Legal Updates

Aug 2023

Summary of Major Legal Updates

Key Highlights:

- Reversal of ITC by the buyer wherein the seller fails to pay the tax to the Government.
- Market consultancy services and investment advisory services are not intermediary services
- Cash cannot be seized under Section 67 of the GST Act.
- No Audit under section 65 to be made for the persons whose registration has been cancelled.
- Burden to bear incidence of GST is on the recipient.
- SCN and Order uploaded in "Additional Notices and Orders" tab – Considering complex architecture of GST portal HC remanded for fresh adjudication
- Issuance of Credit Note by the recipient not mandatory when goods returned before delivery – Detention of goods under Section 129 invalid
- Pre-deposit paid vide DRC-03 not admitted while filing of Appeal in GST portal – Court allowed the benefit of payment
- Credit cannot be disputed merely on account of non-reflection in GSTR-2A

H N A & Co. LLP
Charted Accountants

Index

1. Reversal of ITC by the buyer wherein the seller fails to pay the tax to the Government.

M/S. Suncraft Energy Private Limited and Another Versus the Assistant Commissioner, State Tax, Ballygunge Charge and Others. [Hon'ble Calcutta High Court MAT 1218 OF 2023 WITH I.A NO. CAN 1 OF 2023 Dated: - 2-8-2023]

Facts of the Case:

- ✓ In the instant case, the petitioner has been served with an order to reverse the ITC availed by him corresponding to the supplies, the details of which is not reflecting in GSTR 1 of the supplier.
- ✓ The petitioner herein was in possession of the tax invoice and also was able to substantiate the payment including GST to the seller of goods against the said invoices through bank statement.

Contention of the Petitioner

- ✓ Contention of the appellant is that despite having fulfilled all the conditions as has been enumerated under Section 16(2) of the Act, the respondent erred in reversing the credit availed and directing the appellant to deposit the tax which has already been paid to the seller at the time of availing the goods/ services.
- ✓ In support appellant placed reliance on the decision of the Hon'ble Supreme Court in Union of India (UOI) Versus Bharti Airtel Ltd. And Ors., Press release dated 18th Oct 2018 & 04th May 2018 & Hon'ble Delhi High Court in Arise India Limited and Ors. Versus Commissioner of Trade and Taxes, Delhi and Ors

Decision Held

The Hon'ble High Court in the above case observed that:

- ✓ The action of the Department has to be branded as arbitrary as the same has been initiated without resorting to any action against the selling dealer and ignoring the tax invoices produced by the appellant as well as the bank statement to substantiate that they have paid the consideration to the seller.
- ✓ Before directing the appellant to reverse the ITC and remit the same to the government, the department ought to have acted against the selling dealer and unless.
- ✓ Until the department is able to bring out the exceptional case where there has been collusion between the appellant and the seller or where the seller is missing or has closed down its business or does not have any assets and such other contingencies, the department was not justified in

directing the appellant to reverse the input tax credit availed by them - the demand raised on the appellant is not sustainable.

M/S. Aastha Enterprises Versus the State of Bihar. [Hon'ble Patna High Court Civil Writ Jurisdiction Case No. 10395 of 2023 Dated: - 18-8-2023]

- ✓ The facts of this case were identical to the M/s. Suncraft Energy Private Limited discussed above.

Contention of the Petitioner

- ✓ Contention of the petitioner is that the recovery now sought has the character of a double taxation and it should be the department who proceeds against the selling dealer to recover the collected amount of tax; which if not paid after collection, entails penalties under the tax enactment.

Decision Held

Hon'ble Patna High Court observed that:

- ✓ The decision in case of M/s D.Y. Beathel Enterprises (which provides that the department ought to have proceeded against the selling dealer for recovery of tax) has been under the VAT Act and ignores the provision under sub-clause (c) of Section 16 (2) of the GST Act.
- ✓ The benefit of availment of ITC is one conferred by the statute and if the conditions prescribed in the statute are not complied; no benefit flows to the claimant.
- ✓ The seller and purchaser have an independent contract without the junction of the Government.
- ✓ The contention of double taxation does not impress especially since the claim is denied only when the supplier who collected tax from the purchaser fails to pay it to the Government.
- ✓ The statutory levy and the further benefit of Input Tax Credit conferred on the purchasing dealer depends not only upon the collection by the seller but also the due payment by the seller to the Government and when the supplier fails to comply with the statutory requirement, the purchasing dealer cannot claim Input Tax Credit.
- ✓ The remedy available to the purchasing dealer is only to proceed for recovery against the seller.
- ✓ Further it was held that even if such recovery from the supplier is effected by the purchasing dealer; the department would be able to recover the tax amount collected and not paid to the exchequer, from the selling dealer since the rigor of the provisions for recovery on failure to pay up, after collecting tax, enables the Government so to do.

HNA Comments: - The Government had initiated comparing ITC of GSTR 3B with ITC of GSTR 2A and initiate action under Section 61 of the GST Act somewhere around the year 2020. Finally after three years, the matter has reached High Courts and we have been seeing regular judgements on the correctness of such actions. Accordingly, the above are two complete contradictory cases in

as much as in Suncraft Energy, the Calcutta HC has held that the buyer is not required to reverse ITC merely because the same is not appearing in GSTR 2A whereas in Aastha Enterprises, Patna High Court has held that the buyer is liable to reverse ITC in such a scenario. Nevertheless, the taxpayers may have to wait for this matter to reach before the Supreme Court before the dust finally settles on such issues for the period prior to the implementation of Section 16(2)(aa) of the GST Act.

2. Market consultancy services and investment advisory services are not intermediary services

M/S. Cube Highways and Transportation Assets Advisor Private Limited Versus Assistant Commissioner CGST Division & Ors
[Hon'ble Delhi High Court W.P.(C) 14427/2022 and W.P.(C) 14461/2022,W.P.(C) 6014/2023 Dated: - 17-8-2023]

Facts of the Case:

- ✓ The petitioner in this case was engaged in the provision of Management Consultancy services in the nature of Investment Advisory and Marketing Survey and Advisory services to entities located outside India which includes sharing of market information, market trends and businesses, legal and regulation information/ environment in India.
- ✓ The services inter-alia includes identifying potential opportunities for investments in India, analysing investment returns and related risks, preparing report etc. basis which the overseas entity makes a decision whether to make a particular investment or not.
- ✓ Herein the authorities have claimed that with respect to the nature of the service, it would not classify as an export since the place of supply would fall within India in terms Section 13 of the IGST.

Contention of the Petitioner & Department

- ✓ The Adjudicating Authority observed that the group of companies, which included the petitioner, was engaged in the construction of highways, toll operations etc. in India and held that the petitioner renders services in relation to those projects in India.
- ✓ The Adjudicating Authority, thus, concluded that Sub-section (3)(b), Sub-section (4) and Sub-section (7)(b) of Section 13 of the IGST Act were attracted - Concededly, the petitioner has not rendered any services in more than one state or union territory as envisaged in Sub-section (7) of Section 13 of the IGST Act.

- ✓ Petitioner contended that merely because customers in Singapore may have, on the basis of advisory services given by the petitioner, made the investments in entities in India, cannot be construed to mean that the petitioner had rendered the advisory services as an 'Intermediary'.

Decision Held

The Hon'ble High Court in the above case observed that:

- ✓ Section 13 (3) (b) of the IGST Act is inapplicable as it relates to services which are supplied to an individual and which require the physical presence of the recipient (or a person acting on his behalf) with the supplier of the services. There is no allegation that the petitioner has rendered any service to an individual.
- ✓ Section 13 (4) of the IGST Act is also inapplicable as the supply of services contemplated under the said clause are not those that are supplied directly in relation to an immovable property. Such services include services supplied by experts and estate agents, supply of accommodation by a hotel, inn, guest house, club or campsite. The petitioner in this case has provided invoices which indicated that it was charging "market services and advisory fee".
- ✓ In the concept of an 'Intermediary' there are three parties, namely,
    - the supplier of principal service;
    - the recipient of the principal service and
    - an intermediary facilitating or arranging the said supply. Where a party renders advisory or consultancy services on its own account and does not merely arrange it from another supplier or facilitate such supply, there are only two entities, namely, the service provider and the service recipient. In such a case, the rendering of consultancy services cannot be considered as 'Intermediary Services' and thus the provision of Section 13(8) would not apply.
- ✓ The services rendered by the petitioner qualify to be an export of service.

H NA Comments: - We have ample of jurisprudence from the earlier regime to conclude that the market consultancy services do not qualify as an intermediary service. To continue the same line of jurisprudence, the above judgement has made it clear that marketing consultancy services will not be considered as an intermediary service under GST.

3. Cash not be seized under Section 67 of the GST Act

M/S. Deepak Khandelwal Proprietor M/s. Shri Shyam Metal Versus Commissioner Of CGST, Delhi West & Anr
[Hon'ble Delhi High Court W.P.(C) 6739/2021 Dated: - 17-8-2023]

Facts of the Case:

- ✓ In the instant case, a search was conducted at the petitioner's residence under Sub-section (2) of Section 67 of the Act wherein along with certain books and documents, some cash & silver bars have also been seized by the authority.

Contention of the Petitioner & Department

- ✓ It is contended that that the proper officer does not have any powers under Section 67 of the Act to seize currency as the same is not 'goods' as defined under the Act whereas has the power to seize the goods under Sub-section (2) of Section 67 of the Act only if he has reasons to believe that the same are liable for confiscation.
- ✓ The petitioner also claims that the goods seized are liable to be returned if no notice in respect of the said goods is served within a period of six months from the date of seizure of the said goods.
- ✓ He further contended that the term 'things' was required to be construed by applying the doctrine of ejusdem generis, as taking colour from the preceding words, 'documents' and 'books'.
- ✓ Revenue contended that silver bars and cash seized by the proper officer were not covered under the definition of 'goods' and therefore, there was no requirement for issuing any show cause notice for confiscation of the same. He submitted that the silver bars and cash were seized as 'things' and not as 'goods' that were liable for confiscation. He referred to the definition of the word 'goods' under the Act and contended that 'money' and 'securities' were excluded from the said definition. He contended that silver bars were 'securities' and were seized as such.

Decision Held

The Hon'ble High Court in this case observed that **the word 'things' under Sub-section (2) of Section 67 of the Act is mutually exclusive to the term 'goods'** & therefore the cash & silvers are not liable to be seized under the power of Section 67 on a note that:

- ✓ The search and seizure operations under Section 67 of the Act are not for the purpose of seizing unaccounted income or assets or ensuring that the same is taxed. It is not a machinery provision for recovery of tax but for ensuring compliance and to aid proceedings against evasion of tax.
- ✓ The word 'things' under Section 67 is required to be read, ejusdem generis, with the preceding words 'documents' and 'books'. It is apparent that the legislative intent of using a wide term such as 'things' is to include all material that may be informative or contain information, which may be useful for or relevant to any proceedings under the Act.

- ✓ Applying the rule of purposive interpretation, it was held that the power of the proper officer to seize books or documents or things does not extend to seizing valuable assets for the reasons that they are unaccounted for or may be liable to confiscation under any other statute.

  HNA Comments: - We have seen a lot of judgements from different courts holding that cash is not "things" hence, it cannot be seized under Section 67 of the GST Act. The above judgement has upheld the same legal principle.

4. No Audit under section 65 to be made for the persons whose registration has been cancelled.

M/S. Tvl. Raja Stores vs. the Assistant Commissioner
[Hon'ble Madras High Court W.P.(MD).No. 15291 of 2023 And W.M.P.(MD).No. 12890 of 2023 Dated: - 11-8-2023]

Facts of the case

- ✓ The authorities have allowed the petitioner to close his business with effect from 31.03.2023 in the instant case and later has issued an impugned show cause notice dated 19.05.2023 for conducting an audit since the petitioner failed to pay the collected tax.
- ✓ Such notice for audit is hereby challenged on the grounds that under Section 65, the authorities are empowered to conduct an audit if the concern is a registered unit and not where the registration has sought to be cancelled.

Contention of the Petitioner & Department

- ✓ The respondents have filed a counter stating that the petitioner had challenged the show cause notice, the petitioner is bound to submit a reply before the authorities. The Writ Petition cannot be maintained against the show cause notice stage itself. Further, the respondents submitted that the grounds raised in the Writ Petition cannot be accepted, since it is a recently closed unit and the respondent has every right to conduct an audit. Therefore, the respondents prayed to dismiss this Writ Petition.
- ✓ The contention of petitioner was that under Section 65, the respondents are empowered to conduct an audit if the concern is a registered unit. As on the date, the petitioner's registration is cancelled, he is an unregistered concern. Therefore, the respondent is not having any jurisdiction to conduct an audit.

Decision Held

The Hon'ble High Court in the above case observed that:

- ✓ Section 65 of the CGST Act states that the Commissioner or any other officer authorized through a general or specific order to conduct an audit for any registered person. When the section specifically states 'any registered person', then it ought to be construed as an existence concern and the unregistered person is exempted from the purview of the said section 65.
- ✓ It is stated that the audit can be conducted of the said registered persons "for such period", "for such frequency" and "in such manner" but when a Section provides for a periodical audit, the respondent has failed to conduct an audit for all these years, suddenly cannot wake up and conduct an audit.
- ✓ The Audit could not be conducted in the instant case, however, this does not preclude the respondent from initiating assessment proceedings for the said concern under Sections 73 and 74.

HNA Comments: - It is logical that if a taxpayer has closed down his business then he should not be bothered again by the GST audit department. The same has been upheld in the above case as well. Hence, if the GST audit department approaches such taxpayers then the best recourse is to make a written submission to the GST audit department and request them to drop their proceedings since the registration has been cancelled by the GST department.

5. Service of Notice to a person having Cancelled Registration on the Common Portal is valid

M/S. Koduvayur Constructions Versus the Assistant Commissioner
[Hon'ble Kerala High Court WP (C) NO. 21212 OF 2023 Dated: - 7-8-2023]

Facts of the case

- ✓ The petitioner's case is that it was a registered dealer under the CGST/SGST Acts, 2017. The petitioner's GST registration was cancelled as per order with effect from 30.9.2021.
- ✓ The petitioner was under the impression that it had no liability to pay under GST.
- ✓ However, the petitioner has been served with the order dated 14.10.2022 on the GST portal, calling upon the petitioner to pay an amount of Rs.19,22,566/-.

Contention of the petitioner

- ✓ The petitioner alleges that it was not served with proper notice as provided under the Act. Hence, the entire proceedings are vitiated and the order is liable to be quashed.

Decision Held

The Hon'ble High Court in the above case observed that:

- ✓ Clauses (a) to (f) of sub-sec (1) of Section169 of CGST Act clearly shows that any decision, order, summons, notice or communication under the Act and Rules can be served on the assessee through any one of the methods therein which includes the availability on the common portal.
- ✓ It was the bounden duty of the petitioner to have verified its common portal that is made available as per the provision.
- ✓ The contentions raised in the writ petition that the assessment order was not served as per the provisions of the Act is untenable.

HNA Comments: - It is apposite to note that under GST, unfortunately, the Revenue is very well empowered to make any communication to the taxpayers by way of uploading the same to the online GST portal. The above order is an evidence to the same. Hence, it is of utmost important for the taxpayers to keep track of their online GST portal at all times.

6. Burden to bear incidence of GST is on the recipient

M/S. EKK Infrastructure Limited Versus Kerala State Transport Project
[Hon'ble Kerala High Court WP(C) NO. 12471 OF 2021 WP(C) NO. 12454 OF 2021
Dated: - 26-7-2023]

Facts of the case

- ✓ The Kerala State Transport Project (KSTP) has invited bids for a project insisting that the bidders to submit their tender without the GST amount. In the instant case, the tender was awarded to the petitioner.
- ✓ On a request to pay the 1st instalment of the bill raised inclusive of GST @12%, the KSTP approved only an amount of the contract price deducting the GST claim contenting that the contract itself provided that the contract amount would be exclusive of GST and that the GST has to be suffered by the petitioner.

Contention of the petitioner & respondent

- ✓ Petitioner contended that Clause 12.1 of the Letter of Bid - Financial Part specifically provided that the Letter of Bid shall be prepared using the relevant forms furnished in Section IV of the bid document. It is stated that the forms must be completed without any alterations to the text and no substitutes shall be accepted except as provided under ITB 20.2.
- ✓ In Clause (b) of the letter format, it is clearly stated that the total price of the bid including any discounts offered is to be entered excluding the GST. There was no column provided to furnish the GST amount along with the bid.

- ✓ It is further contended that subsequent to the issue raised by the petitioner, the KSTP has made changes in the tender notification by stating that the rates quoted must be inclusive of GST.
- ✓ Respondent contended that as per Clause 19.1.2 of Article 19 of the agreement entered into between the parties, the contract price is inclusive of all duties, taxes, royalty and fees and that as such, the petitioner ought to have quoted the rate inclusive of taxes.
- ✓ It is submitted that the provision made in the form for quoting the price excluding GST was a typographical error in the Letter of Bid- Financial Part which later came to the notice of the respondents and that the same has been corrected in respect of later works. It is contended that in the bidding document other than the Letter of Bid- Financial Part, it is clearly mentioned that the bid price/contract price is inclusive of all taxes including GST and the petitioner ought to have brought this matter to the notice of the respondents during tendering stage and before executing the agreement.

Decision Held

The Hon'ble High Court in the above case observed that:

- ✓ Since the petitioner was required to make a quote excluding the GST amount, the petitioner cannot be mulcted (extract money by fine or tax) with a liability of payment of GST.
- ✓ The KSTP, who is the ultimate beneficiary of the services performed by the petitioner has to pay the GST regarding the work carried out.
- ✓ There will be a direction to the respondents to consider the claim of the petitioner for the GST element as well and to take necessary steps for the release of the amounts due in accordance with the law.

HNA Comments: - Since the implementation of GST, owing to improper contractual clauses or other reasons, the suppliers and recipients have been facing issues as to who would bear the incidence of taxes. Amongst the highly impacted industries are the infrastructure sector and real estate sector. In light of the same dispute, the above decision would pave the way for the suppliers to recover taxes from the recipients. In this scenario, the taxpayers should go into arbitration for an effective remedy.

7. SCN and Order uploaded in "Additional Notices and Orders" tab – Considering complex architecture of GST portal HC remanded for fresh adjudication

M/s. Sabari Infra Pvt. Ltd. v. Assisstant Commissioner (ST)
[2023 (10) Centax 92 (Mad.)]

Facts of the case

- ✓ The Department had served SCN to the assessee by uploading in "Additional Notices and Orders" tab in the GST portal. The assessee did not notice the same and subsequently PH intimation was served in the same tab and orders were also passed confirming the demand.
- ✓ The assessee filed writ petition before High Court of Madras seeking relief to quash the proceedings and order for fresh adjudication.

Contention of the Petitioner

- ✓ The petitioner brought attention to the GST manual available in the web portal which reads as under:

  How can I view or download the notices and demand orders issued by the GST tax authorities?

  To view or download the notices and demand orders issues by the GST tax authorities, perform the following steps:

  1. Access the www.gst.gov.in URL. The GST Home page is displayed.

  2. Login to the GST Portal with valid credentials.

  3. Click the Services > User Services > View Notices and Orders command."

- ✓ The petitioner submitted that had the notice been uploaded in the correct place, the petitioner would have seen it and replied to the same and participated in the proceedings. Since the Notices and the Orders were hosted in the Dashboard of the petitioner meant for "Additional Notices and Orders", the petitioner failed to notice and file a reply to the Show Cause Notice.

Contention of the Respondents

- ✓ The Respondents argued that the impugned orders are dated 29-4-2023 and the petitioner still has time to file an appeal before the Appellate Commissioner under section 107 of the respective GST Acts.
- ✓ It is submitted that the notices were uploaded, although under the heading meant for 'Additional Notices and Orders', it is submitted that there was no violation of principles of natural justice, they were communicated to the petitioner and therefore, the impugned orders do not call for any interference.

Decision

- ✓ The problem has arisen on account of the complex architecture of the web portal.

- ✓ The GST portal has been designed to facilitate easy access of information. It has however resulted in the petitioner failing to notice the notice that was issued prior to the impugned order on 20-3-2023.
- ✓ It went unnoticed by the petitioner, as a result of which, the impugned orders have been passed on 29-4-2023.
- ✓ Considering the above, the impugned orders are quashed and the case is remitted back to the respondent to pass a fresh order within a period of 60 days from the date of receipt of a copy of this order

HNA Comments: - It is observed that in a majority of the cases the Department uploads the notices in the Additional Notices and Orders tab. This judgment can be relied upon when the assessee fails to make note of the notices being uploaded in the Additional Notices and Orders tab.

8. Issuance of Credit Note by the recipient not mandatory when goods returned before delivery – Detention of goods under Section 129 invalid

M/s. Luminous Power Technologies Pvt. Ltd. v. State Tax Officer
[2023 (9) Centax 342 (Mad.)]

Facts of the case

- ✓ The petitioner sent solar power generating panels to the Customer vide four different invoices and E-way Bill. Due to heavy down pour, the panels got wet and therefore the Customer refused to take delivery of the goods. Therefore, the petitioner on generation of fresh E-way Bills transported the goods back to the factory.
- ✓ The goods were intercepted by the squad officer and notice was served on the ground that invoice is issued supplying goods from Chennai (petitioner location) to tiruppur (Customer location), however when the goods were intercepted, they were returning back from tiruppur to Chennai.
- ✓ The Authority alleged that the goods were not accompanied by delivery challan/debit note/credit note as per Section 34 of the CGST Act, 2017.

Decision

- ✓ On perusal of Section 34 of the CGST Act, 2017 the goods which are being returned need not necessarily accompany a Credit Note.
- ✓ The Credit Note or Debit Note as the case may be are intended only for adjustment of tax liabilities on account of return of the goods and where tax charged in that tax invoice is found to exceed the taxable value or tax payable in respect of such supply.

- ✓ Credit note under section 34 is not required to be issued at the stage, when the goods were being returned without even they having been received by the recipient. Issuance of Credit Note and/or Debit Note under section 34(1) of the CGST Act, is only for adjustment of tax liability.
- ✓ The petitioner has to merely declare the details of the Credit Note in the monthly return during which Credit Note is issued for adjustment of tax liability. The question of issuing Credit Note also will arise only by the supplier and not by the recipient.
- ✓ In view of the same, I am inclined to interfere with the impugned notice by allowing this writ petition.

HNA Comments: - This judgment can be relied when the vehicle is detained on account of documentary requirements other than those required in accordance with statute. In general Courts have taken a view that when there is no loss to Government exchequer, documentary requirements shall not lead to detention of goods.

9. Pre-deposit paid vide DRC-03 not admitted while filing of Appeal in GST portal – Court allowed the benefit of payment

M/s.Vinod Metals v. State of Maharashtra
[2023 (9) Centax 178 (Bom.)]

Facts of the case

- ✓ The petitioner had paid the pre-deposit for filing of Appeal in accordance with Section 107(6) of the CGST Act, 2017 vide Form GST DRC-03.
- ✓ Pursuant to the payment, the GST portal did not allow the petitioner to file appeal online without making payment of the same once again in the process of filing Appeal.
- ✓ Aggrieved by the mechanism adopted in the GST portal, the petitioner filed a writ petition before High Court.

Contentions of the Petitioner

- ✓ For the purpose of the pre-deposit for an appeal intended to be filed by the Petitioner under section 107 as per sub-section (6) of section 107 of the CGST Act, the amount as deposited by the Petitioner under sub-section (5) of section 73 of the CGST Act needs to be accepted towards the fulfillment of such predeposit, as the said amount is already made, it cannot be contended by the Revenue, that such deposit is not available, when it comes to the compliance of sub-section (6) of section 107 of the CGST Act.
- ✓ It is contended that, in a given circumstance, it may be unjust and/or unwarranted that the assessee is required to shell out an additional amount so as to comply the mandate of pre-deposit as per sub-section (6) of section 107 of the CGST Act.

- ✓ It is contended that it would be also unjust and arbitrary that such an adjustment is not permitted and the doors of the appellate authority are closed for such assessee in denying such an adjustment. Further in such situations, the electronic filing Portal itself would not open or would remain closed, in respect of such assessee, who seek adjustment of the voluntary payment of tax already made and who intend to take benefit of such voluntary deposit for the compliance of sub-section (5) of section 107 of the CGST Act.
- ✓ The Petitioner, hence, ought to be permitted to file an appeal, on the portal being made available, which ought not to be closed or, in the alternative, manual filing of an appeal, being appropriately registered in the system ought to be permitted. It is his submission that in the situations in hand, such technicalities imbeded in the electronic system governing filing of appeals cannot defeat a statutory remedy of an appeal and render the assessee remediless.

Contentions of the Respondent

- ✓ The Petitioner would not be correct in bringing about an interplay of both the provisions as they stand distinct and operate differently. Such an adjustment of the payment of tax of a voluntary deposit to be utilised for rectifying the amount of pre-deposit cannot be permitted.
- ✓ The legislature itself has now made the remedy of an appeal more effective by providing for a reasonable pre-deposit of the tax as sub-section (6) of section 107 of the CGST Act would mandate.
- ✓ It is, thus, contended that the Petitioner ought not to have raised such plea and not deposited the amount of tax as per the requirement of the provisions of sub-section (6) of section 107 of the CGST Act.
- ✓ The electronic portal has application throughout the country and such a prayer as made by the Petitioner would disturb as to what is prevalent. Thus, such plea of an adjustment of the portal to be made available for such category of the assessee, who intends to take benefit of the voluntary deposit of taxes under sub-section (5) of section 73 of the CGST Act, ought not to be accepted.

Decision

- ✓ There cannot be two opinions, that any procedural rule or technical requirement cannot defeat the availability of a remedy of an appeal, made available to the assessee under a substantive statutory provision nor can such remedy be rendered illusory. The interpretation of the provisions need to be made to recognise the intention of the legislature, which is to aid access to justice, which itself is a fundamental right guaranteed under the Constitution. When it comes to right of an appeal, as guaranteed by a statutory provision, such right needs to be made effective and meaningful. It cannot be frustrated by shackles of complex procedural formalities.
- ✓ In our opinion, such request of the Petitioner is not something, which is opposed to law, inasmuch as, on a holistic reading of section 73 of the CGST Act, it can be said that an amount deposited

under sub-section (5) section 73 of the CGST Act is not an amount, which is deposited in pursuance of any demand or any assessment order. It is certainly a voluntary deposit and which is subject to all the contentions of the assessee. Also such deposit would be accounted in the event of any the liability of the assessee to pay tax, and would be integral to the assessment.

- ✓ For the above reasons, the voluntary deposit as made under protest by the Petitioner under the provisions of sub-section (5) of section 73 of the CGST Act, cannot be excluded from consideration for the purpose of compliance as mandated by sub-section (6) of section 107 of the CGST Act.

HNA Comments: - Payment of demand under protest during any stage of proceedings shall be accounted for payment of pre-deposit. In case of any disputed by the Department, the above judgment would be of relevance.

10. Credit cannot be disputed merely on account of non-reflection in GSTR-2A

M/s.Diya Agencies v. State Tax Officers
[WP (C) 29769 of 2023]

Facts of the case

- ✓ The petitioner claimed the Input Tax Credit (ITC) for year 2017-18 out of which the Respondent denied the ITC in respect to invoice not reflected in GSTR-2A. Aggrieved by the order passed by the Adjudicating Authority the Petitioner filed a writ before the Hon'ble Kerala High Court.

Contentions of the Petitioner

- ✓ The petitioner relied on the judgment of M/s. Suncraft Energy Private Limited and Another v. The Assistant Commissioner [MAT 1218 of 2023], wherein it was held that before reverting he ITC by the assessee, the Authority should take action against the selling dealer. Unless there is collusion between the selling dealer and the recipient, ITC is not to be denied if the recipient had geneuinely paid the tax to the Selling dealer.
- ✓ The Petitioner contended that, it has fulfilled all the conditions stated under Section 16(2) of the CGST Act, 2017.
- ✓ The Petitioner further contended that the Central Board of Indirect Tax and Customs (CBIC) had issued press release dated October 18, 2018 clarifying that Form GSTR-2A is the facility to view the details furnished by the supplier in GSTR-1 and cannot impact the ability of the recipient to avail ITC on self-assessment basis in consonance with the provisions of Section 16 of the CGST Act.

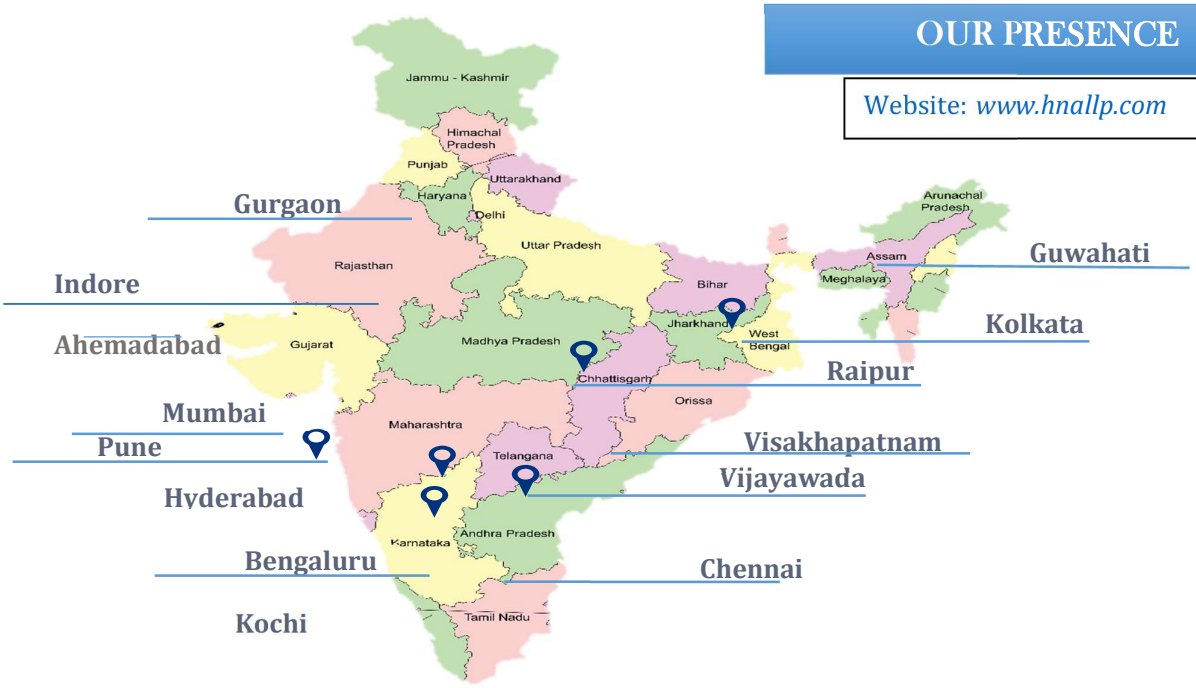
Decision

- ✓ The Petitioner's claim for ITC has been denied only on the ground that the said amount was not mentioned in the GSTR 2A. If the supplier has not remitted the said amount paid by the Petitioner to him, the Petitioner cannot be held responsible.
- ✓ Considered the CBIC press release dated 18 October 2018 which clarified that GSTR-2A is in the nature of facilitation and does not impact the ability of the taxpayer to avail ITC on self-assessment basis as per Section 16 of the CGST Act. The Court directed the Adjudicating Authority to give opportunity to the Petitioner to claim for ITC.
- ✓ Further, the court held that, merely on the ground that in Form GSTR-2A the said tax is not reflected should not be a sufficient ground to deny the assessee the claim of the ITC.
- ✓ The matter was remanded back to the Adjudicating Authority to give opportunity to the Petitioner to claim for ITC.

HNA Comments: - This judgment has once again reaffirmed the fact that non-reflection in Form GSTR-2A shall not deny credit in the hands of the recipient.

OUR PRESENCE

Website: *www.hnallp.com*



Bengaluru (HO) 1010, 2nd floor, 26 th Main, (Above Corporation Bank) 4th T Block, Jayanagar, Bengaluru - 560 041. *Tel:+918041210703* *roopa@hnaindia.com*	**Raipur** 503, Babylon Capital, VIP Chowk, Raipur Tel: +917415790391 bhaveshmittal@hnaindia.com	**Hyderabad** 4th Floor, Anushka Pride, Road Number 12, Banjara Hills, Hyderabad, Telangana – 500 034. Tel:+919908113787 sudhir@hnaindia.com
Gurugram (NCR) 509, Vipul Trade Centre, Sohna Road, Sector 48, Gurugram – 122 009. *Tel:+918510950400* *ashish@hnaindia.com*	**Mumbai** No.409, Filix, Opp. Asian Paints, LBS Marg, Bhandup West, Mumbai – 400 078. *Tel:+919867307715* *vasant.bhat@hnaindia.com*	**Guwahati** 2A, 2nd Floor, Royal Silver Tower, Ulubari, Guwahati- 781 007. Tel:+917670087000 mannu@hnaindia.com
Chennai Fagun Chambers, Third Floor, No.26,EthirajSalai, Egmore, Chennai – 600 008. Tel:+919962508380 vikram@hnaindia.com	**Indore** 107, B Block, The One, 5 RNT Marg, Indore – 452001 Phone – 6366775136 vini@hnaindia.com	**Kolkata** Unit No. 304B, 3rd Floor, Kamalalaya Centre, 156A Lenin Sarani, Dharamtalla, Kolkata - 700013. Tel:+919830682188 gagan@hnaindia.com

Pune Rajyog Creations Apartment, Flat No. 5, IV Floor, Anand Park, Above HDFC Bank, Aundh, Pune - 411 007. *Tel:+917680000205* *ravikumar@hnaindia.com*	**Vishakhapatnam** D.No 8-1-112, Premier House, 2nd Floor, Vidyanagar, Opp.III Town Police Station, PeddaWaltair, Visakhapatnam-530017 Tel:+918916009235 anil@hnaindia.com	**Vijayawada** D. No. 40-26/1-8, Sri Ram Nagar, Mohiddin Estates, Labbipet, Vijayawada – 520010 Tel:+919900068920 rajeshmaddi@hnaindia.com
Kochi 62/6742C, 2nd Floor, Jos Brothers Building, Jos Jn, MG Road, Kochi - 682 015 Kochi Tel:+ 91 8547853584, arjun@hnaindia.com	**Ahmedabad** Mauryansh Elanza 908, 9th Floor, Nr. Parekh's Hospital, Shyamal Crossroad, 132 Feet Ring Rd, Ahmedabad Phone: 9409172331 E-Mail: yash@hnaindia.com	