AIFTP

ETHICS EDUCATION EXCELLENCE

INDIRECT TAX & CORPORATE LAWS JOURNAL

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President's Message

Friends,

The Journey of AIFTP is going strong and every weekend we are having a Conference / Seminar / RRC in different parts of India. It is really remarkable that programmes has been finalized for the complete year till December, 2023 and in all the Zones the programmes are happening. Every weekend we are having some activity in different Zone and the new places are being prioritised and efforts are being made to organize programmes out in the new places. The result is that many Professionals are joining AIFTP and the knowledge is being shared to large numbers of Tax Professionals throughout India.

As already communicated in the last message the website of AIFTP i.e. aiftponline.org has been revamped and it covers details of all the programmes happening and also the photo gallery of all the past programmes held in this year. Apart from it the regular functions like new Membership, Journal subscription etc. has been made easy and it can be easily done on the website. We request all Members to visit the website regularly for the latest information and also for regular updates.

Many changes are being made in the Tax Laws and continuous updation is necessary for it. We are sending mails to all the Members with collaboration of Taxmann informing the latest amendments and judicial decisions. Some times the amendments are having far reaching effects and the same needs discussions and to benefit all the Members throughout India we are also organizing webinars.

Recent decisions of the Hon'ble Supreme Court and the Direct Tax Laws particularly on the aspect of Section 148 and the rejection of SLP in the case of SalilGulati decision arising from the favourable decision from Delhi High Court and then grant of stay on the judgement of the Allahabad High Court will have far reaching impact. In case of GST though some beneficial notification granting some relief has been issued particularly for the revocation of the cancelled Registration certificate but the demand of all the Professionals regarding a general Amnesty is still pending.

The Lucknow NTC & NEC was superb and was fantastically organized by team

Lucknow and AIFTP North Zone. Credit goes to team Lucknow lead by Mr. K.K. Dixit, Mr.Nipendra Singh, Mr. R.N. Shukla and other Members and the AIFTP North Zone team lead by Mr. O.P. Shukla and others. We also had a wonderful RRC at Shimla being coordinated and organized by Mr.SandeepGoyal and his team from Chandigarh. It was a wonderful experience to be at Shimla in RRC. May be it was first time that a programme like RRC has been organised in Himachal Pradesh. It was again the hospitality and the warmth that won the hearts of all. Credit also goes to the Chairman, AIFTP North Zone Sh. O.P. Shukla, Dr.Navin Rattan.

The RRC organized at Chitrakoot by AIFTP Central Zone was a unique event. It was attended by more then 150 delegates from all over India and it was a three day event. All delegates were picked from Prayagraj and thereafter taken to Chitrakoot. The religious atmosphere and the place was amazing. The Speakers Mr.SumitNema, Senior Advocate, Indore and Mr.Vikram Gogra, Advocate, Jaipur delivered talk on Income Tax and GST. Credit for this amazing event and for all coordination goes to Mr.Arvind Mishra, Mr.Jitendra Mishra, Mr.Vijaykant Mishra and their team. The efforts of the Central Zone Chairman Mr.SandeepAgarwal, Mr.LaxmanKashyap and all others have to be appreciated. It was a programme where all the delegates were asking for a repeat programme of this nature.

Friends, Many programmes are planned in April and onwards. We request that you visit the website for it. We are also having NTC & NEC at Kevdiya on 28th – 30th April, 2023. Request all the Members to join the programmes in large numbers. 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 mails 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 Power"

**** Knowledge is a true and strong power,**
which always remains with the person
in all good and bad time **

Friends,

Welcome to the New Financial Year 2023-24. Wish you a predictable, profitable, and sustainable new year ahead. Happy Financial New Year 2023. We hope this new financial year brings wealth, success, boundless achievements and good health with it.

With the beginning of this new financial year, 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.

As the new financial year 23-24 commences, we look back at where we stand at the end of FY 22-23, in terms of the regulatory developments. While there has been no substantial traffic in terms of regulatory developments to the Companies Act, the migration of various forms in MCA's V3 portal proved to be (and still continues to be so in some cases) a turmoil, with a standstill in the fundraising process, and other practical difficulties, even resulting in levy of additional fines.

The whole world is moving towards transparent economy so as India. Starting from 1st April 2023, the Ministry of Corporate Affairs (MCA) has made it mandatory for companies to maintain an audit trail for all their transactions. The new audit trail requirement introduced by the MCA is ahead of its time and is also an essential step towards greater transparency and accountability in business operations. However, instead of implanting the same in phased manner, direct cut-over implementation of audit trail rules will be a difficult phase for corporates. Though the audit trail is highly likely to benefit both businesses and the economy, the path ahead is not so easy. There are so many complexities that businessmen can face while maintaining or managing an audit trail.

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. New financial year also brought changes and updates in Taxation and Corporate Laws. The Articles contained in the Journal are on the recent issues and controversies and amendments. In this journal, we have tried to cover all the timelines, amendments, judgments recent changes and latest updates.

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. 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,

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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		April, 2023	20th May 2023
			May, 2023	20th June 2023
(ii)	Detail of Outward Supplies: -	GSTR-1 (QUARTERLY)	April, 2023 (IFF)	13th May 2023
	(a) QRMP		May, 2023 (IFF)	13th June 2023
	(b) Monthly Filing	GSTR-1	April, 2023	11th May 2023
			May, 2023	11th June 2023
(iii)	Payment of Tax under QRMP	PMT-06	By 25th of next month	
(iv)	Quarterly return for Composite taxable persons	CMP-08	April-June 2023	18th July 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	April, 2023	10th May 2023
			May, 2023	10th June 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	April, 2023	10th May 2023
			May, 2023	10th June 2023

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RECENT NOTIFICATIONS & CIRCULARS UNDER CGST ACT

Adv. Deepak Garg

NOTIFICATIONS – CENTRAL TAX

DATE	NOTIFICATION NO.	REMARKS
31.03.2023	09/2023-Central Tax	Extension of limitation under Section 168A of CGST Act
31.03.2023	08/2023-Central Tax	Amnesty to GSTR-10 non-filers
31.03.2023	07/2023-Central Tax	Rationalisation of late fee for GSTR-9 and Amnesty to GSTR-9 non-filers
31.03.2023	06/2023-Central Tax	Amnesty scheme for deemed withdrawal of assessment orders issued under Section 62
31.03.2023	05/2023-Central Tax	Seeks to amend Notification No. 27/2022 dated 26.12.2022
31.03.2023	04/2023-Central Tax	Amendment in CGST Rules
31.03.2023	03/2023-Central Tax	Extension of time limit for application for revocation of cancellation of registration
31.03.2023	02/2023-Central Tax	Amnesty to GSTR-4 non-filers

CIRCULAR – CENTRAL TAX

DATE	CIRCULAR NO.	REMARKS
27.03.2023	191/03/2023	Clarification regarding GST rate and classification of 'Rab' based on the recommendation of the GST Council in its 49th meeting held on 18th February 2023 –reg

NOTIFICATIONS – COMPENSATION CESS

DATE	NOTIFICATION NO.	REMARKS
31.03.2023	01/2023-Compensation Cess	Seeks to provide commencement date for Section 163 of the Finance act, 2023

NOTIFICATIONS – COMPENSATION CESS (RATE)

DATE	NOTIFICATION NO.	REMARKS
31.03.2023	02/2023-Compensation Cess (Rate)	Seeks to further amend notification No. 1/2017-Compensation Cess (Rate), dated 28th June, 2017.
28.02.2023	01/2023-Compensation Cess (Rate)	Seeks to amend notification no. 1/2017-Compensation Cess (Rate), dated 28.06.2017

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GST - JOURNEY OF 5 YEARS AND ROAD AHEAD

CA Siddeshwar Yelamali

CA Mukesh Shah

Opening statement

Perceived as one of the biggest tax reforms in the country, Goods and Service Tax (GST) was expected to bring the whole country on one platform i.e., 'One Nation-One Tax' as far as indirect taxes are concerned. They say India is a sleeping giant, and why not as it's one of the largest economies in the world with millions of Business Units and thousands of Industries. Definitely, there can't be '***one-size-fits-all***' solution available off the shelf to switch to most efficient tax regime without any roadblocks. But somewhere the journey had to commence, and we have travelled five years of this journey.

The fundamental problems existing in pre-GST Indirect Tax regime (Excise, Service Tax, Central Sales Tax and State Value Added Taxes, Octroi and Entry Tax etc.) was multiple levies without free flow of input tax credit (offset mechanism), apart from the other issues like conflicting tax rates (State-wise) and disconnected administrative structure.

With Constitutional amendments to subsume most of the indirect taxes in GST, a path was carved out for dual tax administration (Centre and State) and free flow of credit. GST was envisaged as operating with fully technology-driven tax administration. The Initial period of implementation has been a roller coaster ride for all. The Taxpayers and professionals were always under jitters and not sure with what shocks they would have to wake up in the mornings due to flood of notifications / circulars / clarifications, AAR/ AAAR rulings. Taxpayers and professionals will never forget the struggle of setting up IT and business processes to align with GST requirements.Almost all High Courts in India were flooded with writs on Transitional Credits, frequent extension of due date for filing monthly returns, endless wait on GST portal to respond etc., consumed lot of time and efforts of each stakeholdersassociated.

Today, when we look back after completing Five years, the dust seems to have settled, if not for all aspects, at least for compliance part. But for every legislation

of this kind, it will take decades to settle the disputes, when the Final (hence Infallible) Authority will have its' say.

An attempt is made toflip back the pages and figure out the lessons learnt as well as the way forward.

Scope of Supply and Levy

Dual Levy is key aspect of GST – CGST and SGST/UTGST for intra-state supplies and IGST for interstate supplies (includes cross border transaction).'Supply' is the subject matter of tax under GST Law,'Scope of Supply', defines the subject matter in an inclusive manner. Following the universal doctrine of 'only change is constant', the GST law underwent it's first round of amendments vide Amendment Acts of 2018, fine tuning as many as 30 sections in CGST Act and 7 sections in IGST Act. Not one year has passed since thenwithout amendments in the law.

If the law is amended every year, the Rules outpaced the law which underwent amendments almostevery month. As many as 70 notifications have been issued under Section 164 of the CGST Act to insert, amend or omit the rules (includes e-waybill related postponements).

With 190 circulars (including the one withdrawn), more than 15 'Removal of Difficulties Orders', Numerous Trade notices, Instructions and SOPs, it looks like, *every week* there is something happening in GST Law. Tariff and Non-tariff notifications have rained every now and then, keeping Tax Professionals and Taxpayersbusy and unsurprisingly engaged. As if the written provisions were not enough, it is almost confirm that there is an unwritten/hidden law in GST, which operates on Goods and Service Tax Network (GSTN) portal.

'No Pain, no Gain' doctrine applies here, GST has to reduce overall cost to consumer, provide transparent and reliable tax administration and reduce compliance cost to businesses over the period. At least this is what is the basic premise and 'the good intent' with which GST is implemented ("Good and Simple tax'"). Undisputedly, structural / grass root level changes and IT environment needs lots of testing, trials and errorsbefore it matures and delivers the objectives for which it is setup.

'Scope of Supply' and 'levy'

1. Schedule II to the CGST Act, 2017, which serves the purpose of basic classification of supply between 'goods' and 'service', was carved out

from Section 7(1) and re-installed as Section 7(1A). It eliminated the confusion created with regard to 'scope' and 'classification' of supplymingling with each other. Sequential reading of 'scope of supply' gives more clarity. We can seean example of what may be called *peripheral drafting*, as special attention is given to address the area where doubts are likely to arise.

2. Section 7(1)(aa) was inserted (vide FA 2021) with retrospective effect from 01-07-2017, clarifying that 'the person' and its members are deemed to be separate persons, for the purpose of 'supply of activities or transactions' inter se. Needless to say the insertion was to overcome decision of the Apex Court under the erstwhile laws in case of **CALCUTTA CLUB LIMITED**[1].

3. RCM on inward supplies of a Registered person from an unregistered persons was widely criticised and resultantly exemption notification was issued on 12-10-2017 firstly with a monetary limit, later the limit was also omitted. What will be the effect of such omission, making the supplies from unregistered person exempt from 01-07-2017 or the omission date, without a saving clause, is disputed. But section 9(4) of the CGST Act, 2017 was substituted by FA 2018, with a limited period dispute.

4. Composition scheme saw enhancement of turnover limit and eventually scheme was opened for supply of services as well.

Way-Forward - Levy

5. The matter of levy on 'online gaming' is sub judiced, the old conundrum has resurfaced – 'Game of Skill'vs. 'Game of Chance'. India is home to one of the largest ecosystem of application development, and 'online gaming' apps are only going to increase with 'Metaverse' and 'Web3'. Clarity on this issue from CBIC will only help the industry grow by keeping costs in proper perspective.

6. Cryptocurrency / Virtual Digital Assets – Anything relating to crypto is cryptic. Virtual Digital Assets (VDAs) like Crypto Assets, Non-fungible Tokens, or such other digital assetreside on the internet. There are unanswered questions regarding levy of GST on VDAs, apart from the

[1]2019 (29) G.S.T.L. 545 (S.C.)

classification issue of VDA being a 'goods' or 'service' keeping in back of our mind the landmark judgement of the **TATA CONSULTANCY SERVICES**[2], what will be taxable value, place of supply (invokese-commerce/OIDAR provisions) etc. For Authorities / Government, will it be easy to track the transactions in VDAs, with existing infrastructure.Although, many investors in Cryptocurrencies have burned their hands due to the free fall in their value, but such VDAs are here to stay. While the taxation under income tax law has made some roads, proper framework with clarity to levy tax under the GST laws is the need of hour to address the questions around such virtual assets.

7. As RCM on Ocean Freight is settled by the Honourable Apex Court, the Standard deduction towards land value in real-estate transactions is about to get tested after the verdict of Honourable Gujarat HCin the case of **MUNJAAL MANISHBHAI BHATT**reading it down saying it'sarbitrary and violative of Article 14 of Constitution of India. However, the least we expect from Government is to avoid attempt of unsettling (retrospectively) what is settled by Honourable Apex Court.

8. Taxpayer expect more rationalisation in rates and better clarity in tariff entries especially in case of services where RCM is payable – GTA 5%/ 12%, Residential property to Registered person, Services by Directors to Company. Due to such ambiguity,at times either both supplier and recipient will pay, or both will not pay the tax.

Input Tax Credit Related

One of the primary objectives of GST implementation was seamless flow of credit. It is agreeable that the flow of credit canblockedif the inward supply is not used in the course of or furtherance of business. But, once that condition is fulfilled, blocking input tax credit runs against the very purpose of GST. In GST regime the very purpose of credit is to give benefit to the assessee (**SAFARI RETREATS PRIVATE LIMITED**[3])

1. Denying input tax credit (for brevity, 'ITC') on the grounds of non-payment to the Supplier is arbitrary and illogical. On the one hand Government collectsits dues from the suppliers as per the time of supply. On the other

[2][2004] 137 STC 620 (SC)
[3]2019 (25) G.S.T.L. 341 (Ori.)

hand, denies credit to Recipient if he doesn't pay to supplier within 180 days. Parties settle their accounts as per their contractual commitments, what is at stake for Government to prescribe a statutory time limit?

2. Time limit to avail ITC of an invoice raised in a particular FY, is increased, but there is sufficient ambiguity as to whether the limit extension has nexus with return filing or availment of credit in books is sufficient. Amendment brought in to give benefit to taxpayers often brings more confusion than clarity.

3. Departmental queries on GSTR-2A/2B vs GSTR3B is an ongoingnightmare for taxpayers. The envisaged returns in Form GSTR-2 and GSTR-3 never saw the light of the day, but the sidekicks -GSTR2A /2B and GSTR-3B (introduced as stop gap arrangement)are set toplay a long inning. There are various reasons of differences between what is available on portal (2A/2B) as against what is taxpayer entitled for and claimed (3B). Rule 36(4) prescribed a tolerance limit of difference between GSTR-2A and GSTR-3B upto 20%, which is eventually reduced to NIL.

4. Section 16(2) (aa) is inserted to limit the entitlement of ITC to Recipient of supply only if the Supplier has reported invoice in his outward supplies.

5. Why is the recipient being penalised for the supplier's fault of not paying taxes. It is the duty of the tax department to be vigilant to tame the defaulting Taxpayers and the Government cannot shy away from its duties and obligations by casting such an onerous obligation on the recipient to ensure that the supplier has paid taxes to claim the ITC. 'Ease of business' which the Government propounds is just a hearsay and not being implemented in true spirit.

6. It may be a policy decision to deny ITC on certain inward supplies as prescribed in Section 17(5), but the rationalebehind such policy must betested thoroughly. The proposal of blocking ITC of CSR (Corporate Social Responsibility) Expenses is definitely a big blow to businesses and society at large. CSR cost is imposed by law, and it serves the purpose ofupliftment/ betterment of society, which to a great extent, Government is directly responsible to take care of.It will not be wrong to say that by denying benefit of ITC on CSR expenses, Government is unjustly enriching itself at the cost of businesses and society.

Way forward

7. A framework should be implemented, as envisaged in GSTR-2, whereby a Recipient can also upload details of Supplier's invoice to avail credit.At times, supplier reports a B2B transaction as B2C transaction and Recipient is denied the ITC benefit, such a situation will be eliminated if there is a two-way communication on portal rather than the current unidirectional flow of ITC.

8. The restriction of ITC linked to an invoice unpaid for more than 180 days should be revisited considering the fact that in commercial world, the payment to supplier depends on various factors / performance. Moreso, when supplier has remitted the taxes to Government, there is hardly anything at stake to restrict the ITCavailment.

9. Clarity should be provided with regard to the deadline of 30th November from the end of a Financial year to avail ITC pertaining to such financial year.

Procedural aspects

1. Registration is the first procedural compliance under GST for any taxpayer to undergo. The process is completely online and largely eliminates the requirement of visiting the Revenue Authorities.

2. E-Invoicing is no doubt a game-changer. By reducing the turnover limit for applicability of e-invoice, more and more taxpayers are brought in the online interface. Internet never forgets, and hence, there will be a complete trail of a transaction with audit logs and time stamps. Every suppliers' HSN-wise outward supply is captured, which gives sufficient data to authorities for adjudication/assessment.

3. With introduction of e-invoice, there seems to be two major parts of reporting / return filing is getting addressed. On the supplier side, the GSTR-1 gets pre-filled and for Recipient the data flows to GSTR-2A/2B, thereby eliminating the possibility of errors and capturing HSN-wise outward/inward supplies. Although the process is unidirectional, over a period, it will mature and eliminate risks of mistakes. This is the larger objective, but the initial phase of implementation for small Taxpayers is very difficult and time consuming. One more objective is to eliminate the compliance cost, but there is apprehension that small businesses may need additional resources

to comply with such requirements.

4. Refund – Electronic Cash Ledger.

As envisaged, Refund of balance lying in electronic cash ledger was supposed to be processed automatically upon filing GSTR-3, but no such facility is implemented as GSTR-3 is scrapped. The balance in electronic cash ledger is equivalent to money in "wallet", and refund should be processed without asking any question. Rule 90(1) and (2) also supports this interpretation as the application for refund is not to be forwarded to Proper Officer. However, notices are issued to taxpayers for differences in GSTR-2A and GSTR-3B when they file for refund of balance in electronic ***cash*** ledger. Surprisingly, taxpayer is asked to provide the reasons of having excess balance in electronic cash ledger.

Facility of Form PMT-09 is a welcoming step allowing transfer of funds from one major had to another in the Electronic Cash Ledger. Taxes wrongly paid in cash ledger can be moved in correct head online, without any interference from authorities.

5. Refund – Inverted Duty Structure matter is decided by the Apex Court in the matter of **VKC FOOTSTEPS INDIA PVT LTD**[4], rejecting the refund pertaining to 'services', it is made clear that there is no constitutional guarantee or statutory right to claim refund beyond what is prescribed.The rational behind denying the refund is 'policy decision', but a rational taxpayer, who is eligible to avail ITC on services and Capital Goods, will have no option to pass on suchITC. This opens the door for malpractices of raising invoice without underlying supply and encash ITC.

Way forward

6. The law provides for online issuance of letters/notices and seeks taxpayers to respond online selecting respective forms. This creates online database of each taxpayer and gives transparency and authenticity of notices. However, the online facilities are not used for some unknown reasons. Replies to SCN, Appeals etc are filed offline by taxpayers in absence of availability of online notices/orders. The earlier these offline practices are stopped, the quicker will be dispute resolution.

[4]2021 (52) G.S.T.L. 513 (S.C.)

7. Central Tax Authorities mention Document Identification Number (DIN) on the communication, but there is no such mandate to State Tax Authorities. At times communication from authorities are received from private email IDs (Gmail/Yahoo). Failure to follow procedure established by law can result in fatal consequencesfor the underlying demand.

8. Despite numerous decisions of various High Courts, authorities are still following an incorrect practice of assuming jurisdiction on e-waybill matters in the garb of classification and valuation of goods. Taxpayers suffer from delays in supply chain and blockage of funds in releasing detained shipments, even though the movement of goods is accompanied with prescribed documents. Strict action should be taken against such officers as genuine taxpayers suffer on account of negligent and mala fide orders passed by them.

Dispute Resolution

1. Advance Ruling mechanism is in the form of an agreement between the parties i.e., the applicant Taxpayer and revenue. There is on mandate to apply for a ruling. But once a ruling is given, the applicant is mandated to follow it. The AARs (Advance Ruling Authorities) across India have given divergent views on many matters,with more than 90% strike rate against taxpayers. Nevertheless, safeguarding Revenue's interest is pioneer at all times.

2. National Appellate Authority is still to be constituted, so the Advance Ruling Framework is still a work in progress, which needs to be addressed as soon as possible.

3. The delay in formation of GST Appellate Tribunal is a major roadblock in the process of dispute resolution. Justice delayed is justice denied, the taxpayers with issues ranging from confirmed tax demands at first appeal stage and rejection of refunds, are suffering irreversible loss. Even after five years of implementation and directions by various courts, the GST Appellate Tribunal is yet to become reality. This is the highest priority task for Government to address as far as GST is concerned. Various High Courts are unnecessarily stressed in absence of GST Appellate Tribunal, as aggrieved taxpayers are left with no choice but to knock the doors of High Courts.

4. Number of Clarificatory Circulars can be reduced if the tariff entries are drafted without creating ambiguity. It can be noticed that, many circulars are issued just after the rate notifications are issued. Withdrawing a

clarificatory circulardemonstrates lack of apathy for taxpayers.

5. Seeking information from taxpayers, even when the same is available on the portal, is one kind of harassment, more so when various departments of Central or State Tax office start asking. One of the main objectives of implementing IT framework for return data processing is to minimize duplication of information. But, information is asked mechanically during audit, adjudication and investigation. Efforts should be made to reduce duplication of printed information and become more environment friendly.
6. Faceless assessment is implemented under Income Tax act. How far is it possible to implement under GST Law is a question worth to evaluate.
7. IT Infrastructure captures data which can be used by various authorities. Turnover reported in GST Returns are already getting reflected on 26AS of the Income Tax portal. Likewise, the possibilities of reducing taxpayer's work should be evaluated to eliminate chances of errors and save compliance time. However, the authorities should refrain from drawing adverse inferences just based on the information received from various sources.

Some unanswered questions

1. Can e-way bill be done away with, where e-invoice is raised?
2. Resorting to cancellation of registration -is it a solution? Does it augur well with what the Government advocates that it is committed to help the SME/ MSME and generate self-employment.
3. To bring in clarity on taxation of VDA.
4. Is there a 'supply'on (i) Corporate Guarantee provided by the Parent Company for loan provided to Subsidiary Company by the financial institution and director's loan provided to the Company by the Director (SAC 997113 - Credit-granting services including stand-by commitment, guarantees & securities) (ii)Equity investment in subsidiaries by the holding company (SAC 997171 - Services of holding equity of subsidiary companies)and thereby adopting a notional value to tax at 18%.

(This article is written with a view to incite the thoughts of a reader who could have different views of interpretation. Disparity in views, would only result in better understanding of the underlying principles of law and lead to a healthy debate or discussion.)

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ANALYSIS OF REVERSAL OF INPUT TAX CREDIT ON RETENTION MONEY WITHHELD AGAINST THE INVOICE IN GST

CA Dr. Arpit Haldia

The article throws light on the applicability of provisions of reversal of Input Tax Credit on account of non-payment of consideration to the supplier within 180 days of raising of the invoice in case of retention of money by the Recipient.

Second proviso to Section 16(2) of CGST Act, 2017 is being reproduced hereinbelow-

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

Supposedly, a supplier has raised invoice of Rs 1 Lakh and the recipient while making the payment has withheld Rs 5000 on account of retention money to be paid after one year of completion of the contract. That the contention of the revenue in such cases is always that since the amount has been unpaid, therefore reversal of Input Tax Credit is required.

That it would be worthwhile to highlight that normally in such cases, there is an agreement between the supplier and the recipient regarding withholding the amount and to be paid later on.

1. **That once the condition regarding the payment of the invoice has been waived by the supplier and has been agreed by him that he will receive the same subject to conditions of the contract, such waiver shall be deemed to be performance of the condition regarding payment of the due amount for the purpose of Second Proviso to Section 16(2) of the CGST Act, 2017**

The Contract Act, has been enacted for defining the essential ingredients required to solidify private rights and obligations between the parties. Be that as it may, a

right which has been conferred on an individual, either by legislation or contractual provisions, such a right can be waived off by the individual which might result in complete abandonment of legal privilege cast by such legal or contractual provision.According to the Black's Law Dictionary, the term "Waiver" has been defined as the voluntary relinquishment or abandonment of a legal right or advantage. It is an act of surrender of benefit or privilege.

The Doctrine of Waiver finds its place under Section 63 of the Contract Act which provides for relinquishment of rights between the parties. Rights that may be relinquished include obligations as well as claims that had been earlier consented to be performed and exercised by the parties. Thus, the waiver of right under Section 63 of the Contract Act has to be a matter of mutual consensus. Once the right to waiver has been exercised then the promisor has no obligations with respect to the promise he had made to the promisee. The promise stands to be waived off in whole.

That provision of Section 63 of the Indian Contract Act, 1872 are being reproduced as under-

63. Promise may dispense with or remit performance of promisee.— Everypromisee may dispense with or remit, wholly or in part, the performance of the promisee made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.

Illustrations

(a) A promises to paint a picture for B. B afterwards forbids him to do so. A is no longer bound to perform the promise.

(b) A owes B 5,000 rupees. A pays to B, and B accepts, in satisfaction of the whole debt, 2,000 rupees paid at the time and place at which the 5,000 rupees were payable. The whole debt is discharged.

(c) A owes B 5,000 rupees. C pays to B 1,000 rupees, and B accepts them, in satisfaction of his claim on A. This payment is a discharge of the whole claim.

(d) A owes B, under. a contract, a sum of money, the amount of which has not been ascertained. A, without ascertaining the amount, gives to B, and B, in satisfaction thereof, accepts, the sum of 2,000 rupees.

This is a discharge of the whole debt, whatever may be its amount.

(e) A owes B 2,000 rupees, and is also indebted to other creditors. A makes an arrangement with his creditors, including B, to pay them a composition of eight annas in the rupee upon their respective demands. Payment to B of 1,000 rupees is a discharge of B s demand.

In the matter of ***JagadBandhuChatterjee v. Smt. Nilima Rani &Ors.*** **(1969) 3 SCC 445**, the Supreme Court, while discussing waiver of a right under Section 63 of the Contract Act, has held that such waiver of right does not even require any consideration or an agreement. The Supreme Court also made a reference to the ***WamanShriniwasKini v. RatilalBhagwandas and Co.*** **AIR 1959 SC 689** and held that waiver constitutes abandonment of a right and normally, everybody is at liberty to waive such a right.

Therefore, even for the sake of admission, if it is admitted that payment for the invoice gets due as soon as it is raised but the supplier waives of the right to receive the payment and agrees it to be treated as retention money, then it shall be treated as performance of payment obligation by the recipient.

That by virtue of provision of Section 63 of the Indian Contract Act, 1872 supplier is entitled to dispense with or remit, wholly or in part, the performance of the recipient made to him, or supplier may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit. That, once this right to waive is exercised by the supplier then recipient has no obligation left with respect to payment of the invoice from the date of invoice until as per the terms of the contract the payment become due. The promise to pay the invoice until the condition as per the agreement is satisfied stands to be waived off in whole.

That therefore, once supplier has waived off his right to receive the payment until it become due as per the terms and conditions of the contract, the condition to pay stands satisfied from the point of the recipient and therefore, once is stands satisfied, there can be no reversal on account of non-payment of consideration by the recipient within 180 days from the date of invoice.

(2. **Once the supplier himself has waived off the right to receive the payment, then asking the recipient to pay the invoice within 180 days of the invoice is asking the recipient to do the impossible. That a condition of the statute asking the taxpayer to do the impossible cannot be enforced and should either be treated as**

complied with or should stand read down to the extent the taxpayer is not devoid of complying with the condition.

That proviso to Section 16(2) of CGST requires the taxpayer to make payment within 180 days of the date of invoice assuming that the payment for an invoice falls due on the same date when it has been issued by the supplier. It is pretty evident that as per the provisions of Section 63 of the Indian Contract Act, 1872 a supplier has the right to waive off the right to receive the payment upon a subsequent date. That now in the case of retention of money by recipient, supplier waivesoff the right to receive the payment immediately and agrees the same to be deferred to a future date. Now since the recipient is no longer required to make the payment until the due date as per the terms and conditions of the contract, therefore to treat the instant case as non-payment of consideration by the recipient is asking the taxpayer to do the impossible. It would be asking the recipient to do the impossible.

Hon'ble Apex Court in the matter of Cochin State Power And Light … vs State Of Kerala on 25 February, 1965 Equivalent citations: 1965 AIR 1688, 1965 SCR (3) 187 held that

"The performance of this impossible duty must be excused in accordance with the maxim, lex non cogitate ad impossible (the law does not compel the doing of impossibilities), and sub-s(4) of s.6 must be construed as not being applicable to a case where compliance with it is impossible."

Further, Hon'ble Allahabad High Court in the matter of **The Inter College, Through Its … vs The State Of U.P. Through … on 6 January, 2006 (All HC)** held that where the law creates a duty and the party is disable to perform it without any default in him and has no remedy over there, the law will excuse him.

Hon'ble Apex Court in the matter of **State Of Rajasthan &AnrvsShamsher Singh on 1 May, 1985 Equivalent citations: 1985 AIR 1082, 1985 SCR Supl. (1) 83** held that however mandatory the provision may be, where it is impossible of compliance that would be a sufficient excuse for non-compliance, particularly when it is a question of the time factor.

Therefore, in view of the above that since the supplier himself has waived off the right to receive the payment within a period of 180 days and this waiver either shall be treated as performance of the condition by the recipient or since the recipient has been prevented from a cause beyond his control to perform the

condition, that condition be not being applicable in the instant case as its compliance is impossible.

3. **That since the right to claim payment in case of retention arises at the time of satisfaction of the condition as per the contract and not from the date of raising of the invoices, therefore the period of 180 days shall be calculated from the date when the payment of retention money becomes due and not from the date of invoice.**

That since the right to claim payment in case of retention arises at the time of satisfaction of the condition as per the contract and not from the date of raising of the invoices, therefore the period of 180 days shall be calculated from the date when the payment of retention money becomes due and not from the date of invoice.

That hon'ble Calcutta High Court in the matter of **Commissioner Of Income-Tax vs Simplex Concrete Piles (India) ... on 5 December, 1988 Equivalent citations: 1989 179 ITR 8 Cal held that**the payment of retention money is deferred and is contingent on the satisfactory completion of the work and removal of defects and payment of damages, if any. Till then, there is no admission of liability and no right to receive any part of the retention money accrues to the assessee.

The Hon'ble Court thus held that

Having regard to the facts and circumstances of the case, we are of the view that on the terms and conditions of the contract as examined by the Tribunal, ***it cannot be held that either 10 per cent. or 5 per cent. as the case may be, being the retention money, became legally due to the assessee on the completion of the work****. Only after the assessee fulfils the obligation under the contract, that the retention money would be released and the assessee would acquire the right to receive such retention money. Therefore, on the date when the bills were submitted, having regard to the nature of the contract, no enforceable liability has accrued or arisen and, accordingly, it cannot be said that the-assessee had any right to receive the entire amount on the completion of the work or on the submission of bills. The assessee had no right to claim any part of the retention money till the verification of satisfactory execution of the contract.*

Further Similar view was taken by Hon'ble Gujrat High Court in **Anup engineering**

Ltd. (247 ITR 457), wherein it held that looking to the facts of the case and in light of the law laid down by the Supreme Court, it is very clear that unless and until a debt is created in favour of the assessee, which is due by somebody, it cannot be said that the assessee has acquired a right to receive. A debt must have come into existence and the assessee must have acquired a right to receive the payment.

Hon'ble Bombay High Court in the matter of **CIT v. Associated Cables P. Ltd. (286 ITR 596)** held inter alia that the right to receive the retention money is accrued only after the obligations under the contract are fulfilled.

Therefore, in view of the above it is pretty clear that retention money does not gets due when the invoice is issued but the money gets due as per the stipulations in the terms of the agreement. The right to receive the amount is the paramount consideration for getting the amount recovered. Mere raising or submission of the invoice does not vest the supplier with right to receive the payment.Therefore, in view of the above calculation of one hundred eighty days should be done from the date when the retention money gets due rather than from the date of invoice.

4. **That since the retention money has been withheld with the consent of the supplier and amount paid by recipient to the supplier is more than the entire tax amount of the entire invoice, therefore it should be treated that recipient has complied with the provision of payment to the supplier within 180 days of the issue of the invoice.**

That a similar provision for reversal of input tax credit for non-payment of consideration to the supplier existed in Cenvat Credit Rules, 2004, The provision was similar in erstwhile law however it was restricted to services only unlike under GST it is applicable to both goods and services. Third proviso to Rule 4(7) of the CENVAT Credit Rules, 2004 provided that in case the payment of the value of input service and the service tax paid (or payable) as indicated in the invoice is not made within 3 months from the date of the invoice then the manufacturer or the service provider shall pay an amount equal to the CENVAT credit so availed.

In this regard the Tribunal in the case **of Hindustan Zinc Limited [(2014) 34 S.T.R. 440 (Tri-Del)]** has held that Rule 4(7) would be applicable only in a situation where the service provider has issued the invoice but he has not paid the service tax. But where there is no dispute that service tax has been paid by the

service provider on the full invoice value, even though he has not received full payment from the service recipient and part of the payment due to him has been withheld by the service recipient due to some reason, this rule would not be applicable.

That if the recipient pays the tax amount to the suppliers and only amount which has been retained is with the consent of the supplier as retention money is the deposit amount which also would be refunded to the suppliers as and when they meet their obligation.

Therefore, in view of the above and following the judgement as laid down in the matter of **Hindustan Zinc Limited [(2014) 34 S.T.R. 440 (Tri-Del)],** input tax credit shall be allowed to the recipient as the retention money has been withheld with the consent of the supplier and amount paid by recipient to the supplier is more than the entire tax amount of the entire invoice.

5. That the amount being retained be treated as deposit as once retained it loses the character of amount being retained for an invoice.

That for the starting, the transaction of withholding can be seen from the point of view that the amount withheld as retention money is nothing but deposit.

What would have been the scenario, supposedly without retaining the amount as retention money, if entire amount would have been paid to the supplier and he would have deposited it again by way of remittance separately. Therefore, in the opinion of the author it would not have been treated as a case of non-payment of consideration.

That it can be argued that it was open for supplier and the recipient to opt either of the method i.e. either against the invoice raised by the supplier, recipient could have made the payment for the entire invoice amount and then taken back the amount back from the supplier as retention money to be held as deposit or could have deducted the amount as retention money from the invoice.That either of the methods result in same end result and insistence on one method rather than the second is arbitrary and the nature of transaction should be looked into rather than merely looking to the nomenclature of the transaction.

That the provisions of Second Proviso to Section 16(2) nowhere provides for the mode of payment that payment should be made through cheque only. That had the intention of the legislature been so, then they would have specifically so provided

for in the statute.That the taxability or otherwise should be governed by the nature rather than nomenclature of procedural matter.

That the transactions need to be viewed as two separate transactions one wherein the entire amount towards has been paid and second wherein subsequent to treating the invoice being paid by the recipient to the supplier, part of the amount of amount is repaid back/retained by the recipient for successful completion of the contract as deposit.

That once an amount is retained, it is not for the particular invoice but as a deposit with the consent of the supplier wherein he has treated that the amount due towards the individual invoice has been paid but the deposit has been kept for the successful completion of the contract. That further when a claim is made by the supplier for payment of retention money, it is not with respect to the individual invoice but with respect to entire amount retained.

That once an amount is retained it loses it connection with invoice as it is held in the nature of deposit thereafter. Therefore, cases regarding retention money shall not at all be treated as a case of non-payment for an invoice but it is holding of an amount towards completion of the contract as deposit treating that amount towards invoice being paid with the consent of the supplier and thus provisions of second proviso to Section 16(2) of CGST Act, 2017 being treated as complied.

6. **That Second Proviso to Section 16(2) is illegal and ultra vires as it forces the buyer to reverse the credit for non-payment of consideration to supplier and government itself get unjustly enriched when both the parties have agreed to defer the payment and the supplier by exercising the right as vested under Section 63 of the Indian Contract Act, 1872 has waived off the right to receive the payment until a future date.That the provision is ultra vires per se as tax in the instant case has already been deposited with the Government and the Government is disallowing the Input Tax Credit citing superficial reasons even in cases wherein both the supplier and recipient have agreed for a payment beyond the stipulated time period of 180 days.**

That Second Proviso to Section 16(2) is illegal and ultra vires as it forces the buyer to reverse the credit for non-payment of consideration to supplier and government itself get unjustly enriched when both the parties have agreed to defer the payment

and the supplier by exercising the right as vested under Section 63 of the Indian Contract Act, 1872 has waived off the right to receive the payment until a future date.

That minutes of the 5th GST Council Meeting held on 2-3 December 2016 at New Delhi states the object of the provisions regarding reversal of input tax credit on non-payment for the reasons as under:

"XXI. Section 16(2) (Eligibility and conditions for taking input tax credit):

The minister from West Bengal raised a question in respect of the second proviso of the Section 16(2), as to why tax would be payable in a situation where a contract between two taxable persons could provide for period for making payment beyond three months and second question raised was as to why the same principle was not applied to goods. ***In response the of the same The Commissioner (GST Policy Wing), CBEC clarified that it was an anti-evasion measure*** *and that the credit reversed after three months could be again taken once the recipient of the service had made payment to the suppler and for the second question the clarification presented that goods being tangible, there would be a proof of its receipt which was not the case in services, where there was only a book entry.*

Emphasis Supplied

That the purpose behind insertion of the above said provision as insertion of anti-evasion measure. That provision was intended to be inserted initially only on services as an anti-evasion measure. That since the movement of the goods can be traced, therefore the fact that the goods have been received can be counter checked by its movement but since movement of the services cannot be traced therefore the provision for reversal of Input Tax Credit was sought to be inserted for services only to link the credit with the payment.

Thus, the business terms and conditions in our Country have always been a prerogative of the buyer and seller. The government cannot force any buyer or seller to choose a particular methodology for doing their business as long as they follow the other regulatory frameworks. In many situations, it is not always necessary that the buyer will make payment to the seller within 180 days. Rather, it also depends on nature of business, model of business, form of business and relationship between the parties. In practical scenario, there are many situations where higher credit period is necessary and allowed.

That through the insertion of the provision, government has entered itself into a position of unjust enrichment. The tax has already been deposited by the supplier to the Government and government in turn by not allowing the credit and retaining the money with itself has enriched itself unjustifiably. The provision on the face might seem that it favours the supplier but in effect, through this provision, government has entered into the field of unjust enrichment.

For Example, A has supplied services to B for Rs 100 and has charged tax of Rs 10. B does not pay to A part of the amount held as retention. B however further supplies services to C for Rs 150 and collects tax of Rs 15.

In a normal scenario, entire tax collection from the transaction would have been Rs. 15. However, since B has not paid any amount to A, therefore he would not be entitled for any credit of the tax paid and he would again deposit entire amount of Rs 15 charged from C. Therefore, government would get revenue of Rs 25 as against Rs 15 on account of non-payment value of services supplied alongwith tax by B to A and that too on account of their own disputes.

The government is indulging itself in unjust enrichment. The government has nothing to do in the matters between A and B. It's just that A has deposited the tax and B claims it irrespective of fact whether he pays any amount to A or not. For, there may be "N" number of reasons that why B would not pay to A. If the intention of the government is fair, then it should collect the tax amount from B and remit the same to A. Holding on to the amount would be unjust enrichment.

That the provision is ultra vires per se as the mere fact that the legitimate credit is being denied to the recipient under the pretext of non-payment when the tax has already been deposited and the government is enriching itself with the money of the recipient.

Conclusion-That in the humble opinion of the author, therefore applicability of reversal of Input Tax Credit on retention money is not at all correct and the fact that right to receive has been waived off by the supplier should be treated as payment of consideration and recipient cannot be asked to do the impossible. Further, once tax has been deposited by the supplier, then government has no right to indulge itself into unjust enrichment in the name of welfare of SSI.

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ANALYSIS OF GST CHANGES APPLICABLE W.E.F. APRIL 1 ST, 2023

CA Ribhav Ghiya

In the 49th GST Council meeting held on February 18, 2023, the Central Board of Indirect Taxes & Customs (CBIC) issued various notifications under Central Tax, dated March 31st 2023.

The notifications issued are as follows-:

1. GST late fee waiver for the delay in filing Form GSTR-4 from July 2017 to March 2022 for Composition dealers.

The CBIC vide Notification No. 02/2023–Central Tax dated March 31, 2023, has issued amendments in its earlier Notification No. 73/2017 – Central Tax dated December 29, 2017 **("Notification No. 73")**, which waived the late fee payable for failure to furnish the return in Form GSTR-4 by the due date, in the following manner:

Financial year	Liability in Return	Original late fees		Notified late fees	Condition
		Per Day	Max Cap		
2017 -18 2018-19 (Quarterly Return) 2019-20 2020-21 (Financial Years)	Nil	Rs.20/-	Rs.10,000/-	Nil	Furnish the said return between the period from the 1st day of April 2023 to the 30th day of June 2023.
	Other	Rs.50/-	Rs.10,000/-	Rs.500/- (250+250)	
2021-22 onwards	Nil	Rs.20/-	Rs.500/-	Nil	
	Other	Rs.50/-	Rs.2,000/-	Rs.500/- (250+250)	

2. One-time big relief for revocation of cancelled Registration.

The CBIC vide **Notification No. 03/2023 – Central Tax dated March 31, 2023,** has notified the amnesty scheme in line with recommendations of the 49th GST Council Meeting held on February 18, 2023, in the following manner:

- The registered person, whose registration has been cancelled under clause (b) or clause (c) of Section 29(2) of the CGST Act, on or before December 31, 2022, and who has failed to apply for revocation of cancellation of such registration within the time period specified in Section 30 of the CGST

Act, shall follow the following special procedure w.r.t. revocation of cancellation of such registration:

The registered person may apply for revocation of cancellation of such registration up to June 30, 2023;

- The application shall be filed only after furnishing the returns due up to the effective date of cancellation of registration and after payment of any amount due as tax, in terms of such returns, along with any amount payable towards interest, penalty and late fee;
- No further extension of the time period for filing an application for revocation of cancellation of registration shall be available in such cases.
- Further, a person whose appeal against the order of cancellation of registration or the order rejecting the application for revocation of cancellation of registration has been rejected on the ground of failure to adhere to the time limit specified in Section 30 of the CGST Act, can also avail the benefits of this Amnesty Scheme.

3. Date of Submission of Application of GST Registration.

The GST Council in its 48th meeting dated December 17, 2022, has recommended commencing a pilot trial in the state of Gujarat for biometric-based Aadhaar authentication and risk-based physical verification of applicants for registration, which would help in tackling the menace of fake and fraudulent registrations.

Now, the CBIC vide **Notification No. 04/2023-Central Tax dated March 31, 2023,** has substituted Rule 8(4A) and Rule 8(4B) of the Central Good and Services Tax Rules, 2017 ("**the CGST Rules**") w.e.f. December 26, 2022, in order to align the Rules with the recommendation of the GST Council.

Further, the CBIC vide **Notification No. 05/2023-Central Tax March 31, 2023,** has amended Notification No. 27/2022- Central Tax dated December 26, 2022 **("Notification No. 27/2022")**, in order to align the Notification with the above amendment in Rule 8(4B) of the CGST Rules.

In case of taxpayers opting for authentication by way of Adhaar Number, the date of submission of the application for GST registration will be the earlier of the following dates–:

a. Date of authentication or

b. Expiry of 15 days from the date of submission of Part B in the application.

Selection of specific applications, based on data analysis and risk parameters, for further validation checks such as biometric based Adhaar authentication, taking photos, and verification of the original copies of documents at facilitation centres shall continue to apply as earlier (currently made operational on a pilot check basis only in Gujarat)

After the success of the pilot trial in the state of Gujarat for biometric-based Aadhaar authentication and risk-based physical verification of applicants for registration, the Government will introduce the same in other states as well.

4. Amnesty scheme for withdrawal of Ex-parte assessment orders against non-return filers.

The CBIC vide Notification No. 06/2023 – Central Tax dated March 31, 2023, in order to align with the recommendations made by the GST Council, has notified that the registered persons who failed to furnish a valid return under Section 39 (GSTR 3B) and Section 45 (Final Return) of the Central Goods and Services Tax Act, 2017 ("the CGST Act"), within a period of 30 days from the service of the assessment order issued on or before February 28, 2023, under Section 62(1) of the CGST Act i.e. best judgment assessment, shall be deemed to have been withdrawn, if the such registered person furnishes the stated return on or before June 30, 2023, along with interest under Section 50(1) and late Fee under Section 47 of the CGST Act.

Further, the withdrawal of such an assessment order will be irrespective of whether or not an appeal had been filed against such an assessment order or whether the appeal, if any, filed against such an assessment order has been decided or not.

5. Amnesty scheme for late fee for non-filing of Annual Return (GSTR 9/ 9C) for the FY 2017-18 to 2021-22 and FY 2022-23 & onwards.

The CBIC vide Notification No. 07/2023 – Central Tax dated March 31, 2023, has reduced the amount of late fees for filing the return under section 44 of the CGST Act viz. Annual Return, which may include the self-certified reconciliation statement (GSTR 9 & GSTR 9C), based on the Aggregate Turnover in the respective financial year in the following manner: –

Aggregate Turnover ('AT') in respective Financial Year ('FY')	Current Late fees		Notified late fees	
	Per Day	Max Cap	Per Day	Max Cap
Up to **Rs. 5 Crs**	Rs.200/-	0.50% of AT of respective FY	**Rs.50/-**	**0.04%** of AT of respective FY
Above **Rs. 5 Crs to Rs.20 Crs**			**Rs.100/-**	
Above **Rs.20 Crs**			**Rs.200/-**	**0.50%** of AT of respective FY

For Taxpayers who have not filed annual returns for any of the periods from FY 17-18 to FY 21-22, but file the same till 30th June 2023 then the maximum late fee would be Rs.20,000/- (CGST+SGST) p.a.

Note**: –** It may be noted that there is no reduction in the late fees for delay in filing the return under section 44 of the CGST Act viz. Annual Return may include the self-certified reconciliation statement (Forms GSTR-9 & GSTR-9C) for the registered persons with aggregate turnover exceeding INR 20 crores in the relevant financial year. The current late fees will apply to such a registered person.

6. Amnesty Scheme for non-filers of Final Return GSTR 10 from July 2017 to March 2022.

The CBIC has issued a notification giving effect to recommendations made by the GST Council vide **Notification No. 8/2023- Central Tax dated March 31, 2023,** whereby there is a waiver of late fee as prescribed in section 47 of the CGST Act, which is in excess of Rs. 1,000/- (CGST – Rs. 500 + SGST- Rs. 500) for the registered persons who fail to furnish the final return in FORM GSTR-10 by the due date but furnish the said return between the period from April 01, 2023, to June 30, 2023.

Hence, this Amnesty scheme for Final Return in FORM GSTR-10 has been provided if the said return is furnished in the period starting from April 01, 2023, to June 30, 2023 with a maximum payment of late fees of Rs.1,000/- (Rs.500 CGST + 500 SGST) only.

Category of the registered person	Criteria	Scheme late fees	Revised late fees	Condition
GSTIN Cancelled	Failed to furnish GSTR-10 (Final Return) within three months from the date of cancellation of GSTIN	Rs.200/- per day (Max Limit Rs.10,000/- [CGST+SGST])	Capped at Rs. 1000/-	Furnish the said GSTR-10 along with the applicable tax and interest on or before 30 June 2023.

7. Extension of time limit for passing of orders in non-fraud cases for FY 2017 to 2020.

The CBIC vide Notification No. 09/2023–Central Tax dated March 31, 2023, has extended the time limit specified under Section 73(10) of the CGST Act for issuance of orders under Section 73(9) of the CGST Act, for recovery of tax not paid or short paid or of input tax credit wrongly availed or utilized for any reason, other than the reason of fraud or any wilful-misstatement or suppression of facts to evade tax, in respect of a tax period for FY 2017-18, 2018-19 and 2019-20.

New timelines are as follows -:

Financial Year	Earlier Last date to order	Extended date to pass an order
2017-18	30.09.2023	31.12.2023
2018-19	31.12.2023	31.03.2024
2019-20	31.03.2024	30.06.2024

Note:- The time limit to issue Show Cause Notice (SCN) for respective financial years shall also stand extended which is at least three months prior to the above due dates.

Important to note that, prior to issuance of SCN U/s 73, proceedings U/s 73(5) by way of pre-notice consultations in Form GST DRC 1A Part A under Rule 142(1A) must be initiated and reasonable time of, say, thirty (30) days must be allowed to submit reply in Form GST DRC1A Part B under rule 142 (2A).

Therefore, proceedings U/s 73 should commence no later than August 31, 2023, for 2017-18, November 30, 2023 for 2018-19 and February 29, 2024, for 2019-20.

8. Compensation cess based on Retail Sale Price and compensation cess rate for branded/unbranded tobacco products being notified.

The CBIC vide **Notification No. 01/2023-Compensation Cess and Notification No. 02/2023-Compensation Cess (Rate) both dated March 31, 2023,** has notified the provisions of Section 163 of the Finance Act, 2023 relating to the levy of compensation cess based on Retail Sale Price ("**RSP**")**.**

Section 163 has amended the Schedule of the Goods and Services Tax (Compensation to States) Act, 2017 (15 of 2017) ("**the Compensation Cess Act**") pertaining to the maximum rate at which GST Compensation Cess may be levied/ collected for items such as Pan Masala (from 135% ad valorem to 51% of the retail sale price/ unit), Tobacco and manufactured tobacco substitutes, including tobacco products (INR 4170/ 1000 sticks or 290% ad valorem or a combination thereof but not exceeding INR 4170/ 1000 sticks + 290% ad valorem or 100% of retail sale price/ unit). Further, the meaning of RSP in various scenarios has been explained through an Explanation to the said Schedule.

In continuity with the above, **Notification No. 02/2023- Compensation Cess (Rate) dated March 31, 2023,** has been issued to change the compensation cess on tobacco and pan masala from ad valorem to RSP based.

The compensation cess rate for pan masala and all unbranded/branded goods other than pan masala containing tobacco 'gutkha' and "Homogenised" or "reconstituted" tobacco, bearing a brand name, has been changed.

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AN END TO TOLERATING AN ACT ?

Narendra Singhvi
Saurabh Sharma

"What is hateful to you, do not do to your fellow; that is the whole Law: the rest is interpretation." – Hillel

Law is a science; science of interpretation. The Governments, all across the world, vary in ideologies, working style, attitude etc., but with one common trait of taxing the maximum. With this, the Governments interpret law in the cruellest of sense, to ensure maximum is taxed. As it is said, the best things in life are free, but sooner or later, the Government will find a way to tax them.

This article concerns one such interpretation adopted by the department to levy Goods and Services Tax/ Service Tax on "Agreeing to the obligation to refrain from an act, or to tolerate an act or situation, or to do an act" provided under S. No. 5(e) of Schedule-II to the Central Goods and Services Tax Act, 2017 and Section 66E(e) of the Finance Act, 1994.

Agreeing to the obligation to refrain from an act, or to tolerate an act or situation, or to do an act (**"toleration of an act"**) was introduced in the Service Tax regime to include services, where there is a positive act of not doing anything. The intention of the legislature was to not limit the ambit of services where a positive act is done by one party and the other party pays for it. The intention was to also include the services where a positive act is not done by one party and the other party pays for it. For instance:

- Mr. A run a business of textiles and supplies goods to Mr. B.
- Mr. B manufactures the final product and sells it in market.
- Mr. C is also engaged in the same business as that of Mr. B.
- Now, Mr. B made an agreement with Mr. A not to sell goods to Mr. C and for this act of not selling goods to Mr. C, Mr. B agreed to pay Mr. A.

Thus, for any service to be 'toleration of an act', as was observed in ***MNH Shakti Limited v. Comm., CGST & CE, 2021-TIOL-732-CESTAT-KOL***, it is essential that:

a. the party has a choice to tolerate or not;

b. the party chose to tolerate;

c. such toleration is for a consideration as per an agreement;

In a case where all the above essentials are present, it may be called as a service of toleration of an act. In absence of any of the above essential, the transaction may not be termed as toleration of an act. This should have been the correct approach to classify services as toleration of an act.

However, following the suit, department came up with bizarre interpretations to cover every flow of money as being towards service, falling under these clauses. These interpretations were made, in complete ignorance of the very basis of levy of GST/ Service Tax: contractual understanding between the parties for provision of service against consideration. Compensation/ damages were alleged to be in nature of consideration towards toleration of an act and demands were made thereon.

To illustrate a few, notice pay amount received from employees, penalties/ damages received from parties breaching contracts, compensation received from Government, cancellation charges, late payment surcharge, etc. were alleged to fall under scope of these services.

Naturally, such demands, after their fructification, were challenged before Hon'ble CESTAT, and such inexplicable interpretation adopted by the department was highly deprecated by it. In many decisions, which are now being followed unexceptionally, it was observed that there is a stark and fine distinction between consideration and compensation/ damages. That while consideration is a result of execution of the contract, whereas compensation/ damages are a result of frustration of the contract.

Meanwhile, the GST regime witnessed a lethal combination of such interpretations of department, with assesses approaching Authority for Advance Ruling seeking rulings on related transactions. Given, such rulings were passed holding leviability of GST in affirmative. Despite the relevant provisions under GST laws and Service Tax law being similar, binding precedents of Hon'ble CESTAT were not followed.

Truth prevails, and so does wisdom. After 5 years of introduction of GST, the CBIC issued Circular No. 178/10/2022-GST dated 3.8.2022 (**"GST Circular"**) exclusively to clarify scope of S. No. 5(e) of Schedule-II to the Central Goods and Services Tax Act, 2017. It was emphasized that for a taxable supply of

'toleration of an act' is to exist, there has to be an express or implied agreement; oral or written, to do or abstain from doing something against payment of consideration for doing or abstaining from such act.

Since the issue was not exclusive to GST disputes only, the CBIC also issued Circular No. 214/1/2023-Service Tax dated 28.2.2023 (**"Service Tax Circular"**)clarifying that for leviability of Service Tax on toleration of an act, there must an agreement specifically referring to such an activity and there is a flow of consideration for this activity.It was also acknowledged that relevant provisions under GST laws and Service Tax law are identical and thus, clarifications made in GST Circular are also relevant for Service Tax laws. Pertinently, it also referred to and accepted CESTAT decisions and clarified that SLPs already filed against CESTAT decisions will not be pursued.

Both GST Circular and Service Tax Circular are in right spirit, to huge relief of assesses, who are already facing the conundrum of Good and Simple Tax. However, until applied in such right spirit, these clarifications shall remain on paper only. This is in context of recent AAR, where despite referring to these circulars, leviability of GST was held in affirmative.

To conclude, it is nothing but apt to refer to this quote by Austin O'Malley:"*In levying taxes and in shearing sheep it is well to stop when you get down to the skin*".

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IS EXPORTING GOODS & SERVICES UPON PAYMENT OF INTEGRATED TAX A BETTER OPTION UNDER GST?

– A detailed analysis

Adv. Hirak Shah

1. The term ***'Refund'*** has a very significant importance amongst every individual contributing in some way or the other towards the country's economic growth. However, when the category of refund is ***'refund of taxes paid'***, the significancefurther increases. Be it refund of Income Tax or refund of Goods and Services Tax ('GST'), every individual who is bonafidely eligible to claim refund shall be keen to encash the same.
2. To facilitate taxpayers, the Government needs to provide a hassle-free refund process. An uninterrupted and adequate refund mechanism is essential for tax administration. It facilitates trade by releasing blocked funds for working capital thereby assisting them in expanding and modernising of existing business.

Overview

3. This article deeply delves into the refund an individual is eligible to claim upon exports of goods and services under GST and specifically highlights which amongst the two options – exports under Integrated Tax or exports under LUT/Bond is beneficial for a registered person under GST.
4. Prior to commencing a detailed analysis of the maximum refund a registered person is entitled to under the two options of export under GST, it is pertinent to note that the Finance Act, 2021 replaced the entire scheme for refunds of zero-rated supplies under GST and has tightened the purse strings, qualitatively as well as quantitatively.
5. The Finance Act, 2021 amended Section 16(3) of the Integrated Goods and Services Act, 2017 ('IGST Act') substantially whereby a registered person shall be eligible to claim refund only of the accumulated ITC upon export under LUT/Bond and that the option of exporting goods or services upon payment of Integrated Tax and subsequently refund of the same in accordance of Rule 96 of the CGST Rules shall be available <u>only to a specific class of registered person which the Government may notify</u>.

6. Thus, the Government introduced a specific provision, i.e. Section 16(4) of the IGST Act which prescribed that the specific class of registered persons who shall export goods and services upon payment of Integrated Tax shall be notified by the Government. However, it is important to note here that such class of registered persons who can export goods and services upon payment of integrated tax are yet to be notified and therefore the old provisions of Section 16(3) of the IGST entitling the registered person two options for exporting goods continues.

Relevant Legal Provisions

7. The detailed analysis in this regard, would kick start with the relevant provisions *qua* refund as prescribed under the GST law:

Provisions of Section 16(3) of the IGST Act – **PRIOR to Finance Act, 2021**

"A registered person making zero rated supply shall be eligible to claim refund under either of the following options, namely: —

(a) he may supply goods or services or both under bond or Letter of Undertaking, subject to such conditions, safeguards and procedure as may be prescribed, without payment of integrated tax and claim refund of unutilised input tax credit; or

(b) he may supply goods or services or both, subject to such conditions, safeguards and procedure as may be prescribed, on payment of integrated tax and claim refund of such tax paid on goods or services or both supplied, in accordance with the provisions of section 54 of the Central Goods and Services Tax Act or the rules made thereunder."

Provisions of Section 16(3) and 16(4) of the IGST Act – **POSTFinance Act, 2021**

"(3) A registered person making zero rated supply shall be eligible to claim refund of unutilised input tax credit on supply of goods or services or both, without payment of integrated tax, under bond or Letter of Undertaking, in accordance with the provisions of section 54 of the Central Goods and Services Tax Act or the rules made thereunder, subject to such conditions, safeguards and procedure as may be prescribed:

Provided that the registered person making zero rated supply of goods

shall, in case of non- realisation of sale proceeds, be liable to deposit the refund so received under this sub-section along with the applicable interest under section 50 of the Central Goods and Services Tax Act within thirty days after the expiry of the time limit prescribed under the Foreign Exchange Management Act, 1999 (42 of 1999.) for receipt of foreign exchange remittances, in such manner as may be prescribed.

(4) The Government may, on the recommendation of the Council, and subject to such conditions, safeguards and procedures, by notification, specify-

(i) a class of persons who may make zero rated supply on payment of integrated tax and claim refund of the tax so paid;

(ii) a class of goods or services which may be exported on payment of integrated tax and the supplier of such goods or services may claim the refund of tax so paid."

Provisions of Section 54 of CGST Act:

"(1) Any person claiming refund of any tax and interest, if any, paid on such tax or any other amount paid by him, may make an application before the expiry of two years from the relevant date in such form and manner as may be prescribed: Provided that a registered person, claiming refund of any balance in the electronic cash ledger in accordance with the provisions of sub-section (6) of section 49, may claim such refund in the return furnished under section 39 in such manner as may be prescribed."

Rule 89(4) of CGST Rules:

"(4) In the case of zero-rated supply of goods or services or both without payment of tax under bond or letter of undertaking in accordance with the provisions of sub-section (3) of section 16 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017), refund of input tax credit shall be granted as per the following formula –

Refund Amount = (Turnover of zero-rated supply of goods + Turnover of zero-rated supply of services) x Net ITC ÷Adjusted Total Turnover Where,-

(A) "Refund amount" means the maximum refund that is admissible;

(B) "Net ITC" means input tax credit availed on inputs and input services

during the relevant period other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both;

Provisions of Section 2(59) of CGST Act:

"Input" means any goods other than capital goods used or intended to be used by a supplier in the course or furtherance of business; [Section 2(59) of the CGST Act]

Rule 96 of CGST Rules:

"(1) The shipping bill filed by an exporter of goods shall be deemed to be an application for refund of integrated tax paid on the goods exported out of India and such application shall be deemed to have been filed only when:-

(a) the person in charge of the conveyance carrying the export goods duly files [a departure manifest or] an export manifest or an export report covering the numberand the date of shipping bills or bills of export; and

(b) the applicant has furnished a valid return in FORM GSTR-3or FORM GSTR-3B,as the case may be;

(c) the applicant has undergone Aadhaar authentication in the manner provided in rule 10B;"

Declaration as required under Section 54(3)(ii) of the CGST Act

"I hereby declare that the refund of input tax credit claimed in the application does not include ITC availed on goods or services used for making 'nil' rated or fullyexempt supplies."

ANALYSIS AND COMMENTS

8. Basis the aforesaid legal provisions, if a person is exporting goods without payment of IGST, i.e. under Bond or LUT, he is eligible to claim refund of unutilised ITC which includes refund of ITC for inputs, input services and capital goods used in making zero rated supplies.It is pertinent to note hear that the provisions of the CGST Act allows the registered person to claim refund of unutilised ITC for making his export without payment of IGST under Bond/LUT as per Section 16(3)(a) of the IGST Act, 2017 and Section 54(3)(a) of the CGST Act, 2017. Further, the words "Input Tax" and "Input Tax Credit" as defined under Section 2(62) and 2(63) will cover all the ITC of inputs, input services and capital goods as well.

9. However, Rule 89(4) of the CGST Rules 2017 has defined the term "Net ITC" as credit of inputs and input services only and does not include capital goods for the purpose of claiming refund. Therefore, this Rules restricts the registered person to claim refund of his unutilised ITC *qua* capital goods only because of the formula prescribed under Rule 89(4) and the way the term "Net ITC" has been defined. Due to this, one might feel that the provisions of Rule 89(4) are *ultra vires* to the provisions of Section 54 of the CGST Act.

10. On the other hand, if the registered person avails the option of exporting goods upon payment of Integrated Tax, then as a part of the return filing process, he will mention the IGST amount proportionate to the taxable value of goods in Row 3.1(b) of Table 3 of Form GSTR-3B and he will disclose all the ITC availed under Row 4(d) – "All other ITC" of Form GSTR-3B. It is pertinent to note here that the ITC which will be availed in Row 4(d) of Form GSTR-3B and which will be accumulated will be inclusive of inputs, input services and capital goods. Therefore, for the purpose of payment of IGST at the time of filing Form GSTR-3B, the registered person shall offset his output liability in terms of his zero-rated supply with the credit already accumulated with him in his electronic credit ledger and such credit shall include ITC of inputs, input services and capital goods. Additionally, the registered person shall disclose the details of goods exported under Table 6 of Form GSTR-1. Disclosure of IGST paid upon export of goods in Form GSTR-3B and Form GSTR-1 will directly be reflected in the electronic system maintained by the Customs Department and thereafter the entries made by the registered person in Form GSTR-1 shall be deemed to be a refund application made by him and after processing and verifying the said data, the Customs Department shall grant refund of the Integrated Tax paid directly into the bank account of the registered person.

11. A hypothetical illustration by which it can be construed that exercising the option of payment of Integrated Tax in case of export of goods is better over

Illustration:

Turnover details	**ITC details**
Value of Total turnover – Rs.11,00,00,000/-	Input tax on inputs – 9,00,000/-
Value of Exempt turnover – Rs.1,00,00,000/-	Input tax on capital goods – 4,00,000/-
Value of Exports– Rs.10,00,00,000/-	Other ITC on Input Services – 1,00,000/-

Particulars	**Export of goods with payment of IGST [First Option]**	**Export of goods under LUT/Bond [Second Option]**
Value of Total Turnover	11,00,00,000/-	11,00,00,000/-
Less: Value of Exempt Turnover	1,00,00,000/-	1,00,00,000/-
Value of Zero supplies / Adjusted total turnover	10,00,00,000/-	10,00,00,000/-
Applicable IGST rate@18%	18,00,000/-	-
ITC available in Electronic Credit Ledger (inclusive of inputs, input services and capital goods)	14,00,000/-	-
Total IGST liability on export	18,00,000/-	-
Less: Offsetting ITC available	14,00,000/-	-
Difference IGST payable/paid	4,00,000/-	-
Net ITC on inputs and input services	-	10,00,000/-
Net ITC on capital goods	-	4,00,000/-
Refund granted in terms of Section 16(3) of the IGST Act, 2017	**18,00,000/-** **(Rule 96)**	**10,00,000/-** [10 crore/10 crore * 10 lacs]**(Rule 89(4))**

12. Therefore, basis the aforesaid illustration it can be concluded that under the first option the registered person is entitled to claim the refund of total IGST paid upon zero rated supply by availing ITC available in his electronic credit ledger whereas under the second option, i.e. export of goods under LUT/

Bond, the registered person who has already prepaid all the taxes in due course of inward supply which is accumulatedly credited in his electronic credit ledger remains unutilised due to the formula prescribed under Rule 89(4) of the CGST Rules and thereby refund *qua* capital goods is not granted.

13. The most logical and practical reason for non granting refund of GST *qua* capital goods could be that capital goods have a longer shelf life and are used by the supplier for longer duration of period. The useful life of capital goods has been prescribed as five years in terms of the provisions of Rule 43 of the CGST Rules, 2017. Further, depreciation at the rate of 5 percentage points for every quarter as per straight line method has been allowed in respect of capital goods under GST. Unlike the erstwhile Central Excise regime where the CENVAT credit in respect of capital goods was available to the extent of 50% only in the first year and remaining CENVAT was available in the subsequent years, there is no restriction on availing ITC of the tax paid on capital goods in one go under GST. Allowing refund of full ITC attributable to capital goods in the month of their procurement itself would amount to unjust enrichment of the supplier as these capital goods would also be subsequently used by the supplier for next 5 years. However, inputs and input services are fully consumed in an output supply and therefore allowing refund of ITC attributable of inputs and input services does not result in such uneven refund calculation. Therefore, restricting refund of ITC *qua* capital goods could be a conscious policy decision of the legislature.

Conclusion

Given the legal provisions under the two options *qua* export of goods under GST and their mathematical implications, it is quite pertinent to note that under the option of exporting goods upon payment of Integrated Tax, whether merely providing a declaration that the registered person is not availing refund of capital goods would suffice in comparison to the stringent provisions of Rule 89(4) of the CGST Rules wherein the registered person is bound to exclude ITC of capital goods while applying for refund itself. Given the rapidly changing GST Law only time will tell whether exporting of goods upon payment of Integrated Tax was actuallybeneficial or not for the registered person.

The views prescribed hereinabove are strictly based on the author's own interpretation of the legal provisions and their implications and do not have any legal impact.

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AUDIT TRAIL

CA Shilvi Khandelwal

1. ***Introduction*** **:** An audit trail is a record of all the transactions in a company, including financial transactions, operational activities, and administrative tasks. The Ministry of Corporate Affairs (MCA), vide its notification GSR 206(E) dated 24th March, 2021 had introducedthe concept of audit trails. The requirement was initially made applicable for thefinancial year commencing on or after the 1st day of April 2021vide notification G.S.R. 206(E) dated March 24, 2021.However, the applicability has been deferred by two times. Initially, for one year by amending the same vide Companies (Accounts) Second Amendment Rules, 2021. The new date of applicability was 1st April, 2022. Then again, the MCA has amended the proviso vide Companies (Accounts) Second Amendment Rules, 2022 and has deferred the applicability by one more year.

   Hence, with effect from 1st April, 2023, all companies big or small, including not-for-profit companies licensed under Section 8 of the Indian Companies Act 2023 must ensure that the software which they use has a built-in mechanism to record audit trail of every transaction, creating an edit log of each change made in the electronically maintained books of account along with the date when such changes are made and ensure that the audit trail cannot be disable. Now, all accounting softwares used by Indian Companies must have an audit trail feature.

   The objective of MCA for mandating the requirement of an audit trail feature in accounting software is to mitigate the chances of fraudulent transactions or manipulation in the books of accounts of the company and to bring in more transparency.

2. ***What is Audit Trail?*** An audit trail is defined as a step-by-step sequential record which provides evidence of the documented history of financial transactions to its source. An auditor can trace the financial data of a particular transaction right from the general ledger to its source document with the help of the audit trail.

   An audit trail can include information such as who accessed a system, what data was accessed or modified, and when it was accessed or modified. It can

also include details about failed login attempts, system errors or any other actions taken within a system.

In accounting terms, it refers to documentation of detailed transactions supporting summary ledger entries. This documentation may be on paper or on electronic records.

3. ***Why Audit Trail?-*** *Law :* A new requirement of audit trail for the management of the company has been introduced for the maintenance of books of accounts by inserting proviso to rule 3(1) of the Companies (Accounts) Rules, 2014 and for the auditors of company to report upon such requirement of maintenance of audit trail by the auditee company, by inserting rule 11(g) to Companies (Audit and Auditors) Amendment Rules, 2021 .Going forward, Companies will have to ensure that all transactions are recorded systematically and chronologically and that the records are accurate, complete, and up-to-date. Further, auditors will have to ensure and report that the requirement of such audit trail has been fulfilled by the company.The audit trail must be maintained for at least eight years from the end of the financial year for which it pertains.

   - **Introduction to Amendments by inserting proviso to Rule 3(1) of Companies (Accounts) Rules, 2014**

     The Ministry of Corporate Affairs (MCA), vide its notification GSR 206(E) dated 24th March, 2021 had introduced the concept of audit trails by inserting proviso to rule 3(1) of the Companies (Accounts) Rules, 2014. It is the management, who is primarily responsible forensuring selection of the appropriate accounting software for ensuring compliance with applicable laws and regulations(including those related to retention of audit logs).This isevidenced by the fact that as per the proviso to the Rule, theaccounting software should be capable of creating an edit log of"each change made in books of account."

   - **Introduction to Amendments to Rule 11(g) of Companies(Audit and Auditors) Rules, 2014**

     Section 143(3) of the Companies Act, 2013 providesvarious matters on which auditors are required to report in theirauditor's report. Clause (j) of Section 143(3) states that auditor'sreport shall also state such other matters as may be prescribed.Rule 11 of the Companies (Audit and Auditors) Rules, 2014specifies such other matters that are to be reported by the

auditor.The Ministry of Corporate Affairs (MCA) vide its notificationNo. GSR 206(E) dated March 24, 2021 has issued the'Companies (Audit and Auditors) Amendment Rules, 2021' introducing new Rule 11(g).Rule 11(g) casts responsibility on the auditor in terms ofreporting on audit trail by making a specific assertion in the audit report under the section 'Report on Other Legal and Regulatory Requirements'.

Text of Proviso to Rule 3(1) of Companies (Accounts) Rules, 2014	**Text of Rule 11(g) of Companies (Audit and Auditors) Rules, 2014**
Provided that for the F.Y. commencing on or after 1st April, 2021, every company which uses accounting software for maintaining its books of account, shall use only such accounting software which has a feature of recording audit trail of each and every transaction, creating an edit log of each change made in books of account along with the date when such changes were made and ensuring that the audit trail cannot be disabled.	Whether the company, inrespect of financial years commencing on or after the 1st April, 2022, has used such accounting software for maintaining its books of account which has a feature of recording audit trail (edit log) facility and the same has been operated throughout the year for all transactions recorded in the software and the audit trail feature has not been tampered with and the audit trail has been preserved by the company as per the statutory requirements for record retention.

By reading of the Account Rules related to maintenance of accounts, it may be noted that companies are required to maintain audit trail (edit log) for each change madein the books of account. Accordingly, the term 'all transactions recorded in the software' would refer to all transactions that result in change to the books of account.However, Rule 11(g) requires the auditor to comment as towhether the company has used such accounting software for maintaining its books of account which has a feature of recording audit trail (edit log) facility and the same has been operated throughout the year for all transactions recorded

in the software and the audit trail feature has not been tampered with and the audit trail has been preserved by the company as per the statutoryrequirements for record retention.

4. What must be included in Audit Trail?

Audit trails are crucial when it comes to validating and verifying the source of a particular transaction. Depending on the size and nature of business of the company, the type of the given transaction and the number of steps involved, the audit trail can vary from simple to a much-complicated process. As required by MCA, Following details must be included in the Audit Trail :

- ✓ Details of every transaction that takes place within the company, including the date, amount and nature of the transaction.
- ✓ Details of every change made to the books of accounts, including the date and nature of the change.
- ✓ Details of all authorization for transactions and changes made to the books of accounts, including the names of the persons who authorized them.
- ✓ Details of all approvals and rejections of transactions and changes made to the books of accounts, including the names of the person who approved or rejected them.
- ✓ Details of all access to the books of accounts, including the date and time of access, and the name of the person who accessed them.
- ✓ Details of all backup and restoration activities related to the books of accounts.

5. Features of Audit Trail requisites in an Accounting Software?

An accounting software may be hosted and maintained in India or outside India or may be onpremiseor on cloud or subscribed to as Software as a Service(SaaS) software. Companies (Accounts) Rules, 2014 also require that:

- ✓ the books of accounts shall remain accessible in India at all times;
- ✓ that the back-up of the books of account and other books and papers of the company maintained in electronic mode, including at a place outside India, if any, shall be kept in servers physically located in India on a daily basis.

It may be noted that any software used to maintain books ofaccount will be

covered within the ambit of this Rule. Any software that maintains records or transactions that fall underthe definition of Books of Account as per the section 2(13) of theAct will be considered as accounting software for this purpose.To comply with the requirements introducedbycompany law, the accounting software must have the features to help companiesto maintain an audit trail that includes deleted transactions, as well as other audit-related features. Following features must be included in the accounting software to comply with the Audit trail requirement as required by the Companies Act-

- ✓ The feature of recording audit trail of each, and every transaction on a date-by-date basis performed using the accounting software.
- ✓ The audit log should be preserved until the accounting records are no longer valid.
- ✓ A timeline stamp must be included in the accounting program.
- ✓ The software must track all the transactional changes.
- ✓ The accounting software should track and monitor all changes to the transaction, which should then be reported in the audit log (from the establishment of the transaction to its modification and deletion).
- ✓ The software should offer a function which allows you to record user information.
- ✓ The accounting software should record login information from creation to modification to deletion.
- ✓ The accounting software should ensure that the audit trail is appropriately protected from anymodification;
- ✓ The software should be able to tell the difference between a technical log and an audit log.
- ✓ The feature to ensure that the audit trail cannot be disabled.
- ✓ The feature toensure that controls over maintenance and monitoring of audittrail and its feature are designed and operating effectivelythroughout the period of reporting.

6. ***Advantage of Audit Trail?*** Audit trails are considered one of the best tools for validating transactions, verifying, and discovering missing information in a company's financial data. Users can validate their financial data at a faster rate and stay on top of their transactions. Most businesses and organisations

use audit trails as a useful management tool for monitoring finances along with other various resources.This is akin to a self-installed monitoring system within the company's accounting system in order to enhance transparency and accountability.

Audit trails are typically used for security and compliance purposes, as they can help organizations identify and investigate security breaches or data-tampering. They are also used to track user activity and ensure accountability, which can be important in regulated industries like healthcare and finance.By maintaining an audit trail, regulators can easily trace the history of any particular transaction and identify irregularities. This can help prevent financial irregularities and ensure that the company complies with all relevant laws and regulations.With the help of audit trail, an auditor can trace every step of, the financial data of a particular transaction right from the general ledger.

7. ***Conclusion :*** A new requirement for companies has been prescribed under the proviso to Rule 3(1) of the Companies (Accounts) Rules, 2014 requiring companies, which use accounting software for maintaining their books of account, to use only such accounting software which has audit trail feature.The new audit trail requirement introduced by the MCA is ahead of its time and is also an essential step towards greater transparency and accountability in business operations. Maintaining a detailed record of all transactions would help all stakeholders identify the source of the financial irregularities. Going forward, accountants should record every entry in the electronic books of account very carefully and accurately. Any subsequent modification/deletion will leave an audit trail scar for the accountant to answer. Using these tools auditors and investigative agencies will ensure a more compliant financial reporting framework. On the other hand, clause(g) of Rule 11 to Companies (Audit and Auditors) Rules, 2014 puts an additional responsibility on statutory auditors of all companies to ensure that the company records entries in their electronic books of accounts in such a way that details of transactions along with who recorded the entry and when (date and time) is implemented and preserved. If the transactions undergo modification or deletion, such details along with date and time of such action needs to be preserved chronologically.

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THE RISE OF SOCIAL STOCK EXCHANGE

CA Amit Kedia

Social Stock Exchange Worldwide

Brazil	South Africa	United Kingdom	Singapore	Canada	Portugal	Jamaica

Social Stock Exchange in India

Budget Speech	→ Constitution of Working Group	→ Constitution of Technical Group	→ ZCZP Declaration	→ SEBI ICDR & LODR Regulations
→ Framework on SSE	→ Governing Council for SSE	→ Principle Approval to BSE & NSE from SEBI	→ Final Approval to BSE & NSE from SEBI	

Benefits of Social Stock Exchange

Eligibility Criteria for Registration

Mode of Raising Fund

Social Stock Exchange Worldwide

Markets and socialism have been strange bedfellows since the start of the industrial revolution, and until recently, most of us have considered them mutually exclusive states of affairs. That is about to change. A third dimension is slowly finding its place in traditional market dichotomy—a dimension that includes social business, impact investing, and now **Social Stock Exchanges** (SSEs).

Social businesses, in their many forms, have been around for a while, but the latest trend seems to be SSEs—trading platforms listing only social businesses. Using SSEs, investors can buy shares in a social business just as investors focused solely on profit would do in the traditional stock market. An investor would come to a SSE to find a social business with a mission according to his or her preference. This is great news for all players in the industry (including governments, multilateral financing institutions, community organizations, development agencies, and social entrepreneurs), and countries like Canada, the UK, Singapore, South Africa, Brazil,

Portugal and Jamaica have already opened their doors to their very own social stock exchanges. Here are all of them:

Brazil: Social Stock Exchange BVS&A was established in 2003 and was the 1st SSE in the world. This SSE does not have its own platform for trading and functions on the base of Brazilian Stock Exchange BOVESPA. BVS&A's particularity is that investors buy "social equity units" in social enterprises and actually they do not get financial profit.

South Africa: SASIX was the second global SSE. It opened in June 2006 in an attempt to provide vital finance to unknown social businesses. It works like a conventional social stock exchange and offers ethical investors a platform to buy shares in social projects according to two classifications: sector and province.

UK: Social Stock Exchange opened in June 2013. The exchange does not yet facilitate share trading. The UK SSE currently acts as an information provider to the general public, publishing standardized and comparable social impact data on its site.

Singapore: Impact Exchange opened in June 2013 and is the only public SSE. It aims to function similarly to the UK SSE by providing information about valued social businesses and impact investing funds. Interestingly, it also includes nonprofits in its list of issuers, which can issue debt securities such as bonds.

Canada: Social Venture Connexion opened in September 2013. It holds itself up as a "trusted connector" whereby it provides social businesses with access to interested impact investors, service providers, high visibility, and a means to value their triple bottom line at affordable prices

Portugal: Financing platform created in Portugal, which replicates the environment of a traditional stock exchange and aims to mobilize resources for promising social entrepreneurial ventures.

Jamaica: The Jamaica Social Stock Exchange (JSSE) provides a platform to assist Social Sector Organizations (SSOs) to attract long term funding to make their projects sustainable.

The JSSE ensures that "socially responsible investor(s)", people interested in contributing and improving the quality of life in Jamaica, are enabled to invest in wholesome projects that require public funding, and by extension promote the socio-cultural economy and the protection of the physical environment.

S.No	Name of SSE	Operating Model	Facts/ Specifics
1	BOVESPA SSE (Brazil 2003)	Only for non-profits. Publicity of listed projects. Investment in the form of "social shares"	Raised Rs 19 million (~$3.6 million USD) for more than 188 projects in its 15 years of operation
2	UK SSE (United Kingdom 2013)	Directory of verified businesses having a social impact. Only for-profit companies are eligible for the Annual review of the impact report. No trading	400 million Euros raised till 2015
3	Social Venture Connexion (SVX) (Canada 2013)	Primary offering platform (secondary trading not allowed). Networking platform returns include social/ environmental and financial returns	Mobilised capital aggregating to around $350 million with a network of around 500+ organizations and 1200+ investors
4	Impact Investment Exchange (IIX) (Singapore 2013)	FPEs and NPOs marketing of social projects social/ environmental returns along with financial returns	Data not available
5	SASIX (South Africa 2006)	NPOs and social businesses. Tax benefits to investors' social/ financial returns. Impact investment exchange	Funds raised – $2.7 million with 15 listed projects as of 2009
6	Jamaica SSE (Jamaica 2018)	Available for NPOs only. Crowdsourcing platform. No financial returns. Audit and reporting requirements	$240,103 as of 2020

Social Stock Exchange in India

Budget Speech (05.07.2019)

Social Stock Exchange serves as a platform for listing social enterprises that are focused on addressing various socio-economic issues.

In July 2019, during the announcement of the Union Budget FY19-20, India's Finance Minister Nirmala Sitharaman said, "I propose to initiate steps towards

creating an electronic fund raising platform – a social stock exchange - under the regulatory ambit of Securities and Exchange Board of India (SEBI) for listing social enterprises and voluntary organizations working for the realization of a social welfare objective so that they can raise capital as equity, debt or as units like a mutual fund."

Constitution of Working Group (19.09.2019)

An expert panel was set up by SEBI in 19 September 2019. Under the chairmanship of Mr. IshaatHussain, Director at SBI Foundation(Former Director of TATA Sons Ltd), the committee's objective was to examine and make recommendations with respect to possible structures and mechanisms, within the securities market domain, to facilitate raising of funds by social enterprises and voluntary organizations.

The panel released its comprehensive report on 1 June 2020. It sets out a structure for an SSE in India, recommending that it be housed under existing national exchanges such as the Bombay Stock Exchange (BSE) and National Stock Exchange (NSE). The report adopts a more holistic approach to create an enabling ecosystem to spur the growth of the social impact sector in the country.

Constitution of Technical Group (21.09.2020)

The Technical Group (TG) was constituted by SEBI on September 21, 2020 under the chairmanship of Dr.Harsh Kumar Bhanwala (ex-Chairman, NABARD).TG objective was to review and make recommendations on certain critical operational issue, in the context of the recommendations made by the Working Group on the Social Stock Exchange.

Technical Group report seeks to put the dots and dashes to the high level recommendations made by the WG. The broad operational structure provided herein will go a long way in enabling SEBI to build robust and adequate framework to kick-start the Social Stock Exchange. Taking the Working Group Report ahead this Technical Group deliberated at length on the various aspects such as determining what constitutes an eligible Social Enterprises for SSE through primacy of social impact, enabling on-boarding of social enterprises on SSE, and detailing their disclosure norms. The Technical Group also deliberated on aspects related to ecosystem development, especially on Social Auditors.

"Zero Coupon Zero Principle" Declaration as Security (15.07.2022)

In exercise of the powers conferred by sub-clause(iia) of clause (h) of section 2 of

the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Central Government hereby declares "zero coupon zero principal instruments" as securities for the purposes of the said Act.

For the purpose of this notification,"zero coupon zero principalinstrument" means an instrument issued by a Not for Profit Organization which shall be registered with Social Stock Exchange segment of a recognized Stock Exchange in accordance with the regulations made by the Securities and Exchange Board of India.

SEBIICDR & LODR Regulations (25.07.2022)

On 25 July 2022, the Securities Exchange Board of India (SEBI) incorporated new chapters relating to the Social Stock Exchange (SSE) by amending the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 (ICDR Regulations), SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (LODR ...

Framework on Social Stock Exchange("SSE") (19.09.2022)

- ☞ Minimum requirements to be met by aNot for Profit Organization(NPO) for registration with SSE in terms of Regulation 292F of the ICDR Regulations
- ☞ Minimum Initial Disclosure Requirement for NPOs raising funds through the issuance of Zero Coupon Zero Principal Instruments in terms of Regulation 292K(1) of the ICDR Regulations
- ☞ Annual disclosure by NPOs on SSE which have either raised funds through SSE or are registered with SSE in terms of Regulation 91C of the LODR Regulations
- ☞ Disclosure of Annual Impact Report by all Social Enterprises which have registered or raised funds using SSE in terms of Regulation 91E of the LODR Regulations
- ☞ Statement of utilisation of funds in terms of 91F of the LODR Regulations
- ☞ Annexure I: Guidance notes for listed/registered NPOs on disclosures of general, governance and financial aspects
- ☞ Annexure II: Guidance notes for all Social Enterprises (SEs) on AIR Strategic Intent and Planning.

Governing Council for SSE (13.10.2022)

Social Stock Exchange shall constitute a Governing Council to have an oversight on its functioning. Composition and terms of reference for Governing Council specified by the Board via circular dated 13.10.2022.

In Principle Approval to BSE (7.10.2022)& NSE (19.12.2022) from SEBI

Stock exchange BSE on Friday 7 October, 2022 said it has got an in-principle approval from the Securities and Exchange Board of India (Sebi) for the social stock exchange (SSE) as a separate segment.

The SEBI granted the National Stock Exchange of India (NSE India) in-principle approval to establish SSE as a separate segment on 19 December, 2022.

Final Approval to BSE (27.12.2022)& NSE (22.02.2023)from SEBI

The Securities and Exchange Board of India (SEBI) has granted its final approval on 27 December 2022 for introducing Social Stock Exchange (SSE) as a separate Segment on Bombay Stock Exchange (BSE).

NSE (National Stock Exchange) has received final approval from markets regulator SEBI to set up a Social Stock Exchange (SSE) as a separate segment on its platform. The final clearance was received on 22 February 2023, the National Stock Exchange (NSE) said in a statement.

The Social Stock Exchange segment will provide new avenue for social enterprises to finance social initiatives, provide them visibility and bring in increased transparency in fund mobilisation and utilisation by social enterprises. "To bring in awareness, we have been conducting various events and hand holding social enterprises currently at various stages of onboarding on the exchange," NSE MD and CEO Ashishkumar Chauhan said.

Also, he has urged social enterprises to get in touch with the NSE to understand the mechanism and benefits from registering and listing on the social stock exchange segment. Under the rules, any social enterprise, Non-Profit Organization (NPOs) or For-Profit Social Enterprises (FPEs), that establishes its primacy of social intent can get listed on SSE segment.

Benefits of Social Stock Exchange

They operate on common minimum laid down standards which encourage participation of various other stakeholders such as investors, donors, etc.

They help leverage existing relations and infrastructure to build newer networks.

They result in a more inclusive economic and social growth.

It results in better reporting capabilities by NGOs, social auditing, etc.

Providing supportive regulations such as tax exemptions, etc could lead to better utilization of funds for social causes.

It would encourage performance linked philanthrophy.

Social Stock Exchange helps in utilisation of funds in an organized way. There will be track of spending by the entity.

Smaller social enterprises will be able raise funds through SSE. This would not be possible through conventional way.

Eligibility Criteria for Registration

Eligible Enterprise	Ineligible Enterprise
Charitable Trust registered under: ➢ The Indian Trust Act,1882 ➢ Public Trust Statue of relevant state ➢ The Society Registration Act,1860	Corporate Foundations
	Political or Religious Organisations or Related Activities
	Professional or Trade Associations
Section 8 Companies under The Companies Act, 2013	Infrastructure & Housing Companies *Except Affordable Housing*

☞ Do you fall under these Social Activities?

Hunger, Poverty, Malnutrition, Inequality, Health, Education, Employability, Gender Equality, Environmental sustainability, National Heritage, Art, Culture, Sports, Small &Marginal Farmers, Worker in non-farm sector, Slum area development, Affordable housing, Disaster management, Bridging digital divide in Internet & mobile phone access etc.

☞ Interested in raising fund? Investor may opt following options:

Non Profit Organization	For Profit Enterprise
➢ Zero Coupon Zero Principal Instrument	➢ Issue Equity Share on main board, SME Platform or Innovators Growth Platform or ➢ Equity Share to AIF including Social Impact Fund (SIF)
➢ Donation through Mutual Funds Schemes	➢ Issue of debt securities

- ☞ Benefits available under Income Tax Act
- ➢ Investor via Social Stock Exchange_80G
- ➢ Social Enterprise_12A/12AA/12AB
- ➢ CSR Entity_ CSR spending deductible as expense.
- ☞ Additional Requirement
- ➢ Minimum issue size for Social Enterprises: Rs. 1.00 Cr.
- ➢ Investors accessible to SSE: Institutional & Non Institutional Investors
- ➢ Minimum application size for investors: Rs. 2.00 Lakhs
- ➢ Minimum spending by NPO in past financial year: Rs. 50 Lakhs in audited accounts
- ➢ Minimum funding by NPO in past financial year: Rs. 10 Lakhs in audited accounts
- ➢ Minimum age of NPO: 3 years.
- ➢ NPO RC validity for minimum next 12 months
- ➢ 12A/12AA/12AB RC Validity for minimum next 12 month and don't have ongoing scrutiny or notice with income tax authority.

Mode of Raising Fund

For non-profit social enterprises (NPOs):

- **Zero coupon zero principal bonds:** Allowing NPOs to directly list on the SSE through issuance of bonds in the form of zero coupon or zero principal bonds. This is a feasible option to unlock funds from donors, philanthropic foundations and CSR spenders. These bonds would carry a tenure equal to the duration of the project that is being funded, and at tenure, they would be written off the investee's books.
- **Social Venture Funds (SVF):** An SVF is a category 1 Alternative Investment Fund (AIF) that is already allowed by SEBI to issue securities or units of social ventures to investors.
- **Mutual funds:** An asset management company could offer closed-end mutual fund units to investors. The units could be redeemable in principal terms, but all of the returns could be channelled towards suitably chosen NPOs by the fund which acts as the intermediary.

- **Pay-for-success models:** Pay-for-success models through lending partners or through grants are highlighted as effective mechanisms to ensure a more efficient and accountable deployment of capital.

For for-profit social enterprises (FPEs):

- **Equity listing:** FPEs would list equity on the SSE subject to a set of listing requirements, including operating practices (financial reporting and governance) and social impact reporting.
- **Social Venture Funds (SVFs):** AIFs and SVFs already exist for FPEs but do not require social impact reporting. The set-up of SSE would bring under the fold of the minimum reporting standard all FPEs that receive funding through the AIF/SVF channel.

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HIGH COURT OF GUJARAT AT AHMEDABAD

R/Special Civil Application No. 23556 of 2022

Allyssum Infra

Versus

Union of India

Appearance:

Mr Abhay Y Desai (12861) for the Petitioner(s) No. 1,2

Government Pleader for the Respondent(s) No. 4

Ms Hetvi H Sancheti (5618) for the Respondent(s) No. 1,3,5,6

Notice Served By DS for the Respondent(s) No. 2

It was pointed out by learned advocates that the competent authority under the Goods and Services Tax Act, 2017 have issued notification No. 3/2023 dated 31.3.2023. It is contemplated in the said notification that on conditions being fulfilled, the cancellation of GST registration effected on the ground of non-filling of the GST returns, could be revoked. Notification No. 3/2023 dated 31.3.2023 stands to the benefit of the petitioners. It was submitted on behalf of the petitioners that the petitioners' case fall within the compass of notification No. 3/2023 dated 31.3.2023. In the aforesaid view, the petitioner is permitted to make application to the competent authority seeking the benefit of Notification No. 3/2023 dated 31.3.2023. As and when such an application is made, the competent authority shall deal with the same and give the benefit of this notification to the petitioner.

CORAM : Honourable Mr. Justice N.V. Anjaria

and

Honourable Mr. Justice Devan M. Desai

Date : 17/04/2023

Oral Order

(Per : Honourable Mr. Justice N.V. Anjaria)

Heard learned advocate Mr. Abhay Desai for the petitioners and learned advocate Ms. Hetvi Sancheti for the respondents-department.

2. The petitioner, which is a partnership firm engaged in the business of real estate projects, has challenged in this petition order of cancellation of its Goods

and Services Tax Registration. The Goods and Services Tax registration of petitioner came to be cancelled on the ground that the petitioner did not file Goods and Service Tax returns.

2.1 While the order was passed on 11.1.2022, the effect thereof was given from 10.09.2021.

3. When the petition came up for consideration, it was pointed out by learned advocates that the competent authority under the Goods and Services Tax Act, 2017 have issued notification No. 3/2023 dated 31.3.2023. It is contemplated in the said notification that on conditions being fulfilled, the cancellation of registration effected on the ground of non-filling of the GST returns, could be revoked.

4. The said notification stands to the benefit of the petitioners. It was submitted on behalf of the petitioners that the petitioners' case fall within the compass of the said notification.

5. In the aforesaid view, the petitioner is permitted to make application to the competent authority seeking the benefit of the aforesaid resolution dated 31.3.2023 bearing No. 3/2003. As and when such an application is made, the competent authority shall deal with the same and give the benefit of this notification to the petitioner.

5.1 It is made clear that this court has not expressed any opinion on the merits of the case of the either side.

6. It was submitted at this stage by learned advocate for the petitioners that retrospective cancellation of the GST registration of the petitioners may come in its way for claiming Input Tax Credit for the period from the date of cancellation till the date of restoration of the registration.

6.1 In this regard it is observed that when the competent authority considers the issue of revocation of cancellation of petitioners' GST registration under the aforesaid notification, the petitioners shall be entitled to lodge its claim for availment of Input Tax Credit in respect of the period from the cancellation of the registration till the registration is restored.

7. The petition stands disposed of in the above terms and with the observations as above. Direct service is permitted.

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HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH

Case No.: I.A.(Civil)/392/2023

Century Plyboards (I) Limited And Anr

A Company Incorporated Under The Companies Act, 1956, Having Its Registered Office At 6, Lyons Range, Kolkata-700001 And Factory At, Inter Alia, Vill- Kokjhar, Palasbari, Dist- Kamrup, Assam, Being Represented By Mr. Narendra Pratap Singh, Authorised Signatory.

2: Cent Ply

A Division Of The Petitioner No. 1 Company Having Its Factory At Vill-kokjahr

Mirja Palashbari Road P.O.-Palashbari

Dist-kamrup Assam

Being Represented By Mr. Narendra Pratap Singh Authorised Signator

Versus

Union Of India And 4 Ors

Represented By The Secretary, Ministry of Finance,

Department of Revenue, Having Its Office At North Block,

New Delhi-110011

Advocate for the Petitioner : Dr. Ashok Saraf

Advocate for the Respondent : SC, Customs

Before

Honourable Mr. Justice Soumitra Saikia

Date:-17.03.2023

Order

Heard Dr. A. Saraf, learned senior counsel appearing for the applicant assisted by Mr. S. J. Saikia, learned counsel. Also heard Mr. S. C. Keyal, learned standing counsel, Customs assisted by Ms. P.Das, learned counsel.

(2) This Interlocutory Application is filed by the petitioner as the applicant seeking

interim orders praying for suspension or stay of the order dated 30.08.2022 passed by Customs Excise and Service Tax Appellate Tribunal (CESTAT) in Anti-Dumping Appeal No. 51491/2021. Dr. A. Saraf, learned senior counsel submits that the petitioner is an industry having one of its manufacturing units within the jurisdiction of this Hon'ble High Court. The petitioner is in the business of manufacture of plywood. For the purposes of undertaking the manufacturing process, the petitioner had imported Phenol and Melamine, which are to be used for captive consumption as raw materials for manufacturing of plywood. The said imports were made from the various countries including Thailand.

(3) The learned senior counsel submits that the private respondent who is a competitor of the petitioner industry, alongwith other competitor industries approached the Central Government for imposition of anti-dumping duty on the petitioner. The matter was referred to the Designated Authority which recommended imposition of anti-dumping duty. The Central Government, vide Office Memorandum dated 28.04.2021 however, declined to accept the recommendations of the Designated Authority and did not impose anti-dumping duty on the petitioner as recommended by Designated Authority. The private respondent and other allied industries approached the CESTAT assailing the office memorandum dated 28.04.2021 passed by Central Government declining to impose anti-dumping duty on the petitioner and other similar industries. It is submitted that in Anti Dumping Appeal Nos. 51492/21, 50017/22, 50060/22 and 50272/22, which were filed before the CESTAT, the present petitioner/applicant was arrayed as a respondent. All these appeals were heard and disposed of together by the CESTAT by its common order dated 30.08.2022, wherein the lead case was Anti Dumping Appeal No. 51491/2021. It is submitted that vide impugned order dated 30.08.2022, the CESTAT disposed of all the appeals by setting aside the respective Office Memorandums issued by the Central Government including Office Memorandum dated 28.04.2021 passed by the Central Government which is with regard to the petitioner, and the matters were remitted back to the Central Government to reconsider the recommendation made by the Designated Authority in the light of the observations made in the order of the CESTAT.

(4) Learned counsel for the applicant submits that under the Customs Tariff Act, 1975 under Section 9 (A), the Central Government is empowered by notifying in the official gazette to impose anti-dumping duty not exceeding the margin of dumping in relation to such an article.

(5) It is submitted that under the Rules made under the Central Excise Tariff Act, 1975, namely, Customs Tariff (Identification Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 there is a Designated Authority which is the prescribed authority reposed with the power to look into the issues relating to imposition of Anti-Dumping duties and make adequate recommendations 'whether such imposition of duty is required to be imposed by the Central Government or not.'.

(6) Learned Senior counsel for the petitioner submits that once a recommendation is made by the Designated Authority it is upto the Central Government to decide whether to act upon such a recommendation or not. In the facts of the present case, the Central Government has decided not to act upon the recommendations made. In that view of the matter the direction of the CESTAT to remand the matter back to the Central Government for taking a fresh decision on the recommendation made by the designated authority is wholly untenable and non-est in law in as much as the decision to act or not to act upon the recommendation is a power which is available to the Central Government alone under the provisions of Section 9 (A) of the Customs Tariff Act, 1975. The Tribunal went beyond its power to issue such a direction to the Central Government to take a fresh decision on the matter when the Central Government has already taken a decision not to impose anti-dumping duty on the petitioner.

(7) Dr. Saraf, learned senior counsel has referred to Judgment of Rajasthan High Court in J. K. Industries Ltd VS Union of India and Ors in support of his contentions and submits that no Court much less the Tribunal can direct any authority to exercise its functions where discretion has been made available to that authority. When an Executive authority exercises a legislative power by way of sub-ordinate legislation, such authority cannot be asked to enact a law which it has been empowered to do under the delegated legislative authority. The learned senior counsel further submits that the Delhi High Court and the Gujarat High Court have also held that the recommendations of the designated authority are not binding on the Government. The Gujarat High Court in Alembic Limited Vs Union of India has held that any direction to the Central Government to accept or not to accept the recommendations of a Designated Authority cannot be issued as the power to take a decision on the recommendation is vested only on the Central Government under the statute. On similar issues Dr. Saraf, learned senior counsel has also referred to the Judgment

rendered in Eveready Industries India Ltd. Vs Union of India and Another , which was rendered by the Delhi High Court.

(8) Besides the above Judgments the learned senior counsel has also pressed into service Judgments of the Apex Court rendered in Jatinder Kumar and others Vs State of Punjab and Others reported in (1985) 1 SCC 122 to drive home his contention that nobody can claim as a matter of right that the Government must accept recommendations of any recommendatory authority like a Designated Authority under the Rules of 1995. It is submitted by Dr. Saraf that where the statute has specifically given powers to the Central Government and such powers are to be exercised on the basis of a recommendation of a statutory Body like the Designated Authority, the power to accept and not to accept any such recommendation is the sole prerogative of the Central Government and which has been duly exercised by the Central Government, in the facts of this case, by not accepting the recommendations of the Designated Authority. The directions of the CESTAT to the Central Government to reconsider its decision on the basis of the recommendation of the designated authority runs contrary to the law laid down uniformly by different High Courts across the Court including by the Apex Court.

(9) It is further submitted by Dr. Saraf, learned senior counsel that any such recommendation even if rendered has only a persuasive value. It is not binding on the Central Government. In support of such contentions, he has relied to the Judgment of the Apex Court in Naraindas Indurkhya Vs State of Madhya Pradesh reported in (1974) 4 SCC 788.

(10) Learned senior counsel submits that once a Designated Authority had rendered its recommendations, in so far as the said matter was concerned, the Designated Authority after rendition of its recommendation became a 'functus officio'. As such any such further orders that the CESTAT may proceed to pass will have the effect of compelling the Central Government to take a decision contrary to the scheme of Statue and the Rules framed thereunder. It is further submitted that all necessary papers and documents relating to the import of Phenol and Melamine by the petitioner were duly submitted before the Customs authorities and other competent authorities of the Central Government. The Central government on proper appreciation of all the materials available before it has proceeded not to act upon the recommendations of the Designated Authority vide the Office Memorandum dated 28.04.2021. Such action of the Central Government is absolutely

within the scheme of the Act and the Rules framed thereunder.

(11) It is further submitted by Dr. Saraf, learned senior counsel that pursuant to the impugned order dated 30.08.2022 of the CESTAT, a further application has been filed by another competitor industry as an applicant before the CESTAT seeking appropriate orders for execution of the impugned order dated 30.08.2022 passed by the CESTAT in Anti Dumping Appeal No. 51491/2021. It is submitted that the CESTAT has admitted such application preferred by the such applicant/ petitioners before it. Referring to Annexure-I of page 19 of the Interlocutory Application, it is submitted that Misc Application No. AD/MISC/50061/2023 in Appeal No. AD/50017/2022-CU(DB), has been filed by "Deepak Phenolics Ltd." as an applicant, wherein the present applicant/petitioner is arrayed as a respondent. It is submitted that in view of the fact that the subsequent such applications having been admitted to hearing by the CESTAT there is every likelyhood of the CESTAT proceeding with the hearing and passing further orders for implementation of the impugned order dated 30.08.2022 passed by the CESTAT in Anti Dumping Appeal No. 51491/2021 and others. As such the present Interlocutory Application has been filed seeking urgent ad-interim protection in order that the WPC is not rendered infructuous.

(12) The learned senior counsel submits that the application filed by the private respondent No.5 seeking implementation of the order dated 30.08.2022 is contrary to the procedure of law and not supported by any provisions of law and/or procedure prescribed. As such notwithstanding the order dated 21.09.2022 passed in WP(C) No. 6180/2022, whereby this Court held that the interim order shall be considered on the next Returnable date, this I/A has been filed praying for adequate interim order.

(13) Mr. S. C. Keyal, learned standing counsel submits that he has no instructions as on date and prays for a short date to obtain required instructions in the matter.

(14) Learned counsels for the parties have been heard. It is seen from the pleadings available before Court that the Designated Authority by Notification dated 28.01.2021 give its conclusions and recommendations as under:-

"L. **CONCLUSION & RECOMMENDATIONS**

109. After examining the submissions made by the interested parties and issues raised therein, and considering the facts available on record, the Authority concludes that: a. The product under consideration has been exported to India from subject countries below its normal value.

b. The Domestic Industry has suffered material I injury.

c. The material injury has been caused by the dumped imports of subject goods from the subject countries.

d. As injury margin in respect of USA is negative, no ADD is recommended against USA.

M.**RECOMMENDATION**

110. The Authority notes that the investigation was initiated and notified to all interested parties and adequate opportunity was given to the domestic industry, exporters, importers and other interested parties to provide information on the aspects of dumping, injury and the causal link. Having initiated and conducted the investigation into dumping, injury and causal link in terms of the provisions laid down under the Rules, the Authority is of the view that imposition of Anti-Dumping duty is required to offset dumping and injury.

111. In terms of provision contained in Rule 4(d) of the Rules, the Authority recommends imposition of ADD equal to the lesser of margin of dumping and the margin of injury, so as to remove the injury to the Domestic Industry. As injury margin in respect of USA is negative, no ADD is recommended against USA. Taking into account the factual matrix of the case, and having regard to information provided, and submissions made by interested parties, it is considered appropriate to recommend benchmark/reference form of anti-dumping duties. The Authority recommends imposition of definitive anti-dumping duties on import of subject goods originating in or exported from Thailand from the date of notification to be issued in this regard by the Central government, as the difference between the landed value of subject goods and the reference price indicated in column 7 of the table below, provided the landed value is less than the value indicated in column 7.

112. The landed value of imports for this purpose shall be assessable value as determined by the Customs under Customs Act, 1962 and applicable level of custom duties except duties levied under Section 3, 8B, 9, 9A of the Customs Tariff Act, 1975.

Duty Table

SN	Heading	Description	Country of Origin	Country of Export	Producer	ReferencePrice	Unit	Currency
-1	-2	-3	-4	-5	-6	-7	-8	-9
1	290711	Phenol	Thailand	Any country including Thailand	PTT Phenol Company Limited	990.83	MT	US$
2	290711	Phenol	Thailand	Any country including Thailand	Any producer other than Serial Number 1	990.83	MT	US$
3	290711	Phenol	Any country other than country attracting anti-dumping duty	Thailand	Any	990.83	MT	US$

113. Subject to the above, the Preliminary Findings notified on 20th August, 2020 is hereby confirmed.

N. FURTHER PROCEDURE

114. An appeal against these findings after its acceptance by the Central Government shall lie before the Customs, Excise and Service tax Appellate Tribunal in accordance with the Customs Tariff Act, 1975 as amended in 1995 and Customs Tariff Rules, 1995.

(B.B. Swain) Special Secretary and Designated Authority"

(15) It is also noticed that in the recommendations of the Designated Authority, it is mentioned that these recommendations are appealable before the CESTAT after this findings are accepted by the Central Government.

(16) The Central Government however vide Office Memorandum dated 28.04.2021 did not accept the recommendations. The Office memorandum dated 28.04.2021 reads as under:-

" **F. No. 354/121/2020-TRU**

Government of India

Ministry of Finance Department of Revenue (Tax Research Unit)

Room No.156, North Block New Delhi, 28th April, 2021

OFFICE MEMORANDUM

Subject: Final Findings dated the 28th January, 2021 in the original investigation on anti-dumping duty on imports of 'Phenol' originating in or exported from Thailand and United States of America-regarding

The undersigned is directed to refer to your office letter under F.No. 8/4/2020-DGTR dated 23rd October, 2020 and the Final Findings issued by the Directorate General of Trade Remedies under F.No. 6/ 3/ 2020-DGTR, dated the 28th January, 2021 in the subject anti- dumping investigation, and to inform that the Central Government has decided not to impose the anti-dumping duty on Phenol originating in or exported from Thailand, proposed in the said Final Findings.

(S.W.Haider)
O.S.D (TRU-I)
28.04.2021

To,

Sh. Satish Kumar

Additional Director General Foreign Trade

Directorate General of Trade Remedies

Jeevan Tara Building New Delhi 110001"

(17) In the appeals preferred before the CESTAT, assailing the Office Memorandum dated 28.04.2021 issued by the Central Government, whereby the Central Government decided not to impose the Anti-Dumping Duty on phenol originating in or exported from Thailand, the CESTAT had after examining the matter had allowed the appeals setting aside the Office memorandums issued by the Central Government and the matter was remitted to the Central Government to reconsider the recommendations made by the Designated Authority in the light of the observations made. The relevant paragraphs of the impugned order dated 30.08.2022 are extracted below:-

"87. The issue that arises for consideration is whether a presumption can be drawn that the Central Government has taken a decision not to impose anti-dumping duty as a decision was not taken within three months by the Central Government from the date of publication of the

final findings by the designated authority. On a consideration of the provisions of the Tariff Act and the 1995 Anti-Dumping Rules, it is clear that a presumption can safely to be drawn that the Central Government by keeping silent for a long period of time shall be deemed to have taken a decision not to impose anti-dumping duty and such cases would also fall in the category of those cases where an office memorandum has actually been issued conveying the decision of Central Government not to impose anti -dumping duty.

88. The inevitable conclusion, therefore, that follows from the aforesaid discussion is that the decision taken by the Central Government not to impose anti-dumping duty despite a recommendation having been made by the designated authority for imposition of anti-dumping duty, cannot be sustained and the matter would have to be remitted to the Central Government for taking a fresh decision on the recommendation made by the designated authority. Though, only the office memorandum dated 20.07.2021 assailed in Anti-Dumping Appeal No. 51491 of 2021 and the office memorandum dated 18.11.2020 in Anti-Dumping Appeal No. 52174 of 2021 have been reproduced above, but similar office memorandums have been issued by the Tax Research Unit in the remaining Anti- Dumping Appeals, except Anti-Dumping Appeals referred to in the first paragraph of the order.

89. Thus, for the reasons stated above, office memorandums dated 20.07.2021, 18.11.2020, 28.04.2021, 27.10.2021, 30.03.2021, 28.10.2021, 30.03.2021, 27.09.2021, 05.03.2021, 05.03.2021, 01.03.2021, 08.12.2021 and 01.10.2021 in Anti-Dumping Appeal No's. 51491 of 2021, 52174 of 2021, 51492 of 2021, 51829 of 2021, 51830 of 2021, 51878 of 2021, 51879 of 2021, 51880 of 2021, 52102 of 2021, 52172 of 2021, 52072 of 2021, 50134 of 2022 and 50272 of 2022, respectively, are set aside and the matter is remitted to the Central Government to reconsider the recommendation made by the designated authority in the light of the observations made above.

(18) Section 9 (A) of the Customs Tariff Act, 1975 provides that- "Where any article is exported by an exporter or producer from any country or territory (hereafter in this section referred to as the exporting country or territory) to India at less than

its normal value, then, upon the importation of such article into India, the Central Government may, by notification in the Official Gazette, impose an anti-dumping duty not exceeding the margin of dumping in relation to such article."

(19) Under the provisions of Section 9 (B) (1) (c) (ii) of the Act of 1975, the Central Government also has the option not to levy any Anti-Dumping Duty under Section 9 (A) upon receipt of satisfactory voluntary undertaking from any exporter to revise its prices or to cease exports into the area in question at dumped price and if the Central Government is satisfied that the injurious effect of dumping is eliminated by such actions.

(20) Under Rule 3 of the Customs Tariff Rules, 1995 the Central Government by Notification in the official gazette shall appoint such officers as specified under the Rules to be the Designated Authority. Duties of the Designated Authority are prescribed under Rule 4 (1) (d). It is provided that the Designated Authority will recommend the amount of the Anti Dumping Duty equal to a margin of dumping or less which if levied, would remove the injury to the Domestic Industry and the date of commencement of such duty.

(21) In the above facts, the judgments cited at the Bar are required to be examined. The Gujarat High Court in the case of Alembic Ltd. Vs Union of India declined to entertain a writ petition which was filed by a Member of the Industry challenging the decision of the Central Government not to impose Anti-Dumping Duty despite the recommendations made by the Designated Authority. Referring to the Judgments of the Apex Court in Saurashtra Chemicals Ltd. Vs Union of India reported in 2000 (118) E.L.T.305 (S.C) as well as the Association of Synthetic Fiber Industry Vs J. K. Industries Ltd. reported in 2006 (199) E.L.T.196 (S.C), the Gujarat High Court recorded the following findings:-

> "**53.** As already noticed, several Courts have opined that the recommendations of the DA are not binding on the Government. In case of Saurashtra Chemicals Ltd. (supra), Apex Court has taken such a view. This decision was followed in case of Association of Synthetic Fibre Industry (supra). Rajasthan High Court in case of J.K. Industries Ltd. (supra) observed as under:
>
> "183. We shall presently notice that merely finding by the Designated Authority the facts leading to conclusion that a case of dumping and specific injury in domestic industry is made out by itself, does not obligate the Central Government to levy anti- dumping duties as a matter of course. But the decision of the

Central Government to impose Anti- Dumping Duty after it receives the findings and the recommended rate which would remove the injury to the domestic industry is still governed by number of other considerations on which the Central Government alone has to decide.

186. The expression used under Rule 13 enabling the Central Government to exercise its power of imposing a Provisional Duty is couched in enabling manner as the expression 'may' has been used, communicating that issue of a public notice on preliminary finding by the Designated Authority does not mean necessarily that the Central Government shall impose a Provisional Duty as a matter of course. It operates as a safeguard against subjective imposition of Provisional Duty envisaged in sub- section (2) of Section 9A read with the rules and ensure that no such Provisional Duty can be imposed before the expiry of 60 days from the date of public notice issued by the Designated Authority regarding its decision to investigate which itself is founded on due application of his mind to matters detailed in Rule 5. It also ensures that the imposition of Provisional Duty may not continue indefinitely to render the investigation an empty formality by ordaining that the Provisional Duty can remain in force only for a period of 6 months in the first instance but which may upon request of the exporters representing the percentage of the trade I involved be extended by the Central Government maximum up to 9 months. Beyond 9 months from the date it is first imposed, Provisional Duty cannot be continued.

187. Effect of final findings recorded under Rule 17 is in the like manner no different. The recording of finding by the Designated Authority does not result in automatic levy and imposition of Anti-Dumping Duty under Section 9A nor it becomes imperative for the Central Government to impose such Duty as recommended by the Designated Authority. The matter again rests with the Central Government which is the delegate of the Parliament to impose in given circumstances Anti-Dumping Duty not exceeding the margin of dumping."

(22) In Eveready Industries India Ltd. Vs Union of India and another, the Delhi High Court while deciding another matter relating to imposition of Anti-Dumping Duties held that the report of the Designated Authority is only a recommendation and it does not create any rights or liabilities and therefore is not binding on the

Central Government. The relevant paragraphs are extracted below:-

29. The report of the Designated Authority is only a recommendation, it does not create any rights or liabilities and is therefore not binding on the Central Government. A bare reading of the Customs Tariff Act and its Rules reveals this. Section 9A(1) of the Customs Tariff Act, which empowers the Central Government to impose anti-dumping duty, reads as follows:

"Where any article is exported by an exporter or producer from any country or territory (hereinafter in this section referred to as the exporting country or territory) to India at less than its normal value, then, upon the importation of such article into India, the Central Government may, by notification in the Official Gazette, impose an anti-dumping duty not exceeding the margin of dumping in relation to such article."

(emphasis added)"

(23) The findings of the Rajasthan High Court in case of J. K. Industries Ltd. Vs Union of India and Ors, which was also a matter relating to imposition of Anti-Dumping Duties is relevant for the purposes of this case. The relevant paragraphs of the Judgment are extracted below:-

"137. Section 9-A is a charging Section for levy of Anti Dumping Duty and provides necessary pre condition to exist before Anti Dumping Duty can be imposed by the Central Government. The Parliament having enacted law authorising levy of Anti Dumping Duty under Sec. 9-A, authorised the Central Government by publishing a Notification in the official gazette to impose Anti Dumping Duty not exceeding the margin of dumping in relation to such article.

138. The power to impose such duty is not conferred on subjective satisfaction of the Central Government but the power is controlled by existence of certain rational founded facts.

139. Before exercising such power it has to be determined that an article is being exported from any foreign country or territory referred to India at less than its normal value and charging of such less price has casual link with material injury caused to domestic industry. Then along upon the importation of such articles to India, the Central Government may by Notification in the official gazette impose an Anti Dumping Duty not exceeding the margin of dumping in relation to such article.

140. Anti Dumping Duty is in the nature of a tax imposed on determining the existence of certain facts with an object to protect the domestic industry against injury that may be caused to it because of unfair trade practice of exporters from the foreign country in selling their products at less than its normal price at home market to the buyers in India. It is not a tax as is ordinarily understood for the purpose of raising public revenue in generality or in the nature of a compensatory tax for services rendered by the State like road tax, but it certainly falls in the category of tax to regulate import of certain articles by subjecting it to an additional duty on finding existence of certain facts in order to protect the domestic industry from injury caused on account of unfair trade pursuits by the exporters of the goods from foreign country or territory to India. The imposition is not complete merely by enacting Sec. 9A authorising imposition of Anti Dumping Duty on certain conditions found to exist. Charge to tax really comes not existence on Notification issued by the Central Government as authorised under Sec. 9A of the Act of 1975. Thus, not only the provision in the principal legislation enacted by the Parliament is legislative but the Notification which ultimately brings the charge into effect, too is legislative in character and is in the nature of delegated legislation.

141. In this connection, we may notice the principle succinctly explained in Narinder Chand Hem Raj v. Lt. Governor, Administrator, Union Territory, Himachal Pradesh, (1971) 2 SCC 747:

"The power to impose a tax is undoubtedly a legislative power. That power can be exercised by the Legislature directly or subject to certain conditions the Legislature may delegate that power to some other authority. But the exercise of that power, whether by the Legislature or by its delegate is an exercise of a legislative power. The fact that the power was delegated to the executive does not convert that power into an executive or administrative power. No Court can issue a mandate to a Legislature to enact a particular law. Similarly, no Court can direct a subordinate legislative body to enact or not to enact a law which it may be competent to enact."

142. If this principle applies to the present case and we think it does apply, Section 9A as well as Notification that the Central Government may issue in exercise of its authority under it, on considering existence of certain facts as found through an elaborate procedure laid for such purpose is a legislative act

and no writ of mandamus, prohibition or certiorari can reach for retraining the Central Government from not issuing a Notification to impose Anti Dumping Duty which it has been Authorised under Sec. 9A of the Act of 1975.

143. The nature of delegation legislation as is contemplated u/S. 9A squarely falls in the category of conditional delegation of legislative function which depends not on subjective satisfaction of the delegate but depends on objective facts to be reached before the power can be exercised. As per the principle enunciated in State of T.N. v. K.Subanayagan, (1998) 1 SCC 318 : AIR 1998 SC 344, the Notification when issued falls in the third category of conditional delegated legislation".

(24) In Haridas Exports vs All India Float Glass Manufacturers' Assn and others reported in (2002) 6 SCC 600, the Apex Court in respect of an appeal arising from the order of MRTP Commission held as under :-

"**49.** There is in this case no challenge to the import policy allowing import of float glass and even if such a challenge was to be there it would hardly succeed. The grievance of the respondents is that import is being made at predatory prices. The challenge is to the actual import. But allowing such a challenge will amount to giving the MRTP Commission jurisdiction to adjudicate upon the legal validity of the provisions relating to import, which jurisdiction the Commission does not have. It is not a court with power of judicial review over legislative action. Therefore, it would have no jurisdiction to decide whether the action of the Government in permitting import of float glass even at predatory prices is valid or not. The Commission cannot prohibit import, its jurisdiction commences after import is completed and any restrictive trade practice takes place".

(25) In Jatinder Kumar and others Vs State of Punjab and others reported in (1985) 1 SCC 122 , the Apex Court held that recommendations of Public Service Commissions are not binding on the Government. The Government may accept such recommendation or may decline to accept the same. It cannot be claimed as a matter of right by any person that the Government must accept the recommendation of the commission.

(26) In Naraindas Indurkhya Vs State of Madhya Pradesh and Others reported in (1974) 4 SCC 788 the Apex Court, in deciding a matter relating to prescription of text books in the State of Madhya Pradesh viz-a-viz the recommendations of the

Chairman of concerned Board, held that recommendation has merely a persuasive effect, it being open to the schools to accept the recommendation or to reject it as they may think.

(27) Having heard the learned counsels for the parties and upon careful perusal of the Judgments referred to by the learned counsel for the petitioner, this Court is of the view that prima-facie it is seen that the findings of the Designated Authority in respect of imposition of Anti-Dumping Duty appear have been held to be recommendatory in nature and it is the prerogative of the Central Government to either accept or not to accept the same on a consideration of the entire facts and circumstances as presented before it. This Court in view of the above discussions is of the considered opinion that the matter will require further examination.

(28) It is also seen that the interim prayer for stay of the operation of the impugned order dated 30.08.2022 passed by the CESTAT was also prayed for in the said writ petition.

(29) This Court by order dated 21.09.2022 had issued Notice in the matter. In respect of the interim relief prayed for the following order was passed:-

> "Heard Dr. A. Saraf, learned senior counsel assisted by Mr. S. J. Saikia, learned counsel for the writ petitioners. Also heard Mr. S. C. Keyal, learned Standing Counsel, appearing for the Custom Department i.e. the respondent herein.
>
> Perused the averments made in the writ petition.
>
> The petitioners are aggrieved by the directions issued by the Customs Excise and Service Tax Appellate Tribunal by order dated 30/08/2022 passed in Anti Dumping Appeal No. 51491/2021, directing the Central Government to take a fresh decision on imposition of the anti-dumping duty.
>
> According to Dr. Saraf, learned senior counsel for the writ petitioner, once the Central Government has taken a decision not to impose anti-dumping duty, the Tribunal did not have any jurisdiction under the law to issue further direction to the Central Government to take a fresh decision in the matter.
>
> Mr. Keyal, learned counsel appearing for the respondents, prays for some time to obtain instruction in the matter.
>
> In view of the above, issue notice of motion returnable in eight weeks.
>
> Since Mr. Keyal has appeared and accepted notice on behalf of all the respondents, no formal notice is required to be sent in this case. However,

extra copies of the writ petition, requisite in numbers, be furnished to the learned departmental counsel within one week from today.

Heard on the prayer for interim relief.

Mr. Keyal has submitted that before announcing any final decision in the matter, the leave of the Court will be obtained. In view of the submission of Mr. Keyal, this Court is not inclined to pass any interim order at this Stage. However, the prayer for interim relief will be considered on the returnable date.

In the meantime, the respondents may bring their stand on record by filing affidavit. "

(30) The present Interlocutory Application has been filed praying for adequate interim orders as the CESTAT has admitted the Misc Case filed by respondent No.5 seeking orders for implementation of the earlier CESTAT order dated 30.08.2022. It is seen that vide order dated 21.09.2022, although this Court did not grant any interim orders on that date, the prayer for interim relief was not rejected, rather it was ordered that the prayer for interim relief will be considered on the Returnable Date. As such it is seen that the prayer for interim relief has not been rejected by the earlier order dated 21.09.2022 passed by this Court. Rather it was differed till the Returnable Date. Considering the apprehension expressed by the appellant that the CESTAT is likely to pass further orders issuing directions to the Central Government for compliance of the order dated 30.08.2022 passed by the CESTAT on the basis of such applications being filed by the private respondent No.5, which it is stated has already been admitted by the CESTAT, and in view of the discussions made above, this Court directs that the impugned order dated 30.08.2022 shall remain stayed till the next returnable date.

(31) Accordingly, let Notice be issued in this I/A Returnable after 4 (four) weeks.

(32) Since Mr. S. C. Keyal, learned Standing counsel, Customs appears on behalf of the Central Government the Notices are waived but sufficient extra copies are to be furnished to the learned standing counsel by the advocate on record for the petitioners. Steps on private respondent No.5 be taken by Registered post with A/D within one week from today.

(33) The parties are permitted to exchange their pleadings in the meantime if so advised, by the returnable date.

(34) List this matter after 4 (four) weeks.

*****

COMMERCIAL NEWS

CA Ribhav Ghiya

CGST Bhiwandi Commissionerate arrests Oppo Mobiles finance manager for IT fraud amounting to Rs 19 crore

An authorized signatory – Manager-Finance & Accounts of Chinese origin company M/s. Oppo Mobiles India Private Limited Mr. Mahendra Kumar Rawat has been arrested by CGST Bhiwandi Commissionerate, for fraudulent availment of ITC amounting to Rs.19 cr on fake invoices. The officers of CGST Bhiwandi Commissionerate in Mumbai Zone arrested Mr. Rawat today (22.03.23) and he will be in judicial custody till 03.04.23. Based on material evidence gathered during the investigation, he was arrested today under section 69 of the CGST Act, 2017 for contravention of section 132 of the CGST Act, 2017. Anti-evasion wing of CGST Bhiwandi Commissionerate's investigation against M/s. Oppo Mobiles India Private Limited (GSTIN – 27AABCO9247K1ZZ) revealed that OPPO Maharashtra was involved in availment of fake ITC without receipt of any goods. The supplier of OPPO Mobiles India Pvt ltd, M/S Gain Hero India Private Limited, was found to be non-existent at its principal place of business. In this connection, sixteen e- way bills for the said transaction were verified and found to be fake. Further, statements of the transporters and vehicle owner were recorded wherein it was revealed that there was no supply of goods to OPPO Maharashtra. ADVERTISEMENT Shri Mahendra Kumar Rawat, Authorized Signatory and Manager-Finance & Accounts of M/s. Oppo Mobiles India Private Limited, is the main key person who has played the key role in availing of the said fraudulent ITC amounting to Rs. 19,27,54,093/- against the invoices amounting to Rs. 107,08,56,072/- issued by Gain Hero India Private Limited, without receipt of the goods. The accused has admitted in his statement that the e-way bills generated are fake. This case is a part of the special drive launched by the CGST Mumbai Zone against the tax fraudsters and tax evaders. So far, CGST Bhiwandi Commissionerate has arrested 24 persons in the last 18 months itself, informed Sumit Kumar, Commissioner, Central GST Bhiwandi.

Delhi South CGST unearths fake invoicing racket

Delhi South CGST unearths fake invoicing racket involving tax evasion of Rs. 17 crore, 2 held

The Central Goods and Service Tax (CGST) Delhi South Commissionerate busts racket of firms fraudulently claiming Input Tax Credit (ITC) of ₹ 17 crore. A specific intelligence was developed by the officers of Central Goods and Service Tax (CGST) Delhi South Commissionerate concerning certain bogus firms that were created solely for the purpose of generating goods less invoices and passing on of ineligible input tax credit along the chain. Inspections were conducted at the registered premises of 03 bogus firms/company namely M/s. NexGen Busicorp, M/s. XEL Informatics and M/s. GW Infotech Pvt. Ltd. registered in the jurisdiction of CGST Delhi South Commissionerate that were engaged in fake invoicing and circular trading. Incriminating documents were resumed from the premises of the taxpayers. Preliminary enquiry conducted so far into the transactions of these firms has revealed tax evasion of Rs. 17 crore approx. The Proprietor/Director in his confessional statements has admitted his role in passing and availing fraudulent ITC without any underlying supply of goods. The persons behind these bogus firms have defrauded the government exchequer and committed offences specified under section 132(1)(b) and 132(1)(c) of the CGST Act 2017 which are cognizable and non-bailable. Two persons namely Sh. Sanjay Kumar Srivastava and Sh. Sunil Gulati have been arrested on 17.03.2023.The accused were produced before the Duty Metropolitan Magistrate following which they have been remanded to judicial custody for 14 days. Further investigation is in progress.

Finance ministry weighs different GST rates for games of skill, chance

Online games in the nature of betting or gambling are likely to attract 28 per cent GST while those involving some amount of skill are likely to be taxed at a lower 18 per cent, an official said.

The Finance Ministry is considering differential tax treatment for online gaming for the categories of games of chance and games of skill. Online games in the nature of betting or gambling are likely to attract 28 per cent Goods and Services Tax (GST) while those involving some amount of skill will likely be taxed at a lower 18 per cent, an official said.

The matter is expected to be taken up for discussion by the GST Council in its next meeting, which is likely either in the month of May or June.

"All online games are not games of chance and are not in the nature of betting or gambling. Many options are being considered, nothing is off the table. We are also going through the rules for online gaming brought out by MeitY. The Finance Ministry will be presenting its view before the council," the official said, adding that the task would be to differentiate between what should be a game of skill and what can be called a game of chance.

At present, online gaming platforms pay 18 per cent GST on platform fees and not on the full value including prize money. A Group of Ministers, under Meghalaya Chief Minister Conrad Sangma, had in December last year, submitted a report on GST on online gaming to Finance Minister Nirmala Sitharaman.

In its last meeting in November, the GoM had agreed on a 28 per cent GST on these segments. However, in absence of consensus on whether the tax should be levied on only the fees charged by the portal or the entire consideration, including the bet amount, received from participants, the GoM had decided to refer all suggestions to the GST Council for a final decision.

The online gaming industry had grown exponentially during the pandemic. The online gaming industry is currently contributing more than Rs 2,200 crores of GST, as per a study by EY and Assocham. As per a KPMG report, the online gaming sector would grow to Rs 29,000 crore by 2024-25 from Rs 13,600 crore in 2020-21.

The long-pending issue of levying GST on online gaming and drawing uniformity with casinos and horse racing has been discussed several times in the GST Council in the last two years, with many states pitching for a lower tax rate on those online games which require skill.

In its report submitted to the Council earlier in June 2022, the GoM had suggested a 28 per cent GST on the full value of the consideration, including contest entry fee, paid by the player, without making a distinction for games of skill or chance. However, the Council had asked the GoM to reconsider its report.

ALL INDIA FEDERATION OF TAX PRACTITIONERS
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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**
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
6th May, 2023	One Day National Tax Conference	Gaziabad
13th & 14th May, 2023	Two Day National Tax Conference (Central Zone)	Indore
20th May, 2023	Full Day Mega Tax Conference (Central Zone)	Bhilwara
27th & 29th May, 2023	National Spiritual Conference (Central Zone)	Mount Abu
2nd to 10th June, 2023	International Study Tour to Vietnam	Vietnam
24th June, 2023	National Tax Conference (Southern Zone)	Tirupathi
29th & 30th June, 2023	National Tax Conference (Western Zone)	Goa
7th July, 2023	National Executive Committee Meeting	Chennai
7th & 8th July, 2023	National Tax Conference (Southern Zone)	Chennai
15th & 16th July, 2023	Residential Refresher Course (Northern Zone)	Amritsar

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