



Legal Precedents' Series | Issue 14 |

Writs, NAA and AAR

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PART A: WRITS

1. Constitutional validity

Issue	Order	Reference
Challenge to validity of NAA's order passed by 4 members while hearing took place before 3 members.	The High Court observed that the procedure followed by the National Anti-Profiteering Authority ('NAA') for deciding the case, was in breach of the principles of natural justice. Further, the Court guided NAA about the importance of fair decisions as such orders severely dent the business' reputation. Considering the aforesaid facts, the Court quashed the order and restored the proceedings before NAA.	Hardcastle Restaurants Private Limited v. Union of India, 2019-VIL-512-BOM
No alternate remedy of an appeal available against order passed by Commissioner (Appeals) as GSTAT not yet functional.	The High Court adjourned the matter for 3 months with an expectation that GST Appellate Tribunal ('GSTAT') would be functional within this period. The Court directed department to refrain from taking any coercive action against the petitioner.	Rochem India Private Limited v. Union of India, 2019-VIL-513-BOM

2. Issue vis-à-vis filing of FORM GST TRAN-1 ('TRAN-1')

Issue	Order	Reference
Seeking direction to Nodal Officer to permit filing of TRAN-1	The High Court observed that GST portal is still in 'trial and error' phase and directed the authorities to allow petitioner for filing of TRAN-1 (either electronically or manually).	Garuda Packaging Private Limited v. Assistant Commissioner, 2019-VIL-500-AP
	The High Court observed that technical glitches prevailed till due date of filing of form. The Court directed the authorities to either extend the date of filing of TRAN-1 or allow filing of TRAN-1 electronically or manually.	Angamuthu Amuthavel v. Union of India, 2019-VIL-509-MAD
Multiple complaints filed for grievances related to filing and rectification of TRAN-1	The High Court observed that Input Tax Credit ('ITC') standing in favour of a taxpayer is its property. A taxpayer could not be deprived of the said property saved by law under Article 300 (A) of the Constitution of India. The Court directed the authorities to allow petitioner for rectification of TRAN-1 (either electronically or manually).	Aadinath Industries v. Union of India, 2019-VIL-526-DEL

3. Detention of goods

Issue	Order	Reference
Detention order was passed despite invoice and e-way bill being carried.	The High Court observed that the authority failed to follow the procedure prescribed in Circular No. 41/15/2018-GST dated April 4, 2018 . Since no discrepancies were found on inspection, the Court ordered release of goods as an interim relief.	Panchhi Traders v. State of Gujarat, 2019-VIL-503-GUJ Insha Trading Company v. State of Gujarat, 2019-VIL-521-GUJ
Goods were seized as being transported without invoice and e-way bill. Subsequently, confiscation order was passed without giving reasonable opportunity of being heard to the petitioner.	The High Court quashed the confiscation order being violative of principles of natural justice on two counts, vis-à-vis no opportunity of hearing provided to the petitioner. Secondly, the order was non-speaking and did not contain reasons required to be mentioned as per Section 130(1) of the Central Goods and Services Tax Act, 2017 ('CGST Act').	Sitaram Roadways v. State of Gujarat, 2019-VIL-510-GUJ

4. Refund of ITC to Duty-Free Shops

Issue	Order	Reference
Refund of GST paid on rent and other charges by DFS at International Airports.	The High Court relied upon Section 16(1) of the Integrated Goods and Services Tax Act, 2017 ('IGST Act') to hold that sales by Duty-Free Shops ('DFS') qualifies to be a zero-rated supply. Hence, full ITC is available for such supplies. Further, the authorities in Maharashtra cannot give discriminatory treatment when refund of ITC was allowed by other States. The Court directed authorities for refund of ITC as per Rule 89 of the Central Goods and Services Tax Rules, 2017 ('CGST Rules').	Sandeep Patil v. Union of India; and Flemingo Travel Retail Limited v. Union of India, 2019-VIL-495-BOM

PART B: NATIONAL ANTI-PROFITEERING AUTHORITY ('NAA') ORDERS

1. Benefit of additional ITC must be passed onto the consumers

Reference	Facts	NAA's Order
Shree Infra, 2019-VIL-45-NAA Bhartiya City Developers Private Limited, 2019-VIL-43-NAA Lodha Developers Limited, 2019-VIL-42-NAA	Nature of business: Real Estate Developer Complaint: The benefit of ITC additionally becoming available to the taxpayer, post introduction of GST, was not passed on to the consumers.	Profiteering: Yes Reasoning: Post implementation of GST, the taxpayer became entitled to additional ITC. Hence, it was liable to pass on the benefit of additional ITC to the consumers by way of price reduction. In <i>Bhartiya City Developers</i> case, NAA rejected the contention of taxpayer to off-set increase in costs with additional benefit of ITC. The DGAP relied on the Applicant's argument that cost of flat has no bearing on sales price of flat and increase in cost is not relevant for anti-profiteering computation. In <i>Lodha Developers</i> case, NAA did not accept the plea of taxpayer that benefit of additional ITC was passed on by way of discount.

2. Base price should increase only to extent ITC denied

Reference	Facts	NAA's Order
Glenmark Pharmaceutical, 2019-VIL-44-NAA	Nature of business: Manufacturer Complaint: The goods were exempted from GST in July 2018 subject to non-availability of ITC. The taxpayer continued with same MRP and consequently, benefit of rate reduction was not passed on to the consumers.	Profiteering: Yes Reasoning: The base prices were increased more than amount of ITC not available post exemption.

PART C: ADVANCE RULINGS

1. Taxability and valuation related issues

Applicant	Relevant facts and observations of AAR
Aquarelle India Private Limited, 2019-VIL-344-AAR (KAR)	The Applicant had taken office premises on lease with 3 years lock-in period. It intended to vacate the premises and handover the fixtures installed by the Applicant to owners without charging any amount. The Applicant did not avail any ITC on such fixtures. The issue under consideration was whether disposing off assets / fixtures fastened to building qualify as 'supply' under GST law. The AAR, whilst answering the above affirmatively, observed that transaction is covered under Entry 4(a) of Schedule II to the CGST Act (which covers disposing of business assets) and thus qualifies to be 'supply' under GST law. The AAR held that <i>'writing off of the value of assets in the balance sheet by the Applicant is an act related to the transfer of property in assets and monetary value of this act would form the consideration in relation to the supply.'</i> <i>NITYA Comments: The AAR has gone overboard to hold writing-off of assets in books of accounts is a 'consideration' under GST law. Such interpretation of 'consideration' is incorrect as there was no underlying price of assets in the instant case.</i>
Kwality Mobikes (P) Limited, 2019-VIL-357-AAR (KAR)	The Applicant was authorized dealer of Harley-Davidson and making supply of motor vehicles. As per the contract, the Company was issuing credit-note for giving volume discount to the Applicant on achieving sales target. The issue under consideration was whether volume discount received in form of credit note, is liable to GST. The AAR observed that credit note was issued as a purchase discount and not for any service provided by the dealer. Hence, there shall be no GST implications on receipt of volume discount. <i>NITYA Comments: This ruling is important and rightly holds that there is no supply from dealer's end when it receives purchase discount. Under Service Tax as well as GST regime, the department is proposing to tax this transaction under the ambit 'agreeing to do an act'. The taxpayers can now rely on this ruling to counter department's claim.</i>
The Pommels, 2019-VIL-340-AAR (KAR)	The Applicant was engaged in supply of accommodation services to various corporates including SEZ units. The issue under consideration was whether accommodation service provided to SEZ units will be an inter-state supply or intra-state supply.

	The AAR relied on Circular No. 48/22/2018-GST dated June 14, 2018 as per which supplies made to SEZ unit shall be treated as inter-state supplies. The AAR held that accommodation services procured by SEZ units for authorized operations shall qualify as 'zero-rated supply' under Section 16(1) of the IGST Act. The AAR further held that in case services are not for authorized operations, the same shall be taxable at 18 percent. NITYA Comments: <i>Notably, there is no condition under the IGST Act that supplies to SEZ unit will be treated zero-rated only if they are supplied for authorized operations. However, Rule 46 of the CGST Rules prescribing particulars of tax invoice and Rule 89 of the CGST Rules providing for refund on supplies to SEZ unit, contain this condition. In our view, the CGST Rules travel beyond the IGST Act and this ruling as well is incorrect. The CGST Rules cannot impose a condition which is not present or permitted by the IGST Act.</i>
Jotun India Private Limited, 2019-VIL-296-AAR	The Applicant was a manufacturer, supplier and exporter of paints and powder coatings. It introduced optional Parental Insurance Scheme ('Scheme') for employee's parents. The Applicant initially paid entire premium and subsequently recovered 50 percent of the amount from employee's salary. The issue under consideration was whether recovery of 50 percent premium from employees qualify as supply and subject to GST. The AAR observed that the activity of providing mediclaim for employees' parents neither qualifies as 'supply' under Section 7 of the CGST Act nor under the term 'business' under Section 2(17) of the CGST Act. Hence, the same is not taxable under GST law. NITYA Comments: <i>A similar ruling was given by the AAR in the case of POSCO India Pune Processing Center Private Limited, 2019-VIL-25-AAR (MAH) [Refer Legal Precedents' Series_Issue 5 (Advance Rulings) for detailed analysis of this ruling]. In these cases, the AAR seem to be colored by the fact that no ITC is available in case of mediclaim services and the taxpayers can avail full ITC in case they consider the transaction as supply. In our view, the taxpayers should treat the transaction as supply and avail ITC only to the extent of recovery.</i>
Volvo-Eicher Commercial Vehicles Limited, 2019-VIL-303-AAR	The Applicant provided repair and maintenance services for goods sold by Volvo Sweden in India during their warranty period. Volvo Sweden reimbursed the cost of goods and services to the Applicant. The issue under consideration was whether such supply qualifies as export of service or not. The AAR held that in this case, the service recipient was the end customer who got its product serviced / repaired. Volvo Sweden was only paying consideration on behalf of the end consumer. Hence, since service was provided to a service recipient in India, the activity would not qualify as export of service.

	NITYA Comments: The AAR has incorrectly held that end customer is the service recipient. While the end customer may be beneficiary of services, Volvo Sweden continued to be service recipient. This is for the reason that it was Volvo Sweden's responsibility to repair the goods under warranty obligation and the Applicant was performing this activity on behalf of Volvo Sweden. Nonetheless, the transaction will not qualify as export of service for a different reason. Section 13(3)(a) of the IGST Act provides that where the service recipient is required to make goods available to the service provider, the place of supply shall be place of performance of service. In this case, the Applicant was undertaking servicing and repairing on the goods in India. Hence, the place of supply of service shall be India and supply shall be subject to GST.
Rashmi Hospitality Services Private Limited, 2019-VIL-342-AAR (KAR)	The Applicant was engaged in supply of food and beverages. It executed a contract with State Government for supply of low-cost food. It collected a small amount from consumers (as fixed under the contract with the State Government) and received rest as subsidy from the State Government. The issue under consideration was whether subsidy received from the State Government would become part of consideration and taxable under GST. The AAR referred to Section 2(31) defining 'consideration' which specifically excludes subsidy granted by Central / State Government. Basis this, the AAR held that subsidy received from the State Government will not form part of value of taxable supply and thus, not exigible to GST.
Santhosh Distributors, 2019-VIL-416-AAR (KER)	The Applicant was an authorized distributor of industrial and automotive lubricants manufactured by Principal Supplier. The Applicant supplied goods to dealers at reduced rates pre-fixed by the Principal Supplier through the latter's billing software. In case of sale of goods at reduced rates, the Principal Supplier was reimbursing the differential amount to the distributors through commercial credit notes. The issues under consideration, were as follows: <u>Issue 1:</u> Whether reimbursement of discounts provided by the Principal Supplier to Applicant attracts levy of GST? The AAR held that the discount was given on the directions of the Principal Supplier to augment the sales volume. Accordingly, the reimbursement amount forms consideration for the Applicant. Hence, the same is liable to be added to the taxable value of supply. <u>Issue 2:</u> Whether ITC should be reversed to the extent attributable to the commercial credit notes?

	The AAR held that the instant discount does not satisfy the conditions prescribed in Section 15(3) of the CGST Act, therefore same is not deductible from taxable value. Consequently, the Applicant is eligible to avail full ITC without making any ITC reversal. NITYA Comments: <i>The Ruling is incorrect on Issue-1 to the extent it enhances the assessable value by the amount discount received by the supplier. While the ruling echoes the view referred in Circular No. 105/24/2019-GST dated June 28, 2019, the said Circular was rescinded by the CBIC on October 3, 2019.</i> <i>We have analyzed the judgment in detail in our update NITYA's Insight AAR update Issue 60 Inclusion of purchase discount in value of supply to customers dated November 6, 2019.</i>
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2. Input Tax Credit

Applicant	Relevant facts and observations of AAR
Surfa Coats (India) Private Limited, 2019-VIL-308-AAR (KAR)	The Applicant was engaged in manufacture of decorative paints. It offered various incentives such as gold, foreign and local trips, TVs, washing machines etc. to painters (intermediary between Applicant and consumer) and to dealers to promote its products. The issue under consideration was whether ITC will be available for aforesaid goods and services provided under various incentive schemes. The AAR answered observed that the goods and services are given as gift. Hence, ITC on goods and services used for incentives schemes is not admissible. NITYA Comments: <i>In this case, provision of goods or services was dependent upon purchase of goods. Hence, the same will not qualify as gifts and ITC would not be restricted on the same. Further, even if the services are procured to provide gifts (like free trips), there is no restriction to avail ITC on the same. The restriction only applies to goods given as gifts. Hence, ruling is incorrect to this extent as well.</i>
Tarun Realtors Private Limited, 2019-VIL-383-AAR (KAR)	The Applicant was developing a shopping mall. It procured various goods and services for installation of lift, air handling units, chillers, sewage treatment plant, and other facilities in building. The issue under consideration was whether ITC shall be available on goods or services procured for above-mentioned purposes. The AAR observed that the installation of above-mentioned plant and machinery is necessary for construction of mall and cannot be separated from building / civil structure. Hence, ITC on inward supply of goods or services involved in

	construction of immovable property is blocked under Section 17(5) of the CGST Act and therefore not admissible.
Embassy Industrial Park Private Limited, 2019-VIL-389-AAR	The Applicant was engaged in building and renting of industrial warehousing spaces to consumers and industrial centers. It procured various goods and services for fitting-out of warehousing spaces. The issue under consideration was whether ITC shall be available on procurements for electrical works, pumps and tanks, lighting and fire system. The AAR observed that works of electrical, structural, lighting and fire-fighting works amounts to works contract. Under Section 17(5) of the CGST Act, ITC on goods and services is not available when supplied for construction of an immovable property. Hence, no ITC shall be admissible to the Applicant on above procurements.
<i>NITYA Comments: In both the rulings discussed above (Tarun Realtors and Embassy Industrial Park), the AAR has disallowed ITC on plant and machinery used for construction of immovable property. Notably, in the ruling of Nipro India Corporation Private Limited (2018-VIL-206-AAR), the AAR has allowed ITC in similar facts. In our view, the ruling in case of Nipro India Corporation Private Limited laid the correct position in law since Section 17(5) of the CGST Act specifically allows ITC on construction of plant and machinery.</i>	
Wework India Management Private Limited, 2019-VIL-386-AAR (KAR)	The Applicant was engaged in business of constructing shared spaces and office services to various companies and individuals. It procured goods and services for fitting-out of works spaces. The issue under consideration was regarding admissibility of ITC on detachable engineered wood with oak top wooden flooring and of detachable sliding and stacking glass partitions. The Applicant capitalized these items as 'furniture and fixture' in its books of accounts. The AAR observed that detachable wooden flooring can be detached and reused. This only adds value to building and is not a necessity for office spaces. Hence, the same shall not be covered under 'construction of immovable property'. Basis this, ITC shall be available on the same. For sliding and stacking glass partitions, the AAR observed that the same are essential for letting out office spaces and covered under the definition of construction under the expression 'addition or alteration to immovable property'. Hence, ITC shall not be available on the same. <i>NITYA Comments: In our view, both the goods discussed in the AAR were attached to immovable property with intent of permanent beneficial enjoyment of such immovable property. Hence, ITC should not be available in both cases. The distinction carved out by AAR for allowing ITC on detachable wooden flooring being not necessary for an office space, seems incorrect.</i>

3. SAC and rate of tax

Applicant	Relevant facts and observations of AAR
Sharma Transports, 2019-VIL-360-AAR (KAR)	The Applicant was rendering employee transportation service to its clients by using its own buses. The Applicant was also responsible for operation and maintenance of buses. The buses were used for commutation of clients' employees over a pre-determined route and schedule. The issue under consideration was whether these services are classifiable under SAC 9964 as 'passenger transport service' or under SAC 9966 as 'renting of transport vehicle to carry passengers'. The AAR relied on Explanatory Notes of Classification of Services and observed that SAC 9964 covers passenger transportation services over pre-determined routes on a pre-determined schedule for specific segment of users. Basis this, the AAR held that the service provided by the Applicant qualifies to be 'passenger transport service' under SAC 9964. <i>NITYA Comments: The ruling is important for availing ITC on passenger transport service of cabs and buses used for transportation of employees. Refer our analysis in detail in our update NITYA's Insight AAR Update Issue 62 Classification of service of transportation of employees through buses and cabs dated November 8, 2019.</i>
Industrial Engineering Corporation, 2019-VIL-418-AAR (KER)	The Applicant was manufacturing packing containers used by paint and petrochemical industries. It intended to execute an agreement with a job-worker for providing raw material to him and receiving back finished goods. The issues under consideration before the AAR, were as follows: <u>Issue 1:</u> What will be the applicable rate of tax on services provided by job worker? The AAR relied on Notification No. 11/2017 dated June 28, 2017 and held that manufacturing services on inputs owned by others, shall be exigible to GST at 18 percent. <u>Issue 2:</u> Whether the Applicant is liable to pay tax on disposal of waste and scrap generated during job work? The AAR referred to Section 143(5) of the CGST Act and held that registered job worker shall be responsible for discharging GST liability. However, if the job-worker is unregistered, then the Applicant shall be responsible for discharging GST.
Hical Technologies Private Limited,	The Applicant was a job-worker performing activities such as assembly, integration and testing of converters. The principal supplied critical inputs to the

2019-VIL-305-AAR (KAR)	job-worker on free of cost (FOC) basis and the Applicant procured non-critical inputs. The issue under consideration was whether the activity of import and assembly, integration and testing undertaken by the applicant qualifies to be job-work or a composite supply. The AAR observed that the activity of the Applicant cannot be said to be treatment or process on the components supplied by the applicant and shall be considered as manufacturing activity. The AAR further observed that the activity undertaken by the Applicant consists of two supplies vis-à-vis manufacturing of inputs and supply of non-critical inputs. Basis this, the AAR held that entire transaction shall be treated as composite supply where manufacturing activity will be principal supply and taxable at the rate of 18 percent. The AAR further held that value of FOC material received by the Applicant will not be added in value of supply.
NITYA Comments: With recent amendment in Service Rate Notification, distinction between ‘job-work’ and ‘manufacturing services’ has become relevant for determination of rate of GST. The above two rulings have provided different meaning to these terms. The ruling in the case of Industrial Engineering Corporation has rightly considering manufacturing activity undertaken by the third party as ‘job-work’, indicating that both terms are inter-changeable. Please also refer to our update NITYA’s Insight Issue 54 GST rate change on job-work services discussing the issue in detail.	

4. Miscellaneous

Applicant	Relevant facts and observations of AAR
Hindustan Coca-Cola Beverages Private Limited, 2019-VIL-397-AAR (KAR)	The Applicant was engaged in manufacturing of aerated drinks and fruit pulp or fruit juice-based drinks under different brand names. The Applicant intends to commence manufacturing and supply of new product ‘Fanta Fruity Orange’. The issue under consideration was whether new product will be classifiable under S. No. 48 of Schedule II as ‘Fruit pulp or fruit juice-based drinks’ or under S. No. 24A of Schedule III as ‘other non-alcoholic beverages’ or under S. No. 12 of Schedule IV as ‘all goods (including aerated waters), containing added sugar or other sweetening matter or flavoured’ under Notification No. 1/2017-Central Tax (Rate) dated 28.06.2017. The AAR rejected the application on the ground that this question has already been answered by Gujarat AAR. NITYA Comments: The AAR could not have rejected the application on the ground that AAR in another State dealt with a similar issue. There is no such restriction in GST law to this effect. In such cases, formulation of National AAR

	<i>(which deals with two contrary rulings of AARs for person with same PAN) will become redundant.</i>
Fulcrum Info Services LLP, 2019-VIL-323-AAR	The Applicant was providing back-end support services and executed an agreement with overseas company for providing services of trade compliance operations management including export-import compliances, manual documentation and other administrative support. The questions before the AAR inter-alia was whether afore-mentioned services come under the ambit of intermediary services. The AAR observed that the Applicant was providing its services without any interaction with third persons either directly or indirectly. The Applicant was mainly concerned with work entrusted to it on the system. Hence, the said services does not qualify to be 'intermediary'. <i>NITYA Comments: This ruling has correctly interpreted the scope of 'intermediary services' and held that back end support services (where interaction with third parties is not involved) are provided on principal to principal basis and will not qualify as intermediary.</i>

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