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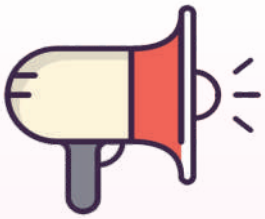

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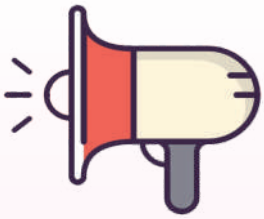

AIFTP

INDIRECT TAX & CORPORATE LAWS JOURNAL

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CHIEF-EDITOR'S COMMUNIQUE

Friends

The economy is opening up after the impact of Covid and now the Professional and Business activities are coming back to normal. The business is growing and there are some issues in the supply chain due to lower production etc. Similarly, for professionals the time lines have to be followed and even the extended time limits are coming near and therefore all compliance has to be made in the matter. This is the time of festivities also as the Diwali and other Festivals are being celebrated.

Continues changes in the Tax Laws are being made and regular notifications, Circulars and Press Notes are being issued by the Government. It is really becoming very difficult for a Professional as well as for a businessmen to keep himself abreast of the latest changes and to comply with the provisions of the Tax Laws including filing of returns and information within the time limit prescribed. We had seen the push by the Central Government on the faceless assessment and appeals under Income Tax Law but it has resulted in more of problems for the Tax payers and the Professionals. Multiple litigation in the High Court has been going on challenging the wrong and incorrect orders passed during faceless proceedings contrary to the principle of natural justice. The Government has been forced in view of the consistent orders of the High Courts to review the scheme for changes.

In the Indirect Tax we had seen the surveys and the proceedings and the issue of summons thereafter without going for calculation of tax or assessment or issue of show cause notice by the authorities. The power to issue summons are being wrongly exercised by the authorities under Indirect Tax and the basic concept of assessment of taxation has been given a bypass and now only the Statements and calling of the top management of the registered tax payer is the main focus of the department. The quantification and issue of specific notice is not being done by the

department in majority of the cases and the proceedings are continuing to be pending for years together. The surveys conducted 2017 and 2018 are still at the same stage and even in majority of the cases the show cause notice has not been issued. The complete GST needs a revamp.

Friends, this Indirect Tax Journal has been going on for the last few years and now from 2022 it will be available on subscription basis and to start with the subscription rate are kept very low at Rs. 1100.00 for one year. We request that the Journal may be subscribed and the subscription fee for the year 2022 may be paid at the earliest by you all so that we may continue to serve you with this Journal.

We are grateful to Sh S. Venkataramani, Bengaluru for the support and also for sponsoring this issue. Looking forward to your continued love and affection. Wishing you all a very Happy New Year- 2022.

Regards,

PANKAJ GHIYA
Chief Editor
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President's Message

Namaskar,

Dear esteemed fellow members, it is my pleasure indeed to meet all my seniors, colleagues and friends physically. We have commenced physical seminars and meetings all over the country. After completion of Katra Jammu Vaishnov Devi NTC programme, we all assembled in Pune (Maharashtra) to celebrate the 45th Foundation Day of AIFTP alongwith National Executive Committee Meeting. This was a great moment for me to meet you all physically at Pune for the 2 Days programme, which was organized jointly by AIFTP (Western Zone) alongwith with our sister associations. On 11th November, 2021, we started the programme with Hare Ram Hare Krishna Bajan to get the blessings of Lord Krishna, followed by flag hoisting at the venue. We presented a table flag alongwith a Tie to our Founder Secretary General, Shri P. C. Joshi, Advocate, Past President, AIFTP. The Technical Sessions started at 9.00 am sharp, followed by Lunch and a Maharashtrian Dance Programme. The Inaugural session was chaired by our Hon'ble Dr. Bhagwat Karad, Minister of State Finance of India as the Chief Guest. Shri Satish Magar, National President, CREDAI and who is a renowned realty business man from Pune was our Guest of Honour. The dignitaries lighted the lamp with all Heads of Associations. Hon'ble Dr. Bhagwat Karad, Minister of State Finance of India very clearly said in his speech that the Taxes collected through Income Tax and GST are for the Nation Building and also addressed gathering about the Technical glitches which are to be solved at the earliest possible by the Central Government. He has also expressed that whatever suggestions from the professional bodies are received are welcome. He shall validate and incorporate the same in the upcoming union budget. In the inaugural session the Hon'ble Minister felicitated our Past President Shri P. C. Joshi, Advocate, Mumbai and Retired Hon'ble Mr. Justice J. K. Ranka, Jaipur, Rajasthan who is our member.

The National Tax Conference had around 370 registered delegates from all parts of the country.

Hon'ble Dr. Bhagwat Karad, Minister of State Finance of India inaugurated our 45th year History book titled "Marching Towards Golden Jubilee". He also unveiled the GST publication. The 45th Foundation Day Celebrations Committee Chairman Shri Kishor Vanjara, Senior Member AIFTP conducted the proceedings of the Foundation Day Celebrations in the presence of galaxy of Past Presidents S/Shri P. C. Joshi, Dr. K. Shivaram, M. L. Patodi, Smt. Prem Lata Bansal, Smt. Nikita R. Badheka.

The 45th Foundation Day Programme started with Video Presentation on Power

Point along with Motivational Song of AIFTP. All Past Presidents were hounored at the hands of National President with Pattu Vasthram, Mala, Citation, Memento, AIFTP Silver Dollar, Gift Boxes and Shawl. During the Felicitation Function the power point presentation also added colour to each and every Office Bearer as well as NEC member. Around 70 members attended this felicitation function and all members re-dedicated themselves to AIFTP. Some felicitated members shared their views. The AIFTP Foundation Day Function was well organized by the Committee under the MOC of CA. Rajesh Mehta National Vice President, AIFTP (CZ) & Smt. CA. Jamuna Shukla, NEC Member, AIFTP (NZ). Later, we all attended the Gala Dinner with Musical Programme.

The 2nd day Technical Sessions started at appropriate time, the 9th National Executive Committee Meeting was simultaneously conducted in other hall. The speakers along with the Chairmen were well chosen. All the delegates were enriched with knowledge in various fields of Taxation.

The Valedictory Function was chaired by Shri Dhananjay Akhade, Addl. Commissioner, SGST, Pune Zone. He spoke about some GST burning issues and felicitated all the Pune Team under the Chairmanship of Shri Narendra Sonawane. The Panel Discussions was the last session and was well attended. The Food arrangements of the two days are also delicious in a grand manner. In this entire year of 2021 of my presidential tenure there is no financial burden on AIFTP. More over in this calendar year Rs. 24 Lakhs is collected particularly for the various awards of upcoming conventions.

The AIFTP members from entire country are requested to join the Padma Vibhushan Dr. N. A. Palkhivala Memorial (Virtual) Moot Court Competition and Research Paper is being conducted on 26th, 27th & 28th November, 2021. Further we are having 4th and 5th of December One Day Tax Conferences at Solapur & Ratnagiri respectively in AIFTP (Western Zone) Maharashtra, a Vindhya Tax Conference at Rewa AIFTP (Central Zone) on 18th & 19th December 2021 and Finally the National Convention at Lucknow, the Capital City of Uttar Pradesh by AIFTP (Northern Zone) is being held on 24th, 25th & 26th December, 2021. Please involve and attend all the programmes and grace all the occasions for the benefit of fellowship and friendship forever.

Finally, as per proposal of Shri Pankaj Ghiya, the Editor of Indirect Tax and Corporate Laws Journal and as approved in our last NEC Meeting held at Pune on 12th November, 2021, from 2022 onwards the Indirect Journal would be supplied only to the members/non-members who will subscribe for the same. The subscription charges for the Members of the Federation will be Rs. 1100/- per year and for Non-members it will be Rs. 1400 per year.

Long Live AIFTP

M Srinivasa Rao
National President AIFTP

RECENT NOTIFICATIONS & CIRCULARS UNDER CGST ACT

Adv. Abhay Singla

NOTIFICATIONS - CENTRAL TAX (RATE)

DATE	NOTIFICATION NO.	REMARKS
18.11.2021	17/2021-CENTRAL TAX (RATE)	Seeks to amend Notification No 17/2017-Central Tax (Rate) dated 28.06.2017
18.11.2021	16/2021-CENTRAL TAX (RATE)	Seeks to amend Notification No 12/2017-Central Tax (Rate) dated 28.06.2017.
18.11.2021	15/2021-CENTRAL TAX (RATE)	Seeks to amend Notification No 11/2017-Central Tax (Rate) dated 28.06.2017.
18.11.2021	14/2021-CENTRAL TAX (RATE)	Seeks to further amend notification No. 01/2021-Central Tax (Rate) dated 28-06-2021
27.10.2021	13/2021-CENTRAL TAX (RATE)	Seeks to amend Notification No 1/2017-Central Tax (Rate) dated 28.06.2017.
30.09.2021	12/2021-CENTRAL TAX (RATE)	Seeks to exempt CGST on specified medicines used in COVID-19, up to 31st December, 2021
30.09.2021	11/2021-CENTRAL TAX (RATE)	Seeks to amend notification No. 39/2017-Central Tax (Rate)
30.09.2021	10/2021-CENTRAL TAX (RATE)	Seeks to amend notification No. 4/2017-Central Tax (Rate)
30.09.2021	09/2021-CENTRAL TAX (RATE)	Seeks to amend notification No. 2/2017-Central Tax (Rate)
30.09.2021	08/2021-CENTRAL TAX (RATE)	Seeks to amend notification No. 1/2017-Central Tax (Rate)
30.09.2021	07/2021-CENTRAL TAX (RATE)	Seeks to amend notification No. 12/2017-Central Tax (Rate) so as to implement recommendations made by GST Council in its 45th meeting held on 17.09.2021
30.09.2021	06/2021-CENTRAL TAX (RATE)	Seeks to amend notification No. 11/2017-Central Tax (Rate) so as to notify CGST rates of various services as recommended by GST Council in its 45th meeting held on 17.09.2021.

NOTIFICATIONS - COMPENSATIONCESS (RATE)

DATE	NOTIFICATION NO.	REMARKS
30.09.2021	01/2021-COMPENSATION CESS (RATE)	Seeks to amend notification No. 1/2017-Compensation Cess(Rate).

CIRCULAR - CENTRAL TAX

DATE	CIRCULAR NO.	REMARKS
17.11.2021	166/22/2021-GST	Circular on Clarification on refund related issues.
17.11.2021	165/21/2021-GST	Clarification in respect of applicability of Dynamic Quick Response (QR) Code on B2C invoices and compliance of notification 14/2020- Central Tax dated 21st March, 2020
06.10.2021	164/2020/2021-GST	Clarifications regarding applicable GST rates & exemptions on certain services.
06.10.2021	163/19/2021-GST	Clarification regarding GST rates & classification (goods) based on the recommendations of the GST Council in its 45th meeting held on 17th September, 2021 at Lucknow

*****

TIMELINE - GST

Adv. Deepak Garg

GOODS & SERVICE TAX

Sr. No.	Particulars	Form	Period	Due Date
(i)	Monthly Summery GST Return	GSTR-3B		
	(a) Regular Taxpayers		Nov, 2021	20th Dec 2021
			Dec, 2021	20th Jan 2022
(ii)	Detail of Outward Supplies: -	GSTR-1 (QUARTERLY)	Nov, 2021 (IFF)	13th Dec 2021
	(a) QRMP		Oct-Dec, 2021	13th Jan 2022
	(b) Monthly Filing	GSTR-1	Nov, 2021	11th Dec2021
			Dec, 2021	11th Jan2022
(iii)	Payment of Tax under QRMP	PMT-06	By 25th of next month	
(iv)	Quarterly return for Composite taxable persons	CMP-08	Oct-Dec, 2021	18th Jan 2022
(v)	Return for Non-resident taxable person	GSTR-5	Non-resident taxpayers have to file GSTR-5 by 20th of next month.	
(vi)	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.	
(vii)	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.	
(viii)	Return to be filed by the persons who are required to deduct TDS (Tax deducted at source) under GST.	GSTR-7	Nov, 2021	10th Dec 2021
			Dec, 2021	10th Jan 2022
(ix)	Return to be filed by the e-commerce operators who are required to deduct TCS (Tax collected at source) under GST	GSTR-8	Nov, 2021	10th Dec 2021
			Dec, 2021	10th Jan 2022

VALUATION OF SUPPLY UNDER GST – AN OVERVIEW

CA S Venkataramani
CA Siddeshwar Yelamali

I. Background:

Valuation of goods or services plays a critical role in indirect tax laws. Under the erstwhile Central Excise Act, 1944, the law provided the manner for valuation of excisable goods under various circumstances. Customs Act, 1962 also provides the manner for valuation of goods exported or imported under various circumstances. The issues on valuation under custom law and erstwhile excise law have been a contentious issue.

II. Central Goods and Services Tax Act, 2017:

1. Central Goods and Services Tax Act, 2017 (for brevity, 'CGST Act') read with Central Goods and Services Rules, 2017 (for brevity, 'CGST Rules')provides themanner in which value supply of goods or services or both should be determined.
2. Value of supply of goods or services or both[1] (for brevity, 'Value of Supply') would be the price actually paid or payable (transaction value) for the said supply of goods and/or services provided the following conditions are fulfilled:
   a. The supplier and the recipient of the supply **are not related**(refer explanation to Section 15 to determine when persons are considered as 'related persons') and
   b. The price is the **sole consideration** for the supply.
3. Value of Supply should**include**[2] the following
   a. Taxes, duties, cesses, fees and charges levied under any law other than GST laws, if charged spearately.
   b. Incidental expenses (eg. commission, packing) chargedby the supplier until delivery.

[1] Section 15(1) of the CGST Act

[2]Section 15(2) of the CGST Act

c. Interest/ late fee/ penalty for delayed payment of consideration

d. Amount incurred by recipient in relation to such supply on behalf of the supplier – if not included in price.

Additional comment: In the normal course of business, the value of materials supplied on free of cost basis by the recipient of supply in relation to a supply, *shall not* be included in the value of taxable supply made by supplier provided that:

i. the recipient is liable to supply such materials or services; and

ii. the value of supply made by the supplier has not been reduced from the originally agreed consideration for supply of goods or services to the extent of the value of materials or service supplied by the recipient.

e. Subsidies directly linked to price (excluding Government subsidies)

4. **Discount**[3] – Value of Supply shall not include discount given under the following circumstances:

a. Discount is given before or at time of supply and is duly recorded in invoice

b. Discount is given after the supply is made provided the following conditions are fulfilled

i. Discount is established in terms of an agreement entered into at or before the time of such supply and specifically linked to relevant invoices.

In this context, it would be relevant to the note the Advance Ruling in the case of *Ultratech Cement Limited 2018 (7) TMI 1761 - Authority for Advance Rulings Maharashtra* in the aspect of the condition laid down in Section 15(3)(b) 'discount is established in terms of an agreement entered into at or before the time of such supply and specifically linked to relevant invoices'; in this ruling the Hon'ble Authority held as follows

"***The wordings of Section 15 (3) (b) (i) very clearly states that quantum of discount is given after the supply of goods has***

[3] Section 15 (3) of the CGST Act

taken place has to be there in the terms of such agreement i.e. it cannot be open ended not based on any criteria. Thus, this discount quantum cannot be arrived at without any basis only at the discretion of the supplier. The supplier has to clearly mention the quantum of discount or percentage of discount which is to be worked out on the basis of certain parameters or certain criteria which may be agreed to between the supplier and the recipient and which are predetermined and mentioned in agreement in respect of supply of the goods."

ii. Input tax credit as is attributable to the discount on the basis of document issued by the supplier has been reversed by the recipient of the supply.

5. **Determination of Value of when price is not the sole consideration (i.e. where the consideration is not wholly in money)**[4]: Value of Supply to be determined in following manner

   a. Open market value of the supply

   b. If open market value is not available, total of money and money equivalent to consideration not in terms of money at the time of supply

   c. If value is not ascertainable as per (a) or (b) above, value of supply shall be supply of goods or services or both of like kind and quality. It may be possible to determine value of like kind and quality for goods,whereas in case of services this may not be possible as there cannot be a comparable for determining the like kind and quality of services.

   d. If Value of Supply cannot be determined as per (a) or (b) or (c) above, Value of Supply shall be 110% of the cost of production or manufacture or the cost of acquisition of such goods or the cost of provision of services.

   e. If Value of Supply cannot be determined as per the (a) or (b) or (c) or (d) above, value shall be determined by reasonable means consistent with principles & general provisions of Section 15 and the valuation rules.

[4] Rule 27, 30 & 31 of CGST Rules

One may note that it is not open to follow the above rules in a random manner, but have to check the applicability sequentially.

6. **Value of Supply between distinct or related persons, other than through an agent**[5]: The principle mentioned in paragraph 5 supra to be followed even in this case. Further, the following points may be noted:

   a. Where goods meant for further supply by recipient to an unrelated person, supplier has the option to value transaction @ 90% of the price of the subsequent supply.

   b. Where recipient is eligible for full input tax credit, the value declared in the invoice shall be deemed to be the open market value of the goods or services.

7. **Value of supply of services in case of pure agent**[6]:

   Pure agent[7] means a person who

   a. enters into a contractual agreement with the recipient of supply to act as his pure agent to incur expenditure or costs in the course of supply of goods or services or both

   b. neither intends to hold nor holds any title to the goods or services or both so procured or supplied as pure agent of the recipient of supply

   c. does not use for his own interest such goods or services so procured; and

   d. receives only the actual amount incurred to procure such goods or services in addition to the amount received for supply he provides on his own account

   Expenditure or costs incurred by a supplier as a ***pure agent*** of the recipient of supply shall be excluded from the value of supply, if the meaning of pure agent as mentioned supra is fulfilled and all following conditions are satisfied:

   a. the supplier acts as a pure agent of the recipient of the supply, when he makes the payment to the third party on authorisation by such recipient

[5] Rule 28, 30 & 31 of CGST Rules

[6] Rule 33 of CGST Rules

[7] Explanation to Rule 33 of CGST Rules

b. the payment made by the pure agent on behalf of the recipient of supply has been separately indicated in the invoice issued by the pure agent to the recipient of service; and

c. the supplies procured by the pure agent from the third party as a pure agent of the recipient of supply are in addition to the services he supplies on his own account.

In this article, discussion on Value of supply of goods made or received through an agent; Value of supply in case of lottery, betting, gambling and horse racing; Value of supply of services involving purchase or sale of foreign currency; Value of service in relation to booking of air ticket by travel agent;Value of supply of service in relation to Life Insurance Business; Value of Supply by a person dealing in buying and selling of second hand goods andValue of a token, or a voucher, or a coupon, or a stamp (other than postage stamp) which is redeemable against a supply of goods or services has not been covered as some of these issues have been covered by the authors in November 2019 edition.

An attempt has been made in this article to make a reader understand the basics of Valuation of Supply under the GST law. This article 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 October 23, 2021.

*****

SUO-MOTO SUSPENSION UNDER RULE 21A(2)/2A VIS A VIS PRINCIPLES OF NATURAL JUSTICE

CA (Dr.) Ayush Saraf

1.01 Introduction

The GST Law is a very young piece of legislation, but in these four years, it has evolved itself into a more mature law. Though there are many unresolved issues and controversies confronting it, but it is expected that sooner or later they shall be resolved to suit the greater interests of revenue. One such issue or controversy is the recent amendment of Rule 21A(2) of the CGST Rules, 2017 wherein the requirement to afford **"a reasonable opportunity of being heard"** was omitted. This has led to a plethora of Show Cause Notices (SCNs) being issued to Registered Persons (RPs) and simultaneous suspension of registrations without giving any opportunity to the RP to present his case. Immediately on suspension of a registration, the entire business comes to a standstill and the RP gets panicstricken even though he may not be at a fault and the issue might get resolved by a single explanation from his side, but the suspension causes an abrupt halt in his business at least for some days. Thus, in this article we shall discuss the various provisions surrounding this provision and its possible mitigating factors.

1.02 Objective

The present article shall discuss and analyse the following issues:

a) Whether suspension post amendment of Rule 21A(2) vide Notification No. 94/2020- Central Tax dated 22nd December, 2020, the Proper Officer has got the absolute powers and that no checks and balances exist to safeguard the constitutional rights of the RP under Article 14 and 19(1)(g)?

b) Whether the principles of natural justice still apply in case of suo-moto suspension of registration post amendment of Rule 21A(2) as stated above?

1.03 Legal Provisions

Suspension provisions were first introduced by The Central Goods and Services Tax (Amendment) Act, 2018 wherein the provisions were included in Second Proviso

to Section 29(1) and Section 29(2) of the CGST Act, 2017.As per these provisions, the Proper Officer[1] may cancel a registration in any of the prescribed conditions and pending the cancellation proceedings, may suspend the registration for *such period and in such manner as may be prescribed*.

Thus, from the above it is clear that suspension of registration may be done in such manner as may be prescribed i.e. vide Rule 21A[2] of the CGST Rules, 2017.

1.03.1Conditions For Suspension of Registration [Rule 21A(2)]

Rule 21A(2) prescribes the following conditions for suspension of registration:

i) The Proper Officer should have reasons to believe.
ii) The registration of the RP should have been liable to be cancelled u/s 21 or 29 of CGST Act, 2017.
iii) In case of a reason to believe, it is the prerogative of the Proper Officer to consider suspension and thus it is not mandatory.
iv) Proceedings u/s 22 for cancellation of registration should also be initiated simultaneously.

Sub-Rule (2) of Rule 21A contained the mandatory requirement of ***"affording the said person a reasonable opportunity of being heard"*** before suspending any registration under the said provisions. However, the CBIC vide Notification No. 94/2020- Central Tax dated 22nd December, 2020 deleted the above provision from the principal rule.

Thus, after this amendment there was no requirement on the part of a Proper Officer to issue a Show Cause Notice or give the RP an opportunity of being heard before suspending his registration.

1.03.2Special Situations for Suspension [Rule 21A(2A)[3]]

On comparison of the following by the Proper Officer

- GSTR 3B with GSTR 1 or
- GSTR 2A or
- Such other analysis as may be carried out on the recommendations of the Council

[1] 'Proper officer' as per CGST Act shall be in terms of Circular No. 3/3/2017-GST dt. 5.7.2017

[2]Inserted vide Notification No. 03/2019 - Central Tax dated 29th January, 2019

[3] Inserted vide Not. No. 94/2020 - CT Dt. 22.12.2020

show that there are significant differences or anomalies indicating contravention of the provisions of the Act or the rules made thereunder, leading to cancellation of registration of the said person, his registration shall be suspended. The said person shall be intimated in FORM GST REG-31, electronically, on the common portal, or by sending a communication to his e-mail address provided at the time of registration or as amended from time to time, highlighting the said differences and anomalies and asking him to explain, within a period of thirty days, as to why his registration should not be cancelled.

Thus, in these cases, the law mandates the Proper Officer to suspend the registration of the RP if he is convinced of any such contravention. However, the point to ponder upon is whether an analysis of the above statements/ returns is possible without seeking explanation from the RP is an issue which has to be considered. Let us discuss some scenarios and understand the need for providing an opportunity of being heard:

1.03.2.1Scenario 1: Difference in output reported as per GSTR 1 and GSTR 3B, wherein output reported in GSTR 3B is substantially less:

It might happen that total output tax reported in GSTR 1 is Rs. 100.00 lakhs and that in GSTR 3B is Rs. 65.00 lakhs. However, the RP has subsequently paid the difference with interest vide DRC-03 or paid the same in subsequent returns in terms of Circular No. 26/26/2017-GST dated 29-12-2017. Thus, though differences exist in returns, the liability is paid off.

However, on a plain reading of the returns/ statements, the Proper Officer may believe that there has been a contravention of the law and suspend his registration.

1.03.2.2Scenario 2: Higher ITC claimed in Table 4A, but reversed in Table 4B:

The Proper Officer may get a Red Flag Report wherein only figures reported in Table 4A of GSTR 3B may be mentioned and its subsequent reversal in Table 4B may not be available in the report. In such cases, if proper investigation is not done by the Proper Officer, he/ she may form an opinion that ITC has been excess availed and that there is a contravention of the law leading to cancellation of registration.

Likewise, there might be many other similar issues in the practical scenario and in many cases it may be difficult for the Proper Officer to arrive at a proper conclusion. Further, under the GST regime, data analytics form a major part of the investigation

structure. It has its own set of limitations and a blind reliance on the data analytics solely without any application of mind may amount to not having a reason to believe. However, if he/ she gives the RP an opportunity of being heard, an objective conclusion may be arrived at and in such cases, the suspension will be done only in eligible cases.

1.04Impact of Suspension of Registration [Rule 21A)(3)/(3A)[4]]

The RP shall not make any taxable supply during the period of suspension and shall not be required to furnish any return under section 39. The expression "shall not make any taxable supply" shall mean that the registered person shall not issue a tax invoice and, accordingly, not charge tax on supplies made by him during the period of suspension.

1.05Reason to Believe

'Reason to Believe' is comprised of two words:

i) **Reason**

Cambridge Dictionary defines Reason as "the cause of an event or situation or something that provides an excuse or explanation"[5]. Thus, reason means having a valid justification of an act.

ii) **Believe**

Cambridge Dictionary defines Believe as "To think that something is true, correct or real"[6].

Thus, 'Reason to Believe' implies that both reason and belief should be present in a particular situation and thus any individual having reason to believe must have a valid and reliable justification for any action and the individual must actually believe that the event has or shall occur.

1.05.1Judicial Precedence on Reason to Believe

1) The Hon'ble Gujarat High Court in the case of **Vimal Yashwantgiri Goswami vs State of Gujarat [2020 (10) TR 3448]**heldthat the word "reason" means cause or justification and the word "believe" means to accept as true or to have faith in it. Thus, there must be a justification and

[4]Inserted vide Notf no. 49/2019-CT dt. 09.10.2019

[5]Source: https://dictionary.cambridge.org/dictionary/english/reason. Accessed on 31-07-2021.

[6]Source: https://dictionary.cambridge.org/dictionary/english/believe. Accessed 31-07-2021

belief is the result of the mental exercise based on information received. The words "reason to believe' contemplate an objective determination based on intelligence, care and deliberation involving judicial review as distinguished from a purely subjective consideration.

2) The Hon'ble Gujarat High Court in the case of **M/s Cotton Industries vs Union of India[2019 (7) TMI 471]**held that reason to believe in terms of section 67 of the CGST Act, 2017 shall be the belief that an honest and reasonable person shall hold based upon the relevant materials and circumstances. The Hon'ble Court further held that the statutory requirement of reasonable belief, rooted in the information in possession of Proper Officer under the Act, is to safeguard the citizen from vexatious proceedings. 'Belief' is a mental operation of accepting a fact as true, so, without any fact, no belief can be formed. It held that the Court can examine the materials to find out whether an honest and reasonable person can base his reasonable belief upon such materials although the sufficiency of the reasons for the belief cannot be investigated by the Court.

3) The Hon'ble Allahabad High Court in **Rimjhim Ispat Limited vs State of U.P. And 3 Others vs State of U.P. and 3 Others and 4 Others and 2 Others [2019 (3) TMI 916]**observed that the 'reasons to believe' should exist and should be based on reasonable material and should not be fanciful or arbitrary. It also held that court cannot go into the sufficiency of the reasons, however the same has to be recorded.

Thus, a careful analysis of the above judicial precedents in the context of GST Law, it is evident that Reason to Believe casts a greater responsibility on the Proper Officer to act fairly and not in an arbitrary manner and that his actions should be supported by tangible facts and records.

1.06Constitutional Provisions on Natural Justice

1.06.01 Article 14

Article 14 of the Constitution of India, 1949 reads as under:

"14. Equality before law

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth."

Thus, Article 14 declares that every person shall be treated equal before the law and shall enjoy equal protection of the laws.

1.06.02 Court Rulings on Article 14

i) **The Hon'ble Supreme Court of India in The State of West Bengal vs Anwar All Sarkarhabib, 1952 AIR 75**, held thatthat equality before the law or the equal protection of laws does not mean identity or abstract symmetry of treatment. It further held that distinctions have to be made for different classes and groups of persons and a rational or reasonable classification is permitted.

ii) **The Apex Court in Maneka Gandhi v UOI, (1978) 1 SCC 248**, held that Article 14 counters arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness is an essential element of equality or non-arbitrariness.

1.06.03Court Rulings on Principles of Natural Justice

i) **In S.N. Mukherjee vs Union of India, [1990 AIR 1984],the Supreme Court of India**held that the requirement that reasons be recorded should govern the decisions of an administrative authority exercising quasi-judicial functions irrespective of the fact whether the decision is subject to appeal, revision or judicial review. The reasons should be clear and explicit so as to indicate that the authority has given due consideration to the points in controversy. The Court held that the need for recording of reasons is greater in a case where the order is passed at the original stage.

ii) In **H.L. Trehan And Ors. Etc vs Union Of India And Ors. Etc, [1989 AIR 568],** the Hon'bleApex Court held that opportunity of being heard is meaningless once the decision has been taken.

iii) The Apex Court in **C.B. Gautam vs Union of India & Ors, [(1993) 1 SCC78]**, held that even if the decision is to be taken in a tight time frame, the principles of natural justice should be complied with even in such situations.

iv) In **M/s Dharampal Satyapal Ltd vs Dy.Commr.Of Cen.Exc.& Ors, [(2015) 8 SCC 519]**,The Supreme Court of India held thatthe principles of natural justice are very flexible principles and thatthey cannot be applied in any straight-jacket formula. It depends upon the kind of functions

performed and to the extent to which a person is likely to be affected and thus certain exceptions to the aforesaid principles have been invoked under certain circumstances.

v) The Gauhati High Court in **Assam Company India Ltd. And Anr vs The Union of India And 2 Ors [(2019) 213 COMP CAS 420 (GAUHATI)]** held that before implicating the company as a shell company, proper opportunity of being heard should have been given to the petitioner.

vi) In **The State of Uttar Pradesh vs Sudhir Kumar Singh [(2020) SCC Online SC 847],** Supreme Court of India held thatnatural justice is a flexible tool in the hands of the judiciary to remedy injustice in fit cases and that mere breach of the principle does not conclude any prejudice.

1.06.04Article 19(1)(g)

Article 19(1)(g) and 19(1)(g)(6) of the Constitution of India, 1949 reads as under:

(1) All citizens shall have the right

(g) to practise any profession, or to carry on any occupation, trade or business

(6) Nothing in sub clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub clause, and, in particular, nothing in the said sub clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise

1.06.05 Court Rulings on Article 19(1)(g):

i) In **Krishnan Kakkantn vs Government Of Kerala And Ors [(1997) 9 SCC 495]**, the **Supreme Court of India** held that reasonableness of restriction is to be decided in an objective manner and the interests of general public and not from the standpoint of the interests of the persons upon whom the restriction are imposed or upon abstract consideration A

restriction cannot be said to be unreasonable merely because in a given case, it operates harshly and even if the persons affected be petty traders (AIR 1958 SC 73- Hanif Versus State of Bihar). In determining the infringement of the right guaranteed under Article 19(1), the nature of right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, enter into judicial verdict (AIR 1981 SC 673 Laxmi) versus State of U.P.; AIR 1968 SC 1323 Treveli Versus State of Gujarat and Herekchand vs. Union of India. India. AIR 1970 SC 1453).

ii) In **M/s. Amazonite Steel Pvt. Ltd. & Anr., M/s. Corandum Impex Pvt. Ltd. & Anr., M/s. Cuprite Marketing Pvt. Ltd. & Anr. Versus Union of India & Ors. [2020 (3) TMI 1179]**, the Hon'ble Calcutta High Court held that arbitrariness in decision making lead to violation of the petitioners' rights for carrying on business under Article 19(1) of the Constitution of India and under Article 300A of the Constitution of India wherein the petitioners have been deprived of their property without authority of law.

A conjoint reading of Articles 14 and 19(1)(g) and after analysing the various observations of the Hon'ble Courts on various occasions, it is amply clear that the principles of natural justice or the right to opportunity of being heard though must be followed by the executive to the extent possible, but it cannot be absolute and without any checks. The executive shall have to comply with the test of Public Interest and impose reasonable restrictions.

1.07Conclusion

Thus, from the above discussion it is apparent that it is the duty of the Proper Officer to do a proper due diligence of the facts of the case and correlate the data with other corroborative evidence before taking any coercive steps. If even after analysis of the above points, the Proper Officer has reasons to believe that there has been some suppression of facts, a show cause notice to the effect under appropriate section of the Act should be sent. However, if he feels that if the registration of the RP is kept active, it may prejudice the interests of revenue, suspension of registration should be done by him. But if the assessee is cooperative, this step should not be normally taken.

Thus, we come to the following conclusion:

- Suspension is not a rule, but an exception.
- Reason to believe should normally be backed by sufficient enquiry.
- As far as possible, opportunity of being heard should be given even if not mandated by the law since in the opinion of the author, opportunity of being heard is not a benefit or concession, but a right and hence mandatory, subject to reasonable restrictions.
- Suspension should be a measure of last resort when all other options are exhausted and that the interests of revenue shall be affected detrimentally if not suspended.

Thus, though Rule 21A of the CGST Rules, 2017 give unfettered powers to the Proper Officer to suspend any registration, the same is with wider duties on his/her part, without which the entire process may get vitiated and may cause irreplaceable damage to the business prospects and long-term market reputation of the RP.

Disclaimer*: The above expressed views are purely the personal views of the author. The possibility of other views on the subject matter cannot be ruled out. So, the readers are requested to check and refer relevant provisions of statute, latest judicial pronouncements, circulars, clarifications etc. before acting on the basis of the above write up. The author is not responsible in any manner.*

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RECENT AMENDMENTS UNDER GST

CA Shilvi Khandelwal

The 45th GST Council meeting was held on Friday, 17th September 2021, chaired by Union Finance Minister Nirmala Sitharaman at Lucknow, Uttar Pradesh and it was held physically for the first time after one and a half years of virtual meetings. In this meeting, several recommendations and clarifications have been provided in respect to GST rates on Goods & Services, Applicability of GST on petroleum products, GST law & procedures such as registration, KYC etc.. In continuation to the decisions taken by the council in this meeting, several notifications/circulars/ clarifications have been issued by the government to give effects to the recommendations given by the council.

Now, we shall discuss changes in respect to GST law and procedures, GST rates, Exemption etc. The brief of these amendments and its implications are as given hereunder:

1. **Aadhaar Authentication for already registered persons in specified cases : (**w.e.f. a date yet to be notified) The existing registered persons in cases of revocation of cancellation of registration, IGST refund on export of goods under Rule 96 of the CGST Rules or Refund under rule 89 of the CGST rules, are required to do Aadhaar Authentication of their registration. Aadhaar Authentication would also be a prerequisite for filing applications for registration, refund etc.

   - Following persons are notified whose Aadhaar would be required to be authenticated:

     a) Authorized Signatory of the registered person; and

     b) A specified individual as per below table :

Sr No	Registered Person	Aadhaar Individual person is to be authenticated
1	Proprietorship Firm	Proprietor
2	Partnership firm	Any partner
3	HUF	Karta

4	Company	Managing Director or any whole-time Director
5	AOP/BOI/Society	Any of the Members of the Managing Committee
6	Trust	Trustee

- Where Aadhaar number has not been assigned to an individual, e-KYC would be required to be done. Further, Aadhaar authentication would be required to be done within 30 days from the date of allotment of Aadhaar number.
- Some Notified categories of persons are exempt from the requirement to do Aadhaar Authentication such as A person who is not a citizen of India, Department or establishment of the Central Government or State Government, Local authority, Statutory body, Public Sector Undertaking, Person to whom Unique Identification Number is granted.

2. Refund related amendments:

- The refund would be disbursed only in the Bank Account which is linked with the same PAN on which registration was obtained (w.e.f. a date yet to be notified). Further, in the case of proprietor, the PAN should also be linked with his Aadhaar.
- Unutilized balance in CGST and IGST cash ledger may be allowed to be transferred between distinct persons (entities having same PAN but registered in different states), without going through the refund procedure, subject to certain safeguards.
- Specific provisions have been incorporated in in CGST Rules, 2017 for removing ambiguity regarding procedure and time limit for filing refund of tax wrongfully paid as specified in section 77(1) of the CGST/SGST Act and section 19(1) of the IGST Act (w.e.f. 24.09.2021). It has been provided that refund can be filed in Form GST RFD-01 within a period of 2 years from the date of payment of tax under the 'correct head'. In order to dispose of the old applications, it has been provided that 2 years will commence from the effective date of the amendment i.e. 24th Sept 2021.

3. Returns/Forms related changes:

- A registered person shall not be allowed to furnish FORM GSTR-1, if he

has not furnished the return in FORM GSTR-3B for the preceding month w.e.f. 01st Jan 2022.

- Late fee for delayed filing of FORM GSTR-1 to be auto-populated and collected in next open return in FORM GSTR-3B w.e.f. a date yet to be notified.
- Frequency for filing Form GST ITC-04 has been reduced from quarterly basis to half-year/yearly basis till 25th of the end of the half-year/year. Taxpayers whose annual aggregate turnover in preceding financial year is above Rs. 5 crores shall furnish ITC-04 once in six months and Taxpayers whose annual aggregate turnover in preceding financial year is upto Rs. 5 crores shall furnish ITC-04 annually.
- Interest is to be charged only in respect of net cash liability. section 50 (3) of the CGST Act to be amended retrospectively, w.e.f. 01.07.2017, to provide that interest is to be paid by a taxpayer on "ineligible ITC availed and utilized" and not on "ineligible ITC availed". It has also been decided that interest in such cases should be charged on ineligible ITC availed and utilized at 18% w.e.f. 01.07.2017.
- Rule 36(4) of CGST Rules, 2017 to be amended, once the proposed clause (aa) of section 16(2) of CGST Act, 2017 is notified, to restrict availment of ITC in respect of invoices/ debit notes, to the extent the details of such invoices/ debit notes are furnished by the supplier in FORM GSTR-1/ IFF and are communicated to the registered person in FORM GSTR-2B.

4. Clarification in respect of certain GST related issues:

- The date of issuance of debit note (and not the date of underlying invoice) shall determine the relevant financial year for the purpose of section 16(4) of CGST Act, 2017 w.e.f. 01.01.2021.
- There is no need to carry the physical copy of tax invoice in cases where invoice has been generated by the supplier in the manner prescribed under rule 48(4) of the CGST Rules, 2017.
- Only those goods which are actually subjected to export duty i.e., on which some export duty has to be paid at the time of export, will be covered under the restriction imposed under section 54(3) of CGST Act, 2017 from availment of refund of accumulated ITC.

5. Recommendations relating to GST rates on goods and services :

A. COVID-19 relief measure in form of GST rate concessions

1. Extension of existing concessional GST rates (currently valid till 30th September, 2021) on following Covid-19 treatment drugs, up to 31st December, 2021, namely-
   i. Amphotericin B -nil
   ii. Remdesivir – 5%
   iii. Tocilizumab -nil
   iv. Anti-coagulants like Heparin – 5%
2. Reduction of GST rate to 5% on more Covid-19 treatment drugs, up to 31st December, 2021, namely-
   i. Itolizumab
   ii. Posaconazole
   iii. Infliximab
   iv. Favipiravir
   v. Casirivimab & Imdevimab
   vi. 2-Deoxy-D-Glucose
   vii. Bamlanivimab & Etesevimab

B. Recommendations on GST rate changes in relation to Goods/ Services:

- GST rate has been reduced/increased on certain goods such as Medicine Keytruda for treatment of cancer, All kinds of pens, Cartons, boxes, bags, packing containers of paper etc. w.e.f. 01.10.2021.
- Supply of mentha oil from unregistered person has been brought under reverse charge. Further, Council has also recommended that exports of Mentha oil should be allowed only against LUT and consequential refund of input tax credit.
- Brick kilns would be brought under special composition scheme with threshold limit of Rs. 20 lakhs, with effect from 01.04.2022. Bricks would attract GST at the rate of 6% without ITC under the scheme. GST rate of 12% with ITC would otherwise apply to bricks.
- GST rate has been reduced/increased/exempted on certain services such as Services related to AFC Women's Asia Cup 2022, leasing of rolling stock by IRFC to Indian Railways, Printing and reproduction services of

recorded media where content is supplied by the publisher (to bring it on parity with Colour printing of images from film or digital media) etc. w.e.f. 01.10.2021.

- E Commerce Operators are being made liable to pay tax on following services provided through them

(i) transport of passengers, by any type of motor vehicles through it [w.e.f. 01st January, 2022]

(ii) restaurant services provided through it with some exceptions [w.e.f. 01st January, 2022].

C. Clarification in relation to GST rate on Goods :

- Pure henna powder and paste, having no additives, attract 5% GST rate under Chapter 14.
- Brewers' Spent Grain (BSG), Dried Distillers' Grains with Soluble [DDGS] and other such residues, falling under HS code 2303 attract GST at the rate of 5%.
- All laboratory reagents and other goods falling under heading 3822 attract GST at the rate of 12%.
- Scented sweet supari and flavored and coated illachi falling under heading 2106 attract GST at the rate of 18%.
- Carbonated Fruit Beverages of Fruit Drink" and "Carbonated Beverages with Fruit Juice" attract GST rate of 28% and Cess of 12%. This is being prescribed specifically in the GST rate schedule.
- Tamarind seeds fall under heading 1209, and hitherto attracted nil rate irrespective of use. However, henceforth they would attract 5% GST rate (w.e.f. 01.10.2021) for use other than sowing. Seeds for sowing will continue at nil rate.
- External batteries sold along with UPS Systems/ Inverter attract GST rate applicable to batteries [28% for batteries other than lithium-ion battery] while UPS/inverter would attract 18%.
- GST on specified Renewable Energy Projects can be paid in terms of the 70:30 ratio for goods and services, respectively, during the period from 01.07.2017 to 31.12.2018, in the same manner as has been prescribed for the period on or after 1st January 2019.

- Due to ambiguity in the applicable rate of GST on Fibre Drums, the supplies made at 12% GST in the past have been regularised. Henceforth, a uniform GST rate of 18% would apply to all paper and paper board containers, whether corrugated or non-corrugated.
- Distinction between fresh and dried fruits and nuts is being clarified for application of GST rate of "nil" and 5%/12% respectively.
- It is being clarified that all pharmaceutical goods falling under heading 3006 attract GST at the rate of 12% [not 18%].
- Essentiality certificate issued by Directorate General of Hydrocarbons on imports would suffice; no need for taking a certificate every time on inter-state stock transfer.

D. Clarification in relation to GST rate on services :

- Coaching services to students provided by coaching institutions and NGOs under the central sector scheme of 'Scholarships for students with Disabilities" is exempt from GST.
- Services by cloud kitchens/central kitchens are covered under 'restaurant service', and attract 5% GST [without ITC].
- Ice cream parlor sells already manufactured ice- cream. Such supply of ice cream by parlors would attract GST at the rate of 18%.
- Overloading charges at toll plaza are exempt from GST being akin to toll.
- The renting of vehicle by State Transport Undertakings and Local Authorities is covered by expression 'giving on hire' for the purposes of GST exemption.
- The services by way of grant of mineral exploration and mining rights attracted GST rate of 18% w.e.f. 01.07.2017.
- Admission to amusement parks having rides etc. attracts GST rate of 18%. The GST rate of 28% applies only to admission to such facilities that have casinos etc.
- Alcoholic liquor for human consumption is not food and food products for the purpose of the entry prescribing 5% GST rate on job work services in relation to food and food products.

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SOME IMPORTANT ADVANCE RULINGS UNDER GST

CA Manoj Nahata

1. Whether belated compliances by the supplier towards payment of tax to the Government would disentitle a person to avail of input tax credit as per the condition laid down in sub-section (c) of section 16 of the GST Act read with the rules made there under?

Held: Yes

In case of ***Eastern Coalfields Ltd -AAR West Bengal*****,** the applicant is a producer and supplier of coal. They have received services from M/s Gayatri Projects Ltd and have availed of input tax credit during the tax periods January'20, February'20 and March'20 respectively against three invoices. Payments against such supplies have also been made by the applicant. However, M/s Gayatri Projects Ltd has furnished FORM GSTR-1 and FORM GSTR-3B for the aforesaid tax periods i.e., January'20, February'20 and March'20 in the month of November'20 which has restricted input tax credit in respect of above-noted invoices in the auto-drafted FORM GSTR-2B of the applicant for the month of November'20. The applicant has sought an advance ruling on the entitlement of the ITC in respect of such invoices, against which the supplier has paid the taxes belatedly to the Govt.

The applicant contended that section 16 of the GST Act has prescribed the eligibility and conditions for taking input tax credit. Sub-section (2) of section 16 is absolute over other sub-sections of Section 16 in as much as it begins with the phrase "Notwithstanding anything contained in this section". All the conditions stipulated in section 16(2) are fulfilled by the applicant for which he is entitled to avail the input tax credit in the instant case. Also, Rules 59 and 60 substituted by 13th amendment of the CGST Rules, 2017 being subordinate to the CGST / WBGST Act, 2017 did not restrict the seamless availment of input tax credit for any registered person. He was in possession of the tax Invoices issued by the supplier namely M/S Gayatri Projects Ltd. in compliance of section 16(2)(a) of the GST Act. He had also received the services from the said supplier in compliance of section 16(2)(b). The supplier, M/S Gayatri Projects Ltd. had actually paid the tax charged in respect of such supply to the Government, either in cash or through utilization of input

tax credit in compliance of section 16 (2)(c) of the GST Act. The supplier had also paid the interest for the month of January-2020, February - 2020 and March-2020. He had furnished the returns under section 39 in compliance of section 16(2)(d) of the GST Act. Hence, the applicant is entitled to claim ITC in respect of such invoices.

The Authority made a reference to section-16 of the CGST Act and stated that while sub-section (1) of section 16 of the GST Act provides for entitlement of input tax credit to every registered person subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, sub-section (2) of section 16 which is a non-obstante provision specifically refers to the conditions where a registered person shall not be entitled to take the credit of input tax in respect of any supply of goods or services or both to him. Further, sub-section (3) and (4) of the said section also put restrictions towards entitlement of input tax credit under certain situations.There can be no denying that section 16 of the GST Act specifies conditions and restrictions towards entitlement of input tax credit. The said section contains four subsections which are to be read in a conjoint manner and the same must be read together with the rules prescribed in this regard as sub-section (1) of section 16 entitles a registered person to take credit of input tax subject to fulfillment of such conditions and restrictions as may be prescribed. Further, the Authority referred Rule-36 of the CGST Rules and para 3 of the Circular No. 123/42/2019– GST dated 11.11.2019 issued by Central Board of Indirect Taxes and Customs, GST Policy Wing wherein it has been clarified that "*The conditions and eligibility for the ITC that may be availed by the recipient shall continue to be governed as per the provisions of Chapter V of the CGST Act and the rules made there under. This being a new provision, the restriction is not imposed through the common portal and it is the responsibility of the taxpayer that credit is availed in terms of the said rule and therefore, the availment of restricted credit in terms of sub-rule (4) of rule 36 of CGST Rules shall be done on self-assessment basis by the tax payers."* It has been further clarified in the said circular that —*The balance ITC may be claimed by the taxpayer in any of the succeeding months provided details of requisite invoices are uploaded by the suppliers."*

In the instant case, the applicant has availed of input tax credit in the months

of Jan2020, Feb-2020 and March-2020 against supplies received from M/s Gayatri Projects Limited and admittedly the details of the invoices in respect of such supplies have not been uploaded by the supplier during the said tax periods. The applicant has, therefore, availed of input tax credit in violation of the restrictions as prescribed in sub-rule (4) of rule 36.The applicant is not entitled for input tax credit claimed by him on the invoices raised by M/sGayatri Projects Ltd. pertaining to the period Jan-2020, Feb-2020 and March-2020 for whichthe supplier has furnished FORM GSTR-1 and FORM GSTR-3B in the month ofNovember'20 and the applicant is, therefore, required to reverse the said input tax credit.

2. What will be the value of supply for charge of GST if the Ecommerce Operator gives discount to the customers for the passenger transportation service and the consideration charged and collected by it from the customer is after deducting such discount amount?

Held: Net of Discount

In case of ***M/s. Gensol Ventures Pvt. Ltd.- AAR Gujarat,*** the applicantintends to own, develop an electronic/digital platform for booking of cabs. The applicant submitted that the drivers will list their electric motor vehicles on the proposed electronic platform/App for booking by the customers for the passenger transportation services. The applicant further submits that as a business measure, it offers discounts to the customers for the passenger transportation service(cab service) provided by the drivers and the consideration charged and collected by it from the customer is after deducting such discount amount. Further, while making payments to the cab drivers, it remits full amount and records such discount as marketing expense. The applicant sought an advance ruling on the valuation of supply of above stated service.

The Authority stated that the applicant is required to discharge the amount of tax on the value of supply of services provided as per section 15 of the CGST Act, 2017. GST is to be discharged on the transaction value as per Section 15(1) of the CGST Act which is the price actually paid or payable for the supply of goods or services or both where the supplier and the recipient of the supply are not related, and the price is the sole consideration for the supply. There are certain inclusions and exclusions that are prescribed in law. Section 15(3) of the CGST Act, relating to discount, provides that discounts given before or at the time of supply recorded in the invoice, can be reduced from

the value of supply. Further, referring to subsection (1) of above section, it categorically states that transaction value shall be the value of supply on which tax be leviable in terms of Section 9(1) of the CGST Act, 2017. Given the above statutory provision, GST is not applicable on the value of discount, which is recorded in and depicted on the invoice, provided by the supplier at the time of supply. In this context, GST flyer dated 1-1-2018 issued by the Central Board of Indirect Taxes and Customs(CBIC) clarified that discount such as trade discount, quantity discount etc. are part of the normal trade and commerce, therefore pre-supply discounts i.e. discounts recorded in the invoice have been allowed to be excluded while determining the taxable value. In the current scenario, the applicant being classified as supplier of services in reference to Section 9(5) of the CGST Act, 2017 intends to offer discount at the time of supply of services on the ride charges to the customers. Hence, the applicant stands liable to pay the amount of GST on Net amount received from customers.

Also, where discount is offered by the applicant to customers, and Driver/s does not bear discount offered since it is offered by the applicant. And so, the applicant remits the entire value of supply(without reducing the discount amount) to Drivers. In other words, the remittance made by the applicant to Driver constitutes of two components: (a) amount collected from the customers (b) amount equivalent to the discount offered to the customer, which is a marketing expense for the applicant, and contributed by it. In the instant case, marketing expenses paid by the applicant to Driver cannot be said to be consideration for or towards any service by Driver, since no reciprocal activity is performed by Driver in order to receive such compensation and hence no GST is payable on it.

3. WhetherCSR activities are in the course of furtherance of business and will therefore be counted as eligible ITC in terms of Sections 16 and 17(5) of the CGST Act, 2017?

Held: No

In the case of ***M/s. Adama India Private Limited-AAR Gujarat*****,** the applicant supplies insecticides, fungicides and herbicides as a measure of spending the mandatory amount on CSR activities in the form of donations to the Government relief funds/educational societies, civil works or installation of plant and machinery items in schools or hospitals, distribution of food kits

etc. Also, the vendors that supply goods/services to the applicant for the purpose of undertaking the CSR activities charge GST on their output supplies. The applicant sought an advance ruling on the entitlement of ITC in respect of above stated transaction.

The applicant submitted that every registered person under GST can avail the ITC of inputs and input services subject to fulfilment of criteria laid down as per Section 16 of the CGST Act, however, the first and foremost condition for availing the ITC of inputs and input services as per Section 16 of the CGST Act is to ensure that the same is being used in the 'course and furtherance of business. Thus, for any inputs or input services to become eligible ITC, it is imperative that the same must be used in the course and furtherance of business, although the expression '**course and furtherance of business**' has nowhere been defined in the GST law. In other words, inputs and input services pertaining to CSR activities being undertaken by the applicant can become eligible ITC if only it is established that such activities are in the course and furtherance of business.The definition of the term 'Business' u/s 2(17) envisages that even an activity or a transaction which is done in connection with the main business operations of the Company shall be covered under the definition of 'business' under the GST law. The expenses incurred on the CSR activities by the Applicant are a mandatory requirement as per the Companies Act and any disclosure regarding non-compliance of the said requirement will lead to tarnishing the image of the company, lower brand value, lower market standing and lower credit rating. It relied on the judgement of Hon'ble CESTAT in the matter of ***Essel Propack vs. Commissioner of CGST, Bhiwandi [2018(362) ELT 833 (Tri-Mum)]*** wherein it was held that CSR is mandatory and essential for smooth business operations of a Company.

The Authority observed that as per Rule 4(1) of theCompanies (CSR Policy) Rules, 2014, the CSR activities undertaken by the company **shall exclude activities undertaken in pursuance of its normal course of business.** As per Section 2(d) of the said Rules, 'Corporate Social Responsibility' **does not include activities undertaken in pursuance of normal course of business of the company**. Thus CSR activities are not activities undertaken inpursuance of applicant's normal course of business.

Section 16(1) of the CGST Act, stipulates that a registered person is entitled

to take credit of input tax charged on any supply of goods or services or both, which are '**used or intended to be used in the course or furtherance of his business'.**Therefore, Section 16(1) of the CGST Act bars CSR activities from input/input service.

Author's comment: There are lot of confusions on availability of ITC on CSR activities due to contrary rulings. Hence suitable clarification on this matter from the Govt. is highly necessary.

4. Whether transfer of assets on lease by registered person to its own branches having separate GSTIN in other States is taxable as supply of service under GST?

Held: Yes.

In the case of***M/s. Chep India Private Limited-AAR Karnataka,*** the applicant is a private limited company involved in renting of reusable unit load equipment for shared use. It has sought an advance ruling on the whether "equipment" leased by the applicant located and registered in Karnataka to its other GST registration located across India would be considered as lease transaction and accordingly taxable as supply of services in terms of section 7 of the Central Goods and Services Tax Act, 2017?

The applicant contended that the definition of supply is wide enough to include "lease" within its ambit. Also, as per point 5(f) of Schedule II, "transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration" is deemed as Service under GST.The term "lease" is not defined under the GST law. Accordingly, the applicant draws reference to the Indian Accounting Standards (Ind AS) 116.The applicant statedthat any lease transaction is deemed as supply of services as per Schedule II since it involves the transfer of right to use any goods for consideration.

The Authority referred section-7 and stated that the applicant is a Company incorporated within India as per the Companies Act and is covered under the definition of "person" as per clause (84) of section 2 of the CGST Act, 2017. The branch of CIPL, in other States is also under the same entity and has no separate existence under the Companies Act. The assets and liabilities of the Company is held in common and hence the assets of one branch **do not have separate existence** as per the Companies Act or under the Income-tax Act, 1961. They are part of the same entity. There cannot be a transfer of

an asset between two persons under these Acts. Therefore, it is clear that the branch of the same company cannot enter into a lease transaction or rental transaction with another branch of the same company as per the provisions of the Companies Act or Income-tax Act, 1961, as they are not transactions between two persons and no revenue could be recognized in this transaction. The assets are held in common and there cannot be distinction between assets of CIPL, Karnataka and CIPL, Kerala as per the Companies Act. Hence CIPL, Kerala is also possessing the goods given to it from CIPL, Karnataka as owner of the goods itself and not as a lease hold asset, as far as all the business laws of the country are concerned.

However section 9(1) of the CGST Act, 2017 mandates that the levy of tax on the intra-State transactions of supply and sections 22 and 24 requires all taxable persons who are located in a State to obtain registration in that State. Therefore all stock transfers from one State to another state are treated as supplies and would be covered under the term "transfer". Further, since the two entities are deemed to be distinct persons, and the transfer of goods are affected from CIPL, Karnataka to CIPL, Kerala without any transfer of ownership of such goods, the same amounts to supply of service as per entry No. 1(b) of the Schedule II to the CGST Act." Hence only for the purposes of the CGST Act, 2017, the transfer of such goods on lease as per the agreement entered to between CIPL, Karnataka and CIPL, Kerala would amount to lease or renting of the goods for a consideration and hence would be a transaction of supply of services and the nature of such services is "lease", as it is for a period of time.

5. Whether there is requirement for reversal of input tax credit on goods used as rawmaterial in manufacturing of expired cakes & pastries that were kept in display for use in course or furtherance of business?

Held: Yes

In the case of ***M/s. Kanayalal Pahilajrai Balwani-AAR Gujarat,*** the applicant is engaged in the business of manufacturing & distribution of cakes & pastries items. The applicant sends cakes & pastries to the distributors to keep them in display to fascinateconsumer. The cakes & pastries are of perishable nature and cannot be preserved forlonger period and on regular interval all cakes & pastries kept in display have to becompulsorily replaced after expiry of said bakery item. The applicant submits that displayassists

them to achieve the objectives of continuing to conduct the business ofmanufacturing and selling cakes & pastries in future also. An advance ruling is sought on the admissibility of ITC in respect of the expired cakes and pastries.

The applicant submitted that there is no free/sample supply of extra cakes &pastries to distributors. Such extra cakes & pastries are supplied with tax invoice whichmeans that supply of goods is taxable supply. When such extra cakes & pastry expiredand return back to the applicant, assessee issues credit note for the same. Hence, there isno free/sample supply of goods by the taxpayer as per section 17(5) (h) of the CGST Act, 2017.

The Authority stated that Cakes and pastry have limited shelf life and after expiry thesebakery items are prohibited from sale. Also Section 7 ofPrevention of Food and Alteration Act, 1954 prohibiting the sale of expired goodsas such are not fit for consumption. The act ofthrowing away expired cakes and pastries is akin to destroying the expired foodproducts, for the applicant destroys by throwing them away.

Further, the'Non-obstante' sub section i.e Sec-17(5) overrides the operation of section 16 andsection 18 of CGST Act provisions contrary to this subsection and thereby blocksITC admissibility contrary to sec-17(5).

Therefore, the provisions of section-17(5) get attracted in the following case, and ITC is required to be reversed in the instant case.

6. Whether street lighting activities undertaken which involves supply of various goods and rendering of various services is to be considered as composite supply under GST?

Held: Yes, supply of service being the predominant supply.

In the case of ***M/s Bangalore Street Lighting Pvt. Ltd.-AAR Karnataka,*** the applicant is a pvt. ltd. Company. It is a special purpose vehicle incorporated by a group of selected consortium, to implement and execute the energy performance contract for supply and installation of LED luminaries, fedder panels, switch gears, cables and other equipment and their installation and operation & maintenance of the Public Lighting Network. It has sought an advance ruling on whether street lighting activities undertaken which involves supply of various goods and rendering of various services is to be considered as composite supply under GST?

The applicant stated that the supply of goods and services are naturally bundled and supplied in conjunction with one another, in the ordinary course of business. Consequently, the energy performance contract appears to be a contract for making a 'Composite Supply'. The principal supply under the energy performance contract is supply of goods (LED luminaries).

The Authority stated that on the examination of the contract, it is observed that the LED luminaries and other equipment are installed, operated and maintained by the same. The applicant receivesconsideration on the basis of energy savings. The Authority relied on the order of AAAR-Karnataka, in the case of M/s Karnataka State Electronics Development Corp. Ltd. Wherein it was held that the street lighting activity is considered as a composite supply of goods and services with the supply of service (Operating and Maintenance of installed equipment) being the predominant supply being the supply of service and is taxable at 18%.

7. Whether GST is payable on Management Fee/Administrative charges only orotherwise complete billing amount including employer portion of EPF & ESl amount?

Held: Complete billing amount including employer portion of EPF & ESl amount

In the case of ***Exservicemen Resettlement Society-AAR West Bengal,*** the applicant is a registered society providing security services andscavenging services to different Medical Colleges & Hospital, DistrictHospitals and other hospitals of Government of West Bengal. As per labour laws of the Government of West Bengal,the applicant claims Minimum Wage + Employer Portion of EPF @ 13% + ESI @ 3.25% andcharges tax @ 18% leviable under the GST Act on gross bill amount in every month forproviding security & Scavenging services to the Government Hospitals.However, the Audit Authority (Indian Audit and Accounts Department, West Bengal) incourse of audit has raised objection ofexcess payment of GST upon observation that GST to eb payable only on the management fees/service charges. Accordingly, an advance ruling is sought on the taxability of the above stated service.

The Authority stated that levy and collection of tax under the GST Act has been specified in section 9 of the GSTAct and section 5 of the Integrated Goods and Services Tax Act, 2017. The Authority further referred sec-15 of the CGST Act, 2017. It transpires from the above-noted provisions of the Act that while sub-section (2) ofsection 15 clearly specifies the elements that will

form a part of value of supply, sub-section(3) of section 15 excludes the elements that are not to be included in the value of supply.The aforesaid provisions of the Act leave no room to deduct any amount likemanagement fee, employer portion of EPF and ESI for the purpose of determination of valueof supply under section 15 of the GST Act meaning thereby in the instant case, tax isleviable under section 9 of the Act on the entire billing amount.

8. Can Composition Dealer purchase Scrap/Used vehicles from Unregistered Dealers? Whether the provision of RCM is applicable on these purchases from Unregistered Dealers?

Held: Yes.No RCM tax liability on purchase of goods from Unregd. Dealers, but RCM provisions get attracted if the same purchased from Central Government, State Government, Union territory or a local authority.

In the case of ***M/s. Ahmedraza Abdulwahid Munshi (Nadim Scrap)-AAR Gujarat,*** the applicant has sought an advance ruling on whether composition dealer can purchase scrap from unregd. Dealers under GST and if, yes, whether the provisions of RCM will get attracted?

The applicant referred sec-9(3) of CGST Act and Sr No.06 of the Notification No.4/2017-Central Tax (Rate) dated 28-6-17 wherein it is stated clearly that the Central Govt., State Govt., Union Territory or Local Authority shall be liable to discharge GST under RCM on the supply of Used vehicles, seized and confiscated goods, old and **used goods, waste and scrap.**Further, Notification No.08/2017-Central Tax(Rate) dated 28-6-17, as amended from time to time, exempts intra-State supplies of goods or services or both received by a registered person from any supplier, who is not registered, from the whole of the central tax leviable thereon under sub-section (4) of section 9 of the CGST Act, 2017. Also, Notification No.7/2019-Central Tax(Rate) dated 29-3-19 notifies that the specified registered persons shall, in respect of supply of goods or services or both, received from an unregistered supplier shall pay tax on reverse charge basis as recipient of such goods or services or both. However, the nature of goods in the present case are not notified vide said Notification 7/2019-CT(R). Hence, there is no RCM tax liability for purchase of subject goods from unregistered dealers. However, RCM provisions get attracted if the above stated goods are purchased from Central Government, State Government, Union territory or a local authority.

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SCRUTINY OF GST RETURNS AND DETERMINATION OF TAX.

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Cambridge Dictionary defines '**scrutiny'** thus— 'the careful and detailed examination of something in order to get information about it.' In the GST law, the purpose of 'scrutiny' is to examine the correctness of the return filed and to ensure that the output tax has been correctly and completely paid, input tax credit has been availed in accordance with the statutory provisions, etc.

For example, the State Goods and Services Tax Department, Kerala in its Circular No.7/2021 dated 7.11.2021 has identified certain parameters for scrutiny of returns as follows:-

1. ASMT13 – Return within 30 days
2. ITC utilisation greater than 5 times cash
3. Turnover above lcrore cash nil
4. Turnover above 60 percent
5. 2A-3B ITC comparison
6. GSTR9-8D difference
7. ITC availed after due date
8. Capital goods ITC vs exempted turnover
9. GSTR-1 Vs GSTR 3B mismatch
10. GSTR 3B Vs E-way bill
11. Turnover less than TDS and TCS

There may also be several other parameters, particularly in the cases of suppression of turnovers and evasion of tax. The Commercial Taxes Department, Government of Tamil Nadu has issued Standard Operating Procedure (SOP) in Circular No.26/2021-TNGST dated 9.10.2021 for scrutiny of GST returns. The following para in this circular may be useful to readers.

"Where the taxpayer files the explanation in Form GST ASMT-11 not accepting the discrepancy and the proper officer also does not accept such explanation of the taxpayer or no such explanation is filed within the stipulated period, not exceeding

30 days or such further time if any granted by the proper officer, then it will be further processed under section 73 or 74 of the TNGST Act, 2017, as the case may be by creation of a new adjudication task and the scrutiny task will be closed. It may be noted that no personal hearing is contemplated in section 61 of the TNGST Act, 2Ol7 since it is being afforded to the registered person/ taxpayer at the later stage in the proceeding under section 73 or74 as the case may be."

(Note: For better understanding, please read both the circulars).

It should therefore be noted that filing of GST returns completely and correctly would result in peaceful sleep. Scrutiny of returns triggers various actions under the GST law. Incorrect data, incorrect tax credit, incorrect rate of tax, ineligible exemption, incorrect computation, suspicious transactions, mis-match, incorrect output tax, etc., would end up in filing incorrect GST returns, attracting scrutiny by the authorities.

Section 61 of the CGST Act, 2017 andRule 99 of the CGST Rules, 2017 deal with 'scrutiny of returns'.

Under sub section (1) of Section 61, the proper officer (hereinafter referred to as PO) may scrutinize the 'return' and related particulars furnished by the registered person (hereinafter referred to as RP) to verify the correctness of the return and inform him of the discrepancies noticed, if any, in such manner as may be prescribed and seek his explanation thereto.Section 2 (97) defines 'return' as follows:-

"Section 2 (97) **—'return'** means any return prescribed or otherwise required to be furnished by or under this Act or the rules made thereunder"

Self-assessment:-

Section 59 says that every registered person shall self-assess the taxes payable under the GST Act and furnish a return for each tax period as specified under Section 39. Self-assessment is a system which places responsibility on the tax payer to ensure his tax return complies with all the provisions in the Act and the Rules made thereunder. Authorities assume that the tax payer completes the return in good faith and accept the data furnished as being true and correct. The moment the return is uploaded, tax payer is taking responsibility for the claims made in the return. A tax return is a legal document and everything must be truly and completely declared. The purpose of scrutiny of returns is to ensure correctness of the self-assessment made. All the tax payers and tax professionals must

frequently log in to the GST portal and verify issue of any communication by the authorities, because in some cases, period of response counts from the date of issue of notice, like Section 73 (8). Voluntary compliance of accepted discrepancies in the return would solve all the problems.

Under sub Rule (1) of Rule 99 , where any return furnished by a registered person is selected for scrutiny, the proper officer shall scrutinize the same in accordance with the provisions of section 61 with reference to the information available with him, and **in case of any discrepancy**, he **shall issue a notice** to the said person in **FORM GST ASMT-10,** informing him of such discrepancy and seeking his explanation thereto within such time, **not exceeding thirty days** from the date of service of the notice or such further period as may be permitted by him and also, where possible, quantifying the amount of tax, interest and any other amount payable in relation to such discrepancy. On receipt of such notice, such person shall cause thorough verification of the contents of the notice with the books of account and other documents. It is always suggested to reconcile the data reported through the various returns with the books of account at least once in six months and rectify the defects if any, without waiting for scrutiny or audit.

The RP may accept the discrepancy mentioned in the notice issued under sub-rule (1) of Rule 99, and pay the tax, interest and any other amount arising from such discrepancy and inform the same or furnish an explanation for the discrepancy in **FORM GST ASMT-11** to the PO—sub Rule (2) of Rule 99.

If the explanation is found acceptable, the RP shall be informed accordingly by dropping further action—vide sub Section (2) of Section 61. If the explanation furnished by the RP or the information submitted under sub-rule (2) of Rule 99 is found to be acceptable, the PO shall inform him accordingly in **FORM GST ASMT-12—**sub Rule (3) of Rule 99.

If satisfactory explanation is not furnished within 30 days or within the further permitted period or after accepting the discrepancies, the RP fails to take corrective measures the PO may initiate appropriate action including those u/s 65 (audit by tax authorities) / 66 (special audit by chartered accountant or cost accountant) /67 (inspection, search and seizure) or proceed to determine the tax and other dues u/s 73 (determination of tax) or 74 (determination of tax) —vide sub Section (3) of Section 61.

Hence response to form GST ASMT-10 must be prompt and to the point. All care must be taken to explain the discrepancies with reference to the facts and statutory

provisions, as any unsatisfactory explanation may result in action under the above five Sections. If the discrepancies are acceptable, the same shall be informed accordingly within the time.

Section 65 (7) provides for action under Section 73 or 74.

Section 66 (6) provides for action under Section 73 or 74.

All roads lead to Rome. Similarly scrutiny, audit, special audit and inspection would lead to determination of tax under Section 73 / 74. Section 2 (11) defines 'assessment' as follows:-

"2 (11) —'assessment' means determination of tax liability under this Act and includes self-assessment, re-assessment, provisional assessment, summary assessment and best judgment assessment;"

Section 73 deals with determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised**for any reason other than fraud** or any willful-misstatement or suppression of facts.

Sub Section (1) of Section 73 mandates issue of notice in the above circumstances by the PO requiring the person chargeable to tax to pay tax, interest and penalty.

Under Rule (1A) of Rule 142,PO**may**before service of the said notice communicate the details of any tax, interest and penalty as ascertained by the said officer in Part A of form **GST DRC-01A.**

Under sub Rule (2A) of Rule 142 where such person made partial payment of the amount communicated or desires to make any submissions against the proposed liability, he may make such submission in **Part-B of form GST DRC -01A.**

Under sub Rule (2) of Rule 142 where before the service of notice or statement, the person makes payment of the tax and interest as per Section 73 (5) or as per the provisions of the Act either on his own computation or as communicated by PO under sub Rule (1A), such person shall inform the PO of such payment in form **GST DRC-03** and the PO shall issue an acknowledgment accepting the payment in form **GST DRC-04.**On receipt of such GST DRC-03, PO shall not serve any notice under Section 73 (1) or statement under sub section (3) in respect of such tax paid or any penalty payable thereof—sub Section (6) of Section 73. If the PO holds the opinion that the amount paid under sub Section (5) falls short of the amount actually payable, he shall proceed to issue notice under Section 73 (1) in respect of the amount falling short of the amount actually payable—sub Section (7) of Section 73.

If such person pays the tax along with the interest payable within 30 days of issue of show cause notice, no penalty shall be payable and the notice shall be deemed to be concluded—sub Section (8) of Section 73.

Under sub Rule (3) of Rule 142 where such person makes payment of tax and interest under Section 73 (8) within 30 days of the show cause notice issued under sub Rule (1) of Rule 142, he shall intimate the PO of such payment in form **GST DRC-03** and the PO shall issue an order in form **GST DRC-05** concluding the proceedings in relation to that notice.

An order under Section 73 (9) shall be issued by the PO **within three years** from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within three years from the date of erroneous refund—sub section (10) of Section 73. PO shall issue Section 73 (1) notice at least **three months prior** to the above time limit specified in sub Section (10)—sub Section (2)of Section 73 and sub Rule (10) of Rule 142.

Under subRule (1) (a) of Rule 142, along with the said show cause notice, PO shall serve a summary of notice electronically in form **GST DRC-01.**

Subsequent to the issue of the said notice, if any such circumstances exist for **such periods other than those covered in the said notice,** the PO may serve a statement showing the details of amounts proposed to be demanded—sub Section (3) of Section 73.Under Rule 142 (1) (b), the PO shall serve a statement under sub-section (3) of section 73, a summary thereof electronically in **FORM GST DRC-02. The** service of such statement shall be deemed to be service of notice on such person under sub-section (1), subject to the condition that the **grounds relied upon** for such tax periods other than those covered under sub-section (1) **are the same as are mentioned in the earlier notice—**sub Section (4).If the amounts proposed to be demanded for the periods other than those covered by the first notice are in relation to new or fresh grounds, then Notice under Section 73 (1) shall be issued.

Person receiving the notice shall make a representation or reply to any notice, whose summary has been uploaded electronically in Form GST DRC-01 under Rule 142 (1) in Form **GST DRC-06**—sub Rule (4) of Rule 142).

Under sub Section (9) of Section 73, PO shall after considering the said representation, if any made by such person DETERMINE the amount of tax,

interest and a penalty equivalent to 10% of tax or Rs.10,000, whichever is higher and issue an order.

Sub Rule (5) of Rule 142 mandates that summary of the said order shall be uploaded electronically in form **GST DRC-07**, specifying therein the amount of tax, interest and penalty payable by such person. The order passed shall be treated as the notice for recovery under sub Rule (6) of Rule 142. It means there would not be any further demand notice.

According to sub Section (11) of Section 73, notwithstanding anything contained in sub-section (6) or sub-section (8), penalty under sub-section (9) shall be payable where any amount of self-assessed tax or any amount collected as tax has not been paid within a period of thirty days from the due date of payment of such tax.

Section 161 provides for rectification of errors apparent on the face of record. Under sub Rule (7) of Rule 142, where a rectification of the order has been passed in accordance with the provisions of section 161 or where an order uploaded on the system has been withdrawn, a summary of the rectification order or of the withdrawal order shall be uploaded electronically by the PO in **FORM GST DRC-08.**

Section 74 deals with determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised**by reason of** fraud or any willfulmisstatement or suppression of facts. With minor variations, provisions and procedures above mentioned under Section 73 would be applicable.

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

Under sub Section (2) of Section 74, the PO shall issue the notice under sub-section (1) at least six months prior to the time limit specified in sub-section (10) for issuance of order.

As per sub Section (8) of Section 74, where such person pays the tax along with interest and a penalty equivalent to twenty-five per cent. of such tax within thirty days of issue of the notice, all proceedings in respect of the said notice shall be deemed to be concluded.

Under sub Section (11) of Section 74, where any person served with an order pays

the tax along with interest and a penalty equivalent to fifty per cent.of such tax within thirty days of communication of the order, all proceedings in respect of the said notice shall be deemed to be concluded.

Section 122 (1)(under various clauses) provides for payment of **penalty** of Rs.10,000 or an amount equivalent to the tax evaded or the refund claimed fraudulently, etc., whichever is higher.

Section 75 (13), which is relevant to this context is extracted below:-

"75 (13) Where any penalty is imposed under section 73 or section 74, **no penalty for the same act or omission shall be imposed** on the same person under any other provision of this Act."

Under sub Section (10) of Section 74, the PO shall issue the order within a period of 5 years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within five years from the date of erroneous refund.

It is mandatory to grant **personal hearing** where a request is received in writing from such person or where any adverse decision is contemplated against such person. The relevant Section 75 (4) reads as follows:-

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

Provision relating to grant of adjournment reads as follows:-

"75 (5) The proper officer shall, if sufficient cause is shown by the person chargeable with tax, grant time to the said person and adjourn the hearing for reasons to be recorded in writing:

Provided that no such adjournment shall be granted for **more than three times** to a person during the proceedings."

Deemed conclusion of determination of tax:-

"75 (10) The adjudication proceedings shall be deemed to be concluded, if the order is not issued within three years as provided for in sub-section (10) of section 73 or within five years as provided for in sub-section (10) of section 74."

Limitation:-

Section 73 (10) and Section 74 (10) specify that the order shall be passed within a period of three years and five years respectively from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or

ITC wrongly availed or utilized relates to. The said due date has been extended as follows through Notifications:-

Year	Central Tax Notification Number & date	Date up to which extended
2017-18	6/2020 dt.3.2.2020	5.2.2020 & 7.2.2020
2018-19	15/2020 dt.23.3.2020	30.6.2020
2019-20	4/2021 dt.28.2.2021	31.3.2021

In conclusion:-

1. Case is selected for scrutiny by the Proper Officer (PO).
2. Form GST ASMT-10 is issued furnishing discrepancies by PO.
3. Person may accept and file GST ASMT-11.
4. Explanation is accepted and GST ASMT-12 is issued by PO.
5. In case explanation is not accepted, action under Section 73 / 74 commences.
6. Before service of notice, person can pay the amounts due through DRC-03 and the PO will issue DRC-04 acknowledging the same.
7. Before service of notice, PO may issue Part A of DRC-01A.
8. Person may furnish his explanation in Part B of DRC-01A if he partially accepts the proposal or doesn't accept fully.
9. PO will then issue show cause notice u/s 73 / 74. Along with the notice, summary of notice is issued in DRC-01.
10. Person can pay demanded tax along with interest through DRC-03 within 30 days of issue of notice and the notice shall be deemed to be concluded without levy of any penalty. PO will issue DRC 05 to the person.
11. For demanding further amounts on the same grounds for a different period, PO issues a summary of statement in DRC-02.
12. Person makes a representation to the said notice in DRC-06.
13. PO passes an order and uploads summary in DRC-07.
14. Summary of rectification order shall be uploaded in DRC-08.

The above exhaustive procedure would help the taxable person to have consultation at different stages to get the issues solved. If the discrepancies pointed out are acceptable, they should be accepted at the earliest stages, so that there would be no or minimal penal consequences.

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"AUDIT" CONDUCTED BY THE GST DEPARTMENT UNDER SECTION 65 OF CGST ACT,2017.

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We have completed 4 years of GST Law. The honorable Union Finance Minister made a proposal of "scrap GST Audit" in Union Budget,2021. The scope of GST Audit under Section 65 has been increased. As per information from the reliable source from the CGST Department "MASSIVE CASES" will be taken in GST Audit as per Section 65 of CGST Act, 2017. So, it's time to know "how to select cases for Audit under Sec.65 and what are the Risk Parameters for selection of Audit" by the CGST Department. So, I thought in my mind to create certain awareness and to provide certain important key points on GST Audit taken by the GST Officers under Section 65 of CGST Act,2017 with relevant notifications, Press Releases and Instructions issued by the CBIC from time to time to prepare data for completion of audit and discuss with the GST Audit Officer by all the GST professionals on various doubts arising by the GST Audit officer during the GST Audit to the tax professionals.

As per Section 65(1) of the CGST Act, 2017, the Commissioner or any officer authorized by him, by way of a general or a specific order, may undertake audit of any registered person for such period, at such frequency and in such manner as may be prescribed. The period of audit to be conducted under Sub-section (1) of Section 65 shall be a financial year or multiplies thereof as per Rule 10(1) of CGST Act, 2017.

As per Section 2(13) of the CGST Act, 2017, 'Audit' means the examination of records, returns and other relevant documents prescribed in the CGST Act,2017, whether the tax payer has maintained or furnished by the registered person under this Act or the rules made thereunder to verify correctness of turnover declared and taxes paid there on, input tax claimed by the tax payer and followed compliance with the provisions of the CGST Law.

Now, let us understand "**what are the Rick Parameters"** for Selection of audit

cases by the GST Department.

Some of the important Risk Parameters that could be considered during selection of audit by Audit Commissioner are as under:-

(i) Volume of the Taxpayer's turnover/net profit,

(ii) If any changes happened in the Taxpayer's turnover/net profit for the previous years,

(iii) Volume of Exemptions claimed by the taxpayer's year wise,

(iv) Higher incidence of supplies without issuance of E-Way Bills,

(v) Taxpayer who does not file periodical return but issues E-Way Bills and inconsistency in the data declared in GSTR-1 and E-way Bills generated,

(vi) Financial ratio analysis and if any major variations observations ,

(vii) Volume of Tax Refund claimed by the taxpayer's year wise comparison and if any variations observations,

(viii) Multitude of the taxpayer's legal relationships with other entities,

(ix) Taxpayer has multiple branches,

(x) Taxpayer who has requested waiver or is bankrupt,

(xi) Taxpayer categorized as High Risk,

(xii) Taxpayer's return was previously investigated for evasion,

(xiii) Taxpayer who has not been audited in the pre-GST era for a long period i.e. 4 to 5 years under VAT or Service Tax,

(xiv) Any specific information received from other Government authorities i.e. Income Tax, ROC,RBI, Local tax authorities or any written compliant received from the person.

(xv) Difference in the turnover as declared in Form GSTR-1 and GSTR-3B returns for continuous period,

(xvi) Difference in ITC availed and utilized as per GSTR-3B and ITC available as per GSTR-2A,

(xvii) Wrong classification of goods or services provide, effecting wrong levy of tax,

(xviii) Mismatch in the details of Export reported under GSTR-1 and

information lodged on ICEGATE,

Under the above circumstances the audit officer on receiving authorization from his higher authority as per GST Law,2017, shall issue notice in advance not less than 15 working days prior to conduct of audit.

The audit officer shall complete such audit within 3 months from the date of communication of audit as per section 65(4) of CGST Act, 2017. 'Commencement of audit' means the date on which the records and other documents called by the audit officer are made available by the registered person or the actual institution of audit at the place of business, whichever is later.

Procedure to be followed by the GST officer during the department audit: During the course of audit the authorized officer may require the following records and data of registered taxable person under GST Law,2017.

(a) Financial Year wise audit: As per Sec.65(1) of CGST Act, 2017, the period of audit shall be a financial year or multiples thereof as per Rule 101(1) of CGST & SGST Rules, 2017.

(b) Powers to order and conduct audit: Persons registered with Central GST authorities, will be audited by Superintendent of Central Tax who is designated as " Proper officer" for the purpose of raising demand under Section 65(7) of CGST Act, 2017, vide circular issued by CBE&C No.3/3/2017-GST,dated . 5.7.2017.

(c) Who are registered with the State GST Authorities, such taxable person's audit is taken up by Assistant Commissioner (State Tax) and Deputy Commissioner (State Tax) designated as proper officer for the purpose of raising demand under Section 65(7) of SGST Act,2017.

(d) Verification of records by audit team and audit notes: The proper officer authorized to conduct audit of the records and books of account of the registered person shall with the assistance of the team of officers and officials accompanying him, verify the documents and statements furnished under the Act and rules made thereunder , to check the correctness of following:-

(i). Books of accounts as per Section 35 of the CGST Act read with Rule 56 Prescribes Accounts and record requirements for a registered person,

(ii). Tax Invoices, Bill of Supply, Delivery Challans, Credit Notes, Debit Notes,

receipt Vouchers, payment vouchers and refund etc., like the details in the invoices should be subject to specific rules, if the format of the invoices various. Management should be advised to make amendment in the invoice include the requirements as per the GST Rules, 2017.

(iii). If the taxpayer is having multiple branches, stock transfers amongst branches must also be reconciled. Stock Register reflecting opening balance, receipts, supply and goods lost, stole Destroyed and the closing stock,

(iv). If the taxpayer is a manufacturer, production records including break up of raw Materials, finished goods, scrap etc,

(v). Details of Advances received and paid during the audit period,

(vi). Records pertaining to Input Tax Credit availed and utilized like if the taxpayer claimed extra ITC , he will have to pay interest @24% on the excess tax amount, the auditor would need to reconcile that businessman does not claim excess Input Tax Credit. Input Tax Credit should be reversed for non-payment within 180 days and this should be checked by the auditor,

(vii). If the taxpayer has maintained electronic records, log of all the entries modified or Deleted etc.,

(viii).If the taxpayer is a Job worker, Job work register etc., Was there any good which was sent on approval basis and it's exceeding the time limit of 6 months and not offered to tax? If yes, then add that amount in turnover and increase the tax liability

(ix). Details of E-Way Bills register as per GSTN data,

(x). Copies of GST Returns like GSTR-1, GSTR-2A,GSTR-2B, GSTR-3B, GSTR-4,GSTR 5,GSTR-5A, GSTR-6, GSTR 9/9C, GSTR-10, ITC-01, ITC-05, ITC-05A and RFD-01 and copies of tax paymentchallan etc., for the audit periods.

(xi). Audited financial Statements including Audit Report etc., for the audit periods,

(xii). Copy of Income Tax Return(filed) for the audit periods,

(xiii). Copy of Form 26AS provided by I.T. Department for the audit periods.

(xiv). Copies of Inward and Outward Ledgers,

(xv). Copy of the GST registration certificates of Principal Place of Business and branch and other place of details whether incorporate or not,

(xvi), Ledger of stock maintained at where house by the taxable person,

(xvii). Copy and details of Trans-1, Trans-2 and 2A and Trans-3 etc., for the year 2017-18 along with stock register and copies of original invoice relating to ITC claimed in Trans-1 for the period prior to July'2017 as per Sec.143 of CGST Act,2017.

The Below Table shows details of documents to be issued under GST Law by the taxpayers.

S.No.	Event	Type of Document	Relevant Section of GST Law	Relevant Rule of GST Rules
1	Where a registered person supplies of taxable goods	Tax Invoice	Sec.31(1) of CGST Act,2017.	Further Proviso to 46 Rule 1 of CGST Rules,2017.
2	Where a registered person supplies of taxable services	Tax Invoice	Sec.31(2) of CGST Act,2017.	Rule 47 of CGST Rules,2017.
3	Where a registed person supply of goods for small value	Bill of Supply.	Sec.31(3) (b) of CGST Act,2017.	Further Proviso to 46 Rule 1 of CGST Rules,2017.
3	In case of continuous supply of goods	Tax Invoice	Sec.31(4)of CGST Act,2017.	Further Proviso to Rule 1 of CGST Rules,2017.
4	In case of continuous supply of Service	Tax Invoice	Sec.31(5)of CGST Act,2017.	Rule 2 of CGST Rules,2017.
5	On refund of Advance by a registered person.	Receipt Voucher shall be issue by the recipient.	Sec.31(3)(d) of 31(3) (e) of CGST Act,2017.	Rule 50 & 51 of CGST Rules,2017
6	In case supply of services under a contract before the completion of the supply.	Tax Invoice	Sec.31(6) of CGST Act,2017.	Rule 47 of CGST Rules,2017.

7	Notwithstanding anything in sub-section (1), where the goods being sent or taken on approval for sale or return are removed before the supply takes place, the invoice shall be issued before or at the time of supply takes supply, the invoice shall be issued before or at the time of supply or six month from the date of removal , whichever is earlier. Explanation:- For the purposes of this section, the expression "tax invoice" shall include any revised invoice issued by the supplier in respect of a supply made earlier.	Tax Invoice	Sec.31(7) of CGST Act,2017.	Rule53(1),(2),(3) of CGST Rules,2017.

Time period prior to conduct the audit:-

The proper officer after receiving intimation and authorization from the Commissioner about GST Audit under Sec.65 of CGST Act, 2017, where it is decided to undertake the audit of a registered person, shall issue a notice not less than 15 working days prior to the conduct of Audit ,

Time Limit for completion of Audit by the GST department:-

The GST Audit officer is required to complete within 3 months from the date of commencement of audit. The period can be extended for a further period of a maximum of 6 months by the Commissioner,

The taxpayer to follow the following duties during the GST Audit conducted by the GST officers:

1) To Comply in time to GST-ADT-01 notice and all necessary correspondence from audit officer with respect to the audit proceeding,
2) To make available all necessary books of accounts i.e. physical record as well as accounting system access/electronic record as per necessity to audit team and any other document/ information required to complete the audit,
3) To provide the necessary facility to verify the books of account/other documents as required,
4) To ensure presence of either the Registered Person or his authorised representative at the place of business where audit is being conducted during audit activity so that he can explain the books and the business activity properly,
5) To extend necessary cooperation to the audit team during Place of Business audit visit for timely completion of audit,
6) To follow the statutory timelines in case of making payment if audit results are accepted and / or to comply with notice under section 73 /74 of GST Act in case audit finding are not accepted.

Modes of serving Notice under GST:

1. Hand-delivering the notice either directly or by a messenger or by a courier to the taxpayer or his representative.
2. By registered post or a speed post or a courier with an acknowledgement- addressed to the last known place of the business of the taxpayer.
3. Communication through the email address.
4. Making it available on the GST portal after logging in.
5. By publication in a regional newspaper being circulated in the locality- that of the taxpayer based on the last known residential address.
6. If none of the above means is used, then by affixing it in some prominent place at his last known place of business or residence. If this is not found as reasonable by the tax authorities, they can affix a copy on the

notice board of the office of the concerned officer or authority as a last resort.

Notices in GST Portal:

The main problem faced by the taxpayers regarding notices is that many a times, they don't understand how to check the notice on the GST portal. Earlier, notices were sent in hard copy at the registered address of the taxpayer, but in GST Law, to follow:-

1. Log in on common portal > Click on User services > Click on View Notices,
2. Or sometimes few notices are served under the heading View additional notices.

List of Notices Form – Description and Response/ Precautions for the same:-

S.No.	Form No. under GST	Description of Notice	Notice/ How to respond
1	REG-03	Sent while verification of GST registration application to ask the taxpayer for clarifying details entered in the application and the documents provided. The same notice form is applicable for amending the GST registration.	Upload documents as mentioned and have clear understanding.
2	CMP – 05	Show cause notice questioning taxpayer's eligibility for composition scheme.	Always keep track of the turnover, so, if limit exceeds, you can opt for normal registration.
3	GSTR-3A	Default notice for the taxpayer who has not filed GST returns : GSTR 1, GSTR 3B, GSTR 4 or GSTR 8	File all the relevant returns due along with late fees, interest on the GST liability, if any.
4	ASMT-10	Scrutiny notice for intimating discrepancies in the GST return after scrutiny along with tax, interest and any other amount payable in relation to such discrepancy, if any	Respond by giving reasons for discrepancies in the GST returns

5	RFD-08	Show cause notice of Rejection of Refund Application of taxpayer	Keep track of documents, information submitted asked by the department.
6	ASMT – 02	Notice for seeking additional information for provisional assessment under GST	Provide such information within the time.
7	ASMT -14	Show Cause Notice for assessment under section 63 – reasons for conducting the assessment on the best judgment basis	These notices are issued mostly when reply to earlier notices are not submitted, hence always file the replies on time.
8	ADT – 01	Notice for conducting audit	These audits are directed because of the complexity or huge defaults are made
9	REG – 17	Show cause notice why should the GST Registration not be cancelled for the reasons laid down in the notice	Apply for the cancellation of GST registration, only after filing all the returns till the date of cancellation, and provide clarification with documents for cancellation

What are the consequences if not responded to the notices by the taxpayer?

The taxpayer should respond promptly to the notice issued in his /her name within the time specified . In case, the taxpayer fails to do so, he will be legally acted upon. The GST authorities can eventually prosecute such a taxpayer or consider it as a purposeful default and charge the taxpayer with penalty. But, as a good practice and timely reply to the notices, Taxpayers are always advised to keep track of information reported on GST Portal.

If any irregularity or mistake is observed, taxpayer should try to correct the same in the most latest return, if possible, also, taxpayer should reconcile all the returns with each other, like turnover reported in Form GSTR-1 with Form GSTR-3B and E-Way Bills generated and also reconciliation of Input Tax Credit availed in Form GSTR3B with Form GSTR-2A or Form GSTR-2B.

How to identify differences between Form GSTR-2A and Form GSTR-3B ?

Generally these following differences happen between Form GSTR-2A and Form GSTR-3B.

(i) The supplier is having frequency of uploading Form GSTR-1 Quarterly,

(ii) Input Tax Credit as per Reverse Charge Mechanism,

(iii) Input Tax Credit relating to Import of Services and Goods,

(iv) The important issues is Supplier has not uploaded and filed Form GSTR-1 in time and not properly filed and uploaded.

(v) The buyer has not made payment on inward supply of goods and services within specified time i.e. within 180 days , but supplier raised invoice as per GST law at the time of supply of goods and services but recipient has claimed ITC on such invoices. So, under these circumstances buyer has reversed ITC along with interest and informed supplier.

If the buyer has identified differences between Form GSTR-1 and Form GSTR-3B , how to rectify such differences by the buyer?

If the buyer has identified any differences between Form GSTR-1 and Form GSTR-3B, he has to take appropriate steps i.e. to follow up supplier and inform to upload Form GSTR-1 timely with correct details of Tax invoices with correct tax and value of supply of gods and services.

What is the importance to reconcile Form GSTR-1 with Form GSTR-3B by the taxpayer?

The GST department is watching taxpayers' data along with Form GSTR-1 and Form GSTR-3B regularly with their data analysis wing as per GST audit manual issued by the GST department from time to time to select files for GST audit by the GST authority as per Section 65 of CGST Act. If GST analysis identifies difference as per GST manual GST audit department issues notice on Form ASMT-10 to the tax payer to submit all the records for audit under Section 65 of the CGST Act.

What are the consequences, if any mistakes are identified by the GST Audit officer?

During the audit due to many reasons mistakes are made by the taxpayer like:-

(i) Wrong or Fake invoices are issued by the taxpayer,
(ii) False information provided while registering under GST or financial records or documents or has filed fake returns to evade tax and has hidden information or has given false information during proceedings,
(iii) The taxpayer has collected GST but did not submit it to the GST department within 3 months,
(iv) The taxpayer has taken ITC without actual receipt of goods and services,
(v) If the taxpayer deliberately suppressed outward supply of goods or services to evade tax and other mistakes, the taxpayers are liable to pay penalty as per below:-

S.No.	Types of mistakes	Liable to pay penalty
1	For any reason, other than the reason of fraud or any wilful misstatement or suppression of facts to evade tax.	The taxpayer shall be liable to a penalty for an amount equal to:- (i). Rs.10,000/- or (ii).Rs.10% of the tax due from such person, (iii). Whichever is higher.
2	For any reason of fraud or any wilful misstatement or suppression of facts to evade tax.	The taxpayer shall be liable to a penalty for an amount equal to:- (i).Rs.10,000/- or (ii). The tax due from such person, (iii). Whichever is higher.
3	Maximum penalty may be --	The amount of penalty may extend to Rs.25,000/-

CONCLUSION:

After completion of GST Audit by the Appropriate officer, if such taxpayer has not paid tax or short paid tax or erroneously claimed refund amount or wrongly claimed Input Tax Credit availed or utilized, then the proper officer has to issue a notice to the taxpayer within 30 days and serve show cause notice to file objections. If he has satisfied with the objections filed by the taxpayer he will drop the proposal of demand or otherwise initiate action under section 73 or 74 of CGST Act, as the case may be.

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DOCTRINE OF IMPOSSIBILITY

- A TOOL OF DEFENSE IN TAXATION MATTERS

CA Manoj Nahata

The doctrine of ***"Lex non Cogit Ad impossibilia"*** is an age-oldmaxim used globally as a measure of defense in variouslegal matters. In our Country also various judicial forum has appreciated this maxim from time to time and provided relief. Of late, this concept has been used extensively in the taxation matters as well.Further due to COVID-19 pandemic this concept has gained much importance as it is impossible to meet certain statutory obligations.

Meaning&Concept:

The maxim "*Lex non Cogit Ad impossibilia"* is of the Latin origin. It means the law does not compel a man to do anything vain or impossible or to do something which he cannot possibly perform. In ***Hughey v. JMS Development Justice Owens of the United States Court of Appeals*** used these words- "Lex Non cogitadimpossibilia: The law does not compel the doing of impossibilities.

Here, the word "lex" literally means a system of law, "non" means does not, "cogit" means to compel, "ad" means to, and "impossibilia" means impossible.It thus means a body of law does not compel or forces someone to do the thing which is impossible. Law requires nothing impossible.

This maxim is one of the important pillars of **doctrine of necessity**which along with another maxim ***"Impotentiaexcusatlegam "***propagates that when law creates a duty or charge and the party is disabled to perform it, without any default in him, and has no remedy over it, then the law in general will excuse him.

Importance& Use:

The genesis of the doctrine is rooted in the law of contracts. Section 56 of the Indian Contract Act, 1872allows contracts to be set aside due to supervening impossibility preventing its performance. This, however, is different from a force majeure clause which relieves the contractual obligation to perform only in an identified 'force majeure event' earmarked in the contract, whereas 'impossibility' covers other unforeseen circumstances that are not covered under the force majeure clause.Thus, principles embodied in the legal maxims 'lex non cogitadimpossibilia' and 'impotentiaexcusatlegem' could come to the rescue in such unforeseen situations.Time and again, various Courts accepted the application of this maxim and excused the parties from performance of obligations.

Let us try to understand the approach of the Courts while applying the above principles.

- In case of ***Emperor v. Ganpat Laxman Kalgutkar, AIR 1938 Bom 427*** the Hon'ble Bombay High Court has explained that if in the

interpretation of an enactment, the Court finds that the duty imposed is either impossible of performance and beyond the normal capacity of a reasonable or prudent man, or when performance in the strictest language of the enactment is either idle or impossible, then the enactment must be understood as dispensing with the strict performance of that duty.

- In case of ***State of Rajasthan v. Shamsher Singh (1985 AIR 1082)***it was argued before the Hon'ble Apex Court that however mandatory the provision may be, where it is impossible of compliance that would be a sufficient excuse for non-compliance, particularly when it is question of time factor.
- Similarly, while dealing with a question as to whether an assessee can be penalized for failure to carry out an act prior to its incorporation the apex court in the case of ***Life Insurance Corp Ltd. v. CIT (1996) 219 ITR 410***held that the law does not contemplate or require the performance of an impossible act - Lex non cogitadimpossibilia.
- The Supreme Court in the case of ***State of MP Vs. Narmada BachaoAndolan [(2011) 7 SCC 639]***, applied this maxim and held that thus, where the law creates a duty or a charge and the party is disabled to perform it without any fault on his part and has no control over it, the law will in general excuse him.
- The judgment of Hon'ble Supreme Court in the case of **Krishnaswamy S. PD. v. Union of India [2006] 151 Taxman 286/281 ITR 305** is also a guiding force wherein the Hon'ble Court held that the law itself and its administration is understood to disclaim as it does in its general aphorisms, all intention of compelling impossibilities, and the administration of law must adopt that general exception in the consideration of particular cases.
- In a more recent case of ***State of Uttar Pradesh vs. Inhuman condition at quarantine centres and for providing better treatment to corona positive***on 21.05.2021 the Supreme Court of India ("SC") has broadened the scope of the 'doctrine of impossibility', which is traditionally invoked in the contractual regime, the SC observed that the 'doctrine of impossibility' would be equally applicable to Court orders. This decision was in response to the slew of directions issued by the Allahabad High Court to improve the state's health infrastructure. These directions, as pointed out by the Solicitor-General, proved to be difficult, almost impossible to implement. Therefore, the two-Judge bench of the SC decided to give the directions a flavour of an "advice of the Court" rather than considering them to be the High Court's mandate. In this context, the SC invoked the doctrine of impossibility terming the Allahabad High Court's order as "impossible".

Thus, it is well-settled that an obligation gets discharged due to impossibility of

performance. The law of impossibility of performance does not necessarily require absolute impossibility, but also encompass the concept of severe impracticability.

Application of thisdoctrine in Taxation matters:

Let's understand the applicability of the doctrine in taxation laws with some judicial precedents.

- The Delhi High Court in the case of ***Arise India Ltd. V. Commissioner of Trade and Taxes [TS-314-HC-2017(Del)-VAT]***, has held that in the present case, the purchasing dealer is being asked to do the impossible, i.e. to anticipate the selling dealer who will not deposit with the Government the tax collected by him from those purchasing dealer and therefore avoid transacting with such selling dealers. Therefore, there was need to restrict the denial of ITC only to the selling dealers who had failed to deposit the tax collected by them and not to punish bona fide purchasing dealers. The latter cannot be expected to do the impossible. It is trite that a law that is not capable of honest compliance will fail in achieving its objective. If it seeks to visit disobedience with disproportionate consequences to a bona fide purchasing dealer, it will become vulnerable to invalidation on the touchstone of Article 14 of the Constitution.
- The larger Bench in case of ***Lucas TVS Ltd., V. Commissioner of Central Excise, Chennai' - 2009 - TMI - 32247 - CESTAT CHENNAI***held that the doctrine cannot be invoked by any person who himself failed to do the possible, to do that the law required him to. The defense might be available to an assessee in procedural matters. It cannot be taken against the substantive provisions of a taxing statute providing for compulsory levy. The argument placed was that it was impossible for the assessee to have paid the differential amount of duty (which was occasioned by subsequent price revision) at the time of clearance of goods and therefore it cannot be said that such duty 'ought to have been paid' at the time of clearance of the goods. It is argued that the law cannot ask a person to do impossible. The defence of impossibility was taken by the assessee to resist the demand of interest. But the same was not accepted in view of the fact that there was already a mechanism for provisional assessment under rule 7 of the Central Excise Rules which the assessee failed to resort to escape interest liability.
- In case of ***Commissioner of Income Tax vs. Premkumar reported in 2008 (2014) CTR 452 (All.)*** the Hon'ble Allahabad High Court while dealing with the question whether an assessee can be faulted for not declaring the amount of capital gain on acquisition of land when the amount of compensation itself is not determined held that requiring the assessee to file a proper and complete return by including the income under the head

'Capital gain' would be impossible for the assessee in such cases.

- A larger bench of the Tribunal in case of ***Hico Enterprise vs. Commissioner of Customs reported in 2005 (189) ELT (Tri.LB)*** following the maxim Lex non Cogit Ad impossibilia held that the transferee of a quantity based license issued by the Licensing authority under the scheme of exemption notification no.204/92 –Custom, cannot be denied the benefit of this exemption, if subsequently it is found that the original license holder (transferor) had obtained the license by fraud and misrepresentation and the condition of notification that in respect of the goods exported in discharge of the export obligation, Cenvat Credit had not been availed, had not been fulfilled, as the condition which is required to be fulfilled by the transferor cannot be expected to be fulfilled by the transferee.
- While dealing with question as to whether an assessee can be held liable to pay interest for failure to pay advance tax during the year when the liability to pay tax had arisen on account of amendment to law which took place after the end of the year, ***Hon'ble Madras High Court in the case of CIT V. Revathi Equipment Ltd. (2008) 298 ITR 67 (Mad)*** held that the assessee was not liable to pay advance tax and therefore levy of interest under sections 234B and 234C is not justified.
- In the case of ***Escorts Ltd. v. CIT [2002] 257 ITR 468***, Hon'ble Delhi High Court was concerned with claim of an assessee for grant of refund under section 244 of the Act, which was denied to an assessee by the revenue on the ground that the assessee himself was responsible for delay of refund, and therefore cannot claim the amount of interest. While considering the rights of the assessee to claim interest, the Hon'ble Delhi High Court held that if the Assessing Officer could not perform his duties to complete the order of assessment in the absence of any evidence furnished by the assessee, the Department cannot be blamed therefore. A law cannot be interpreted in vacuum. It has to be interpreted having regard to the facts and circumstances involved in each case.

Areas under the GST Law where this doctrine can be applied:

The author finds certain areas under the GST lawwherein the doctrine of Impossibility can be invoked. The key provisions where doctrine of impossibility may be possibly argued are as follows:

- In order to avail input tax credit by the recipient of goods and/or services, 16(2)(c) of the CGST Act, 2017 imposes a condition that the supplier should have paid taxes on such supply to the Govt. account. However, there is no mechanism provided on the GST portal to know and verify whether the supplier of goods and/or services has actually paid tax on such supply.

Though the common portal has provided a facility to verify return filing status of the supplier but in view of the author the same is not going to serve the purpose.Thus,the law cannot compel the recipient to do the impossible i.e., to ensure that the Supplier has paid the tax to the Government.

- Of late, taxation departmenthave started issuing notices on account of mis-match of ITC in GSTR-3B vis-a-vis ITC reflecting in Form GSTR - 2A on the GST portal. Again, in view of the author,ITC should not be denied as long as the other conditions as stipulated in law are satisfied because the recipient of goods or services has no control over the supplier. It is beyond one's control to make supplier to file return and pay tax and get ITC reflected on the portal. So, here again, one can possibly argue the matter on the basis of the above maxim.
- The present scenario of Covid -19 pandemic has caused financial hardship to many sectors. In such a scenario the condition for reversal of Input Tax credit if payment to the supplier is not made within 180 days is again a troublesome provision under second proviso to section 16(2). Thus, the author strongly feels that this proviso to section 16(2) is going to be a big challenge for the business houses and very soon going to be tested legally on the touchstone of this maxim. It will be impracticable as well as impossible to follow this condition in the pandemic.
- Under the present provisions of section 80 of the CGST Act,2017 the Commissioner is empowered to extend the time for payment or allow payment of tax due in installments. But this facility is specifically barred and not available in respect of self- assessed tax liability in any return. This is again creating a big problem for the taxpayers particularly in the COVID-19 Pandemic where everyone is facing liquidity problem & tight financial position. However, some of the Courts in the Country has already allowed relief by providing instalment facility even for the self-assessed tax liability. But here author feels that one may also look it as 'inability to perform' instead of 'impossibility to perform'. So, this doctrine needs to be applied carefully in such cases.
- Expiry of E-way Bill's validity during transit is also an area where this doctrine can be used. Many a time it is seen that the validity period of E-way Bill expires while the goods are in transit. This may be due to reasons beyond control like heavy traffic on the route, construction or repair activities on the route etc. and due to such reasons, the E-way bill get expired. The flying squad officers never shows any sympathy in such cases and levy tax and penalty even in cases where goods are accompanied by E- Invoice. Sometimes it is also not possible to extend validity within the time frame

prescribed due to certain reasons beyond one's control like – expiry during night hours, poor connectivity, no means of communication in transit,public holiday etc. etc. So,under such circumstances the doctrine of impossibility may be possibly invoked to buttress the argument.

- Recently, the Govt. has announced for reduction in GST late fee and a GST Amnesty Scheme for the period of July 2017 to April 2021 was brought for non-filers. This GST Amnesty scheme for period July 2017 to April 2021 is applicable only if, GST Returns with Tax payment is filed up to 31st Aug'2021.Now, registration of most of the non-filer who wants to avail this scheme is already cancelled by the system /department due to non-filing and time limit of 90 days for revocation of such cancelled registration is also over. Due to this reason many taxpayers are not able to activate their GST Registration and make payment of pending tax liability. The only option left is to file an appeal to the Appellate Authority but either the time to file appeal is over or by the time their case will be disposed of the statutory timeline of 31st August, as per the Scheme, will be over. So, under such circumstances it is impossible to avail the benefit of this scheme. So, one can take support and contest this matter on the basis of above maxim.

Conclusion:

The doctrine of impossibility is one of the important principles of equity and has been successfully argued in the taxation matters also. In almost all cases, the fundamental tests which have been applied by courts before applying the above legal maxims to the facts of a case, are to see whether the event (i.e., non-compliance with a law) was beyond the control of the person, occurred without any fault of the person and it resulted in an impossibility. Further it should also be noted that the doctrine should not be used in a routine manner or a matter of practice in each and every case. There is always as difference between 'impossibility' to do and 'inability' to do. Rather, the above doctrine or principles are invoked in case of exceptional or extraordinary circumstances only. The courts have strictly interpreted the doctrine of impossibility and have excused non-performance on a case-to-case basis.

Disclaimer*: The views expressed above are purely personal views of the author. The possibility of other views on the subject matter cannot be ruled out. So, the readers are requested to check and refer relevant provisions of statute, latest judicial pronouncements, circulars, clarifications etc. before acting on the basis of the above write up. The author is not responsible in anyway.*

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DIGEST OF ADVANCE RULINGS UNDER GST

S S.Satyanarayana, Tax Practitioner

RULINGS OF ADVANCE RULING AUTHORITIES

1. Input Tax Credit :

Facts : The applicant supplies insecticides, fungicides and herbicides. The applicant submits that as per Section 135 of the Companies Act, 2013, it has been spending the mandatory amount on CSR activities in the form of donations to the Government relief funds/educational societies, civil works or installation of plant and machinery items in schools or hospitals, distribution of food kits etc; that the vendors that supply goods/services to the applicant for the purpose of undertaking the CSR activities charge GST on their output supplies; that the applicant intends to avail the Input Tax Credit(ITC) of the inputs and input services being procured for the purpose of undertaking the CSR activities. The applicant seeks to know whether CSR activities are in the course of furtherance of business and will therefore be counted as eligible ITC in terms of Sections 16 and 17(5) of the CGST Act, 2017.

Observations & Findings : We refer to the Companies (CSR Policy) Rules, 2014, made by the Central Government in exercise of its powers under section 469 of the Companies Act. **Rule 4(1) of the said Rules reads as follows:**

"4.(1) The CSR activities shall be undertaken by the company, as per its stated CSR policy, as projects or programs or activities(either new or ongoing), ***excluding activities undertaken in pursuance of it's normal course of business."***

Further, vide Companies (CSR policy) Amendment Rules 2021, even the definition of CSR **(Rule 2(d) of said Rules)** itself, excluded activities undertaken in pursuance of normal course of business of the company.

Section 16(1) of the CGST Act, stipulates that a registered person is entitled to take credit of input tax charged on any supply of goods or services or both, which are used or intended to be used in the course or furtherance of his business. We note that the applicant submitted that CSR activities being

undertaken by the applicant can become eligible for ITC if only it is established that such activities are in the course and furtherance of business. As per law, Section 16(1) CGST Act bars CSR activities from ITC.

Ruling : CSR activities, as per Companies (CSR Policy) Rules, 2014 are those activities excluded from normal course of business of the applicant and therefore not eligible for ITC, as per Section 16(1) of the CGST Act.

[2021 (9) TMI 1061 – AAR, Gujarat – M/s Adama India P Ltd.]

2. Rate of Tax :

Facts : The applicant is engaged in providing works contract service directly to sub-contractors who execute the contract with the main contractor for original contract work with the irrigation department(State of Gujarat). The applicant has filed the present application to seek clarification for the rate of tax to be levied from the sub-contractor for original contract work pertaining to irrigation and construction work (works contract). The applicant submits that they should be charged 12% GST only and not 18% as applicable in other cases.

Observations & Findings : We note that the Government Irrigation Division awarded work contract to Main Contractor M/s JSIW for EPC of a pumping station. Subsequently, the Main contractor awarded the said work to sub contractor M/s Radhe Construction. Subsequently, the sub contractor awarded the said work to the applicant, who is now a sub-sub contractor.

We hold that to be eligible for being covered at serial number 3 (iii) of said NT 11/2017 CT(R), the following two conditions shall be satisfied:

i. Composite Supply of Works Contract to be supplied by Main Contractor to Government and

ii. Supply by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of canal, dam or other irrigation works.

We observe that the applicant does not satisfy condition 1, but satisfies only condition number 2.

Further, we hold that to be eligible for being covered at serial number 3 (ix) of said NT 11/2017CT(R), the following two conditions shall be satisfied:

i. Composite supply of works contract provided by a sub-contractor

to the main contractor and

ii. That main contractor shall provide services specified in item (iii) to Government.

We hold that if condition of Notification was only that composite supply of works contract to be supplied by way of irrigation works, irrespective of the recipient being Government or not, then sub-sub contractor is also eligible for said entry in Notification. But the Notification lays down the condition that supply should be provided to Government by main contractor and only sub contractor to said main contractor enjoys the benefit of being covered under cited entries of said NT. As said applicant is sub-sub contractor and supplies service to M/s Radhe sub contractor and not to M/s JSIW main contractor, the conditions of said entry 3(iii)/ 3(ix) to said Notification is not satisfied.

Ruling : GST rate on subject supply is 18% for services supplied by the sub-sub-contractor to sub-contractor M/s Radhe and supply merits entry at Heading 9954, Entry No. 3(ii) of Notification No.11/2017-CT(R) dated 28-6-17.

[2021 (9) TMI 1038 – AAR, Gujarat – M/s Kababhai Popatbhai Savalia (Shreeji Earth Movers)]

3. Value of Taxable Supply :

Facts : The applicant is stated to be a registered society providing security services and scavenging services (Karma Bandhus) to different Medical Colleges & Hospital, District Hospitals and other hospitals of Government of West Bengal. It is submitted by the applicant that as per labour laws of Government of West Bengal, the applicant claims Minimum Wage + Employer Portion of EPF @ 13% + ESI @ 3.25% and charges tax @ 18% leviable under the GST Act on gross bill amount in every month for providing security & Karma Bandhus (Scavenging) services to the Government Hospitals.

The applicant sought to know :

(i) Whether GST to be payable on Management Fee/Administrative charges only or otherwise complete billing amount?

(ii) Whether employer portion of EPF & ESl amount of the bill are exempted for paying GST?

Observations & Findings : We note that Sub-section (2) of section 15 clearly specifies the elements that will form a part of value of supply, sub-

section (3) of section 15 excludes the elements that are not to be included in the value of supply.

The aforesaid provisions of the Act leave no room to deduct any amount like management fee, employer portion of EPF and ESI for the purpose of determination of value of supply under section 15 of the GST Act meaning thereby in the instant case, tax is leviable under section 9 of the Act ibid on the entire billing amount.

Ruling :

Question: Whether GST to be payable on Management Fee/Administrative charges only or otherwise complete billing amount?

Answer: GST is payable on total value of supply, as discussed.

Question: Whether employer portion of EPF & ESl amount of the bill are exempted for paying GST?

Answer: Answered in the negative.

[2021 (10) TMI 328 – AAR, West Bengal – M/s Ex-servicemen Resettlement Society]

ORDER OF APPELLATE ADVANCE RULING AUTHORITY

1. Supply or not :

Facts : The appellant, has more than 500 employees working in its factory. There is a canteen in the factory of the appellant, which is run by a third party i.e. Canteen Service Provider, to provide food to the employees of the appellant. As the appellant has arranged to provide the food to its employees at subsidized rate (and not free of cost), the appellant collects some portion of the total amount of food price to be paid to the 'Canteen Service Provider' from the employees, by deducting it from the salary of the employees. The appellant has submitted that it is only facilitating the supply of food to the employees, which is a statutory requirement under the Factories Act, 1948, and is recovering only employee's share towards actual expenditure incurred in connection with the food supply, without making any profit.

The appellant filed an application before the Gujarat Authority for Advance Ruling wherein it raised the following question for advance ruling :-

"Whether GST is applicable on the amount recovered from

employee on account of third party canteen services which is obligatory under Section 46 of the Factories Act, provided by company?"

The AAR, vide ***Advance Ruling No. GUJ/GAAR/R/50/2020 dated 30.07.2020*** inter-alia discussed the meanings of the terms 'outward supply', 'business' and 'consideration', referred to clause 6 of Schedule II of the Central Goods and Services Tax Act, 2017 (herein after referred to the 'CGST Act, 2017') and the Gujarat Goods and Services Tax Act, 2017 (herein after referred to as the 'GGST Act, 2017'), and answered the question raised by the appellant in affirmative i.e. it held that Goods and Services Tax is applicable on the amount recovered from employees on account of third party canteen services.

Aggrieved by the aforesaid advance ruling, the appellant has filed the present appeal.

Observations & Findings : In the present case, as submitted by the appellant, it has provided / arranged a canteen for its employees, which is run by a third party i.e. Canteen Service Provider. The Canteen Service Provider supplies foodstuffs to the employees of the appellant against consideration and pays applicable Goods and Services Tax thereon. However, in respect of the consideration being paid to the Canteen Service Provider, as per the agreed arrangements between the appellant and its employees, part of that consideration / amount is borne by the appellant whereas the remaining part is borne by its employees. The employees' portion of consideration / amount to be paid to the Canteen Service Provider is collected by the appellant and the consolidated amount of consideration (employees' portion as well as appellant's portion) is paid to the Canteen Service Provider by the appellant. The query raised in the present case is limited to the question of applicability of Goods and Services Tax on collection of employees' portion of consideration by the appellant.

It is evident from the aforesaid nature of transaction that the appellant does not supply any goods or services to its employees against the amount collected from the employees. The appellant collects employees' portion of amount and pays the consolidated total amount, which includes appellant's share of amount also, to the Canteen Service Provider towards the foodstuffs provided

to employees by the Canteen Service Provider. The appellant neither keeps any margin in this activity of collecting employees' portion of amount nor makes any separate supply to the employees. Furthermore, it is not the appellant who is supplying the foodstuff or canteen service to its employees, but it is a third party who is supplying the foodstuff or canteen service to the employees of the appellant. In our view, as the appellant is not carrying out the said activity of collecting employees' portion of amount to be paid to the Canteen Service Provider, for any consideration, such transactions are without involving any 'supply' from the appellant to its employees and is therefore not leviable to Goods and Services Tax.

We observe that the GAAR has ruled that the Goods and Services Tax is applicable on the amount recovered from employees, mainly on the premises that 'the appellant is supplying food to its employees', which would be covered under the definition of the term 'business' under Section 2(17) of the Central Goods and Services Tax Act, 2017 and the Gujarat Goods and Services Tax Act, 2017. However, the appellant has asserted before us that it is collecting the portion of employees' share and paying to Canteen Service Provider, a third party, which is nothing but the facility provided to employees, without making any profit and working as mediator between employees and the contractor / Canteen Service Provider. Under these circumstances, we hold that the Goods and Services Tax is not applicable on the activity of collection of employees' portion of amount by the appellant, without making any supply of goods or service by the appellant to its employees.

Order : We, therefore, allow the appeal filed by the appellant *M/s. Amneal Pharmaceuticals Private Limited and modify the Advance Ruling No. GUJ/GAAR/R/50/2020 dated 30.07.2020* issued by the AAR, by holding that the Goods and Services Tax is not applicable on the collection, by the appellant, of employees' portion of amount towards foodstuff supplied by the third party / Canteen Service Provider.

[2021 (9) TMI 1293 – Appellate AAR, Gujarat – M/s Amneal Pharmaceuticals P Ltd.]

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REFUND UNDER GST

CA Ravi Kumar
Adv Amit Kumar

Introduction:

The introduction of Goods & Service Tax (GST) in India is one of the biggest indirect tax reforms since Independence. Implementation of GST has bestowed the country by creation of national market by bringing down fiscal barriers amongst the States and has mitigated the cascading effect of taxes by allowing seamless credit of Input tax across goods and services.

Increasing exports ranks among the highest priorities of any government wishing to stimulate economic growth. GST has changed the taxation policy for import and export transactions and introduced separate incentives by way of refund of tax components resulting in nullifying the impact of indirect taxes on the cost of supply. Timely disbursement of correct amount of refund can help the Companies in having adequate working capital which signifies its operating liquidity. Timely refund is the heart and soul of GST legislation. This article deals in depth, legal and procedural facets of Refund under GST regime.

Refund under GST Act could arise broadly for following reasons:

Export of Goods & Services; Supplies to SEZ's and Developers; Deemed Exports; Refund of Taxes on purchase made by UN or Embassies; Impact of judgment of court; Accumulated ITC on account of Inverted duty structure; On finalization of provisional assessment; Refund of pre-deposit; Excess payment due to mistake; Refunds to international tourists of GST paid on goods in India; Issuance of refund vouchers for taxes paid in advance; Refund of CGST & SGST paid treating the supply as intra-state which is held inter-state later etc.

Brief summary of relevant Sections 54 to 58 of CGST Act covering administration of Refund:

Section 54 contains 14 sub-sections. It provides for application for refund of balance in cash ledger to be filed before the expiry of two years from the relevant date. UNO and Embassies etc. are also entitled to refund of tax paid on inward supplies of goods or services. Refund of un-utilised input tax credit is not to be allowed in few cases. Application for seeking refund is to be accompanied with documentary evidence to establish that refund is due and the incidence of tax has not been

passed on to any other person. No documentary evidence required, if refund amount of refund is less than Rupees two lacs. Provisional refund of 90% can be given in case of zero-rated supplies. Where a person has defaulted in furnishing any return or tax has not been paid then no refund till compliance done. Interest for delayed refund beyond sixty days of filing of application @ 6% and in cases of court orders @ 9% (Sec.56). No refund of advance tax deposited by Casual taxable person and Non-resident taxable person to be paid unless all returns have been furnished as perSection 39.

Sub-Section 11 of Section 54 in our opinion is not in consonance with principle of equity and grants arbitrary discretion to authorities. It reads; "If Commissioner is of the opinion that grant of such refund is likely to adversely affect the revenue on account of malfeasance or fraud committed, he may, withhold the refund".

Section 54 further prescribes "Relevant dates"

For goods exported out of Indiaby sea / air: date on which the ship or the aircraft leaves India. For goods exported by land: date on which such goods pass the frontier. For goods exported by post: date of despatch of goods. In case of Deemed Exports: It isdate on which return relating to deemed exports is furnished.For Services exported out of India;where a refund of tax paid is available: date of receipt of payment in foreign exchange or in INR as per RBI where supply of services has completed prior to the receipt of such payment or Issue of Invoice: where payment for the services had been received in advance prior to the date of issue of the invoice. For tax refund, due to passing of judgment: it is date of communication of such judgment. In case of a person, other than the supplier: date of receipt of goods or services or both by such person.In any other case: date of payment of tax

As per Section 57, Government shall constitute Consumer Welfare Fund.As per Section 58, all sums credited to the fund shall be utilised for the welfare of the consumers. Government shall maintain proper records and annual statement of accounts.

Brief summary of Rule 89 to 97 under CGST Rules 2017 covering Refund:

Rule 89 prescribes procedure for seeking refund. CBIC clarified the online procedure in detail vide its circular number 125/44/2019 dated 18th November 2019. It directs that application for refund is to be filed electronically in RFD-01. Application for refund to be accompanied by relevant documentary evidence.In case where the amount of refund claimed exceeds Rs.2,50,000/- a certificate issued by CA / ICWA

certifying that incidence of tax claimed as refund has not been passed on to any other person shall also accompany.

Rule 90 provides for receipt of refund application in form RFD-02.If any Deficiency is found in the refund application, RFD-03 will be issued. Rule 91 states that person claiming refund, if during period of 5 yearshas not been prosecuted for any offence under the Act or under an existing law where the amount of tax evaded exceeds Rs.2,50,000/- then provisional refund can be sanctioned in RFD-04.The powers are discretionary and too wild and shall hinder proper disbursement of eligible refund.

Rule 92 provides for order sanctioning refund (RFD-06). RFD-07 (Part-A) is for adjustment order of demand against refund. RFD (Part-B) is for refund liable to be withheld. RFD-08 isnotice in writing, that the whole or any part of the amount claimed as refund is not admissible or is not payable. RFD-09 is for reply within a period of 15 days of the receipt of such notice. Rule 93 deals with credit of the amount of rejected refund claim. Rule 94 deals with order sanctioning interest on delayed refunds.

Rule 95 further deals with refund of tax to certain persons.RFD-10 is prescribed form for person eligible to claim refund of tax paid by him on his inward supplies can apply for refund once in every quarter. Rule 95A prescribes for refund of taxes to the retail outlets established in departure area ofan international airport beyond immigrationcounters making tax free supply to an outgoing international tourist by furnishing RFD-10B.As per Rule 96,the shipping bill filed by an exporter of goods shall be deemed to be an application forrefund of integrated tax paid on the goods exported out of India. Rule 96A prescribes forexport of goods or services under bond or letter of undertaking in RFD-11. Rule 97 deals with Consumer welfare fund.

Gist of main Notifications issued under GST on Refund:

- No. 5/2017 dt. 28.06.17: Goods in respect of which Un-utilized ITC will not be admissible as refund w.r.t HSN codes 5007, 5111 to 5113, 5208 to 5212, 5309 to 5311, 5407, 5408, 5512 to 5516, 60, 8601 to 8608
- No.39/2017dt. 13.10.17: Cross-empower State tax officers for processing and grant of refund
- No.49/2017dt. 18.10.17:Evidences required to be produced by the supplier of

Deemed export supplies for claiming refund under Rule 89(2)(g)

- No.10/2018dt. 23.01.18:Amending notification No. 39/2017 dt. 13.10.2017 for cross-empowerment of State tax officers for processing and grant of refund
- No.20/2018dt. 28.03.18:Extension of due date for filing of application for refund u/s 55 by notified agencies
- No.54/2018dt. 09.10.18:Seeks to make amendments (Twelfth Amendment, 2018) to the CGST Rules, 2017. This notification amends rule 96(10) to allow exporters who have received capital goods under EPCG scheme to claim refund of the IGST paid on exports and align rule 89(4B) with rule 96(10)
- An important Notification number 15 / 2021 dt. 18.05.21 brought changes in Rules 90, 92 and 96 to streamline refund procedure. It provides that time period from the date of filing of the refund claim in RFD-01 till the date of communication of the deficiencies is to be excluded from the period of 2 years. It allowed registered person to withdraw the application before issuance of provisional refund sanction order or payment order or refund withhold order. On submission of application in RFD-01, any amount debited from electronic credit ledger or electronic cash ledger, shall be credited back to the ledger from which such debit was made.
- Vide Notification number 35 / 2021 dated 24.09.2021, CBIC has clarified that the term "subsequently held" in Section 77 of CGST Act, 2017 or u/s 19 of the IGST Act, 2017 covers both the cases where the Inter-State or Intra-State supply made by a taxpayer, is either subsequently found as Intra-State or Inter-State respectively. The refund can be claimed before the expiry of two years from the date of payment of tax under the correct head.

Gist of important Circulars issued under GST on Refund:

- No. 17/17/2017 dt. 15.11.17: Manual filing and processing of refund claims in respect of zero-rated supplies
- No.18/18/2017 dt. 16.11.17:Refund of unutilized input tax credit of GST paid on inputs in respect of exporters of fabrics
- No.24/24/2017 dt.21.12.17:Manual filing and processing of refund claims on account of inverted duty structure, deemed exports and excess balance in electronic cash ledger
- No.36/10/2018 dt. 13.03.18:Processing of refund application for UN entities

- No.37/11/2018 dt.15.03.18:Clarifications on exports related refund issues
- No.43/17/2018 dt.13.04.18:Clarifying the issues arising in refund to UN
- No.45/19/2018 dt.30.05.18,No.59/33/2018 dt.04.09.18, No.70/44/2018 dt.26.10.18, No.79/53/2018 dt.31.12.18, No.94/13/2019 dt.28.03.19:No.135/05/2020 dt.31.03.20, No. 139/09/2020 dt.10.06.20, No. 147/03//2021 dt.12.03.21:Clarify certain refund related issues
- No.60/34/2018 dt.04.09.18:Processing of refund applications filed by CSD
- No. 63/37/2018 dt. 14.09.18:Clarification on processing of UN entities refund
- No.104/23/2019 dt.28.06.19:Refund applications wrongly mapped
- No.106/25/2019 dt.29.06.19:Refund of taxes paid on inward supply of indigenous goods by retail outlets in departure area of the international airport
- No.110/29/2019 dt.03.10.19:Eligibility to file refund for a period and category
- No.111/30/2019 dt.03.10.19:Clarify procedure to claim refund in RFD-01 subsequent to favourable order in appeal or any other forum
- No.125/44/2019 dt.18.11.19:Seeks to clarify the fully electronic refund process through RFD-01 & single disbursement
- No.131/01/2020 dt.23.01.20:SOP for IGST refunds for exporters
- No. 162/18/2021 dt.25.09.21:Refund of tax u/s.77(1) CGST &u/s 19(1) IGST

Circular number 125/44/2019-GST dated 18.11.2019 is importantwhereby fully electronic refund process for refund applications filed w.e.f 26.9.2019 was initiated. This circular clarified in detail, the procedures / issues pertaining to refund. Vide Circular no. 139/09/2020 dt. 10.06.2020, CBIC clarified that circular number 135/05/2020 dt. 31.03.2020 in no way impacted the refund of Input Tax Credit availed on Invoices of ISD, imports or Inward supplies liable to RCM etc. Circular number 160/16/2021-GST dt. 20.09.2021deals with Section 54(3) and states that goods which are subjected to Export Duty (export duty is paid at the time of export) will be covered under restrictionsimposed u/s 54(3) from availing of refund of accumulated Input tax credit. Vide circular no. 2122021 / letter number GST/2021-22/14/Commercial Tax dt. 25.08.2021 of Commercial Tax, UP, it has been directed that attachment of taxable person can be undertaken in cases fraudulent refund is obtained.

Circular no.: 22 / 2021–TNGST dated 26.09.2021 issued by Government

of Tamil Nadu:This is a landmark circular with objective of minimal physical interaction anddirects faceless process of refund disbursement by way of flow chart.It simplifies refund procedure and makes it user-friendly. Other State Governments can imbibe the spirit of the Tamil Nadu Government circular to ensure fast track disbursement of refund.

Some important judgments under GST on Refund:

(a) Union of India Vs. VKC Footsteps India Pvt Ltd. (Civil Appeal no. 4810 of 2021) Supreme Court of India: The issue as regards inclusion of input services for the purpose of claiming refund of accumulated input tax credit on account of inverted duty structure was covered by contrary decisions of Madras High Court and Gujarat High Court. While the Gujarat High Court declared rule 89(5) of the CGST Rules, 2017 restricting refund of input services under inverted duty structure as ultra vires the Section 54(3) of the CGST Act, 2017 but Madras High Court upheld the validity of Rule 89(5). Supreme Court conceded with the view of Madras High Court and confirmed the validity of Rule 89(5).

(b) BMG Informatics Private Limited Vs. The Union of India &Ors. (WP(C)/ 3878/2021) High Court of Assam, Nagaland, Mizoram & Arunachal Pradesh: Issue involved was; whether trader availing partial exemption on the output supplies is eligible for claiming refund under inverted duty structure? The Company was engaged in sales and service of IT products to Government departments / PSU / research and educational Institutions situated in the North Eastern region. Vide Noti. no.45/2017 dt. 14.11.17, the tax rate on such sales in the N-E region is liable to 2.5% GST and any tax in excess thereof stands exempted. The Company filed refund claim under inverted duty structure and their refund claim was being disputed in view of clarification issued vide para 3.2 of the circular number 135/05/2020 dt. 31.03.2020 which stated that although input supplies and output supplies may attract different tax rates at different point of time, such differences in tax rates are not covered u/s 54(3)(ii) of the CGST Act.Gauhati High Court inter-alia held that the clarification issued by the circular was against the spirit of provisions contained in Section 54(3)(ii) as it nowhere states that difference in the rates at different points of time for same input and output supplies are not covered under inverted rated duty structure. The exception being, where the output supplies are nil rated or fully

exempted supplies. In present case, the output supplies were not fully exempted but were partially exempted.It was held that the Company is entitled for claiming refund of accumulated input tax credit on account of inverted duty structure

(c) Atin Krishna Vs. Union of India 2019 25 GSTL 390 Allahabad High Court: Refund of input tax credit (ITC) on sale by duty free shop as sales is zero rated (exports) and covered u/s 16(1) & (2)of IGST Act

(d) Cial Duty Free and Retail Services Ltd. Vs. Union of India 2020 42 GSTL 481 Kerala High Court: Goods brought from foreign country kept in bonded warehouse and transferred to duty free shops as and when required. Goods sold at duty free shopsbefore being imported into country as goods did not cross custom frontiers as they were lying in bonded warehouse and will qualify as zero rated / exports sales

(e) Saraf Natural Stone 2019 28 GSTL 385 Gujarat High Court:Interest on delayed refund is allowed

(f) VSG Exports Pvt. Ltd. 2019 28 GSTL 421 Madras High Court: Wrong HSN code mentioned in refund application is no sound reason to hold the refund

(g) Jian International 2020 80 GST 828 Delhi High Court: Deficiency Memo not issued within time, hence refund application presumed to be complete in all respects

(h) Meena Service Centre 2020 43 GSTL 65 (Commissioner (Appeals) Rajasthan): Licence fees is not input. Refund of inverted tax structure on inputs is allowed not on services

(i) Chaizup Beverages LLP Vs. Asstt. Commr. of GST & Central Excise Coimbatore Division 2021 (50) GSTL 354 (Madras): Dealing with Sec.54(7), it was held that in case of exports, dealer can either claim duty drawback or refund of ITC, whichever is higher

(j) Britannia Industries Ltd. Vs. Union of India (Civil Appeal No.: 15473 of 2019 decided on 11.03.2020) Gujarat High Court: Allowed refund of unutilised ITC received by SEZ unit through ISD.

(k) Platinum Holdings Pvt. Ltd. Vs. Additional Commissioner of GST & Central Excise, Chennai (W.P. No.:13284 of 2020 decided on 11.08.2021) Madras High Court: Section 54 and Rule 89 does not restrict refund of ITC on supplies made to SEZ to supplier of services only.

Concept of Unjust Enrichment:

Section 54(8) of CGST Act 2017 clearly states that refund can only be disbursed, if person seeking refund has not passed on the incidence of such tax and interest to any other person, meaning thereby that such person is not being unjustly enriched. Under the GST law, the person seeking refund has to rebut the presumption of unjust enrichment and prove that he has not passed on the burden of excess tax paid of which refund is being claimed. Importance of this concept can be adduced from Rule 89 which states that for refund of tax exceeding Rs.2,50,000/- the person claiming refund has to filea certificate issued by CA / ICWA certifying that incidence of tax claimed as refund has not been passed on to any other person.

Concept of Unjust enrichment was prevalent under previous tax regimes as well. Supreme Court has treated at par insofar as unjust enrichment is concerned; Whether it be a case of the same commodity being sold or a case of captiveconsumption of a rawmaterial or case of captive consumption of even a captive goods.

In the case of Sahkari Khand Udyog Mandal Ltd. Vs. Comm. of Central Excise 2005 2 SCC 738 whereat Unjust Enrichment; "means retention of a benefit by a person that is unjust or inequitable". "Unjust enrichment" occurs when a person retains money or benefits which in justice, equity and good conscience, belong to someone else". The doctrine of "unjust enrichment"is that no person can be allowed to enrich inequitably at the expense of another. A right of recovery under the doctrine of "unjust enrichment" arises where retention of benefit is considered contrary to justice or against equity.

Unjust enrichment has been adapted as a solitary principle of equity i.e. premier through all possible factual scenarios, irrespective of the use to which a commodity isput. Refer judgments of Supreme Court in the cases of Union of India Vs. Solar Pesticides 2000 (116) ELT 401 and Comm. of Central Excise Vs. Grasim Industries 2015 (318) ELT 594.

Our humble view is that refund cannot be held back for the reason that any person after manufacturing sells that commodity in profit. It should not necessarily imply that excess tax wrongly paid by such purchasing manufacturer has been recovered. The profit element could attribute to many other reasons. Nonetheless State cannot earn benefit of such wrongly paid taxes. In the case of Vam Organic Ltd. 1999 UPTC 13 of All. High Court, refund was allowed. In SLP no. 5416-5424 of 2000

before the Supreme Court, vide order dated 18.10.2006, on the basis of judgment in the case of Solar Pesticides (supra), it was held that; "the inevitable conclusion is that whatever has been passed on to the customer by the respondents has to be tested on the touchstone of the principle of unjust enrichment". "While examining the claim the concerned authority shall keep in view the principles of "Unjust Enrichment" in respect of all amounts which have been passed on to any customer in essence that it has been collected from him". Quote.

Concept of finality of Decree, Judgment, Order applicable to Refund under GST:

Section 56 of CGST Act 2017 stipulates that if refund not paid within 60 days of filing of application, then interest @ 9%, will be oaidin cases where refund becomes due on account of decree, judgment or acourt order which attained "FINALITY".For principles of finality, cases of Kunhayammed&Ors. Vs. State of Kerala &Anr. (SC) dt. 19.7.2000 and C.S.T. Vs. Swadeshi Polytex Ltd. of 2005 can be referred. In the case of KarnatakamGovindappaSetty&Sons Vs. State of AP 1980 (46) STC 393 can be a relevant case study where after the appeals filed by the assessee were allowed by the Tribunal, the assesse filed an application before the Commercial tax officer claiming refund of the tax paid. The Commercial tax officer informed the assessee that the refund could not be made as the orders of the Appellate Tribunal has been challenged in revision before the High Court and the application would be considered after the disposal of the revision, but no order of stay was obtained by the officer to that effect.Held, that the pendency of the tax revision cases was not a sufficient ground for withholding the tax.

Conclusion:

It would be pertinent to quote old case of C.T.T. VS. Amrit Vanaspati Company Ltd. 2005 VLJ (Vol.1) 393, Allahabad High Court in context of grant of refund only has held; "It is always to be kept in mind that procedure prescribed under law is towards giving substantial justice to a party. The procedure is not an obstacle for providing justice". A person applying for refund and the person issuing refund should be fully conversant with the provisions of law and procedural mechanism regarding refund discussed hereinabove. Timely grant of Refund is the very essence of proper administration of the GST Act, formulated on the spirit of "Good and Simple Tax".

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TAXATION OF INVITS, REITS AND THEIR UNIT-HOLDERS

CA Paresh P. Shah
CA Mitali Gandhi

1. Background:

1.1 Before the emergence of the Venture Fund industry in India, entrepreneurs largely depended on private & family sources, public issues and lending by financial institutions for raising capital. However, these were not optimal means of raising funds. The economic liberalization of the economy from the 1990s led to the awareness and introduction of international practices of Venture Capital and Private Equity funds as an attractive source of capital.

1.2 Following the introduction of the Securities and Exchange Board of India (Venture Capital Funds) Regulations ("VCF Regulations") in 1996 and the SEBI (Foreign Venture Capital Investors) Regulations in 2000, ("FVCI Regulations"), the Venture Fund industry got a formal structure and recognition which enabled it to successfully fill the gap between capital requirements of fast-growing companies and funding available from traditional sources such as banks, IPOs, etc.

1.3 Subsequently, in 2012, SEBI took steps to completely overhaul the regulatory framework for domestic funds in India and introduced the Securities and Exchange Board of India (Alternative Investment Funds) Regulations, 2012 ("AIF Regulations"). Among the main reasons cited by SEBI to highlight its rationale behind introducing the AIF Regulations are to recognize AIFs as a distinct asset class; promote start-ups and early stage companies; to permit fund investment strategies in the secondary markets; and to tie concessions and incentives to investment restrictions.

1.4 Different kinds of Alternate Investment Funds:

SEBI has classified AIF into the following broad categories into which investors, both domestic and foreign, may invest:

1.4.1 Category I AIF: Funds which invest in start-ups, early stage ventures, social ventures, infrastructure or other sectors which the government or regulators consider as socially or economically desirable will qualify as Category I AIFs.(Priority of the Regulator)

1.4.2 Category II AIF: Private Equity Funds or Debt Funds for which no specific incentives or concessions are given by the Government of India or any other regulator are included in the Category II AIF classification. These are Funds which cannot be categorized as Category I or Category III AIF. These funds do not undertake leverage or borrowing other than to meet the permitted day to day operational requirements.(Tax neutral)

1.4.3 Category III AIF: Funds that employ diverse or complex trading strategies and may employ leverage including through investment in listed or unlisted derivatives are included in this category. Hedge Funds or funds which trade with a view to make short-term returns are included in the Category III AIF classification.(Low Priority)

1.5 Other Special-purpose pooled investment structures:

1.5.1 Infrastructure Investment Trusts ('InvITs'): InvIT means a trust registered under the SEBI (InvIT) Regulations, 2014 which may raise capital through units issued inter alia under private placement and / or initial / follow on offer. The InvIT shall invest in infrastructure projects, either directly or through a Special Purpose Vehicle (SPV), in accordance with stipulated conditions in the said SEBI Regulations.

1.5.2 Real Estate Investment Trust ('REIT'): REIT means a trust registered under the SEBI (REIT) Regulations, 2014 which owns and manages income generating developed properties and offers its unit to public investors. REITs typically offer regular yields coupled with capital appreciation and cater to retail investors. The REIT shall invest in Real Estate assets in accordance with stipulated conditions in the said SEBI Regulations.

These fund can invest only in the ready infrastructure only under the Regulations.

2. Taxation of InvITs and REITs:

2.1 The Income-tax Act provides in relation to the taxability of infrastructure investment trusts ("**InvITs**") and real estate investment trusts ("**REITs**"), both together referred to as "**business trusts**" which are registered with the Securities and Exchange Board of India under the Securities Exchange Board of India (Infrastructure Investment Trusts) Regulations, 2014 ("**InvIT Regulations**") or the Securities Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014 ("**REIT Regulations**"), respectively.

2.2 InvITs and REITs i.e.Business trustsas defined in Section 2(13A) of the Income-Tax Act, have been given a pass-through status under Section 10(23FC) with respect to interest and dividend received orreceivable from an SPV.The expression "SPV" (Special Purpose Vehicle) means an Indian Company in which business trust holds controlling interest or such percentage holding under the InvIT Regulations or REIT Regulations as may be prescribed.

The total income of a business trust may include interest and dividend income fromSPVs, Rental income if it holds rent generating assets, investment income fromfunds/fixed deposits where surplus money is parked, capital gainsunder section111A and 112.

Any income of a business trust being a REIT by way of renting or leasing of any real estate assetdirectly owned by the trust does not form part of total income under Section 10(23FCA).

Subject to the provisions of section 111A and 112, the total income of a businesstrust shall be charged to tax at maximum marginal rate (30 %+ applicable surcharge and cess).

Thus income of the Business Trust is exempt from Tax if it is in the nature of Interest or Dividend or the Rent. Capital gains will be taxed u/s 111 A or u/s 112 as the case may be. Any other Income /Business Income in it's case will be taxed at MMR.

The following are the provisions in relation to taxability and exemptions available to business trusts in India, as amended recently by the Finance Act, 2020 and Finance Act, 2021:

2.2.1 Change in the definition of 'business trusts':

A 'business trust' was defined under Section 2(13A) of the Income-tax Act to mean a trust registered as an InvIT under the InvIT Regulations or a REIT under the REIT Regulations, units of which, are required to be listed on a recognised stock exchange in accordance with the InvIT Regulations or REIT Regulations, as the case may be.

The Finance Act, 2020 has amended w.e.f. April 1, 2020 the definition of 'business trusts' which earlier recognised only listed InvITs and REITs registered with SEBI to now include unlisted InvITs and REITs registered with SEBI as well.

Thus now Business Trust will include both listed as well as unlisted units.

Accordingly, capital gains realised on the transfer of units of unlisted private InvITs shall be taxable at the rate of 10% (plus applicable surcharge and cess) in hands of a non-resident unit-holder and 20% (plus applicable surcharge and cess) for resident unit-holder, provided the units have been held for more than 36 months. The short term capital gains (where units have been held for less than or equal to 36 months) will be taxed at the rate of 30% (plus applicable surcharge and cess) for residents and 40% (plus applicable surcharge and cess) for non-resident corporates. Non-resident unit-holders may claim the beneficial provision available under the applicable double tax avoidance agreement ("**DTAA**"), if any.

Long term capital gains arising from market sale of listed units, both in the hands of residents and non-residents, are taxed at the rate of 10% (plus applicable surcharge and cess) on gains exceeding Rs. 1 lakh while short-term capital gains will be taxed at the rate of 15% (plus applicable surcharge and cess).

2.2.2 Dividend Distribution Tax replaced with Dividend Withholding Tax:

Under the erstwhile Section 115-O of the Income-tax Act, dividend distributed by a domestic company was subject to dividend distribution tax ("**DDT**"), in the hands of the company, at an effective rate of 20.56% (including surcharge and cess). Such dividends were exempt from tax in India in the hands of the unit-holders including non-resident unit-holders though they may have been taxable in the home jurisdiction of a non-resident unit-holder.

Further, as per erstwhile Section 115-O sub-section (7) of the Income-tax Act, dividend distributed by a special purpose vehicle ("**SPV**"), in which a business trust held the entire share capital other than as required to be held by the Government or any regulatory authority, was exempt from DDT. The dividend received by business trusts from their SPVs was then distributed to the unit-holders without any further tax being levied on it.

The Finance Act. 2020 has abolished the DDT regime as applicable to companies and has shifted the incidence of taxation of dividend on the shareholder or unit-holders. Accordingly, as per the amended provisions, (i) dividend income would be subject to tax in the hands of the shareholders, at the applicable rate; and (ii) the SPV would be required to withhold tax on the same. However, the business trust will continue to be exempt from tax on

dividend income from an SPV. Since no mechanism for an SPVwas providedby Finance Act, 2020 to not withhold tax from dividends when distributing to business trust, the business trust was required to provide a nil withholding tax certificate to the SPV to ensure that no tax is withheld by the SPV while distributing dividend to the business trust.Therefore, the Finance Act, 2021 has rectified this hardship by introducing an exemption from tax deduction at source on dividend income earned by business trust from specified investee companies (being SPVs who pay taxes under the normal regime and notconcessional regime). This amendment takes effect retrospectively from 1 April 2020.

Further, the business trust as per the amendment of Finance Act, 2020 is now required to withhold tax on the distribution where the income being distributed is in the nature of dividend income received from the SPV, as described below:

a. Taxation of dividends at the Business Trust Level:

The erstwhile Section 10(23FC) of the Income-tax Act exempted certain income of business trust being, (i) interest income received from an SPV, where the business trust held controlling interest and such percentage holding prescribed under the InvIT Regulations or REIT Regulations; and (ii) dividend income from an SPV in which the business trust held the entire share capital other than as required to be held by the Government or any regulatory authority.

The Finance Act, 2020 has made no changes in respect of the taxation of interest income of a business trust. However, the amended Section 10(23FC) has exempted the dividend income received by a business trust from an SPV, in which the business trust holds controlling interest or such percentage holding under the InvIT Regulations or REIT Regulations as may be prescribed.

Subject to any capital gains tax that may be applicable, the total income of a business trust (other than interest and dividend) shall continue to be charged to tax at the maximum marginal rate of 42.7%.

b. Taxation of dividends at the Unit-holder level:

Erstwhile Section 10(23FD) of the Income-tax Act provided that any distributed income, received by a unit-holder from the business trust, other than interest income or rental income (i.e. rental income earned directly by a REIT) would be exempt from the total income of the unit-holder. As per the amendment by

Finance Act, 2020, in addition to interest income and rental income, dividend income distributed by the business trust to the unit-holders would also be subject to taxation in the hands of the unit-holders with effect from April 1, 2020. Accordingly, interest and dividend income distributed to unit-holders are now taxable at the tax rates applicable to each of the unit-holders.

This tax on dividend in hands of unit-holders is seen to be as a less favourable tax treatment under the new tax regime for dividend, as compared to the DDT regime. Hence, the Finance Act, 2020 has provided some concessions. Accordingly, as per amendment of Section 10(23FD), dividend distributed by abusiness trust is exempt in the hands of the unit-holders, provided the SPV distributing the dividends has not exercised the option to pay corporate tax under the 22% corporate tax regime available in terms of, and subject to compliance with, Section 115BAA of the Income-tax Act.

Further, as per the amendment, dividend income received by residents and non-resident unit-holders would be subject to withholding tax at the rate of 10%. However, in case of non-residents, any lower rate as may be provided in the DTAA between India and the country of residence of the non-resident unit-holder may be applicable, provided such non-resident is eligible for the benefits available in the DTAA provisions.

2.2.3 Taxation of interest and rental income on unit holders of a business trust:

In terms of Section 194(LBA)(1) of the Income-tax Act, any distributable income in the nature of interest income and rental income in the hands of a resident investor is subject to deduction of tax at the rate of 10%. Similarly in terms of Section 194(LBA)(2) of the Income-tax Act, any distributable income in the nature of interest income and rental income in the hands of a non-resident is subject to deduction of tax at the rate of 5%. No change was made by the Finance Act, 2020 in respect of taxation of unitholders on interest and rental income received from the business trust.

2.2.4 Applicability of DDT in a multi-level business trust structure:

In terms of the InvIT Regulations and the REIT Regulations, an InvIT or a REIT is permitted to have a multi-level holding structure, being one where the business trust holds shares in the SPV through a holding company. It would be relevant to note that the erstwhile Section 115-O of the Income-tax Act did not exempt such a multi-level structure of holding shares through a holding company from the applicability of DDT. Accordingly, dividend paid

by an SPV to its holding company was subject to DDT at an effective rate of 20.56% (inclusive of surcharge and cess). The Finance Act, 2020 which has abolished Section 115-O of the Income-tax Act has reintroduced Section 80-M in the Income-tax Act. This section provides for a deduction for dividends received by one domestic company from another domestic company, limited to the amount of dividend received from the investee company if the shareholder company pays dividend before the specified due date. Thus, under the amended provisions, the holding company would be able to claim deduction for the dividends received from the SPV, resulting in avoidance of double tax on dividends. The Finance Act, 2020 in addition to confirming the aforementioned proposals, has further extended the deduction under Section 80-M of the Income-tax Act to dividends received from business trusts and foreign companies. Accordingly, as per the new provisions, a unit-holder of the business trust which is a domestic company, may claim a deduction for the dividends received by it from a business trust, subject to conditions provided under Section 80-M of the Income-tax Act.

2.3 The following example of taxation of the income stream from the underlying SPV in the hands of an investor in a business trust would be helpful in understanding the provisions:

		Rs.
A	Income of SPV	100.00
B	Interest paid by SPV to Business Trust	50.00
C	Taxable Income of SPV (A – B)	50.00
D	Tax payable by SPV (30% of C)	15.00
E	Dividend paid by SPV (C – D)	35.00
F	Tax withheld by SPV of Interest & Dividend paid by SPV to Business Trust	0.00
G	Cash received by Business Trust (B + E)	85.00
H	Interest distributed by Business Trust (B less withholding tax of 10% of B)	45.00
I	Dividend distributed by Business Trust (E less withholding tax of 10% of E)	31.50
J	Total distribution received by Unit-holder net of withholding taxes (H + I)	76.50

If one examines the various streams of income, interest paid by the SPVs is an allowable tax deduction for the SPV, not taxable in the hands of the business trust but taxable in the hands of the investor. The dividend paid by the SPVs out of tax paid profits are not taxed in the hands of the business trust, but are taxed in the hands of the investor only if the SPV has opted to pay the concessional rate of tax on its profits. Rental income of the REIT is exempt in its hands, but taxable in the hands of the investors. Effectively, there is only a single level of taxation for most streams of income, except cases where the SPVs have paid concessional rates of tax on their profits, in which case the dividend is taxed again in the hands of investors, though the SPV has paid tax on its profits.

This is a significant advantage of a business trust as compared to a normal company structure, where the company pays tax on its profits, and the shareholders are subjected to tax on the dividends, irrespective of the rate of tax paid by the company. A business trust can, therefore, effectively give investors a higher post-tax return, as compared to a normal company structure.

3. Taxation of AIFs:

3.1 There have been no changes in the taxation of Investment Funds (i.e. Category I & II AIFs as per clause (a) of Explanation 1 to Section 115UB) and their unit-holders except the implications relating to abolition of DDT by the Finance Act, 2020 and the consequent taxation of dividends in the hands of the unit-holders.

3.2 The tax provisions relating to AIFs – Category I & II are summarized as under:

Nature	**Tax implication for AIF**	**Tax implication for Investor in AIF**
Income of the Investment Fund, other than income from profits and gains of business	Exempt from tax in the hands of the Investment Fund, as per section 10(23FBA). As per Notification No. 51 dated 24th June, 2015, the income (other than business income) received by the Investment Fund would be exempt from TDS requirement.	As per section 115UB(1), such income (including dividends after the amendment by Finance Act, 2020) would be taxable in the hands of the investors on a pass through basis. Such income will be taxable in the same manner as if it were the income accruing or arising to, or received by, such investor had the investments, made by the Investment Fund, been made directly by such investor. Further, income taxable in investors' hands shall be deemed to be of the same nature and proportion as in the hands of the Investment Fund as per section 115UB(3)
Income in the nature of profits and gains of business or profession	Taxable in the hands of Investment Fund at the maximum marginal rate as per section 115UB(4)	As per section 10(23FBB), the investors shall be exempt from tax on such income
TDS on income credited or paid to investor	Where any income other than income from profits and gains of business, is credited or paid to an Investor by the Investment Fund, the Investment Fund shall deduct income-tax at the rate of ten per cent as per section 194LBB.	-

Deemed credit to investors	If income accruing to or received by the Investment Fund is not paid or credited to the investors, such income shall be deemed to have been credited to the investors on the last day of the previous year in the same proportion in which investors would have been entitled to receive the income had it been paid during the year as per section 115UB(6)	Deemed income of the investor with tax credit of tax deducted at source by investment fund.
Loss at investment fund level	If in any year there is a loss at the investment fund level either current loss or the loss which remained to be set off, the loss shall not be allowed to be passed through to the investors but would be carried over at the investment fund level to be set off against income of the next year in accordance with the provisions of the Act as per section 115UB(2)	-

3.3 Taxation of AIF - Category III:

As tax pass through status has not been accorded to Category III AIFs, the taxability of Category III AIFs will be governed by the general principal of taxation (depending on the form in which Category III AIF is set up i.e Trust or LLP or company).

4. Conclusion: It is interesting to note that in addition to the issues which are sought to be

addressed through a pass through structure to avoid multilayer taxation ,due to policy change in tax structure of dividend additional complexities have been found in the taxation of the business trust and one has to look at the main provisions, exemptions and the TDS provisions to grasp the scheme of taxation.

RERA : ANALYSIS OF SUPREME COURT JUDGMENT IN NEWTECH PROMOTERS V STATE OF UP

CA Ishaan Patkar

The Supreme Court has made an authoritative pronouncement on certain knotty issues under the RERA regime in Newtech Promoters and Developers v State of UP [Judgment dated 11.11.2021 – Civil Appeals 6745-6749/2021]. The Act at issue– the "Real Estate (Regulation and Development) Act, 2016 - is a central enactment passed by Parliament. However, the rules which were under consideration were the Uttar Pradesh Real Estate (Regulation and Development) Rules, 2016 issued by the State of Uttar Pradesh under delegated law making powers granted by Parliament.

Background of the lis

The proceedings in this case commenced when allotees/homebuyers from the State of UP filed applications for refund of consideration paid for purchasing units/ plots/buildings alongwith interest under Sectio. 18 and 19 read with Section 31 of the RERA Act. A Single Member of the UP RERA Authority directed refund of the principal amount alongwith interest at "MCLR+1%" as prescribed by the UP Government. Writ Petitions were then filed by the promoters/developers in the High Court of Allahabad on various grounds which came to be dismissed.

When promoters/developers approached the Supreme Court under Article 136, leave was granted and the following issues were framed for consideration of the Court:

(i) Whether the RERA Act, 2016 is retrospective or retroactive in operation and what will be its legal consequences if tested on the anvil of the Constitution of India?

(ii) Whether the authority has jurisdiction to direct return/refund of the amount to the allottee under Sections 12, 14, 18 and 19 the Act or the jurisdiction exclusively lies with the adjudicating officer under Section 71 of the Act?

(iii) Whether Section 81 of the Act authorizes the authority to delegate its powers to a single member of the authority to hear complaints instituted under Section 31 of the Act?

(iv) Whether the condition of pre-deposit under proviso to Section 43(5) of the Act for entertaining substantive right of appeal is sustainable in law?

(v) Whether the authority has power to issue recovery certificate for recovery of the principal amount under Section 40(1) of the Act?

Decision of the Supreme Court

Objects and Reasons behind enactment of RERA Act

The Supreme Court began by analysing the objects and reasons behind enactment of RERA Act:

1. Many homebuyers were putting in life-savings to buy a home as well reeling under loans carrying high rate of interest to finance such purchases.
2. Real estate sector was largely unregulated. There was no adequate mechanism to cater to the grievances of homebuyers. The Consumer Protection Act, 1986 was also not proving very useful in resolving these grievances.
3. Speedy adjudicatory mechanism was required.
4. Greater accountability of real estate promoters/homebuyers was required to protect the homebuyers.
5. Authenticity is attached to the project by being registered under RERA.

The following passage from the judgment of the Supreme Court sheds light on how precarious the position of a homebuyer was in India before the RERA Act was enacted:

"13. To examine the matter in this perspective, consider what a house means in India. The data shows that about more than 77% of total assets of an average Indian household are held in real estate and it's the single largest investment of an individual in his lifetime. The real estate in India has a peculiar feature. The buyer borrows money to pay for a house and simultaneously plays the role of a financer as building projects collect money upfront and this puts the buyer in a very vulnerable position- the weakest stakeholder with a high financial exposure. The amendment to the Insolvency and Bankruptcy Code, 2018 recognised the home buyers as financial creditors and the present enactment is the most important regulatory intervention in favour of the home buyers and it's had an impact and with passage of time, has become a yardstick of laying down minimum standards in the market. Earlier, the real estate sector was completely unregulated and there was no

transparency in their business profile and after the present enactment, it is open for the potential home buyers to check if a project is approved under the Act, 2016 that at least gives a satisfaction to a person who is coming forward in making a lifetime investment."

Issue no. (i) - Whether the RERA Act, 2016 is retrospective or retroactive in operation and what will be its legal consequences if tested on the anvil of the Constitution of India?

The Supreme Court noted that Section 3(1) of the RERA Act, 2016 prohibited any promoter from advertising, marketing, booking, selling or offering to sell or inviting any person to purchase in any manner any plot, building or real estate project. The proviso to Section 3(1) required projects which are "ongoing" and more specifically projects to which completion certificate has not been issued, to apply for registration within 3 months from the date of commencement of the Act.

The Supreme Court held that these provisions manifested intention of Parliament to bring even ongoing projects into the new regulatory regime and protect rights of stakeholders from inception. The Act was held to have been given retroactive operation consciously by Parliament,and this interpretation was bolstered by the fact that the Act was regulatory and beneficial enactment.

On the question of Constitutional validity, the Supreme Court held that it is well settled that Parliament is competent to enact any law which affects antecedent events(that is to give "retroactive operation") and even legislate retrospectively. However, the Act will apply after the registration is done and the requirement to follow the Act is prospective in nature.

Issue no. (ii) - Whether the authority has jurisdiction to direct return/refund of the amount to the allottee under Sections 12, 14, 18 and 19 the Act or the jurisdiction exclusively lies with the adjudicating officer under Section 71 of the Act?

Sections 12, 14, 18, 19, 31 and 71 of the RERA Act reads as follows:

"12.Obligations of promoter regarding veracity of the advertisement or prospectus. -

Where any person makes an advance or a deposit on the basis of the information contained in the notice advertisement or prospectus, or on the basis of any model apartment, plot or building, at the case may be, and sustains any loss or damage by reason of any incorrect, false statement included therein,

he shall be compensated by the promoter in the manner as provided under this Act:

Provided that if the person affected by such incorrect, false statement contained in the notice, advertisement or prospectus, or the model apartment, plot or building, as the case may be, intends to withdraw from the proposed project, he shall be returned his entire investment along with interest at such rate as may be prescribed and the compensation in the manner provided under this Act.

*"**13. No deposit or advance to be taken by promoter without first entering into agreement for sale***

*(3) In case any structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale relating to such development is brought to the notice of the promoter within a period of five years by the allottee from the date of handing over possession, it shall be the duty of the promoter to rectify such defects without further charge, within thirty days, and in the event of promoter's failure to rectify such defects within such time, the aggrieved allottees shall be entitled to receive appropriate **compensation in the manner as provided under this Act."***

"18. Return of amount and compensation

(1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building,—

(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided that where an allottee does not intend to withdraw from the project,

he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.

(2) The promoter shall compensate the allottees in case of any loss caused to him due to defective title of the land, on which the project is being developed or has been developed, in the manner as provided under this Act, and the claim for compensation under this sub- section shall not be barred by limitation provided under any law for the time being in force.

(3) If the promoter fails to discharge any other obligations imposed on him under this Act or the rules or regulations made thereunder or in accordance with the terms and conditions of the agreement for sale, he shall be liable to pay such compensation to the allottees, in the manner as provided under this Act.

19. Rights and Duties of Allottees

(4) The allottee shall be entitled to claim the refund of amount paid along with interest at such rate as may be prescribed and compensation in the manner as provided under this Act, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case may be, in accordance with the terms of agreement for sale or due to discontinuance of his business as a developer on account of suspension or revocation of his registration under the provisions of this Act or the rules or regulations made thereunder."

31. Filing of complaints with the Authority or the adjudicating officer

(1) Any aggrieved person may file a complaint with the Authority or the adjudicating officer, as the case may be, for any violation or contravention of the provisions of this Act or the rules and regulations made thereunder against any promoter allottee or real estate agent, as the cae may be.

Explanation.—For the purpose of this sub-section "person" shall include the association of allottees or any voluntary consumer association registered under any law for the time being in force.

(2) The form, manner and fees for filing complaint under sub-section (1) shall be such as may be specified by regulations.

71. Power to adjudicate

(1) For the purpose of adjudging compensation under sections 12, 14, 18

and section 19, the Authority shall appoint in consultation with the appropriate Government one or more judicial officer as deemed necessary, who is or has been a District Judge to be an adjudicating officer for holding an inquiry in the prescribed manner, after giving any person concerned a reasonable opportunity of being heard:

Provided that any person whose complaint in respect of matters covered under sections 12, 14, 18 and section 19 is pending before the Consumer Disputes Redressal Forum or the Consumer Disputes Redressal Commission or the National Consumer Redressal Commission, established under section 9 of the Consumer Protection Act, 1986, on or before the commencement of this Act, he may, with the permission of such Forum or Commission, as the case may be, withdraw the complaint pending before it and file an application before the adjudicating officer under this Act.

(2) The application for adjudging compensation under sub-section (1), shall be dealt with by the adjudicating officer as expeditiously as possible and dispose of the same within a period of sixty days from the date of receipt of the application:

Provided that where any such application could not be disposed of within the said period of sixty days, the adjudicating officer shall record his reasons in writing for not disposing of the application within that period.

(3) While holding an inquiry the adjudicating officer shall have power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the adjudicating officer, may be useful for or relevant to the subject matter of the inquiry and if, on such inquiry, he is satisfied that the person has failed to comply with the provisions of any of the sections specified in sub-section (1), he may direct to pay such compensation or interest, as the case any be, as he thinks fit in accordance with the provisions of any of those sections."

The Supreme Court characterised the right of homebuyers under Section 18(1)(a) read with Section 19(4) to demand refund if possession is not given in accordance with the agreement as an "unqualified" right, that is, the homebuyers do not need to fulfil any contingencies or stipulations for exercising that right. Though this observation seems to be very sweeping at the first glance, one must note that the

two provisions still require the homebuyers to prove that the possession is not given in accordance with the agreement. What the Sections 18(1)(a) and 19(4) do is that after the homebuyer satisfies the requirements of these sections, the right to demand refund is untrammelled and absolute and cannot be refused on any ground whatsoever. As held by the Court, even unforeseen events or stay orders of any Court/Tribunal which affected the timely completion of the project cannot be put up as defence to the claim of refund.

However an important caveat is entered in at this stage by the Supreme Court: the delay should not have been occasioned by the homebuyer himself. This defence is not expressly incorporated in the statute, but is an equitable defence. In other words, the principle that equity will not allow the one who causes a wrong to use it as a sword, has been recognised by the Court. But the delay must be attributable to the same homebuyer who is demanding refund. It cannot be the law that if some other homebuyer obtains a stay on completion of the project, then the developer is excused from refunding the amounts to all other homebuyers.

The Supreme Court then observed that "refund of amount" and "compensation" are two distinct remedies. The jurisdiction to order refund is with the "Regulatory Authority", whereas the "adjudicating officer" decides the amount of compensation. The further challenge of the Appellants that the refund of amount affects rights of the promoters and therefore proper adjudication is required by the adjudication officer was also turned down on the ground that the RERA Act does not give any defence to the promoters and the refund is an indefeasible right once the conditions for granting refund are fulfilled. Therefore the regulatory authority can exercise summary enquiry into the matter and order a refund.

The author submits that in other words, the Supreme Court has held that there is not much of an adjudication required to be done for refund, since the promoter is not allowed to set up any justification or defence, except that the conditions precedent for refund are not satisfied. These questions can be dealt with summarily by the regulatory authority instead of an adjudication to be done by the adjudicating officer. The Court further observed that in any case the rights of parties are safeguarded by the provision of appeal.

Issue no. (iii) - Whether Section 81 of the Act authorizes the authority to delegate its powers to a single member of the authority to hear complaints instituted under Section 31 of the Act?

The Supreme Court noted that Section 21 of the Act states that the RERA Authority will be composed of a Chairperson and not less than two whole time members. However, the said provision does not refer to minimum strength of the bench. On the other hand, qua the RERA Appellate Tribunal, minimum bench strength is prescribed under the Act.

The Court then went on to hold that the RERA Authority performs both regulatory as well as quasi-judicial functions. Thus, when the statute prescribes minimum quorum for "meetings", such meetings are really meetings for policy and regulatory decisions. The word "meetings", it was held, is ordinarily not used for quasi-judicial functions. Therefore there was no bar on the RERA Authority delegating the task of deciding complaints to a single member, as long as such delegation related to quasi-judicial functions and not the policy/regulatory functions. In any case, Section 81 of the RERA Act specifically empowers the RERA Authority to delegate its powers and functions to any member of the Authority.

Issue no. (iv) - Whether the condition of pre-deposit under proviso to Section 43(5) of the Act for entertaining substantive right of appeal is sustainable in law?

Section 43(5) of the Act imposing pre-condition for appeals was challenged in this Petition. Section 43(5) reads as follows:

"43. Establishment of Real Estate Appellate Tribunal-

.....

(5) Any person aggrieved by any direction or decision or order made by the Authority or by an adjudicating officer under this Act may prefer an appeal before the Appellate Tribunal having jurisdiction over the matter:

Provided that where a promoter files an appeal with the Appellate Tribunal, it shall not be entertained, without the promoter first having deposited with the Appellate Tribunal at least thirty per cent of the penalty, or such higher percentage as may be determined by the Appellate Tribunal, or the total amount to be paid to the allottee including interest and compensation imposed on him, if any, or with both, as the case may be, before the said appeal is heard.

Explanation – For the purpose of this sub-section "person" shall include the association of allottees or any voluntary consumer association registered under any law for the time being in force."

The challenge to validity of the pre-deposit for appeal provision was dismissed on

the ground that the right to appeal being a statutory right, conditions can be imposed on such a right. Such conditions are imposed to ensure that litigants do not file appeals frivolously and waste judicial time. The Court drew on a large number of judgments on this issue arising under different statutes to uphold the validity of the pre-deposit condition.

Issue no. (v) - Whether the authority has power to issue recovery certificate for recovery of the principal amount under Section 40(1) of the Act?

Section 40 of the Act reads as follows:

"40. Recovery of interest or penalty or compensation and enforcement of order, etc.—

(1) If a promoter or an allottee or a real estate agent, as the case may be, fails to pay any interest or penalty or compensation imposed on him, by the adjudicating officer or the Regulatory Authority or the Appellate Authority, as the case may be, under this Act or the rules and regulations made thereunder, it shall be recoverable from such promoter or allottee or real estate agent, in such manner as may be prescribed as an arrears of land revenue.

(2) If any adjudicating officer or the Regulatory Authority or the Appellate Tribunal, as the case may be, issues any order or directs any person to do any act, or refrain from doing any act, which it is empowered to do under this Act or the rules or regulations made thereunder, then in case of failure by any person to comply with such order or direction, the same shall be enforced, in such manner as may be prescribed."

It was argued that Section 40 allows only recovery of interest and penalty and not of the principal amount. The Court held that the object of the statute must be kept and therefore even the principal amount is recoverable under Section 40.

Conlusion

Thus the appeal was dismissed on all grounds by the Supreme Court. It must be noted that the five issues framed in this judgment were the most controversial issues to arise till date and the Supreme Court has timely intervened to settle the law at an All-India level. The RERA law is in early stages of development and certainly the pronouncements of the Apex Court like the one discussed herein will give ensure that it evolves in the proper direction.

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HIGH COURT OF JUDICATURE AT BOMBAY CIVIL APPELLATE JURISDICTION

CIVIL WRIT PETITION NO.5160 OF 2021

SRC Chemicals Private Limited & Anr. ...Petitioners

vs.

Central Board of Indirect Taxes and
Customs through. Dept. of Revenue & Ors. ...Respondents

.....

Mr. Rahul Sarda a/w Mr. Sankalp Anantwar, Mr. Tushar Gaikwad, Mt. Pratik Kadav i/b SMA Law Partners for Petitioners.

Mr. Vijay Kantharia a/w. Dhananjay B. Deshmukh for the Respondent.

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CORAM : K. R. SHRIRAM &
AMIT B. BORKAR,
JJ. DATE : 12th OCTOBER 2021

P. C. :

Petitioner has approached this Court for a direction against respondent to refund Integrated Goods and Service Tax (IGST) of Rs.22,92,587 paid by petitioner No.1 in respect of export of goods on 28/6/2017 the date when the provisions for refund and calculation of IGST under the CGST Act and the Integrated Goods and Services Tax Act, 2017 (the "IGST Act") had not been notified. On 1 July 2017, certain provisions of CGST Act and Goods and Services Act came into force. In the year 2017 the Government of India enacted the CGST Act, IGST Act and certain other Acts for introduction of a single unified tax system for imposition of one tax across the country that is Goods and Services Tax (GST).

2. Petitioner No.1 exported certain goods on 28/6/2017 from Jawaharlal Nehru Port, Nhava Sheva. The formalities pertaining to printing of shipping bill etc were undertaken at the Port. It is petitioner's case that as per the practice prevalent at the said Port, the shipping bill would get generated and printed at the said port based on documents submitted by the exporter. Since the indirect tax regime was set to undergo a complete change and since the said Port was also in the process of adopting new

system for transition to GST regime, the shipping bill which should have got printed on 28/6/2017 got printed on 1/7/2017. Since GST was applicable with effect from 1/7/2017 and leviable on the export of goods, the shipping bill got printed on 1/7/2017 with petitioner No.1's GST Identification Number and levy of IGST albeit with the date of 29/6/2017. Copy of the shipping bill is annexed to the Petition.

3. Petitioner has submitted that he has no control over the process of printing the shipping bill at the said port (at the said port office printing the shipping bill is done based on documents submitted by the exporter without any involvement of the exporter). Petitioner submitted that supplies of goods and services for export have been categorized as "Zero Rated Supply" which means that goods could be exported under Bond or Letter of Undertaking without payment of integrated tax followed by claim of refund of unutilized input tax credit or on payment of integrated tax with provision for refund of the tax paid. Petitioner chose to pay the amount of Rs.22,92,587/- being the IGST and claimed refund. The payment is reflected in the IGST returns of petitioner No.1. It is petitioner's case that as per Circular No.26/2017-Customs dated 1/7/2017, petitioner No.1 was not required to file any separate application for refund of IGST paid on supply of goods for exports. Shipping bill since had all details including IGST, invoice details was to be deemed to be an application for refund itself. As petitioner did not receive the refund of IGST of Rs.22,92,587/- on or about 16/9/2018 petitioner approached the customs office to check the status of its refund. Petitioner No.1 was informed that unless export data was transmitted from GSTN (GST Network) to ICEGATE (Indian Customs Electronic Gateway), the Customs office would not be in position to process the refund claim. Petitioner had no control or role to play in the transmission of data from GSTN to ICEGATE.

4. It is also stated in the petition that sometime in February 2019, the GST portal of Respondent No.1 permitted filing an application for refund in Form GST RFD-01A. Accordingly, on 5/3/2019 petitioner No.1 filed an application for refund in the said form. Petitioner No.1 thereafter received show cause notice from respondent No.3 proposing to reject petitioner's application for refund. Petitioner No.1 had filed a reply and notwithstanding the reply Respondent No.3 rejected petitioner's application for refund. Petitioner preferred an appeal before the Commissioner of Central Tax (Appeals-II) Pune which upheld the order passed by respondent No.3 and rejected the appeal on the ground that the jurisdiction of refund of the IGST paid on exported goods was with the Customs

Department. Therefore it does appear that petitioner's entitlement to refund is yet to be decided. Petitioner kept sending reminders. Respondent No.4 addressed communication dated 10/2/2020 addressed to respondent No.6 stating that the data for the said shipping bill of petitioner was not transmitted from GSTN to ICEGATE and therefore his office is unable to process IGST refund. Respondent No.4 has requested Respondent No.6 to look into the matter and provide suggestions so that refund with reference to Petitioner's shipping bill could be processed. As there was no further response petitioner sent reminders to Respondent No.5 who gave an endorsement in the office copy of petitioner's letters which reads as under:

> *"There is no information received from GSTN for this shipping bills. Through office interface,IGST amount can be refunded which gets reflected in system as per information from GSTN. Raise issue with GSTN helpdesk"*

5. Notwithstanding all these efforts put by petitioner No.1 and notwithstanding the fact that there was no denial of petitioner No.1's entitlement to get the refund of Rs.22,92,587/-, respondents chose to keep quiet.

6. On finding no other option, petitioner approached this Court by way of this petition. On 7/9/2021 following order came to be passed.

> *"1. It appears from the affidavit of service tendered in Court today that the respondent no.6*
>
> *(Joint Director, Directorate General of Systems and Management) has received the consignment bearing no. EM737470797IN which, according to Mr. Sarda, learned advocate for the petitioner was dispatched on India Post containing copy of the Writ Petition.*
>
> *2. The prayer in this Writ Petition is for a direction to the respondents to refund, within a period of four weeks, the Integrated Goods and Service Tax realized from the petitioner in a sum of Rs.22,92,581/- with interest thereon.*
>
> *3. Our attention has been drawn by Mr. Sarda to a communication dated February 10, 2020 of the Assistant Commissioner of Customs, Drawback Section, JNCH addressed to the respondent no.6. The*

contents of the communication, while dealing with the anxiety expressed by the petitioner with regard to non-refund of the said sum of Rs.22,92,581/-, points to the inability of the office of the Commissioner to process the IGST refund claim by the petitioner "because data is not transmitted from GSTN to ICEGATE".

4. We are informed by Mr. Sarda that the petitioner is not aware of any decision having been taken by the respondent no.6 pursuant to receipt of the said communication dated February 10, 2020.

5. Since we are satisfied that the respondent no.6 has been served with a copy of the Writ Petition and he has chosen not to be represented today, we direct him to take an appropriate decision on such communication within a period of a fortnight of service of a copy of this order. Such decision may be placed before this Court on the returnable date, i.e., September 28, 2021."

Notwithstanding this order respondent No.6 has chosen not to take a decision on the communication from respondent No.4. At least nothing has been placed on record by respondents.

7. On 28/9/2021 Shri Kantharia appeared for respondents and sought time to file reply. Time was granted upto 8/10/2021 and the matter stood over to today. Today Shri Kantharia sought further 3 weeks to file reply on written instructions which the Court was not inclined to grant and rejected the request. This is because first of all, as recorded in the affidavit of service, the petition was served on or before 31/8/2021 and Shri Sawant who is instructing Shri Kantharia, also appeared on 7/9/2021 though for respondent Nos.3 and 4 only. But on 28/9/2021 Shri Kantharia informed the Court that he is appearing along with Shri Sawant for all the respondents. In our view therefore respondents had enough time to file a reply. Respondent No.6 also had sufficient time to take appropriate decision on the communication from respondent No.4 and place the same on record. As no reply has been filed, none of the avernments of the petition has been controverted. The directions of this court also has not been complied with. Moreover, even the communication dated 10/2/2020 from respondent No.4 to respondent No.6 indicates that petitioner No.1 is entitled to refund but petitioner No.1 is made to run from

pillar to post only because data of IGST refund is not transmitted from GSTN to ICEGATE. That cannot be petitioner's problem and it was the responsibility of respondents and in particular respondent no.6 to ensure that petitioner No.1 got its refund. Unfortunately, it is more than 4V2 years since the amount has not been refunded.

8. At the beginning itself this court indicated to the Counsel that we are inclined to dispose the petition at this stage itself because respondent No.6 never attempted to resolve the problem of petitioner and no reply has been filed and directions of this court have not been complied with. In the circumstance petition is allowed in terms of prayer clause (a) which reads thus:-

> *"a) that this Hon'ble Court be pleased to issue a Writ of Mandamus or any other order or Writ of direction in the nature of Mandamus or any other order or Writ or direction directing the Respondents or such of them as this Hon'ble Court deems fit to refund within a period of four weeks the Integrated Goods and Service Tax of Rs.22,92,587/- (Rupees Twenty Two Lakh Ninety Two Thousand Five Hundred and Eighty-Seven Only) with interest thereon at the statutory rate of interest in accordance with the provisions of section 54 of the Central Goods and Services Tax Act, 2017 r/w section 16 of the Integrated Goods and Services Tax Act, 2017, irrespective of whether the relevant data has been transmitted from GSTN to ICEGATE."*

9. Respondent No.1 shall, within 4 weeks ensure that the refund of Rs.22,92,587/- is paid to petitioner No.1 together with interest thereon @ 9% p.a. from the filing date of the petition i.e., 28/4/2021 together with costs in the sum of Rs.25,000/-.

10. All to act on copy of the order authenticated by the Associate of this Court. Respondents shall not insist on certified copy for complying with the order contained in paragraph 9 above.

(AMIT B. BORKAR, J) **(K.R. SHRIRAM, J.)**

THE GAUHATI HIGH COURT

(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)

C. EX. APPEAL NO.4 OF 2020

The Commissioner of Central Goods & Service Tax, Milan Nagar, Lane 'F', P.O. C.R. Building, Dibrugarh-786003.

……..Appellant

-Versus-

M/s Pan Parag India Limited (Formally known as M/s Kothari Products Ltd.) Pan Parag House, 24/19, The Mall, Kanpur, Uttar Pradesh- 208001.

*……..**Respondent***

– B E F O R E –

HON'BLE THE CHIEF JUSTICE MR. SUDHANSHU DHULIA
HON'BLE MR. JUSTICE SOUMITRA SAIKIA

Advocate for the appellant : Mr. S.C. Keyal, Senior Advocate.

Advocate for the respondent : Dr. A. Saraf, Senior Advocate.

JUDGMENT AND ORDER (CAV)

(Soumitra Saikia, J)

This Central Excise appeal preferred by the Commissioner of Central Goods & Service Tax and Central Excise as the appellant arises out of the order dated 18.12.2019 passed by the Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred as "CESTAT"), Eastern Regional Bench, Kolkata.

2. The brief facts necessary to decide this Appeal are as under:

(i) The assessee namely the respondent herein is engaged in the manufacture of Pan Masala and Pan Masala containing tobacco classifiable under Chapters 21 and 24 of the First Schedule to the Central Tariff Act, 1985 at its factory situated at Jorhat, Assam. The appellant is availing the benefit of exemption under Notification No. 8/2004-CE dated 21.01.2004, as amended by Notification No. 28/2004-CE dated 09.07.2004. The period

in dispute in this appeal is from March 2004 to March 2005.

(ii) Order dated 06.02.2007 was issued by the

Commissioner whereby the direction was made for recovery of amount deposited in the Escrow account by

way of forfeiture for the alleged violation of the conditions of the exemption notification availed by the appellant as aforesaid. Against the said order, in the appeal filed by the assessee, the Tribunal vide Order dated 06.08.2007 remanded the matter back to the Commissioner for fresh consideration since the aforesaid orders were issued without granting opportunity of being heard in violation of principles of natural justice.

(iii) Pursuant to the Tribunal's Order dated 06.08.2007, the Commissioner re-decided the matter in remand proceedings vide Order dated 30.01.2008, whereby it confirmed the forfeiture of amount deposited in Escrow account consequent to findings made with regard to violation of conditions of exemption notification and allowed the assessee to take the CENVAT Credit back to their account which the assessee had utilized at the time of clearance of goods during the relevant period.

(iv) Thereafter, the Revenue challenged the Order dated 30.01.2008 passed by the Commissioner before the Tribunal on the ground that the same travelled beyond the scope of the directions made by the Tribunal vide previous Order dated 06.08.2007. In the said appeal by the Revenue, the Tribunal in its order dated 17.03.2015 noted that the other Show Cause Notices issued for disallowing CENVAT Credit were pending in parallel proceedings which were not considered by the Commissioner. On the said observations, the Tribunal again set aside the order dated 30.01.2008 passed by the Commissioner and remanded the matter for fresh consideration on the point of admissibility of CENVAT Credit.

(v) The Commissioner re-decided the matter and vide Order dated 31.03.2017 held that the assessee had violated the conditions of the exemption notification as was already decided in previous Order-in-Original dated 30.01.2008 which had attained finality. He further held that the charges framed against the assessee for wrong utilization of credit during the period March 2004 to March 2005 had already been dropped by the then Addl. Commissioner, Central Excise, Dibrugarh, vide Order no. 02/Addl.

COMMR/ADJ/CE/DIB/09 dated 30.01.2009 and that there is no pending Show Cause Notice issued to the appellant assessee in relation to admissibility of Cenvat Credit. Based on above observation, the Commissioner had concluded that since proceedings for alleged wrong credit had already been dropped, the question of further allowing credit does not arise at all.

(vi) Being aggrieved, by the order of the Commissioner, the assessee preferred an appeal before the Tribunal. The Tribunal vide the impugned order dated 18.12.2019 held that in the earlier proceedings, the material facts that the eligibility of credit utilized by the assessee which stood decided in favour of the assessee vide Additional Commissioner's order dated 30.01.2009 were not before the Tribunal earlier. The Tribunal held that the Commissioner was therefore, not required to re-decide the Credit Eligibility of the impugned order. The Tribunal, therefore, held that the amount paid by the assessee by Challan cannot be retained by the Department and is liable to be refunded. The appeal was, accordingly, dismissed.

3. Being aggrieved, the present appeal has been filed by the Department on the substantial questions of law urged. The learned counsel for the appellant submits that vide the Order-in- Original No. 01/COMMR/ADJ/CE/DIB/08 dated 30.01.2008, the forfeiture of the amount of Rs. 98,89,695.00 and Rs.3,88,344.65 makes the total amount forfeited as Rs. 1,02,92,040.00 (Rupees One Crore Two Lakh Seventy two Thousand Forty only). As such the amount being above the monetary limit prescribed by the Ministry of Finance vide instructions of Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes & Customs dated 22.08.2019 fixing the monetary limit of Rs. 1 Crore as the limit below which Appeals cannot be filed before High Court, it does not debar the Department from maintaining the present Appeal.

On merits, the learned counsel for the appellant submits that in terms of Notification No. 08/2004 as amended by Notification No. 28/2004-CE dated 09.07.2004, since the amounts were not deposited by the manufacture/assessee within 60 days from the end of relevant quarter, the amounts were forfeited by the Department. The learned counsel for the appellant submits that the proceedings before the Additional Commissioner, Central Excise were dropped vide its order dated 30.01.2009 by observing that payment of duty made through PLS of Rs. 1.49 Crore was as

good as non-availment of CENVAT credit on the goods cleared. Therefore, the Additional Commissioner held that the CENVAT credit was not admissible on goods (Gutkha) as per Rule 6 of the CENVAT Credit Rules, 2004. However, as the assessee had paid through cash, it was considered that assessee neither availed CENVAT credit nor utilized the inadmissible CENVAT credit to the tune of Rs. 1.49 Crore and accordingly, the authorities although had brought in those protective demands, the same were dropped vide the order dated 30.01.2009. The learned counsel for the appellant, therefore, submits that as per Cenvat Credit Rules, 2004, the assessee was not eligible for availment and utilization and CENVAT credit and accordingly, question of reversal/refund of CENVAT Credit as directed by the Tribunal, does not arise as assessee did not make any double payment. Therefore, the Tribunal erred in holding that there was double payment of duty both by Challan and through CENVAT credit. Consequently it is submitted that the direction of the Tribunal to the Department to refund back the deposit made by the assessee is erroneous and contrary to law and should therefore be set aside and quashed.

4. The learned counsel for the assessee raised his objections to submit that this appeal is not maintainable in view of the Monetary involvement being lower than one crore as notified by a Instruction issued by Central Board of Indirect Taxes & Customs (CBIT&C) dated 22.08.2019. The learned Senior counsel for the assessee submitted that the monetary limit of Rs. 1 crore and above has been fixed by the Finance Department in respect of appeals to be filed by the Department/Government before the High Court. The effect of the circular is that only appeals where the financial involvement is beyond Rs. 1 Crore, can the Department prefer any appeal before the High Court. The learned Senior counsel appearing for the assessee submitted that in this appeal, the financial involvement is Rs.98,83,695.35/- only and as such in terms of the Ministry of Finance Instructions dated 22.08.2019, the monetary limit involved in this matter being below Rs. 1 Crore, the appeal is not maintainable and the same should be dismissed in Limine as not maintainable. Notwithstanding that the learned Senior counsel submits that even on merits this Appeal is not maintainable as there are no substantial questions which arises in the facts of the case which require any deliberation. The dispute sought to be agitated by the appellant relates to factual issues which have been correctly arrived at by the Tribunal. As per the mandate of Section 35G of the Central Excise Act; appeals to the High Court can be admitted

only on substantial questions of law. The learned Senior counsel for the assessee submits that as there are no substantial questions of law made out, the appeal merits dismissal in Limine. The learned Senior counsel for the appellant has referred to the Judgment of the Apex Court in ***Commissioner of Income Tax vs. Hotel & Allied Trades Pvt. Ltd***, reported in ***(2019) 18 SCC 735*** to buttress his submissions.

5. We have heard the learned counsels for the parties and we have also perused the pleadings on record. Since the question of maintainability of the appeal is raised, we propose to examine the issue of maintainability at the outset. The objections regarding maintainability of the present appeal is raised by the learned Senior Counsel for the respondent on the basis that where the monetary involvement is below Rs. 1 Crore as notified by the Central Board of Indirect Taxes & Customs (CBIT&C) circular dated 22.08.2019, Appeals before the High Court are not maintainable. The notification is extracted below for convenience:

"F.No. 390/Misc/116/2017-JC
Ministry of Finance
Department of Revenue
Central Board of Indirect Taxes & Customs
(Judicial Cell)
****

B' Wnng, 4h Fooor, HUDCO VISHALA Buldding
Bhikaji Cama Place, R.K. Puram, New Delhi-66

To

1. *All Principal Chief Commissioners/ Chief Commissioners/ Principal Commissioners/ Commissio ners of Customs/ Customs (Preventive)/ GST& CX;*
2. *All Principal Director Generals/ Director Generals under CBIC;*
3. *Chief Commissioner (AR); Commissioner (Legal), Principal Commissioner, Directorate of LegalAffairs, CBIC;*
4. *webmaster.cbec@icegate.gov. in*

Subject: Reduction of Government Litigation -Raising of monetary limits for filing appeals by the Department before CESTAT/High Courts and Supreme Court in Legacy Central Excise andService Tax-regarding.

In exercise of the powers conferred by Section 35R of the Central Excise Act, 1944 and made applicable to Service Tax vide Section 83 of the Finance Act, 1994, the Central Board of Indirect Taxes and Customs fixes the following monetary iimits below which appeal shall not be filed in the CESTA T, High Courts and Supreme Court.

S. No.	*Appellate Forum*	*Monetary Limit*
1.	*CESTAT*	*Rs. 50,00,000/-*
2.	*High Courts*	*Rs. 1,00,00,000/-*
3.	*Supreme Court*	*Rs. 2,00,00,000/-*

2. This instruction applies only to legacy issuesi.e.mattersrelating to Central Excise and Service Tax, and wiil apply to pending cases as well

3. Withdrawal process in respect of pending cases in above forums, as per the above revised limits, wiil follow the current practice that is being folowedforthewithdrawal of cases from theSupremeCourt, High Courts and CESTAT. Al other termsandconditio sof concerned earlier instructions wil continue to apply

4. It may be noted that issues in volving substantial questions oflaw as described in para 1.3 of the instruction dt 108.2011 from F. No. 390/ Misc/163/2010-JC would be contested rrespective of the prescribed monetary limits

5. Since withdrawal of Departmental Appeals is a long drawn activity requiring routine and constant monitoring, formats have been introduced in the Monthly Performance Report for all field formations tosendmonthlyreports regardingstatus of withdrawal of appeals in the MPR (refer table P/P-1). Details ofthe said cases should also be available in a separate register for further perusal by the Board as and when required. Tables are in the Annexure-A attached. The description of the Tablesinbriefis providedbelow

a) Table P: Position of withdrawal with reference to raised monetary iii itsSC/HC/CESTAT(asperinstruction dated 22/08/2019)

b) Table P-1: Remaining to be fled/wtthdrawn SC/HC/CESTAT

Sd/-

(Rohit Singhal) Director (Review)"

6. It is seen from a perusal of the circular that the monetary limit has indeed been prescribed for the Department, below which no Appeals can be filed. In so far as the High Court is concerned, the Monetary Limit prescribed is 1(one) Crore below which no Appeals can be filed before the High Court. However, Clause 4 of the said instructions prescribes that where substantial questions of law are involved, the matters will be contested irrespective of Monetary Limit prescribed. The submissions of the learned Senior counsel for the assessee that the financial involvement in the present proceedings is Rs.98,83,695.35/- is disputed by the counsel for the appellant submitting that the financial involvement in the present proceedings is beyond Rs. 1 Crore as the demand comprises of Rs.98,83,695.35/- as well as Rs.3,88,344.65/- and as such, it is not below that monetary limit of Rs. 1 Crore. Further the learned counsel for the appellant contended that the impugned order dated 18.12.2019 of the CESTAT, if allowed to stand will have serious consequences. Considering the submissions advanced at the Bar, we find that the restrictions of "monetary limit" is not an absolute bar. In matters where a common principle may be involved, the High Court can entertain appeal subject of course to the provisions of Section 35G of the Central Excise Act. In ***Commissioner of Income Tax, Central III vs. Surya Herbal Limited***, reported in (***2011) 15 SCC 482,*** the Apex Court was examining the applicability of the circular dated 09.02.2011 in respect of Appeals filed by the Income Tax Department where the Tax effect was below the prescribed limit. The Apex Court held that where any matter is likely to have a cascading effect and in which a common principle may be involved in subsequent group of matters or a large numbers of matters, the embargo prescribed by the Circular dated 09.02.2011 need not be applied ipso facto. In that view of the matter, we decline to reject the present appeal at the threshold on the issue of maintainability from the point of view of being below the monetary limit prescribed. We, therefore, proceed to examine the appeal on merits.

7. The following substantial questions of law have been raised by the appellant:-

A. *Whether the Hon'ble CESTAT, Kolkata is correct in holding that the duty payment made by the assessee through CENVAT credit is proper and admissible ignoring the conditions stipulated in Rule 6 of CENVAT credit Rules 2004.*

B. *Whether Hon'ble CESTAT has erred in allowing the refund of the duty paid through TR- 6 challan.*

C. *Whether Hon'ble CESTAT has erred in setting aside the decision of the Ld. Commissioner issued vide OIO No. 07/ADJ/CE/DENOVO/ CINNR/DIB/17 dated 31.03.2017 ordering not to allow further CENVAT credit for the period March, 2004 to March, 2005.*

D. *Whether Hon'ble CESTAT, Kolkata has erred in not appreciating the ratio laid down by the Hon'ble Apex Court in the civil appeal no. 3327/2007 in the matter of Commissioner of Customs, Mumbai –Vs- Dilip Kumar and Company & Ors which is also squarely applicable in the instant case.*

8. A reference to Section 35G of the Central Excise Act, 1944 shows that an appeal shall lie to the High Court from every order passed by an appellate Tribunal provided that the High Court is satisfied that the matter involves substantial questions of law. The appeal under Section 35G is a qualified appeal and not an absolute and/ or unqualified and/or unrestricted appeal. Unless, therefore, an appeal involves a substantial question of law, no appeal can be entertained by the High Court from the order passed in an appeal by an appellate Tribunal. For convenience Section 35G of the Central Excise Act, 1944 is extracted below:

> ***"35G. Appeal to High Court-*** *(1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for the purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law.*
>
> *(2) The Commissioner of Central Excise of the other party aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such appeal under this sub-section shall be-*
>
> *(a) filed within one hundred and eighty days from the date on which the order appealed against is received by the Commissioner of Central Excise or the other party;*
>
> *(b) accompanied by a fee of two hundred rupees where such appeal is filed by the other party;*
>
> *(c) accompanied by a fee of two hundred rupees where such appeal is*

filed by the other party;

(d) in the form of a memorandum of appeal precisely stating therein the substantial question of law involved."

9. In so far as the finding of facts arrived at by the Tribunal is concerned, the same ordinarily cannot be gone into by the High Court as the Tribunal is the final fact finding authority. It is for the Tribunal to find facts and for the High Court to lay down the law as applicable to the facts found. The High Court has no jurisdiction to go behind or question the facts found by the Tribunal unless on the ground of perversity. The Apex Court in ***Karnani Properties Ltd. vs. Commissioner of Income Tax***, reported in ***82 ITR 54*** while examining a question under the Income Tax Act which was to the effect that whether the Tribunal was justified in arriving at a particular finding of fact held as under:

"……. The question as to the correctness of the facts found by the Tribunal was not before the High Court nor is it before us. When the question referred to the High Court speaks of on the facts and in the circumstances of the case, it means on the facts and circumstances found by the Tribunal and not about the facts and circumstances that may be found by the High Court. We have earlier referred to the facts found and the circumstances relied on by the Tribunal, the final fact finding authority. It is for the Tribunal to find facts and it is for the High Court and this Court to lay down the law applicable to the facts found. Neither the High Court nor this Court has jurisdiction to go behind or to question the statements of fact made by the Tribunal. The statement of the case is binding on the parties and they are not entitled to go-behind the facts found by the Tribunal in the statement."

10. As discussed above, as per the mandate of the amended Section 35G of the Central Excise Act that there must be a substantial question of law in order to prefer an appeal before the High Court against the order of the Tribunal. The Apex Court while dealing with the provisions of Section 260A of the Income Tax Act, 1961, where the provisions of appeal to the High Court are parimateria with the provisions of Section 35 of the Central Excise Act; held that the conditions mentioned in Section 260A must be strictly fulfilled before an appeal can be maintained under Section 260A. The Apex Court held that if the appellant is unable

to show that a substantial question of law has arisen for determination, there is no impediment on the part of the High Court to dismiss the appeal without even admitting the appeal. The Apex Court in ***M. Janardana Rao vs. Joint Commissioner of Income Tax,*** reported in ***(2005) 2 SCC 324*** has laid down the tests to determine as to whether a substantial question of law is involved. The Apex Court held that the High Court must make every effort to distinguish between a question of law and a substantial question of law. The Apex Court held in the context of Section 260A that the findings of fact of the Tribunal cannot be disturbed. The relevant paragraphs of the said Judgment is extracted below:

*"**14**. Without insisting on the statement of substantial question of law in the memorandum of appeal and formulating the same at the time of admission, the High Court is not empowered to generally decide the appeal under Section 260-A*

without adhering to the procedure prescribed under Section 260-A. Further, the High Court must make every effort to distinguish between a question of law and a substantial question of law. In exercise of powers under Section 260-A, the findings of fact of the Tribunal cannot be disturbed. It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right, it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in Section 260-A must be strictly fulfilled before an appeal can be maintained under Section 260-A. Such appeal cannot be decided on merely equitable grounds.

***15.** An appeal under Section 260-A can only be in respect of a "substantial question of law". The expression "substantial question of law" has not been defined anywhere in the statute. But it has acquired a definite connotation through various judicial pronouncements. In Sir Chunilal V. Mehta & Sons Ltd. v. Century Spg. & Mfg. Co. Ltd. [1962 Supp (3) SCR 549 : AIR 1962 SC 1314] this Court laid down the following tests to determine whether a substantial question of law is involved. The tests are: (1) whether directly or indirectly it affects substantial rights of the parties, or (2) the question is of general public importance, or (3) whether it is an*

open question in the sense that the issue is not settled by pronouncement of this Court or Privy Council or by the Federal Court, or (4) the issue is not free from difficulty, and (5) it calls for a discussion for alternative view. There is no scope for interference by the High Court with a finding recorded when such finding could be treated to be a finding of fact."

11. In the light of law laid down by the Apex Court, the substantial questions of law as urged by the appellant in the present proceedings will have to be examined.

12. We have carefully perused the substantial questions of law presented by the appellant. It is seen that substantial questions **A, B** and **C** pertains to allowing of CENVAT credit. A perusal of the order dated 31.03.2017 passed by the Commissioner, will reveal that the show-cause Notices which were issued against the assessee for wrong utilization of credit during the period of March, 2004 to March, 2005 has already been dropped by the Additional Commissioner, Central Excise, Dibrugarh vide order dated 30.01.2009 and there is no pending show cause Notice issued to the assessee in relation to admissibility of CENVAT credit. The findings of the Additional Commissioner, Central Excise, Dibrugarh vide order dated 30.01.2009 that the charges framed against the assessee for wrong utilization of credit during the period of March, 2004 to March, 2005 were dropped had not been challenged or questioned by the Department before CESTAT and such findings of the Addl. Commissioner having attained finality, there was no scope for the CESTAT to re-examine the issues, more particularly, in an appeal, which is preferred by the assessee. Further the

Additional Commissioner, Central Excise, Dibrugarh, in its Order- in-Original dated 30.01.2009 had returned a finding that the assessee had paid duty two times- one debited from CENVAT Account and the other by Cash Deposit to the extent of Rs.1.49 Crore and which is as good as non-availment of CENVAT Credit on such goods cleared. The Additional Commissioner accepted the submissions of the assessee and came to the conclusions that penal provisions are not attracted. He, therefore, proceeded to drop the charges against the assessee and the show-cause Notices were accordingly disposed of. In the face of such findings of fact arrived at by the Addl. Commissioner in its Order-in- Original dated 30.01.2009 which had remained unassailed by the Department before a higher forum in the absence of any specific finding to the contrary, there cannot be any presumption that the

CENVAT Credit claimed by the assessee was contrary to the provisions of Rule 6 of CENVAT Credit Rules, 2017 which provides for the conditions for availing *CENVAT Credit.* As such, there was no occasion to re-decide the credit eligibility of the assessee on the relevant period that too without issuance of fresh Show Cause Notices on the assessee. As such the Tribunal had correctly rendered a finding that the benefit of exemption has been denied

to the assessee. Since, as discussed above, the findings arrived at

by the Addl. Commissioner, Central Excise, Dibrugarh in its Order- in-Original dated 30.01.2009 were not challenged by the Department before any higher forum, the same had therefore attained finality. The findings of the Tribunal in allowing the refund of duty paid through TR-6 challan is not in conflict with the conditions mentioned in the exemption Notification No. 08/2004 dated 21.01.2004 issued by the CBIT&C read with Notification No. 28/2004 dated 09.07.2004 and Rule 6 of the CENVAT Credit Rules, 2004. Accordingly, we do not find any substantial questions of law in respect of Question Nos. **A, B** and **C** as sought to be raised by the appellant.

13. In so far as the substantial question '**D'** is concerned, the appellant has referred to the Judgment of the Apex Court in ***Commissioner of Customs (Imports), Mumbai -Vs- Dilip Kumar and Company and Ors***, reported in ***(2018) 9 SCC 1*** to submit that the impugned order of Judgment of the CESTAT/Tribunal is in violation of the ratio laid down by the Apex Court in this case .

14. We have carefully perused the Judgment of the Apex Court in *Dilip Kumar (Supra)*, the ratio in the said Judgment lays down the principle for interpretation of taxing statute as well as the

exemption provisions or exemption notification. The Apex Court has held that the question whether the assessee falls within the notification or the exemption clause, has to be strictly construed and when once the ambiguity or doubt is resolved by interpreting the applicability of exemption clause strictly, the Court may construe the notification by giving full play bestowing wider and liberal construction. We respectfully agree with the ratio laid down by the Apex Court in *Dilip Kumar (Supra)* as there is no quarrel with the proposition laid down in the said matter. However, in view of the peculiar facts involved in the present proceedings, the appellant cannot draw any support from the said case cited. In the present

proceedings as already discussed above, there are findings of fact arrived at by the Addl. Commissioner vide its Order-in-Original dated 30.01.2009 whereby a finding was returned that assessee had paid the duty two times- one debited from CENVAT Account and other by Cash Deposit to the extent of Rs. 1.49 Crore and which is as good as non-availment of CENVAT Credit on such goods cleared. On the basis of the such clear findings of fact arrived at by the Addl. Commissioner, Central Excise, the Show Cause Notices issued to the assessee were dropped and the matter was accordingly disposed of. The said

findings of the Addl. Commissioner was never assailed before the

appropriate forum by the Department. Consequently, the same having attained finality, there was no occasion for the Tribunal to interpret as to whether the assessee was nor was not entitled to CENVAT Credit in an appeal preferred by the assessee. Furthermore, there are no averments or submissions made by the appellant as to how the exemption notifications were misinterpreted by the Tribunal contrary to the ratio laid down by the Apex Court in *Dilip Kumar(Supra).* We therefore hold that the question '**D'** also does not raise any substantial question of law.

15. The issue of wrong utilization of credit by the assessee during the period of March, 2004 to March, 2005 having been already dropped by the Additional Commissioner, Central Excise, Dibrugarh vide order dated 30.01.2009 and no appeal having been preferred by the Department against such finding, the matter has attained finality. The said finding of fact is also accepted by the Commissioner, Central Excise as is seen in the order dated 31.03.2017. The Tribunal, therefore, recorded such a finding and held that the Commissioner, Central Excise, Dibrugarh instead of arriving at the conclusion that the credit cannot be further allowed, which was never before him, ought to have appreciated the fact of payment of amount by challan as well as

by credit utilization has been made by the appellant. Consequently, no substantial question of law arises in this appeal and we are therefore, not persuaded to accept this appeal in view of the mandate of Section 35G of the Central Excise Act, 1985.

16. Before parting, we would like to observe that although it was not pleaded specifically in the appeal that the Judgment of the Tribunal suffered from perversity because of wrong appreciation of facts, however it was orally submitted by the learned counsel for the appellant that the Judgment of the Tribunal is perverse and should be therefore suitably interfered with.

17. The provisions of Section 35G mandates that an appeal under Section 35G of the Central Excise Act can only be admitted/heard by the High Court only on the substantial question of law framed. However, in the present proceedings, there was no substantial question of law framed by the appellant with regard to the 'perversity' as raised by the appellant. Notwithstanding such a question not being specifically framed by the appellant, it is certainly open for the Court to frame such substantial question of law subject, however, to such pleadings being available to demonstrate as to how the impugned order of the Tribunal suffers

from perversity. In the absence of such specific pleadings or reference to such facts to demonstrate as to how the facts were not appreciated or wrongly appreciated by the Tribunal, there cannot be any substantial question of law with regard to the perversity framed. The findings of fact recorded by the Court can be held to be perverse if such findings have been arrived at by wrong appreciation of facts and ignoring relevant materials or taking into consideration irrelevant materials. The Apex Court in

S.R. Tewari –Vs- Union of India, reported in ***(2013) 6 SCC 602*** held that if the decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. The Apex Court held that if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the finding would not be interfered with.

18. In view of all the above discussions, we find no merit in this appeal and the same is, accordingly, dismissed.

19. No order as to costs.

JUDGE **CHIEF JUSTICE**

Comparing Assistant

THE GAUHATI HIGH COURT

(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH) Case No. : WP(C)/5642/2021

KRIT KUNAL DHAWAN

CARRYING ON BUSINESS IN THE NAME AND STYLE OF ECO FUEL INDUSTRIES HAVING ITS PRINCIPAL PLACE OF BUSINESS AT GROUND FLOOR, KAMARKUCHI GAON, TEPSIA, SONAPUR, KAMRUP (M), ASSAM 782402

VERSUS

THE STATE OF ASSAM AND 2 ORS

REPRESENTED BY THE COMMISSIONER AND SECY. TO THE GOVT. OF ASSAM, DEPTT. OF FINANCE AND TAXATION, ASSAM SECRETARIAT, DISPUR, GUWAHATI 781006

2: THE COMMISSIONER OF STATE TAXES

KAR BHAWAN

DISPUR GUWAHATI 781006

3: THE JOINT COMMISSIONER OF STATE TAXES

GUWAHATI-B

ASSAM

KAR BHAWAN

DISPUR

GUWAHATI 78100

Advocate for the Petitioner : DR A SARAF

Advocate for the Respondent : SC, FINANCE AND TAXATION

BEFORE

HONOURABLE MR. JUSTICE
ACHINTYA MALLA BUJOR BARUA

ORDER

Date : 29-10-2021

Heard Dr. A. Saraf, learned senior counsel for the petitioner. Also heard Mr.

B. Gogoi, learned counsel for the respondent in the Finance and Taxation Department of the Govt. of Assam.

2. Two communications bearing No.ZD1810210008801 and NO.ZD181021000894S both dated 08.10.2021 are assailed in this petition.

3. The brief facts of the case narrated in the two communications are extracted below:-

"During investigation it was found that the taxpayer has utilized ITC from dubious firms bearing the following GSTN numbers 18AAUPG9024G1ZE 18AUTPJ2296G1Z3 18ALPPG5591G3ZM 06ALPPG5591G1ZT 18AOKPR5864B1ZM. It has been reported in print and electric media that these taxpayers are involved in bill trading and passing on fake ITC without movement of actual goods therefore ITC claimed from these firms by the taxpayer are sought to be reversed with levy of interest and penalty as per Assam GST Act 2017."

"During investigation it was found that the taxpayer has utilized ITC Form dubious firms bearing the following GSTN numbers 18AAUPG9024G1ZE 18AUTPJ2296G1Z3 18ALPPG5591G3ZM 06ALPPG5591G1ZT 18AOKPR5864B1ZM

it has been reported in print and electronic media that these taxpayers are involved in bill trading and passing on fake ITC without movement of actual goods therefore ITC claimed from these firms by the taxpayer are sought to be reversed with levy of interest and penalty as per Assam GST Act 2017"

4. A reading of the brief facts contained in the two communications indicates that the notice in the Form GST DRC-01 was issued against the petitioner which is a form under Rule 142(1)(a) of the AGST Rules.

5. It is the contention of the petitioners that firstly the notice could not have been issued on the basis of certain report in print and electronic media to that extent Dr. A. Saraf, learned senior counsel relies upon certain decisions of the Supreme Court.

6. But we have taken note of that apart from the print and electronic media being relied upon it has also been specifically stated in the Form GST DRC-01 that during investigation it was found that the tax payers had utilized dubious ITC forms bearing the GSTN numbers as indicated above.

7. By our earlier order dated 26.10.2021 we required the respondent in the Taxation and Finance department of the Govt. of Assam to produce the records, but Mr. B. Gogoi, learned counsel states that inadvertently there was misunderstanding and on the other hand a communication dated 27.10.2021 containing certain instruction has been produced before the Court. We take note of a specific averment in the communication dated 27.10.2021 which is extracted below:-

"Hence, a summon was issued to the instant Taxpayer on 10.09.2021, for further investigation. The Taxpayer appeared on 23.09.2021 and requested for time up to 30.09.2021. The request of the Taxpayer was conceded. However, the Taxpayer failed to appear on the given date. Therefore, as per Assam GST Act, 2017, a Show-Cause Notice in form DRC-01 was issued on 08.10.2021."

8. A reading of the said instruction indicates that before issuing the Form GST DRC-01 the petitioners were issued a summon on 10.09.2021 for further investigation. Pursuant thereof, the petitioner appeared on 23.09.2021 and requested time upto 30.09.2021. The said request to defer the investigation up to 30.09.2021 was agreed upon but however the petitioner taxpayer failed to appear on 30.09.2021. On the other hand, Dr. A. Saraf, learned senior counsel for the petitioner upon instruction has made a statement that the petitioner was

ready with all relevant materials on 23.09.2021 itself to satisfy the authorities as regards their investigation. But on the said date, the required procedure could not take place.

9. Be that as it may, without taking note of the discordant views, we have to understand that in the aforesaid circumstance that the Form GST DRC-01 issued against the petitioner by the respondent authorities on the premises that in the investigation the petitioner had not satisfied the authorities as regards the ITC they had relied upon and therefore, the authorities had arrived at a view that they had relied upon some dubious ITC for the purpose. As it is apparent that the said view was formed as because the petitioner had not provided appropriate material and document at the time of the investigation and therefore, such Form GST DRC-01 was issued, we are of the view that ends of justice would be met if an opportunity is given to the petitioner tax payer to appear before the respondent Joint Commissioner of State Taxes, Guwahati with all relevant materials that he may

desire to rely upon and satisfy the authorities in their investigation pursuant to the earlier summons dated 10.09.2021. Accordingly, as agreed upon by the parties, the petitioner shall appear before the Joint Commissioner of State Taxes, Guwahati on 08.11.2021 on 11.00 am and upon his appearance, the aforesaid authority shall give due audience to the petitioner and take on board all such relevant materials that he may produce as well as the contention that the petitioner may desire to raise.

10. Upon completing the said procedure, the authority shall pass a reasoned order either accepting or rejecting the contention of the petitioner.

11. The reasoned order to be passed shall prevail and till such reasoned order is passed, the Form GST DRC-01 both dated 08.10.2021 shall be kept in abeyance. In the event, the reasoned order goes in favour of the petitioner it

has to be understood that the said Form of GST DRC-01 will no longer remain effective and in the event it is against the petitioner, a fresh Form GST DRC-01 may be issued and in doing so adequate time required under the law shall be given to the petitioner before taking any action.

12. Any observation made in this order shall not influence the authorities in any manner. A copy of the communication dated 27.10.2021 be kept on record.

13. Writ petition stands disposed of in the above terms. Interim order passed earlier stands vacated.

JUDGE

Comparing Assistant

HIGH COURT OF ALLAHABAD

Court No. - 21

Case :- WRIT TAX No. - 931 of 2021

Petitioner :- M/S Raj Enterprises

Respondent :- Commissioner Commercial And Another

Counsel for Petitioner :- Pooja Talwar

Counsel for Respondent :- C.S.C.

Hon'ble Naheed Ara Moonis, J. Hon'ble Saumitra Dayal Singh, J.

1. Heard Ms. Pooja Talwar, learned counsel for the petitioner and Shri Manu Ghildyal, learned counsel for the revenue.

2. Matter is at fresh stage.

3. Perused the amendment application (2 of 2021). The same is allowed. Let amendment in the original record be incorporated by Monday (22.11.2021).

4. Challenge has been raised to the order dated 29.06.2019 issued by respondent no.2 whereby the petitioner's registration granted under the Uttar Pradesh Goods and Services Tax Act, 2017 (hereinafter referred to as the 'Act'), has been cancelled.

5. Learned counsel for the petitioner submits, the impugned order was not preceded by any proceeding, inasmuch as neither any show cause notice was issued and served on the petitioner nor any reply was called nor any date fixed for hearing was communicated to the petitioner. Such facts have been brought on record by means of the amendment application.

6. On the other hand, learned Standing Counsel for the revenue submits that the impugned order is appellable and that in absence of any reply being filed to the show cause notice dated 24.05.2019 that was uploaded on the GST portal and was thus visible to the petitioner, there was no further requirement of granting opportunity of hearing in this case under Rule 22 of the Uttar Pradesh Goods and Services Tax Rules, 2017 (in short, 'Rules').

7. While we may not rule on the issue of service of notice dated 24.05.2019 as no counter affidavit has been called in the present proceeding, insofar as the other objection raised by the petitioner is concerned, the rules of natural justice are too deeply entrenched in our jurisprudence, as may allow any exception to arise, lightly. Thus, if the respondent no.2 proposed to pass an order to cancel the petitioner's

registration, it would have far-reaching civil consequences. It could aversely impact the entire business of the petitioner.

8. Under the first proviso to Section 29 (2) of the Act, the opportunity of hearing is a must before any order cancelling the registration may be passed. Therefore, reliance placed by learned Standing Counsel on Rule 22 of the Rules is wholly misconceived. The statutory provision would dictate to the assessing authority to necessarily issue a show cause notice and afford due opportunity of hearing to the registered person before his registration may be cancelled.

9. In the admitted facts of the present case, though no reply may have been furnished by the petitioner still, it was incumbent on respondent no.2 to fix a date and afford opportunity of hearing to the petitioner in compliance of the first proviso to Section 29(2) of the Act. In view of such facts, no useful purpose would be served in keeping in the present petition pending or calling for a counter affidavit as the instructions received by the learned Standing Counsel are complete with respect to the issue being dealt with by the Court.

10. Accordingly, the writ petition is **allowed**. The order dated 29.06.2019 issued by respondent no.2 is set aside. The petitioner may now furnish its reply to the show cause notice dated 24.05.2019 within a period of two weeks. Thereafter, the respondent authority, after considering the reply so furnished, may pass appropriate order in accordance with law.

Order Date :- 18.11.2021

AHA

COMMERCIAL NEWS

CA Deepak Khandelwal

GoM meet on GST rate rationalisation deferred

A meeting of the panel of state finance ministers looking into GST rate rationalisation has been deferred, sources said. The Group of Ministers (GoM) on rate rationalisation, headed by Karnataka Chief Minister BasavarajBommai, also includes West Bengal Finance Minister AmitMitra, Kerala Finance Minister K N Balagopal, and Bihar Deputy Chief Minister Tarkishore Prasad.

It has met twice so far and was scheduled to meet on November 27 to consider recommendations of the Fitment committe regarding GST rate and slab changes.

Sources said the meeting has been deferred and the GoM would submit its report to the GST Council, chaired by the union finance minister and comprising state counterparts.

The Council, which meets once every quarter, is slated to meet next month.

Sources had earlier said the Fitment committee, comprising tax officers from states and the Centre, has made many "sweeping" recommendations regarding slab and rate changes and taking items out of the exemption list. All the recommendations might not be accepted in toto, the sources added.

Over its last two meetings, the GoM has reviewed items under an inverted duty structure to help minimise refund payout.

Currently, GST has a four-tier slab structure of 5, 12, 18 and 28 per cent. Essential items are either exempted or taxed at the lowest slab, while luxury and demerit items attract the highest tax rate. On the top of the highest slab, a cess is levied on luxury and demerit goods.

There have been demands for merging the 12 and 18 per cent slab, as also taking out certain items from the exempt category to balance the impact of slab rationalisation on revenue.

With regard to inverted duty structure, the GST Council has already corrected the rate anomaly in the case of mobile handsets, footwear and textiles.

How GST authorities are using data analytics and technology for investigations

.Guidelines issued to the tax officials for scrutiny of Goods and Services Tax (GST) returns in Kerala has thrown light on how the tax department is using data analytics and technology.

In a directive issued by commissioner of State GST to the tax officials, a detailed explanation of the risk factors and the red flags and procedure was detailed out. The directive not only mentions the top risk factors but even a detailed step by step procedure of how the system work, how it flags off up risk factors and how to investigate once the data analytics throws discrepancies in tax filings.

The directive also laid out the risk parameters flagged in the back-office system for the scrutiny of the GST returns.

This is an important update, as the guidelines demonstrate the direction/procedure being followed by authorities while issuing notices," said Harpreet Singh, Partner, indirect taxes at KPMG India.

The directive said that some investigators in the past may not have followed the procedure.

"Specific instances have come to the notice wherein proper procedures have apparently not been followed during the scrutiny of returns and thenceforth actions. Hence in order to ensure uniformity in the scrutiny of returns across the field formations and also to prioritise and dispose the cases initiated at the assessment vertical the following instructions/guidelines shall be adhered to," the guidelines said.

The guidelines goes into detail how the system would flag off certain issues and how the tax officials are required to investigate before issuing notices.

The instructions and guidelines also mentioned the risk parameters on input tax credit availed by companies.

GST framework allows companies to set off part of their future tax liability against GST paid by them on the raw materials sourced from suppliers. The set off is often in the form of input tax credit.

"While aforesaid Guidelines have been issued in Kerala, other States are also likely to adopt similar guidelines/ procedure to track anomalies in different filings and issue notices," said Singh.

GST officers told to block tax credit on basis of evidence, not just suspicion

The CBIC has come out with guidelines on blocking of tax credit by GST field officers, saying that it should be on the basis of 'material evidence' and not just out of 'suspicion'. The guidelines laid down five specific circumstances in which such credit could be blocked. These include availment of credit without any invoice or any valid document, or availing of credit by purchasers on invoices on which GST has not been paid by sellers.

The Central Board of Indirect Taxes and Customs (CBIC) said the commissioner, or an officer authorised by him, not below the rank of assistant commissioner, must form an opinion for blocking of input tax credit (ITC NSE -0.16 %) only after "proper application of mind" considering all facts of the case.

"It is reiterated that the power of disallowing debit of amount from electronic credit ledger must not be exercised in a mechanical manner and careful examination of all the facts of the case is important to determine cases(s) fit for exercising power under rules 86A," it said.

The government had introduced Rule 86A in GST rules in December 2019 giving powers to taxmen to block the ITC available in the electronic credit ledger of a taxpayer if the officer has "reasons to believe" that the ITC was availed fraudulently.

Till early last month, taxmen had blocked Rs 14,000 crore of ITC of 66,000 businesses under this rule.

The CBIC in its guidelines dated November 2 said the remedy of disallowing debit of amount from electronic credit ledger being, by its nature, extraordinary, has to be resorted to with utmost circumspection and with maximum care and caution.

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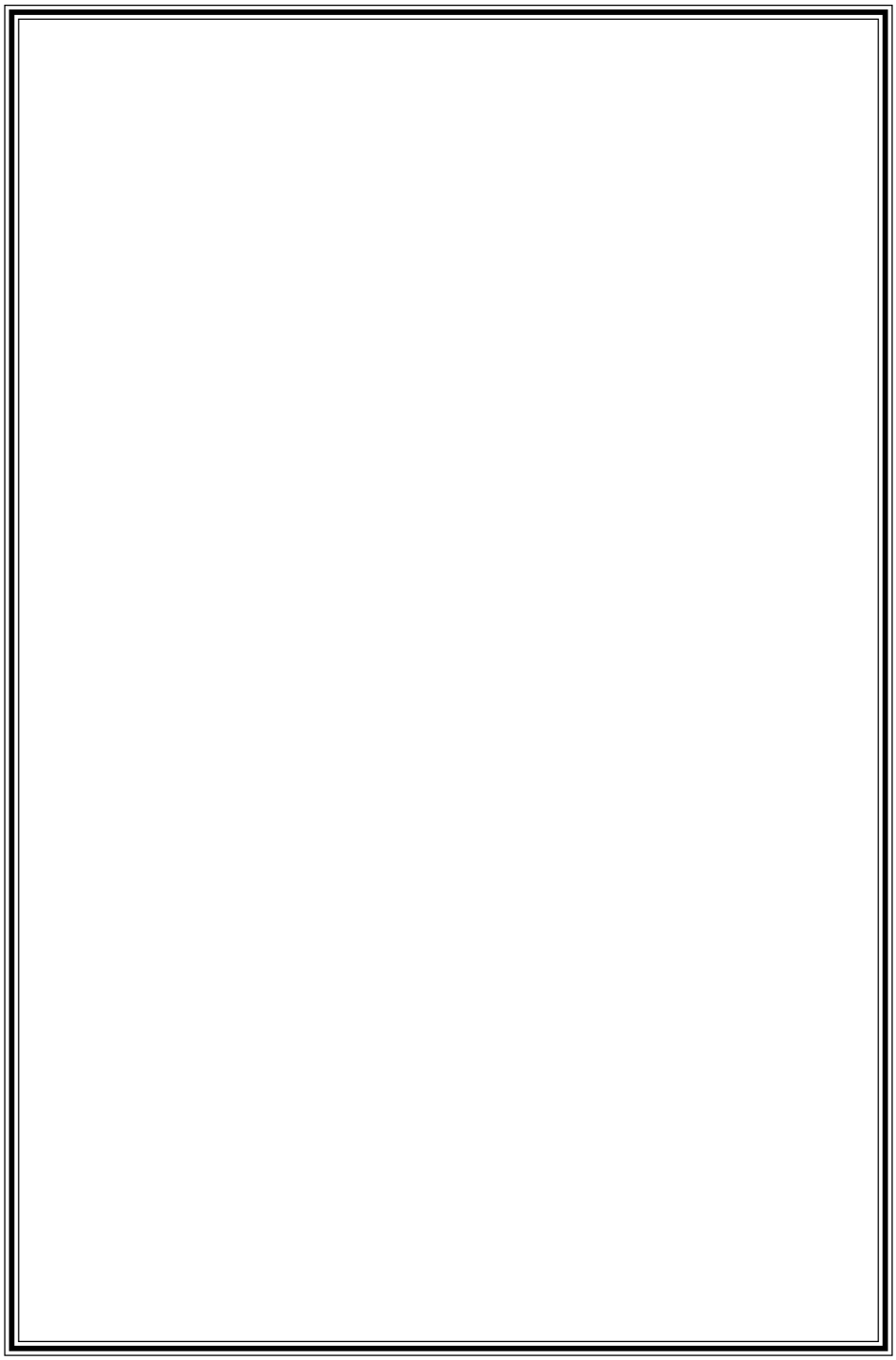

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24th December, 2021	Ordinary General Meeting & Election	Lucknow
25th-26th December, 2021	24th National Convention	Lucknow

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