

## CHALLENGES FACED IN ASSESSMENTS AND AUDITS



CA Jayesh Gogri  
Email : jayeshgogri@gscintime.com

### Introduction:

When this article is being written, the most celebrated festival i.e., Diwali is approaching and celebration has begun by cleaning houses/offices, sharing gifts and bonuses. Even Department is not left out and has started cleaning the tax defaults of assesseees by gifting enquiry letters, show cause notices, demand notices etc. and carrying out GST audit, search, seizure etc. as bonus. From the time GST has been introduced, the rush of tax collection is at peak, and it continues till date. Let us see some of the recent challenges faced by assesseees during departmental inquest such as GST assessments and audits:

### Multiple tax authorities taking multiple actions:

Central Tax Authorities as well as State Tax Authorities are responsible for enforcing GST across Country. Thus, one of the prime objects of complete integration of major indirect taxes has been achieved through GST, however, it has also entailed cross jurisdiction i.e. both Central Government as well as State Government authorities are empowered to enquire and take legal action against every assessee. Already various wings are developed by each Tax Authority such as Audit wing, Investigation wing, Intelligence Wing, etc. The following is an illustrative list of the types of authorities and the types of legal recourse which can be taken on a single assessee:

Types of authorities:

- Central Jurisdictional Officer
- State Jurisdictional Officer
- Central Audit wing
- State Audit wing
- Directorate General of GST Intelligence (DGGI)
- Central Investigation wing
- State Investigation wing

Types of legal recourse:

- Enquiry
- Audit
- Investigation
- Summon
- Search & Seizure
- Assessment

So the moot point is, multiple tax authorities may take multiple actions on a single assessee for the same tax period. Just a reminder: Routine mails, letters, communications, automatic notices etc. are not even considered in the above list. Under GST Law, assessee needs to be prepared to attend various GST matters parallelly while carrying out routine statutory compliances. Is such a structure pragmatic? Whether the phrase 'One Nation, One Tax' is meant only for Government and not for assessee. Was State-wise registration under GST not enough, that even cross-jurisdiction is introduced by Government? Would such structure not affect India's international ranking for ease of doing business?

One may consider that as per recent Supreme Court's decision in the case of *Canon India 2021 (376) E.L.T. 3 (S.C.)*, the person who did the assessment can only undertake reassessment. Therefore, other officers are not authorised for re-assessment.

### **Department visiting for Service Tax Audit and examining GST aspects or vice versa:**

The powers to conduct an audit under GST law are governed by Section 65 of CGST Act, 2017 whereas the powers to conduct Service Tax audit are governed by Rule 5A of the Service Tax Rules, 1994. It is crucial to note that the provisions and scope of audit under both the enactments are different. Further, GST and Service tax Laws are two different spheres. For example, one transaction may be taxable under GST Law but not under Service tax law and *vice versa*.

### **Provisional attachment:**

Habitually, during the course of any audit/investigation, assessee are insisted to make tax payments immediately even before issuance of final audit report or initiation of adjudication proceedings. Officers carry an impression that wide powers are granted under GST Law, and therefore, they keep on pressurising the assessee to pay the tax immediately (even before crystallising such tax demand) otherwise Department takes the recourse of attachment of bank accounts. Earlier, time and again, the Courts in various cases including *New India Civil Erectors Private Limited 2020 (43) GSTL 17 (Bom.)*, *ICICI Bank 2015 (38) STR 907*, *Cleartrip Private Limited 2016 (42) STR 948*, have held that it is premature to attach the bank account of an assessee as without assessment there cannot be a tax which is payable. At this juncture it is pertinent to look at Section 83 of CGST Act, 2017 which provides that bank account can be attached provisionally in order to protect the interest of revenue, after initiation of assessment, inspection, search, seizure, arrest, demand and recovery. In this regard, it is worthwhile to note the observations made by Gujarat High Court in the case of *Jay Ambey Filament Private Limited 2021 (44) G.S.T.L. 41 (Guj.)* that “*In the absence of any cogent or credible material, if the authority passes an order of provisional attachment under Section 83 of the CGST Act, then such action amounts to malice in law. Malice in its legal sense means such malice as may be assumed from the doing of a wrongful act intentionally but also without just cause or excuse or for want of reasonable or probable cause. Any use of discretionary power exercised for an unauthorized purpose amount to malice in law. It is immaterial whether the authority acted in good faith or bad faith.*”. Thus, looking at the observation of High Court, the powers under Section 83 of CGST Act, 2017 must be carefully used to protect the interest of revenue and not as a tool to pressurise the taxpayer for tax payment.

### **Documentation & formats:**

With changing times, Department is also becoming techno savvy which is crucial for timely completion of departmental proceedings. However, even in this technological era, assessee are asked to provide entire data including transactionwise details in Departmental formats which require substantial time & effort. In landmark judicial pronouncement of *EBiz.com Private Limited vs. Union of India and Anr. 2016 (338) ELT*

562 (Del.), Delhi High Court categorically held that in absence of any relevant provisions, assessee may only be asked to produce documents but not to create it and therefore, they shall not be insisted upon to provide information in a particular format.

### **Questioning eligibility of ITC at the stage of auditing refund claims:**

It is a well-settled law that every legal issue needs to be adjudicated separately. However, there are many cases where legal issues are clubbed. One such classic example is rejection of refund solely on the ground of ineligible ITC. Can eligibility of ITC be questioned at the stage of refund? It is important to distinguish two independent aspects i.e. avilment of ITC and refund. In erstwhile regime, in the case of *Allied Chemical & Pharmaceuticals Pvt. Limited MANU/CE/0052/2019 (Tri - Delhi)*, it was observed that in absence of any show cause notice to disallow alleged ineligible credit, refund claim cannot be rejected. At this juncture, please note Section 73(3) of the CGST Act grants explicit powers to initiate separate proceedings to test validity of ITC. Therefore, in all departmental audit and assessment cases, one should analyse each legal issue independently and thoroughly to decide further course of action.

### **Mechanical assessments:**

Under the GST regime, many a times, provisions of GST Law are grossly ignored. Even while carrying out scrutiny, department is blindly relying on figures reported in various forms. Classic examples are assessments merely on the basis of mismatch of outward supplies as per GSTR-1 and GSTR-3B or mismatch of ITC as per GSTR-2A and GSTR-3B. Such mismatch tables are given prime importance over legal provisions. Departmental officers forget that GSTR-3B is a summary statement and more of payment discharge mechanism. In no way, such summary statement can directly be compared with GSTR-1.

Further, without legal validity, GSTR-2A has become an ultimate tool to determine the eligibility of ITC. All legal parameters as envisaged under CGST Act to avail ITC has been given a go-by. Further, to aggravate the issue, show cause notices are issued invoking extended period of limitation for fraud, wilful misstatement or suppression of facts to evade taxes vide Section 74 of CGST Act, 2017. Recently, Hon'ble Jharkhand High Court in the case of *NKAS Services Private Limited 2021 (10) TMI 880* has provided relief to the petitioner by stating that mere mismatch in GSTR-2A and GSTR-3B cannot be the sole basis for issuance of a show cause notice under Section 74 of CGST Act, 2017.

### **Conclusion:**

GST audits and assessments needs to be handled carefully considering frequent amendments; stringent provisions; immediate, mechanical and strict actions by Department. It is time for Government to put organised, efficient and effective processes in place, to achieve the object of "tax collection" and "ease of doing business" simultaneously.

Happy Diwali !!!

