

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 11TH DAY OF JULY 2022 BEFORE

THE HON'BLE MR. JUSTICE M.I.ARUN

**WRIT PETITION No.22250 OF 2021 C/W
WRIT PETITION No.7233 OF 2022 (T-RES) IN WRIT**

PETITION No.22250 OF 2021

BETWEEN:

- 1 . M/S DPJ BIDAR - CHINCHOLI
(ANNUITY) ROAD PROJECT
PRIVATE LIMITED
HAVING ITS REGISTERED OFFICE
AT U/10, HIMALAYA ACCORD
APARTMENT, OPP. LAW COLLEGE
AMARAVATI ROAD, NAGPUR 440 010
REP. BY ITS DIRECTOR
MR. PRAKASH LAXMANRAO ZILPE
- 2 . PRAKASH LAXMANRAO ZILPE
DIRECTOR, M/S DPJ BIDAR-CHINCHOLI
(ANNUITY), ROAD PROJECT PRIVATE
LIMITED, R/AT 396, HANUMAN NAGAR
NAGPUR – 440024, MAHARASHTRA
... PETITIONERS (BY SRI. J. K. MITTAL, ADV. FOR
SRI. VIKRAM UNNI RAJAGOPAL, ADV.)

AND:

- 1 . UNION OF INDIA
DEPARTMENT OF REVENUE
MINISTRY OF FINANCE

NORTH BLOCK

NEW DELHI 110 011

THROUGH ITS SECRETARY

2 . GOVERNMENT OF KARNATAKA

FINANCE DEPARTMENT

VIDHANA SOUDHA

BENGALURU 560 001

THROUGH ITS SECRETARY

3 . THE ADDITIONAL DIRECTOR GENERAL

DIRECTORATE GENERAL OF GST

INTELLIGENCE

BELAGAVI ZONAL UNIT

SHRI LAXMI COMPLEX

NO. 4855/83, SADASHIV NAGAR

1ST CROSS, APMC ROAD,

BELAGAVI 590 019

4 . SENIOR INTELLIGENCE OFFICER OFFICE

OF THE ADDITIONAL DIRECTOR

GENERAL, DIRECTORATE GENERAL OF

GST INTELLIGENCE, BELAGAVI ZONAL

UNIT, SHRI LAXMI COMPLEX NO. 4855/83,

SADASHIV NAGAR

1ST CROSS, APMC ROAD

BELAGAVI 590 019

5 . THE CENTRAL BOARD OF INDIRECT

TAXES AND CUSTOMS (CBIC)

DEPARTMENT OF REVENUE

MINISTRY OF FINANCE

NORTH BLOCK, NEW DELHI 110 011

THROUGH ITS CHAIRMAN

6 . NATIONAL HIGHWAYS

AUTHORITY OF INDIA (NHAI)

UNDER MINISTRY OF ROAD

TRANSPORT AND HIGHWAYS

G5 AND 6, SECTOR 10

DWARKA, NEW DELHI 110 075
THROUGH ITS CHAIRMAN

7 . KARNATAKA ROAD DEVELOPMENT
CORPORATION LIMITED
FIRST FLOOR 16/J
THIMMAIAH ROAD CROSS
MILLER TANK BED
VASANTHNAGAR
BENGALURU 560 052
THROUGH ITS MANAGING DIRECTOR

8 . GOODS AND SERVICES TAX COUNCIL
OFFICE OF THE GSTC, TOWER II
5TH FLOOR, JEEVAN BHARTI BUILDING
NEW DELHI 110 001
THROUGH ITS SECRETARY

9 . MINISTRY OF ROAD
TRANSPORT AND HIGHWAYS
GOVERNMENT OF INDIA
TRANSPORT BHAWAN, 1
PARLIAMENT STREET
NEW DELHI 110 001
THROUGH ITS SECRETARY ... RESPONDENTS

(BY SRI. MADAN PILLAI R., CGC FOR R1, R3, R4, R8 & R9;
SRI. K. HEMAKUMAR, AGA FOR R2;
SRI. JEEVAN J. NEERALAGI, ADV. FOR R5;
SMT. SHILPA SHAH, ADV. FOR R6;
SRI. MANU K., ADV. FOR R7)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226
& 227 OF THE CONSTITUTION OF INDIA PRAYING TO
QUASH THE DECISION TAKEN IN THE 43RD GST COUNCIL
MEETING HELD ON 28.05.2021 VIDE PARA 15.33 OF
MINUTES OF MEETING AT INTERNAL PAGE 40 ANNEXURE-L
INSOFAR AS IT CLARIFIES THAT THE ANNUITY PAID AS
DEFERRED PAYMENT FOR CONSTRUCTION OF
ROADS/HIGHWAYS WAS NOT EXEMPTED FROM GST AS THE

TOLLS OR ANNUITY IN LIEU OF TOLLS ARE. AND

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RECOMMENDS VIDE RECOMMENDATION NO.6 AT INTERNAL PAGE NO.103 THAT CLARIFICATION MAY BE ISSUED THAT ENTRY 23A OF NOTIFICATION NO.12/2017 - CT(R) 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, AND DECLARE THAT THE R8/GST COUNCIL HAS ACTED BEYOND ITS AUTHORITY ETC.

IN WRIT PETITION No.7233 OF 2022

BETWEEN:

M/S SEW BELLARY HIGHWAYS LIMITED
HAVING ITS REGISTERED OFFICE AT
6-3-871 SNEHALATA GREENLANDS ROAD
BEGUMPET, HYDERABAD 500 016
TELANGANA STATE REP. BY ITS
POWER OF ATTORNEY
MR M VENKATARAMUDU
S/O M VENKATAIAH
AGED ABOUT 52 YEARS ... PETITIONER

(BY SRI. V. RAGHURAMAN, SENIOR ADV. A/W
SRI. C. R. RAGHAVENDRA, ADV. FOR
SRI. VIKRAM UNNI RAJAGOPAL, ADV.)

AND:

- 1 . UNION OF INDIA
DEPARTMENT OF REVENUE
MINISTRY OF FINANCE
NORTH BLOCK
NEW DELHI 110 011
THROUGH ITS SECRETARY
- 2 . GOVERNMENT OF KARNATAKA
FINANCE DEPARTMENT
VIDHANA SOUDHA

BENGALURU 560 001
THROUGH ITS SECRETARY

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3 . THE ADDITIONAL ASSISTANT DIRECTOR
DIRECTORATE GENERAL OF GST
INTELLIGENCE, BALLARI REGIONAL UNIT
"AKSHAYA TOWERS" 2ND FLOOR
ABOVE SBI, OPP. GANDHI NAGAR
MARKET, GANDHI NAGAR MAIN ROAD
BALLARI – 583 103

4 . SENIOR INTELLIGENCE OFFICER
DIRECTORATE GENERAL OF
GST INTELLIGENCE
BALLARI REGIONAL UNIT
"AKSHAYA TOWERS" 2ND FLOOR
ABOVE SBI, OPP. GANDHI NAGAR
MARKET, GANDHI NAGAR MAIN ROAD
BALLARI – 583 103

5 . THE CENTRAL BOARD OF INDIRECT
TAXES AND CUSTOMS (CBIC)
DEPARTMENT OF REVENUE
MINISTRY OF FINANCE
NORTH BLOCK, NEW DELHI 110 011
THROUGH ITS CHAIRMAN

6 . NATIONAL HIGHWAYS
AUTHORITY OF INDIA (NHAI)
UNDER MINISTRY OF ROAD
TRANSPORT AND HIGHWAYS
G5 AND 6, SECTOR 10
DWARKA, NEW DELHI 110 075
THROUGH ITS CHAIRMAN

7 . KARNATAKA ROAD DEVELOPMENT
CORPORATION LIMITED
"SAMPARKA SOUDHA", BUILDING 8
B.E.P. PREMISES (OPPOSITE ORION MALL) DR.
RAJKUMAR ROAD, RAJAJINAGAR BENGALURU –

560 010

THROUGH ITS MANAGING DIRECTOR

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8 . GOODS AND SERVICES TAX COUNCIL
OFFICE OF THE GSTC, TOWER II
5TH FLOOR, JEEVAN BHARTI BUILDING
NEW DELHI 110 001
THROUGH ITS SECRETARY

9 . MINISTRY OF ROAD
TRANSPORT AND HIGHWAYS
GOVERNMENT OF INDIA
TRANSPORT BHAWAN, 1
PARLIAMENT STREET
NEW DELHI 110 001
THROUGH ITS SECRETARY ... RESPONDENTS

(BY SRI. HARSHA P. BANAD, CGC FOR R1 & R9;
SRI. K. HEMA KUMAR, AGA FOR R2;
SRI. JEEVAN J. NEERALAGI, ADV FOR R3 TO R5 & R8
SMT. SHILPA SHAH, ADV. FOR R6;
SRI. MANU K. ADV. FOR R7)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 & 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH THE DECISION TAKEN IN THE 43RD GST COUNCIL MEETING HELD ON 28.05.2021 VIDE PARA 15.33 OF MINUTES OF MEETING AT INTERNAL PAGE 40(ANNEXURE Q) IN SO FAR AS IT CLARIFIES THAT THE ANNUITY PAID AS DEFERRED PAYMENT FOR CONSTRUCTION OF ROADS/HIGHWAYS WAS NOT EXEMPTED FROM GST AS THE TOLLS OR ANNUITY IN LIEU OF TOLLS ARE AND RECOMMENDS VIDE RECOMMENDATION NO.6 AT INTERNAL PAGE NO.103 THAT CLARIFICATION MAY BE ISSUED THAT ENTRY 23A OF NOTIFICATION NO.12/2017- CT (R) 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 AND DECLARE THAT THE R8/GST COUNCIL HAS ACTED BEYOND ITS AUTHORITY ETC.

THESE WRIT PETITIONS COMING ON FOR FURTHER
HEARING, THIS DAY, THE COURT MADE THE FOLLOWING:

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O R D E R

Petitioners in both the writ petitions are concessionaires who have been entrusted with construction of road by respondent no.7-Karnataka Road Development Corporation Limited. As a consideration for construction and maintenance of the roads for the contract period, the petitioners are paid certain amounts termed as 'annuity' by respondent no.7. In certain contracts where construction and maintenance of the roads has been out sourced to private persons consideration is paid by permitting the concessionaires/contractors to collect tolls from the vehicles plying on the road.

2. 100% exemption under Goods and Services Tax (for short 'GST') was granted towards collection of toll charges by way of notification No.12/2017 dated 28.06.2017 issued by respondent no.1. The toll charges as already stated above consisted of the entire consideration towards construction, operation and maintenance of the road. In

other words, it consisted of the charges collected towards construction as well as services provided by the

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concessionaires. Subsequently, it was proposed that annuity, which was being paid by the highway authorities as a consideration to the concessionaires instead of permitting them to collect toll charges be also exempted from GST. In this regard, the minutes of 22nd GST Council meeting held on 06.10.2017 reads as under:

“Agenda item 13(iv): Issue of Annuity being given in Place of Toll Charges to Developers of Public Infrastructure – exemption thereon

61. Introducing this Agenda item, the Joint Secretary (TRU-II), CBEC stated that while toll is a payment made by the users of road to concessionaires for usage of roads, annuity is an amount paid by the National Highways Authority of India (NHAI) to concessionaires for construction of roads in order that the concessionaire did not charge toll for access to a road or a bridge. In other words, annuity is a consideration for the service provided by concessionaires to NHAI. He stated that construction of roads was now subject to tax at the rate of 12% and due to this, there was free flow of input tax credit from EPC (Engineering, Procurement and Construction)

contractor to the concessionaires and thereafter to NHAI. He stated that as a result, tax at the rate of 12% leviable on the service of road construction provided by concessionaire to NHAI would be paid

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partly from the input tax credit available with them. He stated that the Council may take a view for grant of exemption to annuity paid by NHAI/State Highways Construction Authority to concessionaires during construction of roads. He added that access to a road or bridge on payment of toll was already exempt from tax. The Hon'ble Minister from Haryana suggested to also cover under this provision annuity paid by State-owned Corporations. After discussion, 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."

3. In this regard, two notifications viz., notification no.32/2017 and notification no.33/2017 were issued on 13.10.2017 and the service by way of access to a road or a bridge on payment of annuity was also exempted. The relevant portions of the notifications read as under:

"Notification No.32/2017

(d) after serial number 23 and the entries relating thereto, the following serial number and entries shall be inserted namely:-

| | | | | | |
|-------------------|--|-----|-----|-----|-----|
| | (1) | (2) | (3) | (4) | (5) |
| "23A Heading 9967 | Service by way of access to a road or a bridge on payment of annuity Nil Nil"; | | | | |
| | 10 | | | | |

Notification No.33/2017

(d) after serial number 24 and the entries
relating thereto, the following serial number and
entries shall be inserted namely:-

| | | | | | |
|-------------------|--|-----|-----|-----|-----|
| | (1) | (2) | (3) | (4) | (5) |
| "24A Heading 9967 | Service by way of access to a road or a bridge on payment of annuity Nil Nil"; | | | | |

4. Pursuant to the said notifications, the annuity being paid by the highway authorities to the concessionaries like the petitioners in the instant case towards construction as well as maintenance of the road was exempted from GST. Thereafter, a clarification was sought from the GST Council by certain government authorities as to whether the entire annuity paid to the concessionaries was exempt from GST or not, for which the GST Council in its minutes of the 43rd GST Council meeting held on 28.05.2021 clarified the same as follows:

"15.33
it was also being clarified that the annuity paid as
deferred payment for construction of

roads/highways was not exempted from GST as the tolls or annuity in lieu of tolls are.....

6. GST on annuities paid under the Hybrid Annuity Model Project for construction of roads: Committee discussed the request of Ministry of Road Transport and Highways regarding exemption on annuities paid under the Hybrid Annuity Model Project and has recommended that clarification may be issued that entry 23A of notification No.12/2017-CT(R) 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.”

5. Based on the same, a Circular bearing No.150/06/2021-GST dated 17.06.2021 was issued by respondent no.5 clarifying the same as follows:

“2.1 GST is exempt on service, falling under heading 9967 (service code), by way of access to a road or a bridge on payment of annuity [entry 23 A of notification No.12/2017-Central Tax]. Heading 9967 covers “supporting services in transport” under which code 996742 covers “operation services of National Highways, State Highways, Expressways, Roads and streets; bridges and tunnel operation services”. Entry 23 of said notification exempts “service by way of access to a road or a bridge on payment of toll”. Together the

entries 23 and 23 A exempt access to road or bridge, whether the consideration are in the form of toll or annuity [heading 9967].

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2.2 Services by way of construction of road fall under heading 9954. This heading inter alia covers general construction services of highways, streets, roads railways, airfield runways, bridges and tunnels. Consideration for construction of road service may be paid partially upfront and partially in deferred annual payments (and may be called annuities). Said entry 23A does not apply to services falling under heading 9954 (it specifically covers heading 9967 only). Therefore, plain reading of entry 23 A makes it clear that it does not cover construction of road services (falling under heading 9954), even if deferred payment is made by way of instalments (annuities).

3. Accordingly, as recommended by the GST Council, it is hereby clarified that Entry 23A of notification No.12/2017-CT(R) does not exempt GST on the annuity (deferred payments) paid for construction of roads.”

Aggrieved by the same, the petitioners have preferred the instant writ petitions.

6. The case of the petitioners is that the annuity (deferred

payments) paid for construction of roads is exempt from GST as per notification nos.32 and 33/2017 dated 13.10.2017 and the clarification issued by the GST

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Council in this regard in its meeting held on 28.05.2021 and the subsequent Circular dated 17.06.2021 issuing clarification regarding the same is contrary to the exemption notifications and are liable to be set aside.

7. Per contra, the learned counsel appearing for respondent nos.1 to 5, 8 and 9 submit that the clarification made by way of a Circular does not contravene the notifications and it only clarifies what is exempted by virtue of the notifications dated 13.10.2017. It is specifically contended that what is exempted is only service by way of access to a road or a bridge on payment of annuity and not annuity (deferred payments) paid for construction of roads. For the said reasons, they pray for dismissal of the writ petitions.

8. 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 notification no.12/2017 dated 28.06.2017. The said exemption reads as follows:

| Sl.No. | Chapter, Section, Heading, Group or Service Code (Tariff) | Description of Services | Rate (per cent.) | Condition |
|--------|---|-------------------------|------------------|--|
| 14 | | | | 23 Heading 9967 Service by way of access to a road or a bridge on payment of toll charges. Nil Nil |

9. Though what is exempted is mentioned as service by way of access to a road or a bridge on payment of toll charges, the said toll charges is collected as consideration by the concessionaires towards construction and maintenance of the road. In short, 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.

10. Annuity is paid to the concessionaires in lieu of toll charges. GST Council, in its 22nd meeting held on 06.10.2017 took note of the same and as entire toll charges were being exempted from GST has decided to recommend exemption of annuity also, which include the consideration

received by concessionaires which is clear from the recordings in the minute book which is mentioned at

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paragraph 4 supra. The said recording makes it clear that it recommended treating annuity on par with the toll charges.

11. Pursuant to the said meeting, the notifications no.32/2017 and 33/2017 dated 13.10.2017 have been issued by respondent no.1 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. The reading of recommendation of the GST Council as well as the notifications issued make it clear that respondent no.1 has treated the annuity being paid to the concessionaires on par with toll charges which the concessionaires are permitted to collect from road users and both were exempted from GST.

12. Thereafter, for reasons best known to it, GST Council

has clarified that the annuity paid as deferred payment for construction of roads/highways was not exempted from GST as the tolls or annuity in lieu of tolls are. Accordingly, the

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impugned Circular dated 17.06.2021 vide Annexure-N to the petition in W.P.No.22250/2021 and Annexure-S to the petition in W.P.No.7233/2022 has been issued.

13. It is a settled proposition of law that a Circular which clarifies the notification cannot have the effect of overruling the notification. In the instant case, what has to be considered is whether the impugned Circular is in violation of notification nos.32 and 33/2017 dated 13.10.2017 or clarifies the said notifications.

14. As stated above, the deliberation of GST Council in its meeting held on 06.10.2017 and the notifications issued pursuant thereto clearly exempts the entire annuity being paid to the petitioners towards construction and maintenance of roads. It cannot be construed to have not exempted the annuity (deferred payments) towards construction of roads. The impugned circular has the effect

of overriding the notifications bearing Nos.32 and 33/2017 dated 13.10.2017 and has to be held as bad in law. Nothing prevents respondent no.1 from imposing GST on the consideration paid to concessionaires like the petitioners

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on the payment received by them by way of annuity but that has to be done in the manner known to law. In the instant case, respondent no.1 has issued the notifications under Section 11 of the Central Goods and Services Tax Act, 2017 and Section 6 of the Integrated Goods and Services Tax Act, 2017 exempting the consideration received by concessionaires from highway authorities as annuity from GST. The clarification issued is contrary to the said notifications for the reasons recorded above. If respondent no.1 is desirous of altering the same, it has to issue fresh notifications amending its earlier notifications.

15. For the aforementioned reasons, the impugned Circular dated 17.06.2021 vide Annexure-N to the petition in W.P.No.22250/2021 and Annexure-S to the petition in W.P.No.7233/2022 is hereby set aside. Consequently, all

actions pursuant to the said Circular is hereby set aside.

The writ petitions stand disposed of accordingly.

Pending I.As. stand disposed of.

Sd/-

JUDGE hkh.