

ICAI – PUNE CASE STUDIES - GST

K.VAITHEESWARAN
ADVOCATE & TAX CONSULTANT

Mobile: 98400-96876

E-mail : vaithilegal@yahoo.co.in / vaithilegal@gmail.com

‘VENKATAGIRI’

**Flat No.8/3 & 8/4, Ground Floor,
No.8 (Old No.9), Sivaprakasam Street,
T. Nagar, Chennai - 600 017, India
Tel.: 044 + 2433 1029 / 4048**

**402, Front Wing,
House of Lords,
15/16, St. Marks Road,
Bangalore – 560 001, India
Tel : 080 22244854/ 41120804**

CASE STUDY 1

- TKL procured purchase invoices from vendor for goods and issued supply invoices without actual supply to MRCL
- Vendor has uploaded all the invoices by filing GSTR-1 and has also paid the GST by filing GSTR-3B
- Summons by DGGI
- Statement taken from the Director of TKL who confessed the transaction to be a paper transaction
- SCN to TKL seeking reversal of ITC based on Section 16(2) along with interest and penalty
- SCN to MRCL based on confession statement of Director of TKL

FAKE INVOICES

- **Is there something called as Fake Invoice?**
 - Invoice is defined in terms of Section 2(66) to be a tax invoice referred to in Section 31
 - In all these transactions, a tax invoice is raised in the format specified
 - All items required to be mentioned are covered
 - Tax is charged and paid
 - Can it be said that it is a fake invoice?
- Fake Invoice can mean a counterfeit invoice; a replica of an original invoice
- Whether invoice without underlying supply can be called as a fake invoice?
 - Law requires tax invoice to be issued where there is a supply of taxable goods or taxable services
 - When there is no such supply and invoice is issued, at best, it is a violation of Section 31

SUMMONS AND STATEMENTS

- The proper officer under Section 70 has the power to summon any person whose attendance, he considers necessary
 - Either to give evidence or
 - To produce document or any other thing
- In any inquiry in the same manner as provided in the case of a civil court under Code of Civil Procedure.
- Every such inquiry shall be deemed to be judicial proceedings within the meaning of Section 193 and Section 228 of IPC

SUMMONS AND STATEMENTS

- **Language of Section 70 of the CGST Act is different from Section 108 of the Customs Act**
- Any Gazetted Officer of customs shall have the power to summon any person whose attendance he considers necessary either to *give evidence or produce a document or any other thing in any inquiry*
- Section 108(3) provides that all persons so summoned shall be bound to state the truth on the subject respecting which they are examined or make statements and produce such documents and other things as may be required
- **Power to summon a person to give a statement as found in Section 108 is missing in Section 70 of the CGST Act**

ADMISSIONS/STATEMENTS

- **What is the nature of statement given by the Director in response to a summon under Section 70?**
 - When Section 70 does not confer power to take a statement whether the statement given is valid or can it be relied upon?
- Assuming it is a sworn statement, whether sworn statement given before the GST authority is valid?
 - The Delhi High Court in the case of *CIT Vs. Dhingra Metal Works (2010) 328 ITR 384* has held that in our view, for a statement to have evidentiary value, the survey officer should have been authorised to administer oath and to record sworn statement. While Section 132(4) specifically authorises an officer to examine a person on oath, Section 133A does not permit the same.
 - The Madras High Court in the case of *CIT Vs. S. Khader Khan Son (2008) 300 ITR 157* held that a statement under Section 133A shall not have any evidentiary value. As there was no material on record to prove the existence of such disclosed income or earning of such income, it cannot be said that the revenue had lost lawful tax payable. The decision of the Madras High Court has been affirmed by the SC in the case of *CIT Vs. S. Khader Khan Son (2013) 352 ITR 480*.

ADMISSION

- Section 136 of the CGST Act
 - Statement pursuant to summons under Section 70
 - **Relevant for the purpose of proving in any prosecution for an offence, the truth of fact which it contains**
 - When the person who made the statement is dead or cannot be found or kept out of the way
 - When the person who made the statement is examined as a witness and the Court is of the Opinion that the statement should be admitted in evidence in the interest of justice

ADMISSIBILITY OF STATEMENTS

- Article 20(3) of the Constitution of India provides that no person accused of an offence shall be compelled to be a witness against himself
- Scope of 'accused of an offence'.
- SC in the case of ***State of Bombay Vs. Kathi Kalu Oghad AIR (1961) SC 1808*** has observed that 'to be a witness' may be equivalent to 'furnishing evidence' in the sense of *making oral or written statements*
- ***Soni Vallabhdas Liladhar Vs. Asst. Collector of Customs (1983) 13 ELT 1408***
 - Customs authorities must be taken to be persons in authority and the statements would be inadmissible in a criminal trial if it is proved that they were caused by inducement, threat or promise

PROCEEDINGS

- Whether ITC was correctly availed?
 - Tax invoice issued by vendor
 - Payment made to vendor
 - Receipt of goods?
 - What is the meaning of receipt?
- Should 'receipt' necessarily be physical?
 - Receipt can be constructive
 - Transfer of title can happen without receipt of goods
 - High sea sale is effected without receipt of goods
 - Ownership transfer can happen through title documents

BURDEN OF PROOF Vs. ONUS OF PROOF

- There is an essential difference between "burden of proof" as a matter of law and pleading and as a matter of adducing evidence
- Burden of proof is upon the party who invites a decision in the existence of certain facts which he asserts.
This burden is constant and never shifts
- Onus of proof shifts from time to time having regard to the evidence adduced by one party or the other, or the presumption of fact or law raised in favour of the one or the other
- **Such shifting of onus is a continuous process in the evaluation of evidence**

ONUS OF PROOF

- Tax invoices received by TKL as well as MRCL
- Payment made to vendor along with GST
- **The onus of proof stands duly discharged insofar the said supply is concerned. Once the said onus is duly discharged by the assessee, the onus shifts to the department to prove otherwise**
- The SC in the case of *A. Raghavamma and Another Vs. A. Chenchamma and Another AIR 1964 SC 136*, held that
 - There is an essential distinction between burden of proof and onus of proof
 - Burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts
 - The burden of proof in the present case undoubtedly lies upon the plaintiff to establish the factum of adoption and that of partition
 - The said circumstances do not alter the incidence of the burden of proof
 - Such considerations, having regard to the circumstances of a particular case, may shift the onus of proof
 - Such a shifting of onus is a continuous process in the evaluation of evidence

STATEMENTS AND CROSS EXAMINATION

- Adverse findings based on statements taken from others
- Assessee entitled to cross examination
 - In the case of ***Shree Parvathi Metals Vs. Union of India (2018) 11 GSTL 137***, the issue was whether statement given by the foremen can be used against the appellant without affording the opportunity of cross examining, while holding disallowance of Cenvat credit. The Rajasthan High Court held that we are of the considered opinion that the cross-examination is a right of assessee
 - The Supreme Court in the case of ***CBI Vs. V.C. Shukla (1996) AIR SC 1406*** has held that third party records alone cannot be relied upon as an admissible piece of evidence
- Assessee can counter the statements
- Reversal before investigation is complete need not necessarily mean that the matter has been accepted or conceded
- Assessee can contest the matter as and when the investigation is completed and Show Cause Notice is issued

CROSS EXAMINATION

- ***Nidhi Auto Pvt. Ltd. Vs. CCE (2020) 33 GSTL 419 (Trib. - All)***
 - Order for recovery of Cenvat credit was passed relying upon few statements recorded and two ledgers maintained by assessee and one diary recovered from residence of partner of another concern and transport details for five months provided by transporter
 - Evidence was accepted by Adjudicating Authority without examining assessee's contentions or allowing cross-examination of any prosecution witness
 - Tribunal held that none of statements are admissible evidence in present case since author of diary was not identified nor was his statement recorded
 - Diary not admissible as evidence

CROSS EXAMINATION

- ***Madhura Ingots and Steel Co. Pvt. Ltd. Vs. CCGST (2022) 380 ELT 334 (Trib. Kol)***
 - Duty demand raised on ground that appellant availed Cenvat credit on strength of fake invoices without actually receiving the goods
 - Statements made by manufacturers and excise dealers relied upon to conclude that appellant has not received goods
 - Request for cross-examination of persons whose statements have been relied upon has been turned down on the ground that despite several opportunities given by Department, those persons failed to turn up before authorities
 - Reasons assigned by authorities below to reject cross-examination was unsustainable in legal parlance
 - No adverse inference can be drawn against assessee in absence of witnesses whose statements were relied by Revenue without ascertaining veracity
 - When the Revenue does not allow cross-examination of any prosecution witness then Revenue cannot rely on statement given by such prosecution witness for confirmation of demand

POSSIBLE VIEWS

- TKL can contest if the SCN is entirely based on the confession statement
- Cross examination can be sought
- MRCL can contest the SCN on the ground that statement given by Director of TKL cannot be the sole basis for action against MRCL
- Multiple show cause notices
- How many reversals?
- What happens to the GST collected from TKL by the Government?

CASE STUDY - 2

- Half-a-Tablet Ltd. – Manufacturer
- Volume discount
- Special schemes
- Year ending discount
- Festival discount
- Financial credit notes
- Credit notes under Section 34
- Non reversal of ITC by dealer

POST-SUPPLY DISCOUNTS

- Section 15(3)(b)
 - Value shall not include post supply discount
 - Discount must be established in terms of an agreement entered into at or before the time of supply and specifically linked to relevant invoices
 - ITC attributable to the discount has been reversed by the recipient

POST-SUPPLY DISCOUNTS

S.No.	Form	Description of form	Current Status
1.	GSTR-1	Details of outward supplies of goods & services.	Available
2.	GSTR-1A	Details of auto drafted supplies	Omitted
3.	GSTR-2	Details of inward supplies of goods & Services	Omitted
4.	GSTR-2A	Details of auto-drafted supplies	Available
5.	GSTR-3	Monthly return	Omitted
6.	GSTR-3A	Notice to return defaulter u/s. 46 for not filing return	Available
7.	GSTR-3B	Monthly return	Available

POST-SUPPLY DISCOUNTS

- These returns as envisaged provided for a self-regulated mechanism for cross checking of credits availed by recipients
- Intention was also reflected in Section 42, 43 and 43A
- Cross-checking mechanism was never made operational
- Section 42, 43 and 43A which contemplated provisional ITC, matching and reversal were omitted by FA 2022 with retrospective effect
- Since cross checking itself was never implemented, the condition in Section 15(3)(b)(ii) loses relevance
- '*Expresessio Unius Est Exclusio Alterius*'
- When a statute requires a certain thing to be done in a certain way, the thing must be done in that way or not at all
- ***Indian Banks Association Vs. Devi Kala Consultancy Services (2004) 267 ITR 179, Bhushan Power and Steel Vs. State of Orissa (2012) 47 VST 466*** etc.

POST-SUPPLY DISCOUNTS

- *'Lex non Cogit Ad impossibilia'*
- Doctrine of impossibility
- Supreme Court in the case of ***Union of India Vs. Azadi Bachao Andolan (2004) 10 SCC 1*** held that where the law creates a duty or charge, and the party is disabled to perform it, without any fault on his part, and has no control over it, the law will in general excuse him, even in such a circumstance, however, the statutory provision is not denuded of its mandatory character because of the supervening impossibility caused therein
- *Sale/Purchase price has to be adjudged on a combined consideration of tax invoice/bill of sale along with accounts reflecting trade discount and actual price paid. - **Southern Motors Vs. State of Karnataka (2017) 98 VST 207***
- The GST Council in its 53rd meeting has recommended issue of Circular to provide clarification on mechanism for providing evidence by the suppliers for compliance of the condition of Section 15(3)(b)(ii) of the CGST Act, 2017 in respect of post-sale discounts to the effect that input tax credit has been reversed by the recipient on the said amount

ITC – QUESTIONS RAISED BY THE REVENUE

- Why did you avail ITC?
- Why did you not avail ITC?
- Where are all the original invoices?
- Amounts in GSTR-3B are more than GSTR-2A
- Amounts in GSTR-3B are less than GSTR-2A
- Why have you not done ISD?
- Why have you chosen ISD when cross charge is the correct method?
- What is the proof that payment was made within 180 days?

CASE STUDY 3 - COMPARING GSTR 3B AND GSTR 2A - LEGALITY

- Number of Companies have received notices comparing 3B and 2A
- Notices call for reversal with interest and penalty
- Mere letters without a section 73 Show Cause Notice
- Summons from DGGSTI on these aspects
- Assessment orders based on this comparison
 - Writ
 - Appeal
- ***Can filing of GSTR 1 be a condition for availment of ITC by the recipient?***
 - For the period prior to 01.01.2022
 - For the period after 01.01.2022



COMPARING GSTR 3B AND GSTR 2A - LEGALITY

- Except for GSTR-1 and GSTR-3B, the filing of GSTR-1A, GSTR-2, GSTR-2A and GSTR-3 were all kept in abeyance
- Matching mechanism as contemplated in GST did not take off
- Payment of GST by the taxpayers is by way of GSTR-3B and not by way of GSTR -1
- GSTR -2A is an auto-populated form and at present, it is only a facilitation measure given to recipient of supply to check whether the corresponding supplier is depositing the taxes collected from him with Government

COMPARING GSTR 3B AND GSTR 2A - LEGALITY

- Non-reflection of invoices in GSTR-2A does not impact the ability of recipient tax payer to avail ITC on self-assessment basis, as the taxpayer has adhered to all the conditions listed down in Section 16 of the CGST Act, 2017
- Section 42 deals with 'Matching, Reversal and Reclaim of Input Tax Credit' and Section 43 deals with 'Matching, Reversal and Reclaim of Reduction in Output Tax Liability' and both these provisions have not been operationalized
- Filing of Form GSTR-2 and Form GSTR-3 remain suspended and therefore, neither Section 42(10) nor Section 43(10) would be applicable
- No liability to pay interest under Section 50(3) CGST Act, 2017

INPUT TAX CREDIT

- Section 42, which dealt with matching reversal etc. was never operationalized and ultimately, was omitted
- No GSTR-2 or GSTR-3 or GSTR-1A
- ***Union of India Vs. Bharti Airtel Ltd. (2021) 54 GSTL 257 (SC)***
 - The registered person is obliged to do self-assessment of ITC, reckon its eligibility to ITC and of output tax liability including the balance amount lying in cash or credit ledger primarily on the basis of his office record and books of account required to be statutorily preserved and updated from time to time
 - This he could do so even without the common electric portal as was being done in the past till recently pre-GST regime
 - The common portal is only a facilitator to feed or retrieve such information and need not be the primary source for doing self-assessment
 - The primary source is in the form of agreements, invoices/ challans, receipts of the goods and services and books of accounts which are maintained by the assessee either manually or electronically

BOARD CIRCULAR No. 183 dated

27.12.2022

- Supplier has not filed GSTR-1 but filed GSTR – 3B and amount not reflected in GSTR – 2A
- Supplier has filed GSTR -1 and 3B but has not reported a particular supply and hence, supply is not reflected in GSTR - 2A
- Supplies made to registered person and invoice issued referring to GSTIN of the recipient but supplier has wrongly reported the supply as B2C and not reflected in GSTR -2A
- Supplier has filed GSTR -1 as well as GSTR -3B but has declared the wrong GSTIN of the recipient in GSTR -1

BOARD CIRCULAR No. 183 dated

27.12.2022

- In all the four scenarios, the difference in ITC can be claimed by the registered person in GSTR -3B by following the specified procedure
 - Officer shall first seek details of ITC not reflected in GSTR -2A
 - Officer shall check whether invoice has been received; goods or services have been received and recipient has made payment to the vendor
 - Officer shall check whether any reversal is required under Section 17 and whether credit was availed within the time limit
 - **Only for verification of the condition for payment of tax by the supplier, the officer shall ask the registered person to produce certificate for the concerned person from a CA or CMA certifying that supplies have been actually made and the supplier has paid the tax in GSTR – 3B. *This is applicable where the difference in ITC for a supplier exceeds Rs. 5 lakhs for the said financial year***
 - *Upto Rs. 5 lakhs, certificate to be obtained from the supplier himself that supplies have been actually made and tax has been paid*

BOARD CIRCULAR No. 183 dated

27.12.2022

- Applicable only for 2017-18 and 2018-19
- Circular is applicable for 2017-18 and 2018-19 only to ongoing proceedings in scrutiny / audit / investigation and not to completed proceedings
- Circular will apply where any adjudication or appeal is still pending
- Karnataka High Court in the case of *Wipro Industries Ltd.* has extended the application of Circular to even **2019-20**

BOARD CIRCULAR NO. 193/05/2023

dated 17.07.2023

- Benefit of Circular 183 extended to 2018-19; 2019-20 and upto 31.12.2021
- Rider to indicate that the benefit shall be subject to the percentage limits set out in Rule 36
- 5%, 10%, 20% restriction in terms of Rule 36(4) brought into Circular 193
 - **Rule 36(4) itself has no authority given the fact that Section 16(2)(aa) came into force only from 01.01.2022**
 - Filing of GSTR-1 by the supplier became a condition only from 01.01.2022
 - Can a Circular give life to Rule 36(4) when the power under Rule 36(4) itself came later.
 - Source of power for a rule which refers to a ceiling limit of 20% in the context of suppliers who have not uploaded invoice data?
 - **The ostensible reference to 20% in the context of ITC restriction is only Section 43A which never saw the light of the day**

RECENT DECISIONS

- Calcutta HC in the case of *M/s.Suncraft Energy Pvt.Ltd. & Anr. Vs. The Assistant Commissioner of State Tax (2023) 153 taxmann.com 81* has held that action against supplier essential before seeking reversal from appellant. The Revenue's action was deemed to be arbitrary in the absence of any action taken against the supplier
- Kerala HC in the case of *Diya Agencies Vs. State Tax Officer (2023) 154 taxmann.com 421* held that non-reflection of ITC in GSTR 2A should not be an automatic ground for denial. Taxpayers have the opportunity to prove the genuineness of their claims, ensuring a fair and just application of tax law

WHAT SHOULD THE INDUSTRY DO?

- **Period prior to 01.01.2022**
 - Comparing GSTR-3B and GSTR-2A itself can be contested
 - Wherever possible and feasible, reconciliation can be done
 - Benefit of Circular 183 and 193 should be availed
 - If supplier still at fault, other evidence can be produced including proof of payment to the vendor
- **Period post 01.01.2022**
 - Constant tracking of vendor compliance
 - Monitoring of GSTR-2B and remedial action
 - Know Your Supplier
 - Green, Red, Amber, categorisation



CASE STUDY – 4

- YSF is a public charitable trust registered under Section 12A under the category of education
- Apart from fees, amounts collected towards books, bags, etc.
- Fees also collected for recreation activities.
- Amounts collected for hostel.
- Auditorium let out to third parties for conducting seminars and programmes
- Additional coaching fee for NEET, IIT etc.
- Applicability of exemption?



EDUCATIONAL INSTITUTION

- Entry 66, Notification No. 12/2017 – CTR exempts services **provided by an educational institution to its students, faculty and staff** from levy of GST
- “educational institution” means an institution providing services by way of,-
 - pre-school education and education up to higher secondary school or equivalent;
 - education as a part of a curriculum for obtaining a qualification recognised by any law for the time being in force;
 - education as a part of an approved vocational education course;
- Notification No. 12/2017 – CTR exempts services by an entity registered under section 12AA or 12AB of the Income-tax Act, 1961 by way of charitable activities from the levy of GST
 - advancement of religion , spirituality or yoga covered by definition of ‘charitable activities’

COMPOSITE SUPPLY

- Section 2(30) of the CGST Act, 2017 defines 'composite supply' to mean a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply;
- Section 2(90) of the CGST Act, 2017 defines 'principal supply' to mean the supply of goods or services which constitutes the predominant element of a composite supply and to which any other supply forming part of that composite supply is ancillary;
- Section 8(a) of the CGST Act, 2017 provides that a composite supply comprising two or more supplies, one of which is a principal supply, shall be treated as a supply of such principal supply

COMPOSITE SUPPLY

- ***College of Estate Management Vs. Customs and Excise,***
 - College was exempted as it was providing education and was also sending printed materials to students
 - The college contended that the printed materials are taxable and hence eligible for input tax credit
 - The House of Lords held that college provides a single education service and the supply of course materials cannot be split to treat a portion as supply of service

COMPOSITE SUPPLY

- ***Union of India Vs. Mohit Minerals Pvt. Ltd. (2022) 61 GSTL 257 (SC)***
 - CIF / CFR transactions
 - Foreign supplier engages foreign shipping line for transport of goods to India.
 - Indian importer made liable to pay IGST under reverse charge mechanism on such transportation services.
 - The impugned levy imposed on the 'service' aspect of the transaction is in violation of the principle of 'composite supply' enshrined under Section 2(30) read with Section 8 of the CGST Act. Since the Indian importer is liable to pay IGST on the 'composite supply', comprising of supply of goods and supply of services of transportation, insurance, etc. in a CIF contract, a separate levy on the Indian importer for the 'supply of services' by the shipping line would be in violation of Section 8 of the CGST Act.

COMPOSITE SUPPLY

- ***Torrent Power Ltd. Vs. Union of India (2020) 34 GSTL 385 (Guj.)***
 - Principal supply of transmission and distribution of electricity cannot be done without electric line, electric plant and electric meter.
 - Principal and related/ancillary services go hand in hand and one cannot be provided independent of other.
 - These services are composite supply.
 - Tax liability is determined by treating such composite same as supply of principal supply of transmission and distribution of electricity.
 - If principal supply of transmission and distribution of electricity is exempt, tax liability of related services is determined accordingly.
- Appeal pending in Supreme Court.

COMPOSITE SUPPLY

- Recent SC decision in the case of *New Noble Education Society* in the context of Section 10(23C)
- **What is incidental business activity to education**
 - Text books
 - Running own buses to transport children
 - Summer camps for special educational courses such as computers
 - Hostels only to students and not outsiders
- If institutions provide their premises or infrastructure to other entities or trusts or societies for the purpose of conducting workshops, seminars or even educational courses (which the concerned trust is not imparting) and outsiders are permitted to enrol in such seminars, workshops, courses etc., then the income derived from such activity cannot be categorised as part of education or incidental to imparting education

COMPOSITE SUPPLY – BOOKS Etc.

- In so far as the supply of shoes, books, belts, bags, stationery, notebooks, geometry boxes, lunch bag, school uniform etc., are concerned, although a separate fee or amount is being collected for the same, this transaction would be naturally bundled and would constitute a composite supply
- The principal supply is providing education via an educational institution which is wholly exempt from GST
- Once the school is identified as an educational institution falling within the definition, the service provided by the said educational institution to its students, faculty and staff qualifies for exemption in terms of Entry 66(a), Notification No.12/2017

ENTRANCE EXAMS COACHING FEE

- NEET, IIT JEE – coaching for entrance exams – collection of fees
 - Fee bundled with regular tuition fee
 - Fee collected separately (optional basis)
 - Coaching conducted during class hours
 - Provided to students
 - Provided to 3rd parties



ENTRANCE EXAMS COACHING FEE

- ***Educational Initiatives India Ltd. Vs. Union of India (2022) 63 GSTL 45 (Guj.)***
 - The word 'education' cannot be given a natural meaning by restricting it to the actual imparting of education to the students but should be given a wider meaning which would take within its sweep all the matters relating to imparting and controlling education.
 - Examination is an essential component of education as it is one of the major means to assess and evaluate the skills of a candidate and the knowledge, be it a school test, university examination, professional entrance examination or any other examination.

ENTRANCE EXAMS COACHING FEE

- The Karnataka High Court in the case of *Alva's Education Foundation Vs. State of Karnataka (2023) 73 GSTL 198*, dealt with a scenario of a school collecting fees for IIT JEE, CA-CPT coaching, abacus, etc. and applying the Gujarat High Court decision, set aside the orders passed by the tax authorities and remanded the matter back to the assessing officer to examine this decision and the contention
- *Applying these decisions and principles, entrance exam coaching if provided only to students would qualify for exemption.*
- *Coaching provided to non-students would be taxable.*
- *Letting out auditorium would be taxable.*

RECREATIONAL ACTIVITIES

- Coaching in recreational activities
 - Music
 - Art
 - Dance
 - Cricket
 - Badminton
 - Football
- Composite supply



RECREATIONAL ACTIVITIES

- The Delhi High Court in the case of *Delhi Music Society v. DGIT, 246 CTR 327 (Del)* held that since the assessee society was teaching and promoting all forms of music and dance-western, Indian or any other and was run like any school or educational institution in a systemic manner with regular classes, the same therefore, met the requirement of an educational institution within meaning of section 10(23C)(vi) of the Act.
- In *ITO Vs. SRM Foundation of India 21 ITD 598 (Del)*, the Tribunal held that, irrespective of the fact that the assessee was not an educational institute recognized by any University/State Government/Central Government, since the assessee had its own prescribed syllabus, trained teachers, branches all over India to spread system of 'transcendental deep meditation' among people in all walks of life, the same constituted imparting of 'education' and the assessee was entitled to exemption under section 10(22) of the Act.

HOSTEL

- Running a hostel
- In ***Taghar Vasudeva Ambrish vs. Appellate Authority for Advance (2022) 100 GSTR 625***, the Karnataka High Court has categorically held that the services provided by leasing out the residential premises as hostel to the students and working professionals are exempted in Entry No.13 of Exemption Notification No.9 of 2017.
- ***Thai Mookambika Ladies Hostel Vs. UOI [2024] 160 taxmann.com 667 (Mad)*** -
 - Renting to college students and girl students as hostel
 - Definition of Residential dwelling
 - What is being rented?
 - The purpose for which the residence is used for
 - In order to claim exemption of GST, the nature of the end-use should be 'residential' and it cannot be decided by the nature of the property or the nature of the business of the service provider, but by the purpose for which it is used i.e. 'resident dwelling' which is exempted from GST

HOSTEL

- 53rd GST Council Meeting has recommended creation of a separate exemption entry to exempt accommodation service having value of supply of accommodation upto Rs.20,000 per month per person subject to the condition that the accommodation service is supplied for a minimum continuous period of 90 days.
- Similar benefits for past cases indicated.

CASE STUDY- 5

- M/s. Great Escape International operates a hotel with declared tariff of Rs. 5,500 per night
- The rooms are housed in a building; there are separate cottages; and a swimming pool divides the resort into two where on the other side of the swimming pool, there is a nature themed restaurant
- Restaurant therein charges GST at 5%
- On few long weekends, some cottages were booked at the rate of Rs. 8,000 per night
- Based on these few transactions, the Department is of the view that GST should be payable at 18% for the entire year

RESTAURANT SERVICES

- Notification No. 11/2017 – CTR covers intra- State supply of taxable services and the relevant entry is given below:

Sl. No	Chapter, Heading or Section	Description of Service	Rate of tax	Condition
7.	9963	(ii)Supply of 'restaurant service' other than at 'specified premises'	2.5	Provided that credit of input tax charged on goods and services used in supplying the service has not been taken [Please refer to Explanation no. (iv)]
		(vi) Accommodation, food and beverage services other than (i) to (v) above Explanation (a) For the removal of doubt, it is hereby clarified that, supplies covered by items (ii), (iii), (iv) and (v) in column (3) shall attract central tax prescribed against them in column (4) subject to conditions specified against them in column (5), which is a mandatory rate and shall not be levied at the rate as specified under this entry. (b) This entry covers supply of 'restaurant service' at 'specified premises'	9	

RESTAURANT SERVICES

- 'Restaurant service' is defined to mean supply, by way of or as part of any service, of goods, being food or any other article for human consumption or any drink, provided by a restaurant, eating joint including mess, canteen, whether for consumption on or away from the premises where such food or any other article for human consumption or drink is supplied
- 'Declared tariff' is defined to mean charges for all amenities provided in the unit of accommodation (given on rent for stay) like furniture, air conditioner, refrigerators or any other amenities, but without excluding any discount offered on the published charges for such unit
- 'Specified premises' is defined to mean premises providing 'hotel accommodation' services having declared tariff of any unit of accommodation above seven thousand five hundred rupees per unit per day or equivalent

RESTAURANT SERVICES

- Possible view
 - *Only on days when more than Rs. 7,500 is charged, it can be said that the property is identified as a specified premises*
 - *Tariff per day is a factor for classification.*
 - *18% for restaurants only on those days where the premises became a specified premises.*
- For the other days in the year, the charging of 5% is correct since, it was not a specified premises and Entry 7(ii) was applicable
- If the intention of the law maker was to impose GST at 18% throughout the year, on restaurants located in a property where even for one day in a year the tariff was more than 18%, it would have expressly said so or alternatively the classification of 18% should have been linked with the star status of the property like in the erstwhile VAT regimes
- The term 'specified premises' has been well defined and it is quite possible for the GST rate for restaurant to shift from Entry 7(ii) to Entry 7(vi) and vice versa

RESTAURANT SERVICES

- There are other examples to demonstrate this position, namely,
 - Whenever the entire year is a reckoning factor it would be specified accordingly. For example, the SSI exemption was applicable only if the turnover in the previous year was less than Rs. 4 crores and once an option is exercised to avail SSI benefit, it cannot be changed during the year under any circumstances.
 - Works contract (VAT) had a composition system which required an exercise of option and that option was applicable for the entire year and once the option was exercised, the concessional rate would apply for that year.
 - Forward charge for GTA - Option

RESTAURANT SERVICES

- 'Specified Premises' is defined to mean premises providing 'hotel accommodation' services having declared tariff of any unit of accommodation above seven thousand five hundred rupees per unit per day or equivalent
- The restaurant is required to be a part of this specified premises and in that context, the intention appears to cover hotel properties which have restaurants in one floor and rooms in other floors or star hotels where the restaurant is next to the reception or at the roof top with rooms in between at different floors
- **In the case of a resort, where the cottages / rooms are separate buildings and the restaurant is in a separate building not forming part of the same property**
- Entry 7(vi), Notification No. 11/2017 – CTR which imposes GST at 18% refers to supply of restaurant service at specified premises. This clearly indicates that the restaurant must be **at the specified premises** and not nearby or within vicinity. The term at cannot have a meaning such as near or adjacent etc.

MULTIPLICITY OF PROCEEDINGS

- There are seven authorities who ask the same question and the same data for the same period for the same assessee
 - DGGSTI – Centre
 - Audit Team – Centre
 - Assessment Team – Centre
 - Investigation – State
 - Audit Team – State
 - Assessment Team – State
 - CAG



JURISDICTION

- Agenda for 22nd GST Council Meeting had proposal for issue of notification on cross empowerment
- Draft notifications were proposed under CGST, IGST and SGST for enabling cross empowerment and conferring jurisdiction on the other authority if the authority having main jurisdiction does not initiate proceedings within a period of 1 year from intelligence based action
- None of these notifications were approved or cleared in the 22nd GST Council Meeting
- The only notification approved was with reference to conferring powers on both State and Central authority on refunds
- Notification No. 39/2017 – CT dated 13.10.2017 under Section 6(1) of the CGST Act, 2017 only for refunds
- **No notification as on date on cross empowerment.**
- **All these arguments have been accepted by the Madras High Court in the case of *Vardhan Infrastructure*.**

CROSS EMPOWERMENT

- Madras High Court in the case of *Vardhan Infrastructure (2024) 16 Centax 509*, in a batch of matters challenging notices issued by one authority when the assessee was assigned jurisdiction under the other authority has categorically held that since no notifications have been issued for cross empowerment, with advise of GST Council, except for the purpose of refund of tax under Chapter XI of the respective GST enactments read with Chapter X of the respective GST Rules, impugned proceedings are to be held without jurisdiction
- Thus, if an assessee has been assigned to the State authorities pursuant to the decision taken by the GST Council, as notified by the Circular No. 1/2017 bearing reference F. No. 166/cross empowerment / GST C / 2017 dated 20.09.2017, the officers of the Central GST cannot interfere, although they may have intelligence regarding the alleged violation of the Acts and Rules by an assessee

GST REFORMS

- **5 Trillion dollar economy needs the following**
 - Reform in input tax credit system in GST
 - Elimination of cascading effect of taxes
 - Bridging the trust deficit
 - Faster refunds for exports
 - Reduction in compliance points
 - Better understanding of law to avoid reconciliation queries
 - Creation of GST Appellate Tribunal
 - Abolition of Authority for Advance Ruling or Strengthening of the same by making it as a judicial body
 - Single regulatory interface

THANK YOU



vaithilegal@gmail.com



[@vaithilegal](https://www.linkedin.com/in/vaithilegal)



www.linkedin.com/in/vaithilegal



vaitheeswarandotblog.wordpress.com

www.vaithilegal.com