble Karnataka High Court also averred to the fact that even though the amendment to Section 108(3) was after the appeal filing date, the amendment, being clarificatory in nature, ought to be given retrospective effect. Basis the aforesaid reasoning, the Hon'ble Karnataka High Court set aside the order rejecting the appeal and remitted the matter for fresh consideration.

CNK comments

This is a useful case for taxpayers who have failed to physically file the certified copy of the order appealed against, within the prescribed seven days of filing the appeal online. The Hon'ble Karnataka High Court has once again reiterated that clarificatory amendments to the GST legislation ought to be given retrospective effect.

Validity of notifications extending the limitation period of passing an order under Section 73(10) of the CGST Act

Barkataki Print and Media Services versus union of India

[2024] 106 GST 348/166 taxmann.com 586 (Guwahati)

In favour of taxpayer

Relevant facts

The taxpayer challenged the order in original issued under Section 73(9) of the CGST Act. The basis of the challenge is the validity of Notification No. 56/2023 – Central Tax dated 28 December 2023 which extends the limitation period for issuance of orders under Section 73(9) of the CGST Act.

The taxpayer argues that the impugned Notification lacks a recommendation from the GST Council as mandated by Section 168A of the CGST Act. The Central Government has misrepresented the existence of such a recommendation in the impugned Notification and this constitutes a colourable exercise of power. Therefore, it can be said that the impugned orders were passed beyond the prescribed period under Section 73(9) of the CGST Act based on an invalid Notification extending the limitation period.

The validity of Notification No. 9/2023-Central Tax dated 31 March 2023 was also challenged on the grounds that the condition of "force majeure" mandated as per the explanation to Section 168A of the CGST Act was not satisfied since the COVID-19 pandemic did not justify an extension in 2022. The taxpayer further contended that the States of Assam had not issued any notification extending the timelines for issuing an order under Section 73(9) of the Assam SGST Act.

On the other hand, the Revenue admitted that while there is no GST recommendation to support the impugned Notification, they argued that the recommendations of the GST Council are not binding and are persuasive in nature. The Central or State Governments can issue notifications under Section 168A of the CGST Act. The Revenue claimed that force majeure conditions existed due to delays caused by the COVID-19 pandemic.

Decision of the Hon'ble Guwahati High Court

- Notification No. 56/2023 – Central Tax dated 26 December 2023 is invalid.
- A recommendation from the GST Council is a necessary pre-requisite for the Government to extend timelines related to GST assessments.
- Since the Central Government's notification was invalid and the State of Assam did not issue its own Notification, the orders issued under both the Central and State GST legislation were considered time-barred and hence set aside.

CNK comments

This is an important judgement which stresses on the word of the law. The Hon'ble Guwahati High Court rightly interpreted the provisions by holding that the GST Council's recommendation is an essential pre-requisite for extending timelines pertaining to assessments under GST.

Authority for Advance Ruling

Taxability of Corporate-Guarantee from overseas group entity

AAR- Green Infra Wind Farm Assets Ltd
RAJ/AAR/2024-25/10

Relevant facts

The overseas parent company of the Applicant has provided a corporate guarantee to the banks/ financial institutions from whom the Applicant has obtained loans. There is no consideration charged by the parent company in lieu of the corporate guarantee.

The Applicant seeks clarification on the following questions:

1) Whether GST under reverse charge mechanism is payable on the corporate guarantee on a one-time basis at the time of execution of the guarantee or on periodical basis extending to the period of the guarantee.

2) If GST is required to be paid on periodical basis, then what shall be the value of supply:
   a) whether 1% of the value of corporate guarantee needs to be divided equally amongst the relevant years of guarantee or
   b) whether GST under reverse charge mechanism is payable on 1% of total value of loan in first year, and on 1% of only remaining outstanding value of loan at beginning of each subsequent year.

The Applicant submits that the corporate guarantee is a one-time guarantee and not a continuous supply of service. Reference in this regard is made to the provisions of the Indian Contracts Act, 1872 and the definition of 'continuous supply of services' under the CGST Act. Support is also drawn from various judicial decisions and FAQs to emphasize that the time of supply is the date of execution of the guarantee deed, and GST should be payable only once.

Decision of the Advance Ruling Authority of Rajasthan

There is an element of service provided by the overseas group company to its Indian subsidiary in the form of standing as a corporate guarantor and this fits the definition of 'import of services' subject to GST under the reverse charge mechanism. In the absence of consideration, the time of supply shall be the date of entry in the books of accounts of the recipient. Hence, the GST liability under reverse charge mechanism is to be paid by the applicant at one time basis at the time of supply. Since the liability is to be discharged on a one-time basis, the other questions relating payment on periodical basis are rendered otiose.

CNK comments

This AAR provides clarity on an important aspect of taxation of corporate guarantee under GST with respect to its periodicity. It is a welcome ruling as it sets aside any confusion regarding discharge of GST liability on a periodic basis.

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