



BURNING ISSUES UNDER GST

Presented by: CA Prerana Shah

On: 2nd December, 2022

Organised by: Kalyan Dombivli Branch of WIRC of ICAI

Notice for suspension and cancellation of registration...

- Hamesha Disciplined Pvt. Ltd. is regular in filing GSTR-1 and GSTR-3B
- For some reason, GSTR-1 of October 2022 could not be filed till November 2022
- Department has issued SCN for cancellation of registration on 2 December 2022
- Further, registration of Hamesh Disciplined Pvt. Ltd. was suspended from 2 December 2022 as per such SCN
- Whether department was correct in taking such legal action? What would be your advice to Hamesha Disciplined Pvt. Ltd.?

Form GST REG-17/31

[See Rule 22(1)/ sub-rule (2A) of rule 21A]

Reference Number:

Date: 27/03/2021

To

Show Cause Notice for Cancellation of Registration

Whereas on the basis of information which has come to my notice, it appears that your registration is liable to be cancelled for the following reasons:

- 1 Non compliance of any specified provisions in the GST Act or the Rules made thereunder as may be prescribed

You are hereby directed to furnish a reply to the notice within seven working days from the date of service of this notice.

If you fail to furnish a reply within the stipulated date or fail to appear for personal hearing on the appointed date and time, the case will be decided ex parte on the basis of available records and on merits .

Please note that your registration stands suspended with effect from 27/03/2021

Place: Rajasthan

Date: 27/03/2021

Signature valid 

...Notice for suspension and cancellation of registration...

- There is no clarity if SCN is issued in GST REG-17 or GST REG-31
 - REG-17 under Rule 22 (1)
 - REG-31 under Rule 21A (2A)
- No specific reason mentioned for such serious action of suspension of registration which would completely stop business of assessee
- Inherent right of a person to get an opportunity of being heard based on the legal maxim '*Audi Alteram Partem*'
- ***Ramkumar Jaigopal vs. Assistant Commissioner of Sales Tax, Sambalpur (2007 – ORHC) 103 (2007) CLT 735***

...Notice for suspension and cancellation of registration...

- ***DBS Tradelink and Advisors Pvt. Ltd. v/s State of Maharashtra 2022 (64) GSTL 389 (Bom.)***
 - *It was observed that both show cause notice issued and order of registration cancellation were **passed without application of mind and in breach of principal of natural justice**. Accordingly, impugned order passed mechanically was quashed and petitioner's registration was restored. **Further respondent was given the liberty to initiate fresh proceedings by issuing a show cause notice and passing an order in physical form.***

System generated show cause notice issued and registration cancellation order passed without application of mind ought to be quashed

...Notice for suspension and cancellation of registration...

- ***TVL. G.K. Digital Printing VS Assistant Commissioner (Circle), Tiruppur 2022 (63) GSTL 34 (Mad)***
 - ***“It was held that the petitioner’s case was squarely considered by this Court in Tvl. Suguna Cutpiece Center vs. Appellate Deputy Commissioner [2022 (61) GSTL 515 (Mad.)] wherein it was held that **no useful purpose would be served if the registration is not revived. It will hamper GST collection. Also, there are enough provisions under GST law to prevent abuse by Petitioners for non-payment of tax or filing of returns. Accordingly, relief was granted to petitioner subject to fulfilment of certain conditions*****

Even if appeal against cancellation of GST registration is dismissed, still registration is liable to be restored”

...Notice for suspension and cancellation of registration

- ***Apparent Marketing Pvt. Ltd. v/s State of U.P. 2022 (59) G.S.T.L. 399 (All.)***
 - ***“Cancellation of Registration merely by describing assessee as bogus means that orders were issued without granting any opportunity to assessee to rebut charge of being bogus; principles of natural justice being also violated at each stage of proceedings, orders cancelling Registration was set aside”***

Mis-match between GSTR-1 & GSTR-3B...

- If GSTR-1 is filed with GST liability of Rs. 10 Lakhs and GSTR-3B is filed with GST liability of only Rs. 7 Lakhs, can recovery proceedings be launched?
 - ***“75(12) Notwithstanding anything contained in section 73 or section 74, where any amount of self-assessed tax in accordance with a return furnished under section 39 remains unpaid, either wholly or partly, or any amount of interest payable on such tax remains unpaid, the same shall be recovered under the provisions of section 79.***

Explanation.- For the purposes of this sub-section, the expression "self-assessed tax" shall include the tax payable in respect of details of outward supplies furnished under section 37, but not included in the return furnished under section 39.”

...Mis-match between GSTR-1 & GSTR-3B...

- If GSTR-1 is filed with GST liability of Rs. 10 Lakhs and GSTR-3B is filed with GST liability of only Rs. 7 Lakhs, can recovery proceedings be launched?
 - **Section 79 Recovery of tax**
 - *(1) Where **any amount payable** by a person to the Government under any of the provisions of this Act or the rules made thereunder **is not paid, the proper officer shall proceed to recover the amount by one or more of the following modes, namely:-***
 - *(a) the proper officer may deduct or may require any other specified officer to deduct the amount so payable from any money owing to such person which may be under the control of the proper officer or such other specified officer;...*

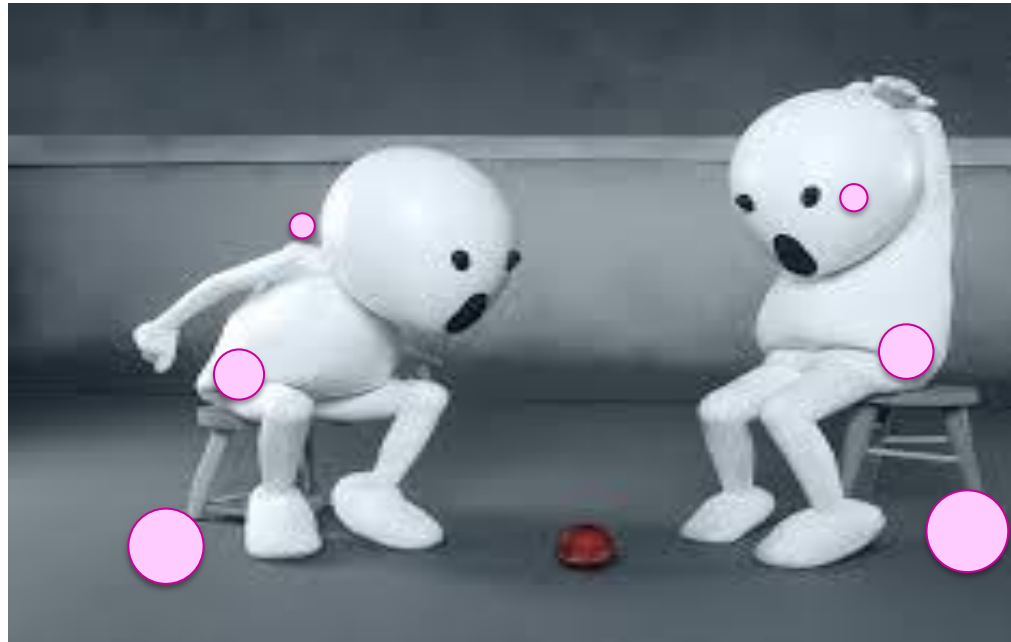
...Mis-match between GSTR-1 & GSTR-3B...

- **Relevant extract of Instruction No. 01/2022-GST** are reproduced hereunder:
 - *“3.2 There may, however, be some cases where **there may be a genuine reason for difference between the details of outward supplies declared in GSTR-1 and those declared in GSTR-3B.** For example, the person may have made a typographical error or may have wrongly reported any detail in GSTR-1 or GSTR-3B. Such errors or omissions can be rectified by the said person in a subsequent GSTR-1/ GSTR-3B as per the provisions of sub-section (3) of section 37 or the provisions of sub-section (9) of section 39, as the case may be. There may also be cases, where a supply could not be declared by the registered person in GSTR-1 of an earlier tax period, though the tax on the same was paid by correctly reporting the said supply in GSTR-3B. The details of such supply may now be reported by the registered person in the GSTR-1 of the current tax period. In such cases, there could be a mis-match between GSTR-1 and GSTR-3B (liability reported in GSTR-1 > tax paid in GSTR-3B) in the current tax period. **Therefore, in all such cases, an opportunity needs to be provided to the concerned registered person to explain the differences between GSTR-1 and GSTR-3B, if any, and for short payment or non-payment of the amount of self-assessed tax liability, and interest thereon, before any action under section 79 of the Act is taken for recovery of the said amount.**”*

...Mis-match between GSTR-1 & GSTR-3B

- ***“3.3 Accordingly, where ever any such amount of tax, self-assessed by the registered person in his outward supply statement GSTR-1 is found to be short paid or not paid by the said person through his GSTR-3B return in terms of the provisions of sub-section (12) of section 75 of the Act, the proper officer may send a communication (with DIN, in terms of guidelines issued vide circular No. 122/41/2019-GST dated 5th November 2019) to the registered person to pay the amount short paid or not paid, or to explain the reasons for such short payment or non-payment of self-assessed tax, within a reasonable time, as prescribed in the communication. If, the concerned person is able to justify the differences between GSTR-1 and GSTR-3B, or is able to explain the reasons of such short-payment or non-payment of tax, to the satisfaction of the proper officer, or pays the amount such short paid or not paid, then there may not be any requirement to initiate proceedings for recovery under section 79.”***

Mis-match between GSTR-2A/2B and GSTR-3B...



Your transactions are not reflected in my GSTR-2A/2B. Should I claim ITC?

I would take time to finalise and pay GST on all my transactions as my suppliers are yet to provide me their invoices. I would face working capital issue

...Mis-match between GSTR-2A/2B and GSTR-3B...

- **For period July 2017 upto 8th October 2019:**
- During such period there was no provision under Rule 36(4) of CGST Rules, 2017 restricting the utilization of credit
- Since the Act itself was not restricting the input tax credit as per GSTR-2A, thus, Department cannot issue SCN for such period merely due to difference arising between GSTR-2A and GSTR-3B

- **For period from 9th October 2019 to 31st December 2021:**
- Restriction was imposed under Rule 36(4), restricting the ITC to the extent of GSTR-2A/2B subject to certain percentage availability over and above GSTR-2A upto certain period
- However, the rules cannot go beyond the powers granted by the Act, Section 16 itself didn't have any condition of restricting the ITC
- Therefore, such notices arising due to difference arising between GSTR-2A and GSTR-3B is invalid

...Mis-match between GSTR-2A/2B and GSTR-3B

- **For period from 1st January 2022 till date:**
- Section 16 was amended as under:
 - *“(2) Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless,-*
 - ...
 - ***(aa) the details of the invoice or debit note referred to in clause (a) has been furnished by the supplier in the statement of outward supplies and such details have been communicated to the recipient of such invoice or debit note in the manner specified under section 37***
 - ...
- **For period from 1st October 2022 till date:**
- Section 16 was amended as under:
 - *“(2) Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless,-*
 - ...
 - ***(ba) the details of input tax credit in respect of the said supply communicated to such registered person under section 38 has not been restricted;***
 - ...”
- From the insertion of the above clause, **now Section 16 itself grants the power to restrict the ITC reflected as per GSTR-2A/2B**

ITC availment through GSTR-3B or Books of Accounts?...

- Currently ITC under GST is allowed to be availed only if reflected in GSTR-2B
- Can it still be claimed as per the details available in the books of accounts?
- Is it legally valid if ITC is availed as per books?

...ITC availment through GSTR-3B or Books of Accounts?...

Union of India v/s Bharti Airtel Ltd. And Ors. (SC) Wherein it was observed that:

*32. Reverting to the analysis of the issues and contentions done by the High Court, it is primarily focused on the grievance of the writ Petitioner that due to non-operability of Form GSTR-2A at the relevant time (July to September 2017), it had been denied of access to the information about its electronic credit ledger account and consequently, availing of ITC for the relevant period and instead to discharge the OTL by paying cash to its vendors. Thus, it has resulted in payment of double tax and unfair advantage to the tax authorities because of their failure to operationalize the statutory forms enabling auto-populating statement of inward supplies of the recipient and outward supplies including facility of matching and correcting the discrepancies electronically. The High Court, however, did not enquire into the cardinal question as to whether the writ Petitioner was required to be fully or wholly dependent on the auto generated information in the electronic common platform for discharging its obligation to pay OTL for the relevant period between July and September 2017. The answer is-an emphatic No. **In that, the writ Petitioner being a registered person, was under a legal obligation to maintain books of accounts and records as per the provisions of the 2017 Act and Chapter VII of the 2017 Rules regarding the transactions in respect of which the OTL would occur.** Even in the past (till recently upto the 2017 Act came into force), during the pre-GST regime, the writ Petitioner (being registered person/Assessee) had been maintaining such books of accounts and records and submitting returns on its own. No such auto-populated electronic data was in vogue. It is the same pattern which had to be followed by the registered person in the post-GST regime.*

...ITC availment through GSTR-3B or Books of Accounts?

*“33. As per the scheme of the 2017 Act, it is noticed that registered person is obliged to do self-assessment of ITC, reckon its eligibility to ITC and of OTL including the balance amount lying in cash or credit ledger primarily on the basis of his office record and books of accounts required to be statutorily preserved and updated from time to time. That he could do even without the common electronic portal as was being done in the past till recently pre-GST regime. As regards liability to pay OTL, that is on the basis of the transactions effected during the relevant period giving rise to taxable event. The supply of goods and services becomes taxable in respect of which the registered person is obliged to maintain agreement, invoices/challans and books of accounts, which can be maintained manually/electronically. **The common portal is only a facilitator to feed or retrieve such information and need not be the primary source for doing self-assessment.** The primary source is in the form of agreements, invoices/challans, receipts of the goods and services and books of accounts which are maintained by the Assessee manually/electronically. **These are not within the control of the tax authorities.** This was the arrangement even in the pre-GST regime whilst discharging the obligation under the concerned legislation(s). **The position is no different in the post-GST regime, both in the matter of doing self-assessment and regarding dealing with eligibility to ITC and OTL.** Indeed, that self-assessment and declarations would be any way subject to verification by the tax authorities. The role of tax authorities would come at the time of verification of the declarations and returns submitted/filed by the registered person.”*

Interest if set-off done belatedly through GSTR-3B...

- Lazy Smarty Pvt. Ltd. has deposited amount in Electronic Cash Ledger on 20 November 2022
- However, it has filed it's GSTR-3B on 2 December 022
- Whether interest shall be paid by Lazy Smarty Pvt. Ltd. on this amount?

Interest if set-off done belatedly through GSTR-3B...

- **Section 50. Interest on delayed payment of tax.-**
- (1) Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made thereunder, but fails to pay the tax or any part thereof to the Government within the period prescribed, shall for the period for which the tax or any part thereof remains unpaid, pay, on his own, interest at such rate, not exceeding eighteen per cent., as may be notified by the Government on the recommendations of the Council:
- **Section 49 Payment of tax, interest, penalty and other amounts**
- (1) Every deposit made towards tax, interest, penalty, fee or any other amount by a person by internet banking or by using credit or debit cards or National Electronic Fund Transfer or Real Time Gross Settlement or by such other mode and subject to such conditions and restrictions as may be prescribed, shall be credited to the electronic cash ledger of such person to be maintained in such manner as may be prescribed.
- Landmark decision of ***Pratibha Processors vs. UOI (SC) on 11 October 1996*** – Interest is compensatory in nature

...Interest if set-off done belatedly through GSTR-3B...

- Hon'ble Jharkhand High Court in the case of ***M/s RSB Transmissions (India) Limited v/s Union of India*** on 12 April 2022, held that:
 - ***“17. Applying the principles of interpretation as has been laid down by the Apex Court such as in the case J.K. Synthetics Limited (supra) and Dwarka Prasad (Supra), we have no hesitation in holding that the liability to pay interest arises on delayed filing of GSTR-3B return and debit of tax due from the Electronic Cash Ledger. Any deposit in the Electronic Cash Ledger prior to the due date of filing of GSTR 3B return does not amount to discharge of tax liability on the part of the registered person.”***

...Interest if set-off done belatedly through GSTR-3B...

- **What if payment is made through Electronic Credit Ledger?**
- Madras High Court in the case of ***India Yamaha Motor Private Limited v/s The Assistant Commissioner, Sriperumbudur Division and Ors. MANU/TN/6613/2022*** has held that:
 - ***“16. That apart, there is some force to the submissions of the respondents that **credit cannot, prior to availment be taken to construe the payment.** There are any number of situations where credit may be found to have been availed erroneously or on a mistaken interpretation of law. Thus, it would be risky, from the view-point of the revenue, to state as a general proposition that the mere availability of electronic credit should be assumed to be utilization that would insulate the petitioner from the levy of interest. Thus, unless an assessee actually files a return and debits the respective registers, the authorities cannot be expected to assume that available credits will be set-off against tax liability.”***

Serving notice on GSTN Portal...

- Mr. Bedarkar has filed GSTR-1 for September 2022
- On 9th November 2022 when Mr. Bedarkar checked GSTN Portal, he realised that GSTR-3B of October 2022 was not filed
- To his shock, there was a notice served to him for non-payment of GST for September 2022 which was served through GSTN portal on 25th October 2022
- Whether Mr. Bedarkar can challenge such service of notice through GSTN Portal?

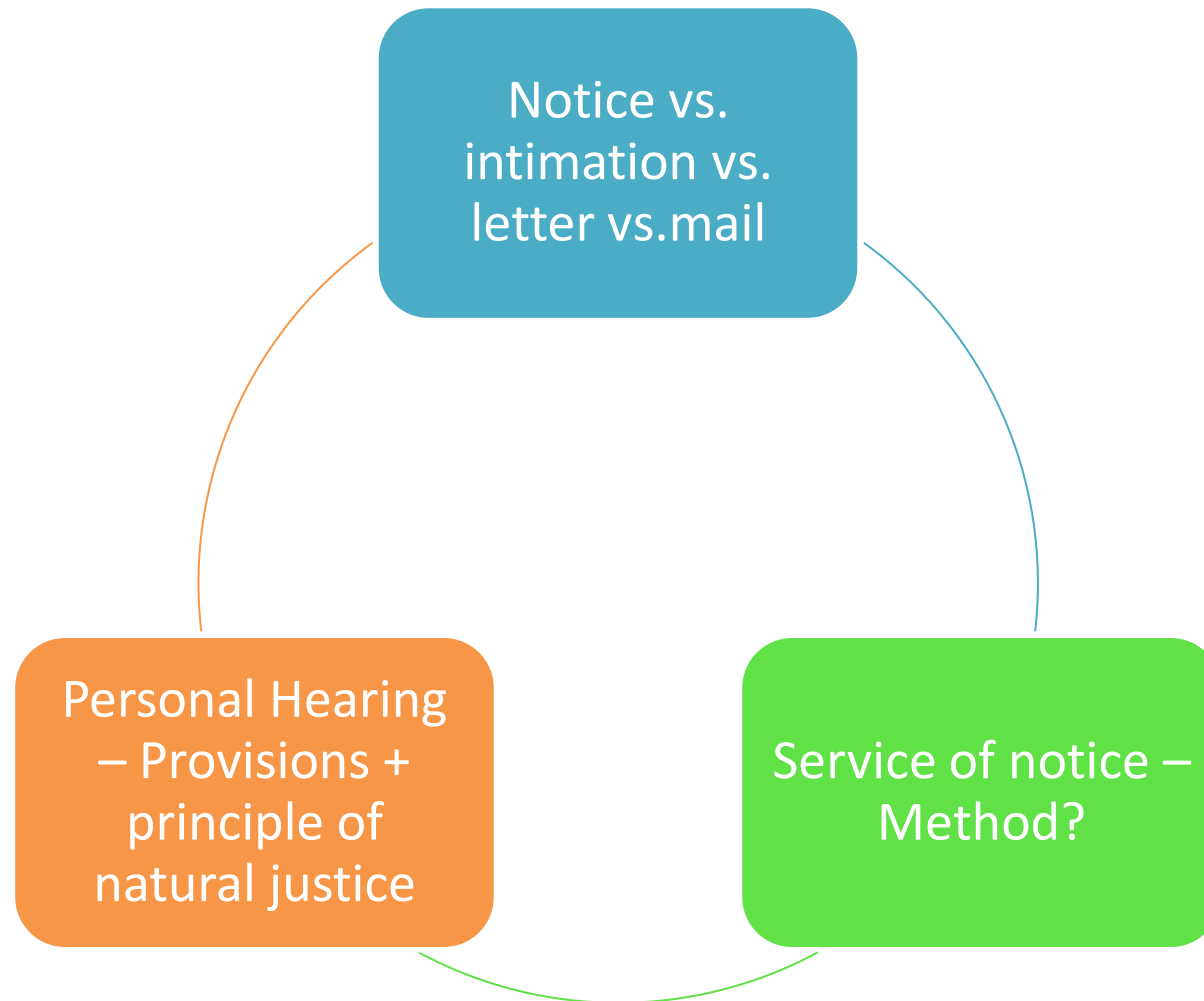
...Service of notice (Section 169)...

- (1) Any decision, order, summons, notice or other communication under this Act or the rules made thereunder shall be served by **any one of the following methods**, namely:-
 - (a) by giving or tendering it **directly or by a messenger including a courier to** the addressee or the taxable person or to his manager or authorised representative or an advocate or a tax practitioner holding authority or to a person regularly employed by him in connection with the business, or to any adult member of family residing with the taxable person;
 - (b) by **registered post or speed post or courier** with acknowledgement due, to the person for whom it is intended or his authorised representative, if any, at his last known place of business or residence; or
 - (c) by **sending a communication to his e-mail address** provided at the time of registration or as amended from time to time; or
 - **(d) by making it available on the common portal**; or
 - (e) **by publication in a newspaper** circulating in the locality in which the taxable person or the person to whom it is issued is last known to have resided, carried on business or personally worked for gain; or
 - (f) if none of the modes aforesaid is practicable, by **affixing** it in some conspicuous place at his last known place of business or residence and if such mode is not practicable for any reason, then by affixing a copy thereof on the notice board of the office of the concerned officer or authority who or which passed such decision or order or issued such summons or notice.

...Serving notice on GSTN Portal

- **Hon'ble Madras High Court in *Pushpam Reality vs. State Tax Officer 2022 (3) TMI 86***
- Issue: Whether service of notice and order through GST portal was a valid service or not
- Though Section 169 of CGST Act/TNGST Act allowed service of notices/orders through GST portal, still, **considering the technical glitches of GST portal**, Madras High Court pronounced that **Department should continue to serve the notices/orders through speed post or registered post with acknowledgement along with upload of such notices/orders on portal**

Departmental communications





Blocked ITC...

- ITC of Mr. Late was blocked by department
- Therefore, Mr. Late could not furnish returns for last 12 tax periods as he was unable to pay tax due
- Even after 12 months, the restriction on ITC of Mr. Late has not been removed
- What should be suggestive course of action for Mr. Late?

Blocked ITC

No.	Period, if any	Type (Debit/Credit)	Integrated tax (₹)	Central tax	State Tax	Cess	Total
6	16/01/2020				0.00	0.00	5,23,588.
7	17/01/2020				10,33,178.00	0.00	20,66,356
8	18/01/2020				7,60,913.00	0.00	15,21,826
9	21/01/2020				2,72,265.00	0.00	5,44,530.
10	23/01/2020	Jan-20	Blocked	Debit	0.00	2,61,794.00	2,61,794.00

Blocked by Shri/Mr/Ms 10040638, Assistant Commissioner, RANGE-II, Admn.

OK

RULE 86A - CONDITIONS OF USE OF AMOUNT AVAILABLE IN ELECTRONIC CREDIT LEDGER...

86A. Conditions of use of amount available in electronic credit ledger.-

(1) *The Commissioner or an officer authorised by him in this behalf, not below the rank of an Assistant Commissioner, **having reasons to believe** that credit of input tax available in the electronic credit ledger has been **fraudulently availed or is ineligible** in as much as*

a) the credit of input tax has been availed on the strength of tax invoices or debit notes or any other document prescribed under rule 36-

*i. issued by a registered person who has been **found non-existent** or not to be conducting any business from any place for which registration has been obtained; or*

*ii. **without receipt** of goods or services or both; or*

*b) the credit of input tax has been availed on the strength of tax invoices or debit notes or any other document prescribed under rule 36 in respect of any supply, the tax charged in respect of **which has not been paid to the Government**; or*

...RULE 86A - CONDITIONS OF USE OF AMOUNT AVAILABLE IN ELECTRONIC CREDIT LEDGER

c) the registered person availing the credit of input tax **has been found non-existent** or not to be conducting any business from any place for which registration has been obtained; or

d) the registered person availing any credit of input tax is **not in possession of a tax invoice** or debit note or any other document prescribed under rule 36,

may, for reasons to be recorded in writing, **not allow debit of an amount equivalent to such credit** in electronic credit ledger for discharge of any liability under section 49 or for claim of any refund of any unutilised amount.

(2) The Commissioner, or the officer authorised by him under sub-rule (1) may, upon being satisfied that **conditions** for disallowing debit of electronic credit ledger as above, **no longer exist, allow such debit.**

(3) Such restriction shall **cease** to have effect **after the expiry of a period of one year** from the date of imposing such restriction.

INSTRUCTION TO BLOCK ITC

CIRCULAR F. NO. 587/CE/167/POL/2019/11219-11269 dated 13.01.2020

- *All the Zonal Chief Commissioners have the facility to block/unblock ITC availed in a situation covered under **Rule 86A(1)(a) of the CGST Rules, 2017** i.e. against fake invoices or against invoices without receipt of goods or services or both, if such availers of credit are located in their jurisdiction. To implement this provision, all the CGST Zones are required to make a list, GSTN-wise of fake credit availers and block their ITC under Rule 86A(1)(a) for the entities located in their jurisdiction. If, however, there are certain entities which are located outside their jurisdiction, they should forward a list of such availers along with GSTN No. to the local office of the Pr. ADG /ADG DGGI, with a request to block credit of such GSTN immediately.*

HIGH COURT DIRECTING UNBLOCKING

- **SADHANA Enviro Engineering Services vs. The Joint Commissioner of Central Tax – WP 6138/2020 – Interim Order dated 17.03.2020 of Karnataka HC**
 - *Being aggrieved by the blocking of its credit ledger as evidenced in Annexure-F, present petition is filed.... It is submitted that the power available to block making use electronic credit ledger under Rule 86A of the CGST Rules, 2017 is available to the Department only if the conditions under Rule 86A(1)(a) (b) (c) or (d) of the CGST Rules is made out. Hence, it is submitted that the action in the present case could not have resorted as there is no default by the petitioner as made out under Rule 86A (1)(a)(b)(c) or (d) of CGST Rules leading to exercise of power as contemplated under Rule 86A to block the credit ledger.... However, the matter requires further consideration as prima-facie the contention of the learned counsel for petitioner at this stage appeals to the court*
 - *Pending further consideration, there would be **unblocking of the Credit Ledger** by the respondent department to enable the petitioner to make use of the credit balance. It is made clear that the petitioner taking of the benefit of credit balance would be subject to the outcome of this petition.*

QUANTUM OF ITC BLOCKAGE??

Can Department block entire ITC?

- *Rule 86A(1) “...may, for reasons to be recorded in writing, **not allow debit of an amount equivalent to such credit** in electronic credit ledger for discharge of any liability under section 49 or for claim of any refund of any unutilised amount...”*

Bona fide mistake in generating E-way Bill...

- **Circular No. 64/38/2018-GST Dated 14 September 2018**
- In case a consignment of goods is accompanied with an invoice or any other specified document and also an e-way bill, proceedings under section 129 of the CGST Act may not be initiated, inter alia, in the following situations:
 - a) **Spelling mistakes** in the name of the consignor or the consignee but the GSTIN, wherever applicable, is correct;
 - b) **Error in the pin-code** but the address of the consignor and the consignee mentioned is correct, subject to the condition that the error in the PIN code should not have the effect of increasing the validity period of thee-way bill;
 - c) **Error in the address** of the consignee to the extent that the locality and other details of the consignee are correct;
 - d) **Error in one or two digits of the document number** mentioned in the e-way bill;
 - e) **Error in 4 or 6 digit level of HSN** where the first 2 digits of HSN are correct and the rate of tax mentioned is correct;
 - f) **Error in one or two digits/characters of the vehicle number**

Bona fide mistake in generating E-way Bill...

- **Sonal Automation Industries V/S State Of Uttarakhand (Uttrakhand HC)**
 - *“the imposition of the penal consequences due to an exception, which has been caused on account of the **inadvertent human error by not referring the invoice number as “SAI/V-235” and by referring it to “235” only.** Since even the invoice number “235” has been consistently maintained in all the documentations, which were made by the petitioner, since it never cleverly intended to evade the tax, or revenue of the State, the exception would fall to be within Clause 5 of the Circular dated 14th September, 2018.*

Penalty under Section 129 on detention of vehicle and goods should not be invoked for inadvertent/human errors at time of furnishing details in E-Way Bill”

...Bona fide mistake in generating E-way Bill...

- **Tirthamoyee Aluminium Products v/s State Of Tripura (Tripura HC) 2021**

- *“Only error recorded was the wrongful depiction of distance in kilometers. It is seen that 470 kilometers has been shown in place of 1470 kilometers. This is a minor lapse on the part of the consigner/transporter and the procedure to deal with such incidence is spelt out in CBEC, Government of India, Ministry of Finance, Department of Revenue under Circular No. 64/38/2018-GST, dated 14-9-2018 issued from file No. CBEC/20/16/03/2017-GST.”*

*Transportation of goods without valid E-way Bill being **on account of minor oversight and clerical error** in mentioning actual distance which is undisputedly 1470 kms., **order confirming tax demand and penalty not sustainable** - Section 129(3) of Central Goods and Services Tax Act, 2017”*

...Bona fide mistake in generating E-way Bill

- ***Raghav Metals vs. State of Haryana Dated 14.03.2022 2022 (63) GSTL 300 (P&H)***
 - ***“where difference in quantity stated in e-way bill and actual quantity was less than 1%, by any stretch of imagination it cannot be regarded as intent to evade tax and entail proceedings under Section 129 of CGST Act, 2017. Accordingly, writ petition was allowed in favour of petitioner.***

Proceedings under Section 129 of CGST Act, 2017 cannot be initiated merely due to negligible difference between quantity of goods stated in e-way bill and actual quantity of goods”

Can ITC be utilized to pay pre-deposit while filing GST Appeal?...

- Section 107
- (6) No appeal shall be filed under sub-section (1), unless the appellant has paid-
- (a) in full, **such part of the amount of tax, interest, fine, fee and penalty** arising from the impugned order, as is admitted by him; and
- (b) a sum equal to ten per cent. of the **remaining amount of tax in dispute** arising from the said order, subject to a maximum of twenty-five crore rupees, in relation to which the appeal has been filed.
- Provided that no appeal shall be filed against an order under sub-section (3) of section 129, unless a sum equal to twenty-five per cent. of the penalty has been paid by the appellant

...Can ITC be utilized to pay pre-deposit while filing GST Appeal?...

- Orissa High Court in the case of ***Jyoti Construction v/s Dy. Commr. of Central Tax & GST, Jaipur MANU/OR/0541/2021*** held that:
 - *“14. The Court does not find the above decision to be helpful to the petitioner. It is **not possible to accept the plea of the Petitioner that "Output Tax"**, as defined under Section 2(82) of the OGST Act **could be equated to the pre-deposit** required to be made in terms of Section 107(6) of the OGST Act. Further, as rightly pointed out by Mr. Mishra, Learned ASC, the proviso to Section 41(2) of the OGST Act **limits the usage to which the ECRL could be utilised. It cannot be debited for making payment of pre-deposit at the time of filing of the appeal** in terms of Section 107(6) of the OGST Act. It is not therefore possible to accept the plea that Section 107(6) of the OGST Act is merely a "machinery provision".”*
- Therefore, based on this decision, ITC cannot be utilized to make pre deposit.

...Can ITC be utilized to pay pre-deposit while filing GST Appeal?

- However, Bombay High Court in the case of ***Oasis Realty v/s The Union of India writ petition (ST) no. 23507 OF 2022***, is of an opposite view as compared to Orissa High Court's view (supra). Wherein Bombay High Court held that:
 - *“9. We are not in agreement with the submission made on behalf of the State. This is because clause (b) of Sub-section (6) of Section 107 provides a precondition, “unless the appellant has paid” (not deposited) a sum equal to 10% of remaining amount of Tax in dispute. It says 10% of Tax has to be paid as a precondition. That Tax can be Integrated Tax or Central Tax or the State Tax as in the case at hand, or Union Territory Tax. The amount of ITC available in the Electronic Credit Ledger can be utilised towards payment of Integrated Tax or Central Tax or State Tax or Union Territory Tax.*
 - *13. Since in the Petitions before us the amounts payable are towards output tax, we hold that Petitioners may utilise the amount available in the Electronic Credit Ledger to pay the 10% of Tax in dispute as prescribed under Sub-section (6) of Section 107 of MGST Act.”*
- Therefore, as per this judgement pre deposit can be made through electronic credit ledger.
- **Note: DRC-03 is not a valid mode of payment for making pre deposit (Instruction No. 240137/14/2022 dated 28.10.2022)**

Compensation received towards arbitration proceedings...

- Sajjan Infrastructure Pvt. Ltd. was awarded a Government contract for construction of road for Rs. 250 Crore
- As per the terms of contract, Government was required to vacate some part of the road to be constructed by evacuating people staying in that locality
- However, Government could not complete its obligation on time and therefore, after arbitration proceedings, Sajjan Infrastructure Pvt. Ltd. was granted liquidated damages of Rs. 150 Crores which was towards the cost of building partial road alongwith compensation for breach of contract
- Whether GST shall be paid on such amount?

...Compensation received towards arbitration proceedings...

- **Definition of liquidated damages:** Black's Law Dictionary defines 'Liquidated Damages' as **cash compensation agreed to by a signed, written contract for breach of contract, payable to the aggrieved party.**
- Attention is invited to the Circular No. 178/10/2022-GST dated 03-08-2022, the relevant extract is reproduced hereunder:
 - ***“7.1.4 In this background a reasonable view that can be taken with regard to taxability of liquidated damages is that where the amount paid as ‘liquidated damages’ is an amount paid only to compensate for injury, loss or damage suffered by the aggrieved party due to breach of the contract and there is no agreement, express or implied, by the aggrieved party receiving the liquidated damages, to refrain from or tolerate an act or to do anything for the party paying the liquidated damages, in such cases liquidated damages are mere a flow of money from the party who causes breach of the contract to the party who suffers loss or damage due to such breach. Such payments do not constitute consideration for a supply and are not taxable.”***

...Compensation received towards arbitration proceedings...

- *“7.1.5 Examples of such cases are damages resulting from damage to property, negligence, piracy, unauthorized use of trade name, copyright, etc. Other examples that may be covered here are the penalty stipulated in a contract for delayed construction of houses. It is a penalty paid by the builder to the buyers to compensate them for the loss that they suffer due to such delayed construction and not for getting anything in return from the buyers. Similarly, forfeiture of earnest money by a seller in case of breach of ‘an agreement to sell’ an immovable property by the buyer or by Government or local authority in the event of a successful bidder failing to act after winning the bid, for allotment of natural resources, is a mere flow of money, as the buyer or the successful bidder does not get anything in return for such forfeiture of earnest money.....*

The key in such cases is to consider whether the impugned payments constitute consideration for another independent contract envisaging tolerating an act or situation or refraining from doing any act or situation or simply doing an act. If the answer is yes, then it constitutes a ‘supply’ within the meaning of the Act, otherwise it is not a “supply”. “

...Compensation received towards arbitration proceedings...

- 7.1.6 *If a payment constitutes a consideration for a supply, then it is taxable irrespective of by what name it is called; it must be remembered that a “consideration” cannot be considered de hors an agreement/contract between two persons wherein one person does something for another and that other pays the first in return. **If the payment is merely an event in the course of the performance of the agreement and it does not represent the ‘object’, as such, of the contract then it cannot be considered ‘consideration’.** For example, a contract may provide that payment by the recipient of goods or services shall be made before a certain date and failure to make payment by the due date shall attract late fee or penalty. A contract for transport of passengers may stipulate that the ticket amount shall be partly or wholly forfeited if the passenger does not show up. A contract for package tour may stipulate forfeiture of security deposit in the event of cancellation of tour by the customer. Similarly, a contract for lease of movable or immovable property may stipulate that the lessee shall not terminate the lease before a certain period and if he does so he will have to pay certain amount as early termination fee or penalty. Some banks similarly charge pre- payment penalty if the borrower wishes to repay the loan before the maturity of the loan period. Such amounts paid for acceptance of late payment, early termination of lease or for pre- payment of loan or the amounts forfeited on cancellation of service by the customer as contemplated by the contract as part of commercial terms agreed to by the parties, constitute consideration for the supply of a facility, namely, of acceptance of late payment, early termination of a lease agreement, of prepayment of loan and of making arrangements for the intended supply by the tour operator respectively.*

...Compensation received towards arbitration proceedings

- ***Therefore, such payments, even though they may be referred to as fine or penalty, are actually payments that amount to consideration for supply, and are subject to GST, in cases where such supply is taxable. Since these supplies are ancillary to the principal supply for which the contract is signed, they shall be eligible to be assessed as the principal supply, as discussed in detail in the later paragraphs. Naturally, such payments will not be taxable if the principal supply is exempt.***

Notice Pay Recovery

- Kanjoos Pvt. Ltd. has recovered some amount from its employees for not serving notice period
- Whether GST is payable?
- Post the recent clarification by Government, can assessee file refund claim for GST paid on notice pay recovery?



...Notice Pay Recovery...

- Schedule II of the CGST Act - Activities or transactions to be treated as supply of goods or supply of services
 - *“5. Supply of services - The following shall be treated as supply of services, namely:
...(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act”*
- Circular No. 178/10/2022-GST dated 03.08.2022
 - *“7.5...The said amounts are recovered by the employer not as a consideration for tolerating the act of such premature quitting of employment but **as penalties for dissuading the non-serious employees from taking up employment and to discourage and deter such a situation.** Further, the employee does not get anything in return from the employer against payment of such amounts. Therefore, such amounts recovered by the employer **are not taxable** as consideration for the service of agreeing to tolerate an act or a situation.”*

...Notice Pay Recovery...

- In terms of entry 5 of Schedule II of the CGST Act, agreeing to tolerate an act is a supply of service.
- Notice pay recovery from employee for leaving early is a condition to employment contract.
- The sole purpose of notice pay recovery is to ensure that the employees serve the notice period.
- An employer is not agreeing to obligation to tolerate an act, in fact, the intention is to provide for penal consequences if there is breach of contract. Such terms in employment agreements are for dissuading non-interested candidates to take up the employment

...Notice Pay Recovery

Legal Position:

- **GE T & D INDIA LIMITED 2020 (35) G.S.T.L. 89 (Mad. HC)**

- 11. *The query raised relates to a contra situation, one, where amounts have been received by an employee from the employer by reason of premature termination of contract of employment, and the taxability thereof. The Board has answered in the negative, pointing out that such amounts would not be related to the rendition of service. Equally, so in my view, the employer cannot be said to have rendered any service per se much less a taxable service and has merely facilitated the exit of the employee upon imposition of a cost upon him for the sudden exit. The definition in Clause (e) of Section 66E as extracted above is not attracted to the scenario before me as, in my considered view, the employer has not 'tolerated' any act of the employee but has permitted a sudden exit upon being compensated by the employee in this regard.*
- 12. *Though normally, a contract of employment qua an employer and employee has to be read as a whole, there are situations within a contract that constitute rendition of service such as breach of a stipulation of non-compete. **Notice pay, in lieu of sudden termination however, does not give rise to the rendition of service either by the employer or the employee***

PLOTTED DEVELOPMENT...

- Mangal Kalyan purchases land and sells the same after development of common areas, common amenities (including pedestrian park, gardens, gaming area, etc.), electrical connectivity, plumbing, etc.
- On sale of developed plot of land, the consideration is bifurcated into two amounts:
 - (i) Amount towards the plot area and
 - (ii) Amount towards infrastructure development charges



...PLOTTED DEVELOPMENT

- **Schedule III of the CGST Act**

- *“Activities or transactions which shall be treated neither as a supply of goods nor a supply of services...*

- ...5. Sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building”*

- **Recent Circular No. 177/09/2022-TRU dated 03.08.2022**

- *“14.3 Land may be sold either as it is or after some development such as levelling, laying down of drainage lines, water lines, electricity lines, etc. It is clarified that **sale of such developed land is also sale of land** and is covered by Sr. No. 5 of Schedule III of the Central Goods and Services Tax Act, 2017 and **accordingly does not attract GST.***

- 14.4 However, it may be noted that any service provided for development of land, like levelling, laying of drainage lines (as may be **received by developers**) shall attract GST at applicable rate for such services.”*

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