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GST CASE LAW COMPENDIUM

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INDEX

Whether the Assessment Order under Section 73 is valid when the taxpayer was not given time to reply to ASMT-10?

No, The Honorable Kerala High Court in the case of ***Vadakkot Chackoo Devassy v. State of Kerala and Others [WP (C) No. 42265 of 2023 dated December 21, 2023]*** set aside the Assessment Order and remitted the matter back for reconsideration in case where the Assessee could not file the reply due to cancellation of GST Registration and the show cause notice was issued the very next day of serving notice in GST ASMT-10.The Honorable Kerala High Court noted that the Petitioner was not afforded any time for filing a reply to the notice in GST ASMT-10 and it is not disputed that the Petitioner's GST registration was canceled before the said notices were uploaded in GST Portal and opined that there is a violation of principles of natural justice. The matter is remanded back to the file of the assessing authority and stated that the assesse will not take any ground regarding the limitation in finalizing the assessment for the assessment year 2017-18.

Author's Comments

Proceedings under section 73 of the CGST Act are completely different and independent of section 61 proceedings. Proceeding under section 61 of the CGST Act is a pre-adjudication exercise (where no demand can be confirmed and recovered) and certainly not a pre-condition to initiate proceedings under chapter XV of the CGST Act. Although, the Proper officer to issue a notice under sections 61 and 73 of the CGST Act might or might not be the same one, still the ground that no time was given for replying to the ASMT-10 notice is not a ground to vacate the demand order issued under section 73 of the CGST Act.
In the Author's opinion, the petitioner could have taken the ground that there was no valid service of notice as per section 169 of the Act to fetch the desired relief from the Honorable Court.

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Whether ITC can be denied merely because the supplier failed to file returns and pay taxes?

No, The Honorable Uttarakhand High Court in ***Subhash Singh v. Deputy Commissioner, SGST [Special Appeal No. 100 of 2024 dated May 03, 2024]*** has modified the assessment order passed earlier against the purchasing dealer on condition of depositing 10% of the amount demanded and further observed that proceedings under Section 74 of the Central Goods and Services Tax Act, 2017 should not ideally be instituted against the purchasing dealer for availing the benefit of ITC since the same has not been availed in a fraudulent manner.

The Honorable Uttarakhand High Court held that keeping in view the provisions of Section 107(6)(d) of the Uttarakhand Goods and Services Tax Act 2017, the Impugned Order is modified and since the appellant has produced all the invoices from the suppliers, it was the duty of the supplier to file their returns, which they have not done. Therefore, the order is being modified that the appellant will deposit 10% of the amount, which is being demanded.

Author's Comments:

As per section 155 of the CGST Act, the Burden of proving eligibility to claim input tax credit is on the registered person. When the supplier has not filed returns (presuming cause-of-action 16(2)(b) is not alleged) it is alleged that the supplier has not paid taxes to the credit of the government, then the burden of proof section 16(2)(c) condition is on the registered person.

The learned Standing Counsel on behalf of the State must have brought this on record and must have allowed the taxpayer to discharge the burden in relation to the eligibility for credit.

Important to highlight that the Honorable Court has ordered the Appellant to deposit 10% of the tax demanded without any basis and reference to legal provisions. The Honorable Courts have the discretion to allow reliefs under Article 226; such decisions do not meet the ends of justice.

Reference is made to Section 107(6)(d) of the Uttarakhand GST Act, which does not exist in the statute. It must be a typographical error.

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Whether the Revenue Department can block an Electronic Credit Ledger by making a negative balance?

No, The Honorable Telangana High Court in ***Laxmi Fine Chem v. Assistant Commissioner [W.P No. 5256 of 2024 dated March 18, 2024]*** held that in case assessee has wrongly or fraudulently availed input tax credit, the Revenue department should initiate appropriate recovery proceedings under Section 73 or 74 of the Central Goods and Services Tax Act, 2017 rather than invoking Rule 86(A) of the Central Goods and Services Tax Rules, 2017.

The Honorable Telangana High Court noted that plain perusal of the impugned order under challenge shows that the Revenue department has made a negative credit in the electronic credit ledger of the Petitioner which otherwise is not permissible and that is permissible is only blocking the availing of the input tax credit to whatever is in a credit of the Petitioner. The Honorable Court relied upon the judgment of the Gujarat High Court in the case of ***Samay Alloys India Pvt. Ltd. [GST 338/2022 (61) G.S.T.L. 421]*** wherein it was held that in case where credit is fraudulently availed and utilized, appropriate proceeding under the provisions of section 73 or section 74 of the CGST Act, as the case may be, may be initiated. Further, noted that Rule 86A of the CGST Rules is not the rule that provides for debarring the registered person from using the facility of making payment through the electronic credit ledger. In case the intention was to disallow future debits or credit in an electronic credit ledger, the text of the rule would be entirely different. The Honorable Court stated that Rule 86A of the CGST Rules, empowers the proper officer to disallow debit from the electronic credit ledger for an amount equivalent to the amount claimed to have been fraudulently availed, and if no input tax credit was available in the credit ledger, the rules does not provide for insertion of negative balance in the ledger. The Honorable Court held that the action on the part of the Revenue Department in passing an order of negative credit was contrary to Rule 86(A) of the CGST Rules.

Author's Comments

There are only five (5) reasons for which this pre-emptive and emergency power under Rule 86A can be invoked. And if there are any other reasons, not falling with these, the use of this exceptional power would be contrary to law. Blocking the use of input tax credit, which is a vested and indefeasible right in the nature of the property of a Registered Person, would be institutionalized theft. Passion to protect the interests of Revenue does not authorize bypassing the law.

It is advisable to call for reasons to believe by the Commissioner or any other officer authorized whenever Rule 86A is used for pre-emptive action.
Moreover, this decision by the Commissioner or any other authorized officer is a non-appealable decision, although not specified u/s 121 of the Act.

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Whether the Registered person have burden to prove the movement of goods and services?

Yes, the Honorable Calcutta High Court in the case of ***Roshan Sharma v. Assistant Commissioner of Revenue, State Tax, West Bengal & Ors. (M.A.T. 854 of 2024 dated May 07, 2024)*** set aside the Adjudication Order affirming tax demand, interest, and penalty proposed in the Show Cause Notice. The Honorable Court held that the Appellant is bound to prove by proper evidence to establish the movement of goods and in the present case; the Appellant had no opportunity to cross-examine the Suppliers and transporters. Further, the statements recorded from them were not furnished to the Appellant. Hence, the case was remanded to the Adjudicating Authority for fresh consideration. The Honorable Calcutta High Court directed the Adjudicating Authority to furnish copies of the statements obtained from the suppliers and transporters to the Appellant within a week. The adjudication shall be completed as expeditiously as possible preferably within 60 days. Further, the Appellant is entitled to submit his further explanation along with the necessary documents. If the Appellant requests for cross-examination of those persons, the same should be permitted. Thereafter, the Adjudicating Authority shall pass fresh orders on merits and in accordance with law.

Author's Comments

Section 155 of the CGST Act places the burden of proof on the taxpayer in respect of 'eligibility' to input tax credit availed and therefore, on Revenue in respect of all other matters.

Pertinent to mention here that there is a difference between 'Burden' and 'Onus' under the Indian Evidence Act, of 1872 where the burden always remains on the person whom the law states to bear it, but when new material is introduced, in rebuttal or otherwise, then the onus to prove all the requirements of its admissibility shifts to the person introducing such material (Section 101 of Evidence Act). In the instant case, once the registered person has introduced E-way bills, the burden placed under section 155 stands discharged and now the onus shifts back to the department to prove evasion of tax. Merely, stating statements of the persons deposed does not discharge that onus.

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Whether the Appellate authority can proceed to confirm the demand where SCN was not issued by the Proper officer?

No, the Honorable Delhi High Court in ***Rahul Packaging v. Union of India [W.P. (C) NO. 5373 OF 2024 dated April 16, 2024]*** held that the appellate authority cannot proceed in the matter wherein the order in the original was passed by the non-competent authority.

The Honorable Delhi High Court noted that the Order in original was passed by Range Superintendent who was not a competent authority under the CGST Act to do so and the Appellate Authority in an Impugned Order has considered the fact that SCN has been issued and adjudicated by an incompetent authority which is bad in law. However, the Appellate Authority proceeded to consider the case of the Petitioner on merits and thereafter, upheld the rejection of the refund application. The Honorable Court held that the course adopted by the Appellate Authority is not sustainable as the SCN was issued and adjudicated by the incompetent authority and therefore, the Appellate Authority could not have proceeded further with the matter and quashed the Show Cause Notice and the proceedings.

Author's Comments

When the 'due process' laid down in the law is bypassed, it is tantamount to abuse of authority. Apex court has instructed in ***Sakal Papers (P.) Ltd. Vs UOI AIR 1962 SC 305*** that:

"*Legitimacy of the result intended to be achieved does not necessarily imply that every means to achieve it is permissible; for even if the end is desirable and permissible, the means employed must not transgress the limits laid down by the constitution.*"

That is the importance of 'due process' and a bulwark against the administrative lethargy to statutory procedures while seeking to protect the interests of Revenue.

This is the classic example to demonstrate the demerits of 'Without Prejudice' replies on the merits of the case, even when the SCN suffers from incurable defects touching jurisdiction, validity, due process, limitation, etc.

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Whether it is mandatory to disclose reasons for the rejection of the Refund in RFD-08?

Yes, the Honorable Rajasthan High Court in the case of ***M/s. Maple Luxury Homes v. State of Rajasthan and Ors. [D.B. Civil Writ Petition No.17061/2023 dated April 18, 2024]*** held that the proper officer has to disclose to the taxpayer the reasons for rejection of the refund application with an object to invite a response and consider the same and then pass an order. The Honorable Rajasthan High Court observed that all the notices served to the Petitioner contained identical disclosure in so far as reasons for the proposed rejection of the application that the Petitioner does not fall under the category of Section 54 of the Central Goods and Services Tax Act, 2017. It appears that the Respondent only completed an empty formality and it did not even disclose why the Respondent formed a tentative satisfaction to reject the claim for the refund. The Honorable Court noted that, if what has been stated in the SCN with regard to reasons is *juxtaposed* with the reasons that have been stated in the Impugned Orders to reject the claim of the refund, it would be clear that what was stated in the Impugned Orders to reject the claim for the refund was not at all stated not even briefly, in the SCN issued under Rule 92(3) of the Central Goods and Services Tax Rules, 2017. Thus, it is apparent that the issuance of the SCN was a farce and an empty formality by the Respondent rather than making it a meaningful exercise requiring the Petitioner to offer its explanation/reply to the reasons for the proposed rejection of application for claim of refund. The Honorable Court held that the provisions contained in Rule 92(3) of the CGST Rules incorporating principles of natural justice were completely violated. If that be so, the objection to the maintainability of the petition on the ground of alternative remedy would not hold water. The said objection was accordingly rejected.

Author's Comments

Apex Court has held that unjust enrichment does not apply to the State by the principle of *parens patriae* in para 74 of ***Mafatlal Industries Vs UOI 1996 SC 1268,*** and even in the absence of an express provision in the statute barring enrichment of taxpayer from collecting refund of tax after having passed on its incidence under misinformation about the applicable law, article 39 of the Constitution proscribes State from perpetuating unjust enrichment. In the case of a refund of Output tax paid, there is a presumption in Section 49(9) that the incidence has been passed on.

In the author's opinion, Jurisprudence regarding the incurability of defects, discrepancies, and deficiencies in the notice was laid down by the Apex Court in the case of **Oryx Fisheries (P) Ltd. v. UoI 2011 (266) ELT 422 (SC)** and **CCE v. Brindavan Beverages (P) Ltd. (213) ELT 487 (S)** which is fortified in Section 75(7) where the 'grounds' on which a notice is issued is mandated to the same 'grounds' on which the Adjudication order is required to be passed. The taxpayer must have pleaded to quash the notice on the grounds of violation of the mandate given in section 75(7), rather than being satisfied with remanding back of the case for another round of adjudication.

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Whether recovery proceedings can be initiated within three months following the issuance of an Order?

No, the Honorable Madras High Court in the case of ***Tvl. Cargotec India (P.) Ltd. v. Assistant Commissioner (ST) [Writ Petitioner No. 13104 of 2023 dated April 23, 2024]*** allowed the writ petition and held that no recovery measures shall be undertaken by the GST Authorities for a period of three months from the date of such order as per the proviso to Section 78 of the Central Goods and Services Tax, 2017.The Honorable Madras High Court observed that the proviso to Section 78 of the Tamil Nadu Goods and Services Tax Act, 2017, may be invoked only if the proper officer records in writing the reason as to why he considers it expedient in the interest of the revenue to require the taxable person to make payment even before the expiry of the prescribed three-month period. In the case in hand, no material was placed on record to justify invoking the proviso to Section 78 CGST Act. The Honorable Court held that the Respondents either refund the recovered amount or re-credit the same to the Petitioner's Electronic Cash or Credit Ledgers, as the case may be, within one month from the date of receipt of the copy of the said Order because the Respondents failed to satisfactorily explain the recourse to the proviso to Section 78 of the CGST Act.

Author's Comment:

As per circular no.03/03/2017- GST dated 5thJuly 2017, the Proper officer for recovery under section 79 of the CGST Act, 2017 is the jurisdictional Deputy or Assistant Commissioner of Central Tax. The Proper officer under proviso to section 78 (for early recovery) is the jurisdictional Principal Commissioner/ Commissioner of Central Tax. Recently, instruction no.01/2024-GST dated 30th May 2024 has been issued by the CBIC laying down the guidelines for initiation of recovery proceedings before three months from the date of service of demand order.

Important to mention that the decision for early recovery action under *proviso* to section 78 is a non-appealable decision, although not listed in section 121 (Non-appealable decisions or orders).

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Whether ITC is available for the construction of the immovable property for renting it out for commercial purposes?

No, the Tamil Nadu AAR in the matter of ***Suswani Foundations (P.) Ltd., In re [Advance Ruling No. 123/AAR/2023 dated December 19, 2023]*** held that as per Section 17(5)(d) of the CGST Act, 2017 no Input Tax Credit is available in respect of any goods or services received by the Assessee for construction of immovable property on its own account even if inputs and input services are used in the course and furtherance of business. The Tamil Nadu AAR observed that the Applicant had built the godown for which he had received various inputs and input services. The Applicant was proposing to rent out to large companies to store their stock for future sale *i.e.* for the furtherance of their business. Therefore, as per Section 17(5)(*d*), no ITC is available on any goods or services received by them for such construction and the same cannot be claimed.

The Tamil Nadu AAR held that the input tax paid on the goods or services received for construction of an immovable property 'on one's own account' is not available. The power to restrict the flow of credit exists under Section 16(1) of the CGST Act, which shows the legislative intent that the ITC may not always be allowed partially or fully. As the suitability and requirements of taxpayers vary from person to person, the legislation cannot be amended accordingly. Therefore, the taxpayers must adhere to the restrictions prescribed in the law.

Author's Comments:

Important to highlight that by no standards of measurement, an Advance ruling is a *Quasi-judicial* proceeding, and likewise, its pronouncements are not binding precedents. Except for Applicant-Taxpayer, decisions of AAR's and AAAR's have no precedent value.

The Decision to take the matter to AAR is a strategic decision and must be taken wisely. The case of ***Chief Commissioner of Central Goods and Services Tax and Others v. M/s Safari Retreats Private Limited and Others [SLP(C) 26696/2019]*** is pending before the Honorable Supreme Court and is at its final stage. Earlier Department had filed an appeal against the judgment passed by the Honorable Orissa High Court in the case of ***Safari Retreats Private Limited and Others v. Chief Commissioner, Central Goods and Services Tax and Others [W.P. (C) 20463 of 2018 dated April 17, 2019]*** wherein the Honorable High Court allowed the ITC on inputs and input services used for construction of immovable property which is to be used in the course or furtherance of business i.e. being further let out. If the favorable decision is rendered in this case, it will be too difficult for the Applicant-taxpayer to go back on this AAR ruling and claim credit.

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Whether Writ Petition against Assessment Order maintainable when the remedy of appeal not availed during the period of limitation?

No, The Honorable Rajasthan High Court in the case of ***M/s. Thekedar Nand Lal Sharma v. State of Rajasthan and Ors. [D.B. Civil Writ Petition No. 1437/2024 dated April 30, 2024]*** dismissed the writ petition and held that the writ petition against the Assessment Order is not maintainable since the remedy of appeal is not availed during the period of limitation.

The Honorable Rajasthan High Court noted that the Petitioner did not file the appeal and admittedly was aware of the Impugned Order passed. Further noted that the Petitioner deliberately chose not to file the appeal and avail the remedy of appeal prescribed under Section 107 of the CGST Act but waited for the prescribed period of limitation for filing of appeal to expire. The Honorable High Court relying upon the judgment of the Honorable Supreme Court in the case of ***Assistant Commissioner (CT) LTU, Kakinada & Ors. vs. Glaxo Smith Kline Consumer Health Care Limited [Civil Appeal No. 2413 of 2020 dated May 6, 2020]*** wherein it was held that the writ petition cannot be filed for granting of relief against the assessment order passed, when the appeal could not be filed within the prescribed period, therefore, being barred by limitation, the Honorable High Court opined that the writ petition is not maintainable and the writ petition is dismissed.

Author's Comments

To approach the High Court, it must be shown to the Honorable Court that the proceedings:

a) Deserves intervention to stop the march of injustice;
b) Remedy necessary, cannot be allowed in adjudication or in appeal.

Timelines are extremely important in the GST law. If the appeal is not preferred within the time limit allowed (3+1 month) under section 107 of the CGST Act, then it operates as a "Prescription" where the right/remedy under the law is lost due to delay.

Similar orders were delivered by the Honorable Madras High Court in the case of ***Tvl. Sri Maharaja Industries v. The Assistant Commissioner (ST) (FAC) [W.P Nos. 16075, 16077, 16080, and 16082 of 2023 and W.M.P.Nos.15499, 15500, 15501, 15502, 15506, 15508, 15509 & 15511 of 2023, dated May 24, 2023]*** and in the case of ***Thiruchy Royal Steels v. Deputy State Tax Officer [W.P.NO. 15338 OF 2023, W.M.P. NOS. 14861 and 14863 of 2023 dated May 11, 2023]***

wherein the writ was rejected by stating if the alternate remedy is available, then the petitioner should exercise that before filing a writ petition.

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Whether the Proper officer has the authority to pass an order beyond the period of seven days from the date of service of notice of detention or seizure of goods or conveyance?

No, the Honorable Patna High Court in the case of ***Pawan Carrying Corporation v. State of Bihar [Civil Writ Jurisdiction Case No. 3499 of 2024 dated February 29, 2024]*** held that the proper officer must issue the notice within seven days of detention or seizure of goods or conveyance. Section 129 starts with the Non-obstante clause and there is no reason to wait for an application by the driver of the vehicle for the verification of the goods when the vehicle is intercepted. Lastly, the order should be passed within seven days of the service of notice of such detention or seizure of goods or conveyance. The Honorable Patna High Court observed that the vehicle was intercepted on December 22, 2023, and there was no reason for the verification of the goods to wait for an application by the driver of the vehicle. Further noted that even if the detention is stated to be on December 28, 2023, the notice was only issued on January 05, 2024, after the seven days provided in Section 129(3) CGST Act. Further, when the Petitioner had required for time on the seventh day from the date of serving of notice, nothing prevented the Respondent from rejecting the said prayer and passing the order, especially where the matter is kept pending, the proceedings would be barred by limitation. The Honorable Court held that the limitation is clear and definite. The facts of the case indicate that the Respondents did not act in accordance with the Section 129 of the CGST Act. Therefore, there is no reason to sustain the demand raised. Hence, the Impugned Order passed for the detention of the vehicles was set aside and directed the Respondents to release the vehicle with the goods immediately.

Author's Comments:

As soon as the goods or conveyance is seized, an application under section 129(1)(c) must be preferred to the intercepting officer to seek the provisional release by furnishing security in MOV-08 and seek the release in MOV-05.

As per Section 129(3) of the CGST Act, the proper officer detaining or seizing goods or conveyance shall issue a notice within seven days of such detention or seizure, specifying the penalty payable, and thereafter, pass an order within seven days from the date of service of such notice, for payment of penalty under clause (a) or clause (b) of sub-section (1). If the notice or order is not issued within the specified time limits under section 129(3), then the whole proceedings are tainted and without the authority of law.

Orders were issued on the same subject matter in the case of ***Udhayan Steels Private Limited v. Deputy Tax Officer (Int.) & Anr. [W.P.No.34268 of 2022 dated December 28, 2022]*** by the Honorable Madras High Court.

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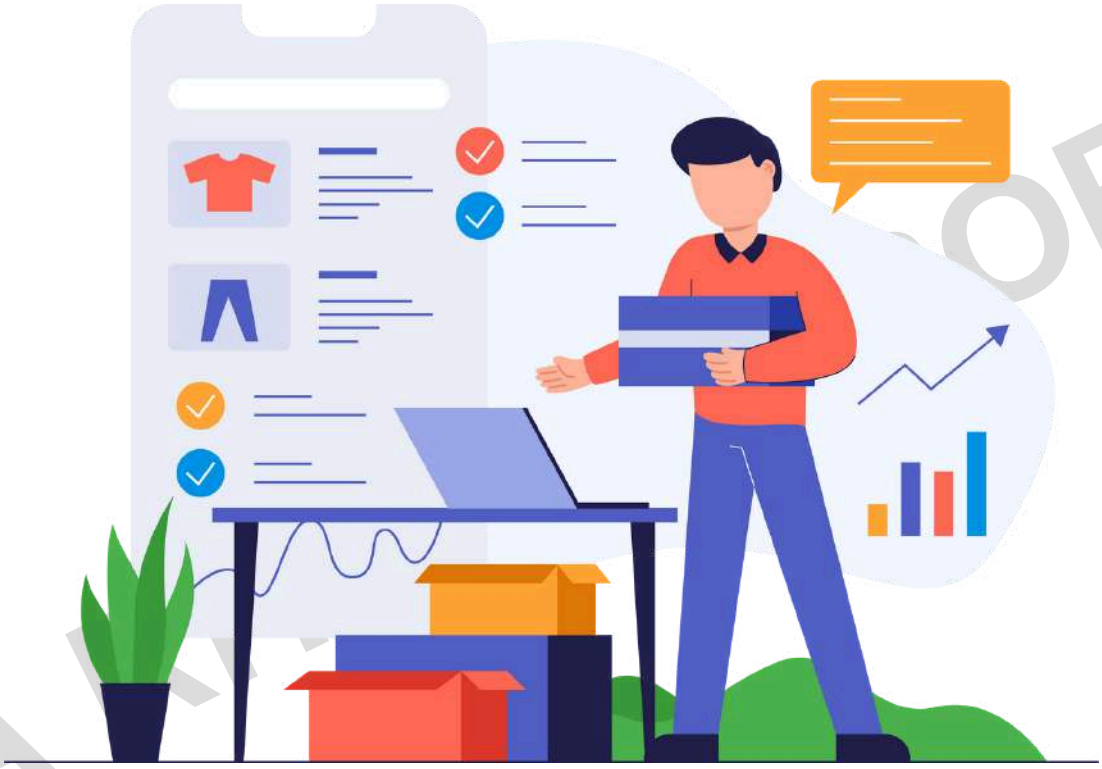

Whether SEZ units furnishing LUT required to pay GST on RCM for services availed from the DTA supplier?

No, the Gujarat, AAR in the matter of ***M/s. Waaree Energies Limited [Advance Ruling No. GUJ/GAAE/R/2024/09 dated April 16, 2024]*** held that the Special Economic Zone units are not required to pay GST under Reverse Charge Mechanism on any service received from suppliers located in the Domestic Traffic Area for carrying out the authorized operation in the SEZ unit, provided a Letter of Undertaking or bond as a deemed supplier of such services is furnished as mentioned in Notification 37/2017-Central Tax dated October 04, 2017. The Gujarat, AAR observed that as per the question in the FAQs on GST, 3rd Edition, dated December 15, 2018, it has been clarified about the question of payment of IGST under RCM, when received by an SEZ unit. It states that all supplies to SEZs are zero rated. However, the suppliers are given two options. In this case, the supplier is not liable to pay GST as the supply is under RCM. The recipient is considered as deemed supplier, therefore, SEZ has to pay GST in this case. This rationale was borrowed from clarification and not a circular which was given to specified SEZ units. The Tax Research Unit, CBIC, New Delhi, clarified a unit in SEZ or the SEZ developer can procure such services, where they are required to pay GST under RCM, without payment of IGST provided by the actual recipient, i.e. SEZ unit, furnishes a LUT in place of a bond as specified in the condition of *Notification No. 37/2017-Central Tax dated October 04, 2017*. The actual recipient of service is the deemed supplier/registered person to fulfill other conditions including the manner of furnishing of LUT.

The Gujarat AAR relied on ***Portescap India (P.) Ltd.In re [Order No. MAH/AAAR/DS-RM/15/2022-23 dated January 13, 2023],*** where the Appellate Authority for Advance Ruling, Maharashtra held that the Appellant is not required to pay GST under RCM on any service received from suppliers located in DTA for carrying out the authorized operation in SEZ unit, provided that a LUT or bond as a deemed supplier of such services is furnished.

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Whether the Taxpayer can be deprived of the statutory right to file an appeal due to non-constitution of the Tribunal?

No, The Honorable Orissa High Court in the matter of ***M/s. BPS Steel Syndicate (P.) Ltd. v. Union of India [Writ Petition (Civil) No. 6518 of 2023]*** held that the petitioner cannot be deprived of its statutory remedy to appeal due to the non-constitution of the Appellate Tribunal. The Honorable Court noted that the Government of India based on the recommendations made by the GST Council issued the Central Goods and Services Tax (Ninth Removal of Difficulties) Order, 2019 on December 03, 2019, where Clause-2 talks about the calculation of removal of difficulties as the "three months from the date on which the order is sought to be appealed against is communicated to the person preferring the appeal" in sub-section (1) of section 112, the start of the three months shall be considered to be the later of the following dates:- date of communication of order, or the date on which the President or the State President, as the case may be, of the Appellate Tribunal after its constitution under Section 109 of the CGST Act, enters office.

Further noted that the CBIC, GST Policy Wing *vide* Circular No. 132/2/2020-GST Dated 18th March, 2020 has come out with the clarification in respect of the appeal having regard to non-constitution of the Appellate Tribunal. Hence, the High Court decided to dispose of the writ petition, Subject to verification of deposit of a sum equal to 20% of the remaining amount of tax in dispute, or deposit of the same, if not already deposited, in addition to the amount deposited earlier under Sub Section (6) of Section 107 of the CGST Act /OGST Act, the Petitioner must be extended the statutory benefit of stay under Sub-Section (9) of Section 112 of the CGST Act / the OGST Act. The Petitioner cannot be deprived of the benefit, due to non-constitution of the Tribunal by the Respondents themselves.

Author's Comments

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This is a laudable judgment by the Honorable Court to give the desired relief to the aggrieved taxpayer. Circular no. 132/2/2020-GST dated 18 March 2020 is issued to clarify that the appeal to the tribunal can be made within three months (six months in case of appeals by the Government) from the date of communication of the order or the date on which the President or the State President, as the case may be, of the Appellate Tribunal enters office, whichever is later (Para 4.2 of the circular). Hence, the time to file an appeal before the Appellate Tribunal is extended. The only question that remains is whether or not an additional pre-deposit as required under sub-section 8 of section 112 of the Act is to be made or not for the stay of operation of the order under section 107/108 because CGST

(Removal of Difficulties) order 9/2019- Central Tax dated 03 Dec 2019 read with circular 132/2/2020 does not expressly stay any recovery under section 79.

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Whether the taxpayer can approach the High Court to seek relief for payment of interest in installments?

No, the Honorable Madras High Court in ***Best Recharge v. Deputy Commissioner (ST) GST [W.P. (MD) NO. 9041 of 2024 and W.M.P (MD) NO. 8258 of 2024 dated April 15, 2024]*** directed the assessee to approach the Commissioner under Section 80 of the Central Goods and Services Tax Act, 2017 to seek relief for payment of interest in monthly installments pertaining to disputed tax already discharged on account of excess/wrong availment of Input Tax Credit. The Honorable Madras High Court observed that the order passed by the first appellate authority does not require any interference as the order does not suffer from any of the vices that require it to be reviewed under Article 226 of the Constitution of India. The Honorable Court noted that since the Petitioner has paid the disputed tax, the only relief the Petitioner is seeking for payment of interest in installments for which the Petitioner has to approach the Commissioner under Section 80 of the CGST Act.

Author's Comments:

Pertinent to mention that as per the amendment made vide Section 116 of the Finance Act, 2022, the rate of interest has been reduced from 24% to 18% on the ITC wrongly availed and utilized, from the retrospective date 01 July 2017.Now the interest can levied at the rate of 18% on ITC wrongly claimed & utilized, subject to provisions of Rule 88B which is currently being overlooked by the administration.

Interestingly, the construct of section 73(1) does not permit recovery of only demand for interest (or penalty) without a primary demand for tax (or credit or refund).Similar was the construct of section 11A of the Central Excise Act or section 73(1) of the Finance Act where the 'deposit-demand appropriation' approach has been upheld, the same would apply to GST, and any other approach to demand 'only interest' would be fatal in GST.

Further, as per Section 80 of the CGST Act, on an application preferred by a taxable person, the Commissioner may, for reasons to be recorded in writing, extend the time for payment or allow payment of any dues in installments not exceeding 24 months. However, in case of default by the taxpayer in payment of any one installment on its due date, the whole outstanding balance payable on such date shall become due and payable forthwith and shall, without any further notice being served on the person, be liable for recovery.

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Whether the GST registration can be canceled without granting the proper opportunity to file a reply to the Show Cause Notice issued?

No, The Honorable Andhra Pradesh High Court in the case of ***Raghavaiah Thelapalli v. State of Andhra Pradesh and Ors. [Writ Petition No. 1743 of 2024 dated March 07, 2024]*** allowed the writ petition and set aside the order canceling GST registration on the ground that the person was not granted the proper opportunity to file the reply against the Show Cause Notice issued. The Honorable Andhra Pradesh High Court noted that, though the Petitioner did not file the reply to the SCN, the Impugned Order has been passed mechanically, without application of mind and the reason for non-filing of reply to the SCN i.e. the person handling the GST matter of the Petition firm has left abruptly and the Petitioner was not aware of the issuance of the SCN could be considered as sufficient reason. The Honorable Court opined that the Petitioner is entitled to the opportunity of hearing in consonance with the principles of natural justice.

Author's Comments

Section 29(2)(c) of the CGST Act provides for the cancellation of registration where the registered person fails to furnish returns for a continuous period of 6 months. The law has specified five explicit delinquencies in Section 29(2) which can lead to cancellation of registration after following the due process laid down in the legislature.

The proper officer is permitted to proceed with cancellation and pass a speaking order in REG19 and demand all dues, which extend to:

➢Outstanding tax, interest, late fee, and penalties due;

➢Due under section 29(5) in respect of credits.

Although Section 169 of the CGST Act, 2017 specifies 14 different ways/modes of serving any decision, order summons, notice, or order communication under the Act, care must be taken by the authorities not to simply pick and choose any option, rather the best possible option must be chosen by which it is mostly likely to reach the intended noticee. The notice or any other communication cannot be termed to be served until it has reached the intended noticee.

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Whether the cross-empowerment is allowed for the adjudication of the registered person assigned to SGST authority by the CGST, or vice-versa?

No, the Honorable Madras High Court in ***Ram Agencies v. Assistant Commissioner of Central Tax [W.P. (MD) NO. 8674 of 2024 and W.M.P (MD) NOS. 7920 & 7921 of 2024 dated April 10, 2024]*** has quashed the impugned order-in-original issued by the Assistant Commissioner of Central Taxes as it was held that in the absence of a notification issued for cross empowerment, authorities from a counterpart department cannot initiate proceedings where an assessee is assigned to another counterpart.

The Honorable Madras High Court noted that the issue regarding cross-empowerment and the jurisdiction of the counterparts to initiate proceedings when an assessee has been allocated either to Central Tax Authorities or to the state tax authorities was examined in detail by this Court in ***Tvl. Vardhan Infrastructure's case [W.P. No. 34792 & Ors. dated March 11, 2024],*** Wherein the Honorable Court has concluded that in the absence of notification issued for cross -empowerment, the authorities from the counterpart department cannot initiate proceedings where an assessee is assigned to the counterpart. The Honorable Court quashed the Impugned Order-in-Original passed by the Assistant Commissioner of Central Tax in the absence of notification issued for cross empowerment, with the liberty given to the State authorities to proceed against the petitioner.

Author's Comments:

Important to highlight here that cross-empowerment is allowed for proceedings carried out under section 67 only and for the rest of the proceedings, the Proper officer to issue Show Cause notice under section 63/73/74/76 is the jurisdictional department (either CGST or SGST).

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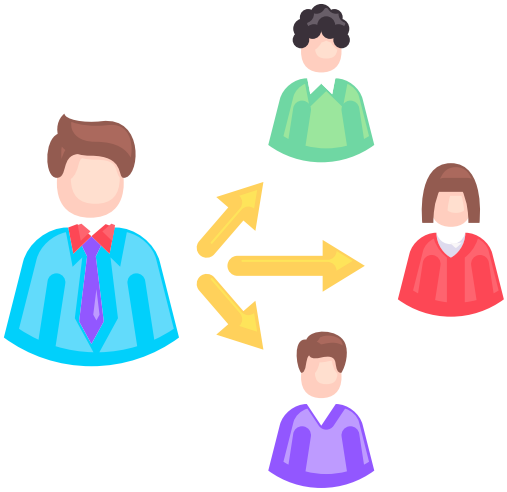

Whether Interest and fee can be levied when there is a delay in depositing GST without the fault of the registered person?

No, the Honorable Allahabad High Court in the case of ***Bhole Baba Milk Food Industries Limited v. Union of India [Writ Tax No. 1431 of 2023 dated April 16, 2024]*** allowed the writ petition and held that the levy of fee and interest would arise only in case where the failure is on part of the assessee to file return and/or payment of tax due within the prescribed period of time. The Honorable Allahabad High Court noted that the Petitioner has initiated the payment of tax within the prescribed time period in the manner prescribed for which the amount is debited from the bank account. However, the Revenue Department states that the amount has been received at a later stage. The Honorable Court held that the writ petition is disposed of directing the Respondent to adjust the amount of interest and penalty against the tax liability.

Author's Comments

This is a welcome decision by the Honorable High Court of Allahabad and it comes to the rescue of the taxpayer. The Revenue Department has to understand that every time filling affidavits in courts to pin all the blame on the GSTN portal will not help the cause. For RTPs, administration, and GSTN portal is the one, not different branches of law. Revenue has to ensure the co-ordinated working of the portal as per the Rule of the land and if there is any glitch, Revenue must suffer, not the RTP.

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Whether the ITC can be claimed where credit pertains to the period when the registered person was not eligible to claim ITC?

No, the Telangana, AAR in the matter of ***M/s. Noori Travels [TSAAR ORDER NO.08/2024 dated May 01, 2024]*** ruled that the credit on a motor vehicle cannot be claimed by the assessee if the supplier has shown the transaction in the period wherein the recipient was claiming the benefit of the lower tax rate on the ground that the GSTR-1 filed by the supplier being a statutory return should be given more weightage than the invoice copy raised by the supplier. The Telangana AAR noted that the Applicant was rendering passenger transport service which is covered under SAC heading 9964 where the assessee has the option to pay GST at the rate of 5% or 12%. In case the assesse opts to pay GST @ 5% in such case the assessee is not eligible to claim ITC on goods and services used in the supply of the services. Whereas, in case the assessee opts to pay GST @12% in that case it is eligible to claim ITC.

The AAR observed that the Applicant purchased a motor vehicle and the details of such purchase were reported by his supplier in GSTR-1 of July 2023 and stated that since the supplier has reported such purchase in GSTR-01 in July which is a statutory return filed on the common portal and stand on a higher pedestal as evidence when compared to the physical invoice held by the Applicant. The AAR ruled that the supply of the car was made in July 2023 when the Applicant was still availing the lower rate of tax on his supplies by forfeiting his right to claim the input tax credit on the purchase of goods and services and hence the ITC pertaining to the purchase of a car is not available to the Applicant.

Author's Comments:

This kind of approach adopted by the AARs (creatures of the Statute) renders the "due process" laid down in the statute "Superfluous, unnecessary, and nugatory", which is impermissible in the law. The input tax credit is a vested and indefeasible right of the taxpayer, post fulfillment of the conditions laid down in section 16 of the CGST Act. There is no provision under GST law which restricts registered person to claim ITC on invoices auto-populating in GSTR-2B of previous month, rather section 16(2)(b) provides that ITC must be claimed when goods or services or both are received. In the instant case, credit must have been allowed to the Applicant.

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Whether remedy can be availed under writ jurisdiction when alternate remedies not availed efficaciously?

No, the Honorable Patna High Court in the case of ***Rajesh Kumar Dubey v. Union of India [CWJ Case No. 5113 of 2024 dated April 23, 2024]*** dismissed the writ petition and held that remedy cannot be availed under writ jurisdiction when the alternate remedies have not been availed efficaciously.

The Honorable Patna High Court observed that Section 107 of the Bihar Goods and Services Tax Act, 2017 states that the appeal has to be filed within three months and apply for condonation of delay with satisfactory reasons within a further period of one month. Further observed that, the Honorable Supreme Court in the case of ***In Re Cognizance for Extension of Limitation [Suo Moto Writ Petition (C) No. 3 of 2020]*** wherein the limitation was saved for the period between March 15, 2020 to February 28, 2022. Further, the appeal could be filed within ninety days from March 1, 2022. The Honorable Court noted that the appeal has to be filed against order on or before May 30, 2022, but the appeal was filed November 25, 2023, after about one year and five months from the date on which even the extended limitation period expired. The Honorable Court opined that the extraordinary jurisdiction under Article 226 of the Constitution is not to be invoked in cases where there are alternate remedies available and the Assessee has not been diligent in availing such alternate remedies within the stipulated period.

Author's Comments

To approach the High Court, it must be shown to the Honorable Court that the proceedings:
a) Deserves intervention to stop the march of injustice;
b) Remedy necessary, cannot be allowed in adjudication or in appeal.

Timelines are extremely important in the GST law. If the appeal is not preferred within the time limit allowed (3+1 month) under section 107 of the CGST Act, then it operates as a "Prescription" where the right/remedy under the law is lost due to delay.

Similar decision has been rendered by the Honorable Rajasthan High Court in the case of ***M/s. Thekedar Nand Lal Sharma v. State of Rajasthan and Ors. [D.B. Civil Writ Petition No. 1437/2024 dated April 30, 2024]*** where the writ petition against the Assessment Order is dismissed since the remedy of appeal was not availed during the period of limitation.

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Whether the Proper officer can pass an order without application of mind on the reply submitted?

No, the Honorable Delhi High Court in ***Spinclabs (P.) Ltd. v. Commissioner of Delhi Goods and Services Tax [W.P. (C) NO. 4187 OF 2024 dated April 10, 2024]*** held that the adjudicating authority could have asked the assessee to furnish any further details that were required, rather, merely holding that replies furnished are unsatisfactory and not supported with proper calculations/reconciliation, which ex-facie shows that the adjudicating authority has not applied his mind and remitted the matter back to the adjudicating authority for re-adjudication. The Honorable Delhi High Court noted that the Petitioner has furnished detailed replies along with supporting documents; therefore, the Impugned Order passed by the adjudicating authority is not sustainable.

The Honorable Court stated that the adjudicating authority should at least consider the reply on merits and then form an opinion. Further noted that if the adjudicating authority was of the view that any further details were required, the same could have been specifically sought from the Petitioner.

Author's Comments

This is a welcome decision by the Honorable High Court of Delhi and it comes to the rescue of the taxpayer and once again the Rule of Land stands tall against the over-passionate administration. The Revenue Department has to understand that this kind of approach renders the "due process" laid down in the statute "Superfluous, unnecessary and nugatory", which is impermissible in the law.

A Similar judgment was delivered by the Honorable Delhi Court in the case of ***Aarem Tradex (P.) Ltd. v. Sales Tax Officer [W.P. (C) 2767 of 2024 dated February 23, 2024]*** wherein it was held that the Assessment Order is not sustainable when devoid of any proper reasoning.

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Whether the unutilized VAT Credit is allowed to be transitioned to the GST regime?

Yes, the Honorable Madras High Court in the case of ***M/s. Radhikka Ceramic World v. State Tax Officer [Writ Petition (MD) No. 1098 of 2021 dated April 04, 2024]*** held that the amount of advance tax that was un-utilized under the Tamil Nadu Value Added Tax Act, 2006, has to be allowed to be transitioned under Section 140 of the Tamil Nadu Goods and Services Tax Act, 2017. The Honorable Madras High Court relied on the case of ***Avatar Petro Chemicals (P.) Ltd. v. GST Council [Writ Petition (MD) No. 7093 of 2020 dated March 4, 2022]*** and held that substantial benefit of such un-utilized credit cannot be denied as these credits were earned legitimately under the Tax Enactments which were in force prior to July 01, 2017. Further relied on ***Magma Fincorp Limited v. State of Telangana [Writ Petition No. 46792 of 2018 dated April 15, 2019]*** where it was held that once it is admitted that credit was available to the petitioner on the date of switch over from the VAT regime to GST regime and once it is admitted that the petitioner may be entitled to make a claim for this credit in other modes, the second respondent ought to have given a purposive interpretation to Section 140 of the TNGST Act read with Sections 16 to 21 of the Telangana Goods and Service Tax Act, 2017. The Honorable Court held that if the amount of advance tax had remained un-utilized under the TNVAT Act, it clearly states that the amount of VAT and Entry Tax remaining un-utilized in the return shall be allowed to be transitioned and such a registered person is entitled to take credit of such an amount in his electronic credit ledger. Hence, there was no reason to sustain the Impugned Order and therefore, it was quashed.

Author's Comments

Important to mention here that the Trans credit is neither the input tax as per Section 2(62) of the CGST Act, 2017 nor the output tax as per Section 2(82) of the CGST Act, 2017. Therefore, the transition credit claimed and utilized, even if found to be ineligible cannot be demanded under section 73 or 74 of the CGST Act as there is no jurisdiction with the proper officer under such provisions of the law. The transaction credit validly claimed cannot be distributed in the law.

A Similar decision was given by the Honorable High Court of Madras in the case of ***Commissioner of GST and Central Excise, Assistant Commissioner of GST, etc. v. Bharat Electronics Limited vide order [W.A.No.2203 of 2021 dated 18 November 2021]*** where the Division Bench allowed the respondent to file a revised Form TRAN-1.

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CA Ritesh Arora is a highly skilled and experienced practicing Chartered Accountant specializing in the indirect tax regime. With over a decade of experience in this field, he possesses in-depth knowledge and expertise in handling various aspects of indirect taxation.

Ritesh Arora's key strength lies in providing comprehensive solutions to his clients, catering to their diverse business, financial, and regulatory requirements. He is committed to offering a one-stop solution that addresses the specific needs of his clients, ensuring their compliance with the tax laws and regulations.

As a trusted professional, Ritesh Arora offers a wide range of services to his clients, including GST compliance, tax consultancy, advisory, and litigation support. He assists businesses in navigating the complex and ever-evolving indirect tax landscape, helping them optimize their tax positions and minimize any potential risks.

With his extensive experience and practical insights, Ritesh Arora is well-equipped to guide his clients through various tax-related matters, providing expert advice and strategic solutions. His dedication to delivering high-quality service and his ability to understand the unique requirements of each client make him a valuable partner in managing their tax affairs effectively.

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