2023: GUJHC:40275-DB

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 14867 of 2022 With
R/SPECIAL CIVIL APPLICATION NO. 4876 of 2023 With
R/SPECIAL CIVIL APPLICATION NO. 5731 of 2023

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE BIREN VAISHNAV

and

HONOURABLE MR. JUSTICE DEVAN M. DESAI

==========

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	NO
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

==========

BRITANNIA INDUSTRIES LIMITED

Versus

UNION OF INDIA

========== Appearance:

MR ANANDODAYA S MISHRA(8038) for the Petitioner(s) No. 1
MR ROHIT G LALWANI(12507) for the Petitioner(s) No. 1
MR PRIYANK LODHA for the Respondent(s) No. 3
MS HETVI H SANCHETI(5618) for the Respondent(s) No. 1,2

==========

CORAM:**HONOURABLE MR. JUSTICE BIREN VAISHNAV** and
HONOURABLE MR. JUSTICE DEVAN M. DESAI

NEUTRAL CITATION

2023: GUJHC:40275-DB

Date : 07/08/2023

CAV JUDGMENT

(PER : HONOURABLE MR. JUSTICE BIREN VAISHNAV)

1. Rule returnable forthwith. Learned advocates appearing for the respective respondents waive service of notice of rule.

1.1 These petitions, though different on facts, essentially raise a common question of interpretation of Section 107 of the Central Goods and Services Tax Act, 2017 ("CGST" for short) and Rule 108 of the Central Goods and Services Tax Rules, 2017 and related provisions.

SPECIAL CIVIL APPLICATION NO.14867 of 2022

2. This petition is filed for the following prayers:

> "9(a) That this Hon'ble Court may be pleased to issue a writ of Mandamus or an appropriate writ, order or direction, ordering, directing or declaring the Ld. Assistant Commissioner to make available and upload the electronic

NEUTRAL CITATION

2023: GUJHC:40275-DB

copy of the OIO dated 23.08.2019, on the GST Portal for the purpose of filing appeal in accordance with Section 107 of hte CGST Act, 2017 and Rule 108(1) of the CGST Rules, 2017.

(AA) That this Hon'ble Court may be pleased to issue a Writ Petition of Mandamus or an appropriate writ in the nature of Mandamus or any other appropriate writ, order or direction, to quash and set aside the Impugned Order in Appeal passed by Ld. Commissioner (Appeals) to the extent it has held that the impugned order in original dated 23.08.2019 has attained the finality and denied the refund of unutilized input tax credit.

(b) That this Hon'ble Court may be pleased to issue a writ of Mandamus or an appropriate writ in the nature of Mandamus or any other appropriate writ, order or direction ordering, directing or declaring the Ld. Assistant Commissioner to re-credit the rejected amount of refund claim to the Electronic Credit Ledger of the Petitioner in accordance with Rule 93 of the CGST Rules, 2017.

3. Facts of the said petition, briefly stated, indicate that the petitioner is a Public Limited Company engaged in the manufacture of food products such as biscuits, bread, rusk etc. The manufacturing unit is situated in Kandla Special Economic Zone and is engaged in the export of goods under Letter of Undertaking. It is the case of the petitioner that it accumulated unutilized Input Tax Credit of IGST distributed by the Input Service Distributor for services related to the SEZ Unit in its Electronic Credit Ledger.

NEUTRAL CITATION

2023: GUJHC:40275-DB

3.1 An application under Section 54 of the CGST Act was filed for refund amounting to Rs.37,28,087/- for the period from April 2019 to June 2019. The application was filed on 16.7.2019. The claim for refund was rejected on 23.08.2019 and the Order-In-Original (O-I-O) was manually served. A fresh application was filed on 27.10.2020.

3.2 The authorities issued a Show Cause Notice on 11.11.2020 asking the petitioner to show cause as to why a fresh application was filed for refund once the claim was rejected vide an order dated 23.08.2019 and no appeal was filed against the same. A reply was filed on

1.12.2020 and by an Order in Original dated 3.12.2020 the claim was once again rejected on the ground that once the Order dated 23.08.2019 rejecting the same claim was passed and no Appeal was filed,the same having attained finality, the claim was not maintainable.

3.3 An appeal filed against the order dated 3.12.2020 was rejected by the Appellate Authority on 21.06.2021 on the ground that there was no powers to review an earlier order. It is the case

NEUTRAL CITATION

2023: GUJHC:40275-DB

of the petitioner that had the OrderIn-Original dated 23.08.2019 been uploaded the petitioner could have filed an appeal under Rule 108 of the CGST Rules and but for it not being done so,the petitioner could not file an Appeal electronically, which is the only manner of filing appeals. Non-receipt of an electronic copy of the order prevented the petitioner from filing an appeal in the required electronic mode.

SPECIAL CIVIL APPLICATIONS NO.4876 and 5731 of 2023

4. Since the facts and the prayers of these two petitions are common, prayers and facts of Special Civil Application No. 4876 of 2023 are set out below:

> "8. (a) That this Hon'ble Court may be pleased to grant an interim relief by issuing an appropriate Writ of Certiorari and Writ of Mandamus or an appropriate writ, order or direction under Article 226 of the Constitution of India, ordering and directing the respondent to release all bank accounts of the Petitioners as provided in Annexure-B, by way of quashing the letters of Respondent No. 3 dated 09.12.2022 and 12.12.2022.
>
> (b) That this Hon'ble Court may be pleased to grant an interim relief by issuing an appropriate Writ of Certiorari and

NEUTRAL CITATION

2023: GUJHC:40275-DB

Writ of Mandamus or an appropriate writ, order or direction under Article 226 of the Constitution of India, asking the Respondent No. 2 to upload the Impugned Order 29.04.2021 on GSTN Portal as is mandated under Section 107(1) of the CGST Act, 2017 read with Rule 108(1) of the CGST Rules, 2017.

(c) That this Hon'ble Court may be pleased to grant an interim relief by issuing an appropriate Writ of Certiorari and Writ of Mandamus or an appropriate writ, order or direction under Article 226 of the Constitution of India, to quash and set aside the Impugned Orders passed by Respondent No. 2 and decide them afresh after according an opportunity of hearing.

5. The petitioners are partners in a partnership firm M/ S Sukhdham Upvan formed for a real estate scheme. The shares are 11% and 4% respectively. That one Darpan Shah is a Managing and a Majority partner. It is the case of the petitioner that on inquiry with the Bank the petitioner was informed that by virtue of notices dated 9.12.2022 and 12.12.2022, the Assistant Superintendent of CGST had directed the Bank to debit-freeze the accounts of the petitioner in lieu of tax recoveries from the Partnership Firm. The recovery of Rs.99,18,154/service tax dues was outstanding by virtue of the order dated 31.3.2021 and Rs.3,31,12,518 towards GST dues vide order dated 29.04.2021.

NEUTRAL CITATION

2023: GUJHC:40275-DB

5.1 It is the case of the petitioners that the Orders-InOriginal dated 31.3.2021 and 29.4.2021 were never uploaded on the GST Portal and hence the petitioners were prevented from filing the appeals which can only be filed through electronic mode and not manually as the process other than electronic mode is not notified. It is the case of the petitioners that the hand delivery of the orders was given on 6.1.2023 and an appeal has been filed in the service tax matter in connection with the order dated 31.3.2021 whereas since the order dated 29.4.2021 wasn't uploaded the petitioners are prevented from filing appeal and therefore the consequential debitfreezing of accounts is bad.

6. Mr.Anandodaya Mishra Learned Advocate for the petitioners would make the following submissions:

Special Civil Application No.14867 of 2022

(i) The order dated 23.08.2019 ought to have been uploaded on the web portal in accordance with Rule 26(1) and Rule 26(3) of the CGST

NEUTRAL CITATION

2023: GUJHC:40275-DB

Rules,2017. In the matter of the petitioner itself in Special Civil Application No. 15473 of 2019, the issue of refund was held admissible and therefore even if no appeal was filed, the principle ought to have been accepted and orders for the subsequent period issued.

(ii) The petitioner could only have filed an appeal electronically as mandated under Rule 108 of the CGST Rules and by no other mode and the fact that the O-I-O was not uploaded as required under Rule 26 it must be considered as non-communication of the order and therefore the subsequent order observing that as no appeal was filed the refund issue had become final is bad and illegal. The mandate of Rule 108 was that an appeal has to be filed by electronic mode and that could only have been done had the original order been uploaded.

(iii) In support of his submissions Mr. Mishra would extensively read out the provisions of Section 107 and Rule 108 of the CGST Act and the Rules. He would also press into service Rules 26(1) and 26(3) to submit that every order should be uploaded on the web portal.

NEUTRAL CITATION

2023: GUJHC:40275-DB

(iv) That there is no provision that even if an order is not uploaded, an appeal can be filed electronically on the web portal. Unless the order is uploaded under Rule 26 read with Rule 142 no appeal can be filed.

(v) Relying on the recommendation of the GST Council in its 50th Meeting where a view was expressed to amend the Rule 108 to enable manual filing of the appeal, it is his submission that no appeal could have been filed except electronic mode and therefore because of the order having not been uploaded the appeal could not be

filed.

6.1 In support of his submissions Mr.Mishra would rely on the following decisions:

(I) M/s. Britannia Industries vs. Union Of India (SCA No. 15473 of 2019)

(II) Gujarat State Petronet vs. Union Of India (SCA No. 15607 of 2019)

(III) Jose Joseph vs. Assistant Commissioner of Central Tax and Central Excise & ors. [W.P.© Nos. 8960 , 8966, 8977 & 9052 of 2021]

NEUTRAL CITATION

2023: GUJHC:40275-DB

(IV) M/s. Garden Silk Mills Ltd. vs. Union of India (SCA No. 7397 of 2018)

6.2 Mr. Mishra, learned advocate for the petitioners would submit that the judgement of the Bombay High

Court in the case of **Meritas Hotels Pvt.Ltd v.State of Maharashtra and Ors. reported in (2022) 89 GST 453 (Bombay)** relied upon by the respondents was per incuriam.

7. Ms. Hetvi Sancheti, learned advocate appearing for the respondents no. 1 and 2 would submit that the refund claim was scrutinised and was rejected. As far as the previous refund application is concerned, which was a subject matter of Special Civil Application No.15473 of 2019 , the same was unconnected inasmuch as before the Court could decide the issue on 11.3.2020, the refund application in the present issue was rejected on 23.08.2019.

7.1 Ms. Sancheti would submit that the prayer for recredit of the rejected refund claim in the electronic register of the petitioner

NEUTRAL CITATION

2023: GUJHC:40275-DB

cannot be done as in accordance with Rule 93 of the CGST Rules, the petitioner had not given an undertaking. If the claim of refund is rejected, no refund is granted. Alternatively, an undertaking has to be filed that no appeal shall be filed. No such undertaking has been given, hence no refund or re-credit can be made.

7.2 On the question of inability to file an appeal through an electronic mode as mandated, she would submit that the appeal can also be filed without the order being uploaded. A manual copy of the order was available to the petitioner and therefore in accordance with the Rule the form only required details of the number of the O-I-O on the portal which could have been lodged. Nonuploading of the Original Order had no connection with the filing of the appeal in the electronic mode.

Submissions in Special Civil Application Nos.4876 and 5731 of 2023

NEUTRAL CITATION

2023: GUJHC:40275-DB

8. Mr Mishra, learned advocate for the petitioners in these petitions would make the following additional submissions apart from the submissions made on the question of Rule 108 of the CGST Rules.

(a) That after filing of the Writ petitions, the order of GST demand dated 29.04.2021 has been uploaded on 23.05.2023 and therefore the petitioner would get time of three months from the date of uploading of the order. He would therefore submit that prayer 8(b) would therefore be fulfilled. The appeal against the GST order has been filed on 28.7.2023 after the conclusion of arguments in the petition on 26.07.2023.

(b) That the entire proceedings are in violation of principles of natural justice.

(c) Invoking Section 107(7) of the Act, Mr. Mishra would submit that a suo motu stay would operate as the petitioner has paid the 10% of the amount as per the original order dated 29.04.2021.

NEUTRAL CITATION

2023: GUJHC:40275-DB

9. For the Revenue, learned advocate Mr. Priyank Lodha would make the following submissions:

(a) That two show cause notices were issued one dated 4.6.2020 for service tax liability and one dated 5.6.2020 for GST liability. Hearing was granted on 9.9.2020; 8.10.2020; 27.10.2020 and 23.12.2020, however, none of the partners appeared for any hearing and therefore the Orders-In-Original dated 31.3.2021 and 29.4.2021 were passed.

(b) The orders were served on the partner Mr. Darpan Shah on 14.6.2021. He would rely on the provisions of Section 169(1)(a) of the Act and submit that in accordance with this section, the orders were communicated which did not prevent the petitioners from filing an appeal.

(c) That as far as the GST order is concerned, the appeal had to be filed within three months from the date it was communicated. The appeal period lapsed on 29.05.2022 in light of the order of the Supreme Court on extension of limitation and therefore the dues became recoverable on and from 30.05.2022.

NEUTRAL CITATION

2023: GUJHC:40275-DB

(d) As per Section 78 of the CGST Act, if no payments are made within three months from the date of the order recovery can be made and therefore the respondents resorted to recovery proceedings under Section 79 of the CGST and notices were issued on 9.12.2022 and 12.12.2022 to the concerned bank to debit freeze the bank accounts.

(e) Reading Section 107 of the Act, Mr Lodha would submit that the limitation is three months from the date of service of the order. He would submit that reading Rule 108 with Sections 107 and 169 together would indicate that the limitation period commenced from the date a copy was manually received. Uploading of orders is only an alternative mode of service and under Rule 142(5) uploading being mandatory cannot be construed to mean that no appeal can be filed unless the orders are uploaded. Communication of the order manually also could facilitate the assessee to file an appeal in the electronic mode and failure to upload an order need not mean inability to file an Appeal under Rule 108.

(f) Relying on the affidavit-in-reply, it is submitted that various letters were written on 26.10.2021; 29.11.2021;

NEUTRAL CITATION

2023: GUJHC:40275-DB

23.2.2022; 3.06.2022 and 14.10.2022 requesting the taxpayer to either pay up the government dues or

intimate the details of filing of the appeal.

(g) That the recovery proceedings were in accordance with the provisions of Section 79 of the CGST Act and Section 87 of the Finance Act and under Section 90 of the CGST Act the partners are liable to pay the dues. Further Section 83 is not at all attracted in the facts of this case as what is invoked is Section 79(1)(c) of the CGST Act.

(h) As far the decision in the case of Gujarat Petronet (supra) is concerned, it is Mr.Lodha's submission that as categorically observed in the judgement itself the same was given in the peculiar facts of the case. The petitioner there was neither served with a physical copy nor the copy was uploaded on the portal. Further, as recorded in the judgement, the petitioner attempted to file an appeal but could not do so because of technical glitches.

(i) Mr.Lodha would rely on a decision of the Bombay High Court in the case of **Meritas Hotels Pvt.Ltd v.State of Maharashtra and Ors. reported in (2022) 89 GST 453 (Bombay)** where an order was

NEUTRAL CITATION

2023: GUJHC:40275-DB

communicated by email and the Court held that the submission of the petitioner that except for communication on the GSTN portal other communications are to be disregarded was fallacious and too far fetched.

(j) That the limitation to file appeal commenced on the date the orders were physically served. The appeal in context of service tax matter is filed and was scheduled for hearing and was adjourned at the request of the appellant himself.

9.1 The Affidavit-in-Reply in Special Civil Application No. 4876 of 2023, relevant to the controversy is reproduced as under:

> "6. It is most respectfully submitted that two Show Cause Notices were issued by the DGGI, Regional Unit, Vadodara. In one case, Show Cause Notice No. DGGI/BRU/36-03/202021 dated 04.06.2020 was issued on the basis of investigation conducted by them, a demand was raised for non-payment of Service Tax liability on "Construction of Residential Complex Services", "Goods Transport Agency", Late fee for non-filing of Service Tax Returns for the Period of April-2015 to June2017 . The SCN dated 04.06.2020 was issued only to the partnership firm M/s Sukhdham Upvan, Waghodia Road, Vadodara.
>
> 7. Another Show Cause Notice No. DGGI/SZU/36-10/202021 dated 05.06.2020 was issued on the basis of investigation conducted by them and raised a demand for non-payment of GST liability on the advance received by them in form of receipts as per Bank Statement and Unaccounted Cash Receipt, GST liability under Construction Service, GST Liability on the taxable

NEUTRAL CITATION

2023: GUJHC:40275-DB

Inward Supplies under RCM and Late fee on non-filing of returns for the Period of July-2017 to March-2019. This SCN dated 05.06.2020 was issued to the partnership firm M/s Sukhdham Upvan, Waghodia Road, Vadodara as well as Shri Darpan Shah, main partner of Sukhdham Upvan, Waghodia Road, Vadodara.

8. Both the SCNs were made answerable to the Deputy / Assistant Commissioner, CGST & C.E., Division-VII, Vadodara-I. The taxpayer was given the opportunity of Personal Hearing on 09.09.2020, 08.10.2020, 27.10.2020 and 23.12.2020 . However, inspite of receipt of Personal Hearing letters, the taxpayer failed to appear for personal hearing on any of the 4 dates given. Therefore, the said notices were adjudicated by the Assistant Commissioner, CGST & C.E., Division-VII, Vadodara-I vide Order-in-Original No. GSTD-VII/ VAD-I/AC/KDN/GST/04/S.Upvan/2020-21 dated 31.03.2021 and Order-in-Original No.

GSTD-VII/VAD-I/AC/KDN/GST/01/S.Upvan/2021-22dated

29.04.2021 . These Order-in-Originals were delivered to Shri Darpan Shah, Authorized Signatory of the firm and Conoticee in the instant case on 14.06.2021 which is a valid way of Serving the Order under Section 169(1)(a) of CGST Act, 2017 . The demand liability confirmed in Order-in-Original is as under:

Tax	Tax/Penalty Payable (Rs.) as per Order-in-Original No. GSTD-VII/VAD-I/AC/KDN /GST/04/S.Upvan/2020-21 dated 31.03.2021	Dues Paid till Date (Rs.)	Differenti al amount to be paid(excl uding Interest & Late Fees) (Rs.)
Servic e Tax	Rs. 46,12,173/- + Rs. 3,31,904/- Tax U/Sec.73(1) of the Finance Act,2017 Rs. 49,44,077/- Penalty- U/Sec 78(1) of the Finance Act,1994 Rs. 20,000/- Penalty U/Sec 70 of the Finance Act,1994 Rs. 10,000/- Penalty U/Sec, 77 (1) (c) of the Finance Act,1994	0	99 ,18, 15 4/-

NEUTRAL CITATION

2023: GUJHC:40275-DB

Tax	Tax/Penalty Payable (Rs.) as per Order-in-Original No. GSTD-VII/VAD-I/AC/KDN/ GST/01/S.Upvan/2021-22 dated 29.04.2021	Dues Paid till Date (Rs.)	Differenti al amount to be paid(exclu ding Interest and Late Fee) (Rs.)
GST	Rs.1,09,75,364/- + Rs. 52,142/- Tax U/Sec.74(1) of CGST Act 2017 & 74(1) Gujarat GST Act . 2017. Rs.1,09,75,364/- + Rs. 52,142/- Penalty U/Sec 74(1) of CGST Act 2017 & 74(1) Gujarat GST Act .2017. Rs.1,09,75,364/- + Rs. 52,142/- Penalty U/Sec 122(1) (xv) of CGST Act,2017 & 122(1) (xvii) of Gujarat GST Act,2017. Rs.5,000/- Late Fee per return U/Sec 47(1) & 47(2) of CGST Act, 2017 & 47(1) and 47(2) of Gujarat GST Act 2017. Rs. 25,000/- Personal Penalty on Partner Shri Darpan Shah U/ s 122(3) (a) 122(3)(d) of CGST Act,2017 & Sec. 122(3)(a) & 122(3)(d) of Gujarat GST Act 2017.	0	3 ,31,07, 5 18/-

(9) The department issued various letters dated 26.10.2021, 29.11.2021, 23.02.2022, 03.06.2022 and 14.10.2022 requesting the taxpayer either to pay up the govt dues or intimate about filing of Appeal, if any. However, inspite of receipt of these letters, no communication was received from the taxpayer.

(10) The appeal period against above said order lapsed on 29.05.2022 in view of the Hon'ble Supreme Court Order dated 10.01.2022. Thus, the said dues became recoverable arrears from 30.05.2022. Accordingly, the Superintendent, Range-II, Division-VII, CGST & C.E., Vadodara-I vide letter dated 09.12.2022 and 12.12.2022 requested the Bank to debit-freeze all the bank accounts of the defaulting firm and partners of the defaulting firm.

(11) In the present case, Shri Hasit Desai the petitioner is one of the partner in the defaulting firm (appeared to be holding share of 11% in the partnership firm) and is aggrieved against the action of the department has filed the present petition. In the petition, the petitioner Shri Hasit Desai inter-alia submitted that the seizure of bank accounts has resulted into financial hardships to the petitioner, thereby, praying before the Hon'ble Court to release saving account of the petitioner by quashing the letters dated 09.12.2022 & 12.12.2022 of respondent authority No. 3 i.e. Superintendent.

NEUTRAL CITATION

2023: GUJHC:40275-DB

(12) The petitioner is also challenging the passing of exparte order by Respondent No.2 i.e. the Assistant Commissioner, Div-VII, CGST & C.E., Vadodara-I and nonuploading of the same on GSTN Portal and thereby, preventing the filing of appeal by the petitioner against the Orders dated 31.03.2021 & 29.04.2021 passed by the Respondent No.2. The petitioner has also sought the Hon'ble Court to quash and set aside the Impugned Orders passed by the Respondent No. 2 and decide them afresh after affording an opportunity of hearing.

(13) It is reiterated that the Competent Authority (Joint Director, DGGI Surat) issued Show Cause Notice No. DGGI/BRU/36-09/2020-21 dated 04.06.2020 to M/s. Sukhdham Upvan (hereinafter referred as taxpayer for the sake of brevity) on the basis of investigation conducted by them and raised a demand for non-payment of Service Tax liability on "Construction of Residential Complex Services", "Goods Transport Agency", Late fee for non-filing of Service Tax Returns for the Period of April-2015 to June-2017.

(14) Further, they have also issued Show Cause Notice No. DGGI/SZU/36-10/2020-21 dated 05.06.2020 to the taxpayer on the basis of investigation conducted by them and raised a demand for non-payment of GST liability on the advance received by them in form of receipts as per Bank Statement and Unaccounted Cash Receipt, GST liability under Construction Service, GST Liability on the taxable Inward Supplies under RCM and Late fee on non-filing of returns for the Period of July-2017 to March-2019.

(15) The taxpayer was given the opportunity of Personal Hearing on 09.09.2020, 08.10.2020, 27.10.2020 and 23.12.2020 **(ANNEXURE-I)**. However, inspite of receipt of Personal Hearing letters, the taxpayer failed to appear for personal hearing on any of the 4 dates given. Therefore, the said notices were adjudicated by the competent authority

(Assistant Commissioner, Division-VII, CGST Vadodara-I) vide

Order-in-Original No.

GSTD-VII/VAD-I/AC/KDN/GST/04/S.Upvan/2020-21 dated 31.03.2021 (for the service tax matter) and Order-in-Original No. GSTD-VII/VAD-I/AC/KDN/GST/01/ S.Upvan/2021-22 dated 29.04.2021 (for the GST matter) after an ample time of almost 10 months after issuance of Show Cause Notices. As per the GST registration, Shri Darpan Shah is the only authorized signatory of the firm (**ANNEXURE-II)**.

Accordingly, these Order-in-Originals were delivered to Shri Darpan Shah, Authorized Signatory of the firm and Conoticee in the instant case on 14.06.2021 **(ANNEXURE-III)** which is a valid way of Serving the Order under

NEUTRAL CITATION

2023: GUJHC:40275-DB

Section 169(1)(a) of CGST Act, 2017 and Section 37C of the Central Excise Act, 1944. The relevant provision of the section 169(1) (a) of CGST Act, 2017 is reproduced as below:

*"**169 . Service of notice in certain circumstances** 169. (1) Any decision, order, summons, notice or other communication under this Act or the rules made thereunder shall be served by any one of the following methods, namely:*

—

*(a) by giving or **tendering it directly** or by a messenger including a courier **to the addressee or the taxable person** or to his manager or **authorised representative** or an advocate or a tax practitioner holding authority to appear in the proceedings on behalf of the taxable person or to a person regularly employed by him in connection with the business, or to any adult member of family residing with the taxable person;*

Or

……"

The relevant provision of the section 37C of the Central Excise Act, 1944 is reproduced as below:

***"37C. Service of decisions, orders, summons, etc**.— (1) Any decision or order passed or any summons or notice issued under this Act or the rules made thereunder, shall be served,—*

*(a) by **tendering** the decision, order, summons or notice, or sending it by registered post with acknowledgement due, **to the person for whom it is intended or his authorised agent**, if any;*

…… "

(16) The registration of the taxpayer was suo-moto cancelled for non-filing of GST returns since the inception i.e. July-2017 and since then the taxpayer never applied for cancellation of revocation of registration. Thus, the respondent was of the view to hand deliver the Order-in-Originals to Authorized Signatory as they were less likely to check the DRC-07 which was to be available on GST portal only, being suspended registration with effect from 1/7/2017. In support of this fact, it is to mention that the petitioner claimed that the Show Cause Notice has not been delivered to them till the filing of Appeal before the Hon'ble Court. However, DRC-01 has already been uploaded by the DGGI in the Form of DRC-01 on 13.01.2023 **(ANNEXURE-IV)**. This clearly shows that the petitioner has never checked the GST portal for any notices or

NEUTRAL CITATION

2023: GUJHC:40275-DB

orders. Further, the said Order has been uploaded on the GST portal on 27.04.2023 bearing Order No. 3CEETA0702A042100011 and Demand ID No. ZD2405230330307 **(ANNEXURE-V)**. Moreover, the non uploading of DRC-07 is an afterthought on part of the petitioner to avoid the recovery of clearly recoverable arrear due to the respondent.

(17) The department issued various letters dated 26.10.2021, 29.11.2021, 23.02.2022, 03.06.2022 and 14.10.2022 **(ANNEXURE-VI)** requesting the taxpayer either to pay up the govt dues or intimate about filing of Appeal, if any. However, inspite of receipt of these letters, no communication was received from the taxpayer.

(18) The taxpayer's claim that they were prevented from filing of appeal on the ground that they couldn't file APL-01 is totally baseless. The appeals are even accepted till date without that also in case of genuine grounds, technical issue faced by the taxpayer. However, the taxpayer neither intended to file an appeal until the recovery proceedings were initiated against them nor paid a single penny against the Service Tax and GST liability since April-2016.

(19) As per Section 90 of the CGST Act, 2017 the firm and each of the partners of firm shall be jointly and severally, be liable for any dues. The relevant provision of the section is reproduced as below:

" Section 90 of Central Goods and Services Act 2017 - Liability of Partners of firm to pay tax:

Notwithstanding any contract to the contrary and any other law for the time being in force*, where any firm is liable to pay any tax, interest or penalty under this Act,* ***the firm and each of the partners of the firm shall, jointly and severally, be liable for such payment****:*

Provided that where any partner retires from the firm, he or the firm, shall intimate the date of retirement of the said partner to the Commissioner by a notice in that behalf in writing and ***such partner shall be liable to pay tax, interest or penalty due up to the date of his retirement whether determined or not, on that date****:*

Provided further that ***if no such intimation*** *is given within one month from the date of retirement,* ***the liability of such partner*** *under the first proviso* ***shall continue until the date on which such intimation is received by the Commissioner****."*

NEUTRAL CITATION

2023: GUJHC:40275-DB

(20) In view of the above, it was each partner's liability to pay the Service Tax and GST during the active period of Project from April-2015 to March-2019. As per the partnership deed, the petitioner is designated as Working Partner who shall engage himself actively in conducting the affairs of partnership firm. Thus, the petitioner should have been aware of the non-payment of Service Tax, GST liability; investigation conducted by DGGI, notices and orders issued to the firm. Even after the retirement, as the case may be, it is their liability till the date of intimation to the Commissioner. However, the petitioner failed to intimate the Commissioner about the dissolution of partnership deed since 2019 in case the partnership deed ceased to exist or dissolved as the case may be as claimed by the petitioner in para 6(V) of the petition. Further, it is also strange on the petitioner's part that he was in contact with Shri Darpan Shah just before the investigation was initiated but not after that as claimed in Para 6(IV) of the petition.

(21) The appeal period against above said orders lapsed on 29.05.2022 in view of Hon'ble Supreme Court Order dated 10.01.2022 allowing the petitioner a relaxation of almost 1 year to file an appeal. However, the taxpayer failed to do so. Thus, the said dues became recoverable arrear from 30.05.2022.

(22) Accordingly, the department initiated the recovery proceedings under Section 79(1)(c) of CGST Act, 2017 read with Section 87 of the Finance Act, 1994 to safeguard the govt revenue; requesting various authorities including Registrar of Companies, Sub Registrar, Income Tax, Mamlatdar Kacheri and Bank regarding the assets of the firm/all the partners vide letter dated 09.12.2022 and 12.12.2022 . The relevant provision of the section 79 of the CGST Act, 2017 is reproduced as below:

"***Section 79 – Recovery of tax***

(1) Where any amount payable by a person to the Government under any of the provisions of this Act or the rules made thereunder is not paid, the proper officer shall proceed to recover the amount by one or more of the following modes, namely:—

(a) the proper officer may deduct or may require any other specified officer to deduct the amount so payable from any money owing to such person which may be under the control of the proper officer or such other specified officer;

(b) the proper officer may recover or may require any other specified officer to recover the amount so payable by detaining and

NEUTRAL CITATION

2023: GUJHC:40275-DB

selling any goods belonging to such person which are under the control of the proper officer or such other specified officer;

(c) (i) the proper officer may, by a notice in writing, require any other person from whom money is due or may become due to such person or ***who holds or may subsequently hold money for or on account of such person, to pay to the Government either forthwith upon the money becoming due or being held****, or within the time specified in the notice not being before the money becomes due or is held, so much of the money as is sufficient to pay the amount due from such person or the whole of the money when*

it is equal to or less than that amount;

……..”

The relevant provision of Section 87 of the Finance Act, 1994 is reproduced as below:

“Recovery of any amount due to Central Government.

87 . Where any amount payable by a person to the credit of the Central Government under any of the provisions of this Chapter or of the rules made thereunder is not paid, the

Central Excise Officer shall proceed to recover the amount by one or more of the modes mentioned below:-

(a) the Central Excise Officer may deduct or may require any other Central Excise Officer or any officer of customs to deduct the amount so payable from any money owing to such person which may be under the control of the said Central Excise Officer or any officer of customs;

(b) (i) the Central Excise Officer may, by notice in writing, require any other person from whom money is due or may become due to such person, or ***who holds or may subsequently hold money for or on account of such person, to pay to the credit of the Central Government either forthwith upon the money becoming due or being held*** *or at or within the time specified in the notice, not being before the money becomes due or is held, so much of the money as is sufficient to pay the amount due from such person or the whole of the money when it is equal to or less than that amount;*

……..”

(23) In response to that the HDFC bank vide their letter (received in this office on 09.01.2023) have put No-debit status on the related account until the full amount required is paid or till the receipt of the revocation order, whichever is earlier. Meanwhile, the petitioner vide letter dated 06.01.2023 (

NEUTRAL CITATION

2023: GUJHC:40275-DB

ANNEXURE-I to the petition) requested to allow them 45 days to do all necessary act and resolve the said matter being the partners of the firm. However, the petitioner or any of the partners failed to pay a single penny of their respective share in last 5 months.

(24) Section 79(1)(c) of the CGST Act, 2017 empowers the department to directly debit the amount lying in the bank account. However, the bank accounts were put on No-debit status for the purpose of protecting the govt revenue while the department gathers the whereabouts of assets related to the firm including the property, bank accounts, etc. Till the time department ascertains any available assets related to the firm, the department intended not to take harsh action against the petitioner by way of directly debiting from the partner's bank account in the form of DRC-13.

(25) Further, Section 83 of CGST Act, 2017 is not at all mentioned in the letters issued to the Bank. So, the judgments mentioned by the petitioner quoting section 83 are completely irrelevant in the instant case.

(26) The seized bank accounts are personal bank account and proprietorship firm related bank account. The Judgement of Hon'ble Karnataka High Court in Urban Heights v. Deputy Commissioner of Commercial Taxes (Audit Recovery), Bangalore mentions the presence of common partner in two firms whereas in the instant case the petitioner is partner in one firm only, not in other firm whose bank accounts are put on "No-debit" status. Hence, the same is not applicable to the present case."

10. Having considered the submissions made by the respective advocates in the three petitions, what this Court needs to decide, despite the factual issues which are not similar, is whether the petitioners' contention that they were handicapped in filing the appeal, which can only be filed through electronic mode, in absence of uploading of the Orders-In-Original, is an acceptable stand or not.

NEUTRAL CITATION

2023: GUJHC:40275-DB

11. In Special Civil Application No. 14867 of 2022, the case of the petitioner is that, had the Order in Original dated 23.08.2019 been uploaded, an appeal could have been filed through electronic mode,the only mode available and that as it could not be so filed, the subsequent order dated 3.12.2020 on the ground that in absence of an appeal to the earlier order, the rejection of refund claims was bad.

11.1 Reading of the subsequent order dated 3.12.2020 indicate that the petitioner, rather than filing an appeal against the order of 23.08.2019, submitted a fresh application though the order of 23.08.2019 had rejected the application. The order further indicates that by the time the High Court had decided the earlier claim of refund of Rs.99,05,156/- on 11.3.2020, the order of rejection dated 23.08.2019 was already in existence and was not challenged in Appeal or by a petition. The submission of the learned counsel for the petitioner therefore that the authorities ignored the High Court decision in a case between the same parties is misconceived as even before the decision of the High Court, the claim in the present case already stood rejected on

NEUTRAL CITATION

2023: GUJHC:40275-DB

23.08.2019. The only remedy therefore for the petitioner was to file an appeal.

11.2 Since the impugned order in Special Civil Application No. 14867 of 2022 also deals with an issue of whether the authorities should have re-credited the refund in the electronic ledger, reliance is placed on Rule 93 of the CGST Rules. Rule 93 reads as under :

> "**Credit of the amount of rejected refund claim**.
>
> (1) Where any deficiencies have been communicated under sub-rule (3) of rule 90, the amount debited under sub-rule (3) of rule 89 shall be re-credited to the electronic credit ledger.
>
> (2) Where any amount claimed as refund is rejected under rule 92, either fully or partly, the amount debited, to the extent of rejection, shall be re-credited to the electronic credit ledger by an order made in **FORM GST PMT 03**.
>
> Explanation.– For the purposes of this rule, a refund shall be deemed to be rejected, if the appeal is finally rejected or if the claimant gives an undertaking in writing to the proper officer that he shall not file an appeal."

11.3 Reading the Rule indicates that a refund can only be re-credited to the electronic ledger if an undertaking is provided by the claimant that he shall not file an appeal or the appeal filed is rejected. In the present facts, the petitioner's appeal

NEUTRAL CITATION

2023: GUJHC:40275-DB

was neither rejected, in other words not filed, nor had he given an undertaking, therefore in absence thereof, the request for re-credit of the refund, in the opinion of this Court, was rightly rejected.

12. That brings us to the main issue, which is common to all petitions i.e. were the petitioners prevented from filing

their appeals through the electronic mode merely because the orders were not uploaded, when it is undisputed that the petitioners otherwise were communicated the orders and had received the same manually.

13 The relevant provisions as far as necessary for the decision in these petitions are Section 37C of the Central Excise Act, 1944 and Sections 107(1) to (6), 169 of the CGST Act and Rule 26(2)(3) and Rule 108 of the Rules. They read as under:

Section 37C ***Service of decisions, orders, summons, etc.—***

(1) Any decision or order passed or any summons or notice issued under this Act or the rules made thereunder, shall be served,—

(a) by ***tendering*** *the decision, order, summons or notice, or sending it by registered post with acknowledgement due,* ***to***

NEUTRAL CITATION

2023: GUJHC:40275-DB

the person for whom it is intended or his authorised agent*, if any;*

…… "

SECTION 107 Appeals to Appellate

Authority (1) Any person aggrieved by any decision or order passed under this Act or the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act by an adjudicating authority may appeal to such Appellate Authority as may be prescribed within three months from the date on which the said decision or order is communicated to such person.

(2) The Commissioner may, on his own motion, or upon request from the Commissioner of State tax or the Commissioner of Union territory tax, call for and examine the record of any proceedings in which an adjudicating authority has passed any decision or order under this Act or the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act, for the purpose of satisfying himself as to the legality or propriety of the said decision or order and may, by order, direct any officer subordinate to him to apply to the Appellate Authority within six months from the date of communication of the said decision or order for the determination of such points arising out of the said decision or order as may be specified by the Commissioner in his order.

(3) Where, in pursuance of an order under subsection (2), the authorised officer makes an application to the Appellate Authority, such application shall be dealt with by the Appellate Authority as if it were an appeal made against the decision or order of the adjudicating authority and such authorised officer were an appellant

NEUTRAL CITATION

2023: GUJHC:40275-DB

and the provisions of this Act relating to appeals shall apply to such application.

(4) The Appellate Authority may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of three months or six months, as the case may be, allow it to be presented within a further period of one month.

(5) Every appeal under this section shall be in such form and shall be verified in such manner as may be prescribed.

(6) No appeal shall be filed under sub-section
(1) , unless the appellant has paid—
(a) in full, such part of the amount of tax, interest, fine, fee and penalty arising from the impugned order, as is admitted by him; and

(b) a sum equal to ten per cent. of the remaining amount of tax in dispute arising from the said order subject to a maximum of twenty-five crore rupees, in relation to which the appeal has been filed.

169 Service of notice in certain circumstances (1): Any decision, order, summons, notice or other communication under this Act or the rules made thereunder shall be served by any one of the following methods, namely: —

(a) by giving or tendering it directly or by a messenger including a courier to the addressee or the taxable person or to his manager or authorised representative or an advocate or a tax practitioner holding authority to appear in the proceedings on behalf of the taxable person or to a person regularly employed by him in connection with the business, or to

NEUTRAL CITATION

2023: GUJHC:40275-DB

any adult member of family residing with the taxable person; or

(b) by registered post or speed post or courier with acknowledgement due, to the person for whom it is intended or his authorised representative, if any, at his last known place of business or residence; or

(c) by sending a communication to his email address provided at the time of registration or as amended from time to time; or

(d) by making it available on the common portal; or

(e) by publication in a newspaper circulating in the locality in which the taxable person or the person to whom it is issued is last known to have resided, carried on business or personally worked for gain; or

(f) if none of the modes aforesaid is practicable, by affixing it in some conspicuous place at his last known place of business or residence and if such mode is not practicable for any reason, then by affixing a copy thereof on the notice board of the office of the concerned officer or authority who or which passed such decision or order or issued such summons or notice.

(2) Every decision, order, summons, notice or any communication shall be deemed to have been served on the date on which it is tendered or published or a copy thereof is affixed in the manner provided in subsection (1).

(3) When such decision, order, summons, notice or any communication is sent by registered post or speed post, it shall be deemed to have been received by the

NEUTRAL CITATION

2023: GUJHC:40275-DB

addressee at the expiry of the period normally taken by such post in transit unless the contrary is proved.

Rule26(2)&(3) Method of Authentication

(1) ***

(2) (2) Each document including the return furnished online shall be signed or verified through electronic verification code-

(a) in the case of an individual, by the individual himself or where he is absent from India, by some other person duly authorised by him in this behalf, and where the individual is mentally incapacitated from attending to his affairs, by his guardian or by any other person competent to act on his behalf;

(b) in the case of a Hindu Undivided Family, by a Karta and where the Karta is absent from India or is mentally incapacitated from attending to his affairs, by any other adult member of such family or by the authorised signatory of such Karta;

(c) in the case of a company, by the chief executive officer or authorised
signatory thereof;

(d) in the case of a Government or any Governmental agency or local authority, by an officer authorised in this behalf;

(e) in the case of a firm, by any partner thereof, not being a minor or authorised signatory thereof;

NEUTRAL CITATION

2023: GUJHC:40275-DB

(f) in the case of any other association, by any member of the association or persons or authorised signatory
thereof;

(g) in the case of a trust, by the trustee or any trustee or authorised signatory
thereof; or

(h) in the case of any other person, by some person competent to act on his behalf, or by a person authorised in accordance with the provisions of section.

(3) All notices, certificates and orders under the provisions of this Chapter shall be issued electronically by the proper officer or any other officer authorised to issue such notices or certificates or orders, through digital signature certificate *specified under the provisions of the Information Technology Act, 2000 (21 of 2000)* [or through E-signature as specified under the provisions of the Information Technology Act, 2000 (21 of 2000) or verified by any other mode of signature or verification as notified by the Board in this behalf].

Rule 108 Appeal to the Appellate Authority.-

(1) An appeal to the Appellate Authority under sub-section (1) of section 107 shall be filed in FORM GST APL-01 , along with the relevant documents, either electronically or otherwise as may be notified by the Commissioner, and a provisional acknowledgement shall be issued to the appellant immediately.

NEUTRAL CITATION

2023: GUJHC:40275-DB

(2) The grounds of appeal and the form of verification as contained in FORM GST APL-01 shall be signed in the manner specified in rule 26.

(3) [Where the decision or order appealed against is uploaded on the common portal, a final acknowledgment, indicating appeal number, shall be issued in FORM GST APL-02 by the Appellate Authority or an officer authorised by him in this behalf and the date of issue of the provisional acknowledgment shall be considered as the date of filing of appeal:

Provided that where the decision or order appealed against is not uploaded on the common portal, the appellant shall submit a self-certified copy of the said decision or order within a period of seven days from the date of filing of FORM GST APL-01 and a final acknowledgment, indicating appeal number, shall be issued in FORM GST APL-02 by the Appellate Authority or an officer authorised by him in this behalf, and the date of issue of the provisional acknowledgment shall be considered as the date of filing of appeal:

Provided further that where the said selfcertified copy of the decision or order is not submitted within a period of seven days from the date of filing of FORM GST APL-01 , the date of submission of such copy shall be considered as the date of filing of appeal.]

Explanation. - For the provisions of this rule, the appeal shall be treated as filed only when the final acknowledgement, indicating the appeal number, is issued."

13.1 Reading Section 107 indicates that any person aggrieved by any decision or order passed under this Act may appeal to the

NEUTRAL CITATION

2023: GUJHC:40275-DB

Appellate Authority as may be prescribed within three months from the date on which the said decision or order is communicated to the person. The Appellate authority has power if sufficient cause is shown that the appellant was prevented from filing an appeal within three months then it can allow a further period of three months.

13.2 Rule 108 provides that the appeal has to be filed in the form either electronically or otherwise as may be notified. That no other mode is notified and the only mode is an electronic mode is accepted. On 26.12.2022, sub- rule (3) as quoted above and provisos to the Rules were added, however, since the relevant dates in the present petitions is before 26.12.2022, the old sub rule (3) reads as under :

> "A certified copy of the decision or order appealed against shall be submitted within seven days of filing the appeal under sub-rule (1) and a final acknowledgement, indicating appeal number shall be issued thereafter in **FORM GST APL-02** by the Appellate Authority or an officer authorised by him in this behalf: **Provided** that where the certified copy of the decision or order is submitted within seven days from the date of filing the **FORM GST APL-01**, the date of filing of the

appeal shall be the date of the issue of the provisional acknowledgement and where the said copy is submitted after seven days, the date of filing of the appeal shall be the date of the submission of such copy."

13.3 Section 169 talks about service of notice in certain circumstances. Reading the Section indicates that any decision or order shall be served by giving or tendering it directly or by a messenger including a courier to the addressee of the taxable person. Section 37C also provides that any decision shall be served by tendering the same to the person to whom it is intended to be so served.

13.4 The orders dated 31.3.2021 and 29.4.2021 were served on the partner on 14.06.2021 and an

acknowledgement to that effect has also been produced by the deponent of the affidavit in reply as far as the Special Civil Applications No. 4876 and 5731 of 2023 are concerned. Whereas in Special Civil Application No.14867 of 2022, the petitioner admits that the order dated 23.08.2019 was served manually. Even in the case of partners, letters were written on several dates to pay up the dues or intimate the filing of the appeal.

NEUTRAL CITATION

2023: GUJHC:40275-DB

14. Heavy reliance is placed by the learned counsel for the petitioners on the judgement of this Court in the case of **Gujarat Petronet** (supra). Reading the judgement in its entirety would indicate that the petitioner therein could not file an appeal due to technical glitches on the portal. Paras 8 to 9 of the judgement read as under:

> "8. On perusal of the above provisions, it is apparent that the appeal is required to be filed in electronic mode only and if any other mode is to be prescribed then the same is required to be notified by way of a notification. There is nothing on record to show that any notification has been issued for manual filing of an appeal. In such circumstances, though the physical copy of the adjudication order was handed over to the petitioner, the time period to file appeal would start only when the order is uploaded on the GST portal. Without the order being uploaded, the petitioner could not file the appeal and therefore, the contention raised on behalf of the respondents that the uploading of the order and filing of the appeal are two different processes, is not tenable in law. Moreover, filing of the appeal and uploading of the order are intertwined activities. The order is required to be uploaded online so that the appeal can be filed electronically as per the mandate of the provisions of the Act and the Rules. However, there is no provision or procedure to file the appeal manually. In such circumstances, there was no failure on part of the petitioner to file the appeal within the prescribed period of limitation as the period of limitation did not start till the order passed by the adjudicating authority was uploaded on the GST portal. Merely because the petitioner has filed the appeal manually

NEUTRAL CITATION

2023: GUJHC:40275-DB

after exhausting all the efforts to ensure filing of the appeal in proper and legal manner, the impugned order rejecting such appeal on the ground of limitation is not sustainable as the petitioner cannot be penalised for lack of clarity of the provision when the new law is enacted. From the facts on record, it also emerges that the petitioner has taken all the steps for proper filing of the appeal immediately after issuance of the order passed by the adjudicating authority till the filing of the appeal. Therefore, the appellate authority was not justified in rejecting the appeal on the ground of limitation and thereby depriving the petitioner to submit its case on merits.

9 . In view of above, taking into consideration the peculiar facts of the case, the impugned order passed by the appellate authority is required to be quashed and set aside by condoning the delay in filing of the appeal manually by the petitioner in absence of availability of the order passed by the adjudicating authority on the GST portal."

14.1 Reading the judgement indicates that firstly the order was not uploaded and that there were technical glitches so also appeal could not be filed. The order was served manually. The only question that the Court decided is whether the limitation would begin to run from the date of service of the manual copy of the order or the uploaded one. The court therefore was only considering the question of counting of limitation in filing the Appeal. Moreover, as observed in Para 9 of the judgement, the order was so passed taking into consideration the

NEUTRAL CITATION

2023: GUJHC:40275-DB

peculiar facts of the case.

14.2 Even in the case of **Jose Joseph** (supra), the only question that was considered was when should the limitation start running. Paras 8 to 15 of the judgement read as under:

> "8. It is the admitted case of both the petitioner and the respondents that the orders impugned in the appeals, though dated 29.03.2019, were never uploaded in the web portal to enable the petitioner to prefer the electronic filing of appeals, as prescribed. There is no quarrel that the Commissioner has not issued any notification specifying any other form of appeal. However, on the basis of receipt of a copy of the order on 10.04.2019, the petitioner preferred appeals manually only on 09.01.2020, with a delay of 184 days. Thus, after referring to the decision in **Debabrata Mishra v.**
> **Commissioner of Central Tax and GST**
> [2020 (36) G.S.T.L. 325 (Ori)] as well as the judgment in **Assistant Commissioner (CT), LTU, Kakinada & Ors. v. Glaxo Smith Kline Consumer Health Care Limited** [2020 (36) G.S.T.L. 305], the Appellate Authority dismissed the appeals as time-barred.
>
> 9. While dismissing the appeals as time-barred, the Appellate Authority went in a mechanical manner without appreciating that the orders that were impugned before the Appellate Authority, though required to have been uploaded in the web portal, were never uploaded. The period of limitation will start to run, as per the provisions of the Act, only when the order is uploaded in the web portal and not

NEUTRAL CITATION

2023: GUJHC:40275-DB

when the order is received in the physical form by the petitioner. When admittedly there was a failure on the part of the respondents to upload the order in the original, petitioner cannot be mulcted with the responsibility of preferring appeals within the time period stipulated. The time period stipulated in the statute for filing an appeal is part of the same transaction that exists with the uploading of an order in the original.

10. When the mode of appeal prescribed by Rules is only the electronic mode, the time limit of three months can start only when the assessee had the opportunity to file the appeal in the electronic mode. The assessee cannot be blamed if he waited for the order to be uploaded to the web portal, even if he had in the meantime received the physical copy of the order. The reliance upon Annexure R1(c) circular have no bearing on the case of the assessee as the same is at the most only an internal communication and not made known to the public and cannot be treated as a notification contemplated under Rule 108(1) of the Rules.

11. In this context, it is appropriate to notice that there is no provision for filing an appeal manually. In the absence of such a provision, even though the petitioner has preferred appeals in the manual form subsequently, the same cannot work out as a prejudice to the petitioner to apply the period of limitation from the date of serving of physical copy of the order.

12. Cases of this nature are occurring on account of the transition phase brought in by the new regime of GST and technical glitches that are occurring in the transition phase. In such circumstances, a different approach is required, especially since the electronic mode of uploading the order

NEUTRAL CITATION

2023: GUJHC:40275-DB

and the electronic filing of appeal had not attained its technical perfection, at least till the recent past.

13. In a similar instance, the High Court of Gujarat, while considering **Gujarat State Petronet Limited v. Union of India** (2020 (41) G.S.T.L. 442) had by judgment dated 05.03.2020 set aside the order of the Appellate Authority, and ordered the delay to be condoned in preferring the appeal manually and remanded the matter back for fresh consideration of the appeal. The observations of the Court are relevant in this context: *"8. On a perusal of the above provisions, it is apparent that the appeal is required to be filed in electronic mode only and if any other mode is to be prescribed then the same is required to be notified by way of a notification. There is nothing on record to show that any notification has been issued for manual filing of an appeal. In such circumstances, though the physical copy of the adjudication order was handed over to the petitioner, the time period to file appeal would start only when the order is uploaded on the GST portal. Without the order being uploaded, the petitioner could not file the appeal and therefore, the contention raised on behalf of the respondents that the uploading of the order and filing of the appeal are two different processes, is not tenable in law. Moreover, filing of the appeal and uploading of the order are intertwined activities. The order is required to be uploaded online so that the appeal can be filed electronically as per the mandate of the provisions of the Act and the Rules. However, there is no provision or procedure to file the appeal manually. In such circumstances, there was no failure on part of the petitioner to file the appeal within the prescribed period of limitation as the period of limitation did not start till the order passed by the adjudicating authority was uploaded on the GST portal. Merely because the petitioner has filed the appeal manually, after exhausting all the efforts to ensure filing of the appeal and proper and legal manner, the impugned order rejecting such appeal on the ground of limitation is not sustainable the petitioner cannot be penalised for lack of clarity of the provision in the new law is enacted."*

NEUTRAL CITATION

2023: GUJHC:40275-DB

> 14. I concur wholly with the aforesaid observations in the said judgment.
>
> 15. Hence, I am of the view that the petitioner is entitled to have his appeals that were filed manually, to be treated as having been filed within time, in the light of the failure of the department to upload Ext.P1 order in the web portal. Therefore, Ext.P3 order passed by the 2 nd respondent in all these writ petitions are set aside and the 2nd respondent is directed to treat the appeals as filed within time and thereafter, to pass final orders in the appeals on merits, after affording sufficient opportunity of hearing to the petitioner.
>
> The writ petitions are allowed as above"

14.3 Here too, the order was served manually and the appeal was filed manually and therefore the Court observed that the only mode available is of filing the appeal electronically which can be availed of only when order is uploaded. The judgement cannot be read to mean that no appeal can be filed at all unless the order is uploaded. The purpose of the judgements are only to consider the question of limitation.

14.4 The Bombay High Court recently had an occasion to consider this issue in the case of **Meritas Hotel** (supra).

The point for consideration was whether in the facts of the case the period of limitation for the purpose of filing the appeal under Section 107 of the

NEUTRAL CITATION

2023: GUJHC:40275-DB

Act would commence from the date of service upon the petitioner of the scanned copy or from the date of uploading. The Bombay High Court in paras 8 to 16 which are reproduced held as under:

> "8. A reading of sub-section (1) of Section 107 of the said Act indicates that from the date of communication of the impugned assessment order passed by the adjudicating authority, the appeal to the appellate authority has to be filed within three months. In the present case, the impugned assessment order passed by the respondent no.4 was communicated by email to the General Manager of the petitioner on April 20 , 2019. It is not the case of the petitioner that the General Manager was not competent and/or not authorised to receive the communication of the impugned assessment order on behalf of the petitioner. Failure on the part of the General Manager to inform the petitioner regarding receipt of the impugned assessment order will not have the effect of extending the period of limitation prescribed under subsection (1) of Section 107 of the said Act. The language of sub-section (1) or (4) of Section 107 of the said Act leaves no scope for any ambiguity. The period of three months prescribed will commence from the date on which the said decision or order is communicated to the petitioner. Sub-section (4) of Section 107 of the said Act provides for a window enabling the assessee to present the appeal within a further period of one month, if the appellate authority is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of three months. It is well settled that the right of appeal is a natural or inherent right but has to be regulated in accordance with the laws in force at the relevant time, the conditions having to be strictly fulfilled.

NEUTRAL CITATION

2023: GUJHC:40275-DB

9. The submission of learned counsel for the petitioner that the limitation prescribed by subsection (1) of Section 107 of the said Act will commence from the date when the impugned assessment order is uploaded on the GSTN portal is in the teeth of the provision of subsection (1) of Section 107 of the said Act which prescribes filing of an appeal within three months from the date on which the said decision or order is communicated to such person. It is well settled that the Court cannot add or subtract the words to a statute or read something into it which is not there. This is precisely what learned counsel for the petitioner wants us to do. The submission of learned counsel for the petitioner that except for communication of the impugned assessment order on the GSTN portal, all other communications are to be disregarded for the purpose of sub-section (1) of Section 107 of the said Act, is fallacious and too far fetched.

10. We may then take a note of Chapter XIII of the Maharashtra Goods and Services Tax Rules, 2017 (hereafter "the Rules" for short) which deals with appeals and revisions. Sub-rule (1), (2) and (3) of Rule 108 reads as under :-

> "108 (1) An appeal to the Appellate Authority under subsection (1) of section 107 shall be filed in FORM GST APL 01, along with the relevant documents, either electronically or otherwise as may be notified by the Commissioner, and a provisional acknowledgement shall be issued to the appellant immediately.
>
> (2) The grounds of appeal and the form of verification as contained in FORM GST APL 01 shall be signed in the manner specified in rule 26.
>
> (3) A certified copy of the decision or order appealed against shall be submitted within seven days of filing the appeal under sub-rule (1) and a final acknowledgement, indicating appeal number shall be

NEUTRAL CITATION

2023: GUJHC:40275-DB

issued thereafter in FORM GST APL 02 by the Appellate Authority or an officer authorised by him in this behalf:

Provided that where the certified copy of the decision or order is submitted within seven days from the date of filing the FORM GST APL 01, the date of filing of the appeal shall be the date of the issue of the provisional acknowledgment and where the said copy is submitted after seven days, the date of filing of the appeal shall be the date of the submission of such copy.

Explanation.- For the provisions of this rule, the appeal shall be treated as filed only when the final acknowledgment, indicating the appeal number, is issued."

11. A brief reference to sub-rule (2) of Rule 108 is required to be made which provides that the grounds of appeal and form of verification as contained in Form GST APL-01 shall be signed in the manner specified in Rule 26. Rule 26 provides for the method of authentication and apart from the applications, replies, appeals, it is provided that any other documents required to be submitted under the provisions of these rules shall be so submitted electronically with digital signature certificate or through esignature as specified under the provisions of Information Technology Act, 2000 or verified by any other mode of signature or verification as notified by the board in this behalf. Sub-rule (2) (c) of Rule 26 provides for the documents to be signed or verified through electronic verification code, in the case of company, by the chief executive officer or authorised signatory thereof.

NEUTRAL CITATION

2023: GUJHC:40275-DB

12. At this juncture, it is material to refer to Rule 108 which is reproduced herein before. Sub-rule (1) of Rule 108 provides that the appeal under sub-section (1) of Section 107 shall be filed in Form GST APL-01, along with the relevant documents, either electronically or as notified by the Commissioner. Sub-rule (3) provides that a certified copy of the decision or order appealed against shall be submitted within seven days of filing the appeal under subrule (1). The proviso to sub-rule (3) prescribes that the certified copy of the decision or order if submitted within seven days from the filing of the Form GST APL-01, the date of filing of the appeal shall be the date of the issue of the provisional acknowledgment and where the said copy is submitted after seven days, the date of filing of the appeal shall be the date of submission of such copy. It is also relevant to refer to the explanation under sub-rule (3) which provides that for the provisions of Rule 108, the appeal shall be treated as filed only when the final acknowledgment, indicating the appeal number, is issued.

Rule 108 no doubt prescribes that the appeal has to be filed electronically, but it no where prescribes that the same is to be filed only after impugned assessment order is uploaded on GSTN portal online. On the contrary, at the time of filing the appeal electronically, it is not even the requirement that the certified copy of the decision of the appeal is to be submitted, for the certified copy of the impugned assessment order can be submitted within seven days of filing the appeal. The proviso to sub-rule (3) of Rule 108 stipulates the consequence of filing the certified copy within seven days and also the consequence of filing the certified copy after seven days from the date of filing of appeal.

13. We may also note the statutory command by the legislation as regards limitation and there is the postulate

NEUTRAL CITATION

2023: GUJHC:40275-DB

that the delay can be condoned for a further period of one month, subject to the satisfaction of the appellate authority that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of three months prescribed by subsection (1) of Section 107 of the said Act. It needs to be emphasized that the policy behind the said Act on the constitution of special adjudicatory forum, is meant to expeditiously decide the grievances of a person who may be aggrieved by the order of an adjudicatory authority. In this context, we may usefully refer to para 20 of the decision of the Hon'ble Supreme Court in the case of Assistant Commissioner (CT) LTU, Kakinada and ors. Vs. Glaxo Smith Kline Consumer Health Care Limited. Their Lordships dealt with the principle regarding the statutory command by the legislation as regards the limitation, the relevant portion of paragraph 20 which reads thus :-

> "20. 15. From the aforesaid decisions, it is clear as crystal that the Constitution Bench in Supreme Court Bar Assn. v. Union of India, (1998) 4 SCC 409, has ruled that there is no conflict of opinion in Antulay case [A.R. Antulay v. R.S. Nayak, (1988) 2 SCC 602] or in Union Carbide Corpn. Case [Union Carbide Corpn. v. Union of India, (1991) 4 SCC 584] with the principle set down in Prem Chand Garg v. Excise Commr., AIR 1963 SC 996. Be it noted, when there is a statutory command by the legislation as regards limitation and there is the postulate that delay can be condoned for a further period not exceeding sixty days, needless to say, it is based on certain underlined, fundamental, general issues of public policy as has been held in Union Carbide Corpn. case [Union Carbide Corpn. v. Union of India, (1991) 4 SCC 584]. As the pronouncement in Chhattisgarh SEB v. Central Electricity Regulatory

NEUTRAL CITATION

2023: GUJHC:40275-DB

Commission, (2010) 5 SCC 23, lays down quite clearly that the policy behind the Act emphasising on the constitution of a special adjudicatory forum, is meant to expeditiously decide the grievances of a person who may be aggrieved by an order of the adjudicatory officer or by an appropriate Commission. The Act is a special legislation within the meaning of Section 29(2) of the Limitation Act and, therefore, the prescription with regard to the limitation has to be the binding effect and the same has to be followed regard being had to its mandatory nature. To put it in a different way, the prescription of limitation in a case of present nature, when the statute commands that this Court may condone the further delay not beyond 60 days, it would come within the ambit and sweep of the provisions and policy of legislation. It is equivalent to Section 3 of the Limitation Act. Therefore, it is uncondonable and it cannot be condoned taking recourse to Article 142 of the Constitution."

14. We may then refer to paragraph 21 of the decision in Assistant Commissioner (CT) LTU, Kakinada (supra) which reads thus :-

"21. A priori, we have no hesitation in taking the view that what this Court cannot do in exercise of its plenary powers under Article 142 of the Constitution, it is unfathomable as to how the High Court can take a different approach in the matter in reference to Article 226 of the Constitution. The principle underlying the rejection of such argument by this Court would apply on all fours to the exercise of power by the High Court under Article 226 of the Constitution."

NEUTRAL CITATION

2023: GUJHC:40275-DB

15. We now advert to the exposition of the Hon'ble Supreme Court in the case of Titaghur Paper Mills Co. Ltd vs State Of Orissa, which finds a reference in paragraph 17 of the decision in Assistant Commissioner (CT) LTU, Kakinada (supra), which reads thus:

> "17. We may usefully refer to the exposition of this Court in Titaghur Paper Mills Co. Ltd. & Anr. Vs. State of Orissa & Ors. wherein it is observed that where a right or liability is created by a statute, which gives a special remedy for enforcing it, the remedy provided by that statute must only be availed of. In paragraph 11, the Court observed thus:
>
> > "11. Under the scheme of the Act, there is a hierarchy of authorities before which the petitioners can get adequate redress against the wrongful acts complained of. The petitioners have the right to prefer an appeal before the Prescribed Authority under subsection (1) of Section 23 of the Act. If the petitioners are dissatisfied with the decision in the appeal, they can prefer a further appeal to the Tribunal under subsection (3) of Section 23 of the Act, and then ask for a case to be stated upon a question of law for the opinion of the High Court under Section 24 of the Act. The Act provides for a complete machinery to challenge an order of assessment, and the impugned assessment orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Article 226 of the Constitution. It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy

NEUTRAL CITATION

2023: GUJHC:40275-DB

provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in Wolverhampton New Waterworks Co. v. Hawkesford [(1859) 6 CBNS 336, 356] in the following passage:

> There are three classes of cases in which a liability may be established founded upon statute. . . . But there is a third class, viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it…. The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.

The rule laid down in this passage was approved by the House of Lords in Neville v. London Express Newspapers Ltd. (1919 AC 368) and has been reaffirmed by the Privy Council in AttorneyGeneral of Trinidad and Tobago v. Gordon Grant & Co. Ltd. (1935 AC 532) and Secretary of State v. Mask & Co. (AIR 1940 PC 105). It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine."

NEUTRAL CITATION

2023: GUJHC:40275-DB

16 . In the present case, having regard to the express provisions of sub-Section (1) and (4) of Section 107 of the said Act, we have no manner of doubt, that for the purpose of limitation, the date of communication of the impugned assessment order is to be regarded as April 20, 2019 viz the date on which the order was sent by email to the petitioner. In the facts of this case, having regard to the express and unambiguous language of sub-section (1) of Section 107 of the said Act, we do not find any force in the contention of learned counsel for the petitioner, that the date of uploading of the impugned assessment order on the GSTN portal has to be regarded as the date of communication for the purpose of calculating limitation. We have no hesitation in holding that the petitioner failed to avail of the remedy provided by the said Act for filing of an appeal within the period prescribed and therefore rightly not accepted and entertained by the appellate authority beyond the extended statutory limitation period of one month in terms of sub-section (4) of Section 107. In support of the view that we take, a profitable reference needs to be made to paragraph 24, 25 and 26 of the decision in the case of Assistant Commissioner (CT) LTU, Kakinada

(supra) which reads thus :-

> "24. Reliance was then placed on a three Judge Bench decision of this Court in ITC Ltd. & Anr. Vs. Union of India. In that case, the High Court had dismissed the writ petition on the ground that the petitioner therein had an adequate alternative remedy by way of an appeal under Section 35 of the Central Excise Act. Concededly, this Court was pleased to uphold that opinion of the High Court. However, whilst considering the difficulty expressed by the petitioner therein that the statutory remedy of appeal had now become time barred during the pendency of the proceedings before the High Court and before this Court, the Court

NEUTRAL CITATION

2023: GUJHC:40275-DB

permitted the petitioner therein to resort to remedy of statutory appeal and directed the appellate authority to decide the appeal on merits. This obviously was done on the basis of concession given by the counsel appearing for the Revenue as noted in paragraph 2(1) of the order, which reads thus:

> "2. The High Court has dismissed the writ petition filed by the petitioner on the ground that there is an adequate alternative remedy by way of an appeal under Section 35 of the Central Excise Act. Learned counsel for the petitioner submits that the petitioner will face certain difficulties in pursuing this remedy:
>
> (1) This remedy may not be any longer available to it because the appeal has to be filed within a period of three months from the date of the assessment order and delay can be condoned only to the extent of three more months by the Collector under Section 35 of the Act. It is pointed out that the petitioner did not file an appeal because the Collector (Appeal) at Madras had taken a view in a similar matter that an appeal was not maintainable. That apart, the petitioner in view of the huge demand involved filed a writ petition and so did not file an appeal. In the circumstances of the case, we are of the opinion that the ends of justice will be met if we permit the petitioner to file a belated appeal within one month from today with an application for condonation of delay, whereon the appeal may be entertained.

NEUTRAL CITATION

2023: GUJHC:40275-DB

> **Learned counsel for the Revenue has stated before us that the Revenue will not object to the entertainment of the appeal on the ground that it is barred by time. In view of this direction and concession, the petitioner will have an effective alternative remedy by way of an appeal.** (emphasis supplied)
>
> 25. In that case, it appears that the writ petition was filed within statutory period and legal remedy was being pursued in good faith by the assessee (appellant).
>
> 26. Suffice it to observe that this decision is on the facts of that case and cannot be cited as a precedent in support of an argument that the High Court is free to entertain the writ petition assailing the assessment order even if filed beyond the statutory period of maximum 60 days in filing appeal. The remedy of appeal is creature of statute. If the appeal is presented by the assessee beyond the extended statutory limitation period of 60 days in terms of Section 31 of the 2005 Act and is, therefore, not entertained, it is incomprehensible as to how it would become a case of violation of fundamental right, much less statutory or legal right as such."
>
> (Underlining by us)"

14.5 In para 12 of the judgement, it has been held that Rule 108 no doubt prescribes that the appeal has to be filed electronically, but it nowhere prescribes that the same is to be filed only after the impugned order is

NEUTRAL CITATION

2023: GUJHC:40275-DB

uploaded on the GSTN Portal. The date of communication of the order by email was taken as the date of communication of the order for the purposes of limitation.

14.6 The decision of **Gujarat Petronet** (supra) was considered and the Division Bench held as under in Para 17 thereof :

> "17. The decision relied upon by the petitioner in the case of Gujarat Tate Petronet Limited (supra) is rendered in a different fact situation.
>
> The petitioner therein approached the adjudicating authority time and again for uploading the order on the GST portal, however, the adjudicating authority was unable to do so due to certain technical issues. The order passed by the adjudicating authority was not served nor was it uploaded on the GST portal and due to nonavailability of the refund order, the petitioner could not prefer the appeal in the electronic form as required under the GST laws. Reverting to the facts of the present case, though the petitioner was in receipt of the impugned assessment order by email on April 20, 2019 itself, the petitioner applied for certified true copy of the order dated April 20, 2019 on November 5, 2019, only after the recovery proceedings were initiated against the petitioner by attaching the bank account on July 1, 2019. The petitioner has by such belated action lost the statutory remedy of appeal. Consequently, in view of the law laid down by the Apex Court, it is not possible for us to entertain the petitioner's challenge to the impugned assessment order."

NEUTRAL CITATION

2023: GUJHC:40275-DB

14.7 The Bombay High Court held that the decision in **Gujarat Petronet** (supra) was rendered in a different situation. The authorities therein could not upload the order due to the technical glitches. The Bombay High Court held that once the assessment order had become final as the petitioner had only applied for a copy of the order after the recovery proceedings were initiated, he had lost his statutory right to appeal.

15. In both the petitions namely in Special Civil Applications No. 4876 and 5731 of 2023, the petitioners have filed the appeals only after the orders of recovery have been passed though being aware and being manually served with the orders dated 31.3.2021 and 29.4.2021 and therefore merely because the orders were subsequently uploaded will not render or save their appeals from the same having been time barred especially when recovery proceedings have already been done and orders to debit freeze accounts have been made in exercise of powers under Section 79 of the CGST Act and not as submitted by the learned advocate for the petitioner, under Section 83 of the Act. Section 79(1)(c) of the CGST Act empowers the department to directly debit the amount lying in the bank accounts.

NEUTRAL CITATION

2023: GUJHC:40275-DB

16. As far the case of the partners in these petitions to contend that they are now not liable, Section 90 of the CGST Act provides that the firm and each of the partners of the firm shall be jointly and severally liable for any dues. The section has been a part of the reproduction of the reply in this part of the judgement and hence is not so reproduced.

17. In Special Civil Application No.14867 of 2022 as well as in Special Civil Applications No. 4876 of 2023 and 5731 of 2023, the prayers in the respective petitions are not accepted. The petitions are accordingly dismissed with no orders as to costs. Rule is discharged.

(BIREN VAISHNAV, J)

(D. M. DESAI,J)

DIVYA