

17th Indirect Tax Colloquium



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Agenda

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1. Handling arbitrary/ capricious GST notices and Orders
2. Re-look at "warranties" supply under GST apropos Supreme Court judgement
3. GST on gaming/gambling/lottery/betting/horse-racing
4. Preparation for CLEAN UP DRIVE AGAINST FAKE GST Registrations
5. FAKE GST INVOICES - Testing a "Null Hypothesis"
6. Test of Classification - Import of Parts of electronics.. not to be considered import of finished products?
7. No Interest if deposit of Tax made in Cash Ledger - Even if GSTR 3B Not filed
8. "Protective Collection" of GST from recipients if supplier defaults
9. Discussion on All GST Notifications, Circulars, instructions, amendment in Rules
10. Discussion on All Customs & FTP Notifications, Circulars, instructions, amendment in Rules and Regulations
11. Interplay of GST with Income Tax

Handling arbitrary/ capricious GST notices and Orders

Sec 75 is a complete Code in itself!

2023-VIL-294-MP

M/s DURGE METALS Vs APPELLATE AUTHORITY AND JOINT COMMISSIONER STATE TAX

GST - Vague Show Cause Notice – Petitioner case that show cause notice is vague to the extent of not communicating the relevant information and material thereby disabling the petitioner to respond to the same – in the instant case, whether the show cause notice issued under Section 74(1) of CGST Act satisfy the requirements of the said provision r/w Rule 142 of CGST Rules

– HELD - the mandatory provisions of Section 74 of CGST Act make it incumbent upon the Revenue to ensure the show cause notice to be speaking enough to enable the assessee to respond to the same - Bare reading of the show cause notice reveals that it neither contained the material and information nor the statement containing details of ITC transaction under question - Section 75 of GST Act is complete Code in itself which prescribes for various stages or determination of wrongful utilization of ITC which is required to subject to affording of reasonable opportunity of being heard to the assessee. Since the Statute itself prescribes for affording reasonable opportunity, it is incumbent upon the Revenue to afford the same and any deficiency in that regard vitiates the end result - the very initiation of the proceedings by way of show cause notice is vitiated for the same being vague - the impugned orders and show cause notice are quashed with a liberty to the competent authority to proceed in the matter in accordance with law, if so advised – writ petition is allowed

Not granting adjournment should not be arbitrary/capricious!

TAXCONNECT

2023-VIL-303-MAD

EXIDE INDUSTRIES LIMITED Vs THE DEPUTY COMMISSIONER (CT) LTU-I, CHENNAI

GST – Issue of show cause notice under Section 73 of the CGST Act, 2017 – pursuant to personal hearing the petitioner sought extension of time in respect of some of the queries, however, respondent-authority proceeded to pass the impugned orders - Petitioner aggrieved by denial of reasonable opportunity of personal hearing HELD

- reasonable opportunity ought to be given to a person to show cause and depending upon the facts of each case, even further extension of time can be granted by the Assessing / Adjudicating Officer
- **the decision to refuse or extend time ought to be exercised with sound reasons** and not in an arbitrary or capricious manner.
- the impugned orders do not discuss the reasons for extension of time at all
- **the impugned orders are set aside and the respondent is at liberty to fix a date for enquiry, giving a minimum of 30 days' time to enable the petitioner to submit its explanation with regard to the three pending queries or any further explanation that may be required by the respondent and thereupon, pass final orders, on merits, after affording personal hearing to the petitioner – writ petition is allowed**

Handling arbitrary/capricious SCNs/Orders!

1. Order cannot travel beyond the SCN –

Eg. SCN does not cast an allegation on GSTR 1/ 3B mismatch, then the Order cannot demand on such mismatch. It has to restrict itself to the allegations cast in SCN

S 75 (7) The amount of tax, interest and penalty demanded in the order shall not be in excess of the amount specified in the notice and no demand shall be confirmed on the grounds other than the grounds specified in the notice.

2. Sec 75 mandates that Opportunity of being heard has to be granted. No Order without the same

75 (4) An opportunity of hearing shall be granted where a request is received in writing from the person chargeable with tax or penalty, or where any adverse decision is contemplated against such person.

*75 (5) The proper officer shall, if sufficient cause is shown by the person chargeable with tax, grant time to the said person and adjourn the hearing for reasons to be recorded in writing:
Provided that no such adjournment shall be granted for more than **three times** to a person during the proceedings.*

Handling arbitrary/capricious SCNs/Orders!

3. Analyze the total impact of an Order..No relief for Interest if demand is admitted

S 75 (9) The interest on the tax short paid or not paid shall be payable whether or not specified in the order determining the tax liability.

In **current TRAN dispensations Orders** it is seen that Orders are being issued allowing the TRAN Credit but interest on the ITC earlier taken.

3A. "Revenue Neutrality" can be a ground sometimes!

M/s HINDALCO INDUSTRIES LIMITED Vs COMMISSIONER OF CENTRAL EXCISE, BHUBANESWAR-II [2023-VIL-426-CESTAT-KOL-CE]

Central Excise – Demand of short payment of finished goods on stock-transfer basis to sister unit – Adjustment of short paid duty with excess paid duty in other months – for various months appellant paid duty in excess payable as per CAS-4 Certificate issued at the end of the year and for few months there was a short payment of duty – Appellant case that if the excess paid duty is adjusted with the short payment then overall there was an excess payment of duty and hence there is no demand liable to be confirmed – HELD – When excess paid duty is adjusted against the short payment that net result is that there is no short payment by the Appellant. The Adjudicating Authority failed to do this adjustment. Demanding duty only on the short payment, ignoring the excess payment is bad in law – further, the entire exercise is revenue neutral as the duty paid by them will be available as credit for their sister unit - the impugned order is set aside and appeal is allowed

Handling arbitrary/capricious SCNs/Orders!

4. SCN cannot be pre-judged. It cannot take the form of a crystallized demand –

For example, SCN can ask to show cause and cannot ask to make the payment of tax. Many SCNs give elaborate reasons as to why a product/service has to be classified/ not classified in a particular manner. SCNs cannot do the same.

5. Speaking Order should be passed -

The Order should have annexures providing the calculations of the demand. Many a times the calculations are faulty and thus the same must be rechecked.

S 75 (6) The proper officer, in his order, shall set out the relevant facts and the basis of his decision.

Handling arbitrary/capricious SCNs/Orders!

6. No DIN – Put the SCN/Order in Waste Paper

7. Incase of a crystallized demand, contest for Section 73 vis-à-vis Section 74 - fraud, or any wilful-misstatement or suppression of facts to evade tax

Sec 75 (2) Where any Appellate Authority or Appellate Tribunal or court concludes that the notice issued under sub-section (1) of section 74 is not sustainable for the reason that the charges of fraud or any wilful-misstatement or suppression of facts to evade tax has not been established against the person to whom the notice was issued, the proper officer shall determine the tax payable by such person, deeming as if the notice were issued under sub-section (1) of section 73.

Sec 75 (3) Where any order is required to be issued in pursuance of the direction of the Appellate Authority or Appellate Tribunal or a court, such order shall be issued within two years from the date of communication of the said direction.

S 74 (4) The service of statement under sub-section (3) shall be deemed to be service of notice under sub-section (1) of section 73, subject to the condition that the grounds relied upon in the said statement, except the ground of fraud, or any wilful-misstatement or suppression of facts to evade tax, for periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.

Handling arbitrary/capricious SCNs/Orders!

8. Order should take into account each and every point raised

Many a times, the point taken in an SCN Reply are not considered at all,

9. Pre-SCN should be issued in DRC-01A, SCN should be in DRC-01 and Order should be in DRC-07

Many a times a "Memo/Reply" is received from an agency/authority. In such cases a "reply/rebuttal" should be filed. However "appeal" cannot be filed until there is an Order

Further sometimes "Order" is also not in DRC-07. In such cases "appeal" should be filed **manually** taking the ground of a "Irregular Order"

Handling arbitrary/capricious SCNs/Orders!

10. Arbitrage between S 73 or S 74 – File Writ

U/s 73 no penalty is payable incase tax + interest is paid before/within 30 days of SCN. Even after 30 days penalty is only 10%

U/s 74 15% penalty is payable even before SCN; 50% penalty is payable after 30 days of SCN; 100% penalty is payable thereafter;

Explanation 2.--For the purposes of this Act, the expression "suppression" shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer.

Advocate during DGGI/DRI proceedings – At Visible distance

2023-VIL-288-BOM-CU

AMIT KUMAR SHARMA Vs DIRECTORATE OF REVENUE INTELLIGENCE

Customs – Presence of Advocate during interrogation under Section 108 of the Customs Act, 1962 - Petitioner seeking direction to Directorate of Revenue Intelligence (DRI) and its officers to permit the presence of his Advocate during the interrogation and recording of statements at visible but not audible distance in accordance with the general direction given by the Apex Court –

HELD - Vide various judicial pronouncements of the Apex Court as well as this Court, the presence of the Advocate at visible but not audible distance has been permitted during the interrogation under Section 108 of the Act - the direction which has been sought by the Petitioner as regards the presence of the lawyer at visible but not audible distance is an aspect of fair investigation and there is no reason to take a different view from the view taken by the Coordinate Benches of this Court - presence of the Petitioner's advocate during the interrogation of the Petitioner is permitted at visible but not audible distance - it is for the Petitioner to ensure the presence of their lawyer, whenever the Petitioner is called for interrogation and the non-availability of the lawyer cannot be a ground to seek exemption from the interrogation as and when called – writ petition is allowed

Warranties under GST

Warranties under GST

M/s TATA MOTORS LTD Vs THE DEPUTY COMMISSIONER OF COMMERCIAL TAXES (SPL) & ANR. [2023-VIL-57-SC]

1. Interpretation and legal import of expression "Credit Note" and "valuable consideration" - Definition of terms "sale", "Price" and "sale price" – Whether, credit note issued by a manufacturer to a dealer of automobiles in consideration of the replacement of a defective part in the automobile sold pursuant to a warranty agreement being collateral to the sale of the automobile is exigible to sales tax under the sales tax enactments of the respective States. **HELD –**

1. When the dealer uses one of the spare parts from his stock for the replacement of a defective part in an automobile under a warranty, he is given a monetary benefit in the form of a credit note.

2. Credit note issued by a manufacturer in favour of a dealer is a valuable consideration within the meaning of the definition of "sale" under both, CST Act, 1956 as well as the respective State enactments under consideration

3. The object and purpose of including the expression "valuable consideration" within the definition of sale apart from cash and deferred payment is to enlarge the scope of the expression price than what is enunciated under the Sale of Goods Act, 1930.

4. On discharging his obligation under the warranty appended to a sale of an automobile, a dealer receives a credit note. This would be a receipt in the account of the dealer and a liability in the returns of the manufacturer which may ultimately enable the manufacturer to decrease his tax liability.

Consequently, the dealer of the automobile in whose account a credit is shown would be ultimately a recipient of a valuable consideration on account of a transfer of goods, namely, spare part by a dealer to a customer while discharging his obligation under a warranty and thereby receiving a valuable consideration for the spare part used by the dealer from his stock from the manufacturer in the form of a credit note

Warranties under GST

5. When the entire transaction is viewed in the aforesaid perspective and in juxtaposition with the expression "sale" under the CST Act as well as the respective State enactments under consideration which is of a wider connotation than the definition of sale under the Sale of Goods Act, the amount shown in the account of the dealer in the form of a credit note is nothing but a price received for a sale of a spare part by the dealer which is from his stock and which belongs to him
6. The aforesaid transaction may be juxtaposed with the transaction of sale which the customer who would buy a spare part de hors a warranty.
7. In such an event, the dealer would have collected the sales tax along with the price of the spare part and would have remitted the same to the revenue
8. Merely because the dealer is acting as an intermediary or on behalf of the manufacturer pursuant to a warranty and receives a recompense in the form of a credit note, the same cannot escape liability of tax under the Sales Tax Acts under consideration
9. However, all the credit notes received by the dealer are not indicative of the value of the spare part supplied by the dealer from his own stock or when he buys it from the open market, to the customer under a warranty. It could be for rendering a service under a dealership agreement which can cover a situation when the manufacturer sends the spare part to the dealer to replace a defective part and receives a consideration for the said service.
- 10 .In such a case, there is no recompense for spare part - It is only when a credit note is issued for a spare part used by a dealer from his own stock or when he has purchased it from the open market or from another manufacturer of a spare part that it becomes a sale within the meaning of the sales tax enactments under consideration
11. In the result, dealer/assessee are liable to pay sales tax under the respective State enactments under consideration - the appeals filed by the dealers are dismissed. The appeals filed by the revenue are allowed

1. **Industries effected** - mobiles, Televisions, other electronic goods, electrical goods, automobiles, automobiles parts, batteries, machines and other equipment, etc.

2. Kinds of Warranties -

A. Replacement Warranties - A replacement warranty is an assurance provided by the manufacturer supplier at the time of supply to replace the defective product post-supply within a specified time.

Sometimes pro-rata costs are recovered from the customers incase the warranty supply is provided after a certain period of time. For eg. Incase a product has been sold with a condition that the warranty is for 5 years and incase the product becomes defective after 3 years, then while replacing the defective product, 60% of the cost of the product is charged to the customer and GST paid on the said 60% of the product value.

B. Warranties for Repair - In such a case, the supplier undertakes to repair the defects found in the product. He may or may not charge additional consideration/ payment.

3. Issue - The issue is that Certain field officers are raising doubts regarding treatment of these warranty supplies on the ground that manufacturer supplier is supplying 'warranty products' free of cost to the dealers/customers. Hence among other points, the following are generally raised as implications -

- As per Clause 1 of Schedule I of Central GST Act' 2017, "*Permanent transfer or disposal of business assets where input tax credit has been availed on such assets*" shall be considered as a supply made without consideration and output GST is liable to be paid on such supply. Warranty supplies would fall under this clause

OR

- As the outward supply of goods during the period of warranty is 'Free of Cost', so no output tax liability is devolved on the supplies. Hence the corresponding ITC needs to be reversed on the inward supplies used in the supply of warranty products, as per Rule 42 of The CGST Act 2017.

4. Defenses –

A. In view of the scope of the term "supply" as provided under Section 7 of the CGST Act the activity of initial supply of the 'original product' is taxable. The original supply has an inbuilt obligation of warranty for specified periods depending on type of good. The supply of original product along with inbuilt warranty falls under the scope of supply. The said transaction qualify as composite supply wherein the pre-dominant supply is that of supply of the original product and 'replacement/warranty' supply is the ancillary supply.

Warranties under GST

B. This has also been clarified in FAQ's released by the CBIC on 15.12.2018. The relevant FAQ has been reproduced

"What composite and mixed supply? How are these two different from each other? Ans. Composite supply is supply two or more taxable supplies of goods services or both combination thereof, which are bundled natural course and in conjunction with each other in the ordinary course business and where one of which is a principal supply. For example, consumer buys a television set and he also gets warranty maintenance contract with the TV, this supply is a composite supply. In this example, supply of TV supply is the principal supply, warranty and maintenance service are ancillary."

C. 7(1)(a) is applicable and not 7(1)(c)

D. ITC is available as all conditions u/s 16(2) are satisfied

E. The treatment of GST and eligibility of input tax credit in respect of warranty supplies has been clarified in Sectorial FAQs by CBIC, for IT/ ITES Sectors as under:

"Question 20: *What would be the tax liability on replacement of parts (no consideration is charged from a customer) under a warranty and whether the supplier is required to reverse the input tax credit?*

Answer: *As part are provided to the customer without a consideration under warranty, no GST is chargeable on such replacement. The value of supply made earlier includes the charges to be incurred during the warranty period. Therefore, the supplier who has undertaken the warranty replacement is not required to reverse the input tax credit on the parts/ components replaced."*

F. the GST law has subsumed the erstwhile Central Excise Law. While defining “transaction value”, the Section 4 of The erstwhile Central Excise Act included, amongst other charges, any amount charged for warranty.

The valuation principles as per the GST law are in line with the Central Excise Law in as much as the value shall be the “Transaction value” and the broad inclusion of “any amount charged for anything done by the supplier in respect of the supply of goods or services or both at the time of, or before delivery of goods or supply of services.”

5. Practices in Industry –

- A. Dealer issues a Tax invoice for spare parts supplied to Customer
- B. Free replacement of spare parts/ products is made against DCs
- C. Credit Note is issued by OEM to dealer

Gaming/Gambling/Lottery/Betting/Horse-racing

Game of Skill or game of Chance?

GAMESKRAFT TECHNOLOGIES PRIVATE LIMITED Vs DIRECTORATE GENERAL OF GOODS SERVICES TAX INTELLIGENCE (HEADQUARTERS), DELHI [2023-VIL-291-KAR]

GST - **Whether offline/online games such as Rummy which are mainly or preponderantly based on skill and not on chance**, whether played with/without stakes tantamount to 'gambling or betting' as contemplated in Entry 6 of Schedule III of the Central Goods and Services Act, 2017 –

Analysis of definition of 'Supply' in terms of Section 7 of the CGST Act – Analysis of definition of "Business" in terms of Section 2(17) of CGST Act, 2017

- **HELD** -

1. There is a distinct difference between games of skill and games of chance;
2. Games such as rummy, etc. as was discussed in several decisions and particularized in the Division Bench decision of this Court in All India Gaming Federation's case, whether played online or physical, with or without stakes would be games of skill and **test of predominance would apply**; the said judgment is a total and complete answer not only to the various contentions urged by the respondents but also covers the issues / questions that arise for consideration in the instant petitions –

Game of Skill or game of Chance?

2. Though Section 2(17) of the CGST Act recognises even wagering contracts as included in the term business, but that in itself would not mean that lottery, betting and gambling are the same as games of skill
3. The meaning of the terms “lottery, betting and gambling” as contemplated in Entry 6 of Schedule III of the CGST Act should be construed nomen juris in the light of the decisions of the Hon’ble Supreme Court, this Court and other High Courts supra which do not include games of skill
4. **Entry 6 in Schedule III to the CGST Act taking actionable claims out of the purview of supply of goods or services would clearly apply to games of skill and only games of chance such as lottery, betting and gambling would be taxable**
5. **Taxation of games of skill is outside the scope of the term “supply” in view of Section 7(2) of the CGST Act, 2017 read with Schedule III of the Act**
6. A game of chance whether played with stakes is gambling; A game of skill whether played with stakes or without stakes is not gambling;
7. **A game of mixed chance and skill is gambling, if it is substantially and preponderantly a game of chance and not of skill**; A game of mixed chance and skill is not gambling, if it is substantially and preponderantly a game of skill and not of chance

Game of Skill or game of Chance?

8. Rummy is substantially and preponderantly a game of skill and not of chance; Rummy whether played with stakes or without stakes is not gambling –

9. There is no difference between offline/physical Rummy and Online/Electronic/Digital Rummy and both are substantially and preponderantly games of skill and not of chance – Online / Electronic / Digital Rummy whether played with stakes or without stakes is not gambling; Other Online/Electronic/Digital games which are also substantially and preponderantly games of skill and not of chance are also not gambling

10. The expressions, 'Betting' and 'Gambling' having become nomen juris, the same are applicable for the purpose of GST also and consequently, the said words, 'Betting' and 'Gambling' contained in Entry 6 of Schedule III to the CGST Act are not applicable to Online/Electronic/Digital Rummy, whether played with stakes or without stakes as well as to any other Online / Electronic / Digital games which are also substantially and preponderantly games of skill

11. The subject Online / Electronic / Digital Rummy game and other Online / Electronic / Digital games played on the Petitioners' platforms are not taxable as 'Betting' and 'Gambling' as contended by the respondents under the CGST Act and Rules or under the impugned show cause notice issued by the respondents -Consequently, the impugned Show Cause Notice issued by the respondents to the petitioners is illegal, arbitrary and without jurisdiction or authority of law and deserves to be quashed – the writ petitions are allowed

1. Test of pre-dominance is of importance. However it is very difficult to establish
2. **As Entry 6 of Sch III restricts to** “lottery, betting and gambling”. To tax “Actionable claim”, the activity has to be brought under these classes.
3. Activity of “horse-racing” is a separate Class which cannot be created until Sch III is amended
4. One may see an amendment going forward to bring such classes into tax as may be specified

**No Interest even when money is available in
Cash Ledger**

Interest is on payment and not on Discharge..

50(1) "Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made thereunder, but **fails to pay the tax** or any part thereof to the Government within the period prescribed, shall for the period for which the tax or any part thereof remains unpaid, pay, on his own, interest at such rate, not exceeding eighteen per cent., as may be notified by the Government on the recommendations of the Council:"

49 (1) **Every deposit made towards tax**, interest, penalty, fee or any other amount by a person by internet banking or by using credit or debit cards or National Electronic Fund Transfer or Real Time Gross Settlement or by such other mode and subject to such conditions and restrictions as may be prescribed, **shall be credited to the electronic cash ledger of such person to be maintained in such manner as may be prescribed...**

(3) **The amount available in the electronic cash ledger may be used for making any payment towards tax**, interest, penalty, fees or any other amount payable under the provisions of this Act or the rules made thereunder in such manner and subject to such conditions and within such time as may be prescribed...

Explanation.-For the purposes of this section,-

(a) **the date of credit to the account of the Government in the authorised bank shall be deemed to be the date of deposit in the electronic cash ledger;**

(b) the expression,-

(i) "tax dues" means the tax payable under this Act and does not include interest, fee and penalty; and(ii) "other dues" means interest, penalty, fee or any other amount payable under this Act or the rules made thereunder

Interest is on payment and not on Discharge..

a. Rule 61(2) of the CGST Rule, 2017 is reproduced as below;

*Every registered person required to furnish return, under sub-rule (1) shall, **subject to the provisions of section 49, discharge** his liability towards tax, interest, penalty, fees or any other amount payable under the Act or the provisions of this Chapter by debiting the electronic cash ledger or electronic credit ledger and include the details in the return in FORM GSTR-3B.*

In the case of **PRATIBHA PROCESSORS Vs. UOI [1996-VIL-22-SC-CU]** the Hon'ble Supreme Court of India clearly held that Interest is compensatory in character and is imposed on an assessee who has withheld of any tax as and when it is due and payable. The levy of interest is geared to actual amount of tax withheld and the extent of the delay in paying the tax on the due date.

Fake Invoices - Testing a Null Hypothesis :

Q: Is there a huge generation of fake invoices & fake GST transactions in the economy?

NH: There is not a huge generation of fake invoices in the economy

Clarification on various issues relating to applicability of demand and penalty provisions in respect of transactions involving fake invoices

In order to clarify issues regarding fake invoices and to ensure uniformity in the implementation of the provisions of law across the field formations, the Board, hereby clarifies the issues detailed hereunder.

Issue 1:

Query: Is Issuing of fake invoices to be considered as supply? whether any action can be taken against Issuer of the fake invoice in such case.

Clarification:

- There is no supply in respect of such tax invoice in terms of the provisions of section 7 of CGST Act.
- No tax liability arises against issuer of fake invoice for the said transaction, and
- Accordingly, no demand and recovery is required to be made against him under the provisions of section 73 or section 74 of CGST Act in respect of the same. Besides, no penal action under the provisions of section 73 or section 74 is required to be taken against issuer in respect of the said transaction.
- The registered person "Issuer" shall, however, be liable for penal action under section 122 (1)(ii) of the CGST Act for issuing tax invoices without actual supply of goods or services or both.

Issue 2:

Facts: A registered person has issued tax invoice to another registered person without any underlying supply of goods or services or both. And credit has been utilised by the recipient on the said tax invoice for payment of his tax liability in respect of outward supplies.

Clarification: Query: Whether Recipient will be liable for the demand and recovery of the said ITC, and what actions will be taken in against of him?

Since, Recipient has availed and utilized fraudulent ITC on the basis of the said tax invoice without receiving the goods or services or both,

- In contravention of the provisions of section 16(2)(b) of CGST Act, he shall be liable for the demand and recovery of the said ITC
- Along with penal action, under the provisions of section 74 of the CGST Act, along with applicable interest under provisions of section 50 of the Act.
- And as per provisions of section 75(13) of CGST Act, if penal action for fraudulent availment or utilization of ITC is taken against recipient under section 74 of CGST Act, no penalty for the same act, i.e. for the said fraudulent availment or utilization of ITC, can be imposed on 'recipient' under any other provisions of CGST Act, including under section 122.

Fake Invoices

Issue 3:

Facts: A registered person 'X' has issued tax invoice to another registered person 'Y' without any underlying supply of goods or services or both. 'Y' avails input tax credit on the basis of the said tax invoice and further passes on the said input tax credit to another registered person 'Z' by issuing invoices without underlying supply of goods or services or both.

Query: Whether 'Y' will be liable for the demand and recovery and penal action, under the provisions of section 73 or section 74 or any other provisions of the CGST Act.

Clarification:

- In this case, the input tax credit availed by 'Y' in his electronic credit ledger on the basis of tax invoice issued by 'X', without actual receipt of goods or services or both, has been utilized by 'Y' for passing on of input tax credit by issuing tax invoice to 'Z' without any underlying supply of goods or services or both.
- As there was no supply of goods or services or both by 'Y' to 'Z' in respect of the said transaction, no tax was required to be paid by 'Y' in respect of the same. The input tax credit availed by 'Y' in his electronic credit ledger, without actual receipt of goods or services or both, is ineligible in terms of section 16 (2)(b) of the CGST Act.
- In this case, there was no supply of goods or services or both by 'Y' to 'Z' in respect of the said transaction and also no tax was required to be paid in respect of the said transaction.
- Therefore, in these specific cases, no demand and recovery of either input tax credit wrongly/ fraudulently availed by 'Y' in such case or tax liability in respect of the said outward transaction by 'Y' to 'Z' is required to be made from 'Y' under the provisions of section 73 or section 74 of CGST Act.
- However, in such cases, 'Y' shall be liable for penal action both under section 122(1)(ii) and section 122(1)(vii) of the CGST Act, for issuing invoices without any actual supply of goods and/or services as also for taking/ utilizing input tax credit without actual receipt of goods and/or services.

Supplier's Invoice can't be called 'fake' without evidence

M/s BALAJI EXIM Vs COMMISSIONER, CGST AND ORS. [2023-VIL-181-DEL]

1. Petitioner's export refund was rejected on allegation of **"it appeared that they are to be part of a supply chain involving fake Input Tax Credit"** of supplier
2. High Court admitted writ 'as tribunal was not formed' even though matter lied in appeals
3. The Appellate Authority concluded that the present case was one of **"goodless supply on the strength of fake invoices"**
4. **There is no allegation that the goods in question were not exported overseas**
- 4A. The invoice was there and was duly paid
5. Allegation was that **"supplier's supplier was involved in issuance of fake invoice"**
6. **Reliance on Arise India/ Quest Merchandising Case wherein the Court held that –**
 - A. Purchasing dealer could not be asked to do the impossible and see whether the selling dealer had paid taxes to the Govt.
 - B. Bonafide Purchasing Dealer had to be distinguished from malafide Purchasing Dealer
7. **Para 26 (Last para is of significance)** - It is clarified that in the event the respondents are able to find material to establish the allegations regarding non-supply of any goods by M/s Shruti Exports to the petitioner, it would be open for the respondents to initiate such action as may be warranted in accordance with law

Instances when the Field action is confusing taxpayers

1. Assuming that commercial CNs is to be treated as a “supply”
2. Incase of bill-to ship-to transactions, dept. alleges that material has moved from somewhere and item has moved from somewhere. Hence, it is a movement of invoice without material movement. This is not sustainable
2. Ab-Initio GSTIN Cancellation of the supplier after filing GSTR 3B – invocation of 16(2)(c)
3. Supplier filed GSTR 3B but took fake ITC at its end : Application of Sec 122(1A)
4. Supplier showed B2B under B2C in GSTR 1 - Disallowance from FY 19-20
5. GSTR2A/2B mismatch before 31st December 2021
6. Assuming that non-availability of persons at APOB/PPOB would mean fake registration
7. Supplier filed the invoices and paid tax after time barring period – 16(4)
8. “Cause for action” after time barring period u/s 16(4)
9. Supplier paid the taxes before time barring period but paid the taxes earlier

Instances when the Field action is confusing taxpayers

10. Amendment in GST Law required –

A. That where-ever asset is, it has to be added as a place of business

B. Definition of “fixed establishment” under GST – registration is required in a state “from” where a supply is made

C. VPOBs concept should be there

11. Incase of L2 suppliers, the L2 purchasers cannot be held guilty

12. Where movement of materials and payment of tax cannot be disputed, then ITC cannot be denied e.g works contract one to one matching of STN items cannot be done

Industry Action which needs to be amended

1. Transfer of ITC without transfer of goods/services – to show bank turnover
2. Transfer of accumulated ITC to other businesses where output tax is available – to liquidate ITC
3. Transfer of accumulated ITC to other states where output tax is available – to liquidate ITC
4. Goods movement not captured in “fast-tag”
5. E-Waybills used loosely.. No reconciliation made between GSTR-1 and E-Waybill or GSTR-3B and E-Waybill
6. Ignoring “excess ITC” from “unknown parties” in GSTR-2A/ 2B
7. Not appointing ARs in every state who are readily available

Other Issues under Scanner of GST

1. Linking of "Credit Notes" & "Debit Notes" with Original Invoices... even after Feb 2019
2. Cross Charge Vs ISD Distribution
3. 194R Impact - Reimbursements as pure agents – whether the bill for reimbursement is in your name or your Company's name.
4. 194R Impact – Do you disclose the value of benefits/perquisites in your ITR. Matching with ITR & AIS/Forms 26AS
5. Credit Notes in GSTR 2B – Are you showing in 'Permanent Reversal' in 4A1 – If the supplier raises a bill and then cancels it without your knowledge, then you do not account for it.
6. Are the recipients of your CNs reversing their ITC – What precautions should you take..
7. Are those suppliers who are liable to E-Invoice supplying you Non-E Invoice Bills
8. Payment Not made to Suppliers whose services are under RCM

Beware of Section 151.. A la 133(6) of Income Tax Act

Power to call for information.

151. The Commissioner or an officer authorised by him may, by an order, direct any person to furnish information relating to any matter dealt with in connection with this Act, within such time, in such form, and in such manner, as may be specified therein

Notes -

1. No basis in upholding the addition by the AO merely on the basis that only 2 out of 17 parties failed to respond to the notice issued under section 133(6) of the Act. [Sonicwall Technology System India Pvt. Ltd. Vs ACIT (ITAT Mumbai – 2/12/22)]
2. Invocation of Sec 151 cannot be co-ersive so as to destroy business and against Article 14 and 19(1)(g) of Constitution

GST Clean Up Drive

GST Clean Up Drive

1. It has been found that in some cases, forged documents, such as forged electricity bills, property tax receipts, rent agreements, etc. have been used as proof of principal place of business to obtain GST registration. The beneficiary/mastermind of a transaction is someone else but on paper it's another person, sometimes from economically weaker section.
2. It has been found that persons are non-existent at their PPOB (Principal Place of Business) /APOB (Additional Place of Business).
3. A Special Drive to cleanse the system will be taken between 16th May 2023 to 15th July 2023 **on the basis of data shared by GSTN; various available analytical tools like BIFA, ADVAIT, NIC Prime, E-Way analytics, etc, as well as through human intelligence, Aadhar database, other local learnings and the experience gained through the past detections and modus operandi alerts.**
4. SGST & CGST Departments will work in close co-ordination in the drive. A nodal officer shall be appointed by each of the Zonal CGST Zone and State to ensure seamless flow of data and for coordination with GSTN/ DGARM and other Tax administrations.
Recovery can take place in the other state/jurisdiction through Nodal officers appointed for each jurisdiction and an All India Information Sharing Mechanism. The co-ordination shall be done by National Co-ordination Committee at the Highest Level.
5. Actions like suspension/cancellation of GSTIN, blocking of ITC, recovery from recipient, attachment, etc can take place in the matter.

1. Physical and Documentary Existence at Place of Business -

- A. There is No concept of VPOB (Virtual Place of Business) under GST Law. Hence one table space in a business centre should not be used for multiple registrations.
- B. If office is shifted permanently please make sure to surrender PPOB (Principal Place of Business) /APOB (Additional Place of Business). If office is shifted temporarily please make sure to add APOB (Additional Place of Business) as well as display requisite information in the earlier POB.
- C. Documents u/r 56 of CGST Rules to exist at each PPOB/APOB as per the transactions taking place from there.
- D. Ensure to appoint an Authorized Representative for each state and ensure that he/she is present at PPOB/APOB as required.
- E. Loading/unloading of vehicles to only happen at PPOB/APOB. They should not happen in an open area which is not registered.

2. "Invoicing without Supply" is an offence under GST even even incase all compliances are done. Especially "Service Providers" need to beware.

3. Both inward as well as outward movement require E-Waybill. Hence E-Waybill reconciliation is to be done with inward as well as outward supplies.

4. Incase Authorised Signatory has changed, please change it on GST Portal.

Dos & Don'ts for Stock Keeping under GST & Income Tax Matters

1. **For All** - Do not store stock at a place which is not added in the GST Registration APOB/PPOB.
2. **For Manufacturers** - Do have a record of not only purchase of Raw Material and closing Stock, but also have records of WIP.
3. **For Downstream Products like Scrap** - Do not load vehicles on the road or any unauthorized place other than APOB/PPOB.
4. **For All** - Generate E-Waybill Part-B only after the vehicle is ready for movement.
5. **For All** - Try to stock lots of material as per your ERP. For example incase one is stocking the same material at different place in different lots, then it is better incase the ERP Stock is also maintained in lots.
6. **Ensure Sales Orders are serial numbered** - It is seen that many small businesses maintain Customer/Sales Orders on pieces of paper and have no record of serial numbers or orders cancelled or a linking to final invoices made.

Rights & Obligations of Taxpayers

...

Be ready for New ASMT 10 for FY 2019-20 – As you prepare for Clean Up Drive



11 May 2023 : CBIC rolls out Automated Return Scrutiny Module for GST returns in ACESGST backend application for Central Tax Officers Date:

During the recent review of the performance of the Central Board of Indirect Taxes & Customs (CBIC), Union Minister for Finance and Corporate Affairs Smt. Nirmala Sitharaman had given **directions to roll out an Automated Return Scrutiny Module** for GST returns at the earliest.

In order to implement this non-intrusive means of compliance verification, CBIC has rolled out the Automated Return Scrutiny Module for GST returns in the ACES-GST backend application for Central Tax Officers this week.

This module will enable the officers to carry out scrutiny of GST returns of Centre Administered Taxpayers selected on the basis of data analytics and risks identified by the System. In the module, discrepancies on account of risks associated with a return are displayed to the tax officers. Tax officers are provided with a workflow for interacting with the taxpayers through the GSTN Common Portal for communication of discrepancies noticed under FORM ASMT-10, receipt of taxpayer's reply in FORM ASMT-11 and subsequent action in form of either issuance of an order of acceptance of reply in FORM ASMT-12 or issuance of show cause notice or initiation of audit / investigation. Implementation of this Automated Return Scrutiny Module has commenced with the scrutiny of GST returns for FY 2019-20, and the requisite data for the purpose has already been made available on the officers' dashboard.

SOP : Scrutiny of GST Returns 17-18 & 18-19

i. GSTR 3B Vs GSTR 1

1. Tax liability on account of "*Outward taxable supplies (other than zero rated, nil rated and exempted)*" and "*Outward taxable supplies (zero rated)*" as declared in table 3.1(a) and table 3.1(b) respectively of FORM GSTR-3B may be verified with corresponding tax liability in respect of outward taxable supplies declared in table 4 (other than table 4B), table 5, table 6, table 7A(1), table 7B(1), table 11A and table 11B (along with the net effect of amendments thereof in Table 9, 10 and 11(II)) of FORM GSTR-1.

Where the tax liability in respect of supplies declared in the aforementioned tables of **FORM GSTR-1** exceeds the liability declared in table 3.1(a) and table 3.1(b) of **FORM GSTR-3B**, it may indicate short payment of tax.

It may be noted that table 11B of FORM GSTR-1 captures details of advance amount received in earlier tax periods and adjusted against the supplies shown in the current tax period in table 4, 5, 6 and 7 of **FORM GSTR-1**. As such, the impact of such details in table 11B is reduction in liability for the tax period under consideration, as the tax should have already been paid upon receipt of such advance amount.

SOP : Scrutiny of GST Returns 17-18 & 18-19

ii. RCM Checking

2. Tax liability on account of "Inward supplies (liable to reverse charge)" as declared in Table 3.1(d) of FORM GSTR-3B may be verified with the following:

(i) ITC availed in Table 4(A)(2) and Table 4(A)(3) of FORM GSTR-3B.

Availment of ITC in excess of the liability discharged on account of reverse charge supplies may indicate either short payment of tax liability on account of RCM supplies or excess availment of input tax credit in respect of RCM supplies.

(ii) ITC in respect of inward supplies attracting reverse charge as available in Table 3 and Table 5 (along with the net effect of amendments thereof in Table 4 and Table 6 respectively) of FORM GSTR-2A.

In respect of inward supplies attracting reverse charge received from a registered person, the details of corresponding invoices and debit/credit notes are communicated in table 3 and table 5 of **FORM GSTR-2A**. Further, in case of amendment of such details by the corresponding suppliers in their **FORM GSTR-1**, the details of such amendments are communicated in table 4 and table 5 respectively.

However, the details of such inward supplies from unregistered persons are not communicated in **FORM GSTR-2A**, as only registered persons furnish **FORM GSTR-1**. Moreover, details of ITC on account of import of services also are not communicated in **FORM GSTR-2A**. As such, the reverse charge supplies declared in table 3.1(d) of **FORM GSTR-3B** cannot be less than the inward supplies attracting reverse charge as available in the above mentioned tables of **FORM GSTR-2A**.

Where the RCM supplies declared in table 3.1(d) of **FORM GSTR-3B** are less than the inward supplies attracting reverse charge as per details available in **FORM GSTR-2A**, it may indicate short payment of tax liability on account of RCM supplies.

It may be noted that the said tables in FORM GSTR-2A contain details of supplies attracting forward as well as reverse charge. Therefore, only the supplies against which there is "Yes" or "Y" in column 14 of Table 3, column 16 of Table 4, column 15 of Table 5 and column 18 of Table 6 may be considered.

(iii) Tax/Cess paid in cash as per column 8 of Table 6.1 of FORM GSTR-3B.

In respect of inward supplies liable to reverse charge, tax/cess is to be paid in cash. Besides such RCM payments in cash, there may also be other payments in cash by the registered person. In any case, tax liability off-set in cash should not be less than the liability arising on account of reverse charge as per table 3.1(d) of **FORM GSTR-3B**. Where the tax liability off-set in cash is less than the liability arising on account of reverse charge, it may indicate short payment of tax.

SOP : Scrutiny of GST Returns 17-18 & 18-19

3. ITC availed in respect of "*Inward supplies from ISD*" in Table 4(A)(4) of FORM GSTR-3B may be verified with Table 7 (along with the net effect of amendments thereof in Table 8) of FORM GSTR-2A.

4. ITC availed in respect of "*All other ITC*" in Table 4(A)(5) of FORM GSTR-3B may be verified with Table 3 and Table 5 (along with the net effect of amendments thereof in Table 4 and Table 6 respectively) of FORM GSTR-2A.

It may be noted that the said tables in **FORM GSTR-2A** contain details of supplies attracting forward as well as reverse charge. Therefore, only the supplies against which there is "**No**" or "**N**" in column 14 of Table 3, column 16 of Table 4, column 15 of Table 5 and column 18 of Table 6 may be considered.

SOP : Scrutiny of GST Returns 17-18 & 18-19

5. It may be verified that the taxable value declared on account of "*Outward taxable supplies (other than zero rated, nil rated and exempted)*" in Table 3.1(a) of FORM GSTR-3B is not less than the net amount liable for TCS and TDS credit as per Column 6 of Table 9 of FORM GSTR-2A.

Section 51 of the CGST Act mandates deduction of tax at source in respect of supplies made to TDS deductors. Similarly, section 52 of the CGST Act requires electronic commerce operators to collect tax at source in respect of supplies made through them. The details of such TDS and TCS are furnished by the corresponding deductors and operators in their **FORM GSTR-7** and **FORM GSTR-8** respectively and communicated to the registered person in table 9 of **FORM GSTR-2A**. Besides such supplies, the registered person may have other supplies also. However, the taxable value declared on account of "*Outward taxable supplies (other than zero rated, nil rated and exempted)*" in Table 3.1(a) of **FORM GSTR-3B** cannot be less than the net amount liable for TCS and TDS credit as per Column 6 of Table 9 of **FORM GSTR-2A**. A discrepancy on the aforementioned count may indicate short payment of tax.

SOP : Scrutiny of GST Returns 17-18 & 18-19

6. Liability on account of outward supplies in Table 3.1(a) and 3.1(b) of FORM GSTR-3B should be verified with the Tax liability as declared in e-way bills.

Rule 138 of the CGST Rules mandates generation of e-way bill before commencement of movement of goods of consignment value exceeding fifty thousand rupees (in relation to supply, or for reasons other than supply, or due to inward supply from unregistered person). Besides such supplies, the registered person may also have such other supplies which do not require generation of e-way bills, such as supply of services or supplies as specified in sub-rule (14) of rule 138, etc. Therefore, e-way bills capture a part of supplies made by the registered person. However, in table 3.1 of **FORM GSTR-3B**, the registered person is required to declare details of all outward supplies. Accordingly, liability declared in table 3.1 (a) and (b) of **FORM GSTR-3B** should not be less than tax liability as declared in the e-way bills.

7. Claim of ITC in respect of supplies from taxpayers whose registrations have been cancelled retrospectively.

In case of retrospective cancellation of registration of a supplier, the recipient is not entitled to claim ITC in respect of invoices or debit notes issued after the effective date of cancellation of the registration. **Effective date of cancellation of registrations of the suppliers, if any, is made available in relevant tables of FORM GSTR-2A.** Accordingly, it may be verified whether the registered person has availed ITC in respect of such invoices or debit notes issued by the suppliers after the effective date of cancellation of their registrations.

8. Ineligible ITC availed in respect of invoices / debit notes issued by the suppliers who have not filed their GSTR-3B returns for the relevant tax period.

FORM GSTR-2A of the registered person contains the details of "**GSTR-3B filing status**" of the supplier in respect of each invoice / debit note received by the registered person. Where the said status is "No", it indicates the supplier has furnished invoice details in his FORM GSTR-1, but has not furnished the return in **FORM GSTR-3B** for the corresponding tax period. The availment of ITC in respect of such invoices / debit notes may be checked.

SOP : Scrutiny of GST Returns 17-18 & 18-19

9. Whether GSTR-3B of a tax period is filed after the last date of availment of ITC in respect of any invoice / debit note as per section 16(4). In such cases, no ITC shall be availed in the return.

Sub-section (4) of section 16 of CGST Act provides for availment of ITC only till the due date of furnishing of **FORM GSTR-3B** for the month of September following the end of FY to which such ITC pertains or furnishing of relevant Annual Return, whichever is earlier. Accordingly, if any return in **FORM GSTR-3B** is furnished after such time by the registered person under scrutiny, any ITC availed therein is inadmissible.

It may also be noted that vide proviso to sub-section (4) of section 16, for FY 2017-18, availment of ITC was allowed beyond the due date of furnishing of return for the month of September, 2018 till the due date of furnishing of the return in **FORM GSTR-3B for the month of March, 2019** subject to the condition that the details of the said invoices / debit notes should have been furnished by the suppliers in their FORM GSTR-1 till the due date of furnishing of FORM GSTR-1 for the month of March, 2019.

SOP : Scrutiny of GST Returns 17-18 & 18-19

10. ITC availed in respect of "*Import of goods*" in Table 4(A)(1) of FORM GSTR-3B may be verified with corresponding details in Table 10 and Table 11 of FORM GSTR-2A.

Wherever required, the details of such imports may also be cross-verified from ICEGATE portal.

11. Whether the registered person has made reversals of ITC in accordance with provisions of rule 42 and rule 43 of the CGST Rules.

Rule 42 of the CGST Rules provides for manner of determination of input tax credit in respect of inputs or input services and reversal thereof. Rule 43 provides for manner of determination of input tax credit in respect of capital goods and reversal thereof in certain cases. The registered person avails ITC in table 4(A) of **FORM GSTR-3B** and reverses in Table 4(B). It may be verified whether requisite reversals have actually been made by the said registered person.

SOP : Scrutiny of GST Returns 17-18 & 18-19

12. Whether the registered person has paid interest liability in terms of section 50.

As per section 50 of the CGST Act a registered person is required to pay interest on delayed payment of tax. It may be verified whether interest payable as per the provisions of section 50 of the CGST Act has actually been paid by the registered person.

13. Whether the registered person has paid late fee in terms of section 47 in respect of returns/statements.

As per section 47 of the CGST Act a registered person is required to pay late fee for delayed filing of returns / statements under the Act. It may be verified whether late fee payable as per the provisions of section 47 of the CGST Act has actually been paid by the registered person.

“Protective Collection” of duties

Proof of delivery of goods mandatory

The Hon'ble Supreme Court in the landmark decision of **Ecom Gill Coffee Trading Private Limited (EGCTPL)** has distinguished its earlier judgement in the case of Arise India Ltd in the matter of laying down the responsibility of the Customer for claiming Input Tax credit (ITC) for goods purchased. Both these decisions, while passed for cases relating to VAT, would be applicable under GST Also. The brief of the judgement are as follows –

1. The earlier Kar VAT Act (now CGST Act) lays burden of proof on the purchasing dealer to substantiate with evidences that it has received the goods to claim ITC.
2. The evidences required for complying with this burden of proof are E-Waybill, consignment note of Vehicle with Vehicle No which carried the goods inwards, Freight charges payment proof and document for acknowledgement of receipt of goods.
3. Just showing invoices and proving that taxes are paid to the supplier would not suffice

Sec 16(2)(c) : Recipient ITC reversal allowed as a 'protective' move and supplier recover a 'substantive' move

2023-VIL-188-MAD

PINSTAR AUTOMOTIVE INDIA PVT LTD Vs ADDITIONAL COMMISSIONER, OFFICE OF THE COMMISSIONER OF GST AND CENTRAL EXCISE, CHENNAI

The provisions of the CGST Act has, assimilating wisdom of experience from the erstwhile tax regimes, gone one step further to ensure that the interests of the revenue are protected by providing for a mandate that the tax liability is defrayed/met either at the hands of the supplier or the purchaser, the petitioner in this case. Thus, no fault can be attributed to the revenue in this regard.

An additional factor is that where the tax liability has been met by way of reversal of ITC and similarly recovery is effected from the supplier as well, this would amount to a double benefit to the revenue.

Thus, while the Department may reverse credit in the hands of the purchaser, this has to be a protective move, to be reversed and credit restored if the liability is made good by the supplier. Thus, the substantive liability falls on the supplier and the protective liability upon the purchaser. A mechanism must be put in place to address this situation.

Key Takeaways

Purchaser now has to ensure the following (**Post 1st Jan 2022**) –

‘Claiming’ stage of ITC –

1. He should have the Invoice – 16(2)(a)
2. The ITC should be available in GSTR-2B 16(2)(a)(a)
3. He should have filed his return 16(2)(d)
4. He should have received the goods/services 16(2)(b). For this, Burden of Proof (u/s 155 of CGST Act) is on purchasing dealer to prove genuineness of transaction i.e. movement has happened with evidences like –

For Goods –

- i. E-Waybill
- ii. CN of Vehicle with Vehicle No
- iii. Freight charges payment
- iv. GRN – acknowledgement of receipt
- v. physical presence of the selling dealer
- vi. “Despatch Address” of the supplier, especially incase of bill-to ship-to transactions
- vii. Are those suppliers who are liable to E-Invoice supplying you Non-E Invoice Bills

Key Takeaways

For Services –

- i. The existence and capability of the service provider**
- ii. The KYC of the service provider (**Identity, creditworthiness & genuineness**)
- iii. The necessity of services
- iv. Proof of delivery of services e.g. Report/opinion/etc
- v. Justification of market value of services
- vi. “Related Party” Status of the service provider

5. The Tax should have been paid to the Govt. 16(2)(c) –

- i. The GSTR 3B Filing Status of the supplier should be up-to-date (Refer GST Portal)
- ii. RC of supplier should not be cancelled before invoice date/receipt of goods/service date – **LGW Industries**
- iii. Value of the ITC and other details of the invoice should be matching with GSTR-2B
- iv. Incase of **Bill-to ship-to** transaction it would be better to get the RC details of the supplier’s supplier and also check the filing status and existence of the same

Hence the genuineness, creditworthiness and identity of the transactions have to be proved

- 6. Supplier’s 3B vs 1 should not be mismatched above a certain amt. - To be notified**

Key Takeaways

However after this is done, then –

1. Section 122(1A) cannot be invoked even incase supplier takes fake ITC (Balaji Exim – Del High Court; Ecom Gill Coffee Trading Private Limited (EGCTPL) - Supreme Court – March 2023).

Incase of bill-to ship-to transactions, dept. alleges that material has moved from somewhere and item has moved from somewhere. Hence, it is a movement of invoice without material movement. This is not sustainable

2. Ab-Initio cancellation will not impact the transaction done pre-cancellation (LGW Industries – Cal HC)

3. Just because Tax has not been paid to the Govt. dept. cannot come to the recipient if supplier is existing (DY Beathel Enterprises – Madras HC)

4. Until supplier is missing/bankrupt/closed down his business, or is untraceable till such time the dept. cannot come to the recipient – Press Release dt'ed 1st May 2018

5. There is no requirement of matching 2A/2B and ITC can be taken on the basis of books of accounts – Pre 1st Jan 2022 – Bharti Airtel Case

Key Takeaways

6. L2 supplier's default cannot effect the ITC of the recipient - (Balaji Exim – Del High Court; Ecom Gill Coffee Trading Private Limited (EGCTPL) – Supreme Court – March 2023; Arise India Ltd – Supreme Court)
7. Even incase of mismatch between 2A/2B, the dept has to go to 'both' recipient and supplier – Sec 42(3) – Pre 1st Jan 2022
8. When "recovery proceedings" are on against the supplier, the recipient cannot be asked to reverse ITC as it would amount to collection of taxes without authority of law – Article 265.
However as a 'protective step' ITC can be asked to be reversed
9. Doctrine of Impossible Performance will apply – Arise India Case (SC). Incase of L2 suppliers, the L2 purchasers cannot be held guilty
10. Court will Distinguishing the 'bonafide' purchaser from 'malafide' purchasers – Arise India Case (SC)
11. Where movement of materials and payment of tax cannot be disputed, then ITC cannot be denied e.g works contract one to one matching of STN items cannot be done

Supplier Due Diligence

1. Declaration of the Supplier for Sec 38 – Creating a Persuasive Evidence
2. Pareto Analysis': Sampling of the Vendors in a way that 80% of the GST-ITC Impact is achieved by a due diligence of 20% or less number of Vendors
3. **Physical Verification of the place of business of the Vendors to check physical existence and Compliances like Rule 18**
4. **Preparing a Suitable Vendor Profile in the format provided by The GST Audit Manual 2019 issued by The CBIC in Annexure 1**
5. Copy of Registration Certificate of the Vendor
6. Copies of All Returns under GST and Challans of payment of taxes
7. Copies of Annual Return and Reconciliation Statement for all years
8. Copies of All Income Tax Returns
9. **Details of Persons Handling Records of the vendor**
10. Details of Accounting System used by the vendor

11. Vendor Due Diligence from the Revenue Authorities as may be deemed fit

12. Checking of whether the Vendor has been filing its GSTR 1 and GSTR 3B or any GST Return as may be required

13. Trend Analysis –

- i. Checking the increase/decrease in the GST Cash Component percentage
- ii. Checking the increase/decrease in the GST ITC Availied percentage
- iii. Checking whether the E-Waybills have been generated as per the GST Law w.r.t. receipts from the Vendors
- iv. Checking whether the correct GST (IGST/CGST-SGST) has been charged and devolved by the Vendors

14. Checking compliances as required under the GST for GST Invoices issued by Vendors like the following

i. Compliance with E-Invoice requirements

- ii. Compliances with the requirements u/r 46 of The CGST Rules and any other Rule for making invoices

iii. Rate of Tax charged

- iv. Other procedural requirements

Current/Future Issues

1. “Bill to – Ship to Cases” – Where L2 Party elopes : Application of Sec 122(1A)
2. Ab-Initio GSTIN Cancellation of the supplier
3. Supplier not filed GSTR 3B – Sec 16(2)(c)
4. Supplier filed GSTR 3B but took fake ITC at its end : Application of Sec 122(1A)
5. Supplier showed B2B under B2C in GSTR 1.
6. GSTR2A/2B mismatch before 31st December 2021
7. E-Waybill not filed for Inward Supplies: 16(2)(b)
8. Supplier filed the invoices and paid tax after time barring period – 16(4)
9. Supplier paid the taxes before time barring period but filed return late

Other Issues under Scanner of GST

1. Linking of "Credit Notes" & "Debit Notes" with Original Invoices... even after Feb 2019
2. Cross Charge Vs ISD Distribution
3. 194R Impact - Reimbursements as pure agents – whether the bill for reimbursement is in your name or your Company's name.
4. 194R Impact – Do you disclose the value of benefits/perquisites in your ITR. Matching with ITR & AIS/Forms 26AS
5. Credit Notes in GSTR 2B – Are you showing in 'Permanent Reversal' in 4A1 – If the supplier raises a bill and then cancels it without your knowledge, then you do not account for it.
6. Are the recipients of your CNs reversing their ITC – What precautions should you take..
7. Are those suppliers who are liable to E-Invoice supplying you Non-E Invoice Bills
8. Payment Not made to Suppliers whose services are under RCM

1. **Whether in the absence of e-way bill (EWB)** for any inputs, the credit of the same can be denied in case of refund or GST Audit?
2. IRP portal shows supplier's GSTIN has been enabled for e-invoicing. However, supplier does not provide e-invoice/ **tax invoice with IRN**. Whether non-furnishing of e-invoice by supplier leads to disallowance of ITC in the hands of recipient?
3. A registered person **by mistake, he paid GST under reverse charge on purchases made from unregistered persons and claimed ITC** although reverse charge provisions were withdrawn at that time as he was not aware of the same. Whether such ITC is allowable as the same was paid by mistake and there was no fraud or misappropriation by the registered person?
4. **When should the ITC of tax paid under reverse charge be availed?** To illustrate, the supply is received in the month of April 202X, and the tax is paid through the return for the month of April 202X filed in the month of May 202X. So, whether ITC of such tax can be claimed in the return filed for the month of April 202X or should be claimed in the return for the month of May 202X to be filed in the month of June 202X?
5. ITC is availed on the basis of Form GSTR 2A. Will **photocopy of the invoice** be sufficient if original invoice is not available?

Dealing with Interest u/s 50 - Various SCNs still being confirmed

Interest under GST – Various Facets

Interest on delayed payment of tax.

50. (1) Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made thereunder, **but fails to pay the tax** or any part thereof to the Government within the period prescribed, shall for the period for which the **tax or any part thereof remains unpaid**, pay, **on his own**, interest at such rate, not exceeding eighteen per cent., as may be notified by the Government on the recommendations of the Council.

2[Provided that the interest on tax payable in respect of **supplies made during a tax period and declared in the return for the said period** furnished after the due date in accordance with the provisions of **section 39, except where such return is furnished after commencement of any proceedings under section 73 or section 74** in respect of the said period, **shall be payable on that portion of the tax which is paid by debiting the electronic cash ledger.**]

Interest under GST – Various Facets

(2) The interest under sub-section (1) shall be calculated, in such manner as may be prescribed, from the day succeeding the day on which such tax was due to be paid.

3[(3) Where the input tax credit has been **wrongly availed and utilised**, the registered person shall pay interest on such input tax credit wrongly availed and utilised, at such rate not exceeding twenty-four per cent. as may be notified by the Government, on the recommendations of the Council, and the interest shall be calculated, in such manner as may be prescribed.]

Interest under GST – Various Facets

1. 50(1) is applicable on only **'tax payment'**
2. No Interest incase of **delayed 3B incase of ITC is available in Credit ledger**
3. 50(1) applicable only **incase supplies shown in last month and 3B filed delayed**
4. **50(1) Not applicable incase supplies shown in subsequent months?**
5. 50(1) not applicable incase payment is made on notice other than SCN u/s 73/74
6. **Interest in RCM Case applicable from date of GSTR-3B subsequent to the 60 days period upto date of filing GSTR-3B**
7. Interest in Rule 37 Case applicable from date of GSTR-3B subsequent to the 180 days period upto date of filing GSTR-3B
8. **Interest on Interest?** DY. COMMISSIONER OF INCOME TAX Vs MSM SATELLITE (SINGAPORE) PTE. LTD. [2022-VIL-707-ITAT-MUM].

Availing Customs Exemption under N No 50/2017 and Other Notifications - DRI debates on classifications based on Rules of Interpretations

**No Appeal reqd. for claiming Exemption by rectification of BoE u/s 149 – ITC Ltd
Order distinguished**

M/S. STANLEY ENGINEERED FASTENING INDIA PVT LTD., REP. BY ITS COMPANY SECRETARY MR. K. SENTHILKUMAR VERSUS AUTHORISED OFFICER SIPCOT HI-TECH SPECIAL ECONOMIC ZONE, COMMISSIONER OF CUSTOMS (CHENNAI IMPORT)

Refund claim - seeking re-assessment of the Bills of Entry in terms of Section 149 read with Section 154 of the Customs Act, 1962 - duty paid without noticing that the petitioner is eligible for a concessional rate of tax at of 15% vide Notification No.57 of 2018 – Cus dated 07.08.2018 - rejection of request for re-assessment and refund on the ground that the petitioner had not filed statutory appeal with the appropriate authority seeking modification of the self-assessment.

HELD THAT:- Inter-alia the first respondent refers to a Public Notice issued by the Commissioner of Customs / R2 in Public Notice No.88 of 2009 dated 18.10.2019. In this public notice, the authority refers to a judgment of the Hon'ble Supreme Court in the case of *IITC LIMITED VERSUS COMMISSIONER OF CENTRAL EXCISE, KOLKATA -IV* [2019 (9) TMI 802 - SUPREME COURT]. In that judgment, the Hon'ble Supreme Court was concerned with the question as to whether in the absence of any challenge to an order of assessment by way of appeal, a refund application against the assessed duty could be entertained.

No Appeal reqd. for claiming Exemption by rectification of BoE u/s 149 – ITC Ltd
Order distinguished

Public Notice No.88 of 2019 which states that '*no reassessment shall be allowed unless the order of assessment including self assessment is duly modified by way of appeal*' is incorrect as it places a restriction on the mode of re-assessment. **No restrictions was envisaged by the Hon'ble Supreme Court that has made it clear that the modification could be by way of statutory appeal or under relevant provisions of the Act.** To this extent, the stipulation in public notice dated 15.10.2019, does not align with the ratio of the judgment of the Supreme Court.

In light of the categoric pronouncement of Hon'ble Supreme Court as aforesaid, resort to Section 149 of the Customs Act is perfectly in order and thus the application of the petitioner is restored to the file of the first respondent for consideration in line with the conclusion in the case of ITC and observations made herein - **In the present case, the document is a statutory Notification. The authority is directed to hear the petitioner, consider applicability or otherwise of the Exemption Notification to its case and pass orders afresh, all within a period of four weeks from date of receipt of this order.**

Petition allowed

If two notifications are available – Most beneficial to importer can be chosen

CESTAT MUMBAI - M/S. CREATIVE NEWTECH LTD. (FORMERLY KNOWN AS M/S. CREATIVE PERIPHERALS & DISTRIBUTION LTD.) VERSUS COMMISSIONER OF CUSTOMS (IMPORT) , MUMBAI AIR CARGO IMPORT

Classification of GoPro Digital cameras and their accessories - to be classified under tariff heading 85258020, availing exemption under Notification No 50/2017-Cus (SI No 502) or under heading 85258090 (without exemption benefit)?

HELD THAT:-..The findings recorded in the impugned order not agreed upon, to the effect that *the phrases used in the Notification No 50/2017-Cus at SI No 502 has to be interpreted in light of the Explanation which was there in some other Notification at any point of time, the interpretation of the Notification wherein explanation was given defining the phrase "Digital Still Image Video Cameras" need not be examined. The said explanation cannot be used to restrict the phrase used in the notification under consideration. If government intended that the said phrase should have been interpreted according to the explanation contained in the earlier notification then same explanation could have been inserted in the present notification.*

It is settled law that if two notifications are available to the importer at the same time in respect of the imported goods, then it is for importer to choose the exemption which is beneficial to him, revenue cannot force him to chose a particular exemption notification. The argument made by the revenue by the revenue that the exemption notification No 50/2017_Cus was General exemption Notification and Notification No 25/2005-Cus as amended by the Notification No 15/2012 dated 17.03.2012, is more specific for the goods under question, is still in existence and should have been applied, was rejected by the Hon'ble Supreme Court in case of HCL. LIMITED VERSUS COLLECTOR OF CUSTOMS, NEW DELHI [**2001 (3) TMI 971 - SC ORDER**].

Nickel Alloy classified as metal predominant in weight – Specific Notification Notes will apply and not a general notification

2023-VIL-251-CESTAT-AHM-CU (See "Newsletter")

ALLEIMA INDIA PRIVATE LIMITED Vs C.C.-AHMEDABAD

Customs – Classification of imported goods – Appellant imported nickel alloy billets and filed bills of entry seeking classification under Custom Tariff Heading 75051220 as nickel billets and claimed benefit of Notification No.50/2017 exempting all goods of chapter 75 of the Customs Tariff Act, 1975 from Basic Customs Duty

- Deputy Commissioner classified goods under CTH 72189910 as stainless steel
- HELD – Appellant declared imported goods as nickel billets by classified it under CTH 75051220
- As per Note 5 of Section XV, an alloy of a base metal has to be classified as an alloy of metal which by weight predominates over total weight of other elements
- For any material to be classified as nickel alloy, nickel must pre dominate by weight over each of other elements – As per mill test certificate submitted by Appellant, imported item was found to be composed of more than 60% of nickel and rest other alloying elements – Composition of iron is less than 5% and nickel is 62.26%, which means that nickel predominates over content of iron and other elements – Since weight of nickel is in excess of 60%, goods qualify as nickel alloy in terms of Section note 5 of Section XV read with sub-heading note 1(b)(ii) of chapter 75 – Goods in question would be classifiable as nickel alloy under CTH 75051220 – Impugned order classifying goods as steel cannot be sustained and is set aside – assessee appeal is allowed

NOTIFICATION No. 33/2023-Customs

G.S.R. 319(E).- In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby makes amendments in the following notifications of the Ministry of Finance (Department of Revenue), specified in Column (2) of the Table below to the extent specified in the corresponding entry in column (3) of the said Table, namely: -

| S. No. | Notification number and Date | Amendments |
|--------|---|--|
| (1) | (2) | (3) |
| 1. | Notification No. <u>11/2022-Customs</u> , dated the 1st February, 2022, vide number G.S.R. 85(E), dated the 1st February, 2022. | In the notification, after the Table, the following proviso shall be inserted, namely: - <i>"Provided that the rate of duty specified in Column (4) against the respective description of goods mentioned in Column (3) of the Table above shall apply even when such goods are presented together in a manner so as to attract the provision of rule 2(a) of the General Rules of Interpretation of the First Schedule of the Customs Tariff Act, 1975, subject to the respective conditions specified in column (5)."</i> |
| 2. | Notification No. <u>12/2022-Customs</u> , dated the 1st February, 2022, vide number G.S.R. 86(E), dated the 1st February, 2022. | In the notification, after the <i>Explanation</i> , the following proviso shall be inserted, namely: - <i>"Provided that the rate of duty specified in Column (4) against the respective description of goods mentioned in Column (3) of the Table above shall apply even when such goods are presented together in a manner so as to attract the provision of rule 2(a) of the General Rules of Interpretation of the First Schedule of the Customs Tariff Act, 1975, subject to the respective conditions specified in column (5)."</i> |

Other issues under GST, Customs & DGFT

Recovery and cancellation of GST Registration cannot go hand in Hand

2023-VIL-187-ALH

M/s SHYAM SUNDAR SITA RAM TRADERS Vs STATE OF U.P.

GST - Section 29(2) of the CGST Act, 2017 - Cancelling the registration on the ground that the petitioner was non-existent and indulged in availing fake ITC credit from bogus firm – Petitioner challenge rejection of application seeking revocation of cancelling the registration

– HELD – once registration is granted, the same could be cancelled only in terms of the conditions prescribed under Section 29(2) of the CGST Act and allegedly being a bogus firm is not a ground enumerated under Section 29(2)

– while on one hand, the stand of the respondents is that the firm is not existent whereas on the other hand, steps are being taken for recovery of the ITC allegedly wrongly taken under Section 74 of the CGST Act and both of them cannot go simultaneously

- the order rejecting the application for revocation was a wrong exercise of power by the department - The appellate order is equally bad, inasmuch as, no such ground was mentioned before passing the order of cancellation and, thus the impugned orders are set aside - The writ petition is allowed

Takeaways

1. In case of bill-to ship-to transactions, dept. alleges that material has moved from somewhere and item has moved from somewhere. Hence, it is a movement of invoice without material movement. This is not sustainable
2. In case of L2 suppliers, the L2 purchasers cannot be held guilty
3. Where movement of materials and payment of tax cannot be disputed, then ITC cannot be denied e.g. works contract one to one matching of STN items cannot be done

Other Issues under GST

Taxes paid under wrong head – Seek Refund & Close the Case!

2023-VIL-295-JHR

M/s GAJRAJ VAHAN PRIVATE LIMITED, SINDUR, HAZARIBAGH Vs THE STATE OF JHARKHAND

GST – Refund of payment of GST made in wrong head – Petitioner made payment in a wrong head - Claim for refund rejected by the authority on the ground of limitation

- HELD – Circular No. 162/18/2021-GST dated 25.9.2021 issued by the CBIC on the clarification in respect to refund of tax – further, vide Notification No. 35/2001-Central Tax dated 24.9.2021, Sub-Rule (1A) of Rule 89 of CGST Rules 2017 has been inserted, which is a benevolent provision for extension of limitation of refund in case of wrong deposit - refund of excess CGST paid shall be considered by the authorities in light of the latest circular
- Writ petition is allowed

Circular bearing No. 162/18/2021-GST dated 25.9.2021 was issued by the CBIC on the subject/clarification in respect to refund of tax specified in Section 77(i) of the CGST Act and Section 19(i) of the IGST Act. Earlier, vide Notification No. 35/2001-Central Tax dated 24.9.2021, Sub-Rule (1A) of Rule 89 of CGST Rules 2017 has been inserted, which reads as follows;

"(1A) Any person, claiming refund under Section 77 of the Act of any tax paid by him, in respect of a transaction considered by him to be an intra-State supply, which is subsequently held to be an inter-State supply, may, before the expiry of a period of two years from the date of payment of the tax on the inter- State supply, file an application electronically in Form GST RFD-01 through the common portal, either directly or through a Facilitation Centre notified by the Commissioner.

Provided that the said application may, as regard to any payment of tax on inter-State supply before coming into force of this sub-rule, be filed before the expiry of a period of two years from the date on which this sub-rule comes into force."

Covered/Uncovered Parking spaces are differently treated

M/s EDEN REAL ESTATES PRIVATE LIMITED [2023-VIL-21-AAAR]

GST – West Bengal AAAR - Whether sale of parking space or supply of services of right to use of parking spaces is naturally bundled with the principal supply of construction services for apartment – **HELD –**

1. It is common knowledge that in any residential apartment blocks, mainly two types of parking spaces are offered, **open and covered -**

2. In terms of provisions of RERA, though a sanctioned plan requires inclusion of parking layout, **an uncovered parking space such as open parking area is not included in the definition of “garage” but falls within the meaning of “common area”**

3. Consideration collected from allottees for right to use of open parking spaces will not form a part of value of composite supply as prayed for by the Appellant.

4. The amount charged by the appellant for right to use of parking space, though not permissible as per RERA, constitutes a separate supply under the GST Act and liable to 18% GST - the question of one-third abatement of valuation of land for open parking space is not maintainable as the “common area” which includes such open parking space is considered in the valuation of apartment and one-third abatement on supply of construction services is being availed before levy of tax under the GST Act

5. sale/right to use car parking service and construction services are separate services which are not dependent on sale and purchase of each other. Therefore, sale/right to use car parking is not naturally bundled with construction services and hence, it cannot be treated as composite supply of construction services – Order passed by Authority of Advance Ruling is confirmed and assessee appeal is dismissed

THANK YOU



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