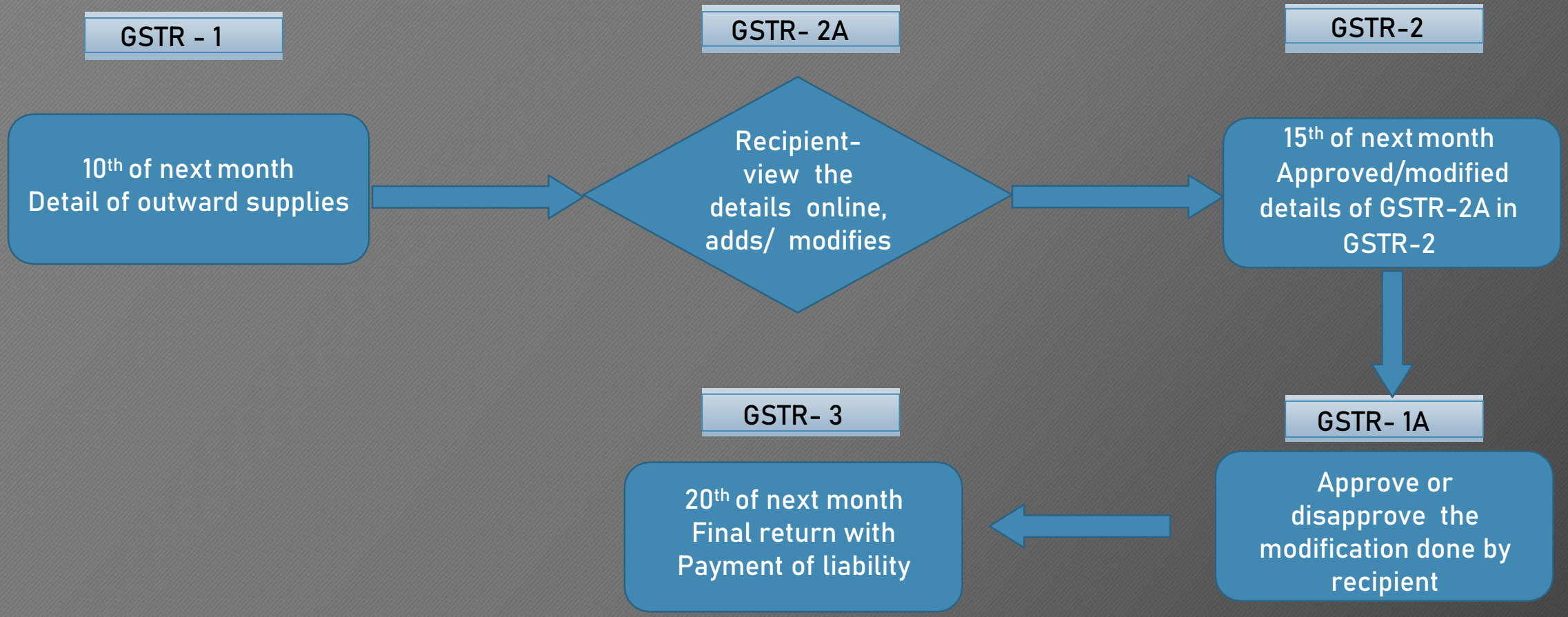
Important decision for GST practitioners
(Gourav Sogani)

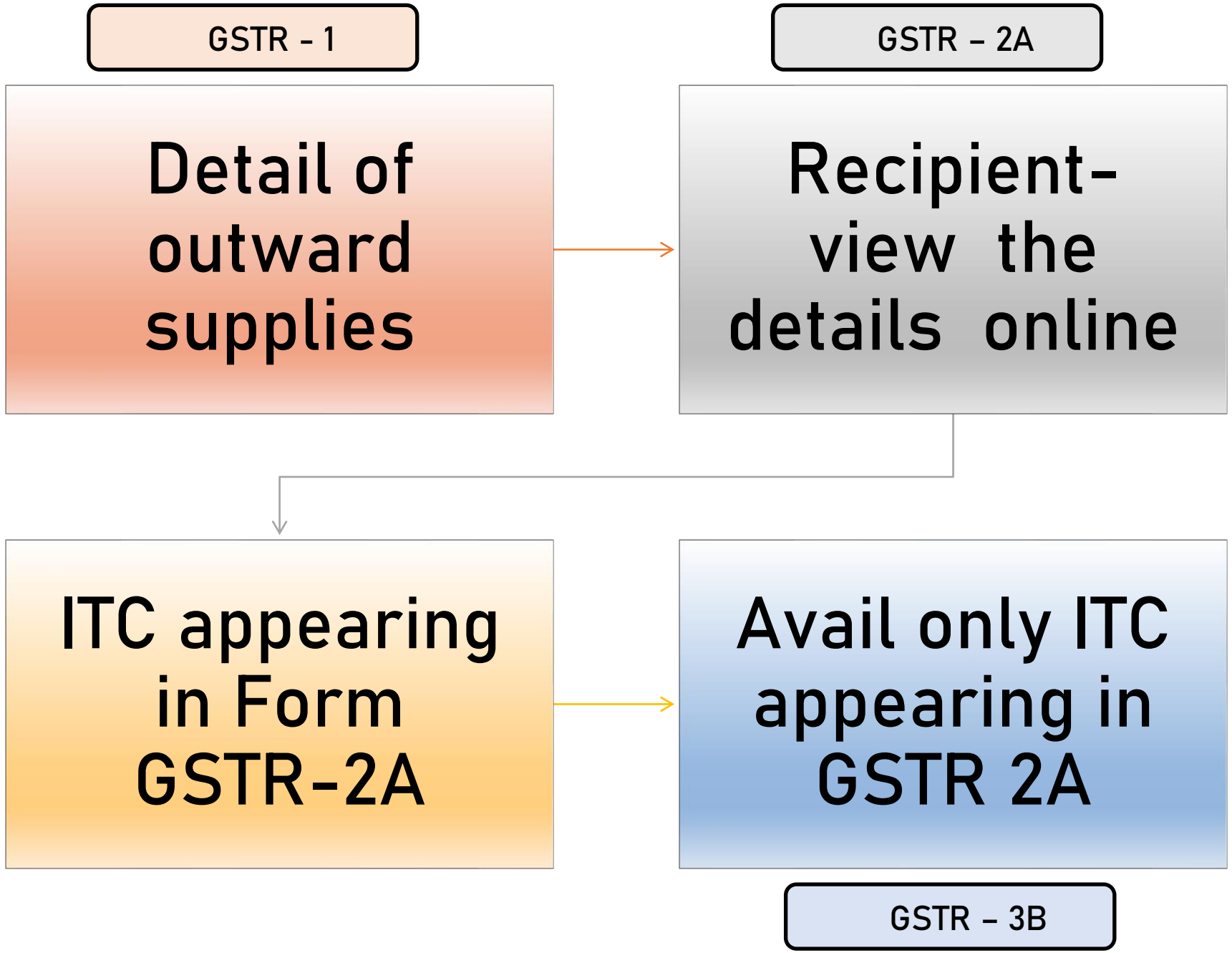
ITC Mismatch Form GSTR 2A vis-à-vis Form GSTR 3B

Bharat Aluminium Company Ltd vs. Union of India Ors.

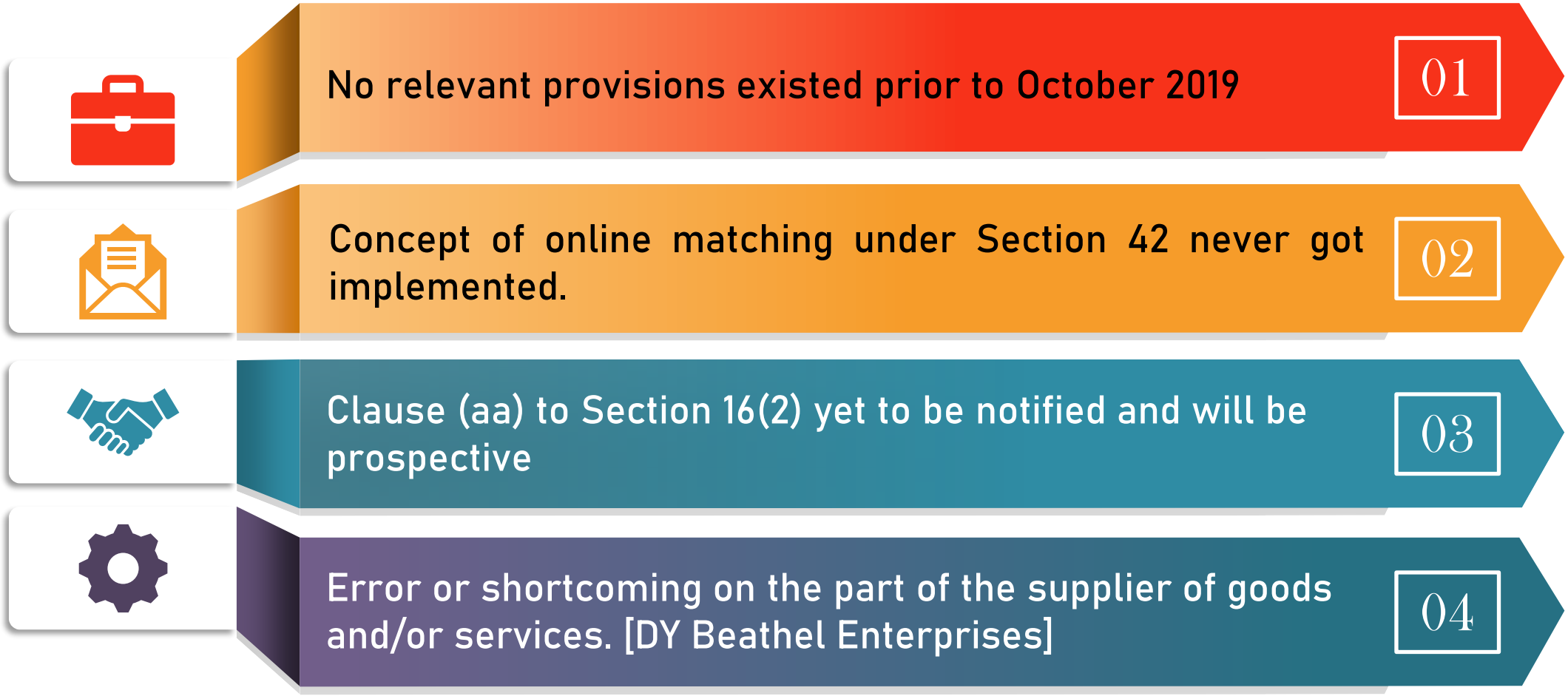
[TS-286-HC(CHAT)-2021-GST]

ITC Matching Concept – As Envisaged Originally




GSTR - 1
GSTR – 2A
Detail of outward supplies
Recipient- view the details online
ITC appearing in Form GSTR-2A
Avail only ITC appearing in GSTR 2A
GSTR – 3B

KEY ARGUMENTS



Relevant Provisions

Section 16(2)(aa)

(aa) the details of the invoice or debit note referred to in clause (a) has been furnished by the supplier in the statement of outward supplies and such details have been communicated to the recipient of such invoice or debit note in the manner specified under section 37;

Section 42 (Relevant extract)

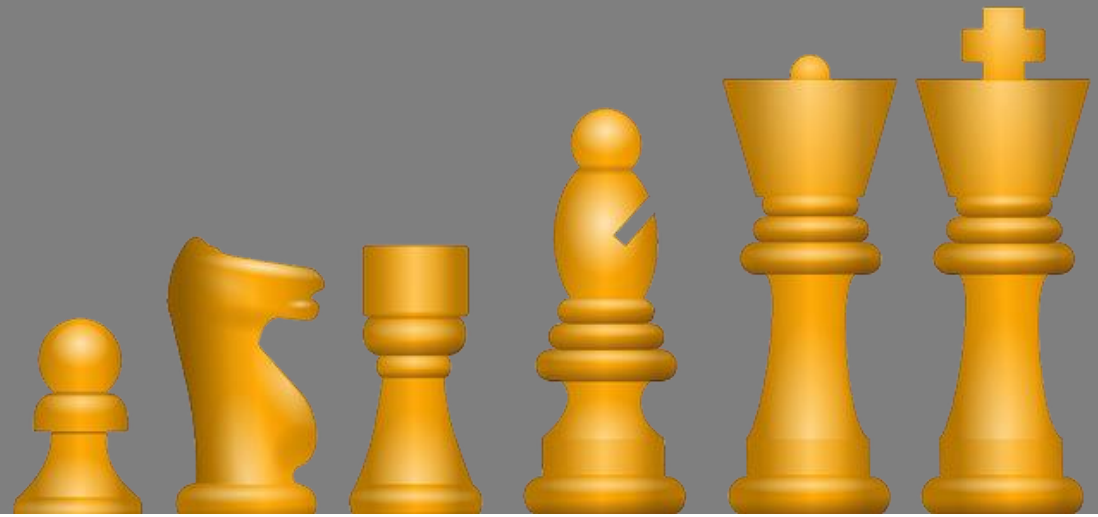
The details of every inward supply furnished by a registered person (hereafter in this section referred to as the "recipient") for a tax period shall, in such manner and within such time as may be prescribed, be matched —

(a) with the corresponding details of outward supply furnished by the corresponding registered person (hereafter in this section referred to as the "supplier") in his valid return for the same tax period or any preceding tax period;

(b) with the integrated goods and services tax paid under section 3 of the Customs Tariff Act, 1975 (51 of 1975) in respect of goods imported by him; and

(c) for duplication of claims of input tax credit.

CURRENT STATUS



STAY HAS BEEN GRANTED

Department has sought time

"Refund of ITC accumulated on account of Inverted duty structure"

Union of India & Ors. Vs. VKC Footsteps India Pvt Ltd.

[TS-472-SC-2021-GST]

Inverted Duty Structure

Challenge to the validity of amended Rule 89(5) of the CGST Rules and Section 54(3)(ii) of the CGST Act to the extent it denied refund of input tax credit relatable to input services in case of inverted duty structure

POSITIVE DECISION

M/s VKC Footsteps India Pvt. Ltd. v. UOI & Others [2020-VIL-340-GUJ]

In view of the provisions of the Act and Rules and keeping in mind the scheme and object of the CGST Act, the High Court held that it cannot be the intent of law to deny the refund of tax paid on "input services' as part of refund of unutilised input tax credit. The Hon'ble High Court thus read down the definition of Net ITC under Explanation (a) to Rule 89(5) of the CGST Rules to the extent it excluded input services from the purview of refund. As such, the High Court ruled that the taxpayers should be allowed to factor in the tax paid on input services for calculating the claim of refund under the inverted duty structure.

NEGATIVE DECISION

Transtonnelstroy Afcons JV and Ors. V. Union of India and Ors. [TS-800-HC-2020(MAD)-NT]

Restriction on right of refund only in respect of unutilized ITC accumulating on rate of tax on input goods being higher than the rate of tax on output supplies does not infringe Article 14. There is no need to read down the provisions contained therein. This is a valid classification and is a valid exercise of legislative power. Rule 89(5) of the CGST Rules, as amended, is intra vires both the general rule making power and Section 54(3) of the CGST Act. Consequently, it was held that it is not necessary to interpret Rule 89(5) and, in particular, the definition of Net ITC therein so as to include the words input services.

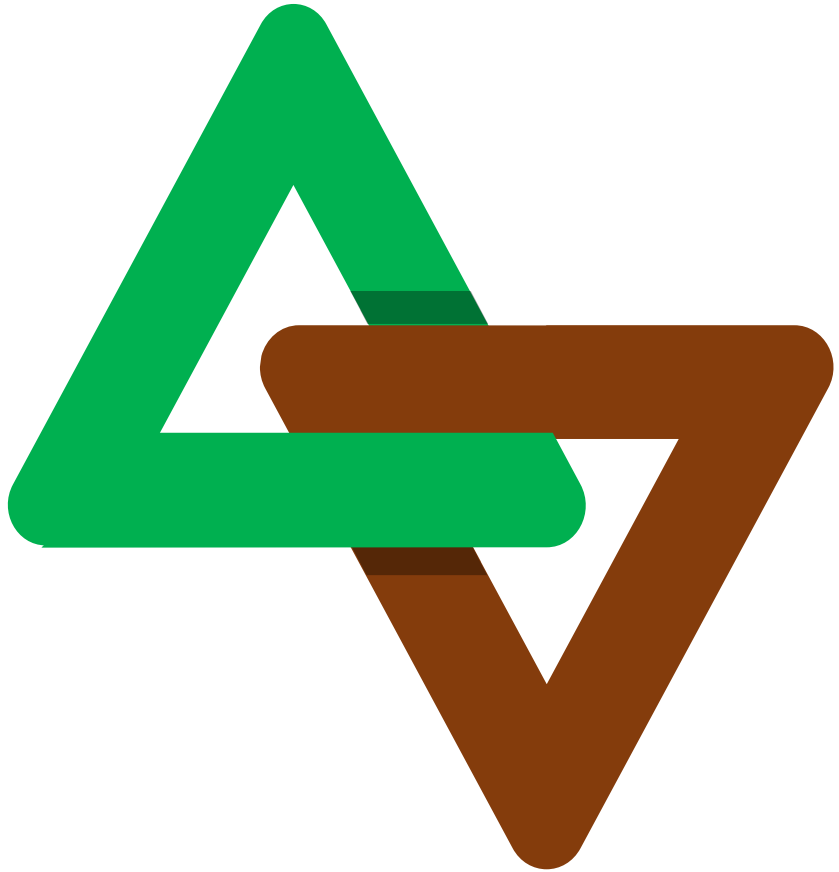
AMENDMENTS TO RULE 89(5)

FROM 01.07.2017 UPTO 18.04.2018

(5) In the case of refund on account of inverted duty structure, refund of input tax credit shall be granted as per the following formula:-

Maximum Refund Amount = {(Turnover of inverted rated supply of goods) x Net ITC ÷Adjusted Total Turnover} - tax payable on such inverted rated supply of goods

"Net ITC" means input tax credit availed on inputs and input services during the relevant period other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both;



AMENDED ON 13.06.2018 W.E.F. 01.07.2017

(5) In the case of refund on account of inverted duty structure, refund of input tax credit shall be granted as per the following formula:-

Maximum Refund Amount = {(Turnover of inverted rated supply of goods and services) x Net ITC ÷ Adjusted Total Turnover} - tax payable on such inverted rated supply of goods and services.

“Net ITC” shall mean input tax credit availed on inputs during the relevant period other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both; and

Section 54(3) of CGST Act

- Section 54(3) of CGST Act
- "Subject to the provisions of sub-section (10), a registered person may claim refund of any unutilised input tax credit at the end of any tax period:
- Provided that no refund of unutilised input tax credit shall be allowed in cases other than—
  - zero-rated supplies made without payment of tax
  - where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies (other than nil rated or fully exempt supplies), except supplies of goods or services or both as may be notified by the Government on the recommendations of the Council (…)"

RULE 89(5)

Maximum Refund Amount in case of Inverted Duty Structure = $\frac{\text{Turnover of inverted rated supply of goods and services}}{\text{Adjusted Total Turnover}}$ × Net ITC − Tax payable on such inverted rated supply of goods and services

Explanation:- For the purposes of computing refund in case inverted duty structure, the expressions –

(a) Net ITC shall mean input tax credit availed on inputs during the relevant period other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both; and

(b) "Adjusted Total turnover" and "relevant period" shall have the same meaning as assigned to them in sub-rule (4)

CBIC vide Circular No. 79/53/2018-GST dated 31.12.2018 clarified that refund in relation to inverted duty structure shall be restricted to ITC of inputs only. Refund in respect of ITC of input services and capital goods shall not be allowed.

ARGUMENTS

Department

- The main clause i.e. Section 54(3) uses the expression 'any', whereas this expression of 'any' is specifically restricted by the use of the expression "no refund of unutilised ITC shall be allowed in cases other than". Accordingly, provisos under Section 54(3) have to be read and interpreted as restrictions and not as qualifications.
- The first proviso cannot be read or interpreted to include input services and capital goods on the ground that if the intention was to allow refund of unutilised ITC on account of input services and capital goods, in addition to input goods, such an intent would have been conveyed through statutory language, which is missing.
- Parliament could not have used the expression 'inputs' in the main clause and first proviso as this would act as a disability to zero rated supplies where it was intended to grant refund to both input goods and input services.

Assessee

- The objective of taxing the goods at a lower rate is frustrated if inputs for making the final products are taxed at a higher rate and no refund of unutilized credit is granted. Refund of unutilised ITC seeks to achieve the objective of value-added consumption-based taxation in its true sense.
- The proviso only provides for cases in which the refund under the main provisions of Section 54(3) will be available. Once the requirement of inverted duty structure in proviso (ii) is fulfilled, the entire unutilised ITC has to be refunded. Further, by stipulating that the proviso provides for the quantum of refunds, the tax authorities are attempting to substitute the words "on account of" with "to the extent of".
- The formula in Rule 89(5) has anomalies. While calculating the refund entitlement as the difference between Net ITC and tax payable on such supplies having inverted rated structure, the tax payable after utilising the ITC availed on input services attributable to inverted rate supplies for payment of the tax should be considered.

Supreme Court Decision

01 The expression “in cases other than” is a clear indicator that clauses (i) and (ii) of the first proviso are restrictive and not conditions of eligibility

02 While it is true that the plural expression ‘inputs’ has not been specifically defined, but there is no reason why the ordinary principle of construing the plural in the same plane as the singular should not be applied. Further, to construe ‘inputs’ so as to include both input goods and input services would do violence to the provisions of Section 54(3) and would run contrary to the terms of Explanation-I

03 The intent of Parliament is evident by the use of a double – negative format by employing the expression “no refund” as well as the expression “in cases other than”. In other words, a refund is contemplated in the situations provided in clauses (i) and (ii) and no other.

04 When proviso (ii) refers to “rate of tax”, it indicates a clear intent that a refund would be allowed where and only if the inverted duty structure has arisen due to the rate of tax on input being higher than the rate of tax on output supplies.

05 The formula prescribed in Rule 89(5) of the CGST Rules seeks to deduct the total output tax from only one component of the ITC, namely ITC on input goods and that such a position is at odds with reality, where the ITC on both input goods and input services is accumulated in the electronic ledger and is then utilized for the payment of output tax. On noticing the anomalies of the formula, the Court held that an anomaly per se cannot result in the invalidation of a fiscal rule which has been framed in exercise of the power of delegated legislation.

Rule 89(5) – As per current formula

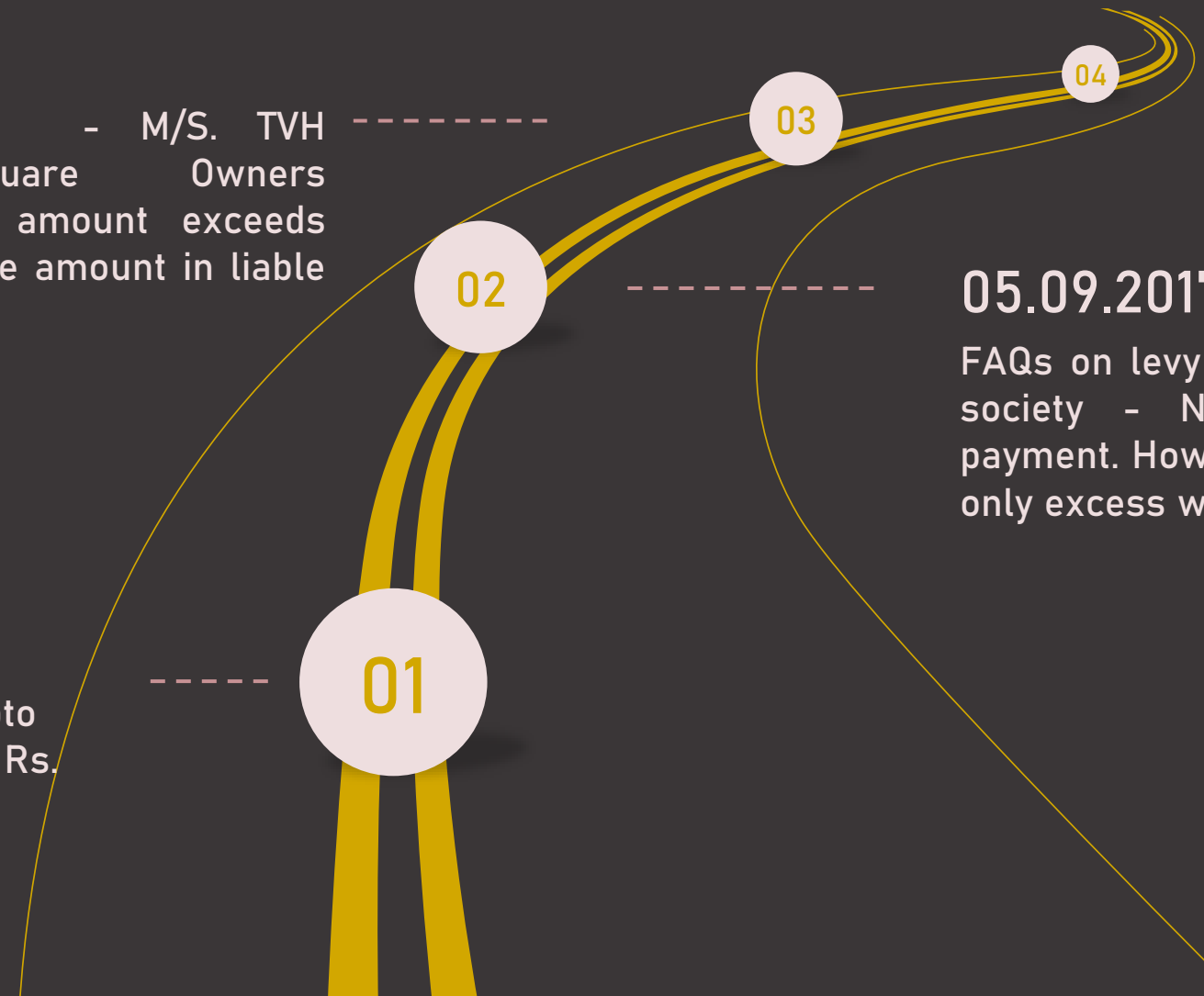
S. No.	Description	Tax payer having only turnover of inverted rate structure	Tax payer having both turnover of inverted rate structure and other turnover
(i)	(ii)	(iii)	(iv)
1	Value of supply of goods, attracting 5% GST (Turnover having inverted rate structure)	Rs. 50,00,000	Rs. 50,00,000
2	Value of supply of goods and services, not having inverted rate structure	NIL	Rs. 50,00,000
3	Adjusted Total Turnover (1+2)	Rs. 50,00,000	Rs. 1,00,00,000
4	GST payable @ 5% on turnover having inverted rate structure 5% on (1)	Rs. 2,50,000	Rs. 2,50,000
5	GST payable @ 18% on turnover not having inverted rate structure	NA	Rs. 9,00,000
5	ITC on inputs availed during the tax period	Rs. 4,00,000	Rs. 9,00,000
6	ITC on input services availed during the tax period	Rs. 2,50,000	Rs. 5,00,000
7	Refund entitlement as per the formula	[Rs. 4,00,000 x Rs. 50,00,000/Rs. 50,00,000] – Rs. 2,50,000 = Rs. 1,50,000	[Rs. 9,00,000 x Rs. 50,00,000/ Rs. 1,00,00,000] – Rs. 2,50,000 = Rs. 2,00,000
	Remarks	ITC of input services of Rs. 2,50,000 will neither be allowed as a refund nor any set off will be available	ITC of input services amounting to Rs. 50,000 will be left as balance which will be neither allowed as a refund nor any set off would be available

Exemption on Member's contribution to RWA

Greenwood Owners Association& Others vs. UOI

[TS-321-HC(MAD)-2021-GST]

IMPORTANT EVENT DATES IN THE MATTER



28.06.2017

Exemption provided upto Rs.5000/-(amended to Rs. 7500/- in 2018)

21.06.2019

Advance Ruling - M/S. TVH Lumbini Square Owners Association –If amount exceeds Rs.7500/- , entire amount in liable to GST

05.09.2017

FAQs on levy of GST on the Co-operative society - No clarification on excess payment. However, GST Flyer clarified that only excess will be liable to GST

22.07.2019

Circular No.109/28/2019- GST – Support the position adopted by the AAR

GST - Notification 12/2017- Central Tax (Rate), Dated 28.06.2017

Sl. No.	Chapter, Section, Heading, Group or Service Code (Tariff)	Description of services	Rate (percent.)	Condition
77	Heading 9995	Service by an unincorporated body or a non-profit entity registered under any law for the time being in force, to its own members by way of reimbursement of charges or share of contribution- (a)...(b) (c) up to an amount of 7500 rupees per month per member for sourcing of goods or services from a third person for the common use of its members in a housing society or a residential complex.	Nil	Nil

Clarifications under GST and Service Tax

The exemption from GST on maintenance charges charged by a RWA from residents is available only if such charges do not exceed Rs.7500/- per month per member. In case the charges exceed Rs.7500/- per month per member, the entire amount is taxable. For example, if the maintenance charges are Rs.9000/- per month per member, GST @ 18% shall be payable on the entire amount of Rs.9000/- and not on (Rs.9000- Rs.7500) = Rs.1500/-.

GST-

Circular No.109/28/2019-GST, Dated 22.07.2019

Service Tax –

Circular No. 175 /01 /2014 -ST- F. No.354/237/2013-TRU Dated 10.01.2014

If per month per member contribution of any or some members of a RWA exceeds five thousand rupees, the entire contribution of such members whose per month contribution exceeds five thousand rupees would be ineligible for the exemption under the said notification. Service tax would then be leviable on the aggregate amount of monthly contribution of such members.

FACTS OF THE MATTER

01 Assessee - Resident Welfare Associations (RWA), were availing the exemption on the contribution from the members upto 7500/- under Entry 77(c) of Notification No 12/2017 – Central Tax (Rate) dated 28.06.2017.

02 On some occasions the contribution is more than Rs.7,500/-. Hence question arose whether, in a case the RWA would lose the entitlement to exemption altogether, or whether the exemption would still continue to be available upto to a sum of Rs.7,500?

03 Assessee approached the Tamil Nadu AAR which issued an adverse order that "*the grant of exemption was conditional upon the contribution being an amount of Rs.7,500/- or less. If the contribution exceeded the sum of Rs.7,500/-, then the very entitlement of that RWA to exemption would stand defeated…*"

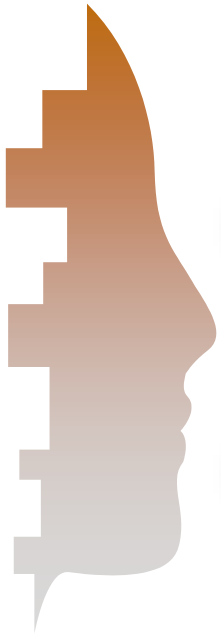
04 Subsequently, CBIC issued Circular No.109/28/2019-GST which towed the line of AAR and expanded the same position as taken by the AAR

05 Hence, assessee moved the writ court assailing the AAR ruling as well as the Circular.

ARGUMENTS

Department

- As per section 15 of the GST Act, it is the transaction value that is liable to GST. The transaction value in this case is represented by the contribution made and it should, in entirety, be taken into account for the purpose of levying tax.
- Where Legislature intended beneficial tax treatment by insisting upon a slab rate, such slab is usually indicated in the Statute itself, which is not the case in the impugned matter.
- The exemption provision must be construed strictly and the assessee are thus not entitled to seek beneficial treatment
- Thus, if the contribution exceeded Rs.7,500, there was an automatic disentitlement.



Assessee

- If emphasis is placed on the use of the phrase ‘upto’ in the relevant Entry, it states that the grant of exemption was for contribution upto Rs.7,500/- and this entitlement remained constant notwithstanding any change in the amount of contribution.
- The withdrawal of a statutory exemption by way of a Circular is contrary to the provisions of the Constitution.
- The assessee were collecting tax only on that component of the contribution that exceeds Rs.7,500 based on the clarification initially issued by the GST Department.
- If a contrary view were to be taken at this juncture, it would be impossible for the RWA to collect the shortfall as there would have been several changes in ownership of the property, in the interim

Madras High Court- Single Bench

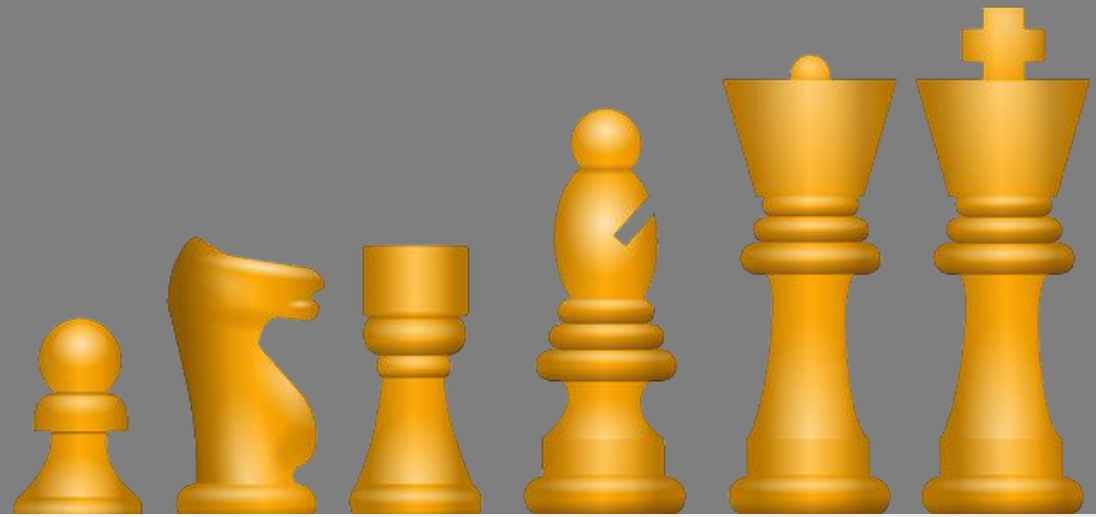
01 No ambiguity on a plain reading of the Entry. The intention is clear to remove contribution upto Rs 7,500 from the purview of taxation

02 The plain words employed in Entry 77 being, 'upto' an amount of Rs.7,500/- can only be interpreted to state that any contribution in excess of the same would be liable to tax.

03 Slab is a measure of determining tax liability. The prescription of a slab connotes that income 'upto' that slab would stand outside the purview of tax on exigible to a lower rate of tax and income above that slab would be treated differently. The intendment of the exemption Entry in question is simply to exempt contributions till a certain specified limit. The clarification by the GST Department even as early as in 2017 has taken the correct view

- AAR and Circular is contrary to the express language of the Entry - Both stand quashed.
- Contributions in excess of Rs.7,500/- would be taxable under GST Act.

CURRENT STATUS



- Appeal to Madras High Court – Division bench – Stay granted on the operation of the judgment of the Single Bench.

Next date of Hearing - 09th Dec 2021

M/S. Vaishnavi Splendour Homeowners Welfare Association [AAAR Karnataka]
M/S Emerald Court Co-operative Housing Society LIMITED[AAR Maharashtra]

Principle of Mutuality

The Assesses sought shelter of the principle of mutuality propounded by the three member bench of the Honourable *Supreme Court of India in the Civil AppealNo. 4184/2009 (State of West Bengal and Others Vs Calcutta Club India) = 2016 (6) TMI 476 -SUPREME COURT* ,wherein it was held that supplies made to its members by the member associations, are governed by the principal of mutuality and therefore they cannot be charged to tax.

Extent of exemption

Alternatively, the Assesses argued that even if GST is applicable, then such amount of contributions as are in excess of ₹ 7500 per month per member alone are taxable.

Amendment to Section 7 of the CGST Act, Retrospectively w.e.f. 01.07.2017 [To be Notified]

For the purposes of this Act, the expression “supply” includes––

(aa) the activities or transactions, by a person, other than an individual, to its members or constituents or vice-versa, for cash, deferred payment or other valuable consideration.

Explanation - For the purposes of this clause, it is hereby clarified that, notwithstanding anything contained in any other law for the time being in force or any judgment, decree or order of any Court, tribunal or authority, the person and its members or constituents shall be deemed to be two separate persons and the supply of activities or transactions inter se shall be deemed to take place from one such person to another

“GST on Ocean Freight”

Mohit Mineral Pvt. Ltd v/s UOI

[TS-29-HC-2020(Guj)-NT]

FACTS OF THE MATTER

01 The assessee is engaged in importing non-cooking coal from Indonesia, South Africa and U.S.A. and supplying it to various domestic industries including power, steel, etc.

02 The assessee discharges the customs duty on the imported products at the time of each import and such value includes the value of freight on which customs duty is demanded and paid.

03 The assessee is liable to pay integrated tax in terms of provisions of the Integrated Goods and Services Tax Act, 2017 (IGST/Integrated Tax Act) and accordingly the assessee is paying the integrated tax at the time of import itself, which also includes value of ocean freight involved in imported coal.

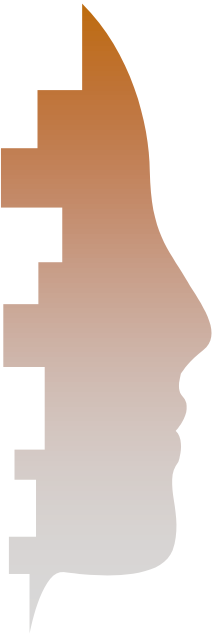
04 IGST was separately levied again on ocean freight through Notification No.8/2017-Integrated Tax (Rate). Further, the liability to pay tax on such service was fixed on the importer as the recipient of service vide entry at serial no. 10 to Notification No.10/2017-Integrated Tax (Rate)

05 Hence, various companies filed the WRIT Petition challenging the levy of IGST on the ocean freight

ARGUMENTS

Department

- IGST on ocean freight is levied based on representations received from Indian shipping industry to provide a level playing field to Indian shipping lines.
- The levy which is introduced on import freight service does not result in additional cost to the importer as the GST paid by the importer on the inward transportation of goods as well as on the import freight services is available to them as the ITC.
- There are two separate taxable events in as much as the levy on the transportation services received by the importer under the notification draws power under Section 5 of the IGST Act, 2017 whereas the levy on the import of goods is under Section 3(7) of the Customs Tariff Act, 1975.



Assessee

- Levy of IGST on ocean freight tantamount to double taxation as IGST gets discharged on the import of goods where such freight amount forms part of the valuation of goods.
- Services of Foreign Shipping lines were procured by the Foreign exporter. Importer of Goods is not a part of the said transaction and hence, cannot be said to be the “recipient” of services for the purpose of payment of IGST.
- Since the Importer is not the recipient of the services, it cannot be made liable to pay tax under reverse charge mechanism (RCM). The entire gamut of transaction occurred outside India. Hence levy is unconstitutional

Gujarat High Court

Notification No.8/2017 – Integrated Tax (Rate) and Notification No.10/2017 – Integrated Tax (Rate) both dated 28.6.2017 are ultravires the provisions of IGST Act

01 Neither an inter-state supply nor an intra-state supply

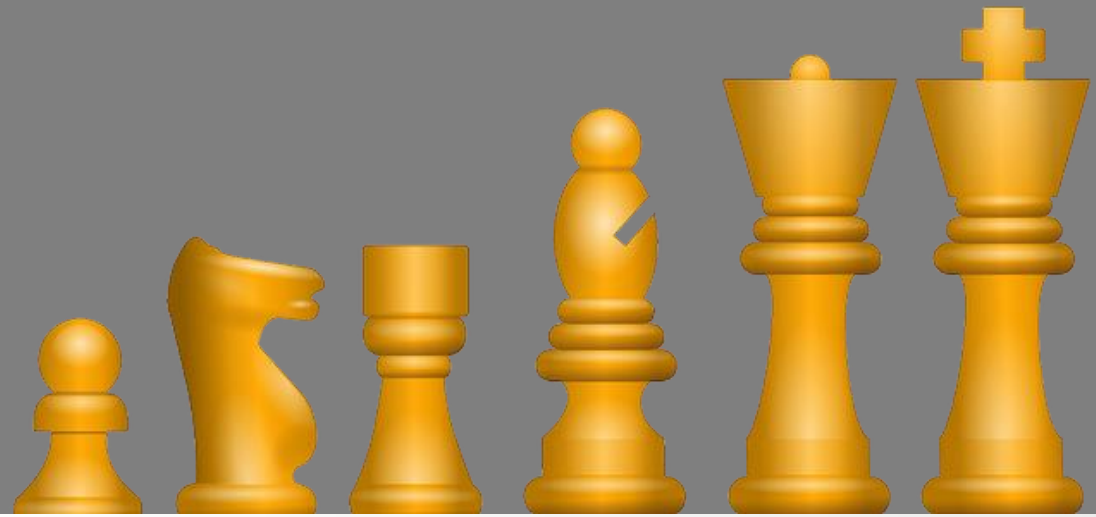
02 No provision for determining the time of supply of the ocean freight service

03 The value of the ocean freight service cannot be determined by the Importer of goods

04 In the case of ocean freight services, the importer of goods is not the recipient of supply of ocean freight services and may not be able to avail the input tax credit

05 Having paid IGST on the amount of freight which is included in the value of the imported goods, levying tax again as a supply of service without any express sanction by the statute, are illegal and liable to be struck down

CURRENT STATUS



- Appeal to Supreme Court by Revenue Authorities – Notice has been issued

Next date of Hearing - 30th September 2021 (Tentative)

Taxability of liquidated damages

M/s. South Eastern Coalfields Ltd. v. Commissioner of Central Excise and Service Tax

[2020 (12) TMI 912 - CESTAT NEW DELHI]

FACTS OF THE MATTER

01

M/s. South Eastern Coalfields Ltd. (the 'Appellant') is a public sector undertaking and is a subsidiary of Coal India Ltd, engaged in the business of mining and selling of coal and entered into various agreements for the same.

02

Appellant had collected certain amount towards

i. Compensation/penalty from the buyers of coal on the short lifted/un-lifted quantity of coal; including forfeiture of earnest money deposit/security deposit;
ii. Compensation/penalty from the contractors engaged for breach of terms and conditions;
iii. Damages from the suppliers of material for breach of the terms and conditions of the contract.

03

The Department fastened liability upon the Appellant under section 65B r/w section 66E(e) of the Finance Act, on the penalty or compensation recovered.

04

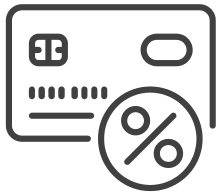
Aggrieved by the order, the Appellant preferred an appeal before the CESTAT, Delhi

Deeming Provision under Service Tax and GST

Service Tax

Section 66E(e) of the Finance Act:

"Declared services-
The following shall constitute declared services, namely:-
(…)
(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act;"



GST

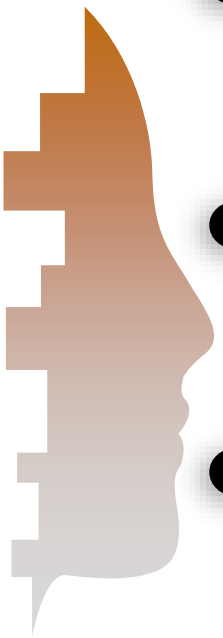
Para 5(e) of Schedule II of the CGST Act:

"(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act;"

ARGUMENTS

Department

- Declared service is a deeming provision enacted by Parliament and as per definition, it need not be an activity carried out by one person for another
- In the alternative, activity includes both active and passive sense. Tolerating the short lifting of coal is a passive activity on the part of the appellant;
- Both the parties planned and agreed to tolerate any breach of contract through the payment of liquidated damages. Hence, the consideration is both intentional and at the desire of the parties;



Assessee

- The Commissioner committed an error in holding that the scope of levy of service tax would also apply to a situation where the actual activity is non-existent
- It cannot be urged that the recovery of any sum by invoking penal clauses was a term of the contract for an agreed consideration;
- There are domestic as well international judicial / quasi-judicial precedents.

Delhi CESTAT Decision

01 There is a distinction between ‘conditions to a contract’ and ’consideration for a contract’.

02 The intention of parties should be seen; whether it is for any of the activities mentioned in the said entry or such clauses are mere conditions to a contract.

03 For an activity to get covered under the said entry, the flow of consideration from one person to another should be for tolerating an act, refraining from an act or to do an act

04 Consideration’ must flow from the service recipient to the service provider. Further, any amount charged, which has no nexus with the taxable service and is not a consideration, does not become a part of the taxable value.

05 Any agreement entered into for supply of goods and/or services having penal clauses is not executed for flouting the terms of the agreement. The penal clauses are for safeguarding the interest of the parties and cannot be the reason to execute an agreement

Appeal allowed and quashed all demands, interest and penalty on the appellant holding that penalty, forfeiture of earnest money, liquidated damages etc. which are conditions to a contract are not covered under Section 66E of the Finance Act, 1994

Other decisions in favour of the Assessee

M/s. Steel Authority of India Ltd., Salem VERSUS Commissioner of GST & Central Excise, Salem [2020 (7) TMI 472 - CESTAT CHENNAI] –	Tribunal relied on the decision of CESTAT Delhi in South Eastern Coal Field and held that liquidated damages recovered by the assessee will not attract Service Tax.
M/s Neyveli Lignite Corporation Limited VERSUS Commissioner of Customs, Central Excise & Service Tax, Unit, Chennai [2021 (7) TMI 1090 - CESTAT CHENNAI]-	Tribunal relied on the decision of CESTAT Delhi in South Eastern Coal Field and held that liquidated damages recovered by the assessee will not attract Service Tax.
M/s K.N. Food Industries Pvt. Ltd. vs. Commissioner of CGST and Central Excise Kanpur [2019-TIOL-3651-CESTAT-ALL]	The Tribunal held that the ex-gratia charges claimed by the assessee were for making good the damages due to the breach of the terms of the contract and did not emanate from any obligation on the part of any of the parties to tolerate an act or a situation and cannot be considered to be towards payment for any services
M/s Lemon Tree Hotel vs. Commissioner, Goods and Service Tax [2020-TIOL-1114-CESTAT-DEL]	The Tribunal held that the forfeiture of the amount received by a hotel from a customer on cancellation of the booking would not attract service tax under section 66E (e)

Advance Rulings under GST

In the case of Maharashtra State Power Generation Company Ltd. (2018-VIL-33-AAR), the Maharashtra AAR has held that liquidated damages are liable to GST in terms of Clause 5(e) to Schedule II of the Central Goods and Services Act, 2017('CGST Act') which declares that '*agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act*'. Therefore, subject to GST at 18% (Heading 9997). The said ruling has been further affirmed by the Maharashtra AAAR [2018 (70) GST 411)].

Further, there are similar rulings pronounced in the following cases:

- Rashtriya Ispat Nigam Ltd. [Advance Ruling No. AAR 01/AP/GST/2019] (GST - AAR Andhra Pradesh);
- Dholera Industrial City Development Project Ltd. [Advance Ruling No. GUJ/GAAR/R/2019/06 (GST - AAR Gujarat)]etc.

Section7(1A) of the CGST Act

(1) For the purposes of this Act, the expression "supply" includes —

(a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business

(b)…(c)

7(1A) where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II."

BAI MAMUBAI TRUST VERSUS SUCHITRA
[2019 (9) TMI 929 - BOMBAY HIGH COURT]

The Bombay High Court *inter alia* held that :

"*58. The Learned Amicus Curiae correctly submits that enforceable reciprocal obligations are essential to a supply. The supply doctrine does not contemplate or encompass a wrongful unilateral act or any resulting payment of damages(...)*

60. Damages may arise in an action in tort, or one in breach of contract as they both entail civil wrongs. Damages represent the compensation or restitution for the loss caused to the plaintiff for the violation of a legal right. It may even be the closest monetary alternative to a remedy in specific performance. The term 'Damages' may be used to include payments towards contractual obligations which are performed yet unpaid for, but the law of damages is not restricted to ordering that what ought to have been done or ought to have been paid under contract. The law recognizes and awards damages between persons who do not have privity, if there is a violation of a legal right resulting in a civil wrong which must be remedied."

M/s Cadila Healthcare Limited vs. C.S.T. - Service Tax – Ahmedabad

[TS-155-CESTAT-2021(Ahd)]

FACTS OF THE MATTER

01 A partnership agreement entered, wherein the assessee was a partner with 96% share and 4% share were held by other parties.

02 As per the agreement, assessee was to provide promotion and marketing services, in return for remuneration

03 Assessee paid the service tax on remuneration and paid interest whenever there was a delay in payment of service tax

04 Thereafter, it realized that services provided by a partner to a partnership firm do not fall under the ambit of services as per Finance Act

05 The refund application was rejected. Being aggrieved by the rejection of refund claim, the assessee filed appeals before the Commissioner (Appeals) which came to be rejected. Therefore, the appeals was filed before Ahmedabad bench of Tribunal

ARGUMENTS

Department

- Assessee has filed refund claim without challenging the self assessment of service tax paid by them.
- The partners and partnership firms are clearly separate entities. Therefore, even though the appellant is a partner, but since provided services to the partnership firm, it is between two different entities.
- As regard the relationship between the Partner & Partnership firm, the appellant have relied upon the judgments which are not on the service tax matter, but it is on the issue of Income Tax
- The refund needs to be passed through the test of unjust enrichment

Assessee

- The entire period of this case is prior to July 01, 2012, when there was no definition of person in the Finance Act, 1994 and only with effect from July 01, 2012, vide section 65B (37) of Finance Act, 1994, 'person' was defined for the first time which included a firm.
- The partners and firm are one and the same as per section 4 of the Partnership Act, 1932,
- Even if the definition of ‘person‘ is considered in terms of section 3(42) of the General Clause Act, the same is inapplicable to partner/partnership firm.
- The impugned activities of the appellants are its obligation as a partner as per partnership deed and not pursuant to separate contact of service. Hence, remuneration received is merely a special share of profits.
- The refund claim is legally maintainable in Service Tax without filing an appeal against self-assessment and there is no provision in the Finance Act, 1994 to file the appeal against self-assessment in Service Tax

CESTAT DECISION

No Service Provider –Recipient relationship between Partner and Firm

01 On perusing the Partnership Agreement, CESTAT observed that the assessee has to carry out the activities which were assigned to the assessee by the partnership firm in the capacity of the partner. In this arrangement, it cannot be said that the partner is a service provider and the partnership firm is the service recipient

02 There should be the existence of service provider and the service recipient, two different persons. The definition of partnership u/s 4 of the Partnership Act, it is clear that the same persons who are partners of the partnership firm are individually called as partners and the same very persons also called collectively as a firm.

03 Prior to 01/07/2012, that is the period involved in the present case, the definition of 'Person' provided under section 65b(37) was not existing. Therefore, the same cannot be made applicable retrospectively. Even as per the definition of General Clauses Act, 'Person' does not include the partnership firm.

04 Relied on the Supreme Court judgments in Dulichand Lakshminarayan and R.M. Chidambaram Pillai, to reach the conclusion that firm is not a different entity or person in law than its partners. It is merely an association of individuals, and a firm name is only a collective of those individuals who constitute a firm.

05 Unlike Customs, there is no express provision to file appeal against the self-assessment of service tax by filing ST-3 return. Therefore, on the ground that appeal against the self-assessment was not filed, the refund claim cannot be rejected.

‘Reversal of ITC on account of manufacturing loss’

A.R.S. Steels and Alloy International Pvt. Ltd. Vs. The State Tax Officer

[2021-TIOL-1393-HC-MAD-GST]

FACTS OF THE MATTER

01

The petitioners are engaged in the manufacture of MS Billets and Ingots. MS scrap is an input in the manufacture of MS Billets and the latter, in turn, constitutes an input for manufacture of TMT/CTD Bars.

02

There was a loss of a small portion of the inputs, inherent to the manufacturing process. The impugned orders sought to reverse a portion of the ITC claimed by the petitioners, proportionate to the loss of the input, referring to the provisions of Section 17(5)(h) of the GST Act.

03

Writs Petitions filed against these orders before the Madras High Court

High Court - Decision

01 Section 17(5)(h) relates to goods lost, stolen, destroyed, written off or disposed by way of gift or free samples - the loss that is occasioned by the process of manufacture cannot be equated to any of the instances set out in clause (h) of Section 17.

02 The situations as set out in clause (h) indicate loss of inputs that are quantifiable, and involve external factors or compulsions.

03 A loss that is occasioned by consumption in the process of manufacture is one which is inherent to the process of manufacture itself.

The reversal of ITC in terms of Section 17(5)(h) is not required in cases of loss by consumption of input which is inherent to manufacturing loss

Rupa & Co. Ltd. Versus The Commissioner Of Central Excise [2015-TIOL-2125-HC-MAD-CX]

Issue:

The entitlement to Cenvat Credit involving the measure of inputs used in the manufacturing process, in terms of the provisions of Rule 9A of the CENVAT Credit Rules, 2002

Facts:

a) A certain amount of input had been utilised by the assessee, whereas the input in the finished product was marginally less.
b) The department proceeded to reverse the Cenvat Credit on the difference between the original quantity of input and the input in the finished product.

Held:

It was held that some amount of consumption of the input was inevitable in the manufacturing process, therefore, Cenvat credit should be granted on the original amount of input used notwithstanding that the entire amount of input would not figure in the finished product. They state at paragraph 13 as follows:

"13. To say that what is contained in finished product is only a quantity of all the inputs of the same weight as that of the finished product would presuppose that all manufacturing processes would never have an inherent loss in the process of manufacture. The expression 'inputs of such finished product', 'contained in finished products' cannot be looked at theoretically with its semantics. It has to be understood in the context of what a manufacturing process is. If there is no dispute about the fact that every manufacturing process would automatically result in some kind of a loss such as evaporation, creation of by-products, etc., the total quantity of inputs that went into the making of the finished product represents the inputs of such products in entirety."

Other favourable decisions / Ruling

R K Ganapathy vs AC [2021-TIOL-1690-HC-MAD-VAT]	Issue was whether reversal of Credit is to be undertaken on invisible loss(inputs damaged in transit or destroyed at some intermediary stage of manufacture), in terms of Section 19(9)(iii) of the Tamil Nadu Value Added Tax Act, 2006 occasioned during the process of manufacture of Ghee – Decided in favour of assessee
Saradhambika Paper and Board Mills Pvt. Ltd. Vs. The State Tax Officer, Gobichettypalayam and Another- [2021 (7) TMI 341- MADRAS HIGH COURT]	Similar issue and decision as above
General Manager Ordinance Factory Bhandara [TS-1300-AAAR-2019-NT]	The issue was - Whether Input Tax Credit is to be reversed on finished goods that are destroyed during testing? The Maharashtra AAR held that – *"where inputs are used, they cease to exist and they being destroyed, lost or stolen, etc. will not arise - thus once the inputs are used in the manufacture of final products, which are then sent for testing purposes, then in such a case the said inputs cannot be considered to have been destroyed".*

Relevant Provisions

Section 17(5)(h)

5)Notwithstanding anything contained in sub-section (1) of section 16 and subsection (1) of section 18, input tax credit shall not be available in respect of the following, namely:-

(a) To (g)...

(h)goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples.

THANK YOU