H N A & Co. LLP
Chartered Accountants
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Legal Updates

March 2023

Summary of Major Legal Updates

Key Highlights:

- Assessee permitted to rectify GSTR-1 as there is no escapement of tax.
- Declaration under clause 5 of Circular No. JC (HQ)-1/GST/2020/Appeal/ADM-8 while an appeal is pending for reason of non-constitution of GST Tribunal.
- Opportunity of Personal Hearing mandatory even if NA opted by Assessee.
- Applying the Dominant Intention Test to determine whether a collection of supplies should be taxed at the same rate as a composite package or separately at a higher rate.
- Power of Recovery of Taxes exercised by issuing Summons u/s 70.
- Recipients of a supply cannot claim ITC if the supplier did not deposit the tax.
- The services provided by an Indian branch office of an entity directly to its group entities do not qualify as intermediary services.
- Assessee having not complied with the requirement of release of seized goods i.e., perishable goods, is not entitled to release of such seized goods.
- Cash cannot be seized as it does not form part of the stock in trade of the petitioner's business
- Refund of unutilized ITC cannot be refused if the petitioner proves goods were exported, invoices were issued by a registered dealer and taxes were paid.
- Imposition of a penalty under Section 129 on goods stored in a godown is not valid.
- The recipient bears the burden of proving the correctness of their ITC claim
- Eligibility of ITC when supplier preceding immediate supplier did not pay tax

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1. Assessee permitted to rectify GSTR-1 as there is no escapement of tax

[M/s. Y. B. Constructions Pvt. Ltd., vs. Union of India [2023] 148 taxmann.com 244 (Orissa) [22-02-2023]]

Facts of the Case:

1. The petitioner requested permission to correct the GSTR-1 Forms for the periods 2017-18 and 2018-19, in Form B2B instead of B2C as was wrongly filed under GSTR-1 to get the Input Tax Credit (ITC) benefit by the principal contractor.

Contentions of Petitioner

1. Petitioner contented that the said error came into notice after the principal contractor held up the legitimate running bill amount of the Petitioner by informing it about the above error, that thereafter it has been making requests to permit it to correct the GSTR-1 Forms but to no avail.

Contentions of Respondent

1. Once the deadline for rectification of the Forms was crossed then no further indulgence could be granted to the Petitioner.

Decision Held:

1. By permitting the Petitioner to rectify the above error, there will be no loss whatsoever caused to the Opposite Parties. It is not as if there will be any escapement of tax. This is only about the ITC benefit which in any event has to be given to the Petitioner. On the contrary, if it is not permitted, then the Petitioner will unnecessarily be prejudiced.
2. In similar circumstances, the Madras High Court in its order dated 6th October 2020 in Writ Petition No.29676 of 2019 **(M/s. Sun Dye Chem v. The Assistant Commissioner ST)** accepted the plea of the Petitioner and directed that the Petitioner in that case should be permitted to file the corrected form.
3. For the aforementioned reasons, this Court permitted the Petitioner to resubmit the corrected GSTR-1 for the aforementioned periods.

H N A Remarks: This ruling is correct and is a welcome decision in line with the objectives of the enactment of the GST Act 2017 of having a seamless flow of Credit. There have been other favorable rulings that have permitted rectification of GSTR 1 where ITC benefit has not been passed to the recipient due to bonafide errors in the GST returns of the supplier.

2. Declaration under clause 5 of Circular No. JC (HQ)-1/GST/2020/Appeal/ADM-8 while an appeal is pending for reason of non-constitution of GST Tribunal.

Gulf Oil Lubricants India Ltd v. Joint Commissioner of State Tax, Appeal-V [2023] 147 taxmann.com 541 (Bombay)

Facts of the Case:

1. The Petitioners have challenged the Order-in-Appeal passed by the State Tax Authorities and have filed the Writ Petitions as recovery proceedings were to be initiated invoking Article 226 of the Constitution of India on the ground that though the statute provides an appeal to an Appellate Tribunal under section 112 of the State Good and Services Tax Act ("State GST Act"), the Appellate Tribunal is not constituted.

Contentions of Respondent

1. Learned Assistant Government Pleader placed on record a Circular No. JC (HQ)-1/GST/2020/Appeal/ADM-8 dated 26 May 2020, as per Clause 5 of which a declaration in Annexure-I has to be filed before the jurisdictional tax officer stating that an appeal is proposed to be filed u/s 112(1) against the appeal order and If such declaration is not filed, then it would be presumed that taxpayer is not willing to file an appeal and recovery proceedings would be initiated.
2. Therefore, in the Instant case, If the Petitioners have not filed declarations, the Petitioners were permitted to submit the same within 15 days from today.
3. Furthermore, Clause 4.3 of the above Circular also states that the prescribed time limit to make an application to the appellate tribunal will be counted from the date on which President or the State President enters the office. The Appellate

   Authority while passing order may mention in the preamble that an appeal may be made to the Appellate Tribunal whenever it is constituted within three months from the President or the State President entering office

Decision Held:

1. Clarifying that the prescribed time limit has been extended as per Clause 4.3 and protective orders are incorporated in Clause 5 of the Circular, the Writ petition disposed of.

2. Respondent State will consider two measures to reduce the inflow of writ petitions in this Court due to non-constitution of the GST Tribunal. First, to incorporate a stipulation contained in Clause 4.3 and Clause 5 of the Trade Circular dated 26 May 2020 in the order passed by the First Appellate Authority. This will put the tax payer to notice that the time limit for filing the appeal is extended and if a declaration is filed in terms of Annexure-I within the stipulated period, the protective measure would automatically come into force. Second, if recovery is being undertaken in terms of Clause 5 for failure to file a declaration within the time limit, by way of indulgence, to give 15 days period to make such a declaration. These two measures,

according to us, will substantially reduce the litigation which has arisen due to the non-constitution of the GST Tribunal.

H N A Remarks: This is a welcome judgment in the right narrative and perspective to stop the recovery proceedings which would cause undue harassment and be violative of principles of natural Justice as the legal remedy to seek justice has not expired for the Assessee. The Assessee should not be penalised for the absence of GSTAT. The measures mentioned in the said circular could be used by the taxpayers of other states as well however, the department may dispute the applicability of the said circular by Maharashtra state in other states.

3. Opportunity of Personal Hearing mandatory even if NA opted by Assessee.

Mohan Agencies, vs. State of U.P. [2023] 148 taxmann.com 323 (Allahabad) [13-02-2023])

Facts of the Case:

1. The only notice in the proceedings issued to the petitioner on 13.05.2022 had at that stage itself chosen to not give any opportunity of hearing to the petitioner by mentioning "NA" against column description "Date of personal hearing", "Time of personal hearing" and "Venue where the personal hearing will be held".
2. Thus, it is the objection of learned counsel for the petitioner, that the petitioner was completely denied the opportunity of an oral hearing before the Assessing Authority.

Contentions of Petitioner

1. Petitioner relying on Section 75(4) of the U.P. GST Act, 2017 as interpreted by a coordinate bench of this Court in **Bharat Mint & Allied Chemicals v. Commissioner Commercial Tax & 2 Ors., [2022] 48 VLJ 325**, it has been then asserted, the Assessing Authority was bound to afford the opportunity of personal hearing to the petitioner before he may have passed an adverse assessment order. Insofar as the assessment order has raised a disputed demand of tax of about Rs. 10 crores, the same is wholly averse to the petitioner.

Contentions of Respondent

1. The petitioner was denied the opportunity of hearing because he had tick marked the option 'No' against the option for a personal hearing in the reply to the Show Cause Notice, submitted through online mode.
2. Having thus declined the opportunity of hearing, the petitioner cannot turn around to claim any error in the impugned order passed consequently.

Decision Held:

1. The Assessing Authority must afford the opportunity of a Personal Hearing even if the taxpayer had selected "NA" against personal hearing in online mode.

2. We find ourselves in complete agreement with the view taken by the coordinate bench in **Bharat Mint & Allied Chemicals Commissioner Commercial Tax & 2 Ors., [2022] 48 VLJ 325**. Once it has been laid down by way of a principle of law that a person/assessee is not required to request for "opportunity of personal hearing" and it remained mandatory upon the Assessing Authority to afford such opportunity before passing an adverse order, the fact that the petitioner may have signified 'No' in the column meant to mark the assessees choice to avail personal hearing, would bear no legal consequence.

3. Even otherwise in the context of an assessment order creating heavy civil liability, observing such minimal opportunity for a hearing is a must. The principle of natural justice would commend this Court to bind the authorities to always ensure to provide such opportunity of hearing.

4. The stand of the assessee may remain unclear unless a minimal opportunity for a hearing is first granted. Only thereafter, the explanation furnished may be rejected and demand created.

H N A Remarks: This ruling is correct and in line with the provisions of Section 75(4) of the CGST Act. The very thought of passing an adverse order or adjudicating the matter without allowing a Personal Hearing sounds entirely unconstitutional and against the principles of natural justice. A positive decision that makes it mandatory to allow Personal Hearings also blocks the grounds of procedural lapse stand taken by the Revenue.

4. Applying the Dominant Intention Test to determine whether a collection of supplies should be taxed at the same rate as a composite package or separately at a higher rate.

State of Karnataka Vs. Intex Technologies India Limited and Others, 2023-VIL-143-KAR)

Facts of the Case:

1. M/s. Intex Technologies India Ltd. is a registered dealer under the Karnataka Value Added Tax Act, 2003. It is engaged in trading mobile phones, parts, and accessories and sells mobile phones in a composite package that also contains accessories such as headsets, cables, ejection pins, adapters, chargers, manuals etc.

2. Revenue has challenged the order of the Hon'ble VAT Tribunal stating that the Hon'ble Tribunal has erred in holding that "Telephone sets, including telephones for Cellular networks" would include "sets" of Cellular Phones also;

Contention of Petitioner:

1. The sale of mobile phones along with its charger in a single retail package constitutes a composite contract and requires the application of the dominant intention test.

2. The Central Government have issued Office Memorandum F. No. 34011/18/2015-SO(ST) dated 30.11.2015 clarifying the position and advising States that accessories be treated as a part of the main item when they are sold as a single unit.
3. As per Rule 3(a) of the General Rules of Interpretation the entry of 'telephone sets' is more specific and therefore, resorting to a 'residuary entry' namely, the unscheduled goods, is unwarranted.

Contention of Revenue:

1. Mobile charger is not an integral part of the mobile phone to treat among 'composite goods' because merely making a composite package of cell phone, chargers shall not make it eligible as one of the composite goods for the purpose of interpretation of the provisions;
2. Mobile chargers though sold with mobile phones, are independent gadgets and therefore, cannot be taxed at par with a mobile phone; reliance being placed on the law laid down in Nokia India Case.

Decision Held:

1. There can be no doubt that the main intention of a purchaser/seller while buying/selling a 'Mobile Set' is to buy/sell the mobile phone and not the charger alone. Supply of charger, headset, and ejection pin is incidental to the sale. Therefore, the Dominant Intention Test would apply to the present case and hence, the charger cannot be differently taxed.
2. The High Court took a view that 'telephone sets' can be considered as 'goods put up in sets for retail sale' under Rule 3(b) of the General Rules of Interpretation.
3. It was also observed that Rule 3(b) states that goods put up in sets for retail sale shall be classified as if they consist of the material or component which gives them their essential character. In the present case, the essential character of the mobile set is the mobile phone and not the charger. Thus, the classification based on the components mentioned above would apply and as per the essential character, the retail set containing a mobile phone and a mobile charger shall be classifiable as 'mobile phones' under heading 8517
4. The mobile phone finds its place in III Schedule and is taxable at 5% therefore, the charger which is also sold along with the mobile phone in 'one set' is together chargeable at 5%

HNA Remarks:

- The ruling is correct considering principles of classification where the mobile charger is to be treated as composite goods when supplied along with a mobile phone. Undoubtedly, when purchasing or selling a 'Mobile Set,' the primary objective of the buyer/seller is to acquire the mobile phone itself and not solely the charger. The provision of additional items such as the charger, headset, and ejection pin is secondary to the transaction. As a

result, the current case would be subject to the Dominant Intention Test, indicating that the charger cannot be taxed differently.

- In this case, the Karnataka High Court has distinguished the Apex Court judgment in the case of State of Punjab vs Nokia India Private Limited ,2015 (315) E.L.T. 162 (S.C.) where it was held that "mobile charger is not an integral part of the mobile phone to treat among 'composite goods' because merely making a composite package of cell phone charger shall not make it eligible as one of the composite goods for interpretation of the provisions." The Karnataka High Court held that the Entries in Punjab VAT Act and the KVAT Act are different, and the Entry under the Punjab VAT Act is limited only to cellular telephones in contradistinction to the Notification under KVAT Act.

5. Power of Recovery of Taxes exercised by issuing Summons u/s 70.

Sri Sai Balaji Associates v. State of Andhra Pradesh [2023] 149 taxmann.com 66 (Andhra Pradesh) [07-03-2023]

Facts of the Case:

1. Writ Petition was filed challenging the notice under Section 70(1) of the GST Act, 2017 issued by the respondent to M/s. Sterlight Technologies Limited, directing them to stop any further payments to the petitioner.

Contention of Petitioner:

1. Section 70 (1) of the G.S.T Act, has the power to summon any person whose attendance is considered necessary either for giving evidence or producing a document or any other thing in any inquiry in the same manner, however, that power is not extended to direct the summoning of a party to stop all further payments, which he ought to receive from the customers.

Contention of Revenue:

1. The concerned officer may not have the power to issue a direction to stop the payment by the summoning party to the assessee, would however argue, he has such power Under Section 83 of the GST Act which deals with provisional attachment of any property or bank account of the assessee;

Decision Held:

1. It is obvious that under Section 70(1) of GST Act, the proper officer cannot exercise powers to direct the summoning party to stop payment to the assessee which is beyond the scope of 70(1) of GST Act.
2. The impugned notice was issued under Section 70 (1) of GST Act but not in the exercise of powers conferred under Section 83 of GST Act. Thus, at the outset, it is clear that the Respondent has exceeded his power in directing M/s. Sterlight Technologies Limited (customer of the petitioner) to stop further payments to the petitioner herein. Therefore, such a direction is beyond the jurisdiction of the Respondent and the same is liable to be set aside to that extent.

HNA Remarks:

- This is a correct ruling w.r.t scope of power of summons with a classic example of abuse and over-reach of power wherein Power of Recovery of Taxes as mentioned in Section 79 was exercised by issuing Summons u/s 70 directing the summoning party to stop payment to the assessee which is beyond the scope of 70(1) of GST Act.

- Further power to stop making payment to an assessee cannot be invoked with Section 83 i.e., provisional attachment of property. The same can only be invoked vide recovery actions vide Section 79 of CGST Act.

6. Recipients of a supply cannot claim ITC if the supplier did not deposit the tax.

Pinstar Automotive India (P.) Ltd. v. Additional Commissioner [2023] 149 taxmann.com 13 (Madras) [20-03-2023]

Facts of the Case:

1. Denial of Input Tax Credit to the petitioner-assessee in respect of supplies made to them when supplier charged tax from them on such supplies but failed to remit same to Department.

Contention of Petitioner:

1. That they had fulfilled all the conditions stipulated under the Statute and had adduced proof for payment of consideration within a period of 180 days and therefore, they are eligible for ITC. The stand was rejected by the respondent who passed an order-in-original on 27-7-2022 confirming the demand proposed in the show cause notice. Inter alia, the assessing authority has confirmed the addition proposed under the show cause notice.

Contention of Revenue:

1. There is a mandate cast upon the petitioner/claimant to ITC to ensure compliance with the provisions of Sub-section (2) of Section 16. One condition mentioned in Section 16(2)(c) is that the tax charged in respect of such supply has been actually paid to the Government in cash or through utilisation of ITC, admissible in respect of the said supply.
2. No fault can be attributed to the Department in this regard, since three suppliers, Techno Rubber Plastic and Co., Techno Rubber and Plastic and M/s. Unique Autoplastics Private Limited had uploaded their invoices in GSTR -1, but no tax had been remitted by them, since GSTR 3B had not been filed by them. The petitioner, as a consequence, suffered reversal of ITC, IGST, CGST, and SGST.

Decision Held:

1. The provisions of Section 16 are to be observed strictly, such that, there is no jeopardy to the interests of the revenue. The provisions of the CGST Act, 2017 have, assimilating wisdom of experience from the erstwhile tax regimes,

gone one step further to ensure that the interests of the revenue are protected by providing for a mandate that the tax liability is defrayed/met either at the hands of the supplier or the purchaser, the petitioner in this case.

2. The Hon'ble High Court also observed an additional factor that where the tax liability has been met by way of reversal of ITC and similarly recovery is effected from the supplier as well, this would amount to a double benefit to the revenue. Thus, while the Department may reverse credit in the hands of the purchaser, this has to be a protective move, to be reversed and credit restored if the liability is made good by the supplier. Thus, the substantive liability falls on the supplier and the protective liability upon the purchaser. A mechanism must be put in place to address this situation.

HNA Remarks:

- This ruling will have huge ramifications under GST where High Court has held that "substantive liability falls on supplier and protective liability upon purchaser". The approach of HC tips the balance of the scale in favor of the revenue in the name of protecting the interest of the same.

- Interestingly, under the earlier VAT laws, there were similar provisions similar to Section 16(2) which were held unconstitutional by the Apex Court in the case of Arise India Limited vs. Commissioner of Trade and Taxes, Delhi - 2018-TIOL-11-SC-VAT.

- It is suggested that purchasers take caution and have strict procedures implemented regarding Vendor compliance control in GST.

7. The services provided by an Indian branch office of an entity directly to its group entities do not qualify as intermediary services.

M/S ERNST AND YOUNG LIMITED vs. ADDITIONAL COMMISSIONER, CGST APPEALS -II, DELHI AND ANR]

Facts of the Case:

1. The petitioner is an Indian Branch Office of M/s Ernst & Young Limited a company incorporated under the laws of the United Kingdom (hereafter 'E&Y Limited'). The petitioner was established pursuant to the permission granted by the Reserve Bank of India on 04.04.2008 and has herein filed the present petition impugning an order-in-appeal dated 15.03.2022 (Order-in-Appeal No.311-313/2021-22) rejecting its refund applications for Input Tax Credit (hereafter 'ITC') in respect of export of services for the period from December 2017 to March 2020.

2. The said applications for refund of ITC were denied on the premise that the petitioner is an 'intermediary' and thus, the place of services is located in India, where the petitioner's place of business is located, and not where the recipient of services is located.

3. E&Y Limited has entered into service agreements for providing professional consultancy services to various entities of Ernst & Young group (hereafter 'EY Entities') including Ernst & Young US LLP (hereafter 'EY US'), Ernst & Young

Service Pty Ltd. Australia (hereafter 'EY Australia'), Ernst & Young Group Ltd. New Zealand (hereafter 'EY NZ') and Ernst & Young LLP, UK (hereafter 'EY UK') on arm's length basis.

4. In terms of the aforementioned service agreements, the overseas entities had retained E&Y Limited, acting through its Indian Branch (the petitioner herein) to provide certain professional services.
5. The principal question to be addressed is whether the Service rendered by the petitioner to EY Entities in terms of the service agreement constitutes services as an 'intermediary'.
6. Also, whether the supply of service by the petitioner is outside India is required to be determined with reference to Section 13 of the IGST Act

Contention of Petitioner:

1. Services were provided directly to the EY Entities located outside India in terms of the service agreements entered into between E&Y Limited (the head office of the petitioner) with the respective EY Entities. Also, invoices were raised for the Services rendered and the consideration was received directly from the overseas EY Entities in convertible foreign exchange. The petitioner's ITC had accumulated on account of supplies availed by the petitioner for performing the Services which were directly related to providing professional services (business support services and management and consultancy services.

Contention of Revenue:

1. Since the petitioner provides services on behalf of E&Y Limited (the petitioner's head office), it was an intermediary.

2. In terms of Clause (b) of Sub-section (8) of Section 13 of the IGST Act, the place of supply of intermediary services is the location of the supplier of services. In the present case, the place of supply of services would be in India as the petitioner is providing intermediary services.

Decision Held:

1. There is no dispute that the petitioner does not arrange or facilitate services to EY entities from third parties; it renders services to them. The petitioner had not arranged the said supply from any third party.
2. The Adjudicating Authority has misunderstood the expression 'intermediary' as defined under Section 2(13) of the IGST Act. A person who provides services, as opposed to arranging or facilitating goods from another supplier, is not an intermediary within the definition of Section 2(13) of the IGST Act.
3. The petitioner is the actual supplier of the professional services and has not arranged or facilitated the supply from any third party. The assumption that the petitioner has acted as a buying and selling agent, is without any basis.
4. As discussed above, the Services rendered by the petitioner are not as an intermediary and therefore, the place of supply of the Services rendered by the petitioner to overseas entities is required to be determined

on the basis of the location of the recipient of the Services. Since the recipient of the Services is outside India, the professional services rendered by the petitioner would fall within the scope of the definition of 'export of services' as defined under Section 2(6) of the IGST Act.

5. There is no dispute that the recipient of Services – that is EY Entities – are located outside India. Thus, indisputably, the Services provided by the petitioner would fall within the scope of the definition of the term 'export of service' under Section 2(6) of the IGST Act

HNA Remarks: The ruling is correct and clears the air as to whether Services directly rendered by the Indian Branch Office of an entity to its group entities constitute services as an intermediary or not, decision being no . Further similar stand was taken by in decision of Genpact India Pvt Ltd vs Union of India by P&H HC.

8. Assessee having not complied with the requirement of release of seized goods i.e., perishable goods, is not entitled to release of such seized goods.

Adarsh Tobacco Co. vs. State of U.P. [2023] 149 taxmann.com 266 (Allahabad) [17-03-2023]

Facts of the Case:

1. The petitioner is a registered dealer under the GST having multiple godowns, one of which is at Etah. That a survey was conducted by the department on 20th July 2022 and certain goods were found in the premises beyond the goods which were already disclosed by the assessee.
2. The petitioner claims to have deposited the amount in terms of Section 74(5) of the GST Act and sought the release of the goods seized by the department which was not considered; hence the petitioner is before this court.
3. The basic issue which needs to be ascertained is whether the goods seized by the department qualify to be perishable goods or non-perishable goods.

Contention of Petitioner:

1. Had the goods been perishable they ought to have sold in terms of Rules 141 (2) within 15 days of the seizure and as it has not been sold, the goods ought to be treated as non-perishable.

Contention of Revenue:

1. The deposit made by the petitioner is not sufficient for the release of seized goods as the commodity which has been seized by the department is a perishable good and by virtue of section 67(8), a different procedure for deposit of the amount is contemplated than what is observed by the petitioner.
2. Unless the petitioner complies with the requirement of Section 67(8) of the Act he would not be entitled to release of the seized goods.

Decision Held:

1. There is no dispute that the goods seized by the department are included within the definition of tobacco and, therefore, we have no doubt in coming to the conclusion that the seized goods would fall within the definition of perishable goods.

2. The determination of the goods being perishable or non-perishable would be in accordance with the applicable rules and the notifications and not upon any fortuitous circumstance whether the goods have been actually sold within 14 days or not. The goods which are treated to be perishable under the rules and notifications would not be converted into non-perishable goods only because the authorities have not acted in terms of Rule 141(2).

3. The deposit made by the petitioner under Section 74(5) of the GST Act cannot be of any help to the petitioner's cause for the purposes to release of goods in terms of Section 67(8) of the Act.

4. The petitioner having not complied with the requirement of release of seized goods i.e., perishable goods, is not entitled to any direction by this court for release of such seized goods.

HNA Remarks: The Ruling is correct and is a reminder that The Courts of Justice cannot be taken for a spin and that the Law has to be followed both literally and in substance.

9. Cash cannot be seized as it does not form part of the stock in trade of the petitioner's business.

Shabu George & Anr. vs. State Tax Officer and Ors. [2023] WA No. 514 of 2023 (Kerala) [24-03-2023]]

Facts of the Case:

1. During an Investigation conducted by the department at the premises of the Petitioner, cash was seized and retained for more than 6 months without the issuance of SCN.

2. This writ appeal is preferred by the petitioner aggrieved by the judgment dated 16.2.2023 of a learned single Judge who disposed of the writ petition rejecting the contention of the Petitioner that the seizure of cash was unwarranted especially when the investigation itself was for alleged evasion of tax due from the appellants under the GST Act

Contention of Petitioner:

1. The instant is a case where the seizure of cash was wholly unwarranted, more so, when the cash did not form part of the stock in trade of any business stated to have been carried on by the petitioner.

Decision Held:

1. In an investigation aimed at detecting tax evasion under the GST Act, we fail to see how cash can be seized especially when it is the admitted case that the cash did not form part of the stock in trade of the appellant's business.
2. The power of any authority to seize any 'thing' while functioning under the provisions of a taxing statute must be guided and informed in its exercise by the object of the statute concerned.
3. The findings of the Intelligence Officer that 'it is suspicious that this much amount of money kept in the house of M/s. Shabu as idle and not deposited at the bank 'and further' the amount received as a gift on the day of marriage has not been recorded in his income tax return and from this it is evident that the money is from illicit sources' reveal the extent to which authorities under the Act are misinformed of their powers and the limits of their jurisdiction.
4. The aforesaid findings of the Intelligence Officer could perhaps have been justified had he been an officer attached to the Income Tax department but irrelevant from the perspective of GST Law.
5. Moreover, as the respondent has retained the seized cash for more than six months and is yet to issue a show cause notice to the appellants in connection with the investigation, there can be no justification for a continued retention of the said amount with the respondent.
6. Respondent directed to release the cash seized without any delay, at any rate, within a week, from the date of receipt of a copy of this Judgement.

HNA Remarks: The ruling is correct on merits as also supported by the decision passed by the Hon'ble Delhi High Court in **Arvind Goyal CA v. Union of India & Ors. [W.P.(C) 12499/2021 dated January 19, 2023]** which held that seizure under Section 67 of the CGST Act is limited to goods liable for confiscation or any documents, books, or things which may be useful for or relevant to any proceedings and 'cash' does not fall within the definition of 'goods' therefore, the action of GST officers of taking away currency was illegal and without any authority of law.

10. Refund of unutilized ITC cannot be refused if the petitioner proves goods were exported, invoices were issued by a registered dealer and taxes were paid.

Balaji Exim v. Commr. (CGST), [2023] 149 taxmann.com 44 (Delhi) [10-03-2023]

Facts of the Case:

1. The petitioner has filed the present petitions impugning the common Order-In-Appeal dated 31.03.2022 (hereafter 'the impugned order'), whereby two separate appeals preferred by the petitioner against the Order-in-Originals were dismissed rejecting the refund applications made in respect of the unutilised ITC accumulated on account of export of goods.
2. The petitioner had filed two refund applications seeking a refund of the unutilized Input Tax Credit amounting to ₹72,03,961/- and ₹12,40,270/- respectively, comprising of IGST and Cess.

3. The refund applications were not processed as the supplier from whom the petitioner had purchased the goods had allegedly received fake invoices from its suppliers.

Contention of Petitioner:

1. The petitioner contended that it is not required to examine the affairs of its supplying dealers. The allegations of any fake credit availed by M/s Shruti Exports cannot be a ground for rejecting the petitioner's refund applications unless it is established that the petitioner has not received the goods or paid for them. In the present case, there is little material to support any such allegations.

2. The Petitioner further, states that the purchases made by it are genuine and are against genuine invoices and therefore, the refund applied by it shall be allowed.

Contention of Revenue:

1. The Appellate Authority held that although the petitioner was in possession of the tax invoices, it could not be said that the petitioner had received the goods. Therefore, one of the conditions as stipulated in Section 16(2) of the Central Goods & Services Tax, 2017 is that the taxpayer has received the goods or services or both - was not satisfied. The Appellate Authority concluded that the present case was one of "goodless supply on the strength of fake invoices".

Decision Held:

1. It is clear that the petitioner's refund applications were rejected on a mere apprehension that its supplier had issued fake invoices. There is no conclusive finding on the basis of any cogent material that the invoices issued by M/s Shruti Exports to the petitioner are fake invoices.

2. The invoices issued by M/s Shruti Exports are reflected in the AIO System and there is no dispute that M/s Shruti Exports had issued the said invoices. It is also clear that M/s Shruti Exports is a dealer registered with the Goods & Services Tax Department. There is no allegation that the invoices (which include IGST as well as Cess) were not paid by the petitioner. It is also important to note that there is no allegation that the goods in question were not exported overseas. Thus, the petitioner has established not only the fact that the goods have been exported but that it had paid for the same including the IGST and Cess.

3. There is no dispute that goods have been exported; the invoices in respect of which the petitioner claims the ITC was raised by a registered dealer; and, there is no allegation that the petitioner has not paid the invoices, which include taxes. Thus, the application for a refund cannot be denied.

4. There is merit in the petitioner's contention that it is not required to examine the affairs of its supplying dealers. The allegations of any fake credit availed by M/s Shruti Exports cannot be a ground for rejecting the petitioner's refund applications unless it is established that the petitioner

has not received the goods or paid for them. In the present case, there is little material to support any such allegations.

5. In **On Quest Merchandising India Pvt. Ltd. v. Government of NCT of Delhi & Ors.: 2017 SCC OnLine Del 11286,** a Coordinate Bench of this Court had referred to various authorities and observed as under:

"39. Applying the law explained in the above decisions, it can be safely concluded in the present case that there is a singular failure by the legislature to make a distinction between purchasing dealers who have *bona fide* transacted with the selling dealer by taking all precautions as required by the DVAT Act and those that have not. Therefore, there was a need to restrict the denial of ITC only to the selling dealers who had failed to deposit the tax collected by them and not punish *bona fide* purchasing dealers. The latter cannot be expected to do the impossible. It is trite that a law that is not capable of honest compliance will fail in achieving its objective. If it seeks to visit disobedience with disproportionate consequences to a bona fide purchasing dealer, it will become vulnerable to invalidation on the touchstone of Article 14 of the Constitution.

HNA Remarks: The ruling is correct and reposes faith in Judiciary limiting the denial of credit on bonafide purchases on grounds that are incomprehensible.

11. Imposition of a penalty under Section 129 on goods stored in a godown is not valid.

(M/s Sandip Kumar Singhal Vs. Deputy Commissioner, 2023-VIL-164-CAL)]

Facts of the Case:

1. In this case, the petitioner had generated an E-way bill on 09.02.2022 for transporting cumin seeds from Gujarat to Siliguri, with its validity ending on 20.02.2022. The authorities seized the petitioner's goods on 22.02.2022 from a godown, invoking section 67(2) of the CGST Act.
2. The goods were en route from Gujarat to Siliguri but were confiscated from a godown which the petitioner claims were three kilometers ahead of the final destination mentioned in the E-way bill.
3. The order of seizure, issued on 22.02.2022 in the Form GST INS-02, stated that upon inspection of the goods under section 67(1) of the Act, along with scrutiny of the books of accounts, registers, documents/papers and goods found during inspection/search, there were grounds to believe that the goods were liable to be confiscated, and thus seized invoking Section 67(2).

Contention of Petitioner:

1. The petitioner argued that Section 129 of the CGST Act can only be applied to goods and conveyances that are in transit. If the goods were

inspected and seized while in transit, then the authority should have invoked Section 68 instead of Section 67.

2. The petitioner claims that the authority invoked Section 129 erroneously in this case, with the sole intention of imposing a penalty on the petitioner.
3. It is impossible for goods to be both in a godown and in transit at the same time. Therefore, since the goods were seized from a godown, Section 67 should not have been invoked, and the penalty imposed under Section 129 should not have been passed without giving the petitioner an opportunity for a hearing.
4. The authority issued Form GST INS 02, which is used for the seizure of goods under Section 67, even though the goods were not in transit. If the goods had been in transit, then the corresponding Form MOV should have been issued.
5. The petitioner also claimed that their right to trade, as protected by Article 19(1)(g) of the Constitution of India, was infringed upon by the illegal seizure of goods, and there was a violation of the principle of natural justice by not allowing the petitioner an opportunity to be heard before the penalty was imposed.

Contention of Revenue:

1. The authority seized goods from a godown as the petitioner was found to be keeping goods with an expired e-way bill. The petitioner's bill was issued for 15,000 kg of cumin seeds, but only 12,840 kg were found during the seizure and therefore the authority invoked Section 129(1)(a) and imposed a penalty equal to 200% of the tax payable on the goods as the proper e-way bill was not present for the seized goods.
2. The petitioner failed to produce any document in respect of the 12,840 kg of cumin seeds. The appellate authority affirmed the order passed by the adjudicating authority. The authority issued the order of seizure under Section 67(2) without any delay.

Decision Held:

1. Section 67(2) of the Act empowers the proper officer to confiscate goods if such goods are secreted in any place, for evading payment of tax. The place may be searched and goods seized and the same shall be released on payment of applicable taxes. The proper officer, if has reasons to believe that the goods are stored in a warehouse or godown or any other place without paying tax or not paying requisite tax, may cause inspection, search, and seizure.
2. Section 129 deals with the detention, seizure, and release of goods and conveyances in transit. The said provision is to be invoked when the goods are in movement on a conveyance.
3. Here, the goods in question were not seized while in transit. Goods were seized from a godown, two days after the expiry of the e-way bill whereas the godown in question from where the goods were seized is approximately three kilometres ahead from the final destination mentioned in the e-way bill.

4. When the goods were held to be in transit, then notice under Form GST MOV ought to have been issued. The authority, as an afterthought, held the goods to be in transit but, for reasons best known, did not issue either order or notice in Form GST MOV. There is no mention of any vehicle or conveyance for transporting the goods.

5. The nomenclature of the form is an indication of the offence committed by the RTP. Not issuing any order/notice in Form GST MOV makes it clear that the authority was satisfied that the goods were not in transit.

6. The e-way bill is for the purpose of moving/transporting the goods from one place to the other. Law does not require a way bill to remain valid for such period the goods remain in the godown.

7. Though the authority found the goods stored in the godown to be of a lesser quantity but the authority never questioned the identity and quantum of the goods apropos the expired e-way bill.

8. Also, The e-way bill number was found in the report filed by the officer and the petitioner admitted that the rest of the goods were sold. It does not appear that the petitioner had any intention to evade taxes as the taxes were already paid during the generation of the e-way bill. The authority could not prove any connivance between the buyer and seller for not paying the necessary taxes.

9. It appears that though initially, the authority invoked the provision of Section 67 but thereafter shifted stand and relied upon Section 68 read with Section 129 for the imposition of penalty.

10. The petitioner was certainly at fault in not recording the additional godown at the time of generation of the e-way bill, but at the same time, the petitioner ought not to be penalized with two hundred percent penalty for such trivial offence. As the goods were not confiscated while on the move, imposition of penalty under Section 129 of the Act is erroneous and bad in law. The aforesaid section cannot be relied upon to penalize the RTP when the goods are seized from a godown.

11. In **Mahabir Polyplast** the Court was of the opinion that provision of Section 129(3) of the Act would not be invoked to subject a godown premises to search and seizure operation. For invoking Section 67 of the Act existence of "reasons to believe" to subject the premises to search and seize goods is mandated. Here, the authority is vacillating between Sections 67 and 68; whether the goods are in transit or in the godown.

12. In view of the above, the impugned order of the adjudicating authority and the appellate forum are liable to be set aside and, accordingly, set aside.

HNA Remarks: The Ruling is correct and establishes that following proper procedure of law is not only the responsibility of the taxpayer but is equally applicable to the revenue. Levy of Tax should be done under the relevant Sections and imposition of Penalty which is a harsh action is not supposed to be done in flow but to be exercised only when deemed necessary.

12. The recipient bears the burden of proving the correctness of their Input Tax Credit (ITC) claim.

(State of Karnataka v. Ecom Gill Coffee Trading (P.) Ltd., [2023] 148 taxmann.com 352 (SC) [13-03-2023])

Facts of the Case:

1. M/s Ecom Gill Coffee Trading Private Limited purchased green coffee beans from dealers for the purposes of further sales in exports and the domestic market and claimed ITC on the same.
2. Upon finding irregularities in the ITC claimed, the Assessing Officer ('AO') disallowed the ITC claim, as it was discovered that M/s Ecom Gill had claimed Input Tax Credit (ITC) from 27 sellers, out of which six sellers were de-registered, three had made sales to the respondent but did not file taxes, and six had denied turnover and did not pay taxes. Therefore, ITC came to be disallowed to the extent of Rs. 10.52 lacs
3. The first Appellate Authority confirmed the findings of the AO. However, Karnataka Appellate Tribunal ('the Tribunal') allowed the appeal, on the grounds that the respondent purchased the coffee from the registered dealer under genuine tax invoices, and consequently allowed the ITC claimed.
4. The revision application preferred by the revenue before the Karnataka High Court was dismissed leading to an instant appeal before the Supreme Court, relying upon its earlier decision in the case of M/s Tallam Apparels.

Contention of Petitioner:

1. The petitioner contended that have produced genuine invoices and payments made through cheques, thereby discharging the burden of proof cast under Section 70 of the KVAT Act, 2003, and proving the genuineness of the transactions. Once the dealer has discharged this burden, they are entitled to Input Tax Credit (ITC). If the seller has not paid the tax, it can be recovered from them, but the purchasing dealer is entitled to the ITC.
2. To avail Input Tax Credit, the purchasing dealer only needs to ensure that the selling dealer is registered and has issued a tax invoice as per the KVAT Act and Rules. Once this is demonstrated, the purchasing dealer cannot be denied ITC even if the selling dealer fails to discharge his obligation under the KVAT Act.
3. Input Tax Credit can be denied if the purchasing dealer has not exercised due diligence by not ensuring that the selling dealer is a registered dealer with a valid registration. However, denying ITC to a diligent purchasing dealer who has taken necessary precautions fails to differentiate them from those who have acted in bad faith.

Contention of Revenue:

1. The High Court has materially erred in dismissing the revision applications and confirming the respective orders passed by the Appellate Authorities in allowing the Input Tax Credit in favour of the respective purchasing dealers.
2. The Assessing Officer found that the sale transactions were only paper transactions and even in some of the cases, the registration of the sellers were cancelled and nothing was on record that any tax was paid by the seller, hence the purchasing dealers shall not be entitled to the Input Tax Credit.
3. The burden of proof required to be discharged under Section 70 of the KVAT Act, 2003 is higher than just showing financial transfers, the mere production of invoices or payment by cheque is not sufficient, and actual movement of goods must be demonstrated along with invoices, payment by cheque, and even the demand for tax by the seller.

Decision Held:

1. The provisions of Section 70, in its plain terms clearly stipulate that the burden of proving that the ITC claim is correct lies upon the purchasing dealer claiming such ITC.
2. Mere production of the invoices or the payment made by cheques is not enough and cannot be said to be discharging the burden of proof cast under section 70 of the KVAT Act, 2003.
3. The dealer claiming ITC has to prove beyond doubt the actual transaction which can be proved by furnishing the name and address of the selling dealer, details of the vehicle which has delivered the goods, payment of freight charges, acknowledgement of taking delivery of goods, tax invoices and payment particulars etc. The aforesaid information would be in addition to tax invoices, particulars of payment etc.
4. If the purchasing dealer/s fails/fail to establish and prove the said important aspect of physical movement of the goods alleged to have been purchased by it/them from the concerned dealers and on which the ITC have been claimed, the Assessing Officer is absolutely justified in rejecting such ITC claim.
5. In certain cases, the registration of selling dealers has been cancelled or the sale has been disputed or denied by the dealers. However, the purchasing dealers involved have not provided any additional supporting evidence, such as the name and address of the selling dealer, vehicle details for delivery, payment of freight charges, proof of receiving goods, tax invoices, and payment details. As a result, it can be concluded that the purchasing dealers have failed to fulfill the burden of proof required by Section 70 of the KVAT Act, 2003.
6. The High Court and the second Appellate Authority's judgments allowing Input Tax Credit (ITC) are unsustainable and have been quashed and set aside. The Assessing Officer's orders denying ITC to the purchasing dealers have been restored.

H N A Remarks:

- This ruling can have an adverse impact on the eligibility of ITC if the same is not supported by relevant documents as stated in the decision. SC observed hereinabove, for claiming ITC, the genuineness of the transaction and actual physical movement of the goods are the sine qua non and the aforesaid can be proved only by furnishing the name and address of the selling dealer, details of the vehicle which has delivered the goods, payment of freight charges, acknowledgment of taking delivery of goods, tax invoices, and payment particulars, etc.

- The purchasing dealers have to prove the actual physical movement of the goods, alleged to have been purchased from the respective dealers. Taking a conservative view, it is advisable to maintain as many records as possible with respect to ITC.

- In our view, once the conditions provided under section 16 of the CGST Act are fulfilled and established with reasonable evidence, the onus would be on the Department to provide positive evidence to establish the contrary (to prove fake/bogus credits). It is only when the Department can establish such suspicion with evidence, the assessee would be required to defend their claim of credit with additional records and evidence.

13. Eligibility of Input Tax Credit in the hands of the buyer when the supplier preceding immediate supplier did not pay tax.

(M/s Vimal Alloys Pvt Ltd, Punjab Authority for Advance Ruling. Order No: AAR/GST/PB/31 dated: 03-02-2023

Facts of the Case:

1. The Applicant Vimal Alloys Pvt Ltd is running a furnace at Mandi Gobindgarh and for the purpose of the same, they are procuring ferrous alloys, scrap, gas, and other materials from within the State of Punjab.
2. Further, the Applicant is receiving the material against GST Invoice on which it is entitled to claim Input Tax Credit on the tax paid on the purchases made by it. The Applicant is making the payments through banking channels and all the transactions are being reflected in books of accounts.
3. Also, Applicant is filing its returns in Form GSTR-3B and Form GSTR-1 as per the provisions of the CGST Act, 2017.
4. In wake of the recent news being published in the newspapers that the officials of the Department have unearthed the scam of bogus purchases as a result of which the furnaces, rolling mills, etc. are being targeted by the Department in order to recover the demands even though they have nothing to do with the bogus purchases as the goods purchased by them on account of raw material is being entered in its books of account and the finished goods manufactured are sold after discharging its tax liability. The Department officials also caught hold of the furnaces/rolling mills on the ground that the preceding sellers of the seller from they have purchased goods, had not paid the tax and, therefore, they are liable to pay tax and consequential Interest and penalty, even though there is

neither any obligation nor any infrastructure provided under the Act to verify or to find out the status of the discharge of tax liability by the said sellers.

5. Applicant, being cautious started procuring Returns from its immediate Vendors, i.e., Form GSTR-3B and Form GSTR-1 in order to make sure that the seller has discharged his tax liability and the purchases made by him have been entered in the books of accounts of the seller.

Contention of Applicant:

1. The Applicant could only ensure that its seller had filed the returns and reflected the transactions in question as the utility for the same had been provided at the GST Portal, or it can also procure the same from the seller. However, there is neither any obligation nor infrastructure to ascertain whether the seller had discharged its tax liability in accordance with law or not. It cannot also ascertain what product its seller was buying and selling or whether the preceding sellers of its seller had discharged their tax liabilities or not. Therefore, in the event of the same the Applicant cannot be held liable and fastened upon the liability on account of its sellers or preceding sellers

Advance Ruling sought with respect to:

1. Whether the purchaser is entitled to claim Input Tax Credit on the purchases made by it from the seller who had discharged its tax liability but the preceding seller has not discharged its liability under the Act?
2. If the answer to the above is in negative, then how the purchaser will ensure that the tax liability has been discharged by all the sellers falling in the queue of the transaction?
3. Whether the purchaser would be eligible for the ITC since no infrastructure has been provided by the Govt. in order to ensure discharging of tax liability by the sellers falling in the queue of a transaction?
4. Whether the purchaser is entitled to claim Input Tax Credit on the purchases made by it from the seller in the event of non-payment of tax by the seller even though the purchaser is in possession of the invoice, other relevant documents, and the payments have been made through banking channels and there is no connivance or collusion between the purchaser and seller?

Held:

1. Taking note of Section 16(2)(c) of the CGST Act, 2017 wherein it is very much clear that no registered person shall be entitled to take the credit of any input tax in respect of any supply of goods or services or both unless the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilization of input tax credit admissible in respect of the said supply. If the seller or preceding sellers have not deposited the tax either in cash or through utilization of input tax credit admissible in respect of the said supply, purchaser is not eligible to claim ITC on such supply.

2. In view of the above, it is held that the purchaser is not entitled to claim Input Tax Credit on the purchases made by it from the seller who had discharged its tax liability but the preceding seller has not discharged its liability under the Act.

Ruling Issued:

1. **Q.1 -** Whether the purchaser is entitled to claim Input Tax Credit on the purchases made by it from the seller who had discharged its tax liability but the preceding seller has not discharged its liability under the Act?

   Ruling : No, as per provisions of Section 16(2)(c) of CGST Act read with PGST Act, the purchaser is not entitled to claim Input Tax Credit on the purchases made by it from the seller who had discharged its tax liability but the preceding seller has not discharged its liability under the Act.

2. **Questions 2, 3 & 4** above are not covered under the purview of Section 97(2)(d) of CGST Act and PGST Act, hence no ruling could be passed on these questions.

HNA Remarks:

- This ruling is incorrect. Section 16(2)(c) r/w Section 41 of CGST Act, 2017 requires a taxpayer to ensure that "the tax charged in respect of such supply has been actually paid to the Government"; hence compliance is limited only to the supplier who has supplied goods or services to the such taxpayer and not for other proceedings suppliers in the supply chain.

- This ruling has been rendered in spite of the various favourable decisions in the past under the erstwhile Indirect Tax Laws which held that bonafide dealers should not be denied the benefit of the credit, even where the seller has not deposited the taxes with the Revenue; that it is for the Department to recover the taxes from the selling dealer. The particular Ruling has stretched the hands too far of a bonafide purchaser expecting him to ensure payment of taxes at every step of the supply chain without any mechanism or infrastructure in place to do so and it will further lead to demands by Revenue at every stage of the supply chain.

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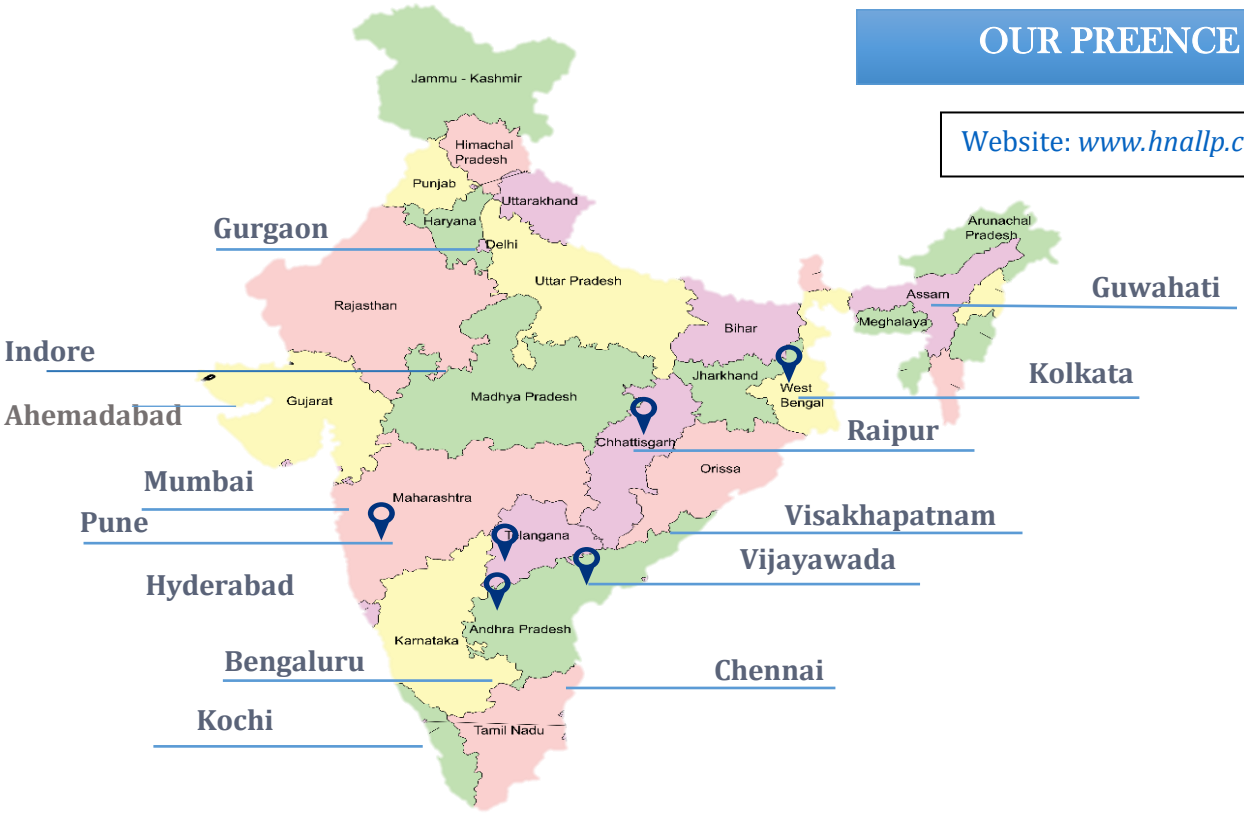

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