Newsletter - May 2023

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Chartered Accountants

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Direct Tax – Circular & Notifications

A. Circulars issued by CBDT in the month of April 2023

1. CBDT clarifies employer's TDS obligation under new 'default' personal tax regime.

Circular no. 4 / 2023, dated 5th April 2023

CBDT issues clarification regarding employer's TDS liability on salary in the light of new default personal tax regime introduced by the Finance Act, 2023 under Section 115BAC(1A). CBDT directs that an employer, shall seek information from each of its employees having income under Section 192 regarding their intended tax regime and each such employee shall intimate the same to his employer for each year and upon intimation, the employer shall compute the employee's total income and deduct tax at source according to the option exercised.

Clarifies that in the absence of intimation by the employee, it shall be presumed that the employee continues to be in the default tax regime and has not exercised the option to opt out of the new tax regime. Further clarifies that employee's intimation would not amount to exercising option in terms of Section 115BAC(6) and the person shall be required to do so separately in accordance with law. This Circular is applicable for TDS during FY 2023-24 and subsequent years.

Click here to read /download the circular.

B. Notifications issued by CBDT in the month of April 2023

1. CBDT notifies 348 as provisional Cost Inflation Index for FY 2023-24.

Notification no. 21 / 2023, dated 10th April 2023

CBDT notifies '348' as Cost Inflation Index (Provisional) for FY 2023-24. The Notification comes into force from April, 2024, thus applies to AY 2024-25 onwards.

Click here to read /download the notification.

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Direct Tax – Legal Rulings

1. **SC: Rules on Sec.80HHC deduction vis-a-vis share-sale & interest income. Holds amended formula prospective.**

   Magnum International Trading Company (P) Ltd [TS-193-SC-2023]

   SC holds that the amendment to Section 80HHC(3) made by the Finance (No. 2) Act, 1991 prescribing a different formula with effect from April 1, 1992 to be applicable prospectively.

   Directs that the income from sale of shares treated as business income shall be included for computation of deduction under Section 80HHC(3)(b). Holds that the interest income shall be taxable under the head 'income from other sources' and not as 'business income, thus, directs it to be excluded from computation of deduction under Section 80HHC.

   Observes that once the income from sale of shares is included under the head of business income, the said amount will also be included in the total turnover of the business for the purpose of Section 80HHC. On the issue of interest income, SC explains that the interest income does not have the direct nexus with the business activity, opines that, "*surplus funds, when deposited in a bank or otherwise to earn interest, are not taxable under the head 'income from business', but under the head 'income from other sources'*". Thus, holds that the interest income is not to be treated as 'business income' for computation of the deduction under Section 80-HHC(3)(b).

   Click here to read / download the copy of the ruling.

2. **SC: DEPB/Duty Drawback receipts lack 'first degree nexus' for Sec.80-IB deduction.**

   Saraf Exports [TS-172-SC-2023]

   SC dismisses Assessee's appeal against Rajasthan HC ruling, holds that receipts from DEPB and duty drawback schemes are not eligible for deduction under Section 80-IB. Opines that the profits from DEPB and duty drawback schemes are ancillary in nature and cannot be said to be 'derived from' industrial undertaking, therefore not eligible for Section 80-IB deduction and even otherwise, such receipts are taxable under Section 28(iiid) and 28(iiie).

   For AY 2008-09, Assessee-Firm, engaged in the business of manufacturing and exporting wooden handicraft items, filed Nil return of income claiming deduction for DEPB and receipts under the duty drawback under Section 80-IB, however, the same was disallowed during assessment proceedings. While CIT(A) upheld the disallowance, ITAT allowed the deductions as claimed on the receipts of amount under DEPB Scheme and Duty Drawback Scheme. HC overruled the ITAT ruling and restored the additions.

   SC opines that "*following the law laid down by this Court in the case of Sterling Foods, Mangalore (supra) and Liberty India (supra) as such, no error has been committed by the High Court in holding that on the profit from DEPB and Duty Drawback claims, the Assessee shall not be entitled to the deductions under Section 80-IB as such income cannot be said to be an income "derived from" industrial undertaking and even otherwise as per Section 28(iiid) and (iiie), such an income is chargeable to tax.*".

   Click here to read / download the copy of the ruling.

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3. **ITAT: Penny stock transaction designed to plough back unaccounted income. Denies Sec.10(38) exemption.**

   Hitendra C. Ghadia [TS-189-ITAT-2023 (Mum)]

   Mumbai ITAT denies exemption claimed under Section 10(38) by the Assessee in respect of long term capital gains, holds that the entire transaction was staged with the object to plough back his unaccounted income in the form of fictitious long term capital gain (LTCG) and claim bogus exemption. Pursuant to search operation carried out on Balaji Group of companies, including Assessee's premises, Revenue made addition in case of the Assessee-individual amounting to Rs.57.58 Lakh on account of LTCG exemption claimed on penny stock transaction, which was upheld by CIT(A).

   ITAT Holds that since the Assessee had failed to prove genuineness of his share dealing transactions and in view of fact that entire transactions were stage managed with object to plough back his unaccounted income in form of fictitious long term capital gain (LTCG) and claim bogus exemption, the Revenue was justified in denying exemption under Section 10(38) and treating such bogus LTCG in penny stock under purview of unexplained cash under section 68.

   Click here to read / download the copy of the ruling.

4. **ITAT: Rules on Sec.80HHE deduction, allowability of non-compete fees & other corporate-tax issues.**

   Zensar Technologies Ltd [TS-198-ITAT-2023(Mum)]

   Mumbai ITAT upholds CIT(A)'s order deleting the addition for non-compete Fees, ESOP expenses, deduction under Section 80HHE and excess depreciation claim for Section 10A exemption. Remands the issue of depreciation on Software Expenses back to the file of Revenue with a direction to consider the workings as submitted by the Assessee providing the break-up of depreciation between STPI & non-STPI units.

   Assessee-Company, a wholly owned subsidiary of Zensar Technologies Inc, USA, engaged in the business of development and marketing of software, filed the return of income for AY 2004-05 declaring NIL income. During scrutiny proceedings, Revenue made disallowance on account of (i) Non-compete Fee of Rs.43.90 (ii) ESOP expenses of Rs.22.08 Lacs, (iii) deduction under Section 80HHE of Rs.12.75 Lacs (iv) depreciation on software expenses (iv) excess exemption claimed under Section 10A. Revenue also treated interest income and rental income as income from other sources and not as business income as claimed by the Assessee. CIT(A) deleted the aforementioned disallowances, however confirmed the treatment of interest and rental income as income from other sources.

   On amortisation of non-compete fees, ITAT notes that the Revenue held that the total fees of Rs.62.68 Lacs cannot be allowed in full in the year of payment and the same has to be amortised over the period of non-competing. With respect to claim of Section 80HHE deduction after setting off brought forward losses, ITAT analyses Section 80HHE(3) dealing with the manner of computation of eligible deduction and observes that for the purpose of the said deduction 'Profits derived from the business' shall be considered. Notes that Section 80A(1) provides that for computation of total income of an Assessee, the deductions specified in sections 80C to 80U shall be allowed from his 'gross total income'. Opines that the Assessee has correctly claimed the deduction under section 80HHE from gross total income.

   Click here to read / download the copy of the ruling.

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5. **ITAT: Upholds wealth-tax liability where Assessee held 'urban land' as capital asset, not stock-in-trade.**

   Triad Resorts and Hotels (P.) Ltd [TS-144-ITAT-2023(Bang)]

   Bangalore ITAT dismisses Assessee's wealth tax appeal, upholds reassessment under Section 17 of the Wealth Tax Act in pursuance to directions by HC in Assessee' s own case for examination of Master Development Agreement (MDA) with the developer. Considers Assessee as 'owner' of land in absence of fulfilment of conditions stipulated in Section 53A of Transfer of Property Act (TPA). Negates Assessee's contention to treat the land as 'stock in trade' as against 'capital asset' in absence of evidence to prove contrary.

   Assessee-Company, owner of 3.39 acres of land entered into a MDA with another company (CIDL) for the development of property in the year 2001 and filed nil wealth tax return for AY 2004-05 by treating the said land as stock-in-trade. Revenue initiated reassessment under Section 17 of the Wealth Tax Act on the premise that Assessee has shown land as investment i.e., capital asset in books of accounts and consequently, adopted Rs.7.48 Cr value of land as determined by the valuer. CWT(A) dismissed Assessee's appeal which was also affirmed by ITAT. HC allowed Assessee's appeal and remand the matter back to ITAT with a direction to re-examine the taxability of subject land under Wealth Tax Act.

   In the remand proceedings, ITAT observes that on perusal of MDA, it is ample clear that the Assessee had only granted a license to enter the land for limited purpose of carrying out development. Observes that grant of license to enter the land for the limited purpose of development cannot be construed as transfer of possession within the meaning of Section 53A of TPA.

   Observes that essential condition to invoke Section 53A of TPA requires that transferee should have performed or willing to perform his part of the contract, however, Assessee has not placed sufficient material on record to establish fulfilment of the aforesaid condition. Notes that the Assessee entered into a settlement agreement with the developer CIDL whereby MDA stood terminated and accordingly, the requirement of Section 53A of TPA have not been fulfilled. Accordingly, holds that there is no transfer of ownership of the land under the MDA.

   Relies on Section 2(ea) of Wealth Tax Act and observes that the said section excludes certain two category of lands namely (i) land occupied by any building which has been constructed with the approval of appropriate authority and (ii) land held by Assessee as 'stock in trade'. Relies on SC ruling in Girdhar G Yadalam and observes that undisputedly only boundary wall have been constructed and nothing has been brought on record to show the approval of appropriate authority for construction of building on the land. Accordingly, dismisses Assessee's appeal.

   Click here to read / download the copy of the ruling.

6. **ITAT: Companies, not shareholders, covered by DDT. 'DTAA protection' requires bilateral agreement.**

   Total Oil India Pvt. Ltd. & Others [TS-197-ITAT-2023(Mum)]

   Mumbai ITAT Special Bench holds that where dividend is declared, distributed or paid by a domestic company to a non-resident shareholder, which attracts Dividend Distribution tax (DDT) under Section 115-O then tax shall be paid by the domestic company at the rate specified under Section 115-O and not at the rate of tax applicable to the non-resident shareholder in the relevant DTAA for taxation of dividend.

   However, ITAT observes, "*we are conscious of the sovereign's prerogative to extend the treaty protection to domestic companies paying dividend distribution tax through the mechanism of DTAAs. Thus, wherever the Contracting States to a tax treaty intend to extend the treaty protection to the domestic company paying dividend distribution tax, only then, the domestic company can claim benefit of the DTAA, if any*".

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Concludes that DDT is not a tax on the shareholders income but a tax on domestic company's distributed profits. ITAT analyses the scheme of the DTAAs and observes that the domestic company covered under Section 115-O does not enter the domain of DTAA at all and given the nature of DTAAs entered into by India, "*If domestic company has to enter the domain of DTAA, the countries should have agreed specifically in the DTAA to that effect*".

The reference to Special Bench arose as the Division Bench in *Total Oil* differed from the rulings of Delhi ITAT in *Giesecke & Devrient.* The Special Bench, thus, decides the reference in favour of the Revenue.

Click here to read / download the copy of the ruling.

7. **ITAT: NR's capital gains taxation under Sec.112(1)(c)(iii) prevails over general provisions. Sec.48-provisos inapplicable**

Legatum Ventures Limited [TS-210-ITAT-2023(Mum)]

Mumbai ITAT dismisses Assessee's appeal, upholds applicability of Section 112(1)(c)(iii) for taxation of capital gains of non-resident Assessee on sale of unlisted shares and confirms addition of Rs.17.14 Cr as against loss of Rs.3.63 Cr. claimed by the Assessee. States that "*if the submission of the assessee that in the present case the income chargeable under the head "capital gains" is to be computed only as per section 48 of the Act is accepted, then the same would render the computation mechanism provided in section 112(1)(c)(iii) of the Act completely otiose and redundant*".

Explains that Section 112(1)(c)(iii) is a special provision for the computation of capital gains, in case of a non-resident, arising from the transfer of unlisted shares and securities whereas Section 48 is a general provision dealing with mode of computation of capital gains in all the cases of transfer of capital assets. Points out that Section 112(1)(c)(iii) does not provide for 're-computation' of capital gains for levying tax rate of 10%, therefore, where ingredients of Section 112(1)(c)(iii) are satisfied i.e. (a) sale of unlisted shares of Indian company (b) by a non-resident/foreign company and (c) giving rise to long term capital gains, then capital gains is required to be computed as per the manner provided under Section 112(1)(c)(iii).

Click here to read / download the copy of the ruling.

8. **SC: ALP determination, judicious selection of filters are 'substantial questions of law'. Quashes Softbrands.**

SAP Labs India Pvt. Ltd. & Others [TS-225-SC-2023-TP]

Apex Court reverses/sets aside Karnataka HC judgment in batch of matters led by Softbrands/SAP Labs on issue of comparables selection and whether it constitutes a 'substantial question of law'. On the question of law arising in the present case, SC rules that "... *there cannot be any absolute proposition of law that in all cases where the Tribunal has determined the arm's length price the same is final and cannot be the subject matter of scrutiny by the High Court in an appeal under Section 260A of the IT Act.*".

Apex Court states that HC can examine the issues of comparability as also selection of filters. SC observes that "*Any determination of the arm's length price under Chapter X de hors the relevant provisions of the guidelines, referred to hereinabove, can be considered as perverse and it may be considered as a substantial question of law as perversity itself can be said to be a substantial question of law*".

Accordingly, remits the cases back to the concerned High Courts to decide and dispose of the respective appeals afresh in light of the observations made. While clarifying that it has not expressed any opinion on the ALP determination in specific cases, SC calls for completion of this exercise.

Click here to read / download the copy of the ruling.

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MCA Updates & Legal Rulings

1. MCA: Application for name removal to be made to Registrar (CPACE), w.e.f. May 1

MCA notifies amendments to the Companies (Removal of Names of Companies from the Register of Companies) Rules, inter alia states that an application for striking off u/s 248(2) of the Companies Act, 2013, shall be made to the the Registrar, Centre for Processing Accelerated Corporate Exit ('CPACE') in Form No. STK-2 and a fee of Rs. 10,000; The Ministry specifies that the Registrar, CPACE established u/s 396(1) of the Act, shall be the Registrar of Companies for the purposes of exercising functional jurisdiction of processing and disposal of application made in Form No. STK-2 and all matters related thereto u/s 248 having territorial jurisdiction all over India; In line with these amendments, MCA revises Forms STK-2, STK-7 (Notice of striking off and dissolution), STK-6 and STK-7; Amended Rules to come into force w.e.f. May 1, 2023: Ministry of Corporate Affairs.

2. MCA related compliances for May 2023

I. Companies:

a) Companies registered in India are required to comply with Filing under the Companies Act, 2013
b) ROC filing shall be done annually or at the time of occurrence of certain events.
c) There are certain important ROC Filing Forms that need to be filed within the specified due dates. Non-compliance with ROC filings can result in a hefty penalty.
d) Companies should keep track of all the important due dates for both Annual and Event Based ROC Compliances.

Sl. No.	Applicability	Purpose	Period	Comments
1.	Q1 2023-24	First BOD meeting	Q1 2023-24	1st BOD meeting can be held within 120 days of previous BOD meeting held in last quarter of 2022-23
2.	Q1 2023-24	Declaration of Directors in format MBP-1 & DIR-8	Q1 2023-24	Declaration of non-disqualification by Directors & Disclosure of Interest of Directors to ascertain Related party transactions and approval required for any such transactions during the FY. This is required in the 1st BOD meeting held for the FY.
3.	30th September 2023	DIN KYC	Open from 1st April to 30th Sept. 2023	Director user ID to be created in case DSC is required for DIN form.
4.	30th May 2023	PAS-6	For half-year ending on 31st March	To be filed by unlisted public company for reconciliation of share capital audit report on half yearly
5.		MGT-14	Within 30 days of Resolution	To be filed if there is any resolution that requires filing with ROC – namely Special resolution for issue of shares through Private placement, Issue of

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				Debentures, Buyback of Shares, Issue of Bonus shares, Loan to Directors, Inter-corporate loans, advances, guarantees and security, etc.,
6.		CHG-1	Within 30 days of creation or Modification of security for loan from Bank or financial institution	To be filed by all Companies within 30 days of sanction of loan with providing of security or mortgage or hypothecation of assets of company
7.		CHG-4	Within 30 days of repayment or satisfaction of security for loan from Bank or financial institution	To be filed by all Companies within 30 days of closure of loan where any security was provided by way of mortgage or hypothecation of assets of company
8.	30th June, 2023	DPT 3	Return of Deposits	DPT 3 is a return of deposits that companies must file to furnish information about deposits and/or outstanding receipt of loan or money other than deposits.

II. Limited Liability Partnership (LLP)

a) LLPs registered in India are required to comply with Filing under the and Limited Liability Partnership Act, 2008 respectively.
b) ROC filing shall be done annually or at the time of occurrence of certain events.
c) There are certain important ROC Filing Forms that need to be filed within the specified due dates. Non-compliance with ROC filings can result in a hefty penalty.
d) LLPs should keep track of all the important due dates for both Annual and Event Based ROC Compliances.

Sl. No.	Due Date	Purpose	Period	Comments
1	30th May, 2023	LLP Annual Return – Form 11	01/04/2022 to 31/03/2023 Newly incorporated LLP incorporation date prior to 30th September, 2022	
2	30th September 2023	DIN KYC	Can be done till 30th Sept. 2023	Director user ID to be created in case DSC is required for DIN form.
3	Within 30 days from the event	Form 3 & Form 4	For recording changes in constitution of LLP	Mandatory to file within 30 days of changes in partners, terms of agreement

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<u>Some recent Caselaws under Companies Act, 2013 :</u>

1) NFRA : Imposes 10-year ban on CA for failure to report fraudulent borrowings, fund diversion in Coffee Day subsidiary.

   In the matter of CA Lavitha Shetty [LSI-337-NFRA-2023 (NDEL)]

   NFRA imposes a penalty of Rs. 10 lakh on a Chartered Accountant ('CA'/'Auditor') and debars her for a period of 10 years from being appointed as an auditor or internal auditor or from undertaking any audit in respect of financial statements or internal audit of the functions and activities of any company or body corporate, for professional misconduct u/s 132(4) of the Companies Act, 2013, pertaining to the Auditor's performance as the statutory auditor of Mysore Amalgamated Coffee Estates Limited (MACEL), an entity owned and controlled by the promoters of Coffee Day Enterprises Limited (CDEL), for FY 2019-20.

2) NFRA : Slaps Rs. 1 cr. penalty, debars Coffee Day subsidiary's auditors for substantial deficiencies in audit, duty abdication.

   In the matter of Sundaresha & Associates and CA C. Ramesh [LSI-338-NFRA-2023(NDEL)]

   NFRA imposes a total penalty of Rs. 1.05 crore on an Audit Firm and a Chartered Accountant (collectively - Auditors) and debars the Audit Firm for 2 years and the CA for 5 years, from being appointed as auditor or internal auditor or from undertaking any audit in respect of financial statements or internal audit of the functions and activities of any company or body corporate, for professional misconduct u/s 132(4) of the Companies Act, 2013, pertaining to the Auditors' performance as the statutory auditor of Tanglin Developments Limited (TDL) a subsidiary company of Coffee Day Enterprises Limited (CDEL), for FY 2018-19.

3) NCLAT : Lending huge amount to unconnected-parties sans security, subsequently writing it off, 'fraudulent transaction'

   Baiju Trading and Investment Pvt. Ltd. vs. Arihant Nenawati & Ors. [LSI-326-NCLAT-2023(NDEL)]

   NCLAT upholds NCLT order allowing an application filed by a Liquidator of Royal Refinery Pvt. Ltd. (Corporate Debtor, in the business of bullion/ gold) u/s 66 of IBC against an NBFC (Appellant, a debtor) on finding that the Appellant is the sole principal beneficiary of fraudulent transactions, remarks that "The very fact that the 'Appellant' was 'NBFC' and the 'Corporate Debtor' was in the business of bullion/ gold, therefore, there cannot be such transactions in the normal course of business."

4) NCLT: Email-communication not "acknowledgement of debt" under Limitation Act, dismisses Creditor's belated insolvency-plea.

   Zambon Company S.P.A vs. Vivimed Labs Ltd. [LSI-317-NCLT-2023(BAN)]

   NCLT dismisses petition filed by Operational Creditor ('Appellant') inter alia seeking to initiate CIRP against Vivimed Labs Ltd. ('Corporate Debtor') on grounds that petition is filed beyond the limitation period, holds that "…email communication cannot be considered as acknowledgement of debt within the meaning of Section 18 of the Limitation Act, 1963."; Observing that Operational Creditor relied on email correspondences exchanged between the parties in 2016 and 2017 to establish acknowledgement of debt, for a default that occurred in 2013, Tribunal peruses the emails and finds that "The expressions of the email which was reproduced in this judgment, reveals that it does not reflect any specific acknowledgement within the meaning of Section 18 of the Limitation Act, 1963."; Moreover, Tribunal refers to NCLAT's decision in Mohan Lal Goel, where it was held

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that the said e-mails didn't contain any acknowledgement, which could be read as an acknowledgement of accepting debt within the meaning of Sec. 18 of the Limitation Act; Accordingly, NCLT concludes that "…this Petition is not a fit case for admission since the petition was filed…beyond the limitation.". Bengaluru NCLT.

5) HC : Slaps penalty on ROC for "palpable delay" in registering Company's charge.

Adventz Finance Private Limited & Anr. vs. Union of India & Ors. [LSI-288-HC-2023(CAL)]

Calcutta HC, in a rare case, imposes a penalty of Rs. 25,000 on the Registrar of Companies ('ROC') on the ground of "palpable and unexplained delay" in registering charge, which was also contrary to the proviso under Rule 10(1) of the Companies (Registration Offices and Fees) Rules; Notes that – (i) w.r.t. the first submitted charge, Petitioners resubmitted the e-form after first e-form was returned to the Petitioners for resubmission with certain particulars, (ii) Petitioners complained that the ROC did not take any steps after August 5, 2021 and that the impugned communication of July 29, 2022 from the ROC does not indicate the particulars which the Petitioners were to resubmit, (iii) w.r.t. the second submitted charge, ROC has been sitting on the same since 2021 without taking any steps thereto; HC elaborates that as per the first proviso under Rule 10(1), the Registrar is under an obligation to take a decision on the e-form or documents within 30 days from the date of its filing; Accordingly, Court allows liberty to Petitioners to resubmit the e-form and w.r.t. the second submitted charge, directs the ROC to register same within a period of 4 weeks from the date of this order. Calcutta HC.

6) NFRA : Slaps penalty of Rs. 1.2 crores & debars auditors for failure to report fraudulent transactions, diversion of funds

In the matter of Ms ASRMP & Co [LSI-289-NFRA-2023(NDEL)]

NFRA imposes a total penalty of Rs. 1.2 crores on an Audit Firm and its 3 partners (collectively called as 'Auditors'), and debars them for 2 to 5 years from being appointed as an auditor or internal auditor or from undertaking any audit in respect of financial statements or internal audit of the functions and activities of any company or body corporate, for professional misconduct u/s 132(4) of the Companies Act, 2013, pertaining to the Auditors' performance as the statutory auditor of Coffee Day Global Limited ('CDGL') for FY 2018-19.

7) SC : Directors cannot escape penal-liability in cheque-dishonour case citing company's dissolution under IBC

Ajay Kumar Radheyshyam Goenka vs. Tourism Finance Corporation of India Ltd. [LSI-281-SC-2023(NDEL)]

SC rules that where the proceedings u/s 138 of the NI Act had already commenced with the Magistrate taking cognizance upon the complaint and during pendency, the company gets dissolved, the signatories/directors cannot escape from their penal liability u/s 138 by citing company's dissolution; Remarking that "What is dissolved, is only the company, not the personal penal liability of the accused covered under Section 141 of the NI Act.", SC clarifies that Sec. 138 proceedings in relation to the signatories/directors who are liable/covered by the two provisos to Sec. 32A(1) (statutory recognition of the criminal liability of the persons who are otherwise vicariously liable under Sec. 141 of NI Act, in the context of Sec. 138 offence) of IBC will continue in accordance with law.

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FEMA

1. **Remittances to International Financial Services Centres (IFSCs) under the Liberalised Remittance Scheme (LRS)**

   Attention of Authorised Dealer Category-I (AD Category-I) banks is invited to A.P. (DIR Series) Circular No. 11 dated February 16, 2021, on "Remittances to International Financial Services Centres (IFSCs) in India under the Liberalised Remittance Scheme (LRS)" and Master Direction No. 7/2015-16 on Liberalised Remittance Scheme (LRS) as amended from time to time.

   On a review and with an objective to align the LRS for IFSCs set up under the International Financial Services Centres Authority Act, 2019 vis-à-vis other foreign jurisdictions, it has been decided to amend the directions under para 2 (ii) of the aforementioned A.P. (DIR Series) Circular dated February 16, 2021, as – "Resident Individuals may also open a Foreign Currency Account (FCA) in IFSCs, for making the above permissible investments under LRS." Thus, the condition of repatriating any funds lying idle in the account for a period up to 15 days from the date of its receipt is withdrawn with immediate effect, which shall now be governed by the provisions of the scheme as contained in the aforesaid Master Direction on LRS.

   The Master Direction No. 7 is being updated to reflect these changes.

   AD Category - I banks should bring the contents of this circular to the notice of their constituents and customers.

   The directions contained in this circular have been issued under sections 10(4) and 11(1) of the Foreign Exchange Management Act, 1999 (42 of 1999) and are without prejudice to permissions/approvals, if any, required under any other law.

2. **Amendment to the Master Direction (MD) on KYC**

   Please refer to the Master Direction (MD) on KYC dated February 25, 2016, as amended from time to time, in terms of which Regulated Entities (REs) have to undertake Customer Due Diligence (CDD), as per the process laid out therein, for their customers.

   In this regard, on a review, it has been decided to amend the MD on KYC to (a) align the instructions with the recent amendments carried out in the Prevention of Money Laundering (Maintenance of Records) Rules, 2005, (b) incorporate instructions in terms of the Government Order dated January 30, 2023, titled "Procedure for Implementation of Section 12A of the Weapons of Mass Destruction (WMD) and their Delivery Systems (Prohibition of Unlawful Activities) Act, 2005 (WMD Act, 2005)"; (c) update certain instructions in accordance with FATF Recommendations; and (d) refine certain extant instructions post review. The changes carried out in the MD in this regard are provided in Annexure available at https://rbidocs.rbi.org.in/rdocs/content/pdfs/NT2428042023_AN.pdf

   Accordingly, the relevant Sections of the MD on KYC are hereby amended to reflect the changes furnished in Annexure. The amended provisions in the MD shall come into force with immediate effect.

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3. Framework for acceptance of Green Deposits

Climate change has been recognised as one of the most critical challenges faced by the global society and economy in the 21st century. The financial sector can play a pivotal role in mobilizing resources and their allocation thereof in green activities/projects. Green finance is also progressively gaining traction in India.

Deposits constitute a major source for mobilizing of funds by the Regulated Entities (REs). It is seen that some REs are already offering green deposits for financing green activities and projects. Taking this forward and with a view to fostering and developing green finance ecosystem in the country, it has been decided to put in place the enclosed Framework for acceptance of Green Deposits for the REs. Detailed framework available at below link https://rbidocs.rbi.org.in/rdocs/notification/PDFs/CIRCULARGREENDEPOSITS55FFC86E3BD94C4A8BFF8946C6C282EA.PDF

The framework shall come into effect from June 1, 2023.

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Indirect Tax – Customs Updates

1. **Implementation of the Advanced authorisation Scheme under Foreign Trade Policy, 2023.**

   In exercise of the powers given under Sec 25(1) of the customs Act, 1962, the central Government, hereby exempts materials imported into India against a valid Advance Authorisation issued by the Regional Authority in terms of paragraph 4.03 of the Foreign Trade Policy (hereinafter referred to as the said authorisation) from the whole of the duty of customs, whole of the additional duty, integrated tax, goods and services tax compensation cess, safeguard duty, countervailing duty, anti-dumping duty, countervailing duty and anti-dumping duty, subject to the following conditions, namely:-

   (i) that the said authorisation is produced before the proper officer of customs at the time of clearance for debit;

   (ii) that the said authorisation bears: -
   (a) the name and address of the importer and the supporting manufacturer in cases where the said authorisation has been issued to a merchant exporter; and
   (b) the shipping bill number(s) and date(s) and description, quantity and value of exports of the resultant product in cases where import takes place after fulfilment of export obligation; or
   (c) the description and other specifications where applicable of the imported materials and the description, quantity and value of exports of the resultant product in cases where import takes place before fulfilment of export obligation.

   Please refer the notification for detailed understanding of all the conditions.

   Click here to read / download ***Notification No.21/2023 Tariff dated 01-04-2023.***

2. **Implementation of Advanced authorisation scheme for deemed exports under Foreign Trade Policy, 2023.**

   In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962, the Central Government, hereby exempts materials required for the manufacture of the final goods when imported into India, from whole of the duty of customs, additional duty, safeguard duty, countervailing duty and anti-dumping duty subject to the following conditions, namely: -

   (i) that the importer has been granted Advance Authorisation for deemed export by the Regional Authority in terms of paragraph 4.05(c)(iii) of the Foreign Trade Policy permitting import of the said materials (hereinafter referred to as the said authorisation);

   (ii) that the said authorisation is produced before the proper officer of customs at the time of clearance for debit;

   (iii) that the said authorisation contains endorsements specifying, inter alia, - (a) the description, quantity and value of materials allowed to be imported under the said authorisation; and (b) the description and quantity of final goods to be manufactured out of, or with, the imported materials:

   Please refer the notification for detailed understanding of all the conditions.

   Click here to read / download the ***Notification No.22 /2023 Tariff dated 01-04-2023***

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3. **Implementation of the Advanced authorisation scheme for annual requirement under Foreign Trade Policy, 2023.**

In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962, the Central Government, hereby exempts materials imported into India, against a valid Advance Authorisation for Annual Requirement from the whole of the duty of customs, additional duty, integrated tax, goods and services tax compensation cess, safeguard duty, countervailing duty and anti-dumping duty, subject to the following conditions, namely:

(i) that the said authorisation is produced before customs officer at the time of clearance for debit of the quantity and value of imports;

(ii) that the said authorisation is issued with respect to Standard Input Output Norms (SION) fixed and bears, -
(a) the name and address of the importer and the supporting manufacturer in cases where the said authorisation has been issued to a merchant exporter; and
(b) the shipping bill number(s) and date(s) and description, quantity and value of exports of the resultant product in cases where import takes place after fulfilment of export obligation; or
(c) the description, Cost Insurance Freight value and other specifications of the imported materials and the description, quantity and Free On-Board value of exports of the resultant product covered under an export product group specified in the Hand Book of Procedures, in such cases where import takes place before fulfilment of export obligation:

Please refer the notification for detailed understanding of all the conditions.

Click here to read / download the ***Notification No.23/2023 Tariff dated 01-04-2023.***

4. **Implementation of Advanced Authorisation Scheme for export of prohibited goods under Foreign Trade Policy, 2023.**

In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962, the Central Government, hereby exempts materials imported into India against an Advance Authorisation from the whole of the duty of customs, additional duty, integrated tax, goods and services tax compensation cess, safeguard duty, countervailing duty, and anti-dumping duty, subject to the following conditions, namely :-

(i) that the said authorisation, issued by the Regional Authority, is produced before the proper officer of customs at the time of clearance for debit;

(ii) that the said authorisation bears the name and address of the importer, the description and other specifications of the imported material and the description, quantity and value of exports of the resultant product;

(iii) that the imported material corresponds to the description and other specifications, where applicable, mentioned in the said authorisation and the value and quantity thereof are within the limits specified in the said authorisation;

(iv) that the export is made subject to pre-import condition under notified Standard Input Output Norms (SION) or under prior fixation of norms in terms of Para 4.06 of Handbook of Procedures.

Please refer the notification for detailed understanding of all the conditions.

Click here to read / download the ***Notification No. 24/ 2023 Central Tax dated 01-04-2023***

5. **Implementation of the Duty-free Import Authorisation for under Foreign Trade Policy, 2023.**

In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act,

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1962, the Central Government, hereby exempts materials imported into India against a valid Duty-Free Import Authorisation from the whole of the duty of customs, subject to the following conditions, namely: -

(i) that the said authorisation is produced before the proper officer of customs at the time of clearance for debit;

(ii) that Standard Input Output Norms (SION) number, description, quantity and Free on-Board value of the resultant product exported and the shipping bill number(s) and date(s) are endorsed on the said authorisation: Provided that the said SION does not prescribe the actual user condition;

(iii) that the description and other specifications wherever applicable, value and quantity of materials imported are mentioned in the said authorisation and the value and quantity thereof are within the limits specified in the said authorisation:

Provided that in respect of inputs referred in paragraphs 4.12(i) and 4.12(ii) of the Foreign Trade Policy, the material permitted to be imported in the said authorisation shall be of the specific name or description or quantity, respectively, as the material used in the export of the resultant product. The exporter shall declare these particulars of materials used in the shipping bill/ bill of export:

Please refer the notification for detailed understanding of all the conditions.

Click here to read / download the ***Notification No. 25/ 2023 Tariff dated 01-04-2023.***

6. Implementation of EPCG Scheme under Foreign Trade Policy, 2023.

In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962, the Central Government, hereby exempts goods specified in the Table 1 annexed hereto, from the whole of the duty of customs, additional duty, integrated tax and the goods and services tax compensation cess subject to the following conditions, namely: -

(i) that the goods imported are covered by a valid authorisation issued under the Export Promotion Capital Goods (EPCG) Scheme in terms of Chapter 5 of the Foreign Trade Policy permitting import of goods at zero customs duty.

(ii) that the authorisation is registered at the port of import specified in the said authorisation and the goods, which are specified in the Table 1 annexed hereto, are imported within validity of the said authorisation and the said authorisation is produced for debit by the proper officer of customs at the time of clearance: Provided that the catalyst for one subsequent charge shall be allowed, under the authorisation in which plant, machinery or equipment and catalyst for initial charge have been imported, except in cases where the Regional Authority issues a separate authorisation for catalyst for one subsequent charge after the plant, machinery or equipment and catalyst for initial charge have already been imported.

Please refer the notification for detailed understanding of all the conditions.

Click here to read / download the ***Notification No. 26/ 2023 Tariff dated 01-04-2023.***

7. Exemption for Import of Fabrics under Special Advanced Authorisation Scheme under para 4.04 of Foreign Trade Policy, 2023 for manufacture and export of Garments.

In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962, the Central Government, hereby exempts fabrics (including interlining) imported into India against a valid Special Advance from the whole of the duty of customs, the whole of the additional duty,

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integrated tax, the goods and services tax compensation cess, safeguard duty, countervailing duty and anti-dumping duty, subject to the following conditions, namely: -

(i) that the said authorisation is produced before the proper officer at the time of clearance for debit.

(ii) that the said authorisation is meant for import of fabric only and bears, -

(a) the name and address of the importer and the supporting manufacturer in cases where the authorisation has been issued to a merchant exporter; and

(b) the description and other specifications of the fabrics to be imported and the description, quantity and value of exports of the product falling under Chapter 61 or 62 of the said First Schedule to the Customs Tariff Act.

(iii) that the fabrics imported corresponds to the description and other specifications (where applicable) mentioned in the authorisation and are in terms of para 4.12 of the Foreign Trade Policy and the value and quantity thereof are within the limits specified in the said authorisation;

Please refer the notification for detailed understanding of all the conditions.

Click here to read/download the ***Notification No. 27/ 2023 Tariff dated 01-04-2023.***

8. **Amendment to the Notification 40/2015-Customs dated 21st July 2015**

Central Government by issuing Notification 40/2015 dated 21st July 2015 exempts cut and polished diamonds falling under Chapter 71 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), when imported (for grading or certification and re-export out of India) by the laboratories and agencies (hereinafter referred to as the said laboratories and agencies) notified in the Foreign Trade Policy. They have notified 5 such laboratories and now notified 6th laboratory as **"6. Gemological Science International Pvt. Ltd., Mumbai, Maharashtra" t**hrough issuance of notification 29/2023 dated 03-04-2023.

Click here to read/download ***Notification No. 29/ 2023 Tariff dated 03-04-2023.***

9. Amendment to the notification No. 55/2022 dated 31st October 2022

In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby makes the following amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 55/2022-Customs, dated the 31st October 2022, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R. 796(E), dated the 31st October 2022, namely:-

In the said notification, in the TABLE, -

(i) against S. No. 1, in column (2), for the entry, the entry "1006 10 90" shall be substituted;

(ii) after S. No. 1 and the entries relating thereto, the following S. No. and entries shall be inserted, namely: -

(1)	(2)	(3)	(4)	(5)
"1A.	1006 10 10	Rice in the husk (paddy or rough), of seed quality	Nil	-" ;

This notification shall come into force on the 11th day of April, 2023.

Through this notification Central Government, hereby exempts Rice in the husk (paddy or rough), of seed quality, when exported from export duty of 20% with effective from 11th April 2023.

Click here to read/download the ***Notification No. 30 / 2023 Customs dated 10-04-2023.***

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Indirect Tax – Legal Rulings

1. **2023 (71) G.S.T.L. 120 (Ori.)/(2023) 3 Centax 225 (Ori.) [12-01-2023]**
(2023) 3 Centax 225 (Ori.)

IN THE HIGH COURT OF ORISSA AT CUTTACK

Dr. S. Muralidhar, CJ. and M.S. Raman, J.

SHIVA JYOTI CONSTRUCTION

Versus

CHAIRPERSON, CENTRAL BOARD OF EXCISE & CUSTOMS

W.P.(C) No. 18216 of 2017, decided on 12-1-2023

GST : Where no loss would occur to department as there was no escapement of tax if petitioner was permitted to rectify error of GST returns, petitioner was to be permitted to resubmit corrected Forms

Returns - Rectification of - Returns were filed in Form-B2B instead of B2C under GSTR-1 - Last date for filing return was 31-3-2019 - 13-4-2019 was date by which rectification was to be carried out - Error came to be noticed on 21-1-2020 after principal contractor held up legitimate running bill amount by informing error - No loss would occur to department by permitting petitioner to rectify error and there would be no escapement of tax - Petitioner would have been prejudiced if rectification was not permitted - Letters of rejection was to be set aside - Petitioner was to be permitted to resubmit corrected Form-B2B under GSTR-1 and department was to be directed to receive it manually [Section 39 of Central Goods and Services Tax Act, 2017/Odisha Goods and Services Tax Act, 2017]. *[paras 5, 6 and 7]*

The Petitioner before this Court seeks a direction to the Opposite Parties to permit the Petitioner to rectify the GST Return filed for the period September, 2017 and March 2018 in Form-B2B instead of B2C as was wrongly filed under GSTR-1 in order to get the Input Tax Credit (ITC) benefit by M/s. Odisha Construction Corporation Limited (OCCL), the principal contractor.

2. Admittedly, the last date of filing the return was 31st March, 2019 and the date by which the rectification should have been carried out was 13th April, 2019.

3. It is the case of the Petitioner that the error came to be noticed after the OCCL held up the legitimate running bill amount of the Petitioner by informing it about the above error on 21st January, 2020. It is the case of the Petitioner that thereafter it has been making requests to the Opposite Parties to permit it to correct the GSTR-1 Forms but to no avail.

4. The stand taken by the Opposite Parties is that once the deadline for rectification of the Forms was crossed, then no further indulgence could be granted to the Petitioner.

5. The fact remains that by permitting the Petitioner to rectify the above error, there will be no loss whatsoever caused to the Opposite Parties. It is not as if that there will be any escapement of tax. This is only about the ITC benefit which in any event has to be given to the Petitioner. On the contrary, if it is not permitted, then the Petitioner will unnecessarily be prejudiced.

6. In similar circumstances, the Madras High Court in its order dated 6th October, 2020 in Writ Petition No. 29676 of 2019 (*M/s. SUN DYE CHEM* v. *The Assistant Commissioner ST*) accepted the plea of the Petitioner and directed that the Petitioner in that case should be permitted to file the corrected form.

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7. For the aforementioned reasons, the letters of rejection dated 19th June and 23rd September, 2020 are hereby set aside. The Court permits the Petitioner to resubmit the corrected Form-B2B under GSTR-1 for the aforementioned periods September, 2017 and March, 2018 and to enable the Petitioner to do so a direction is issued to the Opposite Parties to receive it manually. Once the corrected Forms are received manually, the Department will facilitate the uploading of those details in the web portal. The directions be carried out within a period of four weeks.

8. The writ petition is disposed of with the above directions.

9. An urgent certified copy of this order be issued as per rules.

2. `2023 (71) G.S.T.L. 121 (Tripura)/(2023) 3 Centax 200 (Tripura) [03-01-2023]
(2023) 3 Centax 200 (Tripura)

IN THE HIGH COURT OF TRIPURA

T. Amarnath Goud, ACJ. and Arindam Lodh, J.

BALAJI STEEL ROLLING MILLS LTD.

Versus

STATE OF TRIPURA

W.P. (C) No. 548 of 2021, decided on 3-1-2023

GST : Where starting of movement of vehicle was delayed due to unforeseen circumstances and E-way bill expired and situation was such that assessee was not in a position to ask for renewal, amount paid for release of goods and vehicle was to be refunded

Detention of goods and conveyance - E-way bill - Expiry of e-way bill - As e-way bill expired, tax was demanded and penalty was imposed - Appeal against such order was dismissed - HELD : High Court had earlier ordered release of goods on deposit of 25 per cent of tax, penalty and bond - Petitioner contended that though goods were loaded on vehicles and e-way bills were generated, starting of movement of vehicle was delayed due to unforeseen circumstances - E-way bill had expired during transit and petitioner was not in a position to ask competent authority for renewal - Impugned order was not just and proper and, hence, was liable to be set aside - Petitioner was entitled to refund of amount paid [Section 129 of Central Goods and Services Tax Act, 2017/Tripura State Goods and Services Tax Act, 2017]. *[paras 6 and 7]*

- The case of the petitioner in this instant writ petition is that the vehicles carrying taxable goods of the petitioner entered the State of Tripura a few days later than anticipated and during which period, the validity of the 'e-Way bills' had expired. However, the vehicle was carrying duty-paid goods and there was no attempt to evade duty. Despite this, the authorities imposed fresh levy of duty with the penalty. The petitioner filed a writ petition bearing No. WP(C) No. 179 of 2020, before this Court *inter alia* praying for releasing the seized goods in favour of the petitioner. On 3-9-2020, the same was disposed of in the following terms:-

"Having situated thus, we direct the respondents to release the detained materials, on deposit of 25% of the disputed tax and penalty, by the petitioner, as demanded under Annexure-9 collectively and also on securing the total demand by a bond whereby the petitioner shall pledge for payment of for the rest of the demand subject to the outcome of the appeal.

On deposit of 25% of the tax and penalty as aforementioned, and the bond the authority which detained those goods/materials shall release them within three days from the deposit of the said amount and the bond, as indicated above

So far the question of limitation is concerned we are of the considered view that if the appeal is filed within 15 days from today, the period of limitation shall stand extended till the expiry of that period of 15 days."

2. Pursuant thereto, the petitioner filed two appeals bearing No. 20/CRB-EW/2020 & 21/**CRB**/EWB/2020 before the Additional Commissioner of State of Tax within the time limit as

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stipulated in the said order, the same fell for consideration on 16-4-2021. The Appellate Authority dismissed the appeals filed by the petitioner.

3. Aggrieved thereby, the petitioner has filed this instant petition praying for setting aside and quashing the impugned order dated 16-4-2021.

4. Mr. Somik Deb, learned Sr. counsel assisted by Mr. A. Baran, learned counsel appearing for the petitioner submitted that the petitioner had purchased 2 lots of Mill Machineries. The same was loaded in 2 Nos of trucks which were to be delivered to the petitioner in Agartala. For the said purpose, on 2-2-2020, the 'e-Way bills' were generated which were valid upto 15-2-2020. But owing to some unforeseen circumstances, the movement of the said vehicles was delayed. The said vehicles reached Churaibari on 17-2-2020. On the ground that 'e-Way bills' have expired, the GST authorities have imposed heavy levy on duty with penalty that is grossly irrational and arbitrary. In pursuance to the order of this Court dated 3-9-2020, the petitioner filed two appeals before the Appellate Authority but the same was dismissed *vide* the impugned order dated 16-4-2021. But the said order has not rendered substantive and conscionable justice to the petitioner and the same is liable to be quashed and set aside.

5. Mr. K. De, learned *Addl.* G.A. appearing for the State-respondent submitted that the whole 'e-Way bills' system has now gone online and the same could have been extended on time but was not extended.

6. After hearing both the parties and perusing the evidence on record, this Court is of the opinion that the 'e-Way bills' had expired during the transit and the petitioner was not in a position to ask for its renewal to the competent authority when the vehicle entered into the territory of the State of Tripura. In view of the said fact, this Court is of the opinion that the order dated 6-4-2021 passed by the Appellate Authority is not just and proper and the same is liable to be set aside.

7. Accordingly, this instant writ petition is allowed and the impugned order dated 16-4-2021 is set aside. Consequently, the petitioner is entitled to all the consequential benefits including the refund.

8. With the above observation and direction, this instant writ petition is disposed of.

3. **2023 (71) G.S.T.L. 133 (Mad.)/(2023) 3 Centax 227 (Mad.) [28-12-2022]**
(2023) 3 Centax 227 (Mad.)

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Mohammed Shaffiq, J.

TVL. UDHAYAN STEELS PVT. LTD.

Versus

DEPUTY STATE TAX OFFICER (INT.)

W.P. No. 34268 of 2022 and W.M.P. Nos. 33714, 33715 of 2022, decided on 28-12-2022

GST : Order passed under section 129(3) of CGST Act, 2017 beyond timelines stipulated thereunder was to be set aside and vehicles/goods in question were to be released forthwith

Detention of goods and conveyance - Release of goods - Order under section 129(3) of CGST Act, 2017 being passed on eighth day from date of service of notice, impugned proceedings were beyond timelines stipulated thereunder - Impugned proceedings were to be set aside and vehicles/goods in question were to be released forthwith [Section 129 of Central Goods and Services Tax Act, 2017/Tamil Nadu Goods and Services Tax Act, 2017]. *[para 4]*

- The present writ petition is filed challenging the impugned order dated 15-12-2022 and the connected Order of Detention in Form GST MOV-06 dated 7-12-2022, on the short ground that the impugned proceedings are barred by the limitation prescribed under section 129(3) of the GST Act, 2017 (hereinafter referred to as 'Act').

2. Relying upon the order dated 10-10-2022 made in W.P.No.25931 of 2022, the learned counsel for the petitioner would submit that the scope of Section 129 of the Act, had come up for consideration before

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this Court in the above said writ petition. This Court has held that it is incumbent upon the authority to pass an order of detention prior to the period stipulated *viz.*, 7 days under section 129(3) of the Act. The relevant portion reads as under:

"5. I have, in W.P.No.22646 of 2022 in the case of D.K.Enterprises V. The Assistant/Deputy Commissioner and another, order dated 29-8-2022 set out the scheme of events and timelines stipulated under section 129 of the Act commencing from interception of vehicle upto passing of final order of penalty. Since the statutory show cause notice is to be issued within a period of 7 days from date of interception, it becomes incumbent upon an authority to pass an order of detention prior thereto.

6. In this case, admittedly, neither order of detention nor show cause notice have been issued in time. The date of interception of vehicle is 1-8-2022 and the order of detention has been passed only on 11-8-2022. The show cause notice has been issued on 16-8-2022. The timelines as set out under section 129 are completely vitiate the proceedings in full.

7. Learned Government Advocate draws my attention to the fact that the petitioner had earlier approached this Court in W.P.No.23816 of 2022 challenging show cause notice dated 16-8-2022. By order dated 6-9-2022 I had recorded the request of the learned counsel for the petitioner to withdraw the Writ Petition with liberty to file a reply to the show cause notice. The order reads as follows:

"Learned counsel for the petitioner seeks permission to withdraw this Writ Petition with liberty to file a reply to show cause notice dated 16-8-2022. He has also made an endorsement to that effect.

2. In light of the endorsement made, this Writ Petition is dismissed as withdrawn granting liberty to the petitioner to file a reply to the show cause notice. Reply, if and when filed by the petitioner, shall be considered by the officer in accordance with law and proceedings disposed/closed, after hearing the petitioner, within a period of one (1) from date of receipt of reply. No costs. Connected Miscellaneous Petition is closed."

8. Thus, according to the learned Government Advocate, since the petitioner was permitted to file a reply to the show cause notice, the question of delay had already been taken note of and condoned by this Court and hence, order dated 13-9-2022 impugned in this Writ Petition is perfectly in order.

9. There is no merit in this submission. In fact, neither of the parties had argued the position of delay before me in the earlier round of proceedings and the direction to the officer in order dated 6-9-2022 is to consider the reply of the petitioner 'in accordance with law' and thereafter pass an order.

10. The petitioner in its reply filed on the same day has specifically made reference to the order in this case of D.K.Enterprises (*supra*) and has also referred to the statutory timeline under section 129 of the Act. Thus, it was incumbent upon the authority to have taken note of the same. This has not been done.

11. For all the reasons as aforesaid, specifically since the admitted dates clearly reveal the lapses in adhering to the statutory and stipulated timelines, the case of the petitioner merits acceptance.

12. The impugned orders are set aside. The vehicle in question shall be released forthwith. This Writ Petition is allowed. No costs. Connected Miscellaneous Petitions are closed."

3. In this regard, it may be relevant to note the following dates.

(*a*)		The date of detention is 7-12-2022;
(*b*)		The notice was issued on 7-12-2022; and
(*c*)		The order of detention is passed on 15-12-2022.

4. It is submitted by both the counsel for the petitioner and respondent that the order u/s.129(3) of the Act is passed on the eighth day from the date of service of notice, whereas the time line stipulated under section 129(3) of the Act is that the order ought to be passed within a period of 7 days from the date of service of such notice. Inasmuch as admittedly, the impugned proceedings are beyond the time lines stipulated under section 129(3) of the Act, the same is fatal to the order in terms of the order of this Court in W.P.No.25931 of 2022. The impugned proceedings are *set aside* and the vehicles/goods in question shall be released forthwith.

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5. With the above directions, the writ petition stands allowed. No costs. Consequently, the connected Miscellaneous Petitions are closed. No costs.

4. 2023 (71) G.S.T.L. 144 (Guj.)/(2023) 3 Centax 48 (Guj.) [18-01-2023]
(2023) 3 Centax 48 (Guj.)

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

Ms. Sonia Gokani and Sandeep N. Bhatt, JJ.

ORSON HOLDINGS COMPANY LTD.

Versus

UNION OF INDIA

R/Special Civil Application No. 18982 of 2018, decided on 18-1-2023

GST : E-Way Bill being expired during transit of huge distance, penalty recovered was to be refunded along with interest in absence of any ill-intent on part of assessee

Detention of Goods and conveyance - E-way Bill - E-way bill expired 48 hours prior to detention of goods - Petitioner company situated at Howrah, West Bengal and place of delivery was a distant place being Jamnagar, Gujarat - No ill-intent on part of petitioner to use expired e-Way bill was established - Impugned order was to be quashed - Penalty recovered from petitioner was to be refunded along with interest [Section 129 of Central Goods and Services Tax Act, 2017]. *[paras 7, 9 and 11]*

At the time of issuance of notice on 7-12-2018 in this petition which is filed under article 226 of the Constitution of India, this Court has passed the following order:

"1. This petition challenges the constitutional validity of rule 138(10) of the Central Goods and Services Tax Rules, 2017/Gujarat Goods and Services Tax Rules, 2017 as being unconstitutional and violative of articles 14, 19(1)(*g*) and 301 of the Constitution of India, to the extent the said provision restricts validity period of the e-way bill in terms of distance to be travelled in a day.

2. Mr. Vinay Shraff, learned advocate with Mr. Vishal Dave, learned advocate for the petitioners invited the attention of the court to the notice under section 129(3) of the Central Goods and Service Tax Act, 2017 (Annexure "J" to the petition), to point out that in terms of the said notice, the petitioner was directed to appear before the State Tax Officer-2. It was submitted that in response to the notice, the petitioner filed its reply. Reference was made to the impugned order passed under section 129(3) of the Act, to point out that the same has been passed on 28-9-2018 without waiting for the date of hearing, that is, 2-10-2018. It was submitted that therefore, the impugned order has been passed in breach of the principles of natural justice.

3. The attention of the court was invited to sub-section (4) of section 129 of the Act, which provides that no tax, interest or penalty shall be determined under sub-section (3) without giving the person concerned an opportunity of being heard. It was submitted that despite the fact that in the show cause notice the date has been fixed, the order has been passed prior to the said date, without giving an opportunity of hearing to the petitioner, which is in breach of sub-section (4) of section 129 of the Act.

4. It was farther pointed out that penalty is sought to be imposed under section 129(1) of the Act, whereas section 122(1)(*xiv*) of the Act provides that where a taxable person who transports any taxable goods without the cover of documents as may be specified in this behalf, he shall be liable to pay a penalty of ten thousand rupees or an amount equivalent to the tax evaded or the tax not deducted under section 51 or short deducted or deducted but not paid to the Government or tax not collected under section 52 or short collected or collected but not paid to the Government, etc., whichever is higher.

5. Reference was made to section 73 of the Act, which provides for determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized for any reason other than fraud or any willful misstatement or suppression of facts, and more particularly, to sub-section

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(8) thereof, which provides that where any person chargeable with tax under sub-section (1) or sub-section (3) pays the said tax along with interest payable under section 50 within thirty days of issue of show cause notice, no penalty shall be payable and all proceedings in respect of the said notice shall be deemed to be concluded. It was submitted that in the facts of the present case, the petitioner had deposited the amount of tax and penalty within thirty days from the date of issue of the notice and therefore, the petitioner was entitled to the benefit of sub-section (8) of section 73 of the Act.

6. Reference was also made to section 74 of the Act, which provides for determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized by reason of fraud or any wilful misstatement or suppression of facts, and more particularly, to sub-section (8) thereof, which provides that where any person chargeable with tax under sub-section (1) pays the said tax along with interest payable under section 50 and a penalty equivalent to twenty-five per cent of such tax within thirty days of issue of the notice, all proceedings in respect of the said notice shall be deemed to be concluded. It was submitted that therefore, even in the case of fraud or willful misstatement or suppression of facts, the statute provides for payment of penalty equivalent to twenty-five per cent of the tax within thirty days from the date of the notice.

7. It was further submitted that the statute is required to be read as a whole and that section 129 of the Act ought not to have been read in isolation. Reliance was placed upon the decision of the Supreme Court in *Kailash Chandra and others* v. *Mukundi Lal and others*, AIR 2002 SC 829, wherein the court has held that a provision in the statute is not to be read in isolation. It has to be read with other related provisions in the Act itself, more particularly, when the subject matter dealt with in different sections or parts of the same statute is the same or similar in nature.

8. The attention of the court was also invited to the circular No. 64/38/2018-GST dated 14th September, 2018 and more particularly, clause (5) thereof, which provides that in case a consignment of goods is accompanied with an invoice or any other specified document and also an e- way bill, proceedings under section 129 of the CGST Act may not be initiated, *inter alia*, in the situations enumerated thereunder. It was submitted that the situations enumerated in the said circular are illustrative and not exhaustive. Therefore, a mistake in writing distance can be deemed to have been included within the ambit of the said circular.

9. Another contention raised by the learned advocate for the petitioner is that in terms of the Government of India circular No. 3/3/2017-GST dated 5th July, 2017, the functions under different sections of the Central Goods and Service Act, 2017 or the rules made thereunder, are specifically delegated to the officers in terms of the said circular. It was pointed out that the powers under sub-section (3) of section 129 of the Act have been delegated to the Deputy or Assistant Commissioner of Central Tax.

It was contended that the impugned order has been passed by the State Tax Officer, who is not an officer empowered to exercise powers under sub-section (3) of section 129 of the Act and therefore, suffers from lack of jurisdiction.

10. Having regard to the submissions advanced by the learned advocate for the petitioner, Issue Notice returnable on 10th January, 2019. Direct Service is permitted today."

2. On 13-10-2022, when the matter came up for hearing, Mr. Shah for the petitioners, on instructions, submitted that the petitioners have not pressed for the prayers at paragraphs 7(*a*) to 7(*c*) and thus, he is giving up the challenge to the vires, particularly, rule 138(10) of the CGST Rules and GGST Rules.

3. The only prayers that survives for consideration of this Court are prayers para 7(*d*) and 7(*e*).

4. We have heard learned advocate for the petitioners who has urged that the case of the petitioners is covered by the decision of this Court in the case of [Special Civil Application No. 23835 of 2022, dated 1-12-2022] in the case of *Shree Govind Alloys (P.) Ltd*. v. *State of Gujarat*. It is further urged that in his case also, the way bill has expired and it appears to be *bona fide* and not with any fraudulent intent.

5. As the challenge to the rule 138(10) of the CGST Rules has not been insisted, learned senior counsel Mr.Raval assisted by learned advocate urges that he has nothing to offer, whereas learned AGP Mr.Kathiriya appearing for the State in wake of the challenge given up of rule 138(10) of the CGST Rules has urged this Court to consider the peculiar facts of this case, however, there is no dispute to

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the fact that in this case, this matter is squarely covered by the decision of Special Civil Application No. 23835 of 2022.

6. Having heard both the sides, at the outset, it is to be noted that in case of *Shree Govind Alloys (P.) Ltd.* (*supra*), the respondent had challenged the authority of the respondent demanding the tax and penalty under section 129(3) of the Central Goods & Services Tax Act, 2017, where the goods, which were to be delivered on or before 17-10-2022, could not be delivered in time and on 19-10-2022 when inspected, some of the e-Way bill numbers had shown expired. The entire truck along with the goods had been seized on account of expiration of the e-Way bill. Therefore, the Court had, after a detailed consideration, held that e-Way bill had expired 41 hours before and the release of goods of conveyance and transit through the authority concerned. Relevant observations are made in paragraphs 6 to 10 are as under :

"6. We have heard learned advocates on both the sides and also have considered the material on the record. We notice section 129, which provides as under:—

"Detention, seizure and release of goods and conveyances in transit —

129(1) Notwithstanding anything contained in this Act, where any person transports any goods or stores any goods while they are in transit in contravention of the provisions of this Act or the rules made thereunder, all such goods and conveyance used as a means of transport for carrying the said goods and documents relating to such goods and conveyance shall be liable to detention or seizure and after detention or seizure, shall be released.-

(*a*) on payment of penalty equal to two hundred per cent of the tax payable on such goods and, in case of exempted goods, on payment of an amount equal to two per cent of the value of goods or twenty-five thousand rupees, whichever is less, where the owner of the goods comes forward for payment of such penalty;

(*b*) on payment of penalty equal to fifty per cent of the value of the goods or two hundred per cent of the tax payable on such goods, whichever is higher, and in case of exempted goods, on payment of an amount equal to five per cent of the value of goods or twenty-five thousand rupees, whichever is less, where the owner of the goods does not come forward for payment of such penalty;

(*c*) upon furnishing a security equivalent to the amount payable under clause (*a*) or clause (*b*) in such form and manner as may be prescribed:

Provided that no such goods or conveyance shall be detained or seized without serving an order of detention or seizure on the person transporting the goods.

(2)** ** **

(3) The proper officer detaining or seizing goods or conveyance shall issue a notice within seven days of such detention or seizure, specifying the penalty payable, and thereafter, pass an order within a period of seven days from the date of service of such notice, for payment of penalty under clause (*a*) or clause (*b*) of sub-section (1)

(4) No penalty shall be determined under sub-section (3) without giving the person concerned an opportunity of being heard.

(5) On payment of amount referred in sub- section(*1*), all proceedings in respect of the notice specified in sub-section(3) shall be deemed to be concluded.

(6) Where the person transporting any goods or the owner of such goods fails to pay the amount of penalty under sub-section (1) within fifteen days fro the date of receipt of the copy of the order passed under sub-section (3), the goods or conveyance so detained or seized shall be liable to be sold or disposed of otherwise, in such manner and within such time as may be prescribed, to recover the penalty payable under sub-section (3):

Provided that the conveyance shall be released on payment by the transporter of penalty under sub-section (3) or one lakh rupees, whichever is less:

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Provided further that where the detained or seized goods are perishable or hazardous in nature or are likely to deprecate in value with passage of time, the said period of fifteen days may be reduced by the proper officer."

7. It is not in dispute that in the instant case, e-Way Bill had expired 41 hours before and the release of goods of conveyance and transit through the authority concerned.

8. We could notice that the detention is also on the ground that the goods are of expiration of the eWay bill number, which had expired during the transit and the same cannot be the ground for detaining and seizure of M.S. Billet along with the vehicle truck.

9. This Court in *Govind Tobacco Manufacturing Co.* v. *State of U.P.*, [2022] 140 taxmann.com 383 (Ahhahabad) has held that as there is expiry of eWay bill on transit, the seizure of said vehicle and the goods is not permissible under the law. In the case before the High Court of Madhya Pradesh at Jabalpur in *M/s. Daya Shaker Singh* v. *State of Madhya Pradesh* passed in Writ Petition No. 12324 of 2022 on 10-8-2022, where also the Court had intervened considering the fact that the respondent could not establish any element of evasion of tax with fraudulent intent or negligence on the part of the petitioner. Delay was of almost 4½ hours before the e-Way bill could expire. It appeared to be *bona fide* and without establishing any fraudulent intention. Here also what is found is that there is no fraudulent intention for this to happen.

10. Resultantly, present petition stands allowed. The impugned order dated 4-11-2022 demanding the sum of Rs. 7,53,364/- is quashed and set aside. The order of detention dated 19-10-2022 as well as the notice issued under section 129(3) of the Act dated 19-10-2022 are also quashed and set aside."

7. In the instant case also, as we could notice that the goods of the said vehicle has been detained at 6:05 p.m. at Amirgadh on 27-9-2018, after about expiry of 48 years. This case is squarely covered by the decision of this Court which has not been further challenged and even otherwise, from the facts which are robust in nature, it can be gathered that there does not appear to be any ill-intent on the part of the petitioner to use the expired e-Way bill. The company is situated at Howrah, West Bengal and the place of delivery was Jamnagar, Gujarat and in transit, this e-Way bill has expired.

8. The petition deserves to be allowed and is allowed.

9. The impugned order dated 28-9-2018 demanding a sum of Rs. 63,40,000/- is quashed and set aside.

10. The order of detention as well as the further notice issued under section 129(3) of the CGST Act in FORM GST MOV-07 is also quashed and set aside, with all consequential benefits.

11. The tax of Rs. 11,41,200/- and the matching amount of penalty had been recovered, making it total of Rs. 22,82,400/-. The penalty being an additional amount in wake of this quashment, the same shall be refunded to the petitioner with interest, within eight weeks.

12. Rule is made absolute to the aforesaid extent.

5. 2023 (71) G.S.T.L. 158 (Bom.)/(2023) 3 Centax 86 (Bom.) [16-09-2022]
(2023) 3 Centax 86 (Bom.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

K.R. Shriram and A.S. Doctor, JJ.

OASIS REALTY

Versus

UNION OF INDIA

Writ Petition (ST) Nos. 23507 of 2022 with 12287 & 12457 of 2022, decided on 16-9-2022

GST : Pre-deposit of 10 per cent of disputed tax can be paid either using amount available in Electronic Cash Ledger or Electronic Credit Ledger

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Appeal to Appellate Authority - Pre-deposit - Payment of pre-deposit was done by debiting Electronic Credit Ledger (ECRL) instead of payment from Electronic Cash Ledger (ECL) - 10 per cent of tax was to be paid as precondition - Any payment towards output tax, whether self-assessed in return or payable as consequence of any proceeding instituted under Maharashtra Goods and Services Tax Act, 2017 can be made by utilization of amount available in Electronic Credit Ledger - Hence, a party can pay 10 per cent of disputed Tax either using amount available in Electronic Cash Ledger or amount available in Electronic Credit Ledger, particularly in view of clarification vide Circular F. No. CBIC-20001/2/2022-GST,dated 6-7-2022 [Section 107, read with section 49 of Central Goods and Services Tax Act, 2017/Maharashtra Goods and Services Tax Act, 2017] *[paras 9 to 11]*

CIRCULARS AND NOTIFICATIONS

Circular F.No. CBIC-20001/2/2022-GST, dated 6-7-2022.

REPRESENTED BY : S/Shri Prakash Shah a/w Jas Sanghavi, Mihir Mehta, Yash Prakash, Rahul C. Thakar i/by C.B. Thakar and Vishal Agrawal, a/w Akshit Malhotra, Ms. Hima Doshi i/by Prabhakar K Shetty, for the Petitioner.

Ms. Jyoti Chavan, AGP and Jitendra B. Mishra a/w Ms. Sangeeta Yadav, for the Respondent.

[Judgment Per : K.R. Shriram, J. (Oral)]. - Issue in this Petition is:

Whether, an Appellant, to comply with the requirements of Sub-section 6 of Section 107 of the Maharashtra Goods and Services Tax Act, 2017 (MGST Act) of paying a sum equal to 10% of the amount of Tax in dispute arising out of the impugned order, can pay the amount utilising the credit available in the Electronic Credit Ledger?

2. It is Petitioner's case that it can be used and it is Revenue's case that it cannot be. According to Revenue, Appellant can utilise the credit available only in the Electronic Cash Ledger. By consent Writ Petition (St) No. 23507 of 2022 is taken as the lead Petition to be disposed at the admission stage itself. Therefore, Rule. Rule made returnable forthwith.

3. The provisions relevant to the issue at hand are Sub-sections (1), (6) and (7) of Section 107, Sub-sections (1), (2), (3), (4), (5) and (6) of Section 49 and Sub-section (82) of Section 2 of the MGST Act. These provisions read as under:-

107. Appeals to Appellate Authority -

(1) Any person aggrieved by any decision or order passed under this Act or the Central Goods and Services Tax Act by an adjudicating authority may appeal to such Appellate Authority as may be prescribed within three months from the date on which the said decision or order is communicated to such person.

** ** **

(6) No appeal shall be filed under sub-section (1), unless the appellant has paid-

(*a*)		in full, such part of the amount of tax, interest, fine, fee and penalty arising from the impugned order, as is admitted by him; and
(*b*)		a sum equal to ten per cent of the remaining amount of tax in dispute arising from the said order, in relation to which the appeal has been filed.

(7) Where the appellant has paid the amount under sub-section (6), the recovery proceedings for the balance amount shall be deemed to be stayed.

49. Payment of tax, interest, penalty and other amounts -

(1)	Every deposit made towards tax, interest, penalty, fee or any other amount by a person by internet banking or by using credit or debit cards or National Electronic Fund Transfer or Real Time Gross Settlement or by such other mode and subject to such conditions and restrictions as may be prescribed, shall be credited to the electronic cash ledger of such person to be maintained in such manner as may be prescribed.

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(2)	The input tax credit as self-assessed in the return of a registered person shall be credited to his electronic credit ledger, in accordance with section 41, to be maintained in such manner as may be prescribed.
(3)	The amount available in the electronic cash ledger may be used for making any payment towards tax, interest, penalty, fees or any other amount payable under the provisions of this Act or the rules made thereunder in such manner and subject to such conditions and within such time as may be prescribed.
(4)	The amount available in the electronic credit ledger may be used for making any payment towards output tax under this Act or under the Integrated Goods and Services Tax Act in such manner and subject to such conditions and within such time as may be prescribed.
(5)	The amount of input tax credit available in the electronic credit ledger of the registered person on account of -
(a)	integrated tax shall first be utilised towards payment of integrated tax and the amount remaining, if any, may be utilised towards the payment of central tax and State tax, or as the case may be, Union territory tax, in that order;
(b)	the central tax shall first be utilised towards payment of central tax and the amount remaining, if any, may be utilised towards the payment of integrated tax;
(c)	the State tax shall first be utilised towards payment of State tax and the amount remaining, if any, may be utilised towards the payment of integrated tax;
(d)	the Union territory tax shall first be utilised towards payment of Union territory tax and the amount remaining, if any, may be utilised towards the payment of integrated tax;
(e)	the central tax shall not be utilised towards payment of State tax or Union territory tax; and
(f)	the State tax or Union territory tax shall not be utilised towards payment of central tax.
(6)	The balance in the electronic cash ledger or electronic credit ledger after payment of tax, interest, penalty, fee or any other amount payable under this Act or the rules made thereunder may be refunded in accordance with the provisions of section 54.

2(82) "output tax" in relation to a taxable person, means the tax chargeable under this Act on taxable supply of goods or services or both made by him or by his agent but excludes tax payable by him on reverse charge basis;

4. Before a party files an Appeal, Sub-section (6) of Section 107 mandates the party to pay in full, such part of the amount of tax, interest, fine, fee and penalty arising from the impugned order as is admitted by him. Therefore, if the impugned order provides for the amount of 'tax, interest, fine, fee and penalty' to be paid and the Appellant admits those amounts, such amounts shall be paid by him before filing the Appeal. This would arise only in a situation where part of the order is accepted and part of it is not accepted. It will not a rise in a situation where the entire order is admitted because the party may then not want to file an Appeal.

5. Clause (*b*) of Sub-section (6) of Section 107 provides that for such part of the impugned order that is not admitted by the Appellant, the Appellant shall pay a sum equal to 10% of the remaining amount of 'tax' in dispute arising from the said order in relation to which the Appeal has been filed. It is important to note, it does not say anything about 'interest, fine, fee or penalty'. Therefore, when we compare clauses (*a*) and (*b*) of Sub-section (6) of Section 107, where there is an admission of part of the order and the admission is in relation to tax, interest, fine, fee and penalty, all those amounts will have to be deposited first and, to the part which is not admitted only 10% of the tax in dispute has to be

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deposited. The deposit will not include the interest, fine, fee and penalty mentioned in the impugned order. By way of illustration, if an impugned order provides:-

Tax - Rs. 1 Crore, Interest - 10%, fine - Rs. 2 Lakhs, fee - Rs. 50 Thousand, penalty - Rs. 5 Lakhs and Appellant is admitting 25% of the amount of tax, then the 25% of Rs. 1 Crore, *i.e.,* Rs. 25 Lakhs will have to be paid in full before filing the Appeal. On the remaining Rs. 75 Lakhs of tax only 10% has to be paid, *i.e.,* Rs. 7.5 Lakhs. So before filing the Appeal, Appellant has to pay (*a*) Rs. 32.5 Lakhs and no part of the balance amount of tax and (*b*) NIL against interest, fine, fee and penalty.

6. We must also note that the expression used in Sub-section (6) of Section 107 is, "unless the Appellant has paid". It is a precondition to filing an Appeal. The expression used is "paid" and not "deposited". This would be material while considering the provisions of Sub-section (3), Sub-section (4) and Sub-section (5) of Section 49.

7. Sub-section (1) of Section 49 provides for a party to deposit its tax, interest, penalty, fee or any other amount and how such deposit has to be made. It says it can be made by internet banking or by using credit or debit cards or NEFT or RTGS or by such other mode and subject to such conditions and restrictions as may be prescribed. It also says that if such a deposit is made it shall be credited to the Electronic Cash Ledger of the said party.

Sub-section (2) of Section 49 provides that the input tax credit (ITC) as self-assessed in the return of a registered person shall be credited to his Electronic Credit Ledger. This means, where a supplier has been paid in respect of supply of goods or services or both, the tax portion paid to the supplier by the registered person shall be credited to the Electronic Credit Ledger of the registered person.

Sub-section (3) and Sub-section (4) of Section 49 provide how to use the amounts lying in the Electronic Cash Ledger and Electronic Credit Ledger, respectively. Sub-section (3) provides that the amount available in the Electronic Cash Ledger may be used for making any payment towards tax, interest, penalty, fee or any other amount payable under the provisions of this Act or rules made thereunder. Sub-section (4) provides that the amount available in the Electronic Credit Ledger may be used for making any payment towards output tax under MGST (this) Act or under Integrated Goods and Services Tax (IGST) Act in such manner and subject to such conditions as may be prescribed from time to time.

Sub-section (5) of Section 49 provides for, how the amount of ITC available in the Electronic Credit Ledger shall be utilised. It says any amount of ITC available on account of integrated tax shall first be utilised towards payment of integrated tax and the amount remaining, if any, may be utilised towards payment of central tax or State tax or as the case may be, even Union territory tax in that order. Clause (*b*) of Sub-section (5) says the amount of ITC available in the Electronic Credit Ledger on account of the central tax shall first be utilised towards payment of central tax and the amount remaining may be utilised for payment of integrated tax. Clause (*c*) of Sub-section (5) provides that the amount of ITC available in the Electronic Credit Ledger on account of the State tax shall first be utilised towards payment of State tax and the amount remaining, if any, shall be utilised towards payment of integrated tax. Similarly, clause (*d*) provides for the utilisation for the Union Territory tax.

8. It is Respondents case that Sub-section (4) of Section 49 restricts the usage of the amount available in the Electronic Credit Ledger only for payment of output tax or under MGST or under IGST and the amount available cannot be utilised for payment of tax under clause (*b*) of Sub-section (6) of Section 107.

9. We are not in agreement with the submission made on behalf of the State. This is because clause (*b*) of Sub-section (6) of Section 107 provides a precondition, "unless the appellant has paid" (not deposited) a sum equal to 10% of remaining amount of Tax in dispute. It says 10% of Tax has to be paid as a precondition. That Tax can be Integrated Tax or Central Tax or the State Tax as in the case at hand, or Union Territory Tax. The amount of ITC available in the Electronic Credit Ledger can be utilised towards payment of Integrated Tax or Central Tax or State Tax or Union Territory Tax.

Therefore, in our view, Petitioner having to pay 10% of the Tax in dispute under clause (*b*) of Sub-section (6) of Section 107, can certainly utilise the amount of ITC available in the Electronic Credit Ledger. We hasten to add that in view of provisions of Sub-section (3) of Section 49, the party may also pay this 10% of the Tax in dispute by utilising the amount available in the cash ledger.

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10. Moreover, Sub-section (4) of Section 49 provides the amount available in the Electronic Credit Ledger may be used for making any payment towards output tax under the MGST Act or IGST Act subject to certain restrictions or conditions that may be prescribed. Sub-rule (2) of Rule 86 of MGST Rules provides for debiting of the Electronic Credit Ledger to the extent of discharge of any liability in accordance with the provisions of Section 49 of the MGST Act. Further, output tax in relation to a taxable person is defined in clause (82) of Section 2 of MGST Act as the tax chargeable on taxable supply of goods or services or both but excludes tax payable on reverse charge mechanism. Therefore, any payment towards output tax, whether self-assessed in the return or payable as a consequence of any proceeding instituted under the MGST Act can be made by utilisation of the amount available in the Electronic Credit Ledger. Hence, a party can pay 10% of the disputed Tax either using the amount available in the Electronic Cash Ledger or the amount available in the Electronic Credit Ledger.

11**.** Ms. Chavan relied upon an order of the High Court of Orissa at Cuttack in *M/s Jyoti Construction* v. *Deputy Commissioner of CT & GST* [2021] 131 taxmann.com 104/2021 54 G.S.T.L. 279 to submit that the amount in the credit ledger cannot be used to pay the 10% required to be paid under Sub-section (6) of Section 107 of the MGST Act.

In our view it will not be necessary to discuss the said order because subsequent to the said order the Central Board of Indirect Taxes and Customs, GST Policy Wing, Department of Revenue, Ministry of Finance, Government of India (CBIT&C) has, in exercise of its powers conferred by Section 168(1) of the Central Goods and Services Tax Act, 2017, issued clarification in the form of a circular. This clarification came to be issued in view of various representations that CBIT&C received on utilisation of the amounts available in the Electronic Credit Ledger and the Electronic Cash Ledger for payment of tax and other liabilities. The CBIT&C, in its circular F. No. CBIC-20001/2/2022-GST dated 6th July 2022 has clarified as under:-

Utilisation of the amounts available in the electronic credit ledger and the electronic cash ledger for payment of tax and other liabilities

6.	Whether the amount available in the electronic credit ledger can be used for making payment of any tax under the GST Laws?	1. In terms of sub-section (4) of section 49 of CGST Act, the amount available in the electronic credit ledger may be used for making any payment towards output tax under the CGST Act or the Integrated Goods and Services Tax Act, 2017 (hereinafter referred to as "IGST Act"), subject to the provisions relating to the order of utilisation of input tax credit as laid down in section 49B of the CGST Act read with rule 88A of the CGST Rules.
		2. Sub-rule (2) of rule 86 of the CGST Rules provides for debiting of the electronic credit ledger to the extent of discharge of any liability in accordance with the provisions of section 49 or section 49A or section 49B of the CGST Act.
		3. Further, output tax in relation to a taxable person (*i.e.* a person who is registered or liable to be registered under section 22 or section 24 of the CGST Act) is defined in clause (82) of section 2 of the CGST Act *as the tax chargeable on taxable supply of goods or services or both but excludes tax payable on reverse charge mechanism*.
		4. Accordingly, it is clarified that any payment towards output tax, whether self-assessed in the return or payable as a consequence of any proceeding instituted under the provisions of GST Laws, can be made by utilization of the amount available in the electronic credit ledger of a registered person.
		5. It is further reiterated that as output tax does not include tax payable under reverse charge mechanism, implying thereby that the electronic credit ledger cannot be used for making payment of any tax which is payable under reverse charge mechanism.

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7.	Whether the amount available in the electronic credit ledger can be used for making payment of any liability other than tax under GST Laws?	As per sub-section (4) of section 49, the electronic credit ledger can be used for making payment of output tax only under the CGST Act or the IGST Act. It cannot be used for making payment of any interest, penalty, fees or any other amount payable under the said acts. Similarly, electronic credit ledger cannot be used for payment of erroneous refund sanctioned to the taxpayer, where such refund was sanctioned in cash.
8.	Whether the amount available in the electronic cash ledger can be used for making payment of any liability under the GST Laws?	As per sub-section (3) of Section 49 of the CGST Act, the amount available in the electronic cash ledger may be used for making any payment towards tax, interest, penalty, fees or any other amount payable under the provisions of the GST Laws.

(Emphasis Supplied)

Therefore, CBIT&C has itself clarified that any amount towards output tax payable, as a consequence of any proceeding instituted under the provisions of GST Laws, can be paid by utilisation of the amount available in the Electronic Credit Ledger of a registered person. The CBIT&C has also requested that suitable trade notices be issued to publicize the contents of the circular.

12. Ms. Chavan, the learned AGP submitted that this clarification will not apply to tax payable on reverse charge mechanism.

Mr. Prakash Shah stated that sub-paragraph (5) of paragraph 6 of the circular reproduced in paragraph (11) above above makes it clear that Electronic Credit Ledger cannot be used for making payment of any tax which is payable under reverse charge mechanism.

13. Since in the Petitions before us the amounts payable are towards output tax, we hold that Petitioners may utilise the amount available in the Electronic Credit Ledger to pay the 10% of Tax in dispute as prescribed under Sub-section (6) of Section 107 of MGST Act.

14. Accordingly the impugned Order-in-Appeal No. JC/APP-V/GST-Defective/A.F.Y/2021-22/A.O.Y..2022-23/-B-1 dated 6th April, 2022 and FORM GST APL-02 passed by Respondent No. 2 is quashed and set aside. The Appeal is restored to file on the undertaking of Petitioner that it shall debit the Electronic Credit Ledger within one week of this order getting uploaded towards this 10% payable under section 107(6)(*b*), if not already debited, is accepted.

15. In view of the above order passed in Writ Petition (ST) 23507 of 2022, the orders dated 21st March, 2022 impugned in Writ Petition (ST) No. 12287 of 2022 and Writ Petition (ST) No. 12457 of 2022 are also quashed and *set aside* with the same direction mentioned above.

16. All Petitions disposed. No order as to costs.

6. 2023 (71) G.S.T.L. 164 (Guj.)/(2023) 3 Centax 83 (Guj.) [07-04-2022]

(2023) 3 Centax 83 (Guj.)

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
J.B. Pardiwala and Ms. Nisha M. Thakore, JJ.

I-TECH PLAST INDIA PVT. LTD.
Versus
STATE OF GUJARAT

R/Special Civil Application No. 3653 of 2021, decided on 7-4-2022

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GST : Where raw materials imported by availing exemption under Notification No. 79/2017-Cus., dated 13-10-2017 were used in manufacture of goods which were exported on payment of IGST inadvertently utilizing ITC during period after 23-10-2017, since assessee had voluntarily paid aggregate IGST with interest, restoration/re-credit of ITC in Electronic Credit Ledger was to be allowed

Input Tax Credit - Restoration/re-credit in Electronic Credit Ledger - Raw materials were imported duty free under Advance License under Notification No. 79/2017-Cus., dated 13-10-2017 and used in manufacture of goods which, instead of furnishing bond or Letter of Undertaking (LUT), were exported on payment of IGST inadvertently utilizing such ITC - Since utilization of ITC for payment of IGST on exported goods prohibited w.e.f. 23-10-2017 in terms of Rule 96(10) Central Goods and Services Tax Rules, 2017 as importer availed benefit under Notification ibid and undisputedly, petitioner-assessee voluntarily paid aggregate IGST with interest by filing Form GST DRC-03, denial of restoration/re-credit of such ITC in Electronic Credit Ledger, was not justified, more so when, such re-credit if disallowed, would amount to double taxation which is not permissible in law - Department was to be directed to restore/re-credit ITC in Electronic Credit Ledger within a period of two weeks from date of receipt of copy of order [Section 16 of Central Goods and Services Tax Act, 2017/Gujarat Goods and Services Tax Act, 2017] *[paras 6 to 13]*
In favour of assessee

CIRCULAR AND NOTIFICATIONS
Notification No. 79/2017-Cus., dated 13-10-2017 — [Paras 2.1, 2.3]
Notification No. 53/2018-C.T., dated 9-10-2018 — [Para 2.3]
REPRESENTED BY : Ms. Vaibhavi K. Parikh, Adv. for the Petitioner.
Shri Utkarsh R. Sharma, AGP, for the Respondent.

[Judgment per : J.B. Pardiwala, J. (Oral)]. - By this writ-application under Article 226 of the Constitution of India, the writ-applicant has prayed for the following reliefs:
"....this Hon'ble court be pleased to issue a writ of mandamus or a writ in the nature of mandamus or a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, direction or order and be pleased to :

(*a*)	direct the Respondent authorities, more particularly the Respondent No. 2, to re-credit/restore the ITC of Rs. 1,39,49,810/- in the electronic credit ledger along with interest;
(*b*)	pending the admission, hearing and final disposal of this petition, direct the Respondent authorities, more particularly the Respondent No. 2, to re-credit/restore the ITC of Rs. 1,39,49,810/- in the electronic credit ledger along with interest;
(*c*)	any other and further relief deemed just and proper be granted in the interest of justice;
(*d*)	to provide for the cost of this petition."

2. The facts giving rise to the present writ-application may be summarised as under :
2(1) The writ-applicant is a Company registered under the provisions of the Companies Act, 1956 (for short, the 'Act 1956'). The writ-applicant is engaged in the business of manufacturing various types of toys. The writ-applicant is duly registered under the provisions of the Goods and Services Tax Act (for short, the 'GST Act') and it has been issued 'advance license', whereby the writ-applicant is permitted duty free import of its raw material, *i.e.* import without payment of any import duty. Thus, the writ-applicant is importing its raw material by availing the benefit of the Notification No. 79/2017-Customs dated 13.10.17 issued by the Government of India, Ministry of Finance, New Delhi. The raw material so imported is used in the manufacturing of its products which, in turn, are exported by the writ applicant.
2(2) During the period in question, *i.e.* Financial Year 2017-18 to Financial Year 2020-2021, the writ-applicant, inadvertently and due to oversight, cleared and exported its finished goods (produced using material imported under the advance license) upon payment of the Integrated Goods and Services Tax (for short, the 'IGST') instead of exporting it under the 'Letter of Undertaking' (LoU). Since

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the exports were made upon the payment of the IGST, the writ-applicant periodically received auto-refund of the IGST paid at the time of exports. Upon realizing this inadvertent mistake, the writ-applicant voluntarily paid the requisite IGST along with the interest to the department for the period in question and filed the statutory forms GST DRC-03 on 13-8-2020 for the period in question. The aforesaid fact was also brought to the notice of the GST Department *vide* letter dated 13-8-2020. The details of the IGST and the interest paid by the writ-applicant for the period in question are as follows:

Financial Year	*IGST*	*Interest*
2017-18	Rs.9,23,702/-	Rs.3,67,608/-
2018-19	Rs.72,48,590/-	Rs.21,30,594/-
2019-20	Rs.44,24,930/-	Rs.5,75,390/-
2020-21	Rs.13,52,588/-	Rs.13,959/-
Total	Rs.1,39,49,810/-	Rs.30,87,551/-

2(3) The writ-applicant, *vide* letter dated 24-8-2020, further brought the following facts to the notice of the respondent authorities :

(*a*)	That the writ-applicant holds an advance license for duty free importation of raw material and export goods produced from the same under the advance license. Thus, the writ-applicant is availing the benefit of the Notification No. 79/2017-Customs dated 13.10.17 issued by the Government of India, Ministry of Finance;
(*b*)	With effect from 23.10.17, sub-rule (10) of rule 96 of the Central Goods and Service Tax Rules, 2017, has been inserted by the Notification No. 53/2018 - C.T. dated 9-10-2018 which seeks to prevent an exporter availing the benefit under the specified notifications from exporting goods under the payment of the integrated tax. This is basically to ensure that an exporter, who has availed the benefit under the specified notifications (which includes the Notification No. 79/2017-Customs dated 13.10.17), does not utilize the ITC availed on other domestic supplies for making the payment of the IGST on the export of the goods.
(*c*)	Since the writ-applicant is availing the benefit under the Notification No. 79/2017-Customs dated 13.10.17, the restriction imposed by sub-rule (10) of rule 96 of the CGST Rules is applicable to the writ-applicant.
(*d*)	Owing to lack of knowledge of the Notification No. 53/2018 - C.T. dated 9-10-2018 under which sub-rule (9) of rule 10 has been inserted, the writ- applicant exported its finished goods produced from raw-material imported under the advance license on payment of the IGST by utilizing the accumulated ITC;
(*e*)	The writ-applicant realized that it cannot utilize the ITC for payment of the IGST on export of the goods produced from raw-material imported under the advance license in view of sub-rule 10 of rule 96 of the CGST Rules. Hence, the writ-applicant voluntarily paid an aggregate IGST of Rs. 1,39,49,810/- with interest of Rs. 30,87,551/- by filing the statutory Form GST DRC - 03 for the period in question. The working of the aforesaid IGST and interest thereon was also furnished;
(*f*)	Thus, the amount of refund of the IGST received by the writ-applicant from time to time has been voluntarily paid by the writ-applicant as an honest taxpayer;

2(4) In view of the above, the writ-applicant requested the authorities to re-credit/restore the ITC credit to the tune of Rs. 1,39,49,810/- in the electronic credit ledger which was, inadvertently, utilized for payment of the IGST at the time of exports of the goods produced using raw-material imported under the advance license. The details of such ITC to be restored in the electronic credit ledger were also furnished.

2(5) The writ applicant, thereafter met various officers of the GST department at Bhavnagar and Ahmedabad offices respectively for re-credit of the ITC debited towards the IGST, which were separately paid by the writ-applicant along with interest.

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2(6) The writ-applicant, thereafter, *vide* letter dated 16-10-2020, brought the aforesaid facts to the notice of the Chief Commissioner of the SGST. The writ-applicant also sent an email dated 23-10-2020 to the Commissioner of State Tax to bring out this peculiar aspect of the matter. Despite these repeated attempts, when the ITC was not restored as requested, the writ-applicant preferred the present petition.

SUBMISSIONS ON BEHALF OF THE WRIT-APPLICANT :

3. Mr.Tushar Hemani, the learned senior counsel assisted by Ms.Vaibhavi Parikh, the learned advocate appearing for the writ-applicant made the following submissions:

(*a*)	Since the writ-applicant has voluntarily paid the IGST on exports with interest, the corresponding ITC (which was initially utilized for payment of such IGST on exports) must be recredited/restored in the electronic credit ledger with interest;
(*b*)	Despite the repeated oral as well as written representations by the writ-applicant, the ITC is not being re-credited/restored on the count that there is no such mechanism whereby the ITC can be recredited/restored upon voluntary payment of the IGST;
(*c*)	An honest taxpayer like the writ-applicant must not suffer owing to lack of appropriate mechanism;
(*d*)	The action of the respondent in not recrediting/restoring the ITC in question is also not at all in consonance with Article 265 as well as Article 300-A of the Constitution of India, 1950;

SUBMISSIONS ON BEHALF OF THE RESPONDENT :

4. On the other hand, Mr. Utkarsh Sharma, the learned AGP vehemently opposed the present writ-application. Mr. Sharma submitted that the writ-application is not maintainable as the writ-applicant is not at all entitled to claim the refund. He relied upon paragraph 18 of the affidavit-in-reply to buttress his point that once an amount in question is paid in the Form-DRC-03 voluntarily, the same cannot be refunded.

5. In such circumstances referred to above, Mr. Sharma, prays that there being no merit in the present writ-application, the same may be rejected.

ANALYSIS :

6. Under the scheme of the IGST Act, 2017, a registered person having an advance license shall be eligible for importing raw material without payment of import duty. As per Section 16(1)(*a*) of the IGST Act, export of goods or services or both falls within the ambit of 'zero rated supply', *i.e.* no IGST is applicable on exports of goods. As per Section 16(3) of the IGST Act, a registered person making 'zero rated supply' shall be eligible to claim refund under either of the following options:

i.	A registered person may supply goods or services of both under 'bond' or 'Letter of Undertaking' without payment of IGST and claim refund of unutilized tax credit;

OR

ii.	A registered person may supply goods or services of both on payment of IGST and thereafter claim refund of tax so paid;

7. As per Rule 96(10) of the CGST Rules, a registered person importing raw-material without payment of import duty under the advance license shall not be eligible for utilizing accumulated ITC for payment of IGST on exports of goods or services.

8. On the case on hand, the writ-applicant is importing raw-material under the advance license without payment of the import duty. The finished goods produced using the raw-material so imported have been exported by the writ-applicant. The writ-applicant opted for the second route, *i.e.* payment of IGST on exports, and thereafter claimed refund of such IGST on exports instead of opting for the first route, *i.e.* exports under the Letter of Undertaking. However, inadvertently, the writ-applicant utilized the ITC for payment of the IGST on exports (instead of paying the IGST separately) which, in turn, was automatically refunded. In view of rule 96(10), the writ-applicant could not have utilized the ITC for payment of the IGST on exports. Upon realizing the aforesaid mistake, the writ-applicant separately paid the requisite IGST (which was refunded in past) along with the interest thereon.

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9. Insofar as the erroneous grant of refund and return of such refund amount together with interest by the writ-applicant is concerned, the same is undisputed. That being the case, the first part of the transaction is nullified inasmuch as the amount erroneously refunded has already been repaid by the writ-applicant along with interest. However, once both these transactions are taken out from the equation, what survives is the reduction of the ITC originally effected from the electronic credit ledger of the writ-applicant. The respondent authorities are of the view that the writ-applicant is not entitled to such a refund of the ITC at all. According to Mr. Sharma, the learned AGP, such a refund is not permissible under sub-rule (10) of rule 96 of the CGST Rules. However, in the present case, refund as contemplated under sub-rule (10) of rule 96 of the CGST Rules is not at all an issue. Here, the simple issue is one of restoration of the ITC, which was erroneously refunded and subsequently recovered. If the authorities have accepted that there was an error and resultantly, accepted repayment of the erroneous refund, as a corollary, the credit of the ITC must be restored. It cannot be that for the purpose of repayment, there was an error, and for the purpose of restoration of the ITC, there was no error. There is no question of any refund of the ITC at all. The question is one of restoration of the ITC in the electronic credit ledger and not a refund thereof. Hence, any reference to sub-rule (10) of rule 96 of the CGST Rules is completely misconceived and not tenable.
10. In such circumstances, We direct the respondent authorities to re-credit/restore the ITC to the tune of Rs. 1,39,49,810/- in the electronic tax ledger of the writ-applicant.
11. As regards the submissions of Mr. Sharma that the writ-applicant is not entitled to any refund, we make it clear that we have not gone into the merits or the eligibility of the claim of refund of the writ-applicant. We have directed only with respect to restoration of ITC in the sum of Rs. 1,39,49,810/- in the electronic credit ledger of the writ-applicant. This is the sum that was erroneously refunded by reducing the ITC from the electronic credit ledger. However, as noted earlier, the same has already been repaid by the writ-applicant along with interest in DRC-03. Once such an amount is repaid by the writ-applicant to the GST department, the original debit of the ITC must be re-credited/restored. Otherwise, the same would amount to double taxation, which is not permissible in law.
12. We, therefore, direct the respondent authorities to restore/re-credit the Input Tax Credit of Rs. 1,39,49,810/- in the electronic credit ledger of the writ-applicant within a period of two weeks from the date of receipt of this order.
13. With the aforesaid, this writ-application stands disposed of. Direct service is permitted.

7. **(2023) 3 Centax 121 (Tri.-Del)**

IN THE CESTAT, PRINCIPAL BENCH, NEW DELHI
Justice Dilip Gupta, President and Shri. P.V. Subba Rao, Member (T)

CHAMBAL FERTILIZERS & CHEMICALS LTD.
Versus
COMMISSIONER CENTRAL GOODS AND SERVICE TAX, UADIPUR

Final Order No. 50085 of 2023 in Appeal No. ST/52983 of 2018, decided on 30-1-2023

ST : Principles of unjust enrichment is not applicable to amount deposited during pendency of adjudication or investigation as same cannot

Refund - Unjust enrichment - Amount paid under protest - Issue regarding taxability of license fee paid to foreign parties for import of technical know-how and engineering design license under reverse charge mechanism was decided in favour of assessee by Appellate Tribunal - Refund claim pursuant to Appellate Tribunal's decision was rejected on ground of unjust enrichment - Principles of unjust enrichment was not applicable to amount deposited during pendency of adjudication or investigation - Such amount was, in nature, deposit and was not to be considered towards payment of service tax or excise duty - Fact that amount deposited was accounted as "expense" in profit and

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loss account of assessee could not be made basis to hold that incidence of duty had passed - Further, if price of goods is fixed by Government of India, such price could not be altered by inclusion of any duty - Thus, issue of unjust enrichment would not be applicable - Thus, denial of refund was not proper - Section 11B of Central Excise Act, 1944 as applicable to Service Tax vide Section 83 of Finance Act, 1994. *[paras 11, 12, 16 to 20]*

M/s Chambal Fertilizers and Chemicals Limited[1] has filed this appeal to challenge the order dated 22/26-3-2018 passed by the Commissioner (Audit), Central Excise and CGST, Jodhpur[2] by which the order dated 30-4-2010 passed by the Commissioner confirming the demand of service tax with interest and penalty has been upheld and the appeal has been dismissed.

2. The appellant is engaged in the manufacture of fertilizers and ammonia. In the year 2006-2007, the appellant entered into various agreements with foreign parties for procurement of rights and licenses for use of technical information for manufacturing fertilizers. Such technical information was in the form of designs, flow drawings, vessel sketches, operating philosophy and material specifications along with other details.

3. A show cause notice for demand of service tax was issued to the appellant on 28-7-2008 proposing recovery of Rs. 1,42,79,138/-on license fee paid to foreign parties for import of technical know-how and engineering design license alleging that the appellant had imported 'intellectual property rights' service, which was susceptible to service tax in the hands of the appellant. The demand of service tax was confirmed by the Commissioner by order dated 26-4-2010. An appeal was filed by the appellant before the Tribunal bearing Service Tax Appeal No. 1037 of 2010 and an amount of Rs. 1,26,59,954/- was deposited by the appellant under protest. The appeal was ultimately allowed by the Tribunal by order dated 22-7-2016. It was held that no service tax was payable on import of technical know-how and engineering design license as they were not intellectual rights recognized under any law in India.

4. Pursuant to the order of the Tribunal, the appellant filed claims for refund on 3-8-2016 and 8-8-2016 for an amount of Rs. 1,26,59,954/-, which had been paid by the appellant under protest. However, a show cause notice dated 5-10-2016 was issued to the appellant proposing to reject the refund on the ground that the appellant had not produced any documentary evidence to show that the incidence of tax had not been passed on to the ultimate buyer. A reply was filed by the appellant contesting the proposal made in the show cause notice contending that the test of unjust enrichment would not apply in respect of refund of deposits made under protest and that duty could not have been passed on to the buyers after the goods were cleared.

5. An order dated 2-11-2016 was passed by the Commissioner rejecting the claim for refund made by the appellant by holding that the burden of tax had passed on as the amount was booked as 'expense' by the appellant.

6. The appeal filed by the appellant before the Commissioner (Appeals), Jaipur was rejected by order dated 22-3-2018 for the same reason that the appellant had not passed the test of unjust enrichment.

7. It is this order passed by the Commissioner (Appeals) that has been assailed in this appeal.

8. Ms. Shagun Arora, learned counsel for the appellant, made the following submissions:

(*i*)	The test of unjust enrichment would not apply to refund of an amount deposited during the course of investigation or proceedings and in this connection reliance has been placed upon the decision of the Tribunal in *Dewsoft Overseas Pvt. Ltd.* v. *Commissioner of Service Tax, Delhi* 2019 (6) TMI 904-CESTAT New Delhi 2019 (6) TMI 904 - CESTAT New Delhi
(*ii*)	The amount paid during pendency of proceedings is in the nature of a deposit;
(*iii*)	The method of accounting of deposit does not impact the admissibility of refund and in this connection reliance has been place on the decisions of the Tribunal in *Commissioner of Customs* v. *U.T. Electronics Pvt. Ltd.* 2019 (12) TMI 1219-CESTAT New Delhi and *Allied Chemical & Pharmaceuticals Pvt. Limited* v. *CCE & ST* 2019 (2) TMI 849-CESTAT New Delhi; and
(*iv*)	In any case the appellant had booked the amount has 'recoverable' in its books under the head 'current assets' in 20016-17 when the appeal was allowed by the Tribunal.

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9. Shri Rajeev Kapoor, learned authorised representative appearing for the department, however, supported the impugned order passed by the Commissioner (Appeals) and referred to it at length. Learned authorised representative also submitted that unjust enrichment means passing not only of duty directly to another person but also indirectly.

10. The submissions advanced by the learned counsel for the appellant and the learned authorised representative for the department have been considered.

11. It transpires that in 2008, the service tax department had initiated proceedings against the appellant and issued a show cause notice proposing to demand service tax on services imported by the appellant from foreign companies. The department was of the view that designs, drawings and technical know-how received by the appellant from foreign companies qualified as intellectual property rights services, and when imported, these services were subject to levy of service tax in the hands of the appellant on reverse charge mechanism in terms of section 66A of the Finance Act. The appellant, on the other hand, contested the demand on the ground that technical know-how, designs and drawings did not qualify as intellectual property rights services as these intellectual property rights were not recognized under any law in force in India. After filling an appeal before the Tribunal against the order confirming the demand, the appellant paid an amount of Rs. 1,26,59,954/- under protest. Subsequently, when the appeal was allowed by the Tribunal, the appellant filed a claim for refund of the amount deposited under protest. This refund has been rejected on the ground that the appellant did not pass the test of unjust enrichment.

12. The issue as to whether unjust enrichment has to be examined while considering a claim for refund of an amount deposited during investigation or proceedings arose before the Madras High Court in *Commissioner of Central Excise, Coimbatore* v. *Pricol Ltd*.2015 (320) E.L.T. 703 (Mad.) Investigations revealed that the assessee had cleared waste and scrap without payment of duty. Adjudication proceedings were initiated but during the pendency of these proceedings, the assessee deposited Rs. 1.55 Crores. A show cause notice dated 2 December, 1998 was, thereafter, issued to the asseesee. After adjudication, the demand was confirmed by Order dated 11 May, 2001 and the amount of Rs. 1.55 Crores deposited by the assessee was directed to be appropriated. The assessee filed an Appeal against the aforesaid Order before the Tribunal. The Appeal was allowed by Order dated 17 December, 2004 and the Order passed by the Adjudicating Authority was set aside. The assessee thereafter filed a claim for refund of the deposit. The said refund was sanctioned by the Assistant Commissioner by Order dated 31 March, 2005. An Appeal was, however, filed by the Department. The Appeal was allowed and a direction was issued to the adjudicating authority to examine the plea of unjust enrichment. Feeling aggrieved by the remand order, the assessee filed an Appeal before the Tribunal. The Tribunal held that there was no case of unjust enrichment on the facts of the case as the assessee had produced a certificate of the Chartered Accountant that refund claim had not been passed on to the customers. Against this order of the Tribunal, the department filed an Appeal before the Madras High Court. The plea of unjust enrichment was examined and the High Court found that it was not a case of refund of 'duty' since the assessee had deposited the 'amount' under protest at the time of investigation. The High Court found that the Courts had consistently taken a view that any amount deposited during the pendency of adjudicating proceedings or investigation is in the nature of deposit made under protest and, therefore, the principles of unjust enrichment would not apply when a refund is claimed for this amount. The relevant portion of the judgement of the High Court is reproduced below:

"7. The first question of law, which is raised, relates to the plea of unjust enrichment and much emphasis is laid on the decision of the Supreme Court in *Mafatlal Industries* case (1997 (89) ELT 247 (SC)). Relevant portion of the order passed by the Supreme Court in *Mafatlal Industries* case (*supra*) has been extracted in the grounds (*b*) and (*c*). There is no dispute with regard to the proposition of law as laid down by the Supreme Court. In the present case, as is evident from the records, it is not a case of refund of duty. It is a pre-deposit made under protest at the time of investigation, as has been recorded in the original proceedings itself. In this regard, it has to be noticed it has been the consistent view taken by the Courts that any amount, that is deposited during the pendency of adjudication proceedings or investigation is in the nature of deposit made under protest and, therefore, the principles of unjust enrichment does not apply. The above said view has been reiterated by the High Court of Bombay in *Suvidhe Ltd.* v. *Union of India* (1996 (82) ELT 177 (Bom.)), and by the Gujarat High Court in *Commissioner of Customs* v. *Mahalaxmi Exports* (2010 (258) ELT 217 (Guj.)), which has been

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followed in various cases in *Summerking Electricals (P.) Ltd.* v. *Cegat, New Delhi* (1998 (102) ELT 522 (All.)), *Parle International Ltd.* v. *Union of India* (2001 (127) ELT 329 (Guj.)) and *Commissioner of Central Excise, Chennai* v. *Calcutta Chemical Company Ltd.* (2001 (133) ELT 278 (Mad.)) and the said view has also been maintained by the Supreme Court in *Union of India* v. *Suvidhe Ltd.* (1997 (94) ELT A159 (SC)). *There are also very many judgments of various Courts, which have also reiterated the same principles that in case any amount is deposited during the pendency of adjudication proceedings or investigation, the said amount would be in the nature of deposit under protest and, therefore, the principles of unjust enrichment would not apply.* In view of the catena of decisions, available on this issue, this Court answers the first substantial question of law against the Revenue and in favour of the assessee."

(*Emphasis Supplied*)

13. A similar issue arose before the Allahabad High Court in *EBIZ. Com Pvt. Ltd.* v. *Commissioner of Central Excise, Customs & Service Tax and Ors* 2016 (9) TMI 1405 = 2017 (49) S.T.R. 389 (All.). The assessee was engaged in the business of developing and selling various online/offline educational software packages. The Anti-Evasion Branch of Central Excise Department, NOIDA conducted a search in its premises on 12 January, 2007 and the assessee deposited an amount of Rs. 25,55,000/-. The assessee also deposited an amount of Rs. 2,59,000/- on 21 March, 2007 towards interest. Thereafter, a show cause notice dated 3 July, 2007 was issued to the assessee demanding service tax. The demand was confirmed, against which an appeal was filed which was dismissed by the Commissioners (Appeals) on 29 August, 2008. The assessee filed an appeal before the Tribunal which was allowed by order dated 23 December, 2012 and the matter was remanded to the Commissioner (Appeals). The Commissioner (Appeals), thereafter, by order dated 29 August, 2012 allowed the appeal and *set aside* the order passed by the adjudicating authority. The assessee thereafter, filed a refund claim on 27 January, 2014. A show cause notice dated 2 April, 2014 was issued requiring the assessee to explain why the refund claim should not be rejected for the reason that it had not been made within one year. No order was passed and, therefore, a writ petition was filed in the Allahabad High Court. The Allahabad High Court examined the provisions of Section 11AB of the Central Excise Act, 1944, which contemplates that the amount shall be refunded to the assessee provided the incidence of such duty had not been passed on by him to any other person. The Allahabad High Court held that any amount deposited during the pendency of the adjudicating proceedings or investigation is in the nature of a deposit under protest and, therefore, the principles of unjust enrichment would not be attracted. In coming to this conclusion, the Allahabad High Court placed reliance upon the decision of the Madras High Court in *Pricol Ltd*.

14. The aforesaid decisions of the Madras High Court and the Allahabad High Court in *Pricol Ltd.* and *EBIZ. Com Pvt. Ltd.* were followed by the Allahabad High Court in *Commissioner of Central Excise, Lucknow* v. *Eveready Industries India Ltd*. 2017 (357) E.L.T. 11.

15. This issue was also examined by the Tribunal in *Commissioner of Customs, Bangalore* v. *Motorola India Pvt. Ltd*. 2006 (206) E.L.T. 370 (Tri. - Bang.). The Tribunal upheld the view of the Commissioner (Appeals) that the power of unjust enrichment would not be applicable for refund of an amount deposited during investigation and the relevant paragraph is reproduced below:

"10. It is clear that the Commissioner (A) dealt with two refund claims in respect of each of the appeal filed before him. The fact that the amounts were paid during investigation is not in dispute. The duty liability on the Respondents is settled consequent to Commissioner's order dated 6-10-2003 in respect of Appeal No. 44/05. But as regards Appeal No. 45/05, the Respondents filed the refund claim before the Asst. Commissioner as earlier as 9-11-2001 though the Commissioner passed his order on 27-2-2004. The point is that in respect of both the claims, the amounts were deposited during the course of investigation by the DRI. *The Commissioner (A) has elaborately discussed the issues and come to the conclusion that the excess amount deposited after taking into account the duty liability determined by the Commissioner is in the nature of a deposit and therefore, the bar of unjust enrichment is not applicable. We agree with the learned Consultant's submission (for the Respondent) that when the duty paid during the pendency of an appeal before the appellate authority is considered as deposit, there is no reason why the amount deposited during investigation cannot be considered as deposit*. We also find that the decision of the larger Bench in the case of *Jayant Industries* (*supra*) has merged with the Apex Court's decision in the case of *ITC* (*supra*). Hence, the bar of unjust enrichment would not be applicable even to the amounts deposited during investigations. The contentions raised by Revenue are not tenable. Hence, we do not want to interfere with the findings of the appellate authority."

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(Emphasis Supplied)

16. It is, therefore, clear from the aforesaid decisions of the High Courts and the Tribunal that any amount deposited during the pendency of adjudication or investigation is in the nature of a deposit and, therefore, cannot be considered to be towards payment of service tax or excise duty. The principles of unjust enrichment, therefore, would not apply if a refund is claimed for refund of this amount.

17. It also needs to be noted that the refund claim has been rejected on the ground that in 2006-07, the amount deposited was accounted as 'expense' in the Profit and Loss account of the appellant, meaning thereby that the burden of duty had passed.

18. The method of accounting followed by an assessee does not impact the admissibility of refund, and cannot be made a basis to hold that the incidence of duty had passed. In this regard, reliance can be placed on the decision of the Tribunal in *Commissioner of Customs, ACC Import Commissionerate, New Customs House, New Delhi* v. *UT Electronics Private Limited*[3]. The Tribunal held that merely because the excise duty is booked as ' expenditure' in Profit and Loss account, it cannot be said the incidence of duty had passed. A similar view was taken by the Tribunal in *Allied Chemicals & Pharmaceutical Private Limited* v. *CCE & ST, Jaipur-I*[4]. In any case, the entry made by the appellant of the amount in 2006-07 was neutralized by the appellant in 2016-17, when the appellant booked the same amount as 'recoverable' in its books under the head 'current assets', after the appeal was allowed by the Tribunal.

19. It further needs to be noted that the price of the goods has been fixed by the Government of India. The cost of goods manufactured by the appellant is ascertained on the basis of cost of inputs, which are, gas and cost of production, plus profit. Considering the nature of goods, and for the purposes of extending subsidy thereon, the Government of India determined the Maximum Retail Price of the goods for sale to the ultimate buyers. The difference between the cost of production and the Maximum Retail Price is reimbursed by the Government of India to the appellant. If the price of goods is fixed by the Government of India, such price cannot be altered by inclusion of any duty. Thus, the issue of unjust enrichment would not be applicable. This is the view taken by the Supreme Court in *State of Rajasthan* v. *Hindustan Copper Limited* [1998] 9 SCC 708 [5], and the relevant observations are as follows:

2. On the question of refund, an affidavit of Shri rashant Swarup, authorised representative of the respondent, has been filed wherein it has been stated that there is no question of any unjust enrichment of the respondent as a result of the refund of the excise duty paid on rectified spirit because the respondent has not passed on the duty to any consumer of the final product, *viz.*, copper, manufactured by the respondent. *It has been stated in the said affidavit that the price of copper has always been fixed by the Mineral & Metal Trading Corporation (MMTC) on the basis of the prevailing price fixed by the London Metal Exchange (LME) and this was done not only for the period in question but also for prior and subsequent period and that only such price could be charged and that no part of the duty in respect of rectified spirit captivity consumed in the manufacture of copper could be added to the price of copper which was fixed on the basis of the LME prices.* We have no reason to doubt the correctness of the aforesaid statement contained in the said affidavit. In the circumstances, no case is made out for interference with the direction contained in the impugned judgment of the High Court regarding refund of excise duty paid by the respondent on import of rectified spirit used in the manufacture of copper. The appeals are, therefore, dismissed. No order as to costs."

(*Emphasis Supplied*)

20. In view of the aforesaid discussion, the order dated 22/26-3-2018 passed by the Commissioner (Appeals) cannot be sustained and is set aside. The appeal is, accordingly, allowed. The appellant would be entitled to refund of the amount of Rs. 1,26,59,954/- with interest at the applicable rate.

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8. **2022 (67) G.S.T.L. 260 (All.) [19-10-2022]**
2022 (67) G.S.T.L. 260 (All.)

IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD

[LUCKNOW BENCH]
Pankaj Bhatia, J.

BHARTI AIRTEL LTD.
Versus
STATE OF U.P.

Writ C. No. 6620 *of 2021, decided on 19-10-2022*

GST : In case of seizure of goods in transit, where owner of goods or person concerned does not volunteer to pay penalty as prescribed under clauses (a), (b), (c) of Section 129(1) of CGST Act; department is well equipped to initiate proceedings by taking recourse to Sections 73, 74 and 75 read with Section 122 ibid for determination of tax and penalty

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Detention of goods and vehicle in transit - Tax and penalty - Section 129 can be invoked for determination of tax and penalty and goods can be released only in event owner of goods comes forward for payment of penalty as specified in clause (a) or (b) or (c) of Section 129(1) of Central Goods and Services Tax Act, 2017 and on payment of said amount, intent is to give quietus to litigation - However, where owner of goods or person concerned does not volunteer to pay penalty as prescribed under clauses (a), (b), (c) of Section 129(1) ibid, department was well equipped to initiate proceedings by taking recourse to Sections 73, 74 and 75 ibid read with Section 122 ibid for determination of tax and penalty leviable which, subject to appeal would govern issues in between department and assessee. *[paras 24 to 30]*

[Order]. - Supplementary Affidavit filed by the petitioner is taken on record.

2. Heard Sri Ashish Mishra, the counsel for the petitioner and the Learned Standing Counsel, who appears for the respondents.

3. The present petition has been filed challenging the order dated 17-10-2018 purportedly to be passed in exercise of the power under Section 129 of the CGST Act as well as the order dated 31-10-2020 passed by the respondent No. 4 whereby the appeal preferred by the petitioner has been dismissed.

4. The counsel for the petitioner states that as the Tribunal contemplated under the Act has not been constituted, as such, the petitioner is availing the remedy under Article 226 of the Constitution of India and the same is being entertained in view of the admitted position that the Tribunal contemplated under the Act has not been constituted till date.

5. The facts, in brief, are that the petitioner company is a company incorporated under the Companies Act and has a warehouse situate at Lucknow as well as at Haryana Gurgaon. The company for the purposes of transportation of the goods from Lucknow to Haryana hired a transporter for transporting the said goods on which a bilty tax invoice and Part-A of the E-Way Bill were generated and are contained in Annexure No. 1. It is stated that the petitioner paid the tax as were required under the IGST Act, however, on account of an inadvertence Part-B of the E-Way Bill was not generated prior to the commencement of the transport of goods. It is on record that the driver commenced the journey on 24-9-2018 at 9.30 pm from the warehouse of the petitioner company and was intercepted on 25-9-2018 at 4.43 am.

6. The case of the petitioner's company is that although the Part-B of the E-Way Bill was not generated, the same was attributable to the transporter, however, before the goods were actually seized, the e-way bill was generated at about 7.34 am in the morning on the next date *i.e.* 25-9-2018. It is stated that despite the fact that the petitioner had uploaded the Part-B of the e-way bill at about 7.34

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am, the respondents authorities proceeded to pass a detention order on 29-9-2018 mainly on the ground that till 4.43 am on 25-9-2018, the Part-B of the E-Way Bill had not been generated.

7. The counsel for the petitioner has drawn my attention to the inspection memo of the vehicle in question which was carried out on 29-9-2018 at about 5.47 pm.

8. As the goods were not being released, the petitioner approached this court by filing a Writ Petition Misc. Bench No. 33276 of 2018, which was disposed off on 16-11-2018 directing the release of the goods on the petitioner furnishing the security in terms of Section 129 read with Section 67 of the CGST Act, 2017. It is stated that in terms of the said order, the goods were released on the petitioner furnishing a bank guarantee to the respondents on 7-12-2018 amounting to Rs. 1,25,49,539/-.

9. It is stated that prior to the release of the goods, a show cause notice was issued to the petitioner company on 29-9-2018, which is contained in Annexure No. 9 whereby the petitioner was called upon to show cause as to why the proposed tax and the penalty may not be levied against the petitioner. The said show cause notice was issued under Section 129(3) read with Section 20 of the CGST Act. The petitioner submitted a detailed reply to the show cause notice and prayed that the show cause notice be dropped mainly on the ground that the tax was duly paid as was required under the Act and the Part-B of the E-Way Bill was also uploaded prior to the passing of the detention order. It is claimed that despite the submission of the reply, the department without considering the same imposed a tax liability of Rs. 62,74,769.40 and levied an equal penalty of Rs. 62,74,769.40 by means of an order dated 17-10-2018 as contained in Annexure No. 12.

10. It is argued that the petitioner was never served with a copy of the order dated 17-10-2018, as such, the petitioner could not prefer the appeal within the prescribed time as a result whereof the respondent has threatened to encash the bank guarantee and to avoid the same, the petitioner deposited the amount as was determined against the petitioner in view of the order dated 17-10-2018. The petitioner thereafter preferred an appeal No. 3 of 2019 which too has been dismissed by means of the order dated 31-10-2020.

11. The counsel for the petitioner argues that the appeal has been wrongly dismissed mainly agreeing with the findings recorded by the assessing authority which in turn had passed the order against the petitioner solely placing reliance on the judgment of the High Court of Madhya Pradesh which was passed placing reliance on the judgment in the case of *VSL Alloys (India) Pvt. Ltd.* v. *State of U.P. and others* reported in 2018 (67) NTN-DX 1 = 2018 (17) G.S.T.L. 191 (All.).

12. The contention of the counsel for the petitioner is that the order imposing tax liability as well as the appellate order are bad in law and contrary to the mandate of the provisions of the CGST Act. He argues that from the plain reading of the Section 129 of the Act, it is clear that on the goods being detained, the same are to be released on the owner of the goods or any other person coming forward and offering to pay the amount as indicated in clause (a), clause (b) and clause (c) of Section 129(1) of the Act. He argues that to determine the amount which is liable to be paid under clause-a, clause (b) and clause (c) of Section 129(1), the proper officer is empowered to specify the penalty payable. He argues that although the proper officer is empowered to specify the penalty which should be paid or offered to be paid under clause (a), clause (b) or clause (c) of Section 129(1) of the Act, there is no power to determine the penalty payable which can be done only in terms of the mandate of Section 122 of the CGST Act.

13. He further argues that admittedly no proceedings for determination of the penalty or for determination of the tax outstanding have been initiated either under Section 73 or 74 of the CGST Act or under Section 122 of the CGST Act. He further argues that in any event there was never any dispute that the tax which is required to be paid for transport of the goods was not paid and thus, the demand as well as the imposition of the penalty is neither justified nor proper exercise of the power. He further argues that no proceedings under Section 73, 74 or 75 of the Act have also been initiated against the petitioner for determination of the tax liability.

Thus, in short the submission of the counsel for the petitioner is that in terms of the mandate of Section 129, the proper officer is neither authorized nor justified in determining the tax or imposing the penalty as has been done by means of the impugned orders and thus, the impugned orders are liable to be set aside and the amount deposited by the petitioner is liable to be refunded.

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14. The Standing Counsel, on the other hand, argues that admittedly Part-B of the e-way bill was not uploaded by the petitioner prior to the commencement of the transport, which is a mandatory requirement under Rule 138 of the Rules framed under the Act and once it is admitted by the petitioner that Part-B of the e-way bill was not uploaded, no error can be found with the orders passed by the authority in exercising of the power under Section 129 of the Act. He further argues that a duty is cast upon the petitioner to have uploaded Part-B of the E-Way Bill, which has not been discharged. In light of the said, he argues that the petition lacks merit and is liable to be dismissed.

15. The counsel for the petitioner has placed reliance on the judgment passed by this Court in Writ Tax No. 763 of 2018 decided on 9-5-2018 [2018 (14) G.S.T.L. 184 (All.)] (*Modern Traders* v. *State of U.P.*); the judgment in Writ Tax No. 344 of 2018, decided on 7-2-2020 [2020 (35) G.S.T.L. 67 (All.)] (*Skipper Limited* v. *Union of India*); the judgment in Writ Tax No. 360 of 2020, decided on 17-12-2020 [2021 (52) G.S.T.L. 12 (All.)] (*Metenere Ltd.* v. *Union of India and others*).

16. The Standing Counsel, on the other hand, places reliance on the judgment of the M.P. High Court in the case of *Gati Kintetsu Express Ltd.* v. *Commercial Tax of M.P. and others* decided on 5-7-2018 reported at (2018) 56 GSTR 114 = 2018 (15) G.S.T.L. 310 (M.P.). He also places reliance on the judgment of the Madras High Court in Writ Petition No. 1431 of 2020 (*M/s. Ideal Movers Private Limited* v. *The State Tax Officer (ENF), Roving Squad, Vellore*) decided on 24-1-2020 [2020 (34) G.S.T.L. 193 (Mad.)]. In the light of the said, it is ultimately argued that the writ petition is liable to be allowed.

17. Considering the submissions made at the bar, it is essential to see the mandatory provisions and scheme of the CGST Act which cover the issue in question particularly Sections 73, 74 and 75 read with Sections 122 and 129 and the Rule 138 of the CGST Rules.

18. CGST Act is provided into 21 Chapters. Chapter III of the said Act provides for levy and collection of the tax. Chapter IV concerns with the time and value of the supply. Chapter X of the Act provides for liability of the payment of tax. Chapter XV of the Act in question, with which we are concern, provides for manner and demands or recovery.

19. Section 73 of the Act provides for determination of tax which is not paid or short paid or erroneously refunded or on account of wrong availment inputs tax credit for any reason other than fraud or any wilful mis-statement or suppression of facts. Section 73 is quoted hereinbelow :

73. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for any reason other than fraud or any wilful misstatement or suppression of facts. — (1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilised for any reason, other than the reason of fraud or any wilful misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under Section 50 and a penalty leviable under the provisions of this Act or the rules made thereunder.

(2) The proper officer shall issue the notice under sub-section (1) at least three months prior to the time limit specified in sub-section (10) for issuance of order.

(3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under subsection (1), on the person chargeable with tax.

(4) The service of such statement shall be deemed to be service of notice on such person under sub-section (1), subject to the condition that the grounds relied upon for such tax periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.

(5) The person chargeable with tax may, before service of notice under sub-section (1) or, as the case may be, the statement under sub-section (3), pay the amount of tax along with interest payable thereon under section 50 on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.

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(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1) or, as the case may be, the statement under sub-section (3), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.

(7) Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.

(8) Where any person chargeable with tax under sub-section (1) or sub-section (3) pays the said tax along with interest payable under section 50 within thirty days of issue of show cause notice, no penalty shall be payable and all proceedings in respect of the said notice shall be deemed to be concluded.

(9) The proper officer shall, after considering the representation, if any, made by person chargeable with tax, determine the amount of tax, interest and a penalty equivalent to ten per cent of tax or ten thousand rupees, whichever is higher, due from such person and issue an order.

(10) The proper officer shall issue the order under sub-section (9) within three years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within three years from the date of erroneous refund.

(11) Notwithstanding anything contained in sub-section (6) or sub-section (8), penalty under sub-section (9) shall be payable where any amount of self-assessed tax or any amount collected as tax has not been paid within a period of thirty days from the due date of payment of such tax.

20. Section 74 of the said Act confers power of determination of tax not paid or short paid or erroneously refunded or in case of wrongful availment of input tax credit availed or utilized by the reasons of fraud or any wilful misstatement or suppression of facts. Section 74 is quoted herein below:

74. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any wilful misstatement or suppression of facts. —
(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.

(2) The proper officer shall issue the notice under sub-section (1) at least six months prior to the time limit specified in sub-section (10) for issuance of order.

(3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.

(4) The service of statement under sub-section (3) shall be deemed to be service of notice under sub-section (1) of Section 73, subject to the condition that the grounds relied upon in the said statement, except the ground of fraud, or any wilful misstatement or suppression of facts to evade tax, for periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.

(5) The person chargeable with tax may, before service of notice under sub-section (1), pay the amount of tax along with interest payable under section 50 and a penalty equivalent to fifteen per cent of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.

(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.

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(7) Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.

(8) Where any person chargeable with tax under sub-section (1) pays the said tax along with interest payable under section 50 and a penalty equivalent to twenty-five per cent of such tax within thirty days of issue of the notice, all proceedings in respect of the said notice shall be deemed to be concluded.

(9) The proper officer shall, after considering the representation, if any, made by the person chargeable with tax, determine the amount of tax, interest and penalty due from such person and issue an order.

(10) The proper officer shall issue the order under sub-section (9) within a period of five years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within five years from the date of erroneous refund.

(11) Where any person served with an order issued under sub-section (9) pays the tax along with interest payable thereon under section 50 and a penalty equivalent to fifty per cent of such tax within thirty days of communication of the order, all proceedings in respect of the said notice shall be deemed to be concluded.

Explanation 1. — For the purposes of Section 73 and this section, —

(i) the expression "all proceedings in respect of the said notice" shall not include proceedings under Section 132;

(ii) where the notice under the same proceedings is issued to the main person liable to pay tax and some other persons, and such proceedings against the main person have been concluded under Section 73 or Section 74, the proceedings against all the persons liable to pay penalty under Sections 122 and 125 are deemed to be concluded.

Explanation 2. — For the purposes of this Act, the expression "suppression" shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer.

21. Thus, Sections 73 and 74 deal with situations of determination of tax in case of non-payment simplicitor or for the reasons of fraud or wilful misstatement or suppression of facts respectively.

22. Chapter XIX of the said Act provides for offences and penalties. Section 122 of the Act provides for the quantum of penalty leviable in the event of a taxable person falling on the grounds mentioned under Section 122(1) clause (i) to clause (xxi). The quantum of penalty is also specified under Section 122(1) of the Act. Section 122(1) is quoted hereinbelow :

122. Penalty for certain offences. — (1) 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;

(iii) collects any amount as tax but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;

(iv) collects any tax in contravention of the provisions of this Act but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;

(v) fails to deduct the tax in accordance with the provisions of sub-section (1) of section 51, or deducts an amount which is less than the amount required to be deducted under the said sub-section, or where he fails to pay to the Government under sub-section (2) thereof, the amount deducted as tax;

(vi) fails to collect tax in accordance with the provisions of sub-section (1) of section 52, or collects an amount which is less than the amount required to be collected under the said sub-section or where he fails to pay to the Government the amount collected as tax under sub-section (3) of section 52;

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(vii) takes or utilises input tax credit without actual receipt of goods or services or both either fully or partially, in contravention of the provisions of this Act or the rules made thereunder;

(viii) fraudulently obtains refund of tax under this Act;

(ix) takes or distributes input tax credit in contravention of section 20, or the rules made thereunder;

(x) falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information or return with an intention to evade payment of tax due under this Act;

(xi) is liable to be registered under this Act but fails to obtain registration;

(xii) furnishes any false information with regard to registration particulars, either at the time of applying for registration, or subsequently;

(xiii) obstructs or prevents any officer in discharge of his duties under this Act;

(xiv) transports any taxable goods without the cover of documents as may be specified in this behalf;

(xv) suppresses his turnover leading to evasion of tax under this Act;

(xvi) fails to keep, maintain or retain books of account and other documents in accordance with the provisions of this Act or the rules made thereunder;

(xvii) fails to furnish information or documents called for by an officer in accordance with the provisions of this Act or the rules made thereunder or furnishes false information or documents during any proceedings under this Act;

(xviii) supplies, transports or stores any goods which he has reasons to believe are liable to confiscation under this Act;

(xix) issues any invoice or document by using the registration number of another registered person;

(xx) tampers with, or destroys any material evidence or document;

(xxi) disposes off or tampers with any goods that have been detained, seized, or attached under this Act,

shall be liable to pay a penalty of ten thousand rupees or an amount equivalent to the tax evaded or the tax not deducted under section 51 or short deducted or deducted but not paid to the Government or tax not collected under section 52 or short collected or collected but not paid to the Government or input tax credit availed of or passed on or distributed irregularly, or the refund claimed fraudulently, whichever is higher.

23. In the same Chapter, there is a procedure prescribed under section 129 which is invocable in respect of the goods and conveyances in transit. Section 129 is quoted hereinbelow :

"**129. Detention, seizure and release of goods and conveyances in transit.** — (1) Notwithstanding anything contained in this Act, where any person transports any goods or stores any goods while they are in transit in contravention of the provisions of this Act or the rules made thereunder, all such goods and conveyance used as a means of transport for carrying the said goods and documents relating to such goods and conveyance shall be liable to detention or seizure and after detention or seizure, shall be released, —

(a) on payment of the applicable tax and penalty equal to one hundred per cent of the tax payable on such goods and, in case of exempted goods, on payment of an amount equal to two per cent of the value of goods or twenty-five thousand rupees, whichever is less, where the owner of the goods comes forward for payment of such tax and penalty;

(b) on payment of the applicable tax and penalty equal to the fifty per cent of the value of the goods reduced by the tax amount paid thereon and, in case of exempted goods, on payment of an amount equal to five per cent of the value of goods or twenty-five thousand rupees, whichever is less, where the owner of the goods does not come forward for payment of such tax and penalty;

(c) upon furnishing a security equivalent to the amount payable under clause (a) or clause (b) in such form and manner as may be prescribed :

Provided that no such goods or conveyance shall be detained or seized without serving an order of

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detention or seizure on the person transporting the goods.

(2) The provisions of sub-section (6) of section 67 shall, mutatis mutandis, apply for detention and seizure of goods and conveyances.

(3) The proper officer detaining or seizing goods or conveyances shall issue a notice specifying the tax and penalty payable and thereafter, pass an order for payment of tax and penalty under clause (a) or clause (b) or clause (c).

(4) No tax, interest or penalty shall be determined under sub-section (3) without giving the person concerned an opportunity of being heard.

(5) On payment of amount referred in sub-section (1), all proceedings in respect of the notice specified in sub-section (3) shall be deemed to be concluded.

(6) Where the person transporting any goods or the owner of the goods fails to pay the amount of tax and penalty as provided in sub-section (1) within [fourteen days] of such detention or seizure, further proceedings shall be initiated in accordance with the provisions of section 130 :

Provided that where the detained or seized goods are perishable or hazardous in nature or are likely to depreciate in value with passage of time, the said period of [fourteen days] may be reduced by the proper officer."

24. Thus, in the Act in question, the power of inspection, search and seizure can be carried out under Chapter XIV or in case of goods in transit under Section 129. Section 129, on the plain reading, can be equated with an alternative dispute redressal mechanism and provides an opportunity to the owner of the goods or any other person to pay amounts as specified under Section 129(1)(a) or (b) or (c) of the said Act.

25. On a plain reading of Section 129(1)(a) of the Act, which provides for payment of the applicable tax and penalty equal to one hundred per cent of the tax payable on such goods and Section 129(1)(b) provides for penalty equal to 50% of the value of goods reduced by tax amount paid thereon, further incorporates provisions for determination of quantum of penalty under Section 129(3). Thus, under the scheme of the Act, the procedure for determination of tax and penalty is contained in Chapter XV read with Sections 122, 123, 125, 126, 127 and 128 of the Act and a parallel procedure is prescribed under Section 129 of the Act in case of goods, which are in transit.

26. Section 129, can be invoked by the department with regard to the goods in transit and the goods can be released only in the event the owner of the goods comes forward for payment of penalty as specified in clause (a) or (b) or (c) of Section 129(1) of the Act and on payment of the said amount, the intent is to give quietus to the litigation.

27. The question that arises here is that what happened when the owner of the goods or the person does not volunteer to pay the penalty as prescribed under clauses (a), (b), (c) of Section 129(1) of the Act. In the said case, the department is well equipped to initiate proceedings by taking recourse to Sections 73, 74, 75 of the Act read with Section 122 for determination of tax and the penalty leviable which, subject to the appeal would govern the issues in between the department and the assessee.

28. In the present case, department has proceeded to determine the tax liability as well as penalty only under the provisions of Section 129 of the Act, which is not contemplated or intended. On a plain reading of Section 129, there is no provision under Section 129 for determination of tax due, which can be done only by taking recourse to provisions of Section 73 or 74 of the CGST Act, as the case may be.

29. As the proceedings have been initiated and concluded only under Section 129 and the owner of the goods has not come forward for payment of such penalty as has been determined, the entire action of determining the tax and penalty under Section 129(1) as has been done by means of the impugned order and upheld in the appellate proceedings, impugned before this Court, I have no hesitation in holding that the order passed on 17-10-2018 and as upheld by the order dated 31-10-2020 are not legally sustainable and are accordingly set aside. The amount paid by the petitioner for release of the goods shall be refunded to the petitioner with all expedition preferably within a period of two months from today.

30. With the said observations, the writ petition is allowed.

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