



All India Federation of Tax Practitioner

(An Association of Advocates, Chartered Accountants & Tax Practitioners of India)

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07th March, 2022

Before,
The Hon'ble Finance Minister,
Government of India
&
Chairperson, GST Council,
New Delhi,

Reg: **Representation on various challenges under GST faced by tax payers**

Respected Madam,

The CGST Act, 2017 being a newly introduced and evolving piece of Legislation is leading to divergent legal interpretations, inspite of the best efforts of the Central Government including GST Council or CBIC or GSTN to minimize the problems faced by taxpayers. It is obvious that the taxpayers large or small may have their unique and genuine legal disputes for which the Government should provide a robust judicial platform, which should also be convenient and within the best possible reach of the litigant.

A large number of small, medium and large tax-payers are registered under GST and engaged in the Supply of Goods and Services from every part of the country, these assesses must have the means to get their genuine problems remedied.

In the preceding 4 years since the implementation of GST, Government has made significant improvements from time to time but there is scope for much more to be done towards simplification of the complex law and to ease the compliance. Following are few important issues which need immediate attention of the Government in GST law for ease of doing business, better compliance and to reduce litigation.



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‘Simplicity, Clarity and Transparency’ are essential elements of a good system of collection of Indirect Tax.

1. CONCEPT OF MENS REA SHALL BE PRESENT IN CHAPTER 19 (OFFENCES AND PENALTIES) OF THE CGST ACT

It is submitted that in the developing economy like India, the environment shall be business friendly so that there shall be maximum compliances so that tax collection could also be maximised. In the whole scenario it is obvious that there would be some lapses on behalf of the tax payer which could be innocent and *bona fide* in nature. Therefore it is important that any kind of lapses and procedural infirmities shall not be branded as offence and the tax payer shall not be penalized under such kind of situation unless and until the taxpayer bears ‘guilty mindset’.

It is relevant herein to submit that Section 126 of the CGST Act, 2017, provides certain factors to be kept in mind by the officer while imposing penalty. The relevant provision is as under:

126. General disciplines related to penalty.— (1) No officer under this Act shall impose any penalty for minor breaches of tax regulations or procedural requirements and in particular, any omission or mistake in documentation which is easily rectifiable and made without fraudulent intent or gross negligence.

Explanation.—For the purpose of this sub-section,—

(a) a breach shall be considered a ‘minor breach’ if the amount of tax involved is less than five thousand rupees;

(b) an omission or mistake in documentation shall be considered to be easily rectifiable if the same is an error apparent on the face of record.

(2) The penalty imposed under this Act shall depend on the facts and circumstances of each case and shall be commensurate with the degree and severity of the breach.

(3) No penalty shall be imposed on any person without giving him an opportunity of being heard.

(4) The officer under this Act shall while imposing penalty in an order for a breach of any law, regulation or procedural requirement, specify the nature of the breach and the applicable law, regulation or procedure under which the amount of penalty for the breach has been specified.

(5) When a person voluntarily discloses to an officer under this Act the circumstances of a breach of the tax law, regulation or procedural requirement prior to the discovery of the breach by the officer under this Act, the proper officer may consider this fact as a mitigating factor when quantifying a penalty for that person.

(6) The provisions of this section shall not apply in such cases where the penalty specified under this Act is either a fixed sum or expressed as a fixed percentage.

On perusal of above, it could be said that the provision shall be more tax payer friendly as

this provision has provided discretionary powers to the officer to determine that whether the penalty should be imposed or not, but Demand Notices are being issued to the dealers who are innocent buyers and due to the fraudulent activities of the seller, the entire chain of dealers are being targeted and are harassed by issuing Demand Notices.

For example, if the transaction is verifiable from Invoices and Returns, and then if the situation arises that seller is not traceable, then still entire dealer chain is harassed. As per the said provision officers are having full power to determine penalty and could make any person offender. The said provision shall be inconsonance with Section 122(1A) which reads as under:

*(1A) Any person who **retains the benefit** of a transaction covered under clauses (i), (ii), (vii) or clause (ix) of sub-section (1) and **at whose instance such transaction is conducted**, shall be liable to a penalty of an amount equivalent to the tax evaded or input tax credit availed of or passed on.*

Reference is also invited to the opening words of the provision of Section 132(1) of the CGST Act, 2017 which reads as under:

*(1) Whoever **commits, or causes to commit and retain** the benefits arising out of, any of the following offences:*

As per the said provisions, the person who have retained the benefit or who have caused and triggered some unscrupulous activity for retaining benefit shall only be penalized and not the whole dealer chain. Therefore, reference of Sections 122(1A) and Section 132(1) shall be there in Section 126 and all three provisions shall be read conjunctively.

Further, it is submitted that it is important to read and interpret the provisions of the GST Act with respect to the scope for *mens rea*. A person should be punished for deliberate defiance of law, rather than something which didn't do intentionally or something which happened accidentally etc. The provisions containing words like 'voluntarily', 'intentionally', 'negligently', 'knowingly', 'fraudulently', 'dishonestly', 'rashly', 'omits', 'without lawful authority' etc. are words which clearly depicts the role of *mens rea*. Situations where 'misrepresentation' is clear, involves considering *mens rea*. As said, "The existence of *mens rea* as an essential ingredient of an offence has to be made out by the construction of the statute".

Thus provisions under CGST ACT or SGST ACT like section 122, where in sub section 1 clause (i) embodies words like "issues false invoices" or in clause (viii) "fraudulently obtains refund" or in clause (x) "falsifies or substitutes financial records with an intention to evade tax" or clause (xii) "furnishes any false information" or clause (xvii) "furnishes false information" or sub section (2) clause (b) says "for reason of fraud or wilful mis-statement" are enacted where *mens rea* becomes necessary element.

Similarly, under Section 130 it is prescribed that the goods are liable for confiscation where the transaction "Contravenes any provisions of the Act/Rules with the intention of evading payment of tax".

"For the purpose of Section 129(1) of the Act, it is not only necessary for the revenue to establish that there is a technical violation of the Act and/or the Rules framed thereunder but that such a violation has a revenue impact inasmuch as the revenue is burdened to specifically allege and establish that the alleged violation of the Act and/or the Rules, as may be alleged, has been caused by the assessee with intention to evade payment of tax". On perusal of the above examples of the provisions of Chapter 19 of the CGST Act, it is submitted that the provisions under Chapter 19 of the CGST Act, 2017 shall have the concept of *mens rea* so that only guilty mind could be punished and penalized.

2. CONSTITUTION OF GST APPELLATE TRIBUNALS

The CGST Act 2017 being a newly introduced and evolving piece of Legislation is leading to divergent legal interpretations, inspite of the best efforts of the Central Government including GST Council or the State Governments or CBIC or GSTN to minimize the litigation. It is obvious that the tax-payers large or small may have their unique and genuine legal disputes for which the Government should provide a robust judicial platform, which should also be convenient and within the best possible reach of the litigant. The '*SULABH NAYAYA*' is the right principle for dispensation of justice.

A large number of small, medium and large tax-payers are registered under GST and engaged in the Supply of Goods and Services from every part of the country, these assesses must have the means to get their genuine legal issues remedied from the bench of the GSTAT Tribunal as envisaged in the GST law.

It is important to note that the 'Proper Officers' or 'Jurisdictional Officers' of CGST and SGST had already started scrutinizing the monthly return and now conducting 'Tax Audit' for the Financial Year 2017-18, 2018-19 and 2019-20 as the Annual Return had already been filed. Goods under transport are also being detained/seized by Mobile Squads and large amount of securities/penalties are being demanded; further many issues are cropping up from scrutiny and audits which needs remedial judicial actions after detailed analysis of the facts as provided under the law.

In spite of the provision of a special court (Tribunal) i.e. GSTAT in the GST law the genuine assessee/taxpayers were presently forced to approach Hon'ble High Court's which is undesirably creating pressure on the constitutional courts.

In light of the above, we would like to submit certain points of consideration for your good-self which are as follows:

a) Justice at Door-Steps

The biggest hindrance that assessee is facing is the lack of proper judicial forum like Tribunal in this nascent stage of GST law, due to which many of the provisions are still unclear to the Revenue as well as the Assessee. Therefore, due to lack of understanding of the legal provisions, the assessee has to suffer a lot as for each petty issue the assessee has to file Writ Petition in Hon'ble High Courts. It is submitted that filing of Writ Petition is not viable alternative and also an expensive task, the assessee has to bear lot of expenses during the whole proceedings for getting justice, which is nothing but harassment to the assessee. Due to absence of GST Tribunals the scheme of "*Justice at Door-Steps*" is being violated.

b) Interpretation

It is submitted that by not establishing the Benches of GSTAT, the confusion among the Assessee and the Revenue gravely exists as proper interpretation of provisions based on the facts of unique circumstances are not available with any of them, which is resulting in lot of misinterpretation by the Revenue and due to which Assessee has to suffer creating a bad effect on the business environment.

c) Blocking of amount for both the Assessee and Revenue is not good for Economic Recovery

It is submitted that due to non-formation of GST Tribunal, large number of the 2nd Appeals have been piled up for adjudication which would result into the huge pendency of Appeals before the Tribunals when it would come into the existence. Delay in adjudication of Appeals is resulting in unreasonable blockage of funds which is creating difficulties for both the Assessee as well as the Revenue.

It is relevant herein to state that our Country have just seen the second wave of Covid-19 which was disastrous for our Economy. Therefore, for the fast revival the concrete steps should be taken in creation of the Benches of GSTAT so that there could be no blockage of precious money due to the pendency of cases.

d) Assessee forced to pay Tax which sets Wrong Precedent

It is submitted that due to non-formation of Tribunals, the assessee sometimes ends-up pay Tax under protest which sets wrong precedent for the coming financial years as well as for other Assesses. This is nothing but harassment for the genuine taxpayers of the Nation and miscarriage of Justice. If this continues then the law would lose its credibility and the concept of '*Good and Simple Tax*' would remain on papers only. There should be a **Rule of Law** for GST in this developed business society of this great democratic country.

3. RESTRUCTURING OF THE AUTHORITY FOR ADVANCE RULING BY APPOINTING SENIOR OFFICERS WHO CAN WORK INDEPENDENTLY & FAIRLY

Chapter 17, Section 95 to 106 of the Central Goods and Service Tax Act, 2017 mentions about the provisions pertaining to **Advance Rulings**. The present system & orders for Advance Rulings have created lots of controversy and hysteria among the tax-payers as most of the Advance Rulings are not fairly adjudicated. The reasons for restructuring of the Authority for Advance Rulings are as under:

- a) The Authority for Advance Ruling and Appellate Authority for Advance Ruling should be presided over by a senior officer and not a mid-level officer from GST Departments. There is no provision of any Advocate or a Retired Judge to preside over the Authority, there should be a third member who must be from judicial back-ground. Due to lack of judicial frame of mind most of the Orders till now are pro–Revenue, which defeats the basic purpose of Advance Ruling.
- b) Since there is no provision of appeal before Tribunal after the Order of Appellate Authority for Advance Ruling with-in GST Law, due to which Assesses have to move to Hon'ble High Courts under Article 226 of the Constitution of India which is again a lengthy and costly procedure for many taxpayers. Further, the Advance Ruling being analysed directly by the Hon'ble High Court's they should be pronounced with utmost care and maintaining very high quality of Judicial Analysis.

c) Lack of valid reasoning in most of the orders presently passed by the Authority or Appellate Authority has created hysteria among taxpayers, as many of taxpayers as well officers in general wrongly consider Advance Ruling as a judicial precedent, while the Advance Ruling infact only binds the Applicant to the Advance Rulings.

d) Under section 103(2) it is provided that:

*Section 103 (2) The advance ruling referred to in sub-section (1) shall be binding **unless the law, facts or circumstances supporting the original advance ruling have changed.***

It is submitted that it is unclear that what is the meaning of *change in law*. Suppose, if there is a conflicting Judgment of two High Courts pronounced after the Advance Ruling on a specific issue, then can the favourable Order to the applicant assessee could be considered as change in law. Or if the Hon'ble Supreme Court pronounce the order on the issue which is beneficial to the assessee in some different case, then whether it would be considered as change in law or only legislative amendment would be considered as change in law.

4. DENIAL OF ITC TO THE RECIPIENT UNDER SECTION 16(2)(c) OF THE CGST ACT, 2017 AND PROPOSED AMENDMENTS BY FINANCE BILL, 2022

Section 16(2)(c) seems to be in violation of Articles 14, 19(1)(g) and 300A of the Constitution of India. This provision provides that a registered dealer would be eligible for claiming input tax credit on the goods purchased on the condition that subject to the provisions of Sections 41 and 43A of the Act, the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilization of input tax credit admissible in respect of such supply.

As per Statement of Objects and Reasons of the “The Constitution (One Hundred & Twenty-Second Amendment) Bill, 2014”, the main intention behind was to remove cascading effects of taxes.

It is submitted that, after having paid CGST on the purchases made from a registered dealer, the petitioner thereafter has no control over the seller to ensure that such tax is deposited with the Government as is statutory obligation of the seller. Denying input tax credit to the purchaser on such purchases on which the inward supplier has already paid tax is not reasonable on the ground that the selling/outward supply had not deposited the tax with the Government, reversal of ITC or creation of demand on the purchaser/inward supplier would constitute double taxation and it would be detrimental to the honest taxpayers.

The Hon'ble Supreme Court in the case of **K.T. Plantation Pvt. Ltd. & Anr vs State Of Karnataka, Civil Appeal No.6520 Of 2003**, have clearly interpreted that deprivation from property could only be for the public purpose and under the provision of Section 16(4) of the Act, the attempt made to deprive of the property in the form of ITC does not seem at all in any of the public purposes. Further, if Article 300A is not effective then

deprivation of property could cause serious impact in economy as foreign investments could be get effected due to it. Similarly, where the amount of Credit is huge and that got stuck up due to the provision of Section 16(2)(c) of the Act, then huge loss would have to be faced by the Assesseees in which there could be foreign Companies as well. This all could also result into the dilution of the programme of “Make in India” and “*Aatmanirbhar Bharat*”.

On basis of the above, it is submitted that Section 16(2)(c) of the Act shall be omitted from the Act or the necessary amendments could be made.

Further by virtue of Amendment by Clause 99 of Finance Bill 2022 in Section 16 of CGST Act, 2017 through Finance Bill, 2022, introduction and insertion of new Clause (ba) an additional condition for availment of ITC u/s 16(2) has been introduced which is further against the ‘principal of seamless credit’ as strongly propagated in the beginning by this Government, now ITC can be availed only if the same is not restricted in auto-populated GSTR-2B as communicated to the registered person under newly introduced Section 38. Here, it is important to keep in mind that newly envisaged GSTR-2B shall provide eligible and ineligible Input Tax Credit for each month similar to GSTR-2A, but ITC in GSTR-2B remains constant or unchanged for some specified period of time. Through introduction of this clause a situation may arise that claim of ITC by the taxpayer may be restricted even when the ITC is otherwise legally eligible according to unique or specific facts and documentation but the same may be restricted by the Common Portal in auto-generated GSTR-2B based on the digital logic generally applied in the software as there is no opportunity of application of law by human brain to the specific facts and circumstances of the unique transaction.

Combined reading of newly inserted clause (ba) of subsection (2) of Section 16 with clause (aa) of the same subsection (2) of Section 16 which was made applicable w.e.f. 1st January, 2022 gives the total effect of new restrictions on ITC, thus it is an interplay of multiple clauses as well as multiple sections of the CGST Act under which the amount of ITC is closely scrutinised as per conditions and restrictions provided therein. This will certainly be an ambiguous and difficult proposition to be followed by the taxpayers for a valid claim of ITC. This may not only lead to enormous litigation but will make the life of genuine taxpayer very difficult and complicated.

5. ERRORS DUE TO TECHNICAL GLITCHES SHALL BE COMPENSATED

It is submitted that since advent of GST regime, many technical glitches have occurred on GST portal which is maintained by GST Network, due to which lot of innocent tax payers have to face lot of trouble, as just only for getting the portal re-opened or for correcting a simple mistake, the tax payer had to go to before Hon’ble High Courts by the virtue of Article 226.

It is submitted that many times, the error occurs due to technical glitches on the web portal. Therefore, it is requested that there shall be some provisions which could mandate

compensation to the honest tax payers, which would not only help the taxpayers but also a competent and friendly business environment would also be created and it could also be a confidence booster for foreign investors as well.

We request your honour to kindly consider our very reasonable request to make necessary changes in the light of the above made submissions.

With highest regards,

Yours faithfully,

For: All India Federation of Tax Practitioners



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