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INDIRECT TAX

Newsletter - June 2024

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INSTRUCTIONS

Central Board of Indirect Taxes and Customs Issues Guidelines for Initiation of Recovery Proceedings Before Three Months from the Date of Service of Demand Order

Instruction No. 01/2024-GST dated May 30, 2024

The Central Board of Indirect Taxes and Customs (CBIC), has issued the following guidelines, to be followed by the Proper Officers in cases where it is necessary, in the interest of revenue, to initiate recovery before the expiry of three months for the date of service of the order:

- The matter is required to be placed by the jurisdictional Deputy or Assistant Commissioner of Central Tax before the jurisdictional Principal Commissioner/ Commissioner of Central Tax, along with the reasons/ justification for such earlier recovery.
- If the jurisdictional Principal Commissioner/ Commissioner of Central Tax is satisfied that the case is fit to initiate early recovery, he must record in writing, the specific reason(s) for asking the taxable person for early payment of the said amount, clearly outlining the circumstances prompting such early action.
- The reasons to believe for the apprehension of risk to revenue should be based on credible evidence, which may be kept on record to the extent possible.
- While issuing any directions for early recovery, the Proper Officer must duly consider the financial health, status of business operations, infrastructure, and credibility of the taxable person, and strike a balance between the interest of the revenue and ease of doing business.

In the past, the Revenue Authorities initiated recovery proceedings against taxpayers before the expiry of statutory time period of three months, without any cogent reasons. Such actions have also been challenged by the taxpayers before the High Courts and have been subjected to judicial scrutiny. The issuance of the Guidelines, thus, is a positive step aimed to prevent undue harassment to the taxpayers. However, the efficacy of the Guidelines will ultimately depend upon the implementation and its adherence by the Revenue Authorities.

JUDGMENTS

Revenue Authorities Cannot Block ITC by Creating Negative Balance in Electronic Credit Ledger

Laxmi Fine Chem vs. Assistant Commissioner [WP No. 5256 of 2024]

The Telangana High Court has held that the insertion of negative balance in the Electronic Credit Ledger (ECrL) by the Revenue Authorities is against the provisions of the Goods and Services Tax (GST) Laws.

The Petitioner, by way of a writ petition, challenged inter alia the blocking of Input Tax Credit (ITC) by inserting negative balance in the ECrL.

The High Court noted that if there is a credit balance available in the ECrL, then under the GST laws, the authorities concerned may, for reasons to be recorded in writing, block the credit of such amount. However, no power is conferred upon the authorities to block credit to be availed by the petitioner in future by way of insertion of negative balance in the ECrL.

The High Court further noted that the blocking of the ITC effectively deprived the Petitioner of his valuable right to discharge his liability and realize the value in monetary terms. In the event of the Petitioner having wrongly or fraudulently availed the ITC, revenue can initiate appropriate recovery proceedings under Section 73/74 of the Central Goods and Services Tax Act, 2017 (CGST Act) rather than by restricting the use of ITC, when there was no ITC available in the credit ledger of the Petitioner.

Previously, the Gujarat High Court in the case of Samay Alloys India Pvt. Ltd. vs. State of Gujarat [C/SCA/18059/2021] had held that under the GST laws, there is no power to insert negative credit in ECrl. In case where credit is fraudulently availed and utilised, the Revenue Authorities can initiate appropriate proceeding under the provisions of Section 73/74 of the CGST Act. The judgement of the Telangana High Court has reaffirmed the position laid down by the Gujarat High Court and has consequently brought major relief to the taxpayers.

No Colourable Exercise of Power in Issuance of Notifications Extending the Time Period for Passing of Assessment Orders for Recovery of Tax

Graziano Trasmissioni vs. Goods And Services Tax And 5 Ors. [Writ Tax No. - 1256 of 2023]

The Allahabad High Court dismissed the challenge raised to Notification No. 9/2023- Central Tax dated March 31, 2023, and the corresponding Notification No. 515/2023 dated April 24, 2023, (Impugned Notifications) issued under the Uttar Pradesh Goods and Services Tax (UPGST) vide which the Central/State Government extended the statutory timelines for issuance of assessment orders (and corresponding de facto extension of time of issuance of Show Cause Notices) by the Proper Officers.

The Petitioners, by way of a writ petition before the Allahabad High Court, challenged the Impugned Notifications insofar as the said Notifications extended the time granted to the Adjudicating Authorities to pass Orders with reference to proceedings for the Financial Year (F.Y.) 2017-18.

The High Court, dismissing the batch of writ petitions, observed the following:

On nature of power: The High Court noted that the power under Section 168A of the CGST Act (which enables the central government to extend statutory timelines due to force majeure) is legislative and not administrative. The prescription of limitation to perform an action is a

pure legislative function, accordingly, the extension of limitation prescribed by law is also legislative.

On whether the delegation is uncanalised: The High Court noted that the principal legislature has laid down strict conditions for exercise of special powers to extend the limitation. Consequently, the delegation is not uncanalised.

On whether the delegatee, i.e., the Central/State Government, had acted contrary to the conditions and stipulations of the principal legislation: The High Court, after examining the minutes of 47th and 49th GST Council meetings and the Supreme Court's directions in Suo Moto Writ Petition (C) No. 3 of 2020, in Re: Cognizance for Extension of Limitation (vide which the intervening period, from March 2020 to February 2022, which was affected by COVID-19, was excluded for computing limitation period), noted that there existed material and due deliberation/consideration of that material by the GST Council before the legislative function was exercised by the delegatee, i.e., the Central/State Government. Consequently, there existed circumstances for exercise of the power of conditional legislation.

On whether the due deliberations/consideration by the GST Council was sufficient for exercise of power: The High Court observed that the judicial recognition by the Supreme Court of the disabling events triggered by the spread of the pandemic COVID-19, itself is irrebuttable evidence of both - the extent of disablement and the length of time for which such disablement continued to exist, unabated. In face of that recognition and established truth, no use or purpose may be served in offering any deliberation by the Central/State Government.

On whether the words due to "force majeure" would include the period during which no lockdown may have been declared or during which human/economic activities may not have been specifically disrupted: The High Court held that the writ court, when conducting judicial review of legislative actions, does not evaluate the subjective satisfaction of the legislative body or its delegatee to see if the law made had the exact/measurable fact justification, for its enactment. Consequently, the extent to which the power may have been exercised, i.e. the length of time extension granted would also remain outside the scope of judicial review. However, the High Court concluded that in the present case, no excessive extension of time had been granted vide the impugned Notifications since if the period beginning 15th March 2020 to 28th February 2022 were to be excluded, a similar result would have arisen in terms of limitation extension.

Recently, the Kerala High Court in the case of Faizal Traders Pvt. Ltd. vs Deputy Commissioner of Central Tax and Central Excise, Palakkad Division and Anr. [WP(C) No. 24810 OF 2023] had upheld the constitutional validity of Notification No. 13/2022- Central Tax (Rate) dated July 05, 2022, and Notification No. 9/2023- Central Tax (Rate) dated March 31, 2022, insofar as the said Notifications extended the time limit for Proper Officers to issue assessment orders for recovery of tax, for the F.Y. 2017-18. However, with the normal period of limitation for Financial Years 2018-19 and 2019-20 once again extended by the Central Government vide Notification No. 56/2023 – CT dated December 28, 2023, and various other writ petitions challenging the constitutionality of the afore-mentioned Notifications pending before different High Courts, it would be interesting to see how this issue unfolds and whether it can be said that the force majeure event existed even in December 2023.

No Equivalent Penalty on Employees for Employer's Tax Evasion

Shantanu Sanjay Hundekari vs Union of India [Writ Petition (L) No. 30198 OF 2023]

The Bombay High Court has held against the levy of equivalent penalty on employees for alleged tax evasion by the employer.

The Petitioners, employees of a shipping company, challenged the show cause notices issued under Section 74 of the CGST Act, whereunder a penalty equivalent to tax amount allegedly defaulted by the employer Company was proposed to be levied on the allegation that at the time of evasion of tax by the employer Company, the Petitioners were in-charge of and responsible for the conduct its business and retained the benefit of the alleged evasion of GST.

The High Court, after examining the provisions of Section 137 (which provides for levy of penalty on the person who was in-charge of and responsible for the conduct of business of the Company at the time of offence committed by the Company) and Section 122(1A) of the CGST Act (which provides for the levy of penalty equivalent to tax evaded on the person at whose instance the transactions such as (i) supply of goods without/incorrect issuance of invoice (ii) issuance of invoice without supply of goods/services is carried and such person retains the benefit of the transactions) under which the penalty on the Petitioner was proposed, noted that Section 122(1A) of the CGST Act can be attracted qua the person which retains the benefit of the aforementioned transactions, which can only be a taxable person who would be in a legal position to retain the benefit of tax on such transaction. Therefore, the Petitioners, who were mere employees of the Company, cannot fall within the purview of the said provision.

The High Court further noted that even if Section 137 of the CGST Act could be invoked or is made applicable against the Petitioners, then such proceedings, which are in the nature of prosecution, cannot be made answerable in a demand cum show cause notice issued under Section 74 of the CGST Act since it is not a penal provision. Additionally, the High Court held that the principles of vicarious liability are not attracted to and cannot be read into the provisions of Section 122 and 137 of the CGST Act.

The recent imposition of hefty penalties by the Revenue Authorities on employees of multi- national companies has caused a lot of hardship and distress among such employees. The judgement of the Bombay High Court provides a safeguard to the employees and brings crucial clarity on the scope penal provisions under the GST laws on the liability of the employees in cases of tax fraud committed by the employer-company.

Accreditation Services by 'Education Institutions' Chargeable to GST

National Board of Examination in Medical Sciences vs. Union of India & Ors. [W.P.(C) 1298/2023 & CM No.4924/2023]

The Delhi High Court has dismissed the challenge to Circular No.151/07/2021-GSTdated June 17, 2021, (Impugned Circular) vide which the CBIC clarified inter-alia, that accreditation services provided by the Central/State Boards are chargeable to GST.

The Petitioner challenged the Impugned Circular insofar as the said Circular provided the services rendered by State or Central Boards, such as providing accreditation to an institution or to a professional [accreditation fee such as fee for Foreign Medical Graduate Examination (FMGE) screening test] would be chargeable to GST at the rate of 18%.

The High Court, after detailed examination of nature of services rendered by the Petitioner and Relevant Exemption Notification, held the following:

GST applicability on the National Eligibility-cum-Entrance Test (NEET) conducted for admission to any medical institution in India: The High Court noted that NEET examinations are in effect an entrance examination for the admission of students to various medical institutions. Consequently, the same is covered under the Relevant Exemption Notifications and no GST is payable on the fees collected in respect of the conduct of such examination.

GST applicability on services qua Degrees of Diploma of National Board (DNB) and Fellow of National Board (FNB) granted by the Petitioner after conducting the examination: The High Court noted that although the students conduct their training with accredited medical institutions, the course is structured and managed by the Petitioner. Further, the students undergoing the said courses are also enrolled with the Petitioner. Thus, even though there is no classroom teaching by the Petitioner, the Petitioner is involved in imparting education to the students enrolled with it as a part of a curriculum. Consequently, the Petitioner is an 'educational institution' in respect of the services rendered to its students in connection with and as a part the said courses and no GST is chargeable on the supply of such services.

Conducting screening tests and Accreditation of Medical Institutions: The High Court held that screening tests are neither conducted as a part of the curriculum nor are in the nature of entrance examinations but are for the purposes of recognizing primary medical qualifications secured by candidates from institutions abroad. Further, the accreditation services are also not covered under the relevant entries of the Exemption Notification. Thus, the said services are exigible to GST.

During the pre- GST era, the Karnataka High Court in M/s Rajiv Gandhi University of Health Sciences, Karnataka vs. Principal Additional Director General [Writ Petition No. 59741 of 2018 (T-Res)] had held that affiliation services rendered by the University are not chargeable to service tax. However, the present ruling of the Delhi High Court and the previous rulings of Telangana High Court in Care College of Nursing and Ors. vs. Kaloji Narayana Rao University of Health Sciences and Ors. [Writ Petition Nos. 34617 of 2022] and the Madras High Court in M/s. Sree Ramu College of Arts and Science (Affiliated to Bharathiar University) vs. Authority for Clarification and Advance Ruling, Tamil Nadu [W.P.No.11038 of 2022] had held that affiliation services are chargeable to GST. With the relevant entry under the service tax Exemption Notification being similarly worded to the relevant exemption Notification under the GST laws, it would be interesting to see how the issue unfolds.

Revenue Officers Lack Power to Seize Cash During Search Under the GST Laws

B. Kusuma Poonacha vs. Senior Intelligence Officer and Ors. [Writ Petition No.25864 OF 2023 (T-RES)]

The Karnataka High Court, on challenge by the Petitioner to seizure of cash by Revenue Officers, has held that the power under Section 67(2) of the CGST Act [vide which the Proper Officer can confiscate any (i) goods (ii) document (iii) books and (iv) things during search and seizure operations], does not include the power to confiscate cash or currency.

A search was conducted at the premises of the Petitioner, pursuant to which cash, among other things, was seized by the Revenue Authorities. Subsequently, a seizure order was served to the Petitioner. Being aggrieved, the Petitioners challenged the said seizure order insofar as it related to the seizure of cash from its premises.

The High Court held that the expression "things" contained in Section 67(2) of the CGST Act does not include cash/currency/money found during the course of search and seizure. Consequently, the Revenue Authorities do not have jurisdiction or authority of law to confiscate cash / currency / money during the said operations. Accordingly, the action on the part of the Revenue Officers in seizing the cash was held to be illegal and arbitrary and the Revenue Authorities were directed to refund the cash seized along with the accrued interest back to the Petitioners.

The High Court further noted that the object of Section 67(2) of the CGST Act is not to unearth unaccounted wealth (as in income tax) nor can it be said to be a mechanism for recovering tax by seizing assets, especially when there are separate mechanisms in provided under the GST Laws for such purpose.

Previously, the division bench of Madhya Pradesh High Court in Kanishk Matta v. Union of India & Ors. [W.P.No. 8204/2020] had held that the word 'thing' used under section 67(2) of the CGST Act includes 'money', consequently, the Revenue Authorities have the power to seize cash during search. However, a contrary view was taken by Delhi High Court in Deepak Khandelwal v. Commissioner of CGST [W.P (C) No.6739/2021] and M/s K.M Food Infrastructure Pvt Ltd Through its Director Mukesh Kapoor vs. The Director General DGGI Headquarters, New Delhi & Anr. (W.P.(C). 328/2024 & 363/2024), the Gujarat High Court in Bharath Kumar Praveen Kumar and Co. v. State of Gujarat [R/Special Civil Application No. 26222/2022 dated October 26, 2023 (Guj)] and The Kerala High Court in Shabu George Vs State Tax Officer [W.A.No.514/2023], the latter decision being affirmed by the Supreme Court. The present decision of the Karnataka High Court has provided further clarity on the scope of power of the Revenue Officers in respect of search and seizure under GST.

KEY PEOPLE

Shashank Shekhar

Partner

Shashank Shekhar is a Partner in the Indirect Tax Practice at DMD Advocates, bringing over two decades of experience to the role. He has extensive court-room experience while representing clients at various fora including Supreme Court of India, High Courts and Tribunals and has obtained favourable judgments and orders for the clients from Courts and Tribunals.

Tushar Joshi

Principal Associate

Tushar Joshi is a Principal Associate with 10 years of experience in indirect tax litigation and advisory. He handles a wide range of matters related to GST, Customs, Service Tax, SEZ, Foreign Trade Policy, etc., and has represented clients at the adjudication and appellate stages, as well as before Tribunals, High Courts, and the Supreme Court.

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