

GST NEWSLETTER

ISSUE 21 | FEB/MAR 2023

INDEX



1. Article [pg 2-7]

a. How To Handle ITC Mismatch Notices Under GST



2. Case Laws [pg 8-10]

a. No GST Applicable On Supply Of Vouchers :
Karnataka High Court (16.01.2023)

b. Constitute GST Tribunal to Reduce Needless
Litigations In The Form Of Filing Writ Petitions : Bombay
High Court Advises CBIC - Writ Petition No.10883 Of 2019

c. GST Act Can't Be Interpreted to Deny Right To
Carry Trade And Commerce By Citizens : Bombay
High Court



**3. Notifications and
Circulars** [pg 11, 13]



4. Due Dates [pg 12, 14]

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ARTICLE

How To Handle ITC Mismatch Notices Under GST

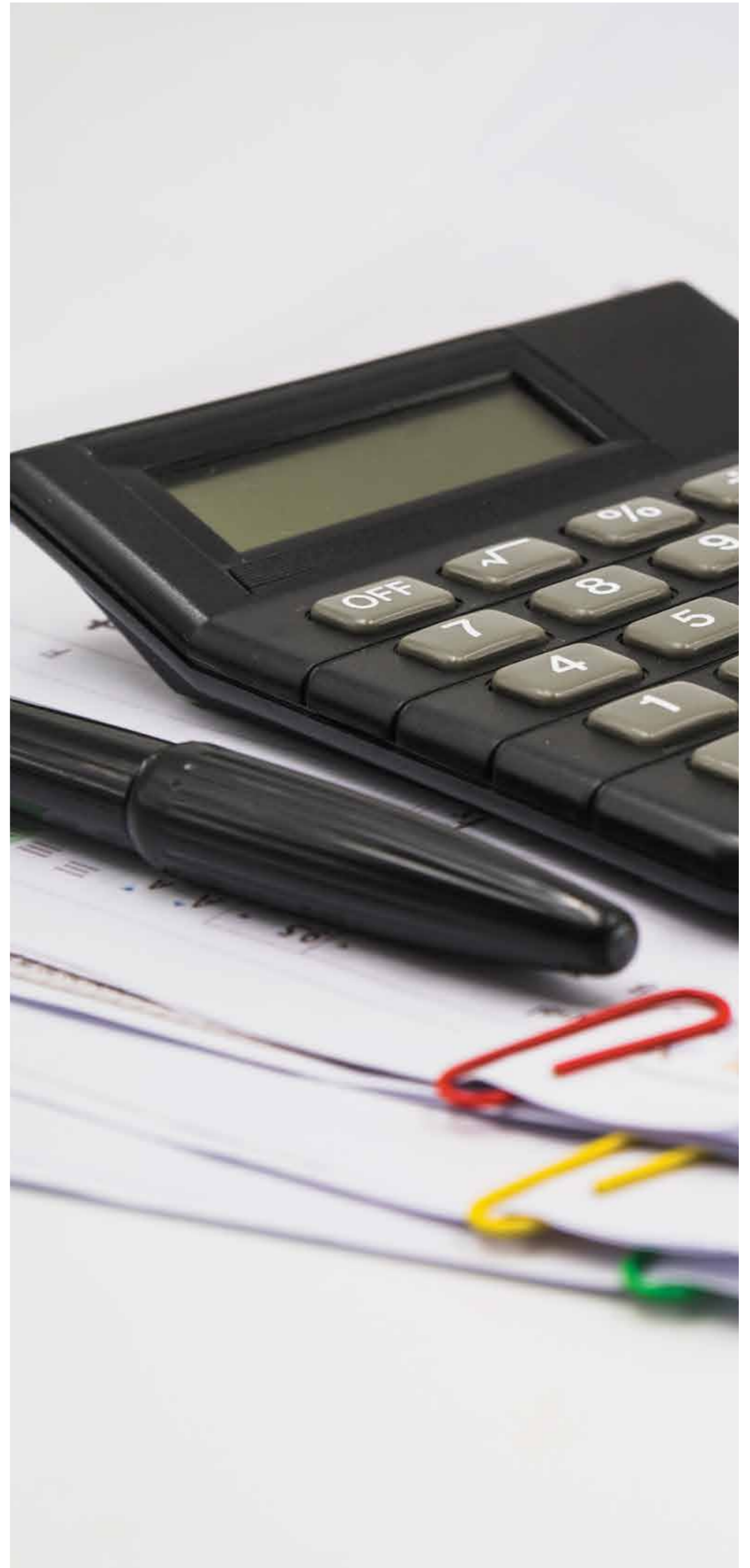
In India, businesses that are registered under the Goods and Services Tax Act are required to file two types of returns - GSTR-3B and GSTR-1. GSTR-3B is a monthly return that summarizes the details of outward and inward supplies, while GSTR-1 is a monthly or quarterly return that provides details of outward supplies.

GSTR-2A is an auto-populated statement that is generated after the supplier files their GSTR-1. It contains details of all the inward supplies made to the recipient. GSTR-2A is compared with the GSTR-3B return filed by the recipient to identify any mismatches in the input tax credit claimed.

If there is a mismatch between the input tax credit claimed in GSTR-3B and GSTR-2A, the recipient may receive notices from the government. The notice may require the recipient to provide explanations for the mismatches and provide documentary evidence to support the claim. Of late, recipients have been witnessing various notices related to mismatch between 2A and 3B and the departmental authorities have been seeking reversal of input tax credit.

Section 16 of the Central Goods and Services Tax (CGST) Act 2017 outlines the provisions related to eligibility and conditions for claiming input tax credit (ITC) under the GST.

A registered person can avail input tax credit on goods and services received and used or intended to be used in the course or furtherance of business.





However, he needs to fulfil following conditions for claiming ITC:

- ✔ **The registered person must possess a valid tax invoice, debit note, or other prescribed documents for claiming ITC.**
- ✔ **The supplier must have filed the GSTR-1 return and such details have been communicated to the recipient as per manner prescribed under section 37 (w.e.f. 01-01-2021)**
- ✔ **He has received goods/services.**
- ✔ **Supplier has paid Tax in respect of such supplies.**
- ✔ **He has furnished GSTR 3B.**

Further Input tax credit can be availed in the return filed on or before 30th November following the end of financial year to which such invoice or debit note pertains or the date of filing of the annual return, whichever is earlier.


One of the conditions on availing ITC states that no buyer shall be entitled to avail ITC in respect of any supply of goods and/or services unless the "tax charged in respect of such supply has been actually paid to the Government". This provision is often argued as unfair, arbitrary and unjust to genuine buyers as it essentially mandates an unreasonable onus on the buyers to ensure that the seller has deposited the tax component charged by him in the invoice. It not only requires buyers to bear the loss of ITC, which he is lawfully entitled to but also obligates them to pay interest on the reversal of ITC under Section 50.

So what can be possible grounds to contest GSTR 3B Vs. 2A mismatch notices :-



01 **Doctrine Of Impossibility**

- a. The doctrine of impossibility dictates that the law cannot compel someone to do something that is impossible to perform. This principle is relevant in cases where a party is unable to fulfil a duty or obligation due to circumstances that are beyond their control.
- b. According to Section 16(2)(c) of the Central Goods and Services Tax (CGST) Act, the benefit of ITC cannot be denied to the recipient on account of the default of the supplier in paying tax to the government after having collected the same from the recipient. This provision ensures that the recipient is not penalized for the actions of their suppliers, over whom they have no control.
- c. The Delhi High Court in case of Arise India Ltd. V. Commissioner of Trade and Taxes has held that the expression 'dealer or class of dealers' occurring in Section 9(2)(g) of the DVAT Act should be interpreted as not including a purchasing dealer who has bona fide entered into purchase transactions with validly



registered selling dealers who have issued tax invoices in accordance with Section 50 of the DVAT Act where there is no mismatch of transactions in Annexure 2A & 2B and not punish bona fide purchasing dealers. The latter cannot be expected to do the impossible. If a law seeks to punish a bona fide purchasing dealer for non-payment of tax by the selling dealer, it will become vulnerable to invalidation on the grounds of Article 14 of the Constitution, which guarantees equality before the law.

d. In the case of State of MP v. Narmada Bachao Andolun, the court applied the maxim *lex non cogit ad impossibilia* and held that where the law creates a duty or a 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.

e. In conclusion, the doctrine of impossibility plays a crucial role in ensuring that the law does not compel individuals to perform tasks that are impossible to achieve. In the context of the GST regime, the denial of ITC to a bona fide purchaser due to non-payment of tax by the selling dealer would be unjust and go against the principles of the Constitution. Therefore, it is important to apply the doctrine of impossibility in such cases to ensure that justice is served.




02 **Section 42 And Section 43 Are In Abeyance (Applicable Only Up To 30-09-2022)**

a. The condition for availment of ITC that "tax charged in respect of the subject supply has been actually paid to the Government" is subject to the provisions of Section 41.

b. Under Section 41, a registered person can provisionally take the credit of eligible input tax in his return, which becomes final after matching, reversal, and reclaim of ITC carried out in the manner laid down under Section 42. However, the mechanism for matching of ITC has been kept in abeyance due to technical glitches prevailing in the GSTN system.

c. It may be further noted that condition of payment of tax to government under Section 16(2)(c) is also subject to Section 43A of the CGST Act. Section 43A lays down the procedure in relation to furnishing of return and availing ITC. As per subsection (2) of Section 43A, notwithstanding anything contained in Section 41, Section 42 or Section 43, the procedure for availing of ITC by the recipient and verification thereof shall be such as may be prescribed. However, it is pertinent to note that neither the Section 43A has been notified yet nor any manner for verification of ITC has been prescribed. Therefore, Section 43A is not applicable in the present case, and Section 41 and Section 42 would continue to apply, which are themselves kept in abeyance.

d. In light of the above, recipients are entitled to claim ITC on the basis of tax invoice issued by the vendor without any consideration of whether such tax invoice is being reflected in GSTR-2A or not. The recipient cannot be asked to comply with the condition of payment of tax to the government and reverse ITC when he has no mechanism to ensure whether the supplier has paid tax to the government or not.



The principle enunciated by the Hon'ble Supreme Court in *Tata Chemicals Limited v. Commissioner*, 2015 (320) ELT 45 (SC), that when the law requires a particular thing to be done in a particular manner, it must be done in that manner only or not done at all, applies to this situation.

03 **No Collusion Between Buyers And Sellers**

a. Section 16(2)(c) of the Central Goods and Services Tax (CGST) Act 2017 places a burden on the recipient to ensure that the supplier has filed the relevant returns for the ITC claim. This provision has been criticized for imposing an unreasonable burden on the recipient for the actions of the supplier, even in cases where there is no collusion between them.

b. The Delhi High Court, in *On Quest Merchandising India Pvt. Ltd. v. Govt. of NCT of Delhi*, held that this provision should not apply if the recipient is bona fide and not in collusion with the supplier. Similarly, the Madras High Court, in *Sri. Vinayaga Agencies v. The Assistant Commissioner* held that input credit can only be revoked if it relates to the incorrect, incomplete, or improper claim of such credit by a dealer.


c. However, in the cases of *Gheru Lal Bal Chand v. State of Haryana* and *Arise India Limited v. Commissioner of Tax*, the court allowed the revenue authorities to investigate the buyers if there exists collusion between the buyers and sellers acting in detriment of the government. The court held that the genuineness of the ITC can be examined to check whether the buyer and seller are in collusion, and in case such collusion is established, the revenue authorities can initiate proceedings against the defaulters and prevent the buyer from availing the benefit of ITC.

d. Therefore, the legality of the condition under Section 16(2)(c) depends on the relationship between the buyer and the seller and can only be imposed in cases where parties are working in collusion. In such cases, the recipient steps into the shoes of the supplier and becomes the same person.

04 **No Automatic Reversal Of ITC Before Investigating Seller**

a. Reliance in this regard is placed on decision under GST Regime by Madras HC in the case of *M/s D Y Beathel Enterprises V/s The State Tax Officer (Data Cell) Investigation* reported at 2021-VIL-308-MAD, wherein the court held that no recovery action can be initiated against the genuine purchaser in the absence of similar recovery action against the seller.

b. The head note is reproduced hereunder:



GST - Recovery of input tax credit for non-payment of GST by seller - Validity of recovery from petitioner-buyer in the absence of similar recovery action against the seller - challenge to automatic reversal of input tax credit from the buyer on non-payment of tax by the seller -

HELD - the respondent does not appear to have taken any recovery action against the seller on the present transactions -

When the seller has collected tax from the purchasing dealers, the omission on the part of the seller to remit the tax in question must have been viewed seriously and strict action ought to have been initiated against the seller - in enquiry in question, the seller ought to have been examined and this is all the more necessary, because the respondent has alleged that the petitioners have not even received the goods and had availed input tax credits on the strength of generated invoices - the impugned orders suffers from fundamental flaws of non-examination of seller in the enquiry and non-initiation of recovery action against seller in the first place – the impugned orders are quashed and the matters are remitted back to the file of the respondent - the writ petitions are allowed.



05


Seller As An Agent

a. The CGST Act provides for the payment of taxes from the seller to the government, however this provision renders the burden of such tax on the buyer. The seller is only entrusted with tax amount paid to him by the buyer until he pays this tax to the government; this in turn, makes the seller an agent of the government.

b. The Supreme Court's decision in Corporation Bank v. Saraswati Abharansala does support the idea that the seller is acting as an agent of the government and bona fide buyer cannot be punished when he has complied with all provisions of law

c. Similarly, while the Supreme Court in Atul Fasteners Ltd. v. State Of Punjab & Ors. held that the selling dealer is acting as an agent of the government, it did so in the context of determining the liability of the selling dealer for any default in remitting the tax to the government.

d. However, in the case of Central Wines Hyderabad and Ors. vs. Special Commercial Tax Officer and Ors, the Court ruled that a dealer who sells goods does not act as an agent for the State in collecting sales tax, but rather acts as an agent of the buyer while collecting the tax. The Court reasoned that if the seller were acting as an agent of the State, he would be required to take reasonable care of the sale proceeds and set them apart without intermingling with his own money. The Court further noted that if the intention of the legislature was to make the seller an agent, the legislature would have imposed penal liability on the seller if he failed to collect the taxes.



e. In conclusion, the question of whether the seller is acting as an agent of the government, or the buyer is a complex one and depends on the specific facts and circumstances of each case.

06

Other Grounds To Contest Notice

a. Technical Errors: There may be technical errors or glitches that caused the mismatch between GSTR-2A and GSTR-3B. You can file an appeal and provide evidence that the error was not intentional.

b. Timing of Purchase and Payment: There may be a difference in timing between the purchase of the goods or services and the availment of ITC, which may result in a mismatch. If you can provide evidence of the timing of the purchase and availment of ITC, you can appeal the notice.

c. Incorrect filing: If you have mistakenly filed the return or entered the wrong information, you can appeal the notice and provide evidence of the correct information.

d. Discrepancies in GSTR-2A: There may be discrepancies in the GSTR-2A form, which may lead to a mismatch with GSTR-3B. In such a case, you can appeal the notice and provide evidence of the correct details.

e. GSTIN Errors: There may be errors in the GSTIN number of the supplier, which can result in a mismatch between GSTR-2A and GSTR-3B. If you can provide evidence of the correct GSTIN number, you can appeal the notice

Conclusion

It is advisable for buyers to safeguard their rights contractually in circumstances where the supplier fails to deposit the due tax charged on the transaction. The recipient should carefully review the notice and the reasons for the mismatch before filing reply to notice. It is recommended that to seek professional advice from a chartered accountant before filing reply to notice.

CASE LAWS

No GST Applicable On Supply Of Vouchers : Karnataka High Court (16.01.2023)

Facts Of The Case

M/s Premier Sales Promotion Pvt Ltd versus Union of India & Ors. - WRIT PETITION NO. 5569 OF 2022 (T-RES)

The petitioner/ assessee, M/s Premier Sales Promotion Pvt Ltd, procures Pre-paid Payment Instruments (PPIs), including Gift Vouchers, Cash Back Vouchers and E-Vouchers, from issuers and supplies them to its clients, which are used by the client's employees or customers, and which can be redeemed by them by availing goods and services, in the form of incentives or to other beneficiaries under promotional schemes.

Provision Of The Law

The vouchers involved in the case are Pre-paid Payment Instruments (PPIs), which do not disclose the goods and services at the time of their issuance. Since the goods are not identifiable at the time of issuance of vouchers, as per Section 12(4)(b) of the CGST Act, the time of supply shall be their date of redemption.

Till the time the voucher is presented for redemption, it would remain an actionable claim as defined in Section 2(1) of the CGST Act. Such actionable claim is neither a good nor a service, as defined in Schedule-III of the CGST Act.

Perusing the definition of "Voucher", as defined under Section 2(118) of the CGST Act, 2017, are mere instruments accepted as consideration for supply of goods or services, which have no inherent value of their own.

As vouchers are considered as instruments, they would fall under the definition of 'money', defined under CGST Act. The CGST Act excludes 'money' from the definition of goods and service and therefore not leviable to tax."

Ruling

The Karnataka High Court has ruled that voucher including Gift Vouchers and Cash Back Vouchers etc. Therefore, the issue and supply of vouchers would not attract GST as it does not fall under the category of goods and services.

CASE LAWS

Constitute GST Tribunal To Reduce Needless Litigations In The Form Of Filing Writ Petitions : Bombay High Court Advises CBIC - Writ Petition No.10883 Of 2019

Facts Of The Case

Rochem India Pvt. Ltd. Versus CBIC - Writ Petition No.10883 Of 2019

The petitioners have challenged the order passed in appeal by the Appellate Authority under the Central Goods and Services Act, 2017. The writ petitions were filed on the grounds that the appellate tribunals are not yet constituted.

Provision Of Law

The Central Goods and Services Act provides a mechanism for appeals. Chapter XVIII deals with appeals and reviews. The order passed under the Act is appealable to the appellate authority under Section 107 of the GST Act. Section 112 provides an appeal thereafter to the Appellate Tribunal. The constitution of the Appellate Tribunal is provided under Section 109.

Ruling

The Bombay High Court has advised the Central Board of Indirect Taxes (CBIC) to construct GST tribunals to reduce needless litigation in the form of filing Writ Petition.

The court held that the period for filing the appeal will stand extended as indicated in Clause 4.2 of the Circular dated March 18, 2020 in each order which is appealable to the Appellate Tribunal constituted under Section 109 of the Act. The order will not be given effect until two weeks after the period prescribed for filing an appeal under Clause 4.2 of the Circular dated March 18, 2020, is over.

CASE LAWS

GST Act Can't Be Interpreted To Deny Right To Carry Trade And Commerce By Citizens : Bombay High Court

Facts Of The Case

Rohit Enterprises Versus The Commissioner State GST Bhavan - Writ Petition No. 11833 Of 2022

The petitioner/assessee is employed in the fabrication industry. It is registered under the Central Goods and Services Tax Act, 2017 as well as the Maharashtra State Goods and Services Tax Act, 2017.

The certificate of registration was issued to his firm. Later, the firm suffered a financial setback in the pandemic situation and GST returns from August 2021 could not be filed. The petitioner was given a reasonable opportunity before the cancellation of the registration. On February 28, 2022, he received a show cause notice, as well as an order suspending his registration.

The petitioner did not take advantage of the opportunity to furnish the documents while dealing with his application for revocation or cancellation of registration and therefore his application to revoke the cancellation of registration was denied.

Provision Of The Law

Section 29(2) of the GST Act enables proper officers to cancel registration if a registered person or firm fails to furnish three consecutive returns. The right to carry on trade or profession cannot be curtailed, contrary to the constitutional guarantee under Art. 19(1)(g) and Article 21 of the Constitution of India.

Ruling

The provisions of the GST enactment cannot be interpreted so as to deny the right to carry on trade and commerce to any citizen or subject.

The constitutional guarantee is unconditional and unequivocal and must be enforced regardless of shortcomings in the scheme of GST enactment. If the petitioner is not allowed to revive the registration, the state would suffer a loss of revenue, and the ultimate goal under the GST regime will stand defeated.

The petitioner must be allowed to continue business and contribute to the state's revenue and shall pay all the dues, along with penalty and interest as applicable.

NOTIFICATIONS AND CIRCULARS FOR THE MONTH OF JANUARY 2023

✓ Central Tax Notification. - [Click here](#)

✓ Central Tax Circular. - [Click here](#)

Sl. No	Subject	Notifications/Circulars No. Date of Issue
1.	Clarification regarding GST rates and classification of certain services.	190/02/2023-GST-13-Jan-2023
2.	Clarification regarding GST rates and classification of certain goods.	189/01/2023-GST-13-Jan-2023
3.	To assign powers of Superintendent of central tax to Additional Assistant Directors in DGGI, DGGST and DG Audit.	01/2023-Central Tax-04-Jan-2023

DUE DATES OF GST FOR THE MONTH OF FEBRUARY 2023

FEBRUARY

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
			1	2	3	4
5	6	7	8	9	GSTR-7, GSTR-8 10	* GSTR-1 11
12	* GSTR-1, GSTR-6 * IFF (Optional) 13	14	15	16	17	CMP-08 18
19	* GSTR-3B GSTR-5 GSTR-5A 20	21	* GSTR-3B (G-1) 22	23	* GSTR-3B (G-2) 24	25
26	27	GSTR-11 28				

2023

- * Monthly return for taxpayers with Annual Turnover more than 1.5 Crore or Taxpayer who has opted Monthly return option.
- * Monthly return for taxpayers with Annual Turnover up to 1.5 Crore or Taxpayer who has opted Quarterly return option (October 2022- December 2022).
- * Quarterly returns for taxpayers with Annual Turnover less than Rs. 5 Crores and opted for quarterly return monthly payment option (QRMP).
- * Monthly return for taxpayers with Annual Turnover of up to or more than INR 5cr in Previous FY Monthly Filing – December 2022
- * Quarterly (October 2022- December 2022)

NOTIFICATIONS AND CIRCULARS FOR THE MONTH OF FEBRUARY 2023

✓ Compensation Cess (Rate) Notification. - [Click here](#)

✓ Central Tax (Rate) Notification. - [Click here](#)

Sl. No	Subject	Notifications/Circulars No. Date of Issue
1.	Seeks to amend notification no. 2/2017-Central Tax (Rate), dated 28.06.2017	No. 4/2023 - Dated: 28-2-2023 - CGST Rate
2.	Seeks to amend notification no. 1/2017-Central Tax (Rate), dated 28.06.2017	No. 3/2023 - Dated: 28-2-2023 - CGST Rate
3.	Seeks to amend notification No. 13/2017-Central Tax (Rate) so as to notify change in GST with regards to services as recommended by GST Council in its 49th meeting held on 18.02.2023.	No. 2/2023 - Dated: 28-2-2023 - CGST Rate
4.	Seeks to amend notification No. 12/2017-Central Tax (Rate) so as to notify change in GST with regards to services as recommended by GST Council in its 49th meeting held on 18.02.2023.	No. 1/2023 - Dated: 28-2-2023 - CGST Rate
5.	Seeks to amend notification no. 1/2017-Compensation Cess (Rate), dated 28.06.2017	01/2023- Dated: 28-2-2023- Compensation Cess (Rate)

DUE DATES OF GST FOR THE MONTH OF MARCH 2023

MARCH

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
			1	2	3	4
5	6	7	8	9	GSTR-7, GSTR-8	* GSTR-1
12	* GSTR-1, GSTR-6 * IFF (Optional)	14	15	16	17	CMP-08
19	* GSTR-3B GSTR-5 GSTR-5A	21	* GSTR-3B (G-1)	23	* GSTR-3B (G-2)	25
26	27	GSTR-11	29	30	31	

2023

- * Monthly return for taxpayers with Annual Turnover more than 1.5 Crore or Taxpayer who has opted Monthly return option.
- * Monthly return for taxpayers with Annual Turnover up to 1.5 Crore or Taxpayer who has opted Quarterly return option (October 2022- December 2022).
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- * Monthly return for taxpayers with Annual Turnover of up to or more than INR 5cr in Previous FY Monthly Filing – December 2022
- * Quarterly (October 2022- December 2022)



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