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PARPARGANJ CA STUDY CIRCLE

**PRESENTATION ON LEVY OF
PENALTY UNDER DIFFERENT
SECTIONS OF GOODS AND
SERVICE TAX ACTS, 2017**

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Section 122

General Principle of Penalty

- Section 122(1) of the GST in case of contravention of nature specified in Clauses (i) to (xxi) shall be made by taxable person. Thus, sub-section (1) restricts penalty only on taxable person be it registered or unregistered.
- In my view, Section 122 talk of “Taxable Person” Section 2(107) says Taxable person mean a person who is registered or liable to be registered under Sec 22 or Sec. 24.



- (i) supplies any goods or services or both without issue of any invoice or issues an incorrect or false invoice with regard to any such supply;
- This covers cases where supplier does not record the transaction in his books of accounts, leading to evasion of not only GST but also income tax and other applicable taxes and levies. It mostly happens in Business to Consumer transactions (popularly known as B2C supplies) where recipient is not eligible to credit of input tax. Evasion of tax is shared between supplier and the customer depending upon the practice followed by other suppliers or market practices. In addition, supplier also saves income tax as transaction is never recorded in books of accounts.



- Further, this clause covers not only issue of an incorrect invoice but also recording also transaction at a value less than actual value or tax is levied at a rate lower than that is payable.



- (ii) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act or the rules made thereunder ;
- This clause shall apply where supplier issues any invoice or bill in violation of the provisions of this Act or the rules made thereunder but does not supply goods or services or both. Such supplier only records the transaction in his books of account without making any supply. It mostly happens in business to business transaction (popularly known as B2B supplies) to allow the recipient to claim credit of input tax, resulting in evasion of GST.



- (iii) collects any amount as tax but fails to pay the same to the Government beyond a period of three months from the date on which payment become due;
- This clause shall apply where a supplier collects any amount as tax from the recipient but fails to pay the same to the Government. Supplier while collecting such amount from the recipient represents that amount as tax. Further, such non-payment of tax should be beyond a period of three months from the date on which such payment becomes due to be paid to the Government to attract penalty under the clause.



- (iv) collects any tax in contravention of the provisions of this Act but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;
- This clause shall be applicable if following conditions are satisfied cumulatively:
 - (a) Where supplier collect any tax in contravention of the provisions of this act; and
 - (b) He fails to pay such excess collected tax to the Government beyond a period of three months from the date on which such payment becomes due.



- (v) fails to deduct the tax in accordance with the provisions of sub-section (1) of Section 51, or deducts an amount which is less than the amount required to be deducted under the said sub-section;
- This clause shall get attracted in either of the following two situations:
 - (a) Person liable to deduct tax under section 51(1) fails to deduct the tax; or
 - (b) Such person deducts an amount which is less than the amount required to be deducted under section 51(1) which is reproduced hereunder for the sake of ready reference:



- Notwithstanding anything to the contrary contained in this Act, the Government may mandate,-
- (a) a department or establishment of the Central Government or State Government; or
- (b) local authority; or
- (c) Government agencies; or
- (d) such persons or category of persons as may be notified by the Government on the recommendations of the Council,



- (hereafter in this section referred to as “the deductor”), to deduct tax at the rate of one percent [effective rate of TDS shall be 2% after deducting 1% SGST) from the payment made or credited to the supplier (hereafter in this section referred to as “the deductee”) of taxable goods or services or both, where the total value of such supply, under a contract, exceeds two lakh and fifty thousand rupees.



- (vi) fails to collect tax in accordance with the provisions of sub-section (1) of Section 52, or collects an amount which is less than the amount required to be collected under the said sub-section or where he fails to pay to the Government the amount collected as tax under sub-section (3) of section 52;
- This clause shall get attracted in any of the following two situations:
 - (a) Where the person liable to collect tax under section 51(1) fails to collect tax; or
 - (b) Such person collects an amount which is less than the amount required to be collected under section 52(1); or


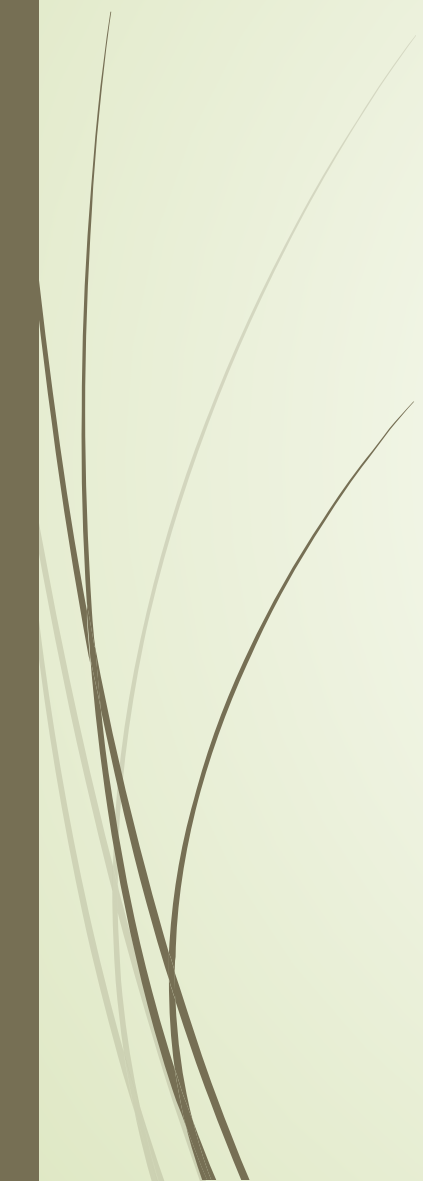



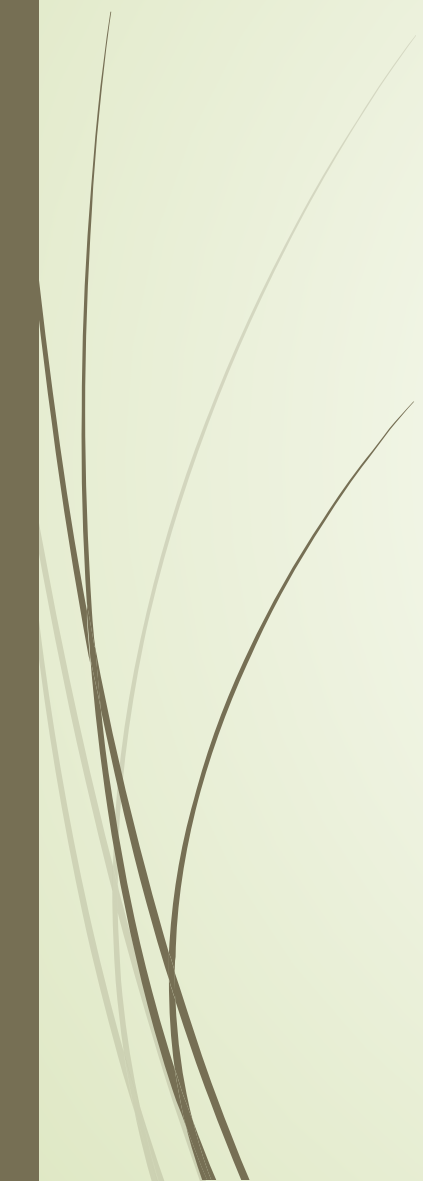
- (c) Where such person fails to pay to the Government the amount collected as tax under sub-section (3) of section 52.
- (vii) takes or utilizes input tax credit without actual receipt of goods or services or both either fully or partially, in contravention of the provisions of this Act or the rules made thereunder;
- This clause shall apply only to registered person because tax credit can be claimed by registered person in terms of section 16(1) of CGST Act. Further, this clause shall get attracted in either of the following two situations:





- (a) Where a registered person takes input tax credit without actual receipt of goods or services or both either fully or partially, in contravention of the provisions of this Act or the rules made there-under; or
- The Supreme Court in the case of CCE Vs. Bombay Dyeing and Mfg. Co. Ltd. : MANU/SC/3318/2007 on the issue of payment of interest when modvat credit/cenvat credit (now ITC), has not been utilized, has observed as under:-


➤ .


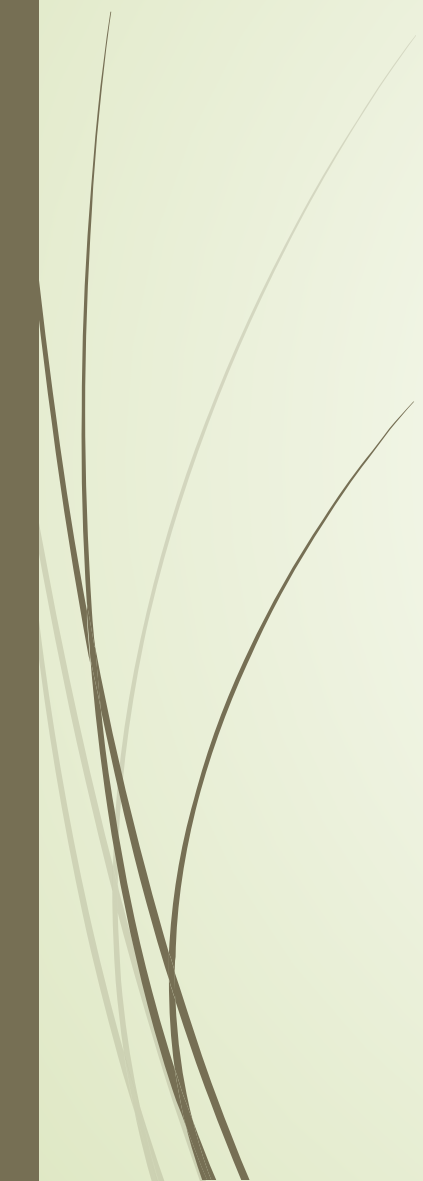
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- In the present case, before the account could be debited and before the assessee could avail of CENVAT credit, the assessee has reversed CENVAT credit which would amount the assessee not taking credit for duty paid on input
 - In another judgment, the Karnataka High Court in the case of CCE Vs. Pearl Insulation Ltd: MANU/KA/0787/2012 has observed that interest cannot be claimed merely on its availment but only from the date of actual utilization:-

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- The interest cannot be claimed from the date of wrong availment of CENVAT credit and that the interest would be payable from the date CENVAT credit is taken or utilized wrongly. In that view of the matter, we do not see any merit in this appeal. Accordingly, the appeal is dismissed.
 - The Punjab & Haryana High Court in the case of CCE, vs. Maruti Udyog Limited [2007 (214) E.L.T. 173 (P & H)] upheld the findings of the Tribunal that the assessee was not liable to pay interest as the credit was only taken as an entry in the Modvat record and was not in fact utilized

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- The above decision of Punjab & Haryana High Court has been upheld by Supreme Court CCE Vs. Maruti Udyog Ltd. - 2007 (214) E.L.T. A50 (S.C.)
 - The Gujarat High Court in another interesting case reported as CCE Vs. Sweet Industries MANU/GJ/1402/2010, emphatically held that when the credit has not been utilized, it does not amount to having taken the credit as such, the question of paying interest does not arise.

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- The Tribunal in a very latest judgment in the case of Echjay Industries Pvt. Ltd. vs. C.C.E.,: MANU/CM/0357/2019, has dealt with the issue of reversal of cenvat credit before its utilization and liability of the assessee to pay interest.
 - The said credit was not utilized by the appellant for payment of excise duty etc. It is merely a book entry and, therefore, the credit wrongly availed does not amount to short payment of duty. The interest is compensatory in nature and to be paid only when either the principal amount is paid belatedly or there is any loss to government exchequer.

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- :The Supreme Court in (i) Chandrapur Magnets Wires (P) Ltd, (ii) Bombay Dyeing & Mfg Co Ltd (iii) and Karnataka High Court in Bill Forge (P) Ltd (supra) and Pearl Insulation Ltd: Punjab & Haryana High Court in Maruti Udyog Ltd where it has been consistently held that when Cenvat has been reversed before utilization or not at all utilized, it could be said that it is neither availed nor utilized at all.

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- (b) Where a registered person utilize input tax credit without actual receipt of goods or services or both either fully or partially, in contravention of the provisions of this Act or the rules made there-under.
 - (viii) Fraudulently obtains refund of tax under this Act;



- Fraud is generally defined in the law as an intentional misrepresentation of material existing fact made by one person to another with knowledge of its falsity and for the purpose of inducing the other person to act, and upon which the other person relies with resulting injury or damage.
- This clause shall apply only to person(s) claiming refund of tax under section 54 of CGST Act and such refund is claimed fraudulently.



- (ix) takes or distributes input tax credit in contravention of section 20, or the rules made thereunder;
- To understand the scope, refer Section 20 Central Act which provides that the Input Service Distributor shall distribute the credit of central tax as central tax or integrated tax as integrated tax tax, by way of issue of a document containing the amount of input tax credit being distributed in such manner as may be prescribed.



- (x) falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information or return with an **intention to evade payment of tax due** under this Act;
- This clause shall apply where a person liable to maintain accounts or documents or required to furnish information does not do so in terms of GST Act(s) or Rule(s) made there-under with an intention to evade payment of tax. If such falsification of accounts or documents or furnishing information is due to bonafide mistake, provision of this clause shall not be applicable.



- (ix) is liable to be registered under this Act but fails to obtain registration;
- (xii) furnishes any false information with regard to registration particulars, either at the time of applying for registration, or subsequently;
- Any person who is seeking registration under the CGST Act or IGST act in terms of Chapter VI of the CGST, Act 2017 but furnishes any false information with regard to registration particulars, either at the time of applying for registration, or subsequently shall get covered under the scope of this clause.



- (xiii) obstructs or prevents any officer in discharge of his duties under this Act;
- (xiv) transports any taxable goods without the cover of documents as may be specified in this behalf;
- It covers any person who transports any taxable goods without the cover of proper documents. Such transportation may be by any mode of transport or by using multiple mode of transport. **If any person transports exempted or non-taxable goods by any mode of transport, it shall not get covered under this clause.**



- (xv) suppresses his turnover leading to evasion of tax under this Act;
- Suppression of turnover which results in the evasion of tax is a situation covered under the scope of this clause. suppression of turnover can be by a taxable person only, hence this clause is applicable to taxable person.
- (xvi) fails to keep, maintain or retain books of account and other documents in accordance with the provisions of this Act or the rules made thereunder;



- Clause (xvii) deals with furnishing of any false information or documents called for by an officer in accordance with the provisions of this Act or the rules made thereunder or furnishes false information or documents during any proceedings under this Act (i.e. hearing before Comm.(A) or by Tribunal.
- Information or return with an intention to evade payment of tax due under this Act and discussed above. However, this clause deals with a different subject and covers the following situations:



- (a) Any person liable to furnish information and documents fails to furnish information called for by an officer in accordance with the provisions of this Act;
- (b) Such person furnishes false information or documents during any proceedings under this Act.
 - (xviii) supplies, transports or stores any goods which he has reasons to believe are liable to confiscation under this Act; (overlap with Section 130)
 - This clause is applicable to any person who supplies, transports or stores any goods which he has reasons to believe are liable to confiscation under this Act.



- (xix) issues any invoice or document by using the registration number of another registered person;
- This clause shall get attracted where any taxable person issues any invoice or document by using the registration number of another registered person.
- (xx) tampers with, or destroys any material evidence or document;



- he (taxable person) shall be liable to pay a penalty of ten thousand rupees or an amount equivalent to the tax evaded or the tax not deducted under Section 51 or short deducted or deducted but not paid to the Government or tax not collected under Section 52 or short collected or collected but not paid to the Government or input tax credit availed of or passed on or distributed irregularly, or the refund claimed fraudulently, which is higher.



➤ Sec. 125: **GENERAL PENALTY WHERE NO PENALTY IS PRESCRIBED.**

Any person, who contravenes any of the provisions of this Act or any rules made there-under for which no penalty is separately provided for in this Act, shall be liable to a penalty which may extend to twenty five thousand.




- Section 126: (1) No officer under this Act shall impose any penalty for minor breaches of tax regulation or procedural requirements and in particular, any omission or mistake in documents which is easily rectifiable and made without fraudulent intent or gross negligence:

Explanation

- (a) a breach shall be considered a minor breach if the amount of tax involved is less than Rs.5,000
- (b):an omission or mistake in documentation shall be considered to be easily rectifiable if the same is an error apparent on the face of record.



- (2): The penalty imposed under this Act shall depend on the facts and circumstances of each case and shall be commensurate with the degree and severity of the breach;
- (3): No penalty shall be imposed on any person without giving him an opportunity of being heard.
- (4) The officer under this Act shall while imposing penalty in an order for a breach of any law, regulation or procedural requirement, specify the nature of the breach and the applicable law, regulation or procedure under which the amount of penalty for breach has been specified.

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- Section 75(4): An opportunity of personal hearing shall be granted where a request is received in writing from the person chargeable with tax or penalty, or where any adverse decision is contemplated against such person.
 - Section 75(7): The amount of tax, interest and penalty demanded in the order shall not be in excess of the amount specified in SCN and no demand shall be confirmed on the grounds other than the grounds specified in the Notice.

Different circumstances where penalty imposable




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- Under CGST Act, primarily penalty is imposable under various provisions as follows:-
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- Section 123 failure to furnish information/return;
- Section 124 Fine for failure to furnish statistics
- Section 127 Power to impose penalty in certain cases;



- Section 127 enables PO to levy penalty and the same is **NOT COVERED** in proceeding U/S 62,63,64,73, 74, 129 or 130 after service of SCN and personal hearing;
- A) Section 62 Assessment of Non-filers of Return;
- B) Section 63 Assessment of unregistered person
- C) Section 64 summary assessment in certain cases;

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- D) Show Cause Notice under Section 73;
 - E) Show Cause Notice under 74 invoking extended period of limitation;
 - F) Detention, Seizure and release of goods & Convey.
 - G) Confiscation of goods of goods & convey, penalty



- **VARIOUS PROVISIONS ADJUDICATION & CALLING FOR PERSONAL HEARING.**
- **However, Section 126(3) Act says that no penalty without personal hearing.**
- **There is no negative covenant in other Sections for not serving any SCN before imposition of penalty.**
- **Section 75(4) : An opportunity of hearing shall be granted where any adverse order is to be passed.**



- Section 75(3): Where any order is required to be issued pursuant to directions of Appellate Authority or appellate tribunal or court, such order shall be issued within 2 years from the date of communication.
- Section 75(8): where the Appellate Authority or Appellate Tribunal or Court modifies the amount of tax determined by the PO, the amount of interest and penalty shall stand modified accordingly, taking into consideration the amount of tax;
- Section 75(10) if proceedings deemed to be concluded if no orders passed as provided under Section 73(10) and 74(10)



GENERAL PRINCIPLE FOR IMPOSING PENALTY

- 5: The Supreme Court
 - (a) Hindustan Steel Limited v. State of Orissa MANU/SC/0418/1969
 - (b) CST v. Sanjiv Fabrics MANU/SC/0698/2010
 - Mens rea is an essential ingredient for imposition of penalty.



- The Supreme Court in *Bharjatiya Steel Industries v. Com.* MANU/SC/7288/2008 observed as under:-
 - ➔ When AA has a discretionary jurisdiction to levy penalty, by necessary implication, the authority may not levy penalty. If it has discretion not to levy penalty, existence of men-rea is a relevant factor. (premises let out by Director to company – company wrongly paid GST on reverse charge)



- **Cement Marketing Co Vs. STO AIR 1980 SC 346: Even if minimum penalty is prescribed, authority is justified and may refuse to impose penalty, if breach is technical or venial**



- If party did not pay tax due to bonafide belief, then deliberate defiance of law or conduct is dishonest, cannot be alleged and penalty is not imposable. EID Parry Vs. ACCT AIR 2000 SC 551. (perks given by company to employees under terms of employee – Deptt wants GST)
- If assessee had bonafide belief and credit has been taken after due intimation, no penalty imposable – Kalpana Industires Vs. CCE 2009(233)ELT 209 Tri.



- On a issue whether process amounts to manufacture and there are divergent view of two benches of Tribunal, no penalty is imposable. CCE Vs. Sudarshan Cable Indu. 2012(276) ELT 300 ALL. DB (Directors' Salary subject to GST or not) (contribution made to PM Relief Fund is allowed as CSR - State Government not allowed).
- Guljag Chemicals Vs. CCE 2009(238) ELT 689.
- CCE Pilot Products 2005(182) ELT 59.
- When issue referred to larger Bench, no penalty. Continental Foundation Vs. CCE 2007(216) ELT 177SC.



INTERPRETATIONAL ISSUE NO PENALTY IS IMPOSABLE.

- If assessee has an arguable case – no penalty
Siddhartha Tubes Vs. CCE 2006(193) ELT 6 SC.
- Mistake detected and correct before Deptt pointing out,
no penalty DCW Ltd Vs. CCE 1996(81) ELT 381.
- Matter involves interpretation of exemption
notification, no penalty. Bharat Bijlee Vs. CCE
2009(234) ELT 652 Tr.



Maya Devi v. Raj Kumari Batra MANU/SC/0731/2010 where authority has discretionary powers, to be exercised by application of mind, recording reasons., promote fairness, equity.

- The CESTAT Sumeet Industries Ltd. v. CCE, MANU/CM/1001/2003
- "Penalty be not ordinarily imposed unless there is a deliberate defiance of law or contumacious or dishonest conduct or a conscious disregard to an obligation.



- SC in Karnataka Rare Earth Vs. Deptt MANU/SC/0057/2004. Penalty will not also be imposed merely because it is lawful to do so. In spite of a minimum penalty prescribed, the authority may refuse to impose penalty if the breach complained of, a technical or venial breach or flew from a bona fide though mistaken belief.

MANDATORY PENALTY EQUAL TO AMOUNT OF TAX EVADED



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- The Bombay HC CCE Vs Hindustan Petroleum Corporation Ltd. MANU/MH/2959/2016: has observed that "in case of non-payment or short payment of duty, penalty gets automatically attracted and the authority had no discretion.
- The Bombay High Court relied upon Apex Court in UOI Vs Dharmendra Textile Processors MANU/SC/4448/2008.



- SC in Rajasthan Spinning and Weaving Mills has held that the penalties under Section 11AC (Section 74 of CGST Act) is a punishment for an act of deliberate deception by the assessee, with the intent to evade duty by adopting any of the means mentioned in such statutory provision. If the conditions enumerated in Section 11AC (Section 74 CGST Act) are fulfilled, then there is no discretion to reduce the amount of penalty but it shall be equal to the duty liability.



PENALTY MUST BE COMMENSURATE WITH THE GRAVITY OF OFFENCE

- 11: Punishment must fit the crime, otherwise it will be hit principle of unreasonableness. No penalty ought to be imposed for a technical and venial breach of statutory obligations. In support of the above contentions, Maharashtra Land Development System Vs. State of Maharashtra MANU/SC/0940/2010, and All India Railway Recruitment Board vs. K. Shyam Kumar MANU/SC/0342/2010.



NOMINAL PENALTY

- The CBIC has issued Circular No. 64/38/2018-GST : MANU/GSCU/0041/2018 dated 14.9.2018 (covering GST era) clarifying that in case of technical errors in the documents accompanying the goods, provisions of Section 129 of the GST Acts may not be resorted to but instead goods may be released on payment of nominal penalty under Section 125 of the GST Acts.



- The Allahabad High Court in *Rajavat Steels vs. State of U.P.* MANU/UP/4633/2018 in GST era, that two authorities below failed to appreciate that it was bonafide mistake in putting the vehicle number (there is a mistake in putting last digit of vehicle number) and penalty was wholly unwarranted.



TAX AND INTEREST PAID BEFORE SCN

- The DB of Madras High Court in Aeon Formulations (P) Ltd Vs. CCE (21.11.2019 - MADHC) : MANU/TN/9468/2019 has observed as under:-
- 100% penalty under Rule 26 CE Rules, 2002 is highly excessive because appellant has paid the duty with interest before the issue of SCN - hence 100% penalty not imposable.



TWO INTERPRETATION

- The CESTAT in Nature's Essence Pvt. Ltd. vs. CCE : MANU/CE/0683/2017 due to interpretational, appellate authority has already reduced the penalty from Rs. 6 lacs to Rs. 3 lacs and CESTAT reduced from Rs.3 to Rs. 1 lacs, as two interpretation were possible.



CREDIT TAKEN TWICE

- The CESTAT in Hindustan Motors Ltd. vs. CCE: MANU/CC/0190/2019 the appellants have availed wrong credit by taking credit twice on the same invoices. Credit availed was reversed with interest on being pointed out and hence, no penalty warranted.



CREDIT AVAILED PRIOR TO RECEIPT OF MATERIAL

- The Tribunal in Gujarat Pipavav Port Ltd. vs. CCE, MANU/CS/0390/2008, due to procedural lapse in availing advance service tax credit prior to the payment of service tax of input service availed by them - otherwise credit is available to them. On payment of interest, penalty was set aside.



CREDIT-NOT DENIABLE ON **TECHNICAL BREACHES**

- Gujarat High Court M/s. Vimal Enterprises v. UOI - MANU/GJ/0470/200 entire endeavour of the Revenue should be to make the Cenvat Scheme effective and not to deny the beneficial provisions on technical breaches - no penalty.



MERE CONTRAVENTION NOT ENOUGH-MENS REA

- The Rajasthan High Court Asstt CTO Vs. Rishab Special Yarns Limited MANU/RH/0658/2004 = mere contravention of provisions of Section 78(2) of the Act of 1994 cannot authorize the assessing officer to impose penalty under Section 78(5) of the Act of 1994 unless there is mens rea on the part of the trader.



GOOD CAUSE FOR NOT FILING RETURN WITH TAX

- The MP High Court in *Comm. Vs. Eastern Air Products (P) Ltd* MANU/MP/1432/2006 = non-filing of return and non-payment of sales tax,
- where sufficient cause is shown by the registered dealer for not filing the return with proof of payment of tax due, such penalty cannot be imposed.



- In the present case, it is a case of bonafide miscalculation as to whether the goods would be exigible to 12% or 28%

GSTR-1 IS ADMISSION OF TAX PAYABLE ON THE PART OF REGISTERED PERSON



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- This Court is of the considered opinion that the tax determination has already been done in the present case, as the petitioner itself has quantified its tax liability under the GSTR-1 Returns. The petitioner's contention that in absence of determination of tax under Section 73 no recovery can be made, is unfounded and in fact Section 73 has got no application in the facts and circumstances of the present case.
- **Kabeer Reality Private Limited vs. UOI (21.11.2019 -) : MANU/MP/1945/2019**



DIFFERENCE IN LANGUAGE OF SECTION 74 & 129

SECTION 74

Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilized by reason of fraud, or any wilful-mis statement or suppression of facts to evade tax.

SECTION 129

Notwithstanding anything contained in this Act, where any person transports any goods or stores any goods while they are in transit in contravention of the provisions of this Act or the rules made thereunder.



SECTION 129(1)-

- Section 129: The Section shall apply where any person transport any goods or stores any goods while goods are in transit in violation of provisions of CGSTG Act or rules made.
- Notwithstanding anything contained in this Act, where any person transports any goods or stores any goods while they are in transit in contravention of the provisions of this Act or the rules made thereunder, all such goods and conveyance used as a means of transport for carrying the said goods and documents relating to such goods and conveyance shall be liable to detention or seizure and after detention or seizure, shall be released.



- In case owner of goods approaches for payment of tax and penalty
- **Taxable Goods:**
- Tax payable and penalty equal to 100% of tax like Section 11AC of Central Excise Act.
- **Exempt Goods:**
- Lower of any of the amounts:
- i) 2% of value of goods (ii) Rs.25,000



- Where owner does not approach for payment of tax and penalty:
- **(A) Taxable Goods:**
- On payment of tax payable and penalty equal to 50% of value of such goods as reduced by tax amount paid thereon.
- **Exempted Goods:**
- Lower of any of the following:
- (i) 5% of value of goods (ii) Rs.25,000/-



- The provisions of Section 67(6) shall, with necessary changes, apply to proceedings under Section 129.
- As per Sec.67(6), when goods are detained, the same shall be released on provisional basis subject to
 - (i) Applicable Tax
 - (ii) Interest accrued thereon (iii) Penalty



- **CBIC Vide Circular No.41/15/2018-GST dt.13.4.2018 has prescribed the procedure for interception of conveyances for inspection of goods in movement and detention, release and confiscation of such goods and conveyances. The following is procedure:-**
- **a): Requisite documents to accompany goods:**
 - (i): Invoice, Bill of Supply or Delivery Challan**
 - (ii): Copy of Bill of Entry in case of imports;**
 - (iii): E Way in case of transportation of goods;**



➤ (b): Verification of documents;

The detaining officer can intercept vehicle and ask for above documents for verification and if no discrepancy found, vehicle released.

If vehicle is detained for more than 30 minutes, transporter can upload detention of vehicle in Form GST EWB-04 on common portal to avoid hardship.



(c) Inspection & Verification of Vehicle & goods;

- If person charge fails to produce to documents or documents produced are improper, following procedure will be followed;
- i): Recording of statement of incharge of Vehicle in Form No.GST MOV-01;
- ii):Issuance of an order for physical verification in Form GST MOV-02. The transporter can insist for this order.



Conclusion of inspection proceedings within three days – further extendable with permission of Commissioner.

- Preparation of report of verification or inspection in Form GST MOV-04 and the same is served on transporter.
- Release of vehicle if no discrepancy found. To avoid further inspection in onward journey, person in charge should obtain GST-MoV-5 for easy of further journey.



- If discrepancy is found viz; (a) without proper documents, non-issuance of E way bill and the officer consider goods/conveyance to be detained in Form No.GST MOV-06.
- The Officer will, after detention will issue notice in Form GST MOV-07 indicating the amount of tax and penalty clearly specifying that party may file reply to SCN. If satisfied, he will issue Release Order.



► The party, instead of making payment, has an option to execute bond in Form GST MOV-08 and furnish security by way of bank guarantee for an amount equal to amount of tax and penalty for provisional release of goods. The party may either make payment or furnish bond within 14 days w.e.f. 1.2.2019 (7 days in case of perishable goods). The party can file an appeal before First Appellate Authority.



SECTION 122

1. It speak of Taxable person Sec.2(107) (a) registered or (b) unregistered.

2. It requires issuance of SCN as the penalty is equal to tax evaded – tax evaded to be adjudicated. Sec. 75(4) No adverse order can be passed without giving hearing.

SECTION 129

1: It speak of a person transporting goods – Generally transporter or taxable person carrying goods in his own vehicle

2: It envisage summary procedure since the goods are transported – may be perishable goods. The procedure as prescribed by Board to be followed.



SECTION 122

3: Adjudication by PO to adjudicate the tax, interest and penalty leviable.

4. In my view, procedure as per Section 73 will have to be followed i.e. SCN at any time before expiry of 2 years & 9 months.

SECTION 129

3: Since it is summary procedure, on the face of it, it should show that the goods are being carried with intent to evade a duty.

4: Where there is procedural defect or technical error or venial breach, Section 129 cannot be invoked.



- **Daily Fresh Fruits India Private Limited vs. STO (04.03.2020 - KERHC) : MANU/KE/0818/2020**
- **In case of a bonafide dispute with regard to the classification between a transporter of the goods and the squad officer, the squad officer may intercept the goods and detain them for the purpose of preparing the relevant papers for effective transmission to the judicial assessing officers and nothing beyond. In the present case, it is a case of bonafide miscalculation as to whether goods (fruit drink) would be liable to 12% or 28%**



- The order of duty and penalty set aside where the Department is saying Fruit Drinks is taxable at 28%

Larsen and Toubro Limited vs. The Commissioner,
(10.02.2020 - KERHC) : MANU/KE/0545/2020

Transporter has to fill the information in Part A of the Form GST e-way bill-01(electronically) but because of non-filling of Part A, three trailers/vehicles were retained. Alleged detention could not have been done under the provisions of Section 129 of the Act, in view of Circular dated 22.11.2017 issued by the Ministry of Finance, material handling vehicles, cranes and other items were exempt from the applicability of IGST in the absence of any 'supply'.



- ▶ If the owner of a crane is transporting his goods from one State to another State for execution of Works Contract in that State, it could be a case of minor penalty as envisaged under Section 122 of the Act. The goods of such nature would not be eligible for any tax or penalty. In this regard, Exts. P5 and P6 replies in response to the impugned notices have already been filed, but there is no adjudication even by the Commissioner.



- In this case, parts of towers, machinery and other items were transported to another site under Delivery Challan (authenticity of which was also not questioned by Department) and undisputedly, there was no supply within the meaning of Section 7 of CGST Act, hence, it is not a case of confiscation and nor of imposition of penalty.



- Allahabad High Court in *Iqra Roadways Vs. State* 2017 TIOL-32-HC-All-GST held that since issues involved factual determination in SCN, while dismissing the writ petition, granted relief of release of goods upon paying tax demanded.
- Kerala High Court in *Sameer Mat Ind. Vs. State* (20.11.2017) 2017-TIOL-33-HC-Ker-GST, ordered release of goods subject to furnishing Bond only.



- Allahabad HC in Ramdev Trading Co Vs. State (30.11.2017) 2017-TIOL-35-HC ALL-GST, absence of Transit Declaration Form is a technical breach. While ordering release of goods & vehicle, penalty set aside.
- Kerala HC in Indus Towers Ltd Vs. State (17.10.2-018)2018-TOIL-12-HC-Kerala GST, Section 129 can be invoked only when the goods are liable to “confiscation” .



- The DB of Gujarat HC in land mark judgement, in the case of Synergy Fertichem (P) Ltd Vs. State MANU/GJ/3200/2019 (23.12.2019), made distinction between Section 129 and 130 of CGST Act and held that both are mutually exclusive. The important observations are as follows:-



- (i) Section 129 of the Act talks about detention, seizure and release of goods and conveyances in transit. On the other hand, Section 130 talks about confiscation of goods or conveyance and levy of tax, penalty and fine thereof. Although, both the sections start with a non-obstante clause, yet, the harmonious reading of the two sections, keeping in mind the object and purpose, would indicate that they are independent of each other. Section 130 of the Act, which provides for confiscation of the goods or conveyance is not, in any manner, dependent or subject to Section 129 of the Act. Both the sections are mutually exclusive.



- The phrase "with an intent to evade the payment of tax" in Section 130 of the Act assumes importance. When the law requires an intention to evade payment of tax, then it is not mere failure to pay tax. It must be something more. The word "evade" means defeating the provisions of law of paying tax. It is made more stringent by use of the word "intent". The assessee must deliberately avoid the payment of tax which is payable in accordance with law. However, the element of mens rea cannot be read into Section 130 of the Act.



- For the purpose of issuing a notice of confiscation under Section 130, i.e., at the stage of detention and seizure of the goods and conveyance, the case has to be of such a nature that on the face of the entire transaction, the authority concerned should be convinced that the contravention was with a definite intent to evade payment of tax. In other words, the authorities need to make out a very strong case against the assessee. Mere suspicion may not be sufficient to invoke Section 130 of the Act straightway.



- If the authorities are of the view that the case is one of invoking Section 130 of the Act at the very threshold, then they need to record their reasons for such belief in writing, and such reasons recorded in writing should, thereafter, be looked into by the superior authority so that the superior authority can take an appropriate decision whether the case is one of straightway invoking Section 130 of the Act.
- (v) Even if the goods or the conveyance is released upon payment of the tax and penalty under Section 129 of the Act, later, if the authorities find something incriminating against the owner of the goods in the course of the inquiry, if any, then it would be permissible to them to initiate the confiscation proceedings under Section 130 of the Act.



- Sections 129 and 130 respectively of the Act are mutually exclusive and independent of each other. If the amount of tax and penalty, as determined under Section 129 of the Act for the purpose of release of the goods and the conveyance, is not deposited within the statutory time period, then the consequence of the same would be forfeiture of the goods and the vehicle with the Government.
- This does not necessarily imply that the confiscation proceedings can be initiated only in the event of the failure on the part of the owner of the goods or the conveyance in depositing the amount towards the tax and liability determined under Section 129 of the Act.



- For the purpose of Section 129(6) of the Act, it would not be necessary for the department to establish any intention to evade payment of tax. If the tax and penalty, as determined under Section 129, is not deposited within the statutory time period, then the goods and the conveyance shall be liable to be put to auction and the sale proceeds shall be deposited with the Government.



DISTINCTION BETWEEN SECTION 73, 74 & SECTION 129&130 CGST ACT

- The provisions of sections 73 and 74 respectively of the Act deal with the 'demands and recovery' to be made by the assessing officer based upon the assessment, whereas the provisions of Section 129 of the Act deal with the 'detention/seizure'. While assessing the returns, if the assessing officer finds that the amount of tax has not been paid or erroneously refunded, or where the input tax credit has been wrongly availed or utilized for any reason, either with mala fide intention or without the same, as the case may be, the provisions of Section 73/74 of the Act would be invoked.



Scope of Section 129

- However, the provisions of Section 129 of the Act deal with situation where the evasion of tax/contravention of the Act/Rules is detected during transit itself, requiring the adoption of summary like proceedings. Therefore, the said provisions operate in different spheres.



- The goods are not liable to be detained on the ground that the tax paid on the product was less. In such circumstances, the Inspecting Authority is expected to alert the Assessing Authority to initiate appropriate proceedings "for assessment of any alleged sale at which the dealer will have his opportunities to put forward his pleas on law and on fact.
- The process of detention of the goods cannot be resorted to when the dispute is bona fide, especially concerning the exigibility of tax and, more particularly, the rate of that tax.



- Even in the absence of the physical availability of the goods or the conveyance, the authority can proceed to pass an order of confiscation and also pass an order of redemption fine in lieu of the confiscation. In other words, even if the goods or the conveyance has been released under Section 129 of the Act and, later, confiscation proceedings are initiated, then even in the absence of the goods or the conveyance, the payment of redemption fine in lieu of confiscation can be passed.



➤ CONFISCATION:

➤ Liability is attached to goods removed without payment of duty and such goods can be confiscated wherever they are found. Goods can be confiscated from innocent buyer. Shakti Textile Corporation Vs. CCE 2000(123) ELT 222 Madras DB.

Penalty cannot be imposed on bonafide purchaser since there is no mens-rea CCE Vs. Kaml Kapoor 2007(5) STR 251 (P&H DB) followed in CCE Vs. Five Star Shipping Ltd 2012(278) ELT 197 Karnataka DB.



➤ Section 130(2)

QUANTUM OF FINE:

Upon confiscation being adjudicated of goods or conveyance, owner is given option to pay fine in lieu of confiscation and fine shall not exceed the market value of goods less tax charged.

REDEMPTION FINE REASONABLE

- UK Enterprises Vs. CCE 2007(218) ELT 481 SC, the fine held to be reasonable even if market value could not be determined.



PRE DETERMINED FINE

- SC in CC Vs. Stoneman Marble Ind. 2011(2)SCC 758 has approved the practice of Tribunal imposing redemption fine of 20% of CIF Value and penalty of 5% of CIF Value.
- Kerala HC in CCC Vs. Navpad Enter.2012(278) ELT 172 (Ker) approved practice of redemption fine of 10% of CIF Value and penalty 4% of CIF Value.
- CCE Vs. Marmo Classic 2003(156) ELT 14 (Bom) if offence is of repetitive in nature, higher penalty should be imposed.



- If the redemption fine is paid, the person becomes absolute owner of goods and can deal as he wants. *Mohan Meakins Ltd Vs. CCE 2000(115) ELT 3 SC.*
- The Constitution Bench of SC in *Maqbool Hussain Vs. State AIR 1953 325* proceedings before revenue authorities are different from proceedings in a criminal court and hence both can continue and are not hit by concept “same person cannot be punished twice for same offence.”



PKMG LAW CHAMBERS

THANKYOU

PARPARGANJ CA STUDY
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