ETHICS EDUCATION EXCELLENCE

AIFTP

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UNION BUDGET 2023 -24

GST HIGHLIGHTS

SUMMARY OF THE LATEST GST CHANGES IN FINANCE BILL 2023

All India Federation of Tax Practitioners

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President's Message

Friends,

The Union Budget has been announced and there are many changes in GST and allied laws. In this issue we had tried to cover the changes in the GST and Customs and Articles detailing the changes has been published. Apart from it other Articles cover the important aspects and a brief digest on assessment and notices has also been published.

AIFTP is continuously organizing programme throughout India and we had celebrated the Republic Day on 26th January, 2023 in all Zones. The National Flag was hoisted in all the Zones and at many places. The National President was at Hyderabad where fantastic programme was organized by AIFTP South Zone along with the Telangana Tax Practitioners Associations. The National Flag was also hoisted at head office at Mumbai wherein Sh. Rajesh Mehta, Secretary General was present and Flag was hoisted by the Senior most Past President Mr. P.C. Joshi. In other Zones also the Flag was hoisted. In addition there was functions organized by AIFTP South Zone at Cochin also.

The National Tax Conference and NEC Meeting was organized at Sterling Resorts, Puri. It was attended by over 250 persons and was organized in a grand and lavish manner. The arrangements and hospitality was superb. The Conference Chairman Mr. Bibekananda Mohanti deserve all the credit for this wonderful NEC and NTC. The Team lead by AIFTP East Zone by Mr. Vivek Agarwal and Mr. Pradosh Patnaik and other team Members worked hard for the success of this grand event.

It is also a proud moment for all of us that Hon'ble Mr. Justice Rajesh Bindal has been elevated as Judge of the Hon'ble Supreme Court of India. We all at AIFTP are proud of him as he has been the Member of AIFTP and always coming to the programme of AIFTP regularly.

Many programmes are being organized by all the Zones of AIFTP. The complete information is available on the website of the AIFTP. In the month of March we are having the National Tax Conference and NEC at Lucknow on 18th – 19th March, 2023. Thereafter on 29th – 30th April we are having National Tax Conference and NEC at Kevdiya. Many other programmes in between are being organized. I will request all the members of AIFTP to join the programmes regularly.

Regards,

PANKAJ GHIYA
National President, 2023
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Membership of All India Federation of Tax Practitioners as on 30th January, 2023					
Life Members					
Zone Name	**Associate**	**Individual**	**Association**	**Corporate**	**Total**
Central	0	1419	25	0	1444
Eastern	6	2043	37	0	2086
Northern	0	1464	20	2	1486
Southern	1	2334	24	4	2363
Western	5	2904	38	3	2950
Total	**12**	**10164**	**144**	**9**	**10329**

FORTH COMING PROGRAMMES		
Date & Month	**Programme**	**Place**
11th February, 2023	Full Day Conference	Bhopal
20th February, 2023	Online Certificate Course on Income Tax (Central Zone)	-
25th February, 2023	One Day Conference (Northern Zone)	Varanasi
25th February, 2023	One Day Conference (Southern Zone)	Puducherry
18th March, 2023	National Executive Committee Meeting	Lucknow
18th March, 2023	Two Day Natfonal Tax Conference (Northern Zone)	Lucknow
6th April, 2023	2 Night 3 Days RRC (Central Zone)	Chitrakoot
15th April, 2023	One Day Conference (Western Zone)	Ahmedabad
22nd April, 2023	One Day Conference (Southern Zone)	Vishakapatnam
29th April, 2023	National Executive Committee Meeting	Kewadia
29th April, 2023	Two Day National Tax Conference with visit to Statute of Unity (Western Zone)	Kewadia
13th May, 2023	Two Day National Tax Conference (Central Zone)	Indore

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विद्या प्रशस्यते लोकैः विद्या सर्वत्र गौरवा।
विद्यया लभते सर्व विद्वान सर्वत्र पूज्यते।।

Knowledge is extolled by everyone, knowledge is considered great everywhere, one can attain everything with the help of knowledge person is person is respected everywhere.

Friends

In the 75th year of India's Independence, the World has recognized the Indian Economy as a 'bright star' as the Economic Growth is estimated at 7 per cent, which is the highest among all major economies, in spite of the massive global slowdown caused by COVID-19 and Russia-Ukraine War. This was stated by Union Minister for Finance & Corporate Affairs Smt. Nirmala Sitharaman, while presenting the Union Budget 2023-24 in Parliament.

The union Budget has been announced and there are many changes in GST and allied laws. The Budget provides for amending the CGST Act so as to raise the minimum threshold of tax amount for launching prosecution under GST from Rs. 1 crore to Rs. 2 crore, except for the offence of issuance of invoices without supply of goods and services or both. The compounding amount will be reduced from the present range of 50 to 150% of tax amount to the range of 25 to 100%. It will also decriminalize certain clauses of the Act like obstruction and preventing of any officer from discharge of his duties, deliberate tempering of evidence or failure to supply the information.

It is important for us as professional to be updated and to be aware of the latest changes and judicial decisions. The impact of the any amendment, clarification or interpretation can be far reaching and accordingly the continuous education and updation is must. In this issue we had tried to cover the changes in the GST and Customs and Articles detailing the changes has been published.
We are also grateful to the contributors to this journal who had been sending Articles, updates, judgments etc. Support of all the professionals by way of advertisement/ subscription is also needed.

"JAI HIND, JAI BHARAT"
Regards,

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TIMELINE - GST

Adv. Abhay Singla

A. GOODS & SERVICE TAX

Sr. No.	Particulars	Form	Period	Due Date
(i)	Monthly Summary GST Return	GSTR-3B		
	(a) Regular Taxpayers		Feburary, 2023	20th March 2023
			March, 2023	20th April 2023
(ii)	Detail of Outward Supplies: -	GSTR-1 (QUARTERLY)	Feb, 2023 (IFF)	13th March 2023
	(a) QRMP		Jan-March, 2023	13th April 2023
	(b) Monthly Filing	GSTR-1	Feburary, 2023	11th March 2023
			March, 2023	11th April 2023
(iii)	Payment of Tax under QRMP	PMT-06	By 25th of next month	
(iv)	Quarterly return for Composite taxable persons	CMP-08	Jan-March 2023	18th April 2023
(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	Feburary, 2023	10th March 2023
			March, 2023	10th April 2023
(ix)	Return to be filed by the e-commerce operators who are required to deduct TCS (Tax collected at source) under GST	GSTR-8	Feburary, 2023	10th March 2023
			March, 2023	10th April 2023

ANALYSIS OF PROPOSED CHANGES IN GST LAW IN BUDGET 2023

No.	Topic	Provision Impacted	Act
1	Benefit of Composition Scheme extended to Supplyof Goods through E-commerce operator	Section 10(2) Section 10(2A)	CGST
2	Sale of warehoused goods before filing Bill of Entryis now liable for reversal of ITC under Rule 42	Section 17(2) Section 17(3)	
3	ITC not allowed on CSR Expenditure anymore	Section 17(5)	
4	Retrospective amendment - Section 23 to haveoverriding effect	Section 23	
5	Last date to file GSTR-1, GSTR-3B, Annual Return(GSTR-9 & 9C) and TCS Return (GSTR-8) notified	Section 37(5) Section 39(11) Section 44(2) Section 52(15)	
6	Onus to conduct due diligence of suppliers liesupon E-commerce operator now	Section 122(1B)	
7	Decriminalization of certain offences and increasein monetary limit for initiating prosecution proceedings	Section 132(1) Section 138	
8	Fake/Bogus Invoices cases cannot be compoundedanymore	Section 138(1)	
9	Reduction in Compounding Fee	Section 138(2)	
10	Retrospective amendment for non-taxable supplies notified in Schedule III and disallowing refund oftaxes already paid	Schedule III	
11	Scope of OIDAR services widened	Section 2(16) Section 2(17)	IGST
12	Place of Supply of Transport of Goods restricted irrespective of destination of goods	Section 12(8)	
13	Consent based sharing of information furnished bytaxable person	Section 158A	CGST
14	Amendment in condition to make payment in 180days to align the language of law with practical working	Section 16(2)	
15	Amendment in Refund Provisions	Section 54(6)	

1. <u>Benefit of Composition Scheme extended to Supply of Goods through E-commerce operator</u>

Benefit of composition scheme which was earlier not available to registered persons engaged in supplying goods through E-commerce operator is proposed to be extended to them by making following amendments in Section 10 of CGST Act, 2017 -

1. Words *"goods or"* to be omitted from clause (d) of sub-section (2) of Section 10. Amended sub-section (2) to read as under –

   "(2) The registered person shall be eligible to opt under sub-section (1), if—

   (d) he is not engaged in making any supply of ~~goods or~~ services through an electronic commerce operator who is required to collect tax at source under section 52;"

2. Similarly, words *"goods or"* to be omitted from clause (c) of sub-section (2A) of Section 10. Amended sub-section (2A) to read as under –

   "(2A) Notwithstanding anything to the contrary contained in this Act, but subject to the provisions of sub-sections (3) and (4) of section 9, a registered person, not eligible to opt to pay tax under sub-section (1) and sub-section (2), whose aggregate turnover in the preceding financial year did not exceed fifty lakh rupees, may opt to pay, in lieu of the tax payable by him under sub-section (1) of section 9, an amount of tax calculated at such rate as may be prescribed, but not exceeding three per cent of the turnover in State or turnover in Union territory, if he is not—

   (c) engaged in making any supply of ~~goods or~~ services through an electronic commerce operator who is required to collect tax at source under section 52;"

<u>Analysis</u> – By way of omitting words "goods or" in sub-section (2) & (2A), the restriction no longer applies to supplier of goods through E-commerce operators and now, these registered persons have the option to pay taxes under the Composition Levy.

Whereas restriction will continue to apply for such registered persons who are engaged in supply of services through E-commerce operator.

2. <u>Sale of warehoused goods before filing Bill of Entry is now liable for reversal of ITC under Rule 42</u>

<u>Background</u> - Sub-section (2) of Section 17 of CGST Act provides that where a registered person is providing for taxable as well as exempted services and used inward supplies for effecting both taxable & exempted supplies, ITC for such inward supplies shall be allowed only to the extent of taxable supplies. Method of calculating such proportionate ITC is given in Rule 42 of CGST Rules.

Sub-section (3) of Section 17 of CGST Act along with Explanation thereof defines the scope of exempt supplies, meaning thereby, on what output supplies, ITC shall not be allowed (if inward supplies used entirely for providing exempt supplies) or allowed proportionately (if inward supplies used for providing both taxable & exempt supplies).

Scope of 'Exempt supplies' (on which ITC cannot be claimed or can be claimed proportionately as per Rule 42 of CGST Rules) is proposed to be broadened to include services inserted w.e.f. 01 February 2019 in Schedule III to CGST Act as under -

Words *"except those specified in paragraph 5 of the said Schedule"* in Explanation to sub-section (3) to be substituted to read as -

"(3) The value of exempt supply under sub-section (2) shall be such as may be prescribed, and shall include supplies on which the recipient is liable to pay tax on reverse charge basis, transactions in securities, sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building.

Explanation.—For the purposes of this sub-section, the expression "value of exempt supply" shall not include the value of activities or transactions specified in Schedule III, ~~except those specified in paragraph 5 of the said Schedule.~~ except, -

(i) the value of activities or transactions specified in paragraph 5 of the said schedule; and,

(ii) the value of such activities or transactions as may be prescribed in respect of clause (a) of paragraph 8 of the said Schedule."

Para 8 in Schedule III to CGST Act was inserted *vide* CGST Amendment Act, 2018 w.e.f. 01 February 2019 and clause (a) thereof reads as *"Supply of warehoused goods to any person before clearance for home*

consumption".

Analysis - By way of insertion of abovementioned services in the scope of 'exempt supplies' for the purposes of availment of ITC under sub-section (2), in case any inward supplies is utilized for rendering these output services, ITC thereof is not admissible to the taxpayer and in case any inward supplies is used for rendering both taxable supplies and exempt supplies, ITC can be availed in proportionate formula given in Rule 42 of CGST Rules.

Though it needs to be noted that value of such activities or transactions in respect of supply mentioned in Para 8(a) of Schedule III will be notified/ prescribed by the Government.

3. ITC not allowed on CSR Expenditure anymore

Section 17(5) of CGST Act which provides for **blocked credits** is proposed to be widened by way of **inserting** clause (fa) which reads as-

> *"(fa) goods or services or both received by a taxable person, which are used or intended to be used for activities relating to his obligations under corporate social responsibility referred to in section 135 of Companies Act, 2013;"*

Analysis - Admissibility of ITC on CSR Expenditure mandatorily required to be incurred as per Section 135 of Companies Act is a matter of continuous debate around the industry from the erstwhile regime.

While on one hand, Hon'ble Tribunal has allowed CENVAT Credit of Service tax paid on CSR Expenditure as well as many Advance Rulings in GST era following the same proposition and allowing ITC thereof, on the other hand, Hon'ble Tribunal in another case has disallowed CENVAT Credit of Service tax paid on CSR expenditure. Ergo, the debates/apprehensions across the industry regarding admissibility of ITC on CSR Expenditure.

Now, Finance Bill 2023 has proposed to disallow said ITC by specifically including it in the category of blocked credits. However, it is pertinent to note that this is a prospective amendment.

4. Retrospective amendment - Section 23 to have overriding effect

Section 23 of CGST Act which provides for *persons who are not liable for registration* is proposed to be substituted to read as -

"23. ***Notwithstanding anything to the contrary contained in sub-section (1) of section 22 or section 24,–***

(a) the following persons shall not be liable to registration, namely:–

(i) any person engaged exclusively in the business of supplying goods or services or both that are not liable to tax or wholly exempt from tax under this Act or under the Integrated Goods and Services Tax Act, 2017;

(ii) an agriculturist, to the extent of supply of produce out of cultivation of land;

(b) the Government may, on the recommendations of the Council, by notification, subject to such conditions and restrictions as may be specified therein, specify the category of persons who may be exempted from obtaining registration under this Act."

Analysis - Section 23 has been made a non-obstante clause to have an overriding effect over Section 22 (Persons liable for registration) & Section 24 (Compulsory registration in certain cases), meaning thereby, if a person is required to get registered under either Section 22 or 24 but specifically exempted from taking registration under Section 23, such person is not required to take registration under GST laws by virtue of Section 23.

5. Last date to file GSTR-1, GSTR-3B, Annual Return (GSTR-9 & 9C) and TCS Return (GSTR-8) notified

Analysis – A sunset date is proposed to be inserted to provide that GSTR-1, GSTR-3B, GSTR-9, GSTR-9C and GSTR-8 can be filed only on or before such sunset date and after such date, taxpayer won't be allowed to file these returns anymore.

Such sunset date is notified as 3 years from the due date of furnishing the relevant return. Also, Government is empowered to notify such persons or class or persons who can file these returns even after the sunset date, meaning thereby, extension in this sunset date can be provided by the Government.

1. Sub-section (5) is proposed to be **inserted** in Section 37 to read as follows -

"(5) A registered person shall not be allowed to furnish the details of outward supplies under sub-section (1) for a tax period after the expiry of a period of three years from the due date of furnishing the said details:

Provided that the Government may, on the recommendations of the Council, by notification, subject to such conditions and

restrictions as may be specified therein, allow a registered person or a class of registered persons to furnish the details of outward supplies for a tax period under sub-section (1), even after the expiry of the said period of three years from the due date of furnishing the said details."

2. Sub-section (11) is proposed to be inserted in Section 39 to read as follows -

"(11) A registered person shall not be allowed to furnish a return for a tax period after the expiry of a period of three years from the due date of furnishing the said return:

Provided that the Government may, on the recommendations of the Council, by notification, subject to such conditions and restrictions as may be specified therein, allow a registered person or a class of registered persons to furnish the details of outward supplies for a tax period, even after the expiry of the said period of three years from the due date of furnishing the said return."

3. Sub-section (2) is proposed to be inserted in Section 44 to read as follows -

"(2) A registered person shall not be allowed to furnish an annual return under sub- section (1) for a financial year after the expiry of a period of three years from the due date of furnishing the said annual return:

Provided that the Government may, on the recommendations of the Council, by notification, and subject to such conditions and restrictions as may be specified therein, allow a registered person or a class of registered persons to furnish an annual return for a financial year under sub-section (1), even after the expiry of the said period of three years from the due date of furnishing the said annual return."

4. Sub-section (15) is proposed to be inserted in Section 52 to read as follows -

"(15) The operator shall not be allowed to furnish a statement under sub-section (4) after the expiry of a period of three years from the due date of furnishing the said statement:

Provided that the Government may, on the recommendations of the Council, by notification, subject to such conditions and restrictions as may be specified therein, allow an operator or a class of operators to furnish a statement under sub-section (4), even after the expiry of the said period of three years from the due date of furnishing the said statement."

6. **Onus to conduct due diligence of suppliers lies upon E-commerce operator now**

Sub-section (1B) is proposed to be inserted in Section 122 to provide for penalty upon E- commerce operator and shall read as -

"(1B) Any electronic commerce operator who–

(i) allows a supply of goods or services or both through it by an unregistered person other than a person exempted from registration by a notification issued under this Act to make such supply;

(ii) allows an inter-State supply of goods or services or both through it by a person who is not eligible to make such inter-State supply; or

(iii) fails to furnish the correct details in the statement to be furnished under sub-section

(4) of section 52 of any outward supply of goods effected through it by a person exempted from obtaining registration under this Act, shall be liable to pay a penalty of ten thousand rupees, or an amount equivalent to the amount of tax involved had such supply been made by a registered person other than a person paying tax under section 10, whichever is higher."

Analysis - E-commerce operator has to be more diligent now in engaging suppliers on its platform. E-commerce operator need to conduct due diligences of unregistered suppliers to check whether they are liable to register under GST laws. Similarly, E-commerce operator needs to build systems so that composition taxpayers are restricted to make inter-state suppliers.

7. Decriminalization of certain offences and increase in monetary limit for initiating prosecution proceedings

Presently, sub-section (1) of Section 132 of the CGST Act, 2017 prescribes certain offences [clause (a) to (l)] which are liable to be punished by way of imprisonment based on monetary threshold [clause (i) to (iv)].

1. The Finance Bill, 2023 has proposed to decriminalize below mentioned offences by omitting offences listed out in clauses (g), (j) and (k) from sub-section (1) Section 132 of the CGST Act, 2017 as under -

"(1) Whoever commits, or causes to commit and retain the benefits arising out of, any of the following offences, namely: -

~~(g) obstructs or prevents any officer in the discharge of his duties under this Act~~

~~*(j) tampers with or destroys any material evidence or documents;*~~

~~*(k) fails to supply any information which he is required to supply under this Act or the rules made thereunder or (unless with a reasonable belief, the burden of proving which shall be upon him, that the information supplied by him is true) supplies false information; or"*~~

2. Simultaneous amendments to give effect to above amendment is proposed to be made in various other clauses of Section 132(1) of CGST Act as under -

a. Clause (l) of sub-section (1) of Section 132 of the GST Act, 2017 is proposed to be amended to **substitute** words as under -

"(1) Whoever commits, or causes to commit and retain the benefits arising out of, any of the following offences, namely: -

(l) attempts to commit, or abets the commission of any of the offences mentioned in ~~***clauses (a) to (k)***~~ ***clauses (a) to (f) and clauses (h) to (i)*** *of this section,"*

b. Clause (iv) of sub-section (1) of Section 132 of the GST Act, 2017 is also proposed to be amended to omit words as under -

"(1) Whoever commits, or causes to commit and retain the benefits arising out of, any of the following offences, namely: -

……

shall be punishable—

(iv) in cases where he commits or abets the commission of an offence specified in clause (f) ~~*or clause (g) or clause (j)*~~*, he shall be punishable with imprisonment for a term which may extend to six months or with fine or with both."*

3. In a similar manner, following parallel amendments are proposed to be made in Section 138 (Compounding of Offences) to remove references to clause (g), (j) & (k) of Section 132(1) therefrom.

Clause (a) of proviso to sub-section (1) of Section 138 is proposed to be amended by way of **substitution** of words and clauses (b) & (e) are to be **omitted** as follows -

"(1) Any offence under this Act may, either before or after the institution of prosecution, be compounded by the Commissioner on payment, by the person accused of the offence, to the Central Government or the State Government, as the case be, of such compounding amount in such manner as may be prescribed :

Provided that nothing contained in this section shall apply to—

(a) a person who has been allowed to compound once in respect of any of the offences specified in clauses (a) to (f), (h), (i) and (l) of sub-section (1) of section 132 ~~and the offences specified in clause (l) which are relatable to offences specified in clauses (a) to (f) of the said sub-section;~~

(b) ~~a person who has been allowed to compound once in respect of any offence, other than those in clause (a), under this Act or under the provisions of any State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act or the Integrated Goods and Services Tax Act in respect of supplies of value exceeding one crore rupees;~~

(c) …….

(d) ……..

(e) ~~a person who has been accused of committing an offence specified in clause (g) or clause (j) or clause (k) of sub-section (1) of section 132; and"~~

Commentary – Three offences which were less grave in nature as compared to other offences have been sought to be decriminalized, i.e., no imprisonment will follow in case of these offences.

4. Background - At present, the monetary threshold given in clauses (i) to (iv) for initiating prosecution proceedings in respect of offences listed in clauses (a) to (l) is as follows -

Where amount of tax evaded or ITC wrongly availed or utilized or

refund wrongly taken is -

(a) More than Rs. 5 crores - Imprisonment upto 5 years with fine

(b) More than Rs. 2 crores but less than Rs. 5 crores - Imprisonment upto 3 years with fine

(c) More than Rs. 1 crores but less than Rs. 2 crores - Imprisonment upto 1 year with fine

Whereas in case of committing or abetting to commit any prescribed offence (specified clauses) - Imprisonment upto 6 months or fine or both.

Analysis - However, the monetary slab of Rs. 1-2 crore is proposed to be amended to excluded cases other than those involving fake/bogus invoices, meaning thereby, in case of fake invoices, the aforementioned slabs/punishment remains the same while in case of offences, other than fake invoices, imprisonment can be initiated if value is more than Rs. 2 crores.

For the same, words *"any other offence"* in clause (iii) of sub-section (1) of Section 132 to be **substituted** by words *"an offence specified in clause (b)".* Amendment clause (iii) to read as under -

"(1) Whoever commits, or causes to commit and retain the benefits arising out of, any of the following offences, namely: -

……

shall be punishable–

(iii) in the case of ~~**any other offence**~~ **an offence specified in clause (b)** where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds one hundred lakh rupees but does not exceed two hundred lakh rupees, with imprisonment for a term which may extend to one year and with fine;"

Section 132 after aforementioned amendments will read as follows -

*"**Section 132 Punishment for Certain offences***

(1) Whoever commits, or causes to commit and retain the benefits arising out of, any of the following offences, namely: -

(a) supplies any goods or services or both without issue of any invoice, in violation of the provisions of this Act or the rules

made thereunder, with the intention to evade tax;

(b) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act, or the rules made thereunder leading to wrongful availment or utilisation of input tax credit or refund of tax;

(c) avails input tax credit using the invoice or bill referred to in clause (b) or fraudulently avails input tax credit without any invoice or bill;

(d) collects any amount as tax but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;

(e) evades tax or fraudulently obtains refund and where such offence is not covered under clauses (a) to (d);

(f) falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information with an intention to evade payment of tax due under this Act;

*(g) *Omitted**

(h) acquires possession of, or in any way concerns himself in transporting, removing, depositing, keeping, concealing, supplying, or purchasing or in any other manner deals with, any goods which he knows or has reasons to believe are liable to confiscation under this Act or the rules made thereunder;

(i) receives or is in any way concerned with the supply of, or in any other manner deals with any supply of services which he knows or has reasons to believe are in contravention of any provisions of this Act or the rules made thereunder;

*(j) *Omitted**

*(k) *Omitted**

(l) attempts to commit, or abets the commission of any of the offences mentioned in clauses

(a) to (f) and clauses (h) to (i) of this section, shall be punishable–

(i) in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds five hundred lakh rupees, with

imprisonment for a term which may extend to five years and with fine;

(ii) in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds two hundred lakh rupees but does not exceed five hundred lakh rupees, with imprisonment for a term which may extend to three years and with fine;

(iii) in the case of an offence specified in clause (b) where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds one hundred lakh rupees but does not exceed two hundred lakh rupees, with imprisonment for a term which may extend to one year and with fine;

(iv) in cases where he commits or abets the commission of an offence specified in clause (f), he shall be punishable with imprisonment for a term which may extend to six months or with fine or with both."

8. Fake/Bogus Invoices cases cannot be compounded anymore

Background - Section 138 of CGST Act provides for compounding of offences on payment of such compounding amount and in the manner as prescribed. However, certain offences cannot be compounded which are listed in proviso to sub-section (1).

Amendment is proposed *via* Finance Bill, 2023 to exclude the cases of fake/bogus invoices from the option of compounding of offences. Clause (c) of proviso to sub-section (1) to be **substituted in entirety** to read as -

"(1) Any offence under this Act may, either before or after the institution of prosecution, be compounded by the Commissioner on payment, by the person accused of the offence, to the Central Government or the State Government, as the case be, of such compounding amount in such manner as may be prescribed :

Provided that nothing contained in this section shall apply to—

(c) ~~***a person who has been accused of committing an offence under this Act which is also an offence under any other law for the time being in force***~~ ***a person who has been accused of committing an offence under clause (b) of sub-section (1) of section 132;"***

Therefore, there will be no option to compound offences wherein issue of fake/bogus invoices is involved post this amendment.

9. Reduction in Compounding Fee

Section 138 of CGST Act provides for compounding of offences on payment of such compounding amount given in sub-section (2) as prescribed and in the manner as prescribed in Rule 162 of CGST Rules. Compounding fee as prescribed in sub-section (2) of Section 132 is also proposed to be reduced as follows -

Compounding fee at present -

Minimum fee - Higher of Rs. 10,000 or 50% of tax involved

Maximum fee - Higher of Rs. 30,000 or 150% of tax involved

Proposed Compounding fee -

Minimum fee - 25% of tax involved

Maximum fee - 100% of tax involved

Amended sub-section (2) shall read as follows -

"(2) The amount for compounding of offences under this section shall be such as may be prescribed, subject to the minimum amount not being less than ~~***ten thousand rupees or fifty per cent. of the tax involved, whichever is higher, and the maximum amount not being less than thirty thousand rupees or one hundred and fifty per cent of the tax, whichever is higher***~~ ***twenty-five per cent. of the tax involved and the maximum amount not being more than one hundred per cent. of the tax involved.****"*

10. Retrospective amendment for non-taxable supplies notified in Schedule III and disallowing refund of taxes already paid

Schedule III to the CGST Act is being proposed to be amended to give retrospective applicability to Para 7, 8 (a) and 8 (b) along with Explanation 2 of the said Schedule, with effect from 01 July 2017, so as to treat the activities/ transactions mentioned in the said paragraphs as neither supply of goods nor supply of services w.e.f., 01 July 2017 itself.

Para 7, 8(a), 8(b) & Explanation 2 in Schedule III to CGST Act was inserted *vide* Central Goods and Services Tax (Amendment) Act, 2018 w.e.f., 01 February 2019 and thus, such benefit of non-taxability was prospective in nature. Para 7, 8 & Explanation 2 to Schedule III reads as follows -

*"**Schedule III***

ACTIVITIES OR TRANSACTIONS WHICH SHALL BE TREATED NEITHER AS A SUPPLY OF GOODS NOR A SUPPLY OF SERVICES

7. Supply of goods from a place in the non-taxable territory to another place in the non- taxable territory without such goods entering into India.

8. (a) Supply of warehoused goods to any person before clearance for home consumption;

(b) Supply of goods by the consignee to any other person, by endorsement of documents of title to the goods, after the goods have been dispatched from the port of origin located outside India but before clearance for home consumption.

…….

Explanation 2.—For the purposes of paragraph 8, the expression "warehoused goods" shall have the same meaning as assigned to it in the Customs Act, 1962 (52 of 1962)."

Analysis - Now, vide Finance Bill, 2023, these supplies are proposed to be non-taxable with retrospective effect from 01 July 2017 to put an end on ongoing litigations or prospective litigations in cases wherein no tax is paid by any taxpayer on such supplies.

However, it is also provided in Finance Bill, 2023 that where the tax has already been paid in respect of such transactions/activities during the period from 01 July 2017 to 31 January 2019, no refund of such tax paid shall be available.

11. Scope of OIDAR services widened

Following amendments are proposed to be carried out in Section 2 of the IGST Act -

1. Definition of "non-taxable online recipient" given in sub-section (16) proposed to be

substituted in entirety to broaden its ambit and shall read as under -

*"**Section 2: Definition***

*(16) "non-taxable online recipient" means any **~~Government, local authority, governmental authority, an individual or any other person not registered~~** **and unregistered person** receiving online*

information and database access or retrieval services ~~***in relation to any purpose other than commerce, industry or any other business or profession,***~~ *located in taxable territory.*

Explanation.– For the purposes of this clause, the expression "unregistered person" includes a person registered solely in terms of clause (vi) of section 24 of the Central Goods and Services Tax Act, 2017';"

Analysis – Section 14 of the IGST Act states that in case of supply of online information and database access retrieval ("OIDAR") services by any person located in a non-taxable territory and received by a non-taxable online recipient located in a taxable territory, the supplier of services located in a non-taxable territory shall be the person liable for paying integrated tax on such supply of services.

Now after proposing to remove the condition of receipt of OIDAR services for purposes other than commerce, industry or any other business or profession, the supplier of OIDAR services located in a non-taxable territory shall be the person liable for paying integrated tax even if such services are received for the purposes of commerce, industry, business or profession.

Further, it also seeks to clarify that the persons registered solely in terms of clause (vi) of Section 24 of CGST Act, i.e., persons who are compulsorily required to take registration for the sole purpose of deducting tax at source (TDS), shall be treated as unregistered person for the purpose of the said clause.

2. Scope of OIDAR services is proposed to be widened by way of **omitting** the words *"essentially automated and involving minimal human intervention"* from definition of OIDAR services given in sub-section (17) as under -

*"**Section 2: Definition***

(17) "online information and database access or retrieval services" means services whose delivery is mediated by information technology over the internet or an electronic network and the nature of which renders their supply ~~***essentially automated and involving minimal human intervention***~~ *and impossible to ensure in the absence of information technology and includes electronic services such as,–*

(i) advertising on the internet;

(ii) providing cloud services;

(iii) provision of e-books, movie, music, software and other intangibles through telecommunication networks or internet;

(iv) providing data or information, retrievable or otherwise, to any person in electronic form through a computer network;

(v) online supplies of digital content (movies, television shows, music and the like);

(vi) digital data storage; and

(vii) online gaming;"

Analysis – For an OIDAR Service, a service must have to cumulatively qualify following two conditions and in the absence of any one condition, such service will not be regarded as OIDAR services.

- The services shall be provided, essentially by use of information technology over the internet or an electronic network and is impossible to provide in absence of Information Technology; and,
- The nature of such services renders their supply essentially automated and involving minimal human intervention.

To curb the litigation in relation to fulfilment of second condition, it has been proposed that second condition for the services to qualify as OIDAR service, as stated above, shall be omitted and scope of OIDAR services is widened.

12. Place of Supply of Transport of Goods restricted irrespective of destination of goods

Amendment is proposed to be brought in sub-section 8 of Section 12 of the IGST Act, by way of omission of proviso to sub-section (8) of section 12 of the IGST Act, after which sub-section

(8) shall read as –

*"**Section 12: Place of supply of services where location of supplier and recipient is in India.***

(8) The place of supply of services by way of transportation of goods, including by mail or courier to,—

(a) a registered person, shall be the location of such person;

(b) a person other than a registered person, shall be the location at which such goods are handed over for their transportation.

~~Provided that where the transportation of goods is to a place outside~~

~~India, the place of supply shall be the place of destination of such goods."~~

Analysis - Sub-section (8) of Section 12 of the IGST Act talks about the place of supply provisions in respect of supply of services by way of transportation of goods, including by mail or courier, where location of supplier and recipient is in India.

Earlier, as per proviso to sub-section (8) where the destination of goods was outside India, then place of supply of such transportation services shall fall outside India. However, now it has been proposed to omit proviso to sub-section (8) of section 12 of the IGST Act to specify that irrespective of destination of the goods, place of supply shall fall in India since the supplier of services and recipient of services are both located in India.

Omission of said proviso will help remove ambiguity in cases where place of supply of services, as per the proviso to sub-section (8) of section 12 of IGST Act, was falling in the concerned foreign destination and not the State where the recipient is registered under GST and accordingly, availment of ITC was under debatable.

In order to clarify such issue, recently, Circular bearing no. 184/16/2022 - GST dated 27 December 2022 was brought which stated that ITC shall be admissible to the recipient even where POS is falling outside India or outside the state where such recipient is situated.

13. <u>Consent based sharing of information furnished by taxable person</u>

Finance Bill, 2023 has proposed to **insert** Section 158A to the CGST Act, 2017 for allowing sharing of information or details furnished by a taxable person on the GST common portal with such other systems <u>as may be notified</u> by government. Section 158A of CGST Act, 2017 shall read as follows -

*"**158A Consent Based Sharing of information furnished by a taxable person***

(1) Notwithstanding anything contained in sections 133, 152 and 158, the following details furnished by a registered person may, subject to the provisions of subsection (2), and on the recommendations of the Council, be shared by the common portal with such other systems as may be notified by the Government, in such manner and subject to such conditions as may be prescribed, namely: —

(a) particulars furnished in the application for registration under section 25 or in the return filed under section 39 or under section 44;

(b) the particulars uploaded on the common portal for preparation of invoice, the details of outward supplies furnished under section 37 and the particulars uploaded on the common portal for generation of documents under section 68;

(c) such other details as may be prescribed.

(2) For the purposes of sharing details under sub-section (1), the consent shall be obtained, of –

(a) the supplier, in respect of details furnished under clauses (a), (b) and (c) of sub-section (1); and

(b) the recipient, in respect of details furnished under clause (b) of sub-section (1), and under clause (c) of sub-section (1) only where such details include identity information of the recipient, in such form and manner as may be prescribed.

(3) Notwithstanding anything contained in any law for the time being in force, no action shall lie against the Government or the common portal with respect to any liability arising consequent to information shared under this section and there shall be no impact on the liability to pay tax on the relevant supply or as per the relevant return."

Analysis – Presently, no such mechanism was given in the CGST Act, 2017 which allow the GST portal to share information furnished by a registered person with any other systems by taking consent from the person whose information is to be shared. However, with this proposed amendment, Government will suggest a mechanism through which the details shared by a registered person on the GST Common portal can be shared with other systems from the government.

Such system with which information can be shared will be notified by the Government separately.

14. Amendment in condition to make payment in 180 days to align the language of law with practical working

Background – Second & Third Proviso to sub-section (2) of Section 16 of

CGST Act, 2017 provides that the payment of inward supplies (along with tax thereon) needs to be made within 180 days of issuance of invoice. However, if such payment is not made within stipulated time period of 180 days, amount of ITC availed on such invoice by the recipient shall be added to recipient's output tax liability along with Interest thereon. Further, recipient shall be entitled to avail such ITC when payment (of taxable value & tax) is made by the recipient to the supplier.

Minor changes are proposed to be made in second & third proviso to align the same with return-filing system.

1. Words *"added to his output tax liability, along with Interest thereon"* to be **substituted** by *"paid by him along with interest thereon"* in second proviso and amended second proviso shall read as under -

   "Provided further that where a recipient fails to pay to the supplier of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, the amount towards the value of supply along with tax payable thereon within a period of one hundred and eighty days from the date of issue of invoice by the supplier, an amount equal to the input tax credit availed by the recipient shall be ~~**added to his output tax liability, along with interest thereon paid by him along with interest thereon**~~, in such manner as may be prescribed:"

2. Words *"made by him"* to be **substituted** by *"to the supplier"* in third proviso and amended third proviso shall read as under -

   "Provided also that the recipient shall be entitled to avail of the credit of input tax on payment ~~**made by him**~~ **to the supplier** of the amount towards the value of supply of goods or services or both along with tax payable thereon."

15. Amendment in Refund Provisions

1. Amendment proposed in sub-section (6) of Section 54 of CGST Act merely to align the same with present scheme of availment of ITC on self-assessment basis.

   Words *"excluding the amount of input tax credit provisionally accepted"* to be **omitted** in sub- section (6) of Section 54 to read as-

"(6) Notwithstanding anything contained in sub-section (5), the proper

officer may, in the case of any claim for refund on account of zero-rated supply of goods or services or both made by registered persons, other than such category of registered persons as may be notified by the Government on the recommendations of the Council, refund on a provisional basis, ninety per cent of the total amount so claimed, ~~**excluding the amount of input tax credit provisionally accepted,**~~ in such manner and subject to such conditions, limitations and safeguards as may be prescribed and thereafter make an order under sub- section (5) for final settlement of the refund claim after due verification of documents furnished by the applicant."

2. Interest on delayed refunds will be granted subject to certain conditions & restrictions and in the manner which will be prescribed. Amended Section 56 of CGST Act, after substitution**, to read as follows -**

"56. If any tax ordered to be refunded under sub-section (5) of section 54 to any applicant is not refunded within sixty days from the date of receipt of application under sub-section

(1) of that section, interest at such rate not exceeding six per cent as may be specified in the notification issued by the Government on the recommendations of the Council shall be payable in respect of such refund ~~***from the date immediately after the expiry of sixty days from the date of receipt of application under the said sub-section till the date of refund of such tax for the period of delay beyond sixty days from the date of receipt of such application till the date of refund of such tax,***~~ ***to be computed in such manner and subject to such conditions and restrictions as may be prescribed:****"*

Amendment is brought to empower Government to prescribe manner in which Interest on delayed refunds will be computed. Further, conditions & restrictions subject to which Interest on delayed refunds will be granted can also be prescribed by the Government now.

*****

COMPREHENSIVE STUDY ON ADJUDICATION PROCEDURE U/S 73 / 74 & SHOW CAUSE NOTICE UNDER GST LAWS IN LIGHT OF RECENT JUDICIAL PRONOUNCEMENTS

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Recently, it is observed that GST department has become very aggressive in issuing show cause notices and passing adjudication orders. While raising the demands and recovering the same, the procedures some times are not followed as per the provisions and circular issues by competent Authorities of Gove. Such cases becomes eligible for litigation and are quashed by the appropriate Authorities.

1. The adjudication is always done in section 73/74.Primarily the distinction between section 73 & 74 have to be made. The officer should have reason and material on record to believe that assessee has evaded tax or suppressed facts, then only proceedings should be done in section 74 or else all the proceedings should be conducted in section 73.
2. The officer while conducting procedure u/s 74 and something is found which can be treated as suppression of an attempt to evasion or the conditions mentioned in section 74, the officer determine tax as per the provisions of section 73, as mentioned in section 75(2) of the Act.

   In the recent amendment in the provisions of the Act. It is mentioned that, even procedure started in section 74 and further nothing have been found in accordance with section 74, the provisions of section 73 will apply in the same proceedings.
3. While determining tax the officer always should follow section 75 and for imposing penalty principles of section 126 be followed strictly. Simultaneously it should be observed by the consultant whether procedure has been followed or not. The same should be pointed out and be raised as objections in submission or in appeal.

   Assessment :

   "The word asst. is used in a **comprehensive** sense and includes all proceedings, starting with filing of returns or issue of notice and ending with the **determination of the tax payable by assessee".**

   (i) S. Shankarappa v. Income Tax Officer, AIR 1968 SC 816, 818

"The word assessment can be **comprehend the whole procedure for ascertaining and imposing liability upon the tax payer".**

*(ii) Kalawati Devi v. Comm. of Income Tax,**(2015) 1 ITJ Online 552 (SC)**:AIR1968 SC 162,167*

"The Assessment includes not merely filing of return and payment by a registered dealer, but also assessment made u/s 11 of Bombay sales tax Act".

(iii) State of Bombay v. Jagmohandas, AIT 1966 SC 1412, 1414

"The word assessment includes not only computation of Income but also **the entire machinery and procedure for imposing and enforcing the tax".**

*(iv) J.K. Iron & Steel Co. v. Income Tax Officer, **(2015) 2 ITJ Online 485 (All)** : (1967) 65 ITR 386 : AIR 1967 All 248,250*

"Assessment is the process determining the total incomeof the assessee and the sum payable by the assessee as Income tax, surcharge, Super tax etc.".

*(v) Commissioner of Income Tax Kanpur v.J.K. Commercial Corporation Ltd., **(2021) 1 ITJ Online 987 (SC)** :AIR1977SC459*

"Assessment can be made either after making detailed scrutiny or by accepting the returns filed by the dealer. In either case, **the assessment is FINAL**. Where assessment made accepting returns filed by the dealer is final, and the assessing authority is not entitled to say that the assessment is provisional. In case of necessity it is open to the assessing authority to invoke provisions of re-assessment".

(vi) Classic & Co. v.DCTO, (2001) 124 STC 501 (TNTST)

"The expression "assess" when used is the context of taxing statute, has a definite meaning and not the ordinary dictionary meaning. The expression "assess" or "assessment" cannot be considered to be synonymous with the expression **"determine" or "determination**" respectively. The expression "assess" in the taxing context only one meaning which is synonymous with the **expression "tax".**

(vii) Kailash Oil Mills v. Asst. Excise & Taxation Comm., (1982) 50 STC 157 (P&H)

Adjudicate &Adjudication:

"To hear or try and determine, as a court ; to settle by **decree;** to adjudge. The court adjudicated upon the case ".

"The word adjudication means judicial determination of a cause after taking in to consideration the material on record and after hearing the parties".

(i) Razia begum v. Iqbal Begum PLD 1957 Lah 1040 (Pak)

"The act of adjudicating ; the process of trying and determining a case judicially. The application of the law to the facts and an authoritative declaration of result".

(A) The adjudication is always done as per the provisions of section 73 & 74. It has to be done as per the time limits provided in the section. The procedure is well explained in Rule 142 of the Act. The same has to be followed strictly. Without following the same no orders can be passed. Following are the procedures prescribed under the Act and by circulars, where officer has to be careful while proceeding in the cases.

To understand adjudication i.e. Determination of Tax, it is essential to start with general principles of section 75 and 126 of the Act.

(A1) No Order can be Passed without giving an Opportunity of being heard Section 75(4)

It is a well settled legal position that an opportunity is required to be given to make personal hearing and submit the reply to SCN. In absence of personal hearing, the order issued may be quashed on the sole ground. In regard to the same, following decisions may be referred:

(a) *M/s Bhardwaj Constructions v. State of UPand 2 Others,(2022) 3 TMI 491 - Allahabad High Court*

(b) *Varuna Integrated Logistics Pvt Ltd v. State of West Bengal and Ors.,(2021) 12 TMI 660 – Calcutta High Court*

(c) *Shiv Kishor Construction Private Limited v. The Union of India, The Principal Commissioner of Central Tax and Others,(2020) 7 TMI 508 - Patna High Court*

(A2)As provided in section 75(4) of the Act "an opportunity of hearing be granted where a request is received in writing". The Hon HC has directed that, an Opportunity of personal hearing in the case where adverse decision is contemplated to be provided even if request for personal hearing not made.

1. *Graziano Trasmissioni India (P.) Ltd. v. State of Gujarat,* ***(2022) 7 GSTJ Online 640 (Guj)****: (2022) 143 Taxmann.Com 381*

The petitioner was manufacturing automobile components and exported the goods outside India under Letter of Undertaking without payment of GST. It had reported the value of exports under GSTR-3B in the Column for nil rated / exempt supply and not in the Column for Zero-rated supply. The department SCN proposing demand of ITC along with interest and penalty and order was passed. It filed writ petition against the order.

The Honorable High Court observed that as per Section 75(4) of the CGST Act, 2017, an opportunity of hearing is to be provided 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. The department also submitted that opportunity of hearing was not granted since the same was not requested for. However, while so arguing, the provision of Section 75(4) has been missed out. ***Even without any request having been made when any adverse decision is contemplated, personal hearing is a must.*** Hence, the same was missing in the instant case and therefore, order was quashed only on the ground of non-availment of opportunity of personal hearing.

2. *Ocean Sparkle Ltd. v. Assistant Commissioner (St),* ***(2021) 5 GSTJ Online 288 (AP)*** *: (2021) 42 GSTJ 156*

Determination of tax not paid or short paid - in this petition, assessment order confirming tax demand of Rs. 57,43,679/- and equal amount of penalty and interest is challenged. The petitioner submitted that impugned order is liable to be set aside on the sole ground of non-compliance of mandatory provisions of Sec. 75(4) of GST Act.

The A.P. High Court held that Sec. 75(4) provides that 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.

In the instant case, it is evident that 1st respondent confirmed the demand only on the ground that petitioner failed to respond show-cause notice. When such a course of action is adopted, the mandatory requirement of Sec. 75(4) is required to be followed scrupulously, which has not been done in the instant case. In view of that the impugned order is set aside on the ground of violation of principles of natural justice. The contention of Revenue regarding availability of alternative remedy of appeal u/s 107 is rejected. The petition is allowed.

Final Outcome- Petition allowed.

Relevant Provision -Sec. 73, 74 and 75 of GST Act., 2017.

(A3) Whether avoiding or ignoring or without affording an opportunity of hearing and further ignoring Principles of Natural justice. No order can be passed Ex parte.

In the following case the Hon. HC has remanded the case for not affording

an opportunity of hearing and also observed violation of natural justice. It is further directed that, petitioner should be provided time and opportunity and also should be allowed to furnish material on record in the support of the case. It is further directed that, no corrosive action be taken against the petitioner during the proceedings.

(a) no sufficient time was afforded to petitioner to represent his case. Thus, for want of fair opportunity of hearing, there is violation of principles of natural justice;

(b) the impugned order is passed ex parte, and it does not assign any reason about how the officer determined the amount due and payable by assessee.

Hav Automobile P. Ltd. v. State of Bihar (Patna), ***(2022) 7 GSTJ Online 95 (Pat)*** *: (2022) 44 GSTJ 177*

Violation of principles of natural justice - the appeal preferred by petitioner u/s 107 of GST Act is dismissed by *ex parte* order 13.1.21. This petition is filed to challenge the said appeal order on the ground that it has been passed in violation of principles of natural justice.

The counsel for Revenue stated that he has no objection if the matter is remanded to assessing authority for deciding the case afresh on merits. He also stated that during pendency of the case, no coercive steps shall be taken against petitioner.

The Patna High Court held that notwithstanding the statutory remedy, the Court is not precluded from interfering in the instant case, as *ex facie* the order is bad in law for two reasons – ***(a) no sufficient time was afforded to petitioner to represent his case. Thus, for want of fair opportunity of hearing, there is violation of principles of natural justice; (b) the impugned order is passed ex parte, and it does not assign any reason about how the officer determined the amount due and payable by assessee.***

In view of above, the High Court disposed of the petition by setting aside the impugned order. It is directed that the Assessing Authority shall decide the case on merits after complying with the principles of natural justice, and giving opportunity to petitioner to place on record all essential documents and materials, if so required and desired by him. It is also directed that during pendency of the case, no coercive steps shall be taken against the petitioner.

(B) Even if the Opportunity of hearing be provided but has to be seen that Sufficient Time should be given to Submit Reply to the SCN:

In the following decisions it has been categorically held that the sufficient time shall be given to the assessee to furnish reply to the SCN:

(B1) (a) In absence of sufficient time to submit the reply to the SCN amounts to not providing of proper opportunity and SCN is merely an empty formality.

1. *NTC Industries Ltd. v. State Tax Officer, Karagpur Zone & Ors.,(2022) 6 TMI 466 - Calcutta High Court:*

   Where sufficient time to give reply of SCN was not given, it is observed by the Hon'ble Calcutta High Court that, "***Opportunity should be effective and not an empty formality".***

2. *M/s. Balaji Traders v. The State Tax Officer, Manapparai,**(2021) 5 GSTJ Online 701 (Mad)** : (2021) 132 taxmann.com 244 : (2021) 10 TMI 837.*

It is held that sufficient breathing time was not provided to reply against SCN. On the same day of issuance of summary in DRC -01, order of SCN was passed.

Accordingly, in absence of sufficient time to submit the reply to the SCN amounts to not providing of proper opportunity and SCN is merely an empty formality.

Insufficient Time limit for filing reply to notice : The Respondent Officer has passed the impugned Order by giving only 7 days to reply to the SCN.

(B2)The officers do not seem to understand or appreciate the hardship that is caused to the general public.

Petition allowed and cost of Rs.10,000 imposed on the Officer.

*Sheetal Dilip Jainv. State of Maharashtra,**(2022) 7 GSTJ Online 468 (Bombay)** : (2022) 143 taxmann.com 159: (2022) 10 TMI 177.*

These acts/omissions of Respondents' officers is adding to the already overburdened dockets of the Court. Valuable judicial time is wasted because such unacceptable orders are being passed by Respondents' officers. ***The officers do not seem to understand or appreciate the hardship that is caused to the general public.***

Petition allowed and cost of Rs.10,000 imposed on the Officer.

(C) In all Circumstances and Situation, an Authority is expected to follow Principle of Natural Justice.

(C1) Service of notice to the wrong /former address is not service of notice.

Therefore, limitation for appeal will start from the date on which notice /order served to the address mentioned in Registration certificate. The Hon. Court in accordance with principle of natural justice has allowed appeal in time.

Note : The section 169 for service of Notices be followed in all cases .

OstroAnantapura Pvt. Ltd. v. State of Andhra Pradesh, ***(2021) 5 GSTJ Online 104 (AP)*** *: (2021) 41 GSTJ 35*

Principles of natural justice - notices for personal hearing issued at old address and due to that not received by petitioner - petitioner conducting its business from Dwaraka Villas, Kalyandurg Road, Anantapuram (A.P.) purchased wind power equipment's for its wind power plant. Subsequently, its operations shifted to Kovur Nagar, Anantapuram. Change of address is intimated on GST portal, and amended registration certificate is also issued. Despite change in address, 2nd respondent issued notices to petitioner at the former address. Some of such notices were returned by postal authorities. Despite that 2nd respondent passed impugned assessment order raising demand of Rs. 3.43 cores. Hence this petition.

The petitioner submitted that since impugned assessment order is passed without serving notice at the correct address, the petitioner had no opportunity to submit its case. Thus, principles of natural justice are grossly violated. It is also submitted that the demand under assessment order is barred by limitation. In fact the notices were sent to M/s. OSTRO A.P. Wind Pvt. Ltd., which is a different company. The respondent submitted that change of address was not properly communicated. Moreover, notices were served to one of the employees of petitioner, who must have informed the petitioner about the same. It is further submitted that petition is not maintainable, in view of availability of alternative remedy.

The Andhra Pradesh High Court did not accept argument of respondents regarding alternative remedy, and held that as petitioner filed this petition within the period available for filing appeal, hence, the Court can entertain this petition. The Court observed that the GST registration certificate of petitioner shows that the address of petitioner was changed w.e.f. 1.2.19. Therefore, notices sent at old address cannot be said to have been received by petitioner. Consequently, the principles of natural justice are violated. Therefore, the impugned assessment order is liable to be set aside.

Whirlpool Corporation v. Registrar of Trade Mark, MANU/SC/0664/1998. Asst. Commissioner (CT), LTU, Kakinada v. Glaxo Smith Kline Consumer

*Health Care Ltd.,**(2020) 4 GSTJ Online 148 (SC)** : (2020) 39 GSTJ 158 : 2020 SCC Online SC 440*.

(C2)Not issuing show cause, issuing non reasoned order, issuing notices to wrong E mail addresses cannot be said that principle of natural justice and more over procedures under the Act are followed. Hence forth such orders and demands are set aside by the Hon'ble Court.

*Ratan Industries Ltd. v. State of U.P. & Others,**(2021) 5 GSTJ Online 181 (All)** : (2021) 41 GSTJ 430*

Principles of natural justice - petitioner challenged order dt. 24.1.19 and appeal order

dt. 27.7.20 whereby his appeal has been dismissed on the ground of limitation. The petitioner claims that he came to know on 15.12.19 that order dt. 24.1.19 has been passed, and ***prior to passing of the said order no show-cause notice has been served upon him. The said order is also not served upon him. This petition is filed against the said orders***, as the Tribunal contemplated under GST Act was not yet created.

Against the contention of petitioner regarding non-issue of show-cause notice, and not passing of a reasoned order, the respondent filed a counter affidavit annexing the show-cause notice, which was sent on wrong E-mail address. In respect of demand notice, only a summary of order dt. 24.1.19 is filed with counter affidavit. But, no order giving the reasoning for levy of demand is filed in counter affidavit.

The Allahabad High Court held that a perusal of orders passed, and the pleadings exchanged, makes it clear that the orders are wholly arbitrary and contrary to the manner of passing of the order, as prescribed under GST Act. The orders are completely in violation of principles of natural justice. In view of that, the petition is allowed, and the impugned orders are set aside.

Final Outcome- Petition allowed.

Relevant Provision -Sec. 107 of GST Act, 2017.

(C3) Natural justice demands to provide adjournments asked with specific and valid reasons. Passing order without providing adjournment and opportunity is violation of principle of natural justice.

*Mittal Plywood & Furniture v.State Of U.P. & Another,**(2022) 7 GSTJ Online 295 (All)** : (2022) 45 GSTJ 48*

Violation of principles of natural justice - a notice dt. 15.3.22 was given to petitioner granting 15 days time to submit his reply with respect to alleged

unverified transaction.

On 30.3.22, the petitioner submitted online adjournment application seeking 15 days time. That application was first adjournment application of petitioner, and the cause shown for taking adjournment was not disbelieved by respondent No. 2. Despite that the adjournment application is rejected, and liability to tax is assessed in the impugned orders. Hence, this petition.

The Allahabad High Court held that it is evident that the impugned ***orders have been passed by respondent in gross breach of principles of natural justice. Hence, they are quashed***, and the matter is remitted back to respondent to pass a fresh order in accordance with law, after giving reasonable time to petitioner to submit his reply and after affording reasonable opportunity of hearing to him.

Final Outcome- Petition disposed of.

(D) PRE – SCNNotice should be given in DRC-01A before issuance of SCN U/s 73 & 74 of the CGST Act.Now word "Shall "has been replaced by "May"inRule 142, Hence DRC 01 a may not remain necessary to be issued by Noti. No. 79/2020 Dated 15/10/2020

(D1)As per the GST Laws, up to 14/10/2020, a notice in Form DRC-01A was required to be given before issuing SCN wherein the Officer shall communicate the details of tax, interest and penalty as may be ascertained by him, to the Assessee. However, vide Notification No. 79/2020 dt15.10.2020, an amendment has been made wherein the word "shall" has been replaced by "may" which means that it has become optional for the Officer to issue notice in DRC-01A (also referred as pre-SCN notice) before issuing an SCN. The matter has been challenged before the various High Courts and it has been contended by the Assesses that a notice in DRC-01A is mandatory even after the amendment vide above Notification No. 79/2020. Therefore, it is stated that a notice in DRC-01A is mandatory before issuing a SCN. Otherwise, the whole proceedings may be held as infructuous. Reference can be made to the following decisions:

M/sNanhey Mal Munna Lal v. State of U.P. and 4 Others,(2022) 3 TMI 795 - Allahabad High Court:

"Prima facie, perusal of Form GST DRC-01A under rule 142(1A) of the Rules indicates that it is a pre-show cause notice intimation with reference to

Section 73(1)/(5) or Section 74(1)/(5) to an assessee so that either he may deposit the amount of tax and interest or he may disagree to the ascertainment resulting in show cause notice under Section 73(1) or Section 74(1), as the case may be. Likewise, such an intimation in Form GST DRC-01A provides an opportunity to the dealer to resolve the dispute by depositing or in case of disagreement to face the adjudication proceedings under the Act. ***Thus, prima facie, it appears that Section 74(1) read with Rule142(1A) intends to afford an opportunity to the dealer/ assessee on a pre-show cause notice stage which shall ultimately benefit both, i.e. the assessee and the department, and shall also reduce litigation. This also indicates to follow the principles of natural justice at a pre-show cause notice stage."***

(D2). Practically it does not remain mandatory to issue DRC 01A from 15/ 10/2020, but ifit is issued, the assessee gets facility to agree with proposal and pay tax and interest u/s 73(5) or 74 (5). If assessee disagree with the proposal, the officer may start proceedings in 74(1) by issuing show cause in DRC 01 .

AgrometalVendibles Private Limited v. State of Gujarat,(2022) 4 TMI 823 - Gujarat High Court:

It is held in Para 28- *"**There is a vast difference between Rule 142(1)(a) and Rule 142 (1A) of the Rules. Therefore, from now onwards, if the department deems fit to issue any intimation of tax ascertained as being payable under sub-section (5) of Section 74 in accordance***

with the Rule 142(1A) of the Rules, it shall issue notice in the Form GST DRC – 01A. In such a notice of intimation, the proper officer shall not threaten the dealer that if he would fail to comply with the intimation, the department shall proceed to recover the tax. The proper officer should inform the dealer that if he would pay the tax, well and good, otherwise the department shall proceed to issue as how cause notice under sub-section (1) of Section 74 in accordance with Rule 142(1)(a) of the Rules, 2017 in Form GST DRC – 01and carry out regular assessment proceedings."

Accordingly, a DRC-01A is mandatory before issuing a SCN and in case, the department serves an SCN without issuing DRC-01A, the proceedings may be challenged.

Note :

Now word"shall "has been removed from Rule 142 hence DRC 01 A may not remain necessary to be issued by Noti. No. 79/2020 dated 15/10/2020

(D3) Without following the procedure, in the course of investigation U/S 67, the officer can not ask to reverse ITC with interest u/s 74(5).

Deem Distributors Pvt. Ltd. v. Union of India & Others, ***(2021) 5 GSTJ Online 295 (TG)*** *: (2021) 42 GSTJ 148*

Pre-show cause notice issued u/s 74 for payment of tax, interest and penalty -

4th respondent issued to petitioner a letter dt. 25.4.19 asking him to reverse ITC of Rs. 1,52,35,820/- allegedly availed on the basis of fake invoices, and 3rd respondent sent an intimation of tax payable by petitioner, and petitioner is advised to pay the same, failing which a show cause notice would be issued u/s 74(1) of GST Act. The petitioner assailed conduct of respondents in directing him to pay the amount at the stage of summons itself without following due procedure as per Sec. 74.

The Telangana High Court held that counter-affidavit of respondents suggests that a conclusion has been drawn on the basis of incomplete investigation. Sec. 74(5) gives a choice to taxpayer to make payment, if he so chooses. But, it does not confer any power on respondents to raise a demand along with interest and penalty, as if there has been a determination of liability of assessee. Before ascertainment of liability, the 4th respondent could not issue letter to petitioner asking him to immediately reverse ITC allegedly availed by him.

Thus, raising of demand when investigation is still in progress is wholly arbitrary and without jurisdiction. Accordingly, the petition is allowed, and respondents are restrained from coercing the petitioner to make any payment without issuing notice u/s 74(1), and following the procedure prescribed therein. They are directed to refund the amount paid by petitioner with interest @ 7%.

(D4)Prior to 15/10/2020 Pre show cause DRC 01Awas necessary to be issued before proceeding in to show cuase u/s 74(1)with DRC 01.

Dharamshil Agencies v.Union of India & Another, ***(2021) 5 GSTJ Online 303 (Guj)*** *: (2021) 42 GSTJ 45*

Pre-show-cause notice - the respondent issued to petitioner a pre-show-cause notice dt. 12.4.19 at 13.55 hrs. calling him to appear before respondent on same day at 16.00 hrs., failing which it would be presumed that petitioner did not wish to be consulted before issuance of show-cause notice. The petitioner requested for another date, as it was not possible for him to make any representation at such a short notice. However, respondent issued show-

cause notice on the same day demanding service tax with interest and penalty on the ground that transaction between petitioner and M/s. Arvind Ltd. was in the nature of services amenable to service tax. The legality and validity of said notice is challenged in this petition.

The Gujarat High Court held that in its Circular dt. 10.3.17, the CBEC has made issuance of pre-show-cause notice mandatory prior to issue of show-cause notice involving demand of duty above Rs. 50 lac. Despite such mandatory requirement of pre-show-cause notice, the respondent issued impugned pre-show-cause notice calling upon petitioner to remain present on the same day, and issued show-cause notice without considering request of petitioner for another date. It is a high-handed action on the part of respondent, which is to be deprecated and seriously viewed. The impugned pre-consultation notice and show-cause notice, being in contravention of Board's Circular dt. 10.3.17 deserve to be quashed and set aside.

Final Outcome- Petition allowed.

Decision Referred/Discussed -

Paper Products Ltd. v. CCE (1999) 112 ELT 765 (SC).

Ranadey Micronutrients v. CCE (1996) 87 ELT 19 (SC).

Decision Applied/Followed/Relied :

Director of Inspection of Income-tax (Investigation), New Delhi v. Pooran Mall & Sons AIR 1975 SC 67.

(D5). Preferablypre show cause needs to be issued in DRC 01Ato exercise powers of 74(5). If the same is not responded, then a fresh proceedings under section DRC 01 needs to be initiated.The order of adjudication cannot be passed on the basis of DRC 01A.

V.R.S. Traders v. Asst. Commissioner (State Taxes), Poonamallee Assessment Circle, Chennai, ***(2022) 7 GSTJ Online 74 (Mad)*** *: (2022) 43 GSTJ 582*

Notice in DRC-01 u/s 74(1) of GST Act - a notice is issued to petitioner on 15.10.20 in DRC-01A alleging that some of the suppliers, who have supplied iron and steel scrap to him during 2017-18 to 2019-20, are either non-existent or are not conducting any business. Thus, the petitioner has wrongly availed ITC on such purchases. The petitioner replied the said notice on 19.10.20. Despite that orders are passed u/s 75(1) of GST Act for 2017-18 to 2019-20. The said orders are challenged in this petition on the ground of violation of principles of natural justice.

A specific query was raised by Court as to whether any notice u/s 74(1) was issued before passing the impugned orders. In reply to that it was submitted on behalf of respondent that except DRC-01A, no further notice u/s 74(1) was issued.

The Madras High Court held that if the Revenue wants to initiate proceedings u/s 74, the first step is to serve a notice to pay the amount of tax along with interest payable u/s 50 and a penalty equivalent to 15% of such tax on the basis of assessee's own ascertainment or as ascertained by proper officer, and inform the proper officer in writing of such payment. Therefore, what has been proposed by Revenue is to be intimated to assessee by way of notice u/s 74(5), who on receipt of the same may or may not accept the same. If the assessee does not accept the same, the next course of action to be followed by Revenue is to issue a notice u/s 74(1).

Thus, notice u/s 74(1) is an independent notice to be issued in DRC-01, whereas notice

u/s 74(5) is to be issued in DRC-01A. In the instant case, admittedly DRC-01A was issued, and thereafter straightaway the Revenue proceeded to pass the impugned orders.

In view of above, the impugned orders cannot be sustained, and the respondent is directed for its re-consideration by issuing DRC-01 to petitioner and after giving him a fair opportunity of hearing.

Final Outcome- Petition disposed of.

Relevant Provision -Sec. 74 of GST Act, 2017.

(E) Show Cause .....DRC 01 :the GST Department even some times ignore Issuing Show Cause Notice (here in after referred as SCN). The Department should understand and appreciate that issuance ofShow Cause Notice (SCN) is the First Step before raising any Demand. It has also been observed that many a times SCN is issued without qualifying the conditions / requirements like proper format, specifying the default and its consequences. in the erstwhile laws also, many a times Apex Court has Held that SCN should be issued as per Law fulfilling all the conditions /requirements.

In regard to the above, reference can also be made to the case of

(E1). (a)The SCN should be in a proper / particular format. Must be issued electronically as per the provisions of Rule 142or should be

served as per section 169 of the Act.

(b) The SCN should be served within time as prescribed under law.

(c) The SCN should not be issued in a routine manner and every communication cannot be construed as SCN.

(d) The proposed demand should have been specifically mentioned in the SCN so that Assessee may specifically revert to the same.

(e) The reason mentioned in show cause should be established and conclusive. On presumption or assumption tax, interest or penalty cannot be proposed or imposed .

Metal Forgings v. Union of India,(2002) 11 TMI 90 -Supreme Court, wherein the Hon'ble Apex Court made the following observations in Para 10 of the judgment *"**Issuance of a show cause notice in a particular format is a mandatory requirement of law. The law requires the said notice to be issued under a specific provision of law and not as correspondence or part of an order. The said notice must also indicate the amount demanded and call upon the assessee to show cause if he has any objection for such demand. The said notice also will have to be served on the assessee within the said period which is either 6 months or 5 years as the facts demand. Therefore, it will be futile to contend that each and every communication or order could be construed as a show cause notice."***

Therefore, as per above decision of the Hon'ble Apex Court, the following are the conditions for issuing SCN:

(a) The SCN should be in a proper / particular format.

(b) The SCN should be served within time as prescribed under law.

(c) The SCN should not be issued in a routine manner and every communication cannot be construed as SCN.

(d) The proposed demand should have been specifically mentioned in the SCN so that Assessee may specifically revert to the same.

Further, we also refer a landmark decision of the Hon'ble Apex Court i.e. the case of

(E2)The fundamental purpose behind the serving of Show Cause Notice is to make the noticee understand the precise case setup against him which he has to meet.

(a) The SCN should clearly define the default / breach committed by the person.

(b) The Department should also mention the nature of action which is proposed to be taken for such default / breach.

Gorkha Security Services v. Govt. of NCTof Delhi & Ors., (2014) 8 TMI 1081 -

Supreme Court,

wherein the Hon'ble Supreme Court has made an observation in Para 19 of the judgment that "***The fundamental purpose behind the serving of Show Cause Notice is to make the noticee understand the precise case setup against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another requirement, according to us, is the nature of action which is proposed to be taken for such a breach***. "Hence, two necessary elements which a SCN must mention are as follows:

(a) The SCN should clearly define the default / breach committed by the person.

(b) The Department should also mention the nature of action which is proposed to be taken for such default / breach.

Therefore, observing that in many a cases the department is not following the settled legal position for issuing the SCNs, an attempt has been made hereunder to summarize nuances related to SCN on the basis judicial pronouncements under GST.

(E3) TheJharkhandHChas made a wonderful observation and said that, "*along with*" is an essential ingredient for the section 74. That while issuing DRC 01a summary of notice, it is essential for the officer to issue detailed show cause notice in section 74(1). The lake in procedure may quash the proceedings initiated u/s 74 of the Act.

Juhi Industries Pvt. Ltd. v. State of Jharkhand & Others, ***(2022) 7 GSTJ Online 299 (Jharkhand)*** *: (2022) 45 GSTJ 68*

Show cause notice u/s 74(1) of GST Act - a search was conducted in the premises of petitioner u/s 67 of GST Act for irregular claim of ITC for 2017-18 mainly on the ground that petitioner has claimed ITC without making payment of value and payment of tax to suppliers within six months as required by 2nd and 3rd proviso to Sec. 16(2) of GST Act. It is also alleged that even during

2018-19, the petitioner made purchases only from one supplier, and there exist no proof of payment. On physical verification, difference in stock was also found as compared to stock as per books of accounts.

The proceeding in both the cases started with issuance of DRC-01 u/s 74(1). The petitioner submitted their reply in DRC-06 explaining that the ITC have been legally claimed, and the goods have been physically received by them. The Respondent No. 4 thereupon passed two separate orders u/s 74(9) and confirmed tax, interest and penalty, and issued summary of orders. The petitioner filed applications u/s 161 for rectification of certain mistakes. The respondent No. 2 rectified some errors, and issued two separate demand notices in DRC-08, which are challenged in these petitions.

The petitioner submitted that no show-cause notice u/s 74(1) is issued, which is not disputed by respondent, while it is mandatory. It is also submitted by petitioner that DRC-01 is not a substitute of show-cause notice u/s 74(1). Thus, the entire proceeding in both the cases is without jurisdiction, and the subsequent proceedings / impugned orders can not sanctify the same.

The Jharkhand High Court held that Rule 142(1)(a) of GST Rules provides that the summary of show-cause notice in DRC-01 should be issued along with show-cause notice u/s 74(1). The word 'along with' clearly indicates that in a given case show-cause notice as well as summary thereof both have to be issued. As per Rule 142(1)(a), the summary of show-cause notice has to be issued electronically to keep track of proceeding initiated against a registered person, whereas a show-cause notice need not necessarily be issued electronically.

In view of above facts and settled position of law, the foundation of the proceeding in both the cases suffers from material irregularity, and is contrary to Sec. 74(1). The subsequent proceedings/impugned orders can not sanctify the same. The respondent stated that filing of concise reply by petitioner proves that show-cause notices have been served upon petitioner. However, the High Court held that it is well settled that there is no estoppels against statute. A *bona fide* mistake or consent by assessee can not confer any jurisdiction upon the proper officer. The jurisdiction must flow from the statute itself. The rule of estoppels is rule of equity which has no role in matters of taxation.

The impugned show-cause notice in both the cases does not fulfill ingredients of a proper show-cause notice, and thus amounts to violation of principles of natural justice. Accordingly, the impugned DRC-01 and subsequent orders are quashed and set aside. The respondents are at liberty to initiate fresh

proceedings in accordance with law.

Final Outcome- Petition allowed.

Relevant Provision -Sec. 74 of GST Act, 2017.

Decision Referred/Discussed -

CCE v. Brindavan Beverages (P) Ltd.,***(2017) 1 GSTJ Online 110 (SC)*** : (2022) 45 GSTJ 4 : (2007) 5 SCC 388.

Khem Chand v. Union of India AIR 1958 SC 300.

Larsen & Toubro Ltd. v. CCE (2007) 9 SCC 617.

Oryx Fisheries P. Ltd. v. Union of India (2010) 13 SCC 427.

(E4)SCN should contain the material particulars / information such as allegations being made, default being occurred, time to submit reply and consequences. In the absence of such information, it would be difficult for an Assessee to revert. It has been held in the following cases that any proceedings initiated on the basis of defective notice, shall stand abated, as it shall be considered as impugned SCN and accordingly, liable to be quashed:

(a) *Shah Industries Through Proprietor Vishal HastimalSakariav. State of Gujarat,* ***(2022) 7 GSTJ Online 215 (Guj)****: (2022) 4 TMI 1093*.

(b) *M/s. NKAS Services Private Limited. v. The State of Jharkhand, The Commissioner of State Taxes, Ranchi, Deputy Commissioner of State Taxes, Godda,* ***(2021) 5 GSTJ Online 676 (Jharkhand)*** *: (2021) 10 TMI 880.*

(c) *Vahanvati Steels v. State of Gujarat,****(2022) 7 GSTJ Online 226 (Guj)****: (2022) 4 TMI 1144.*

(d) *Bharat Mint and Allied Chemicals v. Commissioner Commercial Tax and 2 Others,* ***(2022) 7 GSTJ Online 73 (All)*** *: (2022) 43 GSTJ 575: (2022) 3 TMI 492.*

(E5)In the following judgments, it is held that since grounds for cancellation of registration are not mentioned in the SCN and accordingly, such notices are against the principle of natural justice:

At the outset, we notice that it is settled legal position of law that reasons are heart and soul of the order and non-communication of the same itself amounts to denial of reasonable opportunity of hearing, resulting in miscarriage of justice."

(a) *OPC Assets Solutions Pvt. Ltd. v. The State of Tripura, The Chief Commissioner of State Tax, Tripura Goods & Service Tax*

Department, The Superintendent of State Tax, Sales Tax Officer, Tripura, ***(2021) 5 GSTJ Online 279 (Tripura)*** *: (2021) 42 GSTJ 168: (2021) 9 TMI 53.*

SCN has been received by petitioner which is not stating the grounds on the basis of which the registration is liable to be cancelled. The ground on which such registration was liable to be cancelled, according to the Superintendent, was ***"Non-compliance of any specified provisions in GST Act or the Rules made there under as may be prescribed". Held that if a SCN does not specify the grounds on the basis of which the authority desires to proceed further, it would fail the principle of natural justice and the statutory requirement for issuance of SCN.***

(b) *Aggarwal Dyeing and Printing Works v. State of Gujarat & 2 Other (S),* ***(2022) 7 GSTJ Online 105 (Guj)*** *: (2022) 44 GSTJ 234: (2022) 4 TMI 864.*

Where reasons for cancellation were not mentioned in the SCN, Gujarat High Court gave an observation that, "***At the outset, we notice that it is settled legal position of law that reasons are heart and soul of the order and non-communication of the same itself amounts to denial of reasonable opportunity of hearing, resulting in miscarriage of justice."***

(E6)Show Cause Notice to be issued before raising demand for Penalty:

It is also state that the department shall also issue a SCN before raising a demand of penalty. In case, the department is issuing an order imposing a penalty without giving an SCN, such order would be infructuous and not tenable under the law.

In regard to the same, reference can be made to the decision of

Rama Kotiah And Co. v. State of Andhra Pradesh, ***(2018) 2 GSTJ Online 322 (TG)*** *: (2019) 111 taxmann.com 536 : (2018) 9 TMI 2002.*

(E7)If the assessee is disputing liability of Interest, the proceedings should be initiated in 73(1), directly DRC 07 cannot be issued.

Narsingh Ispat Ltd.v. Union of India (Jhar), ***(2022) 7 GSTJ Online 90 (Jharkhand)*** *: (2022) 44 GSTJ 105.*

Liability of interest and its recovery - the petitioner challenged Summary of Order issued in DRC-07 for July, 17 to March, 18, 2018-19 and for April, 19 to Dec., 19, and also the demand notices issued in DRC-01 relating to these period.

Initially, the Respondent took objection about maintainability of petitions on

the ground of alternative remedy of appeal u/s 107 of GST Act. In this regard, the Jharkhand High Court observed that though petitioner did not pay amount of tax and interest intimated to him in DRC-01A, and instead of that submitted his reply thereto. But, the Respondent failed to issue any show-cause notice to petitioner u/s 73(1). When petitioner has disputed the demand of interest intimated to him, then the adjudication order could not be passed without issuing proper show-cause notice. Thus, Respondents have failed to follow the principles of natural justice and the procedure prescribed u/s 73(1) before issuing DRC-07. Therefore, the writ petition is maintainable considering the decision of Hon'ble Supreme Court in the case of *Magadh Sugar & Energy Ltd.,* ***(2022) 7 GSTJ Online 89 (SC)*** *: (2022) 44 GSTJ 89*.

The next question is whether liability of interest u/s 50 can be raised without initiating any adjudication proceeding u/s 73 or 74, if the assessee has raised a dispute about liability of interest. In this regard, in the case of Mahadeo Construction Co., (2021) 5 GSTJ

Online 153 (Jharkhand) : (2021) 41 GSTJ 307, it has been held that if an assessee disputes liability of interest, then the only option left for assessing officer is to initiate proceeding u/s 73 or 74 for adjudication of liability of interest. In the present case, the petitioner has disputed liability of interest. But, the Respondent has failed to follow the procedure stipulated under the Act, and issued Summary of Order in DRC-07 without following the principles of natural justice.

In view of above, the writ petition succeeds, and the impugned Summary of Orders in DRC-07 are quashed. The Respondents are at liberty to issue proper show-cause notice in terms of Sec. 73(1) with opportunity to petitioner to file response thereto before passing any adjudication order.

Final Outcome- Petition allowed.

(E8)(a) This is a direction that respondents shall follow without fail – not providing details along with the show cause notice is a serious lapse and in many matters the concerned officers do not provide all the details - Perhaps, officer concerned do not have proper training on adjudication matters or they are not even aware about the legal provisions or need to follow principles of natural justice

(b) Show-cause notice issued u/s 73 of GST Act shows that it completely lacks in fulfilling the ingredients of a proper show-cause notice. It does not indicate the contraventions committed by petitioner, and irrelevant particulars have not been strike off.

1. *Archana Textile Corporation v. The State of Maharashtra,2022-VIL-661-BOM.*

   Maharashtra VAT Act, 2002 - Section 23 - Issuance of vague show cause notice – in the impugned order allegations about fake invoices and fake forms have been made against petitioner but show cause notice issued had no such allegations or any details – assessee seeks quashing of impugned order and notice –

   HELD - The show cause notice does not contain any details of any sale or claims or deductions which petitioner has incorrectly made or claimed or recorded in an incorrect manner. It was duty of respondent to have given all the details to petitioner - Every show cause notice issued by respondents in future shall contain every detail required to effectively respond to the show cause notice. ***This is a direction that respondents shall follow without fail – not providing details along with the show cause notice is a serious lapse and in many matters the concerned officers do not provide all the details - Perhaps, officer concerned do not have proper training on adjudication matters or they are not even aware about the legal provisions or need to follow principles of natural justice***

   Though Bench was initially inclined to award substantial cost in favour of petitioner to be recovered from Asst. Commissioner personally, refrain from doing so in this petition - Respondents are warned that the Court will not be so generous in future and may even consider directing the observations made to be specified in the career record of the concerned officer – Board and the Principal Commissioner must take these matters seriously and give proper training to its officers - the impugned order alongwith show cause notice is quashed and set aside – Petition is disposed of

2. *BLA Projects Pvt. Ltd. v. State of Jharkhand & Another,5th March, 2022,* ***(2022) 7 GSTJ Online 340 (Jharkhand)****: (2022) 45 GSTJ 427*

   Notice in DRC-01 -of GST Act, 2017 - on scrutiny on petitioner's GSTR-3B returns for 2018-19 discrepancies were found on account of mismatch between GSTR-2A and GSTR-3B. A notice dt. 18.10.19 in ASMT-10 was issued to petitioner to explain the said mismatch, which is replied by him on 4.11.19 claiming that the difference is only of Rs. 44,303/- and not of Rs. 6.17 lakh, as claimed by Department. However, no action was taken by respondent for more than a year. Thereafter, SCN dt. 20.10.20

in DRC-01 is issued alleging that petitioner has claimed excess ITC during 2018-19. The petitioner furnished its reply on 29.10.20. However, without considering the said reply, a summary order is issued on 14.12.20 in DRC-07 imposing tax, interest and penalty of Rs. 14,36,896/- on account of availment of excess ITC, and petitioner's Credit Ledger is blocked for more than a year.

The Jharkhand High Court observed that a perusal of impugned show-cause notice issued u/s 73 of GST Act shows that it completely lacks in fulfilling the ingredients of a proper show-cause notice. It does not indicate the contraventions committed by petitioner, and irrelevant particulars have not been strike off.

In view of above, the High Court quashed the impugned show-cause notice and summary of show-cause notice. However, the respondents are at liberty to initiate fresh proceedings in accordance with law within 4 weeks.

Final Outcome- Petition allowed.

Relevant Provision -Sec. 73 and 74 of GST Act, 2017.

Decision Referred/Discussed -

Alfa Enterprise v. State of Gujarat, ***(2020) 4 GSTJ Online 55 (Guj)***: (2020) 37 GSTJ 535 : (2019) 31 GSTL 592.

Vimal Petrothin Pvt. Ltd. v. Commissioner, CGST, ***(2021) 5 GSTJ Online 234 (Uttarakhand)***:(2021) 53 GSTL 130

Decision Applied/Followed/Relied :

Asst. Commissioner of State Tax v. Commercial Steel Ltd.,***(2021) 5 GSTJ Online 312 (SC)*** : (2021) 42 GSTJ 185 : (2021) 20 STD 791: (2021) SCC OnLine 884.

Magadh Sugar & Energy Ltd. v. State of Bihar, ***(2022) 7 GSTJ Online 89 (SC)*** : (2022) 44 GSTJ 89 : (2021) SCC Online SC 801.

NKAS Services Pvt. Ltd. v. State of Jharkhand (Jhar),***(2021) 5 GSTJ Online 676 (Jharkhand)***in W.P. (T) No. 2444/2021, Judgment dt. 6.10.21.

NKAS Services Pvt. Ltd. v. State of Jharkhand (Jhar),***(2022) 7 GSTJ Online 145 (Jharkhand)*** in W.P. (T) No. 2659/2021, Judgment dt. 9.2.22.

(E9)The procedure laid down in section 74 and its Rule 142to be followed strictly. Any lapses are found in the procedure, the court is of the strict view to quash the order. Hence the proper /Jurisdictional officer is suppose to follow the procedure and it is also a duty of the appellantor his

representative to carefully notice the procedure adopted by the officer.
Anantham Retail (P.) Ltd. v. State Tax Officer, ***(2022) 7 GSTJ Online 270 (Mad)*** *: (2022) 140 taxmann.Com 167*

Demand – Section 74 r/w Sections 67 and 79 of Central Goods and Services Tax Act, 2017.

Final Outcome- In favour of Assessee.

Relevant Provision -Section 74 r/w Sections 67 and 79 of Central Goods and Services Tax Act, 2017.

Decision Referred/Discussed -

AgrometalVendibles (P.) Ltd. v. State of Gujarat, ***(2022) 7 GSTJ Online 157 (Guj)*** : (2022) 91 GST 635 : (2022) 137 taxmann.com 362 **[Refer Para 10]**

Mahindra and Mahindra Ltd. v. Dy. Commissioner (CT)-II, (Writ Appeal No. 794 of 2021, dated 10.03.2021) **[Refer Para 10]**

Mahindra and Mahindra Ltd. v. Jt. Commissioner (CT), Appeals (Writ Appeal No. 493 of 2021, dated 18.02.2021) **[Refer Para 10]**

NKAS Services (P.) Ltd. v. State of Jharkhand, ***(2022) 7 GSTJ Online 145 (Jharkhand)*** : (2022) 91 GST 736 : (2022) 58 GSTL 257 : (2022) 136 taxmann.com 138 **[Refer Para 10]**

V.R.S. Traders v. Assistant Commissioner (State Taxes), ***(2022) 7 GSTJ Online 74 (Mad)*** : (2022) 43 GSTJ 582 : (2022) 141 taxmann.com 37 **[Refer Para 10]**

In support of his submissions, the learned Counsel for the petitioner relied on the following circulars and decisions :–

(i) Circular No. 10/2019, Commercial Taxes Department, dated 31.05.2019.

(ii) Circular No. 72/2019-TNGST, Commercial Taxes Department, dated 31.05.2019.

(iii) *Mahindra and Mahindra Ltd. v. Jt. Commissioner (CT), Appeals (Writ Appeal No. 493 of 2021, dated 18.02.2021)*

(iv) *Mahindra and Mahindra Ltd. v. Dy. Commissioner (CT)-II, (Writ Appeal No. 794 of 2021, dated 10.03.2021)*

(v) *NKAS Services (P.) Ltd. v. State of Jharkhand,* ***(2022) 7 GSTJ Online 145 (Jharkhand)*** *: (2022) 91 GST 736 : (2022) 58 GSTL 257 : (2022) 136 taxmann.com 138*

(vi) *V.R.S. Traders v. Assistant Commissioner (State Taxes),* ***(2022) 7 GSTJ Online 74 (Mad)*** *: (2022) 43 GSTJ 582 : (2022) 141 taxmann.com 37* in (Writ Petition No. 1607 of 2022, dated 10.02.2022)

(vii) *AgrometalVendibles (P.) Ltd. v. State of Gujarat,* ***(2022) 7 GSTJ Online 157 (Guj)****: (2022) 91 GST 635: (2022) 137 taxmann.com 362.*

within three months from the receipt of that order and therefore, prayed for dismissal of the writ petitions.

Considering the rival submissions and on perusal of the materials, it is seen that there was a surprise inspection in the petitioner's showrooms, Office and Go-down from 14.09.2021 to 16.09.2021 and certain defects were pointed out and thereafter, explanation sought for. Though the petitioner had sent their objections and their authorized representative/Chartered Accountant appeared before the respondent, but they were unable to give proper explanation with supporting documents. This is a merit of the case. It is seen that after issuance of notice in Form DRC-01A, dated 06.12.2021, the respondent has issued Form GST DRC-01A. Thereafter, if the petitioner has got any objection and not paid tax as ascertained, a show cause notice has to be issued under Section 74(1) of the TNGST Act and after receiving objections, giving personal hearing, the assessment order ought to have been finalized. ***In this case, procedure not followed. It is also seen that following the impugned order, the respondent vide Form GST DRC-09, issued a communication, directing the Branch Manager, Axis Bank, Ramanathapuram, to recover the amount due from the petitioner under Section 79 of the TNGST Act, 2017, which is not proper. In view of the same, the assessment orders, bearing Assessment Nos.33AAQCA6068B1ZR/2020-21, 33AAQCA6068B1ZR/2019-20 and 33AAQCA6068B1ZR/2021-22, dated 31.01.2022, are hereby quashed. The consequential recovery notice, dated 10.06.2022, issued to the Branch Manager, Axis Bank, is also hereby quashed****.* The respondent is directed to issue notice after following the procedures prescribed under the TNGST Act and issue show cause notice and after giving an opportunity to file their objections, pass appropriate orders on merits and in accordance with law. The entire process is to be completed as expeditiously as possible without delay.

(E10)Reply to SCN to be considered even if sent by post and not through portal: Madras HC

Asia (Chennai) Engineering Company (P.) Ltd. v. Assistant Commissioner (St) (Fac),

(2022) 7 GSTJ Online 544 (Mad) *: (2022) 143 taxmann.com 126*

The show cause notice (SCN) was issued against the petitioner by the department for revoking the erroneous refund claim. It replied to the SCN

which was sent by the post. The department didn't consider the reply as it was not sent through portal and passed adverse order. The petitioner filed writ petition against the same and contended that any adverse decision to be passed only after hearing the petitioner.

The Honorable High Court noted that the only objection of the Department was that the postal/physical reply had not been considered, since it was not sent through portal. The petitioner had sent a detailed representation which received by the department and it was not disputed. This was a case for erroneous refund and the petitioner would deserve personal hearing so that his objections can be heard. Therefore, the Court directed department to hear objections and give opportunity of personal hearing to the petitioner

(E11) Where order in Form GST DRC-07 as visible in GSTN Portal did not contain reasons, same was wholly defective and, hence was to be remitted back for fresh adjudication.

It is further expected that the said respondent shall take all remedial action to ensure that complete copies of the orders are visible to the assessee and also it shall attempt to provide a verifiable means/ electronic trail/audit etc. to ascertain (where required) how many pages of a document and how many characters were uploaded at any given point of time by any authority or the assessee on the GSTN portal.

Dauji Ispat (P.) Ltd. v. State of U.P., High Court of Allahabad

GST : Improvement/upgrade of GSTN was found necessary since under CGST Act, service of notices and filing of replies are primarily to be done through GSTN portal through electronic means.

Judgment

It is further expected that the said respondent shall take all remedial action to ensure that complete copies of the orders are visible to the assessees and also it shall attempt to provide a verifiable means/electronic trail/audit etc. to ascertain (where required) how many pages of a document and how many characters were uploaded at any given point of time by any authority or the assessee on the GSTN portal.

Such improvement/upgrade is necessary to be made since under the GST Act service of notices and filing of replies is primarily to be done through the GSTN portal through electronic means. Unless due verification can be made of notices issued and filings made, wholly avoidable litigations such as the present case are bound to come.

The writ petition is thus allowed. No order as to costs.

(E12)Show cause sent on a wrong E mail,orders are not passed in accordance with law. Violation of Natural Justice.

Ratan Industries Ltd. v. State of U.P. & Others, ***(2021) 5 GSTJ Online 181 (All)*** *: (2021) 41 GSTJ 430*

Principles of natural justice - petitioner challenged order dt. 24.1.19 and appeal order dt. 27.7.20 whereby his appeal has been dismissed on the ground of limitation. The petitioner claims that he came to know on 15.12.19 that order dt. 24.1.19 has been passed, and prior to passing of the said order no show-cause notice has been served upon him. The said order is also not served upon him. This petition is filed against the said orders, as the Tribunal contemplated under GST Act was not yet created.

Against the contention of petitioner regarding non-issue of show-cause notice, and not passing of a reasoned order, the respondent filed a counter affidavit annexing the show-cause notice, which was sent on wrong E-mail address. In respect of demand notice, only a summary of order dt. 24.1.19 is filed with counter affidavit. But, no order giving the reasoning for levy of demand is filed in counter affidavit.

The Allahabad High Court held that a perusal of orders passed, and the pleadings exchanged, makes it clear that the orders are wholly arbitrary and contrary to the manner of passing of the order, as prescribed under GST Act. The orders are completely in violation of principles of natural justice. In view of that, the petition is allowed, and the impugned orders are set aside.

Final Outcome- Petition allowed.

Relevant Provision -Sec. 107 of GST Act, 2017.

(E13) Determination of Tax : Section 74 of the CGST Act 2017,

1. **The practice of collecting post dated cheques under coercion during raid is not permissible means of collectionof revenue particularly, when no tax demand has been confirmed or crystallized - HC directed the department to return the cheques. (As per the directions of the CBIC, no tax , interest or penalty can be collected in the course of proceedings u/s 67 of the Act.)**
2. **Once a notice has been issued under sub section (1) of section 74of the Act, of the authorities finds that the liability of tax, interestand penalty larger than indicated in the statement referred in to sub section (1) is likely to arise, the competent is remedy - less. Further no second**

notice for the same issue can be issued.

Remark Flour Mills Pvt. Ltd. v. State of Gujarat, 19th April, 2018, ***(2018) 2 GSTJ Online 53 (Guj)*** *: (2018) 32 GSTJ 408 : (2018) 67 GST 559 : (2018) 92 taxmann.com 337, (2022)68TLD541*

Payment and recovery of tax - petitioner is engaged in supply of wheat flour, cereal flour, etc. On 20.2.18, the departmental authorities visited his premises and noticed that petitioner was not paying any tax on branded and unbranded goods. The petitioner's grievance is that forcibly under threat and coercion the authorities collected 3 cheques for total Rs. 19,74,886/- before his tax liability was ascertained. In this regard the Gujarat High Court in its earlier decision in the case of ***Atul Motors Pvt. Ltd. v. State of Gujarat in Special Civil Application No. 959 of 2015 has held that the practice of collecting post-dated cheques under coercion during raid is not a permissible means of collection of revenue, particularly, when no tax demand has been confirmed or crystallized.*** The action of the authorities must fail even if the assessee voluntarily gives such cheques in order to avoid harsh measures of provisional attachment of premises, stock or bank accounts, etc.. In the present case, there was no justification for the authorities to collect post dated cheques, nor for the petitioners to voluntarily give cheques for the said amount. Therefore, the Court directed the department to return the cheques.

Payment and recovery of tax - on 20.2.18, the departmental authorities visited petitioner's premises and noticed that petitioner was not paying any tax on branded and unbranded wheat flour, cereal flour, etc. The authority issued a show-cause noticeof CGST Act asking the petitioner to show cause why for the period between July, 17 and 20.2.18 unpaid CGST and SGST of Rs. 36,88,706/- not be recovered from him. ***Again the authority issued a second show-cause notice for the same period demanding unpaid tax of Rs. 1,29,13,928/-. The crucial question is, whether the subsequent second notice could be issuedfor the same period. The Gujarat High Court held that sub-sections (1) and (3) of envisage to cover separate periods, and therefore notice can not be issued for the period for which notice has already been issued***

Payment and recovery of tax - on 20.2.18, the authorities visited the petitioner's premises and noticed that the petitioner was not paying any tax on branded or unbranded wheat flour, cereal flour, etc. On 27.2.18, the department issued a show-cause notice calling upon the petitioner to pay a tax of Rs. 36,88,706/- and simultaneously, provisionally attached bank accounts of the

petitioner, which is challenged in this petition. In this regard, in the case of Automark Industries (I) Ltd. (2016) 88 VST 274 (Guj) the Division Bench of Gujarat High has held that attachment of bank account for recovery of tax, etc. is in the nature of extraordinary measure for protecting interest of revenue. Such powers can be exercised even before the assessment is made, if the Commissioner is of the opinion that for the purpose of protecting the interest of revenue, it is necessary to do so. Thus, this power is of a drastic nature. Any such power is coupled with a duty to exercise such power with due care and in appropriate cases. In the instant case nothing was demonstrated by the department either in the orders of attachment or in the affidavit filed before the Court why exercise of such drastic power of attachment of bank accounts was necessary. Therefore, the Court set aside the attachment. But, at the same time to provide some security, it directed that the petitioner shall maintain at all time minimum stock of Rs. 50 lacs till the final disposal of proceedings arising out of show-cause notice dt. 27.2.18.

Final Outcome- In favour of Assessee.

Relevant Provision -Section 74 and Section 83 of CGST Act, 2017.

Decision Referred/Discussed -

Atul Motors Pvt. Ltd. v. State of Gujarat, Special Civil Application No. 959 of 2015 **[Refer Para 7]**

Automark Industries (I) Ltd. v. State of Gujarat, (2016) 88 VST 274 (Guj) : 2014 SCC Online Gujarat 14217 **[Refer Para 15]**

(F) ORDERS

(F1) As per the provisions of section 75(7) of the Act, the following order has been issued by the Hon. HC and has set aside the order passed by the respondent based on new grounds, which were never been mentioned in show cause .

Later the PO passed an order rejecting the refund on the ground that "Wrong ITC Claim"

Note : The reasons and objects and proposed amounts cannot be changed from DRC 01A to DRC 01 and further to DRC 07 .

Case: VaridhiCotspin (P.) Ltd. v. State of Gujarat, ***(2022) 7 GSTJ Online 576 (Guj),*** Citation: Special Civil Application No. 5172 of 2022, Court: High Court of Gujarat

Facts:

Petitioner filed an application for refund of IGST of Rs. 1.24 crore paid on

import of goods under Export Promotion Capital Goods Scheme (EPCG). An SCN was issued by the Proper Officer (PO) stating that refund application is liable to reject on the grounds that the refund was more than two years old,the clear ground was not mentioned,the refund calculation was also not clear and the documents were incomplete.

Later the PO passed an order rejecting the refund on the ground that "Wrong ITC Claim"

Held:

The court observed that the PO took entirely new ground to pass an order of rejection of refund than which were mentioned in the show cause notice. Thus, the PO relied on new grounds while passing the order and the petitioner never had an opportunity to respond to such grounds.

The order rejecting the refund is quashed and set aside, and the proper officer shall reconsider the application of the petitioner.

(F2) Procedure prescribed under law will prevail.

It is trite principle of law that when a particular procedure is prescribed to perform a particular act, then all other procedures/modes except the one prescribed by Legislature are excluded.

Ram Prasad Sharma v. Chief Commissioner & Another,19thNovember, 2020 ***(2021) 5 GSTJ Online 82 (MP)*** *: (2021) 40 GSTJ 432*

Communication of show-cause notice/order - grievance of petitioner is that while raising demand of tax on him, the relevant show-cause notice/order is not communicated to him. The petitioner prayed the High Court that the respondents may be directed to upload notice and order on GSTN Portal as mandated by law.

The M.P. High Court held that a bare perusal of Rule 142 of GST Rules reveals that the only mode prescribed for communicating the show-cause notice/order is by way of uploading the same on GSTN Portal. ***It is trite principle of law that when a particular procedure is prescribed to perform a particular act, then all other procedures/modes except the one prescribed by Legislature are excluded. In this case, the State could not provide any material to show that the said show-cause notice/order was uploaded on GSTN Portal.***

In view of above, the High Court held that there is no doubt that statutory procedure prescribed for communicating show-cause notice/order under Rule 142(1) has not been followed, and therefore the impugned demand is struck down,

and the petition is allowed with liberty to the revenue to follow the procedure prescribed under Rule 142 by communicating the show-cause notice to the petitioner by appropriate mode, and thereafter to proceed in accordance with law.
Final Outcome- Petition allowed.

(G) Effective use of DRC 03and suggestions related to DRC 05 and DRC 07.
As per the provisions of section 73/74 and Rule 142, where it is felt that, tax ,interest& penalty with regard to 74is required to be paid, the amount should be paid in DRC 03 and the same should be intimated with reasons in detail in time to the concerned jurisdictional officer foracknowledgement in DRC 04 and further it should be observed that DRC 05 is issued against such DRC 03. It is important to be noted that, where Taxis disputed, No payment should be made in DRC 03. Rather the assessee should wait for DRC 07 to be issued, against which appeal can be filed. It is important to be noted that, whatever tax, interest and penalty is paid through DRC 03 will be treated as voluntary paymentby the assessee, whether it is paid by self acceptation or against any show cause by the Dept. As per the many learned professionals, the DRC 05 so issued against such DRC 03 will not be treated as an order and no appeal can be filed against such order.

(G1)It is commonly understood that, appeal only can be filed against order of demand issued in DRC 07. In my fair opinion, in light of the following judgment, appeal even can be filed against DRC 05 issued by the jurisdictional officer to conclude the proceedings.

The HC has reserved the right to appeal in section 129 in the following judgment, even on payment of Tax and penalty and proceedings are concludedas per the provisions. In the same manner ifTax, Interest and penalty are paid as per the provisions of section 74(5) or (8), where DRC 05 is issued to conclude proceedings will also have the same opportunity to file appeal against such conclusion. Such conclusion of proceedings should be treated as an order.

The relevant sections and its comparison is produced here under ;

Section 129 (5):On payment ofamount referred in subsection (1), all the proceedings in respect of the notice specified in sub section (3) shall be deemed to be concluded .

Section 74(8):Where any person chargeable with tax under sub-section (1) pays the said tax along with interest payable under Section 50 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.

Hindustan Steel & Cement v. Asst. State Tax Officer, 24x7 Mobile Squad, SGST Deptt., Kozhikode & Others, 20th July, 2022, ***(2022) 7 GSTJ Online 351 (Ker)*** *: (2022) 45 GSTJ 508 : (2022) 93 GST 685 : (2022) 65 GSTL 133 : (2022) 141 taxmann.com 342*

Appeal - Section 129 of the GST Act, 2017 - petitioner's vehicle and goods were detained u/s 129 of GST Act. But, on payment of demand as per pre-amended provisions of Sec. 129(1)(a), the vehicle and goods were released, and an order was issued in MOV-09 u/s 129(3). But, a corresponding summary of order in DRC-07 was not issued. As a result, the petitioner was not in a position to file appeal u/s 107. Hence, this petition.

The Kerala High Court held that whether a person opts to make payment u/s 129(1)(a) or provide security u/s 129(1)(c), the jurisdictional officer is responsible to pass order

u/s 129(3), and to upload summary of order in DRC-07. ***The fact that the assessee makes the payment of tax and penalty u/s 129(1)(a) can not affect the right of assessee to file appeal against the said order. The fact that the system does not generate a demand, or that the system does not contemplate the filing of an appeal without a demand does not mean that the intention of Legislature was different.***

In view of above, the petition is allowed.

- This common judgment has been given in the case of B.M. Steel Agencies *v.* Asst. State Tax Officer, 24X7 Mobile Squad, SGST Deptt., Kozhikode : WP(C) No. 17463 of 2022 also.

Final Outcome- Petition allowed.

Note:

As per the provisions of section 107 (Appeals), appeals are to be filed electronically. The Portal allows to file appeal on ARN mentioned in DRC 07 only. Therefore if in any case such ARN is not available on DRC 05, the appeal can be filed manually .

Disclaimer : Here I am sharing few situations, where proper procedure are not adopted, the courts have taken it seriously and further it has been quashed. The situations are well supported by case laws decided by Hon'ble Supreme&High Courts of respective States. I have provided synopsis of the cases. It is humbly suggested to read complete judgment before making any opinion and submission before any Authority.

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UNION BUDGET 2023 – INDIRECT TAX PROPOSALS HIGHLIGHTS

CA Siddeshwar Yelamali

Hon'ble Finance Minister presented the Union Budget 2023 on February 01, 2023. Highlights of Indirect Tax proposals is outlined herein.

A. Goods and Services Tax

1. E-commerce operators

- **Supplier of goods through e-commerce operator eligible for composition scheme:** The gamut of persons who can opt for composition levy has been proposed to be widened to include *registered persons engaged in supplying goods through electronic commerce operators (who is required to collect TCS)*. Hitherto, such persons were not eligible to opt for composition levy.
- **Penal provisions introduced for E-Commerce Operators (ECO):** Special responsibility has been cast on E-commerce operator to ensure that only eligible persons are supplying through their platform. In this regard, penalty has been proposed to be introduced for the following non-compliances by the E-commerce operator to the extent of Rs 10,000/- or Tax involved, *whichever is higher*:
  - Permitting unregistered persons (other than those exempted from registration) to supply goods / services through it.
  - Permitting inter-state supplies by a person who is not eligible to make such inter-state supply.
  - Failing to furnish correct details in TCS returns (Form GSTR-8) pertaining to outward supplies made by a person exempted from registration.

2. Input tax credit

- **ITC on expenditure relating to Corporate Social Responsibility (CSR) activities restricted:** ITC on expenditure incurred towards activities relating to obligations under CSR referred to in Section 135 of the Companies Act, 2013, is proposed to be made ineligible. Considering that the amendment is prospective, the eligibility of ITC on CSR activities for the previous years should be eligible until the date on which the Finance Bill 2023 is enacted.
- **Manner of discharging tax in case of non-payment of consideration**

to the supplier within 180 days clarified: In a scenario where the recipient fails to pay the consideration to the supplier within 180 days from the date of invoice, the redundant requirement of adding the relevant tax to the output tax of the recipient has been proposed to be done away with. Instead, the payment of tax can be made by *reversal of such input tax credit itself* which is aligned to the current return filing provisions.

- **Proportionate ITC to be reversed towards supply of warehoused goods before clearance for home consumption:**Supply of warehoused goods before clearance for home consumption will be treated as 'exempt supply' for the purpose of reversal of common input tax credit ITC u/s 17(2) of the CGST Act, 2017 (i.e. ITC reversals on goods/services used for making exempt supplies). The value of such transactions to be considered is yet to be prescribed. Hitherto, ITC was not restricted on such transactions.

3. **Registration:** Suitable amendments have been made to provide that, persons who are exempted from obtaining GST registration will not be liable to be registered under GST even if they qualify as persons who are required to obtain compulsory registration. This applies to supplier of goods/services which is wholly exempt from tax OR an agriculturist, (to the extent of supply of produce out of cultivation of land) retrospectively w.e.f. 01st July, 2017.
4. **Time limit to file returns:** It is proposed to restrict the time limit of filing of ***Form GSTR-1 (Outward supply statement), GSTR-3B (Monthly return), GSTR-8 (TCS returns by e-commerce operators) and GSTR-9 (Annual Return),*** to3 years from the due date of filing the said statement / returns. The Government has been empowered to extend the time limit, subject to certain conditions and restrictions, for a registered person or a class of registered persons.
5. **Interest on delayed refund:** Interest for delay in refund of tax to assessee would be computed from 61st day of the date of receipt of application by the tax authority till the date of refund tax. This amendment has been made to bring in clarity that interest for refund would not be computed from the date of receipt of refund application which is being litigated. The manner of computation, conditions and restriction is yet to be prescribed.
6. **Compounding of Offence:** The opportunity to compound offence only once has been extended to:
   - a person in possession or transporting or removal or deposit or keeping or

concealing or supply or purchase of goods having reason to believe which are liable to confiscation.

- a person who receives or deals with any supply of services which he knows or has reason to believe are in contravention of any GST provisions.

Hitherto, the compounding of such offences was eligible for value exceeding Rs. 1crore.

Further, the amount for compounding of offences is proposed to be 25% of the tax involved subject to a maximum of 100% of the tax. Hitherto, the compounding amount was Rs. 10,000/- or 50% of the Tax involved whichever is higher subject to a maximum amount not less than Rs. 30,000/- or 150% of the tax involved whichever is higher.

7. Others

❒ **High Sea Sales, Sales from Bonded Warehouse and Merchant Trading Transactions:** Transactions in the nature of High Sea Sales, Sales from Bonded Warehouse and Merchant Trading Transactions were notified not to be treated as a 'supply' w.e.f. 01.02.2019. It is proposed to treat such transactions as not a 'supply' retrospectively from 01st July, 2017 itself. However, no refund of tax paid will be available where any tax has already been paid in respect of such transactions during the period 01.07.2017 to 31.01.2019.

❒ **'OIDAR' and 'Non-Taxable online recipient':** The definition of "Non-Taxable Online Recipient" is proposed to be amended to mean any unregistered person receiving OIDAR services and also includes persons registered only for TDS purposes. OIDAR services provided to such persons alone will require tax to be paid by the supplier even if located outside India.

Services would qualify as OIDAR, amongst other characteristics, only if they were essentially automated and involved minimal human intervention. Due to varied interpretations and inability to objectively measure the same, this requirement has been removed from the characteristics of the services to qualify as OIDAR.Services will be OIDAR, if the delivery thereof is mediated by information technology over internet or an electronic network and by nature the rendering should be impossible without information technology.

B. Customs

1. Exemption: All exemption notifications by default have a life of 2 years. However, the following exemptions are carved out as exceptions to the rule:

- Any multilateral or bilateral trade agreements;
- Obligations under international trade agreement, treaties, conventions, including with respect to UN Agencies, Diplomats and International Organisations;
- Privileges under constitutional authorities;
- Schemes under Foreign Trade Policy (FTP) - Such as EPCG, EOUs, Advance Authorisation etc.;
- Central Government schemes with validity of more than two years;
- Re-imports, temporary imports, goods imported as gifts or personal baggage – Having specified procedures applicable to them;
- Duties of Customs, including IGST payable on imports listed as supra – Other than import of dutiable goods.

2. **Time bound disposal of application filed before the Settlement Commission:** Settlement Commission to pass Order within period of nine months from the last day of the month in which application is filed or extended period of 3 months. If an order is not passed by Settlement Commission within aforesaid timelines, then Settlement Proceedings would abate and adjudication proceedings to continue, as if such application was never made.

   In case of existing applications pending as on date of Assent of Finance Bill, 2023, period of nine months to be reckoned from date of assent of Finance Bill, 2023.

C. Central Sales Tax

CST Appellate Tribunal (CSTAT) will be abolished. As a consequence, all appeals pending before the CSTAT (essentially involving dispute on whether the transaction is inter-State sale of an inter-State stock transfer) will be transferred to the Customs, Excise and Service Tax Appellate Tribunal (CESTAT).

An attempt has been made in this article to summarise Indirect Tax proposals presented in the Union Budget 2023. 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 on08.02.2023.

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PUTTING THE CART BEFORE THE HORSE

Adv. P.V. SubbaRao

GSTP T.V. SubbaRao

'Punishment when awarded with due consideration, makes
the people devoted to righteousness and to works, productive
of wealth and enjoyment'.—Kautilya.

Penalty is a punishment for breaking a law. Failure to comply with the statutory provisions would result in levy of penalty. The main purpose of levy penalty is to deter unwanted behaviour, that causes non-compliant declaration. In the field of taxation, penalty may be imposed for late filing of returns, non-filing of returns, non-payment of taxes due, indulging in fraudulent transactions, etc. Chapter XIX in the Central Goods and Services Tax Act, 2017 (for brevity GST Act) deals with 'offences and penalties'. Section 122 (1) of the GST Act provides for levy of penalty for certain offences. Section 122 (2) reads as follows:-

"122 (2) — Any registered person who supplies any goods or services or both on which any tax has not been paid or short-paid or erroneously refunded, or where the input tax credit has been wrongly availed or utilised,—

(a) for any reason, other than the reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a penalty of ten thousand rupees or ten per cent. of the tax due from such person, whichever is higher;

(b) for reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a penalty equal to ten thousand rupees or the tax due from such person, whichever is higher."

Section 73 of the GST Act provides for 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 wilful-misstatement or suppression of facts. Section 74 provides for the same determination, by reason of fraud or any wilful misstatement or suppression of facts.Sub section (1) under both the sections 73 and 74 empowers the proper officer to require the taxable person to show cause as to why he should not pay the amount of tax specified in the notice along with interest payable thereon under section 50 and a penalty leviable under the provisions of the Act or the rules made thereunder. Obviously such quantum of penalty is linked to section 122 (2) of the GST Act. Accordingly, while issuing show cause

notices under these two sections, proper officers have been indicating the applicable penalty leviable.

It looks odd to come to a conclusion, even before hearing the taxable person, that the case falls under section 74 and therefore cent per cent penalty would be leviable. Fair play demands that the explanation of the affected person must be carefully considered and then a decision as regards levy of penalty has to be thought of. The Hon'ble Supreme Court in the case of EID Parry (I) Ltd. Vs. Asst. Commissioner of Commercial Taxes & Another Batch (117 STC 457**)** held that when the dealer is under a bonafide belief that his transactions are exempted/ taxable at a lower rate and when the legal position is not clear the levy of penalty is not justified. When there is a reasonable cause for the failure to pay tax, the imposition of penalty is not correct. In the case of Kamal Auto Finance Ltd. (8 VST 274) the CESTAT, New Delhi has held that short payment of tax for bona fide reasons does not attract penalty. Same principle holds good for claiming of ITC also.In the case of Uniflex Cables Limited Vs Commissioner, Central Excise (2011—40 PHT 28) (AIFTP October, 2011 Journal) the honourable Supreme Court held that the imposition of penalty was not justified where the issue under dispute in relation to the liability of tax was of interpretational nature. Thus by no stretch of imagination, levy of penalty is not automatic, in which case, it may not be correct to propose levy of penalty, even before the short payment of tax is determined. Even if such short payment is because of bona fide reasons, no penalty need be levied, as per the settled law.

In this context, two issues have been agitating the minds of the taxable persons. Firstly, in most of the cases, show cause notices are being issued under section 74 of the GST Act, so as to levy cent per cent penalty, of course without relevance to the factual scenario. It is a casual proposal and in most of the show cause notices, we do not find any material to establish any fraud or any wilful misstatement or suppression of facts. We are in this paper, concerned with the issue of proposing levy of penalty either under section 73 or 74 of the GST Act, even before the determination of tax not paid or short paid or input tax credit wrongly availed etc. Can there be a proposal to levy penalty, even before the violation or offence has been established.

In the case of Delta Lubricants, Vs Deputy Commercial Tax Officer,

Vijayawada (2006-147 STC 462), the honourable Andhra Pradesh High Court held as follows:-

"But, at the same time, this courthas found, as it has been argued, that the **tax as well as penalty could notbe imposed by the same order.'**

Further full bench of the honourable Andhra Pradesh High Court in Mahaveer Bangles v. Commercial Tax Officer, Tarapet, Vijayawada [1993] 91 STC 168, held thus—

"Thus, while we see no objection for the simultaneous levy of penalty, we have a note of caution against such simultaneous levy. As the cause of action for best judgment assessment and levy of penalty is broadly the same, viz., furnishing of an incomplete or incorrect return warranting rejection of the return, some times the assessee may find it useful to press into service the findings/observations in the assessment order. He may be able to demonstrate that the best judgment assessment was based upon the mere failure of the assesseeto discharge the burden of proof cast by section 7-A but not on account of deliberate concealment of the correct figures and particulars. The assessee may therefore plead that it is not a fit case for levy of penalty even on the findings of the assessing officer. **Penalty being not consequential to the assessment, the assessee can very well take the plea that by reason of simultaneous levy of penalty, he was denied the opportunity of taking aid from the contents of the assessment order itself to the extent they help him**. To avoid such objections, it is desirable that as far as practicable, the penalty proceedings are concluded after the assessment is made, though they might have been initiated earlier. Otherwise, the penalty orders may often become vulnerable to attack on the ground of denial of reasonable opportunity or the like grounds."

In Exelan Networking Technologies Pvt. Ltd. Vs Assistant Commissioner, honourable Madras High Court was concerned with levy of penalty under the Tamilnadu VAT Act in Appeal Number Writ Petition No.35620 of 2016 dated 4.1.2017. Interpreting the relevant provision, it has been held as follows:-

'9.5. A bare reading of the sub-section (5) of Section 22 would show that it is only after an assessment is complete under sub-section (4) of Section 22, that penalty can be imposed by the Assessing Officer. However, it can, either be imposed at the time when, the assessment order is passed, or, by way of a separate order, albeit, after the assessment order is passed. **Therefore, the proposal in the**

show cause notice to levy penalty at the rate of 150% prior to adjudication demonstrates premeditation.'

In fitness of things, in the first instance, the proper officer has to decide whether it is a bona fide inadvertent error, which could be an innocent misstatement by the taxable person on his return, resulting in an understatement, while acting in good faith. Such taxable persons must escape penalty, because the scheme is not designed to punish such people. All such conduct and behaviour could be known only on hearing the taxable person. Even before a cause has been shown, it is not desirable to propose penalty.

It may be that penalty proceedings are separate and independent. On the quantum and leviability of penalty per se, taxable person is entitled to contend on several issues like making a wrong claim not amounting to fraud or concealment, rejection of a claim cannot automatically warrant imposition of penalty, bonafide mistake, interpretational issue, etc. It may be questionable, if a penalty has been proposed, even before the short payment of tax has been determined. Sub sections (1) of sections 73 and 74 begin with 'where it appears to the proper officer'. It means 'it looks or seems' but there is no definite conclusion. When the short payment of tax itself is not definite, it is not desirable to propose penalty.

Rule 142 (1A) of the CGST Rules, 2017 reads as follows:-

'142 (1A)—Theproper officer may, before service of notice to the person chargeable with tax, interest and penalty, under sub-section (1) of Section 73 or sub-section (1) of Section 74, as the case may be, communicate the details of any tax, interest and penalty as ascertained by the said officer, in Part A of FORM GST DRC-01A.'

It could not be known as to how the proper officer 'ascertains' 'chargeable penalty'. What is the basis for such ascertainment, even when the tax itself has not been ascertained/determined.Where is the question of quantification of penalty even before show cause notice is issued? How can they show penalty as 'due' in DRC-01?I think there is nothing like 'voluntary payment of penalty'.

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

CA Sanjay Ghiya

CA Ashish Ghiya

CASE LAWS

RAJASTHAN REAL ESTATE REGULATORY AUTHORITY

Trimurty Landcon VS Allottees

Gist of Case: Authority directed allottees to pay the due maintenance charges and desist from doing any act which hinders the peace of the project.

The project has already been completed and he has already obtained completion certificate and also occupancy certificate for the project on 04.05.2020. There are 216 flats in the project, out of which 207 have been sold and 9 flats are yet to be sold by him. A total of 186 flats are occupied.

Trimurty Ariana Mutual Welfare Society, Respondent No. 26, was formed and registered on 21.05.2019 with the Registrar of Societies vide Registration No. COOP/2019/JAIPUR/104259, for the maintenance of common areas, spaces, amenities and services. The society is functional and the allottees who have paid the requisite charges are its member.

Under the agreement for sale, it was made clear that all the residents shall be required to pay membership fee of the maintenance society and amount towards corpus fund, besides monthly maintenance charges based on the area of the respective unit @ Rs. 3/- per sq. ft. (Super Built Up Area) and the component of monthly maintenance charges, accordingly calculated, has been specifically mentioned in the agreement for sale executed with each allottee. As per section 19 (6) read with section 13 of the RERA Act, it is the responsibility of every allottee to pay all requisite charges as specified in the agreement for sale. Furthermore, as per section 19 (7) of the RERA Act, every allottee is liable to pay interest, at such rate as may be prescribed, for any delay in payment towards any amount or charges to be paid under the said section 19 (6). Respondent allottees have defaulted in payment of the due maintenance charges. Few of them have not paid even the membership fee. It is also contended that there are some more

allottees who have defaulted in timely payment of maintenance charges but they have not indulged in unlawful activities as the 25 respondent allottees have; and are, therefore, not made a party to the present complaint. Respondent allottees, without any contractual or legal right to use the common amenities, etc., have made a gang with malafide and ulterior motives to harass the promoter, put undue pressure on him and avoid payment of the maintenance charges; and to that end they are doing constant, deliberate, unwanted activities that not only fall within the definition of "actionable nuisance" but also attract penal provisions under the law of the land.It is further contended that promoter as such has nothing to do with the maintenance issues when maintenance society has been duly formed.

Therefore, the complainant has sought the relief as to direct all the respondent allottees to pay and clear all their outstanding as against the society and be restrained to not to raise derogatory and defamatory slogans against the promoter and It be further clarified that still who fail to pay their due amount of maintenance charges and other charges to the society then society may submit the status report before the authority for further necessary directions/actions.

Authority heard the contention of the parties in detail and directed the respondents allotteesto comply with the provisions of sub-section (6) and sub-section (7) of section 19 of the RERA Act and pay their overdue maintenance charges to the association of allottees, namely, 'Trimurty Ariana Mutual Welfare Society' at the monthly rate stipulated in the agreement for sale/ sale deed, alongwith interest, within 15 days from the date of issue of this order; and to accordingly pay the amount of maintenance charges every month in future, calculated accordingly, until the rate of contribution to common expenses for the project is determined by the said association; and to comply with clause 15 (iv) of the agreement for sale and clause 16.2 of the sale deed; and desist from doing any act which disturbs the peace and tranquillity in the project. They are also directed not to cause any hindrance in peaceful enjoyment of the property by the allottees in general. In particular, they are directed not to cause any hindrance in the promoter exercising his right to enjoy or sell the nine unsold flats in the project. They shall not put any flexes or hoardings in the project premises with a view to discourage prospective buyers of the unsold flats. They are also directed to remove all the flexes, hoardings, etc., that they have put in the project premises and to do so within 15 days from the date of issue of this order.

Sharad BhandariVS Om Metals Consortium Pvt. Ltd.

Gist of Case: Allottee should be refunded the amount along with interest if possession is not given within the due time.

An agreement for sale was executed between the complainant and the respondent on 07.06.2013, according to which, a construction linked payment was agreed between the two and the possession of the flat was agreed to be given on 06.09.2016 including the grace period. The complainant argued that in compliance with the payment scheme, the complainant made a total payment of Rs.227.11 lakh till December, 2015 which amounts to 100 percent payment vis-a-vis the sale consideration amount as promised in the agreement. However, the respondent did not fulfil his part of the agreement and even though the entire sale proceeds was deposited by the complainant in December, 2015 itself, the respondent failed to complete the project by the agreed date. In fact, the respondent did not commence the construction of the project as per the stipulated date and till date, even though more than six years have passed, the unit has not been delivered.

The complainant further argued that the respondent instead of delivering the project and handing over the unit in time, has demanded additional amount of money in spite of the fact that they have deposited the entire amount as agreed to in the agreement for sale. They further argued that the project is now about 80 percent ready but the respondent is not giving the final touch to the project and delaying handing over the possession for some malafide intention unknown to the complainant. Citing section 18(1) of the Real Estate (Regulation and Development) Act, 2016 (hereinafter called 'the Act') they prayed for payment of interest on the amount paid by the complainant to the respondent for the period of delay and compensation. They also sought the directions from this Court to the respondent to complete the project at the earliest and hand over possession of the unit. In their prayer, they also asked for a waiver of Rs.26.29 lakh demanded by the respondent as additional charges.

The complainant does not want to withdraw from the project and wants a peaceful procession of the apartment. The email from the respondent on record admits that an interest amount is due to be paid by the respondent to the complainant. However, this has not been paid. In view of the above, since the allottee does not withdraw from the project as the project is more than 80 percent complete and the possession can be handed over soon enough, Authority directed the respondent

promoter to pay an interest for every month of delay from September, 2016 till the handing over of the possession of the flat on the amount paid by the complainant at the rate prescribed in the Rajasthan Real Estate (Regulation & Development) Rules, 2017 at SBI highest MCLR + 2%, i.e., 7.30 + 2 = 9.30% from the date of possession of the flat i.e., September 2016 till the date the interest amount is made to the complainant.

Authority also directed the respondent to complete the project within a period of six months and hand over the possession of the allotted unit to the complainant with the condition that for the delay of every month, the interest on the total amount paid by the complainant to the respondent, will continue to be paid by the respondent. In case the respondent does not hand over the possession of the unit as directed above, the Authority would be free to take penal action against the respondent in terms of the provisions of law.

NOTIFICATION

RAJASTHAN REAL ESTATE REGULATORY AUTHORITY

No. F. 1 (229)RJ/RERA/202113595 Dated: 13/12/2022

Sub:Submission of Hardcopy of Application for Registration of Project

In case the promoter fails to submit the hardcopy of application for registration of project, with complete set of documents, within 30 days from the date of issue of RC in accordance with the directions issued vide this Authority's order no. 1478 dated 27.Q8.2021 and order no. 2500 dated 07.10.2022, delay processing charges of 1,000/- per day (with a maximum cap of an amount twice the Registration Fee) are payable before or at the time of depositing of hardcopy. This direction is hereby modified as under: ln case the promoter fails to submit the hardcopy, with complete set of documents, in accordance with the directions issued by Authority's order no. 1478 dated 27.08.2021 read with order no. 2500 dated 07.10.2022, within 30 days from the date of issue of RC, delay processing charges of t 1,000/- per day (with a maximum capping of an amount equal to the Registration Fee) shall be payable before or at the time of depositing of hardcopy This order shall be deemed to be effective from 27.08.2021, with a condition that the cases in which the delay processing charges have already been deposited shall not be re-opened and no refund shall be made therein.

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INTRODUCTION TO DTAA

CA Paresh P. Shah

CA Mitali Gandhi

1. Background and Introduction

1.1. Every jurisdiction adheres to the dual taxing principles of residence and source. In the 'residence principle', the right to tax income is with the country of residence while in the 'source principle' the right to tax income is with the country in which the income originates. Given the above two principles of taxation, there is often a scenario where a person would be taxed twice on the same income in different jurisdictions. In order to avoid such double taxation, Double Tax Avoidance Agreement (DTAA) was introduced in 1963.

A treaty is defined under Vienna convention on law of tax treaties 1969 as " an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;"

A treaty need not be a tax treaty, though in this article the term treaty means DTAA. DTAA is a tax treaty between two or more countries to avoid taxing the same income twice.

1.2. Definition of Treaty

i. Under Oxford Companion to Law : "Treaty"

"an international agreement, normally in written form, passing under various titles (treaty,

convention, protocol, covenant, charter, pact, statute, act, declaration, Concord, exchange of notes, agreed minute, memorandum of agreement) concluded between two or more States, on subjects of international law intended to create rights and obligations between them and governed by international law."

ii. Vienna Convention on law of Treaties 1969 defines "treaty" as :

"An international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".

1.3. Double taxation can be juridical, i.e. when the same person is taxed twice on the same income by more than one state -. In case more than one person is taxed on the same income, it amounts to economic double taxation. DTAA in most cases only resolves juridical double taxation.

1.4. Section 90 empowers Government of India ('GOI') to enter into a DTAA for avoidance of double taxation. As per section 90(1) of the Income Tax Act, 1961, the Central Government may enter into an agreement with the Government of any country outside India or specified territory outside India,—

(a) for the granting of relief in respect of—

(i) income on which have been paid both income-tax under this Act and income-tax in that country or specified territory, as the case may be, or

(ii) income-tax chargeable under this Act and under the corresponding law in force in that country or specified territory, as the case may be, to promote mutual economic relations, trade and investment, or

(b) for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country or specified territory, as the case may be, [without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in the said agreement for the indirect benefit to residents of any other country or territory) or

(c) for exchange of information for the prevention of evasion or avoidance of income-tax chargeable under this Act or under the corresponding law in force in that country or specified territory, as the case may be, or investigation of cases of such evasion or avoidance, or

(d) for recovery of income-tax under this Act and under the corresponding law in force in that country or specified territory, as the case may be,

and may, by notification in the Official Gazette, make such provisions as may be necessary for implementing the agreement.

Similarly, Section 90A, empowers Central Government to enter into agreement with specified Non-Government association for grant of double taxation relief.

1.5. A treaty is meant to provide a relief from scope of charge or provide

concession. A tax payer can choose to be governed by the treaty or by the domestic provisions based on what provisions are more beneficial to him/her.

1.6. India has DTAA with over 85 countries.

1.7. A treaty can either be Bilateral (an agreement between two States) or Multilateral (an agreement between two or more States).

1.8. A treaty could be a limited or a comprehensive treaty. A limited treaty only deals with certain limited issues of taxability of Income like income from Shipping and Air Transport or Estate, Inheritance or Gift. A comprehensive treaty deals with all kinds of income, but it may not cover all types of taxes, for e.g. treaty with USA only covers the federal taxes, US state taxes are not covered. Most of the treaties with which India has business relations are comprehensive treaties. With certain countries we have two treaties, one limited and one comprehensive. The two may supplement each other.

2. Objective of DTAA

i. To prevent double taxation on the same income

ii. To prevent fiscal evasion

iii. To promote mutual economic relations, trade and attract foreign investments by providing relief from dual taxation

iv. To promote exchange of goods and services, movement of capital and person

v. To provide further reduction in the applicable tax rates on certain incomes.

vi. To improve the co-operation between two different taxing authorities

3. Types of Model Treaties

There are two popular Model treaties adopted by the countries:

i. OECD (Organization for Economic Cooperation and Development) Model

ii. UN (United Nations) Model

There is one more Model Treaty known as US Model Income Tax Convention- we will not cover the same in the current article

3.1. A model is a suggested draft/format of an agreement between two countries. Countries may use it as a reference but are not bound to adopt all or any of the terms and can make suitable amends. The OECD model puts more

emphasis on the residence principle and is usually adopted by the developed countries, whereas the UN model puts more emphasis on source principle and is usually adopted by the developing countries. A treaty can be a combination of both the models. As far as India concerned, its Agreements are guided by the UN model of double taxation avoidance agreements.

3.2. Difference between OECD and UN Model – Few Instances

i. Definition Clause - OECD Model includes definition of "enterprise" and "business" which is not present in the UN model at all. The reason this has been done under the OECD is because the OECD model has done away with the separate provision on Independent Personal Services which the UN model retains. Therefore, these two definitions cover such services in order to bring them under the provisions for permanent establishments and business profits.

ii. Permanent Establishment (PE) – The provisions dealing with permanent establishment (Article 5) is where the UN model seems to be more favorable for source-based taxation. The threshold for building sites is twelve months in case of the OECD while it is six months in case of the UN model. Thus, a construction activity which lasts for 7 months will form a PE under the UN model and not form a PE under OECD Model. The UN Model also is more stringent towards agents acting on behalf of an enterprise as it provides that an agent who doesn't conclude any contracts on behalf of the enterprise but maintains stock and delivery for the enterprise also amounts sufficiently as taxable permanent establishment in that state. The UN Model includes any establishment dealing only with delivery to constitute PE, which would not constitute PE under OECD Model.

iii. Royalty - The UN model provides for source country taxation for royalties while the OECD model does not. Despite the OECD model not providing for it, more than half the countries follow the UN approach for the reason that ideally royalties from intellectual property should be taxed where the intellectual property is being used and creates value there.

4. Components of a Treaty

4.1 Article 1 – Persons Covered

i. Provides for application of treaty to persons who are residents of one or both of the Contracting States.

ii. Exceptions

- Article 24(1) (Non-discrimination) - Applies to Residents of third states (Nationals) also.
- Article 19 (Government service) – Applicable to nationals of third state also.
- Article 25 (MAP) - Applies to Residents of third states (Nationals) also.
- Article 1 of OECD MC allows exchange of information in respect of Residents/ nationals of third state

4.2 Article 2 - Taxes covered

- Taxes on Income
- Taxes on Capital
- Wealth tax is included in certain DTAAs
- List of Inclusion of Taxes
- Treaties apply also to any identical or substantially similar taxes which are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes

  Indirect taxes, social security charges, monetary fines and penalties, interest for late payment are not regarded as taxes and hence are not covered under a DTAA

4.3 Article 3 - General definitions

- Person
- Company
- Enterprise
- International Traffic
- Competent Authority
- National
- Business (not included in UN Model)
- Recognised Pension fund (not included in UN Model)
- Terms undefined in the tax treaty should have the same meaning as

defined in the domestic laws of the state in the context in which they are defined.

4.4 Article 4 - Resident

- It lays down the criteria for determining residence of a person. This is essential in resolving cases where double taxation arises as a consequence of double residence or due to taxation in state of source or situs and in state of residence.
- 'Resident of one of the states' means any person who, under domestic law, is liable to taxtherein by reason of his domicile, residence, place of management or any other criterion of a similar nature but not merely due to income being situated therein.
- Tie breaker Rules for Dual Resident are applied in following order:
  - Permanent Home
  - Personal and Economic Relations (centre of vital interests)
  - Habitual Abode
  - Nationality
  - Competent Authorities to settle by mutual agreement
- In case of person other than resident, place of effective management, Place of incorporation or any other relevant factors are considered to establish residency

4.5 Article 5 - Permanent establishment

This Article determines the right of the state of source to tax business income including passive income attributable to PE on net basis.

The different kinds of PE are:

- Fixed Base PE
- Inclusions to Fixed Base PE
- Service PE
- Construction/ Installation PE
- Exclusions from Fixed Base PE
- Dependent Agent PE
- Subsidiary PE – Mere existence of a subsidiary does not constitute a PE

4.6 Article 6 to 21 – Taxation of Income

4.6.1. Article 6 – Income from Immovable Property

- Taxation in source country

4.6.2. Article 7 – Business Profits

- Existence of PE is must for profit attribution
- Only Profits attributable to the PE are taxable in the source country

4.6.3. Article 8 – International Shipping and Air Transport

- Profits of an Enterprise engaged in the operation of ships or aircraft in international traffic shall be taxable in the country in which place of effective management of the enterprise is situated

4.6.4. Article 9 – Associated Enterprise

- Right to adjust Transfer prices for transactions not carried out between Arm's length price between:
  - Enterprises with common management, control or shareholding or
  - An Enterprise with another Enterprise in which it has direct or indirect participation in the capital management or control
- Corresponding Adjustment made by other state to avoid double taxation

4.6.5. Article 10 – Dividend; Article 11 - Interest

- Dividend/Interest is taxed in the source state
- DTAA imposes a limitation on the maximum rate to be charged by the source country
- If Dividend/Interestis earned by a PE of the beneficial holder situated in the State of which the company paying the dividends/interest is a resident, then in such a case the provisions of Article 7 shall applyi.e. when dividend or the interest is effectively connected with the PE of the Non-Resident.

4.6.6. Article 12 – Royalty and Fees for Technical Services (FTS)

- Royalty means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, or ~~films or tapes used for radio or television broadcasting~~, any patent, trademark, design or model, plan, secret formula or process~~, or for the use of, or the right to use, industrial,~~

~~commercial or scientific equipment~~ or for information concerning industrial, commercial or scientific experience.

- Definition as per UN Model is broader than the one given in the OECD Model. The words with strikethrough in above clause are omitted in the definition as per OECD
- In the OECD Model,exclusive taxation rights are given to the country of residence of the beneficial owner of Royalty
- In the UN Model, source state also has the right of taxation in addition to taxation rights of country of residence; rate of taxation is restricted to 10%-20%
- FTS means payments made to any person in consideration of managerial, consultancy and technical service or provision of services of technical or other personnel
- In the OECD Model, FTS is taxed as Business Profits , while the UN Model treats it separately under Article 12A, giving the source state the right to tax as well in addition to the taxation rights of country of residence
- If Royalty/FTS is earned by a PE of the beneficial holder situated in the State of which the company paying the Royalty/FTS is a resident, then in such a case the provisions of Article 7 shall apply

4.6.7. Article 13 – Capital Gains

Type of Capital Asset	Taxation
• Alienation of immovable property • Business Assets of PE • Alienation of shares of company resident in source country, deriving their value mainly from immovable property in source country	Taxable in Country of Source
Gains from alienation of ships, aircrafts, or boats or movable property relating to operations in international traffic	Taxable in Country of POEM
Gains from alienation of any other property not included in the Article**	Taxable in Country of Residence

**In many Indian treaties, capital gains on transfer of shares and securities

are taxable in the source country.Even the treaties with Mauritius, Singapore which earlier taxed on Residence basis arenow amended to source taxation.

4.6.8. Article 14 – Independent Personal Services

- It deals with taxation of various types of professionals/consultants.
- Taxable in source state if fixed base or stay exceeds threshold period
- Deleted in OECD Model 2000 as this is clubbed with Article on PE

4.6.9. Article 15 – Dependent Personal Services

- Taxation of employment by Source Country but taxation will be done by Resident Country, in case the employee is present for less than 183 days in the source state and the employer is non-resident

4.6.10. Article 16 – Directors fees

- Director's fees are taxed by the country of residence of company

4.6.11. Article 17 – Entertainers and Sportspersons

- Income taxable in country in which activities are performed
- Where income accrues to another person in respect of activities performed by an entertainer/sportsperson will be taxable in the country in which activities are performed

4.6.12. Article 18 – Pensions

- Taxable only in country of residence

4.6.13. Article 19 – Government Service

- Primary right to tax is of the Country that makes the payment
- Other contracting state has right to tax if recipient is national or resident of other state

4.6.14. Article 20 – Students

- Payment from outside state for study or maintenance not taxable in the state of study or maintenance

4.6.15. Article 21 – Other Income

- Residuary Article, for incomes not dealt with in the earlier articles
- Taxation by country of residence, except if income relates to PE

4.7 <u>Article 22 – Taxation of Capital</u>

- This is same as mentioned in Article 13

4.8 Article 23 – Elimination of Double Taxation

4.8.1 Exemption Method

- When the resident country provides its taxpayer with an exemption for foreign source income, it is like exemption of income in resident country
- Income which may be taxed in source country is not taken into account by resident country; but resident country reserves the right to take the income into consideration when determining the tax to be imposed on the rest of the income for rate purposes only.

4.8.2 Credit Method

- Full Credit/Ordinary Credit - Resident country gives either full/Partial credit of taxes paid in foreign country. This means Tax payer will be taxed on same source income and tax is to be determined accordingly but tax payer will pay lower amount of taxes to the extent credit available.

  Example: XYZ Ltd, a resident of Country A, has earned a total income of Rs 5 Lakhs. Of its total income, Rs 2 lakhs is derived from Country B. Country A imposes tax of 20%. Country B imposes tax of 30%. Credit would be computed as follows:

Particulars	Full Credit	Ordinary Credit
Amount of Income	5,00,000	5,00,000
Country A tax (@20%)	1,00,000	1,00,000
Country B tax (@30%)	60,000	60,000
Tax Credit available	60,000	40,000 (20%*2,00,000)
Taxes due in State A	40,000	60,000
Total Tax Cost	1,00,000	1,20,000

- Underlying Credit - Credit for corporate tax is available when dividends are paid by resident of one state to another. This is in addition to tax paid on dividends.

4.8.3 Tax Sparing

- Sometimes as an Incentive to economic activities, various tax exemptions are given e.g. Deduction under section 80IB of Income Tax Act, 1961. Now, when the assessee is liable to taxation in his domestic country then credit will be allowed for taxes paid in foreign country, but due to tax

exemption in such foreign state there won't be tax payment and no credit is available to the taxpayer. In such a case, if the taxpayer is taxed on credit method basis then he will end up paying taxes on income which was exempt in foreign state. resulting in no incentive to assessee to take up such specified activities on which exemption is granted as foreign country is not taxing the income, yet domestic country is collecting tax on the same. Hence, to avoid such situation, Tax Sparing comes to help. Under this method, the domestic country will deem such exempt income as tax paid and credit of such taxes which are deemed to be paid in foreign country will be allowed as credit in Domestic country. Hence, the benefit of exemption is not hindered or wiped out due to this method. This type of relief mechanism is known as Tax Sparing.

4.8.4 Unilateral Relief

- Some countries provide relief of Taxes paid in source country without any treaty between those two countries. This kind of relief is known as unilateral relief. In India, U/s 91 unilateral relief is provided. Section 91 provides for relief from double taxation to the Indian Residents. Relief is available of lower of Indian Tax and Foreign Tax paid on the income so doubly taxed. It is Applicable only if the said income does not accrue or arise in India as provided in Section 9 of the Act.

4.9 Article 24 to 30 - Special Provisions

4.9.1. Article 24 – Non-Discrimination applies in certain cases when Non-Resident or a Foreign Citizen may be not be discriminated and accorded the same treatment as Resident Tax Payer

4.9.2. Article 25 – Mutual Agreement Procedure, applies in case of certain aspect of the treaty interpretation or when the Treaty has no solution.

4.9.3. Article 26 – Exchange of Information as to the circumstances and the extent of application of the exchange of the Information between the contracting states.

4.9.4. Article 27 – Assistance in Collection of Taxes deals with the role of the countries to the treaty in extending help for collection of taxes of the Residents of the respective states by the source State.

4.9.5. Article 28 - Members of Diplomatic Missions and Consular Posts,

dealing with taxability of their Income,generally treaty will not apply to them.

4.9.6. Article 29 - Entitlement to Benefits, deals with the circumstances limiting the benefit of the Tax Treaty

4.9.7. Article 30 - Territorial Extension, as to application of the Tax Treaty on the scope and extent to the territory being defined or that certain area is excluded from the application of the tax Treaty.

4.10 Article 31 to 32 – Final Provisions

4.10.1. Article 31 – Entry into Force deals with the notification by the countries as to when the treaty will come in Force in their country.

4.10.2. Article 32 – Termination as to when treaty is said to be terminated between the countries.

4.11 Exchange of Notes/Protocols & MOU

- Provides amendments to the existing treaty
- Provide for Explanations to the treaty provisions

4.12 Limitation of Benefits (LOB)

- DTAAs are sometimes used by unscrupulous entities to pay very less tax or no tax, by impersonating as companies or entities in one of the countries party to the agreement. This leads to revenue leakage. To prevent this, countries usually include a Limitation of Benefits (LoB) clause in their DTAAs.
- LOB clause is intended to prevent DTAA shopping and tax avoidance
- LOB clause intends to limit the benefits of the DTAA to legitimate residentsof the contracting countries.
- Generally, the LOB clause denies DTAA benefits if the person seeking to obtain DTAA benefits is not a qualified person (resident)
- LOB articles in DTAA vary between each DTAA in terms of conditions and complexity

4.13 Conclusion:

- The above provides the overview of the Treaty content, however it's application as well as how it interacts with the Income tax Act will be dealt in the subsequent articles.

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