

# GST NEWSLETTER

MAY 2019 ISSUE



## **Preface:**

### **CA SUMIT KEDIA**

GST is on the verge of completing two years since its implementation. Till date 34 GST Council meetings have been held whereby 1064 decisions had been taken by the Council. The next council meeting scheduled on 20<sup>th</sup> June 2019 is being looked up to since this will be the first meeting after the elections and the first under the new Finance Minister. More than 250 notifications and 200 circulars have been issued to implement, clarify, classify, amend and introduce various provisions under the GST Act. However GST being an evolving law, litigations have started cropping up on certain contentious issues in GST. In this month's newsletter, we have worked on certain recent deliberation of the High Courts and Supreme Courts on certain burning issues.

## DELHI HIGH COURT ISSUES NOTICE TO UNION OF INDIA IN RELATION TO ITC DENIAL FOR DEFAULT OF SUPPLIER:

In Re: *Bharti Telemedia Ltd vs. Union of India*

The argument placed by the petitioner is that the Department has been vested with all the powers to recover any revenue lost owing to non-payment of taxes by defaulting suppliers and credit cannot be denied to recipient for mistake on part of the supplier.

- *Section 16(2) (c)* of CGST Act, 2017 provides a condition that the recipient is entitled to input tax credit only if the tax charged in respect of such supply has actually been paid by the supplier.
- The *second proviso to section 16(2) (d)* provides that the recipient shall add an amount of ITC availed, along with interest to the output tax liability if the recipient fails to pay the invoice amount to the supplier within 180 days.
- *Proviso to Section 16(4)* extends the benefit of availment of ITC till the due date of furnishing of return for the month of March, 2019 in respect of certain invoices, only if the supplier for such supplies has uploaded the details of such invoices in its return.
- *Section 43A(6) (which is yet to be notified)* of the CGST Act provides that the **supplier and recipient shall be jointly and severally liable to pay tax or pay ITC** availed in relation to outwards supplies for which the details have been furnished under sub-section (3) and (4) but returns thereof has not been furnished.
- The provisions have been challenged on the following grounds:



- *Section 16(2) (c), proviso to Section 16(4) is violative to Article 14 of the Constitution of India* which provides equality before the law or equal protection within the territory of India.
- The Department has been vested conferred with all the powers to retrieve any revenue lost owing to non-payment of taxes by erring suppliers; the credit cannot be denied to the recipient for the default on the part of supplier.


**CONCLUSION:**

The notice was passed by the Delhi High Court keeping in view that an assessee who has filed his/her returns promptly does not suffer due to the non-compliance of the suppliers. The final outcome of this shall provide clarity on the subject matter of litigation.

## INTEREST TO BE CALCULATED ON 'GROSS' TAX LIABILITY:

**In Re:** *M/s. Megha Engineering & Infrastructures Ltd. Vs Commissioner of Central Tax*)

The petitioner made a delay in filing of GSTR-3B from the period of October 2017 to May 2018 which was due to shortage of ITC available to offset the entire tax liability and due to certain restraints they could not make the payment and file return within the due date but the entire liability was discharged in May 2018, however consequently the Department demanded interest on gross tax liability.

- The High Court first referred to the provisions dealing with Input Tax Credit. Then the court referred to *Section 50(1)* which stated "Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made there under, *but fails to pay the tax or any part thereof* to the Government within the period prescribed, shall for the period for which the tax or any part thereof remains unpaid, pay, on his own, interest at such rate, not exceeding eighteen per cent., as may be notified by the Government on the recommendations of the Council."
- 
- It was observed that output tax liability can paid by way of Electronic Credit Ledger (ELC) as per *Sub-Section (4) of Section 49* (i.e. until the payment liability is not actually settled off (GSTN portal set-off) from ELC, the same cannot be considered to have been paid into the government treasury and interest meter will keep on running).
  - *Mere availability of the ITC in ELC would not tantamount to the payment of tax.* Moreover the ownership of such money is with the dealer till the actual time of payment so the Government becomes entitled to charge interest up to the date of their entitlement.
  - In the *31<sup>st</sup> meeting of the GST Council* it was recommended that interest should be charged only on the net tax liability after taking into account the admissible input tax credit. The High Court stated that it cannot interpret Section 50 of the CGST Act

in the light of the recommendation of the GST Council. Therefore, the High Court of Telangana ordered that tax payer (in case makes a delay in filing GST returns) is liable to pay penalty on the entire liability.

- While on the other hand in the case of *M/s. Landmark Lifestyle Vs. Union of India* the Delhi High Court has stayed proceeding against the petitioner for late payment of interest on gross tax liability on Goods and Services Tax.
- Before the Court, the counsel for the petitioner, Advocate J K Mittal pointed out that the calculation of the interest payable for delayed payment of GST as determined by the Respondent is erroneous. According to him, interest has been calculated on the gross tax liability which is in fact to be adjusted with input tax credit.
- He stated that on the actual tax liability, interest has been paid by the petitioner. He further stated that against the total tax liability of Rs.3.31 crores, the interest liability works out to 8.19 crores which made it unreasonable and erroneous.
- The Delhi High Court granted a provisional relief saying that no coercive action to be taken against the appellant for non-payment of the interest amount. The matter was posted to 30<sup>th</sup> September 2019.

### **CONCLUSION:**

The judgment given by the Telangana High Court requires payment of interest on gross tax liability (before adjustment of input tax credit) as the recommendation made in the GST Council are not implemented. However the final decision of the Delhi High Court would be closely followed by the Industry and Professionals.

## NO PRE-ARREST BAIL TO BE GRANTED TO GST VIOLATORS:

Different High Courts have taken various stands in relation to grant of anticipatory bail to the violators of the GST Act and requirement of FIR for arresting the defaulters. The Supreme Court therefore issued an order which has to be complied with till the Supreme Court gives its final verdict.

### Telangana High Court

- No anticipatory bail to be granted to those accused of violating the CGST Act and rejected any interim relief to the defaulters.

### Bombay High Court

- Pre-arrest bail can be granted to the CGST Act violators as CGST Officials had not registered any FIR as warranted under the CrPC.

- An argument made by the Centre is that the CGST officers were not police and hence not required to follow the provisions of Criminal Procedure Code, which mandates registration of FIR prior to arrest.
- Solicitor General Tushar Mehta challenged the Bombay HC's orders saying that the Parliament has segregated CGST Act from CrPC and provided a separate procedure for dealing with offenders. He said that HC's orders had brought "*functions of the directorate general of GST intelligence to a grinding halt*".
- The notice given by the Supreme Court says that the High Courts while entertaining such requests in future has to keep in regard that the Supreme Court by order (dated May 27) had dismissed the special leave petition filed against the judgment and order of Telangana High Court in a similar matter, wherein the High



Court of Telangana had taken a contrary view to what has been held by the High Court of Bombay.

- The Madras High Court dismissed the anticipatory bail of nine people apprehending arrest under the Act in February 2019. Hon'ble Justice Anand Venkatesh, in his order said, "Where the accused persons are charged of violations of the CGST Act, involving colossal loss of revenue and the investigation is at a very nascent stage, prudence demands that this court should lay off its hands from investigation and allow complete independence to the prosecuting agency to proceed further with the investigation."

### **CONCLUSION:**

The Supreme Court preliminarily supports the decision of Telangana High Court by suggesting High Courts not to grant anticipatory bails to the defaulters of the Goods & Services Tax and by upholding the authority & power of commissioner of Central Goods & Services Tax to arrest those who are accused of violating the CGST Act.

## ORISSA HIGH COURT ALLOWS ITC ON GOODS & SERVICES USED FOR CONSTRUCTION OF IMMOVABLE PROPERTY:

**In Re:** *M/s. Safari Retreats Private Ltd. Vs. Chief Commissioner of Central Goods & Services Tax.*

- *M/s. Safari Retreats Private Ltd (the petitioner)* is engaged in carrying on business activity of *constructing shopping malls for the purpose of letting out* of the same to numerous tenant and lessees. The petitioner purchased materials for construction, availed various services like consultancy service, architectural services, legal and professional service etc. As these supplies were taxable, the petitioner had accumulated ITC for the purchase of inputs and input services.
- When the petitioner applied the same for availing credit, the Revenue denied the benefit on the grounds of the provisions laid down by *Section 17(5) (d)* which states that, ITC shall not be available in respect of goods and services or both received by a taxable person for construction of an immovable property (other than plant and machinery) on his own account including when such goods or services or both are used in the course or furtherance of business.
- And hence a writ petition was filed before the Orissa High Court to decide whether input tax credit in this stage is available to the assessee or not.
- The Orissa High Court after reading down *Section 17(5) (d)* of the CGST Act, said that the *interpretation made by the Revenue is frustrating the very objective of the CGST and other respective state GST Acts* as the petitioner in that case has to pay huge amount without any basis.
- The section has to be interpreted in continuity of the transaction since rent income is arising out of the malls which are constructed after paying GST on different items.





- The Court says that if ITC is denied on building meant and intended to be let out, it would amount to treating the transaction as identical to a building meant and intended to be sold. Further, treating these two different type of transactions as one for the purpose of GST, is contrary to the basic principles regarding classification of subject matter of tax levy and, therefore, violative of Article 14 of the Constitution.
- Relying on (1999) 2 SCC 361, the *very purpose of the credit is to give benefit to the assessee*. Therefore if the petitioner is required to pay GST on rental income arising out of investment on which he had paid GST, it is required to have the input tax credit on the GST.
- The Delhi High Court has issued a notice in a similar matter to the Centre while admitting a petition filed by a firm who is engaged in construction of five-star hotels.

### **CONCLUSION:**

The Orissa High Court has dealt an important issue of blocked credit under the goods and services tax (GST) regime for real estate companies constructing commercial spaces for the purpose of letting it on rent or lease.

---

**Disclaimer:** This document is prepared by A. K. Lunawath & Associates solely for clients and other chartered accountants to provide updates on important amendments in GST. The information is exclusively for educational purposes, professional advice shall be taken before taking any decision based on this document.

(For your feedback or comments, you can reach CA Sumit Kedia | Email: Sumit@akl.co.in)