
“POSSIBLE AREA OF LITIGATIONS IN GST ARISING DURING COVID PERIOD”

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COVID 19

- These are tough times for businesses
- Tough times need creative ideas
- Out of box thinking
- Communication
- Coordination and cooperation

Issues Covered

1. Rejection of Instalment for payment of tax application under Section 80 of the CGST Act
2. Non-Sanctioning/Withholding of Eligible Refund in case of Exports
3. Availment of Transitional Credit in GST-TRAN-1Form

In view of:

- i. Assessee favourable judgments and reading down of Rule 117 of the CGST Rules
- ii. Department favourable judgments and upholding of Rule 117 and 1A of CGST Rules
- iii. Retrospective effect given to the amendment in Section 140 brought vide Finance Act 2020
- iv. Judgement of Delhi High Court holding that amendment in Section 140 of the CGST Act has no effect on the ruling in the case of Brand Equity.
- v. Litigation Issue & Way Forward

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4. Issues arising in Anti-Profiteering
5. Cancellation of Contracts
6. Complete Denial of Input Tax Credit
 - i. ITC on Expired/obsolete Stock
 - ii. ITC on COVID precaution facility provided by organisation in office
7. Renegotiation of Prices payable or Post sale Discount to move stock in Market
8. Default in payment within 180 Days
9. Time Limit to issue Credit Notes & Debit Notes

1. Rejection of Instalments for payment of tax application under Section 80 of the CGST Act

- Issues
 - Issue of cash crunch and lack of working capital caused due to the COVID19 crisis
 - Section 80 of the CGST Act, gives discretion to the Commissioner to allow the application of the assessee for the payment of tax in instalments
 - However, being discretionary provision and there being ambiguity, applications are often rejected.
 - In many cases, the department is treating the statement of outward supplies in GSTR-1, as self assessed liability for rejection of application.
 - The assessee is unable to file the subsequent returns even if they want to because of the non availability of the feature on the GSTN.
 - Subsequent returns are not allowed to be filed on the GSTN Portal even if the application under Section 80 is accepted.
- Way Forward
 - Write an intimation letter to the authorities before filing of the GSTR-1, otherwise buyer don't get credit.
 - Don't file GSTR 3B and Intimate the tax liability through an intimation letter to safeguard arbitrary best judgment assessment.

2. Non-Sanctioning/Withholding of Eligible Refund in case of Exports

- Hon'ble Finance Minister has announced immediate relief to the assessee in form of expeditious disposal of export refunds during the COVID19 Crisis.
- However, department in large number of case is not disposing refund to the assessees.
- In large number of cases, the department is either withholding or rejecting the refund. Various cases are as follows:
 - i. Provisional Refund to the extent to 90% is not being sanctioned within the time limit of 7 days as prescribed by Section 54(6) of the Act read with Rule 91(2) of the Rules.
 - ii. In large number of cases, the refund is being rejected despite complete filing of the documents which are required under the Rule 89(2) of the Rules.
 - iii. Issues being faced due to Circular No. 125/44/2019 and Rule 90(3) of the CGST Rules
 - Circular and Rule provide for filing of fresh refund application if the deficiency memo has been issued

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- In some of the cases, even if the refund application has been filed within two years along with all the documents required under the Statute, however, deficiency memo has been issued even though all documents under Rule 89(2) has been filed
 - In such case, even when the documents are filed in continuation to the original refund application, however, the department as per Circular 125/44/2019 and Rule 90(3) are treating the additional document filing as fresh refund application and rejecting on the ground of time barred.
 - In such cases it is advised that when the deficiency memo is being issued on want documents which are not prescribed under Rule 89(2), assessee must pursue the original refund application instead of filing the fresh refund application.

iv. The GSTN Portal is not allowing to club two financial years for the purpose of filing refunds, despite Hon'ble Delhi High Court direction in WP(C) 621 of 2020 and despite the Circular No. 135/05/2020 specifically providing for the same.

3. Availment of Transitional Credit in GST TRAN-1Form

- i. Assessee favourable judgments and reading down of Rule 117 of the CGST Rules
 - Hon'ble Delhi High Court in Brand Equity v. UOI W.P.(C) No. 11040 of 2018 and Hon'ble Punjab High Court in Amba Industrial Corporation v. UOI CWP No. 8213 of 2020 by reiterating the previous judgments ended the battle being fought by the assesseees in order to claim the transitional credit, and:
 - read down Rule 117 of the CGST Rules in so far as it prescribes time limit on the grounds that:
 - GST Act does not completely restrict the transition of credit in the GST regime by a particular date
 - Time limit of 90 days as provided under Rule 117 of the CGST Rule is not sacrosanct.
 - Classification created by sub-rule 1A of Rule 117 held to be arbitrary, vague, unreasonable & violation of Article 14 of the COI
 - ITC is vested right and protected under Article 300A of the COI
 - held that period of 3 years shall apply for the purpose of limitation

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ii. Department favourable judgments and upholding of Rule 117 and 1A of CGST Rules

- Hon'ble Bombay HC in Nelco Limited v. UOI W.P No. 6998 of 2018, Hon'ble Rajasthan HC in Shree Motors v. UOI No. 440/2020 and Hon'ble Allahabad HC in Ingersoll Rand Technologies v. UOI Writ Tax No. 1120 of 2019, decided in favour of the department upholding the validity of Rule 117 and sub-rule 1A. The Decision arrived by the Bombay HC on the ground:
 - Section 164 of the GST Act empowers the rule making power of the Government to prescribe time limit for filing GST TRAN-1
 - Transitional credit is concessional right and not vested right

iii. Retrospective effect given to amendment in Section 140 giving power to the Government to prescribe time limit within which the Form TRAN-1 can be filed

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iv. Judgement of Delhi High Court holding that amendment in Section 140 of the CGST Act has no effect on the ruling in the case of Brand Equity.

- Delhi HC in the case of SKH Sheet Metals Component v. Union of India and Ors W.P.C. 13151 of 2019 has ruled in favour of the assessee holding that the retrospective amendment does not have any effect on the ruling of Brand Equity.
- The Grounds which still make the judgment of Brand Equity as effective and as discussed by the Court are:
 - Arbitrary distinction of timelines under Rules 117 & 117 (1A)
 - Input Tax Credit is a vested right of the Petitioner and it is protected under Article 300A of the Constitution of India
 - Procedural timeline for TRAN-1 are directory and not mandatory
- Special Leave Petition with Diary No. 11526 of 2020 has also been filed by the Department against the judgment of the Hon'ble Delhi HC and stay has been granted by the Supreme Court.

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v. Litigation Issue & Ways Forward

- Supreme Court has dismissed SLPs on a few occasions earlier, arising out of Assessee favourable judgment of High Courts; (Adfert Technologies- Supreme Court)
 - Judgements of High Court decided on the ground that assessee could not produce evidence of attempting or facing technical glitches
 - Individual Petitions were allowed
- Supreme Court staying the judgment of *Brand Equity* since the judgment allowed all the assessee to file the TRAN-1, moreover it decided the validity of Rule 117 and 117(1A)
- Conflicting views of various Hon'ble High Courts:
 - Assessee favourable judgments of Hon'ble High Courts
 - Department favourable judgment of Hon'ble High Courts
- Ways Forward:
 - Option to the assessee to file the individual Writ Petitions and obtain relief.

4. Issues arising in Anti-Profiteering Law

- There are no rules/ method for computation
- Anti – profiteering authority has again became active
- All accounting methods for computing profit have been put at bay
- Anti profiteering authority is comparing the ratio of ITC to turnover pre and post GST – it is a makeshift method and is prone to errors of computation
- Several constitutional issues in anti profiteering mechanism
- Later denial of utilisation of GST (w.e.f. 01.04.2019) – hence if GST ITC taken for computing profiteering, then it is incorrect
- They are not allowing benefit of profit already transferred
- Agreeing that the computation is not final, still going on with aggressive calculation
- Imposing penalty for periods prior to the date when penalty provisions notified

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- Earlier certain assesseees have accepted the computation and paid the same to avoid further litigation. - But today Cashflow is a bigger issue with Industries such as Real Estate.
- Way forward
 - Proper representation before the authority
 - Our own figures to be given with proper explanation
 - Their formula to be applied with clear statement that we don't agree with the formula but calculating on their insistence
 - Must say that these are provisional figures, and would be finalised upon completion
- Making confidential data – public
 - Delhi HC stayed – W.P.(C) 9248/2019
- Delhi HC stay on depositing 10% in court
 - Sarvpriya Securities W.P.(C) 2445/2020

5. Cancellation of Contracts- Refund of Tax Paid

- If service is not rendered, advance tax to be refunded
- Article 265: no tax can be collected save by authority of law
- Section 54(8)(c) of CGST Act
- this is not a case where Credit note can be issued as contemplated in S. 34 –
 - “....the taxable value or tax charged in that tax invoice is found to exceed the taxable value or tax payable in respect of such supply, or where the goods supplied are returned by the recipient”
- It is well settled that no taxes can be levied unless the taxable event is attracted

6. Complete Denial of Input Tax Credit

i. ITC on Expired/obsolete Stock

- Due to lockdown Stock of few Industry/ Suppliers have been expired such as Packed Food Products.
- Whether sale of same as Scrap or disposing off by throwing it in Dustbin would cover under S. 15(5)(h) - Destroyed or Written off.
 - **AS & Ind AS -2:** Inventory to be written-down to net realisable value and shall be recognised as an expense in the period the write-down or loss occurs.
- Will not covered under expression - Disposed of by way of gift or free sample

ii. ITC on COVID precaution facility provided by organisation in office

- Sanitizer, Masks, PPE Kits
- No Personal Consumption - will not cover under 17(5)(g)
- 17(5)(b) – restricts credit of “Health Services”.

7. Renegotiation of prices payable or post sale discount to move stock in market

- GST is payable on “Transaction Value” which is the price actually paid or payable.
- Discount given after Supply – No adjustment if discount not agreed prior to supply [S.15(3)]
- Renegotiation of payable amount due to financial issues
- Discount in subsequent invoice
- Supply of Service – Taxes paid on issuance of invoice as per Time of Supply –
 - E.g. Rent of office Building: waived off by supplier (no Consideration?) vs. not paid by Recipient (i.e. Bad Debts)

8. Default in payment within 180 Days

- Proviso to S.16(2):

*“...where a recipient **fails to pay** to the supplier of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, the amount towards the value of supply along with tax payable thereon within a period of one hundred and eighty days from the date of issue of invoice by the supplier, an amount equal to the input tax credit availed by the recipient shall be added to his output tax liability, along with interest thereon, in such manner as may be prescribed”*

- What if payment due date extended by Supplier?
- “Fails to pay” = Fails to pay when due for payment

9. Time Limit to issue Credit Notes & Debit Notes

- September of the Subsequent FY
- To be kept in mind to Settle down the invoice disputes or other adjustments related to FY 2019-20.

THANK YOU

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