# AIFTP
# INDIRECT TAX & CORPORATE LAWS JOURNAL

ETHICS EDUCATION EXCELLENCE

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## Happy New Year 2020

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# AIFTP INDIRECT TAX & CORPORATE LAWS JOURNAL

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# CHIEF-EDITOR'S COMMUNIQUE

Friends

This is the last issue of AIFTP Indirect Tax & Corporate Laws Journal for the year 2019. It has been a remarkable year for the Journal team as we had on the directions of the National President Dr. Ashok Saraf conceptualized, designed this journal and there after with the help of all being able to publish and send it to the AIFTP Members in hard copy and in soft copy through Whatsapp, email etc. We still remember the time when we were asked to think of publishing a journal covering indirect tax and other laws and only 15 days time was given to us for publishing it. The effort of the designing and publishing of journal is more as there was no Precedent earlier in the Federation of such type of journal. However there was tremendous demand of independent journal on Indirect Tax and looking to all the suggestions the National President directed to start a separate journal on Indirect Tax.

I may mention that this would not have been possible except for the support of the paper writers, advertisers/ sponsors, the working team i.e. the journal management committee and in addition to it the whole hearted support of Dr. Ashok Saraf. It is really remarkable for us as we had published all the issues of this journal without any cost on AIFTP and as declared it was free for the first year to all who had opted for the hard copy on the website of the AIFTP.

We covered GST, FEMA, RERA, IBC, Companies Law and other laws and we received the support of the paper writers who sent their articles and publishing material in time. We made it a habit to release the issue on 25th day of each month.

I would be failing in my duty if I do not convey my appreciation and gratitude to Sh. Anand Pasari, Sh. Bhaskar Patel, Sh. D.K. Gandhi, Sh. Vivek Agaarwal, Sh. Sanjay Kumar, Dr. M.V.K. Moorthy, Sh. Manoj Moryani and Sh. Sandeep Choraria for their valuable support in sponsoring the issues of this Journal.

My special thanks to the paper contributors namely:-

*Adv. M.L. Patodi*
*CA Shilvi Khandelwal*
*Adv. PV Subba Rao*
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My team specially worked hard as we did not had any other support and it was all honorary and voluntary contribution in getting the issue publishes in time. The Managing Editor Sh. Anil Mathur in addition to submitting the papers also helped in designing of the issues. The joint editors namely Sh. Sandeep Goyal, Smt. Nikita Badheka, Sh. M.V.J.K. Kumar, Sh. Narayan Jain and Sh. Hament Modh gave their valuable suggestions. The Editorial board led by Sh. M.L. Patodi and including Sh. Mukul Gupta, Sh. D.K. Gandhi, Sh. Ribhav Ghiya, Priyamvada Joshi, Sh. Abhay Singla, Sh. Rajesh Joshi and Sh. Ankit Mahmia was instrumental in suggesting valuable improvements in the Journal. Special Thanks to Sh. Deepak Khandelwal and Priyamvada Joshi for all the hard work and efforts in getting the print-out. It was my backbone team for this journal.

I do not have words to convey my gratitude and thanks to our National President Dr. Ashok Saraf. He not only conceptualized the Indirect Tax Journal but was the financial support behind it. He sponsored the issue and also persuaded others for it. My special thanks to Secretary General Sh. Anand Pasari for all his support and also for sponsoring the issue.

As stated this is the last issue of this year 2019 and let me say GOOD BYE to all of you. It was a dream come true for me as I was made the Chief Editor for launching this special journal for the benefit of all the Members of AIFTP Practicing on the subjects of GST, RERA, FEMA, IBC and Companies Act etc. I being an academition strongly enjoyed it and also enriched my knowledge while working on it. It was only because of the support of all the persons mentioned hereinabove that I was able to do my work with regularity and punctuality. I with folded hands take all the responsibility of any mistake if occurred in the Journal or otherwise and with the core of my heart thank you all once again for giving me this opportunity to work for this Journal.

***All the best to the new team and wish you all a very Happy New Year, 2020.***

Regards,

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| Membership of All India Federation of Tax Practitionersas on 11th, November 2019 | | | | | |
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| Northern | 0 | 1227 | 18 | 1 | **1246** |
| Southern | 1 | 1339 | 19 | 4 | **1363** |
| Western | 5 | 2423 | 37 | 6 | **2471** |
| **Total** | **12** | **7692** | **135** | **10** | **7850** |

# PRESIDENT'S COMMUNIQUE

Dear Friends,

What an amazing year – 2019 has been for me. It was one of the brightest moments for me in my life when I took charge as the National President of AIFTP. We had been working on various things and I decided that some new working for the benefit of the Member is needed and it should be in consonance with the aim and objective of AIFTP i.e. Ethics, Education and Excellence.

Various suggestions were received by me regarding the educational activities and them I noticed that there was a great demand for educational material on GST, other Indirect Taxes and Corporate laws and there was a need for an especially dedicated journal on these subjects. My objective was that lot of members are practicing on the Indirect tax laws including GST and others and there was a special need for regularly updating the knowledge on these subjects and AIFTP can play a vital role in it. Discussions were made by me and it was decided that we should start a new journal especially on indirect taxes and corporate laws. In the month of February, I enquired from Mr. Pankaj Ghiya that whether it can be done and can be released from the month of February itself. His answer was in affirmative and the result is before you all. The journal namely AIFTP Indirect Tax and Corporate Laws journal started from February 2019 and for all the months of 2019, it has been published on time i.e. on 25th day of each month and has been circulated in hard copy / soft copy throughout India to all the members and to other professionals.

The effort has been appreciated by one and all. There is no other journal specially covering all the subjects as covered in the AIFTP Indirect tax journal. The Articles /papers published in the Journal are by the leading tax practitioners, advocates, chartered accountants of India. Several congratulatory messages have been received regularly from one and all about the journal and the materials in the journal and the Tax fraternity and the members of AIFTP have been appreciating about this special effort made in starting this journal free of cost to all who had opted for it. We decided that in addition to the hard copy, the journal would be circulated as soft copy also throughout India by email and through WhatsApp and I am happy to inform that this journal is not only

circulated amongst the Members of AIFTP but amongst all Tax professionals, Tax Administrators and others.

I place on record the hard work done by Sri Pankaj Ghiya in taking the lead in publishing the Journal. I think it is not inappropriate to say that the present journal is the result of the single handed work by Sri Pankaj Ghiya. I am really grateful to him.

I also convey my thanks to the Journal team, advertisers, sponsors, paper contributors and all others who had worked hard throughout the year in making the dream of publishing the AIFTP Journal on Indirect tax laws a reality.

All good things come to an end and my term ends in December, 2019. We are circulating the last issue of the AIFTP Indirect Tax and Corporate Laws Journal of my term. I shall always cherish the memories and the love and affection showered by you all on me and my team throughout – 2019 and will continue to work for the betterment of AIFTP and shall always be with you.

***Wish you all a very Happy New Year – 2020.***

Regards

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# RECENT NOTIFICATIONS & CIRCULARS UNDER CGST ACT

***CA Deepak Khandelwal***
***Jaipur***

## NOTIFICATIONS - CENTRAL TAX

| DATE | NOTIFICATION NO. | REMARKS |
|---|---|---|
| 26.11.2019 | 57/2019-CENTRAL TAX | Seeks to extend the due date for furnishing of return in FORM GSTR-1 for registered persons in Jammu and Kashmir having aggregate turnover more than 1.5 crore rupees for the months of July, 2019 to September, 2019 |
| 26.11.2019 | 58/2019-CENTRAL TAX | Seeks to extend the due date for furnishing of return in FORM GSTR-1 for registered persons in Jammu and Kashmir having aggregate turnover more than 1.5 crore rupees for the month of October, 2019. |
| 26.11.2019 | 59/2019-CENTRAL TAX | Seeks to extend the due date for furnishing of return in FORM GSTR-7 for registered persons in Jammu and Kashmir for the months of July, 2019 to October, 2019. |
| 26.11.2019 | 60/2019-CENTRAL TAX | Seeks to extend the due date for furnishing of return in FORM GSTR-3B for registered persons in Jammu and Kashmir for the months of July, 2019 to September, 2019 |
| 26.11.2019 | 61/2019-CENTRAL TAX | Seeks to extend the due date for furnishing of return in FORM GSTR-3B for registered persons in Jammu and Kashmir for the month of October, 2019 |
| 26.11.2019 | 62/2019-CENTRAL TAX | Seeks to notify the transition plan with respect to J&K reorganization w.e.f. 31.10.2019 |

## NOTIFICATIONS - CENTRAL TAX (RATE)

| DATE | NOTIFICATION NO. | REMARKS |
|---|---|---|
| 22.11.2019 | 26/2019-CENTRAL TAX (RATE) | Seeks to insert explanation regarding Bus Body Building in Notification No. 11/2017-Central Tax (Rate) dt. 28.06.2017 |

## CIRCULARS - CENTRAL TAX

| DATE | CIRCULAR NO. | REMARKS |
|---|---|---|
| 18.11.2019 | 124/2019 | Seeks to clarify optional filing of annual return under notification No. 47/2019-Central Tax dated 9th October, 2019. |
| 18.11.2019 | 125/2019 | Seeks to clarify the fully electronic refund process through FORM GST RFD-01 and single disbursement. |
| 22.11.2019 | 126/2019 | Clarification on scope of the notification entry at item (id), related to job work, under heading 9988 of Notification No. 11/2017-Central Tax (Rate) dated 28-06-2017 |

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# TIMELINE - GST

***Adv. Deepak Garg***
***Jaipur***

## A. GOODS & SERVICE TAX

| Sr. No. | Particulars | Form | Period | Due Date |
|---|---|---|---|---|
| (i) | Monthly Summery GST Return | GSTR-3B | | |
| | (a) Regular Taxpayers | | December, 2019 | 20th Jan 2020 |
| | | | January, 2020 | 20th Feb 2020 |
| (ii) | Detail of Outward Supplies: - | GSTR-1 | | |
| | (a) Taxpayers with annual aggregate turnover up to Rs. 1.5 Cr. | | Oct to Dec 2019 | 31st Jan 2020 |
| | (b) Taxpayers with annual aggregate turnover more than Rs. 1.5 Cr. | | December, 2019 | 11th Jan 2020 |
| | | | January, 2020 | 11thFeb 2020 |
| (iii) | Quarterly return for Composite taxable persons | CMP-08 | Oct to Dec 2019 | 18th Jan 2020 |
| (iv) | Return for Non-resident taxable person | GSTR-5 | Non-resident taxpayers have to file GSTR-5 by 20th of next month. | |
| (v) | Details of supplies of OIDAR Services by a person located outside India to Non-taxable person in India | GSTR-5A | Those non-resident taxpayers who provide OIDAR services have to file GSTR-5A by 20th of next month. | |

| | | | | |
|---|---|---|---|---|
| (vi) | Details of ITC received by an Input Service Distributor and distribution of ITC. | GSTR-6 | The input service distributors have to file GSTR-6 by 13th of next month. | |
| (vii) | Return to be filed by the persons who are required to deduct TDS (Tax deducted at source) under GST. | GSTR-7 | December2019 | 10th Jan 2020 |
| | | | January 2020 | 10th Feb 2020 |
| (viii) | Return to be filed by the e-commerce operators who are required to deduct TCS (Tax collected at source) under GST | GSTR-8 | December2019 | 10th Jan 2020 |
| | | | January 2020 | 10th Feb2020 |
| (ix) | Annual GST return and GST Audit | GSTR-9/9A/9C | FY 2017-18 | 31st Dec 2019 |
| (x) | Annual GST return and GST Audit | GSTR-9/9A/9C | FY 2018-19 | 31st March 2020 |

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# ANALYSIS OF THE PROVISIONS OF INSPECTION, SEARCH & SEIZURE UNDER GST

***CA ManojNahata***
***FCA, DISA (ICAI)***

**Introduction**

The provisions of Inspection, Search and Seizure are not newly inserted provisions in the GST law. The same are age old provisions inbuilt in almost all the taxation laws of the Country. The erstwhile Central Excise and Service Tax law had also such provisions to catch hold of the tax evaders. But under GST law, such provisions have presently become more important in view of the menace of fake invoices and bogus claim of ITC. The powers conferred for taking such stringent steps are executive and exceptional in nature which is always a strong weapon in the hands of the tax department.

The constitutional validity of the provisions of Search and Seizure were challenged before judiciary on several occasions on the ground of interference to one's freedom, personal liberty, privacy and violation of the fundamental rights etc. But on all the occasions the Court rejected the contention and upheld the validity of such provisions as a deterrent against the evaders.

**Powers of Inspection, Search and Seizure under GST law**

The provisions of Inspection, Search and Seizure are enshrined under section 67 & 68 of the Central Goods and Services Tax Act, 2017. The corresponding rules framed thereto are Rule 139 & Rule 138-138D. However, the author in the instant article has tried to discuss the provisions of section 67 and corresponding rules thereto.

**Theme of Section 67:**

The key provisions can be summarized as follows:

| Section | Extract of relevant provision | Relevant Form |
|---|---|---|
| 67(1) | There must be a **reason to believe** that there is a suppression of transaction and evasion of tax. | FORM GST INS-01 – Authorization for Inspection or Search |
| 67(1) | Such reason to believe must be by **Proper officer not below the rank of Joint Commissioner.** | |
| 67(1) | He either himself or may authorize any officer to | |

| | | |
|---|---|---|
| | Inspect any places of business of taxable person. | |
| 67(2) | He either himself or may authorize any officer to Search and Seize goods, documents, books or things which are **secreted in any place**.<br>In case where it is not practicable to seize any goods he may order for non-removal of goods without prior permission.<br>He may retain documents, books or things so seized for so long as may be necessary for examination. | FORM GST INS-02 –Order of seizure<br><br>FORM GST INS-03- Order of Prohibition |
| 67(3) | The documents or things which are not relied upon by him shall be returned within a period of 180 days of the issue of notice. | |
| 67(4) | Where access to premises, almirah, electronic device, box or receptacle is denied he may seal or break upon the door of premises, open almirah etc. in which goods or accounts are concealed. | |
| **67(5)** | **Copies of documents seized shall be provided** except where he believes that making such copies may prejudicially affect investigation. | |
| 67(6) | Goods seized shall be released on provisional basis with such bond or security which covers applicable tax, interest and penalty. | FORM GST INS-04- Bond for release of goods seized |
| 67(7) | Once goods are seized he must give notice within 06 months of seizure to the tax payer and if it is not done then the goods shall be returned to the person from whose possession seized. However, the period of 06 months may be extended further by 06 months. | |
| 67(8) | In case of perishable or hazardous nature of goods the same may be disposed off immediately after seizure as per the notification by the Govt. | FORM GST INS-05-Order for release of goods /things of perishable or Hazardous nature |
| 67(9) | He shall prepare an inventory of perishable or hazardous goods in such manner as may be | |

| | | |
|---|---|---|
| | prescribed. | |
| **67(10)** | **The provisions of Code of Criminal Procedure, 1973 relating to Search and Seizure shall be applied** and the word 'Magistrate' in section 165(5) of the CCP, 1973 shall be substituted by the word 'Commissioner'. | |
| 67(11) | The proper officer may for the **reasons to be recorded in writing** seize the accounts, register or documents produced before him by any person who has evaded or attempting to evade payment of tax and shall retain such documents for so long as may be necessary for the proceedings under the Act or rules made there under. | |
| 67(12) | The Commissioner or any officer authorized by him may cause purchase of any goods or services from the taxable person to check the issue of tax invoice, bill of supply by such taxable person and on return of goods so purchased by officer the taxable person shall refund the amount after cancelling any tax invoice or bill of supply issued by him. | |

**Reason to believe**

The term ***'reason to believe'***is not defined under the GST law. It is not only a foremost condition to be satisfied before authorizing /conducting the search rather it is also a foundation upon which the whole proceeding is built upon.

As per Section 26 of the IPC, 1860 -"A person is said to have 'reason to believe' a thing, if he has sufficient cause to believe that thing but not otherwise."

"Reasons are the links between materials on which certain conclusions are based and actual conclusions. They disclose how the mind is applied to the subject-matter for a decision whether it is purely administrative or quasi judicial. They should reveal a rational nexus between the facts considered and the conclusions reached. Only in this way can opinions or decisions recorded be shown to be manifestly just and reasonable."

**Union of India v. Mohan LalKapoor&Ors. (1973) 2 SCC 836 (SC)**

The word 'believe' is much stronger than the word 'suspect'. Reason to believe is not the same thing as "reason to suspect". **Indian Oil Corporation v. ITO (1986) 159 ITR 956 (SC)**

In a most recent case of **RimjhimIspat Limited v. State of U.P. [2019] 103 Taxmann.com 254 (Allahabad)**the petitioner challenged the powers exercised by the tax department u/s 67 of the U.P. GST Act, 2017. But the Hon'ble Court observed that, it is essential that the officer authorized to carry out the search should have 'reasons to believe' which should be based on reasonable material and should not be arbitrary. However, the reasons may or may not be communicated but the same should exist on record. In this case the Hon'ble Court refrain itself from going into the sufficiency or adequacy of such reasons.

Thus what emerges from the above discussion is that the Joint commissioner and the authorities before the issue of search warrant should have tangible reasons and should be in possession of honest belief and not mere suspicion. There are a plethora of decisions in support of this contention which are not reproduced here for want of space. Needless to say the absence of "reasons to believe" would invalidate the search proceeding.

**Authority who can Search**

The GST law is very loud and clear that the 'reason to believe' must be recorded by the proper officer not below the rank of Joint Commissioner. He may further authorize **any officer** to inspect, search or seize the premises. Further section 67(11) authorizes Proper Officer to seize accounts, registers etc. produced before him by any person.

But practically we face that Inspectors and other subordinate staffs of the tax department also enter, search and seize. Are they really authorized under the law?

Section 3 of the CGST Act, 2017 has an exhaustive list of officers under the Act. Further section 4 authorizes Board to appoint such person as officers under the Act as it may think fit. In this regard the author has not come across any specific provision/notification under the Central Act and therefore has serious apprehensions about the fact whether the Inspector of Taxes is an authorized officer under the Central GST Act? However, the Assam State Govt. has notified the jurisdiction of State officers vide notification no.304 dated: 22.06.2017 whereby Inspector of Taxes is also notified as officer u/s 4(2) of the Assam GST Act, 2017. Similarly, the other States should have also issued notifications in the same line. So this again creates a doubt whether Inspector appointed under the State Tax has the authority to enter into premises etc for the purpose of section 67? The author finds that there is no such clear cut authority provided except under section 6 for cross empowerment but that too seems to be ambiguous.

In a recent case of **Pioneer Cooperative Car Parking Servicing and Construction Society Ltd. v. State of West Bengal [2019] 106 taxmann.com 391 (Calcutta)**the petitioner challenged the search conducted by the GST authority who was

below the rank of Joint Commissioner and the Hon'ble Court directed not to take any coercive process for realisation of GST for municipal lots, which was prima facie not payable.

**Secreted in any place**

The next condition for a valid search is that some documents or book or things are secreted in any place and the authority is of the opinion that they are relevant or useful to proceedings under the Act. The meaning of the word ***"secreted"*** is very important here since if books etc are not secreted in any place then such books etc cannot be the subject matter of the search warrant.

The Hon'ble Supreme court had an occasion to discuss the meaning of the term in **Durga Prasad v H.B.Homes, Supt (prev) Central Excise- 1983(13) ELT 1501**. The court held that the meaning of the term "secreted" should receive a contextual meaning and **means "documents which are kept not in the normal or usual place with a view to conceal them' or it may even mean `documents or things which are likely to be secreted'**. **In other words, documents or things which a person is likely to keep out of the way or to put in a place where the officer of law cannot find it."**This decision of the Hon'ble Court is squarely applicable to searches under the CGST Act, 2017 since Court in that case was interpreting section 105 of the Customs Act 1962 which is almost similarly worded.

In the light of the above discussion, it is to be concluded that the search should be at a place where a reasonable person would expect that such a place is likely to be used as a hiding place where the hands of law may not in the normal course would reach. Hence an office or work place cannot be said to be a place where one can expect documents, books etc to be secreted or concealed.

**Copies of seized documents – Legal Right of taxable Person**

Under the provisions of section 67(5) the officer is duty bound to provide the copies or extracts of the seized documents to the person from whose custody the same are seized. However, this section also put a bar on providing such copies where the officer is of the opinion that making such copies may prejudicially affect the investigation. Thus the department will always try to avoid providing on the plea of prejudicial to revenue. So, here, a question arises as to what makes the officer to believe that making of copies may prejudicially affect the investigation?

The author believes that where documents seized are of such nature that the facts and figures contained therein are already on record or reported either through tax returns submitted by taxable person or through some other means then there is no harm in

sharing such documents. However, where the seized documents are not already accounted for by the tax payers anywhere and making copies may give a chance to the tax payer to manipulate record or enter transactions freshly in regular books or to induce parties listed therein then the officer can deny the same. The said provision is also challenged recently in Bombay High Court in case of **High Ground Enterprises Ltd v. Union of India [2019] WP 8075 (Bombay)**wherein it was argued that the opinion, which would be a decision, should be reflected in the record. The opinion cannot be a mere ***ipsi-dixit*** of the Proper Officer. There must be cogent reasons to withhold giving of copies to the person. A mere statement that it will prejudicially affect the investigation would be only chanting the language of the section. Further Section 67(5) of the Act creates a right to receive the copies by a person from whose custody the documents are seized. The said person need not give justification why he needs the copies of the documents seized.

**Statement of family members through coercion not allowed**

In case of **PareshNathalalChauhan Vs. State of Gujarat reported in 2019 TIOL 2472 HC AHM GST** the Hon'ble Gujrat High Court held that section 67(2) does not empower the officer concerned to record statement of family members through force or coercion or to record their conversations in mobile phone. It is not permissible for the authorized officer to use coercive measures against family members to find out the whereabouts of the taxable person. The court also observed the glaring abuse of law and recorded the same in the following words-

"It is shocking to see that in a premises where there are three ladies, namely, the petitioner's mother, wife and young daughter, male officers together with a CRPF officer have stayed throughout the day and night despite the fact that the goods, articles and things were already seized on 11.10.2019". Entire exercise carried out by the officers from 12.10.2019 to 18.10.2019 was totally without any authority of law and in flagrant disregard of the provisions of the Act and the rules and in total abuse of the powers vested in them under the Act. The Court ordered for proper enquiry on the action of the officers.

**Provisions of Code of Criminal Procedure, 1973 to be applied**

Section 67(10) envisages that the provisions of the Code of Criminal Procedure, 1973 relating to search & seizure shall be applied to search under this section. It means wherever there is violation of such provisions the search conducted may be declared as illegal. In case of **Commercial Tax officer, Benz Circle, Vijayawada and others v. R.M. Motor (P) Ltd.[2007] 005 VST 0459**it was held that if the procedure is not

followed in seizing the accounts, registers or others documents, the seizure becomes illegal.

**Complete Sealing of premises not permissible**

In case of **NapinImpex (P.) Ltd. v. Commissioner of DGST, Delhi [2018] 98 taxmann.com 462 (Delhi)**it was held thatwhere Competent Authority had completely sealed business premises of assessee on account of non-production of account books and other documents, complete sealing was illegal u/s 67(4).

**Goods accounted for in regular books cannot be seized**

In case of **Golden Cotton Industries v. Union of India [2019] 102 taxmann.com 412 (Gujarat)** the matter before the Court was that the goods in respect of which the impugned order of prohibition under rule 139(4) of the rules has been issued, are the goods which are accounted for in the books of account and are not secreted anywhere, and hence, the order of prohibition is contrary to the provisions of sub-section (2) of section 67 of the Act. The Court issued notice to the authorities.

**Goods cannot be detained in case of bonafide dispute about tax rate**

In case of **Jeyyam Global Foods (P.) Ltd. v. Union of India [2019] 103 taxmann.com 108 (Madras)**the Court held that Inspecting Squad Officer is not entitled under section 67 read with section 129 to detain goods or vehicles where there is a bona fide dispute as regards exigibility of tax or rate of tax.

In similar matter in case of **N.V.K. Mohammed SulthanRawther& Sons and Willson v. Union of India [2019] 101 taxmann.com 24 (Ker.)** The Hon'ble Kerala High Court held that in such cases at best the inspecting authority can alert the assessing authority to initiate the proceedings "for assessment of any alleged sale, at which the petitioner will have all his opportunities to put forward his pleas on law and on fact." The process of detention of the goods cannot be resorted to when the dispute is bona fide, especially, concerning the exigibility of tax and, more particularly, the rate of tax.

Under the erstwhile law of sales tax also this issue was considered by Judiciary on several occasions. In case of **Goyal Motor Parts v. State of Punjab and another (2011) 38 VST 159** it was held that the nature of transaction can be determined only by the assessing authority. It is only the Assessing authority who can decide this question. On being determined the nature of goods, the rate of tax as applicable thereto would be decided. The officers carrying out checking on the roadside in exercise of powers conferred upon them under Section 51 of the Punjab Value Added Tax Act, 2005 cannot go into the disputed question of taxability.

**Conclusion:**

The above discussion makes it amply clear that the provisions of Inspection, Search and Seizure are of paramount importance to safeguard the revenue. Thus the same has to be used with utmost care and due diligence. A minor mistake on the part of the seizing officer may lead the whole proceedings illegal. At the same time due care must be exercised to avoid unnecessary abuse of powers by the authorities. The concerned authority must always keep in mind that Powers, Duties and Responsibilities are to be used simultaneously to work in a dignified manner for the betterment of the nation.

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# CASE STUDY LEADING TO SOME PERTINENT ANOMALIES DUE TO GSTN COMMON PORTAL DESIGNING DEFICIENCIES

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In this article 'SHARNAM Legal Team' has through a practical experience based on a specific Case Study tried to raise some pertinent inconsistencies or glitches due to GSTN Common Portal (Web-Portal) designing defects. GSTN might have done a commendable job to help Ministry of Finance or CBIC and the States to administer the intricate provisions of GST Law as an interface between the assessee tax payer and the Government, but at some places GSTN have made some significant mistakes in analysing and converting the provision of GST Law into Web Portal driven by the software.

Since, the implementation of the new regime of GST w.e.f. 1st July 2017 the proactive approach of the Government alongwith GST Council is regularly upgrading the provisions of the GST Law by large number of amendments or clarifications, but the GSTN common portal even though an IT platform has not been able to match the spirit of removing the difficulties or intricacies in the administration of GST Law through their platform. GSTN common portal is under criticism and attack since very beginning due to which the system of gathering information of business transactions from the registered dealers by way of Monthly Return GSTR-1 or GSTR-2 or GSTR-3 have miserable failed and Government have to withdraw the implementation of required return GSTR-2 and GSTR-3 which has shaken the strength of GST which was envisaged and passed by the Parliament. Due to the failure of GSTN common portal, the country has lost a very unique opportunity of being a Game Changer for its economy. The desired jump in the economy or increase in GDP as expected by accredited economist including the Government after the implementation of GST from 1st July 2017 had not been felt at all during the last more than 2 years. GSTN also needs to be tax payer friendly which is the foremost aim of its creation. The tax payer must feel ease of doing business rather than futile running from post to pillar and ultimately to the rescue of Hon'ble High Courts in such large numbers as the Nodal Officer or the Jurisdictional Officer are not able to resolve major problems of the assessee creating decent among the tax payers leading to non-compliance in many circumstances.

In the interesting discussions below, we have thrived to decipher some of the intricate issues which have been faced by many of the registered dealers including the one whose Case Study is being taken to understand the factual situation and the problems faced by the assessee including their possible solutions. In the end some points to ponder have been left for the readers to ultimately solve not only these issues but many such similar issues.

**1. <u>TABLE 6B and TABLE 6C OF PRESCRIBED FORMAT GSTR-1 AS PER RULE 59(1) WRONGLY MERGED WITH TABLE 4 (4A, 4B, 4C) ON GSTN PORTAL LEADING TO PROBLEM IN DECLARATION OF TRANSACTIONS / COMPLIANCE</u>**

**ISSUE 1 OF THE CASE - *SEZ Transactions of Table 6B inadvertently punched in Table 6A of GSTR-1, deletion of such data from Table - 6A and addition of such data in correct Table 6B of GSTR-1.***

**SL Observations:**

***As per the prescribed Form of GSTR-1 under Rule 59(1) as per Notification No. 3 /2017 dated 19 .06.2017:***

**Table 4 of GSTR 1 -** Taxable Outward Supplies made to registered persons (including UIN holders) **other than supplies covered by Table 6**. Under this table three sub tables i.e. Table 4A – Supplies other than those(i) attracting reverse charge (ii) supplies made through e-commerce operator, Table 4B – Supplies attracting tax on reverse charge basis , Table 4C – Supplies made through e-commerce operator attracting TCS (operator wise, rate wise).

**Table 6 of GSTR-1 –** is for declaring outward transactions pertaining to Zero rated supplies and Deemed Exports. Under this table three sub tables i.e. Table 6A – Exports Transactions, Table 6B – Supplies made to SEZ Unit or SEZ Developer, Table 6C – Deemed Exports.

***Position on GST Portal:*** Table 6B & Table 6C of GSTR-1 are merged with Table 4 (4A, 4B, 4C).

**SL Comments:** The taxpayer is to declare the outward supplies made to SEZ under Table 6B of GSTR-1 which has been merged with Table 4 which already consists of (4A, 4B, 4C) on the GST portal whereas Table 6A shows the Export Invoices while 6A and

6B, both are parts of Table 6 as per prescribed format of GSTR-1 under the Rules. Further in the main heading of table 4 it has been mentioned as 'Taxable Outward Supplies made to registered persons (including UIN holders) **other than supplies covered by Table6'**. The inclusion of details to be furnished in Table 6B and 6C as per prescribed format ***under Rule 59(1)*** is wrongly required to be filled in the web portal under main block of Table 4 which is contrary to the Rules. Any common man / taxpayer may get confused while punching the details in GSTR-1 on GST Portal as the Format of Form of GSTR-1 on GST Portal differs from the prescribed format as given under the Rule 59 CGST, 2017.

Further, there is no provision in the GST portal to 'delete' or 'shifting to correct table' of any entry once declared wrongly in a particular table due to confusions like above. Transactions punched in a wrong table may lead to creation of Tax Demands, Mis-match of data between Monthly Returns and Annual Return as well as reversal of ITC, which is leading to filing of multiple Writ Petitions before the Honourable High Courts through the country increasing the litigation which is against the spirit of GST i.e. reducing litigation and creating ease of doing business.

## 2. TABLE 6A OF GSTR-1 REQUIRES CERTAIN INFORMATION AS MANDATORY FOR MATCHING AND VERIFICATION OF CORRECTNESS OF ZERO RATED TRANSACTIONS

**ISSUE 2 OF THE CASE: Export Transactions of Table 6A of GSTR-1: To Add / Correct Shipping Bill, Port Code, Invoice number, Invoice Date as well as mode of payment of tax i.e. with payment or without payment (LUT) etc. (As the time period to correct such data had lapsed on 30.04.2019 while time for filing Annual Return for Financial Year 2017-18 has been extended till 30.11.2019 - these time limitations should coincide for reconciliation and correct filing of the Annual Return).**

**Sharnam Legal Observations:**

***As per the prescribed Form of GSTR-1 under Rule 59(1) as per Notification No. 3 /2017-Central Tax dated 19 .06.2017:***

**Table 6 of GSTR-1 –** is for declaring outward supply transactions pertaining to Zero rated supplies and Deemed Exports. Under this main table three sub tables i.e. **Table 6A –** Exports Transactions, **Table 6B** – Supplies made to SEZ Unit or SEZ Developer, **Table 6C** – Deemed Exports have been separately provided.

**Sharnam Legal Comments :** The taxpayer is to declare the outward Export supplies under Table 6A GSTR-1 wherein the taxpayer has to punch the following details Invoice Details – Invoice Number , Invoice Date , Invoice Value ; Shipping Bill / Bill of Export Details – Number and Date (in case of Goods Exported); Port Code (in case of Goods Exported) ; GST Payment Details (With payment of Tax or Without payment of Tax); Item Details - Rate (0%, 0.1%, 0.25%, 1%, 1.5%, 3%, 5%, 7.5%, 12%, 18% or 28%) Taxable Value, Amount of Tax (Integrated Tax, Cess)

The taxpayer has to furnish the complete data in order to get his transactions details transmitted / matched from GST Portal to ICE Gate Portal (details as per Shipping Bill), The Portal however till date doesn't makes it mandatory to fill Shipping Bill Details, Port Code Details, due to which the data doesn't transmit from GST Portal to ICE Gate Portal and the refund on account of Export is blocked or not processed. Further, the software/ interface designers at GSTN could have made a simple check box system for this particular Table wherein Type of Outward Supply of Export whether Goods or Services. The nature of Export Supply between Goods and Services is also necessary as the Act and the Rules as well as the Procedure laid down for two nature of supplies are distinctly dealt in the GST Law.

In case of Export of Goods the details of Shipping Bill Number, Shipping Bill Date, Port Code, Invoice Number (as declared on Shipping Bill / Bill of Export), Invoice Date (as declared in Shipping Bill / Bill of Export) is to be mentioned necessarily, then only the data gets transmitted from GST Portal to ICEGATE Portal and could be matched for processing of the Refunds or verification of the Export transactions. Further, in case of Services exported Port Code, Shipping Bill details or Bill of Export details are not required and there is lot of confusion regarding Refund in case of payment of GST while making such transaction as the data is not required to be transmitted or matched with ICEGATE.

It is pertinent to note that the Refund in the case of Export of Services is to be processed and finalised only by GST Authorities with no requirement or involvement of Custom Authorities or ICEGATE Portal.

Due to lack of distinction between declaration of Export Supplies for Goods or Services, the verification of transactions pertaining to one nature keeps pending and adding up in the mis-match list or failed Invoices list which is one of the reasons for pending or delayed Refunds in case of Export of Services with payment of Tax.

Further if the Export transaction is made under LUT and the relevant Export Invoice is categorised under Mismatch or failed Invoices list and the Taxpayer has adjusted/ availed the ITC on Inputs with Domestic Outward Supply instead of claiming

refund under Exports made without payment of Tax, then such ITC may be asked to be reversed as the Transaction of Export is not matched with ICEGATE Portal.

Further such type of corrections should be allowed to be made in Annual Return or at any time before filing of Annual Return as these are mere procedural corrections which impact the cash flow of the taxpayer.

Table 6A of GSTR-1 depicts certain fields as mandatory, but not all. Shipping bill number and port code are non- mandatory fields, which are often not filled by assesse/ taxpayer. The same happened in the current case where petitioner skipped filing these non-mandatory fields and it led to mismatch of data as declared in Table 6A with the data punched by Customs Officers at Ports on the ICEGATE portal. This has led to blocked refunds for the petitioner and has significantly impacted the cash flow of the petitioner and has dissolved the purpose of GST i.e. ease of doing business.

The list of 'rates of taxes' under item details are not provided under the prescribed Form GSTR-1 as per Rule 59(1). The 'item-wise rate of taxes list' is probably the creation of GSTN itself for providing some ease to the taxpayers filing the Return, but such list of rates of taxes without complete or sufficient information about the rate regardless of the description for riders / conditions for such rates like 0%, 0.1%, 0.25%, 1%, 1.5% as well as in some cases even 5% does not allow any ITC or refund.

There is no distinction between 0% Vs. 'Zero' Rated for Export/ SEZ Vs. Deemed Export Vs. Nil Rated as per Schedule Vs. Exempt Supplies as per Notification No. 2/2017 Central Tax (Rate) dated 28.06.2017etc which creates confusion and errors in filing up of the respective figures for the Turnovers pertaining to different kinds of Supplies identified by such terminology which ultimately has the same monetary effect as far as outward supply is concerned. This deficiency of required information in the GSTN web portal for Return filing is leading to inappropriate declarations made by assesses throughout the country resulting in blocked refunds and availment of ITC.

In some cases the Taxable turnover declared in 0% wrongly due to the confusion that 0% means Zero Rated and not Nil- Rated or Exempt Supplies, the ITC availed by the taxpayer will be asked to be reversed with interest and penalty when the matching is done after filing of Annual Returns by the Departmental Audit team.

**3. <u>AMENDMENT IN RETURN SHOULD INCLUDE SHIFTING OF TRANSACTION FROM ONE TABLE TO ANOTHER TABLE IN THE SAME RETURN AND DELETION OF THE TRANSACTION FROM THE WRONG TABLE</u>**

**ISSUE 3 OF THE CASE:*B2B Transactions inadvertently punched in B2C Large Table of GSTR-1, deletion of these transactions from B2C Large Table of GSTR-1 as***

***the petitioner had re-declared these transactions in his December 2017 return correctly in B2B Table of GSTR-1, resulting in increase of Total outward Supplies made during the F.Y. 2017-2018.***

**Sharnam Legal Observations:**

***As per the prescribed Form of GSTR-1 as per Notification No. 3 /2017-Central Tax dated 19 .06.2017:***

**Table 4 of GSTR 1 -** Taxable Outward Supplies made to registered persons (including UIN holders) other than supplies covered by Table 6. Under this main table three sub tables are prescribed i.e.

**Table 5 of GSTR 1 -** Taxable Outward inter-state supplies to unregistered persons where the invoice value is more than Rs 2.5 Lakh.Under this table two sub tables are prescribed

***Position on GST Portal:*** Table 4 (4A, 4B, 4C) and Table 5 (5A & 5B).

**Sharnam Legal Comments:** The taxpayer should declare the B2B inter-state outward supplies made under Table 4A of GSTR-1 on the GSTN the portal whereas inadvertently the taxpayer kept on declaring B2B transactions in Table 5A on GSTN portal for a period of four months for August 2017 to November 2017 at the initial stage of introduction of GST. The **GSTR-2A** was made available with a delay due to technical reasons on the GSTN Portal for the first time to Taxpayers in the month of November 2017**.** After the registered buyers of the taxpayer's goods verified the transaction from the available GSTR-2A for the first time made available in November 2017, then they informed the taxpayer that they cannot find and verify the Invoices in their GSTR-2A and insisted the taxpayer for correction of data / declaration of transaction data in the correct Table 4A of GSTR-1 so that the registered Buyer can rightfully claim ITC, the second declaration made under pressure of the transactions in correct column led to double declaration of the same transactions in GSTR-1 for the relevant months which created a mis-match between GSTR-1 and GSTR-3B of the Taxpayer. The gross turnover of the Outward supplier thus, increased due to double declaration as there was no option for shifting of the wrongly declared transaction from one table to another table for rectification in accordance to the correct nature and facts of the transaction.

Further, there is no provision in the GST portal to delete any entry once declared wrongly in a particular table. Transactions punched in a wrong table may lead to creation of Tax Demands, Mis-match in between GSTR-1 and GSTR-3B and accordingly in the Annual Return.

Hence, the mistakes made by the taxpayer could not be rectified/ shifted, so to make ITC available to the registered buyer, taxpayer added the details in Table 4A along with earlier wrongly filled transaction in B2C Large in Table 5 in the month of December 2017. This led mis-match of total outward taxable turnover as declared in GSTR-1 v/s. Tax paid on Total Taxable Turnover in GSTR-3B for the month and further led to increased total turnover of the taxpayer.

**4. AMENDMENT IN RETURN SHOULD INCLUDE SHIFTING OF TRANSACTION FROM ONE ROW TO ANOTHER ROW OF THE SAME TABLE OF THE RETURN AND DELETION OF THE TRANSACTION FROM THE WRONG ROW**

***To correctly punch data in Table 3.1 (b) of GSTR-3B as the petitioner has inadvertently punched / uploaded data in Table 3.1 (a) & Table 3.1 (c).***

***As per the prescribed Form of GSTR-3B as per Notification No. 3 /2017 dated 19 .06.2017:***

**GSTR 3B –** The taxpayer has to declare the tax payable in GSTR-3B.

**Sharnam Legal Comments:**

Under Table 3.1 of GSTR-3B requires information on Outward Supplies and Inward Supplies liable to reverse charge. The petitioner wrongly fed the data in 3.1 (a) which is Outward Supplies other than Zero rated, Nil rated and Exempt as well as in 3.1 (c) which is Other Outward Supplies including Nil rated and Exempted. The petitioner was legally required to fill the data in 3.1 (b), an outward taxable supplies of Zero rated for the Exports Transactions declared under Table 6 (6A, 6B, 6C) of GSTR-1. The fundamental difference in Zero rated, Nil rated and Exempt are not clear among the taxpayers/ business man, common man as well as consultants. This has led to huge confusion among people leading to wrong punching of data on the GST portal and in cases has also led to mis-match of data between GSTR-1 and GSTR-3B as well as also led to blockage of refunds, non–processing of refunds and rejection of refunds. The same happened in the current situation. This caused huge blockage of GST refund on the Export Transaction and impacting the cash flow of the taxpayer, further leading to inconvenience in conducting the business and carrying out routine work.

There is no distinction between 'Zero' Rated for Export/ SEZ Vs. Deemed Export Vs. Nil Rated as per Schedule Vs. Exempt Supplies as per Notification No. 2/2017 Central Tax (Rate) dated 28.06.2017etc which creates confusion and errors in

filing up of the respective figures for the Turnovers pertaining to different kinds of Supplies identified by such terminology which ultimately has the same monetary effect as far as outward supply is concerned. This deficiency of required information in the GSTN web portal for Return filing is leading to inappropriate declarations made by assessees throughout the country resulting in blocked refunds and availment of ITC.

In some cases where the taxpayer has made an Export transaction and has declared the same in GSTR-1 rightly but while making the declaration and payment through GSTR-3B, the taxpayer declares the Taxable turnover wrongly in 3.1(c) {Other Outward Supplies (Nil Rated, Exempted)} instead of declaring in 3.1(b) {Outward Taxable Supplies (Zero Rated)}, then the taxpayer will not be entitled to any refund or availment of ITC as the Act and the Rules very clearly restrict ITC and refund on Nil Rated and Exempt Supplies. Further, if the taxpayer declares the Zero rated transaction in 3.1(a) [Outward Taxable Supplies (Other than Zero Rated, Nil rated and exempted)] instead of 3.1(b) [Outward Taxable Supplies (zero rated)], then the taxpayer maybe liable to deposit GST on the Export transaction made under LUT as he declares his export turnover along with domestic turnover under the Outward Taxable Supplies (Other than Zero Rated, Nil rated and exempted). Further the tax payer may not receive his refund or maybe denied refund due to the mistake he committed while punching the total taxable value in the wrong row of Table 3.1. As well as if the taxpayer has paid the GST through his ITC available then he may be asked to reverse with interest and penalty when the matching is done after filing of Annual Returns by the Departmental Audit team.

Even though the government have issued directions through circular to process the blocked interim Refunds in the above referred circumstances but that is not the correct solution as whenever the returns are analysed by the jurisdictional officer or Audit Team, the issue of mis- match between GSTR-1, GSTR-3B vis-a-vis Annual Return shall naturally crop up to the detrimental of the assessee.

**Practical Scenario as developed on the above issues wherein the Taxpayer was forced to approach the Hon'ble High Court as the Government of India or the GST Council or the GSTN or CBIC has not provided any relief or resolution:**

In brief the petitioner had made inadvertent errors in punching of data in its GST monthly returns (GSTR-1 & GSTR-3B), the petitioner tried making rectifications / corrections in the wrongly filed transaction details but the portal did not allow rectifications / corrections as well as deleting any previous entries resulting in double declaration of total taxable turnover, mis-match in GSTR-1 and GSTR-3B, blockage refund in case of Export Transaction.

On such problematic issues, the Petitioner stated its grievance to the GSTN Portal, ICEGATE as well as to the Jurisdictional Officer to allow him to make necessary corrections before the filing of GSTR-9 so that the Annual return could be filed correctly. As there was no guidance, no help and support to make corrections provided by the GSTN, ICEGATE and the Jurisdictional Officer, the petitioner had no choice but to approach the Hon'ble Punjab & Haryana High Court.

*Case Details:* M/s Neelkamal Enterprises Pvt. Ltd. V. Union of India and others
*Case No.* CWP-21651-2019
*Court:* Punjab & Haryana High Court
*Counsel for the Petitioner:* Prateek Gupta, Advocate (Partner & Counsel – Sharnam Legal), SandeepGoyal, Advocate &Rishab Singla, Advocate (SGA Law Offices, Chandigarh)

**Interim Relief given by the Court**

Punjab & Haryana High Court allowed the Petitioner to correct its GST Returns (GSTR-1 & GSTR-3B) on account of inadvertent errors in punching of data in its monthly returns for F.Y. 2017-2018, the court had directed the GST Authorities on an earlier hearing to verify by the Jurisdictional Authority the transactions of the petitioner which needs to be corrected / revised, on the basis of affirmative report furnished to the High Court after verification of transactions by the GST Authorities, the court has allowed the petitioner to correct its data on GSTN portal and the court has directed GSTN to open the portal in petitioners case however in the meantime the court permitted the petitioner to manually submit revised returns by making necessary corrections in the GSTR-1, GSTR-3B and also Annual Return for assessment year 2017-18 by the closing date subject to decision of the Writ Petition. The court also observed that *"the problem persisting is that such genuine corrections are not being permitted to be corrected in the GST Portal leading to serious consequences of double tax liability along with interest and penalty hence, either the portal has to be re-programmed to permit removal of such restrictions or the assessees like the petitioner have to be permitted to file their annual returns manually which the GST Scheme does not permit. The issue requires some serious reconsideration by the GST Council, the Nodal Agency for administering the provisions of the GST Scheme."*

**Sharnam Legal – Comment / Observation**

This is a unique case where the Honourable High Court has gone into the details of transaction to understand the errors done by the petitioner as well as the department

and portals involved. The court has given the scope to make changes to the errors committed by the assesse, considering that there is no intention to evade tax. The errors are proven to be reasonable that can be committed by any common man as GST is a new law. The court, on such examination of 'intention' through evidences, records and data maintained has given leverage to the assesse and asked GSTN to re-open the portal for correction of data entered.

**Let's Ponder!**

GST has been executed with aim to boost economy and ease the business. But looking at the above complex return filing system and execution of the law, the number of litigations has been on sudden rise. This is causing unnecessary litigations before the High Courts.

Also, it is very important to note that format of GSTR-1 as discussed above is not same as that given under the CGST Rules, 2017.

The question which arises is whether the GSTR-1 Return filed/ uploaded by registered dealers on the GSTN web-portal since July 2017 is in the prescribed Form of Return GSTR-1 as per as per section 39(1) of CGST Act and Rule 59(1)? If not, then had the registered dealers properly complied the CGST Act and Rules 2017?

The Government / CBIC should provide a clarification under which notification or circular or ROD they have allowed the GSTN to change the format on GSTN Web-Portal for the prescribed GSTR-1 Return?

The government must fix a time limit for GST "IT Grievance Redressal Mechanism" Committee to act upon the directions in the order of the Hon'ble High Courts so as to allow the necessary relief to the tax payer immediately as in many cases it has been observed that the "IT Grievance Redressal Mechanism" Committee do not take any action of redressal of the issue and sit upon, inspite of the clear instructions and order of the Hon'ble High Courts which are made after getting the verification of the transactions.

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# E-INVOICING: STRIVING FOR THE "PERFECT INVOICE"

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**INTRODUCTION**

The GST Council in its 35th meeting on June 21, 2019 had decided to introduce electronic invoicing system in a phased manner for B2B (Business-to-Business) transactions. The Council approved, in principle, to launch a pilot project on voluntary basis for online generation of B2B e-invoices from January 2020.

The Council finally approved the standard of e-invoice in its 37th meeting held on 20th Sept 2019. The Council decided to approve the reporting of B2B invoices to GST System starting from 1st January 2020 on voluntary basis. On 10th October 2019 the E-Invoice System concept note, Standard, Scheme and Template was introduced on the GST Portal for the taxpayers, tax consultants and the software companies to adopt the designed standard.

In a recent Government Release dated 29.11.2019 it is stated that The e-invoicing system will be rolled out in a phased manner from January 1 on a voluntary and trial basis, beginning with firms with a turnover of Rs 500 crore, while businesses with a turnover of Rs 100 crore or more will be required to do it from February 1.

The release further states that "The basic aim behind the adoption of the e-invoice system is to facilitate convenience to the taxpayers by further simplifying the GST return system. Though e-invoicing the tax department would help business and taxpayers by pre-populating the returns, resulting in reducing reconciliation problems." There are about 7,500 GST identification numbers (GSTIN) for businesses with a turnover of Rs 500 crore and above.

From April 1, it will be voluntary for businesses with a turnover of less than Rs 100 crore.

**WHAT IS E-INVOICE?**

The concept of E-invoice was never meant for the Generation of Invoices through the Centralised Portal. The letter E in the E-invoice raised many questions in the minds of taxpayers, tax consultants and the software companies which lead to creation of lots of myth and misconception about E-Invoice. The concept was confused with the

concept of E-Way Bill and the myth was created that the E-Invoice will also be required to be generated online like E-Way Bill is generated.

E-invoice does not mean generation of invoices from a central portal of tax department, as any such centralization will bring unnecessary restriction on the way trade is conducted. In fact, taxpayers have different requirements and expectation, which can't be met from single software generating e-invoices from a portal for the whole country.

The concept of E-Invoicing is to make standardize Invoice in country as there was no standard for e-invoice existing in the country, standard for the same has been finalized after consultation with trade/industry bodies as well as ICAI after keeping the draft in public place. Adoption of a standard will also ensure that an e-invoice shared by a seller with his buyer or bank or agent or any other player in the whole business eco-system can be read by machines and obviate and hence eliminate data entry errors.

The e-invoice schema and template, as approved by the GST Council, are available in the GSTN website at https://www.gstn.org/e-invoice/ . The Template includes both Compulsory as well as optional fields as per the requirements of different Business.

Invoice generated by different software's may look more or less same; however, they can't be understood by another computer system even though business users understand them fully. For example, an Invoice generated by Tally system cannot be read by a machine which is using 'Busy' system. Likewise there is hundreds of accounting/billing software which generate invoices but they all use their own formats to store information electronically and data on such invoices can't be understood by the GST System if reported in their respective formats. Hence a need was felt to standardize the format in which electronic data of an Invoice will be shared with others to ensure there is interoperability of the data. The adoption of standards will in no way impact the way user would see the physical (printed) invoice or electronic (pdf version) invoice.

All these software would adopt the new e-Invoice standard wherein they would re-align their data access and retrieval in the standard format.

Generation of e-invoice will be the responsibility of the taxpayer who will be required to report the same to Invoice Registration Portal (IRP) of GST, which in turn will generate a unique Invoice Reference Number (IRN) and digitally sign the e-invoice and also generate a QR code. The QR Code will contain vital parameters of the e-invoice and return the same to the taxpayer who generated the document in first place. The IRP will also send the signed e-invoice to the recipient of the document on the email provided in the e-invoice.

The e-invoice standardized schema has mandatory and optional items. The e-invoice shall not be accepted in the GST System unless all the mandatory items are

present. The optional items are to be used by the seller and buyer as per their business need to enforce their business obligations or relationships.

At initial stage single IRP will be made available but more IRPs will be made available as per the requirements of the tax payers to make the system more efficient and speedy.

**OBJECTIVES OF E-INVOICE**

GST Council has given the responsibility to design the standard of e-invoice and update the same from time to time to GSTN which is the custodian of Returns and invoices contained in the same. Adoption of e-invoice by GST System is not only part of Tax reform but also a Business reform as it makes the e-invoices completely inter-operable eliminating transcription and other errors.

The E-Invoicing will also help in providing better taxpayer Services as it will lead to one time reporting of B2B Invoices and will also help in auto-population of data in GST Returns. The Data in Returns as well as E-Way Bill will be auto populated by the Generation of E-Invoices. The E-Invoice will also help in Verification of Input Tax Credit automatically and will provide the data of the same to the buyer as well as Tax Department. It will help in easy reconciliation of data between Buyer and Seller.

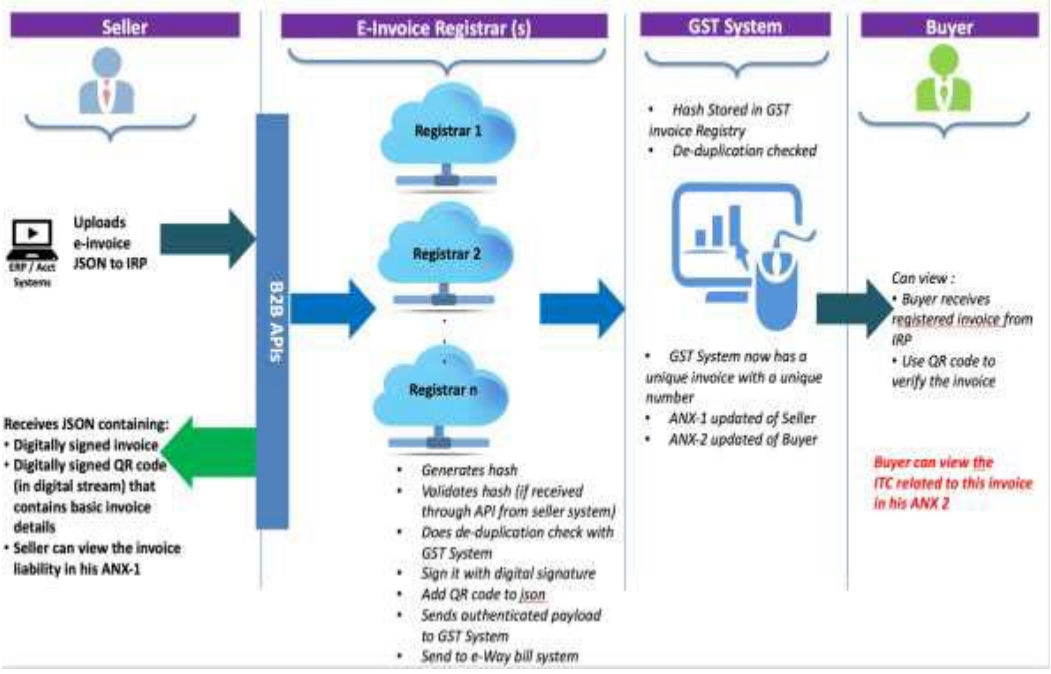
The E-Invoicing will also help in Reduction of Tax Evasion and Efficiency in Tax Administration. It will help in Elimination of Bogus Invoices and will also provide the matching of input and output Tax.

**WORKFLOW OF E-INVOICING**

**Step 1** is the generation of the invoice by the seller in his own accounting or billing system. The invoice must conform to the e-invoice schema (standards) that is published and have the mandatory parameters. The optional parameters can be according to the business need of the supplier. The supplier's (seller's) software should be capable to generate a JSON of the final invoice that is ready to be uploaded to the IRP. The IRP will only take JSON of the e-invoice.

**Step 2** is to generate the unique Invoice Reference Number (IRN) (in technical terms hash of 3 parameters using a standard and well known hash generation algorithm e.g. SHA256). **This is anoptional step**. The seller can also generate this and upload along with invoice data.

**Step 3** is to upload the JSON of the e-invoice (along with the hash, if generated) into the IRP by the seller. The JSON may be uploaded directly on the IRP or through GSPs or through third party provided Apps.




**Step-4**: The IRP will also generate the hash and validate the hash of the uploaded json, if uploaded by the supplier. The IRP will check the hash from the Central Registry of GST System to ensure that the same invoice from the same supplier pertaining to same Fin Year is not being uploaded again. On receipt of confirmation from Central Registry, IRP will add its signature on the Invoice Data as well as a QR code to the JSON. The QR code will contain GSTIN of seller and buyer, Invoice number, invoice date, number of line items, HSN of major commodity contained in the invoice as per value, hash etc. ***The hash computed by IRP will become the IRN (InvoiceReference Number) of the e-invoice.*** This shall be unique to each invoice and hence be the unique identity for each invoice for the entire financial year in the entire GST System for a taxpayer. [GST Systems will create a central registry where hash sent by all IRPs will be kept to ensure uniqueness of the same].

**Step 5** will involve sharing the uploaded data with GST and e-way bill system.

- **Step 5 (a)** will be to share the signed e-invoice data along with IRN (same as that has been returned by the IRP to the seller) to the GST System as well as to E-Way Bill System.
- **Step 5b** The GST System will update the ANX-1 of the seller and ANX-2 of the buyer, which in turn will determine liability and ITC.
- **Step 5c** E-Way bill system will create Part-A of e-way bill using this data to which only vehicle number will have to be attached in Part-B of the e-way bill.

**Step 6** will involve returning the digitally signed JSON with IRN back to the seller along with a QR code. The registered invoice will also be sent to the seller and buyer on their mail ids as provided in the invoice.

## FEATURES OF E-INVOICE SYSTEM

- The **UNIQUE INVOICE REFERENCE NUMBER** will be based on the computation of hash of GSTIN of generator of document (invoice or credit note etc.), Year and Document number like invoice number. This hash will be as published in the e-invoice standard and unique for this combination. This way hash will always be the same irrespective of the registrar who processes it. The hash could also be generated by the taxpayers based on above algorithm. The providers of accounting and billing software are being separately asked to incorporate this feature in their product. One can pre-generate and print it on the invoice book; however, the same will **not make the invoice valid** unless it is registered on the portal along with invoice details.
- The invoice data will be uploaded on the IRP (Invoice Registration Portal), which will also generate the hash in order to verify it and then **digitally sign** it with the private key of the IRP. In case the taxpayer submits hash also along with invoice data, the same will be validated by IRN system. The IRP will sign the e-invoice along with hash and the e-invoice signed by the IRP will be a valid e-invoice and used by GST/E-Way bill system.
- The IRP will also generate a **QR CODE** containing the unique IRN (hash) along with some important parameters of invoice and digital signature so that it can be verified on the central portal as well as by an Offline App. This will be helpful for tax officers checking the invoice on the roadside where Internet may not be

available all the time. The web user will get a printable form with all details including QR code.

- The **OFFLINE APP** will be provided on the IRP for anyone to download to authenticate the QR code of the invoice offline and its basic details. However, to see the whole invoice, one will have to connect to the portal and verify and see the details online. The facility to download entire invoice will be provided to tax officers, the way it is currently available under E-way bill system.
- The facility of QR code verification will be made available only through the GST System and not the IRP. This is because the IRP will not have the mandate to store invoices for more than 24 hours. In order to achieve speed and efficiency, the IRP will be a lean and focused portal for providing invoice registration and verification service, IRN and the QR codes. Hence, storing of the invoices will not be a feature of the IRP.
- **MULTIPLE REGISTRARS (IRPS)** will be put in place to ensure 24X7 operations without any break. To start with, **NIC** will be the first Registrar. Based on experience of the trial more registrars will be added.
- A technical group constituted by the GST Council Secretariat has drafted **STANDARDS FOR E-INVOICE** after having industry consultation.
- The taxpayer can continue to **PRINT HIS PAPER INVOICE** as he is doing today including logo and other information. E-invoice schema only mandates what will be reported in electronic format to IRP.

**MODES OF CREATION OF E-INVOICE**

The GST Council has approved various modes for creation E-Invoice so that taxpayers can use best mode based on his/her needs. The modes given below are envisaged at this stage under the proposed system for e-invoice, through the IRP (Invoice Registration Portal):

a) Web based,
b) API based,
c) SMS based,
d) Mobile app based,
e) Offline tool based and
f) GSP based.

**API mode**: Using API mode, the big tax payers and accounting software providers can interface their systems and pull the IRN after passing the relevant invoice information in JSON format. API request will handle one invoice request at time to generate the IRN. This mode will also be used for bulk requirement

(user can pass the request one after the other and get the IRN response within fraction of second) as well. The e-way bill system provides the same methodology.

**CONCLUSION**

The E-Invoice would not mean generation of invoices from a central portal of tax department or GSTN and the taxpayer would continue to use his accounting system/ERP or excel based tools or any such tool for creating the electronic invoice as s/he is using today. It can be voluntarily opted from 01.01.2020 by the firms having Turnover above of Rs. 500 Crore. From 01.02.2020 it will be voluntarily available for the firms having Turnover above of Rs. 100 Crore and will be compulsorily applicable on both of the abovementioned Turnover firms from 01.04.2020. Firms having Turnover less than Rs. 100 Crore can voluntarily opt for E-Invoicing from 01.04.2020. The E-Invoice will lead to leverage the full potential of the technology driven new indirect tax system to improve accountability and check tax evasion.

*The attempt has been made to understand the newly introduced concept of E-Invoice under GST Laws. The views written in this Article are as on 30.11.2019.*

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# AN OVERVIEW OF INSPECTION, SEARCH, SEIZURE & ARREST UNDER GOODS AND SERVICE TAX

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## A. Erstwhile Central Excise and Service Tax provision

Under the erstwhile Central Excise Act, 1944 the Joint Commissioner of Central Excise or Additional Commissioner of Central Excise or such other Central Excise Officer as was notified by the Board had reasons to believe that any goods liable to confiscation or any documents or books or things, which in his opinion are useful for or relevant to any proceedings under this Central Excise Act, are secreted in any place, he could authorise in writing any Central Excise Officer to search and seize or he himself could search and seize such documents or books or things. Similar provision was available under the service tax provisions (Finance Act, 1994) also.

Section 13 of the Central Excise Act, 1944 provided a Central Excise officer not below the rank inspector of Central Excise with the prior approval from Principal Commissioner of Central Excise or Commissioner of Central Excise, provided power of arrest of any person whom he had reason to believe is liable to punishment under Act or the rules made thereunder. Instruction regarding launching of prosecution and arrest under the Central Excise Act, 1944 - Central Excise F. No. 208/21/2007-CX. 6 provided for launch of prosecution in cases involving duty amount of Rs. 25 lakh or more. However, prosecution was allowed in case of habitual offenders irrespective of monetary limit prescribed, if circumstances so warranted. Section 89(1) read with Section 91 of the Finance Act, 1994 provided for arrest under service tax if there was evasion of service tax exceeding Rs. 2 crore with the prior approval from Principal Commissioner of Central Excise or Commissioner of Central Excise.

## B. Central Goods and Services Tax Act, 2017

1. **Inspection of business place– Section 67(1):**
   a. An officer not below the rank of Joint Commissioner can authorize an officer of central tax to inspect any places of business of the taxable person or the persons engaged in the business of transporting goods or the owner or the

operator of warehouse or godown or any other place if he has ***reason to believe*** that

i. a taxable person has ***suppressed*** any transaction relating to supply of goods or services or both or the stock of goods in hand, or has claimed input tax credit in excess of his entitlement under this Act or has indulged in contravention of any of the provisions of CGST Act, 2017 or the rules made thereunder to evade tax under CGST Act, 2017; or

ii. any person engaged in the business of transporting goods or an owner or operator of a warehouse or a godown or any other place is keeping goods which have escaped payment of tax or has kept his accounts or goods in such a manner as is likely to cause evasion of tax payable under CGST Act, 2017.

b. Authorisation for inspection will have to be in Form GST INS-01. Therefore, before permitting inspection, it should be checked whether appropriate authorization has been issued in Form GST INS-01.

c. The power to inspect would be only of business place. Though the word other place is mentioned in the Section 67(1), on applying the principles of interpretation of statutes 'ejusdem generis', it would be limited to business place only.

Under Section 133A of the Income Tax Act, 1961 (Power of Survey), income tax authority can enter place of business or profession for inspection of books of accounts, documents, check and verify cash, stock or other valuable article or thing only during the hours at which such place is open for the conduct of business or profession and ***any other place*** only after sunrise and before sunset.

However, under the CGST Act, no such restriction on time is prescribed and therefore, an officer can enter for inspection of business place at any time when it is open.

2. **Search of any place and Seizure of goods – Section 67(2):**

a. An officer not below the rank of Joint Commissioner can authorize an officer of central tax pursuant to inspection or otherwise, to search and seize or may himself search and seize goods, documents or books or things where he ***has reasons to believe*** that

- ***any goods liable for confiscation*** or

- any documents or books or things, which in his opinion shall be useful for or relevant to any proceedings under the CGST Act

are***secreted in any place***.

Only such of the goods which can be confiscated can be seized. Following goods are liable for confiscation under Section 130(1) of the CGST Act:

- supplies or receives any goods in contravention of any of the provisions of this Act or the rules made thereunder with intent to evade payment of tax; or
- does not account for any goods on which he is liable to pay tax under this Act; or
- supplies any goods liable to tax under this Act without having applied for registration; or
- contravenes any of the provisions of this Act or the rules made thereunder with intent to evade payment of tax; or
- uses any conveyance as a means of transport for carriage of goods in contravention of the provisions of this Act or the rules made thereunder unless the owner of the conveyance proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the conveyance.

b. Under this Section, search can be made at places other than business premise, as the said Section empowers for search where the goods or documents are secreted in ***any place***.

d. Authorisation for search also will have to be in Form GST INS-01. Therefore, before permitting search, it should be checked whether appropriate authorization has been issued in Form GST INS-01.

c. The officer has the power to seal or break open the door of any premises or to break open any almirah, electronic devices, box, receptacle in which any goods, accounts, registers or documents of the person are suspected to be concealed, where access to such premises, almirah, electronic devices, box or receptacle is denied.

d. Order for seizure of any goods, documents, books should be made in Form GST INS-02. The said order should be made in presence of 2 witnesses. Details of goods, documents etc. seized should be mentioned in detail in Form GST INS-02 by the officer. The goods seized can be entrusted by the officer to the owner or a custodian for safe keeping and the said person should not remove or deal with goods without previous permission of officer.

Where it is not practical to seize the goods, the officer will serve an order in Form GST INS-03 to the owner or custodian of goods not to remove or deal with the goods.

e. The goods seized will be released on provisional basis upon execution of execution of a ***bond*** for the ***value of the goods*** in FORM GST INS-04 and furnishing of a security in the form of a ***bank guarantee.***

   If the goods or things seized are of ***perishable or hazardous nature***, and if the taxable person pays an amount equivalent to the market price of such goods or things or the amount of tax, interest and penalty that is or may become payable by the taxable person, whichever is lower, such goods or, as the case may be, things shall be released forthwith, by an order in FORM GST INS-05, on proof of payment. However, if the taxable person fails to pay the amount in respect of the said goods or things, the Commissioner may dispose of such goods or things and the amount realized thereby shall be adjusted against the tax, interest, penalty, or any other amount payable in respect of such goods or things.

f. The documents or books or things so seized shall be retained by such officer only for so long as may be necessary for their examination and for any inquiry or proceedings under the CGST Act. No time limit has been prescribed as to when the same will have to be returned. The person is entitled to take copies thereof or take extracts therefrom in the presence of an authorised officer at such place and time as officer may indicate except where in the opinion of the officer making of such copies may prejudicially affect the investigation.

Section 67 of the CGST Act uses the word 'reason to believe'. Reason to believe has not been defined in the CGST Act, 2017. Therefore, some of the case laws has been provided below as to how the Courts have examined the word 'reason to believe'

a. Ajit Jain [2003] 129 Taxman 74 (SC – The Hon'ble Supreme Court held as follows

   'The expression 'reason to believe' has been explained in various decisions by the Apex Court and the High Courts while dealing with sections 132 and 148. It has been held that the words 'reason to believe' mean that a reasonable man, under the circumstances, would form a belief which will impel him to take action under the law. The formation of

opinion has to be in good faith and not on mere pretence. For the purpose of section 132, there has to be a rational connection between the information or material and the belief about undisclosed income, which has not been and is not likely to be disclosed by the person concerned.

Examined in the light of the above principles of law, action under section 132, in the instant case, on the basis of material on record, had left much to be desired. On the basis of the information noted on the relevant file of the department, without anything more, Director in charge of investigation, as a reasonable person, could not entertain a belief that the said amount in the possession of the respondent represented his undisclosed income which had not been and would not be disclosed by him for the purposes of the Act. The information provided by the CBI was very general in nature. The mere fact that the respondent was in possession of the said amount could not straightaway lead to the inference that it was his undisclosed income.'

b. Rara Brother 2000 (126) E.L.T. 425 (Pat.) - The Hon'ble High Court of Patna held as follows

'Reasonable belief is not a mere suspicion or a mere subjective satisfaction. It is something more than that. It is a belief which a prudent man on applying his mind judicially to the facts will arrive at.'

c. Bishnu Krishna Shrestha 1987 (27) E.L.T. 369 (Cal.) - The Hon'ble High Court of Patna held as follows

'The words of the section are 'reason to believe' and not 'reason to suspect' and this phrase has been repeatedly interpreted by the Supreme Court under various statutes. When a phrase, which has been interpreted judicially in a number of cases, is employed by the legislature in a new statute, it will be presumed that the legislature has used the phrase with full knowledge of the judicial interpretation of the phrase. In other words, when in the Foreign Exchange Regulation Act of 1956, the phrase 'reason to believe' was used; the legislature was well aware of the judicial interpretation of that phrase and had consciously used that phrase in the well understood judicial sense.

Therefore, the Supreme Court was of the view that the safeguards contained in Section 165(2) of the Code of Criminal Procedure will apply mutatis mutandis to a search order Section 41(2) of the Madras General

Sales Tax Act under consideration in that case. I fail to see why the safeguards will not apply to a similar worded section, Section 37, of the Foreign Exchange Regulation Act. The empowered Officer must have reasonable grounds for formation of the requisite belief. He must record, in writing, the grounds of his belief. He must specify in such writing so far as possible the things for which the search is to be made. In the instant case, the recorded reasons were not produced in Court nor stated or annexed to the affidavit. When the grounds for having reason to believe is under challenge that challenge can be repelled either by stating the reasons in the affidavit or by producing the recorded reasons in Court. Neither of which was done in this case. The documents produced in Court merely contain directions to make enquiry.'

3. **Inspection of Goods in movement – Section 68:**
   a. Section 68 of the CGST Act empowers a Proper officer authorized by the Commissioner to intercept conveyance carrying goods for verification of documents and also inspect the goods in the conveyance.
   b. Upon interception of conveyance, if person in-charge of conveyance fails to produce e-way bill and other prescribed documents or where e-way bills along with prescribed documents are produced, upon verification of documents, if the proper is of the opinion that inspection of goods is required to be done, he shall give an order for physical verification of the conveyance and goods in FORM GST MOV-2 specifying the reasons.
   c. Proper officer shall prepare summary report of inspection in Part A of FORM GST EWB-03 and upload it on the common portal within 24 hours. The inspection proceedings shall conclude within 3 working days from issue of the order and could be extended by another 3 days by the officer with Commissioner's approval. Upon completion of inspection, the proper officer shall issue:
      - Report of the verification in FORM GST MOV–04
      - Report in Part B of FORM GST EWB-03, within 3 days of inspection

      If no discrepancies are found, a release orderto be issued in FORM GST MOV – 05
   d. Order for detention of goods giving details of contravention and discrepancies will be issued in FORM GST MOV-06. Thereafter, the proper officer will issue notice specifying tax and penalty in FORM GST MOV – 07 and requiring the owner of goods to show cause within 7 days

from receipt of notice as to why the proposed tax and penalty should not be initiated. The owner of the goods may also choose to get the goods released by –

- Furnishing a bond in FORM GST MOV-08
- Security in the form of bank guarantee equal to the amount payable u/s 129.

If the owner of goods **comes forward** to pay tax and penalty – the proper officer shall issue an Order in FORM GST MOV-05 and release the goods and conveyance.

In case of any objections against the amount of tax and penalty, the officer shall issue a speaking order in FORM GST MOV - 09after considering the objections and shall thereafter issue an order in FORM GST MOV-05 and release the goods and conveyance.

If the owner of goods **does not come forward to pay** tax and penalty proper officer shall upload order in FORM GST MOV - 09 on common portal by which the said demand shall be added to the electronic liability ledger of the person.

e. If Tax and penalty not paid within 7 days from the date of the issue of FORM GST MOV-06, notice in FORM GST MOV10 will be issued to show cause as to why goods should not be confiscated and why tax, penalty and other charges should not be collected.

The proper officer shall give the owner of goods an option to pay fine in lieu of confiscation of goods. The fine will be in addition to tax and penalty. The fine leviable should not exceed market value of goods confiscated less the tax chargeable thereon.

No order for confiscation of goods and imposition of penalty should be issued without giving the owner of goods an opportunity of hearing. An order of confiscation of goods/ conveyance shall be passed in FORM GST MOV-11 and thereupon the title of goods will vest with the Government. The owner of the goods will be given time of 3 months to pay tax, penalty, fine and secure release of the said goods/conveyance. If within 3 months the owner of goods does not pay fine, tax and penalty, the proper officer shall dispose of the goods or conveyance and deposit the sale proceeds with the Government.

4. **Power to arrest – Section 69:**

a. Commissioner may authorize any officer of central tax to arrest a person if the amount of tax evaded or input tax credit wrongly availed or utilized exceeds Rs. 2 crore in the following cases if he has reason to believe that such person has
   i. made any supply without issue of invoice;
   ii. issues any invoice or bill without making any supply;
   iii. avails input tax credit on invoices or bill issued without any supply;
   iv. collected tax collected but failed to pay the same to the Government beyond a period of 3 months from the due date of payment;
   v. evaded tax, fraudulently availed input tax credit or fraudulently obtained refund and where such offence is not covered under (i) to (iv) above;
   vi. acquired possession of, or in any way concerns himself in transporting, removing, depositing, keeping, concealing, supplying, or purchasing or in any other manner deals with, any goods which he knows or has reasons to believe are liable to confiscation under CGST Act, 2017 or CGST Rules, 2017;
   vii. received or is in any way concerned with the supply of, or in any other manner deals with any supply of services which he knows or has reasons to believe are in contravention of any provisions of the CGST Act, 2017 or CGST Rules, 2017
b. The offence mentioned in paragraph 'a' supra involves amount of tax evaded or input tax credit wrongly availed or utilized exceeding Rs. 2 crore but less than Rs. 5 crore, the offence is a non-cognizable and bailable. If the person is arrested in such a case he should be admitted on bail and where bail is not given the person should be forwarded to the custody of the Magistrate.
c. The offence mentioned in paragraph 'a' supra involves amount of tax evaded or input tax credit wrongly availed or utilized exceeds Rs. 5 crore, such an offence is a cognizable and non-bailable. In such cases officer authorised to arrest the person should inform such person of the grounds of arrest and produce him before a Magistrate within 24 hours.
d. If a person commits or abets the commission of the following offences, he shall be punishable with imprisonment for a term which may extend to six months or with fine or with both:
   i. falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information with an intention to evade payment of tax due under the CGST Act, 2017;

ii. obstructs or prevents any officer in the discharge of his duties under CGST Act, 2017;

iii. tampers with or destroys any material evidence or documents.

With regard to power of arrest under Section 69 of the CGST Act, 2017 the Hon'ble Gujarat High Court in the case of VimalYashwantgiriGoswami 2019 (8) TMI 627 Gujarat High Court held the following

'The powers of arrest under Section 69 of the Act, 2017 are to be exercised with lot of care and circumspection. Prosecution should normally be launched only after the adjudication is completed. To put it in other words, there must be in the first place a determination that a person is "liable to a penalty". Till that point of time, the entire case proceeds on the basis that there must be an apprehended evasion of tax by the assessee'

Under the erstwhile service tax provisions (Finance Act, 1994), the Hon'ble Delhi High Court in the case of MAKEMYTRIP (INDIA) PVT. LTD. 2016 (44) S.T.R. 481 (Del.) held the following with regard to power of arrest under Section 90 and Section 91 of the Finance Act, 1994

'Arrest - Power to arrest - Sections 90 and 91 of Finance Act, 1994 - It is to be used with circumspection and not casually - Before arrest, neither DGCEI nor Service Tax department can presume/suspect, without following procedure under Sections 73A(3) and 73(4) of Finance Act, 1994, that person has collected Service Tax and not deposited it to credit of Central Government - It is more so where assessee has been regularly filing Service Tax returns accepted/examined by ST Department - For this purpose, and to find whether assessee is habitual offender, DGCEI has to check with Service Tax Department - Section 83 ibid stipulates that determination that person is "liable to penalty" is essential, which cannot happen without determination in terms of Section 72 or 73 or 73A ibid - Arrest of officers of assessee company without such safeguards is reckless and violates their fundamental rights under Article 21 of Constitution of India - However, in case of habitual offenders, resort to coercive steps straightaway can be made by making convincing justification in note on file.

Arrest - Power of arrest and penalty - Prosecution for determining commission of offence under Section 89(1)(d) of Finance Act, 1994 and adjudication proceedings for penalty under Section 83 ibid - Though both can go on simultaneously, both have to be preceded by adjudication to determine evasion of Service Tax - Person sought to be arrested has to be given opportunity to explain materials and circumstances gathered against

him, which according to revenue officers, points to commission of offence - It has to be determined with some certainty that person has collected Service Tax beyond prescribed limit and failed to pay it to Central Government beyond prescribed period - Without such determination, conclusion that assessee committed cognizable offence would be putting cart before horse.

Arrest - Habitual offender - Whether assessee is a habitual offender - It has to be determined by DGCEI after discussion with ST Department regarding history of such assessee - In absence of such discussion, DGCEI needs to access Service Tax record of such assessee - Without requisitioning such record, DGCEI cannot arrive reasonable conclusion whether there was deliberate attempt of evading payment of Service Tax - To resort extreme step of arrest, without issuing SCN under Sections 73 or 73A(3) of Finance Act, 1994, is unwarranted and violation of Fundamental Rights under Article 21 of Constitution of India.

The above judgement was affirmed by the Hon'ble Supreme Court - Union of India v. Makemytrip (India) Pvt. Ltd. - 2019 (22) G.S.T.L. J59 (S.C.)

**Conclusion**

*An attempt has been made in this paper to make a reader understand the basics of inspection, search, seizure and arrest under the GST law. This paper is written with a view to incite the thoughts of a reader who could have different views of interpretation. Disparity in views would only result in better understanding of the underlying principles of law and lead to a healthy debate or discussion. The views written in this article is as on November 26, 2019*

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# EXPORTERS OF GOODS & SERVICES – BEWARE OF GST PROVISIONS

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Experience, since the introduction of the GST tells us that for making a transaction, particularly of an export transaction, one must look into the provisions in the C/SGST Act, IGST Act, and Customs Act, relevant Notifications, relevant circulars and relevant advance rulings. This is a brief attempt to explain the export issues in GST.

Section 2 (5) of the IGST Act, 2017 (for short Act) defines thus--- "Export of goods" with its grammatical variations and cognate expressions, means taking goods out of India to a place outside India".

"Section 2 (6) "export of services" means the supply of any service when,—

(i) the supplier of service is located in India;
(ii) the recipient of service is located outside India;
(iii) the place of supply of service is outside India;
(iv) the payment for such service has been received by the supplier of service in convertible foreign exchange; and
(v) the supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with Explanation 1 in section 8;"

As per Section 2 (23) of the Act, 'zero rated supply' shall have the meaning assigned to it in Section 16. Sub Section (1) thereunder defines such supply as follows:-

"16. (1) "zero rated supply" means any of the following supplies of goods or services or both, namely:—

(a) export of goods or services or both; or

(b) supply of goods or services or both to a Special Economic Zone developer or a Special Economic Zone unit."

Under sub Section (2), credit of input tax may be availed for making zero rated supplies, subject to sub section (5) of Section 17 of the CGST Act, even when such supply may be an exempt supply. 'Exempt supply' is defined in Section 2 (47) of the CGST Act, 2017 to mean supply of any goods or services or both, which attracts nil rate of tax or which may be wholly exempt from tax under Section 11, or under Section 6 of the Act and includes non-taxable supply. Irrespective of the fact, whether the supply is nil rated or exempt or non-taxable, ITC is allowed if zero rated supply is made. Section 16 (3)

mandates that a registered person making zero rated supply shall be eligible to claim refund under either of the following options, namely:-

(1) The exporter can supply goods and services under bond or Letter of Undertaking without payment of IGST and claim refund of unutilized input tax credit, subject to prescribed conditions, or

(2) he may supply goods or services or both, on payment of IGST and claim refund of such tax paid on goods or services or both supplied, subject to prescribed conditions.

Thus an exporter can claim the refund in respect of the export of goods or services or both in either of the following ways:-

(1) Refund of unutilized ITC, when export of goods or services has been made without payment of IGST (export under Bond or Letter of Undertaking)

(2) Refund of IGST paid on supplies of goods or services without furnishing bond or LUT.

**DEEMED EXPORTS:-**

In the pre-GST regime, deemed exports of goods were exempt in terms of Section 5 (3) of the CST Act, 1956 on furnishing H declaration form. However no such forms are prescribed in GST. Deemed exports are not exempt in GST.

Section 147 of the CGST Act mentions 'deemed exports.' It reads as follows:-

"147. The Government may, on the recommendations of the Council, notify certain supplies of **goods** as **deemed exports**, where goods supplied do not leave India, and payment for such supplies is received either in Indian rupees or in convertible foreign exchange, if such goods are **manufactured** in India."

It must be noted that the concept of deemed exports would be applicable only to supply of **GOODS**. These deemed exports are neither zero rated nor exempt. They are subject to tax at the applicable rates. In exercise of the powers conferred by Section 147 of the CGST Act, the Central Government has issued Notification **No.48/2017-Central Tax, dated 18.10.2017,** through which, the following categories of supplies of goods have been notified as deemed exports: –

| Sl. No. | Description of supply |
|---|---|
| 1 | Supply of goods by a registered person against Advance Authorisation |
| 2 | Supply of capital goods by a registered person against Export Promotion Capital Goods Authorisation |
| 3 | Supply of goods by a registered person to Export Oriented Unit |
| 4 | Supply of gold by a bank or Public Sector Undertaking specified in the notification No. 50/2017-Customs, dated the 30th June, 2017 (as |

| | |
|---|---|
| | amended) against Advance Authorisation |

For the purposes of the above notification, –

1. "Advance Authorisation" means an authorisation issued by the Director General of Foreign Trade under Chapter 4 of the Foreign Trade Policy 2015-20 for import or domestic procurement of inputs on pre-import basis for physical exports.
2. Export Promotion Capital Goods Authorisation means an authorisation issued by the Director General of Foreign Trade under Chapter 5 of the Foreign Trade Policy 2015-20 for import of capital goods for physical exports.
3. "Export Oriented Unit" means an Export Oriented Unit or Electronic Hardware Technology Park Unit or Software Technology Park Unit or Bio-Technology Park Unit approved in accordance with the provisions of Chapter 6 of the Foreign Trade Policy 2015-20"

Notification No. **49/2017-Central tax, dated 18.10.2017** lays down various evidences which are required to be produced by the deemed export supplier of goods for claiming refund.

**REFUNDS:-**

Section 54 (3) of the CGST Act provides for refund of unutilised input tax credit at the end of any tax period. However no refund of unutilised input tax credit shall be allowed in cases other than—

(i) zero rated supplies made without payment of tax;

(ii) where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies (other than nil rated or fully exempt supplies), except supplies of goods or services or both as may be notified by the Government on the recommendations of the Council:

Provided further that no refund of unutilised input tax credit shall be allowed in cases where the goods exported out of India are subjected to export duty:

Provided also that no refund of input tax credit shall be allowed, if the supplier of goods or services or both avails of drawback in respect of central tax or claims refund of the integrated tax paid on such supplies.

Chapter X in the CGST Rules deals with 'Refunds'. Rule 89 prescribes the detailed procedure for claiming refunds. In the case of zero-rated supply of goods or services or both without payment of tax under bond or letter of undertaking in accordance with the provisions of sub-section (3) of section 16 of the Integrated Goods and Services Tax Act,

2017 (13 of 2017), refund of input tax credit shall be granted as per the procedure in this Rule.

As per Rule 89 (4A) in the case of supplies received on which the supplier has availed the benefit of the notification No. 48/2017-Central Tax dated the 18th October, 2017 refund of input tax credit, availed in respect of other inputs or input services used in making zero-rated supply of goods or services or both, shall be granted.

As per Rule 89 (4B) where the person claiming refund of unutilised input tax credit on account of zero rated supplies without payment of tax has –

(a) received supplies on which the supplier has availed the benefit of the notification No. 40/2017-Central Tax (Rate), dated the 23rd October, 2017, or notification No. 41/2017-Integrated Tax (Rate), dated the 23rd October, 2017, or

(b) availed the benefit of notification No. 78/2017-Customs, dated the 13th October, 2017, or notification No. 79/2017-Customs, dated the 13th October, 2017,

the refund of input tax credit, availed in respect of inputs received under the said notifications for export of goods and the input tax credit availed in respect of other inputs or input services to the extent used in making such export of goods, shall be granted.

As per the Notification No.40/2017 Central Tax-Rate dated 23.10.2017 the rate of CGST is 0.05% on intra State supplies of goods, to be paid by a registered supplier to a registered recipient for export subject to the conditions mentioned therein. Rate of SGST is also 0.05%.

Similarly as per the Notification No. 41/2017 Integrated Tax (Rate) dated 23.10.2017 the Integrated Tax rate is 0.1% on inter-State supply of taxable goods by a registered supplier to a registered recipient for export subject to specified conditions.

**IMPORTANT:-**

**Effective from 23.10.2017 as per Rule 96** (**10**) of the CGST Rules, the persons claiming refund of integrated tax paid on exports of goods or services should not have -

(a) received supplies on which the benefit of the notification No. 48/2017-Central Tax, dated the 18th October, 2017, except so far it relates to receipt of capital goods by such person against Export Promotion Capital Goods Scheme or notification No. 40/2017-Central Tax (Rate), dated the 23rd October, 2017, or notification No. 41/2017-Integrated Tax (Rate), dated the 23rd October, 2017, has been availed; or

(b) availed the benefit under notification No. 78/2017-Customs, dated the 13th October, 2017, or notification No. 79/2017-Customs, dated the 13th October, 2017, except so far it relates to receipt of capital goods by such person against Export Promotion Capital Goods Scheme.

It means exporters, who procure the goods from the supplier by paying concessional GST of 0.1% in all, under the said Notifications are not eligible to export goods on payment of IGST by using accumulated credit and avail IGST refund. If they receive goods by paying concessional GST rate, they are permitted to export goods only under Bond or LUT.

**Export invoices:-**

While issuing invoices for zero rated supplies, the following third Proviso under Rule 46 must be kept in mind.

"Provided also that in the case of the export of goods or services, the invoice shall carry an **endorsement** —SUPPLY MEANT FOR EXPORT/SUPPLY TO SEZ UNIT OR SEZ DEVELOPER FOR AUTHORISED OPERATIONS ON PAYMENT OF INTEGRATED TAX or —SUPPLY MEANT FOR EXPORT/SUPPLY TO SEZ UNIT OR SEZ DEVELOPER FOR AUTHORISED OPERATIONS UNDER BOND OR LETTER OF UNDERTAKING WITHOUT PAYMENT OF INTEGRATED TAX, as the case may be, and shall, in lieu of the details specified in clause (e), contain the following details, namely,- (i) name and address of the recipient; (ii) address of delivery; and (iii) name of the country of destination:"

**Some Advance Rulings on the subject**

1. **Advance Ruling** No.12 dated 17.4.2018 in the case of Behr-HellaThermocontrol India Private Limited, the Maharashtra AAR held—

"Ruling--The applicant is liable to pay IGST on the testing services provided to its overseas group entities and that they cannot be treated as 'zero rated supplies'.

2. **Advance** Ruling No.52 dated 19.12.2018 in the case of NES Global Specialist Engineering Services Private Limited, the Maharashtra AAR held---

"NES India and NES Abu Dhabi have proposed to enter into a service agreement through which NES India will provide support service in respect of the foreign business carried on by NES Abu Dhabi. Services include, accounting, invoicing, cash receipt posting, payroll assistance, etc. These are part of Master Service Agreement (MSA).

Ruling---Transaction covered by NSA between the applicant and the NES Abu Dhabi is a zero rated supply, which is an export of service.'

3. **Advance Ruling**No.GUJ/GAAR/2018/33 dated 30.8.2018 in the case of Take off Academy, the Gujarat AAR held-----

"Ruling---The AAR cannot decide the place of supply for export services".

4. **Advance Ruling** No.03/2018-19 dated 7.7.2018 in the case of Vservglobal Private Limited, the Maharashtra AAR held-

"The applicant company is incorporated to provide back office support services to overseas companies (clients). Clients are engaged in trading of Chemicals and other products in International Trade. Vserv will come into picture after finalization of Purchase / Sale order by a Client. Vserv will also maintain records of employees of Clients, their payroll processing etc……

Ruling---In the present case we find that the condition at (iii) of the above definition is not satisfied and hence without examining and getting into the contention of the jurisdictional officer with regards to condition at (v) of the said definition as to distinct person which would require more specific and detailed examination and verification on their part to get correct factual position in this regard, we hold that the services proposed to be rendered by the applicant do not qualify as 'export of services' as defined u/s.2(6) and thus not a 'zero rated supply' as per sec,16(1) of the IGST Act, 2017."

5. **Advance Ruling** No.05 of 2018 dated 21.3.2018 in the case of Global Reach Education Services Private Limited, the AAR, Kolkata, West Bengal held----

"The Applicant provides Overseas Education Advisory whereby it promotes the courses of foreign universities among prospective students. It is providing the above services to the foreign universities, for which it receives consideration in convertible foreign exchange. The Applicant has tied up with various Universities all over the world. These Universities engage entities like the applicant for promotional and marketing activities for promotion of the courses taught by them and making the prospective students aware about the course fee and other associated costs, market intelligence about the latest educational trend in the territory and ensuring payment of the requisite fees to the Universities if the prospective students decide upon pursuing any course promoted by the Applicant. The Applicant receives consideration in the form of commission from the foreign University for these services rendered to prospective students…….

Ruling---Being an intermediary service provider, the place of the Applicant's supply shall be determined under section 13(8)(b) of the IGST Act and not under section 13(2) of the IGST Act. The place of supply under the above legal framework is the territory of India. As the condition under section 2(6)(iii) of the IGST Act is not satisfied, the Applicant's service to the foreign universities does not qualify as "Export of Services", and is, therefore, taxable under the GST Act. The services of the applicant are not "Export of Service" and are taxable under the GST Act."

6. **Advance Ruling** No.52/2019 dated 18.9.2019 in the case of Toyota Tsusho India Private Limited, the Karnataka AAR held----

"Ruling---The persons who have procured goods by utilising the benefit of notification No. 40/2017 - Central Tax (Rate) dated 23.10.2017 are not eligible to claim refund of the IGST paid on exports as per Rule 96(10) of the CGST Rules 2017 right from 23.10.2017, irrespective of the other transactions made by such person."

7. **Advance Ruling** No.15/2018 dated 20.8.2018 in the case of FairmacsShipstores Private Limited, the Andhra Pradesh AAR held---

"The applicant is importing cosmetics, toiletries food products like confectioneries and cigarettes etc,. The Foreign manufacturers will maintain stores in SEZ units and the same will be supplied to bonded ware house or duty free ship store supplier. For example the brands like Marlboro, L&M, Bond street they are not having any manufacturing units in India. All these goods are manufactured outside India and the manufacturer will maintain a hub at SEZ unit from there they will supply to the applicant. Further the applicant also imports the same from foreign also. The goods so imported will be kept in special warehousing without collecting duties. The applicant is permitted to export the above goods which were kept in special warehouse as duty free to the (a) Ocean going merchant vessels on foreign run (b) Indian Naval Ships and (c) Indian Coast Guard Ships or from their authorized agents.

Ruling---The outward supplies made by the applicant to a) ocean going merchant ships which are in foreign run, b) Indian Navy ships, c) Indian Coast guard ships, will be treated as **'exports'**."

8. **Advance Ruling** No.36 of 2019 dated 21.8.2019 in the case of Shewratan Company Private Limited, the West Bengal AAR held---

"The Applicant supplies foreign going vessels stores like paint, rope, spare parts, electronic equipment etc. It seeks a ruling on whether it is liable to pay tax on such supplies to foreign going vessels. More specifically, it wants to know whether such supplies are zero-rated supplies.

Ruling--The Applicant's supply of stores to foreign going vessels, as defined under section 2(21) of the Customs Act, 1962 Act, is not export or zero-rated supply, unless it is marked specifically for a location outside India. The Applicant is, therefore, liable to pay tax on such supplies under the GST Act or the IGST Act, as the case may be."

9. **Advance Ruling** No.136/2018-19 dated 16.3.2019 in the case of Wilhelmsen Maritime Services Private Limited, the Maharashtra AAR held---

"Whether the delivery of goods to the owner of the ship proceeding to foreign port at the Indian port is an "export of goods" as per the section 16 of the IGST Act, 2017?
Ruling---In view of the discussions made above, supply from Bonded warehouse will fall under Schedule III of CGST Act "and exempted from GST and supply from Non-Bonded warehouse will not fall under Schedule III of CGST Act "and therefore not exempted from GST."

10. **Advance Ruling** No.119/2018-19 dated 4.5.2019 in the case of Cliantha Research Limited, the Maharashtra AAR held---

"The Applicant CRL (formerly known as B.A. Research India Limited), a global Clinical Research Organization, providing comprehensive range of clinical research and support services by performing technical testing and analysis on the Drug/Investigational Product provided by sponsors located outside India and submits final the report to such foreign sponsors. For the services provided above, Applicant will raise invoice to sponsor in foreign currency and receive the consideration in foreign currency.
Ruling--The Clinical Research services proposed to be provided by them to entities located outside India is not eligible to be treated as an export of service under Section 2 (6) of the IGST Act, 2017. The services are liable to CGST and SGST as the location of 'supplier of service' and the 'place of supply' is in the same State, in terms of Section 13 (3) (a) of IGST Act, 2017."

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# EXPORT OF GOODS AND SERVICES

***CA Paresh Shah***
***CA Mitali Gandhi***

## 1. Introduction

The term "Export" is a very popular term known to everybody. Exports are a crucial component of a country's economy as the sale of such goods adds to the balance of trade which in turn increases a country's Gross Domestic Product (GDP).

Export refers to sending of goods and services to overseas and thereby earning foreign exchange. Since it is beneficial to the country, government always encourages export.

Export trade is regulated by the Directorate General of Foreign Trade (DGFT) and its regional offices, functioning under the Ministry of Commerce and Industry, Department of Commerce, Government of India. Regulations pertaining to export of goods under the Foreign Exchange Management Act, 1999(FEMA) is given in Section 7 of FEMA and Notification FEMA 23(R)/2015-RB dated January 12, 2016 (hereinafter referred to as FEMA 23(R)). Exports are considered as current account transactions, prima facie there areno restrictions on them.

## 2. Definition of Export

2.1 Under FEMA

i. Export includes the taking or sending out of goods by land, sea or air, on consignment or by way of sale, lease, hire-purchase, or under any other arrangement by whatever name called, and in the case of software, also includes transmission through any electronic media

ii. Definition of services has been defined under section 2(zb) of FEMA as under: Service means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, medical assistance, legal assistance, chit fund, real estate, transport, processing, supply of electrical or other energy, boarding or lodging or both, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service

2.2 Under the Foreign Trade (Development and Regulation) Act 1992 (FTDR)

i. Export in relation to goods means taking out of India any goods by land, sea or air.
ii. Export in relation to services or technology:
Supplying, services or technology—
a. From India into the territory of any other country;
b. In India to the service consumer of any other country;
c. By a service supplier of India, through commercial presence in the territory of any other country
d. By a service supplier of India, through presence of Indian natural persons in the territory of any other country

2.3 Definition of supply of technology and services under FTDR also includes services provided by a branch office of an Indian entity outside India which is not included in the case of export definition under FEMA which only includes taking or sending out of India but in the case of services provided by a branch there is no taking or sending out of India.

**3. <u>Foreign Exchange Management Act,1999(FEMA) provisions pertaining to Export</u>**

3.1. Section 7 of FEMA – Export of Goods and Services
As per section 7 of FEMA, every exporter of goods shall furnish to RBI
i. Detailed Declaration of exports in the prescribed form (explained in detail below in point no 3)
ii. Such other information for the purpose of ensuring the realisation of the export proceeds by such exporter.

3.2. Section 8 of FEMA – Realisation& Repatriation of Foreign Exchange
As per section 8 an exporter must take all reasonable steps to realise and repatriate to India such foreign exchange within such period and in such manner as may be specified by the Reserve Bank

3.3. FEMA Notification 23(R)/2015-RB dated January 12, 2016 (hereinafter referred to as FEMA 23(R))
FEMA 23(R) has various provisions pertaining to exports from India which shall be discussed in detail in the current article

**4. Declaration of Exports under FEMA 23(R)**

4.1. Export of Goods through Manual Ports
i. In case of export of goods taking place through customs manual ports, every exporter must submit Form EDF in duplicate to the customs at the shipment port

stating true and correct material particulars including the amount representing the full export value or, if the full export value of the goods is not ascertainable at the time of export, the value which the exporter, having regard to the prevailing market conditions, expects to receive on the sale of the goods in a market outside India

ii. Customs will record the declared and assessed value and shall forward the original declaration form/data to the nearest office of the Reserve Bank and hand over the duplicate form to the exporter for being submitted to the Authorised Dealer (AD)

iii. Within 21 days from the date of export, exporter shall lodge the duplicate copy together with relative shipping documents and an extra copy of the invoice to the AD named in the EDF

iv. After the documents have been negotiated / sent for collection, the AD shall report the transaction through Export Data Processing and Monitoring System (EDPMS) to the Reserve Bank and retain the documents at their end

v. On the realisation of the export proceeds, the duplicate copies of export declaration forms viz. EDF shall be retained by the AD

4.2. Export of Software through Manual Port

i. In case of export of software the exporter must fill the declaration in form SOFTEX in respect of export of computer software and audio/video/ television software shall be submitted in triplicate to the designated official concerned of the Government of India at the Software Technology Parks of India (STPIs) or at the Free Trade Zones (FTZs) or Special Economic Zones (SEZs) for certification not later than 30 days from the date of invoice / the date of last invoice raised in a month

ii. After certifying all three copies of the SOFTEX form, the said designated official shall forward the original directly to the nearest office of the Reserve Bank and return the duplicate to the exporter. The triplicate shall be retained by the designated official for record.

iii. A common "SOFTEX Form" has been devised to declare single as well as bulk software exports

4.3. Export of Goods/Software done through EDI (Electronic Data Interchange) ports

i. The shipping bill shall be submitted in duplicate to the authority concerned

*ii.* After authenticating, the authority concerned shall hand over to the exporter, one copy of the shipping bill marked 'Exchange Control (EC) Copy' for being submitted to the AD bank within 21 days from the date of export for collection of shipping documents. *However, in case the shipping bill is integrated with EDPMS,*

*requirement for submission of EC copy of shipping bill with the AD bank would not be there.*

*iii.* The manner of disposal of EC copy of Shipping Bill shall be the same as that for EDF. The duplicate copy of the form together with a copy of invoice etc. shall be retained by ADs and may not be submitted to the Reserve Bank. *The question of disposal of EC copy of shipping bill will, however, not arise where EC copy of shipping bill is not printed and data of shipping bill is integrated with EDPMS.*

4.4. Electronic Data Processing and Monitoring System (EDPMS)

i. EDPMS is an IT based system launched by RBI in February,2014 for better monitoring of export of goods and software and facilitating AD banks to report various returns through a single platform. It is accessible to Customs, RBI and AD banks
ii. Customs enter the details of export as received from the client in EDPMS on export
iii. Exporter submits the details of the export to AD banks within 21 days of the export
iv. AD banks will have to report all the inward remittances including advance as well as old outstanding inward remittances received for export of goods/ software to EDPMS. Realization of all export transaction for shipping documents should be reported in EDPMS
v. The data updated the EDPMS allows banks to immediately track the status of each consignment exported.
vi. On receipt of the export proceeds, AD bank updates the same on EDPMS and the transaction is closed on EDPMS

4.5. Export of Services

In case of export of services, the exporter may export such services without furnishing any declaration but the amount for such export should be realised within 9 months from the date of export

**5. <u>Exemption from Declaration</u>**

In the following cases, export can be done without declaration

i. Trade samples of goods and publicity material supplied free of payment
ii. Personal effects of travellers, whether accompanied or unaccompanied
iii. Ship's stores, trans-shipment cargo and goods supplied under the orders of Central Government or of such officers as may be appointed by the Central Government in this behalf or of the military, naval or air force authorities in India for military, naval or air force requirements

iv. By way of gift of goods accompanied by a declaration by the exporter that they are not more than five lakh rupees in value
v. Aircrafts or aircraft engines and spare parts for overhauling and/or repairs abroad subject to their reimport into India after overhauling /repairs, within a period of six months from the date of their export
vi. Goods imported free of cost on re-export basis;
vii. The following goods which are permitted by the Development Commissioner of the SEZ, Electronic Hardware Technology Parks, STP or FTZ to be re-exported, namely:
    a. Imported goods found defective, for the purpose of their replacement by the foreign suppliers/collaborators
    b. Goods imported from foreign suppliers/collaborators on loan basis
    c. Goods imported from foreign suppliers/collaborators free of cost, found surplus after production operations
viii. Replacement goods exported free of charge in accordance with the provisions of Foreign Trade Policy in force, for the time being
ix. Goods sent outside India for testing subject to re-import into India
x. Defective goods sent outside India for repair and re-import provided the goods are accompanied by a certificate from an authorised dealer in India that the export is for repair and re-import and that the export does not involve any transaction in foreign exchange
xi. Exports permitted by the Reserve Bank, on application made to it, subject to the terms and conditions, if any, as stipulated in the permission

**6. <u>Provisions pertaining to Realization of Export Proceeds</u>**

6.1. Realisation of Export Proceeds

i. The amount representing the full export value of goods /software/services shall be realised and repatriated to India within 9 months from the date of export. Date of export explicitly clarified for software as the date of Invoice, can similar inference be drawn for goods & services?
ii. In case of exports made to a warehouse located outside India, the full export value should be realised and repatriated to India within 15 months from the date of shipment of goods
iii. AD Bank may for a sufficient and reasonable cause shown, extend the period of nine months or fifteen months, as the case may be
iv. In case of an exporter that has participated in an International Trade fair Abroad may open a temporary foreign currency account Abroad, provided that the balance in the

account is repatriated to India through normal banking channels within a period of one month from the date of closure of the exhibition/trade fair and full details are submitted to the AD Category – I banks concerned.

6.2. Delay in Realization of Export Proceeds

i. RBI has permitted AD banks to extend the period of realisation of export proceeds beyond stipulated period of realization from the date of export, up to a period of six months, at a time, irrespective of the invoice value of the export subject to the following conditions:

a. The export transactions covered by the invoices are not under investigation by Directorate of Enforcement / Central Bureau of Investigation or other investigating agencies

b. The AD Category – I bank is satisfied that the exporter has not been able to realize export proceeds for reasons beyond his control

c. The exporter submits a declaration that the export proceeds will be realized during the extended period,

d. While considering extension beyond one year from the date of export, the total outstanding of the exporter does not exceed USD one million or 10 per cent of the average export realizations during the preceding three financial years, whichever is higher.

e. In cases where the exporter has filed suits abroad against the buyer, extension may be granted irrespective of the amount involved / outstanding.

ii. Cases which are not covered by the above instructions would require prior approval from the concerned Regional Office of the Reserve Bank.

6.3. Non-Realisation of Export Proceeds

i. An exporter who has not been able to realize the outstanding export dues despite best efforts, may either self-write off or approach the AD Category – I banks, who had handled the relevant shipping documents, with appropriate supporting documentary evidence. The limits prescribed for write-offs of unrealized export bills are as under:

| | |
|---|---|
| Self "write-off" by an exporter (Other than Status Holder Exporter) | 5%* |
| Self "write-off" by Status Holder Exporters | 10%* |
| 'Write-off" by Authorized Dealer Bank- | 10%* |

*of the total export proceeds realized during the previous calendar year.

ii. The above limits will be related to total export proceeds realized during the previous calendar year and will be cumulatively available in a year.

iii. The above write-off will be subject to conditions that the relevant amount has remained outstanding for more than one-year, satisfactory documentary evidence is furnished in support of the exporter having made all efforts to realize the dues, and the case falls under any of the undernoted categories:

   a. The overseas buyer has been declared insolvent and a certificate from the official liquidator indicating that there is no possibility of recovery of export proceeds has been produced
   b. The overseas buyer is not traceable over a reasonably long period of time.
   c. The goods exported have been auctioned or destroyed by the Port / Customs / Health authorities in the importing country
   d. The unrealized amount represents the balance due in a case settled through the intervention of the Indian Embassy, Foreign Chamber of Commerce or similar Organization
   e. The unrealized amount represents the undrawn balance of an export bill (not exceeding 10% of the invoice value) remaining outstanding and turned out to be unrealizable despite all efforts made by the exporter
   f. The cost of resorting to legal action would be disproportionate to the unrealized amount of the export bill or where the exporter even after winning the Court case against the overseas buyer could not execute the Court decree due to reasons beyond his control
   g. Bills were drawn for the difference between the letter of credit value and actual export value or between the provisional and the actual freight charges but the amounts have remained unrealized consequent on dishonor of the bills by the overseas buyer and there are no prospects of realization

iv. The exporter has surrendered proportionate export incentives if any, availed of in respect of the relative shipments. The AD Category – I banks should obtain documents evidencing surrender of export incentives availed of before permitting the relevant bills to be written off

v. In case of self-write-off, the exporter should submit to the concerned AD bank, a Chartered Accountant's certificate, indicating the export realization in the preceding calendar year and also the amount of write-off already availed of during the year, if any, the relevant EDF to be written off, Bill No., invoice value, commodity exported, country of export. The CA certificate may also indicate that the export benefits, if any, availed of by the exporter have been surrendered.

vi. However, the following would not qualify for the write off facility:

a. Exports made to countries with externalization problem i.e. where the overseas buyer has deposited the value of export in local currency but the amount has not been allowed to be repatriated by the central banking authorities of the country.
b. EDF which are under investigation by agencies like, Enforcement Directorate, Directorate of Revenue Intelligence, Central Bureau of Investigation, etc. as also the outstanding bills which are subject matter of civil / criminal suit.

## 7. Foreign Currency Accounts in India

7.1.Exchange Earner's Foreign Currency Account (EEFC)

i. A person resident in India (PRII) may open an EEFC account in foreign currency with a bank in India
ii. EEFC account will be a non interest bearing current account.
iii. Exporters are permitted to credit 100% of their foreign exchange earnings to EEFC account subject to:
   a. The sum total of the accruals in the account during a calendar month should be converted into Rupees on or before the last day of the succeeding calendar month after adjusting for utilization of the balances for approved purposes or forward commitments.
   b. The facility of EEFC scheme is intended to enable exchange earners to save on conversion/transaction costs while undertaking forex transactions. This facility is not intended to enable exchange earners to maintain assets in foreign currency, as India is still not fully convertible on Capital Account.
iv. No credit facilities, either fund-based or non-fund based, shall be permitted
v. The eligible credits represent –
   a. Inward remittance received through normal banking channel on account of export, including advance received by an exporter towards export of goods or services
   b. Payments received in foreign exchange by a 100% Export Oriented Unit or a unit in EPZ, STF or EHTP for supply of goods to similar such unit or to a unit in Domestic Tariff Area and also payments received in foreign exchange by a unit in Domestic Tariff Area for supply of goods to a unit in SEZ
vi. AD banks may permit their exporter constituents to extend trade related loans/ advances to overseas importers out of their EEFC balances without any ceiling
vii. AD banks may permit exporters to repay packing credit advances whether availed in Rupee or in foreign currency from balances in their EEFC account and / or Rupee resources to the extent exports have actually taken place.

7.2. Diamond Dollar Accounts (DDA)

i. Firms and companies dealing in purchase / sale of rough or cut and polished diamonds / precious metal jewellery plain, minakari and / or studded with / without diamond and / or other stones, with a track record of at least 2 years in import / export of diamonds / coloured gemstones / diamond and coloured gemstones studded jewellery / plain gold jewellery and having an average annual turnover of Rs. 3 crores or above during the preceding three licensing years (licensing year is from April to March) are permitted to transact their business through Diamond Dollar Accounts.

ii. They may be allowed to open not more than five Diamond Dollar Accounts with their banks.

iii. Conditions mentioned at Para 6.2(iii) a) & b) shall also apply.

7.3. Resident Foreign Currency (Domestic) Account (RFC(D))

i. Resident Individuals can open an RFC(D) account to credit their export earnings

ii. It is a non-interest-bearing current account

**8. <u>Manner of Payment:</u>** All the proceeds of exports are required to be realised in the permitted currency only in accordance with regulations framed in this connection under Nof 14 of the FEMA.

**9. <u>Advance against Exports</u>**

i. Where an exporter receives advance payments from a buyer outside India against Goods to be exported. The exporter shall be under an obligation to ensure that the shipment of goods is made within one year from the date of receipt of advance payment;

ii. The documents covering the shipment are routed through the AD bank through whom the advance payment is received

iii. In case of the inability of the exporter to make the shipment partly or fully within one year from the date of receipt of advance, no remittance towards refund can be done without the prior approval of Reserve Bank

iv. Banks may allow exporters to receive advance payment for export of goods which would take more than one year to manufacture and ship and where the 'export agreement' provides for shipment of goods extending beyond the period of one year from the date of receipt of advance payment subject to the following conditions: -

   a. The KYC and due diligence exercise have been done by the bank for the overseas buyer

b. Compliance with the Anti-Money Laundering standards has been ensured
c. Bank should ensure that export advance received by the exporter should be utilized to execute export and not for any other purpose i.e., the transaction is a bona-fide transaction
d. Progress payment, if any, should be received directly from the overseas buyer strictly in terms of the contract
e. The rate of interest, if any, payable on the advance payment shall not exceed London Inter-Bank Offered Rate (LIBOR) + 100 basis points
f. There should be no instance of refund exceeding 10% of the advance payment received in the last three years
g. The documents covering the shipment should be routed through the same authorised dealer bank

v. Banks can also allow exporters having a minimum of three years satisfactory track record to receive long term export advance up to a maximum tenor of 10 years to be utilized for execution of long-term supply contracts for export of goods subject to the conditions
vi. AD banks should regularly follow up with the concerned exporters in order to ensure that export performance is completed within the stipulated time period.

**10. <u>Reduction in Invoice Value</u>**

i. If, after a bill has been negotiated or sent for collection, its amount is to be reduced for any reason, AD bank may approve such reduction, if satisfied about genuineness of the request, provided:
   a. The reduction does not exceed 25 per cent of invoice value
   b. It does not relate to export of commodities subject to floor price stipulations
   c. The exporter is not on the exporters' caution list of the Reserve Bank
   d. The exporter is advised to surrender proportionate export incentives availed of, if any
ii. In the case of exporters who have been in the export business for more than three years, reduction in invoice value may be allowed, without any percentage ceiling, subject to the above conditions as also subject to their track record being satisfactory, i.e., the export outstanding do not exceed 5 per cent of the average annual export realization during the preceding three financial years

**11. <u>Setting up Offices Abroad</u>**

i. Indian Entities can set up branch or representative office Abroad subject to following ceilings:

a. Remittance towards initial expense is permitted up to fifteen per cent of the average annual sales/income or turnover during the last two financial years or up to twenty-five per cent of the net worth, whichever is higher
b. Remittance towards recurring expenses is permitted up to ten per cent of the average annual sales/income or turnover during the last two financial years subject to the following conditions

I. The overseas branch/office has been set up or representative is posted overseas for conducting normal business activities of the Indian entity;
II. The overseas branch/office/representative shall not enter into any contract or agreement in contravention of the Act, Rules or Regulations made there under;
III. The overseas office (trading / non-trading) / branch / representative should not create any financial liabilities, contingent or otherwise, for the head office in India and also not invest surplus funds abroad without prior approval of the Reserve Bank. Any funds rendered surplus should be repatriated to India

ii. Immovable property can be acquired for business purpose/residential purpose for staff within above ceiling limits.
iii. The details of bank accounts opened in the overseas country should be promptly reported to the AD Bank.

**12. <u>Set-off of export receivables against import payables</u>**

AD banks may permit set off of export receivables against import payables subject to following conditions:

i. Payment for the import is still outstanding in the books of the importer
ii. The set-off of export receivables against import payments should be in respect of the same overseas buyer and supplier and that consent for set-off has been obtained from him
iii. The import is as per the Foreign Trade Policy in force
iv. All the relevant documents are submitted to the concerned AD bank who should comply with all the regulatory requirements relating to the transactions.

**13. <u>Merchanting Trade</u>**

Merchanting Trade means when goods are shipped from one foreign country to another foreign country involving an Indian intermediary. Merchanting Traders have to be genuine traders of goods and not mere financial intermediaries. Confirmed orders have to be received by them from the overseas buyers. Following conditions should be satisfied to be classified as a bona fide Merchanting Trade transaction:

i. Goods acquired should not enter the Domestic Tariff Area, and

ii. The state of the goods should not undergo any transformation
iii. Goods involved in the transactions are permitted for exports/ imports under prevailing Foreign Trade Policy of India, at the time of entering into the contract
iv. Both the legs of the merchanting trade transaction will be routed through Same AD bank only
v. The Transactions should be completed within nine months and there should not be any outlay of foreign exchange beyond four months
vi. The commencement of merchanting trade would be the date of shipment / export leg receipt or import leg payment, whichever is first. The completion date would be the date of shipment / export leg receipt or import leg payment, whichever is last
vii. In case advance against the export leg is received by the Merchanting Trader, the same should be earmarked for making payment for the respective import leg. However, AD bank may allow short-term deployment of such funds for the intervening period in an interest-bearing account
viii. Payment for import leg may be allowed to be made out of the balances in EEFC account of the Merchant Trader

**14. Refund of Export Proceeds**

AD banks, through whom the export proceeds were originally realized may consider requests for refund of export proceeds of goods exported from India and being re-imported into India on account of poor quality subject to certain conditions

**15. Exports that require prior approval of RBI**

i. Exports of goods on lease and hire & ultimate reimport
ii. Export on elongated credit
iii. Exports under bilateral trade agreements/rupee credit etc.
iv. Counter trade arrangements.
v. Project exports on deferred payment terms

**16. Other Methods of Export from India**

i. Participating in trade fairs abroad.
ii. Consignment exports.
iii. Exporting to exporter's own warehouse abroad.
iv. Projects abroad.

Each of the above exports method is governed by special conditions as provided in FEMA 23(R)

**17. <u>Project Export</u>**

i. Contracts for export of goods against payment to be received partly or fully beyond the period statutorily prescribed for realisation of export proceeds are treated as deferred payment exports

ii. Export of engineering goods on deferred payment terms and execution of turnkey projects (like rendering of services like designing, civil construction and erection and commissioning of plant / factory along with supply of machinery, equipment and materials) and civil construction contracts abroad are collectively referred to as 'Project Exports'

iii. In order to provide greater flexibility to project & service exporters in conducting their overseas transactions, facilities have been provided as under:

a. Inter-Project Transfer of Machinery
Exporters are permitted to use the machinery / equipment for performing any other contract secured by them in any country subject to the satisfaction of the sponsoring AD bank

b. Inter-Project Transfer of Funds
Bank(s)/EXIM Bank/Working Group may permit exporters to open, maintain and operate one or more foreign currency account/s in a currency (ies) of their choice with inter-project transferability of funds in any currency or country.

c. Deployment of Temporary Cash Surpluses
Project exporters may deploy their temporary cash surpluses,
generated outside India, in the permissible products, subject to monitoring by the bank(s)/EXIM Bank/Working Group. They should, however, repatriate the profits of on-site contracts after completion of the contracts

iv. Post-award Procedure

a. While it is not necessary for exporters to obtain prior approval for submission of bids/offers for execution of contracts, authorised dealer / Exim Bank should, while granting post-award clearance, ensure that the export proposals satisfy certain conditions as given in the PEM Memorandum

b. After entering into a contract, the exporter should submit to the AD bank in form DPX-1(in respect of turnkey and deferred payment supply contracts) or in form PEX-1(in respect of civil construction contracts) in six copies along with six copies of the contract.

c. AD bank/ Exim Bank may grant post-award clearance to the project proposal without any monetary limit. If the AD desires participation of Exim Bank in the financial arrangements and /or guarantee facilities, concurrence of Exim Bank should be obtained before granting post award clearance

d. AD bank/EXIM bank should consult the ECGC in advance if counter-guarantees of the Corporation are required and/or insurance cover is desired to be obtained from it

v. Declaration of the Exports and Handling of EDF

a. In order to facilitate maintenance of proper record of exports made on deferred payment terms, exporters should prominently superscribe both copies of relative EDF/SDF(shipping bill) with the name of export contract for which supplies are being made and the number and date of the approval granted by the approving authority noted on the EDF/SDF(SB). The duplicate copies of the forms should be retained by Bank duly certified after realisation of the last instalment together with interest from overseas buyers.

b. In connection with execution of projects, exporters may sometime be required to export 'consumables' such as tools, tackles, machinery spares etc. for which separate payments will not be made by the overseas buyers. Such consumables will have also to be declared on EDF/SDF In such cases, Bank may, on application, permit exporters to raise invoices against their own site offices abroad, send the shipping documents direct to those offices and realise the value due thereon in convenient installments out of the progress payments for the contracts.

**18. <u>Pre-requisites to become an exporter</u>**

i. Import Export Code (IEC): An IEC is a ten-digit code and only one IEC is allotted per Pan card. As per the current export-import policy in India, no export or import shall be made by any person without an IEC, unless specifically exempted. The application form ANF2A should be downloaded from the DGFT website. The form can also be filled online now. Mandatory requirements to apply for IEC are:

a. PAN Number
b. Current Bank Account
c. Bankers Certificate in the format prescribed by DGFT
d. Application Fee
e. Two copies of the passport size photograph of the applicant that is duly attested by the banker of the applicant
f. Covering letter on the letterhead of the applicant's company to request for the issue of new IEC certification
https://www.dgft.org/iec_code.html

ii. Registration Cum Membership Certificate (RCMC)- After obtaining the IEC, you need to obtain an RCMC, granted by the concerned Export Promotion Councils to

get authorisation to import and export, or for any other benefit available to exporters under Foreign Trade Policy.

iii. Authorised Dealer (AD) code- The bank which has the current account of the exporter will issue a letter stating the AD code of the bank after receiving IEC from DGFT. The AD code needs to be registered with the customs department through which the export proceeds will be realised.

iv. GST Registration- Export under the GST law is treated as inter-state supply under GST law, any person engaged in the inter-state taxable supply of goods or services or both is required to obtain compulsory registration with the exception in case the taxable turnover during the year does not exceed Rs. 40 lakhs or services provided does not exceed Rs 20 lakhs

**19. <u>Brief on India's exports</u>**

Exports are primary sources of foreign exchange earnings for a country. The gap between India's export and import has been growing bigger and bigger in the past decade. However, the share of services in exports has been growing in recent years. From about 32% of the total value of exports a few years ago, it contributed more than 38% in the last two fiscals. India's major exports are Refined Petroleum, Diamonds, Machineries, Vehicles and Organic chemicals. India's major export regions are the developed Nations like USA, UAE, China, Hongkong and Singapore.

**20.Conclusion:**

Export and Import are current Account transaction and are similarly treated for framing the regulations in respect of the trail of documents and routing the transaction through customs and the Authorised Dealer. Numerous relaxation are provided considering the type of the transaction by grating relaxation in procedure and modifying the attendant documentation.

In order to facilitate a transaction of project export a dedicated documentation is prescribed to consider elongated/deferred payment credit period, import to be utilised in foreign project without any documentation in India or local disbursements outside India of expenses by consolidation in a uniquely designed documentation of the project export.

Also Branch export as well as offsite and onsite project export is treated separately to facilitate such exports.

Import and its procedure will be separately dealt with the dedicated article.

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# CASE LAWS AND NOTIFICATIONS/CIRCULARS ON REAL ESTATE (REGULATION AND DEVELOPMENT) ACT, 2016

***CA Sanjay Ghiya (D.I.S.A)***
***CA AshishGhiya (L.L.B, C.S)***

## CASE LAWS

### MAHARASHTRA REAL ESTATE APPELLATE TRIBUNAL

**KIRAN VASANT VEREKAR & ORS V/S SAMRUDDHI DEVELOPERS**

These are 5 Appeals by the Allottees purchasers; feeling aggrieved by the common order of the Ld. Chairperson dated January 15, 2018.The Society has entered into a Development Agreement dated December 30, 2007 for constructing a Ground + 7 storied building with M/s. Rebuilt Developers. However, since M/s. Rebuilt Developers did not carry the terms agreed upon to coordinate in the project the present Respondents Samruddhi Developers entered into a Joint Agreement. The Ld. Counsel for Developer says his client who is one of the developers has also suffered as he has booked two flats on the 8th floor apart from the flat booked by the Appellants.

The grievance of the respondent is that Society not cooperating and getting Commencement Certificate for erecting the structures from 8th floor onwards. There is an available Floor Space Area which has to be utilized for further construction but Cooperation of society is imperative for the same. The order of Ld. Chairperson specifies directions to the Promoter to complete the project and hand over possession of the respective premises to the Appellants before 31/12/2018. The order under challenge does not incorporate further consequences if the Promoter fails to adhere to the deadline indicated by the Ld. Chairperson. Consequently, care needs to be taken in this direction.

The facts were examined. The developer/respondent came into picture by virtue of Agreement dated 05.11.2015. By entering into agreement he voluntarily purchased all the risks including non-availability of commencement certificate for 8th Floor. So, it becomes the duty to make sure that the obligation in the agreement to sale will be duly adhered. Now, it cannot be stand of respondent that earlier developer cheated on him or the society is not cooperating. The appellate authority keeping in mind the matter of Neelkamal Realtors Vs State in Writ Petition No. 2737 of 2017 decided on 6th Dec 2017 opined that the respondent shall release interest @ 10.05% p.a. in favour of each of the

allottee for the payment made of the appellants effective from 1st January, 2018 till handing over the possession of the respective premises duly completed and getting the completion certificate from the Competent Town Planning Authorities.

## HARYANA REAL ESTATE REGULATORY AUTHORITY

**VIJAY KUMAR V/S HUDA**

The grievance of the complainant is that he has approached the respondent and has also made oral requests several times for giving him demarcation of the purchased property on the basis of revised zoning plan. But no proper response was given by the respondent.

Shri YogeshRanga informed the Authority that fresh demarcation and possession of the purchased SCO in terms of the revised zoning plan has already been given to the complainant. The complainant does not dispute delivery of possession and demarcation to him in terms of revised zoning plan. However, the complainant submits that the respondent is demanding fresh fee for extending validity of already sanctioned plan.

The Authority opined that that the complainant due to inaction on the part of respondent was precluded from raising construction within the prescribed period allowed to him at the time of sanctioning of plan. So, considering this the revised zoning plan deserved to be extended. Shri YogeshRanga undertakes to extend the validity without charging any extension fee by another two years from the date of demarcation given on the basis of revised zoning plan.

## MAHARASHTRA REAL ESTATE REGULATORY AUTHORITY

**ASHWIN SHETTY& SONAL ASHWIN SHEETY V/S ULTRA SPACE DEVELOPERS PRIVATE LIMITED&ors**

Complainants contended that they had booked flat on 23.06.2010 in respondent project named Insignia and paid Rs. 41, 05,448. Thereafter the respondents issued allotment letter on 12.08.2010. Respondents did not execute agreement for sale in spite of several requests made by complainants. The respondents were not having permission for construction till 8th Floor. Also, respondents unilaterally changed the size of the flat and asked complainants to pay the remaining amount at increased price.

Respondent submitted that complainants are not sure whether they want to continue in the project and want possession of the flat or they want to quit and want refund of their amount. They further contend that the complainants have paid only around 9.42% of the total consideration and there is no question for executing agreement for sale. Therefore, they request to dismiss the complaint.

After taking into consideration these documents, it is found that the plan has been changed and the area along with the Price of the flat has been increased. The respondents have not produced any evidence to show that they took the previous consent of the allottees including the complainants for changing the plan. Hence, it is held that respondents have changed the sanctioned plan without previous written consent of the allottees and thereby contravened Section 14 of the Act.

Complainants also seek refund of their amount with interest under section 18(1) of the Act. Complainants do not have agreement for sale. Allotment letter cannot be treated as agreement of sale as held by the three Judge Bench of Hon'ble Supreme Court in Hansa V. Gandhi-v/s-Deep Shankar Roy, AIR 2013(SC) 2873. Moreover, the complainants have failed to prove that the respondents agreed to deliver the possession of the flat on 23rdJune 2012. Hence, the complainants are not entitled to get any relief under Section 18 (1)(a) of RERA.

Section 61 of RERA provides that if any promoter contravenes any other provisions of the Act, other than that provided under Section 3 or Section 4 or rules and regulations made thereunder, he shall be liable to penalty which may extend up to 5% of the estimated cost of the real estate protect as determined by the Authority. Complainants submit that they are interested in getting refund of their amount instead of penalizing the promoter.

In view of findings recorded regarding the contravention of Section 14 of the Act, in the facts and circumstances of the case it fits that the order of refunding the complainants amount with interest will serve the ends of justice and therefore, not imposing penalty under Section 6l of the Act on the respondents.

Thus the authority ordered the respondents to pay the complainant Rs. 11, 00,000/-and Rs.30, 05,448/- with simple interest at the rate of 10.05% per annum from 23.06.2010 and 26.07.2010 respectively till they are refunded. Also, Rs. 20,000/- towards the cost of complaint.

**KUNAL PARMAR V/S AMEX DEVELOPER**

The complainant complains that the respondent has not provided permanent alternate accommodation in lieu of his surrendered tenanted premise and also not paid rent till handing over the permanent alternate accommodation in new building. The learned advocate of the respondent submits that the complainant is not an allottee and there is no violation or contravention of any provision of RERA, hence, the complaint is not maintainable.

In the facts and circumstances of the case, it becomes clear that the complainant is also equity holder who in lieu of surrendering the tenanted premises is going to get

permanent alternative accommodation on ownership basis in new building, particularly in its rehab component as mentioned in the agreement entered into by the parties. Thus, the owners and tenants have collectively taken the decision to 'cause it' to be constructed. Hence, the complainant comes in the definition of promoter. Thus the complaint is dismissed as the authority does not entertain any dispute lying between promoters inter se.

**BIYANI FINANCIAL SERVICES PVT.LTD. V/S OMKAR DEVELOPERS AND ASSOCIATES & ORS.**

The complainant has purchased office space on the 17th floor of the respondent's project vide registered agreement for sale dated June 12, 2010. Further, pursuant to discussions between the parties the allotment was shifted to the 25th floor. The complainant contends that respondent has failed to deliver the possession of the office space in time. The complainant seeks interest for the said delay in terms of section 18 of the Act.

The respondent contended that a fresh agreement for sale dated 31st March, 2016 was executed for the 25th floor which does not have date of possession mentioned due to the peculiar nature of the said project. Further he submitted that the said project is complete, ready for occupation and already occupied by many allottees. However due to non-receipt of occupancy certificate, the complainant has not taken possession for the same.

In view of the above facts, the respondent is given a period of one month time to obtain occupancy certificate and therefore, handover the possession the said apartment, with occupancy certificate, to the complainant before the period of 30thJune, 2018, failing which the respondent will be liable to pay interest to the complainant from 1st July, 2018 till the actual date of possession, on the entire amount paid by the complainant.

**ANIS JIKARE V/S M/S. BHAGVATI INFRA**

The complainant has filed this complaint as the respondent failed to handover possession of the flat on the agreed date; the complainant wants to withdraw from the project of respondent and therefore seeks the refund of amount paid with interest and compensation under the provisions of Sec. 18 of RERA Act, 2016.The respondent resisted the contention of the complainant that the delay in project was not due to events which were beyond the control of promoter. It is contended by the respondent that the project is situated in rural area where electric supply is acute problem. Also there was shortage of sand and other building material. It can be said that the project in question of respondents

is ongoing project and being an ongoing project the complaint of the complainant is governed under the provisions of RERA.

Thus the authority concluded that respondents were at default and therefore ordered the respondent to refund the aforesaid amount to the complainant with interest within the period of 30 days from the date of this order. Also, respondents are directed to pay Rs. 25000/- as compensation on account of loss suffered due to reimbursement of claim of Stamp Duty. In addition to this the respondents are also directed to pay the amount of Rs. 30,000/- towards the cost of this litigation.

**HASAN ALI CHAUHAN & ORS.V/S LAKADWALA DEVELOPERS PVT.LTD.**

The complainants alleged that as per the redevelopment agreement, the respondent has neither handed over possession of alternative accommodation till date nor paid rent. The respondent contended that the complainants are not party to the said redevelopment agreement, and he is willing to transfer the allotment to the complainants after they provide the legal heir certificate. Thus the complaint is dismissed as the complainants could not explain which sections of the RERA Act, 2016 or rules or regulations made thereunder are violated, necessitating a direction from MahaRERA.

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# IMPORTANT CASE LAWS, CIRCULARS AND NOTIFICATIONS ON FEMA AND ALLIED LAWS

***CA Anil Mathur***
***Jaipur***

## CIRCULARS

**6. A.P. (DIR SERIES) CIRCULAR NO. 7, DATED 5-9-2019**

**EXIM BANK'S GOVERNMENT OF INDIA SUPPORTED LINE OF CREDIT OF USD 800 MILLION TO THE GOVERNMENT OF THE REPUBLIC OF MALDIVES**

Export-Import Bank of India (Exim Bank) has entered into an agreement dated March 18, 2019 with the Government of the Republic of Maldives for making available to the latter, a Government of India supported Line of Credit (LoC) of USD 800 million (USD Eight Hundred million only) for the purpose of financing development projects in the Republic of Maldives. Under the arrangement, financing of export of eligible goods, works and services from India, as defined under the agreement, would be allowed subject to their being eligible for export under the Foreign Trade Policy of the Government of India and whose purchase may be agreed to be financed by the Exim Bank under this agreement. Out of the total credit by Exim Bank under the agreement, goods, works and services of the value of at least 75 per cent of the contract price shall be supplied by the seller from India and the remaining 25 per cent of goods and services may be procured by the seller for the purpose of the eligible contract from outside India.

**2.** The Agreement under the LoC is effective from August 20, 2019. Under the LOC, the terminal utilization period is 60 months after the scheduled completion date of the project.

**3.** Shipments under the LoC shall be declared in Export Declaration Form as per instructions issued by the Reserve Bank from time to time.

**4.** No agency commission is payable for export under the above LoC. However, if required, the exporter may use his own resources or utilize balances in his Exchange Earners' Foreign Currency Account for payment of commission in free foreign exchange. Authorised Dealer Category- I (AD Category- I) banks may allow such remittance after realization of full eligible value of export subject to compliance with the extant instructions for payment of agency commission.

**5.** AD Category – I banks may bring the contents of this circular to the notice of their exporter constituents and advise them to obtain complete details of the LoC from the Exim Bank's office at Centre One, Floor 21, World Trade Centre Complex, Cuffe Parade, Mumbai 400 005 or from their website www.eximbankindia.in

**6.** The directions contained in this circular have been issued under section 10(4) and 11(1) of the Foreign Exchange Management Act (FEMA), 1999 (42 of 1999) and are without prejudice to permissions/ approvals, if any, required under any other law.

7. **A.P.(DIR SERIES) CIRCULAR NO. 8, DATED 7-11-2019**

**EXIM BANK'S GOVERNMENT OF INDIA SUPPORTED LINE OF CREDIT OF USD 30 MILLION TO GOVERNMENT OF REPUBLIC OF GHANA**

Export-Import Bank of India (Exim Bank) has entered into an agreement dated April 05, 2019 with the Government of the Republic of Ghana for making available to the latter, a Government of India supported Line of Credit (LoC) of USD 30 million (USD Thirty million only) for the purpose of financing rehabilitation and up-gradation of Potable Water System in Yendi, in the Republic of Ghana. Under the arrangement, financing of export of eligible goods, works and services from India, as defined under the agreement, would be allowed subject to their being eligible for export under the Foreign Trade Policy of the Government of India and whose purchase may be agreed to be financed by the Exim Bank under this agreement. Out of the total credit by Exim Bank under the agreement, goods, works and services of the value of at least 75 per cent of the contract price shall be supplied by the seller from India and the remaining 25 per cent of goods and services may be procured by the seller for the purpose of the eligible contract from outside India.

**2.** The Agreement under the LoC is effective from October 11, 2019. Under the LOC, the terminal utilization period is 60 months after the scheduled completion date of the project.

**3.** Shipments under the LoC shall be declared in Export Declaration Form as per instructions issued by the Reserve Bank from time to time.

**4.** No agency commission is payable for export under the above LoC. However, if required, the exporter may use his own resources or utilize balances in his Exchange Earners' Foreign Currency Account for payment of commission in free foreign exchange. Authorised Dealer Category- I (AD Category- I) banks may allow such remittance after realization of full eligible value of export subject to compliance with the extant instructions for payment of agency commission.

**5.** AD Category – I banks may bring the contents of this circular to the notice of their exporter constituents and advise them to obtain complete details of the LoC from the

Exim Bank's office at Centre One, Floor 21, World Trade Centre Complex, Cuffe Parade, Mumbai 400 005 or from their website www.eximbankindia.in.

**6.** The directions contained in this circular have been issued under sections 10(4) and 11(1) of the Foreign Exchange Management Act (FEMA), 1999 (42 of 1999) and are without prejudice to permissions/approvals, if any, required under any other law.

## CASE LAWS

**SUPREME COURT OF INDIA**
**Central Bureau of Investigation**
***vs.***
**ArvindKhanna**
CRIMINAL APPEAL NO. 1572 OF 2019
OCTOBER 17, 2019

**Applicable Sections:**
Section 23 read with Section 4 of the Foreign Contribution (Regulation) Act, 1976

**Decision :-**

High Court by impugned order held that amount received by respondent from his father who is NRI out of latter's personal funds through normal banking channels is outside purview of FCRA, as same cannot be said to be received from a 'foreign source', however, correctness of defence whether such amounts were received by respondent from his father or not is a serious factual dispute. It is not an admitted position, as recorded by High Court. High Court also committed an error in observing that, even otherwise, there is material to show that funds were indeed a gift from father of respondent and prosecution has neither disputed said fact as false nor alleged that funds in question did not belong to father of respondent. The said observation made by the High Court is also contrary to the record.

When it is mainly defence of respondent that funds were received from his father, burden is on him to prove that he received such funds from his father, as such, no permission was required. Even with regard to applicability of provisions under FCRA, 1976, findings are to be recorded after trial.

Accordingly, impugned order is set aside. It is open for trial court to proceed from stage at which proceedings were stopped and to decide same in accordance with law, uninfluenced by any findings and observations made by this Court or High Court.

## NOTIFICATION

- **NOTIFICATION NO. G.S.R. 498 (E) [NO. FEMA 5(R) 2/2019-RB (F.NO. 1 / 31 / EM / 2015)], DATED 16-7-2019**

**FOREIGN EXCHANGE MANAGEMENT (DEPOSIT) (AMENDMENT) REGULATIONS, 2019 - AMENDMENT IN REGULATION 6**

In exercise of the powers conferred by clause (*f*) of sub-section (3) of Section 6 and sub-section (2) of Section 47 of the Foreign Exchange Management Act, 1999 (42 of 1999) and in partial modification of its Notification No. FEMA 5(R)/2016-RB dated April 01, 2016, the Reserve Bank makes the following amendment in the Foreign Exchange Management (Deposit) Regulations, 2016, as amended from time to time, namely:—

**Short title and commencement**

**2.** (*i*) These Regulations may be called the Foreign Exchange Management (Deposit) (Amendment) Regulations, 2019.

(*ii*) They shall come into force with effect from the date of their publication in the Official Gazette.

**Amendment of the regulations**

**3.** Sub-regulation 3 of regulation 6 including all the words and expressions contained therein shall be deleted.

- **NOTIFICATION NO S.O. 3722(E) [F.NO. 1/14/EM/2015], DATED 16-10-2019**

**SECTION 6 OF THE FOREIGN EXCHANGE MANAGEMENT ACT, 1999 - CAPITAL ACCOUNT TRANSACTIONS - NOTIFIED DEBT INSTRUMENTS**

In exercise of the powers conferred by sub-section (7) of section 6 of the Foreign Exchange Management Act, 1999 (42 of 1999), the Central Government hereby determines the following instruments as debt instruments, namely:—

| | | |
|---|---|---|
| (*i*) | | Government bonds; |
| (*ii*) | | corporate bonds; |
| (*iii*) | | all tranches of securitisation structure which are not equity tranche; |
| (*iv*) | | borrowings by Indian firms through loans; |
| (*v*) | | depository receipts whose underlying securities are debt securities. |

**2.** Instruments specified below shall be considered as non-debt instruments, namely:-

| | |
|---|---|
| (*i*) | all investments in equity in incorporated entities (public, private, listed and unlisted); |
| (*ii*) | capital participation in Limited Liability Partnerships (LLPs); |
| (*iii*) | all instruments of investment as recognised in the FDI policy as notified from time to time; |
| (*iv*) | investment in units of Alternative Investment Funds (AIFs) and Real Estate Investment Trust (REITs) and Infrastructure Investment Trusts (InVITs); |
| (*v*) | investment in units of mutual funds and Exchange-Traded Fund (ETFs) which invest more than fifty per cent in equity; |
| (*vi*) | the junior-most layer (i.e. equity tranche) of securitisation structure; |
| (*vii*) | acquisition, sale or dealing directly in immovable property; |
| (*viii*) | contribution to trusts; |
| (*ix*) | depository receipts issued against equity instruments. |

**3.** All other instruments which are not specified in paragraphs (1) and (2) above, shall be deemed as debt instruments.

- **NOTIFICATION NO. G.S.R. 795(E) [NO. FEMA. 395/2019-RB (F.NO. 1/14/EM/2015)], DATED 17-10-2019**

**FOREIGN EXCHANGE MANAGEMENT (MODE OF PAYMENT AND REPORTING OF NON-DEBT INSTRUMENTS) REGULATIONS, 2019**

In exercise of the powers conferred by section 47 of the Foreign Exchange Management Act, 1999 (42 of 1999) and consequent to the Foreign Exchange Management (Non-Debt Instrument) Rules, 2019, the Reserve Bank makes the following regulations relating to mode of payment and reporting requirements for investment in India by a person resident outside India, namely:

**Short title and commencement**

**1. (** *a*) These regulations may be called the Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019.

(*b*) They shall come into force from the date of their publication in the Official Gazette.

**Definitions**

**2.** In these regulations, unless the context requires otherwise, —

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| (*a*) | 'Act' means the Foreign Exchange Management Act, 1999 (42 of 1999); |

| | | |
|---|---|---|
| (*b*) | | 'Rules' means Foreign Exchange Management (Non-Debt Instrument) Rules, 2019; |
| (*c*) | | The words and expressions used but not defined in these regulations shall have the same meanings respectively assigned to them in the Act or the Rules. |

**3. Mode of Payment and Remittance of sale proceeds:**

**3.1**

| **Schedule of the Rules** | **Instructions on Mode of payment and Remittance of sale proceeds** |
|---|---|
| **I. Schedule I (Purchase or sale of equity instruments of an Indian company by a person resident outside India)** | **A. Mode of payment**<br>(1) The amount of consideration shall be paid as inward remittance from abroad through banking channels or out of funds held in NRE/FCNR(B)/Escrow account maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016.<br>*Explanation* : The amount of consideration shall include:<br>(*i*) Issue of equity shares by an Indian company against any funds payable by it to the investor<br>(*ii*) Swap of equity instruments.<br>(2) Equity instruments shall be issued to the person resident outside India making such investment within sixty days from the date of receipt of the consideration.<br>*Explanation*: In case of partly paid equity shares, the period of 60 days shall be reckoned from the date of receipt of each call payment<br>(3) Where such equity instruments are not issued within sixty days from the date of receipt of the consideration the same shall be refunded to the person concerned by outward remittance through banking channels or by credit to his NRE/ FCNR (B) accounts, as the case may be within fifteen days from the date of completion of sixty days.<br>(4) An Indian company issuing equity instruments under this Schedule may open a foreign currency account with an Authorised Dealer in India in accordance with Foreign Exchange Management (Foreign currency accounts by a |

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| | person resident in India) Regulations, 2016.<br>**B. Remittance of sale proceeds**<br>The sale proceeds (net of taxes) of the equity instruments may be remitted outside India or may be credited to the NRE/ FCNR (B) of the person concerned. |
| **II. Schedule II (Investments by Foreign Portfolio Investors)** | **A. Mode of payment**<br>(1) The amount of consideration shall be paid as inward remittance from abroad through banking channels or out of funds held in a foreign currency account and/ or a Special Non-Resident Rupee (SNRR) account maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016.<br>Provided balances in SNRR account shall not be used for making investment in units of Investment Vehicles other than the units of domestic mutual fund.<br>(2) The foreign currency account and SNRR account shall be used only and exclusively for transactions under this Schedule.<br>**B. Remittance of sale proceeds**<br>The sale proceeds (net of taxes) of equity instruments and units of domestic mutual fund may be remitted outside India or credited to the foreign currency account or a SNRR account of the FPI.<br>The sale proceeds (net of taxes) of units of investment vehicles other than domestic mutual fund may be remitted outside India. |
| **III. Schedule III (Investments by Non-Resident Indian (NRI) or Overseas Citizen of India (OCI) on repatriation basis)** | **A. Mode of payment**<br>(1) The amount of consideration shall be paid as inward remittance from abroad through banking channels or out of funds held in a Non-Resident External (NRE) account maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016.<br>(2) The NRE account will be designated as an NRE (PIS) Account and the designated account shall be used exclusively for putting through transactions permitted under this Schedule. |

| | |
|---|---|
| | (3) Investment in units of domestic mutual fund shall be paid as inward remittance from abroad through banking channels or out of funds held in NRE/FCNR(B) account.<br>(4) Subscription to National Pension System shall be paid as inward remittance from abroad through banking channels or out of funds held in NRE/FCNR(B)/NRO account.<br>**B. Remittance of sale proceeds**<br>The sale proceeds (net of taxes) of equity instruments may be remitted outside India or may be credited to NRE (PIS) account of the person concerned.<br>The sale proceeds (net of taxes) of units of mutual funds and subscription to National Pension System may be remitted outside India or may be credited to NRE (PIS)/FCNR(B)/NRO account of the person concerned at the option of the NRI/OCI investor. |
| **IV. Schedule IV (Investment by NRI or OCI on non-repatriation basis)** | **1. Purchase or sale of equity instruments of an Indian company or units or contribution to the capital of a LLP by Non-Resident Indian (NRI) or Overseas Citizen of India (OCI) on Non-repatriation basis.**<br>**A. Mode of Payment**<br>The amount of consideration shall be paid as inward remittance from abroad through banking channels or out of funds held in NRE/FCNR(B)/NRO account maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016.<br>**B. Sale/maturity proceeds**<br>(1) The sale/maturity proceeds (net of applicable taxes) of equity instruments or units or disinvestment proceeds of a LLP shall be credited only to the NRO account of the investor, irrespective of the type of account from which the consideration was paid;<br>(2) The amount invested in equity instruments of an Indian company or the consideration for contribution to the capital of a LLP and the capital appreciation thereon shall not be allowed to be repatriated abroad.<br>2. **Investment in a firm or a proprietary concern.** |

| | |
|---|---|
| | **A. Mode of payment**<br>The amount of consideration shall be paid as inward remittance from abroad through banking channels or out of funds held in NRE/FCNR(B)/NRO account maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016.<br>**B. Sale/maturity proceeds**<br>(1) The disinvestment proceeds shall be credited only to the NRO account of the person concerned, irrespective of the type of account from which the consideration was paid;<br>(2) The amount invested for contribution to the capital of a firm or a proprietary concern and the capital appreciation thereon shall not be allowed to be repatriated abroad. |
| **V. Schedule V (Investment by other non-resident investors)** | **A. Mode of Payment**<br>The amount of consideration shall be paid out of inward remittances from abroad through banking channels.<br>**B. Remittance/credit of sale/ maturity proceeds**<br>The sale/ maturity proceeds (net of taxes) may be remitted abroad |
| **VI. Schedule VI (Investment in a Limited Liability Partnership)** | **A. Mode of payment**<br>Payment by an investor towards capital contribution of an LLP shall be made by way of an inward remittance through banking channels or out of funds held in NRE or FCNR(B) account maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016.<br>**B. Remittance of disinvestment proceeds**<br>The disinvestment proceeds may be remitted outside India or may be credited to NRE or FCNR(B) account of the person concerned. |
| **VII. Schedule VII (Investment by a Foreign Venture Capital Investor)** | **A. Mode of payment**<br>(1) The amount of consideration shall be paid as inward remittance from abroad through banking channels or out of funds held in a foreign currency account and/or a Special Non-Resident Rupee (SNRR) account maintained in accordance with the Foreign Exchange Management |

| | |
|---|---|
| | (Deposit) Regulations, 2016.<br>(2) The foreign currency account and SNRR account shall be used only and exclusively for transactions under this Schedule.<br>**B. Remittance of sale/maturity proceeds**<br>The sale/maturity proceeds (net of taxes) of the securities may be remitted outside India or may be credited to the foreign currency account or a Special Non-resident Rupee Account of the FVCI. |
| **VIII. Schedule VIII (Investment by a person resident outside India in an Investment Vehicle)** | **A. Mode of payment**<br>The amount of consideration shall be paid as inward remittance from abroad through banking channels or by way of swap of shares of a Special Purpose Vehicle or out of funds held in NRE or FCNR(B) account maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016.<br>**B. Remittance of sale/maturity proceeds**<br>The sale/maturity proceeds (net of taxes) of the units may be remitted outside India or may be credited to the NRE or FCNR(B) account of the person concerned. |
| **IX. Schedule X (Issue of Indian Depository Receipts)** | **A. Mode of Payment**<br>NRIs or OCIs may invest in the IDRs out of funds held in their NRE/FCNR(B) account, maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016.<br>**B. Remittance of sale/maturity proceeds**<br>Redemption/conversion of IDRs into underlying equity shares of the issuing company shall be a compliance the Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004. |

**3.2 Issue of Convertible Notes by an Indian start-up company:**

A start-up company issuing convertible notes to a person resident outside India shall receive the amount of consideration by inward remittance through banking channels or by debit to the NRE/FCNR(B)/Escrow account maintained by the person concerned in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016.

Repayment or sale proceeds may be remitted outside India or credited to NRE/FCNR(B) account maintained by the person concerned in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016.

**4. Reporting Requirements:**

The reporting requirement for any Investment in India by a person resident outside India shall be as follows:

| | | |
|---|---|---|
| (1) | | **Form Foreign Currency-Gross Provisional Return (FC-GPR):** An Indian company issuing equity instruments to a person resident outside India and where such issue is reckoned as Foreign Direct Investment, defined under the rules, shall report such issue in Form FC-GPR, not later than thirty days from the date of issue of equity instruments. Issue of 'participating interest/rights' in oil fields shall be reported in Form FC-GPR. |
| (2) | | **Annual Return on Foreign Liabilities and Assets (FLA):** An Indian Company which has received FDI or an LLP which has received investment by way of capital contribution in the previous year including the current year, shall submit form FLA to the Reserve Bank on or before the 15th day of July of each year. |
| | | *Explanation*: Year for this purpose shall be reckoned as April to March. |
| (3) | | **Form Foreign Currency-Transfer of Shares (FC-TRS):** |

(*a*) Form FCTRS shall be filed for transfer of equity instruments in accordance with the rules, between:

*i.* a person resident outside India holding equity instruments in an Indian company on a repatriable basis and person resident outside India holding equity instruments on a non-repatriable basis; and

*ii.* a person resident outside India holding equity instruments in an Indian company on a repatriable basis and a person resident in India,

| | | |
|---|---|---|
| | | The onus of reporting shall be on the resident transferor/transferee or the person resident outside India holding equity instruments on a non-repatriable basis, as the case may be. |
| | | **Note:** Transfer of equity instruments in accordance with the rules by way of sale between a person resident outside India holding equity instruments on a non-repatriable basis and person resident in India is not required to be reported in Form FC-TRS. |

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| (*b*) | Transfer of equity instruments on a recognised stock exchange by a person resident outside India shall be reported by such person in Form FC-TRS. |
| (*c*) | Transfer of equity instruments prescribed in Rule 9(6) of the Rules, shall be reported in Form FC-TRS on receipt of every tranche of payment. The onus of reporting shall be on the resident transferor/transferee. |
| (*d*) | Transfer of 'participating interest/rights' in oil fields shall be reported Form FC-TRS. |

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| | The form FCTRS shall be filed within sixty days of transfer of equity instruments or receipt/remittance of funds whichever is earlier. |
| (4) | **Form Employees' Stock Option (ESOP):** An Indian company issuing employees' stock option to persons resident outside India who are its employees/directors or employees/directors of its holding company/joint venture/wholly owned overseas subsidiary/subsidiaries shall file Form-ESOP, within 30 days from the date of issue of employees' stock option. |
| (5) | **Form Depository Receipt Return (DRR):** The Domestic Custodian shall report in Form DRR, the issue/transfer of depository receipts issued in accordance with the Depository Receipt Scheme, 2014 within 30 days of close of the issue. |
| (6) | **Form LLP (I):** A Limited Liability Partnerships (LLP) receiving amount of consideration for capital contribution and acquisition of profit shares shall file Form LLP (I), within 30 days from the date of receipt of the amount of consideration. |
| (7) | **Form LLP (II):** The disinvestment/transfer of capital contribution or profit share between a resident and a non-resident (or vice versa) shall be filed in Form LLP(II) within 60 days from the date of receipt of funds. The onus of reporting shall be on the resident transferor/transferee. |
| (8) | **LEC(FII):** The Authorised Dealer Category I banks shall report to the Reserve Bank in Form LEC (FII) the purchase/transfer of equity instruments by FPIs on the stock exchanges in India. |
| (9) | **LEC(NRI):** The Authorised Dealer Category I banks shall report to the Reserve Bank in Form LEC (NRI) the purchase/transfer of equity instruments by Non-Resident Indians or Overseas Citizens of India on stock |

| | | |
|---|---|---|
| | | exchanges in India. |
| (10) | | **Form InVI:** An Investment vehicle which has issued its units to a person resident outside India shall file Form InVI within 30 days from the date of issue of units. |
| (11) | | **Downstream Investment** |

*a*. An Indian entity or an investment vehicle making downstream investment in another Indian entity which is considered as indirect foreign investment for the investee Indian entity in terms of the Rules, shall notify the Secretariat for Industrial Assistance, DPIIT within 30 days of such investment, even if equity instruments have not been allotted, along with the modality of investment in new/existing ventures (with/without expansion programme).

*b*. Form DI: An Indian entity or an investment Vehicle making downstream investment in another Indian entity which is considered as indirect foreign investment for the investee Indian entity in terms of Rule 22 of the Rules shall file Form DI with the Reserve Bank within 30 days from the date of allotment of equity instruments.

(12) **Form Convertible Notes (CN)**:

| | | |
|---|---|---|
| *a*. | | The Indian start-up company issuing Convertible Notes to a person resident outside India shall file Form CN within 30 days of such issue. |
| *b*. | | A person resident in India, who may be a transferor or transferee of Convertible Notes issued by an Indian start-up company shall report such transfers to or from a person resident outside India, as the case may be, in Form CN within 30 days of such transfer. |
| | | Provided, the format, periodicity and manner of submission of such reporting shall be as prescribed by Reserve Bank in this regard. |
| | | Provided further that unless otherwise specifically stated in these regulations all reporting shall be made through or by an Authorised Dealer bank, as the case may be. |

**Delays in reporting**

**5.** The person/entity responsible for filing the reports provided in Regulation 4 above shall be liable for payment of late submission fee, as may be decided by the Reserve Bank, in consultation with the Central Government, for any delays in reporting.

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# SALIENT FEATURES ON INSOLVENCY AND BANKRUPTCY CODE-2016

***Adv. ArpitMathur***
***Jaipur***

**INTRODUCTION**

- It is an act to consolidate and amend laws relating to reorganization & insolvency resolution in a time bound manner for maximization of value of assets of person
- The insolvency & Bankruptcy code, 2016 after being passed by Parliament received assent of President on 28/05/2016.
- Implementation of the Code commenced on 1/12/2016
- It became operational gradually with notification of parts of Code over a period of time
- Provision of the Code relating to Individual & firm not yet notified and effective
- Already seen two amendment on 23/11/2017 and 06/06/2018
- Applicable to whole of India except Part –III of code which is not applicable to state of J&K

**Background, object & Vision of the Code**

- The Vision of Code as per press release, is to encourage entrepreneurship and innovation.
- Business is like an organization. An organ can fail or become sick after being healthy.
- Bankruptcy laws accept that some business can fail and it allows them to make fresh start
- It is based on declining stage of an organization and accepts corporate death. If an organization is not viable and likely to be perennially sick, best course is to allow it to have natural death.
- Indian Banks – Neck Deep in Bad loans
- Gross NPA – 4 Lakh crores & huge amount of Restructured Loans
- Total Stressed Assets – 11% of Total Lending
- Bad Loans has grown from 3.49% (2013) to 8.3% (2015)
- Corporate Bad Loans – 56% - Bad Loans of Indian Banks.

**Existing Insolvency Forums prior to the CODE**

- ❖ Prior to enactment of the Insolvency and Bankruptcy Code, 2016 (" The Code") the existing framework was governed by :-
  - ➢ The Companies Act, 1956 and the Companies Act, 2013;
  - ➢ The Sick Industrial Companies (Special Provisions) Act, 1985;
  - ➢ The Recovery of Debts Due to Banks and Financial Institutions ("RDDBFI") Act, 1993;
  - ➢ The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest ("SARFAESI") Act, 2002;
  - ➢ The Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920;
  - ➢ Regulations, directions, circulars, rules, notifications and guidelines of the Reserve Bank of India ("RBI").

**Inception of Insolvency Laws in India**

- Presidency Towns Insolvency Act, 1909
- Provincial Insolvency Act, 1920
- SICA, 1985
- RDDBI, 1993
- SARFAESI, 2002
- COMPANIES ACT, 2013
- IBC, 2016

**Understanding the Code**

***Meaning of Code***

"Code" is usually known as a collection or compendium of laws. It refers to a systematic and comprehensive compilation of laws, rules or regulations that are consolidated and classified according to a particular subject matter.

**Stages**

- Insolvency;
- Bankruptcy; andLiquidation
  - ✓ Insolvency is the inability of a person or corporation to pay their bills as and when they become due and payable
  - ✓ Bankruptcy is when a person is declared incapable of paying their due and payable bills.
  - ✓ Liquidation is the process of winding up a corporation or incorporated entity.

**Scope and Structure**

**SCOPE**

- Insolvency;
- Liquidation;
- Voluntary Liquidation (solvent insolvency); and
- Bankruptcy

**STRUCTURE**

The Code has 255 sections which are divided into 5 Parts and Schedules as given below

Part I – Preliminary (Definitions)

Part II- Insolvency Resolution and Liquidation for Corporate Persons

Part III- Insolvency Resolution and Bankruptcy for individuals and Partnership Firms

Part IV- Regulation of Insolvency Professionals, Agencies and Information Utilities

Part V- Miscellaneous, (also enables amendments in other statutes)

Schedules- (11 Schedules)

Provides for amendments to be carried out in other statutes

**Impact on other statutes**

**Repealed Acts**

- Presidency Town Insolvency Act, 1909
- Provisional Insolvency Act, 1920
- Sick Industrial Companies (Special Provisions) Repeal Act, 2003

**Amendments in other Acts**

- Recovery of Debts Due to banks and financial institutions Act, 1993
- Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002
- Companies Act, 2013

**Benefits of the Code**

- Earlier different forums like High Courts, CLB, BIFR & DRT courts dealt with similar issues
- It was resulting into overlapping of jurisdiction resulting with delays and complexities in the process.
- The Code attempts to overcome this and reduce burden of Courts.
- Litigation for Corporate insolvency and insolvency of LLPs will be dealt by NCLT and that of individual & partnership firm by DRT.
- It can also ensure quicker resolution of NPA problems.

**Key Features**

- Applicable to both corporate and non-corporate persons;
- Allow creditors, whether secured; unsecured; financial or operational; domestic or international to initiate a resolution processes
- Establishes time-bound moratorium on acceleration and enforcement of debts against the company;
- Code not applicable to Financial Service providers like Banks, FIs, insurance Companies , ARC, Mutual Funds , Pension Funds
- NBFC not ipso facto excluded.
- The resolution professionals can replace the existing management during insolvency proceedings;
- Provides for time-bound viability assessment mechanisms, liquidation processes and distribution waterfalls;
- Provides for penalties on promoters for asset diversion leading up to liquidation;
- An inability to pay debt will no more be a ground for winding up under the Companies Act

**APPLICABILITY**

- Any Company incorporated under the Companies Act, 2013 or under any provisions
- Any other Company governed by any Special Act
- Any LLP incorporated under the LLP Act, 2008
- Any other body, as notified by the Central Government
- Partnership Firms
- Individuals

**WHO CAN INVOKE?**

**Financial Creditor (Sec.7)**

- Any person to whom a financial debt is owed &
- Includes a person to whom such debt legally assigned or transferred

**Operational Creditor (Sec.9)**

- A person to whom an operational debt is owed &
- Includes any person to whom such debt legally assigned or transferred

**Corporate Debtor (Sec.10)**

- A corporate person who owes a debt to any person

**INVOKING PROVISIONS OF CODE**

**DEFAULT**

| In case of Co. & LLP | In case of Partnership & Individual |
|---|---|
| Minimum amount of ` 1 lakh | Minimum amount of ` 1 thousand |

Minimum amount of ` 1 lakh & ` 1 thousand can be increased up to "1 Cr & "1 lakh respectively by CG

- ❖ Where any Company or LLP commits-
  A default in paying its-
- ✓ Financial debt
- ✓ Operational debt

Then a financial creditor/ operational creditor/ Company & LLP itself may file an application, for initiating corporate insolvency resolution process with the Adjudicating Authority.

**Adjudicating Authority**

- ➢ **NCLT**
  - Deals with insolvency matters of Co. & LLP
  - Appeal to NCLAT
- ➢ **Debt Recovery Tribunal**
- Deals with insolvency matters of individual & Partnership firm
- Appeal to DRAT

**GROUNDS FOR REJECTION**

Adjudicating Authority within 14 days of receipt of application, by an order –

Reject the application if: -

- It is incomplete
- Default occurred
- Default not occurred

Admit the application, if it is complete.

**NOTICE OF REJECTION**

Adjudicating Authority shall before rejecting application, give notice to applicant to rectify defects in application within 7 days from the date of receipt of such notice

**TIME LINE**

180 days + 90 days (Maximum) = 270 days

**In case of Fast Track**: -

90 days + 45 days (one time) = 135 days

Adjudicating Authority after admission of application shall, by an order

- Declare a Moratorium
- Cause a Public Announcement
- Appoint Interim Resolution Professional

**Broad CIRP-Process**

- Admission of application and appointment of Interim Resolution Professional
- Collation of claims and constitution of committee of creditors by Interim Resolution Professional
- Appointment of Resolution Professional in the creditors meeting held within 7 days of constitution of committee of creditors
- Resolution Professional to prepare Information Memorandum
- Resolution Applicant to prepare (on the basis of Information Memorandum) and submit resolution plan to Resolution Professional for examination & further submission for approval of committee of creditor
- Resolution plan approved by committee
  - ✓ NCLT approves plan
  - ✓ NCLT rejects plan
- Resolution plan rejected by committee
  - ✓ Liquidation process starts

**MORATORIUM EFFECT**

Adjudicating Authority shall by order prohibit the following:

- ✓ Institution/continuation/proceedings of suits including execution of any judgment, decree or order in any Court
- ✓ Transferring, encumbering, alienating or disposing of assets/legal right/beneficial interest
- ✓ Any action to Foreclosure, Recover or enforce any security interest created including any action under SARFAESI Act, 2002
- ✓ Recovery of any property by owner or lessor where such property is occupied

**Objective**

- ✓ Maximizing value of the Entity to Continue Operation
- ✓ No additional stress on Business
- ✓ Supply of essential goods or services to the Corporate Debtor as may be specified shall not be terminated or suspended or interrupted
- ✓ Central Government in consultation with any financial regulator may specify such transactions.

**MORATORIUM PERIOD**

- Order of Moratorium made by Adjudicating Authority;
  Start from Date of Admission of Application;
- Cease to effect
- Date of Approval of Resolution Plan or Liquidation Order.

**PUBLIC ANNOUNCEMENT**

- ➢ Public announcement contain following information:
- ➢ Name & address of corporate debtor
- ➢ Name of authority with which Corporate Debtor is incorporated or registered
  - Last date for submission of claims, as may be specified
  - Details of Interim Resolution Professional who shall be vested with
    - Management of Corporate Debtors
    - Responsible for receiving claims
  - Penalties for false or misleading claims
  - Date on which the Insolvency Resolution Process close (i.e. 180 days from the date of admission of application)
  - Public Announcement shall be made in such manner as may be specified

**INTERIM RESOLUTION PROFESSIONALS**

Appointment by Adjudicating Authority within 14 days from Admission of Application shall not exceed 30 days from date of Appointment.

**Once IRP is appointed:**

- Management of affairs of Corp. Debtor shall vest with IRP
- Powers of BOD/ Partners (LLP) shall stand suspended & will be exercised by IRP
- Officers & Managers of Corp. Debtor shall report to IRP
- FI maintaining accounts of Corp. Debtor shall follow instructions of IRP

**RESOLUTION PROFESSIONAL**

Appointment by Committee of Creditors may in their first meeting

- within 7 (Seven) days of Constitution of Committee
- Resolve to appoint the Interim Resolution Professional as a Resolution Professional (OR)
- Replace the Interim Resolution Professional by another Resolution Professional.

Resolution Professional shall conduct the entire Insolvency Resolution Process and manage the operations of the company during the corporate Insolvency Resolution Process Period.

Resolution Professional shall exercise all such powers and duties as are vested on the Interim Resolution Professional.

All Meetings of the Committee of Creditors shall be conducted by the Resolution Professional

**DUTIES OF RESOLUTION PROFESSIONAL**

**MEETING OF THE COMMITTEE OF CREDITORS**

- Convene & attend all meetings
- Present all resolution plans at the meetings

**DOCUMENTS**

- Maintain an updated list of claims
- Prepare the information memorandum

**RIGHTS**

- Take immediate custody and control of all the assets including business records of the company/LLP
- Represent and act on behalf of the company/LLP with third parties

**Powers of IRP**

IRP has been vested with the powers to-

- Appoint accountants, legal counsels who may provide specialist advice to the IRP;
- Enter into contracts on behalf of the corporate debtor or to amend/ modify the contracts which were entered into before the commencement of the CIRP;
- Raise interim finance
- Issue instructions to the personnel of the corporate debtor to keep the corporate debtor as a going concern;

- Take all such actions as are necessary to keep the corporate debtor as a going concern.

IRP has to manage the operations of the corporate debtor as a going concern to enable him to protect and preserve the value of the property of the corporate debtor.

The IRP may sell unencumbered assets of the corporate debtor, other than in the ordinary course of business, if he is of the opinion that such a sale is necessary for a better realization of value.

**COMMITTEE OF CREDITORS**

The Interim Resolution Professional shall -

- Collate all claims & Determine of financial position
- Constitute a Committee of Creditors– comprising of all Financial Creditors
  All decisions of Committee taken by vote of not less than 66%
- If financial creditor is related party of corporate debtor, shall not have any right of representation, participation or voting
- Position of Financial Creditor- Consortium Agreement:
  - Each Financial Creditor shall be the part of Committee.
  - Voting shares shall be on the basis of Financial Debts.

Position of Financial Creditor when he is an Operational Creditor:

- shall be considered Financial Creditor to the extent of Financial Debts;
- Voting Shares to the extent of Financial Debts;
- Operational Creditor to the extent of Operational Debt;

Assignment of Operational Debt

- If an Operational Creditor has assigned or legally transferred any Operational Debt to a Financial Creditor, the Assignee of Transferee shall be considered as an Operational Creditor to the extent of such assignment or legal transfer.

Determination of Voting Share by Financial Creditor

- IBC Board may specify the manner of determining of voting share.

**RESOLUTION PLAN**

- Preparation of Information Memorandum for formulating a Resolution Plan
- Providing to Resolution Applicant access to all relevant information
- Resolution Applicant will submit a Resolution Plan to the Resolution Professional prepared as per Information Memorandum
- Examination of Resolution Plan
- Presentation of RP to COC for Approval
- Submitting Resolution Plan to Adjudicating Authority

- Adjudicating Authority may by order approve the Resolution Plan;
- Moratorium Period ends
- R P will be binding on the Corp. Debtor, its Employees, Members, Creditors, Guarantors & other Stakeholders
- If Resolution Plan not approved or
    - Not ready within 180 days or
    - Adjudicating Authority rejects the Resolution Plan
- It will pass a Liquidation Order.
- R P will act as a Liquidator and all the powers of the Board of Directors will vest with the Liquidator

**BROAD LIQUIDATION PROCESS**

- Appointment of Liquidator
- Formation of Liquidation Estate
- Consolidation of claims
- Verification of claims
- Admission or Rejection of claims
- Determination of value of claims
- Appeal by the Creditor to the NCLT, within 14 days of rejection of claims
- Liquidator to scrutinise Preferential, under-valued and extortionate credit transactions
- Distribution of assets and dissolution of Corporate Debtor

**Waterfall Mechanism**

- Insolvency resolution and liquidation cost
- Secured creditor (in case he has relinquished security) + Workmen's dues (for period of 24 months preceding liquidation commencement date)
- Wages and unpaid dues to employees (other than workmen) for a period of 12 months preceding liquidation commencement date
- Unsecured creditors
- Central and State government dues + Secured creditor for an unrealised amount for enforcing security interest
- Any remaining debts or dues
- Preference shareholders, if any
- Equity shareholders or partners, as the case may be

- In case of liquidation, the asset of the corporate debtor will be sold and the proceeds will be distributed amongst the creditors in the following order of priority:-

**Key Benefits of the CODE**

- Time bound settlement of Insolvency.
- Banks & Asset reconstruction companies immediate gainers
- Comprehensive coverage- Companies, LLP, Individuals & more can be added
- Database of Serial Defaulters
- Protect workers

**Certain Grey Areas**

Not a Magic wand – Benefits will follow after 3-5 years from now.

- To create Large pool of Insolvency Professionals.
- Draft Procedural Rules for
- Insolvency Professionals
- Information Utilities
- Order of priority to Distribute Assets
- Secured Creditors – why not up to Collateral Value?
- Unsecured creditors have priority over Trade Creditors?
- Government Dues – after unsecured creditors?
- Formation of Multiple Information Utilities – Information about a Company may not be available through a Single IUs
- Insolvency & Bankruptcy Fund- manner of usage of the Fund?

**Opportunity for Professionals**

- Interim Resolution Professional
- Resolution Professional
- To prepare Resolution plan
- To Represent
  - Financial Creditor;
  - Operational Creditor;
  - Corporate Debtor
  - before NCLT- DRT & NCLAT- DRAT
- To represent the Winding Up cases before the Tribunal
- To prepare scheme & seek approval from Tribunal for Revival & Rehabilitation of Sick Cos.

**Recent Issues**

**(i)On account of second Amendment Act, 2018, w.e.f. 06.06.2018**

- Home buyers can initiate corporate insolvency process against builder or developer as financial creditor (Explanation to sec. 5(8) (7) )
- Winding up proceedings pending with High Court can been transferred to NCLT {Proviso to sec. 434(1) (c) of Companies Act.}
- Civil court not to have jurisdiction when NCLT or IBBI has jurisdiction (Sec. 231 )
- Provision of Limitation Act, 1963 shall, as far as may be, apply to the proceedings or appeal before NCLT / NCLAT, DRT / DRAT (Sec. 238A )
- Operational creditor can be punished with fine or imprisonment if it willfully or knowingly conceals the fact that corporate debtor had informed about existence of dispute or about receipt of payment. (Ses.76)

***(ii)* On account of Amendment Act, 2019, w.e.f. 05.08.2019**

- A resolution plan may include provisions for restructuring of the corporate debtor, including by way of merger, amalgamation and demerger. {Sec. 5 (26)}
- Adjudicating Authority shall record its reason in writing if it has not ascertained existence of default and passed order under section 7(5) {Sec. 7(4)}
- Corporate insolvency resolution process shall mandatorily be completed within 330 from the date of its commencement date including the granted extended time period and time taken for legal proceedings. If not completed it shall be completed within 90 days of date of this amended Act. {a insertion of section proviso to section 12 (3)}
- Authorized representative on behalf of all the financial creditors can cast their vote {Sec. 25A( 3) & (3A)}
- Provides the quantum of payments of debts of operational creditors in the manner as prescribed by the Board (Sec. 30 -substitution of clause (b) by new clause and insertion of explanations)
- Insertion of word "including the Central Government, State Government and any local authority to whom a debt is due in form of dues under any law …….under the Statutory dues" in section 31 (1) after the words members and creditors ( Sec. 31)
- Explanation inserted to declared that the committee of creditors may take the decision to liquidate the corporate debtor, any time after its constitution under section 21 (1) and before the confirmation of resolution plan, including at any time before the preparation of the information memorandum (Sec 31)

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# JUDGMENTS

## IN THE HIGH COURT OF JUDICATURE AT PATNA

**Civil Writ Jurisdiction Case No.2259 of 2018**
**02 July 2019**

BIHAR INDUSTRIAL AREA DEVELOPMENT AUTHORITY, PATNA
....Petitioner/s

**VERSUS**

COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX, BIHAR & ORS
....Respondent/s

**For the Petitioner (S):** Mr DV Pathy
**For the Respondent (S):** Mr Satya Prakash Tripathy

***The Patna High Court has recently held that if the service tax burden has already been shifted to the customers, the assessee cannot claim a refund of the same since it would amount to unjust enrichment. The petitioner had filed a refund application. However, the service tax department denied the claim under the provisions of the Finance Act, 1994 on the ground that the burden has been shifted by the petitioner on the customers.***

**HONOURABLE MR. JUSTICE JYOTI SARAN**
**HONOURABLE MR. JUSTICE PARTHA SARTHY**

1. Heard Mr. D.V. Pathy, learned counsel for the petitioner and Mr. Rajesh Kumar Verma, learned counsel for the Central Excise and Service Tax Department, the respondents herein.

2. The petitioner is aggrieved by the order dated 06.10.2017 passed by the Assistant Commissioner, G.S.T., Patna Central, Patna whereby the claim for refund of service tax made by the petitioner under the provisions of Finance Act, 1994 (hereinafter referred to as 'the Act') has been rejected on merits as well as on grounds that the

burden has been shifted by the petitioner on the customers i.e the service recipient. The Assistant Commissioner has relied upon the Constitution Bench judgment of the Supreme Court rendered in the case of **Mafatlal Industries versus Union of India** since reported in **(1997) 5 SCC 536** to hold that the claim raised by the petitioner the burden of which has been shifted to the service recipient if allowed, would amount to unjust enrichment.

3. The claim relates to the service tax deposited by the petitioner for the period 2007-16 and the reason for such belated raising of grievance as advocated by Mr. Pathy is, that in view of the provisions of Section 104 of 'the Act', the services provided or agreed to be provided for a long term lease of 30 years or more was not taxable but the observations of the statutory authority in the order impugned mentions that the petitioner did not submit documentary evidence to espouse his cause.

4. Be that as it may, the fact remains that the service tax for the period in question was deposited by the petitioner but after realizing it from its customers. This fact is not disputed. It is also not in dispute that no refund application was filed by these customers.

5. In such circumstances noted, we find no infirmityin the opinion recorded by the statutory authority to hold that ifthe burden of the service tax has been shifted on the customers in view of the legal position settled by the Supreme Court in the case of **Mafatlal** (supra) the petitioner can not be a beneficiary thereof as any refund to the petitioner would amount to unjust enrichment.

6. For the discussions above and finding no infirmity in the order impugned of the statutory authority put to challenge we dispose of this writ petition.

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## IN THE HIGH COURT OF DELHI AT NEWDELHI

**W.P. (C) 6900/2018**
**19 November 2019**

BHARATIYA VITTA SALAHKAR SAMITI & ANR ….Petitioner
**VERSUS**
UNION OF INDIA & ORS ….Respondent

**For the Petitioner (S):**Mr. PuneetAgrawal with Ms. ParviSinha and Mr. Bharat Agrawal
**For the Respondent (S):**Mr. Harpreet Singh, Ms. SuhaniMathur and Mr. Ankit Singh, Mr. VikasMahajan, Mr. AakashVarma, Mr. Prajesh V.S. and Mr.Anil Kumar.

***The Delhi High Court has directed the Goods and Services Tax (GST) Council, the Central Government to consider the formulation of appropriate amendments in the Central Goods and Services Tax (CGST) Act.***
***Among the several issues raised by the Petitioners, the issue of the appointment of Advocates and Chartered Accountants for appointment as Members was also considered at para 10 of the Order. It was observed by the High Court that decision of the Supreme Court in the case of Roger Mathew clearly shows that the said decision would have a serious bearing on the challenge raised by the Petitioner in the present case.***

**HON'BLE MR. JUSTICE VIPIN SANGHI**
**HON'BLE MR. JUSTICE SANJEEV NARULA**

1. The petitioner has preferred the present writ petition raising a challenge to Section 109 of the Central Goods and Services Tax Act (CGST) and Section 109 of the Delhi Goods and Services Tax Act (DGST) as being ultra vires. The petitioner also assails the Constitutional vires of Section 110 of the CGST and Section 110 of the DGST Act. The petitioner seeks a direction to the respondents to not take steps for appointment and/ or the constitution of the Goods and Service Tax Appellate Tribunal (GSTAT) in terms of the aforesaid provisions till the same are brought in line with the settled principles regarding appointment of members and constitution of Benches, in order to ensure Rule of Law and in line with separation of powers.
2. On 02.05.2019, this Court directed that the respondents shall not, without prior intimation to this Court, proceed to appoint persons to the GST Appellate Tribunal

till the next date. The interim order was made absolute till the disposal of the writ petition on26.07.2019.

3. In the meantime, High Court of Judicature at Madras has rendered its decision in a batch of writ petitions, including W.P. NO. 21147/ 2018, preferred by the Revenue Bar Association (Chennai), whereby the Section 110(1)(b)(iii) of the GST Act – which states a member of Indian Legal Services, who has held a post not less than Additional Secretary for a period of three years, can be appointed as a Judicial Member in GSTAT, has been struck down. The High Court has also struck down Section 109(3) and 109(9) of CGST Act, 2017, which prescribes that the Tribunals shall consist of one Judicial Member, one Technical Member (Centre) and oneTechnical Member (State). The High Court has also recommended to the Parliament that it must consider amendment of the relevant Section, to include Lawyers to be eligible to be appointed as Judicial Members to the Appellate Tribunal, in view of the issues which are likely to arise for adjudication under the CGST Act and in order to maintain uniformity in various statutes.
4. Mr. Harpreet Singh submits that the Government has decided to challenge the said decision before the SupremeCourt.
5. Very recently i.e. on 13.11.2019, the Supreme Court has rendered its Constitution Bench Judgment in ***Rojer Mathew v. South Indian Bank Ltd. &Ors***., Civil Appeal No. 8588/2019. In this decision, the Supreme Court considered the Constitutionality of Part XIV of the Finance Act, 2017 and of the rules framed in consonancetherewith.
6. The Supreme Court, inter alia, considered the issue regarding the need to rationalize the administration of Tribunals, especially conditions of service, mode of appointment, security of tenure and requisite qualifications of Member and Presiding Officers of various Tribunals. The issue with regard to the growing menace of pendency before the Supreme Court arising from direct statutory appeals from orders of such Tribunals was also considered. The Supreme Court, in paragraph 92 of the majority decision crystallized the issues which arose before it, asfollows:

> *"92. In light of these arguments put forth by learned Counsels and the suggestions of by the Amicus Curiae, the following issues arise for our consideration:*
> *I. Whetherthe„FinanceAct,2017"insofarasitamendscertain other enactments and alters conditions of service of persons manning different Tribunals can be termed as a „money bill" under Article 110 and consequently is validlyenacted?*
> *II. Iftheanswertotheaboveisintheaffirmativethen Whether*

*Section 184 of the Finance Act, 2017 is unconstitutional on account of Excessive Delegation?*

*III. If Section 184 is valid, Whether Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2017 are in consonance with the Principal Act and various decisions of this Court on functioning ofTribunals?*

*IV. Whether there should be a Single Nodal Agency for administration of all Tribunals? V. Whether there is a need for conducting a Judicial Impact Assessment of all Tribunals in India?*

*VI. Whether judges of Tribunals set up by Acts of Parliament under Articles 323-A and 323-B of the Constitution can be equated in „rank" and „status" with Constitutional functionaries?*

*VII. Whether direct statutory appeals from Tribunals to the Supreme Court ought to bedetoured?*

*VIII. Whether there is a need for amalgamation of existing Tribunals and setting up ofbenches."*

7. So far as the first issue is concerned, the same stands referred to a Larger Bench of Seven Hon'ble Judges. The other issues have been considered and answered by the SupremeCourt.
8. We may observe that the issue regarding the constitution of Appellate Tribunal under the CGST Act was not before the Supreme Court, since the Supreme Court was dealing with several issues arising before it in the context of the Finance Act, 2017, whereas the CGST Act was passed by the Parliament on 12.04.2017 w.e.f. 01.07.2017. However, a perusal of the decision of the Supreme Court clearly shows that the said decision would have a serious bearing on the challenge raised by the petitioner in the present caseaswell.ThedecisionrenderedbytheSupremeCourtisbindingonall concerned and the respondents are also bound to ensure compliance therewith, not only in respect of the Tribunals considered by it, but in respect of the Appellate Tribunals constituted under the CGSTAct.
9. We, therefore, direct the respondents and particularly respondent Nos. 2,3 and 4 to examine the position as emerging from the decision in ***Rojer Mathew*** (supra) and to consider formulation of appropriate amendments in the CGST Act so that the provisions of the said Act do not continue to fall foul of the saiddecision.

10. The petitioner has highlighted, what according to it, are the infirmities in Section 109 and 110 of the CGST and DGST Act, which are para materia. These infirmities, as pointed out by the petitioner are thefollowing:

> *"a. The number of technical members on the bench are always two, which exceeds the number of judicial member being one (bench would comprise of three members), and is violative of para 120(xiii) in* ***Madras Bar Association v UOI 2010 11 SCC 1***
>
> *b. Appointment of Members of Indian Legal Services as Judicial Members would affect the very purpose of Tribunal, and is directly contrary to para 120(i) of* ***Madras Bar Association v UOI 2010 11 SCC 1 case*** *as also* ***Neelkamal Realtors [(2017) SCC Online Bom9302]****case*
>
> *c. Further, there is no provision for Advocates to become Judicial Members, which is violative of para 120(i) of* ***Madras Bar Association v UOI 2010 11 SCC 1 case****. Other specialists such as Chartered Accountants having specialized knowledge of accounting as also tax, also does not figure in the eligible GSTATmembers.*
>
> *d. Qualification for becoming a technical member is lesser than the qualification required in the case of first appellate authority, which is grossly violative of rule oflaw*
>
> *e. The requirement laid down in Section 110(1)(d)for Technical Member(State) is that he is has merely 3 years of experience in the administration of existing law/SGST or in the field of finance or taxation. The requirement of just 3 years of experience that too in the administration, makes the qualification highly inadequate to hold the present position of Technical Member (State), who will be involved in deciding highly technical and complex legal issues*
>
> *f. A Technical Member (Centre) of GSTAT which requires experience of 15 years as officers of "Indian Revenue Services", is short of the criteria laid down by the Apex Court in* ***Madras Bar Association v UOI 2010 11 SCC 1*** *which prescribes the minimum qualification as a secretary/ additional secretary [para 111 & para120(ii)]*
>
> ***g.*** *Provisions providing selection committee, appointment,*

*re- appointment, transfer, term and removal of members for technical and judicial members, are in violation of the doctrine of separation of powers as there is complete control and discretion of the government in the said sphere. The similar provisions were declared unconstitutional by the Hon'ble Supreme Court in the case of* ***Madras Bar Association V Union of India [(2014) 10 SCC1]***

*h. Government has the power to transfer members at its own will, and hence the totals go by to the doctrine of separation of powers.*

*i. The term of judicial members is just three years which is grossly inadequate, and is shorter than tenure of technical members giving preference to technical members, robbing the GSTAT from its judicialcharacter"*

11. Mr. Agrawal has also drawn our attention to the notification dated 21.08.2019, issued by the Central Government, Ministry of Finance, whereby the Goods and Services Tax Appellate Tribunal (Appointment and Conditions of Service of President and Members), Rules, 2019 have been framed. Mr. Agrawal has pointed out that these rules do not appearin consonance with the decision of the Supreme Court in ***Rojer Mathew*** (supra).
12. The respondent, while examining the position should also bear in mind the aforesaid aspects highlighted by thepetitioner.
13. Let the respondents do the needful and place on record a status report before the next date of hearing after due application of mind and examination of all the aforesaidaspects.
14. List on 05.02.2020.
15. The matter shall be treated as part heard.

*****

# COMMERCIAL NEWS

***CA Ribhav Ghiya***
***Jaipur***

- **GOVERNMENT SETS TIMELINE FOR GST E-INVOICING, TRIAL TO START JANUARY 1, 2020**

The Government has come out with the timeline for the new e-invoicing system under GST and the limit of application for each category. Accordingly, it has been decided by the government that businesses having a turnover of Rs.500 crore or more would take up einvoicing from January 1, 2020 on voluntary and trail basis.

According to a statement, businesses with turnover of Rs.100 crore or more would start einvoicing on voluntary and trial basis from February 1, 2020. However, from April 1, 2020, which is also the beginning of the net fiscal, e-invoicing will be mandatory for both these businesses categories. For businesses having turnover less than Rs 100 crore, it wouldremain voluntary and on trial basis from April 1, 2020.

"Having done full preparation for last 6 months to introduce E-invoicing system, the government has decided to start 'E-invoicing' in a phased manner for generating business to business (B2B) invoices on voluntary basis," read the statement.

The e-invoicing system would help to generate invoice in a standard format so that invoice generated on one system can be read by another system and reporting of e-invoice to a central system becomes possible.

"The adoption of these standards would not impact the users of invoice; however, all the accounting software would adopt the new einvoice standard wherein they would re-align their data access and retrieval in the standard format," said the statement. The generation of e-invoice will be the responsibility of the taxpayer who will be required to report the same to Invoice RegistrationPortal (IRP) of GST. This portal will generate a unique Invoice Reference Number (IRN) and digitally sign the e-invoice and alsogenerate a QR code. The QR Code will contain vital parameters of the e-invoice and return the same to the taxpayer who generated the document in first place. The IRP will also send the signed e-invoice to the recipient of the document on the email provided in the einvoice.

It is to be noted that e-invoice would not mean generation of invoices from a central portal of tax department or GSTN and the taxpayerwould continue to use his

accounting system/ERP or excel based tools or any such tool for creating the electronic invoice as s/he is using today.

- *Reported By economictimes.com on 01st December 2019*

- **HOW TO PREPARE FOR THE TRANSITION TO THE NEW GST RETURNS**

**Identify the 'Profile Type'**

- ✓ If turnover is more than Rs 5 crore, a taxpayer will need to file the return (Normal Monthly) and make the tax payment on a monthly basis.
- ✓ If turnover is less than or equal to Rs 5 crore, a taxpayer will have the following three options to choose from:
  - ❖ Normal Quarterly: Return filing frequency will be on a quarterly basis. Tax payment needs to be done on a monthly basis. Applicable to any type of sales.
  - ❖ Sahaj: Return filing frequency will be on a quarterly basis. Tax payment needs to be done on a monthly basis. Applicable only to B2C suppliers.
  - ❖ Sugam: Return filing frequency will be on a quarterly basis. Tax payment needs to be done on a monthly basis. Applicable to B2B or B2C suppliers

**Switching between return types**

- ✓ A taxpayer can switch only once in a financial year from Quarterly (Normal) to Sahaj or Sugam. The switch has to be initiated at the beginning of any quarter.
- ✓ A taxpayer can switch only once in a financial year from Sugam to Sahaj. The switch has to be initiated at the beginning of any quarter.
- ✓ A taxpayer can switch more than once in a financial year from Sahaj to Quarterly (Normal) or Sugam.
- ✓ The change has to be initiated at the beginning of any quarter. A taxpayer can switch more than once in a financial year from Sugam to Quarterly (Normal). The change has to be initiated at the beginning of any quarter.

**Claim provisional ITC**

- ✓ A taxpayer who opts to file returns on a monthly or a quarterly (GST RET-1) basis would qualify to claim provisional Input Tax Credit (ITC) on missing invoices. However, the credit of missing invoices will not be applicable to a taxpayer who opts to file Sahaj (GST RET-2) or Sugam (GST RET-3).
- ✓ A taxpayer will need to accept, reject, or keep the supplier invoices as pending as necessary. A taxpayer has to take appropriate actions on the invoices uploaded to claim ITC between 11th and 20th of the month.

**Modify ERP systems**

- ✓ The existing Enterprise Resource Planning (ERP) Systems will need to be modified in order to comply with the new GST returns. A few modifications include (not limited to): Bifurcation of capital goods and input services, Details related to Bill of Entry has to be included, Bifurcation of eligible and ineligible purchases and a single debit/credit note has to be linked with multiple invoices of a vendor.

**Know other key changes**

- ✓ A taxpayer will need an HSN code for submitting details at a document level versus an individual HSN summary.B2B supplies which are accountable for reverse charge mechanism (RCM) need not be shown in the GST ANX-1 by the supplier. Nevertheless, the aggregate figure has to be shown in GST RET-1. The recipient of supplies has to declare the inward supplies which are liable for RCM in GST ANX-1.

**File a 'Nil Return'**

- ✓ If a taxpayer is liable for a monthly return filing but hasn't made any purchases or has no output tax liability and ITC to avail in any quarter, he or she will have to file one Nil return for the entire quarter versus monthly returns. The taxpayer needs to report Nil transactions through an SMS in the first and second month of the quarter.
- ✓ Taxpayers must apprise themselves of the new return filing process so that they can prepare themselves accordingly.

*Reported By deccanherald.com on 01st December 2019*

- **FINALLY, SOME GOOD NEWS: NOVEMBER GST COLLECTIONS UP 6%**

India's goods and services tax collections rose 6% to Rs 1.03 lakh crore in November, reversing two months of decline, with experts attributing the increase to festive shopping and better compliance.

GST collections were Rs 97,637 crore in November last year and Rs 95,380 crore in October this year. The increase in collections was a sign of economic revival, recovery in demand and measures to ease compliance, government officials told ET.

"After two months of negative growth, GST revenues witnessed an impressive recovery… During the month, the GST collection on domestic transactions witnessed a growth of 12%, highest during the year," the government said in a statement

Tax revenue growth has been muted in the current financial year because of slowing growth. Net tax revenue climbed 3.4% in AprilOctober from a year ago. Higher collections will provide some fiscal relief to the government. India's economic growth

slowed to a sixyear low of 4.5% in July-September, while nominal GDP growth in the quarter hit a decade low of 6.1%, which would impact taxes.

GST collections had fallen 2.7% in September and 5.3% in October from the corresponding months in 2018. "While increase in collections is encouraging, it's difficult to read too much into the collection for one month, particularly because October was also a month of festivals. We need to see what's the trend," said Pratik Jain, a partner at PwC. "The GDP numbers also say that personal consumption expenditure is slightly on the higher side, so from that perspective it was somewhat expected that GST collections would go higher," said Indranil Pan, chief economist at IDFC First Bank.

"This (increase in collections) might be a festive occurrence – whether the intensity with this will go up, only time will say," Collections may have got a lift from better compliance measures. "With implementation of anti-evasion measures like investigation on identified discrepancies through analytics and the recently implemented restrictions on availing of unmatched credits, there was a general expectation of collections witnessing an increase," said Abhishek Jain, a tax partner at EY.

Collections in November comprised of Rs 19,592 crore of central GST, Rs 27,144 crore of state GST, Rs 49,028 crore integrated GST (including Rs 20,948 crore collected on imports) and cess of Rs 7,727 crore. The total number of GSTR 3B returns filed for October up to November 30 was 77.83 lakh.

- *Reported By economictimes.com on 02nd December 2019*

- **GST MOP-UP CROSSES ₹1 TN ON ANTI-EVASION STEPS, FESTIVE DEMAND**

Festival demand and anti-evasion measures such as restricting the use of tax credits where the seller has not uploaded the invoice has contributed to improved tax collections, experts said.

"With implementation of anti-evasion measures like investigation on identified discrepancies through analytics and the recently implemented restriction on availment of unmatched credits, there was a general expectation of collections witnessing an increase. Festive season and related spur in demand as well could be one key reason for the said growth, "said According to Abhishek Jain, tax partner, EY.

Central and state governments together collected ₹1.03 trillion in November, 6% more than what was collected in the same month a year ago. This is also the third highest monthly GST receipts so far in the GST era since the indirect tax was implemented in July 2017/, said an official statement

Till end-November, about 7.8 million summary tax returns were filed, said the statement.

"After two months of negative growth, GST revenues witnessed an impressive recovery with a positive growth of 6% in November 2019 over the November 2018 collections. During the month, the GST collection on domestic transactions witnessed a growth of 12%, the highest during the year. The GST collection on imports continued to see negative growth of 13%, but was an improvement over last month's negative growth of 20%, "said the statement

Declining GST receipts in the previous two months had led to some tension in Centrestate relations as some states publicly aired their grievances about a delay in GST compensation from the central government.

"Crossing ₹1 trillion in a festive month after a few months of tepid collections would act as sentiment-booster and help in keeping the fiscal deficit under control — hoping that this trend continues in the coming months, " said M.S. Mani, partner, Deloitte India

- *Reported By Livemint.com on 01st December 2019*

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