

Coverage

1. Search, Summons, Investigation & Arrest under GST

2. Audit by GST department

3. Some contentious issues under GST (uncovered in other sessions)

4. Inter play of GST with IBC

Audit, Assessment & Investigation - Different powers

Assessment - Chapter XII

- Self Assessment (S. 59)
- Provisional Assessment (S. 60)
- Scrutiny of Returns (S. 61)
- Assessment of Non-filers of returns (S. 62)
- Assessment of unregistered persons (S. 63)
- Summary assessment in certain special cases (S. 64)

Audit - Chapter XIII

- Audit by Tax Authorities(S. 65)
- Special Audit (S. 66)

<u>Investigation - Chapter</u> <u>XIV</u>

- Power of inspection, search & seizure (S. 67)
- Inspection of goods in movement (S. 68)
- Power of Arrest (S. 69)
- Power to summon persons to give evidence and produce documents
 (S. 70)

Section 71

Access to business premises

<u>Demands & Recovery - Chapter XV</u>

- Adjudication of taxes Matters not involving fraud etc. (S. 73)
- Adjudication of taxes Matters involving fraud etc. (S. 74)

Investigation, Search,
Summons, Arrest & Audit
under GST



Coverage

- Reasons for dispute
- Preventive & Mitigative factors
- Inspection & Search
- Summons
- Arrest
- Audit by GST department

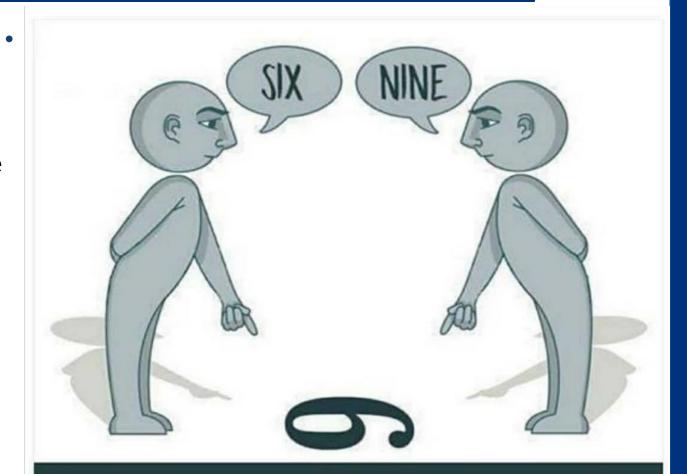
Reasons for Disputes

Department Perspective

- Aggressive tax collection behaviour
- Lack of Training and skills of tax officers
- Lack of accountability and judicial indiscipline
- Lack of supervision and guidance
- Fear of Audit, Vigilance machinery and CBI

Taxpayers perspective

- Complicated law
- Cumbersome procedures
- Compliance requirements
- Ignorance
- Deliberate evasion



Just because you are right, does not mean, I am wrong. You just haven't seen life from my side.

Prevention

- Thorough knowledge of law
- Sincere efforts to be legally compliant
- Strong internal control
- Strong and effective internal audit
- Strong and effective professional audit on GST/Customs issues
- Utilisation of legal provisions to reduce/prevention disputes
- Regular consultation with professional advice
- Utilisation of various fora to air the grievances and get them rectified

Mitigation

- Use of section 73(5) and 73 (8)
- Cost benefit analysis before taking action
- Effective correspondence
- Effective use of RTI Act
- Interaction with senior officers
- Representation to the Officers/government
- Effective use of writ remedies

Start of dispute

- Written Enquiry roving/ fishing survey or with some prior suspicion/ compliant etc. IT VS GST returns, 2A vs 3B.....
- Visit General survey or verification of premises or specific reason.
- Inspection Sec.67 Books, documents, stocks
- Search Sec. 67 with warrant
- Summons 70 to interrogate
- Show Cause Notice with reason for demand
- Payment if agreed at any stage above- not due to threats/ coercion

Document Identification Number (DIN)

- Circular No. 122/41/2019-GST dated 5th Nov 2019
- Search warrants, summons, arrest memos, inspection notices and enquiry letters shall contain electronic DIN
- Exceptions are there when there is no sufficient time to issue the letters.
- Any document without DIN, such communication shall be treated as invalid document
- The above measure has been introduced to promote the transparency and accountability in tax administration.
- Recipient can verify its genuineness @ https://www.cbicddm.gov.in/MIS/Home/DINSearch
- Extended to all communications including E-Mail with effect from 24.12.2019 vide Circular 128/47/2019-GST

Departmental Communication & Correspondences

- **Email:** has got legal recognition Regd email id, uploading on the portal Sec. 169;
- **Telephone:** Not preferable mode of communication with the dept Non-evidence means of correspondence;
- Letters from the dept: the envelope cover should be retained as evidence for date of receipt.
- **Letters to dept:** All correspondences to the departmental officers be duly acknowledged and if not done, a copy to be sent by RPAD;
- Information submitted during audit To be clearly communicated in writing;
- **Visits by depts:** Visiting officers are required to record in the visit register with the purpose;
- **Visit to department:** After introduction of E-Governance projects in tax depts no longer required to visit to dept except in few exceptional cases.

Dealing with enquiries/ Visits

- Is it official? Personal gmail or Gov.in? DIN for central tax officials
- Understand that purpose of enquiry
- If clear provide the information by Email + SP +RPAD. No oral clarifications
- Any oral enquiries ask for written communication
- If persistent write a polite letter referring the phone calls and ask for specifics
- Visits Ask for ID- note down the details of designation, check jurisdiction, call dept number to verify if suspicious
- Information/copies provided- ask for acknowledgement-follow up with explanation provided to officer + AC/DC.

Dealing with Investigation

- If matter relates to valuation, classification, burden of proving is on revenue
- If exemption or ITC then onus on tax payer.
- Interpretation/ use of Circulars- only circulars in line with law valid in law
- Don't be panic seek legal remedies time taking process &
 Patience pays back
- Law serve the vigilant Right to agitate available
- 'Ubi jus Ibi Remedium there is a legal right, there is a legal remedy.

Inspection,
Search &
Seizure

Inspection, Search & Seizure - Section 67

- There should be an authorization from Joint Commissioner. -insist
- Should be in business hours only.
- Should not use coercive measures.
- The action should be in good faith- No pretence- fanciful, arbitrary
- Immunity u/s 157 Officer to be protected provided he is **authorised** to do something under GST Act, and done in **good faith**.
- Paresh Nathalal Chauhan vs State of Gujarat 2020 (32) G.S.T.L. 342 (Guj.)
 Prakashsinh Hathisinh Udavat Vs State of Gujarat 2019 (31) G.S.T.L. 583 (Guj.)

Inspection, Search & Seizure - Section 67

- Reason to believe by JC that
 - o goods liable for confiscation or
 - documents/books

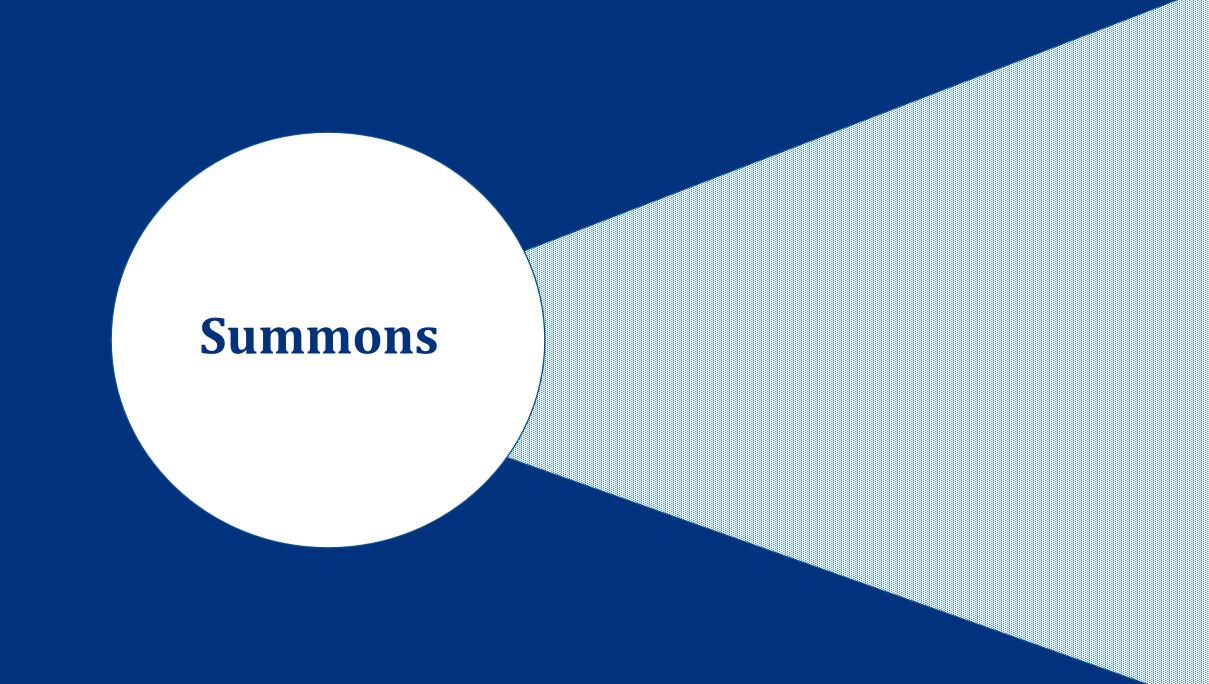
Reasons to be disclosed? - Golden Cotton Industries Vs UOI - 2019 (29) GSTL 587 (Gujarat) Seizure of Money/title deeds etc.,?

Rights of tax payer

- Copies do not believe promise- escalate to Comm/ DC. High Ground Enterprises Ltd vs. Union of India 2020 (33) GSTL 169 (Bombay) & Jayachandran Alloys (P) Ltd. v. Superintendent 2019 (25) G.S.T.L. 321 (Mad.)
- Mahazar to be drawn-duly agreed
- Receive back goods after 6 months- release in between- bond etc
- Books after 30 days of SCN
- Cross Examination

Seizure understanding + dealing

- Search Authorisation in form INS- 01 U/r 139
- Order of the seizure in From INS-02 custody may be with TP
- INS-03 prohibits dealing without officer permission
- Release goods with a bond for market value of goods with BG security for tax + Int + penalty in Form INS-04
- Perishable goods bond for maker value of goods or tax + int + penalty w.e.l in From GST INS – 05 otherwise officer can sell & realise the amount



Summons = interrogation - Section 70

- The Superintendent has power to summon any person
 - **to** to give evidence or
 - to produce a document or
 - Others

As per Code of Civil Procedure, 1908.

- This is a judicial proceeding u/s 193 & 228 of the Indian Penal Code.
 - Sec 193 Intentionally giving the false evidence or fabricating the evidences imprisonment may extend up to 7 years.
 - Sec. 228 Intentionally insulting or interruption to public servant is an offense liable for imprisonment up to 6 months.
- Only if the taxpayer does not respond to letters issued by officers. CBIC Instruction F. No. 207/07/20144aCXC6nfidlential 20-1-2015 & 2 more old circular's

Summons - Section 70

- CA or Advocate can accompany tax payer & permitted to be present during investigations at **visible but not audible distance** Vijay Sajnani v. Union of India 2017 (345) E.L.T. 323 (S.C)
- Summons to owner/MD/Director/CFO/Chairman of the company In extreme & rare cases-yes
- Statement, recorded before a Gazetted Officer during inquiry or investigation will be admissible as evidence to prove charges-Section 136 of CGST Act, 2017
- Statement shall be recorded in language known to person whose statement is recorded.
- It must be left to investigating agency to decide venue, timings and questions and manner of putting questions to persons involved in offences. **UOI Vs Rajneesh Kumar Tuli 2017 (355) ELT 492 (S.C.)**

Summons - Section 70

- Statement to be retracted within reasonable time when it is recorded in duress/threat/atrocity or coercion, violence, intimidations & torture. If dictated or written by officer
- Such retraction could be communicated to higher official also.
- Taxpayer is entitled for copy of statement recorded. Can record in plain paper if permitted. Otherwise come out and write down.
- It is settled law tax demands cannot be confirmed based sole concessions/admissions.
- Non-attendance leads to imprisonment under section 174 of the Indian Penal Code (IPC) for 6 Months.

Summons - Section 70

- Statement cannot be recorded at odd hours
- No manhandling permitted Sudhir Kumar Agarwal vs. DGGI 2020 (34) G.S.T.L. 155 (Del.) Officers cannot physically assault or manhandle the tax payer- Methods which do not have approval of law cannot be used.
- Physical assault by the investigating officers is not permitted under GST law.
 The report given by private hospitals also admissible evidence Agarwal Foundries Pvt Ltd Vs UOI 2020-TIOL-1898-HC-AP-GST
- The person who knows the facts & accounts should attend the summons
- Shall answer question only.
- Answer not aware, or will come back. Ignorance of fact can be excused.
- Should not confess any tax liability due to force.
- Ensure that his answers only the officer is recording.

Other important points

- Give complete facts in case of investigation letter received from the officer since officer is new to your business
- How we record the transactions (title) in the books of accounts will also make lot of sense.
- Pay the tax under protest in case you are not agreeing the liability.
- Ensure all your premises are added in registration certificate
- Facility of payment of tax/interest in instalments After determination Section 80 not exceeding 24 instalments.
- Send background with interpretation placed in detail prior to summons



Arrest - Section 69 & 132

- ➤ What is Arrest: Taking into custody under some lawful command/authority.
- > Why arrest:
 - Preventing from influencing the witness/other suspects
 - Risk of flight
 - Committing additional crimes
- > Arrest restrains the personal liberty guaranteed under art. 21 of COI
- ➤ Bail = Conditional release with promise to appear in court whenever required
- ➤ Bail is rule and jail is an exception [Maneka Gandhi vs UOI AIR 1978 SC 597] rigor of jail should betavel dential

Power to Arrest - Certain Safeguards

- As per Section 41 read with Section 41A of Code of Criminal Procedure a person should not be arrested if he appears before Competent Authority and co-operates in the investigation.
- Where a person is arrested for a non-cognizable and bailable offence, the officer carrying out the arrest can grant him bail in accordance with Section 436 of the Code of Criminal Procedure, 1973.
- Where a person is arrested for a cognizable offence, he has to be produced within 24 hours of his arrest before a judicial Magistrate who will take a decision regarding releasing him on bail.

Power to Arrest - Guidelines

- In 'D.K. Basu v. State of Bengal' 1997 (1) SCC 416, the Supreme Court has laid down the guidelines required to be followed in case of arrest is detailed below and these all are also applicable to the arrest under GST also.
 - The arresting officers should bear accurate, clear and visible identification with them having their name and designation.
 - The arrest memo must be signed by one of the relative of the arrestee or in absence one of the respectable person of the locality and countersigned by the arrestee.
 - The arrestee person shall have the right to inform one of the relative or friend from the place where he is kept after arrest may be a police station, a lock-up or an interrogation place.
 - The arrestee should be subjected to medical examination every 48 hours during his detention.
 - The arrestee should be allowed to meet his lawyer during the interrogation though not throughout the interrogation.
 - Copies of all documents including the memo of arrest should be sent to the Magistrate for his record.

Arrest - Section 69 & 132

- > Serious offenses like
 - Supplies without invoice,
 - Invoice without actual supply
 - Availing ITC on above
 - Collected GST but not paid > 3 months etc.,
- ➤ If the amount > 5 crores, it is cognizable & non-bailable
- ➤ All other offenses are bailable & non-cognizable

Power to Arrest - Strict action by Judiciary

- In 'P.V. Ramana Reddy v. Union of India' 2019 (25) G.S.T.L. 185 (Telangana) Hon'ble Telangana HC held
 - Arrest can be made before completion of the assessment
 - Pre-trail arrest can be challenged before HC
 - Compounding is not possible if not applied;
- Further, the petitioners filed a special leave petition before the Supreme Court against the judgment of Telangana High Court. The Supreme Court dismissing the plea, said that it is not inclined to interfere [2019 (26) G.S.T.L. J175 (S.C.)].
- HC of Karnataka & Bombay has taken different view and the matter is pending before 3
 member bench of Hon'ble SC now on the above issues

Provisional attachment

Radha Krishan Industries v. State of Himachal Pradesh — 2021 (48) G.S.T.L. 113 (S.C.)

- The action of Provisional attachment is draconian nature and to be used after strictly following the conditions of Sec 83.
- This to be used based on the tangible material showing that the taxpayer is likely to defeat the revenue department.
- Rule 159 requires the facility of making objections on the action of department and also hearing. The authority is duty bound to deal with it.
- When appeal against the order u/s. 74 is filed, the balance demand gets stayed and the action of Provisional attachment shall come to end in light of Sec 107(6) Mandatory pre-deposit paid
- When there is no change in circumstances, passing another order of provisional attachment is incorrect when earlier order is withdrawn
- 'Neccessary to do' or 'reasons to believe' expressions involves the judgement which shall be done on tangible material

Provisional attachment

- Attachment –is only for Protection of revenue and not a routine
- Provisional attachment could be termed as a **very drastic and far-reaching power**. Such power should be used sparingly and only on substantive weighty grounds and reasons.
- Only if there is a reasonable apprehension that the assessee **may default the ultimate collection of the demand** that is likely to be raised on completion of the assessment.
- Not wishful thinking or imaginary grounds Ankit Lokesh Gupta vs State Of Gujarat 2019 (31) G.S.T.L. 577 (Guj.) & Pranit Hem Desai Vs DGGI 2019 (30) G.S.T.L. 396 (Guj.)
- Attachment of stocks/bank a/c can paralyse business-Gandhi Trading v. Asst. CIT 3 reported in (1999) 239 ITR 337 Bom

Audit by GST Department

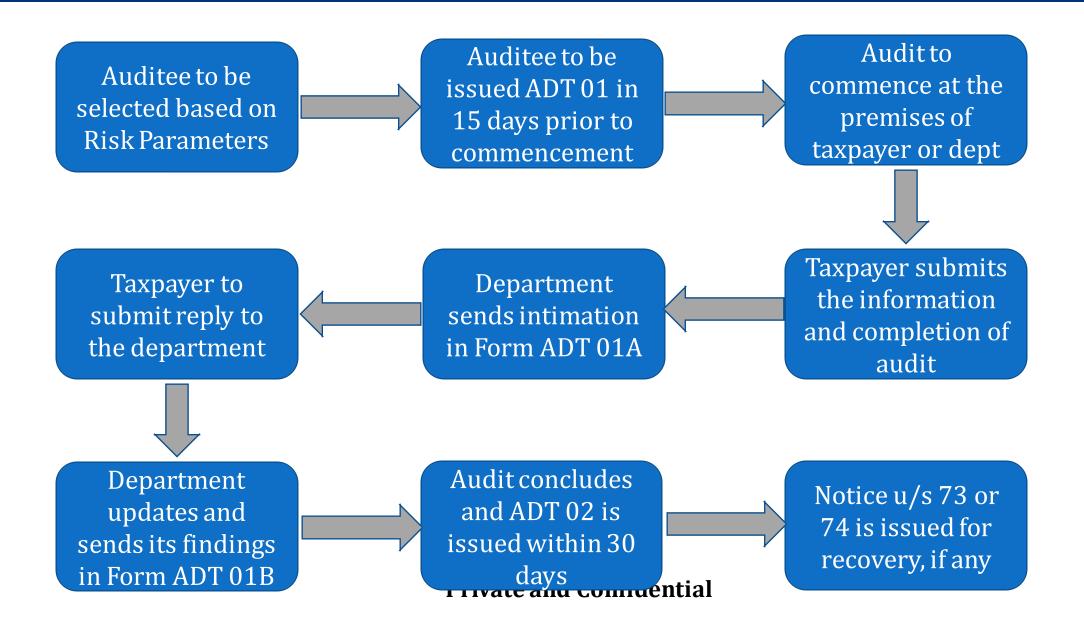
Departmental Audit - Legal Framework

- Relevant legal Provisions in the GST Act and Rules viz.,
 - ✓ Section 2(13) Meaning of the term 'Audit';
 - ✓ Section 2(85) Meaning of the term 'Place of Business';
 - ✓ Section 65 Audit by Tax Authorities;
 - ✓ Rule 101 Departmental Audit;
 - ✓ Section 71 Access to the business premises of the taxpayer;
 - ✓ Sec 35 read with Rule 56 Maintenance of Accounts, Records & Documents.
- GST Audit Manual 2019 issued by the CBIC;
- Manual for Quality Assurance Review & Audit Performance Index 2021 issued by the CBIC;
- Separate guidelines/manuals are also issued by various state GST dept.

Periodicity of Audit & Selection Criteria

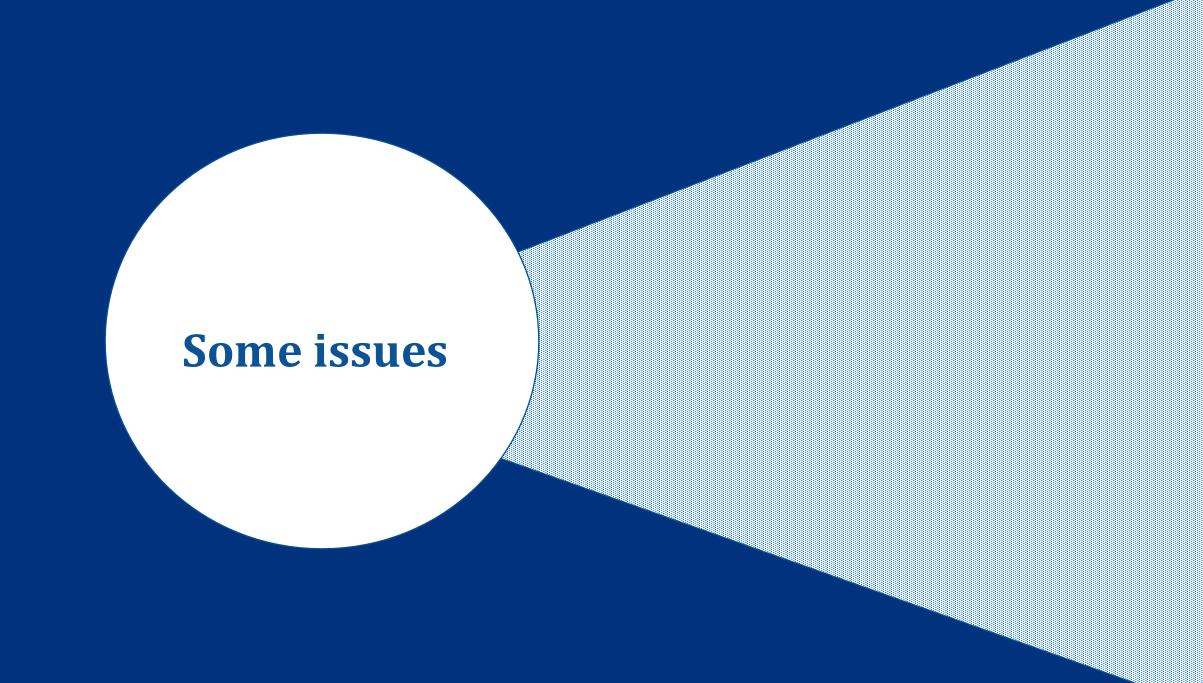
- Audit to be conducted for a financial year [or part thereof] or multiples thereof;
- Audit is sample selection driven, Criteria for selection to be as under:
 - ✓ Risk Based Selection v/s earlier turnover/ taxes paid basis selection
 - ✓ Theme Based Selection
 - ✓ Deferment for Accredited Taxpayers 3 years from the date of last audit
- 20% cases to be identified based on the local risk parameters as under:
 - ✓ Taxpayer did not provide/delayed in providing documents sought by the Audit Team;
 - ✓ Inconsistency in filing of tax returns by the taxpayers;
 - ✓ Taxpayer's return was previously investigated for evasion;
 - ✓ Taxpayer received notices from other governmental entities;
 - ✓ Quality of the Taxpayer's books and records not well-kept;
 - ✓ Taxpayer has supplied goods on which there has been reduction in rate of duty, in order to examine the possibility of profiteering u/s 171 of the CGST Act, 2017;
 - ✓ Higher incidence of supplies without issuance of e-way Bills have been noticed.

Steps involved in the GST Audit



GST Audit by department - Preparation & Approach

- Cooperating with the audit team and providing all the necessary information & documents called for;
- Keeping the entire information in an organized manner ready prior to the visit by the audit party;
- Seek further time if information/ documents are not ready
- Identity of the each and every member of the audit team must be verified;
- Additional time to be requested if not clear/ not sure about any facts or law;
- Professional can be involved as an authorized representative to handle the audit and represent the taxpayer;
- Get pre-audit done internally / externally. **Private and Confidential**



- Jurisdiction General or specific orders, whether central or state Below 1.5 Crore (90% to the state) & Above 1.5 Crore (50% by both) Need to know who has the jurisdiction;
- Either Central or State Tax officer will confine himself for that State only. Refer Notification No. 2/2017-Central Tax dated 19.06.2017 defined the jurisdiction of Central officers. However, CBIC can authorize any Central Tax officer to do any job in terms of section 5. Insist for such authorization if officers wants to audit of other state records
- State officer of one State will not have jurisdiction against assessee located in another state
- Hard copy v/s Soft copy records Whether there is a requirement to provide backup of a software;
- Already assessment completed, returns scrutinized, investigation carried out etc.;

Private and Confidential

- Payment can be made under protest or under the right to contest Areas of interpretation – Keeping the issue alive – waiting for the apex court judgment;
- Proper officer may issue a SCN, if no SCN issued, then file a refund application;
- If department asks for original documents Make available on a sample basis backed by a CA certificate;
- Unofficial demands by the aggressive officers in audits Payment must not be demanded under coercion/ harassment - Gujarat HC in Bhumi Associates vs. UOI 2021-TIOL-397-HC-AHM-GST;
- Oral directions for payment/ reversals Suggested to keep everything in writing Submit a letter stating the complete sequence of events with full facts & details;
- Type of replies given during the audit would help It will make the foundation strong for future litigation;

- Payment of tax liability in the course of audit by utilizing the ITC;
- Rate of interest, whether payable @ 18% or 24%;
- Interest on unutilized ITC liable?
- Whether interest is payable at gross or net value for tax payable in audit. HC in Refex Industries Limited v. Asstt. Commissioner 2020 (34) G.S.T.L. 588 (Mad.);
- Penalty whether payable for tax dues arising for payment in the course of audit;
 - ✓ Cases involving fraud/ suppression or otherwise;
 - ✓ Taxes paid on own ascertainment prior to issuance of the audit para or SCN;
 - ✓ Tax along with applicable interest is paid within 30 days of the issue of SCN;
- If no audit objection raised on a particular matter in one year, then whether penalty payable for issue raised in the subsequent years or whether extended period of limitation cannot be invoked;

 Private and Confidential

- Availability of ITC for taxes paid under reverse charge in the course of audit barred by time limit u/s 9(4)?
- Incorrect type of tax paid i.e., IGST is paid instead of CGST & SGST;
- Extension for payment of tax/ payment of tax in maximum 24 installments u/s. 80;
- Whether audit team can seize the goods, assets or any other things in the course of audit;
- Whether physical verification of stocks and cash be carried out?
- Can audit be carried out at the residence of a taxpayer;
- C&AG is not considered as a proper officer for the purpose of conduct of the audit. HC decision in Kiran Gems Pvt. Ltd vs. UOI 2021 (46) G.S.T.L. 14 (Bom.)

Private and Confidential

- Assessment of ITC eligibility or short payment or non payment of GST shall not be done in revocation proceedings Prateeksha Bharat Gas Gramin Vitrak Vs STO 2021-TIOL-1040-HC-MAD-GST
- 100% refund granted based on verification of the documents, can it be re-opened?
- RCM on procurements from the unregistered persons (upto 13.10.2017)
- Can GST audit by department also go into the classification, valuation, rate of tax etc. of the goods imported or whether it would be covered under the Customs Audit?
- Any tax liability & interest payable under the audit, whether can be recovered from the recipient/ customer;
- Whether receiver can avail input tax credit on the liability detected and paid by the supplier as a part of audit and recovered from the recipient It is not covered u/s 17(5)(i);



Coverage

- 1. Background of IBC
- 2. Implications of the moratorium
- 3. Power and Duties of IRP/RP
- 4. Filing of claim by tax authorities and waterfall mechanism
- 5. Provisions under GST pertaining to IBC
- 6. Compliance by IRP/RP under GST
- 7. Demand and Recoveries under GST
- 8. Other Issues w.r.t GST
- 9. Safeguards to be taken by IRP/RP

Pre IBC era

- 1. Various laws dealt with inability to pay dues by a person:
 - Sick Industrial Companies (Special provisions), Act, 1985
 - The Provincial Insolvency Act, 1920,
 - The Presidency Towns Insolvency Act, 1909,
 - o The SARFAESI Act, 2002
 - The Companies Act
- 2. Secured creditors had various safeguards no safeguards for the unsecured creditors
- 3. Long period taken to resolve the insolvency proceedings

Background of IBC

Objectives of introductions of IBC

- To provide a comprehensive law and single platform to deal with or resolve financial stress of business entities or otherwise
- To assure early detection of financial stress or default, any creditor can report the default now
- To provide for time bound resolution for viable businesses. Helps reorganisation and /or restructuring of business
- Creates a collective platform of the stakeholders to enable them to take decisions about the future of the distressed entity
- Sends the unviable businesses to liquidation at the earliest to arrest any substantial loss in value
- To consolidate all statutes, schemes, orders into single debt resolution process. BIFR, CDR, SDR, S4A and other debt resolution schemes were withdrawn/ repealed with the notification of IBC

Background of IBC

IBC - Two Stage Process

1. Corporate Insolvency Regulation Process:

- For insolvency process of CD, default should be more than Rs. 1 crore
- During CIRP, CoC assess whether the debtor's business is viable for continuation and the option for rescue and revival

2. Liquidation Process

• If the insolvency resolution process fails or CoC decide to wind down and distribute the assets of debtor

Broad process under IBC

- 1. Application by financial creditors, operational creditors or corporate debtors himself
- 2. IRP to be appointed by NCLT based on application or otherwise
- 3. Moratorium period kicks in with appointment of IRP
- 4. RP to be appointed by NCLT pursuant to proposal put forward by COC
- 5. IRP/RP to continue the proceedings of Company as going concern under the broad directions of a committee of creditors
- 6. IRP will take over management of Corporate Debtor, take over the operations of bank accounts, take control and custody of assets over which CD has ownership rights in India or abroad including assets not in possession of CD
- 7. RP to invite Resolution plan and submit to NCLT
- 8. NCLT approves, it binds on all creditors

Important terms

Following terms defined under IBC (relevant for GST)

- ✓ "debt" means a liability or obligation in respect of a claim which is due from any person and includes a
 financial debt and operational debt
- ✓ "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the 2[payment] of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;

GST is operational debts?

✓ "claim" means –(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured, or unsecured; {2 (6)}

Unadjudicated dues of GST can be part of claim of the GST dept?

✓ "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not 1[paid]by the debtor or the corporate debtor, as the case may be

Can GST dept file petition before NCLT if there is default?

Implications of Moratorium

During CIRP:

- 1. Start of fresh proceedings is prohibited (sec 14 (1) (a))
- 2. Continuation of proceedings is prohibited (sec 14 (1) (a))
- 3. Execution of any judgment or order is prohibited Sec 14 (1) (a)
- 4. Any action to recover any due is prohibited sec 14 (1) (c)

During Liquidation

- Start of Fresh Proceeding is prohibited against CD 33 (5)
- 2. Continuation of pending proceeding is prohibited 33 (5)
- 3. Liquidator will take over the control and custody of all assets of Corporate Debtor Sec 35 (1) (b)

Power and Duties of IRP/RP under IBC

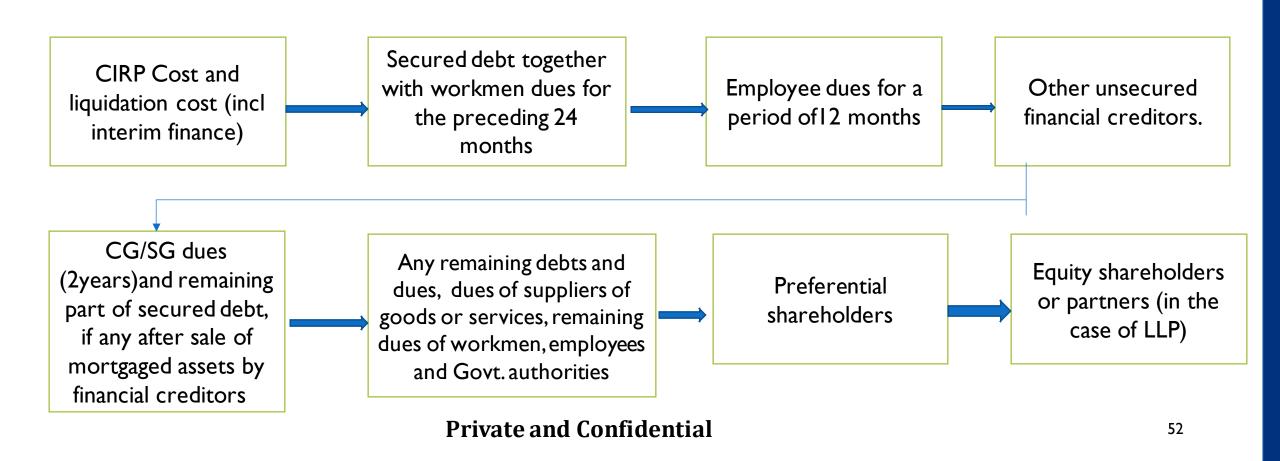
- 1. RP will take over management of Corporate Debtor
- 2. Power of BOD of the CD shall be suspended
- 3. Officers and management of the CD will report to RP
- 4. Can access information from third parties to the extent relevant for CIRP e.g. depositories of securities, professional advisors of CD, IUs, other registries keeping ownership records, members, promoters, partners, directors, JV Partners, contractual counter parties of CD,
- 5. Collect all information relating to assets, finances and operations of CD
- 6. Receive, collate and verify all the claims submitted by creditors and determine any contingent claims to his best estimate
- 7. Manage operations of CD as a going concern
- 8. Observe, find and determine avoidable transactions u/s 43, 45, 50 & 66 of the Code e.g. Preferential, undervalued, extortionate and fraudulent transactions and file appropriate application to NCLT for remedy

 Private and Confidential

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Distribution of Assets (waterfall Mechanism)

Section 53: Amount available under a Resolution Plan or proceeds of sale of assets of the liquidation estate will be distributed in the manner and in the priority based on the value of security Interest of each creditor:





Stages of compliance

Pre-CIRP compliance

During CIRP period

Post CIRP (After take over or liquidation)

Personal liabilities of Directors or promoters

Transfer of Business

| Section | Brief Description |
|---------|---|
| 18 (3) | Change in the constitution of a registered person on account of sale, merger, demerger, amalgamation, lease or transfer of the business with the specific provisions for transfer of liabilities – ITC may be transferred |
| 22 (4) | Makes the transferee company liable for registration with effect from the date the ROC issues a certificate of incorporation giving effect to the order of the High Court / NCLT |
| 87 (2) | The companies shall be treated as distinct companies upto the date of the High Court / NCLT order and registration certificate shall be cancelled from the date of the order |
| 87 (1) | Inter-se Transactions for the period between the appointed date and the effective date shall be included in the turnover of the respective companies and tax paid accordingly |

Govt rights in case of transfer of business

Sec 82: Tax to be first charge on property: Notwithstanding anything to the contrary contained in any law for the time being in force, save as otherwise provided in the Insolvency and Bankruptcy Code, 2016 (31 of 2016), any amount payable by a taxable person or any other person on account of tax, interest or penalty which he is liable to pay to the Government shall be a first charge on the property of such taxable person or such person.

SECTION 85. Liability in case of transfer of business: (1) Where a taxable person, liable to pay tax under this Act, transfers his business in whole or in part, by sale, gift, lease, leave and license, hire or in any other manner whatsoever, the taxable person and **the person to whom the business is so transferred** shall, jointly and severally, **be liable** wholly or to the extent of such transfer, to pay the tax, interest or any penalty due from the taxable person upto the time of such transfer, whether such tax, interest or penalty has been determined before such transfer, but has remained unpaid or is determined thereafter. (Inconsistent with Sec 32A of IBC – overarching sec 238 of IBC Code? Only for pre-CIRP defaults)

Liability of Directors

Sec 88 (3) – Business of private company wound up, director would be liable unless provides to the satisfaction of Commissioner that it cannot be attributed to gross neglect, misfeasance or breach of duty

Sec 89 (1) – Tax dues from a private company not recovered – director liable unless proved that not on account of gross neglect, misfeasance or breach of duty on his part

Sec 137 (1) offences by Company – Offence committed by Company and it is proved that committed with the consent or connivance of the officer of the Company – such person shall be deemed to be guilty of offence and shall be liable to be proceeded against and punished accordingly.

Similarly, Sec 137(2) fixes the directors, managers, secretary or other officer of company for the offenses of company

This is subject to protection that person has acted bona fide and proves his innocence

Notification No 11/2020 and Circular 134/04/2020

- NCLT order dated 25.10.2019 in Axis Bank vs Prius Commercial projects Pvt. Ltd & NCLT, Chennai order dated 05.12.2019 in Kiran Global Chem Limited VS. Asst. Commissioner (ST) held that
 - GST authorities should not take any coercive action against the corporate debtor with respect to dues for period prior to insolvency commencement date
 - o GST authorities shall allow the RP to deposit the GST dues for the CIRP period and allow filing of returns so that appropriate GST credit can be passed on to the customers of the corporate debtor
- 1. Registration by IRP/RP
- 2. Taking ITC
- 3. Filing of Return
- 4. Claim refund of past amount deposited in cash ledger
- 5. Department not to take any coercive action
- 6. Cancellation revocation or suspension of old registration

Compliance by IRP – Registration – Notification No. 11/2020

| Instances | Implications |
|--|--|
| Compulsory registrations in all States? | Notification provides for registration in all States. IRP/RP to examine based on the continuation of business/supply in respective States |
| Continuation of earlier registrations | Where all past tax liability stand discharged by CD: Existing registration may be continued (GSTR01 filed but tax in 3B not done/filed)? IRP/RP to be made as authorized signatory? |
| New Registration by IRP/RP | Not necessary – assess based on the tax liability payment status in different States. Take decision statewise To obtain registration within 30 days of appointment |
| Registration during liquidation proceedings | If business continued with GSTIN of CD – Liquidation proceedings to be completed on this GSTIN. If business continued with GSTIN of IRP/RP – Liquidation proceedings to be done based on such GSTIN If no business continued in the interim period and earlier return filing remains pending ??? |
| Old registration cancelled by department and time period of revocation expired | No option available. Obtain new registration to continue business |
| Old registration cancelled/ suspended and within time limit | Registration to be revoked. Dept to permit revocation without payment of outstanding dues??? |

Compliances by IRP – filing of Return

1. Filing of First Return:

- o Return format No separate format of First Return. To be filed in GSTR-1 and 3B. Intended where gap between date of application viz a viz retrospective date of grant of RC.
- Liabilities to be considered for the period from from date of appointment of IRP/RP
- ITC to be availed from the period of since the date of appointment of IRP/ RP (bearing GSTIN of CD)
- o Relaxation in claiming of ITC Sec 16 (4) and Rule 36 (4)
- Transfer of ITC from existing registration Not provided in the Notification. Can it be transferred?
 Sec 18 r/w Rule 41A, TRAN-2, Invoicing transfer?
- Any past liabilities noticed by IRP nil
- Liability to be determined based on the time of supply falling after period of appointment
- 2. Filing of periodical Returns either erstwhile registration or new registration as if regular business conducted. Relaxation from 36 (4).........? What if any non-compliance noticed subsequently?? Sec 85 of CGST?

Demand and Recoveries

| Nature | Legal provision/impact | IRP/RP responsibilities |
|---|--|---|
| Confirmed liabilities evident from books of account but not paid for earlier tax periods | Covered in operational debt (Provisions made are not covered – SC decision in Bishal Jaiswal) | • Include in the list of Operational creditor for |
| CIRP process commenced in the interim period of a tax period (i.e. 17 th March 2021) and business continued | | Till 17th Mar: same as above From 17th Mar: IRP/RP to pay tax liability. |
| Audit/assessment/investigation process commenced: - Yet to issue SCN - SCN issued but not replied - Adjudication pending | There is no tax dues pending as the proceedings have not resulted in crystalized demand. Could it be considered as operational debt?? | Claim sent by dept which are not due— Not to |

Demand and Recoveries

| Nature | Legal provision/impact | IRP/RP responsibilities |
|---|---|--|
| Demand confirmed by authority and appeal: I. Filed before CIRP and pending disposal 2. Not filed and time limit to file appeal not concluded 3. Time limit expired | No confirmed liability. Same as above. Appeal cannot be decided in CIRP period. Liability not crystalised. Same as above Crystalised demand. Part of operational debt. Dept to intimate | IRP/RP need not file appeal or attend personal hearing. Intimate the fact of CIRP proceedings. Confirmed liability— to be considered in the plan |
| Recovery proceedings initiated by dept in pre CIRP period: I. Provisional attachment of property u/s 83 2. Permanent attachment of property/bank account etc. 3. Blocking of credit ledger | Tax dues recovered by disposing of attached property prior to CIRP – not to revert During CIRP – Attached property not to be used for realization of confirmed/protective demand. | Intimate to dept for CIRP proceedings. Identify all assets under dept attachment and intimate for release. Intimate to bank etc for CIRP and requesting to not to give effect to attachment. Provisional attachment is draconian under the law (Radha Krishna Ind-SC) Write for unblocking credit ledger |

Demand and Recoveries

| Nature | Legal provision/impact | IRP/RP responsibilities |
|---|---|---|
| Proceedings Status - Post plan approval | Once plan approved – Moratorium period comes to an end Operational debt to be paid as per waterfall mechanism All past proceedings discontinued – against CD as well as RA (Ghanshyam – SC) Proceeding to continue against promoter/director?? | Ensure that all operational debt incl dept is paid as per plan Amount may be paid through DRC-03 Write to all dept for conclusion of CIRP proceedings and writing off unpaid amount |
| Proceedings – if plan not approved | Immediate commencement of liquidation proceedings Moratorium is started from the date of proceedings | Same as above |

Liabilities on Transactions during CIRP/Liquidation

| Nature | Legal provision/impact | Liability of IRP/RP |
|---|--|--|
| Arising out of business to continue it as going concern | All liabilities to arise as if taxable person carrying on the business in normal course | Pay the tax liability. Manner of registration, filing of return, payment of taxes etc discussed separately. |
| concern??- Accounting Statement, | Not covered within the definition of supply- business test fails Even if presumed to cover in supply – covered by exemption notification (Services by way of transfer of a going concern, as a whole or an independent part thereof) | Ensure that the business is continued as going concern and its takeover as going concern as part of resolution |
| Non operational or closed plant: Complete business of Person is closed/non operational Some of the plants are non functional in some States | Entire resolution application to be evaluated if consideration payable as going concern. To be seen from perspective of CD or RA? No GST liability if going concern, else liable | |

Liabilities on Transactions during CIRP/Liquidation

| Nature | Legal provision/impact | Liability of IRP/RP |
|---|---|--|
| Sale of assets under liquidation to individual buyers | GST liable on the sale of assets. (Capital goods or Plant & machinery - Sec 18 applies – GST on sale value or prop ITC (depreciable – 5% per Qtr) w.e.h | Ensure that the liability is correctly determined & collected from the customer. Apply all applicable provision of the law. Discharge the tax liability State wise in the GST number of CD or liquidator, as the case may be. |
| Sale of assets as slump sale/going concern during liquidation | Same as discussed for going concern above | Ensure compliance of section 53 while determining dues of respective Govt. No GST liability |
| Waterfall – realization gross or net of tax? | Proceeds from sale of liquidation assets | Tax to be discharged |

Issues post closure of CIRP

- 1. Department can resume past open proceedings? (Investigation, audit, personal hearing, disposal of appeal, recovery proceedings etc)
 - Against buyer No. SC judgment of Ghanshyam misra, Ultratech Cement- Raj HC
 - ❖ Against CD No. Immunity granted u/s. 32A
 - ❖ Against directors or other person in charge of affairs of the Company:
 - No. If directors were due diligent in discharge of their obligations.
 - Yes, if there are gross negligence, misfeasance or breach of trust. (Sec 88 and 89 of CGST Act)
- 2. Continuation of prosecution proceedings?? –Criminal matters alone would be proceeded against individuals and not company. There will be no criminal proceedings against successful resolution applicant.
- 3. Impact on ITC to buyer for non payment of tax by CD?? Claim of Govt settled/not settled in CIRP both cases
- 4. Written off liabilities (waived off in Resolution plan) treated as revenue by successor liable to GST?

Other issues

- 1. Refund application filed by RP or pending application of CD Can department adjust it against confirmed/unconfirmed demand? Bound to give in cash? Right of withheld by department on account of malfeasance or fraud committed {Sec 54 (11)} vs. Sec 14 of IBC (Moratorium)
- 2. Refunds of old period how should it be filed? Old GSTIN or new GSTIN?
- 3. Refunds on shipping bill cases how to deal when new registration is taken by IRP?
- 4. Assessment of assets of CD (Law, portal, ITC, refunds, pending liabilities Eg. ITC in books but not in portal due to non-filing of 3B returns, still it is property?)
- 5. Price adjustments of past (Credit Notes/Debit notes)
- 6. ITC reversals due to default in payment <180 days, IRP/IP liable for reversal if 180th day falls in CIRP?
- 7. Filing of Annual Return to be filed?
- 8. ITC -02 for transfer of ITC If ITC transferred to buyer in resolution plan file ITC 02 for both old as well as new registration old liability discharged??
- 9. Change of registration required if IRP/IP is replaced or IP appointed in place of IRP? No clarified by CBIC circular No, 138 dated 06.05.2020
- 10. Third party recovery notices u/s. 79 of CGST Act, 2017 by the customers/debtors of the CD not to be complied during CIRP proceeding rivate and Confidential

Other issues

- 1. To whom IRP/ RP should issue invoice Statewise or Corporate Office?
- 2. Whether RA (successor) has immunity of transferred ITC under Section 18 also i.e. construction ITC taken by CD and unutilized ITC transferred to RA can department initiate the proceeding? Role of due diligence?
- 3. ITC to be taken even if business closed meaning of term business expanded scope
- 4. Amount paid under the protest during investigation etc- refund?
- 5. Return of bank guarantee not invoked till CIRP commencement
- 6. Binding of claim on the State Government or authorities which did not participate in the proceedings? SC judgment in case of Ghanshyam Misra & Sec 31 of IBC

Safeguarding points for IRP

- 1. Identification of all tax dues (undisputed) for information memorandum
- 2. All disputed tax dues and contingent liabilities RP should assess the legality of the demand so that CoC could make informed decision (can obtain expert opinion on legality)
- 3. Vetting of decisions making vis-à-vis GST, especially in larger and complex business
- 4. Proactive submission of letters to department
- 5. Any matter decided by department consider to prefer appeal during liquidation to ensure the claim are not considered in waterfall
- 6. Registration strategy considering onus of past compliances [180 days, past ITC-04 liabilities]
- 7. Segregation between avoidable and non-avoidable compliances etc. ensure non-avoidable are taken care of

Any Queries???

THANK YOU!

For any further clarifications venkataprasad@hiregange.com +89781 14341

