



**TOPIC GST- “THE TOP 10 SERIES- GST 3”**

**MONDAY, 26 JULY 2021, 5.00.P.M. TO 7.00P.M.  
NAGPUR BRANCH, WIRC, ICAI**

***Presented By***

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# Topics for Discussion

- I. Fake Invoice and Circular Trading issue
- II. Summons and Arrest
- III. Denial of Input Tax Credit to Buyer
- IV. Bank attachments
- V. Insistence of on-the-spot deposit during search
- VI. Jurisdiction both by central and state tax officers
- VII. Significance of “The Proper Officer” under GST, whether DGGI has power to re-investigate.
- VIII. Departmental Audit Under GST
- IX. Mandatory to mention the Document Identification Number (DIN) for all communications sent by its offices to taxpayers
- X. New substituted section 151 in CGST Act

## Supreme Court remarks dated 06.04.2021

Recently, the media was flooded with news quoting the observations made by the Hon'ble Supreme Court on April 6, 2021, while hearing the matter of **M/s Radha Krishan Industries v State of Himachal Pradesh & Ors.** related to attachment of bank accounts under GST, related to allegations of fake invoices, that the purpose of the GST Act is lost by the manner in which tax law is enforced in our country.

“**The Parliament had aimed to give the GST a citizen-friendly tax structure.** But, the purpose of the **Act is lost by the manner of enforcement in our country**, Justice DY Chandrachud observed.” - April 07, 2021 ([CNBCTV18.COM](http://CNBCTV18.COM))

“The Supreme Court on Tuesday (6<sup>th</sup> April 2021) slammed the manner in which the Goods and Services Tax was being enforced by tax authorities and observed that **the taxman cannot see all businesses as being fraudulent.**” – April 07, 2021 ([CNBCTV18.COM](http://CNBCTV18.COM))

"The Parliament had intended the GST to be a citizen-friendly tax structure. The purpose of the Act is lost by the manner in which tax law is enforced in our country ", observed Justice DY Chandrachud on Tuesday. The bench of Justices Chandrachud and M. R. Shah were dealing with contours of the power of provisional attachment of property, including bank accounts - 6 April 2021, [LIVE LAW.COM](http://LIVE LAW.COM)

# 1. GST – “FAKE INVOICES”: IS IT ACTUALITY OR IMAGINATION?

- ❑ **“Fake Invoices”**: While levelling the serious allegation and arresting the persons, GST Department also alleged that the input tax credit have been taken on the fake invoices.
- ❑ The term fake invoices have not been defined in the law. But by common sense one can understand what can construed as fake invoices. A fake invoice could be an invoice which generated & sign by the person other than the person from the invoice belongs to.
- ❑ For instant, if the invoice is of ABCD and company and if that invoices generated by firm X & sign by the person other than the person authorised by ABCD and company, in that case, such invoice would be termed as fake invoice.
- ❑ Whereas, in all such cases, the Department has no such allegation and as such invoices issued by ABCD and company and also signed by the person authorised by the ABCD and company. In such a case no invoice can be construed at fake invoices.
- ❑ It appears that the Department is crying more than the actuality and their entire their allegations fall flat in law.

# 1. GST —“CIRCULAR TRADING”: IS IT BANNED UNDER GST?

- ❑ In simplest way it can be defined as when supply of goods or transaction of goods, take place among the few taxpayers, it is called as circular trading.
- ❑ For instance, firm A supply the goods to firm B, and firm B supply goods to firm C, and firm C supply goods to firm D, and so on.... and by the last transactions, goods is supplied to firm A.
- ❑ Now the question arises, even if such transactions take place, is it illegal? Or is it banned under the law? All such transactions by itself lead to any evasion of tax?
- ❑ If answer to these questions is in negative then how the taxpayer could be booked for alleged circular trading.
- ❑ The circular trading referred by the Department is the term coined by themselves, it could have relevancy only if transactions are made without payment of GST to evade taxes.

# 1. GST — “CIRCULAR TRADING”: HOW TRANSACTIONS TAKE PLACE, AND TAXES PAID- THEN WHY DOUBT ?

- ❑ Let's see how these transaction take place and reported and then judge the questionability of these transactions.
- ❑ When firm A supply the goods to firm B, a raises an invoice on the firm B with GST, and such GST are paid to the government and proper return (GSTR-1/GSRT-3B) is filed. Similarly, firm B supply goods to firm C, and firm C supply goods to firm D, and so on....
- ❑ And it is told that in most of the cases GST so levied, collected and paid are also reflected in GSTR-2A.
- ❑ There are possibility, in some case, selling dealer, would not have deposited GST, which is discussed in later hereinafter.
- ❑ However, despite all this compliance of the law and there are no apparent irregularities, the departmental officer found fishy and book the cases on the grounds that these are the circular trading. Over and above, the Department officers also alleged that in these transactions, there is no supply of goods.

# 1. GST – “NO SUPPLY OF GOODS”: DOES IT FALL UNDER GST ?

- ❑ Do the Department has any legal right to collect even the GST on such transactions alleging there is no supply of goods? Are such transactions are covered within the ambit of GST law?
- ❑ As per section 9 of the CGST Act, 2017, GST is levied on the supply of goods.
- ❑ The tax is collected by the Department from firm A, it never alleged that there is no supply of goods but when on the invoice issued by the firm A, the firm B took input tax credit than in the hands of the firm B, it is alleged that there are not eligible for input tax credit as against that invoice there was no supply of goods.
- ❑ **In *C.W.T. v Inder Sharma (1997) VI AD (Delhi) 1029***, while dealing in the wealth tax matter, Delhi Hihg Court held that “if the dwelling unit belongs to the assessee then liable to be included in his net wealth and at the same time liable to taken into consideration for the purpose of exemption”.
- ❑ Therefore, GST authority cannot take a plea while collecting the tax that there is a supply of goods and at the same time, while the input credit is taken, for the same very transaction, cannot alleged that there is no supply of goods. Therefore, entire their allegations fall flat in law.



## GST – “REVERSAL OF INPUT TAX CREDIT” AND COLLECTION OF GST MULTIPLE TIMES ON FULL VALUE - IS IT CORRECT ?

- ❑ Surprisingly, when the Department make an allegation against the persons so arrested, the prime objective of the Department appears to be to insist upon to pay the taxes equivalent to the amount of input tax credit availed by them on the transaction alleged to be circular trading by alleging that such input tax credit has been taken on the fake invoices.
- ❑ Therefore, essentially what the Department is putting their case in a manner that while the GST has already been collected from the firm A, while insisting to the firm B, to reverse the input tax credit on the same very invoices issued from the firm A on which the GST has already been collected.
- ❑ This essentially means the firm B has to pay GST on the entire value mentioned in the invoice issued to the firm C, without availing the input tax credit. This would be going against the very concept of the GST which is levied and collected on the value addition.
- ❑ Whereas if there is no supply of goods, they cannot demand the GST from any of the firms, whereas they are demanding GST from each from without allowing them to take into tax credit. This stand of the Department itself is self-contradictory and against the legal provisions.

## 2. WHETHER POWER TO ISSUANCE OF SUMMONS IS UNBRIDLED?. NO

Section 70. Power to summon persons to give evidence and produce documents.—(1) The proper officer under this Act shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry in the same manner, as provided in the case of a civil court under the provisions of the Code of Civil Procedure, 1908 (5 of 1908).

### Issues:

Who can issue summons?

Whether power to summons itself is power of conducting inquiry

What are the circumstances when summons can be issued?

Who is the proper officer for empowering to issue summons?

## WHETHER POWER TO ISSUANCE OF SUMMONS IS UNBRIDLED?. NO

- Whether officer while recording Statement – can he asked any questions of law or interpretation of law and agreement? No.
- Whether by issuing summons – can an officer ask to give legal grounds ? No.
- Whether by issuing summons – can an officer ask to prepare details ? No.

**Canon India (P.) Ltd vs Commissioner of Customs 2021 (376) ELT 3 (SC); 2021 SCC OnLine SC 200** “14...when the statute directs that “**the proper officer**” can determine duty not levied/not paid, it does **not mean any proper officer** but that proper officer alone.”

**EBIZ.com Pvt. Ltd. v UOI, 2016 (338) ELT 562 (Del.) [para 5]; eBiz.Com Pvt. Ltd v UOI reported in 2016 (44) STR 526 (Del.) [ para 77].-** Summons to prepare reconciliations/ create other documents not backed by law, cannot be issued.

## WHETHER POWER TO ISSUANCE OF SUMMONS IS UNBRIDLED?. NO

### Decisions:

In **Menka Gambhir v UOI AND ORS. 2020 SCC OnLine Cal 995 : (2020) 373 ELT 604 : (2020) 2 Cal LT 158**, while considering the section 108 of the Customs Act, 1962 for issuance of summons, held that:

**“30.** Thus the necessary elements of a valid summons under Section 108 are:

- (a) a gazetted officer must conduct the **inquiry himself**;
- (b) the **same officer must consider the attendance of the summoned necessary**; and
- (c) the attendance must be **before the same officer.**”

## 2. ARREST PROVISIONS

### □ S. 69. Power to arrest.

(1) Where the Commissioner has reasons to believe that a person has committed any offence specified in clause (a) or clause (b) or clause (c) or clause (d) of sub-section (1) of section 132 which is punishable under clause (i) or (ii) of sub-section (1), or sub-section (2) of the said section, he may, by order, authorise any officer of central tax to arrest such person.

## **GST – CAN A PERSON CAN BE ARRESTED WITHOUT ADJUDICATION OF THE SHOW CAUSE NOTICE? VIMAL YASHWANTGIRI GOSWAMI V STATE OF GUJARAT IN R/SPECIAL CIVIL APPLICATION NO. 13679 OF 2019 JUDGMENT DATED 20/10/2020 HELD**

- (i) “we are of the opinion that the power to arrest as provided under section 69 of the CGST Act can be invoked .....without there being any adjudication for the assessment as provided under the provisions of the Chapter VIII of the CGST Act.”
- (ii) “When any person is arrested by the authorised officer, in exercise of his powers under Section 69 of the CGST Act, the authorised officer effecting the arrest is not obliged in law to comply with the provisions of Sections 154 to 157 of the Code of Criminal Procedure, 1973..... This does not necessarily mean that a person alleged to have committed a non cognizable and bailable offence cannot be arrested without a warrant issued by the Magistrate.”
- (iii) “The authorised officer exercising power to arrest under section 69 of the CGST Act, is not a Police Officer and, therefore, is not obliged in law to register FIR against the person arrested in respect of an offence under Sections 132 of the CGST Act.”
- (iv) “Where an authorised Officer arrests a person and informs that person of the grounds of his arrest, for the purposes of holding an inquiry into the infringement of the provisions of the CGST Act which he has reason to believe has taken place, there is no formal accusation of an offence. The accusation could be said to have been made when a complaint is lodged by an officer competent in that behalf before the Magistrate.”

**GST – IS VIMAL YASHWANTGIRI GOSWAMI V STATE OF GUJARAT IN R/SPECIAL CIVIL APPLICATION NO. 13679 OF 2019 JUDGMENT DATED 20/10/2020, CPC SECTION 4(2) AND VIEWS OF SUPREME COURT WAS NOT NOTICED.**

- (i) The Constitution Bench of the Supreme Court in **A. R. Antulay vs Ramdas Srinivas Nayak And Another (1984) 2 SCC 500** held that “16....In the absence of a specific provision made in the statute indicating that offences will have to be investigated, inquired into, tried and otherwise dealt with according to that statute, the same will have to be investigated, inquired into, tried and otherwise dealt with according to the Code of Criminal Procedure. In other words, Code of Criminal Procedure is the parent statute which provides for investigation, inquiring into and trial of cases by criminal courts of various designations.”
- (ii) **Om Prakash v UOI 2011 (272) E.L.T. 321 (S.C.)** “18....the stand taken by Mr. Mohan Parasaran, learned Additional Solicitor General, was that what was required to be considered in the Writ Petitions was whether there is a power to arrest vested in the officers exercising powers under Section 13 of the 1944 Act without issuance of a warrant and whether such power could be exercised only after an FIR/complaint had been lodged under Section 13 of the aforesaid Act. It was also contended that it was necessary to consider further whether criminal prosecution or investigation could be initiated, which could lead to arrest, without final adjudication of a dual liability.”

## GST – ARREST ON MERE SUSPICIOUS PERMISSIBLE? NO.

- ❑ In the criminal law, law came into motion, once the allegation of an offence is made to police, and on the basis of FIR is registered in the Police Station, thus, criminal law come into motion even on suspicious. Whereas under the Indirect Taxes/ GST, law of arrest come into motion, when there is “reasons to believe” by the officer empower to order for arrest of a person. It is settled principle of law that ‘reason to believe’ is not synonymous to ‘reason to suspect’ [see **Dr. Partap Singh and another v Director of Enforcement, FERA and others AIR 1985 SC 989 para 10**]
- ❑ **Sekar v UOI 2018 (361) E.L.T. 689 (Del.); 2018 SCC OnLine Del. 6523 – “72.** Reasons to believe cannot be a rubber stamping of the opinion already formed by someone else. The officer who is supposed to write down his reasons to believe has to independently apply his mind. Further, and more importantly, it cannot be a mechanical reproduction of the words in the statute. When an authority judicially reviewing such a decision peruses such reasons to believe, it must be apparent to the reviewing authority that the officer penning the reasons has applied his mind to the materials available on record and has, on that basis, arrived at his reasons to believe. The process of thinking of the officer must be discernible. The reasons have to be made explicit. It is only the reasons that can enable the reviewing authority to discern how the officer formed his reasons to believe.”



# GST – HOWSOEVER STRONG MAY BE THE SUSPICION, IT CANNOT TAKE THE PLACE OF PROOF.

- ❑ **Krishnand vs. State of Mandharsinghji P. Jadera (2005) 281 ITR 0019, AIR 1977 SC 796, 1977 CriLJ 566, (1977) 1 SCC 816**, it is held that “26... It is not enough merely to show circumstances which might create suspicion, because the court cannot decide on the basis of suspicion. It has to act on legal grounds established by evidence. Here, in the present case, no evidence at all was led on the side of the prosecution to show that the monies lying in fixed deposit in Shanti Devi's name were provided by the appellant and **howsoever strong may be the suspicion of the court in this connection, it cannot take the place of proof.**”
- ❑ **State (Delhi Administration) Vs. Guljari Lal Tondon AIR 1979 SC 1382, 1979 CriLJ 1057, (1979) 3 SCC 316** – “4... There can be no doubt that the circumstances raise a serious suspicion against the respondent but **suspicion however grave it may be, cannot take the place of proof.**”

## GST – ARREST – IS PROVISIONS OF CR.P.C APPLIES?

- ❑ In **Arnesh Kumar v/s State of Bihar and another (2014) 8 SCC 273** has observed that *“Before a Magistrate authorises detention under [Section 167, Cr.PC](#), he has to be first satisfied that the arrest made is legal and in accordance with law and all the constitutional rights of the person arrested is satisfied. If the arrest effected by the police officer does not satisfy the requirements of [Section 41](#) of the Code, Magistrate is duty bound not to authorise his further detention and release the accused.”*
- ❑ In **Adani Enterprises Ltd versus UOI 2019 (368) ELT 781 (BOM.)** has observed that *“17... The manner in which he would carry an investigation, when he receives an information in respect of a cognizable offence/non-cognizable offence is found to be conspicuously missing in the statutory scheme of Customs Act. The procedure for investigation or its culmination which is to be found in Chapter XII of the Code in respect of cognizable and non-cognizable cases is apparently missing in the special enactment.”* And the High Court held that *“17...In absence of any procedure being prescribed for investigation of such offences under the special enactment, recourse must necessarily be had to sub-section (2) to Section 4. The necessary sequitur is that in case of an offence which is made cognizable under the Customs Act, the procedure contemplated under Section 154 and in case of an offence which is non-cognizable, the procedure under Section 155 would thus become imperative. Sub-section (2) of Section 4 which acts like an exemplar would govern the manner of investigation under the Custom Act by the provisions contained in the Code of Criminal Procedure in absence of any special provision in the Customs Act prescribing the manner of investigation.”*

## GST – ARREST AND REALITY- WHAT SUPREME COURT OBSERVATIONS

- ❑ In **Ishwar Das Moolrajani v UOI 2016 (332) E.L.T. 387 (S.C.)**, the Supreme Court once found that even after arrest, no criminal proceeding was initiated despite laps of many years, ordered for the CBI investigation, by recorded in para 6 that *“directions to the Central Bureau of Investigation (C.B.I.) to conduct an investigation against the concerned persons/officials as to why the criminal proceedings were not initiated against the detinue and other concerned persons when he was arrested”*.
- ❑ In **Arnesh Kumar v/s State of Bihar and another (2014) 8 SCC 273** – *“ It affects the liberty and freedom of citizens and needs to be exercised with great care and caution. Our experience tells us that it is not exercised with the seriousness it deserves. In many of the cases, detention is authorised in a routine, casual and cavalier manner.”*

### 3. DENIAL OF INPUT TAX CREDIT TO BUYER

## GST — CAN INPUT TAX CREDIT BE DENIED ON THE GROUNDS OTHER THAN THOSE MENTIONED IN THE LAW?

- ❑ the Department many a times, also add newer grounds that
- ❑ the selling dealers could not be found/ traced or not in existence at the address mentioned in the invoice even though selling dealer is registered as per GST portal on that address only.
- ❑ Firstly, is any duty has been cast under the law on the buying dealer about all these things? Answer is no?
- ❑ Therefore, the second question arises whether the GST Department can book a case against the taxpayers on the grounds for denial of input tax credit which is not found in the law. Answer to this question is also in negative as eligibility and non-leviability of the input tax credit is there in the section 16 whereas the blocked credit provisions are there in section 17.
- ❑ Therefore, the Department cannot make out a case against the assessee to deny the input tax credit on a grounds unfounded in the law.

## GST – CAN INPUT TAX CREDIT BE DENIED ON THE GROUNDS OTHER THAN THOSE MENTIONED IN THE LAW – OR PHYSICAL DELIVERY OF GOODS NECESSARY?

- ❑ As per explanation attached to section 16(2)(b), it is not necessary goods has to be received physically by the dealer, even if goods is delivered to the 3<sup>rd</sup> party on his direction, it will be sufficient compliance of the requirement.
- ❑ Delivery could be physical or constructive.
- ❑ Bill to ship is a valid transaction – therefore allegation of non-physical delivery is unfound in law.
- ❑ High Sea Sale – this is valid transaction and no physical deliver take place.
- ❑ Transaction is share/ securities take place without actual deliver.

## GST – IF SELLER DOES NOT PAY TO THE GOVERNMENT, CAN THIS BE LEGAL GROUNDS TO DENY THE INPUT TAX CREDIT?

- ❑ Section 16(2)(c) – condition for entitlement to take credit- tax charged, actually paid to the credit of Government.
- ❑ once the buyer pays GST to the seller and if the seller does not pay to the government, can this be legal grounds to deny the input tax credit?
- ❑ In *On Quest Merchandising India Pvt. Ltd. v Govt. of NCT of Delhi 2018 (10) G.S.T.L. 182 (Del.)*- the High Court held that “54. a purchasing dealer who has *bona fide* entered into a purchase transaction with a registered selling dealer who has issued a tax invoice reflecting the TIN number. In the event that the selling dealer has failed to deposit the tax collected by him from the purchasing dealer, the remedy for the Department would be to proceed against the defaulting selling dealer to recover such tax and not deny the purchasing dealer the ITC.....”
- ❑ In *Gheru Lal Bal Chand v State of Haryana and Anr. 2011 SCC OnLine P&H 13205* it is held that “33. ..no liability can be fastened on the purchasing registered dealer on account of non-payment of tax by the selling registered dealer in the treasury unless it is fraudulent, or collusion or connivance with the registered selling dealer or its predecessors with the purchasing registered dealer is established..”

# GST – IF SELLER DOES NOT PAY TO THE GOVERNMENT, CAN THIS BE LEGAL GROUNDS TO DENY THE INPUT TAX CREDIT?

- ❑ Section 16(2)(c) – condition for entitlement to take credit- tax charged, actually paid to the credit of Government.
- ❑ once the buyer pays GST to the seller and if the seller does not pay to the government, can this be legal grounds to deny the input tax credit?

## **Judgment dated 24.02.2021 Madras High Court in the matter of W.P.(MD)No.2127 of 2021 M/s. D.Y. Beathel Enterprises v The State Tax Officer.**

“13....I am unable to appreciate the approach of the authorities. When it has come out that the seller has collected tax from the purchasing dealers, the omission on the part of the seller to remit the tax in question must have been viewed very seriously and strict action ought to have been initiated against him.”

The High Court in this directed that seller dealer to be examined and recovery action to be initiated against selling dealer. The High Court held as, “16....In the said enquiry, Charles and his wife Shanthi will have to be examined as witnesses. Parallely, the respondent will also initiate recovery action against Charles and his wife Shanthi.”

**4. SECTION 83. PROVISIONAL ATTACHMENT TO PROTECT REVENUE IN CERTAIN CASES.—M/S RADHA KRISHAN INDUSTRIES V STATE OF HIMACHAL PRADESH & ORS CIVIL APPEAL NO 1155 OF 2021 BY JUDGMENT DATED APRIL 20, 2021 OF SUPREME COURT**

**Bank Attachment**

Section 83 “(1) Where during the pendency of any proceedings under Section 62 or Section 63 or Section 64 or Section 67 or Section 73 or Section 74, **the Commissioner** is of the opinion that for the purpose of protecting the interest of the Government revenue, it is necessary so to do, he may, by order in writing attach provisionally any property, including bank account, belonging to the taxable person as may be prescribed.

**Rule 159**

(5) Any person whose property is attached may, **within seven days** of the attachment under sub-rule (1), file an **objection** to the effect that the property attached was or is not liable to attachment, and the Commissioner may, **after affording an opportunity of being heard** to the person filing the objection, release the said property by an order in Form GST DRC-23.

(6) The Commissioner may, upon being satisfied that the property was, or is no longer liable for attachment, release such property by issuing an order in Form GST DRC-23.



**83. PROVISIONAL ATTACHMENT TO PROTECT REVENUE IN CERTAIN CASES.—M/S RADHA KRISHAN INDUSTRIES V STATE OF HIMACHAL PRADESH & ORS CIVIL APPEAL NO 1155 OF 2021 BY JUDGMENT DATED APRIL 20, 2021 OF SUPREME COURT**

**Issues**

- (i) Is attachment of bank accounts can be done of another person, when proceedings of pending for different persons?
- (ii) When the search is end, whether proceedings for attachment is permissible?
- (iii) Whether second time attachment by the same assessee, after end of period of first attachment, is permissible?
- (iv) When attachment proceedings are done by the officer to whom the power is delegated under section 5(3), would be the power exercise by the commissioner?
- (v) Whether hearing to the objection raised for attachment is necessary?
- (vi) Whether formation of opinion on the basis of some tangible material, before attachment, is necessary?
- (vii) Whether order passed by the State Commissioner is Appealable?
- (viii) Whether the order passed by delegated officer, will be order passed by the Commissioner only?

## **83. PROVISIONAL ATTACHMENT TO PROTECT REVENUE IN CERTAIN CASES.—M/S RADHA KRISHAN INDUSTRIES V STATE OF HIMACHAL PRADESH & ORS** **2021 SCC ONLINE SC 334 JUDGMENT DATED APRIL 20, 2021**

In this case, before attachment of bank account, search was carried out and partner was arrested for allegation of fraudulent input tax credit for “fake fictitious firms without actual movement of goods...”

### **Decision**

- (i) **No Appeal lies:** “62 From the above definition, it is evident that the expression ‘adjudicating authority’ does not include among other authorities, the Commissioner. In the present case, the narration of facts indicates that on 21 October 2020, the Commissioner had in exercise of his powers under Section 5(3) made a delegation *inter alia* to the Joint Commissioner of State Taxes and Excise in respect of the powers vested under Section 83(1). The Joint Commissioner, in other words, was exercising the powers which are vested in the Commissioner under Section 83(1) to order a provisional attachment in pursuance of the delegation exercised on 21 October 2020. This being the position, clearly the order passed by the Joint Commissioner as a delegate of the Commissioner was not subject to an appeal under Section 107(1) and the only remedy that was available was in the form of the invocation of the writ jurisdiction under Article 226 of the Constitution..” When the search is end, whether proceedings for attachment is permissible?
- (ii) **Opinion on the basis of Tangible material:** “50. [...] Moreover, the words embodied in sub-Section (1) of Section 83, as interpreted above, would leave no manner of doubt that while ordering a provisional attachment the Commissioner must in the formation of the opinion act on the basis of tangible material on the basis of which the formation of opinion is based in regard to the existence of the statutory requirement.”

**83. PROVISIONAL ATTACHMENT TO PROTECT REVENUE IN CERTAIN CASES.—M/S RADHA KRISHAN INDUSTRIES V STATE OF HIMACHAL PRADESH & ORS CIVIL APPEAL NO 1155 OF 2021 BY JUDGMENT DATED APRIL 20, 2021 OF SUPREME COURT**

**Decision**

- III. **Proceeding pending against other entity will not give right for attachment:** In this case, not only the Supreme Court observed that there was no tangible material was available on records for formation of an opinion for order for provisions attachment, but also held that show cause notice was issued under section 74, after the provisional attachment order, and further, proceeding pending against other entity, and not against the Appellant, “68 [...] would not satisfy the requirements of Section 83. Thus, the order of provisional attachment was *ultra vires* Section 83 of the Act.”
- IV. **Second attachment is not permissible:** “71....Both the earlier and the subsequent orders of provisional attachment are on the same grounds. Therefore, unless there was a change in the circumstances, it was not open for the Joint Commissioner to pass another order of provisional attachment, after the earlier order of provisional attachment was withdrawn after considering the representations made by the petitioner. This is an additional ground to set aside the subsequent order of provisional attachment.”
- V. **Attachment in rare cases:** “72. (vi) The expression “necessary so to do for protecting the government revenue” implicates that the interests of the government revenue cannot be protected without ordering a provisional attachment.”

## 5. WHETHER DURING SEARCH ON-THE-SPOT COLLECTION/ DEPOSIT OF TAX JUSTIFIED IN LAW. NO.

Section 67(2) Where the proper officer, not below the rank of Joint Commissioner, either pursuant to an inspection carried out under sub-section (1) or otherwise, has reasons to believe that any goods liable to confiscation or any documents or books or things, which in his opinion shall be useful for or relevant to any proceedings under this Act, are secreted in any place, he may authorise in writing any other officer of central tax to search and seize or may himself search and seize such goods, documents or books or things;

### Issues

1. Whether the Revenue Authority can recover the amount of tax during the search or inspection procedure under undue harassment, coercion and by pressurizing the assesseees?
2. When the Search is permissible under section 67(2)?

### Cases pending on this issues:

1. Bhumi Associate v UOI R/Special Civil Application No. 3196 of 2021 and Niraj Cement Structural Ltd. v UOI R/Special Civil Application No. 4760 of 2021 pending in Gujarat High Court.
2. Interim order: **Niraj Cement Structural Ltd. v UOI** R/Special Civil Application No. 4760 of 2021 - The Hon'ble Gujarat High Court also in R/Special Civil Application No. 4760 of 2021 by interim order dated 12.03.2021 directed that "no coercive recovery from the petitioners"

## 5. WHETHER DURING SEARCH ON-THE-SPOT COLLECTION/ DEPOSIT OF TAX JUSTIFIED IN LAW. NO.

### Decisions:

(a) In [Digipro Import & Export Pvt. Ltd. V UOI 2017 \(350\) E.L.T. 145 \(Del.\)](#), the Hon'ble Delhi High Court deprecate the practice of cheque collected on the spot and termed it as illegal as no provision under Central Excise Act, 1944 or Rules or CBEC circulars authorizes officers to collect such differential duty liability during search or survey.

(b) In [Gullu's v Commissioner Of Trade & Taxes 2016 \(334\) E.L.T. 396 \(Del.\)](#) Hon'ble Delhi High Court, directed the Department not to take any coercive steps and to return cheque so obtained, and Commissioner was also directed to issue instructions that no amount be collected forcibly as a pretext of collecting tax during search/survey in future.

## 6. CIRCULAR NO. 01/2017 DATED 20.09.2017 SINGLE INTERFACE WITH ASSESSEE

□ The GST Council, a constitutional body, for which the Respondents are members, issued the Circular No. 01/2017 dated 20.09.2017 Guidelines for division of taxpayer base between the Centre and States to ensure Single Interface under GST, based on the decisions taken in the 9th Meeting of the GST Council held on January 16, 2017 and 21st Meeting of the GST Council held on September 9, 2017, the criteria given in said circular should be followed for the division of taxpayer base between the Centre and the States to ensure single interface. Accordingly if the assessee's jurisdiction has been assigned to Central Tax Officers, therefore, the State Tax Officers have no jurisdiction over the said assessee as the jurisdiction has been assigned to Central Tax Officers.

## 6. OVERLAPPING JURISDICTION.

□ In case, it is assumed that statute provide or does not debar for concurrent jurisdiction, even in that case, if jurisdiction is exercised by one officer of the Central Tax officer or State Tax officer, it should impliedly oust the jurisdiction of other officers. The doctrine of comity of jurisdiction requires that for the proper administration of justice there should not be an overlapping of the exercise of powers and functions. *The decision of the Punjab and Haryana High Court in **Kenapo Textiles Pvt. Ltd. v. State of Haryana** — (1992) 84 STC 88 (P & H) and the decision of the Supreme Court in **India Household and Healthcare Limited v. LG Household and Healthcare Limited** — (2007) 5 SCC 510* are relevant in this context, which indicate that once a particular officer exercises jurisdiction, it would exclude the jurisdiction of all the other officers.

## 6. OVERLAPPING JURISDICTION.

- ❑ In judgment dated 01.09.2016 in WP(c) 756/2016 ***eBIZ.com (P) Ltd. v Union of India reported in 2016 (44) S.T.R. 526 (Del.)***, this Hon'ble Court declared the search and arrest as illegal, further in para 46 observed that “*the DGCEI has sought to do is to reassess the service tax liability of eBIZ for a past period without resorting to any known procedure under the FA*”.
- ❑ This Hon'ble Court in ***eBIZ.com (P) Ltd. v Union of India, 2016 (44) S.T.R. 526 (Del.)*** [judgment dated 01.09.2016] para 52 –held that audit/ investigation under Rule 5A cannot either insignificant or of a lesser scope for the purposes of the determination whether there has been evasion of service tax and reference to earlier audit/ inquiry / search is necessary. This judgment has been approved by the Supreme Court by dismissing the Revenue Civil Appeal No. 8082/2018 by order dated 23.01.2019.



## 6. OVERLAPPING JURISDICTION.

❑ **National Building Construction Co. Ltd. V Union of India 2019 (20) G.S.T.L. 515 (Del.)**  
[judgment dated 16.11.2018] in para 32 held that “..the stand of the respondents that Rule 5A(1) is for periodic checks and not for specific investigation or inquiry is wrong and unacceptable...”  
[NBCC Review Petition No. 470/2018 after notice is under consideration].

❑ **Canon India (P.) Ltd vs Commissioner of Customs 2021 (376) ELT 3 (SC); 2021 SCC OnLine SC 200**

13. Where the statute confers the same power to perform an act on different officers, as in this case, the two officers, especially when they belong to different departments, cannot exercise their powers in the same case. Where one officer has exercised his powers of assessment, the power to order re-assessment must also be exercised by the same officer or his successor and not by another officer of another department though he is designated to be an officer of the same rank. In our view, this would result into an anarchical and unruly operation of a statute which is not contemplated by any canon of construction of statute.

## 6. WHETHER CENTRE AND STATE BOTH CAN EXERCISE JURISDICTION OVER ASSESSEE? NO.

in WP (C) No 5040/2021 in the matter of M/s. **Koenig Solutions Pvt.** Ltd Vs. Union of India & Ors order 28.04.2021 Delhi high court **granted stay**. Now by order dated 20.07.2021 the writ petition is closed as said summons withdrawn by the Commissioner by Affidavit submitted in Court and inquiry is closed.

**Section 6(2)(b) where a proper officer under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act has initiated any proceedings on a subject matter, no proceedings shall be initiated by the proper officer under this Act on the same subject matter.**

### **Decision**

1. The Delhi High Court by order 28.04.2021 has stayed the proceedings initiated by the Central Tax Officers against the Petitioner company whose jurisdiction has been assigned to the State Tax officer, Delhi, who have also exercised the jurisdiction. The High Court also recorded the submission of bar under section 6(2)(b) of the Central Tax Officer.
2. The High Court, while granting the stay, has found that prima facie there is lack of jurisdiction by the Central Tax officer.
3. The High Court also took cognizance of the fact that summons have been issued by using the language that Petitioner representative should not leave the office without completion of the inquiry or without leave permissions of the officer or till the inquiry/ case is adjourned, which is contrary to the format for the summons prescribed by the Central Government.

## SUMMONS ISSUED BY THE STATE TAX AUTHORITIES – HIGH COURT GRANTED STAY WHETHER CENTRE AND STATE BOTH CAN EXERCISE JURISDICTION OVER ASSESSEE? NO.

In W.P.A. 1629 OF 2021 Raj Metal Industries & Anr. V Union of India & Ors. order 24.03.2021 CALCUTTA high court **granted stay**.

### **Decision**

1. In W.P.A. 1629 OF 2021 Raj Metal Industries & Anr. V Union of India & Ors. inter alia challenge the actions initiated by the State GST authorities with respect to **summons issued on October 19, 2020**. It was submitted that the proceedings were pending under the CGST Act and therefore, no proceedings could have been initiated by the State GST, by relying on Sub-Section 2(b) of Section 6 of the West Bengal GST Act. **The High Court by order dated 24.3.2021 held that** “I am of the view that the summons that have been issued on October 19, 2020 by the State GST is, *prima facie*, in violation of Section 6(2)(b) of the WBGST Act. Accordingly, I direct stay of the above summons and any proceedings thereunder.”

## 7. SIGNIFICANCE OF “THE PROPER OFFICER” UNDER GST, WHETHER DGGI HAS POWER TO RE-INVESTIGATE.

**Canon India (P.) Ltd vs Commissioner of Customs 2021 (376) ELT 3 (SC); 2021 SCC OnLine SC 200 “14...when the statute directs that “the proper officer” can determine duty not levied/not paid, it does **not mean any proper officer** but that proper officer alone.”**

**12... The power has been so conferred specifically on “the proper officer” which must necessarily mean the proper officer who, in the first instance, assessed and cleared the goods i.e. the Deputy Commissioner Appraisal Group. Indeed, this must be so because no fiscal statute has been shown to us where the power to re-open assessment or recover duties which have escaped assessment has been conferred on an officer other than the officer of the rank of the officer who initially took the decision to assess the goods.**

## 7. SIGNIFICANCE OF “THE PROPER OFFICER” UNDER GST, WHETHER DGGI HAS POWER TO RE-INVESTIGATE.

13. Where the statute confers the same power to perform an act on different officers, as in this case, the two officers, especially when they belong to different departments, cannot exercise their powers in the same case. Where one officer has exercised his powers of assessment, the power to order re-assessment must also be exercised by the same officer or his successor and not by another officer of another department though he is designated to be an officer of the same rank. In our view, this would result into an anarchical and unruly operation of a statute which is not contemplated by any canon of construction of statute.

14. It is well known that when a statute directs that the things be done in a certain way, it must be done in that way alone. As in this case, when the statute directs that “the proper officer” can determine duty not levied/not paid, it does not mean any proper officer but that proper officer alone. We find it completely impermissible to allow an officer, who has not passed the original order of assessment, to re-open the assessment on the grounds that the duty was not paid/not levied, by the original officer who had decided to clear the goods and who was competent and authorised to make the assessment. ...

## 8. DEPARTMENTAL AUDIT UNDER GST

**Section 65(1)-** The Commissioner or any officer authorised by him, by way of a general or a specific order, may undertake audit of any registered person for such period, at such frequency and in such manner as may be prescribed.

**Rule. 101. Audit.**—(1) The period of audit to be conducted under sub-section (1) of section 65 shall be a financial year or multiples thereof.

Section 65(3) - The registered person shall be informed by way of a notice not less than fifteen working days prior to the conduct of audit in such manner as may be prescribed.

Rule 101 (2) Where it is decided to undertake the audit of a registered person in accordance with the provisions of section 65, the proper officer shall issue a notice in **FORM GST ADT-01** in accordance with the provisions of sub-section (3) of the said section.

# DEPARTMENTAL

# AUDIT

# UNDER

# GST

Section 65(4) The audit under sub-section (1) shall be completed within a period of three months from the date of commencement of the audit. Further extension upto 6 months.

Section 65 (6) On conclusion of audit, the proper officer shall, within thirty days, inform the registered person, whose records are audited, about the findings, his rights and obligations and the reasons for such findings

Rule 101 (4) The proper officer may inform the registered person of the discrepancies noticed, if any, as observed in the audit and the said person may file his reply and the proper officer shall finalise the findings of the audit after due consideration of the reply furnished.

Rule 101 (5) On conclusion of the audit, the proper officer shall inform the findings of audit to the registered person in accordance with the provisions of sub-section (6) of section 65 in **FORM GST ADT-02**.

# DEPARTMENTAL

# AUDIT

# UNDER

# GST

The Hon'ble Supreme Court in the case of **Sahara India (Firm), Lucknow v. Commissioner of Income Tax, Central-I and Another reported in (2008)14 Supreme Court Cases 151** wherein it was held that verification by the Department have the civil consequences and the party has the right to be given a notice by the Department, stating the reason and the basis for such verification need to be conducted, even if there is no express provision under the law and the Court held that compliance of principles of natural justice is implicit.

This Hon'ble Court in **eBIZ.com (P) Ltd. v Union of India, 2016 (44) S.T.R. 526 (Del.)** [judgment dated 01.09.2016] para 52 –held that audit/ investigation under Rule 5A cannot either insignificant or of a lesser scope for the purposes of the determination whether there has been evasion of service tax and reference to earlier audit/ inquiry / search is necessary. This judgment has been approved by the Supreme Court by dismissing the Revenue Civil Appeal No. 8082/2018 by order dated 23.01.2019.

Hon'ble Court in **National Building Construction Co. Ltd. V Union of India 2019 (20) G.S.T.L. 515 (Del.)** [judgment dated 16.11.2018] in para 32 held that “..the stand of the respondents that Rule 5A(1) is for periodic checks and not for specific investigation or inquiry is wrong and unacceptable...”



## 9. MANDATORY TO MENTION THE DOCUMENT IDENTIFICATION NUMBER (DIN) FOR ALL COMMUNICATIONS SENT BY ITS OFFICES TO TAXPAYERS

- Circular No. 122/41/2019-GST, dated 5-11-2019 read with Circular No. 128/47/2019-GST, dated 23-12-2019 issued by the Central Board of indirect taxes and custom which make it mandatory to mention the Document Identification Number (DIN) for all communications sent by its offices to taxpayers.
- In para 10 of the said circular, it is stated that “It is reiterated that any specified document that is issued without the electronically generated DIN shall be treated as invalid and shall be deemed to have never been issued.”
- The Circulars have made it clear that “*Document Identification Number (DIN) shall be done in respect of all communications (including e-mails) sent to taxpayers and other concerned persons by any office of the Central Board of Indirect Taxes and Customs (CBIC) across the country.*”
- There is a settled law that if the law has prescribed the things that have to be done in a particular manner, the same has to be done only in the manner prescribed or not to be done at all.[***CIT v. Pearl Mech. Engg. & Foundry Works (P) Ltd., (2004) 4 SCC 597, at page 605***]

# 10. NEW SUBSTITUTED SECTION 151 IN CGST ACT

**Section 151.** The Commissioner or an officer authorised by him may, by an order, direct any person to furnish information relating to any matter dealt with in connection with this Act, **within such time, in such form, and in such manner, as may be specified therein**".

The officers, while proposing said provisions of section 151, would have given the impression as if there are no provisions in CGST Act to call for information. Whereas, the fact is that **there are plethora of provisions for seeking information**, such as power of search & seizure [section 67(2)], inspection [section 67(1)], summons (section 70), special audit (section 65), audit by officers (section 65), access to premises without any limit (section 71), scrutiny of return (section 61), there are many others. There is no dearth of power with the Officers under GST. Sorry to raise a question - are these provisions are not enough for officers quench their thirst of power as they need one more provision?

The aforesaid new section 151, totally vague, **without any safeguard and unnecessary**, except to empower officers **for breeding corruption and tax terrorism**. I have no iota of doubt in my mind that said provisions will create havoc in the entire country. The said new section 151 has been delinked with section 168, by the Finance Act, 2021 ensuring upregulating power at field formation itself instead at Board level.

WISHING FOR GOOD HEALTH FOR EVERYONE

.....*Thank you*.....