GST CASE ABRIDGEMENT

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AMRG & ASSOCIATES
CHARTERED ACCOUNTANTS

About Amrg

AMRG & Associates Chartered Accountants firm was established in INDIA in 1984 and has currently become one of the leading chartered accountants firms in North India. The firm operates from its offices situated in Delhi, Mumbai, Sydney and various other locations. The firm offers its clients a full range of services including :

- Direct Tax Services
- Audit & Assurance Services
- GST Services
- Other Services

AMRG & Associates has a client base of more than 200 companies & individuals. The firm's approach to service delivery helps to provide value-added services to clients. Our differentiation is derived from a rapid performance based, industry-tailored and technology-enabled business advisory services delivered by talented professionals in the country.

The team consists of distinguished Chartered Accountants, Corporate Financial Advisors, Risk advisors and Tax consultants. The firm represents a combination of specialized skills, which are geared to offer sound financial advice and personalized proactive services.

We crave to build a better working world through our own actions and by engaging with like-minded organizations and individuals. This is our sole purpose of existence as an organization.

AMRG & ASSOCIATES
CHARTERED ACCOUNTANTS

From the Desk of

Rajat Mohan

AMRG & Associates, is a group of professional accountants specialized in providing top notch accounting services across the globe since 1984 .We currently have 200+ client base from various industries enjoying our services . AMRG & Associates is a reputed firm specialized in providing robust services like GST & Indirect Taxation , Statutory & Corporate Audits & Risk Advisory , to name a few.

Here in AMRG , we offer sound financial solutions and expert advices for your modern business queries . We are highy driven team of qualified professionals specializing in different fields of taxation and regulatory matters. We are committed to offer the best of our services to all our esteemed clients. With a holistic perspective in mind , we hope to deliver such dynamic services and grow our clientele with the growth of our clients.

We have been conducting webinars on various topics and also publishing monthly periodical to give our readers a 360 degree view of the changes in Income tax, GST and corporate laws. We are pleased by the overwhelming response that we have received for all our publications and hope to keep doing better and achieving each milestone that that comes our way .

Since 2017 we have been successfully running a GST weekly magazine[1] to get you everything that you need to know from the world of litigation, along with incisive analysis from the AMRG team. Now keeping pace with time, we have now decided to come with "GST case abridgement", which will be shared on a fortightly/monthly basis[2]. GST case abridgement would be much improved version of GST weekly magazine in respected of design, framework, incisive summarizing etc.

This will be the first of its kind digest that will get you key judicial pronouncements from the Supreme Court, various High Courts, AARs and Appellate Authorities emerging in the GST era and the erstwhile VAT, Service tax and Excise regime.

- This document intends to act as a reference tool for businessmen, professionals and tax officers providing them with a common pool of synopsis of important rulings.

- Creative feedback and valuable suggestion from the learned readers, bringing to our notice any discrepancy that may have crept in this book In spite of our best efforts, is most welcome, as it would help us improve the quality of the forthcoming editions, and may be provided at **rajat@amrg.in**

Rajat Mohan

[1] These updates were sent on daily basis till mid of 2019. Then it became weekly eyeing the repetitive nature of case laws.
[2] Depending upon the quality case laws.

Featured Case

Other Case

CONTENT

30

No bail in case of fraudulently availment of ITC, where investigation is ongoing and mastermind is absconding

31

Bail
High Court grant regular bail to assessee on furnishing a personal bond in sum of INR one lac.

32

TRAN-1
HC directed GST authorities to open online portal, especially when government press release mentioned a wrong date.

33

HC directed authority to open online portal so as to enable assessee to re-file rectified Form GST TRAN-1 electronically or manually.

34

Serving order on driver of vehicle cannot be assumed to be served on owner of goods.

35

Anti-Profiteering
Sample checking of evidence by DGAP by contacting customers (home buyers) could at best give provisional indication of passing on benefit of input tax credit but it would not provide true and complete picture. DGAP was directed to verify evidence in this regard and submit his report before National Anti-profiteering Authority

39

Supply of Services
Sale of handmade chocolates which are manufactured in workshop and brought to outlets for further processing namely, for Shakes, brownies, will be covered under restaurant services.

Featured Case

Section 174 of the CGST Act 2017

Repeal and Saving

Section 174(1) of Karnataka Goods and Service Tax Act, 2017 is not ultra vires to Constitution.

The appellant is a dealer in jewellery. On the basis of the intelligence report by the Assistant Commissioner of Commercial Taxes, notice, under Section 39(1) of the Karnataka VAT Act was issued. The petitioner/appellant did submit a reply to the notice and an order has been passed by the assessing authority under the Karnataka Goods and Service Tax Act, 2017, which came into existence w.e.f., 1.7.2017.

The appellant's main contention is that the order passed by the competent authority is bad in law and he has challenged the constitutional validity and clauses (d) and (e) of Section 174(1) of the Karnataka Goods and Service Tax Act, 2017. He has also prayed for quashing the demand order.

The repeal of the Acts specified in section 173 shall not-

- affect any tax, surcharge, penalty, fine, interest as are due or may become due or any forfeiture or punishment incurred or inflicted in respect of any offence or violation committed against the provisions of the repealed Acts;
- affect any investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and any other legal proceedings or recovery of arrears or remedy in respect of any such tax, surcharge, penalty, fine, interest, right, privilege, obligation, liability, forfeiture or punishment, as aforesaid, and any such investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and other legal proceedings or recovery of arrears or remedy may be instituted, continued or enforced, and any such tax, surcharge, penalty, fine, interest, forfeiture or punishment may be levied or imposed as if these Acts had not been so repealed

HC observed that the power to enact Section 174 of the KGST Act can be traced to Article 246A, which, when read with Article 366(12-A), confers power on the States to make laws with respect to any tax on supply of goods. Accordingly, Section 174 is a validly enacted piece of legislation and cannot be said to be without legislative competence.

HC held that the reassessment order for the period 2012-13 is clearly appealable before the appellate authority under Section 62 of the KVAT Act, 2003.

Resultantly, HC dismissed the writ appeal with a liberty to the assessee company to avail the alternative remedy, if it so chooses and in case, the appeal is preferred within a period of four weeks.

[Prosper Jewel Arcade LLP v. Deputy Commissioner of Commercial Taxes, Bangalore [2021] 127 taxmann.com 400 (Karnataka)]

Section 9(3) of CGST Act 2017

Supplies Taxable under Reverse Charge

Indian company is liable to pay GST on reverse charge basis for amount paid as interest to holding foreign company on late payment of invoices of imported goods

The applicant is importing goods from the Holding company located at Turkey namely for which the payment terms is 120 days from the date of invoice for import of goods and if the company Transformer located at India does not pay to Holding company located at Turkey on due date, Holding company is charging interest on late payment.

The applicant has obtained bank credit facility from CITI Bank based on the Corporate Guarantee issued by Holding company. Holding company has paid Stamp tax in Turkey as per their land rules and have raised reimbursement invoice of said payment to M/s. Enpay India.

Questions before AAR were:

- Whether liability to pay GST on Reverse charge arises if amount is paid as interest on late payment of invoices of imported goods? If yes, then at what rate?

AAR observed that as per Section 7 of the CGST Act, 2017, the activities to be treated as supply of goods or supply of services are covered in Schedule II. And As per Entry No. 5(e) of the Schedule-II agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act shall be treated as supply of services.

As per Section-15(2)(d) of the CGST Act, 2017, value of supply also includes "interest or late fee or penalty for delayed payment of any consideration for any supply."

In present case, the foreign buyer has tolerated the act of receiving payment after a lapse of a period of 120 days from the date of the invoice in respect of the goods supplied by them to the applicant for which interest is to be paid by the applicant.

The interest paid by the applicant for delay in payment of the amount/value of the imported goods is included as a part of the value of the said goods as per the provisions of Section-15(2)(d) of the CGST Act.

Therefore, AAR concluded that the payment of interest by the applicant will be covered under the supply of services under Entry No.5(2)(e) of Schedule-II of the CGST Act, 2017 and is liable to GST in view of the provisions of Section-15(2)(d) of the said Act. Rate of GST payable on the aforementioned interest will be the same as that of the IGST applicable on the aforementioned goods.

[Enpay Transformer Components India (P.) Ltd. [2021] 127 taxmann.com 48 (AAR – GUJARAT)

Rule 33

Not a Pure agent

Pure agency is not established in the absence of fulfillment of conditions

The applicant is importing goods from the Holding company located at Turkey namely for which the payment terms is 120 days from the date of invoice for import of goods.

The applicant has obtained bank credit facility from CITI Bank based on the Corporate Guarantee issued by Holding company. Holding company has paid Stamp tax in Turkey as per their land rules and have raised reimbursement invoice of said payment to M/s. Enpay India.

Question before AAR was:

- Whether liability to pay GST on Reverse charge arises if amount is paid for reimbursement of Stamp tax paid as a pure agent by M/s. Enpay, Turkey on our behalf?

AAR examined, whether the supplier i.e. M/s.Enpay, Turkey satisfies all the conditions mentioned hereinabove and satisfies the conditions of a pure agent, which are enlisted hereunder:

- The supplier acts as a pure agent of the recipient of the supply, when he makes the payment to the third party on authorisation by such recipient - AAR observed that no such document, agreement or contract has been produced by the applicant which proves that they have authorised the supplier to make payment to the third party. In view of absence/non-submission of any such documents in this regard, it was concluded that this condition is not satisfied.

- The payment made by the pure agent on behalf of the recipient of supply has been separately indicated in the invoice issued by the pure agent to the recipient of service - In this regard, the applicant themselves have submitted that the supplier has issued them a separate invoice mentioning the reimbursable amount therein. AAR find that the amount of stamp tax paid by the supplier on behalf of t he applicant has been mentioned in a separate commercial invoice issued to the applicant. However, in the condition mentioned above, there is no mention of issuance of any separate invoice regarding payment made by pure agent. As per the said condition, the supplier was required to indicate the aforementioned payment amount (made on behalf of the recipient of supply), separately in the invoice issued by him to the recipient of service/goods i.e. it should form a part of the invoice (related to the supply of goods) issued by the supplier and should be indicated separately, therein. The applicant has not submitted any evidence to prove that the aforementioned amount paid as stamp tax by the supplier on behalf of the applicant has been indicated separately in the invoice related to the supply of goods made to them. Hence this condition is not satisfied.

- The supplies procured by the pure agent from the third party as a pure agent of the recipient of supply are in addition to the services he supplies on his own account- In the instant case, the Bank Guarantee entered into by the supplier with the CITI Bank (the third party) on behalf of the applicant is in direct relation to the business connection/link that they are having with the applicant by way of supply of goods to them and are not in addition to the supply of services/goods that they provide to the applicant on their own account. Hence, this condition is also not satisfied.

In view of above observation, AAR concluded that the supplier of the applicant does not fulfil/satisfy all the conditions required for being a 'Pure agent' in terms of the provisions of Rule 33 of the CGST Rules, 2017 and therefore, the expenditure or costs incurred by the supplier of the recipient of supply cannot be excluded from the value of supply in terms of the provisions of Rule 33 of the said rules and is liable to GST on reverse charge basis.

[Enpay Transformer Components India (P.) Ltd. [2021] 127 taxmann.com 48 (AAR – GUJARAT)

Section 13 of IGST Act 201

Liaison office in India is intermediary and is taxable.

Applicant is established by DCCI UAE in Mumbai, Maharashtra. Applicant is also a non-profit organization, formed to represent, support and protect the interests of the Dubai business community in India, by creating a favourable environment, promoting Dubai businesses and by supporting development of business in India. Under the ambit of RBI norms, Applicant is Liason office ("DCCI LO") who undertakes below liaison/ representation activities in India;

(1) Liaison between India office and Dubai office

(2) Attending and representing DCCI in various seminars, conferences & trade fairs

(3) Connecting businesses in India with business partners in UAE and vice versa

(4) Organizing events & interactions with Indian stakeholders for sharing information about Dubai

- Applicant has submitted that it is not undertaking any supply, further submitted that it connects businesses in India with business partners in Dubai,

Following questions were raised in AAR:

- Whether activities performed by 'DCCI LO' shall be treated as supply under GST law?
- Whether 'DCCI LO' is required to obtain GST registration?
- Whether 'DCCI LO' is liable to pay GST?

As per the definition, an intermediary:-

a. means a broker, an agent or any other person, by whatever name called,

b. who arranges or facilitates the supply of goods or services or both, or securities, between two or more persons,

c. but does not include a person who supplies such goods or services or both or securities on his own account.

AAR observed that the applicant calls itself a liaison office and an intermediary can be called "by whatever name". So in the subject case condition number (a) is satisfied.

AAR also observed that applicant said that it connects businesses in India with business partners in Dubai. The term business, in a general sense, means an activity which generates income, where there may be trading of goods or provision of services, etc. the applicant has not given details of their business partners in Dubai but AAR concluded that these business partners would be companies doing business of some kind involving trading in goods or provision of services or securities or all of them. Similarly is the situation with 'businesses in India". These businesses also would be involving trading in goods or provision of services or securities or all of them. By connecting businesses in India with business partners in 'Dubai', applicant is actually arranging or facilitating the supply of goods or services or both, or securities, between two or more persons and therefore satisfies condition number (b) mentioned above.

Further, AAR observed that applicant is not providing any services on its own account. Rather it is providing the service of connecting two or more business with an intention of promoting such businesses in Dubai and since it has stated by the applicant that it is a liaison office of its Dubai Head Office, the applicant is not acting on its own account, rather it is acting on behalf of its Head Office and thus satisfies condition number (c) mentioned above.

Thus the applicant is satisfying all the conditions of an intermediary and AAR ruled that, the applicant is an intermediary. As per the provisions of Section 13 (8) of the IGST Act, 2017, AAR found that the place of supply in subject case of the applicant as an intermediary would be the location of the supplier of services i.e. the location of the applicant which is located in the State of Maharashtra, India.

From the website of Dubai Chamber, UAE, AAR observed that they are providing various services for which fees is charged. Thus it is clear that the applicant's Head Office appears to be a profit making organization, in which case the applicant cannot be considered as a non-profit making organization.

Further, the website says that "Dubai Chamber's Representative Office in India was established in June, 2018 in Mumbai, India and is continuously engaging with businesses in India and Dubai. The

India office gathers first hand market information and identifies opportunity areas for the members of Dubai Chamber, at major events in India. Thus the Mumbai office promotes the interest of Dubai companies intending to grow their international presence. They encourage Indian businesses to participate at key exhibitions in Dubai to boost their International business, along with gathering & dissemination of market intelligence. The Mumbai office also facilitates business by way of B2B meetings, trade missions, networking events, buyer seller meets and brainstorming with businesses on their plans for Dubai and India."

Thus there is definitely, a supply of services by the applicant to various businesses in India and Dubai and such supply is done by the applicant as an intermediary as has been discussed above.

AAR observed that activities undertaken by the applicant are covered by the scope of word "commerce", "Business" and also covered under the scope of "Supply".

In view of above discussion, AAR, Maharashtra replied affirmative to the above-mentioned three questions.

[Dubai Chamber of Commerce and Industry [2021] 127 taxmann.com 388 (AAR – MAHARASHTRA)

Other Case

Section 17(5) of CGST Act 2017

ITC is available for refrigerated storage tank and Fire Water reservoir

The applicant Company (SHV) is registered in India and the primary business comprises of supply of Liquified Petroleum Gas (LPG) in Bulk and in cylinders to domestic/ other Business' segments under the brand name of "SUPER GAS". SHV also supply bulk LPG for Industrial and Auto LPG.

They import LPG from outside India and store/ processes the same at various terminals located in India. The terminals are in Tami Nadu, Gujarat and Mumbai Maharashtra. SHV operates in 16 states in India through 3 terminals, 4 Regional offices, 24 filling plants and 6 depots in India.

The applicant had stated that they are contemplating expansion to increase the LPG capacity As part of proposed expansion, new Propane and Butane unloading arms(one each) are to be installed at jetty and new transfer pipelines laid; refrigerated storage tank for storing, processing and maintaining of propane / Butane and water storage reservoir to follow the fire protection measure at Terminal are to be set up.

Following questions were posed to AAR:

- Whether the applicant is eligible for availment of input tax credit of GST paid on goods and services for laying of transfer pipeline for transporting Propane/Butane from Jetty to the Terminal?
- Whether the applicant is eligible for availment of input tax credit of GST paid on goods and services for construction of refrigerated storage tank at Terminal?
- Whether the applicant is eligible for availment of input lax credit of GST paid on goods and services for construction of Fire Water reservoir which is a part of firefighting system?

AAR observed that he CGST Act clearly states what constitutes 'Plant and Machinery' and in that what is excluded i.e. apparatus, equipment, machinery-used for making outward supplies and fixed to earth by foundation or structural support constitutes 'Plant and Machinery' and the 'Pipelines laid outside the factory premises' are excluded from the ambit of 'Plant and Machinery' for the purposes of eligible Credit.

In view of above, AAR ruled that the applicant is not eligible for availment of input tax credit of GST paid on goods and services for laying of transfer pipeline and the foundation and structural support for such pipeline for transporting propane/Butane from jetty to the Terminal as pipelines laid outside the factory premises as being restricted under Section 17(5) of the act read with the Explanation thereof.

The Propane/Butane is stored, processed and maintained in refrigerated storage tanks before being dispatched to the end customers as per their requirements. Refrigerated storage tanks are constructed I n a manner which can facilitate storage of Propane/ Butane and maintain its characteristics. It is built with certain equipment along with the concrete inputs to enable it to perform the said functions. Therefore, it is clear that these tanks are used for making outward supply'.

Therefore, AAR in view that refrigerated storage tanks may qualify as an apparatus or an equipment, as long as the applicant capitalizes these tanks and accounts these tanks under 'Plant and Machinery' in their books of accounts and not as Immovable property'.

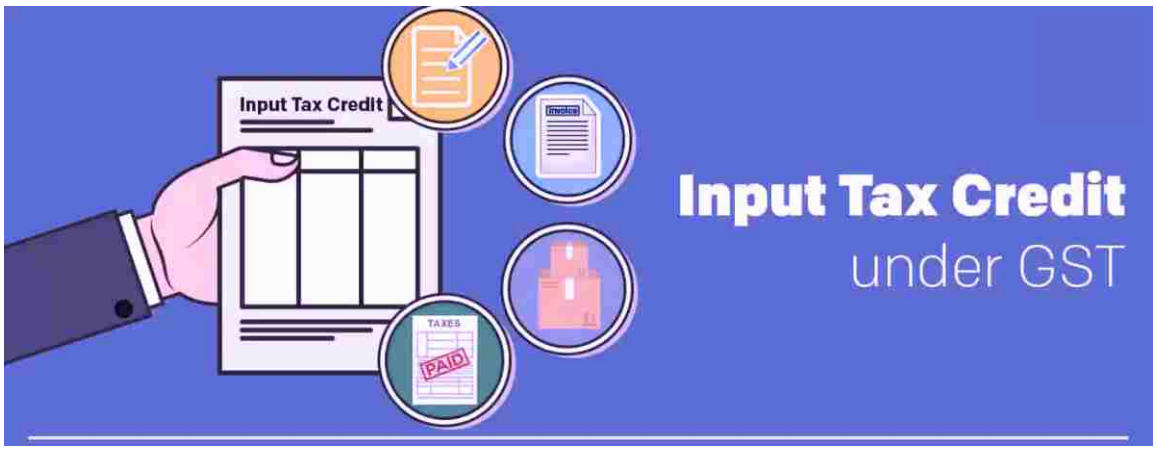
Therefore, AAR held that the applicant is eligible for availing credit of tax paid on the setting up Refrigerated storage tank ,in as much as such tanks stands accounted as Plant and Machinery' in their books of accounts and the structural support to such tanks is as per the scope of the said Purchase Order

The water storage tanks with the necessary tools/equipment are to be maintained in the Terminal as a 'Fire Protection System for LPG Terminal' and therefore they are constructed in the course of business. These Tanks are constructed as 'Works Construct'.

Considering this definition of equipment/apparatus and the requirement of the applicant to maintain such a water Storage system AAR were inclined to held the Water Storage Tanks' in the case of applicant, as 'Plant and Machinery' provided, the said tanks are accounted as 'Plant and Machinery and not as 'Immovable Property-Land and Building' in their books of accounts.

In view of the above, AAR ruled that the applicant is eligible for availment of input tax credit of GST paid on goods and services for setting up of Fire Water reservoir (tank) including the structural support thereon subject to the condition that the tanks are capitalized in their books of accounts as 'Plant and Machinery' and not as Immovable Property".

[SHV Energy (P.) Ltd. [2021] 127 taxmann.com 172 (AAR – TAMILNADU)



Section 61 of CGST Act 2017

Scrutiny of Returns

Department has mechanically and blindly accepted the alleged statement given by the petitioner. Thereby assessment quashed

Competent Authority passed assessment order on assessee observing that at time of inspection conducted by Inspecting Officials in assessee's business premises assessee had deposed that it was not maintaining any books of account.

Assessee filed writ petition before High Court challenging impugned assessment order. It contended that to pre-assessment notice, it had sent a detailed reply on 18-10-2019 raising various objections and pleaded that it was ready and willing to produce books of account and it had claimed only eligible input tax credit under Form GSTR - 3B filed by it with Competent Authority. Despite sending reply, same had not been considered by Competent Authority under impugned assessment order.

HC observed that the objections raised by the petitioner through their various replies, in which they have reiterated that they are ready and willing to produce books of accounts, were not considered in the impugned assessment order. But the impugned assessment order only based on the alleged deposition made by the petitioner before the Inspecting Officials that they are not maintaining books of accounts without any independent assessment.

HC had perused and examined the various replies sent by the petitioner and as seen from the said replies, there is no admission on the part of the petitioner that they were not maintaining books of accounts at the time when the Inspecting Officials visited the petitioner's place of business.

HC also observed that, from the impugned assessment order, the respondents have mechanically and blindly accepted the alleged statement given by the petitioner before the Inspecting Officials without independently giving reasons after duly considering the objections raised by the petitioner.

For the foregoing reasons, HC in view that the impugned assessment order passed by the second respondent is arbitrary and is in violation of the principles of natural justice, since no sufficient opportunity was granted to the petitioner nor did the respondents consider all the objections raised by the petitioner.

Thus, HC quashed and set aside assessment order and matter remanded to Competent Authority for fresh consideration.

[Tvl. J.F. International v. Commissioner of Commercial Taxes, Chennai [2021] 127 taxmann.com 267 (Madras)]

Section 62 of CGST Act 2017

In best judgment assessment, Multiplying 3 times the monthly average GST paid is not reasonable

This Writ Petition is filed challenging the assessment order passed by the assessing authority under the Telangana GST Act, 2017 in relation to the petitioner for the tax period November, 2018.

Petitioner contended that though the assessing authority is entitled to do best judgment in the absence of filing of GSTR-3B, the method adopted is by multiplying by 3 times the monthly SGST tax of Rs.50,000/- to determine the tax liability is arbitrary and not based on any principle. He also contended that 100% penalty has been levied without indicating under which provision of the Act the same has been levied.

HC found that assessing authority is unable to point out what is the principle followed by the him in doing best judgment assessment in the manner indicated above i.e. multiplying 3 times the monthly average SGST, and adopting it as a basis for assessing the petitioner to tax for the month of November, 2018. He also could not indicate under which provision of law 100% penalty is levied on the petitioner.

HC in view that the impugned order was prima facie arbitrary and contrary to the provisions of the Telangana GST Act, 2017, Therefore HC set aside the impugned order and remitted back the matter to assessing authority for fresh consideration

HC directed that assessing authority shall issue notice to the petitioner indicating the method of assessment under the best judgment assessment provision contained in Section 62 of the said Act; grant a personal hearing to the petitioner; and then pass a reasoned order both with regard to levy of tax but also with regard to interest and penalty afresh.

[Golden Mesh Industries v. Assistant Commissioner of State Tax [2021] 127 taxmann.com 336 (TELANGANA)]

Assessee has to file his return and pay tax based on the said returns within 30 days if he wants the best judgment basis to be cancelled. No extension in the same.

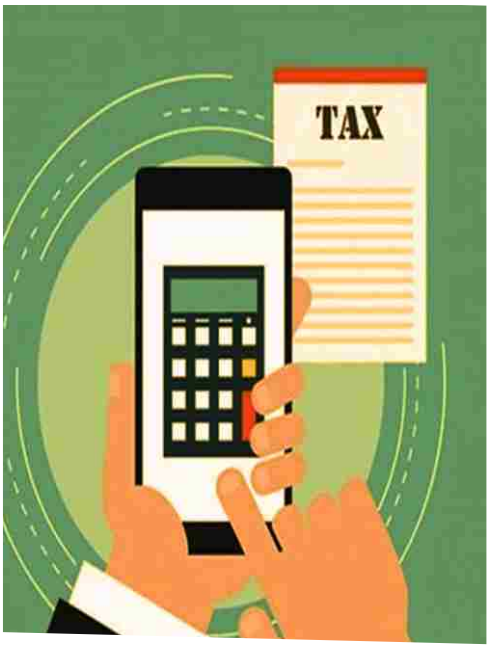
Assessee did not file returns for period May, 2018 onwards. Competent Authority passed assessment orders on assessee under section 62(1) on best judgment basis.

Assessee filed writ petition praying High Court for extension of time of 30 days from date of receipt of best judgment assessment orders so as to enable it to file returns beyond said period for purposes of getting benefit of withdrawal of assessment orders passed on best judgment basis under section 62(1).

HC found that as per provisions of section 62 of the SGST Act, it is only in circumstances where an assessee refuses to furnish the particulars required for an assessment under the Act, through the filing of a return within time that the proper officer has to proceed to finalise the assessment on the best of his judgment, taking into account all relevant material which is available or which he has gathered for the said purpose.

Section 62(2) indicates that even after the service of the best judgment assessment order on the assessee, if the assessee furnishes a valid return within 30 days thereafter, the assessment order passed on best judgment basis will be deemed to have been withdrawn save for the continuance of the liability to pay interest for late payment of the tax. Thus, the statutory provisions are clear with regard to the time frame within which the assessee has to file his return and pay tax based on the said returns if he wants the assessment done on best judgment basis to be cancelled.

HC in view, the statutory prescription of 30 days from the date of receipt of the assessment order passed under sub section (1) of section 62 has to be strictly construed against an assessee and in favour of the revenue, since this is a provision in a taxing statute that enables an assessee to get an order passed against him on best judgment basis set aside. The provision must be interpreted in the same manner as an exemption provision in a taxing statute.



Court may not be justified in granting an extension of the period contemplated under sub section (2) of section 62, so as to enable the assessee to file a return beyond the said period for the purposes of getting the benefit of withdrawal of an assessment order passed on best judgment basis under section 62(1) of the GST Act.

[JS Fusion Industries (P.) Ltd. v. State Tax Officer, Ettumanoor [2021] 127 taxmann.com 269 (Kerala)]

Before rejecting a condonation application, appeal authority must ascertain the date of serving the order

Against assessment order, assessee filed appeal before Appellate Authority asserting 7-11-2019 as date of communication of assessment order. Appellate Authority vide order dated 6-3-2020 rejected assessee's appeal on ground that it was filed beyond even condonable period inasmuch as according to department copy of order was served on assessee's registered e-mail.

Thereafter, assessee filed writ petition before high court seeking relief in this regard.

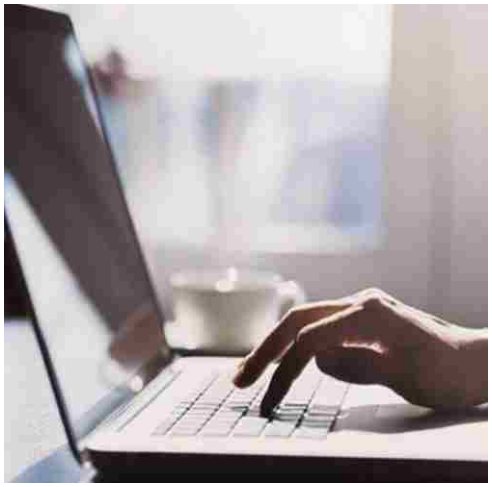
Assessee submitted that he has not received copy of the order on the registered e-mail, and in any event, the Appellate Authority could not have concluded that a copy of the order is served on the assessee only because the 'the Appellate Authority asserts that a copy of the order is sent by e-mail.

Assessee further submitted that physical copy of the order has not been served either on the Directors of the Company or its authorized representative.

As per section 107 of CGST Act, a person aggrieved by any decision or order under the Act may prefer an appeal to the prescribed authority within three months from the date on which the said decision or order is communicated to such person with a further condonable period of thirty days.

Therefore HC in view that it would be necessary for the appellate authority, while dismissing an appeal on the ground that it is filed beyond the period of limitation prescribed and the further condonable period, to decide on the limitation considering the circumstances relied upon by the parties to assert a particular date as the date of communication.

In the present case, HC observed that the Department asserts 14-5-2019 and the petitioner asserts 7-11-2019 as the date of communication. The impugned order does not indicate that the appellate authority has considered the controversy in this regard. The appellate Authority has also not considered the circumstances relied upon by the assessee to justify that the date of communication of the order.



Therefore HC set aside the impugned order passed by Appellate Authority and restored the appeal to Appellate Authority for reconsideration.

[Venu R K Infra (JV) v. Joint Commissioner of Commercial Taxes (Appeals) [2021] 127 taxmann.com 263 (Karnataka)]

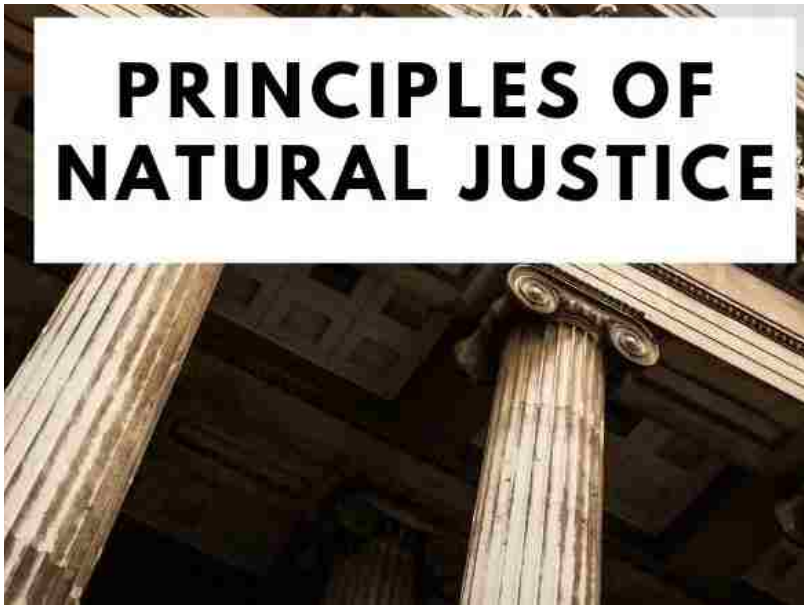
HC set aside impugned order, where principles of natural justice were not followed.

Competent Authority for month of June, 2019 passed assessment order on assessee under section 62(1) on best judgment basis without affording any adequate opportunity of hearing or assigning any reason.

In view of above fact, HC in view that the principles of natural justice, in passing the order, stands violated.

Thus, HC set aside impugned order with a direction to Competent Authority to decide matter on merits in compliance of principles of natural justice.

[Suman Kumar v. State of Bihar [2021] 127 taxmann.com 268 (Patna)]



Section 117 of CGST Act 2017

Writ Petition to High Court

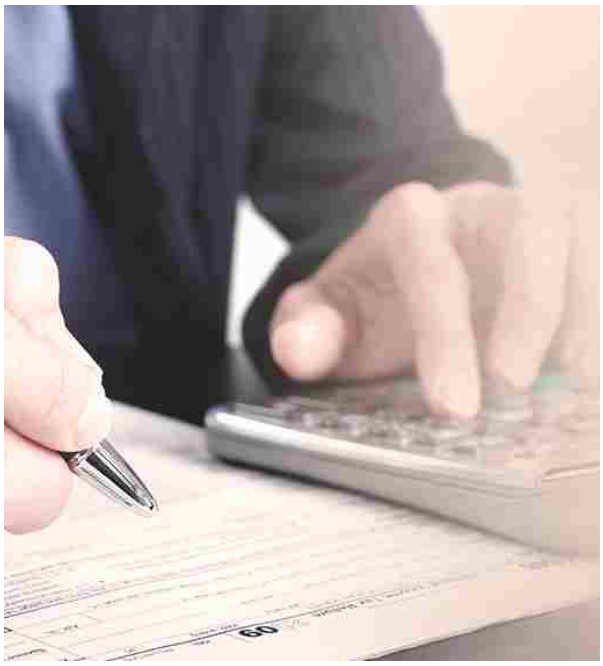
Taxpayer can withdraw the writ petition

Assessee defaulted in filing returns in Form GSTR-3B for months of March, 2019 to June, 2019. Thereupon Competent Authority passed assessment orders on assessee under section 62 on best judgment basis .

Assessee filed writ petition praying High Court to quash aforesaid assessment orders. Later on assessee filed application before High Court seeking permission to withdraw instant writ petitions.

In view of above fact, HC granted permission to withdraw instant writ petition.

[Balwant Construction (P.) Ltd. v. State of Bihar [2021] 126 taxmann.com 202 (Patna)]



Section 37

High court to not interfere with limitation period as per statute

Rectification of GSTR-1 Form after expiry of prescribed time period is not permitted

Petitioner while uploading Form GSTR-1 (return) inadvertently reported a particular sale made to registered company as unregistered sale. Petitioner thereafter almost one and half year made an application seeking rectification of GSTR-1 Form. Said application was rejected by Authorities on ground that period for making such an application was expired.

Thereafter, Petitioner filed petition before high court seeking relief in this regard.

HC noted that the Act does not provide any provision for appeal. Furthermore, there is no provision for condoning of such a delay.

HC did not find any reason to interfere as the statute has provided a period of limitation for seeking rectification. The writ court cannot, by itself, condone such a limitation period. Condoning such delay would make the provision otiose and open the floodgates for similar cases. Accordingly, instant writ against rejection of claim of petitioner for rectification of accounts was rejected.

[Abdul Mannan Khan v. Goods & Services Tax Council [2021] 127 taxmann.com 357 (Calcutta)]

Assessee has to file his return and pay tax based on the said returns within 30 days if he wants the best judgment basis to be cancelled.

Competent Authority passed best judgement assessment orders on assessee under section 62. Petitioner filed petition before high court seeking relief in this regard.

HC observed that the returns that had to be filed within 30 days after receipt of the order for getting the benefit of setting aside the orders in terms of section 62 of the GST Act were filed only on 21-11-2019. Inasmuch as, admittedly, the said returns were filed more than 30 days after the receipt of the orders by the petitioner, the petitioner cannot be heard to contend that assessment orders ought to be set aside in terms of section 62 of the GST Act.

Accordingly, HC dismissed the writ petition filed by applicant and directed authority to keep in abeyance recovery proceedings against assessee for a period of three weeks so as to enable assessee to avail its appellate remedy in meanwhile.

[Wild Tree Resorts v. State Tax Officer [2021] 126 taxmann.com 203 (Kerala)]

Section 70 of CGST Act 2017

Bail

HC grants anticipatory bail to taxpayer who is not directly involved in day to day operations of the alleged bogus firms.

Competent Authority conducted enquiry/investigation against assessee and her husband and called them for investigation and duly recorded their statements. Husband of assessee was arrested but assessee was released on same day.

Assessee filed writ petition seeking anticipatory bail in relation to enquiry/Investigation being conducted by Competent Authority.

Revenue opposing bail application submitted that assessee and her husband created five bogus export companies and fraudulently availed input tax credit of Rs. 45 crores upon strength of fake invoices providing fabricated information on E-way bill portal.

Revenue further submitted that on enquiry, it is found that none of the transporters have transported the good for the companies in question, however, only one transporter disclosed that he transported the goods from a warehouse to ICD TKD and not from any of the suppliers as claimed by the husband of the applicant in his statement recorded u/s 70 & 174 of CGST Act.

HC found that the e-way bill is uploaded by the supplier with the concerned online portal of the Respondent wherein vehicle no. and HSN code are mentioned. This portal is also linked to the Regional Transport Authority to verify whether the vehicle is existent or not. In case of any discrepancy in vehicle arising therefrom, the system of the Respondent does not accept it. Moreover, after uploading the e-way bill, the goods are transported by the concerned vehicle at ICD, Tukhlaqabad, wherein the entry pass are issued by the custom authorities and the goods are unloaded from the vehicle and are further inspected by the authorities.

It goes to many levels of checks and inspection by the Custom Authorities and Export General Manifesto ("EGM") are issued at different stages. It leaves no doubt that the goods are not transported by the concerned vehicle as it goes through different level of checks and inspections. However, above facts have not been investigated by the tax department.

HC found that on the day the impugned order has been passed, the said Judge granted regular bail to the husband of the applicant after spending nearly 50 days in custody who is the person involved in day-to-day affairs of the company, however, dismissed the anticipatory bail of the applicant.

HC observed that the export made by the companies of the applicant in crores of rupees. The Investigating Agency has conducted as many as 5 raids including the residence and office premises of the applicant and seized the evidence such as original documents, purchase and sale invoices, ledgers and Bank Statements, hard disks, CPU, export details, etc.

In view of above observation, HC was of the view that custodial interrogation of the applicant is not required.

Accordingly, HC directed arresting Officer directed that in the event of arrest, the petitioner/applicant shall be released on her furnishing a personal bond. Further HC directed that the petitioner shall cooperate with the investigation and make herself available for interrogation by police officer, as and when required. She shall not directly or indirectly influence any witness or tamper with the evidence.

[Lupita Saluja v. DGGI. [2021] 126 taxmann.com 201 (Delhi)]

HC refuse to grant bail to assesse as it would have a detrimental effect on investigation

Petitioner acted as middleman by procuring GST registration pertaining to defunct companies and passed over the same to one Rakesh, who utilised the same for the purpose of raising GST invoices and in turn, the said invoices were given to the petitioner, who, thereafter, filed the statutory returns. Further the petitioner was receiving commission for selling the details of GST registration of defunct companies and he was aware that raising of invoices in the names of the defunct companies is illegal and, thereby, caused loss of GST to the tune of several Crores of rupees to the exchequer.

Petitioner filed petition before high court seeking bail.

Revenue opposing bail application submitted that the offence u/s 132 (5) of the CGST Act is a cognizable and non-bailable offence and the petitioner having committed the said offence, no bail can be granted to him. Further, revenue submitted that since investigation is on, allowing the petitioner to go out on bail will very much hamper the investigation.

Revenue also submitted that the petitioner, knowingly, had indulged in the said act of providing the credentials of the defunct companies for monetary value which was utilised in getting tax remission by the said individuals without there being any supply of goods and the petitioner had not only received illegal gains from several persons, but has also utilised his mobile number for communication for opening various bank accounts and filed returns by engaging auditors.

HC in view that the petitioner would have been aware that the said credentials would be used for fake/ fraudulent transactions. The petitioner cannot pretend ignorance on this aspect. Once the petitioner, on clear and proper thinking, has obtained the credentials of defunct firms and handed over the same to the other persons for being misused for cheating the exchequer, the petitioner cannot absolve himself from the said offence by holding a lifeline that he is only a middleman.

HC observed that there are serious allegations against the present petitioner, who is the one of the main accused, that he along with co- accused, by perpetrating fraud and through paper transactions have claimed the relief to the tune of more than Rs.55 Crores. The case is at preliminary stage and enlarging the petitioner at this point of time on bail would have a detrimental effect on the investigation. Further, without his role as middleman, the whole crime could not have been perpetrated. The nexus of very many persons within the administrative framework could not be ruled out and a proper and full-fledged investigation is necessary to unearth the larger conspiracy involved behind the above. It is not as if the petitioner has been under incarceration for a long length of time. In such a backdrop, Court is of the considered view that the prayer for grant of bail by the petitioner cannot be acceded to.

Therefore HC was not inclined to entertain petition and grant bail to the petitioner.

[Bajan Lal Bishnoi @ Rohan v. Superintendent of GST & Central Excise [2021] 127 taxmann.com 191 (Madras)]ns by engaging auditors.

Section 83 of CGST Act 2017

Attachment of Bank Account

No provisional attachment if there are no proceedings.

Petitioner was acting as commission agent at Agricultural Produce Market Committee.

Without availing any opportunity, Petitioner straightway received the attachment order and realized that from the Office of the Principal Commissioner of Central GST, such order of freezing had happened and since then, he has not been allowed to operate the account.

Thereafter, the petitioner approached the Principal Commissioner of Central GST with the request of defreezing the account and also to provide the reasons of such attachment for freezing of his account. He was orally conveyed that because of voluminous transactions with the third party, which is involved in violation of the provisions of the CGST Act, his account has been frizzed.

Aggrieved by such provisional attachment order of bank account, petitioner filed writ petition before high court seeking relief in this regard.

HC observed that that there are no proceedings against the petitioner under Sections 62, 63, 64, 67, 73 and 74 of the Act. There is no reason therefore, to invoke section 83 against the writ applicant and proceedings. Since the proceedings are initiated by the authorities in connection with the third parties, invocation of powers under Section 83 are not available with the respondents.

Therefore HC quash and set aside the provisional attachment order of bank account

[Bhavesh Kiritbhai Kalani v. Union of India. [2021] 127 taxmann.com 199 (Gujarat)]

Section 70 of CGST Act 2017

Others

No criminal prosecution to be initiated against assessee if summons to appear served after date for appearance mentioned in summon

Petitioner filed petition before high court seeking direction against summons issued qua the petitioner. He submitted that not only are the summons vague, but they were served on the petitioner after the date provided in the summons for appearance.

Department submitted that the aforementioned summons are like spent bullets, and therefore, have become inefficacious. No steps for criminal prosecution qua the petitioner have been triggered based on the impugned summons.

In view of above fact, HC closed writ petition and directed that if recourse is taken by the respondents to Section 70 of the Central Goods and Service Tax Act, 2017, the legal parameters provided therein will be kept in mind by the concerned officer.

[Mrs. Bhawna Chugh v. Union of India [2021] 127 taxmann.com 359 (Delhi)]

Section 130 of CGST Act 2017

Others

Department cannot conclude evasion of tax without evidence on basis of mere existence of some discrepancies

Competent Authority passed an order under section 130 on assessee and on basis of loose documents (loose invoices) discovered during survey from assessee's business premises and also taking into consideration fact that there was discrepancy in Form GSTR-3B and Form GSTR-2A filed by assessee determined assessee's turnover of iron scrap and imposed tax and penalty on same.

Assessee contended before Appellate Authority that there was no discrepancy in Form GSTR-3B and Form GSTR-2A filed by it and also sought to reconcile loose documents (loose invoices) with original tax invoices and also e-way bills issued from time to time that were otherwise uploaded on web portal of GST department.

Appellate Authority accepted explanation furnished by assessee with respect to all but two loose documents relied against. Accordingly, Appellate Authority partly allowed appeal and sustained imposition of tax and penalty on balanced turnover.

Thereafter assessee filed an appeal before high court challenging the order passed by the appellate authority.

Assessee submitted before High Court that aforesaid two loose documents were regular tax invoices and purchase invoices and e-way bills had been uploaded against both transactions.

HC in view that once the revenue authority admits that the invoice and the e-way bills relied upon by it, had been issued in regular course, it is difficult to imagine how the appeal authority could have reached a conclusion that the goods sold or purchased against those invoices were unaccounted for. The invoice is primary evidence of the transaction. Unless the revenue authority disputes it's genuineness, it cannot be lightly overlooked. Then, in the present case, the revenue authorities further admit to the issuance of the e-way bills against the aforesaid invoices. Therefore, the transaction was not only made against the regular invoice but also the details of the transaction were uploaded on the portal of the revenue authority.

In view of the aforesaid facts to permit the revenue authorities, to draw a conclusion of evasion of tax is found to be without any basis. The alleged discrepancy in GSTR-3B and GSTR-2A referred to by the assessing authority did not even find favour with the appeal authority, inasmuch as, it did not refer to the same in the impugned order. Therefore, that part of the submission advanced by learned Standing Counsel cannot be accepted. Even otherwise, in face of the admission, as to the genuineness and existence of the tax invoice and the e-way bills, mere existence of some discrepancies may not have ever led the revenue authority to the conclusion that tax had been evaded or the transaction had not been disclosed. To hold that there was discrepancy in the account is different and lighter charge than to hold that the assessee had not disclosed or concealed part of it's turnover. As noted above, once the revenue authority accepted, even if impliedly, that the transaction were covered by regular invoices and those details had been uploaded on the web portal by issuing e-way bills, merely because there may have been existed certain discrepancies, the transaction cannot be said to be one falling under the category of undisclosed turnover.

Therefore HC set aside order passed by appellate authority and matter remitted to Appellate Authority to pass a fresh order.

[Jai Maa Jwalamukhi Iron Scrap Supplier v. State Of U.P. [2021] 127 taxmann.com 474 (Allahabad)]
Section 132 of CGST Act 2017

No bail in case of fraudulently availment of ITC, where investigation is ongoing and mastermind is absconding

Petitioner was proprietor of firm and director of company which had fraudulently availed ITC only on basis of mere documents i.e. Invoices/ E-way Bills, without receipt of any goods in contravention of provisions of Section 16(2) of CGST Act, 2017 and petitioner was arrested for playing a prominent role in fraudulent availment of and passing of ITC without supply of goods, attracting punishment under provisions of Section 132.

Petitioner filed an appeal before high court seeking interim/ ad-interim bail.

Revenue opposing bail application submitted that petitioner, despite arrest, is not cooperating with the investigation and so far has not produced the required documents such as invoices, E-way Bills, Transport documents, detail of persons of respective firms with whom its transactions have been carried out and has also not revealed the names of other conspirators. The co-conspirators are absconding and not joining investigation. Investigations for ascertaining role of other firms involved in the fraudulent availment of ITC are going on and there is possibility that Petitioner would tamper with evidence, influence the witnesses, may abscond and not co-operate if released on bail.

HC found that a perusal of the file noting, indicates that the concerned officer has on the basis of the information given so far by the Petitioner is in the process of identifying other key conspirators/ master mind in the fraudulent availment of ITC, the concerned officer has recorded her reasons to believe that Petitioner has floated the two firms with the core objective to defraud the Government Ex-chequer; that Petitioner is only doing paper transactions involving 66 Crores of revenue which is huge by any standards and, has authorized his arrest under Section 69 of the CGST Act. It is observed from the file notings that in furtherance of the ongoing investigation, the Revenue authorities are in the process of issuing summons to them and other key persons and co-accused to interrogate and record statements.

Considering the magnitude and the scale of the alleged fraud involving public money and the critical stage, when investigation to get hold of the mastermind/ king pin and other key conspirators as well as the modus operandi is underway in which Petitioner through his sole proprietary concern, as well as through the Pvt. Limited Company, is alleged to be an active participant, at this stage, HC held that at instant stage bail under Article 226 of Constitution of India could not be granted to petitioner. Accordingly, HC rejected the petitioner's Petition.

[Amit Kumar Shukla v. Union of India [2021] 127 taxmann.com 198 (Bombay)]

Bail

High Court grant regular bail to assessee on furnishing a personal bond in sum of INR one lac.

Assessee for offence punishable under section 132(1)(I) was arrested on 9-12-2020. Allegations against assessee and his brother were that they were providing fake invoices through various firms, floated/ managed either directly by them or by putting convenient people to manage their affairs, without any corresponding supply of goods or services and around 400 such fake firms were created by assessee and his brother and invoices issued.

Assessee filed an application before High Court seeking grant of regular bail.

HC observed that the petitioner has been in custody now for 56 days. The maximum sentence provided for the offence alleged against the petitioner is imprisonment for a period of five years, therefore Chief Metropolitan Magistrate is required to take cognizance on the complaint is required to be filed in 60 days.

On a query put to the Senior Investigating Officer, as to whether the respondent is likely to file a complaint within four days, he very fairly states that since around 100 hard-drives have been recovered from the offices of the petitioner and his brother, the same are required to be analyzed and a detailed investigation is required to be carried out to find out the number of fake firms, the complete transactions carried out as also the number of beneficiaries of the fake bills and invoices generated by the petitioner and the co-accused. He further states that a comprehensive complaint cannot possibility be filed in four days.

It is thus evident that the respondent does not propose to file a complaint within 60 days and after 4 days the petitioner would in any case be entitled to the default bail as a matter of right.

Consequently, the petitioner is directed to be released on bail on his furnishing a personal bond in the sum of Rs. 1 lakh with one surety bond of the like amount subject to the satisfaction of the learned CMM/Duty Magistrate concerned, further subject to the condition that the petitioner will not leave the country without the prior permission of the Court concerned and in case of change of mobile number and/or the residential address the petitioner will intimate the same to the Court concerned by way of an affidavit.

[Mukul Mittal v. Directorate General of GST Intelligence [2021] 127 taxmann.com 279 (Delhi)]

Section 140 of CGST Act 2017

TRAN-1

HC directed GST authorities to open online portal, especially when government press release mentioned a wrong date.

Assessee believing on a press release wherein it was conveyed to public that time to upload declaration in Form GST TRAN-1 was available till 30-12-2017, attempted to upload declaration on 29-12-2017. But Attempt was futile. Immediately assessee enquired with GST Network as to when portal would reopen again so as to entitle it to upload required details for migration.

Assessee's query was met with denial for reason that date 30-12-2017 specified in press release was a mistake and last date for requesting for migration was 27-12-2017 and assessee had not attempted to log on system before 27-12-2017.

Single Judge of High Court held that press release was in fact made though date 30-12-2017 specified therein was a mistake and mistake on part of GST Authorities ought not to deprive substantive benefit due to assessee under Act, that too on account of technical procedural error. He directed GST Authorities to open online portal to enable assessee to file Form GST TRAN-1 electronically or to accept same manually.

Aggrieved by the said direction, the Union of India along with the GST Council and others have preferred appeal before High Court.

HC observed that the existence of a press release issued on 20-11-2017 is admitted by the learned Senior Central Government Standing Counsel. It is also admitted that there was no press release intimating that the date specified in the press release was a mistake or that it was not supported by any consequent notification. A large group of dealers believe the statements that come in the newspapers and especially in the absence of a clarification or a subsequent notification, it cannot be said that a dealer, who acted upon the basis of a press release, especially during the transitional stage could be said to have committed any default. It is elementary that when a period is prescribed for doing an act, the person bound to do such an act is entitled to wait until the last day and he cannot be found fault with for not carrying out such an act much ahead of the date of expiry.

Therefore HC was in view that when assessee had all valid reasons to assume that the facilities to upload the necessary form was available till 30-12-2017, it is not available in the eye of law for the respondents to loathe the action of assessee in attempting to upload on 29-12-2017.

In view of above observation, HC was in view that Single Judge was perfectly justified in issuing the judgment impugned. Therefore HC did not find any merit in the appeal and the same is dismissed.

[Union of India v. A.F. BABU. [2021] 126 taxmann.com 95 (Kerala)]

HC directed authority to open online portal so as to enable assessee to re-file rectified Form GST TRAN-1 electronically or manually.

Assessee while filing Form GST TRAN-1 committed an error, i.e., it failed to take into account certain invoices pertaining to inputs and/or input services on which service tax was paid under erstwhile service tax regime.

Realising this mistake, assessee approached GST Authorities requesting for revision of Form GST TRAN-1, but said Authorities took no action.

Assessee filed writ petition seeking directions to GST Authorities to allow it to modify/revise Form GST TRAN-1 either by opening GST portal or by permitting submission of manual modified/rectified Form GST TRAN-1.

HC observed that Court in numerous cases has taken a view that the Respondents ought to have provided in the system, a facility for rectification of bona fide errors. HC had also taken note that though the system provided for revision of the return, it was impractical and meaningless, inasmuch as the deadline for making revision coincided with the last date for filing the original return i.e. 27th December, 2017.

HC in view that the difficulty faced by the Petitioner was a genuine one. Due to an inadvertent human error and oversight on the part of the Petitioner, its substantive right should not be denied. Petitioner should therefore not be precluded from having its claim examined by the authorities in accordance with law.

Thus, HC directed authority to open online portal so as to enable assessee to re-file rectified Form GST T RAN-1 electronically or accept same manually with corrections within a period of three weeks and assessee's claim shall thereafter be processed in accordance with law.

[National Internet Exchange of India v. Union of India* [2021] 127 taxmann.com 246 (Delhi)]

Section 169 of CGST Act 2017

Serving of order

Serving order on driver of vehicle cannot be assumed to be served on owner of goods.

Competent Authority passed penalty order under section 129 on assessee and served copy of order on driver of vehicle.

Assessee gained knowledge of penalty order and filed appeal against said order under section 107(1) within period of three months.

Appellate Authority dismissed assessee's appeal as time barred by treating period of limitation to have been commenced on the date of order.

HC observed that the language of section 107(1) of the Act provides for a period of limitation of three months from the date of communication of the order. Then section 107(4) of the Act limits the period for which delay may be condoned in filing of such appeal to a period of one month and no more.

Keeping in mind the fact that the delay in filing the appeal may not be condoned beyond the period of one month from the expiry of period of limitation, the phrase "communicated to such person" appearing in section 107(1) of the Act commend a construction that would imply that the order be necessarily brought to the knowledge of the person who is likely to be aggrieved. Unless such construction is offered, the right of appeal would itself be lost though a delay of more than a month would in all such cases be such as may itself not warrant such strict construction.

In the facts of the present case as well it is seen that it is on the driver of the truck while the penalty order is directed against the owner of the goods. Therefore, for that reason also it may be accepted that the penalty order had not been communicated to the petitioner on the date when it was served on the driver of the vehicle.

The order is set aside. The Appellate Authority may condone the delay and proceed to decide the appeal as expeditiously as possible.

[S/S Patel Hardware v. Commissioner of State GST [2021] 127 taxmann.com 284 (Allahabad)]

Section 171 of CGST Act 2017

Anti-Profiteering

Sample checking of evidence by DGAP by contacting customers (home buyers) could at best give provisional indication of passing on benefit of input tax credit but it would not provide true and complete picture. DGAP was directed to verify evidence in this regard and submit his report before National Anti-profiteering Authority

The brief facts of the case are that the Applicant had filed an application (originally examined by the Karnataka State Screening Committee on Anti-Profiteering) under rule 128(1) of the CGST Rules, 2017 against the Respondent alleging profiteering in respect of construction service supplied by him. The Applicant had stated that he had purchased a flat in the Respondent's project "Prestige Lake Ridge" and had alleged that the Respondent had not passed on the benefit of Input Tax Credit (ITC) to him by way of commensurate reduction in the prices.

The Standing Committee on Anti-profiteering examined and upon being prima facie satisfied had referred the above application to the DGAP recommending a detailed investigation and to collect evidence necessary to determine whether the benefit of ITC had been passed on by the Respondent to the recipients in respect of the construction service supplied by the Respondent.

The DGAP has further reported that in the pre-GST era, the Applicant had booked Flat No. 10043 in the project "Prestige Lake Ridge" of the Respondent and the Applicant was to pay the consideration in 21 instalments and one additional instalment at the time of possession, each linked with different stages.

The DGAP in his report has also stated that the documents and the Report of Karnataka State Screening Committee on Anti-profiteering has been examined and it appeared that the Respondent had demanded approximately 40% of the total amount payable which meant construction had been completed around 40% of the totals construction. The remaining construction of around 60% was to be completed after introduction of GST from 1-7-2017. On going through the demand note/tax and payment schedule pre and post-GST, it was observed that the basic price of the apartment payable at each milestone had remained same and hence, it appeared that the builder had not passed on the benefit of ITC to the Applicant.

DGAP has reported that during the pre-GST era, the Respondent was eligible to avail CENVAT credit of Service Tax paid on input services and deduction of the payments made to the registered contractors and sub-contractors (from the taxable turnover under VAT) on which VAT @ 4% was being levied. However, CENVAT credit of the Central Excise Duty paid on inputs was not admissible as per the CENVAT Credit Rules, 2004, which were in force at the material time. However, post-GST, the Respondent could avail the ITC of GST paid on all the inputs and input services including the sub-contracts. From the information submitted by the Respondent DGAP has drawn below table.

Sl. No.	*Particulars*	*April,2016 to June, 2017 (Pre-GST)*	*July, 2017 to Sept. 2019 (Post-GST)*
1	Credit of Service Tax Paid on Input Services (A)	248,17,672	
2	ITC of VAT paid on Inputs (B)	198,10,567	
3	Total CENVAT/VAT/ITC Available (C=A+B)	446,28,239	
4	ITC of GST Availed (D)		2,4,61,48,335
5	Total Turnover from Residential Area (E)	43,48,25,336	1,82,95,58,518
6	Total Saleable Area (F)	14,93,301	14,93,301
7	Sold Area relevant to Turnover in Sq Ft. (G)	2,26,055	6,02,049
8	Relevant ITC proportionate to Sold Area (H=(C or D)*G/F)	67,55,796	9,92,38,773
9	Ratio of Cenvat/ITC to Turnover (I=H/E*100)	1.56%	5.42%

The DGAP had further stated it was clear that the ITC as a percentage of the total turnover that was available to the Respondent during the pre-GST period (April 2016 to June 2017) was 1.56% and during the post-GST period (July 2017 to September 2019), it was 5.42% which clearly confirmed that post-GST, the Respondent had been benefited from additional ITC to the tune of 3.86% [5.42% (-) 1.56%] of the taxable turnover.

Comparative figures of the ratio of ITC availed/available to the turnover in the pre and post-GST periods, recalibrated base price and the excess collection (profiteering) during the post-GST period has been tabulated by the DGAP:—

Sl. No.	Particulars		Pre-GST	Post-GST
1	Period	A	April, 2016 to June, 2017	July, 2017 to Sept, 2019
2	Output tax rate (%)	B	6.00%	12.00%
3	Ratio of CENVAT/VAT/GST ITC to Total Turnover as per Table -B above (%)	C	1.56%	5.42%
4	Increase in ITC availed post-GST (%)	D	-	3.86%
5	Analysis of Increase in ITC:			
6	Total Basic Demand during July, 2017 to Sept, 2019	E		1,82,95,58,518
7	GST @ 12%	F= E*12%		21,95,47,022
8	Total demand	G=E+F		2,04,91,05,540
9	Recalibrated Basic Price	H=E*(1-D) or 96.14% of E		1,75,89,37,559
10	GST @ 12%	I=H*12%		21,10,72,507
11	Commensurate demand price	J=H + I		1,97,00,10,066
12	Excess Collection of Demand or Profiteered Amount	K=G - J		7,90,95,474

Respondent has not contested that any such benefit would eventually have to be passed on to the recipients. In fact, the Respondent has claimed that he has passed on an amount of Rs. 8,28,91,520/- which has been duly verified with the Credit Notes, Ledgers, Customers' communication letters, Customers' Master List and Acknowledgements (sample basis) submitted by the Respondent.

DGAP has concluded Respondent was required to pass on the benefit of ITC in respect of demands raised up to 30-9-2019, to the tune of Rs. 7,90,97,474/-. However, he had actually passed on an amount= of Rs. 8,28,91,520/-, thereby passing on an extra amount of Rs. 37,94,046/- [(Rs. 8,28,91,520/-) - (Rs 7,90,97,474/-)]. This extra benefit passed on by the Respondent to the home buyers could be adjusted against the demand to be raised on such home buyers or against the benefit of ITC to be passed on to them, post 30-9-2019. Therefore, the allegation that the Respondent has contravened the provision of Section 171 of the CGST Act, 2017, did not appear to be sustainable. Therefore, no additional profiteered amount was required to be returned to such eligible recipients. Hence, the profiteering amount in this case might be treated as NIL.

The above Report of the DGAP was considered by this Authority

It is revealed from the plain reading of Section 171(1) that it deals with two situations one relating to the passing on the benefit of reduction in the rate of tax and the second pertaining to the passing on the benefit of the ITC. On the issue of reduction in the tax rate, it is apparent from the DGAP's Report that there has been no reduction in the rate of tax in the post-GST period; hence the only issue to be examined is as to whether there was any additional benefit of ITC with the introduction of GST availed by the Respondent or not. Respondent has been benefited from additional ITC to the tune of 3.86% (5.42% - 1.56%) of his turnover and the same is required to be passed on by him to the eligible flat buyers, including the Applicant. We also observe that the said computation of the amount of profiteering worked out by the DGAP is based on the data and information supplied by the Respondent himself. We also take note of the fact that the Respondent has not challenged the said mathematical computation and has agreed to pass on the ITC benefit to the recipients.

The DGAP Report states that the above claim of the Respondent was verified by the DGAP with the Credit Notes, Ledgers, Customer's communication letters, Customer's Master List and Acknowledgements received from the recipients on a sample basis. The Report of the DGAP doesn't indicate how those samples were selected, how many customers/recipients/flat buyers were contacted, how many of them actually responded and how the verification was done. Further, it is also not clear whether sample customers were selected by the DGAP himself or these samples were provided by the Respondent.

On the basis of the above reasons and without going into the merits of the other submissions filed by the Applicants and the Respondent at this stage, we find this to be a fit case where the Respondent's claim of having passed on the benefit to his recipients/home buyers requires to be verified against third party evidence in the form of written acknowledgements receipts from the home buyers evidencing the receipt of the benefit, including its quantum and also evidencing that the said benefit is in terms of Section 171(1) of the CGST Act, 2017 which states that "Any reduction in the rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices".

Needles to state that the claim made by the Respondent of having passed on the benefit has to be supported by acknowledgements which the Respondent shall procure from the home buyers alongwith their contact details i.e. e-mail & Phone/Mobile No., failing which his claim will have to be considered as not established. The Respondent shall submit the homebuyer wise evidence, as detailed above within a period of 30 days of this Order and the same shall then be verified by the DGAP. Accordingly, the matter is sent back to the DGAP for further investigation as per the provisions section 171(2) of the CGST Act, 2017 read with rule 133(4) of the CGST Rules, 2017. This Authority directs the DGAP to verify the evidence submitted by the Respondent to evidence the passage of ITC benefit from the Respondent to the home buyers and submit his Report, alongwith all the relied upon documents/evidence. The DGAP is accordingly directed to reinvestigate the above issue and furnish his Report under rule 129(6) of the CGST Rules, 2017.

It has also been observed that the Report of the DGAP is silent on the issue whether the Respondent has paid applicable interest to all the eligible recipients/flat buyers/customers or not. In view of the above, we direct the DGAP to investigate and verify whether applicable interest on the profiteered amount, which the Respondent has already claimed to have passed on to his customers/flat buyers, has been paid by him or not from the date from the above amount was profiteered till the date of passing on/payment, as per the provisions of rule 133(3)(b) of the CGST rules, 2017.

Deepak Naik vs Prestige Estate Projects Ltd. [2021] 127 taxmann.com 258 (NAA)

Schedule II to CGST Act 2017

Supply of Services

Sale of handmade chocolates which are manufactured in workshop and brought to outlets for further processing namely, for Shakes, brownies, will be covered under restaurant services.

The business of the applicant is producing and selling of bakery products viz cakes, artisan cakes, pastries, pizza, patties, sandwich, self-manufactured ice-creams, handmade chocolates, cookies, beverages etc. in its various outlets operating in the state of Odisha.

Applicant submitted that the raw materials are manufactured in the nearby workshops which are brought to the outlets for further processing. Nothing is sold directly from the workshop and each and every item is brought to the outlets for sale.

Further, Applicant submitted that outlets of the applicant are equipped with all the facilities to dine such as table and chairs, air conditioner, drinking water, stylish lights for providing a nice ambience which provide an overall good experience to the customers. The customers are provided with the option of either enjoying their food in the outlets itself by utilizing the facilities present in the outlets or they are at the liberty to take away their food.

AAR asked the question

- Whether supply of Cakes, bakery items, ice creams, chocolates, drinks and other eatable products prepared at the premises of the applicant and supplied to the customers from the counter with the facility to consume the same in the air-conditioned premises itself covered under the restaurant services?

- Whether supply of items such as birthday stickers, candles, birthday caps, snow sprays etc related items which are essentially used in birthday celebration can be classified as Composite Supply wherein the principal supply of goods consists of bakery items, chocolates while the supply of services include the supply of air conditioned place to sit and to celebrate birthday?

- Whether the sale of handmade chocolates which are manufactured in the workshop of the applicant and are utilised for the purpose of providing other services such as shakes, brownies and are also retailed by packing in different containers as per the choice of the customer will be covered under the under the restaurant services?

The business of the applicant is producing and selling of bakery products viz cakes, artisan cakes, pastries, pizza, patties, sandwich, self-manufactured ice-creams, handmade chocolates, cookies, beverages etc. in its various outlets operating in the state of Odisha.

Items such as Birthday caps, knife, decorative items which are bundled along with the cakes and are utilised by the Customers in the premises of the outlets.

Items such as Birthday caps, knife, decorative items which are bundled along with the cakes and are taken away by the Customers from the outlets.

Items such as chocolate, cookies which are prepared in the nearby workshop of the Applicant and then processed / customized in the outlets of the Applicant before selling to the customers

Items such as chocolate, cookies which are prepared in the nearby workshop of the Applicant and then processed / customized in the outlet as per the choice and consumed in the premises itself.

In respect of 1st issue, AAR observed that the supplies made by the applicant in its outlets involve both supplies of goods and services, with one of them as principal supply i.e. supply of goods which are naturally bundled and supplied in conjunction with each other, therefore, the same has to be considered as a composite supply.

As per Entry No. 6 of the Schedule-II to the Central Goods and Services Tax Act, 2017, states that composite supply of goods being food or any other article for human consumption or any drink, where supply or service is for a consideration, then such composite supply shall be treated as a supply of services.

AAR further observed that since the applicant is supplying ice creams, cakes and other eatables, which are items for human consumption, by way of or as part of any service or in any other manner, the composite supply has to be treated as a supply of services, more specifically the 'Restaurant Service'.

As regards supply of items such as birthday stickers, candles, birthday caps, Balloon, Carry Bags, snow sprays etc, AAR observed that the said related items are being purchased and sold as such without any further processing in the restaurant. These items are not articles of foods and drinks and are covered under goods. Sale of such bought out goods as such, is not a service but sale of goods.

With respect to chocolates, AAR observed that raw chocolates are manufactured in the nearby workshop of the applicant which are utilised for the purpose of providing other services such as shakes, brownies and are also retailed by packing in different containers as per the choice of the customer. In no case, chocolates are sold as such from the work shop but are customized and sold

from the outlets. Therefore, AAR in view that sale of handmade chocolates which are manufactured in the workshop and brought to the outlets for further processing will be covered under the 'restaurant services'.

[Pioneer Bakers. [2021] 127 taxmann.com 22 (AAR-ODISHA)]

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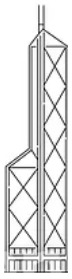

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