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President's Message

Friends,

AIFTP is continuing with main Motto of spreading education regarding the Tax and Allied Laws to all and for it various Webinars, Seminars, Conferences etc. are being organized throughout the Country. In addition to it the AIFTP is publishing the journals and the books for the benefit of the Professionals. In the Journal the AIFTI is covering the latest issues and controversies and the amendments. The judgments are also discussed and digest of the judgments is also given in the journals. The journals cover the Direct and Indirect Taxes separately apart from the allied laws.

It is important for Federation that its website is interactive and provides all the information's required. The website of AIFTP has been revamped and the new website must be seen by all the Members. It covers the pictures/ photos of the events held along with the details for the forthcoming events and also the details of the various Committees and sub committees including the office bearers of the AIFTP. The online correction facility of the Members data is also made active on the website and now the data can be corrected by the Members directly. Further the subscription to the AIFTP Journal and the AIFTP Indirect Tax Journal can be made directly through the website. The Social Media Icons of face book, twitter etc. has been made active and are reflected on the website. We request the time any further suggestions for improving the website may be sent.

In the month of February & March AIFTP had done may programmes throughout the country. The Central Zone conducted one week Income Tax Certificate course on the important topic of Income Tax and it was a huge success. The average attendance in the webinar course was over 400 Members / Tax Professionals.

The facilitation function of Hon'ble Mr. Justice Rajesh Bindal, Judge, Supreme court of India was organized at New Delhi. It was attended by over 120 persons. It was proud moment for AIFTP that one of its members has reached to the Hon'ble Apex Court. The efforts was made by Mr. K.C. Koshik who coordinated the complete function.

Thereafter, a one day seminar was organized on 25th Feb., 2023 at Varanasi and Puducherry. At the Puducherry the seminar was organized by the AIFTP South Zone in Association with Puducherry GST Practitioners Association. It was the first state Tax Practitioners Conference in Puducherry and may be the first seminar by AIFTP in Puducherry. It was well attended by over 150 delegates and the Chief Commissioner, SGST Mr. Raja Sekhar was the Guest of honour. There was technical session also.

The one day seminar at Varanasi was a grand affair and was organised by AIFTP North Zone along with Income Tax Bar Association, Varanasi. It was attended by

over 200 delegates Mr. Kaushal Raj Sharma, D.M. was the Chief Guest of the function and the Commissioners of Income Tax and GST were the Guest of honour. The Seminar was a grand success.

For the first time one day seminar was organized by the AIFTP Central Zone along with MPLTBA at Chindwara (MP). It was a grand success as it was attended by over 300 delegates. It is also a moment of pride that for the first time any Conference of AIFTP at Chindwara was organized.

Similarly the Central Zone again created a record by organizing one day seminar at Bharatpur on 11th March, 2023. It was along with the Bharatpur Tax Bar Association and it is also for the first time that any AIFTP programme was organized at Bharatpur. It was attended by over 150 delegates. The National President and the Secretary General was the guest of honours and also the Speakers. Credit goes to the Central Zone Chairman Mr. Sandeep Agarwal and the Bharatpur Tax Bar Association President Mr. Ronak Kothary for the successful Seminar.

The National Tax Conference and the NEC meeting is being organized at Lucknow on 18th – 19th of march, 2023 along with the complimentary visit to Ayodhya.

The International Study Tour to Vietnam has been announced. It will be from 2nd June to 10th June. Detail programmes is available on the website. Mr. Santosh Gupta is the Chairman of the International Tour Committee and further details can be seeked from him. I request Members to participate in this International Study Tour.

Many programmes are being announced by all the Zones and the same are reflected on the website of the AIFTP and are also informed by mail. I request all the Members to regularly visit the website and also update their records and correct the same. We are targeting that the AIFTP Members Directory will be published in the month of August/ September, 2023.

We look forward to active participation of the Members and also request Members to update their data on the website using the online facility. Individual mail are also being sent to Members to upload their data. In case Members are having suggestions then the same may kindly be informed by sending mail at aiftpho@gmail.com or WhatsApp to the undersigned.

Regards,

PANKAJ GHIYA
National President, 2023
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CHIEF-EDITOR'S COMMUNIQUE

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,

May God gift you all the colours of life, colours of joy, colours of happiness, colours of love and all other colours you want to paint your life with. Happy Holi to each and every member of AIFTP and family and also to all Tax Practitioners throughout the India. Holi is a special time of year to remember those who are close to our hearts with splashing colours. Let the colours of Holi spread the message of peace and Happiness.

As the end of financial year draws near I would like to take this opportunity to thank to everyone for all the love and support. The Journal has been applauded by the Professionals and it has received wide acceptance.

The GST Council has set in motion the process to tackle rising GST litigation through the introduction of GSTAT. This would pave way for resolving the pending demand for tribunal under GST. Further, it will help in reducing the burden of Writ Courts as earlier taxpayers had to invoke Writ Jurisdiction under Article 226 of the Indian Constitution post issuance of order by the authorities.

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 journal, we have tried to cover latest updates, amendments and judgments etc. The Articles contained in the Journal are on the recent issues and controversies and amendments. The eminent Professionals had been contributing Articles in the Journal regularly and we are also covering RERA, FEMA and Companies Act apart from GST.

I also request you all to renew your subscription if due and circulate the information of subscription to all the professionals and friends in all the Whats app groups/

Facebook posts or twitter handler, so that we may get more subscription for this Journal.

Apart from the journal, in respect to AIFTP's main moto of spreading education regarding the Tax and Allied Laws to all, AIFTP also organises Various wabinars, Seminars, Workshops, Study Tours and Conferences etc.

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.

We also request you to kindly send your Articles, important judgments or updates for publishing in the journal at the mail Id aiftpjournal@gmail.com.

Regards,

Deepak Khandelwal

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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		March, 2023	20th April 2023
			April, 2023	20th May 2023
(ii)	Detail of Outward Supplies: -	GSTR-1 (QUARTERLY)	Jan-March, 2023	13th April 2023
	(a) QRMP		April, 2023 (IFF)	13th May 2023
	(b) Monthly Filing	GSTR-1	March, 2023	11th April 2023
			April, 2023	11th May 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	March, 2023	10th April 2023
			April, 2023	10th May 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	March, 2023	10th April 2023
			April, 2023	10th May 2023

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RECENT NOTIFICATIONS & CIRCULARS UNDER CGST ACT

Adv. Deepak Garg

NOTIFICATIONS–CENTRAL TAX (RATE)

DATE	NOTIFICATION NO.	REMARKS
28.02.2023	04/2023-Central Tax (Tax)	Seeks to amend notification no. 2/2017-Central Tax (Rate), dated 28.06.2017.
28.02.2023	03/2023-Central Tax (Tax)	Seeks to amend notification no. 1/2017-Central Tax (Rate), dated 28.06.2017
28.02.2023	02/2023-Central Tax (Tax)	Seeks to amend notification No. 13/2017-Central Tax (Rate) so as to notify change in GST with regards to services as recommended by GST Council in its 49th meeting held on 18.02.2023.
28.02.2023	01/2023-Central Tax (Tax)	Seeks to amend notification No. 12/2017-Central Tax (Rate) so as to notify change in GST with regards to services as recommended by GST Council in its 49th meeting held on 18.02.2023.

*****

MOBILISATION ADVANCE

CA Dr. Arpit Haldia

Taxation of Mobilization Advice in GST Regime-

Is it a Loan or an advance or a deposit or be it of any nature, whether it is taxable as an advance in GST Regime?

Taxation of Mobilization Advance has always been a bone of contention not only in GST but also under Service Tax Regime as well. The moot point of litigation is whether it is nature of advance or loan because if it is in the nature of advance then the liability to pay tax arises on receipt of the amount and if it is treated as a loan then there is no liability to pay tax on the receipt of said amount.

This article is an attempt to analyse the subject in greater detail and put in a perspective and reference from various decisions given under Income Tax, Service Tax and GST Regime.

1. Substance and real Purport of the Document and Intention of the Parties would override the Nomenclature of the Document

The litigation starts form the point since the name itself contains "advance" and prima facie since nomenclature contains "advance", it has been treated as "advance" and thus liable to tax by the revenue. However, as has been held in following decisions as narrated below that it's the substance of the document and intention of the parties which would override the nomenclature of the document.

The Supreme Court in the matter of M/S. Super Poly Fabriks Ltd vs Commissioner Of Central Excise, ... on 24 April, 2008 observed that

There cannot be any doubt whatsoever that a document has to be read as a whole. The purport and object with which the parties thereto entered into a contract ought to be ascertained only from the terms and conditions thereof. ***Neither the nomenclature of the document nor any particular activity undertaken by the parties to the contract would be decisive.***

Emphasis Supplied

The Patna High Court in the matter of **Nilkantha Narayan Singh vs Commr. Of Income-Tax observed that**

It is the substance & not the form of the contract that should be regarded. In analysing the transaction, it is not necessary that the documents should be construed from the purely legal aspect. *It is open to the High Court not merely to look at the documents but consider the surrounding circumstances so as to conclude what is the real character of the transaction.*

Emphasis Supplied

The Madras High Court in the matter of R.Ramaiah vs Lakshmamma on 9 March, 2011, the court held that

14. All those decisions would highlight and spotlight the fact that it is not the nomenclature of a document that matters, but the real purport of the document and the intention of the parties concerned are of paramount importance.

The Court further observed that

18. The terminological inexactitude should not be the decisive factor in deciding a case and both the courts below, appropriately and appositely and that too legally construed the clauses in Ex./Ex.B1 and decided that no loan transaction or mortgage, was found embodied in Ex.A2/Ex.B1.

Emphasis Supplied

Similarly, it is a trite law that mere nomenclature of entry in the books of accounts is not determinative of the true nature of transaction as has been held in the matter of Commissioner of Income Tax Vs. India Discount Co. Ltd. 75 ITR 191 (SC), Commissioner of Income Tax Vs. Provincial Farmers (P) Ltd. 108 ITR 219 (Cal) and KCP Ltd. Vs. CIT, 245 ITR 421.

Therefore, the mere fact that the term "mobilization advance" contains the term "advance" would have no implication and the real purport and intention of the parties would have to be ascertained from the document.

2. Ordinary Meaning of "Loan""

The Bombay High Court in the matter of Dr. FredieArdeshir Mehta And ... vs Union Of India And Others on 3 August, 1989 Equivalent citations: 1989 (3) BomCR 656, 1991 70 CompCas 210 Bom observed the ordinary meaning of loan as follows:

6. The principal and an interesting question is : What is a loan ? A loan

is defined by the Oxford English Dictionary as " a thing lent; something the use of which is allowed for a time, on the understanding that it shall be returned or an equivalent given ; esp., a sum of money lent on these conditions and usually with interest."

It was further observed by the Bombay High Court that

9. The essential requirement of a loan is the advance of money (or of some article) upon the understanding that it shall be returned, and it may or may not carry interest.

Emphasis Supplied

Therefore, The Bombay High Court provided that normal attributes of loan are

a) There is an advance of money;

b) There may or may not be interest;

c) There is an obligation of re-payment.

3. Distinction between a "Loan" and "Advance"

The distinction between a "loan" and "advance" has been highlighted by Hon'ble Delhi High Court in the matter of **Commissioner of Income Tax vs Shri Raj Kumar on 14 May, 2009 wherein it was held that**

"Usually attributes of a loan are that it involves positive act of lending coupled with acceptance by the other side of the money as loan: it generally carries an interest and there is an obligation of re-payment. *On the other hand,* ***in its widest meaning the term advance may or may not include lending. The word advance if not found in the company of or in conjunction with a word loan may or may not include the obligation of repayment. If it does then it would be a loan."***

Emphasis Supplied

Therefore, The Delhi High Court clearly provided that normal attributes of loan are

a) It involves positive act of lending;

b) The positive act of lending is coupled with acceptance by the other side of the money as loan;

c) It generally carries an interest;

d) There is an obligation of re-payment.

It was observed that although the term "loan" includes the obligation to repay but in its widest meaning "advance" would never include the obligation to repay and if it does that even the term used might be "advance" but it would be treated as a loan. Therefore, the element of repayment is one of the most important criteria to identify whether the amount being received is an advance or loan. This above description of the term "loan" and "advance" was further relied upon by The Delhi High Court in the matter of **CIT vs. Creative Dyeing & b Printing (P) Ltd 201031(I) ITCL 93 (Delhi).**

In another matter before the Hon'ble Karanatka High Court in the matter of **M/S Bagmane Construction Private Limited Vs CIT (ITA No. 474/ 2013)** referred to the distinction between "loans" and advance" as referred by Hon'ble Delhi High Court as follows:

The attribute of a loan is that it is a positive act of lending money coupled with acceptance by the other side of the money as loan and generally carries interest and there is an obligation of repayment. The word "advance" may or may not include lending. The word "advance" if not found in the company or in conjunction with the word loan may or may not include the obligation of repayment. If it does then it would be a loan.

Emphasis Supplied

The above decision by the Karnataka High Court only further emphasize what has been held by the Delhi High Court that if any advance contains the obligation to repay then its in the nature of the Loan and not advance.

4. Distinction between a loan and a deposit

The Delhi High Court discussed the meaning of "Loan" in perspective with the meaning of "deposit" in the matter of **Baidya Nath Plastic Industries ... vs K.L. Anand, Income Tax Officer on 25 November, 1997 and observed that**

The distinction between the loan and the deposit is that in the case of the former it is ordinarily the duty of the debtor to seek out the creditor and to repay the money according to the agreement *and in the case of the latter it is generally the duty of the depositor to go to the banker or to the depositee, as the case may be, and make a demand for it.*

Emphasis Supplied

It was further observed by the Court by making reference to the decision of Hon'ble Madras High Court in the matter of **V. Balakrishnudu vs. Narayanaswamy Chetty 24 IC 842**

In popular language commodious is translated by the word "loan" and the distinction between deposit and loan is this : that a deposit is to be kept by the depositee for the depositor ***and the loan is to be kept by the borrower for himself****. Thus I deposit my hat in the cloak room. My hat is not to be used by the depositee, but is to be kept for me and returned to me on my demand;* ***but I lend my money to a friend and he can do what he likes with it as long as he returns it to me either on demand or at some specified time.***

Emphasis Supplied

Therefore, as per the meaning of loan given by the Delhi High Court, in the case of loan it is the duty of the debtor to seek out the creditor and element of repayment is one of the most important criteria to identify whether the amount has been given as a loan.

5. Distinction between a Debt and a Loan

Hon'ble Bombay High Court in the matter of **Dr. FredieArdeshir Mehta And ... vs Union Of India And Others on 3 August, 1989 Equivalent citations: 1989 (3) BomCR 656, 1991 70 CompCas 210 Bom** observed the difference between a "debt" and a "loan" as follows:

7. The concept of a loan has received judicial consideration in India. In Suradindu Sekhar v. Lalit Mohan Mazumdar money was due to the plaintiff and the defedant had executed a bond in respect thereof. The defendat claimed relief under the Bengal Money Lenders Act. The Court said, "leaving the purchase money unpaid is leaving a debt unpaid. ***Every loan is a debt but every debt is not a loan.*** *The purchase money due to the plaintiff is a debt due to the plaintiff but is not a loan or a transaction which is in substance a loan" This judgment was relied upon in Sujansing Ajitsing Mohota v. Ramachandra rao Krishna rao Singaroo . In Laxmi Co. v. CIT the question arose in the context of the Income-tax Act. The firm of J.K.Kothi was supplying goods to the assessee on credit. Whenever goods were supplied, the account of the assessee with the firm was debited*

with the price thereof. The amount which was outstanding against the assessee in the books of the firm represented the price of the goods supplied on credit. The amount was held to be a debt due from the assessee to the firm but it was not of the nature created by a loan. Reliance was placed upon the judgment of the Supreme Court in Shree Ram Mills Ltd. v. CEPT , which held that a loan "imports a positive act of lending coupled with an acceptance by the other side of the money as loan."

Emphasis Supplied

6. Mere fact that that amount is given by the awarder to the contractor is not sufficient enough to hold the mobilisation advance as "advance"

The moot question is whether the mere fact that the amount is given by the awarder to the contractor would be sufficient enough to categorize the said amount as advance. It should not be because supposedly take an example of the situation wherein festival loan is given by the employer to the employee and is deductible from the salary of the employee. However, the fact that such amount is given by the employer to the employee and is recoverable from the salary is not sufficient enough for holding the loan as an advance salary and liable to Income Tax. The amount given as festival loan is to be categorized as a loan or advance only by the intent of the parties and real purport of the document entered into by the parties.

7. General conditions and drafting of the agreement associated with Mobilisation Advance- Referred in the case of Thermax Instrumentation Ltd. Versus Commissioner of Central Excise, Pune-I-2015 (12) TMI 1222 – CESTAT MUMBAI.

The relevant conditions which are generally prevalent in case of a Mobilisation Advance were reproduced in the case **Thermax Instrumentation Ltd. Versus Commissioner of Central Excise, Pune-I-2015 (12) TMI 1222 – CESTAT MUMBAI.** The various Terms and Conditions as generally referred as follows:

A) **Condition relating to Advance Payment and Security towards the Advance Amount**

11.1.1 The Contractor shall deliver to the Owner a payment security in the form of a bank guarantee for 10% i.e. Rs 80.50 Lakh (Rupees Eighty

Lacs Fifty Thousand Only) of the Contract price valid until the completion of Scope of Work ("payment security"). Upon receipt of the payment security, the Owner shall pay to the Contractor 10% of the Contract Price as an advance payment (Initial Advance") amount to Rs 80.50 Lacs (Rupees Eighty Lacs Fifty Thousand Only).

B) **Mode of Payment of the Amount Received**

11.1.2 The value of the Payment Security shall be reduced on a quarterly basis in proportion to the amount of advance adjusted in the invoices of the Contractor.

11.1.3 The payment Security will be reduced by the Bank Guarantee issuing Bank of such payment Security based on a letter that shall be issued by the Owner to Such Bank Guarantee issuing Bank authorizing the reduction of the value of the payment Security.

C) **Balance Payment-The agreement referred to by CESTAT provided that balance payment would be released to the contractor as follows:-**

11.2 MILE STONE PAYMENTS FOR PROGRESS WORK:

Upon mobilization of Site by one of the Mechanical Erection Sub-Contractor of the main contractor, the owner shall pay to the contractor a Mile Stone Payment of Rs 80.50 Lacs (Rupees Eighty Lacs Fifty Thousand only). (Ten percent) of the Contract Price ["Mile Stone Payment"].

11.2.1 Payment of the Mile Stone Payment shall be effected directly within three days from the date of submission of following documents.

11.3 BALANCE PAYMENT

11.3.1 The balance payment of 80% (Eighty Percent) of the Contract Price including all taxes, shall be paid on a pro rata basis as set out in a mutually agreed upon billing break up, through an irrevocable, inland, without recourse letter of credit payable on demand in Pune to be opened by the owner in favour of the Contractor ("Balance Payment Letter of Credit").

8. **General Modus Operandi in case of a Mobilisation Advance-**The Mobilization advance is generally given in order to enable to deploy machinery and manpower in sufficient quantity.

a) That interest is generally charged on advance amount given by the awarder to the contractor.

b) The contractor gives bank guarantee to the customer of equal amount of advance being given to him.

c) Contract contains condition of how the amount paid as mobilisation amount is to be repaid back. The mode of repayment followed generally is deduction from the bills submitted in respect of work executed.

d) The awarder can invoke bank guarantee anytime during the contract in case cancellation of work or non-execution of contract, delay in execution of a contract, etc.

e) The appellant does not have complete dominion over the amount as he has given a security of equal amount and the same can be recovered at any time by invoking the bank guarantee.

9. Key Observation about the general modus operandi of the mobilisation advance vis-a-vis the characteristics of Loans or deposit

It can be observed from the fact that the payment is guaranteed against the security and the conditions about the repayment are provided in the agreement and generally such amount given as mobilisation advance carries interest liability along with the same.

The fact that there are specific conditions associated for re-payment and mobilisation advance is secured by bank guarantee highlights the fact that 'mobilization advance' is adjusted against the payment not on account of being linked to the work but as a pledge of the contract between the contractor and the awarder. The connection to the execution of the contract is only limited to deduction from the payment to be released to the contractor and the deduction from the bill amount is more or less akin to the situation wherein rather than deducting from the bill amount, the awarder would pay the entire amount towards the bill to the contractor and the contractor would then pay the amount towards mobilisation advance separately. The deduction is nothing but an option opted by the awarder for an advance deduction from the bill amount rather than waiting for subsequent payment.

It is also subject to furnishing of prescribed 'bank guarantee' thus there seems to be less a connection with the performance of the contract. The payment of

'mobilization advance' is more like a separate financial transaction within the contract for providing of service. Thus, the nature of the mobilisation advance is more like a separate credit facility being extended by the awarder himself rather than the awarder taking from any third person.

Therefore, the mere fact that the amount is being received from the awarder by the contractor is not sufficient to hold the mobilisation advance as "advance". There is more to it which needs to be analysed.

10. Relevant Case Law in Pre and Post GST Regime about taxability of Mobilization advance and decision under Income Tax about mobilization advance being in the nature of loan.

a) Judgements from Pre-GST Regime

Case-1-Thermax Instrumentation Ltd. Versus Commissioner of Central Excise, Pune-I, 2015 (12) TMI 1222 - CESTAT MUMBAI

The CESTAT Mumbai Bench in this given case held that

The advance is only an amount given as kind of earnest money and for which the appellant gives a bank guarantee to the customers of equal amount. *It is more in the nature of a deposit. As defined in Borrows, in Words & Phrases, Vol II*

"An earnest must be a tangible thing… That thing must be given at the moment at which the contract is concluded, because it is something given to bind the contract, and, therefore, it must come into existence at the making or conclusion of the contract. The thing given in that way must be given by the contracting party who gives it, as an earnest or token of goods faith, and as a guarantee that he will fulfill his contract, and subject to the terms that if, owing to his default, the contract goes off, it will be forfeited. K, on the other hand, the contract is fulfilled, an earnest may still serve a further purpose and operate by way of party payment".

In the present case the advance is like earnest money for which a Bank Guarantee is given by the appellant. It is a fact that the customer can invoke the Bank Guarantee at any time and take back the advance.Hence the appellant does not show the advance as an income, not having complete dominion over the amount and therefore the same cannot be treated as a consideration for any service provided. *Therefore, the findings lack*

appreciation of the complete facts and evidences.

Emphasis Supplied

The decision lays down the fact that the amount received by the contractor from the awarder is more like an earnest money rather than being an advance. The person receiving the same does not have complete dominion over the amount being received. The party who has given the mobilisation advance has bank guarantee against the same and can be invoked at any time in case of non-repayment of the same as per the term and conditions of the contract.

Case-2-:Gammon India Ltd Vs CST (CESTAT Mumbai) Appeal Number : Service Tax Appeal No. 87483 of 2016

The CESTAT Mumbai Bench held that

9. *The several contracts provide for the payment to be made at different, predetermined stages of performance and are, generally, subject to evaluation of the work undertaken. It is also seen that such appraisal, as a prelude to making payments, is not undertaken until after the execution of the work in relation to the taxable service has 4/5 commenced and that all the contracts, while linking such measurable stages, provide for payment of only 90% of contracted amount for the entirety of the work.* ***The 'mobilization advance' is adjusted against the final payment due and is not linked to the work but as a pledge of the contract between the appellant and principal. It is also subject to furnishing of prescribed 'bank guarantee'; there is no connection with the performance of the contract. It is not in dispute that the 'mobilization advance', carrying interest, is granted to enable the contractor to prepare for undertaking the contracted work. The subsequent adjustment with the final payment due does not suffice to construe this as an advance payment for the work to be done merely because the recipient and payee happened to be the provider of service. The payment of 'mobilization advance' is but a separate financial transaction within the contract for providing of service..***

Emphasis Supplied

The judgement details out some very important reasons about why mobilisation advance is not an advance. The key reasons why this judgement held that mobilisation advance is not in the nature of advance are as under-

- **Adjustment of amount against the bill amount is not because of linkage with contract amount but as a pledge of contract-**It emphasises the fact that 'mobilization advance' is adjusted against the final payment due and is not linked to the work but as a pledge of the contract between the appellant and principal.
- **Mobilisation advance has not connection with the performance of the contract and is subject to furnishing of bank guarantee by the contractor to the awarder-**It is also subject to furnishing of prescribed 'bank guarantee'; there is no connection with the performance of the contract.
- **Subsequent adjustment of the mobilisation advance is not suffice to hold it as ana advance payment-**It is not in dispute that the 'mobilization advance', carrying interest, is granted to enable the contractor to prepare for undertaking the contracted work. The subsequent adjustment with the final payment due does not suffice to construe this as an advance payment for the work to be done merely because the recipient and payee happened to be the provider of service.
- **Payment of Mobilisation advance is separate financial transaction-**The payment of 'mobilization advance' is but a separate financial transaction within the contract for providing of service.

b) Judgements in Post GST Regime

Case-1-Shapoorji Pallonji & Company (P.) Ltd.[2020] 115 taxmann.com 113 (AAR - TAMILNADU)

7.4 Further 'Supply of Works Contract' is deemed to be a service under GST. Under the pre-GST regime, service tax was leviable on the service portion of the Works Contract, which in the case at hand being original work, was levied on 40% of the value. The applicant on receipt of advance has paid the service tax on the 40% of the value as required under the provisions of Service Tax. The like situations are more aptly covered under the transition provision at section 142(11)(b) wherein it is stated that no tax is payable on services under the GST Act to the extent the tax was leviable on the said services under Chapter V of the Finance Act. Therefore, we conclude that GST is not payable on the Mobilisation advance which has been received prior to GST implementation as per

section 142(11)(b) of the Act.

The issue in this matter was regarding the taxability of mobilisation advance received prior to GST Regime but outstanding as on 1st July 2017. The AAR did not discuss about the nature of the amount and its taxability since the appellant had already paid the tax on mobilisation advance in GST Regime. Thus, this decision has only a limited applicability on the issue whether mobilisation advance is an advance for the purpose of taxability.

Case-2-Siemens Ltd.-[2019] 108 taxmann.com 460 (AAR-WEST BENGAL)

AAR West Bengal discussed about the nature of Mobilisation Advance as given below-

3.4 The Applicant has received interest-free 'mobilisation advance' against bank guarantee. The primary purpose of such advances is to extend financial assistance within the terms of the contract to enable the contractor to mobilise resources for a smooth take-off of the project. Such advances are invariably ring-fenced with securities like bank guarantees to prevent misuse and misappropriation. The advance shall be recovered as adjustment towards payment due for the tax invoices that the Applicant shall issue after achieving successive contract milestones. In case of delay in recovery for the slow progress of work, the contract provides KMRCL with the option to charge penal interest. If the advance is misused or diverted, KMRCL, if required, can recover the unadjusted advance with penal interest by means of invoking the bank guarantee.

AAR West BENGAL then reasoned that why the decision given in Thermax Instrumentation Ltd. (supra) and GB Engineering Enterprises (P.) Ltd. (supra) are not applicable in GST Regime.

3.5 In the pre-GST regime, the Contract was divisible for the purpose of taxation as a contract for the sale of goods and a service contract. It appears from the invoices raised in the pre-GST period that some amount of the mobilisation advance was adjusted towards payment of the RA bills raised on the milestones reached. The relevant tax invoices clearly show that the Applicant treated the entire amount as the sale of goods in the course of import in terms of section 5(2) of the Central Sales Tax Act,

1956. As no tax is leviable on the advance payment under either the West Bengal Value Added Tax Act, 2003 or the Central Sales Tax Act, 1956, the unadjusted portion of the advance as on 01-07-2019 has not suffered tax under the pre-GST regime under either of the above Acts.

3.6 The Finance Act, 1994 allowed the contractor to pay service tax on that portion of the works contract, which was attributable to the actual provisioning of service, arrived at applying Rule 2A(i) of the Service Tax (Determination of Value) Rules, 2006. Under this method, the value of the taxable service was the residual amount that remained after deducting from the gross amount charged for the works contract the actual value of the property in goods transferred in the course of executing the contract. The value of the taxable service was, therefore, not ascertainable before the contractor raised the invoice. ***As the value of the taxable service was not ascertainable before the invoice was raised, no payment received in advance could be included in the gross amount charged for such taxable service except the portion adjusted in the service bills. In Thermax Instrumentation Ltd. (supra) and GB Engineering Enterprises (P.) Ltd. (supra), the Tribunal has followed this principle.***

AAR West Bengal then reasoned that the Mobilisation advance is taxable in GST Regime as follows:

3.8 After the GST comes into force, the works contract is no longer divisible into a contract for the supply of goods and a service contract. It is a service contract and the entire unadjusted mobilisation advance as on 01-07-2017, according to the Contract, applies towards payment of consideration for the works contract service. ***As discussed in para 3.3 above, 'consideration' includes any payment for the inducement of a supply. Mobilisation advance is meant specifically for inducing the contractor to spend for provisioning the works contract service. The contract provides a mechanism in the form of a bank guarantee that ensures that the advance is not diverted or misappropriated. Its application as payment for inducing the supply is, therefore, direct and unambiguous. It is, therefore, 'consideration,' whether or not in the form of a deposit, for the supply of the works contract service. The Contract makes it amply clear that the entire amount is applied as consideration***

for provisioning works contract service.

3.9 The Applicant's reference to the decisions of the Tribunal in Thermax Instrumentation Ltd. (supra) and GB Engineering Enterprises (P.) Ltd. (supra) is misplaced in this context. The relevance of these decisions in the legal framework of the Finance Act, 1994 is discussed in para 3.6 and need not be repeated. They are not relevant under the GST regime, as the valuation of works contract no longer requires a rule separate from other services. The Contract, therefore, is to be valued as provided under section 15(1) of the GST Act, which does not restrict in any way the scope of time of supply, as provided under section 13(2) of the GST Act. Moreover, 'consideration' under the GST Act has a wider scope and includes deposits if applied as consideration. In that context, whether the mobilisation advance is earnest money or not is of little relevance.

Emphasis Supplied

In the given case the AAR West Bengal discussed about the nature of the mobilisation advance received and held that since mobilisation advance is specifically related to inducement to the contractor and the security given is only for the purpose of ensuring that the advance is not misappropriated, therefore mobilisation advance is advance and is consideration for the work being executed. However, it seems that the AAR West Bengal did not consider that amount received by the applicant came with an obligation of repayment. The advance which comes with an obligation of repayment is not an advance but in the nature of loan. Linkage of the mobilisation advance is only as a pledge towards the amount to be recovered and it is completely altogether separate transaction from the work being executed.

The above judgement of AAR West Bengal has been upheld by AAAR West Bengal by observing that in the instant matter the only applicable law is the GST Act, 2017. Accordingly, the time of supply of services is to be guided by section 13(2) of the GST Act. Hence, the remaining unadjusted amount of Rs.13.80.74,549/- as on 01.07.2017 has to be construed as if it was credited into the account of the appellant on the date of 01.07.2017 only, which will attract GST on such amount on that date itself. Hence, we find no force in the argument of the appellant that section 13(2) of the GST Act, 2017 will not be applicable in the instant case.

c) Relevant Decision in Income Tax about the nature of advance received i.e. whether it an advance or a loan

Although the taxable event under Income Tax is Income and taxable event in GST is supply but still decisions under the Income Tax are relevant limited to the context it requires tax to be deducted at the time of payment or credit whichever is earlier. Therefore, if the amount is in the nature of advance relating to the contract, then Income Tax is required to be deducted and if it is not so, then TDS is not required to be deducted.

Case-1-Income Tax Appellate Tribunal - Delhi Bikramjit Ahluwalia, New Delhi vs Jcit, New Delhi on 11 May, 2017

6. We have heard the rival submissions and have also gone through the relevant records. We agree with the contentions of the ld. AR that the assessee's case is covered in favour of the assessee by the order of the ITAT, Visakhapatnam in the case of ACIT vs Peddu Srinivasa Rao (supra). ITAT Visakhapatnam Bench has discussed the issues at length in paragraphs 3, 4, 6, 8 and 10 of the impugned order. The relevant portions of these paragraphs are being reproduced for a ready reference:-

*"3. .....**this mobilization advance is in the nature of loan, on which interest @8% is chargeable as per the terms of sub-contract agreement. The mobilization advance is a capital receipt being in the nature of a loan and therefore, there was no legal obligation to deduct tax at source.** However, M/s Gammon India Limited deducted tax at source in respect of such mobilization advance also.....*

Emphasis Supplied

In the given case, the Tribunal clearly held that TDS was not required to be deducted since the amount was in the nature of Loan. Therefore, the nature of the amount being received has been held to be loan rather than advance in Income Tax as well.

Case-2- ACIT Vs. M/s. Patel Engineering Ltd. (ITA No. 6605/Mum/ 2013 vide order dated 18.11.2015).

32. We have considered rival contentions and found that in terms of the contract agreement, the assessee receives advances/loans on which the

payer deducts tax at source. ***Such loans and advances can broadly be classified as (i) Site Mobilisation loan granted to enable the assessee to mobilise the work site i.e. create access roads, mobilise men, equipments, establish and set up site office, etc., (ii) Machinery Mobilisation loan granted to enable the assessee to purchase machineries and equipments needed to carry out the subsequent work on the site and (iii) Advance against work and material given to the assessee to help it in procuring material and against the work in progress on the site. Whereas in the first two cases, it is a capital receipt in the nature of loan not connected to any work carried out by the contractor, the third one is an advance in the revenue field.***

Emphasis Supplied

It can be clearly observed form the above that the ITAT in the above case clearly held that mobilisation advance is in the nature of loan rather than advance.

Case-3- Transtonnelstroy Afcons Joint ... vs Asst Cit Cir 20(3), Mumbai on 16 May, 2019

As per terms of various contract agreements under which Site Mobilisation Loan and the Machinery Mobilisation Loan I advances, mostly on interest ranging from @ 12% to 18% pa., have been granted against bank guarantee, In the balance sheet, such contractee advance mobilisation loan is reflected as loan funds under the head Contractee advances as a liability. Such loan can never be the income of the assessee, neither in present or in future; deduction of such loan advance from running bills is only a practical and convenient way to recover the loan. Such mobilisation loan being a capital receipt, there was no legal obligation on the part of the contractee to deduct tax at source u/s 1940

Emphasis Supplied

This case again spelts out very clearly that mobilisation advance is a capital receipt in the nature of loan and not an advance and further deduction of such loan advance from running bills is only a practical and convenient way to recover the loan.

Therefore, be it Income Tax or be it GST, the nature of the amount will never

change even though the statute might change. Therefore, if an amount is held as loan in income Tax, there cannot be a scenario wherein the same amount would not be loan in GST. Treatment of an amount received as "Loan" or "advance" is a matter of common parlance and in the absence of the definition being provided in the statute, common meaning associated with the term would have to be given.

Since, under Income Tax as well, mobilisation advance has been held as "Loan", then the nature would be the same in GST as well applying the meaning associated to the term in common parlance, therefore mobilization advance shall be treated as a loan and not as a loan.

11. Can Mobilisation advance be treated as an Earnest Money/Deposit

In the matter of Thermax Instrumentation Ltd. Versus Commissioner of Central Excise, Pune-I, 2015 (12) TMI 1222 - CESTAT MUMBAI has held that the mobilisation amount is in the nature of Earnest money/ Deposit. The CESTAT Mumbai Bench in this given case held that

The advance is only an amount given as kind of earnest money and for which the appellant gives a bank guarantee to the customers of equal amount. *It is more in the nature of a deposit. As defined in Borrows, in Words & Phrases, Vol II*

"An earnest must be a tangible thing... That thing must be given at the moment at which the contract is concluded, because it is something given to bind the contract, and, therefore, it must come into existence at the making or conclusion of the contract. The thing given in that way must be given by the contracting party who gives it, as an earnest or token of goods faith, and as a guarantee that he will fulfill his contract, and subject to the terms that if, owing to his default, the contract goes off, it will be forfeited. K, on the other hand, the contract is fulfilled, an earnest may still serve a further purpose and operate by way of party payment".

In the present case the advance is like earnest money for which a Bank Guarantee is given by the appellant. It is a fact that the customer can invoke the Bank Guarantee at any time and take back the advance.Hence the appellant does not show the advance as an income, not having complete dominion over the amount and therefore the same cannot be treated as a

consideration for any service provided. *Therefore, the findings lack appreciation of the complete facts and evidences.*

Emphasis Supplied

The decision lays down the fact that the amount received by the contractor from the awarder is more like an earnest money or a deposit rather than being an advance. The person receiving the same does not have complete dominion over the amount being received. The party who has given the mobilisation advance has bank guarantee against the same and can be invoked at any time in case of non-repayment of the same as per the term and conditions of the contract.

A Look at the terms of agreement **relating to mobilisation advance** referred in case of the decision of Thermax Instrumentation is as follows-

S.No.	Thermax Instrumentation Ltd
1.	Mobilisation advance received is 10% of contact value received
2.	Mobilisation Advance is secured against bank guarantee by bank guarantee
3.	The advance is shown as current liability in the Balance Sheet.
4.	Mobilisation advance is recovered against the invoice being raised.

Deposits is to pay someone an amount of money when you make an agreement with that person to pay for or buy something, that either will be returned to you later, if the agreed arrangement is kept, or that forms part of the total payment.

In this regard, definition of consideration as provided under Section 2(31) of CGST Act, 2017 is reproduced hereinbelow-

(31) ¯" consideration" in relation to the supply of goods or services or both includes–

(a) any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government;

(b) the monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government:

Provided that a deposit given in respect of the supply of goods or services or both shall not be considered as payment made for such supply unless the supplier applies such deposit as consideration for the said supply;

The definition clearly provides that the deposit given in respect of supply of goods or services or both shall not be considered as payment made for such supply unless the supplier applies such deposit as consideration for the said supply. Therefore, applying the rationale of the decision of The CESTAT Bench of Mumbai in the case of **Thermax Instrumentation Ltd. Versus Commissioner of Central Excise, Pune-I, 2015 (12) TMI 1222 - CESTAT MUMBAI, since the mobilisation amount is in the nature of deposit, therefore it would not be considered as consideration unless it applied as consideration for the said supply.**

Since the mobilisation advance would be applied as consideration at the time of invoice being raised, therefore the said amount being received as mobilisation advance would partake the nature of payment towards the supply of goods or services or both, only at the time of application as consideration for the said supply.

Conclusion-The author in humble but firm opinion is of the view is that terms and conditions of the agreement plays a very crucial role in arriving at the nature of the amount. Mobilisation advance, though contains in its reference "advance" but subject to the terms and conditions as discussed above in the agreement executed between the parties, it is not really an advance. It has characteristics of loan with shades of earnest money but it's not an advance in any way. But as they say, don't go on the external appearance, it's all in the document.

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DIGEST OF ADVANCE RULINGS UNDER GST

S.S. Satyanarayana

1. Classification of Supply :

The applicant is a company engaged in manufacturing and processing of dry parts of plants, foliage, flower buds, grasses and branches of plant which are dried, bleached, dyed and coloured for decorative and ornamental purposes and sold as bouquets made with dried parts of plants and packed in plastic foil packaging. The applicant has approached AAR to seek clarification whether the packages sold with plastic foil packaging would be considered as *"Exempt supply" under GST as covered under HSN code 06049000.*

The applicant collects dried parts of various plants from plant growers/ vendors, clean & sort the items, dye/colour the items as per specifications and pack the items in plastic foil packaging in pieces/ bunches/bouquet. The raw materials undergo some sort of processing before packing with a simple plastic foil packaging. The packages supplied by the applicant are classifiable under Tariff Item Nos. 06039000 or 06049900, and supply of the aforesaid goods is exempted from payment of tax vide serial number 34 of Notification No.2/2017-Central Tax (Rate) dated 28.06.2017, as amended.

[2023 (2) TMI 876 – AAR, West Bengal – Shopinshop Franchise P Ltd.]

2. Value of Taxable Supply :

The applicant is job worker and receive orders for manufacture of gold ornaments from a registered persons. The applicant receivessay 1000 grams of pure gold from Principal for manufacturing of gold ornaments. The applicant will be allowed a provision for wastage of 40 gms by the principal. The applicant, thereafter, would sub-contract the order to another job-worker on agreed provision of allowing wastage of 30 gms. Thus, the applicant, would stand to gain 10 gms of pure gold in addition to the making charges for manufacturing of gold ornaments.The applicant has made an application for seeking ruling whether the gain of 10 grams of pure gold would result in supply of goods or services under section 7 of the CGST Act, 2017?

The value of supply of services, i.e., making charges on which the

applicant is liable to pay tax @ 5% would be determined as per provision of section 15 of the GST Act read with rule 27 of the CGST Rules, 2017. Since the applicant retains 10 gms of pure gold on account of wastage, the value of pure gold so retained by the applicant shall form a part of value of supply of job work services.

[2023 (2) TMI 873 – AAR, West Bengal – Aabhushan Jewellers P Ltd.]

3. Exempted Supply :

The respondent, owner of the land, intended to sell the land by making small residential plots with or without completion of works related to basic necessities. On an application made by the respondent, the AAR, Karnataka has given ruling that GST is not applicable for the consideration received on sale of site with or without completion of works related to basic necessities.

Aggrieved by the Ruling,the CGST Department has filed the present appeal before Appellate AAR.

The Board's Circular No 177/09/2022 dated 3rd August, 2022 at Para 14.3,has clarified that the sale of developed land does not attract GST. Hence, Sale of land developed by the Respondent is covered within the scope of the term 'sale of land' as mentioned in entry 5 of Schedule III. Appeal filed by the Department has been rejected.

[2023 (2) TMI 929 – Appellate AAR, Karnataka – Ms. Rabia Khanum]

4. Input Tax Credit :

The Appellant, a major Indian fashion e-commerce company & owns an e-commerce portal engaged in the business of selling of fashion and lifestyle products through the portal. In order to incentivise the customers visiting the portal / e-commerce platform, proposes to run a loyalty program, by way of issuing points to the customers on the basis of purchases, effected by the customers from various sellers on the said platform.

The applicant has sought advance ruling whether the applicant would be eligible to avail the ITC, in terms of Section 16 of the CGST Act 2017, on the vouchers and subscription packages procured by the applicant from third party vendors that are made available to the eligible customers participating in the loyalty

program against the loyalty points earned / accumulated by the said customers.

The AAR, Karnataka has given ruling that the redemption of loyalty points, admittedly involves no flow of consideration from the customer. Thus redemption of loyalty points by the customer for receiving vouchers from the applicant implies that the vouchers are issued free of cost to the customer and amounts to disposal of vouchers(goods) by way of gift and squarely covered under clause (h) of Section 17(5) of the Act.

Aggrieved by the Ruling the present appeal has been filed.

The Appellant has also made detailed submissions on why the vouchers cannot be termed as 'gifts' given to the customers. The submissions has no relevance and input tax credit is not eligible on an inward supply as ***Hon'ble Karnataka High Court in the case of M/s Premier Sales Promotions Pvt Ltd.,*** held that 'vouchers' are neither goods nor services. Therefore, the ruling given by the lower Authority that the input tax credit is not available on the vouchers received by the Appellant is upheld rejecting the appeal filed by the Appellant.

[2023 (3) TMI 107 – Appellate AAR, Karnataka – Myntra Designs P Ltd.]

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'AS ALL THE RAINS FALLING FROM THE SKY REACH THE OCEAN'

Adv. P.V. SubbaRao

Adv. V.Ch.Narsireddy

As all the rains falling from the sky reach the ocean, all the GST (tax) notices culminate in '**determination of tax'**.

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

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

1. ASMT 13 – Return within 30 days
2. ITC utilisation greater than 5 times cash
3. Turnover above l crore
4. Turnover above 60 percent
5. 2A-3B ITC comparison
6. GSTR9-8D difference
7. ITC availed after due date
8. Capital goods ITC vs exempted turnover
9. GSTR-1 Vs GSTR 3B mismatch
10. GSTR 3B Vs E-way bill
11. Turnover less than TDS and TCS

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

"Where the taxpayer files the explanation in Form GST ASMT-11 not accepting the discrepancy and the proper officer also does not accept such explanation of the taxpayer or no such explanation is filed within the stipulated period, not exceeding 30 days or such further time if any granted by the proper officer, then it will be further processed under section 73 or 74 of the TNGST Act, 2017, as the case may be by creation of a new adjudication task and the scrutiny task will be closed. It may be noted that no personal hearing is contemplated in section 61 of the TNGST Act, 2017 since it is being afforded to the registered person/ taxpayer at the later stage in the proceeding under section 73 or 74 as the case may be."

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

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

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

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

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

Self-assessment:-

Section 59 says that every registered person shall self-assess the taxes payable under the GST Act and furnish a return for each tax period as specified under Section 39. Self-assessment is a system which places responsibility on the tax payer to ensure his tax return complies with all the provisions in the Act and the Rules made thereunder. Authorities assume that the tax payer completes the

return in good faith and accept the data furnished as being true and correct. The moment the return is uploaded, tax payer is taking responsibility for the claims made in the return. A tax return is a legal document and everything must be truly and completely declared. For example, at the end of GSTR-3B you would see the declaration 'I hereby solemnly affirm and declare that the information given herein above is true and correct to the best of my knowledge and belief and nothing has been concealed there from.' The purpose of scrutiny of returns is to ensure correctness of the self-assessment made. All the tax payers and tax professionals must frequently log in to the GST portal and verify issue of any communication by the authorities, because in some cases, period of response counts from the date of issue of notice, like Section 73 (8). Voluntary compliance of accepted discrepancies in the return would solve all the problems.

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

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

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

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

Hence response to form GST ASMT-10 must be prompt and to the point. All care must be taken to explain the discrepancies with reference to the facts and statutory provisions, as any unsatisfactory explanation may result in action under the above five Sections. If the discrepancies are acceptable, the same shall be informed accordingly within the time.

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

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

All the rains falling from the sky reach the ocean. Similarly scrutiny, audit, special audit and inspection would lead to determination of tax under Section 73 / 74. Section 2 (11) defines 'assessment' as follows:-

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

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

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

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

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

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

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

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

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

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

Subsequent to the issue of the said notice, if any such circumstances exist for **such periods other than those covered in the said notice,** the PO may serve a statement showing the details of amounts proposed to be demanded—sub Section (3) of Section 73.Under Rule 142 (1) (b), the PO shall serve a statement under sub-section (3) of section 73, a summary thereof electronically in **FORM**

GST DRC-02. Theservice of such statement shall be deemed to be service of notice on such person under sub-section (1), subject to the condition that the **grounds relied upon** for such tax periods other than those covered under sub-section (1) **are the same as are mentioned in the earlier notice—**sub Section (4). If the amounts proposed to be demanded for the periods other than those covered by the first notice are in relation to new or fresh grounds, then Notice under Section 73 (1) shall be issued.

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

Under sub Section (9) of Section 73, PO shall after considering the said representation, if any made by such person DETERMINE the amount of tax, interest and a penalty equivalent to 10% of tax or Rs.10,000, whichever is higher and issue an order.

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

A summary of the order issued under section 52 (TCS) or section 62 (assessment of non-filers of returns) or section 63 (assessment of unregistered persons) or section 64 (summary assessment in certain special cases) or section 73 (determination of tax….) or section 74 (determination of tax……) or section 75 (general provisions relating to determination of tax) or section 76 (tax collected but not paid to government) or section 122 (penalties) or section 123 (penalties) or section 124 (fine) or section 125 (general penalty) or section 127 (penalty) or section 129 (vehicular check) or section 130 (confiscation) shall be uploaded electronically in **FORM GST DRC-07,**

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

Section 161 provides for rectification of errors apparent on the face of record.

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

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

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

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

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

Under sub Section (11) of Section 74, where any person served with an order pays the tax along with interest and a penalty equivalent to fifty per cent.of such tax within thirty days of communication of the order, all proceedings in respect of the said notice shall be deemed to be concluded.

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

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

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

Under sub Section (10) of Section 74, the PO shall issue the order within a

period of 5 years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within five years from the date of erroneous refund.

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

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

Provision relating to grant of adjournment reads as follows:-

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

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

Deemed conclusion of determination of tax:-

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

Limitation:-

Section 73 (10) and Section 74 (10) specify that the order shall be passed within a period of three years and five years respectively from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or ITC wrongly availed or utilized relates to. Please verify for any Notification issued extending such period.

In conclusion:-

1. Case is selected for scrutiny by the Proper Officer (PO).
2. Form GST ASMT-10 is issued furnishing discrepancies by PO.
3. Person may accept and file GST ASMT-11.
4. Explanation is accepted and GST ASMT-12 is issued by PO.
5. In case explanation is not accepted, action under Section 73 / 74 commences.

6. Before service of notice, person can pay the amounts due through DRC-03 and the PO will issue DRC-04 acknowledging the same.
7. Before service of notice, PO may issue Part A of DRC-01A.
8. Person may furnish his explanation in Part B of DRC-01A if he partially accepts the proposal or doesn't accept fully.
9. PO will then issue show cause notice u/s 73 / 74. Along with the notice, summary of notice is issued in DRC-01.
10. Person can pay demanded tax along with interest through DRC-03 within 30 days of issue of notice and the notice shall be deemed to be concluded without levy of any penalty. PO will issue DRC 05 to the person.
11. For demanding further amounts on the same grounds for a different period, PO issues a summary of statement in DRC-02.
12. Person makes a representation to the said notice in DRC-06.
13. PO passes an order and uploads summary in DRC-07.
14. Summary of rectification order shall be uploaded in DRC-08.

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

CASE LAW:-

Agrometal Vendibles (P.) Ltd. V. State of Gujarat – 2022— (Gujarat High court)

Intimation cannot be given in Form DRC-01 but it should be issued in DRC-01A. Form GST DRC-01 is a summary of a show-cause notice. Form GST DRC-01A is only an intimation issued before issue of a show cause notice. The honourable Gujarat High Court quashed the intimation holding that an intimation should be issued in GST DRC-01A and not in form GST DRC-01.

Shri Tyres v. State Tax Officer - 2021 (Madras High court).

Proper Officer passed an order under section 73 of the CGST Act, 2017. The same has been questioned in a writ petition contending that the procedure prescribed for passing the impugned order had not been followed and that Form GST DRC-01 and Form GST DRC-01A have not been issued. The honorable

High Court observed that Form GST DRC-01 and Form GST DRC-01A must be issued in terms of Rule 142 of the CGST Rules, 2017. The following is the relevant extract:-

"10. I carefully considered the submissions made by either side and find that the second point endures in favour of writ petitioner and the reasons are as follows:

(a) The requirements of issue of FORM GST DRC-01 and FORM GST DRC-01A have been statutorily ingrained in the rules made under the CG&ST Act i.e., Rule 142 of the CG&ST Rules, 2017,….

12. A careful perusal of Section 73 of the CGST Act in conjunction with Rule 142 makes it clear that non adherence to Rule 142 had caused prejudice to the writ petitioner qua impugned order and therefore it is a rule which necessarily needs to be adhered to,if prejudice is to be eliminated in the case on hand. In other words, it is not a mere procedural requirement but on the facts and circumstances of this case, it becomes clear that it tantamount to trampling the rights of writ petitioner."

CBIC—FAQs as on 15.12.2018

Q 2. In what form and manner will the demand notice be issued?

Ans. Demand notices can be issued under Section 73 (cases not involving fraud/ suppression), Section 74 (cases involving fraud/suppression) & Section 76 (Tax collected but not paid to the Government. In all cases, along with the notices, a summary thereof has to be served electronically to the noticee in FORM GST DRC-01.

SOP

Through Instruction No. 02/2022-GST in CBIC-20006/4/2022-GST dated 22.3.2022, Central Board of Indirect Taxes and Customs, GST Policy Wing has provided Standard Operating Procedure (SOP) for scrutiny of returns for FY 2017-18 and 2018-19

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BEST JUDGMENT ASSESSMENT UNDER GST

Adv. M.V.J.K. Kumar

DESCREPANCIES :-

After the introduction of the GST Act on midnight of 30th June, 2017, which happens to be earlier hours of 1st July, 2017 the Prime Minister thought it fit to introduce the GST Act. The ascent was taken from the President of India and the GST Act was approved by the Parliament and was introduced.

The GST Act subsumed maximum indirect tax Laws and except the Custom Act and certain other indirect tax laws, the GST Act come into effect.

Several amendments, notifications, circulars have been seen the light of the day and several more are yet to be floated.

The GST Act like the earlier indirect tax laws has introduced best judgment assessment, apart from other modes of assessment.

The relevant provisions for best judgment assessment is Capital XII, Section 62 and Section 63.

I may refer Section 62 for the better understanding.

"(1) Notwithstanding anything to the contrary contained in section 73 or section 74, where a registered person fails to furnish the return under section 39 or section 45, even after the service of a notice under section 46, the proper officer may proceed to assess the tax liability of the said person to the best of his judgement taking into account all the relevant material which is available or which he has gathered and issue an assessment order within five years from the date specified under section n 44 for furnishing of the annual return for the financial year to which the tax not paid relates.

(2) Where the registered person furnishes a valid return within thirty days of the service of the assessment order under sub-section (1), the said assessment order shall be deemed to have been withdrawn but the liability for payment of interest under sub-section (1) of section 50 or payment of late fee under section 47 shall continue".

This section starts with a non-obstante clause to say that nothing contained in Section 73 and Section 74 shall be applicable and it also says that a registered person, who fails to furnish a return u/sec. 39 or sec. 45, even after service of a notice u/sec.46, the proper officer may proceed to assess the person, who has not filed the returns to the best judgment taking into account all the relevant material, which has been gathered or available and pass an assessment order within a period of 5years from the date specified u/sec.44 for furnishing of the annual return for the financial year to which the tax not paid relates.

Here one has to read sub-section 1 of sub-section 62 carefully and pass the assessment order. It is the duty of the tax authorities to read the sections and to understand the provisions of the Act, under which the authorities are born.

Section 39 refers to returns and Section 45 refers to the final return and Section 44 refers to annual return. There is a difference in between final return and annual return as final return refers to a registered person, whose registration has been cancelled shall furnish a return under sub-section 1 of Section 39 shall furnish a final return within 3 months of the date of cancellation or date of cancellation of order.

Section 44 refers to annual return and it says that every registered person other than an input service distributor, a person paying tax u/sec. 51 or sec. 52, a casual taxable person and a non-resident taxable person shall furnish an annual return, which may include a self-certified reconciliation statement.

Hence there is a difference between annual return and final return and in other words final return can be deemed to be the last return that would be furnished by a dealer, who does not want to continue the business.

The sub-sec. (1) of Sec. 62 categorically says that the period for passing a best judgment assessment would be 5 years from the date specified u/sec. 44 for furnishing of the annual return for the financial year to which the tax is not paid.

It is pertinent to mention that the authorities cannot assume to pass any best judgment order soon after the return is not filed or in the next month where the return is not filed. This is because of Sec.29 says that if a dealer has not filed his returns continuously for a period of 6 months then his registration can be cancelled after following the due procedure.

For the purpose of passing of the best judgment assessment the authorities has to wait till the annual return is filed, this has been said in the Act itself. Hence the passing best judgment assessment by the authorities before the annual return is

filed by relying upon the highest turnover scored in a particular month of the previous year would not be valid.

There is no provision under the GST Act, which says that the turnover of the preceding financial year can be relied upon or Section 62 specifically does not say anything in regard to choosing the best highest turnover under the provisions of financial year.

Sub-section 2 of Section 62 says that if a dealer furnishes any return within 30 days of service of assessment order, the assessment order shall be deemed to have been withdrawn, but interest has to be paid u/s.50 or payment of late fee u/sec. 47.

There is a discrepancy according to me in Section 62, as Section 62 says that any best judgment assessment can be made for the month in which no return is filed within 5 years, after filing of the annual return, but sub-sec. 2 says that the assessing authority or the proper officer, who can pass the best judgment assessment, can withdrawn the judgment assessment order passed by him if the dealer files any return within 30 days.

The whole confusion is that, once the annual return is filed then there is no scope for disclosing any turnover in a return and whether the authorities or GSTIN would be opening the portal for the dealer to file an annual return is a million dollar question. I feel that the section is not properly drafted and it needs to be redrafted for better application of the Act. Same is with reference to Section63 and it is not known how the registered person can file an annual return after cancellation of registration u/sec. 29 and no registered person would be allowed to file any return, forget about the annual return. Hence I feel that there is any amount of discrepancy and applying the Hayden theory, the section should be either read down or has to be declared as unconstitutional and arbitrary.

I hope that my article would be helpful to the taxmen and practitioners and if there are any suggestions to be made, you may kindly forward the same, as they will enable me to improvise myself and learn the subject more and authenticity would improve.

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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

Suo Moto V/s Trimurty Colonizers & Builders & Ors.

Gist of the case: Once the project is completed, certain provisions relating to pre- completion requirements shall not apply.

In the present matters, a show cause notice was issued to the respondents on 01.08.2022 under section 60 read with section 4(2)(l)(D) and section 61 read with section 11(2) and section 13 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter called 'the Act') for (i) having advertised their registered and completed projects without mentioning therein registration number of the project and website address of the Authority; (ii) not executing and registering agreements for sale before accepting more than 10% of sale consideration; and (iii) not depositing 70% of the amount received from the allottees in the separate bank account of the concerned project.

The following arguments were made by the respondents:

1. The completion certificates for the projects have been obtained and uploaded on the RERA web portal. Occupancy Certificate have also been obtained. So the respondents are no longer needed to mention the RERA registration number and website address in any subsequent advertisements.
2. Since the project is completed, the amount realized from the customers is no longer needed to be deposited in a separate bank account.
3. Since the project is completed, they can directly execute a sale deed and accept, in one go, total sale consideration amount of the unit(s) that are sold.

Contention of respondent were heard in detail.

As per Section 4(2)(i)(d), to ensure that funds collected from the allottees are utilized for completion of the registered project and are not siphoned off or diverted

to other ventures, seventy per cent of the amounts realised from the allottees shall be deposited in a separate account in bank, withdrawal from which account shall be in proportion to the percentage of completion of the project. **And as such since the project is 100% completed, the respondent can immediately withdraw the whole amount from the said separate bank account.**

As per Section 13, the Act mandates that the promoter shall enter into a written agreement for sale with the allottees, detailing out the various terms & conditions of the sale. Once a registered project is completed, most of the provisions of Section 13 and the agreement of sale are rendered irrelevant since they are made with the presumption that the project is not yet completed. And as such to execute the agreement for sale the promoters have to give false information, which cannot be the intention of the act.**Thus, the provisions of section 13 become meaningless once the registered project gets completed. When a project is completed and, besides completion certificate, occupancy certificate has also been obtained and, thereafter, if a buyer is willing to make down payment of the balance or total cost of the allotted plot, apartment or building, as the case may be, the promoter can straight away execute a conveyance deed or sale deed in favour of such buyer and, in that case, no agreement for sale may need to be executed.**

Effectively, when a project is completed and completion certificate as well as occupancy certificate have been obtained, the requirement of executing and registering an agreement for sale before accepting more than 10% of the sale consideration, automatically stands dispensed with. If, however, the buyer is not willing to or is not in position to pay the whole amount in one go and the buyer and the promoter do want to execute an agreement for sale and since, in a completed project, it is just not possible to execute the agreement in the prescribed form, an agreement can be suitably worded, executed and registered on mutually agreed terms, while ensuring that nothing contained therein is in derogation of or inconsistent with any other provisions of the Act and the Rules.

As per Section 11(2), the promoter has to, even after the project has been completed, mention the RERA Registration No. and website address of the Authority in all advertisement and marketing materials, so long as the promoter continues to advertise/market the project for selling the unsold units.As such, by omitting registration number of the project and

website address of the Authority from the advertisement issued by them on 22.07.2022, the respondents are found to have acted in violation of section 11(2) of the Act.

As such the Authority directed that the a total penalty of Rs. 10,000/- is hereby imposed under section 61 of the Act, which will be shared and borne equally by the three respondents and deposited with the Authority within 45 days from the date of issue of this order.

Suo Moto V/s Shree Krishna Associates& Ors.

Gist of Case: Registration of the project is not required in case the project is completed, Completion certificate & Occupancy certificate are obtained and the project is not yet marketed by the promoters.

In the present matters, a show cause notice was issued to the respondents on 28.07.2022 under section 59 read with section 3 of the RERA, 2016 for having advertised their real estate projects without obtaining prior registration thereof.

The main points made by them are as under:

1. That the completion certificates were obtained before any marketing or advertising was done for the said projects, and as such no violation of Section 3 of the said Act have been made.
2. That authority has been made to regulate responsibilities of completing the project and as such the project is already completed and such there remains nothing for the authority to regulate.
3. That registering a completed project would not be in tandem with Form-G as it is set of futuristic promises. Also registering a completed project would compel the promoters to provide false details.
4. That registration under RERA is valid only till completion certificate is obtained and such no registration is required once such certificate is received.
5. That banks do not provide loans if there is no registration between date of completion and date of sale. This contention is hence meaningless.
6. That Registration in RERA is valid upto the date of completion of the project which in itself means that once the project is completed no registration is required.

7. That Section 3(2)(b) of the Act exempts such projects from getting registered wherein the completion certificate has been obtained.

The provisions of Section 3 does not make it clear whether the contentions of the respondents are correct and such Section 3 is open to interpretations to decide the question whether or not a project that has been completed after 01.05.2017 but before it is advertised or marketed or any plot, apartment or building therein is booked, allotted or sold, is required to be registered under the Act.

The court interpreted that the said section 3(1) does not prohibit construction or development of the project without first getting it registered under the Act provided that approval has been obtained from the competent authority, so long as he does not make any advertisement, marketing, booking, sale or offer for sale, or invitation to purchase in respect of any plot, apartment or building in the project.**A contravention of section 3(1) would happen only if the promoter does not get the project registered and, before getting the project registered, makes any advertisement, marketing, booking, sale, offer for sale, or invitation to purchase in respect of any plot, apartment or building in the project.**

As per Section 3(1) read with Section 5(3), the projects where the promoter does not advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building therein, as the case may be, before completing the project, i.e., before obtaining completion certificate for the project, do not require to be registered under the Act.

The Authority decided to test the above findings with the application of the Heydon's Mischief Rule, for which the true intention of the enactment was sought. The intent of RERA and the mischief that it seeks to remedy have been aptly summed up by the Hon'ble Bombay High Court, in its judgment dated 06.12.2017 passed in Writ Petition No. 2737 of 2017 "Neelkamal Realtors Suburban Pvt. Ltd. and anr. versus Union of India & ors.". **As per this case law, the main purpose of the Act is to achieve completion of projects in a time bound manner, and this main purpose of the Act is automatically served, even without registration. Thus, we can say that it is not the intention of the Act that such completed projects be registered.**

Based on the above examination it has been found **that the whole Act has been so made that, neither by its expression nor by its intent, it envisages registration of a completed project where no advertisement, marketing,**

booking, sale, offer for sale or invitation to purchase is made before its completion, i.e., where no seller-buyer relationship has, directly or indirectly, developed between the promoter and the prospective buyers before the project is completed.

Hon'ble Bombay High Court has decided on 01.03.2021 in the matter of "Macrotech Developers Limited vs The State of Maharashtra and Ors."that if an ongoing project that was not completed as on 01.05.2017 but got completed within the window of three months, i.e., upto 31.07.2017, it is not required to be registered under the Act. This means that if an ongoing project got completed before its registration fell due, it is not required to be registered under the Act. Using the same logic, the new projects that get completed before their registration falls due should also not require to be registered under the Act. Hence, new projects are not required to be registered if they are completed before any advertisement, marketing, booking, allotment, sale or offer for sale, or invitation to purchase in respect of any unit therein is made by the promoter.

The following directions are provided by the Authority:

1. That no registration is required in case the project marketed before it is completed. However to fortify his claim that the promoter of such project, if he so wants, may submit the details, make the declarations and apply for an exemption certificate to the Authority on payment of a specified fee to be specified for the purpose.
2. The Authority shall operationalize an online application module for the purpose with the next 60 days, also covering other projects which do not require registration under the Act.
3. That in case marketing was done, a penalty and prosecution would be attracted under Section 3.
4. That no extension in registration is required to sell the unsold units once a project is completed.

NOTIFICATION

MAHARASTHRA REAL ESTATE REGULATORY AUTHORITY

No.MahaRERA/Secy/File No. 27/74/2023Dated: 10/01/2023

Sub: - In the matter of introduction of real estate agent training andCertification.

As Section 9 of the Act,, mandates every real estate agent to be registered with MahaRERA before facilitating the sale or purchase of or act on behalf of any person to facilitate the sale or purchase of any plot, apartment, unit or building as the case may be in a real estate project or part of it being sold by a promoter and accordingly, MahaRERA has around 38771 real estate agents registered across the State of Maharashtra.

And whereas, in the State of Maharashtra, there is need to make available an Institution for real estate agents to undertake formal training and certification course and thus, enable homebuyers allottees to get comprehensive professional advice and expertise inputs thereby assisting the home buyers / allottees to make an informed choice / decision in the real estate market.

And whereas, in order to bring about certain level of consistency in the practices of real estate agents, enhance knowledge and awareness of the regulatory and legal framework and practices, enforcement of code of conduct and with a view to ensure that real estate agents are professionally qualified to help / assist home buyers / allottees, MahaRERA proposes to introduce basic real estate agent training and certification course for real estate agents across the State of Maharashtra.

And whereas, Section 33 (3) of the Act empowers the Authority to take suitable measures for the promotion of advocacy, creating awareness and imparting training about laws relating to real estate sector and policies.

And whereas, under Section 34 of the Act, one of the function of the Authority is to register and regulate real estate projects and real estate agents registered under the Act.

And whereas, MahaRERA has over the past 2 years, in consultation with associations of real estate agents, homebuyers, promoters and All India Institute of Local Self Governance (AIILSG), have developed the basic curriculum for real estate agent training and has empaneled training providers for imparting the training as per the convenience of the real estate agents: online, physical and in hybrid form with effect from first week of February 2023.

And whereas, MahaRERA has collaborated with Institute of Banking Personnel Selection (I B PS) for undertaking online examinations so that real estate agents who clear the examinations are provided with "Certificate of Competency".

In view of the above the following directions are issued:

a) With effect from 01.05.2023, only those real estate agents who have a valid MahaRERA Real Estate Agent Certificate of Competency can apply for MahaRERA real estate agent registration / renewal of registration.

b) The mandate mentioned in Clause (a) above shall apply to the following persons:

   i. All individual real estate agents in case of individuals and authorized signatory (authorized for making application for MahaRERA real estate agent registration) in case of firms / companies I organizations (Other than Individuals).

   ii. All employees / staff / officers by whatever designation called working in firms / companies / organizations of real estate agents, who interact with homebuyers allottees for effecting transactions in real estate projects.

c) Existing registered real estate agents shall obtain MahaRERA Real Estate Agent Certificate of Competency before 01.09.2023 and upload the same at their respective web page failing which action as deemed fit shall be initiated by the Authority.

d) With effect from 01.09.2023 promoters of real estate project shall ensure that the names and addresses of the real estate agents if any to be given in compliance of Section 4 (2) (j) of the Act shall be of only such real estate agents who have MahaRERA Real Estate Agent Certificate of Competency.

e) Guidelines detailing the process for real estate agents training and certification shall be issued shortly.

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HIGH COURT OF JUDICATURE AT MADRAS

Deepam Roadways

Versus

Deputy State Tax Officer, Chennai

W.P. Nos. 476 of 2023 with 33851 of 2022 and W.M.P. Nos. 425, 428 of 2023 & 33322 of 2022, decided on 23-1-2023

GST : Orders on detention and demand of penalty were not sustainable when same was not passed within seven days from date of issuance of notice; High Court quashes order and directs release of goods and conveyance.

In favour of assessee

Represented By : Mr. R. Senniappan for the Petitioner.

Mr. M. Venkateswaran, Special Government Pleader for the Respondent.

[Order.]

The issue that arises for consideration in these writ petition is whether section 129(3) of the Central Goods and Services Tax Act, 2017 was adhered to by the respondents or not.

2. Heard Mr.R.Senniappan, learned counsel for the petitioner and Mr.M.Venkateswaran, learned Special Government Pleader appearing for the respondents.

3. The petitioner has challenged the detention order dated 31-10-2022 as well as the consequential order dated 10-11-2022 calling upon the petitioner to pay a sum of Rs. 4,16,862 towards CGST and another sum of Rs. 4,16,862/- towards SGST as penalty, totalling Rs. 8,33,724/-. Both the orders were passed as per the provisions of section 129 of the CGST Act, 2017. Section 129 of the CGST Act reads as follows:

"129. *Detention, seizure and release of goods and conveyances in transit.*-

(1) Notwithstanding anything contained in this Act, where any person transports any goods or stores any goods while they are in transit in contravention of the provisions of this Act or the rules made thereunder, all such goods and conveyance used as a means of transport for carrying the said goods and documents relating to such goods and

conveyance shall be liable to detention or seizure and after detention or seizure, shall be released,—

(a) on payment of penalty equal to two hundred per cent. of the tax payable on such goods and, in case of exempted goods, on payment of an amount equal to two per cent. of the value of goods or twenty-five thousand rupees, whichever is less, where the owner of the goods comes forward for payment of such penalty;

(b) on payment of penalty equal to fifty per cent. of the value of the goods or two hundred per cent. of the tax payable on such goods, whichever is higher, and in case of exempted goods, on payment of an amount equal to five per cent. of the value of goods or twenty- five thousand rupees, whichever is less, where the owner of the goods does not come forward for payment of such penalty;

(c) upon furnishing a security equivalent to the amount payable under clause (*a*) or clause (*b*) in such form and manner as may be prescribed:

Provided that no such goods or conveyance shall be detained or seized without serving an order of detention or seizure on the person transporting the goods.

(2) (omitted)

(3) The proper officer detaining or seizing goods or conveyance shall issue a notice within seven days of such detention or seizure, specifying the penalty payable, and thereafter, pass an order within a period of seven days from the date of service of such notice, for payment of penalty under clause (*a*) or clause (*b*) of sub-section (1).

(4) No penalty shall be determined under sub-section (3) without giving the person concerned an opportunity of being heard.

(5) On payment of amount referred in sub-section (1), all proceedings in respect of the notice specified in sub-section (3) shall be deemed to be concluded.

(6) Where the person transporting any goods or the owner of such goods fails to pay the amount of penalty under sub-section (1) within fifteen days from the date of receipt of the copy of the order passed under sub-section (3), the goods or conveyance so detained or seized shall be liable to be sold or disposed of otherwise, in such manner and within such time as may be prescribed, to recover the penalty payable under sub-section

(3) Provided that the conveyance shall be released on payment by the transporter of penalty under sub-section (3) or one lakh rupees, whichever is less:

Provided further that where the detained or seized goods are perishable or hazardous in nature or are likely to depreciate in value with passage of time, the said period of fifteen days may be reduced by the proper officer."

4. As seen from section 129(3) of the Central Goods and Services Tax Act, 2017, the proper officer after detaining the goods or conveyance shall issue a notice of such detention or seizure specifying the penalty payable and thereafter, pass an order within a period of seven days from the date of service of such notice, for payment of penalty under clause (*a*) or clause (*b*) of Sub-Section (1) of Section 129.

5. In the instant case, after detaining the petitioner's vehicle and the goods on 26-10-2022, notice was issued by the respondents on 31-10-2022 within seven days from the date of detention. However, the consequential order for payment of penalty was passed only on 10-11-2022 which is beyond the period of seven days from the date of service of notice on the petitioner. Having passed the impugned order beyond the period of seven days from the date of service of notice on the petitioner which is contrary to section 129(3) of the CGST Act, 2017, the impugned orders have to be necessarily quashed and the writ petitions will have to be allowed.

6. The very same view was taken by two other learned Single Judges of this Court in the case of *Udhayam Steels Private Limited* v. *Deputy Tax Officer (Int.) and another* dated 28-12-2022 in W.P.No.34268 of 2022 and in the case of *D.K. Enterprises* v. *The Assistant/Deputy Commissioner and another* dated 29-8-2022 in W.P.No.22646 of 2022. It is brought to the notice of this Court by the learned Special Government Pleader appearing for the respondents that no appeals have been filed against the aforesaid orders passed by two learned Single Judges of this Court and therefore, the said orders have also attained finality.

7. For the foregoing reasons, the impugned detention order dated 31-10-2022 as well as the impugned consequential order dated 10-11-2022 are hereby quashed and the writ petitions are allowed and a direction is issued to the respondents to release the detained goods and conveyances of the petitioner within a period of one week from the date of receipt of a copy of this Order. No costs. Consequently, connected miscellaneous petitions are closed.

HIGH COURT OF JHARKHAND AT RANCHI

Chitra Automobile

Versus

State of Jharkhand

W.P. (T) No. 4784 of 2022, decided on 24-1-2023

SCN issued without striking out irrelevant particulars was vague in nature; Summary of order passed within 5 days of issuing summary of SCN without granting any opportunity of hearing was not sustainable

(In favour of assessee)

REPRESENTED BY : Ms. Ravi Kumar, Akata Anand, Bhawesh Kumar, Sanjeev Kumar and Sneha Sonam Advs., for the Petitioner.

Mr. Sachin Kumar, AAG - II for the Respondent.

Aparesh Kumar Singh, A.C.J. and Mr. Deepak Roshan, J.

[Order.] -

The petitioner has prayed for following reliefs:

I. For issuance of an appropriate writ(s), order(s) or direction(s) quashing and setting aside the impugned purported Show Cause Notice dated 12-2-2022 bearing No. ZD200222000811G which is Annexure-1 here to, issued by the Respondent No. 03 in purported exercise of powers under section 73 of the Jharkhand Goods and Services Tax Act, 2017.

II. For issuance of an appropriate writ(s), order(s) or direction(s) quashing and setting aside the consequential impugned Summary of Show Cause notice in FORM GST DRC-01 dated 12-2-2022 issued by the Respondent No. 03 which is at Annexure-2 here to, in purported exercise of powers under Rule 142(1) (*a*) of the Jharkhand Goods and Services Tax Rules, 2017.

III. For issuance of an appropriate writ(s), order(s) or direction (s) quashing and setting aside the consequential impugned Summary of the order in FORM GST DRC-07 dated 17-2-2022 issued by the Respondent No. 3 which is at Annexure-3 hereto, in purported exercise of powers under Rule 142(5) of the Jharkhand Goods and Services Tax Rules, 2017.

IV. For issuance of an appropriate writ(*s*), order(*s*) or direction(*s*) to the respondents to not attach the business bank Account no. 37038649040 of the petitioner running in the State Bank of India, Deoghar Branch.

AND/OR

V. For any other appropriate writ(*s*)/order(*s*)/direction(*s*) as this Hon'ble Court may deem fit and proper for doing conscionable justice to the petitioners.

2. The brief facts of the case are that the petitioner firm is engaged in trading of Two Wheeler Bikes and its parts which are sold to the various customers. The petitioner is registered under the Central Goods and Services Tax Act, 2017 and the Jharkhand Goods and Service Tax Act, 2017 (hereinafter to be referred as the 'JGST Act') *vide* GSTIN 20AMQPK5542B1ZF with the Commissioner of Commercial Taxes, Commercial Tax Department, Project Bhawan, Dhurwa, Ranchi-834004 for supply of taxable services in the State of Jharkhand. Further, the petitioner for supply of taxable services, receives input services, inputs and capital goods for use in the course or furtherance of its business and claims input tax credit on such inward supplies in accordance with Section 16 of the JGST Act, 2017/CGST Act, 2017.

   During the period under dispute the petitioner had regularly filed its monthly returns of outward supplies in FORM GSTR-1 under section 37 of the JGST Act read the Rule 59 of the JGST Rules, monthly return of self assessment in FORM GSTR-3B under section 39 read with rule 61 (5) of the Act.

   All of a sudden, a Show Cause Notice under section 73 of the JGST Act, 2017 was issued on 12-2-2022 along with FORM GST DRC-01 of even date stating that the petitioner has violated provisions of the JGST Act, 2017 related to the Tax Period: MAR 2019 and the petitioner was asked to reply the show cause notice *vide* Reference No. ZD200222000811G. The total demand was to the tune of Rs. 30,22,586.00 including CGST, SGST and interest. Since the petitioner has not presented any reply of the show cause notice dated 12-2-2022; summary of order in FORM GST DRC-07 as per Rule 142(5) of the JGST Act, 2017 was issued on 17-2-2022.

3. Learned counsel for the petitioner submits that the show-cause notice under section 73(1) of the JGST Act, 2017 dated 12-2-2022 (Annexure-1) for the

tax period March 2019 is in a format without striking out the irrelevant particulars, is vague and does not spell out the contravention for which the petitioner is charged. It is in fact, worse than the Summary of Show-Cause Notice in FORM GST DRC-01 of the same date (Annexure-2). It is submitted that the State Tax Offiicer, Dumka has thereafter proceeded to issue Summary of the Order in FORM GST DRC-07 on 17-2-2022 (Annexure-3). The impugned proceedings, show cause notice and the Summary of the Order are in teeth of the decision rendered by this Court on this subject.

Learned counsel for the petitioner contended that the show cause notice issued is in violation of rule of law and principles of natural justice. He contended that the initiation of proceeding under section 73(1) of the JGST Act is not an empty formality or a mere pretext but integral of principles of natural justice and fair play.

He lastly submits that on the one hand, the show cause notice which was issued under section 73 (1) of JGST Act, 2017 (Annexure-1) dated 12-2-2022 was in format without striking the irrelevant particulars; on the other hand, summery of order in Form GST DRC-07 was issued just within five days of issuance of show cause notice dated 12-2-2022 *i.e.,* on 17-2-2022.

4. He further relied on the judgment passed by this Court in the case of *M/s NKAS Services Pvt. Ltd.* v. *State of Jharkhand & Ors.*, passed in W.P.(T) 2444 of 2021 and submits that the impugned show cause notice dated 12-2-2022 issued under section 73(1) of the Act (Annexure-1), summary of show cause notice of the even date issued under FORM GST DRC-01 (Annexure-2) and summary of order issued in FORM GST DRC-07 on 17-2-2022, are liable to be quashed and set aside.

5. Mr. Sachin Kumar, learned AAG-II for the respondent State relied upon the counter afiidavit and submits that the present writ petition is not maintainable in the eye of law as the petitioner has eficacious and alternative remedy available of filing the appeal against any decision or order before the Appellate Authority under section 107(1) of the GST Act. The petitioner despite having knowledge of the issuance of summary order in FORM GST DRC-07 dated 17-2-2022 has not availed the same.

Further, the prayer of the petitioner is primarily concerned with the realization of its Input Tax Credit (ITC) to the tune of Rs. 22,01,732.12/- lying in the

electronic credit ledger of the petitioner as for the Financial Year 2018-19 last date for availing ITC as per provisions under section 16(4) of Jharkhand Goods & Service Act, 2017 was 20-10-2019; however, petitioner filed his GSTR-3B returns for the tax period mentioned above after 20-10-2019, as such, ITC availed to the tune of Rs. 22,01,732.12 is in utter violation of Section 16(4) of JGST Act, 2017.

Accordingly, ASMT-10 notice under section 61 of JGST Act, 2017 and Rule 99 of JGST Rule, 2017 was issued as per the provisions of law on 26-10-2021. Since the petitioner has not given any reply to the ASMT-10; the show cause notice under section 73 of the JGST Act, 2017 was issued on 12-2-2022 stating that the petitioner has violated provisions of the JGST Act, 2017 related to the Tax Period: MAR 2019 and the petitioner was asked to reply the show cause notice along with FORM GST DRC-01 as per Rule 100(2) & 142(1)(*a*) of the JGST Act, 2017 stating the ground as "ITC AVAILED AFTER DUE DATE" of the JGST Act, 2017. Since the petitioner has not presented the reply of the show cause notice dated 12-2-2022 summery of order in FORM GST DRC-07 as per Rule 142(5) of the JGST Act, 2017 was issued on 17-2-2022.

6. He lastly submits that the petitioner is liable to pay the tax liability as issued by the Department in FORM GST DRC-07 as the same is legal and fully justified.

7. Having heard learned counsel for the parties and after going through the documents available on record, it appears that a show cause notice under section 73(1) of the Act dated 12-2-2022 (Annexure-1) was issued to the petitioner which was issued in a format without striking out the irrelevant particulars and thus, there won't be an exaggeration in treating the same as vague as it does not spell out the contraventions for which the petitioner is charged. As a matter of fact, it is worse than the summary of show cause notice issued under FORM GST DRC-01 of the even date (Annexure-2).

It further transpires that without giving any opportunity of hearing State Tax Officer was in so hurry, that he finally issued summary of order in FORM GST DRC-07 on 17-2-2022 (Annexure-3); that means just within five days from issuance of show cause.

8. Now the law is no more res integra, inasmuch as, Rule 142(1) (*a*) of the JGST Rules provides that the summary of show cause notice in Form DRC-

01 should be issued "along with" the show cause notice under section 73(1) which will spell out the contraventions in details for which the Assessee is charged. 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*) of the JGST Rules, the summary of show cause notice has to be issued electronically to keep track of the proceeding initiated against the registered person whereas a show cause notice need not necessarily be issued electronically.

This Court in the case of *M/s NKAS Services Pvt. Ltd.* v. *State of Jharkhand & Ors.*, passed in W.P.(T) No. 2444 of 2021 in which one of us (Aparesh Kumar Singh, J.) was the member, has taken note of the said position of law. For brevity, Paragraph-14, 15 & 16 of the said judgment is quoted herein below:

"14. A bare perusal of the impugned show-case notice creates a clear impression that it is a notice issued in a format without even striking out any irrelevant portions and without stating the contraventions committed by the petitioner *i.e.* whether its actuated by reason of fraud or any willful misstatement or suppression of facts in order to evade tax. Needless to say that the proceedings under section 74 have a serious connotation as they allege punitive consequences on account of fraud or any willful misstatement or suppression of facts employed by the person chargeable with tax. In absence of clear charges which the person so alleged is required to answer, the noticee is bound to be denied proper opportunity to defend itself. This would entail violation of principles of natural justice which is a well-recognized exception for invocation of writ jurisdiction despite availability of alternative remedy. In this regard, it is profitable to quote the opinion of the Apex Court in the case of *Oryx Fisheries P. Ltd.* (*supra*) at para 24 to 27 wherein the opinion of the Constitution Bench of the Apex Court in the case of Khem Chand versus Union of India (AIR 1958 SC 300) has been relied upon as well :

"24. This Court finds that there is a lot of substance in the aforesaid contention. It is well settled that a quasi-judicial authority, while acting in exercise of its statutory power must act fairly and must act with an open mind while initiating a show-cause proceeding. A show cause proceeding

is meant to give the person proceeded against a reasonable opportunity of making his objection against the proposed charges indicated in the notice.

25. Expressions like "a reasonable opportunity of making objection" or "a reasonable opportunity of defence" have come up for consideration before this Court in the context of several statutes. A Constitution Bench of this Court in Khem Chand v. Union of India, of course in the context of service jurisprudence, reiterated certain principles which are applicable in the present case also.

26. S.R. Das, C.J. speaking for the unanimous Constitution Bench in Khem Chand held that the concept of "reasonable opportunity" includes various safeguards and one of them, in the words of the learned Chief Justice, is:

"(*a*) An opportunity to deny his guilt and establish his innocence, which he can only do if he is told what the charges levelled against him are and the allegations on which such charges

are based;"

27. It is no doubt true that at the stage of show cause, the person proceeded against must be told the charges against him so that he can take his defence and prove his innocence. It is obvious that at that stage the authority issuing the charge-sheet, cannot, instead of telling him the charges, confront him with definite conclusions of his alleged guilt. If that is done, as has been done in this instant case, the entire proceeding initiated by the show-cause notice gets vitiated by unfairness and bias and the subsequent proceedings become an idle ceremony."

15. The Apex Court has held that the concept of reasonable opportunity includes various safeguards and one of them is to afford opportunity to the person to deny his guilt and establish his innocence, which he can only do if he is told what the charges leveled against him are and the allegations on which such charges are based.

16. It is also true that acts of fraud or suppression are to be specifically pleaded so that it is clear and explicit to the noticee to reply thereto effectively [See *Larsen & Toubro Ltd.* v. *CCE*, (2007) 9 SCC 617 (para 14)]. Further in the case of *CCE* v. *Brindavan Beverages (P.) Ltd.* reported in (2007) 5 SCC 388 relied upon by the petitioner, the Apex Court at para-14 of the

judgment has held that if the allegations in the show-cause notice are not specific and are on the contrary, vague, lack details and/or unintelligible *i.e.* its sufficient to hold that the noticee was not given proper opportunity to meet the allegations indicated in the show-cause notice. We do not agree with the contention of the respondent that the notice ought not to be struck down if in substance it contains the matters which a notice must contain. In order to proceed under the provisions of Section 74 of the Act, the specific ingredients enumerated thereunder have to be clearly asserted in the notice so that the noticee has an opportunity to explain and defend himself."

9. Though, in the instant case purported show cause notice has been issued but at the cost of repetition, the same was issued in a format without striking out irrelevant particulars which is not the intent of the legislature. Thus, this Court holds that the foundation of the proceeding in the instant case suffers from material irregularity and hence not sustainable being contrary to Section 73 (1) of the JGST Act. Thus, the subsequent proceedings/impugned orders issued under DRC-07 dated 17-2-2022 cannot sanctify the same and liable to be quashed and set aside. At the cost of repetition, DRC-07 has been issued within five days of issuance of DRC-01 is a clear picture of violation of principles of natural justice.

10. As we are of the considered view that the impugned show cause notice in the instant case does not fulfill the ingredients of a proper show cause notice and thus amounts to violation of principles of natural justice; the challenge is maintainable in exercise of writ jurisdiction of this Court. Accordingly, the show cause notice under section 73(1) of the Act dated 12-2-2022 (Annexure-1), summary of show cause notice in FORM GST DRC-01 of the same date (Annexure-2) and also the summary of order dated 17-2-2022 in FORM GST DRC-07 (Annexure-3), are, quashed and set aside.

It is made clear that since this Court has not gone into the merits of the case, the respondents are at liberty to initiate fresh proceeding from the stage of issuance of show cause notice under section 73 (1) of the JGST Act, 2017 in accordance with law. As a result, the instant application stands allowed. I.A. No. 11817 of 2022 is also disposed of.

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HIGH COURT OF GUJARAT AT AHMEDABAD

Smita And Sons Coal Pvt. Ltd.

Versus

State of Gujarat

R/Special Civil Application No. 10780 of 2022, decided on 1-2-2023

REPRESENTED BY : Vijay H Patel for the Petitioner.

MR. Siddharth Rami, asstt. Government pleader for the Respondent.

GST : Power on provisional attachment under Section 83 of CGST Act is serious and harsh in nature, it should not be used as a tool to harass assessee; High Court orders lifting of provisional attachment of bank account subject to conditions (*In favour of assessee)*

[Judgment per : Ms. Justice Sonia Gokani]. -

The petitioner challenges the order of provisional attachment of the Bank under section 83 of the Gujarat Goods and Services Tax Act, 2017 ('the Act' hereinafter) issued on 18-5-2022 issued in FORM No. GST DRC-22 by the respondent No. 2 attaching the Bank account of the petitioner on the ground of the violation of provisions of law.

2. Brief facts leading to the present petition are as follow:

The petitioner is a private limited company engaged in the business of trading in coal. It is also having valid registration number under the Act.

The respondent No. 2 is an officer under the provision of section 3 of the Act entrusted with the assessment and recovery of GST under various provisions of the Act.

The petitioner is regular in filing its return under the Act both annually and periodically.

During the period between 2018-19, the petitioner company had purchased Iron and Steel Waste Scrap from M/s. Arsh Enterprise, which has having valid GST registration at the time of purchase of goods. The goods worth Rs. 37,31,420/- had been purchased where the value of goods

was of Rs. 31,53,746/- and the GST was Rs. 5,67,674/-. The goods purchased from M/s. Arsh Enterprise also had been sold by the petitioner to various other purchasers and the sale proceeds were received in his Bank account. The GST registration of M/s. Arsh Enterprise had been cancelled on 31-10-2020.

On 4-1-2022 summons under section 70 of the Act was issued to the petitioner where he was called upon by the respondent No. 2 to remain present for recording of statement and production of sales and purchase registers. The summons is silent regarding specific subject matter about the inquiry. The Director of the petitioner was unable to attend on specific date, the request of adjournment was made on 11-1-2022.

A detailed letter was addressed to the respondent No. 2 as no new date was given on 11-2-2022 submitting all documents. The petitioner again served with a letter from respondent No.

2 being the letter dated 10-3-2022 calling upon the petitioner to submit details of freehold immovable property, property card, index copy, etc. The respondent failed to indicate any live link with the document sought as well as with the inquiry which the summons under section 70 of the Act was issued.

It is averred by the petitioner that respondent No. 2 had taken extreme coercive steps, whereby his entire business came to a grinding halt by attaching the Bank account without any pending proceedings. With communication on 18-5-2022, FORM GST DRC-22 was issued on the Bank under section 83 of the Act.

On 21-5-2022, request was made by the petitioner to the respondent No. 2 to release the Bank account, however, till date the Bank account is not released and hence, this petition with the following prayers:

"7…

(A) YOUR LORDSHIPS may be pleased to admit and allow this petition.

(B) YOUR LORDSHIPS may kindly be pleased to issue a writ of mandamus or an appropriate writ, orders directions and thereby be pleased to quash and *set aside* the order of provisional attachment of the petitioner's current account bearing A/C No. 01592000001920 with Kotak Mahindra Bank Limited, Maninagar Branch, Ahmedabad dated 18-5-2022 passed by the respondent No. 2;

(C) Pending hearing and final disposal of the present petition, Your Lordships may kindly be pleased to issue an appropriate writ, orders, directions and thereby be pleased to stay the operation and implementation of the orders dated 18-5-2022;

(D) Ex-parte ad interim relief in terms of para 7(C) may kindly be granted;

(E) To grant any other such relief in the nature of case may require."

3. The emphasis on the part of the petitioner is that the recourse to the powers of section 83 of the Act could be only in exception circumstances. As a last resort, the Bank account be attached and hence, the present petition.

4. On issuance of the notice, appearance has been filed and affidavit-in-reply has also been brought on the record.

According to the respondent, the petitioner had purchased the goods from M/s.Arsh Enterprise as per its returns filed for the year 2018-19 and 2019-20. Directorate General of Goods and Service Tax Intelligence, Surat Zonal Unit, had gathered the intelligence that M/s.Arsh Enterprise having its place of business at Surat was involved in wrongfully availed and utilizing the Input Tax Credit without any actual receipt or supply of goods. Hence,the search was conducted at the office premises of M/s.Arsh Enterprise and relevant documents were seized. The panchnama was also recorded on 9-4-2019.

The show cause notice was issued for the purpose of cancellation of registration of M/s.Arsh Enterprise on 16-10-2020 on the ground that M/s.Arsh Enterprise had obtained the registration by means of fraud, willful mis-statement and by suppression of facts. The proprietor of M/s.Arsh Enterprise was required to remain personally present before the authority and he did remain present.

It is the say of the respondent that 40 business entities as per the report of intelligence had passed on Input Tax Credit amounting to Rs. 6.03 Crore (rounded off) during the period from April 2018 to June 2019 to M/s.Arsh Enterprise and most of these entities were bogus. On verification, it was noticed that M/s.Arsh Enterprise had wrongly availed and utilized the Input Tax Credit amounting to Rs. 6,03,77,363/-.

M/s.Arsh Enterprise being the supplier of goods to the petitioner and since it was found to have availed the Input Tax Credit wrongly without any actual supply of goods and the registration also has been cancelled by means of fraud and by willful misstatement. The respondent authority issued a summons under section 70(1) of the Act intimating the proprietor of petitioner firm to give a statement on 4-1-2022 and produce the sale and purchase registers along with purchase invoices from effective date of GST registration.

M/s.Arsh Enterprise did not possess any godown/warehouse to restore the goods. The proprietor of the firm remained present and gave a statement on 23-2-2022 that he was not ready to pay any amount of tax along with interest and penalty arising out of the tax activities with M/s.Arsh Enterprise.

On 10-3-2022, a communication was issued upon the proprietor of the petitioner firm to give the details regarding the freeholds property of the firm and to attach the same under section 83 of the Act in order to protect the Government Revenue. Thus, neither the Director of the company nor the company had any freehold property in India. The respondent was compelled to issue a communication to the Bank.

These are the circumstances, which have been specified for the purpose of taking recourse to the extreme step of attaching the Bank account.

5. This Court has heard the learned advocate, Mr.Vijay Patel appearing for the petitioner, who has made a serious grievance of the provisional attachment of the Bank account having been made in the moth of May 2022 without taking any legal recourse as required under the law. He has also relied heavily on the Circular No. CBEC-20/16/05/2021-GST/359 so also the provisions of the Act to urge before this Court that the FORM DRC-01A had been issued by the respondent only on 18-1-2023, there was nothing pending for the authority concerned to take recourse to the provisional attachment. He has also brought to the notice of this Court that there had been a genuine purchase from M/s.Arsh Enterprise and its GST registration was also in tacked when the purchase had been made. Relying heavily on the decision of the *Arya Metacast Pvt. Ltd.* v. *State of Gujarat, Special* Civil Application No. 2787 of 2022 he has urged this Court to quash the order/communication, whereby the provisional attachment of the Bank account is made.

6. Per contra, the learned AGP, has vehemently submitted that for protecting the revenue's interest the steps have been taken. More particularly, realizing that the dealing of the present petitioner was with M/s.Arsh Enterprise where about 40 suppliers in whose connection the verification was conducted by the senior intelligence officer. The process revealed that the supplier listed in the communication dated 23-6-2022 have passed on the Input Tax Credit amounting to Rs.6.03 Crore to M/s.Arch Enterprise. They were found to be bogus/fake firms. M/s.Arsh Enterprise since had wrongly availed and utilized the Input Tax Credit amounting to Rs. 6.03 Crore on the strength of the invoice issued from supplier, further investigation was necessary. The preliminary verification in respect of the supplier had necessiate the action on the part of the respondent authority. More particularly, when the petitioner had been called and neither the director nor the company had any immovable property at his credit. He admits that FORM DRC-01A has been issued after about six to seven months' period. The officer concerned is also conscious of the Circular No. CBEC-

20/16/05/2021-GST/359.

7. Having thus heard the learned advocates on both the sides and having also perused the material on the record, it clearly appears that there had been a cancellation of registration of M/s.Arsh Enterprise. M/s.Arsh Enterprise is found to be receiving bogus bills and invoices without actual supply of goods. It did not have the godown/warehouse to store the goods. The officer was, therefore, of the prima facei opinion that the company was involved in availing and utilizing the Input Tax Credit without there being any actual supply of goods from the supplier. The petitioner company since did not have any freehold property and there was nothing, it could have offered pursuant to the summons issued by the respondent authorities, it had chosen to provisionally attache the Bank account for protecting the interest of revenue.

8. Undoubtedly, the powers exercise under section 83 of the Act are serious and harsh in nature. This Court in Special Civil Application No. 2787 of 2022 in case of *Arya Metacast* (*supra*) had an occasion to deal with the very issue of attachment under section 83 of the Act of the Bank account. The Court also had an occasion to consider the Circular issued by the CBES to hold that sparingly the powers of section 83 of provisional attachment needs to be taken recourse of. It should not use as a tool to harass the assessee nor should it be used in any manner that it may have irresistible detrimental effect on the business of the assessee.

The summary of findings recorded by the this Court reads as under:

"8. We have carefully gone through the records as well as have also examined the documents and the judgments relied upon by the learned counsel for the writ applicants. Before we decide the aspect of the exercise of powers by the respondent authority, while passing the impugned order, it would be appropriate at this stage to look into the instructions issued by the Central Board of Indirect Taxes and Customs *vide* dated 23-2-2021.

"CBEC-20/16/05-2021-GST/359

Government of India Ministry of Finance Department of Revenue

Central Board of Indirect Taxes and Customs GST Policy Wing *****

New Delhi Dated 23 rd February, 2021 To, The Principal Chief Commissioners/

Chief Commissioners/Principal Commissioners/ Commissioners of Central Tax (All)

The Principal Director (Generals/Director Generals (All) Madam/Sir,

Subject: Guidelines for provisional attachment of property under section 83 of the CGST Act, 2017-Reg.

1. I am directed to refer to the section 83 of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as "the Act"). This section provides for provisional attachment of property for the purpose of protecting the interest of revenue during the pendency of any proceeding under section 62 or section 63 or section 64 or section 67 or section 73 or section 74 of the Act.

2. Doubts have been raised by the field formations on various issues pertaining to provisional attachment of property under the provisions of section 83 of the Act read with rule 159 of Central Goods and Services Tax Rules, 2017 (hereinafter referred to as the "CGST Rules"). Besides, in a number of cases, Hon'ble Courts have also made observations on the modalities of implementation of provisions of section 83 of the Act by the tax officers. In view of the same, the following guidelines are hereby issued with respect to the exercise of power under section 83 of the Act.

Grounds for provisional attachment of property

Section 83 of the Act is reproduced hereunder.

"83. Provisional attachment to protect revenue in certain cases

(1) Where during the pendency of any proceedings under section 62 or section 63 or section 64 or section 67 or section 73 or section 74, the Commissioner is of the opinion that for the purpose of protecting the interest of the Government revenue, it is necessary so to do, he may, by order in writing attach provisionally any property, including bank account, belonging to the taxable person in such manner as may be prescribed.

(2) Every such provisional attachment shall cease to have effect after the expiry of a period of one year from the date of the order made under sub-section (1).

Perusal of the above provision of the law suggests that the followings grounds must exist for resorting to provisional attachment of property under the provisions of section 83 of the Act.

(i) There must be pendency of a proceeding against a taxable person under the sections mentioned in section 83 of the Act;

(ii) The Commissioner must have formed the opinion that provisional attachment of the property belonging to the taxable person is

necessary for the purpose of protecting the interest of the Government revenue. 3.1.3 For forming an opinion under section 83, it is important that Commissioner must exercise due diligence and duly consider as well as carefully examine all the facts of the case, including the nature of offence, amount of revenue involved, established nature of business and extent of investment in capital assets and reasons to believe that the taxable person, against whom the proceedings referred in section 83 are pending, may dispose of or remove the property, if not attached provisionally

The basis, on which, Commissioner has formed such opinion, should be duly recorded on file.

It is reiterated that the power of provisional attachment must not be exercised in a routine/mechanical manner and careful examination of all the facts of the case is important to determine whether the case(*s*) is fit for exercising power under section 83. The collective evidence. based on the proceedings/ enquiry conducted in the case, must indicate that prima- facie a case has been made out against the taxpayer, before going ahead with any provisional attachment. The remedy of attachment being, by its very nature, extraordinary, has to be resorted to with utmost circumspection and with maximum care and caution.

Procedure for provisional attachment of property

In case, the Commissioner forms an opinion to attach any property, including bank account. of the taxable person in terms of section 83, he should duly record on file the basis, on which he has formed such an opinion. He should, thereafter, pass an order in FORM GST DRC-22 with proper Document Identification Number (DIN) mentioning therein the details of property being attached. A copy of the order of attachment should be sent to the concerned Revenue Authority or Transport Authority or Bank or the relevant Authority to place encumbrance on the said movable or immovable property. The property, thus attached, shall be removed only on the written instructions from the Commissioner.

A copy of such attachment order shall be provided to the said taxable person as early as possible so that objections, if any, to the said attachment can be made by the taxable person within the time period prescribed under rule 159 of the CGST Rules. If such objection is filed by the taxable person,

Commissioner should provide an opportunity of being heard to the person filing the objection. After considering the facts presented by the person in his written objection as well as during the personal hearing, if any, the Commissioner should form a reasoned view whether the property is still required to be continued to be attached or not, and pass an order in writing to this effect. In case, the Commissioner is satisfied that the property was or is no longer liable for attachment, he may release such property by issuing an order in FORM GST DRC-23.

Even in cases where objection is not filed within the time prescribed under Rule 159(5) of CGST Rules, the Commissioner may take the grounds mentioned in the said objection/representation on record and pass a reasoned order. Where the Commissioner is satisfied that the property was or is no longer liable for attachment, he may release such property by issuing an order in FORM GST DRC-23.

Each such provisional attachment shall cease to have effect after the expiry of a period of one year from the date of the order of attachment.

If the provisionally attached property is of perishable/hazardous nature, then such property shall be released to the taxable person by issuing order in FORM GST DRC-23, after taxable person pays an amount equivalent to the market price of such property or the amount that is or may become payable by the taxable person, whichever is lower, and submits proof of payment. In case the taxable person fails to pay the said amount, then the said property of perishable/hazardous nature may be disposed of and the amount recovered from such disposal of property shall be adjustable against the tax, interest, penalty, fee or any other amount payable by the taxable person. Further, the sale proceeds thus obtained must be deposited in the nearest Government Treasury or branch of any nationalised bank in fixed deposit and the receipt thereof must be retained for record, so that the same can be adjusted against the amount determined to be recoverable from the said taxable person.

Cases fit for provisional attachment of property

As mentioned above, the remedy of attachment being, by its very nature, extraordinary. needs to be resorted to with utmost circumspection and with maximum care and caution. It normally should not be invoked in cases of technical nature and should be resorted to mainly in cases where there is an evasion of tax or where wrongful input tax credit is availed or utilized or

wrongfully passed on. While the specific facts of the case need to be examined in detail before forming an opinion in the matter, the following are some of type of cases, where provisional attachment can be considered to be resorted to, subject to specific facts of the case:

Where taxable person has:

a. supplied any goods or services or both without issue of any invoice, in violation of the provisions of the Act or the rules made there under, with an intention to evade tax; or

b. issued any invoice or bill without supply of goods or services or both in violation of the provisions of the Act, or the rules made there under; or

c. availed input tax credit using the invoice or bill referred to in clause (*b*) or fraudulently availed input tax credit without any invoice or bill, or

d. collected any amount as tax but has failed to pay the same to the Government beyond a period of three months from the date on which such payment becomes due; or

e. fraudulently obtained refund; or

f. passed on input tax credit fraudulently to the recipients but has not paid the commensurate tax,

The above list is illustrative only and not exhaustive. The Commissioner, may examine the specific facts of the case and take a reasoned view in the matter.

Types of property that can be attached

It should be ensured that the value of property attached provisionally is not excessive. The provisional attachment of property shall be to the extent it is required to protect the

interest of revenue, that is to say, the value of attached property should be as near as possible to the estimated amount of pending revenue against such person,

More than one property may be attached in case value of one property is not sufiicient to cover the estimated amount of pending revenue against such person. Further, different properties of the taxpayer can be attached at different points of time subject to the conditions specified in section 83 of the Act.

It may be noted that the provisional attachment can be made only of the property belonging to the taxable person, against whom the proceedings mentioned under section 83 of the Act are pending.

Movable property should normally be attached only if the immovable property, available for attachment, is not sufiicient to protect the interests of revenue.

As far as possible, it should also be ensured that such attachment does not hamper normal business activities of the taxable person. This would mean that raw materials and inputs required for production or finished goods should not normally be attached by the Department.

In cases where the movable property, including bank account, belonging to taxable person has been attached, such movable property may be released if taxable person offers, in lieu of movable property, any other immovable property which is sufficient to protect the interesa of revenue. Such immovable property should be of value not less than the tax amount in dispute. It should also be free from any subsisting charge, liens, mortgages or encumbrances, property tax fully paid up to date and not involved in any legal dispute. The taxable person must produce the original title deeds and other necessary information relating to the property, for the satisfaction of the concerned officer.

Attachment Period

Every provisional attachment shall cease to have effect after the expiry of a period of one year from the date of the provisional attachment order.

Besides, the provisional attachment order shall also cease to have effect if an order in FORM GST DRC-23 for release of such property is made by the Commissioner.

Investigation and Adjudication

As the provisional attachment of property is resorted to protect the interests of the revenue and may also affect the working capital of the taxable person, it may be endeavored that in all such cases, the investigation and adjudication are completed at the earliest, well within the period of attachment, so that the due liability of tax as well as interest, penalty etc. arising upon adjudication can be recovered from the said taxable person and the purpose of attachment is achieved.

Share in property

Where the property to be provisionally attached consists of the share or interest of the concerned taxable person in property belonging to him and another as

co-owners, the provisional attachment shall be made by order to the concerned person prohibiting him from transferring the share or interest or charging it in any way.

Property exempt from attachment

All such property as is by the Code of Civil Procedure, 1908 (5 of 1908), exempted from attachment and sale for execution of a Decree of a Civil Court shall be exempt from provisional attachment.

4. It may be noted that an amendment to section 83 has been proposed in Finance Bill 2021. However, such proposed amendment shall come into effect only from a date to be notified in future. The present guidelines, which are based on the existing provisions of section 83 of the Act, shall stand modified according to the amended provisions of section 83, once the said amendment comes into effect.

5. Difficulty, if any, in the implementation of the above guidelines may please be brought to the notice of the Board.

Sd/-

(Sanjay Mangal) Commissioner (GST)

9. On bare reading of the contents of the aforesaid instructions, we find that the respondent no. 2, inspite of repeated reminder by this Court in various decisions has once again overlooked the aforesaid guidelines issued by the Central Board of Indirect Taxes and Customs dated 23-2-2021, which otherwise in clear terms provides the guidelines to be adhered while exercising powers conferred upon the respondent authority under section 83 of the GST Act. We may guardedly put the respondent authorities a word of caution to note that such instructions were issued by the CBITC in woke of the observations made by the Courts as regards modalities of implementation of provisions of section 83 of the act by the Tax officers. This Court in the case of *Valerius Industries* v. *Union of India*, reported in [2019] 70 GSTR 147 (Guj) has held that power of provisional attachment under section 83 of the act should be exercised by the authority only if there is reasonable apprehension that the assessee may default the ultimate collection of the demand that is likely to be raised on completion of the assessment. It should therefore be exercised with extreme care and caution. The Court held that power under section 83 of the act should not be used as a tool to harass the assessee nor should it be used in as manner which may have irreversible detrimental effect on the business of the assessee. However, we may once again remind the respondent

authorities what has been instructed, more particularly, in form of clause 3.4.3 to 3.4.5, which reads as under:

"3.4.3 It may be noted that the provisional attachment can be made only of the property belonging to the taxable person, against whom the proceedings mentioned under section 83 of the Act are pending.

Movable property should normally be attached only if the immovable property, available for attachment, is not sufficient to protect the interests of revenue.

As far as possible, it should also be ensured that such attachment does not hamper normal business activities of the taxable person. This would mean that raw materials and inputs required for production or finished goods should not normally be attached by the Department."

10. Apart from the aforesaid guidelines, the above stated decision in the case of *Valerius Industries* (*supra*), has been recognized in the recent pronouncement of the Supreme Court in the case of *Radhe Krishan Industries* v. *State of H.P.* reported in (2021) 6 SCC 771 and has in detail has dealt with similar provision on statute book of Himachal Pradesh Goods and Service Tax act, 2017. The Supreme Court *set aside* the judgment passed by the Himachal Pradesh High Court and the orders of provisional attachment passed by the Joint commissioner. The Supreme Court held that, the power to order a provisional attachment of the property of the taxable person including a bank account is draconian in nature and the conditions which are prescribed by the statute for a valid exercise of the power must be strictly fulfilled The summary of findings recorded by the Supreme Court reads as under :

- The Hon'ble HP High Court has erred in dismissing the writ petition on the ground that it was not maintainable;
- The power to order a provisional attachment of the property of the taxable person including a bank account is draconian in nature and the conditions which are prescribed by the statute for a valid exercise of the power must be strictly fulfilled;
- The exercise of the power for ordering a provisional attachment must be preceded by the formation of an opinion by the Commissioner that it is necessary so to do for the purpose of protecting the interest of the government revenue. Before ordering a provisional attachment the Commissioner must form an opinion on the basis of tangible material that the assessee is likely to defeat the demand, if any, and that therefore, it is necessary so to do for the purpose of protecting the

interest of the government revenue.

- The expression "necessary so to do for protecting the government revenue" implicates that the interests of the government revenue cannot be protected without ordering a provisional attachment; The formation of an opinion by the Commissioner under section 83(1) of the HPGST Act must be based on tangible material bearing on the necessity of ordering a provisional attachment for the purpose of protecting the interest of the government revenue;
- In the facts of the present case, there was a clear nonapplication of mind by the Respondent to the provisions of Section 83 of the HPGST Act, rendering the provisional attachment illegal;
- Under the provisions of Rule 159(5), the person whose property is attached is entitled to dual procedural safeguards: a. An entitlement to submit objections on the ground that the property was or is not liable to attachment; and b. An opportunity of being heard;
- There has been a breach of the mandatory requirement of Rule 159(5) of the HPGST Rules and the Respondent was clearly misconceived in law in coming into conclusion that the Respondent had a discretion on whether or not to grant an opportunity of being heard;
- The Respondent is duty bound to deal with the objections to the attachment by passing a reasoned order which must be communicated to the taxable person whose property is attached;
- The Appellant having filed an appeal against the order under section 74(9) of the HPGST Act, the provisions of Sections 107(6) and Section 107(7) of the HPGST Act will come into operation in regard to the payment of the tax and stay on the recovery of the balance as stipulated in those provisions, pending the disposal of the appeal.

11. In the facts of the case, undisputedly, the respondent no. 2 has not only provisionally attached the stock of goods lying at the factory premise of the writ applicants, at the same time, the respondent No. 2 has also provisionally attached the demat account and current account of the writ applicants. These are the valuable assets of the writ applicants, more particularly, raw material and the finished goods are valuables which are otherwise necessary for running of the business of the applicants. Even operating the demat account and current account are essentially required for the routine business of the writ applicants.

Time and again, this Court as well as even the instructions instructions issued by the higher authority of the respondents, has directed the proper officer to ensure that their action of the provisional attachment should not hamper normal business activities of the taxable person. Even thereafter this Court *vide* judgment dated 27-1-2022 passed in Special Civil Application No. 188 of 2022 in the case of *M/s. Utkarsh Ispat LLP* v. *State of Gujarat* had an occasion to deal with the similar facts whereby the respondent authorities have provisionally attached goods, stock and receivables and also bank accounts. This Court did not approve the provisional attachment of the goods, stock and receivables, more particularly, when the entire stock and receivables have been pledged and a fioating charge has been created in favour of the Kalupur Commercial Bank Limited for the purpose of availing the cash credit facility with the provisional attachment of the goods, stock and receivables the entire business will come to a standstill.

12. For the aforesaid reasons, present writ application succeeds in part. We hereby quash and *set aside* the order of the provisional attachment dated 27-11-2021 *qua* the stock of goods, two demat accounts as well as current account of the writ applicants is concerned. So far the prayer of the writ applicants with regard to release of electronic items including Mobile Phone, laptop and other documents seized during the search proceedings are concerned, same is also directed to be released forthwith on condition that the writ applicants shall file an undertaking before the respondent no. 2 thereby declaring that the aforesaid goods electronic items including mobile phone, laptop and other seized documents shall be retained in its original form and shall not be disposed of pending the investigation, if any. At the same time, we permit the respondent authorities to secure the original data by availing necessary certificate under section 65B of the Information and Technology Act. With the aforesaid, the petition stands disposed of accordingly."

9. The chronology of events clearly indicate that the trade activities of M/s.Arsh Enterprise had come under a scanner and not only the serious doubts were raised, but also the inquiry had revealed that it was involved in bogus billing. Out of the 40 suppliers, the verification was conducted in respect of the supplier, the one who had passed on the Input Tax Credit amounting to Rs. 6.03 Crore (rounded off) to M/s.Arsh Enterprise were found to be bogus and fake firms. M/s.Arsh Enterprise also has wrongfully availing and utilizing the Input Tax Credit amounting to Rs. 6.03 Crore (rounded off).

Summons came to be issued to the present petitioner in exercise of the powers delegated under section 70(1) of the CGST Act to appear in person for giving statement and producing the sales and purchase registered and also on 10-3-2022 he was asked to produce the freehold property of the company or of the Directors. On 11-4-2022, the correspondence shows that there had been no freehold property in India or abroad of the company or the Director. The details had been furnished of the Bank. The Manager, Kotak Mahindra Bank had been communicated *vide* dated 18-5-2022 in FORM GST DRC-21 by provisionally attaching the Bank account under section 83 of the petitioner.

Section 83 would be apt to be reproduced at this stage, which provides for the provisional attachment to protect the revenue in certain cases.

> "Section-83. Provisional attachment to protect revenue in certain cases.(1) Where during the pendency of any proceedings under section 62 or section 63 or section 64 or section 67 or section 73 or section 74, the Commissioner is of the opinion that for the purpose of protecting the interest of the Government Revenue, it is necessary so to do, he may by order in writing attach provisionally any Property, including bank account, belonging to the taxable person in such manner as may be prescribed."

The powers are given to the Commissioner, when it is of the opinion that for protecting the interest of the Government Revenue, there is a need for attaching provisionally the property including the Bank account belonging to the taxable person. However, this being a very harsh powers, the recourse is to be made sporadically and consciously for which the detailed guidelines have been issued by the CBEC itself and the same has already been considered by this Court in case of *Arya Metacast Pvt. Ltd.* (*supra*). The Court having noticed that the provisional attachment

of the property of taxable person including the Bank account being a prepounion step the conditions which are prescribed under the statute for a valid exercise of the power must be strictly fulfilled.

In the given set of circumstances, it can be thus noticed that the proper officer is always required to ensure that there are action of the provisional attachment may not hamper normal business activities of the taxable person. Of course, the summons had been issued against the petitioner after getting the inquiry made against M/s.Arsh Enterprise, the procedure that had been required to be followed as per the Circular and also on issuance of FORM DRC 01A had

not been done before the provisional attachment of the Bank account had been made. There is no explanation as to why the FORM DRC-01A has been issued on 18-1-2023 could not have been done if, it was for ascertaining the preliminary details and for protecting the revenue.

Noticing, however, the gravity of the matter, when there is a direction for attachment of the Bank account, the Court needs to interfere following the decision of *Arya Metacast Pvt. Ltd.* (*supra*) and also various decisions which have been referred to in that decision itself. The guidelines issued by the Circular of CBEC on 23-2-2021 also make it amply clear that the remedy of attachment being by itself very extra ordinary needs to be resorted to with at most circumspection and maximum care and caution, which in the instant case appear to have been missing and hence, that order needs to be quashed and set aside. At the same time being aware of the inquiry which has been made against M/s.Arsh Enterprise and the purchase having been made by the present petitioner in 2018-19 from M/s.Arsh Enterprise for the goods worth Rs. 37,21,420/-.However, striking the balance in wake of the details which have come on record of M/s.Arsh Enterprise it would be apt to release the Bank account by directing the Bank to not permit the petitioner to operate so far as the tax amount of Rs. 3,95,568/- for the year 2018-19 and tax amount of Rs. 1,72,104/- for the year 2019-20.

The request on the part of the learned AGP of calculating the interest and the penalty presently is not being considered as the procedure which has been followed is not what has been prescribed under the law and the Circular both. Nothing prevents the respondent to follow the procedure in accordance with law.

10. This order will not come in the way of respondent authority in carrying out its recourse as provided under the law in relation to this inquiry.

11. The amount of tax amount of Rs. 3,95,568/- for the year 2018-19 and tax amount of Rs. 1,72,104/- for the year 2019-20 which the Bank is directed not to part with, let the said amount be parted once there is a direction subject to the crystallization of this liability of the petitioner and subject to the order of the Appellate Authority if any appeal is preferred within the time frame given under the statute. For the remaining amount of penalty and interest, the petitioner shall furnish the bond before the authority concerned.

12. With the above directions, present petition is allowed accordingly.

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COMMERCIAL NEWS

CA Ribhav Ghiya

GSTN launches e-invoice registration services with private IRPs

In another step towards further digitization of the business process flow, GSTN has launched the e-invoice registration services through multiple private IRPs at the recommendation of the GST Council. Four private companies viz. ClearTax, Cygnet, E&Y and IRIS Business Ltd were empaneled by GSTN for providing these e-invoice registration services to all GST taxpayers of the country. The details of the existing and new IPRs is available at https://einvoice.gst.gov.in/einvoice/dashboard

The taxpayers now have a choice of more than one IRP (earlier being the only single portal of NIC), which they can use to register their e-invoices. This adds significant capacity and redundancy to the single e-invoice registration portal which existed earlier.

The end-to-end flow of a digitally signed e-invoice between sellers and buyers by integration with the GST system will lead to ease of compliance for the taxpayers. It will also lead to facilitation of auto-drafting and auto-populating of invoice details in the GST returns which would lead to increased accuracy, correctness of reporting of supplies and availing of ITC by the recipients of the supply.

Advisory on opting for payment of tax under the forward charge mechanism by a Goods Transport Agency (GTA)

In compliance of Notification No. 03/2022-Central Tax (Rate), dated 13th July, 2022, an option is being provided on the portal to all the existing taxpayers providing Goods Transport Agencies Services, desirous of opting to pay tax under the forward charge mechanism to exercise their option. They can navigate Services > User Services > Opting Forward Charge Payment by GTA (Annexure V), after login, to submit their option on the portal.

Option in Annexure V FORM is required to be submitted on the portal by the

Goods Transport Agencies every year before the commencement of the Financial Year. The Option once filed cannot be withdrawn during the year and the cut-off date for filing the Annexure V FORM is 15th March of the preceding financial year.

Annexure V has been made available on the portal for GTA's to exercise their option for the Financial Year 2023-24, which would be available till 15th March, 2023.

Advisory on Geocoding of Address of Principal Place of Business

1. GSTN is pleased to inform the taxpayers that the functionality for geocoding the principal place of business address (i.e. the process of converting an address or description of a location into geographic coordinates) is now available on the GST Portal. This feature is introduced to ensure the accuracy of address details in GSTN records and streamline the address location and verification process.

2. This functionality can be accessed under the Services/Registration tab in the FO portal. The system-generated geocoded address will be displayed, and taxpayers can either accept it or update it as per their requirements of their case. In cases where the system-generated geocoded address is unavailable, a blank will be displayed, and taxpayers can directly update the geocoded address.

3. The geocoded address details will be saved separately under the "Principal Geocoded" tab on the portal. They can be viewed under **My profile>>Place of Business** tab under the heading **"Principal Geocoded"** after logging into the portal. It will not change your existing addresses.

4. The geocoding link will not be visible on the portal once the geocoding details are submitted by the taxpayer. This is a one-time activity, and once submitted, revision in the address is not allowed and the functionality will not be visible to the taxpayers who have already geocoded their address through new registration or core amendment. GSTN emphasizes once again that the address appearing on the registration certificate can be changed only through core amendment process. This geocoding functionality would not impact the previously saved address record.

5. This functionality is available for normal, composition, SEZ units, SEZ developers, ISD, and casual taxpayers who are active, cancelled, and suspended. It will gradually be opened for other types of taxpayers.

6. GSTN would like to also inform you that this functionality is currently being made available for taxpayers registered in Delhi and Haryana only, and it will gradually be opened for taxpayers from other States and UTs.

Introduction of Negative Values in Table 4 of GSTR-3B

1. The Government vide Notification No. 14/2022 – Central Tax dated 05th July, 2022 has notified few changes in Table 4 of Form GSTR-3B for enabling taxpayers to report correct information regarding ITC availed, ITC reversal and ineligible ITC in Table 4 of GSTR-3B. According to the changes, the net ITC is to be reported in Table 4(A) and ITC reversal, if any, is to be reported in Table 4(B) of GSTR-3B.

2. Currently in GSTR-3B, credit note (CN) is being auto-populated in Table 4B(2), as ITC reversal. Now in view of the said changes, the impact of credit notes are also to be accounted on net off basis in Table 4(A) of GSTR-3B only. Accordingly following changes have been made in the GST Portal from January-2023 period onwards and shall be applicable from tax period - January 2023' onwards.

a. The impact of credit note & their amendments will now be auto-populated in Table 4(A) instead of Table 4(B) of GSTR-3B . In case the value of credit notes becomes higher than sum of invoices and debit notes put together, then the net ITC would become negative and the taxpayers will be allowed to report negative values in Table-4A. Also, taxpayers can now enter negative values in Table 4D(2) of GSTR-3B.

b. Consequent updates/ modification in the advisory, messages, instructions, and help-text in form GSTR-2B, without any structural changes in form GSTR-2B summary or tables have also been done in GSTR-2B.

c. The calculation logic of *Comparison Report* has now been changed accordingly.

3. The taxpayers are advised to go through instructions/help text carefully in GSTR-2B & *System Generated* GSTR-3B pdf before filing GSTR-3B.

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ALL INDIA FEDERATION OF TAX PRACTITIONERS
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Zone Name	**Associate**	**Individual**	**Association**	**Corporate**	**Total**
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Eastern	6	2051	37	0	2094
Northern	0	1478	21	2	1501
Southern	1	2331	23	4	2359
Western	5	2911	38	3	2957
Total	**12**	**10203**	**144**	**9**	**10368**

FORTH COMING PROGRAMMES		
Date & Month	**Programme**	**Place**
18th March, 2023	National Executive Committee Meeting	Lucknow
18th March, 2023	Two Day Natfonal Tax Conference (Northern Zone)	Lucknow
25th March, 2023	One Day Tax Conference (Central Zone)	Jodhpur
31st March, 2023 & 1st & 2nd April, 2023	Residential Refresher Course at (Northern Zone)	Shimla
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	Vadodara
29th & 30th April, 2023	Two Day National Tax Conference with visit to Statute of Unity (Western Zone)	Vadodara
13th & 14th May, 2023	Two Day National Tax Conference (Central Zone)	Indore
27th & 28th May, 2023	National Tax Conference (Northern Zone)	Kanpur
28th May, 2023	One Day Conference (Central Zone)	Mount Abu

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