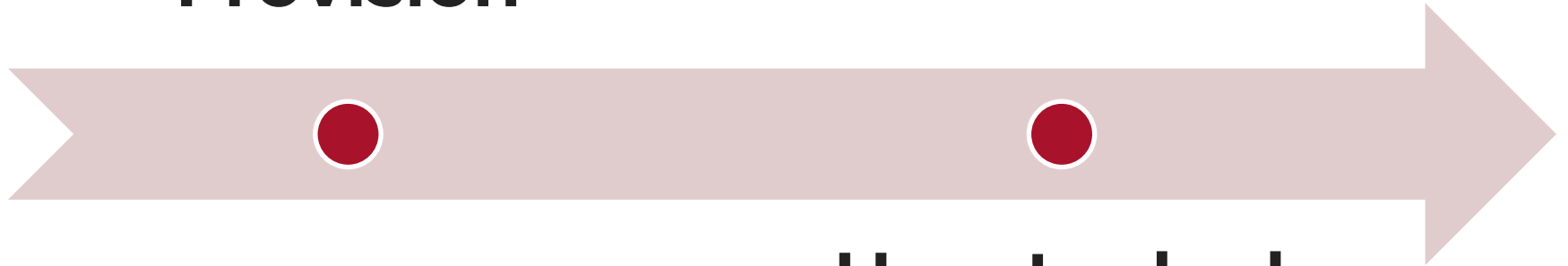


A complete approach on how to deal with
**GST audit conducted by
Department**

Topics to be covered

Analysis of Provision



How to deal
with the issue?

Provisions

Audit

Hon'ble Delhi High Court already declared rule 5A (2) of Service Tax Rules, 1004 to be ultra vires the provisions of Finance Act, 1994 in the case of **Mega Cabs Pvt Ltd vs. Union of India 2016 (43) S.T.R. 67 (Del.)**.

However, Hon'ble Supreme Court has stayed the operation of this Court Order and final decision in this respect is still awaited from Apex Court.

Audit

Section 2(13) of the CGST Act, 2017, defines 'Audit' as “the examination of records, returns and other documents maintained or furnished by the registered person under this Act or Rules made thereunder or under any other law for the time being in force to verify, inter alia, the correctness of turnover declared, taxes paid, refund claimed and input tax credit availed, and to assess his compliance with the provisions of this Act or rules made thereunder”.

Audit

Accordingly, 'Audit' implies – **(a) Detailed examination of**

i. records,

ii. returns and

iii. other documents -

maintained / furnished by a registered person, under GST law/any other law or rules;

(b) For verification of correctness of -

(i) turnover declared;

(ii) taxes paid;

(iii) refund claimed;

(iv) input tax credit availed; and

(v) assessment of compliances with provisions of GST law and rules

Audit by Tax Authorities

65. (1) The Commissioner or any officer authorized by him, by way of a general or a specific order, may undertake audit of any registered person for such period, at such frequency and in such manner as may be prescribed.

Place of Conduct of Audit

(2) The officers referred to in sub-section (1) may conduct audit at the place of business of the registered person or in their office.

Intimation

(3) The registered person shall be informed by way of a notice not less than fifteen working days prior to the conduct of audit in such manner as may be prescribed.

Period of Completion

(4) The audit under sub-section (1) shall be completed within a period of three months from the date of commencement of the audit:

Provided that where the Commissioner is satisfied that audit in respect of such registered person cannot be completed within three months, he may, for the reasons to be recorded in writing, extend the period by a further period not exceeding six months.

Explanation.--For the purposes of this sub-section, the expression "commencement of audit" shall mean the date on which the records and other documents, called for by the tax authorities, are made available by the registered person or the actual institution of audit at the place of business, whichever is later.

Obligation of Auditee

- (5) During the course of audit, the authorized officer may require the registered person,-
- (i) to afford him the necessary facility to verify the books of account or other documents as he may require;
 - (ii) to furnish such information as he may require and render assistance for timely completion of the audit.

Audit Report

(6) On conclusion of audit, the proper officer shall, within thirty days, inform the registered person, whose records are audited, about the findings, his rights and obligations and the reasons for such findings.

Consequences

(7) Where the audit conducted under sub-section (1) results in detection of tax not paid or short paid or erroneously refunded, or input tax credit wrongly availed or utilized, the proper officer may initiate action under section 73 or section 74.

Provision for access to business premises and records of taxpayer for Audit

Sec. 71 of CGST Act, 2017

.....for the purposes of carrying out any audit, scrutiny, verification and checks as may be necessary to safeguard the interest of revenue.

Rule 101

(1) The period of audit to be conducted under sub-section (1) of section 65 shall be a financial year or part thereof or multiples thereof.

(2) Where it is decided to undertake the audit of a registered person in accordance with the provisions of section 65, the proper officer shall issue a notice in FORM GST ADT-01 in accordance with the provisions of sub-section (3) of the said section.

Rule 101

(3) The proper officer authorized to conduct audit of the records and the books of account of the registered person shall, with the assistance of the team of officers and officials accompanying him, verify the documents on the basis of which the books of account are maintained and the returns and statements furnished under the provisions of the Act and the rules made thereunder, the correctness of the turnover, exemptions and deductions claimed, the rate of tax applied in respect of the supply of goods or services or both, the input tax credit availed and utilized, refund claimed, and other relevant issues and record the observations in his audit notes.

Rule 101

(4) The proper officer may inform the registered person of the discrepancies noticed, if any, as observed in the audit and the said person may file his reply and the proper officer shall finalize the findings of the audit after due consideration of the reply furnished.

(5) On conclusion of the audit, the proper officer shall inform the findings of audit to the registered person in accordance with the provisions of sub-section (6) of section 65 in FORM GST ADT-02.

Maintenance of Accounts and Records

Section 35 of CGST Act 2017 read with Rule 56 of CGST Rules 2017 provides for maintenance of accounts and records by registered person. Further Section 36 of CGST Act and Rules 57 and 58 of CGST Rules may also be referred in this regard.

Pre GST Regime Audit is Valid ?

W.e.f. 1st July, 2017, CGST Act, 2017 was introduced and Chapter V of Finance Act, 1994 omitted vide Section 173 of CGST Act, 2017 with an exception “ save as otherwise provided in CGST Act, 2017”.

Relevant clause and sub-section are reproduced hereinbelow:-

(2) The repeal of the said Acts and the amendment of the Finance Act, 1994 (hereafter referred to as “such amendment” or “amended Act”,) to the extent mentioned in the sub-section (1) or section 173 shall not –

e) affect any investigation, inquiry, verification (including scrutiny **and audit**),.....

Pre GST Regime Audit is Valid ?

Department assumes that rule 5A of Service Tax Rules, 1994 read with clause (e) along with other clauses of Section 174(2) give authority for conducting service tax audit.

However, clause (e) along with other clauses of Section 174(2), prima facie, show that there is no saving of rule 5A in respect of initiating fresh proceedings of service tax audit. Hence, fresh audit proceedings can't be initiated on or after 01st July 2017.

Pre GST Regime Audit is Valid ?

Hon'ble High Court of Gujarat in the case of **M/s OWS Warehouse Services LLP vs. Union of India 2018 (19) GSTL 27 (Guj)** where after noticing the judgment of this Court in Mega Cabs (supra) and the stay thereof by the Supreme Court, the Gujarat High Court nevertheless stayed a similar notice issued to the Petitioner in that case.

The Gujarat High Court noticed that while enacting the Central Goods and Services Tax Act, 2017, there was no provision saving Rule 5A of the ST Rules to enable fresh proceedings for audit to be initiated under that rule for a period prior to the repeal of the Rule.

Pre GST Regime Audit is Valid ?

T. R. Sawhney Motors Private Limited v. UOI, WP(C) 2138/2019 & CM Appl. No. 10002/2019 (Stay) wherein the Court has relied the judgment of M/s. OWS Warehouse Services LLP vs. Union of India 2018 (19) GSTL 27 (Guj) and stayed the notices issued by assistant commissioner in respect of conducting audit.

Pre GST Regime Audit is Valid ?

Sulabh International Social Service Organisation v. UOI, 2019-TIOL-808-HC-JHARKHAND-GST wherein it was held that “In our prima facie view, the expression “instituted” in sub-clause(e) would imply the proceeding which stood already instituted at the time of repeal or omission of the 1994 Act.

In such circumstances, we choose to follow the course taken by the Hon'ble High Courts of Gujarat and Delhi and direct status quo to be maintained till the next date of hearing so far as the proceeding which forms the subject matter of the present writ petition is concerned.

Key Audit Observations

Key Observations

GSTR-2A Vs. 3B

Section 16(4)

Tax to be paid on Net Tax Liability

Rule 96 (10)

Section 17(5)

Table 8A of GSTR-9

GSTR-2A Vs. 3B Mismatch

Article 14: Equality before law.

Article 19(1)(g): Right to practice any profession, or to carry on any occupation, trade or business.

Article 300A: Right to Property

Article 301: Freedom of trade, commerce and intercourse.

GSTR-2A Vs. 3B Mismatch

ITC is Vested Right ? Yes

1. A.B. Pal Electricals Pvt. Ltd. vs Union Of India & Ors W.P.(C) 6537/2019
2. BRAND EQUITY TREATIES LIMITED Vs Union of India W.P.(C) 11040/2018 and C.M. No. 42982/2018

GSTR-2A Vs. 3B Mismatch

M/S. TVS Motor Company Ltd. vs The State of Tamil Nadu And Others, 2018 Latest Caselaw 763 SC

“After discussing certain judgments of this Court and other High Courts, the High Court has observed that the legal position was that right to claim ITC is not a vested right or an indefeasible right. It is a benefit conferred under the Act in certain contingencies and subject to conditions prescribed in the statutory scheme. Therefore, it is open to the State Legislature to provide for conditions and restrictions while extending the concession. Likewise, it was also necessary for any assessee to claim input credit to fulfill those conditions.”

GSTR-2A Vs. 3B Mismatch

Rule 36 which has put a restriction for the availing ITC is inserted vide Notification 10/2017 dated 28th June 2017 (As amended) inserted by power U/s 164 of Act, whereas the matching concept is in Section 43 of Act, so our submission is that Rule 36(2) which restrict the ITC on account of not mentioned in the GSTR-2 is not correct in the law.

GSTR-2A Vs. 3B Mismatch

- It is also submitted that Rule 36(2) of Rule mentioned restriction on ITC in the GSTR 2, which is not made available as on date, so ITC restriction based on the GSTR 2A is not valid as per the law and REGISTERED PERSON is entitled to take ITC based on the own ascertainment if fulfilled the condition of Rule 36(1) such as invoice along with the condition of Section 16(2) such as Receipt of goods, payment by the supplier and filling the return.
- So, restrictions of the ITC based on the GSTR 2A not showing these ITC is illegal.

Section 16(4)

- Sec 16(4) of the CGST Act is unlike Sec 16(1), Even Sec 16(2) & 16(4) are non obstante clause. **Hon. Supreme Court in the case of Indra Kumar Patodia and Another v/s Reliance Industries Ltd. AIR 2013 SC 426** clarified that that the non obstante clause has to be given restricted meaning and when the section containing the said clause does not refer to any particular provisions which intends to over ride but refers to the provisions of the statute generally, it is not permissible to hold that it excludes the whole Act and stands all alone by itself.

Section 16(4)

- In other words, there requires to be a determination as to which provisions answers the description and which does not.
- While interpreting the non obstante clause, the Court is required to find out the extent to which the legislature intended to do so and the context in which the non obstante clause is used.

Section 16(4)

- A **Press Release** was issued on 18.10.2018 by CBIC, declaring extension of the time period up to which ITC can be claimed for financial year 2017-18, stated that the last date for claiming such credit extended to Oct 2018 to March 2019.
- This created a huge confusion that whether the GSTR-3B is a Return prescribed under Section 39 of CGST Act 2017 i.e. GSTR3 or GSTR-3B is the substitute of GSTR-3.

Section 16(4)

- The due date of filing return under Section 39 for the months of July 2017 to March 2019 shall be subsequently notified in Official Gazette. Vide **Order No. 02/2018 – Central Tax dated 31 December 2018**, the last date for availing was further extended till the due date of furnishing of the return for the month of March 2019,, i.e. April 2019, subject to specified conditions.

Section 16(4)

- The Supreme Court, in the case of **MRF Ltd. v. Assistant Commissioner (Assessment) Sales Tax**, has held that a person may have a 'legitimate expectation' of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice. The doctrine of legitimate expectation has an important place in developing law of judicial review.

Tax to be paid on Net Tax Liability

- In the 43rd GST Council Meeting held on 28th May 2021, it was decided to notify the above amendment at the earliest.
- Accordingly, vide NN 16/2021 CT dated 01.06.2021, aforesaid retrospective amendment has been notified.

Rule 96 (10)

- There is no doubt that the GST regime has not seen a rule so debated as Rule 96(10) of the Central Goods and Services Tax Rules, 2017 ('CGST Rules, 2017').
- This provision has seen conflicting interpretations, several retrospective amendments and multiple challenges before the High Courts. One may think that after so much brouhaha, the final amended rule will be free from controversy. Unfortunately, the rule still has a long way to go.

Section 17(5)

- **Section 17 of the CGST** deals with apportionment of credit and blocked credit. Sub-section (5) of section 17 enumerates the goods and services in respect of which the input tax credit shall not be available.

Clauses (g) and (h) of sub-section (5) of section 17 envisages the following goods or services, namely;

(g) Goods or services or both used for personal consumption

(h) Goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples.

Table 8A of GSTR-9

Value of GSTR2A Invoices + Debit Notes – Credit Notes = GSTR9 Table 8

Figures in GSTR-2A are auto populated based on filed/ saved / submitted Form GSTR-1 of the supplier taxpayer. But figures in table 8A of Form GSTR-9 are auto-populated only on the basis of only FILED Form GSTR-1 by the supplier taxpayer. In case, Form GSTR -1 is not filed by your supplier, then credit related to those invoices will not appear in table 8A of your Form GSTR-9

Table 8A of GSTR-9

- **For FY: 2017-18**, Figures in table 8A of Form GSTR 9 are auto populated only for those of Form GSTR-1, which are filed by the supplier taxpayer by due date of its filing i.e. 31st May, 2019.
- Thus, ITC on supplies of the financial year 2017-18, if reported beyond 31st May, 2019, will not get auto-populated in table 8A of Form GSTR-9. For FY: 2018-19, Figures in table 8A of Form GSTR 9 are auto populated only for those of Form GSTR-1, which are filed by the supplier taxpayer by due date of its filing i.e. 31 October, 2019.
- Thus, ITC on supplies of the financial year 2018-19/2019-20, if reported beyond 31st October, 2019/31st October, 2020, will not get auto-populated in table 8A of Form GSTR-9.



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Have any Queries ?
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