



## **Frivolous Notices & Advantages of pre-dept. GST Reviews**

### ***Introduction***

In the past 3 years there has been a spike in the number of GST notices. This is on account of completion of audit within time lines, data analytics being performed by the department, the recent slew of fake invoicing/fake ITC claim cases, and many more. Frivolous and vague notices are abundant. This is more likely to increase due to the poor quality of AAR, targets and deadlines enforced by the govt. and GST Tribunals still to be set up. Going to Court is not always possible or cost effective. This is one more broken promise of trusting the taxpayer with promise of audits %age coming down.

The compliant industries need to represent on basis of promissory estoppel.

They say, 'A good doctor cures the disease, but a great doctor cures the cause'. Identifying the root cause of non-compliance and putting in place controls and checkpoints is key to the growth and sustainability of any organisation.

### **In this article we deliberate on:**

1. Common issues raised by Dept. and possible solutions
2. Process in accepting and replying to Notices
3. Procedure when departmental contention is not valid
4. Advantages of pre-departmental GST Review
5. Practical Difficulties in Litigation process

### ***Common issues raised by Dept. and possible solutions:***

#### ***1. Reply on Equity held in Subsidiary***

- Equity shares fall under the terminology of securities.
- Securities is specifically excluded from the definition of 'goods' and 'services' under GST
- The contention that it is a deemed supply under Schedule I also would not hold good as section 7 specifically requires there to be a 'supply of goods or services or both'.
- Upheld similarly in **Yonex India Private Limited Vs Union of India** [Writ Petition No. 2301 of 2023]

#### ***2. Appeal on variance b/w GSTR 2A/2B Vs GSTR 3B***

Genuine credit – available of tax invoice, full payment to vendor, receipt of goods/services should be eligible. (section 16)



- Period up to October 2019 – not applicable, no provision of law. Otherwise also Rule 36(4) disputable without an authorizing Section in CGST Act. Albeit, Circular 183 – vendor + CA certificate (if reqd.) can be followed as a via media.
- October 2019 to December 2021 – Rule did not have authorizing power through the Act. Circular 193 – vendor + CA certificate (if reqd.) may be followed.
- **Goparaj Gopalakrishnan Pillai, Henna Medicals & Diya Agencies – Kerala HC**
- CBIC press release dated 18.10.2018 – “4...*the facility to view the same in FORM GSTR-2A by the recipient is in the nature of taxpayer facilitation and does not impact the ability of the taxpayer to avail ITC on self-assessment basis in consonance with the provisions of section 16 of the Act.*”
- **Suncraft Energy Pvt Ltd – Calcutta HC - Issuance of demand notice on recipient cannot be sustained without any investigation being done at the end of the supplier**
- January 2022 onwards – Section 16(2)(aa) implemented, GSTR 2B matching required.

### **3. Notices based on GSTR 9 or GSTR 9C – mismatch**

- Variance in tax payable and paid could have logical reasons and need not be liable. Taxpayers to ensure final workings with linked documents are available for past and present period.
- Not all unreconciled values need to be taxable in nature. Department must clarify or type of variances and dispute taxability accordingly.
- Certain tables in GSTR 9 & 9C were optional and were not filled. Where certain data auto-populates based on system requirement, taxpayer cannot be harassed for the same.
- Disclosure methodology for various situations follow differently across India. Key is to clarify that all liabilities were paid and eligible ITC only was claimed.

### **4. Grounds for ITC claimed under wrong tax head**

- Rule 92(1A) allows for adjustment of pending demand against eligible refund application.
- Section 77 although pertains to outward supply, similar logic if applied along with above Rule, there would not be a need to follow SCN process.
- Being revenue neutral and will only result in unnecessary utilization of resources of the revenue & yield nothing in return.
- As there is no unjust enrichment, a demand of this nature would affect the fundamental right to do trade, commerce, or business as per Article 19(1)(g) of the Constitution of India.

### **5. Reply against tax demanded under RCM from employee directors**



Dept. bases the demand on CBIC's Circular No. 140/10/2020.

- Non-applicability of GST on remuneration paid to whole-time/executive directors as they are employees of the entity as provided in form DIR-12 filed with the MCA. They are not non-executive directors. Sch III clause 1 specifically considers such activity as not a supply of service.
- Non-executive directors not performing in the capacity of a 'director' would not be liable to RCM under GST
- *Amrish Rameshchandra Shah Vs. UOI 2021-TIOL-583-HC-MUM-ST* wherein the Hon'ble HC stayed the show cause notice demanding service tax based on ITR data.
- Alternate plea - in case of *Jet airways India Ltd vs Commissioner of Service Tax, Mumbai – 2016 (44) S.T.R.465 (Tri-Mumbai)*, wherein the entire demand of service tax was set aside on the grounds of revenue neutrality, including the interest and penalty. The said judgement has been *affirmed by Hon'ble Supreme Court [2017(7) GSTL J35 (Supreme Court)]*.

#### **6. Reply against tax demanded under RCM u/S 9(4)**

- Section 9(4) was exempted vide Notification 38/2017-CT(Rate). Therefore, the omission of the said exemption, mentioned in the original notification, has been deleted by the amending Notification No. 38/2017, dated 13.10.2017 and is therefore effective from the date of original notification dated 28.6.2017.
- *Hon'ble Supreme Court in the case of Vatika Township (2014-TIOL-78-SC-IT-CB)* wherein it was held that any beneficial amendment to the statute may be given benefit retrospectively.
- Alternate plea – As ITC would be eligible upon RCM payment, the observations is revenue neutral. Accordingly plead to drop such point.

#### **7. E-way bill related notices**

- Movement must not be hampered for genuine transactions. Various case laws available to support EWB related issues. – **Allahabad HC** says the 'burden of proof' rests on Revenue to establish the actual intent to evade tax before imposing penalties for mere technical error of not generating an e-way bill.
- Ensure proper documentation during transshipment or delays in transportation.
- Reference material - Handbook on EWB under GST – ICAI April 2020 edition

#### **8. Supplier not filed GSTR 3B**



- ITC being restricted due to vendor not filing his GSTR 3B linked to Section 16(2)(c).
- Recently, said provision was held constitutionally valid. Rule 37A was introduced to reverse ITC based on vendors not filing GSTR 3B.
- Section 75(12) indicates that dept. must first investigate supplier before approaching recipient.
- High Court rulings in *Favour - D.Y.Beathel Enterprises (Madras HC), Arise India (Delhi HC-VAT). Against – ECOM Gill Coffee Trading (Supreme Court-VAT)*

### **9. RCM liability as per 2B and 3B**

- RCM liability demand is being fixed based on vendor filing alone, based on GSTR 2B reflection. Ideally, such expense must also reflect in books of accounts to confirm liability.
- Vendor filing errors not considered – shown as RCM “Y” instead of “N”, or updated incorrect GSTIN.
- Communication with taxpayers on a proactive basis and ensuring amendment is suggested to avoid such enquiries.

### **10. ITC restriction based on 2B data**

- ITC on recipient is being questioned based on supplier’s top 5 goods/services updated in the GST portal. Sometimes disallowed based on vendor name itself. (for example: insurance, restaurant services, passenger transport, etc.)
- Recipient to maintain clarity in nature of expenses in the ITC register and distinguish from those blocked under section 17(5) of CGST Act.
- All taxpayers may verify their goods/services and ensure it is clearly mentioned as per activity performed to avoid issues for their customers.

### **Other general disputed areas:**

1. RCM demand on GTO services - Specifically exempt vide NN 12/2017-CT(R). Important document – consignment note.
2. General penalty for 9C late filing – Late fee u/s 47(2) not being disputed, although penalty u/s 125 being considered incorrectly. Waiver can be requested based on s.126.
3. Disallowing credits on employee related expenses – Other than specifically ineligible ITC u/s17(5) other eligible credits being disputed incorrectly such as accommodation, travel expenses, etc..



4. Considering the target-based as service provided by the recipient - Must first satisfy 'supply' definition. Schedule II of CGST Act is not applicable as supply cannot be established. Discounts in any form, must not be construed as an income liable to GST. An in-depth research paper written by Hiregange team on 'Discounts' - <https://www.linkedin.com/feed/update/urn:li:activity:7007578653689618432>
5. Denial of ITC availed where such places are not added as additional place of business - Procedural lapse cannot create such liability. Various ST regime cases can be cited as basis under GST.
6. Section 16(4) timeline - SC accepts to look at challenge to Section 16(4) disallowing ITC for belated return-filing.
7. Payment of Interest - Interest calculations are being performed without considering credit balances available as per rule 88B.
8. Pre-deposit using Credit - Clarity now available that the pre-deposit under section 107 can be paid out of electronic credit ledger balance. Also pre-deposit amount is linked to tax value only and need not consider interest and penalty.
9. RCM on payment to the Government services - Whether the service provider is falling under 'CG/SG/LA' must first be verified. Various exemptions available under NN 12/2017-CT(R) must first be verified. Other grounds of dispute - whether there is a supply, i.e. can quid pro quo be established.

*Note - Providing supporting case laws, legal maxims, reference to Constitution and intention of law would work in the favour while replying to notices.*

### ***Process in accepting and replying to Notices***

1. How to manage roving enquiries?
  - Reply immediately that the notice is vague and is not clear.
  - Request for clarity and detailed requirement.
  - Disclose that you are ready to share information as requested once clarity is provided.
2. Time limit to respond + Reasonable extension
  - Time limit to revert to a notice must be adhered to.
  - Where not possible, ask for a reasonable extension to reply.
  - Ensure all such correspondences through online response and/or registered post acknowledgement due (RPAD/ speed post). [ Do not visit the dept.]
3. Follow-up - Where information is provided although department is silent on further steps. Initial correspondence been kept open, without closing the issue. There could be many



reasons for their silence such as transfer of officer, work pressure in handling cases, loss of documents by dept. or cases kept pending in call book.

### ***Procedure when departmental contention is not valid***

1. Information which is already available within the department can be informed as available with them and need not be provided.
2. Obtain expert written opinion. Disclose clearly but respectfully that departmental contention is not acceptable by giving reference to GST provisions, case laws, etc.
3. Departmental usage of AAR/AAAR decisions, Circulars which not in line with the law can be disputed as not being applicable to the assessee to render inconsequential.
4. Validity of notice must be verified, and where it is not from the appropriate authority or is time barred, contention of the department can be said to be invalid.

### ***Practical Difficulties in Litigation process***

1. Inherent limitation to get relief is that tribunal is yet to be formed under GST. Taxpayer left in the doldrums due to mismanagement and lack of implementation.
2. Payments under coercion – Taxpayer is suggested to mention that he would pay under protest by mentioning officers name and his designation. If succeeded could mention again and claim with interest. This may help protect the assessee.
3. Handling dept. hassling & when bribes are asked for – Document minutes of discussion and send a letter to the officer requesting to follow the rule of law. Escalation to higher levels (Commissioner) if there is no change in the approach. Can also approach Anti-corruption bureau, raise issue on Public Grievance portal to obtain relief.
4. Option to approach High Court – Not always a solution considering alternative remedies and costs.

### ***Some common terminologies that can be considered in replies:***

- Specifically deny the allegations and substantiate your claim
- Notice issued does not contain DIN and thereby the notice is not valid. (disputable)
- Non-speaking order - *Jay Jay Mills (India) Pvt Ltd Vs State Tax Officer 2020 (41) GSTL 304(Mad)*, wherein it was held that the statutory authority is bound to consider the claim made and pass a reasoned order.
- Where pre-consultation is mandated as per CBIC master circular and not followed, this can be highlighted. Reliance can be placed on *Gujarat High Court Decision in case of L and T Hydrocarbon Engineering Ltd (TS-146-HC-2022 (GUJ)-EXC)*



### ***Advantages of pre-departmental GST Review***

<b>Area</b>	<b>Activity</b>	<b>Advantage</b>
<b>Revenue</b>	<ul style="list-style-type: none"> <li>• Verify classification &amp; tax rate</li> <li>• Study income not subjected to tax</li> <li>• Ensure tax not paid against incentives (discounts), employee recoveries (w/o margin)</li> <li>• Valuation check + agreement adherence</li> <li>• Documentation – E-INV, proof of outward supply (EWB + In/Out reg.)</li> </ul>	<p>Reduces shock demands that bring the entity to a halt. Also, reduces interest implication.</p> <p><i>Tip – Option to disclose tax positions through ‘initial disclosure letter’ to avoid demands u/s 74.</i></p>
<b>ITC</b>	<ul style="list-style-type: none"> <li>• Verify ITC report from software – data captured and displayed correctly?</li> <li>• Verify eligibility of ITC</li> <li>• Deferred ITC – study the ability to withhold/recover taxes paid to vendors</li> <li>• Documentation – sec 16 conditions, proof of inward supply</li> </ul>	<ol style="list-style-type: none"> <li>1. To ensure ITC is claimed within timelines prescribed. (30<sup>th</sup> Nov)</li> <li>2. To avoid incorrect ITC claim which could lead to high demands incl. interest &amp; penalty.</li> </ol> <p><i>Tip – Perform vendor analysis and payment terms</i></p>
<b>RCM</b>	<ul style="list-style-type: none"> <li>• Study liability and decide appropriate rate of tax (ex: GTA)</li> <li>• RCM on import of services study (incl. those w/o consideration &amp; associated enterprises)</li> <li>• Whether ITC eligible &amp; claimed?</li> <li>• Past period liability + ITC</li> </ul>	<p>Enable compliance and ensure optimum benefit claimed. Also, restricts interest implications.</p> <p>RCM paid for past periods – possible to claim ITC.</p>
<b>E-way bill</b>	<ul style="list-style-type: none"> <li>• Inward – Maintain along with GRN to dispute and fake ITC allegations.</li> <li>• Outward (supply) – Match with IN/OUT register. Verify inventory impact. Ensure documentation also available for sales returns.</li> </ul>	<p>Useful when burden of proof is on the taxpayer.</p> <p>Avoids penalty u/s 122 or 125.</p>



Area	Activity	Advantage
	<ul style="list-style-type: none"> <li>Outward (other than supply) – Ensure document raised as per Rule 55 contents. (+ Form ITC 04?)</li> </ul>	
<b>Reconciliation</b>	<ul style="list-style-type: none"> <li>Confirm GST payable (books) is paid through GSTR 3B or DRC-03</li> <li>GSTR 1 Vs GSTR 3B</li> <li>GSTR 2B Vs GSTR 3B</li> <li>Confirm ITC where eligible entirely claimed</li> <li>GSTR 9C vs Books (turnover &amp; taxes)</li> </ul>	<p>Ability to prove no lapses in tax compliance by way of mismatch.</p> <p>Also, reduces interest implication.</p>
<b>Others</b>	<ul style="list-style-type: none"> <li>Refund application correctness and formula check</li> <li>Maintain all communications with dept. officials.</li> <li>A tracker of cases raised, activity performed, status, persons involved.</li> <li>Keep envelope covers + letters and responses sent against the same (with acknowledgement)</li> </ul>	<p>Documentation for posterity.</p> <p>When employee attrition is high, avoids confusion and data loss. Helps reduce harassment by dept.</p>
<b>GST Portal</b>	<ul style="list-style-type: none"> <li>Business details are up to date</li> <li>Authorized signatories (min. 2)</li> <li>Places of business up to date</li> <li>Notices/Demands (if any)</li> <li>Taxpayers' communications</li> <li>Reco ECrL ledger balance with books</li> </ul>	<p>Details in GST portal is updated and appropriate.</p> <p>Dept. cannot dispute procedural lapses either.</p>

### **Others**

- Amendments in GST law –
  - Rate notifications – Study change in rate against specific HSN. Follow Section 14 for application of rate change. Ensure tax masters are updated.





- Other notifications – New rules may be implemented or changes in process and procedures may be implemented. One must stay updated to ensure compliance is not missed due to negligence.
- Circulars – Stay updated with Dept. position on various issues. Circulars are binding on the dept. but not on taxpayers, i.e. if a Circular is not well reasoned and goes beyond the corners of the GST law, it can be said to be void ab-initio.
- Case laws – As GST is an emerging area, various acts & rules are being challenged and settled positions are arising. Similarly, Service tax, Excise & VAT related cases, having similar provisions on GST would help set the precedent and help in understanding intention of the law. Using settled principles of the past may help in disputing cases in the present. (such as levy, valuation, ITC, classification have a plethora of SC decisions)

**WHO** - A professional in the indirect tax area, including erstwhile laws (service tax, excise, etc.) who can highlight non-compliances, weak internal controls and issues addressed by taxpayers before departmental visits.

**WHEN** – for a FY, before the succeeding 30<sup>th</sup> November timeline, all corrections can be considered in upcoming GST returns and the annual returns for the corresponding year can be filed easily with complete clarity.

### ***Conclusion***

There have been many instances where the judiciary is not pleased with the notices issued by department and have chastised the dept officers. Law favors the vigilant.

The various issues highlighted above display that the department officials are unclear of tax laws, and some take it to the level of harassing genuine taxpayers. GST audits by dept. could lead to demand of taxes along with a hefty interest and penalty.

Taxpayers unclear of erstwhile laws and jurisprudence may approach experts for their services to avoid high value SCNs and amounts being blocked through pre-deposits for years to come. Implementing a proactive internal audit by GST experts would help understand various non-compliances, how to deal with past issues and implement checks and balances to avoid future non-compliances. Regular training further helps avoid negligent tax errors.

*We hope this article having specific issues would help the taxpayers as a whole and reduce the quantum and issues converting into a show cause notice.*



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**End.**