
M/S DPJ BIDAR – CHINCHOLI (ANNUITY) ROAD PROJECT PRIVATE LIMITED & ANOTHER VS. UNION OF INDIA & OTHERS IN WRIT PETITION NO. 22250 OF 2021 C/W & WRIT PETITION NO. 7233 OF 2022 (T-RES) (HIGH COURT – KARNATAKA).

Circular taxing annuity being contradictory to the exemption notifications is not sustainable

Facts: –

- That the petitioners in both the writ petitioners are concessionaries who have been granted construction of roads by Karnataka Road Development Corporation, and in consideration for the construction & maintenance of roads, the petitioners received annuity from K.R.D.C. However, in certain contracts where the construction & maintenance work has been outsourced to private persons, the concessionaries were allowed to collect the tolls from the vehicles plying on the roads.
- That notification 12/2017-Central Tax(Rate) dated **28.06.2017** provides for 100% exemption towards collection of toll charges. Further the toll charges are already included in the entire consideration towards construction, operation and maintenance of the road.
- Subsequently in the **22nd GST Council meeting** held on **06.10.2017**, it was proposed that the annuity paid to concessionaries as consideration instead of allowing them to collect toll charges, be also exempted from GST. That after the discussions in the meeting, the Council decided to treat annuity at par with toll and to exempt from tax, service by way of access to a road or bridge on payment of annuity.
- That based on above two notifications 32 & 33/2017- Central Tax (Rate) both dated **13.10.2017**, were issued giving exemption to the annuity paid in case of Service by way of access to a road or a bridge. The exemption was inserted at serial number 23A of notification 32/2017- Central Tax (Rate) and at serial number 24A of 33/2017 notification.
- That in view of the above notification the concessionaries like the petitioners got exemption with respect to annuity paid by the highway authorities towards construction maintenance of roads.

- Thereafter, a clarification was sought by certain government authorities from GST Council that the entire annuity paid to the Concessionaries was exempt from GST or not. That in GST Council in **43rd GST Council** meeting held on **28.05.2021** discussing about annuity paid under the Hybrid Annuity Model Project, recommended that clarification may be issued that '*entry 23A of notification No.12/2017-Central Tax (Rate) exempts services by way of providing access to road or bridge on payment of annuity. It does not exempt annuity paid for construction of roads.*'
- That based on the above, a Circular No.150/06/2021- GST dated **17.06.2021** was issued by respondent authorities clarifying that entry 23 and 23A exempt 'service by way of access to a road or a bridge on payment of toll' falls under code '9967'. However, services by way of construction of roads fall under code '9954' and is not covered by entry 23A of notification 12/2017 – Central Tax (Rate), even if deferred payment is made by way of instalments (annuities).

Petitioners' Submissions: –

- It was submitted on the behalf of the petitioners that annuity paid for construction of roads is exempt from GST as per notification 32 & 33/2017-Central Tax (Rate) dated **13.10.2017**.
- Further the clarification issued by GST Council in its meeting on **28.05.2021** and the subsequent circular dated **17.06.2021**, are contrary to the exemption notifications and are liable to be set aside.

On the other hand, it was contended on the behalf of the respondents that the impugned Circular does not contravene the notifications and it only clarifies what is exempted by virtue of notifications dated **13.10.2017**. Further the only service which is exempt is 'service by way of access to a road or a bridge on payment of annuity' and not annuity paid for construction of roads.

Held: –

- The Hon'ble Court after considering the submissions made from both sides, facts of the case and the law applicable found that admittedly the toll charges collected by the concessionaries for construction, maintenance, operation and providing road access to the vehicle which ply on the road are exempted from GST by Entry 23 of Notification No.12/2017 dated **28.06.2017**.
- Further the said toll charges are collected by the concessionaries towards construction and maintenance of roads. Thus, the entire consideration for construction and maintenance of the road by concessionaires which is collected as toll charges is exempt from GST from 01.07.2017 and onwards.
- It was found that as the annuity is paid in lieu of toll charges, GST Council in its 22nd meeting held on **06.10.2017**, as entire toll charges were being exempted from payment of GST, recommended exemption of annuity also, which include the consideration paid to

concessionaries. **It is very clear from the minutes of the said meeting that the recommendation was made treating annuity on par with the toll charges.**

- That after the meeting, the Notification 32/2017 & 33/2017 both dated **13.10.2017** were issued by the respondent authorities, wherein service by way of access to a road or a bridge on payment of annuity has been exempted from GST and no GST was being collected on the entire annuity being paid to the concessionaires which included the consideration towards construction as well as the service that they provide towards maintenance of the said road.
- Thereafter, the GST Council clarified that the annuity paid as deferred payment for construction of roads/highways was not as the tolls or annuity in lieu of the tolls are exempted.
- That based on above, the impugned Circular dated **17.06.2021** was issued by the respondent authorities.
- It was found by the Hon'ble Court that it is settled law that a Circular which clarifies the notification cannot have the effect of overriding the notification. Moreover, the deliberations of the GST Council in its meeting held on **06.10.2017** and the notifications issued pursuant thereto clearly exempts the entire annuity paid to the petitioners towards construction and maintenance of roads. Therefore, it cannot be construed that annuity (deferred payments) towards construction of roads is not exempted.
- It was held that the impugned Circular has the effect of overriding the notifications No. 32/2017 and 33/2017 dated 13.10.2017 and has to be held bad in law and the clarifications issued is contrary to the said exemption notifications.**
If respondent authorities are desirous of altering the same, it has to issue fresh notifications amending its earlier notifications.

The Hon'ble Court with the above findings disposed of the writ petitions, setting aside the impugned Circular dated **17.06.2021** and all actions pursuant to it.

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