



NITYA'S INSIGHT:

Legal Precedents' Series

Issue 1 (Writs) / November 19, 2018

Period: July 1, 2017 to October 31, 2018

INTRODUCTION

The Goods and Services Tax ('GST') has been one of the major law reforms in India in recent times which sought to simplify the indirect tax landscape in the country. However, the real picture is far from the utopian GST that the country dreamt of. Within days of its implementation, disputes vis-à-vis GST began making its entry in the courtrooms both on its applicability as well as compliance requirements.

With no alternate remedy available to the assessee, they sought the route of writ petitions as a prerogative remedy. Though the Advance Ruling Authorities got established at a later stage; the scope of such rulings was limited to certain matters as prescribed under the law. In this intervening period, writ petitions were the only efficacious remedy available to the assesses. Nearly 300 writ petitions on various legal issues have already been filed before the various High Courts till date.

This Insight is an attempt to familiarize the reader with the significant issues that have been dealt by the Courts through writ petitions post implementation of GST till October 31, 2018. The Insight covers both disposed matters as well the matters pending disposal which are likely to have a significant impact on the GST sphere in the near future.

We hope you find this an interesting read!

Regards,
Team NITYA

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PART A: WRITS DISPOSED-OFF

A. TRAN-1

Under the GST law, assessee are entitled to carry forward the amount of credit of eligible duties and taxes that were appearing in the returns filed under erstwhile laws for June 2017. The assessee had to file TRAN-1 to claim such credit.

At a later stage, the law also provided for a one-time facility for revision of TRAN-1. As per the Notifications / orders issued by the Government, the due date for filing / revision of TRAN-1 was extended till December 27, 2017. No filing / revision of TRAN-1 was allowed beyond this date.

Due to technical glitches, various assessee could not file / revise TRAN-1 by the due date. Consequently, vide **Circular No. 39/13/2018-GST dated April 3, 2018 ('Circular No. 39')**, the Government set up an IT-Grievance Redressal Mechanism to address the difficulties faced by assessee owing to technical glitches on the GST portal and allowed time till April 30, 2018 to file TRAN-1 in such cases.

Later, the Government vide **Notification No. 48/2018-Central Tax dated September 10, 2018 ('NN 48')** amended Central Goods and Services Tax Rules, 2017 and gave power to the Commissioner to extend due date for filing TRAN-1 till March 31, 2019 (on recommendations of the GST Council) for assessee who could not file such return due to technical glitches. In this regard, the Commissioner issued **Order No. 4/2018-GST dated September 17, 2018** to extend the due date for filing TRAN-1 for such assessee till January 31, 2019.

A number of writ petitions have been filed in the jurisdictional High Courts vis-à-vis various issues on TRAN-1. Significant orders in this regard have been discussed hereinafter.

1. Constitutional validity

Issue	Decision of High Court	Reference
Condition on exempted goods manufacturer / trader to avail credit of stock in hand only if duty paying document is not more than 12 months old as on July 1, 2017 [Section 140(3)(iv) of the Central Goods and Services Tax Act, 2017 ('CGST Act')]	The Bombay High Court held that the provision is constitutional, for the following reasons - Assessee cannot pick and choose a condition for challenge by alleging that the availment is undisputedly conditional but one of the conditions having nexus with the availment is unconstitutional, arbitrary and excessive. - The right to avail transitional credit is neither indefeasible nor absolute under the existing law or in transitional arrangements set out or in the substantive provisions permitting availment of credit.	JCB India Limited v. Union of India, 2018-VIL-165-BOM
	The Gujarat High Court held that provision is unconstitutional, for the following reasons	Filco Trade Center Private Limited v. Union of India, 2018-VIL-403-GUJ

	<ul style="list-style-type: none"> - The credit was a vested right which cannot be taken away. - The condition imposed for availing such benefit has no rational or reasonable basis. 	<i>(the Court disagreed with the decision of Bombay High Court in JCB India)</i>
<p>Restriction on right of a dealer to carry forward credit if the prescribed forms are not furnished within prescribed period</p> <p><i>[Proviso to Section 140(1) of the Gujarat Goods and Services Tax Act, 2017]</i></p>	<p>The High Court held that the restriction is constitutional, for the following reasons:</p> <ul style="list-style-type: none"> - A combined reading of the relevant provisions shows that the statutory provisions do not deny the benefit of credit where necessary declarations are furnished. Thus, no existing or vested right has been taken away. - The prescription of time limit within which necessary declarations must be made, is neither without authority nor unreasonable. 	<i>Willowood Chemcial Private Limited v. Union of India, 2018-VIL-433-GUJ</i>
<p>No credit on capital goods that were in transit as on July 1, 2017</p>	<p>The Court held that not granting transitional credit on capital goods in transit on the date of introduction of GST is not in violation of the Constitution of India, 1950 ('Constitution') on the following grounds:</p> <ul style="list-style-type: none"> - The distinction between inputs and capital goods is in not artificial or arbitrary and both form different and distinct classes - Taxing statutes contained self-sufficient scheme of levying computation and calculation of tax. The time in which a return is to be filed for the purpose of assessment of tax cannot be dependent on the will of a dealer 	<i>RSPL Limited v. Union of India, 2018-VIL-477-GUJ</i>

2. Filing of return

Issue	Return not filed due to technical glitches		
	Before setting up of IT Grievance Redressal Committee	After issue of <i>Circular No. 39 and NN 48</i>	
Order passed	Portal to be re-opened or accept manual application	Matter to be placed before Nodal officer and filing of return to be allowed subject to verification of credits	Portal to be re-opened or accept manual application on grounds that substantive credit cannot be denied or altered on procedural grounds

Reference	<ul style="list-style-type: none"> - Continental India Private Limited v. Union of India, 2018-VIL-44-ALH - KTL (P) Limited v. Union of India, 2018-VIL-81-ALH - Arihant Superstructure Limited v. Union of India, 2018-VIL-142-RAJ - Pothys v. Principal Chief Commissioner, 2018 (9) TMI 685 	<ul style="list-style-type: none"> - Schwing Stetter India Private Limited v. Commissioner, GST, 2018-VIL-313-MAD - E. V. Radha Krishna Kurup v. Union of India, 2018-VIL-425-KER - Calibre Industries v. Principal Commissioner, GST, 2018-VIL-428-MAD - Sare Realty Projects Private Limited v. Union of India, 2018-VIL-427-DEL - Dhamtari Krishi Kendra v. Union of India, 2018-VIL-426-CHG 	<ul style="list-style-type: none"> - Tara Exports v. Union of India, 2018-VIL-432-MAD
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3. Miscellaneous issues

Issue	Decision of High Court	Reference
Typographical error in filing of return	The Court directed the Central Government to issue a general and / or special order under Section 172 of the CGST Act (removal of difficulties) addressing the above issue on general or special basis, taking into account the ground realities.	O/E/N Limited v. Union of India, 2018-VIL-434-BOM
	Consequently, the Central Board of Indirect Taxes & Customs decided to grant relief to this assessee post due verification of the bona fides of the claims.	O/E/N Limited v. Union of India, 2018-VIL-491-BOM
	The Court allowed extension in filing of return on the ground that the extended time for making declaration, would take within its fold any typographical or such other corrections in the declaration already filed. Even otherwise, the case of the petitioner would fall within the situation of an assessee unable to file correct declaration due to technical glitches.	Privi Organics India Limited v. Union of India, 2018-VIL-480-GUJ

Missed credits while filing of TRAN-1	<p>In the instant case, the assessee had filled its TRAN-1 but missed filing some transactions due to oversight.</p> <p>The Court did not allow rectification of TRAN-1 owing to the fact that the instant case neither constituted any special circumstance nor a genuine hardship for the assessee.</p>	<p>Jay Chemcial Industries Limited v. Union of India, 2018-VIL-454-GUJ</p>
Seeking direction to allow revision of VAT Return for December 2016 to enable assessee to claim benefit in TRAN-1	<p>In the instant case, the assessee purchased a capital equipment, paid applicable tax but failed to include the purchased item in the VAT return. The concerned authorities did not respond to assessee's request to revise VAT return. Consequently, the assessee had to upload TRAN-1 without incorporating the details of input credit under the KVAT regime.</p> <p>The Court held that the provisions of the applicable State VAT Act, allowed revision return. In light of this, the Court allowed revision of VAT return in this case.</p> <p><i>NITYA Comments: In this case, though the Court allowed revision of VAT return, the methodology of carrying such credit in TRAN-1 is neither clear nor prescribed. Such revision in VAT return may allow the assessee to claim such amount as refund at the time of assessment under VAT law.</i></p>	<p>Super Plast Poly Products India Private Limited v. State of Kerala, 2018- VIL-345-KER</p>
Transitional credit not reflected in the electronic credit ledger	<p>In the instant case, the assessee could not transition its credit despite several representations being made before the authorities.</p> <p>The High Court whilst asking the assessee to file a detailed representation, directed the Nodal officer to dispose the matter within five days of receiving the certified copy of the order.</p>	<p>Vishal Traders v. Union of India, 2018 (10) TMI 743 (P&H)</p> <p>Shree Trading Company v. Union of India, 2018 (10) TMI 48 (P&H)</p>

NITYA Comments:

Considering the multiple writs filed by the assessee and directions of the High Courts, the Central Government and CBIC have issued Notifications and Circulars to address situations where assessee could not file form TRAN-1 due to technical glitches. It is pertinent to note that these Notifications and Circulars do not address situations wherein transitional credit is not reflected in electronic credit ledger though Form TRAN-1 was correctly filed. Further, the department has consistently displayed laxities in identifying the affected assessee and responding to various representations filed before it.

The above judgments stand testament to the Court's empathetic view in respect of assessee who have not received any response despite several representations. The Courts in such cases, have issued directions to

ensure that substantive right to avail transitional credit is safeguarded. The Courts have also been inclined to dispose-off the writ petitions by suggesting administrative route to assesseees to approach the department.

B. ISSUES VIS-À-VIS E-WAY BILL

E-way bill system was introduced to check tax evasion amidst great apprehensions from the industry. The departmental officers have been extremely stringent towards any non-compliance, with even minor and bona-fide errors like incorrect invoice number, date, HSN etc. being penalized. Aggrieved by the penalty amount being 100 percent of tax amounts, the assessee have approached the doors of High Courts to get their goods released and relief from penalty.

Grounds for seizure of goods	Order	Reference
Non-availability of e-way bill due to problem in downloading from the site	Petitioner was directed to deposit bank guarantee equal to the value of tax on goods.	<i>Vikram Solar Private Limited v. Union of India, 2018-VIL-15-ALH</i>
Goods being transported under cover of delivery challan without e-way bill	<p>The Court held that when a delivery challan is issued under GST, it is also mandatory to generate e-way bill. The absence of e-way bill raises a reasonable presumption of attempt to evade tax. The fact that there was no supply and movement was made under a delivery challan, will not dilute this presumption.</p> <p>If the conditions prescribed under the law are not complied with, confiscation would be attracted. The respondents are entitled to adjudication, but they would have to prove that in fact there was a requisite declaration made as per the law before the transportation commenced. If such aspect is proved, they would be absolved of the liability; otherwise, assessee would be required to pay tax and penalty under the Act.</p>	<i>CCT v. Indus Towers Limited, 2018-VIL-300-KER</i> <i>which overruled single judge order of Indus Towers Limited v. Assistant State Tax Officer, 2018-VIL-48-KER</i>
Goods seized as being transported without e-way bill, which was later produced by the assessee	The Court quashed seizure on the ground that e-way bill was downloaded before the seizure order and was produced during investigation.	<i>Bhumika Enterprise v. State of UP, 2018 (4) TMI 530 (Allahabad High Court)</i>

Validity of levy of penalty on the ground that Part-B of e-way bill not filled	An incomplete e-way bill cannot be considered as valid document for movement of goods. Accordingly, the High Court imposed a hefty fine for errors in e-way bill despite the assessee's contention of technical glitch on e-way bill portal.	<i>Gati Kintetsu Express Private Limited v. Commissioner, Commercial Tax of MP, 2018-VIL-293-MP</i>
Seizure of goods on the ground that Part-B of e-way bill is unfilled and the vehicle details are missing	The Court held that mere non-mentioning of vehicle number in Part-B cannot be a ground for seizure of the goods.	<i>VSL Alloys (India) Private Limited v. State of Uttar Pradesh, 2018-VIL-196-ALH</i>
Goods detained on the ground that few digits of the vehicle number were incorrect	The Court held that in case of minor discrepancies in the details mentioned in e-way bill (such as errors of one or two digits/character of the vehicle number) would not be sufficient for initiation of any proceedings. The goods were released on furnishing of indemnity bond.	<i>Diamond Metal v. State of Uttar Pradesh, 2018-VIL-487-ALH</i> <i>Rajavat Steels v. State of Uttar Pradesh, 2018-VIL-452-ALH</i>

NITYA comments: *In general, the Courts as well as the concerned authorities have been strict in their approach regarding carriage of e-way bills during transportation of goods. Thus, an assessee is recommended to ensure generation of a valid e-way bill for transportation of goods. Further, a seizure order issued for violation of e-way bill provisions, is an appealable order. Accordingly, in genuine cases, an assessee can approach the appellate authority.*

C. MISCELLANEOUS ISSUES

1. Claim of old credits and credits for financial year 2017-18

Issue	Order	Reference
Seeking direction to claim credit before October 20, 2018 to claim old credits and credit pertaining to financial year 2017-18	<p>In the instant case, the assessee's grievance was with respect to credits (both transitional credit and normal credit) not getting reflected in electronic credit ledger.</p> <p>The Court held that as the deadline for completing the relevant form and availing the credit was approaching, the assessee should be allowed to file Form GSTR-3B manually to claim the credit subject to the final outcome of the pending proceedings.</p>	<i>IndusInd Media Communications Limited v. Union of India, 2018-VIL-460-DEL</i>
Seeking direction to claim transitional credit from centralized location to branches	<p>In the instant case, the assessee distributed transitional credit from centralized location amongst branches / other locations by filing Form TRAN-1 which was not reflected in electronic credit ledger.</p> <p>The Court held that as the deadline for availing the credit was approaching and the technical glitches could not be resolved, the assessee was permitted to file a revised copy of TRAN-1, ITC-01 and GSTR-3B manually.</p> <p>Based on revised TRAN-1, ITC-01 and GSTR-3B at the head office, the assessee was held to be entitled to take credit at various branches / other locations, subject to the satisfaction of the jurisdictional Commissioner.</p>	<i>IndusInd Media Communications Limited v. Union of India, 2018-VIL-468-BOM</i>

2. Imports under advance authorization

Notification No. 18/2015-Cus dated April 1, 2015 was amended vide **Notification No. 79/2017-Cus dated October 10, 2017** to provide exemption from IGST on inputs imported under Advance Authorization scheme ('AA') subject to satisfaction 'pre-import' condition. This pre-import condition has been constitutionally challenged before various High Courts.

In the case of ***Vedanta Limited v. UOI, 2018-VIL-490-MAD***, the Madras High Court held that not allowing exemption of IGST at the time of import, does not result in alteration of benefit of the AA scheme. The AA scheme is a matter of public policy and the judiciary cannot interfere in administrative matters. Thus, the pre-import condition was held to be constitutionally valid.

It is pertinent to note that similar cases are pending before various High Courts and are tabulated below for reference:

Order	Reference
The High Court has admitted the petition challenging the 'pre-import' condition and the same is pending for final disposal	- Narendra Plastic Private Limited v. CBIC, W.P.(C) No. 4922/2018 (Delhi HC)
The High Court has issued notice to the Government on this issue	- Balco W.P.(C) No. 9473/2018 (Delhi HC) - Pasupati Acrylon Limited W.P.(C) No.9813/2018 (Delhi HC)
The High Court has admitted the petition and directed the concerned authorities not to take any coercive action against importers on this issue	- Vedanta Limited v. Union of India, W.P.(C) No. 14745 /2018 (Orissa HC)

3. Power of inspecting officer to detain goods

In the case of **N. V. K. Mohammed Sultan Rawther and Sons v. UOI, 2018-VIL-502-KER**, the power of officer to detain goods on the ground of misclassification and incorrect rate of tax in the invoice was challenged. The Court held that that the assessee with *bonafide intention* classified a product and paid tax accordingly. The assessee cannot be accused of evading the tax and the detention is unwarranted. The department was directed to release the goods.

The Court held that the Revenue was at liberty to initiate appropriate proceedings if they deem it fit on the issue of alleged misclassification and rate of tax based on any suspicion raised by inspecting authority.

4. Constitutional validity of levy of compensation cess

The Supreme Court in the case of **UOI v. Mohit Mineral Private Limited, 2018-VIL-27-SC** upheld the validity of the Compensation to States Act, 2017 on the following grounds:

- Article 270 of the Constitution empowers Parliament to levy any cess by law. When the Constitution provision empowers the Parliament to provide for Compensation to the States for loss of revenue by law, the expression 'law' used therein will include levy of any cess for the said purpose.
- Article 246A of the Constitution provides express power to make laws regarding GST which shall also include power to levy cess on GST.

5. Constitutional validity of levy of GST on lottery

In the case of **Teesta Distributors v. UOI, 2018-VIL-455-CAL**, the High Court upheld the validity of levy of GST on lottery. The Court stated that since lotteries are covered under the natural meaning of the term 'goods', it can be charged to GST. It is pertinent to note that although lotteries qualify as an actionable claim (which do not attract under GST), the definition of actionable claim under the CGST Act specifically exclude lotteries.

PART B: WRITS PENDING FOR FINAL DISPOSAL

A. Availability of credit of SGST in States where assessee is not registered

A writ petition praying has been filed before the Delhi High Court in the case of ***D. Pauls Tours and Travels Limited v. Union of India, 2017-VIL-626-DEL*** to allow credit of SGST component (in states where assessee does not have a registration) has been made.

NITYA Comments: Principally, the credit of CGST component should be available across India as the tax is 'central' in nature and the scope of such tax cannot be limited to a particular State. Thus, an assessee can claim credit of CGST. In case the GSTN portal does not reflect the CGST component, an assessee can challenge the same before the appropriate forum.

As far as credit of SGST component is concerned, such tax is specific to a State and cannot be availed in another State. Interestingly, assessee are able to see SGST component as well in their GSTR-2A in some cases. Assessee should be wary before availing such credit in the absence of specific legislative permission to claim the same.

B. GST on ocean freight

The levy of GST on ocean freight has been challenged in the case of ***Mohit Mineral Private Limited v. Union of India, 2018-VIL-66-GUJ*** on the grounds that:

- It leads to double taxation wherein the assessee has already paid IGST on the entire value of imported goods inclusive of ocean freight and is now being asked to pay tax on the ocean freight again as a service
- In case of CIF contracts, the service provider and service recipient both are outside India. The assessee is not the recipient of the service. No tax on such service can be collected under reverse charge mechanism

The assessee has been granted an interim relief and the matter is still pending before the High Court.

NITYA Comments: The levy of IGST in such cases lacks the legislative backing since Section 5(3) of the Integrated Goods and Services Tax Act, 2017 does not empower the Government to tax such transactions.

C. Levy of GST in case of duty free-shops

In the case of ***Vasu Clothing Private Limited v. Union of India, 2018-VIL-370-MP***, the assessee has sought clarification for eligibility of refund in case of GST paid on goods purchased from duty free shops. As per the assessee, no GST can be levied on the same as such shops are located beyond the custom frontiers of India. The matter is pending before the Madhya Pradesh High Court.

NITYA comments: An advance ruling has already been passed wherein levy of GST in case of supply from duty-free shops has been upheld. In our view, the reasoning provided in the advance ruling is incorrect and the Government should amend the law or issue an appropriate clarification on the tax implications on this subject.

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