

EY Tax Alert

HC quashes Notification 56/2023 extending time limit to pass order under GST

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Executive summary

This Tax Alert summarizes a recent ruling of the Gauhati High Court (HC)¹ on the validity of notifications extending the time limit to pass order under section 73(10) of Central Goods and Services Tax Act, 2017 (CGST Act).

The key observations of the HC are:

- ▶ Since the orders under dispute were passed basis the extension provided by Notification no. 56/2023 (the Notification), the Court is not considering challenge to Notification No. 9/2023 (earlier extension notification).
- ▶ There is no denial to the fact that the Notification was issued without the recommendation of the GST Council.
- ▶ In the Notification, the Central Government for reasons best known, mentioned "on the recommendations of the Council", which on the face of it shows that the exercise of power by the Government insofar as the Notification is concerned, is a colourable exercise of power.
- ▶ Since the Notification was issued without the recommendation, GST Council had no occasion to consider existence of force majeure.
- ▶ Recommendations to be made by the GST Council if required as per the provisions of the Central Act or the State Act has to be construed to be a "*sine qua non*" for exercise of power by the Union or the State Government.

Accordingly, the Court held that the Notification is *ultra vires* the CGST Act and not legally sustainable in law.

However, since the Government has the power to issue retrospective notification as per section 168A(2), the Court mentioned that this decision shall not prejudice the Government to take such steps in the manner provided under law.

¹ TS-588-HC(GAUH)-2024-GST

Background

- ▶ Section 168A of Central Goods and Services Tax Act, 2017 (CGST Act) empowers the Government to issue a notification extending the time limit specified in or prescribed or notified in the CGST Act in respect of actions which cannot be completed or complied with due to force majeure.
- ▶ Notification No. 9/2023-CT was issued on 31 March 2023 whereby the period for passing the order was extended for FY 2017-18 up to 31 December 2023; for FY 2018-19 up to 31 March 2024 and for FY 2019-20 up to the 30 June 2024.
- ▶ Later, Notification No. 56/2023-CT (the Notification) extended the time limit for passing of the order for FY 2018-19 up to 30 April 2024 and for FY 2019-20 up to 31 August 2024.
- ▶ Both the notifications have been challenged before the Gauhati High Court (HC) in a batch matter.

Taxpayer's Contentions

- ▶ There is no recommendation from the GST Council prior to issuance of the Notification.
- ▶ Department, on the basis of the Notification, had passed various orders and as such the said orders are without jurisdiction having been passed beyond the period prescribed in Section 73(10).
- ▶ A perusal of Section 168A of both the Central Act and the State Act shows that the recommendation of the GST Council is a condition precedent. There cannot be a subsequent ratification by the GST Council.
- ▶ In respect to the challenge to Notification No. 9/2023-CT, the question of there being a force majeure does not arise inasmuch as the COVID pandemic was not affecting the working of the administration in the year 2022 and there is already an extension granted earlier.
- ▶ Unless the State Government or the Central Government would have proved by way of affidavit or otherwise giving material particulars that they were not able to perform on account of force majeure, the condition precedent that it is only when there exists force majeure, is not fulfilled.
- ▶ The State of Assam had issued notification dated 6 September 2024 only covering the period stipulated in Notification No.9/2023-CT and as such, there is a notification in terms with Section 168A of the State Act for the period when the impugned orders have been passed.

Revenue's Contentions

- ▶ On account of the COVID-19 pandemic, there were various delays on account of completing certain assessment, audit etc. and under such circumstances, the existence of force majeure as defined in the Explanation to Section 168A was there.
- ▶ All recommendations made by the GST Council are not binding and are persuasive in nature and as such, the Union Government or the State Government can issue notification under Section 168A more so when the Supreme Court in Mohit Minerals Pvt. Ltd.² had watered down the effect of the recommendations to be made by the GST Council.

High Court's Ruling

- ▶ Since the orders under dispute were passed basis the extension provided by the Notification, the challenge so made to Notification No. 9/2023-CT has no relevance for which the Court is not considering the challenge to the said notification.
- ▶ There is no denial to the fact that the Notification was issued without the recommendation of the GST Council.
- ▶ The use of the phrase "on the recommendation of the Council" in Section 168A prima facie suggests that the power to be exercised under Section 168A by the Government is when a recommendation is made by the GST Council.
- ▶ Since both the Central Act as well as the State Act do not define the term "recommendation", it would be necessary to understand the impact of the term in the context of the provisions of the Constitution as well as the Central and State GST law.
- ▶ The object behind the insertion of the Article 246A and Article 279A and overriding Article 254 is to promote fiscal federalism and cooperative federalism. Under such circumstances, the recommendations to be made by the GST Council if required as per the provisions of the Central Act or the State Act has to be construed to be a *sine qua non* for exercise of power by the Union or the State Government.
- ▶ As observed by the Supreme Court in V.M. Kurian³, the meaning of the word "recommend" would also be applicable to the interpretation of Section 168A to mean "giving of a favourable report opposed to an unfavourable one" by the GST Council for exercise of power under Article 168A.
- ▶ SC judgment in case of Mohit Minerals does not lay down the proposition that as some of the recommendations are not binding, there is no

² (2022) 10 SCC 700

³ (2001) 4 SCC 215

requirement of recommendation by the GST Council to exercise the power.

- ▶ In the Notification, the Central Government for reasons best known mentioned “on the recommendations of the Council” which on the face of it shows that the exercise of power by the Central Government insofar as the Notification is concerned is a colourable exercise of power for which the said Notification is a colourable legislation.
- ▶ The Notification was issued without the recommendation and natural corollary thereof is that the GST Council had no occasion to consider existence of force majeure inasmuch as the same was never placed before the GST Council before issuance of the same.

Therefore, the Notification if construed from that angle also would be a notification issued without considering the force majeure condition in accordance with law.

- ▶ Accordingly, the Court held that the Notification is *ultra vires* the CGST Act and not legally sustainable in law.
- ▶ Also, the State of Assam has not issued any *pari materia* notification for the period on or after 1 April 2024 for FY 2018-19 and for the period on or after 1 July 2024 for FY 2019-20.

Under such circumstances, the impugned orders are beyond the time period prescribed under Section 73(10) for which the same are liable to be interfered with as being passed without jurisdiction.

- ▶ The Department submitted that both the Union Government as well as the State Government has the power in terms of Section 168A(2) to issue retrospective notification and the judgment so passed herein should not prejudice their rights.
- ▶ The Court mentioned that the decision shall not prejudice both the Central Government and the State Government to take such steps in the manner provided under law.

Comments

While the ruling provides relief to the taxpayers, tax department is likely to litigate the matter before the apex court.

It needs to be seen whether the law makers initiate action by issuing notifications with retrospective effect for such extensions once the GST Council makes recommendation in subsequent meetings.

It is relevant to note that both Notification 56/2023-CT and Notification no. 9/2023-CT are challenged in multiple writs before various High Courts.

The ruling highlights interpretation of the term 'recommendation' in the context of GST law.

The taxpayer needs to analyse the impact of this decision by identifying the cases where order has been passed basis the extension provided by the Notification.

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