

ADV.V.B.GAIKWAD

328, 'E' Ward, D/10, Royal Plaza, Dabholkar Corner, Kolhapur-416 001.

[VERY IMPORTANT/VERY URGENT]

10.05.2024.

To,

All,

Sir,

Sub:- GST – Non-payment of GST/non-filing of GSTR-1/GSTR-3B by the supplier – Reversal of ITC by the recipient of goods/services – Reg....

I have come across various transactions wherein the various suppliers have supplied the goods/services to recipient (under the cover of valid tax invoice with valid GSTIN) and have also recovered the full payment (including GST) against the said tax invoices from the recipient. However, the said suppliers either have not filed the GSTR-1 returns/GSTR-3B returns at all and thus have not paid the GST involved in the said tax invoices or though have filed the GSTR-1/GSTR-3B returns still have not declared the said tax invoices in the said returns and resultantly have not paid GST involved in the said tax invoices.

- [2] In such transactions the jurisdictional GST officers of the supplier has simply cancelled the GST registration of the suppliers and has not at all taken any efforts to recover the GST from the said suppliers.

Whereas, the jurisdictional GST officers of the recipient are denying the ITC claimed by the recipient and ordering its recovery along with interest and penalty, by relying upon the provisions of Sec.16(2)(c)/(d) of the CGST Act, 2017 according to which no registered person will be eligible to claim the ITC, if the tax charged by the supplier is not actually paid to the Government and the supplier has not filed the GSTR-1/GSTR-3B return. This action of the GST officers is causing grave financial hardship to the said recipients, as inspite of actually receiving the goods/services under valid tax invoices and inspite of making full payment (along with GST) to the supplier against the said tax invoices, they are being deprived of not only the ITC (equal to the GST charged in the invoices) but also are being compelled to pay the huge interest and penalties.

- [3] In fact, the intention of the Government is not to leave the defaulter supplier scot-free and to deny the ITC to the bonafide recipient out rightly and that's why the CBIC vide its Press Release No.156/2018, dt.04.05.2018 has clarified that, -

(i) No automatic reversal of credit :There shall not be any automatic reversal of input tax credit from buyer on non-payment of tax by the seller. In case of default in payment of tax by the seller, recovery shall be made from the seller

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however reversal of credit from buyer shall also be an option available with the revenue authorities to address exceptional situations like missing dealer, closure of business by supplier or supplier not having adequate assets etc.

However, the jurisdictional GST officers of the recipient are fully ignoring the above said clarification and are taking harsh action against the bonafide receivers and unfortunately most of the recipients due to fear/ignorance/ill advice are succumbing to the pressure and are reversing the ITC along with huge interest and penalties.

- [4] I herewith draw your kind attention towards the fact that, following the said press release (setting the guideline for action to be taken in cases where the supplier inspite of receiving full payment from the recipient, has not paid the GST/not filed the GST returns), the Hon'ble Calcutta High Court in the case of Suncraft Energy Pvt.Ltd. V/s. Assistant Commissioner, State Tax, Ballygunge Charge, 2023(8)TMI-174 has held that, -

before directing the assessee to reverse the input tax credit and remit the same to the government, the department ought to have taken action against the supplier dealer and unless and until the department is able to bring out the exceptional case where there has been collusion between the assessee and the supplier or where the supplier is missing or the supplier does not have any assets and such other contingencies, straight away the department was not justified in directing the assessee to reverse the input tax credit availed by him. Therefore, the demand raised on the assessee is not sustainable.

Please note that, the department has challenged the above said decision of the Hon'ble Calcutta High Court before the Hon'ble Supreme Court by filing Special Leave Petition (C) No(s).27827-27828/2023 and the Hon'ble Supreme Court vide its order dt.14.12.2023 as reported in 2023(12)TMI-739 has dismissed the said Special Leave Petition.

As the Hon'ble Supreme Court has upheld the above said decision of the Hon'ble Calcutta High Court by rejecting the departments special leave petition, the said decision of Hon'ble Calcutta High Court has become binding on the department.

- [5] Further, recently the Hon'ble Calcutta High Court (following the above said press release as well as the decision in the case of Suncraft Energy Pvt.Ltd.) in the case of Lokenath Construction Pvt.Ltd. V/s.Govt.WB&Ors., 2024(5)TMI-362(Cal.) has held that, -

8. The decision in Suncraft Energy Private Limited applies with full force to the case on hand. Admittedly, the adjudicating authority without resorting to any action against the supplier who is the selling dealer, had ignored the tax invoices produced by the appellant as well as the certificates issued by the Chartered Accountants which is erroneous and wholly without jurisdiction. It is interesting to note in the facts of the instant case that even in the showcause notice the authority has admitted that "it is true that the recipient has made payment of the element of tax to the supplier against such transaction but the payment of such tax has not been reciprocated to the exchequer". If the authority has admitted the fact that the recipient who is the appellant has made payment of the tax to the supplier against the transaction and if it is a case of the department that such tax has not been remitted to the State exchequer, the elementary principle to be adopted is to cause enquiry with the supplier and without doing so to penalise the appellant would be arbitrary, illegal and without jurisdiction.

9. For all the above reasons the appellant is entitled to succeed. Accordingly, the appeal is allowed. The order passed in the writ petition is set aside and the writ petition is allowed. The order impugned in the writ petition dated 28.12.2023 is set aside as well as the show-cause notice dated 22.08.2023 is set aside with a direction to the authorities to first proceed against the supplier and only under exceptional circumstances as clarified in the press release issued by the Central Board of Indirect Taxes and Customs (CBIC) and then only proceedings can be initiated against the appellant.

- [6] In the light of above said press release of CBIC and the decisions, it is now crystal clear that, the jurisdictional GST officer of the recipient cannot blindly deny the ITC availed by the bonafide recipient (who has actually received the goods/services under valid tax invoices and has made full payment to the supplier) merely for non-payment of tax/non-filing of GST return by the supplier unless and until it is proved beyond any doubt that the jurisdictional GST officer of the supplier has taken all possible actions/applied all possible measures to recover the GST from the defaulter supplier and inspite of the said efforts the GST has not been recovered.
- [7] In view of the above I herewith further inform you that, if you are facing such problems where inspite of receiving the goods/services under valid tax invoices and of making full payment to the supplier, the GST officers are insisting you to reverse the ITC for non-payment of GST by your supplier without taking any action against such defaulter supplier, then, you can very well refuse to reverse

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the said ITC and can fight the same with the department by relying upon above said CBIC press release and decisions of Hon'ble High Court.

Also note that, if you have already reversed any such ITC (for non-payment of tax by the supplier) as per the direction of the GST officers, then you can file refund application to get back the said reversed ITC from the department.

- [8] Kindly keep the above said important legal aspect in mind while dealing with any such transaction.
- [9] I hope I have clarified the matter. However, if you have any doubts then I request you to kindly come to my office for personal discussion.

Thanking you,

Yours faithfully,
Sd/-
Adv.V.B.Gaikwad.