Hiregange & Associates
Chartered Accountants

June 2020 Edition

GST NEWSLETTER

COVERAGE

An investment in knowledge pays the best interest. Hiregange & Associates coming up with the latest Newsletter for the month of June'20. We wish you all a happy reading ahead.

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MNH Corner

"The month of June saw partial lifting of the lockdown in many States. However, the metros seem to be a cause of concern due to medical infrastructure getting strained. However, the wealth creators of India- the entrepreneurs, agriculturist have been innovative. We see the record exports by pharma companies. Jugad in manufacturing of pandemic related protection as well as pharma production have been the silver lining.

The GST collections for June being 90,000 crores + is indeed a cause for cheer. Several amendments and extensions in regard to relaxation in filing and late fee are welcome. However, if a longer range perspective was put in place, it might bring much needed confidence back. It is expected that the economy would recover in a few months. The pent up demand could be good news at that time. In the meantime empower yourself and get ready to be more effective post lockdown. Please find attached the newsletter which focuses on some of the interesting aspects of GST."

VSS Corner

"The month of June seems to be a complete unlock for most of transaction in many locations. The economy opening up leading to movement of some cash flows and transactions in many parts of the country. However, the huge shortage of labour has disturbed the entire manufacturing and supply chain that could have an impact in the upcoming months. Extension of the due dates due to COVID-19 lockdowns has given some relief for the businessman and the taxpayer with the compliance of GST. With the raising positive cases and increasing fears among the people the upcoming quarter may slow down the economic, requiring us to revisit our way of doing business and to tackle the scenario in hand."

Way forward – GST 4.0

CA Madhukar N Hiregange
CA Rajesh Maddi

The GST was launched at midnight on 1 July 2017 by the President of India, and the Government of India. The launch was marked by a historic midnight (30 June – 1 July) session of both the houses of parliament convened at the Central Hall of the Parliament. We have completed three years of implementation.

Our honorable Prime Minister called it a 'Good and Simple Law', however it is not as simple as thought. In this honeymoon period, tax payers gone through a lot of amendments, changes, judgments, etc. May time to revisit the entire law and considering the best practices across the world make it easy for compliance and cure the defects in the law. This should not be the responsibility of the executive who is to administer the law. However, their representatives would contribute.

Government had also made some amendments favoring the tax paying industry/ trade on many representations being done or Courts ruling in favor of the tax payers. These are as under:

- Interest on net liability;
- Few changes in Place of supply (except for intermediary services)
- Amending Schedule II of CGST Act as a clarificatory nature;
- Covering High Sea sales, Merchanting Trade in Schedule III of CGST Act;
- Amendment in section 17(5) vide CGST Amendment Act, 2018 curtailing the extent of restricted / blocked credit;

As we are entering into 4th year of implementation (GST-4.0), based on the experience of three years, the paper writers wishes to suggest the following way forward for better implementation of GST:

Expected modifications in revenue & law from Industry –

1. Even though the laws changed, the perception / mindset of department officers has not changed. Still the assessees are treated as thieves or tax evaders instead of part in nation development.

2. For everyone, the law was new when implemented. Rigorous training with evaluation required for the officers who are handling day-to-day affairs especially State officers with respect to issues relating to services where they didn't have prior experience.

3. The Government should accept the technological failure happened and plan for phase-wise implementation of matching should be done like staggered manner of filing GST returns done considering the load on the last day.

4. As promised by the Government, the retrospective amendments should be avoided to have a fair play.

5. The bodies of Authority for Advance Rulings and Anti Profiteering has to be removed. It would take years to clear the mess created by these authorities by delivering revenue biased judgments.

6. ITC is the soul of GST. Still, the department treating it as a 'concession' or 'favour' by the department to the assessee. Recently released advice on transitional credit is an evidence for this. Department should accept that it is a vested right of the tax payer upon satisfying the conditions specified.

7. The helpdesk created by the GSTN has to be improved. Simply for the sake of numbers, statistics / records replies are received as 'resolved' for the complaints raised even though it is not resolved.

8. Circulars issued by the department most of the times instead of clarifying they are creating mess. In most of the times, except the words 'to clear' all the other things are unclear. Department should understand the 'principles of the law' or 'intention of the law' instead of merely relying the rules.

9. Without having proper technological backup, the department has started harassing the assessee by way of issuing the notices. Few examples could be notices for GSTR-2A vs 3B, Notices under section 16 (4) and the list goes on. Proper facility should be given and reasonable opportunity should be given before passing the adverse orders.

10. The purpose of annual returns / annual audit needs to be understood and the form needs to changed in accordance with that. Present forms do not add much value to the department / the assessees but it looks like a summary of figures mentioned in monthly returns.

11. 'Technological glitches', the word much used after implementation of GST. All thanks to Infosys and GSTN for the same. It looks like most of effective professional time wasted while filing GST returns than that of traffic jams.

12. There is a big gap between the technological aspects and legal aspects due to lack of co-ordination between the two. Still many decisions taken by the GST Council yet to be implemented. The gap should be reduced.

13. Extension of due dates is become very much common in GST. Monthly returns, Annual returns, compliance returns, etc. are extended as and when the need arises. GSTN is unable to handle the load and the technological issues. New returns are still on the paper and yet to see reality.

14. Most of the cases, the legal remedy is not available which resulted in assessees heading to High Courts through Writ applications. It resulted in increase in cost of litigation for the assessees and increase in cases for the High Courts. Even after three years after implementation, not even one Appellate Tribunal formed.

15. Bringing petroleum products, left out transactions pertaining to real estate into GST regime would reduce the cascading effect to the assessees.

16. Even though Check posts removed in most of the States, mobile squads creating a lot of problems even for procedural errors in e-way bill related issues.

17. Fairness should be required in many matters like attaching bank accounts without proper adjudication, recovery proceedings, arrests, etc.

18. Many arbitrary/draconian provisions exist as on date needs to modified or removed. Example of such provisions could be:

    a. Section 17(5) of CGST Act – Considering the Statement of Objects Clause
    b. Section 54 – Refund on Capital goods credit when there is no restriction under Section 16 of IGST Act.
    c. Section 129 – even when "mens rea" not involved – Irrespective of nature of mistake.
    d. Section 19 read with Section 143 – job work – How can procedural section can prescribe levy?
    e. Validity of Schedule I entries (like import of services from related person)
    f. Rule – 36 (4) without effecting the provisions of section 43A
    g. Rule 86A – Conditions of use of amount available in electronic credit ledger
    h. Rule – 89 authorised operations for SEZ unit, limit in value of export of goods to 1.5 times for similar goods in domestic market, etc
    i. Rule – 96(10) – retrospective implementation – Came on 23.01.2018 effective from 23.10.2017
    j. Rule 96A – Non export of goods within three months – no supply – duty liability?
    k. Rule 96B - Non receipt of foreign currency for export of goods.
    l. RCM liability on ocean freight.
    m. Lapsing of credit in specific cases like textile industry
    n. No refund for invoices not appearing in GSTR-2A
    o. Non-payment for the supply received beyond 180 days – Payback the ITC with interest and many more……

Possible Way out:

GST an evolving law, where the assessees should show proactively involve in learning the law and make suggestions to meet the objective. The law doesn't protect ignorant.

The Assessee should be ready to fight to uphold their rights. For being effective one may opt to fight legally through association/ unions – "Together we stand, divided we fall".

Government should implement/provide charter of citizen's right in tax laws as promised by Hon'ble Finance Minister of India in her Budget speech as follows – "Our government would like to reassure taxpayers that we remain committed to taking measures so that our citizens are free from harassment of any kind"

Conclusion:

GST is in the initial years of implementation has thrown up many disputable areas which were settled in the central excise/ service tax regime. The grey areas needs to be clarified / modified by the Government to make it a Good and Simple Law. Transforming or redrafting the law to be simple, fair and transparent, requires efforts from both the revenue and the assessees. Blame game may not sort out the issues, whereas positive acts from both ends would resolve the same. As quoted by Martin Luther King "Darkness can't drive out darkness, only light can do that", hence we being responsible citizens of the country should strive towards making the law respectable in order to respect the same.

Any inputs/suggestions, please write to madhukar@hiregange.com / rajeshmaddi@hiregange.com

TRAN-1 Trauma - No Treatment found yet - Count down started!

CA Vasant K Bhat

TRAN-1 is the artery to infuse the eligible CENVAT credit from the erstwhile tax regime to GST. Transitional provisions for this purpose have been provided in the CGST Act. Section 140 of the CGST Act, 2017 empowers the government to prescribe the procedure in this regard. Accordingly rule 117 of the CGST Rules, 2017 prescribed the filing of TRAN-1 to carry the credit balance of earlier tax regime to GST. Earlier, the provisions of section 140 did not provide the power to prescribe the time limit to file the TRAN-1. Yet rule 117 prescribed 90 days time limit file TRAN-1 and the commissioner was empowered to extend the time limit upon the recommendation of the GST Council.

In the Finance Act, 2020, a "retrospective" amendment was made to the provisions of section 140 enabling it to prescribe the time limit. As per the settled legal principles, Parliament is empowered to make the retrospective amendment with respect to provisions beneficial to the taxpayers. No retrospective amendment can be made which restricts the rights of the taxpayers.

Even today, most of the problems faced by the taxpayers in GST compliance is on account of the inefficient functioning of the GST portal. The taxpayer's pocket is burning due to the incompetence of GST network. It is close to 3 years since the introduction of GST, still many of the forms are not yet made available in the portal, many of the provisions are not compliable. The number of notifications issued to change in the procedures, number of clarificatory circulars issued, number of circulars withdrawn due to confusions created therein and the number of writ petitions filed at various High Courts till today are the evidence of the lacuna and ambiguity in the GST law and depicts the preparedness of the GST portal.

It is surprising that the GST Council is not heeding to the orders of the various High Court direction to re-open the portal for filing TRAN-1 or to accept the manual TRAN-1. The department is very much sitting on the proof of 'technical glitch' to allow the taxpayers to file or revise the TRAN-1. There is no term 'technical glitch' defined in the GST Act or Rules made thereunder. The sole architect, owner and authority of this 'technical glitch' is the GST network and the department is riding on it and the taxpayer is bleeding on account of this.

The mitigating of the cascading effect of taxes and to reduce the litigations were among the objectives of introduction of GST. However, currently the department is expecting all those taxpayers who have trouble in filing the TRAN-1 is to go to High Courts!

Various judicial pronouncements on TRAN-1 are as under;

Brand Equity Treaties Ltd.,[1] (order dated 05.05.2020)

The upshot of this experience is that the GSTN network, indeed, is riddled with shortcomings and inadequacies. This is palpably evident from the sheer number of cases being presented before us, in relation to such technical difficulties and inadequacies. The benchmark, is that the online system brought into force by the GSTN Ltd. should be able to perform all functions and should have all flexibilities/options, which were available in the pre-GST regime. The problems on the GSTN cannot be wished away, and have to be resolved in the right earnest. This requires sensitivity on the part of the Government which has, unfortunately, not been exhibited in adequate measure.

There is nothing sacrosanct about the time limit so provided. It is not as if the Act completely restricts the transition of CENVAT credit in the GST regime by a particular date, and there is no rationale for curtailing the said period, except under the law of limitations. The period of 90 days has no rationale and as noted above, extensions have been granted by the Government from time to time, largely on account of its inefficient network.

The arbitrary classification, introduced by way of sub Rule (1A), restricting the benefit only to taxpayers whose cases are covered by "technical difficulties on common portal" subject to recommendations of the GST Council, is arbitrary, vague and unreasonable.

The credit standing in favour of the assessee is a vested property right under Article 300A of the Constitution and cannot be taken away by prescribing a time-limit for availing the same.
The provision Rule 117 is read down as being directory in nature, insofar as it prescribes the time-limit for transitioning of credit and therefore, the same would not result in the forfeiture of the rights, in case the credit is not availed within the period prescribed.

Accordingly, since all the Petitioners have filed or attempted to file Form TRAN-1 within the aforesaid period of three years they shall be entitled to avail the Input Tax Credit accruing to them. They are thus, permitted to file relevant TRAN-1 Form on or before 30.06.2020. Respondents are directed to either open the online portal so as to enable the Petitioners to file declaration TRAN-1 electronically, or to accept the same manually. The other taxpayers who are similarly situated should also be entitled to avail the benefit of this judgment.

The Hon. Supreme Court in its Order dated 19.06.2020 has stayed the operation of the order in case of Brand Equity Treaties Ltd (supra)

[1] 2020-TIOL-900-HC-DEL-GST

Amba Industrial Corporation[2] (Order dated 18.06.2020)

It is not appropriate to declare rule117(1A) invalid, but the Petitioner is entitled to carry forward Cenvat Credit accrued under Central Excise Act, 1944. The Respondents have repeatedly extended date to file TRAN-I where there was technical glitch as per their understanding. Repeated extensions of last date to file TRAN-I in case of technical glitches as understood by Respondent vindicate claim of the Petitioner that denial of unutilized credit to those dealers who are unable to furnish evidence of attempt to upload TRAN-I would amount to violation of Article 14 as well Article 300A of the Constitution of India.

In view of decision of this Court in the case of Adfert Technologies Pvt. Ltd. (Supra) and Delhi High Court in the case of Brand Equity Treaties Ltd. (Supra) present petition deserves to be allowed and accordingly allowed. The Respondents are directed to permit Petitioner to upload TRAN-I on or before 30.06.2020 and in case Respondent fails to do so, the Petitioner would be at liberty to avail ITC in question in GSTR-3B of July 2020.

Mangla Hoist Pvt Ltd.[3] (Order dated 17.06.2020)

Division Bench in Brand Equity Treaties Ltd (supra), has held that the time limit of 90 days prescribed in Rule 117 of the CGST Rules is not mandatory but directory in nature. It was also held therein the judgment is to be publicised by uploading it on the respondent's website and that all the assessees, who were unable to upload TRAN-1, could do so on or before 30th June, 2020.

Since there is no stay on the said order, the respondents are under an obligation to abide by the directions issued therein by adequately publicising the said decision and uploading it on their website as also by opening its common portal to enable the petitioner and all similarly placed parties to upload TRAN-1, for claiming transitional credit.

The respondents are directed to ensure compliance of the captioned judgment by 19.06.2020, particularly since the cut of date fixed by the court in the said case is 30.06.2020, which would leave only ten clear days for the petitioner and similarly placed assessees to take necessary steps.

SKH Metal Sheet Components[4] (order dated 16.06.2020)

The law should provide for a remedial avenue. The stand of Central Government, focusing on condemning the Petitioner for the clerical mistake and not redressing the grievance, is unsavory and censurable. Tax laws, as it is, are complex and hard to interpret. Moreover, no matter how well conversant the taxpayers may be with the tax provisions, errors are bound to occur. Therefore, if the tax filing procedures do not provide for an appropriate avenue to correct a bona fide mistake, the same would lead to the taxpayers avoiding compliances.

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[2] 2020-TIOL-1046-HC-P&H-GST
[3] 2020-TIOL-1037-HC-DEL-GST
[4] 2020-TIOL-1031-HC-DEL-GST

The necessary Forms under GST are difficult to identify and the Government had to put efforts to assist the citizens in understanding the procedures. Nevertheless, all things considered, in spite of the amendment to section 140, the decision in Brand Equity Treaties Ltd (supra) is not entirely resting on the fact that statute did not prescribe for any time limit for availing the transition of the input tax credit. There are several other grounds and reasons enumerated in the said decision that continue to apply with full rigour even today, regardless of amendment to Section 140 of the CGST Act.

The time limit of 90 days is not sacrosanct. In Brand Equity Treaties Ltd. (supra), that court has observed that the government has not ascribed any meaning to the words 'technical difficulties on the common portal' and it cannot be interpreted in a restrictive manner

Both the Act and Rules do not provide any specific consequence on failure to adhere to the timelines. Since the consequences for non-comopliance are not indicated, the provision has to be seen as directory. Pertinently, nonobservance of the timelines would prejudice only one party- the registered person/taxpayer. If the timelines held to be mandatory, the failure to fulfil the obligation of filing TRAN-1 within the stipulated period, would seriously prejudice the taxpayers, for whose benefit section 140 has been provided by the legislature. In view of the above discussion, interpreting the procedural timelines to be mandatory would run counter to the intention of the legislature and defeat the purpose for which the transitionary provisions have been provided and have to be construed as directory and not mandatory.

There is no convincing reason to hold that as on date, the revision of the said return, will be time-barred and treated to be a fresh return. The revised data can be easily verified and correlated with the tax returns filed in the erstwhile regime. In fact, Rule 120A of CGST Rules is an enabling provision that can be resorted to, by the taxpayers to revise the Form GST TRAN-1 on the common portal within the time specified in the rules or such further period as may be extended by the Commissioner

Petitioner is permitted to revise TRAN-1 Form on or before 30.06.2020 and transition the entire ITC, subject to verification by the Respondents. The Respondents should either open the online portal so as to enable the Petitioner to file revised declaration TRAN-1 electronically, or to accept the same manually.

Chogori India Retail Ltd.[5]**,**
It is not denied by the Respondent that the Petitioner is entitled to carry forward such TC and use it for payment of the taxes under the CGST Act. It is also not in dispute that there have been numerous glitches on the GST Portal in making it difficult for uploading of the TRAN-1 Forms. This Court has itself issued orders in numerous cases permitting Petitioners to be afforded one more opportunity to either file the TRAN-1 Form electronically or manually. Accordingly, a direction is issued to the Respondent to either re-open the portal to enable the Petitioner to file its TRAN-1 Form electronically failing which to permit it to file manually on or before 13th September, 2019.

[5] 2019-TIOL-1823-HC-DEL-GST

The Hon Supreme Court[6] declined to interfere in the Order and dismissed the SLP filed against the above Order.

Adfert Technologies Pvt. Ltd.[7]
The introduction of Rule 117(1A) & Rule 120A and absence of any time period prescribed under Section 140 of the Act indicate that there is no intention of government to deny carry forward of unutilized credit of duty/tax already paid on the ground of time limit.

The Respondents is directed to permit the Petitioners to file or revise where already filed incorrect TRAN-1 either electronically or manually statutory Form(s) TRAN-1 on or before 30th November 2019. The Respondents are at liberty to verify genuineness of claim of Petitioners but nobody shall be denied to carry forward legitimate claim of CENVAT/ITC on the ground of non-filing of TRAN-I by 27.12.2017

The Hon Supreme Court[8] has dismissed the SLP filed by the department against this order.

Siddharth Enterprises[9]
The right to carry forward credit is a right or privilege, acquired and accrued under the repealed Central Excise Act, 1944 and it has been saved under Section 174(2)(c) of the CGST Act, 2017 and, therefore, it cannot be allowed to lapse under Rule 117 for failure to file declaration form GST Tran-1 within the due date, i. e. 27.12.2017.

The time limit prescribed under Rule 117 to allow the availment of the ITC with respect to the purchase of goods and services made in the pre-GST regime and post-GST regime is arbitrary, irrational and unreasonable and, therefore, it is violative of Article 14 of the Constitution.

The due date contemplated under Rule 117 of the CGST Rules to claim the transitional credit is procedural in nature and thus merely directory and not a mandatory provision.
By not allowing the right to carry forward the CENVAT credit for not being able to file the form GST TRAN-1 within the due date may severely dent the writ-applicants working capital and may diminish their ability to continue with the business and such action violates the mandate of Article 19(1)(g) of the Constitution.

The liability to pay GST on sale of stock carried forward from the previous tax regime without corresponding input tax credit would lead to double taxation on the same subject matter and is, therefore, arbitrary and irrational.

The phrase "technical difficulties on the common portal" should be given a liberal interpretation because it is a settled principle of law that an interpretation unduly restricting the scope of a beneficial provision should be avoided so that it may not take away with one hand what the policy gives with the other.

[6] 2020-TIOL-114-SC-GST-LB
[7] 2019-TIOL-2519-HC-P&H-GST
[8] 2020-TIOL-64-SC-GST
[9] 2019-TIOL-2068-HC-AHM-GST

Few other decisions wherein similar views were expressed are as under;

a) Krish Authomotors Pvt. Ltd.[10]
b) Ganapati Advisory Ltd.[11]
c) Arora & Company[12]
d) Mrinal Ghosh[13]
e) Soni Traders[14]
f) SRC Aviation Pvt Ltd[15]
g) Jakap Metind Pvt Ltd[16]
h) Tara Exports[17]
i) Uninav Developers Pvt Ltd[18]
j) Tyre Plaza[19]
k) Blue Bird Pure Pvt Ltd[20]

The principles emanating from the above decisions may be summarized as under;

a. The provisions of the section 140 is not mandatory and only directory.
b. Transitional credit is a vested right and is protected under Article 300A of the Constitution which cannot be taken away due to procedural lapse.
c. Denying the transitional credit violates Article 14 of the Constitution.
d. Civil rights can be enforced within 3 years under the Limitation Act1963, which should be applicable to GST also.
e. There is nothing called 'technical glitches' in the GST provisions. That should not be the criteria to allow the taxpayers to file the TRAN-1.
f. Denial of the transitional credit affects the working capital and may diminish the ability of the taxpayers to continue with the business and such action violates the mandate of Article 19(1)(g) of the Constitution.

The Delhi High Court, in the case of SKH Sheet Metal Components (supra) went on to criticize the functioning of the department as under;

"We may just add that we do not derive any pleasure when we make such observations, as comments of the Court affect the reputation of the administration in the country. Such remarks are made only when we are constrained to do so. The case before us is one where there is a complete lack of understanding and fairness on the part of the Tax Department. The fact that Respondents have done nothing to solve the problem

[10] 2019-TIOL-2153-HC-DEL-GST
[11] 2019-TIOL-1602-HC-ALL-GST
[12] 2019-TIOL-2544-HC-DEL-GST
[13] 2019-TIOL-2676-HC-KOL-GST
[14] 2019-TIOL-2932-HC-DEL-GST
[15] 2019-TIOL-2931-HC-DEL-GST
[16] 2019-TIOL-2931-HC-DEL-GST
[17] 2018-TIOL-2872-HC-MAD-GST
[18] 2019-TIOL-1661-HC-DEL-GST
[19] 2019-TIOL-1902-HC-DEL-GST
[20] 2019-TIOL-1564-HC-DEL-GST

faced by the Petitioner, fueled with the adamant stand before us, contributes to skepticism of GST technical infrastructure, which we feel should and can be easily avoided. Only if Respondents were to engage with the taxpayers with a genuine intention to solve the problems, confidence in the system can be built up and such matters would not reach courts."

It is high time for the department to find the solution to the problems with reagard to TRAN-1. The Central Govt is talking about Make in India, Atmanirbhar Bharat etc. But the difficulties of the taxpayers remain unattended even after so many court orders! The limitation period of 3 years is ending on 30th June 2020. The taxpayers may be left with the following options now;

1. Writing the letter to the jurisdictional officer, the Nodal officer, IT Grievance Redressal Mechanism requesting them to open the portal or to accept manual TRAN-1.
2. Filing of writ petition before the jurisdictional High Court.
3. Informing the department that the transitional credit shall be taken through GSTR 3B and taking the credit in GSTR 3B. The department shall deny the credit and follow the appeal route. The cost of interest, in the event of unfavorable order by the court should be borne in mind.

Disclaimer

The views expressed herein are the views of the article writer and cannot be used in framing of opinions or devising methodologies for the purpose of compliance without an independent evaluation- vasant.bhat@hiregange.com.

Human beings equated to property – Supply of implants to in-patient treated as works contract!!!

CA. Ashish Chaudhary
CA. Vikram Katariya

The power to impose sales tax/VAT flows from Entry 54 of List II of Schedule VII of the Constitution of India. Under Article 366(29A) of the Constitution of India, "tax on the sale or purchase of goods" includes

a. a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;
b. a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;
c. a tax on the delivery of goods on hire-purchase or any system of payment by instalments;
d. a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;
e. a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;
f. a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration,

As per the above definition, the status of deemed sale is fastened to transactions where one or the other element of sale is missing. But where the element of sale is altogether missing, the transaction would not fall within any of the clauses of Article 366(29A) of the Constitution of India

There were disputes as to whether supplies (such as medications, implants, surgical items and other pharmaceutical items) made to an In-Patient would constitute an independent sale amenable to levy of VAT or to be considered as part of the healthcare service.

The Punjab & Haryana High Court in the case of M/s. Fortis Health Care Ltd. and Another[21] had passed a combined order against a batch of writ petitions, holding that
For the purpose of attracting VAT, a transaction or a part thereof, which is essentially a service would have to qualify as a sale within the meaning of Sales of Goods Act, 1930 or the definition of sale. The fiction of a deemed sale applies only to such situations as would fall within the sub-clauses of Article 366(29-A) of the Constitution of India which permit severance of the service element from the sale element and empowers the State to tax the element of sale. A perusal of Article 366(29-A) of the Constitution of India does not enable us to record an opinion that it covers services provided by hospitals. Before such a transaction is put to tax, whether under the Haryana or Punjab VAT Act, it would have to satisfy the dominant nature test by reference to the substance of the contract. A contract for medical treatment necessarily involves medicines, supply of surgical items, stents, implants, valves, without which a medical procedure or medical treatment cannot be completed.

[21] 2015 (2) TMI 1014

Medical procedures/services offered by the petitioners are a service. The supply of drugs, medicines, implant, stents, valves and other implants are integral to a medical services/procedures and cannot be severed to infer a sale as defined under the punjab or the haryana act and therefore, are not exigible to value added tax.

The Jharkhand High Court in the case of M/s. TATA Main Hospital[22] had passed an order against the writ petition filed, wherein it had held as under
On the facts noticed in the forgoing paragraphs, we find that the TMH is not doing business of sale of the aforesaid articles, i.e. Medicines, vaccines, surgical items, x-ray films & plates etc. and therefore, cannot be said that the Hospital is a dealer within the meaning of Dealer Under the Bihar Finance Act.
The transaction aforesaid, cannot be said to be sale under the law as there is no element of sale at all in the said transaction. It is to be held that the transaction of supply of Medicines, surgical items, x-ray films and plats etc. for the treatment of the indoor patients does not come under the purview of sale in terms of the Bihar Finance Act because the TMH is not selling those items to the indoor patients but in fact they are being consumed, utilized, administered to those indoor patients, which are essentially required for their treatment. Accordingly, it is to be held that supply of the aforesaid article by the TMH are not liable to be taxed.

Same view has been held by the Allahabad High Court in the case of **M/s. International Hospital Pvt. Ltd.**[23] **Contrary to the above, the Kerala High Court in the case of Malankara Orthodox Syrian Church**[24] **(Single Member) and Comtrust Eye Hospital**[25] **(2 Member Division Bench) the court held that hospitals selling medicines in the course of medical treatment would be liable to pay tax. Replacement of natural lens with artificial lens supplied by hospital through implantation is not different from sale of medicines. While lens is inserted in the eye in place of natural lens in cataract surgery, artificial stent is fixed inside blood vessel in the course of angioplasty to clear occluded blood vessel supplying blood to the heart muscle. Similar is the case of installation of steel rods to repair or reconstruct damaged human bones, whether crushed or corroded by reason of disease, injury, etc. Even though hospitals may be charging consolidated rates, the cost of material supplied is a major component of the charges and it is proportionate to the value of the item supplied, which again depends on its quality, brand name, etc**

Subsequently, the Division Bench (3 Member Bench) of the Kerala High Court in the case of Sanjose Parish Hospital and Ors[26] had disagreed to the above referred judgement of the lower benches of the same Court. It was held that the judgements in these cases do not propound and declare the correct position in law and the Registry was directed to place these orders before the Division Bench for consideration.

[22] 2007 (9) TMI 599
[23] 2014 (2) TMI 765
[24] 2002 (12) TMI 587
[25] 2006 (10) TMI 413
[26] 2019 (3) TMI 1017

Recently, in the case of **MIOT Hospitals Ltd.**[27], the Single Member Bench of the Madras High Court while dismissing a batch of Writ petitions, had disagreed with the rulings of other High Courts on the said matter and held that health services provided to In-Patient would qualify as a works contract, liable to VAT. The primary question of law under consideration was whether in the course of provision the medical service, VAT would be applicable on the stents, valves, medicines, x-ray and other goods used while treating their In-Patients. In this case, the Court had made the following key observations

1. Works contract essentially involves two fundamental elements namely (i) transfer of material and (ii) rendering of service. The supplier transfers the ownership and possession of the material used to the recipient in the course of execution of the work contract. Sometime such work may result in new identity altogether different from the material supplied while sometimes such materials become part of the existing structure or goods. It can be both divisible and indivisible contract.
2. Referring to the decision of the Hon'ble Supreme Court in the case of **Larsen and Toubro Ltd and another**[28]**,** it held that "works contract" is a separate specie of contract distinct from contract for service.
3. Works contract is of infinite variety and it is not possible to conclude hospital service are outside the purview of Art.366 (29A) of the Constitution.
4. Definition of "works contract" in Section 2(43) of the Tamil Nadu Value Added Tax Act, 2006 is of very wide import. It is a generic definition. It is not confined to any specific genre of contract involving service and supply of goods. It is also not confined to immoveable property. Any agreement for fitting or installation of any moveable property such as prosthetics can qualify as "works contract".
5. The ground of "dominant test" does not survive after the 46th amendment to the Constitution. Even if such a test was to be applied, the Court has to first answer as to whether in the course of the provision of "medical /health service", any of the clauses in the definition of "sale" were attracted or not. It is only after ruling out the applicability of the definition of sale and the definition of "works contract" in the said Act, the Court could have thereafter proceeded to determine the taxability or non-taxability of the transaction.
6. Health service cannot be carved out as separate specie of service and/or sale different from the definition of "works contract" for the purpose of the Tamil Nadu Value Added Tax Act, 2006.
7. Fitting out or implanting of prosthetics into the physiology or the body of the patient for alleviation of pain or for improvement of the life of the patient in the course of medical/surgical procedure can be construed as "works contract".
8. Thus, there is merits in the contention of the respondent that the medical/Health services rendered by the petitioners could fall within the ambit of the Article 366 (29-A) of the Constitution of India read with the provisions of the Tamil Nadu Value Added Tax Act, 2006. At the same time, dispensing of medicine to such patients while they undergo treatment as an inpatient in the hospital cannot come within the purview of the definition of "works contract". Consequently, no tax can be demanded on the value of such medicine.
9. Under section 2(43) of the Tamil Nadu Value Added Tax Act, 2006 the definition of "works contract" includes any agreement for carrying out building construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property for cash or deferred payment or other valuable consideration. The words fitting

[27] 2020 (6) TMI 119
[28] 2015 (8) TMI 749 - SUPREME COURT

out of any immovable property can bring within its purview the fixing of valves, stents, metal plates, artificial hips and knees etc.

10. There is not only transfer of possession of prosthetics into the physiology of the patient but also the ownership of such prosthetics to the patient for consideration in the course of the provision of medical/health service. Similarly, in the course of taking x-ray, scan, MRI/CT Scan for such in-patient, cost of which get included into the package are taxable as such activity can be termed as the processing of moveable property.

In the view of the authors, the Madras High Court has failed to consider and evaluate the expression “property”. Under no stretch of imagination, a living human body can be considered as a “property” and therefore it would be absurd to conclude that there could be a “works contract” on the body of a living human being. There is a clear distinction between the term “property” and “persons”. The Court had failed to answer the specific question as to how the patient could be considered as a property and thus the question of levy as a works contract would fail.

One needs to consider the definition of works contract and none of the words used therein can be said to allude to work on a human body. The term “fitting out” and “improvement” are not phrases used to describe procedures carried out on a human body. The contextual exclusion of surgical procedures from the definition of “works contract” is even more compelling when one considers that the legislature which went to considerable lengths to include 11 such words, but did not choose to mention “implant” or “transplant” on human body, which are the words which are used to describe surgical procedures. Hence, it is difficult to understand as to how one can fit the said service within the purview of “works contract”.

The various other High Courts had appreciated the correct nature of transaction and held that there is no independent sale leviable to VAT in case of goods used for treatment of Inpatient. The objective of the patient is to get the healthcare services wherein the goods are consumed in the course of services. Thus, the entire transaction is to be considered as a service, though certain goods are supplied in the course of provision of such service. However, where the medicines / consumables prescribed can be procured from outside, GST on such items could be applicable.

In the context of GST, the coverage of works contract under Section 2(119) of the CGST Act,2017 is applicable only with respect to immovable property. Also, the Madras High Court in Para 139 of the said order had acknowledged the fact that it is a healthcare service and that GST would be exempted on such service.

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RCM implications on Services provided by Directors – A Circular with hidden challenges

CA. Vikram Katariya

Section 9(1) of the CGST Act,2017 is the basic provision which provides for levy of GST on all intra-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption.

The question of payment of GST under reverse charge would arise only when the said transaction qualifies to be a 'supply' under Section 7 of the CGST Act. For example, services provided by an employee to the employer is specifically excluded from the scope of supply. Hence, the question of payment of GST in case of payments made to a person, in the capacity of an employee, does not arise.

The concept of reverse charge mechanism has been provided to shift the liability for making payment of GST in the hands of the recipient. The coverage of services, the provider of service and on whom the said liability is shifted under RCM, is provided under a specific notification.

Notification 13/2017-Central Tax (Rate) dated 28.06.2017 ('RCM notification') issued under Section 9(3) of the CGST Act,2017 provides for payment of GST under reverse charge mechanism for services provided by a Director of a Company to the said Company. More specifically, the said entry under the notification reads as under

Sl. No.	Category of Supply of Service	Supplier of Service	Recipient of Service
6	Services supplied by a director of a company or a body corporate to the said company or the body corporate.	A director of a company or a body corporate	The company or a body corporate located in the taxable territory.

It is to be noted that the RCM Notification does not use the phrase 'services provided by any person to a Company, who is a Director in the said Company'. Instead, it uses the phrase 'services supplied by a Director of a Company'. Hence it is clear that the said notification covers only those services which are provided in the capacity of a Director.

In this context, the Department vide a recent Circular No. 140/10/2020 – GST dated 10.06.2020 had clarified in respect of levy of GST on Director's remuneration. Some of the key aspects of the said Circular are as under

a. It is hereby clarified that the remuneration paid to such independent directors, or those directors, by whatever name called, who are not employees of the said company, is taxable in hands of the company, on reverse charge basis (Para 4.3)

b. Accordingly, it is clarified that the part of Director's remuneration which are declared as 'Salaries' in the books of a company and subjected to TDS under Section 192 of the IT Act, are not taxable being consideration for services by an employee to the employer in the course of or in relation to his

employment in terms of Schedule III of the CGST Act, 2017 (Para 5.3)

c. It is further clarified that the part of employee Director's remuneration which is declared separately other than 'salaries' in the Company's accounts and subjected to TDS under Section 194J of the IT Act as Fees for professional or Technical Services shall be treated as consideration for providing services which are outside the scope of Schedule III of the CGST Act, and is therefore, taxable. Further, in terms of notification No. 13/2017 – Central Tax (Rate) dated 28.06.2017, the recipient of the said services i.e. the Company, is liable to discharge the applicable GST on it on reverse charge basis (Para 5.4)

It is specifically noted that the said Circular has emphasized the words 'Director's remuneration' and it is abundantly clear that the Circular covers the aspect of remuneration paid to a Director, in his capacity as a Director. This aspect also supports the view that the services which are provided in the capacity of a Director would only be covered under the reverse charge mechanism. The RCM notification does not appear to cover services which are provided in the independent capacity of the Director, as it would not form part of the remuneration paid to the Director in the said capacity.

Also, under entry no.6 of the RCM notification the supplier of service should be a Director of the said Company. A 'Director' by itself is not a person, but a position in the Company which is held by a person. When the services are provided in the independent capacity of an individual, it cannot be said it is the Director who has provided the said service. For instance, when a Director provides his commercial property for rent to the Company, it cannot be construed that it is a service provided by the Director in his capacity as a Director of the Company. On the other hand, it is a service provided in the individual capacity of the Director (i.e. as a third party), on which consideration is paid for the property provided on lease.

Hence, the test would be to determine whether the service is provided by a person to the Company, in his capacity as a Director or otherwise. The requirement to pay GST under RCM would arise only when it is provided in the capacity of a Director. The exclusion of employer-employee relationship under Schedule III of the CGST Act, 2017 shall be evaluated in case of such transactions.

Reference to the Companies Act, 2013

In this regard, one can draw reference to some of the provisions of the Companies Act, 2013 which deal with the aspect of remuneration paid to the Directors. Section 197 of the Companies Act provides for overall limit of remuneration payable to the Directors of a public company.

Proviso to Section 197(4) of the Companies Act,2013 specifically provides that any remuneration for services rendered by any such Director in other capacity shall not be so included under remuneration paid to the Director if—

a. the services rendered are of a professional nature; and
b. in the opinion of the Nomination and Remuneration Committee, if the company is covered under sub-section (1) of section 178, or the Board of Directors in other cases, the director possesses the

requisite qualification for the practice of the profession.

Further, we understand that when the services are provided by a Director in his independent capacity, the provisions under Section 188 of the Companies Act,2013 (i.e. related party transactions) would apply. Specific procedures and safeguards have been provided with regard to such transactions with Director's in their independent capacity.

Section 197(5) of the Companies Act,2013 provides that a Director may receive remuneration by way of fee for attending meetings of the Board or Committee thereof or for any other purpose whatsoever as may be decided by the Board. The amount of sitting fee paid to Director is considered to be part of the remuneration paid to the Director, however not in nature of salary payment. Hence, TDS under Section 194J of the Income Tax Act,1961 is deducted on such payments.

It emerges from the foregoing provisions that there is a clear distinction between what would be considered as remuneration paid to a Director and what would be a remuneration/consideration paid in the independent capacity of a Director. It is not a case where all payments are made to a Director just because he/she is a Director of the Company. A Director in his independent capacity, having requisite qualification and skills, could provide specific services to the Company and the consideration for the said service would be dependent on the nature of service provided.

Reference of TDS provisions in the Circular

The reference made to the TDS provision under the Income Tax Act,1961 shall apply only to the extent of remuneration paid to the Director. This aspect is abundantly clear from the wordings of the said Circular. Any other payment made to the Director which are not in the nature of remuneration, are not covered in the said Circular.

For instance, payment of sitting fee to a Director would be relevant for the purpose of evaluation of the Circular, as it considered to be part of remuneration paid to the Director. TDS deducted on sitting fee under Section 194J of the Income Tax Act, 1961 would be covered within the ambit of RCM.

Further, the Circular does not envisage a scenario where rent payments are made to Directors and TDS is deducted under Section 194I of the Income Tax Act, 1961. It can be inferred that since such payments are made in their individual capacity, the question of RCM on such payments would not arise and hence not covered under the Circular. TDS implications on payment made to a Director in their independent capacity, would not have any relevance to determine the GST liability under RCM.

Concluding Remarks

It is possible to conclude that the Company would not be required to pay GST under RCM for the services provided by the Directors, in their independent capacity. Further, if a view is taken that the Director is not required to charge GST under forward charge (provided they are required to take registration under GST), there could be a possibility of future tax demands in the hands of the Director.

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GST implications on sale of repossessed goods

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Adv. Lavanya

With reference to the activity of sale of repossessed goods by an NBFC, there are certain aspects in the GST law which require further evaluation. This article analyses various implications under the GST law and the possible interpretations, on the activity of sale of repossessed goods.

A. What is meant by repossessed goods?

In the business of lending, hypothecation of goods and security of assets play vital role in the event of default in repayment of the loan. In such cases, the goods/assets would be repossessed or attached as a part of recovery of the outstanding loan amount. Taking over of goods by the lender from the defaulting borrower is termed as repossession and accordingly known as repossession of goods.

B. Sale of repossessed goods

It is a general practice in the industry to sell off the repossessed goods by way of sale or auction. Whether the same would be treated as supply and GST would be attracted has to be evaluated. Sale of repossessed goods is made for a consideration in the course of business, therefore, it would be conveniently covered within the scope of supply. This was further clarified by Question No.63 in FAQ issued by the CBIC on Banking, Insurance and stock brokers sector dated 27.12.2018.

C. Valuation on Sale of Repossessed Goods

Rule 32 of the CGST Rules, 2017 is a non-obstante clause under the valuation chapter, which provides the valuation mechanism in respect of certain specified supplies. Specifically, Rule 32(5) of the CGST Rules, 2017 reads as follows:

Where a taxable supply is provided by a person dealing in buying and selling of second hand goods i.e., used goods as such or after such minor processing which does not change the nature of the goods and where no input tax credit has been availed on the purchase of such goods, the value of supply shall be the difference between the selling price and the purchase price and where the value of such supply is negative, it shall be ignored:

Provided that the purchase value of goods repossessed from a defaulting borrower, who is not registered, for the purpose of recovery of a loan or debt shall be deemed to be the purchase price of such goods by the defaulting borrower reduced by five percentage points for every quarter or part thereof, between the date of purchase and the date of disposal by the person making such repossession.

The real essence of Rule 32(5) of the CGST Rules is to tax only on the margin earned by the dealer of second hand goods. This provision appears to factor the impact of loss of input tax credit on purchase of such used goods. The benefit of payment of tax on the margin/profit element under Rule 32(5) of the CGST Rules, 2017 would be available only if all of the following conditions are satisfied

a. Person must be dealing in buying and selling of second-hand used goods (including repossessed goods)
b. It is a sale of used goods as such or after minor processing without changing the nature of the goods
c. No input tax credit should have been availed on the purchase of such goods.

On a prima facie view, it appears from the above rule that it shall be applied only in respect of "person dealing in buying and selling of second hand goods". However, the proviso following the rule talks about the method of determining the purchase value in case of repossessed goods from a defaulting borrower. If we interpret Rule 32(5) of the CGST Rules, 2017 to mean to include only the activities of buying and selling of second hand goods, it would make the proviso redundant.

A proviso is resorted to provide conditions or riders to the main provisions. Its function is to carve out an exception or exclusion to the main provision, which otherwise would have been in the main section. The Hon'ble Supreme Court in the case of Sales Tax Commissioner v. B.G. Patel [1995 (1) TMI 311 – SC] has held that it is settled law that the proviso and the main part of the Act or Rule are to be harmoniously read together and interpreted to give effect to the object of the provision. It should not render itself otiose or ineffective.

It is well settled principle that a statute never waste words in a statute as held by the Hon'ble Supreme Court in the case of Visitor Amu v. K.S.Misra [2007 (8) SCC 594]. Also, it is well established principle of interpretation denoted by the legal maxim "ut res magis valeat quam pereat" which means that a statute should be read to make it effective and operative rather than rendering it redundant. This principle was also upheld by the Hon'ble Supreme Court in the case of Corporation of Calcutta v. Liberty Cinemas [AIR 1965 SC 1107].

Going by the above principle of interpretation, though one can argue that the provision primarily applies only to a reseller of used goods, it may be concluded that Rule 32(5) has a deeming fiction to include within its ambit sale of repossessed goods also.

In case of repossessed goods from a defaulting borrower (who is not registered), purchase price in the hands of the seller would be the original purchase price of the goods by the defaulting borrower reduced by five percentage for every quarter or part thereof, between the date of purchase and the date of disposal by the person making such repossession.

For instance, a vehicle is purchased in January 2019 for Rs.60,000/-, under finance by a lender. The borrower defaults payment of loan amount and vehicle was taken over by the lender in December 2019. The vehicle so repossessed had been sold in the month of March 2020 for Rs.50,000/-. In this situation, the purchase price to be considered in the hands of the lender would be Rs.45,000/- [i.e. 60,000 – (60,000 * 5% * 5)], considering 5 quarters from the date of purchase. The taxable value under Rule 32(5) of the CGST Rules,2017 for the said transaction would be Rs.5,000/-.

The above proviso can be applied only when the defaulting borrower is an unregistered person. There is no explicit proviso provided for determining the purchase price, when the defaulting borrower is a registered person. As discussed earlier, the main provision under Rule 32(5) of the CGST Rules,2017 would cover the transaction of sale of repossessed goods within the meaning of the term 'buying and selling of second hand goods'. Absence of a specific proviso would not make the rule inapplicable to the said transaction. In fact, it means that there are no exceptions carved out for the said transaction and the valuation has to be determined on the basis of the main provision itself i.e. Rule 32(5).

Since the manner to determine purchase price has not been explicitly provided for such transactions, by logical reasoning, one can consider the extent of default to be the purchase price of the repossessed goods. It would also correlate with the accounting treatment provided in the books of the lender, where the outstanding loan from such defaulting borrower would be transferred and accounted as repossessed goods. An illustrative accounting treatment could be as under

Dr. Repossessed Good (Asset A/c)

Cr. To Loan Receivable (Asset A/c)

Since the lender does not pay any price for the repossessed goods, the reasonable rationale which can be considered is to treat the outstanding loan amount as the effective purchase price of the lender. Therefore, the valuation in case of sale of repossessed goods from a registered borrower could be computed as the difference between the sale price and the effective purchase price (i.e. amount of loan in default).

D. Valuation when the repossessed goods are sold to related party

In case of supply made to related parties, the value of supply shall be determined as per Rule 28 of the CGST Rules, 2017. The said Rule requires determination of value based on the open market value and in case of non-availability of open market value then the other methods of valuation as provided therein should be adopted. Whereas Rule 32(5) of the CGST Rules, 2017 specifically provides valuation mechanism for repossessed goods. In a case where repossessed goods are further sold by the lender to a related party, the adoption of valuation mechanism will become a dispute.

Applying the legal maxim "Generalia specialibus non derogant" which means specific provision shall over general provisions in a statute it can be concluded that Rule 32(5) of the CGST Rules, 2017 shall apply when the repossessed goods is sold to related party since it is a more specific rule as compared to Rule 28 of the CGST Rules, 2017.

E. Rate of tax on repossessed goods

In general, the rate of tax on supply of goods shall be the rate applicable to the said goods under Notification No. 01/2017-Central Tax (Rate) dated 28.06.2017. In general, the rate of GST on sale of motor vehicles is 28%. However, Notification No. 08/2018-Central Tax (Rate) dated 25.01.2018 provides specific exemption in respect of old and used vehicles from so much of tax as in excess of tax computed on the margin. In other words, the effective tax payable on sale of repossessed goods would be the rate of tax provided in Notification No.08/2018-Central Tax (Rate) on the amount of margin. Where such margin is negative, no tax would be payable.

Summary of the effective rate of tax under the said notification is as under

HSN	Description of Goods	GST Rate
8703	Old and used, petrol Liquefied petroleum gases (LPG) or compressed natural gas (CNG) driven motor vehicles of engine capacity of 1200cc or more and of length of 4000mm or more.	18%
	Old and used, diesel driven motor vehicles of engine capacity of 1500cc or more and of length of 4000mm	
	Old and used motor vehicles of engine capacity exceeding 1500cc, popularly known as Sports Utility Vehicles (SUVs) including utility vehicles	
87	All Old and used Vehicles other than those mentioned above	12%

As per Section 2(28) of the Motor Vehicles Act,1988 the term 'motor vehicle' has been defined to mean any mechanically propelled vehicle adapted for use upon roads whether the power of propulsion is transmitted thereto from an external or internal source and includes a chassis to which a body has not been attached and a trailer; but does not include a vehicle running upon fixed rails or a vehicle of a special type adapted for use only in a factory or in any other enclosed premises or a vehicle having less than four wheels fitted with engine capacity of not exceeding twenty-five cubic centimetres.

Summary

In a nutshell, in case of sale of repossessed goods, the value of supply would be determined based on the defaulting borrower's registration status. In case the defaulter is an unregistered person, then the purchase price would be based on the proviso given under Rule 32(5) and in case where the defaulter is registered, the purchase value can be adopted based on the rationale of effective cost to the lender. The rate of GST to be adopted for sale of repossessed goods (other than motor vehicles) would depend on the rate as applicable to said product. In case of motor vehicle covered under Notification No.08/2017-Central Tax (Rate), the effective rate would be in accordance with the said notification.

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Input tax credit reversal on write-off

CA Shilpi Jain

It is a known fact that the input tax credit (ITC) which is available under the GST laws is very wide and it covers credit in respect of goods and services that are used for business and to the extent used for making taxable supplies. However, the exception to this is the credit in respect of the goods and/or services or the situations mentioned in section 17(5) of the CGST Act, 2017, which are also known as the blocked credits. Write-off of goods is one such situation when the credit is blocked i.e. is not available to the taxpayer. The following could be reasons for the write-off of the stock value:

1. Slow or non-moving stocks – due to the market demand certain stocks could be slow moving or non-moving. In some cases, these goods could be used in the future when the need arises.
2. Obsolete stocks – due to technological changes or for any other reason these stocks could be out-dated or no longer usable.
3. Goods destroyed – could be due to natural or other reasons where such goods would be of no use or could be refurbished and used.
4. Any other reason.

This write-off could be either partial or a full write-off. For example, if the value of goods has reduced due to technological advancements or due to the reason of partial destruction (which can be used after certain expenses being incurred to restore it), then there could be only a partial write-off. In other cases, where the goods cannot be used at all or there is a high chance that the demand for those goods will not occur in the future, there could even be a full write-off. The principles of write-off in the books of account are also dependent on the Generally Accepted Accounting Principles (GAAP).

The write-off could be of raw materials or inputs, spares, work-in-progress, finished goods or capital goods/assets. The question that now arises under GST is whether all these kinds of write-offs will entail blocking or reversal of credit. Before answering this let us analyse the position under the CENVAT scheme prior to the introduction of GST.

Position under the CENVAT scheme

Under the CENVAT Credit Rules, 2004, there was a rule 3(5B) which read as below:

If the value of any, -

*1) **input**, or*

*2) **Capital goods before being put to use,***

on which Cenvat credit has been taken is written off fully or where any provision to write off fully has been made in the books of account, then the manufacturer or service provider, as the case may be, shall pay an amount equivalent to the Cenvat credit taken in respect of the said input or capital goods :

Provided that if the said input or capital goods is subsequently used in the manufacture of final products or the provision of taxable services, the manufacturer or output service provider, as the case may be, shall be entitled to take the credit of the amount equivalent to the Cenvat credit paid earlier subject to the other provisions of these rules.

The important aspects to note from the above are

Full write off or provision in books: The scenario covered is that of a full write-off of the value or a provision for full write-off created in the books of account. Hence, the write-off of the goods and a provision created in the books for write-off are 2 different aspects. The write-off of the inputs/capital goods (CG) could be in respect of those goods that may not be used in future (due to being obsolete or damaged, etc). The provision created in the books of account could be in respect of the GAAP requirements and there could be a possibility of such goods being used in future.

Only inputs and capital goods credit: The reversal is in relation to inputs and capital goods that are written-off. There is no reference of reversal of credit relating to any input services.

Reversal effected by way of a payment provision: The reversal of the credit is required to be done by way of payment of an amount equivalent to the CENVAT credit taken in respect of the said input or capital goods. This shows that a specific payment provision is in place to give effect to the reversal of the credit, which was validly availed at the time of receipt of the said goods.

Subsequent availing: In case the goods are used subsequently, there is an enabling provision by which the manufacturer can take back the credit that has been reversed due to the write-off.

Position before the said rule was enacted

Prior to the insertion of the above referred rule, the Gujarat High Court in the case of Ingersoll Rand (India) Ltd. 2014 (300) E.L.T. 347 (Guj.) held that the reduction of the value of goods for income-tax purpose cannot be equated with writing-off of the physical stock and if under such accounting principles, the assessee is entitled to diminish the value of a certain stock held over a period longer than the specified period, the same has no correlation with the availability of physical stock insofar as the manufacturing activity is concerned. It was thus held that reversal of credit is not required on mere reduction in the value of goods i.e. write off, more so when the goods are still available in the factory in a usable condition.

In the case of Federal Mogul Automotive Products (I) P. Ltd. Versus Commr. Of C. Ex., Jaipur 2007 (212) E.L.T. 158 (Tri. - Del.) it was held:

......that inputs that are held in stock by an assessee, even if their value is written of, do not attract requirement for reversal of Modvat credit. In fact, what has happened in the present case is only a revaluation of inputs. Otherwise they are being used for manufacture. Revaluation of assets, in no way, affects Modvat credit taken on them. Increase in the value fetches no additional credit. Similarly, reduction in value, does not diminish the quantum of credit already taken. Quantum of credit available is fixed i.e. equivalent to the specified duties paid.

From the above it can be noted that mere write-off in the value cannot attract credit reversal, since the goods are available for use in the manufacture, unless a specific provision for the reversal of credit is in place in the law as was the position after the insertion of rule 3(5B) ibid.

Provision under GST

Under GST, section 17(5)(h) is the relevant provision which reads as under:

Notwithstanding anything contained in sub-section (1) of section 16 and subsection (1) of section 18, input tax credit shall not be available in respect of the following, namely:-

(h) goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples;

On contrasting the above provision with what existed under the CENVAT scheme, the following points can be noted:

a. The provision contained in section 17(5) is not a specific credit reversal provision or a payment provision as compared to the CENVAT provision discussed above wherein a specific direction is in place to pay the amount of credit availed on happening of a subsequent event (i.e. write-off) after availing credit on receipt of the ggods. Section 17(5) only states that credit will not be available in respect of goods that are written off. In such a case, whether the said provision must be seen at the time of availing the credit or it has to be seen at all times until the goods are completely used? This question arises on the settled principle that credit eligibility has to be seen at the time of receiving the goods/services as was held in the case of Spenta International Ltd. v. Commissioner — 2007 (216) E.L.T. 133 (Tribunal-LB) and Grasim Industries V CCE 2005 (179) E.L.T. A38 (S.C.)], and any subsequent reversal of credit should have a specific provision requiring such reversal as held in the case of Grasim Industries Versus Commissioner Of Central Excise, Indore 2007 (208) E.L.T. 336 (Tri. - LB) Approved in 2015 (322) E.L.T. 209 (Mad.).
b. The next independent point is, the scenario mentioned in the statute is only a write-off as against provision for write-off in the books. Hence it can be said that mere reduction in the value of the goods which are available for use in future will not be covered u/s 17(5). Similarly partial write-offs will not require reversal of credit as the said goods will be available for future use and it is only a reduction in the value of the goods i.e. as long as they are capable of being used for business and for making taxable supplies credit blocking should not occur.
c. Reversal is required in respect of inputs and capital goods not put to use or would it include reversal of credit in respect of inputs, inputs services, capital goods used in finished goods or work-in-progress written off?
    i. If we agree to the fact that 17(5) is a provision that has to be seen at the time of receiving the goods only, then the question of reversal of credit in respect of FG and WIP written off does not arise as the validly availed credit becomes a vested right and its subsequent reversal would require specific reversal provisions whereas section 17(5) is not a credit reversal or a tax payment provision as existed in the CENVAT regime.
    ii. If we take a conservative view that section 17(5) is a provision that has to be seen until the goods are actually used, then the next question that is to be answered is whether the phrase 'in respect of' used in section 17(5) can be said to have such a wide meaning to encompass the credit denial on the inputs, CG and input services that have been used in making the FG or WIP. In this regard, it is to be noted that in general 'in respect of' is a phrase of wide connotation as was held in various decisions like Union of India (UOI) and Anr. Vs. Vijay Chand Jain (1977) 2 SCC 405, Canadian Supreme Court in Nowegijick v. The Queen [1983] 1 SCR 29, etc. It has also been considered to have no precise legal meaning by the New Zealand Court of Appeal in - Phonographic Performances (NZ) Ltd. v. Lion Breweries Ltd.- (1980) PSR 383 (1979). (Garner).

       However, in the Indian context, in the case of Tolaram Relumal v State of Bombay, AIR 1954 SC 496 and State of Madras v Swasthik Tobacco Factory, 1966 (17) STC 316 (SC), it has been held

that the meaning of this phrase has to be interpreted considering the context/setting in which it is used and the object of the legislature. In these cases 'in respect of' was interpreted to mean 'on' i.e. a restrictive word. In the case of Swasthik Tobacco it was held that 'in respect of the goods' has to be interpreted in a restricted manner and it cannot cover the inputs that have been used in making the final product.

In the case of GST, the object and reasons statement indicates that GST was enacted to remove the cascading effect of taxes. Hence, it can be said that 'in respect of' cannot be construed to have a wide meaning so as to restrict maximum possible credit more so when the object of implementation of GST is to remove the cascading effect of taxes. It should be equated with 'on'. Hence, on this count also it can be said that the write-off of finished goods would not require reversal of credit relating to the goods and services that have been used for manufacture of the FG or WIP, whereby write-off of value of FG or WIP would not require reversal of any credit.

d. Section 17(5) does not override section 17(1) or section 17(2). This would imply that once the goods are used or intended to be used in making exclusive taxable supplies or commonly used or intended to be used for making taxable and exempt supplies, and the credit has been availed as per rule 42 and 43, then the provisions of section 17(5) will not apply whereby any goods damaged thereafter will not require any reversal of credit. This is drawn from the principle set out in the case of Multimetals Ltd. v ACCE 57 ELT 209 SC wherein it was held that credit is eligible as it is used in the manufacture. Thereby it can be said that any subsequent reversal will require a specific provision, which in the case of GST does not exist as we have stated that section 17(5) does not override section 17(1) and (2). This also supports the view that once inputs/input services are issued for production i.e. are intended to be used for making taxable supplies then subsequent write-off of the WIP or FG cannot attract reversal of credit.

From the above discussion it can be noted that the provision of credit not being available on the write-off of goods as per section 17(5) ibid, which seems to be a simple provision, does not bear the meaning as simple as it might seem to us as on date. There is a lot of clarity missing since the legislature has chosen not to adopt the settled position under the CENVAT Credit regime. However, our above discussion must be adopted after considering the principle that any interpretation should not lead to redundancy of any provision existing in the legislature i.e. the interpretation adopted should not make the provision of non-availability of credit on write-off, redundant.

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GST impact on CSR activities

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As the world is reeling under the impact of Covid-19, most donations made in India, would qualify as a Corporate Social Responsibility (CSR) activity. These donations may be in the form of cash or in kind such as PPE kits, sanitisers etc. This article aims at analysing the impact of GST on CSR activities/expenditure.

What is CSR?
CSR is a corporate entity's way of giving back to the society from which it draws all its resources, personnel and business for the betterment of its stakeholders and society we live in. At the corporate level, CSR is generally considered as a strategic initiative that contributes to organisations brand and positive impact. Section 135 of the Companies Act, 2013, mandates companies satisfying either of the following 3 conditions during any financial year to spend at least 2% of the average net profit of the company made during the three immediately preceding financial years towards CSR activities:

- Net worth of Rs. 500 Cr or more; or
- Turnover of Rs. 1000 Cr or more; or
- Net profit of Rs. 5 Cr or more

Implication of GST on CSR activities
Donation in kind
Whether input tax credit would be eligible on expenditure incurred for performing CSR activities?

Section 16 of the CGST Act enables a registered person to take credit of input tax charged on supply of goods or services to him, if the said goods or services are used or intended to be used in the course or furtherance of business, along with certain conditions.
It is imperative to understand whether the activities performed for CSR are in the course or for furtherance of business as it is one of the main conditions to avail input tax credit.

The term "business" is defined under section 2(17) of the CGST Act, to include:

- Any trade, commerce, manufacture or any other similar activity, whether or not it is for a pecuniary benefit;
- Also, any activity or transaction which is ancillary or incidental to the above-mentioned activities would be included;
- The activities above would be called a business activity irrespective of the volume, frequency, continuity or regularity.

CSR activities are said to be carried out mandatorily for the above-mentioned specific class of companies under Companies Act, 2013, they are required for conducting the business in compliance with the law. Hence it can be said that they are incidental to the main business activities. Therefore, they can be considered to be in the course of or for the furtherance of business.

In the case of Essel Propack Ltd vs Commissioner of CGST, Bhiwandi 2018-TIOL-3257-CESTAT-MUM, it was held that CSR can be considered as input service since they are included within the definition of "activities relating to business" and that these activities could be differentiated from charitable activities. This analogy is more true/apt in GST on the eligibility of ITC on CSR activities as the same is having much wider implications in comparison with CENVAT credit provisions.

However, the aspect that needs to be examined is section 17(5) of the CGST Act, which discusses about blocked credit. Section 17(5) (h) disallows ITC on goods that are lost, stolen, destroyed, written off or disposed-off by way of gift or free samples.
The phrase that is required to be analysed here is “disposed-off by way of gift”. CSR activity cannot be categorised as a gift, as the Companies Act, 2013 mandates certain expenditure to be incurred. Hence it is obligatory in nature, (this may not hold good for entities other than companies) whereas, gifts are not obligatory in nature.
Therefore, it can be said that, section 17(5)(h) of the CGST Act, would not be applicable to the expenditure incurred on CSR activities. Unless and until the same is specifically covered in Section 17(5) of the CGST Act.

However, in case of M/s Polycab Wires Pvt ltd 2019-TIOL-107-AAR-GST, a different view has been taken, where the AAR held that, ITC would not be available on such activities u/s 17(5)(h), as they are provided free of cost.
It is also important to understand the treatment of expenditure on CSR activities under the Income Tax Act. Section 37 of the Income Tax Act, specifically disallows deduction of any expenditure incurred on such activities for the purpose of computing the taxable profit as per the Act. However, most of the expenses incurred for CSR activities would qualify as a deduction under section 80G or under sections 30 to 36 of the Income Tax Act.
Unlike in Income Tax Act, there is no specific restriction under the GST law which provides for exclusion from the word business under Section 2 (17) & which blocks the availment of ITC under Section 17(5) on such inward supply of goods or services.

Would supply of own goods (for e.g. supply of medicines free of cost by a pharmaceutical company to hospitals treating Covid patients) for CSR activities attract GST?

A transaction should fall in the “scope of supply” as provided for in section 7 of the CGST Act to attract GST. As per the said section “supply” includes:

- Supply of goods or services such as sale, barter, transfer, disposal etc. made for a consideration by a person in the course or furtherance of business;
- Activities specified in Schedule I, made without a consideration.

Since it is clear that there is no consideration received from CSR activities performed by the registered

person, it is important to examine Schedule I of the CGST Act, which mentions the activities that would be treated as a supply even if made without a consideration.

Entry No. 1 of Schedule I of the CGST Act, would be relevant in the current scenario, i.e. "Permanent transfer or disposal of business assets where input tax credit has been availed on such assets".

Firstly, since the registered person's own products (manufactured or traded) are being distributed free of cost for CSR activities, these would be "finished goods" in the business of the registered person, hence they can be called as business assets.

Secondly, input tax credit should have been taken on these assets. As discussed earlier, input tax on CSR activities can be taken as a credit, hence any input tax incurred on procurement/manufacture of the output goods, which are distributed for CSR purposes can be availed as a credit.

Hence, if the registered person has availed ITC on the said goods (business assets), the permanent transfer of these goods would amount to supply, though it is given without any consideration/ free of cost, thereby attracting GST.

Whether supply of services for CSR purposes would attract GST?

As discussed above, Schedule I of the CGST Act, is required to be analysed to decide whether provision of service qualifying as a CSR activity would be a supply attracting GST.

It is to be noted that entry No. 1 "Permanent transfer or disposal of business assets" would not be applicable in case of services, as it particularly covers goods(business assets) but not services.

The next entry, i.e. entry No. 2 "Supply of goods or services between related persons or between distinct persons" would also not be applicable, as the services provided under CSR must not be to related persons or distinct persons.

Hence any services provided by a company without any consideration for CSR activities would not be a supply, thereby not attracting GST. On the contrary CSR activities done through outside agency to undertake specific projects for consideration may get covered under supply and would be liable for GST. However, if the said service is specifically exempt under notification No. 12/2017- Central Tax (Rate), then there would be no GST payable.

Conclusion:

Since, there is no specific provision which denies input tax credit on CSR activities, a stand can be taken to avail the input tax credit. However, the short fall in CSR expenditure arising due to availment of ITC should be compensated by contributing additionally towards CSR activities, so that the minimum contribution requirement (i.e. 2% of average net profits) is satisfied. Professional guidance can be sought in this regard, before taking a stand, as it may be litigated by the department.

In these times of crisis, it is imperative that all those who are contributing to the well- being of others, be encouraged and motivated to keep doing the same. Hence, government should allow businesses to avail the input tax credit on CSR activities without any litigation would be received with high appreciation by the trade and industry.

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Is the refund of waived late fee possible?

Adv. Venkatanarayana GM

The waiver of late fee has become a hot topic on social media now. Twitter is flooded with tweets to waive of the late fee on late filing of GSTR 3B from the inception of law. Recently, GST Council has released a press note stating that the "Issue of GST late fee for the past period (August 2017 to January 2020) to be discussed in the GST Council meeting which is going to held on June 14, 2020". Finally, the late fee got reduced up to a maximum of Rs. 500 in the aforesaid Council meeting.
Keeping aside the discussion upon late fee for a while, the million dollar question which arises here is whether the taxpayer can claim the refund of late fee, if the same is already paid by him. Because GSTR 3B would not allow the taxpayers to file the return without paying the late fee. So, can the taxpayer claim the refund of such late fee which he has already paid while filing returns earlier. In this article we will analyze the issue with the help of equity rule of law and the relevant judicial pronouncements.

Authorizing Provision:
Section 47(1) of CGST Act, 2017 gives the power to levy late fee in case of belated filing of returns. In terms of section 47(1) "Any registered person who fails to furnish the details of outward or inward supplies required under section 37 or section 38 or returns required under section 39 or section 45 by the due date shall pay a late fee of one hundred rupees for every day during which such failure continues subject to a maximum amount of five thousand rupees".
Thus, the registered person who has not filed the returns on time has to pay a late fee of Rs. 100 in CGST Act and Rs. 100 in SGST Act on each such day of delay. The same provision has been included in the IGST Act with a late fee of Rs. 200.

Late Fee waived off earlier
However, on 31st December 2018 the GST Council has issued a Notification vide 76/2018 – CT, which waives off the late fee on delayed filing of GSTR 3B for the period July 2017 to September 2018, if the same were filed in between the period 22nd December 2018 to 31st March 2019. But the said notification has not talked anything about the refund of late fee which has already been paid. Thus, it can be said that the issue was not arisen now. It was there since the earlier waiver.

Current Reduction of Late Fee:
In the 40th GST Council held on 12th June 2020 the government has reduced the late fee on filing of GSTR 3B by fixing a maximum cap of Rs. 500. But the said relief has been given to the filing of GSTR 3B pertaining to July 2017 to January 2020, if the same were filed in between 01.07.2020 to 30.09.2020 i.e. prospective in nature. Furthermore, the government has not talked about the refund of late fee which is already paid. This again has led to the stage where it was started.

Analysis:
The word waiver has not been defined under any Act. However, In the case of "M/s. Galada Power and Telecommunication Ltd. Vs. United India Insurance Co. Ltd. and Another" the Apex Court has described the meaning of waiver as "The expression 'waiver' may, in law, bear different meanings. The primary

meaning has been said to be the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct". Thus, it can be said that collecting the late fee is a right of government and the government has abandoned such right by waiving off the same. Now the biggest question that arises is, whether such right can be abandoned to the specific set of people i.e. people who have not filed returns till date as late fee has been waived off for them.

Logic behind waiving of the late fee:

The government's intention on waiving of the late fee is to enable the taxpayers, who have not yet filed the returns, pay the taxes along with the interest. This is like an encouragement to the taxpayers to file their returns properly, even if there is a delay and at the same time government could also get the revenue in the form of interest. Now the biggest flaw here is the situation of honest taxpayers who have already paid the late fee on late filing of returns. Either of the waivers has not talked about the refund of late fee which has already been paid. This can be said as a discouraging factor on them. Let us analyze, how far the said treatment is correct.

Prospective or Retrospective Amendment?

Before starting our discussion on the subject topic, first, we have to analyze whether the benefit of waiver will be applicable prospectively or retrospectively. Because the words used in the GST Council Meeting are as follows: "The reduced rate of late fee would apply for all the GSTR 3B returns furnished between 01.07.2020 to 30.09.2020". Thus, the statement has made clear that the reduced late fee will be applicable only if the returns are filed between the said period. The question here is, can the legislation give the benefit of law giving only prospective amendment.

In the case of "Commissioner of Income Tax, New Delhi vs Vatika Township Pvt Ltd (2015) 1 SCC 1", the Apex Court has held that "If a legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislators object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect".

Further in the case of "Vijay vs State of Maharashtra & Others (2006) 6 SCC 286", the Supreme Court has held that "When a law is enacted for the benefit of the community as a whole, even in the absence of a provision, the statute may be held to be retrospective in nature"

From the above judgements, it is clear that the amendments incorporated by the statue shall be given a retrospective effect if the same have been enacted for the benefit as a whole. Applying the same judgements in our case, it can be accentuated that as the benefit of waiver of late fee has been granted to public at large, the same has to be given a retrospective effect i.e. from the inception of law and refund the late fee which was already paid by the honest taxpayers.

Doctrine of Fairness

In the case of "Government of India & Others vs Indian Tobacco Association (2005) 7 SCC 396", the doctrine of fairness has been nicely explained. The facts of the said case are that the respondent is cultivator of tobacco. Government has provided an incentive of 2% on the exports carried out from notified container depots vide Notification dated 07.04.1997. In that notification "Guntur" port was not there. However, another Notification dated 27.11.1997 was issued amending the former one by including the Guntur port. The respondent has challenged that the said benefit of incentive from Guntur port will be applicable from

07.04.1997. While pronouncing the judgement in the said case, the Supreme Court has based its decision o "Doctrine of Fairness".

The Apex Court has held that "Where a statute is passed for the purpose of supplying an obvious omission in a former statute, the subsequent statute relates back to the time when the prior Act was passed [See Attorney General vs. Pougette (1816) 2 Price 381 : 146 ER 130] The doctrine of fairness also is now considered to be a relevant factor for construing a statute. In a case of this nature where the effect of a beneficent statute was sought to be extended keeping in view the fact that the benefit was already availed of by the agriculturalists of tobacco in Guntur, it would be highly unfair if the benefit granted to them is taken away, although the same was meant to be extended to them also. For such purposes, the statute need not be given retrospective effect by express words but the intent and object of the legislature in relation thereto can be culled out from the background facts"

Thus, the decision makes it clear that if a benefit has been granted by the statute, it cannot be taken away on the ground that the said benefit doesn't have retrospective nature. Even the intent and the object of the legislature have to be analyzed to check its extent. In our case too, the benefit of late fee which is already paid cannot be snatched from the taxpayer by giving it a prospective nature and hence, refund of such waived off late fee shall be granted upon.

Can the Doctrine of Legitimate Expectation evolve here?

The Halsbury's Laws of England, Fourth Edition, Volume I has explained the Legitimate Expectation as "A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice. The authority ought not to act so as to defeat the expectation without some overriding reason of public policy to justify it doing so".

If the decision maker deprives any benefit, advantage or interest of a person which militates his legitimate expectation , he can apply this doctrine. This doctrine imposes duty on public authority to act fairly. In the case of "The Scheduled Caste and Weaker Section Welfare Association vs. State of Karnataka (1991)2 SCC 604" the doctrine has been brought down by Supreme Court. In the said case, the government has notified some slum clearance areas. However, the notification was subsequently amended by excluding some of such areas. The Court has held that the earlier notification had raised legitimate expectation in the people living in an area which has been subsequently left out and it is clear violation of principles of natural justice.

Based on the above discussion, it can be said that the refund of the late fee waived off can be treated as a legitimate expectation as it is being in the nature of reasonable and logical, unless there is an overriding reason of public interest which defeats such expectation. Furthermore, the legislation has to justify such denial of expectation by showing the reasons. Thus, even if the decision makers have not talked about the refund of late fee which was already granted, the same can be implied with regard to this doctrine of legitimate expectation.

Rule of Beneficial Construction

A legislation is not just a series of statements. There is a technique required to draft a legislation as well as to understand a legislation. Former technique is known as legislative drafting and latter one is to be found in the various "Principles of Interpretation of Statutes". There are specific set of principles which helps us to interpret the provisions of the law. One of such rules is this "Rule of Beneficial Construction".

As per this rule, where there are two or more possible interpretation arising out a provision, the one which

protects the benefits given by legislation and which moves onwards the directions of the objectives, should be chosen. By connecting this rule with the subject case, it can be said that granting the refund of late fee already paid is the benefit to the honest taxpayers and it cannot be snatched upon. As the Council has not talked about the refund of such late fee, it can be considered as implied.

Mitigating circumstances – reasonable and non-arbitrary principle

The notifications for waiver of late fee are issued by virtue of Section 128 of the CGST Act, which inter alia provide for waiver of late fee or penalty under the specified sections, under such mitigating circumstances as may be specified by GST Council. The fact that the power to waive off fees is exercisable only on the basis of satisfaction of GST Council on certain parameter, the qualification of non-arbitrary action under Article 14 of the Constitution kicks in.

Further a mitigating circumstance under the criminal law is one which the court determines to be conditions or happenings which do not excuse or justify criminal conduct but are considered out of mercy or fairness in deciding the degree of the offense. The mitigating circumstance by their very nature appears to be grant of mercy one time, therefore arbitrary exercise of powers by the GST Council by giving amnesty multiple times contradicts this concept of mitigating circumstances inter alia fairness. Therefore, a person while arguing for refund of late fee could put an argument before the court that exercise of powers by taking recourse to mitigating circumstance again and again, would suffice fairness only when the refund is also granted to the persons who are on the compliant side of the law.

Morality of law

The continuous promulgation of amnesties are textbook examples of neglecting of the morality of the law. Time and again, the government have introduced amnesty schemes like these, the object of such scheme may be encouraged compliance, but the end results always paves way for the illogical disparity between the honest taxpayers and the ones who keep waiting for the scheme.

Justice Bhagwati, PN in the classic case of RK Garg vs UOI 1981 AIR 2138, 1982 SCR (1) 947 had upheld the constitutionality of immunity granted to holders of Special Bearer Bonds despite the fact that such the holders had evaded payment of taxes, on the ground that morality does not find place in the framing of law. The Supreme Court agreed with the view taken by Bombay High Court in All India Federation of Tax Practitioners vs UOI 1997 228 ITR 68 Bom wherein the Court had inter alia upheld voluntary disclosure scheme under the Income Tax Act on the basis of assurances given by Attorney General that such schemes would be formulated with due care and interest of honest tax payers would be kept in consideration.

It appears that the statements of securing the interest of honest taxpayer is long forgotten. The government has decided to accept waiver of late fees but at the same time forgotten about the ones who have already paid late fees. Considering the quantum of the late fees that has already been collected by government would also be humungous, it looks highly likely that discriminated policy of the government would be scrutinized by the Court. And the fact that frequency of the amnesty is increasing over the years and interest of honest taxpayers jeopardized, it would be interesting, how the Courts would react considering the assurances that was given by government in AIFTP case.

Conclusion:

The legislation should set out the principles which should not create any hardship on the taxpayers and it should also be made beneficial to the public at large. Not giving the refund of already paid late fee could discourage the honest taxpayers who have already paid such late fees and it goes upon the biased nature. It

is opined that the government should consider the subject matter and give a clarity on claiming the refund of the late fee which is paid.

Special thanks for Vinay Kumar J.

For any feedback/queries please write to venkat@hiregange.com.