

PRACTICAL ASPECTS ON ASSESSMENTS AND DEPARTMENTAL AUDIT IN GST

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Assessments

For Taxpayer

- Self Assessment u/s 59

For Authorities

- Provisional Assessment u/s 60
- Scrutiny of Returns u/s 61
- Best Judgment Assessments
 - ⑩ For Non-Filers u/s 62
 - ⑩ For Unregistered Persons u/s 63
- Summary Assessment u/s 64

PRACTICAL ASPECTS IN GST ASSESSMENTS

“Assessment” clause 2(11)

- *means determination of tax liability under this Act, and*
- *includes self-assessment, re-assessment, provisional assessment, summary assessment and best judgment*

Self assessment in GST is very similar to other fiscal laws like Income tax and erstwhile laws like Excise & Service Tax

SELF ASSESSMENT- SECTION-59

Difference in GSTR1 and GSTR-3B due to:

Try to correct errors and reflect correct presentation

Previous Period Adjustments

GSTR-9 with Financials and monthly returns

Interest calculation

ITC Reconciliation GSTR-2A/2B and Books of Accounts

INTEREST CALCULATION

- Whether interest is liable from date immediately after due date of filing return to
 - ❖ date of payment and reflection in cash ledger?
 - ❖ date of filing return?
- Can it be stated that amount reflected in cash ledger is advance payment of tax and hence interest is to be calculated on balance payments to be made at the time of filing of return?
- What is significance of Explanation to Section 49?

“Explanation. — For the purposes of this section, —

(a) the date of credit to the account of the Government in the authorised bank shall be deemed to be the date of deposit in the electronic cash ledger;”

INTEREST CALCULATION

- Plethora of judgments and circular by CBIC have confirmed that interest may be calculated @18% of net payment in cash from due date of return to the date of payment, which is date of filing of returns, as the amount deposited is debited for payment on date of filing the return.
- Reliance can be placed on
 - ❖ Refex Industries Ltd Vs The Assistant Commissioner of CGST & Central Excise in case of **2020-TIOL-382-HC-MAD-GST**
 - ❖ Megha Engineering and Infrastructures Ltd in case of **2019-TIOL-893-HC-TELANGANA-GST**

ERRORS OCCURRED IN RETURNS

There is no option of rectification of returns on GST portal.

In current scenario it is advisable to **correct the mistakes of previous periods in subsequent month's returns (whether in GSTR-1 or GSTR-3B) as early as possible** to avoid the penalty before any action of Department.



WAIVER OF LATE FEE DOESN'T NECESSARILY MEAN EXTENSION OF DUE DATE OF PAYMENT OF TAX

During the nascent stage of GST, there were multiple waiver of late fees on filing of monthly returns, due to which taxpayers didn't file their monthly returns in time, although the payments thereof were made in time.

Notices were served upon Assessee for interest liability on such delayed filing/ payment.

PROVISIONAL ASSESSMENT- SECTION 60

- When a taxable person is unable to determine:
 - ❖ Value of supply
 - ❖ Rate at which it should be taxedprovisional order to such request may be made within 90 days.
- Final Assessment may be done within a period of 6 months from the date of provisional order which may be further extended to period not exceeding 4 years.
- It is advisable to opt for provisional assessment than going for Advance Ruling for valuation and rate of tax.

SCRUTINY OF RETURNS – SECTION 61

- The proper officer may scrutinize the returns and related particulars furnished by registered person to verify correctness of return (correctness of amounts, arithmetic error, ensuring correctness of ITC availed and utilised) and inform the discrepancies noticed in prescribed manner.
- An explanation to above notice may be given within 30 days which may further be extended at the mercy of PO.
- If explanation offered is acceptable, no further action may be taken.
- Otherwise PO may initiate appropriate action in Section 65/66/67/73/74.

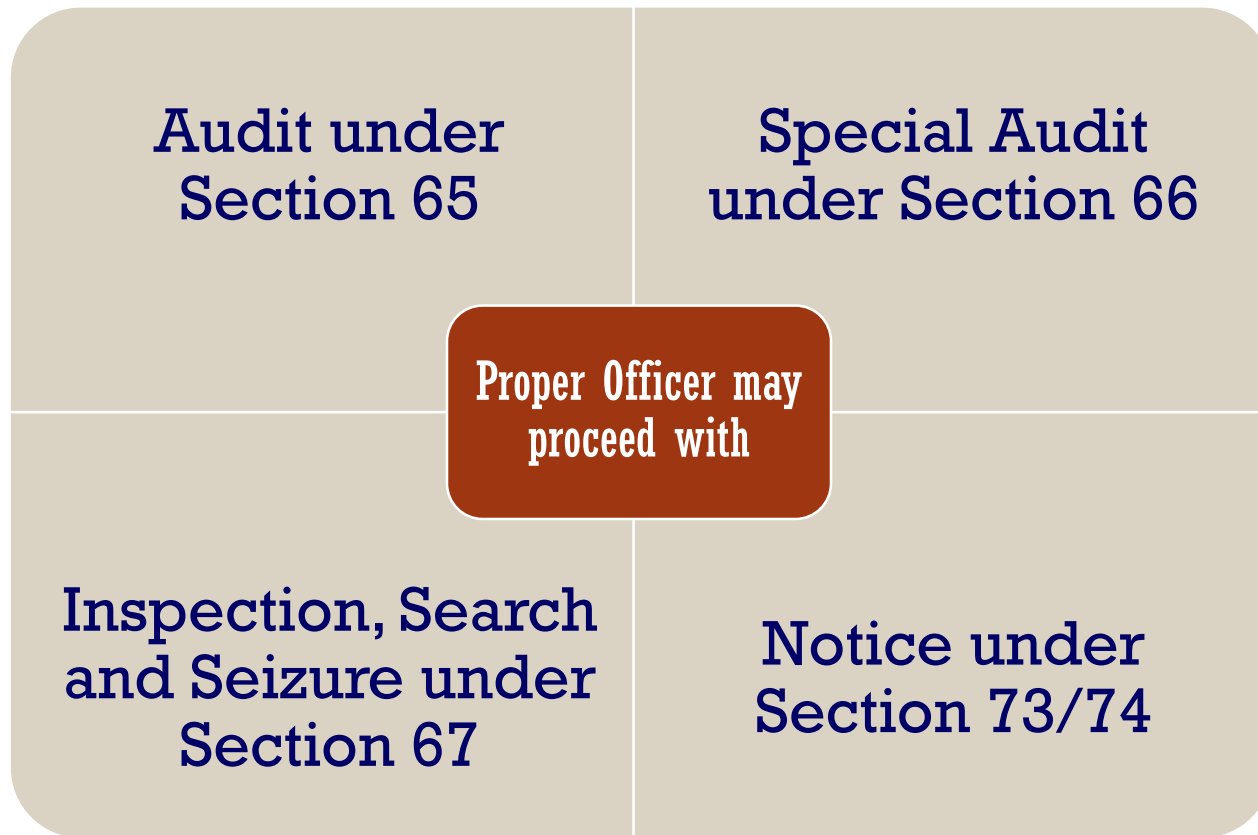
RELEVANT PROVISION -SECTION 61 OF CGST ACT, 2017 READ WITH RULE 99 OF CGST RULES, 2017

•**ASMT-10:** Notice u/s 61 for intimating discrepancies in the return after scrutiny

ASMT-11: Reply to the notice issued u/s 61 intimating discrepancies in the return (within 30 days which can be extended by PO)

ASMT-12: Order of acceptance of reply against the notice issued

UNSATISFIED BY THE EXPLANATION



MEANING OF CORRECTNESS U/S 61

- Supreme Court in **UOI & Ors. vs Naresh Chander** on 27/08/2014 has referred to the meaning of correctness as follows:
- *In its ordinary meaning and substance, 'correctness' is compounded of 'legality' and 'propriety' and that which is legal and proper is 'correct'.*
- Verification of correctness covers both legality and propriety and therefore for any return and related particulars furnished by the registered person, proceedings-initiated u/s 61 can extend to verify legality and propriety of the return and related particulars furnished in the return regarding **Output tax liability** (Tax Rate, GSTR3B Vs GSTR-1 etc.), **Input tax credit** (Section 16, GSTR 3B Vs GSTR-2A, Section 17(5) etc.).

SCOPE OF SCRUTINY OF RETURNS – SECTION 61

- Sec. 61 only allows scrutiny of return for further action to be taken.
- **Scope of verification of correctness is limited to mistake apparent from returns.**
- **Once a return has been selected for scrutiny, only then** proper officer would be able to scrutinize return.
- **The discrepancy must be pre-identified by PO before issuing ASMT-10.** PO cannot ask for further information from taxpayer to ascertain discrepancy
- No scope of investigation beyond returns and related particulars.
- No demand can be created/confirmed u/s 61.

ISSUES GETTING SCRUTINIZED

- Reconciliation of GSTR-1 and GSTR-3B including arithmetic errors
- ITC availed in GSTR-3B exceeds ITC reflected in GSTR-2A by 20%/10%/5% - Dynamic nature of GSTR-2A
- Reconciliation of monthly returns with GSTR-9 and GSTR-9C
- E-way bills with monthly returns

ITC AVAILED IN GSTR-3B EXCEEDING ITC REFLECTED IN GSTR-2A

- Outrightly, denial of ITC to bonafide receiver is bad in law. The same view was given by Delhi High Court in case of Arise India (2018-TIOL-11-SC-VAT) which was followed in case of Quest Merchandising. The SLP of Arise India was dismissed summarily by Supreme Court.
- The provisions of availment of ITC is covered under Section 16. Further, Section 16(2)(c) particularly requires the payments of GST by supplier to Government (under Section 39- GSTR-3B) subject to provisions of Section 41 and 43A. However, there is no mechanism on GST portal to trace whether the supplier has paid the relevant tax in its GTSR-3B.

ITC AVAILED IN GSTR-3B EXCEEDS ITC REFLECTED IN GSTR-2A

- Further the Rule 36(4) came in effect from 09 October, 2019 (restricting ITC to 20%, was further amended to 10% which is now restricted to 5%).
- Whether this rule is applicable retrospectively or prospectively?
- Therefore, notices denying the benefit of ITC during period FY 2017-18, FY 2018-19 and FY 2019-20 (till September' 2020) are legally not maintainable?
- It is pertinent to mention that the said rule has been challenged in various High Court. The Rajasthan HC has already issued a notice to CBIC upon validity of Rule.

ASSESSMENT OF NON-FILERS OF RETURN - SECTION 62

A registered person may after service of Notice under Section 46 of Act to Non Filer of GSTR-3B or GSTR-9 or Final Return be assessed under this Section.

*The said Assessment shall be withdrawn on filing of relevant **valid return** within 30 days (**no further extension**- 2019-TIOL-2230-HC-KERALA-GST) from service of Assessment Order.*

The section does not give an unfettered power to the assessing officer and the guess work involved in the order of best judgement **has to be made on the basis of material available on record and information gathered** by the assessing officer.

SECTION 46 NOTICE TO RETURN DEFAULTER

- Where a registered person fails to furnish a return under section 39 (GSTR-3B or 4) or section 44 (GSTR-9) or section 45 (GSTR-10), a notice shall be issued requiring him to furnish such return **within fifteen days** in such form (GSTR-3A) and manner (electronically) as prescribed.



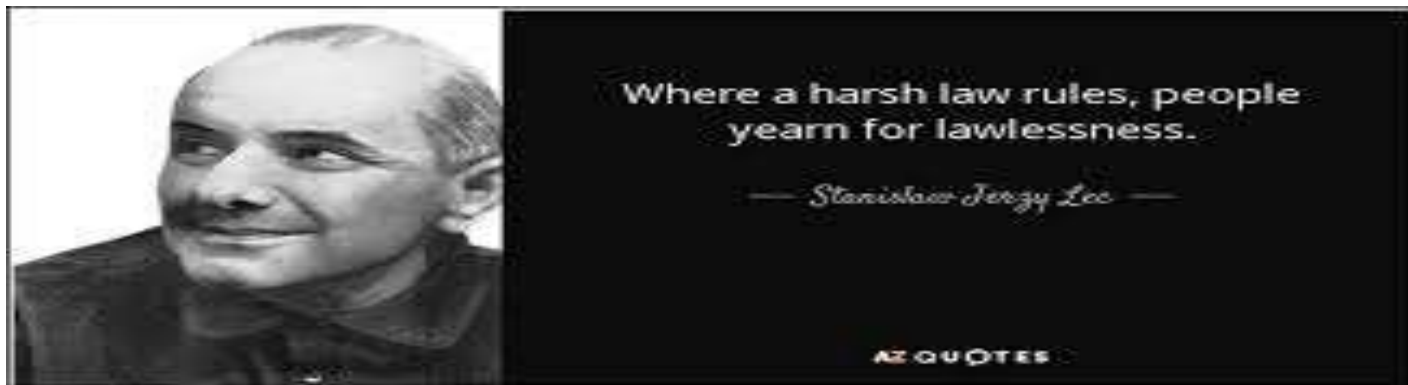
ASSESSMENT OF UNREGISTERED PERSON - SECTION 63

Best Judgment by Proper Officer in case of unregistered person who have failed to register themselves or whose registration is cancelled but liable to pay tax.



SUMMARY ASSESSMENT- SECTION 64

- *On any evidence showing a tax liability of a person coming to PO's notice, with the previous permission of Additional Commissioner or Joint Commissioner, proceed to assess the tax liability of such person to protect the interest of revenue and issue an assessment order, if he has sufficient grounds to believe that any delay in doing so may adversely affect the interest of revenue*



SUMMARY ASSESSMENT- SECTION 64

- Such order is issued with permission of Additional Commissioner or Joint Commissioner, only when delay in issuing order can adversely affect the interest of revenue
- An application may be made by supplier against the same within 30 days (**no further extension**) of service of Order.
- No opportunity of being heard is given for personal hearing in this section.

OBSERVATIONS IN SECTION 64

- Is this section applicable to supplier of goods or services or both or only supplier of goods?
- This section does not contain a non-obstante clause with reference to section 73/74 as was the case in earlier section – implication thereof?
- If order is erroneous, PO has to follow the procedure u/s 73/74. Why not otherwise?

SECTION 160 - ASSESSMENT PROCEEDINGS, ETC., NOT TO BE INVALID ON CERTAIN GROUNDS

Protection from Technical Errors

- *160. (1) No assessment, re-assessment, adjudication, review, revision, appeal, rectification, notice, summons or other proceedings done, accepted, made, issued, initiated, or purported to have been done, accepted, made, issued, initiated in pursuance of any of the provisions of this Act shall be invalid or deemed to be invalid merely by reason of any mistake, defect or omission therein, if such assessment, re-assessment, adjudication, review, revision, appeal, rectification, notice, summons or other proceedings are in substance and effect in conformity with or according to the intents, purposes and requirements of this Act or any existing law.*

SECTION 160 - ASSESSMENT PROCEEDINGS, ETC., NOT TO BE INVALID ON CERTAIN GROUNDS

Protection from Technical Errors

- *(2) The service of any notice, order or communication shall not be called in question, if the notice, order or communication, as the case may be, has already been acted upon by the person to whom it is issued or where such service has not been called in question at or in the earlier proceedings commenced, continued or finalised pursuant to such notice, order or communication.*



AUDIT BY TAX AUTHORITIES- SECTION 65

- An Audit can be conducted by Department to determine the evasion of tax for a period of Financial Year or part thereof or multiple thereof at the registered place of business or in their office with a prior intimation of 15 days through Form ADT-01.
- Such an audit may be completed within 3 months which may further be extended by 6 months.



OBSERVATIONS OF DEPARTMENTAL AUDIT OUTPUT SUPPLY

- Cross Charge between entities with same PAN or sister concerns
- Input Service Distribution
- Invoices without supply or vice versa
- Place of Registration
- Agreeing to Obligation to refrain
- Export of services
- Payments to Directors
- Notice pay recovery
- Services provided to employees
- Freight expenses to be borne by receiver

OBSERVATIONS OF DEPARTMENTAL AUDIT OUTPUT SUPPLY

- Pure Agent
- Free Supplies
- Valuation
 - ❖ Over valuation of Exports
- Whether High Sea Sales and other sales outside India to be included in Schedule III retrospectively or with effect from 01.02.2019?

OBSERVATIONS OF DEPARTMENTAL AUDIT

Cross Charges

- Predominant ruling of Karnataka AAR in case of Columbia Asia Hospital [2018] 100 taxmann.com 501, wherein it was held that services of administrative staff by head office to branch office is subject to GST, being distinct identities. Although, the same is strongly opposed and press release was issued thereafter by CBIC dated 15.11.2019 that the administrative services of top management to branch offices is not subject to GST.

OBSERVATIONS OF DEPARTMENTAL AUDIT

Issuance of Invoices without supply /making supply without issuance of invoice

- Cross Examination of witness
- Payment through Banking channel – whether evidence of cash transaction available with revenue?
- Ownership of goods
- Whether revenue is included in financial statement as reported to ITD?
- Implications under Section 143 (1)(b) of Company's Act, Section 271AAD of Income Tax Act, 1961 and ICAI guidelines

OBSERVATIONS OF DEPARTMENTAL AUDIT

INPUT TAX CREDIT DISSALLOWED DUE TO NON PAYMENTS BY SUPPLIER

- How to appropriate ITC available with supplier particularly when short payment is made by Supplier?
- Can revenue neutrality be ground to justify classification?
- Is Denial of ITC on procedural lapse by supplier justified?
- Is demand of ITC on RCM valid, where the payment is made beyond period u/s 16(4). Point of Taxation as per R-36(2) read with S. 31(3)(f) of CGST Act.

OBSERVATIONS OF DEPARTMENTAL AUDIT

REFUNDS

- Deemed payment in Foreign Exchange, realisation of Foreign Exchange?
- One to one correction with shipping bills is justified?
- Whether Pre-import on Advance Authorization entitles to refund?
- Whether refund on ITC of service/ Capital Goods be denied on Inverted Duty Structure. Different opinions by Gujarat High Court (**2020-TIOL-1273-HC-AHM-GST**) and Madras High Court (**2020-TIOL-1599-HC-MAD-GST**).

MULTIPLE ADJUDICATION AT SAME TIME

Competent Authority issued a SCN proposing tax demand for allegedly dealing with fake dealers and using of fake invoices. Subsequently DG-GSTI wing conducted a raid and having found on investigation that magnitude of offence committed by Assessee was far more grave and serious and issues another SCN.

Assessee filed writ petition stating that once a SCN proceeding for demand of tax evaded was pending before Competent Authority, another SCN could not have been issued. Held against assessee.

[2020] 116 taxmann.com 334 (Chhattisgarh) in case of Dadhichi Iron and Steel.

Provisional Attachment u/s 83

- (1) Where during the pendency of any proceedings **under section 62 or section 63 or section 64 or section 67 or section 73 or section 74, the Commissioner** is of the opinion that for the purpose of protecting the interest of the Government revenue, it is necessary so to do, he may, by order in writing attach provisionally any property, including bank account, belonging to the taxable person in such manner as may be prescribed.*
- (2) Every such **provisional attachment shall cease to have effect after the expiry of a period of one year from the date of the order made under sub-section (1).***

Relevant Judgments on provisional Attachments for period beyond 1 year

Law doesn't permit extension of Provisional Attachment Order beyond 1 year. Instead a fresh order needs to be issued, reliance is placed on

- ❖ **M/s. Amazonite Steel Pvt. Ltd. & Anr., M/s. Corandum Impex Pvt. Ltd. & Anr., M/S. Cuprite Marketing Pvt. Ltd. & Anr. Versus Union Of India & Ors. (2020 (3) TMI 1179 - CALCUTTA HIGH COURT)**
- ❖ **M/S. KMC Constructions Limited And Another Versus Principal Commissioner of Central Tax And 4 Others (2020 (10) TMI 1000 - TELANGANA HIGH COURT)**

Relevant Judgments on provisional Attachments

- ❖ To **provisionally attach all the bank accounts** would cause undue hardship to the Assessee. This is the grey area where the Revenue or the authority concerned needs to apply its mind before the power is exercised.
- ❖ Bench requests the Union of India as well as the CBIC to read this judgment thoroughly and consider issuing appropriate instructions or guidelines at the earliest with respect to the exercise of power under Section 83 of the Act, 2017

Reliance is placed on Gujarat HC judgment in 2021-TIOL-148-HC-AHM-GST

Blocking of ITC u/r 86A with effect from 26.12.2019

Power of tax authorities to block or debit ITC in the electronic credit ledger pending inquiry or investigation (allegations of fraudulent transactions/ fake/bogus invoices) - whether Rule 86A of the CGST Rules envisage passing of a specific order with an obligation to communicate the same to the affected person – term “Reason to believe” - theory of “vested right”

COURT HELD - The aspect of availing the credit and utilization of credit are two different stages. The utilization of credit is a vested right. No vested right accrues before taking credit.

–2020-VIL-658-GUJ in the case of S.S. Industries

Blocking of ITC u/r 86A With effect from 26.12.2019

- *The power conferred upon the authority under Rule 86A of the Rules for blocking the ITC could be termed as a very drastic and far-reaching power. **Such power should be used sparingly and only on subjective weighty grounds and reasons.***
- *The power under Rule 86A of the Rules should **neither be used as a tool to harass the Assessee nor should it be used in a manner which may have an irreversible detrimental effect on the business of the Assessee.***

THANKS