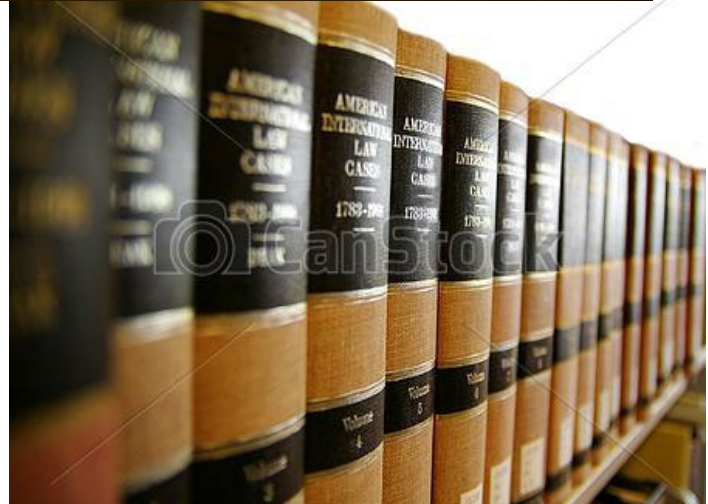
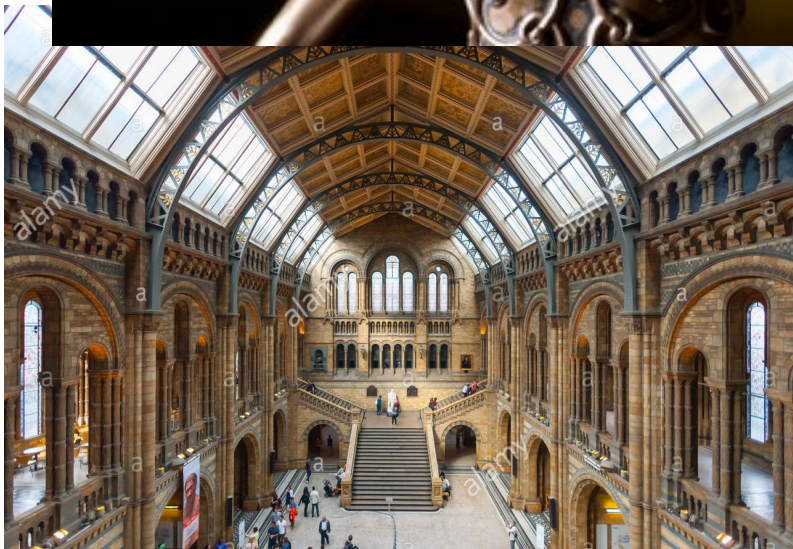
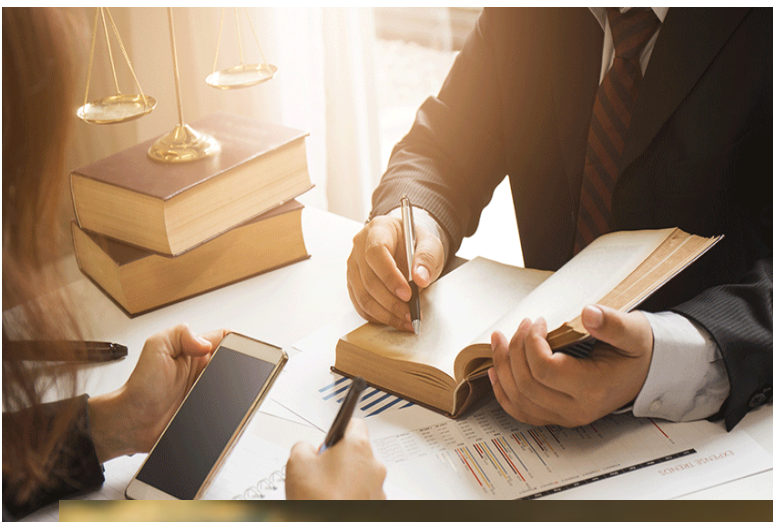




Legal Precedents' Series | Issue 12 | Writs, NAA and AAR

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PART A: WRITS

1. Constitutional validity

Issue	Order	Reference
Power of officer to demand interest and attach bank account without issuance of show cause notice.	The Karnataka High Court observed that issuance of show-cause notice is an essential condition for recovery of interest and non-compliance is breach of principles of natural justice. The Court set aside the impugned order demanding interest and attaching bank account for recovery of same.	<i>LC Infra Projects Private Limited v. Union of India, 2019-VIL-365-KAR</i>
Validity of Notification and Circular issued to lapse unutilized ITC accumulated on account of inverted rate structure.	The Gujarat High Court held that Notification and Circular lapsing unutilized input tax credit ('ITC') accumulated on specified date on account of inverted rate structure, was unconstitutional and ultra-vires for the following reasons: - The taxpayer had vested right on ITC accumulated because of inverted rate structure. - The provisions for lapsing of ITC have been specifically provided under Section 17(4) and Section 18(4) of the Central Goods and Services Tax Act, 2017 ('CGST Act'). However, there is no such provision under Section 54(3). - Notification issued for lapsing of ITC, exceeded the powers delegated under Section 54(3)(ii) of the CGST Act.	<i>Shabnam Petrofils Private Limited v. Union of India, 2019-VIL-369-GUJ</i>

2. Issue vis-à-vis filing of return

Issue	Order	Reference
Rectification of FORM GSTR-3B where ITC of IGST wrongly reported in column of import of goods and services.	The Andhra Pradesh High Court granted interim relief to taxpayer by permitting manual filing of returns.	<i>Panduranga Stone Crushers v. Union of India, 2019-VIL-422-AP</i>

3. Writs against NAA order

Issue	Order	Reference
Challenge to decision of National Anti-Profiteering Authority ('NAA') where taxpayer is mere distributor of products and does not have power to change the prices.	The Court granted an interim relief to the taxpayer by staying the impugned order.	Satya Enterprises v. Union of India, 2019-VIL-364-DEL

4. Relevant writs admitted by High Courts and pending final decision

- In the case of **The Quarry Owners Association v. Union of India, 2019-VIL-407-GUJ**, **Raymond Uco Denim Private Limited v. Union of India, 2019-VIL-414-BOM** and **Afcons - Sibmost Joint Venture v. Union of India, 2019-VIL-409-PAT**, the petitioners challenged Rule 89(5) of the Central Goods and Services Tax Rules, 2017 ('CGST Rules') as amended by **Notification No.21/2018-CT** dated **April 18, 2018** and **Notification No.26/2018-CT** dated **June 13, 2018** restricting refund of input services in inverted duty structure situations. The petitioners contended that such restriction is ultra-vires to Section 54(3) of the CGST Act. The High Courts have admitted the petition and the matter is pending the final decision.

NITYA Comments:

The Government amended the CGST Rules vide the abovementioned Notifications to bar refund of input services in an inverted duty structure situation. The petitioners have raised a valid point that Section 54 of the CGST Act does not restrict refund of input services nor empower the Government to impose such restriction through the CGST Rules. Hence, imposition of such restriction by the CGST Rules is ultra-vires. Other taxpayers having inverted duty structure and significant credit accumulation, can consider filing writs on similar lines.

- In the case of **AAP and Co. v. Union of India, 2019-VIL-427-GUJ**, the petitioner challenged the validity of late fee imposed for late filing of FORM GSTR-3B. It also prayed for refund of late fee already paid for late filing of FORM GSTR-3B on the ground that FORM GSTR-3B is not a return under Section 39. The Gujarat High Court has admitted the petition.

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PART B: ADVANCE RULINGS

1. Taxability

Applicant	Relevant facts and observations of AAR
Rajkot Nagarik Sahakari Bank Limited, 2019-VIL-255-AAR (GUJ)	The Applicant was a scheduled Cooperative Bank, engaged in supply of various financial services. It was also running various schemes for Demat account holders. The question before AAR were as follows: - Whether receipt of Refundable Interest Free Deposit ('RIFD') qualifies as supply under GST law. The AAR observed that while RIFD will not qualify as consideration, notional interest on RFID will qualify as consideration for supply of services by the Applicant. Hence, Applicant is providing service against consideration in form of notional interest on deposits. - Whether offer of first 10 free transactions under the Scheme was chargeable to tax. The AAR held that free transactions were in nature of discount and thus, not chargeable to GST subject to conditions mentioned under Section 15(3) of CGST Act. <i>NITYA Comments: The ruling is partially incorrect to the extent it proposes to levy GST on notional interest. There is no concept of notional consideration under GST law.</i> <i>Further, the department has been demanding service tax / GST on free services provided by banks to preferred customers. The banks can seek support of second part of this ruling that free services are in nature of discount and would not attract service tax / GST.</i>
Rotary Club of Mumbai Nariman Point, 2019-VIL-239-AAR (MAH)	The Applicant was an International Organization having clubs in 216 countries and engaged in humanitarian & charitable activities. The Applicant received fee from its members for meeting administration expenses. The question before the AAR was whether fee qualified as 'consideration' and results in 'supply' under GST law. The AAR observed that the definition of business includes provision of facilities or benefits by a club to its members for a subscription or any other consideration. Basis this, the AAR held that fee is covered under definition of 'consideration' and was collected for facilities provided to members. Thus, the activities undertaken by the Applicant qualified as 'supply' and exigible to GST.

	NITYA Comments: The AAR failed to consider that membership fee received from members cannot be considered as consideration due to the principle of mutuality (society and members does not have separate existence). This concept was duly recognized by High Courts under service tax law as well. Hence, the activity does not constitute to be supply nor exigible to GST.
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2. Valuation

Applicant	Relevant facts and observations of AAR
Specsmakers Opticians Private Limited, 2019-VIL-233-AAR (TN)	The Applicant was engaged in business of trading of imported as well as domestically procured goods. It transferred goods between various branches situated in different States. The question before AAR was whether assessable value for stock-transferring goods from one location to another, can be determined under either of the two provisos available under Rule 28 of the CGST Rules or not. The AAR held that if the Applicant was given an option to determine the value under second proviso to Rule 28 (which deems invoice value as open market value, thereby allowing adoption of any value), it will make first proviso redundant. Further, under second proviso, the Applicant can use a value higher or lower than open market value which can result in utilization or accumulation of credit at supplier location. Basis the above, the AAR held that the provisos should be read sequentially, and the Applicant does not have an option to choose the proviso favorable to them. NITYA Comments: The ruling is incorrect as it imposes a condition of chronological following of the provisos under Rule 28 of the CGST Rules which is absent in the Rule itself. This ruling is also contrary to other advance rulings on the identical issue. For detailed reasoning, please refer our update NITYA's Insight Issue 39 Recent advance rulings on supplies between distinct persons dated August 26, 2019.

3. Input Tax Credit (ITC) and related issues

Applicant	Relevant facts and observations of AAR
MRF Limited, 2019-VIL-62-AAAR setting aside 2019-VIL-71-AAR (TN)	The AAR was dealing with the issue of availability of ITC to the extent of discounts passed on by the suppliers by way of accounting / financial credit notes. The AAR invoked Section 16(2)(d) of the CGST Act and held that there was failure to pay consideration to the extent of discounts. Therefore, the Applicant needs to reverse the ITC in that proportion.

	The AAAR set aside the order of AAR and held that full ITC of GST charged on undiscounted price was admissible subject to the condition that ITC had not been reversed / refunded to the vendors. NITYA Comments: <i>The AAAR aptly distinguished that in case of 'post sale discount', there is an agreement not to pay the discounted amount which cannot be said to be 'failure to pay'. We duly pointed this out in our update 'NITYA's Insight Issue 18 AAR Update' dated March 27, 2019.</i>
Sanghvi Movers Limited, 2019-VIL-234-AAR (TN)	The Applicant was engaged in leasing of medium-sized heavy-duty cranes to customers without transferring right to use the cranes. The Applicant was also sending cranes from its Head Office ('HO') to branches. HO and branches entered into a MOU whereby branches paid rent to HO and HO paid GST on such rent. Further, the branches were charging upkeep charges from HO. The branches were entitled to adjust the amount of upkeep charges receivable from HO from rent payable to HO and were paying net amount to HO. The question before the AAR was whether branches were entitled for ITC of GST charged by HO. The AAR held that book adjustment was not equivalent to payment and since branches did not pay full amount to HO, branches will not be entitled to avail credit in terms of proviso to Section 16(4) of the CGST Act. NITYA Comments: <i>The ruling is incorrect to the extent it states that book adjustment should not be treated as payment. We have examined the ruling in detail in our update NITYA's Insight Issue 39 Recent advance rulings on supplies between distinct persons dated August 26, 2019.</i>
Chennai Port Trust, 2019-VIL-247-AAR (TN) and 2019-VIL-249-AAR (TN)	The Applicant was engaged in supply of port services. It was also maintaining an in-house hospital within port premises, for providing health and medical cover to its employees and pensioners due to statutory requirement. The treatment was provided on payment of one-time contribution. The question before the AAR was whether ITC of goods and services, such as medicines, medical apparatus, equipment and repairing services of such instruments and machines installed in in-house hospital, was admissible or not. The AAR observed that in-house hospital was a free center where goods and services were provided to employees and pensioners free of cost and as per Section 17(5)(g) of CGST Act, ITC on goods and services used for personal consumption is ineligible. Hence, ITC on goods and services used for providing medical and health care facilities to employees, was inadmissible. NITYA Comments: <i>The ruling is incorrect as it fails to consider that medical and health care services were provided by the Applicant under statutory obligation and in course of its business.</i>

	<i>It is a settled principle (upheld by several High Courts under Income Tax law) that a corporate and its employees are distinct persons and expenses incurred by corporates for their employees are not personal expenses but business expenses. Basis above, the disallowance by the AAR is incorrect.</i>
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4. Liquidated damages

Applicant	Relevant facts and observations of AAR
<i>Dholera Industrial City Development Project Limited, 2019-VIL-259-AAR (GUJ)</i>	Dholera Industrial City Development Limited was a special purpose vehicle with 51 percent stake held by Gujarat Government and balance 49 percent by Government of India, created for development of Dholera Industrial city. The Applicant received liquidated damages from the contractors for delay in completion of projects. The question before the AAR was whether the Applicant was liable to pay GST on liquidated damages or not. The AAR held that violation charges shall be treated as ‘consideration’ for supply under GST law and hence shall chargeable to GST. <i>NITYA Comments:</i> <i>We have consistently voiced that liquidated damages are not for benefit of the recipient nor will qualify as ‘supply for consideration’. Hence, the same would not be covered under toleration of an act. Recently, the Tribunal in few cases gave a restrictive meaning to ‘toleration of an act’ as detailed in our update NITYA’s Insight Issue 41 Recent Tribunal decisions on ‘toleration of an act’.</i>
<i>Chennai Port Trust, 2019-VIL-245-AAR (TN)</i>	The Applicant was engaged in supply of port services and was leasing port space. The Applicant received late fee and penalty for delay / default in payment of lease rent. The question before the AAR was whether late fee / penalty received post-GST for services rendered in pre-GST period, was liable to GST. The AAR observed that late fee and penalty for delayed payment should be considered as toleration of an act of delayed payment of rent. The same would attract GST even if received for the services rendered in pre-GST period. <i>NITYA Comments:</i> <i>Section 15 of the CGST Act includes interest, late fee or penalty for delayed payment of any consideration for any supply in the value of supply itself. Hence, this shows the intent of the legislature that such amounts are not for provision of any service but part of original transaction only (in this case rental service).</i> <i>Since the service was provided under service tax regime and there was no provision under service tax regime to include such amounts in value of service,</i>

	<i>no tax implications should arise on amount of interest, late fee or penalty received post GST regime as well. For this reason, this ruling is incorrect.</i>
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5. Composite Supply

Applicant	Relevant facts and observations of AAR
Aditya Birla Nuvo Limited (Grasim Industries Limited), 2019-VIL-257-AAR (GUJ)	The Applicant was engaged in supply of insulator to its customer on ex-works basis. Issue 1: The question before the AAR was whether supply of goods (ex-works), freight and insurance would be treated as composite supply of goods The AAR relied on the definition of composite supply under Section 2(30) of CGST Act which squarely covers this case as an illustration to composite supply. Hence, AAR held that supply of goods along with freight and insurance is a composite supply of goods. Issue 2: The question before the AAR was whether showing and charging freight and insurance amount separately in invoice, would attract GST. The AAR held that when multiple supplies qualify as a composite supply, the presentation on invoice will not make a difference and GST will be charged as composite supply. Issue 3: The question before the AAR was whether valuation will be impacted when the amount of freight and insurance recovered is different than the expense incurred. The AAR held that If there are two values for a supply, GST is to be charged on the higher of two values. Hence in this case, GST will be charged on the cost of freight and insurance recovered from the customer or actual amount incurred, whichever is higher. NITYA Comments: <i>The AAR incorrectly answered the last question. This is because Section 15(2)(c) of the CGST Act clearly mentions ‘incidental expenses, including commission and packing, charged by the supplier to the recipient of a supply’. Hence, GST should be charged on the amount charged by the supplier from the recipient irrespective of the amount incurred by him and not the higher value.</i>

6. Miscellaneous

Applicant	Relevant facts and observations of AAR
Nuetech Solar Systems Private Limited, 2019-VIL-63-AAAR	The department was aggrieved by the order of AAR and approached AAAR after 145 days of receipt of order. The department requested for condonation of delay. The AAAR observed that Section 100 of the CGST Act empowers it to condone delay of 30 days after expiry of initial period of 30 days for filing appeal. Basis this, the AAAR rejected the appeal being time barred. <i>NITYA Comments: It is important to note that if a taxpayer is aggrieved by the order of the AAR, it should approach the AAAR on timely basis. In case of inordinate delay, the taxpayer will lose the right to appeal.</i>
Spacelance Office Solutions Private Limited, 2019-VIL-241-AAR (KER)	The Applicant was engaged in business of sub-leasing of office space as 'co-working spaces' to its clients. It allocated dedicated, distinct and identifiable space to the clients. The question before the AAR was whether GST registration can be obtained for multiple companies (clients) at the same address. The AAR held that registration of same address, can be obtained on submission of rental agreement between landlord and Applicant as well as sub-lease agreement between the Applicant and the clients.

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