DELHI SALES TAX CASES

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HIGHLIGHTS

"We are not final because we are infallible, but we are infallible only because we are final"

Justice Robert H Jackson

Sales Tax Bar Association (Regd.)
Knowledge, Diffusion & Promotion Section
Trade & Taxes Department, 2nd Floor, Bikrikar Bhawan, New Delhi-110002

CONTENTS

DELHI SALES TAX CASES

Volume 61 Part 5

INDEX

NEWS AND UPDATES

1. The Karnataka High Court in the case M/S Tejas Arecanut Traders Versus Joint Commissioner Of Commercial Taxes observed and has set aside the order passed by the Appellate Authority to deposit 10% of the entire amount in dispute, which included tax, interest, a fine, a fee, and a penalty.

The bench observed wherein the appeal is filed under Section 107(6) of the GST Act, thus, the appellant is required to deposit only 10% of the disputed tax amount and not 10% of the entire disputed amount, including penalty, fine, and interest.

2. In a landmark decision, the Allahabad High Court, in the case of Yash Building Material v. State of Uttar Pradesh [Writ Tax No. 1435 of 2022 dated January 31, 2024], declared demand orders without a Show Cause Notice (SCN) as legally baseless. The court's ruling, dated January 31, 2024, emphasizes the importance of due process in tax matters.

Yash Building Material ("the Petitioner") were served a Notice dated June 4, 2021 under Section 74(5) of the Central Goods and Services Tax Act, 2017 ("the CGST Act") wherein it was stated that the tax was payable by the Petitioner. As per the law, upon non-payment of the tax, Section 74(7) of the CGST Act states that the proper officer is required to give a notice under Section 74(1) of the Uttar Pradesh Goods and Services Tax Act, 2017 ("the UPGST Act"). However, the said procedure was not followed. The Assistant Commissioner ("the Respondent") did not serve the SCN to the Petitioner. Instead, an Order dated July 30, 2021 ("the Impugned Order") was passed by the Respondent. The Petitioner appealed against the Impugned Order on the ground that no notice was issued to the Petitioner under Section 74(1) of the UPGST Act. However, an the Order dated August 31, 2022 passed by the Additional Commissioner and aggrieved by the Impugned Orders, the Petitioner has filed the present writ petition. Issue: Whether the demand orders can be passed without issuance of the SCN?

Held that, proper SCN was not issued to the Petitioner. Therefore, all the Impugned Orders were baseless and were issued without any basis of law. Hence, the Impugned Orders were quashed and set aside.

3. Globe Panel Industries India Pvt Ltd Vs State of U.P. And Others

(Allahabad High Court) Introduction: In a landmark judgment, the Allahabad High Court provided significant relief to Globe Panel Industries India Pvt Ltd, setting a precedent on the implications of an expired GST E-Way Bill during transportation of goods. This decision, stemming from the case against the State of U.P. and Others, delves into the intricacies of tax and penalty imposition under the Uttar Pradesh Goods and Services Tax Act, 2017, specifically Section 129(3).

4. In the case of Jinsasan Distributors vs. Commercial Tax Officer

(CT) adjudicated by the Madras High Court addresses a pivotal issue concerning the reversal of input tax credit in instances where the selling dealer's registration is retrospectively cancelled. This judgment holds significant implications for registered dealers under the Tamil Nadu Value Added Tax Act, 2006 (TNVAT Act, 2006), particularly concerning the availing and reversing of input tax credits on purchased goods. The court's interpretation of the relevant provisions of the TNVAT Act, 2006 provides critical insight into the rights and obligations of registered dealers in such scenarios.

5. Prestress Steel LLP Vs Commissioner ,Uttarakhand High Court held that invocation of proceedings u/s. 129 of the Central Goods and Services Tax Act, 2017 for minor infraction i.e. for not carrying any delivery challan unjustified as there is no intention to evade tax.

The petitioner is into the business of manufacturing of PC wires- Strand ACSR Core Wire and Galvanized steel wire. He purchases the raw material from Steel Authority of India Limited, Kolkata ("SAIL"). The petitioner placed an order with SAIL, the goods were transported from West Bengal to Kanpur through railway in the wagon against invoices and other documents required under the Act. The wagon was unloaded and taken into custody by the petitioner for further transportation of good to Bazpur. For that purpose two vehicles were deployed. Accordingly, e- way bill was also generated and goods were moved towards its destination on 04.06.2023. When the vehicles were intercepted by the respondent no.3, it was found that the vehicles were not carrying the delivery challans as required under Rule 55 (5) (b) of the Central/State Goods and Services Rules, 2017. The challenge in these petitions is made to the orders dated 06.2023 passed by the respondent no.3, Assistant Commissioner State Tax/Tax Officer u/s. 20 read with - Held that there has been no evasion of tax. There has been no intention to evade tax. Every information was with the GST authorities. Even if the petitioner was not carrying any delivery challan, there was no additional information that could have been provided by virtue of production of delivery challan. E-way bill was properly generated. Tax was properly paid. It was mere non compliance of the provisions of Section 55 (5) (b) of the Act. Thus, instead of proceeding under Section 129, the respondents authorities ought to have proceeded under Section 122 of the Act.

If "access to justice" has to be real, it becomes the moral responsibility of the Supreme Court, the supreme guardians/protectors of the rights of people guaranteed by the Constitution and the laws, not to construe the substantive part in section 25 of the C P Code in a pedantic manner to bring about a situation that would thwart the initiative of making "access to justice" real.

Shah Newaz Khan vs State of Nagaland | 2023 LiveLaw (SC) 146

IN THE HIGH COURT OF CALCUTTA AT CALCUTTA

[Krishna Rao, J.]

WPA 1009 of 2022

M/s. Gargo Traders ... Petitioner

Versus

The Jt. Commissioner,
Commercial Taxes (State Tax) & Ors. ... Respondent

Date of Order: 12.06.2023

WHETHER BENEFIT OF ITC CAN BE REFUSED ON THE ALLEGATION BY THE RESPONDENT THAT ON INQUIRY THEY CAME TO KNOW THAT THE SUPPLIER FROM WHOM THE PETITIONER CLAIMED TO HAVE PURCHASED THE GOODS IN QUESTION ARE ALL FAKE AND NON-EXISTING AND THE BANK ACCOUNTS OPENED BY THE SUPPLIER IS ON THE BASIS OF FAKE DOCUMENT AND THE CLAIM OF THE PETITIONER OF INPUT TAX CREDIT ARE NOT SUPPORTED BY ANY RELEVANT DOCUMENTS?

BASED ON THE JUDGMENT OF M/S LGW INDUSTRIES LTD. VS. UOI.

HELD – Admittedly at the time of transaction, the name of the supplier as registered taxable person was already available with the Government record and the petitioner has paid the amount of purchased articles as well as tax on the same through bank and not in cash. It is not the case of the respondents that there is a collusion between the petitioner and supplier with regard to the transaction. Based on the unreported judgment of M/S LGW Industries Ltd. Vs. UOI.

Present for Petitioner	:	Ms. Jagriti Mishra, Mr. Subham Gupta, Ms. Mrinmoyee Das & Mr. Reshab Kumar
Present for Respondent	:	Mr. Subir Kumar Saha, Ld. A.G.P Mr. Bikramaditya Ghosh

ORDER

Krishna Rao, J.

1. The petitioner has filed the present writ application challenging the order passed by Joint Commissioner, State Tax, West Bengal, Siliguri Circle dated 13th April, 2022 wherein the appeal preferred by the petitioner is rejected and the order passed by the Adjudicating Authority is withheld.

2. The petitioner being the registered taxable person (RTP) claimed credit of input tax against supply made from a supplier. As per the ledger account of the petitioner for the period from 01.04.2018 to 31.03.2019, the total purchase credit was Rs. 13,04,586/-. The petitioner has filed a tax invoice cum chalan reflecting a purchase of Rs. 11,31,513.00 from Global Bitumen. The debit note issued in the name of the transporter i.e. the International Transport Corporation for an amount of Rs. 1,73,073.00/-. The petitioner has made payment to Global Bitumen from the account of the petitioner through bank.

3 . The petitioner is aggrieved by the impugned order issued by the respondent authorities for not allowing the petitioner, who is the purchaser of goods in question and refusing to grant the benefit of Input Tax Credit (ITC) on purchase from supplier and also asking the petitioner to pay penalty and interest under the relevant provisions of GST Act.

4 . The case of the respondents that on inquiry, they came to know that the supplier from whom the petitioner claimed to have purchased the goods in question are all fake and non-existing and the bank accounts open by the supplier is on the basis of fake document and the claim of the petitioner of Input Tax Credit are not supported by any relevant document. It is the further case of the respondent that the petitioner has not verified the genuineness and identity of the supplier whether is a registered taxable person (RTP) before entering into any transaction with the supplier.

5 . It is the further case of the respondents that the registration of the supplier in question has already been cancelled with retrospective effect covering the transaction period of the petitioner.

6. The petitioner has filed supplementary affidavit by enclosing tax invoice cum challan dated 12th November, 2018, debit note dated 12th November, 2018, e-Way Bill dated 12th November, 2018, transportation bill dated 12th November, 2018 and statement of bank account of HDFC Bank of the petitioner showing the transaction made by the petitioner in favour of the supplier.

7. Learned Counsel for the petitioner relying upon the said documents and submits that the authorities have not considered the said documents and from the said documents, it is crystal clear that the petitioner has purchased the goods from the supplier and had transported the said goods and also transferred the amount through bank in the account of the supplier.

8 . Learned Counsel for the petitioner relied upon unreported judgment passed by the Principal Bench of this Court in WPA 23512 of 2019 (M/s.

LGW Industries Limited & Ors.-vs-Union of India & Ors.) dated 13th December, 2021 and the Judgment reported in MANU/DE/1509/2023 (Balaji Exim-vs-Commissioner, CGST & Ors.) and submitted that the allegation of fake credit availed by Global Bitumen cannot be a ground for rejecting the petitioner's refund application unless it is established that the petitioner has not received the goods or paid for them.

9 . Per contra, Learned Counsel for the respondents submits that the transaction relied by the petitioner with Global Bitumen is of November, 2018 but the authorities have cancelled the registration of the supplier of the petitioner with effect from 13.10.2018 and the said cancellation has been accepted by the supplier.

1 0 . Learned Counsel for the respondents submits that the judgments relied by the petitioner is distinguishable from the present case as in the present case, the cancellation of the supplier has been given retrospective effect and the supplier has accepted the same and thus the judgment relied by the petitioner is not applicable in the present case.

11. Considered the submissions made by the Counsels for the respective parties, perused the materials on record and the judgment relied by the petitioner.

12. The main contention of the petitioner that the transactions in question are genuine and valid and relying upon all the supporting relevant documents required under law, the petitioner with due diligence verified the genuineness and identity of the supplier and name of the supplier as registered taxable person was available at the Government Portal showing its registration as valid and existing at the time of transaction.

13. Admittedly at the time of transaction, the name of the supplier as registered taxable person was already available with the Government record and the petitioner has paid the amount of purchased articles as well as tax on the same through bank and not in cash.

14. It is not the case of the respondents that there is a collusion between the petitioner and supplier with regard to the transaction.

15. This Court finds that without proper verification, it cannot be said that there was any failure on the part of the petitioner in compliance of any obligation required under the statute before entering into the transactions in question.

16. The respondent authorities only taking into consideration of the cancellation of registration of the supplier with retrospective effect have

rejected the claim of the petitioner without considering the documents relied by the petitioner.

17. The unreported judgment passed in the case of M/s Law Industries Limited & Ors. (supra) is squarely applicable in the present case.

18. In view of the above, the impugned orders are set aside. The respondent no. 1 is directed to consider the grievance of the petitioner afresh by taking into consideration of the documents which the petitioner intends to rely in support of his claim.

19. The respondent no. 1 shall dispose of the claim of the petitioner by passing a reasoned and speaking order after giving an opportunity of hearing to the petitioner within a period of eight weeks from the date of receipt of copy of this order.

20. WPA No. 1009 of 2022 is thus disposed of. Parties shall be entitled to act on the basis of a server copy of the Judgment placed on the official website of the Court.

Urgent Xerox certified photocopies of this Judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

IN THE HIGH COURT OF CALCUTTA AT CALCUTTA

[Md. Nizamuddin, J.]

WPA 23512 of 2019

M/s. LGW Industries Limited & Ors. ... Petitioner

Versus

UOI & Ors. ... Respondent

Date of Order: 13.12.2021

WHETHER ITC BENEFIT CAN BE DENIED BY THE PETITIONERS TO THE RESPONDENT DUE TO CANCELLATION OF REGISTRATION RETROSPECTIVELY IN CASE OF SUPPLIES IN QUESTION COVERING THE TRANSACTION PERIOD?

HELD – It is found upon considering the relevant documents that all the purchases and transactions in question are genuine and supported by valid documents and transactions in question were made before the cancellation of registration of those suppliers and after taking into consideration the judgments of the Supreme Court and various High Courts which have been referred in this order and in that event the petitioners shall be given the benefit of input tax credit in question.

Editor's Note : Please see also W.P. 1658/24, W.P. No. 1198 and 1199 of 2024 of Delhi Hight Court.

Present for Petitioner	:	Mr. Vinay Kumar Shraff, Mr. Himangshu Kumar Ray, Ms. Priya Sarah Paul
Present for Respondent	:	Mr. Jaydip Kar, sr. adv., Mr. Arijit Chakraborty, Mr. Debsoumya Basak, Mr. Pranit Bag, Mr. Nilotpal Chowdhury, Mr. Prabir Bera, Mr. Subhas Chandra Jana, Mr. V. Neogi, Mr. D. Saha

ORDER

In view of similarity in facts and questions of law involved in the writ petitions in item nos. 1, 4, 6 and 8 - WPA No.23512 of 2019, WPA No.6768 of 2020, WPA No.7285 of 2020 with CAN No.1 of 2020 and WPA No.8289 of 2021, these are heard together and disposed of by a common order.

The petitioners in those writ petitions are aggrieved by the impugned notices issued by the respondents concerned for not allowing the petitioners, who are the purchasers of the goods in question and refusing to grant the benefit of input tax credit (ITC) on purchase from the suppliers and also asking the petitioners to pay penalty and interest under relevant provisions of GST Act.

Petitioners have also challenged the constitutional validity of section 16(2)(c) of the CGST/WBGST Act, which, according to me, does not require consideration in these cases, since it appears on perusal of relevant record that the refusal to grant benefit of input tax credit (ITC) to the petitioners are not on the grounds of non-deposit of tax in the Government account by the suppliers which have been collected from the petitioners, under Section 16 (2) (c) of the CGST/WBGST Act.

In these cases, it is the case of the respondents-GST authorities that on inquiry, they came to know that the suppliers from whom the petitioners/ buyers are claiming to have purchased the goods in question are all fake and nonexisting and the bank accounts opened by those suppliers are on the basis of fake documents and petitioners' claim of benefit of input tax credit are not supported by the relevant documents, and the case of the respondents is also that the petitioners have not verified the genuineness and identity of the aforesaid suppliers who are registered taxable persons (RTP) before entering into any transaction with those suppliers.

Further grounds of denying the input tax credit benefit to the petitioners by the respondents are that the registration of suppliers in question has already been cancelled with retrospective effect covering the transactions period in question.

The main contention of the petitioners in these writ petitions are that the transactions in question are genuine and valid by relying upon all the supporting relevant documents required under law and contend that petitioners with their due diligence have verified the genuineness and identity of the suppliers in question and more particularly the names of those suppliers as registered taxable person were available at the Government portal showing their registrations as valid and existing at the time of transactions in question and petitioners submit that they have limitation on their part in ascertaining the validity and genuineness of the suppliers in question and they have done whatever possible in this regard and more so, when the names of the suppliers as a registered taxable person were already available with the Government record and in Government portal at the relevant period of transaction petitioners could not be faulted if they appeared to be fake later on. Petitioners further submit that they have paid the amount of purchases in question as well as tax on the same not in cash and all transactions were through banks and petitioners are helpless if at some point of time after the transactions were over, if the respondents concerned finds on enquiries that the aforesaid suppliers (RTP) were fake and bogus and on this basis petitioners could not be penalised unless the department/respondents establish with concrete materials that the transactions in question were the outcome of any collusion between the petitioners/purchasers and the suppliers in question. Petitioners further submit that all the purchases in question invoices-wise were available on the GST portal in form GSTR-2A which are matters of record.

Considering the facts as recorded subject to further verification it cannot be said that that there was any failure on the part of the petitioners in compliance of any obligation required under the statute before entering the transactions in question or for verification of the genuineness of the suppliers in question.

The petitioners in support of their contention and proposition of law as discussed above rely on the following decisions:–

1) Commissioner of C. Ex. East Singhbhum v. Tata Motors Ltd. reported in 2013 (294) ELT 394 (Jhar).

2) R.S. Infra-Transmission Ltd. v. State of Rajasthan through its

Secretary, Ministry of Finance in Civil Writ Petition No.12445/2016 passed by the High Court of Rajasthan Bench at Jaipur.

3) Commissioner of Trade & Taxes, Delhi & 66 Ors. v. Arise India Limited & Ors. reported in TS-2 SC-2018-VAT.

4) On Quest Merchandising India Pvt. Ltd. v. Government on NCT of Delhi, reported in TS314-HC 2017 (Del)-VAT; 2018 (10) GSTL. 182 (Del);

5) M/s. Tarapore & Company, Jamshedspur v. The State of Jharkhand in W.P.(T) No. 773 of 2018 passed by Jharkhand High Court;

6) Gheru Lal Bal chand v. State of Haryana reported in (2011) 45 VST 195 (P&H);

7) D.Y. Beathel enterprises v. State Tax Officer (Data Cell) Tiruneveli reported in (2021) 127 Taxman. Com 80 (Madras);

8) Taparia Overseas (P) Ltd. v. Union of India reported in 2003 (161) E.L.T. 47 (Bom);

9) Prayagaj Dying & Printing Mills Pvt. Ltd. v. Union of India reported in 2013 (290) ELT 61 (Guj);

10) Star Plastic Industries v. Additional Commissioner of Sales Tax (Appeal) & Ors. reported 2021 SC OnLine Ori 1618; and

11) State of Maharashta v. Suresh Trading Company reported in (1998) 109 STC 439 (SC). The respondents have relied on the following decisions in support of their contention:–

    1) P. R. Mani Electronics v. Union of India reported in 2020 TIOL-1198 HC Mad GST;

    2) ALD Automotive Pvt. Ltd. v. The Commercial Tax Officer, reported in 2019 (13) SCC 225;

    3) Jayram & Co. v. Assistant Commissioner & Ors. reported in 2016 (15) SCC 125;

    4) Godrej & Boycentg & Co. Pvt. Ltd. v. GST reported in 1992 (3) SCC 624;

5) TVS Motors v. State of Tamil Nadu reported in 2019 (13) SCC 403;

6) Collector of Ex Commissioner v. Douba Cooperative Sugar Mills Ltd. reported in 1988 (37) ELT-478; and

7) D.Y. Bethal Enterprise v. The State Tax Officer (Data Cell) in W.P. (MD) No.2127 of 2021.

Considering the submission of the parties and on perusal of records available, these writ petitions are disposed of by remanding these cases to the respondents concerned to consider afresh the cases of the petitioners on the issue of their entitlement of benefit of input tax credit in question by considering the documents which the petitioners want to rely in support of their claim of genuineness of the transactions in question and shall also consider as to whether payments on purchases in question along with GST were actually paid or not to the suppliers (RTP) and also to consider as to whether the transactions and purchases were made before or after the cancellation of registration of the suppliers and also consider as to compliance of statutory obligation by the petitioners in verification of identity of the suppliers (RTP).

If it is found upon considering the relevant documents that all the purchases and transactions in question are genuine and supported by valid documents and transactions in question were made before the cancellation of registration of those suppliers and after taking into consideration the judgments of the Supreme Court and various High Courts which have been referred in this order and in that event the petitioners shall be given the benefit of input tax credit in question.

These cases of the petitioners shall be disposed of by the respondents concerned in accordance with law and in the light of observation made above and by passing a reasoned and speaking order after giving effective opportunity of hearing to the petitioners and by dealing with the judgments petitioners want to rely at the time of hearing of the cases, within eight weeks from the date of communication of this order.

These Writ Petitions being WPA No.23512 of 2019, WPA No.6768 of 2020, WPA No.7285 of 2020 with CAN No.1 of 2020 and WPA No.8289 of 2021 are disposed of in the light of observation and directions as made above.

Further, let these Writ Petitions being WPA No. 10776 of 2021, WPA

No. 12964 of 2019, WPA No. 6771 of 2020 with CAN No. 1 of 2020 (Old CAN No. 5711 of 2020) and WPA No. 8195 of 2020 be listed for hearing two weeks after the Christmas Vacation.

IN THE HIGH COURT OF DELHI AT NEW DELHI
[Sanjeev Sachdeva & Ravinder Dudeja, J.J.]

WPC No. 3340 of 2024

Balaji Medical And Diagnostic Research Centre ... Petitioner

Versus

Union of India & Ors. ... Respondent

Date of Order: 05.03.2024

WHETHER ILLEGAL DEMANDS CAN BE RAISED IN ABSENCE OF REASONED AND SPEAKING ORDER AND AFTER NON-CONSIDERATION OF DETAILED REPLIES FILED?

HELD – NO

Present for Petitioner	:	Mr. Harsh Makhija, Advocate
Present for Respondent	:	Mr. Rajeev Aggarwal, ASC for R-1 and 4. Mr. Jitesh Vikram Srivastava, SPC and Mr. Prajesh Vikram Srivastava, Advocate. Mr. Aditya Singla, SSC for CBIC with Mr. Anand Pandey, Advocate.

ORDER

Sanjeev Sachdeva, J. (Oral)

1. Petitioner impugns order dated 27.12.2023, whereby the impugned Show Cause Notice dated 23.09.2023, proposing a demand against the petitioner has been disposed and a demand of Rs. 3,09,18,988.00 including penalty has been raised against the petitioner. The order has been passed under Section 73 of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as the Act).

2. Learned counsel for Petitioner submits that a detailed reply dated 23.10.2023 was filed to the Show Cause Notice, however, the impugned order dated 27.12.2023 does not take into consideration the reply submitted by the petitioner and is a cryptic order.

3. Perusal of the Show Cause Notice shows that the Department has given separate headings under declaration of output tax, excess claim Input Tax Credit ["ITC"], under declaration of ineligible ITC and ITC claim from cancelled dealers, return defaulters and tax nonpayers. To the said Show Cause Notice, a detailed reply dated 23.10.2023 was furnished by the petitioner giving full disclosures under each of the heads.

4. The impugned order, however, after recording the narration, records that the reply uploaded by the tax payer is not satisfactory. It merely states that "And whereas, in response to the DRC-01, the Taxpayer submitted his reply in Form DRC-06. The reply of the registered person as well as data available on GST Portal have been checked / examined and the submission of the Taxpayer was not found satisfactory." The Proper Officer has opined that the reply is unsatisfactory.

5. The observation in the impugned order dated 27.12.2023 is not sustainable for the reasons that the reply filed by the petitioner is a detailed reply. Proper Officer had to at least consider the reply on merits and then form an opinion whether the reply was not satisfactory. He merely held that the reply is not satisfactory which *ex-facie* shows that Proper Officer has not applied his mind to the reply submitted by the petitioner.

6. Further, if the Proper Officer was of the view that reply was not satisfactory and further details were required, the same could have been specifically sought from the petitioner. However, the record does not reflect that any such opportunity was given to the petitioner to clarify its reply or furnish further documents/details.

7. In view of the above, the order cannot be sustained, and the matter is liable to be remitted to the Proper Officer for re-adjudication. Accordingly, the impugned order dated 27.12.2023 is set aside. The matter is remitted to the Proper Officer for re-adjudication.

8. As noticed hereinabove, the impugned order records that petitioner has not furnished the requisite details. Proper Officer is directed to intimate to the petitioner details/documents, as maybe required to be furnished by the petitioner. Pursuant to the intimation being given, petitioner shall furnish the requisite explanation and documents. Thereafter, the Proper Officer shall re-adjudicate the Show Cause Notice after giving an opportunity of personal hearing and shall pass a fresh speaking order in accordance with law within the period prescribed under Section 75(3) of the Act.

9. It is clarified that this Court has neither considered nor commented upon the merits of the contentions of either party. All rights and contentions of parties are reserved.

10. The challenge to Notification No. 9 of 2023 with regard to the initial extension of time is left open.

11. Petition is disposed of in the above terms.

IN THE HIGH COURT OF MADHYA PRADES AT JABALPUR
[Sujoy Paul & Prakash Chandra Gupta, J.J.]

WPC No. 12323 of 2022

Daya Singh ... Petitioner

Versus

State of Madhya Pradesh ... Respondent

Date of Order: 10.08.2022

WHETHER PENALTY CAN BE IMPOSED ON A TRUCK DRIVER FOR HAVING HIS E-WAY BILL EXPIRED ON 19TH WHEN THE GOODS HAD REACHED THE DESTINATION BEFORE 12 O'CLOCK AND BUT FOR WEIGHMENT HAD TO MOVE FOR WEIGH BRIDGE AFTER 12 O'CLOCK AND WAS STOPPED AT 4.35 AM?

HELD – In the instant case, the delay of almost 4:30 hours before which E-way Bill stood expired appears to be bonafide and without establishing fraudulent intent and negligence on the part of petitioner, the impugned notice/order could not have been passed.

Resultantly, the penalty imposed by the order dated 25/05/2022 (Annexure P/11) is set aside. The amount of penalty already deposited by the petitioner be refunded back to him within 30 days failing which it will carry 6% interest till the time of actual payment.

The writ petition is allowed

Editor's Note : Please refer to W.P. (C) 8585/2022 also

Present for Petitioner : Mr. Abhishek Kumar Dhayani, Advocate

Present for Respondent : Mr. Darshan Soni, Govt. Advocate

ORDER

This petition filed under Article 226 of the Constitution of India takes exception to the notice dated 25.05.2022 (Annexure- P/10) and another order of same date (Annexure-P/11).

2. In short, the case of petitioner is that petitioner is a registered Government contractor and registered dealer holding Goods and Service Tax Identification No as 23BDRPS9015A1ZK.

3. The petitioner received a work order from Divisional Project Engineer of Public Works Department (PIU), Dindori for construction of additional laboratory and class room at Chandravijay College, Dindori. This work order dated 21.04.2022 is filed by petitioner as Annexure P/1.

4. The petitioner received quotation (Annexure-P/2) from Mittal Steels for supply of TMT bars. In turn, petitioner placed order to Mittal Steels, Raipur for supply of TMT bars.

5. Mittal Steels in furtherance of petitioner's order/demand raised commercial invoice on 17.05.2022 (Annexure-P/3) charging IGST @ 18% i.e. Rs. 3,41,011.37/-.

6. Mittal Steels being supplier of goods in compliance of Section 68 of the Central Goods and Services act R/W Rule 138-A generated an E-Way Bill for movement of goods from Raipur to Dindori on 17.05.2022 on 06:08 PM. The E-Way Bill No 8212 2755 0219 is filed as Annexure-P/4.

7. The vehicle which was carrying TMT bars on 18.05.2022 and was travelling from Raipur to Dindori suffered a problem and clutch-plates of vehicle got damaged. The proprietor of 'Maa Rewa Transport' sent a vehicle for servicing to 'Rama Moto Cooperation', Raipur on 18.05.2022. Copy of Customer Job Card is filed as Annexure-P/5.

8. On 19.05.2022, the vehicle bearing No. CG04MW3477 got repaired and tax invoice raised for changing parts is filed as Annexure-P/6. The vehicle after getting gate pass, started movement with related documents from Raipur to Dindori . The gate pass is also placed on record as Annexure-P/7.

9. It is averred in the petition that said vehicle reached Dindori on 19.5.2022 between 10.30 to 10.45 pm well within the time mentioned in the E-Way Bill. After reaching the destination, i.e. Dindori, the truck driver called the petitioner and informed that the truck has reached the destination. The petitioner told the truck driver to take the vehicle to Weigh Bridge. While the vehicle was moving towards Weigh Bridge, the Assistant Commissioner at 4.35 AM on 20.5.2022 stopped the vehicle and demanded the relevant documents. The truck driver produced all the relevant documents necessary for the purpose of transportation. The Assistant Commissioner was satisfied by all the documents produced by truck driver

except the Eway Bill. The Assistant Commissioner opined that E-way Bill got expired on 19.5.2022 at 12:00 AM. The repeated requests of truck driver and transporter to Assistant Commissioner that the goods reached Dindori before 12:00 AM and unintentional delay occurred thereafter went in vain. The Assistant Commissioner issued FORM GST MOV-02 stating that E-way Bill got expired. The vehicle was detained in the custody of the City Police Station, Dindori.

10. The petitioner submitted his written reply on 24.5.2022, (Annexure P/9) and requested that material detained be supplied to him which is necessary for construction of the class room and laboratory. The said written submission was not accepted and FORM GST MOV-06 was issued. The same was followed by GST FORM MOV- 07 specifying the penalty amount of Rs.6,82,030.00, (Annexure P/11).

11. Criticizing the impugned notice and order Shri Abhishek Dhyani, learned counsel for the petitioner urged that proceedings initiated under Section 29 of the GST Act were not justifiable. The respondents have not followed the principles of natural justice, which is part of statutory requirement of Section 126 of the said Act which clearly provides that no penalty should be imposed for 'minor breaches' or procedural requirements or omission etc. The petitioner was not found guilty of any fraudulent intent or gross negligence. Thus, imposition of penalty to the tune of Rs.6,82,030.00 was totally disproportionate and unwarranted.

12. The respondents have failed to see that there was no revenue loss. The intention of introducing E-Way Bill mechanism was to keep a check on the movement of goods without tax invoice or and to regulate tax evasion but penalty notice issued for expiry of E-Way Bill was unjustifiable and runs contrary to the scheme and object of said mechanism.

13. In support of his contention Shri Dhyani placed reliance on a judgment of Telangana High Court reported in (2021) 5 GSTJ Online 174 (TG) (Satyam Shivam Papers Pvt. Ltd. Vs. Asst. Commissioner, ST & Others). It is urged that in the aforesaid case, the High Court set aside FORM GST MOV-09 and action of levying tax and penalty on the petitioner because the department could not establish any evasion of tax by the petitioner. Mere lapsing of time mentioned in the E-Way Bill is not sufficient for invoking penalty clause. It is urged that this judgment of Telangana High Court was unsuccessfully challenged by the Revenue and in (2022) 7 GSTJ Online 16 (SC) (Assistant Commissioner (ST) & Others Vs. Satyam Shivam Papers Pvt. Ltd. & Another) the judgment got a stamp of approval from Apex Court.

14. Learned counsel for the petitioner then placed reliance on a judgment of Calcutta High Court in (2022) 7 GSTJ Online 78 (Cal) (Ashok Kumar Sureka Vs. Asst. Commissioner, State Tax, Durgapur Range) and urged that the facts of the present case have similarity, if compared with the facts involved in the case before Telangana High Court and Calcutta High Court.

15. The next contention of Shri Dhyani is based on a Circular No.64/38/2018-GST, dated 14.9.2018. On the strength of this circular, which was considered by the Division Bench of this court in (2021) 5 GSTJ Online 81 (MP) (Robbins Tunnelling & Trenchless Technology (India) Pvt. Ltd. Vs. State of Madhya Pradesh & Others) and it was held that imposition of penalty tax and penalty for clerical error is bad in law. The Division Bench judgment of this court was not interred with and Special Leave to Appeal (C) No.(S) 14196/2021 (The State of Madhya Pradesh & Ors. Vs. Robbins Tunnelling & Trenchless Technology (India) Pvt. Ltd.) was dismissed by the Supreme Court. Thus, the impugned notice and penalty order may be set aside. Since the petitioner has deposited the amount of penalty before the department in obedience of court's order dated 30.5.2022, the department be directed to refund the same.

16. Shri Darshan Soni, learned counsel for the Department/respondents supported the impugned notice/order. On a specific query from the Bench, Shri Soni, categorically admitted that singular flaw/deficiency found in the documents provided by the truck driver was that E-way Bill stood expired on 19/05/2022 and vehicle was intercepted almost 4-5 hours thereafter at 4.35 A.M. on 20/05/2022. No other discrepancy/deficiency was found in the documents produced by the truck driver.

17. Shri Darshan Soni, learned counsel for the respondents urged that the action taken by the Department is in consonance with the enabling provisions and no fault can be found in the impugned notice/order.

18. Learned counsel for the parties further apprised the Court that the Statutory Appellate Forum under the GST Act has not been constituted till date. Thus, the only remedy at present available to the petitioner is the remedy before this Court.

19. No other point is pressed by learned counsel for the parties.

20. We have heard learned counsel for the parties and perused the record.

21. In view of aforesaid stand of parties, it is clear that the E-way Bill of the petitioner was valid upto 19/05/2022 and truck was intercepted

on 20/05/2022 at Dindori at 4.35 A.M. The specific contention of learned counsel for the petitioner that there was no element of tax evasion, fraudulent intent and negligence on his part was not rebutted by learned counsel for the respondents. It is apt to reproduce the relevant para of judgment of Telangana High Court in (2021) 5 GSTJ Online 174 (TG) Satyam Shivam Papers Pvt. Ltd. vs. Asst. Commissioner, ST & others (W.P.No.9688 of 2020), which reads as under :-

> "42. How the 2nd respondent could have drawn an inference that petitioner is evading tax merely because the E-way Bill has expired is also nowhere explained in the counter-affidavit. In our considered opinion, there was no material before the 2nd respondent to come to the conclusion that there was evasion of tax by the petitioner merely on account of lapsing of time mentioned in the E-way Bill because even the 2nd respondent does not say that there was any evidence of attempt to sell the goods to somebody else on 6.1.2020. On account of non-extension of the validity of the E-way Bill by petitioner or the auto trolly driver, no presumption can be draw that there was an intention to evade tax."
>
> (Emphasis supplied)

22. The writ petition was allowed by the High Court and action of

levying of tax and penalty was set aside. The respondents were directed to refund the said amount with interest.

23. This judgment of Telangana High Court was put to test before the Apex Court and Apex Court in (2022) 7 GSTJ Online 16 (SC), Assistant Commissioner (ST) & others vs. Satyam Shivam Papers Pvt. Ltd. & Another, opined as under:-

> "8. Upon our having made these observations, learned counsel for the petitioners has attempted to submit that the questions of law in this case, as regards the operation and effect of Section 129 of Telangana Goods and Services Tax Act, 2017 and violation by the writ petitioner, may be kept open. The submissions sought to be made do not give rise to even a question of fact what to say of a question of law. As noticed hereinabove, on the facts of this case, it has precisely been found that there was no intent on the parat of the writ petitioner to evade tax and rather, the goods in question could not be taken to the destination within time for the reasons beyond the control of the writ petitioner. When the

undeniable facts, including the traffic blockage due to agitation, are taken into consideration, the State alone remains responsible for not providing smooth passage of traffic."

(Emphasis supplied)

24. Similarly Calcutta High Court in (2022) 7 GSTJ Online 78 (Cal), Ashok Kumar Sureka vs. Asst. Commissioner, State Tax, Durgapur Range, opined as under :-

"2. In this writ petition, petitioner has challenged the impugned order of the appellate Commissioner dated March 18, 2021 confirming the original order dated September 11, 2019 passed by the adjudicating authority under Section 129 of the West Bengal Goods and Services Tax Act, 2017 for detention of the goods in question on the grounds that the E-way Bill relating to the consignment in question had expired one day before i.e. in the midnight of September 8, 2019, and that the goods was detained in the morning of September 9, 2019 on the grounds that the E-way Bill has expired which is even less than one day and extension could not be made and petitioner submits that delay of few hours even less than a day of expiry of the validity of the tenure of the E-way Bill was not deliberate and willful and was due to break down of the vehicle in question and there was no intention of any evasion of tax on the part of the petitioner.

3. The petitioner in support of his contention has relied on an unreported decision of the Supreme Court dated January 12, 2022 passed in Special Leave Appeal (C) No(s). 21132/2021 (Assistant Commissioner (ST) & Ors. v. Satyam Shivam Papers Pvt. Limited & Anr.).

4. Learned advocate appearing for the respondent could not make out a case against the petitioner that the aforesaid violation was willful and deliberate or with a specific material that the intention of the petitioner was for evading tax.

5. Considering the submission of the parties and the facts and circumstances of the case, this writ petition being WPA No.11085 of 2021 is disposed of by setting aside the impugned order of the appellate authority dated March 18, 2021 as well as the order of the adjudicating authority dated September 11, 2019 and as a consequence, the petitioner will be entitled to get the refund of the penalty and tax paid on protest subject to compliance of all legal formalities."

(Emphasis supplied)

25. We find substantial force in the arguments of learned counsel for the petitioner that present case has similarity with that of the above cases decided by Telangana and Calcutta High Court. The respondents could not establish that there exist any element of evasion of tax, fraudulent intent or negligence on the part of the petitioner. In this backdrop, the impugned notice/order could not have been passed.

26. The principles of natural justice were statutorily recognized and ingrained in Section 126(1)(3) of the Act. The Law Makers have taken care of doctrine of proportionality while bringing sub-section (1) of Section 126 in the Statute Book. The punishment should be commensurate to the breach is the legislative mandate as per subsection (1) of Section 126.

27. In the instant case, the delay of almost 4:30 hours before which E-way Bill stood expired appears to be bonafide and without establishing fraudulent intent and negligence on the part of petitioner, the impugned notice/order could not have been passed.

28. Resultantly, the penalty imposed by the order dated 25/05/2022 (Annexure P/11) is set aside. The amount of penalty already deposited by the petitioner be refunded back to him within 30 days failing which it will carry 6% interest till the time of actual payment.

29. The writ petition is allowed.

IN THE HIGH COURT OF MADRAS AT MADRAS
[Krishna Ramasamy, J.]

WPA 35453 of 2023

Jak Communications Private Limited ... Petitioner

Versus

The Deputy Commercial Tax Officer & Ors. ... Respondent

Date of Order: 19.12.2023

WHETHER AN ORDER CAN BE PASSED WITHOUT PROVIDING AN OPPORTUNITY OF BEING HEARD?

Held - NO

Present for Petitioner : Mr. M.V.Swaroop,
for Ms. Rukmani Venugopalan

Present for Respondent : Ms. E. Ranganayaki,
Additional Government Pleader,

ORDER

This writ petition has been filed challenging the impugned order dated 25.05.2023 passed by the 1st respondent.

2. Ms. E.Ranganayaki, learned Additional Government Pleader, takes notice on behalf of the respondents. By consent of the parties, the main writ petition is taken up for disposal at the admission stage itself.

3. The learned counsel for the petitioner would submit that prior to the passing of the impugned order dated 25.05.2023, all the notices dated 24.12.2021, 24.03.2023 and 15.05.2023 were uploaded by the respondent in their web portal in the “View Additional Notices and Order” column and the same were not served physically to the petitioner, due to which, the petitioner was unaware of the said notice. Therefore, he would contend that the said impugned order was passed in the violation of principles of natural justice since prior to the passing of the impugned order, neither opportunity for filing the reply nor the opportunity of personal hearing was provided by the respondent to the petitioner.

4. In reply, the learned counsel for the respondent would submit that though the notice was uploaded by the respondent in the web portal, the petitioner had failed to appear before the respondent for personal hearing. However, she would fairly submit that if any order is passed by this Court, the same will be complied with by the respondent. 5. Heard the learned counsel for the petitioner and the respondent and also perused the materials available on record.

6. In the present case, it appears that the notices dated 24.12.2021, 24.03.2023 and 15.05.2023 and the assessment order dated 25.05.2023 have been uploaded in the web portal in the “View Additional Notices and Orders” column and the same were not at all physically served to the petitioner, due to which, the petitioner was unaware about the said notice. Hence, the reasons provided by the petitioner for being unaware of the notice, which was uploaded in the web portal, are appears to be genuine.

7. Further, this Court is of the view that no order can be passed without providing sufficient opportunities to the petitioner. However, in the present case, no reply was filed by the petitioner and no opportunity of personal

hearing was provided to the petitioner. Hence, the impugned order is liable to be set aside.

8. Accordingly, the impugned order dated 25.05.2023 is set aside. While setting aside the impugned order, this Court remits the matter back to the respondents. The petitioner is directed to file the reply to the show cause notice dated 24.03.2023 within a period of 21 days from the date of receipt of copy of this order. Thereafter, the respondent is directed to dispose of the matter after providing sufficient opportunities to the petitioner.

9. With the above directions, this writ petition is disposed of. No cost. Consequently, the connected miscellaneous petition is also closed.

IN THE SUPREME COURT OF INDIA
[Dinesh Maheswari & Hrishikesh Roy, J.J.]

SLP (C) No. 21132 of 2021

Assistant Commissioner (St) & Ors. ... Petitioner

Versus

M/s Satyam Shivam Papers Pvt. Limited & Anr. ... Respondent

Date of Order: 12.01.2022

SLP DISMISSED – AND UPHELD THE ORDER OF THE HIGH COURT AS WELL AS THE COSTS IMPOSED ON THE OFFICERS WHO LEVIED PENALTY –

HELD – Having said so; having found no question of law being involved; and having found this petition itself being rather mis- conceived, we are constrained to enhance the amount of costs imposed in this matter by the High Court.

Present for Petitioner : Mr. P. Venkat Reddy, Adv.
Mr. Prashant Tyagi, Adv.
Mr. P. Srinivas Reddy, Adv.
M/s. Venkat Palwai Law Associates, AOR

Present for Respondent :

ORDER

Having heard learned counsel for the petitioners and having perused the material placed on record, we find no reason to consider interference

in the well-considered and well-reasoned order dated 2nd June, 2021, as passed by the the High Court for the State of Telangana at Hyderabad in Writ Petition No. 9688 of 2020. Rather, we are clearly of the view that the error, if any, on the part of the High Court, had been of imposing only nominal costs of Rs. 10,000/- (Rupees Ten Thousand) on the respondent No. 2 of the writ petition, who is petitioner No.2 before us.

The consideration of the High court in the order impugned and the material placed on record leaves nothing to doubt that the attempted inference on the part of petitioner No.2, that the writ petitioner was evading tax because the e-way bill had expired a day earlier, had not only been baseless but even the intent behind the proceedings against the writ petitioner was also questionable, particularly when it was found that the goods in question, after being detained were, strangely, kept in the house of a relative of the petitioner No.2 for 16 days and not at any other designated place for their safe custody.

The High Court has, inter alia, found that:

> "41. ……It was the duty of 2nd respondent to consider the explanation offered by petitioner as to why the goods could not have been delivered during the validity of the e-way bill, and instead he is harping on the fact that the e-way bill is not extended even four(04) hours before the expiry or four(04) hours after the expiry, which is untenable.
>
> The 2nd respondent merely states in the counter affidavit that there is clear evasion of tax and so he did not consider the said explanations.
>
> This is plainly arbitrary and illegal and violates Article 14 of the Constitution of India, because there is no denial by the 2nd respondent of the traffic blockage at Basher Bagh due to the anti CAA and NRC agitation on 4.01.2020 up to 8.30 pm preventing the movement of auto trolley for otherwise the goods would have been delivered on that day itself. He also does not dispute that 04.01.2020 was a Saturday, 05.01.2020 was a Sunday, and the next working day was only 06.01.2020."

The High Court has further found and, in our view, rightly so thus:

> "42. How the 2nd respondent could have drawn an inference that petitioner is evading tax merely because the e-way bill has expired, is also nowhere explained in the counter- affidavit.

> In our considered opinion, there was no material before the 2nd respondent to come to the conclusion that there was evasion of tax by the petitioner merely on account of lapsing of time mentioned in the e-way bill because even the 2nd respondent does not say that there was any evidence of attempt to sell the goods to somebody else on 06.01.2020. On account of non-extension of the validity of the e-way bill by petitioner or the auto trolley driver, no presumption can be drawn that there was an intention to evade tax".

The High Court has also commented on blatant abuse of the power by the petitioner No.2 and has deprecated his conduct in the following words:

> "43. We are also unable to understand why the goods were kept for safe keeping at Marredpally, Secunderabad in the House of a relative of 2nd respondent for (16) days and not in any other place designated for such safe keeping by the State.
>
> 44. In our opinion, there has been a blatant abuse of power by the 2nd respondent in collecting from the petitioner tax and penalty both under the CGST and SGST and compelling the petitioner to pay Rs.69,000/- by such conduct.
>
> 45. We deprecate the conduct of 2nd respondent in not even adverting to the response given by petitioner to the Form GST MOV-07 in Form GST MOV-09 and his deliberate intention to treat the validity of the expiry on the eway bill as amounting to evasion of tax without any evidence of such evasion of tax by the petitioner."

Having said so, the High Court has set aside the levy of tax and penalty of Rs. 69,000/- (Rupees Sixty-nine Thousand) while imposing costs of Rs. 10,000/- (Rupees Ten Thousand), payable by the petitioner No.2 to the writ petitioner within four weeks.

The analysis and reasoning of the High Court commends to us, when it is noticed that the High Court has meticulously examined and correctly found that no fault or intent to evade tax could have been inferred against the writ petitioner. However, as commented at the outset, the amount of costs as awarded by the High Court in this matter is rather on the lower side. Considering the overall conduct of the petitioner No.2 and the corresponding harassment faced by the writ petitioner we find it rather necessary to enhance the amount of costs.

Upon our having made these observations, learned counsel for the petitioners has attempted to submit that the questions of law in this case,

as regards the operation and effect of Section 129 of Telangana Goods and Services Tax Act, 2017 and violation by the writ petitioner, may be kept open. The submissions sought to be made do not give rise to even a question of fact what to say of a question of law. As noticed hereinabove, on the facts of this case, it has precisely been found that there was no intent on the part of the writ petitioner to evade tax and rather, the goods in question could not be taken to the destination within time for the reasons beyond the control of the writ petitioner. When the undeniable facts, including the traffic blockage due to agitation, are taken into consideration, the State alone remains responsible for not providing smooth passage of traffic.

Having said so; having found no question of law being involved; and having found this petition itself being rather mis conceived , we are constrained to enhance the amount of costs imposed in this matter by the High Court.

The High Court has awarded costs to the writ petitioner in the sum of Rs. 10,000/- (Rupees Ten Thousand) in relation to tax and penalty of Rs.69,000/- (Rupees Sixty-nine Thousand) that was sought to be imposed by the petitioner No.2. In the given circumstances, a further sum of Rs. 59,000/- (Rupees Fifty-nine Thousand) is imposed on the petitioners toward costs, which shall be payable to the writ petitioner within four weeks from today. This would be over and above the sum of Rs. 10,000/- (Rupees Ten Thousand) already awarded by the High Court.

Having regard to the circumstances, we also make it clear that the State would be entitled to recover the amount of costs, after making payment to the writ petitioner, directly from the person/s responsible for this entirely unnecessary litigation.

This petition stands dismissed, subject to the requirements foregoing.

Compliance to be reported by the petitioners.

IN THE HIGH COURT OF ALLAHABAD AT ALLAHABAD
[Shekhar B. Saraf, J.]

Writ Tax No. 937 of 2022

M/s Roli Enterprises Petitioner

Versus

State of UP & 2 Ors. Respondents

Date of Order: 16.01.2024

WHETHER THE STATE WAS JUSTIFIED IN LEVYING PENALTY U/S 129(3) IN VIEW OF THE FACTS AND CIRCUMSTANCES OF THE CASE?

HELD – No.

Present for Petitioner : Mr. Subham Agrawal,

Present for Respondents : C.S.C.

ORDER

Hon'ble Shekhar B. Saraf,J.

Heard Mr. Shubham Agrawal, learned counsel for the petitioner and Sri Rishi Kumar, learned Additional Chief Standing Counsel for the State respondents.

This is a writ petition under Article 226 of the Constitution of India wherein the petitioner is aggrieved by an order dated November 10, 2020 passed under Section 129(3) of the Uttar Pradesh Goods and Services Tax Act, 2017 (hereinafter referred to as "the Act") levying penalty upon the petitioner and the subsequent appellate order dated January 10, 2022 dismissing the appeal filed by the petitioner.

Upon perusal of the record, it appears that the only controversy involved in the present petition is with regard to non filling up of Part 'B' of the e-Way Bill. The undisputed facts are that firstly the bilty in fact had the details of the truck that was carrying the goods; secondly, the goods were not in variance with the invoice; and thirdly, the Department has not been able to indicate any kind of intention of the petitioner to evade tax.

Mr. Shubham Agarwal, learned counsel for the petitioner has relied upon two judgments of this Court in **VSL Alloys (India) Pvt. Ltd v. State of**

U.P. and another reported in **2018 NTN [Vol.67]-1** and **M/s Citykart Retail Private Limited through Authorized Representative v. Commissioner Commercial Tax and Another** reported in **2023 U.P.T.C. [Vol.113]-173** to buttress his argument that non filling up of Part 'B' of the e-Way Bill by itself without any intention to evade tax cannot lead to imposition of penalty under Section 129(3) of the Act.

Sri Rishi Kumar, learned Additional Chief Standing Counsel has relied upon the order passed by the appellate authority to show that part 'B' of the e-Way Bill was not filled up.

One may look into the judgment passed in **M/s Citykart Retail Pvt. Ltd.'s case (supra)** and lay reliance on two paragraphs that are quoted below:

> "7. In view of the contentions of the parties and the material placed on record, it is clear that the only allegation levelled against the petitioner leading to seizure of the goods was that Part-B of the e-way bill was not filled up. There is no allegation that the goods being transported were being transported without payment of tax. The explanation offered by the petitioner for not filling the Part-B of e-way bill, is clearly supported by the Circulars issued by the Ministry of Finance wherein the problem arising in filling the part-B of e-way bill was noticed and advisories were issued.
>
> In the present case, prima-facie no intent to evade the duty can be ascertained, only on the allegation that Part-B of the e-way bill was not filled, more so, in view of the fact that the vehicle in which the goods were being transported on a Delhi number, the said issue being decided in the judgment dated 13.04.2018 in the case of VSL Alloys India Pvt. Ltd. (supra) covers the issue raised in the present case also, as such, for the reasoning recorded above, the impugned order dated 18.04.2018 and the appellate order dated 14.05.2019 are set aside."

In the present case, the facts are quite similar to one in **M/s Citykart Retail Pvt. Ltd.'s case (supra)** and I see no reason why this Court should take a different view of the matter, as the invoice itself contained the details of the truck and the error committed by the petitioner was of a technical nature only and without any intention to evade tax. Once this fact has been substantiated, there was no requirement to levy penalty under Section 129(3) of the Act.

In light of the above, the orders dated November 10, 2020 and January 10, 2022 are quashed and set aside. The petition is allowed. Consequential reliefs to follow. The respondents are directed to return the security to the petitioner within six weeks.

IN THE HIGH COURT OF DELHI AT NEW DELHI
[Rajiv Shakdher & Tara Vitasta Ganju, JJ.]

WPC No. 8585 of 2022

M/s Nirmal Kumar Mahaveer Kumar ... Petitioner

Versus

Commissioner of CGST & Anr. ... Respondents

Date of Order: 23.08.2022

WHETHER PENALTY U/S 129(3) CAN BE IMPOSED WHEN THE VEHICLE IS BROKEN-DOWN DURING THE JOURNEY?

HELD – NO

Present for Petitioner	:	Mr. Rahul Gupta & Mr. Rakesh Kumar, Adv.
Present for Respondents	:	Mr. Anurag Ojha, Mr. Gautam Narayan with Ms. Pragya Barsaiyan, Advs.

Physical Hearing/Hybrid Hearing (as per request)]

ORDER

Rajiv Shakdher, J. (Oral):

1. We have heard the learned counsel for the parties at some length.

2. This writ petition is directed against the order dated 31.12.2021 passed by respondent no.2/Office of Appellate Authority (Delhi GST).

3. Respondent no.2 *via* the impugned order dated 31.12.2021, has sustained the demand raised by respondent no.3/Assistant Commissioner,Ward-112, Special Zone, Delhi,towards tax and penalty.

4. The amount demanded towards tax is Rs.2,33,100/-.An equal amount has been also demanded towards penalty i.e., Rs.2,33,100/-.

4.1 Thus, as is obvious, penalty has been imposed on the petitioner, at the rate of 100%.

4.2 In this regard, the respondent no. 3 appears to have taken recourse to the provisions of Section 129(3) of the Central Goods and Services Tax Act, 2017 [in short "CGST Act"].

5. What has emerged from the record, is that the impugned demand was raised against the petitioner on account of the fact that the e-way bill generated had expired. In other words, when the goods were intercepted, the e-way bill was no longer valid.

6. The record also shows, that the subject goods were being transported from Guwahati to New Delhi.

7. The e-way bill was valid till 28.09.2020.

7.1 The subject goods were intercepted on 29.09.2020 at 3:40 AM, by which time the e-way bill had expired.

8. On record, we have two e-way bills. These are marked as Annexure P-1 and Annexure P-3, appended on pages 25 and 30 of the casefile respectively.

9. A comparison of the two e-way bills, even according to Mr Gautam Narayan, who appears for respondent nos.2 and 3, shows that the vehicles were changed.

9.1 The explanation given across the bar, was that since the earlier vehicle had broken down, another vehicle was requisitioned for transporting the goods.

10. It appears, that the petitioner did not ask for extension of time for completion of journey. Resultantly, when the vehicle was intercepted, it was found that the e-way bill generated had already expired.

11. It is on this account, that a showcause notice was issued to the petitioner on 30.09.2020 in a prescribed form i.e.,Form GST MOV-07.

11.1 This was issued as required under Section 129(3) of the CGST Act.

12. The reason given for issuance of the show-cause notice was "*goods not covered by valid documents*". The proposed tax and penalty were also indicated in the said show-cause notice.

12.1 However, in consonance with the principles of natural justice, the petitioner was accorded seven days to file a reply with respect to the proposed demand made towards tax and penalty, and to appear before the concerned officer for a hearing on 07.10.2020.

13. We are informed that the petitioner paid the amount demanded towards tax and penalty, as he was keen that the goods reached the designated destination at the earliest.

13.1 The demand was liquidated on the same date on which it was made i.e., 30.09.2020.

14. Consequentially, the petitioner did not avail of the opportunity to demonstrate, that the goods could not reach their destination before the expiry of the validity period of the e-way bill.

15. It is not in dispute, that against the subject goods, the tax stands paid, and that the impugned demand has been raised, as noticed above, only for the reason that at the time of interception, the e-way bill was not valid.

16. This is not a case where the petitioner intended to evade tax. However, the impugned demand seeks not only the payment of tax, but also penalty.

17. Given the aforesaid circumstances, we are of the view, that the petitioner needs to be given another chance to establish, as to why the subject goods did not reach their designated designation before the expiry of the e-way bill.

18. Accordingly, the impugned order dated 31.12.2021 passed by respondent no. 2 is set aside.

19. The matter is remanded to respondent no. 2, to take a fresh decision in the matter, after giving the petitioner due opportunity to produce relevant material/evidence to establish its case, that the delay in transporting the goods to their destination was on account of genuine reasons.

19.1 While carrying out this exercise, the concerned officer will also bear in mind, the provisions of section 126 of the CGST Act, which *inter alia* adverts to omission or mistake in documentation which is easily rectifiable.

20. Needless to add, respondent no. 2 will issue a notice, in writing, to the petitioner, indicating the date and time when he intends to hear the petitioner and/or his authorized representative, in support of his case.

21. The writ petition is disposed of in the aforesaid terms.

IN THE HIGH COURT OF DELHI AT NEW DELHI
[Sanjeev Sachdeva & Ravinder Dudeja, J.J.]

WPC No. 1199 of 2024

Himanshu Goyal Proprietor of M/s Raj and Co. ... Petitioner

Versus

Principal Commissioner State GST Delhi & Anr. ... Respondents

Date of Order: 27.02.2024

WHETHER GST REGISTRATION CAN BE CANCELLED WITH EFFECT FROM 08.06.2018 RETROSPECTIVE DATE FOR NON-FILING OF RETURNS?

HELD – NO

Present for Petitioner : Mr. Santanu Kanungo &
Mr. Himanshu Goel, Adv.

Present for Respondents : Mr. Rajeev Aggarwal, ASC

JUDGMENT

Sanjeev Sachdeva, J. (Oral)

1. Petitioner impugns order dated 12.10.2022, whereby, the GST Registration of the Petitioner has been cancelled with effect from 08.06.2018 i.e. retrospective date.

2. Petitioner was in the business of trading of household edible items and had obtained the GST Registration.

3. As per the petitioner, petitioner closed his business in June 2022. Subject Show Cause Notice dated 18.07.2022 was issued on the ground that the petitioner had not filed the returns. Petitioner was called upon to file a reply and appear for personal hearing on the appointed date and time.

4. Show Cause Notice shows that there was no date, time or venue mentioned where the petitioner had to appear pursuant to the Show Cause Notice. The Show Cause Notice does not even bear the name and designation of the Officer issuing the Show Cause Notice and merely bears the digital signature signed by D.S. Goods & Services Tax Network (4).

5. The impugned order cancelling the registration dated 12.10.2022 begins with a reference to a reply dated 27.07.2022 and then states that no reply to notice to show cause has been submitted and the effective date of cancellation is 08.06.2018. The notice thereafter records that the petitioner has to pay the amounts mentioned in the notice on or before 22.10.2022. However, the amounts mentioned are 0.0 i.e. Nil.

6. In terms of Section 29(2) of the Central Goods and Services Tax Act, 2017, the proper officer may cancel the GST registration of a person from such date including any retrospective date, as he may deem fit if the circumstances set out in the said sub-section are satisfied. Registration cannot be cancelled with retrospective effect mechanically. It can be cancelled only if the proper officer deems it fit to do so. Such satisfaction cannot be subjective but must be based on some objective criteria. Merely, because a taxpayer has not filed the returns for some period does not mean that the taxpayer's registration is required to be cancelled with retrospective date also covering the period when the returns were filed and the taxpayer was compliant.

7. It is important to note that, according to the respondent, one of the consequences for cancelling a tax payer's registration with retrospective effect is that the taxpayer's customers are denied the input tax credit availed in respect of the supplies made by the tax payer during such period. Although, we do not consider it apposite to examine this aspect but assuming that the respondent's contention in this regard is correct, it would follow that the proper officer is also required to consider this aspect while passing any order for cancellation of GST registration with retrospective effect. Thus, a taxpayer's registration can be cancelled with retrospective effect only where such consequences are intended and are warranted.

8. Further, Show Cause Notice dated 18.07.2022 and order dated 12.10.2022 does not put the petitioner to notice that the registration is liable to be cancelled retrospectively. Accordingly, petitioner had no opportunity to even object to the retrospective cancellation of the registration.

9. Clearly, the impugned notice and impugned order are bereft of any detail and are thus not sustainable. However, in the instant case, the case of the petitioner is that petitioner has himself shut the business since June 2022 and is no longer interested in the restoration of the GST registration.

10. Both the petitioner as well as the respondent want cancellation of GST registration, however, for different reasons. Accordingly, the impugned order dated 12.10.2022 is modified to the effect that the cancellation of

registration shall be effective from 18.07.2022 i.e. the date of the Show Cause Notice on which date the registration was also suspended.

11. The petitioner shall however comply with the provisions of Section 29 of the Central Goods & Service Tax Act, 2017 and file all necessary details as mandated by the Act.

12. It is clarified that Respondents are also not precluded from taking any steps for recovery of any tax, penalty or interest that may be due in respect of the subject firm in accordance with law including retrospective cancellation.

13. Petition is disposed of.

IN THE HIGH COURT OF MADRAS AT MADRAS
[Krishnan Ramasamy, J.]

WP No. 33164 of 2023

Titan Company Ltd. ... Petitioner

Versus

The Jt. Commissioner of GST & Central Excise & Anr. ... Respondents

Date of Order: 18.12.2023

WHETHER BUNCHING OF SHOW CAUSE NOTICE IS PERMISSIBLE U/S 73 OF CGST ACT WHERE THE TIME LIMIT SPECIFIED U/S 73(10) HAS NOT BEEN EXTENDED?

HELD – NO.

In view of the aforesaid direction, the respondent is directed to defer all the proceedings, until the date of disposal of the representation of the petitioner to split up the show cause notices for each year separately.

Present for Petitioner : Mr. Mr.N.L.Rajah, Senior Counsel
for Mr. Natesan Murali

Present for Respondents : Mr. M. Santhanaraman,
Sr. Standing Counsel

ORDER

The petitioner has come up with the present Writ Petition seeking for issuance of a Writ of Mandamus directing the first respondent to consider and pass orders on the representation dated 25.10.2023 submitted by the petitioner before proceeding with the adjudication of show cause notice dated 28.09.2023.

2. Mr.N.L.Rajah, learned Senior Counsel appearing on behalf of the petitioner would submit that the first and foremost grievance of the petitioner is that the respondent had issued bunching of show cause notices dated 28.09.2023 for five Assessment Years starting from 2017-18 to 2021-22. According to the learned Senior Counsel, in terms of Section 73 of CGST Act, 2017 [hereinafter referred to as the 'Act'], bunching of show cause notices is not permissible and it only provides for determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized for any reason other than fraud or willful misstatement or suppression of facts.

3. Further, he would submit that sub-section 10 of Section 73 provides that an order determining the tax from a person should be passed within three years from the due date for furnishing of annual return for the financial year to which the tax due relates to and therefore, he would submit that determination of tax due under Section 73 is with reference to a financial year and the limitation date to complete the proceedings and issue an order is three years from the due date to file annual return for that particular financial year.

4. By referring to the aforesaid provision, learned Senior Counsel would further submit that though in the present case, the time limit specified under Section 73(10) of the Act has been extended from time to time, the respondent is still issuing show cause notices and in the event if they have not extended the said period, virtually the bunching of show cause notices issued on 28.09.2023 is barred by limitation for the Assessment Years 2017-18. He would further submit that if the respondents are allowed to issue bunching of show cause notices, it would set a bad precedent and in future, it would pave way for issuance of show cause notices even for the cases where limitation is not available.

5. Section 73(10) of the Act has categorically fixed the limitation for the purpose of making assessment under Section 73. What the respondents cannot do directly, they cannot do the same indirectly by issuing bunching of show cause notices to extend the period of limitation, is the further submission of the learned Senior Counsel appearing on behalf of the

petitioner.

6. Learned Senior Counsel would further submit that the GST council in its 49th Meeting held on 18.02.2023 had observed that it may not be desirable to extend the timelines in such a manner so that it may lead to bunching of last date of issuance of SCN/order made under Section 73 and 74 for a number of financial years and they have extended the limitation period specified under Section 73(10) separately for each financial year and accordingly, the time limit is extended as follows:

– For FY 2017-18, time limit under Section 73(10) is extended from the present 30th September 2023 to 31st December 2023.

– For FY 2018-19, time limit under Section 73(10) is extended from the present 31st December 2023 to 31st March 2024.

– For FY 2019-20, time limit under Section 73(10) is extended from the present 31st March 2024 to 30th June 2024.

7. To support his contention, learned Senior Counsel appearing on behalf of the petitioner relied on the decisions reported in ***AIR 1966 SC 1350, State of Jammu and Kashmir and Others v. Caltex (India) Ltd*** and (***2011) 39 VST 184, Kesar Enterprises Ltd., v. State of U.P and Others***.

8. Thus, by placing the above submission learned Senior Counsel would submit that the petitioner has made a representation to split the show cause notices and to adjudicate the same independently and the said representation is not disposed of till date and hence, the petitioner is constrained to approach this Court by filing the present Writ Petition.

9. On the other hand, learned Senior Standing Counsel appearing on behalf of the respondents would submit that there is no provision under Section 73 of the Act prohibiting the respondents from issuing bunching of show cause notices and in the absence of such provision, the petitioner cannot come before this Court and submit that the respondent is not empowered to issue bunching of show cause notices.

10. He would further submit that in the event if this Court is inclined to order splitting up of bunching of show cause notices issued by the respondent, in which case, for the Assessment Year 2017-18, the limitation is going to expire on 31st December 2023 and before that the respondent has to finish the adjudication and pass orders. He would contend that since

in the instant case, the petitioner was enjoying the stay of proceedings granted by this Court for a period of 26 days, the said period may be excluded for calculating the period of limitation.

11. Considered the submissions made by the learned Senior Counsel appearing on behalf of the petitioner and the learned Senior Standing Counsel appearing on behalf of the respondents and perused the materials placed before this Court.

12. The prayer in this Writ Petition is for issuance of Writ of Mandamus directing the first respondent to consider and pass orders on the representation dated 25.10.2023 submitted by the petitioner before proceeding with the adjudication of show cause notice dated 28.09.2023. It is the case of the petitioner that the respondent had issued bunching of show cause notices dated 28.09.2023 for five Assessment Years starting from 2017-18 to 2021-22.

13.The main contention of the petitioner was that bunching of show cause notices was not allowed in law and it is against the provisions of Section 73 of the Act. Section 73(10) of the Act specifically provides a time limit of three years from the due date for furnishing of annual return for the financial year to which the tax due relates to. In the present case, notice was issued under Section 73 of the Act for determination of the tax and therefore, the limitation period of three years as prescribed under Section 73(10) would be applicable. Therefore, the contention of the respondent that there is no time limit contemplated under Section 73 of the Act is not correct.

14. Further, by issuing bunching of show cause notices for five Assessment Years starting from 2017-18 to 2021-22, the respondents are trying to do certain things indirectly which they are not permitted to do directly and the same is not permissible in law. If the law states that a particular action has to be completed within a particular year, the same has to be carried out accordingly. The limitation period of three years would be separately applicable for every assessment year and it would vary from one assessment year to another. It is not that it would be carried over or that the limitation would be continuing in nature and the same can be clubbed. The limitation period of three years ends from the date of furnishing of the annual return for the particular financial year.

15. Therefore, issuing bunching of show cause notices is against the spirit of provisions of Section 73 of the Act and the Constitution Bench of the Hon’ble Apex Court in the decision reported in ***AIR 1966 SC 1350,***

State of Jammu and Kashmir and Others v. Caltex (India) Ltd has held that where an assessment encompasses different assessment years, each assessment year could be easily split up and dissected and the items can be separated and taxed for different periods. The said law was laid down keeping in mind that each and every Assessment Year will have a separate period of limitation and the limitation will start independently and that is the reason why the Hon'ble Supreme Court has held that each assessment year could be easily split up and dissected and the items can be separated and taxed for different periods. The said principle would apply to the present case as well.

16. For all these reasons, I do not find force in the submission made by the learned Senior Standing Counsel appearing on behalf of the respondents. Therefore, I find fault in the process of issuing of bunching of show cause notices and the same is liable to be quashed. However, since the petitioner has made an representation before the authorities concerned for splitting up of the show cause notices and pass separate adjudication order, this Court is inclined to pass the following order:

(i) The first respondent is directed to dispose of the representation dated 25.10.2023 made by the petitioner, keeping in mind the above order passed by this Court.

(ii) As far as splitting up of the show cause notice pertaining to the Assessment Year 2017-18 is concerned, the period of stay granted by this Court viz., 26 days will be excluded and accordingly, the time period of passing the adjudication order pertaining to the Assessment Year 2017-18 is extended upto 26.01.2024, subject to the orders to be passed in the W.P.Nos.34065, 34073 and 34074 of 2023.

(iii) In view of the aforesaid direction, the respondent is directed to defer all the proceedings, until the date of disposal of the representation of the petitioner to split up the show cause notices for each year separately.

17. The Writ Petition is disposed of with the above observations. Consequently, connected miscellaneous petition is closed. No costs.

BEFORE THE NATIONAL ANTI-PROFITEERING AUTHORITY UNDER THE CENTRAL GOODS AND SERVICES TAX ACT, 2017

[B.N. Sharma, Chairman, J.C. Chauhan, R. Bhagyadevi & Amand Shah, Members (T)]

Case No. 30/2019

Ms. Pallavi Gulati & Anr. ... Applicants

Versus

Puri Constructions Pvt. Ltd. ... Respondent

Date of Order: 19.12.2023

WHETHER THERE WAS A CASE OF NOT PASSING ON OF THE ITC AND WHETHER THE PROVISIONS OF SECTION 171 OF THE CGST ACT, 2017 ARE ATTRACTED IN THE PRESENT CASE?

Held – In view of the above facts this Authority under Rule 133 (3) (a) of the CGST Rules, 2017 orders that the Respondent shall reduce the prices to be realized from the buyers of the flats commensurate with the benefit of ITC received by him as has been detailed above. Since the present investigation is only up to 30.06.2018 any benefit of ITC which accrues subsequently shall also be passed on to the buyers by the Respondent. The Annexures submitted by the Respondent through his submissions dated 11.10.2018 and 05.11.2018 which comprise of the details of suo moto payments made by him through various modes are taken on record.

Present for Petitioners	:	Sh. Anwar Ali T.P., Addl. Commissioner
Present for Respondent	:	Sh. Rakesh Sodhi, Sh. Himanshu Juneja, Sh. Kishor Kunal, Sh. Achal Chawla & Ms. Ruchi

ORDER

1. The present Report dated 27.08.2018, has been received from the Applicant No. 2 i.e. the Directorate General of Anti-Profiteering (DGAP) after detailed investigation under Rule 129 (6) of the Central Goods & Service Tax (CGST) Rules, 2017. The brief facts of the case are that vide his application dated 22.01.2018 (Annexure-1 of the Report) submitted to the Standing Committee on Anti-profiteering under Rule 128 of the CGST Rules, 2017, the Applicant No. 1 had alleged profiteering by the Respondent while he had purchased Flat No. T4-2B in the Anand

Vilas Project, Sector-81, Faridabad, Haryana-121006 launched by the Respondent. Initially Sh. Dinesh Kumar Madan, H. No. 86/L, Ward No. 10, New Colony, Palwal, Haryana and Shri Ravi Kumar were jointly allotted this flat which was transferred to the Applicant No. 1, however, the Respondent had not allegedly passed on the benefit of Input Tax Credit (ITC) to the above Applicant although he had charged GST @ 12% w.e.f. 01.07.2017.

2. The DGAP has stated in his Report that the above Applicant had booked the flat on 09.05.2017 before the GST had come in to force and following demands had been raised on him by the Respondent as per the Table-'A' given below:-

Table-"A" (Amounts in Rs.)

Particulars	BSP	DEV	Service Tax & VAT	GST @12%	Total
Agreement Value (A)	72,75,000	8,73,000	4,39,410	–	85,87,410
Paid in Pre-GST era (B)	43,65,000	5,23,800	2,63,646	–	51,52,446
Balance to be paid Post GST (C)= (A)-(B)	29,10,000	3,49,200	1,75,773	–	34,34,973
Demanded by the Respondent (D)	29,10,000	3,49,200	–	3,91,104	36,50,304
Excess Demand by the Respondent (E)= (D)-(C)					2,15,331

3. The DGAP has also stated that the above Applicant had claimed that the Respondent had completed approximately 60% of the project work using inputs which were liable to higher GST @18% or 28% due to which additional ITC benefit had accrued to him. The Applicant No. 1 had also furnished an e-mail dated 28.08.2017 through which he had asked the Respondent why he was not being given the benefit of ITC when GST was being charged from him @12% and vide e-mail dated 28.08.2017, the Respondent had communicated that the benefit of ITC would be calculated at the time of the completion of the project and if due, would be proportionately passed on to the above Applicant. The Applicant No. 1 had also submitted the following documents along with his complaint:-

(a) Duly filled in Form APAF-1
(b) Payment Schedule pre-GST & post-GST
(c) Copy of Tax Invoice post-GST
(d) Copy of Demand Note pre-GST
(e) Statement of GST paid upto 02.01.2018

(f) Copy of receipts of payment

(g) ID proof (Aadhar Card)

(h) Copies of e-mails requesting for passing on the benefit of ITC

(1) Detailed work-sheet

4. The above complaint was considered by the Standing Committee on Anti-profiteering in its meeting held on 09.02.2018 and was forwarded to the DGAP on 28.02.2018 for investigation whether the benefit of ITC had been passed on by the Respondent to the above Applicant or not.

5. The DGAP had issued Notice under Rule 129 of the CGST Rules, 2017 on 14.03.2018 (Annexure-2 of the Report) asking the Respondent to intimate whether he admitted that the benefit of ITC had not been passed on to the above Applicant through commensurate reduction in the price of the flat and if so, to suo moto determine the quantum of such benefit and communicate the same with necessary evidence. An opportunity to inspect the non- confidential evidences/information submitted by the Applicant No. 1 was also afforded to the Respondent between 21.03.2018 and 23.03.2018 (Annexure-3 of the Report) which he had utilised on 23.03.2018.

6. The DGAP has further stated that the above Applicant vide e-mail dated 08.08.2018 (Annexure-4 of the Report) was given an opportunity to inspect the non-confidential evidences/replies submitted by the Respondent between 10.08.2018 to 14.08.2018 however, he through his letter dated 13.08.2018 had informed the DGAP that the matter had been discussed by him with the Respondent and after being fully satisfied with the clarification given by the Respondent he had no grievance left and therefore, his complaint should be treated to have been withdrawn. The DGAP has also submitted that the present investigation had been conducted from 01.07.2017 to 30.06.2018 and the period for completing the investigation was extended upto 27.08.2018 by this Authority, vide its order dated 15.05.2018, as per the provisions of Rule 129 (6) of the CGST Rules, 2017.

7. The DGAP has further submitted that the Respondent had filed replies to the Notice vide his letters dated 28.03.2018, 12.04.2018, 27.04.2018, 07.05.2018, 17.05.2018, 29.05.2018, 07.06.2018, 12.06.2018, 20.07.2018, 25.07.2018, 31.07.2018, 03.08.2018, 09.08.2018 and 13.08.2018. The contents of the replies given by the Respondent have been given in brief by the DGAP as under:-

I. That the Respondent had intimated his buyers that he intended to compute the benefit of additional ITC at the time of handing over

the possession so that correct amount of benefit could be passed on as it was not certain that the customers would take possession or leave the project or transfer the booking after availing benefit of additional ITC or they would pay the construction linked instalments on time or not.

II. That no additional benefit of ITC had accrued after coming in to force of the GST to the Respondent and the benefit of ITC on all the taxes charged from him before GST, was available to him as has been described as under:-

a) All the purchases of marble and steel etc. had been done from the suppliers based in Haryana by paying Value Added Tax (VAT), on which ITC was available under the Haryana VAT Act and no purchases had been made from outside the State.

b) In the service contracts in respect of design, architecture, horticulture work, cutting and testing and painting etc., the contractors were charging Service Tax on which CENVAT credit was available.

c) In one contract, the civil contractor had charged Service Tax and VAT (WCT) from the Respondent on which CENVAT Credit was available and the VAT (WCT) was eligible as deduction under the Haryana VAT Act.

III. That costs of various inputs had increased during the period of agreement for sale executed with the above Applicant, the details of which had been submitted by the Respondent with the reply. He had also claimed that there were several exempted services which formed part of the transaction and in a number of cases ITC had not been allowed and hence its figures were always dynamic.

IV. That the Respondent had requested that except the following documents all other information was to be treated as confidential in terms of Rule 130 of the CGST Rules, 2017:-

a) Buyers agreement (Annexure R-5 to the letter dated 12.06.2018)

b) Customer receipts and demands (Annexure R-5 to the letter dated 12.06.2018)

c) Cost Inflation Index (Annexure R-6 to the letter dated 12.06.2018)

d) Pre-GST and Post-GST tax chart (Annexure R-7 to the letter dated 12.06.2018).

V. That the above Applicant had informed the Respondent vide his letter dated 13.08.2018 that he was withdrawing his application and therefore, the investigation should be closed.

8. The DGAP has intimated that the Respondent had also submitted the following documents:-

(a) Copies of GSTR-1 returns for July, 2017 to June, 2018

(b) Copies of GSTR-3B returns for July, 2017 to June, 2018

(c) Copies of Tran-1 returns for transitional credit availed

(d) Copies of VAT & ST-3 returns for April, 2016 to June, 2017

(e) Copy of ST-2 (Certificate of Service Tax Registration)

(f) Copies of all demand letters and sale agreement/contract issued in the name of Applicant No 1

(g) Tax rates - pre-GST and post-GST

(h) Copy of Cost Audit report for the FY 2016-17

(i) Details of cost indices and cost escalation.

(j) Abridged Cost Statement along with pre-GST impact of input tax credit on cost.

(k) Copy of Electronic Credit Ledger for 01.07.2017 to 25.07.2018

(l) CENVAT/Input Tax Credit register for April, 2016 to June, 2018

(m) List of home buyers in the project “Anand Vilas”

9. The DGAP after investigation has stated that the main issues for determination was whether there were benefits of reduction in the rate of tax or additional ITC on the supply of construction service provided by the Respondent after coming in to force of the GST w.e.f. 01.07.2017 and whether the Respondent had passed on the above benefits to the recipients in terms of Section 171 of the CGST Act, 2017. The DGAP has also stated that the Respondent vide his letter dated 12.04.2018, had furnished copy of the agreement executed by him with the above Applicant for the purchase of one flat measuring 1940 square feet at the basic sale price of Rs. 3750 per square feet, copies of the demand letters and the payment schedule, the details of which were as under:-

Table-"B" (Amounts in Rs.)

S. No.	Payment Stages	Due Date	Basic %	BSP	DEV	Service Tax includ-ing SBC & KKC	VAT	CGST	SGST	Total
1	At the time of Booking	07.09.2016	10%	7,27.500	87,300	36,666	7,275	–	–	8,58,741
2	Booking+60	06.11.2016	10%	7,27.500	87,300	36.666	7,275	–	–	8,58,741
3	Booking +120	05.01.2017	10%	7,27.500	87,300	36.666	7,275	–	–	8,58,741
4	Booking +180	06.03.2017	10%	7,27.500	87,300	36.666	7,275	–	–	8,58,741
5	Booking +270	04.06.2017	10%	7,27.500	87,300	36.666	7,275	–	–	8,58,741
6	Booking +311	15.07.2017	10%	7,27.500	87,300	36.666	7,275	–	–	8,58,741
7	Booking +375	17.09.2017	10%	7,27.500	87,300	–	–	48,888	48,888	9,12,576
8	Booking +720	01.11.2017	10%	7,27.500	87,300	–	–	48,888	48,888	9,12,576
9	Booking +480	31.12.2017	10%	7,27.500	87,300	–	–	48,888	48,888	9,12,576
10	On App. of OC or within 18 Months of Booking (whichever is later)	Not due till date of application	5%	3,63,750	43,650			24.444	24,444	4,56.288
11	At the time of offer for possession									4,56,288
Total										88,02,750

10. The DGAP has also submitted that the claim of the Respondent that the exact amount of ITC would be finally determined and the benefit passed on to the buyers at the time of handing over possession might be correct but the profiteering, if any, had to be computed at a point of time in terms of Rule 129 (6) of the CGST Rules, 2017 and hence the amount of ITC available to the Respondent and the taxable amount realised by him from the above Applicant so far had to be taken into consideration for determining profiteering. The DGAP has further submitted that the contention of the Respondent that a customer might cancel or transfer the booking before taking possession after availing the benefit of additional ITC was valid, however, in such cases the benefit already availed by such a customer would be taken into account while determining the price to be paid by the prospective customer. Therefore, the above contention of the Respondent had no bearing on his legal liability of passing on the benefit of ITC to the Applicant No. 1, the DGAP has stated.

11. The DGAP has also intimated that another claim made by the Respondent was that the above Applicant had withdrawn his complaint and hence, the investigation should be closed, however, he has submitted that although the proceedings must flow from an application but there was no legal provision under which it could be withdrawn. He has further

intimated that as per the provisions of Rule 129 of the CGST Rules, 2017, he was legally bound to complete the investigation in case of any reference having been received from the Standing Committee on Anti-profiteering and hence withdrawal of an application could legally not be a valid reason for closing the investigation.

12. The DGAP has found that before coming in to force of the GST w.e.f. 01.07.2017, the Respondent was entitled to avail CENVAT credit of Service Tax paid on input services, credit of VAT paid on purchases of the inputs and credit of VAT (WCT) charged by the civil contractor on sub-contracts but the CENVAT credit of Excise Duty paid on inputs was not available. He has further found that post-GST, the Respondent had become entitled to avail ITC on GST paid on inputs and input services including on the sub-contracts. He has also averred that from the information supplied by the Respondent which had been further verified from the invoices issued during the pre-GST period (April, 2016 to June, 2017) and the post-GST period (July, 2017 to June, 2018), the details of the ITC availed by the Respondent and his taxable turnover were as per the Table-C given below:-

Table-"C" (Amounts in Rs.)

S . No.	Particulars	April, 2016 arc, to March, 2017	April, 2017 to June, 2017	Total (Pre-GST)	July, 2017 to March, 2018	April, 2018 to June, 2018	Total (Post-GST)
1	CENVAT of Service Tax Paid on Input Services (A)	167,90,834	39,87,427	207,78,261	-	-	-
2	Input Tax Credit of VAT Paid on Purchase of Inputs (B)	21,27,046	8,23,223	29,50,269	-	-	
3	Input Tax Credit of VAT(WCT) paid to Sub Contractors (C)	107,38,476	26,43,641	133,82,117	-		-
4	Total CENVAT/Input Tax Credit Available (D)=(A+B+C)	296,56,356	74,54,291	371,10,647	-	-	-
	Input Tax Credit of GST						
5	Availed (E)		-	-	532,51,994	84,12,610	616,64,604
6	Total Taxable Turnover (F)	4243,39.766	1127.06,432	5370,46,198	3843,52,825	657,71,797	4501,24,622
7	**Ratio of CENVAT/ Input Tax Credit Pre-GST [(G)=(D)/(F)] and Ratio of Input Tax Credit Post-GST [(G)=(E)/(F)]**			**6.91%**			**13.70%**

13. On the basis of the above Table the DGAP has argued that it was evident that the ITC as a percentage of the total turnover that was available to the Respondent during the pre-GST period was 6.91% and during the post-GST period it was 13.70% and therefore, it was clear that post-GST, the Respondent had benefited from additional ITC to the extent of 6.79% (13.70%-6.91%) of the total turnover. He has further argued that

the issue of profiteering had been examined by comparing the applicable tax and the ITC available for the pre-GST period when Service Tax @4.5% and VAT@1% was payable (total tax rate of 5.50%) with the post-GST period when the prevalent GST rate was 12% (GST @18% alongwith 1/3d abatement on value) on construction service imposed vide Notification No. 11/2017-Central Tax (Rate), dated 28.06.2017. He has also computed the comparative figures of ITC availed/available during the pre-GST period and the post-GST period as per the Table-'D' given below:-

Table-"D" (Amounts in Rs.)

S. No.	Particulars		Pre-GST	Post- GST
1	Period	A	April, 2016 to June,2017	July, 2017 to June, 2018
2	Output tax rate (%)	B	5.50%	12.00%
3	Total input tax credit availed (Rs.)	C	371,10,647	616,64,604
4	Taxable turnover (Rs.)	D	5370,46,198	4501,24,622
5	Ratio of input tax credit to taxable turnover (%)	E=C/D	6.91 %	13.70%
6	Increase in tax rate post-GST (%)	F= GST Rate less pre-GST Tax rate	-	6.50%
7	Increase in input tax credit availed post-GST (%)	G	-	6.79%
8	Analysis of Increase in input tax credit:			
9	Basic Price Pre-GST (per square feet) (Rs.)	H		3,750.00
10	Service Tax @4.5% (Rs.)	1= H*4.5%		168.75
11	VAT @ 1% (Rs.)	J=H*1°/0		37.50
12	Total per square feet price pre-GST (Rs.)	K=H+I+J		3,956.25
13	Recalibrated Basic Price after considering additional input tax credit of 6.79% in GST (Rs.)	L= H*(100-G)/100		3,495.38
14	GST 012% on recalibrated Basic Price (Rs.)	M= L*12%		419.45
15	Commensurate price post-GST (Rs.)	**N= L+M**		3,914.82

14. The DGAP has also contended that the additional ITC of 6.79% of the taxable turnover, should result in commensurate reduction of cum-tax price from Rs. 3,956.25 per square feet to Rs. 3,914.82 per square feet. He has further contended that as per the provisions of Section 171 of the CGST Act, 2017, the benefit of the additional ITC which had accrued to the Respondent, was required to be passed on to the flat buyers. He has also claimed that the Respondent had not objected to passing on of the benefit of ITC at the time of giving possession of the flat, however, the fact was that the benefit had not been passed on till now. The DGAP has pleaded that the payments received from the above Applicant did not state that the benefit available to the Respondent had been passed on to the Applicant, which showed that the Respondent had retained the benefit which had

accrued to him on account of GST. The DGAP has also alleged that by not reducing the basic price by 6.79% due to additional benefit of ITC and by charging GST at the increased rate of 12% on the pre-GST basic price, the Respondent had violated the provisions of Section 171 of the of the CGST Act, 2017.

15. The DGAP has also stated that on the basis of the CENVAT/ITC available pre and post-GST and the details of the amount collected by the Respondent from his purchasers during the period from 01.07.2017 to 30.06.2018, the amount of benefit of ITC not passed on by the Respondent or the profiteered amount came to Rs. 3,42,31,077/- which included 12% GST on the basic profiteered amount of Rs. 3,05,63,462/-. He has also supplied the details of all the buyers who had purchased flats from the Respondent along with their unit numbers vide Annexure-22 attached with the Report. The DGAP has further stated that the above amount was inclusive of Rs. 1,65,975/- (including 12% GST over the basic amount of Rs. 1,48,192/-) which the Respondent had profiteered from the Applicant No. 1. He has also intimated that the construction service was supplied in the State of Haryana only.

16. The DGAP has also stated that the benefit of additional ITC (6.79%) was more than the increase in the rate of tax (6.5%) which showed that net benefit of ITC had accrued to the Respondent and the same was required to be passed on to the above Applicant and therefore, the provision of Section 171 of the CGST Act, 2017 had been violated by the Respondent as the additional benefit of ITC @6.79% of the basic price received by the Respondent from the above Applicant during the period from 01.07.2017 to 30.06.2018, had not been passed on to him and the Respondent had collected an additional amount of Rs.1,65,975/- from the Applicant No. 1 which included both the profiteered amount @6.79% of the taxable amount and the GST on the said profiteered amount @12%. The DGAP has further stated that the Respondent had also realized an additional amount of Rs. 3,40,65,102/- including profiteered amount @6.79% of the taxable amount and GST on the profiteered amount @12% from the other home buyers who were not applicants in the present investigation. He has also intimated that all such buyers were identifiable as per the documents received form the Respondent in which their names and addresses along with unit nos. allotted to them had been mentioned.

17. The above Report was considered by the Authority in its meeting held on 28.08.2018 and it was decided that the Applicants and the Respondent be asked to appear before the Authority on 13.09.2018. Since, the Respondent had asked for adjournment of the hearing scheduled on

13.09.2018, it was decided to grant next hearing on 28.09.2018. During the course of the hearing the Applicant No. 1 did not appear, the DGAP was represented by Sh. Anwar Ali T. P., Additional Commissioner and the Respondent was represented by Sh. Rakesh Sodhi, Sh. Himanshu Juneja, Sh. Kishor Kunal, Sh. Achal Chawla and Ms. Ruchi Jha.

18. The Respondent vide his reply dated 11.09.2018 has submitted that the Applicant No. 1 had withdrawn the complaint which alleged that the Respondent had not passed on the benefit of ITC to him which showed that he was satisfied with the explanation given by the Respondent on the issue of not passing on the benefit of ITC.

19. The Respondent has also submitted that the computation of the benefit/ loss could not be done before completion of the project and he had never denied to pass on the benefit to the buyers as was evident from the correspondence made by him with them. He has further submitted that vide his email dated 28-Jul-2017 he had intimated the above Applicant that the benefit accruing to him, if any, would be calculated at the time of completion of the project and the same would be passed on to him. He has also claimed that the DGAP had also not disputed his this contention as had been mentioned in para 13 of the report. The Respondent has reiterated that the profiteering needed to be computed on the overall project and the benefit would be passed on to the buyers on the completion of the project and calculation of the same before completion would not give true account of the actual benefit/ loss accruing to the Respondent.

20. The Respondent has also pleaded that as per entry 5 (b) of 'Schedule II' of the CGST Act, construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly was deemed to be supply of service liable to GST, however, the said entry specifically excluded the cases where the entire consideration had been received after issuance of completion certificate or after its first occupation. He has further pleaded that 'Schedule III' of the CGST Act listed the activities or transactions which should be treated neither as a supply of goods nor a supply of services which covered, sale of land and subject to clause (b) of paragraph 5 of Schedule II, sale of building and accordingly, in case the building/ flat was sold post completion, it would be considered neither supply of goods nor supply of services. He has also contended that as per section 17 (2) of the CGST Act in case the goods or services or both were used by the registered person partly for effecting taxable supplies and partly for effecting exempt supplies the amount of credit shall be restricted to so much of the input tax as was attributable to the taxable supplies. He has further contended that

the value of the exempt supply included sale of land and subject to clause (b) of paragraph 5 of Schedule II, sale of building and therefore, the sale of building post completion was considered as exempt supply wherein the Respondent would be required to reverse the ITC. He has also stated that the Respondent was constructing flats under the project 'Anand Vilas', the total saleable area of which was 11,54,550 square feet, out of which he had been able to sell only 6,67,065 square feet which accounted for only 58% of the total saleable area. The Respondent has also mentioned that the above project was started in the year 2013 and was likely to be completed by March 2019 and during the last 4 years he had sold only 58% of the total saleable area and no flat had been sold since July 18 and hence at this point of time he was not in a position to determine how many flats would be sold before completion. He has further mentioned that in case if the flats were not sold before the completion, it would amount to sale of the building as per Schedule III of the GST law which would result in reversal of the ITC. The Respondent has also contended that the ITC which had been taken in to account for computation of the profiteered amount was based on all the credit availed by him till the time, assuming that he would be able to sell all the flats before completion, however, in case no sale could be made before completion, he would be required to reverse the proportionate credit to the extent of 42% of the area which was still unsold. He has also argued that due to the reversal of ITC which might happen later on, it would be incorrect to infer that the entire ITC was the benefit accruing to the Respondent. The Respondent has further argued that he was required to follow the guidelines issued by the Real Estate Regulatory Authority (RERA) Haryana according to which he could not increase the price of the flats and if the benefit computed by the DGAP was passed on to the buyers without taking in to account the reversals on the unsold flats, he would not be able to recover the amount from the buyers due to the Real Estate (Regulation and Development) Act, 2016 and therefore, the profit/ loss should be calculated on the completion of the project. He has also claimed that he was yet to receive the balance instalments from the buyers and if any benefit would accrue due to additional ITC it would be passed on and adjusted in the last instalment.

21. The respondent has also submitted that the Real Estate Sector had unique complexities due to long turnaround time unlike manufacture of goods and construction of a building was a long drawn process. He has further submitted that the manufacturing of goods took short time and hence computing of the benefit per unit was easy due to availability of exact quantities and prices of the inputs used per unit and the time taken for manufacturing but it took substantial period of time to construct a building. He has also claimed that the input output ratio varied considerably

since the start of the project till its completion due to various factors which included change in the tax rate and change in the prices of the inputs as construction period extended from 4-5 years and therefore, it was difficult to compute the benefit/ loss merely for the impugned period.

22. The Respondent has further claimed that the rate of GST had been changed on various goods/ services during the last one year of its implementation and the Government had reduced rates on over 200 products on 15th Nov 2017 and about 50 products on 27th Jul 2017 and therefore, in case there was any reduction in the tax rate in future, ITC would also be reduced and hence accurate computation of the benefit would be possible only when the project was completed.

23. The Respondent has also submitted that he was not in agreement with the computation of the profiteered amount of Rs. 3,42.31,077/- calculated by the DGAP as it included the GST of Rs. 36,67,615/- in the above amount which he had already paid to the Government and hence it should be excluded for the purpose of computation of the benefit. The Respondent has further submitted that a mere difference in the ITC availed in the pre and the post GST era could not be said to be the profit which had accrued to the Respondent and there were a number of factors which were required to be taken in to account for calculating the benefit. The Respondent has also claimed that he was eligible to take ITC in the pre GST regime as well however, the rate of tax on services had increased from 15% to 18% post GST and the rate of tax on goods had also increased from 5.25% VAT to 18%/12%/ 28% post GST. He has also furnished the comparison of tax rates under the erstwhile and post GST regime as under:-

Sr. No.	Description of goods/services	Tax rate under erstwhile regime	Post GST tax rate
1.	Architect	15%	18%
2.	Brokerage	15%	18%
3	Steel	5.25%	18%

He has further claimed that he would be paying tax at the rate of 18%/28% on the inputs instead of 5.25%/13.125%, due to which ITC would increase but it could not be considered as additional benefit which had arisen to the Respondent.

24. The Respondent has also contended that he had made purchases during the pre-GST period and hence the benefit of CENVAT credit of Excise Duty paid on the inputs was not available for providing the construction

services under the erstwhile regime, however the same was available in the GST regime on the basis of which the DGAP had computed the benefit which had accrued to him. The Respondent has further contended that the DGAP had not taken in to account the fact that he was engaged in procurement of goods from traders and he was not aware whether the trader was purchasing such goods from a trader or manufacturer and therefore, the benefit of Excise Duty, if any, had accrued to the vendor of the Respondent and not to him which had not been passed on to him. The Respondent has also highlighted that the prices of the goods procured by him had not reduced post GST. He has also claimed that as per the provisions of Section 171 of the CGST Act, any reduction in the rate of tax on any supply of goods or services or the benefit of input tax credit had to be passed on to the recipients by way of commensurate reduction in prices and it was the duty of the supplier to do so and the law did not require the recipient to pass on the benefit and hence the Respondent would be in a position to pass on the benefit only if the same had accrued to him, however, there was no benefit of Excise Duty to the Respondent as he was purchasing goods from the traders and therefore, the benefit which had not accrued to him could not be passed on by him.

25. The Respondent has also pleaded that he was a bonafide and law abiding dealer who was filing his Statutory Returns and he had not violated any provisions of the law and had never denied to pass on the benefit, however the accurate computation of the same was required as he would not be able to recover the wrongly passed on benefit and therefore, he had been requesting to allow him to pass it on on the completion of the project. He has further pleaded that in view of his submissions the Imposition of penalty was not warranted. The Respondent also prayed that he was in the process of computing the actual benefit/loss which had accrued to him with the reasonable assumption for the unsold area which required reversal of ITC and would submit the same to the Authority and requested for grant of 15 days time for quantifying the benefit and submit the same. The Respondent further prayed that personal hearing be granted to him before any decision was taken in this matter with liberty to produce relevant evidence.

26. The Respondent vide his submissions dated 28.09.2018 reiterated the submissions which were made by him on 11.09.2018 and additionally submitted that the DGAP had mentioned in his Report that the Respondent had not denied his liability to transfer the benefit. However, the same could not be computed before completion of the project, as accurate computation of the same was required as it would not be posssible to recover it if it was passed on wrongly. He has also prayed that he should be allowed to

pass on the benefit after the completion of the project and therefore, the imposition of penalty was not warranted. He has also argued that it was well settled that imposition of penalty was a quasi-criminal adjudication and hence, the mens rea or malafide intent ought to be necessarily present, which was absent in the present case. He has also cited the cases of Hindustan Steel Limited v. State of Orissa (1970) 25 STC 211 (SC) and CST v. Sanjiv Fabrics 2010-TIOL-71-SC-CST wherein it has been held that mens rea was an essential ingredient for imposition of penalty. He has also quoted the case of Bharjatiya Steel Industries v. Commissioner Sales Tax, U.P. 2008 (11) SCC 617 in which it was held that:-

> "An assessing authority has been conferred with a discretionary jurisdiction to levy penalty. By necessary Section 78 (5) of the Act of 1994 unless there is mens rea on the part of the trader. Apart from this, mens rea is an essential ingredient for imposing penalty. The word "mens rea" does not bear a literal meaning (i.e. "bad mind" or quilty mind) because one who breaks the law even with the best of motives still commits a crime The language is no longer meant to convey the idea of general malevolence characteristic of early common law usage. The true translation is criminal intention or recklessness. Words typically imposing a mens rea requirement include wilfully, maliciously, fraudulently recklessly, negligently, corruptly, feloniously and wantomly
>
> The fundamental principle pertaining to mens rea is based on the maxim actus non facit reum nisi mens sit rea. (the intent and act must both concur to constitute the crime). Meaning thereby an act does not make a man guilty without guilty intention to do the guilty act which is made penal by the statute or common law..."

Based on the above judgements the Respondent has argued that the penalty proposed to be imposed by the impugned notice under Section 29 and 122-127 of the CGST Act read with Rule 133 of CGST Rules, was not justifiable and hence it might not be imposed.

27. The Respondent has also requested to take into account the amount of reversal of ITC due to unsold flats and allow him to pass on the benefit at the time of completion of the project so that correct amount of benefit could be passed on and no penalty should be imposed on him on this account. He has further requested that since the beneficiaries/ buyers were identifiable it would not be difficult to pass on the benefit with the last instalment.

28. Further, hearing in the case was held on 11.10.2018 during which the Respondent has submitted the following details:-

- Purchase summary for 'Anand Vilas' project-Annexure-2
- Summary of payment details and pending dues-Annexure-3
- Payment Schedule-Annexure-4
- Detail of buyers with pending instalments-Annexure-5
- Project details-Annexure-6
- Details of taxes collected from buyers till date-Annexure-7
- Undertaking to pass-on the benefit on completion of the project-Annexue-8

29. The Respondent has also stated that the benefit of ITC accruing to the Respondent was not certain due to variation in the project cost and the GST rates which was evident from the uneven purchase pattern of the Respondent given in Annexure-2. He has further stated that the ITC of the Respondent was varying due to the changes in the rates of GST on the inputs and hence it was difficult to ascertain the costs and pass on the benefit before closure of the project. He has also claimed that 42% of the total saleable area had not been sold as on 30.06.2018 as was evident from Annexure-3 and since the ITC was required to be reversed on the unsold area the accurate computation of the benefit could not be made at this stage. He has further claimed that after completion of the project no GST could be charged and the ITC has to be reversed however, the DGAP had calculated the benefit on the assumption that the whole area would be sold therefore, the calculation of the benefit made by the DGAP was incorrect. He has also contended that as per the RERA guidelines he could not increase the prices of the flats and in case the benefit was passed on at this stage the wrongly passed benefit could not be recovered. He has further contended that he vide the payment schedule (Annexure-4) had stated that "all other additional charges and taxes as applicable, in terms of application form, shall be payable along with last instalment" therefore, bona-fide intention of the Respondent to pass- on the benefit was clear. The Respondent has also submitted that the reversal of the ITC should be taken in to account while computing the benefit to be passed on and accordingly, he had computed the benefit on the basis of the area sold i.e. 58% of the total saleable area vide Annexure-5. He has also mentioned that the benefit accruing to him was due to the ITC which pertained to all the buyers as the construction was being undertaken in respect of all the units and the inputs were also being used for all of them whether the instalment was due/paid by the buyer post introduction of GST or not. He has further mentioned that the benefit computed by the DGAP was based on the instalments received which was accruing only to the buyers who had paid

instalment(s) post introduction of GST however, he had also computed the benefit to be passed on the basis of the instalment(s) received. He has also claimed that the amount of benefit was Rs. 11,97,77,709/- as per Annexure-5, after considering reversals on account of the unsold flats. He has further claimed that each buyer should be entitled to benefit, however, had he computed the same on the basis of the instalment(s) received, no benefit would be passed on to those buyers who had not purchased flats post GST. Therefore, he has submitted that the benefit should be given on the basis of the area sold which would be more correct and rational mechanism for passing on the benefit. The Respondent has also prayed to consider the amount of reversal of credit due to unsold flats and requested to allow him to pass on the benefit at the time of completion of the project and also not to impose penalty.

30. Further, hearing in the case was held on 28.10.2018 wherein the Respondent has submitted the following details:-

- Annexure-2: Project status of all other projects
- Annexure-3: Certified copies of Occupancy Certificates (OCs)
- Annexure-4: Details of projects whose OCs have been obtained post GST
- Annexure-5: Letter sent to customers intimating that benefit has been passed on in respect of all on going projects
- Annexure-6: Press statements
- Annexure-6: Case law

31. The Respondent has also stated that no penalty should be imposed on him as he had passed on the benfit which had accrued to him to his customers subject to the modification at the time of completion of the project. He has further stated that no malafide intention had been established on the part of the Respondent not to pass on the benefit to his customers and in fact, he had discharged his obligation as per the provisions of Section 171 of the CGST Act and hence penalty was not attracted in his case.

32. The Respondent has also submitted that in accordance with the anti- profiteering clause he had passed on the benefit in respect of the Anand Vilas project not only to the Applicant No. 1 but to all the buyers who had purchased flats. He has also contended that without prejudice to the disagreement on the methodology of computation of the benefit, he had passed on the benefit on account of ITC subject to modification and

credited the same to all the buyers and intimation had also been given to them as per Annexure-5. He has further submitted that he had also passed on the benefit accuring to the customers of his other projects also in respect of which OCs had been applied post GST on a non-prejudice basis. He has also pleaded that there was no mens rea or malafide intent in the instant case and imposition of penalty was not sustainable. He has further pleaded that he had never refused to pass on the benefit which was evident from the correspondence made between him and his customers, however it was his contention that the benefit could be passed only at the time of completion of the project as accurate computation of the benefit was required to be done.

33. The Respondent has also argued that the anti-profiteering clause had been recently introduced in the law and in the absence of any mechanism/ timeline, the Authority ought to act leniently in respect of imposition of penalty. He has also claimed that the Government and the GST Council through this clause wanted to ensure that the rate rationalization benefit was passed on to the society at large in the shape of reduced prices. He has also quoted the then Finance Secretary to the Government of India stating that this Authority would investigate only those cases which had mass impact and not small cases and threfore, he has pleaded that no penalty should be imposed on him. He has also contended that the Government of India was laying great stress on the ease of doing business and was promoting business activities for employment generation and hence, the imposition of penalty in the absence of mens rea or wrong doing, would be detrimental to the business. He has further contended that the CGST Act did not provide for imposition of penalty in the cases of profiteering as it was not covered under Section 122-127 of the CGST Act read with Rule 133 of the CGST Rules. It was also submitted that none of the said provisions of the CGST Act contemplated levy of penalty in the cases where the Respondent had been benefited due to introduction of GST and the benefit had not been passed on to the recipients by commensurate reduction in the prices which were still prone to modification at the time of completion. He has further submitted that the real estate industry being dynamic and governed by the contractual obligations of the parties through the Buyer's Agreements and the sale considerations, it was advised and it was understanding of the Respondent to pass on the benefit of ITC only on closure of the obligations of the parties. He has also argued that under Rule 133 of the CGST Rules penalty could be imposed as was specified under the CGST Act and since there was no corresponding provision in the Act to impose penalty for contravention of Section 171 no penalty could be imposed as it was well settled that the penalty had to be prescribed in the main statute/ Act itself. He has further argued that the Rules could not prescribe penalty

by travelling beyond the provisions of the Statute/Act and such exercise of power amounted to “excessive delegation”. He has also pleaded that in a similar situation of Sikkim State Lottery Rule imposing a fee of Rs. 2,000/- per lottery draw on the distributor was struck down by the Hon’ble Sikkim High Court in the case of Shubh Enterprises v. Union of India; W. P. (C) No. 41 OF 2013 decided on 14.10.2015 which was later on affirmed by the Hon’ble Supreme Court on the grounds of excessive delegation since the parent statute i.e. the Lottery Regulation Act, 1998 did not envisage such a fee. Similarly, the Hon’ble Madras High Court had struck down Rule 3 (ee) of the Gold Control Rules, 1969 since it did not contain any guidelines for the licensing authorities to determine “too low a turnover holding that the Rule would work differently for different individuals depending upon the particular officer, as per the law settled in the case of B. Narasimhalu Chettiar v. Government of submitted that the real estate industry being dynamic and governed by the contractual obligations of the parties through the Buyer’s Agreements and the sale considerations, it was advised and it was understanding of the Respondent to pass on the benefit of ITC only on closure of the obligations of the parties. He has also argued that under Rule 133 of the CGST Rules penalty could be imposed as was specified under the CGST Act and since there was no corresponding provision in the Act to impose penalty for contravention of Section 171 no penalty could be imposed as it was well settled that the penalty had to be prescribed in the main statute/Act itself. He has further argued that the Rules could not prescribe penalty by travelling beyond the provisions of the Statute/ Act and such exercise of power amounted to “excessive delegation”. He has also pleaded that in a similar situation of Sikkim State Lottery Rule imposing a fee of Rs. 2,000/- per lottery draw on the distributor was struck down by the Hon’ble Sikkim High Court in the case of Shubh Enterprises v. Union of India; W. P. (C) No. 41 OF 2013 decided on 14.10.2015 which was later on affirmed by the Hon’ble Supreme Court on the grounds of excessive delegation since the parent statute i.e. the Lottery Regulation Act, 1998 did not envisage such a fee. Similarly, the Hon’ble Madras High Court had struck down Rule 3 (ee) of the Gold Control Rules, 1969 since it did not contain any guidelines for the licensing authorities to determine “too low a turnover holding that the Rule would work differently for different individuals depending upon the particular officer, as per the law settled in the case of B. Narasimhalu Chettiar v. Government of Tamil Nadu 89 LW 55. He has also contended that in his case even if the profiteering was established maximum penalty of Rs. 25000/- under Section 125 of the CGST/SGST Act could be imposed.

34. The Respondent has also submitted that the Show Cause Notice issued to him had merely mentioned the provisions of Section 122-127

of the CGST Act and Rule 133 of the CGST Rules, without specifying the exact allegations against him and the above Sections were not attracted in his case except for Section 125 which was general in nature. It was further submitted that it was obligatory to point out the allegation specifically in order to enable the Respondent to make appropriate submissions in his defence and since the notice was general it was bad in law for being vague and arbitrary and the penalty proceedings were required to be dropped. He has also cited the judgement recorded by the Hon'ble Apex Court in the case of Kaur & Singh v. CCE, New Delhi, 1997 (94) ELT 289 (SC), wherein the Hon'ble Court has held as under:-

> "2. The assessee was issued a notice dated 10th December, 1981, to show cause why a penalty should not be imposed upon it under Rule 9 (2) of the Central Excise Rules, 1944, and why Central Excise duty should not be collected from it on goods cleared without payment of the same during the year 1980-81. The notice, it is common ground, was issued after the expiration of the period of six months. It could, therefore, have been issued only upon the basis that the assessee was guilty of fraud or of collusion or of wilful mis-statement or suppression of facts or of contravention of the provisions of the Act or the Rules with intent to evade payment of Excise duty; this because, by the time the show cause notice was issued, Rule 9(2) had been amended to incorporate therein the period specified in Section 11A of the Act. The show cause notice does not set out any particulars in respect of fraud or collusion or wilful mis-statement or suppression of facts or contravention with intention to evade the payment of Excise duty. Not only does it not give any such particulars, it does not even make a bare allegation.
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> 4. This Court has held that the party to whom a show cause notice of this kind is issued must be made aware of the allegation against it. This is a requirement of natural justice. Unless the assessee is put to such notice, he has no opportunity to meet the case against him. This is all the more so when a larger period of limitation can be invoked on a variety of grounds. Which ground is alleged against the assessee must be made known to him, and there is no scope for assuming that the ground is implicit in the issuance of the show cause notice. [See Collector of Central Excise v. H.M.M. Limited, 1995 (76) E.L.T. 497 and Raj Bahadur Narayan Singh Sugar Mills Limited v. Union of India, 1996 (88) E.L.T. 24]."

35. The Respondent has also cited the judgment passed by the Hon'ble Supreme Court in the case of **CCE v. HMM Ltd., 1995 (76) ELT 497 (SC)**,

wherein the Hon'ble Court has ruled as under:-

> 2. There is considerable force in this contention. If the Department proposes to invoke the proviso to Section 11A(1), the show cause notice must put the assessee to notice which of the various commissions or omissions stated in the proviso is committed to extend the period from six months to 5 years. Unless the assessee is put to notice, the assessee would have no opportunity to meet the case of the department. The defaults enumerated in the proviso to the said sub-section are more than one and if the excise department places reliance on the proviso it must be specifically stated in the show cause notice which is the allegation against the assessee falling within the four corners of the said proviso. In the instant case that having not been specifically stated the Additional Collector was not justified in inferring (merely because the assessee had failed to make a declaration in regard to waste or by-product) an intention to evade the payment of duty. The Additional Collector did not specifically deal with this contention of the assessee but merely drew the inference that since the classification list did not make any mention in regard to this waste product it could be inferred that the assessee had apparently tried to evade the payment of excise duty."

The Respondent has therefore, argued that in the absence of invocation of specific provision with respect to imposition of penalty, the entire notice regarding levy of penalty deserved to be dropped.

36. The Respondent has also submitted that the methodology of computation of profiteered amount applied by the DGAP was arbitrary as there was no acceptable methodology to demonstrate the absence of 'profiteering' as neither the CGST Act nor the CGST Rules provided the guidelines/methodology for ascertaining the quantum of 'profiteering' by the supplier and the same methodology could not be applied in all the cases due to different business models, tax structure and production cycle etc. The Respondent has further submitted that the DGAP had assessed the profiteered amount by merely computing the difference in the ratio of ITC to the taxable turnover under the pre-GST and the post-GST era however, it had not been taken in to account that the rates of tax under both the regimes on the outward supplies made by the Respondent had also varied which had not been considered by the DGAP in his report. In this regard, the Respondent has quoted the findings given by this Authority in the case of Kumar Gandharv v. KRBL Limited 2018-VIL-02-NAA, Case No. 3/2018 decided on 04.05.2018 as under:-

> "6. We have carefully heard the Respondent and also perused the material placed on the record and it is revealed that the "India Gate Basmati Rice" sold by the Respondent was not liable for tax before the implementation of the GST and after coming into force of the CGST Act, 2017 it was levied GST @ 5% w.e.f. 22.09.2017. The Respondent was also made eligible to avail ITC w.e.f. the above date. However, the ITC claimed by the Respondent was not sufficient to meet his output tax liability and he had to pay the balance amount of tax in cash as is evident from the perusal of the table prepared by the DGSG. It is also apparent from the returns filed by the respondent for the months of September, 2017, October, 2017 and November, 2017 that the ITC available to him as a percentage of the total value of taxable supplies was between 2.69% to 3% whereas the GST on the outward supply of his product was 5% which was not sufficient to discharge his tax liability. Moreover in this case the rate of tax has been increased from 0% to 5% instead of reduction in the same. Therefore, there appears to be no reason for treating the price fixed by the Respondent as violation of the provisions of the Anti-Profiteering clause."

37. The Respondent has also claimed that there was no nexus between the instalments received and the ITC as the ITC was dependent on the goods and services purchased by the Respondent and the taxable turnover was based on the instalments received from the buyers. He has further claimed that the Respondent might not have received any instalment from the buyers during a specific period however, the construction would have continued and therefore, ITC would be available. He has also contended that in case instalments were due from lesser number of buyers, it would always increase the ratio of ITC to the taxable turnover and vice-versa. He has further contended that in this case also no instalment was due from 01-07-2017 to 30-06- 2018 from the buyers of 130 flats however, it could not be stated that the inputs and the input services had not been obtained for the flats purchased by these buyers. Therefore, he has claimed that the computation made by the DGAP had not considered the various factors which would have impacted the profiteered amount.

38. The Respondent has also argued that this Authority had travelled beyond its power by increasing the scope of investigation. He has further argued that in the present case the DGAP had started investigation in respect of a single unit of Anand Vilas Project launched by the Respondent however, the complaint was withdrawn by the Applicant No. 1 and the report submitted by DGAP also pertained to the above project and the proceedings before the Authority were initially restricted to the scope of

the above however, during the course of the proceedings, the Authority had asked the Respondent about his other projects also. He has further argued that as per Rule 133 (4) if the Authority was of the view that further investigation was required in the matter after the DGAP's investigation, it could for reasons to be recorded in writing, refer the matter to the DGAP to cause further investigation or inquiry. Therefore, he has contended that in view of the above provision it was incumbent upon the Authority to seek report from the DGAP before proceeding to pass any order with respect to other projects of the Respondent and the power of investigation could not be taken over by the Authority in the absence of any such prescription under the CGST Act / Rules. The Respondent has also stated that without prejudice to the above, as a provisional measure he had also passed on the benefit which had accrued to the buyers of the other projects also in respect of which OCs had been obtained post GST. He has also attached copies of the letters sent to the buyers intimating that the benefit had been passed on in respect of the on- going projects i.e. the Emerald Bay and the Aman Vilas. The Respondent finally prayed that the present proceedings may be dropped and penalty may not be imposed.

39. In continuation of the earlier submissions, the Respondent has filed additional submissions dated 05.11.2018 in which he has furnished status of all the projects along with the details of the benefit passed vide Annexure-1, details of compliances in respect of the projects vide Annexures-2A, 2B & 2C, sample letter of intimation to buyers vide Annexure-3 and reasons for difference between the area sold of the projects in his submissions dated 11.10.2018 vide Annexure-4. He has also stated that out of the total 11 projects OCs had been received in respect of 8 projects and the buyers had occupied them after registration of the conveyance deeds. He has further stated that sale of land as per Schedule III of the CGST Act and clause 5 (b) of Schedule II was not to be treated as supply of goods or services therefore, ITC would not be available on the sale of the flats of 6 projects after receipt of OCs and hence, the provisions of Section 171 of the CGST Act should not be applicable on these projects. He has also claimed that the difference in the area sold in annexures furnished through his letter dated 11-Oct-2018 was due to inadvertent error while stated that without prejudice to the above, as a provisional measure he had also passed on the benefit which had accrued to the buyers of the other projects also in respect of which OCs had been obtained post GST. He has also attached copies of the letters sent to the buyers intimating that the benefit had been passed on in respect of the on- going projects i.e. the Emerald Bay and the Aman Vilas. The Respondent finally prayed that the present proceedings may be dropped and penalty may not be imposed.

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40. The submissions dated 26.11.2018 and 05.11.2018 filed by the Respondent were forwarded to the DGAP for his counter replies and he vide his Reports dated 16.11.2018 and 12.11.2018 respectively has stated that all the issues raised by the Respondent pertained to the Authority and hence, no Report was being filed. The DGAP was again asked to file a comprehensive reply on 20.11.2018 on the issues raised by the Respondent. The DGAP has accordingly submitted revised investigation Report dated 28.12.2018, the brief facts of which are as follows:-

a. On the issue of details of all the projects and the benefit passed on in respect of all the on-going projects by the Respondent: The DGAP has stated that as per the provisions of Rule 129 (1) of the CGST Rules, 2017, if the Standing Committee on Anti-profiteering was of the view that there was prima facie evidence to come to the conclusion that a supplier had not passed on the benefit of reduction in the rate of tax on the supply of goods or services or the benefit of ITC to his recipients by way of commensurate reduction in the prices, it should forward the case to the DGAP for a detailed investigation and hence he could investigate the complaint only when the above Committee had referred the matter to him. He has also stated that accordingly, he had confined the scope of investigation to only that project on the basis of the RERA registration in respect of which the anti-profiteering application had been received and for which direction to investigate had been given by the Standing Committee. He has further stated that the investigation had covered all other recipients in that project, in addition to the Applicant No. 1. He has also contended that due to

shortage of staff and other infrastructure he was not in a position to investigate all the projects of a supplier against which allegation of profiteering had been made.

b. On the Issue of the modalities and mechanism of Anti- profiteering: The DGAP has submitted that the Respondent had mentioned that there were no guidelines/methodology for computing the quantum of "profiteering by the supplier. In this regard, it has been contended by the DGAP that as per Rule 126 of the CGST Rules, 2017, the Authority had been empowered to determine the methodology and procedure for determination as to whether the reduction in the rate of tax or the benefit of ITC had been passed on by a registered person to the recipients by way of commensurate reduction in prices or not. He has also submitted that this Rule did not stipulate that the Authority should prescribe the methodology and procedure to quantify the amount of profiteering and hence the quantum of profiteering had to be computed on a case to case basis analysis by devising appropriate method as per the nature and facts of each case and no uniform methodology could be prescribed for determination of the quantum of benefit to be passed on. He has further stated that in Rule 126, the word used was 'determine' and not 'prescribe'.

c. On the issue of the CGST Act, 2017 that it does not contemplate levy of penalties: The DGAP has submitted that this issue pertained to the proposal of the Authority to impose penalty on the Respondent which was the exclusive domain of the Authority and he being the investigative arm could not file any Report on the same.

d. On the issue that the NAA had travelled beyond its scope of investigation: The DGAP has claimed that this issue did not pertain to him hence, no Report was being filed.

41. The DGAP after examination of the documents submitted by the Respondent during the hearing held on 05.11.2018, has stated that a notice was issued to the Respondent on 04.12.2018 asking him to furnish details of the home buyers along with the area sold and in response, the Respondent had submitted further documents on 11.12.2018 & 18.12.2018. The DGAP has also stated that in view of the various submissions made by the Respondent before the Authority and him he had re-examined the Report dated 27.08.2018 filed by him and after taking in to account the revised details of the area sold by the Respondent as per the home-

buyer's list, the ITC availed and the Respondent's taxable turnover during the period from April, 2016 to June, 2017 (i.e. pre-GST) and during the period from July, 2017 to June, 2018 (i.e. post-GST), the ratio of CENVAT/ Input Tax Credit and the taxable turnover, pre-GST & post-GST, was as per the details furnished in Table-E below:-

Table-"E" (Amounts in Rs.)

S. No.	Particulars	April, 2016 to March, 2017	April, 2017 to June, 2017	Total (Pre-GST)	July 2017 to June, 2018 (Post-GST)
1	CENVAT of Service Tax Paid on Input Services (A)	1,67,90,834	39,87,427	2,07,78,261	–
2	Input Tax Credit of VAT Paid on Purchase of Inputs (B)	21,27,046	8,23,223	29,50,269	–
3	Total CENVAT/Input Tax Credit Available (C)= (A+B)	1,89,17,880	48,10,650	2,37,28,530	–
4	Input Tax Credit of GST Availed (D)	–	–	–	6,16,64,604
5	Total Taxable Turnover (E)	42,43,39,766	11,27,06,432	53,70,46,198	50,10,60,283
6	Total Saleable Area (in Sq ft.) as per Submission dated 28.09.2018 to NAA (F)			11,54,550	11,54,550
7	Sold Area (in Sq. ft.) relevant to above turnover as per Home Buyers List (G)			5,78,095	3,75,400
8	Relevant Proportionate input tax credit [(H)= (C*G)/(F)] or [(H)= (D*G)/(F)]			1,18,81,118	2,00,50,143
9	**Ratio of CENVAT/Input Tax Credit Pre-GST & Post-GST [(I)= (H)/(E)]**			**2.21%**	**4.00%**

42. The DGAP has also claimed that the ITC as a percentage of the total turnover that was available to the Respondent during the pre-GST period (April, 2016 to June, 2017) was 2.21% and during the post-GST period (July, 2017 to June, 2018), was 4.00% which showed that post-GST, the Respondent had benefited from the additional ITC to the tune of 1.79% [4.00% (-) 2.21%] of the taxable turnover. He has further claimed that as per the revised details given in the Table-E above, the comparative figures of ITC availed/available during the pre-GST period and the post-GST period, were computed in the Table-'F' as under:-

Table-"F" (Amounts in Rs.)

S. No.	Particulars		Pre-GST	Post-GST
1	Period	A	April, 2016 to June, 2017	July, 2017 to June, 2018
2	Output tax rate (%)	B	5.50%	12.00%
3	Ratio of CENVAT/Input Tax Credit to Taxable Turnover as per Table - A above (%)	C	2.21%	4.00%
4	Increase in tax rate post-GST (%)	D= 12% less 5.50%	–	6.50%
5	Increase in input tax credit availed post-GST (%)	E= 4.00% less2.21%	–	1.79%
6	**Analysis of Increase in input tax credit:**			
7	Base Price raised during July, 2017 to June, 2018 (Other Than Cancelled Units)	F		44,37,82,127
8	Other than Base Price raised during July, 2017 to June 2018	G		5,72,78,156
9	Total Taxable Value raised during July, 2017 to June, 2018	H=F+G		50,10,60,283
10	GST Collected @ 12% over Basic Price	I= F*12%		5,32,53,855
11	GST Collected @ 18% over other than Basic Price	J = G*18%		1,03,10,068
12	Total GST Collected	K = I+J		6,35,63,923
13	Total Demand collected	L=H+K		56,46,24,206
14	Recalibrated Basic Price	M=F*(1-E) or 98.21% of F		43,58,38,427
15	GST @12%	N = M*12%		5,23,00,611
16	Recalibrated other than Basic Price	O = G*(1-E) or 98.21% of G		5,62,52,877
17	GST @18%	P = O*18%		1,01,25,518
18	Commensurate demand price	Q=M+N+O+P		55,45,17,433
19	Excess Collection of Demand or Profiteering Amount	R=L-Q		1,01,06,773

43. The DGAP has also argued that the additional ITC of 1.79% of the taxable turnover should result in commensurate reduction in the base prices of the flats and hence as per the provisions of Section 171 of the CGST Act, 2017, the benefit of the additional ITC which had become available to the Respondent, was required to be passed on to the flat buyers. He has also re-computed the profiteered amount after taking in to account the CENVAT/ITC availability pre and post-GST and the details of the instalments received by the Respondent from the Applicant No. 1 and the other home buyers during the period from 01.07.2017 to 30.06.2018 and stated that the amount of benefit of ITC which had not been passed on by the Respondent to his customers or the profiteered amount came to Rs. 1,01,06,773/-which included GST (@12% or 18%) on the base profiteered amount of Rs. 89,68,979/- and which also included an amount of Rs. 49,169/- (including GST on the base amount of Rs. 43,655/-) which was profiteered by the Respondent from the above Applicant. The details of the home buyers and the unit no. wise break up of the amount of Rs. 89,68,979/- has been furnished by the DGAP vide Annexure-22 (revised).

44. The DGAP has also mentioned that the above computation of the profiteered amount was in respect of the 155 flat buyers whereas, the Respondent had booked 303 flats till 30.06.2018, out of which 148 buyers had booked them in the pre-GST period and also paid the booking amount in this period but they had not paid any consideration during the period between 01.07.2017 to 30.06.2018 post-GST, the period for which the investigation was being carried out. He has further mentioned that if the ITC in respect of these 148 units was calculated with reference to the 155 units where payments had been received after GST had come in to force, the ITC as a percentage of taxable turnover would be distorted and it would be erroneous and hence, the the benefit of ITC in respect of these 148 units should be calculated when the consideration had been received post-GST by taking into account the proportionate taxable turnover in respect of these 148 Units. He has also intimated that in view of the details of outward supplies of the construction service furnished by the Respondent, it was found that the service was supplied in the State of Haryana only. The DGAP has further mentioned that the Respondent vide Annexure- 2A attached to his submissions dated 05.11.2018 had submitted before the Authority that he had passed on the benefit of Rs. 1,97,77,419/- to the 303 flat buyers including the units under cancellation and accordingly, a summary of the category wise profiteering & the benefit passed on has been furnished by him in the Table-'G' given below:-

Table-"G" (Amounts in Rs.)

S. No.	Category of Customers	No. of Units	Area (in Sqf)	Amount Received Post GST	Profiteering Amt. as per Annex-22	Benefit claimed to have been Passed on by Respondent	Difference	Remark
A	B	C	D	E	F	G	H	I
1	Applicant	1	1,940	24,38,844	49,169	53,994	(4,825)	Excess Benefit passed on.
2	Other Than Applicant	92	2,25,420	38,99,63,392	78,64,128	62,73,889	15,90,239	Further Benefit to be passed on as per Annex-24
3	Other Than Applicant	62	1,48.040	10,86,58,047	21,93,476	41,20,249	(19,26,774)	Excess Benefit passed on. List Attached as Annex-25
4	Other Than Applicant	127	2,85,845	–	–	79,55,638	(79,55,638)	No Consideration Paid Post-GST, However, Respondent passed on benefit. List Attached as Annex-26
5	Other Than Applicant	3	5,820	–	–	–	–	No Consideration Paid Post-GST & No benefit passed. List Attached as Annex-26
6	Other Than Applicant	3	8,120	86,78,966		2,25,996	(2,25,996)	Cancelled Units. List Attached as Annex-26
7	Other Than Applicant	18	41,235	–	–	11,47,653	(11,47,653)	Cancelled Units. List Attached as Annex-26
8	Other Than Applicant	206	4,38,130	–	–	–	–	Unsold Units
	Total	**512**	**11,54,550**	**50,97,39,249**	**1,01,06,773**	**1,97,77,419**	**(96,70,646**	

45. The DGAP has also contended that the benefit claimed to have been passed on by the Respondent was less than what he should have passed on in respect of 92 cases (Sr. 2 of the above table) amounting to Rs. 15,90,239/- and the benefit claimed to have been passed on by the Respondent was higher compared to what he should passed on in respect of the 63 recipients of the flats including the Applicant No. 1 (Sr. 1 & 3 of above table) amounting to Rs. 19,31,599/-. He has further contended that the Respondent has also stated to have passed on the benefit amounting to Rs. 93,29,286/- in respect of 148 buyers of the flats who had not paid any consideration post GST. The DGAP has found that the additional ITC benefit of 1.79% of the taxable turnover which had accrued to the Respondent was required to be passed on to the Applicant No. 1 and the other recipients and therefore, the provisions of Section 171 of the CGST Act, 2017 had been violated by the Respondent as the additional benefit of ITC @1.79% of the base price received by the Respondent during the period from 01.07.2017 to 30.06.2018 had not been passed on to the

Applicant No. 1 and the other buyers and the Respondent had realized an additional amount of Rs. 49,169/- from the Applicant No. 1 which included both the profiteered amount @1.79% of the taxable amount (base price) and the GST on the said profiteered amount, however, the Respondent has claimed to have passed on Rs. 53,994/- during the hearings therefore, the Respondent has passed on excess amount of Rs. 4,825/- (53,994/-(-) 49,169/-) which might be adjusted against the future demands from the above Applicant. He has also claimed that the investigation had revealed that the Respondent had realized an additional amount of Rs. 15,90,239/- which included both the profiteered amount @1.79% of the taxable amount (base price) and the GST on the said profiteered amount from 92 other recipients who were not Applicants in the present proceedings and since they were Identifiable as per the documents furnished by him therefore, this additional amount of Rs. 15,90,239/- was required to be returned to such eligible buyers.

46. The revised Report filed by the DGAP was considered by the Authority and it was decided that the Applicants and the Respondent be asked to appear before the Authority on 15.01.2019. Since, the Respondent had asked for adjournment of the hearing scheduled on 15.01.2019, the Authority decided to accord next hearing opportunity on 21.01.2019. During the hearing, the Respondent has filed reply dated 19.01.2019 on the DGAP's revised Investigation Report as follows:-

i. The Respondent has submitted that the benefit of ITC pertained to all the buyers on account of the area sold to each of them and on the basis of his understanding of the proceedings before this Authority and the previous report of the DGAP, he had already passed on the benefit of ITC to all the buyers although he had not received consideration from all of them post GST. He has also submitted that the benefit if any, had accrued to him due to ITC which pertained to all the buyers as the construction was under progress in respect of all the units and the inputs were also being used for all of them irrespective of the fact whether the instalment was due/paid by the buyer post introduction of GST or not. He has also attached details of the benefit passed as per Annexure-A.

ii. The Respondent has also claimed that vide 'Table B' of the reply of the DGAP the GST realised from the buyers had been considered as the profiteered amount, which was not correct as it had been paid to the Government. The Respondent has further claimed that the GST amount of Rs. 11,37,794/- collected on the increased sale consideration had been deposited with the Government even if it

was collected in excess and the same should not be included in the profiteered amount and therefore, the revised profiteered amount should be taken as Rs. 89,68,938/- (79,43,655+10,25,279). He has also contended that the additional benefit to be passed on to the buyers would be Rs. 7,53,217/- and not Rs. 15,90,239/- as had been calculated vide Annexure-B and the excess benefit passed on to the buyers would be Rs. 22,22,072/- as per the revised calculation shown in Annexure-C.

iii. The Respondent has further contended that the DGAP has claimed in his Report that after taking in to account the profiteered amount of Rs. 15,90,239/- which was payable to the flat buyers the Respondent had paid an amount of Rs. 96,70,646/- in excess to them and hence the total extra benefit was Rs. 1,12,56,061/- (96,70,646 +15,90,239). He has also stated that the DGAP had suggested to adjust this amount against the future instalments however, it would not be possible to do so and hence he should be allowed to adjust the same against the amount which was payable by the Respondent.

47. The Authority, during the hearing held on 21.01.2019, had directed the Respondent to submit the details of the instalments received by him from the buyers from 01.07.2018 to 31.12.2018 and the ITC benefit passed on by him to them on these instalments. He was also asked to submit compliance of Section 171 of the CGST Act, 2017 in case of his other on going projects and Occupation/Completion Certificates in case of the completed projects as he had himself admitted during the course of the hearings that he was executing other projects also and had taken suo moto initiative to pass on the benefit of additional ITC which he had received on these projects. The Respondent, vide his submissions dated 04.02.2019 has submitted the following points and documents:-

a. Detail of instalments received post GST till 31st Dec 2019 as per Annexure-A

b. OCs of the completed projects as per Annexure-B

c. The Respondent has further submitted that he had not sold any unit under the Project Anand Vilas after 30th June, 2018.

48. The submissions of the Respondent were forwarded to the DGAP on 06.02.2019 and the DGAP vide his Report dated 12.02.2019 has stated that:-

a. As the OC for the project had already been applied and was expected to be received shortly, it would not be correct to re-quantify the profiteered amount by extending the period of investigation till 31.12.2018 as it would amount to re-investigation of the case, leading to complete reworking of the availability of ITC, area sold, taxable turnover and the profiteered amount. He has also stated that the exact quantum of benefit of ITC to be passed on could be ascertained only after the project was completed when there would be no further accrual of ITC to the Respondent. Therefore, he has suggested that the present proceedings based on his Report dated 27.08.2018 and subsequent Report dated 21.12.2018 should be finalised and the Respondent should be asked to pass on the balance benefit to the flat buyers after completion of the project, based on the area sold after 30.06.2018, consideration received after 30.06.2018 and the ITC availed after 30.06.2018.

b. The DGAP has also submitted that no Report was being filed on the details of the OCs issued in respect of other completed projects which were not part of the present investigation.

49. The Respondent vide his submissions dated 11.02.2019 has also stated that he had already submitted the details of the instalments received post GST till 31.12.2018 and also the status and the OCs of the completed projects. He has further stated that the DGAP by comparative analysis of the period from April 2016 till June 2017 and July 2017 till June 2018 had filed his Report on 27.8.2018, wherein the profiteered amount had been calculated and he had already passed on the benefit of ITC to all the buyers as per the above Report. He has further submitted that the DGAP had submitted a revised Report on 28.12.2018 in which the methodology adopted was different from the earlier Report and the profiteered amount had been reduced however, he had already passed on the ITC benefit to all the buyers which was higher than what had been computed in the revised Report dated 28.12.2018.

50. The Respondent vide his submissions dated 06.03.2019 has stated that he had already supplied the required information and explanation regarding the pre-GST and the post-GST data/figures to the DGAP who had also filed his detailed investigation Report on 27th August, 2018 which included the unsold area and the Revised Report on 28th Dec., 2018 which excluded the unsold area and he had already passed on the ITC benefit to all the buyers on the basis of the area sold while the DGAP, vide his revised Report dated 28th Dec., 2018, had adopted different methodology and computed amount of profiteering by excluding the unsold area as

compared to the original Report dated 27th August, 2018. He has further submitted that in view of this matter may be concluded.

51. We have carefully considered all the Reports filed by the DGAP, submissions of the Respondent and the other material placed on record and find that the Applicant No. 1 had booked Flat No. T4-2B on 09.05.2017 with the Respondent in his Anand Vilas Project located in Sector 81, Faridabad, Haryana for total consideration of Rs. 85,87,410/- as per the details furnished by the DGAP in Table A of his Report. It is also revealed from the record that the above Applicant vide his complaint dated 22.01.2018 had alleged that the Respondent was not passing on the benefit of ITC to him inspite of his request made through email dated 28.08.2017 although he had completed 60% of the work and was availing ITC on the purchase of the inputs at higher rates of GST which had resulted in bebefit of additional ITC to him and was also charging GST from him @12%. The above complaint was examined by the Standing Committee in its meeting held on 09.02.2018 and was forwarded to the DGAP for investigation who vide his Report dated 27.08.2018 had found that the ITC as a percentage of the total turnover which was available to the Respondent during the pre-GST period was 6.91% and during the post-GST period this ratio was 13.70% as per the Table C mentioned above and therefore, the Respondent had benefited from the additional ITC to the tune of 6.79% (13.70%-6.91%) of the total turnover which he was required to pass on to the flat buyers of this project. He has also stated that the additional ITC of 6.79% of the taxable turnover, should result in commensurate reduction of cum-tax price from Rs. 3,956.25 per square feet to Rs. 3,914.82 per square feet as per Table D of his Report however, the Respondent had not reduced the basic prices of his flats by 6.79% due to additional benefit of ITC and by charging GST at the increased rate of 12% on the pre- GST basic price, he had contravened the provisions of Section 171 of the of the CGST Act, 2017. The DGAP has further submitted that the amount of benefit of ITC which had not been passed on by the Respondent or the profiteered amount came to Rs. 3,42,31,077/- which included 12% GST on the basic profiteered amount of Rs. 3.05.63,462/-. The DGAP has also intimated that the above amount was inclusive of Rs. 1,65,975/- (including 12% GST over the basic amount of Rs. 1,48,192/-) which the Respondent had profiteered from the Applicant No. 1. He has also supplied the details of all the buyers who had purchased flats from the Respondent along with their unit numbers vide Annexure-22 attached with the Report.

52. The Respondent was issued notice dated 29.08.2018 to explain why the above Report of the DGAP should not be accepted and his liability for violating the provisions of Section 171 of the CGST Act, 2017 should not be

fixed along with imposition of penalty as per Section 122-127 of the above Act read with Rule 133 of the CGST Rules, 2017 and his registration under the Act should also not be cancelled. The Respondent in his submissions has repeatedly stated that the Applicant No. 1 had withdrawn the complaint in which it was alleged that the Respondent had not passed on the benefit of ITC to him, on being satisfied with the clarification given by him on the issue of benefit of additional ITC and hence the investigation conducted against him should have been dropped. However, this contention of the Respondent is not acceptable as there is no provision in the above Act or the Rules framed under it to withdraw the complaint once it has been made by following the prescribed procedure and despite withdrawal the offence of profiteering remains and therefore, the DGAP has rightly persued the investigation. Moreover, once violation of the provisions of Section 171 (1) of the above Act had come to the notice of the DGAP he was legally bound to ascertain the truth of the allegation after conducting detailed investigation as per the provisions of Rule 129 (1) of the CGST Rules, 2017 as it not only adversely affects the interests of the common buyers but also amounts to wrongful appropration of the concession which has been granted by the Central as well as the State Government by sacrificing their own revenue and hence no illegality has been committed by him by launching the present investigation against the Respondent.

53. The Respondent has also stressed that the computation of the benefit/ loss could not be done before completion of the project. It is apparent from the record that the above project was launched by the Respondent in the year 2013 and was likely to be completed by March, 2019 after a lapse of a period of about 6 years whereas he had been regularly availing the benefit of additional ITC w.e.f. 01.07.2017 to pay his output tax liability by appropriating the benefit of ITC which he was required to pay to the flat buyers. The Respondent can not be allowed to enrich himself at the cost of of the buyers and keep them waiting till the project was completed and hence he is legally bound to pass on the benefit periodically to them by computing the same on the basis of the ITC availed as well the instalments paid by them. Any reversal of ITC due to unsold flats could have been factored by him during the course of calculation of the benefit and had any of the buyers surrendered his allotment after availing the benefit of ITC the same could also have been taken in to consideration while selling the flat to the subsequent buyer. The contention of the Respondent that he had not got any benefit of additional ITC after coming in to force of the GST w.e.f. 01.07.2017 as he was already availing this benefit during the pre GST regime is also not borne out from the record as he has got benefit of 1.79% of additional ITC after coming in to force of the GST as is apprent from the perusal of Table E mentioned above. The Respondent has also

claimed that he had no malafide intention of not paying the benefit of ITC to the flat buyers is also not borne out from the record as he had not taken any effective steps to release the benefit till the present proceedings were launched. All the claims made by the Respondent in this regard are not correct and hence they are not tenable.

54. It would be pertinent to mention here that the Respondent through his submissions dated 11.09.2018 had sought time of 15 days to compute the benefit of ITC which he was required to pass on as per the provisions of Section 171 of the CGST Act, 2017 to the above Applicant as well as rest of the house buyers which was granted to him. Accordingly, he has himself computed and passed on the benefit of Rs. 53,994/- to the above Applicant and Rs. 1,97,23,425/- to rest of the flat buyers the details of which have also been furnished by him through his subsequent submissions.

55. The Respondent has also pleaded that as per entry 5 (b) of 'Schedule II' and 'Schedule III' of the CGST Act, 2017 where a building/ flat is sold after issuance of the OC the ITC availed on it was required to be reversed and since he had sold only 58% of the total saleable area he would have to reverse ITC in respect of the balance 42% area and he also could not increase the prices of the flats as per the RERA guidelines and hence the exact benefit of ITC could not be determined at this stage. However, the above argument of the Respondent is not correct as the benefit was required to passed on only to those buyers who had paid the instalments after coming into force of the GST and on the sold area only as the unsold area was not to be taken into consideration while computing the benefit.

56. The Respondent has also claimed that the Real Estate Sector had long gestation period and the rates of tax were being changed frequently due to which the benefit of ITC could not be calculated periodically. However, the claim of the Respondent can not be accepted as the buyers can not be compelled to wait till the completion of the project when the Respondent is utilising the additional ITC every month to discharge his output tax liability, the benefit of which he is legally bound to pass on to the flat buyers. Moreover, any change in the rates of tax is duly reflected in the quantum of ITC available to the Respondent and in case there is additional benefit of ITC only then the same is required to be passed. It is apparent from the data supplied by the Respondent that he had got additional benefit of 1.79% ITC which was required to be passed on by him to the flat buyers and hence the argument advanced by the Respondent in this behalf is without any merit.

57. The Respondent has also contended that he was not in agreement with the computation of the profiteered amount by the DGAP as it included

the GST which had been deposited by him in the Govt. account. The plea taken by the Respondent on this ground is fallacious as by forcing the flat buyers to pay more price by not releasing the benefit of additional ITC and by collecting tax @12% on this additional realisation he has denied the benefit of additional ITC to them by not reducing the prices of the flats commensurately. Had he not collected additional GST the buyers would have paid less price and by doing so he has denied them the benefit of additional ITC which amounts to violation of Section 171 of the above Act. Both the Central as well as the State Government had no intention of collecting the additional GST as they had forfeited their revenue in favour of the flat buyers to provide them accommodation at affordable prices and by compelling the buyers to pay the same the Respondent has not only defeated the intention of the above Goverments but has also acted against the interests of the house buyers hence the contention of the Respondent is not justifiable and therefore, the GST collected by him on the additional realisation has rightly been included in the profiteered amount by the DGAP.

58. The Respondent has also contended that he had made purchases from the traders who had not passed on the benefit of ITC to him and hence he could not further pass on the same to the house buyers. This pleading of the Respondent goes completely against the provisions of Section 171 (1) of the above Act as every registered person is required to pass on the benefit of additional ITC on every supply by commensurate reduction in the prices. Since the Respondent is a person duly registered under the above Act he is legally liable to pass on the benefit and he cannot deny the same on the ground that he had not received the benefit from his suppliers. The Respondent can always claim the benefit from his suppliers if he thinks that it is due to him by following the legal options but he cannot contend that he would not pass on the benefit to his recipients on this ground and hence his claim is ultra vires of the above Section.

59. The Respondent has also stated that no penalty should be imposed on him as he had voluntarily passed on the benefit which had accrued to him to his customers subject to the modification/recalculation at the time of completion of the project. He has further stated that no malafide intention had been established on compelling the buyers to pay the same the Respondent has not only defeated the intention of the above Goverments but has also acted against the interests of the house buyers hence the contention of the Respondent is not justifiable and therefore, the GST collected by him on the additional realisation has rightly been included in the profiteered amount by the DGAP.

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59. The Respondent has also stated that no penalty should be imposed on him as he had voluntarily passed on the benefit which had accrued to him to his customers subject to the modification/recalculation at the time of completion of the project. He has further stated that no malafide intention had been established on execution of the project, the area sold and the tumover realised. The Respondent has himself admitted that the same methodology could not be applied in each case and hence he should have no objection on the methodology which had been adopted in his case based on the ITC availed, area sold and the instalments received after 01.07.2017. Further the Authority under Rule 126 of the CGST Rules, 2017 has already notified the 'Procedure & Methodology' for determination of the profiteered amount vide its Notification dated 28.03.2018 however, as has been stated above the same has to be applied on case to case basis. It would also be appropriate to mention here that this Authority has power to 'determine' the methodology and not to 'prescribe' it as per the provisions of the above Rule and therefore, no set prescription can be laid while computing profiteering. Hence the objection raised by the Respondent on this ground is frivolous and without legal force.

61. The Respondent has also argued that the anti-profiteering Section has been introduced to ensure that the rate rationalization benefit was passed on to the society and only cases of mass impact were to be investigated. He has further contended that the CGST Act, 2017 did not provide for imposition of penalty under Section 122-127 read with Rule 133 of the CGST Rules. He has further pleaded that since there was no corresponding provision in the Act to impose penalty for contravention of Section 171, no penalty could be imposed as it was well settled that a penalty has to be prescribed in the main statute/Act itself and therefore, imposition of penalty would amount to excessive delegation. The

Respondent has also submitted that the Show Cause Notice issued to him on 29.08.2018 has merely mentioned the provisions of Section 122-127 of the CGST Act and Rule 133 of the CGST Rules, without specifying the exact allegations against him and the above Sections were not attracted in his case except for Section 125 which was general in nature. Perusal of the notice dated 29.08.2018 issued to the Respondent shows that he has been intimated that it was proposed to impose penalty under Section 122- 127 of the CGST Act, 2017 read with Rule 133 of the CGST Rules, 2017 and also to cancel his registration if the allegation of profiteering was proved against him, however, no specific instances of violation of the above Sections have been mentioned in the above Notice. Therefore, the proposed imposition of penalty under the above Sections and cancellation of his registration is not sustainable unless specific allegations how he had violated the provisions of the above Sections are levelled against him. Therefore, the above notice is ordered to be withdrawn to the extent that it proposes to impose penalty on him as per the provisions of the above Sections and the Rule. However, rest of the contents of the above show cause notice will continue to operate.

62. The Respondent has also cited the following cases in his support on the issue of imposition of penalty which are being relied upon and the show cause notice issued for imposition of penalty is being ordered to be withdrawn. However, the rest of the cases cited by the Respondent are not relevant to the facts of the present case at this stage and hence they are not being followed:-

1. Shubh Enterprises v. Union of India; W. P. (C) NO. 41 of 2013 decided on 14.10.2015.

2. B. Narasimhalu Chettiar and others v. Government of Tamil Nadu 89 LW 55.

3. Kaur & Singh v. Collector of Central Excise, New Delhi, 1997 (94) ELT 289 (SC).

4. Collector of Central Excise v. HMM Ltd., 1995 (76) ELT 497 (SC).

63. The Respondent has also argued that this Authority had travelled beyond its jurisdiction by increasing the scope of investigation by including the projects which were not investigated by the DGAP. However, perusal of the record shows that the Respondent had himself come forward and furnished details of his other projects and claimed that he had passed on the benefit of ITC in respect of his other projects also. He has voluntarily

submitted full details of the flat buyers, the area sold, the amount of instalments received and the benefit of ITC which was to be passed on to them. He has also furnished copies of the letters and the credit notes through which the benefit has been released in favour of the buyers. The above action of the Respondent appears to have been taken to avoid the consequences of Section 171 of the above Act when he had realised that he was legally bound to pass on the benefit of additional ITC availed by him to the flat buyers. Therefore, the allegation made by the Respondent in this regard is false and cannot be accepted.

64. It is also apparent from the record that the DGAP has submitted revised investigation Report dated 28.12.2018, in which he has stated that after taking in to account the revised details of the area sold by the Respondent, the ITC availed and the Respondent's taxable turnover during the period from April, 2016 to June, 2017 (i.e. pre-GST) and during the period from July, 2017 to June, 2018 (i.e. post-GST), the ratio of CENVAT/ ITC to the taxable turnover, pre-GST was 2.21% and during the post-GST period, it was 4.00% which shows that post-GST, the Respondent has benefited from the additional ITC to the tune of 1.79% [4.00% (-) 2.21%] of the taxable turnover which was required to be passed on to the buyers by the Respondent. It would be appropriate to mention here that vide his Report dated 27.08.2018 the pre-GST ratio had been computed as 6.19% and the post-GST ratio had been shown as 13.70% as per Table C mentioned above and the Respondent was held to have availed additional ITC to the tune of 6.79%. The revised ratio calculated by the DGAP has not been challenged by the Respondent, moreover the same is based on the information supplied by the Respondent and therefore, the same is being treated to be correct.

65. The DGAP has also re-computed the profiteered amount after taking in to account the CENVAT/ITC availability pre and post-GST and the details of the instalments received by the Respondent from the Applicant No. 1 and the other home buyers during the period from 01.07.2017 to 30.06.2018 and stated that the amount of benefit of ITC which has not been passed on by the Respondent to his customers or the profiteered amount came to Rs. 1,01,06,773/- which included GST (@12% or 18%) on the base profiteered amount of Rs. 89,68,979/- and which also included an amount of Rs. 49,169/- (including GST on the base amount of Rs. 43,655/-) which was profiteered by the Respondent from the above Applicant. The details of the home buyers and the unit no. wise breakup of the amount of Rs. 89,68,979/- has been furnished by the DGAP vide Annexure-22 (revised) against which no objection has been raised by the Respondent and hence the same can be relied upon. On the basis of the aforesaid

facts the amount of benefit of ITC which has not been passed on by the Respondent to the recipients or in other words, the profiteered amount as per the provisions of Rule 133 (1) of the CGST Rules, 2017 is determined as Rs. 1,01,06,773/- which includes GST (@ 12% or 18%) on the base profiteered amount of Rs. 89,68,979/-. This amount is also inclusive of Rs. 49,169/- (including GST on the base amount of Rs. 43,655/-) which is the profiteered amount in respect of the Applicant No. 1.

66. The DGAP has also mentioned that the above computation of the profiteered amount was in respect of the 155 flat buyers whereas, the Respondent had booked 303 flats till 30.06.2018, out of which 148 buyers had booked them in the pre-GST period and also paid the booking amount in this period but they had not paid any consideration during the period between 01.07.2017 to 30.06.2018 post-GST. He has further mentioned that if the ITC in respect of these 148 units was calculated with reference to the 155 units where payments had been received after GST had come in to force, the ITC as a percentage of taxable turnover would be distorted and erroneous and hence, the benefit of ITC in respect of these 148 units should be calculated when the consideration had been received post-GST by taking into account the proportionate taxable turnover in respect of these 148 Units. It is observed from the documents placed on record as well as the above submissions of the DGAP that there are total 512 flats out of which 209 flats have remained unsold and 303 flats have been sold by the Respondent. Out of the above 303 flat buyers the Respondent has received consideration post GST, only from 155 flat buyers. Therefore the ITC benefit is required to be passed on to the 155 buyers only at this stage and benefit should be passed on to the other buyers at a later stage when demands would be raised against them and payments received.

67. The DGAP has further mentioned that the Respondent vide Annexure- 2A attached to his submissions dated 05.11.2018 had submitted before the Authority that he had passed on the benefit of Rs. 1,97,77,419/- to the 303 flat buyers including the units under cancellation. The DGAP has also stated that the benefit claimed to have been passed on by the Respondent was less than what he should have passed on in respect of 92 cases (Sr. 2 of the Table G mentioned in para supra) amounting to Rs. 15,90,239/- (Annexure-24 of the Report) and the benefit claimed to have been passed on by the Respondent was higher (Annexure-25 of the Report) compared to what he should have passed on in respect of the 63 recipients of the flats including the Applicant No. 1 (Sr. 1 & 3 of Table G mentioned above) amounting to Rs. 19,31,599/-. He has further contended that the Respondent has also stated to have passed on the benefit amounting to Rs. 93,29,286/- in respect of 148 buyers of the flats

who had not paid any consideration post GST. The above claims made by the DGAP appear to be based on the analysis of the data supplied by the Respondent and after careful perusal of Table G mentioned above appear to be accurate.

68. The DGAP has also found that the additional ITC benefit of 1.79% of the taxable turnover which had accrued to the Respondent was required to be passed on to the Applicant No. 1 and the other recipients and therefore, the provisions of Section 171 of the CGST Act, 2017 had been violated by the Respondent as the additional benefit of ITC @1.79% of the base price received by the Respondent during the period from 01.07.2017 to 30.06.2018 had not been passed on to the Applicant No. 1 and the other buyers and the Respondent had realized an additional amount of Rs. 49,169/- from the Applicant No. 1 which included both the profiteered amount @1.79% of the taxable amount (base price) and the GST on the said profiteered amount. He has also claimed that the investigation had revealed that the Respondent had realized an additional amount of Rs. 15,90,239/- which included both the profiteered amount @1.79% of the taxable amount (base price) and the GST on the said profiteered amount from 92 other recipients who were not Applicants in the present proceedings and since they were identifiable as per the documents furnished by him therefore, this additional amount of Rs. 15,90,239/- was required to be returned to such eligible buyers. Since the above claims made by the DGAP are based on the information supplied by the Respondent and have also not been objected to by him they are treated to be correct.

69. The issue that needs to be dwelled upon is as to whether there was a case of not passing on of the benefit of ITC and whether the provisions of Section 171 of CGST Act, 2017 are attracted in the present case. Perusal of Section 171 (1) of the CGST Act, 2017 shows that it provides as under:-

> "Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices."

70. It is established from the perusal of the above facts of the case that the provisions of Section 171 of the CGST Act, 2017 have been contravened by the Respondent as he has profiteered an amount of Rs. 1,01,06,773/- inclusive of GST @ 12% or 18% on the base profiteered amount of Rs. 89,68,979/-, The Respondent has also realized an additional amount to the tune of Rs. 49,169/- from the Applicant No. 1 which includes both the profiteered amount @1.79% of the taxable amount (base price) and GST on the said profiteered amount. The Respondent has also realized an

additional amount of Rs. 15,90,239/- which includes both the profiteered amount @1.79% of the taxable amount (base price) and GST on the said profiteered amount from 92 other flat buyers who were not Applicants in the present proceedings as per Annexure-24 of the Report. These buyers are identifiable as per the documents placed on record and therefore, the Respondent is directed to pass on this amount of Rs. 15,90,239/- along with interest @18% per annum to these 92 flat buyers from the dates from which the above amount was collected by him from the buyers till the payment is made.

71. In view of the above facts this Authority under Rule 133 (3) (a) of the CGST Rules, 2017 orders that the Respondent shall reduce the prices to be realized from the buyers of the flats commensurate with the benefit of ITC received by him as has been detailed above. Since the present investigation is only up to 30.06.2018 any benefit of ITC which accrues subsequently shall also be passed on to the buyers by the Respondent. The Annexures submitted by the Respondent through his submissions dated 11.10.2018 and 05.11.2018 which comprise of the details of suo moto payments made by him through various modes are taken on record.

72. It is also evident from the above narration of facts that the Respondent has denied benefit of ITC to the buyers of the flats being constructed by him in his Anand Vilas Project in contravention of the provisions of Section 171 (1) of the CGST Act, 2017 and has thus realized more price from them than what he was entitled to collect and has also compelled them to pay more GST on the additional realisation than what they were required to pay by issuing incorrect tax invoices and hence he has committed an offence under section 122 (1) (i) of the CGST Act, 2017 and therefore, he is liable for imposition of penalty under the provisions of the above Section. Accordingly, a Show Cause Notice be issued to him directing him to explain why the penalty prescribed under Section 122 of the above Act read with Rule 133 (3) (d) of the CGST Rules, 2017 should not be imposed on him. The above act of the Respondent appears to be deliberate, contumacious and conscious violation of the provisions of the CGST Act, 2017. Since a specific allegation of issuing incorrect invoices has been levelled against the Respondent he would have sufficient opportunity to state his defence on the above charge. He can also raise his other objections which have been mentioned above during the course of the hearing on the issue of imposition of penalty.

73. The Respondent has himself admitted that he has passed on the additional ITC benefit of Rs. 1,99,42,985/- in respect to the project “Emerald Bay” and Rs. 53,19,592/- in respect to the project “Aman Vilas being

executed by him. Since the above claim of the Respondent is required to be verified the DGAP is directed to investigate the issue of passing on the benefit of additional ITC in respect of the above two projects and submit his Report within a period of 3 months from the receipt of this order in terms of Rule 133 (4) of the CGST Rules, 2017.

74. The Authority as per Rule 136 of the CGST Rules 2017 directs the Commissioners of CGST/SGST Haryana to monitor this order under the supervision of the DGAP by ensuring that the amount profiteered by the Respondent as ordered by the Authority is passed on to all the eligible buyers. A report in compliance of this order shall be submitted to this Authority by the Commissioners CGST /SGST within a period of 4 months from the date of receipt of this order.

75. A copy each of this order be supplied to both the Applicants, the Respondent, Commissioners CGST/SGST as well as the Principal Secretary (Town & Planning), Government of Haryana for necessary action. File be consigned after completion.

Mandatory Provisions v. Directory Provisions.

Compiled by: Kumar Jee Bhat, Advocate

Substantive And Procedural Law

Substantive law is the statutory of written law that governs rights and obligations of those who are subject to it. Substantive law defines the legal relationship of people with other people or between them and the state. Substantive law stands in contrast to procedural law, which comprises the rules by which a court hears and determines what, happens

In civil or criminal proceedings, procedural law deals with the method and means by which substantive law is made and administered. The time allowed for one party to sue another and the rules of law governing the process of the lawsuit is examples of procedural laws. Substantive law defines crimes and punishments (in criminal law) as well as civil rights and responsibilities in civil law .it is codified in legislated statues or can be enacted through the initiative process.

Another way of summarizing the difference between substantive and procedural is as follows:

> substantive rules of law define rights and duties, while procedural rules of law provide the machinery for enforcing those rights and duties. However, the way to this clear differentiation between substantive law and, serving the substantive law, procedural law has been long, since in the roman civil procedure the action included both substantive and procedural elements.

When is a statutory procedural requirement ‘mandatory’? There has been much debate as to whether in any given instance a requirement is ‘mandatory’ or ‘directory’, and the debate continues! In Wade & Forsyth Administrative Law (8th edn, 2000) p 228 the authors state: -

> “… the same condition may be both mandatory and directory: mandatory as to substantial compliance, but directory as to precise compliance …”

Procedural law prescribes the means of enforcing rights or providing redress of wrongs and comprises rules about jurisdiction, pleading and practice, evidence, appeal, execution of judgments, representation of counsel, costs, and other matters. Procedural law is commonly contrasted

with substantive law, which constitutes the great body of law and defines and regulates legal rights and duties. Thus, whereas substantive law would describe how two people might enter into a contract, procedural law would explain how someone alleging a breach of contract might seek the courts' help in enforcing the agreement.

To be effective, law must go beyond the determination of the rights and obligations of individuals and collective bodies to say how these rights and obligations can be enforced. Moreover, it must do this in a systematic and formal way, because the failure to do so would render the legal system inefficient, unfair, and biased and, as a result, possibly upset the social peace. Embodying this systematization and formalization, procedural law constitutes the sum total of legal rules designed to ensure the enforcement of rights by means of the courts.

Because procedural law is a means for enforcing substantive rules, there are different kinds of procedural law, corresponding to the various kinds of substantive law. criminal law is the branch of substantive law dealing with punishment for offenses against the public and has as its corollary criminal procedure, which indicates how the sanctions of criminal law must be applied. Substantive private law, which deals with the relations between private (i.e., nongovernmental) persons, whether individuals or corporate bodies, has as its corollary the rules of civil procedure. Because the object of judicial proceedings is to arrive at the truth by using the best available evidence, there must be procedural laws of evidence to govern the presentation of witnesses, documentation, and physical proof.

In deciding whether a provision is mandatory or directory the court must examine its purpose and its relationship with the scheme, subject matter and objective of the statute in which it appears. The court must also attempt to assess the importance attached to the provision by Parliament.

The word 'shall' is prima facie mandatory, but may often be construed as merely directory depending on the context in which it appears. If the effect of adopting a mandatory construction would be substantial public inconvenience, public policy requires that it should not be adopted.

Lord Hailsham of St Marylebone, Lord Chancellor, In London and Clydesdale Estates Ltd v. Aberdeen District Council [1980] 1 WLR 182 said at p. 189:

> "When Parliament lays down a statutory requirement for the exercise of a legal authority it expects its authority to be obeyed down to the minutest detail."

However, there is the well-known older line of authority which is evidenced by the dictum of Lord Penzance in Howard v. Boddington (1877) 2PD 203 at p. 211:

> "You must look at the subject matter, consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act, and upon a review of the case in that aspect decide whether the enactment is what is called imperative or only directory."

Provision in the legislation for a consequence which is to follow on failure to perform the act prescribed is an indication that the provision is mandatory. Mr Larkin QC for the appellant cited the old American cases of Shaw v Randall (1860) 15 Cal 384 and Perine v Forbrush (1893) 97 Cal 305 in support of this proposition, but its logical force is such that it hardly needs authority.

There is American authority that as a general proposition constitutional provisions are given mandatory effect: Sutherland, Statutory Construction, 3rd ed, vol, para 57:13. On the other hand, it has been held by the Privy Council that such provisions may require more flexible interpretation to cater for changing circumstances: Attorney General for Ontario v Attorney General for Canada [1947] AC 127 at 154. In that case the Judicial Committee paid considerable regard to the spirit of the Statute of Westminster that Dominion legislatures should have "the widest amplitude of power". This approach is an application of the well-established principle that in construing legislation the court should pay regard to its policy and objects.

In some cases the consequences of adopting a mandatory construction would cause such public inconvenience that public policy requires that it should not be adopted: see such cases as R v Mayor of Rochester (1857) 7 E & B 910 and the striking example of Simpson v Attorney General [1955] NZLR 271.

In Jeyeanthan, R (on the application of) v Secretary of State for the Home Department respondent [1999] EWCA Civ 3010 (21 May 1999) Lord Woolf said:

> "……I suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance

than the application of the mandatory/directory test: The questions which are likely to arise are as follows:

(a) Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (The substantial compliance questions.)

(b) Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (The discretionary question.) I treat the grant of an extension of time for compliance as a waiver.

(c) If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (The consequences question.)

He went on to say:

"Which questions arise will depend upon the facts of the case and the nature of the particular requirement. The advantage of focusing on these questions is that they should avoid the unjust and unintended consequences which can flow from an approach solely dependent on dividing requirements into mandatory ones, which oust jurisdiction, or directory, which do not. If the result of non-compliance goes to jurisdiction it will be said jurisdiction cannot be conferred where it does not otherwise exist by consent or waiver."

Under the taxation law a literal interpretation of the provisions should be made. A reference is made to the provisions of DVAT Act,2004 Section 9. On a plain reading of section 9(1) it does not say about the time period for claiming the tax credit on the purchases occurring during the tax period unlike in section 9(9) which stipulates the time period for claiming the tax credit in respect of capital goods. The tax credit under section 9(1) is in respect of purchases which arises in the course of his activities as a dealer and the goods are to be used directly or indirectly for the purpose of making sales which are liable to tax under section 3 or the sales which are not liable to tax under section 7 of the DVAT Act. The legislative intent behind introducing VAT is to avoid cascading effect and denial of tax credit is contrary to the provisions of VAT. It is necessary to mention here when full tax credit is not utilized in the tax period, the same can either be refunded or adjusted/carry forward to next tax period, how the claim of

tax credit can be denied if taken in the subsequent month. The law does not envisage such intent. The tax credit comes first on the purchases and utilization comes thereafter.

The rule of law is that what cannot be done directly cannot be done indirectly also. The Hon'ble Delhi High Court in the case of Northern Motor Company vs. Commissioner, Value Added Tax 25 VST 466(Del) has held that a pragmatic interpretation of the principals of the provision of the Act had to be made. The word used "shall" be entitled to a tax credit in respect of the turnover of purchases occurring during the tax period where the purchase arises in the course of his activities as a dealer being procedural in nature and since no tax deficiency found by the VA the penalty cannot be imposed. More so, under section 86 no penalty is leviable if the dealer fails to take tax credit in respect of the turnover of the purchases. The Hon'ble Supreme Court in various judgments gave fine distinction for determining a provision as mandatory or directory. In addition to the language used therein, the Court has to examine the context in which the provision is used and the purpose it seeks to achieve. It may also be necessary to find out the intent of the legislature for enacting it and the serious and general inconveniences or injustice to persons relating thereto from its application. **A Constitution Bench in the case of Commissioner of Central Excise, New Delhi vs. M/S Hari Chand Shri Gopal & Others etc. Civil Appeal Nos.1878-1880 of 2004 order dated 18.11.2010** has observed and held that "The doctrine of substantial compliance is a judicial invention, equitable in nature, designed to avoid hardship in cases where a party does all that can reasonably expected of it, but failed or faulted in some minor or inconsequent aspects which cannot be described as the "essence" or the "substance" of the requirements. Like the concept of "reasonableness" , the acceptance or otherwise of a plea of "substantial compliance", depends upon the facts and circumstances of each case and the purpose and object to be achieved and the context of the prerequisites which are essential to achieve the object and purpose of the rule or the regulation. Such a defense cannot be pleaded if a clear statutory prerequisite which effectuates the object and the purpose of the statute has not been met. Certainly, it means that the Court should be determine whether the statute has been followed sufficiently so as to carry out the intent for which the statute was enacted and not a mirror image type of strict compliance. Substantial compliance means "actual compliance in respect to the substance essential to every reasonable objective of the statute" and the court should determine whether the statute has been followed sufficiently so as to carry out the intent of the statute and accomplish the reasonable objectives for which it was passed. Fiscal statute generally seeks to preserve the need to comply strictly

with regulatory requirements that are important, especially when a party seeks the benefit of an exemption clause that are important. Substantial compliance of an enactment is insisted, where mandatory and directory requirements are lumped together, for in such a case, if mandatory requirements are complied with, it will be proper to say that the enactment has been substantial complied with notwithstanding the non-compliance of the directory requirements. In cases where substantial compliance has been found, there has been actual compliance with the statue, albeit procedurally faulty. The test for determining the applicability of substantial compliance doctrine has been the subject of a myriad of cases and quite often, the critical question to be examined is whether the requirements relate to the “substance” or “essence” of the statute, if so, strict adherence to those requirement is a precondition to give effect to that doctrine. On the other hand, if the requirements are procedural or directory in that they are not of the “essence” of the thing to be done but are given with a view to the orderly conduct of business they may be fulfilled by substantial, if not strict compliance.

In Dattatraya Mores war Vs. The State of Bombay & Ors., AIR 1952 SC 181, this Court observed that law which creates public duties 8 is directory but if it confers private rights it is mandatory. Relevant passage from this judgment is quoted below:-

It is well settled that generally speaking the provisions of the statute creating public duties are directory and those conferring private rights are imperative. When the provision of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of legislature, it has been the practice of the Courts to hold such provisions to be directory only the neglect of them not affecting the validity of the acts done.

A Constitution Bench of Supreme Court in State of U.P. & Ors. Vs. Babu Ram Upadhya AIR 1961 SC 751, decided the issue observing: -

For ascertaining the real intention of the Legislature, the Court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance, namely, that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not

visited by some penalty, the serious or trivial consequences that flow there from, and, above all, whether the object of the legislation will be defeated or furthered.

In **Sharif-Ud-Din Vs. Abdul Gani Lone AIR 1980 SC 303**, this Court held that the difference between a mandatory and directory rule is that the former requires strict observance while in the case of latter, substantial compliance of the rule may be enough and where the statute provides that failure to make observance of a particular rule would lead to a specific consequence, the provision has to be construed as mandatory.

In **M/s. Rubber House Vs. M/s. Excellsior Needle Industries Pvt. Ltd. AIR 1989 SC 1160**, this Court considered the provisions of the Haryana (Control of Rent & Eviction) Rules, 1976, which provided for mentioning the amount of arrears of rent in the application and held the 10 provision to be directory though the word shall has been used in the statutory provision for the reason that non-compliance of the rule, i.e. non-mentioning of the quantum of arrears of rent did involve no invalidating consequence and also did not visit any penalty.

The law on this issue can be summarised to the effect that in order to declare a provision mandatory, the test to be applied is as to whether non-compliance of the provision could render entire proceedings invalid or not. Whether the provision is mandatory or directory, depends upon the intent of Legislature and not upon the language for which the intent is clothed. The issue is to be examined having regard to the context, subject matter and object of the statutory provisions in question. The Court may find out as what would be the consequence which would flow from construing it in one way or the other and as to whether the Statute provides for a contingency of the non-compliance of the provisions and as to whether the non-compliance is visited by small penalty or serious consequence would flow there from and as to whether a particular interpretation would defeat or frustrate the legislation and if the provision is mandatory, the act done in breach thereof will be invalid.

The apex court in the case of Sambhaji and Others vs. Gangabai and Others (2008) 17 SCC 117 has held that “No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner for the time being by or for the court in which the case is pending, and if, by an Act of the Parliament the mode of procedure is altered, he has no other right than to proceed to the altered mode..... . a procedural law should not ordinarily be construed as mandatory; the procedural law is always subservient to and is in aid to justice. Any

interpretation which eludes or frustrates the recipient of justice is not to be followed..... Procedural law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice. It is also to be noted that though the power of the court under the proviso appended to Rule 1 Order 8 is circumscribed by the words 'shall not be later than ninety days' but the consequences flowing from non- extension of time are not specifically provided for though they may be read in by necessary implication. Merely because a provision of law is couched in a negative language implying mandatory character, the same is not without exceptions. The courts, when called upon to interpret the nature of the provision, may, keeping in view the entire contacts in which the provision came to be enacted, hold the same to be directory though worded in a negative form." The court also held that the consequences which may follow and whether the same were intended by the legislature have also to be kept in view.

A **Constitution bench in the case of Raza Buland Sugar Co. Ltd. Vs. Municipal Board, Rampur AIR 1965 SC 895** held that "the question whether a particular provision is mandatory or directory cannot be resolved by laying down any general rule and it would depend upon the facts of each case and for that purpose the object of the statute in making out the provision is the determining factor. The purpose for which the provision has been made and its nature, the intention of the legislature in making the provision, the serious general inconvenience or injustice to the persons resulting from whether the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject and other considerations which may arise on the facts of a particular case including the language of the provision, have all to be taken in to account in arriving at the conclusion whether a particular provision is mandatory or directory."

The Constitution Bench decision in the case of Bhikraj Jaipuria v. Union of India [1962] 2 SCR 880, the Supreme Court observed that where a statute requires that a thing shall be done in the prescribed manner or form but does not set out the consequences of non-compliance, the question whether the provision was mandatory or directory has to be adjudged in the light of the intention of the Legislature as disclosed by the object, purpose and scope of the statute.

In the present case substantial compliance have been made by the appellant as required under section 9(2) and section 9(7) of DVAT Act, 2004. In fact, section 9(2) and section 9(7) is rider. The appellant made

purchases from the registered dealers & is in possession of tax invoices, goods which were purchased are used directly or indirectly for the purpose of export outside India. The selling dealers were not under composition scheme and the goods purchased are creditable goods. More so, no penal consequences arise if the tax credit not taken in the same period or no loss to the revenue if taken in subsequent tax period rather revenue is benefited.

Hence in view of the judgments of the apex court and interpreted by their Lordships, the notice of assessment of penalty be quashed. Reference can made to other judgments also;

***B.S. Khurana & Ors. Vs. Municipal Corporation of Delhi & Ors. (2000) 7 SCC 679; State of Haryana & Anr. Vs. Raghubir Dayal (1995) 1 SCC 133*; *Gullipilli Sowria Raj Vs. Bandaru Pavani @ Gullipili Pavani (2009) 1 SCC 714*,**

The various courts have held that substantial benefits cannot be disallowed or rejected relying on technicalities and the authorities should act in a manner consistent with the broader concept of justice.

The Hon'ble Supreme Court in the case of Manglore Chemicals & Fertilizers Ltd. vs. Deputy Commissioner 1991 (55) ELT 437(SC) while drawing a distinction between a procedural condition of a technical nature and a substantive condition in interpreting statute has held "Exemption – technicalities cannot be equated with substantive conditions in an exemption notification. The consequence which Shri Narasimhamurthy suggests should flow from the non-compliance would, indeed, be the result if the condition was a substantive one and one fundamental to the policy underlying the exemption. Its stringency and mandatory nature must be justified by the purpose intended to be served. The mere fact that it is statutory does not matter one way or the other. There are conditions and conditions. Some may be substantive, mandatory and based on considerations or policy and some others may merely belong to the area of procedure. It will be erroneous to attach equal importance to the non-observance of all conditions irrespective of the purposes they were intended to serve……. **A distinction between the provisions of statute which are of substantive in character and were built- in with certain specific objectives of policy on the one hand and those which are merely procedural and technical in their nature on the other must be kept clearly distinguished.**"

The Apex court laying down the test for giving the distinction between '*mandatory provisions'* and '*directory provisions*', in a recent decision in

May George Vs. Special Tahsildar & Ors. on 25 May, 2010, CIVIL APPEAL NO. 2255 OF 2006, has stated that where the provisions are mandatory, their non-compliance vitiates the entire proceedings and set to naught the action taken thereon. The Court was dealing with the requirement on the part of the Land Acquisition Officer to give notice under Section 9(3) of the Land Acquisition Act and the question raised thereon as to whether such requirement was a mandatory precondition. In this scenario, the Supreme Court brought forth the distinction between mandatory and directory provisions in the following terms;

The only question remains for our consideration is as to whether the provisions of Section 9(3) are mandatory in nature and non-compliance thereof, would vitiate the Award and subsequent proceedings under the Act. Section 4 Notification manifests the tentative opinion of the Authority to acquire the land. However, Section 6 Declaration is a conclusive proof thereof. The Land Acquisition Collector acts as Representative of the State, while holding proceedings under the Act, he conducts the proceedings on behalf of the State. Therefore, he determines the pre-existing right which is recognised by the Collector and guided by the findings arrived in determining the objections etc. and he quantifies the amount of compensation to be placed as an offer on behalf of the appropriate government to the person interested. It is for the tenure holder/person interested to accept it or not. In case, it is not acceptable to him, person interested has a right to ask the Collector to make a reference to the Tribunal.

Section 9(3) of the Act reads as under: -

> "The Collector shall also serve notice to the same effect on the occupier (if any) of such land and on all such persons known or believed to be interested therein, or to be entitled to act for persons so interested, as reside or have agents authorized to receive service on their behalf, within the revenue district in which the land is situate"

Section 9 of the Act provides for an opportunity to the "person interested" to file a claim petition with documentary evidence for determining the market value of the land and in case a person does not file a claim under Section 9 even after receiving the notice, he still has a right to make an application for making a reference under Section 18 of the Act. Therefore, scheme of the Act is such that it does not cause any prejudicial consequence in case the notice under Section 9(3) is not served upon the person interested.

Conclusion

The controversy can be resolved and summarized by the judgment in Robinson v Secretary of State for Northern Ireland & Ors [2002] UKHL 32 (25 July 2002) Lord Slynn of Hadley in Wang v Commissioner of Inland Revenue [1994] 1 WLR 1286 at 1296 said:

> **"**. . . their Lordships consider that when a question like the present one arises - an alleged failure to comply with a time provision - it is simpler and better to avoid these two words 'mandatory' and 'directory' and to ask two questions. The first is whether the legislature intended the person making the determination to comply with the time provision, whether a fixed time or a reasonable time. Secondly, if so, did the legislature intend that a failure to comply with such a time provision would deprive the decision maker of jurisdiction and render any decision which he purported to make null and void?"

Allahabad High Court in State of U.P. vs Triloki Nath Pandey (H.C.C.P. ... on 2 December, 2004

Acquiescence, being the principle of equity, must be made applicable in a case where the order has been passed and complied with without raising any objection.

A Constitution Bench of the Hon'ble Supreme Court, in Pannalal Binjraj and Ors. v. Union of India and Ors., AIR 1957 SC 397, had explained the scope of estoppel observing that once an order is passed against a person and without raising any objection he submits to the jurisdiction or complies with such order, he cannot be permitted to challenge the said order merely because he could not succeed there, for the reason that such conduct of that person would disentitle him for any relief before the Court.

A similar view has been reiterated by the **Hon'ble Supreme Court in Manak Lal v. Dr. Prem Chand Singhvi and Ors., AIR 1957 SC 425; Maharashtra State Road Transport Corporation v. Balwant Regular Motor Service, Amravati and Ors., AIR 1969 SC 329.**

State Bank Of Patiala & Ors vs S.K. Sharma; 1996 AIR 1669, 1996 SCC (3) 364

It is not brought to our notice that the State Bank of Patiala (Officers') Service Regulation contains provision corresponding to Section 99 C.P.C.

or Section 465 Cr.P.C. Does it mean that any and every violation of the regulations renders the enquiry and the punishment void or whether the principle underlying Section 99 C.P.C. and Section 465 Cr.P.C. is applicable in the case of disciplinary proceedings as well. In our opinion, the test in such cases should be one of prejudice, as would be later explained in this judgment. But this statement is subject to a rider. The regulations may contain certain substantive provisions, e.g., who is the authority competent to impose a particular punishment on a particular employee/officer. Such provisions must be strictly complied with. But there may be any number of procedural provisions which stand on a different footing. We must hasten to add that even among procedural provisions, there may be some provisions which are of a fundamental nature in the case of which the theory of substantial compliance may not be applicable For examples take a case where a rule expressly provides that the delinquent officer/employee shall be given an opportunity to produce evidence/ material in support evidence of the other side. If no such opportunity is given at all inspite of a request therefor, It will be difficult to say that the enquiry is not vitiated. But in respect of many procedural provisions it would be possible to apply the theory of substantial compliance or the test of prejudices as the case may be. The position can be stated in the following words: Regulations which are of a substantive nature have to be complied with and in case of such provisions, the theory of substantial compliance would not be available. (2) Even among procedural provisions, there may be some provisions of a fundamental nature which have to be complied with and in whose case, the theory of substantial compliance may not be available. (s) In respect of procedural provisions other than of a fundamental nature the theory of substantial compliance would be available. In complain objection on this score have to be judged on the touch-stone of prejudices as explained later in this judgment. In other words, the test is: all things taken together whether the delinquent officer/employee had or did not have a fair hearing. We may clarify that which provision falls in which of the aforesaid categories is a matter to he decided in each case having regard to the nature and character of the relevant provision.

> “Where the court acts without inherent jurisdiction, a party affected cannot by waiver confer jurisdiction on it, which it has not. Where such jurisdiction is not wanting, a directory provision can obviously be waived. But a mandatory provision can obviously be waived. But a mandatory provision can only be waived if it is not conceived in the public interests, but in the interests of the party that waives it. In the present case the executing court had inherent jurisdiction to sell the property. We have assumed that s.35 of the Act is a mandatory provision. If so, the question is whether the said provision

> is conceived in the interests of the public or in the interests of the person affected by the non- observance of the provision. It is true that many provisions of the Act were conceived in the interests of the public, but the same cannot be said of s.35 of the Act, which is really intended to protect the interests of a judgment-debtor and to see that a larger extent of his property than is necessary to discharge the debt is not sold. Many situations may be visualized when the judgment-debtor does not seek to take advantage of the benefit conferred on him under s.35 of the Act."

The principle of the above decision was applied by this Court in Krishan Lal State of Jammu & Kashmir [1994 (4) S.C.C.422) in the case of an express statutory provision governing a disciplinary enquiry. It was a case where the employee was dismissed without supplying him a copy of the enquiry officer's report as required by Section 17(5) of the Jammu and Kashmir (Government Servants) Prevention of Corruption Act, 1962. This was treated as mandatory. The question was how should the said complaint be dealt with.

In Krishan Lal v. State of J & K (1994 (4) SCC 422), this Court while considering the requirement of furnishing copy of inquiry proceedings under Section 17(5) of the J & K (Government Servants) Prevention of Corruption Act, 1962 held following the judgment in V. Chettiar's case (supra) and D.N. Gorai (supra) that though the requirement mentioned in Section 17(5) of the Act was mandatory, the same can be waived because the requirement of giving a copy of the proceedings of the inquiry mandated by Section 17(5) of the Act is one which is for the benefit of the individual concerned.

HWR Wade's name is well known in the world **of** administrative law. He has dealt with this aspect at page 267 **of** the sixth edition **of** his treatise wherein he has quoted what Lord Denning, MR said in Wells v. Minister **of** Housing-and Local Government, 1967 (1) WLR 1000, which is as below: -

> "I take the law to be that a defect in procedure can be cured, and irregularity can be waived, even by a public authority, so as to render valid that which would otherwise be invalid."

We may end this journey into the field **of** law by referring to the meaning **of** the words "irregularity" as given at page 469 **of** Volume 22A **of** "Words and Phrases" (Permanent Edition) and **of** 'nullity' at pages 772 and 773 **of** Volume 28A **of** the aforesaid book. As to "irregularity" it has been stated that it is "want **of** adherence to some prescribed rule or mode **of** proceeding"; whereas "nullity" is "a void act or an act having no legal force

or validity" as stated at page 772. At page 773 it has been mentioned that the safest rule **of** distinction between an "irregularity" and a "nullity" is to see whether "a party can waive the objection: if he can waive, it amounts to irregularity and if he cannot, it is a nullity.

Commissioner Of Customs, Mumbai vs M/S. Virgo Steels, Bombay & Anr on 4 April, 2002 (2002) 4SCC 316

The next question for our consideration is: can a mandatory requirement of a statute be waived by the party concerned ? In answering this question, we are aided by a catena of judgments of this Court as well as of the Privy Council. We will first refer to the judgment of the Privy Council which has been consistently followed by the Supreme Court in a number of subsequent cases involving similar points. In Vellayan Chettiar v. Government of Province of Madras (AIR 1947 PC 197), the Privy Council held that even though Section 80 C.P.C. is mandatory, still non-issuance of such notice would not render the suit bad in the eye of law because such non-issuance of notice can be waived by the party concerned. In the said judgment, the Privy Council held that the protection provided under Section 80 is a protection given to the person concerned and if in a particular case that person does not require the protection he can lawfully waive his right.

From the ratio laid down by the Privy Council and followed by this Court in the above-cited judgments, it is clear that even though a provision of law is mandatory in its operation if such provision is one which deals with the individual rights of person concerned and is for his benefit, the said person can always waive such a right.

Bearing in mind the above decided principle in law, if we consider the mandatory requirement of issuance of notice under Section 28 of the Act, it will be seen that that requirement is provided by the Statute solely for the benefit of the individual concerned, therefore, he can waive that right. In other words, this Section casts a duty on the Officer to issue notice to the person concerned of the proposed action to be taken. This is not in the nature of a public notice nor any person other than the person against whom the proceedings are initiated has any right for such a notice. Thus, this right of notice being personal to the person concerned, the same can be waived by that person.

Scope of Rectification Under CGST Act – Section 161

Sushil K Verma, Advocate

On the request of large number of professionals – Advocates and CAs – who have been calling me to pen down a note on the above issue – for all my esteemed bros a legal note on section 161. An alternative could be developed to section 107 provided we are able to appreciate the law on this subject and rectification order is also appealable. Let's expolore the law further and together.

Section 161 of GST Act 2017 deals with the provisions of 'Rectification of errors apparent on the face of record'. It states that the prescribed Authority can rectify the errors (and not mistakes as we usually read such provisions in other laws) in order or decision or notice or certificate or any other document on its own motion or when brought to its notice by any officer appointed under this act or by the affected person within a period of Three months from the date it is passed / issued. No such rectification shall be done after a period of six months from the date of issue of such decision or order or notice or certificate or any other document.

Taxable person can move the application within three months (and not ninety days) from the date when decision or order etc was issued and the proper officer shall have to complete the process, this way or that way, within a maximum period of 6 months (and not 180 days as normally people understand this)

This section has been very widely worded and including within its scope all decisions, notices, certificates and other documents issued and all these can be subject to rectification *suo moto* by the officer or based on directions or based on application by the affected party.

Rectification under section 161 can be done by proper officet suo moto or upon notice or application by the taxable person or affected person or upon notices of GST officials, both central and state. In other words, a proper officer of a State can request for rectification or a central officer is also authorised to request the state officer to rectify the order or decision or notice. This is a huge power given to revenue by the legislature.

This provision provides an alternative remedy, without pre-deposit of 10 percent, where the taxable person can file the application for rectification instead of going in appeal under section 107 which mandates a minimum

10 percent deposit of the disputed tax amount – it is possible provided the application is covered by section 161 i.e. There are errors apparent on the face of the order, notice or decision or certificate etc. No doubt it requires detailed appreciation of scope of such applications and especially the meaning of the phrase “errors apparent on the face of the record. And the appeal against rectification order, if the taxable person is not satisfied is not barred under section 121 of the CGST Act and hence another move can be availed and appeal can also be filed.

It is settled legal position that errors of law and errors of facts both can be rectified. Generally, there are three types of errors such as errors of law, errors of facts and clerical, arithmetical errors. Errors which are patent, obvious, visible and evident from the face of record can be said as errors apparent on the face of record and could be covered under section 161 of the Act. Errors which involved debatable, arguable points, involving interpretation, long and elaborate arguments and required additional evidences cannot be covered under the scope of apparent errors. Failure to consider documents submitted by person while passing order or decision is error of fact and apparent on the face of record. Similarly, failure to consider provision of law is error of law and amount to error apparent on the face of record.

M/s Deva Metal powder vs Commissioner of Trade Tax UP of 2007 is a very good Supreme Court Judgment to appreciate the scope of rectification and you must read.

Section 161 specifically prescribes that if any rectification affects any person adversely, principles of natural justice must be followed i.e., in general parlance an inference can be drawn that no adverse order in lieu of rectification must be passed without giving the affected party a chance to be heard and present their case against the given facts and circumstances of that rectification. In all applications under this section please mention that PERSONAL HEARING IS REQUIRED.

Always keep in mind while availing this remedy that the power vested by the said Section is neither a power of review nor is akin to the power of revision but is only a power to rectify a mistake apparent on the face of the record. Rectification implies the correction of an error or a removal of defects or imperfections. It implies an error, mistake or defect which after rectification is made right.

The limited scope of section 161 is that order of rectification can be passed in certain contingencies as spelt out in the provision quoted

hereinabove. It does not confer on any officer a power of review.- whether Suo moto or on the application of a taxable person. If an order of assessment is rectified by the Assessing Officer in terms of Section 161 of the Act, the same itself may be a subject matter of a proceeding for Suo moto revision by the higher authorities to whom such power may have been delegated under the Act.

It is a settled principle of law that if an order of rectification is passed by the Assessing Authority, the rectified order shall be given effect to.

Hon'ble Supreme Court of India in Assistant Commissioner of Income Tax vs. Saurashtra Kutch Stock Exchange Limited (2008) 219 CTR (SC) 90 settled long ago that non-consideration of the decision of the jurisdictional high court/Supreme Court constitutes mistake apparent from the face of record and is rectifiable- this judgment though under income tax act (section 254(2), but in my view squarely applicable to section 161 as well. Hence, whenever you think Delhi High Court judgment on the given issue or that of the Supreme Court has not been followed by the proper officer, you could avail this remedy instead of pushing your client to appeal process.

Hon'ble Supreme Court of India in Commissioner of Income Tax vs. Reliance Telecom Limited, Civil Appeal No.7110 of 2021 dated 03rd December, 2021 reported as (2021) 323 CTR (SC) 873 went a step ahead to curtail and prune the powers conferred upon the tribunal to rectify its mistake apparent from record itself. This judgment gives guidelines under which application for rectification can be made and you must go through this judgment.

To conclude legal aspects of section 161 the following judgment defines the phrase Error Apparent on the face of the Record

In Meera Bhanja v. Nirmala Kumari Choudhury (1995) 1 SCC 170, the Court considered as to what can be characterised as an error apparent on the fact of the record and observed: (though judgment was dealing with Review – but the phrase has been aptly defined that is in section 161)

> "9. ....it has to be kept in view that an error apparent on the face of record must be such an error which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions. We may usefully refer to the observations of this Court in the case of Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa

> Tirumale AIR 1960 SC 137 wherein, K.C. Das Gupta, J., speaking for the Court has made the following observations in connection with an error apparent on the face of the record:
>
> 17. ....An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by a writ of certiorari according to the rule governing the powers of the superior court to issue such a writ".

Errors apparent on the face of the "RECORD"

The Act does not define the word RECORD which is so crucial for the purpose of this section. The Hon'ble Bombay High Court in the case of Maharashtra State, Bombay Vs Motwane Pvt Ltd reported in [1992] 84 STC 377W held that, "the word 'record' cannot be construed as meaning not only the assessment record but also the books of accounts, various registers maintained and the sale invoices which the assessee might have brought to the Sales Tax Officer at the time of assessment.

The power of rectification in the order is confined only to mistakes apparent on the face of record. The application for rectification can be made if the mistake is ex facie and it is not capable of further arguments. If the issues in order is involving legal interpretation, then it cannot be rectified under section 161.It is held by Hon'ble Supreme Court in Master construction Co (P) Limited Vs State of Orissa and Another 1966 AIR 1047. In simple terms, a decision on the debatable point of law or undisputed questions of fact is not a mistake apparent from the record.

Under the GST law the time limit for notifying the error by the assessee to the Authority is three months and the Authority can pass the rectification order within six months within specified date. Suppose a Central Officer requests for rectification after six months from the date of issue – order cannot be rectified under this provision as it would become time barred.

Whether time spent in pursuing rectification application can be excllluded for calculationg limitation period of 3 months under section 107?

What happens to the limitation period if someone in good faith files a case in a court that is unable to entertain it because of a defect of

jurisdiction? How will limitation be counted when the case is ultimately filed in the court of competent jurisdiction? Section 14 of the Limitation Act, 1963 ("LA") gives the answer. Under this provision, the court can exclude from limitation "the time during which the plaintiff has been prosecuting with due diligence another civil proceeding.

Section 14 of the Limitation Act deals with exclusion of time of proceeding bona fide in a court without jurisdiction. On analysis of the said section, it becomes evident that the following conditions must be satisfied before Section 14 can be pressed into service:

(1) Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party;

(2) The prior proceeding had been prosecuted with due diligence and in good faith;

(3) The failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature;

(4) The earlier proceeding and the latter proceeding must relate to the same matter in issue; and

(5) Both the proceedings are in a court

Section 14(2) of the Limitation Act excludes the time for which the applicant has been prosecuting, with due diligence, another civil proceeding, whether in the court of first instance or of appeal or revision. The conditions precedent for exclusion under this section are: (a) the earlier proceedings were against the same party; (b) the earlier proceedings were for the same relief; (c) they were prosecuted with diligence and good faith; and (d) the proceedings were prosecuted in a forum which could not entertain it for want of jurisdiction, or any other defect of like nature.

The SC has spelt out, in Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department, the conditions stated above for the application of Section 14, including the requirement that 'both the proceedings are in a court', which creates room for controversy. It brings to the fore the issue whether the provisions of Section 14 of the Limitation Act would be applicable to 'quasi-judicial forums' as against 'courts.' This issue came up for consideration in the case of MP Steel Corporation v. Commissioner of Central Excise, wherein the SC held that "the word 'court' in section 14 takes its colour from proceeding terms 'civil proceedings'. It

was held that the section would not be applied to appeals before a quasi-judicial Tribunal".

However, the court further observed that this finding does not conclude the issue and held that even when Section 14 may not apply, the principles on which Section 14 is based shall apply by virtue of them being the principles advancing the cause of justice. This application of principles of Section 14 can be seen in the case of J. Kumardasan Nair vs. Iric Sohan. Further, in the case of Consolidated Engineering Enterprises, it was observed that in considering the provisions of Section 14, proper approach must be adopted in interpreting the provisions in a way that such interpretation advances the cause of justice rather than aborting proceedings. The SC recently, in Kalpraj Dharamshi and Another v. Kotak Investment Advisors Limited and Another, endorsed the above decisions.

It must be noted that the exclusion of time under Section 14 is mandatory, given its pre-requisites are met. The purpose of Section 14 is to grant relief to a party who has bona fide committed some mistake.

***In MP Steel Corporation* v*. Commissioner of Central Excis*e, (2015) 7 SCC 58 "the principles guiding the application of Section 14 OF LimitationAct, have been succinctly set down by the Supreme Court**

Thus if you received the order on 1.1.2024 the time for filing appeal is three months from 1.1.24. Suppose you file rectification application under Section 161 on 10.1.24, then you have consumed 10 days of the first month and you still have 2 months plus days of the first month. Let us image it takes six months for the proper officer to decide the rectification application – then in my view you still have 2 months and say 20 days left of the first month to file the appeal. Hence, it is worth taking this recourse if you meet the parameters of rectification law as spelt out hereinabove. As an alternative to appeal process this route can be very successful, more so, when SC says provisions of section 14 shall be applicable to quasi tribunals as well even though they are not courts in strict sense – law in section 14 being in advancement of justice to the citizens.

Rule 142(7) – Consequence of Rectified Order

In cases, where rectification of the directive has been issued under Section 161 or in cases, where an order uploaded on the portal has been taken back, then the proper officer must upload the abstract of the rectification order or the withdrawal order electronically in Form GST DRC-08.

As per the regulations, the Proper Officer must upload an abstract of the rectification order issued under Section 161 electronically in Form GST DRC-08. This same form can also be utilized for the withdrawal of the directive. This form includes information on the original order and rectification order and a summary of the original claim and demand post-rectification. As a summary of the rectification order, it is required to issue Form GST DRC-08 under Section 142(7). This form was a replacement via the GST Notification No. 16/2019-CT on 29.03.2019, which was in effect from 01.04.2019.

EDITORS NOTE

Delhi High Court in The Indian Institute of Planning vs The Commissioner of Service Tax, 2020 has held as under:

We note that the scope of the rectification of the mistakes application is very limited. Only mistakes which are apparent on the face of the record and which do not require long drawn process of arguments by both sides, may be rectified. It is well settled law that applicant cannot seek review of the order in the guise of rectification of mistakes. This view finds support in the decision of Hon'ble Supreme Court in case of Commissioner of Central Excise Kolkata vs. ASCU Ltd. reported in [2003(151) ELT (481) (SC)]. Further, such views are to be found in the decision of the Apex Court in case of Commissioner of Central Excise, vs RDC Concrete: India Pvt. Ltd. reported in [20 11(270) ELT 625(SC)], as also in case of Honda Power Products vs. Commissioner of Income Tax, Delhi [2008(221)ELT(11) (SC)]."