

PANIPAT BRANCH OF NIRC OF ICAI



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The Institute of Chartered Accountants of India

Ya esa suptesu jagarti kamam kamam
Puruso nirmimanah |
Tadeva sukram tad brahma
tadevamrtamucyate |
Tasminlokah sritah sarve tadu natyeti
Kascan | etad vai tat | |

य एष सुप्तेषु जागर्ति कामं कामं
पुरूषो निर्मिमाणः ।
तदेव शुक्रं तद् ब्रह्म तदेवामृतमुच्यते ।
तस्मिंल्लोकाः श्रिताः सर्वे तदु नात्येति
कश्चन । एतद् वै तत् ॥

That Person who is awake in those that sleep, shaping desire after desire, that, indeed is pure.

That is Brahman, that, indeed, is called the immortal. In it, all the worlds rest and no one ever goes beyond it.

This, verily, is that, kamam kamam: desire after desire, really objects of desire.

Even dream objects like objects of waking consciousness are due to the Supreme Person.

Even dream consciousness is proof of the existence of the self.

No one ever goes beyond it: of Eckhart: 'On reaching God all progress ends.'

Source: Kathopanishad

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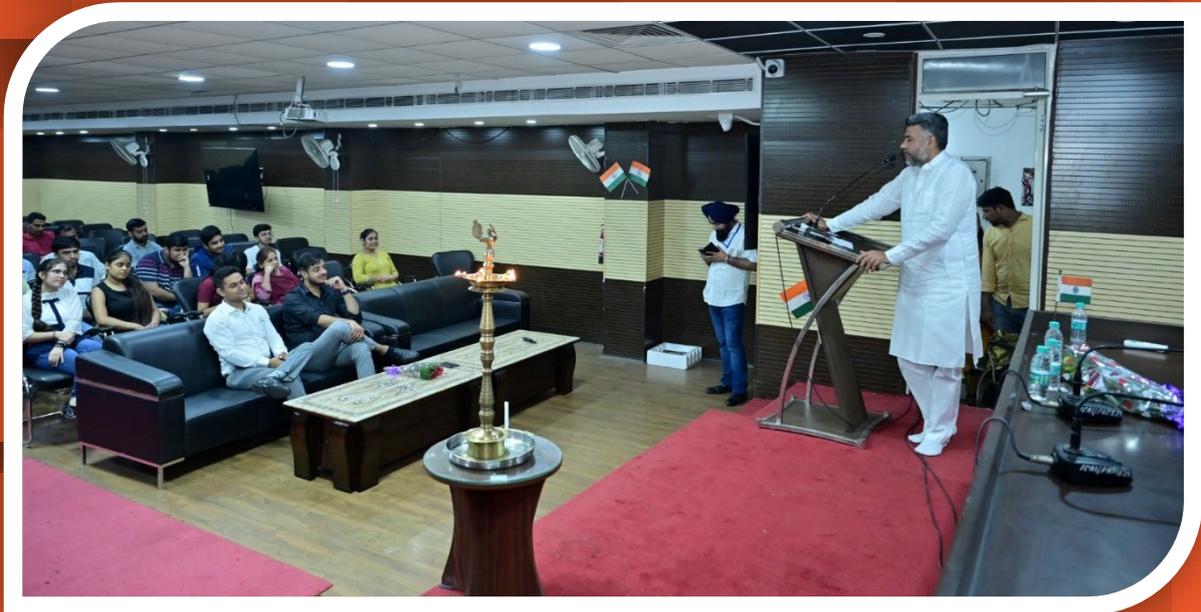
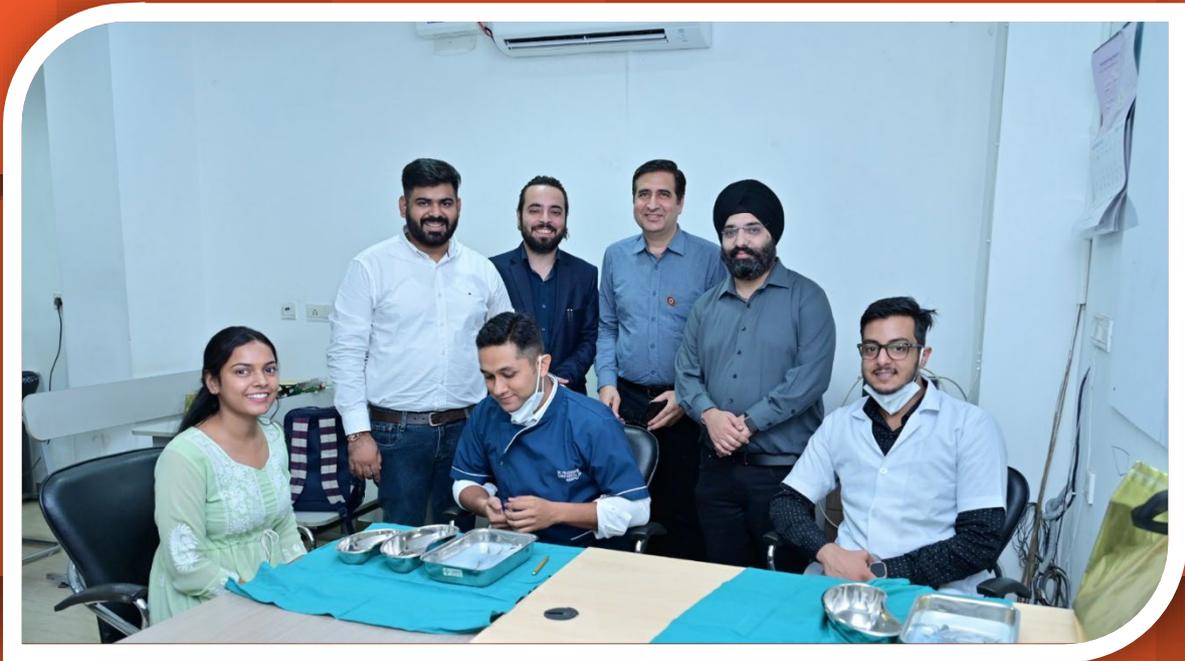
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ICAI cares Nurturing Health Saving Lives (Health Checkup & Awareness About CPR)

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GST CASE LAW COMPENDIUM

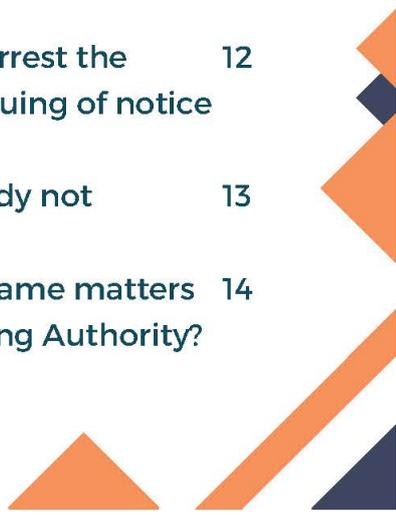


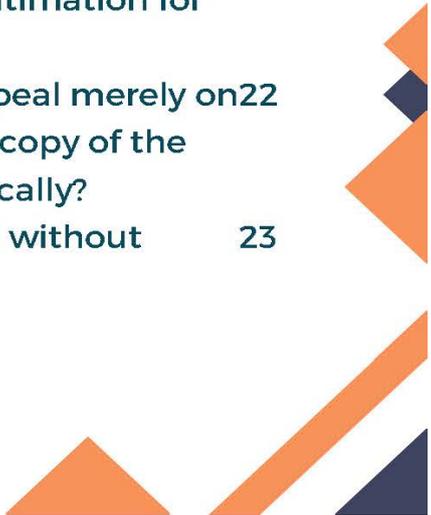
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Whether ITC can be denied to the recipient without conducting a proper investigation of the supplier?

No, the Honorable Calcutta High Court in **Suncraft Energy Private Limited and Another v. The Assistant Commissioner, State Tax [MAT 1218 of 2023 dated August 02, 2023]** set aside the order of reversing excess credit availed in Form GSTR-3B as compared to Form GSTR-2A and held that the demand notice issued to the assessee for reversing the ITC could not be sustained without proper inquiry into the supplier's actions.

The Honorable Calcutta High Court observed that the issuance of a demand notice on the recipient of service on account of a mismatch in Form GSTR-2A and Form GSTR-3B ITC cannot be sustained without any investigation being done at the end of the supplier whose invoices are not reflecting in Form GSTR-2A. Further opined that only in exceptional cases, such as collusion between the recipient and the supplier or the supplier's absence or closure of business, proceedings can be initiated against the recipient.

The Honorable Court relied upon the Judgment of the Honorable Supreme Court in *Union of India v. Bharti Airtel Ltd. and Ors. (2022) 4 SCC 328* wherein the court held that Form GSTR-2A is only a facilitator for taking a confirmed decision while doing such self-assessment. Non-performance or non-operability of Form GSTR-2A or for that matter, other forms will be of no avail because the dispensation stipulated at the relevant time obliged the registered persons to submit the return based on such self-assessment in Form GSTR-3B manually on electronic platform.

Author's Comment:-

This is a welcome and a landmark judgment by the Honorable Court. Very rightly, it has been ordered that without launching any investigation into the defaulting supplier, no demand can be raised from the recipient. If the parallel proceedings are carried out on both the defaulting supplier and recipient, then it would lead to double taxation and violate Article 265 of the Constitution of India.

Important to note that for such issues, no demand can be raised u/s 61 of the CGST Act, 2017 i.e. scrutiny of returns.

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Whether criminal proceedings can be initiated under IPC even in cases where GST law prescribes punishment for the same offense?

Yes, The Honorable Jharkhand High Court in **Anupam Kumar Pathak v. The State of Jharkhand and Ors. [W.P. (Cr.) No. 141 of 2022 dated July 04, 2023]** held that the FIR logged and criminal proceeding initiated under Sections 120B/406/ 420/471 of the Indian Penal Code (“IPC”) cannot be quashed merely because of the reason that the offense is covered under GST law.

The Honorable Jharkhand High Court relied upon the judgment of the Honorable Supreme Court of India in **Jayant and Others v. State of Madhya Pradesh [(2021) 2 SCC 670]** wherein the court held that in case where the violator is permitted to compound the offenses on payment of penalty as per of Section 23A(1), considering the Section 23A(2) of the Mines and Minerals (Development and Regulation) Act, 1957 (“the MMDR Act”), there shall be no further proceedings against the offender in respect of the offenses punishable under the MMDR Act or any rule made thereunder so compounded. However, the bar under Section 23A (2) of the MMDR Act shall not affect any proceedings for the offenses under the IPC, such as Sections 379 and 414 of the IPC and the same shall be proceeded without any restriction.

The Honorable Court held that the dispute in the case is related to the forging of invoices and bills without any transaction and it was found that there was such offence committed by the Petitioner. Since there is no bar for prosecution under IPC merely because the provisions of GST law prescribe punishment.

Author's Comment:-

Very rightly the Honorable Court has held that there is no such bar in the statute to preclude from initiating proceedings under the Indian Penal Code (IPC).

Section 131 of the CGST Act, 2017, Chapter XIX states that any penalty imposed or confiscation made under the GST Act will not prevent proceedings under any other law for the time being in force.

It is a herculean task to prove the allegations under any other law, without bringing home the allegations levied under the GST law. This law is too complicated for other agencies like the police to frame the charges.

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Whether the Revenue Department confiscate the goods of the assessee based on the proceedings initiated against the supplier of the assessee?

No, The Honorable Andhra Pradesh High Court in **M/s Arhaan Ferrous and Non-Ferrous Solutions Pvt. Ltd. v. Deputy Assistant Commissioner [Writ Petition No.15481 of 2023 dated August 03, 2023]** held that the assessee is responsible only to the extent of establishing that he bonafide purchased goods from the supplier for valuable consideration after verifying the GST registration of the said supplier on the GST portal.

The Honorable Andhra Pradesh High Court opined that it is clear that the proceedings for the detention of goods can be initiated while the goods are in transit in contravention of provisions of the CGST Act. In the instant case, the Respondent may initiate proceedings against the Supplier under Section 130 of the CGST Act because of his absence at the given address and not holding any business premises at the provided address. However, the Respondent cannot confiscate the goods of the Petitioner merely on the ground that the Petitioner happens to purchase goods from the said Supplier.

The Honorable Court noted that the claim made by the Petitioner of purchase of goods is highly doubtful as the physical existence of the said supplier is questioned. Thus, the Respondent can initiate proceedings under Section 129 of the CGST Act against the Petitioner and conduct an inquiry by allowing the Petitioner to establish their case.

Further held that the Petitioner's responsibility will be limited to the extent of establishing that he bona fide purchased goods from the Supplier for valuable consideration after verifying the GST registration of the said supplier on the GST portal.

Author's Comment:-

Confiscation is not an emergency proceeding, unlike seizure. Only the offending articles (liable to confiscation) can be confiscated. Every instance of non-payment of tax, even under special circumstances of section 74 does not support confiscation U/s 130.

SCN u/s 130 must be issued to the right person with an allegation supported by evidence that identified goods "Offending Articles" are liable to confiscation by showing how to ingredients listed in any of the clauses u/s 130 (1) are fulfilled.

Determination that any goods are "liable" for confiscation is an irreversible step.

In the present case, the goods being transported are duly recorded in books of accounts; therefore they cannot be under no circumstances regarded as "Secreted" and "Offending Articles" liable to be confiscated.

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Whether the loan facility provided exclusively to the credit card holder be considered a credit card service and thereby exigible for GST?

No, The Honorable Calcutta High Court in **Ramesh Kumar Patodia v. City Bank N.A. and Ors. [APO 10/2023 with WPO 547/2019 dated July 25, 2023]** held that the loan facility availed by a credit card holder, where being a credit card holder is a condition for eligibility, is not considered a credit card service. Instead, it is treated as a standard loan which is exempt under GST.

The Honorable Calcutta High Court observed that the agreement between the Bank and the Petitioner cannot be enforced in light of a well-settled principle of law that mere acceptance of a condition prohibited by law does not make the said condition, enforceable in law and noted that the loan was advanced by a cheque and not by using the credit card. Being a credit card holder was merely an eligibility criterion for availing of such a loan facility. The advanced loan and its repayment along with interest were an altogether separate transaction from the credit card facility offered by the Bank.

Further noted that the Banks have discretion whether to give a loan to a credit card holder but once it chooses to grant a loan to a credit card holder it has to treat the loan similar to other types of loan, and cannot treat the same as credit card facility and charge GST on it.

The Honorable Court held that the transaction of granting of loan was a service that could not be termed as a credit card service and thus not eligible for the GST being exempt as per Sl. No. 28 of the Notification.

The court directed the Bank and other Respondents to refund the IGST paid by the Petitioner.

Author's Comment:-

This is a remarkable judgment by the Honorable Court. The Honorable Supreme Court in Govind Saran Ganga Saran's [2022 – TIOL – 589 – SC – CT] case stated that 4 pillars of taxation together constitute the cornerstone for the levy.

In this particular scenario, the tax must not have been collected. The credit card holders who availed loan facility must revisit their statements and check if the bank has charged GST on such interest amount or not. If charged, the refund must be claimed

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Whether Section 129 (1)(b) of the UPGST Act can be invoked when the owner of the goods comes forward?

No, the Honorable Allahabad High Court in **M/s. Margo Brush India & Ors. v. State of U.P [Writ Tax No. 1580 of 2022 dated January 16, 2023]** set aside the penalty order passed under Section 129(1)(b) of the Uttar Pradesh Goods and Services Tax Act, 2017 (“the UPGST Act”) by the adjudicating authority and held that penalty under Section 129(1)(b) of the UPGST Act was unjustified and untenable since the owner has come forward for payment of penalty.

The Honorable Allahabad High Court observed that the Petitioner was present and had accepted the ownership of the seized goods and held that in light of the facts of the case and the Circular, the imposition of a penalty under Section 129(1)(b) of the UPGST Act was not justified, as the owner of the goods comes forward for payment of penalty. Only a penalty as per Section 129(1)(a) of the UPGST Act can be levied which is an amount equivalent to 200% of the tax payable.

Author's Comment:-

It is a case of gross violation of the due process laid in the statute and unwarranted abuse of authority to confirm demand u/s 129(1)(b) of the Act. Moreover, the CBIC Circular dated December 31, 2018, has been issued to clarify to treat the consignor as a deemed owner in case the goods are accompanied by invoices. Since, in this case, the Petitioner was a consignor who accepted the ownership of goods, the penalty order passed under Section 129(1)(b) of the UPGST Act was not correct.

A similar judgment has been passed by the Honorable Allahabad High Court in case of **Bhawani Traders Pvt. Ltd. v. State of Uttar Pradesh [Writ Tax No. 854 of 2023 dated July 24, 2023]** wherein it is held that if the assessee comes forward and is willing to pay the penalty for the detained goods, the Revenue Department cannot issue penalty order under section 129(1)(b) of the Central Goods and Services Tax Act, 2017.

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Hostels and PG accommodation services attract 12% GST

The AAR, Karnataka, in the case of **Srisai Luxurious Stay LLP [Ruling No. KAR ADRG 25/2023 dated JULY 13, 2023]** ruled that hostel and PG accommodation cannot be considered equivalent to residential accommodation and thus such services are not eligible for exemption and accordingly are exigible to GST @12%.

The AAR Karnataka concerning the exemption of services observed that neither the service exemption notification nor the Central Goods and Services Tax Act, 2017, and rules made there under define the term 'residential dwelling'. However, it was observed that the education guide on taxation services interprets 'residential dwelling' based on normal trade parlance to mean a residential accommodation intended for permanent stay, excluding guest houses or lodges excluding places meant for temporary stay.

Held that the accommodation services provided by the Applicant are akin to the guest house and lodging services, and thus do not qualify as 'residential dwellings' and accordingly, not eligible for exemption under Sl. No. 12 of the service exemption notification.

Regarding additional services offered by the Applicant, the AAR observed that services such as meals and other facilities are optional and not integral to the main accommodation service and the Applicant is liable to pay GST on such services.

Regarding payment of tax under RCM the authority firstly observed that the Applicant has taken the building on rent from the owner of the building (landlord) and carried out business from such building and Stated that a new entry 5AA has been inserted vide notification no. 05/2022- Central Tax (Rate) dated July 18, 2022, in the principal notification no. 13/2017- Central Tax (Rate) dated June 28, 2017, which states that the registered recipient would be liable to pay GST under RCM for 'service by way of renting of a residential dwelling to a registered person'.

Held that the Applicant who is a registered person is liable to pay GST under RCM on the rental payment made to the landlord of the residential property.

Author's comments:

A similar ruling was passed by the AAR, Uttar Pradesh in the case of M/s V S Institute & Hostel Private Limited [AR No. UP ADRG -26/2023 dated May 08, 2023]. Although the ruling pronounced by both the AAR is only binding on the Applicants and the officers pronouncing the ruling. However, this would certainly impact the hostel industry.

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Whether the cash that does not form part of the stock in trade of the business can be seized during search proceedings under GST?

No, The Honorable Supreme Court in the matter of **State Tax Officer v. Shabu George (IB) Special Leave Petition (SLP) No.27670/2023 dated July 31, 2023**] dismissed the SLP filed by the Revenue Department against the order of the Honorable Kerala High Court ordering the Revenue Department to release the cash seized during the search since such cash does not forms part of stock in trade of business.

The Honorable Supreme Court dismissed the appeal of the Revenue Department and held that the court is not inclined to interfere with the judgment and order of the High Court.

Author's Comment:-

It is important to note that even cash must be 'secreted' to qualify for the seizure but, more importantly, cash is not 'goods liable to confiscation' under section 130(1) but are 'things' which are considered "useful or relevant" by the Authorized Officer to carrying out "any further proceedings". What, therefore, can be the 'use or relevance' of cash to be seized? There is a popular, mysterious, and erroneous understanding that 'cash' is illicit if discovered in search proceedings. Officers tend to seize cash without even ascertaining to whom it belongs.

'Cash' seizure does not directly point to proceeds from unaccounted sales. That would have been easy but the Legislative wisdom is that (i) 'Evasion of tax is a must for proceedings under section 67 to be with the jurisdiction and lawful and (ii) No presumption flows in favor of the Revenue, especially, when cash may be treated to be 'things' and not 'consideration from supply'. After all, 'things' seized can only be if they are "useful or relevant" for that Authorized Officer in carrying out "any further proceedings".

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Whether communication to freeze a bank account be considered a valid attachment order under Section 83 of the CGST Act?

No, The Honorable Delhi High Court in **M/s. Redamancy World v. Senior Intelligence Officer [W.P. (C) 6208/2019 dated July 31, 2023]** held that the communication letter sent by the Directorate General of Goods and Services Tax Intelligence (“DGGI”) to the assessee’s bank and customers, directing them not to make payments for the goods supplied by the petitioner, was not legally authorized, being not issued in requisite Form DRC-22.

The Honorable Delhi High Court observed that no order in Form GST DRC-22 was issued to the petitioner under Section 83 of the CGST Act and the communication sent to various customers of the petitioner, restraining them from making payments for goods supplied by the petitioner, was without authority of law.

The Honorable Court noted that Section 83 of the CGST Act empowers the Commissioner to issue orders for provisional attachment of assets, including bank accounts, of the taxpayer only when necessary to protect the interests of Revenue. However, In the Present case, there was no specific noting in the files indicating that such action was necessary.

Author’s Comment:-

This welcome decision by the Honorable Delhi High Court and it comes to the resume of the taxpayers and once again the Rule of Law Stands tall against the over-passionate administration.

The Revenue Department has to understand that this kind of approach renders the due process “laid down in the statute superfluous, unnecessary, and nugatory, which is impermissible in the law.

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Whether the Revenue Department cancel GST registration from a retrospective date, even before the date of filing of an application for cancellation by Petitioner?

No, The Honorable Delhi High Court in the matter of **Ashish Garg v. Assistant Commissioner of State Goods and Services Tax [W.P.(C) 6652 of 2023 dated July 20, 2023]** held that although the Revenue Department has the discretion to cancel GST registration from a retrospective date but doing so without valid justification constitutes the arbitrary exercise of power.

The Honorable Delhi High Court noted that as per section 29 of the Central Goods and Services Tax Act, 2017 (“the CGST Act”), the Adjudicating Authority has the discretion to cancel the registration from a retrospective date, however, the said power cannot be exercised arbitrarily.

The Honorable Court observed that there is no material on record to justify such retrospective cancellation of GST registration by the Adjudicating Authority and opined that the Petitioner cannot be asked to file returns for the period after he had closed down his business.

Author’s Comment:-

This is an applaudable and much-needed judgment by the Honorable High Court of Delhi. Cancellation of registration from an earlier date, although, permitted u/s 29 of the GST Act, must not be resorted to arbitrarily. Such cancellation would lead to disruption of whole credit claims and hardships will be faced by the taxpayers who have already availed bonafide credit. If such extraordinary power has to be exercised by the Proper Officer, it must be well thought out, reasoned order based on documentary evidence in consensus with rule 21.

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Whether a purchasing dealer can be denied the benefit of ITC in cases where the supplier has collected the tax but not paid it to the government?

Yes, The Honorable Patna High Court in **M/s. Aastha Enterprises v. State of Bihar [CWJ 10395 of 2023 dated August 18, 2023]** held that ITC is like a benefit/concession and not a right extended to the assessee under the statutory scheme. The ITC to purchasing dealer will depend not only upon the collection by the seller but also the due payment by the seller to the Government and the burden of proof lies with the assessee to substantiate that the tax collected has been paid to the government by the supplier.

The Honorable Patna High Court observed that the claim of ITC raised by the Petitioner cannot be sustained when the supplier has not paid the tax amount to the Government, despite the collection of tax from the Petitioner. The Honorable Court noted that the burden of proof lies with the purchasing dealer to substantiate that the tax collected has been paid to the government by the supplier. This requirement underscores the statutory compliance aspect and safeguards the integrity of ITC claims. The court maintained that this condition cannot be viewed in isolation, it is an essential prerequisite for enjoying the benefit of ITC and relied upon the Judgment in *The State of Karnataka v. M/s Ecom Gill Coffee Trading Private Limited* [Civil Appeal No. 230 of 2023 dated March 13, 2023] wherein the Honorable Supreme Court held that to sustain a claim of ITC on purchases, the purchasing dealer would have to prove the genuineness of transactions by furnishing the details. Mere production of tax invoices would not be sufficient to claim ITC.

The Honorable Court opined that the statutory levy and the benefit of ITC conferred on the purchasing dealer depends not only upon the collection by the seller but also on the due payment by the seller to the Government and held that when the supplier fails to comply with the statutory requirement, the Petitioner cannot claim ITC and the remedy available to the Petitioner is only to proceed for recovery against the seller.

Author's comments:

Section 155 of the GST Act places the burden on them to prove about eligibility of ITC on the taxpayer. But, there is a difference between "Burden to Prove" and "Onus to Prove" under the Evidence Law. Once the taxpayer fulfills all the conditions of section 16(2) of the Act, the required "Burden to Prove" is discharged, and now "Onus to Prove" shifts onto the department to prove that ITC is ineligible.

In the present case, non-payment of taxes by the supplier i.e. Section 16(2)(c) is alleged. But care must be taken to ensure the mechanism of how a recipient can make sure such a condition is fulfilled, in the view of no facility to check.

This petition lacked persuasive arguments to substantiate the claim of ITC, although other Honorable High Court has divergent rulings on the same subject matter.

The ruling of the Honorable Court will add to litigation.

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Whether the Revenue Department have the right to arrest the Applicant without assigning any reason or without issuing of notice for Recovery of GST?

No, The Honorable Allahabad High Court in **Ravinder Nath Sharma v. Union of India** [Criminal Misc. Bail Application No. 26376 of 2023 dated July 10, 2023] granted the bail to the assessee on some conditions and held that the arrest was made without justifiable reasons and no GST recovery notice was issued.

The Honorable Allahabad High Court opined that the court has to keep in mind the nature of the accusation, the nature of the evidence, the character of the accused, the circumstances that are peculiar to the accused, his role and involvement in the offense, his involvement in other cases and reasonable apprehension of the witnesses being tampered with will have to be taken into consideration for granting bail.

The Honorable Court relied upon the judgment in Mahipal v Rajesh Kumar &Anr. [(2020) 2 SCC 118] wherein the Honorable Supreme Court held that at the stage of assessing whether a case is fit for the grant of bail, the court is not required to enter into a detailed analysis of the evidence on record to establish beyond reasonable doubt the commission of the crime by the Accused.

And held that the arrest was made without justifiable reasons and no GST recovery notice was issued.

Author's Comment:-

Punishment is the sentence awarded after the conclusion of the trial. The arrest of a Person is not the Commencement of sentence but preparatory to filing of complaint u/s 190(1)(a) of Cr.PC by GST Officer requesting magistrate to take cognizance of the offense involved and direct trial. There is a popular saying, "Jail is an exception, and bail is a norm". As per Section 69(1) of the GST Act, where the commissioner for goods and sufficient "Reason to Believe" require arrest is warranted, an arrest can be made.

Issuance of SCN u/s 74 for offense and detention u/s 69 for prosecution u/s 132 may be taken up in parallel proceedings independently.

Instructive words as per instruction No. 2/2022 – 23 dated (GST Investigation) 17 August 2022 are reproduced:-

"The occasion to arrest an accused during investigation arises when the custodial investigation becomes necessary or it is a heinous crime or where there is the possibility of influencing the witnesses or accused may abscond. Mere arrest can be does not mandate that arrest must be made."

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Supreme court disallows SLP, where alternative remedy not exercised by the assessee

The Honorable Supreme Court in **M/s. Vishwanath Traders v. Union of India & Ors. [Special Leave to Appeal (C) No(s). 15594 of 2023 dated August 04, 2023]** upheld the order of the Honorable Patna High Court wherein the high court held that extraordinary jurisdiction under Article 226 of the Constitution of India cannot be invoked where the assessee has alternate remedies available and he was not diligent in availing such alternate remedies within the stipulated time.

The Honorable Supreme Court upheld the order of the Honorable Patna High Court rejected the SLP and stated that the Petitioner delayed in approaching the Appellate Authority therefore, the High Court was justified in dismissing the writ Petition.

The Honorable Patna High Court dismissed the writ and stated that they did not find any reason to invoke the extraordinary jurisdiction under Article 226 of the Constitution of India, especially when the Petitioner had alternate remedies available and the Petitioner was not diligent in availing such alternate remedies within the stipulated time.

Author's Comments:

It's a trite law that the High Court has discretion to decide whether or not to accept a writ petition under Article 226 of the Constitution of India.

However, the Honorable Supreme Court in the case of **Magadh Sugar & Energy Ltd. v. State of Bihar LL 2021 SC 495** held that the existence of an alternate remedy does not bar the exercise of writ jurisdiction if the order is challenged for want of jurisdiction. The bench also noted that there are exceptions to the rule of alternate remedy arise, the court which are: (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged.

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Whether the Revenue Department issue SCN on the same matters that have already been adjudicated by the Adjudicating Authority?

No, The CESTAT, Ahmadabad, in **Neeraj Sharma v. Commissioner of Customs, Kandla [Customs Appeal No. 12056 of 2018-DB dated July 24, 2023]** set aside the order passed by the Adjudicating authority on that matter which is already been adjudicated and held such order as void-Ab-initio.

The CESTAT, Ahmadabad, in Customs Appeal No. 12056 of 2018-DB observed that the Impugned Order was already adjudicated by the Ld. Commissioner of Customs vide order-in-original No. 5/2013-14/CC(I)JNCH dated June 30, 2014, and is currently pending before the CESTAT, Mumbai. Held that the present order passed by the Revenue Department is ab initio void and illegal.

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Invoice value is the deemed open market value for supplies between distinct persons

The AAAR, Maharashtra, in the matter of **M/s Chepp India Private Limited [Order No.MAH/AAAR/DS-RM/02/2023-24 dated June 05, 2023]** held that the transaction between two GSTINs of the same person would be considered a lease transaction and accordingly taxable as a supply of services in terms of Section 7 of the Central Goods and Services Tax Act, 2017 ("the CGST Act") and since the recipient unit is eligible for full ITC the valuation may be done as per second proviso to Rule 28 of the Central Goods and Services Tax Rules, 2017 ("CGST Rules").

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Whether rejection of the refund applications solely based on a mismatch between GSTR-3B and GSTR-2A was justified?

No, the Honorable Delhi High Court in **M/s Shivbhola Filaments Private Limited. v. Assistant Commissioner of CGST [W.P.(C) 9742/2023 dated July 25, 2023]** restored the refund application rejected by the Adjudicating Authority and held that the assessee would not be left unheard.

The Honorable Delhi High Court observed that the rejection of the Petitioner's refund applications based on mismatches without providing them with an opportunity to reconcile and the discrepancies is deemed inappropriate and unfair and directed the Adjudicating Authority to review the Petitioner's submissions, explanation, and reconciliation statement and to issue a comprehensive and well-reasoned decision regarding the refund applications.

Author's Comment:-

This is an urgent need to understand that any mismatch between GSTR – 3B & GSTR – 2A figures does not mean any non-payment or evasion of tax. Yes, it can be a red flag for the Proper Officer to enquire deeply about the mismatch but the mismatch is not sufficient ground to impeach self-assessment of the taxpayer.

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Whether the penal interest and bounce charges collected by an NBFC attract service tax?

No, The CESTAT, Mumbai, in **M/s Bajaj Finance Ltd. v Commissioner of Central Excise and GST [Service Tax Appeal No. 90043 of 2018 dated August 07, 2023]** set aside the impugned order and held that the assessee is not receiving penal interest and bouncing charges as a consideration for tolerating an act. Thus, service tax cannot be demanded.

The CESTAT noted that the government had excluded the interest on delayed payment from the scope of payment of service tax as per clause (iv) to sub-rule 2 to Rule 6 of the Service Tax Rules, 2006 notified vide Notification No. 24/2012- S.T. dated June 06, 2012 and Relied upon the Judgment of CESTAT, Dehradun in **M/s Rohan Motors v Commissioner of Central Excise** wherein it was held that the bouncing charges are penal in nature and thus are not towards consideration of any service.

Author's comments:

The CBIC vide Circular No. 178/10/2022-GST dated August 03, 2022, has clarified that the fine or penalty imposed, for dishonor of a cheque, is a penalty imposed not for tolerating the act or situation but a fine, or penalty imposed for not tolerating, penalizing and thereby deterring and discouraging such an act or situation. This means thereby, the cheque dishonor fine or penalty is not a consideration for any service and thus, not taxable.

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Whether the Revenue Department have the authority to seize currency during search proceedings under Section 67 of the CGST Act?

No, The Honorable Delhi High Court in **Baleshwari Devi v. Additional Commissioner (Anti-Evasion), Central Goods and Service Tax [W.P.(C) 5056 of 2023 dated July 21, 2023]** held that the Revenue Department has no power to take possession of the personal assets without official seizure under the Central Goods and Services Tax Act, 2017 (“the CGST Act”).

The Honorable Delhi High Court noted that there is no dispute that the Respondent is required to act strictly by the provisions of the statute and the rules thereunder and the action of the Respondent in dispossessing the Petitioner or any of the family members of any of their assets in the proceedings under Section 67 of the CGST Act, without seizing the same, is illegal.

The Honorable Court held that the Respondent cannot continue with the possession of the currency collected from the Petitioner’s residence and opined that the assumption that the cash recovered from the locked room was in the possession of Seema Gupta (the Petitioner’s daughter-in-law) is ex facie erroneous.

Author’s Comments:-

It is important to note that even cash must be ‘secreted’ to qualify for the seizure but, more importantly, cash is not ‘goods liable to confiscation’ under section 130(1) but are ‘things’ which are considered “useful or relevant” by the Authorized Officer to carrying out “any further proceedings”. What, therefore, can be the ‘use or relevance’ of cash to be seized? There is a popular, mysterious, and erroneous understanding that ‘cash’ is illicit if discovered in search proceedings. Officers tend to seize cash without even ascertaining to whom it belongs.

‘Cash’ seizure does not directly point to proceeds from unaccounted sales. That would have been easy but the Legislative wisdom is that (i) ‘Evasion of tax is a must for proceedings under section 67 to be with the jurisdiction and lawful and (ii) No presumption flows in favor of the Revenue, especially, when cash may be treated to be ‘things’ and not ‘consideration from supply’. After all, ‘things’ seized can only be if they are “useful or relevant” for that Authorized Officer in carrying out “any further proceedings”.

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Whether delay in making a pre-deposit due to the attachment of the bank account, is a sufficient cause to condone the delay to entertain an appeal?

Yes, The Honorable Andhra Pradesh High Court in **M/s. S A Iron and Metal v. State of Andhra Pradesh and Anr. [W.P. No. 15490 of 2023 dated July 07, 2023]** set aside the order refusing to entertain an appeal on the ground of delay in filing of the appeal and held that it is not the length of the delay, but cause for delay which would be paramount consideration.

The Honorable Andhra Pradesh High Court observed that the expression 'sufficient cause' is adequately elastic to enable the Court to apply the law in a meaningful manner which subserves the ends of justice, while considering an application for condonation of delay, it is not the length of the delay, but cause for delay which would be paramount consideration. Further observed that when the bank account of the Petitioner is attached by the Respondent it is a relevant fact to consider the delay since the pre-deposit of 10% disputed tax at the time of filing of the appeal is mandatory and held that the language employed under Section 107(4) of the CGST Act and in the backdrop the factual and legal background of the case, the impugned order is to be set aside.

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Whether the Revenue Department pass a rectification order under Section 161 of the CGST Act without providing the opportunity to be heard to the Petitioner?

No, the Honorable Madras High Court in **M/s. Vadivel Pyro Works v. The State Tax Officer [W.P No.11143 of 2023 dated July 26, 2023]** set aside a demand raised by the Revenue Department on the ground that rectification order under section 161 of the Central Goods and Services Tax Act, 2017 ("the CGST Act") was passed without giving the opportunity of being heard to the assessee.

The Honorable Madras High Court held that before passing the order under section 161 of the CGST Act, the Respondent should have followed the proviso and granted a personal hearing to the Petitioner. Therefore, while passing the rectification order there was a violation of the principle of natural justice.

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Whether the claim of ITC through GSTR-3B justified since Form GST ITC-02 was not live on the common portal?

Yes, The Honorable Allahabad High Court in **M/s TikonaInfinet Private Limited v. State of U.P. [Writ Tax No. 859 of 2023 dated July 25, 2023]** set aside the demand raised on the ground that assessee instead of passing the Input Tax Credit (“ITC”) through Form GST ITC-02 transferred ITC through Form GSTR-3B and held that the stand of the Revenue Department was not correct since the Form ITC-02 was not live on the common portal.

The Honorable Allahabad High Court observed that the Form GST ITC-02 was not available on the GST Portal since the whole system was at the nascent stage during the initial months after its implementation on July 01, 2017, and opined that the Petitioner had to raise a proper grievance on the GST portal help-desk and ought to have waited for the relevant Form to go live on the GST portal instead of making illegal adjustment by use of the Form GSTR-3B of the Petitioner (transferor) and the TDN (transferee company).

Further opined that a mere shortage of working capital cannot be an excuse to bypass the legal procedure laid down under the law.

Held that the stand of the Respondent for rejecting the claim of the Petitioner in the wake of the admitted fact that the GST common portal was not online cannot be justified.

The Honorable Court set aside the Impugned order and stated that the Respondent had the liberty to pass a fresh order after considering the objections of the Petitioner and affording the opportunity of hearing, strictly by law.

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Whether the Petitioner files an appeal manually if the order was not electronically uploaded, especially when it is an undisputed fact that the assessee communicated the orders and had received the same manually.

Yes, The Honorable Gujarat High Court in **Britannia Industries Limited v. Union of India [Special Civil Application No. 14867 of 2022 dated August 07, 2023]** rejected the refund claim filed by the assessee on the ground that no appeal was filed against the refund rejection order.

The Honorable Gujarat High Court observed that Section 107 of the CGST Act which states that any person aggrieved by any decision or order passed under the CGST Act may appeal to the Appellate Authority within three months from the date on which the said decision or order is communicated to the person and noted that the Appellate authority has power to condone the delay in filing appeal if the Petitioner shows sufficient cause which prevented them from filing an appeal within three months, then Appellate Authority can allow a further period of three months.

The Honorable Court relied upon the Judgment of M/s. Meritas Hotels Pvt. Ltd. v. The State of Maharashtra [Writ Petition No.7793 of 2021 dated December 03, 2021], wherein the Bombay High Court observed that Rule 108 of the Central Goods and Services Tax Rules, 2017 (“the CGST Rules”) is no doubt, prescribes that the appeal has to be filed electronically, but it nowhere prescribes that the same is to be filed only after the order is uploaded on the GSTN Portal.

The Honorable Court held that merely because the order was not uploaded on the GSTN portal will not save the assessee’s time to file appeals especially when the recovery proceedings have already been done and the order to freeze bank accounts has been made in exercise of powers under Section 79 of the CGST Act.

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Whether the refund application be rejected without giving a proper time for the reply of SCN?

No, The Honorable Bombay High Court in the matter of **M/s. WallemShipmanagement (India) Pvt. Ltd. v. The Union of India & Ors [Writ Petition no.3460 of 2021 dated July 11, 2023]** set aside the order of Adjudicating Authority of not granting refund and held that the assessee should have given time to file reply since the notice was issued during the pandemic period.

The Honorable Bombay High Court noted that the reason furnished by the Petitioner to seek extended time to file a reply to the SCN on account of the pandemic was a sufficient reason and the Respondent gave only three days to file the reply, which cannot be termed as reasonable time or an adequate opportunity of a hearing to the Petitioner.

The Honorable Court held that the Petitioner was not granted the proper opportunity to reply to the SCN and set aside the Impugned order being violative of the principle of natural justice.

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Whether the assessee entitled to interest on the refund which was withheld by the Revenue Department without any intimation for more than 6 months?

Yes, The Honorable Gujarat High Court in **M/s. Panji Engineering Private Limited v. Union of India [R/SPECIAL CIVIL APPLICATION No. 560 of 2022 dated July 10, 2023]** held that disbursement of refund by the department beyond the statutorily prescribed period makes the assessee entitled to interest on such refund amount.

The Honorable Gujarat High Court relied upon the judgment of **Ranbxi Laboratories Ltd. v. Union of India 2011 [Civil Appeal No. 6823 of 2010]** wherein the Honorable Supreme Court held that in case of delayed refunds, the applicant shall be entitled to interest on such delayed refund amount.

The Honorable Court held that the Petitioner's case is fit for grant of interest on refund under section 56 of the CGST Act due to a delay of more than 60 days from the date of application as prescribed under Section 54(1) of the CGST Act.

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Whether the Revenue Department can reject the appeal merely on the ground that the assessee has not filed a physical copy of the order even though the order copy was filed electronically?

The Honorable Calcutta High Court in **Rama ShankerModi v the Assistant Commissioner, Central Goods, And Services Tax and Central Excise [WPA 15639 of 2023 dated July 20, 2023]** set aside the impugned order and held that mere non-filing of order physically within the time limit cannot be a valid ground to rejection of appeal.

The Honorable Calcutta High Court observed that the Petitioner was bonafide and made the mistake of not filing the appeal physically before the Appellate Authority within time and the Appellate Authority cannot reject the appeal merely on the technical ground of not filing an appeal physically before the authority without going into the merits.

The Honorable Court set aside the impugned order and directed the Appellate Authority to accept the certified copy filed by the Petitioner beyond time dispose of the appeal in question by law and pass a speaking order after giving an opportunity of hearing to the Petitioner.

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Whether the application for a refund can be rejected without giving any reason?

No, The Honorable Delhi High Court in the matter of **M/s Chegg India Pvt. Ltd. v. Commissioner of Central Goods and Services Tax [W.P.(c) 14886 of 2022 dated July 19, 2023]** held that the refund application cannot be rejected without giving a proper reason and stated that the Revenue department may issue a fresh notice, clearly setting out the reasons for proposing to reject the refund claim and the assessee file a response in Form RFD-09, within the prescribed period.

The Honorable Delhi High Court observed that there is a fundamental error in the manner in which the petitioner's refund applications have been processed and noted that the Appellate authority had not issued any notice as required under Rule 92(3) of the Central Goods and Services Tax Rules, 2017 setting out the reasons for rejecting the refund thus, the Petitioner had no opportunity to satisfy the Appellate Authority to its claim for refund to the extent it has been rejected.

The Honorable Court held that the application of refund claim cannot be rejected without giving a proper reason and a proper opportunity should be given to the Petitioner to show the reason why the refund should not be rejected

Author's Comment:-

Even if a refund is to be denied, a speaking order must be passed rejecting the refund for good and sufficient reasons and properly founded in the law.

Unlike other notices for demand, a refund is a very crisp proceeding because the taxpayer is fully seized of the facts and needs to be "put at notice" on certain specific matters that need a response to consider the application to sanction or reject the said refund.

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Whether the duty can be demanded solely based on differences between sales figures in the balance sheet and the ER-1 returns?

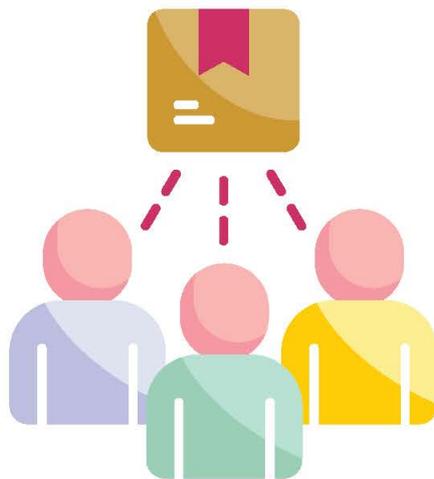
No, The CESTAT, Kolkata in **M/s. Pratap Polysacks Ltd. v. Commissioner of Central Excise, Haldia**[Excise Appeal No.175 of 2011 dated August 07, 2023] set aside the demand order passed by the Adjudicating Authority and held that duty cannot be demanded merely based on the difference in sales figures between the balance sheet and the and ER-1 Returns, there has to be some positive evidence brought on record to substantiate the allegation of clandestine clearance.

The CESTAT, Kolkata observed that the demand in the Impugned Order is mainly due to the difference between the sale figures available in the Schedule of the Balance Sheet for financial years 2004-05, 2005-06, 2006-07 and 2007-08 and the quantity of clearance of those products declared in the monthly ER-1 returns filed by the Appellant during the corresponding financial years and noted that the demand was confirmed based on the difference between the sales figures available in the Balance Sheet and the value declared in the ER-1 returns.

The CESTAT opined that a mere allegation of shortage based on the difference in sales figures between the balance sheet and the ER-1 Returns, cannot be the basis for confirming the central excise duty on the differential quantity and Central Excise duty cannot be demanded merely based on the difference in sales figures found between the balance sheet and the and ER-1 Returns, there must be some positive evidence brought on record to substantiate the allegation of clandestine clearance.

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Whether the Assistant Commissioner can proceed against the findings of the higher authority?

No, The Honorable Bombay High Court in **Jacobs Solutions India Pvt. Ltd. v. Union of India [Writ Petition No. 5808 of 2023 dated July 31, 2023]** set aside the order passed by the Assistant Commissioner and held that the revenue officers are required to follow the principles of judicial discipline and accordingly are bound by the decisions of the Appellate Authority.

The Honorable Bombay High Court relied on the judgment of *Globus Petroadditions Pvt. Ltd. v. Union of India 2022(64) G.S.T.L. 54 (Bom.)* wherein the Honorable Bombay High Court observed that the Assistant Commissioner is required to comply with the orders passed by the Commissioner of (Appeals) and in taking such view the Assistant Commissioner would not have refused to comply with the orders of the higher authority and opined that Assistant Commissioner has no authority to re-visit the concluded findings of fact as derived by the Appellate Authority.

The Honorable Court held that the principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not “acceptable” to the department – in itself an objectionable phrase – and is the subject matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent Court.

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Writ remedy not available if assessee defaults in compliance with law and non-cooperation in proceeding

The Honorable Madras High Court in **M/s Karmaxx Infotech v. Assistant Commissioner (ST) [W.P. No. 18311 of 2023 dated June 20, 2023]** dismissed the writ filed by the assessee against the order of cancellation of GST registration and held writ remedy cannot be granted to the assessee who defaulted in compliance with provisions of GST law and has not cooperated in departmental proceedings.

The Honorable High Court of Madras noted that the default of non-intimation of change of place of business to the department was well within the knowledge of the Petitioner before the issuance of the Notice, therefore such a notice cannot be held to be non-speaking.

Further held that the above facts of default on the part of the Petitioner, along with non-cooperation with departmental proceedings, make the case unfit for grant of remedy under Article 226 of the Constitution of India.

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Whether R&D services provided to the foreign company considered an export of service?

Yes, The AAR Gujarat, in the case of **M/s. Hilti Manufacturing India Pvt. Ltd. [Advance Ruling No. GUJ/GAAR/R/2023/26 dated July 12, 2023]** held that, services provided by the assessee to the entities

Located outside India is covered under section 13(2) of the Integrated Goods and Services Tax Act, 2017 ("the IGST Act"). Accordingly, such services would qualify to be treated as export of service.

The AAR, Gujarat observed that the Applicant is located in India HAG (the Recipient) is located outside India and the place of supply is the location of the Recipient of service, since the prototype on which R&D is conducted and whose report is supplied to HAG was not supplied by HAG but was developed by the Applicant. Thus, the service of R&D would not fall within the ambit of the second proviso of section 13(3)(a) of the IGST Act and held that services provided by the Applicant to the foreign company are covered under Section 13(2) of the IGST Act and is eligible to be treated as a 'zero-rated supply' under Section 16 of the IGST Act.

Further held that the services provided by the Applicant would fall under 'export of service' more so because all the five conditions as enumerated under section 2(6) of the IGST Act viz the Applicant (the Supplier) is located in India and HAG (the Recipient) is located outside India as in the application the payment of the supply is received in foreign exchange.

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Supreme Court to hear Revenue's review petitions on taxability of duty-free shops

The Honorable Supreme Court in **Commissioner of CGST and Central Excise Mumbai East v. M/s. Flemingo Travel Retail Ltd [Review Petition (Civil) No. 1017 of 2023 dated August 18, 2023]** allowed the review petition by recalling the judgment dated April 10, 2023 wherein the Honorable Supreme court held that Duty-Free Shops at arrival or departure terminals of Airports are outside the customs frontiers of India and tagged the matter with the appeals mentioned in the signed order.

The Honorable Supreme Court observed that the memo of appeal lodged by the Commissioner against the judgment of the CESTAT which formed the subject matter of the appeal as well as the grounds in the review petition and noted that substantial grounds on law have been advanced by the Union Government during the course of the oral hearing in support of its case that the applicable regime regarding goods stands on a distinct footing from the regime applicable to the levy of service tax and later, under IGST.

Further noted that sixteen other appeals involving the same issue were stated in the synopsis to the paper book to be pending and allowed the review petition by recalling the judgment dated April 10, 2023, and held that the civil appeal shall stand tagged with the above appeals. The Registry shall obtain administrative directions so that all the appeals can be clubbed together and be heard by one Bench expeditiously.

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Whether penalty can be imposed if the assessee has voluntarily paid the service tax before the issuance of show cause notice?

No, The CESTAT, Chennai in M/s. Susee Auto Sales & Service Pvt. Ltd. v. Commissioner of GST & Central Excise [Service Tax Appeal No.40764 of 2013 dated July 31, 2023] quashed the penalty imposed by the adjudicating authority and held that penalty under sections 77 and 78 of the Finance Act, 1994 ("the Finance Act") will not be imposed in cases where duty and interest are paid voluntarily.

The CESTAT observed that the Appellant had voluntarily paid the tax liability hence judicious exercise of discretion on the part of the Respondent was required before the imposition of such a penalty and relied upon the Judgment in Hospitech Management Consultants Pvt. Ltd. Vs. CST (2023) 7 CENTAX 134 (Tri. Del.) Wherein the CESTAT, New Delhi held that that extended period of limitation for raising demand under proviso to section 73(1) of Finance Act could not be invoked if alleged suppression of facts was not willful with intent to evade payment of service tax.

The CESTAT opined that the Appellant had accepted and paid the service tax with interest before issue of the SCN, the matter should have been closed and allowed to rest in terms of section 73 (3) of the Finance Act.

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CA Ritesh Arora is a highly skilled and experienced practicing Chartered Accountant specializing in the indirect tax regime. With over a decade of experience in this field, he possesses in-depth knowledge and expertise in handling various aspects of indirect taxation.

Ritesh Arora's key strength lies in providing comprehensive solutions to his clients, catering to their diverse business, financial, and regulatory requirements. He is committed to offering a one-stop solution that addresses the specific needs of his clients, ensuring their compliance with the tax laws and regulations.

As a trusted professional, Ritesh Arora offers a wide range of services to his clients, including GST compliance, tax consultancy, advisory, and litigation support. He assists businesses in navigating the complex and ever-evolving indirect tax landscape, helping them optimize their tax positions and minimize any potential risks.

With his extensive experience and practical insights, Ritesh Arora is well-equipped to guide his clients through various tax-related matters, providing expert advice and strategic solutions. His dedication to delivering high-quality service and his ability to understand the unique requirements of each client make him a valuable partner in managing their tax affairs effectively.