



**GST TOPIC - “NEMESIS OF FAKE INVOICES UNDER
GST- PENALTIES & PROSECUTION AFTER RECENT
CIRCULARS”**

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Supreme Court remarks dated 06.04.2021

Recently, the media was flooded with news quoting the observations made by the Hon'ble Supreme Court on April 6, 2021, while hearing the matter of **M/s Radha Krishan Industries v State of Himachal Pradesh & Ors.** related to attachment of bank accounts under GST, related to allegations of fake invoices, that the purpose of the GST Act is lost by the manner in which tax law is enforced in our country.

“**The Parliament had aimed to give the GST a citizen-friendly tax structure.** But, the purpose of the **Act is lost by the manner of enforcement in our country**, Justice DY Chandrachud observed.” - April 07, 2021 (CNBCTV18.COM)

“The Supreme Court on Tuesday (6th April 2021) slammed the manner in which the Goods and Services Tax was being enforced by tax authorities and observed that **the taxman cannot see all businesses as being fraudulent.**” – April 07, 2021 (CNBCTV18.COM)

"The Parliament had intended the GST to be a citizen-friendly tax structure. The purpose of the Act is lost by the manner in which tax law is enforced in our country ", observed Justice DY Chandrachud on Tuesday. The bench of Justices Chandrachud and M. R. Shah were dealing with contours of the power of provisional attachment of property, including bank accounts - 6 April 2021, LIVE LAW.COM

GST – “FAKE INVOICES”: IS IT ACTUALITY OR IMAGINATION?

- ❑ **“Fake Invoices”:** While levelling the serious allegation and arresting the persons, GST Department also alleged that the input tax credit have been taken on the fake invoices.
- ❑ The term fake invoices have not been defined in the law. But by common sense one can understand what can construed as fake invoices. A fake invoice could be an invoice which generated & sign by the person other than the person from the invoice belongs to.
- ❑ For instant, if the invoice is of ABCD and company and if that invoices generated by firm X & sign by the person other than the person authorised by ABCD and company, in that case, such invoice would be termed as fake invoice.
- ❑ Whereas, in all such cases, the Department has no such allegation and as such invoices issued by ABCD and company and also signed by the person authorised by the ABCD and company. In such a case no invoice can be construed at fake invoices.
- ❑ It appears that the Department is crying more than the actuality and their entire their allegations fall flat in law.

GST – “FAKE INVOICES”: IS IT ACTUALITY OR IMAGINATION?

- ❑ **“Fake Invoices”:** 2021 (46) G.S.T.L. C17 (Instruction dated 25.01.2021, Commissioner GST, Chennai)
- ❑ What is a “Fake Invoice”?
- ❑ Fake invoice referred to in “Non-compliant GST invoice”.
- ❑ “Non-compliant GST invoice” means any invoice which does not comply with the provision of the GST Act, and Rules 2017. Usually, “Fake invoice” referred to in non-compliant GST invoice of the following types:
 - ❑ (a) Invoice without any “Supply”.
 - ❑ (b) Invoice with a “Non-compliant” supply.

GST — “CIRCULAR TRADING”: IS IT BANNED UNDER GST?

- ❑ In simplest way it can be defined as when supply of goods or transaction of goods, take place among the few taxpayers, it is called as circular trading.
- ❑ For instance, firm A supply the goods to firm B, and firm B supply goods to firm C, and firm C supply goods to firm D, and so on.... and by the last transactions, goods is supplied to firm A.
- ❑ Now the question arises, even if such transactions take place, is it illegal? Or is it banned under the law? All such transactions by itself lead to any evasion of tax?
- ❑ If answer to these questions is in negative then how the taxpayer could be booked for alleged circular trading.
- ❑ The circular trading referred by the Department is the term coined by themselves, it could have relevancy only if transactions are made without payment of GST to evade taxes.

GST — “CIRCULAR TRADING”: HOW TRANSACTIONS TAKE PLACE, AND TAXES PAID- THEN WHY DOUBT ?

- ❑ Let's see how these transaction take place and reported and then judge the questionability of these transactions.
- ❑ When firm A supply the goods to firm B, a raises an invoice on the firm B with GST, and such GST are paid to the government and proper return (GSTR-1/GSRT-3B) is filed. Similarly, firm B supply goods to firm C, and firm C supply goods to firm D, and so on....
- ❑ And it is told that in most of the cases GST so levied, collected and paid are also reflected in GSTR-2A.
- ❑ There are possibility, in some case, selling dealer, would not have deposited GST, which is discussed in later hereinafter.
- ❑ However, despite all this compliance of the law and there are no apparent irregularities, the departmental officer found fishy and book the cases on the grounds that these are the circular trading. Over and above, the Department officers also alleged that in these transactions, there is no supply of goods.

GST—“NO SUPPLY OF GOODS”: DOES IT FALL UNDER GST ?

- ❑ Do the Department has any legal right to collect even the GST on such transactions alleging there is no supply of goods? Are such transactions are covered within the ambit of GST law?
- ❑ As per section 9 of the CGST Act, 2017, GST is levied on the supply of goods.
- ❑ The tax is collected by the Department from firm A, it never alleged that there is no supply of goods but when on the invoice issued by the firm A, the firm B took input tax credit than in the hands of the firm B, it is alleged that there are not eligible for input tax credit as against that invoice there was no supply of goods.
- ❑ In *C.W.T. v Inder Sharma (1997) VI AD (Delhi) 1029*, while dealing in the wealth tax matter, Delhi High Court held that “if the dwelling unit belongs to the assessee then liable to be included in his net wealth and at the same time liable to taken into consideration for the purpose of exemption”.
- ❑ Therefore, GST authority cannot take a plea while collecting the tax that there is a supply of goods and at the same time, while the input credit is taken, for the same very transaction, cannot alleged that there is no supply of goods. Therefore, entire their allegations fall flat in law.

CIRCULAR — WHAT IS THE STATUS — SC JUDGMENT

CCE, Bolpur v Ratan Melting & Wire Industries, 2008 (12) STR 416 (SC) : 2008 (231) ELT 22 (SC): (2008) 13 SCC 1,

"6. Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the Court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the Court to declare what the particular provision of statute says and it is not for the Executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law."

CIRCULAR — WHAT IS THE STATUS — SC JUDGMENT

CC, Calcutta & Others v Indian Oil Corporation and Another, (2004) 3 SCC 488 : 2004 (165) ELT 257 (SC) in para 12 has held that

“1. Although a circular is not binding on a court or an assessee, it is not open to the Revenue to raise a contention that is contrary to a binding circular by the Board. When a circular remains in operation, the Revenue is bound by it and cannot be allowed to plead that it is not valid nor that it is contrary to the terms of the statute.

2. Despite the decision of this Court, the Department cannot be permitted to take a stand contrary to the instructions issued by the Board.

3. A show-cause notice and demand contrary to the existing circulars of the Board are ab initio bad.

4. It is not open to the Revenue to advance an argument or file an appeal contrary to the circulars.”

State of Tamil Nadu v India Cements Ltd., (2011) 13 SCC 247 (SC)

The instructions issued by the Board is binding on the officers.

CIRCULAR NO. 171/03/2022-GST, DATED 06.07.2022

Circular No. 171/03/2022-GST, dated 06.07.2022, has noted that A number of cases have come to notice where the registered persons are found to **be involved in issuing tax invoice, without actual supply of goods or services or both** (hereinafter referred to as “fake invoices”), in order to enable the recipients of such invoices to avail and utilize input tax credit (hereinafter referred to as “ITC”) fraudulently.

Representations are being received from the trade as well as the field formations seeking clarification on the issues relating to applicability of demand and penalty provisions under the Central Goods and Services Tax Act, 2017 (hereinafter referred to as “CGST Act”), in respect of such transactions involving fake invoices. In order to clarify these issues and to ensure uniformity in the implementation of the provisions of law across the field formations, the Board, in exercise of its powers conferred by section 168 (1) of the CGST Act, hereby clarifies the issues detailed hereunder.

CIRCULAR NO. 171/03/2022-GST, DATED 06.07.2022

- A. When a registered person 'A' has issued tax invoice to another registered person 'B' without any underlying supply of goods or services or both, whether such transaction will be covered as "supply" under section 7 of CGST Act and whether any demand and recovery can be made from 'A' in respect of the said transaction under the provisions of section 73 or section 74 of CGST Act. Also, whether any penal action can be taken against registered person 'A' in such cases.**

No supply, no tax, no action under section 73/74

- (a)** Since there is only been an issuance of tax invoice by the registered person 'A' to registered person 'B' without the underlying supply of goods or services or both, therefore, such an activity does not satisfy the criteria of "Supply" as defined under section 7 of the CGST Act. As there is no supply by 'A' to 'B' in respect of such tax invoice in terms of the provisions of section 7 of CGST Act, no tax liability arises against 'A' for the said transaction, and accordingly, no demand and recovery is required to be made against 'A' under the provisions of section 73 or section 74 of CGST Act in respect of the same. Besides, no penal action under the provisions of section 73 or section 74 is required to be taken against 'A' in respect of the said transaction.

CIRCULAR NO. 171/03/2022-GST, DATED 06.07.2022

- b) The registered person 'A' shall, however, be liable for penal action under section 122 (1)(ii) of the CGST Act for issuing tax invoices without actual supply of goods or services or both.

However, same circular in third situation (para 3 of circular) has stated that if further invoice issued without supply, then even no credit can be recovered. Further, question arises, if no action can be taken under section 73 or section 74, then how penalty under section 122(1)(ii) will be justified, and once no supply, then the transaction is out of GST, and

further, as per **section 75(13)**, if penalty is imposed under section 73 or section 74, no penalty for the same act or omission shall be imposed on the same person under any other provision of the Act. But the question, is when it is accepted that provision of section 73 or section 74 do not attract, then obviously means, other provisions of Act for same act or omission, do not apply, as if same act or omission was treated as an act liable for action, then of course section 73 or section 74 shall also apply. Therefore, it can be concluded the if same act or omission is absolve from the shackle of section 73 and/or section 74, then of course, for same act or omission can not be liable for penal action under other provisions of the same Act.

CIRCULAR NO. 171/03/2022-GST, DATED 06.07.2022

- B. A registered person “A” has issued tax invoice to another registered person “B” without any underlying supply of goods or services or both. ‘B’ avails input tax credit on the basis of the said tax invoice. B further issues invoice along with underlying supply of goods or services or both to his buyers and utilizes ITC availed on the basis of the above mentioned invoices issued by ‘A’, for payment of his tax liability in respect of his said outward supplies. Whether ‘B’ will be liable for the demand and recovery of the said ITC, along with penal action, under the provisions of section 73 or section 74 or any other provisions of the CGST Act.**

Since the registered person ‘B’ has availed and utilized fraudulent ITC on the basis of the said tax invoice, without receiving the goods or services or both, in contravention of the provisions of section 16(2)(b) of CGST Act, he shall be liable for the demand and recovery of the said ITC, along with penal action, under the provisions of section 74 of the CGST Act, along with applicable interest under provisions of section 50 of the said Act.

It is very difficult to understand, when in first leg there was no supply, then in second leg, how B could make supply, therefore, Department assumption is wrong in law and facts.

In M/s. Pr. CIT V M/S AGSON GLOBAL PVT. LTD. DHC judgment dated 19.01.2022 in ITA 68/2021, Delhi High Court held that findings “15.9. If the revenue chooses to disallow bogus purchases, it would necessarily have to, in our view, ignore the corresponding sales recorded against the very same parties.”

CIRCULAR NO. 171/03/2022-GST, DATED 06.07.2022

Further, as per provisions of section 75(13) of CGST Act, if penal action for fraudulent availment or utilization of ITC is taken against 'B' under section 74 of CGST Act, no penalty for the same act, i.e. for the said fraudulent availment or utilization of ITC, can be imposed on 'B' under any other provisions of CGST Act, including under section 122.

CIRCULAR NO. 171/03/2022-GST, DATED 06.07.2022

- C. A registered person 'A' has issued tax invoice to another registered person 'B' without any underlying supply of goods or services or both. 'B' avails input tax credit on the basis of the said tax invoice and further passes on the said input tax credit to another registered person 'C' by issuing invoices without underlying supply of goods or services or both. Whether 'B' will be liable for the demand and recovery and penal action, under the provisions of section 73 or section 74 or any other provisions of the CGST Act.

Invoice without further supply- no tax recovery

In this case, the input tax credit availed by 'B' in his electronic credit ledger on the basis of tax invoice issued by 'A', without actual receipt of goods or services or both, has been utilized by 'B' for passing on of input tax credit by issuing tax invoice to 'C' without any underlying supply of goods or services or both. As there was **no supply of goods or services or both by 'B' to 'C'** in respect of the said transaction, no tax was required to be paid by 'B' in respect of the same.

CIRCULAR NO. 171/03/2022-GST, DATED 06.07.2022

Invoice without further supply- no action for wrongful credit

The input tax credit availed by 'B' in his electronic credit ledger on the basis of tax invoice issued by 'A', without actual receipt of goods or services or both, is ineligible in terms of section 16 (2)(b) of the CGST Act. In this case, there was no supply of goods or services or both by 'B' to 'C' in respect of the said transaction and also no tax was required to be paid in respect of the said transaction. Therefore, in these specific cases, no demand and recovery of either input tax credit wrongly/ fraudulently availed by 'B' in such case or tax liability in respect of the said outward transaction by 'B' to 'C' is required to be made from 'B' under the provisions of section 73 or section 74 of CGST Act.

However, in such cases, 'B' shall be liable for penal action both under section 122(1)(ii) and section 122(1)(vii) of the CGST Act, for issuing invoices without any actual supply of goods and/or services as also for taking/ utilizing input tax credit without actual receipt of goods and/or services.

M/S. BRIGHT STAR PLASTIC INDUSTRIES V ADDITIONAL COMMISSIONER OF SALES TAX 2022 (57) G.S.T.L. 226 (ORI.)

- ❑ The revenue **cannot blow hot and cold** i.e., cannot portray the **purchases as bogus**, even while holding that the **sales made** to those very parties **were genuine**.
- ❑ This case may help you - **M/s. Bright Star Plastic Industries v Additional Commissioner of Sales Tax 2022 (57) G.S.T.L. 226 (Ori.)** before Orissa High Court decided by order dated **04.10.2021**, in this case, one of the allegation was “you have claimed ITC (Input Tax Credit) of Rs.2,04,650,06 against fake invoices issued by non-existent supplier”, which was responded by detailed reply dated 31.08.2020, along with the details of the bill numbers, the dates, the value of the goods and the CGST & SGST amounts paid and the total amount by stating that the purchases so made has been reflected in the return 3B for the relevant showing the total tax paid purchases and tax collected messages and that no mismatch in the return had been intimated to the Petitioner.
- ❑ The High Court held that “19. To attribute fraud in such circumstances to the Petitioner, as a purchasing dealer, the Department would have to satisfy a high threshold of showing that the **purchaser indulged in the 8 transactions with the full knowledge that the selling dealer was non-existent**. The Department would have to show that somehow the purchasing dealer and selling dealer acted in connivance to defraud the revenue. This threshold has not been made in the present case. In other words, the Department has failed to show that the Petitioner as a purchasing dealer deliberately availed of the ITC in respect of the transactions with an entity knowing that such an entity was not in existence.”

GST – SECTION 438 CR.P.C. SEEKING ANTICIPATORY BAIL

□ **LUPITA SALUJA Versus DGGI 2021 (47) G.S.T.L. 3 (Del.) – granted Anticipatory Bail.**

□ The case of the prosecution against the petitioner herein is that applicant and her husband created five bogus export firms. On enquiry, it is found that all their suppliers were either non-existent at the declared principal place or the business address given in the GST registration.

Court observed that

□ “11. It is not in dispute that the suppliers have their valid PAN cards as well as Bank accounts and they have been **granted registration by the respondents itself** after doing complete verification from their end, in terms of Chapter VI of CGST Act, 2017. Moreover, the suppliers of the Companies of the applicant have been filing requisite GSTR returns and doing all the compliances under CGST Act, 2017, on the basis of which ITC is credited to the account of the Companies of the applicant.”

□ “12. From the material available on record, it established that the suppliers have supplied goods to the Companies, which have been further exported by the Companies to the buyer. In addition to it, payments received by the Companies from their foreign buyers are further transferred to account of the suppliers via-online. Copy of some of the Ledgers maintained by the Company *qua* their suppliers are annexed herewith as Annexure A-32. Therefore, it is **wholly misconceived that the suppliers are non-existent.**”

19. Accordingly, the Arresting Officer is directed that in the event of arrest, the petitioner/applicant shall be released on her furnishing a personal bond in the sum Rs. 25,000/-.

20. The petitioner shall cooperate with the investigation and make herself available for interrogation by police officer, as and when required.

M/S. PR. CIT V M/S AGSON GLOBAL PVT. LTD. DHC JUDGMENT DATED 19.01.2022 IN ITA 68/2021

- ❑ HC findings “15.9. If the revenue chooses to disallow bogus purchases, it would necessarily have to, in our view, ignore the corresponding sales recorded against the very same parties.”
- ❑ “11.2...Significantly, the revenue chose not to examine those, who had ostensibly executed these documents.”
- ❑ 18.2.1 (i) That Mr Praveen Aggarwal’s statement was recorded in a separate search action on 12.11.2012; which, as is obvious from the record, occurred before the search action that was carried out vis-à-vis the assessee on 21.03.2017.
- ❑ (v) The revenue did not point to any part of the record which would show that the statement made by Mr Praveen Agarwal was furnished to the assessee and was allowed to cross-examine or rebut the statement. Since the assessee was not allowed to cross-examine or rebut the statement made by Mr Praveen Agarwal, the said statement could not be used against the assessee.
- ❑ (vi) The failure on the part of the revenue to demonstrate from the record that the aforesaid person i.e., Mr Praveen Agarwal was examined by the A.O. in the assessment proceedings concerning the assessee. Nothing was shown to us, which could establish that the A.O. conducted an independent enquiry to test the veracity of the statement made by Mr Praveen Agarwal. 18.3. Therefore, given the aforesaid circumstances, we are of the view that no cognizance can be taken of the statement made by Mr Praveen Agarwal.”

GST – “REVERSAL OF INPUT TAX CREDIT” AND COLLECTION OF GST MULTIPLE TIMES ON FULL VALUE - IS IT CORRECT ?

- ❑ Surprisingly, when the Department make an allegation against the persons so arrested, the prime objective of the Department appears to be to insist upon to pay the taxes equivalent to the amount of input tax credit availed by them on the transaction alleged to be circular trading by alleging that such input tax credit has been taken on the fake invoices.
- ❑ Therefore, essentially what the Department is putting their case in a manner that while the GST has already been collected from the firm A, while insisting to the firm B, to reverse the input tax credit on the same very invoices issued from the firm A on which the GST has already been collected.
- ❑ This essentially means the firm B has to pay GST on the entire value mentioned in the invoice issued to the firm C, without availing the input tax credit. This would be going against the very concept of the GST which is levied and collected on the value addition.
- ❑ Whereas if there is no supply of goods, they cannot demand the GST from any of the firms, whereas they are demanding GST from each from without allowing them to take into tax credit. This stand of the Department itself is self-contradictory and against the legal provisions.

GST – CONCLUDING REMARKS

- ❑ The Government cannot be permitted to take **dual stand**, on the one hand levying and collecting GST on the same very transaction and while input tax credit is taken against the same making allegations that there is no supply of goods.
- ❑ At the same time the Government cannot be permitted **to collect the tax** (GST) on the same transaction **without allowing the input tax** credit as it goes against the very concept of GST which is a tax on value addition. In case the tax is permitted to be collected on the entire value of the transaction without allowing the input tax credit in that case it goes against the Article 265 of the Constitution of India, which provides that no tax shall be levied or collected except by authority of law.
- ❑ As of now there is no case come to the notice of the general public where any person has been convicted by the court where the GST officers have arrested persons on the alleged circular trading of fake invoices for disallowing the input tax credit.
- ❑ Let us hope at some stage, the judicial scrutiny of such cases will be taken by the courts to its logical conclusion.

GST – IF SELLER DOES NOT PAY TO THE GOVERNMENT, CAN THIS BE LEGAL GROUNDS TO DENY THE INPUT TAX CREDIT?

- ❑ Section 16(2)(c) – condition for entitlement to take credit- tax charged, actually paid to the credit of Government.
- ❑ once the buyer pays GST to the seller and if the seller does not pay to the government, can this be legal grounds to deny the input tax credit?
- ❑ In *On Quest Merchandising India Pvt. Ltd. v Govt. of NCT of Delhi 2018 (10) G.S.T.L. 182 (Del.)*- the High Court held that “54. a purchasing dealer who has *bona fide* entered into a purchase transaction with a registered selling dealer who has issued a tax invoice reflecting the TIN number. In the event that the selling dealer has failed to deposit the tax collected by him from the purchasing dealer, the remedy for the Department would be to proceed against the defaulting selling dealer to recover such tax and not deny the purchasing dealer the ITC.....”
- ❑ In *Gheru Lal Bal Chand v State of Haryana and Anr. 2011 SCC OnLine P&H 13205* it is held that “33. ..no liability can be fastened on the purchasing registered dealer on account of non-payment of tax by the selling registered dealer in the treasury unless it is fraudulent, or collusion or connivance with the registered selling dealer or its predecessors with the purchasing registered dealer is established..”

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D.Y. Beathel Enterprises v State Tax Officer (Data Cell), Tirunelveli 2022 (58) G.S.T.L. 269 (Mad.)

“13....I am unable to appreciate the approach of the authorities. When it has come out that 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 very seriously and strict action ought to have been initiated against him.”

The High Court in this directed that seller dealer to be examined and recovery action to be initiated against selling dealer. The High Court held as, “16....In the said enquiry, Charles and his wife Shanthi will have to be examined as witnesses. Parallely, the respondent will also initiate recovery action against Charles and his wife Shanthi.”

WISHING FOR GOOD HEALTH FOR EVERYONE

.....*Thank you*.....