

IMPLICATIONS OF FAKE INVOICE IN GST AND INCOME TAX

K.VAITHEESWARAN
ADVOCATE & TAX CONSULTANT

Mobile: 98400-96876

E-mail : vaithilegal@yahoo.co.in / vaithilegal@gmail.com

‘VENKATAGIRI’
Flat No.8/3 & 8/4, Ground Floor,
No.8 (Old No.9), Sivaprakasam Street,
T. Nagar, Chennai - 600 017, India
Tel.: 044 + 2433 1029 / 4048

402, Front Wing,
House of Lords,
15/16, St. Marks Road,
Bangalore – 560 001, India
Tel : 080 22244854/ 41120804

CASE STUDY 1

- Procurement of purchase bills from vendor for iron and steel and issuing tax invoices without actual supply
- Vendor has uploaded all the invoices by filing GSTR-1 and has also paid the GST by filing GSTR-3B
- Summons by DGGI
- Statement taken from the Director who confessed the transaction to be a paper transaction
- SCN to the company seeking reversal of ITC based on Section 16(2) along with interest and penalty under Section 122(1)(vii) read with Section 77
- Penalty also proposed under Section 122(1)(ii) for issuing invoices without supply of goods

FAKE INVOICES

- **Is there something called as Fake Invoice?**
 - Invoice is defined in terms of Section 2(66) to be a tax invoice referred to in Section 31
 - In all these transactions, a tax invoice is raised in the format specified
 - All items required to be mentioned are covered
 - Tax is charged and paid
 - Can it be said that it is a fake invoice?
- Fake Invoice can mean a counterfeit invoice; a replica of an original invoice
- Whether invoice without underlying supply can be called as a fake invoice?
 - Law requires tax invoice to be issued where there is a supply of taxable goods or taxable services
 - When there is no such supply and invoice is issued, at best, it is a violation of Section 31

SUMMONS AND STATEMENTS

- The proper officer under Section 70 has the power to summon any person whose attendance, he considers necessary
 - Either to give evidence or
 - To produce document or any other thing
- In any inquiry in the same manner as provided in the case of a civil court under Code of Civil Procedure.
- Every such inquiry shall be deemed to be judicial proceedings within the meaning of Section 193 and Section 228 of IPC

SUMMONS AND STATEMENTS

- **Language of Section 70 of the CGST Act is different from Section 108 of the Customs Act.**
- Any Gazetted Officer of customs shall have the power to summon any person whose attendance he considers necessary either to *give evidence or produce a document or any other thing in any inquiry.*
- Section 108(3) provides that all persons so summoned shall be bound to state the truth on the subject respecting which they are examined or make statements and *produce such documents and other things as may be required.*
- **Power to summon a person to give a statement as found in Section 108 is missing in Section 70 of the CGST Act.**

SUMMONS AND STATEMENTS

- ***Ambalal Vs. Uol (1983) 13 ELT 1321 (SC)***
 - Search of the appellant and recovery of 10 items alleged to be smuggled.
 - Statement taken at the time of search under the Customs Act.
 - It does not appear from the records that the appellant was given a copy of the statement or that he was allowed to inspect the same. If the customs authorities wanted to rely upon the statement they should have given an opportunity to inspect and supplied a copy thereof.
 - Burden of proof not discharged by customs for 5 items and confiscation set aside.
 - Confiscation confirmed for other 5 items with the observation that it would have been better for the authorities to have taken the admission in writing.

ADMISSIONS/STATEMENTS

- **What is the nature of statement given by the Director in response to a summon under Section 70?**
 - When Section 70 does not confer power to take a statement whether the statement given is valid or can it be relied upon?
- Assuming it is a sworn statement, whether sworn statement given before the GST authority is valid?
 - The Delhi High Court in the case of ***CIT Vs. Dhingra Metal Works (2010) 328 ITR 384*** has held that in our view, for a statement to have evidentiary value, the survey officer should have been authorised to administer oath and to record sworn statement. While Section 132(4) specifically authorises an officer to examine a person on oath, Section 133A does not permit the same.
 - The Madras High Court in the case of ***CIT Vs. S. Khader Khan Son (2008) 300 ITR 157*** held that a statement under Section 133A shall not have any evidentiary value. As there was no material on record to prove the existence of such disclosed income or earning of such income, it cannot be said that the revenue had lost lawful tax payable. The decision of the Madras High Court has been affirmed by the SC in the case of ***CIT Vs. S. Khader Khan Son (2013) 352 ITR 480***.

ADMISSION

- Section 25 of the Indian Evidence Act, 1872 states that no confession made to a police officer shall be proved as against a person accused of any offence
- Section 136 of the CGST Act
 - Statement pursuant to summons under Section 70
 - **Relevant for the purpose of proving in any prosecution for an offence**, the truth of fact which it contains
 - When the person who made the statement is dead or cannot be found or kept out of the way
 - When the person who made the statement is examined as a witness and the Court is of the Opinion that the statement should be admitted in evidence in the interest of justice

ADMISSIBILITY OF STATEMENTS

- Article 20(3) of the Constitution of India provides that no person accused of an offence shall be compelled to be a witness against himself.
- Scope of 'accused of an offence'.
- SC in the case of ***State of Bombay Vs. Kathi Kalu Oghad AIR (1961) SC 1808*** has observed that 'to be a witness' may be equivalent to 'furnishing evidence' in the sense of *making oral or written statements*
- ***Soni Vallabhdas Liladhar Vs. Asst. Collector of Customs (1983) 13 ELT 1408***
 - Customs authorities must be taken to be persons in authority and the statements would be inadmissible in a criminal trial if it is proved that they were caused by inducement, threat or promise

ADMISSIBILITY OF STATEMENTS

- The Madras HC in the case of *Jet Unipex Vs. Commissioner of Customs (2020) 373 ELT 649*, held that
 - Adjudication proceedings under the Customs Act, 1962 cannot solely be based on the inculpatory statements of witnesses and noticee alone
 - Such statements could be only used for corroborating the case which the Department proposed to establish before the quasi-judicial authorities
 - The department was bound to prove the case based on balance of probabilities as per well-recognised principle of law in the case of departmental adjudications

PROCEEDINGS

- Whether ITC was correctly availed?
 - Tax invoice issued by vendor
 - Payment made to vendor
 - Receipt of goods?
 - What is the meaning of receipt?
- Should 'receipt' necessarily be physical?
 - Receipt can be constructive
 - Transfer of title can happen without receipt of goods
 - High sea sale is effected without receipt of goods
 - Ownership transfer can happen through title documents

RECEIPT

- The term 'receipt' is not defined in the CGST Act, 2017 though there are following definitions
 - 'address of delivery' means the *address of recipient of goods or services or both indicated on the tax invoice issued by the registered person for delivery of such goods or services or both*
 - 'document' includes *written or printed record of any sort and electronic records as defined in Section 2(t) of the Information Technology Act, 2000*
 - 'removal' in relation to goods is defined to mean *despatch of the goods for delivery or collection of the goods by the recipient*
- Section 2(2) of the Sale of Goods Act, 1930 defines delivery to mean *voluntary transfer of possession from one person to another*
- SC in the case of ***Dunichand Rataria Vs. Bhuwalka Brothers Ltd. (1955) AIR SC 182*** has held that *the manufacture of jute does not come directly into contact with the shipper. It is only through a chain of contracting parties that the shipper obtains the goods from the manufacturer. If only actual delivery of possession as contrasted with symbolic or constructive delivery were contemplated, it would be impossible to carry on the business.* Actual delivery or possession included symbolic as well as constructive delivery of possession. Delivery under the Sale of Goods Act means voluntary transfer of possession. If nothing more was said in the definition, delivery would not only include actual delivery, but also symbolic or constructive delivery.

CASE STUDY 2

- A Ltd. is engaged in business of manufacturing Iron products (bars, coils, iron wires etc.)
- Foundry is Maharashtra wherein raw material is procured; melted and new products are made
- During FY 2020-21, the price of raw material increased to about 100 per kg
- Mr. Khan, scrap dealer agreed to supply iron and steel raw material to A Ltd. for Rs. 72 per kg who bought 4778 tons of raw material against tax invoice backed by e-way bill and weighment slips
- **A Ltd. received the material at his foundry and processed the same and manufactured final goods which were sold against tax invoices along with GST**
- A Ltd. took ITC of the raw material and used the same for discharging GST liability on output
- **During FY 2022-23, DGGI on investigation found that Mr. Khan has fraudulently availed ITC and utilised the same for discharging GST on outward supplies to A Ltd.**

CASE STUDY 2

- Mr. Khan confessed that he has procured goods from various small scrap dealers who have either not charged GST or have not paid the GST charged to the Government
- Mr. Khan was imprisoned on default of tax liability to the tune of Rs. 5 crores for wrong availment / utilisation of ITC
- **Department could not recover any amount from Mr. Khan on ITC wrongly claimed**
- Mr. Khan issued tax invoices with taxable supplied totalling Rs. 34,40,00,000 and GST amounting to Rs. 6,19,20,000
- DGGI has issued SCN to A Ltd. wherein A Ltd. is required to show cause as to why
 - ITC to the tune of Rs. 6,19,20,000 being wrongly availed in contravention of Rule 16(2) shall not be reversed / paid
 - Interest under Section 50(3) should not be invoked
 - Penalty under Section 122(1)(vii) read with Section 74 should be imposed

CASE STUDY 2

- Goods purchased and received
- Used in manufacture of goods and sold on payment of GST
- Payment made to vendor with GST
- Vendor purchased goods from other dealers who had defaulted in GST
- Vendor's ITC is being questioned by the Department
- Vendor prosecuted for wrongly availed ITC
- Inability to recover tax from vendor
- Does that justify recovery action from A Ltd.?
- GST is on each supply
- In so far as A Ltd. is concerned, the Company has met all the conditions under Section 16(2) of the CGST Act, 2017

SECTION 16(2)

- Section 16(2)(c) provides that subject to Section 41, tax charged in respect of supply has been actually paid to the Government, either in cash or through utilisation of ITC credit admissible in respect of such supply
 - Has A Ltd. discharged this burden?
 - Mr. Khan has paid taxes using ITC
 - Mr. Khan at the relevant point of time was identified as a vendor with a valid GST number in the portal
 - Department has not proceeded to cancel Mr. Khan's registration
 - There is no communication to the public at large that Mr. Khan's ITC is questionable

BURDEN OF PROOF Vs. ONUS OF PROOF

- *Rajendra Jagannath Parekh Vs. Commissioner of Customs, Ahmedabad (2004) 175 ELT 238*
 - There is an essential difference between "burden of proof" as a matter of law and pleading and as a matter of adducing evidence.
 - Burden of proof is upon the party who invites a decision in the existence of certain facts which he asserts. **This burden is constant and never shifts.**
 - Onus of proof shifts from time to time having regard to the evidence adduced by one party or the other, or the presumption of fact or law raised in favour of the one or the other.
 - **Such shifting of onus is a continuous process in the evaluation of evidence**

ONUS OF PROOF

- Tax invoices received by A Ltd.
- Goods also received
- Payment made to vendor along with GST
- **The onus of proof stands duly discharged by us insofar the said supply is concerned. Once the said onus is duly discharged by us the onus shifts to the department to prove otherwise**
- The SC in the case of *A. Raghavamma and Another Vs. A. Chenchamma and Another AIR 1964 SC 136*, held that
 - There is an essential distinction between burden of proof and onus of proof
 - Burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts
 - The burden of proof in the present case undoubtedly lies upon the plaintiff to establish the factum of adoption and that of partition
 - The said circumstances do not alter the incidence of the burden of proof
 - Such considerations, having regard to the circumstances of a particular case, may shift the onus of proof
 - Such a shifting of onus is a continuous process in the evaluation of evidence

ONUS OF PROOF

- The Commissioner (Appeals) in the case of ***CCE Vs. Victor Pushin Cords Pvt. Ltd. (2013) 297 ELT 312***, whilst dismissing the appeal filed by the revenue, observed that in case of doubt regarding any invoice issued by a supplier, the revenue ought to have acted upon the same and ought to have cancelled either the registration or provided a public notice informing genuine buyers reading fraudulent actions of such supplier. The department not having done any of these cannot shift the onus to genuine/ bonafide assesseees transacting with such parties.

CROSS EXAMINATION

- Whether Mr. Khan's affidavit alone is enough to take action against M/s. A Ltd?
- Cross examination of Mr. Khan
- Whether default in ITC availment by Mr. Khan can cast a shadow on the ITC availed by A Ltd?
- Given the fact that proceedings have been launched for recovery of ITC from Mr. Khan, whether further proceedings can be initiated against A Ltd.?
- Mere non-recovery of taxes or inability to recover taxes from one assessee cannot justify action against the next assessee in the chain

PROOF BY AFFIDAVITS

- Affidavits can be used as a means of presenting evidence in tax cases.
- An affidavit is a written statement of facts made under oath and signed by the person making the statement .
- Whether affidavits are required or accepted in a tax case depends on the specific procedural rules and the discretion of the tax authority or court.
- Both taxpayers and tax authorities may submit affidavits to support their respective positions.

PROOF BY AFFIDAVITS

- ***Commissioner of Sales Tax Vs. Abdul Ghani Banne Mian (2000) taxmann.com 2062 (Allahabad)***
 - Assessee claiming exemption from payment of sales tax is under an obligation to adduce evidence; mere filing of affidavit not enough
- ***Capital Ispat Ltd. Vs. Commissioner of Central Excise, Jaipur (2004 177 ELT 253)***
 - Date of receipt as stated in appellant's affidavit to be accepted when correctness of affidavit is not disputed
- ***Kamdhenu Ltd Vs. The Registrar Of Trade Marks, C.A.(COMM.IPD-TM) 66/2021,***
 - Documentary evidence without an affidavit can still establish well-known status of the mark

AFFIDAVIT

■ Role of an affidavit

- Affidavit filed cannot be rejected outright without cross examination - ***Mehta Parikh & Co. Vs. CIT 30 ITR 181 (SC)***
- Affidavit on fact should ordinarily be countered by another affidavit if one were to challenge the facts – ***Hemesh Family Trust Vs. CIT (2007) 295 ITR 514 (Guj.)***
- Where an alleged borrower had denied such borrowal but later retracted the statement with evidence suggesting that the advance was made by the assessee, the AO is not justified in going by the first statement contradicted by an Affidavit with deponent who had died subsequently. Re-assessment not valid - ***Indian Express Newspapers (Bombay) Pvt. Ltd. Vs. Uol (2008) 300 ITR 351 (Bom.)***
- When Affidavit is filed stating that no hearing notice was served, burden is on the Revenue to prove service - ***CIT Vs. Silver Streak Trading Pvt. Ltd. (2010) 326 ITR 418 (Del.)***

CROSS EXAMINATION

- In the case of ***Shree Parvathi Metals Vs. Union of India (2018) 11 GSTL 137***, the issue was whether statement given by the foremen can be used against the appellant without affording the opportunity of cross examining, while holding disallowance of Cenvat credit. The Rajasthan High Court held that we are of the considered opinion that the cross-examination is a right of assessee
- In the case of ***HIM Logistics Vs. Comm. Of Customs (2016) 336 ELT 15***, the Delhi High Court noted that the Respondent Department is placing considerable reliance on the statements of Mr. Shyam Lal and Ms. Preeti, the partners of the importer, in support of the case made out in the SCN. The impugned order of the AA does not indicate that any prejudice would be caused to the Department by providing the Petitioner the right of cross-examination. On the other hand, the denial of such right would prejudice the Petitioner since the said statements are adverse to the Petitioner. In the circumstances, the denial of the Petitioner's right of cross-examination is held contrary to the law explained in Basudev Garg (supra)

CROSS EXAMINATION

- In the case of ***Jayachandran Alloys Vs. Superintendent of GST & CE (2019) 25 GSTL 321***, the Single Judge of the Madras High Court has held that
 - Interpretation given under the pre-GST laws would equally apply to GST
 - Where ISD distributes credit in contravention of Section 20 excess credit can be recovered from the recipients through Section 73 or Section 74 as the case may be
 - The determination of excess credit by way of procedure set out in Section 73 or Section 74 is a pre-requisite for the recovery
 - There is no doubt in my mind that the Department intended to intimidate the petitioner with the possibility of punishment under Section 132 and this action is contrary to the scheme of the Act
 - A statement is no substitute for an assessment. No doubt the value of the statement and the retraction thereof will be considered by the assessing authority while framing the order of the assessment

STATEMENTS AND CROSS EXAMINATION

- Adverse findings based on statements taken from others
- Assessee entitled to cross examination
 - In the case of ***Shree Parvathi Metals Vs. Union of India (2018) 11 GSTL 137***, the issue was whether statement given by the foremen can be used against the appellant without affording the opportunity of cross examining, while holding disallowance of Cenvat credit. The Rajasthan High Court held that we are of the considered opinion that the cross-examination is a right of assessee.
 - The Supreme Court in the case of ***CBI Vs. V.C. Shukla (1996) AIR SC 1406*** has held that third party records alone cannot be relied upon as an admissible piece of evidence.
- Assessee can counter the statements
- Reversal before investigation is complete need not necessarily mean that the matter has been accepted or conceded
- Assessee can contest the matter as and when the investigation is completed and Show Cause Notice is issued

NON PAYMENT OF TAX BY SUPPLIER

- SC in the case of *Gheru Lal Bal Chand Vs. State of Haryana (2011) 45 VST 195* held that no liability can be fastened on the purchasing registered dealer on account of non-payment of tax by the selling registered dealer in the treasury unless it is fraudulent, or collusion or connivance with the registered selling dealer or its predecessors with the purchasing registered dealer is established.

CIRCULAR NO. 171/03/2022 dated 06.07.2022

Issues	Clarifications
<p>A registered person "A" has issued tax invoice to another registered person "B" without any underlying supply of goods or services or both. 'B' avails input tax credit on the basis of the said tax invoice. B further issues invoice along with underlying supply of goods or services or both to his buyers and utilizes ITC availed on the basis of the above mentioned invoices issued by 'A', for payment of his tax liability in respect of his said outward supplies. Whether 'B' will be liable for the demand and recovery of the said ITC, along with penal action, under the provisions of section 73 or section 74 or any other provisions of the CGST Act</p>	<p>Since the registered person 'B' has availed and utilized fraudulent ITC on the basis of the said tax invoice, without receiving the goods or services or both, in contravention of the provisions of section 16(2)(b) of CGST Act, he shall be liable for the demand and recovery of the said ITC, along with penal action, under the provisions of section 74 of the CGST Act, along with applicable interest under provisions of section 50 of the said Act.</p> <p>Further, as per provisions of section 75(13) of CGST Act, if penal action for fraudulent availment or utilization of ITC is taken against 'B' under section 74 of CGST Act, no penalty for the same act, i.e. for the said fraudulent availment or utilization of ITC, can be imposed on 'B' under any other provisions of CGST Act, including under section 122.</p>

CIRCULAR NO. 171/03/2022 dated 06.07.2022

Issues	Clarifications
<p>A registered person 'A' has issued tax invoice to another registered person 'B' without any underlying supply of goods or services or both. 'B' avails input tax credit on the basis of the said tax invoice and further passes on the said ITC to another registered person 'C' by issuing invoices without underlying supply of goods or services or both. Whether 'B' will be liable for the demand and recovery and penal action, under the provisions of section 73 or section 74 or any other provisions of the CGST Act.</p>	<p>In this case, the input tax credit availed by 'B' in his electronic credit ledger on the basis of tax invoice issued by 'A', without actual receipt of goods or services or both, has been utilized by 'B' for passing on of ITC by issuing tax invoice to 'C' without any underlying supply of goods or services or both. As there was no supply of goods or services or both by 'B' to 'C' in respect of the said transaction, no tax was required to be paid by 'B' in respect of the same. The ITC availed by 'B' in his electronic credit ledger on the basis of tax invoice issued by 'A', without actual receipt of goods or services or both, is ineligible in terms of section 16(2)(b) of the CGST Act. In this case, there was no supply of goods or services or both by 'B' to 'C' in respect of the said transaction and also no tax was required to be paid in respect of the said transaction. Therefore, in these specific cases, no demand and recovery of either ITC wrongly/fraudulently availed by 'B' in such case or tax liability in respect of the said outward transaction by 'B' to 'C' is required to be made from 'B' under the provisions of section 73 or section 74 of CGST Act. However, in such cases, 'B' shall be liable for penal action both under section 122(1)((ii) and section 122(1)(vii) of the CGST Act, for issuing invoices without any actual supply of goods and/or services as also for taking/utilizing ITC without actual receipt of goods and/or services.</p>

STATE OF MAHARASHTRA VS. SURESH TRADING CORP (1998) 109 STC 439 (SC)

- A purchasing dealer is entitled by law to rely upon the certificate of registration of the selling dealer and to act upon it
- **Whatever may be the effect of a retrospective cancellation upon the selling dealer, it can have no effect upon any person who has acted upon the strength of a registration certificate when the registration was current**
- The argument on behalf of the department that it was the duty of persons dealing with registered dealers to find out whether a state of facts exists which would justify the cancellation of registration must be rejected
- To accept it would be to notify the provisions of the statute which entitle persons dealing with registered dealers to act upon the strength of registration certificates.
- The genuineness of the transactions between the registered dealer and the respondents was not in doubt and not disputed
- **This being so, it is difficult to see how there could have been a cancellation of registration with effect from a date that preceded the dates of the transactions and how, accordingly, the respondents could be made liable to pay tax.**

RECENT DECISIONS

- Calcutta High Court in the case of ***M/s.Suncraft Energy Pvt.Ltd. & Anr. Vs. The Assistant Commissioner of State Tax (2023) 153 taxmann.com 81*** has held that action against supplier essential before seeking reversal from appellant. The Revenue's action was deemed to be arbitrary in the absene of any action taken against the supplier
- The Kerala HC in the case of ***Diya Agencies Vs. State Tax Officer (2023) 154 taxmann.com 421*** held that non-reflection of ITC in GSTR 2A should not be an automatic ground for denial. Taxpayers have the opportunity to prove the genuineness of their claims, ensuring a fair and just application of tax law.

RECENT DECISIONS

- ***LGW Industries Vs. Union of India (2022) 134 taxmann.com 42 (Cal)***
 - The petitioner received notices from the department alleging that its suppliers were fake and non-existent
 - The department contended that genuineness of suppliers was not verified before entering into transactions and refused to grant the benefit of ITC on purchase from the suppliers and also asked the petitioner to pay penalty and interest under relevant provisions of GST Act. The petitioner filed writ petition against the same.
 - HC observed that when the details of the suppliers as a registered taxable person were already available with the Government record and in Government portal at the time transaction was entered into, then the buyer could not be faulted if they appeared to be fake later on
 - Therefore, it cannot be said that there was any failure on the part of the petitioners in compliance of any obligation required under the statute before entering the transactions in question or for verification of the genuineness of the suppliers in question
 - Thus, it was held that benefit of ITC to be granted if the purchases were genuine and supported by documents and it was directed to verify whether payment along with tax actually paid to suppliers and transactions were made before cancellation of registration of suppliers

CASE STUDY 3

- DGGI started conducting investigation on B Ltd in respect of “Fake Invoicing” in May 2022
- After recording statement and carrying out due investigation, DGGI issued SCN dated 30.11.2022 to B Ltd alleging that ITC in respect of following parties has been fraudulent availed by B LTD without actual receipt of goods/services:

Supplier Name	ITC
P	36,00,000
Q	75,00,000
R	80,00,000
S	44,00,000
Total	2,35,00,000

CASE STUDY 3

- Simultaneously, State Authorities have also initiated enquiry and issued SCN dated 15.07.2022 alleging that ITC is availed from parties whose registration is cancelled by the department Suo-moto

Supplier Name	ITC
Q	75,00,000
R	80,00,000
Total	1,55,00,000

CASE STUDY 3

- SCN issued by state authorities was adjudicated and order thereto was issued upholding the entire demand. The order was uploaded on GST portal on 30.04.2023. The assessee has jurisdiction for his case with state authorities.
- B Ltd was unaware of any such order passed against them by State authorities and therefore failed to file appeal against said order.
- It came to knowledge of B Ltd that such order has been passed only after notice for recovery was issued to them.
- B Ltd seeks your advice on following points
 - Will SCN issued by DGGI override the proceeding undertaken by state department since the DGGI has carried out investigation of the matter?
 - Whether the Proceeding of State will override the DGGI SCN since State has issued the SCN before the DGGI has issued the SCN?
 - Where the time limit for filing appeal has expired, what recourse B Ltd should take in such a scenario?

APPEAL

- B Ltd. falling under State jurisdiction
- Order uploaded on 30.04.2023
- 52nd GST Council Meeting Press Release
 - Amnesty Scheme through special procedure under Section 148
 - For taxpayers who could not file appeal under Section 107 against order passed on or before 31.03.2023 or whose appeals were rejected on the ground of time bar
 - Appeals can be filed upto 31.01.2023 subject to the condition of payment of an amount of pre-deposit of 12.5% of the tax under dispute, out of which at least 20% (i.e. 2.5% of the tax under dispute) should be debited from Electronic Cash Ledger

APPEAL

- Whether there can be an amnesty scheme under Section 148 for an appeal ?
- Can the provisions of Section 107 and specifically pre-deposit be given a go-by through notification?
- Can pre-deposit be insisted through cash?
- What is the justification for the cut-off date of 31.03.2023?
- Circular No. 183 was applicable only for 2017-18 and 2018-19
- Karnataka High Court in the case of ***Wipro Ltd. Vs. AC of CT (2023) 148 taxmann.com 216*** extended its applicability to 2019-20
- Circular No. 193 extended the benefit upto 31.12.2021

WRIT OPTION

- Concept of specification of time limits upto which delay can be condoned by an authority.
- Can the authority condone delay beyond the period stipulated by statute?
- Authority is a creature of statute.
- High Court under Article 226 has exercised the powers condoning delay beyond the period specified and directed admission of the appeal without reference to delay.
 - High Court has also refused to exercise powers under Article 226 stating that time period is frozen in the statute.
- ***Kakinada & Ors. Vs. Glaxo Smith Kline Consumer Health Care Ltd. (2020) 36 G.S.T.L. 305 (SC)***
 - Whether the High Court u/Art. 226, could entertain a challenge to the assessment order of the Appellant **on the sole ground that the statutory remedy of appeal against that order stood foreclosed by the law of limitation?**
 - Though HCs have wide powers, it cannot issue a writ which is inconsistent with the **legislative intent of the concerned statute and in utter disregard of the statutory period of limitation provided thereunder**, as the same would render the legislative scheme and intention behind the concerned provision otiose.

WRIT OPTION

- Gujarat HC in the case of ***Panoli Intermediate India Pvt. Ltd. Vs. UOI (2015) 326 ELT 532*** has held that where the limitation period for appeal or the further period for condonation is over, it cannot be said that HC will not have jurisdiction under Art. 226. But the exercise of such power has to be in exceptional cases where gross injustice is demonstrated.
- Madras HC in the case of ***SRM Engineering Construction Corporation Ltd Vs. The Assistant Commissioner (TS – 498-HC (Mad) – 2023 – GST)*** has considered the ***Glaxosmithcline*** decision and taken into account the the grounds of business decline and employees leaving the company “to be reasonable” while considering a writ petition seeking condonation of delay in filing statutory appeal after expiry of limitation period

JURISDICTION

- B. Ltd. under State Jurisdiction
- State issued SCN on 15.07.2022
- DGGI has commenced investigation in May 2022
- DGGI has issued SCN dated 30.11.2022
- Multiplicity of proceedings
- Cross empowerment

JURISDICTION

- Agenda for 22nd GST Council Meeting had proposal for issue of notification on cross empowerment
- Draft notifications were proposed under CGST, IGST and SGST for enabling cross empowerment and conferring jurisdiction on the other authority if the authority having main jurisdiction does not initiate proceedings within a period of 1 year from intelligence based action
- None of these notifications were approved or cleared in the 22nd GST Council Meeting
- The only notification approved was with reference to conferring powers on both State and Central authority on refunds
- Notification No. 39/2017 – CT dated 13.10.2017 under Section 6(1) of the CGST Act, 2017 only for refunds
- No notification as on date on cross empowerment

JURISDICTION

- The Andhra Pradesh High Court in the case of ***Sri Balaji Rice Co. Vs. Commercial Tax Officer (1984) 55 STC 292*** has held that if plurality of officers are invested with the powers of assessing the same dealer it will result in great hardship and inconvenience to the dealers in travelling to offices of different officers and producing accounts before different officers and will greatly handicap the dealers in making their representations and it will also lead to conflicting and contradictory orders of assessment.
- The Kerala High Court in the case of ***Sivaramakrishnan Vs. State of Kerala (1995) 1 ILR 92*** held that conferment of concurrent jurisdiction on several officers in respect of the same area was likely to result in discriminatory consequences resulting in violation of Article 14.

JURISDICTION

- The Larger Bench of the SC in the case of *Canon India Pvt. Ltd. Vs. Commissioner of Customs (2021) TIOL 123* has held that:
 - The power of issue of Show Cause Notice must flow under the Section that provides for issuance of Show Cause Notice.
 - Unless the specific power is given through the statute, the action is without the authority of law.
 - There is no inherent power vested on the authority. In fact, the power shall be specific and explicit.
 - When the Legislature employed the Article 'the', the same is with the intention to designate the power to such proper officer.
 - The power available for entrustment of functions on other Officers shall not be sufficient to appoint proper Officer for the purposes specified in the Section for issuance of Show Cause Notice.
 - Where the statute confers the same power to perform an act on different officers, as in this case, the two officers, especially when they belong to different departments, cannot exercise their powers in the same case. Where one officer has exercised his powers of assessment, the power to order re-assessment must also be exercised by the same officer or his successor and not by another officer of another department though he is designated to be an officer of the same rank. In our view, this would result into an anarchical and unruly operation of a statute which is not contemplated by any canon of construction of statute.
 - When there is a requirement under the statute to do something, the same has to be done in that way alone.

JURISDICTION

- Section 74 of the CGST Act provides for issue of Notice for recovery of duties not levied or not paid or short levied or short paid or erroneously refunded.
- Section 74 of the CGST Act has the term 'The Proper Officer'. Therefore, an Officer who has assigned power under Section 74 shall only be considered as Proper Officer for the purpose of issue of Show Cause Notice.

CASE STUDY 4

- Dealer unaware of the activities of the consultant
- Consultant has committed a fraud by misusing the registration of the dealer and acted without his knowledge
- Issue of invoices without underlying supply
- Consultant disappears
- SCN to dealer

PROCEEDINGS

- Circular No. 171/03/2022
- Since there is only been an issuance of tax invoice by the registered person 'A' to registered person 'B' without the underlying supply of goods or services or both, therefore, such an activity does not satisfy the criteria of "supply", as defined under section 7 of the CGST Act. As there is no supply by 'A' to 'B' in respect of such tax invoice in terms of the provisions of section 7 of CGST Act, no tax liability arises against 'A' for the said transaction, and accordingly, no demand and recovery is required to be made against 'A' under the provisions of section 73 or section 74 of CGST Act in respect of the same. Besides, no penal action under the provisions of section 73 or section 74 is required to be taken against 'A' in respect of the said transaction.
- The registered person 'A' shall, however, be liable for penal action under section 122(1)(ii) of the CGST Act for issuing tax invoices without actual supply of goods or services or both.

PROCEEDINGS

- Tax demand cannot be raised on Innocent once it is recognised that there is no supply involved
- When there is no tax, there is no question of interest
- When there is no supply and no tax, can there be penalty?
- KYC – Know Your Consultant
- Bona fide to be demonstrated
- Complaint to be filed against the consultant to the relevant authority or institution

FRAUD BY THE CONSULTANT

- **Fraud vitiates everything**
- ***Venkata Ramana Anupa Vs. ITO (2023) 151 taxmann.com 369 (Hyd-Trib.),***
 - The CA, with the connivance of the partners of the assessee, prepared fake documents to support the ITR which was uploaded without the knowledge of the assessee
 - It prima facie creates doubt as to whether there is any income in the hands of the assessee for this year or not?
 - ICAI is a professional body competent to deal with the complaints against the CA, and the proceedings of the Disciplinary Board thereof carry their own credibility and cannot be simply brushed aside
 - Due regard has to be given to the findings of such professional Body
 - The Hyderabad Bench of the ITAT held that be that as it may, criminal case is pending against the alleged perpetrators of the fraud and the findings of the criminal court would clinch the issue with this aspect
 - Fraud vitiates everything. In these circumstances, I am of the considered opinion that it would not be in the interest of justice to direct the assessee to pay the taxes resulted on the fraud played against him and then, to collect the same from the perpetrators of the fraud. In the fitness of things, I deem it just and proper to set aside the issue to the file of the learned Assessing Officer to take a view basing on the outcome of the criminal case. I hold and direct so.

CASE STUDY 5

- Mastan purchased materials from Zannat during 2017-18
- Zannat closed business in 2020
- Summons to Mastan asking for details of Zannat Enterprises with documentary evidence of transportation
- DGGI insisting for written confirmation and presence of Zannat
- Mastan submitted that goods were delivered ex-godown
- Mastan could not produce representative of Zannat
- SCN issued to Mastan on the ground that he has not discharged his burden under Section 155 and ITC is proposed to be disallowed

DOCTRINE OF IMPOSSIBILITY

- In the case of ***Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal (2020) 7 SCC 1***, the Supreme Court referred to the legal maxim *lex non cogit ad impossibilia* that is the law does not demand the impossible and *impotentia excusat legem* i.e. when there is a disability that makes it impossible to obey the law, the alleged disobedience of the law is excused
- The maxim was applied in the context of requirement of a certificate to produce evidence by way of electronic record under Section 65B of the Evidence Act and held that having taken all possible steps to obtain the certificate and yet being unable to obtain it for reasons beyond his control, the respondent was relieved of the mandatory obligation to furnish a certificate

THANK YOU



vaithilegal@gmail.com



[@vaithilegal](#)



www.linkedin.com/in/vaithilegal



vaitheeswarandotblog.wordpress.com

www.vaithilegal.com