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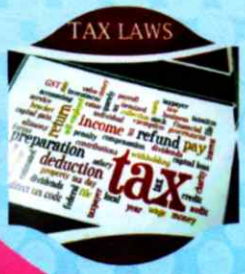

ON THE OCCASION OF

ONE DAY TAX CONFERENCE
AT BLACK DIAMOND AUDITORIUM, ANGUL
ON 28TH OF APRIL 2024

ORGANIZED BY

ALL INDIA FEDERATION OF TAX PRACTITIONERS - EZ

HOSTED BY

ANGUL DISTRICT TAX BAR ASSOCIATION, ODISHA

Gyan Tarang

BALASORE TAX BAR ASSOCIATION
BALASORE
ESTD - 1996

ALL INDIA FEDERATION OF TAX PRACTITIONERS
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संघशक्तिः
ESTD. 11th NOVEMBER 1976

ALL ODISHA TAX ADVOCATES ASSOCIATION
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★ 2019 ★

National Tax Conference EZ-2024

Missile City, Balasore, Odisha

SOUVENIR

GST

GOODS AND SERVICES TAX

ETHICS
EDUCATION
EXCELLENCE

BRAHMAPUR TAX CONFERENCE

Gyan varsha

30th June, 2024

ALL INDIA FEDERATION OF TAX PRACTITIONERS

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ESTD. 11th NOVEMBER 1976

ALL INDIA FEDERATION OF TAX PRACTIONERS - EZ

Brahmapur Branch
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Venue : CONVENTION HALL, S3 LAWN
AMBAPUA, BRAHMAPUR

ONE DAY TAX CONFERENCE

ज्ञान मंडपम्

1ST SEPTEMBER 2024 AT JAMSHEDPUR

Organised by

Commercial Taxes Bar Association, Jamshedpur

In Association with

ALL INDIA FEDERATION OF TAX PRACTITIONERS

Eastern Zone

Shortlisted Articles On

G.S.T.

APPLICABILITY OF GST ON ROYALTY

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Royalty by its definition and nature means payment made to the owner of certain types of rights by those who are permitted by the owners to exercise such rights. The rights concerned, for example, are - literary, copyright, patent etc. and include rights in mineral deposits. A dictionary meaning of Royalty reads 'Royalty as a compensation to the owner of intellectual property or natural resources for the right to use or profit from the property.' Thus, a literal reading of term Royalty would suggest it as a sum paid by the user to the owner/occupier of any intellectual property or mineral deposits.

Although mineral deposits have nothing in common with the fruits of intellectual and artistic endeavours except that they are often exploited by persons other than the owners upon payment of Royalties, it forms a vital part of a fiscal regime and an important means of revenue realization for the Government. Thus, the term 'royalty' as laid down under Rajasthan Minor Minerals Concession Rules, 2019 particularly section 2 (xliv) defines it as a charge payable to the Government in respect of the ore or mineral excavated, consumed or removed from any land granted under these rules as specified in Schedule II. Elaborating in this context, Hon'ble Apex Court in *Mineral Area Development Authority* v. *Steel Authority of India* (2024 SCC OnLine SC 1796) while elaborating on the characteristics of royalty, noted its essential characteristics as

i. It is a consideration or payment made to the proprietor of minerals, either the government or a private person.
ii. It flows from a statutory agreement (a mining lease) between the lessor and the lessee;
iii. It represents a return for the grant of a privilege (to the lessee) of removing or consuming the minerals; and
iv. It is generally determined on the basis of the quantity of the minerals removed.

Mining Operations are primarily regulated by the Mines and Minerals (Development and Regulation) [MMDR] Act, 1957. The MMDR Act, 1957 being the central legislation, has been enacted by the Parliament which by driving its power from Entry 54 of the Union List is empowered to pass such law and regulate mines and minerals development. However, as far as the 'owner of minerals' part is concerned, the State Government while deriving powers from Entry 50 of List-II has been conferred the title of owners of minerals which can grant mineral concessions and collect royalty, dead rent and fees as per the MMDR Act, 1957. These revenues are held in the Consolidated Fund of State Government until the State Legislature approves their use through budgetary processes. On a conjoint read, such power with the State is subject to powers of the Parliament. The power to levy such tax on mineral vests solely with the State Governments under Entry 50 of List - II (State List) and has not undergone any change because of GST. However, such power is subject to power of parliament as provided above. It is pertinent to note that Entry 50 of State List is specific than law making power of the parliament in Entry 54 in that matter of the Union List. Hence, Entry 50 will prevail being specific one in disputes arising in that matter. But here, the question as to authority to levy tax lying with the State which is an Executive Body, whereas it being a subject and authority of the Centre, is also contemplated.

From the aforementioned discussion, it is ample clear that the term 'Royalty' concludes the understanding that it signifies the variable part of a red-dendum depending upon the quantity of minerals excavated or the agreed payment to the patentee on every article made according to the patent. Rights or privileges for which remuneration is payable is in the form of a royalty.

Speaking of granting of right to extract the minerals by Private Operators, the State generally leases out the mining area to such Private Operator by virtue of contract in nature of a Lease. A Lease, in general parlance, would mean a contract by which one party conveys land, property, services, etc. to another for a specified time, usually in return for a periodic payment. In mining lease, lessee is conferred upon with the right not only to enjoy the property but also to extract the minerals from the land and to appropriate them for his own use or benefit, and so in addition to the usual rent for the death of the area, the lessee is also required to pay a certain amount in respect of the minerals extracted proportionate to the extracted quantity. Such payment is called 'royalty'.

So, the above explanations based upon various definitions under the law, lucidly conclude that royalty is paid by a lessee to the lessor

When it comes to Taxation on Mining in India, there has always been complications primarily due to the cascading effects of multiple taxation regimes. It is pertinent to note that in India, the combined cascading effect of taxes on mining is very high compared to other resource-rich countries making India less competitive in global markets. Further, payment of royalties to the relevant governments is a common feature across the entire spectrum of mining leases in India, irrespective of the type of mineral.
The taxpayers in the field are encountering growing pains by Government furthermore levying taxes on royalty paid on mining operations.

While in the Pre-GST remine and during the realm of Service Taxes when Negative list-based taxation was introduced, only select services provided by the Government were out of Service Tax purview via Negative list and the rest were covered under Service Tax. Later, the list was amended to bring all the services provided by the Government under levy of tax. Since then, there has been a constant tussle between the tax authorities and the mining lease holders as to whether grant of mining lease by a government was a taxable service, thereby attracting Service Tax. For long, this issue continued to bother the mining - trade/industry continuing into the GST regime as well and most importantly, given the large amounts that are typically payable as royalty/dead rent, the GST exposure as well was expected to be very high.

Before delving into the taxability of royalty paid on mining operations, the more imperative question here is whether royalty itself is in the nature of tax. This question fundamentally exerts influence on tax implications, which has been at stretch from a long time now as there cannot be levy of tax on tax which cannot be attached to the value of the goods/services. Although various judicial decisions to all intents and purposes explored the matter's clear position in law, it is only recently that a 9 Judges Bench of Hon'ble Supreme Court in *Mineral Area Development Authority* (Supra) where the Majority held two-fold:

- Royalty is not a tax. Royalty is a contractual consideration paid by the mining lessee to the lessor for enjoyment of mineral rights. The liability to pay royalty arises out of the contractual conditions of the mining lease. The payments made to the Government cannot be deemed to be a tax merely because the statute provides for their recovery as arrears.
- Entry 50 of List II does not constitute an exception to the position of law laid down in *M. P. V. Sundararamier & Co.* v. *State of Andhra Pradesh*, (1958) 9 STC 298. The legislative power to tax mineral rights vests with the State legislatures. Parliament does not have legislative competence to tax mineral rights under Entry 54 of List I, it being a general entry. Since the power to tax mineral rights is enumerated in Entry 50 of List II, Parliament cannot use its residuary powers with respect to that subject-matter.

While deciding the aforesaid, Hon'ble Court upon noting that the MMDR Act seeks to provide for the regulation of mines and development of minerals under the control of the Union, it observed that the declaration indicates that Parliament intends to take the regulation of mines and development of mines under the control of the Union to the extent indicated in the statute. The Court further noted that rates of royalty were primarily governed by the terms of lease prior to the enactment of the MMDR Act. Once a mining lease was entered into between a lessor and lessee, the rates of royalty would remain static during the subsistence of the lease. Section 9 of the MMDR Act has enabled the Central Government to examine the rates of royalty in respect of all minerals and modulate them periodically after taking into consideration various factors, including the uniformity of mineral prices.

Coming back to the instant topic of GST on Royalty, it is equally pertinent to appreciate the equal proposition of Taxability under erstwhile Service Tax regime. While on the issue of applicability of Service Tax on Royalty in the erstwhile regime, a batch of petitions were filed before varied Courts across the Country wherein to mention a few, in the case of *Udaipur Chamber of Commerce & Industry* v. *Union of India* (D. B. Civil Writ Petition No. 8109/2022 dated 27-9-2022) the Court had held that Royalties paid on assignment of rights to use natural resources were a consideration and found no illegality on levy of Service Tax on Royalties. However, the Judgement was challenged before the Supreme Court which lastly stayed the payment of Service Tax on Royalties.

Now coming to the levy of GST under GST laws, it is on supply of goods or services. The term 'supply' is defined under section 7 of the CGST Act in an inclusive manner and it includes all activities undertaken for consideration unless expressly excluded under Schedule III. Going by the judicial decisions, royalty paid towards extraction of minerals is in the nature of tax and cannot be considered as consideration. However, we are looking at it here from the other perspective also assuming that there can be levy of GST on Royalty.

When GST was implemented, the classification of Royalty under GST was as such that Leasing Services were classified under Heading No. 9973 Leasing or Rental Services with or without Operator, where under this heading, Entry No. 997337 Licensing services for the right to use minerals including its exploration and evaluation was most suitable for Royalty as it is the only entry relating to extraction and use of minerals. As per this, the classification rightly fell into this Entry No. 997337.

The rate of tax on Royalty could be derived from the Notification No. 11/2017-Central Tax. As per this Notification the rate of tax for Heading 9973 were given in Entry No. 17, wherein there were 7 Sub-Entries to this Main Entry. Out of these 7 Entries, only 3 Entries had specific rates of 5%, 12 % and 18%. All the remaining Sub-Entries in this Entry carried rate of tax as "Same rate of central tax as applicable on supply of like goods involving transfer of title in goods". The Heading No. 997337 did not qualify under any of the 3 Entries with specific rate. It only qualified for the residuary entry. Thus, the rate of tax on this entry of 997337 was that which was the rate of goods. Therefore, it was a conclusive understanding that the rate of tax on royalty shall be the rate which is applicable on the rate of goods *i.e.,* minerals. Whatever is the rate of tax on minerals, the same rate was going to apply on Royalty

However, Department brought various taxpayers into scrutiny who took and implemented such an interpretation and disputes followed. Divergent rulings were issued by Authorities for Advance Rulings (AAR) and Appellate Authorities for Advance Ruling (AAAR) on applicability of GST rate on the same. Where some ruled that the service of grant of mining leases is classifiable under Service Code 997337 and attracted the same rate of GST as applicable to minerals, whereas in certain other rulings a view had been taken that grant of rights for mineral exploration and mining would be covered under Heading 9991 and would attract GST @ 18%.

AAAR Odisha observed that GST rate applicable against Sl. No. 17 item (*viii*) of Notification No. 11/2017-Central Tax (Rate) prior to 1-1-2019 was not implementable. Unlike leasing or renting of goods, there are no underlying goods in case of leasing of mining area. The rate prescribed for goods cannot be made applicable to leasing of mining area, which confers the right to extract and appropriate minerals. The mining lease by Government, not being a lease of any goods, cannot attract the rate applicable to sale of like goods. Appellate Authority for Advance Ruling, Odisha had further held that the amendment carried out *vide* Notification No. 27/2018-Central Tax (Rate), dated 31-12-2018, which restricted the "same rate as applicable to supply of goods involving transfer of title in goods" only to leasing or renting of goods was to clarify the legislative intent as well as to resolve the unintended interpretation and that it is a settled law that interpretation which defeats the intention of legislature cannot be adopted. It accordingly upheld that "licensing services for the right to use minerals including its exploration and evaluation" falling under service code 997337 were taxable @ 18% during 1-7-2017 to 31-12-2018.

Taxpayers in this regard sought clarification as to the rate of GST applicable on supply of services by way of granting mineral exploration and mining rights during the period from 1-7-2017 to 31-12-2018 as w.e.f. 1-1-2019 the rate schedule had been specifically amended that such service attracted GST @ 18% from 1-1-2019 onwards. On 6-10-2021, a clarification was made that since the intent of the Council was always to tax this activity/supply @ 18% as a subject matter in all the previous meetings of the GST Council and that in the erstwhile regime as well, the Service Tax rate on such activity was 15.5%, so GST @ 18% shall apply.
Royalty and tax on Royalty are very long pending matters in the judicial system of India which should be settled. The controversy started from the very beginning and continuing under GST as well.
Rajasthan High Court, as contradictory to its decision, in the matter of *Udaipur Chamber of Commerce & Industry* (*supra*) , has recently granted a stay in the matter of *Adapt Infra Pvt. Ltd.* with respect to applicability of GST on royalty paid on mining operations.

However, it may be noted that even after decision of 9 Judges bench in the case of *Mineral Area Development Authority* (Supra), Hon'ble Supreme Court is still considering as to whether Royalty paid by the Mining leases is subject to service tax and GST. In *Udaipur Chamber and Commerce* (Supra), issue of levy of GST is also involved and said matter is listed before Supreme Court for 'final hearing'. Hence, as yet although it has been held that royalty is a consideration, other issues regarding availability of Service Tax and Royalty is still under consideration.

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ADJUDICATION PROCEEDINGS UNDER THE GST LAW

By Preet Vardhan, Advocate

"Adjudication is the legal process by which an arbiter or judge reviews evidence and argumentation including legal reasoning set forth by opposing parties or litigants to come to a decision which determines rights and obligation between the parties involved. The decision has to be based on settled principles of adjudication which is a *quasi judicial* exercise involving judicious application of mind. Litigation arises in GST due to disagreement on the particular matter between the proper officer and the taxpayer. It may be scrutiny of returns, classification of goods or services, assessment, determination of tax, valuation of goods or services, search, inspection of premises, seizure of goods, interception of movement of goods or vehicle in transit and refunds. Every, litigation has its statutory remedy under GST law starting from the stage of Adjudication.

The word 'adjudication' has not been defined anywhere in the Central Goods and Services Tax, 2017. However, under the section 2(91)[2] and section 2(4)[3] of the same, the act defines the two very important terms – Proper officer and Adjudicating authority, respectively. The powers granted into these two bodies are to perform any act required by them under this act. These acts include the process involved in the act of adjudication, which in other words can be defined as resolving a dispute legally/judicially and concluding based on the evidence provided by both the parties. It is to be noted that the need for adjudication arises when such departmental bodies observe any irregularities regarding GST issues.

Role of adjudicating authority:

The adjudication proceeding is carried by the departmental officers depending upon monetary limits and they discharge functions in the capacity of quasi-judicial officers. The officers vested with power of adjudication are expected to use it with utmost care and caution, free from any prejudice or bias or unfairness. It is very important on the part of the adjudicating officers to

know and understand the facts of the case, examine these facts properly and to apply correctly the statutory provisions of the relevant statute. The adjudicating officer should pass the final order after thorough verification of the relevant documents of the case, due study of the written submission filed by the parties and subsequent discussion in the personal hearing. The demand order should be served to the taxpayer as per section 169 of the Act and should be passed in FORM GST DRC-07.

The basic principles of adjudication

1. The adjudication proceeding is based on the principle of natural justice and the said principle to be followed by the adjudicating officers to decide a case/pass order.
2. The adjudicating authorities to provide reasonable time for adjudication as per the statutory provisions and time limitation provided in the Act.
3. The adjudicating authority may, is sufficient cause is shown, at any stage of proceeding, grant time by adjournment of personal hearing for three occasions and no such adjournment is normally allowed thereafter.
4. The adjudicating authority should exercise their powers fairly, reasonably and impartially in a just manner and they should not decide a matter on the basis of any enquiry unknown to the party, but should on the basis of supported documentary evidence on record.
5. The decision of adjudicating authority should not be biased, arbitrary or based on mere conjectures, assumptions and presumption of the facts.
6. The adjudication order must be a speaking order giving clear findings on all the points raised in the show cause notice , after due consideration of submissions made by the party and final decision in clear terms.
7. The adjudication order should be in accordance with precedent judgment and not violation of judicial discipline.
8. The adjudication order should quantify the duty demanded and order portion must contain the correct provisions of law under which duty is confirmed and penalty is imposed.

9. The adjudication order of decided case, if remanded by the appellate authority for *de novo* adjudication, it should be adjudicated in *de novo* proceedings by the same authority who had earlier adjudicated the case.

10. The adjudicating officers should exercise powers of adjudication within the monetary limits available to them.

11. The adjudicating authority should not pass order in a routine manner as per precedent decision and he should give his own findings as per the change of circumstances, if any, and prevalent laws.

12. Adjudication order has to be dated and signed by the adjudicating authority.

13. The adjudicating authority cannot pass two orders on the same show cause notice but corrigendum can be issued on minor omission of facts without changing the main order.

14. The adjudicating authority should not pass order beyond the scope of show cause notice and no new allegation should not be discussed in the order which is not a part of the show cause notice.

15. The adjudicating authority should communicate the order within a reasonable time after grant of personal hearing. He is also expected to keep 'Record of Personal Hearing' and to provide signed copy of the same to the parties.

Judicial discipline:

The adjudicating officers should follow the principles of judicial discipline or precedent judgments before passing of any judicial decision. The judicial discipline is a vital factor in adjudication proceedings. The adjudicating officers should be bound by the precedent judgments of the higher authorities in the identical cases. Then only the judicial decision would be just, fair, right, substantial and universally acceptable. The judicial discipline is self-discipline and it is an inbuilt mechanism in the system itself in adjudication proceedings. This is the minimum discipline and decorum to be maintained by quasi judicial/judicial fraternity. The principles of natural justice and judicial discipline are both sides of the same coin in adjudication proceedings. In case of violation of principles of Natural justice the demand order may be challenged by the taxpayer before the High Court.

Principles of Demand Order:

(*i*) The demand order should be issued in FORM GST DRC-07 by uploading summary of demand order in FORM GST DRC-07 electronically on the portal by the proper officer as per CBIC instruction No. 04/2023-GST dated 23-11-2023. [2023 (79) G.S.T.L. C3]

(*ii*) The demand should be passed by the adjudicating authority by considering all the submissions made by the taxpayers and additional submissions made during the personal hearing.

(*iii*) The demand order should be passed within normal period of limitation within three years from the due date for furnishing of annual return u/s 73 (10) of the Act and within normal period of limitation within five years from the due date for furnishing of annual return u/s 74 (10) of the Act.

(*iv*) The demand order should not be beyond the scope of show cause notice in respect of amount of demand, interest and penalty and no demand should be confirmed on the grounds other than grounds specified in the notice as per section 75(7) of the Act.

(*v*) The demand order should not be passed by the adjudicating authority beyond his jurisdiction and monetary limit.

Deemed conclusion of proceedings

As per Section 75(10) of the CGST Act,2017, the adjudication proceeding shall be deemed to be concluded, if the order is not issued within three years as provided for section 73(10)*ibid* or within five years as provided for in sub-section (10) of section 74*ibid.*

Monetary Limits for adjudication:

Whereas, for optimal distribution of work relating to the issuance of show cause notices and orders under sections 73 and 74 of the CGST Act and also under the IGST Act, monetary limits for different levels of officers of central tax has been prescribed. Therefore, in pursuance of clause (91) of section 2 of the CGST Act read with section 20 of the IGST Act, the Board has clarified the proper officers in relation to issue of show cause notices and orders undersections 73 and 74 of the CGST Act and section 20 of the IGST Act (read with sections 73 and 74 of the CGST Act), upto the monetary limits as per circular No. 31/05/2018-GST, dated 9-2-2018. [2018 (9) G.S.T.L. C21]

TABLE

Sl. No.	Officer of Central Tax	Monetary limit of the amount of central tax (including cess) not paid or short paid or erroneously refunded or input tax credit of central tax wrongly availed or utilized for issuance of show cause notices and passing of orders under sections 73 and 74 of CGST Act	Monetary limit of the amount of integrated tax (including cess) not paid or short paid or erroneously refunded or input tax credit of integrated tax wrongly availed or utilized for issuance of show cause notices and passing of orders under sections 73 and 74 of CGST Act made applicable to matters in relation to integrated tax vide section 20 of the IGST Act.	Monetary limit of the amount of central tax and integrated tax (including cess) not paid or short paid or erroneously refunded or input tax credit of central tax and integrated tax wrongly availed or utilized for issuance of show cause notices and passing of orders under sections 73 and 74 of CGST Act made applicable to integrated tax vide section 20 of the IGST Act.
(1)	(2)	(3)	(4)	(5)
1	Superintendent of Central Tax	Not exceeding Rupees 10 lakhs	Not exceeding Rupees 20 lakhs	Not exceeding Rupees 20 lakhs
2	Deputy or Assistant Commissioner of Central Tax	Above Rupees 10 lakhs and not exceeding Rupees 1 crore	Above Rupees 20 lakhs and not exceeding Rupees 2 crores	Above Rupees 20 lakhs and not exceeding Rupees 2 crores
3	Additional or Joint Commissioner of Central Tax	Above Rupees 1 crore without any limit	Above Rupees 2 crores without any limit	Above Rupees 2 crores without any limit

Furthermore, after the adjudication order is passed, the last stage with respect to the adjudicating process is the presence of provision of appeal. The assessee has the right to appeal against the order passed by the adjudicating authority. However, such right comes with a limitation under the CGST act of 2017. That is, the right to appeal will be granted to him only after he satisfy the condition of not only paying the full amount of tax accepted by him that he is liable for as per the impugned order, but also after paying 10% of the remaining tax amount that is in dispute, as per the section 107(6)[22]. This amount is known as 'pre-deposit'. Likewise, the power to appeal against an order also rest with the Commissioner under the GST law. In a case where commissioner himself feel that the order delivered by the appellant authority, adjudicating authority or the revisional authority is not legal or proper, he may as well file for a review application (appeal).

FAKE INVOICE - ITS FACTORS, REMEDIES AND LITIGATIONS UNDER GST

Ramesh Chandra Jena, Advocate

The word fake invoice has not been defined under Section 2 of the CGST Act, but the term fake invoice has been incorporated in certain Sections of the CGST Act as incorrect or false invoice. The dictionary meaning of fake invoice means a document that is not genuine or real. The generation of fake invoice is the biggest scam in the GST regime across the country. The unscrupulous persons use to issue fake invoice to avail fraudulently ITC benefits in chain manner and generation of black money in the country. It is noticed that finally those unscrupulous persons are being caught by the revenue DGGI authorities and State Revenue Enforcement Units.

Statutory expression of fake invoice:

Section 122 of the CGST Act, 2017 described penalty for certain offences and in the first two clauses of sub-sections (1) used word fake invoice where a taxable person who-

(i) supplies any goods or services or both without issue of any invoice or issues an incorrect or false invoice with regard to any such supply,

(ii) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act or the rules made thereunder.

Any person who retains the benefit of a transaction covered under cited above clauses (i) , (ii) of sub-section (i) of Section 122 and at whose instance such transaction is conducted, shall be liable to a penalty of an amount equivalent to tax evaded or input tax credit availed of or passed on.

Further, the similar expressions have been incorporated under Section 132 of the CGST Act, specified that whoever commits or causes to commit and retain the benefits arising out of , any of the following offences, namely:-

(a) supplies any goods or services or both without issue of any invoice, in violation of the provisions of this Act or the rules made thereunder, with the intention to evade tax;

(b) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act, or the rules made thereunder leading to wrongful availment or utilization of input tax credit or refund of tax;

(c) avails input tax credit using the invoice or bill referred to in clause (b) or fraudulently avails input tax credit without any invoice or bill;

The cited statutory provisions of Section 122 & 132 of the CGST Act are being adopted by the unscrupulous persons in the chain manner by using fake invoices even without existence of registered premises or no genuine activities of supply of goods or services or both have involved therein. Thus, these monetary transactions using fake invoices without supply of goods or services not only involved in evasion of taxes but also help in circulation of black money in the country.

C.B.I & C's Circular for penal provisions:

The CBIC vide its circular No.171/03/2022-GST, dated 06.07.2022 has clarified the issues relating to applicability of demand and penalty provisions under the CGST Act. The fundamental principles that have been delineated in the various scenarios of the said circular may be adopted to decide the nature of demand and penal action to be taken against a person for such unscrupulous activity. Actual action to be taken against a person will depend upon the specific facts and circumstances of the case which may involve complex mixture of the various scenarios or even may not be covered by any of the scenarios as explained in the circular. Any person who has retained the benefit of transactions specified under sub-section (1A) of section 122 of CGST Act, and at whose instance such transactions are conducted, shall also be liable for penal action under the provisions of the said sub-section. It may also be noted that in such cases of wrongful/ fraudulent availment or utilization of input tax credit, or in cases of issuance of invoices without supply of goods or services or both, leading to wrongful availment or utilization of input tax credit or refund of tax, provisions of section 132 of the CGST Act may also be invokable, subject to conditions specified therein, based on facts and circumstances of each case.

Factors influences for the fake invoices:

(i) Prevalence of multiple rates of taxes in the GST regime viz; 5%,12%,18% & 28% GST, apart from special rates for composition schemes and Gold ornaments /jewellery;

(ii) Small entrepreneur engaged in the manufacturer of consumer oriented products with highest rates of taxes viz; Soda drinks with sugar flavors where attracts GST rate is 28%+Cess is 12% all amounting of 40% taxes;

(iii) Consumer durables products available with easy EMI, dealer use to avoids to issue invoice as per the need of the consumers;

(iv) An uneducated customer always prefers to buy goods or services without tax invoices for the lesser benefits of prices;

(v) In the name of democracy corruption is playing a vital roles each administration of the country;

(vi) Government has no control over the prices of essential consumer oriented products;

(vii) Common peoples have very less exposures to GST laws;

(viii) Life styles of the people influences generation of illegal money by adopting easy method;

(ix) Punishments for tax evader are not remarkable as per the provisions of tax laws.

Factors for mitigation of fake invoices:

(i) Government interference by way of 'rationalization' of tax rates and redrafting of provisions of GST laws;

(ii) Government has to ensure minimizing of 'corruption' at each level of administrations.

(iii) Services provided by the Government should be free from 'political interferences' 'just, fair and equitable';

(iv) Procurement of goods & services by the Government should free from 'corruption';

(v) Revamping of the entire 'justice delivery system' with 'speedy and accuracy';

(vi) GST laws should be simple for the 'common man' and 'common man'

comes to believe that the taxes imposed 'just, fair and proper';

(vii) The entire election process of the country should be revamped and cash flow should be eliminated from the process;

(viii) The common man should be educated to bear a fair share of taxes for the development of the country;

(ix) The common man should realize that punishment for illegal Act is 'fair and just' to control fake invoices in the country.

Litigations and judicial decisions:

The Hon'ble High Court of Delhi in the case of Aman Gupta vs. State-reported in (2023) 10 Centax 294 (Del.), held that "the present case is not just relating to the applicant having duped the complainant of a huge sum of money, it also involves allegations of issuing fake invoices and e-way bills for the purposes of GST evasion, which is an economic offence involving loss to the public exchequer - Such offences need to be viewed seriously as the same pose a threat to the economy of the country - Further, the present case involves offence under Section 467 of the IPC read with Section 471 of the IPC, for which the maximum punishment is imprisonment for life - In the present case, for the aforesaid reasons, the custodial interrogation of the applicant is required - Allegations levelled against him are serious, being in the nature of forgery and GST evasion by creating false invoices issued by non-existent entities, no grounds for grant of anticipatory bail to the applicant are made out - Bail application dismissed."

In the High Court of Punjab & Haryana in the matter of Amrinder Singh. vs. State of Punjab reported in 2023-TIOL-666-HC-P&H-GST, held that "grant or refusal of bail lies in the discretion of the Court -However, bail is not to be denied to satisfy the collective sentiments of a community or as a punitive measure - Denial of bail must be the exception rather than the ruled and Thus, without commenting on the merits of the case, the aforementioned petitions are allowed and the petitioner-Amrinder Singh, son of Gurnam Singh is ordered to be released on bail subject to the satisfaction of the Trial Court. It is to be mentioned that in this case all individuals have made a total of 40 firms and have evaded tax amounting to Rs. 122.28 Crores - Common Email-ids, Phone numbers and PAN cards have been used in all these firms to get registrations and pass on the fraudulent Input tax Credit (ITC) to various beneficiary firms - No tax has been ever paid in the inward supply chain of these firms and a mechanism has been devised by all these individuals to cover the movement of clandestine goods with fake invoices so that fraudulent ITC could be availed for adjustment against the output tax liability - Further bank accounts given/uploaded at the GSTN Portal of these firms are different than the bank accounts through which money transaction has happened and even parallel and fake bank accounts have been opened to withdraw the cash in some of these firms - It is also pertinent to mention that huge cash has been collected/ withdrawn from the bank accounts by same and common persons. Accordingly, complaint came to be filed under sections 132(1)(a), (b) and (c) of CGST Act,2017 and Punjab GST Act, 2017 and arrests were made."

The Hon'ble High Court of Uttarakhand in the case of Rajesh Kumar Dudani vs. State of Uttarakhand, reported in 2023 (72) G.S.T.L.28(Uttarakhand), held that "the allegations

are much grave - It is the case of generating fake and forged invoices so as to claim ITC - Respondent no.2 has given categorical details of such dubious transactions and has also submitted as to how in one day, the money was routed in different accounts - The applicant transferred the money in his wife's account and, subsequently, from her account, it comes to the applicant's account - It is a kind of act, which effects the economy of the country - Added to it is the non-cooperative attitude of the applicant during enquiry - Considering the gravity of the offence and its implications, Court is of the view that the applicant is not entitled for anticipatory bail - Application is dismissed." But the Hon'ble Supreme Court decision in the said case reported in 2023 (72) G.S.T.L. 6 (S.C.), held that "following the reasons given in the said judgment and orders, the appellant is entitled to be granted anticipatory bail without imposing any condition as suggested by Learned Additional Solicitor General. In such circumstances, it is provided that in case the appellant is arrested, he shall be liable to be released forthwith, subject to such terms and conditions which the Trial Court/Investigating agency may deem fit and proper to impose."

The Hon'ble High Court of Orissa in the case of M/s Bright Star Plastic Industries vs. Additional Commissioner Sales Tax, reported in 2022 (57) G.S.T.L. 226 (Ori.), held that "Court finds merit in the contention that for the fraud committed by the selling dealer, which resulted in cancellation of a selling dealer's registration, there cannot be an automatic cancellation of the registration of the purchasing dealer - None of the three circumstances outlined in Clauses (a), (b) & (c) are attracted in the present case - Consequently, Rule 21 of the OGST Rules cannot be invoked by the Department, in circumstances such as the present, to cancel the registration of the purchasing dealer - To attribute fraud to the Petitioner, as a purchasing dealer, the Department would have to satisfy a high threshold of showing that the purchaser indulged in the transactions with the full knowledge that the selling dealer was non-existent - The Department would have to show that somehow the purchasing dealer and selling dealer acted in connivance to defraud the revenue - This threshold has not been made in the present case - In other words, the Department has failed to show that the Petitioner as a purchasing dealer deliberately availed of the ITC in respect of the transactions with an entity knowing that such an entity was not in existence - Impugned orders are set aside - Department is directed to restore the Petitioner's registration forthwith by issuing appropriate orders/directions not later than one week - Petitioner is permitted to file all the return which it could not file on account of the cancellation of the registration - Petition is allowed."

The Hon'ble High Court of Madras in the case of Sree Rajendra Steels vs. Assistant Commissioner (CT), reported in 2022(59) G.S.T.L.265(Mad.), observed that "It is the case of the respondent that the claim of ITC is itself bogus insofar as there was no actual movement of the goods at all - To this end, a show cause notice has been issued on 30.03.2021 and the petitioner has been afforded an opportunity of personal hearing on 07.04.2021 but same has not been availed citing lock-down on account of the on-going pandemic - Thereafter, impugned order dated 22.06.2021 has

been passed rejecting the claim for ITC by simply stating that 'the tax payer has claimed ITC using fake invoices. Hence the corresponding ITC is disallowed."

The Hon'ble Supreme Court in the case of DGGI vs. Lupita Saluja, reported in 2021-TIOL-190-SC-GST-LB, observed that "Allegation of floating of bogus export firms and fraudulent availment of ITC of Rs.45 crores on the strength of fake invoices - Respondent had sought anticipatory bail on the ground that she was a housewife and was unaware of the alleged misdeeds in relation to the enquiry/ investigation being conducted by respondent - Delhi High Court had held that custodial interrogation of the respondent is not required and allowed the application seeking anticipatory bail - Aggrieved, DGGI is in appeal before the Supreme Court and held that " No reason to interfere with the impugned order passed by the High Court - Special leave petitions are, accordingly, dismissed: Supreme Court Larger Bench."

The Hon'ble High Court of Uttarakhand in the case of M/s Vimal Petrothin Pvt. Ltd, vs. Commissioner CGST & Others, reported in 2021 (53) G.S.T.L. 130 (Uttarakhand), it is the case of Petitioner's input tax credit available in its electronic ledger was provisionally blocked on the ground that petitioner had availed input tax credit, amounting to Rs.1.5 crores, based on fake invoices issued by non-existing firms. Counsel for the respondent Revenue, on instructions, concedes that petitioner's electronic credit ledger cannot be blocked for any period in excess of one year, in view of express provision contained in Sub-Rule (3) of Rule 86(A) of C.G.S.T. Rules. Thus, petitioner's contention to this extent is correct that continuance of blockage of his input credit ledger after 14.01.2021 is not supported by any law - Writ petition, therefore, stands allowed - Respondent no. 1 is directed to forthwith unblock input tax credit availed by the petitioner in its electronic credit ledger."

In the High Court of Bombay in the case of Anuj Mahesh Gupta vs. Assistant Commissioner of State Tax, reported in 2021(50) G.S.T.L.180(Bom.), it is the matter of Petitioner was arrested on 15.01.2021 by respondent No. 1 and seeks bail - It is alleged that the petitioner has committed offences under section 132(1)(b) and (c) of the MGST Act by receiving fake invoices of value not less than Rs. 277 crores and by taking input tax credit of not less than Rs. 31 crores; that such offences are punishable under section 132(1)(i) of the MGST Act which are cognizable and non-bailable. But petitioner was arrested on 15.01.2021 and as on today has completed 54 days in custody. Further, as on today no charge sheet has been filed by the respondents before the competent court. Considering the fact that offences in the present case are punishable for a term up to 5 years, provisions of section 167(2)(a)(ii) of the Code of Criminal Procedure, 1973 would be applicable. That apart, petitioner has made payment of Rs.4,68,66,408.00 including Rs. 1,90,25,000.00 after arrest and under protest. In these circumstances and taking an overall view, Bench is of the opinion that petitioner should be released on bail subject to certain conditions."

The High Court of Bombay in the case of One Point One Solution Ltd and Ors. vs. Union of India and Ors, reported in 2021-TIOL-483-HC-MUM-GST, it is the case of "Primary grievance and apprehension of petitioner Nos. 2 to 8 is arrest at the hands of respondent Nos. 2 and 3 u/s 69 of the

Act,2017- Chairman Cum Managing Director of petitioner No.1 company and Chief Financial Officer of petitioner No.1 company have been arrested and are in judicial custody on the allegation that petitioner No.1 had committed the offence of availing ineligible Input Tax Credit to the extent of Rs. 9,04,89,054.00 by using fake invoices i.e. without actual supply of goods or services - Petitioner submits that out of the alleged availing of ineligible Input Tax Credit of slightly more than Rs.9 crores, petitioner No.1 has deposited Rs.4.80 cr; that petitioner Nos. 2 to 8 have co-operated with the investigation and will continue to do so and that no useful purpose would be served by arresting petitioner Nos. 2 to 8 except causing humiliation to them. Held that no coercive action shall be taken against petitioner Nos. 2 to 8 till the next date, however, petitioner Nos. 2, 7 and 8 shall appear before the investigating authority as summoned on 26.02.2021 and thereafter as and when summoned - Rest of the petitioners shall appear before the investigating authority as and when summoned and co-operate with the investigation - Matter to stand over to 16.03.2021 for filing of reply and rejoinder."

Conclusion: In nutshell, the unscrupulous person's activities for issuance of fake invoices and availment of ITC benefits without supply of goods or services or both is the easy way of black money circulation in the Country. Hence, there is need of Government interference to control fake invoices by adopting policy of rationalization tax rates and redrafting of GST laws for the exemplary punishment for the unscrupulous activities. Recently, a special all India drive has been launched against fake registrations jointly by Central and State tax authorities in close coordination and detailed guidelines issued for the implementation of the said drive vide instruction no.01/2023-GST dated 04.05.2023. Further, amendment has been made in Rule 25 of CGST Rules,2017 to provided for physical verification in high risk cases even Aadhaar has been authenticated to reduce activities for fake registration. Apart from that to control fake invoices, E- Invoicing system was introduced in the GST regime with effect from 01.10.2020 for B2B transactions as well as exports, for taxpayers with annual aggregate turnover of Rs. 500 crore and above. This threshold has been reduced progressively over a period of time and was reduced to Rs 10 crores from 01.10.2022. This threshold limit has been further reduced to Rs 5 crore with effect from 01.08.2023 vide notification no. 10/2023-Central Tax dated 10.05.2023. However, there is need of further development, measures and changes in policy of GST provisions to control fake invoices and reduce litigation on account of the fake invoices in the GST regime.

■■■

AN OVERVIEW ON GST

Birendra Kumar Senapati

India is a welfare country where citizenprosperity is prime objective. In order to overall developmentof India and Indian economy requires collection of revenue.In the same time the interest of citizen who generate and provide revenue to Indian economy should not be ignored.With this thinking to minimize variousindirect taxationlawa task force/commission constituted headed by Dr. Vijay Kelkar in 2000 who submitted a report to finance minister in 2002 with thinking to simplify various indirect taxation into one taxation system only. The objective was to replace the prevailing complex and fragmented tax structure with a unified system that would simplify compliance, reduce tax cascading, and promote economic integration.

Due to federal system of the Government of India to implement such taxation reform after facing so many hurdles and difficulties it took a long period of time; finally the GST was implemented and came into force on 01 July 2017 with a slogan of "One nation one tax and simple taxing system" after 101st Constitution Amendment Act, 2016.

Purpose of implementation GST law was to collect indirect taxes in simplified manner but at present the medium and small businessmen feel it is completely complex, rigorous and one sided law only for the collection of revenue. The complexity arisedue to main reason that the authority framing and designing the law only by referring the framework, language and procedure of Central Excise Act & Rule and Service Tax Act & Rule with ignoring Value Added Tax law which was matured by facing many hurdles in the court of law. The framing and designing authority of GST law Abovetwo law by referring which framing and designing authority prepared new GST law are confined with specific and very limited businessmen specifically Excise Law deals with only big manufacturers, where no common/small and medium businessmen were involved. Further it isstated that the central excise law was not matured and never faced common difficulties in various court of law as like asVAT law. So the complexity of central excise law was transferred to GST law for it became more complex and rigorous to comply by the common businessman including Government officials for implementation. The process and procedure of GST law is not commonly understood by both taxpayer and implementing authority till yet. It is also fact that the GST implementing authority are not properly trained by the Government to guide the medium and small businessmen, as it is a complex and rigorous law, frequently amended/rectified which are also not educated to both businessman and implementing authority. In this situation the small and medium businessman which are about 80% of the total taxpayers are suffering under the dictatorial law of taxation.

It is an important taxation law of land by which maximum revenue is generated in India, but due to complexity of law the different Government authority are executing or implementing the law in different manner, both in Central and State level. If GST law is continuing as it is without simplification, than the small and medium businessman may gradually unable to continue their business smoothly.

In India the small and medium businessmen are not so equipped both digitally and also not acquainted with the language of law, which is mainly referred from Central Excise and Service Tax Act & Rule. The ensuing GST law killing the time of small and medium category businessmen to comply the guidelines of law for which unable to apply their mind for the development and growth of their business.

There is mandatory provision for late fees, penalty and 18% interest for the businessman with any de-schedule of law without considering the situation which is more vigorous in comparison to receive of interest from any organization , but there is no any such provision for the Governmental authority who is implementing GST for de-schedule manner. It should be rectified /amendedthrough provisions of law.

In GST law it is very hardship and inconvenience to both taxpayer and implementing authority the way of repeated amendment by circulars without convert into the statute. This thing happens due to only outdated habit of monitoring by the authority of Central Board of Indirect Taxes and Customs. It would be better to amend statute with publication of books for smooth implementation of GST law.

GST Act both central and state Governments are guided by one Act but, procedure followed by them on their suit-will. In India the 80% small GST taxpayers are not understood the newly implemented GST law, even the GST authorities who are directly in contact with the small taxpayers unable to explain GST law easily for which the 80% of small taxpayers are compelled to accept the GST law in our welfare country which is a matter of regret.

In India having multiple taxing systems at present i.e. direct and indirect tax. The direct tax is named as Indian Income Tax and Indirect Tax presently known as GST, so we could not say the "one nation one tax". If the Indian citizen pay only one tax to Government than it will be treated as One Nation one tax, then we could not say the GST is only one tax for Indian nation. Provided that the citizen of India are paying so many types of local tax and central tax like road tax, property tax, professional tax, holding tax etc. when abolition of all taxes will be made the citizen will pay only one type of tax than we can say "one nation one tax" i.e. also requirement of Indian citizen's.

So to conclude, India being a welfare country and the entire Indian economy depends upon 80% small and medium businessmen, I can saythe present complicated and harsh GST lawneeds to be amended and rectified for growth of Indian economy as well as peaceful living of the taxpayers.

Advocate, Balaosre

THE COMPLEXITIES OF GST NOTIFICATIONS.

ROMEET PANIGRAHI
ADVOCATE
ODISHA HIGH COURT

India's economic reforms following the 1990s accelerated its progress as a globally integrated nation, with notable gains in regulatory efficacy, macroeconomic stability, and geopolitical constancy. Besides China on the Asian continent, India has emerged as one of the fastest-growing economies in recent decades. Fortifying the topsy-turvy but relatively continuous growth tale, India has seen tremendous indirect tax reform over the last three decades and proven economic resilience by beginning on another breakthrough in July 2017. According to experts, the Goods and Services Tax (henceforth GST) is the Indian government's significant taxation turn-around since liberalising the Indian economy in 1991. India has come a long way to accept GST as a wonderful and long-awaited indirect tax reform intended to implement one nation one tax and one market.

The Goods and Services Tax (GST) is implemented in India with the tagline of "one tax, one nation'. GST implementation in India aims to simplify laws and procedures. Regardless, With the introduction of GST, the government's administrative system had to issue numerous notifications regarding the GST Law's stipulations. The issuance of 718 notifications until December 31, 2022 (excluding notifications from state governments and union territories) complicates tax assessment, levy, and collection for officials and taxpayers. If the law is as simple as it is claimed, it should have fewer recommended amendments. GST notifications are frequently issued, making it difficult for tax payers to prepare monthly returns and respond to assessment orders. The notification will be updated overnight without prior notice, and failure to complete the process within the specified timeframe will result in fines.

Government of India vide its Notification no 35/2020- Central Tax, exercised its power under section 168-A of the CGST Act, and as the entire country was suffering from COVID-19 Pandemic, the Government on the recommendation of the Council, extended the time limitation to 30th June, 2020, for completion of any proceeding or passing of any order or issuance of any notice, intimation, notification, sanction or approval or such other action, by whatever name called, by any authority, commission or tribunal, by whatever name called, under the provisions of the Acts or filing of any appeal, reply or application or furnishing of

any report, document, return, statement or such other record, by whatever name called, under the provisions of the Acts. Further the Government using its power under section 168-A, extended the time limit 31.05.2021 in view of the COVID-19 Pandemic.

However, Government of India, vide its notification No-13/2022 dated 05.07.2022, extends the time limit specified under sub-section (10) of section 73 for issuance of order under subsection (9) of section 73 of the said Act, for recovery of tax not paid or short paid or of input tax credit wrongly availed or utilized, in respect of a tax period for the financial year 2017-18, up to the 30th day of September, 2023. This notification states that it is a partial modification to the above 2 mentioned notifications. Again the time limit was extended vide notification no 09/2023-Central tax dated 31.03.2023.

Having a brief overlook at section 168-A of the CGST Act, it clearly talks about extension of time limit in special circumstances, and more specifically due to Force Majeure. The section also expressly defines Force Majeure which includes a case of war, epidemic, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature or otherwise affecting the implementation of any of the provisions of this Act. However the Notification no 13/2022 dated 05.07.2022 and Notification No.09/2023 dated 31.03.2023, were published in a time where there was no case of COVID-19 Pandemic. Mere mentioning of "Partial Modification" doesn't allow the Government to misuse its power U/s 168-A, where its an exhaustive provision in itself, in the absence of any condition of Force Majeure, the passing of this notification in the first place is itself an abuse of power.

The vires of these two notifications have been challenges at various High Courts and High Courts have interfered at the Show Cause Notice stage where they have been pleased to pass interim orders whereby they have issued notice and directed the department to not pass any final orders without the leave of the court. Cases relied upon are M/s. Graziano Trasmissioni vs GST &ors in Writ Tax No. 1256 of 2023 before Hon'ble Allahabad High Court- interim order dt. 17.11.2023. New India Acid Baroda Pvt. Ltd. vs UOI in Special Civil Application No. 21165 of 2023 before Hon'ble Guajarat High Court- interim order dt. 21.12.2023. M/s. Garg Rice Mills vs State of Punjab &ors in CWP No. 1138 & 1140 of 2024 before Hon'ble Punjab & Haryana High Court- interim order dt. 18.01.2024. Hon'ble Orissa High Court in the case of M/s Orissa Stevedores Ltd. vs Deputy Commissioner and ors. in W.P. (C) No. 3703 of 2024 while issuing notice has directed vide order dt. 22.02.2024 that the Opp. Parties that proceeding relating to SCN may go on but no final order shall be passed.

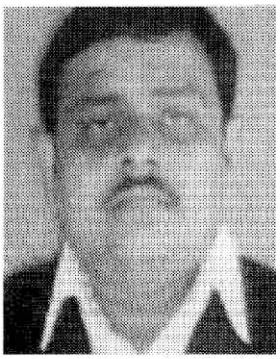
Recently, in the case of OSL Exclusive Pvt Ltd Vs. UOI and Others,[WPA 7423 OF 2024], The Hon'ble Calcutta High court have stayed the adjudication order and have restrained the recovery proceedings. Similar orders have also been passed by the Hon'ble Orissa High Court in Swastik Stevedores Pvt Ltd Vs. UOI and Others [WP(C) No. 6333 of 2024].

In the further course of time, the constitutionality of these notifications will be answered and there will be certainly a major change in the tax jurisprudence. But this raises a very fundamental question and that is whether the Act is making life easier for the Business man or has it deviated from its main objective, which was to simplify the process and make it easier for the business man to conduct their business. Certainly, issuance of numerous notifications under the act have made compliance a tough task but it also highlights the abuse of the power and its direct impact on article 19(1)(g) of the Constitution of India.

Being a 7 year old Act, it certainly needs more time to evolve, and in the process, a lot of question needs to be answered and most importantly, certain provision's constitutionality needs to be analysed. The majority of CGST tax notices address GSTN system issues. Approximately 25% of notices are connected to return filing, namely postponement of the date. Filing of returns. This shows that the majority of notifications issued are due to technical faults with the GSTN system. Notifications directly affect several provisions of the CGST Act. This requires more examination of the substance of alerts.

REVERSAL OF INPUT TAX CREDIT: NAVIGATING FINANCIAL AND COMMERCIAL CREDIT NOTES

VINOD PATODIA, ADVOCATE
ANGUL DISTRICT TAX BAR
ASSOCIATION, ANGUL



Section 15 of the GST Act lays down the principle in which value of supply is determined. In other words, Credit note(s) can be issued as a commercial transaction between the two contracting parties. Secondary discounts shall not be excluded while determining the value of supply as such discounts are not known at the time of supply and the conditions laid down in clause (b) of sub-section (3) of section 15 of the said Act are not satisfied.In this regard, attention is invited to Section 2(62) which deals with input tax credit uses the words 'tax charged' whereas Section 2(82) which deals with output tax liability uses the words 'tax chargeable'. This itself reflects the fact that the recipient of the goods or services is only concerned with tax charged by the supplier for the claim of input tax credit and need not to go on the compliances/chargeability issues of the supplier. Further, in case of incentive related benefits such as cash discount which are extended by supplier to recipient of the supply, there cannot be any service by the recipient to the supplier. There is no service which is rendered by the recipient in this case. There is no quid pro quo or agreement or intention for the rendering of any services by recipient to the supplier.

Also, we would like to throw the light on clause (aa) sub-section (2) of section 16 of CGST Act, 2017 and sub-rule (4) of rule 36 of CGST Rules, 2017, wherein it is mentioned that registered person can avail ITC only if the invoice/debit note reflects in GSTR-2B/GSTR-2A. Since, in our case the supplier has issued financial credit note and accordingly the same is not reflected in GSTR-2B/GSTR-2A. As such there is no liability on us to reverse the Input Tax Credit.

It is further relevant to note that Section 34(1) of the CGST Act, 2017 allows the issuance of the GST credit note only for the reduction of the taxable value or tax charged which is not the present case. Even if it does qualify the requirements of Section 34(1), issuance of the such credit note is discretionary on the part of the supplier. Nonetheless, in the present facts of the case, no credit note reducing GST liability has been issued and accordingly there is no requirement on us to reduce the corresponding input tax credit which is availed in due compliance with Section 16. This aspect is unequivocally clarified by circular no. 92/11/2019-GSTas reproduced above which is issued by CBIC in the exercise of the powers conferred by Section 168. Further guidance can be taken from the ruling of AAR, Andhra Pradesh, in the matter of Vedmutha Electricals India Pvt. Ltd. [Advance Ruling no. 05/AP/GST/2023 dated May 26,2023].

Facts:

M/s. Vedmutha Electricals India Private Limited ("the Applicant") are engaged in the business of supply various electronic items. The Applicant purchased various electronic items from M/s. Gold Medal Electricals Private Limited ("the Supplier"). The supplier issued tax invoice as per Rule 46 of the Central Goods and Services Tax Rules, 2017 ("the CGST Rules"), and charge GST on taxable as per section 15 of the Central Goods and Services Tax Act, 2017 ("the CGST Act"). The supplier provided number of incentives in the form of "discounts," including Turnover Discounts, Quantity Discounts, Cash Discounts, Additional Scheme Discounts, 3 Months Regular Scheme

Discounts, etc., year by year from the time of registration to the present. All of the aforementioned discounts are post sale discounts. The supplier raised financial/commercial Credit notes for the above-mentioned discounts. The applicant has properly accounted for these financial credit notes and the distributors have disclosed them in their Income Tax Returns. The supplier does not reduce its output tax liability concerning these financial/commercial credit notes as stated in Section 15 which does not make it subject to exclude "Post Supply Discounts" from the transaction value. Additionally, the supplier has submitted an affidavit stating the non-reduction of GST liability due to these credit notes. The Applicant further asserts that in case of post supply discounts, the discount is specified in an agreement made at or before the time of the supply and the Input tax credit ("ITC") attributable to the discount is not to be reversed by the Applicant.

Issues:

Whether the Applicant is liable to reverse the ITC proportionately to the extent of financial/ commercial Credit note issued by the supplier?

Held:

The AAR, Andhra Pradesh, in Advance Ruling no. 05/AP/GST/2023 held as under:

- Observed that, the provisions of section 15(3)(b) of the CGST Act can only be applicable if there was a prior agreement and a link is established between the relevant invoices and the discounts provided. In this case, no such correlation was found between the Credit notes issued by the supplier and the Applicant. As a result, the benefit of reducing the value of the discount from the transaction value, as per the provisions of section 15(3)(b), was not allowed.
- Noted that, the financial credit note should not be used as a means of fraudulently transferring ITC by inflating an invoice.
- Held that, the post-supply discount received by the Applicant from the supplier did not impact the transaction value between the parties. Therefore, the Applicant is eligible to take full credit of the GST charged in the tax invoice and was not required to reverse the ITC to the extent of the financial or commercial Credit notes issued by the supplier.

Similar to the above ruling In MRF Ltd. AAAR Tamil Nadu (TN/AAAR/04/2019(AR) dated 24.06.2019) dated 24.06.2019. Ruled that, 'appellant (recipient) can avail the Input Tax Credit of the full GST charged on the undiscounted supply invoice of goods/ services by their suppliers. A proportionate reversal of the credit is not required to be done by them in case of a post purchase discount given by the supplier to them through the C2FO platform (commercial credit note)'

Representations have been received from the trade and industry that whether credit notes(s) under sub-section (1) of section 34 of the said Act can be issued in such cases even if the conditions laid down in clause (b) of sub-section (3) of section 15 of the said Act are not satisfied. It is hereby clarified that financial/commercial credit note(s) can be issued by the supplier even if the conditions mentioned in clause (b) of sub-section (3) of section 15 of the said Act are not satisfied. In other words, credit note(s) can be issued as a commercial transaction between the two contracting parties.

Conclusion-

The question of whether a reversal of Input tax credit is required in the case of financial or commercial Credit notes is a complex issue. It depends on the purpose and nature of the Credit note. To navigate this area effectively, businesses should maintain transparent and accurate records of all transactions. Understanding the nuances of ITC and Credit notes is essential for businesses seeking to operate within the bounds of tax compliance while optimizing their financial processes

GST LIABILITY ON FORFEITED AMOUNT ON ACCOUNT OF BREACH OF CONTRACT- UNDER GST LAW

JEEBAN DAS, INCOME TAX & GST CONSULTANT

The term 'breach of contract' prescribes under Sections 73 & 74 of the Indian Contract Act, 1872 and provides for the consequences of breach of contract. The contract is an advance agreement between two parties to ensure to complete certain work within the given period of contract. In case of breach of contract by the party who agreed upon to forfeit the amount so agreed upon to pay as compensation to other party and it forms as consideration.

Taxability under GST:

'Supply' is the taxable event under GST. With regard to the levy of GST on recovery of compensation or forfeited amount depends upon the "test of supply" i.e., so one has to satisfy that recovery of compensation/forfeited amount itself is a supply, then only GST could be levied on it in terms of the insertion of sub-clause (1A) in Section 7 of the CGST Act read with omission of sub-section (d) of Section 7(1) of the CGST Act (vide Central Goods and Services Tax (Amendment) Act, 2018 w.e.f. July 1, 2017.

The moot question arises here, whether amount forfeited on account of breach of sale of land agreement taxable under GST? This question is answered by the Authority for Advance Ruling Gujarat.

Advance Ruling:

In Re: Fastrack Deal Comm Pvt. Ltd, vide Advance Ruling No. GUJ/GAAR/R/58/2020, dated 30-07-2020.

Brief facts of the Case:

M/s Fastrack Deal Comm Pvt Ltd is a company registered under GST filed an application for Advance Ruling. The applicant want to sell factory land to Mr. B and after entering into a sale agreement to sell a factory land to a "Mr. B" for a consideration didn't receive 80% of the value of consideration due to which has filed the current application seeking clarification of whether 20% the amount forfeited on account of breach of agreement of sale of land is liable to GST or not.

Accordingly, an applicant sought advance ruling on the following question:

1. Whether the amount forfeited by Fastrack will attract GST?
2. Who will be considered as Service Receiver and Service provider?
3. When sale of land is not treated as supply as per Schedule III of GST Act, 2017, whether forfeiture of advance pertaining to sale of land will be treated as supply and accordingly attract GST?

Submission of the Applicant:

The applicant submitted that Schedule III to the CGST Act 2017 pertains to "ACTIVITIES OR TRANSACTIONS WHICH SHALL BE TREATED NEITHER AS A SUPPLY OF GOODS NOR A SUPPLY OF SERVICES". Para 5 of Schedule III states that,

"5. Sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building."

Further, submitted that Schedule II of CGST Act, 2017 pertains to "ACTIVITIES TO BE TREATED AS SUPPLY OF GOODS OR SUPPLY OF SERVICES". Clause (b) of para 5 of Schedule II states that,

5. Supply of services

(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier.

The applicant's submissions is that the amount of Rs. 20 lacs has forfeited on account of sale of land and as per Schedule II & Schedule III of CGST Act, 2017, sale of land is an activity or transaction, which is treated as, neither supply of goods nor service. Therefore, they have claimed that such transaction is not liable to GST.

Findings and Discussion:

The applicant contention is not tenable because he is of the view that the forfeited amount received by him is on account of sale of land. Applicant has received money not on account of sale of land but on account of non fulfillment of conditions as stipulated in the agreement by the prospective customer. Hence the said income of Rs. 20 lacs of the applicant is not due to sale of factory land but it is due to breach of condition of contract by Mr. B. It can be termed as a consideration to the applicant for "refraining or tolerating or doing an act" of Mr. B to not comple te the transaction, which Mr. B (customer) had agreed in terms of contractual obligations.

As per Section 7(1) (d) of the CGST Act'2017 'the activities to be treated as supply of goods or supply of services as referred to in Schedule-II are covered under the scope of supply of goods and services. Clause 5(e) to Schedule II to CGST Act 2017, declares that 'agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act' shall be treated as s upply of service. The amount, which was received from Mr. B and forfeited by the applicant, was a part of the terms and condition of an agreement held between the applicant and Mr. B (customer).

Thus, the appellant has refrained from taking subsequent action/ tolerated an act of the Mr. B (customer), for which consideration has been received by hm. The purpose of payment of amount is an act of tolerance in the sense that when there is breach of the contract, the appellant

is put to certain hardships, which he tolerates in return of the payment received as advance being forfeited. Therefore, the impugned transaction is also a 'supply' under the provisions of the CGST Act and therefore taxable. In view of the above, the amount forfeited/ received by applicant is covered under supply of service as per clause 5(e) of Schedule II of CGST Act, 2017 and therefore, liable to GST.

Ruling:

The amount forfeited / received by the applicant is covered under supply of service as per clause 5(e) of Schedule II of CGST Act, 2017 and therefore, liable to GST. Conclusion: It may be referred to a similar view has been taken by the Hon'ble Gujarat AAR, in the matter of M/s. Dholera Industrial City Development Project Ltd. [Advance Ruling No. GUJ/GAAR/R/2019/06, decided on March 4, 2019] wherein it was held that Applicant is liable to collect GST on amount recovered from contractors on account of breach of conditions specified in the contract and the transaction shall be treated as supply of services. Moreover, as violation charges are payable by the contractors, the same are required to be treated as consideration. Therefore, the transaction is liable to GST. Thus, it is pertinent to mention that the word consideration under GST has been defined under Section 2(31) of the CGST Act, 2017 and consideration means in relation to the supply of goods, or services or both includes any payment made or to be made for the inducement of the supply of goods or services and the monetary value of any act or forbearance in respect of supply of goods or services. Hence, it is observed that, there is no positive act of supply of services between the parties and there is no agreement between the parties to cause loss by breaching terms and conditions of an agreement for a consideration. The expression 'to tolerate an act' relates to situations where a person commissions another person to do or commit a particular act for a consideration. The payment of compensation or forfeiture of advance is a condition of contract and not a consideration for supply of goods or services in the nature of forbearance or tolerating an act. It needs further clarification by the GST Council or the Government to levy GST on forfeited advance amount, which is not a consideration on account of supply of goods or services.

TDS AND TCS UNDER GST

PURNA CHANDRA HOTTA, Advocate

TDS and TCS under GST is an acronym for tax deduction at source and tax collection at source. These terms are even present under the Income Tax law. TDS and TCS under GST came into effect from 1st October 2018.

TDS refers to the tax which is deducted when the buyer of goods or services, such as government departments, makes payments under a business contract. On the other hand, TCS refers to the tax which is collected by the electronic commerce operator when a seller supplies some goods or services through its website and the payment for that supply is collected by the electronic commerce operator.

TDS under GST: Basics and Applicability

Who is liable to deduct TDS under GST?

- A department or an establishment of the Central Government or State Government; or
- Local authority; or
- Governmental agencies; or
- Such persons or category of persons, notified by the Government.
- Public sector undertakings, or
- A society established by the Central or any State Government or a Local Authority and the society is registered under the Societies Registration Act, 1860, or
- An authority or a board or any other body which has been set up by Parliament or a State Legislature or by a government, with 51% equity (control) owned by the government.

What is the rate of TDS to be deducted under GST?

The rate of TDS notified under the GST laws is 2% (1% CGST+1% SGST or 2% IGST) on the payments made to the seller of taxable goods or services

Is there any limit for deducting TDS under?

If the total value of supply under a contract exceeds Rs 2.5 lakhs then the person/entity would be liable to deduct TDS.

What is the time limit for payment of TDS?

The deductor would be liable to make the payment of TDS by the 10th day of the next month in form GSTR-7. For example, an 'X' department of the Central Government deducts TDS @2% from 'Y' on 5 March 2021, then it is liable to make payment by 10 April 2021

Impact of TDS under GST on Government civil contractors

The Indian government, on average, gives out more than 10,000 civil contracts every year throughout the country. The contract for constructing/repairing the national highways average more than Rs.100 crores.

These contracts are acquired by big construction companies and then sub-contracted to smaller firms and then again further sub-contracted to another small firm. This loop will face problems due to GST and in particular due to the TDS liability.

The government would need to deduct TDS from the contractor which would ensure tax compliance by the contractors and all the other sub-contractors. Currently, many small civil/labour contractors do not fulfil tax compliance. Under GST it will be imperative for them to get registered and fulfil tax compliance.

For example, M/s ABC Ltd. got a contract for repair work on an 800-meter road by the government for Rs 10 lakhs. The company outsources work to M/s XYZ Ltd. which is further outsources it to a small civil or labour contractor M/s DEF & Associates.

Under the earlier regime, M/s DEF & Associates would not have registered under service tax and VAT but now he would need to register under GST for claiming the ITC credit. The purpose of inserting the TDS provision under GST (Section 51 of the CGST Act) is to ensure tax compliance by the unorganized sectors such as the construction industry.

TDS rule will help in achieving transparency in the operations of government contracts and tax compliance.

TCS in GST for the e-Commerce Sector: Compliance in Gist

Section 52 has been inserted under the CGST law for all e-commerce aggregators to bring TCS in GST. e-Commerce aggregators are made responsible under the GST law for deducting and depositing tax at the rate of 1% from each transaction.

Any dealers or traders selling goods or services online would get the payment after deduction of 1% tax (0.5% CGST+ 0.5% SGST or 1% IGST).

It is a significant change that has increased the compliance and administration cost for online aggregators like Flipkart, Snapdeal, Amazon, etc. They would need to deposit the tax deducted by the 10th day of the next month in form GSTR-8.

All the traders or dealers selling goods or services online would need to get registered under GST for claiming the tax deducted by e-commerce operators, even if their turnover is less than the threshold turnover limit notified for GST registration.

For example, Mr Vinay Dua is a trader who sells his ready-made clothes online on Amazon India. He receives an order for Rs 10,000, inclusive of tax and commission. Amazon charges a commission of Rs 200. Further, there is a return worth Rs 1,000. Amazon would, therefore, need to deduct 1% tax (TCS) on the amount, excluding sales returns (Rs 1,000), but including the

money paid as a commission (Rs 200) and GST. Amazon would thus be deducting TCS in GST at Rs 90 (1% of Rs 9,000) on net sales value.

Impact of the TCS in GST on e-Commerce Operators

Online sellers like Amazon, Flipkart, Snapdeal, etc had to make certain changes in their online payment process and administration or finance department to implement the TCS in GST.

They must register under GST in every state in which they operate. The ERP systems have to be well integrated to apply these provisions in the day-to-day businesses smoothly.

On the other hand, the e-tailers or sellers must compulsorily register under GST for operating on such e-commerce platforms. Moreover, the working capital of these sellers supplying through an e-commerce operator will be blocked until they file their return and claim the excess taxes paid.

Benefits of TDS and TCS under GST

TDS and TCS under GST have numerous benefits. Both TDS and TCS under GST were introduced by the government for strengthening regulation on tax evaders. Sections 51 and 52 of the CGST Act respectively covers the provisions of TDS and TCS under GST.

From a deductee or supplier's standpoint, there will an automatic reflection in his electronic ledger once the deductor files his/her returns under the TDS system. The deductee can claim credit in his electronic cash ledger of this tax deducted and use it for payments of other taxes, at his convenience.

TDS majorly helps in bringing the unorganised sectors to comply with the tax provisions and keeps frauds at bay.

Likewise, TCS in GST regulates the online sellers, keeps a check on the transactions and ensures timely deposit of tax with the government.

DIFFERENCE BETWEEN TDS IN INCOME TAX AND TDS IN GST

TDS stands for Tax Deducted at Source, and it is a mechanism used by the government to collect tax at the time of transaction rather than at the end of the financial year.

The main difference between TDS in income tax and TDS in GST are:

TDS under GST1 Deduct or Every person who is making the specified payments mentioned under the Income Tax. However, individual or HUF whose books are not required to be audited is exempted from deducting TDS.

1. Deductor:Every person who is making the specified payments mentioned under the Income Tax. However, individual or HUF whose books are not required to be audited is exempted from deducting TDS. The detectors specified in the GST Act are as under :

    i) Central Government or State Government (ii) Local authority (iii) Governmental agencies (iv) Other Notified persons.

2 **Deductee :** The Receiver of the payment shall deduct TDS.The supplier of taxable goods or services or both shall deduct the TDS.

3 **Taxability arises on:** If the amount of payment increases the threshold amount specified under particular sections of the Income Tax Act, 1961 then only taxability shall arise. If the total value of supply under a contract of taxable goods or services or both, exceeds Rs. 2,50,000/- then TDS is required to be deducted.

4 **Rate of Tax :** The rate of tax differs as specified under different sections. It may also depend upon the nature of the expense, Foreg.

- U/s 194J - TDS to be deducted @ 10% on the technical/professional services,
- U/s 194DA - TDS to be deducted @ 1% on Premium paid for any life insurance policy etc.The Rate of tax for intra-state supply is @ 2% [i.e. 1% for CGST & SGST/UTGST component each] & for inter-State supply it is @ 2% [as IGST].

5 **Registration:** As and when the liability to deduct TDS arises then it is necessary to take the Registration. Provision of Compulsory registration is there for all the deductors of TDS. Further, if they are already registered under GST then also separate registration is required as a TDS deductor.

6 Payment Generally, the 7th day of the next month is the due date for payment. However, for the month of March, the date of payment is 30th April* For Governmentdeductors it is 7 April. The due date for payment is 10th of the next month.

7 **Return :** The various types of returns are 26Q, 24Q, 27Q etc.The TDS Return is filled in FORM GSTR-7.

8 **Credit :** The amount of TDS deducted during the year reflects in Form 26AS. Further, the credit of TDS can be taken while filing the ITR.The amount of TDS deducted would be available in FORM GSTR 2A/4A and credited in receiver's electronic cash ledger.

9 **Certificate:** TDS certificates are issued by deductor (Payer) to the deductee (Payee) from Dept website. Examples of TDS Certificates are Form 16, Form 16A, Form 16 B and Form 16 C.The deductor shall issue the deductee a certificate in FORM GSTR 7A.

10 Interest and late fees Late fees is levied amounting to Rs.200 per day but shall not exceed the amount of TDS. If the certificate is not issued within 5 days of crediting then the deductor shall pay a late fee of Rs. 100/- per day under CGST Act &Rs. 100/- per day under SGST/UTGST Act respectively. However, the maximum amount shall not exceed Rs.5000/-.

In summary, while both TDS in income tax and TDS in GST are mechanisms for the government to collect tax at the source, they have different applicability, rates, registration, deduction, utilization, and compliance requirements.