THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

(Setup by an Act of Parliament)

GURUGRAM BRANCH (NIRC)

JANUARY 2024

CHARTERED ACCOUNTANTS

E-NEWSLETTER

Table of Content

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ICAI MOTTO

य एष सुप्तेषु जागर्ति कामं कामं पुरुषो निर्मिमाणः ।
तदेव शुक्रं तद् ब्रह्म तदेवामृतमुच्यते ।
तस्मिंल्लोकाः श्रिताः सर्वे तदु नात्येति कश्चन । एतद् वै तत् ॥

Ya eṣa supteṣu jāgarti kāmam kāmam purūṣo nirmimāṇah I
Tadeva śukram tad brahma tadevāmṛtamucyate I
Tasminlokāh ṣritāh sarve tadu nātyeti kaścan I Etad vai tat II

That person who is awake in those that sleep, shaping desire after desire, that, indeed, is the pure. That is Brahman that, indeed is called the immortal. In it all the worlds rest and no one ever goes beyond it. This, verily, is that, kamam kamam: desire after desire, really objects of desire. Even dream objects like objects of waking consciousness are due to the Supreme Person. Even dream consciousness is a proof of the existence of the self.

No one ever goes beyond it: of Eckhart: 'On reaching God all progress ends'.

Source: Kathopanishad

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Chairman`s Message

CA Amit Gupta
Gurugram Branch (NIRC)

Dear Esteemed Members & CA Students,

As we approach the culmination of another remarkable year, it is my privilege to address you in this December edition of our newsletter. The ICAI Gurugram Branch has had a year filled with accomplishments and collective growth, and as we enter the festive season, let us take a moment to reflect on our journey together.

Our branch has consistently strived for excellence, and I am proud to share that our members and students have played a pivotal role in upholding the highest standards of the accounting profession. The various seminars, workshops, and events hosted throughout the year have contributed significantly to our collective knowledge and skill enhancement.

With the joyous occasion of Christmas around the corner, I extend my heartfelt wishes to you and your families. May this festive season bring warmth, happiness, and moments of togetherness. As we cherish these festive moments, let us also prepare to welcome the New Year with optimism and anticipation. May 2024 be a year of renewed opportunities, personal and professional growth, and continued success for each member of our esteemed community.

To our dedicated CA students eagerly awaiting their results, I understand the mix of excitement and nervousness that this period brings. Your hard work and dedication have undoubtedly paved the way for success. Remember that examinations are a stepping stone in your journey, and regardless of the outcome, your resilience and commitment are commendable. The ICAI Gurugram Branch

stands by you, offering support and encouragement as you progress in your professional endeavors.

As we await the results together, let us keep in mind that success is a journey, not a destination. The experiences gained during this process will contribute to your growth and development as future leaders in the accounting field.

Upcoming Events and Initiatives:

Looking ahead, we have exciting events and initiatives planned for the upcoming year, aimed at fostering a sense of community, knowledge sharing, and professional development. Stay tuned for announcements and make the most of these opportunities to connect with fellow members and enhance your skills.

In conclusion, I want to express my sincere gratitude for your continued support and active participation in the activities of the ICAI Gurugram Branch. Together, we have built a vibrant community, and I am confident that the coming year will bring even greater accomplishments and shared success.

Wishing you a prosperous New Year!

Jai hind!

Jai ICAI!

With warm regards,
CA Amit Gupta
Chairman ICAI Gurugram Branch

GST Case Law Compendium

CA. Ritesh Arora

1.	Whether the Assessee liable to pay a penalty when the amount of GST collected has not been credited to the Government even when GST along with interest has been paid within 30 days of issuance of Notice?
2.	Whether there is any provision to disclose the route of transportation of Goods under the CGST Act?
3.	Whether recovery proceedings due to differences in Form GSTR-1 and Form GSTR-3B can be effected without complying with Rule 88C of CGST Rules?
4.	Whether the Respondent granting a short period of time to file a reply would amount to a fair opportunity of hearing the assessee?
5.	Whether cash can be seized by the GST department?
6.	Is the authorization under Section 67(2) of the SGST Act/CGST Act required for every person or article, good, book, and document discovered during the search operation?
7.	Whether the transitional credit be denied by issuing the summary of the Show Cause Notice?
8.	Whether the dues of the CBIC and Department of Revenue will be paid as per the waterfall mechanism stipulated under Section 53 of the IBC?
9.	Whether Service Tax demand be raised on the basis of Form 26AS without proper investigation by the Adjudicating Authority?
10.	Whether the Revenue Department erred in passing the Assessment order without taking into consideration the reply filed by the Assessee?
11.	Whether the refund of ITC can be claimed when there are multiple inputs having a higher rate of GST than the rate of GST on output supplies?
12.	Can the GST Council Determine the Classification of Goods?
13.	Whether Penalty and Interest be imposed when Credit erroneously availed is not utilized by the Assessee?
14.	Punjab and Haryana High Court also granted interim stay on GST demand on salaries paid to seconded employees in Indian Currency
15.	Corporate Guarantee is taxable as Business Auxiliary Service under Section 65(105)(zzb) of the Finance Act
16.	Whether Adjudication Proceeding taken up after unreasonable and inordinate delay justified?
17.	Whether the Appellate Authority have to provide sufficient reasons for not considering submission while deciding the limitation issue after the appeal is filed?
18.	Whether mere infractions of law valid grounds for filing a writ petition for setting aside of adjudication notice?

1. Whether the Assessee liable to pay a penalty when the amount of GST collected has not been credited to the Government even when GST along with interest has been paid within 30 days of issuance of Notice?

Yes, The Honorable Kerala High Court in the case of **M/s. Global Plasto Wares v. Assistant State Tax Officer [WP (C) No. 33787 of 2023 dated October 17, 2023]** dismissed the writ petition and held that Assessee is liable to pay a penalty when the amount of GST collected has not been credited to the government even when GST along with interest has been paid within 30 days of Notice issued for raising demand concerning non-payment of GST.

The Honorable Court observed that the central issue is whether the Petitioner is liable to pay the amount of penalty when the Petitioner has already paid the GST amount along with interest within 30 days of receiving the notice. The Honorable Court noted that the demand raised for payment of GST is on account of not crediting the amount of GST received by the supplier from the recipient to the government and opined that as per the sub -section 6,8 and 9 of Section 73 of the CGST Act, the Petitioner is liable to pay the amount of penalty as the amount of GST collected by the Petitioner has not been deposited with the government, within 30 days from the due date of payment of GST.

The Court held that the Respondent has taken the correct view and no error of law has been committed which requires the interference of the Court and dismissed the writ petition.

Author's Comment:-

This judgment will have far-reaching consequences. Section 73(11) starts with non–the obstante clause and has an overriding effect over other provisions to levy a penalty in case of tax collected is not remitted within 30 days of the due date of payment of such tax.

It is pertinent to mention here that circular 76/50/2018–GST dated December 31, 2018, has been issued to specify that no penalty shall be levied U/s 73(11) in case of delayed filing of GSTR–3B return because tax along with applicable interest has already been paid but after the due date for payment of such tax. However, the penalty of U/s 125

can be levied in such cases. Section 122(1)(iii) also provides for a penalty in case of delay in payment of tax collected beyond 3 months.

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2. Whether there is any provision to disclose the route of transportation of Goods under the CGST Act?

No, The Honorable Allahabad High Court in **M/s. Om Prakash Kuldeep Kumar v. Additional Commissioner Grade-2 and another [WRIT TAX No. – 277 of 2022 dated October 03, 2023]** set aside the seizure of goods transported and held that, unlike the Value Added Tax Act, 2008 ("**the VAT Act**"), there is no specific provision in the Goods and Services Tax Act, 2017 ("**the CGST Act**") which requires assesses to declare the route of transportation/ transit of goods.

The Honorable High Court observed that the goods in question were sold by the registered dealer along with genuine documents, i.e., tax invoices and e-way bills. At the time of interception, it is alleged that the driver of the vehicle made the statement that goods were to be unloaded at the place, which is not mentioned in the tax invoice but in Manipuri itself.

The Court opined that under the CGST Act, there is no specific provision that bounds the selling dealer to disclose the route to be taken during the transportation of goods or while goods are in transit however, there was a provision under the VAT Act to disclose the route during the transportation of goods to reach its final destination. Once the legislature itself, in its wisdom, has chosen to delete the said provision, this Court opined that the authorities were not correct in passing the seizure order even if the vehicle was not on a regular route or a different route.

Author's Comment:-

This is the case of absolute over–passionate administration. Section 68 read with section 129 gives the proper officer limited powers to verify documents required to be accompanied as per Rule 138A. Either prescribed documents are available, or they are not. There is no third

possibility that the law admits. Intercepting Officers fuelled by their experiences in earlier tax regimes, can "sense" evasion of tax and expand the scope of their limited powers conferred by the legislature.

On detention of consignment, every effort must be made to secure release immediately. The delay raises a new presumption against the taxpayer's claim and permitting detention can lead to the development of the belief that e-auction under section 129(6) may be justified.

If the Proper officer is willing to release the detained consignment against bond in MOV8, then an application under section 129(1) (c) is in order. To this end, every detention must be followed by such an application, regardless of whether this option was informed by the Proper Officer or not, and whether the application filed was allowed by the Proper Officer or not. It will furnish grounds in appeal.

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3. Whether recovery proceedings due to differences in Form GSTR-1 and Form GSTR-3B can be effected without complying with Rule 88C of CGST Rules?

No, The Madras High Court in the case of **M/s. Caterpillar India Pvt. Ltd. v. The Assistant Commissioner Chennai [WP No. 28092 of 2023 dated September 25, 2023]** allowed the writ petition and held that, no recovery can be effected directly based on the difference in Form GSTR-1 and Form GSTR-3B without complying with the requirements stated in Rule 88C of the Central Goods and Services Tax Rules, 2017 **("the CGST Rules").**

The Honorable Madras High Court noted that **Instruction No. 01/2022 dated January 7, 2022**, pertaining to **Guidelines for recovery proceedings under the provisions of section 79 of the CGST Act, in cases covered under explanation to 75(12) of the CGST Act, is a predecessor to Rule 88C of the CGST Rules.**

The Court opined that no recovery can be effected directly based on differences in Form GSTR-1 and Form GSTR-3B without complying with the requirements stated in Rule 88C of the CGST Rules and held that the Impugned Notice issued under Section 79 of the CGST Act, 2017 is quashed and liberty is granted to the Respondent to issue

an appropriate notice in Form GST DRC-01B before proceeding to recover any amount based on the difference in Form GSTR-1 and Form GSTR 3B. Hence the writ petition is allowed.

Author's Comment:-

This is a welcome judgment by the Honorable Court. An explanation has been inserted to section 75(12) by virtue of the Finance Act, 2021 from 1st January 2022 which authorizes the department to recover self–assessed liability U/s 79 directly without putting the taxpayer at notice.

As per notification No. 23/2022 dated December 26, 2022 Rule 88C has been notified to specify the procedure in case of a difference in amount of liability disclosed U/s 37 (GSTR–1) and discharged U/s 39 (GSTR–3B). Bye – passing the procedures is against the legislature mandate.

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4. Whether the Respondent granting a short period of time to file a reply would amount to a fair opportunity of hearing the assessee?

No, the Honorable Madras High Court in the case **M/s Health and Allied Insurance Company Ltd. v. the Commissioner of State Tax, Chennai [W.P. No. 30494 of 2023 dated October 20, 2023]** allowed the writ petition and held that the granting short period of time to file reply would not amount to the fair opportunity of hearing to assessee, as the contravention of the said principle would lead to the violation of the legal right of the assessee to defend during the adjudication proceeding.

The Honorable High Court observed that no notice was served in physical mode as the notice was uploaded through online mode only. The Petitioner was granted limited time for filing of reply which cannot be considered a fair opportunity of hearing.

The Court noted that the Petitioner should not be directed to file the reply within a short period of 2 days as it would violate the object of the provisions of fair opportunity to the assessee and would lead to depriving the legal right of the Petitioner to defend and opined that the Impugned

Order is untenable on the ground that the Impugned Order is a non-speaking order and violates the principles of natural justice. Hence, the Court is inclined to set aside the Impugned Order.

Author's Comment:-

This is a welcome decision by the Honorable Allahabad High Court and it comes to the rescue of the taxpayer once again the Rule of Land stands tall against the over-passionate administration.

The Revenue Department has to understand that this kind of approach renders the "due process" laid down in the statute "Superfluous, unnecessary and nugatory", which is impermissible in the law.

Section 73(8) provides a time limit of 30 days to pay tax and applicable interest to the person chargeable with the tax U/s 73 (1) or 73(3). Granting time less than 30 days to respond to SCN is tantamount to the extra legislature and goes against the wisdom of the legislature. Providing no fair opportunity of hearing to the taxpayer to put forward a defense is a gross violation of the principles of natural justice.

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5. Whether cash can be seized by the GST department?

No, The Honorable Gujarat High Court in the case of **M/s. Bharat Kumar Pravin Kumar and Co. v. State of Gujarat [Special Civil Application No. 26222 of 2022 dated October 26, 2023]** allowed the writ petition and held that cash would not be considered as goods for the purpose of seizure proceedings, and it is not justified to retain cash seized by the Revenue Department for more than six months, without issuance of Show Cause Notice (**"SCN"**).

The Honorable Court observed that the CGST Act is an act for levy and collection of tax on intra-state supply of goods or services or both by the Central Government and as per Section 67(2) of the CGST Act, the Proper Officer when confiscating any goods, documents, books or things, must have a reason to believe that it would be useful or relevant to any proceedings initiated under the Act.

The Court relied upon the judgment of the Honorable Kerala High Court in the case

of **Shabu George v. State Tax Officer (IB) [WA No. 514 of 2023 dated March 23, 2023] and** the Court further observed that Section 67(2) of the CGST Act, authorizes the seizure of things, not cash particularly when the cash does not form part of the stock in trade of the business. Also, it is not justified to retain cash seized by the Respondent for more than six months, without issuance of SCN.

The Court noted that it is admitted by the Respondent that the present case pertains to the amount of consideration received on sale proceeds of silver bars, not seizure made in relation to unexplained transactions under the CGST Act and opined that as per Section 67(7) of the CGST Act, the goods shall be returned to the person for whose possession the goods were seized when no SCN is given within six months of the seizure of goods.

Author's Comment:-

It is important to note that even cash must be 'secreted' to qualify for the seizure but, more importantly, cash is not 'goods liable to confiscation' under section 130(1) but are 'things' which are considered "useful or relevant" by the Authorized Officer to carrying out "any further proceedings". What, therefore, can be the 'use or relevance' of cash to be seized? There is a popular, mysterious, and erroneous understanding that 'cash' is illicit if discovered in search proceedings. Officers tend to seize cash without even ascertaining to whom it belongs.

'Cash' seizure does not directly point to proceeds from unaccounted sales. That would have been easy but the Legislative wisdom is that (i) 'Evasion of tax is a must for proceedings under section 67 to be with the jurisdiction and lawful and (ii) No presumption flows in favor of the Revenue, especially, when cash may be treated to be 'things' and not 'consideration from supply'. After all, 'things' seized can only be if they are "useful or relevant" for that Authorized Officer in carrying out "any further proceedings".

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6. Is the authorization under Section 67(2)

of the SGST Act/CGST Act required for every person or article, good, book, and document discovered during the search operation?

No, the Honorable Kerala High Court in the case of **M/s. Velayudhan Gold LLP v. State of Kerala and Others [WP (C) No. 34654 of 2023 dated October 20, 2023]** disposed the writ petition and held that authorization under Section 67(2) of the State Goods and Services Act, 2017 **("the SGST Act")** / the Central Goods and Services Act, 2017 **("the CGST Act")**, is not required for every person or article, goods, books and documents discovered during the search operation.

The Honorable Kerala High Court observed that, when search and seizure operations are conducted, it is not known which items documents, or books might be recovered or kept at a secret place. Authorization by the Joint Commissioner has to be in general terms and cannot be with respect to any specific books, items, things, or documents. The relevant factor while granting authorization for search and seizure operation is whether the authority granting the permission, i.e. Joint Commissioner or above has a reason to believe that the goods, documents, or things hold relevance, are kept in a secret place and are useful in any legal proceeding conducted under the SGST Act/ the CGST Act.

The Honorable Court noted that the authorization under Section 67(2) of the SGST Act/ the CGST Act, cannot be granted in respect of every person or article, good, book, and document that may be discovered during a search operation, and the arguments made by the Petitioner that there was no authorization under Section 67 (2) of the SGST Act/ the CGST Act for the seizure of gold ornaments is devoid of merit.

Author's Comments:-

It is important to mention here that inspection and search proceedings are two different processes in the law. "Inspection" is permitted U/s 67(1) and "Search" is permitted U/s 67(2). For authorizing "Inspection", authorization must be granted under part A and/or part B of form GST INS–01, and for authorizing "Search", authorizing must be given in form INS–01 part C.

Care must be taken that if Inspection is authorized in Form INS – 01(Part A or Part B)

and during the inspection, new or additional reasons to believe become available to support "Search", then afresh authorization under Part C of Form INS–01 must be sought before conducting "search" operations.

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7. Whether the transitional credit be denied by issuing the summary of the Show Cause Notice?

No, The Honorable Jharkhand High Court in the case of **Aditya Medisales Ltd. v. State of Jharkhand [W.P. (T) NO. 4338 OF 2022 dated October 9, 2023]** held that the initiation of proceedings is bad in law, in as much as in this case only a summary of show cause notice vide Form DRC – 01 was served and not the proper show cause notice. Thus, the writ application stands allowed and therefore the recovery notice is set aside.

The Honorable Jharkhand High Court observed that the Impugned Order has been served upon the Petitioner and not the actual adjudication order. Also, the Appellate Order was perverse as it disallowed transitional credit on the ground that the Petitioner did not have possession of declarations in Form JVAT 410/411.

The Honorable Court relied upon the judgments of **Juhi Industries (P) Ltd. v. State of Jharkhand [P.(T) No. 1991 of 2021 With W.P. (T) No. 1984 of 2021]** and **NKAS Services Pvt. Ltd. v. State of Jharkhand [W.P.(T) No. 2444 of 2021],** and held that the foundation of the proceeding in both the cases suffers from material irregularity and hence not sustainable, the entire proceedings had been set aside.

Further opined that the Assessing Officer for the purpose of transition of credit is only required to verify the figures specified in the TRAN-1. Further, the maximum extent to which the Respondent can verify the genuineness of the transitional credit is to see whether the transitional credit is admissible as credit under this Act, i.e., the JGST Act. Section 18(6) of the JVAT Act, does not contemplate the production of JVAT 404 Forms as a mandatory condition for availing the benefit of ITC. Undoubtedly, tax paid on purchases of medicine products/food products is admissible as tax under the JGST

Act, more particularly because it does not fall within any of the categories specified under section 17(5) of the JGST Act.

Further Opined that, as per Section 142(8)(a) of the JGST Act, if any sum is found to be recoverable from a dealer in respect of assessment done under the JVAT Act, the same can be covered as an arrear of tax under the JGST Act. Thus, the interest of the revenue is already protected.

The Honorable Court held that under the garb of disallowing transitional credit, the Assessing Officer under the JGST Act cannot conduct an assessment of the returns filed under the JVAT Act. The initiation of proceedings is bad in law, since, in this case only a summary of the show cause notice in DRC – 01 was served and not the proper show cause notice.

Author's Comment:-

Important to mention here that the Trans credit is neither the input tax as per Section 2 (62) of neither the CGST Act, 2017 nor the output tax as per Section 2 (82) of the CGST Act, 2017. Therefore, the transition credit claimed and utilized, even if found to be ineligible cannot be demanded U/S 73 or 74 of the CGST Act as there is no jurisdiction with the proper officer under such provisions of the law. The transaction credit validly claimed cannot be distributed in the law.

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18. Whether the dues of the CBIC and Department of Revenue will be paid as per the waterfall mechanism stipulated under Section 53 of the IBC?

Yes, the Honorable Supreme Court in the case of **Principal Commissioner of Customs v. Rajendra Prasad Tak & Ors [Civil Appeal Nos. 6432-6433 of 2023 dated October 30, 2023]** reinforces the primacy of the waterfall mechanism under the Insolvency and Bankruptcy Code in Section 53 of the Insolvency and Bankruptcy Code, 2016 ("**the IBC**").

The Honorable Supreme Court observed that the fundamental principles of priority laid out in Section 53 of the IBC, underscores the significance of adhering to the legislative intent behind this provision, ensuring that creditors and stakeholders

are treated fairly and equitably in insolvency proceedings and held that the CBIC, Department of Revenue dues will be paid as per the waterfall mechanism stipulated under Section 53 of the IBC.

Author's Comments:-

The central issue in this case is the order of priority for the distribution of proceeds from the sale of liquidation assets, as stipulated in Section 53 of the IBC. This section delineates a hierarchical distribution mechanism essential for the equitable settlement of debts and obligations in an insolvency scenario.

As per Section 53 of the IBC, the priority list commences with the payment of insolvency resolution process costs, followed by the Secured Creditors and workmen dues up to 24 months preceding the Liquidation Commencement Date. Subsequently, the dues of employees (other than workmen) up to 12 months preceding the Liquidation Commencement Date take precedence. Following this, Financial Creditors (unsecured creditors) are entitled to their dues, followed by the Central Government and State Government dues up to 2 years preceding the Liquidation Commencement Date. At the lowest rung of this priority list are any remaining debt and dues, preference shareholders, and Equity.

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9. Whether Service Tax demand be raised on the basis of Form 26AS without proper investigation by the Adjudicating Authority?

No, the CESTAT, Kolkata in **M/s. Piyush Sharma v. Commissioner of CGST & CX, Patna-I [Service Tax Appeal No.75856 of 2021 dated October 17, 2023]** held that service tax demand based on Form 26 AS from the Income Tax Department without Investigation is Invalid.

The CESTAT noted that the Appellant is a registered service provider and filing their Service Tax returns and no investigation has been conducted by the Adjudicating Authority, in these circumstances, the demand cannot be raised on the basis of Form 26AS obtained from the Income Tax

Department.

Further observed that the SCN has been issued to the Appellant by invoking an extended period of limitation and some of the demand pertains to beyond five years and in this case, the demand has to be calculated in terms of Valuation Rules, 2006.

The CESTAT held that the extended period of limitation is not invocable. Moreover, on the basis of Form 26AS, no demand is sustainable against the Appellant.

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10. Whether the Revenue Department erred in passing the Assessment order without taking into consideration the reply filed by the Assessee?

Yes, the Honorable Madras High Court in the case of **M/s. Chennai Silks v. The Assistant Commissioner, Tirupur [W.P. No. 29095 of 2023 dated October 12, 2023]** allowed the Writ Petition and held that the Revenue Department has erred in passing the Assessment order without taking into consideration the reply filed by the assessee, thereby setting aside the Impugned Assessment Order and directing the Revenue Department to pass a detailed order after taking into consideration the reply filed by the Petitioner.

The Honorable Madras High Court observed that though the Appellate Authority has the power of Assessing Officer to make an assessment by providing an opportunity for a personal hearing and by taking a reply into consideration, however, the said order passed cannot be equated with the order passed by the Assessing Officer who would pass the order after taking into consideration the reply/objection and evidence provided by the Petitioner pursuant to the SCN. Thereby, the Petitioner would lose the opinion of the Assessing Officer, to which the Petitioner is legally entitled under the provisions of law.

The Honorable Court noted that once the Assessee has filed the reply/objections to the SCN issued, the Assessing Officer is bound to pass the speaking order providing reasons for rejection of the reply/objections raised by the Assessee. It would cause prejudice to the Assessee and a huge loss to the revenue if cryptic orders are passed

without taking into consideration the queries/contentions of the Assessee.

Author's Comment:-

The department has to ensure robust training and must enforce a system to track the quality of orders passed by the adjudicating authorities.

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11. Whether the refund of ITC can be claimed when there are multiple inputs having a higher rate of GST than the rate of GST on output supplies?

Yes, the Honorable Rajasthan High Court (Jaipur Bench) in the case of **M/s. Nahar Industrial Enterprises Limited v. Union of India [Civil Writ Petition No. 8476 of 20/21 dated October 31, 2023]**, allowed the Writ Petition and held that refund of Input Tax Credit (**"ITC"**) can be claimed when there are multiple inputs having a higher rate of GST than the rate of GST on output supplies.

The Honorable Rajasthan High Court (Jaipur Bench) observed that as per Section 54(3) of the CGST Act, once all the inputs and output supplies are on comparative basis, it is found that the rate of GST on inputs is higher than the rate of GST on output supplies, the scheme of refund is required to be given full effect and cannot be denied on grounds that rate of GST, on comparative analysis is more or less the same. Further noted that as per clause (ii) of the proviso to Section 54(3) of the CGST Act, the statutory scheme of refund of unutilized ITC would apply provided it fulfills the statutory precondition that the accumulation of unutilized ITC is due to the rate of GST on input exceeds the rate of GST on output supplies, despite multiple input and output supplies. Therefore, the scheme of refund based on an inverted duty structure would be applicable in the present case.

The Honorable Court relying upon **Circular No. 79/53/2018-GST dated December 31, 2018**, **and Circular No. 125/44/2019-GST dated November 18, 2019**, further noted that the scheme of inverted duty structure and refund would be applicable even when there are multiple inputs having a higher rate of GST than the GST rate on output supplies.

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12.Can the GST Council Determine the Classification of Goods?

No, The Honorable Madras High Court in the case of **M/s. Parle Agro Private Limited v. Union of India & Ors. [W.P. No. 16608 & 16613 of 2020 dated October 31, 2023]** allowed the Writ Petition and held that the Flavoured Milk is to be classified under Heading 0402 of the Customs Tariff Act, 1975 (**"the Customs Tariff Act"**) and is therefore, liable to Central Tax at the rate of 2.5 percent in terms of Entry 8 to First Schedule to Notification No. 1/2017-Central Tax (Rate) dated June 28, 2017 **("the Goods Rate Notification").**

The Honorable Madras High Court relying upon the judgment of **Union of India v. Mohit Mineral Private Limited [Civil Appeal No. 1390 of 2022 dated May 19, 2022]** the Court observed that the recommendations of the GST Council are not binding in nature. The Court further stated that the GST Council does not have the power to determine the classification of goods.

The Court noted that 'Beverage Containing Milk' includes only such beverage that contains seed-based, fruit-based, or plant-based milk and cannot be extended to 'Dairy Milk' from milch cattle and therefore, cannot come within the purview of sub-heading 2202 90 30 as 'Beverage Containing Milk'.

Further noted that the GST Council cannot impose a wrong classification of 'Flavoured Milk' as a 'Beverage Containing Milk' under the residuary item as 'Non-Alcoholic Beverage' under Sub Heading 2202 90 30 of the Customs Tariff Act. Therefore, the recommendation of the GST Council Meeting dated December 22, 2018, concluding that flavored milk is classifiable under HSN Code 2202 and thereby suggesting that flavored milk will be liable to tax at the rate of 6% Central Goods and Services Tax **("the CGST")** cannot be upheld. The Classification ought to have been independently determined by the Respondent Assessing Officer.

The Honorable Court opined that the Flavoured Milk manufactured by the Petitioner is to be classified under Heading

0402 of the Customs Tariff Act and is therefore, liable to the CGST at the rate of 2.5 percent in terms of Entry 8 to First Schedule to the Goods Rate Notification.

The Honorable Court held that it is left open for the Government to issue a fresh Notification for amending Entry No. 8 to Schedule I & and Entry No. 50 to Schedule II to the Goods Rate Notification to tweak the rate of tax, based on the well-settled principle that Central Government Authorities have the power to fix the rate of tax based on the recommendation of GST Council or by its own discretion.

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13. Whether Penalty and Interest be imposed when Credit erroneously availed is not utilized by the Assessee?

No, the Punjab and Haryana High Court in the case of **M/s. Deepak Sales Corporation v. Union of India [CWP No. 283 of 2023 dated September 21, 2023]** allowed the appeal filed by the Assessee by way of the writ petition and held that the demand of interest and penalty is not tenable when the credit erroneously availed is reversed and such credit is not utilized by the Assessee.

The Honorable Punjab and Haryana High Court observed that as per Section 50(3) of the CGST Act, the taxable person who makes the undue or excess claim of ITC shall pay interest on such undue or excess claim at the rate not exceeding twenty-four percent.

The Honorable Court relies upon the judgment of **Commissioner of Central Excise v. Jagatjit Industries Ltd. [S.T.A. No. 41 of 2010 dated December 24, 2010]**, observed, that when the credit credit was wrongly availed and was reversed before the said credit was utilized, the Revenue Department is not justified for the demand of interest. The Court also relied upon the judgment of **CCE Rohtak v. Grasim Bhiwani Textile Ltd. [C.E.A No. 38 of 2016 dated May 15, 2018]**, wherein it was observed that, when the cenvat credit was reversed prior to the utilization, the demand of interest and penalty was untenable.

The Honorable Court noted that the legislative intent behind the provision is that where ITC/Cenvat credit is wrongfully

reflected in ECL, the same is not sufficient to invoke penal proceedings until the said ITC is put to use, and no demand of interest or penalty is tenable when the said claim wrongfully reversed is not used by the taxable person.

Further opined that when it is proved that the amount of excess ITC entered in the ECL, was not utilized by the Petitioner and reversed prior to utilization of the credit, the demand of interest and penalty is not tenable, and the Petitioner could not be burdened with the same.

The Court held that the Petitioner is not liable to pay the amount of interest or penalty on the excess ITC wrongly entered by the Petitioner in its ECL. Therefore, the Impugned Order is set aside, and the appeal is allowed.

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14. Punjab and Haryana High Court also granted interim stay on GST demand on salaries paid to seconded employees in Indian Currency

M/s Mitsubishi Electric India Private Limited **("the Petitioner")** entered into a Secondment and Cost Reimbursement Agreement dated March 31, 2019, with Mitsubishi Electric Corporation, Japan, the parent company wherein certain employees have been seconded for service in India.

Relying upon the judgment of the Honorable Supreme Court in the case of ***C.C., C.E. & S.T. – Bangalore (Adjudication) Etc. v. M/s Northern Operating Systems Pvt. Ltd. [Civil Appeal No. 2289-2293 of 2021 dated May 19, 2022]***, wherein it was clarified that manpower supply service would be a taxable service w.e.f. May 19, 2022, the Revenue Department **("the Respondent")** initiated an investigation on August 11, 2022, regarding GST implications and conducted internal due diligence.

The Petitioner paid GST of INR 8,00,46,776 on the total amount of INR 44,47,04,312/- paid by the Petitioner to the parent company along with interest of Rs.2,79,80,800/- in compliance with the aforementioned judgment of the Supreme Court. Thereafter, the Respondent closed the proceedings initiated against the Petitioner without the issuance of a Show Cause Notice **("SCN")** as per Section 73(6) of the

CGST Act leaving the rights open for investigation of remaining tax duties and liabilities and other issues for the similar period.

Further, the Respondent vide communication dated August 2, 2023, put Petitioner to notice as to whether proper tax along with interest has been deposited by the Petitioner on the Indian part of the payment made by the Petitioner for which the reply dated August 31, 2018, was filed by the Petitioner. The Respondent vide Order dated September 18, 2023, wherein the Petitioner was advised to pay the additional amount Rs.20,46,87,723/- along with applicable interest failing which SCN under Section 73(1) of the CGST Act, would be issued. The Petitioner submitted a detailed representation dated September 27, 2023, wherein the Petitioner raised the objection stating that the amount deposited in the Indian currency of the salary component was not covered and a closure letter has already been issued in favor of the Petitioner. However, the Petitioner was issued SCN dated September 29, 2023 **("Impugned Notice")** under Section 73(8) of the CGST Act, stating that no penalty in respect of tax and invoice, would be imposed if the amount of tax along with interest is paid within 30 days of issuance of Impugned Notice.

Aggrieved by the Impugned Notice and proceedings initiated by the Respondent, the Petitioner filed a **Writ Petition *[CWP 25351 of 2023]* before the Honorable Punjab and Haryana High Court.**

The Counsel for the Petitioner contended that a similar issue has come up for consideration before the Honorable Karnataka High Court in the case ***M/s Alstom Transport India Ltd. v. State of Karnataka [WP 23915 of 2023]*** wherein an interim order dated November 2, 2023, was passed, thereby holding that writ petition would be rendered infructuous if no interim protection is granted.

The Court vide Order dated November 9, 2023, issued a Notice of Motion and further stayed the proceedings initiated by the Respondent in pursuance of the Impugned Notice.

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15. Corporate Guarantee is taxable as Business Auxiliary Service under Section 65(105)(zzb) of the Finance Act

M/s. Infrastructure Leasing and Financial Services Limited **("the Respondent")** is engaged in the business of providing 'financial services'. The Respondent was issued Show Cause Notice dated July 23, 2009, and September 29, 2010 **("the SCN")** by the Revenue Department **("the Appellant")** on the ground that the Respondent has failed to discharge the tax liability for the period from 2004-05 to 2009-10 on the 'commission' charged for providing 'corporate guarantee' to their customers despite the said service being specifically included in 'Banking and other Financial Services' under Section 65(12)(ix) of the Finance Act, 1994 **("the Finance Act")** for the purpose of levy of tax under Section 65(105)(zm) of the Finance Act. The SCN was adjudicated by the Appellant, thereby confirming the recovery of the amount of Rs.2,01,03,661/- for the period of 2004-05 to 2008-09 and Rs.94,08,029/- for the period of 2009-10 under Section 73 of the Finance Act, along with interest and penalty under Section 75 and 76 of the Finance Act vide Order dated February 18, 2014 **("the Order")**.

Aggrieved by the Order, the Respondent filed an Appeal before the CESTAT, Mumbai *[Service Tax Appeal No. 86820 and 86821 of 2014]* challenging the Order along with the proceedings initiated by the Appellant. The Tribunal vide Final Order dated September 07, 2021 **("the Impugned Order")** set aside the Order and allowed the Appeal, thereby holding that, the Corporate Guarantee would be taxable as Business Auxiliary Service under Section 65(105)(zzb) of the Finance Act. The Tribunal noted that a different 'taxable service' was invoked for the purpose of initiating recovery proceedings and the Appellant failed to determine the facilitation of the Corporate Guarantee provided, within the purview of taxable service under Section 65(105)(zm) of the Finance Act. Also, there is a lack of certainty of 'taxable service' in the mind of the Authority issuing the SCN. Therefore, the Appellant cannot impose tax liability on the Respondent.

Aggrieved by the Impugned Order, the Appellant filed a Civil Appeal before the Honorable Supreme Court of India **[Civil Appeal No. 2406-2407 of 2022]** which has been admitted vide Order dated November 3, 2023.

16. Whether Adjudication Proceeding taken up after unreasonable and inordinate delay justified?

No, The Honorable Jharkhand High Court in the case of **M/s. Kamaladitya Construction (P) Ltd vs. The Principal Commissioner of CGST, Ranchi and Ors. [W.P.(T) No. 2890 of 2022 dated October 09, 2023]** allowed the writ petition and held the delay of seven (7) years in the adjudication of Show Cause Notice proceedings would amount to inordinate and unreasonable delay and violate Article 14 of the Indian Constitution. Therefore, the Show Cause Notice and Notice issued for the fixation of personal hearing is liable to be quashed and set aside.

The Honorable High Court observed that the Sub-Section (4B) was inserted in Section 73 of the Finance Act, by Finance (No. 2) Act w.e.f. April 6, 2014. Section 73 (4B) of the Finance Act, provides for the determination of a SCN within a period of six months in cases "where it is possible to do so" and one year in cases where the SCN is issued under proviso to Section 73 (1) of the Finance Act. The outer limit prescribed under Section 73(4B) of the Finance Act, was inserted with the legislative intent that the adjudication proceedings should be completed within a reasonable time frame as set out under Section 73(4B) of the Finance Act unless an extraordinary situation arises beyond the control of the adjudicating authority and cannot be kept pending or sine die for an infinite period.

The Court relying upon the judgment of the Honorable Supreme Court in the case of **M. Sharma v. ITO [Civil Appeal No. 7742 of 1997 dated April 11, 2002]** further observed that the provisions of the fiscal statute particularly pertaining to the period of limitation, must be construed strictly as the law of limitation is intended to give finality to legal proceedings.

The Court relied upon the judgment of the Honorable Supreme Court in the case of **Union of India v. Hansoli Devi and Ors. [Civil Appeal No. 9477 of 1994 dated September 12, 2002]** further observed that the legislature does not waste words or say anything that is unnecessary, and construction of the words in the statute which leads to unnecessary repetition would not be accepted except for compelling reasons.

The Court relying upon the judgment of the Honorable Punjab and Haryana High Court in the case of **Shree Baba Exports v. Commissioner of GST and Central Excise [CWP No. 11860 of 2021 dated March 15, 2022]** further observed that the expression "where it is possible to do so" does not mean that the time prescribed for adjudication of the SCN cannot be extended indefinitely except in cases where the Revenue Department has an explanation for extending the period of the limitation.

The court relying upon the judgment of the Honorable Gujarat High Court in the case of **Siddhi VinayakSyntex Pvt. Ltd. v. UOI [Special Civil Application No. 19437 of 2016 dated March 07, 2017]** further observed that the expression "where it is possible to do so" means that the amount of duty to paid has to be determined within the specific time period. The High Court stated that pendency causes immense prejudice to the Assessee, and the revival of proceedings after a long period without disclosing any reason for delay constitutes a breach of principles of natural justice.

The Court relying upon the judgment of the Honorable Supreme Court in the case of **CCE v. Krishna Wax Private Ltd. [Civil Appeal No. 8609 of 2019 dated November 14, 2019]** further observed that the date on which the SCN was issued would be the date of relevance for the purpose of the computing the period of limitation.

The Court relying upon the judgment of the Honorable Supreme Court in the case of **B. Nagur, M.D. (Ayurvedic) v. Union of India [Writ Petition (Civil) No. 33 of 2009 dated February 24, 2012]** further observed that when there is no time limit prescribed by a statue, the power has to be exercised within a reasonable period of time. Further relying upon the judgment of the Honorable Supreme Court in the case of the **State of Punjab and Ors.v.Bhatinda District Cooperative Milk Producers Union Ltd. [Civil Appeal No. 4808 of 2007 dated October 11, 2007],** the Court observed that the reasonable period of time would be different on a case basis. However, the maximum time period prescribed would be the reasonable period for the purpose of the Act for determining the period of limitation.

The Honorable Court noted that the CBIC has issued **Instruction F. No. 390 Misc 3 2019-JC dated April 27, 2020**, for conducting virtual hearings of cases with a view to complete the process of adjudication completely taking into consideration the ex-

traordinary situation of the COVID-19 pandemic. The instructions were mandatory in nature.

Further opined that Section 73(1) and 73 (4) of the Finance Act, provide five years as the maximum period for adjudication and would be considered as a reasonable period of adjudication. However, in the present case, the period of seven years cannot be construed as the reasonable period for the taking up/concluding adjudication proceedings and held that the fixing personal hearing of the Petitioner and conducting/taking up adjudication proceedings after more than seven years of the issuance of Impugned SCN is unreasonable, arbitrary, oppressive, and violates Article 14 of the Indian Constitution. Therefore, the proceeding initiated by the Respondent stands vitiated due to unreasonable and inordinate delay.

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17. Whether the Appellate Authority have to provide sufficient reasons for not considering submission while deciding the limitation issue after the appeal is filed?

Yes, The Honorable Bombay High Court in the case of **M/s. IMS Ship Management Private Ltd. v. State of Maharashtra [Writ Petition (L) No. 3121 of 2023 dated October 17, 2023]** disposed of the writ petition by quashing and setting aside the Appellate Order and holding that the Revenue Department should have given proper reasoning on the issue raised by the Petitioner in the written statement pertaining to the limitation in the Impugned Order.

The Honorable Bombay High Court opined that the Impugned Order passed by the Respondent is devoid of proper reasoning and has not taken into consideration the written submissions filed by the Petitioner. The Respondent should have given proper reasoning on the issue raised by the Petitioner in the written statement pertaining to the limitation in the Impugned Order. The Respondent failed to do so and therefore the Impugned Order suffers from infirmity and is liable to be quashed and set aside.

The Honorable Court directed that the Respondent shall grant a personal hearing to the Petitioner, and after taking into consideration the submissions made by the Peti-

tioner, the Respondent shall pass a speaking order, taking into consideration the issues raised by the Petitioner. The Respondent should, thereafter, adjudicate on the merits of the case if it is of considered view that there is no delay in filing the appeal.

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18. Whether mere infractions of law valid grounds for filing a writ petition for setting aside of adjudication notice?

No, the Honorable Allahabad High Court in the case of **M/s. Bajrang Trading Company v. Commissioner Commercial Tax and Another [Writ Tax No. 1123 of 2023 dated October 27, 2023]** dismissed the writ petition and held that mere infractions of law are not a valid ground for filing a writ petition for setting aside of adjudication notice.

The Honorable High Court noted that the objection raised by the Petitioner pertaining to misuse of the e-way bills is devoid of merit and, therefore, could not be accepted at this stage as the same would involve fact appreciation and opined that when the allegation of infraction of law arises, adjudication proceeding may not be interjected by invoking extraordinary jurisdiction of the High Court. The scope of challenging the adjudication proceeding through writ petition is limited to cases involving an inherent lack of jurisdiction or grounds of a like nature.

The Honorable Court held that the Petitioner has the option to avail the alternative remedy, therefore, the Court is not inclined to interfere with the proceedings, and hence, the writ petition is dismissed.

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Glimpses

Topic: Two Days Conference on Standards of Auditing (SA)
Day & Date : Friday-Saturday, 1st-2nd December 2023
Venue : Hotel Radisson Gurgaon, Sector-20, Gurugram

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Glimpses

Topic: CA Students Seminar on Decoding Complexities in GSTR 09 with Recent Changes in GST
Day & Date : Friday, 8th December 2023
Venue : Hotel Radisson Gurgaon, Sector-49, Gurugram

Glimpses

Topic: S. Vaidyanath Aiyar Memorial Lecture on International Taxation
Day & Date : Saturday, 16th December 2023
Venue : Hotel Radisson Gurgaon, Sector-20, Gurugram

Glimpses

Topic: Conference on FEMA Considerations & Transfer Pricing Dispute Resolution Strategies
Day & Date : Saturday, 23rd December 2023
Venue : Hotel Radisson Gurgaon, Sector-49, Gurugram

Gurugram Branch Managing Committee for the Session 2023-24

SNo.	Designation	Name	Mobile	Email ID
1	Chairman	CA. Amit Gupta	9654346350	amitmbaca@gmail.com
2	Vice-Chairman	CA. Amit Kithania	9716013030	caamitkithania@yahoo.co.in
3	Secretary	CA. Pooja Aggarwal	9810559631	poojaaggarwal8@gmail.com
4	Treasurer	CA. Jitender Yadav	9911656371	cajitender9@gmail.com
5	NICASA Chairman	CA. Vipin Agrawal	9599336633	cavipinagrawal@gmail.com
6	Chairman of Members in Industry	CA. Jitender Sharma	9811899901	cajitendersharma01@gmail.com
7	Immediate Past Chairman	CA. Mohit Singhal	9555379714	fcasmc@gmail.com
8	Executive Member	CA. Himmat Yadav	9999929513	cayadavhimmat@gmail.com
9	Executive Member	CA. Nishant Kumar	9560753535	nishant@srjnindia.com
10	Ex-Officio Member	CA. Naveen Garg	9911283111	nvn_garg@yahoo.com
11	Ex-Officio Member	CA. Pitam Goel	9650777079	pitam.goel@tattvamgroup.in
12	Ex-Officio Member	CA.Sandeep Agarwal	7903121471	sandeep.agarwal@felixadvisory.com
13	Ex-Officio Member	CA. Sangam Agarwal	9818911609	ashcompanyca@gmail.com
14	Ex-Officio Member	CA. Vijay Kr. Gupta	9871174091	vkguptaca@gmail.com

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Gurugram Branch of NIRC of ICAI
2A, Second Floor, Pavilion Building, Sector-14, Gurugram-122001
gurgaon@icai.org www.icaigurugram.org 124-4268867