# INDIRECT TAX UPDATE- JUNE 2020-3<sup>RD</sup> ISSUE FOR JUNE

S.K.KANODIA & ASSOCIATES

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HC: Bail Application of the petitioner allowed- [TS-377-HC-2020(RAJ)-NT]

#### MohitVijay vs UOI (In the High Court of Rajasthan)

The petitioner was arrested and complaint was filed against them before the jurisdictional CMM (Economic Offences) for offences u/s 132 of the CGST Act. **It was believed that the petitioner has issued invoices giving benefit of ITC to about 36 companies**. Investigation was conducted against the petitioners and documents were seized and presented before the court. The present petitions were filed seeking that the petitioners be released on bail. The counsel for the petitioners claimed that while the petitioners were arrested, no action was taken against the companies which availed the ITC. The counsel for the petitioners claimed that no further investigation was needed as the petitioners were in judicial **custody for a long period of 450 days**. The counsel for the petitioners claimed that about 1300 beneficiaries were being investigated and that such process would consume considerable amount of time. It was held that since no witness has been pointed out and the petitioners had already spent 450 days in jail, the petitioners are allowed to be released on bail, albeit subject to conditions: HC.

**SKKA Comments:** The receiver of the incorrect ITC had been penalised by recovering Rs. 30cr from them. The petitioner should also have been penalised heavily so instead of leaving them on bail after holding them under arrest for 450 days. This would have set an example for all the fraudulent.

#### HC: Bail Application by the petitioner allowed Darshan Dinesh Patel Vs Commissioner of Central Goods and Services Tax (In the High Court of Gujarat)

Applicant had availed wrong ITC and had passed the same to the buyer. Applicant was arrested for its faulty act. Application is filed under Section 439 of the Code of Criminal Procedure, 1973, for regular bail in connection with offence registered in the context of s.132(1)(b) of the CGST Act, 2017. Court is of the opinion that this is a fit case to exercise the discretion and enlarge the applicant on regular bail. Court has arrived at such conclusion by considering the following aspects viz. applicant is in jail since 23.12.2019; for the alleged transaction of wrong availment of ITC and further passing of the same, it is always open for the respondent department to take departmental action for recovery of penalty against the applicant; that without prejudice to his rights and contentions, applicant is ready and willing to deposit Rs.25 lakh before the respondent No.2 within a period of 8 weeks from the date of his actual release; that applicant will cooperate with the respondent department during the course of further investigation. Applicant is ordered to be released on regular bail on executing a personal bond of Rs.10,000/- with one surety of like amount to the satisfaction of the trial Court and subject to the compliance of the conditions set out.

**SKKA Comments:** Where the availment of ITC is by mistake applicant has accepted their mistake, no arrest shall be made. The Applicant in this case has suo moto paid the penalty hence he shall be let go of the criminal procedure. No person shall be penalised twice for the same mistake.

AAR: Whether 'porota' can be classified as khakhra, roti etc and taxed at 5%

M/s ID Fresh Food India Pvt Ltd in the Authority for Advance Ruling in Karnataka- [TS-359-AAR-2020-NT]

Karnataka AAR holds that 'whole-wheat Parota' & 'Malabar Parota' made up of whole wheat flour and refined flour (maida) is classifiable under Heading 2106 which covers preparation for use directly or after processing for human consumption; Disentitles applicant for applicability of concessional rate of tax of 5% in terms of entry 99A of Schedule I to the Notification No. 01/2017- CT (Rate) dated June 28, 2017; Observes that 'parota' is neither 'khakhra, plain chapatti nor roti', as khakhra, roti are completely cooked preparations and do not require any processing for human consumption, hence are ready to eat food preparations whereas 'parota' requires further processing for human consumption; Further, opines that "...the impugned products do no merit classification under heading 1905"; Moreover, suggests that even if applicant's argument of classification under heading 1905 as well as 2106 is considered, heading 2106 occurs last in numerical order and hence, would be more appropriate for classification: Karnataka AAR.

**SKKA Comments:** When the like products are being sold, the same shall be taxed at the same rate. No distinction shall be made based on after sale preparation. Any product being sold as packaged food might be moderated by the consumer as per his liking. Where the general category of the product remains the same, the item shall be classified as the same and same rate of tax shall be charged.

#### HC: 'Brand Equity' decision applies with 'full rigour' despite retrospective amendment to Section 140 SKH Sheet Metals Components vs. UOI & Ors.- [TS-373-HC-2020(DEL)-NT]

Delhi HC allows Petitioner to revise TRAN-I Form on or before June 30, 2020 to avail the short transitioning of ITC amounting to Rs. 5.5 crores (approx..) which crept on account of a clerical mistake to fill in the correct details in the right column; Highlighting the adverse 'procedural working of the GST system', holds that, "In line with the spirit of the decision of the GST Council and the blurring thin line between technical and non-technical difficulty, keeping in view that entire filing is electronic, we find the restrictive applicability of Rule 117 (1A) to be arbitrary. Rejects Revenue's contention that by virtue of retrospective amendment in Section 140, there has been a change in circumstances and the benefit of the judgment in the case of Brand Equity is no longer available to the Petitioner; Opines that "since, there is no specific challenge to the amendment introduced by Section 128 of the Finance (Amendment) Act, 2020, we do not want to venture into legality of the said provision viz-a-viz the judgment of Brand Equity. Expounds that "when we contrast the time limit stipulated under Rule 117 (1) and Rule 117(1A), we find that the time limit of 90 days is not sacrosanct", adds that "the rule suffers from the vice of vagueness and concept of 'technical difficulty on common portal' and its applicability has not been adequately defined anywhere". Cogitates that since the consequences for non-compliance are not indicated both in the Act and Rules, "the provision has to be seen as directory", not mandatory while emphasizing that "interpreting the procedural timelines to be mandatory would run counter to the intention of the legislature and defeat the purpose for which the transitionary provisions have been provided": Delhi HC

#### **SKKA COMMENTS**

In the given case the Hon'ble HC has provided important insights which are discussed below:

- HC stated that in spite of the amendment to Section 140, there were several other grounds and reasons enumerated which shall apply with full rigour regardless of amendment.
- Thus, on contrasting the time limit stipulated under Rule 117 (1) and Rule 117(1A), **HC opined that the time limit of 90 days was not sacrosanct**. In Brand Equity, that court had observed that the govt. had not ascribed any meaning to the words "technical difficulties on the common portal" and it cannot be interpreted in a restrictive manner. Therefore in absence of any defining words, there was no predictability about the application of this Rule for the class of cases to which it would apply. In absence of a criteria, the application of the provision would suffer from arbitrariness.
- HC allowed the Petitioner to revise TRAN-1 Form on or before June 30, 2020 and transition the entire ITC, subject to verification by the Respondents and thereby issued a mandamus to the Respondents to either open the online portal so as to enable the Petitioner to file revised declaration TRAN-1 electronically, or to accept the same manually and thereby process the claims in accordance with law.

SC: Dismisses SLP against HC decision directing re-opening of portal for TRAN-I submission- [TS-375-SC-2020-NT]

#### Union of India vs. Chogori India Retail Limited

SC dismisses the appeal filed against the decision of Delhi HC directing the Revenue to either re-open the Portal to enable the assessee to file its TRAN-I Form electronically else accept the form manually considering the numerous glitches on the GST Portal; Refuses to interfere in the Delhi HC decision: SC

#### **SKKA Comments**

This is the second review petition being dismissed by the Hon'ble Apex Court after the review petition against the Aldfert judgment of the Punjab and Haryana HC was also dismissed by the Apex Court.

The challenge to these petitions was on the jugdment of the HC allowing the petitioners to file revised TRAN I to amend the errors made while filing the original TRAN I form to carry forward the Cenvat credit/ITC of the pre GST regime.

However, the Apex court has kept the question of law open and the petition of the department against the judgment of the Delhi HC in Brand Equity case has been admitted at Apex Court and notice issued.

# GST REFUND FOR CANCELLED CONTRACTS DUE TO COVID 19

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#### GST REFUND FOR CANCELLED CONTRACTS DUE TO COVID 19

#### GST REFUND ON ADVANCE AGAISNT PROVISION OF SERVICE AND CANCELLED CONTRACTS

It has been seen that in the hospitality sector comprising of hotels, tours and travel agents, airlines and other related intermediaries there has been a major impact of COVID 19 wherein many tours have been cancelled. In this note we shall discuss the GST impact of the same.

Say Mr. X had given an advance of Rs. 100,000 in March beginning to M/s ABC Tours for a tour to the Dooars in June 2020. However due to the lockdown imposed due to COVID 19, Mr. X has decided to cancel the trip and sought refund of the amount paid as advance from M/s.ABC Tours.

In this case, M/s. ABC Tours has to treat the same as advance and as per provisions of Time of Supply of service under section 13 of the CGST Act, 2017, GST has to be paid on such advances received in March 2020.

Now, in June 2020, when M/s. ABC Tours intend to refund the said amount to the Mr. X, in such case, M/s, ABC Tours will issue a refund voucher under section 31(3)(e) of the CGST Act, 2017 as no supply has been made against the advance received and neither any invoice was raised for the same. Further, with the issuance of the refund voucher, M/s. ABC Tours will be able to adjust the GST paid in March on such advances with the GST liability if any in June 2020. However the issue arises when M/s. ABC Tours does not have any GST output liability in June 2020 and also does not has any probability of having such outputs to adjust the amount of advance GST in the comig 6 months or so.

#### GST REFUND FOR CANCELLED CONTRACTS DUE TO COVID 19

In such a situation, one needs to refer to Circular No. 137/07/2020-GST dated 13/04/2020 issued by the CBIC wherein CBIC has clarified as-

**"2**. An advance is received by a supplier for a Service contract which got cancelled subsequently. The supplier has issued receipt voucher and paid the GST on such advance received. Whether he can claim refund of tax paid on advance or he is required to adjust his tax liability in his returns?

Reply: In case GST is paid by the supplier on advances received for an event which got cancelled subsequently and for which no invoice has been issued in terms of section 31 (2) of the CGST Act, he is required to issue a "refund voucher" in terms of section 31 (3) (e) of the CGST Act read with rule 51 of the CGST Rules. The taxpayer can apply for refund of GST paid on such advances by filing FORM GST RFD-01 under the category "Refund of excess payment of tax"."

On perusal of the above clarification, it seems that the department would have to issue refund to such assessee under excess payment of tax category under section 54 of the CGST Act, 2017. However, every refund application is subject to the question of unjust enrichment, and it would be necessary for the assessee to provide details of each advance received and tax paid thereon along with details of refund of each advance and tax adjustments/refund sought thereof. If the same is not done conclusively, there would be a high probability that the such refund applications would go under litigation and the already doomed hospitality industry would face other constraints on account of improper guidelines to the filed officers.

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### THANK YOU

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