April 2020 Edition

GST NEWSLETTER

Coverage

In every difficulty, lies an opportunity. If you are learning and updating yourselves, this entire world will crave for a piece of you. Team Hiregange comes up with an opportunity during this lockdown period with the help of a GST Newsletter including all the latest updates came under the Law within the period of April 2019 to March 2020.

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MNH Corner

"This financial year ended with some largess from China which the world could have done surely done without. The same may result in whiplash. Losing a few billions is not what is important, but the lives and destruction of the world economy may not be forgiven.

Now the survival of smaller businesses are in question. Unemployment in USA & Europe the largest spenders is at record heights. Global trade possibility in a slowdown.

India could be the savior after handled the deadly pandemic so well in spite of negligible resources. Scores of multinationals would be setting up shop in India instead of China who has much to answer for. The GST though badly drafted by the revenue and father complicated by them could still the good days in the coming year. The complicated law, further complicated by circulars and rules beyond the Act, need a good understanding.

To understand the trial and tribulation in various aspects of GST law we have a few insights and practical solution collated in the 2019-20 Newsletter which may shed some light and add some value. Would recognize the efforts of many at team hiregange for their contributions. Happy reading and learning – **Madhukar Narayan Hiregange**".

VSS Corner

""The new beginning, unlike every year this financial year beginning with a challenge of the COVID crisis. The crisis brings the danger and opportunities together, the one who would work with the positive mind-set, planned and prepared, look at every possible opportunity that would be coming on his way will be able to overcome the same without much damages. This is the time to look at all process including the taxation, take the best advantage of planning and restricting your contracts for having the best optimization of GST and ITC. This news letter also gives some insight on the changes and to be abridge- **CA Sudhir VS"**

Changes in Supply & Allied Areas – Some Clarity and Some Unsettled

CA Roopa Nayak &

CA Mayank Jain

Under the erstwhile indirect tax laws, the taxable event attracting the levy varied under central excise law, service tax law, and VAT laws i.e., the levy was on manufacture, provision of service and sale of goods respectively. The levy under the GST law would get attracted on "Supply of goods and/or services". The scope of supply as provided in Section 7 of the CGST Act is wide and majority of the transactions could get covered under the scope of supply. It also covers certain transactions where consideration is not involved, further enhancing its coverage.

We have extracted for easy reference the relevant extracts of scope of supply under GST as under:

The term Supply has been defined under section 7 (1) of the CGST Act

The expression "supply" includes:

a. All forms of Supply of goods or services or both such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;
b. Import of services for a consideration whether or not in the course or furtherance of business; and
c. The activities specified in Schedule I, made or agreed to be made without a consideration.

(1A) where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II.

- ✓ In the CGST Amendment Act, 2018, section 7 was amended to exclude activities/ transactions listed in Schedule II from the scope of supply. Sub-section 1A has been inserted to ensure that the activities/ transactions as per Schedule II are merely to decide whether the same is supply of goods or services. These changes have been notified on 1st Feb 2019 be effective from 01.07.2017.

- ✓ It means that Schedule II only differentiates a supply either as a supply of goods or a supply of services in case of an activity which has constituted a supply in accordance with the provisions of sub-section (1) of section 7. Hence entries of Schedule II can be invoked under sub-section (1A) of section 7, only if an activity is qualified as a supply under sub-section (1) of the section 7.

- ✓ As a consequence, the activities/ transactions listed in Schedule II (as supply of service or supply of goods) shall not be taxed just because it is set out in Schedule II. Such activities would be taxed instead only when they constitute 'supply' in accordance with provisions of Section 7(1) (a), (b) and (c) of the CGST Act, 2017. Thus, now the role of Schedule II would be limited to classification of supply as 'goods' or 'service' from the notified date.

- ✓ For levying GST, the transaction will have to first pass the test of supply. Erstwhile service tax law, on the introduction of the negative list based taxation, declared certain activities to be a service. GST law does not provide any such proposition after amendment set out above.

- ✓ In short, when there is no supply of goods or service being provided in exchange for recoveries made, tax levy fails.

- ✓ Similarly, under erstwhile law, in the case of Spring Fresh Drinks (1997(92) ELT A70 (SC) where liquidated damages recovered by the assessee for non-performance of contract being profit for the manufacturer are not includible in the assessable value. This is an income or profit for the manufacturer, but not the price for the manufacture of aerated water. This concept equally applies under GST, to exclude incomes from tax net when it is not towards supply of goods/service.

- ✓ The various advance rulings given under GST in the past by considering the position of Schedule II as deemed supply (prior to amendment) may no longer be binding on those assessees as there has been a change in the law which was supporting the advance ruling.

- ✓ Further, clause 4 of Schedule II provided that the transfer of business asset would be treated as goods or services whether or not for a consideration. This clause included transfer of business assets even if made without consideration which would otherwise be outside the scope of GST as the levy fails, when there is no consideration except in cases covered under schedule I [i.e., permanent transfer or disposal of business asset on which ITC was availed]. This was a defect where the levy failed in the absence of any consideration however schedule II had deemed it to be a supply till amendment was made as explained above. However, this defect has been removed w.e.f. 01-Jul-2017 vide section 131 of the Finance Act, 2020. Now clause 4 of Schedule II only includes transfer of business assets done for a consideration.

- ✓ These amendments have led to reconsideration of tax position taken on many transactions especially on the activities which have been considered as taxable under the entry "agreeing to obligation to refrain from an act or to tolerate an act or a situation or to do an act". However, the amount of litigation would increase due to the inclusive scope of supply as the department would try to cover everything under the scope of supply.

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New Composition Scheme– Service Providers and others not covered u/s 10.

CA Shilpi Jain &
CA Monika Motta

To ease out the GST compliances for the MSME sector, the Government has introduced a new scheme of tax for the suppliers of goods or services or both, who are not covered under the existing composition scheme u/s 10 of the CGST Act. Under such scheme, GST can be discharged at the rate of 6% and an annual return needs to be filed with quarterly payment of taxes.

This scheme can be recommended to the vendors of registered persons who are not in a position to avail ITC for various reasons like ineligibility of the credit u/s 17(5) of the Act (i.e. blocked credits) or procurement being used for making exempt supplies, etc. This article is a basic understanding of the said scheme.

The following industries can evaluate whether it would be beneficial for them (by way of cost reduction) to propose their vendors to choose the above scheme:

- Health care
- Education
- Real estate industry not eligible to claim credits (under 5%/1% scheme)
- Restaurants paying tax @ 5% not eligible for credits vide entry in the notification no.11/2017-CT(R)
- Persons whose supplies are liable under RCM like GTA, advocates, etc.
- Persons supplying other exempt goods/services, etc.

Brief of the new scheme:

(Notification No.02/2019 – Central Tax (Rate) dated 07.03.2019 – effective from 01.04.2020)

Who can opt: Persons:

a. Supplying goods or services or both,

b. Having an aggregate turnover of up to Rs. 50 lakh in the preceding financial year (PFY).

c. Not eligible to pay tax under section 10(1) of the Act i.e., below persons whose value of supply of services (other than the service of supply of food falling under entry 6(b) of Schedule II to the Act) does not exceed 10% of turnover in State/UT or 5 lakhs, whichever is higher

- A manufacturer,
- Trader, and a
- Person supplying food as part of service (entry 6(b) of Schedule II to the Act,

(The value of supply of exempt service by way of extending deposits loans or advances in so far as the consideration is represented by way of interest or discount, shall not be taken into account for the purpose of aggregate turnover for (b) and (c) above)

Supply of what: Goods or services or both

Rate of tax: 6% (3% CGST & 3% SGST)

Value: Turnover from the date on which liability to take registration arises under the Act. Example: The liability to register in Telangana arises when the aggregate turnover exceeds Rs. 20 lakhs. Hence, the liability @ 6% will be on the turnover exceeding Rs. 20 lakhs.

Required Form:

a. New registration: While filing Form GST REG-01 for GST registration, select serial no. 5 and 6.1(iii) in Part B of Form GST REG-01) (As per clause 2(ii) of circular No. 97/16/2019-GST dated 05.04.2019)

b. Existing registration: Intimation to be filed in Form GST CMP-02 by selecting the category as "Any other supplier eligible for composition levy" as listed at Sl. No. 5(iii) of the said form

Time limit for opting:

a. **FY 2019-20 -** 30.09.2019 (Corrigendum- to circular No. 97/16/2019-GST dated 29.07.2019)

b. **FY 2020-21 –** 30.06.2020 (Notification No. 30/2020 – Central Tax dated 03.04.2020)

Other conditions: Such persons should,

a. Not be engaged in making supplies not leviable to GST. Example: petrol, liquor, etc.

b. Not be engaged in making inter-State supplies

c. Not be a casual taxable person or a non-resident taxable person

d. Not be engaged in making any supply through an electronic commerce operator who is required to collect tax section/s 52 of the Act.

e. Not be engaged in supply of the following:

Tariff item, sub-heading, heading or chapter	Description
21050000	Ice cream and other edible ice, whether or not containing cocoa.
21069020	Pan Masala
22021010	Aerated water
24	All goods, i.e. Tobacco and manufactured tobacco substitutes

f. Not to collect any tax from the recipient and is not entitled to any credit.

g. Issue a bill of supply instead of a tax invoice.

h. Mention a disclaimer on the bill of supply 'taxable person paying tax in terms of notification No.2/2019-Central Tax (Rate) dated 07.03.2019, not eligible to collect tax on supplies'.

i. Pay tax liable under RCM u/s 9(3) and 9(4) of the Act.

j. In case of multiple GST registrations under a single PAN, if one registration has opted for the 6% scheme, then the other GST registrations under the same PAN would also have to pay @ 6%.

ITC reversal

The existing taxpayer opting for this scheme should pay an amount, by way of debit in the electronic credit ledger or electronic cash ledger, equivalent to the ITC on inputs held in stocks, inputs contained in semi-finished goods and finished goods held in stock and capital goods section/s 18(4) in the Form

GST ITC-03 in accordance with the provisions of rule3(3) of the CGST Rules, 2017and after payment of such amount, the balance of input tax credit, if any, lying in his electronic credit ledger shall lapse.

Rules:

The Central Goods and Services Tax Rules, 2017, as applicable to a person paying tax under section 10 of the Act shall, mutatis mutandis, apply in terms of notification No. 9/2019 – Central Tax (Rate) dated 23.03.2019 i.e. rules 3 to 7.

Returns:

a. **Form GST CMP-08** – For payment of tax to be filed quarterly by the 18th of the month following the quarter (Notification No. 21/2019 Central Tax dated 23.04.2019)
b. **Form GSTR-4**– File annually - by the 30thof April following the end of the financial year. (Notification No. 21/2019 Central Tax dated 23.04.2019)

In case the taxpayers instead of furnishing Form GST CMP-08 for the FY 2019-20 had furnished return in Form GSTR-3B, then relaxation has been provided from furnishing Form GSTR-01 or Form GST CMP-08 for all tax periods in FY 2019-20 (Notification No. 12/2020 Central Tax dated 21.03.2020)

Extension of time for furnishing forms in light of COVID-19

a. The due date to make **payment** for **Jan to March 2020** and file GST return for FY 2019-20 is extended to **07.07.2020**. (Notification No. 34/2020 Central Tax dated 03.04.2020).
b. The due date for filing **Form GSTR-4** for the **F.Y 19-20** is extended to **15.07.2020.**(Notification No. 34/2020 Central Tax dated 03.04.2020).

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Input Tax Credit

CA Ashish Chaudhary

Input Tax Credit

A. ITC on Debit Notes

Time limit for availment of ITC in case of Debit Note to be determined based on the date of debit note. Earlier, the time limit was linked to the date of invoice of original supply. This is a welcome move as once the supplier recovers additional amount of tax from recipient of supply through debit note, there is no justification to link the time limit for availment of credit on such debit note based on original invoice.

The amendment should have been made retrospective as many of the taxpayers might have not been able to take the credit of the same in the earlier years. Considering that the amendment is beneficial in the nature, the Court could interpret the same as having retrospective applicability. The registered persons could evaluate the possibility of availing the credit based on the debit notes issued earlier where credit was not availed earlier and reverse the credit under protest. This could be handy in case matter is decided favorably by the courts in future.

B. Rigorous requirement of GSTR-2A Reconciliation

In order to reduce the large instances of fraudulent availment of ITC, Rule 36 (4) was inserted to provide for the ITC based on the reconciliation of GSTR-2A w.e.f. 9th October 2019. Essential feature of the rule has been as under:

a. ITC to be availed by recipient in GSTR-3B based on invoices uploaded by suppliers in their GSTR-1. In respect of invoices not uploaded, maximum 20% ITC may be availed (subsequently reduced to 10% w.e.f. January 2020).

b. It has been clarified in circular number 123/42/2019–GST that the reconciliation to be done at aggregate level, not at invoice level. But practically, the reconciliation may be required at invoice level only which may be in line with proposed new return format also.

c. Not applicable in case of RCM, import of goods and re-availment of ITC.

The amendment could be challenged on many grounds i.e. vice of excessive legislation, violating the rights of recipient, arbitrary and unreasonableness. Further, it may not be implemented at the time of receipt of invoice and there is no machinery provision for post-facto implementation. It may be challenged in the court of law on many of such grounds. The writ challenging rule 36(4) has already filed and pending before the Court. Further, PIL has also been filed before Supreme Court.

There have been seen many instances where department have issued notices on account of difference between GSTR-2A and GSTR-3B. Such notices should be suitably replied so that the proceedings to be dropped at the initial level only.
(Notification No 49/2019 -CT (R) as amended and Circular No. 123/42/2019-GST)

Relaxations have been provided in the compliance of provision of Rule 36 (4) during COVID-19 period from Feb 2020 to August 2020 where monthly reconciliation requirements have been waived and final computation of eligible ITC viz a viz ITC availed is to be done at the time of filing of GSTR-3B for the month of September 2020.

C. Blocking of Credit by Department

The Commissioner or an officer authorised by him in this behalf, not below the rank of an Assistant Commissioner, having reasons to believe that ITC in electronic credit ledger has been fraudulently availed or is ineligible, he may not allow debit from electronic credit ledger (offset of liability in GSTR-3B) or claim of any refund on the grounds given below:

Default at supplier end:

a. Supplier found non existent
b. Supplier not conducting business from any of the registered place of business
c. Taxes have not been paid by the supplier

Default at recipient end:

d. Credit availed based on documents, but goods or services not received
e. Recipient found non-existent or not to be conducting business from any of the registered place of business
f. Credit availed but not in possession of invoice/debit note/documents

The credit may be blocked for a maximum period of one year. This provision is arbitrary in as much as it violates the principal of natural justice wherein the right of the buyer to claim the ITC is curtailed

without giving him an opportunity of being heard. It is in akin to initiate the recovery provision without adjudication of the demand.

D. Denial of ITC to buyer on account of non-payment of tax by the suppliers

Rule 36 (4) and Rule 86A have been primarily inserted for the reasons of increasing instances of availing the credit by the buyer without paying the tax by the suppliers. Section 16 (2) of the CGST Act specifically enumerates one of the condition for taking ITC is payment of tax by the supplier to the Government. This poses a question as to whether ITC is vested right of the recipient and if so, whether the same can be denied under the law on account of non-payment of tax by the suppliers. There have been judicial precedents under erstwhile indirect tax laws where held that the genuine claim of buyer cannot be denied on account of non-payment of tax by the supplier. Some of the notably rulings in this regard are:

- ✓ Arise India (Delhi High Court upheld by Supreme Court) – Under Delhi VAT where 2A/2B matching but tax not paid by the supplier. Held that buyer cannot be asked to identify the payment of tax by supplier and consequently reversal of ITC
- ✓ Kay Kay Industries (SC): Buyer not to identify whether supplier has paid the tax to the Government.
- ✓ Tarapore & Company Vs State of Jharkhand (Jharkhand High Court): ITC not deniable to purchasing dealer if the selling dealer is bonafide but could not deposit the tax due to technicalities
- ✓ On Quest Merchandising India Pvt. Ltd. versus Govt. of NCT of Delhi: Demanding tax from purchasing dealer and expecting him to do impossible act of identifying the supplier paying tax would be violation of Article 14 of the Constitution. Govt to collect tax from the supplier, not from purchaser.

The principles laid down under the above laws could be equally applicable under the GST also and the bonafide recipient could claim the ITC even if nonpayment by supplier essentially on following grounds:

- ✓ Credit under GST is indefeasible right whereas VAT ITC was on deduction basis.
- ✓ Benefit has been given to bonafide purchasing dealer.
- ✓ If selling dealer is not proceeded – this would defaulting dealer in advantageous position and person who has paid tax, in worsening position.
- ✓ There is provision for proceeding by department against the defaulting selling dealer. If credit is denied to buyer always, the provision for proceedings against seller would become redundant.

- ✓ There is no specific provision in the law to provide for the refund/benefit to the recipient in case tax is collected from the supplier. Government cannot enrich itself at the cost of citizen.
- ✓ Act envisaged condition of sec 16 of "actually paid" along with the Return filing mechanism of GSTR-1/2/3. Failure of Government to provide these returns, conditions set out in 16 may not be unconditionally met by recipient.
- ✓ Even if transaction appearing in GSTR-2A, no conclusive evidence that the tax has been paid by the supplier.
- ✓ Buyer cannot compel to supplier to upload the sale invoice. He may not be asked to do impossible Act. (Indian Seamless Steel and Alloys Ltd.)

However, if there is collusion between the buyer and supplier to defraud the revenue, the conditions imposed for payment of tax may be invoked and ITC may be denied to the recipient relying on M/s. Mahalaxmi Cotton Ginning Pressing & Oil Industries v. State of Maharashtra under M-VAT Act.
Under the GST law, the matter is pending before Delhi High Court in case of Bharti Telemedia Limited.

E. Input tax credit on issuance of financial credit note

There have been doubts as to whether the recipient is required to reverse the ITC proportionate to the consideration not paid to the supplier where the supplier have issued commercial/financial credit note to the recipient. It has been inter-alia clarified in Circular No. 105/24/2019 that the recipient is not required to reverse the ITC once he has paid full tax to the supplier. Though the circular has been withdrawn due to other controversial clarifications therein, nevertheless, in our view, the clarification was correct proposition of the law considering that once the tax has been paid fully to the supplier who in turn have paid full tax to the Government, there cannot be any justification of denial of credit to the recipient.

F. Manner of utilization of ITC

Section 49A and 49B were inserted in the CGST Act w.e.f. 1.2.2019 to provide for manner and sequence of utilization ITC. Pursuant to such section, Rule 88A has been inserted in the CGST Rules which provides for order of utilization of ITC as per below order:

Input tax Credit on account of	Output liability on account of Integrated tax	Output liability on account of Central tax	Output liability on account of State tax/ Union Territory tax
Integrated tax	(I)	(II) - In any order and in any proportion	
(III) Input tax Credit on account of Integrated tax to be completely exhausted mandatorily			
Central tax	(V)	(IV)	Not permitted
State tax/Union Territory tax	(VII)	Not permitted	(VI)

Detailed illustrations on the manner of utilization may be referred from circular number 98/17/2019. It has been a welcome provision to reduce the accumulation of ITC by providing higher flexibility in its utilization.

G. Transfer of ITC in case of death of sole proprietor

There have been confusion as to manner of transfer of ITC in case of death of sole proprietor. Detailed procedure has been clarified with respect to transfer of ITC vide Circular No. 96/15/2019-GST. Essential attributes of circular have been as below:

- ✓ Successor to take registration by mentioning the reason of registration as death of proprietor
- ✓ Cancellation of old registration to be applied by legal heirs
- ✓ Continuation of business by successor is considered as transfer of business and ITC available with the proprietor is transferrable to the successor u/s 18 (3) by filing form GST-ITC 02 by recipient.

H. Transfer of ITC in case of reorganization/ demerger of business {Sec 18(3) R.w. Rule 41(1)}

There was ambiguity as to the manner of transfer of ITC in case of business reorganization by way of demerger etc. of the entity. Below clarifications have been issued vide Circular No.133 03/2020-GST:

- ✓ ITC to be transferred to new entity in the ratio of net asset value computed separately for each of the States.
- ✓ The transferor is required to file FORM GST ITC-02 only in those States where both transferor and transferee are registered.
- ✓ The computation has to be made at aggregate level i.e. combined credit of CGST/SGST and IGST.

- ✓ Total amount to be transferred as per above methodology. However, transferor would be permitted to transfer the nature of ITC (I/C/S) available with him in any proportion.
- ✓ Net Asset value to be computed on the appointed date as per scheme approved under the Companies Act. Such ratio has to be applied on ITC balance available in electronic credit ledger on the date of filing of ITC-02.

I. Transfer of credit in case of obtaining separate registration in the same State (Rule 41A)

Registered person may take more than one registration in the same State. Rule 41A has been provided in the CGST Rule to provide that the ITC in such cases may be transferred from old registration, at the option of the registered person, to new registration in the ratio of value of assets held by them at the time of registration. The value of assets may be computed in the manner as clarified in the circular discussed above in case of business reorganization.

J. New methodology provided for availment and reversal of ITC by the person engaged in the business of real estate

There have been changes in the taxation structure for the real estate sector. Consequent to such changes, Rule 42 and Rule 43 of CGST Rules have also been amended to provide the manner of availment and reversal of ITC in accordance with the provision of the Scheme. Detailed discussion on the new scheme and ITC impact thereon has been discussed separately under the chapter titled as" Real estate – Changes wef April 19....."

K. Life of capital goods to be treated as 5 years from the date of invoice – relevant in case of reversal of ITC required under Rule 43

There could be instances where manner of usage of capital goods changes wherein earlier such capital goods were used exclusively for making exempted supplies or taxable supplies and later on, these are used commonly for making both taxable as well as exempted supplies. There was anomaly in the Rule whereby the life of such capital goods was treated as 60 months at the time of each such date of change in the manner of usage of the capital goods. This was contrary to the intention of the Act and Rule as per which the life of capital goods is treated as five years. The anomaly has been corrected by providing that at the time of each such change in the manner of usage of capital goods, the residual life would be taken at 5 years from the date of invoice minus the period already elapsed. The amendment has become effective w.e.f. 1.4.2020.

L. Penalty and prosecution provision w.r.t. fraudulent availment of ITC

Section 122 and 132 of the CGST Act have been amended vide Finance Act 2020 to provide for penalty and prosecution not only for the persons who have committed such offence, but also for the person who has facilitated commitment of such offence and has retained the benefit arising out of such offence. This includes person who have availed the credit issued by the supplier without supplying the goods/services or fraudulently avails ITC without any invoice or bill. Corresponding amendments have been in the Income Tax Act, 1962 also to provide for equivalent amount of expenses where such expenses have been debited in the books of account based on false entry.

M. Common errors in ITC

Many time businesses could commit errors in ITC which could ultimately result in loss of ITC. Some of the common areas where ITC availed has been overlooked could be as below:

a. Canteen facility in terms of Factory Act or any other law for the time being in force where no recovery is made from the employee or even if recovery is made, it is not treated as supply in terms of the contractual engagement with the employee and hence not recovered tax on such facility.
b. Bus facility provided to the employees for pick up and drop from home to office and/or vice versa.
c. Mediclaim or life insurance premium paid for the employees under the statutory provisions of employee provident fund.
d. Accommodation and travel of the employees.
e. Goods or services used for construction of immovable property where such immovable property is in the nature of plant and/or machinery but there is lack of proper bifurcation between civil and non-civil structure.
f. ITC on the goods given in the course of business where treatment done by the business as if these are gifts though there is embedded consideration collected from the customer in some other form and hence not falling within the definition of gift.
g. Tax paid on GTA services under RCM.
h. Full ITC reversed in case of goods lost/expired not required, or if required to be done on the value of goods or services which are used in the manufacture of such goods.
i. Uniforms, shoes etc. given to the employees.

There could be many such instances where ITC might have been missed out due to ignorance or wrong interpretation of the law. Wherever doubtful, the business could consider:

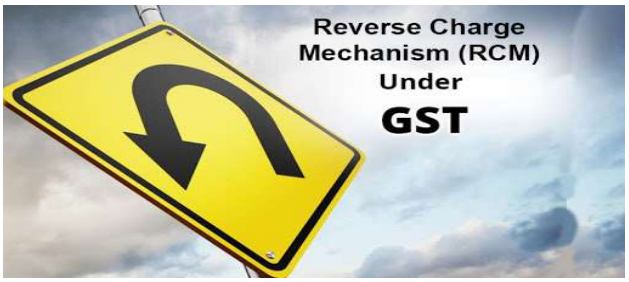
- Avail the ITC and not utilize the same
- Avail the ITC, reverse it under protest and re-avail it once the clarity emerges in the law

Further, there should be continuous monitoring of instances where ITC has not been availed though it could be eligible. Decision should not be taken merely based on advance ruling issued in case of some other party. More reliance should be on the statutory provision, intention of the law and judicial precedents in the erstwhile indirect tax laws.

For any feedback or queries, please write to Ashish@hiregange.com

RCM – Amendments, some insights

CA Vasant K Bhat



The concept of Reverse Charge Mechanism (RCM) was first introduced in 1997 in Service Tax and got continued in GST also. The government found it convenient to collect the tax from the recipient in certain cases where the suppliers are generally unorganized or located in non-taxable territories. In some cases, due to ease of tax administration certain supplies are notified for RCM. RCM has imposed added responsibilities on the taxpayers.

Though the RCM is eligible for input tax credit (ITC) in most cases, the taxpayer has to comply many procedures and his cash flow gets affected as the tax is to be first paid in cash and then the eligible ITC is to be availed. Keeping track of time of supply, issuing self-invoices where the supply is from an un-registered person is tedious. Thankfully, RCM on the supplies from un-registered persons to a registered person has been deferred except the in the case of real estate developer.

To understand the scope of RCM, it is important to understand 3 conditions specified in the notifications. (i) Category or nature of service, HSN & description of goods (ii) supplier of goods or service, and (iii) recipient of supply. Only if all these three conditions are satisfied, the liability under RCM arises. For example, in case of Goods Transport Agency, the specified service provided to any one of the seven notified persons alone is covered under RCM. In case of advocates, the representational services provided by an individual advocate and legal service provided by a firm of advocate to a business entity located in taxable territory is covered under RCM. If they provide service to a recipient located in non-taxable territory or if they provide any service other than legal service, then the liability to pay GST is on them only.

In this write up, we are covering the changes made in RCM after 01.04.2019. Notification No.22/2019-CT(R), dated 30.09.2019 whereby following supplies are being amended or new services are included under RCM with effect from 01.10.2019.

✓ The item in the Sr. No. 9 has been substituted. The service of the Author has been removed from Sr. No. 9 and a separate entry Sr. no. 9A has been inserted for the same

S. No.	Category of Supply of Services	Supplier of service	Recipient of Service
(1)	(2)	(3)	(4)
"9	Supply of services by a music composer, photographer, artist or the like by way of transfer or permitting the use or enjoyment of a copyright covered under clause (a) of sub-section (1) of section 13 of the Copyright Act, 1957 relating to original dramatic, musical or artistic works to a music company, producer or the like.	Music composer, photographer, artist, or the like	Music company, producer or the like, located in the taxable territory. ";
"9A	Supply of services by an author by way of transfer or permitting the use or enjoyment of a copyright covered under clause (a) of sub-section (1) of section 13 of the Copyright Act, 1957 relating to original literary works to a publisher.	Author	Publisher located in the taxable territory : Provided that nothing contained in this entry shall apply where, - (i) the author has taken registration under the Central Goods and Services Tax Act, 2017 (12 of 2017), and filed a declaration, in the form at Annexure I, within the time limit prescribed therein, with the jurisdictional CGST or SGST commissioner, as the case may be, that he exercises the option to pay central tax on the service specified in column (2), under forward charge in accordance with Section 9(1) of the Central Goods and Service Tax Act, 2017 under forward charge, and to comply with all the provisions of Central Goods and Service Tax Act, 2017 (12 of

			2017) as they apply to a person liable for paying the tax in relation to the supply of any goods or services or both and that he shall not withdraw the said option within a period of 1 year from the date of exercising such option; (ii) the author makes a declaration, as prescribed in Annexure II on the invoice issued by him in Form GST Inv-I to the publisher.”;

✓ After Sr. No. 14, the following entries have been inserted.

(1)	(2)	(3)	(4)
“15	Services provided by way of renting of a motor vehicle provided to a body corporate.	Any person other than a body corporate, paying central tax at the rate of 2.5% on renting of motor vehicles with input tax credit only of input service in the same line of business	Anybody corporate located in the taxable territory.
16	Services of lending of securities under Securities Lending Scheme, 1997 (“Scheme”) of Securities and Exchange Board of India (“SEBI”), as amended.	Lender i.e. a person who deposits the securities registered in his name or in the name of any other person duly authorised on his behalf with an approved intermediary for the purpose of lending under the Scheme of SEBI	Borrower i.e. a person who borrows the securities under the Scheme through an approved intermediary of SEBI.”

Entry No. 15 had created lots of confusions. Suppliers of service by way of renting of any motor vehicle designed to carry passengers where the cost of fuel is included in the consideration charged

from the service recipient have an option to pay GST either at 5% with limited ITC (of input services in the same line of business) or 12% with full ITC. The recipient had to know whether the supplier has opted to pay 5% GST with limited ITC to ascertain the liability under RCM. Therefore, the said entry has been substituted vide Notification No. 29/2019-CT(R), dated 31.12.2019 as under.

(1)	(2)	(3)	(4)
"15	Services provided by way of renting of any motor vehicle designed to carry passengers where the cost of fuel is included in the consideration charged from the service recipient, provided to a body corporate.	Any person, other than a body corporate who supplies the service to a body corporate and does not issue an invoice charging central tax at the rate of 6 per cent. to the service recipient	Anybody corporate located in the taxable territory."

After this amendment it was understood that in case of renting of any motor vehicles designed to carry passengers where the cost of fuel is included in the consideration, the supplier is a person other than a body corporate charging 12% GST and recipient is a body corporate is covered under RCM. The amended entry has increased the scope of the coverage by including the supply made by unregistered person also.

However, a circular No. 130/49/2019-GST, dated 31-12-2019 was issued clarifying that the present amendment of the notification is merely clarificatory in nature and therefore for the period 1-10-2019 to 30-12-2019 also, clarification given shall apply as any other interpretation shall render the RCM notification for the said service unworkable for that period which is not permissible in law. The notification does not specify that the amendment shall be effective from 01.10.2019. The circular being only a clarificatory in nature, it cannot extend the scope of the notification. The circulars which are not in line with the provisions of law are non-Est.In law. Similarly held in Ratan Melting & Wire Industries cited 2008 (231) E.L.T. 22 (SC) case. Therefore, in the views of the author, the amended entry is applicable from 31.12.2019.

- ✓ The Notification No. 8/2017-Integrated Tax (Rate) had notified interalia, payment of GST on ocean freight under RCM by the importer. As per GST law, the RCM liability is on the specified recipient. The importer, though he is not the recipient of service of the ocean freight service provided by the supplier located in non-taxable territory, was liable for payment of GST under RCM. Recently, the Gujarat High Court in the case of Mohit Minerals Vs UOI in its order dated 23.01.2020 held that the Notification No. 8/2017-Integrated Tax (Rate) is un-constitutional. The High Court held that the GST liability cannot be fixed on any person other than the recipient. There is no 'scheme of classification of services' or 'description of services' in the Act. The 'scheme of classification of services' or 'description of services' etc. are essential functions of the Parliament, which are neither delegated nor could have been delegated but assumed by the Central Government while issuing the Notification no. 8/2017-Integrated Tax (Rate). Thus, the said Notification is beyond the scope of the Act and do not conform to the provisions of the statute under which these are issued. As on today, there is no stay on this order by the Hon Supreme Court. Therefore, in the views of the author the recipient could take a call not to pay GST on ocean freight under RCM. Alternately, could make payment of tax under protest under acknowledged letter to dept. and claim refund without time limit in case after few years this view is upheld by Supreme Court.

- ✓ There is an issue in case of RCM is services supplied by the Governments and local authorities. It is confusing to understand the payments to Govt. which are liable for payment of GST under RCM. The business entity keeps making many payments to Govt. and local authorities in its day to day activities. Though the exemption notification specifies some of the services of the Govt. and local authorities to be exempt, the confusion is to understand what are those payments which are in the nature of consideration for the supplies made by the Govt. or local authorities. In such cases, it is to be first understood whether the payment made to Govt. or local authorities is towards a supply. To qualify a supply, the activity must be in the nature of sale, transfer, barter, exchange, licence, rental, lease or disposal. If the payment is made towards any activities of the aforesaid nature, GST is applicable on such payments.

- ✓ Section 23 provides exemption from registration where a person provides only exempt supplies. However, section 24 provides for compulsory registration in case of supplies liable for payment of GST under RCM. Then the question is where a person who provides only an exempt supply but

receives supplies liable for payment of GST under RCM, whether he is required to register and pay GST under RCM? In the views of the author, levy provision supersedes machinery provision, therefore since such person is required to register and pay GST under RCM.

- ✓ Recently, Rajasthan Advance Ruling Authority in the case of Clay Craft India Pvt. Ltd held that a director is not an employee of the company hence the salary paid to him is liable for payment of GST under RCM. In the views of the author it is incorrect. GST is a contract-based levy. It is a well settled legal position that whether a director is an employee or not depends upon the terms of contract with him. The Hon'ble Apex Court in the case of Employee's State Insurance Corporation V. Venus Alloy Pvt. Ltd. on 5th February, 2019 held that Directors of Company, who receive remuneration, shall come within the purview of "employee" under Section 2(9) of the Employee's State Insurance Act, 1948. Therefore, where the terms of contract provide, the director is an employee of the company and accordingly his service is neither supply of goods nor supply of service as per Schedule III.

- ✓ Another issue is in case of payments made to directors, GST is to be paid by the company under RCM. It is generally understood, where a company pays any remuneration, sitting fee or any commission to a director other than a whole-time director, the GST is to be paid under RCM by the company. The doubt is where such independent directors or non-executive directors provide any service in their professional capacity, not as a director, for which consideration is paid by the company whether RCM is applicable? Even though as per the strict interpretation of the relevant provision, RCM may not be applicable where service is provided in his professional capacity, it is advisable to pay the GST under RCM and take ITC of the same to avoid the litigation.

It is always advisable to pay GST and take ITC, wherever ITC is available on any doubtful cases to avoid dispute in future.

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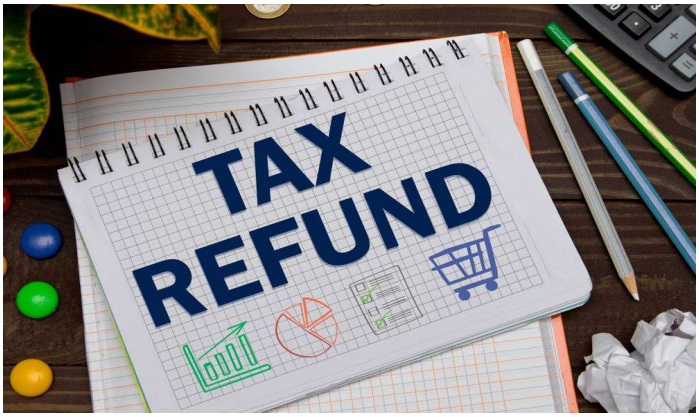
Refund amount shrinking with more procedures

CA Akbar Basha

During the days prior to GST, an expectation was created among the tax-payers that the GST refund will be seamless. Which created a huge expectation among the industry. As time pass by, there is gap between expectation vis-à-vis and actual refund. The gap is created due to procedural aspects, which is resulting in shrinking of refund to the industry taxpayer.



In this article an attempt is made to bring out the procedures which is resulting in shrinking of refund to the industry, which otherwise the industry was rightly entitled for refund.

1. Exporters denied refund of ITC under LUT with respect to transitional credit: Rule 89(4) (B) of CGST Rules, defines "Net ITC" means input tax credit availed on inputs and input services during the relevant period other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both.

   This rule indicates refund only for inputs and input services availed during the relevant period of refund, will be allowed as refund, which means the ITC on capital goods and transitional credit is barred from claiming refund. This aspect was clarified in circular 125/44/2019-GST dated 18.11.2019. Which only meant 100% exporter of service could not have claimed the benefit of transitional credit. As such exporter will not have any domestic liability, therefore such transitional credit will only remain as book entry.

   Now the exporter has option no.2 to export goods or service on payment of IGST, however Rule 96(10) had imposed certain conditions, like exporter should not have received the supplies under

   - U/n 48/2017-CT dated 18.10.2017, (supplied treated as deemed exports)
   - U/n 40/2017-CT dated 23.10.2017, (supply of goods to exporter at concessional rate of 0.05% or 0.10%)
   - U/n 78/2017-Customs dated 13.10.2017, provided if such exporter had paid IGST and compensation cess on imports and claimed exemption of BCD on imported goods, then the

benefit of 78/2017-Customs would be treated as not availed. Thou this relaxation was extended with retrospectively from 23.10.2017. However few questions even now remain in the minds of exporters like, will the benefit of explanation inserted to Rule 96(10) be available only if the imported goods had suffered IGST and compensation cess, on imports or whether this explanation be applicable to goods imported which did not suffer compensation cess.

- If the exporter received supplies either under notification 48/2017-CT or 40/2017-CT, at any time during the year, will such exporter be barred for the life time from claiming refund under exports on payment of IGST or be restricted from claiming refund on exports on payment of IGST during the financial year in which supplies were received under the prescribed notifications. Paper writer is of the view that supplier upon exhausting the stock of supplies received under notification 48/2017-CT or 40/2017-CT, would be entitled for claiming the benefit of exporting on payment of IGST. A clarification in this regard will be helpful to the industry.

The above said confusions have restricted the exporters in encashing the transitional credits. Which is resulting in the exporters to merely keep the transitional credits in its books without being in a position to encash transitional credit as refund.

2. Rule 89(4) (C) of CGST Rules, has restricted the turnover of zero-rated supply of goods for the purpose of claiming refund to maximum of 1.5 times of domestic supplies. The need of tinkering with this rule is beyond one's imagination. When the Rule 96B was inserted emphasising for realization of export proceeds within the period as prescribed under FEMA and as permitted by RBI. This rule 96B, read with Rule 36(4) could have taken care to encounter the fake exporters claiming refund. Therefore, the amendment to Rule 84(4) (C) will only result in reduction of refund to genuine exporters and increase the cost. As a compliment the exporter will be burdened with compliance cost, in justifying the zero-rated turnover for goods. The ice-in on the cake will be when the exporters who do not have a comparable domestic supply and when the exporter is dealing with client specific customized goods. In such cases the exporter may be made to run pillar to post in justifying its turnover of zero-rated supply of goods in terms of Rule 89(4) (C). This amendment to the rule could open up valuation issues for the purpose of refund, and shrink the refund and also cause unwanted delays in processing refund claims.

3. **Filing of fresh refund claim, in pursuance of deficiency memo:** Upon filing of refund claim within the relevant date, if a deficiency memo is issued the refund claim amount debited from

electronic credit register will be re-credit through PMT-03, once the deficiency memo is rectified a fresh claim is required to be filed. Circular 125/44/2019-GST has clarified that fresh claim should be filed within 2 years from the relevant date as defined in explanation after sub-section (14) of section 54 of CGST Act. Such an interpretation would result in making the claim time barred. If the refund claims were filed nearing due date and if any deficiency memos are issued. As per the interpretation of above mentioned circular the claim will be time barred. Thou the original refund claim was filed within the relevant date. This principle brought out through circular is diametrically opposite to settled position of law, in case of CCE VS Arya Exports and Industries 2005 (192) ELT 89 (Del), it was held that "refund claim cannot be denied to them merely on the ground that the same was not filed in the prescribed form. If the refund claim has not been filed on proper form or without necessary documents the Department can direct the appellants to file the same in proper prescribed from along with supporting documents. But as far as the time for filing the refund claim is concerned, it has to be considered from the date the refund claim was filed initially in the form not prescribed or without documents" this rationale was confirmed in series of decisions rendered under the erstwhile Central Excise law.

4. Exporter of goods on payment of IGST were given seamless and automatic refund, however if there was a mis-match between GSTR-1/GSTR-3B and shipping bill, then the refund gets stuck. In such cases, the exporter had an option to file a refund of excess payment of tax and get the refund which was stuck. Now with the insertion of Rule 86(4A), if the claim for refund filed as excess payment of tax or wrong payment of tax and if the amount of excess/ wrong payment was made as per the above explained scenario then refund will be the re-credit in electronics credit register, in terms of Rule 86(4A), since the excess or wrong payment was paid through the credit, therefore the same will be re-credited in electronic credit register. Such an afterthought amendments, are taking away the means of assessee claiming refund and resulting in shrinking of refund dues to stringent procedures, ignoring the objectives of the refund claim.

5. **Inverted duty structure refund:** Rule 89(5a), allows refund only on inputs, thou no proper justification is provided as to why the input service and capital goods credit refund was not allowed under inverted duty structure refund mechanism. Input service component constitutes significant portion varying in percentage from industry to industry, in case of tractor industry and agarbathi industry it would be around 15-20% per month. In mining and mineral industry, input service component constitutes of more than 50%,

wherein most of equipment's/ machineries are taken on rental basis, which has resulted these industries merely carrying these credits in its books without being in a position to encash these input service credits in the form of refund. Which automatically cascades into higher input cost. Paper writer feels that section 54(3) (ii) should allow refund on input service also, in order to meet the intention of the law.

Some of the issues cited above are confirmed through circular, thou not said so in the law. Supreme Court in case of CCE Vs Ratan Melting & Wire industries, 2008 (12) STR 416 (SC), has held that circular which is contrary to the statutory provisions has really no existence in law"

Considering the intension of the law, GST law is been driven by procedures, making life difficult for the assesses. Keeping the objective of ease of doing business and easy compliance mechanism. The issues cited in the article might have to be re-visited by the GST council, necessary action from GST council will be appreciated by the industry in these tuff times. If appropriate action are taken on the points suggested in this article will help the industries in reducing the cost between 10-15%.

(For feedback/ suggestion you may reach out the paper writer at akbar@hiregange.com)

Key Rate Changes and amendment to exemptions

CA. Pradeep V &
CA. Vikram Katariya

A. Key Changes in the Rate of Tax for Services:

I. General Changes

Chapter, Section or Heading	Description	Old Rate	New Rate	Notification No
9987	Maintenance, repair or overhaul services in respect of aircrafts, aircraft engines and other aircraft components or parts.	18%	5%	02/2020-CT(R) dt 26.03.2020 w.e.f. 01.04.2020
9988	"(ib) Services by way of **job work** in relation to **diamonds** falling under chapter 71 in the First Schedule to the Customs Tariff Act, 1975 (51of 1975);	5.00%	1.5%	20/2019-CT(R) dt 30.09.2019 w.e.f. 01.10.2019
	(ic) Services by way of job work in relation to **bus body building**;	18%	18%	20/2019-CT(R) dt 30.09.2019 w.e.f. 01.10.2019
	(id) Services by way of job work other than (i), (ia), (ib) and (ic) above;	18%	12%	20/2019-CT(R) dt 30.09.2019 w.e.f. 01.10.2019
9983	"(ia) Other professional, technical and business services relating to exploration, mining or drilling of petroleum crude or natural gas or both	18%	12%	20/2019-CT(R) dt 30.09.2019 w.e.f. 01.10.2019

H&A Comment: With regard to Job work service under heading 9988, the department has issued a clarification vide circular no: 126/45/2019-GST dt. 22.11.2019, to clarify the applicability of two residual entries namely item (id)- Services by way of job work other than (i), (ia), (ib) and (ic) above; and item (iv)- Manufacturing services on physical inputs (goods) owned by others, other than (i), (ia), (ib), (ic), (id), (ii),

(iia) and (iii) above. The Circular provided that there is a clear demarcation between scope of the entries at item (id) and item (iv) under heading 9988 of Notification No. 11/2017-Central Tax (Rate) dated 28-06-2017. Entry at item (id) covers job work services as defined in section 2 (68) of CGST Act, 2017, that is, services by way of treatment or processing undertaken by a person on goods belonging to another registered person. On the other hand, the entry at item (iv) specifically excludes the services covered by entry at item (id), and therefore, covers only such services which are carried out on physical inputs (goods) which are owned by persons other than those registered under the CGST Act.

Changes in GST rates in relation to Hospitality Sector:

(Notification No. 20/2019- Central Tax (Rate) and Notification No. 21/2019 Ce-ntral Tax (Rate) effective from 1st October 2019)

There has been reduction in the rate of tax for the hospitality sector with respect to the accommodation and catering services. Further, the entries have been rationalised and made easy to understand.

The rate of tax applicable effective from 1st October 2019 would be as under,

a. **For the accommodation services:**

Transaction value per unit per day	GST Rate
INR 1,000 and less (per unit)	Nil
INR 1,001 to INR 7,500	12%
INR 7,501 and more	18%

b. **Outdoor catering services:** Any persons providing outdoor catering service at the specified premises would be liable to pay GST @ 18%. Further, a person providing hotel accommodation services at a specified premise and a person who is a supplier located in the specified premises, would be liable to pay GST on outdoor catering service provided at any place @ 18%.

"**Specified premises**" means premises providing "hotel accommodation" services having declared tariff of any unit of accommodation > Rs. 7,500 per unit per day or equivalent. It is important to note that the word used is 'declared tariff', not the value charged. Hence, if declared tariff of any unit of accommodation is more than Rs. 7,500/-, such hotel premise would get covered within definition of specified premise.

For example, if a hotel say M/s. ABC Ltd. (hereinafter referred to as ABC) has a unit in its premises whose declared tariff is > Rs. 7,500 per day, then such hotel premises would be a specified premise. Further, anyone providing outdoor catering at ABC's premises or ABC providing outdoor catering at such/any premises, would be liable @ 18%.

Other outdoor catering services would be liable @ 5% i.e. say outdoor catering provided at an auditorium by any other person (i.e. other than a

person providing hotel accommodation services at a specified premise and a person who is a supplier located in the specified premises).

A summary of the rate of tax is given below:

Premise	Supplier	New GST Rate	Old GST rate
At other than specified premise	By suppliers providing "hotel accommodation" at "specified premises", or Suppliers located in "specified premises".	18% (with ITC)	18% (with ITC)
	Others	5% (Without ITC)	18% (with ITC)
At specified premise	By any person	18% (with ITC)	18% (with ITC)

The above rates would be equally applicable for composite supply of **outdoor catering with renting of premise.**

H&A Comment: The entry relating to accommodation, F&B has been simplified by reducing the number of slabs for the accommodation services including a reduction of upto 10% GST on certain categories of these services.

With respect to the outdoor catering services, there is not much clarity regarding the phrase 'supplier located in 'specified premises'. It is not clear whether a person who has his principal place of business at a premises which is not a 'specified premises' and has an additional place of business at a 'specified premises', would be considered as a 'supplier located in 'specified premises' or not.

Further, for certain categories of service providers the rate of tax for the outdoor catering services would now be liable @ 5% without ITC. This would lead to ITC restriction in their hands which was hitherto eligible. In such case the provision of anti-profiteering would also get attracted as there is a decrease in the rate of tax which needs to be passed on to the customer after taking into account the increase in cost due to the ineligible credit.

B. Key Changes in the Rate of Tax for Goods:

Chapter / Heading / Sub-heading / Tariff item	Particulars	Old Rate	New Rate	Notification No
8504	Charger or charging station for Electrically operated Vehicles	18%	5.00%	12/2019-CT(R) dt. 31.07.2019 w.e.f 01.08.2019
87	Electrically operated vehicles, including two and three wheeled electric vehicles. Explanation .- For the purposes of this entry, "Electrically operated vehicles" means vehicles which are run solely on electrical energy derived from an external source or from one or more electrical batteries fitted to such road vehicles and shall include E- bicycles."	12%	5.00%	12/2019-CT(R) dt. 31.07.2019 w.e.f 01.08.2019
8509	Wet grinder consisting of stone as grinder	12%	5%	14/2019-CT(R) dt. 30.09.2019 w.e.f 01.10.2019
8601	Rail locomotives powered from an external source of electricity or by electric accumulators	5%	12%	14/2019-CT(R) dt. 30.09.2019 w.e.f 01.10.2019
8602	Other rail locomotives; locomotive tenders; such as Diesel electric locomotives, Steam locomotives and tenders thereof	5%	12%	14/2019-CT(R) dt. 30.09.2019 w.e.f 01.10.2019
8603	Self-propelled railway or tramway coaches, vans and trucks, other than those of heading 8604	5%	12%	14/2019-CT(R) dt. 30.09.2019 w.e.f 01.10.2019
8604	Railway or tramway maintenance or service vehicles,whether or not self-propelled (for example, workshops, cranes, ballast tampers,	5%	12%	14/2019-CT(R) dt. 30.09.2019 w.e.f 01.10.2019

	track liners, testing coaches and track inspection vehicles)			
8605	Railway or tramway passenger coaches, not self-propelled; luggage vans, post office coaches and other special purpose railway or tramway coaches, not self-propelled (excluding those of heading 8604)	5%	12%	14/2019-CT(R) dt. 30.09.2019 w.e.f 01.10.2019
8606	Railway or tramway goods vans and wagons, not self-propelled	5%	12%	14/2019-CT(R) dt. 30.09.2019 w.e.f 01.10.2019
8607	Parts of railway or tramway locomotives or rolling-stock; such as Bogies, Bissel-bogies, axles and wheels, and parts thereof	5%	12%	14/2019-CT(R) dt. 30.09.2019 w.e.f 01.10.2019
8608	Railway or tramway track fixtures and fittings; mechanical (including electro-mechanical) signalling, safety or traffic control equipment for railways, tramways, roads, inland waterways, parking facilities, port installations or airfields; parts of the foregoing	5%	12%	14/2019-CT(R) dt. 30.09.2019 w.e.f 01.10.2019
2202 99 90	Caffeinated beverages	18%	28% + 12% compensation cess	14/2019-CT(R) dt. 30.09.2019 w.e.f 01.10.2019
813	Tamarind, dried	5%	Exempt	15/2019-CT(R) dt. 30.09.2019 w.e.f 01.10.2019
46	Plates and cups made up of all kinds of leaves/ flowers/bark	5% / Nil	Exempt	15/2019-CT(R) dt. 30.09.2019 w.e.f 01.10.2019

3923 or 6305	Woven and non-woven bags and sacks of polyethylene or polypropylene strips or the like, whether or not laminated, of a kind used for packing of goods;	12%	18%	27/2019-CT(R) dt. 30.12.2019 w.e.f 01.01.2020
6305 3200	Flexible intermediate bulk containers".	12%	18%	27/2019-CT(R) dt. 30.12.2019 w.e.f 01.01.2020
Any Chapter	Lottery	12%	28%	01/2020-CT(R) dt. 21.02.2020 w.e.f 01.03.2020
36050010	All Goods	5%	12%	03/2020-CT(R) dt. 25.03.2020 w.e.f 01.04.2020

H&A Comment: The amendment in the rate of taxes have been done considering the difficulties faced by the industries. Further the department has realized that some of the luxury goods had enjoyed the benefit of lower rate of tax and these amendments had ensured that it had been taxed at the higher rate instead of lower rate of tax.

C. Key Exemptions during the year:

I. Notification No. 21/2019 C.T.(R) effective from 1st Oct '19

a. Insertion of new exemptions-

S.no.	Chapter, Section, Heading, Group or Service Code (Tariff)	Description of Services	Rate (per cent.)	Condition
9AA	Chapter 99	Services provided by and to Fédération Internationale de Football Association (FIFA) and its subsidiaries directly or indirectly related to any of the events under FIFA U-17 Women's World Cup 2020 to be hosted in India.	Nil	Provided that Director (Sports), Ministry of Youth Affairs and Sports certifies that the services are directly or indirectly related to any of the events under FIFA U-17 Women's World Cup 2020.
24B	Heading 9967 or Heading 9985	Services by way of storage or warehousing of cereals, pulses, fruits, nuts and vegetables, spices, copra, sugarcane, jaggery, raw vegetable fibres such as cotton, flax, jute etc., indigo, unmanufactured tobacco, betel leaves, tendu leaves, coffee and tea.	Nil	-
29B	Heading 9971 or Heading 9991	Services of life insurance provided or agreed to be provided by the Central Armed Police Forces (under Ministry of Home Affairs) Group Insurance Funds to their members	Nil	-

		under the Group Insurance Schemes of the concerned Central Armed Police Force.		
82A	Heading 9996	Services by way of right to admission to the events organized under FIFA U-17 Women's World Cup 2020.	Nil	-
35	Heading 9971 or Heading 9991	Services of general insurance business provided under Bangla ShasyaBima	Nil	-

b. **Exemption to the following services extended up to 30.09.2020**

S.no.	Chapter, Section, Heading, Group or Service Code (Tariff)	Description of Services
19A	Heading 9965	Services by way of transportation of goods by an aircraft from customs station of clearance in India to a place outside India.
19B	Heading 9965	Services by way of transportation of goods by a vessel from customs station of clearance in India to a place outside India.

(For feedback/ suggestion you may reach out the paper writer at pradeep@hiregange.com)

E-way bill – Issues and Solutions with Judicial decisions

CA Mannu Kashliwal

One of the major objectives of GST implementation in India was to ensure 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, E-way bill mechanism has proved to be 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 above, the author has compiled some common issues which have cropped up in E-way compliances along with solutions based on recent judicial decisions. The objective of the author is to enlighten the tax- payers of the legal validity of the actions taken by the authorities at the time of 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 assesse 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 validity period**

   Held: Typographic error may be treated as a minor one and in such case if the demand and penalty has been levied by the proper officer u/s 129, the same need to be refunded to the supplier. **[Godrej Consumer Product Ltd. 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 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. <u>Detention of goods</u>

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 detention of the goods and vehicle u/s 129 of 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 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 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. **[Umiya Enterprise Vs Assistant State Tax Officer, 2020-VIL-50-KER]**

8. **Interception of vehicle within few hours of expiry of E-way bill and Adjudicating authority passed and 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 petitioner was not given reasonable time for renewal of 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 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. <u>Seizure of Goods</u>

9. **Goods were seized for as goods being transported without invoice and e-way bill. Further, confiscation order was passed without giving 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 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, respondent ought to have taken a lenient and sympathetic view. The court ordered 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 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 Fertichem 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 single E-Way Bill may cause practical difficulty for 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 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 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 transaction of supply. 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 car, detention of car was illegal. The provisions of Section 129 of SGST Act was not attracted **[Kun 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 does not involve intent of fraud or evasion of tax have led to detention of goods or seizure of goods which ultimately increased litigations. Thus, the author wishes for 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.

(For feedback/ suggestion you may reach out the paper writer at mannu@hiregange.com)

Key Actions in the beginning of the FY and year end compliances:

CA Rajesh Maddi.

Beginning of every year there are certain steps every registered person has to take before making any supply. These steps are summarized as under;

1. Submission of LUT for FY 2020-2021
2. Starting new series of the tax invoice, debit note, credit note, delivery challan, receipt voucher with unique serial numbers.
3. Following reconciliations to be done for FY 2019-20:
   - ✓ Outward supplies as per books of account and GST returns (Books vs. GSTR-1 vs. GSTR-3B)
   - ✓ ITC claimed in GSTR-3B vs. ITC appearing in GSTR-2A
   - ✓ Reconciliation of balance of credit and cash as per GST portal with balance appearing in books.
4. Check the requirement for any ITC reversal or ITC to be reclaimed;
   - ✓ Rule 37 – Any ITC reversal required on account of non-payment within 180 days or reclaim of any ITC in respect of supplies for which payment has been made.
   - ✓ Rule 42 or 43 – Impact of annualized ITC reversal in case of exempted as well as taxable supplies to be considered.
   - ✓ Check if any reversal required against purchased goods rejected and returned. (Ensure the impact of the same has been considered in GST returns)
5. Few additional pointers for GSTR-2A reconciliation
   - ✓ Identification of default vendors for the purpose of recovery of tax paid along with interest
   - ✓ The reconciliation of 20%/10% being maintained month-wise to be incorporated to an annual level, in addition to an invoice level reconciliation.
   - ✓ Follow up for any required amendments in invoices.
6. Update the masters (vendor details, GSTINs, product descriptions, tax rates etc.)
7. Cross charge to distinct person and related parties for supply of common services.
8. Validation of RCM liability –
   - ✓ Ensure if the liability is being paid in respect of all input supplies notified for reverse charge and all the amendments have been taken care of.
   - ✓ Check if the tax paid under RCM matches with ITC under RCM. RCM liability should be more than or equal to ITC under RCM.

- ✓ Ensure timely payment of RCM liability, interest liability need to be discharged in respect of any delay in tax payment.

9. Bird-eye view of compliance status or a walk back to ensure no lapse in compliances. Any interest short paid, late fee not paid etc. Check if any amendments required to be made in GST returns.
10. Issuance of GST Debit note/ Credit note –
    - ✓ The taxpayer may issue credit note for excess value and/or tax charged, short supply or goods returns. Issue credit note and account in the books of account.
    - ✓ Issue debit note where lesser value and/or tax was charged and pay the tax along with interest.
11. Ensure tax liability against receipt of advances and adjustment thereof to derive at unadjusted advances at the year end. If no supply has been made against the advance, claim refund.
12. Track status of goods sent on job work or goods sent on approval whether all the goods have been received back within the due time period.
13. Reconciliation of E-way Bill issued during the year viz a viz tax invoices/delivery challans generated.
14. In case of reconciliation of books inventory with physical inventory, assess if ITC reversal to be required.
15. In case of continuous supply of services, ensure whether invoice is raised on milestone.
16. If some of the registrations are required to be closed on account of no business activities, file surrender application for the same.
17. Invoicing for goods sent on approval.
18. Amendment to registration certificate - Products, additional places etc.
19. In case any amount paid/reversed under protest, ensure receivable are accounted and reported in the asset side of BS.
20. Verify year-end accrual/provision entries for transactions with related parties and ensure compliance in March 2020 returns. For example, with respect to inventory write off entries, ITC restriction under section 17(5) of CGST Act needs to be examined.
21. Based on the turnover for FY 2019-20, check whether there is any change in the requirement of no of digits in HSN?

    Taxpayers whose turnover is below Rs. 1.5 crore are not required to mention HSN Code in their invoices. Taxpayers whose turnover is above Rs. 1.5 crore but below Rs. 5 crore shall use 2-digit code and the taxpayers whose turnover is Rs. 5 crores and above shall use 4-digit code.

22. If the assessee wishes to opt for Composition Scheme for FY 2020-21, the due date for opting for Composition Scheme (CMP-02) is 30.06.2020 and for GST ITC-03 is 31.07.2020. Those who are already in composition Scheme need not to any intimation.
23. If the aggregate turnover for FY 2019-20 is above Rs. 1.5 Crore then the taxpayers have to file monthly return. If the aggregate turnover is below Rs. 1.5 Crore then the taxpayers have an option to file the quarterly GST returns. Taxpayer can choose any of the option.
24. If ISD registration is there, ISD Returns to be filed by 30th June, 2020
25. While calculating depreciation for the financial year, ensure that ITC availed is not added to the cost of asset.

Check the status of GST refund. For the export of goods done in FY 2017-18, the time period for claiming refund application would be two years from the end of the financial year in which such refund claim arises i.e. 31st March, 2020 which is subsequently extended to 30th June, 2020 due to COVID-19 pandemic lockout.

(For feedback/ suggestion you may reach out the paper writer at rajeshmaddi@hiregange.com)

GST Changes in Real Estate w.e.f 01.04.2019

CA Sudhir VS &
CA Venkataprasad

Indirect tax implications on real estate has been a tricky issue ever since its presence in the country. Struggling with impact of various reforms, especially after the launch of Demonetization, GST and RERA, there has been a drastic slowdown in this sector. The last nail in the coffin is the deadly impact of the virus.

Bearing the issues in mind, several representations were made to the Government for further simplification and reduction of rates, especially for residential real estate sector, in the hope that the same would boost the demand for that sector. The government has been encouraging and has been taking measures to aid the sector in emerging from its difficulties. The CBIC had notified Rules & Procedures for builders who intended to take benefits of reduced rates (1 to 5 %) on sale of under construction flats commencing on or after 1st April, 2019. The focus has been in giving relief to the affordable housings segment.

Highlights of the new scheme of Taxation:

Construction of Affordable Houses (1% without Input tax credit)

- 1. 60 sqm in metros and value Rs. 45L
  2. 90 sqm in non-metros and value of Rs. 45 Lakhs
- Ongoing projects under the existing central and state housing schemes.

* In case houses booked prior to 01.04.2019, new rate shall be available on instalments payable on or after 01.04.2019.

Other than Affordable houses (5% without Input tax credit)

- Other than affordable houses in new projects
- Affordable houses in ongoing projects whether booked prior to or after 01.04.2019 *.
- Commercial apartments in RREP – Carpet area is less than 15% of the total carpet area

Rates as prescribed by the Notification:

The following tables gives the comparison of the new scheme with the existing rates:

Sl.No	Description	Effective New Rate	Effective Old Rate
1	Construction of **affordable** Residential Apartment by a promoter	1%	8%
2	Construction of **Other than affordable** Residential Apartment by promoter	5%	12%
3	Construction of commercial portion (< 15%) in RREP by promoter	5%	12%
4	Construction of commercial portion (> 15%) in REP by promoter	12%	12%
5	Ongoing projects who has not opted for the new scheme (Optional only for ongoing projects)	12%	12%

This scheme is mandatory for all new projects commencing from 1st April, 2019. However, for the ongoing projects as on 01.04.2019, one time option is given to continue with the existing tax structure and mechanism. For this, an intimation informing the option of continuing old scheme should have been given to the Jurisdictional commissioner on or before 20.05.2019.

Meaning of few important terms as referred above:

1. **Real Estate Project (REP)** - As defined in 2(zn) of RERA Act, 2016
   - The development of a new building/apartments,
   - Converting an existing building into apartments, or
   - The development of land into plots or apartment,
   - For selling to all/few,
2. **Residential Real Estate Project (RREP)** - REP in which the carpet area of the **commercial apartments** is not more than 15 per cent.
3. **Ongoing Projects - Conditions:**
   - commencement certificate **issued** - on/ before 31.03.2019
   - Construction has started – on/before 31.03.2019
   - Completion certificate **not issued** on / before 31.03.2019
   - **Booking*** - on/ before 31.03.2019
4. * Booking means an **apartment booked –** Conditions

- part of supply of construction - ToS
- at least 1 instalment has been credited to the bank account
- Document evidencing booking issued.

Conditions to be complied under the New Scheme:

1. Input tax credit shall not be available - Liability shall be discharged by way of debit to Electronic Cash ledger only.

2. On the ongoing projects, wherein the promoter who opts to the new scheme, input tax credit of GST including transitional credit needs to be reversed/ availed in accordance with formulae given under Annexure I and Annexure II of the notification. The main logic of reversal is that ITC shall be given to the extent of project TO subjected to old rate of 12/8% and restrict ITC attributable to the project TO to be offered at new rates of 5/1%.

3. The notification requires that if the credit already availed is more than eligible ITC as per the above referred notification, such excess ITC has to be paid back immediately or on permission in 24 instalments along with interest. On the other hand if the credit already availed is less than credit notionally worked out, the difference amount can be availed out of future purchases. However, such credit availed cannot be used for making payment of tax at concessional rate, it can be used for any other supplies on which GST is payable (if any). For detailed calculation for reversal of ITC, one may refer to book on Real estate the link https://hiregange.com/assets/articles/34991-real-estate-booklet_10apr-19_har.pdf.

4. In order to ensure compliance on suppliers (to promoters) front, additional condition is added as to procurements, wherein it requires that a percentage of procurements (except grant of development rights, long term lease of land or FSI, electricity, high speed diesel, motor spirit, natural gas) shall be procured from registered suppliers only. The details are as summarized in the table below:

Procurement	RD	URD	Consequences in the hands of the Builders (In case of Violation)
Inputs and Input services except cement	Min 80%	Max 20%	Pay tax under RCM * @ 18% (generally) - by 30th June following the end of FY

Cement	100%	0%	Pay tax under RCM * @ 28% - On monthly basis
Capital Goods	100%	0%	Pay tax under RCM * @ applicable rate

*Corresponding effect was also given in the RCM notification

5. Project-wise account of inward supplies needs to be maintained for supplies procured from registered suppliers and unregistered suppliers. Such details are to be electronically submitted on the portal before 30th of June of subsequent year in the prescribed form.

6. With respect to JDA (relating to residential real estate projects i.e. including projects where the commercial area is less than 15% of the total project area) entered into on or after 1st April, 2019, the Developer needs to pay GST on the built-up area handed over to Landowner (value shall be equal to the flats sold [registered] by developer to their customer nearest to joint development agreement) at the rate of 5% or 1% as the case may be at the time of obtaining completion certificate or first occupation, whichever is earlier.

The changes w.r.t JDA

Joint Development Agreement after 01.04.2019		
Development rights given by Landowner to Developer		
Particulars	**For Commercial Purpose**	**For Residential Purpose**
Date of liability	Date of completion certificate or first occupation whichever is earlier.	Exempt, except to the unsold portion as on the Date of completion certificate or first occupation whichever is earlier.
Value of liability	Open market value of development rights/SA or on **first sale value (dispute free valuation)** of Developer closer to date of JDA	Sale value nearest to the date of completion certificate (i.e. first sale value of Developer) * Developer's built up area(dispute free valuation)
Person liable to pay	Developer (RCM)	Developer (RCM)

Rate of tax	18%	Initially exempt. 18% on development rights attributable to unsold units subject to maximum of 1%/5% on value of unsold units as on date of CC/OC
Construction services provided by Developer to Landowner		
Particulars	**For Commercial Purpose**	**For Residential Purpose**
Date of liability	Date of completion certificate or first occupation whichever is earlier.	Date of completion certificate or first occupation whichever is earlier.
Value of liability	Sale value nearest to the date of completion certificate.	Sale value nearest to the date of completion certificate.
Person liable to pay	Developer	Developer
Rate of tax	12%	5%

What would be the GST liability w.r.t. the JDA if:

- The supplementary agreement is entered before 1st Apr'19
- The supplementary agreement is entered on or after 1st Apr'19

Particulars	**Conclusion**	
	SA before April, 2019	**SA after Apr'19**
(i)Development rights given by Landowner		
Time of supply	Date of SA	Date of SA
Value of supply	Open market value of development rights/land	First sale value of unit closer to date of JDA
Person liable to pay	Landowner	Landowner
Rate of tax	18%	18% (1/3rd deduction for land value is not forth coming from the explanation 1A in terms of notification 12/2017 ibid if the first sale value is adopted).
(ii)Construction services provided by Developer to Landowner:		
Time of supply	Date of SA	Date of SA

Value of supply	Open market value of construction services	First sale value of the Developers' unit nearest to the date of JDA.
Person liable to pay	Developer	Developer
Rate of tax	18%	12%- for commercial portion

Other Relevant changes:

7. The existing ITC provisions have been amended to ensure that the ongoing projects would be required to reverse credit availed during the project execution from 1st Jul '17 or project commencement, whichever is later, to the extent of the units sold after completion certificate or first occupation, whichever is earlier. The reason behind this amendment was that, the frequency for reversal was given as a financial year. But, a Real Estate project would take more than a financial year to complete. Let's say, a Real estate project runs for 5 years, it is obvious that in the first 4 years it will be having only taxable supplies and when calculated in accordance with Rule 42 of the CGST Rules, the reversal would be '0' as the entire turnover in the first 4 years is taxable, and in the 5th year when the proportion of exempt supplies increases, the value of ITC will be minimal. Hence, the concept of built up area was introduced. Accordingly, as per the amendment the total credit for the entire period during which the real estate project was into operation will be treated as common credit and the reversal will be required in proportion of the unsold flats as on the date of the completion certificate to the total flats.

The Central government has released FAQs in connection to the scheme, which may be found at:
http://www.cbic.gov.in/resources//htdocs-cbec/gst/FAQ-Real-estate-sector-0705.pdf
http://www.cbic.gov.in/resources//htdocs-cbec/gst/FAQ(II)-Real-estate-sector-1405.pdf

Open Issues:

1. **Joint Development Agreement (JDA) entered on or before 31.03.2019 and the supplementary agreement entered on or after 01.04.2019. Whether exemption on development rights would be applicable in terms of notification No.12/2017 - Central Tax (Rate) dated 28.06.2017 as amended from time to time?**

- Service by way of transfer of development rights (TDR) or Floor Space Index (FSI) (including additional FSI) **on or after 01.04.2019** for **construction of residential apartments** by a promoter in a project **would be exempted. However,** The JDA was entered prior to 01.04.2019, and the

exemption would not be applicable as the rights arising from the JDA has already been transferred to the developer on or before 31.03.2019.Thereby, such liability needs to be discharged by the land owner on the date of transfer of possession in terms of notification No.04/2018 - Central Tax (Rate) dated 25.01.2018. However while discharging such liability whether the new rate of tax would be applicable needs clarification.

2. **Joint Development Agreement (JDA) entered on or before 31.03.2019 and the supplementary agreement entered on or after 01.04.2019. For construction services provided by the Developer, whether ToS to pay such GST liability shall be in terms of notification No. 04/2018 ibid or as per notification No. 06/2019 – Central Tax (Rate) dated 29.03.2019?**

- In the instant case the JDA was entered prior to 01.04.2019, whereas the supplementary agreement after 01.04.2019, the notification 06/2019 refers to rights transferred after 01.04.2019, now in this case whether the rights transferred on entering into JDA (Development Agreement with General Power of Attorney) or the same gets crystallizes on entering into supplementary agreement for area allocation?

3. **In case of ongoing projects opting for new scheme, whether landowner share of flats should be considered as taxable for the purpose of proportionate ITC reversal as on 31.03.2019**

- In case if time of supply of services relating to landowners share was on or before 31.03.2019, the same need to be considered for the purpose of proportionate ITC reversal, considering services towards landowner share as taxable services. Another view which could be possible here is that the ITC reversal as on 31.03.2019 has to be calculated considering the developers share only, as this would be the developer's share of revenue which could be taxable/exempted. As the confusion exists, necessary clarification needs to be given by department to avoid disputes.

4. **If the commercial space in the residential apartment is not sold to the customer, but transferred to the association and the cost is apportioned in the residential apartments, whether the development rights w.r.t commercial space would be taxable?**

- As the commercial space is not sold, and the cost of the same is apportioned in the residential apartments sold to the customer, RCM would not be applicable on the development rights attributable to the commercial space. However, the same view is not coming from the exemption notification.

5. **Whether excess procurement from registered persons (>80%) in year 1 can be set off against the shortfall in the year 2?**

- The % of registered procurements should be computed on yearly basis. However, there is no clarity provided in the notification on whether excess purchase in year 1 can be set off against the shortfall in the year 2. In our view, the same should be allowed which would be beneficial to the developer as they can target on purchases from registered persons based on project wise, instead of financial year wise.

6. **There are 3 towers where single permission is obtained for all 3 towers. Construction of tower-1 is completed whereas construction of other two towers has not yet started. Whether different schemes of rates can be applied for 3 towers?**

- If separate permission is obtained for each tower as required by RERA then each tower would be treated as separate project. In such case, only tower-1 would be an on-going project if CC/OC has not obtained, whereas for construction of other two towers, should be considered as new projects. Clarification awaited.

Conclusion:

Though the April 2019 scheme was an outcome of detailed consultation between the Real estate industry players and the group of ministers appointed by the GST Council, it ended up landing the stakeholders with a no-win, no-loss situation. It is very clear that the benefit of the proposed GST of 5% restricting the input tax credit would be only to those projects which has a high rate per sft on account of increased land price and has negative impact or no impact where the flat price is less on account of reduced land price. So this proposal is beneficial to rich and not middle class people. Further restriction of input tax credit will also increase the non-compliance and black marketing of the supplier to builder and also will put pressure on vendors to real estate developers the practical challenges of collection of GST from the developer. Lakhs have opted for the composition scheme to further reduce the tax payable on inputs. Further this creates a lot of confusion with the developers and customer and may lead to contractual litigation. The real benefit that could have been passed on could have been by way of increasing the deduction for value of land or by reducing the GST rate on supplies to developers.

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Interest - The interesting aspects under GST law

CA Vasant Bhat

Currently interest for delayed payment of GST has become the most interesting topic. The tax payment procedure and ambiguity in the provisions relating to interest is haunting the taxpayers. Recently, the department understood that about 46 thousand crores of rupees interest is outstanding on the delayed payment of taxes declared in the return, as per their own method of computation. Accordingly, CBIC instructed the field formations to initiate the action for recovery of the same. The interest is payable for delay in payment of tax dues or reversal of input tax credit.

In this regard it is worth to understand the history of interest under the erstwhile laws. As per the provisions of the Central Excise Act, 1944 and Rules made thereunder, the excise duty could have been discharged either through debiting the Personal Ledger Account ('PLA') or debiting the Cenvat credit register. Both of these records were to be maintained by the assessee.

The money was to be deposited in the government treasury through TR-6 Challan and credit entry was made in the PLA with regard to excise duty. However, in case of service tax, the facility of PLA was not available, but the tax could have been paid through TR-6 challan any time to discharge the tax liability. As per the provisions of Cenvat Credit Rules, 2004 ('CCR'), the eligible credit was taken as and when goods are received and the specified documents are received for goods purchased or service received. Such debit and credit details were required to be disclosed in the respective periodic return. Thus, effectively the interest was paid on the net liability in many cases.

Thus, the assessee had the facility to pay the tax anytime during the month. The discharge of tax payment was not connected to the filing of the return. The GST law provides for Electronic Credit Ledger ('ECrL'), Electronic Cash Ledger ('ECL') and Electronic Liability Register ('ELR') which are maintained by the GSTN portal based on the returns/statements filed by the taxpayer.

The GST law provides for discharge of tax liability only through filing the periodical returns. Even if there is sufficient money available in the ECL or sufficient balance of Input Tax Credit ('ITC') is

available in the ECrL, the GST liability cannot be discharged unless the GST return is filed. Thus, in GST the return is not only for the reporting of tax liability and payment thereof but it is the only mode of discharge of tax liability. Further, the return can be filed as per the return periodicity and the GST returns cannot be revised. If a taxpayer has committed any inadvertent error in reporting the liability he has to wait till the next return period to rectify the same. Off late GST DRC-03 has been made available in the portal for voluntary payment tax. However, if the tax liability paid through DRC-03, the liability cannot be reported in the return and adjust the payment made through GST DRC-03. Section 39 requires furnishing the details of tax liability, tax paid and ITC.

Section 50 of the CGST Act, 2017 ('Act') provides for payment of interest under following situations;

1. Failure to pay tax within the specified time (interest rate notified is 18%).
2. Reducing the output tax liability more than the ITC matched where un -matched ITC was earlier added to the output tax liability (interest rate notified is 24%).

In the earlier tax regime, the provisions relating the cenvat credit was in the CCR. The relevant rule had provided for recovery of wrongly availed and utilized credit along with interest and penalty. Whereas in GST law, the provision related to ITC is in the Act itself. Section 16 provides for conditions and availment of ITC. There is no specific provision in GST law for recovery of interest in case of wrongly availed/utilized ITC except, the case mentioned in (2) above.

Section 73 and Section 74 of the Act are the provisions relating to issue of show cause notices in case of non-payment of tax or wrong availment or utilization of the ITC or erroneous refunds, requiring the taxpayer to show cause why tax dues or other dues cannot be recovered along with interest payable thereon under section 50 and penalty. It shows sections 73, 74 are not independent of section 50. Wherever interest is payable under section 50, the same shall be recovered under the procedures of sections 73, 74.

However, section 75 of the Act provides for determination of tax and recovery thereof in certain cases. The said provisions (sub-section 12) specifically provides that where any tax liability is reported in the return (i.e, self-assessed tax) remains unpaid, either wholly or partly, or the interest payable on such unpaid tax, shall be recovered as per the procedure specified in section 79 without issuing show cause notice under section 73 or 74.

Many notices issued by the department for recovery of interest quotes section 75(12). It is interesting to note that portal does not allow filing of the GST return without discharging the tax liability. Section 39(7) provides that the tax declared in the return is to be paid before the due of filing the return. Thus, there is no conditions

for filing the return that tax is to be paid before filing the same. In view of this, legally there exists a situation where tax and interest liability are declared in the return filed but not paid. In such situation, provisions of section 75(12) is applicable.

Though section 50 requires interest is to be paid voluntarily, if the same is not paid, then the department has to follow the procedure of issuing show cause notice. However, one more question is whether the show cause notice can be issued for recovery of interest where the tax has been paid belatedly? There is no specific provision in GST law like sec 11A (15) of the Central Excise Act, 1944 which specifically provides for issue of show cause notice for interest alone. The department may issue showcase notice for recovery of tax not paid before the due date along with interest and appropriate the tax paid.

It is also to be noted that the provisions relating to provisional attachment under section 83 is not applicable to interest unpaid on delayed payment of tax.

One more interesting question is whether the interest is to be paid for wrong availment of credit or wrong availment and utilization of the credit? Section 50 does not cover this situation as it covers with regard to ITC only a situation where excessive mismatched credit is taken again. The provisions of sections 73 or 74 are procedural provisions for recovery proceedings. Said provisions cannot impose interest. Since the provisions relating to ITC is in the GST Act itself, unlike cenvat credit which was there in the rules, the provision for imposing interest should also have been in the GST Act itself. In the case of Steel Authority of India Ltd. V. CCE, Raipur, 2019 (366) ELT769 (S. C.), it was held that to levy interest there must be substantive provision. Demand for interest can be made only if the legislature has specifically intended collection of interest. The legal lacuna in the present GST law may have to be rectified by the government.

Where there is a loss to the revenue on account of the utilization of wrongly taken ITC, then interest must be applicable. If it is merely wrong availment of credit, the interest should not be applicable.

Conclusion:

In view of the above, the interest for delayed payment of tax cannot be recovered without issue of show cause notice. Due process of law is to be followed by the authorities in case of recovery proceedings keeping natural justice in mind.

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.

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ITC on Vehicles used for 'Demo' by Automobile Dealers

- - CA Ravi Kumar Somani
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As we all know that procurement of vehicles for demo is common practice in the automobile dealers industry, since the said vehicles are used for promotional purpose including test drive etc. in order to attract buyers, However, unlike purchase of other vehicles, the intention or objective behind the purchase of demo vehicles is not to sell the same but instead it is mainly to use it for the various business promotion / marketing purposes. Needless to say, that once the above purpose is achieved i.e. usage for approximately two years or about 40,000 Kms, the dealer would eventually sell such demo vehicle in the open market at its current market value.

Since the inception of GST, the issue of eligibility of credit on demo vehicles has been a matter of dispute, which mainly stems from the fact that credit in respect if the motor vehicles is available only when it is used for making the further supply of such motor vehicles.

While one may doubt this restriction on the premise that all the vehicles including Demo vehicles would be eventually sold and also since the demo vehicles are used for business promotion, thereby having a clear nexus with the outward supply and therefore the restriction of availing credit placed in section 17(5) must not be applicable to the automobile dealers.

However, there is another view being expressed that if the Demo vehicles are expensed off instead of capitalizing the same, then the credit becomes admissible. While reserving our view on this proposition, reference can be placed on the advance ruling issued in this regard as under:

In **Chowgule Industries (P.) Ltd. (2019) 107 taxmann.in 293 (AAR, Goa)**, it was held that

- Demo vehicles are used for promotion of sale by providing trial run to customer and therefore it can be considered as a capital asset as per section 2(19) of the CGST Act, 2017 which states that "capital goods" means goods, the value of which is capitalised in the books of account of the person claiming the input tax credit and which are used or intended to be used in the course or furtherance of business.

- Further the Authority of Advance ruling held that these demo vehicles <u>are an essential part of marketing and sales promotion to facilitate supply of cars</u> and therefore ITC on the same could also be availed as it is used for

furtherance of business which is also in line with section 16(1) of the CGST Act, 2017, which states that every registered person shall be entitled to take credit of input tax charged on any supply of goods or services or both which are used or intended to be used in the course or furtherance of his business.

- Further, ITC on the same is also not restricted under Sec 17(5) (a) of CGST Act, 2017 which allows ITC on Motor vehicles if it is used for further supply of such vehicles or conveyances and demo vehicles are used by dealers to train the prospective buyers about the features of the car and how to use them and is also used for driving including the test drives.

Although, the view rendered in above referred advance ruling is in favor of the assesse that the credit in respect of the demo vehicles should be available to the automobile dealers even if the same is capitalized in the books of accounts. However, one must note that this view would be highly disputable and litigative in as much as that the motor vehicles are used for marketing/ promotional purposes in many other industries i.e. they are used for sales & marketing personnel for travel in the course of promotional activities which also has a direct nexus with the outward supply in other industry as well.

Further, the wordings employed in section 17(5) does not give any such relaxation as to availability of credit if the vehicle is used for marketing/ selling purpose or if it has any direct nexus with the outward supply. Therefore, the ruling expressed in the above referred AAR seems to have been given beyond the literal interpretation of the statutory provisions of the act.

Caution to be placed if any person wishes to apply the ratio of this advance ruling for their business, as it is a settled principle that the AAR holds a binding precedent only on the person who has obtained the same and the department can very well take a contrary view.

One may surely argue that the motor vehicle is eventually supplied and therefore the condition that the vehicle must be used for providing the further outward supply is fulfilled and on this premise the credit must not be denied. On this count, it must be noted that if such a liberal interpretation is given to this statement, then each business where an assessee purchases the motor vehicle would sell the same after using for some time and therefore why only automobile dealers industry, the credit on motor vehicle should be eligible for all the industries.

One must refer to an important doctrine of 'Sentential Legis' which would mean the 'men's' or 'intention' i.e. a statute must be construed or read according to the intent or the objective for which it is brought. In other words, the interpretation must be given effect based on the

text and the context where the text is the texture and it is the context which gives the color or meaning to the basis of interpretation.

It is to be noted that the entry of placing restriction on motor vehicles is in the context of blocking the credit on motor vehicles with an intent to deny such credits. Further, the interpretation of its restriction on the similarly placed wordings in the erstwhile Cenvat credit rules, 2004 has a settled view on non-availability of cenvat credit on the motor vehicles unless when it was intended to be sold.

It must also be noted that merely changing the accounting methodology and expensing the cost of such vehicles instead of capitalizing the same would not change the position of the law as long as the main intention of procurement was not for sale.

Apart from the above legal interpretations on eligibility or otherwise of credit, one must note that practically either ways the situation remains more or less the same as the assessee who has not availed the credit can have an option to pay taxes pay tax on the margin treating it as a used car. The same query was also discussed in the **FAQ's** issued by CBIC related to supply of old and used cars.

"...Whether a car dealer can avail the concessional rate benefit for demo cars?

Ans: The Demo car is used for the purpose of test drive and sold at a later date. It could be considered as "used/old car". Therefore, the dealer can avail the rate benefits which are applicable for the supply of old and used cars, subject to conditions mentioned therein..."

Before Parting...

Therefore, considering the above propositions it can be concluded that Demo Vehicles can be termed as "Used Vehicles" and hence a benefit of Concessional rates i.e. margin scheme can be availed. However, it is important to note that in order to avail the concessional rate benefits i.e. margin scheme on sale of Demo car, it is necessary that **ITC has not been availed** on the same at the time of purchase. From the above, one may surely take a considered view of opting a route of paying taxes on the margin scheme (which is more or less same as an impact) instead of inviting litigation in the guise of such unreasoned rulings, this is more so when we know the 'just and wisdom' of the authorities issuing these "advanced" rulings, and thus it is ok to be "penny wise than being a pound foolish" or else the monetization made out of claim of the credits may soon have to be **"Demo"**netized.

(For any feedback or queries, please write to ravikumar@hiregange.com or pratik@hiregange.com)

Pranit Hem Desai Vs Additional Director General, DGGI (2019 (30) G.S.T.L. 396 (Guj.))

Facts:

Bank Account cannot be attached for simple reasons like non filing or delay in filing GST Returns.

The petitioner's bank account was provisionally attached by the officers of DGGI under Section 83 of Central Goods & Services Tax Act, 2017 alleging that the petitioner had procured various invoices of goods and claimed ITC, and they have passed on ITC fraudulently without actual supply of goods to their buyers. The order of provisional attachment issued u/s. 83 wrongly mentioned that same was passed because proceedings u/s. 74 of CGST Act, 2017 were pending, whereas as a matter of fact, no proceedings u/s. 74 were even initiated. Later a corrigendum was immediately issued correcting that the proceedings under Section 67 of the Act were pending and not under Section 74. A writ petition was filed challenging such orders.

Issues involved:

Whether the act of provisional attachment under Section 83 by the officers of DGGI is valid?

Decision:

- ✓ Scope of Section 83 of CGST Act, 2017 empowering department to provisionally attach any property of assessee including Bank accounts during pendency of proceedings to protect interest of Revenue even if there is no outstanding demand pending against him. Reason for introducing this provision is that since investigations and further demand proceedings take lot of time, assessee may not fritter its assets during this long period out of the reach of the Commercial Tax department when the assessment or reassessment is completed.

- ✓ The availment of credits could be said to be justified on two counts : (1) it is a revenue neutral satisfaction and (2) payment of tax although not payable having regard to the fact that there was no supply of goods, yet is to be treated if unavailable credits are reversed if they were wrongly paid.

- ✓ The attachment of bank accounts and trading assets should be resorted to only as a last resort, when assessee may default the ultimate collection of the demand, not to harass the assessee, only if assessee is about to dispose of wholly or any part of his/her property with a view to thwarting the ultimate collection of demand, the attachment of the bank accounts of the assessee would paralyse the functions and business of the assessee and this tool has to be used sparingly because no safeguards have been provided in Section 83.

Comment:

The GST department in many instances has been attaching the bank accounts of the assessees without proper application of law however the courts are interfering and quashing such orders. It should neither be used as a tool to harass the assessee nor should it be used in a manner which may have an irreversible detrimental effect on the business of the assessee. The Government at higher level has been making several efforts to reduce the litigation. But, these unnecessary actions/notices would run contrary to the aforesaid objective and create avoidable litigation.

Safari Retreats Private Limited Vs Chief Commissioner Of CGST (2019 (25) G.S.T.L.

Facts:

The petitioners are mainly carrying on business activity of constructing shopping malls for the purpose of letting out of the same to numerous tenants and lessees. Huge quantities of materials and other inputs in the form of Cement, Sand, Steel, Aluminum, etc. and services in the form of consultancy service, architectural service, legal and professional services etc., are required for the aforesaid construction purpose.

GST paid Goods/services used for construction of shopping is eligible for ITC as renting of shops in mall is liable for

The petitioner was advised by the revenue authorities to deposit the CGST and OGST on the rentals received from tenants without taking input credit on the purchase/supply of goods and services which are consumed and used in the construction of the said shopping mall in view of restrictions placed as per Section 17(5)(d) of CGST Act, 2017.

Writ petition was filed challenging the action of the Revenue authority that 17(5)(d) of the CGST Act is not applicable in the case of Construction of immovable property intending for letting out for rent.

Issues involved:

Whether ITC on goods & services used for construction of a commercial mall used for letting out can be set-off against the GST payable on rents received from the tenants?

Decision:

- ✓ The very purpose of the Act is to make the uniform provision for levy collection of tax, intra state supply of goods and services both central or State and to prevent multi taxation and to obviate the cascading effect of various indirect taxes and reduce multiplicity of indirect taxes.
- ✓ The provision of Section 17(5)(d) is to be read down and the narrow restriction as imposed, reading of the provision by the department, is not required to be accepted, in as much as keeping in mind the language used in Eicher Motors Ltd. - 2002-TIOL-149-SC-CX-LB, the very purpose of the credit is to give benefit to the assessee.
- ✓ The benefit of credit would be available to assessee on goods or services used in construction of immovable property if the assessee is required to pay GST on the rental income arising out of the investment on which he paid the GST.

Comment:

The above judgement shall have long reaching implications in respect of various businesses which are getting/ have got civil construction done and are using such civil structures for further provisioning of taxable outward supplies with no breakage in tax credit chain. This judgement re-establishes the principle of seamless credit in the supply chain as backbone of GST regime. Based on this judgment many 'WRIT' petitions have been filed with various High Courts. As the law is evolving day by day, there will be a development on this issue in due course of time.

Amit Cotton Industries Vs Principal Commissioner Of Customs (2019 (29) G.S.T.L. 200

Facts

The petitioner is a Cotton Ginning Mill and had exported cotton bales to Bangladesh in July, 2017 on payment of IGST and said supply therefore is Zero-rated supply under IGST Act and eligible for refund.

Interest shall be payable for delay of sanctioning the refund of IGST paid on export. Refund can be withheld only for reasons specified in Rule 96(4) only.

There was a delay in sanctioning the refund of IGST from authorities. Exporter asked for interest for delay in refunding the GST amount. The Revenue claimed that IGST refund mechanism is system based and processed electronically in accordance with the declaration which the exporter may give in the shipping bill and the GST return; that as the petitioner had availed the higher drawback, the system declined the IGST refund and relied upon the circular issued by the Government of India vide circular No. 37/2018-Customs, dated 09-10-2018. The excess drawback has already been returned to exchequer with interest by petitioner.

Issues Involved:

Whether we can seek IGST refund, where higher rate of duty drawback has been claimed?

Decision:

- ✓ The shipping bill that exporter filed is deemed to be an application for refund of IGST on zero-rates supply. Rule 96(4) of the CGST Rules makes it abundantly clear that the claim for refund can be withheld only in two circumstances:

  (a) A request has been received from the jurisdictional Commissioner of Central tax, State tax or Union territory tax to withhold the payment of refund due to the person claiming refund in accordance with the provisions of sub-Section (10) or sub-Section (11) of Section 54; or

  (b) The proper officer of Customs determines that the goods were exported in violation of the provisions of the Customs Act, 1962.

- ✓ The Circular 37 explains the provisions of the drawback and it has nothing to do with the IGST refund and it is settled legal proposition that circulars cannot override legal provisions. Therefore, Circular 37 cannot be said to have any legal force, as it runs contrary to Rule 96 of the CGST Rules. Hence, the assessee is entitled to claim refund of interest on IGST for delay in sanctioning the refund.

Comments:

The judgement of the HC has clarified the legal position that the IGST refunds could be withheld only in circumstances permitted under law and shall not be withheld unreasonably. While the intention of the CBIC and GST authorities by applying the provisions of the Circular was to ensure that no exporter is doubly benefitted for the same transaction, the same does not have authority under the existing provisions of GST law. Where the government contemplates expanding the scope of the restrictions for grant of refund, the same may have to be brought only by way of an amendment to the existing provisions of GST law.

Bai Mamubai Trust Vs Suchitra [2019 (31) G.S.T.L. 193 (Bom.)]

Facts:

> Damages received for illegal occupation/usage of property or right is not to be construed as 'supply'

In this case, the factual background was that the complainant had filed a suit to recover possession of a premises (suit premises). The suit proceeded on the cause of action of trespass/unauthorized occupation. The question to be decided, amongst others, was whether payment of damages (royalty) by the defendant for remaining in possession of suit premises, either during the pendency of the suit, or at the time of decree, should be subject to GST.

Issues involved:

(i) Whether GST is liable to be paid on services or assistance rendered by the Court Receiver appointed by this Court under Order XL of the CPC?

(ii) Whether GST is liable to be paid on royalty or payments under a different head paid by a defendant (or in a given case by the plaintiff or third party) to the Court Receiver in respect of properties over which a Court Receiver has been appointed?

(iii) Specifically, in the facts of the present Suit, where the Plaintiff alleges that the Defendant is in illegal occupation of the Suit Premises: Whether there is any 'supply' within the meaning of the CGST Act?

(iv) Whether payment of royalty/damages for remaining in possession of the Suit Premises, either during the pendency of the Suit, or at the time of passing of the decree, falls within the definition of 'consideration' for a 'supply' chargeable to payment of GST under Section 9 of the CGST Act?

Decision:

- ✓ The element of 'reciprocity' is essential to trigger the definition of 'supply' under the GST law. Therefore, in cases where, there is no 'reciprocity', there is no taxable supply.

- ✓ Court-awarded compensation/damages for legal injury will not qualify as supply to the extent the case before the court does not relate to consideration payable for a service/supply made by one party to a case to another.

- ✓ Although the court has not specifically dealt with the applicability of clause 5(e) in Schedule II of the Act, there has been an argument advanced by the complainant that an award of damages for trespass/illegal occupation is not an agreement to the obligation to refrain from an act, to tolerate an act or situation, or to do an act. In order to fall within the gamut of clause 5(e) in Schedule II of the Act, it is imperative that the said transaction should first qualify as 'supply' [Reference is invited to Section 7(1A) of the Act].

Comment:

Considering that the court has held that the damages payable by defendant does not partake the character of consideration for a 'supply', the question of applicability of clause 5(e) in Schedule II of the Act does not arise. Therefore, the services of the Court Receiver are to be considered as services provided by any Court. Accordingly, the fees or charges paid to the Court Receiver are not liable to GST. The Honourable High Court held that GST cannot be levied or recovered on services provided by the Court Receiver.

Mohit Minerals Pvt Ltd Versus Union Of India & 1 other(s) (Guj H.C)

Facts:

IGST cannot be imposed on deemed ocean freights in the case of imports on CIF contracts.

The applicant is importing coal from various countries on FOB (Free on Board) and CIF (sum of Cost, Insurance and Freight) basis. The petitioner pays Custom duty, the value of which includes Ocean Freight. On the same valuation, the claimant also pays IGST. The claimant's grievance is that under the impugned Notifications, the petitioner is asked to pay IGST at the prescribed rate all over again on the ocean freight

Issues involved:

- ✓ Whether levy of IGST on ocean freight would tantamount to double taxation as IGST was already discharged once on the import of goods where such freight amount already formed a part of the valuation of goods?
- ✓ The services of foreign shipping lines were procured by the foreign exporter. Whether the importer shall be part of the said transaction and can he said to be the "recipient" of services for the purpose of payment of IGST?
- ✓ In terms of notification 10/2017-Integrated tax (Rate), the recipient of service is liable to pay tax under reverse charge mechanism (RCM). Whether the complainant is the recipient of the services and be made liable to pay tax under RCM as per this notification?
- ✓ The entire gamut of transaction occurred outside India. Supply of service of transportation of goods by a person in a non-taxable territory to another person in a non-taxable territory from a place outside India up to the Customs station of clearance in India is neither an inter-state supply nor an intra-state supply. In such circumstances, can GST be levied and collected from the writ petitioner?

Decision:

- ✓ The Gujarat High Court examined the provisions of GST law and observed that taxing statutes have to be given a strict interpretation. Importers cannot be deemed to be covered within the scope of the term "recipient" defined under the GST law for the purpose of levy of IGST on ocean freight services.
- ✓ The Revenue has erred in treating importers as recipient of services as the services are actually received by the foreign exporter. The Indian importers were not even liable to pay consideration to the foreign shipping lines and hence, cannot be held liable to pay tax on such services.
- ✓ It was observed that the transaction is not entered into by supplier or the recipient located in India. The mere fact that the transportation of goods terminates in India, will not make such supply of transportation of goods as taking place in India.
- ✓ Accordingly, the Gujarat High Court allowed the writ petitions and declared the impugned notifications as unconstitutional being ultra-vires the provisions of IGST Act.

Comment:

Tax cannot be imposed by Notification, imposition/levy of tax is essential function of legislature. In the contemporary, civilized federal democratic environment single transaction cannot be levied twice for same tax. Indian Governments cannot levy tax on transactions occurred in foreign land through the Notifications.

State Of West Bengal Versus Calcutta Club Limited (SC) - [2019-TIOL-499-SC-ST-LB]

Facts

Way back in 1970, the Hon'ble SC ruled that there is no sale of goods between the clubs / associations and its members. This ruling was given based on the universal settled legal precedence that clubs/associations and its members are one and the same (popularly known as 'Doctrine of Mutuality').

Incorporated clubs/societies not liable to VAT/service tax when services provided or goods sold to its members. Same challenge is very much possible in GST

Thereafter, Indian Constitution was amended to make the goods movement between unincorporated associations and its members as 'sale' and to levy sales tax. Even after the amendment, the Hon'ble Supreme court & lower courts had been continuously holding that the goods movement between clubs/associations and its members is not a 'sale'. The same view was held in the context of service tax liability as well.

The Division bench of Hon'ble Apex court has referred matter to larger bench to clarify the impact of the constitutional amendment and correctness of the decisions rendered in the past. The appeals filed by the service tax department are also clubbed with these petitions and placed before the Hon'ble Supreme court (Larger bench).

Issues Involved:

The issues that fall for consideration before the Larger bench of Hon'ble Apex court are as follows:

1. Whether the doctrine of mutuality is still applicable to incorporated clubs or any club after the 46th Amendment to Article 366(29-A) of the Constitution of India?
2. Whether the judgment of Supreme Court in Young Men's Indian Assn. [CTO v. Young Men's Indian Assn., (1970) 1 SCC 462] still holds the field even after the 46th Amendment of the Constitution of India; and whether the decisions in Cosmopolitan Club v. State of T.N., (2017) 5 SCC 635; Fateh Maidan Club v. CTO (2017) 5 S C 638 which remitted the matter applying the doctrine of mutuality after the constitutional amendment can be treated to be stating the correct principle of law?
3. Whether the 46th Amendment to the Constitution, by deeming fiction provides that provision of food and beverages by the incorporated clubs to its permanent members constitute sale there by holding the same to be liable to sales tax?"
4. Whether there is any provision of service by the clubs / associations to its members and consequently liable for service tax?

Decision:

After threadbare analysis of the legal position before and after the constitutional amendment, the larger bench of Supreme court held that

- ✓ The doctrine of mutuality continues to be applicable to incorporated and unincorporated members' clubs after the 46th Amendment adding Article 366(29-A) to the Constitution of India.
- ✓ Young Men's Indian Association (supra) and other judgments which applied this doctrine continue to hold the field even after the 46th Amendment.
- ✓ Sub-clause (f) of Article 366(29-A) has no application to members' clubs.
- ✓ Service tax is not liable on the clubs/associations for the amounts received from its members.

- ✓ The deeming fictions created in the Service Tax law does not accommodate levy of service tax in the case of incorporated clubs/associations/societies.

Comments:

In light of the above cited decision, Service tax/VAT is not liable on the clubs or associations and issue is settled now. The clubs/association who are contesting the Service tax/VAT demands raised can rely on this and get the relief. Refund of the taxes paid under protest can be claimed as refund now citing the above decision.

Link to GST:

The rationale of the aforesaid decisions squarely applies even under GST law as the definitions given under service tax law and in GST are similar thereby all clubs/associations can possibly contest GST liability.

Maxim Tubes Company Pvt. Ltd. Versus Union of India [2019 (368) E.L.T. 337 (Guj.)]

Facts:

Petitioner is a renowned exporter and imports raw material against advance authorization (AA). AA holders are eligible to claim exemption from payment of IGST and compensation cess w.e.f. 13-10-2017 vide notification No. 79/2017-Cus dated 13th Oct, 2017 (amended original notification 18/2015-Cus dated 01st Apr, 2015).

Advance Authorization Holders is eligible for IGST exemption on their imports even prior to amendment

As per the above notifications the exemption from IGST and Compensation cess is subject to satisfaction of the following conditions,

a) Imported goods should be used only in physical exports
b) Pre import conditions

Note: The corresponding amendment was made in chapter 4.14 of FTP vide Notification no. 33/2015-2020 dated 13th Oct, 2017.
However, pre import condition is removed w.e.f.10th Jan, 2019 vide notification No. 01/2019-Cus dated 10th Jan, 2019 (corresponding notification issued in FTP is 53/2015-20). Pre import condition is limited to the period.

Issue:

Whether the conditions prescribed vide said notifications for claiming exemption of IGST and Compensation cess are valid?

Discussion:

- ✓ The notifications imposing pre import condition are fails to define the term "Pre-import conditions". Hence in the absence of a clear direction as to what would amount to a "pre-import condition", makes such condition ambiguous and vague and hence, the petitioners cannot be compelled to adhere to the same.
- ✓ If the pre import conditions is understood as inputs should be imported first and exported goods should be manufactured out of such inputs, exporters can't fulfil their export obligation within delivery time. In case of

many exporters, the period of delivery as per export order would be 3 to 4 months, whereas time needed to comply with the pre-import condition would be around 6 months.

- ✓ Considering the above difficulties, it is more or less impossible to make any exports under an AA without violating the condition of pre-import. In effect and substance, what is given by one hand is taken away by the other. In other words, in the light of the condition of pre-import, the benefit of exemption from levy of integrated tax and GST compensation cess becomes more or less illusory.

- ✓ The export in anticipation of Advance Authorization as contemplated in paragraph 4.27 of the Handbook and the "pre-import condition" contained in paragraph 4.14 of the Foreign Trade Policy and condition (xii) of the exemption notification, cannot stand together.

- ✓ The levies under sub-sections (3) and (5) of Section 3 of the Customs Tariff Act are replaced by sub-sections (7) and (9) of Section 3 of the Customs Tariff Act and there is no change in the basic scheme warranting a different procedure.

- ✓ In the light of the above discussion, this Court is of the view that paragraph 4.14 of the Foreign Trade Policy whereby a condition of pre-import has been put for availing the benefit of exemption from levy of integrated tax and GST compensation cess vide Notification No. 33/2015-2020, dated 13th October, 2017 as well as the condition (xii) inserted in Notification No. 18/2015, dated 1st April, 2015 vide Notification No. 79/2017, dated 13-10-2017, are ultra vires the scheme of the Foreign Trade Policy, 2015-2020 and the Handbook of Procedure and are, therefore, required to be quashed and set aside.

Comment:

The exporters who have received summons/notices for payment of IGST exemption availed along with interest and penalties in violation of the pre import condition can use this decision to defend the case.

Siddharth Enterprises Vs The Nodal Officer [2019 (9) TMI 319-Gujarat HC]

Facts:

Assessee has failed to file form GST TRAN-1 within the time limit prescribed under Rule 117 of CGST Act, 2017 due to technical glitches. Subsequently, the time limit was extended till 31st March 2019 for all those tax payers who could not submit the said declaration by the due date on account of the technical difficulties.

Pre-existing credits are indefeasible and vested rights can be claimed even after time limit for filing Form Trans-1 is over

However, the assessee's request to enable the common portal has not reached the Jurisdictional officer with in time limit specified and struck with the Nodal officer which lead to non-filing of return. Hence, assessee has filed a writ petition requesting the court to direct the High Court to allow filing TRAN-01.

Issue:

Whether the time limit prescribed under Rule 117 of CGST Act, 2017 for carry forwarding of transitional credit is procedural in nature or mandatory in nature?

Decision:

- ✓ The due date contemplated under Rule 117 of the CGST Rules to claim the transitional credit is procedural in nature and thus merely directory and not a mandatory provision;
- ✓ The right to carry forward credit is a right or privilege, acquired and accrued under the repealed Central Excise Act, 1944 (1 of 1944) and it has been saved under Section 174(2)(c) of the CGST Act, 2017 and, therefore, it cannot be allowed to lapse under Rule 117 of the CGST, 2017, for failure to file declaration form GST Tran-1 within the due date, i. e. 27. 12. 2017;
- ✓ The time limit prescribed under Rule 117 to allow the availment of the ITC with respect to the purchase of goods and services made in the pre-GST regime and post- GST regime is arbitrary, irrational and unreasonable and, therefore, it is violative of Article 14 of the Constitution;
- ✓ The phrase "technical difficulties on the common portal" should be given a liberal interpretation because it is a settled principle of law that an interpretation unduly restricting the scope of a beneficial provision should be avoided so that it may not take away with one hand what the policy gives with the other;
- ✓ By not allowing the right to carry forward the CENVAT credit for not being able to file the form GST TRAN-1 within the due date may severely dent the writ-applicants working capital and may diminish their ability to continue with the business and such action violates the mandate of Article 19(1)(g) of the Constitution;
- ✓ The liability to pay GST on sale of stock carried forward from the previous tax regime without corresponding input tax credit would lead to double taxation on the same subject matter and is, therefore, arbitrary and irrational;
- ✓ The revenue department is directed to permit the writ applicants to allow filing of declaration in form GST TRAN-1 and GST TRAN-2

Comment:

It is well known and settled principle that mere non fulfilment of procedures cannot take away the benefit available to the tax payers. Hence, the above case law is an add-on and supportive to the established principle. Further the due date is now extended to 31.12.2019 for filing the Form Tran-01 for the persons who missed to file due to technical glitches. Whoever have missed can file Form Tran-01 now taking either the time extension given by the Government or the above cited decision and able to transfer the Pre-GST ITC into GST.

Notes:

- ➢ The same view is expressed in case of Adfert Technologies Pvt Ltd vs Union of India and others in the High court of Panjab & Haryana.
- ➢ That contrary view was expressed in case of M/s. Willowood Chemicals Pvt Ltd Vs UOI 2018-TIOL-133-HC-AHM-GST002E
- ➢ To nullify the said judgments to some extent, the Government through amendment bill, 2020 seeks to amend section 140 of the CGST Act relating to transitional arrangements for input tax credit, so as to prescribe the time limit and the manner for availing input tax credit against certain unavailed credit under the existing law. This amendment shall take effect retrospectively from the 1st day of July, 2017. Even after the retrospective amendment, the issue is contentious and defend with other arguments. Whoever missed to file the Trans-1, now the assessee can approach the jurisdictional High Court for relief.

Union of India Vs Mohit Mineral Pvt Ltd (SC)- [2018 (17) G.S.T.L. 561 (S.C.)]

Facts:

Mohit Mineral Pvt Ltd is a Company incorporated under the Companies Act which is a trader of imported and Indian coal. In the instant case, the validity of the Goods and Services Tax (Compensation to States) Act, 2017 enacted by Parliament as well as the Goods and Services Tax Compensation Cess Rules, 2017, the 2 rules framed by the Central Government in exercise of power under Section 11 of the Goods and Services Tax (Compensation to States) Act, 2017 are challenged before Delhi High Court.

Parliament is vested with authority to make law on Compensation Cess to States Act. Coal Cess is not eligible for ITC for set of against Compensation Cess

The Delhi High Court give an interim order in favour of the petitioner and the Respondents i.e. Government of India preferred an appeal before the Supreme Court. The Government also requested to transfer the case before itself and try case on its own. The supreme court acceded to the request and heard the matter in front of it.

Issues involved:

- ✓ Whether the Compensation Cess Act, 2017 is beyond the legislative competence of Parliament?
- ✓ Whether Compensation to States Act, 2017 violates Constitution (One Hundred and First Amendment) Act, 2016 and is against the objective of Constitution (One Hundred and First Amendment) Act, 2016?
- ✓ Whether the Compensation to States Act, 2017 is a colourable legislation?
- ✓ Whether levy of Compensation to States Cess and GST on the same taxing event is permissible in law?
- ✓ Whether on the basis of Clean Energy Cess paid by the petitioner till 30th June 2017, the petitioner is entitled for set off in payment of Compensation to States Cess?

Decision:

- ✓ The Compensation to States Act, 2017 is not beyond the legislative competence of the Parliament
- ✓ The Compensation to States Act, 2017 does not violate Constitution (One Hundred and First Amendment) Act, 2016 nor is against the objective of Constitution (One Hundred and First Amendment) Act, 2016.
- ✓ The Compensation to States Act is not a colourable legislation.
- ✓ Levy of Compensation to States Cess is an increment to goods and services tax which is permissible in law.
- ✓ The petitioner is not entitled for any set off of payments made towards Clean Energy Cess in payment of Compensations to States Cess

Comment:

Supreme Court had the rejected the contentions of double taxation. It was observed that it GST and compensation cess being were two different things in law and were not prohibited, It was held that compensation cess must be seen as an increment to GST. Supreme Court told Parliament is entitled make any law with respect to Goods & Service Tax Act.

Commercial Steel Engineering Corporation Vs State of Bihar (Pat.) – [2019 (28) G.S.T.L.

Mere availment of ITC without utilization not liable for interest

Facts:

Commercial Steel Engineering Corporation is a partnership firm having its works at Bihta in the district of Patna.

Entity has filed an application in terms of Section 140 of the Bihar Goods and Services Tax Act, 2017 (hereinafter referred to as 'the BGST Act') to take credit of the surplus Value Added Tax and Entry Tax and to carry forward the same in his electronic ledger in form TRAN-1 for the two years 2007-08 and 2011-12.

Issues involved:

- ✓ Whether credit reflected in Electronic Credit Ledger of assessee would amounts to either availment or utilization of credit.
- ✓ Whether interest can be levied for mere availment of credit without utilization.
- ✓ Whether penal consequence under section 73 is applicable on the above credit?

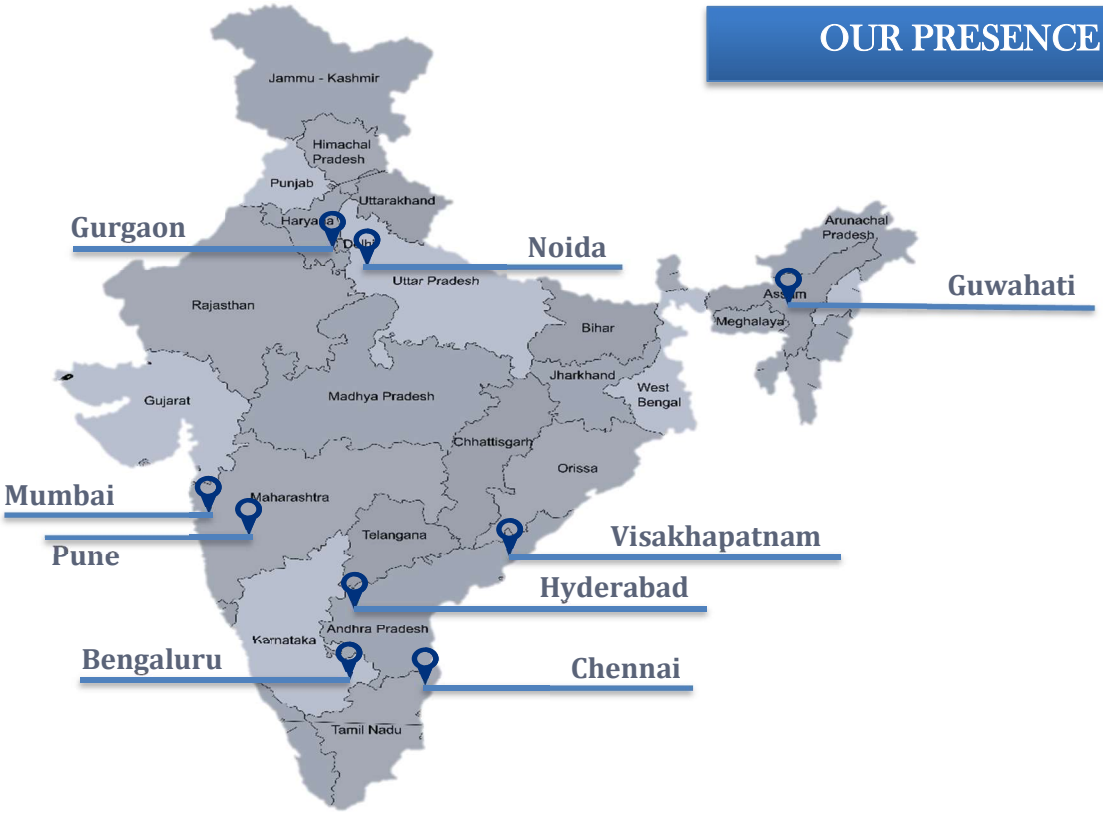
Decision:

- ✓ Reflection of transitional credit in an electronic ledger is not sufficient to draw penal proceedings until the same or any portion thereof, is put to use so as to become recoverable. Order passed by the Assistant Commissioner of State Taxes in purported exercise of power vested in him under section 73 of 'the BGST Act' is held per se illegal and an abuse of the statutory jurisdiction and is accordingly quashed and set aside. Petition allowed.

Comment:

As per the above decision, interest cannot be demanded for mere availment of credit without its utilization.

OUR PRESENCE



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