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THE ICAI MOTTO

The Institute of Chartered Accountants of India

Ya esa suptesu jagarti kamam kamam Puruso nirmimanah | Tadeva sukram tad brahma tadevamrtamucyate | Tasminlokah sritah sarve tadu natyeti Kascan | etad vai tat | |	य एष सुप्तेषु जागर्ति कामं कामं पुरूषो निर्मिमाण :। तदेव शुक्रं तद् ब्रह्म तदेवामृतमुच्यते । तस्मिंल्लोका: श्रिता: सर्वे तदु नात्येति कश्चन । एतद् वै तत् ।।

That Person who is awake in those that sleep, shaping desire after desire, that, indeed is 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 proof of the existence of the self. No one ever goes beyond it: of Eckhart: 'On reaching God all progress ends.'

Source: Kathopanishad

PANIPAT BARNCH OF NIRC OF ICAI

INDEX

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EVENTS

(NOVEMBER)

HELD IN

PANIPAT BRANCH

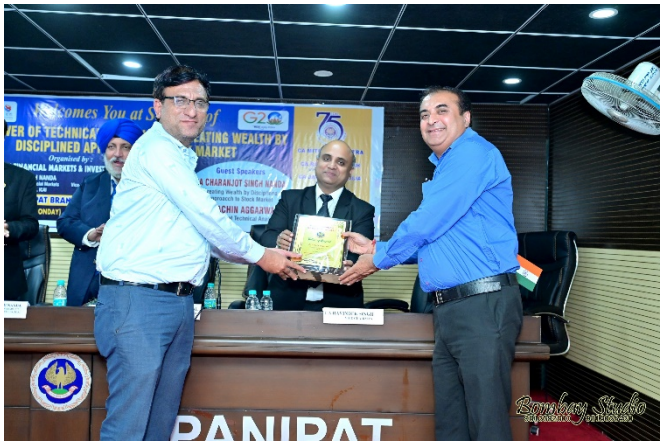
OF

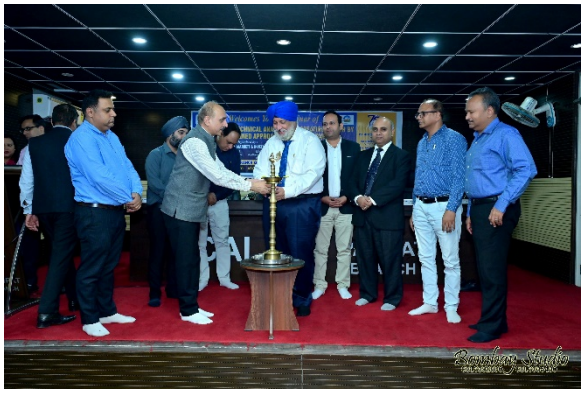
NIRC OF ICAI

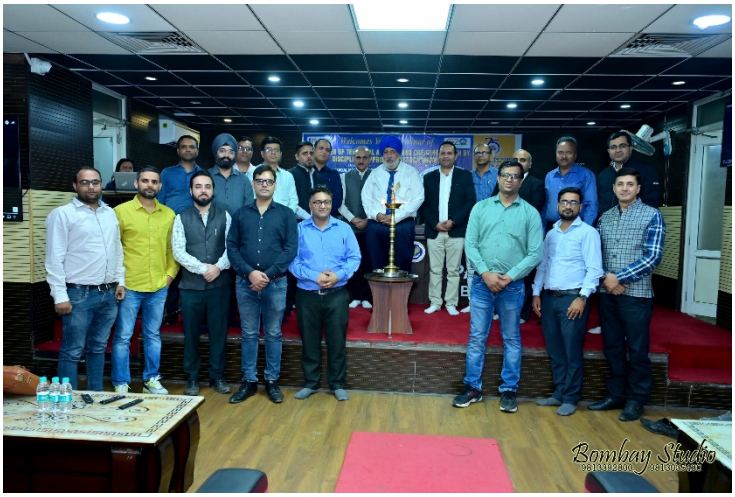
THE POWER OF TECHNICAL

ANALYSIS AND CREATING WEALTH BY DISCIPLINED APPROACH TO STOCK MARKET

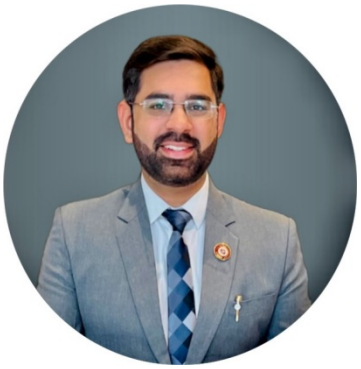
November 20th, 2023







GST CASE LAW COMPENDIUM – NOVEMBER 2023 EDITION



CA. Ritesh Arora

Partner, Ritesh Arora & Associates

Author

1.	Whether the credit be denied when the mistake was committed by the assessee in filling TRAN-1?
2.	Whether Revenue Department can cancel the GST registration retrospectively if the assessee fails to file GSTR 3B for several years?
3.	Can the Search be conducted without fulfilling all the conditions of Section 67 of the CGST Act, 2017?
4.	Whether the Appellate Authority have the power to condone delay beyond the period of one month as prescribed under Section 107(4) of the CGST Act?
5.	Whether the Revenue Department can seize the goods and vehicles even after payment of penalty as per the terms and conditions stated in Section 129(1) of the CGST Act?
6.	Whether the denial of an ITC mismatch claim in GSTR-3B and GSTR-2A be justified when the conditions outlined in Circular No. 183/15/2022-GST are not taken into account?
7.	Rule 89(4)(C) of the CGST Rules violates the rights of the supplier for the denial of refund of unutilized ITC accrued on account of export of zero-rated supply of goods.
8.	Whether the extended period of limitation can be invoked only on the ground that the returns are not scrutinized on time and records are not called by issuing of SCN?

9.	Whether GST paid by the recipient but not remitted by the Supplier to the Government is ground for denying ITC?
10.	Whether the assessment order could be passed without serving notice as per conditions stipulated in Section 169(1)(b) of the CGST Act?
11.	Tax Invoices, E-way bills, and Goods Receipts are not sufficient proof to avail of ITC.
12.	Court admitted the writ challenging the amendment to Rule 61(5) of the CGST Rules.
13.	Whether the provisions of Section 73A of the Finance Act, 1994 applicable based on the calculation sheets to allege collection of Service Tax?
14.	Whether the writ petition maintainable when filed almost four years after the issuance of the Impugned Order?
15.	Limitation Period u/s 54(1) of the CGST Act cannot be invoked when tax is collected without the authority of law.
16.	Whether the ITC claim can be denied on the ground that there is a difference between GSTR 2A and GSTR 3B?
17.	Whether the Applicant eligible to claim the ITC of the GST paid by them for acquiring the rights of lease from the Transferor as service for the construction of Immovable Property?
18.	GST Exemption for Notice Pay Deduction and Limited ITC for Canteen Facilities to the extent of cost borne by the assessee.
19.	Whether the cancellation of GST registration is justified when the Petitioner contends that the cancellation orders are illegal and unjustified, particularly due to the absence of an opportunity for cross-examination regarding the business activities conducted at the registered premises?
20.	Whether the period from February 2020 to August 2020 to be considered cumulatively for availing GST Credit under Rule 36(4) of the CGST Rules?
21.	Whether penalty can be imposed on wrongly availed ITC when Transitional Credit has been debited for discharging tax liability?
22.	Whether the Petitioner liable to pay GST on payment received after implementation of the GST Act for the Works contract entered before implementation of the GST Act?
23.	Whether the extended period of limitation can be invoked on the ground that the assessee was unaware of the charge ability of service tax concerning specific income earned?
24.	Whether the Appellant liable to pay service tax on the commission received under business ancillary services?

25.	**Whether the Petitioner can be considered an "intermediary" within the meaning of Section 2(13) of the IGST Act? Where taxpayer is referred to as an agent in the contract?**

1. **Whether the credit be denied when the mistake was committed by the assessee in filling TRAN-1?**

No, The Honorable Madras High Court in **M/s. Sri Renga Timbers v. The Assistant Commissioner (ST) (FAC) [W.P. No. 22854 of 2023 dated August 17, 2023]** quashed the order passed by the Adjudicating Authority and held that the credit validly availed cannot be denied, even if there were mistakes in the TRAN-1 returns filed twice.

The Honorable Madras High Court observed that the validly availed credit is indefeasible in law and the Petitioner's errors in filing FORM TRAN-1 and the revised return established that the amount of INR 89,88,498 was unutilized credit from the Petitioner's last return filed for June 2017. The Honorable Court relied Upon the Judgment of **Unichem Laboratories v. Commissioner of Central Excise [(2002)7 SCC 145]**, wherein the Honorable Supreme Court held that it is not on the part of the duty of the revenue to deny the benefit that was otherwise legitimately available to an assessee.

The Honorable Court quashed the Impugned order and remanded back the matter to the Adjudicating Authority to re-examine the records of the petitioner afresh from the last VAT return for June 2017 under the TNVAT Act.

Author's Comment:-

Important to mention here that the Trans credit is neither the input tax as per Section 2 (62) of 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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2. **Whether Revenue Department can cancel the GST registration retrospectively if the assessee fails to file GSTR 3B for several years?**

Yes, The Honorable Kerala High Court in **M/s Sanscorp India Pvt. Ltd. v. The Assistant Commissioner, Goods and Service Tax Network, Union of India [WP(C) No.24904 of 2023 dated September 14, 2023]** held that, if an assessee fails to file the returns for a continuous period of six months, his registration is liable to be cancelled and interest will be levied for any delayed payments.

The Honorable Kerala High Court observed that if the Petitioner fails to file the returns for a continuous period of six

months, his registration is liable to be canceled, there is no contradiction in the provisions of Section 50 or Section 29 of the CGST Act and opined that the provisions for cancellation of registration and making payment of the tax due with interest are different, both the provisions have different scope, purpose, and intent.

The Honorable Court noted that the alternative remedy is available to the Petitioner as per the CGST Act and the Rules thereto, which the Petitioner should have resorted to within the statutory prescribed limit and it cannot be said that the GST portal is not viable as the whole country files returns and pays tax by uploading the same in the same software.

The Honorable Court held that the Adjudicating Authority can cancel GST registration if the Petitioner fails to make payment of the full GST amount or part thereof, and interest will be levied for any delayed payments.

Author's Comment:-

Section 29(2)(c) of the CGST Act provides for the cancellation of registration where the registered person fails to furnish returns for a continuos period of 6 months. The law has specified five explicit delinquencies in Section 29(2) which can lead to cancellation of registration after following the due process laid down in the legislature.

The proper officer is permitted to proceed with cancellation and pass a speaking order in REG19 and demand all dues, which extend to:

- Outstanding tax, interest, late fee, and penalties due;
- Due under section 29(5) in respect of credits.

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3. Can the Search be conducted without fulfilling all the conditions of Section 67 of the CGST Act, 2017?

No, The Honorable Delhi High Court in the case of **M/s. Bhagat Ram Om Prakash Private Limited &Anr. v. The Commissioner Central Tax GST Delhi-East [W.P. (C) 12304/2023 dated September 19, 2023]** stayed the proceedings under the search, conducted based on the directions issued by the Special Judge, for checking the source of the amount, and directed the proper officer to authorize the search only if all the conditions specified under Section 67 of the Central Goods and Service Tax Act, 2017 are fulfilled.

The Honorable Delhi High Court observed that there are serious reservations about whether any such roving and fishing inquiry under the CGST Act could have been directed to be conducted by the Special Judge and opined that the respondent is authorized to search only if the conditions specified in Section 67 of the CGST Act are satisfied.

The Honorable Court directed that the Respondent shall also produce the relevant files containing the directions for searching.

Author's Comment:-

There are very fundamental and essential 'ingredients' that must be shown to exist before the grant of authorization by the Joint Commissioner to any other officer, who will be empowered to discharge duties as the 'Authorized officer' for inspection of the premises or goods. Inspection under section 67 is pre–authorized by Circular No. 3/3/2018-GST dated 5 July 2017.

Reference may be made to rule 139 where Form GST INS–01 is prescribed as the format of authorization to be granted by the Joint Commissioner. This format shows the specific 'contraventions' potentially involved, that support the authorization request.

Reasons to believe must be about 'Contraventions' listed in the section 67 that apply to 'taxable person':

- 'Suppressed' any transaction of supply;
- 'Suppressed' stock of goods;
- Claimed input tax credit 'in excess 'of entitlement; and
- Indulged in 'contravention to evade payment of tax'.

Important to note that the proceedings u/s 67 of the Act can be initiated based on only above stated "reasons to believe" that pre-existed on the day of authorization. These emergency powers must be used very cautiously.

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4. Whether the Appellate Authority have the power to condone delay beyond the period of one month as prescribed under Section 107(4) of the CGST Act?

No, The Honorable Kerala High Court in the case of **M/s. Isha Holidays Private Limited v. The Commissioner, SGST Department & Ors. [W.P.(C) No. 30666 of 2023 dated September 25, 2023],** dismissed the petition and held that the Appellate Authority has been vested with the power to condone the delay only by one month by satisfying that there exists a sufficient cause, which prevented the assessee from presenting the appeal beyond the period of three months.

The Honorable Kerala High Court observed that the Petitioner could not enumerate upon any powers vested with the Respondent under which the delay could be condoned beyond the period of four months and opined that as per Section 107(1) of the CGST Act, the appeal had to be filed within three months before the Respondent. Upon which the Respondent has the power to condone the delay by one month, if satisfied that there exists a sufficient cause.

The Honorable Court held that there are no powers vested with the Respondent to condone the delay beyond the period of four months as per Section 107(1) read with Section 107(4) of the CGST Act.

Author's Comment:-

Limitations Act, 1963 states in sections 5 and 14 that "sufficient cause" must be shown to justify the delay. In Ramlal v. Rewa Coalfields Ltd. ibid, Apex Court has held that:

- Non–filing of an appeal within the normal time allowed is not questionable;
- Every day of delay is to be explained with affidavit;

- ❖ Reasons cited verified and rejected if not found satisfactory; and
- ❖ Condonation allowed by a Speaking Order.

The principle of law is that when the time to file an appeal lapses, the counterparty gets a vested right (or advantage or benefits from such failure) which cannot be denied by condonation of appeal in a routine and mechanical manner without 'good and sufficient' reasons.

When an appeal is filed after the period of condonation permitted in section 101(4), the Appellate Authority does not have statutory authority to condone the delay, not even if the reasons are ample and deserve to be entertained. The appeal must be dismissed for being fatally belated because the legislature has allowed appellate authority this much authority and not more.

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5. Whether the Revenue Department can seize the goods and vehicles even after payment of penalty as per the terms and conditions stated in Section 129(1) of the CGST Act?

No, The Honorable Allahabad High Court in **M/s. Western Carrier India Ltd v. State of U.P. and 4 Others [WRIT TAX No. – 1020 of 2023 dated September 15, 2023]** held that since the assessee's goods in transit were accompanied by the necessary documents, including an E-Way bill and invoice, the department should have released the goods and vehicle under Section 129 of the Central Goods and Service Act, 2017.

The Honorable Allahabad High Court observed that vide Issue 6 of **Circular No. 76/50/2018-GST dated December 31, 2018**, either the consigner or the consignee accompanied with relevant documents should be deemed as the owner of the goods. Therefore, the Petitioner is considered as an owner of the goods and directed the Respondent to release the goods and vehicle seized in transit under Section 129(1)(a) of the CGST Act, as were accompanied by necessary documents, including an E-Way bill and invoice, etc.

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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6. Whether the denial of an ITC mismatch claim in GSTR-3B and GSTR-2A be justified when the conditions outlined in Circular No. 183/15/2022-GST are not taken into account?

No, The Honorable Calcutta High Court in **M/s. Makhan Lal Sarkar and anrs. vs. the Assistant Commissioner of Revenue, State Tax B.I. and Ors. [WPA/2146/2023 dated September 18, 2023]** directed the Revenue Department to hear the appeal afresh as the benefit of Input Tax Credit (**"ITC"**) was denied due to a mismatch of ITC claimed in Form GSTR-3B and that reflected in Form GSTR-2A by **Circular No. 183/15/2022-GST dated December 27, 2022.**

The Honorable Calcutta High Court observed that the Petitioner's contention of a breach of the Principal of Natural Justice can be upheld, as the Petitioner despite being granted several opportunities, voluntarily opts not to appear before the Respondent, thereby compelling the Respondent to proceed with an ex-parte decree.

The Honorable Court held that the Impugned Order is unsustainable because it imposes an obligation on the Respondent to ascertain the mismatch from the documentary evidence available and should have taken into consideration the clarification specified under the Circular about the respondent's approach in cases where the supplier had wrongly reported the said supply under B2C instead of B2B in Form GSTR-1, resulting in the omission of the relevant supply or in cases where an incorrect GSTIN of the recipient was declared in Form GSTR-1.

The Honorable Court directed the Petitioner to deposit 20% of the disputed tax amount in addition to the amount already remitted under Section 107(6) of the CGST Act.

Author's Comments:

It is important to note that in FY 2017-18, reporting of ITC in GSTR-2A was not a mandatory prerequisite for claiming ITC. This aspect was clarified through a Press Release by CBIC issued on October 18, 2018. Additionally, the Honorable Supreme Court in the case of **Union of India v. BhartiAirtel [Civil Appeal No. 6520 of 2021 dated October 28, 2021],** held that GSTR-2A serves as a facilitator, and the recipient is required to avail ITC based on self-assessment. Notably, the conditions related to the reflection of ITC in GSTR-2A/GSTR-2B were initially introduced in October 2019 through Rule 36(4) of the CGST Rules and later on January 01, 2022, through the incorporation of Section 16(2)(aa) i.e. GSTR 2B, in the CGST Act.

There is an urgent need to understand that if one figure is not matching with another figure, it does not mean non-payment of taxes. SCN based on GSTR-2A vs. GSTR-3B mismatch is demand based on the presumption that the supplier has defaulted in payment of tax on supplies to the recipient (notice). There is no scope for presumption or conjecture to create demand under the GST Law.

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7. **Rule 89(4)(C) of the CGST Rules violates the rights of the supplier for the denial of refund of unutilized ITC accrued on account of export of zero-rated supply of goods.**

Yes, The Honorable Delhi High Court in the case of **M/s. Indian Herbal Store Pvt. Ltd. vs. Union of India [W.P.(C) 9908/2021 and W.P.(C) 9912/2021 dated September 15, 2023]** allowed the writ petition and held that the Rule 89(4)(C) of the Central Goods and Services Rules, 2017 **("the CGST Rules")** would not have any retrospective application. The Honorable High Court while relying upon the judgment of the Honorable Karnataka High Court in **M/s. Tonbo Imaging India Pvt. Ltd. vs. Union of India and Others [W.P.(C) No. 13185/2020 dated February 16, 2023]**, noted that the Honorable Karnataka High Court has already struck down the substitution made in Rule 89(4)(C), being arbitrary and ultra vires in nature and contrary to provisions of Section 54 of the Central Goods and Services Tax Act ("**the CGST Act**"). Therefore, the Honorable High Court set aside the Refund Rejection Order and Order-In-Appeal and directed the Revenue Department to process the claim for Refund of unutilized Input Tax Credit **("ITC").**

The Honorable Delhi High Court observed that the right to refund unutilized ITC accrues when the goods are exported. Therefore, the Petitioner under Section 54(1) of the CGST Act, has the right to apply for the refund of unutilized ITC within two years from the relevant date. As per Explanation to clause 2(a) to Section 54 of the CGST Act, the relevant date of supply of goods for export would be the date on which the ship or aircraft on which goods are loaded leaves India.

The Honorable Court noted that the substitution of Rule 89(4)(C) of the CGST Rules would be applied prospectively from March 23, 2020, and the Respondent had erred in applying Rule 89(4)(C) of the CGST Rules for computing the export turnover for determining the refund claimed by the Petitioner for the Impugned Period 1 and 2, thereby, rejecting the contentions of the Respondent.

The Honorable Court opined that Rule 89(4)(C) of the CGST Rules would not be applicable for determining the amount of refund of unutilized ITC and the Petitioner has a rightful claim for refund of unutilized ITC.

Author's Comment:-

Earlier, the Honorable Karnataka High Court struck down Rule 89(4)(C) of CGST Rules, 2017 as amended vide notification no. 16/2020- central tax dated 23/03/2020 for being ultra vires the provisions of section 16 of IGST Act, 2017 & Section 54 of CGST Act, 2017 read with section 164 of CGST Act,2017 being violative of Articles 14 and 19(1)(g) of the constitution. Additionally, the provision is arbitrary, unreasonable & vague. This is a big relief for the exporters claiming refunds for those who export via the LUT model and do not supply domestically special purpose or customized products.

It would be interesting to note how the courts will respond to another draconian rule i.e. Rule 96(10) of the CGST Rules, 2017.

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8. **Whether the extended period of limitation can be invoked only on the ground that the returns are not scrutinized on time and records are not called by issuing of SCN?**

No, The Honorable Supreme Court in the case of **Commissioner of CGST and Central Excise, Jabalpur v. M/s. Birla Corporation Limited [Civil Appeal No. 6410 of 2023 dated October 03, 2023]**, dismissed the appeal filed by the Revenue Department, holding that the extended period of limitation for issuing Show Cause Notice **("the SCN")** has to be invoked as per facts of the case, thereby denying the benefit of the extended period of limitation to the Revenue Department.

The Honorable Supreme Court observed that five audits for the relevant period have been conducted by the Appellant and a similar SCN has been issued by the Appellant for the same issue.

The Honorable Court held that the observations made in the Impugned Order, enumerating upon the duty of the Officer to scrutinize the returns and issue SCN within time, have been made about facts and circumstances of the case, and do not have any general application, thereby holding that extended period of limitation cannot be invoked.

Author's Comments:-

In GST, Notice U/s 74 is required to be issued when there is an allegation of "evasion of tax" and "special circumstances" of fraud; or willful – misstatement of facts to evade tax; or suppression of facts to evade tax exists.

It is incumbent upon the proper officer to show how these "special circumstances" exist and what benefit, if any is derived by the taxpayer.

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9. **Whether GST paid by the recipient but not remitted by the Supplier to the Government is ground for denying ITC?**

No, The Honorable Kerala High Court, in the case of **M/s. Goparaj Gopal Krishnan Pillai v. State Tax Officer, Thripunithura & Ors. [WP(C) 29855 of 2023 dated October 5, 2023]** allowed the writ petition and held that the Input Tax Credit **("ITC")** should not be denied on the ground that GST paid is not reflected in Form GSTR-2A due to non-remittance by Supplier. Therefore, the High Court set aside the Assessment Order to the extent of denial of ITC and directed the Revenue Department to examine the evidence placed on record by the assessee and pass fresh orders accordingly.

The Kerala High Court relies upon the judgment of the Honorable Kerala High Court in the case of **M/s. Diya Agencies**

v. State Tax Officer [WP (C) 29769/2023 dated September 12, 2023], the High Court noted that the amount of GST paid, not reflected in Form GSTR-2A should not be the sole basis for denial of the claim for ITC when there is evidence on record to prove that the claim of ITC is bonafideand genuine. Further held that the Impugned Order to the extent of denial of ITC of Rs.19,830/- was set aside, hence the Writ Petition is allowed.

The Honorable Court directed the matter be remanded back to the Respondent for examination of the evidence and documents submitted by the Petitioner for claiming ITC. Thereby, the Petitioner should be allowed to avail of ITC denied if the Respondent Officer is satisfied that the ITC claim is bonafide and genuine.

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10. Whether the assessment order could be passed without serving notice as per conditions stipulated in Section 169(1)(b) of the CGST Act?

No, The Honorable Madras High Court (Madurai Bench) in the case of **M/s. Tvl. Diamond Shipping Agencies Pvt. Ltd. v. Assistant Commissioner, Tuticorin [W.P. (MD) 6874 of 2023 dated August 29, 2023]** allowed the writ petition and held that an assessment order could not be passed without serving notice as per the conditions stipulated in Section 169(1)(b) of the Central Goods and Services Tax Act, 2017 **("the CGST Act")**.

The Honorable Madras High Court (Madras Bench) ruled that the Impugned Order was passed without serving notice under Section 169(1)(b) of the CGST Act and because the Petitioner has three business verticals and therefore the Impugned Order is quashed. The Honorable Court directed that the Respondent shall grant the opportunity for personal hearing to the Petitioner and Petitioner shall produce the evidence and required documents. Thereafter, the Respondent officers shall pass the required orders.

Author's Comments:-

Although Section 169 of the CGST Act, 2017 specifies 14 different ways/modes of serving any decision, order summons, notice, or order communication under the Act, care must be taken by the authorities not to simply pick and choose any option, rather the best possible option must be chosen by which it is mostly likely to reach the notice. The notice or any other communication cannot be termed to be served until it has reached the intended notice.

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11. Tax Invoices, E-way bills, and Goods Receipts are not sufficient proof to avail of ITC.

No, The Allahabad High Court in the case of **M/s. Malik Traders v. State of Uttar Pradesh and Ors. [Writ Tax No. 1237 of 2021 dated October 18, 2023]**, dismissed the writ petition and held that details of the Tax Invoice, E-Way bill, and Goods Receipt are not sufficient to prove the genuineness of the transaction beyond a reasonable doubt, to avail Input Tax Credit (**"ITC"**). The recipient of purchased goods must provide essential information, including vehicle numbers used for transporting the goods, payment of freight charge, and acknowledgment of receipt, to substantiate the genuine physical movement of goods for availment of ITC.

The Honorable Allahabad High Court observed that the scheme of ITC was introduced to avoid the cascading effect of tax and to avoid double taxation. As per Section 16(2) of the UPGST Act, the registered dealer can avail of ITC only when the conditions under Section 16 are fulfilled. The proceedings can be initiated against the Petitioner for ITC wrongly availed or utilized by any reason or willful misstatement or suppression of fact. Relying upon the judgment of the Honorable Supreme Court in the case of **State of Karnataka v. M/s Ecom Gill Coffee Trading Private Limited [Civil Appeal No. 230 of 2023 dated March 13, 2023]** the court noted the primary burden is upon Petitioner to prove beyond reasonable doubt that the actual transaction and physical movement of goods have taken place. The Petitioner is required to furnish the details of the selling dealer, vehicle number, payment of freight charges, acknowledgment of taking delivery of goods, Tax Invoices and payment particulars, etc. to prove and establish the actual physical movement of the goods. Furnishing details of the Tax Invoice, E-Way bill, and Goods Receipt are not sufficient to prove the genuineness of the transaction beyond a reasonable doubt, for availing ITC.

The Honorable Court opined that the facts of the aforementioned case would be applicable in the present case and proceedings have rightly been initiated by the Respondent against the Petitioner and held that the court is not inclined to interfere with the proceedings initiated by the Respondent and dismissed the writ petition.

Author's Comments:-

Judgment by the Honorable Supreme Court in the case of **State of Karnataka v. M/s Ecom Gill Coffee Trading Private Limited [Civil Appeal No. 230 of 2023 dated March 13, 2023]** has gained unmatchable limelight, although, it is delivered in the context of Karnataka VAT Act, 2003 but it will have the larger repercussions for the GST regime also. In the GST Law, Section 155 of the CGST Act, 2017 places the "Burden of Proof" in case of eligibility to ITC availed on the taxpayer. So to prove that the ITC availed by the taxpayer is eligible, the taxpayer has to satisfy the conditions of Section 16 read with Section 155 of the CGST Act, 2017. Once the taxpayer discharges the "burden of proof" by showing fulfillment of conditions of Section 16, then the "Onus to proof" shifts onto the department to prove that the ITC is ineligible (Section 101 of the Indian Evidence Act, 1872).

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12. Court admitted the writ challenging the amendment to Rule 61(5) of the CGST Rules

The Honorable Madras High Court in **M/s. Sakthi Industries v. Union of India [W.P.No.26901 dated September 12, 2023]** admitted the writ challenging the amendment to Rule 61(5) of the Central Goods and Services Tax Rules, 2017 (**"the CGST Rules"**) and directed the Petitioner to pay 10% of the disputed amount within 4 weeks to get the interim stay from all further proceedings.

The Honorable Madras High Court noted that the Petitioner has availed ITC, which, according to the Respondent is beyond the limitation prescribed under Section 16(4) read with Section 39 of CGST Act read with Rule 61(5) of the CGST Rules and further noted that the petitioner has also challenged the amendment to Rule 61(5) of the CGST Rules vide Notification No. 49/2019 – Central Tax dated October 09, 2019. The Honorable Court stated that the Petitioner has an alternate remedy and challenged the impugned order on the strength of the challenge to the amendment to Rule 61(5) of the CGST Rule vide Notification No. 49/2019-Central Tax dated October 09, 2019. Therefore, the court has admitted the writ.

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13. Whether the provisions of Section 73A of the Finance Act, 1994 applicable based on the calculation sheets to allege collection of Service Tax?

No, The CESTAT, Chandigarh in the case of **M/s. Pearls Buildwell Infrastructure Limited v. Commissioner of Central Excise & Service Tax, Chandigarh – I [Service Tax Appeal No. 1196 of 2011 dated September 19, 2023]** set aside the demand confirmed by the Commissioner for Service Tax based on the calculation sheet only. The Tribunal found that the appellants did not collect any service tax from their customers, substantiated by the absence of invoices and a certificate from their customer confirming this. Consequently, the Commissioner's reliance on calculation sheets to establish service tax collection was considered insufficient. As a result, the impugned order was deemed unsustainable, and the appeal was allowed. Simultaneously, the Department's appeal against the dropped demand was dismissed.

The CESTAT, Chandigarh observed that for the applicability of section 73A of the Finance Act in this case, it was crucial to determine whether the Appellants had collected service tax from their customers, and if so, whether this collection was more than the assessed service tax.

Going through the provisions of Section 73A, it is evident that sub-clause 2 of Section 73A remains applicable in the instant case. It is observed that to invoke this clause, the notice must have collected an amount that is not legally mandated to be collected, in any manner that represents Service Tax. In the present case, it has not been established by the Department that the Appellant has issued invoices or bills indicating the collection of service tax from their customers. Further, noted that the Certificate issued along with the absence of challenged records, indicated that the Appellant had not collected any from their customers.

The CESTAT observed that the allegations against the Appellant were primarily based on isolated and uncorroborated calculation sheets discovered during the search. These sheets were deemed insufficient to establish the collection of service tax.

The CESTAT held that the impugned order could not be sustained and was set aside.

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14. Whether the writ petition maintainable when filed almost four years after the issuance of the Impugned Order?

No, The Honorable Kerala High Court in the case of **M/s. Krishna Steel Rolling Mills v. Deputy Commissioner of State Tax [WP(C) NO. 15991 of 2023 dated September 15, 2023]** dismissed the writ petition, while allowing the assessee to pay in installments of the arrears of tax and further directed the Commissioner to decide the application within 7 days from the day the assessee approached the Commissioner.

The Honorable Kerala High Court held that the writ petition is not maintainable as the Petitioner had not initiated any proceeding within four years and directly approached this Court without availing alternate remedy of filling statutory appeal. The Honorable Court observed that under Section 80 of the Central Goods and Service Act, 2017, the Commissioner has the power to grant up to 12 installments for the payment of arrears of tax and directed that the Petitioner may approach the Respondent within 7 days from the pronouncement of the order for payment of arrears of tax in the form of installments and the Respondent should decide it within 7 days and dismissed the writ petition.

Author's Comment:-

1. Section 80 empowers the commissioner to grant permission only to the taxable person to make payment of any amount due on an installment basis, on an application filed electronically in **FORM GST DRC–20**.

The commissioner after considering the request by the taxable person (in **FORM GST DRC–20**) and report of the jurisdictional office, may issue an order in **FORM GST DRC–21**, allowing the taxable person to either extend the time or allow payment of any amount due under the Act on an installment basis.

2. This section applies to amounts due other than the self–assessed liability shown in any return.
3. The installment period shall not exceed 24 months.
4. The taxable person shall also be liable to pay prescribed interest on the amount due from the first day such tax was due to be payable till the date tax is paid.
5. If default occurs in payment of any one installment the taxable person would be required to pay the whole outstanding balance payable on such date of default itself without further notice.

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15. Limitation Period u/s 54(1) of the CGST Act cannot be invoked when tax is collected without the authority of law

The Honorable Delhi High Court in the case of **Delhi Metro Rail Corporation Limited vs. The Additional Commissioner, Central Goods and Services Tax Appeals and Others [W.P. (C) 6793/2023 dated September 18, 2023]** held that the limitation period of two years under Section 54(1) of the Central Goods and Service Tax Act, 2017 ("the CGST Act")

for applying for a refund of tax, cannot be invoked when Revenue Department collected the tax without any authority of law. Hence the Writ Petition was allowed, and the Revenue Department was directed to process the claim for refund of the Petitioner.

Author's Comment:-

This judgment by the Honorable Delhi High Court is applaudable and it will provide relief to all the taxpayers seeking refunds where the tax was collected without the authority of law. Interesting to see, that where the tax is collected without the authority of law during inspection, and search proceedings and where no DRC–04 is issued by the proper officer, the taxpayer may raise refund claims and the department will be forced to accept those claims.

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16. Whether the ITC claim can be denied on the ground that there is a difference between GSTR 2A and GSTR 3B?

No, The Honorable Kerala High Court in the case of **M/s. Henna Medicals vs. State Tax Office, Thalassery & Ors. [WP (C) 30660 of 2023 dated September 19, 2023]** allowed the writ petition and held that the difference between GSTR 2A and GSTR 3B is not a ground for denial of the claim for Input Tax Credit **("ITC"),** thereby directed the Revenue Department to examine the evidence placed on record by the assessee and pass fresh orders accordingly.

The Honorable Kerala High Court relying upon the judgment of the Honorable Supreme Court in the case of **State of Karnataka vs. M/s Ecom Gill Coffee Trading Private Limited [Civil Appeal No. 230 of 2023 dated March 13, 2023]** and the judgment of Honorable Calcutta High Court in the case of **M/s Suncraft Energy Private Limited and Another vs. The Assistant Commissioner, State Tax, Ballygunge Charge [MAT 1218 of 2023 dated August 2, 2023],** wherein Court observed that the claim of ITC should not be denied only on the ground that there is a difference between GSTR 2A and GSTR 3B.

Further relying upon the judgment of the Honorable Kerala High Court in the case of **M/s Diya Agencies vs. State Tax Officer [WP (C) 29769/2023 dated September 12, 2023],** the Honorable High Court noted that the difference between GSTR 2A and GSTR 3B should not be the sole basis for denial of the claim for ITC when there is evidence on record to prove that the claim of ITC is bonafide and genuine. The Honorable Court directed the Assessing Authority to grant an opportunity to the assessee to give evidence to support his claim for ITC and the matter be remitted back to Respondent for examination of the evidence of the Petitioner for claiming ITC and after examination of evidence, the Respondent passes fresh orders by law.

Author's Comment:-

There is an urgent need to understand that if one figure is not matching with another figure, it does not mean non-payment of taxes. SCN based on GSTR-2A vs. GSTR-3B mismatch is demand based on the presumption that the

supplier has defaulted in payment of tax on supplies to the recipient (notice). There is no scope for presumption or conjecture to create demand under the GST Law.

Deficiency in this SCN as to the cause of action is incurable and fatal to demand because mismatch is not the cause of action in law; it is only suspicion of possible non – non-compliance. The actual cause of action may arise under section 16(2) (aa) or section 16(2) (c), depending on which one Revenue chooses to pursue. Taxpayers cannot answer such 'either–or' allegations.

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17. Whether the Applicant eligible to claim the ITC of the GST paid by them for acquiring the rights of lease from the Transferor as service for the construction of Immovable Property?

No, The AAR, Gujarat, in the case of **M/s Bayer Vapi Private Limited [Ruling No. GUJ/GAAR/R/2023/29 dated August 24, 2023]** ruled that the transferee acquiring the rights of the lease for construction of the immovable property is not entitled to take Input Tax Credit **("ITC")** of the Goods and Service Tax ("**GST**") paid by them on the services received by the Transferor by way of the lease as per Section 17(5)(d) of the Central Goods and Services Tax Act, 2017 (**"the CGST Act").**

The AAR, Gujarat observed that Section 17(5)(d) of the CGST Act states that the registered person is not eligible to take input credit on GST paid on goods and services received for construction of an immovable property (not plant & machinery) on his account including when such Goods/Services are used in course or furtherance of business. Further observed that the Gujarat Authority for Advance Ruling in **M/s GACL NALCO Alkalis& Chemicals Private Limited [Advance Ruling No. GUJ/GAAR/R/53/2021]** has ruled that the legislature has clearly expressed its intent that ITC shall not be available in respect of services about land received by a taxable person for the construction of an immovable property, including when such services are used in the course or furtherance of business. The above-mentioned point was also substantiated by the Telangana State Authority in the ruling of **M/s Daicel Chiral Technologies (India) Private Limited [TSAAR order No. 6/2020].**

The AAR, Gujarat opined that the intent of the Applicant through the annexure to the application and MOU is clear that the Applicant is acquiring the rights of leasehold land, which is industrial land adjacent to the manufacturing plant from the Transferor to set up a new manufacturing plant/expand its existing manufacturing plant.

The AAR, Gujarat ruled that the Applicant is not entitled to take ITC of GST paid by them on the services provided by the Transferor in the form of rights in the leasehold land in terms of Section 17(5)(d) of the CGST Act.

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18. GST Exemption for Notice Pay Deduction and Limited ITC for Canteen Facilities to the extent of cost borne by the assessee

The AAR, Gujarat, in the case of **M/s. Tata Auto Comp Systems Ltd [Ruling No. GUJ/GAANW2023/23 dated June 19, 2023],** held that deductions from employees' salaries for availing canteen facilities, transportation services provided to the employees, and notice pay are not considered taxable under GST, and Input Tax Credit ("**ITC**") can be claimed on GST charged by service providers, with restrictions based on the cost borne by the employer.

The AAR, Gujarat observed that as per **Circular No. 172/04/2022-GST dated July 06, 2023**, the contractual agreement entered between the employer and employee will not be subject to GST when the same is provided in terms of the contract between the employee and employer.

Further observed that the ITC will be available to the Petitioner in respect of canteen facilities provided under the Factories Act, 1948. However, ITC on GST charged by CSP will be restricted to the extent that the Petitioner bears the cost.

The AAR, Gujarat opined that the ITC under Section 16 of the CGST Act can be claimed, subject to the conditions and restrictions specified in Section 49 of the CGST Act. The services received by the Petitioner are used in their business, making them eligible for ITC on the GST charged by their suppliers. Additionally, the amended Section 17(5) of the CGST Act allows ITC to lease, rent, or hire motor vehicles with a seating capacity of more than 13 persons (including the driver).

The AAR, Gujarat held that the Petitioner is not liable to pay GST on the amounts deducted towards notice pay vide **Circular No. 178/10/2022-GST dated August 07, 2022**, wherein no GST is applicable on the salary deducted instead of the notice period. The deduction is not considered a supply under GST and is viewed as compensation for the breach of employment terms.

Author's Comments

The AAR, Maharashtra in **Re: Emcure Pharmaceuticals Ltd. [2022 (60) G.S.T.L. 231 (AAR – GST-Mah.)]** ruled that the canteen facilities provided by the employer to its employees through third-party vendors are not a transaction made in the course or furtherance of business, and hence, cannot be considered as a "Supply" under the provisions of the CGST Act and therefore the employer is not liable to pay GST on the recoveries made from the employees towards providing canteen facility at subsidized rates.

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19. Whether the cancellation of GST registration is justified when the Petitioner contends that the cancellation orders are illegal and unjustified, particularly due to the absence of an opportunity for cross-examination regarding the business activities conducted at the registered premises?

Yes, The Honorable Kerala High Court in **M/s. Steel India v. the State Tax Officer, Nattika, Thrissur, and Ors. [W.P.(C) No.29033 of 2023 dated October 5, 2023]** held that the investigation carried out by the qualified officer should not be considered a trial. The Honorable Kerala High Court upheld the State Tax Officer's decision to cancel the Petitioner's registration due to the absence of business activity at the declared location. The Honorable Court emphasized that

the officer's inquiry was not a trial but a swift process to determine if the registered dealer operated from the declared business address, and the Petitioner failed to provide supporting evidence for his claim or documents to change the business location. Consequently, the writ petition was dismissed, affirming the authority.

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20. Whether the period from February 2020 to August 2020 to be considered cumulatively for availing GST Credit under Rule 36(4) of the CGST Rules?

Yes, The Honorable Allahabad High Court in the case of **M/s. Vivo Mobile India Private v. Union of India and Others [Writ Tax No. 433 of 2021 dated September 5, 2023]** allowed the writ petition and held that as per Rule 36(4) of the Central Goods and Services Tax Rules, 2017 (**"the CGST Rules"**), the period of February 2020 to August 2020 would be considered cumulatively for calculating the amount of eligible Input Tax Credit (**"ITC"**) for the invoices or debit notes, details of which has not been furnished, prescribing a limit of 10 percent of the eligible ITC, about invoices or debit notes furnished by the supplier.

The Honorable Allahabad High Court observed that the GST regime is founded on the premise that the GST is leviable at every link of value addition and the Assessee can claim ITC on the tax paid, which is used to offset outward tax liability. Section 16 of the CGST Act prescribes conditions for availing of Input Tax Credit wherein Section 16(1) of the CGST Act registered person is eligible to claim ITC as per the conditions enumerated in the Act. Section 16(2) enumerates the eligibility conditions for availing ITC. Section 16(2) of the CGST Act, states that in case the recipient fails to pay the supplier the value of supply along with GST payable, within 180 days from the date of issuance of the Tax Invoice, the ITC is reversed and the amount is added to the recipient outward tax liability. Further observed that the Respondent vide Notification No. 49/2019 dated October 09, 2019, inserted sub-rule (4) to Rule 36 of the CGST Rules stating that a registered person can claim ITC in respect of invoice or debit notes the details of which have not been uploaded by suppliers in GSTR-1, only to the extent of 20 percent of the eligible credit available in respect of invoice or debit notes the details of which have been uploaded by the supplier. Further, by way of the Impugned Circular, a condition was imposed that the amount of ITC calculated in cases where the details of invoice and debit notes are not furnished would be based on invoices or debit notes the details of which have been uploaded by the suppliers under Section 37(1) of the CGST Act as on the due date of filing of the returns in FORM GSTR-1 of the suppliers for the said period which has to be ascertained based on auto-populated FORM GSTR 2A available on the due date of filing of FORM GSTR-1 under Section 37(1) of the CGST Act. The amendment was made in Rule 36(4) of the CGST Rules vide Notification No. 75/2019 dated December 26, 2019, wherein the limit of ITC claimed under Rule 36(4) of the CGST Rules was reduced from 20 percent to 10 percent. Thereafter first Proviso to Rule 36(4) was inserted by way of the Notification, stating that the conditions in Section 37 of the CGST Act would apply cumulatively for February, March, April, May, June, July, and August of the year 2020 and the return in Form GSTR-3B for tax period of September, 2020 shall be furnished with cumulative adjustment of the ITC for the above said period.

The Honorable Court noted that the Impugned Circular being contrary to the statutory provision and first proviso of Rule 36(4) of the CGST Rules, cannot be enforced in the present case for the limited period of February 2020 to August 2020 and opined that the condition laid out in Rule 36(4) of the CGST Rules, stating that, the amount of the eligible ITC for the period of February 2020 to August 2020, not exceeding ten per cent of the eligible ITC as per Tax invoice or Debit Note, filed by supplier in GSTR-1 has to be calculated cumulatively. Further stated that the Respondent has the power to recover the amount from the Petitioner during the pendency of the writ petition even if the Petitioner has pre-deposited the ten percent of the disputed tax amount in the absence of an interim order issued by the Court granting protection from the recovery of the disputed tax amount, however, the Respondent actions to recover the entire disputed tax amount is unacceptable. The Respondent should have taken into consideration any amount which has been pre-deposited by the Petitioner.

The Honorable Court held that the Impugned Order is quashed and the entire amount recovered from the Petitioner by the Respondent shall be returned to the Petitioner within six weeks along with interest @ 6 percent of Rs.11,00,69,010/- i.e. excess amount recovered, from the date of excess recovery to the date of actual refund. The Court granted the liberty to the Respondent to recover up to 10 percent of the interest amount from the erring official of the Respondent.

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21. Whether penalty can be imposed on wrongly availed ITC when Transitional Credit has been debited for discharging tax liability?

No, The Honorable Madras High Court in the case of **M/s. PMA Controls India Limited v. Joint Commissioner of Central Tax and others, Chennai [W.P. No. 16638 of 2023 dated September 20, 2023]** allowed the writ petition and held that the penalty could not be imposed on wrongly availed Input Tax Credit as there is no change in tax liability of the Assessee when Transitional Credit has been debited for discharging tax liability and wrongly availed Input Tax Credit has been reversed.

The Honorable Madras High Court observed that the issue is revenue neutral, as the Petitioner was entitled to transmit the ITC lying unutilized under the CENVAT account, which was lying unutilized under GST. Due to technical glitches, the transition could not be allowed under Section 140 of the CGST Act.

Relying upon the judgment of **Rashtriyalspat Nigam Limited v. Deputy Commissioner (CT) III [W.P. 22241 of 2019 dated June 20, 2022],** wherein the Court held that the transition of ITC, even if incorrect, the Petitioner's only way to protect the claim was to avail the transition of ITC and taking hyper-technical view while the imposition of penalty and levy of interest is not sustainable.

The Honorable Court opined that the amount for the utilization of ITC would have been available if the Petitioner was allowed a successful transition of ITC. Thus, the Petitioner has not caused any loss to the revenue, as the Petitioner utilized the Transitional Credit as regular ITC and wrongly availed ITC has been reversed and held that there exists no reason to sustain the Impugned Order and impose the interest and penalty on the Petitioner as there is no change in the tax liability. Hence, a Writ Petition is allowed.

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22. Whether the Petitioner liable to pay GST on payment received after implementation of the GST Act for the Works contract entered before implementation of the GST Act?

Yes, The Honorable Calcutta High Court, in the case of **Dipak Sarkar v. The State of West Bengal and Others [WPA/2127/2023 dated September 15, 2023],** dismissed the writ petition and held that the assessee is liable to pay

the GST on payment received after implementation of the GST regime for the work orders given before the implementation of the GST regime.

The Honorable Calcutta High Court opined that the Impugned Order is reasoned and has been passed after taking into consideration all the points raised by the Petitioner. Thus, the Impugned Order is valid and devoid of any error of law.

The Honorable Court held that all the payments regarding the works contract are executed post-GST, making the Petitioner obligated to pay GST on the payment received and tax had to be deposited after filing of the required forms. Hence, the writ petition is dismissed.

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23. Whether the extended period of limitation can be invoked on the ground that the assessee was unaware of the charge ability of service tax concerning specific income earned?

No, The CESTAT, Ahmadabad in the case of **M/s. Sophisticated Instrumentation v. C.C.E & S.T.-Vadodara-I [Service Tax Appeal No. 11477 of 2013 dated September 22, 2023],** allowed the appeal and ruled that the assessee is a charitable trust and not covered under the definition of commercial training or coaching center as per Section 65(27) of the Finance Act, 1994 and thus invocation of an extended period of limitation by five years is not justified.

The CESTAT, Ahmadabad observed that the definition of CTCS as defined under Section 65(27) of the Finance Act, 1994 was silent on the nature of the institute which is covered under the definition of CTCS specifically concerning Appellant being a charitable trust, which was cleared by adding the explanation vide Finance Act, 2010 stating that any kind of organization providing coaching service or imparting training and deriving income through these activities would fall under the head of CTCS, thus service tax could be levied on such organizations w.e.f. July 1, 2003.

The CESTAT opined that the appellant was under the bona fide belief that they were not covered under the head of CTCS and, thus were not required to pay service tax and held that the appellant has not willfully suppressed any fact to evade payment of service tax. Therefore, the extended period of limitation of five years could not be invoked in this case, hence appeal is allowed on the ground of limitation.

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24. Whether the Appellant liable to pay service tax on the commission received under business ancillary services?

Yes, The CESTAT, Ahmadabad in the case of **M/s. Natural Petrochemicals Private Limited vs. C.C.E & S.T, Rajkot [Final Order No. A/12059/2023 dated September 18, 2023]** has ruled that the assessee was aware of the changeability of

service tax upon the commission received under the head of Business Ancillary Services (**"BAS"**) and had deliberately never disclosed the same in the monthly returns, thus the financial hardship faced by the assessee is no ground for non-payment of Service Tax, hence dismissed the appeal.

The CESTAT, Ahmadabad observed that the Appellant should have disclosed the income received under the category of BAS in the monthly returns even if the same is believed to be exempted under the Act and the Appellant was aware of their liability to pay service tax, and deliberately chosen not to pay service tax, owing to financial difficulties.

The CESTAT held that due to financial hardships, the Appellant cannot escape from the liability to pay service tax on the commission received in the form of income under the category of BAS and hence, dismissed the appeal.

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25. Whether the Petitioner can be considered an "intermediary" within the meaning of Section 2(13) of the IGST Act? Where taxpayer is referred to as an agent in the contract?

No, The Honorable Delhi High Court in **BOOKS Business Services Pvt. Ltd vs. Commissioner of Central Goods and Services Tax Delhi South and Anr. [W.P.(C) 1255/2023 dated August 22, 2023]** held that even when an assessee is referred to as an agent in the agreement, doesn't concretely mean that he is an intermediary and not a principal service provider. As a result, the denial of the refund was overturned, and the tax authorities were instructed to process the refund claim expeditiously.

The Honorable Delhi High Court held that the Petitioner could not be classified as an "intermediary" under the IGST Act. The Petitioner's services included bookkeeping, payroll, and accounting services using cloud technology. The Honorable Court noted that in the case of intermediary services, there are typically three entities involved: one providing the principal service, one receiving the principal service, and an intermediary acting as an agent or broker to facilitate or arrange such services for the recipient. Further noted that the agreement between the Petitioner and its foreign affiliate, Books Business Services Limited, did use the term "agent," but it was clear that the Petitioner was not acting as an agent to procure services for the service recipient. Since, the agreement clearly stated that the Petitioner was engaged to provide the principal services, and it was the principal service provider for bookkeeping, payroll, and accounts through the use of cloud technology.

The Honorable Court held that merely because the services were for the clients of the Petitioner's affiliate did not make the Petitioner an "intermediary" as per the IGST Act. Subsequently, the Court relied on relevant decisions, including **M/s Ernst And Young Limited v. Additional Commissioner, CGST Appeals-II, Delhi, and Anr. [2023:DHC:2116-DB]** and **M/s Cube Highways and Transportation Assets Advisor Private Limited v. Assistant Commissioner CGST Division & Ors.[2023: DHC:5822- DB]**, to support its conclusion.

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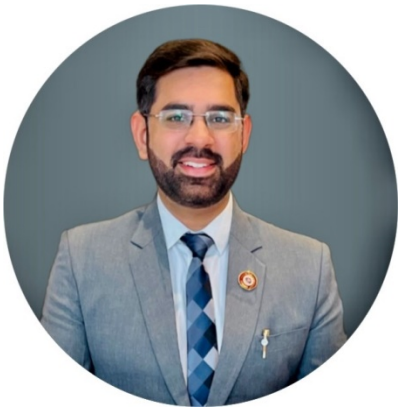

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