

**WIRC – ICAI  
GST May Fair**  
*A Presentation on*  
**Fake Invoices & Other Fraud cases – Issues  
and Consequences under GST law**

**By**

**Sushil Solanki, FCA**

**Principal Commissioner of Service Tax (Rtd)**

**Partner, TLC Legal, Mumbai**

**23<sup>rd</sup> May, 2021**

# PRESENTATION TOPICS

- Fake Invoices – Why
- Manner of detection by Tax authorities - Reports available to tax authorities
- Fake invoices - Consequences under GST law and Income Tax Act
- Section 16(2) (c) - Availability of ITC where tax not paid by supplier - Judgements
- Sharing of Information to other department
- Precautions while undertaking transactions
- FAQ's relating to investigation, adjudication of cases relating to fake invoices

## Types of GST Frauds

- Fake/Bogus Invoices
- Fraudulent Export Refund based upon fake invoices
- Supply of goods without Invoice (Clandestine Removal)
- Transfer of accumulated Input Tax Credit without supply of goods or services

## Fake Invoices – Why

- Undue availment of ITC without receipt of goods/service
- For bank Overdraft facility/ overcome NPA status
- To increase turnover for higher valuation for Share market
- To get Income Tax benefit
- Siphoning of money by owners
- To avail export refund & other benefits
- Encasement of accumulated ITC

# Business Compulsions or Greed

## Business Compulsion

- Purchase through broker
- Goods from A, but bill from B
- Circular trading
- Group company transactions

[Precautions can save you from unwarranted consequences and to defend during legal proceedings – next slides]

## Greed

- Complete fake invoices without any underlying goods or without payment of tax by seller

## Important Reports Available to Tax Authorities - I (Used for Detecting Fake Invoice Cases)

### Business Intelligence and Financial Analysis Tool shared by GSTN

- Report of Non-filers of GSTR 1 & 3B and list of all persons who purchased from non-filers including exporters claiming refund
- Reports of Non-filers of GSTR 3B but who have filed GSTR 1. Other linked report is all purchasers from these non-filers
- Mirror imaging - Compare ITC availed as per GSTR 2A of recipient and status of GSTR 3B of supplier
- Report of GSTR- 1 – 3B difference
- Search tool – one mobile/mail – how many registration
- Fast tag & RFID reports for movement of vehicle
- Cancellation of E-way bill by tax-payer/transporter with time bands
- Report of mismatch of HSN wise purchase and Sale

## Important Reports Available to Tax Authorities - II (Used for Detecting Fake Invoice Cases)

- E way bill and GSTR I mismatch
- High value transaction by new registrants
- Report of suspected bogus Export refund cases - Coordinated Study by investigation teams of GST, Customs, and Data Analysis wing to find out bogus exports
- Tax-payer paying substantial tax through utilization of ITC
- Risk profile of a taxpayer (ten risk parameters)
- Valuation – Same HSN – per unit valuation by different person
- Tax-payers migrated to and from a jurisdiction
- Data sharing with CBDT – PAN and TDS deduction

## Fake Invoice – Mismatch of Input & Output Case Studies

- E Way Bill Module provide information on HSN of inward and outward supplies

(GSTR 1 records HSN of outward supply, GSTR 9 report HSN summary of purchases and Sales, E way reflect HSN on purchase and Sales)

- Ground nut oil manufacturer taking credit on Castor seeds
- Butter manufacturer taking credit on Ghee.
- HDPE seller taking credit on PVC.



# Export Refund on Fake Purchase Cases

- Create bogus firms in the name of driver, peons
- Purchase on fake invoices, claim ITC and pay IGST on export and claim refund
- Online refund within 1-2 months of export
- Close firm in 4-6 months after getting refund
- Keep turnover less than 5 crore to avoid arrest (but DGGI clubbing more firms or even purchase and sale both can be clubbed),
- Same freight forwarder, same CHA
- Supply to SEZ – bogus sale as SEZ did not receive goods (eg sale to Nagpur SEZ which is almost defunct)
- Service Export cases
- Circular No. 16/2019 – Customs dated 17th June 2019 directing stoppage of export refund by Customs authorities. Even bank accounts attached

# Supply Without Invoice

- Import of consumer goods cases - Compare import data from Custom's database with Sales as per GSTR 1 and GSTR 3B
- Compare purchase data as per GSTR 2A with sales as per GSTR 1 and GSTR 3B – cases of higher purchases as compared to sales
- Sale to URD (B2C) by manufacturers/wholesalers – Indication of sale to actual user without invoice and fake invoice raised to other person
- Report of Purchase from URD and sale to URD available

# Fake/Bogus Invoices Consequences - I

- Section 16 (2) – denial of credit
- Issuer of invoice – 100% penalty of ITC passed on [Sec.122(1)(ii)]
- Receiver of invoice – 100% penalty of ITC availed on [Sec.122(1)(vii)]
- Every issuer and receiver of fake invoice in the chain (circular trading) liable for penal action
- Blocking of credit in the hands of receiver of invoice [Rule 86A]
- Offence of issue of fake invoice and taking ITC on such invoices is cognizable and non-bailable offence, where tax involved is more than Rs. 5 crore [Sec. 132]
- Arrest – Sec. 69
- If tax involved between Rs.2-5 crore, arrest can be made and bail to be granted by GST officer

# Fake Invoices

## New Provisions in Budget 2020 - I

- Amendment in Sec. 122 - “(1A) Any person **who retains the benefit** of a transaction covered under clauses (i), (ii), (vii) or clause (ix) of sub-section (1) and **at whose instance such transaction is conducted**, shall be liable to a penalty of **an amount equivalent to the tax evaded or input tax credit availed of or passed on.**”
- Similar amendment in Sec. 132
- Hence, now not only issuer or receiver of fake invoice but even brokers or even CA's who facilitated in such transactions are also liable for penalty of 100% of GST amount [Sec. 122(1A)] and prosecution as well as arrest [Sec. 132 & Sec. 69]

## Fake Invoices

### New Provisions in Budget 2020 - Income Tax Act

- Insertion of new section 271AAD in the Income Tax Act - Penalty for false entry, including fake purchase/sale invoice in books of account **equal to value of that transaction. Penalty also imposable on any person who made or cause to make such entry (Accountant, CA, brokers, etc.)**
- Under income tax law penalty on the entity issuing and receiving fake invoice as well as other person like accountant, CA, broker, etc. who was found to be assisting or helping the said entity would also be liable for penalty of value of said transaction
- **Judgements holding addition of 3% to 5% may not be applicable for imposition of penalty** . There are few contrary judgements of Gujrat, Bombay, Delhi, Allahabad HC upholding addition if full amount of bogus purchases. Tax authorities have many evidences to prove fake purchase transaction w/o receipt of goods like statement of supplier, transporter, bogus vehicle number, etc

## Availability of ITC Where Tax has not been paid By Supplier

- Section 16(2) (c) – Payment of tax by supplier is a condition for availment of ITC
- WP challenging constitutionality of this provision admitted by many HC's, like Delhi, Gujrat & AP
- *Similar provision in VAT law - On Quest Merchandising India Pvt. Ltd. Vs. Commissioner of Trade – Delhi(2017) HC struck down a similar provision under Delhi VAT Act as violative of Article 14 . SLP dismissed with rider that it can be used in case only in Fraud cases. –*
  - Bombay HC decision in case of Mahalaxmi Cotton Ginning Pressing and Oil Industries v. State of Maharashtra — (2012) 51 VST 1 (Bom.) distinguished.
- Recently Madras HC in the case of DY Beathel Enterprises ( April 2021) held that first recovery efforts should be made from Seller and Seller should also be made part of investigation and straightway recovery cannot be made from buyer. GST Council Press release dated 4<sup>th</sup> May, 2018 referred by petitioner. However, virus of Section 16(2)(c) not considered by HC

# Sharing Of Information with Other Departments

- Regional Economic Intelligence Committee
  - GST (Center and State)
  - Customs
  - Income Tax
  - ED
  - RBI
  - SEBI
  - CBI/EOW
- Regular meeting, all cases involving > 1 crore tax are shared
- Cash Transaction reports/Suspected Transaction Report by FIU

# Group Company/Intra-company Transactions

Transfer of credit temporarily / permanently

- Issue of sales invoice and later on reversal of transaction by issue of Credit Note to transfer credit temporarily
- If **accumulated Credit** – Issue only invoices to transfer credit (mostly in Group company transactions)



# Precautions while Undertaking Transactions

- How to find out seller being genuine :
  - Check GSTR 2A before making payment
  - Check whether GSTR 3B filed by supplier – keep screen shots in record for new suppliers
  - New provision – Not filing 3B for 2 months, GSTR I cannot be filed, Cancellation of registration,
- In case of sale w/o movement of goods, keep records like e-mails, warehouse receipts, storage charge payment by different entities & not to issue E way bill.
- In case of Bill to Ship to transaction, E-way bill for entire transaction can be prepared by Purchaser
- Group company transactions for fund transfer – avoid GST linked transactions
- Buyer can verify correctness of lorry Number as mentioned in E-way bill – Apps available
- Preserve weigh bridge slips, Maintain and preserve gate register and stock register
- Keep separate godown for different entities, & Installation of CCTV at unloading area, wherever possible

## Investigation- Precaution & related matters

- Attachment of bank account or property during investigation – Section 83
- Retraction of confessional statement and Use of affidavit
- Confessional Statement
  - Answer “I will check up and let you know” or “I have no idea, maybe he knows, I do not know” “We have received goods, but documents are prepared by supplier, hence I have no control”
- Read computer typed statement before signing. Put ‘time’ of start and signing.
- Copies of documents seized – your right to get copy & restrictions (67(5))

## Presence of Counsel during Investigation

- Presence of counsel or advocate during recording of statement
  - ROHIT SAKHUJA vs DRI (2017 (349) E.L.T. 204 (S.C.)) –  
Lawyer permitted to be present at visible distance but beyond hearing range during Interrogation/Investigation
  - ARVINDKUMAR JAIN DHAKAD – (2019) – Bombay HC followed above case
- Contrary earlier judgement - *Ramesh Chandra Mehta v. State of West Bengal* - AIR 1970 S.C. 940, followed by Rajasthan HC recently in BHAG SINGH case (2019) refused to permit advocate also Delhi HC denied advocate.

## Investigation – Other issues

- Manner of Payment – Under protest, ground like non-payment to supplier, technical lapses.
- DRC 03 – Pay only under “other category” with remarks that payment is under protest. Do not pay under Section 74
- Seizure of cash – Sec 67 (2) - “things useful or relevant for proceedings”
- Refund filling for GST paid on sales
- Arrest : general guidelines are that non co-operation or apprehension of tempering with evidence could lead to arrest.
- Approach senior officer in case of undue harassment – at least know the hierarchy
- Return of un-relied upon documents within 30 days of issue of Notice (67(3))

## FAQ'S Relating to Investigation & Adjudication of Fake Invoice cases

- Can recovery be sought from each dealer in the chain – way out – refund ??
- Even though there is corresponding sale, still can there be recovery sought for bogus purchase – income tax judicial precedents ??
- Manner of payment during investigation (earlier slide)
- Closure of proceedings under Section 74(8) but prosecution can still be launched
- Payment of tax, int and penalty by main person shall also conclude proceedings against other persons
- Strategy during adjudication

# THANK YOU

9820118110  
022-61708500/400

[sushil@tlclegal.in](mailto:sushil@tlclegal.in)

[sushisolanki@hotmail.com](mailto:sushisolanki@hotmail.com)

## Features of GST leading to more detection of Fake Invoice cases

- Every B-B Invoice is recorded in GSTR I
- Return can be filed only on payment of taxes
- ITC availment can be matched with supplier's records
- Movement of goods only with E-Way Bill
- Reduction of exemption limit for SSI's
- Every transaction of goods or service liable to tax

## Availability of ITC Where Tax has not been paid By Supplier

- Section 16(2) (c) – Payment of tax by supplier is a condition for availment of ITC
- WVP challenging constitutionality of this provision admitted by many HC's, like Delhi, Gujrat & AP
- *Similar provision in VAT law - On Quest Merchandising India Pvt. Ltd. Vs. Commissioner of Trade – Delhi(2017) HC struck down a similar provision under Delhi VAT Act as violative of Article 14 . SLP dismissed with rider that it can be used in case only in Fraud cases. –*
  - *Provision is arbitrary for the reason that it expects the Petitioner to perform the impossible. Court observed that this provision requires purchasing dealer to do impossible act of anticipating selling dealer who will not deposit with Government tax collected by him and avoid transacting with such selling dealers - For defaults of selling dealer, purchasing dealer had to bear consequence of denial of credit - Also, it was applicable without differentiation between bona fide purchasing dealers from those that were not*
- Bombay HC decision in case of Mahalaxmi Cotton Ginning Pressing and Oil Industries v. State of Maharashtra — (2012) 51 VST 1 (Bom.) distinguished.