SC to examine whether an assessee can be relegated to the appellate remedy, when the challenge is to a binding Circular

The Hon'ble Supreme Court in ***M/s Jorabat Shillong Expressway Limited v. Union of India & Ors. [Petition(s) for Special Leave to Appeal (C) Nos. 23643-23644 of 2026 dated July 17, 2026]*** issued notice on the Special Leave Petitions as well as on the prayer for interim relief, in a challenge to the judgment of the Hon'ble Meghalaya High Court which had declined to entertain the writ petition against a GST demand of Rs. 112.39 Crores on annuity received from the National Highways Authority of India (**"NHAI"**) purely on the ground of availability of an alternate statutory remedy under Section 107 of the Central Goods and Services Tax Act, 2017 (**"the CGST Act"**), where the Assessee contended that relegation to the appellate remedy is illusory since the appellate authorities are themselves bound by *Circular No. 150/06/2021-GST dated June 17, 2021* issued under Section 168 of the CGST Act, the very Circular whose validity is under challenge and which already stands quashed by the Hon'ble Karnataka High Court.

Facts:

M/s Jorabat Shillong Expressway Limited (**"the Petitioner"**) is a special purpose vehicle promoted by a consortium of IL&FS Transportation Networks Limited and Ramky Infrastructure, incorporated pursuant to the Letter of Acceptance dated May 20, 2010 issued by NHAI for four-laning of approximately 61.98 KM on the Jorabat-Shillong Section of National Highway No. 40 in the States of Assam and Meghalaya, on a Design, Finance, Operate and Transfer pattern on Build-Operate-Transfer (**"BOT"**) Annuity basis.

The Petitioner executed a Concession Agreement dated July 16, 2010 for a concession period of 20 years, under which it was granted the right to construct, operate and maintain the project highway. The right to collect toll was retained by NHAI, and the Petitioner's cost recovery was made through half-yearly annuities payable after the commercial operation date.

The Directorate General of Goods and Services Tax Intelligence (**"DGGI"**), Shillong Regional Unit, issued Show Cause Notice dated September 30, 2023 alleging that the Petitioner had failed to pay GST on annuity received for road construction, and re-classified the activity as works contract services under SAC 9954 taxable at 12-18%, as against exempt service by way of access to a road or a bridge under SAC 9967 covered by Entry 23A of Notification No. 12/2017-Central Tax (Rate) dated June 28, 2017 (as inserted vide Notification No. 32/2017-Central Tax (Rate) dated October 13, 2017) (**"the Exemption Notification"**).

The Respondent thereafter passed Order-in-Original No. 01/Additional Commissioner/CGST Shillong/2024-25 dated April 18, 2024 (**"the Impugned Order"**) under Section 74 of the CGST Act read with the corresponding provisions of the Meghalaya Goods and Services Tax Act, 2017, confirming a demand of Rs. 112,39,64,394/- (CGST + SGST) along with interest and penalty on annuity of Rs. 864,12,69,958/- received from NHAI for the period July 2017 to December 2022.

Aggrieved, the Petitioner filed a writ petition before the Hon'ble Meghalaya High Court challenging the Show Cause Notice and the Impugned Order, and also assailing the constitutional validity of Circular No. 150/06/2021-GST dated June 17, 2021 (**"the Impugned Circular"**) and the recommendation of the 43rd GST Council meeting held on May 28, 2021, whereby it was clarified that Entry 23A does not exempt GST on annuity paid for construction of roads, apart from challenging Notification No. 14/2017-Central Tax dated July 01, 2017 and Circular No. 3/3/2017-GST dated July 05, 2017 investing the Respondents with the powers of "Proper Officer".

The Hon'ble Meghalaya High Court, vide judgment in ***Jorabat Shillong Expressway Limited v. Union of India & Ors. [WP(C) No. 245 of 2024 dated June 02, 2026],*** dismissed the writ petition on the ground of availability of an efficacious alternate statutory remedy, while granting liberty to file an appeal under Section 107 of the CGST Act within four weeks. The Review Petition filed by the Petitioner was also dismissed on July 07, 2026, compelling the Petitioner to approach the Hon'ble Supreme Court by way of the present Special Leave Petitions.

Petitioner's Contentions:

- Annuity payments received under the BOT (Annuity) Model were specifically exempted under Entry 23A introduced by Notification No. 32/2017-Central Tax (Rate) dated October 13, 2017, and the Impugned Circular impermissibly curtailed the scope of a statutory exemption, which is impermissible in law and contrary to Section 11(3) of the CGST Act.

- The Hon'ble Karnataka High Court in ***DPJ Bidar-Chincholi (Annuity) Road Project Private Limited & Anr. v. Union of India & Ors. [(2024) 122 GSTR 48]*** has already quashed the Impugned Circular and held that the entire annuity, including the construction component, is exempt; since the CGST Act is an all-India statute, the authorities administering it are bound to follow such a judgment, as held by the Hon'ble Supreme Court in ***Kusum Ingots & Alloys Ltd. v. Union of India [(2004) 6 SCC 254]***.

- Relegating the Petitioner to the statutory appellate remedy is illusory and futile, inasmuch as the appellate authorities are themselves bound by Circulars issued under Section 168 of the CGST Act and cannot rule against the very Circular that forms the foundation of the demand; the issue was therefore pre-determined even prior to issuance of the Show Cause Notice.

- The dispute involves a pure question of law, namely whether annuity receipts under BOT road projects are exempt, with no disputed questions of fact requiring evidence, and the case squarely falls within the recognised exceptions to the rule of alternate remedy.

Issue:

Whether a High Court can relegate an assessee to the statutory appellate remedy under Section 107 of the CGST Act when the challenge is directed against the validity of a Circular issued under Section 168 of the CGST Act, which is binding on all departmental authorities including the appellate authority?

Held:

The Hon'ble Supreme Court in ***Petition(s) for Special Leave to Appeal (C) Nos. 23643-23644 of 2026*** held as under:

- Observed that, the controversy centres on whether a High Court can relegate an assessee to the statutory appellate remedy when the challenge is directed against the validity of a Circular issued under Section 168 of the CGST Act, which is binding on all departmental authorities.
- Noted that, the Petitioner contended that annuity payments were specifically exempted under Notification No. 32/2017-Central Tax (Rate) and that the Impugned Circular impermissibly curtailed the scope of the statutory exemption, and that relegation to the appellate remedy was illusory since the appellate authorities are themselves bound by Circulars issued under Section 168 of the CGST Act.
- Noted that, the Petitioner's review petition highlighting errors in the High Court's judgment was also dismissed, compelling the Petitioner to file the present Special Leave Petitions.
- Directed that, notice be issued to the Respondents on the prayer for interim relief as well as on the Special Leave Petitions, returnable on **August 07, 2026**.
- Directed that, the learned counsel for the Petitioner is permitted to serve the Union of India through the Central Agency.

Our Comments:

Entry 23A of Notification No. 12/2017-Central Tax (Rate) dated June 28, 2017, inserted vide Notification No. 32/2017-Central Tax (Rate) dated October 13, 2017 pursuant to the 22nd GST Council meeting, exempts "service by way of access to a road or a bridge on payment of annuity", falling under Heading 9967. The evident legislative object was to place annuity at par with toll, which already stood exempted under Entry 23. However, vide the 43rd GST Council meeting and the consequent Impugned Circular, it came to be clarified that Entry 23A does not exempt GST on annuity (deferred payment) paid for construction of roads, and that only the access component is exempt. It is this bifurcation of a single indivisible consideration into a taxable construction component and an exempt access component that lies at the heart of the dispute.

Section 11(3) of the CGST Act permits the Government to insert an explanation in a notification within one year for the purpose of clarifying its scope, and such explanation takes effect retrospectively. It is a settled principle that a circular issued under Section 168, which is an instrument of administrative instruction, cannot override, curtail or whittle down a statutory exemption notification. At the same time, Section 168 makes such circulars binding on departmental officers, and it is precisely this feature that the Petitioner relies upon to contend that the appellate remedy is not an efficacious one. The Hon'ble Meghalaya High Court, however, took the view that mere existence of binding circulars does not render the statutory appellate mechanism otiose, relying on ***Bela Singh Daulat Singh v. Commissioner of Income Tax [(1966) 62 ITR 250] and Indo-Gulf Fertilizers and Chemicals Corporation Limited v. Union of India [1992 SCC OnLine All 1067],*** to hold that a Board circular may bind departmental authorities but is not law and does not bind the appellate authority or the courts.

The other limb of the controversy is one of classification, i.e. whether the activity of a BOT (Annuity) concessionaire is a composite supply of works contract under Section 2(119) read with Section 8(a) of the CGST Act, with construction as the principal supply taxable under SAC

9954, or an integrated supply of road development and access covered by SAC 9967. The Hon'ble Meghalaya High Court has held that these questions involve interpretation of contractual clauses, examination of the nature of services under the Concession Agreement and determination of principal supply, and therefore cannot be regarded as pure questions of law capable of adjudication in writ jurisdiction in the first instance.

The issue is presently engaging several constitutional courts, with divergent outcomes:

- The Hon'ble Supreme Court in ***CG Tollway Limited*** is hearing an SLP against the Hon'ble Rajasthan High Court's judgment, where it sustained demand of over Rs. 16.36 Crores (approx.) along with interest and penalty against the toll-road concessionaire operating under a DBFOT/BOT (Toll) model.

- The Hon'ble Madras High Court in ***GVR Ashoka Outer Ring Road Limited*** directed the Revenue not to pass any final orders, which was extended until any further orders.

- The Hon'ble Telangana High Court in ***GMR Pochanpalli Expressways Ltd****.* had dismissed the Assessee's writ petition challenging the levy on annuity.

- The Hon'ble Andhra Pradesh High Court in ***Rajahmundry Expressway Pvt. Ltd****.* granted interim relief to the concessionaire against demand of GST on annuity paid for construction of roads.

- Similar interim relief has been granted by the Hon'ble Jammu & Kashmir and Ladakh High Court and the Hon'ble Gauhati High Court.

- The Hon'ble Karnataka High Court in ***DPJ Bidar-Chincholi (Annuity) Road Project Private Limited (supra)*** had quashed the Circular dated June 17, 2021, against which the Union of India has filed an appeal, and the said judgment has therefore not attained finality – a factor that weighed with the Hon'ble Meghalaya High Court in declining to follow it.

The outcome of the present Special Leave Petitions assumes considerable significance for the entire highway infrastructure sector, since exposure on annuity receipts across BOT (Annuity) and Hybrid Annuity Model projects is substantial and largely relates to periods for which the concessionaires can no longer pass on the tax burden to NHAI. Equally important is the wider procedural question the Hon'ble Supreme Court has agreed to examine, namely the contours of the "efficacious alternate remedy" doctrine where the very foundation of the demand is a Section 168 circular binding on the appellate authority. Concessionaires similarly placed may, as a matter of abundant caution, continue to file statutory appeals within limitation while preserving their contentions, since the liberty granted by the Hon'ble Meghalaya High Court to appeal within four weeks operates independently of the pendency of the Special Leave Petitions. The matter is listed for further hearing on August 07, 2026.

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