

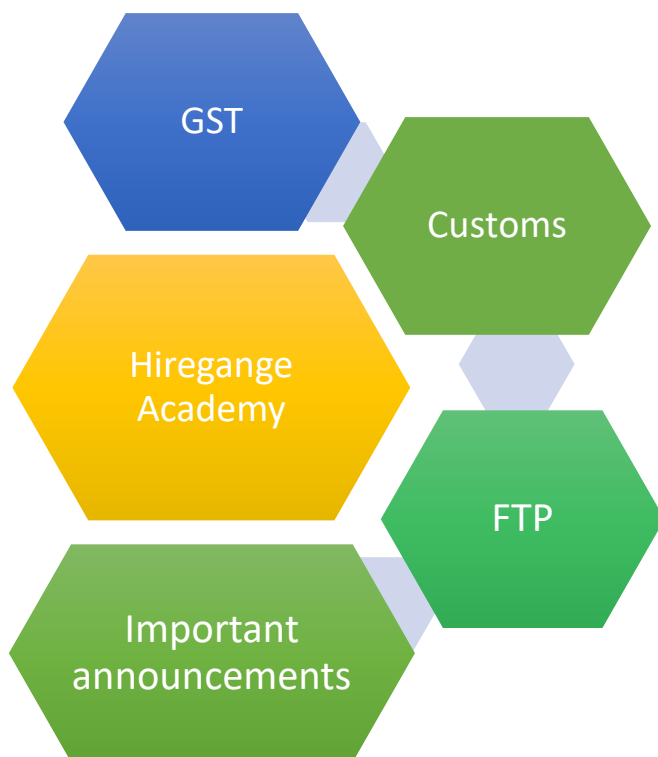
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Going Beyond!!!

Half Yearly Ending Jul'20



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Prelude:

Goods and Services Tax (GST) was hailed as the landmark tax reform when it was introduced w.e.f. 1.7.2017. It was supposed to be a Good and Simple Tax. However, when we look at the issues emerging, it appears that GST would attain the dubious status of the most litigation prone law in the country. Being a tax law, it would hinder the avowed policies of the Government viz., ease of doing business, Make in India, Atmanirbhar Bharat etc. This article seeks to explore the trends in litigation.

Tax litigation – past regime:

In the past there were several indirect tax laws applicable to each tax payer depending on the activity undertaken. At times, the tax payer was facing multiple-litigation in different laws, which hampered the business activities as it strained their financial status and posed a threat to sustenance in view of the protracted or impending litigation. This was supposed to change in the GST regime as multiple taxes were merged in a single basket.

Trends:

Even before GST was introduced a petition (Public Interest Litigation) was filed in the Bombay High Court¹ seeking directions for deferring the GST law citing lack of unpreparedness. The Court dismissed the Petition and observed that the Petitioner cannot urge or seek directions to postpone the decision to implement GST w.e.f. 1st July, 2017 as the levy and collection had the sanction of law.

How well prepared were we to face the challenges is evident from the types of issues, which have cropped up some of which have gone to the Court. Illustrative instances of the issues, which have been raised by the Department or driven the litigants to Courts are briefly mentioned herein²:

Transition issues:

- 1) Applicability of time limit for taking transition credit.
- 2) Carry forward of credit relating to Cesses.
- 3) Restrictions in carry forward of credit - whether justified.

Technical glitches:

- 1) Transition declarations could not be filed on time due to technical glitches.
- 2) Regular Returns/Forms could not be filed on time.
- 3) Some of the features could not be enabled.
- 4) Unable to effect corrections in the portal after submission of data.
- 5) Credit details filled in wrong column but portal not allowing correction or rectification.
- 6) Whether GSTR 3B is recognised as a return.

¹ Dr. Kannaga Sabapathy Sundaram Vs UOI, 2018 (9) GSTL 57 (Bom.). Affirmed by the Supreme Court in 2018 (12) GSTL J.80 (SC).

² To avoid prolixity, citations are kept to the bare minimum.

Constitutional Aspects

- 1) Taxability of immovable property transactions.
- 2) Whether recovery of past taxes is possible after implementation of GST and expiry of one year time limit prescribed in section 19 of the Constitution (101st Amendment) Act, 2016 vis-à-vis section 174 of the GST Act.
- 3) Applicability of mutuality principle for associations/clubs.
- 4) Taxability of high sea sales.
- 5) Taxability of mining rights.
- 6) Taxability of supplies to and from duty free shops.
- 7) Taxability of advertisements/hoardings.
- 8) Taxability of lotteries.
- 9) Validity of Compensation Cess.

Advance Rulings:

Under GST law, advance ruling mechanism has been departmentalised contrary to what we had in the past Central Taxes regime. This has resulted in a spate of adverse rulings, which exhibit revenue bias and lack of application of mind. Some of the rulings have been challenged before the Courts.

Illegal actions by Mobile squads, seizure of vehicles, goods etc:

- 1) Mis-match of e-way bill and invoice.
- 2) Procedural mistakes in raising e-way bills.
- 3) Clerical mistakes while filling e-way bills.
- 4) Expiry of e-way bill.
- 5) Incomplete particulars in e-way bill.

Evasion cases:

- 1) Circular trading or issuances of fraudulent invoices.
- 2) Non-remittance of taxes collected from the customers.
- 3) Setting up bogus concerns to avail the threshold exemption.
- 4) Taking excess credits without supporting documents or without receiving the supplies.

Board Circulars contrary to legal position:

- 1) In the case of inverted rate structure, the refund is restricted to tax paid on inputs. Input services and capital goods are not considered.
- 2) Board circulars clarifying on taxability, rates, exemption, input tax credit contrary to the provisions of law.
- 3) Additional procedures prescribed or conditions specified though not specified in the statute or rules.

Rule of law – given up:

- 1) Mis-match of credit and recovery from the recipient without holding the supplier responsible.

- 2) Blocking of credit without following the due process of law.
- 3) Suo-motu cancellation of registration.
- 4) Garnishee proceedings to recovery the so-called dues without adjudicating the matter.

Retrospective amendments:

- 1) Introduction of time limit for taking transition credit.
- 2) Declaring GSTR 3B as a return to overcome High Court judgment.
- 3) Removing cesses from transition credits.

Delegation legislation – upper hand:

There are many instances where the delegated legislation in the form of rules and notifications have overreaching or overriding effect over the statutory provisions. Some of the matters have been taken up before the High Courts and the vires of the provisions have been challenged.

Delayed refunds:

- 1) Refund to exporters delayed or kept pending without any valid reasons.
- 2) Refund denied on input services and capital goods w.r.t. inverted tax structure.
- 3) Refund denied on technical grounds or for non-compliance of procedures even when substantive compliance has been ensured.

Anti-profiteering:

There is no mechanism or method prescribed in the law as to how profiteering needs to be determined. This has led to disputes and many tax payers have been subjected to proceedings and the validity of the anti-profiteering provisions have been questioned before the Courts. Extreme steps have been taken to cancel the registration, which has hampered the business operations.

Conclusion:

Apart from the issues, which have already surfaced, there are innumerable issues relating to taxability, supply, classification, rate, exemption, valuation, input tax credit, refunds etc, which are expected in GST when the returns are scrutinised by the departmental audit team apart from investigation of unregistered persons. In view of the poor drafting and complexity, GST regime would throw up many issues and the tax payers would be forced into litigation. Unless the Centre and States take interest in resolving the issues and make the law simple, the object of reducing litigation would remain a distant dream.

For clarifications, write to ksnkadv@yahoo.com.

BONDED MANUFACTURING – A NEW OPPORTUNITY TO THE MANUFACTURERS

CA Vasant K Bhat

Aatma Nirbhara Bharat is recent mission of the Central Government to promote manufacture in India. This is to ensure that India will be self-reliant and generate employment. Under the Invest India Scheme, the Central Government has introduced a facility called Bonded Manufacturing.

Bonded manufacturing allows the manufacturer to import the raw materials and capital goods without payment of customs duty and IGST. Where the finished goods or the processed goods are exported, there will be no need to pay the customs duty and IGST on the raw materials imported. Where the finished goods or the processed goods are sold domestically wholly or partly, the customs duty and the IGST on the imported raw materials attributable to the goods so sold domestically shall be paid. This facility is applicable not only for manufacture but also for any processing on the imported goods, like repacking etc. The customs duty and IGST on capital goods is to be paid only if the capital goods are removed for home clearance. If the capital goods are re-exported, even after its shelf life, no need to pay customs duty and IGST.

1. What is bonded manufacturing?

- Declare your factory as private bonded facility.
- Import the raw materials or capital goods without payment of customs duty and IGST.
- Carry out the manufacturing or processing using these raw materials or capital goods.
- Export the manufactured goods or processed goods.
- Pay customs duty and IGST on the raw materials attributable to goods cleared for home consumption, in addition to applicable GST.
- No export commitments.

2. What are the advantages of bonded manufacturing?

- Cashflow advantage-No customs duty & IGST paid at the time of import. Import duties are to be paid only when manufactured/ processed goods are cleared domestically.
- To the extent of exported, exemption from customs duty and IGST on imported goods.
- No customs duty and IGST to be paid on capital goods so long as it is not cleared domestically, not payable if exported subsequently. A huge benefit.
 - ✓ Single application, simple procedure and simple compliance.
- Not time limit for the benefit, no renewals.
- No regular visits by customs officers.

3. Who should go for it?

- If you are importing substantial quantity of raw materials and also engaged in exports.
- If you are importing machineries.

- If a foreign company wants to set up their factory in India.
- JV with a foreign entity to set up facility in India.
- E-Commerce activity which involves importing, packing and selling abroad.
- Importing in bulk, re-packing and exporting/selling.
- Import in bulk and use it for domestic consumption over the period.

4. What are the compliances required?

- Single online application, giving the nature of manufacturing, inputs to be imported, anticipated trade volume etc.
- Documents required includes, MoA, AoA or partnership deed, PAN of the entity, PAN & Aadhaar of the directors/partners/Authorised Signatory, rental agreement/property documents, ground plan and fire safety audit certificate.
- A bond in the prescribed format is to be executed and submitted to the jurisdictional commissioner of customs.
- At the time of granting the permission, the officer shall visit the premise once.
- Simple records are to be maintained in the prescribed form.
- A monthly return is to be filed
- Facility of moving goods from one place to other place is also provided.

The above scheme may be very useful to the many manufacturers or entrepreneurs where there will be substantial working capital facility is in build in the scheme by way of waiver or deferment of customs duty and IGST. It is also promised that the government shall extend all the necessary help required for this scheme. This could be game changer to attract more manufacturing activities to India. Present exporter could also use this as an alternative which could be simpler.

Disclaimer

The views expressed herein are the views of the article writer and cannot be used in framing of opinions or devising methodologies for the purpose of compliance without an independent evaluation- vasant.bhat@hiregange.com.

In this article an attempt is made to bring out various doctrines or principles, for placing reliance on case laws. This article would explain various doctrines, which would help in better understanding on case laws. Whether to distinguish or rely on during the course of reply, adjudication or appeal proceedings.

Doctrines:

1. **Ratio decidendi:** It means reasons on the basis of which a decision is given. Ratio decidendi could arise from legal provisions and facts of the case. The ratio for the decision must be derived from reading the entire judgement. While placing reliance on a decision, the ratio of the relied upon decision must be ascertained and such ratio must be equated to the facts of our case, and how the ratio of the relied upon decision is applicable to our case in hand must be highlighted.
2. **Stare decisis:** is a legal doctrine that obligates courts [quasi judicial authorities be they Dy. Comm, Comm (appeals), Tribunals] to follow historical decisions, while rendering a decision on similar facts and circumstance. This doctrine ensures binding precedents are followed by the courts and not carried forward unnecessarily. In case the binding precedents are not followed, justifiable reasoning for not following the same should be explained in the decision. Bland statement like case laws relied on are not applicable without any reasons are not acceptable. Else such decision becomes per-incuriam order.

Principles of Stare decisis has a binding force on lower courts and gives certainty and consistency in law and enables organic development of law. Decision of Central Board of Dawoodi Bohra Community Vs State of Maharashtra 2010 (254) ELT 196 (SC), explains this doctrine in detail.

The judicial discipline is self-discipline and it is an inbuilt mechanism in the legal system. In case of UOI Vs Kamlakshi Finance Corporation Ltd 1991 (55) ELT 433 (SC) Strictures was passed by Bombay High Court against department, for not following the principles of judicial discipline, while the lower court gave its decision, ignore the settled principles laid down by the higher forum.

Even for the Supreme Courts the rule applies. It is bound by its own previous decision, unless proper reasoning is given to differentiate the previous decision. Supreme court based on other possible view can refer the matter to larger bench for its decision. Supreme Court in case of Maruti Suzuki on cenvat credit to inputs had laid down principles as to how the credits on inputs would be treated as eligible. However the said principles were doubted and referred matter to larger bench. Larger bench of Supreme Court in case of Ramala Sahakari Chini Mills, departed the decision of Maruti Suzuki 2009 (240) E.L.T. 641 (S.C.) in the case of Ramala Sahakari Chini Mills Ltd Vs CCE 2016 (334) ELT 3 (SC).

3. **Doctrine of Merger:** Is a process wherein decision of lower court gets merged into with the decision of higher court. In case an appeal is filed against the order of Commissioner (Appeals) before tribunal and if the tribunal set aside the Commissioner (Appeals) order, then the decision of tribunal would prevail over the decision of Commissioner (Appeals). In case any appeal has to be filed, then the appeal has to be filed against the order of tribunal. From the above said example, it is clear that when tribunal set aside the order of Commissioner (Appeals), order of tribunal would step into the shoes of order of Commissioner (Appeals). This principle is called Doctrine of Merger. This principle is well explained, in case of *Kunhayammed Vs State of Kerala* 2001 (129) ELT 11 (SC).

Exception to the principle of Doctrine of Merger: If an appeal is dismissed on the ground of limitation. Eg: if an appeal was filed before Commissioner (Appeals) beyond the statutory time period and beyond the condonable period, and if such appeal was rejected without being admitted, then the doctrine of merger would not apply to such decision.

If Special Leave Petition is dismissed by Apex court giving some reason, even if the reasoning of decision is given in one sentence, there would be merger of judgement of high court into the order of Supreme Court.

When a special leave petition is dismissed without giving any reasons, there is no merger of the judgment of the High Court with the order of Supreme Court. The judgment of the High Court can be reviewed since it continues to exist.

4. **Per Incuriam order:** Means orders passed "through lack of care". It refers to a judgment of a court which were passed without reference to a statutory provision or without referring to precedent decisions having the same ratio. The significance of a judgment being per incuriam is that, it need not be followed as precedent by a lower court. Ordinarily, in the common law, the rationale of a judgment must be followed by lower courts while hearing similar cases. A lower court is free, to depart from an earlier judgment of a superior court where the earlier judgment of superior court was decided per incuriam. This doctrine is an exception to article 141 of Constitution of India which embodies the doctrine of precedents as a matter of law.

In tax cases for subsequent period involving the same issue as in for earlier period. The court can differ from the view expressed in the preceding period, if the case is distinguishable, due to change in facts or there was change in legal position of law or if the previous relied upon decision was per incuriam order. However if the legal provisions and facts remained same, then the precedent decision would continue to apply for the subsequent period.

5. **Sub- Silento** is a legal Latin term meaning "under silence" or "in silence". It is often used as a reference to something that is implied but not expressly stated. Commonly, the term sub-silento is used when a court overrules an issue in a case without citing the reasons in doing so.

Salmond on Jurisprudence of sub-silento, Twelfth Edition: P. J. Fitzgerald on this proposition: Extract of the same is re-produced for reference.

"A decision passes sub silentio, in the technical sense is that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the Court or present to its mind. The Court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be

shown, however, that logically the Court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or not considered by the Court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio".

In some cases the Court may make no pronouncement on a point with regard to which there was no argument, and yet the decision of the case as a whole assumes a decision with regard to the particular point, which was not argued. Such decisions are said to be passed sub silentio, limited to such point.

In case a portion of decision is sub silentio, such portion of decision cannot be set as a precedent decision to be followed.

6. **Obiter dicta:** is an, incidental statement. It refers to passage in a judicial opinion which is not necessary for the decision of the case before the court. Such statements lack the force of precedent but may nevertheless be significant.

In case of mPORTal India Wireless Solutions P Ltd, 2012 (27) S.T.R. 134 (Kar.), the context of decision was on an issue whether unregistered assessee can avail Cenvat credit/refund. In the course of such decision, a passing remark on non-application of period of limitation for refund claim was made, such statement at best can be said as passing reference and it can be termed as obiter dicta. The weightage on decision on an issue being obiter dicta, may not weight high vis-à-vis compared to decision with Ratio decidendi.

7. **Res Judicata:** Is the principle that a cause of action may not be re-litigated once it has been judged on merits.

In case of Instalment Supply (Pvt.) Ltd. v. Union of India, AIR 1962 SC 53, it was held that Principles of Res Judicata, would not apply to tax matters. However the exception to this doctrine is that if the fact of case and legal provision remain same, then the principles of Res Judicata would apply.

8. **Res integra:** means entire thing; or an untouched matter; or a point without a precedent; a case of novel impression. The term res integra is applied to those points of law which have not been decided, which are untouched by dictum or decision. In case of decision on a point which was sub-silentio, as no decision was rendered on the issue can be termed as res integra.

Above mentioned are few of the important doctrines, which can be used as a tool either to defend a case or to distinguish any decisions relied by the counterpart.

Any queries feedback/comments on this article may be mailed to akbar@hiregange.com

GST - PRECAUTIONS TO BE TAKEN WHILE RESPONDING TO DEPARTMENT

CA Venkata Prasad
CA Rasika Kasat

Introduction:

It has been nearly 34 months since the implementation of GST in the country. It is undeniable fact that GST law has proven to be the most dynamic law in the country with umpteen number of Notifications, Circulars, Removal of difficulty order, etc. Some did serve the purpose and had aided in ease of business, while some, though never intended to, but ended up creating chaos in the trade and businesses. Many instances can be given to easily arrive at the conclusion that the GST law has been loosely drafted, which in turn gave room for many interpretational issues, resulting in friction between the department and the assessee.

While the assessee would choose the interpretation beneficial to him, the department would state otherwise. Already many writ petitions have been filed highlighting the deficiencies in the law and this is **JUST THE BEGINNING!**

The department has already started floating notices to demand GST. Some of the common areas of issues are listed as under:

1. Reversal of ITC difference not reflected in GSTR 2A (many times the GSTR-2A data is not updated or incorrect details);
2. GST on the difference between Turnovers declared in GSTR 1 and GSTR 3B (many times ignoring the subsequent rectifications made);
3. Reversal of ITC invoking Rule 36(4) – Reversal of ITC to the extent not reflected in GSTR 2A (here again – compared data would be incorrect most of the times);
4. Interest on Gross liability Vs Interest on Net liability (before the proposal of retrospective amendment);
5. ITC availed in FY 2018-19 GST returns filed after September 2019 citing Section 16(4);
6. Blockage of ITC for vendors not filing returns u/r. 86A
7. Cancellation of the registration for not filing returns > 6 months
8. Best judgment assessments for non-filers of returns

And many other

With the advancement of technology, all the above notices have been generated by the system promptly and the same are being issued to the tax payers in the form of bulk notices, seeking explanation. The time-limits are also not lenient and in many cases the time limit is ranging from 3 to 7 days. Thus, it becomes very important for the tax payers to submit their reply within time and with all the possible defences. Many time the taxpayer tend to act upon the department notice immediately without checking the validity of the same due to limited time and pressure from department. This would become dangerous mistake that the taxpayers ever commit by taking Section 160(2) into consideration.

In this article, an attempt has been made to give precautions that one must take while replying to the all sorts of communications from the department.

On receipt of Notice:

Before responding to any notice or any other communication, the taxpayer must ensure the following:

1. Whether the notice is issued the jurisdictional proper officer?

2. Whether the officer who has issued the notice is empowered to do so?

3. Whether the service of notice is valid?

4. Whether the notice is issued as per the rules laid thereunder?

5. Whether notice issued is valid considering the statutory provisions and settled jurisprudence?

In case the notice issued or communication made fails the litmus test as stated above, then on such ground alone, entire proceedings can be invalidated. If the above referred things are not taken care while doing the first communication with the department as a reply to the notice or communication then the tax payer cannot question the same in subsequent proceedings and such notice becomes valid.

To emphasize the importance of the aforementioned checks, it is pertinent to draw your kind attention to Section 160(2) of the Central Goods and Service Tax Act, 2017, wherein it is clearly stated that, in case any person had responded to any notice issued or communication made under this Act without any questioning the same in the earlier stages, then validity of such notice or communication cannot be questioned in the subsequent stages. An extract of section 160 (2) of the Act is as follows:

“The service of any notice, order or communication shall not be called in question, if the notice, order or communication, as the case may be, has already been acted upon by the person to whom it is issued or where such service has not been called in question at or in the earlier proceedings commenced, continued or finalised pursuant to such notice, order or communication.”

From the above, it is clear that in case where a person acts upon any notice issued or communication made under this Act, then such person is legally bound by the provisions of the Act and has to suffer for the actions arising out of such proceedings even though such notice issued or communication is not legal and proper

Further it is also important to bring all essential facts on record and explaining the any differences/deviations in understanding the facts or amounts taken by department. The introduction of new facts at later stage of the proceedings like Tribunal or HC/SC would not be allowed and leads to bad result albeit avoidable if facts are properly presented before lower authorities.

Whether the notice is issued the jurisdictional proper officer?

Only the Jurisdictional officer can issue notice under the Act. As per the Notification No.2/2017-CT dated 19-06-2017 (applicable for Central Tax officers), Executive Commissionerate is empowered to direct any taxpayer to show cause to any notice or communication made under the Act. In case of executive Commissionerate cross empowerment of jurisdiction officers are not allowed i.e., officer of one jurisdiction cannot issue a notice to the person belonging to another jurisdiction. Further, the Central Government and State Government have divided the taxpayers among themselves. Therefore, either the State tax officer or Central tax officer would initiate the proceedings or both the officers would not raise the action for the same subject matter.

Further, the GST Council in its 9th meeting held on 16.01.2017 had discussed and it is clarified that the officers of both Central tax and State tax are authorized to initiate intelligence-based enforcement action on the entire taxpayer's base irrespective of the administrative assignment of the taxpayer to any authority. However, what is intelligence-based enforcement is not clarified leaving the option open for both Central &

State offices to initiate the proceedings irrespective of allocated jurisdiction. The authority which initiates such action is empowered to complete the entire process of investigation, issuance of SCN, adjudication, recovery, filing of appeal

etc., arising out of such action. It may so happen that while investigation is ongoing, the taxpayers may be getting notices from another office. In all such cases, it can be requested to investigating authorities to club all the proceedings and complete.

Whether the officer who has issued the notice is empowered to do so?

CBIC vide Circular No.1/1/2017 dated 26.06.2017 and Circular No.3/3/2017 dated 05.07.2017 has prescribed the powers of Central tax officers under different sections and rules. Further, Circular No. 31/05/2018 dated 09.02.2018 has prescribed monetary limits for issuance of notices and adjudication of cases. Departmental officers cannot afford to contravene instructions of their own Board and, therefore, normally, officers not covered by the ceiling fixed in the circular will not proceed to issue notice.

Officer of central tax	Monetary limit for issuance of notice and passing an order CGST (Section 73&74)	Monetary limit for issuance of notice and passing an order IGST (Section 73&74)	Monetary limit for issuance of notice and passing an order CGST plus IGST (Section 73&74)
Superintendent of central tax	Max 10L	Max 20 L	Max 20 L
Commissioner of central tax	10 L - 1 Cr	20 L - 2 Cr	20 L - 2 Cr
Additional or joint commissioner of central tax	>1 cr - without limit	>2cr - without limit	>2cr - without limit

However, many states have not prescribed any monetary limits for issuance of notice by State tax officers.

Audit Commissionerate's are also empowered to issue notice, make any communications or to conduct an audit in accordance with the Act for the taxpayers covered under their respective Commissionerate. All the limitations apply to executive Commissionerate applies to Audit Commissionerate also. In addition to above, the regional offices of Directorate General of Goods and Service Tax Intelligence (DGGSTI) can also initiate investigation in their respective regions.

Whether the service of notice is valid?

Section 169 of the Act deals with the serving of notice. As per the said section any decision, order, summons, notice or other communication under this Act or the rules shall be communicated in either of the following:

1. by giving or tendering it directly or by a messenger including a courier
2. by registered post or speed post or courier with acknowledgement due
3. by sending a communication to his e-mail address
4. by making it available on the common portal

Unless the notice is served in any one or combination thereof, such notice served shall deemed to be an invalid notice.

- Also, the notice has to mention the relied upon documents and the service of notice will be deemed to have been made only on receipt of such relied upon documents.

- If such communication is received through registered post or speed post or courier, it is advised to retain and maintain such postal cover and receipt of acknowledge due since Section 169(3) of the Act assumes that the registered post or speed post or courier so issued shall reach the intended person within normal time of transit unless otherwise proved. In case of any delay in such delivery, the acknowledgement due shall be a defense. This is important in safeguarding ourselves from time limits mentioned in the notice. If the communication is received through e-mail, the taxpayer should ensure whether such mail is received from official mail id or not. Even though email communication is valid one, one has to ensure whether any postal communication is also received or not.

Whether the notice is issued as per the rules laid thereunder?

CBIC vide Para 2 of the Circular No. 128/47/2019-GST dated 23-12-2019 has made quoting of DIN mandatory for all the communications with the taxpayers, including e-mail communication. As per Para 5 of above circular, any communication made without DIN shall be invalid. However, the DIN is not mandatory for the state tax officers. Therefore, the notices issued by state tax officers without DIN is still valid.

In certain exceptional cases, the notices/letters can be issued without quoting DIN

Whenever any communications received from the Central Tax officers, one must check the DIN and its veracity at <https://www.cbicddm.gov.in/MIS/Home/DINSearch>.

Whether notice issued is valid considering the statutory provisions and settled jurisprudence?

The department has started issuing notices for various contraventions, however, the many notices does not contain what is the contravention and the specific Section and Rule which the taxpayer has contravened. In such circumstances, the following settled principles can save the tax payer from unnecessary litigation

- The Supreme Court in the case *Oudh Sugar Mills Limited v. UOI*, 1978 (2) ELT 172 (SC) has held that if the Notice was issued totally ignoring the factual position, but was based on mere assumption, unwarranted inferences, and presumptions such notices are not sustainable under the law.
- The Supreme Court in case of *CCE v. Brindavan Beverages* (2007) 213 ELT 487(SC) held that notice is a foundation on which department has to build up its case. If allegations are not specific and on the contrary vague, lack details and/or unintelligible, it is sufficient to hold that the Noticee is not given proper opportunity to meet the allegations indicated. On this ground alone the notice can be held to be baseless and is liable to be dropped.
- The Supreme Court in case of *Oryx Fisheries Pvt. Ltd. v. Union of India* – 2011 (266) E.L.T. 422 (S.C.) held that the demand shall be raised informing charges against the assessee, so that defense can be taken to prove his innocence/understating. Further, authorities while raising the demand must take care to manifestly keep an open mind as they are to act fairly in adjudging guilt or otherwise. If the notice issued is with pre-judged & pre-meditated, then the demand in that fashion is bad in law and requires to be dropped.
- Section 75 of CGST Act, 2017 imposes responsibility on officers to issue notice in writing along with all the grounds and reasons for issue of such notice. A failure to do the same shall make the notice invalid.
- No proceedings shall be initiated without considering the submissions made by the taxpayer. Consider a situation where an audit has been conducted and a spot memo has been issued to which taxpayer has replied. However, department proceed to issue notice without considering the submissions made by the responded. Such proceedings become invalid.

- In addition to above, the following precautions/litigation best practices can be followed to safeguard ourselves from department
- Have good and polite relation with the officer
- Be straight / transparent and co-operate with the department during the proceedings. Ensure to stick to the facts and no lies.
- Submit all the required information in a timely manner. Ensure that the reply is filed in the required format and as per the rules prescribed. In case of any doubts as to the validity of the notice – Mention the fact and comply with the notice.
- Avoid unnecessary visits to the department. Use emails to official id's of the department or **RPAD (Registered Post Acknowledgement Due)** / Speed Post for intimation & filing
- Use help desk- take screen shots, follow up, as a facility to file reply online is also made available in a few cases.
- If stakes are big, seek the help of professional in reply & representation

Conclusion: With passing of times, the ideology that prevention is better than cure is only made stronger. In any given scenario, it is always better to take the above discussed precautions while doing any correspondence with the department. Also, in the current times where the department is being very much pro-active, it demands that the assessee is equipped with greater awareness than ever. In the hour of crisis, wisdom should take the lead over knowledge, and keeping all the points as discussed above in mind, the journey through the departmental procedure becomes an easy ride. The authors are of sound belief that the above directions will certainly help the taxpayers in safeguarding themselves from the department in future.

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SUPPLY OF FOOD – GOODS OR SERVICE UNDER GST – TAKING PERSPECTIVE FROM EARLIER LAWS

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GST is a tax levied on supply of goods or services or both. The definition of 'goods' in the CGST Act, 2017 means every kind of movable property other than money and securities. So, from a small pencil to a huge bulldozer, everything is included in the category of goods. However, in case of food it cannot be considered as goods always. Why is it so? Before directly getting to the conclusion, we would have to see the history regarding the taxability of food i.e. how food was taxed in India, during the Sale Tax and Service tax regime. Earlier, the supply of food was sought to be taxed by the Sales Tax Department as supply of goods. The scenario turned around with the landmark judgement in the case of M/s. Northern India Caterers (India) Limited V. Lt. Governor of Delhi (1978) 4 SCC 36.

Judgement in the case of Northern India Caterers:

Brief Facts

- The appellant runs a hotel in which lodging and meals are provided to residents. Meals are also served to the outsiders in the restaurant located within the premises of the hotel.
- Meals served to the residents is however not exigible to sales tax as held in State of Punjab v. M/s Associated Hotels of India Ltd., ([1972] 2 S. C. R. 937.)
- Therefore, the appellant has raised a question whether the supply of food in restaurants to outsiders is leviable to Sales Tax.

Observations Made:

- The key issue examined in this case is whether the supply of food in restaurants is supply of goods for the reason that sales tax is levied on purchase and sale of goods. So, if it is proved that the supply of food is a service, then the levy of sales tax on a service will become void.
- The Apex Court has made the following observations:
 1. The essence of the transaction is not to transfer the property of such food or drink, but to satisfy his appetite or thirst.
 2. The customer does not become owner of food. He is just privileged to eat.
 3. The true essence of the transaction is service in the satisfaction of a human need or desire, ministry to a bodily want.
 4. Before consumption title does not pass; after consumption there remains nothing to become the subject of title.
 5. What the customer pays for is a right to satisfy his appetite by the process of destruction.
 6. The consideration he pays is more than for the food. It includes the factor of other personal services provided to him.
 7. The Court has declined the Revenue the proposition to split up the transaction into service portion and food portion.

Judgment:

The Hon'ble Supreme Court held "We hold that the service of meals to visitors in the restaurant of the appellant is not taxable under the Bengal Finance (Sales Tax) Act, 1941, as extended to the Union Territory of Delhi, and this is so whether a charge is imposed for the meal as a whole or according to the dishes separately ordered".

Review petition against Judgement of Northern India Caterers case:

In 1979 a review petition was filed against the above judgement (1980 AIR 674) but the Apex Court dismissed the same and had further clarified as "Indeed, we have no hesitation in saying that where food is supplied in an eating-house or restaurant, and it is established upon the facts that the substance of the transaction, evidenced by its dominant object, is a sale of food and the rendering of services is merely incidental, the transaction would undoubtedly be exigible to sales-tax. In every case it will be for the taxing authority to ascertain the facts when making an assessment under the relevant sales tax law and to determine upon those facts whether a sale of the food supplied is intended."

Thus, supply of food can either be a supply of goods or services which is completely dependent on the facts, and the dominant factor would decide the nature of the transaction.

Post Judgement Situation:

The above judgment created a lot of confusion amongst taxpayers all over the India and there was a chaos on what needs to be treated as sale of goods and what to be treated as supply of service. In this regard the Andhra High Court in the case of "Durga Bhavan And Others vs The Deputy Commercial Tax 1981 47 STC 104 AP" in para 13 summarized the decisions of the Supreme Court in the case of Northern Caterers supra and Associated hotels supra as :

- "1.If there is no right to carry away the food there would be no sale in favour of the customer.
2. Even if there is a right to carry away if in essence the transaction is a transaction of service and not a transaction of sale it would not be exigible to tax.
3. If, however, where the customer has a right to take away the food if the dominant object is the sale of food and the rendering of service is merely incidental, then the transaction would be a transaction of sale and not a service contract.
4. The question whether the dominant object was the sale of food or rendering of service would depend upon the facts and circumstances of each case which has to be decided by the assessing authority in the light of the evidence before it. Thereby, the taxation would depend on the dominant intent. However, it concluded that "We are holding that the sale across the counter are liable to sales tax"

This judgement makes it clear that if there is a supply of food i.e. sale across the counter like sale of sweets, packed food etc., which does not involve service at all or involves very minimal service, it would be treated as sale of goods and not rendering of service.

Amendment to the Constitution:

In order to overcome the above judgments and to enable the levy of sale tax on the sale of food in restaurants and the like, clause 29A was inserted in Article 366 by way of 46th Constitutional Amendment Act (CAA), of which clause (f) is of relevance to us.

As per the said clause "tax on the sale or purchase of goods includes a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service is for cash, deferred payment or other valuable

consideration”. With this amendment the scope of levy of sales tax was expanded to include the power to tax the supply of food, whether by way of or as a part of any service.

Further, in the Statement of Reasons of the said Amendment Act, it has been stated that “In the case of food or drink supplied by Restaurants the relief will be available only in respect of the period after the date of judgment in the Northern India Caterers (India) Limited case and the commencement of the present Amendment Act”.

It can be seen from section 6 of The Constitution (Forty-Sixth Amendment) Act, 1982 that a retrospective operation is given to the expansion of the expression "tax on the sale or purchase of goods" in Entry 54 of List II, to include a tax on the supply of food or drink and thus validating retrospectively State Sales Tax Acts that had made provision for the levy of sales tax on the supply of food and drink. However, the said section 6 does not equate a provision for sales tax on food and drink in States Sales Tax Acts as Parliament, when exercising the powers to amend the Constitution under Article 366, cannot and does not amend State Acts. Thereby, even though there was a retrospective operation of the expansion of the definition of sale of goods in the Constitution, the State Sales Tax Acts could not levy tax retrospectively unless there were express provisions in this regard, contained therein. This has been upheld in the case of *K. Damodarasamy Naidu and Bros. v. State of Tamil Nadu and another* (2000 (117) STC 1 “Levy of sales tax on the supply of food and drink prior to 2nd February 1983 in the State of Maharashtra is bad in law”

Situation in VAT and Service Tax:

The levy of tax on services was introduced in 1994 vide the Finance Act, 1994. VAT was introduced in 2005 and the supply of food was made taxable under VAT. The activity of supply of food at Air-Conditioned restaurant was liable to service tax from 01st May 2011 at a rate of 15% on 40% of the value, without any change in levy of VAT on the same. Therefore, from 01.05.2011, the situation for restaurants was as follows:

- If it is Non-AC restaurant, VAT at a rate of 14.5% (average) was levied
- If it is an AC restaurant, VAT at a rate of 14.5% (average) and service tax at a rate of 6% (40% of 15%) i.e., a total of 20.5% of tax on the value of food supplied.

This created ambiguity and controversy because VAT is to be levied on goods and service tax on services. The Apex Court earlier held that supply of food is a service, which was then undone by the 46th CAA by bringing it under the scope of sale of goods. However, from 2011, VAT and service tax was being charged and many restaurants challenged such levy as it increased their tax burden.

Judicial Pronouncements on the above issue:

As a result of the above taxes on the restaurant owners, many petitions were filed challenging the constitutional validity of the levy of service tax and VAT on a single transaction. Following are the important judgements that have to be noted.

1. In the case of “Kerala Classified Hotels and Resorts Association and Others Vs. Union of India and Others 2013 (31) STR 257 (Ker)” the Single Bench Judge (and Division Bench in 2014) of the Kerala High Court held that service tax cannot be levied on supply of food as the Union cannot characterize it as a service.
2. However, in the case of “Indian Hotels and Restaurant Association vs Union of India 2014 (34) STR 522 (Bom)” the Bombay Hight Court rejected the decision of the Single Bench Judge of the Kerala High Court and held that service tax can be levied on the service portion.

3. In the case of “Ballal Auto Agency vs Union of India 2015 (40) STR 51 (Kar)”, the Karnataka High Court agreed with the view of Bombay High Court and gave its judgement with reference to aspect doctrine.
4. Above view was upheld by the Delhi High Court in the case of “Federation of Hotels and Restaurants Association of India and Others vs Union of India and Others 2016 (44) STR 3 (Del)” which gave its decision on the basis of aspect doctrine. The said case is pending before the Apex Court.
5. Regardless of these judgements, the Kerala High Court in the case of “Kerala Classified Hotels and Resorts Association vs Union of India 2017 (47) S.T.R. 215 (Ker.)” has adhered to its earlier judgement and declared that levying service tax on supply of food is null and void. Accordingly ordered for refund of service tax which was already collected.

In this way, there was always a litigation on taxability on supply of food under earlier tax regime. A landmark judgement of the Supreme Court can put to rest on all this confusion. Such judgment could be expected in the case of Federation of Hotels and Restaurants Association of India.

Situation in GST:

In Schedule II of the CGST Act, 2017, in entry 6(b) it can be seen that the same words as in the Article 366(29A)(f) is appearing, which reads as: “The following composite supplies shall be treated as a supply of services, namely:

- a.
- b. supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (other than alcoholic liquor for human consumption), where such supply or service is for cash, deferred payment or other valuable consideration”

However, the difference being that under GST the said transaction is considered as supply of services. Without getting into the conflict between Article 366(29A)(f) and the said entry under Schedule II, we would analyse to find out what are the supplies that would be covered under it. In this regard, since it is worded similar to Article 36(29A)(f) we can rely on the judgments prior to the 46th CAA. Further, having understood the history of this entry, we should be able to conclude on the taxability under GST for the below scenarios assuming that the GST law has intended to take its historical meaning as it has not added, deleted or modified any words from those introduced by the 46th CAA:

1. Pure sale of food
2. Supply of food by way of service
3. Supply of food as a part of service
4. Home delivery of food

Pure Sale of Food

Sale of food at counters like namkeens, sweets etc., where no or minimal service element could exist, is considered as sale of goods. Even if there is a service in the form of packing, it could be considered as very minimal and the supply would be treated as sale of goods and not a service as was held by the Andhra High Court in the case of Durga Bhavan And Others *ibid*. Further, in the Advance Ruling of ‘M/s Kundan Mishthan Bhandar 2019 (24) GSTL 94 (App. AAR – GST)’ the AAAR held that “sale of sweets, namkeens, cold drinks and other edible items from sweetshop counter will be treated as supply of goods with applicable GST rates of the items being sold

Supply of food by way of service:

It covers the services provided by the restaurants where the food is being served to the customers who sit in the restaurants and consume food. The Collins Dictionary defines the term “by way of” as “If you do something by way of a particular method, you use that method to do it.” Therefore, if you are supplying food by way of service, you are actually supplying the service. The service could be providing the good furniture, crockery or an airconditioned hall. Furthermore, the supply of food in restaurants itself can be considered as a service as held in Northern India Caterers’ case.

As the dominant factor in this case is supply of service, the entire supply could be treated as supply of service and made taxable accordingly.

Supply of food as a part of service:

It covers the supply of food, not being provided separately, but provided along with a service. For example, if a hotel is providing accommodation service along with the breakfast, it can be said that food is being provided as a part of accommodation service. In this case also, the supply will be considered as supply of service. Similar was held by the Supreme Court under the erstwhile law in the case of “State of Punjab v. M/s Associated Hotels of India Ltd., ([1972] 2 S. C. R. 937”

Home delivery of food

In some cases, the customer will not consume any food at the restaurant but would take delivery of the food either by himself or would get it delivered by the restaurant or by a third party. Whether this case would also be covered under Schedule II? As per the decision rendered by the Supreme Court in the review petition of Northern India Caterers supra it can be said that, in such a case the dominant factor is supply of food and the service provided (packing or delivery) is merely incidental to the said supply. Hence it will be treated as supply of goods and not services.

However, when we refer to the definition of “restaurant service” given in Notification 11/2017 – CTR, which reads as “Restaurant service means supply, by way of or as part of any service, of goods, being food or any other article for human consumption or any drink, provided by a restaurant, eating joint including mess, canteen, whether for consumption on or away from the premises where such food or any other article for human consumption or drink is supplied”.

Does the above mean that carrying the food from the restaurant without any consumption there, is also covered under the ambit of supply of service? In this regard it is important to note one aspect mentioned in the Northern India Caterers’ judgements, where it was stated that the customer comes to the restaurant to appease his appetite and thirst and he has no right over the left over food either to give it to anyone else or to take it away. Further, in the case of “East India Hotels Ltd vs Commissioner of Sales Tax [1981] 48 STC 179” the Delhi High Court has been held that “If, in any case, the customers purchased the food and took it away, then only would it be chargeable to sales tax and would be included in the taxable turnover”. The same view has been upheld by Punjab High Court in the case of “Gopinath and Sons vs Shri HB Gandhi, Excise and Taxation Officer 1983 RLR 226”.

These judgements make it clear that the carrying away the food from the restaurants is rightly classified under goods and including it in the definition of restaurant services is nothing but leaving the doors open for litigation. Further also that

in today's times it is known that generally people do get their left-over food at the restaurants packed and carry it considering it to be owned by them. Thereby, the phrase 'consumption on or away from the premises' used in the rate entry could be to cover these situations also which the Northern Caterer's case and others have considered as not being part of the restaurant service. Though, how far this can be held valid since the said phrase is not part of the Schedule II entry and is only part of the rate notification, can be questioned. However, this cannot seem to cover the cases of home delivery of food, which would be in the nature of supply of goods as the element of service is either minimal or only incidental. Hence, the rate entry mentioned above will not be applicable to the home delivery situations.

Considering the present COVID times where the economy is slowly trying to open-up and later when majorly all sectors open-up including the food vendors, restaurants, etc., our way of life could be, in the need of continuing to maintain social distance, delivery of food rather than consumption at the restaurant. In such scenarios, as per the above discussion it would be relevant to note that the classification of such supplies would be that of supply of goods and not of service. Understanding the history of the taxation of supply of food over the past 40 years has led to a certain conclusion regarding its taxability under GST until a different interpretation emerges under GST from the Courts. Though GST was supposed to have reduced the litigation relating to the classification of the supplies into goods or services, the place of supply, rate of tax, input credit provisions including its restrictions and conditions; have made the classification of a supply into goods or services all the more important. Hence it is important to keep in mind the above discussed principles while identifying whether a supply involving food is a supply of goods or services.

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IMPACT OF ITC & REFUND DUE TO MERGER, DEMERGER, SPIN-OFF AND SPLIT WITHIN INDIA AS WELL AS OUTSIDE INDIA

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Introduction

Nowadays corporate restructuring has become a need for change in the organizational structure, or business model of a company. It is done majorly to expand the business, revive a declining business, increase a company's value or to gain a competitive advantage, attain the benefit of synergy etc. Post this Covid-19 pandemic as well, we may notice major corporate restructuring because of the covid-19 effect. One of the forms of corporate restructuring is the transfer of existing business/part of the business to a different entity.

Understanding of terms merger, Demerger, Spin-off and Split

Merger: A merger is a corporate strategy of combining different companies into a single company in order to enhance the financial and operational strengths of both organizations. It can be made either through slump sale or itemised sale. The process requires the approval of National Company Law Tribunal (NCLT) in case of merger by companies.

Demerger: A demerger is a form of corporate restructuring in which the entity's business operations are segregated into one or more components. It is the converse of a merger or acquisition. The process requires the approval of NCLT in case of de-merger by company.

Spin-off: A spinoff is the creation of an independent company through the sale or distribution of new shares of an existing business or division of a parent company.

Split: A split is a way of restructuring the capital structure of a company. Shareholders of a split must relinquish their shares of stock in the parent company in order to receive shares of the subsidiary company.

Being the aforementioned process subsume or create a separate person, it is very diligent to evaluate the GST implications on such transfer before taking any decision in this regard. Through this article, we have made an attempt to discuss on the impact on input tax credits, pending refund proceedings and other refund options available to the transferor.

Relevance of GST law in the intervening period of the aforementioned processes i.e. merger, demerger, amalgamation etc. The merger, demerger or amalgamation of companies can be done only with the approval of the NCLT. The date of the NCLT order is typically subsequent to the date from which the merger, demerger, etc. is effective. The companies undergoing a change in the constitution would be treated as distinct entities till the date of order of the Court or Tribunal. The companies would have to obtain, cancel, and/or amend their registrations with the tax authorities and meet the procedural compliance requirements. In case of any pending proceedings with the department, the tax authorities should be informed of the proposed slump sale or merger or demerger or amalgamation of companies, as well as the details of the new undertaking and the new communication address to ensure that the notices reaches the new company. When it comes to liability, the GST law provides for transitional provisions (i.e. section 86 of CGST Act, 2017). Whereas, in relation to input tax credit, it provides the mechanism to transfer the input tax credit, however it does not touch upon the intervening period proceedings of refund claims, availment of ITC on invoice bearing the name of previous entity etc. Recently, in relation to IBC proceedings, CBIC had notified vide notification no.11/2020 CT dated

21st March 2020, special procedures under section 148 of CGST Act enabling the Interim Resolution Professionals / Resolution Professionals to avail the input tax credit though the same is addressed in the name of the company entered into insolvency code provisions. Without touching the legal validity of such notification, it provides the intention of the lawmakers towards enabling the availment of credit.

Wherever, refund applications (i.e. in case of inverted duty structure / Zero rated supplies) were not made by the transferor, such application can't be made by the transferee on behalf of transferor, rather either of the following can be planned -

1. Transferor file all the pending refund applications prior to corporate re-structuring (This has to be mandatorily followed where the zero rated supply of services has been made with payment of integrated tax) (or)
2. Transfer the accumulated credit to the transferor through filing ITC-02 as explained below and let the transferee to utilise the same or enabling him to file a refund application wherever applicable

Impact on unutilized input tax credits

Input Tax Credit being a blood in the system of value additive taxation, the law GST has also considered the factor of transferring the asset - input tax credit, accrued in GST during the restructuring of the business. Article 300A of constitution of India also provides the relevance for such provision. Hence, section 18(3) of CGST Act read with rule 41 and 41A of CGST Rules, 2017 provides an option to transfer input tax credit in consequent to merger, demerger, spin-off, or split within India. By going through the provisions provided in the law, one may infer that the transfer of the ITC under GST would be a secondary level action in the cases of corporate restructuring, since, prior to transfer of input tax credit, it is necessary that the transferee has to get himself/itself registered under GST Act. Rule 41 of CGST Rules, 2017 reads as "A registered person shall, in the event of sale, merger, de-merger, amalgamation, lease or transfer or change in the ownership of business for any reason, furnish the details of sale, merger, de-merger, amalgamation, lease or transfer of business, in FORM GST ITC-02, electronically on the common portal along with a request for transfer of unutilized input tax credit lying in his electronic credit ledger to the transferee: Provided that in the case of demerger, the input tax credit shall be apportioned in the ratio of the value of assets of the new units as specified in the demerger scheme. Explanation: - For the purpose of this sub-rule, it is hereby clarified that the "value of assets" means the value of the entire assets of the business, whether or not input tax credit has been availed thereon. The transferor shall also submit a copy of a certificate issued by a practicing-chartered accountant or cost accountant certifying that the sale, merger, de-merger, amalgamation, lease or transfer of business has been done with a specific provision for the transfer of liabilities. The transferee shall, on the common portal, accept the details so furnished by the transferor and, upon such acceptance, the un-utilized credit specified in FORM GST ITC-02 shall be credited to his electronic credit ledger. The inputs and capital goods so transferred shall be duly accounted for by the transferee in his books of account. Recently, CBIC has issued a Circular No. 133/03/2020-GST dated 23rd March 2020 clarifying various issues in apportionment of ITC in case of business reorganization. Few of such issues are discussed below:

Issue Clarification given At the time of calculation of ITC to be transferred, whether the value of the assets shall be taken at state level or at all India level?

The value of the assets shall be taken at state level and accordingly ITC available at each state shall be apportioned based on the assets transferred at each state.

Is the transferor required to file ITC-02 in each state where it is registered?

The transferor is required to file ITC-02 only in those states where transferor and transferee are registered.

Whether the ITC to be apportioned shall be calculated independently for CGST, SGST and IGST?

No. The ITC to be apportioned shall be calculated on overall basis i.e., total of CGST, SGST and IGST and not independently.

How to determine the amount of ITC that is to be transferred to the transferee under each tax head (IGST/CGST/SGST) while filing of FORM GST ITC - 02 by the transferor?

The total ITC to be transferred shall not exceed the ITC amount to be transferred in accordance with Rule 41 of CGST Rules, 2017. However, the transferor is at his liberty to decide the amount to be transferred under each head subject to the ITC balance available with the transferor under the respective tax head – For instance, as per our earlier example, the ITC to be transferred is Rs. 4 cr.

Following is the amount of ITC balance under each head and the ITC that can be transferred –

Tax head	Balance available	Amount that can be transferred	Amount that can be transferred	Amount that can be transferred
CGST	2 cr	2cr	Nil	1 cr
SGST	2cr	2cr	Nil	1 cr
IGST	6cr	Nil	4cr	2cr
Total	10cr	4cr	4cr	4cr

Care must be taken that the total ITC to be transferred shall not exceed 4 cr.

ITC balance as on which date shall be taken for apportionment?

ITC balance as on the date of filing ITC-02 shall be considered for the purpose of apportionment of the same to the transferee.

Which date shall be relevant to calculate the ratio of value of assets?

The date to be taken is the appointed date of demerger/any business reorganization

Transfer of Cenvat credit – judicial precedents to understand the courts view

In case of Merger - Unutilised Cenvat credit on inputs and capital goods of a company which was merged with the appellant company is available to the appellant and no prior permission from the Deputy Commissioner was required under rule 10 of the Cenvat Credit Rules, 2004. [Kiran Pandy Chems Ltd. vs. CCE (2011) 22 STR 119 (Tri. – Che.)

In case of Conversion - In this case the Tribunal held that where the appellant firm was converted into a Private Limited company no formal permission from the Central Excise Officers was required by the company to avail the unutilized balance of Cenvat credit lying with the firm. [Flex Art Foil Pvt. Ltd. vs. CCE (2011) 22 STR 591 (Tri-Ahmd.)

In case of change in name of company - Where there had been only a change in the name of the assessee company without any change in the Constitution, the Tribunal held that the unutilized Cenvat credit standing in the old name of the company can be transferred in the new name of the company [CCE vs. Sri Varahiamman Steels (P) Ltd. (2011) 23 STR 91 (Tri-Chennai)]

In case of change in management - Where only the people controlling the affairs of the assessee company had changed but the assessee company continued to be the owner of factory, the Tribunal held that provisions of Rule 8 of Cenvat Credit Rules, 2002, (Corresponding to Rule 10 of the 2004 Rules) which mainly deals with transfer of cenvat credit on account of shifting of factory to another site or change in the ownership in certain specified circumstances, would not apply [Auora Foam Pvt. Ltd. v. CCE (2012) 26 STR 603 (Tri - Del.) CENVAT Credit cannot be denied merely based on the facts that the input service invoices were received in an earlier name of the company which had since got changed. [Showa India (P) Ltd. v. CCE (2012) 25 STR 152 (Tri- Del.)]

Relevance of GST refund

Even though there are no restrictions under the GST law for merger, demerger, split and spin off, to restrict only within a State, the GST portal doesn't allow one to file ITC 02 between parties of different States.

The above reason triggers a person to claim refund under GST.

The above restriction by portal also triggers Article 19(1)(g) of Constitution of India. If there are any GST portal glitches to transfer input tax credit, it would cause the taxpayers to approach to courts through writs. Input tax being the most important and would play a vital role for the management of working capital of an organization, it is ensured to be transferred appropriately otherwise refund options via courts are suggested though there are no enabling refund provisions in GST law. It was decided in case of Slovak India Trading Private Limited vs. Commissioner of Central Excise (Bengaluru) [2006 (205) ELT 956 that, "refund claimed is eligible to the assessee and refund has to be made in cash when the assessee goes out of the erstwhile MODVAT Scheme or their unit is closed" this view was maintained by apex court of India. Thereafter, the following questions were aroused: -

- (a) Whether cash refund is permissible in terms of clause (c) to the proviso to section 11B (2) of the Central Excise Act, 1944 where an assessee is unable to utilize credit on inputs?
- (b) Whether by exercising power under Section 11B of the said Act of 1944, a refund of un-utilised amount of Cenvat Credit on account of the closure of manufacturing activities can be granted?
- (c) Whether what is observed in the order dated 25th January 2007 passed by the Apex Court in Petition for Special Leave to Appeal (Civil) No. CC 467 of 2007 (Union of India vs Slovak India Trading Company Pvt Ltd.) can be read as a declaration of law under Article 141 of the Constitution of India?"

In the referring order, the court has found that the attempt is to claim something which the law does not permit to be claimed at all. If the law does not permit something, no provision therein should construed to hold that it is also not prohibited. It not being prohibited, the provision has been erroneously construed as permitting the refund. This would amount to rewriting the provisions or reading into them something which they themselves do not provide. In these circumstances, the court should hold that a refund of unutilised amount of Cenvat Credit on account of closure of manufacturing activities or inability to utilise input credit is not permitted. The order passed by the Hon'ble Supreme Court in Slovak India (supra) cannot be a declaration of law. It appears that the Revenue has brought to the notice of the Division Bench, the view of the larger Bench of the CESTAT in the case of Steel Strips Ltd. vs. Commissioner of

Central Excise, Ludhiana⁵. 2011-TIOL-656-CESTAT-DEL-LB = 2011 (269) E.L.T. 257 (Tri.-LB) The Revenue relied upon this judgment while urging that the claim of refund is not a matter of right unless vested by law. The plea of injustice or hardship cannot be raised to claim refund in the absence of statutory mandate. No equity or good conscience influence fiscal courts without the same being embedded to statutory provisions. Thus, strict compliance with law in matters of refund is a pre-requisite. This larger Bench judgment in the case of Steel Strips (supra), according to the Revenue, expressly refers to all prior views of the tribunal and answers the questions, accordingly. It also decides the issue of merger, which was pressed into service. Hence, the attention of this court is invited to the view taken in this matter and though it is claimed that an appeal has been admitted against this larger Bench order by the High Court of Punjab and Haryana, still, now there is at least a certainty. Now the tribunal's view is that refund of un-utilised Cenvat Credit on closure of unit was not admissible in the absence of express statutory mandate or provision of law. It is well settled law that Courts in India have no authority to direct the legislature to frame a law as held by Hon'ble Supreme Court in the case of Gaiinda Ram & Ors v. MCD and Ors. Hence, GST Law does not provide for refund of unutilized credit in such a case, such credit would lapse.

Relevant date for claiming refund

It was held in case of CST Vs. ITC Hotels Ltd by Hon'ble Supreme Court that, in case of Merger, Demerger, Spin-off or Split-off the date of high court order to be taken as relevant date for applying refund and not the date on which entire formalities were completed and the service provided.

GST implication on slump sale and an itemised sale

The sale of a business as a whole on a going concern basis with all its assets and liabilities comprising movable and immovable property, including stock-in-trade and other goods, for a lumpsum consideration (i.e. a separate price is not assigned to each asset or liability) would be exempt under Entry no 2 of Notification 12/2017. Unlike a slump-sale, in an itemized sale, individual assets are transferred at a specified price for each asset transferred. Since the intention is clearly to sell goods as goods, a GST liability may apply to the consideration paid for the goods.

Liability in case of amalgamation or merger of companies

When two or more companies are amalgamated or merged in pursuance of an order of court or of Tribunal or otherwise and the order is to take effect of merger and amalgamation from a date earlier to the date of the order and any two or more of such companies have supplied or received any goods or services or both to or from each other during the period commencing on the date from which the order takes effect till the date of the order, then such transactions of supply and receipt shall be included in the turnover of supply or receipt of the respective companies and they shall be liable to pay tax accordingly. Notwithstanding anything contained in the said order, for the purposes of this Act, the said two or more companies shall be treated as distinct companies for the period up to the date of the said order and the registration certificates of the said companies shall be cancelled with effect from the date of the said order.

Liability in case of company in liquidation

When any company is being wound up whether under the orders of a court or Tribunal or otherwise, every person appointed as receiver of any assets of a company (hereafter in this section referred to as the "liquidator"), shall, within

thirty days after his appointment, give intimation of his appointment to the Commissioner. The Commissioner shall, after making such inquiry or calling for such information as he may deem fit, notify the liquidator within three months from the date on which he receives intimation of the appointment of the liquidator, the unpaid liability which in the opinion of the Commissioner would be sufficient to provide for any tax, interest or penalty which is then, or is likely thereafter to become, payable by the company. When any private company is wound up and any tax, interest or penalty determined under this Act on the company for any period, whether before or in the course of or after its liquidation, cannot be recovered, then every person who was a director of such company at any time during the period for which the tax was due shall, jointly and severally, be liable for the payment of such tax, interest or penalty, unless he proves to the satisfaction of the Commissioner that such non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company.

Merge, Spin-off or Split – off with entity outside India

If the Merge, Spin-off or Split off involved with the company outside India, and the consideration is received in convertible foreign currency one may claim refund of the input tax credit by considering the transaction as export of service due to the following:

- In terms of SL No 2 of Notification No. 12/2017 CTR dated 28th June, 2017 transfer of business as going concern has been considered as a supply of services and same has been exempted from the levy of GST.[1]
- In terms of section 13 (2) of IGST Act, 2017 “Place of supply of services where location of supplier or location of recipient is outside India” – “The place of supply of services except the services specified in sub-sections (3) to (13) shall be the location of the recipient of services:...”
- In terms of section 16(2) of IGST Act, 2017 “Subject to the provisions of sub-section (5) of section 17 of the Central Goods and Services Tax Act, credit of input tax may be availed for making zero-rated supplies, notwithstanding that such supply may be an exempt supply.”

By above provision one may infer that, the subjected transaction can qualify as export of service thereby getting eligibility to claim refund of un-utilized input tax credit/integrated tax paid based on the option availed by the registered person under section 16 (3) of IGST Act, 2017. The time limit would be two years from the date of receipt of consideration. In erstwhile law, a similar question came up before the High court of Karnataka in the case of CCE v ANZ international (2009) 233 ELT 40 (Kar), wherein the assessee was an EOU engaged in the manufacture of agricultural equipment which were chargeable to NIL rate of duty. They claimed refund of input credit under rule 5 which was denied on the ground that no credit could be availed in manufacture of exempted goods. The High Court held that even though the goods are exempt they are exported under bond and hence in terms of Rule 5 and 6 of CENVAT credit Rules, 2004 credit is admissible and refund is allowable.

Other Points

If the main intention of the corporate restructuring via merger, Demerger, Spin-off and Split within India is to encash the accumulated input tax credit to aid the working capital requirement of the business entity, the following factors may be considered:

1. Merge, Spin-off or Split of with an entity having core business of Zero-rated supplies be it may an EOU unit, SEZ unit or Advance authorization holder.

2. Instead of transferring the entire business under GST, one may also choose for individual transfer of asset in order to transfer the credit which can be used by transferee.
3. When corporate restructuring made through split-off or spin off, one should look into provisions of the related parties under explanation to the section 15(5) of CGST Act, 2017 to comply with the schedule I taxability resulting in transfer of input tax credit.

Conclusion

Even though, the prima facie requirement of the law is to transfer of input tax credit for which there are special provisions prescribed under the law when the restructuring happening within India. The lacuna in the implementing such provisions would trigger the requirement of filing the refund applications by the registered person to protect his freedom of practising/ continuing his business and to preserve his asset (Input tax credit). However, when that restructuring is between an entity outside India, subject to the satisfaction of the conditions of the export of service, the transferor can claim the refund of un-utilized tax credit/integrated tax paid, under the category of Zero-rated supplies.

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REFUND OF INPUT SERVICES UNDER INVERTED DUTY STRUCTURE

Adv. Venkatanarayana GM
CA. Dhruv Dedhia

One of the intentions of implementation of GST is to provide "Uninterrupted and seamless chain of input tax credit". This intention has been lost in case of refund of inverted duty structure. An effort has been made in this article to discuss the issue faced by the registered person while claiming refund of inverted duty structure and way forward.

A registered person shall be entitled to claim refund of unutilized input tax credit as provided in Section 54(3) of CGST Act, 2017 where credit has been accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies. This mechanism of claiming refund is called as Inverted duty structure. Restriction has been provided under Rule 89(5) of the CGST Rules, 2017, for claiming refund of input tax credit in respect of input service in case of inverted duty structure, by excluding input service from the formula provided for calculation of refund amount vide Notification No. 26/2018-CT dated 13.6.2018 which was given retrospective effect from 01st July 2017. Registered persons have not claimed the refund on such input services or wherever refund is claimed, the same was rejected due to such restriction and hence input tax credit has been accumulated in the electronic credit ledger remaining unutilized. Rule 89(5) prescribing the formula for calculation of refund on account of inverted duty structure is contrary to sub-section 3 of Section 54 of the CGST Act, 2017 rendering it contradictory to the basic scheme and object of the GST Law.

Amended Rule 89 of the CGST Rules is violative of Article 14 of Constitution of India in as much as it provides refund of accumulated credit on inputs and not accumulated credit on account of input services to the registered person.

A recent judgement of Gujarat High Court in the case of M/s VKC Footsteps India Pvt Ltd. V/s Union of India and Other(s) 2020-TIOL-1273-HC-AHM-GST dated 24th July, 2020 has dealt with this issue. The petitioner had challenged the validity of amended Rule 89(5) of the CGST Rule, 2017 to the extent it denies refund of input tax credit on input services.

Following were the submission of the applicant in the above case

1. The fundamental principle of implementing GST was to overcome the cascading effect of taxes which was prevailing in the earlier tax regime. Thus, not allowing the refund of input tax credit has led to the accumulation of such credit.
2. Reliance was placed on the decision of the Supreme Court in the case of Printers (Mysore) Ltd. and another vs. Assistant Commercial Tax Officer and Others reported in [1994] 2 SCC 434 , to submit that the object of the GST Law is not to create a burden, which was not there but to remove the burden, if any already existing in the prevailing tax structure.
3. Law states that in case of refund on account of inverted duty structure, the taxpayer can claim the refund of any unutilized input tax credit. The petitioner has placed reliance on the case Shri Balaganesan Metals v. M.N. Shanmugham Chetty (1987) 2 SCC 707 where the *word "any" has a diversity of meaning and may be employed to indicate "all" or "every" as well as "some" or "one" and its meaning in a given statute depends upon the context and the subject matter of the statute*.

4. The word "Input tax credit" is defined in Section 2(63) means the credit of input tax. The word "input tax" is defined in Section 2(62), whereas the word "input" is defined in Section 2(59) means any goods other than capital goods and "input service" as per Section 2(60) means any service used or intended to be used by a supplier. Whereas "input tax" as defined in section 2(62) means the tax charged on any supply of goods or services or both made to any registered person. Thus "input" and "input service" are both part of the "input tax" and "input tax credit".
5. The parent law allows to claim the refund of all the input tax credit and the definition of input tax credit in the CGST Act, 2017 includes the credit on input services too but Rule 89(5) is not in accordance with law and should be made ultra-vires.

The Hon'ble Gujarat High Court, after considering the submissions and relevant provisions, has held that the phrase "any unutilized input tax credit" would include the credit of input services also. Thus, Rule 89(5) which denies the refund of credit in input services is declared ultra-vires and liable to be struck down relying on *Intercontinental Consultant and Technocrats Pvt. Ltd. Vs. Union Bank of India* reported in 2013 (29) S.T.R. (Del.) = 2012-TIOL-966-HC-DEL-ST and directed the petitioners to consider unutilized input tax credit of "input services" as part of the "net input tax credit" (Net ITC) for the purpose of calculation of the refund of the claim as per Rule 89(5).

Following are the way forward considering the ratio held by Gujarat high court;

1. The time limit to claim the refund on account of inverted duty structure is two years from the due date for furnishing of return under section 39 for the period in which such claim for refund arises. As per the current date scenario, the taxpayers could claim the refund from the period July 2018. The Applicant could follow below mentioned procedure for claiming refund of input service used for inverted duty structure:
 - a. In case the applicant has not claimed refund under inverted structure for the period after July 2018 could claim refund including input services on the ratio of this judgement.
 - b. Whereas in case refund has been claimed considering only inputs under the net input tax credit as per Rule 89(5) the applicant would be left with no option other than fresh refund claim under "Refund on account of any other reason". There is no bar in the provision of law for claiming refund for the same period twice however the GSTN portal restricts the same. Applicant however could file a manual refund claim considering hardship in complying with the procedure provided in the law based on Rule 97A of the CGST Rules, 2017, which provides power for manual filing and processing of refund.
2. The other question arises whether the applicant can claim refund on input services pertaining to the period between July 2017 to June 2018? Prior to amendment in Finance Act 2019 (applicable from 1st February 2019), The time-period to file refund application on account of inverted structure was provided as two years from the end of the financial year for which such claim of refund arises.

In the case of *Banco Products India Ltd vs CCE Vadodara* 2016 (42) S.T.R. 535 (Tri. - Ahmd.), the appellant has filed a refund application of input tax credit including ineligible credits within time limit. A revised application claiming the eligible credits was filed time-barred. The CESTAT has allowed such application stating that the original application is filed within limit.

Considering the above judgement, the taxpayer could apply refund of input services under "Refund on account of any other reason" or the refund can be applied manually as per Rule 97A of the CGST Rules, 2017 provided the original application is filed within the time limit.

If the assessee has huge credit of input services in electronic credit ledger from that period, not letting him for filing refund application, is nothing but violating the principle of natural justice. The said ratio of the decision of the Hon High Court may be considered and clarification in this regard may be expected from the department.

Conclusion:

The judgement given by Gujarat High Court is a welcome judgement as the Companies having huge accumulated input tax credit on account of input services can start to plan to claim refund for the earlier period. However, the practical aspects of getting refund should be tested to see the difficulties in obtaining the same.

Special thanks to **Vinay Kumar J** for contribution in this article.

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E-WAY BILL - COMMON ISSUES AND SOLUTIONS WITH JUDICIAL DECISIONS

CA Mannu Kashliwal

One of the major objectives of GST implementation in India was to ensure the seamless movement of goods and no-check posts in between the states. Further, it was expected that it would put an end to the prolonged road permit system and inspector raj in India. In order to facilitate the same E-way bill mechanism was introduced. However, the E-way bill mechanism has proved to be a continuous source of pain for businessmen and transporters where they are subjected to hefty penalties for minor slip-ups in compliances which is further leading to increasing litigations. The taxpayers are facing numerous issues daily in relation to compliances and further have disputes and questions in mind regarding the legal validity of the actions taken by GST authorities in cases of non-compliance and how to move forward. Considering the above, the author has compiled some common issues which have cropped up in Eway compliances along with solutions based on recent judicial decisions. The objective of the author is to enlighten the taxpayers of the legal validity of the actions taken by the authorities at the time of the interception of the vehicle and legal way-forward.

A. Clerical errors in E-way bill Note:

In the cases listed below for clerical errors, decisions were made in favor of assessee in view of Circular 64/38/2018-GST dated 14.09.2018.

1. Imposition of penalty for error in mentioning vehicle number in E-way bill

Held: The minor mistakes in Part-B of the e-way bill, inter-alia “error in one or two digits/characters of the vehicle number” will not invite detention order and only penalty of ₹ 1000/- (CGST- ₹ 500/- & SGST- ₹ 500/-) will become due to payable. [M/s K.B Enterprises Vs Asst. Commissioner State Taxes & Excise-2019(12) TMI 1089-GSTAA-HP]

2. Incorrect distance mentioned in the E-way bill due to typographic error resulting in expiry of the validity period

Held: Typographic error may be treated as a minor one and in such case, if the demand and penalty have been levied by the proper officer u/s 129, the same need to be refunded to the supplier. [Godrej Consumer Products Ltd. Vs ACST&E-Cum- GIB/HP/ Godrej Consumer/11-02-2020/HC-67]

3. Incorrectly mentioning the number of tax invoices as tax invoice number on E-way Bill.

Held: Prima facie, there seems no discrepancy in E-way Bill attracting seizure of goods. Goods directed to be released without insisting for a deposit of any amount and furnishing security as GST already paid on goods [Hindon Machinery Tools Vs State of U.P.- 2019 (22) G.S.T.L. 4 (All.)]

B. Detention of goods

4. Detention of goods on the ground of under- valuation of goods

Held: The under valuation of goods in the invoice could not be a ground for the detention of the goods and vehicle u/s129 of the CGST Act. r/w Rule 138 of CGST Rules. Accordingly, the order is quashed, and Authorities were directed to release the goods. [K.P. Sugandh Limited v. Commissioner, SGST, 2020-VIL-142- CHG]

5. Detention of goods on the ground of wrong classification of goods

Held: The High Court quashed detention order on the ground that this was a bona-fide case of dispute in the classification of goods and directed release of goods. [Daily Fresh Fruits India Private Limited v. Commissioner, SGST,

2020-VIL-115- KER; and Hindustan Coca Cola Private Limited v. Assistant State Tax Officer, SGST, 2020-VIL-144-KER]

6. Detention of goods on the ground that the vehicle took a different route or reached wrong destination.

Held: The High Court observed that allegation of 'wrong destination' or that the driver has taken a different route is not a ground to detain the vehicle carrying the goods or levy tax or penalty. It was held that the fact that the vehicle was found at another place does not automatically lead to any presumption that there was an intention of evasion of tax. The amount collected was directed to be refunded with interest @ 6%. [Commercial Steel Company v. Assistant Commissioner of State Tax, 2020-VIL- 116-TEL]

7. Detention of goods on the ground that tax on invoice shown as CGST: SGST as against IGST but e-way bill declared correct tax as IGST

Held: The High Court observed that a clerical error on the invoice will not prejudice the Revenue. Since there is no question of evasion of tax; goods to be released on executing a simple bond instead of issuing bank guarantee for the demand raised. [Uniya Enterprise Vs Assistant State Tax Officer, 2020-VIL-50-KER]

8. Interception of vehicle within a few hours of expiry of E-way bill and Adjudicating authority passed an order of detention of vehicle

Held: Rule 138(10) of the CGST Rules allow extension of E-way bill within 8 hours of expiry. The Authority noted that the petitioner was not given reasonable time for renewal of the e-way bill and held that penalty under Section 129 of the CGST Act should not be imposed. Since the petitioner has made minor procedural as per Rule 138(10) of CGST Rules, thus the Authority imposed a general penalty of Rs. 1,000/- u/s 125 of the CGST Act. [Bhushan Power & Steel Limited v ACSTE, 2020(2) TMI 858-GSTAA (HP)]

C. Seizure of Goods

9. Goods were seized for goods being transported without invoice and e-way bill. Further, the confiscation order was passed without giving an opportunity of being heard to the petitioner.

Held: The High court quashed the confiscation order considering that principles of natural justice were violated and no opportunity of being heard was provided to the petitioner. It was also observed that the confiscation order was not a speaking order and did not reflect the reasons required to be mentioned as per Section 130 of the CGST Act. [Sitaram Roadways v State of Gujarat, 2019-VIL-510-GUJ]

10. Goods seized as they were not offloaded at designated place but taken further to another delivery point.

Held: The High court observed that the order was passed by the Adjudicating authority was grossly unreasonable and disproportionate. In such circumstances, the respondent ought to have taken a lenient and sympathetic view. The court ordered the release of goods and vehicle on payment of a sum of 5,000 towards fine to respondent [TVL. R.K. Motors Vs State Tax Officer, Virudhunagar- 2019 (23) G.S.T.L. 178 (Mad.)].

11. Confiscation of goods before seizure on mere suspicion of evasion of tax

Held: The High Court observed that provisions of both Section 129 and Section 130 of the CGST Act mutually exclusive and independent of each other. Further, it was held that authorities can invoke confiscation u/s 130 of the Act only when a definite intent to evade payment of tax is established and not on mere suspicion. Accordingly, it was held that even at the stage of detention and seizure itself or after the tax and penalty is paid by the owner of the goods in

terms of Section 129, if there exists incriminating evidence of tax evasion, action under Section 130 of the CGST Act can also be initiated.[Synergy Fertilchem Pvt. Ltd v. State of Gujarat-2019(12) TMI 1213- HC-GUJ]

D. Other issues

12. Single e-way bill generated for multiple invoices

Held: As per the current e-way bill system, multiple invoices/delivery challan cannot be clubbed to generate one e-way bill. Failure to generate separate E-Way Bill for each invoice and mentioning multiple invoices in a single E-Way Bill may cause practical difficulty for the Department in tracking such invoices. However, goods and vehicle directed to be released on petitioner's executing simple bond [Stove Kraft Pvt. Ltd. Vs Assistant State Tax Officer, SGST Dept., Muthanga- 2019 (22) G.S.T.L. 512 (Ker.)]

13. Failure of driver to carry tax invoices and E-way Bill along with the goods by mistake.

Held: As driver merely left behind documents by mistake and there being no allegation against transporter whose business would be affected adversely on account of seizure, vehicle directed to be released to him unconditionally if the owner of goods does not come forward to comply with conditions of release [MKC Traders Vs State of U.P.- 2019 (22) G.S.T.L. 348 (All.)].

14. Machine sent for repair without E-way bill. Authority raised demand of taxes and penalty u/s 129 of the CGST Act.

Held: The Authority held that there it is very clear that goods are only sent for repair and it is not a sale transaction. Thus, provisions of section 129 of the Act are not attracted and the order is set aside. The tax and penalty deposited by the appellant under section 129(1) may be refunded and a penalty of Rs 10,000/- is imposed on the taxpayer under section 122(1) of the Act. [Neva Plantation Private Limited, 2020- VIL-08-GSTAA (HP)]

15. No E-way bill issued for transportation of new car purchased and driven for delivery to the customer who uses it for personal use

Held: Supply of new vehicle by dealer terminated on its purchase and its subsequent movement was not the transaction of supply. The car had come into possession of purchaser and used for some distance which indicated that it was "used personal effect". There was no taxable transaction for movement of the car, detention of car was illegal. The provisions of Section 129 of the SGST Act were not attracted [Kum Motor Co. Pvt. Ltd. Versus Assistant State Tax Officer, Kerala State GST Department, Thiruvananthapuram- 2019 (21) G.S.T.L. 3 (Ker.)].

On a perusal of the aforesaid issues and related judgments, it is very interesting to note that minor errors or procedural lapses that do not involve intent of fraud or evasion of tax have led to the detention of goods or seizure of goods which ultimately increased litigations. Thus, the author wishes for the introduction of a speedy and efficient dispute resolution mechanism for matters involving detention, seizure, and confiscation of goods in transit under GST. Hope the above could bring some awareness, clarity, and caution for the assesses and other stakeholders in order to tackle day to day problems faced due to E-way bill compliances.

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POST IMPORT ACTIVITY - THE GREAT 'CUSTOMS VALUATION' ESCAPE

CA Manish Sachdeva

The Customs Valuation Rules, 2007 [and earlier that of 1988] ("the CVR") were formulated under the aegis of Customs Valuation Agreement ("the CVA") in pursuance of GATT 1994. Largely the rules under the CVR mimics the Articles of the CVA to show India's accord to the GATT. The value for imported goods under Article 1[1] of CVA is transaction value (TV) adjustable in accordance with provisions of Article 8[2] of CVA. The present piece examines the challenge faced by revenue in customs valuation cases involving EPC arrangements.

Transaction Value and Price adjustments

The CVA states that Article 1 is to be read together with Article 8, the premise of Article 8 is for providing for the inclusion of those price adjustments where such elements are considered to form a part of the value for customs purposes are incurred by the buyer but are not included in the price actually paid or payable for the imported goods. In the Indian context not only that it is deducible from the interpretive rules that Rule 10 of the CVR[3] is subservient to Rule 3 of the CVR, but has also been affirmed by the judiciary[4].

Rule 10 (1) (e) - modification to CVA

So far so good, but factor in the bad habit here. Rule 10 (1) of the CVR which almost mimics Article 8 by including all the four limbs of Article 8 (1), also provides an additional sub-clause, namely subclause (e)[5]. An eminent Indian author in his exhaustive commentary on Customs Valuation, emphasis the relevance of sub-clause (e), by saying that since the value in Rule 3 points to 'total payment made'[6], it was needed to have an additional clause to cover the possible exclusions of sub-clause (a) to clause (d).

Post import activity - the fallacy of Rule 10 (1) (e)

Very well, sub-clause (e) attempts to cover up the mischief of importers who disguise the nature of extra payments for escaping the exclusion under sub-clause (a) to (d). But recall that, Rule 10 is a subservient to Rule 3, therefore the application of Rule 10 is subject to the inclusions and exclusions of Rule 3. The interpretive note to Rule 3 provides that value of imported goods shall not include 'Charges for construction, erection, assembly, maintenance or technical assistance, undertaken after importation on imported goods such as industrial plant, machinery or equipment'. This exclusionary clause has been the nomenclature-d as 'post import activity' by the Courts. The combined operation of Rule 3 read with the exclusionary clause of interpretive note therefore restricts the application of clauses of Rule 10 (1), if the payments relates to post import activities, regardless of the fact that payments satisfies the test of condition of sale. In numerous cases[7] relating to EPC arrangements of steel plants, the Courts has vehemently rejected the argument of revenue for inclusion of engineering, design, supervision, implementation and the charges alike for them being post-import activity, even when the revenue for argument's sake succeeds in establishing that such charges satisfied the condition of sale test. The recent decision by the Hon'ble Supreme Court in Commissions of Customs vs SAIL[8] continues the trend.

Post Script

The anomaly lies in the fact that while sub-clauses (a) to (d) of Rule 10 (1) and other sub-rules of Rule 10 majorly escapes the embargo of 'post import activity exclusion' criteria of Rule 3. But subrule (e) in all these cases fails to the satisfaction of this criteria in Rule 3. The revenue counsel have always built their arguments on the basis of decision in Essar Gujarat case[9] and Mukund Limited case[10], despite being seemingly aware that authorities in these cases are distinguishable. In fact, the Supreme Court also appears to have created a bubble by making Rule 10 (1) (e) subject to the exclusion of Rule 3, in as much as reading the rules literally it is quite apparent that Rule 10 is not subject to Rule 3, but is in accordance with Rule 3. The Court if it able to appreciate that once the 'condition of sale' test is satisfied, it could try to find the colorable device employed by many importers in disguising the nature of their payments. The importers can continue to enjoy, till the Courts is not able to the fault in their stars. We may also spare a thought for the government which is promise-tied to adopt the customs valuation principles formulated in the CVA, and therefore unable to misuse its unfettered powers. Post Import activity is a tool which the importers continue to exploit.

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BINDING VALUE OF CIRCULARS ISSUED UNDER GST LAW

CA Dhruv Dedhia
Vinay Kumar J

Once a law is implemented, it is a known fact that Notifications, Circulars and Orders issued subsequently forms part of the Act to amend or to clarify procedures or ambiguity. Notifications are considered as delegated legislature and are generally issued to give effect to a legal provision or rule, whereas Circulars are normally explanatory or clarificatory in nature. In this article, we will have an in-depth analysis on purpose of circular issued under GST law and their binding value on Assessee, department and courts.

Meaning and purpose of Circular

The word Circular has not been defined under GST law. Therefore, in the absence of the definition in the Act, in the general legal understanding, Circular is understand as an instruction or direction by an authority that aims to clarify the ambiguity. Hence a Circular could be issued for the purpose as specified in the Act to ensure the compliance of such purpose. The Central Board of Indirect tax and Customs (herein referred to as CBIC) has been accorded the power under GST to issue orders, instructions and directions to the officers if it considers necessary for the purpose of uniformity in implementation of the Act and thereupon all such officers and all other persons employed in the implementation of this Act shall observe and follow such orders, instructions or directions in accordance with Section 168 of Central Goods and Service Tax 2017. The same power has been provided to Commissioner of the State under Section 168 of State GST Act. Similar power was provided under Central Excise Act, 1944 for the purpose of uniformity in the classification of excisable goods or with respect to levy of duties of excise on such goods. Similar power was provided in Customs Act 1962. By power given under section 168, we can understand that the Circulars are internal memos which are issued for proper implementation of Act and intended to clarify the ambiguities and provide procedures for implementation of Act.

Hon'ble Supreme Court in the case of Commissioner Of C. Ex., Bolpur v. Ratan Melting & Wire Industries, 2008 (231) E.L.T. 22 (S.C.), culled out the following principles -

1. Binding Value of Circular to Department - This Court has, in a series of decisions, held that circulars issued under Section 119 of the Income Tax Act, 1961 and Section 37B of the Central Excise Act are binding on the Revenue. Provision itself has stated that officers or other persons employed in implementation of Act shall follow the circulars.

Hon'ble supreme Court opined that regardless of the interpretation that of the Court, if there are circulars which have been issued by the CBIC which place a different interpretation upon the said phrase, then that interpretation will be binding upon the Revenue, also held by Hon'ble Supreme Court (Constitutional Bench) in case of Collector of C. Ex., Vadodara v Dhiren Chemical Industries 2002 (139) E.L.T. 3 (S.C.)

2. Binding Value of Circular to Assessee - However the question arises, whether Circular is binding to the Assessee. Hon'ble Supreme Court has held that Circular is not binding on an Assessee. Hence, the Assessee is at discretion to follow the orders, instructions and directions if it stands beneficial. In case such circular is not beneficial, Assessee can choose not to follow them or challenge the issuance of the Circular.

3. **Binding Value of Circular to Court** - The Hon'ble Supreme Court in case of *Bengal Iron Corporation and Anr. vs Commercial Tax Officer and Ores* on 27 April 1993, 1993 AIR 2414, 1993 SCR (3) 433 suggests that quasi-judicial authorities shall be bound only by 'law', which does not include administrative instructions, opinions, clarifications and circulars. Adjudicatory Authorities are also afforded the flexibility to use their independent interpretations which may deviate from Departmental Circulars. Further, Judiciary cannot direct that a Circular shall be given effect to over any interpretation of Hon'ble Supreme Court or High Courts' in the question of law. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law.

Further understanding on Circulars:

1. Advance a contrary argument and file an appeal contrary to circular - It is not open to the Revenue to advance an argument or file an appeal contrary to the Circulars. Similar reiteration of law can be found in a later judgment of the Hon'ble Supreme Court in *Union of India and others v. Arviva Industries India Limited and others* - (2014) 3 SCC 159 = 2007 (209) E.L.T. 5 (S.C.) = 2008 (10) S.T.R. 534 (S.C.).

2. Contrary stand by Department - Considering that the Circulars are binding on the Department, they shall not be permitted to take a stand contrary to the instructions issued by the Board. For Instance, Circular No. 48/22/2018 - GST dated 14th June 2018 states that services of short-term accommodation provided to SEZ unit would be treated as interstate supply. In case department acts against such circular to recover tax treating it as intrastate supply, such contrary stand could not hold good. Same view has been taken by Hon'ble Supreme Court in case of *Collector of Central Excise vs Usha Martin Industries* 1997 10 SCC 402.

3. Contrary show cause notice -

A show cause notice and demand contrary to the Circulars already in existence are bad ab initio held by Hon'ble Supreme Court in *Commissioner of Customs, Calcutta v. Indian Oil Corporation Ltd.*, (2004) 3 SCC 488 = 2004 (165) E.L.T. 257 (S.C.). Continuing with the example provided in point 4 above, Department cannot raise a demand by issuing a show cause notice on a contrary understanding of the Circular.

4. Contention by Department - It is not open to the Revenue to raise a contention contrary to a binding Circular by the Board. When a Circular remains in operation, the Revenue is bound by it and cannot be allowed to plead that it is not valid nor that it is contrary to the terms of the Statute. The same was held by Hon'ble Supreme Court in *Commissioner of Customs, Calcutta v. Indian Oil Corporation Ltd.*, (2004) 3 SCC 488 = 2004 (165) E.L.T. 257 (S.C.).

5. Retrospective or prospective - To decide the issue whether Circulars are to be interpreted in a retrospective or prospective manner, it is worthy to analyse the ambiguity arose under GST on a similar issue wherein RCM liability has been extended in case of rent a cab service provided by unregistered person to a body corporate vide Notification 29/2019 dated 31st December 2019 which has not mentioned the date of applicability but Circular 130/2019 dated 31st December 2019 clarifies it would be retrospectively applicable from 01st October 2019. Such a case provided the additional liability retrospectively and added a cost by way of interest for 3 months. It would be beyond the powers of

board to provide additional liability for the previous period. Circulars should be issued only to clarify the ambiguity and not enhance the liability. In the case of *Suchitra Components Ltd. Vs. Commissioner* 2008(11) ST- R430(SC), Hon'ble Supreme Court held that a beneficial Circular must be applied retrospectively by the Assessee while oppressive circular must be applied prospectively. Thus, when the circular is against the Assessee, they have right to claim enforcement of the same prospectively.

6. Binding value of inconsistent Circular - In the case of *Ranadey Micronutrients v. Collector of Central Excise* (1996 (87) ELT 19) the Hon'ble Supreme Court held that "It does not lie in the mouth of the Revenue to repudiate a Circular issued by the Board on the basis that it is inconsistent with a statutory provision. (Consistency and discipline are, according to this Court, of far greater importance than the winning or losing of court proceedings". Thus, even if the Circular is inconsistent with the provisions of law, the Department cannot say that it is not binding on them. The Assessee can context on the same as it is not binding on it.

7. Circular issued post issuance of show cause notice - This could be understood based on an instance, in case a show cause notice has been issued as to why should a specific rate not be charged and differential tax need not be deposited where there was ambiguity on classification. Post issuance of show cause notice and 1st hearing, a Circular is issued which leads to no additional payment of tax. In such a case, the Assessee can contest as Department has not reached the finality and the same is bound to take stand as taken in the Circular.

8. Circular creates ambiguity - Normally a circular clarifies certain things in law. But there could be instances where the Circular tends confuse the taxpayer even more by providing two or more understanding or opinion. In such case, the Assessee could take the that interpretation which is beneficial to them. In the case of *M/s Poulouse And Mathen vs Collector of Central Excise* 1997 (90) E.L.T. 264 (S.C.), the Hon'ble Supreme Court held that "Where two opinions are possible, the assessee should be given the benefit of doubt and that opinion which is in its favour should be given effect to".

Conclusion - CBIC/ Commissioner of State by way of Circulars issue instructions and directions to the Department which are binding on them. However, such Circulars tend to lose the binding force when applicable at the stance of Assessee or the Adjudicating Authority or the Court. Therefore, the Assessee is always at discretion to adopt the same to the extent it stands beneficial to them.

Special thanks to CA Anil Kumar Bezwada and Adv Surabhi Parihar for their valuable inputs.

This article is published in Taxguru at the below mentioned link: <https://taxguru.in/chartered-accountant/binding-circular-issued-gst-law.html>

The author could be reached at dhruv@hiregange.com for any feedback/suggestions.

FAQ'S ON GST RETURNS - DUE TO COVID-19 RELAXATION

CA Rashmi B

Due to the ongoing pandemic considering the difficulties for the tax payers the various relaxations for the tax payers was provided by the GST council in order to reduce the burden & to ease the return filing process which was hindered due to the lockdown across the country.

The relaxation was provided by reducing the interest rate, & no interest if returns were filed on or before 15 days from the due date & capping the late fees up to the maximum of Rs. 500 (CGST+SGST) considering the economic difficulties of the tax payers.

However, the relaxation has brought various confusions in the taxpayer's mind relating the applicability of the relaxation for various practical scenarios. This article is intended to give insight on the frequently asked questions.

1. Whether the due date for the GST returns of February to July 2020 extended?

Ans: No, the due for the GST returns (GSTR-1 & GSTR-3B) of February to July 2020 has not been extended. The due dates remain same as earlier. However, the relaxation has been provided by not charging the interest for 15 days from the original due date.

2. Liability of FY 18-19 (March 2019) has been missed out & not paid till September 2019 return. However, tax payer decided to discharge it while filing annual return of FY 18-19 through DRC-03. How is the interest computed for such cases? Whether the concessional rate of 9% would be applicable from March 2020 to date of filing annual return, if it is filed before 30th September 2020 (or) interest @ 18% will be applicable from March 2019 to date of filing annual return?

Ans: Notification No. 51/2020 d 24th June 2020 provides relief by lowering interest rates for prescribed time for tax periods from February to July 2020 for those who are required to furnish GSTR-3B but fail to furnish the said return within prescribed due date.

However, such relaxation cannot be applied for missed out liability of previous tax periods or annual return filing. Thus, interest @ 18% would be applicable.

3. A tax payer has supplied goods on credit to a customer but not raised an invoice & did not paid any tax on the same assuming all the compliances under GST are extended. Whether all the compliances are extended?

Ans: As per notification No. 35/2020 r/w 55/2020 it is notified that time limit for completion of compliances during the period 20th March 2020 to 29th August 2020 shall be extended to 31st August 2020 except provisions related to Chapter IV & few other sections (which include section 31). Chapter IV covers Time & Value of supply. Section 31 related to tax invoice, credit notes & debit notes.

Therefore, tax payer has to comply with time of supply provisions & raise invoice accordingly. Further, the tax has to be discharged through returns. For delay in payment of tax, interest & late fee would be applicable.

4. Does concessional rate applicable to composition tax payers, TDS return & TCS returns?

Ans: No, it is only applicable to those registered persons who are required to furnish GSTR-3B.

5. Waiver of late fees for delayed filing of GSTR-3B in excess of Rs. 500 was made vide notification 57/2020. What if the late fees say Rs. 4250 was paid on 25/06/2020 i.e before the notification was released?

Ans: The late fees paid in excess of Rs. 500 would be reccredited to the cash ledger of the tax payer. Kindly note the same has not been provided specifically in the notification however the same is being shown in the official website (gst.gov.in).

6. Within when the GST returns to be filed in order to avail the benefit of late fees reduction?

Ans: The GST returns for the period February to July 2020 to be filed on or before the 30/09/2020 in order to avail the benefit of late fees reduction up to maximum of RS. 500. If the returns if filed beyond 30/09/2020 the full late fees would be liable. The notification 52/2020 provides relaxation for the July 2017-January 2020 GSTR-3B, if the said returns is filed between 01/07/2020 to 30/09/2020.

7. Whether the late fees waiver is applicable for delayed filing annual returns also if filed before 30/09/2020?

Ans: No, the late fees waiver beyond Rs. 500 is not applicable for the delayed filing of annual returns. If the annual returns for the FY 2017-18 is being filed after the specified due date the late fees of Rs. 200 per day would be applicable till the date of filing of annual returns.

8. Whether late fees of Rs. 500 to be paid for filing NIL return/ Nil liability?

Ans: No, the late fees would be fully waiver off for those tax taxpayers whose total amount of tax is NIL

9. Whether the late fees for the delayed filing of GSTR-1 has been capped up to Rs. 500?

Ans: No, if the GSTR-1 is not filed within the due dates mentioned in notification 53/2020-CT, the full late fees would be liable from the original due date. No change/ waiver provided for GSTR-1 in the notification 57/2020-CT.

10. Whether the late fees waiver in excess of Rs.500 would be applicable for August 2020 return also if filed before 30/09/2020?

Ans: No, the late fees waiver is not applicable for the August GSTR-3B. As per notification 57/2020-CT r.w. 52/2020-CT the period covered is February to July 2020.

11. If a tax payer having turnover above 5 crores filed March GSTR-3B (original due date 20/04/2020) on 25/06/2020. Is late fees liable from original due date as per 52/2020?

Ans: No, the notification 52/2020 r.w notification 57/2020 provides the relaxation saying the late fees would be maximum of Rs. 500 in relation to the the GSTR-3B pertaining to February to July 2020 if filed on or before 30/09/2020 & notification 52/2020 provides for the July 2017-January 2020 if the said returns is filed between 01/07/2020 to 30/09/2020.

Therefore, the late fees would be restricted for Rs. 500 and not applicable from original due date.

12. ITC utilisation rules have been recently amended. IGST ITC has to be completely utilised first before utilising CGST & SGST ITC. Where a tax payer has duly utilised IGST ITC completely and still there is liability to be paid in cash. For example – CGST Rs. 50,000 & SGST Rs. 1,50,000. In 39th GST council meeting it was recommended to amend law retrospectively that interest for delay in payment of GST to be charged on net cash tax liability. Now, if the said return is related to April 2020 & filed on 10th October 2020, how much interest to be paid (considering recommendations)?

Ans: Interest would be paid on net cash liability i.e. on CGST Rs. 50,000 & SGST Rs. 1,50,000 at the rates provided below.

If turnover more than 5 crores – (April month original due date was 20th May 2020)

21st May 2020 to 4th June 2020 - 15 days - no interest.

5th June 2020 to 24th June 2020 - 20 days - Interest @ 9%

25th June 2020 to 10th October 2020 - 108 days - Interest @ 18%

If the turnover up to 5 crores – (Southern States)

21st May 2020 to 6th July 2020 - 47 days - no interest.

7th July 2020 to 30th September 2020 - 86 days - Interest @ 9%

1st October 2020 to 10th October 2020 - 10 days - Interest @ 18%

If the turnover up to 5 crores – (Northern States)

21st May 2020 to 9th July 2020 - 50 days - no interest.

10th July 2020 to 30th September 2020 - 83 days - Interest @ 9%

1st October 2020 to 10th October 2020 - 10 days - Interest @ 18%

13. In the above example, what if the said return is related to January 2020?

Ans: Notification clearly specifies that the concessional rate of interest for the period mentioned therein would be applicable to the tax periods February to July 2020.

14. In the example mentioned in question 12, how to disclose the same in GSTR-3B because GSTN portal will take CGST/SGST automatically when one of those amounts are feed in?

Ans: It would not be possible to pay different CGST & SGST interest through GSTR-3B. Suggested to discharge interest through DRC-03 or discharge at the time of filing annual return as interest amount would get freeze till the date of payment of liability.

15. A tax payer has availed ineligible ITC during tax period March 2020 and will reverse such ineligible ITC in the tax period May 2020. Will there be any relaxation of interest on reversal of ITC?

Ans: In general, ineligible ITC reversal would attract interest @ 24% p.a. Notification provides concessional rate of tax for those who are required to file GSTR-3B but failed to furnish the same along with payment of taxes. However, it is

not clear about ITC reversal aspect. Suggested to discharge interest at concessional rate and when department demands, differential interest amount could be paid.

16. In the above example, what if ineligible ITC claimed in the tax period January 2020?

Ans: Notification applicable to specific tax period returns from February 2020. Therefore, such notification will not be applicable to January 2020 return.

17. GST liability of March 2020 has been missed out while filing March 2020 return. However, the same has been paid in April 2020. April & May GST returns were filed on 5th May 2020 & 4th June respectively. Whether interest is applicable in such case? If yes, at what rate?

Ans: Interest would be attracted for delay in payment of tax. In the given example, assuming tax payer has turnover more than 5 crores, March month liability was supposed to be paid without any interest on 5th May 2020 but discharged on 4th June 2020. Therefore, there is delay of 31 days & the interest has to be discharged for the same.

Rate at which interest would be discharged will be staggered manner. For first 15 days it will be nil interest & then 9% p.a. (16 days) would be applicable.

18. GSTR-3B due dates would be based on the previous FY turnover. How to determine in the following cases:

- Where a registered person has started business in the FY 2020-21 & registered in April 2020?
- Where a registered person has started business in the FY 2019-20 & registered in April 2020?
- Where a registered person has registered in January 2020 with turnover of Rs. 1.25 crore?

Ans: Possible suggestions are as follows in each case:

- Can consider current FY turnover or can consider 0 turnover as business started in FY 20-21.
- Turnover of FY 2019-20 would be considered as aggregate turnover definition include aggregate of all supplies whether he is registered or unregistered or a taxable person.
- The turnover of FY 2019-20 is to be considered, when the registration is obtained in January 2020, the turnover from January to March 2020 to be considered i.e the turnover of Rs. 1.25 crore.

For any clarifications kindly reach me out at rashmi@hiregange.com

NO COST EMI: A FAÇADE OR A NAÏVETÉ?

Aporna Dasgupta

Shopping online is no more a fad but a necessary change from the conventional way of shopping. It's not just the convenience and the plethora of options available but online shopping also gives us the option of purchasing products at what is termed as "No Cost EMI". Here, the banker gets business from the retailers, the retailers have the scope of increasing the sales volume by giving easy payment options to the consumers and, the purchaser has the convenience of deferring lump sum payment to spread out the cost over a period of time.

During this unprecedented time when the entire economy is at a major slow-down and cash inflow has become uncertain, we are all taking measures to ensure that there is a sufficient liquidity available. No Cost EMI is one such way to purchase products without having to make a major sacrifice on the working capital. It might be a drop in the ocean but desperate times call for desperate measures, doesn't it?

What is 'No Cost EMI'?

EMI as we know stands for Equated Monthly Installments. A traditional loan arrangement requires the person taking the load to repay in installments along with interest at a decided percentage.

However, when we sum up the installments paid as per 'No-cost EMI' scheme, the total amount out of your pocket would be equal to the cost of the product purchased. There is no excess interest component to be borne by the person taking the loan.

How do banks provide this facility?

The Reserve Bank of India (RBI) in its circular dated September 17, 2013, stated that the concept of zero per cent interest is non-existent and that it is just a marketing gimmick to lure customers into purchasing more.

To bypass the law stating that interest-free loans cannot be extended, the scheme actually withholds the discount that would have been given on upfront payment made and re-directs that amount of discount to the bank to cover the cost of interest.

Example for Case-I

Particulars	Amount
Cost of Mobile Phone	Rs. 30,000/-
Discount amount	Rs. 5,000/-
Interest to be paid on EMI	Rs. 5,000/-
Amount payable	Rs.30,000/-

So here, we are ultimately paying the original price of the phone in installments. The retailer earns the discounted price of Rs. 25,000/- and the balance (i.e., the 'discount amount' of Rs. 5,000/-) goes to pay the interest on the loan.

The amount of discount being given is equated to the interest that is to be drawn from the customer. Hence, the total price you pay i.e., Rs. 30,000/- gets divided into price paid to retailer plus interest paid to financier. It's just that this break up may not be visible on prima facie examination of the transaction.

Is this really a No-cost EMI?

As per an excerpt from Amazon website:

“The bank will continue to charge interest on EMI as per existing rates. However, the interest to be charged by the bank will be passed on to you as an upfront discount at the time of your purchase, effectively giving you the benefit of a No Cost EMI. This discount excludes GST on interest amount that will be charged by your bank.”

How does GST come into the picture?

As mentioned in the extract, “...excludes GST on interest amount that will be charged by your bank”, we see that over and above the interest portion (which you as a consumer are effectively bearing) there is an additional tax burden too.

What is the nature of interest that is being spoken about here?

It can be one of the following two things:

Interest to be added to the value of supply when interest arises by virtue of late payment. Hence it is added to the value as per section 15(2)(d) of CGST Act, 2017 and thereby liable to GST at the rate applicable to the supply procured.

or

Interest on loans and advances. Though it is known that interest is exempt by virtue of entry No. 27 of notification No. 12/2017-Central Tax (Rate) dated 28th June 2017.

Then why are the customers liable to pay GST on the interest?

Interest as per clause 2(zk) of the notification No. 12/2017-Central Tax (Rate) dated the 28th June, 2017, “‘interest’ means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) but does not include any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilized”.

Entry 27 of notification No. 12/2017-Central Tax(Rate) dated 28.06.2017 reads-

Services by way of-

(a) extending deposits, loans or advances in so far as the consideration is represented by way of interest or discount (other than interest involved in credit card services)

No-Cost EMIs are transactions that are routed through one’s bank account via the banker’s credit card facility/debit card facility. Since this interest is linked to the credit card services, the exemption is not available. Further, the definition of “interest” is not satisfied to claim the exemption. Thereby, the customers may get the interest portion as a discount in their invoice but will be liable to pay the GST on it by way of a charge by the banker.

The same has been clarified by Circular No. 102/21/2019-GST dated the 28th June, 2019.

What is the actual cost that you are paying?

The cost of the product and interest on the loan is built into the EMI. Moreover, GST on the interest charges also become an out of pocket expense. However trivial the amount may look, it certainly spikes up the effective cost of loan that can add up to a large sum as and when the term of the loan becomes longer.

Conclusion

Although No-cost EMI is a good option, it is always better to have knowledge about the actual transaction rather than falling for a misnomer as “No-cost” EMI, which does come with a cost.

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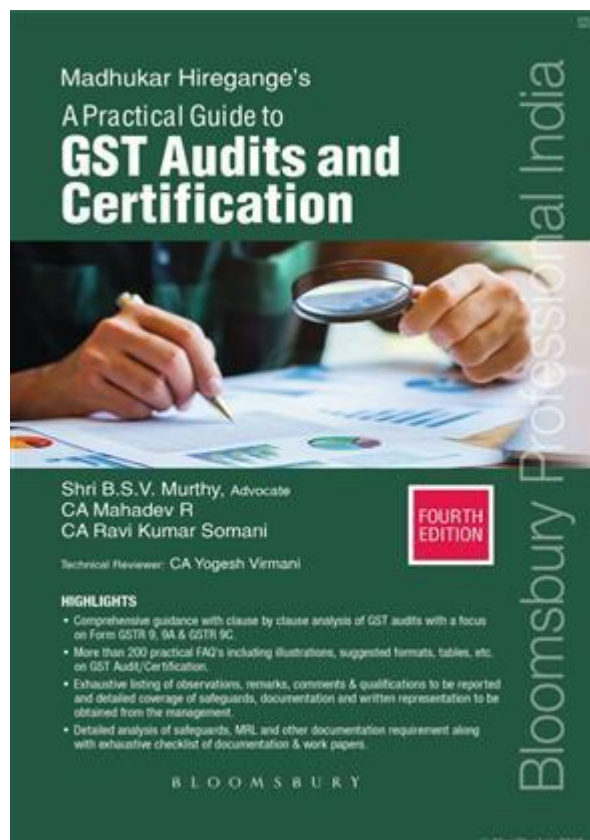
IMPORTANT LINKS

- a. Link of recording of webinar taken by CA Madhukar N Hiregange on critical analysis of Gujarat HC judgments on refund under inverted duty structure, intermediary and exports of services in case of associated enterprises –



https://youtu.be/F_SdQuqhv8o

- b. Madhukar Hiregange's A Practical Guide to GST Audit and Certification by B S V Murthy and Mahadev R and Ravi Kumar Somani, Bloomsbury India.



<https://www.meripustak.com/Madhukar-Hiregange-s-A-Practical-Guide-to-GST-Audit-and-Certification-179690>

RECENT NOTIFICATIONS & CIRCULARS

Notification no. and Date	Description
44/2020- Central Tax ,dt. 08-06-2020	Seeks to give effect to the provisions of Rule 67A for furnishing a nil return in FORM GSTR-3B by SMS
45/2020- Central Tax ,dt. 09-06-2020	Seeks to extend the date for transition under GST on account of merger of erstwhile Union Territories of Daman and Diu & Dadar and Nagar Haveli.
46/2020- Central Tax ,dt. 09-06-2020	Seeks to extend period to pass order under Section 54(7) of CGST Act
47/2020- Central Tax ,dt. 09-06-2020	Seeks to amend Notification No. 40/2020 - Central Tax dated 05.05.2020 in respect of extension of validity of e-way bill generated on or before 24.03.2020 (whose validity has expired on or after 20th day of March 2020) till the 30th day of June.
48/2020- Central Tax ,dt. 19-06-2020	Seeks to make sixth amendment (2020) to CGST Rules.
49/2020- Central Tax ,dt. 24-06-2020	Seeks to bring into force Sections 118, 125, 129 & 130 of Finance Act, 2020 in order to bring amendment to Sections 2, 109, 168 & 172 of CGST Act w.e.f. 30.06.2020.
50/2020- Central Tax ,dt. 24-06-2020	Seeks to make seventh amendment (2020) to CGST Rules.
51/2020- Central Tax ,dt. 24-06-2020	Seeks to provide relief by lowering of interest rate for a prescribed time for tax periods from February, 2020 to July, 2020.
52/2020- Central Tax ,dt. 24-06-2020	Seeks to provide one time amnesty by lowering/waiving of late fees for non furnishing of FORM GSTR-3B from July, 2017 to January, 2020 and also seeks to provide relief by conditional waiver of late fee for delay in furnishing returns in FORM GSTR-3B for tax periods of February, 2020 to July, 2020.
53/2020- Central Tax ,dt. 24-06-2020	Seeks to provide relief by waiver of late fee for delay in furnishing outward statement in FORM GSTR-1 for tax periods for months from March, 2020 to June, 2020 for monthly filers and for quarters from January, 2020 to June, 2020 for quarterly filers
54/2020- Central Tax ,dt. 24-06-2020	Seeks to extend due date for furnishing FORM GSTR-3B for supply made in the month of August, 2020 for taxpayers with annual turnover up to Rs. 5 crore

55/2020-Central Tax dated 27.06.2020	Seeks to amend notification no. 35/2020-Central Tax in order to extend due date of compliance which falls during the period from "20.03.2020 to 30.08.2020" till 31.08.2020.
56/2020-Central Tax dated 27.06.2020	Seeks to amend notification no. 46/2020-Central Tax in order to further extend period to pass order under Section 54(7) of CGST Act till 31.08.2020 or in some cases upto fifteen days thereafter.
57/2020-Central Tax dated 30.06.2020	Seeks to amend notification no. 52/2020-Central Tax in order to provide conditional waiver of late fees for the period from July, 2017 to July, 2020
58/2020-Central Tax dated 01.07.2020	Seeks to amend CGST Rules - for facilitating filing of nil GSTR-1 by short messaging service.
59/2020-Central Tax dated 13.07.2020	Seeks to extend the due date for filing FORM GSTR-4 for financial year 2019-2020
60/2020-Central Tax dated 30.07.2020	Seeks to amend CGST Rules - substituting FORM GST INV-01.
61/2020-Central Tax dated 30.07.2020	Seeks to amend Notification no. 13/2020-Central Tax in order to amend the class of registered persons for the purpose of e-invoice
Circular No. and Date	Description
139/08/2020 (10-06-2020)	Clarification on Refund Related Issues.
140/10/2020 (10-06-2020)	Clarification in respect of levy of GST on Director's Remuneration.
141/11/2020 (10-06-2020)	Clarification in respect of various measures announced by the Government for providing relief to the taxpayers in view of spread COVID-19

CONCLUDED EVENTS

Period of event	Particulars
21.04.2020 - 03.05.2020	13 days webinar on GST certification course
04.05.2020 - 16.05.2020	Webinar series 2 - GST certification course
21.04.2020 - 30.04.2020	GST knowledge empowerment - Web series 2
07.04.2020 - 14.04.2020	GST knowledge empowerment - Web series 1

GALLERY



Hiregange Academy providing school kits to students of Sri Sangameshwara Vidyalaya, Bangalore

CAREER OPTIONS

Designation: Academic Manager

Job Description:

We are looking for an Academic Manager, managing and supervising day to day Academic programmes. As a part of the Academy visited and met clients and have taken their feedback on what they look for in their prospective employees and tried to impart training on various skills like English Speaking and GST and Accounts for the unemployed graduates to make them more employable.

Responsibilities

- Organising webinars/seminars on GST/other laws, including brochure preparation, scheduling the programs, coordinating/inviting the speakers
- Sending emails for webinars/programs and follow up to check if emails sent for webinars going into spam
- Organising Career guidance workshop
- Ensure website of Academy is uploaded with latest and updated
- Support to ensure Academy newsletter sent every month regularly on time
- Visits onsite to prospective customers/clients for programs/webinars
- Visits to colleges/schools education institutes to arrange programs/webinars
- Touch base with customers- where training was done in past
- Support/coordinate throughout the training/webinar
- Plan coordinate to get published the booklets/New publications through Academy

Requirements

- Any Degree (M.com/ MBA/any degree) with 1-3 years of experience.
- High level of verbal written communication skills,
- Ability to encourage team work
- Excellent analytical and problem solving skill
- Advance knowledge in implementing plans to respond to academic related issues.
- Leadership. Fresh out of university, teamwork might have seemed like a great skill to include on your CV.
- Subject-specific skills.
- Strategic thinking.
- Decision making.
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Interested participants can write us to namratha@hiregangeacademy.com